Legal Claims and Compensation in Climate-Related Disasters

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Abstract: Climate change-related disasters harm places and people. Many of those hurt in a disaster aim to hold agents responsible. Examples in the United States include floods in the Midwest, storms on the Gulf Coast, and fires and a megadrought in the West. This paper argues that given the failure to institute broad programs to mitigate climate risks, the task of governing climate risks includes decisions after a disaster strikes. Some decisions fall to courts, including lower courts and decisions under statutes. Neither is prominent in debates. This paper contrasts the broad aspirational claims for climate-related change based in human rights or in efforts to hold fossil fuel companies responsible with the narrower legal claims made after climate-related disasters, including cases involving insurance, property, and government agencies or public utilities. We draw upon cases raised after what the National Oceanic and Atmospheric Administration (NOAA) lists as multi-billion-dollar disasters. Our discussion centers on multiple cases filed after Hurricane Katrina and on the liability of the utility Pacific Gas and Electric (PG&E) in Western fires and drought. Climate-related disasters also represent a risk shift, from those first addressed in social welfare programs oriented around work and family to oft-neglected climate-related risks. More scholarship surrounding governing and courts in climate change is needed, given widespread failures to mitigate damage in a changing climate.

Keywords: disasters; courts; settlement; climate change

**INTRODUCTION: CLIMATE-RELATED DISASTERS, COMPENSATION, AND LEGAL PROCESS**

In 2020, Pacific Gas & Electric (PG&E) agreed to pay $13.5 billion to settle claims for people who had lost homes and lives in devastating California wildfires in 2015, 2017, and 2018. A bankruptcy judge approved the plan. The utility’s failure to maintain power lines had contributed to the extensive damage wrought by these climate-related disasters. The utility agreed to the settlement after declaring bankruptcy, anticipating billions in claims, given how early cases had settled. Claimants began to receive their payments in December 2020, two years or more after the fires, according to the *Sacramento Bee*. The largest early payment was $25,000. In the first months of 2021, fire survivors sued PG&E’s former leadership over the trust’s declining value, as the terms of the trust allowed.[[2]](#endnote-2)

PG&E’s legal problems from climate-related disasters reached before and after the 2020 settlement. Back in 2010, the utility had pled guilty to manslaughter after an explosion in San Bruno, California. Under the terms of probation imposed after this explosion, PG&E had to answer to a judge about its disaster-related decision making. Deaths resulting from the 2017 fires led the utility to plead guilty to manslaughter again—84 counts this time.[[3]](#endnote-3) In the summer of 2021, as fires continued to burn in California, PG&E executives found themselves before a judge again, answering questions about how the company had responded to notices about the 2021 Dixie Fire’s outbreak.[[4]](#endnote-4)

These cases, which took place in state court, comprise a few examples of climate-related disaster cases recently filed in the United States. Such cases typically bring in private attorneys and people seeking compensation more than environmental interest organizations. Groups such as Earth Guardians and the Natural Resources Defense Council in the United States and Europe, together with state attorneys general in the United States, tend to take challenges to coal plants’ compliance with legal rules, or innovative climate-related damage claims on behalf of children, or cases that would blame oil companies. These latter cases continue to work their way through courts, without clear final victories.[[5]](#endnote-5)

This paper argues that courts are integral to governing climate-related disaster. In the PG&E settlement, courts and judges participated in governing what are widely agreed to be climate-related disasters. [[6]](#endnote-6) These include floods as well as fires. Sea level rise exacerbated Hurricane Katrina’s intensity in 2005 and continues amplifying storms today.[[7]](#endnote-7) Settled court cases now raise claims about carelessness in maintaining utilities, failures to pay insurance claims, or administrative failures. Following actual court cases filed after a given climate-related disaster broadens the significant actors and cases, leading us away from the inspiring cases environmental lawyers and state attorneys general take, focused on greenhouse gas emissions. The relevant cases now include complaints about insurance, liability for damage, and assistance; and they fall outside the structure often used to define what courts do, attaining their outsider status in at least three ways. First, they are settlements, not orders from final courts of appeal; second, complainants pursue utilities, insurance, and emergency response, not fossil fuel companies; and third, the litigators are not the environmental lawyers currently pursuing cases against fossil fuel companies. [[8]](#endnote-8) More modest in aspiration, these cases do not promise to save the future for children, as the climate suits in progress in the United States and Europe hope to do. But they wield a notable on-the-ground effect: these settlements increase the cost of climate-related disasters to utilities and insurance companies. The accompanying court processes have become part and parcel of governing in and after climate-related disasters. The length of time it takes to settle these cases and obtain a payout, together with the ambiguity of a settlement, means that such cases do not capture the same attention or inspire as much excitement among scholars as environmental litigation blaming fossil fuel corporations for greenhouse gas emissions might stir up. But they remain informative. The cases stretch the timeline and scope of responsibility for climate change-related disasters in a way that touches many facets of civil society today, implicating poverty, inequality and housing, utilities and their responsiveness to shareholders, and land use, as well as the more familiar greenhouse gas emissions.[[9]](#endnote-9)

In what follows, we first describe climate-related disaster displacement as a risk that social welfare frameworks do not accommodate, despite the centrality of housing to well-being and risks of losing housing, especially for renters, the underinsured and those who live in public housing. Next, we argue that the United States offers a key case for turning to ordinary frameworks for litigation, including insurance, negligence, and state administrative processes, given the significance of litigation nationwide today. We also describe finding cases by following disasters. The main body of the paper organizes these claims in court, touching briefly on human rights claims about displacement, on innovative claims attributing harm to fossil fuel companies, and finally to the range of claims concerning insurance, negligence, and assistance. In this analysis, we rely on cases taken after major disasters as listed by the National Oceanic and Atmospheric Administration (NOAA). In particular, this paper draws on multiple types of cases taken after Hurricane Katrina. That 2005 disaster was unique in how many people it displaced and in how long the federal government extended housing assistance payments for those affected. For our purposes, following these cases requires following complaints, not outcomes in final courts of appeal. The claims we describe do not exhaust the reach of climate change or climate-related disasters, but they do demonstrate that this reach extends far beyond contests over whether courts will hold fossil fuel companies responsible for climate change.[[10]](#endnote-10) We conclude by emphasizing the importance of including litigation in lower courts, and litigation after disasters, when synthesizing climate change politics.

**WHOSE DISASTER? SOCIAL WELFARE STATES, RISK SHIFTS, AND CLIMATE CHANGE**

Extreme weather events are more likely in a changing climate. Earth scientists explain climate change as exacerbating disasters rather than analyzing whether climate change by itself causes disasters.[[11]](#endnote-11) Local governments are not always so cautious.[[12]](#endnote-12) In the United States, damage from storms has increased in recent years.[[13]](#endnote-13) The 2017, 2018, 2019, and 2020 fires in California, the 2019 fires in Alaska, and the long megadrought in the West set records for damages inflicted.[[14]](#endnote-14) The problem extends well beyond the United States. In Australia, the Black Saturday fires in 2009 destroyed more than one million acres, and days of record-setting heat preceded the fires.[[15]](#endnote-15) The summer of 2019–2020 was Australia’s worst fire season on record.[[16]](#endnote-16)

Climate-related disasters are a housing problem. The Fourth National Climate Assessment (NCA), issued in November 2018, states that increasingly severe storms and sea level rise will require many millions of people to leave the United States coasts.[[17]](#endnote-17) The NCA recommends support for massive relocation from areas at risk. [[18]](#endnote-18) The housing risk in climate change exacerbates the precarious housing millions already experience.[[19]](#endnote-19) In the past, poor treatment and inaccessible housing in disaster may have contributed to the Great Migration of African American people from the South to the North.[[20]](#endnote-20) Increasing storm damage means a continuing need for temporary housing assistance, particularly for renters, people who live in public housing, or the underinsured. Although homeowners also lose homes in climate-related disasters, many will have insurance. The usefulness of that insurance, however, varies with how quickly companies pay out, and whether people have enough money to rebuild or relocate.[[21]](#endnote-21)

In the United States, the federal government’s failure to adapt to climate change means other institutions respond to demands.[[22]](#endnote-22) These institutions include courts. Drawing on litigation aiming to limit greenhouse gas emissions, some scholars have argued that the courts fill a ‘governance gap’ in the absence of national climate action.[[23]](#endnote-23) In environmental politics, this gap often targets greenhouse gas emissions. But climate change implicates much more than emissions alone, including insurance and liability after climate-related disasters. Kim Bouwer contrasts ordinary litigation under statutes with what she names ‘holy grail’ cases, or cases that make large, principled or innovative claims attributing responsibility for climate change to fossil fuel companies or governments that have failed to limit greenhouse gas emissions.[[24]](#endnote-24) Like the lawsuits on behalf of children mentioned above, these cases are ongoing.

Adjudicating compensation for people hurt in climate-related disasters also identifies a governance gap in risk and social welfare. Social welfare state scholars have focused on work-related compensation claims as central to citizenship.[[25]](#endnote-25) The demand for assistance during and after disasters is compelling enough, however, that Michele Landis Dauber has argued disaster relief is foundational to social welfare programs in the United States. She maintains that social welfare scholars have misunderstood American political development by not including disaster assistance in their histories. She centers her argument on litigation before the United States Supreme Court during the 1930s, when the Supreme Court held that emergencies justify assistance.[[26]](#endnote-26)

Dauber effectively revises the history of social welfare in the United States, which has largely centered on compensation based in work and family.[[27]](#endnote-27) Under post-New Deal social insurance programs, payments depended on injury, age and employment eligibility for social security, a person’s status either as a worker or as a dependent of a working head of household, and contributions through taxes. Agricultural workers and domestic workers were not included in the 1930s employment-based social welfare system, an exclusion deliberately based on race. Today, U.S. programs protecting the social rights of citizenship fail to accommodate the risk shifts that changes in employment and family structure have brought to individuals.[[28]](#endnote-28) Even less does the current system build in coverage for disasters in a changing climate, including systematic help with housing problems.

As a result, the United States has primarily relied on private insurance companies to compensate individuals for losses incurred during disasters. Homeowners’ insurance offers a case in point. Demographers analyze past disasters and conclude that the risk of massive displacement in a changing climate is less likely than climate reports state. They argue that people often return to their homes after a disaster. They find, however, that home ownership and housing insurance influence this decision in important ways. Climate reports and demographic analyses of whether people have moved after disaster represent the risk of displacement in a changing climate very differently. Demographers conclude experience with past disasters indicates people will not move far from home given climate change. They take existing insurance systems as fixed. Climate reports argue response to previous disasters does not predict the future. [[29]](#endnote-29) Disaster assistance, the fallback for those who are not insured or who are awaiting insurance, does not improve people’s lives or elevate their standard of living above how they lived before the calamity; it only contributes to compensating people for what they lost. Individuals who were homeless when Katrina hit did not qualify for housing assistance because they did not have an address to lose. They eventually received assistance from a different emergency program.[[30]](#endnote-30) Disaster-specific assistance layers atop existing programs; and entities such as utilities, sometimes held responsible for damage in disaster, also insure against claims, extending the reach of insurance in governing disaster. Private insurance is as much a part of climate politics as it is of healthcare politics in the United States.[[31]](#endnote-31) Including resource differences such as access to insurance turns away from what has been a ‘deadly discourse’ on race and poverty in the United States when trying to understand inequities in compensation and assistance after disaster.[[32]](#endnote-32)

The risks incurred by our growing susceptibility to climate-related disasters throughout the United States extend beyond unemployment assistance, housing assistance, and social security. Risks compound one another. In New Orleans, long histories of racial injustice left African Americans more likely to live in public housing, After Katrina, when floods destroyed public housing, African American women who had lived in these buildings had no housing they could return to.[[33]](#endnote-33) Adapting to climate change may not be a risk that social welfare states accommodate well, but the risks of losing home or work are very real possibilities in climate-related disasters. Ad hoc accommodation for these occurrences can happen in administrative appeals and in court.[[34]](#endnote-34) With the costs of climate-related disasters mounting, treating disaster assistance as part of social welfare scholarship has become even more pressing.

Both the argument that the past predicts the future, as demographers claim and the contention that more people will have to leave as disasters increase, come to rest on physical disasters rather than on the multiple types of losses that people often suffer. Physical disasters extend the already-existing need for housing.[[35]](#endnote-35) Put another way, what has counted as a disaster or a crisis in public life has not sufficiently included the ongoing struggles that poorer people have long endured and that exacerbate these crises. A notable example is the 2008 mortgage, and therefore housing, disaster: poorer people and people of color had been experiencing a mortgage financing disaster long before the federal government named it as such.[[36]](#endnote-36) To these communities, the housing crash housing disaster was old news.

Other assistance for individuals after disasters also intertwines with ordinary welfare state assistance and long-term problems. Disasters sometimes bring extended unemployment insurance, contingent on what political officials choose to do. After Katrina, people gained more from extended unemployment insurance and medical benefits than from the assistance specifically marked as disaster relief.[[37]](#endnote-37) Ordinary support available to people in need on an everyday basis comprises the bulk of the assistance disaster survivors can receive, with all the attendant burdens that come along with receiving those benefits.[[38]](#endnote-38) If people collect federal disability payments, for instance, they will still receive disability payments after a disaster. People who need to move from public housing destroyed in disaster will have to get in line for public housing vouchers in a new place, if they do not have another option. Changing addresses, or worse, changing states after a disaster, can add to the administrative burden of receiving benefits because some programs require state-specific applications.

Not only have welfare state histories often left out disaster assistance, despite how these programs tend to layer on top of one another, but court cases as compensatory mechanisms are also seldom included in these histories. The welfare rights movement litigation campaigns in the 1960s and 1970s brought administrative processes to governing social insurance programs; today, administrative due process throughout these programs draws from the results of earlier litigation campaigns.[[39]](#endnote-39) Other litigation to compensate people for harms after a disaster has proceeded against corporations. Perhaps scholarship neglects such lawsuits because they are not regular bureaucratic programs initiated by the federal government. They are governance nonetheless.[[40]](#endnote-40) Relocating after disaster, or failing to relocate, comprises one outcome of failed disaster mitigation efforts: broadly put, it points to an adaptation problem within U.S. governance processes.

Climate change–related litigation thus must include the fallout after disaster, linking climate-related disasters to welfare state politics. And since claims filed after disasters tend to replicate inequities in the mixed public and private American welfare state, as things currently stand, most compensation from courts pay more to those who have lost more. Private insurance certainly operates this way, and private insurance remains the primary compensation scheme for loss in the United States. Those who claim housing assistance from the Federal Emergency Management Agency (FEMA) lose that assistance as soon as they have an alternative, so people with fewer resources are likely to have to claim it longer. No one can claim it once the program ends and Congress does not allocate more money. Even compensation cases against a utility such as PG&E will compensate people based on the value of what they lost. Cases about FEMA decisions or about the responsibilities of insurance and utility companies follow from statutes—and from previous case law about injuries and negligence. The reasoning and claims formulated under statutes and previous case law after disaster can be less inspiring than the innovative claims climate advocates often make about human rights or our children’s future. But the ordinary claims are the ones courts hear.

the United States retains an outsize importance in climate change, social welfare, and courts, thanks to the nation’s size, to its failures at climate change mitigation, and persistent social inequality and migration challenges. Following case filings and settlements in the climate-disaster arena affords us a different understanding of the place of courts in governance, one broader than that provided by final court of appeals decisions alone.

**RESEARCH DESIGN, DATA, AND METHODS**

The United States is a critical case for litigation in assistance after disasters.[[41]](#endnote-41) The country has experienced extensive damage from disasters, so loss after disaster is a real problem.[[42]](#endnote-42) Litigation organizes complaints about injuries in the United States more than in other western liberal democracies. In many other national states, bureaucracies and social insurance programs rely on administrative processes, not courts, to distribute social insurance benefits after injuries.[[43]](#endnote-43) In the United States, however, court cases reveal problems in administering assistance that could be less visible in countries with less court involvement. Even so, interest group litigation is becoming key to policymaking in Europe, and Australia has seen extensive climate litigation concerning greenhouse gas emissions.[[44]](#endnote-44) The remedy of judicial review is often integral to international guidelines concerning multiple problems.[[45]](#endnote-45) The limits to what judicial review can accomplish in the United States have illuminated similar limits elsewhere.[[46]](#endnote-46)

At the same time, displacement in the context of climate change is a risk in multiple national states.[[47]](#endnote-47) International negotiations over compensating loss and damage between countries recognize that small islands could become uninhabitable; small islands draw outsize attention.[[48]](#endnote-48) Problems revealed in litigation in the United States imply problems elsewhere. When people flee after disaster, whether within their home country or beyond it, they will make legal claims in national or regional courts within national states. Therefore, the method used for this paper, tracing the kinds of cases that come before domestic courts, can be useful elsewhere.

Tracing cases and settlement processes is messier than following decisions from final courts of appeal. Final decisions promise authoritative statements of what the law is and imply that people will follow the decision. Law as orders from final courts of appeal takes a top-down approach to the field.[[49]](#endnote-49) This approach both overstates and understates the significance of courts. Focusing on final court decisions as authoritative overstates their significance because many decisions from courts are not self-implementing. In many fields, allies in government agencies are critical to implementing decisions.[[50]](#endnote-50) Without ongoing social movements maintaining pressure to implement favorable court decisions, even legal victories can quickly lose their instrumental significance. But relying only on final courts of appeal also understates the significance of courts because most cases settle or are resolved in lower courts. These cases are still meaningful. People may gain settlements, or litigators’ goals may include advertising a problem or contributing to public debate without expecting a given case will fix a difficult problem.[[51]](#endnote-51)[[52]](#endnote-52) Excluding settlements or even dismissed cases from study thus obscures from view some of the key actors and important incentives that should be a part of the larger climate-disaster discussion.

Litigation after a climate-related calamity includes not only the outcomes, but also the process of gaining mixed decisions and settlements from lower courts. Demands from below are critical to finding failures in adequately adapting to a changing climate, and cast light on the problem of existing or anticipated loss and displacement.[[53]](#endnote-53) Tracking what lower courts do, and the process between courts and legislatures, brings us closer to interpreting such demands from those whose perspectives often go unheard.

Furthermore, treating courts as endpoints with final decisions paints a picture of governance as static. Governance dynamics are difficult to capture solely through the lens of final decisions made by the highest courts. On the ground, governing includes multiple actors, including businesses and nonprofits.[[54]](#endnote-54) As Laura Jensen has argued, the term ‘governance’ reflects the “restless, kinetic nature of states and stateness.” “Everyday practice” reveals this nature.[[55]](#endnote-55) A dynamic approach to courts is critically important to the politics of adapting to climate change, particularly given that courts address problems when other institutions leave them unresolved. Although courts respond to failures in mitigating climate-related disasters, they are often invisible when discussing adapting to a changing climate.[[56]](#endnote-56)

Following judicial processes requires moving from case reports to news reports, and sometimes from national to local news. Tracking the movement from a high profile notice of an initial complaint to a settlement for an unnamed amount some years later does not offer the satisfying closure of a definitive ruling from a final court of appeal that names a winner and a loser. Yet bringing these cases, dismissing them, settling them and implementing settlements are all part of governing, with key information contained within each step of the process.

For this paper, we drew on court cases filed after disasters listed by NOAA as causing more than $1 billion of damage in the United States.[[57]](#endnote-57) We limit discussion to cases after Katrina and to cases surrounding PG&E, though we include others in notes. Katrina was the largest displacement in recent U.S. history, and the fires in the American West continue to set records every year. We searched Nexis Uni, a legal database, using the names of the high-damage disasters. We also searched news reports, which can capture documents for cases in progress. Rather than cataloguing all cases, we searched to ensure we captured the range of types of cases. Since most cases settle or are dismissed, finding the kinds of cases filed will capture a wider range of cases than following final courts of appeal.

The hope for a ‘holy grail’ case, one centering on human rights claims or blaming fossil fuel companies for disasters, remains central in prominent science journals and reports on displacement. Though this holy grail is not our primary focus, its dominance requires describing the rights claims in displacement and the state of innovative claims about fossil fuels and disaster before we turn to the ordinary claims in multi-billion dollar disasters close to home.

**GOVERNING DISPLACEMENT RISK: HUMAN RIGHTS, ATTRIBUTION, AND STATUTES**

Environmental interest organizations have played a central role in litigating for better climate management, with a particular focus on limiting greenhouse gas emissions. Scholars have compared these groups’ strategies cross-nationally.[[58]](#endnote-58) Activists and legal scholars have promoted human rights claims and international governance, arguing that such stances motivate action and activism. Human rights advocates craft instruments relying on language familiar in the world of courts and law, though courts vary in whether they will apply international language.[[59]](#endnote-59) U.S. courts are particularly unlikely to use international rights language; advocating for human rights aspires to better treatment rather than results in court. Describing how a U.S. court reasons about international rights after a climate-related disaster leads to the insurance and liability claims they do decide.

***Human Rights, International Instruments, and Domestic Courts***

Advocacy about climate change has centered on human rights[[60]](#endnote-60) and international instruments,[[61]](#endnote-61) rather than on ordinary domestic law and the courts that interpret it. Both draw on the aspirational language and interest organizations common to transnational activism and to international conferences and scholarship.[[62]](#endnote-62) For its part, the United States has often limited the implementation of human rights documents, leading to questions about what U.S. support for human rights truly means.[[63]](#endnote-63) Courts in the United States seldom cite international, non-binding instruments; however, international guidelines allow advocacy groups to frame domestic problems as international human rights disasters. This section outlines key human rights claims and follows international claims made about the displacement of public housing inhabitants after Katrina in a case that settled years after the hurricane struck.

The rights theorist Sumudu Atapattu has argued that states must address displacement after extreme events, including displacement resulting from climate change, as a matter of human rights.[[64]](#endnote-64) At least two kinds of human rights claims would be relevant after disasters: principles about internal displacement, and claims for the more legally structured status of refugee. Internally displaced people—those who must leave home after a disaster—stay within the national state in which they live. The United Nations Guiding Principles on Internal Displacement (GPID) from 1998 accommodates war and other disasters.[[65]](#endnote-65) Walter Kälin, who chaired the committee drafting the guidelines, has described how these principles also fit climate-related disasters.[[66]](#endnote-66) After Katrina, advocates used the guidelines to mark the failure of the U.S. government to meet people’s needs.[[67]](#endnote-67) Not all internally displaced persons are citizens, however; immigrants and refugees could also have to leave their homes during a disaster. The GPID Principle 28, which states the right to return home after displacement, includes the recommendation that a government “shall facilitate the reintegration of returned or resettled internally displaced persons… [and] ensure the full participation of internally displaced persons in the planning and management of their return or resettlement.”[[68]](#endnote-68) These non-binding international guidelines for internally displaced people contrast with the more fully developed U.S. domestic law implementing international obligations to protect refugees and asylum seekers. Advocates for those harmed in climate change often debate whether refugee law should apply to people who flee disasters due to climate change, since refugee and asylum law already have a legal administrative structure. Scholars and advocates argue, as well, about the usefulness of the term ‘climate refugee’ and the guidelines on internal displacement when considering human rights and climate change.[[69]](#endnote-69) After Katrina, the Brookings Institution put its imprimatur on that frame by holding a conference that included Katrina as a problem of internal displacement. An advocacy group also used the language of international human rights and the GPID in its post-Katrina report.[[70]](#endnote-70)

The GPID include a right to judicial review, part of the mechanisms of “transnational modernity,” as Sally Merry has argued.[[71]](#endnote-71) ‘Judicial review’ is accepted language across multiple documents, and like all international human rights agreements, what it means depends on local translation.[[72]](#endnote-72) The claims made under these principles are aspirational. Advocates seldom raise them in court in the United States, precisely because they are aspirational rather than binding law. We can evaluate how well even the aspirations can meet need in litigation now, for governance in the United States already includes judicial review. Hurricane Katrina brought a significant illustration of internal displacement and accompanying judicial review, in addition to the conference and advocacy report that applied the concept of internal displacement to the United States.

The Loyola University New Orleans School of Law legal clinic assisted claimants and brought cases in the aftermath of Katrina. Along with others, Bill Quigley, who led that clinic, brought *Anderson v. Jackson* (2007, 2009) in 2006. The complaint contested the Housing Authority of New Orleans’s (HANO) decision to demolish public housing. The complaint, filed 27 June 2006 (almost 10 months after the storm), claimed that demolishing public housing violated fair housing law by discriminating on the basis of race because all the residents of the housing were African American.[[73]](#endnote-73) The complaint also claimed the demolition was unconstitutional, both because it discriminated on the basis of race and because it denied due process, here meaning appropriate hearings required in administrative state social welfare programs.[[74]](#endnote-74) Finally, the complaint held that demolishing the housing violated what it named as international law for internally displaced persons.[[75]](#endnote-75)

 Judge Ivan L.R. Lemelle heard the case and issued his decision in February 2007, almost 18 months after the storm.[[76]](#endnote-76) Dismissing most of the claims, he cited statutes Congress had enacted, including sections of the Fair Housing Act, housing cases from Chicago, a case concerning due process, the Administrative Procedure Act, and cases from district courts throughout the country, in addition to cases from the United States Supreme Court. He cited statutes about what constitutes a violation of civil rights that would make a housing authority responsible for compensating people. Finally, he dispensed with the GPID.

The judge analyzed rights concerning internal displacement as legal authority in the hierarchy of legal authorities. He authorized his decision by citing introductory commentary to the guidelines, which stated that the guidelines are not a treaty and not binding law, so—on his reading—they did not apply to the question of whether New Orleans could close public housing. Judge Lemelle was not finished. Courts have legal doctrine to cover many issues, including explaining why international documents are not binding, and they defer to existing practices to determine what is customary: the law does not enter from outside the field it governs. He cited an earlier decision to conclude that customary international law is not binding when states do not abide by it, and they do not abide by the GPID.[[77]](#endnote-77) Since they do not, the guidelines therefore did not apply to the question of whether New Orleans could close public housing.[[78]](#endnote-78) Under this approach, international guidance or rights do not have authority in domestic courts if not already implemented. The courts will not do more than what other courts have done. The rights that Judge Lemelle did see as significant for the displaced residents were constitutional rights to due process. The domestic meaning of a right to judicial review hinged on rights to a given process rather than rights to housing, which positive law in the United States does not protect.

From a lawyer’s point of view, the judge had to dismiss claims based in international guidelines; U.S. courts do not usually recognize international instruments not incorporated into domestic law. The case is worth recounting anyway. First, making the argument is an element of an interest organization’s activity. The Loyola legal clinic amplified many poor people’s voices after Hurricane Katrina; the lawsuit marked one way to describe poor people’s problems as a human rights violation.. One of the hopes for those taking lawsuits is ‘discursive change,’ or shifting public understanding, not just winning a given case.[[79]](#endnote-79) Discursive change is a long-term project, with no guarantee of effectiveness. The GPID made it into a community group’s report and appeared at a conference at the Brookings Institution. Even when claims lose in court, they can provide an opportunity to name human rights issues for the United States in the world of NGOs and conferences.

The case itself ended in mixed results. The case law concludes with Judge Lemelle’s decision, but the plaintiffs’ stories—Ms. Anderson’s and Ms. Burbank’s—concerned the loss of housing, situations unresolved by the court decision. Finding out what happened to them requires going outside Judge Lemelle’s text. The Housing Authority of New Orleans’s insurance company settled in 2012, almost seven years after Katrina, and five years after Judge Lemelle’s decision.[[80]](#endnote-80) Ms. Anderson and others received Section 8 housing vouchers when the insurance company agreed to a settlement. Lawyers in the case argued that vouchers did not replace housing for the former residents, many of whom still had not returned to New Orleans. A voucher is not a home.[[81]](#endnote-81) Once a case settles, public documents do not usually record what happens, so the case but not the people’s story ends with the settlement. When cases settle, it is not possible to say how much of a role a lawsuit played. Lawyers themselves may not entirely know why a case settled. Everyone reads the meaning through their own professional lenses, which can emphasize or downplay the lawsuit.

Human rights claims concerning displacement inspire activists and contribute to organizing workshops and conferences. The GPID, like other international agreements, imply technical legal effectiveness by relying on categories familiar in legal rights claims. These include providing for a right of return, caring for women and children, and recommending judicial review. The principles are aspirational; standard legal reasoning would not apply these guidelines to cases where people have lost housing, as the case brought on behalf of public housing residents after Katrina illustrates. In a similar manner, activists have brought claims against fossil fuel companies for negligently causing climate change, another set of aspirational claims that they hope will help bring about action on climate change in the absence of decisions from Congress. These cases, too, are ongoing.

***Attributing climate change to fossil fuel companies***

The ‘holy grail’ in court that Bouwer identifies has not yet succeeded in the United States, though cases continue to proliferate here and elsewhere. In 2008, the Alaskan village of Kivalina sued to hold oil companies responsible for climate change, thereby raising the popular discussion concerning how to hold organizations accountable. The case did not succeed. The Alaskan villages of Shishmaref (also losing land to sea level rise) and Kivalina have gained press despite the villages’ small size.[[82]](#endnote-82) So has Isle St. Jean, Louisiana, whose 85 inhabitants need to move because sea level rise has taken their land; a 2016 federal grant allowed a land purchase on their behalf.[[83]](#endnote-83) A notable case is working its way through the European Court of Human Rights in 2021, brought on behalf of young people against 33 countries. Cases against oil companies in the United States also remain in process.[[84]](#endnote-84) This search for a big case, one capable of changing the climate-change policy, serves as a guide to how advocates can describe what climate and disaster sciences can contribute to litigation. When general science journals discuss climate change and what science can contribute to litigation, they typically center on disputes over attributing responsibility for climate change to fossil fuel companies. The prominent general scientific journals *Nature Geoscience* and *Proceedings of the National Academy of Sciences* have featured such articles on litigation concerning climate change. The articles signal scientists’ commitments to the quest to attribute responsibility for climate-related displacement to the fossil fuel industry. Litigators see that attribution as helping to gain compensation; some argue that attributing individual disasters to climate change is now closer to a reality.[[85]](#endnote-85) Attributing specific disasters to climate change promises to hold fossil fuel companies accountable, rather than utilities or insurance companies

A hoped-for analogy is to the tobacco industry, which was held responsible for having hidden information about how damaging smoking is.[[86]](#endnote-86) Drawing on the science of attribution to get closer to holding the oil companies culpable follows the axis of disagreement in industrial accident lawsuits: how much are the failures attributable to engineered systems, and how much are they attributable individual responsibility? [[87]](#endnote-87) Claimants allege the fossil fuel industry, or industries responsible for greenhouse gas emissions, have caused the harm, not least by deceiving the public about what they knew.[[88]](#endnote-88)

Even the scientists most optimistic about attributing disaster damage to climate change argue that disasters never have one single cause, however, and looking for one cause is pointless. Instead, better attribution will mean better describing probabilities.[[89]](#endnote-89) Climate change exacerbates harm, but decisions about where to build, and why, and about maintaining infrastructure such as levees and utility wires (or buildings[[90]](#endnote-90)) all put people at risk. Attributing harm in specific disasters to fossil fuel companies would require overcoming obstacles to relying on probabilities in courts.[[91]](#endnote-91) An alternative strategy might come into play here: Utilities and builders operate closer to disasters than do oil companies, and claims against them require less analysis of long term, attenuated causation.

Legal structures allow multiple ways to contest cases, whether or not the science of attributing disasters to climate change becomes more exact and accurate. Many preliminary contests turn on the intricacies of procedure, a narrative somewhat less compelling than attributing damage to an oil company. One such high stakes procedural quibble involves contesting which court should hear a case. In 2020, oil companies answered claims from both the city of Baltimore and the state of Delaware for compensation due to climate change by asking to move the cases to the federal courts. They would expect the federal courts to be more sympathetic, not least based on previous cases. In May 2021, the United States Supreme Court ruled in favor of the oil companies’ claim that the cases belonged in federal court. Lower courts with cases against oil companies before them will now need to rely on the decision in the Baltimore case. [[92]](#endnote-92)

Human rights claims and claims about fossil fuel companies’ responsibility comprise the ‘holy grail’ cases that Bouwer discusses, but they are not easy towin. These claims wend their way through court and advocacy groups as environmental activists and state and city attorneys seek ways to mitigate greenhouse gas emissions and contest climate change.[[93]](#endnote-93) Whether or not a court victory results, by their dramatic nature, the cases call attention to the problem.[[94]](#endnote-94) Seeing what occurs with judicial review now in cases of internal displacement only requires examining the ordinary law of the administrative state in the United States. Litigants and courts draw on existing domestic law. Litigation after disasters has included insurance companies, infrastructure failure and FEMA. The legal system ascribes responsibility to people and organizations. Fires and floods, though, result from complex, long-term interactions. Disasters make these extended histories of power and decisions about governing visible; courts are not well organized to see complex interactions over long periods.[[95]](#endnote-95)

***Claims in court after harm: insurance, interpreting statutes and due process***

Problems with multiple causes have plenty of agents available to blame, and more than one organization with legal responsibilities (see Table 1). Since the United States has not mitigated environmental harm sufficiently to limit damaging disasters, some of those agents show up in court.

Insert Table 1 Here

Ordinary claims can take four forms in climate-related disasters, for the purposes of this paper. First, insurance companies deny coverage, leading to class action or other multi-party suits against the insurers. Second, those injured in disasters may gain settlements from those responsible for keeping up the infrastructure to protect people from disaster. If, for example, utilities do not maintain levees or utility lines well enough, they can be sued for failing to live up to their legal responsibilities, as PG&E has been,[[96]](#endnote-96) and as levee boards were after Hurricane Katrina. These can also include claims that the utility ‘took,’ or confiscated property via flooding, and therefore must compensate. What is more, since utilities are insured, these utility cases can also become insurance cases. For example, *Anderson v. Jackson*,the case concerning the demolition of public housing in New Orleans, led to a subsequent lawsuit between HANO and its insurance company, Landmark Insurance. HANO argued that Landmark Insurance had a duty to defend against the claims, a duty it had not met. A court decided the claim in 2016, almost 11 years after Hurricane Katrina had struck. The court held that HANO’s legal claim against the insurance company failed, leaving a factual claim concerning what insurance covered and what it did not. HANO and Landmark Insurance had to determine what they had agreed to, a matter for negotiation between lawyer and client, not a court order.[[97]](#endnote-97)

Third, in the United States, FEMA takes short-term responsibility for housing assistance, though problems in housing in the United States can far exceed what FEMA can accommodate. These responsibilities do not require dramatic, inspiring, legally risky, or politically contentious claims about climate change, attribution, or human rights. Courts can recognize these responsibilities in current law, and lawyers can frame them in familiar ways. Trial court processes and settlements allow judges to contribute to extending benefits without setting precedents, maintaining flexibility for federal agencies and fitting welfare state needs with the event-centered nature of governing disasters. Finally, the utility PG&E has been held responsible for manslaughter after fires in California. This paper will not discuss these cases further.

Laws permit some claims and discourage others; the variation shapes the cases that appear in court.[[98]](#endnote-98) For example, homeowners can bring insurance claims if they believe their insurance company wrongly denied a payment under an insurance policy. Rules can allow lawyers to aggregate claims, which makes a case more valuable for the lawyers. Insurance companies have a legal duty to live up to the terms of their contract; the contest is what the terms mean. In claims where the monetary settlement could be high, such as a lawsuit with many parties complaining about how insurance companies pay claims, or for responsibility for damages to housing that people own, lawyers may find it financially feasible to take a claim. The value of a case could be enough to allow for substantial fees. On the other hand, however, limits to what assistance the federal government provides can make a case more difficult to take.

Lawsuits are a particularly difficult remedy for assistance from FEMA. First, ‘sovereign immunity’ limits courts’ ability to hold government officials legally responsible for a harm. Furthermore, some of what agencies do is wholly committed to their discretion: they have no legal duty. Both of these points—whether people can sue FEMA and whether FEMA has a legal duty to pay assistance—became subject to litigation in the wake of Katrina. After Katrina, by statute, individual assistance for all losses not reimbursed through insurance or charitable donations could not exceed $26,200.[[99]](#endnote-99) People challenging the end of assistance would gain an extension before payments ended, not a lump sum settlement. The legal structure does not support bringing claims for the least well off if it depends on incentives for private law firms to take these claims.

The difficulties do not end there. Filing cases requires finding lawyers, and in cases with limited payout possible, that task can be challenging. Claims for people who need more assistance from FEMA have limited financial value because disaster assistance ends and the statute authorizing payment has a cap. Housing assistance varies across disasters, and payments from FEMA are temporary for people out of place, so the payments do not facilitate moving for the most vulnerable. FEMA is responsible for emergency housing and individual assistance after individual insurance is exhausted, and its assistance has limits. FEMA pays assistance as a matter of statutory duty, through block grants, administrative due process, and need, not attribution and climate change.Although legal aid associations witness individuals and families struggling to gain assistance from FEMA, these groups can only do so much. Restrictions on legal aid associations that date from the Reagan administration limit pursuing class action claims in court.[[100]](#endnote-100) In extraordinary circumstances, other can take on what legal aid organizations cannot. Provisions for fees can bring in public interest litigation organizations. Private law firms have taken on cases in partnerships with legal aid or public interest organizations. As we discuss below, lawsuits against federal agencies can fail because courts sometimes hold that under the law, an agency is immune from suit.

We represent the varying claims schematically rather than with amounts of money because for any given disaster, including Katrina, identifying the total compensation after litigation is not feasible: finding out would require waiting for many years and following multiple cases. Some cases settle, and settlements can be secret. Cases against insurance companies may settle many years after a lawsuit, as in the decision made between HANO and its insurance company, almost eleven years after Katrina. That case was only one of many insurance claims in the aftermath of the hurricane. Moreover, the value of a settlement can change over time, as it has with the PG&E settlement noted earlier; and government officials can make a case ‘moot,’ or no longer active, by changing rules and thereby answering a claim. The claim may be about government processes, making it difficult to assess how much it was worth for a set of people. The government’s concession is not definitively traceable to a court’s decision. Officials could concede because conceding is simpler, or less expensive than pursuing a case, or simply because they think it is the right thing to do. Providing an accurate monetary picture of multiple cases, accordingly, isunlikely, or at minimum, difficult to access. .

*Insurance.* Insurance claims are key to social welfare practices in the United States. Private health insurance shaped resistance to public health insurance in the 1990s.[[101]](#endnote-101) After disasters, people must rely on private housing insurance before claiming federal assistance for losses. The National Flood Insurance Program subsidizes flood insurance, further intertwining private and public social welfare provision.[[102]](#endnote-102) Insurance can mark the difference between compensation and devastation, so complaints can be high stakes.

In 2005, Norman and Genevieve Broussard lost their home in Biloxi, Mississippi, to Hurricane Katrina. Their insurance company, State Farm, said the homeowners’ policy did not cover the loss; the policy covered damage due to a ‘windstorm,’ not the ‘water’ that had damaged the Broussards’ and so many others’ homes. In 2007, the Broussards won a large jury award in a trial court. In April of 2008, more than two and a half years after Katrina, the court of appeals denied the award and sent the case back to the trial court.[[103]](#endnote-103) The case disappeared from the news, and probably settled for an amount no one announced. Large awards make the news; later decisions to overturn or reduce them are less likely to attract attention.[[104]](#endnote-104) Settlement amounts were made secret in later wind/water insurance cases after Katrina.[[105]](#endnote-105) Covering large jury awards when the actual, smaller settlements come later contributes to public stories that people who sue corporations always gain large amounts of money.[[106]](#endnote-106)

Multi-billion-dollar disasters listed by NOAA, including Hurricanes Gustav and Ike (2008), Irene (2011), Irma (2017), and Michael (2018), all led to disputes in court about insurance coverage.[[107]](#endnote-107) Pandemics, too, widely recognized to be climate-related, generate insurance claims.[[108]](#endnote-108) Adapting to climate change in private social welfare leads to claims that insurance companies argue their risk assessments and pricing cannotaccommodate . Appellate courts can overturn decisions or lower awards, backstopping a system that meets widespread need with some individual payments to insured homeowners or to those harmed by a utility’s negligence.

*Negligence, Injury and Taking Property.* Responsible agents in climate-related disasters also include utilities, and survivors of climate-related disasters in the United States have pursued these companies. Here including levee boards, dam managers, and electrical companies, utilities are closer to the damage caused by fires, storms, and floods than are fossil fuel companies.[[109]](#endnote-109) Courts and legislatures interact as they handle large, complex claims resulting from climate-related disasters. Climate change exacerbated fires in California in 2015, 2017, 2018, 2019, 2020, and 2021; but poor utility maintenance contributed sparks that set grasses, buildings and trees ablaze. After lawyers filed lawsuits about the 2015, 2017, and 2018 fires, PG&E filed for bankruptcy.[[110]](#endnote-110) In 2020, the state legislature in California voted for a fund to pay for utility failures in future fires; PG&E could participate if it could reach a settlement by a deadline.[[111]](#endnote-111) PG&E agreed to settle for $13.5 billion. States underwriting settlements could contribute to a utility continuing to fail to practice key safety measures—including measures urgently needed in an era of growing risk from climate-related damage.

Injury and negligence intersected with sovereign immunity after Katrina. Lawyers in New Orleans pursued a lawsuit against the Army Corps of Engineers for damages and for failing to build structures safely. Under ‘sovereign immunity,’ however, the Army Corps was not legally responsible for failed levees.[[112]](#endnote-112) Local levee boards were also parties to a lawsuit for failing to maintain levees to withstand storm surges, thereby exacerbating damage to people’s homes in this climate-related disaster. Their insurance companies settled, promising small checks in 2017 (almost 12 years after Hurricane Katrina) to people who had lived in, rented, or had been visiting flooded areas. Even later, lawsuits and dismissals continued. In 2016, the Louisiana state Supreme Court put an end to a class action suit claiming that parish officials had increased damage by moving pump station operators during Hurricane Katrina.[[113]](#endnote-113) Utilities are among the many points of failure in managing climate-related disasters. Local utilities, more likely subject to a lawsuit, are likely to have less money than the federal government, and still can have cases against them dismissed.

In floods, the levee boards and water districts are the utilities that courts could hold responsible. In the American West, the utilities are the electricity providers responsible, with electrical lines that can set fires after high winds. Legal claims made after fires in the American West faulted electrical utilities that could have maintained their lines better—and made this argument long before PG&E settled the claims for the 2018 California fires.[[114]](#endnote-114) Although the utilities should of course invest in infrastructure, reducing the problem to lines and bad regulation narrows causation, excluding longer and complex histories that result in catastrophic fire damage in a changing climate. Local levee boards or other organizations charged with managing infrastructure are less likely to be immune from lawsuits than the federal government, allowing homeowners to claim compensation via private attorneys, for taking property without compensation and failing to maintain infrastructure. Multiple other disasters have led to court cases with long timelines about whether the conduct of the Army Corps of Engineers or other entities when managing levees and floods constitutes a ‘taking’ that the agency must compensate.[[115]](#endnote-115) The federal government has greater fiscal capacity, but not responsibility. Since the cases settle, they may show up more in local news than the case reports commonly used for studies of courts in governance.

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### *Statutory Claims and* *Disaster Assistance.* In the United States, presidents declare national disasters. A presidential declaration then brings in FEMA and allows money to flow for emergency relief, individual assistance, and rebuilding infrastructure. FEMA is the federal umbrella organization for managing disaster; localities also remain central in firefighting and managing floods. Federal management of disasters initially built on Cold War responsibility, and FEMA’s responsibilities have accumulated with each disaster.[[116]](#endnote-116) The ordinary processes of bureaucratic accountability, including reports and hearings before Congress,[[117]](#endnote-117) aim to hold FEMA accountable. To a lesser extent, so do lawsuits.

Assistance after disasters varies and can include disaster-specific appropriations.[[118]](#endnote-118) Congress’s specific appropriations, together with FEMA’s discretionary oversight, permits paying for things in one disaster but not another. For example, in the COVID-19 disaster, Congress appropriated money to help with funeral expenses; and in April 2021 FEMA announced it would extend these payments.[[119]](#endnote-119) The Stafford Act governed assistance after an emergency through Katrina.[[120]](#endnote-120) For the purposes of this paper, the Stafford Act permitted two kinds of assistance for those affected by the hurricane: emergency assistance, which did not have a financial cap, and individual assistance, which did. At the time of Katrina, the cap on individual assistance was $26,200, the maximum amount any one household could receive for replacement of goods not covered by insurance or donations, or for housing assistance once the government stopped emergency assistance. (Since then, the cap has increased; and the Department of Housing and Urban Development has taken some responsibility for disaster housing assistance.) People who relied on assistance rather than on home insurance needed to find some other solution for long-term housing: After Katrina, FEMA repeatedly threatened to end its assistance beginning in December 2005, a few short months after a massive displacement in the United States, when many low-income people still lacked stable housing.[[121]](#endnote-121) Although no permanent program exists for housing assistance after a disaster, FEMA can fund housing as a matter of discretion under the Stafford Act.[[122]](#endnote-122) Speed is essential to payments that are useful to people; and legal contests, including settlements, can be slow. Fundamental socioeconomic inequality in insurance payments rests on whether one owns housing and can receive an insurance payment for housing damage, or whether one rents and cannot receive such assistance.

Katrina is a good site to address lawsuits as accountability for disaster assistance payments, for at least two reasons. First, it was the largest climate-related displacement in U.S. history since the Dust Bowl.[[123]](#endnote-123) Claims for accountability, focusing on how individual assistance was distributed, relied on ordinary legal doctrine about the administrative state. These claims were innovative because courts had not held FEMA legally responsible before the Katrina case *McWaters v. FEMA*. FEMA did not usually pay out for rentals for an indeterminate period, but it did after Katrina. Second, Katrina tested the legal standards that held assistance to be discretionary. Under standard legal reasoning, that would mean there is no law for for FEMA to followwhen distributing assistance. The doctrine of ‘sovereign immunity’ would also mean it would be difficult to hold the federal government legally accountable.

Remarkably, between 2005 and 2010, FEMA found itself in court several times over how it had administered emergency assistance and individual assistance, which it had used in part for rental payments for displaced people. Four cases aggregated many individuals’ claims about how FEMA distributed this assistance.[[124]](#endnote-124) In addition, a lawsuit against FEMA challenged the inaccessibility of the organization’s trailers for people with disabilities.[[125]](#endnote-125) As Katrina’s aftermath dragged on, FEMA extended rental assistance payments and suspended rules challenged in court. While temporary orders or favorable rulings were made in four class action suits, these were eventually lifted, or dismissed on appeal.[[126]](#endnote-126)

As FEMA threatened to end first emergency and then individual housing assistance, private attorneys and community groups jumped into action. Four lawsuits went forward about terminating assistance without due process or in violation of a statute. Trial courts temporarily stopped, or enjoined, FEMA from ending the assistance. FEMA extended its assistance, and lawsuits then ended in the trial courts. In an early victory, a court held that FEMA was not exempt under the doctrine of sovereign immunity.[[127]](#endnote-127) As displacement after Katrina dragged on for thousands, a later lawsuit threw into question whether FEMA was exempt after all. Multiple iterations of assistance cases between district courts and courts of appeal ended in settlements or vacated orders. The cases’ timelines (Figure 1) illuminate how long cases can take before they are overturned, settled, or dismissed, with each point representing different rulings in each case.

Insert Figure 1 About Here

Court structure and processes allow for discretion and flexible precedent—including not setting precedent at all. Courts can address pressing issues after disasters while also limiting claims’ meaning in the future by not ruling for claimants in final courts of appeal. By limiting a given case’s meaning, courts do not commit governments to future spending. Such cases might have contributed to extending assistance for the particular disaster, but subsequent lawsuits have treated these assistance cases as meaning that courts will order injunctions only in extraordinary circumstances.[[128]](#endnote-128) Judicial decisions in disaster assistance are here consistent with other spending decisions before the courts; around the world, courts have proven unwilling to expand government spending for social welfare claims.[[129]](#endnote-129) If courts eventually would not hold FEMA accountable for how it distributed assistance after Katrina, then holding it accountable for later disasters would proveunlikely albeit possible. People pursuing legal accountability in climate-related disasters are likely to search elsewhere. The lawsuits against PG&E and insurance companies are exemplars.

Courts can issue provisional orders, or complex orders dividing issues and ruling in favor of different sides for separate issues. Calling these winning or losing closes off the complexity that drags litigation and implementation on for years. Separating issues allows for decisions that are more complex. Courts can later end temporary or provisional orders. The ad hoc decision making and responsiveness to particular events in courts establishes cases that stay in federal district courts. Such cases address a problem in the moment without promising to address recurrent problems.

In cases concerning payments for displaced people, the courts relied on due process as grounds to try to stop the government from ending assistance. In the 1970s, the U.S. Supreme Court had held that the due process clause of the Constitution required administrators to give comprehensible reasons for terminating people from benefits.[[130]](#endnote-130) The courts interpret statutes about assistance in light of this due process, joining social welfare to disaster.[[131]](#endnote-131) At the same time, since Congress has discretion in creating benefit programs, these Congress can end them.. By the time climate-related disasters were being litigated, assistance was entrenched in the legal apparatus of the administrative state, which both enables and constrains payments across programs. Climate-related assistance claims now depended not only on perceptions of disasters and personal responsibility in a privatized social welfare state, but also on the limits and practices already entrenched in multiple programs.

Yet dispersed, event-centered disaster governance persists.[[132]](#endnote-132) Court processes, too, are event-centered; settlements only ever reach beyond the immediate case in the sense that lawyers develop a sense of what a case is worth. Where courts contributed to extending benefits, they issued injunctions that courts of appeal or even district courts later lifted. Governing by preliminary injunction and then vacating those decisions allows payments to be extended while disasters are in the news and then for rights to be dropped or to dissipate later. No one judge could have controlled outcomes or reasoned differently to improve outcomes, either for renters or for accountability to Congress.

For climate and social welfare advocates, the complexity and problematic nature of these cases, often across multiple iterations, signal the importance of broadening climate change politics and law. Housing advocacy is part of climate change advocacy. After Katrina, public interest housing organizations and private attorneys who are not traditional environmental law organizations found themselves participating in post-climate related disaster litigation. Increasingly, climate-related disasters exacerbate long-term housing problems, especially for renters. In its ongoing failure to solve housing problems, disaster assistance will continue to disappoint those who need its help the most.

The presence of proliferating rules and administrative orders suspending those rules belies the claim that the only goal of assistance is to assist people. For example, FEMA had a longstanding rule called the ‘shared household rule’ that limits benefits to one person in a household. FEMA policy requires that people who were in a household before a disaster remain in a household after a disaster, because providing payments to two people in a household would duplicate benefits, by FEMA’s accounting. But this rule fails to match the reality on the ground after a disaster. First, people flee to different places, and family members might not all be able to live together after a disaster. Second, the person in a household who receives the check might not share it with others. Third, FEMA might treat people as a household when they shared an address but did not share expenses. Correcting such mistakes takes time and effort from people who urgently need the financial support. In this case, then, the goal of the rule seems clear: to answer concerns about overspending from Congress by minimizing payments. The policy here embodies a preference for minimizing the risks of paying too much rather than for supporting people displaced after disaster.

Problems implementing this ‘shared household rule’ led FEMA to suspend it via memo shortly after Katrina. Some decision makers still enforced it, however, as one of the complaints to court about FEMA’s assistance noted.[[133]](#endnote-133) Suspending the rule is not a cure-all. It answers the argument that the rule is impossible to apply and the rule most hurts the people who have the least. It also adds to confusion, including for decisionmakers.[[134]](#endnote-134) The rules respond at least as much to Congress’s concern with fraud as they do to housing needs.

A legal scholar would likely conclude from these cases that FEMA needs to follow administrative due process better.[[135]](#endnote-135) To recommend that organizations follow rules more closely means accepting how courts and lawyers define the problem of displacement after disaster: as a problem of rules and rule following, not as a problem of housing. But following administrative rules better cannot remedy the fundamental problems of access to housing, which climate-related disasters exacerbate. Of course, few arguing for better administrative due process would argue it could solve housing problems. Still, to suggest that due process can solve or partially resolve FEMA’s problems with assistance ignores the challenge of deciding large numbers of cases that are really about persistent long-term need, something short-term assistance cannot meet. In legal interpretation, the problem here becomes how an agency applies the rule, not housing insecurity; it reflects an ongoing expectation that disasters somehow will not upend how people organize their lives. Rules that help an agency answer to a legislature intent on policing fraud—for example, rules requiring that FEMA try to recoup overpayments, even from poor people, or rules that individuals living in households before disaster must remain in that same household after leaving home—might not make sense for the people claiming assistance.[[136]](#endnote-136) Rules, appropriations, and disaster managers all typically define disasters as discrete in space and time,[[137]](#endnote-137) so that disaster assistance can be brought to an end after a period of time. After superstorm Sandy, a judge dismissed a case about housing loss because the court could do nothing about the fundamental problem: that money from Congress was ending.[[138]](#endnote-138)As such, lower court cases broaden our conceptions of climate change problems from housing to land use to assistance, revealing significant limits to what due process claims can accomplish.

**CONCLUSION: DOMESTIC LEGAL CLAIMS IN CLIMATE-RELATED DISASTERS**

Litigation that would attribute culpability for climate change to fossil fuel companies or other large corporations implicitly promises to solve multiple problems. It offers narrative closure; it promises to name right and wrong, and it holds that the work involved can be instrumentally effective on a large scale. For these reasons, finding a favorable ruling remains the ‘holy grail’ of climate litigation.[[139]](#endnote-139) Yet focusing solely on strategies that attribute climate change to large fossil fuel corporations neglects how climate change exacerbates harm from disasters underway right now, today. . Experience with recent disasters and litigation teaches us that even if activists succeed in attributing damage to fossil fuel companies, that victory will not solve all problems. The cases claiming human rights and taken on behalf of children inspire a movement that has placed children as its spokespeople. They too cannot solve everything, and will not preclude insurance cases and claims for damages.

The pervasive, disruptive forces of climate change will continue to bring in legal fields not self-evidently environmental.[[140]](#endnote-140) Failing to capture the trial court cases under domestic law will ignore the persistent problems that appear episodically in climate-related disasters.[[141]](#endnote-141) As cases move between courts and settlement, time itself becomes a significant factor. Time takes cases and complaints out of news spotlights. Never gaining a decision from a final court of appeal ensures the public will pay a given issue or case very limited attention.

In the arena of post-disaster housing assistance, moving between courts and gaining temporary orders extended the length of time that FEMA paid for housing but also extended the uncertainty. Time resolving a homeowner’s insurance dispute can add to uncertainty about moving or rebuilding. Time also allows other institutions and people in temporary housing to take action, whether that means finding other housing or simply ensuring that a given problem will disappear from the news. Small individual payments also diminish the public’s interest and attention, and such settlements, paid out over time, become less newsworthy than they would have been shortly after a disaster. Temporary decisions further exacerbate uncertainty for those who need housing, even if extensions delay putting people out of their homes. The process as a whole deflects responsibility. No one judge, administrator, or member of Congress need take either credit or blame for ending the needed assistance.

Legal processes resemble each other across different types of large-scale disasters. Accordingly, we can look to previous disasters to observe the limits to legal remedies, even if litigators could find a ‘holy grail.’ Most cases settle. Settlements are often very unsatisfactory, not least because they take so long. People often receive a small amount compared with the harm they experienced. [[142]](#endnote-142) Finally, because the amounts that people receive reflect the monetary value of what they lost, poorer people are given less. Courts cannot compensate renters or public housing tenants for property they do not own. Assessing a domestic right of judicial review in internal displacement thus requires assessing the ordinary law of the administrative state, not only international rights.

Assistance programs do pay rent, and people may gain compensation for damage to their homes. They also make claims against insurance companies, who in turn may contest responsibility and offer to settle. The underinsured or the uninsured, including renters, will not have the money to choose where to live or build. Even those who are sufficiently insured can experience unequal access to compensation; waiting for payment has in the past differed by race.[[143]](#endnote-143) Lump-sum insurance payments make it more possible to move away to a new location after a disaster.[[144]](#endnote-144) Although this paper centers on the United States, it invites integrating trial courts and interactions between courts elsewhere, as well.[[145]](#endnote-145) The 2019-2020 fires in Australia revealed under-insurance issues and people who were anxious about insurance companies’ responsiveness.[[146]](#endnote-146) Displacement as an administrative state problem relies on already existing practices in the absence of major new initiatives to meet needs now. Settlements and lower court rulings are the daily legal politics of climate change.

Climate-related disasters are here to stay, and the judicial politics of climate change include utility failures, insurance, assistance, and compensation. As disasters become increasingly damaging, claims will continue to reveal systemic failures. The anemic multiple iterations, dismissals, and settlements disappoint, compared to the promise of cases that might attribute climate change to fossil fuel companies. Disasters make complex histories more visible. After disaster, it becomes impossible to treat the legal histories embedded in the objects around us—the above-ground utility lines, the housing in flood and fire zones—as a background for climate change rather than as contributors to damage.[[147]](#endnote-147) When the claims far exceed what insurance companies or utilities will pay, claimants, insurance companies, and utilities ask legislatures to fix problems they might otherwise neglect. If legislatures underwrite the expense of building in areas subject to repeated flooding and fires, insurance pricing will not fully capture the cost of living in these areas.[[148]](#endnote-148) Examining legal contests brought in the aftermath of disasters shifts attention away from the dominant focus on fossil fuels and toward a wide array of questions provoked by everyday life in a changing climate, where disasters far exceed what states, utilities and the federal government do to meet long term need.

Since damage from climate-related disasters is increasing and the United States has not chosen to manage damages and displacement systematically, event-centered assistance governs in climate change.[[149]](#endnote-149) Event-centered governance means temporary assistance, or settlements for losses gained some uncertain time for some uncertain amount after a disaster. Event-centered governance is not designed to allow people to improve their situation. Event-centered governance accompanies existing legal/political programs, including disability payments or unemployment insurance, and it goes hand-in-hand with familiar ways of interpreting obligations, including due process. Payments from FEMA are temporary and not designed to resettle people in safer housing where they might be able to flourish. Settlements from large lawsuits often come many years after the fact, and when they do come, they meet property losses rather than need. Discretion, legal immunity, and time to resolution can limit humanitarian governance and the financial support that disasters bring. FEMA is responsible for emergency housing and assistance after individual insurance is exhausted, and its assistance has limits. Domestic court decisions about something other than attributing climate change to fossil fuel companies gain some settlement or benefits—but these are very limited. Courts can recognize or refuse to recognize legal responsibilities to maintain levees, dams, and power lines, or to follow due process. Trial court processes and settlements allow judges to contribute to extending benefits for one event without setting precedents, maintaining flexibility for federal agencies. Understanding the political and social welfare problems in climate-related disasters requires understanding these disasters as part of the complex apparatus of the twenty-first century state.

Recommending how to improve disaster assistance disconnected from broader problems of inequality is appealing. But problems that predate the disaster can make such regulation only marginally effective. If the western United States is in a megadrought, as climate scientists have argued, regulating how utilities maintain their lines could be reassuring when the problem is the fires making the West difficult to inhabit. Better line maintenance cannot be the end of climate responsibility given a megadrought and expensive housing. In the United States, the ordinary way of distributing benefits includes timelines that legislatures and agencies define with forms, accountability checks, and rules. The rules do not always match how people organize their lives, particularly during disaster. And the disasters we face are multiplying. Complex systems, of which distributing assistance is one, include multiple ways of failing.[[150]](#endnote-150)

**Figure and Table**

Figure 1. Timeline of the four major housing assistance cases brought post-Katrina.

Source: Nexis Uni; author’s timeline.

Table 1. Disaster compensation claims.

|  |  |  |
| --- | --- | --- |
| **Defendant Type** | **Claim Type** | **Attorneys: examples** |
| Insurance companies | Terms in a contract: ‘water’, ‘windstorm;’ ‘duty to defend’ Administrative claim assistance: Hurricane Andrew, (Baker and McElrath, 1996) | Private attorneys, attorneys for those insured; Housing Authority of New Orleans |
| FEMA | Administrative appeals, Due process | Pro bono: private attorneys, Legal aid:Texas Rio Grande Legal Aid;Weil Gotshal (New York)(*Sapp v. City of New York*) |
| Utilities (likely paid by insurance; also legislation, bankruptcy) | Negligence | Private attorneys: Caddell ChapmanCaliFireAttorneysNorthern California Fire Attorneys |
| Utilities  | Manslaughter | PG&EState, City, County Attorneys |

Source: Nexis Uni; news reports.

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