Monique Harden
Co-Director & Attorney, Advocates for Environmental Human Rights

Hurricane Katrina has compelled international attention to a human rights crisis in the United States, where the government fails to protect the lives of people who are African American.

While there have never been local resources to evacuate the entire population of New Orleans, it has been well known that the city's majority African American and poor population would not be able to leave the city without assistance. The people who are most in need of emergency transportation and shelter to protect them from hurricanes are also the people who attend crumbling schools, earn less than a living wage for long hours of work, live in neighborhoods that have abandoned toxic waste sites, and are presumed to be criminals when seen in white and affluent neighborhoods. The horrendous response to Hurricane Katrina did not create an injustice, but only continued and magnified the injustice.

Although my family and I were able to evacuate New Orleans before Hurricane Katrina made landfall, many people were not so fortunate. I have talked to friends who have told me what it was like to be trapped in a city with rising flood waters for five days. They told me about trusting people in helicopters who shouted out to them that help is coming soon as they flew by their rooftops. When help did not come soon they swam and waded in deep flood waters to find food and water, and are now suffering from burns and skin rashes because the flood water contained a mixture of toxic chemicals. They told me about being separated from their children by rescue workers.

While news reports create the impression that the nightmare is finally over, the reality is that displaced residents are having a hell of time getting financial assistance, adequate housing, and affordable medical care. President Bush, according to news reports, seems intent on rebuilding New Orleans through policies that continue the injustice of paying people less than the prevailing wage, while contractors, like Haliburton, receive huge sums of tax dollars. His policies secure a place for real estate developers without any participation of displaced residents about the future of their neighborhoods and cities. The places where rebuilding is needed is not in the neighborhoods, where residents are mostly white and wealthy, which were virtually unaffected by the hurricane. The places where rebuilding is needed is in the neighborhoods where floodwaters were up to the rooftops of homes – the neighborhoods whose residents are mostly African American.

African American neighborhoods, where companies abandoned massive amounts of contaminated soil and debris, were underwater. Other neighborhoods, where oil refineries and petrochemical facilities operate, are now a virtual toxic dump. In response to Hurricane Katrina, the EPA has not been transparent or forthcoming with the details of its sampling of water and soil for toxic substances. The opportunities for EPA to mask the extent of contamination, in a way that is similar to the agency's false reporting on air pollution after the 9/11 attack, is compounded by government officials calling for a

"relaxation" of environmental standards. The actions taken by our government set the stage for a major public health threat.

African Americans, who struggled to overcome the resistance of the Environmental Protection Agency ("EPA") and state environmental agencies to cleaning up their neighborhoods, advocated for the improvement of public school education, and sought reforms in the criminal justice system, are now either dead, displaced in far away cities, or disconnected from family members on whom they depend. Will their efforts to realize a vision for better neighborhoods and cities be blocked in the rebuilding of New Orleans and Gulf Coast communities?

What is needed now is people across the country demanding that displaced residents, who are mostly African American, have the resources to rebuild their lives, are able to return to their cities with the assurance that the environment is clean and healthy, and able to meaningfully participate in the planning and implementation of rebuilding New Orleans and Gulf Coast communities.

Angela J. Davis
Professor, American University Washington College of Law

I. INTRODUCTION

The tragic aftermath of Katrina has laid bare the race and class disparities in this country like no other event in recent history. We've known that the country is very divided around issues of race, and there have been other events in recent history that have demonstrated that divide. The Simpson verdict, for example, demonstrated how divided we are in our perception of race, racism and fairness in the criminal justice system. But the aftermath of Katrina revealed these issues in such stark ways that it has been impossible to ignore.

The day after the levees broke and the city of New Orleans flooded, we were overwhelmed with images on television and in newspapers that revealed that almost all of the people left behind – on rooftops, floating on pieces of furniture, and swimming and drowning in the toxic ocean of water, oil, feces, and dead bodies – were black and poor. And then the questions rose – why didn't they leave? Well, the mayor issued a mandatory evacuation order, apparently without realizing that almost 100,000 people in the city of New Orleans were so poor that they had neither a car nor enough money to take a Greyhound bus out of the city. Or if they did, they didn't have anywhere to go or money to stay in a hotel or start a new life. And yes, there were those who chose to stay and weather the storm, but after the flood came, the tens of thousands of people who were herded into the Superdome and the Convention Center, as well as many others who didn't make it, wanted to leave. But they couldn't.

We saw the images on television starting on Tuesday, August 30th, and by Wednesday, some members of the media began to ask the obvious questions because they were too obvious to ignore: Almost all of the folks left behind were black and poor and

why wouldn't the government help them? Could these two phenomena have something to do with each other? The images were on every network – even Fox News. The media managed to get there. They walked around the Convention Center with Harry Connick, Jr. and others and no one harmed any of them. So why couldn't the government get there?

Bush decided to end his 6 week vacation early and fly over the poor Black people, but Tuesday, Wednesday, and Thursday went by before the National Guard was finally called in. And then it was too late – too many had died or had seen and experienced too much. The harm could not be undone.

II. CRIME – The Harm Principle

So let's talk about harm. You know from your criminal law classes, that in our society we deem certain behaviors to be so unacceptable that we call them crimes and we punish people who engage in those behaviors. There are a number of reasons why these behaviors are considered unacceptable, but one of the main reasons is because of the harm that these acts cause. But there are degrees of harm, and we punish accordingly. Murders, rapes, and robberies are violent crimes that harm people. So we punish them much more harshly than we do property crimes like theft and destruction of property. Some would suggest that there are some behaviors that shouldn't be crimes at all because they don't cause harm, like possession of marijuana, for example.

But in looking at the issue of "lawlessness" in the aftermath of Katrina, we must examine the harm principle. There was much focus on the lawlessness of the hurricane victims. "They are looting, stealing – stealing food, clothes, televisions." And of course some of us made distinctions between the types of property: "It's okay to steal food but not clothes, or it's okay to steal clothes if you're naked but only certain types of clothes, not designer tennis shoes or suits, but maybe basic, inexpensive shirts and pants" – as if the people wading through the swamp were supposed to keep wading until they found appropriate clothes to cover their bodies with – not too expensive, of course. And of course it's never okay to steal televisions.

But look at this so-called looting through the lens of the harm principle. Whether it was food, clothes or televisions, it was all property. And many times, it was property from huge retail conglomerates that were going to file insurance claims for this property at any rate – most of which was damaged beyond use by the flood. So who was harmed?

Compare this so-called looting with the deaths of hundreds of people in hospitals and nursing homes or even in their own homes. When a person's negligence causes the death of another, he is guilty of involuntary manslaughter. If he fails to exercise the ordinary caution that a person of reasonable prudence would exercise under the same or similar conditions, he acts negligently. Who was responsible for rescuing the people who drowned because they couldn't hold on any longer? How about the critically sick people in the hospitals who the doctors and nurses helplessly watch die because no one showed up? Did the persons responsible for rescuing them act negligently? Perhaps

recklessly? If so, they are guilty of involuntary manslaughter. If they acted extremely recklessly, they are guilty of 2nd degree murder. But no one is talking about that. We're worried about the televisions from Walmart.

Or if we're worried about looting, let's talk about Halliburton and Bechtel – just 2 of the Republican-linked firms that are lining up to get the no-bid contracts that will surely come as a result of the $62 billion dollars Congress has appropriated to rebuild the Gulf Coast.

And let's not ignore the harder cases. Because there were allegations that some people were assaulting people, even raping. Certainly police must protect people against violent behavior. But how widespread was this violent behavior? And might there be a reason not to prosecute in some of these cases? There were allegations that some people threatened to kill some of the rescuers if they weren't rescued first – not exactly admirable behavior and perhaps criminal. But might a person in the convention center who has been held up without food or water, living in filth and squalor and watching people drop dead around him believe that he will die if he isn't rescued immediately? Should we judge his behavior differently under the circumstances? I don't know.

III. RACE AND CRIME

The photographs on the screen behind me and their captions epitomize the racial disparities in the criminal justice system. There is little doubt that people of color – both the accused and victims of crime – are treated differently at every stage of the criminal process – from arrest to prosecution, at trial, at sentencing, and in the implementation of the death penalty. Time does not permit me to cite for you the numerous studies and reports that have documented this fact.

But these photographs epitomize the phenomenon that forms the basis for not only the overall poor treatment of the 100,000 residents that were abandoned in New Orleans, but for the stark disparities that exist at every stage of the criminal justice system. And that phenomenon is unconscious racism. Prof. Charles Lawrence's seminal law review article The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism, 39 Stan. L. Rev. 317 (1987) describes the phenomenon as follows:

> Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism. We do not recognize the ways in which our cultural experience has influenced our beliefs about race or the occasions on which those beliefs affect our actions. In other words, a large part of the behavior that produces racial discrimination is influenced by unconscious racial motivation.

One unconscious phenomenon that contributes to, or forms the basis of, this unconscious racism is the association of crime with black and brown people. Prof. Katheryn Russell writes about it in her book The Color of Crime. It is that association and these unconscious beliefs that result in the captions on these photographs, and that causes so many to care more about black people stealing televisions than white people causing the death of black lives through their neglect. And because these beliefs are unconscious, they are so difficult to eliminate or even address.

IV. CONCLUSION

So where does that leave us? Out of the tragedy of Katrina comes some hope. First, it truly shows the humanity of most Americans. Despite the government's failures, the generosity of most individual Americans has been overwhelming – giving money, opening their homes, and offering all kinds of assistance to total strangers, often times to people of a different race, culture, or background. And we can only hope that this country's realization that so many of our brothers and sisters live in abject poverty will spark some long-lasting solutions. Hopefully we won't lose interest in a few months when the media moves on to the next story but will affirm our commitment to ending poverty in this country. Let's stop declaring war on other countries. Let's declare war on poverty and racism in this country and let's start that war right here at the Washington College of Law.

Muneer Ahmad
Professor, American University Washington College of Law

There has been a great deal of discussion about the use of the term "refugee" to describe the victims of Katrina. Some have suggested that, as a matter of international law, the correct term is "internally displaced persons." This is where I want to start, though ultimately I will argue that neither term is fully satisfying.

First, a brief look at the law:

Refugees are protected by a well-defined body of international laws and conventions, and typically are entitled to food, shelter, and a place of safety in the host country. In contrast, there is no international legal instrument protecting the rights of IDPs, and therefore no specific state obligations with regard to IDPs, though UNHCR has issued a 30-point "guiding principles" document. That document states, "Authorities have the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement." But this is at best persuasive authority.

As embodied in both international instruments and U.S. law, refugees are persons outside their country of nationality. Although this is not stated explicitly, IDPs are generally understood to be persons within their country of nationality. So we begin to see a

correlation of terminology with nationality, and nationality's more robust companion, citizenship.

Looking at the situation in New Orleans, then, through our lens of legal definition, it seems clear that IDP is the more appropriate term.

Most of the objections to the use of the term "refugee" are coming not from lawyers or on legal grounds, but from victims of Katrina themselves, and in particular, African Americans. How do we understand these objections?

Let me read a few quotes, with the caveat that these may not be representative, but they do express at least one view that has been represented prominently in the media:

- New Orleans resident Tyrone McKnight (Wash. Post): "The image I have in my mind is people in a Third World country, the babies in Africa that have all the flies and are starving to death," he says, while sitting outside Baton Rouge's convention center, where 5,000 displaced residents are being housed. "That's not me. I'm a law-abiding citizen who's working every day and paying taxes."

- Daphne Carr (LA Times): "I'm not a refugee, I'm an American."

- Donna Jo Napoli, linguistics professor at Swarthmore: "Although there are ways in which their situation is parallel to a refugee situation, the fact is that they are *our own people.* They are not refugees." (LA Times)

- Rep. Diane Watson, D-Los Angeles: "These are American citizens, plus they are the sons and daughters of slaves."

What do we make of these comments? For one thing, it would appear that the correlation of refugee with noncitizens exists in both law and popular understanding. If we look closer, we can see though that what is at stake is not some jingoistic sense of being an American, but something more substantive.

The question of citizenship for African Americans, so shamefully addressed in Dred Scott, and later a main force behind the Civil War, was resolved in a formal, de jure sense by the 14th Amendment, but I would argue that as a factual, or de facto matter, it remains heavily contested. Persistent racial discrimination, massive racial inequalities in wealth and status, hate crime, unconscionable levels of incarceration, voter disenfranchisement, and the daily degradation of microagression can be understood as challenges to the full membership and belonging of African Americans. Katrina laid all of this bare, and so when Rep. Watson invokes the history of slavery, I believe she is doing two things: (1) she is highlighting the centrality of the *struggle* for citizenship to African American history; and (2) she is reminding us of how citizenship should be measured—not merely in formalistic terms, but by the lived experience of individuals and communities. By this account, Katrina exposed how degraded the citizenship of many African Americans continues to be.

At this point we might ask, what is lost in accepting the refugee-noncitizen distinction?

First, there is a danger that our choice of language—for good and important reasons—inadvertently hardens distinctions that exist among citizens and noncitizens, and within the category of noncitizens. Within the rubric of citizenship, there exists a hierarchy of status, rights, and perceived worthiness: citizen, IDP, refugee, noncitizen, foreigner, alien. Until Katrina, refugees were viewed by many as the most worthy of immigrants. If "refugee" is now a bad term, what does that say about "aliens"—a category already associated with criminals and border crossers (not to mention extraterrestrials).

Second, how do we now think about refugees in other parts of the world? Does our rejection of the "refugee" term harden the line between the U.S. and the rest of the world, in exactly the moment when we might be drawn closer? There is a danger here of further nativism, isolation, and exceptionalism when the U.S. already has too much of these.

Third, if we adopt an IDP framework—one that appears to rely on nationality (if not citizenship), what of those who are not citizens? How should be view the 30,000 Vietnamese refugees in Louisiana (now made refugees for a second time), about half of whom have taken refuge in Texas. What about the 40,000 Hondurans forced from their homes, the 9,600 Salvadorans living in the area, or the tens of thousands of Mexicans?

Moreover, what becomes of those immigrants who are undocumented? FEMA has thoughtfully posted a Q&A about undocumented immigrants on its website. Here is an excerpt:

> Q: If I am an undocumented immigrant, am I eligible for assistance for needs related to the recent storms, tornadoes, and flooding?
>
> A: Yes, you may be eligible under many different programs run by State and local agencies and voluntary agencies for various types of cash assistance.

It then goes on to list the names and phone numbers of organizations such as the American Red Cross, Catholic Charities, and Lutheran Services. One does not need to read this all that closely to see that the answer is "no," you are not qualified for cash assistance from FEMA (although some non-cash assistance is available).

As we think about who gets left out in Katrina's aftermath, we should also take note of the Bush Administration's decision to suspend the Davis-Bacon Act, which requires payment of the prevailing wage to workers on federal contracts. In New Orleans, the prevailing wage for construction work—much of which is done by immigrant workers—is $9.25/hour. The minimum wage—the only wage protection that now applies—is $5.15/hour.

We might think about not the lawlessness—that is, the absence of law—in New Orleans in the aftermath of Katrina, but about the abundance of law that helped to create this

disaster: the systematic dismantling of the welfare state, the attacks on affirmative action, the degrading of labor law protections.

As we move forward, we could make recourse a human rights approach other than the refugee-IDP framework. In particular, we can think more about how to advance economic, social, and cultural rights, whether domestically or internationally.

But we should also consider recourse to politics, a dynamic politics that recognizes the different claims to citizenship of African Americans, poor whites, and immigrants, but that does not put them in competition with one another, and a politics that deeps our empathy and our commitments to those marginalized the world over.