A Domestic Right of Return?: Race, Rights, and Residency in New Orleans in the Aftermath of Hurricane Katrina

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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 commission

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INTRODUCTION

A. Gone with the Wind, and The Wind Done Gone—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.


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 rooftops 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

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\(^6\) 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, disquietingly “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 (2005)); 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.\textsuperscript{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.\textsuperscript{12} Cameras scanning the shelters, which had quickly deteriorated into little more than human warehouses, rarely showed a white face.\textsuperscript{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.\textsuperscript{14} One

\textsuperscript{11} Hunter Cutting & Makani Themba-Nixon, \textit{Katrina Coverage: Race in Your Face}, in \textit{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.


\textsuperscript{13} See Cutting & Themba-Nixon, supra note 11, at 118–21.

\textsuperscript{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, \textit{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, \textit{From Race to Culture: The Emergence of African American}, in \textit{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,
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A commentator described the televised presentations of the aftermath of Hurricane Katrina and the squalor that many survivors faced as examples of “disaster pornography.” 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. 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. 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.

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 292.

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 Elliot 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).

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,
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. Some evacuees had never lived anywhere else and had no friends or relations on whom to rely outside of their home city. 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. 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. 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.

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. Other towns, though initially welcoming, soon developed “Katrina fatigue,” or weariness with addressing the concerns of so many continuously needy people. This was apparently the case in Houston, which probably received the bulk of Katrina evacuees. 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. 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-
ing the months following the arrival of the evacuees. At least one town, apparently viewing the poor, black hurricane evacuees as malignant debris left after the storm, actively refused to provide sanctuary. 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. They are now among the last to return to New Orleans; in fact, many may never return. 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. In the New Orleans metropolitan area, the post-hurricane population was “more white, less poor, and more transitory than the pre-hurricane population.” 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. Moreover, researchers

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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 hadarchy 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.


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 repairable 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,
privately owned housing units that served the working poor and lower middle class before the hurricane.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{48} Long-term residency imbues a sense of place involving individual as well as collective or communal rights.\textsuperscript{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 resettle 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.\textsuperscript{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-


\textsuperscript{46} \textit{Id}.

\textsuperscript{47} \textit{See discussion infra} Part III.B.

\textsuperscript{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 \textit{libre}—population, which was unique in the South. \textit{See generally} Kimberly S. Hanger, \textit{Bounded Lives, Bounded Places: Free Black Society in Colonial New Orleans}, 1769-1803 (1997).


\textsuperscript{50} \textit{See discussion infra} Parts IV.C, V.
tutional right. 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. 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 Nagin

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. This social liberality ended, however, with the onset of Jim Crow laws. The racial division originating during this period resulted in the growth of largely black neighborhoods. 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.

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. The Lower Ninth Ward has long been known for its high number of working-class African American homeowners. 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

55 Id.
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.
be developed. The area’s poor drainage and relative isolation from the rest of the city explains its late development. 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. 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. 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.

By the early 1920s, a significant portion of the Lower Ninth Ward’s residents were black, and they remained underserved by public officials. 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. 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. 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. 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. 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.

60 Amis, supra note 4, at 64.
61 See id.
62 Id.; Landphair, supra note 56, at 35, 36–37, 40.
63 Id.; Landphair, supra note 56, at 35, 36–37, 40.
64 See Craig E. Colten, An Unnatural Metropolis: Wrestling New Orleans from Nature 114 (2005); Landphair, supra note 56, at 40–41.
65 E.g., Colten, supra note 64, at 97–98, 114.
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.\footnote{Logan, supra note 5, at 11 tbl.3 (indicating that 99.9\% of the Lower Ninth Ward was damaged).} 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.\footnote{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.”).} 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.\footnote{Evan Thomas et al., New Orleans Blues, Newsweek, Sept. 4, 2006, at 28, 29.} 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.\footnote{See discussion infra Part I.B.} Two other areas, the Central City and the Seventh Ward were also hard hit.\footnote{See discussion infra Part I.B.}

**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.\footnote{See New Orleans Neighborhood Map, supra note 5.} The section was first developed in the 1830s and was initially populated by working-class European, mostly Irish and Jewish, immigrants.\footnote{See Colten, supra note 64, at 91; Robert N. Rosen, The Jewish Confederates 25 (2000).} 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.\footnote{See Colten, supra note 64, at 82–83.} 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.\footnote{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).}

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-
ollowing Hurricane Katrina. 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. 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. Nonetheless, almost since the founding of New Orleans, the Seventh Ward Creoles formed their own discrete social group with distinctive cuisine and culture. Moreover, a number of the city’s best known musicians, artists and craftsmen made their homes in the Seventh Ward. One of the nation’s most prosperous black business districts, the Claiborne Avenue neighborhood, was partly located in the Seventh Ward.

In the late 1960s, the business district along Claiborne Avenue was destroyed to allow for the new Interstate 10 loop. The destruction of a large swath of the Ward for the interstate’s construction undermined the integrity of the neighborhood. 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. More recently, the Seventh Ward was home to publicly funded housing complexes including St. Bernard, the largest of New Orleans’s housing complexes.

80 See Logan, supra note 5, at 11 tbl.3; New Orleans Neighborhood Map, supra note 5.
82 Colten, supra note 64, at 91, 95, 96.
83 Domínguez, supra note 81, at 125–27.
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.
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 Jackson

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. 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. 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. Even in cases where the homeowners had insurance policies, the payouts

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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.


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.

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 polices are offered either by private insurers or, more often, by the government in markets that face extreme flood risk. 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. The NFIP makes federally backed flood insurance available in communities that agree to adopt and enforce floodplain management ordinances to reduce future flood damage. 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. 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. 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.

Notwithstanding government backing, flood insurance policies are often among the most expensive types of insurance offered to homeowners. 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.


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.


108 Id. at 1–2.


homeowners choose to forgo flood coverage.\textsuperscript{112} It has been reported that roughly half the damaged properties in Louisiana were covered by flood insurance.\textsuperscript{113} A large number of poor, black New Orleanians were among those lacking flood insurance.\textsuperscript{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.\textsuperscript{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.

\section*{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.\textsuperscript{116} Demolition by local authorities in such circumstances is permitted under the general police power granted to states.\textsuperscript{117} However, in order for governmental authorities to act and demolish a structure, there must in fact be a nuisance.\textsuperscript{118} Owners of properties destroyed as nuisances are not granted compensation for those properties, as owners of properties taken for public use are.\textsuperscript{119} Yet owners may contest the finding of nuisance in cases of pending demolition through a public hearing, after proper notice is given.\textsuperscript{120}


\textsuperscript{114} See Hooks & Miller, supra note 112, at 34–35.

\textsuperscript{115} Popkin et al., supra note 59, at 19.

\textsuperscript{116} Joe Gyan, Jr., \textit{N.O. Officials Promise Not to Seize Property}, \textit{Advocate} (Baton Rouge, La.), Aug. 4, 2006, at A1.


\textsuperscript{118} See \textit{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.”).

\textsuperscript{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. \textit{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. 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. However, protections are limited, and housing authorities who assert that units are unsafe or uninhabitable usually prevail in removing tenants. Moreover, if public housing is renovated or revitalized, residents have no constitutional right to remain after revitalization of their residential units.

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

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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.


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


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

126 Id.

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 “vouched-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.

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\(^{129}\) 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. LEGY & 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.


\(^{133}\) 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.\textsuperscript{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.\textsuperscript{135}

Before Hurricane Katrina, Hope VI was slated for termination.\textsuperscript{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.\textsuperscript{137} Critics of the program point to several flaws.\textsuperscript{138} Primarily, the Hope VI plan leaves many former housing residents without adequate housing.\textsuperscript{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.\textsuperscript{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.\textsuperscript{141} Unfortunately, even in cases where renovated

\textsuperscript{134} Davis, supra note 133.

\textsuperscript{135} E.g., Gwen Filosa, \textit{Public Housing Still Empty}, \textit{Times-Picayune} (New Orleans), Apr. 9, 2006, at 1; Davis, supra note 133.

\textsuperscript{136} See Rob Nelson, \textit{Fischer Low-Rise Set to Be Razed}, \textit{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.”).


\textsuperscript{138} See generally False HOPE, \textit{supra} note 132.

\textsuperscript{139} \textit{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, \textit{supra} note 130, and Wolfson, \textit{supra} note 131.

\textsuperscript{140} Wolfson, \textit{supra} note 131, at 69–70.

\textsuperscript{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.  

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. 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. 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. 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. 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. 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.


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

Despite efforts to address the problem of exorbitant rents, the problem continues over a year after the hurricane. 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. This increase in rental price was left largely unameliorated by the actions of the government. 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. No funds or economic benefits have been slated for direct delivery to tenants. 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.

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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”).


150 Id.


153 Id. at 4, 5.


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 Rouge

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.” Comments such as these, expressing an open Schadenfreude at the evacuation and slow return of poor blacks, 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-
aster dividend,” or an unexpected bonus arising from the adversity.\textsuperscript{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.”\textsuperscript{162}

This process of eliminating blacks from the urban fabric reflects anthropologist Claude Lévi-Strauss’ work on societies’ response to difference.\textsuperscript{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).\textsuperscript{164} In primitive societies these devices were often literal and were seen in the use of exile and cannibalism.\textsuperscript{165} Lévi-Strauss argues that these strategies of domination are mutually exclusive.\textsuperscript{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.\textsuperscript{167}

\textsuperscript{161}See, e.g., Ashok Malik, \textit{The Disaster Dividend}, \textit{Indian Express} (Mumbai), Oct. 31, 2005, \textit{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, \textit{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. \textit{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. \textit{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.


\textsuperscript{165}\textit{Id.}

\textsuperscript{166}See \textit{id.}

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. 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. The 1906 earthquake was of immense proportions, estimated to have been at 8.3 on the Richter Scale. The earthquake and subsequent fire that it caused damaged much of the city. Chinatown, centrally located on a hill in one of the prime commercial quarters of San Francisco, was all but destroyed by the earthquake. 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.

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
to eliminate the “blight” that Chinatown had caused to the central city. 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. Like the Chinese in San Francisco in 1906, the poor blacks in post-Katrina New Orleans face dispossession and dislocation. 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. Unfortunately, no powerful defender, either in the United States or abroad, has thus far stepped forward to aid black New Orleanian 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 Jackson

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. 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.
176 See discussion infra Part III.B–C.
177 See discussion infra Part III.B–C.
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. In the aftermath of Katrina, stories abounded of the criminal propensities and improvidence of these areas’ former residents. The media reported that government or private issue emergency funds were misused to buy expensive toys, other luxury items, and in some cases drugs. 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. In some cases it was not clear whether it was a case of art imitating life or art imagining life.

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.

E.g., Reckdahl, supra note 29.

See id.

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

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\(^{184}\) 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).


\(^{186}\) 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 “Aristocracy.” Michael Eric Dyson, Is Bill Cosby Right?: Or Has the Black Middle Class Lost Its Mind?, at xiii–xiv (2005).


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).


often the morally troubling signal of a fatigue with the problems of others and an effort to create social distance.\footnote{Veena Das & Arthur Kleinman, \textit{Introduction to Violence and Subjectivity}, supra note 15, at 1, 4.} 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.

\section*{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.\footnote{Francis M. Deng, \textit{Divided Nations: The Paradox of National Protection}, \textit{Annals Am. Acad. Pol. \\& Soc. Sci.}, Jan. 2006, at 217, 219. Deng is the author of the Guiding Principles on Internal Displacement, discussed supra Parts IV.C, V.} 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.”\footnote{Id.} Identity cleavages sever members of the differentiated group from the dominant group in a society.\footnote{Id.} 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.\footnote{Id.} 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.”\footnote{Id.} For these displaced persons, many of the guarantees of civic membership are absent, and citizenship becomes, if not contested, certainly contingent.\footnote{See Deng, supra note 195, at 219.} 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. \textit{Id.}
ness.” 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.

The dual concepts of identity cleavage and the vacuum of responsibility illuminate certain aspects of the situation facing poor, black Katrina evacuees. Almost immediately after the hurricane, there were statements disclaiming responsibility for victims by local, state, and federal authorities. 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. 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.

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-

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201 Id.
202 Id.
203 See id. (supra note 21, at 54–76). 
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.
ily been expressed in positive terms. 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. These contracts were implicit agreements whereby each person understood that in order to receive rights, they had to perform some duty in return. With the development of nation-states, the contractual aspect of rights became one wherein the exchange was between the individual and a sovereign leader. Social contract theory offered an account of social and political relationships within the nation-state and ultimately of rights themselves. 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. 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.

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. Such laws, though perhaps more nuanced and refined than in past centuries, are still only provisionally valid. 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. Since the period after World War I, however, there has

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209 Id. at 5.
210 See id. at 5–6.
211 See id. at 4.
213 See Stauffer, supra note 208, at 3–4.
214 See id.
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.\textsuperscript{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.\textsuperscript{218} These bodies create rules which ideally have a legitimizing and constraining effect upon both the international and intra-national behavior of member nations.\textsuperscript{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.\textsuperscript{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.\textsuperscript{221} The Preamble states that “the Peoples of the United Na-

\begin{footnotes}
\item[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 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.
\item[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).
\item[219] Byers, \textit{supra} note 216, at 6–7.
\item[220] Id.
\end{footnotes}
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

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

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-


229 See Jonathan Todres & Pamela L. Marcogliese, International Health Law, 39 Int’l L. 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 CRES CENT 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. 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.

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.” Such norms are found in the Guiding Principles on Internal Displacement. Protections for the internally displaced are also detailed in the London Declaration of International Law Principles on Internally Displaced Persons.

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233 See id.
placed Persons (London Declaration). 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. 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. 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.

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

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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.\textsuperscript{238} Typically, individual nations make their own laws and norms regarding such issues as citizenship and permissions to enter or remain.\textsuperscript{239} A frequently cited example is the right of abode granted to some Hong Kong residents by Great Britain.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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.\textsuperscript{244}

The provisions of the UDHR were rearticulated in two treaties drafted in 1966 and put into effect in 1976.\textsuperscript{245} The first is the Interna-
tional Covenant on Civil and Political Rights (ICCPR). The other is the International Covenant on Economic, Social and Cultural Rights (ICESCR). The two treaties effectively bifurcated the types of rights that were being articulated in the UDHR.

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. 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. 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. 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.

The U.S. Senate ratified the ICCPR in 1992, with a number of reservations, understandings, and declarations. On June 4, 1992, President George H. W. Bush signed the instrument of ratification. The Senate declared that “the provisions of Article 1 through 26 of the Covenant are not self-executing.” 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. However, even if there

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246 ICCPR, supra note 226.
247 ICESCR, supra note 226.
248 See ICCPR, supra note 226; ICESCR, supra note 226; UDHR, supra note 226.
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.
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. 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.

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

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. Therefore, such persons may not rely on international provisions referring to refugees or other

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258 ICCPR, supra note 226, art. 12.
259 See id.
260 See discussion infra Part VI.
externally displaced persons. 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. Katrina evacuees are thus more similar to internally displaced persons within the meaning of the 1998 Guiding Principles on Internal Displacement.

No specific treaty protects the rights of persons displaced within their own national borders by natural disasters or other causes. To address this void, the United Nations Commission on Human Rights prepared a set of guidelines to be used in cases of internal displacement. 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. The Guiding Principles outline the scope and purpose of the document and state general principles for ensuring humanitarian assistance. They also describe procedures for three phases of internal displacement: pre-displacement; displacement; and return, resettlement, and reintegration.

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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)).
266 See Guiding Principles, supra note 232.
267 See id. §§ 1, 4.
268 See id. §§ 2, 3, 5.
explicitly incorporated in any treaty, they have been accorded recognition by United Nations member states.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{273}


\textsuperscript{271} Guiding Principles, supra note 232, intro. ¶ 2.

\textsuperscript{272} Id. § 5, Principle 28, ¶ 1.

\textsuperscript{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.\(^\text{274}\) 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.\(^\text{275}\) In addition, several countries have added provisions modeled on the Guiding Principles to their domestic laws.\(^\text{276}\) Regional organizations have also made use of the principles.\(^\text{277}\) Perhaps surprisingly, even some “non-state actors,” as rebel army groups are sometimes called, have begun to employ the Guiding Principles.\(^\text{278}\) 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.”\(^\text{279}\)

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


\(^{276}\) 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

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.