



**From the SelectedWorks of Phyliss V Craig-Taylor**

---

March 2010

## The Sorcerer's Apprentice: A Potential Misappropriation of Power in the Implementation of Community Development Block Grants

Contact  
Author

Start Your Own  
SelectedWorks

Notify Me  
of New Work

---

Available at: [http://works.bepress.com/phyliss\\_craig\\_taylor/2](http://works.bepress.com/phyliss_craig_taylor/2)

# **THE SORCERER'S APPRENTICE: A POTENTIAL MISAPPROPRIATION OF POWER IN THE IMPLEMENTATION OF COMMUNITY DEVELOPMENT BLOCK GRANTS**

“Good! The sorcerer, my old master, left me here alone today!  
Now his spirits, for a change, my own wishes shall obey!  
Having memorized what to say and do, with my powers of will,  
I can do some bewitching, too! ... <sup>1</sup>

Prof. Phyliss Craig-Taylor<sup>\*</sup>

## I. Introduction

Inevitably, in any catastrophic event a massive loss of equity, wealth and income potential occurs. The pre-existing inequality in wealth resources and insurance protection between racial groups and class groups is exacerbated and becomes hyper-exaggerated in a natural disaster. For the economically advantaged segments of the community, the wealth and income loss in natural disasters, while painful, will be temporary. For significant numbers of the economically disadvantaged segments of the community these losses will render long-term or permanent damage. Examining these situations under the microscopic lens of race and class, an inequitable pattern emerges in the economically disadvantaged communities that suffer long term and permanent impact. In short, the notion of colorblind as well as classless systems and institutions remains an elusive myth in our society.

---

<sup>1</sup> The Sorcerer's Apprentice, Johann Wolfgang von Goethe, (1797), This poem has a number of iterations but one consistent theme threads through each version. The sorcerer leaves his workshop and his apprentice stays behind and attempts to use magical powers to complete his assigned work. His lack of understanding of the power of magic and all of the cascading effects of using the magic created unanticipated problems far worse than the initial task he was initially assigned by his master.

<sup>\*</sup> Phyliss Craig-Taylor is a Professor at the Charlotte School of Law and serves as the Associate Dean for Faculty Development. Thanks to the administration and to my colleagues on the faculty for their comments and continued support of my research in the area of land loss.

In a compelling and disturbing manner, the approach to redevelopment in post-Katrina Mississippi demonstrates the extent to which systems of discrimination still endure, despite laws which prohibit direct discrimination. This erosion of wealth emasculates and defeats the promise envisioned in the adoption of anti-discrimination laws in this country. They, instead, highlight a growing need for public policy debates and political discourse over the continued erosion of citizenship and the expanding absence of government protection for those without wealth and a disproportionate number of people of color.

Local, state and federal government assistance programs and regulatory policies are pivotal determining factors in who will recover from natural disasters. Historically, the governmental responses were clouded by class and racial bias. In post-catastrophic disaster situations, the hyper-exaggeration on racial and class groups combined with governmental aid bias leads to what I characterize as “assetless” or “asset-poor” permanent displacement of populations, neighborhoods and social networks.

This paper explores the specific implications of this theory in the case of post-Katrina recovery for people of color and lower economic class groups within communities in the Mississippi Gulf Coast region. Part One of this paper explores the historic discrimination encountered by people of color that has shaped the current inequalities of wealth and property ownership. In addition, in this section I highlight the historic pattern of racial discrimination in post-catastrophic events. There is a specific focus on the disparity of wealth and property ownership between African-Americans and European Americans. The second part of the paper applies and analyzes the impact of

my theory of “assetless displacement” for people of color in the context of the current post-Katrina recovery efforts.

“[P]ower always follows property”<sup>2</sup>

## II. Historical Roots for Discrimination in Asset Accumulation

There is a contrived and old continuing powerful intersection between race and class which fundamentally impacts the development of law and policy in the United States. The government plays a key role in shaping the direction, development and implementation of regulatory laws and policies. As the governing body of a civilized society, the people have surrendered and entrusted certain necessary powers to the government. This act of entrustment is founded on the premise that the government will act in the best interest of the entire commonwealth. Therefore, the government becomes the legitimate or recognized authority in society. In this position of responsibility and authority the government can organize and determine the access of different groups of people to governmental and other societal resources in a positive or negative manner.<sup>3</sup>

By illustration, the government can proactively generate policies that attack problems of poverty and racism.<sup>4</sup> Conversely, by failing to act or acting in a

---

<sup>2</sup>RICHARD HOFSTADER, THE AMERICAN POLITICAL TRADITION, 15-16 (1960).

<sup>3</sup> See, e.g., DONALD G. NIEMAN, PROMISES TO KEEP 3-29 (1991). See Also A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR 68-93 (1978) (At the federal level, specific legislation was enacted to deny African-Americans the right to naturalized citizenship while granting it to other immigrants). See generally LOREN SCHWENINHER, BLACK PROPERTY OWNERS IN THE SOUTH, 1790-1915 (1990), ABRAMS L. HARRIS, THE NEGRO AS CAPITALIST (Negro University Press 1969) (1936), W.E.B. DUBOIS, ECONOMIC CO-OPERATION AMONG NEGRO AMERICANS (1907), and BOOKER T. WASHINGTON, THE NEGRO IN BUSINESS (1969).

<sup>4</sup> See generally TAYLOR BRANCH, PARTING THE WATERS (1988); NOAM CHOMSKY, DETERRING DEMOCRACY 9-68 (Hill and Wang 1992) (1991); and BLUM, supra note 24, at 781-92; Fair Housing Act, Pub. L. No. 90-284, 82 Stat 81 (1968) (codified at amended at 42 U.S.C. §§ 3601-3619 (1988)); Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1521 (1974) (codified as amended at 15 U.S.C. § 1691-1691 (f) (1988 & Supp. V. 1933)); Community Reinvestment Act, Pub. L. NO. 95-128, 91 Stat. 1147 (1977) (codified as amended at 12 U.S.C. §§ 2901-2906 (1988 & Supp. V. 1933)); Home Mortgage Disclosure Act, 12 U.S.C. 2801, as amended by the Financial Institutions Reform, Recovery, and

discriminatory manner the government can erode the progress of certain population groups. The public discourse within governmental circles may not directly reflect discriminatory attitudes that designate certain populations as inferior. Nonetheless, that derogatory sentiment can be effectively conveyed in the spirit of the laws and the ensuing application of those laws. That application process results in the implementation of policies which produce a damaging and disparate impact on certain population groups.

Being mindful of this reality, the response to the Katrina catastrophe and the policies developed and implemented, in its wake, require careful scrutiny and critique. There is a vital need to determine if the immediate response or non-response as well as the subsequent policies and regulations adopted for future application produce inequitable treatment based on race and/ or class. Looking ahead to the 20<sup>th</sup> century the noted scholar and social commentator, Dr. W.E.B. Dubois opined that America's struggle would be one of the color-line.<sup>5</sup> Recovery programs in the wake of Hurricane Katrina highlight the accuracy of Dr. Dubois statement. Race as a determinate of class disadvantage was a predominate issue in the 20<sup>th</sup> Century, it also continues as a prevailing problematic issue in the 21<sup>st</sup> century.

To further complicate matters, in our national history, race has been inextricably intertwined with class to become a vexing joint dilemma for society. Slavery, for example was an economic system which was based on class. Through the invidious enslavement process, the wealthy land owners could control the lives of the

---

Enforcement Act of 1989, Pub. L. No. 101-73, § 1211, 103 Stat. 183, 524-26 (1989); Housing and Community Development Act of 1974, Pub. L. No. 93-383, 8-8(b)(2), 88 Stat. 633, 729 (1974) (codified as amended at 42 U.S.C. § 5301 (1988)); Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, 60, 102 Stat. 1619, 1622 (1988) (codified as amended at 42 U.S.C. §§ 3601-3619 (1988)).

<sup>5</sup> W.E.B. DUBOIS, THE SOULS OF BLACK FOLK 1 (Chicago, A.C. McClurg & Co 1903).

slaves and members of the lower class of that general society. Class and race became inextricably linked as African-Americans comprised the slave population.

At the forefront of the societal debate over human slavery were not only the prospects for conversion of property, but the types of treatment to be accorded those held as human chattel. The expropriation of property, the denial of political rights, the introduction of slavery and other forms of coercive labor, as well as outright extermination became predominating features of our national political, economic and social culture. Ironically this presupposed a worldview which distinguished Europeans—children of God, blessed human beings, etc. —from less worthy “others”. Such a worldview was needed to explain why some should be “free” and others enslaved, why some had rights to the land and property while others did not.<sup>6</sup>

Examining the historical and contemporary role of property in our society provides additional instructive insight into the dual barriers of race and class. In our society, property ownership has significant historical underpinnings for our republican vision of democracy. Correspondingly, providing assistance and creating an equal opportunity to acquire, regain and retain the value of property for citizens should be deemed an essential right.<sup>7</sup> The historical analysis reveals an abandonment of this principle and a pattern of flagrant discrimination against African-Americans in the valuation of property by the real estate industry.<sup>8</sup> Many examples of language in real estate industry publications included a discriminatory perspective toward different racial classifications:

It is a matter of common observation that the purchase of property by certain racial types is very likely to diminish the value of other property in

---

<sup>6</sup> MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* 58 (New York, Routledge & Kegan Paul 1986). See also *Johnson v McIntosh* (Justice Marshall discusses the Eurocentric Christian-based view of the European powers towards Native American “occupants” of North and South America)

<sup>7</sup> E.g. Lockean theory of private property creation based on ones’s labor was not supported by the human slave labor in the 16<sup>th</sup> through 19<sup>th</sup> Centuries, whereby the fruits of the labor—property ownership—flowed not to the laborer but to the slave owner.

<sup>8</sup> See CHARLES ABRAMS, *FORBIDDEN NEIGHBORS* 150-68 (1st ed. 1955), See also *Buchanan v. Warley*, 245 U.S. 60 (1917).

the section....<sup>9</sup>  
The prospective buyer might be a colored man of means who was giving his children a college education and thought they were entitled to live among whites .... No matter what the motive or character of the would-be purchaser, if the deal would instigate a form of blight, then certainly the well-meaning broker must work against its consummation.<sup>10</sup> A realtor should never be instrumental in introducing into a neighborhood ... members of any race ... whose presence will clearly be detrimental to property values in the neighborhood.<sup>11</sup> The colored people certainly have a right to life, liberty, and the pursuit of happiness, but they must recognize the economic disturbance which their presence in white neighborhoods causes, and forego their desire to split off from the established district where the rest of their race lives.<sup>12</sup>

The rule of property value was framed around the "100% American community".<sup>13</sup> This concept with its inherent racial inferiority doctrines drove the property valuation analysis.<sup>14</sup> As background context, in the 1920's, Homer Hoyt an economist wrote a publication that embraced or endorsed a racist theory that relegated African-American into an inferiority status. This publication was expansively utilized in the real estate industry. The widespread belief in the inferiority of African-Americans severely limited any opportunities for their investment in property of every type. Thereby stunting their accumulation of wealth.

---

<sup>9</sup> ERNEST MCKINLEY FISHER, PRINCIPLES OF REAL ESTATE PRACTICE 116 (1923), *quoted in* ABRAMS, *supra* note 6, at 63.

<sup>10</sup> EQUALITY OF OPPORTUNITY IN HOUSING, National Community Relations Advisory Council, June 1952 at 15, ABRAMS, cited *supra* note 6, at 156.

<sup>11</sup> NATHAN WILLIAMS MACCHESNEY, THE PRINCIPLES OF REAL ESTATE LAW 586 (1927), *quoted in*, ABRAMS *supra* note 6, at 156.

<sup>12</sup> STANLEY L. MCMICHAEL & R.F. BINGHAM, CITY GROWTH AND VALUES 182 (1923), ABRAMS, cited *supra* note 6, at 159. (Choice of language such as "form of blight", "economic disturbance" and "established district" were euphemisms that allowed the use of segregation to inflate property values and creating market zones. This manipulated and exploited property values based on race and provided brokers the fig leaf for what was the economic policy realities of the times.)

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 158.

Any standard which purports, and is then accepted, as an "objective" and "scientific" designation carries greater weight. A false thesis appears and becomes a decisive factor in decision making. One such thesis appeared in Hoyt's writings. He asserted first, that a negative impact on property values occurred when a "colored family" moved into a neighborhood, and second, upon achieving an American standard of living, the impact on property values increased for all ethnic groups except Mexicans and African-Americans.<sup>15</sup> Hoyt even ranked thirteen "races and nationalities" based on his perception on how each group depressed property values. English were at the top of the hierarchy and Negroes at the bottom:

1. English, Germans, Scotch, Irish, Scandinavians
2. North Italians
3. Bohemians or Czechoslovakians
4. Poles
5. Lithuanians
6. Greeks
7. Russians, Slavs of the Lower Class
8. South Italians
9. Negroes
10. Mexican

This racially derogatory theory was adopted by many in the real estate industry including the American Institute of Real Estate Appraisers.<sup>16</sup> The impact was extensive and pervasive as reflected in the formation of many communities with single ethnic group representation. The property owners were lead to believe this protected their property values against the subsequent depression caused by the incursion of less desirable ethnic groups. The government's adoption of this theory of inferiority precluded many minorities from accessing desirable mortgage loans

---

<sup>15</sup>HOMER HOYT, ONE HUNDRED YEARS OF LAND VALUES IN CHICAGO 314 (1933).

<sup>16</sup> *Id.*

underwritten by the government.<sup>17</sup>

Thus, not only were African-Americans limited in their opportunities to buy and sell residential real estate, but the value of the real estate they could purchase was sharply constrained by racist theory and practice. Furthermore, this racist disparity persisted to haunt and impede an equitable approach to disaster relief efforts throughout the twenty and twenty-first centuries.

A closer examination of the history of disaster relief, in Mississippi, up to and including post-Katrina strikingly verifies that the goal of becoming a classless and colorblind society remains a unachieved myth in the Twenty-first Century United States.

### III. The Mississippi Way

In Mississippi, there exists a distinct historical pattern of racial discrimination toward and disparate impact upon African-American populations in post-catastrophic events.<sup>18</sup> During and after the great flood of 1927, African-American were subject to horrendous discriminatory treatment. Thousands were forced to stay on a thin strip of levee for months. To compound this oppressive treatment they were forced into unpaid labor reinforcing the levee to provide protection for European American owned property.<sup>19</sup> Subject to threats of violence, they were entrapped in servitude. Living under the invidious restrictions of Jim Crow but struggling to become independent, African-Americans used any avenue available to acquire property and other assets.<sup>20</sup> In

---

<sup>17</sup> *Id.*

<sup>18</sup> *See generally*, RISING TIDE: THE GREAT MISSISSIPPI FLOOD OF 1927 AND HOW IT CHANGED AMERICA 103 (Simon & Shuster 1997).

<sup>19</sup> *Id.* at 314-317.

<sup>20</sup> *Supra* note 11, at 158, HOWARD ZINN, A PEOPLE'S HISTORY OF THE UNITED STATES 192-93 (Harper Perennial 1995) (1980), MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977), Robert H. Skilton, *A Development in Mortgage Law and Practice* 17 TEMP. U.L.Q. 315 (1943), BENJAMIN HIBBARD, A HISTORY OF PUBLIC LAND POLICIES (1939), and PAUL W. GATES, A HISTORY OF PUBLIC LAW DEVELOPMENT 413-14, 443-47 (1968).

the wake of the flood, thousands of African-Americans lost everything they had and received negligible if any compensation. In essence they were forced back into quasi-slavery status and treated as the property of the large land owners in the area. This event played an important role in the decision of countless African-Americans to leave the area in the great migration north.<sup>21</sup>

In 1969, the Mississippi gulf coast experienced a hurricane of significant force. Hurricane Camille had devastating winds of 200 miles per hour and generated waves of up to 30 feet.<sup>22</sup> This riveting devastation killed hundreds and thousands more lost property. In Mississippi it was estimated that approximately 4,000 houses were lost and 12,000 homes suffered major damage.<sup>23</sup> While the government's response, overall, was slow and very limited, this most severely damaging impact was inflicted upon poor and African-American households. The post-Camille response appears eerily similar to the post-Katrina response today. For example, of the 617 disaster loans the Small Business Administration paid out after Camille, 97% of the loans went to European-Americans. The average European-American loans were \$8,919 dollars. In bleak contrast, the average African-American loans were less than half that amount, \$3,797 dollars.<sup>24</sup>

The few African-American homeowners who possessed insurance were forced to accept less than equitable settlements because they lacked the resources necessary to challenge the companies' decisions. Discriminatory distribution policies by the Red Cross and relevant federal departments, especially the department of Housing and

---

<sup>21</sup> *Supra* note 15.

<sup>22</sup> See, "In the Wake of the Hurricane Camille: An Analysis of the Federal Response", American Friends Service Committee and the Southern Regional Council (1969).

<sup>23</sup> *Id.* at 7.

<sup>24</sup> *Id.* at 18.

Urban Development, restricted the ability of African-Americans to rebuild.<sup>25</sup> Civil Rights laws passed in 1964 to protect the rights of African-Americans were not followed as “European Americans Only” policies regarding education aid and economic development opportunities were maintained and dominated governmental aid distribution.<sup>26</sup>

#### IV. A Theory of Assetless Displacement

Wealth and stability in our society is determined by a consideration of income and asset accumulation which includes property ownership. The aforementioned historical discrimination is reflected in the contemporary financial realities of American families. Economic Policy Institute’s Basic Family Budget Calculator indicates that the 2004 national median basic needs budget for a two-parent, two-child household was \$39,984.<sup>27</sup> The national median basic needs budget was \$38,136 in New Orleans and 33,636 in Biloxi.<sup>28</sup> In 2004, median household income declined for the fifth year in a row.<sup>29</sup> Media portrayals for successful people of color create the appearance of progress. However, for the majority of citizens, in this group, that progress is illusory. When examined through the lens of wealth, the substantial numbers of people of color are far from breaking through the many glass ceilings and embedded biases that restrict wealth/asset accumulation. In short, race and class remain as unbroken shackles substantially impeding the income and asset accumulation progress for people of color.

---

<sup>25</sup> *Supra* note 15, at 329-334.

<sup>26</sup> *Id.*

<sup>27</sup> Chaka A.K. Uzondo, “Washing Away the Veil: Katrina and the Racial Divide”, United for a Fair Economy (Oct. 10, 2005) *available at* <http://www.racialwealthdivide.org/research/WashgAwayVeil.html>.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

Today, an appreciably large number of families in this country are experiencing a challenge just to stay on the margin.<sup>30</sup> Families of color represent a disproportionate number of those families.<sup>31</sup> The occurrence of Katrina and the disparity in the hurricane relief effort becomes another means of deepening the inequality and poverty inside of certain groups of citizens. The opportunities for expansion of wealth and profit for the wealthy and/or corporate community are plentiful. By disturbing comparison, a person in the middle or lower class is always precariously placed at risk of losing their small asset accumulation. This danger is magnified with the occurrence of a natural disaster.

Class status is a derivative of more than the amount of money the person makes; it is also defined by the level of economic security. This inequity, in asset accumulation, also wears the face of disparate treatment among racial groups. By illustration one of the most devastated areas in New Orleans was the Ninth Ward which has a largely African-American population.<sup>32</sup> While suffering the worst blows from Katrina, it has been woefully neglected in the hurricane relief efforts.<sup>33</sup>

In order to dissect the Katrina dilemma through the lens of race and class one must step back and ask some fundamental questions. For example: 'Why are so many people of color poor?' The National Urban League report of Wealth and class indicates that the divide between people of color and European Americans is widening.<sup>34</sup> Multi-disciplinary contemporary scholars are engaged in an on-going discourse about the distribution of income and wealth for the different racial and ethnic groups in this

---

<sup>30</sup> [www.oxfamamerica.org/whatwedo/emergencies/hurricane\\_katrina](http://www.oxfamamerica.org/whatwedo/emergencies/hurricane_katrina)

<sup>31</sup> *Id.*

<sup>32</sup> [http://www.democracynow.org/2007/8/30/new\\_orleans\\_hit\\_by\\_another\\_hurricane](http://www.democracynow.org/2007/8/30/new_orleans_hit_by_another_hurricane)

<sup>33</sup> *Id.*

<sup>34</sup> National Urban League, Even as U.S. Economy Gets Better Jobs and Wealth Gap Gets Larger On The Equality Index, [www.nul.org](http://www.nul.org) (April 6, 2005).

country. Report after report highlight the same alarming pattern-- that the dream of equality pursuant to the enactment of the Civil Rights Act is more of an illusion than a reality.<sup>35</sup>

Instead of measurable progress, the country is plagued by a deepening racial/class divide.<sup>36</sup> By the standard and limited measure of income, racial inequality is readily apparent. The typical African-American family makes 59 cents for every dollar earned by the typical white household.<sup>37</sup> Apart from this annual income disparity, the wealth divide is even more substantial. "The most optimistic analysis suggest that the black median net worth ratio is .10, meaning blacks have control of ten cents for every dollar of net worth that whites possess. Other estimates indicate that the ratio is closer to seven cents...Isolating the period and dynamics of the past decade a little more closely, the racial wealth gap grew by \$14,316 between 1966 and 2002."<sup>38</sup> In 2001, the median household net worth of the typical European American family was \$121,000.<sup>39</sup> In stark contrast, the median household net worth for the typical African-American family is \$19,000.<sup>40</sup> In other words, there is a \$102, 000 dollars net worth or asset deficit that arises from belonging to an African-American household.

The disparities are apparent in every category of asset accumulation. Home ownership and annual income are central variables in determining asset accumulation. A report from the Levy Institute of Economics from Bard College found the typical

---

<sup>35</sup> <http://www.econ.duke.edu/~tkw2/BWinequality.pdf>

<sup>36</sup> THOMAS SHAPIRO & MELVIN OLIVER, *Preface* to *Black Wealth White Wealth* ix-xii (Routledge Publishing) (2006).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

African-American household had fifty-four cents of income and twelve cents of wealth for every corresponding dollar in the typical European American household. Hispanics had sixty-two cents of income and four cents of wealth.

In his study on homeownership, Professor Lance Freeman of Columbia University explained that while 49.1 percent of African-American owned homes in 2004.<sup>41</sup> While this was the highest rate ever of homeownership for African-Americans, that number was 25 percent less than the homeownership rates among European Americans. Furthermore African-American homeowners had significantly less equity in their homes than European Americans. This was derivative of only being able to purchase less expensive houses at considerably higher interest rates.

The National Urban Leagues' 2006 report on "The State of Black America" documented that the median net worth of the average African-American family is \$6166.00.<sup>42</sup> This figure is ten times less than the net worth average for European American family at \$67,000.<sup>43</sup> This discrepancy is attributed primarily to the difference in home ownership and income. Nearly, 50% of African-Americans own their homes.<sup>44</sup> In contrast, over 70 percent of European Americans own their homes. Equally revealing is the fact that mortgage and home improvement financing denial rates for African-Americans is twice that of European Americans. In the transportation category, another disparity in usage for African-Americans and European Americans is documented. "Most importantly, the "Index Value for Reliance Upon Public Transportation" was 0.25 for African-Americans. This low index number validates that nearly four times as many African-Americans rely

---

<sup>41</sup> Freeman, Lance, *There Goes the Hood: Views of Gentrification from the Ground* (Temple Press 2006).

<sup>42</sup> <http://www.nul.org/publications/SOBA/2006SOBAEXCSUMMARY.pdf>

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

more heavily on public transportation systems than European-Americans.”<sup>45</sup>

In a professed “classless” society, the myth asserts that success is determined by one’s intelligence and determination. This paper contends that, in reality, these differences are based in historical processes of domination and subordination as well as economic exploitation. Without a historical view, the economic disparities defy comprehension or are subject to manipulation and distortion. Reminiscent of this discriminatory mode of thought, in post catastrophic disasters such as Katrina, the policies and regulations adopted by the government and the courts essentially provide a discriminatory paradigm for the valuation of people. This is done by establishing a framework to allow some to retain their property and wealth while others are excluded. A privilege system is implanted which differentially advantages and disadvantages groups depending on their social location.<sup>46</sup>

Contemporary evidence of an extension of this discriminatory approach is shown in policies that produce “red-lining”, mortgage lending discrimination practices, as well as real estate block busting and steering. These accumulatively serve to impair the ability of people of color and economically disadvantaged groups to accumulate assets, while advantaging European Americans. While race and ethnicity discrimination is unconstitutional, wealth substitutes as an invisible yet effective distinction for disparate treatment of racial groups and economically disadvantaged persons. The power of this distinction to influence and determine policy is demonstrated in catastrophic recovery support programs. Demographic attributes such as race and economic class are an effective manner of analyzing who will and who will not be made whole by recovery and

---

<sup>45</sup> *Id.*

<sup>46</sup> MARGARET ANDERSON & PATRICIA COLLINS HILL, RACE, CLASS AND GENDER 61 (6th ed. (2007)).

disaster relief programs. In reality, racial hierarchy and class stratification remain ingrained in the foundation of America culture.<sup>47</sup> Underlying beliefs regarding the inferiority of certain groups, allows a “blame the victim” syndrome to develop. The previously mentioned historical derogatory references to race and class instituted the foundation for establishing and perpetuating discriminatory views of race and class

Issues of race and class become especially problematic in the context of asset and property accumulation.<sup>48</sup> For example, home ownership as a means to generate wealth and enhance one’s social location or economic class is deeply rooted in the history of this country. “The success of the American experiment rested on the property-holding success of many individuals.”<sup>49</sup> Property ownership was exalted as essential to full participation of American citizens.<sup>50</sup> Property ownership has become a primary tool for wealth accumulation for people of color. Inherited wealth, essentially unearned income, as well as other assets contribute substantially to the wealth building capacity of European Americans. The smaller inter-generational transfers between groups of color and European-Americans creates a multiplier effect over time, Thus, as the wealth disparity between groups of color and European Americans expands, the loss of large amounts of property within groups of color raises considerable reason for concern.

---

<sup>47</sup> RISA L. GOLUBOFF, *THE LOST PROMISE OF CIVIL RIGHTS* HARVARD UNIVERSITY PRESS (2007).

<sup>48</sup> Supra note 7 and 8.

<sup>49</sup> John Adams, *quoted in* PATRICIA NELSON LIMERICK, *THE LEGACY OF CONQUEST* 58 (1st ed. 1987).

<sup>50</sup> “The availability of millions of acres of land in the new nation and the initially small freeholder population gave rise to a series of legislative and legal decisions, which encouraged and promoted the ownership of homesteads...” The belief that property ownership was an integral link to liberty of action and freedom fueled advocacy for a wider distribution of property. A belief by the founders of this country that “if America were to become like Europe, with a mass of propertyless workers and peasants, liberty would fall with equality and authority concentrated in the hands of a few would turn into tyranny.” PHYLISS CRAIG-TAYLOR, *To Be Free: Liberty, Citizenship, Property and Race*, 14 HARV. BLACKLETTER L.J. 50. See also CLINTON RUSSITER, 1787 GRAND CONVENTION 42-57 (1966).

The documented gap between the property ownership of people of color and the European Americans in the population is steadily widening. This becomes exaggerated in times of catastrophes such as Katrina, as those with wealth and insurance find the government and the private insurance companies providing the resources to facilitate their recovery. By comparison, those with less wealth and greater need are not given required resource support. They face the unenviable and distressing plight of struggling for themselves. They absorb the full extent of their loss in wealth and property. Arguably, government recovery efforts should provide an equalizing remedy to address this disparity in impact as these programs are funded by tax payer dollars. Instead, they are designed in a manner which cruelly reinforces the wealth difference.

What occurs in post catastrophic disasters such as Katrina can be descriptively termed “asset-less” or “asset-poor” permanent displacement of whole populations, social networks and communities. This phenomenon is in direct contradiction to prior efforts in this country to promote asset/wealth accumulation. Such displacement perpetuates economic class and racial bias. There is a clear disparate impact on people of color in disasters where there are racially diverse populations affected. The historic evidence of previous disasters tends to support this racialized approach to recovery efforts.<sup>51</sup>

#### IV. The Mississippi Recovery Plan Post-Katrina

When analyzing the details of governmental disaster assistance programs, a prevailing pattern emerges. The particular way the government structured the disaster

---

<sup>51</sup> See generally, JOHN M. BARRY, RISING TIDE: THE GREAT MISSISSIPPI FLOOD OF 1927 AND HOW IT CHANGED AMERICA (Simon and Schuster 1997) and Forgotten Communities Unmet Promises: a Unfolding Tragedy on the Gulf Coast, Oxfam America Report 2006 at 12 – 19 available at [http://www.uusc.org/katrina/reports/oxfam\\_gulfcoast\\_report.pdf](http://www.uusc.org/katrina/reports/oxfam_gulfcoast_report.pdf).

relief programs tilts the benefits favoring some and disadvantages others with economic assets that were damaged or/or destroyed.<sup>52</sup> For example, in Mississippi the Governor sought and obtained waivers from the Department of Housing and Urban Development in the multi-billion dollar Community Development Block Grant Package. That action detrimentally impacted the opportunity for poor and citizens of color to recover the value of their damaged or destroyed assets. These waivers included removing the income cap for the program to allow wealthier property owners to participate and dropping altogether the 50% requirement which earmarked half of the funds for low and moderate income households.<sup>53</sup> These actions combined to produce disastrous results for property owners who did not sustain initial surge damage as the water slowly made its way farther inland.

Thousands of households including a significant number of African-American households were denied any assistance in the Governor's program for relief.<sup>54</sup> Households were described as "undeserving" because they did not buy or keep active property insurance policies on their property. The designation of undeserving was attributed to this group of households without any analysis of the facts and unique situations faced by this group of homeowners outside the surge area. In addition,

---

<sup>52</sup> See for example, ROBERT B. OLSHANSHKY, HOW DO COMMUNITIES RECOVER FROM DISASTER: A REVIEW OF CURRENT KNOWLEDGE AND AN AGENDA FOR FURTHER RESEARCH, Presented at 46<sup>th</sup> Annual Conference of Collegiate Schools of Planning, Kansas City, October 27, 2005; Michael K. Lindell and Carla Prater, "Assessing Community Impact of Natural Disaster", 4 Natural Hazard Review; MARY COMERIO, DISASTER HITS HOME: NEW POLICY FOR URBAN HOUSING RECOVERY, Univ. of California Press, Berkeley (1998); Mark Bernstein, Julia Kim, Paul Soversen, Mark Hanson, Adrian Overton and Scott Hiromoto, "Rebuilding Housing Along the Mississippi Gulf Coast: Ideas for Ensuring An Adequate Supply of Affordable Housing" Rand Gulf State Policy Institute Occasional Paper (2006).

<sup>53</sup> See, U.S. Department of Housing and Urban Development FR 5051-N03 Filed June 9, 2006. "Waivers Granted to Alternative Requirement for the State CDBG Disaster Recovery Grant Under the Department of Defense emergency."

<sup>54</sup> See FEMA/HUD, Methodology for Assessing Housing Unit Damage due to Katrina, Rita and Wilma July 12, 2006. (Up to 34,000 homeowners with moderate to severe wind damage are ineligible for aid under Governor Barbour's recovery program including 10,300 who had no insurance).

Mississippi is the only state that conditioned assistance on water damage from the surge and denied assistance to homeowners who sustained only wind damage.<sup>55</sup> As many African-Americans did not own beach front property but lived in communities that were impacted by the effects of the storm, this particular condition added a variable that was troubling.

Thousands of low and moderate income property owners of color, including business and homeowners, are subject to significant pressures and face daunting hurdles to redevelopment and recovery.<sup>56</sup> Many of these homeowners suffered total devastation of all their property and possessions in Hurricane Katrina. Cost to repair for major damage ranges between \$33,000 and \$53,000.<sup>57</sup> Cost of repair for catastrophic damage ranges between \$70,000 and \$201,000. Insurance settlements did not provide compensatory coverage for the full cost to repair the damages inflicted by Katrina. The average wind insurance settlement along the 3 coastal counties was \$15,869,<sup>58</sup> and did not provide the full cost to repair. For wind-damaged households, subtracting out \$15,000 in insurance, the unmet need starts at \$17,000 for moderate damage and \$54,000 for catastrophic damage and escalates substantially from that point.

Lower income African-American households in many coastal Mississippi communities suffered exclusively wind damage. This occurred due to the segregated patterns of settlement that placed those households on the north side of the railroad tracks which functioned as a levee holding back the surge for many in the

---

<sup>55</sup> See The Road Home Program *available at* <http://www.road2la.org> (which provides assistance to all homeowners with property damage in Louisiana and for running statistics on the recovery program for homeowners).

<sup>56</sup> *Supra note* 33 at 6.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at Table 1.

predominantly African-American communities. Many of these residences were of older construction, with greater deferred maintenance and increased vulnerability to more severe windstorm damage than residences generally.<sup>59</sup> Some of these persons found themselves in the unenviable position of being under-insured. Others faced the even more distressing fate of having no insurance coverage. Even those who felt they had insurance came to realize that their insurance coverage may not include flood coverage.<sup>60</sup> Without government programs designed specifically to assist this population, they are left to suffer an overwhelming and paralyzing loss in assets and wealth. The composition of this group is significantly African-American.

This lack of governmental assistance in Mississippi highlights an intentional decision to limit the ability of a segment of homeowners to rebuild their homes and retain their accumulated assets. The ultimate discriminatory and debasing impact is to force that population to potentially lose their assets or sell their property for a considerable loss. Moreover, it signals a revision of government policy that in fact cruelly impedes asset accumulation for African-Americans, instead of promoting equal access to property and wealth accumulation for all citizens. This generates the discriminatory impact of systematically protecting the wealth of a privileged segment of society, at the expense of African-American and other economically disadvantaged groups. All groups are expected to contribute to the wealth of the country through the payment of taxes in proportion to their income. Paradoxically, in the instance of natural disasters, those with less wealth receive comparatively reduced consideration for assistance while those with more wealth receive more consideration for assistance from

---

<sup>59</sup> Governor's Commission Report, December 31, 2005 52-53.

<sup>60</sup> See, Warnkle Community Consulting, The East Biloxi Community Plan (Draft) June 2006. (Explaining that over 60% of the East Biloxi, Mississippi households in the flood zone did not have flood insurance).

government-tax funded redevelopment programs.<sup>61</sup> Therefore, the practical affect is the absence of an equalizing remedy for those with less wealth.

#### V. FEMA Redevelopment Guidelines

This inequitable paradox is further demonstrated by the manner in which FEMA adopts redevelopment guidelines. An essential element in post-Katrina disaster reconstruction was the establishment of new mitigation frameworks to provide incentives for private insurance companies. In the case of flooding, the Federal Flood Insurance Program issues new insurance policies and reinsures existing policy holders. In the coastal areas of Mississippi, this involves the re-designation and regulation of flood plains.<sup>62</sup>

The new proposed FEMA regulations include flood elevation guidelines for rebuilding.<sup>63</sup> Many argue the guidelines impose an undue burden on some to rebuild. The elderly and the disabled are deeply impacted by the new elevation requirements to rebuild at 18 feet or higher. The cost is prohibitive for building-up at the higher elevation. For the disabled and the elderly to reasonably enjoy the benefit of their property, installation of an elevator is required. Rebuilding at the higher elevation and the additional cost of installing an elevator potentially places such a substantial burden on many of the homeowners in this group who must then relocate to other areas of the country. Without government funding to rebuild to new elevation standards, safety is juxtaposed to cost which forces migration. This forced relocation and its inequitable

---

<sup>61</sup> SunHerald.com, Gulfport Mayor Brent Warr's State of the City Speech, [http:// www.sunherald.com/185/v-print/story/426448.html](http://www.sunherald.com/185/v-print/story/426448.html) (posted Mar. 11, 2008) (discussing how governor proposes 600 million for Port redevelopment out of CBG funds and no additional funds for homeowners).

<sup>62</sup> See Hurricane Katrina Flood Recovery Maps, [www.fema.gov/hazard/flood/recoverydata/katrina/katrina\\_index.shtm](http://www.fema.gov/hazard/flood/recoverydata/katrina/katrina_index.shtm) (last visited May 9, 2008).

<sup>63</sup> *Id.*

impact should not be an acceptable part of a plan funded by tax-payer dollars. Although there were some minimum mitigation funds available, the qualifications to receive the funds were also restrictive and the pool of funds is very low.<sup>64</sup> Requirements of the elevation also impede the opportunity for the disabled to rebuild and access their property. This group faces the same issues and in some cases more issues than the elderly as they attempt to redevelop their property.

The cost and resources to challenge the FEMA elevations requirements is significant. FEMA has an appeals process in place but the process requires substantial resources to pursue a challenge. Resources are needed to pay legal counsel and to compensate the experts required to challenge the need for or validity of the proposed flood elevation guidelines.<sup>65</sup> The rebuilding costs escalate if the homeowner chooses to comply with the FEMA guidelines.<sup>66</sup> This cost escalation is far more expensive than many of the affected people can afford. Their only option then is to opt out of the FEMA flood insurance process and look to the open market for private insurance.<sup>67</sup>

The decision making process for revising flood regulations does not grant non-property owners standing or voice in the deliberations. Consequently, the fate and welfare of thousands of non-property owning households are subject to decisions made by rental property owners and government officials. Those decisions are the controlling

---

<sup>64</sup> Governor's Office of Recovery and Renewal, <http://www.governorbarbour.com/recovery/enews/enews3.html>.

<sup>65</sup> Id.

<sup>66</sup>“ FEMA's new recommendation for Biloxi, for example, increased the base elevation for construction from 13 feet to 18 feet above the ground, and some elevation extend as high as 27 feet, depending on the location of the property. Estimates for elevating an 800 square-foot-home by 12 feet range from \$20,000-\$50,000, dramatically increasing the cost of rebuilding and severely limiting the number of people who can afford it”.Federal Reserve Bank of Atlanta Partners In community and Economic Development “Post-Katrina Housing Woes Challenge Residents and Planners, Vol 16. No. 3 2006.

<sup>67</sup> Insurance Cost Become 3<sup>rd</sup> Storm, [http://www.usatoday.com/money/perfi/insurance/2007-04-02-gulf-recovery-usat\\_N.htm](http://www.usatoday.com/money/perfi/insurance/2007-04-02-gulf-recovery-usat_N.htm) (discussing the burden of acquiring insurance at the new higher rates post-Katrina

variables in determining the ability of the voiceless non-property owning households to return to their home communities.<sup>68</sup> Only 11,730 rental units are forecast to be built by the Small Rental Program and the GO Zone Low Income Housing Tax Credit Program. When one adds 316 destroyed public housing units and a projected 1,275 units under the Mississippi Home Corporation set-aside the total of rental units projected is 13,321. On the bottom line this only meets 51% of the reported rental housing loss – the 26,037 damaged units reported in the July, 2006 FEMA/HUD report. As for units severely damaged, the small rental program will restore only 43% of them.<sup>69</sup>

Low to moderate income property owners and prior renters from the coastal areas are essentially having their property rights and liberties expropriated against their will without any viable due process opportunity to be heard. Their choices of whether to rebuild or to return to their communities are eliminated or severely constrained by the controlling government policy.<sup>70</sup> Property owners, who cannot receive any government relief assistance outside of loans offered to small business owners through the Small Business Administration, find themselves paying a mortgage on an unlivable home site. Some few find other resources including aid from charitable organizations to rebuild

---

<sup>68</sup> FEMA, Mississippi 1604, GCRO, IA Global Report No. 26.0, report Date 02/06/08, FEMA/HUD, Methodology for Assessing Housing Unit Damage due to Katrina, RITA and Wilma. July 12, 2006 (illustrating an estimate of 34,405 low income rental units were damaged and more than half the households still in FEMA Trailers or those receiving rental subsidy were renters prior to Katrina).

<sup>69</sup> See Small Rental Program Final Action Plan, June 26, 2007, p. 9.

<sup>70</sup> To qualify for Mississippi Development Authority's (MDA) Homeowner Assistance Program (HAP), homeowners must attach a covenant to their damage property. The covenant requires homeowners to obtain and maintain flood insurance on their property, rebuild or repair their homes in accordance with all applicable building codes and local ordinances, and if rebuilding, do so in accordance with FEMA advisory flood elevations. See Press Release: MDA Clarifies Grant Application Procedure for Homeowners Who Sold their Homes, <http://www.mississippi.org/files/press/20061023HOASold.pdf>., <http://www.governorbarbour.com/recovery/enews/enews3.html>, Governor's Office of Recovery and Renewal.

while living in “toxic” FEMA trailers.<sup>71</sup> Simultaneously, others attempt to sell their property at a loss and others accept the unfortunate reality of foreclosure.

In addition, the issues associated with ownership inside of heir property also have a profound impact. In other words, problematic heir property matters arise that dramatically influence and obstruct the ability of potentially qualified homeowners to negotiate a grant for assistance.<sup>72</sup> Because the heir property ownership is fractured into many divisions based on intestate succession, there is not a single owner or even a group of clearly designated owners. Without a deed or other instrument clearly identifying the owner or owners, the family members in possession of the property are without the proof needed to establish their entitlement to the available grant funds. The appeals process for many property owners would prove particularly onerous and cost prohibitive.<sup>73</sup>

---

<sup>71</sup> After complaints, Center for Disease Control and Prevention Report documents dangers of high formaldehyde level, FEMA Warns Workers Not to Enter Stored Trailers, <http://www.npr.org/templates/story/story.php?storyID=1614394>, See, <http://www.cdc.gov/nceh/ehhe/trailerstudy/pdfs/SummaryofStudyFindings.pdf>, Formaldehyde Levels in FEMA Supplied Trailers, Preliminary findings from the Center of Disease Control and Prevention, February 14, 2008

<sup>72</sup> For a more detailed analysis of the issues of heir property see, Phyliss Craig-Taylor, *Through a Colored Looking Glass: A View of Judicial Partition, Family Land Loss, and Rule Setting*, 78 Wash. U.L.Q. 737, 752 (2000).

<sup>73</sup> Timeline for the FEMA Appeals Process is triggered when the FEMA Director must provide notice to the local government of Proposed Based Flood Elevations (BFE),. FEMA must publish the flood elevations determinations in a prominent local newspaper at least twice during the ten-day period following the identification to the local government. Appellants must file administrative appeals within ninety days after FEMA’s second publication in a local newspaper. FEMA will issue a final determination within a reasonable amount of time. Appellants aggrieved by the final decision may appeal to U.S. District Court within sixty days of the final determination. Appellants must have completed the administrative appeal process to be able to appeal to the district court. Evidence required includes ability to show incorrect methodology was used by FEMA, or an expert to develop and provide documentation of superiority of alternative methodology and study using the alternative methods..42 U.S.C 4104(b)-(g) See, e.g. *City of Biloxi v Guiffrida*, 608 F. Supp. 927, 931 9S.D/ of Miss. 1985); *Reardon v Krimm*, 541 F. Supp. 187, 189 (d. Kansas. 1982); *City of Trenton v Federal Emergency Management*, 545 F. Supp.13, 17 (E.D. Mich. 1981).

## VI. The Role of Private Insurance

The private market based disaster insurance system creates significant problems for homeowners to overcome in their efforts to rebuild on the Mississippi Gulf Coast. A number of major insurers were accused of intentionally low-balling damage estimates as they established contested casualty findings on properties. Such practices lead to very depressed proposed pay-outs to homeowners.<sup>74</sup> Even with rising profit levels, many insurance companies denied claims and engaged in trickery to avoid paying claims to policy holders.<sup>75</sup> “After doing everything that they could to deny claims, the insurance industries next step was to cancel or threaten to cancel homeowner policies.”<sup>76</sup> The threats and pull-outs occurred even though the property casualty insurance industry experienced increased profits during 2006 of 44%. In dollars this amounts to profits of 63 billion dollars; a surplus that topped 487 billion dollars.<sup>77</sup> Decisions by a number of insurers to stop writing policies on the Gulf coast added significant pressure on the Mississippi State Fund as the insurer of last resort.<sup>78</sup> This pressure leads to an increase in premiums by the State Insurance Fund.<sup>79</sup> The Mississippi Windstorm Underwriting Association, the state’s wind damage insurance pool, increased its rates 90 percent for single-family homes and 286 percent for commercial property.<sup>80</sup>

---

<sup>74</sup> [http://insurancenewsnet.com/article.asp?a=top\\_pc&neID=20070218125.18\\_8f6e012f90943e40](http://insurancenewsnet.com/article.asp?a=top_pc&neID=20070218125.18_8f6e012f90943e40)

<sup>75</sup> Pattern of Greed, <http://www.justice.org/pog2007.pdf> (discussing the insurance industries strategy of avoidance in response to claims for damage along the Gulf Coast).

<sup>76</sup> *Id.*

<sup>77</sup> *Id at 8.*

<sup>78</sup> [http://www.consumeraffairs.com/news04/2007/02/state\\_farm\\_ms.html](http://www.consumeraffairs.com/news04/2007/02/state_farm_ms.html)

<sup>79</sup> [http://bulletin.aarp.org/yourmoney/personalfinance/articles/home\\_insurance\\_hell0.html](http://bulletin.aarp.org/yourmoney/personalfinance/articles/home_insurance_hell0.html)

<sup>80</sup> [http://www.frbatlanta.org/invoke.cfm?objectid=D1E4DE19-5056-9F12-12B51C75E7FA6920&method=display\\_body](http://www.frbatlanta.org/invoke.cfm?objectid=D1E4DE19-5056-9F12-12B51C75E7FA6920&method=display_body)

In addition, increased cost of insurance presents those on fixed income with an array of other difficult and dispiriting choices. By illustration, some of the elderly living on the Gulf Coast reported facing the untenable choice of accepting a lower payout from an insurance claim and just not returning to the area due to the high cost associated with rebuilding and insurance.<sup>81</sup> Some elderly homeowners have retired the mortgage debt on their homes. Nonetheless, they sadly face losing their homes and their equity if a disaster or catastrophic event occurs. As in Katrina or some future danger, they will not be insured against any losses that may result from such a horrific event. When this is combined with the historic discrimination that is experienced by the poor and African-American homeowners, these groups are left under-insured or without insurance at all.<sup>82</sup>

## VII. Cumulative Impacts

With a declining number of insurers and escalating policy costs post-Katrina, the option to secure private insurance in the market is now out of the financially-viable reach for many.<sup>83</sup> This dramatically impacts the nature of the rebuilding process and essentially defines who can rebuild. Without other feasible options in place, the Mississippi State Recovery Plan combined with federal regulations limits the opportunity to rebuild and redevelop to those with the greatest financial resources. It is foreseeable that this in all likelihood will dramatically alter the face of the coast in the future. In short, diverse communities comprised of all income levels, the elderly and disabled individual homeowners may become historic relics along the Mississippi coast. The face of the coast will feature luxury condominiums replacing individual home owners. Concurrently,

---

<sup>81</sup> <http://katrinanetworking.blogspot.com/2006/11/elderly-still-in-storms-eye.html>

<sup>82</sup> [www.americanprogress.org/kf/katrinavictims.pdf](http://www.americanprogress.org/kf/katrinavictims.pdf) (documenting the racial breakdown of the areas impacted by Hurricane Katrina), Essential Facts About the Victims of Hurricane Katrina, [www.cbpp.org/9-19-05pov.htm](http://www.cbpp.org/9-19-05pov.htm)

<sup>83</sup> Id., [http://insurancenewsnet.com/article.asp?a=top\\_pc&neID=20070218125.18\\_8f6e012f90943e40](http://insurancenewsnet.com/article.asp?a=top_pc&neID=20070218125.18_8f6e012f90943e40)

hotels will predictably emerge in places where private ownership has previously sustained itself for generations.

This approach embodies significant practical and legal barriers for resource poor property owners in the impacted areas. The inadequate allocation of recovery funds dedicated to rebuild rental units; the cost of the appeals process to challenge Base Flood Elevations and the rising cost of acquiring private insurance effectively provide insurmountable hurdles for low income and many African-American property owners.<sup>84</sup> More specifically, the failure to provide any money for assistance to low income renters who need relief and the failure to provide funds to homeowners with only wind damage discriminates against the low income, elderly and disabled. These exclusions define who is entitled to return and rebuild in that area. This inordinately imposed more redevelopment pressure on the traditional communities along the coast. Many of the African-American communities will be hit hardest by the Governor's choice to deem some entitled to rebuild and others as not entitled to rebuild.<sup>85</sup>

The burden placed on low-income people to challenge the Governor's Recovery Plan and the proposed new FEMA regulations is so onerous that it is in fact illusory. The plan provides the illusion of assistance while the true opportunity to recover remains out of reach for many who need assistance most. Without the ability to bring forth the necessary resources to defend themselves, they are left with a nightmare instead of seeing their dreams for having their lives made whole realized. Lacking special

---

<sup>84</sup> Insurance Cost Become 3<sup>rd</sup> Storm, [http://www.usatoday.com/money/perfi/insurance/2007-04-02-gulf-recovery-usat\\_N.htm](http://www.usatoday.com/money/perfi/insurance/2007-04-02-gulf-recovery-usat_N.htm) (discussing the burden of acquiring insurance at the new higher rates post-Katrina)

<sup>85</sup> For African-Americans attachment to the land is even more significant in light of our movement from slavery status to freedom. This dramatically connotes making movement from being another's tool or human chattel for wealth accumulation, to land ownership and stability. This progression manifests itself in the opportunity to have one's own labor contribute to personal wealth accumulation. |

accommodation or the formation of an office staffed with highly qualified and determined advocates to represent these citizens throughout the process, their due process rights are deeply undermined if not completely emasculated. The already under-funded and resource starved local advocacy and legal services programs are stressed beyond capacity as the programs suffered a decrease in funding and down-sizing for the last twenty years. These resource-starved organizations can not absorb the growing need for services that this crisis created.<sup>86</sup> In order to protect the due process rights of the low income, disabled and poor who are impacted by the federal government, new advocacy offices and resources are needed. Without this, the redevelopment opportunities are only available based on wealth qualifications.

In light of the historical importance of property ownership, any mechanism that disproportionately impedes the access of a group of citizens necessitates an institutionalized countervailing force to insure an adequate stabilizing opportunity to redress violated rights and interest. Instead of receiving this type of protection, landowners in these regulated areas face almost insurmountable odds, if they attempt to challenge the constitutionality of floodplain regulations. Courts at all levels broadly and repeatedly uphold the general validity of floodplain regulations.<sup>87</sup> This is the controlling judicial pattern despite several United States Supreme Court cases which

---

<sup>86</sup> <http://www.house.gov/pelosi/fllegserve6-22-00.HTM> (See Floor Statement by Congresswoman Nancy Pelosi discussing the substantial cutbacks in funding incurred by the Legal Services Corporation and the implications for many low income Americans.

<sup>87</sup> See *Wenatchee v United States*, 526 F. Supp 439 (E.D. Wash. 1981) the plaintiffs argued that their Fifth Amendment due process rights were violated. The court stated "the agency sanctions did not foreclose other non-federal sources of funding for insurance". At 441; *Town of Falmouth v Hunter*, 427 F. Supp 26 (D. Mass. 1976) plaintiff alleged that flood elevations were unsupported by scientific data and were an arbitrary determination. Court found no violation of due process and that plaintiff failed to prove that private insurance was unavailable. At 30-31.; *Texas landowners rights Association v Harris*, 453 F. Supp. 1025 (D. D.C. 1978) aff'd per curiam, 598 F.2d 311 (D.C. Cir. 1979), cert denied, 444 U.S. 927, 100 S. Ct. 267 (1980) Plaintiffs asserted their fifth and fourteenth amendment rights were violated. Court concluded any deprivation of property that did occur would be insubstantial when compared to the procedures protecting that interest.

held that other types of regulations imposed on real property might be unconstitutional in certain circumstances.<sup>88</sup> It is clearly established that landowners may attack the constitutionality of regulations as applied to his or her property, even where regulations are valid in general. However, even in the case where one landowner is successful in challenging a regulation, a decision that regulations are unconstitutional as applied to that specific property will not determine unconstitutionality as applied to any other properties. This essentially limits the controlling precedential value of the ruling in other cases.

When critically examining whether floodplains regulations are in fact a taking of private property, courts may seek to adjudge a complete loss of all “reasonable” economic use of the property. This is likely to transpire in cases where the landowner purchased the land prior to adoption of the regulation in question. Without the provision of resources to redevelop, or the possibility to transfer development rights to other comparable property outside the regulated floodplain, I argue a quasi-taking or the moral equivalent to a taking occurs and property loss is unavoidable. The lack of resources to satisfy building restrictions sets in motion an intractable potential for loss. Loss of land due to foreclosure, bankruptcy or the inability to redevelop the property due to a lack of resources should arguably meet this standard. However, in cases where people are forced to sell their land at a loss to recoup any potential value, the forced sale, which occurs at a loss, destroys their opportunity to argue a successful case under the current takings test. Thus the sale at a loss becomes the evidence that all

---

<sup>88</sup> For example, the Supreme Court held that South Carolina beach protection regulations which denied all economic use of lands (i.e. a coastal setback line) could be invalid as applied to this specific property. It also held in an Oregon case that dedication requirements for a bike path in a floodplain were unconstitutional because the regulatory conditions were not “roughly” proportional to burdens on the public created by the commercial use.

“reasonable” economic use of the property is not loss due to the regulation. This presents an unfair conundrum.

#### VIII. Proposals for Reform

The accumulative impact of all of these factors coupled with the high cost of rebuilding to new code requirements culminates in the adding of the private insurance industry to the list of contributing causes of wealth loss by the elderly and African-American homeowners on the Mississippi Coast.<sup>89</sup> The current system of market based disaster insurance is disproportionately and adversely slanted against and disfavors the limited-asset and limited income property owners. These historic problems in the insurance industry have lead to repeated calls for Congress to legislatively mandate a new national disaster insurance program to replace the hodge-podge public and private insurance system currently in place.<sup>90</sup> Legislative proposals include a variety of universal publicly funded national disaster insurance programs.<sup>91</sup> In light of the frequency of natural disasters, the projected potential for future disasters and the continuous failures of the current insurance systems, I propose the adoption of a form of affordable national disaster insurance. This insurance should offer homeowners guaranteed protection of their assets with a swift and equitable claims settlement

---

<sup>89</sup> Among households headed by persons age 65 or older who were likely displaced by the storm, 70% are estimated to have owned their own home — an ownership rate higher than any other age group. Among aged homeowners likely displaced by the storm, over 70% had lived in their homes for over 20 years, and 47% over 30 years, in the year 2000. Among likely displaced aged renters, an estimated 55% had lived in their rental units for over 20 years, and 36% over 30 years, based on 2000 Census data. Hurricane Katrina: Social-Demographic Characteristics of Impacted People, [www.gnocdc.org/reports/crsrept.pdf](http://www.gnocdc.org/reports/crsrept.pdf).

<sup>90</sup> Testimony of Kevin M. McCarty, Florida Insurance Commissioner as Chairman of The National Insurance Commissioners Catastrophe Insurance Working Group, Before the Subcommittee on Housing and Community Opportunity of the House Committee on Financial Services, Regarding Perspectives on Natural Disaster Insurance, march 27, 2007

<sup>91</sup> *Id.*

process. The insurance industry is regulated by the government. There has been a prevailing pattern of a governmental failure to act in the face of the mounting evidence indicating that historically the insurance industry places profit over the well-being of the property owners.<sup>92</sup> This reality combined with an understanding of who loses the most in this equation, indicates a disconcerting and offensive complicity on the part of the government in this discriminatory process. This results in the same consequences as an unlawful and discriminatory taking of the property and assets of the impacted groups without payment of just compensation.

#### IX. Conclusion

Liberty and property in this country are inseparable and ingrained as fundamentally sacred rights. Property rights afford the bases for security and contribute to prosperity and wealth. Property is much more than just the land and buildings. Virtually everything in our lives is deemed a form of property. Property has become a predominate medium through which we define ourselves.

The history of disaster relief in Mississippi evidences a repeating pattern of discrimination against African-Americans and other low income residents along the Gulf coast. From the disaster of 1927 and continuing through the recovery efforts post-Katrina, this segment of the population has suffered discriminatory infringements that caused land loss and resulting wealth loss. The Recovery Plan adopted in Mississippi post-Katrina adds to this historical pattern.

By using color-blind language which appears neutral on its face, the Governor's Recovery Relief Program in Mississippi limited the access and equal provision of

---

<sup>92</sup> See generally, *Id.*

resources to those he deemed “undeserving”. This language when decoded produced compounded devastating consequences for those who survived Hurricane Katrina. Their immediate misery was cruelly exacerbated by unresponsive, insensitive and ill-conceived exclusionary actions by government officials. This is also graphically illustrated by the onerous burden and rising cost of meeting the requirements under the proposed FEMA Based Flood Elevation. Due to the demographics of the impacted areas, the disturbing impact is that many homeowners and residents who are struggling to obtain assets and accumulate a modest level of wealth find themselves excluded from any real benefit under the current recovery plans. Although they escaped physical death during Katrina, they will suffer a devastating economic death, a symbolic death for their dream of economic independence and strength that is derived from the ownership of productive property, homes and financial stability. Government policy or inaction should not reduce people to a state of poverty or move them further into poverty. Instead, a republican form of government composed of representatives of the people should serve to protect the basic property rights of the populous or at a minimum avoid doing discriminatory harm on a race and class basis. This fundamental expectation is the right of all citizens; a right due protection by the courts and the rest of the legal system. The protection of basic property rights should not disappear in the event of a disaster. The failure of government to act consistent with this basic protection represents an incongruity in the system. Before a disaster, citizens should receive protection through the administration of a national disaster insurance program. Post-disaster the equitable protection should evidence itself in the fair administration of all

disaster recovery plans. Without this, the challenge of recovery in disaster is the sole burden of the individual.

More specifically, this challenge may prove too overwhelming for many as they struggle with how to rebuild and reestablish stable homes for themselves and their families. Without affordable housing, workers that are needed cannot return. In the recovery process, renters face the overbearing and oppressive reality of having no property rights. As are the homeowners who did not receive recovery funds, this population is at the mercy of the Mississippi government to allocate the recovery funds in an equitable manner to include all residents who have lost homes, their personal assets or their place to live even if renting. When the Mississippi government provides no resources for renters to recover and fails to rebuild or provide adequate resources for rebuilding rental units, the state indirectly deems this population as unwelcome to return. This is a shocking omission, since many of the renters were employed before Katrina and contributed to the tax base which is now funding the recovery effort.

I acknowledge that the plaintiffs, who did manage to bring lawsuits challenging FEMA elevation requirements as violations of the fourteenth and fifth amendments, did not receive favorable rulings in the courts. Nonetheless, I assert, that if the usage or even partial reasonable usage is impeded by government action or inaction, this is tantamount to a taking of property without payment of just compensation as it eliminates all reasonable value from the property. In the alternative, any value that may be realized from the property is derived from a forced sale. This forced transfer of property from the low income, elderly and disabled property owners to those with wealth only serves to widen an already expanding gap between the rich and the poor in our country.

The lack of adequate access to redevelopment and recovery funds combined with the proposed revisions to FEMA Flood Plain Maps present exceptionally formidable, if not insurmountable, obstacles for many poor people of color to overcome in an attempt to rebuild their property and asset base. Essentially, these actions amount to a seizure of their property by forcing them to sell to those who have the resources to rebuild and can afford to purchase the property at a reduced value.

The end result is an inequitable and discriminatory impact on people of color as well as other low income communities and reallocation of wealth potential from low income property owners to those with more wealth and access to resources. A failure to manage the potential for instability that results from the deepening structural imbalances in growth and wealth distribution is short-sighted and dangerous to our entire society.

In a compelling and disturbing manner, the approach to redevelopment in post-Katrina Mississippi demonstrates the extent to which systems of discrimination still endure, despite laws which prohibit direct discrimination. This erosion of wealth emasculates and defeats the promise envisioned in the adoption of anti-discrimination laws in this country. They, instead, highlight a growing need for public policy debates and political discourse over the continued erosion of citizenship and the expanding absence of government protection for those without wealth and a disproportionate number of people of color.

There is still an imperative prevailing need to develop a holistic strategy for dismantling or deconstructing the myth of equitable government protection in natural disaster without regard to race or class. The media attention to the inequities following the hurricane was disappointingly brief and fleeting. As a nation, we should undertake a

Careful analysis to exact instructive lessons learned from the racial and class inequities arising from Katrina. From this tragedy, we have the opportunity to enact new laws and regulations for disaster relief.

By doing so our nation could infuse equity and fairness as operative values in disaster assistance programs designed to help restore and maintain property ownership. This action would demonstratively inject concrete and visible meaning to “life, liberty and pursuit of happiness” for all citizens unencumbered by limitations of race and economic class. Shall we choose to exhibit leadership or continue to suffer as a nation from the dual burdens of race and class? Our collective actions will provide the answer.