OUR “RIGHTS ARE NOT CAST IN STONE”: POST-KATRINA ENVIRONMENTAL “RED-LINING” AND THE NEED FOR A BROAD-BASED HUMAN RIGHT LAWYERING MOVEMENT

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“The U.S. Constitution should be sufficient. We don’t need to go to the United Nations; all we got to do is step up … It’s an American problem. We should guarantee the reconstruction.”


“Rights are not cast in stone: they are redefined and reassigned in light of society’s values and perceived needs.”


I. THE SECOND DISASTER OR RISK NOT REDUCED

On June 21, 2007, the New Orleans Times Picayune headline read: “Risk Reduced.” The article detailed the release of current flood

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3 Pastor et al., supra note 1.

4 Mark Sehleifstein & Sheila Grisett, Risk Reduced, THE TIMES PICAYUNE, June 21, 2007, at 1; see also Press Release, Advocates for Environmental Human Rights, Army Corps of
projection maps created by the Army Corps of Engineers ("Corps") for the New Orleans area given a 100-year hurricane. The data emerged as the centerpiece of a 150-person Interagency Performance Evaluation Task Force ("IPET") “risk and reliability” study intended to investigate the failure of “federal hurricane protection systems” during Hurricane Katrina. Along with the data, the Corps unveiled a new website based on levee system improvements through June 1, 2007, that allowed residents go online, “type their addresses into the risk analysis Web Site,” and “see the flood potential for their homes.”

The Corps presented the data, which included “projections of loss of life and property,” as a helpful tool to the public. The Corps touted the maps as “a first-of-its-kind assessment” of southeast Louisiana’s hurricane protection program. They celebrated this as the first time the Corps had ever presented the public with a tool to assess its own risk. According to news coverage, the study explicitly abstained from “declaring any area unfit for human resettlement,” and did not intend to “dictate elevation standards.” Instead, news coverage of the IPET project presented data and the online mapping as tools to guide individual decision-making as to where to live. The Corps anticipated that the public and private sector would benefit from the data. Insurance companies could use the maps “to determine rates and relative risk for different areas.” Local policymakers could look to the data to “shap[e] the broader debate on new development,


Schleifstein & Grissett, supra note 5; see also CRAIG E. COLTON, AN UNNATURAL METROPOLIS: WRESTLING NEW ORLEANS FROM NATURE 11 (2005). Colten gives a comprehensive description of the development of the two major forms of flood protection in New Orleans: “[t]he mighty levees ...serve one purpose: flood protection, from both high river stages and hurricane driven storm surges from [Lake Pontchartrain]. The numerous canals that dissect the city bespeak the longstanding need for drainage.”

Schleifstein & Grissett, supra note 5.

Id.

Id. See Advocates for Environmental Human Rights Press Release, supra note 5. Monique Harden and Nathalie Walker of Advocates for Environmental Human Rights first called attention to the disparate impact of flood protection improvements to the media, pointing out the irony of the Corps public relations initiative regarding the IPET maps.

Schleifstein & Grissett, supra note 5.


Schleifstein & Grissett, supra note 5; Sheila Grissett, Raising the Level of Protection, THE TIMES PICAYUNE, Dec. 3, 2006.

Schleifstein & Grissett, supra note 5.

Id.
building codes, watersheds, green space, [and] reforestation.”\textsuperscript{14}

The Corps saw a gain for local citizens as well. Lt. Gen. Robert Van Antwerp, recently installed into his position as chief of the Corps, celebrated the release of the maps as an exercise in truth telling. “People are going to understand their risk, their personal risk,” he said, “[residents] have a right to know what we know. And the other important part of that is truth well told. How do we translate this so everyone understands?”\textsuperscript{15}

By framing the release of the maps as responsive to a community’s right to know, the Corps downplayed the significance of the information presented. From the IPET maps, residents of the New Orleans East, Gentilly, and Ninth Ward neighborhoods came to understand the disproportionate impact of two years of Army Corps flood reduction efforts. On the day of the release, the New York Times page one coverage reported that, were a 100-year hurricane to hit that day, “parts of Gentilly and Lakeview neighborhoods ...would probably still take on at least eight feet of water.”\textsuperscript{16} However, the New Orleans Times Picayune reported that while, “vulnerable areas” in those neighborhoods had shrunk, the most “dramatic reductions” had occurred in areas benefiting from the construction of “enormous gates” on the 17\textsuperscript{th} Street Canal, namely Lakeview and Old Metairie.\textsuperscript{17}

The underlying story behind the benevolent mapping is one of racial and economic disparity. As a result of the floodgates, the predominantly white and more affluent neighborhoods of Lakeview\textsuperscript{18} and Old Metairie\textsuperscript{19}

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\textsuperscript{15} Schleifstein & Grisett, supra note 5.

\textsuperscript{16} Schwartz, supra note 11.

\textsuperscript{17} Id.; Schleifstein & Grisett, supra note 5.

\textsuperscript{18} According to a Brookings Institution analysis of census data, the Lakeview is 6.1% non-white, in a city that was 67% African-American before Hurricane Katrina. BROOKINGS INST., NEW ORLEANS AFTER THE STORM: LESSONS FROM THE PAST, A PLAN FOR THE FUTURE 7 (Oct. 2005), available at http://www.brookings.edu/metro/pubs/20051012_NeOrleans.pdf, (last visited Nov. 24, 2008).

\textsuperscript{19} Old Metairie, which is part of neighboring Jefferson Parish, is no more than 10% non-white. Brown University, Map USA, Katrina and the Built Environment, Hurricane Katrina Maps, http://maps.s4.brown.edu/website/hurricanekatrinanaa/viewer.htm (last visited Nov. 24, 2008).
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received 4.5 and 5.5 feet of flood reduction respectively. In contrast, the maps projected no flood reduction in New Orleans East, a large area with several areas exceeding a population that is 75% African-American, with the exception of a one-foot reduction in one of five areas. In Gentilly, a neighborhood with a similar racial makeup, IPET maps showed flood reductions of six inches. The Ninth Ward, which was 99.5% African-American before Katrina, has received only two feet of flood reduction to date. These three African-American neighborhoods were, along with Lakeview, three of the areas hardest hit by Hurricane Katrina.

Connie Uddo, the site manager of a Lakeview “homecoming center” called the maps “very encouraging.” After the Corps released the maps, she told the Times Picayune that the “[t]hey show we are significantly better off than before Katrina.” For her neighbors, resistance to returning home was rooted in a “crisis of confidence” about the safety of the city. She explained that “[t]he maps eliminate[d] a huge question mark for a lot of people.” However, for low income people and people of color, the maps did not provide a satisfactory answer, and instead highlighted continuing environmental inequity and barriers to return home.

Katrina’s aftermath laid bare our country’s ongoing failure to ensure equity in access to the basic human rights such as housing, a healthy

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22 The Gentilly population is at least 50% black and above 75% in most areas. Hurricane Katrina Maps, supra note 20.
25 The income disparities between these neighborhoods are equally stark. Lakeview had a 4.9% poverty rate before the storm, while the poverty rate in Old Metairie was fewer than 8% in most areas. BROOKINGS INST., supra note 19. In Gentilly, New Orleans East, and the Lower and Upper Ninth Wards, the range is greater. However, in half that area over 25% lived below the poverty line and in large sections low-income residents make up more than 35% of the population. With the exception of Village D’Est in New Orleans East, none of these neighborhoods have percentages of below 10%. Hurricane Katrina Maps, supra note 20.
26 Schleifstein & Grissett, supra note 5.
27 Id.
28 Id.
29 Id.
environment, and protection from disaster. Adding insult to New Orleans’s history of environmental injustice, policy decisions by the Corps, the Environmental Protection Agency (“EPA”), and the U.S. Department of Housing and Urban Development (“HUD”) surrounding flood reduction, toxic cleanup, and environmental hazards have restricted the opportunities of traditionally disenfranchised communities. A wealth-based approach to federal policy has put the burdens of securing environmental health and safe housing on residents, and will stymie the rights of low-income residents and residents of color to return home. The IPET mapping story above provides a snapshot of inequity in federal policy. Part II of this comment will provide historical background and a framework with which to examine this and other federal agency policy decisions.

As New Orleans is rebuilt, increases in flood protection by the Corps benefit affluent and white neighborhoods while others wait. The EPA has left cleanup of hazardous sediment and spills to strapped local governments or individual resources. Neglect by local and federal agencies has, in turn, provided HUD with a basis to limit assistance for homeowners living on a Superfund site. In Part III, this comment builds upon the IPET mapping story and provides additional examples from the EPA and HUD.

Our nation abandoned low income communities and communities of color during the storm. Now, our wealth-based system of allocating risk fails these residents as they attempt to rebuild. In 1941, while preparing to enter a world war, President Franklin Delano Roosevelt challenged the world to grant protections for those who lack resources to protect themselves. International human rights law echoes his call, obligating

31 See Pastor et al., supra note 1, at 5: I address the difference between wealth- and rights-based approaches below, infra at notes 39 through 44.


34 See Franklin D. Roosevelt, President of the U.S., FDR’s Speech to Congress (Jan. 6, 1941) [hereinafter FDR’s Congressional Speech], available at http://www ourdocuments.gov/doc.php?flash=true&doc=70&page=transcript (last visited October 30, 2008). President Roosevelt’s speech is discussed in more depth in Part IV.
governments to provide for essential socio-economic or “positive” rights.\textsuperscript{35} Despite the expectations created by the human rights framework, New Orleans residents are hard pressed to find a legal remedy for inequities post-Katrina. Part IV of this comment discusses Constitutional limits New Orleans residents face in seeking redress of economic injustice in this country and additional barriers to seeking relief through civil rights and environmental claims.

Legal and non-legal advocates and organizers throughout New Orleans and the Gulf South have embraced the human rights framework in their fight for the equitable rebuild of their city. The human rights framework allows advocates to access forums for independent review of government action and to unify multiple battles into one struggle. Their work joins a national social justice movement to bring human rights—including social and economic rights—home.\textsuperscript{36} The success of the domestic human rights movement requires engagement of law-trained voices both through integrating the human rights framework into our legal work and mainstreaming the language of human rights. Parts V and VI of this comment discuss the effort to bring human rights to the Gulf South and the role of the legal community in human rights movement building.

The nation took notice after Hurricanes Katrina and Rita—for a moment. That visibility has not translated into a mandate to do things differently on a national scale—as evidenced by the inequities perpetuated by federal recovery policies. Our commitment to solidarity with those rebuilding in the Gulf South and to the needs of communities we serve requires the legal community to push boundaries, to be creative, and to refuse to be limited by current legal norms. To create real change, we must expand our vision of rights, one that matches the expectations of justice and fairness proposed by President Roosevelt, international human rights law, and our own nation’s residents.

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\textsuperscript{35} Socio-economic rights have been referred to as “positive rights” because they “aim to promote freedom by imposing upon the state the obligation to ensure a minimum standard of living, commensurate with the state's level of development.” Elizabeth M. Iglesias, \textit{International Law, Human Rights, And Laterit Theory}, 28 U. MIAMI INTER-AM. L. REV. 177, 183 n.6 (1997). Positive rights contrast with “negative” civil and political rights, so-called because their protections come from limits on state power. \textit{Id.}

II. WHO GETS SHELTER FROM THE STORM?

In *In the Wake of the Storm: Environment, Disaster, and Race After Katrina*, Manuel Pastor, Robert Bullard, and their co-authors define risk reduction measures as “impure public goods” that inevitably fail to benefit all equally.37 As a result of limited resources, “policymakers and the public must grapple” with how to allocate the benefit of risk reduction among competing sets of individuals and communities.38 The authors present two questions associated with allocation of scarce resources: (1) the normative question of how resources should be allocated to “prevent disasters, mitigate their effects and compensate their victims,” and (2) the descriptive question regarding how this allocation plays out in practice.39 In answering the latter question, Pastor and his co-authors posit that risk reduction can be provided through a “wealth- or market-based approach” or a “rights-based approach.”40 Where agencies utilize a wealth-based approach, they root policy decisions and outcomes in a “willingness of individuals to pay, to safeguard the environment or to protect themselves from hazards.”41 As a result, individuals choose their own level of risk based on their ability and/or willingness to bear the burden of protecting themselves from risk and consequence.42

That choice is often made for low-income communities, particularly where economic status intersects with lack of political capital due to racial or ethnic identity.43 The pervasiveness of the wealth-based approach has cemented racial and economic environmental inequity as an “established part of the American urban landscape.”44

Lack of wealth, which in New Orleans has been consistently linked

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37 Pastor, supra note 1, at 5.
38 Id. at 6.
39 Id.
40 Id.
41 Id.
42 Id. at 7. See also James K. Boyce, *Let Them Eat Risk: Wealth, Rights, and Disaster Vulnerability*, 24 DISASTERS 254-261 (2000) available at http://www.peri.umass.edu/fileadmin/pdf/working_papers/working_papers_1-50/WP4.pdf (contrasting the wealth-based risk system to one in which “equal weight [is given to] mortality and morbidity impacts” on each member of the population, regardless of socioeconomic status, and explaining that such a system would create a “right to a safe environment” and an associated legal claim when that right is denied).
43 See generally James K. Boyce, *Inequality as a Cause of Environmental Degradation*, 11 ECOLOGICAL ECONOMICS 169 (1994) (discussing the manner by which less powerful groups absorb the costs of environmental degradation, while more powerful groups reap the benefits).
to race, compounds risks in several ways. First, inadequate resources cripple one’s ability to “secure private alternatives to public provision of a clean and safe environment.” Adequate insurance, high quality and/or elevated housing, or housing in areas less prone to flooding, are out of reach. Public and private discriminatory policies, such as racist lending practices, exclusionary zoning, and racial steering, exacerbated effects of income disparity. Racial and economic barriers limited the mobility of people of color and their ability to secure housing in environmentally safe areas. In New Orleans, race-based environmental inequity has been pervasive for years. Historically, as today, “water flowed away from money.”

Economic factors led African-Americans in New Orleans to settle in low-lying neighborhoods. This meant waiting longer than residents elsewhere for environmental improvements. Sewage, flood protection, water service, and tree planting came slowly, first due to Jim Crow policies and later based on the ability of neighborhoods to pay tax assessments. Later, post-war, segregationist ordinances and deed covenants kept African-Americans out of newly developed neighborhoods and in low-lying lands. Even recently, Broadmoor, a New Orleans neighborhood with wealthy constituents and broad based support, has been able to advocate for better pumping services, while an African-American section of neighboring Jefferson Parish has lacked the political capital to do so.

45 In 2000, the poverty rate of African-American residents of New Orleans was three times higher than that of the white population. Poor African-Americans “were five times as likely [as whites] to live in concentrated poverty,” and the rate of African-Americans with college degrees was four times lower than that of whites. BROOKINGS INST., supra note 19, at 7.
46 Pastor, supra note 1, at 9.
48 COLTEN, supra note 6, at 81, 211 n.23 (describing how racial restrictions on housing opportunities worked in tandem with inequities in resource distribution to limit the opportunities of African-Americans in New Orleans).
49 COLTEN, supra note 6, at 141. Colten states that New Orleans’s Ninth Ward has been “chronically denied public services,” resulting, among other things, in historically severe flooding (citing Julliette Landphair, Sewerage, Sidewalks, and Schools: The New Orleans Ninth Ward and Public School Desegregation, LOUISIANA HISTORY 35-62 (1999)).
50 COLTEN, supra note 6, at 80-81.
51 Id. at 99.
52 Id. at 146-61.
Second, public policies that place a lower priority on protecting “less valuable” people and their assets exacerbate risk.\textsuperscript{53} Public officials have historically failed to provide equal access to pre-disaster warnings, “disaster services,” and “post-disaster sheltering efforts.”\textsuperscript{54} Pre-Katrina New Orleans and its environs are full of iconic examples of this link between racial inequity and increased disaster risk, including the 1927 Mississippi flood and Hurricanes Audreycy and Betsy.\textsuperscript{55} As in years prior, the 2005 message from “state and federal emergency officials [to] the poorest of New Orleans’s poor” was: “in the event of a major hurricane, you’re on your own.”\textsuperscript{56} Thus, officials foisted the cost of rescue on residents who could not pay.\textsuperscript{57}

Placement of chemical plants and landfills in predominately low-income and African-American communities forces these communities to bear the risk for the citizenry at large.\textsuperscript{58} For example, the Thompson Hayward Chemical Company operated a pesticide plant in New Orleans’s historically black neighborhood of Gert Town.\textsuperscript{59} The company stored DDT and other chemicals onsite even after they shut down operations.\textsuperscript{60} While a $51 million dollar settlement over health effects of hazardous materials had been settled for ten years, a state-mandated cleanup had not properly remediated the site before Katrina hit.\textsuperscript{61} Post-Katrina testing by community organizations revealed “high levels of several banned pesticides … outside the fence line of some homes”\textsuperscript{62} Katrina has forced the New Orleans East neighborhood around Agriculture Street to contend with its own environmental legacy once again. Built atop a toxic landfill and then

\textsuperscript{53} Pastor, supra note 1, at 9.
\textsuperscript{54} Id. at 23.
\textsuperscript{55} During the 1927 flood, hundreds of African-Americans were “rounded up and put on levees without food, water or shelter,” out of concern that allowing them to evacuate would mean the loss of an “inexpensive labor force.” Id. at 22 (citing John M. Barry, Rising Tide: The Great Mississippi Flood of 1927 (1997)). Death rates of African-Americans during Hurricane Audreycy were ten times the rate of whites killed. Id. See also Colton, supra note 6, at 154 (noting that the Ninth Ward suffered significantly during Hurricane Betsy, as well as in 1983 “when the levee board failed to close floodgates.”)
\textsuperscript{57} Pastor, supra note 1, at 9.
\textsuperscript{58} Id.
\textsuperscript{59} Fields, supra note 33, at 17.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
marketed to low-income families, residents find that “contaminants that triggered EPA’s Superfund designation ... are now present in the sediment.”63 Upon returning home after Katrina, residents of these African-American neighborhoods face not only the rebuilding of their own homes and communities, but the cumulative impact of pre-storm hazards and restrictions on access to Road Home buyouts because of the continued contamination of the site.64

Lacking private protections, but still bearing risk, those with fewer financial resources have “less ability to withstand shocks (such as health bills and property damage) that wealth would cushion.”65 Again, this differential is compounded when recovery assistance is doled out disproportionately based on race. Studies have found white communities may receive better and swifter relief services.66 In addition, racial and ethnic minorities may face further barriers to accessing relief funds. African-Americans and Latinos are less likely than whites to receive adequate insurance settlements.67 African-Americans are also more likely to require “multiple aid sources” as a result of receiving smaller amounts from each source and are less likely than whites to receive Small Business Administration loans.68 In addition, low income people and people of color are more likely to be renters, for whom there are fewer long-term recovery benefits.69 Where African-Americans are homeowners, as a great proportion of the New Orleans black community was pre-Katrina, their home may be their primary asset, both increasing the likelihood that they will not evacuate and increasing the devastating impact of its loss.70 Were

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64 Hammer, supra note 33.
65 Pastor, supra note 1, at 9.
66 Hurricane Frederick relief workers provided African-American communities with less emergency aid and restored their power only after restoring that of the white communities. After the Lomo Prieta earthquake, shelters servicing upper-class communities received more volunteer aid and governmental attention. Alice Fothergill, Race, Ethnicity and Disasters in the United States: A Review of the Literature, 23(2) DISASTERS 156, 163 (1999).
67 Pastor, supra note 1, at 24; See also Fothergill, supra note 67, at 164-66 (“After Hurricane Andrew, ... Blacks and non-Cuban Hispanics were more likely than Anglos to receive insufficient settlement amounts, although there were no differences between Hispanics and Anglos if they had insurance with a major company. The results showed that black neighborhoods were not likely to have insurance with major companies, which may be due to red-lining practices.”).
68 Fothergill, supra note 67, at 167.
70 Pastor, supra note 1, at 21.
private or public resources distributed more equally, white communities and communities of color would share the burden of disaster outcomes. Due to historic disparities, those who can use their financial wealth and access to public goods to both reduce their own vulnerability to disaster and recover more quickly. Instead of stepping in to fill the gap, our national government places the burden on disadvantaged and disfranchised communities to do the same. During a disaster, the result is “a sort of auction for rescue.” Now, as New Orleans works to revive itself, low-income communities and communities of color contend with a “second disaster.” Lack of access to information, relief services, loans, and protection from risk forecloses on their freedom to choose how and where to recover and rebuild.

III. BEYOND RISK: IS RISK REDUCTION THE NEW REDLINING?

A. The Army Corps Doles out Flood Protection

As the Corps unveiled its flood maps, the agency revealed one piece of the second disaster: the lack of flood protection in New Orleans’ African-American neighborhoods. For those in unprotected neighborhoods, federal policy decisions may have restricted access to not merely post-Katrina environmental protection, but to post-Katrina New Orleans altogether. Disproportionate risk exposure, damaging unto itself, could amount to a new form of “redlining,” by which the restriction of critical resources devalues more vulnerable low-income areas. Once, disinvestment of black neighborhoods combined with segregationist policies kept people in riskier neighborhoods. Now, a wealth-based allocation of environmental safety may keep residents out, restricting the mobility of current and potentially now-former New Orleans residents. Residents may not be able to come back to a safe place or they may not come back at all.

71 ld. at 7.
72 ld. at iii.
73 See MASSEY & DENTON, supra note 48, at 51-52 (explaining that redlining was a discriminatory practice of rating “risks associated with loans made to specific urban neighborhoods.” As a rule, African-American neighborhoods were coded red and labeled “hazardous.” The federal Home Owners’ Loan Corporation (“HOLC”) institutionalized this practice in the 1930s, serving as a model for private banks. This practice was just part of a set of public and private practices that contributed to disinvestment of African-American neighborhoods and restricted access into white neighborhoods.) See also BROOKINGS INST., supra note 19 (describing New Orleans before Katrina, measuring the impact of Katrina, examining how federal policies contributed to the disaster, and suggesting a federal reconstruction agenda for New Orleans).
Since Katrina, policy-makers have spoken of shrinking New Orleans’s footprint, changing demographics, and privatizing development. While federal agencies may not be consciously disadvantaging communities, the Corps’ policy, as well as that of the EPA and HUD, may help accelerate these outcomes.

Within weeks of Hurricane Katrina, Joseph Cannizaro, local developer and chair of Mayor C. Ray Nagin’s Bring Back New Orleans Commission (“BBNOC”) teamed with the Urban Land Institute (“ULI”), a Washington think tank, to plan for a “new New Orleans.” By November of 2005, ULI released a planning map proposing that some of the hardest hit areas—eastern New Orleans East and Gentilly, the northern part of Lakeview, and parts of the Lower 9th Ward, Broadmoor, Mid-City and Hollygrove—be slated for “mass buyouts and future green space.” In the words of Beverly Wright, founder and executive director of the Deep South Center for Environmental Justice, New Orleans East “was literally wiped off the map.” The BBNOC plan, released in January 2006, anticipated a building permit moratorium for some of the hardest hit areas. These proposals provoked a strong reaction from the predominantly African-American residents of low-lying areas in the city, particularly in New Orleans East, which was not slated for reconstruction in this early plan. Spurred by community pressure, the City of New Orleans backed down, initiating a series of neighborhood-based planning efforts presented as opportunities to incorporate community voices.

Estimates indicate that the city of New Orleans will decrease from 475,000 to 350,000 residents and may lose 80 percent of its African-

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75 Id.
76 Pastor, supra note 1, at 26.
79 Id. at 31 (examining the subsequent community distrust with the process, as evident in the following excerpt: “Referencing a previous neighborhood development project that resulted in the construction of a public park (Louis Armstrong) that was, nevertheless, closed off to neighborhood residents, an African-American resident listed his concerns: ‘Armstrong Park was a plan too. One hundred and sixty four families were moved out. The plan never worked. Your proposed plan, the green space, everything sounds like the entire area is going to be commercialized. I know there are a lot of homeowners in this room. Nobody had an input as to what our neighborhood is going to look like.’”)
American residents, in contrast to 50 percent of its white residents. The data released in the IPET maps may contribute to this shift, raising questions about whether the green space/buyout plan may still become reality for vulnerable neighborhoods.

The vast majority of expected Road Home buyouts are in Gentilly, New Orleans East, and the Bywater/Lower Ninth Ward. Residents may be voting with their feet, choosing not to return to their neighborhoods because rebuilding is cost-prohibitive, insurance rates are too high, or because they fear another storm. Or, decisions to prioritize the 17th Street Canal floodgates over protections in areas where residents have fewer resources may have incentivized buyouts by making return unaffordable and unsafe. Furthermore, the Corps flood maps are a powerful tool to create additional barriers. Pointing to the maps for justification, local policymakers could revive a building permit moratorium or advocate for use of eminent domain over vulnerable areas.

B. EPA and HUD Tell Residents: You’re on Your Own for Toxic Cleanup

Like the Corps, the EPA decision not to engage in environmental cleanup has placed the burden of risk mitigation on residents and calls into question the viability of return. The EPA itself has reported some “575 Katrina-related spills of petroleum or hazardous chemicals.” Floodwaters exacerbated prior environmental hazards in places like Gert Town and Agriculture Street by spreading contaminants from hazardous waste sites and spilling pesticides and petroleum products at current and closed industrial facilities. The Government Accountability Office (“GAO”)

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80 Logan, supra note 70, at 16.
81 The Road Home Homeowner Program provides grants of up to $150,000 to eligible homeowners who have suffered loss due to Hurricanes Katrina or Rita, which can go towards repair or relocation. The Road Home Website, available at http://www.road2la.org/homeowner/default.htm (last visited Nov. 3, 2008). The majority of Louisiana’s state-controlled lots are expected to be in Orleans Parish. Thus far more than 4,400 of the 13,000 residents applying for a Road Home buyout were “concentrated in the 9th Ward, Gentilly and the eastern New Orleans ZIP code of 70126.” David Hammer, Buyout plan called golden chance. Group seeks to boost N.O. homeownership, THE TIMES-PICAYUNE, NOV. 10, 2007 at 1.
82 Even the restrictive Louisiana state constitutional amendments on eminent domain allow for the taking of property when the public purpose is the “removal of a threat to public health or safety,” opening up the possibility of seizure in the public interest based on environmental health concerns. L.A. CONST. art. I, § 4, cl. (B)(2)(c).
83 Fields, supra note 33, at 22.
84 Id. at 16.
85 Id. at 17.
reported that the EPA analyzed about 1800 sediment and soil samples since September 2005.\textsuperscript{86} The EPA tested most of the samples for over 200 hazardous metals and chemicals.\textsuperscript{87} The agency took months to release the results of its assessments about environmental health risks they could face when returning home, "limiting their usefulness to residents [seeking information]."\textsuperscript{88} On August 17, 2006, the EPA finally announced that sediment presented no "adverse health effects ...provided people use common sense and good personal hygiene and safety practice."\textsuperscript{89}

Subsequent studies call into question both the EPA's determination of risk and the actual toxin levels found. Starting in October of 2005, the National Resources Defense Council ("NRDC") teamed with the Subra Company and community groups to test neighborhoods throughout New Orleans. The group found sediment contaminated with "lead, petroleum, pesticides, industrial chemicals, arsenic, and polycyclic aromatic hydrocarbons."\textsuperscript{90} In August of 2007, the NRDC released a study that documented arsenic hazards in low-lying "schools, playgrounds, and residential areas" that exceeded the EPA and Louisiana Department of Environmental Quality ("LDEQ") mandated cleanup levels.\textsuperscript{91} The NRDC also analyzed the EPA's own soil samples, finding diesel fuel and carcinogen benzo(a)pyrene at levels that should trigger a cleanup by the LDEQ and levels of lead that exceed the EPA cleanup standards.\textsuperscript{92}

Neither the EPA nor the LDEQ have engaged in any cleanup of contaminated soil since Katrina and deny any legal responsibility to do so.\textsuperscript{93} With its determination of no adverse risk,\textsuperscript{94} the EPA shifted the burden of environmental protection to citizens where risk remains. While advocacy


\textsuperscript{87} \textit{Id.} at 6.

\textsuperscript{88} \textit{Id.}

\textsuperscript{89} Fields, supra note 33, at 22 (quoting EPA Katrina Environmental Assessment, http://www.epa.gov/katrina/testresults/katrina_env_assessment_summary.htm.) The GAO has criticized the agency for its decision not inform the public until one year after the storm that this determination applied only to short visits, "such as to view damage to their homes." Furthermore, the EPA made its health determinations regarding indoor contaminants by extrapolating data from outdoor sources, despite the fact that indoor contamination levels "can be significantly higher." Government Accountability Office, supra note 87, at 6.

\textsuperscript{90} Fields, supra note 33, at 13.

\textsuperscript{91} \textit{Id.} at 4.

\textsuperscript{92} \textit{Id.} at 14.

\textsuperscript{93} \textit{Id.} at 10.

\textsuperscript{94} \textit{Id.} at 22.
by the Gert Town Revival Initiative and Advocates for Environmental Human Rights has achieved onsite cleanup of the Thompson-Hayward pesticide plant.\(^95\) residents have no current recourse to compel a cleanup of the surrounding area. According to the NRDC, the cost of soil remediation for single-family homes ranges from $3500 to $5000.\(^96\) In a short film created to call attention to this problem, NRDC Staff Attorney Al Huang stated, “the message that’s been sent by the city and the federal government …for those that want to come back is that you are almost on your own to clean up.”\(^97\) The film highlighted a program by the Deep South Center for Environmental Justice called “A Safe Way Home” that brings together New Orleans East residents, the local Steelworkers union, and environmental groups to remove contaminated topsoil, pressure-wash asphalt surfaces, and re-landscape grassy areas.\(^98\) Residents are “painstakingly cleaning up block-by-block.”\(^99\)

The policy decision to downplay potential health effects serves to justify the EPA’s decision not to engage in cleanup and now creates cumulative effects for residents. Not only must residents bear the financial burden of remediation, they are also facing additional short- and long-term health care costs. The heavy cost of self-protection makes the Road Home buyout option an attractive option for health and financial well-being.

Those living on or adjacent to the Agriculture Street Superfund site may not have the buyout option. Residents in the Agriculture Street area originally purchased their homes from the Housing Authority of New Orleans (“HANO”) as part of a federally subsidized project.\(^100\) The development, built on top of a toxic landfill in 1970, was designated as a Superfund site in 1994.\(^101\) Agriculture Street has been the site of protracted legal battles and remediation delays, due in part to flawed methodology that delayed its Superfund designation and in part to barriers created by the City of New Orleans.\(^102\) The result: this area is one of the

\(^{95}\) *id.* at 17.

\(^{96}\) *id.* at 6.


\(^{99}\) A NEW DAY IN NEW ORLEANS, supra note 98.

\(^{100}\) Hammer, supra note 33. HANO has been in either partial or full administrative receivership by HUD since 1979. Federal Housing Response to Hurricane Katrina, Hearing Before the H. Comm. on Financial Services, 110th Cong., 272 (2007) (statement of Sheila Crowley, MSW, Ph.D., President of the National Low Income Housing Coalition).

\(^{101}\) See COLTEN, supra note 6, at 116.

\(^{102}\) *id.* at 122-23 (noting that the City of New Orleans, as “sole Potentially Responsible Party” under Superfund, initially resisted both buyouts and cleanup, due to financial concerns).
very few that the EPA determined to be hazardous post Katrina. HUD, which provides the financing for the Road Home program, has decided that Road Home money cannot be used to buyout contaminated land designated as a Superfund site. While Louisiana state officials are pushing HUD and the EPA to develop a solution, for the moment, federal officials have once again created policies which leave residents to fund their own environmental health and safety. The choice of local and federal agencies to place a housing development on a toxic site put its majority African-American population at risk from the outset. Now, government neglect in cleanup has devalued the neighborhood, at the same time foreclosing on residents’ options for mobility.

Katrina thrust New Orleans into an affordable housing crisis. Returning to one’s community of origin becomes unaffordable it will often mean not returning at all. For residents in neighborhoods like the Ninth Ward, this means the loss of over a century of common history. It means the loss of “institutions from innumerable churches to civic groups” to schools and locally-owned restaurants and stores that arose out of the area’s historic “geographic isolation.” In an area where 60% of homes were owner-occupied, it means the loss of one’s only asset and the loss of a family legacy.

103 “After Hurricane Katrina, when the EPA tested the ground in New Orleans and gave the city a clean bill of health, there was one glaring exception: the old Agriculture Street landfill area yards had 50 times the normal level of the cancer-causing petroleum byproduct benzo(a)pyrene.” Hammer, supra note 33.
104 Id.; The Road Home Website, supra note 82.
105 Hammer, supra note 33.
107 Families in the Ninth Ward “date their presence in the area to the 1870s” as a result of African-American efforts to support newly “freedmen.” Inniss discusses the culture of “self-help” and “mutual aid” that emerged in response to societal neglect and disenfranchisement of the African-American population. Inniss, supra note 107, at 337 (citing CRAIG E. COLTEN, AN UNNATURAL METROPOLIS: WRESTLING NEW ORLEANS FROM NATUR E114 (2005)).
109 Soon after the storm, Ninth Ward resident Betty Lewis stood in her neighborhood and
This second disaster—the environmental one—accelerates the loss of these other precious resources besides real property, like connection to place, and proximity to cohesive and generations-old, even centuries-old, community networks. As Carla Jacobson stated at an early post-Katrina community planning meeting, “I am 90 years old and I lived in the 9th ward for 9 decades, and all I want is to die in New Orleans and be buried in DePaul, where my mother and sister are...”

IV. LEGAL RECOURSE?

When Brown University Professor John Logan reports that only 20 percent of African-Americans may be able to return to New Orleans, it is because of policies like those of the Corps, EPA, and HUD. Residents have been fighting in the courts at every step since Katrina so they may return home safely: to prevent the cutoff of rental aid, to gain recourse for those injured by formaldehyde in FEMA trailers, to challenge insufficient insurance settlements, to prevent the siting of new hazardous waste landfills in communities of color, and to prevent the closure of public housing developments. The list will go on. Residents wishing to confront wealth-based policies that place the burden of environmental safety and risk reduction on low-income communities and communities of color will face extensive legal barriers.

In 1941, President Roosevelt put forward a vision of the world “attainable in our own time and generation.” He “founded [his vision] upon four essential freedoms: freedom of speech, freedom to worship, freedom from want, and freedom from fear.” In his State of the Union
address following the attack by Japan on Pearl Harbor, President Roosevelt proclaimed the third and fourth freedoms to be “eternally linked.”

“Essential to peace,” President Roosevelt stated, “is a decent standard of living for all.” In the interest of “true individual freedom,” President Roosevelt called on the country to embrace a “second bill of rights,” rooted in the guarantee of freedom from want and fear. His bill included “the right of every family to a decent home,” “the opportunity to achieve and enjoy good health,” and “the right to adequate protection from the economic fears of old age, sickness, accident, and unemployment.”

President Roosevelt envisioned a country where residents are on equal footing to make life decisions, and to be safe in and preserve their communities. President Roosevelt’s vision would have breathed life into the notion of a rights-based approach to allocation of risk. His bill of rights would bring vitality to claims of New Orleans residents that the Corps, EPA, and HUD have jeopardized their right to return to a safe and healthy home.

International human rights law builds on Roosevelt’s second bill of rights. It affords a positive rights framework for low-income New Orleans residents and residents of color negatively affected by federal policy decisions. For example, under the International Covenant on Economic, Social and Cultural Rights (“ICESCR”), States party to the Convention must take all necessary steps for “the improvement of all aspects of environmental and industrial hygiene,” so that everyone may enjoy “the highest attainable standard of physical and mental health.” The ICESCR also recognizes the right to “an adequate standard of living,” including adequate housing and “the continuous improvement of ...living conditions.”

The United Nations Guiding Principles on the Rights of Internally Displaced Persons (“Guiding Principles”) ensure the right of those

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118 FDR’s Congressional Speech, supra note 35.
119 Sunstein, supra note 118, at 11.
120 Id. at 12-13.
121 Id.
123 Id. at 389. As Edwards states, the U.S. has signed, but not ratified the ICESCR and, thus, is “obligated to refrain from acts that would defeat the object and purpose” of the treaty, but is “not bound to comply fully.” Id. at 366.
124 Id. at 392.
125 While the Guiding Principles are not treaties, they do contain “binding customary international human rights law norms.” Furthermore, the United States government co-sponsored the United Nations resolutions to adopt the Guiding Principles and Department of State has accepted the principles as the standard to which other countries are held. Id. at 366. See
displaced by natural or manmade disaster to return voluntarily or resettle in safety and with dignity and the right to support for rebuilding of permanent housing. The Guiding Principles also create an obligation for States to “prevent conditions that can cause displacement” and to prevent the alteration of the “racial, ethnic, or religious composition of the affected population.” Further, the ICESCR and International Covenant on Civil and Political Rights (“ICCPR”) recognize and provide for “collective rights like “right to self-determination, the right to free disposal of natural wealth and resources, and the right to a safe environmental, development, and peace.” Finally, the International Convention on the Elimination of All Forms of Racial Discrimination (“ICERD”) prohibits policies with a racially discriminatory impact on the enjoyment of all the aforementioned human rights including the rights to public health, social services, and housing. Thus, the language of international human rights law creates a set of governmental obligations that would provide redress for New Orleans residents struggling to return home and live free from want or fear.

A. Limits to Seeking Economic Rights

The United States has continuously rejected President Roosevelt’s vision of a rights-based approach to economic equity. While the federal, state, and local governments provide many “socioeconomic public goods for Americans,” these are characterized as benefits, not rights. The United States Supreme Court has held that the U.S. “Constitution does not


127 See AEHR Website, supra note 127 (citing Guiding Principle 18, 19, 23, 28, and 29).

128 Id. (citing Guiding Principle 5).

129 Id. (citing Guiding Principles 4, 6, 18, and 24).

130 The United States has signed and ratified the ICCPR. See Edwards, supra note 123, at 363.

131 Aka, supra note 31, at 424

132 Id. at 434 (citing The International Convention on the Elimination of All Forms of Racial Discrimination).

133 Id. at 443.

134 Id.
provide judicial remedies for every social and economic ill." and refused to find a fundamental right even where it involved the "most basic economic needs of impoverished human beings." Provision of flood protection, safe water, toxic soil remediation, and disaster recovery assistance are "designed [merely] to cushion the material hardships arising from the operation of an otherwise laissez-faire economic system." These benefits are "at best, legislative entitlements ... subject to budgetary constraints, political whim, and the ebb and flow of compassion and compassion fatigue." As the Court stated in San Antonio Independent School District, "where wealth is involved, the Equal Protection Clause does not require equality or equal advantages." Without a legal entitlement, the benefits provided by federal programs can be provided disparately and need not be provided at all. Thus, New Orleans residents cannot claim a right to assistance with remediating hazardous materials, raising their homes, or affording skyrocketing insurance, even when others have been provided with greater opportunity not only due to personal wealth, but allocation of risk protection.

In San Antonio Independent School District, Latino parents living in school districts with a low tax base tried to challenge the unequal education of their children under the Equal Protection Clause of the Fourteenth Amendment; however, the Court refused to find discrimination based on wealth. The Court rejected the need for strict scrutiny of government policies where plaintiffs failed to distinguish an identifiable class as indigent, and where a "lack of personal resources [had] not occasioned an absolute deprivation of the desired benefit." The Court refused to engage in searching evaluation of socio-economic legislation that provided childhood education inequitably based on income. Post-Katrina, federal

135 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 32-33 (1973) (rejecting the contention that the Constitution provides a fundamental right to education) (citing Lindsey v. Normet, 405 U.S. 56, 74 (1972) (refusing to find a fundamental right to housing)).
136 *Id.* at 33 (citing Dandridge v. Williams, 387 U.S. 471, 485 (1970) (refusing to find a fundamental right to public welfare assistance)).
137 *Id.* at 33 (citing Louis Henkin, The Universal Declaration and the U.S. Constitution, 31 PS: POL. SCI. & POLITICS 512, 514 (1998)).
139 *Id.* at 4.
140 *Id.* The Court distinguished San Antonio Independent School District from cases where a lack of resources completely foreclosed on the ability to 1) acquire a trial transcript for appeal purposes, 2) access counsel for appeal of conviction, or 3) gain equal access to the polls. *Id.* at 21 (citing Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963); Bullock v. Carter, 405 U.S. 134 (1972)).
142 *Id.*
agencies have also conditioned environmental health and safety on ability to pay. New Orleans residents seeking to courts to mandate equal access to flood protection or toxic remediation will likely fair as well as parents in San Antonio.

\[\text{OUR "RIGHTS ARE NOT CAST IN STONE"} 57\]

\[\text{B. Limits on Civil Rights Remedies}\]

While courts will not subject economically unjust policies to strict scrutiny, they must look suspiciously at policies that disadvantage individuals due to race.\(^{144}\) However, under the 5th and 14th Amendments, the plaintiff must show proof that “discriminatory intent or purpose was a motivating factor” in the policy decision.\(^{145}\) The rights creating language of § 601 of Title VI of the Civil Rights Act of 1964, which provided Executive power to “end the Government’s complicity in constitutionally forbidden racial discrimination,”\(^{146}\) is limited to the prohibition of intentional discrimination.\(^{147}\) Federal agencies may promulgate regulations under § 602 of Title VI to preclude “activities that have a disparate impact on racial groups,” but the court found in Alexander v. Sandoval that an individual cannot assert a private cause of action to enforce such regulations.\(^{148}\)

The Sandoval decision foreclosed on an ongoing suit by a South New Jersey African-American and Latino community struggling to protect their environmental health.\(^{149}\) South Camden Citizens in Action had challenged the discriminatory impact of a New Jersey Department of Environmental Protection (“DEP”) decision to grant a permit to build a cement plant in an area already overburdened by hazardous sites.\(^{150}\) Sandoval overturned a federal district court decision that found “disparate impact discrimination” on behalf of the New Jersey DEP and had enjoined the operation of the cement plant.\(^{151}\) After Sandoval, communities bearing

\(^{148}\) Id. at 282-83 (emphasis added).
\(^{150}\) Id. The District Court noted that “Executive Order No. 12,898, mandating that federal agencies consider environmental justice impacts did not “intend to, nor [did] it create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by any party.” See Exec. Order No. 12,898, 59 F.R. 7629 (Feb. 16, 1994).
\(^{151}\) Olga Pomar & Rachel D. Godsil, The Environment: Permitted to Pollute: The
disproportionate risk from environmental health impacts must rely on federal agencies to enforce discriminatory impact regulations. Residents in the Ninth Ward, New Orleans East, or Gentilly can argue that the Corps decisions to prioritize flood protection in Lakeview and Old Metairie or EPA decisions not to remediate actually exacerbate racial disparity in environmental health. Yet these communities must rely on the agencies themselves to seek a remedy either under the Constitution or civil rights statutes.

C. Limits on Remedies based on Environmental Protection Statutes

The environmental statutory regime ushered in during the 1970s established the environment as a protected resource, with the passage of such environmental statutes as the National Environmental Policy Act ("NEPA"), the Resource Conservation and Recovery Act ("RCRA"), and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or Superfund). However, despite citizen suit provisions allowing individuals to advocate for agency compliance, environmental statutes like NEPA only bind agencies to limited procedural and public participation requirements. Individuals seeking to hold the Corps accountable face the additional barrier of immunity, while the EPA appears shielded by agency discretion.

NEPA in particular directs federal agencies to issue an environmental impact statement for all "major Federal actions significantly affecting the human environment." Under NEPA, the Corps was required to engage in an environmental review in anticipation of starting the entire flood protection project. NEPA contains no substantive


152 See Pomar & Godsil, supra note 152 at 201-02.
153 43 U.S.C. § 4331 (2006) (declaring it the policy of the U.S. government "to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans").
158 NEPA regulations state that an environmental review must be “prepared early enough” to meaningfully inform decision-making and assure that the process is not “used to
mandates requiring Federal agencies to take particular action to protect the environment or environmental health. However, the statute requires comprehensive evaluation, communication of environmental impact with the public, and opportunities for public comment.\(^\text{159}\) While public hearings are not "substantive opportunities for dialogue between decision makers and those most affected,"\(^\text{160}\) the statute's public participation mandates have historically provided opportunity for citizens to "come out in force" to promote transparent decision-making and bring problems out into the open.\(^\text{161}\) Public hearings and comments may also offer the one chance to hold agencies accountable to their responsibility under Executive Order 12898 to identify and address environmental justice impacts.\(^\text{162}\) Finally, attempts by public and private entities to avoid compliance with NEPA and analogous state laws do provide a legal hook and allow affected communities to advocate for greater access to the decision-making process.\(^\text{163}\)

In 2007, the Corps proposed to fast-track its environmental review process under NEPA.\(^\text{164}\) Instead of completing the review prior to construction, the Corps planned to engage in environmental review as the work "is occurring, instead of in advance."\(^\text{165}\) The Corps would submit incremental reports per project, compiling them into a final report, which

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rationalize or justify decisions already made (citation omitted).” Pit River Tribe v. U.S. Forest Serv., 469 F.3d 768, 785 (9th Cir. 2006).


161 Id.

162 "To the greatest extent practicable ...each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations ...." Exec. Order No. 12,898, 59 F.R. 7629 (Feb. 16, 1994). Unfortunately, the Executive Order does not create a cause of action to enforce its directives.

163 COLE & FOSTER, supra note 161, at 123.


165 Id.
would then be subject to public comment. The Corps’ proposal to engage in a truncated review process eliminates a key component of accountability to local communities.

Residents who may seek to hold the Corps accountable for failures in its substantive duties face a special grant of immunity insulating the agency from lawsuits challenging flood protection projects. The Louisiana Environmental Action Network (“LEAN”) brought a suit against the Corps under RCRA for Katrina-related harms. The complaint alleged that design, maintenance, and construction failures caused breaches to the London Avenue Canal “result[ing] in the disposal of solid and hazardous waste … into the surrounding neighborhood” and placing residents in danger. The Court held that the Flood Control Act of 1928 pre-empts any general waiver of immunity found in RCRA’s citizen suit provision. The Flood Control Act, passed in the aftermath of the 1927 flood, defines the Corps’s “immunity in sweeping terms …namely that no liability of ‘any kind shall attach to or rest upon the United States for any damages from floods or by flood waters at any place.’” The Court held that the Flood Control Act similarly “abrogates any permission in the [Federal Tort Claims Act (FTCA)] to sue the federal government.” Plaintiffs in a second suit have been able to move forward only because they alleged their injury is the result of damages from the Mississippi River Gulf Outlet (“MR-GO”). To get past the Corps’ immunity, plaintiffs will have to (1) prove allegations that MR-GO is a navigation waterway rather than a Corps flood control project, and (2) prove that the Corps was neither exercising due care nor making discretionary decisions “based on considerations of public policy.” Any suit challenging the Corps’ priority setting will face similar hurdles. Releasing flood maps may even strengthen the Corps’ immunity. The maps potentially bolster the Corps’ due care argument; the agency can claim it has informed residents of risk and thus placed the decisions in the residents’ hands.

While immunity does not shield the EPA in the same manner,

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166 Id.
167 Pastor, supra note 1, at 35.
169 Id. at *8 (citing Cent. Green Co. v. United States, 531 U.S. 531, 604 (2001)).
170 Id.
171 Id. (citing United States v. James, 478 U.S. 597 (1986)).
173 See also Forms Filed with Corps So Far Seek $400 Billion, THE TIMES PICAYUNE, March 23, 2007 at A1.
residents face a different set of hurdles in seeking to challenge the agency’s determination of “no adverse risk” and its decision not to engage in remediation. As lead agency for toxic cleanup in the case of a national emergency, the EPA has broad power to intervene “whenever there is a reasonable question about the safety to the public posed by toxic pollution” under the RCRA, the Federal Water Pollution Control Act (commonly referred to as the “Clean Water Act”), CERCLA, and other environmental laws. Yet courts have held that this authority does not translate into a mandate to act. When workers at Ground Zero challenged EPA’s decision not to engage in environmental clean up after the September 11 attacks, the Court held that EPA had no legal duty to act upon its authority. Furthermore, while NRDC data disputes the EPA’s assessment of health risk, countering the EPA’s determination will be difficult to refute until residents start demonstrating actual health effects; even then, causation will be a problem. While even the Government Accountability Office has come down on the EPA for its lack of responsiveness, the agency will argue that it has met its legal duty in protecting the health of New Orleans residents, even as residents contend with cleanup themselves.

V. THE MOVEMENT FOR HUMAN RIGHTS IN THE GULF SOUTH

Two years after the storm, Loyola University Professor of Law William P. Quigley chronicled human rights abuses of Hurricane Katrina’s aftermath: evictions from public housing, police misconduct, lengthy incarcerations, biased delivery of public services, privatization of schools, and a wholesale denial of support for low-income people and people of color that stands in the way of their return to New Orleans. Professor


176 Benson v. Whitman, 523 F.3d 119, 130-31 (2d Cir. 2008).

177 GAO Report, supra note 87 (finding a “lack of timeliness and insufficient disclosures” on the part of EPA).

Quigley named thirteen examples of “what is yet not done on the agenda to make liberty and justice for all a reality.”

Fourteenth on Professor Quigley’s list should be federal policies to ensure freedom from want of a safe home and freedom from fear of environmental disaster, rather than policies that make these freedoms privileges subject to “purchasing power.”

In response to these abuses, Professor Quigley wrote, “the Gulf Coast has gained new respect for international human rights because they provide a more appropriate way to look at what should be happening.”

This language of human rights “changes the discussion . . . and opens the door to other outcomes.” Residents need litigation, but they need suits not to be foreclosed upon before they are filed. They need public participation, but voices—even a diverse multitude of voices—are only useful if there is enforcement power behind them. Finally, residents need to see the possibility that values and associated rights have, can, and will change.

Legal and non-legal advocates in the Gulf South have claimed the language of human rights as a framework for advocacy that transforms their focus from defensive to aspirational. Under the unifying language of the United Nations Guiding Principles on Internal Displacement, residents link demands for safe housing, environmental justice, health care, and education into a common enterprise, with a legal, if not constitutional, basis. By integrating the human rights perspective into legislative advocacy, legal claims, grassroots organization, and media messaging, legal and non-legal advocates in the Gulf South now build a rights-based movement of the sort that President Roosevelt envisioned.

New Orleans based public interest environmental law firm, Advocates for Environmental Human Rights (“AEHR”), looks to the Guiding Principles as a starting place to address the panoply of injustices

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179 Id.
180 Pastor, supra note 1, at 7.
182 Aka, supra note 31, at 432.
183 Id. at 419 (citing Henkin, supra note 139, at 515).
that Professor Quigley recounts.184 With the Guiding Principles as the backdrop, displaced Katrina and Rita survivors would have "the right to voluntarily return or resettle in safety and with dignity," including the right to short and long-term housing, education, and medical service and the right to "governmental assistance and protection that does not intentionally discriminate or result in discriminatory impact."185 In contrast to U.S. law, the Guiding Principles place "primary duty and responsibility" for disaster protection and assistance directly on the federal government, as opposed to states.186 AEHR now advocates for reform of the Robert T. Stafford Disaster Relief and Emergency Act based on the Guiding Principles. The U.S. Agency of International Development ("USAID") has committed to "encouraging wider international recognition and support for the Guiding Principles."187 AEHR and others argue that USAID’s promotion of the Guiding Principles should extend to U.S. policy at home. Responding to a report on Katrina submitted by the U.S. Human Rights Network in 2006, the United Nations Human Rights Committee agreed, stating

The [U.S. government] should review its practices and policies to ensure the full implementation of its obligations to protect life and of the prohibition of discrimination, whether direct or indirect, as well as of the United Nations Guiding Principles on Internal Displacement.188

New Orleans residents who brought suit against HUD to prevent the demolition of more than four thousand New Orleans public housing units post-Katrina pointed to the Guiding Principles in their complaint.189 The Anderson v. Jackson complaint alleged one "Violation of International

184 AEHR submitted the debate question regarding the application of Guiding Principles on Internal Displacement to the Democratic Primary Presidential Debate.
Law," asserting that (1) Katrina victims are internally displaced and (2) that the government has an obligation under Principle 28 to recognize the rights of internally displaced persons to return home. While the court found that that the Guiding Principles did not "constitute a binding instrument," including the violation in the complaint helped to transform the residents' story from one of injustice to an expectation of what is just.

New Orleans advocates have taken their stories, concerns, and demands to international forums that presume guaranteed rights for displaced residents. The 2006 report submitted to the United Nations Human Rights Committee came from a coalition of over 200 "legal, humanitarian, and advocacy groups." Also in 2006, Laurel Fletcher and Roxanna Altholz of the UC Berkeley's School of Law (Boalt Hall) International Human Rights Law Clinic worked with a coalition to ensure that the Inter-American Commission on Human Rights would hear testimony on the United States Government's response to Katrina. In the spring of 2007, AEHR co-directors Monique Harden and Nathalie Walker, along with Gert Town Revival Initiative's Reverend Lois Dejean, traveled to Geneva, Switzerland, to testify before the U.N. Human Rights Committee regarding failures by the United States Government to protect residents. On the two-year anniversary of the storm, the New Orleans-based People's Hurricane Relief Fund hosted an International Tribunal. Jill Soffiyah Elijah, Deputy Director of the Criminal Justice Institute at Harvard Law School, presided as chief judge over proceedings that heard thirty hours of testimony and brought together representatives of nine countries. Participation in forums like these validates residents' claims, gives integrity to the role of international human rights forums in the United States, and provides opportunity for independent oversight of government actions.

Human rights movement building in the Gulf Coast intersects with a larger project nationally, represented by the 10,000 people who attended the

190 Id.
191 Id.
192 Kromm & Sturgis, supra note 189, at 7.
United States Social Forum in Atlanta, Georgia, in June and July of 2007. The World Social Forum has brought hundreds of thousands of “civil society networks” to gatherings in Brazil and India since 2001, with a collective mission: “another world is possible.” The U.S. Social Forum modeled itself on these gatherings, adding its own message: “another U.S. is possible.” With activists from New Mexico and Texas, Gulf South advocates and community members organized an eleven-bus solidarity caravan, resulting in a significant presence at the Forum. The Gulf Coast contingent arrived in Atlanta several hundred strong, represented over forty organizations, and facilitated countless workshops and cultural events. At the close of the forum, the group presented a collectively written resolution to the Forum Assembly calling for a just, anti-racist, sustainable rebuilding of the region and for the enactment of federal laws establishing protection for immigrants working on the rebuild, the domestic adoption of the U.N. Guiding Principles, and the establishment of a Gulf Coast Civic Works Project.

VI. THE HUMAN RIGHTS PROJECT AND THE PUBLIC INTEREST COMMUNITY

“The success of social justice legal activism so often depends on an effective integrated strategy where legal work is part of movement building, so as to ensure both legal victories and real world change.”

A human rights paradigm shift has and will continue to meet resistance in the United States—whether it asks to make human rights law binding or to use it as a source for guidance. When asked, in 2007, whether he would support a federal law based on the U. N. Guiding Principles on Internal Displacement guaranteeing the right to return for residents displaced by Hurricanes Katrina and Rita, then Senator Joseph Biden (now Vice-President elect) responded that “the U.S. Constitution should be

196 Penelope E. Andrews, Some Middle-Age Spread, A Few Mood Swings, and Growing Exhustion: The Human Rights Movement at Middle Age, 41 TULSA L. REV. 693, 702 (Summer 2006).
197 I was a participant in the caravan and provided logistical support both on the road and during demonstrations in Atlanta.
198 Kimberley Richards and Monique Harden, A Katrina Reader, Proposed Resolution to Protect the Human Rights of People Struggling to Return to and Rebuild the Gulf Coast Region in the Aftermath of Hurricanes Katrina & Rita, July 1, 2007, available at http://www.cwsworkshop.org/katrinareader/node/483
199 Albisa & Sekaran, supra note 182, at 354.
sufficient ...all we [as a country have to] do is step up."\textsuperscript{200} The then senator’s response was representative of the view of most Democratic candidates, that our current rights structure is sufficient even when not fully functional.\textsuperscript{201} The Eastern District Court of Louisiana responded with a similar lack of receptivity to the claim that HUD had violated the rights of New Orleans public housing residents by failing to live up to the Guiding Principles on Internal Displacement.\textsuperscript{202} In the United States Supreme Court, Justice Antonin Scalia and the late Justice William Rehnquist, among others, have denounced use of international and foreign law, even to assess “the climate of international opinion.”\textsuperscript{203} Academics have also “question[ed] the relevance of international human rights law in the American domestic context” and argued for constraints in its use.\textsuperscript{204} Conservatives in the legislature have gone so far as to introduce a resolution condemning the Court’s use of international and foreign sources.\textsuperscript{205}

Political and judicial resistance responds to growing recognition that international human rights can provide guidance in how we define rights. Several current and former Supreme Court justices have long supported drawing from international sources to interpret constitutional questions.\textsuperscript{206} In a 2003 keynote to the American Society of International Law Proceedings, Justice Steven Breyer recognized an “ever-stronger consensus (now nearly worldwide) on the importance of protecting basic human rights” and the value of cross-border analysis of how to ensure these

\textsuperscript{200} Transcript of the Third Democratic Primary Presidential Debate, supra note 3.

\textsuperscript{201} Id.

\textsuperscript{202} Anderson, No. 06-3298, slip op. at 12 (finding that the “Guiding Principles on Internal Displacement (GDIP) are not a treaty and ‘do not constitute a binding instrument.’”).

\textsuperscript{203} Lawrence v. Texas, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting) (rejecting the majority’s look to “values we share with a wider civilization” as “dangerous dictum” (citing Lawrence, 539 U.S. at 576); Atkins v. Virginia, 536 U.S. 304, 325 (2002) (Rehnquist, J., dissenting) (citing Coker v. Georgia, 433 U.S. 584, 596 n.10 (1977)) (“For if it is evidence of a national consensus for which we are looking, then the viewpoints of other countries simply are not relevant.”). See also Jeffrey Toobin, Swing Shift, THE NEW YORKER 42 (September 12, 2005) (examining the use of international and foreign sources by Justice Anthony Kennedy).

\textsuperscript{204} Andrews, supra note 197, at 704 (citing Jack Goldsmith, Should International Human Rights Law Trump US Domestic Law? 1 CIT, J. INT’L. L. 327 (2000); Steven G. Calabresi, The Supreme Court And Foreign Sources Of Law: Two Hundred Years Of Practice And The Juvenile Death Penalty Decision, 47 WM. & Mary L. Rev. 743, 909 (2005) (arguing that reliance by the Supreme Court on foreign law, including international law, should be consistent with historical practice and limited where it would impose “secular European values on the American citizenship”).


\textsuperscript{206} Toobin, supra note 204, at 1 (examining the use of international and foreign sources by Justice Anthony Kennedy).

Opinions like Roper, Lawrence, and Grutter draw on international human rights law to support decisions on the civil and political rights already rooted in the United States Constitution. It has proven a harder task to convince courts to hold the federal government to socio-economic human rights obligations in a way that would provide remedies for those New Orleans residents put at risk by wealth-based policy decisions. Most state constitutions do “address social and economic concerns,” creating positive rights to childhood education, public health, welfare, even a “right to a healthy environment.” Further, human rights advocates are now engaged in campaigns to pass local ordinances through which

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209 Lawrence, 539 U.S. at 576.
210 Roper, 543 U.S. at 604 (O’Conner, J., dissenting).
213 See supra notes 134 through 144.
municipalities, like New York City, San Francisco, and Eugene, Oregon, incorporate economic, social, and cultural rights into their charters. Human rights advocates in the Gulf South and nationally are now pushing the country to create federal obligations and accountability mechanisms to protect every citizen from the many costs of a future Katrina.

The legal community can play a critical role in moving this vision forward and making another United States possible. By making the human rights framework an everyday part of our legal work, we can shift legal norms about the scope of rights available. Bringing the language of human rights into society at large, we join in a large scale project to transforming national values.

At the outset, legal professionals have an opportunity to educate judges and peers about the international human rights framework and its application domestically. Justice Breyer has described a “chicken-and-egg problem” as a barrier towards consideration of international and foreign law. Judges and clerks, he says, will not necessarily look to international sources independently; yet, lawyers fail to refer to international sources if they do not know judges to be receptive. He writes,

By now, however, it should be clear that the chicken has broken out of the egg. The demand is there. To supply that demand, the law professors, who teach the law students, who will become the lawyers, who will brief the courts, must help to break down barriers between disciplines, so that criminal law professors, for example, as well as international law professors understand the international dimension of their subject; and they must also break down barriers between the academy and the bar, and between the international specialist and the trial or appellate lawyer...International institutional issues cannot be treated as if they were exotic hot-house

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217 See Breyer, supra note 208, at 267-68.

218 Id.
flowers, rarely of relevance to domestic courts.

Justice Breyer is discussing international and foreign law as an opportunity for comparison and guidance, not necessarily in terms of binding obligations. Katrina’s appalling auction for rescue revealed social and economic human rights as “exotic hot-house flowers,” too expensive for the likes of low income communities or communities of color. It is the job of the legal community to make these rights relevant to domestic courts. Such a paradigm shift will not happen overnight, but it will never happen if we allow our perception of legal rights to be limited by available legal claims. As Florence Wagman Roisman wrote recently, “[i]t is part of our job to know what courts are holding now and what they are entertaining as bases for decision. But it also is a crucial part of our job to know what courts ought to be holding, and what they ought to be entertaining as bases for decision.”219 The decision as to what courts “ought to be holding” involves collaborating with our individual and community-based clients to develop a case theory that expresses their aspirations and demands in terms of human rights guarantees.220 As advocates, we can advance that theory through bringing claims based on international human rights law and by pointing international human rights decisions for support.221 So doing, we can offer a more complete telling of our client’s story and provide the judge with a more comprehensive set of legal tools and a stronger basis to offer just relief. Moreover, we engage the legal community in a dialogue about transforming the law to reflect changing global values. Where we reach the limits of relief, we can promote domestic accountability and independent review through strategic use of international legal mechanisms.

Yet, the human rights role of the legal community does not begin or end in the courts. The human rights framework is “an important tool of empowerment.”222 It presents a vocabulary and framework with which to “fight persecution, injustice, and inequity.”223 It can be used to create

220 See supra note 190 regarding the assertion of a legal claim under the Guiding Principles by displaced New Orleans public housing residents.
222 Andrews, supra note 197, at 711-12.
223 Id.
pressure points for change through "diplomatic persuasion, shaming, and trade pressures." Gulf South advocates recognize these opportunities. They have transformed fights for housing, environmental justice, health care, and schools into a larger human rights struggle for an equitable rebuild of the region. As demonstrated in the Gulf South, true national human rights movement building requires an "integrated strategy" that extends beyond domestic legal institutions to pair legal with non-legal advocates.

The legal community can be educated participants in this larger human rights effort. Whether we are engaged in delivery of legal services, impact litigation, or legislative advocacy, we can incorporate human rights demands and expectations into our mission statements, signaling our human rights commitment to our constituents, our funders, and the public. In our work for law reform, we can provide policy-makers with access to the human rights perspective on social and economic justice issues. When we are given a voice to speak to the media, we can use this opportunity to make human rights vocabulary familiar and accessible to all.

Our legal training also allows us combat a phenomenon that Penelope Andrews calls "the judicialization of politics." While the human rights framework can serve as a unifying language, the legal nature of its "symbols, content, and structure" may restrict understanding and, thus, access to its tools. As law-trained voices, we can help bridge the gap by making information available at every opportunity—from conversations with clients to community education.

VII. Conclusion

Despite national attention post-Katrina, federal agencies have still been free to auction off protections from environmental harms, leaving low-income communities and communities of color disproportionately vulnerable to hurricanes and hazardous agents. Given the combined uncertainty of the current economic and environmental climates, new communities will soon be put at risk by wealth-based policies. As President Roosevelt understood, our Constitutional protections have proven insufficient in the face of these social and economic injustices.

224 Handmer, supra note 34.
225 Albisa, supra note 182.
226 Andrews, supra note 197.
227 Cummings, supra note 222, at 992. ("Groups, such as [The Mexican American Legal Defense and Educational Fund], have ...begun to train communities on human rights norms and mechanisms of enforcement").
In litigation efforts, legislative advocacy, scholarship, and grassroots organizing, advocates in New Orleans and the Gulf South confront these struggles using the unifying language of human rights. So doing, they endeavor to right the past and current wrongs of Katrina’s aftermath by accessing independent review of government action and, more importantly, by shifting national values and expectations. Advocacy in the Gulf South joins a national movement which “(re)commit[s]” our nation to the socioeconomic rights of President Roosevelt’s vision—rooted in the baseline values of “equality and dignity.”228 In turn, the movement to bring human rights home229 points to Katrina as an impetus for a national paradigm shift.

Members of the legal community are uniquely poised to be change agents in this effort. We can work within legal institutions to educate, engage, and advocate for an expanded vision of rights. Sharing the power of our training, we can also collaborate with our individual and community-based clients and partners to build broad based human rights literacy and bring a human rights vision into the mainstream. So doing, we can shift from thinking of rights as subject to governmental limitation to recognizing rights as based in what we believe “is required to be fully human.”230

228 THE FORD FOUNDATION, supra note 37, at 7. See also Aka, supra note 31, at 419, 436.
230 THE FORD FOUNDATION, supra note 37, at 9.