

Environmental Justice and Community-Based Reparations

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INTRODUCTION

This Article seeks to illuminate the lack of adequate legal remedies that are available for low-income, predominantly minority communities that have suffered historic environmental injustices. The Article not only discusses the lack of adequate legal remedies, but also proposes the use of local, state, and federal reparations programs for communities that have previously suffered environmental injustices; are still living with the effects of environmental injustices, by way of disease, air, soil, and water pollution; or are suffering current and ongoing environmental injustices.

As has been recently illustrated by Michigan's state action of providing lead-contaminated water *for over a year* to residents of Flint, Michigan, environmental injustices at the hands of local, state, and federal governments are, unfortunately, all too common.¹ Certainly, governments are not the only entities perpetrating environmental injustices; however, because governments are charged with enforcing environmental and civil rights laws, their own perpetration of environmental injustice is sometimes even more egregious than environmental misconduct by private entities.

This Article stems from the work of the University of Miami School of Law Center for Ethics & Public Service Environmental Justice Clinic.² The Environmental Justice Clinic began as a community-based

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1. Lenny Bernstein & Brady Dennis, *Flint's Water Crisis Reveals Government Failures at Every Level*, WASH. POST (Jan. 24, 2016), https://www.washingtonpost.com/national/health-science/flints-water-crisis-reveals-government-failures-at-every-level/2016/01/23/03705f0c-c11e-11e5-bcda-62a36b394160_story.html; see also Anna Maria Barry-Jester, *What Went Wrong in Flint?*, FIVETHIRTYEIGHT (Jan. 26, 2016, 2:08 PM), <http://fivethirtyeight.com/features/what-went-wrong-in-flint-water-crisis-michigan/>.

2. See Anthony V. Alfieri, *Resistance Songs: Mobilizing the Law and Politics of Community*, 93 TEX. L. REV. 1459, 1460–62 (2015). The Environmental Justice Clinic's umbrella program, the Historic Black Church Program, was founded in 2008 through a partnership with the Coconut Grove Ministerial Alliance, a consortium of West Grove black churches. This program is housed at the law school's Center for Ethics and Public Service, which was founded and directed by Professor Anthony V. Alfieri. The Program helps engineer antipoverty and civil rights campaigns through legal (direct service, impact litigation, and law reform) and political (civic engagement, coalition building, government lobbying, media networking, public education, and grassroots protest) interventions in

project working with historic black churches in the West Coconut Grove³ neighborhood of Miami. The Environmental Justice Clinic, in partnership with these historic black churches, community stakeholders, and local nonprofits, has been researching the environmental injustice of “Old Smokey”—the aptly nicknamed City of Miami Municipal Trash Incinerator.⁴

Using Old Smokey and the West Grove community as illustrations, this Article will demonstrate the lack of adequate legal remedies through traditional environmental law and civil rights law frameworks that continues to permit countless historic and current environmental injustices. In addition, this Article will show how someone living in any of these communities can rarely, if at all, achieve their own personal justice, justice for their families and friends, and justice for their neighbors and communities.

This Article seeks to illuminate the need for, and potential benefits of, community-based reparation programs by demonstrating: 1) there is a lack of adequate legal remedies available for historical environmental injustices; 2) even if a potentially adequate legal remedy does exist, it is either unattainable or barely attainable for low-income communities exposed to historical environmental injustices; 3) it may be more financially beneficial for the polluter to actually create a reparations program than to defend against potential litigation, media scrutiny, and community protests; and 4) reparations programs would not only provide potential closure to the wounds of the historical injustice, but the programs would also be designed by the community, for the community, and thus give power back to the community made powerless by the initial polluters.⁵

impoverished inner cities. See *Environmental Justice Clinic*, MIAMI L., <http://www.law.miami.edu/academics/center-for-ethics-and-public-service/environmental-justice-project> (last visited May 25, 2016).

3. This neighborhood has many names and is also known as Village West, Coconut Grove, and historically was known as the Black Grove. For the purposes of this Article, I will refer to it as the West Grove. Founded by black Bahamian immigrants in the late 1800s, and revered as the birthplace of the City of Miami, Coconut Grove is a section of Miami frequently divided into the East Grove, Center Grove, West Grove, and South Grove. Up until the 1920s, the black and white residents lived relatively harmoniously. During the 1920s, however, Miami experienced an influx of white southern residents moving down through Florida and bringing with them Jim Crow laws. During this time, the City of Miami segregated its black residents into various Jim Crow neighborhoods surrounded by physical walls. The West Grove was where the black Coconut Grove residents were forced to live. Adjacent to the West Grove was the “East Gables” or “Black Gables” which was the few-block radius where the City of Coral Gables segregated its black residents. See Nick Madigan, *In the Shadow of ‘Old Smokey,’ a Toxic Legacy*, N.Y. TIMES (Sept. 22, 2013) http://www.nytimes.com/2013/09/23/us/old-smokey-is-long-gone-from-miami-but-its-toxic-legacy-lingers.html?_r=1&.

4. See *History*, OLD SMOKEY, <http://www.oldsmokey.org/story/> (last visited Apr. 5, 2016).

5. For purposes of this Article, historic environmental injustices pertain mostly to the low-income, predominantly minority communities, which have been subjected to disproportionate pollution for years, regardless of whether it has already been stopped.

Part I of the Article will examine the case study of Old Smokey in the West Grove and provide context for the numerous communities affected by historic environmental injustices.

Part II will discuss the meaning of environmental justice by exploring the movement's history and the status of environmental justice today across the country. Environmental justice is generally defined as the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.⁶

Part III will examine what environmental and civil rights laws govern current and ongoing environmental injustices and illuminate how, even when an environmental injustice is occurring, it can be incredibly difficult to stop through the available legal tools. This difficulty makes the case for how impossible it is to achieve justice for either current or historic environmental injustices. Communities that challenge environmental injustices through the major environmental laws, such as the Clean Air Act, Clean Water Act, or the Resource Conservation and Recovery Act, experience very limited successes, if any. Successes may include settlements that do not result in either adequate removal of the environmental injustice or proper remediation for properties affected, or health-related prevention and treatment for exposure to toxins. The communities' success usually only pertains to cleaning up the historic environmental injustice or stopping the siting of a new polluter in a low-income minority community, rather than address the heart of the environmental injustice—why was this polluter placed in this community and how can the community heal from this injustice? This Part will also examine the shift away from environmental law to typical tort-compensation models and the innovative use of medical monitoring. It will also explore the use of traditional civil rights claims brought under the Fourteenth Amendment Equal Protection Clause, 42 U.S.C. § 1983, and the Civil Rights Act of 1964 Title VI. It examines why the legal avenues and remedies available for communities suffering environmental injustice are more often than not inadequate and even more frequently, the remedies are wholly unsuccessful.

Part IV begins by outlining the history of reparations scholarship and practice in the United States and where the dialogue is today. Paying particular attention to Professors Alfred Brophy and Eric Yamamoto's influential scholarship on reparations theory, reparations for environmental injustice should incorporate the existing models with a greater com-

6. *Environmental Justice*, U.S. ENVTL. PROTECTION AGENCY, <http://www3.epa.gov/environmentaljustice/> (last updated May 12, 2016).

munity-based focus. The recommended framework for environmental injustice reparations must include: 1) recognition of and responsibility for the environmental injustice; 2) acknowledgment of the affected community; 3) respect and incorporation of the affected community in the discussion; and 4) reparations in the form of community-based or individual funds, which may be for community goods such as community centers, paved roads, medical monitoring, epidemiological studies, or any other community-based need. This Part will also briefly discuss how reparations programs could be implemented at the federal, state, and local level for communities that have suffered environmental injustices—some for nearly a century. This Part will discuss how, despite the negative political connotation associated with reparations in the United States, these programs could be made appealing to government officials. Perhaps, “throwing money at the problem” could not only benefit and seek to heal these communities, but could also alleviate time, money, and political forces from affecting government entities.⁷

I. ENVIRONMENTAL JUSTICE CASE STUDY: OLD SMOKEY

The City of Miami Municipal Trash Incinerator, Old Smokey, operated from 1926 to 1970, until it was shut down by court order in a successful nuisance lawsuit.⁸ However, during Old Smokey’s decades of operation, the huge trash incinerator blanketed the West Grove community in ash, soot, and stench.⁹ Community members who were forced to live through the incinerator’s operation¹⁰ vividly remembered the unbelievable conditions in interviews. Delores Patterson Baine recalled: “We were often bathed in ash. It was just a part of our lives. It was a way of life. What were we going to do? We had to go to school. We made the best of it.”¹¹

The incinerator was allowed to operate in this manner for generations—polluting West Grove residents’ homes, schools, and churches. It was not until the neighboring affluent City of Coral Gables began to suf-

7. The majority of the environmental injustices focused on in this Article are those perpetrated directly by government agencies or those directly perpetrated by private actors that were condoned by government agencies.

8. *City of Miami v. City of Coral Gables*, 240 So. 2d 499, 500 (Fla. Dist. Ct. App. 1970) (affirming injunction issued by the trial court in favor of Miami’s neighboring city, Coral Gables).

9. *Id.*

10. The Historic Black Church Program’s Oral History Film Documentary Project has produced five student-driven documentary films about the West Grove community. The most recent, entitled *Old Smokey: A Community History*, premiered in August 2014 and chronicled the history of the incinerator through the eyes of the West Grove community. OLD SMOKEY: A COMMUNITY HISTORY (2014), available at <https://vimeo.com/104690626>; <http://law.miami.edu/academics/center-for-ethics-and-public-service/oral-history-film-project>.

11. Interview by Ariel Mitchell with Delores Patterson Baine, in Miami, Fla. (Jan. 10, 2014).

fer the effects of the incinerator¹² that the complaints of Old Smokey were taken seriously. The decades of suffering experienced by the West Grove residents apparently paled in comparison to the importance of the Coral Gables residents' pools and mansions that were now covered in ash. But for the Coral Gables residents' outrage, it is possible that the incinerator could have operated for many more years. The residents of the West Grove were deemed powerless and unimportant. Jimmie Ingraham confirms this chronic helplessness as he remarked:

The community itself really suffered back in the days. We were put through something that we had no control over because we were here to stay with our parents, and our parents had us here. A lot of us was born right here in this Grove. It was bad for the community and for us to be breathing stuff like that, but we had no alternative. We had to take it.¹³

Unfortunately, the incinerator was not located in a remote part of town, but rather abutted a park, the segregated black schools, private residential properties, public housing units, and churches. To this day, the area surrounding the former incinerator is largely unchanged.¹⁴ Over 1,000 children play in the few blocks surrounding the incinerator site.¹⁵ The site is currently the home of the City of Miami Fire Rescue Training Center—it even utilizes one of the original buildings of the incinerator.¹⁶

The Environmental Justice Clinic's Old Smokey research began in 2013 during an investigation into the siting of a municipal bus depot in the middle of the residential West Grove community—a modern-day environmental injustice that was to be perpetrated on this same predominantly minority community.¹⁷ From a whistleblower-leaked, municipal environmental report and a series of subsequent environmental site assessments, the Environmental Justice Clinic learned that Old Smokey had caused extensive soil and groundwater contamination not only at the

12. The City of Coral Gables began experiencing smoke, ash, and stench on its side of the highway after the incinerator was repaired and remodeled to be smokeless in the early 1960s. It was these "repairs" that allowed the incinerator to burn more and more trash and thus the ash and smoke traveled to Coral Gables, often blanketing pools and cars with ash. See Michael Baxter, *Those in Old Smoky's Path Never Liked the Fumes*, MIAMI HERALD, Jan. 28, 1970, at 1B.

13. Interview by Ariel Mitchell with Jimmie Ingraham, in Miami, Fla. (Jan. 10, 2014).

14. Zachary Lipshultz, Anthony Alfieri & Steven Lipshultz, *Miami's West Grove: 'Old Smokey' Incinerator Remains Health Hazard*, MIAMI HERALD, July 20, 2013, at 19A.

15. *Id.*

16. *Id.*

17. See Anthony V. Alfieri, *Community Education and Access to Justice in a Time of Scarcity: Notes from the West Grove Trolley Garage Case*, 2013 WIS. L. REV. 121, 125–28 (discussing the siting of a bus depot in the residential community of the West Grove); Jenny Staletovich & Andres Vignuzzi, *Building of Bus Depot Rankles Coconut Grove Neighborhood*, MIAMI HERALD (Dec. 29, 2012, 6:45 PM), <http://www.miamiherald.com/latest-news/article1945875.html>.

site of the former incinerator, but also on off-site lands abutting private properties and at many public parks.¹⁸ It was unclear at first how public parks that were in some cases miles away could have ash, half-burnt pieces of old glass, and other indicators of incinerator waste. However, it soon came to light that during the incinerator's operation, incinerator waste (ash and other trash byproduct) was commonly dumped into open pits, rock quarries, and other vacant lands.¹⁹ These open pits and quarries, however, later became city and county public parks—without any form of remediation to ensure that these sites were safe.²⁰

The saga of Old Smokey is far from over today. Despite the closure of the incinerator and the discovery of contamination at public parks, there is still public outcry about where all of Old Smokey's contamination still exists. The Old Smokey Steering Committee, which formed in the wake of the discovery of public park contamination, is a group of committed West Grove and City of Miami residents dedicated to ensuring that comprehensive testing and remediation occurs at all public and private properties likely to be contaminated and that local, state, or federal officials conduct a health study and create a disease registry to examine the effects Old Smokey had on the community's health. To date, there has been no West Grove-specific health study, nor have the properties in the close vicinity of Old Smokey been tested and thus remediated. The Old Smokey Steering Committee is also fighting for "right to know laws" to ensure that residents are provided notice of contamination on public properties should further discoveries be made.

18. See SCS ES CONSULTANTS, ENVTL. CONSULTANTS AND CONTRACTORS, REGIONAL SOIL ASSESSMENT REPORT: CITY OF MIAMI FIRE RESCUE TRAINING CENTER, 3425 JEFFERSON STREET, MIAMI, MIAMI-DADE COUNTY, FLORIDA, FILE NO. 09213010.07 (Oct. 3, 2013), <http://derm.miamidade.gov> (click on "Library Search," and search by address); Letter from Wilbur Mayorga, P.E., Chief, Env'tl. Monitoring & Restoration Div., Miami-Dade County, to Alice Bravo, Assistant City Manager, City of Miami (Sep. 23, 2013) (on file with University of Miami School of Law Env'tl. Justice Project) (requesting the City to investigate contamination in 112 public parks).

19. Jenny Staletovich & Patricia Mazzei, *Miami's Douglas Park Shut Down Indefinitely for Widespread Contamination*, MIAMI HERALD (Nov. 22, 2013, 12:32 PM), <http://www.miamiherald.com/2013/11/22/3771751/miami-park-shut-down-indefinitely.html>.

20. The current state of these parks is in disarray. Some parks have been remediated and reopened—perhaps not coincidentally those largely restored parks are in more affluent white and Hispanic neighborhoods. As of this writing, the Environmental Justice Clinic along with a litigation team comprised of three law firms has filed a statutorily required notice of intent to sue the City of Miami and Miami-Dade County (on file with Environmental Justice Clinic).

II. THE ENVIRONMENTAL JUSTICE MOVEMENT²¹

21. Delegates to the First National People of Color Environmental Leadership Summit held on October 24–27, 1991, in Washington D.C., drafted and adopted the following Preamble and 17 principles of Environmental Justice:

Preamble

We the People of Color, gathered together at this multinational People of Color Environmental Leadership Summit, to begin to build a national and international movement of all peoples of color to fight the destruction and taking of our lands and communities, do hereby re-establish our spiritual interdependence to the sacredness of our Mother Earth; to respect and celebrate each of our cultures, languages and beliefs about the natural world and our roles in healing ourselves; to insure environmental justice; to promote economic alternatives which would contribute to the development of environmentally safe livelihoods; and, to secure our political, economic and cultural liberation that has been denied for over 500 years of colonization and oppression, resulting in the poisoning of our communities and land and the genocide of our peoples, do affirm and adopt these Principles of Environmental Justice:

1. Environmental justice affirms the sacredness of Mother Earth, ecological unity and the interdependence of all species, and the right to be free from ecological destruction.
2. Environmental justice demands that public policy be based on mutual respect and justice for all peoples, free from any form of discrimination and bias.
3. Environmental justice mandates the right to ethical, balanced and responsible uses of land and renewable resources in the interest of a sustainable planet for humans and other living beings.
4. Environmental justice calls for universal protection from nuclear testing and the extraction, production and disposal of toxic/hazardous wastes and poisons that threaten the fundamental right to clean air, land, water and food.
5. Environmental justice affirms the fundamental right to political, economic, cultural and environmental self-determination of all peoples.
6. Environmental justice demands the cessation of the production of all toxins, hazardous wastes, and radioactive materials, and that all past and current producers be held strictly accountable to the people for detoxification and the containment at the point of production.
7. Environmental justice demands the right to participate as equal partners at every level of decision-making including needs assessment, planning, implementation, enforcement, and evaluation.
8. Environmental justice affirms the right of all workers to a safe and healthy work environment, without being forced to choose between an unsafe livelihood and unemployment. It also affirms the right of those who work at home to be free from environmental hazards.
9. *Environmental justice protects the right of victims of environmental injustice to receive full compensation and reparations* for damages as well as quality health care.
10. Environmental justice considers governmental acts of environmental injustice a violation of international law, the Universal Declaration on Human Rights, and the United Nations Convention on Genocide.
11. Environmental justice must recognize a special legal and natural relationship of the Native Peoples to the U.S. government through treaties, agreements, compacts, and covenants affirming sovereignty and self-determination.
12. Environmental justice affirms the need for urban and rural ecological policies to clean up and rebuild our cities and rural areas in balance with nature, honoring the cultural integrity of all our communities, and providing fair access for all to the full range of resources.

An environmental revolution is taking shape in the United States. This revolution has touched communities of color from New York to California and from Florida to Alaska—anywhere where African Americans, Latinos, Asians, Pacific Islanders, and Native Americans live and comprise a majority of the population. Collectively, these Americans represent the fastest growing segment of the population in the United States. They are also the groups most at risk from environmental problems.²²

Environmental justice is generally defined as the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.²³ Other relevant terminology includes environmental equity and environmental racism. Environmental equity is often defined as the proposition that all people should be poisoned equally, while environmental racism is the intentional or disproportionate poisoning of communities of color.²⁴ Environmental racism and environmental injustice are sometimes used interchangeably; however environmental injustice encompasses a broader definition of “community,” as it takes into account socioeconomic status and not just race and ethnicity.²⁵ Still today, the people who are negative-

13. Environmental justice calls for the strict enforcement of principles of informed consent, and a halt to the testing of experimental reproductive and medical procedures and vaccinations on people of color.

14. Environmental justice opposes the destructive operations of multi-national corporations.

15. Environmental justice opposes military occupation, repression and exploitation of lands, peoples and cultures, and other life forms.

16. Environmental justice calls for the education of present and future generations which emphasize social and environmental issues, based on our experience and an appreciation of our diverse cultural perspectives.

17. Environmental justice requires that we, as individuals, make personal and consumer choices to consume as little of Mother Earth’s resources and to produce as little waste as possible; and make the conscious decision to challenge and reprioritize our lifestyles to insure the health of the natural world for present and future generations.

Principles of Environmental Justice, EJNET.ORG, <http://www.ejnet.org/ej/principles.html> (last modified Apr. 6, 1996) (emphasis added).

22. ROBERT BULLARD, *CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS* 7 (1993).

23. *Environmental Justice*, *supra* note 6.

24. See Robert Bullard, *New Report Tracks Environmental Justice Movement Over Five Decades*, DR. ROBERT BULLARD (Feb. 9, 2014) [hereinafter Bullard, *New Report*], <http://drrobertbullard.com/2014/02/09/new-report-tracks-environmental-justice-movement-over-five-decades/> (discussing the struggle for environmental justice is not just about distributing environmental risks equally but about preventing them from being produced in the first place so that no one is harmed at all).

25. LUKE W. COLE & SHEILA R. FOSTER, *FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT* 15 (2001).

ly affected by the environment in disproportionate ways are overwhelmingly low-income, minority residents. By environmental injustice, I mean communities that have disproportionately suffered environmental pollution, harm, and nuisance because of their disenfranchised and perceived powerless status.²⁶ These communities are disproportionately minority and almost always low-income.²⁷

A. *The Early Days of Environmental Justice*

Dr. Robert Bullard is widely credited as being the father of the environmental justice movement.²⁸ His foray into the field began in 1979 when he conducted a study examining the location of all the municipal solid-waste disposal facilities in Houston for a class action lawsuit, *Bean v. Southwestern Waste Management Corp.*²⁹ The study sought to examine whether the municipal solid-waste disposal facilities were disproportionately in African-American communities and whether those communities had existed prior to the siting of the facility.³⁰ However, the generally recognized beginnings of the environmental justice movement in the United States can be traced back to Warren County, North Carolina, where a PCB (polychlorinated biphenyl) landfill spurred protests and

26. *See id.* at 3 (discussing the 1984 Cerrell Report commissioned by the California Waste Management Board which suggested that companies and municipalities site garbage incinerators and other locally undesirable land uses in communities that would offer the least resistance such as rural communities, poor communities, communities with residents of low-educational levels, highly Catholic communities, smaller communities, and those that were involved in resource-extractive jobs); *see also* Robert D. Bullard & Beverly Wright, *Disastrous Response to Natural and Man-Made Disasters: An Environmental Justice Analysis Twenty-Five Years After Warren County*, 26 UCLA J. ENVTL. L. & POL'Y 217, 218 (2008).

Much of environmental injustice can be identified through an analysis of power and the power dynamics of the polluter/siter and the community. The environmental justice movement itself repudiates the notion that the communities that experience the disproportionate environmental injustices are powerless because these communities do speak up, they do protest, they do initiate litigation, and they *are* the environmental justice movement.

27. *See* JAMES P. LESTER, DAVID W. ALLEN & KELLY M. HILL, ENVIRONMENTAL INJUSTICE IN THE UNITED STATES MYTHS AND REALITIES 57–87 (2001) (discussing the various factors for injustice identified in the environmental justice literature including race; social class; political mobilization; pollution potential; environmental interests; government capacities; business climate).

28. Mary Hoff, *Robert Bullard: The Father of Environmental Justice*, ENSIA (June 12, 2014), <http://ensia.com/interviews/robert-bullard-the-father-of-environmental-justice/>.

29. *Bean v. Sw. Waste Mgmt. Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979); *see also* ROBERT D. BULLARD, DUMPING IN DIXIE xiv (3d ed. 2000).

30. *See* BULLARD, *supra* note 30. There continues to be the argument that landfills, polluting factories, and other environmental injustices occur in low-income minority neighborhoods because those are the only communities that are affordable. However, through Dr. Bullard's research and others (particularly the LA Study), it is quite clear that there is no "chicken or egg" (which came first) problem. The low-income minority communities were already there before the environmental injustices arrived.

over 500 arrests.³¹ Although the demonstrators were unsuccessful in stopping the siting of the PCB landfill, they put “environmental racism”³² on the map and launched the national environmental justice discussion and movement. The Warren County protests also led to the United Church of Christ Commission for Racial Justice to produce the 1987 *Toxic Wastes and Race* report, which is the first national study to correlate waste facility sites and demographic characteristics.³³ Throughout the last few decades the use of statistical analysis and geographic information system (GIS) mapping projects have analyzed the prevalence of contamination, industrial pollution, and other environmental injustices throughout minority communities.³⁴

31. Robert Bullard et al., *Toxic Wastes and Race at Twenty: Why Race Still Matters After All These Years*, 38 ENVTL. L. 371 (2008) [hereinafter Bullard et al., *Toxic Wastes and Race at Twenty*].

32. See Eileen Guana, *Environmental Law, Civil Rights, and Sustainability: Three Frameworks for Environmental Justice*, 19 J. ENVTL. & SUSTAINABILITY L. 34, n. 8 (2012) (“The phrase ‘environmental racism’ has been attributed to Dr. Benjamin Chavis, former Executive Director of the United Church of Christ Commission for Racial Justice, who . . . noted: ‘Racism is the intentional or unintentional use of power to isolate, separate and exploit others. This use of power is based on a belief in superior racial origin, identity or supposed racial characteristics. Racism confers certain privileges on and defends the dominant group, which in turn sustains and perpetuates racism. Both consciously and unconsciously, racism is enforced and maintained by the legal, cultural, religious, educational, economic, political, environmental and military institutions of societies. Racism is more than just a personal attitude; it is the institutionalized form of that attitude.’”); BENJAMIN F. CHAVIS, COMM’N FOR RACIAL JUSTICE UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON RACIAL AND SOCIOECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES, at ix-x (1987), http://d3n8a8pro7vhmx.cloudfront.net/unitedchurchofchrist/legacy_url/13567/toxwrace87.pdf?1418439935); COLE & FOSTER, *supra* note 25, at 34.

33. CHAVIS, *supra* note 32.

34. See COLE & FOSTER, *supra* note 25, at 167–83 (providing an annotated bibliography of studies and articles that document and describe the disproportionate impact of environmental hazards by race and income). For example, the University of Miami School of Law Environmental Justice, Law and Science 2015 Summer Consortium conducted county-wide environmental justice research with four main factors including: (1) federal, state, and local known contaminated sites, including waste processing sites; (2) race and socioeconomic status; (3) available health metrics; and (4) previously unconsidered information such as historical zoning, historical residential demographics, and past industrial facilities. The data was compiled and analyzed to assess Miami-Dade County’s known environmental injustices and to learn from previous (and unfortunately current) zoning laws. The completed map is forthcoming in 2016 and will be available through a website, community-based presentations, and presentations and discussions with community stakeholders and local, state, and federal government actors. Adrian Grant-Alfieri et al., *Environmental Justice, Law and Science Summer Consortium* (Ctr. for Ethics & Pub. Serv., Working Paper, 2015), available at <https://sites.google.com/a/g.law.miami.edu/ceps-hbcp/> (last visited June 21, 2016); see also *Melding Civil Rights and Environmentalism: Finding Environmental Justice’s Place in Environmental Regulation*, 26 HARV. ENVTL. L. REV. 1, 6 (2002) (quoting the 1992 study by the *National Law Journal* which examined government enforcement of environmental laws at 1,177 Superfund toxic waste sites and concluded that “penalties under hazardous waste laws assessed at sites having the greatest white population were about 500 percent higher than penalties at sites with the greatest minority population”).

B. Environmental Justice Progress

The environmental justice movement and its advocates have come a long way since the 1980s. Now, dozens of environmental justice organizations exist in the United States, such as the Border Environmental Justice Campaign; Center for Health, Environment, and Justice; Environmental Justice Resource Center; Greenaction; New York Environmental Justice Alliance; and others.³⁵ There are also now more environmental law school clinics that focus not only on environmental law, but also on environmental justice in low-income communities. These clinics include the Environmental Law and Justice Clinic at Golden Gate University; Environmental Law and Justice Clinic at Texas Southern University; Interdisciplinary Environmental Clinic at Washington University; and the Environmental Law Clinic at Tulane. The movement has also expanded to include several law groups with a mission that includes environmental justice, such as Earthjustice and the Natural Resources Defense Council.³⁶ However, despite these now-dozens of advocacy and law organizations fighting for environmental justice, there is still a profound lack of *actual* environmental justice in the United States.

Environmental justice over the years has come to mean much more than images of segregated communities rife with polluting industry.³⁷ Today, environmental justice can encompass many traditional civil rights fights such as housing equality, access to transportation, access to healthcare, access to education and economic opportunities, as well as more traditional environmental justice issues such as contaminated water, soil, and air.³⁸ The Environmental Justice Clinic defines environmen-

35. Other environmental justice advocacy groups include: Action PA; Amazon Watch; America's Migrant Farmworkers; Arc Ecology; Asian Pacific Environmental network; California Environmental Justice Alliance; Communities for a Better Environment; Clark Atlanta University; Environmental Research Foundation (ERF); Futenma-Henoko Action Network; Indigenous Environmental Network; Little Village Environmental Justice Organization; Sierra Club Human Rights and the Environment Campaign; Silicon Valley Toxic Coalition; Working Group on Environmental Justice; and Southwest Organizing Project.

36. See *Environmental Justice*, N.Y. LAWYERS FOR PUB. INT., <http://www.nylpi.org/environmental-justice/> (last visited May 25, 2016). NYLPI's environmental justice and community development program provides legal assistance to low-income communities in New York City disproportionately burdened by noxious and undesirable land uses.

37. Bullard et al., *Toxic Wastes and Race at Twenty*, *supra* note 31.

38. For example, environmental justice principles are invoked when examining the difference between public housing and private housing options, whether due to lead paint, pesticide use, chemical use, or materials used during construction or maintenance. See HEALTH JUSTICE PROJECT, LOYALA UNIV. SCH. OF LAW & SHRIVER CTR., PETITION FOR RULEMAKING UNDER U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT "LEAD BASED PAINT POISONING PREVENTION IN CERTAIN RESIDENTIAL STRUCTURES" REGULATIONS TO PREVENT LEAD POISONING AMONG CHILDREN, 24 C.F.R. § 35 (2016) [hereinafter PETITION FOR RULEMAKING], available at <http://www.childsdefense.org/library/data/petition-for-rulemaking-24.pdf>. Racially segregated communities fall under the umbrella term as well, as do food insecure communities and food deserts

tal justice as issues affecting low-income minority communities regarding their built and natural environment. “Simply put, environmental justice demands that everyone—not just the people who can ‘vote with their feet’ and move away from threats or individuals who can afford lawyers, experts, and lobbyists to fight on their behalf—is entitled to equal protection and equal enforcement of our environmental, health, housing, land use, transportation, energy, and civil rights laws and regulations.”³⁹ The question remains whether the existing laws, policies, and frameworks are sufficient for communities to achieve environmental justice or whether there are alternative models to accomplishing justice in historically wronged communities.

III. TOOLS AND BARRIERS

Using the West Grove as an example of the thousands of communities across the country that have been wronged by their governments, by local and multinational corporations, farms, slaughterhouses, energy companies, and others that have physically harmed residents’ bodies and communities, created nuisances, noxious effects, and destroyed the quality of life for these residents, how can any of these communities achieve justice using an adversarial legal system not designed to address historic environmental injustices? True environmental justice requires the restoration, respect, and preservation of low-income and minority communities, rather than simply punishing the wrongdoers. The restorative justice theory allows distinct voices to contribute to an appropriate outcome without necessarily assenting to the same theory and implementation.⁴⁰ It is an example of a holistic process that can harmonize irreconcilable theories in reaching concrete resolutions for particular cases.⁴¹ Its goal is the repair and healing of relationships damaged by conflict and other

where there is a lack of access to fresh produce, meats, and simply a lack of affordable foods. It constituted an environmental injustice when communities of color were destroyed to make way for highways as these communities were disproportionately burdened for the highways ease and enjoyment of others. See Greg Allen, *Paying a Local Price for I-95’s Global Promise*, NPR (Aug. 28, 2010, 1:32 AM), <http://www.npr.org/templates/story/story.php?storyId=129475747>. Other chronic environmental justice issues affecting communities can range from school facility contamination to urban tree cover, or the lack thereof, in low-income minority communities. See Bullard et al., *Toxic Wastes and Race at Twenty*, *supra* note 31, at 375 (“A new movement has taken root in the United States, and spread around the world, that defines environment as ‘everything’—where we live, work, play, worship, and go to school, as well as the physical and natural world. This relatively new national movement is called the environmental and economic justice movement.”).

39. Bullard et al., *Toxic Wastes and Race at Twenty*, *supra* note 31, at 376.

40. Erik Luna, *Punishment Theory, Holism, and the Procedural Conception of Restorative Justice*, 2003 UTAH L. REV. 205, 207 (2003).

41. *Id.*

harms.⁴² The goals of restorative justice are not met in the existing environmental justice legal frameworks.

A. Environmental Laws

Environmental justice and the laws that impact the movement's effect are most often at the crossroads of environmentalism and civil rights.⁴³ Environmentalism's history is rooted in white, nonminority leadership.⁴⁴ With the rise of the environmental justice movement in the 1980s and 1990s, the prevailing white leadership among environmental advocacy and law organizations made headlines when leaders within the environmental justice movement contacted the eight major national environmental organizations, accusing them of racist hiring policies that allowed for a complete lack of diversity among employees.⁴⁵ This prompted the major environmental groups to form an "Environmental Consortium for Minority Outreach" as "part of a concerted effort to remedy the hiring imbalance."⁴⁶ As of a 2014 study researching diversity among environmental organizations and nonprofits, the gender gap among employees and leadership of these groups has been closed much more than the racial and ethnic minority gap.⁴⁷ Despite some growth in the hiring of minorities, the organizations studied do not collectively have more than 16% minority employees in their general workforce.⁴⁸ Furthermore, of these 16% minority employees, most occupy lower-level positions and thus the general leadership for the studied organizations only contains 12% minority employees.⁴⁹ Clearly, there is still much to be done to bridge the gap between environmental law, conservation, preservation, and advocacy organizations and environmental justice organizations and grassroots efforts at the community level.

Even if these organizations were more diverse, whether they would be able to implement and effectuate greater change and justice for envi-

42. Leigh Goodmark, "Law and Justice Are Not Always the Same": Creating Community-Based Justice Forums for People Subjected to Intimate Partner Abuse, 42 FLA. ST. U. L. REV. 707, 722 (2015).

43. See Julie Sze & Jonathan K. London, *Environmental Justice at the Crossroads*, 2 SOC. COMPASS 1331 (2008).

44. DORCETA E. TAYLOR, THE STATE OF DIVERSITY IN ENVIRONMENTAL ORGANIZATIONS 14 (2014), available at <http://www.diversegreen.org/the-challenge/> (click "Download the FULL report").

45. See Philip Shabecoff, *Environmental Groups Told They Are Racists in Hiring*, N.Y. TIMES, Feb. 1, 1990, at A20, available at <http://www.nytimes.com/1990/02/01/us/environmental-groups-told-they-are-racists-in-hiring.html>.

46. *Id.*

47. TAYLOR, *supra* note 44.

48. *Id.*

49. *Id.*

ronmentally disenfranchised communities given our current environmental laws is questionable.

The major federal regulations that are *sometimes*⁵⁰ applicable in environmental justice cases—or may be used indirectly as a means of achieving environmental justice⁵¹—include the National Environmental Protection Act,⁵² Clean Water Act,⁵³ Safe Drinking Water Act,⁵⁴ Clean Air Act,⁵⁵ Resource Conservation Recovery Act,⁵⁶ Comprehensive Environmental Response, Compensation, and Liability Act,⁵⁷ Toxic Substances Control Act,⁵⁸ Emergency Planning and Community Right-to-Know Act,⁵⁹ Endangered Species Act,⁶⁰ Federal Insecticide, Fungicide, and Rodenticide Act,⁶¹ and Federal Food, Drug and Cosmetic Act.⁶² Citizen suits are permissible under various acts—the Clean Water Act; Safe Drinking Water Act; Clean Air Act; Resource Recovery and Conservation Act; Comprehensive Environmental Response, Compensation, Conservation Recovery Act; Endangered Species Act; and Emergency Planning and Community Right to Know Act—which grant standing to both individual citizens or groups to bring a suit against an alleged violator and the government entity (or entities) not enforcing the law.⁶³ However,

50. Sometimes these laws are available depending not only on the specific facts of the case and the nature of the contamination, but more importantly the access to adequate legal and scientific assistance. While these laws on their face appear to be suitable avenues to pursue, they are infrequently invoked because they seek to address current environmental contamination and not historical environmental contamination. Further, these laws often require immense scientific expertise that is often unattainable for low-income communities.

51. For example, a community may bring a lawsuit on behalf of an endangered species that exists in a community in order to prevent the siting of a factory and challenging the siting under the ESA rather than as a civil rights violation.

52. 42 U.S.C. §§ 4321–4370 (2012).

53. 33 U.S.C. §§ 1251–1388 (2012).

54. 42 U.S.C. §§ 300f–300j-26 (2012).

55. *Id.* §§ 7401–7671q.

56. *Id.* §§ 6901–6992k.

57. *Id.* §§ 9601–9675.

58. 15 U.S.C. §§ 2601–2697 (2012).

59. 42 U.S.C. §§ 11001–11050 (2012).

60. 16 U.S.C. §§ 1531–1544 (2012).

61. 7 U.S.C. §§ 136–136y (2012).

62. 21 U.S.C. §§ 301–399f (2012). Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and Federal Food, Drug and Cosmetic Act (FFDCA) work together to provide the framework for pesticide regulation in the United States. Under FIFRA, EPA is responsible for regulating the manufacture, labeling, sale, and use of pesticides and the EPA determines the allowable level of pesticide residue in food under FFDCA. FIFRA provides for civil penalties but does not provide monetary awards to plaintiffs. In fact, it may deleteriously preempt monetary awards from state tort and personal injury provisions. See Kevin McElroy et al., *The Federal Insecticide, Fungicide and Rodenticide Act: Preemption and Toxic Tort Law*, 2 *FORDHAM ENVTL. L. REP.* 29, 49 (1990).

63. See Clean Air Act, 42 U.S.C. § 7604(a) (2012); Clean Water Act, 33 U.S.C. § 1365(a) (2012); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9659(a) (2012); Emergency Planning and Community Right to Know Act, 42 U.S.C. § 11046(a)(1)

these citizen suits only allow for litigation costs and attorney's fees to be recovered and do not provide for private monetary awards for successful plaintiffs.⁶⁴

Analyzing the major environmental laws that exist for potential environmental injustice lawsuits is important because lawsuits are a critical step in American legal, political, and social development.⁶⁵ Environmental laws bring awareness, dialogue, and momentum to the underlying issues of the lawsuit. However, the current laws on the books that address environmental injustices are insufficient to bring a level of awareness, dialogue, and momentum that will change the history and perpetuation of environmental injustice across the country. The environmental and civil rights laws discussed below are frequently invoked for ongoing and current environmental injustices, frequently involving permitting and siting cases. Permitting and facility siting decisions continue to be litigated and challenged by communities across the country and are one of the easier, more clear-cut ways to challenge environmental injustices that either currently pollute or will soon pollute low-income minority communities.⁶⁶ This brief review of relevant laws is by no means an exhaustive analysis of the theory or application of each law.

1. National Environmental Protection Act

The National Environmental Protection Act (NEPA) is the first major national environmental law and created the mandate that all federal branches of government provide proper consideration to the environment before taking major federal action.⁶⁷ Thus, it requires performance of Environmental Assessments (EAs) and Environmental Impact Statements (EISs).⁶⁸ President Clinton's Executive Order 12,898,⁶⁹ which is

(2012); Resource Conservation and Recovery Act, 42 U.S.C. § 6972 (2012); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (2012); Toxic Substances Control Act, 15 U.S.C. § 2619 (2012).

64. See Eileen Guana, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 *ECOLOGY L.Q.* 1, 76–80 (1995).

65. See Alfred L. Brophy, *Reparations Talk: Reparations for Slavery and the Tort Law Analogy*, 24 *B.C. THIRD WORLD L.J.* 81 (2004) [hereinafter Brophy, *Reparations Talk*].

66. Two general opportunities arise for the use of permitting to address environmental justice: 1) the siting of new facilities; and 2) changes or renewal of operating permits for a facility. Because siting decisions are typically local land use decisions, these challenges are often brought seeking injunctions to prevent the siting or to place conditions on the operating permit that would mitigate the pollution. The EPA's role is usually limited in these decisions. See ENVTL. LAW INST., *ENVIRONMENTAL LAWS AND ALTERNATIVE DISPUTE RESOLUTION: TOOLS FOR ENVIRONMENTAL JUSTICE* 7 (2011), available at <https://www.eli.org/sites/default/files/docs/environmentallawsandalternativedisputeresolution-toolsforenvironmentaljustice.pdf>.

67. *Summary of the National Environmental Policy Act*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-national-environmental-policy-act> (last updated Aug. 10, 2015).

68. *Id.*

often simultaneously touted as an environmental justice success and as a failure due to its lack of enforcement, requires federal agencies undergoing NEPA compliance to assess the environmental justice effects of potential federal action through the EAs and EISs.⁷⁰ NEPA is most helpful to environmental justice causes in regard to new actions and thus, does not assist communities seeking justice for their historical exposures.

2. Executive Order 12,898

President Clinton issued Executive Order 12,898 (EO) on February 11, 1994, requiring all federal agencies to collect data about the health and environmental impact of their actions in order to develop policies to achieve environmental justice “to the greatest extent practicable and permitted by law.”⁷¹ The EO created a federal Interagency Working Group on Environmental Justice—chaired by the administrator of the EPA—with the mission of providing guidance to federal agencies.⁷² The Working Group further established eight task forces with representatives from all participating agencies. EO 12,898 does not create a private right to judicial review, unlike any environmental justice analysis arising under NEPA and the Administrative Procedure Act.⁷³

69. Exec. Order No. 12,898, 3 C.F.R. § 859 (1994), *reprinted in* 42 U.S.C. § 4321 (2012).

70. See Bullard, *New Report*, *supra* note 25. Suzie Canales, Executive Director, Citizens for Environmental Justice, Corpus Christi, TX, said,

The Executive Order on EJ is a sham. The only thing the EO has produced is jobs for the people at these federal agencies tasked to create the illusion that they are working to achieve environmental justice. I have witnessed heartless and clueless representatives of federal agencies visit hardcore EJ communities and board their plane back to DC untouched, unmoved and, despite numerous attempts on our part, were never heard from again. I have witnessed good people at federal agencies that wanted to truly help. But, before they could do anything significant they were removed from their position, or lost their job. The only ones celebrating the 20th anniversary of the EO is the federal government for succeeding to put on the biggest fraud and sin against EJ communities everywhere.

Id.

71. Bradford C. Mank, *Executive Order 12,898*, in *THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS* 103 (Michael B. Gerrard ed., 1999).

72. *Id.* at 105.

73. See *Communities Against Runway Expansion, Inc. v. F.A.A.*, 355 F.3d 678 (D.C. Cir. 2004). The court found that the environmental impact statement (EIS) completed for an airport runway expansion included an environmental justice analysis concluding that the increase in significant noise exposure would not be disproportionately borne by low-income or minority populations. *Id.* at 688. Petitioners argued that the environmental justice analysis was arbitrary and capricious. *Id.* The court found that while EO 12,898 did not provide jurisdiction, the proper jurisdiction could be found under NEPA and the APA. *Id.* at 690. However, the court found that the FAA properly exercised its discretion to include the EJ analysis in its NEPA evaluation and there was no cause to invalidate the EIS. *Id.*

As Alexandra Gilliland points out in her review of the first environmental justice assessment by the federal government since the issuance of the Executive Order, because federal “agencies’ approaches to environmental justice ha[ve] varied,” environmental justice concerns were “frequently raised as a consideration in the course of environmental impact studies.”⁷⁴ Nonetheless, plaintiffs still “raise environmental justice issues as grounds for challenging agency actions and regulations, although often with little success.”⁷⁵

3. Clean Water Act and Safe Drinking Water Act

The Clean Water Act (CWA) and Safe Drinking Water Act (SDWA) may provide low-income communities and communities of color a limited legal avenue to challenge the lack of access to clean, safe drinking water due to contamination or a lack of adequate infrastructure.⁷⁶ However, there are great limitations for environmental justice-seeking communities. For example, limitations under the CWA include the EPA’s restricted ability to regulate the discharge of contaminants into navigable waters, and notably, the fact that the entire hydraulic fracturing (“fracking”) industry is exempt from the CWA, SDWA, and other federal environmental laws, as well as various state laws.⁷⁷

The SDWA “focuses on all waters actually or potentially designed for drinking, whether from aboveground or underground sources” and

74. Alexandra Gilliland, *A Review of EPA’s First Environmental Justice Analysis in Conjunction with a CERCLA Remediation Plan* (2014), available at http://www.americanbar.org/content/dam/aba/events/environment_energy_resources/2014/03/43rd-spring-conference/conference_materials_portal/12-gilliland_alexandra-paper.authcheckdam.pdf. The report cites *Coliseum Square Ass’n, Inc. v. Jackson*, 465 F.3d 215 (5th Cir. 2006), as determining that “the Executive Order did not create a private right of action, and that the environmental justice requirement could be analyzed under the Administrative Procedure Act, and finding that the Department of Housing and Urban Development’s consideration of environmental justice issues was not ‘arbitrary and capricious.’” Gilliland, *supra*, at 1 n.5. It further cites *Sur Contra La Contaminacion v. E.P.A.*, 202 F.3d 443 (1st Cir. 2000), as concluding that “the Executive Order did not create a right of judicial review for agency’s actions”, and *Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569, 576 (9th Cir. 1998), as “declining to analyze environmental justice concerns raised under the Executive Order and finding the agency adequately addressed environmental justice issues as required under the National Environmental Policy Act (NEPA).” Gilliland, *supra*, at 1 n.5.

75. Gilliland, *supra* note 74, at 2.

76. See ENVTL. LAW INST., *supra* note 66, at 70.

77. Congress amended the SDWA as part of the Energy Policy Act of 2005, modifying the definition of “underground injection” to add exclusions which removed EPA’s authority under the SDWA to require permits for fracking operations; this exemption has come to be known as the “Haliburton Loophole.” Adam Kron, *EPA’s Role in Implementing and Maintaining the Oil and Gas Industry’s Environmental Exemptions: A Study in Three Statutes*, 16 VT. J. ENVTL. L. 586, 613 (2015).

establishes minimum water quality standards.⁷⁸ Environmental justice concerns arise under the SDWA when failure to enforce compliance with water quality standards may deny consumers the health benefits associated with less contaminated water or when forcing compliance may secure health benefits but at a prohibitive cost. The extent to which SDWA implicates communities affected by environmental injustice depends on the extent to which these communities are disproportionately exposed to higher levels of contamination via drinking water than other communities.⁷⁹

Unfortunately for many communities affected by historical environmental injustices, there is no adequate remedy under the CWA or SDWA. For example, the West Grove community members who were forced to live with Old Smokey were also forced to drink and use private well water throughout the operation of the incinerator.⁸⁰ The West Grove was forced to use their own private wells because the City of Miami refused to put the Jim Crow community on public water mains.⁸¹ The City eventually did provide public water to the community, but in some cases, it was not provided until the 1980s.⁸² Thus, the thousands of community members who were drinking well water contaminated with incinerator run-off and fly ash for years seemingly have no recourse. Laws such as the CWA and SDWA do not provide a mechanism for addressing this historic wrong, unless plaintiffs can show that the wells are still contaminated, which requires expensive testing paid for by the low-income community.

Further, few studies have investigated income or racial disparities in drinking water infrastructure or quality.⁸³ However, studies that have been conducted revealed disparities in drinking water infrastructure in minority communities consisting of American Indians and Alaskan Natives.⁸⁴

78. *Summary of the Safe Drinking Water Act*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/laws-regulations/summary-safe-drinking-water-act> (last updated Oct. 8, 2015).

79. See Dennis C. Cory & Tauhidur Rahman, *Environmental Justice and Enforcement of the Safe Drinking Water Act: The Arizona Arsenic Experience*, 68 *ECOLOGICAL ECON.* 1825 (2009).

80. See Marjorie Stoneman Douglas, *Communities Face Their Slums . . . In Coconut Grove, Florida*, *LADIES HOME J.*, Oct. 1950, at 23.

81. *Id.*

82. See Memorandum from Miami-Dade Water and Sewer Department Regarding Water and Sewer Mains in the West Grove (Feb. 25, 2016) (on file with University of Miami School of Law's Environmental Justice Clinic).

83. See James VanDerslice, *Drinking Water Infrastructure and Environmental Disparities: Evidence and Methodological Considerations*, 101 *AM. J. PUB. HEALTH* S1, S109 (2011).

84. *Id.* at S110. For example, a 2009 assessment in the Navajo Nation found that 30% were without piped water, 70% of domestic water sources tested positive for total coliforms, 21% tested positive for *E. coli*, 12% had arsenic concentrations above the maximum contaminant level, and 5% had uranium concentrations above the maximum contaminant level. Additionally, other low-income

Under the CWA § 505 citizen suit provision, individuals or groups do have standing to bring a suit against an alleged violator and can also bring claims against the government for failing to perform duties under the CWA. Remedies may include compliance orders, civil penalties, or other equitable remedies—notably, however, no right to monetary awards exists for plaintiffs, nor do any remedies arise for historic exposure to contaminated water.⁸⁵

4. Clean Air Act

The Clean Air Act (CAA) regulates emissions into the air from stationary and mobile sources to protect public health and decrease air pollution.⁸⁶ Again, this law does not provide monetary awards for plaintiffs other than occasional attorney's fees.⁸⁷ The provisions of CAA § 309 requires the EPA Administrator to comment in writing upon the environmental impacts associated with proposed federal actions, including those subject to NEPA. The Administrator must determine that the proposed action is satisfactory from the standpoint of public health, welfare, and environmental quality.⁸⁸ The determination and review process allows the EPA to ensure that environmental justice concerns are considered by federal agencies, as set by EO 12,898.⁸⁹

Despite § 309, the CAA has had a varied impact on the environmental justice movement. While many suits have been brought against developers, companies, federal agencies, and the EPA for enforcement of the CAA, several courts have not enforced a thorough or enhanced analysis of environmental justice policies.⁹⁰

minority communities suffering from insufficient drinking water infrastructures are the small, unincorporated settlements, known as colonias, along the U.S.-Mexico border. The most recent assessment conducted by the Texas Department of Health indicates that 60,000 people in 442 colonias in Texas remain without water or sewer infrastructure, and approximately 10,000 live in colonias without sources of piped water. *Id.* at S110–11 n.18.

85. Under 28 U.S.C. § 2462, a five-year statute of limitations is imposed on claims for relief. Several courts have held that § 2462 applies to citizen suits brought under the CWA. *See* Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals, Inc., 913 F.2d 64, 73–77 (3d Cir. 1990); *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1521 (9th Cir. 1987) (“Application of section 2462 to citizen enforcement suits [brought under the Clean Water Act] is in keeping with the language of the statute; a citizen enforcement suit is also an ‘action . . . for the enforcement of [a] civil fine.’” (quoting 28 U.S.C. § 2462)).

86. 42 U.S.C. §§ 7401–7671q (2012).

87. *Id.* § 7604(d).

88. *Id.* § 7609(b).

91. *See* ENVTL. PROT. AGENCY, FINAL GUIDANCE FOR CONSIDERATION OF ENVIRONMENTAL JUSTICE IN CLEAN AIR ACT 309 REVIEWS § 2.4 (July 1999), available at https://www.epa.gov/sites/production/files/2014-08/documents/enviro_justice_309review.pdf.

90. *See, e.g.*, *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 145 F. Supp. 2d 446 (D.N.J. 2001); *City of Brockton v. Energy Facilities Siting Bd.*, 14 N.E.3d 167 (Mass. 2014).

5. Resource Conservation Recovery Act

The Resource Conservation Recovery Act (RCRA) regulates the management and disposal of solid and hazardous waste.⁹¹ Subtitle C of the statute creates a complex system designed to manage hazardous waste from its creation, through its transportation, to its ultimate disposal.⁹² Subtitle D of RCRA includes planning requirements and technical criteria for building municipal solid waste facilities that can be significant for communities in which new municipal solid waste facilities are being sited; however, this law also only provides equitable remedies and does not provide plaintiffs with monetary awards.⁹³ Further, while RCRA seems like a logical tool for environmentally wronged communities, it requires that the solid and hazardous waste be a current issue. Thus, for example, if the matter involves a community seeking justice for their historic exposure to a poorly operated toxic landfill that for decades did not adhere to best practices of environmental protection, but today does and is in environmental compliance, the community has no recourse under RCRA for its past exposures. It was unclear until 1996 whether RCRA applied to past transgressions. However, the United States Supreme Court in *Meghrig v. KFC Western, Inc.*⁹⁴ held that Congress had not intended to authorize citizen suits for wholly past violations of the RCRA.⁹⁵

6. Comprehensive Environmental Response, Compensation, Liability Act

The Comprehensive Environmental Response, Compensation, Liability Act (CERCLA), also known as “Superfund,” regulates the cleanup of sites where hazardous substances have been released into the environment or where a substantial threat exists that hazardous substances will be released into the environment.⁹⁶ The process of responding to releases of hazardous substances is known as a “Response Action.”⁹⁷ The EPA compiles its list of the sites that it believes pose the greatest danger

91. 42 U.S.C. §§ 6901–6992k (2012).

92. *Id.* §§ 6921–6939.

93. *Id.* §§ 6941–6949.

94. *Meghrig v. KFC W., Inc.*, 516 U.S. 479 (1996).

95. *Id.* at 488 (rejecting a private cause of action to recover costs of cleaning up toxic waste that did not continue to pose a danger to health or the environment because it failed to satisfy RCRA’s requirement of imminent and substantial endangerment to health or the environment).

96. 42 U.S.C. §§ 9601–9675 (2012).

97. Larry Schnapf, *Cleaning Up Abandoned or Inactive Contaminated Sites*, in *THE LAW OF ENVIRONMENTAL JUSTICE*, *supra* note 71, at 524.

and places them on the National Priorities List (NPL).⁹⁸ There are two types of response actions—removal and remedial.⁹⁹ These actions have their own rules and procedures for investigation and clean up. The processes under CERCLA are very lengthy, complicated, and filled with acronyms.¹⁰⁰ CERCLA does provide for citizen suits to be filed under specific conditions, and these cases, which typically seek cleanup from private defendants, have had some successes.

Notably, the Lower Duwamish Waterway in Seattle, Washington, became the site of the first environmental justice analysis performed by the EPA in the nearly 20 years since Executive Order 12,898.¹⁰¹ The EPA analyzed this Superfund site by balancing the fishing rights of federally recognized tribes, the continued use of the river for subsistence fishing by disadvantaged populations, the disparate health impacts suffered by local residents under current area conditions, and the ongoing industrial interests in the river.¹⁰²

7. Toxic Substances Control Act

The Toxic Substances Control Act (TSCA) addresses threats to health and the environment from chemical substances. TSCA regulates the import, production, use, and disposal of its inventory containing more than 83,000 chemicals.¹⁰³ Under TSCA, EPA has the authority to screen, test, restrict, and require reporting by people who manufacture, import, process, or distribute these chemical substances that pose unreasonable health or environmental threats.¹⁰⁴ Again, TSCA does not provide for plaintiffs' monetary awards, but like the CAA, the judicial review section of the statute allows for the recovery of attorney's fees and costs.¹⁰⁵

Combined, these laws are the most important mechanisms for ensuring the prevention and cleanup of contamination, pollution, and other sorts of environmental harms that not only affect the natural environ-

98. *National Priority List (NPL) Sites—By State*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/superfund/national-priorities-list-npl-sites-state> (last updated May 6, 2016).

99. See Schnapf, *supra* note 97.

100. For a more robust discussion of the CERCLA procedures, see Schnapf, *supra* note 99, at 524–41.

101. Gilliland, *supra* note 74, at 1–2.

102. *Id.*

103. *Summary of the Toxic Substances Control Act*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/laws-regulations/summary-toxic-substances-control-act> (last updated Nov. 16, 2015).

104. *Id.*

105. See 15 U.S.C. § 2618(d) (2012).

ment, but also, of course, affect individual and public health.¹⁰⁶ However, with that said, when examining historical environmental injustices such as Old Smokey and its constant ash, smoke, and stench, the challenges of restoration become clear: how are affected communities to seek justice with only injunctive remedies that seek to clean up past damage? Of course, if Old Smokey were still in operation these laws would be quite useful, but without an ongoing contamination of these communities, they are left in the dark as to what they have been exposed. They are left in the dark to only assume why their communities were targeted and poisoned but are never provided a clear and distinct reason. They are never provided an apology, and they are never asked what they would like to do next. In the case of Old Smokey, a community that has been disenfranchised for over a century has been forced to endure pollution, segregated housing policies, and new segregated zoning policies.¹⁰⁷ In addition, old wounds of neglect are being reopened as the community's concerns about Old Smokey's contamination in the West Grove are ignored and attention is directed toward affluent neighborhoods. The community has requested time and time again for public health officials, universities, and government officials to study Old Smokey's impact.¹⁰⁸ Their requests have gone unanswered. Even in Florida,¹⁰⁹ a state that "created the Florida Environmental Equity and Justice Study Commission to collect data to determine whether [low-income minority groups] in Florida are subject to unequal enforcement of state environmental laws,"¹¹⁰ hundreds of historical environmental injustices exist that have either never been

106. The cleanup is of utmost importance to the environment and ongoing issues of exposure for human health, but it does not tackle the question of justice. It does not seek to rebuild these communities, but only seeks to clean up these communities.

107. These new segregated policies and practices allow for redevelopment in predominantly low-income minority neighborhoods without any sort of affordable housing protections in place. This leads to affordable housing stock being demolished and its residents displaced. These residents are then unable to afford a new rental in their current neighborhood and are forced out of their community, typically to a more segregated community that is "affordable." These patterns and practices lead to displacement, the perpetuation of segregation, and a lack of fair and affordable housing options.

108. See Petition Letter from Old Smokey Steering Committee to Agency for Toxic Substances and Disease Registry (Nov. 20, 2014) (on file with University of Miami School of Law Environmental Justice Clinic).

109. See AM. BAR ASS'N & HASTINGS COLL. OF THE LAW PUB. LAW RESEARCH INST., ENVIRONMENTAL JUSTICE FOR ALL: A FIFTY STATE SURVEY OF LEGISLATION, POLICIES AND CASES 61–64 (Steven Bonorris ed., 4th ed. 2010). "In 1998, the Florida Legislature created the Center for Environmental Equity and Justice at Florida Agricultural & Mechanical University in Tallahassee." See Maribel Nicholson-Choice, *The Many Faces of Environmental Justice*, FLA. B.J., May 2000, at 50, 50. The center conducts research, develops policies, and engages in educating and training communities on environmental justice issues. The center may also enter into memoranda of understanding with state agencies to address environmental justice matters. *Id.*

110. Nicholson-Choice, *supra* note 109, at 50.

remediated or have been remediated without recognition of the injustice.¹¹¹ Thus, federal environmental laws and even those of states that recognize environmental justice in their laws or policies are often wholly inadequate for communities seeking justice.

B. Tort Compensation and Medical Monitoring

Recognizing that federal environmental laws do not adequately compensate communities for historic environmental injustices,¹¹² the tort-litigation compensation model, including wrongful death actions and mass toxic torts, is frequently invoked in these cases. However, while the tort-litigation compensation model has remedies that could provide meaningful monetary awards, they are almost wholly unrealistic for low-income communities that barely have access to general civil legal assistance, let alone complex mass toxic torts. Even if the tort-litigation compensation model were accessible, it does not provide reconciliation or social healing. If anything, it re-traumatizes these communities as they are forced to prove their harm, suffering, and worth to assess compensatory damages. Forcing these communities to litigate their injustice and indignities in an adversarial setting undermines the very mission of environmental justice to provide all people a meaningful opportunity to be involved in environmental laws, policies, and programs.

Medical monitoring is one of the most significant legal tools to emerge for environmental justice-seeking communities in the last few decades.¹¹³ Medical monitoring is a remedy whereby a program pays for medical examinations to provide for early detection of diseases and conditions associated with exposure to particular contaminants the defendant

111. See *infra* Part IV.B.

112. There are other environmental law or economic tools and incentives to clean up and revitalize properties that are contaminated or have the perception of contamination. See Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2356 (2002), available at <https://www.congress.gov/107/plaws/publ118/PLAW-107publ118.pdf>. This federal “Brownfields Law” provides grants, technical assistance, and resources to communities to clean up, sustainably reuse, and reinvest in formerly contaminated properties. Many states have also enacted their own brownfields programs that typically mirror the federal program. For example, Florida’s Brownfield Redevelopment Act, FLA. STAT. §§ 376.77–376.85 (2012), created financial and regulatory incentives to encourage voluntary cleanup and redevelopment of abandoned or underused commercial and industrial sites. The Florida Brownfields Programs are designed to empower communities and other stakeholders in economic redevelopment to work together in a timely manner to prevent, assess, safely clean up, and sustainably reuse Brownfields. See *id.* § 376.78. The Florida Brownfields Association has established an Environmental Justice and Public Health Committee to assist low-income & minority communities located in Brownfields areas. See *Florida Brownfields Association Committees*, FLA. BROWNFIELDS ASS’N, <http://www.floridabrownfields.org/?page=10> (last visited Mar. 30, 2016).

113. See *Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 746 F.2d 816, 824–25 (D.C. Cir. 1984).

allegedly exposed to the community. This contradicts traditional tort law theory, which requires a plaintiff to have suffered an actual harm or injury. Here, the plaintiffs can bring a cause of action prior to exhibiting any harm or injury because their exposure to the contamination is likely to make them sick. “This remedy is rooted in a desire to promote the public health benefits of early detection and the lower medical costs that come with early detection.”¹¹⁴ Proponents of medical monitoring argue that, rather than forcing plaintiffs to wait until sickness develops, the basic notions of fairness and social justice require the defendant to provide for early detection methods.¹¹⁵ This remedy is most often sought in the “toxic tort” arena of environmental justice cases.¹¹⁶

Six states view medical monitoring as a tort remedy of law similar to traditional tort claims, while two states recognize the claim in equity. Specifically, Arizona, California, Missouri, New Jersey, Utah, and West Virginia permit plaintiffs to seek medical monitoring damages in tort claims, and Florida and Pennsylvania allow plaintiffs to bring medical monitoring claims in equity as separate claims.¹¹⁷ According to the Florida case *Petito v. A.H. Robbins Co.*, a trial court may use its equitable powers to create and supervise a fund for medical monitoring purposes if the plaintiff proves the following elements: (1) the plaintiff has been exposed to greater than normal background levels of (2) a proven hazardous substance; (3) the exposure was caused by the defendant’s negligence; (4) as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease; (5) a monitoring procedure exists that makes the early detection of the disease possible; (6) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and (7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles.¹¹⁸ In other courts, recovery for medical monitoring

114. Adam P. Joffe, Note and Comment, *The Medical Monitoring Remedy: Ongoing Controversy and a Proposed Solution*, 84 CHI.-KENT L. REV. 663, 665 (2009).

115. *Id.*

116. *Id.*

117. See, e.g., *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993) (recognizing medical monitoring claim for landowners whose water was contaminated from toxic waste at landfill); *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712 (Mo. 2007) (recognizing medical monitoring in Missouri for children exposed to emissions from a lead smelter); *Redland Soccer Club, Inc. v. Dep’t of the Army and Dep’t of Def. of the U.S.*, 696 A.2d 137 (Pa. 1997) (first Pennsylvania case recognizing medical monitoring for exposure to toxic substances at a park and soccer field that had previously been a landfill); *Perrine v. E. I. du Pont de Nemours & Co.*, 694 S.E.2d 815 (W. Va. 2010) (awarding medical monitoring to property owners due to off-site arsenic, cadmium, and lead soil contamination from a zinc smelter); *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424 (W. Va. 1999) (recognizing medical monitoring in West Virginia for occupational exposure to toxic substances from several acres of manufacturing debris).

118. *Petito v. A.H. Robbins Co.*, 750 So. 2d 103, 106–07 (Fla. Dist. Ct. App. 1999).

remains unsettled or it has been outright rejected.¹¹⁹ However, medical monitoring programs remain an excellent example of what can be included in community-based reparations as potentially life-saving remedies for communities affected by historical environmental injustices.

C. Property Damage Claims for Environmental Justice Communities

Property law can provide a legal avenue for owners of environmentally contaminated lands. Property owners may bring state property damage claims, such as nuisance, trespass, or strict liability,¹²⁰ as well as federal and state constitutional takings claims.¹²¹ To bring traditional property claims, property owners must usually pay for and arrange testing of their homes, buildings, and land themselves.

In the case of Old Smokey, under the relevant environmental protection laws, the municipality is required to delineate—continue testing outwards from contamination—until it no longer discovers contamination.¹²² Over the last few years, there has been no delineation of testing onto private properties, despite the municipality's letter to private homeowners requesting permission to perform soil testing.¹²³ Providing access to the City to test for contamination on private property is a risky proposition for any homeowner, but is especially risky for low-income homeowners who may be unable to afford additional testing and remediation,

119. See *Caronia v. Philip Morris USA, Inc.*, 5 N.E.3d 11 (N.Y. 2013) (ruling that medical monitoring is not a separate cause of action); see also Debra M. Perry & Zane C. Riester, *The Viability of Medical Monitoring Class Actions*, FOR THE DEFENSE, July 2009, at 26, 28.

120. Nuisance, the intentional use that substantially interferes with the reasonable use, enjoyment, or value of another's property, is an important theory of relief for owners of environmentally contaminated property. Allan Kanner, *Assisting Injured Individuals*, in THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS, *supra* note 71, at 642; see, e.g., *Borland v. Sanders Lead Co.*, 369 So.2d 523 (Ala. 1979); *Spur Indust., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700 (Ariz. 1972); *Town of Mount Pleasant v. Van Tassell*, 166 N.Y.S.2d 458 (N.Y. Sup. Ct. 1957); *Martin v. Reynolds Metal Co.*, 342 P.2d 790 (Or. 1959); *Madison v. Ducktown Sulfur, Copper & Iron Co.*, 83 S.W. 658 (Tenn. 1904). Trespass is a wrongful invasion or encroachment of an interest in property; it requires proving that defendant acted with knowledge of the substantial certainty of invasion by the contaminant. Kanner, *supra*, at 641–42. Strict liability is probably the most useful theory of liability in environmental property cases; it can be imposed on parties engaged in ultrahazardous activity for profit constituting a nonnatural use of land. *Id.* at 640; see, e.g., *Sterling v. Velsicol Chem. Corp.*, 647 F. Supp. 303 (W.D. Tenn. 1986), *rev'd in part, aff'd in part*, 855 F.2d 1188 (6th Cir. 1988); *Chavez v. S. Pac. Transp. Co.*, 413 F. Supp. 1203 (E.D. Cal. 1976); *State Dep't of Env'tl. Prot. v. Ventron Corp.*, 468 A.2d 150 (N.J. 1983).

121. Orell Anderson et al., *The Intersection of Eminent Domain and Environmental Contamination*, AM. B. ASS'N (May 19, 2011), <https://apps.americanbar.org/litigation/committees/environmental/articles/051911-eminent-domain.html>.

122. See MIAMI-DADE COUNTY, FLA., CODE OF ORDINANCES § 24-44(2)(j)(iv), (k) (2016).

123. Letters from Jeovanny Rodriguez, P.E., Assistant Dir., City of Miami, to Property Owners (Sept. 30, 2014) (on file with the University of Miami School of Law's Environmental Justice Clinic).

which can run into the thousands of dollars depending on the type of contaminants being tested.¹²⁴ Typically, the municipality will pay for the actual testing, but then will not pay for nor provide the remediation services, thus leaving contaminated soil where it sits. Without any sort of outreach, other than this letter, it is no surprise that homeowners have not provided this permission and thus have not attempted to rectify potential property contamination through claims such as nuisance, trespass, or inverse condemnation.

D. Civil Rights Laws in an Environmental Justice Framework

Analyzing environmental justice through the general environmental law regimes and tort-compensation models, the options for environmentally wronged communities do not appear, nor have they proved to be, very promising. There are, however, several civil rights causes of action available for current environmental injustices, including Equal Protection claims, Title VI administrative complaints to the EPA, and 42 U.S.C. § 1983 claims against state actors.¹²⁵

1. Fourteenth Amendment Equal Protection Clause

Equal protection has evolved over the centuries from its use in upholding “separate but equal” in *Plessy v. Ferguson*¹²⁶ to the Court overruling separate but equal in *Brown v. Board of Education*.¹²⁷ The usual measure of judicial review for Equal Protection claims is a rational basis test unless a suspect classification such as race or a fundamental right like free speech is involved. The challenged state action almost always

124. For example, one sample testing for dioxin is typically \$600–\$1,000.

125. There are some other civil rights titles that are applicable, such as the Fair Housing Act, 42 U.S.C. § 3601–3619 (2012). *See* Tex. Dep’t of Hous. and Cmty. Affairs v. Inclusive Cmty. Project, Inc., 135 S. Ct. 2507 (2015) (upholding disparate-impact claims under the Fair Housing Act (FHA)); Alice L. Brown & Kevin Lyskowski, *Environmental Justice Litigation: Environmental Justice and Title VIII of the Civil Rights Act of 1968 (The Fair Housing Act)*, 14 VA. ENVTL. L.J. 741, 745 (1995) (citing *Oliver v. City of Indio*, No. SA CV 90-0097 (C.D. Cal. Feb. 19, 1990)). In *Oliver*, the City of Indio targeted a historically African-American neighborhood for acquisition and demolition to expand a privately owned shopping mall, and the plaintiffs were provided with meaningful relief after asserting that the City’s redevelopment plan disproportionately affected the housing choices and opportunities, thus violating the FHA. *See id.* In *Houston v. City of Cocoa*, 2 Fair Hous.-Fair Lending (P-H) ¶ 15,625 (M.D. Fla. Dec. 22, 1989), the plaintiffs challenged the adverse impacts of the city’s heavy commercial zoning in low-income African-American communities. *See* Brown & Lyskowski, *supra*, at 747; *see also* Colin Crawford, *Other Civil Rights Titles*, in *THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS*, *supra* note 71, at 69–101 (discussing the use of the Fair Housing Act to challenge environmental injustices).

126. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding a Louisiana state law for separate accommodations in railroad cars).

127. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (overruling separate but equal as inherently unequal).

passes muster under the rational basis test, and thus, Equal Protection claims are not a reliable avenue to challenge state action.¹²⁸ In the watershed case of *Washington v. Davis*, the Supreme Court determined that action by state or federal government was not “invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution.”¹²⁹

Bringing an environmental justice case under the Fourteenth Amendment Equal Protection Clause is almost certain to fail without clear-cut evidence of racial animus used to justify the state action. Environmental justice cases require the same standards as any other race-based discrimination claims, including challenges to the federal government’s actions under the Fifth Amendment Due Process Clause.¹³⁰ Government action—either through direct state action (operation of a municipal trash incinerator) or private discrimination that is mandated or abetted by state law—can trigger the Equal Protection Clause.¹³¹ State constitutions also have Equal Protection clauses and can be used to challenge state and municipality discriminatory action.

Practically, environmental justice cases have had little success through Equal Protection challenges. The first major environmental justice decision under Equal Protection is *Bean v. Southwestern Waste Management Corp.*¹³² Plaintiffs challenged a state permit for a solid waste landfill on the outskirts of Houston and asserted the permit approval was part of a pattern of discrimination.¹³³ Of Houston’s solid waste sites, 68% were in the city’s eastern half, where 62% of Houston’s minority population resided.¹³⁴ The court was not persuaded that there was a pattern of discrimination because it found the proportion of total

128. See Derek W. Black, *The Contradiction Between Equal Protection’s Meaning and Its Legal Substance: How Deliberate Indifference Can Cure It*, 15 WM. & MARY BILL RTS. J. 533, 533 (2006).

129. *Washington v. Davis*, 426 U.S. 229, 242 (1976) (unanimously holding that a disparate impact may be proof of racial discrimination, but actual evidence of invidious discrimination must be presented in a Title VII claim); see also *Vill. of Arlington Heights v. Metro. Hous. Dev. Co.*, 429 U.S. 252 (1977) (reaffirming the need to prove a discriminatory purpose in equal protection cases asserting discrimination based on race regarding a one-family zoning law in a Chicago suburb that was challenged as being racially motivated). The state action in *Davis* was D.C.’s required written test given to police department applicants. See *Davis*, 426 U.S. at 232. The plaintiffs were able to show that four times as many black applicants failed this test as whites. *Id.* at 237.

130. Philip Weinberg, *Equal Protection*, in *THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS*, *supra* note 71, at 3.

131. U.S. CONST. amend. XIV, § 1.

132. *Bean v. Sw. Waste Mgmt. Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979).

133. *Id.* at 675.

134. *Id.* at 678.

solid waste sites was almost evenly split between minority and nonminority communities.¹³⁵

The second influential early environmental justice decision regarding the application of the Equal Protection Clause is *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning and Zoning Commission*. Similarly to *Bean*, *East Bibb* involved a suit to enjoin a landfill in a largely minority community.¹³⁶ And again as in *Bean*, this suit failed.¹³⁷ The court here relied largely on the fact that the only other private landfill in the county was in a heavily white area.¹³⁸

The third Equal Protection decision implicating environmental justice also included a landfill siting in *R.I.S.E., Inc. v. Kay*.¹³⁹ The plaintiff organization, Residents Involved in Saving the Environment (R.I.S.E.), alleged a violation of the Equal Protection Clause when the county granted a permit for a regional landfill to be sited in a predominantly black community in northern Virginia.¹⁴⁰ This community was 64% black, and the landfill was to be a replacement landfill for three smaller county sites, which were in areas made up of 95–100% black residents.¹⁴¹ Here again, the court found that the plaintiffs had not shown purposeful racial discrimination and that the siting decisions were based on the sites' environmental suitability.¹⁴² Other similar decisions to *Bean*, *East Bibb*, and *R.I.S.E.*, include *Boyd v. Browner*¹⁴³ and *Rozar v. Mullis*.¹⁴⁴ These cases also rejected Equal Protection environmental claims.

Interestingly, two examples of successful equal protection suits on environmental justice issues involved unequal provision of municipal services rather than siting decisions. In both *Hawkins v. Town of Shaw*¹⁴⁵

135. *Id.* The court relied on the proportion of total solid waste sites as being 42.3% of the sites were in the 42.5% of tracts with a largely minority population and 57.7% were in the 57.5% percent of largely nonminority tracts. *Id.*

136. *E. Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb Cnty. Planning & Zoning Comm'n*, 706 F. Supp. 880 (M.D. Ga. 1989) (decision to approve the operation of a landfill did not deprive minority residents of equal protection of the laws when the zoning commission appeared to have made the decision based on the merits and not on improper racial animus).

137. *Id.*

138. *Id.*

139. 768 F. Supp. 1144 (E.D. Va. 1991).

140. *Id.* at 1148–49.

141. *Id.* at 1148.

142. *Id.* at 1150.

143. *Boyd v. Browner*, 897 F. Supp. 590 (D.D.C. 1995) (finding that Equal Protection claim against government agencies failed because black homeowners were unable to show a discriminatory purpose in the purchase of their land or that white owners whose contaminated property was acquired were similarly situated).

144. *Rozar v. Mullis*, 85 F.3d 556 (11th Cir. 1996) (holding that a neighborhood association's alleged racial discrimination in the siting and permitting of a solid waste landfill was time-barred and that the association failed to put forward any viable federal statutory or constitutional claims).

145. *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971).

and *Ammons v. Dade City*,¹⁴⁶ the court enjoined the municipalities to pave streets and provide equal sewer services in the black communities.

Turning to other applicable civil rights laws, it is clear that those who suffer environmental injustices have little recourse under the Fifth or Fourteenth Amendments of the U.S. Constitution and that the burdens for proving environmental siting decisions or environmental inequities—as opposed to municipal inequities—is often too high or simply not attainable.¹⁴⁷

2. 42 U.S.C. § 1983 Claims

Another oft-desired route for environmental justice claims is through 42 U.S.C. § 1983. The Reconstruction Era statute, enacted in 1871, provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State[,] . . . subjects, or causes to be subjected, any citizen . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law [or] equity¹⁴⁸

Theoretically, historic environmental injustices can be brought in § 1983 actions, but such actions are frequently prevented by a statute of limitations. Generally, the statute of limitations of the state in which the action is commenced applies, and the statute of limitations for § 1983 actions is the same as the statute of limitations for personal injury actions.¹⁴⁹ Thus, § 1983 actions very rarely apply in historic environmental injustice matters.¹⁵⁰

3. Title VI of the 1964 Civil Rights Act

It would appear that communities could bring claims of environmental injustices under Title VI and be successful, given the provision's language, as it forbids discrimination by programs receiving federal fi-

146. *Ammons v. Dade City*, 783 F.2d 982 (11th Cir. 1986).

147. See *R.I.S.E.*, 768 F. Supp. at 1150 (finding that there was no showing of racial animus or intent despite the statistics indicating disproportionate siting of solid waste facilities to be in almost exclusively black communities).

148. 42 U.S.C. § 1983 (2012).

149. Philip Weinberg, *Equal Protection*, in *THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS*, *supra* note 71, at 19–20.

150. Arguments have been made regarding the continuing tort doctrine. See, e.g., Kyle Graham, *The Continuing Violations Doctrine*, 43 GONZ. L. REV. 271 (2008); Albert C. Lin, *Application of the Continuing Violations Doctrine to Environmental Law*, 23 ECOLOGY L.Q. 723 (1996); James R. MacAyeal, *The Discovery Rule and the Continuing Violation Doctrine as Exceptions to the Statute of Limitations for Civil Environmental Penalty Claims*, 15 VA. ENVTL. L.J. 589 (1996).

nancial assistance.¹⁵¹ Claims under this title can be pursued for both administrative and judicial relief by bringing claims of disparate impact discrimination under § 602.¹⁵² The environmental justice movement began bringing actions under Title VI because almost all state environmental agencies receive federal funding from the EPA.¹⁵³ Title VI is not usually used against federal agencies and thus is typically brought to challenge state or municipal actions.¹⁵⁴ However, during the last fifteen years, this remedy has been significantly narrowed.¹⁵⁵ *Alexander v. Sandoval*¹⁵⁶ prohibits private individuals or organizations from filing disparate impact discrimination claims under § 602 of Title VI, effectively forcing communities to prove intentional discrimination.¹⁵⁷ Thus, communities have sought recourse through agency regulations under Title VI for environmental justice complaints.

Not only is it that current and ongoing environmental injustices face a tremendous uphill battle in the courts using either environmental laws, civil rights laws, or administrative laws, but it is even more clear that historic environmental injustices have very limited, if any, recourse in the court system. Cases targeting historic environmental injustices would likely have the most success through the tort-compensation models, but as is evident from reparations scholarship and practice, these models are rarely successful for historic injustices such as slavery. Since the dawn of the environmental justice movement, it has been strikingly clear that there are only inadequate legal solutions to providing justice for affected communities.¹⁵⁸

151. 42 U.S.C. § 2000d (2012). “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” *Id.*

152. Bradford C. Mank, *Title VI*, in *THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS*, *supra* note 71, at 24.

153. *Id.* at 24–25.

154. *Id.*

155. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (holding that there is no private right of action to enforce disparate impact regulations under Title VI); *see also* *Gonzaga Univ. v. Doe*, 536 U.S. 273, 285–86 (2002) (holding that there must be explicit congressional intent to confer private rights in spending clause litigation to be enforced through § 1983); *S. Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot.*, 274 F.3d 771, 777–78 (3d Cir. 2001) (holding that in addition to no private right of action, Title VI does not create freestanding rights to be enforced through 42 U.S.C. § 1983 by private individuals); U.S. COMM’N ON CIVIL RIGHTS, NOT IN MY BACKYARD: EXECUTIVE ORDER 12,898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE 79 (2003), available at <http://www.usccr.gov/pubs/envjust/ej0104.pdf>.

156. *Sandoval*, 532 U.S. at 300 (Stevens, J., dissenting) (“Litigants who in the future wish to enforce the Title VI regulations against state actors in all likelihood must only reference § 1983 to obtain relief . . .”).

157. *Id.*; *see also* *S. Camden Citizens in Action*, 274 F.3d at 777–78.

158. *See* National People of Color Environmental Leadership Summit’s 17 Principles of Environmental Justice, *supra* note 21, at Principle 9; *see also* Bradford C. Mank, *Environmental Justice*

IV. ALTERNATIVE REMEDIES: COMMUNITY-BASED REPARATIONS

In proposing community-based reparations as a mechanism for achieving environmental justice, the term reparations must be defined in the broadest and most comprehensive manner. Professors Alfred Brophy and Eric Yamamoto's influential reparations scholarship calls for reconsideration of reparations and offers an American reparations path that elevates the role of "social healing" and links groups and societal healing to "doing justice."¹⁵⁹ Incorporating this scholarship into this proposal would allow reparations to serve as a source of funding for neighborhood associations, community-based entities, community groups, or individuals living within a specified community or zip code that have suffered historic environmental injustices. These reparations might be provided by the perpetrator of the injustice or by an entity, corporation, or government that allowed the injustice to continue unregulated and unchecked. The reparations program is to be created by the defined community in conjunction with the various perpetrators or the complacent parties, which in turn create the funding source for the program.¹⁶⁰ It is possible that the community-based reparations, being based on what the community needs, may not be a source of funding and may instead be increased transparency, increased awareness and education campaigns, or other nonmonetary programming.

A. Justifications for Community-Based Reparations

Drawing from Professor Yamamoto's suggested framework of social healing through justice outlines three distinct markers.¹⁶¹ First, social healing through justice builds upon the scholarship embracing reconcilia-

and Discriminatory Siting: Risk-Based Representation and Equitable Compensation, 56 OHIO ST. L.J. 329, 333 (1995) (failing to adequately recognize environmental injustices prevalent in siting decisions, but proposing risk-based representation and compensation for the siting decision through community-based negotiations). "The EPA or state siting agencies, however, would provide a technocratic framework for assessing the scope of risks, despite the limitations of risk and cost-benefit analysis; would set limits on the maximum amount of risk in any community; and would specify the minimum compensation required from a developer. Immediate neighbors, political residents in the siting community, and regional residents would have a varying degree of input into the siting and compensation process depending upon the risk they bear from a facility." *Id.*

159. Eric Yamamoto, Sandra Hye Yun Kim & Abigail M. Holden, *American Reparations Theory and Practice at the Crossroads*, 44 CAL. W. L. REV. 1, 3 (2007) [hereinafter Yamamoto, *American Reparations Theory and Practice*]; see also Alfred Brophy, *Reconsidering Reparations*, 81 IND. L.J. 811 (2006) [hereinafter Brophy, *Reconsidering Reparations*].

160. Depending on the community and the community's desires, individual payments to people who have directly suffered the effects of the environmental injustice or individuals who are direct descendants of individuals who suffered the environmental injustice may be appropriate.

161. Yamamoto, *American Reparations Theory and Practice*, *supra* note 159, at 3.

tion, rather than compensation, as the initial premise for reparations.¹⁶² Reparations for historic environmental injustices are not simply about monetary payments at the outset of the discussion for reparations. To change the narrative and critical dialogue around reparations as a baseline concept, the communities seeking reparations for their environmental injustices need to recognize the resistance they will face and tailor the conversation around what reconciliation means to the community, rather than “the debt owed.”¹⁶³ Second, reparations are not the end of the controversy, but rather an integral part of the larger goal of social healing.¹⁶⁴ Reparations for environmental injustices begin the healing process through multifaceted discussions, historical storytelling, and targeting responsibility, recognition, and reconstruction of the community and the community’s relationship with the offenders of the injustice. Third, reparations practice in these injustice-burdened communities across the United States must draw from the insights and struggles seen through the various global reparations movements.¹⁶⁵

Environmental justice reparations are necessary for shifting the power paradigm among communities and those committing injustices. There is very limited access and justice in the court system and thus the push must be for wronged communities to demand that their legislators examine the effects of the historic environmental injustice and remedy the historic wrong. Reparations for historic environmental injustices must be retrospective and prospective. Critics of reparations often confine the definition of reparations to backward-looking programs, however a truly reparative program must be both retrospective and prospective either through apologies, relationship and community building, or community-based funds or educational programs to attempt to prevent the type of historic injustice from occurring again.¹⁶⁶ Critics prefer to focus on the retrospective aspect of reparations as it is more controversial (i.e., “Why should American taxpayers or governments that did not them-

162. *Id.*

163. “This renewed attention in the repair paradigm is important because it moves past the flagging tort litigation-compensation model for reparations, offers a forward-looking remedy, and aims to generate an interest-convergence among the varying slices of the American polity. The fourth generation is also significant because it frames the moral justification for reparations away from repaying ‘a debt owed’ toward social healing.” *Id.* at 33 (footnotes removed).

164. *Id.* at 4.

165. *Id.* See generally THE HANDBOOK OF REPARATIONS (Pablo de Greiff ed., 2006) [hereinafter HANDBOOK OF REPARATIONS].

166. See generally Brophy, *Reconsidering Reparations*, *supra* note 159 (discussing Eric Posner and Adrian Vermeule’s definition of reparations to include only backward-looking programs in their article *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689 (2003)).

selves commit the bad acts be required to pay for them?”).¹⁶⁷ It is always easier to rally naysayers. It is also easier to focus on the past, rather than address the current and ongoing injustices that have damaged communities for decades.

Community-based healing and social justice through healing require recognition, responsibility, reconstruction, and reparation.¹⁶⁸ The party that inflicted the injustice on the community must acknowledge and accept its responsibility, and publicly atone and apologize for its behavior. The perpetrator of the injustice, a municipality, for example, must include in the atonement and apology the goal of building and strengthening the relationship between the community and the municipality in order to empower and franchise the community. The municipality must demonstrate that it accepts its past contribution to the disenfranchisement of the community and seeks to remedy the effects of the disenfranchisement, as well as prevent further acts of injustice.¹⁶⁹ Communities have been so damaged and deeply affected by historic environmental injustices that for a reparations program to be successful in any meaningful way, it must not only revisit the past, but also address what can be done to make the community whole—or at least less damaged.¹⁷⁰ For example, time after time, and community meeting after community meeting, residents of the West Grove demand that the City apologize to the community; create a medical monitoring program (without litigation or a court order); create open and transparent relationships and dialogues between the community members and their elected officials and City staffers; and create right-to-know laws that prevent the community from being left in the dark regarding environmental contamination on public lands.¹⁷¹ And yet, the City has taken no steps to address the residents’ concerns. In fact, the City has completely ignored the community’s call for strengthened right-to-know laws and policies and the City rejects the request that medical monitoring is important for this community because it believes there

167. See *id.* at 825; Kaimipono David Wenger, *From Radical to Practical (And Back Again?): Reparations, Rhetoric, and Revolution*, 25 J. CIV. RTS. & ECON. DEV. 697, 707 (2011) (noting the practical/radical divide of reparations theory is not simply a restatement of the political/moral divide).

168. Yamamoto, *American Reparations Theory and Practice*, *supra* note 159, at 4.

169. *Id.* at n.259.

170. If a community can ever become whole—especially if it did not start out whole through segregation, Jim Crow, and intentional racism.

171. See UNIV. OF MIAMI ENVTL. LAW JUSTICE PROJECT, OLD SMOKEY STEERING COMMITTEE INFORMATION SHEET (2015) (on file with University of Miami School of Law Environmental Justice Clinic).

are no health risks.¹⁷² Thus, for a reparations program to be meaningful it would require the City to actually listen to these community concerns and address them head-on through programming, funding, or other relevant mechanisms.

B. Reparations Through the Ages

The discussion of reparations is not new, but programs and scholarship have advanced more in recent years.¹⁷³ Reparations scholarship has seen various waves,¹⁷⁴ or generations, as they are sometime called,¹⁷⁵ and the actual practice of reparations has been used in this country since at least the eighteenth century.¹⁷⁶ The first generation allowed the idea of reparations for slavery and other injustices as group-based remedies to become a reality.¹⁷⁷ It also introduced moral justification for reparations rather than just legal justification.¹⁷⁸ The second generation largely grew out of the Civil Liberties Act of 1988, which provided a presidential apology to Japanese Americans interned during World War II, in addition to monetary reparations.¹⁷⁹ During this second generation, there

172. This has been stated by city officials at various meetings; the author does not believe such individuals are qualified to discuss environmental exposure latent effects of disease. Therefore, comments such as these only reinforce the community's injustice and indignity.

173. See, e.g., HANDBOOK OF REPARATIONS, *supra* note 165; see also Yamamoto, *American Reparations Theory and Practice*, *supra* note 159, at 12 (discussing the Canadian reparations program to address aboriginal injustice allocating "\$1.9 billion to fund a comprehensive four-part reparations-healing program that includes symbolic monetary payments to survivors, the creation of a Truth and Reconciliation Commission for future storytelling and healing initiatives, the establishment of a public commemoration and education fund, and payments to the Aboriginal Healing Foundation").

174. Charles J. Ogletree, Jr., *Repairing the Past: New Efforts in the Reparations Debate in America*, 38 HARV. C.R.-C.L. L. REV. 279, 286 (2003).

175. See Yamamoto, *American Reparations Theory and Practice*, *supra* note 159, at 16 (discussing the first, second, and third generations of reparations scholarship); Brophy, *Reparations Talk*, *supra* note 65, at 81–82.

176. For example, take the case of Belinda Royall who in 1783, petitioned the Commonwealth of Massachusetts for reparations after being enslaved for 50 years. She won 15 pounds and 12 shillings to be paid out of the Royall family's estate. See Ta-Nehisi Coates, *A Case for Reparations*, ATLANTIC (June 2014), <http://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631/>. *Contra* Eric Posner & Adrian Vermeule, *Reparations for Slavery and Other Historical Injustices*, 103 COLUM. L. REV. 689 (2003) (using a backward-looking definition of reparations and settling on the first reparations program occurring in 1946 in the United States).

177. See Yamamoto, *American Reparations Theory and Practice*, *supra* note 159, at 16–17.

178. See Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 383 (1987) ("An act of racism against a powerless victim is a classic case justifying imposition of a proximate causal connection. The typical reparations claim involves powerless victims in no way capable of contributing to the illegal acts. These situations involve the gross imbalance of moral claim between the innocent and guilty to which the law is peculiarly sensitive.").

179. See Yamamoto, *American Reparations Theory and Practice* *supra* note 159 at 18; Brophy, *Reparations Talk*, *supra* note 65, at 82; Civil Liberties Act of 1988, 50 U.S.C. § 1989 (1988)

were more reparations programs happening around the globe. For example, during the late 1990s, the South African Truth and Reconciliation Commission¹⁸⁰ utilized both reparations and reconciliation to attempt to bring together multiple groups and together engage in rebuilding community after apartheid. The third generation framed reparations claims in legal frameworks, particularly tort-compensation unjust enrichment claims for slavery reparations and other historic injustices.¹⁸¹ This third generation of modern-day reparations has continued the framing of reparations in the courts, but has also been successful in some legislatures.¹⁸² The push towards the courts and legislatures has been a positive step in the reparations movement and a step outside the bounds of academic scholarship and into the practicing world; however, it has been increasingly difficult to seek justice through these systems. There has been little success in slavery reparations claims brought through traditional tort and contract law.¹⁸³ In particular, claims have been barred by statutes of limitation and through standing challenges due to the absence of directly harmed individuals (those who were enslaved).¹⁸⁴ Further, requiring the roots of the slaveholder to be traced to individual American families, in the absence of individual perpetrators, has not been a particularly suc-

(signed by President Reagan and authorized the payment of \$1.2 billion in reparations to Japanese Americans interned without any trial or due process, but rather because of their race and ethnicity).

180. South Africa's Truth and Reconciliation Commission (TRC) was set up by the Government of National Unity to help deal with the violence and human rights abuses which occurred under apartheid. The TRC assists victims of apartheid with tuition fees for basic and higher education and training. See *Welcome to the Official Truth and Reconciliation Commission Website*, TRUTH & RECONCILIATION COMMISSION, <http://www.justice.gov.za/trc/> (last visited May 25, 2016).

181. See, e.g., *Cato v. United States*, 70 F.3d 1103, 1108, 1111 (9th Cir. 1995) (affirming the dismissal based on sovereign immunity and statute of limitations issues); Charles J. Ogletree, Jr., *The Current Reparations Debate*, 36 U.C. DAVIS L. REV. 1051, 1067 n.56 (2003). These attempts to win through the court system have resulted in dismissals of these claims on technical grounds, such as statute of limitations issues. This also enforces the narrative that claims for slavery reparations are unrealistic and without merit. See Wenger, *supra* note 167, at 726 (discussing the effect of lawsuit failures from not providing reparations; advocates not obtaining discovery; "fail[ure] to create the desired secondary effect of . . . litigation-impelled settlement[s], whether through congressional action or private company embarrassment"; and failure to shift public opinion about large scale reparations).

182. The Tulsa Race Riots destroyed what was known as "Black Wall Street" in Oklahoma. See *Alexander v. Oklahoma*, No. 03-C-133-E, 2004 U.S. Dist. LEXIS 5131 (N.D. Okla. 2004), *aff'd*, 382 F.3d 1206 10th Cir. 2004); Yamamoto, *American Reparations Theory and Practice*, *supra* note 159, at 6. In 1923, Rosewood, Florida, an entirely black inhabited town, was burned to the ground when a white mob chased all the residents out of town, burned their homes, and threatened the community to never return. The last surviving members of the riot received funds through a \$2 million bill passed by the Florida State legislature. Adam Yeomans, *Florida Pays Survivors of a 1923 Racist Attack: Rosewood: Blacks Were Run Out of Town by a White Mob. At Last, the State Allocates \$2 Million in Reparations*, L.A. TIMES (Feb. 12, 1995), http://articles.latimes.com/1995-02-12/news/mn-30965_1_racist-mob.

183. See Wenger, *supra* note 167, at 707-08; Brophy, *Reparations Talk*, *supra* note 65, at 128.

184. Yamamoto, *American Reparations Theory and Practice*, *supra* note 159, at 7.

cessful tactic.¹⁸⁵ Additionally, the variation and uncertainty of compensation amounts and sovereign immunity protections has called the viability of reparations claims into question.¹⁸⁶

Environmental justice reparations face some of these same issues, particularly statute of limitations defenses and issues of mootness for claims under any of the major environmental laws and sovereign immunity defenses, as many claims for reparations would be against municipalities that either committed the environmental injustice or allowed it to occur. In contrast to slavery reparations claims, however, to return to the case of Old Smokey, the individuals who were harmed by the incinerator are known (family members are easily identifiable in this small, close-knit community), as is the entity directly responsible for the incinerator's poor operation and siting in a Jim Crow neighborhood. Nonetheless, like slavery reparations claims focusing on tort models, the "causal chain is too long and has too many weak links for a court to be able to find that the defendants' conduct harmed the plaintiffs at all, let alone in an amount that could be estimated without the wildest speculation."¹⁸⁷ Thus, the court system and particularly the tort-compensation frameworks are not adequate means of addressing environmental injustices for descendants of those directly harmed.

Problems also arise when calculating damages. Determining a cognizable monetary amount of compensation for individual sufferers and communities of historic environmental injustices is difficult, as it would likely be based on illnesses and medical issues beginning decades earlier. Additionally, quantifying the psychological trauma of a community that has been forced to live with an incinerator for decades is practically impossible. While, there is a growing understanding of the effects of trauma, particularly the effects of race-based trauma,¹⁸⁸ and the difference between group psychological healing and individual psychological healing, calculating this for a whole community is challenging.¹⁸⁹

Although standing, mootness, and damages calculations also provide difficulties in the application and practice of an environmental injus-

185. *See id.* at 25–27.

186. *See id.*

187. *Id.* at 25 (quoting *In re African-American Slave Descendants Litig.*, 471 F.3d 754, 759 (7th Cir. 2006)).

188. Changes made to the Post-Traumatic Stress Disorder (PTSD) criterion in the Diagnostic and Statistical Manual-5 (DSM-5) may be a significant step toward recognizing the impacts of racism in diagnosis. This may be particularly relevant in the diagnosis of PTSD in African Americans who may be traumatized by familial, historical, or sociopolitical accounts of discrimination or ethnoviolence. *See* Monnica T. Williams et al., *Cultural Adaptations of Prolonged Exposure Therapy for Treatment and Prevention of Posttraumatic Stress Disorder in African Americans*, 4 BEHAV. SCI. 102, 103 (2014).

189. *See* Yamamoto, *American Reparations Theory and Practice*, *supra* note 159, at 44.

tice reparations program, this method allows for greater healing. The monetary compensation would be determined through what sort of actions the community believes will guide it through its healing process, whether that be a community center, education fund, public apology, truth and reconciliation commission, or another mode of reconciliation. A monetary amount can be attached to these demands, but the amount is unknown until the community has the opportunity to think through the possibility that it could “get something” for the injustice it suffered and then determine the financial value. Further, every community is different and it should be recognized at the outset of any call for community-based reparations that these reparations must be culturally appropriate and devised with the community in a leadership capacity directing the perpetrator.¹⁹⁰ Because of difficulties in aligning reparations theory and practice in already existing legal frameworks, there is a need to further reassess and refocus the route to which reparations are demanded—likely outside of the court system.¹⁹¹

The next generation of reparations will need to repair a society significantly damaged by its deep history of racism, segregation, and discrimination, and these repair efforts should target the areas where damage is severe and where reparations will have a huge impact on the continued growth of these communities, such as education, health care, housing, and banking.¹⁹² However, this framework has only garnered limited traction because it neither completely replaces the tort-compensation model, nor does it fully embrace the social healing that is required for complete reconciliation.¹⁹³ Similar to how tort and contract law prescribe legal remedies without reference to social justice or healing,¹⁹⁴ so, too, do the environmental laws that largely govern environmental justice claims fail to mention social justice. Thus, a multidisciplinary, multifaceted, approach must be utilized for successfully achieving the goals of community-based reparations.¹⁹⁵

190. See ERIC K. YAMAMOTO, *INTERRACIAL JUSTICE: CONFLICT AND RECONCILIATION IN POST-CIVIL RIGHTS AMERICA* 166, 194 (1999) (citing Karen Ito, *Ho'oponopono, "To Make Right": Hawaiian Conflict Resolution and Metaphor in the Construction of a Family Therapy*, 9 *CULTURE MED. & PSYCHIATRY* 201 (1985) (discussing the Indigenous Hawaiians' use of communal healing through a process called *ho'oponopono*, which uses prayer, statement of the problem, discussion, confession of wrongdoing, restitution when necessary, forgiveness and release).

191. See Yamamoto, *American Reparations Theory and Practice*, *supra* note 159, at 31.

192. See Ogletree, Jr., *supra* note 181; see also Wenger, *supra* note 167, at 711–13.

193. Yamamoto, *American Reparations Theory and Practice* *supra* note 159, at 34.

194. *Id.* at 40.

195. Without the constraints of the environmental or civil rights legal frameworks, the narrative about the environmental injustice can be broader and provide the community the opportunity to tell its story of what the injustice was like as a day-to-day struggle. Similarly to the framing of slavery reparations lawsuits in narrow tort models, as discussed by Professor Wenger, “this narrative excluded many other types of claims for harm to Blacks, such as voter suppression, violence and

Reparations dialogue and advocacy in the United States has mainly focused on reparations for slavery.¹⁹⁶ Recently, renewed attention outside of academic circles has been in large part due to the Ta-Nehisi Coates cover story for *The Atlantic*, *A Case for Reparations*. Coates presents the case for reparations based largely on the systemic and institutionalized racism that he documents throughout Chicago—practices historically used all across the country—regarding the process of redlining¹⁹⁷ and focuses on the neighborhood of North Lawndale. While Coates supports his argument with the history of slavery, he also uses the history of Jim Crow laws in the South and other similar practices in the North.¹⁹⁸ He takes a more current view of the need for reparations, situating his argument in the injustices suffered by African Americans due to the then-legal system of redlining and contract mortgages. These systems resulted in the degradation of property values in black communities, the rampant eviction and foreclosure of black-owned homes, the intentional contribution to white flight, as well as increased segregation in residential communities and the schools that serve the children who live there.¹⁹⁹ In particular, Coates discusses the lingering and ongoing effects that institutionalized segregation and racism had on the community of North Lawndale.²⁰⁰ Many of the communities that have suffered historic environmental injustices are also significantly affected in their quality of life at the time of the injustice, their degradation of property values and

lynching, cultural theft, peonage and slave-like convict labor practices.” Wenger, *supra* note 167, at 719–20.

196. See *Making Amends: Debate Continues Over Reparations for U.S. Slavery*, NPR (Aug. 27, 2001), <http://www.npr.org/programs/specials/racism/010827.reparations.html>.

197. The word “redlining” has roots in the 1930s, when the government-sponsored Home Owner’s Loan Corporation drafted maps to rank communities worthy of mortgage lending. The neighborhoods unworthy of mortgage lending, mostly low-income communities of color, were typically outlined in red. See Emily Badger, *Redlining: Still a Thing*, WASH. POST (May 28, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/05/28/evidence-that-banks-still-deny-black-borrowers-just-as-they-did-50-years-ago/>; see also Charles L. Nier, III, *Perpetuation of Segregation: Toward a New Historical and Legal Interpretation of Redlining Under the Fair Housing Act*, 32 J. MARSHALL L. REV. 617, 620 (1999).

198. Coates, *supra* note 176.

199. *Id.*

200. Coates opines:

In 1930 its population was 112,000. Today it is 36,000. The halcyon talk of “interracial living” is dead. The neighborhood is 92 percent black. Its homicide rate is 45 per 100,000—triple the rate of the city as a whole. The infant-mortality rate is 14 per 1,000—more than twice the national average. Forty-three percent of the people in North Lawndale live below the poverty line—double Chicago’s overall rate. Forty-five percent of all households are on food stamps—nearly three times the rate of the city at large.

Id.

health conditions, and the degradation of their neighborhood and community.²⁰¹

Along with the recent literature in the mainstream²⁰² and the academic rhetoric surrounding reparations, there are also organizations and attorneys who have brought reparations lawsuits in the hopes of achieving justice through the court systems.²⁰³ Arguably, the most influential organization dedicated to slavery reparations is N'COBRA, the National Coalition of Blacks for Reparations in America.²⁰⁴ N'COBRA was founded in 1987 with the sole mission of securing reparations for African descendants in the United States.²⁰⁵ In 2003, N'COBRA formed the N'COBRA Legal Defense, Research and Education Fund, a 501(c)(3) corporation to develop and implement projects to educate and seek reparations for Africans and people of African descent in the United States.²⁰⁶ More recently, however, there has been a renewed push for reparations at the local level and a renewed way of approaching what form reparations should take. For example, the City of Chicago started a \$5.5 million reparations fund for more than 100 victims tortured by the police under

201. *Id.* See generally CHARLES P. HENRY, LONG OVERDUE: THE POLITICS OF RACIAL REPARATIONS (2007). There is no surprise that communities that have suffered environmental injustices have lower property values than other communities and often have higher incidences of disease than nonburdened communities.

202. See Coates, *supra* note 176; David Frum, *The Impossibility of Reparations*, ATLANTIC (Jun. 3, 2014), <http://www.theatlantic.com/business/archive/2014/06/the-impossibility-of-reparations/372041/>; Tressie McMillan Cottom, *No, College Isn't the Answer. Reparations Are*, WASH. POST (May 29, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/05/29/no-college-isnt-the-answer-reparations-are/>; Alfred L. Brophy, *Who Would Pay for Reparations, and Why?*, N.Y. TIMES (June 9, 2014, 1:24 PM), <http://www.nytimes.com/roomfordebate/2014/06/08/are-reparations-due-to-african-americans/who-would-pay-for-reparations-and-why>; Samuel Oakford, *In US Visit, UN Experts Insist That Washington Needs to Consider Reparations for Slavery*, VICE NEWS (Jan. 29, 2016, 6:00 PM), <https://news.vice.com/article/in-us-visit-un-experts-insist-that-washington-needs-to-consider-reparations-for-slavery>.

203. See Ogletree, Jr., *supra* note 181, at 1065.

204. See N'COBRA, <http://ncobra.org> (last visited Feb. 21, 2016).

205. *Id.* According to N'COBRA's website, the organization believes the following individuals should receive reparations:

Within the broadest definition, all Black people of African descent in the United States should receive reparations in the form of changes in or elimination of laws and practices that allow them to be treated differently and less well than White people. For example, ending racial profiling and discrimination in the provision of health care, providing scholarship and community development funds for Black people of African descent, and supporting processes of self determination will not only benefit descendants of enslaved Africans, but all African descendant peoples in the United States who because of their color are victims of the vestiges of slavery.

Id.

206. *What is N'COBRA?*, N'COBRA, <http://ncobra.org/aboutus/index.html> (last visited Apr. 2, 2016).

Commander Jon Burge.²⁰⁷ At Georgetown University, students demanded that the administration set aside an endowment to recruit black professors equal to the profit from an 1838 slave sale that paid off university debt. The 272 slaves were sold for \$400 each, the equivalent of about \$2.7 million today. While this effort for reparations has not been successful, students were able to successfully rename a residence hall that was named after Thomas Mulledy, the university president who oversaw the sale (it was renamed Freedom Hall).²⁰⁸

Flint is a prime example of environmental injustice at the hands of the government. Here, the governor and other lawmakers knowingly decided to switch Flint's water source from the Great Lakes to the Flint River, which was historically known as an industrial dumping ground.²⁰⁹ Not only did the lawmakers in charge of protecting and caring for their citizens know that they were engaging in a practice that would likely lead to contaminated water, they knowingly chose to further cut costs and not treat the water in the most environmentally sound manner.²¹⁰ As though all of this is not bad enough—cost-cutting elected officials knowingly signing off on a program that would cause contamination—these very same individuals allowed children to be poisoned for over a year and, but for others finally taking the Flint residents seriously, this could have continued for years. The government knowingly poisoned and ruined the lives of poor, predominantly minority children. Because of the gravity of the situation and the recentness, it is more likely than not that the residents of Flint will be able to find some justice in the court system through civil and criminal cases. However, when we look back through history and find similar egregious actions by government officials, we often lack the documentation and luxury of the now. When we know

207. See David Schaper, *Chicago Creates Reparations Fund for Victims of Police Torture*, NPR (May 6, 2015, 6:04 AM), <http://www.npr.org/sections/thetwo-way/2015/05/06/404545064/chicago-set-to-create-reparation-fund-for-victims-of-police-torture>.

208. See Christina Cauterucci, *Why Protesting Georgetown Students Want Their School to Pay a Novel Form of Reparations*, SLATE (Nov. 13, 2015, 5:14 PM), http://www.slate.com/blogs/the_slatest/2015/11/13/georgetown_students_protest_a_residence_hall_named_for_a_slave_selling_jesuit.html.

209. Stephen Rodrick, *Who Poisoned Flint, Michigan?*, ROLLING STONE (Jan. 22, 2016), <http://www.rollingstone.com/politics/news/who-poisoned-flint-michigan-20160122>. The author notes:

There were some from the very beginning who thought this was a terrible idea, notably Flint's congressman Rep. Dan Kildee. "My first thought was, 'Are you kidding me?'" Kildee told me one morning in his office. He threw his palms up in the universal sign of exasperation. "We go from the freshest, deepest, coldest source of fresh water in North America, the Great Lakes, and we switch to the Flint River, which, historically, was an industrial sewer."

Id.

210. *Id.* There are other contaminants that are present in the water in Flint, not just lead. *Id.*

there is a problem within a year or a few years of the environmental injustice, it is much easier to secure evidence, documentation, and records of the injustice, unlike when the injustice has occurred far in the past.

Further, Flint is a clear environmental injustice not only because of the documentation, emails, and current nature of the situation, but also because lead has been studied significantly. There is little dispute about the effects of lead poisoning and particularly the effects of lead poisoning in children.²¹¹ Further, no one can dispute that water should not be orange or brown. The color of the water and settled science of the contaminant allows the conversation to acknowledge the environmental injustice and move forward. However, with so many communities and so many different types of contamination that exist in water, air, and soil, the science is not always there and the visual of contamination is not always present, either. Thus, there needs to be broader understanding of what environmental injustice looks like. With a broader understanding of environmental injustice, communities can use their power to demand action by their elected officials, regulatory agencies, and polluting corporations. Reparations have long been discussed, analyzed, litigated, and proposed, but now is the time for communities to demand reparations and seek to create meaningful environmental justice.

C. Suggested Model for Environmental Injustice Reparations

Incorporating many of the theories of reparations that have been discussed above, the framework for environmental injustice reparations must include: 1) *recognition of and responsibility for* environmental injustices; 2) *acknowledgment* of the affected community; 3) *respect and incorporation* of the affected community in the discussion; and 4) *reparations* in the form of community-based or individual funds.

The proposal for community-based reparations programs differs from the dialogue surrounding slavery reparations in a variety of ways. First, community-based reparations focus primarily on the community rather than on the individual that was affected by the environmental injustice. This means that the community is most likely, but not necessarily, a predominantly minority community, with a large population of African American, Black, Asian American, Hispanic, or Native American individuals. Thus, the dialogue is not about reparations for just one minority group or one race or ethnicity, but for predominantly minority, low-income communities. However, to be clear: this is not a colorblind approach, but simply a reality of the fact that a diverse group of commu-

211. See PETITION FOR RULEMAKING, *supra* note 38.

nities experience environmental injustice.²¹² The reparations would be more tied to the perceived lack of power that these communities possess, not necessarily because of their racial or national origin identity, but mostly because of their low socioeconomic status. Second, while reparations programs would be for historic environmental injustices, the length of time between the injustice and today would be shorter than that of slavery. Third, because the injustices are relatively more recent, collaboration between the direct perpetrator of the injustice and the affected community is more feasible. These reparations programs would not focus on race; rather, they would focus on the effect of environmental injustices that affected low-income communities, most likely those of color. Thus, the controversy over slavery reparations is somewhat mitigated by the fact that these are not in and of themselves race-based reparations.

1. Recognition and Responsibility: Recognition of the environmental injustice must be realized in a meaningful way, whether through public education, public apology, oral histories, or other mediums to convey recognition.²¹³ Either the direct perpetrator or another responsible party

212. Race is almost always a factor in the conversations surrounding environmental injustices. But there is a hesitancy to focus exclusively on Black communities rather than all low-income communities of color that have experienced historic environmental injustices. See, e.g., Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988) (colorblindness perpetuates white privilege and white perspective). On this topic, Professor Alfieri further notes:

To the extent that racial reconciliation suffers from contingent identity constructions, narrative integrity may be obtainable only through tolerance for pluralism and experimentation in telling the stories of community resistance. Telling stories about the history of Village West, Overtown, and Liberty City offers insurgent accounts of socio-legal conflicts over race and space. In each of these neighborhoods, it is crucial to link future community-based legal-political strategies to identity politics and to color-conscious advocacy. Equally important, it is appropriate to connect those strategies to restorative justice initiatives and to reparations movements in order to memorialize the devastation wrought by private exploitation and public neglect. Both restorative justice and reparation claims are part of the growing dialogue between nonprofit groups and city officials in Overtown and Liberty City. Making those connections in dialogue and in negotiation entails the assessment of compensation and restitution claims. It also involves the formulation of a racial reparations claim and a reparations litigation strategy. Erected on slavery reparations campaigns, the strategy calls for apology and reconciliation. The dilemma provoked by such multifaceted campaigns goes to institutional competence.

Anthony V. Alfieri, *Faith in Community: Representing "Colored Town,"* 95 CALIF. L. REV. 1829, 1869–70 (2007) (footnotes omitted). Superfund research shows that environmental inequality is especially rampant in economically deprived African-American neighborhoods. See, e.g., Martin Burda & Matthew Harding, *Environmental Justice: Evidence from Superfund Cleanup Durations*, 107 J. ECON. BEHAVIOR & ORG. 380 (2014); Chad L. Smith, *Economic Deprivation and Racial Segregation: Comparing Superfund Sites in Portland, Oregon and Detroit, Michigan*, 38 SOC. SCI. RES. 681 (2009).

213. See YAMAMOTO, *INTERRACIAL JUSTICE*, *supra* note 190; Yamamoto, *American Reparations Theory and Practice*, *supra* note 159.

must claim responsibility of the environmental injustice.²¹⁴ If no responsible party exists, then the local, state, or federal government most directly involved in the injustice must bear the burden of recognition and responsibility. Public apology, public education, plaques, and historical designation of the affected site or suffered community can show recognition and responsibility, or any other means the community desires.

2. *Acknowledgment*: Acknowledgement of the community itself must be made. The community must be identified as it wishes to be identified. The boundaries of who is within the community are for the community to define, not for the perpetrator to identify and define.

3. *Respect and Incorporation*: Respect must be given and thus, deference must be provided to the community for their desires and what it is that they wish to see executed in their reparations program. The community must be *actually* incorporated through community meetings that make a true effort to bring the community to the table and to sit with its perpetrator or the entity that has claimed responsibility.

4. *Reparations*: The reparations may include individual payments, but will also include what the community needs and how the community itself can be made whole. If the best way for this to be accomplished is through individual payments, then so be it. But likely, many communities that have suffered environmental injustices will need medical monitoring programs or other health-related assistance, including access to health care providers that understand environmental exposure and latent effects. The reparations program will likely also include community-based funds for educational opportunities or revitalization of properties that have been left in the injustice's wake without adequate environmental testing or remediation. The entire point to the reparations conversation is the need for the community to engage with the perpetrator and come out with more than it would have otherwise.

Ideally, community-based reparations programs for historic environmental injustices could be accomplished through local, state, and federal legislation.²¹⁵ As is clear from the history of slavery reparations and other reparations through the court system, it is much more difficult to fit claims for reparations whether based on environmental law or contract and tort law. The court systems could be used together with proposed

214. See generally Brophy, *Reparations Talk*, *supra* note 64; Alfreda Robinson, *Corporate Social Responsibility and African American Reparations: Jubilee*, 55 RUTGERS L. REV. 309 (2003).

215. See Brophy, *Reconsidering Reparations*, *supra* note 159, at 845 (discussing the reconceptualization of reparations as part of a social welfare program which focuses on need as well as past injury, making it consistent with generations of legislation). "When viewed as a program that is both corrective—designed to repair past damage—and distributive—designed to provide a fair distribution of benefits—slave reparations look like other legislative programs. The difficulty is not the nature of reparations, but determining their amount and figuring who the beneficiaries ought to be." *Id.*

legislation to establish community-based reparations if it is in conjunction with cleanup litigation, and the claims for reparations can be incorporated into the case and perhaps into settlement negotiations. Given our current political system at the federal level, it is unlikely that even discrete federal reparations programs for environmental injustices could muster significant support.²¹⁶ However, federal reparations programs are likely the best option for ensuring continued monitoring and implementation of the program and would serve as an example to state and local governments. On the other hand, at the state and local levels, there may be a greater likelihood of creating reparations programs, particularly when local governments are faced with costly lawsuits for mass toxic torts. Despite the challenges for plaintiffs in succeeding in these sorts of actions, there is still a tremendously high financial burden to defending these lawsuits, as well as a high political cost.²¹⁷ I would argue it is preferable that local governments—instead of outsourcing their legal counsel to large, costly multinational law firms to defend these actions—sit down with the community to figure out a way to remedy the injustice. The cost may be significantly less to afford a community the opportunity to speak with the perpetrator and assess what can be done to provide closure and support for the wronged. This may be more challenging a proposition for corporations or nonmunicipal entities.²¹⁸ Thus it is likely that government offenders are more willing to engage in reparative justice negotiations with their constituents than corporate polluters; however, it does not mean that communities should not try to engage these entities in conjunction with government regulators and municipalities when relevant for multifaceted discussions about the injustice and what to do moving forward. There are typically multiple individuals and entities that contribute to an environmental injustice and having as many of the perpetrators involved in community-based reparations discussions contributes to the societal healing as well as the 1) recognition and responsibility; 2) acknowledgment; and 3) respect and incorporation of the community.

216. See generally HANDBOOK OF REPARATIONS, *supra* note 165.

217. However, when communities do not bring lawsuits for their environmental injustices, they lose some potential benefits. Wenger notes:

Legal actions provided secondary benefits as well. For instance, they potentially opened the door for discovery. In some mass restitution cases, such as the tobacco litigation, that power ultimately ended up being instrumental in providing information that ultimately led to settlement. In addition, information gleaned from the legal process could be used for storytelling and consciousness-raising.

Wenger, *supra* note 167, at 715.

218. Further scholarship seeks to explore environmental injustice reparations by corporations.

D. Community-Based Reparations in Practice

There are different design models that can be employed for environmental justice reparations. For example, Professor Alfred Brophy sees five key forms of reparations: truth commissions, apologies, civil rights legislation, cash or in-kind payments to groups/communities, and cash or in-kind payments to individuals.²¹⁹ Similar to the idea behind mandated community benefits agreements for new developments, the process would require the perpetrator to sit down with the community, either in the form of individuals, community groups, local faith-based groups, or other relevant entities.²²⁰ Reparations for historic environmental injustices require a different pathway than that of the courts.²²¹

Using Old Smokey as an example of community-based reparations in practice and hypothetically speaking, if there were to be a continued outpouring of community activism through the Old Smokey Steering Committee demanding a sit-down with government officials it may result in community-based reparations discussions. Given the current climate of the continuing park contamination and slow remediation process, it is feasible that a meeting with City and County staff would be called. At this meeting, the community would broach the topic of reparations, whether through a thinly veiled threat of future mass toxic tort litigation or simply as what the tax-paying citizens of the City want. At this time, undoubtedly many elected officials would scoff and pay no heed to the demands; however, communities can engage in activism in many different ways. Let's assume the Steering Committee gets nowhere in its initial meeting. The residents take to the streets and the newspapers for months. Eventually, their City Commissioner calls the group in for another meeting. At this point, the Steering Committee begins to outline what it wants as reparations for its historic environmental injustice.

219. Brophy, *Reconsidering Reparations*, *supra* note 159, at 836–42 (listing the forms of reparations in order from least controversial to most controversial).

220. See, e.g., Vicki Been, *Community Benefits Agreements: A New Local Government Tool or Another Variation on the Exactions Theme?*, 77 U. CHI. L. REV. 5, 6 (2010); *Community Benefits Agreement Model Ordinance* (Ctr. for Ethics & Pub. Serv. Cmty.-Based Research Working Paper 2015), available at <https://sites.google.com/a/g.law.miami.edu/ceps-hbcp/> (follow link to “view” Community Benefits Agreement Model Ordinance) (evidencing a model ordinance to be introduced by local elected officials requiring developers to sit down with communities in which developments are induced with public benefits, either through land sale, tax benefits, or any other publicly funded benefit, and to enter into an enforceable, legally binding community benefits agreement based on the community’s negotiations and desires).

221. Wenger, *supra* note 167, at 732 (“It is now certain that reparations will not follow the lawsuit to settlement path of other groups, such as Holocaust survivors and Japanese-Americans. Reparations advocates will need to break new ground in order to succeed.”).

They demand the following:

- 1) The City *recognize* the grave environmental injustice of Old Smokey that the community members suffered for decades and generations and the City *claims responsibility* for the injustice through its siting of the incinerator, its operation of the incinerator, and its failed maintenance;
- 2) The City *acknowledges* that the affected community includes residents of the West Grove and East Gables during the incinerator's operation from 1926 to now, as many of their properties are still contaminated; children who have attended the schools near the incinerator site and played at known contaminated parks; and the firefighters working at the old incinerator building;
- 3) The City must *include* the community—not just the Steering Committee—in negotiations and discussions. This is to be done through publicly noticed meetings with hand delivered notice to at least all those residents still residing in the community; and
- 4) The City must create a *reparations program* that includes the following components: medical monitoring program for the identified affected community; right-to-know laws at the local level; further testing and remediation of the public and private properties that are likely contaminated; creation of a Bahamian-American History Museum in the West Grove that discusses the injustice perpetrated against this community; and individual funds for identified community members that lived adjacent within four blocks to the incinerator during its operation.

Assuming the Commissioner takes these demands from the community seriously, it is not entirely outside the realm of possibility that several of these goals could be accomplished.

Some criticisms of an Old Smokey reparations program, such as the above, would be that the municipality, and thereby the taxpayers who are not directly responsible for the historic actions of their elected officials, would be required to pay for the historic injustice.²²² Taxpayers, critics would argue, are not responsible for the historic actions of their elected officials that occurred when the current taxpayers likely were not even living in the municipality.²²³ However, justice and social healing are impossible to accomplish without the entire community—both the perpetrator and the perpetrated.

222. This Article barely scratches the surface of criticisms to reparations for environmental injustices; future scholarship seeks to address the responses to these criticisms.

223. Brophy, *Reconsidering Reparations*, *supra* note 159, at 830 (discussing taxpayer criticism for government-sponsored injustices and reparations programs).

CONCLUSION

This is the first of hopefully many more explorations into the realm of community-based reparations to achieve environmental justice. The environmental justice movement has significantly progressed from its beginnings in Warren County, North Carolina. Activists, scholars, and lawmakers have incorporated environmental justice into different theoretical and practical frameworks more than ever. However, it is not enough. Environmental justice requires “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”²²⁴ Environmental justice, though, is hard to come by. The environmental and civil rights laws that govern current and ongoing injustices are incredibly difficult to apply and implement against historical environmental injustices. Similarly, tort compensation models are not enough to achieve environmental justice, either. The element of causation is often too attenuated for the injustices of the past. We then seek justice in civil rights laws, particularly the Fourteenth Amendment Equal Protection Clause and 42 U.S.C. § 1983. But again, these frameworks have been less than successful in achieving justice for environmentally burdened communities.

Drawing from the already existing reparations scholarship and frameworks, the recommended framework for environmental injustice reparations must include: 1) *recognition and responsibility* of and for the environmental injustice; 2) *acknowledgment* of the affected community; 3) *respect and incorporation* of the affected community in the discussion; 4) *reparations* in the form of community-based or individual funds, or new programs for the community or changes in existing laws.

While reparations programs may lead to social healing and justice for communities that have been environmentally wronged due to the color of their skin, their nationality, or their socioeconomic status, real environmental justice will be achieved when individuals and communities are no longer disproportionately exposed to toxic pollutants and chemicals.

224. *Environmental Justice*, *supra* note 6.