

# IT'S A TRAP!: RESPONSIBLE ENFORCEMENT OF TEXAS DISASTER EVACUATION ORDERS

*William S. Gribble\**

I. INTRODUCTION .....	725
II. DISASTERS, EVACUATIONS, AND THE LAW .....	726
A. <i>Legal Basis for Evacuations</i> .....	726
B. <i>The Functioning of an Evacuation</i> .....	728
C. <i>Why Is Enforcement Necessary?</i> .....	731
III. EVACUATION ENFORCEMENT MECHANISMS.....	732
A. <i>The Criminal Enforcement Mechanism</i> .....	732
B. <i>The Civil Recoupment Mechanism</i> .....	733
C. <i>Issues with Available Evacuation Enforcement Mechanisms</i> .....	734
1. <i>Criminal Enforcement Problems</i> .....	734
2. <i>Ambiguous Punishment</i> .....	735
3. <i>Civil Recoupment Problems</i> .....	736
4. <i>Tertiary Family Code Problems</i> .....	737
IV. ASSURING JUSTICE & EQUITY DURING AN EVACUATION.....	738
A. <i>The Affirmative Defense Option</i> .....	738
B. <i>The Statutory Exception Option</i> .....	739
C. <i>Addressing the Penalty Ambiguity &amp; Hybrid Nature</i> .....	740
V. CONCLUSION .....	741
APPENDIX A: SAMPLE STATUTORY EXCEPTION LANGUAGE.....	742

## I. INTRODUCTION

We see emergencies within our lives and communities every day without much fanfare. However, when emergencies impact entire neighborhoods, communities, or regions, they become disasters. Depending on its severity, residents can be forced to flee in search of safety. Texas has had nearly five times the annual average of federal disaster declarations than that of any other state in the union.<sup>1</sup> To manage emergencies and disasters,

---

\* J.D., Texas A&M University School of Law, 2017; Master of Public Administration focused in Disaster Management, American Military University, 2014; B.S. in Emergency Administration and Planning, University of North Texas, 2009; Certified Law Enforcement Planner, International Association of Law Enforcement Planners, 2015. U.S. Army Captain and a member of the United States Army's Judge Advocate General's Corps. The views and opinions expressed in this Article are the author's and are not that of the Department of Defense, Department of the Army, or the International Association of Law Enforcement Planners. A special thank you to my son Connor for his guidance and assistance preparing this research.

1. See *Disaster Declarations by State/Tribal Government*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/disasters/state-tribal-government/0/TX> (last visited May 30, 2020). There are

Texas law affords local governments numerous powers, including the authority to order evacuations.<sup>2</sup> While many states have a single mechanism to enforce evacuation orders, Texas has both a civil (recovery of rescue expenses) and criminal (misdemeanor offense) enforcement mechanism.<sup>3</sup> While the criminal mechanism has a misdemeanor offense tied to it, the civil mechanism allows jurisdictions to recover the cost of a rescue from people who ignored an evacuation order.<sup>4</sup> This Article examines Texas's dual enforcement approach and the need for a statutory exception. This Article does not examine (1) whether "mandatory" evacuations constitute a Fifth Amendment "taking" or (2) whether a moral duty to rescue exists during a disaster.

## II. DISASTERS, EVACUATIONS, AND THE LAW

### *A. Legal Basis for Evacuations*

What are colloquially called types of "disasters" are technically types of "hazards."<sup>5</sup> Hazards can exist without impacting humans.<sup>6</sup> Disasters occur when a hazard intersects everyday life, significantly altering a community's normal routine.<sup>7</sup> Historically, our society tends to focus resources towards preventing or mitigating the last major disaster.<sup>8</sup> As part of the human condition, we naturally prepare and manage emergencies; however, our method and strategies vary based on our experiences, resources, cultures, and social structures.<sup>9</sup> This informs our legal authorities to manage the effects and impacts of a disaster.

---

4,163 total federal disaster declarations (with Texas accounting for 354 federal disaster-related declarations since 1953), an average of 71 per state. *See id.*

2. *See infra* Part II (discussing the Texas Government Code provisions that authorize municipalities to order evacuations).

3. *See infra* Part III (explaining both enforcement mechanisms).

4. *See infra* Part IV (advocating for a statutory exception to the enforcement mechanisms).

5. *See* Thomas Cova, *GIS in Emergency Management*, in *GEOGRAPHIC INFORMATION SYSTEMS: PRINCIPLES, TECHNIQUES, APPLICATIONS, AND MANAGEMENT* 847–48 (Paul A. Longley, Michael F. Goodchild, David G. Maguire & David W. Rhind eds., 1999).

6. *See* E.L. Quarantelli, Patrick Legadec & Arjen Boin, *A Heuristic Approach to Future Disasters and Crises: New, Old, and In-Between Types*, in *HANDBOOKS OF SOCIOLOGY AND SOCIAL RESEARCH* 22–27 (Havidán Rodríguez, Enrico L. Quarantelli, & Russell R. Dynes eds., 2007).

7. Quarantelli et al., *supra* note 6, at 16–17; Olga Petrucci, *The Impact of Natural Disasters: Simplified Procedures and Open Problems*, in *APPROACHES TO MANAGING DISASTER - ASSESSING HAZARDS, EMERGENCIES AND DISASTER IMPACTS*, 109 (John Tiefenbacher ed., 2012).

8. *See, e.g.*, GEORGE D. HADDOW, JANE A BULLOCK, & DAMON P. COPPOLA, *INTRODUCTION TO EMERGENCY MANAGEMENT* 2–5 (4th ed. 2011) (providing a historical perspective of federal emergency management from the 1800s to the 1970s).

9. *Id.* at 17–21.

The Tenth Amendment has been interpreted to give states “police powers,”<sup>10</sup> and to allow for state laws and local ordinances to preserve, protect, and improve the general welfare of the state’s citizens.<sup>11</sup> Texas primarily places the responsibility of preparing for and responding to disasters upon the local government—county and municipal.<sup>12</sup> Though the Governor is responsible for ensuring the state can meet “the dangers . . . presented by disasters,” the county and municipal entities are the leads for their jurisdictions.<sup>13</sup> Responsibility at the lowest level maintains the efficient “bottom-up” approach that the War Department recommended in 1947 that many states follow today.<sup>14</sup> This tiered system of emergency response layers more assets and capabilities on top of the local response from higher echelons of government until the situation is stabilized.<sup>15</sup>

As their jurisdiction’s Emergency Management Director (EMD), Texas law authorizes county judges and mayors to order evacuation of areas that have been struck by, or are about to be struck by, disaster.<sup>16</sup> This includes the use of reasonable force to remove individuals from a disaster area or making them civilly liable for remaining in the area following a disaster.<sup>17</sup> While the Governor may recommend evacuation and control how people leave a designated disaster area, Texas stops short of any gubernatorial evacuation powers absent a concurrent local evacuation order.<sup>18</sup> This can potentially create a checkerboard confusion effect across a region where some municipalities issue evacuation orders, while others do not.<sup>19</sup>

---

10. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); see *Brown v. Brannon*, 399 F. Supp. 133, 147 (M.D.N.C. 1975), *aff’d*, 535 F.2d 1249 (4th Cir. 1976) (“The exercise of the police power for the general welfare of the public is a right reserved to the states . . .”).

11. *Brannon*, 399 F. Supp. at 147–48; *accord* *Kleid v. Bd. of Ed. of Fulton, Ky. Indep. Sch. Dist.*, 406 F. Supp. 902, 905 (W.D. Ky. 1976) (“Each state has an interest [and right—pursuant to its police power—to enact legislation that attempts to improve and] protect[] the health and . . . well-being of [its] citizens.”).

12. TEX. GOV’T CODE ANN. §§ 418.1015(b), .102(b); see *id.* § 418.103(b) (requiring county and municipal emergency management programs be coordinated).

13. See *id.* §§ 418.011–.018, .1015(b), .102(b).

14. See U.S. DEP’T HOMELAND SEC. NAT’L PREPAREDNESS TASK FORCE, CIVIL DEFENSE AND HOMELAND SECURITY: A SHORT HISTORY OF NATIONAL PREPAREDNESS EFFORTS 6 (2006), <https://training.fema.gov/hiedu/docs/dhs%20civil%20defense-hs%20-%20short%20history.pdf>. The War Department’s Civil Defense Board noted that civil defense was best implemented locally through “self-help” and driven at the local level. *Id.* This “bottom-up” approach is still used today in United States Emergency Management. *Id.*; see GOV’T §§ 418.011–.018, 418.1015(b), 418.102(b); IDAHO CODE ANN. §§ 46-1008, 1011 (West, Westlaw through ch. 22 of the 2020 2d Reg. Sess. of the 65th Idaho Leg.); 63 OKLA. STAT. ANN. tit. 63, § 683.11 (West, Westlaw through ch. 4 of the 2d Reg. Sess. of the 57th Leg.).

15. HOMELAND SEC., NATIONAL RESPONSE FRAMEWORK, 6–7 (4th ed. 2019).

16. See GOV’T §§ 418.185(c), .1015(a) (“The presiding officer of the governing body of an incorporated city or a county or the chief administrative officer of a joint board is designated as the emergency management director . . .”).

17. *Id.* § 418.185(b), (d).

18. *Id.* § 418.018.

19. See Brandon Formby & Edgar Walters, *Ahead of Hurricane Harvey, Officials Send Texans Mixed Messages on Evacuations*, TEX. TRIB. (Aug. 25, 2017, 6:00 PM), <https://www.texastribune.org/2017>

Texas law only recognizes mandatory evacuation orders.<sup>20</sup> Common practice, however, has implemented voluntary evacuation orders.<sup>21</sup> Voluntary evacuation orders carry little weight in Texas and are essentially non-binding recommendations.<sup>22</sup> Mandatory evacuation orders require everyone to leave a specific area within or leave the jurisdiction entirely.<sup>23</sup> This activates all or part of a jurisdiction's Emergency Management Plan (EMP)<sup>24</sup> and once in place, triggers both civil and criminal liabilities.<sup>25</sup>

### B. The Functioning of an Evacuation

Evacuations range in scale from a neighborhood to entire regions and may not be necessary for every disaster. For example, in 2015 a Waxahachie, Texas neighborhood was evacuated for fear of the natural-gas saturated sewer lines turning a quiet neighborhood into a belated Fourth of July fireworks display.<sup>26</sup> As such no disaster declarations were issued, though an evacuation occurred. In contrast, before Hurricane Harvey made landfall along the Texas Coast in 2017, the Texas Governor encouraged many to evacuate.<sup>27</sup> However, local governments had to be the ones to issue the evacuation order and request state support, and there was no evacuation accounting system.<sup>28</sup>

Evacuations generally function “in five phases: [(1)] mobilization, [(2)] evacuation and shelter-in-place, [(3)] impact, [(4)] displacement/mass

---

7/08/25/officials-send-texans-mixed-messages-hurricane-evacuations/.

20. GOV'T § 418.185(b).

21. See *Mandatory, Voluntary Evacuations Issued Across Houston Area*, CLICK 2 HOUS. (Sept. 8, 2017, 12:55 PM), <https://www.click2houston.com/news/2017/09/08/mandatory-voluntary-evacuations-is-sued-across-houston-area/>.

22. See *Gosby v. State*, No. 09-92-277-CR, 1993 WL 429799, at \*1 (Tex. App.—Beaumont Oct. 20, 1993, no writ). A voluntary evacuation order was not enough to convince a judge to grant a continuance to court proceedings. *Id.*

23. GOV'T § 418.185(b)–(c).

24. See *Emergency Operations Plan (EOP)*, CAL. HOSP. ASS'N: EMERGENCY PREPAREDNESS, <https://www.calhospitalprepare.org/emergency-operations-plan> (last visited May 30, 2020). An Emergency Management Plan (EMP) is sometimes referred to as the Emergency Operations Plan (EOP). *Id.*

25. GOV'T § 418.108(d).

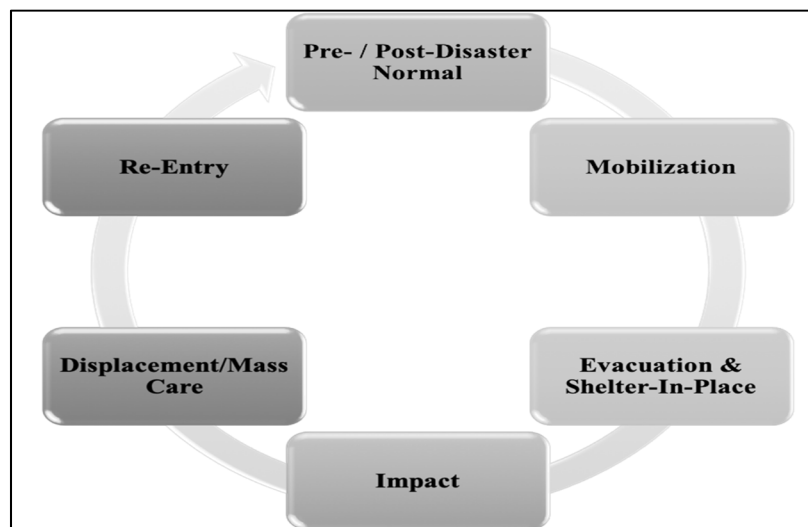
26. Jennifer Lindgren, *Families Return Home After Waxahachie Blast*, CBS DFW (Sept. 22, 2015, 1:42 PM) <http://dfw.cbslocal.com/2015/09/22/families-return-home-after-waxahachie-blast/>; *New Details on Cause of Waxahachie Home Explosion*, CBS DFW (Sept. 28, 2015, 4:29 PM) <http://dfw.cbslocal.com/2015/09/28/new-details-on-cause-of-waxahachie-home-explosion/>.

27. Angela Fritz, *Texas Governor Urges People to Evacuate, Even If It's Not 'Mandatory'*, WASH. POST (Aug. 25, 2017, 1:31 PM), [https://www.washingtonpost.com/national/2017/live-updates/weather/hurricane-harvey-updates-preparation-evacuations-forecast-storm-latest/texas-governor-asks-people-to-evacuate-even-if-its-not-mandatory/?noredirect=on&utm\\_term=.429646aa37eb](https://www.washingtonpost.com/national/2017/live-updates/weather/hurricane-harvey-updates-preparation-evacuations-forecast-storm-latest/texas-governor-asks-people-to-evacuate-even-if-its-not-mandatory/?noredirect=on&utm_term=.429646aa37eb).

28. *Id.* While it would not track evacuation orders, in 2017 the 85th Texas Legislature sought to require disaster declarations to be published on a jurisdiction's website. Tex. S.B. 1897, 85th Leg., R.S. (2017). While the Senate passed the bill and reported favorable out of House committee, it was never voted on and not reintroduced during the 86th Texas Legislature in 2019. See *id.*

care, and [(5)] re-entry.”<sup>29</sup> During mobilization, the jurisdiction identifies a potential evacuation situation, and the jurisdiction’s leadership begins its local warning protocol.<sup>30</sup> This phase starts the decision-making process for officials to determine if they will advise residents to shelter-in-place or issue an evacuation order.<sup>31</sup>

Once a jurisdiction’s leadership makes a decision, the evacuation and shelter-in-place phase begins.<sup>32</sup> Keep in mind that legally speaking, in Texas, there is no such thing as a voluntary evacuation order.<sup>33</sup> It is either evacuate or not.



It is important to realize that sheltering-in-place during a disaster can often be a viable option (for example, during a pandemic such as COVID-19). A decision to shelter-in-place is largely based on the nature of the hazard compared to the capability, resources, and ability of individuals to defend their property or take protective actions against the hazard.<sup>34</sup> This phase feeds into the impact phase, when the disaster actually strikes.<sup>35</sup>

29. See U.S. DEP’T HOMELAND SEC., FED. EMERGENCY MGMT. AGENCY, PLANNING CONSIDERATIONS: EVACUATION AND SHELTER-IN-PLACE 5 (2019), [https://www.fema.gov/media-library-data/1564165488078-09ab4aac641f77fe7b7dd30bad21526b/Planning\\_Considerations\\_Evacuation\\_and\\_Shelter-in-Place.pdf](https://www.fema.gov/media-library-data/1564165488078-09ab4aac641f77fe7b7dd30bad21526b/Planning_Considerations_Evacuation_and_Shelter-in-Place.pdf).

30. See *id.*

31. See generally Thomas Cova et al., *Protective Actions in Wildfires: Evacuate or Shelter-in-Place?*, NAT. HAZARDS REV., 151, 151–53 (2009); Michael K. Lindell & Carla S. Prater, *A Hurricane Evacuation Management Decision Support System (EMDSS)*, NAT. HAZARDS REV. (2007).

32. See U.S. DEP’T HOMELAND SEC., *supra* note 29, at 6.

33. See TEX. GOV’T CODE ANN. § 418.185(b)–(c); *Gosby v. State*, No. 09-92-277-CR, 1993 WL 429799 (Tex. App.—Beaumont Oct. 20, 1993, no writ).

34. See Cova et al., *supra* note 31, at 151–52.

35. See *id.* at 152.

The fourth phase involves the displacement of evacuees and mass care of those evacuees until their community is safe again.<sup>36</sup> When sheltering, individuals stay in: (1) hotels, motels, or other extended stay facilities; (2) with friends or family; or (3) emergency shelters provided by the government or non-profits.<sup>37</sup> Not every evacuation requires long-term mass care; mass care is simply when host jurisdictions provide necessities (food, water, and information) and shelter.<sup>38</sup> This phase tends to receive the most attention and is probably both the most stressful and financially burdensome phase because evacuees usually cannot plan for or time these expenses. Fortunately, during instances where a Federal Major Disaster or Emergency Declaration is issued, FEMA's Individual and Public Assistance Grant Programs can help offset the costs.<sup>39</sup> The American Red Cross, which assists in running many shelters across the nation, has the primary responsibility for sheltering and mass care for the federal government.<sup>40</sup>

The final phase is re-entry.<sup>41</sup> Re-entry is an incredibly delicate and deliberate process so that a community is able and ready to handle the influx of evacuees returning to the post-disaster area.<sup>42</sup> Once an area is evacuated, there is a potential for arrest and prosecution for returning early or being in an evacuated area without a reason.<sup>43</sup> During the re-entry phase, those who evacuated make their way back to their homes to either pick up where they left off before the evacuation or begin the recovery process.<sup>44</sup> Despite popular belief, looting during a disaster is a relatively modern phenomenon.<sup>45</sup>

---

36. See U.S. DEP'T HOMELAND SEC., *supra* note 29, at 6.

37. *Id.* at 11–12.

38. *Id.* at 2. While not always considered a “necessity,” during disasters, information is a premium. This includes information about: (1) whether it is safe to return; (2) where assistance can be obtained; and (3) whether family members are safe. *Id.*

39. See U.S. DEP'T HOMELAND SEC., FED. EMERGENCY MGMT. AGENCY, PUBLIC ASSISTANCE APPLICANT HANDBOOK 2, 14 (2010) [https://www.fema.gov/pdf/government/grant/pa/fema323\\_app\\_han\\_dbk.pdf](https://www.fema.gov/pdf/government/grant/pa/fema323_app_han_dbk.pdf).

40. See 6 U.S.C. § 772(b)(2)(H) (2018); 36 U.S.C. § 300102(4) (2018).

41. See U.S. DEP'T HOMELAND SEC., *supra* note 29.

42. See Eric Besson, *Timing of Return Can Be as Tricky as Evacuation*, TEX. TRIB.: BEAUMONT ENTERPRISE (Sept. 22, 2015), <https://apps.texastribune.org/road-from-rita/the-difficult-return/>.

43. See TEX. GOV'T CODE ANN. §§ 418.018, .050; Kellen Browning, *Two More Arrested in Redding for Entering Evacuated Neighborhoods, Police Say*, SACRAMENTO BEE (July 30, 2018, 2:00 PM) <https://www.sacbee.com/news/california/fires/article215770635.html> (noting that two men were arrested for entering an evacuated area). While nothing specific allows for prosecution of someone for returning early, arguably this could be prosecuted by the state or local government under other penal code provisions. GOV'T §§ 418.018, .050.

44. See U.S. DEP'T HOMELAND SEC., *supra* note 29, at 6.

45. Compare Ronald Perry & Michael Lindell, *Preparedness for Emergency Response: Guidelines for the Emergency Planning Process*, 27 DISASTERS 341 (2003) (finding that looting in evacuation areas is extremely rare), with Bethany L. Brown, *Disaster Myth or Reality: Developing a Criminology of Disaster*, 17 SOC. CRIME, L. & DEVIANCE: DISASTERS, HAZARDS, & L. 3, 3–17 (Mathien Defiem ed., 2012) (finding that looting does not occur after most disasters).

### C. Why Is Enforcement Necessary?

While there is a movement afoot to reverse the trend, society has gradually shifted towards preparedness being considered a governmental responsibility instead of a personal responsibility.<sup>46</sup> Current studies suggest over half of Americans are not prepared for a disaster and even fewer have enough savings to cover a \$1,000 emergency expense.<sup>47</sup> Apathy towards disaster preparedness and an inability to prepare are significant factors in an evacuation.<sup>48</sup> Sometimes apathy towards evacuation orders can stem from past successful experiences from riding out a storm or attitudes towards the local government.<sup>49</sup> However, others may not have the resources to evacuate and support their household's prolonged displacement.<sup>50</sup> Though not widely recognized terms, there are generally two types of non-evacuators: "willful stayers" and "vulnerable stayers."<sup>51</sup>

A "willful stayer" can be described as someone with an apathetic attitude towards: (a) disaster preparedness; (b) following disaster guidance from local officials; or (c) a combination of the two.<sup>52</sup> A "vulnerable stayer" may want to evacuate but cannot due to lack of resources, abilities, or social pressure.<sup>53</sup> Often, the issue of whether a vulnerable stayer may evacuate turns on the resources, willingness, and abilities of individuals within the vulnerable stayer's immediate familial network.<sup>54</sup> For example, during Hurricane Katrina in 2005, many who received evacuation orders did not evacuate because they were concerned with: (a) losing their job; (b) lacking transportation; (c) having enough money to cover gas, hotels, and food for

---

46. See Ana-Marie Jones, *Use of Fear and Threat-Based Messages to Motivate Preparedness: Costs, Consequences, and Other Choices Part One*, 6 J. BUS. CONTINUITY & EMERGENCY PLAN. 180 (2013); U.S. DEP'T HOMELAND SEC., FED. EMERGENCY MGMT. AGENCY, 2018–2022 STRATEGIC PLAN 7, 12–19 (2018), [https://www.fema.gov/media-library-data/1533052524696-b5137201a4614ade5e0129ef01cbf661/strat\\_plan.pdf](https://www.fema.gov/media-library-data/1533052524696-b5137201a4614ade5e0129ef01cbf661/strat_plan.pdf).

47. See Jones, *supra* note 46; Lyle Adriano, *Allstate: Almost 60% of Americans Unprepared for Natural Disaster*, INS. BUS. MAG. (America) (Sept. 3, 2019) [https://www.insurancebusinessmag.com/us/news/catastrophe/allstate-almost-60-of-americans-unprepared-for-natural-disaster-176897.aspx?fbclid=IwAR1K\\_rLFiROvYRD6xQ8YrOIO-RH6sZDHbOO1YDtt5rDjASYK2wQQki6Lnjc](https://www.insurancebusinessmag.com/us/news/catastrophe/allstate-almost-60-of-americans-unprepared-for-natural-disaster-176897.aspx?fbclid=IwAR1K_rLFiROvYRD6xQ8YrOIO-RH6sZDHbOO1YDtt5rDjASYK2wQQki6Lnjc).

48. See Earl Baker, *Hurricane Evacuation Behavior*, 9 INT'L J. OF MASS EMERGENCIES & DISASTERS 287, 302–06 (1991), <https://training.fema.gov/emiweb/downloads/ijems/articles/hurricane%20evacuation%20behavior.pdf>; Tanya L. Settles, *Federalism, Law, and the Ethics of Disaster Evacuations*, 17 SOC. CRIME, L. & DEVIANCE: DISASTERS, HAZARDS, AND L., 65, 73–74 (Mathien Defiem ed., 2012); Brian Resnick, *Why Some People Never Evacuate During a Hurricane, According to a Psychologist*, VOX (Sept. 14, 2018, 11:11 AM), <https://www.vox.com/science-and-health/2017/8/25/16202296/hurricane-florence-2018-evacuation-psychology>.

49. Settles, *supra* note 48, at 73–74.

50. See Baker, *supra* note 48, at 293–94.

51. Brandon Curtis, *Criminalizing Non-Evacuation Behavior: Unintended Consequences and Undesirable Results*, 2015 B.Y.U. L. REV. 503, 526–28 (2015).

52. See *id.*

53. *Id.*

54. David P. Eisenman et al., *Disaster Planning and Risk Communication with Vulnerable Communities: Lessons from Hurricane Katrina*, 97 AM. J. PUB. HEALTH S109, S111–12 (2007).

their family while evacuated; or (d) maintaining obligations to family members (especially the elderly) who resisted evacuation.<sup>55</sup> Defining whether an individual is a vulnerable stayer or not frequently turns on the presence of these factors.<sup>56</sup>

### III. EVACUATION ENFORCEMENT MECHANISMS

#### A. The Criminal Enforcement Mechanism

A state, local, or interjurisdictional emergency management plan may provide that failure to comply with the plan or with a rule, order, or ordinance adopted under the plan is an offense. . . .

The plan may prescribe a punishment for the offense but may not prescribe a fine that exceeds \$1,000 or confinement in jail for a term that exceeds 180 days.<sup>57</sup>

Though force may be used to compel evacuation, the specific crime does not exist in the Texas Penal Code.<sup>58</sup> Because the authority to use force does not create a criminal offense, some other provision is needed. While “Interference with Public Duties”<sup>59</sup> or “Resisting Arrest, Search, or Transportation” could potentially be used for failure to evacuate, they do not address the evacuation issue.<sup>60</sup> However, Texas law allows for a criminal penalty for failing to comply with a provision contained in an EMP.<sup>61</sup>

The criminal offense of noncompliance with an EMP does not naturally exist; it must be created by the EMP. This makes the criminal offense of EMP provisions a hybrid offense (a criminal offense enumerated outside the Penal

55. *Id.* at S113. As more transportation-oriented development is planned, Emergency Managers face the potential challenge to evacuate a larger class of vulnerable stayers who are completely dependent on public transportation. *See id.* at S112.

56. *Id.* at S111–13.

57. TEX. GOV'T CODE ANN. § 418.173.

58. *Id.* § 418.185(b).

59. TEX. PENAL CODE ANN. § 38.15. It is a Class B misdemeanor to “interrupt[,] disrupt[,] impede[,] or . . . interfere[] with . . . a peace officer” exercising their authority. *Id.* § 38.15(a)(1), (b). An evacuation order can create the “authority” for application of Texas Penal Code § 38.15. *See id.* The tricky part is proving an individual’s ignorance of the evacuation order meets the “interference” definition and must be more than mere “speech.” *See id.* § 38.15(d); *see also* *Carney v. State*, 31 S.W.3d 392, 396 (Tex. App.—Austin 2000, no pet.) (observing that § 38.15 provides a defense when the interference is merely speech).

60. PENAL § 38.03. It is a Class A misdemeanor to “intentionally [prevent] or [obstruct] a person [who they know] is a peace officer or a person acting in a peace officer’s presence and at his direction from effecting an arrest, search, or transportation of the actor or another by using force against the peace officer or another.” *Id.* § 38.03(a), (c). This can be seen as any amount of force, including “shak[ing] off an officer’s detaining grip whether by pushing or pulling.” *Clement v. State*, 248 S.W.3d 791, 797 (Tex. App.—Fort Worth 2008, no pet.) (citing *Sartain v. State*, 228 S.W.3d 416, 424 (Tex. App.—Fort Worth 2007, pet. ref’d)). Because this section provides for consequences for resisting an arrest, it would likely be aggravating the original offense. A Class A misdemeanor is punishable by a fine up to \$4,000, up to a year in jail, or both. PENAL § 12.21.

61. GOV'T § 418.173.



Code). Texas Government Code § 418.173(a) uses the term “may provide,” which is construed as granting permission, power, or discretionary authority, meaning not every jurisdiction has one.<sup>62</sup> Thus, to use the Chapter 418 penalty, an EMP must state that noncompliance with the plan is a criminal offense and it must designate prison or a fine as punishment.<sup>63</sup>

There is the additional issue that if there is not enough notice of an offense, there could be a level of voidability to the offense.<sup>64</sup> This means that if an Emergency Operations Plan (EOP) that has the offense enumerated in it is withheld from the public for “security,” the penalty may become unenforceable.<sup>65</sup> However, an ordinance published in the local or county code would be more permissible and would allow for the EOP to remain closed hold.

### B. The Civil Recoupment Mechanism

Civil recoupment reimburses Texas taxpayers for the expense of rescuing someone who ignored an evacuation order. Texas Government Code § 418.185(d) makes a person financially liable to a governmental entity or nonprofit agency that rescues them, if:

- (1) [t]he person knowingly ignored a mandatory evacuation order under this section and:
  - (A) engaged in an activity or course of action that a reasonable person would not have engaged in; or
  - (B) failed to take a course of action a reasonable person would have taken;
- (2) [t]he person’s actions under Subdivision (1) placed the person or another person in danger; and
- (3) a governmental rescue effort was undertaken on the person’s behalf.<sup>66</sup>

This approach gives consequences for ignoring an evacuation order, while not necessarily criminalizing the act of staying behind.<sup>67</sup> An individual triggers this mechanism when the individual ignores the evacuation order.<sup>68</sup>

---

62. GOV’T § 311.016(1).

63. *Id.* § 311.035(b); *see also* Letterman v. State, 171 S.W.2d 349, 350 (Tex. Crim. App. 1943) (noting that there is no limitation, other than a penalty capped by statute on a court’s discretion). Arguably, an EMP would not need to specify a punishment because § 417.173 could guide a court’s sentencing. *See id.*

64. *See* GOV’T § 418.106(d)–(e).

65. Soderman v. State, 915 S.W.2d 605, 610 (Tex. App.—Houston [14th Dist.] 1996, writ ref’d) (noting a penal statute cannot encourage arbitrary and erratic arrests and convictions, and must give fair notice to people of ordinary intelligence that their conduct is forbidden).

66. GOV’T § 418.185(d).

67. *See* Brenner M. Fissell, *Taxpayers as Victims: Taxpayer Harm & Criminalization*, 7 N.Y.U. J.L. & LIBERTY 126, 143–45 (2013).

68. *See id.*

The requirement for someone to “knowingly” ignore an evacuation order implies that an individual received some sort of notice of that evacuation order and then subsequently acted in a way that did not comply with the notice.<sup>69</sup> This is less than intentionally remaining behind. An intentional act is “[t]he process of doing or performing; an occurrence that results from a person’s will being exerted on the external world.”<sup>70</sup> Thus, knowingly means simply having notice and not evacuating, which is a lower standard than purposefully not evacuating.

These rescues can be pricey. For example, rescue flights from flood waters can be expensive, especially if the aircraft used to effect the rescue has a high hourly operating cost.<sup>71</sup> While there is not a procedural requirement to this mechanism, starting recoupment too soon after a rescue or disaster would likely cause public relations issues that would further complicate a disaster or emergency. An ethical issue would likely arise if rescue crews demanded payment at the time an individual is being rescued. Because costs of a rescue are generally determined after the rescue has already happened, the costs are likely to be billed to the local government, which can then pass the costs of the rescue to the individual.<sup>72</sup>

### *C. Issues with Available Evacuation Enforcement Mechanisms*

#### *1. Criminal Enforcement Problems*

Criminal law gives society a means for deterring, punishing, and rehabilitating those who commit non-socially-accepted acts.<sup>73</sup> Alleged crimes are examined to ensure: (a) the alleged offender has fair notice of prohibited conduct; (b) the alleged offender is protected from condemnation for noncriminal acts; and (c) prevent “oppressive treatment” of those alleged offenders.<sup>74</sup> This prompts the question: Which “stayer’s” actions do we need to criminalize to achieve compliance and deter defiance? Most importantly,

---

69. See GOV’T § 418.185(d)(1).

70. *Act*, BLACK’S LAW DICTIONARY (11th ed. 2019).

71. *Schedule of Equipment Rates*, FEMA, <https://www.fema.gov/schedule-equipment-rates> (last updated Aug. 28, 2019, 1:54 AM) (explaining the 2015 rate for a UH-60 during a major disaster or emergency declaration is \$3,063 per hour).

72. See *Water Rescue Comes at a Cost to Taxpayers*, FOX 7 AUSTIN (Jan. 23, 2015), <http://www.fox7austin.com/news/water-rescue-comes-at-a-cost-to-taxpayers> (explaining that an air ambulance could only bill for medical emergencies and related transportation). In this case the \$750 rescue was billed to Travis County. *Id.* Had there been an evacuation order, Travis County could have used the civil recoupment mechanism. See *id.*

73. TEX. PENAL CODE ANN. § 1.02(1); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 402–05 (1958). See Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089, 1089–93 (2010).

74. PENAL § 1.02(5); *Soderman v. State*, 915 S.W.2d 605, 610 (Tex. App.—Houston [14th Dist.] 1996, writ ref’d); Hart, *supra* note 73, at 402–05; see Robinson, *supra* note 73, at 1089–93.

to achieve a conviction at trial all elements of a criminal offense must be proven beyond a reasonable doubt.<sup>75</sup>

Criminal enforcement of evacuation orders gives proverbial teeth to an official's evacuation order—potentially preventing human suffering. On the surface, a sole criminal mechanism seems to provide uniform treatment across all social and economic backgrounds.<sup>76</sup> However, this could result in punishing individuals, who simply lack the resources, for not being able to evacuate.

## 2. *Ambiguous Punishment*

The ambiguity of § 148.173's misdemeanor classification spawned as a byproduct of several substantive and non-substantive changes to various state statutes, and finally merging together to become today's Texas Government Code. While Texas has had disaster related statutes since the 1950's, a criminal penalty has only existed in Texas since 1969.<sup>77</sup> In 1969, the Texas Militia Act was amended to grant enforcement powers for the state's executive branch and local municipalities, by stating:

Any violation of the provisions of this Act or any orders, rules, or regulations or ordinances promulgated hereunder shall be punishable as a misdemeanor and shall subject the offender to a fine of not more than \$200 or not more than 60 days incarceration, or both, upon conviction thereof.<sup>78</sup>

In 1980, an effort to streamline the different emergency management statutes in Texas moved relevant portions of the Texas Militia Act (Article 5890e) into the Texas Disaster Act of 1975.<sup>79</sup> Specifically, the 1980 amendment to Article 6889-7 moved the Texas Militia Act's penalty provision under § 17 and made it a Class B Misdemeanor, but without the ability to impose both fine and prison.<sup>80</sup>

---

75. TEX. CRIM. PROC. CODE ANN. § 38.03 (“All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt.”).

76. *See id.*

77. Act effective June 21, 1969, 61st Leg., R.S., ch. 877, § 10, 1969 Tex. Gen. Laws 2658, 2661 (granting the power to declare a state of emergency).

78. *Id.* At the time, each offense had its own punishment and was either a misdemeanor or a felony. Charles P. Bubany, *The Texas Penal Code of 1974*, 28 SW. L.J. 292, 322–23 (1974); *see also* Page Keeton & Seth S. Searcy III, *A New Penal Code for Texas*, 33 TEX. B.J. 980 (1970) (discussing changes to the Penal Code).

79. Act effective Aug. 31, 1981, 67th Leg., R.S., ch. 134, 1981 Tex. Gen. Laws 332.

80. *See* Acts 1981, 67th Leg., R.S., ch. 134, 1981 Tex. Gen. Laws 332, *repealed by* Acts 1987, 70th Leg., R.S., ch. 147, § 6(a), 1987 Tex. Gen. Laws 316 (noting that a Class B Misdemeanor's maximum fine when § 17 was added was \$1,000). The code was amended in 1991 to increase the fine to \$1,500 and amended again in 1993 to increase the fine to \$2,000. Act effective Sept. 1, 1991, 72nd Leg., R.S., ch. 108, § 1, 1991 Tex. Gen. Laws 681, 681–83; Act of Sept. 1, 1993, 73rd Leg., R.S., ch. 900, § 1.01, 1993 Tex. Gen. Laws 3586.

A state, local, or interjurisdictional emergency management plan may provide that failure to comply with the plan or with a rule, order, or ordinance adopted pursuant to the plan is an offense. The plan may not prescribe as punishment for the offense a fine that exceeds \$1,000 or confinement in jail for a term that exceeds 180 days.<sup>81</sup>

In 1987, the Emergency Management statutes were compiled into Chapter 418 of the Texas Government Code, which reflects the statutes in the way it reads today.<sup>82</sup>

While the term “misdemeanor” was dropped in 1980, it was likely a non-substantive change because the allowable punishments fell within the permissible ranges of a Class B or Class C Misdemeanor.<sup>83</sup> However, when § 17 and later § 418.173 were adopted by the Texas Legislature, the punishment prescribed fit squarely under the Texas Penal Code provision for a Class B Misdemeanor, but it did not fit a Class C Misdemeanor because confinement was permitted. However, the likely intent was to create a Class B Misdemeanor offense because the code revision project’s changes were not supposed to be substantive in nature.<sup>84</sup> This means the maximum penalty creates a special form of Class B Misdemeanor, one that is below the maximum fine and limited in punishment range.

### 3. Civil Recoupment Problems

During recovery, the economic impact of a disaster is at its most prevalent. Households that are in a delicate financial balance pre-disaster will find their financial world upside down following a disaster. A disaster can sometimes cause a breakdown in the network of a local community’s households, businesses, and services that could otherwise support a quick and full recovery.<sup>85</sup> In fact, a 2005 study noted that bankruptcy filings can increase by 50% following a major disaster (compared to unaffected areas), with poorer areas experiencing higher filing rates than wealthier areas.<sup>86</sup>

---

81. Act effective Aug. 31, 1981, 67th Leg., R.S., ch. 134, § 17, 1981 Tex. Gen. Laws 332, 343 (repealed 1987).

82. See *Code Projects*, TEX. LEGIS. COUNCIL, <https://tlc.texas.gov/code-projects> (last visited May 30, 2020). In 1963, Texas began a multi-year project to reorganize the Civil Statute system into a topical code system “to make the statutes more accessible, understandable, and usable.” *Id.* at 3; see Mark Kuster, *Legislative History Research in Texas*, <http://www.ncsl.org/Portals/1/Documents/racss/LegisHistory-Kuster-2012LegSum.pdf> (last visited May 30, 2020).

83. Compare TEX. GOV’T CODE ANN. § 418.173 (stating the allowable punishment falls within a Class B or Class C Misdemeanor), with *supra* note 80 (stating the allowable punishment falls under a Class B Misdemeanor).

84. See Kuster, *supra* note 82.

85. Michael K. Lindell, *Recovery and Reconstruction After Disaster*, ENCYCLOPEDIA OF NATURAL HAZARDS 812, 814 (Peter T. Bobrowsky ed., 2013).

86. Robert M. Lawless, *Bankruptcy Filing Rates After a Major Hurricane*, 6 NEV. L.J. 7, 11–15 (2005).

Not every debt, however, is satisfied or discharged at bankruptcy.<sup>87</sup> Claims—or “right[s] to payment”—are categorized and prioritized before the bankruptcy estate is distributed.<sup>88</sup> Secured claims and certain other types of claims receive higher “priority” and are paid first, while unsecured claims have lower priority and are paid after secured claims.<sup>89</sup> Thus, the cost of a rescue would likely be an unsecured claim and the creditor would receive little to no payout. However, courts generally view costs incurred by a city as an actual pecuniary loss and not a fine or penalty; any cost of the rescue would be discharged and non-collectable after the bankruptcy is finalized.<sup>90</sup> Because reimbursement from state and federal disaster resources is grant-based, they are not guaranteed funding streams.<sup>91</sup> This potentially places the government in the situation of receiving very little—if anything at all—on the cost of the rescue if the rescued declares bankruptcy afterwards and potentially leads to increased pressure to enforce evacuation or not pay for rescues.

#### 4. Tertiary Family Code Problems

Should a parent be prosecuted for not complying with an evacuation order, it could potentially subject the parent to additional troubles if the non-evacuation is considered child neglect.<sup>92</sup> This would trigger an investigation and potentially lead to a suit to involuntarily terminate the parent–child relationship.<sup>93</sup> This argument would have roots in the parent’s knowingly<sup>94</sup> placing the child in “conditions or surroundings which endanger the physical or emotional well-being of the child.”<sup>95</sup> Not only would this likely require an attorney and continue the downward spiral of punishing

87. 11 U.S.C. § 523(a) (2018).

88. 11 U.S.C. § 101(5) (2018).

89. Rebecca McDowell, *Understanding Secured, Unsecured & Priority Claims in Bankruptcy*, BANKRUPTCY SITE, <https://www.thebankruptcysite.org/resources/understanding-secured-unsecured-priority-claims-bankruptcy> (last visited May 30, 2020). A secured claim is generally attached to some sort of collateral, such as a mortgage on a house or a loan on a car. 11 U.S.C. § 506(a)(1). An unsecured claim is essentially everything else, such as credit card debt or debts to the government for fees and fines. *Id.* § 506.

90. *Gray v. City of Decatur (In re Gray)*, 394 B.R. 900, 905 (Bankr. C.D. Ill. 2008) (holding city’s expenses to demolish the building a debtor owns were dischargeable because the expenses were not considered a fine or a penalty). 11 U.S.C. § 523(a)(7)(B) (“A discharge . . . does not discharge an individual debtor from any debt . . . to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss . . .”).

91. See 11 U.S.C. § 523(a)(7)(B); *In re Gray*, 394 B.R. 900.

92. TEX. FAM. CODE ANN. § 261.101(a) (“A person having cause to believe that a child’s physical or mental health or welfare has been adversely affected by abuse or neglect by any person shall immediately make a report . . .”).

93. *Id.*

94. TEX. GOV’T CODE ANN. § 418.185(d)(1)(A). Consider that the standard for civil recoupment is also “knowingly ignored a mandatory evacuation order . . . and . . . engaged in an activity . . . that a reasonable person would not have engaged in.” *Id.*

95. FAM. § 161.001(b)(1)(D); see *Santosky v. Kramer*, 455 U.S. 745, 769–70 (1982) (holding that clear and convincing evidence is necessary to terminate parental rights).

vulnerable stayers with debt and/or jail time, but it would also annihilate their home life.<sup>96</sup>

#### IV. ASSURING JUSTICE & EQUITY DURING AN EVACUATION

*“[I]n this world, with great power there must also come—great responsibility.”*<sup>97</sup>

What assures vulnerable stayers are not improperly prosecuted after a disaster? Currently Texas appears to rely solely upon prosecutorial discretion and the current political climate to determine who will face litigation.<sup>98</sup> While the dual enforcement mechanisms give flexibility to government officials, they pose the unique issue of when it is proper to use each mechanism.<sup>99</sup> Though the civil remedy allows for financial recoupment, higher bankruptcy filing rates among poor communities after a major disaster—coupled with the high probability of no recovery in bankruptcy—may result in little-to-no cost recovery for expensive rescue.<sup>100</sup> This may lead government officials to use the criminal enforcement mechanism disproportionately in poorer areas and use the civil mechanism in wealthier.<sup>101</sup> Disparate use of either mechanism could inadvertently shatter a community when it needs unification for a better recovery. A statutory exception that places the burden of proof upon the government may prove to be the most effective control mechanism.

##### *A. The Affirmative Defense Option*

An affirmative defense is “[a] defendant’s assertion of facts and arguments that, if true, will defeat the plaintiff’s or prosecution’s claim, even if all the allegations in the complaint are true.”<sup>102</sup> An affirmative defense is unique in that the government is not required to negate the possibility of an affirmative defense and that admissible evidence must support the

---

96. Travis Peeler, *How Much Will a Child Custody Lawyer Cost*, LEGAL MATCH, <http://www.legalmatch.com/law-library/article/how-much-will-a-child-custody-lawyer-cost.html> (last updated May 24, 2019, 4:56 PM). For simplicity a flat fee for an attorney’s fee averages around \$4,500. *Id.* The \$1,275 criminal attorney fee and the \$4,500 the family attorney fee totals \$5,775. *Id.* To pay off attorney’s fees, this would require over four and a half months if an individual worked at a forty-hour minimum wage job (only considering gross wages). *Id.*

97. *Kimble v. Marvel Entm’t, L.L.C.*, 135 S. Ct. 2401, 2415 (2015) (alteration in original) (quoting STAN LEE, *AMAZING FANTASY #15: SPIDER MAN* 13 (1962)).

98. Curtis, *supra* note 51, at 540–42.

99. *See id.*

100. Lawless, *supra* note 86, at 11–15.

101. Curtis, *supra* note 51, at 540–42. Because this is a hybrid offense, little data is available to determine accurately each time the government prosecutes an offense for failure to evacuate after a disaster.

102. *Affirmative Defense*, BLACK’S LAW DICTIONARY (11th ed. 2019).

affirmative defense.<sup>103</sup> Thus, the defendant alone must properly plead and bear the burden of proving each of the affirmative defenses' elements.<sup>104</sup> Because an affirmative defense is a question usually submitted to the finder of fact after receiving evidence, the most effective way to raise this affirmative defense is to hire an attorney, potentially costing several hundred dollars at a minimum.<sup>105</sup> This raises the concern of whether the vulnerable stayer—who may not have had the resources to evacuate—can now potentially afford a month's salary to hire a lawyer in an attempt to avoid criminal prosecution.<sup>106</sup> Thus, an affirmative defense briefs well, but may do more to exacerbate the problem than protect vulnerable stayers.

### *B. The Statutory Exception Option*

The best option would be to write in a statutory exception to the Texas Government Code preventing legal action against vulnerable stayers and force the plaintiff to demonstrate that the prosecuted individual is not a vulnerable stayer. A statutory exception is a statutory provision that exempts certain persons or conduct from a statute's operation.<sup>107</sup> The major difference between an affirmative defense and a statutory exception is that affirmative defenses require defendants to prove to a judge or jury that their actions fit within the defense.<sup>108</sup> A statutory exception, however, would cut off ill-guided prosecutions from the very beginning and prevent vulnerable stayers from hiring legal counsel to properly plead an affirmative defense.<sup>109</sup> This means a statutory exception can act as a bar to prosecution or a lawsuit and requires the government to prove that the defendant is not a vulnerable stayer at the outset.

---

103. TEX. PENAL CODE ANN. § 2.04(b)–(d) (emphasis added) (“The [prosecution] is not required to negate the existence of an affirmative defense . . . [and] an affirmative defense is not submitted to the jury unless evidence is admitted supporting the defense . . . . If the issue of the existence affirmative defense is submitted to the jury, the court shall charge that the defendant must prove the affirmative defense by a preponderance of the evidence.”).

104. *See* *Benson v. State*, 476 S.W.3d 136, 138 (Tex. App.—Austin 2015, pet. ref'd) (explaining the burden of proof); *Killam Ranch Props., Ltd. v. Webb Cty.*, 376 S.W.3d 146, 157 (Tex. App.—San Antonio 2012, pet. denied) (stating that a party cannot file a no-evidence summary judgment motion on an affirmative defense).

105. *How Much Does a Defense Attorney Cost?*, THUMB TACK (Sept. 11, 2019), <https://www.thumbtack.com/p/criminal-defense-attorney-cost>.

106. *Id.* Presuming \$8.00 per hour, it would take 159.378 hours to meet the gross pay amount to pay a \$1,275 attorney's fee. Further, this breaks down into 3.98 forty-hour work weeks at gross pay—all of this simply because the individual could not afford to evacuate.

107. *Exception*, BLACK'S LAW DICTIONARY (10th ed. 2014) (collateral definition for “statutory exception”).

108. PENAL § 2.04(d) (“If the issue of the existence of an affirmative defense is submitted to the jury, the court shall charge that the defendant must prove the affirmative defense by a preponderance of the evidence.”).

109. *See* *Assiter v. State*, 58 S.W.3d 743, 746–48 (Tex. App.—Amarillo 2000, no pet.) (applying the burden of proof for defenses).

Disasters are not cookie-cutter and neither are the reasons that vulnerable stayers are unable to evacuate. Thus, a factors approach is necessary to best evaluate who is a vulnerable stayer. A 2007 study of those who did not evacuate during Hurricane Katrina revealed that individuals did not evacuate for instrumental reasons—such as shelter, transportation, funds, and social networks—and cognitive reasons—such as sources and timing of messages, risk perception, and sociocultural norms.<sup>110</sup> As such, a factors test should apply against these obstacles to evacuation so that if those obstacles were so great, to hold them liable for non-evacuation would violate due process and “shock[] the conscience.”<sup>111</sup>

The degree of persuasion should be “by a preponderance of the evidence” so as to prevent the statutory exemption from effectively being a complete bar to prosecution in practice.<sup>112</sup> Because evidence may be unclear or lost after a disaster, both direct and circumstantial evidence should be permitted to establish the vulnerability of the stayer.

While communities often seek to do what is morally and ethically right after a disaster, emotions and politics can play a role in recovery decision making.<sup>113</sup> Communities in financial crisis following a disaster might want to “punish” non-evacuators for forcing what they see as unnecessary costs of an imprudent decision.<sup>114</sup> Without a safety mechanism, in theory one could bring an action against a vulnerable stayer to simply force a quick settlement or keep repleading the case until the standard of proof is perfected. Either way is not ideal and is a waste of both society’s and the court’s time. Thus, the factors established by a preponderance of the evidence at the outset or require the court to dismiss the matter with prejudice. This assures that only the most appropriate situations are before the court and it does not risk situations that are malicious. Additionally, allowing reasonable attorney fees for the vulnerable stayer would add an extra layer of assurance that the matter properly serves justice.

### *C. Addressing the Penalty Ambiguity & Hybrid Nature*

While addressing the exception to prosecution, it may be an appropriate time to address § 418.173’s latent ambiguity and bring all disaster-related criminal offenses to the same subsection of the Texas Penal Code.<sup>115</sup> The latent ambiguity can be resolved by replacing the punishment range and establishing it as a Misdemeanor. With the appropriate flexibility,

---

110. Eisenman et al., *supra* note 54, at S111–12.

111. *See Rochin v. California*, 342 U.S. 165, 175 (1952) (Black, J., concurring).

112. Neil Orloff & Jerry Stedinger, *A Framework for Evaluating the Preponderance-of-the-Evidence Standard*, 131 U. PA. L. REV. 1159, 1159 (1983).

113. *See supra* Part II.C (examining why evacuation enforcement is important for communities).

114. *See supra* Part II.C (examining why evacuation enforcement is important for communities).

115. *See supra* Part III.A (explaining the criminal component of the disaster-related penal code).



jurisdictions could designate it as Class B or C Misdemeanors—or it can be designated in the Penal Code as a Class B Misdemeanor alone. Substantively, this would allow a fine *and* confinement to be imposed, rather than only one or the other. While only allowing a Class B Misdemeanor reduces a jurisdiction's options, giving jurisdictions the flexibility to opt for a Class B or Class C Misdemeanor provides them with latitude to determine for themselves what the appropriate class is. Additionally, the legislative Chapter 418 penalty section should be moved from the Government Code to the Penal Code and combined with other disaster-related Penal Code provisions into a new subsection that gives better public notice, rather than allowing it to be one of the many criminal offenses scattered throughout Texas law.

#### V. CONCLUSION

Sometimes people choose to ignore evacuation orders and take their chances—putting first responders' lives at risk, putting taxpayers on the hook for a rescue, and potentially exacerbating a disaster.<sup>116</sup> After a disaster, it can also be a politically-charged issue to care for survivors and punish those who ignored the evacuation order.<sup>117</sup> This can lead to the use of the criminal justice system to deter noncompliance and civil liability to get the taxpayer's money back.<sup>118</sup> However, sometimes people ride out the storm against their will.<sup>119</sup> To assure that the correct acts are criminalized and result in civil liability, a statutory exception should be established within Chapter 418.<sup>120</sup> Though this is not a complete bar to suit, it helps ensure the defendant has the right amount of alleged culpability and is not simply a political scapegoat.<sup>121</sup>

---

116. *See supra* Part II.C (discussing why enforcement is important in disasters).

117. *See supra* Part II.C (examining the concept of willful stayers and vulnerable stayers).

118. *See supra* Part III.A (using criminal and civil liability to encourage individuals to evacuate during a disaster).

119. *See supra* Part II.C (discussing why people choose to stay during an evacuation).

120. *See supra* Part IV.B (providing guidance for a statutory exception option).

121. *See supra* Part IV.B (explaining how the statutory exception can help defendants).

## APPENDIX A: SAMPLE STATUTORY EXCEPTION LANGUAGE

Tex. Code XXX.XXX: Exemption from Certain Post-Disaster Legal Actions

(a) In the original petition or criminal complaint, the petitioner or government is responsible for proving by a preponderance that the respondent is not part of a vulnerable population which is exempted from civil or criminal recourse for failure to follow an evacuation order properly issued under TEX. GOV'T CODE § 418.185.

(b) This additionally applies to suits for the termination of parental rights under TEX. FAM. CODE § 161(b)(1)(D) if one or more of the basis for termination include failure to evacuate after an evacuation order was properly issued under TEX. GOV'T CODE § 418.185.

(c) An individual is considered to be a “vulnerable-stayer” at the time of a mandatory evacuation if they were not able to comply with an evacuation order properly issued under § 418.185 due to one or more of the following conditions that individually, or when aggregated, are so substantial that a finding of culpability would shock the conscience and be an affront to the concept of ordered liberty and justice:

(1) the resources needed and practical considerations for evacuation or instrumental barriers (such as finances or access to transportation to evacuate);

(2) the cognitive components of how evacuation messages were received or cognitive barriers (such as if the evacuation order was unclear or in a foreign language to the recipient);

(3) the beliefs, attitudes, and perceptions of the nature of disasters or the underlying community structure or politics, including discrimination or sociocultural barriers.

(d) Unless good cause is shown, a petition failing to establish subsection (a) by a preponderance of the evidence will be dismissed and may be dismissed with prejudice at a judge's discretion. Reasonable and necessary attorney fees may be awarded to the respondent for an egregious failure to establish subsection (a).