

## A FOREWORD FROM THE HARVARD ENVIRONMENTAL LAW REVIEW STAFF, VOLUME 45

Since 2015, police have shot and killed 5,400 people, disproportionately Black Americans.<sup>1</sup> The list of household names is long—George Floyd, Breonna Taylor, Philando Castile, Freddie Gray—but the list of names that have not garnered as much attention is far longer. Any one of those deaths should have been the turning point, yet the protests in the wake of George Floyd’s death finally raised the country’s collective consciousness and demanded change from every discipline. While this Issue was being edited, a wave of anti-Asian violence swept the country,<sup>2</sup> and reminded us again of the dire need for cross-cultural understanding and inclusion.

Police brutality and gun violence are but a few of the many kinds of violence that Black Americans, Asian Americans, and other communities of color and historically marginalized communities encounter daily. These communities are also disproportionately affected by environmental harms such as pollution and climate change. The environmental justice (“EJ”) movement began calling attention to these environmental inequities in the late 1970s and early 1980s, and it forced environmental lawyers and policymakers to apply a new justice frame to environmental problems and to reckon with the effects of racist policies. New terms such as environmental justice,<sup>3</sup> environmental equity, environmental racism, and environmental classism<sup>4</sup> helped to conceptualize the existing ills as well as what the goals of policy- and law-making should be. Studies were conducted,<sup>5</sup> and the federal government took action.<sup>6</sup>

But as Dr. Bullard notes in his Introduction to this Issue, progress has been stubbornly slow. Detrimental environmental impacts persist in communi-

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1. Mark Berman et al., *Protests Spread over Police Shootings. Police Promised Reforms. Every Year, They Still Shoot and Kill Nearly 1,000 People.*, WASH. POST (June 8, 2020), <https://perma.cc/6BH7-W2NN>.
  2. See, e.g., *Atlanta Spa Shootings*, N.Y. TIMES, <https://perma.cc/8444-RNNJ>; Neil Vigdor, *Attack on Asian Woman in Midtown Prompts Another Hate Crime Investigation*, N.Y. TIMES (Mar. 30, 2021), <https://perma.cc/YJQ6-9BUU>.
  3. The Environmental Protection Agency (“EPA”) defines environmental justice 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.” *Environmental Justice*, EPA, <https://perma.cc/HF5U-FEXS>.
  4. See, e.g., *Environmental Justice Definitions*, N.M. DEP’T OF HEALTH, <https://perma.cc/XQQ9-GKRC>.
  5. See, e.g., U.S. GEN. ACCT. OFF., GAO/RCED-83-168, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983), <https://perma.cc/8SLR-55ZK>.
  6. See, e.g., Exec. Order No. 12,898, 3 C.F.R. 859 (1995), *reprinted as amended in* 42 U.S.C. § 4321.

ties of color. Dr. Bullard describes how Black and Latinx Americans are over-represented in populations who live near Superfund sites and chemical plants; how people of color breathe more polluted air and are at greater risk of death from COVID-19; and how the heat and flooding effects of climate change fall disproportionately on long-segregated neighborhoods. Little has changed since Dr. Bullard began fighting for environmental justice in the 1970s. Anthony Moffa shows how, today, radon pollution plagues correctional facilities that house too many Black men.

Part of the reason communities of color and other historically marginalized communities continue to shoulder a disproportionate share of the burden is because the law is structured to preserve the status quo. Despite the EJ movement, there has still been little focused attention paid to these issues from legal academia, and there are few tools available to EJ communities seeking to redress or avoid environmental harms. Professor Richard Lazarus wrote in 1993 that “[u]ntil very recently, the legal academic community has paid relatively little attention to these emerging issues of ‘environmental justice.’”<sup>7</sup> We could use the same words to describe legal academia today.

This Environmental Justice Symposium Issue contributes to the country’s much-needed and long-overdue recommitment to EJ issues, motivated by today’s racial justice efforts and the disparities evident in the COVID-19 pandemic. It comes alongside President Joe Biden’s pledge to bolster and integrate EJ across the federal government.<sup>8</sup> The Articles in this Issue call attention to the reality of inequality, identify the systems that establish and perpetuate that inequality, and suggest solutions for empowering communities and lawmakers to make lasting change.

The law has repeatedly forced the burdens of economic development<sup>9</sup> and environmental protection<sup>10</sup> on communities of color. In *Black Urban Ecologies and Structural Extermination*, Etienne Toussaint describes Cedric Robinson’s theory of racial capitalism—that “expansion of capitalist society pursued essentially racial directions.” He then puts a finer point on it, noting that Black urban geographies, such as Washington, DC, have been “structural[ly] exterminated” by certain socio-ecological and politico-economic systems. Further, even

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7. Richard J. Lazarus, *Pursuing “Environment Justice”: The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 790–91 (1993) (citation omitted).

8. See Julius M. Redd & Hilary Jacobs, *The Evolving Landscape of Environmental Justice in 2020 and Beyond*, NAT’L L. REV. (Oct. 30, 2020), <https://perma.cc/VRW2-Z4HT>.

9. See generally NAT’L ACADS. OF SCI., ENG’G, & MED., COMMUNITIES IN ACTION: PATHWAYS TO HEALTH EQUITY 101 (James N. Weinstein et al. eds., 2017) (“[T]he effect of interpersonal, institutional, and systemic biases in policies and practices (structural inequities) is the ‘sorting’ of people into resource-rich or resource-poor neighborhoods . . . largely on the basis of race and socioeconomic status. . . . Such structural inequities give rise to large and preventable differences in health metrics such as life expectancy, with research indicating that one’s zip code is more important to health than one’s genetic code.” (citation omitted)).

10. See Lazarus, *supra* note 7, at 794–95.

the urban agriculture systems designed to rectify the injustices that led to Black neighborhoods becoming food deserts have led to the reinforcement of oppression.

Congress and the Supreme Court have also disempowered Native American communities and prevented tribal nations from reaping the benefits of the natural resources on their land. In *Indian Country Post-McGirt: Implications for Traditional Energy Development and Beyond*, Elizabeth Kronk Warner and Heather Tanana discuss what the Supreme Court's recent decision in *McGirt v. Oklahoma*<sup>11</sup> means for environmental and natural resources law in Indian country. They conclude that this case reverses a trend of limiting tribal sovereignty and may permit tribes to become a key player in energy development in the United States.

The legal tools available to EJ communities and to agencies seeking to protect them—including civil rights laws, Executive Order 12,898,<sup>12</sup> statutory remedies, and state and local EJ initiatives—have been used with limited success.<sup>13</sup> Several Articles in this Issue identify innovative ways for EJ communities to take advantage of existing tools. In *Environmental Indifference*, Anthony Moffa argues that the Eighth Amendment's prohibition of "cruel and unusual punishment" applies in the context of prison conditions, and particularly to exposure to known toxic substances such as radon. Although there are "significant hurdles to successful litigation," the Constitution remains a viable tool for remedying radon pollution in prisons. In *Practicing on Uneven Ground: Raising Environmental Justice Claims Under Race Neutral Laws*, Brenda Mallory and David Neal trace the various ways the Southern Environmental Law Center, a public interest non-profit law firm, has used existing tools—such as state EJ laws and federal civil rights law—in new ways to protect threatened communities in the American Southeast.

In *Pipeline Struggles: Case Studies in Ground Up Lawyering*, Marianne Engelman Lado and Kenneth Rumelt find that not only are the legal tools important, but the process of using those tools to represent communities matters, too. They identify community-lawyering—whereby lawyers serve as technical advisors to communities and community movements—as instrumental to achieving systemic change. Specifically, they show how community-lawyering models have been used to resist pipeline development, achieving not only environmental and climate change goals, but also protecting local communities and supporting communities' pursuit of their own visions for their future.

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11. 140 S. Ct. 2452 (2020).

12. See *supra* note 6.

13. See, e.g., Hannah Perls, *EPA Undermines Its Own Environmental Justice Programs*, HARV. L. SCH. ENV'T & ENERGY L. PROGRAM (Nov. 12, 2020), <https://perma.cc/N5S4-TAQR> (describing EPA's relatively toothless environmental justice enforcement mechanisms); EPA, PLAN EJ 2014: LEGAL TOOLS (2011), <https://perma.cc/YM66-X9XL>.

In addition to fostering scholarship that develops solutions to the environmental problems facing communities of color and other historically marginalized communities, this Issue is also intended to highlight the need for diversity in the legal academy and in environmental law. The authors in this Issue come from public and private universities across the country, including a historically Black institution, and represent both tenure-track faculty and clinical faculty. They are early in their careers and well-established scholars. They represent national environmental groups. They are diverse in race and gender.

However, the same cannot be said for most environmental legal spaces. Law schools often have small numbers of tenured faculty of color.<sup>14</sup> The percentage of Black and Latinx clinical faculty has remained stagnant since the 1990s, and white faculty continue to hold 79 percent of positions.<sup>15</sup> Environmental non-governmental organizations, government agencies, and foundations are predominantly white; those groups are just 12.2 percent, 15.5 percent, and 12 percent people of color, respectively.<sup>16</sup> The group of authors represented in this Issue stands out against the backdrop of legal academia and the environmental law community, but we hope that the diversity in this Issue will one day be the norm. As a historically majority-white journal, we have work to do ourselves, both in our personal lives and in the scholarship and conduct of the journal.

This Issue is a small first step.

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14. See Stephanie Francis Ward, *How Many Tenured Law Professors Are Black? Public Data Does Not Say*, ABA J. (Oct. 28, 2020), <https://perma.cc/BNV2-CZQZ>.

15. CLINICAL LEGAL EDUC. ASS'N COMM. FOR FAC. EQUITY & INCLUSION, *The Diversity Imperative Revisited: Racial and Gender Inclusion in Clinical Law Faculty*, 26 CLINICAL L. REV. 127, 128 (2019).

16. *The Challenge*, GREEN 2.0, <https://perma.cc/ZV2D-MR7Y>.