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Lolita Buckner Inniss

Cleveland Marshall College of Law, Cleveland State University, linnisscsu@gmail.com

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A DOMESTIC RIGHT OF RETURN?: RACE, RIGHTS, AND RESIDENCY IN NEW ORLEANS IN THE AFTERMATH OF HURRICANE KATRINA

LOLITA BUCKNER INNISS*

Abstract: This article begins with a critical account of what occurred in the aftermath of Hurricane Katrina. This critique serves as the backdrop for a discussion of whether there are international laws or norms that give poor, black Katrina victims the right to return to and resettle in New Orleans. In framing this discussion, this article first briefly explores some of the housing deprivations suffered by Katrina survivors that have led to widespread displacement and dispossession. The article then discusses two of the chief barriers to the return of poor blacks to New Orleans: the broad perception of a race-crime nexus and the general effect of the imposition of outsider status on poor, black people by dominant groups. Finally, the article explores the international law concept of the right of return and its expression as a domestic, internal norm via standards addressing internally displaced persons, and considers how such a “domestic right of return” might be applicable to the Katrina victims.

“As a practical matter, these poor folks don’t have the resources to go back to our city, just like they didn’t have the resources to get out of our city.” . . . “So we won’t get all those folks back. That’s just a fact. It’s not what I want, it’s just a fact.”

—Joseph Canizaro, member of New Orleans’s rebuilding commission¹

* © 2006, Lolita Buckner Inmiss, Associate Professor, Cleveland Marshall College of Law, Cleveland State University; A.B. Princeton University; J.D. University of California, Los Angeles; LL.M., Osgoode Hall Law School, York University; Ph.D. Candidate, Osgoode Hall Law School, York University. The author thanks Professor Mitchell Crusto of Loyola University, New Orleans; Professor Hope Lewis of Northeastern University Law School; Associate Dean and Professor Kevin Johnson of the University of California, Davis; and Professor Kathleen Engel of Cleveland Marshall College of Law, Cleveland State University, for their insightful comments on earlier drafts of this article.

¹ Peter Beaumont, *Drowned City Cuts Its Poor Adrift*, OBSERVER (London), Dec. 11, 2005, at 24.

INTRODUCTION

A. Gone with the Wind, *and* The Wind Done Gone²—
Hurricane Katrina and Its Aftermath

On August 29, 2005, Hurricane Katrina, a massive Category Four storm, hit New Orleans, Louisiana and the surrounding Gulf Coast area with a destructive wrath not felt in the area in decades.³ Eighty percent of New Orleans was flooded.⁴ Some of the most severely damaged areas of the city were the Lower Ninth Ward, Central City, and the Seventh Ward, all areas heavily populated by African Americans.⁵ In the wake of

² See MARGARET MITCHELL, *GONE WITH THE WIND* (Scribner 1996) (1936); ALICE RANDALL, *THE WIND DONE GONE* (2001). This playful header to a very sobering topic recalls a 2001 book by Alice Randall called *The Wind Done Gone* and the controversy it generated. *E.g.*, Nancy Pate, *A Conversation with Alice Randall*, ORLANDO SENTINEL, Aug. 25, 2001, at E1. Randall's book parodied Margaret Mitchell's iconic novel of the antebellum South, *Gone With the Wind*. See MITCHELL, *supra*; RANDALL, *supra*. In her book Randall takes sharp aim at the saccharine, hackneyed, and thoroughly racist mythology which characterized Mitchell's book. See MITCHELL, *supra*; RANDALL, *supra*. In choosing this header, I am consciously "signifying." See ANGELYN MITCHELL, *THE FREEDOM TO REMEMBER: NARRATIVE, SLAVERY, AND GENDER IN CONTEMPORARY BLACK WOMEN'S FICTION* 14 (2002). Signifying is the act of "reversing, revising, or parodying another's speech or discourse." *Id.* Signifying is verbal play that is often dual edged, being simultaneously obtuse and subtle. See HENRY LOUIS GATES, JR., *THE SIGNIFYING MONKEY: A THEORY OF AFRO-AMERICAN LITERARY CRITICISM* 80–81 (1988). Its purpose may be anything from didactic to critical to entertaining, and sometimes all three at once. Signifying may occur in various forms including "repetition with a signal difference," "troping," or as "a metaphor for textual revision." See GATES, JR., *supra*, at xxiv, 81, 88.

³ *Hurricane Katrina Timeline*, CBC NEWS ONLINE (Can.), Sept. 4, 2005, http://www.cbc.ca/news/background/katrina/katrina_timeline.html; see ERNEST ZEBROWSKI & JUDITH A. HOWARD, *CATEGORY 5: THE STORY OF CAMILLE, LESSONS UNLEARNED FROM AMERICA'S MOST VIOLENT HURRICANE* 234–36 (2005). Hurricane intensity is measured on the Saffir-Simpson Hurricane Scale. ZEBROWSKI & HOWARD, *supra*, at 223–25. The scale ranges from one to five, with a Category One hurricane being the least intense with wind speeds between 74 and 95 miles per hour, and a Category Five hurricane being the most intense with wind speeds exceeding 155 miles per hour. *Id.* at 249–50. Hurricane Katrina was a Category Four storm at 140 miles per hour. *Hurricane Katrina Timeline*, *supra*.

Prior to Katrina, the last storm to cause significant damage to New Orleans was Hurricane Betsy in 1965. See ZEBROWSKI & HOWARD, *supra*, at 47–50. However, no storm besides Katrina has wielded such destructive force in the United States since the 1928 Okeechobee Hurricane, which killed over 3000 people in Florida and Puerto Rico and many hundreds more on the Caribbean island of Guadeloupe. See ELIOT KLEINBERG, *BLACK CLOUD: THE GREAT FLORIDA HURRICANE OF 1928*, at xiv (2003). The Okeechobee Hurricane caused an estimated \$80 billion in damage in today's dollars. *Id.* at 225.

⁴ ROD AMIS, *KATRINA AND THE LOST CITY OF NEW ORLEANS* 32 (2005).

⁵ JOHN R. LOGAN, BROWN UNIV., *THE IMPACT OF KATRINA: RACE AND CLASS IN STORM-DAMAGED NEIGHBORHOODS* 11–12 (tbl.3) (2006), available at <http://www.s4.brown.edu/Katrina/report.pdf>. New Orleans is divided into seventeen wards. Gordon Russell, *Relatives Often Inherit Assessors Powers*, TIMES-PICAYUNE (New Orleans), Apr. 6, 2004, at 1. The Lower Ninth

this destruction, many of these areas' residents, though forced out of their homes, were unable to evacuate the city immediately due to a lack of personal resources.⁶ A number of residents were unable to leave their homes at all, and the death toll ran high as some weathered the storm on roof tops and in attics.⁷ Other residents sought safety in government-established shelters at the Louisiana Superdome and the New Orleans Convention Center.⁸ Both refuges exhibited conditions often seen only in developing countries or during times of war, as occupants remained for days without adequate food, sanitation, or security.⁹ Stories of criminal activity in the shelters, both actual and apocryphal, filled the airwaves.¹⁰ Media outlets, many of their reporters often safely

Ward, prior to Hurricane Katrina, was approximately ninety-seven percent black. DOUGLAS BRINKLEY, *THE GREAT DELUGE: HURRICANE KATRINA, NEW ORLEANS, AND THE MISSISSIPPI GULF COAST* 258 (2006). The Ninth Ward, located in the easternmost downriver portion of the city is the largest and arguably most famous of these wards. See BRINKLEY, *supra*, at 255–61; GREATER NEW ORLEANS CMTY. DATA CTR., *NEIGHBORHOODS IN ORLEANS PARISH* (2004), <http://www.gnocdc.org/mapping/docs/Neighborhood.pdf> [hereinafter NEW ORLEANS NEIGHBORHOOD MAP].

⁶ BRINKLEY, *supra* note 5, at 327–30. One commentator described the early departure of those with “cars, money, and good health” as an example of how, in the days immediately preceding Hurricane Katrina, the strong (the well-to-do) failed to care for the weak (those without resources). *Id.* at 328.

⁷ *Id.* at 163–64.

⁸ *Id.* at 275–76. According to Brinkley's account, by the Tuesday after the storm, the Superdome held over 24,000 people. *Id.* at 275.

⁹ Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413, 457 (2006) (remarking that the media images in the aftermath of Hurricane Katrina were, for many viewers, disquietly “third-worldish”). Yet another observer described the images as evocative of either slavery or slave insurrection, and suggested that they “triggered memories of Jim Crow injustice[s]” and other historic inequalities suffered by African Americans. BRINKLEY, *supra* note 5, at 329–30.

¹⁰ Gary Younge, *Murder and Rape—Fact or Fiction?*, GUARDIAN (London), Sept. 6, 2005, at 5. Various media outlets reported that in the chaos at the New Orleans Superdome in the aftermath of Hurricane Katrina, two babies had their throats slit, a seven-year-old child was raped and murdered, and several corpses were left among piles of excrement. *Id.* None of these stories were ever substantiated. *Id.* Moreover, media attributions of crime may in some cases have depended on whether the actor involved was white or black. See Cheryl I. Harris, *Whitewashing Race: Scapegoating Culture*, 94 CAL. L. REV. 907, 930–32 (2006) (reviewing MICHAEL K. BROWN ET AL., *WHITEWASHING RACE: THE MYTH OF A COLOR-BLIND SOCIETY* (2003)); Gregory Kane, *Two Photos Pose Puzzle: When Is It Not Looting?*, BALTIMORE SUN, Sept. 3, 2005, at 1B. In one well-publicized case, two photos were shown on Yahoo News depicting persons in the aftermath of Katrina carrying food supplies. Harris, *supra*, at 930; Kane, *supra*. One of the photos showed a black person with the caption: “A young man walks through chest deep waters after looting a grocery store in New Orleans.” Harris, *supra*, at 930. The other showed two white persons and was accompanied by the caption: “Two residents wade through chest-deep waters after finding bread and soda from a local grocery store after Hurricane Katrina came through the area.” *Id.* Succumbing to reader pressure, Yahoo later removed the photo depicting whites finding

ensconced in the mostly white, relatively unaffected French Quarter of New Orleans, chronicled the disaster.¹¹

These news reports showed mainstream Americans, some of them dubious about the continued existence of racial discrimination and increasingly reluctant to address it, a vision of American apartheid in the new millennium.¹² Cameras scanning the shelters, which had quickly deteriorated into little more than human warehouses, rarely showed a white face.¹³ Viewers watched with feelings ranging from stark horror to horrid fascination the spectacle of masses of mostly black, mostly poor people abandoned together in despair, filth, and chaos.¹⁴ One

food but left the black “looter” along with the original caption. Makani Themba-Nixon, *Race, Racism and Media: Field Notes from the Frontlines*, in TALKING THE WALK: A COMMUNICATIONS GUIDE FOR RACIAL JUSTICE 5, 9 (Hunter Cutting & Makani Themba-Nixon eds., 2006).

¹¹ Hunter Cutting & Makani Themba-Nixon, *Katrina Coverage: Race in Your Face*, in TALKING THE WALK, *supra* note 10, at 118, 118; *see also* LOGAN, *supra* note 5, at 12 (noting that the French Quarter was only 4.5% black and suffered minimal damage). As one commentator observed, reporters for some media outlets often confined themselves to the French Quarter in the aftermath of the storm and, as a result, initially reported that little damage had been sustained in New Orleans overall. Cutting & Themba-Nixon, *supra*, at 118. It took two days for the mainstream press to fully recognize the scope of the disaster. *Id.*

¹² John Powell, *Foreword* to TALKING THE WALK, *supra* note 10, at v (describing the media portrayal of the “American apartheid”). As one observer noted, “The recent devastation of Hurricane Katrina revealed the entrenched racial apartheid in America’s cities.” Benjamin Fleury-Steiner, *Death in “Whiteface”: Modern Race Minstrels, Official Lynching, and the Culture of American Apartheid*, in FROM LYNCH MOBS TO THE KILLING STATE: RACE AND THE DEATH PENALTY IN AMERICA 150, 175 (Charles J. Ogletree, Jr. & Austin Sarat eds., 2006).

¹³ *See* Cutting & Themba-Nixon, *supra* note 11, at 118–21.

¹⁴ *See id.* Throughout this article I use the word “black” to refer to people who themselves originated in—or a significant number of whose ancestors originated from the continent of—Africa, and who embrace the social customs and norms associated with this ancestry. Just what to call such persons has long been a subject of some debate. F. JAMES DAVIS, WHO IS BLACK? 145–46 (1991). It has been suggested that the transition from “Negro” and “colored” to “black” and “African American” was a result of the efforts by persons of African ancestry in the 1960s to achieve a sense of racial pride. *Id.* Ultimately, however, the word “black,” having become acceptable in public discourse, has remained as the most popular choice in written accounts and conversation. *See id.* at 32. It has been estimated that “African American” is used only one out of three times over “black” by blacks themselves, and even less often by non-blacks. Gina Philogène, *From Race to Culture: The Emergence of African American*, in REPRESENTATIONS OF THE SOCIAL: BRIDGING THEORETICAL TRADITIONS 113, 118 (Kay Deaux & Gina Philogène eds., 2001). One likely reason is the relative brevity of the word black. I choose it for this reason and because I think that even if “black” is not as historically or geographically defining as “African American,” it is equally or more culturally defining.

In this article I use the word “poor” to designate the economically disadvantaged, low-income population. While I endeavor to use the word in a purely neutral, descriptive sense, I recognize that it is a term fraught with “mischievous ambiguity.” A. B. ATKINSON,

commentator described the televised presentations of the aftermath of Hurricane Katrina and the squalor that many survivors faced as examples of “disaster pornography.”¹⁵ Some less sympathetic viewers likely thought the spectacle evocative of the circles of Dante’s *Inferno*, with some commenting, both publicly and privately, that “those people” got what they deserved.¹⁶ When it was all over, in addition to the loss of human life and individual property losses, there were communal losses—large portions of neighborhoods that were the bedrock of black New Orleans were all but washed away.¹⁷ With the neighborhoods went

INCOMES AND THE WELFARE STATE: ESSAYS ON BRITAIN AND EUROPE 94 (1995) (quoting the British Poor Law Report of 1834). It has been noted that for much of U.S. history the word “poor” conjures two distinct images: the first of the “deserving” poor who lack the ability to work, and the second of the “undeserving” or “unworthy” poor who are fully able to provide for themselves but choose to exploit charity. CHRISTIE W. KIEFER, *HEALTH WORK WITH THE POOR: A PRACTICAL GUIDE* 3 (2000). Kiefer defends neither image but instead rejects the dichotomy, thus rejecting “the notion that poverty is essentially a matter of personal responsibility.” *Id.* Like Kiefer, I choose to reject the dichotomy, and in doing so, I acknowledge the immense multidimensionality of poverty and the way in which it may intersect with race, gender, or sexual orientation. *See id.*

¹⁵ Corey Rayburn, *To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 COLUM. J. GENDER & L. 437, 470 (2006). The phrase “disaster pornography” has been used to describe the way in which victims suffering in disasters are dehumanized, exploited, and reduced to objects of mass media consumption by sensationalized portrayals. *See id.* at 468–71. These accounts are characterized by excessive repetition, a focus on the grotesque or the obscene, and a complete lack of nuance in reporting the actual problems of victims. *See id.*; *see also* Kenneth Hewitt, *Excluded Perspectives in the Social Construction of Disaster*, in *WHAT IS A DISASTER?: PERSPECTIVES ON THE QUESTION* 75, 87 (E.L. Quarantelli ed., 1998). Compare the notion of “dismay of images,” a phrase that describes the way in which media portrayals of violence, crime, and disaster distort identity in face-to-face relations. *See* Arthur Kleinman, *The Violences of Everyday Life: The Multiple Forms and Dynamics of Social Violence*, in *VIOLENCE AND SUBJECTIVITY* 226, 231–33 (Veena Das et al. eds., 2000). Distortion occurs because such portrayals appropriate images of the victims, normalize suffering, turn empathetic viewers into voyeurs, and thereby alter the experience of social suffering. *See id.* at 232.

¹⁶ *See* Carey Hamilton et al., *When the Spotlight Fades*, SALT LAKE CITY TRIB., Mar. 1, 2006, at A1. One commentator explained this attitude as follows: “Katrina victims are what we’ve termed in social work circles the undeserving poor. The hurricane hits and they become the symbol for how we focus our resources. They were in the headlines, and we could see their poverty and their need.” *Id.* (quoting Mary Jane Taylor, Associate Professor at the School of Social Work, University of Utah).

In Dante’s *Inferno*, one of the three books of *The Divine Comedy*, Hell consists of nine concentric descending circles, with each successive descending circle more gruesome or harrowing than the previous one. *See generally* DANTE ALIGHIERI, *THE DIVINE COMEDY* (Charles Eliot Norton trans., Encyclopedia Britannica 1952) (1308–1321). The circles are occupied by unrepentant sinners whose sins are punished in an ironic fashion—the sinner is inflicted by the chief sin he or she committed for all of eternity. *See id.* *See generally* W.H.V. READE, *THE MORAL SYSTEM OF DANTE’S INFERNO* (Kennikat Press 1969) (1909).

¹⁷ *See* discussion *infra* Part I.

the people and the collective cultural life they infused into their own neighborhoods and into the entire city of New Orleans.

Thousands of these poor, black New Orleanians were able to flee their home city only after Hurricane Katrina had passed, when the national and international spotlight sparked enough outrage to convince local and federal authorities to provide some means of escape.¹⁸ The reaction of national leaders to the crisis caused by Hurricane Katrina was slow, causing many to excoriate the Bush administration for its inadequate response.¹⁹ *Newsweek* published a cover photo showing a tearful black infant, a victim of Hurricane Katrina, with the caption “Poverty, Race & Katrina Lessons of a National Shame.”²⁰ Rap singer Kanye West declared during a nationally televised telethon for hurricane victims that “George Bush doesn’t care about black people,” sparking a maelstrom of responses, both critical and approving.²¹

Those escaping the deluge and its aftermath were frequently labeled “refugees” by media reports.²² While these persons were not,

¹⁸ See WALTER M. BRASCH, ‘UNACCEPTABLE’: THE FEDERAL RESPONSE TO HURRICANE KATRINA 58–69 (2006).

¹⁹ See *id.* at 58–65.

²⁰ NEWSWEEK, Sept. 19, 2005 (cover photograph).

²¹ Adrienne T. Washington, Op-Ed., *Timidity No Answer to Racism in Katrina Debacle*, WASH. TIMES, Sept. 6, 2005, at B2. Secretary of State Condoleezza Rice stated in response to West’s remarks that, “Americans don’t want to see Americans suffer. Nobody, especially the president, would have left people unattended on the basis of race.” Angela Rozas & Howard Witt, *The Dreadful Toll*, CHI. TRIB., Sept. 5, 2005, § 1, at 1. Conversely, Scholar Michael Eric Dyson argued that Kanye West’s comments suggested that “the government had callously broken its compact with its poor black citizens, and that it had forgotten them because it had not taken their pain to heart.” MICHAEL ERIC DYSON, *COME HELL OR HIGH WATER: HURRICANE KATRINA AND THE COLOR OF DISASTER* 28 (2006). However, perhaps the most creative expression of approval of West’s comments was a parodic rap written by Houston rap group The Legendary K.O. THE LEGENDARY K.O., *George Bush Doesn’t Care About Black People*, on C.I.G.A.C. MIXTAPE (2005), available at <http://www.k-otix.com/cigac/komixtape.zip>. The song, titled *George Bush Doesn’t Care About Black People*, and sung to the tune of Kanye West’s hit single *Gold Digger*, is a powerful statement about the loss and powerlessness of poor, black Katrina victims. *Id.*; KANYE WEST, *Gold Digger*, on LATE REGISTRATION (Roc-a-Fella Records 2005). For a portion of the lyrics to the song, see Appendix A.

²² See *Hurricane Katrina Turns ‘Refugee’ into Word of the Year*, WASH. POST, Dec. 15, 2005, at C7. The word refugee was designated a word of the year by the Global Language Monitor, a language-monitoring group. *Id.*; see also *Top Word Lists of 2005*, GLOBAL LANGUAGE MONITOR, Dec. 16, 2005, http://www.languagemonitor.com/Top_Word_Lists.html. The group pointed to the political storm caused by the use of “refugee” to describe the hundreds of thousands of people who fled Hurricane Katrina. *Hurricane Katrina Turns ‘Refugee’ into Word of the Year*, *supra* (“Global Language Monitor head Paul JJ Payack said refugee, which was used five times more often than other words to describe those made homeless by Katrina, triggered a debate on race and political correctness.”). As a result of complaints by storm victims and their ad-

strictly speaking, refugees—generally defined as persecuted escapees from often dysfunctional countries with no immediate prospect of return—in many respects they were adrift and functionally stateless.²³ Some evacuees had never lived anywhere else and had no friends or relations on whom to rely outside of their home city.²⁴ A good number lost vital documents such as government identifications, birth certificates, and health insurance cards, and hence had great difficulty securing services elsewhere in the state or the country.²⁵ Some were the victims of scam artists who exploited the evacuees' lack of documents, often taking what few funds victims possessed in exchange for worthless documentation.²⁶ Others fell prey to identity theft when thieves gained access to the social security cards and other vital data left behind by their victims in the haste of evacuation.²⁷

Those who were last to escape New Orleans often suffered the brunt of the storm, were the least able to evacuate to other places, and were often unwelcome in their new havens. Some towns and cities extended only a lukewarm welcome to the escapees.²⁸ Other towns, though initially welcoming, soon developed “Katrina fatigue,” or weariness with addressing the concerns of so many continuously needy people.²⁹ This was apparently the case in Houston, which probably received the bulk of Katrina evacuees.³⁰ There, Rep. John Culberson (R-Tex.) proposed “one-strike” legislation, which was directed at evacuees and would make it possible to “deport” criminal offenders out of Houston and back to their home cities.³¹ The comments of this legislator reflected the widely held, though unsubstantiated, belief that Katrina evacuees were largely responsible for Houston’s upsurge in crime dur-

vocates, a number of media outlets switched to the alternate term “evacuee.” See Robert E. Pierre & Paul Farhi, *Refugee: A Word of Trouble*, WASH. POST, Sept. 7, 2005, at C1.

²³ See *id.*

²⁴ See David Ellison, *A Tale of Two Cities*, HOUSTON CHRON., Sept. 19, 2006, at A1.

²⁵ See Alisa Marie DeMao, *Katrina Evacuees Tangled in Red Tape*, FLA. TIMES-UNION (Jacksonville), Oct. 25, 2005, at B1; Jeb Phillips, *Problems Following Evacuees up North*, COLUMBUS DISPATCH (Ohio), Sept. 23, 2005, at 1A.

²⁶ Michelle Hunter, *Fake Driver’s Licenses Fuel Arrests*, TIMES-PICAYUNE (New Orleans), May 12, 2006, at 1 (reporting that evacuees purchased what turned out to be false driver’s licenses in order to secure services in the absence of actual identification documents).

²⁷ Grant Schulte, *Agencies Warn of Scam Artists*, HOUSTON CHRON., Oct. 6, 2005, at 1.

²⁸ See, e.g., Jeremy Alford, *In One Parish, Divide over Sheltering Newcomers*, N.Y. TIMES, Sept. 28, 2005, at A24.

²⁹ See Katy Reckdahl, *Desert Storm*, PHOENIX NEW TIMES, July 13, 2006.

³⁰ See Howard Witt, *In Houston, Storm Brews on Evacuees*, CHI. TRIB., Apr. 26, 2006, § 1, at 3. Estimates are that over 100,000 Katrina evacuees remained in the Houston metropolitan area as of September, 2006. Ellison, *supra* note 24.

³¹ Witt, *supra* note 30.

ing the months following the arrival of the evacuees.³² At least one town, apparently viewing the poor, black hurricane evacuees as malignant debris left after the storm, actively refused to provide sanctuary.³³ Many of the Katrina evacuees will be, like actual refugees, permanently in exile—they will have great difficulty returning to live in the New Orleans of the future.

B. *Many Thousands Gone, Perhaps Never to Return*

Poor, black New Orleans residents were frequently the last to escape during the evacuation.³⁴ They are now among the last to return to New Orleans; in fact, many may never return.³⁵ This delay in movement is illustrated by analysis of the first U.S. Census Bureau data showing the demographic impacts of Hurricanes Katrina and Rita on the population of the Gulf Coast region.³⁶ In the New Orleans metropolitan area, the post-hurricane population was “more white, less poor, and more transitory than the pre-hurricane population.”³⁷ It has been suggested that these changes were the result of the disproportionate evacuation and slower return of lower-income and black residents from the entire metropolitan area after the storms.³⁸ Moreover, researchers

³² See, e.g., Todd Bensman, *Katrina Crime: Perceived or Real?*, SAN ANTONIO EXPRESS-NEWS, Oct. 29, 2006, at 1A; Peggy O’Hare, *Which Came First—The Evacuees or the Crime?*, HOUSTON CHRON., Oct. 22, 2006, at B1.

³³ See *60 Minutes: The Bridge to Gretna* (CBS television broadcast Dec. 18, 2005) (transcript available on LEXIS, follow News & Business, Combined Sources, Transcripts). Armed police from the town of Gretna, Louisiana, which is just over the Mississippi River from New Orleans, blocked the only connecting route, a bridge called the Crescent City Connection, when hundreds of Katrina evacuees tried to cross on foot in the aftermath of the storm. *Id.* Town officials argued that they were trying to protect the town. *Id.* Mayor Ronnie Harris of Gretna, in response to criticism of the town’s behavior, allegedly stated, “This [Hurricane Katrina] was not a 9/11 tragedy with good-heartedness all around. You had anarchy and civil disobedience.” *Hurricane Katrina: Voices from Inside the Storm: Hearing Before the H. Select Bipartisan Comm. to Investigate the Preparation for and Response to Hurricane Katrina*, 109th Cong. (2005) (opening statement of Rep. Tom Davis, Chairman, H. Select Katrina Response Investigation Comm.).

³⁴ See BRASCH, *supra* note 18, at 9. Many poor and working class people, the majority of whom were black, were the last to leave New Orleans chiefly because they had no resources to leave. *Id.* Some resisted leaving in order to safeguard their possessions. *Id.*; *Lou Dobbs Tonight: Crisis in Louisiana* (CNN television broadcast Sept. 8, 2005) (rush transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0509/08/ldt.01.html>).

³⁵ LOGAN, *supra* note 5, at 1.

³⁶ WILLIAM H. FREY & AUDREY SINGER, BROOKINGS INST., *KATRINA AND RITA IMPACTS ON GULF COAST POPULATIONS: FIRST CENSUS FINDINGS 8–11* (2006), available at http://www.brookings.edu/metro/pubs/20060607_hurricanes.pdf.

³⁷ *Id.* at 8.

³⁸ *Id.* at 9, 11.

from Brown University have found that if these overwhelmingly poor, mostly black evacuees are prevented from returning to their own neighborhoods, New Orleans stands to lose approximately eighty percent of its black population.³⁹

There are a number of explanations for why poor, black Katrina victims failed to return to New Orleans. First, a lack of personal financial resources may have prevented many evacuees from returning.⁴⁰ Additionally, many evacuees face difficult housing-related barriers. Some of the storm victims were the owners of uninsured or underinsured houses, and thus have insufficient funds to repair or replace damaged homes.⁴¹ Others were the owners of only marginally damaged houses that have been slated for demolition by city authorities who have made little, if any, effort to contact owners.⁴² Some storm victims were the occupants of public housing that, whether reparable or not, has been slated for demolition or renovation.⁴³ These former public housing occupants have, for the most part, been offered no meaningful alternate housing.⁴⁴ Still others have been evicted from fully functioning,

³⁹ LOGAN, *supra* note 5, at 1; Ross Frazier, *New Orleans Could Lose 80 Percent of Black Population, Brown Study Finds*, BROWN UNIV. DAILY HERALD, Feb. 2, 2006, at 1.

⁴⁰ *See, e.g.*, Beaumont, *supra* note 1; Allan Turner & Eric Berger, *Report: Storms Left New Human Landscape*, HOUSTON CHRON.COM, June 7, 2006, <http://chron.com/disp/story.mpl.hurricane/3945689.html>.

⁴¹ *See* discussion *infra* Part II.A.

⁴² The limited efforts of New Orleans authorities to contact homeowners of the demolition list was documented by a number of entities, among them law students at the University of California, Los Angeles (UCLA) Law School who volunteered to assist storm victims in 2005 and 2006. *See, e.g.*, Audio tape: Panel Discussion, Critical Race Praxis: Reports on Race, Rights, and Reconstruction from the Gulf Coast, at Western Law Professors of Color Conference, Pale Promises: Confronting the Rights Deficit (Mar. 31, 2006) (on file with author) [hereinafter Panel Discussion on Race, Rights, and Reconstruction]. One student commented about the insistence of the city of New Orleans that it had made a good faith effort to reach many of the owners of homes slated for demolition. *Id.* (comments of Panelist Priscilla Ocen, Student Member of the Critical Race Theory Program, UCLA Law School). In the course of a few days' work, using standard search tools such as the Internet, the students had located a number of previously "lost" homeowners. *Id.*

⁴³ *NBC Nightly News: New Orleans Residents File Lawsuit to Block Demolition of Public Housing Complexes Damaged by Hurricane Katrina* (NBC television broadcast Dec. 8, 2006) (transcript available on LEXIS, follow News & Business, Combined Sources, Transcripts).

⁴⁴ *See* Class Action Complaint for Declaratory Relief, Injunctive Relief, and Damages at 2–3, *Anderson v. Jackson*, No. 06-3298 (E.D. La. June 27, 2006), 2006 WL 2032744. On June 27, 2006, former residents of public housing in New Orleans filed a lawsuit alleging that a federal plan to demolish four public housing complexes in New Orleans was discriminatory and violated international laws that protect people displaced by natural disasters. *Id.* at 25–31. The suit was filed by several residents against the U.S. Department of Housing and Urban Development (HUD) and the Housing Authority of New Orleans, which was effectively taken over by HUD four years ago. *Id.* at 7, 16–17.

privately owned housing units that served the working poor and lower middle class before the hurricane.⁴⁵ Those housing units, like much of the housing available in New Orleans after Hurricane Katrina, are in high demand and thus are being re-rented at often significantly higher rates.⁴⁶ Finally, the lack of housing is exacerbated by the desire of local authorities to build a “new, improved New Orleans” that excludes “undesirables,” that is, poor, black people.⁴⁷ As a result, large numbers of New Orleans’s poor blacks are not likely to resume residency in the city.

In the face of so many obstacles to the return of much of New Orleans’s black community, a fundamental inquiry arises—what is the recourse for persons facing housing loss impeding their ability to return home? While there are some standard legal remedies for individuals facing displacement, the question concerns not just the harms to individual housing rights created in the wake of Hurricane Katrina but also harms to the evacuees’ right to live where they, and in many cases generations of their families, have lived for many years.⁴⁸ Long-term residency imbues a sense of place involving individual as well as collective or communal rights.⁴⁹ Many of the poor blacks evacuated from New Orleans occupied some of the longest-standing and most vibrant black communities in the United States. Is there a right to return to and re-settle these places, and if not, should there be?

Generally, U.S. law provides no explicit right of return for persons who are displaced internally, meaning within the country.⁵⁰ Although the U.S. Constitution protects freedom of movement and the right to travel, there is no explicit right to return to a previous place of habitation, nor has such a right been held to flow from any articulated consti-

⁴⁵ Sacha Pfeiffer, *Landlord with Boston Ties Lashed for Katrina Evictions*, BOSTON GLOBE, Jan. 29, 2006, at A1.

⁴⁶ *Id.*

⁴⁷ See discussion *infra* Part III.B.

⁴⁸ The black community in New Orleans has a long history dating back to antebellum New Orleans’s large, influential, and propertied free black—or *libre*—population, which was unique in the South. See generally KIMBERLY S. HANGER, *BOUNDED LIVES, BOUNDED PLACES: FREE BLACK SOCIETY IN COLONIAL NEW ORLEANS, 1769-1803* (1997).

⁴⁹ See Nadia Lovell, *Introduction to LOCALITY AND BELONGING* 1, 1–2 (Nadia Lovell ed., 1998). Some individuals’ sense of belonging arises from not only the individual memory, but also the collective memory associated with a place. *Id.* at 4. Several sources provide a discussion of the politics of the placement and displacement of particular social groups. See Irwin Altman & Setha M. Low, *Place Attachment: A Conceptual Inquiry*, in *PLACE ATTACHMENT* 1, 1–12 (Irwin Altman & Setha M. Low eds., 1992) (providing an overview of previous research regarding the characteristics, sources, and roles of place attachment from a multi-disciplinary point of view). See generally SUZAN ILCAN, *LONGING IN BELONGING: THE CULTURAL POLITICS OF SETTLEMENT* (2002).

⁵⁰ See discussion *infra* Parts IV.C, V.

tutional right.⁵¹ Given this void in U.S. domestic law, I turn to international law to find support for a domestic right of return.

C. *What This Article Is About*

I began this article with a critical account of the aftermath of Hurricane Katrina. This critique serves as the backdrop for a discussion of the extent to which there are international laws or norms that give poor, black Katrina victims, both as individuals and community members, the right to return to and resettle their historical place.⁵² This article is framed by a discussion of the neighborhoods that were destroyed and an exploration of some housing deprivations suffered by Katrina survivors that have led to widespread displacement and dispossession. Thereafter the article discusses two of the chief barriers to the return of poor blacks to New Orleans: the broad perception of a race-crime nexus and the effect of the imposition of outsider status on poor, black people. Turning to remedies for the dispossession, I explore the international law concept of the right of return and its expression as a domestic, internal norm and consider how it might be applicable to the Katrina victims. While this article considers only the contours of this complex and multifaceted issue, it is clear that its significance merits further analysis by both theorists and practitioners. Undoubtedly, a right of return would help the poor, black former inhabitants of New Orleans become a part of their city once more.

⁵¹ See *United States v. Guest*, 383 U.S. 745, 764 (1966) (Harlan, J. concurring) (“[T]he right of ingress and regress . . . is a privilege and immunity of national citizenship under the Constitution.” (citing *Corfield v. Coryell*, 6 F. Cas. 546, 551–52 (C.C.E.D. Pa. 1825) (No. 3230))); *Kent v. Dulles*, 357 U.S. 116, 125 (1958) (holding that, under the Fifth Amendment, a citizen cannot be deprived of the right to travel without due process of law). The right to domestic travel is said to have three separate components in the United States: “the right of a citizen of one state to enter and leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien . . . and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.” *Saenz v. Roe*, 526 U.S. 489, 500–03 (1999).

⁵² Blacks were by no means the only community of color to suffer in the aftermath of Hurricane Katrina. See generally BRENDA MUÑIZ, NAT’L COUNCIL OF LA RAZA, IN THE EYE OF THE STORM: HOW THE GOVERNMENT AND PRIVATE RESPONSE TO HURRICANE KATRINA FAILED LATINOS (2006), available at http://www.nclr.org/files/36812_file_WP_Katrina_FNL_fnl.pdf. Katrina had a devastating impact on the Latino community for two reasons. See *id.* at 4–7, 11. The few sources of relief which were made available during and after the storm were sometimes inaccessible to Latinos due to language barriers. See *id.* at 11. In addition, Latino immigrants, both documented and undocumented, were frequently excluded from receiving benefits due to uncertainty about their eligibility. See *id.* at 4–7.

I. THE WAY THEY WERE: NEW ORLEANS'S HISTORIC BLACK NEIGHBORHOODS

"I don't care what people are saying Uptown or wherever they are. This city will be chocolate at the end of the day. . . . This city will be a majority African-American city. It's the way God wants it to be."

—New Orleans Mayor Ray Nagin⁵³

A. *The Lower Ninth Ward*

New Orleans, despite being subject to the South's stringent social codes separating blacks from whites in most avenues of life, was relatively integrated in the period before the U.S. Civil War.⁵⁴ This social liberality ended, however, with the onset of Jim Crow laws.⁵⁵ The racial division originating during this period resulted in the growth of largely black neighborhoods.⁵⁶ Though a number of these primarily black areas sustained significant damage during Hurricane Katrina and in the storm that came less than a month later, Hurricane Rita, the best known of the black neighborhoods was the Lower Ninth Ward.⁵⁷

The Lower Ninth Ward, often called Lower Nine by New Orleanians, consists of the portion of the Ninth Ward that runs along the Mississippi River downriver from the Industrial Canal and stretching to the parish of St. Bernard.⁵⁸ The Lower Ninth Ward has long been known for its high number of working-class African American homeowners.⁵⁹ However, though much of New Orleans dates back to the eighteenth century, the Lower Ninth Ward was one of the last sections of the city to

⁵³ John Pope, *Evoking King, Nagin Calls N.O. 'Chocolate' City*, TIMES-PICAYUNE (New Orleans), Jan. 17, 2006, at 1.

⁵⁴ See, e.g., Craig E. Colten, *Basin Street Blues: Drainage and Environmental Equity in New Orleans, 1890-1930*, 28 J. HIST. GEOGRAPHY 237, 241 (2002) (citing Roger A. Fischer, *Racial Segregation in Ante Bellum New Orleans*, 74 AM. HIST. REV. 926 (1969), H.W. Gilmore, *The Old New Orleans and the New: A Case for Ecology*, 9 AM. SOCIOLOGICAL REV. 385 (1944), and Daphne Spain, *Race Relations and Residential Segregation in New Orleans: Two Centuries of Paradox*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 1979, at 82).

⁵⁵ *Id.*

⁵⁶ See *id.* at 239–41; Juliette Landphair, *Sewerage, Sidewalks, and Schools: The New Orleans Ninth Ward and Public School Desegregation*, LA. HIST., Winter 1999, at 35, 40–41.

⁵⁷ See Beaumont, *supra* note 1.

⁵⁸ See NEW ORLEANS NEIGHBORHOOD MAP, *supra* note 5; see also AMIS, *supra* note 4, at 45; Landphair, *supra* note 56, at 38–39.

⁵⁹ Susan J. Popkin et al., *Rebuilding Affordable Housing in New Orleans: The Challenge of Creating Inclusive Communities*, in URBAN INST., AFTER KATRINA: REBUILDING OPPORTUNITY AND EQUITY INTO THE NEW NEW ORLEANS 17, 18–19 (Margery Austin Turner & Sheila R. Zedlewski eds., 2006), available at http://www.urban.org/UploadedPDF/311406_after_katrina.pdf.

be developed.⁶⁰ The area's poor drainage and relative isolation from the rest of the city explains its late development.⁶¹ The Lower Ninth Ward was created from a cypress swamp, and initially was populated by poor blacks and immigrant whites unable to afford housing in other sections of New Orleans.⁶² Some black families date their presence in the area to the 1870s, when a number of African American benevolent associations and mutual-aid societies organized to provide support for the large numbers of freedmen whose recent condition of servitude had left them few resources to live on their own.⁶³ From their earliest presence in the Lower Ninth Ward, self-help became the watchword for African American families as municipal authorities all but ignored the area's residents.⁶⁴

By the early 1920s, a significant portion of the Lower Ninth Ward's residents were black, and they remained underserved by public officials.⁶⁵ For example, despite much of the wealth generated throughout New Orleans in the early twentieth century, eighty-six percent of the streets in the Lower Ninth Ward remained unpaved as late as the 1960s.⁶⁶ For much of its history, the area also lacked proper drainage and sewers; a number of homes still used outhouses and poorly installed septic tanks.⁶⁷ In September 1965, Hurricane Betsy exacerbated these problems; Betsy killed sixty-five people in New Orleans, with its most devastating effects felt in the Lower Ninth, much of which was left underwater.⁶⁸ However, despite its limited resources, the Lower Ninth Ward was a vibrant neighborhood characterized by an independent "can-do" attitude that developed in response to governmental neglect.⁶⁹ Even in the face of persistent poverty in some areas, by the time Hurricane Katrina hit, sixty percent of the homes in the area were owner-occupied.⁷⁰

⁶⁰ AMIS, *supra* note 4, at 64.

⁶¹ *See id.*

⁶² *Id.*

⁶³ *Id.*; Landphair, *supra* note 56, at 35, 36–37, 40.

⁶⁴ *See* CRAIG E. COLTEN, AN UNNATURAL METROPOLIS: WRESTING NEW ORLEANS FROM NATURE 114 (2005); Landphair, *supra* note 56, at 40–41.

⁶⁵ *E.g.*, COLTEN, *supra* note 64, at 97–98, 114.

⁶⁶ Kent B. Germany, "They Can Be Like Other People": Race, Poverty, and the Politics of Alienation in New Orleans's Early Great Society, in *THE NEW DEAL AND BEYOND: SOCIAL WELFARE IN THE SOUTH SINCE 1930*, at 163, 166–67, 170 (Elna C. Green ed., 2003).

⁶⁷ COLTEN, *supra* note 64, at 100; Landphair, *supra* note 56, at 35.

⁶⁸ BRINKLEY, *supra* note 5, at 59; *see* COLTEN, *supra* note 64, at 145–46, 154.

⁶⁹ *See* Nicolai Ouroussoff, *In New Orleans, Each Resident Is Master of Plan to Rebuild*, N.Y. TIMES, Aug. 8, 2006, at E1; Landphair, *supra* note 56, at 37, 41, 44.

⁷⁰ Popkin et al., *supra* note 59, at 19.

Hurricanes Katrina and Rita destroyed or heavily damaged the vast majority of the Lower Ninth Ward's housing.⁷¹ Mandatory evacuations of New Orleans resulted in the displacement of a large number of residents, with many unable to return to their homes or even to New Orleans proper.⁷² Piles of debris, untreated water, lack of electricity, insufficient housing, and limited public educational facilities and other services are only some of the problems that caused and are still causing the prolonged absence of former residents.⁷³ The destruction of the Lower Ninth Ward meant the loss of more than just individual homes and businesses; it was the death of a vital institution. The Lower Ninth Ward was not, however, the only predominantly black section of New Orleans to experience such overwhelming loss.⁷⁴ Two other areas, the Central City and the Seventh Ward were also hard hit.⁷⁵

B. *Other Predominantly Black Areas Sustaining Damage:
The Central City and the Seventh Ward*

The Central City is a section of New Orleans located just above the central business district.⁷⁶ The section was first developed in the 1830s and was initially populated by working-class European, mostly Irish and Jewish, immigrants.⁷⁷ Much like the Lower Ninth Ward, the Central City is located in a basin so far below sea level that it has long been considered marginal land.⁷⁸ Despite being geographically ill-favored, the central business district contained theaters, music companies, and publishing houses that were part of a mainstream entertainment industry in the early twentieth century.⁷⁹

The Seventh Ward, located near downtown New Orleans and extending from Esplanade Avenue to Elysian Fields, is one of the lesser-known areas of New Orleans yet one of the hardest hit by flooding fol-

⁷¹ LOGAN, *supra* note 5, at 11 tbl.3 (indicating that 99.9% of the Lower Ninth Ward was damaged).

⁷² See *id.* at 1 ("[I]f nobody [is] able to return to damaged neighborhoods . . . New Orleans is at risk of losing more than 80% of its black population.").

⁷³ Evan Thomas et al., *New Orleans Blues*, NEWSWEEK, Sept. 4, 2006, at 28, 29.

⁷⁴ See discussion *infra* Part I.B.

⁷⁵ See discussion *infra* Part I.B.

⁷⁶ See NEW ORLEANS NEIGHBORHOOD MAP, *supra* note 5.

⁷⁷ See COLTEN, *supra* note 64, at 91; ROBERT N. ROSEN, *THE JEWISH CONFEDERATES* 25 (2000).

⁷⁸ See COLTEN, *supra* note 64, at 82–83.

⁷⁹ See Greater New Orleans Cmty. Data Ctr., Central Business District Neighborhood Snapshot, <http://www.gnocdc.org/orleans/1/47/snapshot.html> (last visited Apr. 20, 2007).

lowing Hurricane Katrina.⁸⁰ Throughout much of its early history, the Seventh Ward was home to Creoles—a term which, when employed in the context of New Orleans, refers to persons of mixed black and white ancestry.⁸¹ Like the Ninth Ward, it was a long-underserved section of the city, plagued by poor sewage, poor drainage, overpopulation, and frequent attempts by city government to curtail the autonomy of the residents.⁸² Nonetheless, almost since the founding of New Orleans, the Seventh Ward Creoles formed their own discrete social group with distinctive cuisine and culture.⁸³ Moreover, a number of the city's best known musicians, artists and craftsmen made their homes in the Seventh Ward.⁸⁴ One of the nation's most prosperous black business districts, the Claiborne Avenue neighborhood, was partly located in the Seventh Ward.⁸⁵

In the late 1960s, the business district along Claiborne Avenue was destroyed to allow for the new Interstate 10 loop.⁸⁶ The destruction of a large swath of the Ward for the interstate's construction undermined the integrity of the neighborhood.⁸⁷ While this caused some homeowners to move or abandon their homes, the neighborhood continued to house various groups of professionals, including skilled laborers such as mechanics, carpenters, and bricklayers.⁸⁸ More recently, the Seventh Ward was home to publicly funded housing complexes including St. Bernard, the largest of New Orleans's housing complexes.⁸⁹

⁸⁰ See LOGAN, *supra* note 5, at 11 tbl.3; NEW ORLEANS NEIGHBORHOOD MAP, *supra* note 5.

⁸¹ See VIRGINIA R. DOMÍNGUEZ, WHITE BY DEFINITION: SOCIAL CLASSIFICATION IN CREOLE LOUISIANA 122 (1986); see also Alice Moore Dunbar-Nelson, *People of Color in Louisiana* (pt.1), 1 J. NEGRO HIST. 361 (1916), reprinted in CREOLE: THE HISTORY AND LEGACY OF LOUISIANA'S FREE PEOPLE OF COLOR 3, 8–9 (Sybil Klein ed., 2000).

⁸² COLTEN, *supra* note 64, at 91, 95, 96.

⁸³ DOMÍNGUEZ, *supra* note 81, at 125–27.

⁸⁴ A number of well-known and lesser-known but highly esteemed jazz musicians of African ancestry made their homes in the Seventh Ward, among them Ferdinand “Jelly Roll” Morton, often cited as the “inventor” of jazz. ALAN LOMAX, MISTER JELLY ROLL: THE FORTUNES OF JELLY ROLL MORTON, NEW ORLEANS CREOLE AND “INVENTOR OF JAZZ,” at xii, xiv, 70–71 (Random House 1993) (1949).

⁸⁵ Tim Wise, *Progress and the Eye of the Beholder: Reflections on Race, Class and Truth*, BLACK COMMENTATOR, July 6, 2006, http://www.blackcommentator.com/190/190_progress_beholder_wise_think_pf.html.

⁸⁶ *Id.* A recent proposal is slated to replace Claiborne Avenue in order to recreate some of the black-owned businesses that once thrived there. See Ouroussoff, *supra* note 69.

⁸⁷ Wise, *supra* note 85.

⁸⁸ DOMÍNGUEZ, *supra* note 81, at 253–55; Wise, *supra* note 85.

⁸⁹ Bill Sasser, *Locking out New Orleans' Poor*, SALON.COM, June 12, 2006, http://www.salon.com/news/feature/2006/06/12/nola_housing/index.html.

The Lower Ninth Ward, the Central City, and the Seventh Ward all faced crippling loss in the aftermath of Hurricane Katrina. The suffering continues even now, long after the storm, as those affected must still deal with displacement and dispossession.

II. REASONS FOR THE DISPLACEMENT AND DISPOSSESSION OF POOR, BLACK NEW ORLEANIANS

“Whether we like it or not, New Orleans is not going to be 500,000 people for a long time. . . . New Orleans is not going to be as black as it was for a long time, if ever again.”

—Housing and Urban Development Secretary Alphonso Jackson⁹⁰

A. *Voyage of the Undammed: The Plight of the Uninsured and the Underinsured*

Many homes in the range of the storm, and virtually all of those that were mortgaged, had homeowner’s insurance coverage.⁹¹ Nonetheless, a number of poor, black Katrina survivors owning real property found themselves in a difficult position in the aftermath of the storm. One reason for this is that a number of low-income homeowners, having owned their homes long enough to pay off mortgages, were under no obligation to purchase either standard homeowner’s insurance or flood insurance; thus, many did not.⁹² For these uninsured homeowners, the only recourse against Katrina damage was to hope for government assistance, which in many cases has been slow in arriving.⁹³ Even in cases where the homeowners had insurance policies, the payouts

⁹⁰ Beaumont, *supra* note 1.

⁹¹ Cf. MARTIN F. GRACE ET AL., CATASTROPHE INSURANCE: CONSUMER DEMAND, MARKETS AND REGULATION 83 & n.14 (2003) (assuming, for purposes of analyzing demand in the market for homeowners insurance, that “homeowners insurance . . . is essentially mandatory”). Mortgage lenders generally require homeowners to purchase and keep in effect a policy of homeowner’s insurance prior to closing on the loan. See *id.* at 108; Popkin et al., *supra* note 59, at 18–19. The lender is named as sole or co-loss payee along with the borrower. See Mary L. Burgner, *Assisting Clients in Achieving the American Dream*, MICH. BUS. J., Jan. 1996, at 44, 46–47. In many cases, the lender collects funds from the mortgagor and maintains them in an escrow account in order to make the payments to the insurer, thus ensuring compliance with the insurance requirement. See *id.* at 45–47.

⁹² See Popkin et al., *supra* note 59, at 18, 19.

⁹³ Richard Wolf, *New Orleans Symbolizes U.S. War on Poverty*, USA TODAY, Dec. 22, 2006, at A13 (“Since Hurricane Katrina struck on Aug. 29, 2005, only 94 homeowners—and no tenants—have received federal aid to rebuild.”).

from insurance companies have also been delayed and insufficient for full recovery, particularly in the case of black claimants.⁹⁴

Many insurers denied claims made under valid homeowner's policies for losses caused by Hurricane Katrina, arguing that the losses were caused by flooding resulting from the levee breach and not the hurricane itself.⁹⁵ While standard homeowner's policies often cover wind and rain, flooding and associated perils are generally excluded from such policies and may only be addressed under flood insurance policies.⁹⁶ Nonetheless, several lawsuits have been filed to force insurers to cover some Katrina losses under standard homeowner's policies. In some cases, such suits argue the doctrine of "efficient proximate cause," which provides that if a covered peril causes an excluded peril, coverage is available even for the damage caused by the excluded peril.⁹⁷ Accordingly, if high winds, an included peril under many policies, caused flooding, then such flooding would be covered.⁹⁸ Efficient proximate cause has been the basis of successful claims by the insured in a number of jurisdictions, including Louisiana.⁹⁹ Because of the doctrine's

⁹⁴ Rukmini Callimachi & Frank Bass, *Complaints About Insurance Can Pay Off*, HOUSTON CHRON., Oct. 26, 2006, at 3. There is evidence to suggest that residents of black areas who actually had insurance and who filed claims under those policies are not being served in the same manner as their counterparts in white neighborhoods. *Id.* An analysis performed by the Associated Press (AP) showed that although more than 8000 Louisiana residents have filed Katrina-related complaints with the state insurance office, almost seventy-five percent of the 3000 insurance cases settled in Louisiana in the first year after Katrina were filed by residents currently living in predominantly white areas. *Id.* Claims filed by households in majority-black zip codes represented only twenty-five percent of settled claims. *Id.* As a result of the slow response from insurance companies, a number of black claimants have given up and accepted amounts representing, in some cases, only a fraction of their original claims. *Id.* The AP analysis also showed that "residents living in white neighborhoods have been three times as likely as homeowners in black areas to seek state help in resolving insurance disputes." *Id.*

⁹⁵ Mitchell F. Crusto, *The Katrina Fund: Repairing Breaches in Gulf Coast Insurance Levees*, 43 HARV. J. ON LEGIS. 329, 330-31, 333-34 (2006).

⁹⁶ *Id.* at 334-35. At least one major insurer is seeking to exempt wind and hail from its standard homeowners policies in hurricane-prone sections of Louisiana. Mike Hasten, *Allstate Threatens to Pull out of State*, NEWS-STAR (Monroe, La.), July 22, 2006, at 1A. Allstate, the state's second largest insurer, threatened to cancel its 30,000 homeowners insurance policies with customers in eighteen coastal Louisiana parishes if the state did not allow it to make the changes it sought. *Id.* For a discussion of excluded perils, see generally Crusto, *supra* note 95.

⁹⁷ For a further discussion of the doctrine of efficient proximate cause, see Crusto, *supra* note 95, at 343-44.

⁹⁸ *See id.*

⁹⁹ *Id.* at 344 (citing *Assurance Co. of Am. v. Jay-Mar, Inc.*, 38 F. Supp. 2d 349, 354 (D.N.J. 1999) and *Rhoden v. State Farm Fire & Cas. Co.*, 32 F. Supp. 2d 907, 912 (S.D. Miss. 1998)).

success, many insurers had inserted “anti-concurrent causation clauses” in their policies, chiefly in response to paying large numbers of claims from the devastation of Hurricane Camille in 1969.¹⁰⁰ Notwithstanding insurers’ efforts to limit the application of efficient proximate cause, a number of lawsuits have been filed by homeowners seeking such coverage.¹⁰¹ These suits have been met with limited success.¹⁰² In one such suit, plaintiff Trent Lott, the U.S. Senator from Mississippi, was denied coverage under a standard homeowner’s policy. As a result of the denial, Senator Lott filed suit and the insurer moved to dismiss.¹⁰³ Though Senator Lott prevailed, the matter continues in litigation. Another legislator, Representative Gene Taylor, a Democrat from Mississippi, has also filed suit after being denied coverage by an insurer.¹⁰⁴

¹⁰⁰ Spencer M. Taylor, *Insuring Against the Natural Catastrophe After Katrina*, NAT. RESOURCES & ENV’T, Spring 2006, at 26, 27. “Anti-concurrent causation clauses provide that the insurer will not pay if one of the causes was an excluded loss, even if there are several enumerated causes that played a role in a loss.” Crusto, *supra* note 95, at 344.

¹⁰¹ See, e.g., *Tuepker v. State Farm Fire & Cas. Co.*, No. 05-CV-559-LTS-JMR, 2006 WL 1442489, at *3 (S.D. Miss. May 24, 2006) (noting plaintiff’s allegation that wind was the proximate cause of damage to their property in Hurricane Katrina); *Buente v. Allstate Prop. & Cas. Ins. Co.*, No. 05-CV-712-LTS-JMR, 2006 WL 980784, at *1 (S.D. Miss. Apr. 12, 2006) (noting plaintiff’s allegation that storm surge was the cause of damage to their property in Hurricane Katrina and that storm surge was not an excluded peril). Homeowners in Orleans and Jefferson Parishes commenced a class action against the Louisiana Insurance Commissioner and numerous insurers to obtain a declaration that the flooding was dominantly and efficiently caused by levee breaches and thus by negligence and wind-storm, not by the flood exclusion. Class Action Petition for Declaratory Judgment and Mandamus at 3–6, *Chehardy v. Wooley*, No. 536451 (La. Jud. Dist. Ct. Sept. 16, 2005), 2005 La. Dist. Ct. Pleadings LEXIS 5, at *4–8, *9–10.

¹⁰² *Guice v. State Farm Fire & Cas. Co.*, No. 1:06CV001 (S.D. Miss. 2007) (Mem.), available at <http://www.mssd.uscourts.gov/Insurance%20Opinions/ch06cv1orderA0322.pdf> (denying certification of a class in a suit against State Farm brought by policyholders whose claims were rejected following Hurricane Katrina).

¹⁰³ See *Lott v. State Farm Fire & Cas. Co.*, No. 1:05-CV-671-LTS-RH, 2006 WL 2728695 at *1 (S.D. Miss. Sept. 19, 2006). In response, in June 2006, Senator Lott and Senator Mark Dayton, a Democrat from Minnesota, proposed a bill, colloquially termed “Honesty is the Best Insurance Policy,” which would require the language of insurance policies to be in plain English. Uniform Insurance Non-Coverage Disclosure Act, S. 3239, 109th Cong. § 2 (2006); Nomi Prins, Op-Ed., *Don’t Let Insurers Shirk Responsibility*, NEWSDAY (N.Y.), Aug. 30, 2006, at A33. Though the coverage problem was widespread and has caused many to file suit against insurers, some have speculated that because the insurance industry is one of the biggest donors to politicians’ coffers, there is little support in Congress for any change that would harm the interests of insurers. Ana Radelat, *Congress Unlikely to Help in Insurance Fights*, GANNETT NEWS SERV., Sept. 6, 2006 (on file with author).

¹⁰⁴ Ana Radelat, *Congress Targets Katrina Claims*, CLARION-LEDGER (Jackson, Miss.), Jan. 19, 2007, at 1A. Taylor is also chair of the House Democratic Caucus Hurricane Katrina Task Force, which advocates a number of proposals, among them “ending the insurance industry’s limited antitrust exemption” under the McCarran-Ferguson Act, “requiring homeowners’ policies to cover all perils, and creating a federal regulator to provide over-

Separate flood policies are offered either by private insurers or, more often, by the government in markets that face extreme flood risk.¹⁰⁵ In 1968 Congress created the National Flood Insurance Program (NFIP) in response to the rising cost of taxpayer-funded disaster relief for flood victims and the increasing amount of damage caused by floods.¹⁰⁶ The NFIP makes federally backed flood insurance available in communities that agree to adopt and enforce floodplain management ordinances to reduce future flood damage.¹⁰⁷ A large number of policies made available through the NFIP are administered by the Federal Emergency Management Agency (FEMA), a unit of the Department of Homeland Security.¹⁰⁸ Only owners in participating communities may purchase coverage, and generally this participation is based on an agreement between the local community and the federal government.¹⁰⁹ Because flood insurance is largely unavailable in standard homeowner's policies, the NFIP, which sells policies directly or through individual agents, assumes all risk of damages in the case of a flood.¹¹⁰

Notwithstanding government backing, flood insurance policies are often among the most expensive types of insurance offered to homeowners.¹¹¹ The exorbitant cost of such policies means that many

sight of the industry." *House Democrats' Katrina Panel Calls for Federal Insurance Oversight*, BESTWIRE, Oct. 20, 2006 (on file with author). For a broad discussion of the homeowner's insurance problems faced by Hurricane Katrina victims, see generally Crusto, *supra* note 95.

¹⁰⁵ See generally Edward T. Pasterick, *The National Flood Insurance Program: A U.S. Approach to Flood Loss Reduction*, in FLOOD ISSUES IN CONTEMPORARY WATER MANAGEMENT 185, 185–86 (Jiri Marsalek et al. eds., 2000).

¹⁰⁶ *Id.* at 185. For a broad discussion of the impact of the NFIP, see generally Raymond J. Burby, *Hurricane Katrina and the Paradoxes of Government Disaster Policy: Bringing About Wise Governmental Decisions for Hazardous Areas*, ANNALS AM. ACAD. POL. & SOC. SCI., Mar. 2006, at 171.

¹⁰⁷ FED. EMERGENCY MGMT. AGENCY (FEMA), ANSWERS TO QUESTIONS ABOUT THE NATIONAL FLOOD INSURANCE PROGRAM 1 (2006), available at <http://www.fema.gov/library/viewRecord.do?id=1404> (follow "View/Download/Print" hyperlink to access PDF file).

¹⁰⁸ *Id.* at 1–2.

¹⁰⁹ See *id.* at 9; Mark A. Riebau, *The Importance of Maps for Floodplain Management and Flood Insurance*, in FLOOD ISSUES IN CONTEMPORARY WATER MANAGEMENT, *supra* note 105, at 167, 168.

¹¹⁰ FEMA, NATIONAL FLOOD INSURANCE PROGRAM FLOOD INSURANCE MANUAL: GENERAL RULES, at GR-1 to GR-2 (2006), available at <http://www.fema.gov/pdf/nfip/manual200610/03gr.pdf>; see also Pasterick, *supra* note 105, at 189–90; Riebau, *supra* note 109, at 111.S

¹¹¹ For a discussion of the allocation of flood risk and the cost of such coverage, see Robert Rhee, *Catastrophic Risk and Governance After Hurricane Katrina: A Postscript to Terrorism Risk in a Post-9/11 Economy*, 38 ARIZ. ST. L.J. 581, 597–600 (2007).

homeowners choose to forgo flood coverage.¹¹² It has been reported that roughly half the damaged properties in Louisiana were covered by flood insurance.¹¹³ A large number of poor, black New Orleanians were among those lacking flood insurance.¹¹⁴ Moreover, another significant factor in the lack of flood insurance in the heavily African American Ninth Ward is that, prior to Hurricane Katrina, FEMA had termed much of the Lower Ninth Ward “low risk” because it was located on relatively high ground and was expected to be protected by the levees.¹¹⁵ In summary, many poor, black New Orleanians have been unable to recover and rebuild because they are either uninsured or, if they carry insurance at all, have insufficient coverage.

B. *The Threat of Wrongful Demolition*

In the immediate aftermath of Hurricanes Katrina and Rita, a number of the homes owned or occupied by evacuees were marked as nuisances by the city and slated for demolition.¹¹⁶ Demolition by local authorities in such circumstances is permitted under the general police power granted to states.¹¹⁷ However, in order for governmental authorities to act and demolish a structure, there must in fact be a nuisance.¹¹⁸ Owners of properties destroyed as nuisances are not granted compensation for those properties, as owners of properties taken for public use are.¹¹⁹ Yet owners may contest the finding of nuisance in cases of pending demolition through a public hearing, after proper notice is given.¹²⁰

¹¹² See Jonathan P. Hooks & Trisha B. Miller, *The Continuing Storm: How Disaster Recovery Excludes Those Most in Need*, 43 CAL. W. L. REV. 21, 28–29 (2006) (“[G]iven their financial constraints, many elderly, fixed-income, and low-income households simply do not purchase or maintain insurance.”).

¹¹³ E.g., *When Government Fails—Katrina’s Aftermath*, ECONOMIST, Sept. 10, 2005, at 25, 28.

¹¹⁴ See Hooks & Miller, *supra* note 112, at 34–35.

¹¹⁵ Popkin et al., *supra* note 59, at 19.

¹¹⁶ Joe Gyan, Jr., *N.O. Officials Promise Not to Seize Property*, ADVOCATE (Baton Rouge, La.), Aug. 4, 2006, at A1.

¹¹⁷ See *Freeman v. City of Dallas*, 242 F.3d 642, 652 (5th Cir. 2001); *James v. City of Dallas*, No. 3:98-CV-436-R, 2003 WL 22342799, at *18 (N.D. Tex. Aug. 28, 2003), *aff’d* 115 F. App’x 205 (5th Cir. 2004).

¹¹⁸ See *Freeman*, 242 F.3d at 652–53 (“[A] city may not arbitrarily enter abatement orders or declare the existence of nuisances with no underlying standards.”).

¹¹⁹ See *Willard v. City of Eugene*, 550 P.2d 457, 459 (Or. Ct. App. 1976). Actions for wrongful demolition or actions to enjoin such acts by a governmental entity are distinct from actions for inverse condemnation. See *id.* at 460 (denying plaintiff’s inverse condemnation claim but implying that the facts of the case may have been sufficient to prove the tort of wrongful demolition). An action for wrongful demolition typically contests a finding by governmental authorities that a property is a nuisance and seeks damages for the removal or destruction of the edifice. In contrast, an inverse condemnation claim requires

The issue of notice creates the major problem for poor, black New Orleanian homeowners. As a group of law students from the University of California at Los Angeles reported, New Orleans officials very often indicated that houses were set for destruction by physically marking them with fluorescent paint or by publishing details in local newspapers and referencing GPS coordinates instead of addresses.¹²¹ None of these forms of notice, of course, was likely to give actual notice to displaced homeowners, who were thousands of miles from New Orleans after Hurricane Katrina, that their homes were slated for demolition.

C. Eviction from Public Housing

Tenants who live in public housing or a federally subsidized apartment complex generally enjoy greater protection against eviction than most other tenants.¹²² However, protections are limited, and housing authorities who assert that units are unsafe or uninhabitable usually prevail in removing tenants.¹²³ Moreover, if public housing is renovated or revitalized, residents have no constitutional right to remain after revitalization of their residential units.¹²⁴

Many residents who had occupied public housing units were left with no immediate place of residence.¹²⁵ Many tenants fear that units that remain unoccupied will be gentrified to produce mixed-income units, thus permanently displacing the former residents.¹²⁶ These fears are well-founded if the previous actions of housing officials are any indication of their future intent.¹²⁷ Replacement of older public housing

an assertion that private property was taken for public use without compensation. *See id.* at 459.

¹²⁰ *See* Wantanabe Realty Corp. v. City of New York, 159 F. App'x 235, 237–38 (2d Cir. 2005).

¹²¹ *See* Joe Gyan, Jr., *N.O. Serves Notice on Property*, *ADVOCATE* (Baton Rouge, La.), Feb. 21, 2006, at A1; Panel Discussion on Race, Rights, and Reconstruction, *supra* note 42.

¹²² *See* Evictions from Certain Subsidized and HUD-Owned Projects, 24 C.F.R. § 247 (2006); Shelby D. Green, *The Public Housing Tenancy: Variations on the Common Law that Give Security of Tenure and Control*, 43 *CATH. U. L. REV.* 681, 732–33 (1994). Generally, eviction from public housing units must be for “good cause,” including but not limited to material noncompliance with the rental agreement, material failure to carry out obligations under any state tenancy laws, or certain types of criminal activity. 24 C.F.R. § 247.3(a).

¹²³ *See* 24 C.F.R. § 247.5, .10; Green, *supra* note 122, at 730–34.

¹²⁴ *Reese v. Miami-Dade County*, 242 F. Supp. 2d 1292, 1301, 1306–09 (S.D. Fla. 2002).

¹²⁵ Susan Saulny, *Residents Clamoring to Come Home to Projects in New Orleans*, *N.Y. TIMES*, June 6, 2006, at A14.

¹²⁶ *Id.*

¹²⁷ *See* Andrew Rice, *The Suburban Solution*, *N.Y. TIMES*, Mar. 5, 2006, § 6 (Magazine), at 114.

with mixed-income units has been a major result of a federal program called Hope VI.¹²⁸

Hope VI was designed to revitalize the nation's most damaged and dilapidated public housing.¹²⁹ Envisioned as a "New Urbanism" approach to public housing, Hope VI used a combination of public and private dollars to underwrite the costs of reconstructing public housing.¹³⁰ The funds provided for the construction of conventional subsidized apartments for low-income families, along with market rate apartments and private town homes.¹³¹ Across the United States, mixed-income developments were built where public housing devoted to the poor once stood.¹³² As a result of Hope VI, New Orleans residents who had lived in now-demolished housing projects were "vouchered-out," or given Housing Choice (Section 8) vouchers that were often difficult to use because of the dearth of landlords who choose to accept the subsidies.¹³³ In the 1990s, the residents of the St.

¹²⁸ See *id.* In 1992, under an annual appropriations act, Congress established the Urban Revitalization Development program, also known as HOPE VI (Homeownership and Opportunity for People Everywhere). Department of Veteran Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act of 1993, Pub. L. No. 102-389, tit. II, 106 Stat. 1571, 1579-81 (1992) (codified as amended at 42 U.S.C. § 1437v (2000)).

¹²⁹ See 42 U.S.C. § 1437v(a).

¹³⁰ *Id.* § 1437v(e)(2)(G); Ngai Pindell, *Is There Hope for HOPE VI?: Community Economic Development and Localism*, 35 CONN. L. REV. 385, 387, 420-22 (2003). For a discussion of the effects of HOPE VI, see DIANE K. LEVY & DEBORAH R. KAYE, METRO. HOUS. & CMTYS. CTR., URBAN INST., HOW ARE HOPE VI FAMILIES FARING?: INCOME AND EMPLOYMENT (Series Policy Brief No. 4, 2004). New Urbanism is a design and planning theory founded on assertions about the nature and scope of "traditional" American cities. See EMILY TALEN, NEW URBANISM AND AMERICAN PLANNING: THE CONFLICT OF CULTURES 1-2 (2005). New Urbanism attempts to bring together the multiple strands of urbanism such as "diversity, equity, community, connectivity, and the importance of civic and public space." *Id.* at 2-3.

¹³¹ Arthur M. Wolfson, *Lost in the Rubble: How the Destruction of Public Housing Fails to Account for the Loss of Community*, 9 CHAP. L. REV. 51, 63 (2005).

¹³² *Id.*; NAT'L HOUS. LAW PROJECT, FALSE HOPE: A CRITICAL ASSESSMENT OF THE HOPE VI PUBLIC HOUSING REDEVELOPMENT PROGRAM 10-11 (2002), available at <http://www.nhlp.org/html/pubhsg/FalseHOPE.pdf> [hereinafter FALSE HOPE].

¹³³ E.g., Rhonda Bell, *Apartments Scarce for Section 8 Renters*, TIMES-PICAYUNE (New Orleans), June 6, 2000, at B1. In some regions, housing vouchers would provide landlords with substantially the same rent as rent paid via private funds, but there is a chronic shortage of landlords who will accept the vouchers. See Pindell, *supra* note 130, at 430-32. As one commentator writes, "[t]he idea that the availability and quality of housing will be determined solely by the ability of persons seeking housing to pay rent at market rates . . . [t]o a great extent . . . is false." Green, *supra* note 122, at 685. This is the case because often property owners refuse to enter into landlord-tenant relationships based on non-monetary factors that are not necessarily reflective of economic rationality, such as "racism, low-income status, family composition, and receipt of public benefits." *Id.* (citing James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42

Thomas project in New Orleans found themselves “vouchered-out” when their building was demolished under Hope VI.¹³⁴ The St. Thomas project has become the prototype for the future of public housing in New Orleans, as planners envision a wide-scale implementation of mixed-use, market-rate developments.¹³⁵

Before Hurricane Katrina, Hope VI was slated for termination.¹³⁶ Proponents of the program argue that it has led to the revitalization of neighborhoods all over the United States and want to see it applied to the renewal of public housing in post-Katrina New Orleans.¹³⁷ Critics of the program point to several flaws.¹³⁸ Primarily, the Hope VI plan leaves many former housing residents without adequate housing.¹³⁹ In New Orleans and beyond, Hope VI, in its zeal to create mixed-use neighborhoods, has ignored the bonds formed among residents of public housing and in so doing has destroyed the sense of community forever.¹⁴⁰ The offer of vouchers instead of newly renovated housing has been upheld as a permissible government response to the problem of housing shortages for the poor.¹⁴¹ Unfortunately, even in cases where renovated

VAND. L. REV. 1049, 1050–51 (1989)). For a discussion of “vouchering out” the poor in the context of post-Katrina New Orleans, see Mike Davis, *Gentrifying Disaster*, MOTHER JONES, Oct. 25, 2005, available at http://www.motherjones.com/commentary/columns/2005/10/gentrifying_disaster.html.

In view of the international human rights norms discussed in later sections of this article, it may be interesting to consider the extent to which Hope VI or similar programs that require public housing residents to move and that result in gentrification may be viewed as arbitrarily forced relocation under international norms. See Marco Simons, *The Emergence of a Norm Against Arbitrary Forced Relocation*, 34 COLUM. HUM. RTS. L. REV. 95, 98–103 (2002). Forced relocation includes not only the most egregious human rights violations such as internment in concentration camps, but also “the assertion of control over populations (especially those of persecuted ethnic minority groups)” and “the relocation of populations out of areas designated for resource exploitation or off of lands that they do not own.” *Id.* at 104.

¹³⁴ Davis, *supra* note 133.

¹³⁵ E.g., Gwen Filosa, *Public Housing Still Empty*, TIMES-PICAYUNE (New Orleans), Apr. 9, 2006, at 1; Davis, *supra* note 133.

¹³⁶ See Rob Nelson, *Fischer Low-Rise Set to Be Razed*, TIMES-PICAYUNE (New Orleans), Feb. 28, 2003, at A1 (noting that in 2003, “President Bush [sought] to end the 10-year-old federal HOPE VI program, which his administration [said was] riddled with inefficiency and poor planning by local authorities.”).

¹³⁷ Gwen Filosa, *4 Housing Complexes Will Be Demolished*, TIMES-PICAYUNE (New Orleans), June 15, 2006, at A1.

¹³⁸ See generally FALSE HOPE, *supra* note 132.

¹³⁹ *Id.* at 7–15. For a further discussion of Hope VI and its impact on communities and the availability of housing for the poor, see generally Pindell, *supra* note 130, and Wolfson, *supra* note 131.

¹⁴⁰ Wolfson, *supra* note 131, at 69–70.

¹⁴¹ *Darst-Webbe Tenant Ass’n Bd. v. St. Louis Hous. Auth.*, 339 F.3d 702, 714 (8th Cir. 2003) (finding that even if Congress intended to require HOPE VI grant recipients to

housing reopens in the same communities, there is no guarantee that former residents will have access to the new units.¹⁴²

D. *Market Response Eviction from Private Housing*

Eviction from privately owned housing, or the forced removal from leased premises by a landlord or his agents, is usually governed by state and local statutes.¹⁴³ In many jurisdictions, landlords may evict tenants at the end of a lease term without cause, as long as the landlord uses the appropriate legal process and adheres to procedural requirements.¹⁴⁴ There are some jurisdictions where laws bar all but "just cause" evictions, with just cause defined either by the terms of the lease, case law, or a statute that enumerates permissible reasons for eviction.¹⁴⁵ Louisiana, however, is not such a jurisdiction. The lack of "just cause" regulation allows for what I have here termed "market response eviction."

By market response eviction, I mean those evictions that take place in an economic climate wherein it is more economically rewarding for landlords to evict current tenants and seek new tenants who are able to pay much higher rates. In cases where the increase in rent is exorbitant, this is sometimes referred to as price-gouging.¹⁴⁶ The issue of large rent increases versus tenant hardship has been described in a number of jurisdictions as the dilemma between "fair rent," or rents that achieve long-term equilibrium in landlord returns despite limited supply, and "forced subsidy," which involves rent control legislation that seems to place the burden of rental market failures on the landlord.¹⁴⁷ Generally, rent control legislation has been upheld, particularly in times of

provide replacement housing for all displaced tenants, the housing authority met this requirement by offering all displaced tenants Section 8 housing vouchers).

¹⁴² See *id.* at 714–15 (rejecting the contention that a refurbished housing project was required to provide space for all former tenants).

¹⁴³ See P. A. Agabin, Annotation, *Right of Landlord Legally Entitled to Possession to Dispossess Tenant Without Legal Process*, 6 A.L.R.3d 177, §§ 1, 5 (1966).

¹⁴⁴ See *id.* § 5.

¹⁴⁵ See, e.g., New Jersey Anti-Eviction Act, N.J. STAT. ANN. § 2A:18-61.1 (West 2000).

¹⁴⁶ See generally Geoffrey C. Rapp, *Gouging: Terrorist Attacks, Hurricanes, and the Legal and Economic Aspects of Post-Disaster Price Regulation*, 94 KY. L.J. 535 (2005–2006); Richard A. Epstein, *Rent Control and the Theory of Efficient Regulation*, 54 BROOK. L. REV. 741 (1988).

¹⁴⁷ See, e.g., Timothy L. Collins, "Fair Rents" or "Forced Subsidies" Under Rent Regulation: Finding a Regulatory Taking Where Legal Fictions Collide, 59 ALB. L. REV. 1293, 1294 (1996); Michael D. Bergman, Recent Development, *Property Law: Recent Developments in Rent Control and Related Laws Regulating the Landlord-Tenant Relationship*, 1989 N.Y.U. ANN. SURV. AM. L. 691, 734–36 (1989).

emergency shortage.¹⁴⁸ Since Katrina, over 450 complaints of housing-related price-gouging have been lodged with the office of Louisiana Attorney General Charles Foti, Jr.¹⁴⁹ However, because rent-based price-gouging is not covered explicitly by Louisiana law, the Attorney General has not filed any charges.¹⁵⁰ A bill introduced in the Louisiana legislature is designed to end the practice by making “unfair residential rent increases” in hurricane-damaged areas illegal.¹⁵¹

Despite efforts to address the problem of exorbitant rents, the problem continues over a year after the hurricane.¹⁵² According to data collected by the Brookings Institution, the fair market value of a two-bedroom apartment in New Orleans after Hurricane Katrina has risen by thirty-nine percent, meaning that the average price of a two-bedroom apartment has risen from \$676 to \$940 per month.¹⁵³ This increase in rental price was left largely unameliorated by the actions of the government.¹⁵⁴ For example, the Louisiana Recovery Authority has set aside \$7.5 billion to help homeowners with property recovery efforts and \$859 million to assist landlords.¹⁵⁵ No funds or economic benefits have been slated for direct delivery to tenants.¹⁵⁶ Hence, while landlords have been able to restore some of their properties and re-rent them, often at the new, higher rates, tenants whose rental housing was destroyed have received little funding to find housing in the higher-priced market.¹⁵⁷

¹⁴⁸ See, e.g., *Block v. Hirsh*, 256 U.S. 135, 155 (1921) (upholding a rent control ordinance on the theory that World War I had created an economic emergency that “clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law”).

¹⁴⁹ Michael Kunzelman, *After Katrina, Low-Income Tenants Fight Eviction*, MOBILE REGISTER (Ala.), Apr. 19, 2006, at A6.

¹⁵⁰ *Id.*

¹⁵¹ Jake Wagman, *Survivors of Katrina Strive to Set Down Roots Nine Months Later*, ST. LOUIS POST-DISPATCH, May 30, 2006, at A1.

¹⁵² AMY LIU ET AL., BROOKINGS INST., SPECIAL EDITION OF THE KATRINA INDEX: A ONE-YEAR REVIEW OF KEY INDICATORS OF RECOVERY IN POST-STORM NEW ORLEANS 4 (2006), available at http://www.brookings.edu/metro/pubs/20060822_katrina.pdf.

¹⁵³ *Id.* at 4, 5.

¹⁵⁴ See Susan Saulny & Gary Rivlin, *Renewal Money Bypasses Renters in New Orleans*, N.Y. TIMES, Sept. 17, 2006, at 14.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ See *id.*

III. OTHER BARRIERS TO THE RETURN OF POOR BLACKS TO NEW ORLEANS

A. “Cleaning up the Ghetto”: *The Conflation of Race and Crime in Urban Neighborhoods*

We finally cleaned up public housing in New Orleans. We couldn't do it. But God did.

—Representative Richard Baker, Republican Congressman from Baton Rouge¹⁵⁸

One of the significant barriers to the return of poor blacks to New Orleans is a notion that these persons were undesirable elements in the community. As one observer suggested, “If we’re going to try to recreate the city, why not do it right? Why rebuild it the way it was? New Orleans was a dangerous city even before the hurricane hit.”¹⁵⁹ Comments such as these, expressing an open Schadenfreude at the evacuation and slow return of poor blacks,¹⁶⁰ reflect notions held by many white and economically well-off New Orleanians—that there is conflation between race, crime, and urban residency, and that the face of crime in New Orleans is black.

Accordingly, the widespread evacuation of many poor blacks who previously resided in New Orleans is viewed as the beginning of a “dis-

¹⁵⁸ Susan Saulny, *Residents Clamoring to Come Home to Projects in New Orleans*, N.Y. TIMES, June 6, 2006, at A14.

¹⁵⁹ Haya El Nasser, *A New Orleans Like the Old One Just Won't Do*, USA TODAY, Sept. 19, 2005, at 15A.

¹⁶⁰ “Schadenfreude” is a German word, usually capitalized, signifying a malicious or perverse pleasure in the misfortune of others. 16 OXFORD ENGLISH DICTIONARY 611 (2d ed. 1989). It has been imported to English directly in its German form, as it is often said to have no true English equivalent. *But see* PETER NOVOBATZKY & AMMON SHEA, *INSULTING ENGLISH* 51 (2001) (defining “epicaricacy,” an English word of apparently similar meaning, but appearing in few modern dictionaries). In some of its earliest scholarly usage, Schadenfreude focused upon considerations of interpersonal relations. *See generally* FRITZ HEIDER, *THE PSYCHOLOGY OF INTERPERSONAL RELATIONS* (1958); FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* 127 (Walter Kaufmann ed., Walter Kaufmann & R. J. Hollingdale trans., Vintage Books 1989) (1887). In more recent scholarly usage, it has moved beyond the interpersonal to the broader context of intergroup relations, particularly where there are feelings of scorn or superiority held by one group towards another, and for this reason, it has a particular piquancy in the context of some mainstream white attitudes held about poor, black Katrina victims. *See* Russell Spears & Colin Wayne Leach, *Intergroup Schadenfreude: Conditions and Consequences*, in *THE SOCIAL LIFE OF EMOTIONS* 336, 336–38 (Larissa Z. Tiedens & Colin Wayne Leach eds., 2004). Spears and Leach argue that Schadenfreude is an important aspect of group social identity because of the way that it implies both “psychological distance” from and “emotional divergence” between one group and another. *Id.* at 338.

aster dividend,” or an unexpected bonus arising from the adversity.¹⁶¹ This dividend has helped to hasten the “urban renewal” process that has been part of the fabric of New Orleans and other American cities since the 1950s, resulting in such wholesale elimination of communities of color, especially black communities, that it is often cynically called “negro removal.”¹⁶²

This process of eliminating blacks from the urban fabric reflects anthropologist Claude Lévi-Strauss’ work on societies’ response to difference.¹⁶³ Lévi-Strauss suggests that societies use two mechanisms for addressing the “otherness” of Others: anthropoemic (expelling the Other) or anthropophagic (swallowing or appropriating the Other).¹⁶⁴ In primitive societies these devices were often literal and were seen in the use of exile and cannibalism.¹⁶⁵ Lévi-Strauss argues that these strategies of domination are mutually exclusive.¹⁶⁶ More recent commentators have viewed the anthropophagic and anthropoemic processes as coexisting mechanisms, which may function at the same time in societies although they may be in the province of differing institutions or may only be applied to certain segments of the population.¹⁶⁷

¹⁶¹ See, e.g., Ashok Malik, *The Disaster Dividend*, INDIAN EXPRESS (Mumbai), Oct. 31, 2005, available at http://www.indianexpress.com/res/web/pIe/archive_full_story.php?content_id=81079 (arguing that the massive October 8, 2005 earthquake in Jammu and Pakistan-occupied Kashmir might have the benefit of helping to bring peace the region). The disaster dividend may be compared in some respects to the notion of a “peace dividend.” TODD SANDLER & KEITH HARTLEY, *THE ECONOMICS OF DEFENSE* 277–79 (1995). A peace dividend refers, in the most basic sense, to the reallocation of spending from military purposes to other budget categories that are perceived as peacetime expenditures. *Id.* at 277. It has been noted that this view of the peace dividend is simplistic and fails to take into account the often complex and slow-moving process of such reallocations. *Id.* Similarly, a disaster dividend, while popularly conceived as an almost instantaneous materialization of a benefit after a disaster or emergency, may in fact be much slower in manifesting itself.

¹⁶² Thomas J. Campanella, *Urban Resilience and the Recovery of New Orleans*, 72 J. AM. PLANNING ASS’N 141, 144 (2006); see also CHARLES C. EUCHNER & STEPHEN J. MCGOVERN, *URBAN POLICY RECONSIDERED: DIALOGUES ON THE PROBLEMS AND PROSPECTS OF AMERICAN CITIES* 101 (2003); DAVID HILFIKER, *URBAN INJUSTICE: HOW GHETTOS HAPPEN* 6–11 (2002); Philip M. Hauser & Mary B. Wirth, *Relocation—Opportunity or Liability?*, in *POVERTY IN AMERICA* 349, 360–61 (Margaret S. Gordon ed., 1965).

¹⁶³ See CLAUDE LÉVI-STRAUSS, *TRISTES TROPIQUES* 287–88 (John Weightman & Doreen Weightman trans., 1992) (1955).

¹⁶⁴ Zygmunt Bauman, *Uses and Disuses of Urban Space*, in *ORGANIZING METROPOLITAN SPACE AND DISCOURSE* 15, 24 (Barbara Czarniawska & Rolf Solli eds., 2001) (citing LÉVI-STRAUSS, *supra* note 163).

¹⁶⁵ *Id.*

¹⁶⁶ See *id.*

¹⁶⁷ See ZYGMUNT BAUMAN, *LIFE IN FRAGMENTS: ESSAYS IN POSTMODERN MORALITY* 179–81 (1995); STANLEY COHEN, *VISIONS OF SOCIAL CONTROL: CRIME, PUNISHMENT AND*

These mechanisms are often present in modern society in “upgraded” or “refined” forms via the appropriation of cultural artifacts or other attributes of the Other, spatial separation, the establishment of urban ghettos, and measures that make it impracticable for the displaced to return to their former homes.¹⁶⁸ Indeed, the final mechanism may be at work in the case of blacks in New Orleans. Yet Hurricane Katrina is not the first time that the dislocation and destruction caused by a major disaster has driven some dominant white interests to seek the removal of a community of color.

Probably the best known historical example of a post-disaster effort to eliminate a community of color was seen in San Francisco’s Chinatown following the earthquake of 1906.¹⁶⁹ The 1906 earthquake was of immense proportions, estimated to have been at 8.3 on the Richter Scale.¹⁷⁰ The earthquake and subsequent fire that it caused damaged much of the city.¹⁷¹ Chinatown, centrally located on a hill in one of the prime commercial quarters of San Francisco, was all but destroyed by the earthquake.¹⁷² City leaders, and even out-of-town critics, immediately reprised attempts from the 1870s to move Chinatown from its central, geographically favorable location to a more marginal neighborhood.¹⁷³

In the wake of the destruction caused by the earthquake in San Francisco, it was argued that the entire neighborhood should be relocated, for the “safety” and “happiness” of the Chinese themselves, and

CLASSIFICATION 218–19, 234 (1985); JOCK YOUNG, *THE EXCLUSIVE SOCIETY: SOCIAL EXCLUSION, CRIME AND DIFFERENCE IN LATE MODERNITY* 56–57 (1999).

¹⁶⁸ MAY JOSEPH, *NOMADIC IDENTITIES: THE PERFORMANCE OF CITIZENSHIP* 131–32 (1999) (discussing “ideological cannibalism” and the way in which postcolonial societies consume the cultural corpus of Others as an exercise in state-building). Although Lévi-Strauss seemed to see the two impulses as being starkly opposed and viewed “primitive” societies as anthropoemic and modern societies as anthropophagic, Bauman sees both impulses in modern society. BAUMAN, *supra* note 167, at 179–81; LÉVI-STRAUSS, *supra* note 163, at 287–88.

¹⁶⁹ See generally PHILIP L. FRADKIN, *THE GREAT EARTHQUAKE AND FIRESTORMS OF 1906: HOW SAN FRANCISCO NEARLY DESTROYED ITSELF* 289–304 (2005).

¹⁷⁰ ANN WEIL, *EARTHQUAKES* 24 (2004). The Richter magnitude test scale, more accurately described as the local magnitude M_L scale, was developed in 1935 and credited to Charles Richter. *Id.* at 4; see Bruce A. Bolt, *Engineering Seismology*, in *EARTHQUAKE ENGINEERING: FROM ENGINEERING SEISMOLOGY TO PERFORMANCE-BASED ENGINEERING* 2-1, 2-13 to 2-15 (Yousef Bozorgnia & Vitelmo V. Bertero eds., 2004). The scale uses a base ten logarithmic scale to assign a single number to quantify the size of an earthquake. Bolt, *supra*, at 2-13. Approximating tools have allowed scientists to assign the 1906 San Francisco earthquake a place on the scale. *Id.*

¹⁷¹ FRADKIN, *supra* note 169, at 3–4.

¹⁷² *Id.* at 34–35, 289.

¹⁷³ *Id.* at 34–37.

to eliminate the “blight” that Chinatown had caused to the central city.¹⁷⁴ But for the intervention of the Dowager Empress in China, San Francisco’s Chinatown would have been rebuilt on a vastly smaller scale with fewer inhabitants on the mudflats near the city’s slaughterhouses.¹⁷⁵ Like the Chinese in San Francisco in 1906, the poor blacks in post-Katrina New Orleans face dispossession and dislocation.¹⁷⁶ Desires to reduce the number of certain people in order to fight urban blight or crime stand as one of the most insurmountable barriers to the renewal of neighborhoods chiefly occupied by blacks and especially poor blacks.¹⁷⁷ Unfortunately, no powerful defender, either in the United States or abroad, has thus far stepped forward to aid black New Orleansian efforts to reestablish their neighborhoods.

B. *The Race, Crime, and Urban Residency Triad*

“Some of the people shouldn’t return.” . . . “The (public housing) developments were gang-ridden by some of the most notorious gangs in this country. People hid and took care of those persons because they took care of them. Only the best residents should return. Those who paid rent on time, those who held a job and those who worked.”

—Housing and Urban Development Secretary Alphonso Jackson¹⁷⁸

One of the principal reasons for the undesirability of poor, black Katrina victims is the belief, expressed by public figures and private actors, of a significant link between the black, mostly poor inhabitants of New Orleans and high crime rates.¹⁷⁹ Therefore, the story goes, the evacuation of poor, black areas and the subsequent destruction of housing which make broad reoccupation impossible means a reduction in crime rate in New Orleans because the “criminals” were cleaned out by

¹⁷⁴ *Id.* at 294–96.

¹⁷⁵ See SIMON WINCHESTER, *A CRACK IN THE EDGE OF THE WORLD: AMERICA AND THE GREAT CALIFORNIA EARTHQUAKE OF 1906*, at 330–31 (2005); JUDY YUNG & THE CHINESE HISTORICAL SOC’Y OF AM., *SAN FRANCISCO’S CHINATOWN* 43 (2006).

¹⁷⁶ See discussion *infra* Part III.B–C.

¹⁷⁷ See discussion *infra* Part III.B–C.

¹⁷⁸ Bill Walsh, *Official Blunt on Public Housing*, *TIMES-PICAYUNE* (New Orleans), Apr. 25, 2006, at 1.

¹⁷⁹ See DYSON, *supra* note 21, at 114–15. Author Michael Eric Dyson writes that Louisiana Governor Kathleen Blanco, responding to media reports that blacks in many parts of New Orleans were looting and rioting out of control, authorized National Guard troops to shoot “hoodlums.” *Id.* at 114.

the hurricane.¹⁸⁰ In the aftermath of Katrina, stories abounded of the criminal propensities and improvidence of these areas' former residents.¹⁸¹ The media reported that government or private issue emergency funds were misused to buy expensive toys, other luxury items, and in some cases drugs.¹⁸² Popular culture in the form of gangsta rap quickly picked up this strain. In the months following the hurricane, New Orleans rappers and deejays, exiled to locations all over the United States, released songs chronicling the events of Hurricane Katrina and its aftermath.¹⁸³ In some cases it was not clear whether it was a case of art imitating life or art imagining life.¹⁸⁴

¹⁸⁰ In one instance, Councilman Chris Roberts of Jefferson Parish, a town near New Orleans that was slated to accept a number of families under the federally funded Housing Choice Voucher Program (formerly Section 8) wanted to legislate a requirement that landlords who accept federal housing subsidies must hire around-the-clock security. Meghan Gordon, *Councilman Takes Back Security Plan*, TIMES-PICAYUNE (New Orleans), July 27, 2006, at 1. Roberts, as a result of studying incident reports and riding along with local police, concluded that there was a "direct correlation between frequent crime and apartments that the 'government is giving away for free.'" *Id.* According to the councilman, "It's no secret that if you go in New Orleans, the majority of the crime happens in public housing complexes' . . . 'Unfortunately, in Jefferson Parish, they have turned private apartments into public housing complexes.'" *Id.* The proposed required security detail, in Roberts's opinion, would have reduced crime in the parish. *Id.* Roberts later withdrew the proposal in the face of criticism that it was discriminatory. *Id.*

¹⁸¹ *E.g.*, Reckdahl, *supra* note 29.

¹⁸² *See id.*

¹⁸³ *See, e.g.*, JUVENILE, *Get Ya Hustle On*, on REALITY CHECK (Atlantic Records 2006); TENTH WARD BUCK, *What Is Your FEMA Number?*, <http://b.rox.com/media/fema-number.mp3> (transcript available at <http://b.rox.com/archives/2006/03/29/what-is-your-fema-number/>). One artist sang a paean to the chaos after Katrina:

The loamin hard sparkle like glass
Main bitch right behind me lookin sharp in the Jag
Security say you don't know me so I talk to 'em bad
If a nigga want somethin I got somethin for his ass
Choppers—I'm already knowin that it's a G thang
Ever since they tried to drown a nigga on the eastbank
Everybody need a check from FEMA
So he can go and sco' him some co-ca-in-e
Get money! And I ain't gotta ball in the Beemer
Man I'm tryin to live, I lost it all in Katrina (damn)
And nobody cares what the police thank
Everybody fuckin with ki's cause it's a street thang.

JUVENILE, *supra*. Yet another rap artist, in his salute to Hurricane Katrina, wrote and performed a song titled *What is Your FEMA Number?* See Appendix B (providing lyrics as performed by rap artist Tenth Ward Buck).

These artists perform a variant of hip hop music particular to New Orleans called bounce music. Bounce music is characterized by call and response party chants and dance call-outs and frequently has an undercurrent of techno-funk sound. It is akin to rap, but involves "festive beats" and "exuberant chants" yet basic lyrics. Kelefa Sanneh, *Gangsta*

The conflation of poverty, blackness, and urban residency with lawlessness is, writes one observer, one of the results of the so-called War on Poverty.¹⁸⁵ The War on Poverty, rather than addressing the mainstream institutional power arrangements that created and continue to sustain poverty, treats poverty and its ills as more attributable to internal factors such as the failings of black individuals and communities.¹⁸⁶ In this view, poverty in black neighborhoods does not result from widespread, external, and systemic social and political failings but instead is framed as an internal, localized, episodic, urban, self-generating, and overwhelmingly black problem which “naturally” engenders crime.¹⁸⁷

This take on race, crime, and poverty is reproduced frequently by apparently well-meaning observers and even by some members of the black community.¹⁸⁸ One commentator, in an effort to spur blacks to

Gumbo, N.Y. TIMES, Apr. 23, 2006, at § 2. The chants and sometimes claps are often interspersed with “shoutouts.” Sean Ross, *Bounce Music Bounces Back*, AIRPLAY MONITOR, Aug. 22, 2003. Though bounce music has not always enjoyed the wide appeal and fame of more standard rap or hip hop music, it is critically successful among hip hop enthusiasts in New Orleans and well beyond, and is increasingly becoming exemplary of New Orleans music in much the same way that Cajun music once defined the New Orleans sound. The vibrant eruption of bounce music that addressed Hurricane Katrina and its aftermath is a hopeful sign that a sound that is part of the unique flavor of black New Orleans which, now dispersed, may remain undiminished in the absence of New Orleans black residents. For a more in depth discussion of the above, see generally NIK COHN, *TRIKSTA: LIFE AND DEATH AND NEW ORLEANS RAP* (2005) and CHERYL L. KEYES, *RAP MUSIC AND STREET CONSCIOUSNESS* (2004).

¹⁸⁴ See KEITH NEGUS, *MUSIC GENRES AND CORPORATE CULTURES* 91 (1999); IMANI PERRY, *PROPHETS OF THE HOOD: POLITICS AND POETICS IN HIP HOP* 90 (2004). One of the critiques of the gangsta rap genre is that it not only glorifies actual violence but also imagined violence, and that it thus presents life in ghettos and poor neighborhoods as excessively violent or profane and ultimately not true to reality. See PERRY, *supra*, at 90. This is done in order to gain market share and “street cred,” or authority as one knowledgeable about life in poor minority neighborhoods. See *id.* Many of those involved in songwriting, production, and often the performance of gangsta rap are themselves well-educated products of middle-class homes. See NEGUS, *supra*, at 91–92. For a discussion of the relationship between class, race, and rap, see generally ADAM KRIMS, *RAP MUSIC AND THE POETICS OF IDENTITY* (2000).

¹⁸⁵ STEVEN GREGORY, *BLACK CORONA: RACE AND THE POLITICS OF PLACE IN AN URBAN COMMUNITY* 105 (1999).

¹⁸⁶ See *id.*

¹⁸⁷ See *id.*

¹⁸⁸ See Juan Williams, Op-Ed., *Getting Past Katrina*, N.Y. TIMES, Sept. 1, 2006, at A17. Juan Williams writes that one of the biggest barriers to the return of poor blacks to New Orleans is not lack of government financing to rebuild housing but “poverty of spirit.” *Id.* Black comedian and recent social critic Bill Cosby, while acknowledging the hardships suffered by poor, black Katrina survivors, chided survivors for their failures to adequately parent and the consequent high crime rate in New Orleans before the hurricane. *Cosby Charms, Chastises Crowd*, CHATTANOOGA TIMES FREE PRESS, June 12, 2006, at B2.

take greater responsibility for the problem of black crime, decried the spread of a “cultural illness” in the black community.¹⁸⁹ This illness produces sufferers who “don’t snitch on criminals, seldom marry, frequently abandon their children, refer to themselves in the vilest terms (niggers, whores, etc.), spend extraordinary amounts of time kicking back in correctional institutions, and generally wallow in the deepest depths of degradation their irresponsible selves can find.”¹⁹⁰ Such accounts subvert and distort the meaning of culture, giving sustenance to notions such as the “culture of crime.” These rhetorical constructions posit crime as a socially transmitted, wholly voluntary set of traits that are characteristic of an entire group of people instead of the anomalous perversion of social norms that it is. The ideological sibling of the culture of crime is the culture of victimhood, based on a “rhetoric of grievance” and “ressentiment” that become part of a group’s “constitutive traits.”¹⁹¹

These claims about culture in poor, black communities, often made by persons who are socially and politically outside of those communities, rely on assertions of the inherent neutrality of mainstream culture and ignore the social, political, and economic contexts of the people under discussion.¹⁹² They impose “culture from above” wherein external forces ascribe to members of a particular group a corrupt, arid, and perverse form of culture based on the ethnic or racial identity of the group to which they are presumed to belong.¹⁹³ Such claims are

Scholar Michael Eric Dyson writes that some of the most prominent bashers of the black urban poor, or what he terms the “ghettocracy,” are members of the black middle and upper middle classes, which he calls the “Afristocracy.” MICHAEL ERIC DYSON, IS BILL COSBY RIGHT?: OR HAS THE BLACK MIDDLE CLASS LOST ITS MIND?, at xiii–xiv (2005).

¹⁸⁹ Bob Herbert, Op-Ed., *A Triumph of Felons and Failure*, N.Y. TIMES, Aug. 24, 2006, at A27.

¹⁹⁰ *Id.* For a broader discussion of this point of view, see generally JUAN WILLIAMS, ENOUGH: THE PHONY LEADERS, DEAD-END MOVEMENTS, AND CULTURE OF FAILURE THAT ARE UNDERMINING BLACK AMERICA—AND WHAT WE CAN DO ABOUT IT (2006).

¹⁹¹ MICHAEL DORLAND & MAURICE CHARLAND, LAW, RHETORIC, AND IRONY IN THE FORMATION OF CANADIAN CIVIL CULTURE 18 (2002) (citing Richard Jenkyns, *Cards of Identity*, N.Y. REV. BOOKS, Apr. 23, 1998, at 49, 50 (reviewing DAVID LOWENTHAL, POSSESSED BY THE PAST: THE HERITAGE CRUSADE AND THE SPOILS OF HISTORY (1996))). The use of “ressentiment” in this context comes from the work of Friedrich Nietzsche, who defined it generally as venting the effects of suffering by seeking a cause external to oneself as the source of that suffering. See Mary Sigler, *By the Light of Virtue: Prison Rape and the Corruption of Character*, 91 IOWA L. REV. 561, 602–03 (2006). See generally NIETZSCHE, *supra* note 160.

¹⁹² See JOSEPH H. CARENS, CULTURE, CITIZENSHIP, AND COMMUNITY: A CONTEXTUAL EXPLORATION OF JUSTICE AS EVENHANDEDNESS 260–61 (2000).

¹⁹³ Abebe Zegeye et al., *Resisting Ethnicity from Above: Social Identities and Democracy in South Africa*, in DEMOCRACY AND GOVERNANCE REVIEW: MANDELA’S LEGACY 1994–1999, at 151, 152 (Yvonne G. Muthien et al. eds., 2000). I derive the expression “culture from

often the morally troubling signal of a fatigue with the problems of others and an effort to create social distance.¹⁹⁴ In such accounts, innocent, hardworking poor or working-class blacks become peripheral and are sidelined. When such innocent blacks suffer or fail, they are portrayed as marginal, barely existing victims of the prevailing “criminal” culture of the black community. When they succeed, which is rare because success is measured in giant steps rather than in small, measured steps, they are held up as bootstrapping role models to be plucked from the degradation of the ghetto and cultivated as hothouse flowers in mainstream white America.

C. “Identity Cleavages” and “Vacuums of Authority”

One observer has suggested that the problems experienced by persons displaced in a disaster are often the result of or exacerbated by the “differentiated identities” of the victims.¹⁹⁵ These identities may be based on a variety of factors such as race, ethnicity, or religion, any one of which may effectively serve as “identity cleavages.”¹⁹⁶ Identity cleavages sever members of the differentiated group from the dominant group in a society.¹⁹⁷ When these persons also happen to be members of a marginalized or disfavored group already in conflict with the dominant group, the rights of citizenship are rarely fully available to them during a crisis of displacement.¹⁹⁸ In such a case, displaced persons are not “protected and assisted” as mainstream citizens during a crisis, but instead are “identified as part of the enemy, neglected and even persecuted.”¹⁹⁹ For these displaced persons, many of the guarantees of civic membership are absent, and citizenship becomes, if not contested, certainly contingent.²⁰⁰ Because they are disconnected from the enjoyment of the rights normally associated with the dignity of being a citizen, their marginalization “becomes tantamount to stateless-

above” from the notion of “ethnicity from above” which has been used to describe the way in which an empowered minority of persons exercise hegemony via the imposition of politicized racial categories that serve to perpetuate inequality. *Id.*

¹⁹⁴ Veena Das & Arthur Kleinman, *Introduction to VIOLENCE AND SUBJECTIVITY*, *supra* note 15, at 1, 4.

¹⁹⁵ Francis M. Deng, *Divided Nations: The Paradox of National Protection*, *ANNALS AM. ACAD. POL. & SOC. SCI.*, Jan. 2006, at 217, 219. Deng is the author of the Guiding Principles on Internal Displacement, discussed *infra* Parts IV.C, V.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *See* Deng, *supra* note 195, at 219.

ness.”²⁰¹ In these cases, there is frequently no governmental authority willing to assume responsibility for the displaced, and thus there is a “vacuum of responsibility” that may be filled by international law.²⁰²

The dual concepts of identity cleavage and the vacuum of responsibility illuminate certain aspects of the situation facing poor, black Katrina evacuees.²⁰³ Almost immediately after the hurricane, there were statements disclaiming responsibility for victims by local, state, and federal authorities.²⁰⁴ This response, or rather lack of response, was one of the hallmarks of the crisis; the government’s continual finger pointing and buck-passing conveyed the extent to which many of Hurricane Katrina’s victims were viewed with contempt.²⁰⁵ It was a poignant reminder of the way in which legal and political discourse concerning people of African ancestry involves an active and continual “othering” of blacks, which renders them outsiders.²⁰⁶

I have set forth some of the reasons for the displacement and dispossession of poor, black New Orleanians and shown how many of those barriers are housing related or based on the notion that poor blacks pose a security risk or are undesirable. I will now turn to possible remedies for dispossession and focus on how international law may be a source of a domestic right of return.

IV. INTERNATIONAL HUMAN RIGHTS IN THE CONTEXT OF HURRICANE KATRINA

A. *An Overview of the Development of International Law as a Source of Rights*

The word “rights” carries great weight and raises expectations. Rights are entitlements, rights are freedoms, and ultimately, in all cases, rights are power. While the notion of rights has certainly been at the heart of most Western legal and social systems, rights have not necessar-

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *See id.*

²⁰⁴ *See* DYSON, *supra* note 21, at 54–76. Author Michael Eric Dyson describes the extent to which the hurricane, though anticipated by officials and various levels of government, was all but ignored both before and immediately after it struck. *See id.*; *see also* BRINKLEY, *supra* note 5, at 56.

²⁰⁵ *See* DYSON, *supra* note 21, at 54–76.

²⁰⁶ *See* Nicholas B. Dirks, *Introduction to COLONIALISM AND CULTURE* 1, 7–9 (Nicholas B. Dirks ed., 1992).

ily been expressed in positive terms.²⁰⁷ Historically, rather, the rights that guided and shaped the day-to-day lives of persons living in Western societies were often subtle, implicit, and not necessarily recorded. It has been argued, for example, that early peoples living in proto-government societies lived by social contract.²⁰⁸ These contracts were implicit agreements whereby each person understood that in order to receive rights, they had to perform some duty in return.²⁰⁹ With the development of nation-states, the contractual aspect of rights became one wherein the exchange was between the individual and a sovereign leader.²¹⁰ Social contract theory offered an account of social and political relationships within the nation-state and ultimately of rights themselves.²¹¹ However, for the most part, social contract theory as it was initially conceived left the international arena, those spaces external to the individual nation-state, relatively undefined.²¹² In these interstitial spaces between nations, there was no fixed legal framework or international sovereign, and nations existed in a “state of nature” wherein there was always the specter of war.²¹³

Though modern nations have historically filled the void outside of the nation-state, some would argue that we are still in a state of nature regarding laws that govern international relations.²¹⁴ Such laws, though perhaps more nuanced and refined than in past centuries, are still only provisionally valid.²¹⁵ Nonetheless, there has long been a well-understood system of laws and norms that govern international relationships, including both customary laws and basic forms of conventional law.²¹⁶ Since the period after World War I, however, there has

²⁰⁷ *E.g.*, Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees?: Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1, 71 (1992) (“[M]any classical rights are often imagined in all but exclusively negative terms . . .”).

²⁰⁸ See Jill Stauffer, *The Fiction of the State of Nature in Real Time: The Social Contract, International Human Rights and the Refugee*, in CRITICAL BEINGS: LAW, NATION AND THE GLOBAL SUBJECT 3, 3–4 (Peter Fitzpatrick & Patricia Tuitt eds., 2004) (encapsulating the theories of Thomas Hobbes).

²⁰⁹ *Id.* at 5.

²¹⁰ See *id.* at 5–6.

²¹¹ See *id.* at 4.

²¹² See *id.* at 3–4. For a broad discussion of the development of international law, see generally WILHEM G. GREWE, *THE EPOCHS OF INTERNATIONAL LAW* (Michael Byers trans., rev. ed. 2000) (1984).

²¹³ See Stauffer, *supra* note 208, at 3–4.

²¹⁴ See *id.*

²¹⁵ See JÜRGEN HABERMAS, *THE INCLUSION OF THE OTHER: STUDIES IN POLITICAL THEORY* 168–69 (Ciaran Cronin & Pablo De Greiff eds., Ciaran Cronin trans., 1998).

²¹⁶ See, *e.g.*, MICHAEL BYERS, *CUSTOM, POWER AND THE POWER OF RULES: INTERNATIONAL RELATIONS AND CUSTOMARY INTERNATIONAL LAW* 3–4 (1999) (describing custom-

been an intensive focus on formalizing the process of developing international law by coalitions of governments.²¹⁷ The idea was to form a “government of governments,” and international law, rather than evolving only as the need arose, became the subject of continuous contemplation by international bodies created solely for this purpose.²¹⁸ These bodies create rules which ideally have a legitimizing and constraining effect upon both the international and intra-national behavior of member nations.²¹⁹ It is within this framework of international law that the notion of international human rights has developed.

B. *The International Bill of Human Rights*

International human rights are a foundational aspect of more general international law norms.²²⁰ The language used in the Preamble of the Charter of the United Nations, the constitution of the United Nations whose provisions are paramount to all other treaties, supports this view.²²¹ The Preamble states that “the Peoples of the United Na-

ary international law as law governing the relationships between and among nations that have arisen from custom and usage, and recognized and accepted as binding even though not codified); H. VICTOR CONDÉ, *A HANDBOOK OF INTERNATIONAL HUMAN RIGHTS TERMINOLOGY* 26 (2d ed. 2004) (1999) (describing conventional international law as referring to formal agreements between or among nations that are found in covenants, conventions, charter pacts, statutes, protocols, or other similar instruments).

²¹⁷ See MARK E. VILLIGER, *CUSTOMARY INTERNATIONAL LAW AND TREATIES: A MANUAL ON THE THEORY AND PRACTICE OF THE INTERRELATION OF SOURCES* 69–74 (2d ed. 1997) (1985). There have long been private attempts to codify of the law of nations. *Id.* at 65–67. These were undertaken by a diverse group of private individuals. *Id.* at 65–66. Among these private drafters were Jeremy Bentham and David Dudley Field, the drafter of the Field Code. *Id.* at 65. Some private organizations that undertook the codification of international law included entities such as the International Law Association and the *Institut de Droit International*. *Id.* at 66–67.

²¹⁸ See generally 3 AKIRA IRIYE, *THE CAMBRIDGE HISTORY OF AMERICAN FOREIGN RELATIONS: THE GLOBALIZING OF AMERICA, 1913–1945*, at 62–68, 205, 209–13 (1993). One of the earliest efforts was the League of Nations. Franz Cede, *Historical and Legal Framework for Activities of the United Nations*, in *THE UNITED NATIONS: LAW AND PRACTICE* 3, 3 (Franz Cede & Lilly Sucharipa-Behrmann eds., 2001). The League of Nations was the first international intergovernmental organization. *Id.* at 3–4. It was formed after World War I to promote international cooperation among nations and to achieve peace. *Id.* at 3. It functioned from 1920 until it was dissolved in 1946, after World War II. See *id.* at 5. Out of the League of Nations grew the United Nations, which was created in 1945 as another international rule-making body. *Id.* at 6–7. The United Nations has 192 member states, which includes most internationally recognized independent nations. See United Nations, United Nations Member States, <http://www.un.org/members/list.shtml> (last visited Apr. 17, 2007).

²¹⁹ BYERS, *supra* note 216, at 6–7.

²²⁰ *Id.*

²²¹ See U.N. Charter pmbl.; Theo van Boven, *Human Rights and Rights of Peoples*, 6 EUR. J. INT’L L. 461, 462 (1995), available at <http://www.ejil.org/journal/Vol6/No3/art9.pdf>.

tions [are] determined . . . to reaffirm [their] faith in fundamental human rights.”²²² However, one query arising in a discussion of the concept of international human rights is whether they are “rights” at all under a general understanding of rights.²²³ Nonetheless, norms for international human rights are clearly a well-entrenched part of international law.²²⁴

Though international human rights have developed from a number of sources and over a long period of time, the International Bill of Rights presents a comprehensive normative framework.²²⁵ It encompasses several instruments, including: the Universal Declaration of Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights; the Optional Protocol to the International Covenant on Civil and Political Rights; and the Second Optional Protocol to the International Covenant on Civil and Political Rights.²²⁶ Within some of these instruments, support for a domestic right of return may be found for displaced Katrina victims.

C. *International Human Rights, Hurricane Katrina and the Right of Return*

The right to return is hollow without a plan for transportation and a place to stay.

—Rev. Jesse Jackson, speaking at a news conference at the site of the now famous levee breach on the Industrial Canal²²⁷

Invoking international human rights norms in the domestic context is not a novel idea, and the use of international human rights law

²²² U.N. Charter, *supra* note 221, pmbl.; van Boven, *supra* note 221, at 462.

²²³ See LOUIS HENKIN, *THE AGE OF RIGHTS* 31–33 (1990); MICHAEL J. PERRY, *THE IDEA OF HUMAN RIGHTS: FOUR INQUIRIES* 48–56 (1998).

²²⁴ See HENKIN, *supra* note 223, at ix.

²²⁵ See *id.* at 1–2 (describing the evolution of the contemporary notion of human rights); van Boven, *supra* note 221, at 463 (describing the International Bill of Human Rights).

²²⁶ See PERRY, *supra* note 184, at 12; van Boven, *supra* note 221, at 463; see also International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR]; International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICESCR]; Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR]; Office of the High Comm’r for Human Rights, Fact Sheet No.2. (Rev.1), *The International Bill of Rights*, <http://www.unhchr.ch/html/menu6/2/fs2.htm>.

²²⁷ Bruce Nolan, *Jackson: Housing Key to ‘Right of Return’*, *TIMES-PICAYUNE* (New Orleans), Jan. 31, 2006, at 8.

in United States domestic cases is increasing.²²⁸ With this heightened focus on the benefits of international law in domestic contexts, it is progressively clearer that there are few detailed international standards for disaster relief and prevention and that development of such standards must take into account the role of both international and domestic actors.²²⁹

To the extent that there are existing international law norms to address disasters and the problems of those affected by them, few of these norms were followed after Hurricane Katrina. For example, a number of activists and NGOs have cited much of the chaos and depri-

²²⁸ See Catherine Albisa & Sharda Sekaran, Foreword, *Realizing Domestic Social Justice Through International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 351, 353–54, 354 n.10 (2006) (citing *Roper v. Simmons*, 543 U.S. 551, 578 (2005) and *Lawrence v. Texas*, 539 U.S. 558, 576 (2003), and noting that the Court cited international practices in these opinions to strike down the juvenile death penalty and an anti-sodomy law, respectively). For an extensive listing of primary documents and an in-depth discussion of the International Covenant on Economic, Social, and Cultural Rights in general and of the application of socio-economic rights in the U.S. context, see HUMAN RIGHTS AND THE GLOBAL MARKETPLACE: ECONOMIC, SOCIAL AND CULTURAL DIMENSIONS (Jeanne M. Woods & Hope Lewis eds., 2004).

²²⁹ See Jonathan Todres & Pamela L. Marcogliese, *International Health Law*, 39 INT'L LAW 503, 515–16 (2005); David P. Fidler, *The Indian Ocean Tsunami and International Law*, AM. SOC'Y INT'L L. INSIGHTS, Jan. 2005, <http://www.asil.org/insights/2005/01/insight050118.htm>. In January 2005, the United Nations sponsored the World Conference on Disaster Reduction, where delegates considered whether and how international law could be developed to more fully address the global impact of natural disasters. World Conference on Disaster Reduction, Kobe, Japan, Jan. 18–22, 2005, *Report of the World Conference on Disaster Reduction*, U.N. Doc. A/CONF.206/6 (Mar. 16, 2005) [hereinafter *WCDR Report*]; Todres and Marcogliese, *supra*, at 515–16. One of the outcomes of the conference was the Hyogo Declaration, a statement emphasizing the importance of internationally coordinated disaster reduction. *WCDR Report, supra*, ch. I, resolution 1. The Hyogo Declaration, in addition to articulating an intention to build upon international commitments and frameworks, also acknowledged the important role that domestic governments must play in disaster response. *Id.* The Declaration explained that “States have the primary responsibility to protect the people and property on their territory from hazards, and . . . to give high priority to disaster risk reduction in national policy, consistent with their capacities and the resources available to them.” *Id.*

Consider also the work of the International Disaster Response Laws, Rules and Principles (IDRL) program, a project sponsored by the International Federation of the Red Cross and Red Crescent Societies. INT'L FED'N OF THE RED CROSS & RED CRESCENT SOC'YS., IDRL APPEAL 2006–2007, at 1 (2006), available at <http://www.ifrc.org/Docs/pubs/idrl/idrl-ga0607-revised.pdf>. The IDRL program seeks to “raise awareness about . . . and to strengthen the international, regional and national frameworks of laws, rules and principles” so as to circumvent the operational challenges of disaster relief, and to “enable requested international aid to be delivered as efficiently and effectively as possible.” *Id.* at 5–6. The chief goal of the IDRL project is “to identify how the response to international disasters could be improved through changes in both national and international law.” Todres & Marcogliese, *supra*, at 515.

vation occurring in the wake of Katrina, and the way in which those deprivations were disproportionately suffered by poor blacks, as an indictment of the U.S. government's clear violations of sections of the International Covenant on Civil and Political Rights.²³⁰ Moreover, it has been observed that victims of Hurricane Katrina might be better served if the United States incorporated the socioeconomic rights of international law into its domestic regime.²³¹

One way of deploying international human rights norms in the context of Katrina would be to apply explicit international norms regarding what could effectively be called a "domestic right of return."²³² Such norms are found in the Guiding Principles of Internal Displacement.²³³ Protections for the internally displaced are also detailed in the London Declaration of International Law Principles on Internally Dis-

²³⁰ See Human Rights Comm., *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: International Covenant on Civil and Political Rights: Concluding Observations of the Human Rights Committee: United States of America*, ¶ 26, U.N. Doc. CCPR/C/USA/CO/3/Rev.1 (Dec. 18, 2006) (discussing race and poverty-related concerns associated with Katrina); The Independent Expert on the Question of Human Rights and Extreme Poverty, *Report of the Independent Expert on the Question of Human Rights and Extreme Poverty on his Mission to the United States of America (24 October to 4 November 2005)*, ¶¶ 43–58, delivered to the Commission on Human Rights, U.N. Doc. E/CN.4/2006/43/Add.1 (Mar. 27, 2006); OXFAM AM., RECOVERING STATES? THE GULF COAST SIX MONTHS AFTER THE STORMS (Oxfam Briefing Paper No. 4, 2006), available at http://www.oxfamamerica.org/newsandpublications/publications/briefing_papers/recovering_states/oa_briefingpaper-04_FINAL.pdf; Press Release, Inter-Am. Comm'n on Human Rights, Evaluation of Human Rights in the Americas During IACHR Regular Sessions, No. 07/06 (Mar. 17, 2006), available at <http://www.cidh.org/Comunicados/English/2006/7.06eng.htm>; Press Release, Nat'l Econ. & Soc. Rights Council, NESRI Statement: FEMA Hotel Evictions Violate Human Rights (Mar. 2006), http://www.nesri.org/media_updates/fema_hotel_evictions.html; Letter from Judith Brown et al. to Santiago A. Canton, Executive Sec'y, Inter-Am. Comm'n on Human Rights (Jan. 17, 2006) (requesting hearing regarding human rights impact of Hurricanes Katrina and Rita), http://www.nilc.org/disaster_assistance/iachr_hearingrequestltr_2006-1-17.pdf; Press Release, U.S. Human Rights Network, U.S. Human Rights Network Presents Report on Katrina Abuses to U.N. Committee (July 11, 2006), available at <http://www.ushrnetwork.org/pubs/USHRN%20release%20on%20ICCPR%20hearings.pdf>; Statement of Jeanne M. Woods, Henry F. Bonura Distinguished Professor of Law, Loyola Univ. Sch. of Law, and Hope Lewis, Professor of Law and Faculty Director of Program on Human Rights and the Global Economy, Northeastern Univ. Sch. of Law, prepared for the Hearings of the United Nations Special Rapporteur on Extreme Poverty, Dr. Arjun Sengupta, on the Aftermath of Hurricane Katrina (Oct. 27, 2005), <http://www.slaw.neu.edu/clinics/WoodsLewis.pdf>.

²³¹ See generally Phillip A. Aka, *Analyzing U.S. Commitment to Socioeconomic Human Rights*, 39 AKRON L. REV. 417 (2006).

²³² See Representative of the Sec'y-Gen., *Guiding Principles on Internal Displacement*, § 5, submitted to the Commission on Human Rights, U.N. Doc. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) [hereinafter *Guiding Principles*].

²³³ See *id.*

placed Persons (London Declaration).²³⁴ I will forgo discussion of the London Declaration in favor of a fuller discussion of the Guiding Principles of Internal Displacement. First, I will discuss the right of return in international law as it applies to movements between nation states, and then I will discuss the norms for internal displacement.

V. THE RIGHT OF RETURN IN INTERNATIONAL LAW

A. *The Right of Return in General*

The right of return is a concept in international law that allows for repatriation to a country of origin by former citizens or their descendants.²³⁵ In some right of return regimes, the claimants may have no clearly articulated claim to descent from former citizens of a country; in such cases the right of return is offered based on generalized racial, religious, or ethnic background of the claimant.²³⁶ The right of return typically presumes that right holders will have access to all of the rights held by other citizens of a particular country.²³⁷

B. *The Relationship Between the Right of Return and the Right to Abode*

As the phrase is commonly understood, the right *to* abode, sometimes stated as the right *of* abode, refers to the right of a person to remain indefinitely in a country without seeking explicit permission from the government. It is most often associated with citizenship or permanent residency rights, though holders of the right of abode need not

²³⁴ INT'L LAW ASS'N, REPORT OF THE 69TH CONFERENCE 794–822 (2000). For a discussion of the London Declaration, see Luke T. Lee, *The London Declaration of International Law Principles on Internally Displaced Persons*, 95 AM. J. INT'L L. 454 (2001).

²³⁵ See, e.g., Eric Rosand, *The Right to Return Under International Law Following Mass Dislocation: The Bosnia Precedent?*, 19 MICH. J. INT'L L. 1091, 1095 & n.17 (1998).

²³⁶ See, e.g., Ayelet Sachar, *Citizenship and Membership in the Israeli Polity*, in FROM MIGRANTS TO CITIZENS: MEMBERSHIP IN A CHANGING WORLD 386, 394–96 (T. Alexander Aleinikoff & Douglas Klusmeyer eds., 2000). One example is Israel's Right of Return for persons of Jewish ancestry. *Id.* The Israeli Right of Return, however, exists in stark contrast to the claims to a right of return made by former Palestinian residents of the same geographical territory. See Salman Abu Sitta, *The Implementation of the Right of Return*, in THE NEW INTIFADA: RESISTING ISRAEL'S APARTHEID 299, 299 (Roane Carey ed., 2001). A more recent example is Ghana's creation of a right of return (or right of abode as it is interchangeably called), which would allow U.S. citizens of African ancestry the right to live and work in Ghana as permanent residents, but would not necessarily confer any right to political participation. See GODFREY MWAKIKAGILE, RELATIONS BETWEEN AFRICANS AND AFRICAN AMERICANS: MISCONCEPTIONS, MYTHS AND REALITIES 353–56 (2d ed. 2006).

²³⁷ See, e.g., *Guiding Principles*, *supra* note 232, § 1, Principle 1, ¶ 1; *id.* § 5, Principle 28, ¶ 1.

have the full panoply of rights granted to citizens.²³⁸ Typically, individual nations make their own laws and norms regarding such issues as citizenship and permissions to enter or remain.²³⁹ A frequently cited example is the right of abode granted to some Hong Kong residents by Great Britain.²⁴⁰

C. *The Source of Normative Law Supporting the Right of Return*

Countries that grant a right of return do so under the authority of their own national laws. However, there are also a number of international human rights instruments that address the freedom of movement as well as the right of return.²⁴¹ For example, the Universal Declaration of Human Rights (UDHR) states that “[e]veryone has the right to freedom of movement and residence within the borders of each State. . . . Everyone has the right to leave any country, including his own, and to return to his country.”²⁴² While the UDHR does not have the force of law, it is a guiding document which “set up a common standard of achievement for all peoples and all nations.”²⁴³ The UDHR has been described as ranking with the Magna Carta, the French Declaration of the Rights of Man and of the Citizen, and the American Declaration of Independence.²⁴⁴

The provisions of the UDHR were rearticulated in two treaties drafted in 1966 and put into effect in 1976.²⁴⁵ The first is the Interna-

²³⁸ See A.C. Evans, *European Citizenship: A Novel Concept in EEC Law*, 32 AM. J. COMP. L. 679, 679–80 (1984).

²³⁹ See *id.*

²⁴⁰ British Nationality (Hong Kong) Act 1990, ch. 34, § 1, sched. 1 (Eng.).

²⁴¹ E.g., UDHR, *supra* note 226, art. 13; ICCPR, *supra* note 226, art. 12; African Charter on Human and Peoples’ Rights, art. 12, 21 I.L.M. 58, 61 (1982); American Convention on Human Rights, art. 22, Nov. 22, 1969, *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS 504 (Ian Brownlie ed. 3d ed., 1992); Fourth Protocol to the European Convention on Human Rights, arts. 2–3, May 12, 1968, *reprinted in* BASIC DOCUMENTS ON HUMAN RIGHTS, *supra*, at 347; Banjul Charter on Human and Peoples’ Rights, art. 12, 1981, 21 I.L.M. 58 (1982). For other examples and for further discussion of the right to movement, see PAUL SIEGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* 174–88 (1983).

²⁴² UDHR, *supra* note 226, art. 13.

²⁴³ Eleanor Roosevelt, *quoted in* Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices: Introduction*, in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* 1, 1 (Thomas Risse et al. eds., 1999).

²⁴⁴ Thomas Buergenthal, *Centerpiece of the Human Rights Revolution*, in *REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A FIFTIETH ANNIVERSARY ANTHOLOGY* 91, 91 (Barend Van der Heijden & Bahia Tahzib-Le eds., 1998).

²⁴⁵ See ICCPR, *supra* note 226; ICESCR, *supra* note 226.

tional Covenant on Civil and Political Rights (ICCPR).²⁴⁶ The other is the International Covenant on Economic, Social and Cultural Rights (ICESCR).²⁴⁷ The two treaties effectively bifurcated the types of rights that were being articulated in the UDHR.²⁴⁸

Because the UDHR encompasses a wide range of rights that go well beyond political and civil rights and into the realm of social, economic, and cultural rights, it could not garner the international consensus necessary to become a binding treaty.²⁴⁹ In particular, a divide developed between some western industrialized nations with capitalist economic systems, such as the United States, and countries with socialist or mixed economies.²⁵⁰ Capitalist countries generally favored guaranteeing only civil and political rights, or what are known as first generation rights, while socialist nations favored guaranteeing only economic, social, and cultural rights, or second generation rights.²⁵¹ The dispute was solved by the development of the two separate treaties, the ICCPR and ICESCR, to which nations acceded according to their particular philosophies.²⁵²

The U.S. Senate ratified the ICCPR in 1992, with a number of reservations, understandings, and declarations.²⁵³ On June 4, 1992, President George H. W. Bush signed the instrument of ratification.²⁵⁴ The Senate declared that “the provisions of Article 1 through 26 of the Covenant are not self-executing.”²⁵⁵ Therefore, the ICCPR did not create a private cause of action in U.S. courts and hence was of no authoritative value in domestic situations.²⁵⁶ However, even if there

²⁴⁶ ICCPR, *supra* note 226.

²⁴⁷ ICESCR, *supra* note 226.

²⁴⁸ See ICCPR, *supra* note 226; ICESCR, *supra* note 226; UDHR, *supra* note 226.

²⁴⁹ See James Thuo Gathii, *Rights, Patents, Markets and the Global AIDS Pandemic*, 14 FLA. J. INT'L L. 261, 275–78 (2002) (discussing some of the criticisms of the ICESCR).

²⁵⁰ See DIANA G. ZOELLE, *GLOBALIZING CONCERN FOR WOMEN'S HUMAN RIGHTS: THE FAILURE OF THE AMERICAN MODEL* 81 (2000). It has been suggested that the ICESCR is problematic from a capitalist perspective because it raises the specter of global redistribution and concerns itself with a global society rather than a global market. *Id.* at 79–80.

²⁵¹ *Id.* at 80–81.

²⁵² See *id.* at 80–82.

²⁵³ See 138 CONG. REC. S4781–84 (daily ed. Apr. 2, 1992).

²⁵⁴ White House Statement on the Ratification of the International Covenant on Civil and Political Rights, 1 PUB. PAPERS 901 (June 5, 1992).

²⁵⁵ 138 CONG. REC. S4784.

²⁵⁶ *Id.*; see S. Exec. Rep., No. 102–23, at 15 (1992). Where a treaty or covenant is not self-executing, and where Congress has not acted to implement the agreement with legislation, no private right of action is created by ratification. *Sei Fujii v. State*, 242 P.2d 617, 619–22 (Cal. 1952); see *Buell v. Mitchell*, 274 F.3d 337, 370–76 (6th Cir. 2001) (discussing the relationship between ICCPR and the death penalty).

were such a cause of action, and particularly applying the provisions on internal freedom of movement and even analogizing the right to return, the problem still remains that these rights encapsulated in the ICCPR do not place explicit duty upon the government to ensure that conditions are such that evacuees have the tools they need to fully reestablish themselves, much less that conditions would permit their presence.²⁵⁷ Can the ICCPR, even if applicable, place a duty on the government?

The ICCPR includes a right of return, along with provisions on the right of free internal movement in Article 12:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
4. No one shall be arbitrarily deprived of the right to enter his own country.²⁵⁸

Whether this provision supports a domestic right of return is not clear from its terms alone.²⁵⁹ To bridge this gap, the United Nations acted to create more explicit standards.²⁶⁰

VI. A “DOMESTIC RIGHT OF RETURN”? THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT

Though the victims of Hurricane Katrina who fled their homes were frequently referred to as “refugees,” they are not, of course, refugees in the common meaning of the word.²⁶¹ Therefore, such persons may not rely on international provisions referring to refugees or other

²⁵⁷ See CHRISTINE BELL, *PEACE AGREEMENTS AND HUMAN RIGHTS* 236–37 (2000).

²⁵⁸ ICCPR, *supra* note 226, art. 12.

²⁵⁹ See *id.*

²⁶⁰ See discussion *infra* Part VI.

²⁶¹ See Frederic L. Kirgis, *Hurricane Katrina and Internally Displaced Persons*, AM. SOC'Y INT'L L. INSIGHTS, Sept. 21, 2005, <http://www.asil.org/insights/2005/09/insights050921.html>; cf. CONDÉ, *supra* note 216, at 125 (defining “refugee” as persons who have fled their country to avoid persecution).

externally displaced persons.²⁶² Even though they are not “refugees,” for the period immediately after the hurricane and in some cases much longer, many of them found themselves in the same material conditions as refugees—bereft of home, family, and friends, while lacking basic necessities.²⁶³ Katrina evacuees are thus more similar to internally displaced persons within the meaning of the 1998 Guiding Principles on Internal Displacement.²⁶⁴

No specific treaty protects the rights of persons displaced within their own national borders by natural disasters or other causes.²⁶⁵ To address this void, the United Nations Commission on Human Rights prepared a set of guidelines to be used in cases of internal displacement.²⁶⁶ The resulting document, the Guiding Principles on Internal Displacement (Guiding Principles), sets forth thirty principles detailing international laws that protect the human rights of internally displaced persons.²⁶⁷ The Guiding Principles outline the scope and purpose of the document and state general principles for ensuring humanitarian assistance.²⁶⁸ They also describe procedures for three phases of internal displacement: pre-displacement; displacement; and return, resettlement, and reintegration.²⁶⁹ While the Guiding Principles have not been

²⁶² See Kirgis, *supra* note 261.

²⁶³ See *id.* For a discussion of the distinction between refugees and internally displaced persons, see CATHERINE PHUONG, *THE INTERNATIONAL PROTECTION OF INTERNALLY DISPLACED PERSONS* 13–37 (2005). Phuong considers whether the exclusion of the internally displaced from the refugee category is justified, and concludes that the distinction should remain in place. *Id.* at 37. It has been argued by the United Nations High Commission on Refugees that “internally displaced persons are persons who would be refugees had they left their country,” and that hence the distinction between the two is so narrow as to not constitute a substantive difference. *Id.* at 29 (citing Representative of the Sec’y-Gen., *Comprehensive Study Prepared by Mr. Francis M. Deng, Special Representative of the Secretary-General on the Human Rights Issues Related to Internally Displaced Persons Pursuant to Commission on Human Rights Resolution 1992/73, delivered to the Commission on Human Rights*, U.N. Doc. E/CN.4/1993/35 (Jan. 21, 1993) and Office of the U.N. High Comm’r for Refugees, Div. of Int’l Protection, *UNHCR’s Operational Experience with Internally Displaced Persons* (Sept. 1994)).

²⁶⁴ See *Guiding Principles*, *supra* note 232, at intro. ¶ 2. For a general discussion of internal displacement, see Chris Nwachukwu Okeke & James A. R. Nafziger, *United States Migration Law: Essentials for Comparison*, 54 AM. J. COMP. L. 531 (Supp. 2006) and Maria Stavropoulou, *The Right Not to Be Displaced*, 9 AM. U. J. INT’L L. & POL’Y 689 (2004).

²⁶⁵ Stavropoulou, *supra* note 264, at 735.

²⁶⁶ Comm’n on Human Rights, Res. 1996/52, U.N. Doc. E/CN.4/RES/1996/52 (Apr. 19, 1996) (calling “upon the Representative of the Secretary-General to continue, on the basis of his compilation and analysis of legal norms, to develop an appropriate framework in this regard for the protection of internally displaced persons.”).

²⁶⁷ See *Guiding Principles*, *supra* note 232.

²⁶⁸ See *id.* §§ 1, 4.

²⁶⁹ See *id.* §§ 2, 3, 5.

explicitly incorporated in any treaty, they have been accorded recognition by United Nations member states.²⁷⁰

The Guiding Principles describe individuals, such as the exiled Katrina survivors, as:

persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized [international] State border.²⁷¹

Guiding Principle 28(1) effectively creates a domestic right of return for internally displaced persons by charging states with the “primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country.”²⁷² Principle 29(2) further details the duties of states to effectuate the return of displaced persons in such matters, stating:

Competent authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation.²⁷³

²⁷⁰ See G.A. Res. 60/1, ¶ 132, U.N. Doc. A/Res/60/1 (Sept. 16, 2005); G.A. Res. 58/177, U.N. Doc. A/Res/58/177 (Dec. 22, 2003). On December 22, 2003 the U.N. General Assembly adopted a resolution “[r]ecalling the relevant norms of international human rights law, international humanitarian law and international refugee law, and recognizing that the protection of internally displaced persons has been strengthened by identifying, reaffirming and consolidating specific standards for their protection, in particular through the Guiding Principles on Internal Displacement.” G.A. Res. 58/177, *supra*, pmb1. The United Nations General Assembly also explicitly recognized the Guiding Principles in adopting the 2005 World Summit Outcome, stating, “We recognize the Guiding Principles on Internal Displacement as an important international framework for the protection of internally displaced persons.” G.A. Res. 60/1, *supra*, ¶ 132 (footnote omitted).

²⁷¹ *Guiding Principles*, *supra* note 232, intro. ¶ 2.

²⁷² *Id.* § 5, Principle 28, ¶ 1.

²⁷³ *Id.* § 5, Principle 29, ¶ 2.

One significant caveat to the use of the Guiding Principles is that they do not have the force or effect of a treaty and therefore it can be argued that they are only advisory in nature.²⁷⁴ However, as one commentator has observed, despite their non-binding status and relatively recent creation as an international norm, they have frequently been cited by countries addressing problems of internal displacement.²⁷⁵ In addition, several countries have added provisions modeled on the Guiding Principles to their domestic laws.²⁷⁶ Regional organizations have also made use of the principles.²⁷⁷ Perhaps surprisingly, even some “non-state actors,” as rebel army groups are sometimes called, have begun to employ the Guiding Principles.²⁷⁸ Finally, even without having the force of law, the Guiding Principles may be significant tools in helping governments develop their own legal standards because the Guiding Principles offer “an authoritative statement of the rights of the internally displaced in one document.”²⁷⁹

It is clear that the Guiding Principles, if applied to the evacuees of New Orleans, would provide the numerous poor, black victims of Hurricane Katrina the basic, yet currently non-existent, right to return to

²⁷⁴ See ROBERTA COHEN & FRANCIS M. DENG, *MASSSES IN FLIGHT: THE GLOBAL CRISIS OF INTERNAL DISPLACEMENT* 73–76 (1998).

²⁷⁵ Hannah Entwisle, *Tracing Cascades: The Normative Development of the U.N. Guiding Principles on Internal Displacement*, 19 *GEO. IMMIGR. L.J.* 369, 370–71 (2005).

²⁷⁶ *Id.* at 371. “Colombia, Uganda, Sri Lanka, and Indonesia have adopted, or are in the process of adopting, the *Guiding Principles*, in various forms, into their domestic legal systems.” *Id.*

²⁷⁷ Francis Deng, *International Response to Internal Displacement: A Revolution in the Making*, *HUM. RTS. BRIEF*, Spring 2004, at 24, 25. Some regional organizations who have employed the Guiding Principles in their work or have further encouraged their dissemination are the Organization of African Unity Commission on Refugees, the Economic Community of West African States, the Inter-Governmental Authority on Development, the Organization for Security and Cooperation in Europe, and the Council of Europe’s Parliamentary Assembly. *Id.*

²⁷⁸ *Id.* One example of such a non-state actor that has addressed the Guiding Principles is “the Sudan’s Peoples Liberation Movement/Army, which has referred to them in its consideration of its own internal rule-making on dealing with the internally displaced.” *Id.*

A “non-state actor” is any social actor that is not a recognized state but may in some contexts have the authority of a state. See Richard Desgagné, *European Union Practice in the Field of International Humanitarian Law: An Overview*, in *THE EUROPEAN UNION AND THE INTERNATIONAL LEGAL ORDER: DISCORD OR HARMONY?* 455, 461–63 (Vincent Kronenberger ed., 2001). Although traditionally only states were held responsible for human rights violations, there is a trend towards also making non-state actors accountable. *Id.* Non-state actors are generally divided into two principle types: private sector corporate actors such as multinational and transnational corporations, and non-governmental organizations. Richard A. Higgott et al., *Introduction: Globalisation and Non-State Actors* to *NON-STATE ACTORS AND AUTHORITY IN THE GLOBAL SYSTEM* 1, 1–2 (Richard A. Higgott et al. eds., 2000).

²⁷⁹ COHEN & DENG, *supra* note 274, at 76.

their homes. Though no such binding authority currently exists providing this basic human right, it is certainly a goal that our country and its internal localities should adopt to prevent the permanent dislocation of peoples from their homes due to natural disaster, subsequent government coercion, or culturally tainted removal as in the current case of New Orleans.

CONCLUSION

Using international human rights as the source of a domestic right of return for poor, black New Orleanians may result in the beginning of the kind of broad-based restorative justice that black people in the United States have lacked since their emancipation from slavery. A domestic right of return in this circumstance, however, would impact well more than just the immediate victims. In the aftermath of Hurricane Katrina, New Orleans is enmeshed in plans for a renaissance which includes a focus on economic revitalization and gentrification. This two-pronged focus may cause the city to forget Katrina's poor, black victims who are already disenfranchised by the unfolding drama. New Orleans's vitality arises from the existence and affirmation of its black community and its unique culture and contributions; any attempt to recreate New Orleans without this vital group would result in a sterile imitation of the city that once was.

APPENDIX A

I ain't saying he's a gold digger
But he ain't messing with no broke niggas [Repeat once]

George Bush don't like black people [Repeat four times]

Hurricane came through, fucked us up 'round here
Government acting like it's bad luck down here
All I know is that you better bring some trucks 'round here
Wonder why I got my middle finger up 'round here

People lives on the line you declining to help
Since you taking so much time we surviving ourself
Just me and my pets, and my kids, and my spouse
Trapped in my own house looking for a way out

. . . .

Five damn days, five long days
And at the end of the fifth he walking in like "Hey!"
Chilling on his vacation sitting patiently
Them black folks gotta hope, gotta wait and see
If FEMA really comes through in an emergency
But nobody seem to have a sense of urgency
Now the mayor's been reduced to crying
I guess Bush said, "Niggas been used to dying!"²⁸⁰

²⁸⁰ THE LEGENDARY K.O., *supra* note 21 (transcript available at <http://www.nathanielturner.com/lyricstogeorgebushdoesntcare.htm>).

APPENDIX B

Wat is yo FEMA numba? (FEMA) (huh?)

Yo FEMA numba (who?)

Wat is yo FEMA numba? (FEMA) (huh?)

Yo FEMA numba (who?)

Wat is yo FEMA numba? (FEMA) (huh?)

Yo FEMA numba (who?)

I think it start wit 9

I think it start wit 3

Look I ain't gettin' off the phone till you give me me
Man I walked through the flood wit these shoes on my feet

And I need a fresh pair give me my 23

So I can walk to the conda store

Spend up the 23 so I can ask for more

I smoke, I roll, I gamble, I save

But I don't know how I got broke in 2 days

I'm lose and I'm low

FEMA drop by and give me 50 more (oh)

Red Cross came thru and gave me a couch

Now I'm at the town getting golds in my mouth

....

93105 wit the dash

That's my FEMA numba so gimme my cash

I'm headed to the mall, shop at all the stores

Don't matter if I go broke you betta get yours

You see I'm the CEO I just want you to know

When I got my FEMA check baby I went bazerc

I got golds and rims and all the tims

I got a house wit my voucher from the disaster shelter

Drop and give me 50

23, 50

Please FEMA give me

Wat you got to give me

I need some more

So I can go

To the shoppin center and buy some more clothes.²⁸¹

²⁸¹ TENTH WARD BUCK, *supra* note 183.

