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A Housing-Centered Approach to Justice

This Article highlights and expands on an argument that I made in late 2007 advocating for a reexamination of Title VIII of the Civil Rights Act of 1968 (the Fair Housing Act)[1] in the unique and important context of the reconstruction and revitalization of New Orleans.[2] As a threshold matter, it is imperative to recognize that litigation cannot stand alone from coalitions and community activism, all of which give communities a voice, provide them with leverage, and help to rebalance power. As Beverly Wright points out, communities can mobilize to address environmental injustices through collaborative problem solving between community members,

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1 42 U.S.C. §§ 3601–3619, 3631 (2006).

2 Benjamin Rajotte, *Environmental Justice in New Orleans: A New Lease on Life for Title VIII?*, 21 TUL. ENVTL. L.J. 51 (2007).

educators, and researchers in a relationship founded on equal partnership.[3]

Reilly Morse captures the role of litigation, together with these additional community-based forces, in *Environmental Justice Through the Eye of Hurricane Katrina*:

> Minority and disempowered populations are at great disadvantage in securing equitable policy decisions from elected and appointed official bodies through conventional processes because political power tends to be asymmetrical. When the controversy can be brought into federal court, however, and the disparate impact of the proposed action is scrutinized, the power relationship shifts . . . .[4]

Consider this alongside Robert Bullard's observation that "[t]he push for environmental equity is an extension of the civil rights movement."[5] Here, the Fair Housing Act codifies civil rights as they relate to fair housing, and it is loosely considered alongside Title VI of the Civil Rights Act of 1964[6] and the Equal Protection Clause[7] as a federal regime designed to achieve civil rights and social justice. All of this poses the instant question: whether a civil rights regime that deals with housing can advance environmental justice in terms of new housing opportunities post-Katrina.

It is important to observe that this Article focuses on New Orleans merely to allow for a more discrete analysis, both legally and factually. I believe that the theories it espouses are generally applicable; they turn on the facts, not geography. The recent flooding in Texas, coupled with growing exposure and vulnerability of many coastal habitats to such ecological disasters, reinforces this idea.

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3 Beverly Wright, *Environmental Equity Justice Centers: A Response to Inequity*, *in* ENVIRONMENTAL JUSTICE: ISSUES, POLITICS, AND SOLUTIONS 57, 63–65 (Bunyan Bryant ed., 1995); *see also* Gary Williams, *Drum Majors for Justice–Leading the March Toward Social Justice*, 37 LOY. L.A. L. REV. 925, 933 (2004) ("[W]e need academicians and advocates who see how the threads . . . interlink in the quilt of social justice.").

4 REILLY MORSE, ENVIRONMENTAL JUSTICE THROUGH THE EYE OF HURRICANE KATRINA 25 (2008), *available at* http://jointcenter.org/publications_recent_publications/environmental_projects/environmental_justice_through_the_eye_of_hurricane_katrina (follow "Download the file" hyperlink).

5 ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY 13 (3d ed. 2000).

6 42 U.S.C. §§ 2000d to 2000d-7 (2006).

7 U.S. CONST. amend. XIV, § 1.

I
FAIR HOUSING ACT THEORIES AND HURRICANE KATRINA

Section 3604(b) of the Fair Housing Act makes it unlawful to "discriminate against any person in the *terms, conditions, or privileges of sale or rental* of a dwelling, or in the provision of *services or facilities in connection therewith.*"[8] As held by the Court of Appeals for the Fifth Circuit in *Cox v. City of Dallas*, the discriminatory conduct must take place "in connection" with the "sale or rental" of housing.[9] In *Cox*, the plaintiffs sued the city for failing to prevent illegal dumping at a landfill near their homes in the Deepwood neighborhood of Dallas.[10] The Fifth Circuit held that "the 'services' subject to the alleged discrimination must be 'in connection' with the 'sale or rental'" of housing.[11] The section 3604(b) claim failed because the city's conduct was not connected to the sale or rental of the plaintiffs' homes.[12] The court found this interpretation to be "grammatically superior."[13] Though acknowledging that Title VIII was "meant to have a broad reach," the court expressed concern over claims resting on harm to property values and Title VIII acting in a "general anti-discrimination pose."[14]

As this shows, *Cox* involved post-acquisition claims by individuals asserting interests shared by their community as a result of certain acts of municipal discrimination. In *Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n*, decided a year earlier, the Court of Appeals for the Seventh Circuit rejected the plaintiffs' claims that a homeowners association and its members were part of a menacing campaign of harassment against them because of their religion.[15] The plaintiffs alleged that the homeowners association and members

8 42 U.S.C. § 3604(b) (2006) (emphasis added).

9 Cox v. City of Dallas, 430 F.3d 734, 746 (5th Cir. 2005). The Fifth Circuit has jurisdiction over appeals from the federal district courts sitting in Louisiana, Mississippi, and Texas.

10 *Id.* at 739–40.

11 *Id.* at 746.

12 *Id.* at 746–47.

13 *Id.* at 745.

14 *Id.* at 746. For claims of post-acquisition discrimination, *Cox* expressly did "not foreclose the possibility of a section 3604(a) or (b) claim as the result of eviction or constructive eviction, because such actions may make housing 'unavailable' or deny 'privileges of sale' or 'services.'" *Id.* at 745 n.32.

15 Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 330 (7th Cir. 2004).

victimized them with slurs; vandalized their property (among other things, by applying chemicals to their yard that were harmful to their health and well-being); restricted the use of their property; and then destroyed evidence to hide the harassment.[16] On appeal, the issue was whether these facts, accepted as true, stated a case for Title VIII discrimination.[17] After a relatively cursory review of the statute—which did not differentiate between subparagraphs (a) and (b) of section 3604—the court ruled against the plaintiffs by reasoning that they were "complaining not about being prevented from acquiring property but about being harassed by other property owners."[18]

Inequality, however, does not have an expiration date. It can manifest in a myriad of subtle forms, including through people's relationship with their homes. Accordingly, neither case addressed the argument that section 3604(b) covers post-acquisition discrimination in specific services expected from the nature of the relationship between the parties, and many other courts have expressly adopted a broader interpretation.[19] The most logical reading of the plain language of section 3604—and the structural division between subparagraphs (a) and (b)—must be that subparagraph (a) generally refers to discriminatory conduct that would make housing separate and that subparagraph (b) generally refers to such conduct that would make the nature of housing unequal in terms of the basic expectations that residents may have about the safety and sanctity of their home at the time of the transaction (such as those expectations from a landlord, housing association, or municipality).[20] Specifically, section 3604(a) covers conduct that makes housing otherwise unavailable,[21] which has been interpreted to

16 *Id.*

17 *Id.* at 328.

18 *Id.* at 328–29.

19 *See, e.g.*, ROBERT G. SCHWEMM, HOUSING DISCRIMINATION: LAW AND LITIGATION § 4:4 (2008); Rigel C. Oliveri, *Is Acquisition Everything? Protecting the Rights of Occupants Under the Fair Housing Act*, 43 HARV. C.R.-C.L. L. REV. 1, 9 n.45 (2008) (listing cases); Rajotte, *supra* note 2, at 66 n.95 (discussing cases); Aric Short, *Post-Acquisition Harassment and the Scope of the Fair Housing Act*, 58 ALA. L. REV. 203, 215 n.89 (2006) (discussing cases).

20 For example, a new African-American resident to a predominantly white enclave should have a section 3604(b) claim for the refusal to provide him or her with water services, just as the current residents of a predominantly African-American enclave should have the same claim for denial of the same service.

21 42 U.S.C. § 3604(a) (2006).

cover virtually any conduct affecting availability.[22] A section 3604(b) claim, however, requires discrimination with respect to "services" or "privileges," inherently suggesting a nexus to discriminatory conduct that impairs the nature of housing, no matter how severe the harm, which can happen at any time.

A relatively early case from the District of Columbia Circuit Court, *Clifton Terrace Associates v. United Technologies Corp.*, offered a similar reading in stating that section 3604(b) addresses habitability.[23] Likewise, the Seventh Circuit had previously recognized in *Southend Neighborhood Improvement Ass'n v. County of St. Clair* that section 3604 generally "forbids discrimination in making available or providing services related to housing."[24] Also, consider a case from almost thirty years ago where a district court within the Seventh Circuit applied section 3604(b) post-acquisitionally and emphatically rejected the defendants' argument against it.

> Such a tortured interpretation of the application of § 3604(b) is ludicrous and runs counter to the *plain and unequivocal* language of the statute. Quite clearly, the plaintiffs have alleged that they are not getting the kinds of services and facilities that were available to tenants when the project was predominantly white, and that this differential treatment existed because they are black. . . . This court can but note that there need be no argument when the statutory language is so clear.[25]

It seems clear that the *Halprin* and *Cox* courts were concerned about transforming the Fair Housing Act into a common law nuisance action. The concern about creating this kind of slippery slope is

22 *See, e.g.*, Steptoe v. Beverly Area Planning Ass'n, 674 F. Supp. 1313, 1318 (N.D. Ill. 1987) ("[A]lthough section 3604(a) applies principally to the sale or rental of dwellings, it also encompasses a wide variety of discriminatory practices that affect detrimentally the availability of housing to minorities and thereby make housing more difficult to obtain."); United States v. Hous. Auth., 504 F. Supp. 716, 726 (S.D. Ala. 1980) ("Section [3604(a)] forbids not only the refusal to sell or rent a dwelling, but also prohibits all practices that 'otherwise make unavailable or deny' housing to any person because of race, color, religion, sex or national origin. This provision is as broad as Congress could have made it and it reaches every private and public practice that makes housing more difficult to obtain on prohibited grounds.").

23 Clifton Terrace Assocs. v. United Techs. Corp., 929 F.2d 714, 719–20 (D.C. Cir. 1991).

24 Southend Neighborhood Improvement Ass'n v. County of St. Clair, 743 F.2d 1207, 1209 (7th Cir. 1984). *Cox* also cited this case approvingly in analyzing section 3604(a). Cox v. City of Dallas, 430 F.3d 734, 740 (5th Cir. 2005).

25 Concerned Tenants Ass'n v. Indian Trails Apartments, 496 F. Supp. 522, 525 (N.D. Ill. 1980).

certainly legitimate. But *Halprin* suggests far too narrow a view of the statute and its purpose while *Cox* lacks normative clarity. The Fifth Circuit in *Cox* stated that the issue hinged on whether the conduct was "connected" to the "sale or rental" of housing, but it did not specify what these terms meant.[26] At the same time, the court found it conceivable to connect important municipal services in this way.[27] The holding reflects generalized policy considerations and a conclusory restatement of the "connected" legal standard without applying it.[28] More importantly for social and environmental justice, *Cox*'s implicit application of what that term is *not* comes at the expense of sanctioning conduct that would clearly and directly harm residents' health and welfare in their homes and neighborhood by a municipality charged with protecting those interests. Equally problematic, it did so by denying a prima facie claim under the Fair Housing Act in the first instance. Arguments along these lines have been developed elsewhere.[29] How section 3604(b) applies here, however, is worth exploring.

First, my central thesis explains why section 3604(b) should have a different application in the reconstruction. Specifically, I previously analyzed how this statute may apply to challenges in how the government is (or is not) remediating soil contamination.[30] The impetus for my focus on section 3604(b), and its interplay with section 3617 (a separate provision discussed below), was that *Cox* and *Halprin* should be considered inapposite to soil remediation during the reconstruction. This approach analyzes a relatively intricate system of Title VIII case law, but its core is uncomplicated: the reconstruction, if done justly, should go hand in hand with new and safe housing opportunities post-Katrina.[31] Indeed, *Cox* analogously recognized that "[t]o the extent that some courts hold that general police and fire protection are within the scope of § 3604(b), . . . one can still conceivably connect [these services] to the 'sale or rental of a dwelling.'"[32]

26 *See Cox*, 430 F.3d at 746–47.

27 *See id.* at 745 n.36.

28 *Id.* at 745–47.

29 *See* SCHWEMM, *supra* note 19, at § 14:3; Oliveri, *supra* note 19, at 9 n.45; Short, *supra* note 19, at 215 n.89.

30 *See* Rajotte, *supra* note 2, at 54–60 (discussing state cleanup thresholds with respect to soil contamination).

31 *See id.* at 53.

32 *Cox*, 430 F.3d at 745 n.36.

Here, any disparate impacts would be linked in time and go hand in hand with new housing opportunities in the reconstruction. The devastation is difficult to imagine, let alone to have experienced as a resident. Many thousands of homes, both owner-occupied and rental, were either destroyed or significantly flood damaged.[33] Communities were displaced. Lives were lost. As of the writing of this Article, spray paint on many homes still bears witness to the incompressible depth of what happened. The rebuilding process cannot be said to involve the traditional sort of challenges to the post-acquisition siting or operation of locally undesirable land uses. Housing has not simply been acquired—it has been lost. And the reconstruction, "which necessarily contemplates (if not directly provides for) the sale, resale, and releasing of housing, ought to carry with it a duty not to vest new generations in these communities with preventable contamination" and other such harms.[34] Housing and the reconstruction are interdependent, both temporally and substantively.

Second, cases have also held that section 3604(b) applies post-acquisitionally against certain defendants, such as landlords and building service providers, because of the special nature of their relationship. This both supports my original approach and provides an independent basis for a section 3604(b) claim by existing residents in the special context of the rebuilding process. Often cited among these cases is *Richards v. Bono*, which held that the narrow interpretation as expressed by *Halprin* does not "extend to cases of post-acquisition discrimination in a rental context."[35] One, but not the only, basis for the distinction is that a rental suggests a continuing relationship.[36] However, even cases following *Halprin* have distinguished its rigid approach in light of the overall nature of the relationship between the parties and the victim's expectations in that relationship. One district court within the Seventh Circuit (and thereby bound to follow *Halprin* as precedent) would have allowed a

33 *See, e.g.*, William P. Quigley, *Obstacle to Opportunity: Housing that Working and Poor People Can Afford in New Orleans Since Katrina*, 42 WAKE FOREST L. REV. 393, 394–95 & nn.5–6 (2007); Rajotte, *supra* note 2, at 67 & n.107.

34 Rajotte, *supra* note 2, at 73.

35 Richards v. Bono, No. 5:04CV484, 2005 WL 1065141, at *3 (M.D. Fla. May 2, 2005).

36 *See id.* ("Unlike a sale, a rental arrangement involves an ongoing relationship between the landlord and tenant in which the landlord typically retains various powers, such as the right to increase rent or evict a tenant, and concomitant obligations, such as the duty to make repairs or provide other services and facilities.").

tenant's claim to proceed based on a discriminatory refusal to provide maintenance services had the tenants been able to make out a prima facie case.[37] The Court reasoned that because "*Halprin* addressed general 'interference with enjoyment' rather than denial of specific services, . . . the Court [would] not presume that the Seventh Circuit intended to categorically preclude all denial of service claims under § 3604(b)."[38] Furthermore, a district court in Florida upheld a post-acquisitional section 3604(b) claim by a homeowner in a planned community based precisely on the victim's expectation of specific services that are "part and parcel with home ownership," stating:

> Ordinarily, a homeowner purchases a home for the home itself. After the sale, provision or lack of provision of services for that homeowner might decrease his enjoyment of his home, but absent some interference with his ability to inhabit it, the *Halprin* line of cases have found [Title VIII] to be inapplicable. *Halprin*, and other similar cases, however, did not directly address the provision of services as they relate to planned communities where some types of services are in fact part and parcel with home ownership.
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> . . . .
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> Accordingly, part and parcel of the purchase of a home within a planned community are the rights and privileges associated with membership within the community. It would appear, therefore, that in the context of planned communities, where association members have rights to use designated common areas as an incident of their ownership, discriminatory conduct which deprives them of exercising those rights would be actionable under [Title VIII].[39]

Cox precluded this application and also recognized that it is conceivable to connect important municipal services to the sale or rental of housing without limiting the definition of "connect" in this

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37 Krieman v. Crystal Lake Apartments L.P., No. 05-C-0348, 2006 WL 1519320, at *5–6 (N.D. Ill. May 31, 2006).

38 *Id.* at *6. The plaintiffs "provided specific facts as to the number of days the repairs required and their repeated calls and written requests for repair," but the court rejected their claims in finding no disparate impact. *Id.* at *7; *see also* United States v. Koch, 352 F. Supp. 2d 970, 978 (D. Neb. 2004) ("It seems to me that little progress could have been made toward Congress's goals—and its measures would appear to have few teeth—if the basic privilege of residing within one's home were not protected from the evils of discriminatory harassment."); Discriminatory Conduct Under the Fair Housing Act, 24 C.F.R. § 100.65(b)(2) (2008) ("Prohibited actions under this section include, but are not limited to . . . [f]ailing or delaying maintenance or repairs of sale or rental dwellings."). For these reasons, Rigel Oliveri argues that the issue should turn on whether the defendant exercises control over the plaintiff's housing situation. Oliveri, *supra* note 19, at 3, 46–50.

39 Savanna Club Worship Serv., Inc. v. Savanna Club Homeowners' Ass'n, 456 F. Supp. 2d 1223, 1229–30 (S.D. Fla. 2005) (citations omitted).

context.[40] Here, the government plays an integral role in facilitating safe homes and communities post-Katrina. Unlike anywhere else, residents have a special dependency on the government to carry out specific services in fulfilling its public trust duty.[41]

Third, section 3617 makes it unlawful "to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, . . . any right granted or protected by" enumerated sections of the Fair Housing Act, section 3604 being among them.[42] The Fifth Circuit, in an unpublished opinion, decided against an existing homeowner on facts that appear less compelling than in *Cox*.[43] Without elaboration, it cited *Cox* and *Halprin* for the proposition that section 3604 prohibits conduct that goes to the "availability" of housing but not its "habitability."[44] *Cox* did not involve section 3617, and its holding under section 3604(b) did not concern availability.[45] This case and a handful of other cases with similarly generalized language manifest an imprecise form of judicial shorthand that does not distinguish between subparagraphs (a) and (b) in disposing of post-acquisitional claims[46] and are inapposite to this analysis for the reasons discussed above.

As Robert Schwemm describes it, section 3617 is a watchdog for those who are blocked from asserting or exercising their fair housing rights, such as through interference or retaliation by third parties.[47]

40 Cox v. City of Dallas, 430 F.3d 734, 746–47 & n.36 (5th Cir. 2005).

41 The government likewise maintains the same degree of control and the same integral role over residents and their homes irrespective of what kind of estate they hold—for example, whether through ownership or rental. Indeed, it can perhaps be said that the obligation should run even stronger to homeowners because they have more at stake.

42 42 U.S.C. § 3617 (2006).

43 Reule v. Sherwood Valley I Council of Co-Owners, Inc., No. H-05-3197, 2005 WL 2669480, at *1–2 (S.D. Tex. Oct. 19, 2005) (discussing the case's facts), *aff'd per curiam*, 235 F. App'x 227 (5th Cir. 2007).

44 *Reule*, 235 F. App'x at 227.

45 *Cox*, 430 F.3d at 746.

46 *See, e.g.*, Bloch v. Frischholz, 533 F.3d 562, 563 (7th Cir. 2008) (stating that *Halprin* stands for the proposition that section 3604(b) "does not address discrimination after ownership has changed hands"); *Reule*, 235 F. App'x at 227–28.

47 SCHWEMM, *supra* note 19, at § 20:2 ("For example, if a black family who has just moved to a white neighborhood is threatened or intimidated by a white neighbor, the neighbor's conduct would violate § 3617's second phrase ('on account of [the family's] having exercised' their rights), but that conduct might not violate § 3604(a) unless it caused the family to move and thereby made housing 'unavailable' to them."); *see also* Oliveri, *supra* note 19, at 11–12 (providing a hypothetical showing section 3617 violations

This is consistent with the statute's plain language, which speaks to rights without regard to whether they are violated. It also bears mentioning that "discriminatory housing practice" is by definition an unlawful act under sections 3604, 3605, 3606, and 3617.[48] Inversely, the district court in *United States v. Koch* interpreted section 3617 as meaning interference with use or enjoyment of housing after acquisition.[49] The applicable Department of Housing and Urban Development regulation also covers interference with "enjoyment of a dwelling."[50] The *Halprin* court suggested in dictum that this regulation was an illegitimate exercise of agency authority but allowed the claim to proceed because the defendants had not challenged the regulation's validity.[51] The court in *Koch*, by contrast, rejected *Halprin's* dictum and employed the Supreme Court's well-known "*Chevron* test" to uphold the regulation as a reasonable interpretation of section 3617.[52]

In accordance with the application discussed above and the principle of framing complaints broadly, a section 3617 claim may be based on the government's interference with plaintiffs' ability to effectuate new safe housing opportunities, undermining Title VIII's purpose and effect.[53] While this suggests a more penumbral legal

from (1) a landlord's eviction of a tenant because she filed a HUD complaint against him for sexual harassment; (2) regardless of the eviction, the landlord's interference with the tenant's ability to seek, obtain, or reside in housing free of discrimination; and (3) a landlord's harassment of a third party for assisting the tenant in exercising her rights); Short, *supra* note 19, at 217–19 (discussing the reasons supporting section 3617's application to post-acquisition conduct).

48 42 U.S.C. § 3602(f) (2006).

49 United States v. Koch, 352 F. Supp. 2d 970, 978–79 (D. Neb. 2004) (pinpointing the statute's language of interference with a person "on account of his having exercised or enjoyed" a section 3604 right); *see also* United States v. Veal, No. 02-0720-CV-W-DW, 2005 U.S. Dist. LEXIS 10875, at *1 n.1 (W.D. Mo. Apr. 12, 2005) (finding *Koch* "extremely persuasive").

50 Discriminatory Conduct Under the Fair Housing Act, 24 C.F.R. § 100.400(c)(2) (2008); *see also id.* § 100.70(d)(4) ("Prohibited activities relating to dwellings . . . include, but are not limited to . . . [r]efusing to provide municipal services . . . for dwellings or providing such services . . . differently.").

51 Halprin v. Prairie Single Family Homes of Dearborn Park Ass'n, 388 F.3d 327, 330 (7th Cir. 2004) (dictum).

52 *Koch*, 352 F. Supp. 2d at 979–80 (citing Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984)).

53 *See, e.g.*, Evans v. Tubbe, 657 F.2d 661, 662, 663 & n.3 (5th Cir. 1981) ("[Defendant] erected a metal gate across the road and placed a lock upon the gate, thereby preventing [the plaintiff] from reaching and using her property . . . . On account of [plaintiff's] race, defendant has threatened, intimidated, and harassed her . . . . [This]

standard, even a de minimis government interference has been found actionable (a fact which goes to the remedy and not liability itself). As one district court held:

> Neither the cases nor the legislative history of § 3617 attempt to define the minimum level of intimidation or coercion necessary to violate this statute. Therefore, the Court assumes that the words of the statute—"coerce, intimidate, threaten or interfere"—mean exactly what they say. The fact that the City's behavior is not as severe or egregious as some other cases under § 3617 does not mean that, as a matter of law, what the City did was not violative of this provision. Moreover, if the trier of fact considers that the acts of the City constituted slight or de minimis interference, such a conclusion can be adequately reflected in an appropriate award of damages.[54]

Additionally, the Northern District of Texas' decision in *Lopez v. City of Dallas* is instructive.[55] As referenced above, section 3604(a) makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person" based on race.[56] In *Lopez*, the plaintiffs alleged that the city discriminatorily "limited its provision of protection from adverse industrial uses and flooding, and its provision of adequate water drainage," making housing "unavailable to future residents of Cadillac Heights because of their race."[57] The court allowed the plaintiffs to go forward with

conduct is arguably within the prohibitions of both §§ 3604(a) and 3617."); Groome Res., Ltd. v. Parish of Jefferson, 52 F. Supp. 2d 721, 724–25 (E.D. La. 1999) (enjoining a zoning ordinance on the ground that it violated section 3617 by "unnecessarily restricting [the plaintiffs'] ability to live in residences of their choice"); Summerchase Ltd. v. City of Gonzales, 970 F. Supp. 522, 531–32, 540 (M.D. La. 1997) (finding genuine issues of material fact as to whether two defendants violated section 3617 based on allegations that they hindered construction of low-income housing).

54 People Helpers, Inc. v. City of Richmond, 789 F. Supp. 725, 733 n.5 (E.D. Va. 1992).

55 Lopez v. City of Dallas, No. 3:03-CV-2223-M, 2006 WL 1450520 (N.D. Tex. May 24, 2006).

56 42 U.S.C. § 3604(a) (2006). *Compare* Cox v. City of Dallas, 430 F.3d 734, 744 (5th Cir. 2005) (rejecting the argument that section 3604(a) applied because the record did not show that the residentially zoned portions of the landfill site met Title VIII's definition of a dwelling), *with Lopez*, 2006 WL 1450520, at *2, *8 (allowing a section 3604(a) claim, alleging that "discrimination in municipal services has rendered dwelling units unavailable to future residents," where the neighborhood was in the flood plain but the city "refused to provide flood protection").

57 *Lopez*, 2006 WL 1450520, at *4–5.

> [N]inety-six parcels of land currently zoned for single family residential use are in the 100-year flood plain, and the entire Cadillac Heights neighborhood is in the

their claim that the city "violated § 3604(a) by making other plots of land in the Cadillac Heights neighborhood unavailable to third persons on the basis of race."[58] Michael Daniel, counsel for plaintiffs in *Lopez* and *Cox*, has pointed out that unequal services here may make it more difficult to place housing back on the land, secure financing, sell or lease such housing that is put back on the land, rebuild communities, and so forth, which are prerequisites for a claim by current or prospective residents based on unavailability.

II
POST-KATRINA APPLICATION OF THE FAIR HOUSING ACT

Focusing on soil remediation, the reconstruction ignited fresh debate over lead, arsenic, and other contaminants. Indeed, lead was a focal point of a joint workshop held at the Deep South Center for Environmental Justice's *Race, Place, and the Environment After Katrina* symposium in New Orleans on May 15, 2008.[59] This emanates from studies to test the extent of contamination post-Katrina—including lead, arsenic, and contaminants from landfills, which were found in some cases in excess of state cleanup thresholds[60]—combined with the recognition that any such risks should be addressed now regardless of their cause.[61]

> 800-year flood plain. The City prohibits construction of dwelling units in a flood plain and, therefore, many parcels of land which would otherwise be 'available' are rendered unavailable to potential future residents.

Id. at *5 (citation omitted).

58 *Id.* at *4; *see also* Lopez v. City of Dallas, No. 3:03-CV-2223-M, 2004 WL 2026804, at *3–6 (N.D. Tex. Sept. 9, 2004) (upholding part of plaintiffs' section 3604(a) claim in a previous opinion).

59 *See* Deep South Center for Environmental Justice, Race, Place, and the Environment After Katrina, http://www.dscej.org/PlenNWorkshop.html (last visited May 5, 2009).

60 *See* Rajotte, *supra* note 2, at 55–56 & nn.23–26, 57–58 & nn.33–46 (citing studies); William Kern et al., Soil Toxicity in Post-Katrina New Orleans, Presentation at the Deep South Center for Environmental Justice Symposium (May 15, 2008) (presentation on samples tested for lead and arsenic), *available at* http://www.dscej .org/PlenNWorkshop.html (follow "Soil Contamination in Post-Katrina New Orleans" hyperlink); Howard W. Mielke, Race, Place and Lead in New Orleans, Presentation at the Deep South Center for Environmental Justice Symposium (May 15, 2008) (presentation on samples tested for lead), *available at* http://www.dscej.org/PlenNWorkshop.html (follow "Lead in Urban Environment" hyperlink).

61 *See, e.g.*, MORSE, *supra* note 4, at 10–15; Robert D. Bullard, Let Them Eat Dirt: Will the "Mother of All Toxic Cleanups" Be Fair to All NOLA Neighborhoods, Even When Some Contamination Predates Katrina? 4 (Apr. 14, 2006) (unpublished article), *available at* http://www.ejrc.cau.edu/Let_Them_Eat_Dirt.pdf.

Some of the most extensive data and analyses concern lead in soil. While childhood lead exposure is not isolated to New Orleans, the issue has taken on a new force in the reconstruction for these reasons. Howard Mielke writes how soil-lead contamination is most pervasive in urban centers in New Orleans and other major cites and affects home safety (especially for young children) given its relationship to blood-lead levels.[62] Other post-Katrina studies have found elevated levels of both lead and arsenic in schoolyards.[63] Also, as William Kern pointed out in his presentation about arsenic testing at this joint workshop, even insofar as such contamination may not itself evidence a disparate impact, the issue of where, when, and how any remediation is carried out may do so. The same can be said for other material aspects of the reconstruction.

After an ecological disaster such as this, "[w]hile the numbers of dead, injured, or hospitalized can be counted, the psychological and social sequelae are harder to quantify—there is no universal unit for indicating the amount of anxiety, depression, social disruption, or family hardship that these events produce."[64] As Aric Short described, these hardships are compounded by environmental injustices, precisely because the idea of "home" itself "provides intensely personal benefits to its inhabitants, including rootedness, privacy, and safety" against discrimination and hostile surroundings.[65] This is consistent with the axiom that real property is so unique that related losses cannot be adequately remedied with money damages,[66]

62 *See* Howard W. Mielke, *Soil Is an Important Pathway of Human Lead Exposure*, 106 ENVTL. HEALTH PERSP. SUPPLEMENTS 217 (1998), *available at* http://www.ehponline.org/members/1998/Suppl-1/217-229mielke/full.html; Rajotte, *supra* note 2, at 56–57 & nn.28–38, 75–76 & nn.161–64 (citing studies on lead contamination and sources discussing related harms); Mielke, *supra* note 60.

63 *See* LESLIE FIELDS ET AL., NATURAL RES. DEF. COUNCIL, KATRINA'S WAKE (2007), *available at* http://www.nrdc.org/health/effects/wake/wake.pdf; Rajotte, *supra* note 2, at 54–55 n.18 (citing and cross-referencing studies); Kern et al., *supra* note 60.

64 Julie G. Cwikel et al., *Understanding the Psychological and Societal Response of Individuals, Groups, Authorities, and Media to Toxic Hazards*, *in* TOXIC TURMOIL 39, 40 (Johan M. Havenaar et al. eds., 2002).

65 Short, *supra* note 19, at 254.

66 *See, e.g.*, United States v. Esposito, 970 F.2d 1156, 1160 (2d Cir. 1992) (acknowledging that real property and the "relationship between a person and his or her home are unique"); Johnson v. U.S. Dep't of Agric., 734 F.2d 774, 788 (11th Cir. 1984) ("Possibly wrongful eviction from one's home is a serious injury. It is well recognized that real property is unique and not fungible. A person's home has even more intangible value."); Hillard v. Franklin, 41 S.W.3d 106, 111 (Tenn. Ct. App. 2000) ("Given that real property is unique, damages are generally deemed an inadequate remedy for breach of real

and the central tenant of constitutional law that home is the "center of the private lives of our people."[67] Residents have already faced inestimable harm in its aftermath and will no doubt encounter more if the reconstruction perpetuates a new cycle of injustice. "This opportunity for action is unique, both temporally and because the costs can be contained. To the contrary, the cost of doing nothing is greater and more widespread, perhaps inestimable."[68]

Housing is at the center of social and environmental justice. Injustices were not only exposed by Hurricane Katrina but exacerbated by it and may continue to persist without intervention. For instance, as the *Lower Ninth Ward Planning District Rebuilding Plan* states: "The Lower Ninth Ward Neighborhood has a long history of neglect by the City, State and the Federal government. From the minimal construction of basic infrastructure to the limited assistance offered in the wake of Hurricane Betsey, this neighborhood has frequently not received its fair share."[69] This neighborhood suffered unparalleled damage relative to other New Orleans neighborhoods.[70] The government's collapse in the hours and, tragically, even several days after the levees failed and the problematic system of flood protection and eroding coastline that endure cannot be detached from this picture. Litigation, combined with activism and coalitions focused on advancing community interests, may play a correlative role by rebalancing power asymmetries and petitioning an independent judiciary for relief. Narrowing Title VIII here may effectively sanction discriminatory conduct in carrying out the rebuilding process, re-creating the conditions that it was designed to

estate contracts, and, accordingly, such contracts are generally eligible for specific performance.").

67 Georgia v. Randolph, 547 U.S. 103, 116 (2006) ("We have, after all, lived our whole national history with an understanding of 'the ancient adage that a man's house is his castle [to the point that t]he poorest man may in his cottage bid defiance to all the forces of the Crown.'" (quoting Minnesota v. Carter, 525 U.S. 83, 99 (1998) (Kennedy, J., concurring)).

68 Rajotte, *supra* note 2, at 77.

69 CITY OF NEW ORLEANS, LOWER NINTH WARD PLANNING DISTRICT REBUILDING PLAN 14 (2006), *available at* http://nolanrp.com/Data/Neighborhood/District_8_Final_Lower%20Ninth%20Ward.pdf.

70 *Id.* at 9; *see also* Lisa K. Bates, Housing Recovery of Ninth Ward: Disparities in Policy and Prospects, Presentation at the Deep South Center for Environmental Justice Symposium (May 15, 2008), *available at* http://www.dscej.org/PlenNWorkshop.html (follow "Housing Recovery of Ninth Ward: Disparities in Policy and Prospects" hyperlink).

eliminate. Whatever comes to pass, in Oliver Houck's words, "will change South Louisiana entirely."[71]

III
CONCLUSION

Forty years since Title VIII's enactment, barriers to fair housing persist in terms of power asymmetries, procedural defects and nontransparency, inequitable distributions of benefits and burdens to individuals and communities, and subtle yet institutionalized forms of discrimination. Not all Title VIII claims have succeeded, but this has not interfered with its disparate-impact and segregative-effect burdens of proof, and it cannot disturb the private right of action that the law guarantees. Rather, a principal Title VIII issue now surrounds how to construe section 3604(b)'s "in connection therewith" element. I argue that a narrow interpretation is distinguishable, both factually and legally, given how extensive and inextricably linked housing is with everything that must come post-Katrina. This moment in the history of New Orleans and the Gulf Coast cannot be replicated. It would be worthwhile to reexamine what we mean by housing rights, and their unmistakable intersection with social and environmental justice, with the same promise that comes with revitalizing a great city.

71 Oliver Houck, *Can We Save New Orleans?*, 19 TUL. ENVTL. L.J. 1, 41 (2006).