

**Who's in Charge Here?
Some Observations on the Relationship
Between Disasters and the American Criminal Justice System**

Robert J. Loudon, Ph.D.
Professor and Program Director, Criminal Justice
Department of Sociology, Anthropology and Criminal Justice
Georgian Court University
900 Lakewood Avenue, Lakewood, New Jersey 08701
(732) 987-2711 loudenr@georgian.edu www.georgian.edu

Abstract: Since the beginning of time the world has experienced a wide range of disasters. Responsibility for organizing and directing responses to disasters has varied over time and from place to place. The core functions of the American criminal justice system were established between 1776 and the adoption of the US Constitution, particularly the Bill of Rights in 1789. However, it was not until 1967 that our federal government produced a schematic that graphically presented both the process and the major decision points of the criminal justice system. Although disaster related activity has been present and accepted as a central function of many criminal justice agencies, it did not appear in this significant document. A brief overview of the American criminal justice system is offered. The aftermath of the terrorist attacks of 09/11/01 and the hurricanes of 2005 have illuminated many problems and concerns confronting the criminal justice system as a major component of government response to disasters. Practical experiences in NYC and New Orleans are highlighted. Broad based recommendations for research are suggested.

INTRODUCTION

As with any discussion involving links between disasters and a given discipline, the relationship between this subject and the criminal justice system are extensive and complex. In our society criminal justice is perhaps the ultimate multi-disciplinary discipline. At a minimum, aspects of the law, political science, public health, public management, psychology, and sociology influence the practical, tactical and legal

activities of criminal justice system agencies on a daily basis. All of these sometimes complementary and sometimes contradictory interactions converge in disaster planning and response. Disaster in this paper is regarded to be a nonspecific event and includes natural and man-made incidents.

There are numerous overlapping practical associations that one must be concerned with when considering this topic. One set of issues is relevant to the mandate of an individual criminal justice organization; a second is the interconnected bureaucratic concerns of police, the courts and corrections. Another is the involvement of the machinery of criminal justice with the broader community that it is part of. Within this context one must also remember that given the nature of governmental and political subdivisions in the US: federal, state, county, and local, linkages are far-reaching and potentially confusing if not conflicting. The concerns of issues related to ‘states-rights’ and ‘home-rule’ have influenced the development of criminal justice agencies, and their organizational mandates, throughout the country. Although our federal government does not directly control most of the criminal justice agencies in the US, there are several ways in which local policy and practice may be influenced by Washington through various court decisions, rule settings, investigative bodies, oversight mechanisms and funding. All of this has had an impact upon the role of law enforcement in emergency management in the United States.

This paper reflects on the topic of disaster and the discipline of criminal justice from a number of perspectives: inter and intra operations of criminal justice agencies, and the collaboration or lack there of, between criminal justice agencies and other aspects of governance. Portions of this paper are anecdotal in nature, based on the author’s

participant-observer status during an active twenty-one year career in policing and a subsequent eighteen year career in higher education, primarily involving criminal justice and protection management programs.

The three components of the criminal justice system - police, courts, and corrections – have their own responsibilities and concerns when faced with a disaster. This paper presents many issues from a police perspective since they are generally considered the gate-keepers for the rest of the system and they are also the boots-on-the-ground among the first responders to disasters which usually impact on the operations of the courts and correctional institutions. Occasionally conflict will arise between law enforcement agencies and others responsible for disaster related response activities. In other cases, there will be lawlessness in disasters. Both situations present a challenge to be overcome by future emergency managers.

THE CRIMINAL JUSTICE SYSTEM

First, let's consider an abbreviated and selective criminal justice history. It was not until The President's Commission on Law Enforcement and Administration of Justice published their *The Challenge Of Crime In A Free Society* in 1967 that we could view "...in simplified form the process of criminal administration and the many decision points along its course" (pp. 7-9). Obviously, our nation had components of a criminal justice system in place since the founding of the Republic, but President Johnson indicated in forming his Commission in 1965 that there was a "depth of ignorance about [criminal justice];" the country needed a comprehensive examination of crime and justice to identify where we were and the direction that we should be headed in. The 340 page

document “embodies all the major findings we have drawn from our examination of every facet of crime and law enforcement in America” (forward). It does not include discussions of disasters, with the exception of a brief consideration of some social, economic and criminal aspects of riots (pp. 37-38). Riots, not unlike other disasters, are mostly spontaneous outbursts, precipitated by a spark-event and every bit as complicated as the social problems and conditions present in a community.

The President’s Commission presented some 200 Recommendations (pp. 292-301), but none of them dealt with disasters. The Commission also issued nine task force reports. The one most appropriate to a consideration of disasters is *Task Force Report: The Police* (1967). In that 239 page document, the treatment of disaster is limited to issues related to “Handling Crowds, Demonstrations, and Riots.” The topics were mostly concerned with police-community relationships and Constitutional questions (pp. 192-193). Police and subsequently court and correction agency reaction to looting and violence are the focus of the very brief discussion. Riots and related activities are thus distinctive types of disaster requiring both specific and generalized responses. Twenty-first century police agencies, as they have been for more than 150 years, are often the first responders to a variety of actual and potential disaster scenarios. However, the *Task Force Report* admonition that “the police have little control over the social, economic, or other factors which create riots” (p.193) could well have been written in 2006 in a discussion about the response of the criminal justice system to disasters.

In *Disasters and Democracy* (1999), Rutherford Platt cited a 1987 California Court of Appeals case, *First English Lutheran Evangelical Church v. County of Los Angeles* (p. 143): “If there is a hierarchy of interest the police power serves – and both logic and prior

cases suggest there is – then the preservation of life must rank near the top” (originally reported as 258 Cal. Rptr. at 904). Although this is obviously a reference to the overall police power of our government in a Constitutional context, the concept could be interpreted as applicable to certain roles of government in dealing with disasters, often operationalized by criminal justice agencies.

Cops

Sir Robert Peel, the British Home Secretary in the early nineteenth century wanted a particular attention to order in society and was instrumental in forming the first professional police force in 1829. His police force was organized according to nine principles which demonstrated a commitment to the public. It is generally accepted that his organization for the London police, originally tested in Ireland, became the model for the first police agencies formed in the northeastern United States. The British police role became ours (Piffner, 1967). Disaster related activity was a common police function from the earliest days in the UK and in the US. Commentary on characteristics of present day policing would not be meaningful without reflecting on the formation of organized policing in the US.

For instance, Lee (1901) noted that the police are the only members of the public who are paid to give full-time attention to duties which are incumbent on every citizen in the interest of community welfare. Although this is obviously an out-dated characterization, such police duties often involved response to disasters.

The fire service of course has a longer history of response activity, but then as now the majority of fire-fighters are volunteers who are not always as readily available as full-time paid police officers. Interestingly, Boston hired the first paid fire captain in the

country (IMCA, 1979) almost one hundred years before the first police forces in the US were formally organized in Boston and New York.

This nation's police departments are therefore charged by law, administrative code and ready availability with providing certain services to the population of a given political or geographical division. Depending on geographic location, correctional institutions and courts are located within a given law enforcement agency's area of responsibility.

According to federal government statistics there are more than 17,000 local and state police departments in the country; more than fifty federal agencies have law enforcement authority. Even though the NYPD employs almost 40,000 sworn officers, the next largest city has only about one-third that complement of officers. Not even 100 local agencies have at least one thousand officers and less than 1000 departments employ a minimum of 100 officers (BJS, 2003). We are largely a nation of small town, not national policing. In contrast, most democratic nations have one, or at most a few, principal law enforcement organizations which have nationwide jurisdiction.

A forty-year old publication of the University of Connecticut noted that "police duties and responsibilities are predicated upon the customs, traditions, and demands of the community served." This has resulted in a "wide diversity of tasks" (Goldstein, 1966, p. 1). Among those tasks are various response protocols to disasters. As the 1967 *Task Force Report: the Police* noted "The police are the part of the criminal justice system that is in direct daily contact...with the public. The entire system – courts and corrections as well as the police – is charged with enforcing the law and maintaining order" (p. 1). The American Bar Association (ABA, 1974) reported that included among the "Major current responsibilities of police" were (excluding four items):

1. to aid individuals who are in danger of physical harm;
2. to facilitate the movement of people and vehicles;
3. to assist those who cannot care for themselves;
4. to identify problems that are potentially serious governmental problems;
5. to create and maintain a feeling of security in the community;
6. to promote and preserve civil order; and
7. to provide other services on an emergency basis” (pp. 3-4).

Each of these responsibilities may be considered as applicable to the role of law enforcement in preparing for and responding to disasters.

Egon Bittner (1975) discussed two inter-related aspects of policing that could also be equated to their role in dealing with disasters: “...the police are nothing else than a mechanism for the distribution of situationally justified force in society.” And “The American city dwellers repertoire of methods for handling problems includes one known as ‘calling the cops’” (p. 39). Bittner advances the concept that police are called upon to respond to a situation and do something about which something must be done. It has been stated many times in the literature of policing that they are viewed as an immediately available resource in times of emergency and crisis.

Post 9-11 law enforcement activities in America span a range from the traditional, often characterized as community policing programs, to enhanced intelligence gathering and analysis to military-style tactical units to search, rescue and recovery. Obviously, not all US police agencies perform all of these functions and the capacity of a local law enforcement agency to do more without commensurate increases in resources is problematic. One law enforcement concern is that intelligence collection or investigative follow-up may be compromised if a criminal justice agency is not ‘lead-agency’ in disasters resulting from criminal or terrorist actions (see Loudon, 2005).

This practical and potentially problematic concern has framed part of the discussion of the role of criminal justice in disaster response at least since the 1993 bombing of the World Trade Center, and continued with the 1995 Oklahoma City bombing, the explosion of TWA 800 and certainly 9/11/01. The final chapter of *The 9/11 Commission Report*, “How to Do It? A Different Way of Organizing the Government” (pp. 399-428) may serve as a good starting point to explore not only intelligence and defense issues but also the broader question of ‘Who is in charge here?’(See also Police Executive Research Forum, October 2, 2001.)

Corrections

Correctional institutions present special problems and concerns when exposed to disasters. A disaster may endanger the lives and well being of inmates and staff, yet under most circumstances the inmates must continue to be controlled. Faced with the high number of individuals incarcerated in jails and prisons throughout the country, the potential for disasters impacting on the correctional population is highly probable. Protection of life is a standard of care imposed on all agencies charged with the custody of others. In addition to protecting inmates, government officials must keep in mind that a perception that prisoners may not be under proper control could generate fear in the surrounding community. Persistent attention to issues of operational security and rumor control are crucial to a competent response to correction related disaster. A potential positive consequence of a disaster in or near a correctional institution is that non-violent inmates may be available to assist in rescue, recovery and rebuilding efforts.

There is a lack of published research dealing exclusively with corrections and disasters situations. For example, see The New York State Special Commission on Attica

(1972); Useem and Kimball (1989); Wills-Raftery (1994); Useem, et al (1995); and (Flin and Arbuthnot, 2002). Additionally, the special population nature of inmates found in disaster related literature is appropriate to assess in the context of the criminal justice system.

Prisoners are sentenced to jails or prisons as the result of a judicial process. Much of what subsequently happens to prisoners in the US is determined or at least reviewed by a court. This role is only one part of the potential effects of disasters on our judicial branch of government; local, state or federal.

Courts

As with correction related disasters, there had not been a great deal of material published on the relationship of disasters and the courts prior to the bombing in Oklahoma City in 1995. The federal General Services Administration, the landlord for the federal judiciary, became more actively involved in prevention, mitigation and response activities for court buildings as a result of the bombing of the Alfred P. Murrah federal building. However, in 1998 the American Bar Association devoted an entire issue of the *Judges' Journal* (Vol. 37, No. 4) to disaster related court experiences and concerns. This forty page special volume is a mix of articles and case studies, mostly natural disaster related. It deals with local, state and federal jurisdictions and includes the impact of disasters on the mechanics and logistics of trial calendars, 'time-sensitive-progression' aspects of case flow; processing of new arrests and other criminal and civil actions; managing the jury process, production of transcripts and other case files; and the potential distress of court personnel.

AN EXAMPLE FROM NYC

NYC experiences suggest a range of problem areas that deserve consideration and resolution. Less than one year after 9/11/01, the *NY Daily News* quoted NYC Police Commissioner Ray Kelly as saying that between \$500 and \$700 million was needed for training, resources and equipment to fight terrorism. He further noted that “There was \$3.5 billion languishing in Congress, and we are not going to get anything before the coming [2002] 9/11.” Likewise, *Newsday* attributed similar sentiments to the director of the NYS Police Chief’s Association, who indicated, “Not one additional resource has been provided even though all first-response comes locally.” Both of these views were against the backdrop of comments by President Bush, as reported in *The New York Times*, “...he would not spend \$5.1 billion approved by Congress last month for domestic security...” (see Loudon, 2002).

Cordes (1971) noted that when rules and procedures are being devised it becomes necessary to clear up obvious misconceptions, re-examine relationships, and review the responsibility of each toward the other. This process should foster a redefinition of the collective obligation to approach and in some cases attack society's problems. This caution was especially cogent in 2005 New York City - the battle of the badges. This is a perennial problem: Which agency, fire or police or emergency management, should perform a particular task, and/or be in charge of what?

Prior to the first administration of Mayor Rudolph Giuliani in 1994, the city-wide function generally referred to as emergency management was actually an organizational entity within the headquarters of the New York Police Department (NYPD). It had been that way for many years, including twenty-five years ago when the NYPD Office of Civil Preparedness was designated as the Director of the NYC Mayor’s Emergency Control

Board (Urban Academy, 1979). The Office of Civil Preparedness was a pre-cursor of city-wide emergency management. The NYPD coordinated activities of all city agencies, including FDNY, utilities and supplementary services during a declared emergency.

Giuliani created a separate and distinct Office of Emergency Management (OEM), in part to settle problems and disputes between NYPD and FDNY. He believed that “the city had to reorganize its response to emergencies” (Giuliani, p. 315). A decade later the separate OEM still exists, but serves more as a research, resource and facilitating entity than the “overarching organizational structure that was equipped to coordinate many different departments” that the Mayor had envisioned (p. 315).

The NYPD also maintained a highly specialized tactical element, the Emergency Service Unit (ESU). Originally formed in 1930 as the ‘riot-squad’, ESU evolved into a diverse group of EMT certified police officers which also involved Special Weapons and Tactics (SWAT) and a variety of rescue and recovery related activities; building collapse, subway derailment, hazmat. A commonly heard expression among NYPD personnel is ‘when the public needs help they call the police; when the cops need help they call ESU.’ Companion elements within the NYPD Special Operations Division (SOD) were Aviation, Harbor, and Scuba. The rescue and recovery functions of ESU and several of the other SOD tasks are often assigned to Fire and Rescue Units in many jurisdictions across the country; not generally a police function. The New York Fire Department (FDNY) also fielded rescue and recovery units, marine and scuba personnel. One argument as to why the NYPD was so heavily involved in such specialized non-enforcement duties, besides long-standing traditions, was the relationship between the police SOD and the pre-Giuliani police-based city-wide emergency management apparatus.

Historically both agencies responded to the same emergency situations. Sometimes the agencies worked the problem together and other times they worked in competition with each other. In extreme cases, fists flew and arrests were occasionally a result! Periodically politicians or the press, often prompted by one side or the other, call for a modification in arrangements; substantive change seldom occurred.¹

The attacks of 09/11/01, predictably, brought OEM, FDNY and NYPD, among others, to the horrific scene; we all know the toll in death and destruction. Although often working side-by-side, some aspects of the smoldering rivalry continued and intensified over the following four years. As Clyde Haberman (2005) noted in the *New York Times*,

Take the Fire and Police Departments. Having both suffered terribly, they seemed headed after Sept.11 for a new era of comity. Their ancient antagonisms? The occasional testosterone-fueled fistfights at disaster scenes? The failed communication that may have contributed to the 9/11 death toll? They belonged to the unlamented past, or so some thought (April 26, 2005, p. B1).

Haberman's column was one of many reactions to a change in "...one part of a (sic) emergency response plan known formally as the Citywide Incident Management System." (Confessore, 2005).

In testimony before the NYC Council, Glenn P. Corbett, an engineer, volunteer firefighter and professor of fire science at John Jay College of Criminal Justice in NYC noted that, "Instead of taking a giant leap forward through correcting longstanding major flaws in New York City's emergency response protocols, the plan "takes several steps backward." (Corbett, 2005). Corbett has stated that absent exigent circumstances, a police

¹ An advisory comment! This author worked very closely with ESU personnel over a span of many years, particularly in their tactical, SWAT, role during hostage, barricade and siege type situations. In my view, their training and actual deployment to non-enforcement rescue and recovery related activities helps to prepare them to be more competent tactical officers. They gain practical experiences, improved patience and a greater reverence for life

agency should not be in-command of most disaster scenes. He also indicated that he does not believe that there is another jurisdiction in the country that is organized like NYC for response to disasters.

Regardless of the genesis of rivalry between FDNY and NYPD, Mayor Bloomberg has spoken. OEM still exists as a separate governmental entity but does not have a lead-agency role in responding to disasters. The new Citywide Incident Management System (CIMS) delineates primacy to one agency or another depending on events and expertise. (See www.NYC.gov). The NYC plan is designed to meet the mandate of the NIMS. A major point of demarcation is the nature of the disaster. Terrorism automatically begets law enforcement command and control while natural and non-terror man-made disaster adheres to the mayor's newest plan. Neither NYPD nor FDNY are totally pleased with the new system, but both agencies have pledged to support the mayor and adhere to the guidelines. In fact, there have been, and continue to be, numerous examples of cooperation and coordination among and between the agencies. For example, a task force of FDNY and NYPD personnel, coordinated by NYC OEM, recently participated in WMD exercise at the Center for National Response in Standard, W.Va. (McGeehan, 2005). Likewise, two helicopter crashes during 2005 in the East River in NYC resulted in a well coordinated multi-agency response.

COMPATABILITY AND CONTROVERSY

A different, longer standing, example of positive police and fire agency collaboration may be found in the Report of the Joint Fire/Police Task Force on Civil Unrest (FEMA, 1994). At the time it was noted that "... for the first time in recent memory, police

and fire executives were able to sit and work together, to voice their concerns and wishes, and to come to a basic agreement on how personnel can best cooperate in the field.” (P. iii).

It was also noted in their report that: “A successful collaboration among agencies will depend on:

1. Compatibility of the agencies
2. Adaptation of a common technical terminology
3. A strong joint command structure
4. Regularly scheduled joint training exercises
5. Effective mutual aid agreements.” (p. 4).

When considering the appropriateness of these five points one may consider whether there is an ideal organizational structure for disaster response, or might dynamic leadership be more fundamental? And, under what circumstances should criminal justice personnel be in-charge at the scene of a disaster?

In these times of increased threat and response, natural and man-made, some factors about preparing for potential role change become apparent. This nation has a variety of government, volunteer and private sector mechanisms that respond to disaster. Some are the result of legal mandate, others are the result of long-time practical experiences and some will continue to be ad hoc. Accordingly, the most important issue to be considered in any response is ‘Who is in charge?’ In order to be able to properly address that simple-sounding question a number of items must be considered. First, there is a need to specify the new reality and determine what is to be done about it. Next, a review of legal and administrative directives is appropriate. These two items should identify 1) the nature of the problem(s), 2) the legislated parties responsible for response; 3) the actual parties involved in attempts at resolution, and 4) suggested changes in mandate or practice which would provide an improved conclusion. Another basic factor for any role change is to specify appropriate

organizational change, if any, and delineate the nature of resources needed and of training required. Adequate and appropriate funding is a must.

Some jurisdictions rely on an operational version of OEM, incorporating Incident Command principals. Others have adopted a Public Safety model (Nickerson, 2005). Whatever the configuration, the controversy will continue.

NEW ORLEANS AND THE FUTURE

There has not been sufficient time since hurricanes Katrina and Rita to assess the long-term implications of the relationship of disaster and criminal justice response. However, preliminary comments can be made.

The police department and its personnel were heroic and selfless in many ways, but also experienced serious bouts of disorder in many forms including desertion, pilfering and brutality. Communications systems failed dismally forcing 120 - 911 operators to evacuate, resulting in thousands of emergency calls to go unanswered (Connolly, 2005). Evidence stored at police headquarters, including DNA in rape kits and bags of cocaine was destroyed by flood water, severely limiting the chance of proceeding with trials for hundreds of defendants; innocent and guilty alike.(Peristein, 2006). Additionally, emergency plans were not up to the task, and many routine duties have not been resumed some six months later.

Many court operations have been impacted by the distress of the police department and further negatively influenced by damage to physical structures, computer systems and lack of personnel. In October 2005, the Orleans Parish District Attorney reported that he was close to shutting down operations, impacting on 3000 criminal cases, due to a lack of resources caused by the hurricane. (Randolph, 2005)

Corrections, like the police and the courts, can boast of many positive contributions to the people of New Orleans. They too have many problems. Standards of care were not always adequate, prisoners absconded, and facilities are in need of major rebuilding. There were reports of inmate dying due to flood water in confined spaces (see Asbury Park Press, 2005); and, escaped and prematurely released inmates were transported to other jurisdictions at government expense (see Tucker, 2005). Some inmates were evacuated and released early while other were detained beyond their sentence due to the destruction of records and lack of personnel. (Millhollon, 2005).

The entire criminal justice system appears to be in dire need of a major influx of personnel, equipment and other resources and plans and training that may simultaneously provide for a return to some normalcy and prepare for the next worse case scenario.

We can state, based on media accounts and government hearings, that: organized policing was not prepared for the vastness of the tasks; the court systems are in a state of turmoil with long term implications for the delivery of justice, for defendants and victims alike; correctional inmates were in many cases positive contributors to response strategies and in other instances the cause of additional concern as special populations in need of special care and consideration. Criminal, organizational and procedural investigations and reviews are in progress. The findings of these deliberative bodies will make meaningful contributions to the questions of compatibility and controversy that are present in the criminal justice disaster response discussion.

CONCLUSION AND RECOMMENDATIONS

This paper provides a selective overview of the discipline and practice of criminal justice in America. It also notes that there is a direct relationship between criminal justice and disaster response. Sometimes there are well ordered and complementary, and at other times rife with confusion and conflict.

This document was framed, in part, by considering a series of questions: What recommendations does criminal justice have for the study of disasters? What recommendations does criminal justice have for emergency management; what are the gaps in knowledge? Hopefully answers to those questions are contained in the preceding material. Working backwards through the questions, the gaps are still vast, but the right questions are beginning to be asked, prompted in large part by the NYC experience with 9/11 and the New Orleans experience with Katrina.

Criminal justice, as a discipline and as a system, has had a great deal of experience with formulating and implementing emergency management plans. It is my opinion that an on-going impediment to smoother future operations is territoriality and turf issues, at all levels of government coupled with sometimes conflicting mandates concerning the primacy of response, rescue, recovery in the context of intelligence and investigative evidence gathering and collection. Criminal justice as an academic discipline must also assume an active leadership role in collaboratively conducting empirically sound research projects, across scholarly disciplines and across geographic, political and bureaucratic boundaries; the problems are not going away

NYC, of course, is unique in many ways; no other jurisdiction has comparable resource availability or parallel life and death experiences. New Orleans, on the other hand, is still reeling from the aftermath of *Katrina*. Many of the on-going problems in both cities

are criminal justice related. The New York City example, historically and especially post-9/11 should be viewed as a living laboratory which affords bureaucrats and researchers an opportunity to review and challenge both traditional and unique organizational arrangements and resource allocation for disaster response. Likewise, New Orleans should be subjected to examination, criminal, civil and academic to contribute answers to the question: What went wrong?

Disaster research must focus on the practical, tactical and legal aspects of the appropriate role of criminal justice. Among other facets, the research agenda, privately and publicly funded, must reflect on organizational configurations, human factors, technological applications, governmental relationships.

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