

# CRIMINAL JUSTICE COLLAPSE: THE CONSTITUTION AFTER HURRICANE KATRINA

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## ABSTRACT

*The New Orleans criminal justice system collapsed after Hurricane Katrina, resulting in a constitutional crisis. Eight thousand people, mostly indigent and charged with misdemeanors such as public drunkenness or failure to pay traffic tickets, languished indefinitely in state prisons. The court system shut its doors, the police department fell into disarray, few prosecutors remained, and a handful of public defenders could not meet with, much less represent, the thousands detained. This dire situation persisted for many months, long after the system should have been able to recover. We present a narrative of the collapse of the New Orleans area criminal system after Hurricane Katrina. Not only did this perfect storm illuminate how unprepared our local criminal systems may remain for a severe natural disaster or terrorist attack, but it raised unique and underexplored constitutional questions. We argue that constitutional criminal procedure failed to serve its protective role during this emergency, while deferential rules*

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The authors thank Kerry Abrams, Corinne Carey, G. Ben Cohen, Anne Coughlin, Jancy Hoeffel, Kim Forde-Mazrui, Katherine Mattes, Pamela Metzger, John Monahan, Erin Murphy, and Richard Schragger for their invaluable comments, as well as faculty participants at the University of Virginia Law Incubator Lunch and the Columbia Experimentalism Group, and excellent research assistance from Kent Olsen, Ben Doherty, and Abaigeal Van Deerlin. The authors also thank all of those who agreed to be interviewed by Professor Tetlow for this piece, including: Judge Terry Alarcon, The Honorable Helen G. Berrigan, Warden Burl Cain, Sheriff Marlin Gusman, ATF Agents Daniel Hebert, Charles Smith and Ray Connor, Assistant United States Attorney Greg Kennedy, District Attorney Eddie Jordan, Renee Lapeyrolerie, Phyllis Mann, Robert Mann, and Nick Tresticosta.

*rooted in federalism had the unanticipated effect of hindering provision of critical federal emergency assistance, and perhaps most important, longstanding local neglect rendered the system vulnerable to collapse. We conclude by imagining systems designed to safeguard the provision of criminal justice during emergencies.*

## INTRODUCTION

Hurricane Katrina washed away the New Orleans criminal justice system. As residents evacuated, the jail flooded to inmates' chests and police scrambled to enforce order without any communication. The water receded weeks later revealing "thousands of detainees awaiting hearings and trials . . . thrust into a legal limbo without courts, trials, or lawyers"<sup>1</sup> resulting in what one judge called "a 'constitutional crisis.'"<sup>2</sup> This dire situation lasted not just during the initial period of severe disruption, but for upwards of a year. While courts eventually reopened, they failed to act as eight thousand people languished for months "doing Katrina time" in prisons. Most were arrested for petty offenses such as public drunkenness, reading tarot cards without a permit, or failure to pay traffic tickets, and then detained based solely on a police affidavit. Most then served long past their likely sentences without ever receiving a judicial hearing.<sup>3</sup> Nor did these thousands of detainees, mostly indigent, meet with lawyers. Only six public defenders remained in New Orleans, which the Chief Judge of the criminal court called "a full-blown disaster."<sup>4</sup> In effect, Louisiana courts suspended habeas corpus for six months. The United States has rarely experienced such a rapid and complete collapse of local law enforcement, a district attorney's office, the indigent defense

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1. Peter Applebome & Jonathan D. Glater, *Storm Leaves Legal System a Shambles*, N.Y. TIMES, Sept. 9, 2005, at A1.

2. Laura Parker, *People arrested before Katrina still await trial*, USA TODAY, Feb. 27, 2006, at A4; *Morning Edition: Evacuated Prisoners Held in Limbo After Katrina* (NPR radio broadcast Oct. 25, 2005), <http://www.npr.org/templates/story/story.php?storyId=4973246&ampsourceCode=RSS> (last visited Sept. 12, 2006).

3. See Gwen Filosa, *Katrina leaves inmates in limbo: Many still jailed are 'doing Katrina time'*, TIMES-PICAYUNE, Mar. 18, 2006, at B1 ("[P]eople have been held after their release dates, some of whom should have been out before Katrina."); ACLU NATIONAL PRISON PROJECT, ABANDONED AND ABUSED: ORLEANS PARISH PRISONERS IN THE WAKE OF HURRICANE KATRINA 13 (Aug. 2006) [hereinafter ACLU REPORT], available at <http://www.aclu.org/pdfs/prison/opporeport20060809.pdf> (noting that 60 percent of inmates were held on attachments, traffic violations or municipal charges).

4. Michael Perlstein, *Public defender cases in limbo: Indigent program broken, judge says*, TIMES-PICAYUNE, Feb. 11, 2006, at A1.

system, jails, and criminal courts. A perfect storm illuminated how unprepared a local criminal system may remain for a severe natural disaster or terrorist attack.

The nearly unprecedented collapse of Louisiana criminal justice institutions and the mass detentions that resulted raise unique constitutional questions. We argue that constitutional criminal procedure rules failed to serve their intended protective roles during the emergency due to the institutional collapse of already vulnerable local actors.<sup>5</sup> Post-Katrina, criminal procedure rules failed to protect individual rights or even ensure normalcy, while deferential doctrines rooted in federalism hindered provision of critical federal emergency assistance.

In Part I of this Article, we present a narrative of the collapse of the New Orleans area criminal system after Hurricane Katrina. The account is based on local news coverage and a series of interviews at all levels of the New Orleans criminal system. We obtained first-hand information from police officers, state and federal judges, the district attorney, prosecutors, prisoners, prison officials, federal agents, and defense lawyers. These actors describe unforeseen devastation, poor planning, indifference and shock, heroic efforts, creative jerry-rigging, but ultimately inadequate efforts to preserve a semblance of orderly administration of justice. We describe how a police department was left alone to try to enforce order. Courts set up temporary facilities haphazardly (in a Greyhound bus station). Prosecutors remained understaffed and in disarray. Prisoners arrested for minor violations remained in poor conditions without hearings for upwards of six months. The few local judges who tried to intervene faced an indifferent state supreme court. While federal and state officials failed to intervene, volunteers conducted an ad hoc operation to identify thousands of prisoners and file motions for their release, but with

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5. On how one defines an “emergency,” see Bruce Ackerman, *The Emergency Constitution*, 113 YALE L.J. 1029, 1042 (2004). See also Oren Gross, “Once More unto the Breach”: *The Systemic Failure of Applying the European Convention on Human Rights to Entrenched Emergencies*, 23 YALE J. INT’L L. 437, 438–39 (1998) (describing the term emergency as “open-ended” and relative to the definition of normalcy). We use the term “emergency” and not “natural disaster” given the significant role played in New Orleans by non-natural faulty construction of levees and canals and because the same concerns would be implicated in the event of a terrorist attack. For recent criticism of the role of federalism in institutional failure after Katrina, see Stephen M. Griffin, *Stop Federalism Before it Kills Again: Reflections on Hurricane Katrina* (Mar. 2006) (unpublished manuscript), available at <http://papers.ssrn.com/abstract=894470>.

only a skeleton crew of six defense lawyers remaining to represent them.

In Part II, we turn from what happened to the roles played by constitutional criminal procedure and federalism during the collapse of the New Orleans criminal system. The aftermath of Hurricane Katrina presents a little-examined constitutional crisis. Scholars typically examine the scope and role of constitutional rights during an emergency given a scenario of executive aggrandizement of power at the expense of individual rights.<sup>6</sup> The opposite occurred after Katrina: abdication of responsibility at all levels of government. Local officials and institutions did not function and did not provide even a forum for constitutional rights to be heard, much less vindicated. First, existing criminal procedure rules remained ineffective in preventing mass abuses—we catalogue the Bill of Rights provisions violated—but not

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6. Scholarship regarding law during emergencies has focused on executive powers during wartime and recently regarding the War on Terror. See, e.g., PAUL L. MURPHY, *THE CONSTITUTION IN CRISIS TIMES: 1918–1969*, at 1 (1972) (“Confronted with the immediate crisis of modern total war . . . Congress and the President were called upon to extend their powers . . .”); WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 218 (1998) (“Without question the government’s authority to engage in conduct that infringes civil liberty is greatest in time of declared war . . .”); Ackerman, *supra* note 5, at 1029 (“After each successful [terrorist] attack, politicians will come up with repressive laws and promise greater security . . .”); David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 28–30 (2003) (“[T]he war on terrorism has once again prompted calls for preventive justice . . .”); Oren Gross, *Chaos and Rules: Should Responses to Violent Crises Always Be Constitutional?*, 112 YALE L.J. 1011, 1023 (2003) (“[D]emocratic governments must be careful not to fight terrorism with lawless means.”); Jules Lobel, *Emergency Power and the Decline of Liberalism*, 98 YALE L.J. 1385, 1397–1421 (1989) (“In a nuclear age dominated by two superpowers, frequent crises have been substituted for direct military confrontation between two great power blocs.”); Arthur S. Miller, *Constitutional Law: Crisis Government Becomes the Norm*, 39 OHIO ST. L.J. 736, 741 (1978) (“[D]uring times of all-out emergency, such as declared war, judges and legislators deferred to the Executive.”); Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605, 605 (2003) (“Events since September 11, 2001 have produced a new round of debate about law and the emergency powers of government.”); Laurence H. Tribe & Patrick O. Gudridge, *The Anti-Emergency Constitution*, 113 YALE L.J. 1801, 1801 (2004) (“[T]alk of leaving the Constitution behind . . . was to be expected in the wake of September 11.”). While a few have studied the effect of wartime emergencies on local criminal justice, they again focus on the problem of executive overreaching and not institutional collapse. See Donald A. Dripps, *Terror and Tolerance: Criminal Justice for the New Age of Anxiety*, 1 OHIO ST. J. CRIM. L. 9, 30–42 (2003) (examining possible transformation of criminal procedure rights during the war on terror); William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2138 (2002) (arguing that the war on terrorism will affect domestic local law enforcement); William J. Stuntz, *Terrorism, Federalism, and Police Misconduct*, 25 HARV. J.L. & PUB. POL’Y 665, 674–78 (2002) (arguing that police misconduct may result from use of war on terror tactics in domestic law enforcement).

because they were inadequate or insufficiently flexible. Instead, with local courts failing to hold hearings, prosecutors not making charging decisions, and with a skeletal public defender's office, procedure rights had no practical significance. Second, the emergency sheds light on how federalism and rules grounded in comity and deference to state and local government can undermine the very institutions they were designed to protect. In the initial period after the storm when local institutions were most disabled, federal aid would have been particularly crucial. Yet in the months after Katrina, statutes made it difficult for the federal government to provide law enforcement with logistical or financial assistance, while federal courts remained reluctant to remedy constitutional violations.<sup>7</sup>

One reason may be the practical limitations of remedying pre-existing structural deficiencies of local criminal justice actors. New Orleans, like many other localities, for years failed to secure basic criminal justice needs, particularly protections for the poor, minorities, and vulnerable communities. As a result of this persistent neglect, after Katrina, the system totally collapsed. For that reason, long-run rehabilitation may now require concerted local, state and federal efforts.

In Part III, we conclude by imagining a system for the emergency provision of criminal justice that might begin to address the limitations of our existing institutions.<sup>8</sup> Just as it failed to secure the levees, our government has ignored the vulnerability of criminal justice systems during emergencies. Predictable chaos followed from a lack of resources but also from a lack of coordination between different levels of government. Given the dangers of emergencies, from natural disasters to terrorist attacks, joint planning to secure basic legitimate functioning of criminal justice is sorely needed. The last time our country took a hard look at such questions was in the wake of urban riots in 1967, when the Presidential Kerner

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7. As discussed *infra* Part II.B.1, the federal executive branch has been granted a raft of statutory emergency powers for other purposes under the Stafford Act, such as repairing buildings. See Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5206 (2000) (“[S]pecial measures, designed to assist the efforts of the affected States in expediting the rendering of aid, assistance, and emergency services . . . are necessary.”). In the criminal justice arena, little to no financial assistance has been made available. See *infra* notes 182–86 and accompanying text.

8. For a general discussion of system-wide approaches courts adopt in criminal law, see Brandon L. Garrett, *Aggregation in Criminal Law*, 95 CAL. L. REV. (forthcoming 2007), available at <http://papers.ssrn.com/abstract=893552>.

Commission suggested a range of procedures and remedies to adapt criminal justice institutions to domestic emergencies.<sup>9</sup> We propose similar planning in states, the creation of emergency courts, and new collaboration regarding criminal justice emergency planning. Democratic legitimacy and public safety counsel sound administration of a criminal system during exigent circumstances. Longstanding fractures in one local criminal justice system made that impossible after Hurricane Katrina.

## I. NEW ORLEANS CRIMINAL JUSTICE COLLAPSE

### A. *The New Orleans Criminal Justice System Before Katrina*

Long before Hurricane Katrina, the New Orleans criminal justice system was troubled by high crime, poor funding, bad management, and corruption. Commentator David Brooks described how the Hurricane “wash[ed] away the surface of society, [and] expose[d] the underlying power structures, the injustices, the patterns of corruption and the unacknowledged inequalities.”<sup>10</sup> Perhaps this is particularly true with respect to local administration of criminal justice.

The criminal justice system in the New Orleans area was more underfunded than typical in American cities. The district attorney’s office could only afford to pay prosecutors about \$30,000 a year to start.<sup>11</sup> Public defenders earned \$29,000 a year.<sup>12</sup> Louisiana is the only state that funds public defenders through the unsteady income stream of traffic tickets and court costs.<sup>13</sup> In Orleans Parish, an office of thirty

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9. See *infra* Part III.A. Urban riots in Detroit in July 1967, also resulted in prolonged detentions of thousands. Comment, *The Administration of Justice in the Wake of the Detroit Civil Disorder of July 1967*, 66 MICH. L. REV. 1544, 1544, 1629–30 (1968).

10. David Brooks, *The Storm After the Storm*, N.Y. TIMES, Sept. 1, 2005, at A23. Nearly 100,000 of New Orleans’ residents had no means of transportation when it came time to evacuate the city. Eric Lipton, *Committee Focuses on Failure to Aid New Orleans’s Infirm*, N.Y. TIMES, Feb. 1, 2006, at A20.

11. Gwen Filosa, *Report on DA’s office finds major problems; Subpar prosecution rates, staff morale and turnover are cited*, TIMES-PICAYUNE, May 20, 2005, at A1.

12. See NICHOLAS L. CHIARKIS ET AL., AN ASSESSMENT OF THE IMMEDIATE AND LONGER-TERM NEEDS OF THE NEW ORLEANS PUBLIC DEFENDER SYSTEM 8 (2006), available at <http://www.lajusticecoalition.org/doc/DOJ-Orleans-Parish-Study.pdf>.

13. See *State v. Peart*, 621 So. 2d 780, 784 n.1 (La. 1993) (discussing LA. REV. STAT. § 15:146 (1993) (current version at LA. REV. STAT. ANN. § 15:146 (2005)), which establishes “a mechanism for local funding of individual districts’ indigent defender systems” in Louisiana); NAT’L LEGAL AID AND DEFENDER ASS’N, IN DEFENSE OF PUBLIC ACCESS TO JUSTICE: AN ASSESSMENT OF TRIAL LEVEL INDIGENT DEFENSE SERVICES IN LOUISIANA 40 YEARS AFTER

public defenders handled a docket of thousands of cases a year.<sup>14</sup> A decade of independent police chiefs rooted out flagrant corruption from the New Orleans Police Department (NOPD), but officers remained underpaid and citizen distrust and police brutality complaints remained high.<sup>15</sup>

The demographics of New Orleans contributed to problems that the criminal justice system faced. Issues of inequality remain inextricably tied to the aftermath of Katrina, where Orleans Parish's pre-Hurricane population was 67 percent black, 28 percent below the poverty line, and 22 percent without their own transportation.<sup>16</sup> The New Orleans poverty rate ranked the third highest of any major city in the United States.<sup>17</sup> Polls indicated that most Americans thought the response to Katrina was inadequate, but two-thirds of blacks thought race was a factor<sup>18</sup>; rapper Kanye West announced that "George Bush doesn't care about black people,"<sup>19</sup> and President Bush acknowledged the disproportionate impact of the Hurricane due to a "legacy of inequality."<sup>20</sup>

*GIDEON* 24–25 (2004) (Alabama, the only other state that relies on court cost revenues, does so only as a small supplement to state funding.); *see also infra* notes 129–31 and accompanying text.

14. Perlstein, *supra* note 4.

15. New Orleans police officers were among "the most poorly paid in the country." Dan Baum, *DELUGED: When Katrina hit, where were the police?*, *NEW YORKER*, Jan. 9, 2006, at 50, 52.

16. See U.S. CENSUS BUREAU, ORLEANS PARISH QUICK FACTS, <http://quickfacts.census.gov/qfd/states/22/22071.html> (last visited Aug. 21, 2006). By 2004, the city had a population of about 450,000, of which 66 percent was African-American, 26 percent white, 3 percent Hispanic and 2.5 percent Asian (including a large Vietnamese community). OFFICE OF NAT'L DRUG CONTROL POLICY, PROFILE OF DRUG INDICATORS 2 (Aug. 2004), available at <http://www.whitehousedrugpolicy.gov/statelocal/la/lanewor.pdf>.

17. Frederic Dimanche & Alenna Lepetic, *New Orleans Tourism and Crime; A Case Study*, 38 *J. TRAVEL RES.* 19, 19 (1999) (examining the effect of crime and poverty on tourism in New Orleans); *see also* Christopher Drew, *Courts' Slow Recovery Begins at Train Station*, *N.Y. TIMES*, Oct. 14, 2005, at A22 ("[M]ore than one-quarter of the city's 450,000 people liv[e] in poverty.").

18. A Pew Research Center poll showed that many more African Americans (85 percent) than whites (63 percent) believed President Bush "could have done more to get relief efforts going quickly." PEW RESEARCH CTR., TWO-IN-THREE CRITICAL OF BUSH'S RELIEF EFFORTS: HUGE RACIAL DIVIDE OVER KATRINA AND ITS CONSEQUENCES 5 (2005), available at <http://people-press.org/reports/pdf/255.pdf>.

19. See John M. Broder, *Amid Criticism of Federal Efforts, Charges of Racism Are Lodged*, *N.Y. TIMES*, Sept. 5, 2005, at A9 (quoting Mr. West and detailing several claims that race played a factor in the government's response to Katrina).

20. See Michael A. Fletcher & Jonathan Weisman, *Bush Says Spending Cuts Will Be Needed, Tax Increase Not Part Of His Gulf Relief Plan*, *WASH. POST*, Sept. 17, 2005, at A1 (reporting President Bush's recognition of and vow to end "the legacy of racial discrimination

New Orleans' local government was not unaware of the dangers of flooding and hurricane damage,<sup>21</sup> and after a 2004 hurricane created traffic deadlock, Louisiana officials developed elaborate "contraflow" evacuation plans. However, the criminal justice system and its constituent parts, already struggling, remained particularly unprepared. The police department was never given proper supplies for a flood, including boats, food, and water. Its hurricane preparedness plan remained on a shelf and was never practiced.<sup>22</sup> The court system did not create redundancies in records. The evidence room was in a basement. Prisons had no evacuation plans. Nor were the courts prepared to resume business after an emergency.

### B. *The Storm*

On Friday, August 26, 2005, Hurricane Katrina changed course from its forecasted path, gathered enormous strength, and aimed at New Orleans. Mayor Ray Nagin ordered the first mandatory evacuation of the City's half million citizens on Sunday morning, August 28, 2005.<sup>23</sup> Buses drove thousands to the Superdome, but the City and State lacked an organized system to transport and shelter residents outside of the city.<sup>24</sup> The storm raged Sunday night and Monday morning. Tens of thousands within the Superdome waited in the dark as part of the roof tore off. Cell phone towers and power

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and social inequality that has compounded poverty [in the Gulf Coast]"); see also Jack Shafer, *Lost in the Flood: Why no mention of race or class in TV's Katrina coverage?*, SLATE, Aug. 31, 2005, <http://fray.slate.com/id/2124688/nav/tap2/gmail.com> (last visited Aug. 19, 2006) (criticizing cable news' lack of attention to the race and class elements of Katrina's aftermath).

21. For example, in July, Senator Mary Landrieu held a press conference "emphasiz[ing] the importance of wetlands in the protection of New Orleans from hurricanes." Children in life preservers held up a blue tarp to show what fifteen feet of water would look like after a major storm. *Pupils go overboard to show coastal threat; Blue tarps simulate underwater Quarter*, TIMES-PICAYUNE, June 26, 2005, at 99.

22. See Baum, *supra* note 15, at 54 (stating that officers were never familiarized with the elaborate hurricane plan and few who were interviewed even knew it existed).

23. See Jan Moller, *Revised contraflow starts off smoothly; First use of new plan relatively snarl-free*, TIMES-PICAYUNE, Aug. 28, 2005, at A1 (reviewing the evacuation process under the revised "contraflow" traffic plan); Posting of Gordon Russell to TIMES-PICAYUNE Breaking News Weblog, [http://www.nola.com/newslogs/breakingtp/index.ssf?/mtlogs/nola\\_Times-Picayune/archives/2005\\_08.html](http://www.nola.com/newslogs/breakingtp/index.ssf?/mtlogs/nola_Times-Picayune/archives/2005_08.html) (Aug. 28, 2005) (last visited Aug. 21, 2006) (detailing Mayor Nagin's evacuation orders). During Katrina, a record of up to one million people evacuated in the two days before the storm. *Pleading for Help; Bush Vows More Troops; Exodus Continues*, ADVOCATE (Baton Rouge, La.), Sept. 1, 2005, at A-1.

24. See Bruce Nolan, *Katrina Takes Aim*, TIMES-PICAYUNE, Aug. 28, 2005, at A1 (reporting the city's plans to bus residents to the Superdome).



lines fell, cutting off electricity and telephone communication for hundreds of miles.<sup>25</sup> By morning, however, city officials announced that Katrina had inflicted serious wind damage but had largely spared New Orleans.<sup>26</sup> What Katrina's turn spared, poorly designed levees destroyed. On Monday, several canal levees, constructed by the Army Corps of Engineers with design flaws, broke, inundating 80 percent of the city.<sup>27</sup> The waters rose past the ceilings of homes, forcing families to cut through their roofs to breathe. Many of the weak, the elderly, the sick, and the handicapped who remained did not survive.<sup>28</sup> The death toll in three states totaled 1,600, the vast majority from the New Orleans area.<sup>29</sup>

### C. *Abandoned Prisoners*

We begin with the fate of Orleans Parish Prison (OPP), the city jail big enough to be a "city within the city" and the seventh-largest jail in the country.<sup>30</sup> Nearly eight thousand prisoners were housed in OPP during Hurricane Katrina, evacuated from the New Orleans area in the next week, and then eventually transferred to thirty-four facilities scattered across Louisiana.<sup>31</sup> Of the thousands "lost in the system" for months afterwards, most were indigent minorities, and

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25. See Marc Caputo et al., *Hurricane Katrina Killed At Least Five More People, Leveled Numerous Building and Drove Hundreds to Their Rooftops to Escape Floods*, MIAMI HERALD, Aug. 30, 2005, at 1A (detailing the destruction in the aftermath of Katrina).

26. See Anonymous posting, *Scenes From a Broken City*, to TIMES-PICAYUNE Breaking News Weblog, [http://www.nola.com/newslogs/breakingtp/index.ssf?/mtlogs/nola\\_Times-Picayune/archives/2005\\_08.html](http://www.nola.com/newslogs/breakingtp/index.ssf?/mtlogs/nola_Times-Picayune/archives/2005_08.html) (Aug. 28, 2005, 22:30 CST) (last visited Aug. 21, 2006) (detailing Katrina's destruction).

27. See Bob Marshall et al., *Report: Flood policy flawed*, TIMES-PICAYUNE, June 2, 2006, at A1 (stating that after an eight month study, the Army Corps of Engineers admitted that the New Orleans hurricane protection system was "a system in name only").

28. See Shaila Dewan & Janet Roberts, *Louisiana's Deadly Storm Took Strong as Well as the Helpless*, N.Y. TIMES, Dec. 18, 2005, at A1 (analyzing Katrina's death toll).

29. See *id.* ("[M]ore than 1,400 victims from along the Gulf Coast have been counted . . ."); Gwen Filosa, *Storm victim's body is found in Mid-City home; As death toll rises, search teams continue efforts to find missing*, TIMES-PICAYUNE, May 28, 2006, at B1 (reporting that the Louisiana death toll is at 1577 with around 300 people still missing); Sean Reilly, *Katrina medical response was chaos*, TIMES-PICAYUNE, Mar. 29, 2006, at A1.

30. See Michael Perlstein, *Prison became island of fear; Inmates and guards were in it together*, TIMES-PICAYUNE, Sept. 23, 2005, at A1; Henry Weinstein, *2,500 Arrested Before Katrina Are Still in Limbo*, L.A. TIMES, Nov. 20, 2005, at A38 ("[A]bout 8,500 people being held in the New Orleans jails were relocated."); Interview with Marlin Gusman, Sheriff of Orleans Parish, La., in New Orleans, La. (Mar. 13, 2006).

31. Paul Purpura, *Inmates ordered released after months of waiting*, TIMES-PICAYUNE, Dec. 23, 2005, at B3.

some had already served longer while waiting for trial than they would have if actually convicted. Few received a hearing or met with counsel, and thousands remained in detention from months to a year.<sup>32</sup>

Orleans Parish Sheriff Marlin Gusman did not evacuate the inmates before the storm, stating that he could never have convinced other sheriffs to house his thousands of inmates.<sup>33</sup> Instead the prison conducted some very last minute preparation and planned on “vertical evacuation” to higher floors if the city flooded.<sup>34</sup>

Most of the inmates spending the storm in OPP were arrested for minor offenses like criminal trespass, public drunkenness, failure to pay traffic tickets, or disorderly conduct; many had not yet been brought before a judge or charged, some had almost finished serving their sentences, and others would only have been subject to a ticket.<sup>35</sup> For example, one inmate was charged for reading tarot cards without a permit and was to have been released prior to August 29.<sup>36</sup> The prison also, however, housed hundreds of defendants charged with rape and murder.<sup>37</sup>

The large concrete buildings survived the storm itself well, but not the levee break. Waters rose quickly on Monday night and ruined the emergency generators.<sup>38</sup> The prison lost lights and air circulation

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32. *Id.*; Interview with Terry Alarcon, Judge, Orleans Parish Criminal Dist. Ct., in New Orleans, La. (Mar. 13, 2006); ACLU REPORT, *supra* note 3.

33. Interview with Marlin Gusman, *supra* note 30. For criticism of Sheriff Gusman’s decision see ACLU REPORT, *supra* note 3, at 19–27. The ACLU conducted an extensive investigation of the conditions of OPP, interviewing more than a thousand prisoners.

34. Interview with Renee Lapeyrolerie, Spokesperson for New Orleans Criminal Sheriff Marlin Gusman, in New Orleans, La. (Dec. 12, 2005); *see also* ACLU REPORT, *supra* note 3, at 19–27 (criticizing the inadequacies of the sheriff’s hurricane preparedness).

35. Press Release, Human Rights Watch, New Orleans: Prisoners Abandoned to Floodwaters (Sept. 22, 2005), available at <http://hrw.org/English/docs/2005/09/22/usdom11771.htm>.

36. *Democracy Now: After the Hurricane: Where Have All the Prisoners Gone? More than 500 from New Orleans Jail Still Unaccounted For* (Democracy Now radio broadcast Sept. 27, 2005) [hereinafter *Democracy Now*] (transcript available at <http://www.democracynow.org/article.pl?sid=05/09/27/1433256#transcript>).

37. See Phyllis Mann, *Hurricane Relief Aid*, ADVOCATE (La. Ass’n of Criminal Def. Lawyers, Baton Rouge, La.), Fall 2005, at 3, 3, available at [www.lacdl.org/Newsletters/LACDLFall2005.pdf](http://www.lacdl.org/Newsletters/LACDLFall2005.pdf) (noting the crimes of various jail residents).

38. Interview with Marlin Gusman, *supra* note 30. While the generators were located safely above the waters, the fuel was on the first floor. *Id.*; *see also* Perlstein, *supra* note 30 (noting that the jail was without power).

(in ninety-degree weather); soon the sewage backed up as well.<sup>39</sup> The rising water filled the ground floor cells with chest-deep water, and transformed the jail into an “island of fear and frustration.”<sup>40</sup>

Guards, required to stay during the storm, had brought their families with them.<sup>41</sup> Worried about their own children, they were “not doing quite so much worrying about the safety of the people locked inside the cells.”<sup>42</sup> Electronic cells could not be opened and food could not be safely distributed.<sup>43</sup> Guards brought inmates to higher floors, where they were crowded in with other prisoners.<sup>44</sup> “[T]he man who failed to pay his traffic ticket was shoulder to shoulder with the man serving 20 years for manslaughter. They were afraid of each other; they were afraid of dying; they were afraid no one would ever come back for them.”<sup>45</sup>

Many deputies simply deserted; some deputies that remained attempted to use force to keep prisoners in their flooded cells, though some helped them break windows, because “[i]f you didn’t break the windows, you didn’t breathe.”<sup>46</sup> Prisoners signaled for help by setting fire to blankets and shirts and hanging signs outside the windows reading “We Need Help,” “Help Us,” and “One Man Down.”<sup>47</sup> Despite early reports of deaths, all of the prisoners have been accounted for.<sup>48</sup> Several escaped, jumping over razor wire fences and swimming through the floodwaters.<sup>49</sup>

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39. Perlstein, *supra* note 30.

40. *Id.*

41. Mann, *supra* note 37, at 3.

42. *Id.*

43. *Id.*

44. *Id.* at 4.

45. *Id.*

46. Perlstein, *supra* note 30.

47. *Id.*; Press Release, Human Rights Watch, *supra* note 35.

48. Interview with Renee Lapeyrolerie, *supra* note 34.

49. See Michael Perlstein, *Inmate says jail escape was ‘survival’; Fear of new charges keeps him on the lam*, TIMES-PICAYUNE, Nov. 23, 2005, at B1 (stating that an inmate wanted on fugitive charges called the reporter from an undisclosed location to describe the necessity of his decision to escape). Fourteen warrants were later issued for fugitives. *Id.* Some of these were later located in custody, but eight had actually escaped and were recovered. Interview with Marlin Gusman, *supra* note 30; see also Michael Perlstein, *Fourteen escaped prison in Katrina chaos*, TIMES-PICAYUNE, Nov. 19, 2005, at A1 (detailing efforts to account for fourteen inmates for whom fugitive arrest warrants were issued after Katrina). One of the fugitives was located after he applied for FEMA benefits in his own name. Interview with Marlin Gusman, *supra* note 30.

The next day, the Louisiana Department of Corrections arrived with boats to carry prisoners to an elevated overpass on the nearby interstate (where New Orleans residents rescued from their homes also awaited transportation).<sup>50</sup> Deputies parked buses as close as floodwaters allowed, and ferried prisoners day and night to other jails around the state.<sup>51</sup>

Most prisoners were brought to a staging area for processing, an outdoor football field at the Elayn Hunt Correctional Facility in St. Gabriel, Louisiana.<sup>52</sup> The numbers at Hunt grew so large that guards did not feel safe patrolling inside the gated field and retreated beyond the fences.<sup>53</sup> An inmate described, “[y]ou had to sleep on the wet grass. They didn’t have anywhere we could urinate or defecate . . . we didn’t have hot food. We didn’t have cold water. In fact, they come once a day and throw peanut butter sandwiches over the gate. They wouldn’t even come in the gate.”<sup>54</sup> Men and women charged with misdemeanors were mixed together with inmates facing felony and capital murder charges, and violence resulted.<sup>55</sup>

New Orleans judges attempted to create makeshift court hearings at Hunt, but could not meaningfully conduct hearings in the absence of the inmates themselves (who were in a jumble), or their lawyers (who were evacuated) or the public (who were not allowed into the state prison).<sup>56</sup> Although a few public defenders attended these hearings, some private defense lawyers were turned away at the gates of Hunt.<sup>57</sup>

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50. See Laura Maggi, *Roundup of buses for storm bungled*, TIMES-PICAYUNE, Dec. 6, 2005, at A1 (noting that a number of people had gathered on Interstate 10 after the storm); Press Release, Human Rights Watch, *supra* note 35 (criticizing the prison’s lack of an evacuation plan); Telephone Interview with Phyllis Mann, Past President, La. Ass’n of Criminal Def. Lawyers (Jan. 5, 2006); Interview with Burl Cain, Warden, La. State Penitentiary, in Angola, La. (Jan. 23, 2006). Thousands of other citizens also were left to wait on the interstate for rescue, including Professor Tetlow’s family.

51. Interview with Burl Cain, *supra* note 50.

52. *Id.*

53. *Id.*

54. *Democracy Now*, *supra* note 36.

55. *Id.*; Posting of Gwen Filosa, *New Detention Center Opened*, to TIMES-PICAYUNE Breaking News Weblog, [http://www.nola.com/newslogs/breakingtp/index.ssf?/mtlogs/nola\\_Times-Picayune/archives/2005\\_09\\_03.html](http://www.nola.com/newslogs/breakingtp/index.ssf?/mtlogs/nola_Times-Picayune/archives/2005_09_03.html) (Sept. 3, 2005) (last visited Aug. 21, 2006); Interview with Burl Cain, *supra* note 50; ACLU REPORT, *supra* note 3, at 74–76.

56. See Susan Finch, *New Orleans courts carry on in Gonzales and Baton Rouge*, TIMES-PICAYUNE, Oct. 14, 2005, at B1 (reporting that judges were taking turns presiding at bond hearings at Hunt); Interview with Phyllis Mann, *supra* note 50.

57. Interview with Phyllis Mann, *supra* note 50.

The Department of Corrections then housed inmates in prisons and parish jails around the state.<sup>58</sup> More than a thousand inmates, including several hundred women, were moved to Angola, the state's maximum-security men's prison.<sup>59</sup> While grateful to have escaped the hell of Orleans Parish Prison, evacuated prisoners faced a new purgatory.<sup>60</sup> For days and sometimes weeks, defendants were not given access to telephones to find out whether their families had survived the storm.<sup>61</sup> Few would see lawyers. Many would end up serving more than six months, far more than their sentences, or for those with pending charges, more than their sentences could have been if convicted.<sup>62</sup>

#### D. Emergency Law Enforcement

When the levees broke, the citizens outside of the jail walls were left to their own devices for law enforcement as police officers struggled to patrol and rescue with flooded vehicles and dead radios.<sup>63</sup> "To those left in the city, it felt as if government at all levels had vanished, as if not only New Orleans but the nation itself had disappeared."<sup>64</sup> The NOPD lacked leadership. Police Chief Eddie Compass was nowhere to be found in the first few days after the

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58. Interview with Burl Cain, *supra* note 50.

59. See Gwen Filosa, *Inmates fighting for their freedom*, TIMES-PICAYUNE, Oct. 15, 2005, at B1 (noting that ninety-four women moved from New Orleans to Angola had filed a suit seeking their release); Penny Brown Roberts, *16 Female Prisoners Released from Angola*, ADVOCATE (Baton Rouge, La.), Sept. 23, 2005, at 11-A (stating that several women who were moved from New Orleans prisons to Angola after Katrina were released following an order from a federal judge). Angola's population increased by 40 percent. John Corley et al., *Worst case scenario: Hurricanes Katrina and Rita change life as we know it*, ANGOLITE, Sept./Oct. 2005, at 17, 18 (THE ANGOLITE is the award-winning magazine published by inmates at Angola Prison).

60. Interview with Phyllis Mann, *supra* note 50; Interview with Burl Cain, *supra* note 50. Inmates brought to facilities other than Angola continued to face brutal treatment, including racial epithets and beatings from guards. ACLU REPORT, *supra* note 3, at 82-85. The Louisiana Department of Corrections housed inmates at a private jail facility in Jena, Louisiana, which had previously been closed because of brutality allegations. Inmates reported particularly egregious violence there. *Id.*

61. Interview with Phyllis Mann, *supra* note 50; Interview with Nick Trenticosta, Criminal Defense Attorney, in New Orleans, La. (Dec. 12, 2005). Angola Penitentiary, where inmates reported far better treatment, was an exception. ACLU REPORT, *supra* note 3, at 85.

62. Interview with Nick Trenticosta, *supra* note 61.

63. See Michael Perlstein & Trymaine Lee, *The Good and the Bad*, TIMES-PICAYUNE, Dec. 18, 2005, at A1 (detailing the obstacles the police force faced in providing law enforcement after Katrina).

64. Baum, *supra* note 15, at 58.

storm and soon resigned citing personal problems.<sup>65</sup> Among the rank and file, though most officers struggled bravely to do their jobs under impossible circumstances, more than two hundred officers left under the pressure, and two officers killed themselves.<sup>66</sup> During the storm, flying debris knocked out police radios and thus the chain of command; groups of officers functioned under their own orders.<sup>67</sup> District commanders learned how to “beg, borrow and acquire” to feed their officers, getting socks, underwear and food for them (with permission) from a Wal-Mart.<sup>68</sup> Most police stations and vehicles flooded, so officers commandeered boats and siphoned gas from parked cars.<sup>69</sup> They cleared blocked streets with chainsaws and bulldozers, and evacuated patients from hospitals.<sup>70</sup> They managed to rescue thousands, with little outside assistance.<sup>71</sup> They slept in police stations or in requisitioned buildings until receiving housing on a cruise ship named “Ecstasy.”<sup>72</sup>

While the NOPD remained in disarray, local officials and the national media reported violence, murders, and rapes (including of babies).<sup>73</sup> The level of violence in pre-Katrina New Orleans made it

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65. See *id.* at 55, 59 (noting that Compass was nearly invisible during the first three days of the crisis).

66. Perlstein & Lee, *supra* note 63, at A1. Five days after the storm, Officer Lawrence Celestine cried that he did not know whether his family was alive and felt betrayed by officers who abandoned them; a few hours later, he shot himself dead in front of fellow officers. See Telephone Interview with Ray Connor, Agent, Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), and former New Orleans Police Officer (Dec. 20, 2005) (Connor spoke to Celestine shortly before his suicide); see also Trymaine Lee, *District struggles to come to terms with officer's suicide*, TIMES-PICAYUNE, Dec. 18, 2005, at A28 (detailing the suicide of Officer Celestine). The next day, police spokesman Officer Paul Accardo killed himself. See Interview with Ray Connor, *supra*.

67. Perlstein & Lee, *supra* note 63.

68. *Id.*

69. Baum, *supra* note 15, at 54–55; Michael Perlstein, *Undercover officers embark on new mission: search and rescue*, TIMES-PICAYUNE, Dec. 18, 2005, at A1.

70. Michael Perlstein, *Uptown heroics overshadowed by number of officers gone AWOL*, TIMES-PICAYUNE, Dec. 18, 2005, at A1.

71. See Baum, *supra* note 15, at 57 (describing the police force's struggle to rescue storm victims with little outside help); Perlstein & Lee, *supra* note 63 (noting the resourcefulness of the police in helping citizens after the storm).

72. Baum, *supra* note 15, at 62; Trymaine Lee, *After securing Algiers, officers throw a lifeline to fellow cops*, TIMES-PICAYUNE, Dec. 18, 2005, at A1 [hereinafter Lee, *Officers throw a lifeline*]; Trymaine Lee, *Stranded but still standing, officers rescue 9th Ward neighbors*, TIMES-PICAYUNE, Dec. 18, 2005, at A1; Walt Philbin, *Housing sorely needed, cops say; Cruise ship living is about to sail away*, TIMES-PICAYUNE, Feb. 16, 2006, at A1.

73. *After the Flood, The Hard Truths: Sharks in Canal Street? Snipers on Rooftops? Terror in the Superdome?*, INDEPENDENT (London), Oct. 15, 2005, at 28 [hereinafter *After the Flood*].

easier for local public officials and citizens to believe these rumors and to pass them on,<sup>74</sup> but in total, only four murders have been confirmed during the week after Katrina, a typical week in a city that anticipated more than 200 homicides in 2005.<sup>75</sup> Still, fear of violence was significant, as it delayed help to those waiting on roofs.<sup>76</sup>

Looting occurred, particularly in downtown stores, making additional law enforcement and arrests necessary under emergency conditions.<sup>77</sup> The day after the storm, looters at a gas station shot a police officer in the head.<sup>78</sup> Officers shot eleven people during the week after the storm; four died.<sup>79</sup> In the meantime, civilians “tried to weave their own safety net.”<sup>80</sup> Several law enforcement witnesses reported that citizens beat up a man after he attempted a sexual assault of a young girl.<sup>81</sup> Many began carrying firearms.<sup>82</sup> Residents of one of the city’s most exclusive gated communities hired armed Israeli mercenaries to guard their mansions.<sup>83</sup> Citizens also created

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74. See Michael Lewis, *Wading Toward Home*, N.Y. TIMES, Oct. 9, 2005 (Magazine), at 44 (detailing some of the rumors and fears floating around New Orleans after the storm); Robert Pierre & Ann Gerhart, *News of Pandemonium May Have Slowed Aid*, WASH. POST, Oct. 5, 2005, at A8 (reporting that some officials believe that exaggerations of mayhem slowed the response to the disaster).

75. See Brian Thevenot & Gordon Russell, *RAPE. MURDER. GUNFIGHTS.*, TIMES-PICAYUNE, Sept. 26, 2005, at A1 (noting that there were no murders at the Superdome, and one at the Convention Center, which lacked meaningful security).

76. *Id.*; Pierre & Gerhart, *supra* note 74; see also *After the Flood*, *supra* note 73 (“If the dome and the Convention Centre had harboured large numbers of middle-class white people, it would not have been a fertile ground for his kind of rumour-mongering.” (quoting James Amoss, *Rita’s Aftermath; Katrina Takes Toll on Truth, News Accuracy*, L.A. TIMES, Sept. 27, 2005, at A16)).

77. See Jed Horne, *Help Us, Please; After the disaster, chaos and lawlessness rule the streets*, TIMES-PICAYUNE, Sept. 2, 2005, at A1 (“The focused police work had not been enough to shield all French Quarter shops from the looters . . .”).

78. Lee, *Officers throw a lifeline*, *supra* note 72.

79. See Perlstein & Lee, *supra* note 63 (“[T]he department also is reviewing . . . police shootings in which four people were killed and seven injured . . .”).

80. Baum, *supra* note 15, at 59.

81. Thevenot & Russell, *supra* note 75.

82. See Baum, *supra* note 15, at 59–60 (relating that nearly every white New Orleanian Baum met was armed; he feared racial violence). Weapon sales in surrounding areas soared. See, e.g., Paul Rioux, *Firearm sales are booming since Katrina; Chaos after storm has fueled fears*, TIMES-PICAYUNE, Feb. 19, 2006, at B1.

83. See Jamie Wilson, *Mercenaries Guard Homes of the Rich in New Orleans*, GUARDIAN (London), Sept. 12, 2005, at 22 (“Hundreds of mercenaries have descended on New Orleans to guard the property of the city’s millionaires from looters.”).

their own rescue efforts, commandeering boats and vehicles to rescue people from roofs.<sup>84</sup>

By the Thursday after the storm, federal law enforcement agents (especially from the Drug Enforcement Agency (DEA) and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)) came to assist the NOPD patrol.<sup>85</sup> Agents brought crucial supplies, including ammunition and law enforcement t-shirts for officers without uniforms.<sup>86</sup>

A remarkable political battle between the governor of Louisiana and President Bush delayed by a week the arrival of federal military troops for rescue operations and to establish order.<sup>87</sup> Most of the Louisiana National Guard was serving in Iraq, due back weeks after Hurricane Katrina hit.<sup>88</sup> The day the storm hit, Governor Blanco asked President Bush for Guard assistance.<sup>89</sup> The White House informed Blanco that it would not send troops unless she would agree to the federalization of her National Guard.<sup>90</sup> Commanders of the Louisiana National Guard and other state guards advised Blanco not to agree because the Guard would then be prohibited by the Posse

84. See Baum, *supra* note 15, at 59 (“A casting director and a tax attorney... commandeered a waterskiing boat to... rescue people from roofs and attics.”). A local businessman used a fire truck (which he owned for Mardi Gras parading purposes) to ferry paramedics around Lakeview. Interview with Scott Sewell, Owner of Sewell Cadillac, in New Orleans, La. (Nov. 2, 2005).

85. Interview with anonymous DEA agent (Jan. 10, 2006); Telephone Interview with Daniel Hebert, Agent, ATF, in New Orleans, La. (Jan. 12, 2006). Indeed, agents sometimes ignored orders to focus on law enforcement and instead rescued people with their boats. *Id.*

86. Interview with anonymous DEA agent, *supra* note 85; Interview with Charles Smith, Agent, ATF, in New Orleans, La. (Oct. 24, 2005).

87. See Robert Travis Scott, *Politics delayed troop dispatch to N.O.; Blanco resisted Bush leadership proposal*, TIMES-PICAYUNE, Dec. 11, 2005, at A1 (“[T]he question for many people is why it took President Bush five days to order the 82nd [Army Airborne] on the ground... [D]ocuments show that the White House delayed its decision to deploy federal troops while it pressured... Blanco to accept the president’s hand-picked commander...”); Interview with Robert Mann, Commc’ns Dir. for Governor Blanco, in Baton Rouge, La. (Nov. 30, 2005). In contrast, other governors sent National Guard members within days, creating the largest coordinated, multi-state mobilization of guardsmen in U.S. history. *Id.* The Coast Guard, already stationed locally, became the most effective rescue unit, saving more than thirty-three thousand with their fleet of boats and helicopters. Paul Purpura, *Coast Guard stands up well to its biggest task: Unprecedented rescues draw praise*, TIMES-PICAYUNE, Oct. 2, 2005, at A1.

88. Scott, *supra* note 87; see Scott Shane & Thom Shanker, *When Storm Hit, National Guard Was Deluged Too*, N.Y. TIMES, Sept. 28, 2005, at A1 (“Guard commanders... blame in part... the deployment to Iraq of 3,200 Louisiana guardsmen.”).

89. See Scott, *supra* note 87 (“On the day Katrina hit, Blanco told the president by phone, ‘We need everything you’ve got,’ according to the governor’s overview.”).

90. *Id.*



Comitatus Act<sup>91</sup> from conducting law enforcement, and because the governor would lose all control over the operation.<sup>92</sup> Blanco refused the request for federalization, and a few minutes later President Bush announced anyway that he would send federal troops.<sup>93</sup>

Those troops helped rescue people who remained trapped on their roofs after five days, and began recovering bodies of those who had perished in the storm and its aftermath. Soldiers provided less help with law enforcement. People soon learned that the soldiers carried unloaded rifles.<sup>94</sup> Prohibited by the Posse Comitatus from making arrests, soldiers had no law enforcement training and sometimes, together with FEMA, merely hindered local law enforcement.<sup>95</sup>

After the floodwaters receded, police officers, federal agents, and troops patrolled the city and settled into a posture of undeclared martial law.<sup>96</sup> On Tuesday, September 6, the Mayor ordered a mandatory evacuation of remaining citizens.<sup>97</sup> Military checkpoints stopped every passing car at major intersections checking for

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91. See Posse Comitatus Act, 18 U.S.C. § 1385 (2000) (prohibiting the use of armed forces to “execute the laws”).

92. See Scott *supra* note 87 (“Documents and interviews show that Blanco wanted to avoid conceding her authority . . .”). The governor also wondered whether the White House was seeking political advantage by seizing control of the Guard. Sources within the White House indicated that they planned to blame Blanco for the delay in federal troops because she refused to accede to the president’s ultimatum about federalizing the Guard. *Id.*

93. See Manuel Roig-Franzia & Spencer Hsu, *Many Evacuated, but Thousands Still Waiting; White House Shifts Blame to State and Local Officials*, WASH. POST, Sept. 4, 2005, at A1 (“President Bush authorized the dispatch of 7,200 active-duty ground troops . . . . Shortly before midnight Friday, the Bush administration . . . [had] ask[ed] her [Governor Blanco] to request a federal takeover . . .”).

94. See interview with Daniel Hebert, *supra* note 85.

95. See Eric Lipton et al., *Storm and Crisis: Government Assistance; Breakdowns Marked Path From Hurricane to Anarchy*, N.Y. TIMES, Sept. 11, 2005, at 1.1 (“[T]he federal government failed . . . to face domestic threats as a unified, seamless force. Instead, the crisis in New Orleans deepened because of . . . hesitant federal officials and besieged local authorities . . .”). Regarding Posse Comitatus, see *infra* notes 217–20. The military is largely untrained in police work. “They were good people, but a lot of them were used to using computer guided rockets to blow things up from miles away.” Interview with anonymous DEA agent, *supra* note 85.

96. See Baum, *supra* note 15, at 60 (“The phrase on the lips of the guest enforcers was ‘martial law.’”). Other local law enforcement officers came from around the country to help. In particular, because New Orleans departments were among the first responders after September 11, New York’s departments were eager to reciprocate. See Al Baker, *In New Orleans, Pausing to Remember*, N.Y. TIMES, Sept. 12, 2005, at B4 (“The team’s work is not only a tangible way to pay back the New Orleans Fire Department, which rushed some of its firefighters to New York City four years ago, but a benchmark for how far the New York department has come . . .”).

97. Baum, *supra* note 15, at 60.

identification and the permission slips required to be in the city.<sup>98</sup> The City reopened to citizens on September 30,<sup>99</sup> but a nighttime curfew remained in place through December. Until late February, Louisiana National Guardsmen patrolled New Orleans in humvees, with M-16s and flack-jackets.<sup>100</sup> Meanwhile, the evacuation resulted in a precipitous drop in the crime rate in New Orleans for the next six months.<sup>101</sup>

### E. "Camp Greyhound": Jerry-Rigging a Judicial System

Immediately after the storm, the NOPD realized they could not make arrests without a jail, so officers simply released the people they apprehended.<sup>102</sup> Within a week, however, the state Department of Corrections set up a temporary jail in a Greyhound bus station and train terminal, using electrical power from a locomotive.<sup>103</sup> Inmate "trustees" from Angola prison built the jail out of chain-link fences with a bus canopy for a roof; each cell contained a portable toilet and inmates slept on the ground.<sup>104</sup>

98. Residents became creative about manufacturing permission slips or official identifications. See *Day to Day: Katie Lasky Discusses Going Home, With or Without Permission* (NPR radio broadcast Sept. 16, 2005).

99. See Bruce Hamilton, *Hobbled city opens doors to some; There won't be much to eat, drink or do*, TIMES-PICAYUNE, Sept. 30, 2005, at Hurricane Katrina: Special Coverage ("[R]esidents return to New Orleans today, one month after Hurricane Katrina . . . Residents who live in the reopened zip codes can enter the city at 8 a.m.").

100. See *Guard stands down from hurricane duty*, TIMES-PICAYUNE, Mar. 19, 2006, at A18 ("The last of the Louisiana National Guard troops mobilized for Hurricanes Katrina and Rita . . . were released from active duty in late February . . .").

101. See Adam Nossiter, *New Orleans Crime Swept Away, With Most of the People*, N.Y. TIMES, Nov. 10, 2005, at A18 ("New Orleans, the nation's most dangerous city, has suddenly become perhaps its safest, and what had easily been the country's murder capital now has a murder rate of exactly zero."). New Orleans crime may have shifted elsewhere. See Trymaine Lee, *Evacuee-packed Houston sees jump in crime; 9 of 122 killings tied to people from N.O.*, TIMES-PICAYUNE, Jan. 2, 2006, at B1 ("[O]fficials [in Houston] say the city has found itself under the gun, with an escalating murder rate . . .").

102. See Baum, *supra* note 15, at 57 ("One captain told me that when his officers caught looters they photographed them with their booty and turned them loose, hoping to arrest them later on a warrant.").

103. Gwen Filosa, *Looting suspects stationed at Greyhound terminal*, TIMES-PICAYUNE, Oct. 9, 2005, at A8; see also Reuters, *Bus Line Upset With 'Camp Greyhound' Jail Name*, MSNBC.COM, Sept. 13, 2005, <http://www.msnbc.msn.com/id/9324415> (last visited Aug. 21, 2005) ("The Greyhound bus station in New Orleans was converted into a makeshift jail . . .").

104. See Drew, *supra* note 17 ("Inmates are held in chain-link pens . . . under a canopy where the buses once pulled up. Each cell has a portable toilet, like those at construction sites."). Warden Cain turned over cash kept in Greyhound's safe to the company, using his trustees to crack the safe. Interview with Burl Cain, *supra* note 50.

Though crime rates fell with the population evacuated, between August 30 and September 8, 2005, more than two hundred arrests were made.<sup>105</sup> Most of those, 178, were for looting; 26 for possession of stolen vehicles; 20 for resisting arrest; 14 for theft; and 9 for attempted murder.<sup>106</sup> A few were arrested for misdemeanors such as disturbing the peace.<sup>107</sup> According to the warden, the first prisoner housed there “drove up in a stolen Enterprise rental car to buy a bus ticket.”<sup>108</sup> Assistant District Attorneys for Orleans Parish and Assistant U.S. Attorneys manned a desk in the lobby of the bus station, working from the “Taste of New Orleans Gift Shop,”<sup>109</sup> and a magistrate held bond hearings.<sup>110</sup>

For its two-month life, the makeshift criminal court facility did not follow rules of open proceedings, instead “barring family and friends and allowing only arrestees and counsel in the courtroom.”<sup>111</sup> Most days, inmates were bused to true bond hearings in state or federal court outside of New Orleans.<sup>112</sup> Local judges then set bonds too high for many indigent defendants to pay, rather than release defendants back into the city or provide transportation to where their families had evacuated. Large numbers of prisoners simply accepted guilty pleas for misdemeanors and were then released.<sup>113</sup>

#### F. *The Judicial Response*

After the storm, the court system first faced the major logistical problems of lacking a physical plant and communications. Judges,

105. See Filosa, *supra* note 103 (“In the past week, 155 came from the Jefferson Parish Sheriff’s Office; 39 were nabbed by Kenner police. New Orleans brought in 17 . . .”).

106. *Id.*

107. *Id.*

108. *Id.*

109. See *id.* (“Orleans Parish District Attorney Eddie Jordan’s office has a designated work space, as does U.S. Attorney Jim Letten’s.”); Drew, *supra* note 17 (“The prosecutor hustles up from his office—aka the Taste of New Orleans gift shop . . .”).

110. See Finch, *supra* note 56 (“Magistrate Gerard Hansen has relocated to the Union Passenger Terminal, which has served as a makeshift criminal justice center . . .”).

111. Press Release, ACLU of La., Orleans Parish Deputy Attempts to Boot ACLU Staff Attorney from New Orleans Criminal Court Room; ACLU Calls for Open, Public Court Proceedings (Oct. 12, 2005), available at <http://www.laclu.org/News/2005/Oct12OPPProceedings.htm>; see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980) (“Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.”).

112. *Id.*; Telephone Interview with Greg Kennedy, Assistant U.S. Attorney, E. Dist. of La. (Jan. 15, 2006).

113. Interview with Phyllis Mann, *supra* note 50.

prosecutors, defense attorneys and their staffs evacuated over a weekend, without any opportunity to discuss logistics, and scattered over several states.<sup>114</sup> These officials became unreachable for weeks.<sup>115</sup> The court complex flooded, damaging police headquarters, public defender, district attorney, and clerk of court offices, and coroner and evidence rooms.<sup>116</sup> The Louisiana Supreme Court building (also housing the intermediate court of appeal) was located in New Orleans, and although it did not flood, the city itself was inaccessible for a month. The federal district court and U.S. Court of Appeals for the Fifth Circuit were forced to relocate, to Baton Rouge and Houston, respectively.<sup>117</sup>

The state criminal court now faced problems that included suspended funding for prosecutors and public defenders, prisoners scattered around the state,<sup>118</sup> about half of the private defense bar gone,<sup>119</sup> a flooded evidence room,<sup>120</sup> no jury pool,<sup>121</sup> and a docket of thousands of pending cases.<sup>122</sup> New Orleans criminal court judges took turns sitting at Hunt and the Greyhound jail until December when they borrowed courtrooms in the federal courthouse.<sup>123</sup> Their own courthouse did not reopen until June 1, 2006.<sup>124</sup>

114. See Interview with Judge Alarcon, *supra* note 32.

115. See Interview with Phyllis Mann, *supra* note 50.

116. See, e.g., Susan Finch, *Orleans judge holds court in Gonzales*, TIMES-PICAYUNE, Sept. 26, 2005, at A2 (“Katrina’s floodwaters invaded most of the first floor of [Orleans Parish district attorney’s] office building . . . [with] reports of flooding in some of the evidence rooms . . .”).

117. See Pamela MacLean, *A Tale of Disaster and Two Courts; U.S. Courts Open, La. Courts Struggle*, NAT’L L.J., Nov. 7, 2005, at 1 (“[J]udges in U.S. District Court in New Orleans have returned to the old court . . . [T]he 5th U.S. Circuit Court of Appeals . . . [has a] new temporary headquarters in Houston.”). Chief Judge Ginger Berrigan of the federal district court suspended speedy trial deadlines for three months, modeling her order after a September 11, 2001, order issued by the Southern District of New York; ultimately, federal court reopened more quickly than that. See Interview with Helen G. Berrigan, Chief Judge, U.S. Dist. Court for the E. Dist. of La., in New Orleans, La. (Dec. 11, 2005).

118. See Michael Perlstein, *Charge suspects or free them, DA urged*, TIMES-PICAYUNE, Nov. 9, 2005, at A1 (“[I]nmates . . . remain spread among various state prisons . . .”).

119. MacLean, *supra* note 117 (noting that half of the defense bar is gone).

120. See Perlstein, *supra* note 118 (“The police evidence room . . . [was] underwater for several days.”).

121. Finch, *supra* note 56 (reporting that the jury pool had scattered around the country).

122. Perlstein, *supra* note 118.

123. See Interview with Judge Alarcon, *supra* note 32; Interview with Chief Judge Berrigan, *supra* note 117.

124. Gwen Filosa, *Court set to reopen today; Trials resume Monday at Tulane and Broad*, TIMES-PICAYUNE, June 1, 2006, at B1.

The district attorney's office lost much of its funding when the tax base of the city collapsed, and laid off dozens of staff, including all investigators, and could not pay its phone bill.<sup>125</sup> For months, prosecutors worked from home and at three tables in a downtown hotel.<sup>126</sup> From December 2005 until May 2006, the office moved into a nightclub where lawyers worked at tables under disco balls.<sup>127</sup> Witnesses had scattered around the country and the evidence vault, in a basement, was underwater for several days.<sup>128</sup>

The public defender's office faced still greater adversity, eventually laying off twenty-five of its thirty-five attorneys for budget reasons.<sup>129</sup> The funding for the office, which had recently been criticized by the state Supreme Court as constitutionally inadequate,<sup>130</sup> was based primarily on traffic tickets.<sup>131</sup> With the population evacuated, "[n]o tickets, no money."<sup>132</sup> Accordingly, the few public defenders still on the job have struggled to represent those arrested post-Katrina, and have not even attempted to meet with the thousands detained from before Katrina.<sup>133</sup>

In the absence of courthouses, venue and local jury pools, the state supreme court declared a "court holiday" until October 25.<sup>134</sup> It

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125. See Associated Press, *Katrina Still Threatens 3,000 New Orleans Court Cases*, USA TODAY, Oct. 30, 2005, [http://www.usatoday.com/news.nation.2005-10-30-katrina-courts\\_x.htm](http://www.usatoday.com/news.nation.2005-10-30-katrina-courts_x.htm) (last visited Aug. 21, 2006) (reporting that the D.A.'s phone shut off when the phone bill was not paid); Susan Finch, *Civil, criminal courts face funding crisis; Orleans DA cuts nonessential staff*, TIMES-PICAYUNE, Oct. 8, 2005, at B4 (contending that the city is responsible for one-third of the D.A. budget, and not paying); Susan Finch, *supra* note 116 (reporting that the district attorney laid off fifty-four employees after receiving no money from city); Interview with Eddie Jordan, District Attorney of Orleans Parish, in New Orleans, La. (Dec. 12, 2005).

126. See Frank Donze, *Study says city should weigh bankruptcy, Municipal government, schools described as near insolvency*, TIMES-PICAYUNE, Apr. 6, 2006, at A1; Interview with Eddie Jordan, *supra* note 125; Filosa, *supra* note 124.

127. See Interview with Eddie Jordan, *supra* note 125.

128. *Id.*; Perlstein, *supra* note 118. While juries might accept a rusty gun or moldy plank as evidence, the clerk of court noted that "[c]ocaine doesn't hold up very well in water." *Id.*

129. Paul Purpura, *Cupboard bare for poor's legal aid*, TIMES-PICAYUNE, Nov. 2, 2005, at B1.

130. See *State v. Citizen*, 898 So. 2d 325, 336-39 (La. 2005) (criticizing the deficiencies in public defender funding, but requiring proof of insufficiency in individual cases).

131. See MacLean, *supra* note 117 ("Each judicial district pays its own [defenders] through collection of court costs, usually traffic tickets."); Interview with Nick Trenticosta, *supra* note 61.

132. MacLean, *supra* note 117 (quoting Phyllis Mann, past president of the Louisiana Association of Criminal Defense Lawyers).

133. See Perlstein, *supra* note 118.

134. *Id.*

did nothing else to assist the court system. On September 6, Governor Kathleen Blanco issued an executive order declaring that because hurricanes Katrina and Rita had disrupted communications, rendered courthouses inoperable, and caused “destruction and disruption of services and infrastructure to our system of justice,” all deadlines in legal proceedings would be suspended for thirty days.<sup>135</sup>

Due to this institutional collapse, of the approximately 8,000 inmates transferred from New Orleans throughout the state of Louisiana, thousands served illegal sentences, thousands were released only after six months, and thousands still faced charges but have yet to see a lawyer in more than six months, and many still had not seen a lawyer a year after Katrina struck.<sup>136</sup>

Normally prisoners arrested for misdemeanors, as most of the 8,000 were, would have been released after forty-five days, “unless they had an outstanding warrant or a probation or parole hold,” but “without paperwork, a judge, a prosecutor and a defense lawyer,” no such hearings were held after the aborted effort at Hunt.<sup>137</sup> Thus, these prisoners were not released, received no hearing, and had not seen a lawyer, much less a judge, for many months after the storm.

A handful of criminal defense lawyers did respond immediately after the storm. Phyllis Mann, a former president of the Louisiana Association of Criminal Defense Lawyers, heard that prisoners from the New Orleans area were landing in jails around the state, so she sent out an appeal to defense lawyers to call their local sheriff and get a list of inmates.<sup>138</sup> Sheriffs could provide no proper records for these inmates, because “they just poured out of those flooded jails.”<sup>139</sup> Jailers tried to sort out inmates and house them under enormous logistical difficulties, but inmates’ medical records did not follow them, and psychiatric patients did not receive their medications.<sup>140</sup>

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135. See Exec. Order No. KBB 2005-32 (2005) (“All deadlines in legal proceedings . . . are hereby suspended until at least September 25 . . .”). Exec. Order No. KBB 2005-67, issued on October 19, then asks that the Louisiana Legislature meet to address these issues. See Exec. Order No. KBB 2005-67 (2005) (“[I]t has been announced that the Louisiana Legislature will be called into a special session . . . for legislative action on these issues . . .”).

136. See Filosa, *supra* note 3 (“The [volunteer] law students have seen cases in which people have been held after their release dates . . . . Some have been held seven months longer than what the law allows.”); Purpura, *supra* note 31 (“[M]ore than 8,000 inmates held in New Orleans-area parish jails were evacuated to 34 . . . correctional facilities in Louisiana.”).

137. Interview with Phyllis Mann, *supra* note 50.

138. *Id.*

139. *Id.*

140. ACLU REPORT, *supra* note 3, at 77.

Ultimately, Mann produced a questionnaire for inmates asking for their lawyer's names and pending court dates.<sup>141</sup> With the help of local sheriffs, she compiled a list and created a website listing inmates and their locations.<sup>142</sup> Mann and other volunteers interviewed thousands of defendants to let them know that someone knew that they were there, to try to tell their families they were alive, and to contact their attorneys.<sup>143</sup>

This ad hoc team of volunteers discovered that defendants fell into several categories. Some had already completed their sentences or had served more time than they could have received had they been convicted.<sup>144</sup> Some were incarcerated on minor charges, but had never received bond consideration or had been unable to post bond before the storm.<sup>145</sup> Some had never received counsel at all because they had been recently arrested before the storm.<sup>146</sup> Finally, some were serving sentences or pending trial on more serious charges.<sup>147</sup>

Criminal defense lawyers planned to file habeas petitions to release several categories of prisoners that they assumed the system would be happy to release: those who had served their time and those awaiting trial on petty misdemeanors who could be given a summons.<sup>148</sup> Within two weeks, a New Orleans Municipal Court judge signed release orders in the municipal misdemeanor cases, but the other cases met resistance.<sup>149</sup> Mann and others filed habeas petitions in districts around the state where the prisoners were located and where venue lay, thus thoroughly annoying rural local judges.<sup>150</sup> They

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141. *Id.*

142. The jails had rules requiring that lawyers visiting clients be members of the Louisiana bar. Mann negotiated exceptions to the rule requiring (a) that lawyers be visiting their own individual clients and (b) that the jail confirm bar membership with the Louisiana bar association, whose office was located in New Orleans and was closed. Mann was allowed to interview all evacuated prisoners, none of whom were her "clients," but could only bring Louisiana lawyers with her who happened to have their wallet-size bar cards. Volunteers from around the country were turned away. *Id.*

143. *Id.*

144. *Id.*

145. See MacLean, *supra* note 117 ("Hundreds of prisoners who had either finished their terms just before the storm, or faced misdemeanor charges such as public drinking or solicitation, were unable to post bond before the storm hit. Or for others who did put up bail, computers and phone lines died before they could be processed and released.").

146. *Id.*

147. Interview with Phyllis Mann, *supra* note 50.

148. *Id.*; Interview with Nick Trenticosta, *supra* note 61.

149. Interview with Phyllis Mann, *supra* note 50.

150. *Id.*

then filed an appellate writ asking the state supreme court to appoint a single judge to take charge of the habeas process, or at least one judge per district, and asking for a single clerk's office to accept all of the filings.<sup>151</sup> The supreme court refused to accept the filing, stating that the court was closed and would not be reopened for the purposes of hearing the motion, with three justices dissenting.<sup>152</sup>

After several months, New Orleans Chief Criminal Judge Calvin Johnson provided some relief. He began ordering the release of defendants who had served their sentences, and gave the district attorney a deadline for charging those who had not yet formally been charged.<sup>153</sup> That deadline was pushed back, but then finally upheld, by the state supreme court.<sup>154</sup> On January 6, 2006, the district attorney's office complied with the deadline and filed charges on 1,140 defendants.<sup>155</sup> On September 22, 2005, defense attorney Nick Trenticosta also filed a section 1983 petition in federal court, asking Judge Jay Zainey to release the women at Angola who should already have been released, which Judge Zainey did.<sup>156</sup>

Posting bond became difficult where relevant Orleans Parish institutions were closed or scattered.<sup>157</sup> Wardens could not release prisoners without a signed court order or posted bond. The first defendant was not released on bond until October.<sup>158</sup> State and local jailers were slow to release prisoners after posting bond.<sup>159</sup> There was also a reluctance to release prisoners directly into the communities

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151. See *Ansari v. State*, 913 So. 2d 834 (La. 2005) (denying an emergency motion to open court).

152. *Id.*

153. Richard A. Webster, *Prisoners Evacuated for Katrina and Scattered in Jails Throughout LA Now in Legal Limbo*, NEW ORLEANS CITYBUSINESS, Jan. 16, 2006, at 1, 32.

154. See *Kimbrough v. Cooper*, 915 So. 2d 344, 344, 345 (La. 2005) ("The stay previously issued on November 18, 2005, is lifted. . . . [T]he state shall have until 5:00 p.m. on January 6, 2006, in which to file a bill of information of indictment . . .").

155. Webster, *supra* note 153, at 32.

156. Complaint for Civil Rights Violations and Request for Injunctive Relief at 10, *Gettridge v. Gusman*, 2005 WL 3162040 (E.D. La. 2005) (No. 2:05-cv-04200-JCZ-KWR); Filosa, *supra* note 59 (noting that Judge Zainey ordered the release on September 22, 2005).

157. See MacLean, *supra* note 117 ("[C]omputers and phone lines died before [prisoners who had put up bail] could be processed and released. . . ."); Interview with Phyllis Mann, *supra* note 50.

158. Interview with Phyllis Mann, *supra* note 50.

159. The criminal defense bar argues that FEMA created a financial incentive for the jails to hold inmates too long by reimbursing jailers per inmate per day, though FEMA had yet to pay the prisons by January 2006. Interview with Phyllis Mann, *supra* note 50; Interview with Burl Cain, *supra* note 50.



surrounding jails.<sup>160</sup> Sheriff Gusman sent buses only twice a week to collect released prisoners, thus adding days to their sentences without authority.<sup>161</sup> The process sped up after the Tulane Law School Criminal Defense Clinic moved to hold the deputy warden in contempt.<sup>162</sup>

Phyllis Mann attributes the court system's early paralysis to "Katrina coma," which rendered "capable, hardworking, talented people incapable of decision and action; . . . they were themselves the victims of the hurricane, without homes and without family members. They were just not functioning."<sup>163</sup> Local courts also, unsurprisingly, had failed to plan how they would react to the entire city being almost wiped away, or even to make obvious provisional plans for a predictable major hurricane. The entity most capable of reacting to the crisis across local jurisdictional lines was the state supreme court.<sup>164</sup> Phyllis Mann argued:

The Supreme Court should have a system in place that allows for law, for civilization to continue in the face of a disaster. . . . We literally had no system of law for at least the first two months after the hurricane. There were judges who said to us, "the court of appeals is closed. Where are you going to go?" No one was in charge. The decisions being made were to not make a decision.<sup>165</sup>

The state supreme court, itself displaced during the storm, did eventually set up offices in Baton Rouge.<sup>166</sup> Nevertheless, as noted, the supreme court did not ensure the orderly administration of justice after the storm.

Early paralysis during the first two months then persisted for more than a year. The court system continued to permit mass detentions for upwards of six months for those who still faced criminal charges, but who lacked access to defense counsel. Six

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160. Weinstein, *supra* note 30.

161. Interview with Marlin Gusman, *supra* note 30.

162. Interview with Katherine Mattes, Clinical Instructor, Tulane Law School, in New Orleans, La. (Oct. 23, 2006).

163. Interview with Phyllis Mann, *supra* note 50.

164. Interview with Nick Trenticosta, *supra* note 61; Interview with Phyllis Mann, *supra* note 50.

165. Interview with Phyllis Mann, *supra* note 50.

166. Finch, *supra* note 116.

months after Hurricane Katrina, 700 to 1,500 defendants remained incarcerated, together with 3,000 who still face charges.<sup>167</sup>

Hearings regarding the situation were only finally convened following Judge Arthur Hunter's ruling in February 2006 that post-Katrina the New Orleans public defender system, with only six lawyers remaining, could no longer adequately represent its over four thousand clients.<sup>168</sup> The effect, as Chief Judge Johnson noted, was "a de facto shutdown of the public defender's office."<sup>169</sup> Judge Hunter initially imposed a deadline of summer 2006, almost a year after Katrina, before he would even begin to order release of inmates who have not seen a lawyer and have not been tried, and order charges dropped against three thousand others released but facing charges.<sup>170</sup> He ordered the district attorney's office to compile a list of indigent detainees still facing charges, and stated that he would order their release in the summer of 2006 if the state did not provide adequate indigent defense funding.<sup>171</sup> After repeating and delaying his deadlines, Judge Hunter finally released four defendants because of inadequacy of counsel on October 6, 2006.<sup>172</sup> The district attorney still refused to help triage cases, declaring that it was not his job to help free defendants.<sup>173</sup>

Finally, six months after Katrina, some Louisiana state funding was allocated for local indigent defense, but Judge Hunter stated in his court order that "instead of the state providing a cure, it has only prescribed a Band-Aid and the bleeding continues."<sup>174</sup> Efforts remain

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167. *Id.*

168. See Perlstein, *supra* note 4 ("Criminal Court Judge Arthur Hunter ruled that the Orleans Parish Indigent Defender Program can no longer adequately represent poor defendants [and noted that] '[f]or all practical purposes, the public defender program no longer exists.'").

169. *Id.* (Chief Judge Johnson added, "Crisis is not a big enough word to describe the situation. . . . The public defender situation was bad before Katrina. Now it's a full-blown disaster." (internal quotation marks omitted)).

170. Gwen Filosa, *Judge says he'll release inmates unless state pays for lawyers*, TIMES-PICAYUNE, Apr. 7, 2006, at B1.

171. *Id.*

172. Telephone Interview with Steve Singer, Clinical Professor, Loyola Law School, and Chief of Trials, New Orleans Public Defender's Office (Oct. 6, 2006); Mary Foster, *Judge Frees Four Inmates Without Lawyers*, WASHINGTON POST, Oct. 7, 2006.

173. *Judge Vows to Free Inmates Held Since Katrina Hit* (NPR radio broadcast Aug. 25, 2006) [hereinafter *Judge Vows*], available at <http://www.npr.org/templates/story/story.php?storyId=5708448>.

174. *Id.*

stalled to fundamentally change the methods of funding indigent defense to make it sustainable.<sup>175</sup>

Beginning in April, law school faculty stepped in to operate and redesign the public defender's office. The judges appointed a new board, including Tulane Law School professor Pamela Metzger and Loyola Law Professor Dane Ciolino, which then hired Yale Law Professor Ronald Sullivan to direct the office and Loyola Clinical Professor Steve Singer as chief of trials.<sup>176</sup> With scarce resources, the new directors have attempted to make major structural reforms such as requiring public defenders to work full time.<sup>177</sup> The office has exactly four working computers, two telephones and a docket of thousands of cases.<sup>178</sup>

After Katrina, the first criminal bench trial was not held until March 31, 2006, and the first jury trial on June 5, 2006.<sup>179</sup> During the subsequent four months, there were only about fifteen jury trials despite three thousand pending cases.<sup>180</sup> A year after the storm, prison officials, public defenders and law school clinic students continued to locate hundreds of inmates who had yet to see a lawyer or a judge.<sup>181</sup>

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175. Perlstein, *supra* note 4; see Laura Maggi, *Katrina adds to public defender woes*, TIMES-PICAYUNE, Mar. 23, 2006, at B1 (describing hearings investigating the adequacy of indigent defense in New Orleans Parish, and noting that "a scathing report released this month by a New Orleans-based advocacy group found that of 83 interviewed defendants from the city locked up before the hurricane hit Aug. 29, just four had met with an attorney").

176. *Id.*; Laura Maggi, *Judge blasts public defender for delay*, TIMES-PICAYUNE, Sept. 12, 2006, at B1. Even before taking over the operation of the public defender's office, law school faculty became heavily involved in the crisis. In October, 2005, Chief Judge Johnson appointed the Tulane and Loyola Criminal Clinics to represent all indigent defendants for the purpose of arguing ineffective assistance of counsel. Telephone interview with Pamela Metzger, Associate Professor, Tulane Law School (Oct. 23, 2005).

177. Maggi, *supra* note 175; Interview with Steve Singer, *supra* note 172.

178. *Judge Vows*, *supra* note 173.

179. Filosa, *supra* note 170; see Gwen Filosa, *Orleans trials resume with familiar themes*, TIMES-PICAYUNE, June 8, 2006, at B1 (reporting that the first six-member jury trial on June 5 ended with a hung jury, and that the first twelve-member jury acquitted two defendants tried on police testimony alone).

180. Interview with Steve Singer, *supra* note 172.

181. Gwen Filosa, *Pledge to release detainees unmet: Frustrated judge orders report on indigents' cases*, TIMES-PICAYUNE, Aug. 31, 2006, at B1. On the anniversary of the storm, Judge Arthur Hunter issued a ruling stating that "[t]he entire criminal justice infrastructure in New Orleans is being held together with spit and tape, and it is just a matter of time before the system collapses . . . . Now, one year after Hurricane Katrina, the Orleans Public Defenders reports it is practically no better off today than it was in February 2006, and far worse than it was before Hurricane Katrina." *Id.*

### G. The Federal Response

The federal government after Katrina did not intervene significantly in the criminal justice area. Since the storm, New Orleans teeters on the edge of bankruptcy with only two months of operating budget; its tax base, made up primarily of property and sales taxes, washed away in the storm and will take years to recover.<sup>182</sup> In 1988, however, Congress passed legislation prohibiting FEMA from providing operating expenses to local government, although it may provide money for repairing buildings and loans to homeowners and businesses.<sup>183</sup> In the past, the president forgave emergency loans to local government, but Congress amended the Katrina relief bill to prohibit forgiveness, and thus local governments signed loan applications with dubious promises of an ability to repay, with repayments beginning immediately.<sup>184</sup>

Nine months after the storm, the Department of Justice gave grants totaling \$58 million for the benefit of all of the local criminal justice systems affected by the storm, including \$2.8 million for the beleaguered Orleans Parish public defender's office.<sup>185</sup> The office remains, however, seriously underfunded. The Justice Department commissioned a study estimating the cost of creating a constitutionally adequate public defender's budget at \$8.2 million annually and with \$10.7 million required for the first year to establish such an office.<sup>186</sup>

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182. See Donze, *supra* note 126 ("Bankruptcy should be considered as an option for New Orleans' financially crippled government and public school system, which are 'teetering on the edge of a cliff' . . .").

183. See *supra* note 7.

184. See Landrieu *pushes for loans to be forgiven*, TIMES-PICAYUNE, Oct. 19, 2005, at A7; Michelle Millhollon, *St. Bernard Officials Say Funding Crucial*, ADVOCATE (Baton Rouge, La.), Oct. 4, 2005, at 1-A. President Bush continues to cite the misleading figure of \$85 billion provided for hurricane relief; however, little was allocated for state or local government. First, federal authorities can estimate only that "more than half" of the money has been spent. \$29.7 billion was allocated for "administration"; and \$18.5 billion was allocated for payment of flood insurance claims, for which homeowners paid premiums. Bill Walsh, *Dollars faulted as measure of help; '\$85 billion is a lot,' but needs remain*, TIMES-PICAYUNE, Feb. 15, 2006, at A1. \$67 billion of the grand total was allocated for emergency response and recovery. That figure includes \$5.4 billion for trailers and \$5 billion in temporary housing aid, but no money to fund local government services. *Id.*

185. Laura Maggi, *Indigent office in for nearly \$3 million; But it's a drop in the bucket, officials say*, TIMES-PICAYUNE, May 12, 2006, at B1.

186. CHIARKIS ET AL., *supra* note 12, at 26. The White House's report describing Katrina failings recommends future federal study of federal assistance to local law enforcement. See THE WHITE HOUSE, THE FEDERAL RESPONSE TO HURRICANE KATRINA: LESSONS LEARNED

## II. EMERGENCY CRIMINAL PROCEDURE AND FEDERALISM

The constitutional problem of criminal justice collapse reverses the conventional paradigm of constitutional rights during an emergency. Courts and scholars have focused since the Founding, and more recently since the terrorist attacks of September 11, 2001, on the scope of civil liberties during wartime and executive aggrandizement of power during emergencies. None have focused on how emergencies affect “everyday criminal justice” provided by local government officials, judges, prosecutors, public defenders and police.<sup>187</sup> Our project here, however, explores that bedrock provision of “everyday criminal justice” by local actors and institutions during exigent circumstances. The collapse of the New Orleans criminal justice system and the response of local, state, and federal government in the aftermath of Hurricane Katrina present difficult new questions about the Constitution’s protective role in the criminal system during natural disasters or terrorist attacks.

We argue that criminal procedure rules remain highly vulnerable to failure in their protective roles during times of emergency. Post-Katrina, criminal procedure rules did not safeguard individual liberties nor ensure orderly emergency administration of justice, because the unprepared and underresourced local criminal system simply collapsed. Doctrines animated by the concept of federalism hindered the provision of federal assistance to local institutions which could have been of particular help in the period just after the storm. Left particularly helpless, long after those first weeks and months, were individuals such as indigent criminal defendants whose constitutional rights had already been neglected for years.

### A. *Indefinite Suspension of Criminal Procedure*

The Constitution’s role in guiding the provision of criminal justice in times of emergency remains largely unexplored. The

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65–66 (2006), <http://www.whitehouse.gov/reports/katrina-lessons-learned.pdf> (last visited Aug. 22, 2006) (calling for a system of “national preparedness”).

187. See *Zadvydas v. Davis*, 533 U.S. 678, 696 (2001) (noting that the Court uses a standard of “heightened deference to the judgments of the political branches with respect to matters of national security”); Louis D. Billionis, *Conservative Reformation, Popularization, and the Lessons Of Reading Criminal Justice As Constitutional Law*, 52 UCLA L. REV. 979, 986 (2005) (“As those decisions bear out, the dominant American legal mindset strives to conceptualize the relevant issues as out-of-the-ordinary struggles between freedom and society, belonging to the rubrics of war, emergency, and national security rather than everyday criminal justice.”).

response after Katrina provides a case study in the legal and normative force of those criminal procedure safeguards when the institutions of justice collapse. Far from unduly constraining criminal justice actors during emergencies, we argue that several of the relevant current constitutional criminal procedure rules already sufficiently relax during times of emergency. Nevertheless, post-Katrina, the constitutional rules that could be bent were broken across the board. The rules were not too thin to provide needed protection, but remained vulnerable as courts suspended the Constitution *sub silencio*. If state and federal courts had acted more quickly to end what amounted to an unconstitutional suspension of habeas corpus, local actors could have complied months sooner, preventing ongoing constitutional violations that tarnished the criminal system and disrupted the lives of thousands detained and their families.

A starting point in examining emergency criminal procedure is the Federal Constitution, which contains only one provision on point: the Habeas Corpus Suspension Clause. The Suspension Clause states: "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."<sup>188</sup> The Clause applies only to the federal government, permitting suspension by Congress. It has rarely been invoked, most significantly by President Abraham Lincoln during the Civil War in a manner later found unconstitutional by the Court but then authorized by Congress.<sup>189</sup> In one previous example of a suspension of habeas

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188. U.S. CONST. art. I, § 9, cl. 2.

189. *Ex parte Merryman*, 17 F. Cas. 144, 147 (C.C.D. Md. 1861) (No. 9,487); see WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 145 (1980) ("Lincoln thus believed that as Commander-in-chief he had implied power to execute the habeas clause."); DANIEL FARBER, LINCOLN'S CONSTITUTION 17-19 (2003) ("Lincoln authorized the suspension of habeas corpus anywhere necessary between Philadelphia and Washington."). Additional suspensions occurred during Reconstruction and the War of 1812. See ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863-1877, at 457-58 (1988) ("Grant in October 1871 proclaimed a 'condition of lawlessness' in nine [South Carolina] upcountry counties and suspended the writ of habeas corpus."). General Andrew Jackson ignored one writ of habeas corpus when he imposed martial law in New Orleans. *Jolinson v. Duncan*, 3 Mart. (o.s.) 530 (La. 1815); see DUKER, *supra*, at 142, 172 n.128 ("The Supreme Court of Louisiana in *Johnson v. Duncan*—a case arising from General Andrew Jackson's declaration of martial law in New Orleans during the War of 1812—citing *Bollman*, declared that the Constitution had exclusively vested in Congress the right of suspending the privilege of the writ of habeas corpus, and that that body was the sole judge of the necessity that called for the suspension."). President Andrew Johnson suspended the writ for a conspirator in President Lincoln's assassination. See REHNQUIST, *supra* note 6, at 165 ("[The government] showed the

corpus, after Pearl Harbor, habeas corpus jurisdiction was suspended in the then-territory of Hawaii. Martial law was declared with authorization of federal legislation, and a U.S. military officer appointed “commanding Governor,” for three years, from 1941 to 1944, closed all courts of the Territory, established military tribunals, and suspended habeas corpus.<sup>190</sup> The Supreme Court ultimately held that the military regime could not “obliterate the judicial system of Hawaii.”<sup>191</sup>

Most state constitutions have similar suspension clauses, and some states have suspended habeas corpus during emergencies; Massachusetts, Vermont, and Virginia legislatures suspended the writ during Shay’s Rebellion, as did other states during labor strikes in the early 1900s.<sup>192</sup> Louisiana’s state constitution provides that “[t]he writ of habeas corpus shall not be suspended.”<sup>193</sup> But even if Louisiana courts did not explicitly suspend habeas corpus in violation of the Louisiana constitution, they all but extinguished its efficacy in state courts. After Katrina, thousands languished in state prisons for months, awaiting a chance to meet with an attorney and a decision of whether the prosecutor would proceed (required under state law within sixty days). Without any legislative suspension of habeas

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court the endorsement of President Johnson suspending the writ of *habeas corpus*, and [Judge Andrew] Wylie declined to act further.”). The writ was suspended by the Governor of the Philippines during a “state of insecurity and terrorism among the people” resisting U.S. rule. *Fisher v. Baker*, 203 U.S. 174, 179–81 (1906). Additional suspensions included a suspension of habeas corpus to combat anti-black violence in Tulsa, Oklahoma, in 1923, and a series of suspensions of habeas corpus during labor strikes in mining states including Colorado, Idaho, and West Virginia. *Martial Law Widened After New Outrage*, N.Y. TIMES, Sept. 1, 1923, at 2; see generally Note, *Habeas Corpus-Strikes-Suspension*, 38 YALE L.J. 545 (1929) (reviewing labor strike suspensions of habeas corpus in various states).

190. *Duncan v. Kahanamoku*, 327 U.S. 304, 309 (1946); see also REHNQUIST, *supra* note 6, at 212–17 (offering an account of “Hawaii under martial law”).

191. *Duncan*, 327 U.S. at 315.

192. See, e.g., An Act to prevent Routs, Riots, and tumultuous Assemblies, and the evil Consequences thereof, 1786 Mass. Acts, ch. 8 (prohibiting “any persons to the number of twelve, or more, being armed with clubs, or other weapons [from remaining] unlawfully, routously, riotously or tumultuously assembled . . .”); Vermont Riot Act of 1787, reprinted in 14 STATE PAPERS OF VERMONT: LAWS OF VERMONT 265–66, 281–84 (J. Williams ed., 1966); Virginia Riot Act of 1786, reprinted in 2 THE PAPERS OF THOMAS JEFFERSON 517–19 (J. Boyd ed., 1955); Richard H. Kohn, *The Constitution and National Security: The Intent of the Framers*, in THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES, 1789–1989, at 69–72 (Richard H. Kohn ed., 1991); Jason Collins Weid, *A Republic of Emergencies: Martial Law in American Jurisprudence*, 36 CONN. L. REV. 1397, 1413–16 (2004) (describing state court suspensions of habeas corpus in response to strikes).

193. LA. CONST. art. I, § 21.

corpus, the state court system suspended its rules and failed to hold any hearings regarding the prisoners. Only a few state courts haltingly granted habeas petitions and ordered release of prisoners. And again, most prisoners had no access to counsel and only a few were represented by counsel to file habeas petitions. Worse, when a few trial judges did approve the grant of habeas corpus petitions, the Louisiana Supreme Court reversed and delayed the releases, citing its suspension of court deadlines. Federal courts granted relief to only a few prisoners.<sup>194</sup>

Detaining thousands of prisoners indefinitely, often under misdemeanor charges, violated a host of constitutional provisions, yet we argue that each violation was entirely preventable in the months that followed Hurricane Katrina.

First, the Due Process Clause provides a constitutional right of access to attorneys and to courts.<sup>195</sup> The state's failure to ensure that counsel and families promptly received information about the location of clients during an indefinite detention by the state raises substantial constitutional concerns.<sup>196</sup>

Second, defendants clearly do not have constitutionally adequate representation if no counsel is available even to meet with them, much less represent them.<sup>197</sup> Most of the thousands of detainees had no defense lawyer to raise constitutional claims and have not even seen a public defender. The six public defenders remaining in New Orleans after Katrina<sup>198</sup> simply could not handle 4,200 backlogged cases; they did not try, and instead struggled to keep up with arraignments in new cases.<sup>199</sup> Yet state courts waited over six months before even convening hearings regarding the lack of indigent defense counsel; out-of-state volunteer lawyers were not even solicited.

Third, the Sixth Amendment also provides for a "right to a speedy . . . trial,"<sup>200</sup> because as the Supreme Court has stated,

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194. On federalism and reasons why they might have deferred—improperly, we argue—to a suspended state court system, see *infra* Part II.B.1.

195. See *Bounds v. Smith*, 430 U.S. 817, 828 (1977) (holding that failure to provide library facilities violated the right of access to courts).

196. See *id.*; see also *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980).

197. See *infra* Part II.B.2.

198. See *supra* note 4 and accompanying text.

199. See *supra* text accompanying note 133.

200. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .").



“inordinate delay between arrest, indictment, and trial may impair a defendant’s ability to present an effective defense.”<sup>201</sup> Trials are unlikely within the state statutory deadline;<sup>202</sup> “for ten months after the water receded, not a single jury trial” occurred in New Orleans.<sup>203</sup>

As for the 700 to 1,500 defendants still incarcerated six months after the storm, many for minor charges, together with approximately 3,000 who also still faced charges but had not been tried,<sup>204</sup> Chief Judge Johnson noted, “If I were a defense lawyer, I would raise [speedy trial claims] every moment, every opportunity that I get . . . I would be standing on top of tables raising it.”<sup>205</sup>

Fourth, due process should prevent the state from imprisoning persons months beyond their release dates, particularly for misdemeanors such as drinking in public, disturbing the peace, and failing to pay tickets, and especially without providing counsel or charging them with any crime.<sup>206</sup> As noted, for months, “persons arrested in New Orleans the weekend preceding the storm—many for minor offenses, such as begging, prostitution, or drunk-and-disorderly—were still awaiting their hearing in a prison facility in some far corner of the state.”<sup>207</sup> Hearings to free those incarcerated for minor charges should have been held promptly once courts reopened, not months later.

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201. *United States v. Marion*, 404 U.S. 307, 320 (1971).

202. According to LA. CODE CRIM. PROC. ANN. art. 578 (2003), “[N]o trial shall be commenced . . . [i]n misdemeanor cases after one year from the date of institution of the prosecution.”

203. Harriet Ryan, *Justice delayed: ‘We the jury’ and other words unheard in New Orleans since Katrina*, COURT TV NEWS, Mar. 20, 2006, [http://www.courtstv.com/news/neworleans/032006\\_notrials\\_ctv.html](http://www.courtstv.com/news/neworleans/032006_notrials_ctv.html) (last visited Aug. 15, 2006); Filosa, *supra* note 170; see Gwen Filosa, *Orleans trials resume with familiar themes*, TIMES-PICAYUNE, June 8, 2006, at B1.

204. Ryan, *supra* note 203.

205. *Id.* (ellipsis in original).

206. Such detention arguably violates the Fourth and Fourteenth Amendments. See, e.g., *Bell v. Wolfish*, 441 U.S. 520, 536 n.16 (1979) (“Due process requires that a pretrial detainee not be punished.”); cf. *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (“[P]rolonged detention based on incorrect or unfounded suspicion may unjustly ‘imperil [a] suspect’s job, interrupt his source of income, and impair his family relationships.’” (quoting *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975))) (second alteration in original).

207. Jack King, *In The Wake Of The Hurricanes: NACDL Responds Quickly; Defense Bars Regroup and Rebuild*, CHAMPION, Nov. 2005, at 4, 10.

Finally, the excessive bail clause applies where individuals were detained without an opportunity to pay bail, or where judges set excessively high bail for misdemeanors.<sup>208</sup>

These constitutional provisions could have been complied with had courts: insisted on prompt identification of prisoners and release of their names to counsel and permitted attorney access (to provide access to courts); permitted out-of-state volunteer attorneys to help, and insisted on funding for public defenders for prosecutions to proceed (to ensure adequate indigent defense counsel); conducted hearings to release misdemeanor detainees (to address the due process problem of indefinite detention for minor crimes); insisted prosecutors issue prompt charge decisions or permit guilty pleas; conducted proceedings in absentia including to reduce bail; and if all else failed, granted habeas petitions.

The failure to accomplish those steps was more than understandable in the immediate weeks after the storm. Each of those steps, however, could have been taken within months when courts reopened. Instead, even after a year, actors violated constitutional criminal procedure rather than restore normalcy.<sup>209</sup> Local judges, themselves elected officials, repeatedly threatened to dismiss cases and release prisoners, but never acted on their threats, fearing perhaps the release of one who would then commit a violent crime. Yet those judges did not ensure that prosecutors and defense attorneys conducted proper screening to permit release of those arrested for petty violations who posed no such danger. The system simply collapsed with courts conducting no hearings and no trials, and with no defense counsel available.

Nor did any executive reach out to assume powers over criminal justice matters. Instead, the official response institutionalized the Louisiana judiciary's fundamental inability to maintain the orderly administration of the criminal process. The Louisiana legislature

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208. See *United States v. Salerno*, 481 U.S. 739, 752-55 (1984) (invoking the Excessive Bail Clause to assess the facial constitutionality of a statute which allowed a judicial officer to deny certain arrestees an opportunity to pay bail); *Stack v. Boyle*, 342 U.S. 1, 5 (1951) ("Bail set at a figure higher than an amount reasonably calculated to fulfill [its] purpose is 'excessive' under the Eighth Amendment.").

209. One might think emergencies would merely provide an additional period of necessity justifying crafting of exceptions to constitutional rules; instead the rules were suspended entirely. See Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 963 (1995) ("A rule with necessity or emergency exceptions might be described, somewhat imprecisely, as a strong presumption.").

passed permanent legislation permitting courts to suspend habeas corpus for ninety days and indefinitely thereafter until the governor-declared “emergency” subsides. The legislature thus confirmed that what occurred after Katrina was, effectively, a state court suspension of habeas corpus.<sup>210</sup>

Related was the failure to respond systematically to the emergency by reconsidering overcriminalization.<sup>211</sup> The elected district attorney did not, after months passed, triage cases and release persons imprisoned for petty crimes or who had already completed their sentences. When an emergency sorely stresses the public order, expending criminal justice resources on minor infractions has a greater relative cost to government, but worse, incarceration imposes a greater social cost on families already strained and separated during an emergency. Mark Tushnet writes that emergencies “provide new information relevant to the assessment of the costs and benefits of some policies.”<sup>212</sup> Those costs and benefits were not reconsidered by criminal justice actors in Louisiana.

Thus, a state criminal system effectively suspended habeas corpus for months in the face of mass detentions, long after courts had reconvened and could have held hearings, long after prosecutors could have conducted screening and triage of cases (and long after an ad hoc team of volunteers conducted their own screening). The legislature and the governor likewise failed to intervene. As a result, thousands languished in prisons and families remained separated, adding to post-Katrina dislocation and trauma. It remains to be seen whether any will receive civil compensation for the ordeals that they suffered.<sup>213</sup>

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210. See *infra* notes 262–64 and accompanying text.

211. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509 (2001) (“The . . . natural assumption is that the public would want to criminalize only the kinds of things criminals, understood in the ordinary sense of that word, do. Yet contemporary criminal codes cover a good deal of marginal middle-class behavior . . .”).

212. Mark Tushnet, *Issues of Method in Analyzing the Policy Response to Emergencies*, 56 STAN. L. REV. 1581, 1589 (2004).

213. Regarding the ACLU lawsuit filed on behalf of a group of detainees in New Orleans Parish prison, see *supra* note 111. See also, e.g., Brandon L. Garrett, *Innocence, Harmless Error, and Federal Wrongful Conviction Law*, 2005 WIS. L. REV. 35, 48–51, 53–56 (describing standard to show malicious prosecution and elements of section 1983 claims alleging wrongful convictions); see generally Jeffrey Manns, *Liberty Takings: A Framework For Compensating Pretrial Detainees*, 26 CARDOZO L. REV. 1947 (2005) (arguing that excessive use of pre-trial detention should be considered a compensable “liberty taking”).

### B. *Federalism and Vulnerability of Local Criminal Justice Actors*

While criminal procedure rights did not help or constrain law enforcement, but were instead ignored, a second set of constitutionally-inspired federalism principles hindered provision of emergency relief. Lingering in the aftermath of Katrina is the question of why federal assistance came so slowly to local criminal justice actors, when it came at all. As to law enforcement assistance, for example, federalism delayed relief as President Bush and Governor Blanco debated the form of military help. The complications of "Our Federalism," which long has characterized our approach to criminal law, contributed to confusion resulting in meager assistance provided post-Katrina, not just of federal troops, but also by judicial review of habeas petitions and financial assistance to criminal courts, prisons, prosecutors and indigent defense attorneys. Nevertheless, a lack of local resources before the emergency made the New Orleans local criminal justice system already vulnerable. Federal and judicial reluctance to intervene post-Katrina can be in part attributed to the practical limits of their ability to remedy such longstanding structural deficiencies of local criminal justice actors.

1. *Hindering Emergency Relief.* Federalism, or doctrines that limit intrusion on prerogatives of state and local government, characterizes the Supreme Court's approach to regulating local criminal justice institutions under the Constitution.<sup>214</sup> The Court has repeatedly held that matters of criminal justice are the states' "primary authority" and that federal courts may not intrude on

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214. See Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1488 (1987) ("It is not that the states deserve autonomy simply because they are states, but rather that it is appropriate to leave the states alone, to accord them a 'separate sphere,' [sic] because the 'National Government will fare best' that way." (footnote omitted) (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971))); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 323 (1997) ("To all appearances, the United States has a federal system. This generally means that regulatory authority is divided between a national government and many state governments. Those governments are free, within constitutional bounds, to develop and pursue their own regulatory agendas, supported by the power to tax and spend."); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1402 (1997) ("[F]ederalism is a decentralized decisionmaking system that is . . . responsive to local interests and preference, that can tailor programs to local conditions and needs, and that can provide innovation in creating new programs.").

criminal law,<sup>215</sup> an area “where States historically have been sovereign.”<sup>216</sup> That traditional deference to state and community administration of justice, though justified for a host of reasons, had unexpected harmful effects on the ability of actors to respond and recover after Hurricane Katrina. Federal assistance, in several areas, would have provided crucial support, particularly in the period immediately following the storm when state and local actors remained in the greatest disarray.

Principles of federalism made it more difficult for the federal government to assist local police in need. First, federal officials remain barred from conducting law enforcement by the Reconstruction-era Posse Comitatus Act, which makes it a federal crime for federal troops to “execute the laws” in the states.<sup>217</sup> The Act sought not to prevent emergency assistance, but rather to prevent federal officials from monitoring Jim Crow elections after Reconstruction.<sup>218</sup> The Constitution also limits domestic exercise of federal military power (already prevented under Posse Comitatus from conducting law enforcement) to two limited emergency circumstances, during a natural disaster or during domestic violence, but only with the governor’s consent or to enforce a federal court’s

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215. See, e.g., *Engle v. Isaac*, 456 U.S. 107, 128 (1982) (“The States possess primary authority for defining and enforcing the criminal law. . . . Federal intrusions into state criminal trials frustrate both the States’ sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.”).

216. *United States v. Lopez*, 514 U.S. 549, 564 (1995); see *United States v. Morrison*, 529 U.S. 598, 617–18 (2000) (“We . . . reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.”); *Printz v. United States*, 521 U.S. 898, 922 (1997) (“The power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States.”); see also *Screws v. United States*, 325 U.S. 91, 109 (1945) (“Our national government is one of delegated powers alone. Under our federal system the administration of criminal justice rests with the States except as Congress, acting within the scope of those delegated powers, has created offenses against the United States.”).

217. See Posse Comitatus Act, 18 U.S.C. § 1385 (2000) (prohibiting use of armed forces to “execute the laws” and making willful violation punishable by up to two years imprisonment). Posse comitatus refers to the common law power of a sheriff to call up a “posse” of able-bodied people to assist in arrests or to suppress riots. E.g., *Scott v. Vandiver*, 476 F.2d 238, 240–41 (4th Cir. 1973); BLACK’S LAW DICTIONARY 1200–01 (8th ed. 2004).

218. See, e.g., *United States v. Allred*, 867 F.2d 856, 870 (5th Cir. 1989) (“The legislative and judicial history of the Act, however, indicates that its purpose springs from an attempt to end the use of federal troops to police state elections in ex-Confederate states.”); H.R. REP. NO. 97-71, pt. II, at 5 (1981), as reprinted in 1981 U.S.C.A.N. 1785, 1787 (“[N]o one has been charged or prosecuted under the Posse Comitatus Act since its enactment.”).

order.<sup>219</sup> These requirements create possibilities for crossed signals during emergencies, as after Katrina when battles over federalism and whether the governor had consented delayed crucial military assistance for rescue missions. Further, federal troops lack law enforcement training because, after all, the Posse Comitatus Act prohibits law enforcement.<sup>220</sup>

Similarly, principles of federalism supported federal courts' reluctance to grant petitions for the release of the thousands of indefinitely detained prisoners after Hurricane Katrina. Federal courts must abstain under *Younger v. Harris*<sup>221</sup> from enjoining pending state prosecutions.<sup>222</sup> The Court's rationale in *Younger* was based on "the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments . . . . This . . . is referred to by many as 'Our Federalism . . . .'"<sup>223</sup> The Court did note that perhaps in "extraordinary circumstances" when a threat is "great and immediate" and "when absolutely necessary for protection of

219. The first of the Militia Clauses permits Congress to call the militia, our modern day National Guard, but only to "suppress Insurrections and repel Invasions." U.S. CONST. art. I, § 8, cl. 15 ("The Congress shall have Power . . . To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."). Also the Constitution permits the president to call the National Guard upon the request of a state to protect against "domestic Violence" short of a national emergency. See U.S. CONST. art. IV, § 4 ("The United States . . . shall protect each of them [the States] against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence."); see also 10 U.S.C. § 331 (2000) ("Whenever there is an insurrections [sic] in any State . . . the President may, upon the request of [that State's] legislature or of its governor if the legislature cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State . . .").

220. See Baum, *supra* note 15, at 60 ("[The author] asked a sergeant first class what he and his men were permitted to do . . . . 'We're just trick-or-treating,' he said. 'If I saw someone going in that store right there, I couldn't do anything but radio it in.'") Perhaps those reasons explain why, despite the president's call for "greater federal authority and a broader role for the armed forces" during emergencies, no such authority has been granted by Congress. See Angie C. Marek, *National Security Watch: The militarization of disaster response*, U.S. NEWS & WORLD REP., Sept. 21, 2005, <http://www.usnews.com/usnews/news/articles/050921/21natsec.htm> (last visited Aug. 18, 2006).

221. *Younger v. Harris*, 401 U.S. 37 (1971).

222. See *id.* at 41, 49, 53–54 (holding that federal courts may not enjoin pending state prosecutions); see also Martin H. Redish, *Abstention, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71, 75 (1984) ("The *Younger v. Harris* abstention doctrine provides that a federal court may not enjoin an ongoing state criminal proceeding, even to protect federal constitutional rights." (footnote omitted)).

223. *Younger*, 401 U.S. at 44.

constitutional rights,” federal courts could enjoin criminal actions.<sup>224</sup> After Katrina, the threat to constitutional rights arguably appeared quite great, immediate, and not adequately remedied in largely closed state courts (in which prosecutions were arguably not “pending”). Federal judges granted only a few hundred habeas or section 1983 petitions after Katrina, and they did not issue written opinions. The *Younger* abstention doctrine, despite its exceptions, may explain why federal courts failed to intervene more broadly to grant relief to the thousands of illegally detained prisoners that remained, and why defense lawyers did not seek more sweeping relief.

Still more troubling, principles of federalism also hindered the provision of financial aid sorely needed at least in the immediate period following the storm. Given their already sparse resources, financial assistance, not military patrols, might have been the most useful federal contribution to local police, courts, prisons, prosecutors and public defenders. Yet legislation providing for disaster relief and funding also reflects traditional reluctance to interfere with local law government. The federal executive branch has been granted a raft of statutory emergency powers under the Stafford Act,<sup>225</sup> which allows the federal government to provide aid to families<sup>226</sup> and repair damaged buildings.<sup>227</sup> The Act does not, however, provide for or permit payment of operating expenses for local government, and thus the only aid law enforcement or criminal courts can receive is to repair buildings. There is no routine source for federal emergency criminal justice funding, and no funding was provided during the crucial months after Hurricane Katrina.<sup>228</sup> The federal government could provide support without undermining local law enforcement by funding implementation of emergency plans to assist lawyers, courts, prisons, and police in administering justice during emergencies.

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224. *Id.* at 45 (quoting *Fenner v. Boykin*, 271 U.S. 240, 243 (1926)).

225. Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1974, Pub. L. No. 93-288, 88 Stat. 143 (codified as amended at 42 U.S.C. §§ 5121-5206 (2000)).

226. 42 U.S.C. §§ 5174, 5177-5183 (2000).

227. *Id.* §§ 5171-5172.

228. The Justice Department does provide grants for pilot projects through its Bureau of Justice Assistance, and it did later provide a grant of \$58 million for courts, prosecutors, indigent defense, and law enforcement, which will provide some emergency assistance for the local criminal justice systems in the New Orleans region, but “is not enough to tackle needed systemic changes.” Maggi, *supra* note 185.

2. *The Persistence of Inadequate Indigent Defense.* Doctrines of federalism had unanticipated effects, hindering efforts to release detained prisoners, assist law enforcement, and provide financial support to local law enforcement. Nevertheless, the efficacy of federal assistance after an emergency has limits. Federal assistance, including judicial review of indefinite detentions, could have provided important assistance, particularly during the initial period after the storm. The sustained nature of the local institutional collapse for upwards of a year, however, must be attributed to the local criminal system's vulnerability during an emergency. The New Orleans criminal system remained precariously balanced before the emergency for a variety of reasons, including the political unpopularity of expending resources for indigent defendants, lack of resources, and lack of planning, all in addition to insufficient enforcement of constitutional rules. The longstanding problem of indigent defense funding in particular provides a clear example of the limitations of judicial enforcement of constitutional rights given underlying vulnerability of local criminal justice institutions.

The underlying lack of criminal justice resources in the area of indigent defense reflects no simple cause, but rather systemic problems in many jurisdictions, not just New Orleans, that have persisted for decades. Although Louisiana provides very low indigent defense funding and is the only state to rely chiefly on traffic tickets and court costs to fund indigent defense, studies have shown pervasive underfunding of indigent defense in many other states.<sup>229</sup>

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229. See A.B.A. STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* 8 (2004) (“[A] significant funding crisis persists today. Throughout [hearings conducted by the A.B.A.’s Standing Committee on Legal Aid and Indigent Defendants], witnesses from each of the twenty-two states examined reported grave inadequacies in the available funds and resources for indigent defense.”); NAT’L LEGAL AID AND DEFENDER ASS’N, *supra* note 13, at 31–32 (“Alabama’s plan for defender services has been universally criticized for its systematic deficiencies, including inadequate funding. . . . [I]t is . . . telling that Louisiana’s funding does not even match Alabama’s low threshold.”); THE SPANGENBERG GROUP, STATE AND COUNTY EXPENDITURES FOR INDIGENT DEFENSE SERVICES IN FISCAL YEAR 2002, at 34, 36–37 (2003), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/indigentdefexpend2003.pdf> (tabular state by state comparison shows twenty-six states with less annual state-wide indigent defense funding than Louisiana, though some significant variation can also be explained by caseloads, presence of death penalty cases, appointment of counsel for misdemeanor cases and civil cases); see generally THE SPANGENBERG GROUP, A COMPREHENSIVE REVIEW OF INDIGENT DEFENSE IN VIRGINIA (2004), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/va-report2004.pdf> (study



Similarly, in other states, studies report that due to inadequate resources, in nonemergency circumstances, indigent arrestees often wait weeks or months in detention before seeing a lawyer.<sup>230</sup>

Perhaps because the problem of grossly underfunded indigent defense counsel has remained so widespread and intractable, the Supreme Court elaborated a constitutional right to effective assistance of counsel, but has stopped short of setting any baseline level of resources. The Supreme Court's current constitutional test reflects the limitations of judicially-enforced criminal procedure rights and the role of federalism, but also the failings of local institutional actors. The Court's test asks in an individual case whether counsel was "reasonably effective" and whether there was prejudice to the outcome at trial.<sup>231</sup> Commentators have criticized the test, arguing that given local political unwillingness to fund indigent criminal defense, "*Gideon* requires some budgetary floors if it is to fulfill its promise."<sup>232</sup> According to the Supreme Court, however, an advantage of its approach is to avoid the need for inquiry into systemic inadequacy. As the Court put it, "the entire criminal justice system" should not "suffer[]" the burden of litigating such claims.<sup>233</sup> Principles of federalism counseled against intruding into state and local policy choices regarding the baseline level of resources for criminal justice; the Court does not typically define constitutional rights as "affirmative" rights or entitlements for the indigent, whether

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documenting grossly inadequate indigent defense resources based on data collection in eleven states).

230. A.B.A. STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *supra* note 229, at 23 ("[I]n some places throughout the country, poor persons accused of crime are arrested and detained in local jails for months or even years before they have a chance to speak with a lawyer.").

231. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

232. William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 70 (1997).

233. *Strickland*, 466 U.S. at 697.

the context is public benefits,<sup>234</sup> education,<sup>235</sup> medical care,<sup>236</sup> police protection,<sup>237</sup> or criminal law.<sup>238</sup> (One exception to that general rule applies to those in custody, for whom the government assumes an affirmative obligation to provide reasonably safe conditions, food, clothing, and medical care.)<sup>239</sup> Such deferential principles give localities the primary responsibility to fund counsel for the indigent at appropriate levels to ensure constitutionally adequate defense.

New Orleans and the State of Louisiana failed to do so for decades. The Louisiana courts, a decade before Katrina, ruled against the grossly underfunded indigent defense system in New Orleans. In 1993, Chief Judge Johnson held a series of hearings on defense services after a public defender, Richard Teissier of the Orleans Indigent Defender Program, informed the court that he had no investigator, no funding for experts, and so many cases—418 cases to be precise—that his clients were “routinely incarcerated 30 to 70 days

234. See *Goldberg v. Kelly*, 397 U.S. 254, 260, 262 (1970) (reaching question regarding due process rights of recipients of statutory welfare benefits, but not reaching whether there was any constitutional right to such benefits); Barbara Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982, 1005 (1996) (“Courts are not institutionally equipped to make the adjustments and readjustments necessary to resolve budget-allocation issues.”); see also Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 NW. U. L. REV. 410, 420 (1993) (“[E]ven if we assume some rough operational understanding of . . . each minimum entitlement . . . much more would have to be decided: . . . The[se] are questions that seem far better addressed by the legislative and executive branches of government, questions that seem virtually out of the reach of the judiciary absent special circumstances.”).

235. See *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 452, 461–62, 463, 465 (1988) (holding that schools may charge bus fees to indigent families); *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973) (holding that education is not a fundamental right).

236. See *Maher v. Roe*, 432 U.S. 464, 469 (1977) (“The Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigents.”).

237. See *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 187, 202 (1989) (“A State may, through its courts and legislatures, impose such affirmative duties of care and protection upon its agents as it wishes. But not ‘all common-law duties owed by government actors were . . . constitutionalized by the Fourteenth Amendment.’” (quoting *Daniels v. Williams*, 474 U.S. 327, 335 (1986)) (omission in original); *Reiff v. City of Philadelphia*, 471 F. Supp. 1262, 1265 (E.D. Pa. 1979) (“The Constitution does not explicitly or implicitly provide a right to adequate police protection.”).

238. See *Strickland*, 466 U.S. at 687 (refusing to set a baseline level of resources which a criminal justice system must provide the indigent).

239. *DeShaney*, 489 U.S. at 199–200; see *Estelle v. Gamble*, 429 U.S. 97, 104–06 (1976) (holding that a state violates the Eighth Amendment when it exhibits deliberate indifference to a prisoner’s serious medical needs).

before he meets with them.”<sup>240</sup> Chief Judge Johnson concluded in this case that the system of indigent defense in New Orleans was unconstitutional and ordered the legislature to provide funding.<sup>241</sup> The Supreme Court of Louisiana on appeal agreed that indigent criminal defendants in New Orleans received unconstitutionally inadequate counsel, but was unwilling to order the Legislature to provide additional funding (beyond the local funds from court fees and tickets) for separation-of-powers reasons.<sup>242</sup> The legislature then created a state-funded Louisiana Indigent Defender Assistance Board,<sup>243</sup> though over time gross inadequacies reappeared,<sup>244</sup> requiring an additional judicial intervention that was still pending before Katrina.<sup>245</sup>

Thus, courts may only with great difficulty ameliorate longstanding institutional neglect, and only sustained review may address persistent constitutional violations. Further, before-the-fact attention is essential, given the even greater difficulty of a systemic response after an emergency. The New Orleans system has only slowly addressed the problem of inadequate indigent representation in hearings convened following Judge Hunter’s ruling in February 2006 that after Katrina, the New Orleans public defender system could no longer adequately represent its over 4,000 clients.<sup>246</sup> Indeed,

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240. *State v. Peart*, 621 So. 2d 780, 784 (La. 1993). For additional discussion of the case, see Note, *Effectively Ineffective: The Failure Of Courts To Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1736–38 (2005).

241. *Peart*, 621 So. 2d at 784–85. As a result, Peart received additional resources for his case, resulting in acquittals on the charges against him in two separate trials. *Id.* at 785 & n.4.

242. *Id.* at 791.

243. 1997 La. Acts No. 1361, § 1 (codified at LA. REV. STAT. ANN. § 15:151 (2005)); see *State v. Citizen*, 898 So. 2d 325, 336 (La. 2005) (discussing the legislature’s creation in 2003 of a “blue ribbon” Louisiana Task Force on Indigent Defense Services to make reform recommendations); Lee Hargrave, *Ruminations: Mandates in the Louisiana Constitution of 1974; How Did They Fare?*, 58 LA. L. REV. 389, 398 n.45 (1998) (“In 1993, just before *Peart* was decided, legislation to provide better funding for indigent defense was defeated. The legislature did provide \$5 million additional funds in 1994 and 1995. Also, after a report by an advisory commission, the 1997 legislature established the Indigent Defense Assistance Board.” (citations omitted)).

244. See Stephanos Bibas, *The Psychology of Hindsight and After-The-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 8 (“Over time, the money failed to keep up with inflation and caseloads, and today New Orleans defense counsel still have heavy caseloads.”).

245. Before Katrina, the Louisiana Supreme Court again intervened and ruled that a “trial judge may halt the prosecution of [capital] cases” if sufficient indigent defense funding was not timely provided. *Citizen*, 898 So. 2d at 339.

246. Perlstein, *supra* note 4.

Richard Teissier, no longer a public defender, was appointed Special Master to develop a plan to revise the indigent defense system.<sup>247</sup> Teissier noted, "It was broke before . . . . Now it's rubble. It's like the Lower 9th Ward. It's completely ravaged of even the appearance of a public defender's office."<sup>248</sup> Local efforts remain ongoing to change fundamentally the system of indigent defense, though the local tax base remains devastated, and state and federal assistance to date cannot support an adequate system of representation.<sup>249</sup> The Justice Department has suggested that only a structural intervention can now revive and recreate the formerly thirty-person and now six-person New Orleans public defender staff so that it can adequately represent its thousands of clients.<sup>250</sup> Attempts to intervene will remain inadequate until the sources of funding are improved and stabilized.

Framing the legal and policy problem of regulating baseline resources as a safeguard for basic functioning of the criminal justice system in times of emergency might encourage local, state or federal actors to rethink the persistent problem of inadequate indigent defense. Policymakers might start to view the problem in a different light, as implicating the fundamental legitimacy of the criminal process. Courts might also view differently case law regarding inadequate funding for indigent counsel, which has never considered the emergency provision of justice.<sup>251</sup> Actors might particularly scrutinize indigent defense funding contingent upon funding sources that remain equivocal after an emergency.

Nevertheless, past and present experience in New Orleans illustrates both the promise and the difficulties of relying upon political actors and courts to remedy systematic vulnerability of local

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247. *Id.*

248. *Id.*

249. Maggi, *supra* note 175; Perlstein, *supra* note 4 ("The chairman of the [Orleans Parish Indigent Defender Program] Board, Frank DeSalvo, vowed to return with a plan to resume operations. 'Sometimes you just have to do the best with what you've got,' DeSalvo said."); see *supra* notes 182-86 and accompanying text (regarding state and federal contributions to date).

250. See CHIARKIS ET AL., *supra* note 12, at 10 ("[W]e present recommendations for both short-term and long-term actions to address the indigent defense needs in Orleans Parish. The short-term actions are primarily . . . to oversee the restructuring of the public defender program . . . . The long-term actions are generally . . . to restructure the defender program.").

251. Further, requiring that government provide a baseline amount of funding to ensure minimally adequate counsel could be fairly simple for courts to police. See Stuntz, *supra* note 232, at 70-71 ("No judicial micromanagement would be necessary. Unlike prison cases, testing compliance with judicial decrees would seem to be easy: Either the required appropriations were made or they weren't.").

criminal justice institutions. With these deep longstanding limitations in mind, the next Part discusses potential reforms aimed at enabling reluctant institutional actors to address the problem of emergency criminal justice.

### III. AN EMERGENCY CRIMINAL JUSTICE SYSTEM

The aftermath of Hurricane Katrina calls into question the ability of the criminal justice system's diffuse, divided, administrative structure to respond to emergencies. As Professor William Stuntz writes, "[F]or all its flaws, centralization does have one large advantage—it permits easy adaptation to changed circumstances."<sup>252</sup> Decentralized local, state, and federal actors could not join together to respond to adversity. After a crisis, it may prove difficult to preserve constitutional functioning among constituent parts of a criminal system, each with different or adverse interests and each disparately affected by the emergency. Actors may agree, however, in advance of a crisis to reach compromises regarding emergency resources and procedures. We discuss below possibilities for centralization and coordination in an emergency-oriented criminal justice system.

#### A. *The Kerner Commission Model*

The travails of the Louisiana criminal justice system are not new; the federal government proposed a range of reforms aimed at preventing such a criminal justice collapse after nationwide urban unrest and riots in 1967. President Lyndon Johnson appointed a National Advisory Commission on Civil Disorders, known as the Kerner Commission, to make recommendations.<sup>253</sup> The Commission found that many cities experienced preventable failures in the administration of criminal justice,<sup>254</sup> and a chapter of the report addressed the need for emergency planning to avoid aggravating conditions of disorder.<sup>255</sup>

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252. Stuntz, *supra* note 6, at 2148 n.21.

253. NAT'L ADVISORY COMM'N ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 15–16 (1968).

254. *See id.* at 183 ("Partially paralyzed by decades of neglect, deficient in facilities, procedures and personnel, overwhelmed by the demands of normal operations, lower courts have staggered under the crushing new burdens of civil disorders.")

255. *See id.* at 183–95 (chapter entitled "The Administration of Justice Under Emergency Conditions").

Specifically, the Kerner Commission recommended that the criminal justice system be used sparingly during an emergency to maintain order rather than resort to mass arrests.<sup>256</sup> The New Orleans criminal justice system, like most, lacked any such protocols to limit the scope of arrests or to handle mass arrests under emergency conditions. The Kerner Commission also recommended that “each community . . . undertake the difficult but essential task of reform and emergency planning . . . to meet emergency needs.”<sup>257</sup> The Kerner Commission also suggested that local law enforcement develop “mutual assistance pacts” and also interstate mutual assistance agreements.<sup>258</sup> In response, lawyers and police in several cities, including New York and Washington, D.C., convened and issued procedures for the “Administration of Justice Under Emergency Conditions,” while others all but ignored the recommendations.<sup>259</sup>

Despite the limitations of expert study groups, such planning could at least begin the process of preparation to avoid criminal justice collapse. Nevertheless, few efforts have been made post-Katrina to revive such planning. No “Katrina Criminal Justice Commission” has investigated the causes of the criminal justice collapse we describe, nor has any been convened.<sup>260</sup> On the other

256. *Id.* at 189. The Kerner Commission also reported that mass arrests resulted in few successful prosecutions, but instead caused overcrowding of facilities, inability of defense lawyers to locate clients, and failure of prosecutors to screen cases. *Id.* at 184–85.

257. *Id.* at 187. Additionally, the Kerner Commission recommended specific planning guidelines for communities to implement. *Id.* at 187–95, 282–83.

258. *Id.* at 283–86.

259. See generally COMM. ON THE ADMIN. OF JUSTICE UNDER EMERGENCY CONDITIONS, THE ADMINISTRATION OF JUSTICE UNDER EMERGENCY CONDITIONS IN THE DISTRICT OF COLUMBIA (1973) (recommending procedures to the Judicial Conference of the District of Columbia to implement following an emergency); CRIMINAL JUSTICE COORDINATING COUNCIL & VERA INST. OF JUSTICE, THE ADMINISTRATION OF JUSTICE UNDER EMERGENCY CONDITIONS (1969) (recommending procedures for New York City’s criminal justice system to implement following an emergency).

260. A White House report calls for future study of the problem. WHITE HOUSE, *supra* note 186. The Senate rejected a call for an independent Katrina Commission, opting for an investigative commission composed of members of Congress. See Charles Babington & Shailagh Murray, *Parties Scramble for Post-Katrina Leverage*, WASH. POST, Sept. 8, 2005, at A6 (“[C]ongressional Republicans . . . announc[ed] the formation of an investigative commission that they can control. They rejected Democratic appeals to model the panel after the Sept. 11 commission, which was made up of non-lawmakers and was equally balanced between Republicans and Democrats.”). That commission’s report discusses a “breakdown in law enforcement” in police and military responses. The report, however, discusses no other criminal justice issues and makes no recommendations. SELECT COMM. TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, A FAILURE OF INITIATIVE: THE FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION

hand, it is heartening that the Department of Justice assembled a group that has issued comprehensive recommendations regarding the central problem of funding and design of a sound public defender's office in New Orleans.<sup>261</sup> Failures along lines familiar since the 1960s suggest the need to again study and address criminal justice administration during emergencies.

### *B. Toward Emergency Courts*

When an emergency threatens physical safety, criminal justice institutions take on heightened importance. Criminal justice actors share an important role in maintaining calm and order during emergencies. During the aftermath of Hurricane Katrina, far from presenting a deliberative well-planned response, all actors remained in disarray. Below we indicate ways that criminal justice institutions could better coordinate during crises.

Legislation in Louisiana adopted a scheme in which a central court receives administrative authority in times of emergency. The Louisiana Legislature in effect codified the governor's and the state supreme court's suspension of habeas corpus, stating that in future "emergencies and disasters of unprecedented size and destructiveness resulting from terrorist events, enemy attack, sabotage, or other hostile action, or from fire, flood, earthquake, or other natural or manmade causes,"<sup>262</sup> once the governor issues an "emergency order" all state speedy trial requirements and other deadlines will be suspended for ninety days, and the supreme court may extend the suspension upon a determination that it is "necessary."<sup>263</sup> The law also creates "emergency sessions" for courts, so that where courts are damaged and closed, the default venue for prisoners in detention would be transferred to Baton Rouge (or if Baton Rouge is affected, another unaffected jurisdiction).<sup>264</sup> As a result, during future emergencies courts will (1) consolidate criminal cases in a district unaffected, and (2) delay resolution of criminal cases.

The Louisiana Legislature realized that emergencies make criminal justice a shared concern, with prisoners transferred

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FOR AND RESPONSE TO HURRICANE KATRINA 241 (2006), available at [http://katrina.house.gov/full\\_katrina\\_report.htm](http://katrina.house.gov/full_katrina_report.htm).

261. See CHIARKIS ET AL., *supra* note 12, at 9–16 (reporting the group's recommendations).

262. LA. CODE CRIM. PROC. ANN. art. 941(1) (2005).

263. *Id.* art. 955(A)–(C).

264. *Id.* art. 944, 945(B).

throughout the state. Establishing a trained, prepared default court could avoid future confusion about jurisdiction and authority during an emergency. Nevertheless, that “emergency session” serves only as a default court. The legislature did not take any steps to ensure that it was a trained default actor, or even an actor with resources to cope with emergencies. Nor did the legislature task the “emergency session” with any planning role that might prepare it for future emergencies. Nor do other states have criminal justice institutions designed to take on such an emergency planning role.<sup>265</sup>

Suppose states create institutions designed to permanently plan and prepare for judicial administration during times of emergency—emergency courts. Emergency courts would be tasked not just with calling sessions in an unaffected area, but also with handling the coordination issues that were not performed after Katrina. That is, emergency courts could provide a clearinghouse for such subjects as planning for transfer of prisoners; tracking and making public updated contact information for defense attorneys and prosecutors; making public lists of prisoners and where they are located; monitoring hearings; ensuring adequate indigent defense; ensuring court deadlines are complied with; safeguarding records and evidence; and supervising efforts to locate witnesses and evidence.

Given the Louisiana courts’ failure to respond to the emergency, it may seem surprising to focus on courts as exercising a future leadership role. Yet despite their relative lack of power as compared with the political branches, courts provide a natural center for planning to prevent criminal justice collapse and for decisionmaking to maintain the integrity of the criminal process during times of emergency. Courts are the “executive” within the criminal system, with authority to supervise operation of court facilities, correctional facilities, and prosecutors and defense lawyers appearing before

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265. See, e.g., N.C. GEN. STAT. § 15A-1063(1) (2005) (permitting a judge to declare a mistrial if “[i]t is impossible for the trial to proceed in conformity with law . . .” but refusing to provide for an emergency court). The New York state courts developed novel procedures to restore administration of justice “surprisingly quickly,” without even a two week delay, and in a manner sensitive to individual rights after September 11, 2001, according to a report by the VERA institute. See OREN ROOT, *THE ADMINISTRATION OF JUSTICE UNDER EMERGENCY CONDITIONS: LESSONS FOLLOWING THE ATTACK ON THE WORLD TRADE CENTER* (2002), [http://www.vera.org/publications/publications\\_2c.asp?section\\_id=16&project\\_id=&sub\\_section\\_id=5&publication\\_id=148&publication\\_content\\_id=210](http://www.vera.org/publications/publications_2c.asp?section_id=16&project_id=&sub_section_id=5&publication_id=148&publication_content_id=210).



them,<sup>266</sup> as well as to consolidate cases to examine systemic issues affecting their jurisdiction.<sup>267</sup> Courts thus may have the best “on the ground” information about problems in administering criminal justice.

Courts could maintain the legitimacy of the criminal system during an emergency by insisting on reasonable compliance with constitutional criminal procedure rules. For example, we argue that unlike the Louisiana courts, an emergency court should take the following six minimal steps:

1. Require the state corrections department and prosecutors to make promptly available names and locations of all inmates to defense counsel and families;
2. Conduct prompt triage hearings to release non-felony offenders, for whom due process should prevent indefinite detention, and waive or reduce statutory bail;
3. For more serious offenses, insist that prompt hearings be held in which prosecutors decide whether to charge or accept guilty pleas with probation (to be supervised for evacuees in their new homes);
4. Ensure full access to counsel at detention facilities;
5. Conduct prompt hearings to ascertain adequacy of indigent defense counsel, solicit volunteer counsel if there is a shortage of local counsel, and evaluate the institutional adequacy of the indigent defense office;
6. Insist on compliance with charge deadlines and speedy-trial deadlines, and if there is no compliance, entertain writs of habeas corpus—with priority for misdemeanor detainees.

An emergency court should develop further emergency response procedures to the range of post-Katrina failures; our outline above

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266. See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) (“Certain implied powers must necessarily result to our Courts of justice . . .”); see generally Garrett, *supra* note 8. Criminal justice actors come from multiple branches of government, each answering to different authorities and constituencies. A crisis can make it impossible to reassemble in one place all of the necessary players. Advance emergency planning becomes crucial for such a necessarily decentralized system, and courts are natural conveners of that planning.

267. The Supreme Court has long recognized that consolidation of cases falls within “implied powers” of courts. See *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (“[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants.”).

addresses only some of the glaring constitutional violations tolerated for many months without even investigative hearings by the Louisiana courts.<sup>268</sup>

Additional advance planning should involve prosecutors, defense counsel, and law enforcement. The court ideally would continue to evaluate emergency criminal justice needs and then seek to raise baseline levels of resources in the criminal system. For example, the New Orleans courts have pressed a reevaluation of the indigent defense office in New Orleans, which, based on the Department of Justice's recommendations, may finally lead to a constitutionally adequate system. A focus on emergency needs may force other jurisdictions to reassess, before a crisis occurs, the costs of neglecting already borderline-constitutional indigent defense systems.

### C. Collaborative Criminal Justice

Certain tasks might not be effectively handled by an emergency court alone. The court system has little to say about operation of the local police department, which must conduct its own emergency planning and preparations. Nor can the state courts convene outside state and federal assistance for local agencies. Problems of coordination between states and with the federal government call for added mutual assistance and collaboration regarding criminal justice emergencies. Existing mutual aid programs coordinate only the provision of law enforcement and National Guard troops.<sup>269</sup> Coordinated mutual assistance operations could extend to emergency courts, prosecution resources, defense resources, and correctional facilities. They could create opportunities for learning and

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268. Local elected judges may be particularly unwilling to carry out threats to release prisoners whose constitutional rights have been violated. Perhaps judges appointed to an ad hoc emergency court would be more willing than elected local judges to enforce compliance.

269. The Emergency Management Assistance Compact (EMAC) provides for law enforcement assistance, but not other criminal justice support. *See generally* EMERGENCY MGMT. ASSISTANCE COMPACT, EMERGENCY MANAGEMENT ASSISTANCE COMPACT, available at <http://www.emacweb.org/?564>. The Select Committee Report describes its response post-Katrina as disorganized. *See* SELECT COMM. TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, *supra* note 260, at 250–51 (“EMAC officials have acknowledged a significant population of ‘self-deployed’ personnel. . . . Due to the *ad hoc* nature of these ‘self-deployed’ officers, specific figures are not known. . . . Without an official deployment, the ‘self-deployed’ personnel were acting without proper authority, without liability protection, and without eligibility for expense reimbursement.”).

collaboration between state and local law enforcement across state lines and establish new baseline resources levels.

The federal government could act as a center for such efforts. A federal agency could, upon the request of state or local government, establish an emergency court to resume administration of criminal justice.<sup>270</sup> The authorizing federal statute could require state consent, but also require that the federal emergency court involve (to the extent possible) local judges, prosecutors, and defense lawyers familiar with state law, or actors from nearby unaffected cities or states. Less intrusively, a federal agency could conduct training on operation of criminal justice during emergencies and supervise planning efforts. Further, financial assistance to maintain the basic operations of local criminal justice systems may be critical, particularly during the initial recovery period after an emergency. Perhaps new collaboration in emergency planning and assistance could counter the fragmented structure that contributed to the vulnerability of the Louisiana criminal justice system.

#### CONCLUSION

One Louisiana criminal defense lawyer expressed hope that “[w]e may see some lasting reform out of this tragedy. We have a criminal justice system that in some ways was already in crisis, and this could allow us to address those issues.”<sup>271</sup> So far, the state legislative response merely centralized judicial emergency authority to suspend court deadlines. The federal government provided military assistance of limited use, and almost no criminal justice assistance. Meanwhile, the local police department all but dissolved. The local court system failed to resolve cases of thousands detained, and tolerated a range of constitutional violations and a defunct indigent defense system. Appellate courts largely failed to intervene, and in effect suspended the Constitution for months.

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270. Perhaps a non-Article III court could be created by Congress, such as an Article I tribunal with administrative law judges that could handle state prosecutions. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 70 (1982) (plurality opinion) (“[T]his Court has identified three situations [territorial courts, courts to establish and administer courts-martial, and courts to adjudicate cases involving ‘public rights’] in which Art. III does not bar the creation of legislative courts.”); James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643 (2004) (discussing Congress’s power to create Article I tribunals). Alternatively, the federal emergency court could merely create infrastructure for state actors to maintain criminal adjudication.

271. King, *supra* note 207, at 11.

The end of the story is not in sight. More than a year after Hurricane Katrina, people remain in detention, facing charges, and uncompensated, and the system has not yet developed a plan to avoid future mass constitutional violations and disorder or to provide meaningful indigent criminal defense representation. Criminal procedure rules did not serve their intended roles after Katrina to protect individual liberties because the institutions of justice collapsed. Local judges, public defenders, prosecutors and police failed to intervene, even after months passed and they began to resume their work. Nor did the state or federal government provide timely or sufficient assistance. The individuals most affected were largely indigent, but also usually arrested for petty crimes for which they never had a hearing or a chance to pay bail to secure their release.

These failures that lingered long after the hurricane were not surprising given the persistent inability of local criminal justice actors to address their own vulnerability during emergencies, particularly where doing so required allocating scant resources for unpopular causes such as indigent criminal defense. By shedding light on the nature and vast scope of criminal justice collapse after Hurricane Katrina in New Orleans, we have shown how criminal justice actors can benefit from rethinking their institutional preparedness. We propose the creation of emergency courts as one mechanism to ensure criminal procedure rules are followed to the extent possible, to coordinate and plan for responses during emergencies, and to obtain state and federal collaboration and resources. If governments do not commit to secure the basic operation of the criminal process during emergencies, the same fault lines may result in another entirely predictable criminal system collapse.