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# Criminalizing Non-Evacuation Behavior: Unintended Consequences and Undesirable Results

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## INTRODUCTION

Contrary to the maxim that natural disasters function as a great equalizer, Hurricane Katrina has reminded us that "natural disasters occur in the same social, historical, and political environment in which disparities . . . already exist."[1] The inequalities already present in Hurricane Katrina's path were given a fiercer breath of life, disproportionately exacerbating the already dire circumstances of New Orleans' most vulnerable populations.

One such disparity became apparent when government officials began ordering mandatory evacuations. After experiencing Hurricane Georges in 1998 and Hurricane Ivan in 2004, emergency planners responsible for evacuating New Orleans were already aware of many of the risks facing vulnerable populations.[2] For example, the "city already knew that at least '100,000 New Orleans Citizens [did] not have means of personal transportation' to evacuate in case of a major storm."[3] Notwithstanding this knowledge, the city's emergency plan had no solution for the evacuation problem and instead "called for thousands of the city's most vulnerable population to be left behind."[4] In fact, "little attention was paid [during disaster

1. Sandra Crouse Quinn, *Hurricane Katrina: A Social and Public Health Disaster,* 96 AM. J. PUB. HEALTH 204, 204 (2006).

2. MANUEL PASTOR ET AL., IN THE WAKE OF THE STORM: ENVIRONMENT, DISASTER, AND RACE AFTER KATRINA 4 (2006).

3. *Id*. (quoting City of New Orleans, *City of New Orleans Comprehensive Emergency Management Plan*, CITY OF NEW ORLEANS (2005), http://www.cityofno.com); *see also Challenges in a Catastrophe: Evacuating New Orleans in Advance of Hurricane Katrina: Hearing Before the Comm. on Homeland Sec. and Gov't Affairs*, 109th Cong. 4 (2006) (statement of Sen. Joe Lieberman) ("The warnings of the fictional Hurricane Pam exercise that we have focused on in this Committee, that a hundred thousand people at least in New Orleans had no means to evacuate and that thousands more would be immobilized by infirmity or age, appear to have been received at all levels of government, but at all levels of government just about nothing was done about those warnings.").

4. *See* PASTOR ET AL., *supra* note 2.

planning meetings predating Katrina] to moving out New Orleans' 'low-mobility' population—the elderly, the infirm and the poor without cars or other means of fleeing the city."[5]

A 2005 post-Katrina survey confirmed these inadequacies, finding that, among respondents, forty-two percent of those who did not evacuate had no way to leave.[6] Others reported that although they could have left, other circumstances, such as vulnerable loved ones, convinced them to stay behind.[7] Despite these realities, many citizens and government officials blamed the victims for their misfortunes. One study found that the public characterized non-evacuators as "passive (e.g., lazy, dependent), irresponsible (e.g., careless, negligent), and inflexible (e.g., stubborn, uncompromising)."[8] These results come as no surprise in light of the government's rhetoric concerning non-evacuation following the disaster. Michael Brown, the Federal Emergency Agency Director at the time, attributed the rising death toll in New Orleans to "people who . . . chose not to leave."[9] He explained, "[W]e've got to figure out some way to convince people that whenever warnings go out it's for their own good."[10] Michael Chertoff, Secretary of Homeland Security, remarked, "[L]ocal and state officials called for a mandatory evacuation. Some people chose not to obey that order. That was a mistake on their part."[11]

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5. Scott Shane & Eric Lipton, *Government Saw Flood Risk but Not Levee Failure*, N.Y. TIMES, Sept. 2, 2005, at A16, *available at* http://www.nytimes.com/2005/09/02/national/nationalspecial/02response.html?hp&ex=1125633600&en=9ef3f7389573ef2a&ei=5094&partner=homepage&_r=0.

6. Mollyann Brodie et al., *Experiences of Hurricane Katrina Evacuees in Houston Shelters: Implications for Future Planning*, 96 AM. J. PUB. HEALTH 1402, 1404–05 (2006).

7. *Id*. at 1404.

8. Nicole M. Stephens et al., *Why Did They "Choose" to Stay? Perspectives of Hurricane Katrina Observers and Survivors*, 20 PSYCHOL. SCI. 878, 880 (2009).

9. *FEMA Chief: Victims Bear Some Responsibility*, CNN.COM (Sept. 1, 2005, 11:41 PM), http://www.cnn.com/2005/WEATHER/09/01/katrina.fema.brown/.

10. *Id*.

11. *American Morning: Interview with Homeland Security Secretary Michael Chertoff* (CNN television broadcast Sept. 1, 2005) (quoted in Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413, 463 (2006)).

The public's perception of non-evacuators, combined with comments from government officials,[12] reflects the policy judgments many state legislatures have made and are beginning to make. Rick Santorum's remark[13] during a television interview is representative of the direction that many states have taken: "[Y]ou have people who don't heed those warnings and then put people at risk as a result of not heeding those warnings. There may be a need to look at tougher penalties on those who decide to ride it out and understand that there are consequences to not leaving."[14] In the spirit of "tougher penalties," several states have passed statutes that criminalize non-evacuation, thereby subjecting violators of evacuation orders to potential incarceration and financial penalties. In light of the vulnerabilities common among non-evacuators, these criminalization and sanctioning policies are impractical and unjust, regardless of whether they are enforced. Further, many such statutes reflect an erroneous judgment that non-evacuators are blameworthy for their failure to comply.

Part I of this Comment will examine the developing body of law aimed at curing the non-evacuation problem. In particular, this Part will address two criminal frameworks that state legislatures have employed to penalize non-evacuation: the traditional framework and the public welfare offense doctrine. Part II will look at specific state laws in an effort to categorize them within the traditional or public welfare offense framework. Part III will examine different enforcement regimes, namely arrest and relocation, prosecution, and symbolic impact. Part IV will consider the impact of mens rea upon those enforcement regimes, examine the class of offenders at risk under each regime, and argue that criminalizing non-evacuation is either ineffective in producing results or produces undesirable results. Part V will conclude.

12. *See, e.g.*, *id.*; *FEMA Chief: Victims Bear Some Responsibility, supra* note 9.

13. Santorum later said his remarks were only directed at those with resources to evacuate. *See* Carrie Budoff, *Candidates Sling Barbs over Hurricane Remark*, PHILLY.COM (Sept. 7, 2005), http://articles.philly.com/2005-09-07/news/25428468_1_jay-reiff-rick-santorum-john-brabender.

14. *Id.*

## I. THE STATE OF THE LAW CRIMINALIZING NON-EVACUATION

When a disaster occurs, state statutes typically grant the governor authority to declare a state of emergency.[15] This declaration entitles the governor to a new set of emergency powers, including the power to issue evacuations. Statutes commonly grant the governor authority to "*direct* and *compel* evacuation."[16] Other statutes are more explicit and specify that the governor's orders made in connection with the state of emergency have the "force and effect of law."[17] Regardless of the statutory language, the government's power to issue an evacuation that legally obligates residents to leave the designated area has been established in a majority of states.[18]

Although government officials have the power to order a mandatory evacuation, states have struggled to find the best method of enforcement. Some officials have expressed that mandatory evacuation orders are only valuable insofar as they impress the seriousness of danger upon the citizenry, while others have employed their state's plenary power to physically remove noncompliant citizens. What is clear is that mandatory evacuation orders can serve a variety of functions, both symbolic and practical. While states have explored several approaches, including arresting and relocating residents by use of "reasonable force,"[19] scare tactics,[20]

15. *See, e.g.*, KAN. STAT. ANN. § 48-924(b)(1) (2005) ("The governor, upon finding that a disaster has occurred or that occurrence or the threat thereof is imminent, shall issue a proclamation declaring a state of disaster emergency."); KY. REV. STAT. ANN. § 39A.100(1) (LexisNexis 2013) ("In the event of the occurrence or threatened or impending occurrence of any of the situations or events contemplated by KRS 39A.010, 39A.020, or 39A.030, the Governor may declare, in writing, that a state of emergency exists.").

16. *See, e.g.*, S.C. CODE ANN. § 25-1-440(a)(7) (2013) (emphasis added).

17. LA. REV. STAT. ANN. § 29:724(a) (Supp. 2014).

18. Brenner M. Fissell, *Taxpayers as Victims: Taxpayer Harm & Criminalization*, 7 N.Y.U. J.L. & LIBERTY 126, 143 (2013) ("My own state survey finds twenty-eight states with mandatory evacuation . . . .").

19. *See, e.g.*, TEX. GOV'T CODE ANN. § 418.185(b) (West 2012) ("A county judge or mayor of a municipality who orders the evacuation of an area stricken or threatened by a disaster by order may compel persons who remain in the evacuated area to leave and authorize the use of reasonable force to remove persons from the area."). Constitutional challenges have been waged against statutes authorizing forcible removal, but the courts have upheld the states' authority. *See* Reynolds v. New Orleans, 272 F. App'x 331 (5th Cir. 2008). Furthermore, this authority may have some strings attached. See Konie v. Louisiana, CIV. No.

criminalization,[21] and civil liability for rescue,[22] this Comment will focus on criminalization.

### *A. Criminalization: Traditional Framework and Public Welfare Offense*

This Comment will discuss two theories governing conviction of non-evacuators: the traditional framework and public welfare offense doctrine.

#### *1. Traditional framework: actus reus and mens rea*

To fully assess an individual's culpability for a criminal act, society traditionally "demands that an individual both make a wrong choice and commit a wrongful act."[23] In other words, society requires both an actus reus and mens rea. Actus reus, or the "comprehensive notion of act, harm, and its connecting link [of] causation,"[24] is typically satisfied when one commits a voluntary act that in turn causes the proscribed harm. As one scholar put it, "*actus* express[es] the voluntary physical movement in the sense of conduct and *reus* express[es] the fact that this conduct results in a certain proscribed harm."[25]

Mens rea, on the other hand, requires that the actor have a criminal intent. While diverse language has been used to classify the varying levels of intent, the Model Penal Code has established four

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05-6310, 2010 WL 812980 (E.D. La. Feb. 25, 2010), for an example of how law enforcement was exposed to potential liability while enforcing mandatory evacuation orders in the wake of Hurricane Katrina. Forcible removal, to some extent, merges with criminalization. However, they will be treated separately for the purposes of this paper.

20. Amy L. Fairchild, James Colgrove & Marian Moser Jones, *The Challenge of Mandatory Evacuation: Providing For and Deciding For*, 25 HEALTH AFF. 958, 963 (2006) ("Local police have often asked those who refuse to evacuate for contact information for next of kin to impress on them the gravity of the risk they were assuming.").

21. *See, e.g.*, UTAH CODE ANN. § 76-8-317(2) (West 2014).

22. *See, e.g.*, TEX. GOV'T CODE ANN. § 418.185(d) (West 2014).

23. Rachael Simonoff, Ratzlaf v. United States: *The Meaning of "Willful" and the Demands of Due Process*, 28 COLUM. J.L. & SOC. PROBS. 397, 410 (1995).

24. Albin Eser, *The Principle of "Harm" in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 DUQ. L. REV. 345, 386 (1965).

25. *Id.*

broad and representative categories: purpose, knowledge, recklessness, and negligence. Each category represents a "progressively less directed and intentional form of conduct."[26] While *purpose* denotes "the intent to purposefully do an act, knowing that it is an unlawful act,"[27] *knowledge* denotes the intent to do an act without knowledge of its unlawfulness.[28] While recklessness denotes "gross disregard for a risk created by an actor's conduct,"[29] negligence indicates that an actor failed to account for a risk he should have.[30]

In the traditional framework, whether discussing actus reus or mens rea, choice is a primary consideration. In essence, "[i]n the absence of a wrong choice, the moral justification for refusing to respect a person's liberty disappears."[31] Criminal excuses illustrate the impact choice can have on criminal liability. William Blackstone emphasized this principle when he said, "All the several pleas and excuses, which protect the committer[s] of a forbidden act from the punishment which is otherwise annexed thereto, may be reduced to this single consideration, the want or defect of will."[32] What would otherwise be a convictable act is guarded from conviction when the actor's conduct is not the product of choice. Put another way, one escapes liability when his outward act is beyond his control, such as a reflex, convulsion, or unconscious movement.[33] Other defenses, such as self-defense, shield an actor from liability because the actor's options are greatly limited, not because the actor has been deprived of choice. The Model Penal Code commentators explained this rationale: "[L]aw is ineffective . . . if it imposes on the actor who has the misfortune to confront a dilemmatic choice, a standard that his judges are not prepared to affirm that they should and could comply

26. Paul Rosenzweig, *The Over-Criminalization of Social and Economic Conduct*, CHAMPION, Aug. 2003, at 28, 32.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. Simonoff, *supra* note 23.

32. 4 WILLIAM BLACKSTONE, COMMENTARIES *20, *20.

33. *See* MODEL PENAL CODE § 2.01(2) (1962).

with if their turn to face the problem should arise."[34] To some extent, the law's effectiveness under the traditional framework depends on whether its standards account for the complexity of choice in an imperfect world.

*2. Public welfare offenses*

Public welfare offenses turn the traditional framework on its head. Rather than punishing an individual for a wrongful choice, public welfare offenses seek to punish offenders who commit a prohibited act. These offenses began to develop in the early twentieth century and were meaningfully explicated in a seminal 1933 article by Francis Bowes Sayre.[35] He argued that public welfare offenses reflect a judgment that social order often outweighs the importance of individual liberty, carry light penalties, and involve conduct for which evidence of the offender's state of mind is particularly difficult to prove.[36] The difficulty of proving state of mind arises especially where the circumstances "necessitate enforcement against such armies of offenders that to require proof of each individual's intent would be virtually to prevent adequate enforcement."[37] The primary practical difference between the traditional framework and the public welfare offense doctrine is that the latter does not require proof of criminal intent.[38] Such offenses

34. MODEL PENAL CODE § 2.09 cmt. 2 ("Proper Scope of Defense").

35. Francis B. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 55–56 (1933).

36. *Id*. at 72.

37. *Id*.

38. With this definition, public welfare offenses begin to sound like strict liability offenses. The Supreme Court has noted, however, that public welfare offenses are not necessarily "[t]rue strict liability" offenses. Staples v. United States, 511 U.S. 600, 607 n.3 (1994) ("[W]e have avoided construing criminal statutes to impose a rigorous form of strict liability. . . . True strict liability might suggest that the defendant need not know even that he was dealing with a dangerous item. Nevertheless, we have referred to public welfare offenses as 'dispensing with' or 'eliminating' a *mens rea* requirement or 'mental element[.]' . . . While use of the term 'strict liability' is really a misnomer, we have interpreted statutes defining public welfare offenses to eliminate the requirement of *mens rea;* that is, the requirement of a 'guilty mind' with respect to an element of a crime. Under such statutes we have not required that the defendant know the facts that make his conduct fit the definition of the offense. Generally

criminalize the act itself without concern for whether the actor intentionally broke the law.[39]

The question of whether a particular law operates under the traditional framework or the public welfare framework has, at times, been difficult for courts to resolve. The public welfare offense is commonly found in the void of legislative silence. Defining the criminal law is largely the province of states, but the Supreme Court has also provided guidance, especially when a law presents due process concerns. Although the Supreme Court has not explicitly laid out a test for this question,[40] it has examined the public welfare doctrine and suggested several factors to consider.[41] In *Morissette v. United States*, for example, the Court undertook an extensive analysis of the public welfare offense's evolution and character.[42] The dispute arose when Morissette, a local fruit stand operator, trucker, and scrap iron collector, removed and converted used bomb casings from government-owned property.[43] Although Morissette claimed to be operating under the belief that the casings had been abandoned, the government indicted and charged him with "'unlawfully, wilfully and knowingly steal[ing] and convert[ing]'" U.S. government property.[44] The trial court rejected Morissette's defense outright and barred his attorney from introducing it altogether.[45] Instead, it found that Morissette's act spoke for itself: "'The question on intent is whether or not he intended to take the property. He says he did. Therefore, . . . he is guilty . . . . [Felonious intent] is presumed by his

speaking, such knowledge is necessary to establish *mens rea*, as is reflected in the maxim *ignorantia facti excusat*.").

39. *See* Simonoff, *supra* note 23, at 409.

40. *See* Morissette v. United States, 342 U.S. 246, 260 (1952) ("Neither this Court nor, so far as we are aware, any other has undertaken to delineate a precise line or set forth comprehensive criteria for distinguishing between crimes that require a mental element and crimes that do not. We attempt no closed definition, for the law on the subject is neither settled nor static.").

41. *See, e.g.*, *id.* at 254–63; *Staples*, 511 U.S. at 604–20.

42. *Morissette*, 342 U.S. at 250–63.

43. *Id.* at 247–48.

44. *Id.* at 248 (quoting language from the indictment).

45. *Id.* at 249.

own act.'"[46] The court of appeals affirmed the trial court, holding that the statute did not require criminal intent, an assumption the court gleaned from Congress's failure to "express such a requisite"[47] and Supreme Court precedent.[48]

In analyzing the lower courts' decisions, the Supreme Court reviewed the development of the public welfare offense, contrasting that development against the historical, "universal and persistent"[49] presumption of a criminal intent requirement.[50] Through this review, the Court outlined several characteristics of public welfare offenses: (1) they often punish acts of "neglect where the law requires care";[51] (2) they are regulatory in nature, not originating in common law;[52] (3) they often "result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize";[53] (4) they offend the state's authority by impairing its ability to efficiently maintain social order;[54] (5) the injury is the same regardless of intent;[55] (6) penalties are often

46. *Id*.

47. *Id*. at 249–250.

48. *Id*. at 250. The precedents the court of appeals relied on were *United States v. Behrman*, 258 U.S. 280 (1922), and *United States v. Balint*, 258 U.S. 250 (1922). *Morissette*, 342 U.S. at 250. Of the rulings in these cases, the Supreme Court stated:

> In those cases this Court did construe mere omission from a criminal enactment of any mention of criminal intent as dispensing with it. If they be deemed precedents for principles of construction generally applicable to federal penal statutes, they authorize this conviction. Indeed, such adoption of the literal reasoning announced in those cases would do this and more—it would sweep out of all federal crimes, except when expressly preserved, the ancient requirement of a culpable state of mind. We think a résumé of their historical background is convincing that an effect has been ascribed to them more comprehensive than was contemplated and one inconsistent with our philosophy of criminal law.

*Id*.

49. *Id*. at 250–51.

50. *Id*. at 250–63.

51. *Id*. at 255.

52. *Id*.

53. *Id*. at 256.

54. *Id*.

55. *Id*.

relatively small;[56] and (7) conviction does not gravely impair an offender's reputation.[57] Taking these factors into consideration, the Court held that the mere omission of intent from the statute did not justify eliminating the mens rea requirement, especially in light of larceny's common law origins.[58]

The Supreme Court had another opportunity to set firm criteria for evaluating the public welfare offense in *Staples v. United States*; however, the Court ultimately relied on the logic set forth in *Morissette* and refused to elaborate any definitive test.[59] Despite this denial to further define the contours of the doctrine, many state courts have construed the *Staples* Court's language into a multi-factor test.[60] The *Staples* factors these courts have identified largely overlap with the *Morissette* factors. Those that do not explicitly overlap are fairly intuitive and include "the extent to which a strict-liability reading of the statute would encompass innocent conduct;"

56. *Id*.

57. *Id*. Others have distilled the factors defining public welfare offenses similarly. *See, e.g.*, Holdridge v. United States, 282 F.2d 302, 310 (8th Cir. 1960) ("From these cases emerges the proposition that where a federal criminal statute omits mention of intent and where it seems to involve what is basically a matter of policy, where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where conviction does not gravely besmirch, where the statutory crime is not one taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent."); David P. Gold, *Wildlife Protection and Public Welfare Doctrine*, 27 COLUM. J. ENVTL. L. 633, 640 (2002) ("First, the crime is always a violation of a modern regulatory statute with little or no common law history. Second, the activity regulated by the statute is of such a nature that those engaging in it can reasonably be expected to take the precautions necessary to avoid violations. Third, conviction brings only minor penalties and little damage to the perpetrator's reputation. Fourth, the statute would be unusually hard to enforce if specific intent were required.").

58. *Morissette*, 342 U.S. at 263–73.

59. 511 U.S. 600, 619–20 (1994).

60. *See, e.g.*, State v. Watterson, 679 S.E.2d 897, 901 (N.C. Ct. App. 2009) (listing the *Staples* factors as "(1) the background rules of the common law and its conventional *mens rea* requirement; (2) whether the crime can be characterized as a public welfare offense; (3) the extent to which a strict-liability reading of the statute would encompass innocent conduct; (4) the harshness of the penalty; (5) the seriousness of the harm to the public; (6) the ease or difficulty of the defendant ascertaining the true facts; (7) relieving the prosecution of time-consuming and difficult proof of fault; and (8) the number of prosecutions expected").

"relieving the prosecution of time-consuming and difficult proof of fault;" and "the number of prosecutions expected."[61]

While the traditional framework can largely be said to criminalize choice, the public welfare offense doctrine sanctions conduct, regardless of whether the conduct is the product of choice. The notion driving this policy is that preventing such conduct is so crucial to the public welfare that its value exceeds that of individual liberty. By enacting public welfare offenses, legislatures express a willingness to risk punishing non-culpable parties if, by doing so, they can decrease commission of the conduct.[62]

## II. STATE STATUTES CRIMINALIZING NON-EVACUATION

Having outlined the characteristics of the traditional framework and public welfare offense doctrine, I now consider which framework statutes criminalizing non-evacuation behavior have adopted. While several states have enacted such statutes,[63] there appears to be disagreement over the appropriate mens rea requirement. In this section, I will begin by discussing several state laws that have adopted the traditional framework, although with varying requirements of criminal intent. I will then analyze North Carolina's law to determine whether it falls within the public welfare offense doctrine. North Carolina's law deserves special attention because it appears to be an outlier as the only public welfare offense and may serve as a model if the criminalization of non-evacuation movement continues to gain traction.

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61. *See id.*

62. *See, e.g.*, Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 422 n.108 (1993).

63. *See, e.g.*, MICH. COMP. LAWS § 30.405(3) (West 1981) ("A person who willfully disobeys or interferes with the implementation of a rule, order, or directive issued by the governor pursuant to this section is guilty of a misdemeanor"); N.C. GEN. STAT. § 166A-19.31(h) (West 2013) ("Any person who violates any provision of an ordinance or a declaration enacted or declared pursuant to this section shall be guilty of a Class 2 misdemeanor in accordance with G.S. 14-288.20A."); N.Y. EXEC. LAW § 24(5) (McKinney 2010) ("Any person who knowingly violates any local emergency order of a chief executive promulgated pursuant to this section is guilty of a class B misdemeanor.").

### *A. States Applying the Traditional Framework*

Several states have adopted the traditional framework to address the non-evacuation problem. For example, Utah's law states that "[a] person may not refuse to comply with an order to evacuate . . . or refuse to comply with any other order issued by the governor in a state of an emergency . . . if notice of the order has been given to that person."[64] A person who violates an evacuation order "is guilty of a class B misdemeanor."[65] The fact that the statute prohibits "refus[al]" and requires the violator to receive notice of the order[66] suggests that innocent and ignorant non-compliance is not punishable. At least some degree of mens rea must be established, placing Utah's statute within the traditional framework. Furthermore, even absent a notice requirement, a general provision in Utah's criminal code states that when the crime's definition does not express a clear intent to impose strict liability, and "the definition of the offense does not specify a culpable mental state . . . intent, knowledge or recklessness shall suffice to establish criminal responsibility."[67] Accordingly, the Utah statute clearly falls within the traditional framework.[68]

Other states designate a more explicit level of culpability. For example, Michigan's law states that a person must "willfully disobey[] or interfere[]."[69] The plain meaning of willful may imply nothing more than intention, meaning the actor intended to act, but not to break the law.[70] However, Michigan courts have suggested a

64. UTAH CODE ANN. § 76-8-317(1) (West 2014).

65. *Id.* § 76-8-317(2).

66. *Id.* § 76-8-317(1).

67. Due S., Inc. v. Dep't of Alcoholic Beverage Control, 197 P.3d 82, 94 (Utah 2008) (citing UTAH CODE ANN. § 76-2-102 (LexisNexis 2012)).

68. Also noteworthy is Utah Senator Mark B. Madsen's recent proposal to amend this section to remove criminal liability. The amendment advocates allowing persons to stay in their home, but includes an explicit caveat that those who remain may not receive rescue aid timely or at all. *See* S.B. 273, 60th Leg., Gen. Sess. (Utah 2013).

69. MICH. COMP. LAWS ANN. § 30.405(3) (West 2014).

70. *See* Pavlov v. Cmty. Emergency Med. Serv., Inc., 491 N.W.2d 874, 877 (Mich. Ct. App. 1992) (citing McKimmy v. Conductors Protective Assurance Co., 235 N.W. 242, 242 (1931)); *see also* 21 AM. JUR. 2D *Criminal Law* § 130 (2008).

higher standard associated with willfulness, requiring that the act be committed with "design and purpose."[71] The statute appears to be aimed at punishing choice, again falling within the traditional framework. New York, rather than requiring a willful violation, requires that the actor "knowingly" act.[72] In *People v. Shapiro*, the New York Court of Appeals explained that "[t]he term 'knowingly' imports a knowledge that the facts exist which constitute the act or omission a crime, and does not require knowledge of the unlawfulness of the act or omission."[73] Thus, New York's law appears to require a mens rea similar to Utah's in that both require notice or knowledge of the evacuation order, but not knowledge of the unlawfulness of non-compliance.

### *B. North Carolina's Public Welfare Offense*

North Carolina's non-evacuation statute[74] departs substantially from other state statutes in that it appears to be a public welfare offense, requiring no mens rea. *State v. Watterson*[75] provides a roadmap for how North Carolina courts evaluate whether a state statute creates a public welfare offense. In that case, the court considered whether a statute, which made it "unlawful for any person to manufacture, assemble, possess, store, transport, sell, offer to sell, purchase, offer to purchase, deliver or give to another, or acquire any weapon of mass death and destruction[,]" created a public welfare offense.[76] First, the court considered statutory language, asking whether, as a matter of construction, the language created a public welfare offense, taking into account its manifest purpose and design.[77] Second, the court considered eight factors

71. Montgomery v. Muskegon Booming Co., 50 N.W. 729, 731 (Mich. 1891).

72. N.Y. EXEC. LAW § 24(5) (McKinney 2014).

73. People v. Shapiro, 152 N.E.2d 65, 67 (N.Y. 1958).

74. N.C. GEN. STAT. § 166A-19.30(d), (h) (2013) (criminalizing non-compliance with evacuation orders).

75. State v. Watterson, 679 S.E.2d 897 (N.C. Ct. App. 2009).

76. *Id.* at 899 (quoting N.C. GEN. STAT. § 14-288.8(a) (2013)).

77. *Id.* at 900.

discussed in *Staples v. United States.*[78] The court approached this second multi-factor inquiry with hesitation, noting that *Staples* involved a case of federal statutory interpretation, while the task presently before the court was to interpret a state statute.[79] Accordingly, the second inquiry was undertaken as a belt-and-suspenders measure and does not appear to be a dispositive or necessary step. As discussed, these *Staples* factors largely resemble the *Morissette* factors.[80] To fully consider the *Morissette* factors, while staying true to the *Watterson* analysis, I will consider both the *Morissette* factors, as well as the *Staples* factors insofar as they are not already covered in the *Morissette* analysis. To determine whether North Carolina's non-evacuation statute creates a public welfare offense, this Section will first consider the statutory language, and then the substantive factors laid out in *Morissette* and *Staples.*

*1. The statutory language and context*

The North Carolina non-evacuation statute reads, in part, that "[a]ny person who violates any provision of a declaration or executive order issued pursuant to this section shall be guilty of a Class 2 misdemeanor in accordance with G.S. 14-288.20A."[81] Notably, the legislature has omitted any reference to mens rea. The above-referenced section, G.S. 14-288.20A, also neglects to reference mens rea for this violation. It lays out three crimes as follows:

> Any person who does any of the following is guilty of a Class 2 misdemeanor:
>
> (1) Violates any provision of an ordinance or a declaration enacted or declared pursuant to G.S. 166A-19.31.
>
> (2) Violates any provision of a declaration or executive order issued pursuant to G.S. 166A-19.30.

78. *Id.* at 901 (citing Staples v. United States, 511 U.S. 600, 604–19 (1994).
79. *Id.* at 902 (citing State v. Jordan, 733 N.E.2d 601, 605 (Ohio 2000)).
80. *See supra* text accompanying notes 60-61.
81. N.C. GEN. STAT. § 166A-19.30(d) (2013).

(3) Willfully refuses to leave the building as directed in a Governor's order issued pursuant to G.S. 166A-19.78.[82]

The first and second subsections refer to violating evacuation orders issued by municipalities and governors, respectively.[83] These orders involve evacuation from a stricken or threatened area.[84] The third section, however, deals with the violation of a governor's order to evacuate a building. While the first two subsections dealing with evacuations from stricken or threatened areas omit any mens rea requirement, the third subsection requires the actor to "willfully refuse[]." This contrast suggests that the legislature had culpability language within its vernacular, and that it made an explicit choice to not require culpability in the event of evacuating from a threatened or stricken area. This assumption is particularly appropriate in light of the fact that the supreme court of North Carolina has inferred a legislative intent to create a public welfare offense from similar statutory omissions.[85] Furthermore, the *Watterson* court noted that "'[w]hen a legislative body includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that [the legislative body] acts intentionally and purposely in the disparate inclusion or exclusion.'"[86]

*2. The* Morissette *and* Staples *factors*

The factors identified in *Morissette* and *Staples* also lend support to the proposition that North Carolina's legislature intended to create a public welfare offense. This Section will consider (1) the

82. N.C. GEN. STAT. § 14-288.20A (2013).

83. *See id.* §§ 166A-19.30(b)(1), -19.31(b)(1).

84. *Id.*

85. *See* Watson Seafood & Poultry Co., Inc. v. George W. Thomas, Inc., 220 S.E.2d 536, 542 (N.C. 1975) (noting that the driving regulation was "a safety statute enacted by the Legislature for the public's common safety and welfare. The statute does not contain the words 'knowingly,' 'willfully' or any other words of like import. It was the obvious intent of the Legislature to make the performance of a specific act a criminal violation and to thereby place upon the individual the burden to know whether his conduct is within the statutory prohibition.").

86. *Watterson*, 679 S.E.2d at 900 (quoting N. C. Dep't of Revenue v. Hudson, 675 S.E.2d 709, 711 (N.C. Ct. App. 2009)) (internal quotation marks omitted).

*Morissette* factors, and (2) the non-duplicative *Staples* factors. The examination that follows is not intended to demonstrate that North Carolina's statute should be a public welfare offense; rather, it is meant to discern whether it is reasonable to impute this intent upon the legislature in light of the characteristics the Supreme Court has identified.

The first factor, whether the law seeks to punish neglect when care is required, supports this proposition. Non-evacuation, at least from a legal perspective, is the failure to act when the law requires action. Although the statute speaks in terms of the government official's duty to direct and compel evacuation, the sanctioning power backing that order implies and imposes the duty upon those within the specified areas.[87]

Secondly, *Morissette* emphasized that public welfare offenses tend to not have common law roots.[88] Emergency powers are not the type of powers thought to originate in the common law. Such powers, especially the power to order evacuation of geographic regions, have developed to improve public safety as cities' populations have increased. As *Morrissette* points out in its discussion of public welfare offenses, the "[c]ongestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times."[89] Additionally, the *Watterson* court explained that the statutory article containing the weapons of mass destruction statute contained laws of a regulatory, rather than common law, nature.[90] Significant for our purposes, the weapons of mass destruction statute at issue was and continues to be codified in the same article, Article 36A, as § 14-288.20A, the statute criminalizing non-evacuation.[91] As support for this proposition, the court referenced a general provision, Section 14-288.3 of the North Carolina Code, which applied to all sections of Article 36A (including the non-evacuation section). 14-288.3

87. *See* § 166A-19.30.

88. *See supra* text accompanying note 52.

89. Morissette v. United States, 342 U.S. 246, 254 (1952).

90. *Watterson*, 679 S.E.2d at 902.

91. Thus, both Sections 14-288.8 and 14-288.20A of the North Carolina Code are contained in Article 36A, entitled "Riots, Civil Disorders, and Emergencies." N.C. GEN. STAT. §§ 14-288.8, 14-288.20A (2013).

states that offenses within the Article are "intended to 'supersede and extend the coverage' of the common law."[92] The provision also states the Article is "intended to be supplementary and additional to the common law . . . ."[93] Both the legislature and the court appear to regard offenses within Article 36A as reaching beyond the common law, and the court explicitly extends this rationale to justify finding a legislative intent to abrogate the common law presumption in favor of mens rea.[94]

The third *Morissette* consideration, whether the act is designed to decrease the probability of danger or injury to person or property,[95] also favors labeling the law a public welfare offense. The idea of probability is often fundamental to an evacuation order. Whether or not the threat necessitating the evacuation will strike is often questionable, and whether those violating an evacuation order will suffer damage to property or person is also uncertain. This is evident from North Carolina's statutory definition of "disaster declaration," which provides that such a declaration is issued when the "the impact or *anticipated impact* of an emergency constitutes a disaster . . . ."[96]

The fourth characteristic, that the regulated conduct offends state authority,[97] also favors deeming the law a public welfare offense. This requires ascertaining the nature of the state's authority and how non-evacuation offends that authority. First, North Carolina's supreme court has succinctly explained the state's relevant authority: "[T]he police power of the State may be exercised to enact laws, within constitutional limits, 'to protect or promote the health, morals, order, safety, and general welfare of society.'"[98] With this

92. *Watterson*, 679 S.E.2d at 902 (citing § 14-288.3).

93. § 14-288.3.

94. *Watterson*, 679 S.E.2d at 902.

95. *See supra* text accompanying note 53. This factor overlaps with the *Staples* factor requiring consideration of the ease or difficulty of the defendant ascertaining the true facts. Both involve the uncertain circumstances involved in evacuation.

96. N.C. GEN. STAT. § 166A-19.3(3) (2013) (emphasis added).

97. *See supra* text accompanying note 54. This factor essentially requires the same analysis as the *Staples* factor asking whether the crime can be characterized as a public welfare offense.

98. Standley v. Town of Woodfin, 661 S.E.2d 728, 731 (N.C. 2008) (quoting State v. Ballance, 51 S.E.2d 731, 734 (N.C. 1949)).

power in mind, it is clear that non-evacuators could conceivably offend the state's power to protect order, safety, and general welfare. For example, non-evacuators could impede the egress process, endangering themselves and others, or increase taxpayer burdens in the event of rescue.

The fifth, sixth, and seventh *Morissette* characteristics also favor labeling the law a public welfare offense.[99] The fifth factor, that harm is the same regardless of intent, is invariably true in the context of non-evacuation.[100] Generally speaking, the threatening or damaging forces involved in emergency situations do not take the intent of a non-evacuator into account. Furthermore, rescue workers and taxpayers stand to suffer the same harm whether the individual willfully stays or is helplessly trapped, and this is the harm that proponents of the law primarily identify.[101] The sixth factor, that penalties are often relatively small is also true in this case—the penalty for non-compliance is a Class 2 misdemeanor.[102] The seventh characteristic, that conviction does not gravely impair an offender's reputation, is also true of North Carolina's law, at least insofar as it is a regulatory crime not associated with behavior traditionally perceived as immoral.

The first non-duplicative *Staples* factor, "the extent to which a strict-liability reading of the statute would encompass innocent conduct," is complicated in the non-evacuation context.[103] The *Watterson* court gleaned this factor from language in *Staples*, which asked whether an illegally possessed item was sufficiently dangerous to put its owner on notice of the likelihood of regulation.[104] By analogy, this factor may consider whether the geographical,

99. *See supra* text accompanying notes 55–57.

100. This factor overlaps with the *Staples* factor that considers the seriousness of the harm to the public.

101. *See infra* Part IV.B.2.b.

102. A class 2 misdemeanor in North Carolina imposes a maximum prison sentence of 6 months and a maximum fine of $1,000. *See* N.C. GEN. STAT. § 14–3(a)(2)(2014); N.C. GEN. STAT. § 15A–1340.23(2) (2014).

103. State v. Watterson, 679 S.E.2d 897, 901 (N.C. Ct. App. 2009) (citing Staples v. United States, 511 U.S. 600, 604–19 (1994)).

104. *Id*. at 902–03.

meteorological, and social indicia of danger are likely to be sufficient to put the actor on notice of the likelihood of an evacuation order. Basically, the inquiry is whether a person, in the absence of actual knowledge of the evacuation order, should know from other alarming conditions that an evacuation order has been issued. This question is complicated because the prohibited conduct is behavior that citizens lawfully engage in on a daily basis—remaining in their home. But it is possible that general knowledge about threats inherent in an area's geography (i.e., the presence of fault lines or low-lying land in a hurricane-prone area), combined with other warning signs, such as gloomy skies or packing neighbors, sufficiently puts residents on notice that an official has ordered evacuation.

The second and third non-duplicative *Staples* factors weigh in favor of the public welfare offense classification.[105] First, the statute relieves the prosecution of time-consuming and difficult proof of fault. Evidence is likely to be difficult to come by in the messy aftermath of a disaster, and the decision to not evacuate is particularly complicated. Offenders may blame late evacuation notices or insufficient state assistance. The public welfare framework would relieve the prosecutor of having to navigate through this series of scapegoating attempts.[106] Second, assuming a prosecutor ever used the statute to penalize a non-evacuator, a vast number of offenders would fall within the statute's reach.[107] That no such prosecutions have been uncovered does not prove that the law will never be used in this way, especially since these laws are in their infancy.

Having examined the legislature's intent from a textual perspective and the *Morissette* and *Staples* factors, North Carolina's evacuation

105. *Id*. at 901 (citing *Staples*, 511 U.S. at 604–19).

106. This is not to say that such "scapegoating attempts" could not amount to valid defenses. This is true regardless of whether the statute requires a mens rea element.

107. I have not found any cases involving criminal prosecution pursuant to a non-evacuation statute. On WestlawNext, I searched all state and federal court databases with the following queries: "(emergency OR disaster) & ((evacuat! /s crim!))," "(emergency OR disaster) & ((evacuat! /p crim!))," and "(evacuat! /s crim!)." Similar efforts on popular search engines yielded similar results.

statute appears to create a public welfare offense, imposing criminal liability on non-evacuators without a mens rea requirement.

### *C. Competing Interests*

A survey of the state statutes criminalizing non-evacuation demonstrates that legislatures around the country have made a wide range of differing policy judgments, stretching from willful, to knowing, to strict liability.

At their core, the disparate mens rea requirements are the product of a calculus balancing individual liberty against public safety. When the mens rea standard is heightened, the legislature appears to be prioritizing individual liberty over public safety. Contrarily, when the mens rea standard is low or non-existent, the legislature appears to make the opposite judgment—that public safety, when compared to individual liberty, is a value more worthy of protection.

## III. THE INTERACTION OF ENFORCEMENT AND MENS REA

The mens rea requirement affects how the law is enforced and whom it is enforced against. High mens rea requirements make the law more difficult to enforce and limit the kind of offender the law can reach.[108] Because disasters and their accompanying evacuation orders typically affect a large group of people, the mens rea requirement is an important feature with serious potential to limit or expand the scope of enforcement and offenders. The evacuation order will apply to those who are wealthy and poor, prepared and unprepared, sick and healthy; some are entirely capable of coping with disasters and the evacuations that may accompany them, while others are helpless. In light of this interaction between mens rea and enforcement, this Part will address two questions: First, how are these laws enforced? Second, how do the disparate mens rea requirements impact that enforcement?

108. *See generally* Assaf Hamdani, *Mens Rea and the Cost of Ignorance*, 93 VA. L. REV. 415, 420–23 (2007).

### *A. Enforcement and Mens Rea*

Statutes criminalizing non-evacuation exist to serve one or more of the following purposes: justify the arrest and relocation of citizens, serve as grounds for prosecution, or operate as a symbolic expression of social norms. The purpose of this discussion is not only to explore the various ways the law can be enforced, but also to ascertain how the disparate mens rea requirements will affect the efficacy of these enforcement goals.

#### *1. Arrest and relocation*

To perform an arrest, an officer must have probable cause to believe that an individual has committed a crime.[109] "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."[110] Because law enforcement is empowered to inform citizens of evacuation orders, mens rea is not likely to have an impact on the officer's assessment of probable cause, even when the statute requires a willful violation. Essentially, the non-evacuator's conduct becomes willful as soon as law enforcement informs him of his obligation to leave.[111] Accordingly, the mens rea requirement does not significantly affect the arrest and relocation objective.

#### *2. Criminal prosecution*

On the other hand, with respect to criminal indictment, the mens rea threshold has a significant impact on which offenders the statute will reach. Generally, mens rea is the most difficult element of a crime to prove—the higher the culpability, the more difficult it is

109. *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

110. *Id*. at 354.

111. *See, e.g.*, Hebron v. Touhy, 18 F.3d 421, 423 (7th Cir. 1994) (explaining that "[p]olice have a hard time evaluating competing claims about motive; they are entitled to act on the basis of observable events and let courts resolve conflicts about mental states").

to prove.[112] States employing a willful standard impose a significant burden on prosecutors and increase the amount of resources required to secure conviction. The willful standard also safeguards liberty in that it requires the prosecutor to demonstrate that the unlawful act was the product of choice. Conversely, with respect to the public welfare offense, the prosecutor's burden becomes relatively low. Just as a willful standard safeguards liberty, a public welfare offense loosens its protection of liberty in the interest of regulating and, presumably, protecting the public.

*3. Symbolic impact*

States may have no intention of enforcing statutes criminalizing non-evacuation. At the time of this writing, my survey has not uncovered any such prosecutions.[113] Instead, these statutes may serve a symbolic purpose, solely intended to communicate social norms. The expressive theory of criminal law explains this symbolic impact. The expressive theory states that the law communicates social values, placing legislatures and courts in the position of shaping, defining, codifying, and/or disseminating norms.[114] As the law becomes linked with norms, the cost of criminal conduct is not only punishment for law breaking, but also social condemnation for norm breaking.[115] The expressive function of law does not depend on enforcement, at least not in the sense that a violator must be sanctioned pursuant to a statute.[116] Rather, law's expressive function can operate independent of nominal enforcement, finding its power through the spontaneous processes of social perception, pressure, and condemnation.

112. Alun Griffiths, People v. Ryan*: A Trap for the Unwary*, 61 BROOK. L. REV. 1011, 1014 (1995) ("Because a defendant's mental state can be difficult to prove, a mens rea requirement places significant administrative and labor burdens on prosecutors and the judicial system.").

113. *See supra* note 107.

114. *See* Maggie Wittlin, *Buckling Under Pressure: An Empirical Test of the Expressive Effects of Law*, 28 YALE J. ON REG. 419, 423-29 (2011).

115. *Id.* at 420-21.

116. *See, e.g.*, *id.* at 456-58 (finding "secondary [seatbelt] laws, despite having zero penalty for otherwise obedient drivers, have a large and significant impact on behavior").

Furthermore, the law's expressive power does not depend on a malum in se categorization. Traditionally, malum in se crimes attract the indignation of society because, in theory, they sanction conduct that is inherently repugnant. However, the expressive function demonstrates that even malum prohibitum crimes can attract condemnation. This is presumably because such crimes are enacted to serve public safety interests, and violators, by their unlawful conduct, exhibit a carelessness or indifference for others' welfare that is socially reprehensible.

It seems unlikely that mens rea requirements have any impact on the law's symbolic value because symbolic value depends on the public's perception of the law. Research suggests that an actor's intent does not dictate the public's perception of a crime's seriousness; instead, whether the public views a crime as serious depends on the results of the action.[117] For example, the Model Penal Code punishes attempt, solicitation, and conspiracy in the same way it punishes the completed offense.[118] This is so because the intent of the actor is the same regardless of whether the result is accomplished. In contrast, the public does not believe that inchoate offenses are worthy of serious sanctions.[119] Whereas the Model Penal Code punishes an actor's intent, the public looks at the results of the conduct to evaluate the level of desert and the appropriateness of a serious sanction.[120] While there are certainly exceptions to this rule, generally speaking, society cares more about harmful results than intent.

## IV. WHO ARE THE OFFENDERS?

Having identified the impact mens rea has upon various enforcement regimes, this Section considers who will be

117. Sara Sun Beale, *What's Law Got to Do with It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 56 (1997).

118. *Id.*

119. *Id.* (citing Julian V. Roberts, *Public Opinion, Crime, and Criminal Justice*, 16 CRIME & JUST. 136 (1992)).

120. *Id.*

implicated under each enforcement regime. Whether the law will affect a given individual depends on several factors. To fully explore the implications of enforcement, three matters require examination. In section A, I will identify a potential class of offenders. In section B, I will identify who, among this class of offenders, would fall within the statutes under each enforcement regime described above, namely, arrest and relocation, prosecution, and symbolic function. Ultimately, I will demonstrate that the statutes create undesirable results.

### *A. Who Are the Non-Evacuators, and Why Don't They Evacuate?*

Several studies have sought to assess evacuation behavior, especially among those who remain behind.[121] To paint a portrait of these individuals, researchers have tried to understand the factors affecting their decisions. Non-evacuators often consider factors such as the magnitude and proximity of the disaster, past encounters with disasters, vulnerability of dependents, and consistency and clarity of warnings.[122] Other studies have taken a more nuanced approach, focusing on the impact social factors have on non-evacuation behavior. Such studies have helped bring to the forefront an unfortunate truth: for minority and impoverished communities, the choice not to evacuate is often not a choice at all. As far as criminal law is concerned, the nuanced justifications of non-evacuation do not affect liability unless they rise to the level of a viable defense. This occurs when justifications inhibit the agency of an actor so severely as to remove the element of choice from the equation altogether. For purposes of analyzing criminal liability, I will consider two classes of non-evacuators: First, there are those who choose not to evacuate, despite having a meaningful opportunity to do so ("Willful Stayers"). Second, there are those whose agency is

121. *See, e.g.*, Earl J. Baker, *Hurricane Evacuation Behavior*, 9 INT'L J. MASS EMERGENCIES AND DISASTERS 287 (1991); Robert Bolin, *Evacuation Behavior and Problems: Findings and Implications from the Research Literature*, 2 INT'L J. MASS EMERGENCIES & DISASTERS 419 (1984); Keith Elder et al., *African Americans' Decisions Not to Evacuate New Orleans Before Hurricane Katrina: A Qualitative Study*, 97 AM. J. PUB. HEALTH S124 (2007); Stephens, *supra* note 8.

122. *See* Elder, *supra* note 121, at S124.

inhibited to an extent that evacuation is impractical or impossible ("Vulnerable Stayers").[123]

It is unclear whether Willful Stayers account for a large portion of non-evacuators. In the case of Hurricane Katrina, official reports suggest that those who had the resources to leave largely did so.[124] But reports and responses from public officials,[125] news media,[126] and the public generally[127] suggest that willful non-evacuation in the wake of a disaster is a significant problem. While these institutions' perspectives often dominate, it is difficult to know to what extent

123. While this is undoubtedly an oversimplification, a simple model of a complex process can help "clarify our thinking and enable us to extract implications from admittedly oversimplified versions of reality." *See* Ronald W. Perry, *The Effects of Ethnicity on Evacuation Decision-Making*, 9 INT'L J. OF MASS EMERGENCIES AND DISASTERS 47, 48 (1991).

124. Michael Greenberger, *Preparing Vulnerable Populations for a Disaster: Inner-City Emergency Preparedness - Who Should Take the Lead?*, 10 DEPAUL J. HEALTH CARE L. 291, 298–99 (2007) (citing A FAILURE OF INITIATIVE, FINAL REPORT OF THE SELECT BIPARTISAN COMMITTEE TO INVESTIGATE THE PREPARATION FOR AND RESPONSE TO HURRICANE KATRINA, H.R. REP. NO. 109–377, AT 73 (2006), *available at* http://www.gpoaccess.gov/congress/house/katrina/index.html) ("The Louisiana evacuation for the general population, including contraflow, worked very well. Governor Kathleen Babineaux Blanco and other state officials labeled the implementation of this evacuation as masterful and as one of the most successful emergency evacuations in history.") (internal quotations omitted).

125. *See supra* text accompanying notes 9–11 and 14.

126. Dr. Keith Ablow, *Why Don't People Evacuate When Sandy or Another Major Storm Looms? Are They Nuts?* FOX NEWS (Oct. 29, 2012), http://www.foxnews.com/opinion/2012/10/29/why-dont-people-evacuate-when-sandy-or-another-major-storm-looms-are-nuts/; Melissa Dahl, *Storm Psychology: Why Do Some People Stay Behind?* NBC NEWS (Aug. 30, 2012), http://www.nbcnews.com/health/storm-psychology-why-do-some-people-stay-behind-971995; Timothy Dwyer & Michael A. Fletcher, *Residents Stay Put, Despite Orders*, WASH. POST (Sept. 8, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/09/07/AR2005090701309.html; Rick Jervis, *Officials Fear Many Won't Evacuate*, USA TODAY (Oct. 28, 2012), http://www.usatoday.com/story/news/nation/2012/10/28/hurricane-sandy-wont-evacuate/1662755/; *New Orleans will Force Evacuations*, CNN.COM (Sept. 7, 2005), http://www.cnn.com/2005/US/09/06/katrina.impact/.

127. *See* Stephens, *supra* note 8; *see also* Dahl, *supra* note 126 (noting the typical response website commenters had to non-evacuators: "What part of MANDATORY EVACUATION do these people NOT UNDERSTAND!" and "You were told to evacuate! Now you should be on your own and not expect others to put themselves in harms [sic] way!").

their ideas are representative of non-evacuators generally. Judith N. Shklar explained, "Neither the facts nor their meaning will be experienced in the same way by the afflicted as by mere observers or by those who might have averted or mitigated the suffering. These people are too far apart to see things in the same way."[128] The fact that defining the willful non-evacuation problem is largely the province of observers may account for the overwhelming perception that non-evacuation is predominantly a meaningful choice.

Notwithstanding uncertainty concerning the size of the problem, anecdotal evidence demonstrates that some people disobey evacuation orders willfully, choosing to ride out the storm. With respect to why Willful Stayers choose not to evacuate, it is sufficient to say that, while many are motivated by a sense of invulnerability, others often remain for compelling reasons. Take, for example, the Dresch family from Staten Island.[129] When they evacuated for Hurricane Irene, they found their house looted upon their return days later.[130] When Hurricane Sandy approached, Mr. and Ms. Dresch and their youngest daughter decided not to evacuate in order to protect their home.[131] Waves overwhelmed their home, and water quickly filled the second floor.[132] The roof caved in, and the house was washed away.[133] Mr. Dresch and his daughter were found dead, with only Ms. Dresch surviving the ordeal.[134]

On the one hand, this tragedy demonstrates that non-evacuation is sometimes the product of a meaningful choice. However, it also demonstrates how complicated that choice can be, even for those without circumstances conventionally perceived as vulnerable. The

128. Robert R.M. Verchick, *Disaster Justice: The Geography of Human Capability*, 23 DUKE ENVTL. L. & POL'Y F. 23, 71, n.15 (2012) (quoting JUDITH N. SHKLAR, THE FACES OF INJUSTICE 1 (1990)).

129. *See* Kia Gregory, *After Tragic Loss During Hurricane Sandy, a Woman Chooses not to Return*, N.Y. TIMES (Oct. 10, 2013), http://www.nytimes.com/2013/10/11/nyregion/after-tragic-loss-during-hurricane-sandy-a-woman-chooses-a-buyout.html.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

two categories I have outlined, Willful Stayers and Vulnerable Stayers, often overlap. Illustratively, the Dresch family's *vulnerability* to looting induced their *choice* not to evacuate. By terming these individuals Willful Stayers, I do not mean to say that they are without vulnerability, only to say that their vulnerability does not unequivocally prevent them from evacuating of their own accord.

The category I have termed Vulnerable Stayers deals with a more profound vulnerability, the kind that makes evacuation impractical or impossible. While government officials, the media, and the public often focus on Willful Stayers, social research has shown that such stories of purposefulness are often not representative, especially in the case of vulnerable citizens. In fact, vulnerable populations' inability to comply with evacuation orders is not a new phenomenon. As early as 1956, researchers detected different evacuation behavior among minorities.[135] In the 1970s, researchers began to focus more concertedly on "racial, ethnic, and socioeconomic differences in disaster response and recovery."[136] Since that time, extensive quantitative and statistical research has been published outlining the impact social characteristics have on disaster response.[137]

Studies concerning disaster communication and response have found that "minority and low income households are less likely to receive . . . official disaster warnings," which presumably include evacuation orders.[138] In the event such warnings are received, these households are less likely than their higher income counterparts to believe them.[139] Among those who take the warnings seriously, they are less likely to have the resources necessary to obey them.[140] Hurricane Katrina is an apt example. In New Orleans, thousands who did not

135. Verchick, *supra* note 128, at 41.

136. *Id*. at 42.

137. *Id*.

138. Sammy Zahran, et al., *Social Vulnerability and the Natural and Built Environment: A Model of Flood Casualties in Texas*, 32 DISASTERS 537, 540 (2008).

139. *Id*.

140. *Id*.

evacuate had no access to private transportation, no financial resources to evacuate on their own, or no way to the leave the dangerous areas safely without additional assistance.[141] Thus, this group's ability to evacuate is inhibited by several factors including ignorance of orders, distrust of the message-giver, and insufficient resources.

This group regards non-evacuation not as a choice but as the only action possible in its resource-limited circumstances.[142] One study surveyed, among others, those who survived the storm—non-evacuees, evacuees, and first responders.[143] Researchers then divided their responses into one of three categories: "shared themes," "[t]hemes significantly more common among leavers than among stayers," and "[t]hemes significantly more common among stayers than among leavers."[144] Themes more common among stayers than leavers included the following: "I try not to let it get me down. I just let it make me stronger"; "We had a good community. All the people here help one another"; "The hand of God took care of me and that's why whatever I do, wherever I go, I just trust in God"; and "I was worried . . . for a lot of people."[145] Upon analyzing these themes in their broad context, the researchers concluded, "understanding survivors' actions requires realizing that what can be done is contingent on the resources that people have available to them."[146] Many non-evacuators commonly emphasized personal strength, reliance on community, and faith in God because those were the resources available to them. Although other respondents—evacuees and first responders—found non-evacuees' behavior transgressive,[147]

141. Greenberger, *supra* note 124, at 299–300; *see also* Elizabeth Fussell, *Leaving New Orleans: Social Stratification, Networks, and Hurricane Evacuation*, SOC. SCI. RES. COUNCIL (June 11, 2006), http://understandingkatrina.ssrc.org/Fussell/ ("New Orleanians' plans for evacuation were strongly shaped by their income-level, age, access to information, access to private transportation, their physical mobility and health, their occupations and their social networks outside of the city. These social characteristics translated into distinct evacuation strategies for different sectors of the population.").

142. *See* Stephens, *supra* note 8, at 885.

143. *Id*. at 879, 882.

144. *Id*. at 883 – 84.

145. *Id*.

146. *Id*. at 884 – 85.

147. *Id*. at 880.

non-evacuees regarded their own behavior as a product of their resource-limited circumstances.[148] Evacuation, for one reason or another, was not or did not appear to be an option, so they did the best they could to cope with what seemed like the only rational alternative—staying.

### *B. Who Is Guilty? Arrest, Prosecution, and Condemnation*

With the potential offenders in mind, I now turn to the question of who among these classes of offenders would be subject to criminal sanctions. The objective of this discussion is to determine whether the statutes' sanctioning power is appropriately and desirably applied. By sanctions, I refer broadly to the three enforcement regimes discussed earlier: arrest and relocation, prosecution, and societal condemnation through criminal law's expressive function.

#### *1. Arrest and relocation.*

Under the arrest and relocation enforcement objective, virtually every offender identified above would be affected. While statutes criminalizing non-evacuation give one basis for this authority, they are not the only basis. As the First Circuit has explained, "Almost every state in the United States has adopted statutes providing for the exercise of police powers in the event of an emergency or disaster (such as fire, flood, tornado, hurricane, etc.)."[149] Such statutes do not typically allocate criminal liability, but express or imply the state's powers to protect the public.[150] The authority to seize and relocate citizens does not require reasonable suspicion that a crime has been committed; rather, the authority is implied from broader statutory

148. *Id*. at 885.

149. Thames Shipyard & Repair Co. v. United States, 350 F.3d 247, 258 (1st Cir. 2003). The Court goes further and cites approvingly an inference of an Ohio statute stating an officer "may, in a reasonable manner, remove to a safe area any persons who refuse to evacuate voluntarily." *See id*. (quoting 1987 Ohio Op. Atty. Gen. No. 99). Furthermore, the Court states, "We have no doubts about the constitutionality of such authority." *Id*. at 258 n.9.

150. *See, e.g.*, LA. REV. STAT. ANN. § 29:724(C)(3) (2007) (granting power to "[c]ontrol ingress and egress to and from a disaster area, the movement of persons within the area, and the occupancy of premises therein").

authorizations.[151] Seizure and relocation would exist even if the state did not make non-compliance criminal. For example, Texas's recently enacted statute explicitly lays out this authority to seize and relocate but does so without defining a criminal offense.[152]

Although the criminal law is not the only enabler of the seize and relocate enforcement option, it provides an unequivocal basis for the option and, therefore, deserves some discussion. Since the law establishes a legal basis for arresting citizens, the question becomes whether the state or municipality should use this authority. In a House of Representatives bipartisan committee meeting following Hurricane Katrina, Governor Blanco argued that "evacuation at 'gunpoint' [is] unjustified . . . and impractical."[153] Both of these adjectives invite discussion.

*a. Unjustified*. The position that arrest and relocation is unjustified is largely premised on Americans' deep-rooted reverence for property rights. One author observed how forcible eviction threatens these rights:

> [F]orcible eviction appears to be another symptom of the disease manifest in society in the form of rapidly eroding property rights. The government's ability to oust citizens from their homes to build shopping malls and business districts and, now, to remove citizens from private residences when it believes it should, begs the question of whether private property rights are merely illusory.[154]

The importance of property rights is often heightened in the midst of disaster scenarios. Concerns regarding looting arise.[155] Those who are forced from their homes may be restricted from returning for a long period of time, an inconvenience that delays the

151. *See, e.g.*, *Konie v. Louisiana*, CIV.A. 05-6310, 2010 WL 812980 (explaining the allegations of a woman who was arrested for violating a mandatory evacuation order, even though Louisiana had not statutorily criminalized the conduct).

152. *See supra* note 19.

153. *See* Fairchild, *supra* note 20, at 961.

154. Jonathan Jorissen, *Katrina's House: The Constitutionality of the Forced Removal of Citizens from Their Homes in the Wake of Natural Disasters*, 5 AVE MARIA L. REV. 587, 606 (2007).

155. *Id*. at 606 – 07.

individual recovery process.[156] There are also more fundamental property concerns, namely, whether the property will be able to withstand the disaster at all.

Alternatively, governments assert that evacuation orders are justified to protect citizens, to improve clean-up efforts, and to maintain order.[157] In this context, governments play a paternalistic role, acting to protect citizens from danger, including danger from themselves.[158] Such paternalistic laws are rampant in today's society and include legislation involving seat belts, smoking, and illegal drugs.[159] While laws dealing with seat belts, smoking, and the like involve restricting privileges, mandatory evacuation involves restricting constitutional rights.[160] For the state to justify revoking such a fundamental right, its interest must be far more compelling than the "potential for disease" or the "desire for orderly clean-up."[161] Upon this basis, arrest and relocation are unjustified.

*b. Impractical.* Arrest and relocation are impractical, as well. The number of law enforcement officers required to remove all non-evacuators from their homes would be overwhelming. Even if adequate law enforcement could be mustered to accomplish the task, there is a significant question about whether this would be a prudent use of resources. States apparently recognize the impracticality of such a maneuver since, in reality, arrests have typically been limited to special circumstances and violations.[162] Even in those limited circumstances, arresting one hubristic non-evacuator may come at the expense of aiding another who desperately needs assistance. There are too many Vulnerable Stayers for the state to conscionably pursue the Willful Stayers.

156. *Id*. at 607.
157. *Id*. at 604.
158. *Id*. at 602.
159. *Id*.
160. *Id*. at 602 – 04.
161. *Id*. at 604.
162. Amy L. Fairchild et al., *Ethical and Legal Challenges Posed by Mandatory Hurricane Evacuation*, NAT'L CENTER FOR DISASTER PREPAREDNESS 17 (Oct. 2006), http://hdl.handle.net/10022/AC:P:15773.

While the arrest and relocation objective may serve a valid purpose in a narrow set of circumstances, it is largely unjustified and impractical. Furthermore, states can empower law enforcement to seize and relocate citizens without codifying a crime through its police power. Because of the negative effects that come with criminalization, states desiring to use this authority should implement it through other statutory means.

*2. Prosecution*

Whether a given offender would be subject to prosecution depends on the mens rea threshold the jurisdiction requires. Because I am discussing non-evacuators, the mens rea is the only element at issue.[163] For illustrative purposes, I will examine the offenders under two different mens rea regimes: willful and public welfare offense.

*a. Willful.* Under a willful regime, all offenders who had knowledge of the mandatory evacuation order and its legal import would be subject to criminal prosecution. On its face, the willful statutes could implicate both Willful and Vulnerable Stayers; however, it is less likely to reach Vulnerable Stayers in light of the fact that such non-evacuees are less likely to have notice of the orders.[164] Accordingly, at first glance, this seems an appropriate course of action. It's not hard to imagine a scenario where an individual refuses to evacuate, requires rescue, jeopardizes the lives of rescue workers, and is issued criminal sanctions for disobeying evacuation orders. Society at large would likely be comfortable with this result as it comports with our values of desert and blameworthiness. The common sentiment, "What part of MANDATORY EVACUATION do these people NOT UNDERSTAND,"[165] would be vindicated.

163. Non-evacuators have already committed the actus reus by not evacuating.

164. *See supra* text accompanying notes 138–41.

165. *See supra* note 126.

But these blanket assertions ignore harsh realities. Recall the Dresch family, for example.[166] Should Ms. Dresch, as the only member of her family to survive, be subject to criminal sanctions? Although no reasonable citizen would condone this result, she would nevertheless likely satisfy the elements of the crime.[167] But rather than receiving criminal sanctions, Ms. Dresch attended a news conference at Staten Island Borough Hall with New York City Mayor Michael Bloomberg and other officials.[168] There, she was introduced as the first homeowner to be bought out pursuant to New York City's Hurricane Sandy recovery program.[169] Viewing this transaction through a criminal law lens, it becomes one where criminal behavior inspires mayoral sympathy and government assistance. In reality, both the man requiring rescue and Ms. Dresch made the same choice in the eyes of the law, but for this law to operate in a way that comports with social conscience, the legislature would need to write in an arbitrary exclusion for those that arouse sympathy.

This anecdote reveals a great deal about the desirability of a statute criminalizing willful non-evacuation. First, it shows that the traditional framework may not be an appropriate vehicle for treating the non-evacuation problem. The traditional framework cannot function without blame. But when society learns the facts, when individuals become something more than uninformed observers, willful non-evacuation often loses its power to inspire feelings of desert. This occurs not only when tragic results befall victims, but also when the choice to not evacuate is complicated. Sympathy is not the only thing mitigating society's need to punish. The mitigation also stems from the "universal and persistent" belief that the law

166. *See supra* text accompanying notes 129–34.

167. The particular law that the Dresch family would have been subjected to only required a knowing violation. *See* N.Y. EXEC. LAW § 24(5) (McKinney 2014). The law became effective on March 30, 2012, and Hurricane Sandy made landfall in October of that year. While it is difficult to ascertain whether the family knew non-evacuation was illegal, it appears they at least had sufficient knowledge of the order to satisfy the knowing standard they would be held to.

168. Gregory, *supra* note 129.

169. *Id.*

should only punish a blamable choice.[170] On the one hand, the choice may fail to inspire blameworthiness because a reasonable person in the same circumstance would have weighed the risks similarly. On the other hand, the choice may not be perceived as a choice, but an unavoidable course of action taken to preserve or protect an important right or resource.

Secondly, this example reveals the illogic of blaming and punishing victims.[171] Failing to evacuate often brings about terrible consequences. Accordingly, these laws threaten to place even more burden on those who have already suffered the toll of disaster.[172] By assigning blame to disaster victims, these laws have the potential of distracting authorities from what the victims really need—help. Blaming the victim relieves other accountable players from taking responsibility.[173] This practice of shifting blame is not new: "When millions perished in Bengal's 1943 famine, Winston Churchill scandalously blamed Indians for 'breeding like rabbits,' instead of admitting his government's incompetence."[174] Furthermore, as discussed above,[175] when "federally maintained levees burst and drowned the Crescent City, beset victims were forced to swallow a torrent of blame from moralizing Congressmen and agency officials."[176] Assigning culpability to the evacuation choice, as the traditional framework does, is perhaps worse than these sporadic,

170. Morissette v. United States, 342 U.S. 246, 250 (1952).

171. *See generally* Fussell, *supra* note 141 (citing WILLIAM RYAN, BLAMING THE VICTIM (1976)) ("One fundamental insight of social science is to understand the illogic of blaming the victim.").

172. To give the legislature the benefit of the doubt, it is possible that these laws were enacted to deter non-evacuation behavior, rather than punish it. If such is the case, New York's most recent hurricane activity suggests that the laws fail to achieve this objective. *See infra* text accompanying notes 184–86.

173. *See* SHKLAR, *supra* note 128, at 60 ("Next to guilt, the most truly unjust and unwarranted response to accidents and disasters is scapegoating . . . .").

174. Verchick, *supra* note 128, at 55 (quoting MADHUSREE MUKERJEE, CHURCHILL'S SECRET WAR 205 (2010)).

175. *See supra* text accompanying notes 9–14.

176. Verchick, *supra* note 128, at 55 (citing *FEMA Chief: Victims Bear Some Responsibility*, *supra* note 9; *Arizona Talk Radio Brings You Some Kindly Compassion*, AZCENTRAL.COM (Sept. 4, 2005), http://www.azcentral.com/arizonarepublic/local/articles/0904polinsider04.html).

insensitive remarks, for it represents a systematic process of misapplied scapegoating that parades under the guise of legal legitimacy. Prosecuting willful violators produces undesirable results by assigning blame to those already burdened and excusing other accountable parties from taking responsibility.

*b. Public welfare offense*. Under a public welfare offense regime, all offenders, regardless of knowledge, intent, or resources, would be subject to criminal prosecution. Thus, the law would even punish Vulnerable Stayers who don't receive notice of orders or otherwise lack means to obey. The injustice of such a practice is astounding, so much so that it seems particularly unlikely that society would condone such prosecutions. In fact, as of this writing, I have not uncovered a prosecution premised on the violation of a non-evacuation statute.[177]

However, a statute that disproportionately incriminates vulnerable populations is not made valid by its dormancy. If this sleeping giant is awakened by making non-evacuation a public welfare offense, the legislature has not only secured penalties for Willful Stayers, but also, and perhaps especially, for its underprivileged citizens. The offense is premised on the idea that punishing innocence may occur: "the interest of the enforcement for the public health and safety requires the risk that an occasional non-offender may be punished in order to prevent the escape of a greater number of culpable offenders."[178]

Rather than seeking to affix blame, public welfare offenses seek to prevent a public harm the regulated activity causes. If the conduct does not cause harm that the regulation is capable of avoiding or mitigating, it is difficult to affix a purpose to that regulation or call it good policy. To ascertain whether prosecution premised on non-evacuation would serve the ends of the public welfare offense, the following discussion will seek to establish what type of harm non-evacuation creates and whether criminalization is an appropriate method for mitigating or preventing that harm.

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177. *See supra* text accompanying note 107.

178. Levenson, *supra* note 62 (citing People v. Travers, 124 Cal. Rptr. 728, 730 (1975)) (emphasis removed).

Non-evacuation harm can be divided into two categories: harm to others and harm to self. The harm principle is the most common rationale for criminalizing conduct. John Stuart Mills explained that "the only purpose for which power can be rightfully exercised over any member of a civilized community against his will, is to prevent harm to others."[179] The primary threat persistently identified in the non-evacuation context, endangering first responders, is a classic application of the harm principle.[180] The other threat non-evacuators create is not to the public, but to themselves.[181] Paternalism describes the body of law designed to prohibit such self-harm.[182] Soft paternalism prohibits conduct in areas "where the individual has assumed a risk without adequate information, without sufficient maturity, or without adequate freedom from coercion."[183] Hard paternalism, however, goes further and prohibits conduct that is both "informed and voluntary."[184] Statutes criminalizing non-evacuation more accurately fall within the soft paternalism category. The paternalistic statute operates on the assumption that individuals are, on the whole, unable to acquire all relevant information, rationally process that information, or both. The law assumes that the public official, however, is capable of such a task and, therefore, shifts the duty to him. Thus, if an offender disregards a gubernatorial or municipal evacuation order, he is, in effect, demonstrating his "[in]sufficient maturity" by disrespecting the legislature's delegation of that decision-making right.[185]

179. Thaddeus Mason Pope, *Balancing Public Health Against Individual Liberty: The Ethics of Smoking Regulations*, 61 U. PITT. L. REV. 419, 434 (2000) (quoting JOHN STUART MILL, ON LIBERTY 68 (Penguin ed., 1974) (1859)).

180. *Id*.

181. Fairchild, et al., *supra* note 20, at 958–59; *see also* Fissell, *supra* note 18, at 143 ("It is not hard to imagine that a homeowner might, upon hearing the warnings, be so adequately prepared for a disaster that his decision to leave or stay has absolutely no impact upon anyone but himself, or in the alternative, that one might accept the risk and not ask for rescue, thus incurring no costs.").

182. Pope, *supra* note 179, at 429. Importantly, "in reality most intervention is 'impure' paternalism, that is, it is for the good of the individual and also of others." *Id*. at 454–55.

183. *Id*. at 429–30.

184. *Id*. at 430.

185. There is a substantial question about whether the paternalism philosophy has any

Criminalizing non-evacuation is ultimately bad policy. There is no indication that first responder harm is somehow more extraordinary in the non-evacuation context than it is in other scenarios where first responders are called upon. As in all first responder operations, if the circumstances surrounding a rescue request are so severe as to make the operation impractical or impossible, it will not be attempted. Also, those who do receive assistance are doing no more than asking first responders to perform duties within their job description. The risks non-evacuators create for first responders are typical of those risks first responders regularly encounter. If legislatures criminalize one activity on the basis that it requires first responders to perform their duties, why not criminalize all activities that prompt emergency response? The answer that policymakers seem to rely upon is that non-evacuators are more culpable for putting first responders at risk. But, as this Comment demonstrates, the difference between non-evacuators and other victims of disaster is slight, if not nil. It is certainly insufficient to justify criminalization.

Furthermore, if the harm is to justify the means, the means ought to diminish the harm. Public welfare offense liability is an ineffective and unjustified sanction unless its imposition fixes the non-evacuation problem. The only way imposing strict criminal liability conceivably addresses these harms is by deterring non-evacuation behavior in the first place. However, in the case of Vulnerable Stayers, facilitation, rather than deterrence, is what is needed, and in the case of Willful Stayers, the deterrent effect of the law is questionable.

Compliance, or the lack of, with New York's statute criminalizing non-evacuation during Hurricane Sandy is illustrative.[186] One factor

place in lawmaking. In the non-evacuation context, this raises the question of whether the self-harm of non-evacuation is an appropriate basis for prohibiting the conduct. For more on this topic, see Jorissen, *supra* note 154, at 616. For a general discussion on the validity of paternalism, see David L. Shapiro, *Courts, Legislatures, and Paternalism*, 74 VA. L. REV. 519 (1988); Eric Tennen, *Is the Constitution in Harm's Way? Substantive Due Process and Criminal Law*, 8 BOALT J. CRIM. L. 3 (2004).

186. *See, e.g.*, Nathaniel Herz, *Don't Blame Irene*, THE N.Y. WORLD (Nov. 8, 2012), http://www.thenewyorkworld.com/2012/11/08/dont-blame-irene/.

indicating compliance was the number of citizens who took refuge in shelters.[187] While 9,600 people took refuge in shelters in 2011 when Hurricane Irene hit (before the law was effective), only 6,100 people took refuge in shelters as Hurricane Sandy approached in 2012 (after the law was effective).[188] If the possibility of criminal sanctions effectively deterred people, presumably more people would have sought refuge in shelters during Sandy.

Several studies have found that the criminal law is, on the whole, an ineffective deterrent to criminal conduct.[189] Potential offenders are often unaware of the law.[190] If they know the law, they make their decision based on a cost-benefit analysis, and because potential offenders perceive a low likelihood of detection, this analysis commonly encourages violation.[191] Even if that analysis urges compliance, criminals still commonly fail to comply because of overriding social or situational influences.[192] Although preventing non-evacuation through deterrence would guard the safety of first responders and non-evacuators, imposing criminal liability cannot achieve that objective when it fails to provide Vulnerable Stayers with the choice and fails to deter Willful Stayers from making the choice.

*c. Prosecutorial discretion and criminal defenses.* Prosecutorial discretion could ameliorate some of the problems identified above, such as the prosecution of victims like Ms. Dresch or the prosecution of Vulnerable Stayers. The initial decision to charge an individual largely depends on the prosecutor's discretion.[193] To justify

187. *Id.*

188. *Id.*

189. *See, e.g.*, Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?*, 100 J. CRIM. L. & CRIMINOLOGY 765, 766 (2010); Paul H. Robinson, *Criminal Justice in the Information Age: A Punishment Theory Paradox*, 1 OHIO ST. J. CRIM. L. 683 (2004); Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Social Science Investigation,* 24 OXFORD J. LEGAL STUD. 173 (2004) [hereinafter Robinson, *Does Criminal Law Deter?*]; Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949 (2003).

190. Robinson, *Does Criminal Law Deter?*, *supra* note 189, at 174.

191. *Id.*

192. *Id.*

193. Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 FORDHAM L. REV. 851, 862 (1995).

prosecution, the prosecutor only needs to establish that there is probable cause to believe the accused committed the offense.[194] Prosecutorial discretion is an important limitation on the law's potential to indict innocent or undeserving individuals: it is the precise instrument that comes to mind when dealing with cases such as Ms. Dresch.[195]

While prosecutorial discretion may enable undeserving or unremarkable defendants to escape prosecution, there are reasons relying on this principle is undesirable. The depth of freedom in plotting a prosecutorial course necessarily translates into a great deal of power.[196] At least one author has suggested that it "gives prosecutors more power than any other criminal justice officials, with practically no corresponding accountability to the public they serve."[197] Because the decision to bring a charge, dismiss a charge already brought, or forgo charging altogether is, for the most part, immune to judicial review,[198] the discretion is especially prone to abuse.

Research showing prosecutors' propensity to make racially based decisions makes reliance on discretion particularly alarming. "Evidence collected in scholarly articles indicates that the race of the defendant and the victim sometimes affects the prosecutor's decision to file charges at all, her selection of the severity of charges to file, and which charges to file."[199] The fact that so many African American defendants and victims lack power or are otherwise disadvantaged increases the likelihood that prosecutors will "treat them less well

194. *Id.*

195. *See, e.g.*, Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 20 (1998) ("One easily thinks of the prototypical case of a poor man who steals a loaf of bread to feed his starving family. Few would question the propriety or fairness of a prosecutorial decision to dismiss criminal charges against this criminal defendant. Such a decision could not be made in the absence of some level of discretion.").

196. Meares, *supra* note 193, at 863.

197. Davis, *supra* note 195, at 18 (citations omitted).

198. Meares, *supra* note 193, at 862.

199. *Id.* at 888–89 (citing Randolph N. Stone, *The Criminal Justice System: Unfair and Ineffective*, 2 HARV. J. AFR. AM. PUB. POL'Y 53, 63–64 (1993)); *see also* Davis, *supra* note 195, at 16–17 ("[B]ecause prosecutors play such a dominant and commanding role in the criminal justice system through the exercise of broad, unchecked discretion, their role in the complexities of racial inequality in the criminal process is inextricable and profound.").

than whites."[200] Because so many non-evacuators, especially Vulnerable Stayers, are part of minority communities, prosecutorial discretion seems to be an inadequate protection against abuse.

In the event prosecutors elect to prosecute individuals like Ms. Dresch or Vulnerable Stayers, a criminal defense of justification or excuse may also serve as protection. Justification concedes that the defendant committed the act, but claims that the act was not wrongful.[201] The relevant justification defense is that of necessity. This arises when natural forces confront a person in an emergency with a choice of two evils.[202] If violating the law will cause relatively less harm than complying with it, the act is considered a necessity and is, therefore, justified.[203] Excuse, on the other hand, concedes that the defendant committed the act, but seeks "to avoid the attribution of the act to the actor."[204] An excuse can shield liability when the actor's ability to make unencumbered decisions or to meaningfully control his behavior is impaired.[205]

While it is not hard to imagine how these defenses could apply in various non-evacuation circumstances, several factors impair their ability to protect defendants. First, in the evacuation context, application of these defenses would be novel. Necessity tends to deal with "the destruction of another's property to prevent further destruction to more property or to save lives,"[206] while excuse tends to involve defenses such as duress, insanity, and immaturity.[207] Second, the successful assertion of such defenses will often require the intervention of counsel. Notably, "the Sixth Amendment right to counsel does not apply to all misdemeanors," and may therefore not

200. Davis, *supra* note 195, at 32.

201. GEORGE FLETCHER, RETHINKING CRIMINAL LAW 759 (2000).

202. Eugene R. Milhizer, *Justification and Excuse: What They Were, What They Are, and What They Ought to Be*, 78 ST. JOHN'S L. REV. 725, 813 (2004).

203. *Id*.

204. FLETCHER, *supra* note 201.

205. *See* Milhizer, *supra* note 202, at 818.

206. Jorissen, *supra* note 154, at 611.

207. Milhizer, *supra* note 202, at 816 n.469.

apply to non-evacuation charges.[208] While the Supreme Court has ruled that "any imposed or suspended sentence of incarceration triggers the right to counsel,"[209] crimes that merely impose fines, such as non-evacuation in some instances, do not trigger the right.[210] Furthermore, "a Bureau of Justice report found that 28% of jail inmates charged with misdemeanors stated, when interviewed, that they had no counsel."[211] Vulnerable Stayers are likely to be vulnerable in many areas of their lives. They are more likely to not have the luxury of hiring attorneys to defend their cases. Although public defenders may be provided,[212] defendants may not understand the significance of accepting such assistance and may waive that right. While prosecutorial discretion and criminal defenses may aid in protecting innocent or indigent offenders, these protections as they apply to the non-evacuation problem are inadequate to fully address the potential inequities.

*3. Symbolic impact*

Even if these laws are not enforced through traditional means, such as arrest and relocation and prosecution, they have an expressive impact upon those within and without its jurisdiction. At the outset, it is important to note that "[p]revailing norms, like preferences and beliefs, are not a presocial given but a product of a complex set of social forces," and law is only one of those forces.[213] Thus, the issues to be discussed are not solely the product of the laws at issue, but laws certainly contribute. To fully assess the

208. Jenny Roberts, *Why Misdemeanors Matter: Defining Effective Advocacy in the Lower Criminal Courts*, 45 U.C. DAVIS L. REV. 277, 310 (2011).

209. *Id*. at 311 & n.144 (citing Alabama v. Shelton, 535 U.S. 654, 662 (2002)).

210. *See id*. at 311 & n.146 (citing Scott v. Illinois, 440 U.S. 367, 373–74 (1979)).

211. *Id*. at 312. The survey does not indicate the demographics of those surveyed, so it is not entirely clear whether the survey results reflect an inequity for one group over another. However, even assuming that the results reflect an equal impact along racial and socio-economic lines, the results still suggest that many persons would be devoid of the legal counsel essential to successfully mounting a legal defense.

212. Gideon v. Wainwright, 372 U.S. 335, 340 (1963).

213. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2026 (1996).

expressive impact, I will consider the norms that criminalization of non-evacuation communicates and how social enforcement of those norms impacts non-evacuators.

The basic message criminalizing non-evacuation sends is that people should evacuate. This is, overall, an uncontroversial directive. However, its simplicity makes it dangerous. If the norm is simply that one must evacuate when ordered to do so, this fails to account for the litany of legitimate reasons people disobey. One would hope that the public could appreciate the complicated plight of those facing an evacuation decision, but research suggests that the public fails to discriminate.[214] One study already mentioned here[215] showed that two classes of post-Katrina observers—relief workers and lay observers—condemned non-evacuators by "using one particular set of assumptions about the culturally 'right' way to act."[216] As discussed previously, the non-evacuators viewed their decision differently, and for good reason, citing a number of option-limiting factors.[217] This study supports the conclusion that, generally, the public fails to account for the nuanced circumstances that prevent compliance with evacuation orders.

The indiscriminate condemnation is troubling for several reasons. First, unlike traditional enforcement, the public is not obligated to give due process before issuing judgment and condemnation.[218] This means there is no obligatory fact-finding, investigation, or benefit of doubt. "[S]urely an offender cannot be said to deserve the vague punishment given by ill-informed societal condemnation any more than an innocent person deserves the culpability judgment of an ill-informed factfinder."[219]

214. *See generally* Stephens et al., *supra* note 8.

215. *See id.*

216. *See id.* at 884.

217. *See supra* text accompanying notes 145–48.

218. David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811, 1819 (2001) (citing Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 6 (1991)).

219. Adam J. Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182, 209 (2009).

Second, while expressive enforcement may be constructive for Willful Stayers, its indiscriminate application against Vulnerable Stayers reinforces prejudicial attitudes. For Willful Stayers, the factors emboldening them to stay are not as compelling, and social condemnation following a disaster may convince them to evacuate the next time a disaster strikes. However, in the case of Vulnerable Stayers, expressive enforcement cannot be productive because Vulnerable Stayers need help, not coercion or reprobation. Rather than encouraging evacuation, condemnation will simply bolster and further solidify the prejudices already directed at these citizens. When society expresses its derogation for non-evacuators, those feelings of derogation will likely spill over from the act to the actor, especially if the observer already holds prejudices associated with the actor's characteristics.

To understand how this process works and why it matters, we need to ascertain the qualities associated with non-evacuators generally, the actual qualities of Vulnerable Stayers, and the stereotypes already associated with Vulnerable Stayers. The public generally views non-evacuation as a passive, irresponsible, careless, and stubborn act.[220] Lay observers, relief workers,[221] and government officials[222] embrace this sentiment. With respect to the actual qualities of Vulnerable Stayers, they are presumably vulnerable because they are poor, uneducated, or otherwise underprivileged. As history has shown, those falling into this category are too often racial minorities. In Hurricane Katrina, for example,

> [i]t was a largely African American and often poor populace that had lived in the areas most vulnerable to the collapse of the levees, that proved unable to secure transportation to evacuate the city, and that was now scrambling in frightening conditions to secure scarce aid for their families, their friends, and themselves.[223]

220. *See* Stephens et al., *supra* note 8, at 880.

221. *Id*. at 884.

222. *See supra* text accompanying notes 9–14.

223. PASTOR ET AL., *supra* note 2, at 1.

While it is possible that misdirected social condemnation may create new stigmas about new groups of people, it is more likely that it will reinforce those stigmas already in place. In light of this country's history of racism, it is not hard to imagine where those stigmas exist. Research has shown that whites "view African-Americans as a violent black underclass, associating traits like aggressiveness, violence, and hostility with their stereotypical opinions."[224] In fact, "for many whites, crime policy attitudes are fueled by their racial beliefs."[225] "Research has also demonstrated that even whites who consider themselves to be nonbiased and liberal nonetheless harbor unconscious racist attitudes and behave in racist fashion toward blacks."[226]

Combining these findings, when the negative perceptions of the act of non-evacuation gradually become integrated into the actor, the public will likely view both the act and the actor negatively. But when the actor is already the target of prejudice, the social condemner feels validated not only in his condemnation of the act, but also in his preexisting prejudices. By making non-evacuation a crime, legislatures enable the public to reinforce established stereotypes.

Even if non-evacuation laws are not enforced through traditional means, they will have a negative impact on non-evacuators. This is particularly true for Vulnerable Stayers who are condemned and further marginalized for an innocent act.

## V. CONCLUSION

In late 2005, a Select Bipartisan Committee formed by the U.S. House of Representatives investigated the failures of the

224. Sherrie Armstrong Tomlinson, *No New Orleanians Left Behind: An Examination of the Disparate Impact of Hurricane Katrina on Minorities*, 38 CONN. L. REV. 1153, 1169–70 (2006) (quoting John Hurwitz & Mark Peffley, *Public Perceptions of Race and Crime: The Role of Racial Stereotypes*, 41 AM. J. POL. SCI. 375, 393 (1997)) (internal quotation marks omitted).

225. *Id*.

226. *Id*. (quoting Ann C. McGinley, *¡Viva La Evolución!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415, 426 (2000)) (internal quotation marks omitted).

governmental response to Katrina.[227] Throughout these hearings, two views emerged concerning the purpose of mandatory evacuation orders: (1) evacuation orders trigger the obligation to *provide for* people, and (2) evacuation "orders entail *deciding for* people."[228] Despite recognizing these dual obligations during the hearing, "[t]he view that the government bore an obligation not only to provide for the public but also to compel them to evacuate did not appear in the committee's final report."[229] If policymakers are going to effect a meaningful change in evacuation behavior, they must begin by adopting policies that account for both of these obligations.

Criminalization ultimately goes too far in advancing the deciding-for obligation, and does so at the expense of the providing-for responsibility. While encouraging evacuation is a worthy goal, criminalization frames non-evacuation solely as a malfunction of human agency, and thus fails to address some of the most fundamental obstacles. A substantial group of citizens fail to evacuate not because they lack adequate incentive, but because they lack adequate resources. These citizens need help, not punishment. Criminalization, rather than providing aid, affixes blame to victims, diminishes the role of governmental shortcomings, and threatens to further burden those already reduced to destitution by the disaster. While North Carolina's public welfare offense is designed to avert harm rather than affix blame, it does so at the risk of penalizing vulnerable, and ultimately innocent, citizens. Furthermore, non-evacuation primarily creates self-harm, and criminalization fails to mitigate that harm by inadequately deterring Willful Stayers and altogether neglecting Vulnerable Stayers. Even if government officials do not enforce the law in a traditional sense, the law's expressive impact will negatively contribute to public attitudes of non-evacuators, especially Vulnerable Stayers.

227. Fairchild et al., *supra* note 20, at 960.

228. *Id*. at 960

229. *Id*. at 961.

At its best, criminalizing non-evacuation encourages the status quo, and at its worst, it has potential to exacerbate the non-evacuation problem.

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