

HOWARD LAW JOURNAL

Business Information

SUBSCRIPTIONS: The *Howard Law Journal*, ISSN 0018-6813, is published three times per year. One year's domestic subscription rate is \$34, with a per-issue price of \$12. Symposium issues are \$15. International subscriptions are \$44. These rates are competitive with those of other journals and reviews.

SUBMISSIONS: The Editorial Board of the *Howard Law Journal* invites the submission of articles of substantial legal merit. The *Howard Law Journal* does not publish submissions by current students of other institutions. Authors seeking publication in the *Howard Law Journal* should submit one copy of a double-spaced manuscript. All manuscripts should be submitted in Microsoft Word format. The *Journal* assumes no responsibility for the return of any material unless accompanied by a self-addressed stamped envelope.

Although the *Journal* generally gives great deference to an author's work, the *Journal* retains the right to determine the final published form of every article. As a rule, footnotes should follow the form mandated by *The Bluebook: A Uniform System of Citation* (21st Edition).

When submitting an article, please include pertinent biographical data, business and home addresses, email address, and business and home phone numbers. Please submit electronic submissions (including curriculum vitae) to: hljexecutivesolicitations@gmail.com. Electronic submissions can also be submitted via ExpressO, an online delivery service available at <http://law.bepress.com/expresso/>. Please submit hardcopy manuscripts to:

Howard Law Journal
2900 Van Ness Street, NW
Washington, DC 20008
Phone: (202) 806-8084

VOLUME 64 • ISSUE 3 • SPRING 2021

HOWARD LAW JOURNAL

EDITORIAL BOARD 2020-2021

BRIANA P. ADAMS-SEATON
Editor-in-Chief

RYAN THOMAS
Managing Editor

ASH PENN
*Executive Notes &
Comments Editor*

ALEXIS CHAMBERS
*Executive Publications
Editor*

KATHERINE SAWCZYN
*Executive Solicitations &
Submissions Editor*

NAFEESAH ATTAH
Senior Articles Editor

TESSA GRAY
Senior Articles Editor

ALEXA M. KING
Senior Articles Editor

MICHAEL WALKER
Senior Articles Editor

JUSTICE WALTERS
Senior Articles Editor

CHRYSAL CANTRELLE
*Senior Notes &
Comments Editor*

VERONICA CRAIG
*Senior Notes &
Comments Editor*

KHALA JAMES
*Senior Notes &
Comments Editor*

CHRISTOPHER A. JOHNSON
*Senior Notes &
Comments Editor*

MYA REID
*Senior Notes and
Comments Editor*

ALLIYAH J. BROWN
*Senior Solicitations and
Submissions Editor*

KAYLA B. EVANS
*Senior Solicitations and
Submissions Editor*

DANIELLE HOLLEY-WALKER
Dean

ANDREW I. GAVIL
SARAH VANWYE
CARLTON WATERHOUSE
Faculty Advisors

RANEEKA CLAXTON WITTY
Director of Communications

HOWARD LAW JOURNAL

MEMBERS 2020-2021

OLUWASEUN AJIMOKO***	ALEXANDER SCOTT MCGEE
ZARIAH ALTMAN**	VIONNA MOORE
MERON BAYU	AJA SIMONE NUNN**
MAKESI K. BUDDY	ADA OHANENYE
CHASITY FAIR	OLUWATOBI OLAJUBU
ASHLEY GREY	ADRIENNE PARMS***
MAHAYLIA LATOYA HINES	BREE PRINCE*
ATIANA JOHNSON*	TYRA RICHMOND
TIFFANI L. KENNEDY****	QUAY STROZIER*
SHANZAH KHAN	BETHANY THOMAS**
KUFERE J. LAING***	ANNA B. WILLIAMS
REINALDO FRANQUI MACHIN	

Member, National Conference of Law Reviews

- * Senior Staff Editor
- ** Associate Publications Editor
- *** Associate Solicitations Editor
- **** Associate Managing Editor

ADMINISTRATIVE OFFICERS 2020-2021

Danielle Holley-Walker, *Dean, J.D., Harvard University*
Mariela Olivares, *Associate Dean of Academic Affairs, J.D., University of Michigan, LL.M., Georgetown University*
Reginald McGahee, *Associate Dean of Admissions and Student Affairs, J.D., Howard University*
Ann-Marie Waterman, *Assistant Dean for Administration & Operations, M.A. Howard University*
Carmia N. Caesar, *Assistant Dean of Career Services, J.D., Harvard University*

FULL-TIME FACULTY

Rhea Ballard-Thrower, *Associate Professor of Law and Director of Howard University Libraries, J.D., University of Kentucky, MILS, University of Michigan*
Jasbir Bawa, *Assistant Professor of Lawyering Skills, J.D., Howard University*
Matthew A. Bruckner, *Assistant Professor of Law, J.D., New York University*
Sha-Shana N.L. Crichton, *Assistant Professor of Lawyering Skills, J.D., Howard University*
Lisa A. Crooms-Robinson, *Professor of Law, J.D., University of Michigan*
E. Christi Cunningham, *Professor of Law, J.D., Yale University*
Okianer Christian Dark, *Professor of Law, J.D., Rutgers University*
Marsha A. Echols, *Professor of Law and Director of Graduate Program, J.D., Georgetown University, LL.M., Free University of Brussels, S.J.D., Columbia University*
Tammi Etheridge, *Assistant Professor of Law, J.D., University of Minnesota Law School*
Andrew I. Gavil, *Professor of Law, J.D., Northwestern University*
Justin Hansford, *Professor of Law and Director of the Thurgood Marshall Civil Rights Center, J.D., Georgetown University*
Lenese Herbert, *Professor of Law, J.D., University of California, Los Angeles*
Steven D. Jamar, *Professor of Law, J.D., Hamline University, LL.M., Georgetown University*
Darin Johnson, *Associate Professor of Law, J.D., Harvard University*
Robin Konrad, *Assistant Professor of Lawyering Skills, J.D., Howard University*
Adam H. Kurland, *Professor of Law, J.D., University of California, Los Angeles*
Homer C. LaRue, *Professor of Law, J.D., Cornell University*
Harold A. McDougall, *Professor of Law, J.D., Yale University*
Ziyad Motala, *Professor of Law, LL.B., University of Natal, S.J.D., LL.M., Northwestern University*
Lateef Mtima, *Professor of Law, J.D., Harvard University*
Cheryl C. Nichols, *Associate Professor, J.D., Georgia State University*
Lucius Outlaw, *Associate Professor of Law, J.D., University of Pennsylvania*
Reginald L. Robinson, *Professor of Law, J.D., University of Pennsylvania*
W. Sherman Rogers, *Professor of Law, J.D., Howard University, LL.M., George Washington University*
Anibal Rosario-Lebrón, *Assistant Professor of Lawyering Skills, J.D., University of Puerto Rico, San Juan*
Josephine Ross, *Professor of Law, J.D., Boston University*
Valerie Schneider, *Associate Professor of Law, J.D., George Washington University*
Mark R. Strickland, *Assistant Professor of Lawyering Skills, J.D., Rutgers University*
Keeva L. Terry, *Associate Professor of Law, J.D., Columbia University*
Alice M. Thomas, *Associate Professor of Law, J.D., Howard University, M.B.A., Howard University*
Sarah VanWye, *Assistant Professor of Lawyering Skills, J.D., University of South Carolina*
Kayonia L. Whetsone, *Assistant Professor of Lawyering Skills, J.D., Howard University School of Law*
Patricia M. Worthy, *Professor of Law, J.D., Howard University*

EMERITI FACULTY

Loretta Argrett, *Professor of Law, J.D., Howard University*
Spencer H. Boyer, *Professor of Law, LL.B., George Washington University, LL.M., Harvard University*
Alice Gresham Bullock, *Professor of Law and Dean Emerita, J.D., Howard University*
Warner Lawson, Jr., *Professor of Law, J.D., Howard University*
Isiah Leggett, *Professor of Law, J.D., Howard University, LL.M., George Washington University*
Oliver Morse, *Professor of Law, LL.B., Brooklyn College, S.J.D.*
Michael D. Newsom, *Professor of Law, LL.B., Harvard University*
Laurence C. Nolan, *Professor of Law, J.D., University of Michigan*
Jeanus B. Parks, Jr., *Professor of Law, LL.B., Howard University, LL.M., Columbia University*
J. Clay Smith, *Professor of Law, J.D., Howard University*
Richard P. Thornell, *Professor of Law, J.D., Yale University*



School
of Law

HOWARD LAW JOURNAL

TABLE OF CONTENTS

ARTICLES

ENVIRONMENTAL LAW AS SEGREGATION *Nadia B. Ahmad* 439
& *Melissa A. Bryan*

HARD LIFE OF ENVIRONMENTAL JUSTICE
LEGISLATION IN MARYLAND: POLICY
EVALUATION OF THREE FAILED CUMULATIVE
IMPACT BILLS BETWEEN 2014 AND 2016.....*Sacoby Wilson,* 455
Marcus Jones,
Jarred Miles,
Aliyah Adegun
& *Sakereh Carter*

NOTES

IMITATION IS NOT FLATTERY WHEN
YOU DON'T GET CREDIT: PROTECTING
INTELLECTUAL PROPERTY IN THE AGE OF
FAST FASHION, SOCIAL MEDIA, AND
"CULTURE VULTURES" *Katherine Sawczyn* 491

A BREATH OF FRESH AIR:
HOW JUDGES' EMBRACE OF LEGAL
REALISM CAN AID IN THE FIGHT FOR
ENVIRONMENTAL JUSTICE *Ryan G. Thomas* 521

LETTER FROM THE EDITOR-IN-CHIEF

On October 8, 2020, the *Howard Law Journal* hosted its seventeenth annual Wiley A. Branton Symposium in honor of former Howard University School of Law dean and civil rights legend, Wiley A. Branton. For the past seventeen years, the *Journal* has gathered students, scholars, and advocates to tackle pressing legal issues of the day. It is our duty as social engineers and legal scholars to serve as a conduit for the legal community to convene and continue the legacy of Wiley Branton: fighting for social justice.

This year's Symposium was entitled: *An Environment of Justice: Developments & Challenges in Environmental Law*. During a time when marginalized communities are fighting several pandemics: police brutality, COVID-19, and global warming, the *Journal* deemed it appropriate to focus on the current state of environmental justice. To that end, the discussions of our Symposium explored the impact of COVID-19 on communities of color, the phenomenon of climate gentrification, and the role of environmental justice litigation. A number of our esteemed panelists have written Articles about the current state of environmental justice, and they have been included here in our Branton Symposium Issue.

Issue 3 of Volume 64 begins with an Article by Professor Nadia B. Ahmad and law student Melissa A. Bryan entitled, *Environmental Law as Segregation*. This Article examines how the preservation of white spaces has led to more environmental protection efforts rooted in the preservation of segregated systems of property, land, avoidance of toxins, and protection of environmental health. As a proposed solution, the Article suggests normative solutions for redistributive justice to improve environmental law outcomes in favor of equity, justice, and inclusion of communities of color.

Dr. Sacoby Wilson, Marcus Jones, Jarred Miles, Aliyah Adegun, and Sakereh Carter evaluate failures in environmental justice legislation in their Article, *Hard Life of EJ Legislation in Maryland: Policy Evaluation of Three Failed Cumulative Impact Bills between 2014 and 2016*. Through an examination of three cumulative Maryland legislative bills that failed to become law, the Article reveals opportunities for improvement in drafting environmental justice legislation. Specifically, the Article recommends that Maryland policymakers learn more about regional environmental justice issues, involve environmental justice communities in legislative plans, and learn from other states that have successfully implemented cumulative impact legislation.

In addition to our Symposium pieces, we are pleased to publish two of our student-written Notes. In *Imitation is Not Flattery When You Don't Get Credit: Protecting Intellectual Property in the Age of Fast Fashion, Social Media, and "Culture Vultures,"* Katherine Sawczyn, the Executive Solicitations and Submissions Editor, argues that the absence of strong intellectual property protec-

tions in the fashion context negatively impacts independent Black designers. In her Note, Sawczyn explains the current state of intellectual property law in the United States pertaining to fashion, and addresses how Black designers face a unique challenge due to cultural appropriation. The Note concludes with possible solutions to this challenge, including expanding current intellectual property law, advocating for reparations, crediting the original designer, social shaming, and enforcing environmental regulations.

Finally, in *A Breath of Fresh Air: How Judges Embrace of Legal Realism Can Aid in the Fight for Environmental Justice*, Managing Editor Ryan Thomas examines why the judiciary's embrace of legal formalism has hindered the Black community's environmental justice suits in federal court. The Note argues that legal formalism has failed by not recognizing race as a crucial factor in judicial discourse and refusing to account for significant judicial discretion. Ultimately, Thomas proposes a shift toward legal realism, which casts aside the façade of impartial and mechanical decision-making, and replaces it with holistic evaluation of contexts and consequences.

On behalf of the members and leadership of the *Howard Law Journal*, I thank you for your support and readership. It is with great pride that we present our final Issue of Volume 64. In the midst of a global pandemic and fully virtual school year, the *Howard Law Journal* remained steadfast in its commitment to excellence and social engineering through academia. I extend my deepest appreciation to our phenomenal Executive Editorial Board: Ryan Thomas, Alexis Chambers, Ash Penn, and Katherine Sawczyn. I'd also like to thank our faculty advisors, Business Manager, and the staff editors of Volume 64 for their invaluable contributions. It has been an honor to be of service to this publication and our institution. I am confident that the *Journal* will remain resolute in its mission to publish quality, relevant pieces that contribute to the ongoing legal conversations across the world. It is in this spirit that we close Volume 64.

BRIANA P. ADAMS-SEATON
EDITOR-IN-CHIEF
VOLUME 64

Environmental Law as Segregation

NADIA B. AHMAD* & MELISSA A. BRYAN**

Introduction	440
I. White Spaces	441
II. The Roots of Segregation	443
III. Pitfalls of Environmental Justice	446
IV. Silencing Environmental Law	450
Conclusion	453

We write about the formulation of environmental law as segregation in that environmental law evolved to enhance the experience and preservation of white spaces. Environmental law, broadly conceived, is an extension of the common law and administrative law that promote white racial supremacy and subjugate non-white people. Both environmental law and administrative law, upon which it is based, are rooted in the Anglo-American legal tradition, which forms the basis for enslavement, incarceration, disenfranchisement, dislocation, and segregation.

Environmental law, climate change, the carceral state, dispossession of land, pollution, and chemical toxicity are all inextricably related.

* Associate Professor of Law, Barry University Dwayne O. Andreas School of Law; B.A., University of California, Berkeley; J.D., University of Florida Fredric G. Levin College of Law; LL.M. in Natural Resources and Environmental Law and Policy, University of Denver Sturm College of Law. This Article has benefited from discussions at the 2020 Wiley A. Branton/Howard Law Journal Symposium, 2020 Loyola Law Review Symposium, 2019 Southeast Environmental Law Scholars Workshop, 2019 Margaret Montoya Writing Workshop, 2019 Critical Legal Academics and Scholars International Collective Workshop, and the 2019 Online Environmental Law Workshop. Special thanks to Barry University School of Law and my dean, Leticia Diaz, for the creative space and intellectual support to facilitate this research. Much appreciation extended to my co-author, Melissa Bryan. A shout-out to Mishel Suarez and Carlos Torrealba for their insights on brainstorming for this topic. Thanks to the library assistance of Whitney Curtis, Jason Murray, and Diana Botluck. A note of gratitude to Akmal, Senan, Hanan, Jihan, my parents, and my siblings for their love and support.

** Melissa A. Bryan, Barry University Dwayne O. Andreas School of Law, J.D. expected 2021; Criminal Justice: Criminalistics B.A., Saint Leo University. I would love to thank God primarily for the strength and knowledge that He gave me to complete this Article. I would also like to thank Professor Nadia Ahmad for her support and guidance. Lastly, I would like to thank my mom, family, and friends for their never-ending love and support.

The environmentalism of white spaces, of suburbs and rural areas, is meant to limit and restrict access to environmental rights and segregate communities. More so, environmentalism and climate change adaptation has been exclusively the domain of protecting white spaces. Even green growth initiatives and renewable energy development occur on the backs of the indigent, poor, Black and brown folks. This Article examines how the preservation of white spaces has led to more environmental protection measures rooted in efforts to preserve segregated systems of property, land, avoidance of toxins, and protection of environmental health.

INTRODUCTION

A survey of environmental law encapsulates major federal legislation, such as the National Environmental Policy Act,¹ the Clean Air Act,² the Endangered Species Act,³ the Clean Water Act,⁴ the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),⁵ the Resource Conservation and Recovery Act (RCRA),⁶ as well as judicial precedent on these pieces of legislation. Environmental law also includes the law of wetlands, forests, agriculture, and climate change. Through a study of these various environmental laws, this Article examines how the law has worked to create a tiered system of environmentalism—the environmental law, which benefits white people and another system of laws, known as environmental justice, to protect non-white people. The dissonance between these two sets of legal approaches for environmental law and environmental justice elucidates the demands for equity against the backdrop of systemic racism. The moment for environmental justice is almost here, but before environmental justice can have its moment, we must see how environmental law has worked to preserve whiteness.

This Article adds to the existing literature on whiteness as property, environmental justice, and race and the law, but expands to how the role of environmental law rulemaking and application and interpretation of environmental law has intensified segregation over time and promoted and preserved systems of whiteness. In order to re-

-
1. 16 U.S.C. §§ 1531–1544.
 2. 42 U.S.C. §§ 7401–7671q.
 3. 16 U.S.C. §§ 1531–1544.
 4. 33 U.S.C. §§ 1251–1387.
 5. 42 U.S.C. §§ 9601–9675.
 6. 42 U.S.C. §§ 4321–4370h.

spond to calls for racial justice, it is imperative to examine the nefarious and invidious role that environmental law has intentionally and unintentionally played in maintaining the models of the confederacy. We will examine what needs to be done to dismantle those systems of whiteness to achieve equity and inclusion more fully.

Part I, the introduction of this Article, provided an overview of the problem of systemic racism and environmental law. Part II considers the rise of white spaces to heighten segregation following the era of environmental movements. Part III explores the roots of segregation. Part IV surveys the pitfalls of environmental law in perpetuating segregation. Part V suggests normative solutions for redistributive justice to improve environmental law outcomes in favor of equity, justice, and inclusion of communities of color.

I. WHITE SPACES

Environmental law is meant to create pristine clean spaces⁷ but only to benefit some people and not others. These clean spaces created by environmental law are an extension of white spaces. After the Civil War, the notion of white spaces came into place as Black people began to believe that certain spaces such as schools, neighborhoods, occupations, and places for public recreation, were not for them.⁸ These spaces were filled with white people, and Black people had to approach them delicately. “While white people usually avoid [B]lack space, [B]lack people are required to navigate the white space as a condition of their existence.”⁹ To adjust to white space environments, Black people typically resort to finding others who look like them, other Black people in white spaces, to feel a sense of belonging and comfort.¹⁰

The 1960s and 1970s resulted in a period of racial integration, but it only normalized Black people being deemed as lower class and white people being of higher class and privilege.¹¹ From this period, “[B]lack ghettos” (Black spaces) and “white urban or suburban” spaces also emerged.¹² Black spaces, where Black people settled, were considered ghettos because they consisted of public housing in

7. See generally Tracy Hester, Robert Percival, Irma Russell, Victor Flatt & Joel Mintz, *Restating Environmental Law*, 40 COLUM. J. ENV'T. L. 1 (2015).

8. Elijah Anderson, *The White Space*, 1 SOCIO. RACE & ETHNICITY 10, 10 (2015).

9. *Id.* at 11.

10. *Id.*

11. *Id.* at 19.

12. *Id.*

the heart of certain cities where only low-paying jobs could be found.¹³ In contrast, white spaces had more access to better-paying jobs and living environments.¹⁴ Even within occupations, it has been observed that professionals such as lawyers, doctors, business officials, and elected officials are mostly white, while Black people maintain only single-digit percentages within those occupations.¹⁵

Though the Black middle class grew, Black individuals within the middle class were still treated like their Black counterparts in the ghetto.¹⁶ One would think that middle-class Black people who moved out of the ghetto would be treated better, but it does not matter. Sometimes while driving in white spaces, police will pull them over just because they think they do not belong in those spaces.¹⁷ Hence, those middle-class Black people are still “driving while [B]lack,”¹⁸ and living in a society where everything they do is scrutinized or has to match up to the standards of white people, especially in white spaces.

Consider the most recent incident with Mr. Ahmaud Arbery.¹⁹ Mr. Arbery was killed in an area deemed as a white space.²⁰ As he simply went jogging in a white space, he lost his life because he looked like he did not belong based on of the color of his skin; which because he was in a white space made him a possible “burglary suspect.”²¹ Young Black males have to be very careful about entering white spaces as they are easily targeted as “suspicious looking or violent” when they are only going about their day-to-day activities.²² Unfortu-

13. See generally Richard Rothstein, *Race and Public Housing: Revisiting the Federal Role*, 21 *POVERTY & RACE RSCH. ACTION COUNCIL* 1 (2012).

14. *Id.*

15. Anderson, *supra* note 8, at 11.

16. *Id.* at 15–16.

17. *Id.* at 11–12.

18. David A. Harris, *The Stories, the Statistics, and the Law: Why “Driving While Black” Matters*, 84 *MINN. L. REV.* 265, 265 (1999) (“African-Americans call it ‘driving while [B]lack’—police officers stopping, questioning, and even searching [B]lack drivers who have committed no crime, based on the excuse of a traffic offense.”).

19. Richard Fausset, *What We Know About the Shooting Death of Ahmaud Arbery*, N.Y. *TIMES* (Dec. 17, 2020), <https://www.nytimes.com/article/ahmaud-arbery-shooting-georgia.html>.

20. *Id.*

21. *Id.*

22. Anderson, *supra* note 8, at 14 (explaining, “[i]n white neighborhoods, [B]lack[people] may anticipate such profiling or hassling by the neighborhood watch group, whose mission is to monitor the ‘suspicious looking.’ Any [B]lack male can qualify for close scrutiny, especially under the cover of darkness. Defensive whites in these circumstances may be less consciously hateful than concerned and fearful of ‘dangerous and violent’ [B]lack people. And in the minds of many of their detractors, to scrutinize and stop [B]lack people is to prevent crime and protect the neighborhood. Thus, for the [B]lack person, particularly young males, virtually every public encounter result in a degree of scrutiny that a ‘normal,’ white person would certainly not need to endure.”).

nately, Black people that are more accepted in white spaces are the ones who know “their place” and who act in a manner whereby Black people are the subordinates to white people.²³

The creation and maintenance of white spaces has been perpetuated through environmental law. Environmental racism and residential segregation are inseparable, resulting from systemic racism.

II. THE ROOTS OF SEGREGATION

Segregation began the moment the Native Americans were found in the United States. Then, when Africans were brought to the U.S. as slaves, the cycle continued.²⁴ Segregation further evolved into de facto and de jure segregation, which was mostly seen in the education (school) system of the U.S.²⁵ De jure segregation is segregation based on intentional actions or inactions by government officials,²⁶ while de facto segregation is not by legislation—the people involved segregate based on their terms.²⁷

Segregation occurred because financial institutions discriminated against Black people through “redlining,” the “discriminatory practice of denying the extension of credit to specific geographic areas due to the income, race, or ethnicity of its residents” and “reverse redlining,” “the discriminatory practice of extending credit on unfair terms to those same communities.”²⁸ As a result, real estate agents followed suit by only directing African Americans to communities where mostly African Americans lived and white people only where other white people lived.²⁹ Hence, it became innate in the American society for Black people to live with Black people and white people to live with white people.

However, during the integration period, the rising population of middle-class African Americans who sought better jobs and schools

23. *Id.* at 11.

24. Danyelle Solomon, Connor Maxwell & Abril Castro, *Systemic Inequality: Displacement, Exclusion and Segregation*, AM. PROGRESS (Aug. 7, 2019, 7:00 AM), <https://www.americanprogress.org/issues/race/reports/2019/08/07/472617/systemic-inequality-displacement-exclusion-segregation/>.

25. James M. McGoldrick Jr., *Two Shades of Brown: The Failure of Desegregation in America; Why it is Irremediable (and a Modest Proposal)*, 24 CARDOZO J. EQUAL RTS. & SOC. JUST. 271, 276 (2018).

26. *Id.*

27. See 14 C.J.S. *Civil Rights* § 177 (2021).

28. 18 A N.Y. JURIS. 2D *Civil Rights* § 195 (2021).

29. Mary Szto, *Real Estate Agents as Agents of Social Change: Redlining, Reverse Redlining, and Greenlining*, 12 SEATTLE J. SOC. JUST. 1, 10–12 (2013).

for their kids started moving into white communities.³⁰ As African Americans moved into white neighborhoods, some white families would leave, which is a practice known as “white flight.”³¹ This is evident in the community of Ferguson, Missouri.³² Ferguson is a former white suburban community that became heavily populated with African Americans, and the more that Black people came to the community, the more white flight occurred.³³ As the neighborhood became an area solely for Black people, certain subsidies to those areas were no longer rendered to maintain the suburban-like area like that of when white people lived there, so the neighborhood eventually deteriorated.³⁴

Racial segregation, which was influenced by governmental policies, also occurred in other neighborhoods like St. Louis, Missouri.³⁵ Zoning laws were implemented that “classified white neighborhoods as residential and [B]lack neighborhoods as commercial or industrial.”³⁶ Because Black people could only move to certain areas, it turned “[B]lack neighborhoods into overcrowded slums and white families came to associate African Americans with slum characteristics. White homeowners then fled when African Americans moved nearby because they feared their new neighbors would bring slum conditions with them.”³⁷ As a result, racial segregation in housing led

30. See MARY PATTILLO-MCCOY, *BLACK PICKET FENCES: PRIVILEGE AND PERIL AMONG THE BLACK MIDDLE CLASS* 1–4 (1999).

31. See RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

32. Richard Rothstein, *The Making of Ferguson*, 24 *J. AFFORDABLE HOUS. & CMTY. DEV. L.* 165, 165 (2015).

33. *Id.*

34. *Id.*

35. *Id.* at 166.

36. Valerie Strauss, *How Ferguson Became Ferguson — the Real Story*, *WASH. POST* (Nov. 23, 2014, 10:00 AM), <https://www.washingtonpost.com/news/answer-sheet/wp/2014/11/23/how-ferguson-became-ferguson-the-real-story/>.

37. *Id.*

Segregated public housing projects that replaced integrated low-income areas; federal subsidies for suburban development conditioned on African American exclusion; federal and local requirements for, and enforcement of, property deeds and neighborhood agreements that prohibited resale of white-owned property to, or occupancy by, African Americans; tax favoritism for private institutions that practiced segregation; municipal boundary lines designed to separate [B]lack neighborhoods from white ones and to deny necessary services to the former; real estate, insurance, and banking regulators who tolerated and sometimes required racial segregation; and urban renewal plans whose purpose was to shift [B]lack populations from central cities like St. Louis to inner-ring suburbs like Ferguson.

Id.

to societal discrimination whereby people started discriminating against each other based on place of residence.³⁸

Furthermore, the federal government implemented public housing when there was a rapid growth in the population.³⁹ The issue was that the public housing for African Americans was not situated in the best areas.⁴⁰ In the 1940s, in Richmond, Virginia, the federal government provided public housing to help assist veterans with securing housing.⁴¹ However, the “housing in Richmond was poorly constructed and [was only] intended to be temporary. For white defense workers, government housing was built farther inland, closer to white residential areas, and some of it was sturdily constructed and permanent.”⁴² On its face, public housing was a tool for segregation. Environmentally, the Black people were disadvantaged “because Richmond had been overly white before the war, and the federal government’s decision to segregate public housing established segregated living patterns that persist to this day.”⁴³

Additionally, in *Thompson v. the U.S. Department of Housing & Urban Development (HUD)*, a class of African American residents brought suit against the public housing units in Baltimore City, Maryland, claiming discrimination based on their race.⁴⁴ The plaintiffs-residents sued HUD, claiming that HUD did nothing to ameliorate the effects of past race-based discrimination in regard to public housing.⁴⁵ The court subsequently found that HUD did not afford the plaintiffs-residents opportunities to acquire housing beyond the boundaries of Baltimore City.⁴⁶

38. Michela Zonta, *Racial Disparities in Home Appreciation*, CTR. FOR AM. PROGRESS (July 15, 2019, 12:01 AM), <https://www.americanprogress.org/issues/economy/reports/2019/07/15/469838/racial-disparities-home-appreciation/>.

39. Michela Zonta, *Expanding the Supply of Affordable Housing for Low-Wage Workers*, CTR. FOR AM. PROGRESS (Aug. 10, 2020, 12:01 AM), <https://www.americanprogress.org/issues/economy/reports/2020/08/10/488313/expanding-supply-affordable-housing-low-wage-workers/>.

40. Terry Gross, *A ‘Forgotten History’ of How the U.S. Government Segregated America*, NPR (May 3, 2017, 12:47 PM), <https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-s-government-segregated-america>.

41. Richard Rothstein, *A History of Exclusion: How African Americans Were Blocked From Living in Most East Bay Neighborhoods*, OAKLAND MAG. (Oct. 23, 2017), <https://www.oaklandmagazine.com/October-2017/A-History-of-Exclusion/>.

42. *Id.*

43. *Id.*

44. *Thompson v. U.S. Dep’t of Hous. & Urban Dev.*, 348 F. Supp. 2d 398, 404 (D. Md. 2005).

45. *Id.*

46. *Id.* at 451.

HUD failed to consider regionally oriented desegregation and integration policies, despite the fact that Baltimore City is contiguous to, and linked by public transportation

In suburban white areas, the people who lived there were given “exclusionary zoning, and greater environmental protection increased property values—ensuring that Black[] [people] and Latinos lacked access to these resources.”⁴⁷ Environmental law directly accounted for the “disconnect between property values in the inner cities and those in the suburbs, [which] makes it very difficult for many people to leave the inner cities and purchase homes in the suburbs.”⁴⁸ Environmental racism and segregation perpetuate the property value disparities and racial composition of neighborhoods—which strengthens the connection between non-white communities and low property values, poor school quality, white-dominated political systems, gentrification, exclusionary zoning, and redlining.

III. PITFALLS OF ENVIRONMENTAL JUSTICE

Discriminatory housing laws predated the modern environmental movements of the 1960s and 1970s. As discussed, through redlining, housing policy leaders assigned grade-levels and color-codes to neighborhoods, to which local lenders perceived credit risk based largely on race and ethnicity.⁴⁹ While the policies were outlawed in the 1960s,⁵⁰ the damage has been extensive to Black property ownership rights and the corresponding Black environmental rights, which supports the claim that environmental laws evolved to protect the white spaces that were established by redlining. Environmental laws did not work to desegregate and, in fact, intensified segregation in the years moving forward. A study by Redfin found the average home in a redlined neighborhood rose by \$212,023 (or 52 percent) less than one in a “greenlined” neighborhood over the past 40 years.⁵¹ Now, Black homeowners are five times more likely to own a home in a formerly redlined neighborhood than a greenlined one.⁵² The wealth disparity

and roads to, Baltimore and Anne Arundel Counties and in close proximity to the other counties in the Baltimore Region. In effectively wearing blinders that limited their vision beyond Baltimore City, Federal Defendants, at best, abused their discretion and failed to meet their obligations under the Fair Housing Act to promote fair housing affirmatively.

Id. at 462.

47. Rachel D. Godsil, *Environmental Justice and the Integration Ideal*, 49 N.Y.L. SCH. L. REV. 1109, 1124–27 (2005).

48. *Id.*

49. Michele Lerner, *One Home, A Lifetime of Impact*, WASH. POST (July 23, 2020), <https://www.washingtonpost.com/business/2020/07/23/black-homeownership-gap/?arc404=true>.

50. *Id.*

51. *Id.*

52. *Id.*

between Black and white families is based, in part, on these property disparities.⁵³ Levels of segregation for Latinos are significant, but slightly lower than those for African Americans.⁵⁴

In assessing racial segregation in America, Douglas Massey and Nancy Denton documented changing residential patterns from before the Civil War to the hyper-segregated present.⁵⁵ Massey and Denton asserted that working class white people, particularly immigrants, “feared the economic competition” from Black people.⁵⁶ At the same time, other white people subjugated Black people, positioning themselves as “better” in the racial hierarchy.⁵⁷ Conflicting messages between political groups also undermined desegregation, and consequently environmental protection efforts, particularly in the Deep South.⁵⁸

53. *Id.*

[R]esidential living in the United States are highly segregated by race and class Although levels of racial segregation for African Americans have been slowly decreasing since 1970, a recent Brookings Institute study suggests, based on 2000 census figures, that “the large number of American metropolitan areas with extremely high levels of segregation remains quite striking.”

Alice Kaswan, *Distributive Justice and the Environment*, 81 N.C. L. REV. 1031, 1051 (2003).

For African Americans, the most segregated group in the United States, the national average of a key segregation index is in the “hyper[-]segregated” range, and segregation is significantly above this national average in the nations’ most populous areas. The slow decreases in segregation over the last three decades have been achieved through the integration of formerly all-white census tracts, not through the integration of heavily African-American census tracts, and the decreases in segregation have been smallest in the areas with the greatest African-American populations and the greatest amount of historic segregation. Almost a third of the nation’s African Americans currently live in neighborhoods that are 80[percent] African-American or more.

Id. at 1051–52.

54. Kaswan, *supra* note 53, at 1051 (explaining that in the “Northeast, Latino segregation has reached ‘hyper[-]segregation’ levels. As with African Americans, the highest levels of segregation exist in those regions with the highest percentages of Latinos,” and that “[t]he reality, therefore, is that neighborhoods differ greatly in their demographic make-up.”)

55. Rachel D. Godsil, *Viewing the Cathedral from Behind the Color Line: Property Rules, Liability Rules, and Environmental Racism*, 53 EMORY L.J. 1807, 1838–40 (2004).

Legal historian Herbert Hovenkamp contends that much of white hostility towards Black[people] was rooted in pseudoscientific theories of racial inferiority that abounded in the late nineteenth and early twentieth centuries. These theories created a popular horror of racial mixing and widespread support for segregation. During a series of race riots in northern cities between 1900 and 1920, anyone seeking to transgress racial boundaries was subject to violence as individual Black[people] were beaten, shot, and lynched and homes were ransacked and burned. Following this rising tide of violence, even wealthier Black[people] were not welcome into middle class white neighborhoods.

Id.

56. *Id.*; see also Kevin E. Jason, *Dismantling the Pillars of White Supremacy: Obstacles in Eliminating Disparities and Achieving Racial Justice*, 23 CUNY L. REV. 139, 152–53 (2020).

57. *Id.*

58. See generally BENJAMIN E. MAYS, *AFRICA SOUTH: DESEGREGATION IN THE SOUTH* 26–34 (1957), <https://www.sahistory.org.za/sites/default/files/archive-files2/asjul57.6.pdf#61>.

Environmental protection efforts and desegregation efforts failed to result in integration in housing and reductions in toxicity fully and accurately. For example, in the space of educational desegregation, gains were sparse and left much to be desired.⁵⁹ Appealing to white sensibilities took high priority over effective desegregation in order to maintain the status quo.⁶⁰ Desegregation and environmental protection meant railing against the status quo.⁶¹ Anthony Cook argues that Ronald Reagan's discursive practices used race "to align the interests of disparate groups to reabsorb movement narratives back into the dominant narratives of colorblindness, individualism, and American Exceptionalism," favoring "the status quo and severely limit[ing] the civil rights movement's ability to sustain the victories of the Second

59. See Erica Frankenberg, *The Impact and Limits of Implementing Brown: Reflections from Sixty-Five Years of School Segregation and Desegregation in Alabama's Largest School District*, 11 ALA. C.R. & C.L.L. REV. 33, 60–62 (2019).

[T]he Supreme Court noted that the projections for 1970–71 were inaccurate and higher segregation resulted in the eastern part of Mobile, including nine elementary schools (enrolling 64[percent] of [B]lack elementary students) that were more than 90% [B]lack and more than half of [B]lack junior/senior high school students in metropolitan Mobile were attending all or nearly all [B]lack schools (instead of none as the Fifth Circuit had projected). The Supreme Court remanded for a plan that "promises to realistically work now."

Id.

60. Abby Motycka, *White Southerners Respond to Brown v. Board of Education: Why Education: Why Crisis Erupted When Little Rock, Arkansas, Desegregated Central High School*, BOWDOIN C. (2017), <https://digitalcommons.bowdoin.edu/cgi/viewcontent.cgi?article=1084&context=honorsprojects>.

61. Anthony Cook, *The Ghosts of 1964: Race, Reagan, and the Neo-Conservative Backlash to the Civil Rights Movement*, 6 ALA. C.R. & C.L.L. REV. 81, 85–87 (2015).

Appealing to a southern white constituency that had overwhelmingly supported the Democratic Party since the end of Reconstruction, the Republican Party's Southern Strategy offered a new political home to those disenchanted with the role played by the national Democrats in dismantling Jim Crow segregation and advancing the civil rights of Black Americans. Yet, Reagan's Republican Party was home not just to these southern Dixiecrats, but big-business Republicans and Midwestern, blue-collar Democrats as well. All were welcomed under the big tent of the "new" Republican Party. . .

Dixiecrats might hear in the call for "limited government," for instance, a return to "states' rights" and dual sovereignty—in other words, permission to resist, frustrate, and reverse desegregation efforts. On the other hand, big-business Republicans might hear a commitment to roll back costly government regulations that required certain safety, environmental, and wage standards or prohibited certain mergers and acquisitions. Finally, Midwestern Reagan Democrats might hear job creation and protection of existing jobs from minorities and women threatening to displace them through new employment discrimination statutes and affirmative action.

Dixiecrats might hear in the rhetoric of "anti-communism and the calls for national security" a divine command to destroy a Godless empire with a long history of undermining the stability and security of sovereign southern states through the support of civil rights and labor causes challenging the culture of White supremacy. Big-business Republicans might hear an opportunity to defeat an enemy of capitalism that threatened colonial holdings and global expansion with the confiscation and nationalization of private property. They might hear the opportunity to grow the national defense industry by selling goods and services needed to sustain the war against communism at home and abroad.

Id.

Reconstruction.”⁶² Despite white America’s desire to maintain color-blindness, the racial imbalance of environmental risk is well-established, particularly in “the placement of waste sites, enforcement of environmental laws, remedial action, location of clean-up efforts, and the quality of clean-up strategies.”⁶³ However, proving discrimination in environmental cases is difficult. For example, ever since the Supreme Court in *Washington v. Davis* established intent as a necessary element in an equal protection claim, discriminatory motivation has proved to be a formidable obstacle to obtaining judicial relief in suits challenging the unequal consequences of public policies, including policies affecting the environment.⁶⁴

Due to the long-term impacts of environmental destruction, there must be broader environmental risk assessments.⁶⁵ The awareness of preparing in advance instead of responding to environmental exposures and disasters, instead of reactive responses, would be more effective to prevent and control disease. This subsection reconsiders the conceptualization of environmental risk assessments. The concern for humans for environmental degradation is based on inevitable public health consequences, whether from pesticides ingested in fruits and vegetables, air pollution chemical contaminants, water quality concerns due to toxic substances, etc. The health impacts can pass on to future generations through epigenetics and evolutionary biology and exacerbate as immunities and natural defense mechanisms of the body decline. The variability of environmental risk assessments is complicated science. For example, diseases like cancer are caused by multi-

62. *Id.*

63. Donald E. Lively, *The Diminishing Relevance of Rights: Racial Disparities in the Distribution of Lead Exposure Risks*, 21 B.C. ENV’T. AFF. L. REV. 309, 311–13 (1994). “The EPA has acknowledged the need to increase the priority of environmental equity issues, to improve methods of assessing comparative risks by including the factor of race, and to upgrade communication efforts with low-income groups and racial minorities.” The EPA has known for decades the impacts of toxins on communities of color. *Id.* at 312.

Data it has collected on the distribution of lead exposure risks suggest that concern with environmental inequity is not misplaced or overstated. Exposure to lead is a problem that, although of national dimension, is especially acute in regions with large and long-established population bases. The EPA projects that, of 1,429,000 children under the age of seven in six midwestern states, 166,000 have elevated blood-lead levels. Of the total number of children at risk, the EPA estimates that 56,000 are African-American and 12,000 are Hispanic. The high proportion of minority exposure correlates to preexisting research indicating that poor minority children in central cities, experiencing malnutrition and other health risks, are more susceptible to lead poisoning.

Id. at 312–13.

64. See *Washington v. Davis*, 426 U.S. 229, 239–41 (1976).

65. David Briggs, *A Framework for Integrated Environmental Health Impact Assessment of Systemic Risks*, ENV’T. HEALTH J. (Nov. 27, 2008), <https://ehjournal.biomedcentral.com/articles/10.1186/1476-069X-7-61?optIn=false>.

ple risk factors.⁶⁶ “Multicausality also means that a range of interventions can be used for disease prevention, with the specific mix being affected by factors such as cost, technology availability, infrastructure, and preferences.”⁶⁷

IV. SILENCING ENVIRONMENTAL LAW

The canon of environmental law⁶⁸ consists of four major anti-pollution statutes administered by the Environmental Protection Agency, the Clean Air Act,⁶⁹ the Clean Water Act,⁷⁰ the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA),⁷¹ and the Resource Conservation and Recovery Act (RCRA),⁷² along with two other statutes, the National Environmental Policy Act (NEPA)⁷³ and the Endangered Species Act (ESA).⁷⁴ Congress enacted the statutes comprising the canon in the 1970s, during what has been called the “environmental law revolution.”⁷⁵ Todd Aagaard observes that “although the canonical environmental statutes have re-

66. See Goodarz Danaei, Stephen Hoorn, Alan Lopez, Christopher Murray & Majid Ezzati, *Causes of Cancer in the World: Comparative Risk Assessment of Nine Behavioural and Environmental Risk Factors*, 366 LANCET 1784, 1786 (2005).

67. *Id.* at 1786.

For example, more than 70% of Chinese households rely on solid fuels (coal and biomass) for cooking and heating, and more than 60% of Chinese men smoke. Since smoking and coal smoke magnify one another’s hazards for lung cancer, some deaths from lung cancer can be prevented by removal of smoking or exposure to indoor smoke from coal. Such cases would be attributed to both risk factors.

Id.

68. See Todd S. Aagaard, *Environmental Law Outside the Canon*, 89 IND. L.J. 1239, 1240–42 (2014) (citing Holly Doremus, *Preserving Citizen Participation in the Era of Reinvention: The Endangered Species Act Example*, 25 ECOLOGY L.Q. 707, 717 (1999)); see also Robert L. Fischman, *What Is Natural Resources Law?*, 78 U. COLO. L. REV. 717, 720 (2007); J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 VAND. L. REV. 1407, 1459 (1996); Robert V. Percival, *Regulatory Evolution and the Future of Environmental Policy*, 1997 U. CHI. LEGAL F. 159; Richard J. Lazarus, *A Different Kind of “Republican Moment” in Environmental Law*, 87 MINN. L. REV. 999 (2003); Richard N.L. Andrews, *The EPA at 40: An Historical Perspective*, 21 DUKE ENV’T. L. & POL’Y F. 223, 224 (2011); J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263, 265 (2000).

69. 42 U.S.C. §§ 7401–7671q.

70. 33 U.S.C. §§ 1251–1387.

71. 42 U.S.C. §§ 9601–9675.

72. 42 U.S.C. §§ 4321–4370h.

73. 16 U.S.C. §§ 1531–1544.

74. 16 U.S.C. §§ 1531–1544.

75. Holly Doremus, *Preserving Citizen Participation in the Era of Reinvention: The Endangered Species Act Example*, 25 ECOLOGY L.Q. 707, 707–08 (1999).

sulted in some dramatic reductions in pollution, environmental threats loom large.”⁷⁶

Rachel Carson’s *Silent Spring* ushered in a new wave of environmental activism, but it also led to a coordinated response to silence the momentum that the book created: an appreciation of nature and the stillness of environmental activism.⁷⁷ Instead, stillness in environmental protection laws is what transpired.⁷⁸ This ongoing silencing of environmentalism is part of the continued efforts based on the original responses to Carson’s *Silent Spring*.⁷⁹ Laws for environmental protection operate within a matrix of responses to environmental disasters, both sudden-onset (hurricanes, wildfires, tornadoes, oil spills, etc.) and slow-onset (drought, air pollution, water quality, etc.).⁸⁰ Movements for change require “both the recognition of opportunity for change and the creation of opportunity for change.”⁸¹ Others have also questioned the narrative of Rachel Carson as catalyzing American environmentalism.⁸²

Law professor Bret Rappaport notes, “silence can be silencing—a verb that means censorship or mutism.”⁸³ The idea of silencing environmental law is an underexplored area but literature on eco-criticism draws upon literary theory to explain the impacts of silencing on the

76. Aagaard, *supra* note 68 at 1241. “Many environmental harms continue relatively unregulated. New regulatory challenges arise as advancements in science identify new hazards. The threat from anthropogenic global climate change, the worst environmental problem in human history, continues to grow even as efforts to enact comprehensive climate policy seem more and more beyond reach.” *Id.*

77. Perry Parks, *Silent Spring, Loud Legacy: How Elite Media Helped Establish an Environmental Icon*, 94 JOURNALISM & MASS COMM. Q. 1215, 1216 (2017).

78. Donald Worster, *Another Silent Spring*, OHIO ST. U. (Oct. 2020), <https://origins.osu.edu/article/another-silent-spring-covid-pandemic>.

79. *Id.*

80. *Key Concepts on Climate Change and Disaster Development*, U.N. HIGH COMM’R FOR REFUGEES, <https://www.unhcr.org/en-us/protection/environment/5943aea97/key-concepts-climate-change-disaster-displacement.html> (last visited Feb. 14, 2021).

81. Linda S. Greene, *Feminism, Law, and Social Change: Some Reflections on Unrealized Possibilities*, 87 NW. U.L. REV. 1260, 1264 (1993)

I have suggested that change requires not only theory and strategy, but also the recognition and creation of transformative opportunities. Law is not an isolated social phenomenon; it is part of a complex web of circumstances that determine the conditions under which women live. If we are to determine whether significant social change through law is possible, we must look beyond the law to the question of empowerment.

Id.

82. See CHAD MONTRIE, *THE MYTH OF SILENT SPRING* (1st ed. 2018).

83. Bret Rappaport, “Talk Less”: *Eloquent Silence in the Rhetoric of Lawyering*, 67 J. LEGAL EDUC. 286, 291–92 (2017).

environment.⁸⁴ Law professor Martha Minow has addressed how silence in the social and family violence context can be interpreted outside the courtroom and away from the law to underscore the problems of breaking silence: “the power to impose silence is integral to the violence itself.”⁸⁵ Epstein recognizes the limits of language to express hardship.⁸⁶ Critiques of Native American rights have also considered the power of silencing in limiting access to rights.

Silencing as a rhetorical device occurs through a horde of ways. The rhetoric of silencing and the process of quieting voices limit the opinions and expressions of the more vulnerable segments of the population. The law limits the voices of those impacted by legal outcomes through the structural dynamics of law in the form of cases and rulemaking. Jane Murphy explains:

The notion that the people most directly affected by court decisions or legislation should be heard in the process seems self-evident. And yet, legal decisions and lawmaking consistently occur in an atmosphere where discussion of the law’s impact on people’s day-to-day lives is almost non-existent. This “unhinging of the law from human experience” is justified on the theory that law is rational and objective.⁸⁷

84. See generally David Gray, “Command these elements to silence”: *Ecocriticism and The Tempest*, 17 LITERATURE COMPASS, 1 (2020), <https://onlinelibrary.wiley.com/doi/full/10.1111/lic3.12566>.

85. James A. Epstein, *Rhetoric of Silence: Some Reflections on Law, Literature, and Social Violence*, 43 VAND. L. REV. 1701, 1701 (1990).

86. *Id.* (“Respectful listening indeed may be a prerequisite to attempting to frame words and actions of intervention and resistance. We are called upon to speak, but we are hard pressed to summon public language that does justice to private pain and anguish.”).

87. Jane C. Murphy, *Lawyering for Social Change: The Power of the Narrative in Domestic Violence Law Reform*, 21 HOFSTRA L. REV. 1243, 1253 (1993).

Classical legal thought views the law as a science in which legal judgments are made by applying objective rules to facts and reaching consistent and predictable results. We are a “government of laws, not men” and adhere to a system of “neutral” laws which are supposed to ensure fairness and impartiality in the application of the law. Historically, therefore, legal theorists have viewed any discussion of the reality of pain and suffering that results from oppressive laws—or the absence of laws—as a corruption of the lawmaking process. Injection of such emotion, they claim, would produce chaos and irrationality in the rule of law.

What is really happening here? Is it that the human experience is being ignored in lawmaking? Or is it that the experiences of the decisionmaker are the only experiences reflected in the “neutral” process of lawmaking? As feminist theory and feminist litigation have sought to clarify, “one’s personal experience is inextricably linked with one’s legal analysis.” To the extent that the legal decisionmakers primarily reflect one dominant perspective—that of the white heterosexual male—the perspectives of the “others,” the diverse groups making up the majority, are often undermined or undervalued. This point is well developed in recent feminist and critical race scholarship, and is demonstrated in the inadequacy of the law’s response to race and gender discrimination.

Id. at 1253–55. See GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 28 (1991) (examining empirical data on the results of judicial decisions in the

Nancy Cook considers how the narrative form has become the desired style of writing.⁸⁸ The narrative form offers more possibilities as an expressive form of communication to respond to ongoing attempts at silencing of vulnerable communities.⁸⁹

Law professor Margaret Montoya points out, “silence and silencing have been among other linguistic concepts . . . exploring the relationship between language and subordination.”⁹⁰ Montoya points out “the official silencing represented by the English-Only Movement through its use of law to proscribe the public use of Spanish and other minority languages” has drawn critique.⁹¹

CONCLUSION

What this Article has posited is that in protecting the environment, the law has furthered systems that promote segregation instead of enhancing them. The silencing of environmental law is instrumental to how it has served the purpose of segregation, particularly in the South. Limited environmental justice litigation, but a plethora of cli-

areas of civil rights, abortion, women’s rights, environmental protection, and criminal procedure, concluding that courts are rarely effective producers of change); Deborah L. Rhode, *The ‘No-Problem’ Problem: Feminist Challenges and Cultural Change*, 100 *YALE L.J.* 1731, 1733 (1991) (finding that despite substantial formal change in the legal status of women, significant gender inequalities still exist in all aspects of women’s lives). *But see* Greene, *supra* note 81 (articulating optimism about the use of the law to achieve concrete gains in social and political empowerment of women).

88. Nancy L. Cook, *Outside the Tradition: Literature as Legal Scholarship*, 63 *U. CINCINNATI L. REV.* 95, 98–99 (1994).

The rise in the use of narrative naturally invites the question of why this form of writing has suddenly taken off as a style of choice. The question is a legitimate one, but one could just as reasonably ask, why not? or, why not before this? Dominant discourse, after all, can itself be viewed as narrative, albeit narrative in which much of the “story” remains clouded and from which much is omitted.

Id.

89. *Id.*

90. Margaret E. Montoya, *Silence and Silencing: Their Centripetal and Centrifugal Forces in Legal Communication, Pedagogy and Discourse*, 5 *MICH. J. RACE & L.* 847, 849–50 (2000).

Other aspects of silence, such as performative and communicative aspects, have been eloquently described by the Asian American Critics—particularly by Sharon Hom and Margaret (H.R.) Chon. In describing the work of other Chinese women artists and writers, Hom calls attention to the “many tongues that silence, too, can speak.” She cautions against “the logocentric privileging of ‘voice’ that can colonize the very differences we seek to recognize.”

Id.

91. *Id.*

Some of the most significant work on silence and silencing has been done within Queer Theory, exposing the ways in which invisibility and its counterpart, inaudibility, are imposed on sexual minorities. Queer Theory also examines discriminatory public policies that aim to silence gays, lesbians, bisexuals, and transgendered persons, such as the military’s purportedly liberal “Don’t Ask, Don’t Tell” regulations.

Id.

mate change lawsuits, shows the prioritization of a field of the law that preserves whiteness as a neoliberal fascination. Environmental law as a canon is behind the bulwark of laws to limit and thwart integration and mixed-use objectives in single family zoning efforts. As a candidate, President Joe Biden promised to tackle the housing situation, but critics derided it as throwing big money at housing woes without practical solutions.⁹² Biden said he would seek to expand the reach of the housing voucher program, mandate affordable housing units for states receiving government funds, and reinstate a plan to mitigate discriminatory housing practices.⁹³ Such measures would work to limit housing segregation overall, but the extent to which they will be broad and sweeping is limited by the efficacy in which they are implemented. The reversal of environmental laws, which have perpetuated segregation, therefore, remains to be seen.

92. Katy O'Donnell, *How Biden Hopes to Fix the Thorniest Problem in Housing*, POLITICO (Apr. 10, 2021, 7:00 AM), <https://www.politico.com/news/2021/04/10/biden-housing-plan-480676>.

93. Natalie Campisi, *How President-Elect Joe Biden Proposes to Change Housing Policies*, FORBES (Nov. 9, 2020), <https://www.forbes.com/advisor/mortgages/biden-housing-policies/>.

Hard Life of Environmental Justice Legislation in Maryland: Policy Evaluation of Three Failed Cumulative Impact Bills Between 2014 and 2016

SACOBY WILSON,* MARCUS JONES,** JARRED MILES,****
ALIYAH ADEGUN***** & SAKEREH CARTER*****

Introduction	456
I. Methods	462
A. Policy Evaluation	462
B. Stakeholder Interviews	463
II. Results	464
A. Policy Evaluation	464
B. Positive And Negative Components Of Each Bill...	465
1. Senate Bill 706 And House Bill 1210 (2014)	465
2. Senate Bill 693 And House Bill 987 (2015)	466
3. Senate Bill 398 And House Bill 820 (2016)	467
C. Stakeholder Interviews	468
III. Discussion	468
Conclusion	474
Appendices A–I.....	476

* Dr. Sacoby Wilson is an Associate Professor at the School of Public Health, UMD, College Park, MD 20740 and Director of the CEEJH Lab. His lab focuses on addressing environmental justice and health issues through community engagement, consultation, and technical assistance. He is a member of the National Environmental Justice Advisory Council (NEJAC), board member for the Citizen Science Association, and Editor-in-Chief for Environmental Justice, swilson2@umd.edu (SW).

** Marcus Jones is a student at the University of Pittsburgh, Pittsburgh, PA 15260 and worked in the Community Engagement, Environmental Justice, and Health (CEEJH) lab for Dr. Sacoby Wilson, mhj8@pitt.edu (MJ).

*** Jared Miles is a law student at the University of Maryland (UMD), Baltimore, MD 21201 and worked in the CEEJH lab for Dr. Sacoby Wilson, jarred.miles@umaryland.edu (JD).

**** Aliyah Adegun is an undergraduate student at UMD, Baltimore 21201 and works in the CEEJH lab for Dr. Sacoby Wilson, aadegun1@umbc.edu (AA).

***** Sakereh Carter is a PhD student at UMD, College Park, MD 20740 and works in the CEEJH lab for Dr. Sacoby Wilson, scarter9@umd.edu (SC).

Low-wealth communities of color are disproportionately exposed to various chemical and non-chemical stressors, including environmental hazards, financial insufficiency, food insecurity, and inequitable zoning practices. These social and environmental pathogens suppress community viability and negatively impact the health of low-wealth communities and people of color. Cumulative impact assessments (“CIA”) address the cumulative burden of social and environmental inequity by integrating multiple environmental stressors into health-risk assessments that reflect real-world scenarios. A holistic analysis of all negative externalities in low-wealth communities of color provides the opportunity for multifaceted interventions that are tailored to environmental justice (“EJ”) communities. In the state of Maryland, three cumulative impact bills S.B. 706/H.B. 1210 (2014), S.B. 693/H.B. 987 (2015), and S.B. 398/H.B. 820 (2016) failed to become law. To discern the mechanistic underpinnings of legislative failure, our team performed a policy evaluation for each co-filed legislative bill, and interviewed stakeholders involved in drafting the proposed legislation. Our investigation revealed that inconsistencies between S.B. 706 and H.B. 1210 severely impacted its probability of success. Extraneous costs in S.B. 693/H.B. 987 and redundancy in S.B. 398/H.B. 820 contributed to the failure of both bills, which were deemed unnecessary by Maryland policymakers. Complex jargon and confusing language also contributed to the failure of S.B. 693/H.B. 987. Stakeholder interviews revealed opportunities for improvement, suggesting that policymakers familiarize themselves with environmental justice issues, specify well-characterized environmental hazards in legislative proposals, and include EJ advocates and community members in drafting EJ legislation. We also identified positive aspects of each bill, including clearly defined meanings of “protected communities” and stricter regulation of permitting processes. Thus, Maryland policymakers must learn more about regional EJ issues, involve EJ communities in legislative plans, and learn from other states that have successfully implemented cumulative impact legislation.

INTRODUCTION

Environmental justice issues usually occur in low-wealth communities of color and indigenous communities, which amplifies the existing health disparities they face from systematic racism and social and economic inequality. African Americans disproportionately suf-

Hard Life of Environmental Justice Legislation

fer from higher rates of health inequities than other groups.¹ For example, African Americans are 42 percent more likely to have asthma relative to white people and three times more likely to die from asthma-related ailments.² According to the Centers for Disease Control (“CDC”), infant mortality rates are twice as high for African American mothers relative to non-Hispanic white population.³ The maternal mortality rate is two to three times higher in African American populations than their white counterparts, and this disparity widens with age.⁴ In 2010, African Americans were 30 percent more likely to die from heart disease prematurely and twice as likely to die from stroke-related illnesses.⁵ African Americans are exposed to 72 percent more traffic-related air pollution (“TRAP”) relative to whites.⁶ African Americans are 80 percent more likely to live in close proximity to facilities that handle hazardous waste (“TSDFs”) compared to whites.⁷ Recent studies suggest that African Americans inhale 56 percent more polluted air than they produce and white people inhale 17 percent less pollution than they create.⁸ The nation’s most polluted and high poverty areas are often highly racially segregated.⁹ In several states across the country, proximity to polluting entities poses the greatest health risk to people of color.¹⁰

1. Allan S. Noonan, Hector Eduardo Velasco-Mondragon & Fernando A. Wagner, *Improving the Health of African Americans in the USA: An Overdue Opportunity for Social Justice*, 37 PUB. HEALTH REV. 1, 2 (2016).

2. *Current Asthma Demographics*, AM. LUNG ASS’N (Jul. 6, 2020), <https://www.lung.org/research/trends-in-lung-disease/asthma-trends-brief/current-demographics>; NAT’L ACADEMIES SCIENCE, ENGINEERING, & MEDICINE, COMMUNITIES ACTION: PATHWAYS TO HEALTH EQUITY (James N. Weinstein et. al., eds.) (2017) [hereinafter COMMUNITIES IN ACTION].

3. *Infant Mortality*, CTR. FOR DISEASE CONTROL & PREVENTION (Mar. 27, 2019), <https://www.cdc.gov/reproductivehealth/maternalinfanthealth/infantmortality.html>.

4. Emily E. Petersen, Nicole L. Davis, David Goodman, Shanna Cox, Nikki Mayes, Emily Johnston, Carla Syverson, Kristi Seed, Carrie K. Shapiro-Mendoza, William M. Callaghan & Wanda Barfield, *Vital Signs: Pregnancy-Related Deaths, United States, 2011-2015, and Strategies for Prevention, 13 States, 2013-2017*, MORBIDITY MORTAL Wkly. REP. 423-29 (2019).

5. COMMUNITIES IN ACTION, *supra* note 2.

6. John Larsen, *A Just Green Recovery*, RHODIUM GRP. (June 29, 2020), <https://rhg.com/research/a-just-green-recovery/>.

7. *Id.*

8. Christopher W. Tessum, Joshua S. Apte, Andrew L. Goodkind, Nicholas Z. Muller, Kimberley A. Mullins, David A. Paoletta, Stephen Polasky, Nathaniel P. Springer, Sumil K. Thakrar, Julian D. Marshall & Jason D. Hill, *Inequity in Consumption of Goods and Services Adds to Racial-Ethnic Disparities in Air Pollution Exposure*, PROC. NAT’L ACAD. SC’S. (Mar. 26, 2019), <https://www.pnas.org/content/116/13/6001>.

9. SIERRA CLUB BOOKS STAFF, *THE QUEST FOR ENVIRONMENTAL JUSTICE: HUMAN RIGHTS AND THE POLITICS OF POLLUTION* (Robert Bullard ed., 2005).

10. David Pace, *Minorities Suffer Most from Industrial Pollution*, NBC (Dec. 13, 2005, 2:19 PM), http://www.nbcnews.com/id/10452037/ns/us_news-environment/t/minorities-suffer-most-in-dustrial-pollution/#.XzRC7C2ZMmI.

Recently, the Black Lives Matter (“BLM”) movement has brought attention to numerous issues that impact Black communities, including the epidemic of police brutality, the criminalization of Blacks, food apartheid, economic inequality, health inequities, and environmental racism.¹¹ The movement also created a space to reimagine policy directives that enhance community sustainability. For example, Black Lives Matter inspired the Breathe Act, which reallocates funding from regional law enforcement to programs that nurture health-promoting infrastructure and social equity.¹² Fundamentally, the BLM movement advocates for the health and longevity of all Black individuals, similar to the EJ movement. Cumulative impact assessments (“CIAs”) align with BLM objectives and the EJ framework by assessing and mitigating the cumulative burden of chemical and non-chemical stressors in low-wealth communities of color that significantly impair the health and longevity of its residents. Thus, CIAs are an opportunity to understand the overall burden of chemical and non-chemical stressors in communities of color and low-wealth areas such as the distribution of environmental hazards, exposure to air and water pollutants, institutional racism, poor housing quality, inadequate health care, and food insecurity to name a few.

CIAs serve to determine health outcomes associated with exposure to negative stimuli or ecologic pathogens, such as hazardous pollutants, racial discrimination, poverty, inequities in the implementation of land-use policies, and enforcement of environmental regulations.¹³ Furthermore, CIAs allow for policymakers to treat each community as its own “ecological niche” or an interdependent web that can be modified to improve community health holistically. These factors can be separated into two groups—susceptibility and vulnerability.¹⁴ Susceptibility refers to intrinsic factors possessed by a person, such as age, gender, and underlying disease; these factors are

11. NEHA Issues Joint Statement on Racism & Environmental Health, NAT'L ENV'T HEALTH ASS'N (June 17, 2020), <https://www.neha.org/news-events/latest-news/neha-issues-joint-statement-racism-environmental-health>.

12. Victoria Moorwood, *Movement for Black Lives proposes The Breathe Act*, REVOLT (July 7, 2020 12:07 PM), <https://www.revolt.tv/2020/7/7/21316066/movement-for-black-lives-the-breathe-act>.

13. Sacoby Wilson, *An Ecologic Framework to Study and Address Environmental Justice and Community Health Issues*, 2 ENV'T JUST. 1, 15–24 (2009).

14. Rachel Morello-Frosch, Miriam Zuk, Michael Jerrett, Bhavna Shamasunder & Amy D. Kyle, *Understanding The Cumulative Impacts Of Inequalities In Environmental Health: Implications For Policy*, 30 HEALTH AFF. 879 (2011).

Hard Life of Environmental Justice Legislation

inherent, and so serve as a baseline for the risk of disease.¹⁵ Vulnerability, alternatively, refers to added risk from extrinsic factors, such as proximity to hazards, exposure to pollutants, and social stressors such as poverty and racism.¹⁶ When all factors are considered, it becomes possible for researchers to determine potential risk for disease, cumulative risk, and it can also show how multiple negative factors can create even more added health risks.¹⁷ CIAs can cover multiple shortcomings associated with various singular assessment methods.¹⁸

The development of processes and practices to better demonstrate the presence of inequalities is useful to shift the role of policy toward promoting EJ and equality.¹⁹ In communities with the highest environmental health risks, various forms of evidence are often required—specifically assessments that analyze pollutants and their health risks. CIAs can assist in this process by providing evidence.²⁰ EJ emphasizes the importance of chemical and non-chemical stressors on vulnerable populations and related adverse health effects and social impacts.²¹ These populations are most often low-wealth and communities of color whose interests are not considered during policy development and regulatory enforcement. Several states have successfully passed cumulative impact legislation²²; however, the absence of CIA methodological consistency impedes transferability and appli-

15. *Id.* at 881.

16. *Id.* at 882.

17. Timothy M. Barzyk, Sacoby Wilson & Anthony Wilson, *Community, State, and Federal Approaches to Cumulative Risk Assessment: Challenges and Opportunities for Integration*, 12 INT. J. ENV'T RSCH. PUB. HEALTH 4546, 4547 (2015); James L. Sadd, Manuel Pastor, Rachel Morello-Frosch, Justin Scoggins & Bill Jesdale, *Playing It Safe: Assessing Cumulative Impact and Social Vulnerability through an Environmental Justice Screening Method in the South Coast Air Basin, California*, 8 INT. J. ENV'T RSCH. PUB. HEALTH 1441, 1441–42 (2011).

18. *Consideration of Cumulative Impacts in EPA Review of NEPA Documents*, EPA (May, 1999), <https://www.epa.gov/nepa/cumulative-impacts-guidance-national-environmental-policy-act-reviews>.

19. Ken Sexton & Stephen H. Linder, *Cumulative Risk Assessment for Combined Health Effects From Chemical and Nonchemical Stressors*, 101 AM. J. PUB. HEALTH S81, S85 (2011); Robert D. Bullard & Glenn S. Johnson, *Environmentalism and Public Policy: Environmental Justice: Grassroot Activism and Its Impact on Public Policy Decision Making*, 56 J. SOC. ISSUES 555 (2000).

20. Lara Cushing, John Faust, Laura Meehan August, Rose Cendak, Walker Wieland & George Alexeeff, *Racial/Ethnic Disparities in Cumulative Environmental Health Impacts in California: Evidence From a Statewide Environmental Justice Screening Tool (CalEnviroScreen 1.1)*, 105 AM. J. PUB. HEALTH 2341 (2015); Sexton & Linder, *supra* note 19, at S81.

21. Sexton & Linder, *supra* note 19, at S81.

22. Samantha Maldonado, *How a Long-stalled 'Holy Grail' Environmental Justice Bill Found its Moment in New Jersey*, POLITICO (Aug. 27, 2020, 4:36 PM), <https://www.politico.com/states/new-jersey/story/2020/08/27/new-jersey-legislature-sends-groundbreaking-environmental-justice-bill-to-governors-desk-1313030> (“More than a dozen states, including California and New York, require cumulative impact assessments as part of the permitting process.”).

capability to other states. This lack of procedural uniformity may generate disparities in legislative strength and implementation.

Although each state should tailor its CIA to the geographical hazards present in their community, a transferable CIA backbone will ensure that CIA methodologies are scientifically sound and useful to decision makers. Additionally, mindful consideration of project feasibility and available resources is critical for successful CIA implementation. In 2003, the California Environmental Protection Agency (Cal-EPA) Environmental Justice Advisory Committee (“CEJAC”) created a report that emphasized (1) cumulative impacts from past and current emissions, (2) quantitative assessments, and (3) geographic distributions.²³ This report informed the Cal-EPA cumulative impacts framework, which considers: (1) extrinsic exposures, (2) all sources of harmful emissions, (3) all routes of exposure, (4) chemical releases, (5) vulnerable populations, and (6) socioeconomic factors.²⁴

In 2008, Minnesota passed legislation requiring its Pollution Control Agency to consider the cumulative impact of all past and present environmental insults prior to issuing permits to polluting entities.²⁵ Successful cumulative impact frameworks also engage community-based EJ organizations, propel community action, and address EJ concerns. In 2016, the New Jersey Environmental Justice Alliance established the Newark Environmental Justice and Cumulative Impacts Ordinance.²⁶ The ordinance informs community members about estimated pollution emissions associated with proposed projects, forms collaborations with local EJ organizations, informs policy-making decisions, and addresses exposure disparities from multidimensional health risks.²⁷ On August 27, 2020, New Jersey passed a landmark bill, S.B. 232, which allows the state’s Department of Environmental

23. *E.g.*, EJ ADVISORY COMMITTEE, RECOMMENDATIONS OF THE CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY ADVISORY COMMITTEE ON ENVIRONMENTAL JUSTICE TO THE CAL/EPA INTERAGENCY WORKING GROUP ON ENVIRONMENTAL JUSTICE 15, 31, 45 (2003), <http://www.precaution.org/lib/calepafinal.20031012.pdf>.

24. *See generally* LINDA S. ADAMS & JOAN E. DENTON, CUMULATIVE IMPACTS: BUILDING A SCIENTIFIC FOUNDATION (Dec. 2010), <https://oehha.ca.gov/media/downloads/calenviroscreen/report/cireport123110.pdf>.

25. Kristie M. Ellickson, Sarah M. Sevcik, Shelley Burman, Steven Pak, Frank Kohlasch & Gregory C. Pratt, *Cumulative Risk Assessment and Environmental Equity in Air Permitting: Interpretation, Methods, Community Participation and Implementation of a Unique Statute*, 8 INT’L. J. ENV’T. RSCH. PUB. HEALTH 4140, 4140 (2011).

26. *Environmental Justice and Cumulative Impact Ordinance (EJCI) FAQ*, N.J. ENV’T JUST. ALL. (May 9, 2016), http://www.njeja.org/wpcontent/uploads/2019/10/Newark_EJ_Cumulative_Impacts_ordinance.pdf.

27. *Id.*

Hard Life of Environmental Justice Legislation

Protection to consider the cumulative burden in communities inundated with chemical and non-chemical stressors during the permitting process.²⁸

EJ legislative efforts in Maryland experienced early success when the state began to incorporate EJ into state policy. In 1997, the Maryland Advisory Council on Environmental Justice was formed to provide recommendations on approaches to address EJ issues in the state.²⁹ Maryland, as one of the first states to focus on environmental justice,³⁰ later established the Commission on Environmental Justice and Sustainable Communities (“CEJSC”) in 2001 to be a permanent commission focused on the topic.³¹ The commission’s responsibilities included advising state agencies on EJ, analyzing the effectiveness of related laws and policies, developing assessment criteria for communities experiencing environmental injustices, and recommending actions to the Maryland Governor and General Assembly.³²

Despite these responsibilities, in the years after the formation of the CEJSC, EJ legislative success has stagnated with multiple bills failing to become law.³³ A 2013 review on the CEJSC found, based on report analysis and interviews, that the commission has generally been reactive with a need for more proactivity in advocacy and legislative efforts and impact. One recommendation from the review was a need for more concentrated themes and goals for the CEJSC to promote as Maryland’s efforts to target specific EJ issues legislatively have struggled.³⁴ In the years following the review, legislation specifically

28. See generally S. 232, 219th Leg., 2020 Sess. (N.J. 2020).

29. MARYLAND ADVISORY COUNCIL ON ENVIRONMENTAL JUSTICE REPORT, ENVIRONMENTAL JUSTICE IN THE STATE OF MARYLAND 1 (1999), https://mde.maryland.gov/programs/Crossmedia/EnvironmentalJustice/Pages/ej_reports.aspx#1999.

30. ENVIRONMENTAL LAW CLINIC, ENVIRONMENTAL JUSTICE IN MARYLAND 4 (2015), https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2555&context=fac_pubs.

31. Md. Exec. Order No. 01.01.2001.01 (Mar. 9, 2001).

32. Rebecca Rehr & Sacoby Wilson, *The Maryland Commission on Environmental Justice and Sustainable Communities: A Review*, 24 J. HEALTH CARE POOR UNDERSERVED 129, 130 (2013).

33. See S. 706, 2014 Leg., Reg. Sess. (Md. 2014) (passing bill in the Senate but failing in the House); see also H.D. 1210, 2014 Leg., Reg. Sess. (Md. 2014) (failing after a hearing on the bill); see also S. 693, 2015 Leg., Reg. Sess. (Md. 2015) (failing after a hearing was held); see also H.D. 987, 2015 Leg., Reg. Sess. (Md. 2015) (failing after receiving an unfavorable report by the Environment and Transportation committee); see also S. 398, 2016 Leg., Reg. Sess. (Md. 2016) (failing after receiving an unfavorable report by the Education, Health, and Environmental Affairs committee); see also H.D. 820, 2016 Leg., Reg. Sess. (Md. 2016) (failing after a hearing was held).

34. Rehr & Wilson, *supra* note 32, at 138.

targeting cumulative impacts was proposed, but ultimately failed to become law.³⁵

Between 2014 and 2016, three legislative bills—S.B. 706 (H.B. 1210) (2014), S.B. 693 (H.B. 987) (2015), and S.B. 398 (H.B. 820) (2016)—were proposed to both chambers of the Maryland General Assembly, which focused on cumulative impacts directly and had a cumulative impact assessment component.³⁶ However, none of the three bills were enacted. On the state level, the effective implementation of CIAs can be crucial in developing impactful environmental policies that promote state-level EJ.³⁷ Additionally, statewide adoption of transferable CIA methodological approaches may prevent context-specific legislative failure.³⁸ Knowing this, our research focuses on the failure of Maryland in the past several years to pass cumulative impacts legislative bills. In this paper, the three failed Maryland bills were analyzed to understand issues, benefits, lessons learned, and recommendations for the drafting of future policy and legislation on cumulative impacts.

I. METHODS

A. Policy Evaluation

A policy evaluation was performed on each co-filed legislative bill to examine and identify potential factors that may have assisted in the failure of each bill to become law. Policy evaluations are most often used as a means of providing insight and analysis of existing and implemented legislation. Due to the failure of each bill, the policy

35. *E.g.* S. 706, 2014 Leg., Reg. Sess. (Md. 2014) (passing the bill in the Senate but failing in the House); *see also* H.D. 1210, 2014 Leg., Reg. Sess. (Md. 2014) (failing after a hearing on the bill); *see also* S. 693, 2015 Leg., Reg. Sess. (Md. 2015) (failing after a hearing was held); *see also* H.D. 987, 2015 Leg., Reg. Sess. (Md. 2015) (failing after receiving an unfavorable report by the Environment and Transportation committee); *see also* S. 398, 2016 Leg., Reg. Sess. (Md. 2016) (failing after receiving an unfavorable report by the Education, Health, and Environmental Affairs committee); *see also* H.D. 820, 2016 Leg., Reg. Sess. (Md. 2016) (failing after a hearing was held).

36. S. 706, 2014 Leg., Reg. Sess. (Md. 2014) (passing the bill in the Senate but failing in the House); H.D. 1210, 2014 Leg., Reg. Sess. (Md. 2014) (failing after a hearing on the bill); S. 693, 2015 Leg., Reg. Sess. (Md. 2015) (failing after a hearing was held); H.D. 987, 2015 Leg., Reg. Sess. (Md. 2015) (failing after receiving an unfavorable report by the Environment and Transportation committee); S. 398, 2016 Leg., Reg. Sess. (Md. 2016) (failing after receiving an unfavorable report by the Education, Health, and Environmental Affairs committee); H.D. 820, 2016 Leg., Reg. Sess. (Md. 2016) (failing after a hearing was held).

37. NAT'L ENV'T JUST. ADVISORY COUNCIL, ENSURING RISK REDUCTION IN COMMUNITIES WITH MULTIPLE STRESSORS: ENVIRONMENTAL JUSTICE AND CUMULATIVE RISKS/IMPACTS 35–36 (2004).

38. *Id.*

Hard Life of Environmental Justice Legislation

evaluation procedure was modified to evaluate each bill based on its proposed features and outcomes. The evaluation criteria of the legislative bills' contents were based on the shared features of each bill as well as similar bills passed in other states.³⁹ The evaluation criteria for potential impact (Appendix A, Figure 1) were based on previous research on policy durability with modifications made to analyze the environmental component of each bill.⁴⁰ In order to perform a comprehensive evaluation, information was used from a combination of sources from the Maryland General Assembly: (1) committee hearings, (2) fiscal and policy notes, (3) bill draft, and (4) committee and house votes, if available.⁴¹

B. Stakeholder Interviews

An important component of the policy process is engaging stakeholders who the legislation would directly impact or have the most

39. See *infra* Appendix A.

40. See Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, 28 *FORDHAM URB. L. J.* 1611 (2011); see also NAT'L COLLABORATING CTR. HEALTH PUB. POL'Y, *A Framework for Analyzing Public Policies: Practical Guide* (Sept. 2012), https://www.ncchpp.ca/172/Publications.ccnpps?id_article=827 [hereinafter *Nat'l Pub. Policies: Practical Guide*].

41. *M.D. Gen. Assemb. Fiscal and Policy Note. Reducing Environmental Degradation for the Underserved Through Community Engagement (The REDUCE Act)*, MD. STATE ARCHIVES (2015), <https://msa.maryland.gov/msa/mdmanual/07leg/html/ga.html>; *M.D. Gen. Assemb. Fiscal and Policy Note. Environment - Ambient Air Quality Control - Cumulative Air Impact Analysis*, MD. STATE ARCHIVES (2015), <https://msa.maryland.gov/msa/mdmanual/07leg/html/ga.html>; *M.D. Gen. Assemb. Fiscal and Policy Note. Environment - Permit Determinations - Cumulative Impact Assessments* MD. STATE ARCHIVES (2014), <https://msa.maryland.gov/msa/mdmanual/07leg/html/ga.html>; *Reducing Environmental Degradation for the Underserved Through Community Engagement (The REDUCE Act): Hearings before the Committee on Environment and Transportation, Maryland House of Delegates, Reg. Sess.*, MD. STATE ARCHIVES (2016), <https://msa.maryland.gov/msa/mdmanual/07leg/html/ga.html>; *Reducing Environmental Degradation for the Underserved Through Community Engagement (The REDUCE Act): Hearings before the Committee on Education, Health, and Environmental Affairs, Maryland Senate, Reg. Sess.*, MD. STATE ARCHIVES (2016), <https://msa.maryland.gov/msa/mdmanual/07leg/html/ga.html>; *Reducing Environmental Degradation for the Underserved Through Community Engagement (The REDUCE Act), HB0820/SB0398*, MD. STATE ARCHIVES (2016), <https://msa.maryland.gov/msa/mdmanual/07leg/html/ga.html>; *Environment - Ambient Air Quality Control - Cumulative Air Impact Analysis: Hearings before the Committee on Environment and Transportation, Maryland House of Delegates, Reg. Sess.*, MD. STATE ARCHIVES (2015), <https://msa.maryland.gov/msa/mdmanual/07leg/html/ga.html>; *Environment - Permit Determinations - Cumulative Impact Assessments: Hearings before the Committee on Environmental Matters, Maryland House of Delegates, Reg. Sess.*, MD. STATE ARCHIVES (2014), <https://msa.maryland.gov/msa/mdmanual/07leg/html/ga.html>; *Environment - Permit Determinations - Cumulative Impact Assessments: Hearings before the Committee on Education, Health, and Environmental Affairs, Maryland Senate, Reg. Sess.*, MD. STATE ARCHIVES (2014), <https://msa.maryland.gov/msa/mdmanual/07leg/html/ga.html>; *Environment - Permit Determinations - Cumulative Impact Assessments, SB0706/HB1210*, MD. STATE ARCHIVES (2014), <https://msa.maryland.gov/msa/mdmanual/07leg/html/ga.html>.

effect.⁴² Each of these legislative bills were created through the combined efforts of multiple stakeholders including academics, professionals, and policymakers.⁴³ Interviews were conducted with stakeholders involved in the policy or legislative process, with each interviewee working on at least one bill.⁴⁴ The interviews were conducted remotely with each interviewee answering ten questions.⁴⁵ These questions were meant to discern and collect first-hand information on each bill, the stakeholder's contribution, additional legislative and policy work done by the interviewees, and post-process feedback and recommendations about the failed legislative bills.⁴⁶

II. RESULTS

Since 2016, there has not been a similar legislative bill introduced to the Maryland General Assembly focusing on cumulative impacts.⁴⁷ The closest substitute was the Cumulative Impacts Workgroup, which helped to craft the 2014 co-filed Senate bill 706 and House bill 1210, which failed.⁴⁸

A. Policy Evaluation

Each legislative bill's content was analyzed based on language found in each policy, enacted cumulative impact policies in other states, and information compiled from each bill's fiscal and policy note.⁴⁹ As written, each bill except S.B. 706 covered the entire state of Maryland. S.B. 693/H.B. 987 and S.B. 398/H.B. 820 both required a comprehensive CIA and plan as a component of the permit process⁵⁰; however, only S.B. 693/H.B. 987 had language indicating a direct effect or modifying to current permit regulation and procedure.⁵¹ Both S.B. 706/H.B. 1210 and S.B. 693/H.B. 987 were stated to have a signifi-

42. *Nat'l Pub. Policies: Practical Guide*, *supra* note 40.

43. *Id.*

44. *Id.*

45. *See infra* Appendix B, Table 1.

46. *See infra* Appendix B.

47. *See infra* Appendix C; *See infra* Appendix D, E, and F.

48. *Cumulative Impacts Workgroup*, MD. DEP'T ENV'T, https://mde.maryland.gov/programs/Crossmedia/EnvironmentalJustice/Pages/Cumulative_Impacts_Workgroup.aspx (last visited Mar. 1, 2021); *see infra* Appendix C, Table 2; *see infra* Appendix D, Vignette 1; *see infra* Appendix E, Vignette 2; *see infra* Appendix F, Vignette 3.

49. *See infra* Appendix G, Table 3.

50. *See* S.B. 693, 2015 Leg., Reg. Sess. (Md. 2015); *see generally* S.B. 398, 2016 Leg., Reg. Sess. (Md. 2016).

51. S. 693, 2015 Leg., Reg. Sess. (Md. 2015).

Hard Life of Environmental Justice Legislation

cant impact on small businesses, and at the local level.⁵² S.B. 693/H.B. 987 and S.B. 398/H.B. 820 included language explicitly defining and discussing provisions for certain types of communities.⁵³ In S.B. 693/H.B. 987, these communities were called “Protected Communities” and in S.B. 398/H.B. 820, these communities were called “Affected Communities.”⁵⁴ None of the bills had explicit language discussing specific enforcement actions or penalties for violating the policy. Each bill, except H.B. 1210, required the involvement or action from other state agencies or local governments and agencies.⁵⁵ S.B. 693/H.B. 987 and S.B. 398/H.B. 820 both had language explicitly stating provisions for the direct participation and involvement of stakeholders.⁵⁶ S.B. 693 defined a specific location in which it would primarily focus—unincorporated communities within Prince George’s County.⁵⁷ S.B. 398/H.B. 820 were the only bills that explicitly focused on specific industries—those involving diesel vehicles.⁵⁸

B. Positive and Negative Components of Each Bill

We highlighted the positive components of each bill in Appendix H, Table 4. However, we wanted to focus on the negative components of each bill to outline why we think the bills failed. A detailed description of the negative components of each bill can be found in the following section.

1. Senate Bill 706 and House Bill 1210 (2014)

The viability of Senate Bill 706 appeared to be promising through its tenure on the Senate floor, passing the Education, Health, and Environmental Affairs Committee vote of 43 to 3.⁵⁹ However, the bill was withdrawn from the House of Delegates’ Environmental Matters Committee and subsequently failed.⁶⁰ House Bill 1210 also failed after its first reading in the Environmental Matters Committee.⁶¹ Although there is no rationale listed for the withdrawal of the bill, its

52. Md. S. 398; Md. S. 693.

53. Md. S. 398; Md. S. 693.

54. Md. S. 398; Md. S. 693.

55. See Md. S. 398; see also Md. S. 693. *But see* H.D. 1210, 2014 Leg., Reg. Sess. (Md. 2014).

56. Md. S. 398; Md. S. 693.

57. Md. S. 693.

58. Md. S. 398; see *infra* Appendix H.

59. S. 706, 2014 Leg., Reg. Sess. (Md. 2014).

60. *Legislation*, MD. GEN. ASSEMBLY, <http://mgaleg.maryland.gov/mgaweb/Legislation/Details/sb0706/?ys=2014rs> (last visited Mar. 1, 2021).

61. H.D. 1210, 2014 Leg., Reg. Sess. (Md. 2014).

failure in the House of Delegates can likely be attributed to an inconsistency between the House and Senate variations of the bill. Senate Bill 706 stipulated that the permit applicant conducts CIAs while House Bill 1210 stated that the Maryland Department of the Environment (“MDE”) would conduct the assessments, and left out the special Prince George’s County provisions all together.⁶² The consequence of this change was seen in discrepancies within each bills’ fiscal and policy note, created by the Department of Legislative Services.

Senate Bill 706’s fiscal summary claims that the legislation would have no material effect on state and local operations or finances.⁶³ Due to the provision in House Bill 1210 that states MDE was to conduct CIAs, the bill’s Fiscal Summary accounts for a \$226,600 budget increase for MDE to hire employees and consultants to conduct the assessments.⁶⁴ Accordingly, the fiscal and policy note for House Bill 1210 stipulates that permit application fees would need to be raised to cover the costs of new employees, placing a larger burden on small businesses applying for permits.⁶⁵ Additionally, a provision mandating that MDE conduct CIAs was deemed unnecessary, due to Maryland’s Environmental Policy Act that requires MDE and other agencies to “prepare environmental effects reports for each proposed state action that significantly affects the quality of the environment.”⁶⁶ For the above reasons, the House version of the bill was deemed costly and unnecessary.

2. Senate Bill 693 and House Bill 987 (2015)

The bill’s complex nature was addressed in the Department of Legislative Services fiscal and policy note, which pointed out several negatives associated with the bill.⁶⁷ Requiring the MDE, the Department of Health and Mental Hygiene, and the local governments to carry out all tasks beyond the current permitting processes would have resulted in a \$521,900 expenditure increase in funds in 2016.⁶⁸

62. Md. S. 706.

63. *Id.*

64. Md. H.D. 1210.

65. FISCAL AND POLICY NOTE, H.R. 1210, 2014 Sess. (Md. 2014) at 4.

66. HORNE ENGINEERING SERVICES, INC., WILDLIFE HABITAT MANAGEMENT GUIDELINES FOR THE CITY OF BOWIE, MARYLAND 69 (Jan. 2002), https://www.cityofbowie.org/DocumentCenter/View/31/wildlife_guidelines?bidId=.

67. FISCAL AND POLICY NOTE, S. 693, 2015 Sess. (Md. 2015).

68. *Id.* at 1.

Hard Life of Environmental Justice Legislation

Like the 2014 cumulative impacts bill, MDE alleged that the cost of permitting would have to rise to cover these increased expenditures, placing a disproportionate burden on small businesses. Local expenditures were predicted to increase as well due to local governments' potential roles in the cumulative air impacts assessment process. Another inadequacy determined by the Department of Legislative Services lay within the inefficient establishment of "protected communities."⁶⁹ The bill assumed whole zip codes would be protected areas simply because an area within the zip code was protected. This assumption paired with the fact that the bill lacked sufficient data to designate a "significant percentage" of Maryland as protected or non-protected created uncertainty surrounding the efficiency of the bill.⁷⁰

The fiscal and policy note additionally noted that the Maryland Environmental Policy Act provides for state agencies to create environmental effects reports for proposed actions that affect environmental and public health.⁷¹ The bill was withdrawn from the House of Delegates' Environment and Transportation Committee before a vote because of its heightened and costly requirements on two state agencies, inadequate data and planning for a vital component of the legislation, and heightened notice requirements, which would materially alter the state's permitting processes indefinitely.⁷²

3. Senate Bill 398 and House Bill 820 (2016)

The fiscal and policy note for the REDUCE Act did not mention any issues with the bill on any fiscal matter, noting that the state, local, and small business's fiscal impacts in Maryland were minimal.⁷³ The Department of Legislative Services also did not mention conflict with the Maryland Environmental Standing Act.⁷⁴ However, Legislative Services implied that the existing notice laws were sufficient and explicitly stated that the use of census tract data would cause multiple problems.⁷⁵ The Maryland Association of County Health Officers provided information that showed disease and health-related data was not provided at the census tract level and will never be available at the

69. *Id.* at 3.

70. *Id.*

71. *Id.* at 8.

72. FISCAL AND POLICY NOTE, H.D. 987, 2015 Sess. (Md. 2015) at 1–2.

73. FISCAL AND POLICY NOTE, H.D. 398, 2016 Sess. (Md. 2016) at 1.

74. *See generally* FISCAL AND POLICY NOTE, H.D. 398, 2016 Sess. (Md. 2016).

75. *Id.* at 2–3.

unit of analysis because of Health Insurance Portability and Accountability Act (“HIPAA”) restraints.⁷⁶ The fiscal and policy note stipulated that access to census tract information on disease and health issues would significantly increase the costs of implementing the REDUCE Act.⁷⁷ The note also stated that this information is readily available at “the zip code level with existing budgeted resources.”⁷⁸ The REDUCE Act received an unfavorable report from the Senate Education, Health, and Environmental Affairs Committee before it could be amended and voted on.⁷⁹

C. Stakeholder Interviews

The key findings of our stakeholder interviews and recommendations can be found in Appendix I, Table 5.

III. DISCUSSION

CIAAs are important tools for evaluating how projects and actions of governments and businesses impact human health and the environment. The use of CIAAs has helped to adequately assess and monitor projects, especially those requiring permits. National Environmental Policy Act (NEPA), mini-NEPA legislation, and other supplemental environmental policies serve this purpose in their respective jurisdictions, enforcing environmental and governmental regulations on businesses and governmental agencies. Several states have attempted to pass cumulative impacts legislation with differing results—including failure and passage with varying impacts to their states. In this paper, we evaluated three failed cumulative impacts bills in Maryland—S.B. 706/H.B. 1210, S.B. 693/H.B. 987, S.B. 398/H.B. 820—to determine their benefits and potential issues, effects to current law, and the pitfalls, which impacted their eventual failures.

Maryland not passing S.B. 706/H.B. 1210, S.B. 693/H.B. 987, and S.B. 398/H.B. 820, in addition to not introducing other similar legislation since 2016, means that the state presently lacks legislation, which comprehensively includes CIAAs or cumulative impacts in general. Had any of these bills become law, the state would have enhanced its protection of the environment and human health via reinforcing and

76. *Id.* at 3.

77. *Id.*

78. *Id.*

79. *See generally* FISCAL AND POLICY NOTE, S. 398, 2016 Sess. (Md. 2016).

Hard Life of Environmental Justice Legislation

expanding its permit and environmental regulations. These bills would have benefited populations disproportionately burdened in the state. All three bills focused primarily on issues of air quality by using CIAs to discern collective factors and risks.⁸⁰ Environmental impact assessments are effective at determining impacts on air quality given specific methodologies that are region and context specific.⁸¹ Each of the legislative bills had a geographic component that provided specificity on geographic coverage. This included the necessary defining of “affected” or “protected” communities, where EJ issues often occur due to the underlying demographics of impacted populations.⁸²

Despite the need for cumulative impacts legislation, there were substantive issues with S.B. 706/H.B. 1210, S.B. 693/H.B. 987, and S.B. 398/H.B. 820. Results from a policy evaluation found that there were inconsistencies between the Senate and House versions.⁸³ For example, while S.B. 706 passed its original chamber—which made it the closest bill to becoming law among the cohort of bills—it did so with the assistance of amendments that were not present or adopted by H.B. 1210.⁸⁴ Additionally, findings from the stakeholder interviews demonstrated that the writing of the co-filed bills was a major problem, even among those who testified on behalf of the bills.⁸⁵ S.B. 693/H.B. 987 had the opposite issue, as the uniform bills’ complexities were an issue.⁸⁶ Stakeholders shared their knowledge of the extensive research and effort that went into crafting the bills. This was found to backfire, as some of the bill’s language was too complex to be practical or implemented in a cost-effective manner. The last co-filed bills analyzed, S.B. 398/H.B. 820, were less complex and more focused than their predecessors, but also failed. The policy evaluation and stake-

80. See *infra* Appendices D–F, Vignettes 1–3.

81. See Paulina Maria Porto Silva Cavalcanti & Emilio Lèbro La Rovere, *Strategic Environmental Assessment of Mining Activities: A Methodology for Quantification of Cumulative Impacts on the Air Quality*, 61 J. AIR & WASTE MGMT. ASS’N, 377 (2011), <https://www.tandfonline.com/loi/uawm20>; Kristie M. Ellickson, Sarah M. Sevcik, Shelley Burman, Steven Pak, Frank Kohlasch & Gregory C. Pratt, *Cumulative Risk Assessment and Environmental Equity in Air Permitting: Interpretation, Methods, Community Participation and Implementation of a Unique Statute*, 8 INT’L J. ENV’T RSCH. & PUB. HEALTH 4140 (2011).

82. See *infra* Appendix H; see also Paul Mohai, David Pellow & J. Timmons Roberts, *Environmental Justice*, 39 ANN. REV. ENV’T RES. 405 (2009).

83. See results *infra* Appendix G, Table 3.

84. See discussion *infra* Appendix D, Vignette 1.

85. See *infra* Appendix I (finding “. . . as drafted [the co-filed bills] lacked sufficient specificity to be truly useful.”).

86. *Id.*

holder interviews revealed that S.B. 398/H.B. 820 was wholly unnecessary.⁸⁷

During the development of each bill, the inclusion of and input from grassroots stakeholders were not widely seen or presented. Stakeholders—individuals, communities, and organizations invested in an action, its effects, and its impact on them—are a necessary component of policy development due to their insight and the direct impact environmental policy will have on stakeholders. Meaningful involvement of impacted stakeholders in policy development and environmental decision-making is a tenet of EJ. Based on a recent report conducted by the University of Maryland’s Environmental Law Clinic, residents from impacted communities were often more knowledgeable than CEJSC commissioners on EJ issues.⁸⁸ Additionally, the report found that the CEJSC and policymakers did not prioritize engaging residents from impacted communities in the process of developing EJ legislation.⁸⁹

One limitation of this study was the limited number of interviews completed. This impacted the comprehensiveness of the results. Several interviewees recommended improving the inclusion of communities in the EJ policymaking process.⁹⁰ Lack of community inclusion creates a knowledge gap that significantly impairs the recognition of regional EJ issues, which in turn influences the effectiveness of mitigation efforts in low-income communities of color. Specifically, the misrecognition of environmental externalities leads to substandard coverage of environmental issues in local environmental policies and administrative decisions. Both of these issues were items that S.B. 706/H.B. 1210, S.B. 693/H.B. 987, and S.B. 398/H.B. 820 were meant to address but were not able to, due to other unfavorable aspects of the bills. The passage of cumulative impacts legislation to regulate specific environmental features and issues has been seen in other states. 14 CCR § 952.9, 14 CCR § 932.9, and 14 CCR § 912.9, contained within the Forest Practices chapter, are examples of regulatory

87. See *infra* Appendix H; see also *infra* Appendix I.

88. Jane F. Barrett, Matthew Peters, Hilary Jacobs & Jason Rubinstein, *Environmental Justice in Maryland*, ENV’T L. CLINIC, UNIV. MD., at 9–10, 17 (Sept. 2015) (finding that a lack of representation of impacted communities limited CEJSC’s ability to identify and address environmental justice issues).

89. *Id.* at 10–11.

90. *Id.* (stating a “need for large scale [community] driven efforts to bring issues to decision makers and funders.”).

Hard Life of Environmental Justice Legislation

guidelines for assessing cumulative impacts for specific environmental features.

Each bill includes a cumulative impacts checklist in addition to regulatory measures specific to their region of jurisdiction and environmental feature. Louisiana Administrative Code Title 43:XV § 2525, Montana Administrative Rule 17.24.314, and Arkansas Code 014-06 § 20 detail the use of CIAs in the context of hydraulics and water systems in their states.⁹¹ The use of CIAs and related policies is most useful when developed and implemented with multiple stakeholders, particularly residents from impacted communities, the most pressing issues, and the region's context in mind.⁹²

The American Bar Association's 2010 report discusses EJ advancements at the state level and details the states that have passed state-level NEPA legislation, as known as mini-NEPAs.⁹³ Similar to NEPA, passed in 1970 and requiring all federal agencies to evaluate and report the potential environmental impacts of their direct (agency managed) or indirect (agency funded or approved) actions, state-level NEPAs regulate and monitor actions taken in their states and jurisdictions related to the environment.⁹⁴ Multiple states, including California ("CEQA"), Indiana ("IEPA"), North Carolina ("SEPA"), and Virginia ("VEPA"), have passed mini-NEPAs over the past several decades.⁹⁵ Though there is variation in their requirements, regulations, and exemptions, each state with mini-NEPA legislation mandates environmental assessments to be produced.⁹⁶

91. See, e.g., LA. ADMIN. CODE tit. 43:XV, § 2525 (2011); MONT. ADMIN. R. 17.24.314 (2012); 014-06 ARK. CODE R. § 20 (LexisNexis 2021).

92. See generally Daniel Grace, Matt Egan & Karen Lock, *Examining Local Processes When Applying a Cumulative Impact Policy to Address Harms of Alcohol Outlet Density*, 40 HEALTH & PLACE, 76–82 (2016).

93. *Environmental Justice for All: A Fifty State Survey of Legislation, Policies and Cases*, AM. BAR ASS'N & UC HASTINGS COLL. L. (Steven Bonorris ed., 4th ed. 2010), https://listserv.ur.sinus.edu:88/scripts/wa.exe?A3=ind1808B&L=AESS&E=base64&P=376710&B=-_004_89c1bd6951654144aeaddfe7f09fcfebmailsonomatechcom_&T=application%2Fpdf;%20name=%22UC%20Hastings%20EJ_ejreport-fourthedition.pdf%22&N=UCHastings%20EJ_ejreport-fourthedition.pdf&attachment=q&XSS=3 [hereinafter *Environmental Justice Survey*].

94. See generally National Environmental Policy Act of 1969, Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified at 42 U.S.C.A. § 4332 (West)); see also U.S. GOV'T ACCOUNTABILITY OFF., GAO-14-370, *National Environmental Policy Act: Little Information Exists on NEPA Analyses* (2014), <https://www.gao.gov/assets/670/662546.pdf>; see also LINDA LUTHER, THE NATIONAL ENVIRONMENTAL POLICY ACT: BACKGROUND AND IMPLEMENTATION (Feb. 29, 2008); see also Linda Luther, CONG. RSCH. SERV., RL 33152, *The National Environmental Policy Act: Background and Implementation* (2008), <https://fas.org/sgp/crs/misc/RL33152.pdf>.

95. *Environmental Justice Survey*, supra note 95.

96. *Id.*

Due to increasing recognition of cumulative impacts, especially in relation to the environment, multiple states that possess state-level NEPA legislation have policy and regulations focused on cumulative impacts and their assessment.⁹⁷ Laws like 14 CCR § 15130 and 14 CCR § 15355, contained within the California Code of Regulations discussing guidelines for implementing the California Environmental Quality Act (“CEQA”), discuss the inclusion of cumulative impacts in the environmental impact report (“EIR”) process and the policy definition.⁹⁸ The consideration of cumulative impacts in legislation is an important advancement in efforts to advance EJ at the state, regional, and national levels.

EJ Geographic Information System (“GIS”) screening tools provide a comprehensive analysis of local environmental hazards that can inform policymakers and direct financial resources to high-need communities—communities with cumulative impacts from multiple environmental and social stressors.⁹⁹ Specifically, state-level screening tools allow decision-makers to visualize the distribution and location of environmental hazards that contribute to exposure and health disparities in low-wealth communities of color. This is particularly beneficial for assessing cumulative burden in low-resource communities.¹⁰⁰ Policymakers can use this tool to inspect and confront agencies causing environmental hazards, allocate funding to mediate the issues, and map out where to best place infrastructure that promotes community health.

For example, in 2013, the CalEPA and the Office of Environmental Health Hazard Assessment (“OEHHA”) announced a publicly available program that provides a statewide analysis of “communities that are disproportionately burdened by multiple sources of pollution.”¹⁰¹ The California Communities Environmental Health Screening Tool (“CalEnviroScreen”) combines various environmental, socio-demographic, and health factors to produce an EJ score for every cen-

97. *Id.*

98. CAL. CODE REGS. tit. 14, § 15355 (2019); CAL. CODE REGS. tit. 14, § 15130 (n.d., 2019), https://resources.ca.gov/CNRALegacyFiles/ceqa/docs/2019_CEQA_Statutes_and_Guidelines.pdf.

99. Lee Charles, *A Game Changer in the Making? Lessons From States Advancing Environmental Justice Through Mapping and Cumulative Impact Strategies*, 50 ENV'T. L. REP. 10203, 10208, 10214 (2020).

100. *Id.*

101. Cushing et al., *supra* note 20.

Hard Life of Environmental Justice Legislation

sus tract in the state.¹⁰² Each census tract's score is produced comparatively, giving high scores to areas experiencing an elevated pollution burden relative to low-scoring regions.¹⁰³ Policymakers use CalEnviroScreen to direct funding to neighborhoods with inflated EJ scores.¹⁰⁴ For example, Assembly Bill 693 directs the California Public Utilities Commission to award \$1 billion over ten years to install solar technology in low-wealth communities of color identified by CalEnviroScreen.¹⁰⁵ Los Angeles County also uses CalEnviroScreen to allocate funding to high-need jurisdictions identified in the screening tool.¹⁰⁶ Thus, EJ screening tools provide residents, EJ researchers, and decision-makers with miniscule maps that can be used to inform geographically relevant CIA policies and solutions.¹⁰⁷

At the federal level, legislative agencies have incorporated cumulative impacts assessments into environmental policies to combat environmental injustice. On July 1, 2020, the \$1.5 trillion Moving Forward Act passed in the House.¹⁰⁸ The Moving Forward Act electrifies America's transportation infrastructure in order to reduce traffic-related air pollution ("TRAP") and greenhouse gas ("GHG") emissions.¹⁰⁹ Furthermore, the bill contained several initiatives to remediate perfluoroalkyl substances ("PFAS"), a toxic substance in drinking water, install solar technology in low-wealth communities of color, expand affordable housing, and invest in green infrastructure.¹¹⁰ The bill died in the majority-Republican Senate, as Senator Mitch McConnell expressed his disdain for the bill multiple times.¹¹¹ On July

102. *About CalEnviroScreen*, OEHHA (Mar. 20, 2019), <https://oehha.ca.gov/calenviroscreen/about-calenviroscreen>.

103. *Id.*

104. *Using CalEnviroScreen*, OEHHA (Apr. 24, 2017), <https://oehha.ca.gov/calenviroscreen/how-use>.

105. Multifamily Affordable Housing Solar Roofs Program, A.B. 693, 2015 Assemb., (Cal. 2015).

106. LOS ANGELES COUNTY HEALTH AGENCY: CENTER FOR HEALTH EQUITY, ENVIRONMENTAL JUSTICE, http://publichealth.lacounty.gov/CenterForHealthEquity/PDF/Factsheet_EnvironmentalJustice.pdf (last visited July 10, 2021).

107. Molly Blondell, Wakako Kobayashi, Bryan Redden & Arianna Zrzavy, *Environmental Justice Tools for the 21st Century*, DEEP BLUE, 33, 45 (May 2020), <https://deepblue.lib.umich.edu/handle/2027.42/154874>.

108. Moving Forward Act, H.R. 2, 116th Cong. (2020) (as passed by House July 1, 2020), <https://www.congress.gov/bill/116th-congress/house-bill/2>.

109. *Id.*

110. NATIONAL COUNCIL OF STATE HOUSING AGENCIES, THE MOVING FORWARD ACT, H.R. 2, FACT SHEET (2020), <https://www.ncsha.org/resource/the-moving-forward-act-h-r-2-fact-sheet/>.

111. Sergei Klebnikov, *Senate Sleeps On House Democrats' \$1.5 Trillion Infrastructure Bill—Here's Why It's Doomed*, FORBES (July 3, 2020, 1:59 PM), <https://www.forbes.com/sites/sergeik>

30, 2020, Senate Democrats Kamala D. Harris, Cory Booker, and Tammy Duckworth introduced the Environmental Justice for All Act.¹¹² The bill aims to tackle EJ issues in low-income communities of color with federal grants, utilize pre-existing NEPA policies for EJ enforcement, and include CIAs as a requirement of the Clean Water Act and the Clean Air Act.

Useful recommendations were provided during stakeholder interviews that could be helpful in passing future CIA legislation.¹¹³ Stakeholders recommended that policymakers be better educated about environmental issues, the need for EJ, and the inclusion of cumulative impacts in legislation.¹¹⁴ Stakeholders also recommended connecting EJ issues including cumulative impacts to other social justice issues, which have more established support in the state.¹¹⁵ An example is criminal justice. Maryland passed S.B. 1005—The Justice Reinvestment Act—in 2016 with the goal of reforming and improving the current criminal justice system via advancing research-based sentencing and corrections policies.¹¹⁶ The policy was bipartisan and passed unanimously, compared to S.B. 706/H.B. 1210, S.B. 693/H.B. 987, and S.B. 398/H.B. 820, which were primarily introduced and sponsored by Democrats ended in failure.

CONCLUSION

The process of developing and passing legislation successfully is difficult and often results in multiple failed bills with sections that may have been beneficial or useful if passed into law. In Maryland, this was the case with S.B. 706/H.B. 1210, S.B. 693/H.B. 987, and S.B. 398/H.B. 820, which all failed during the 2014, 2015, and 2016 legislative sessions. Though failures, these bills included several important features and produced recommendations from subsequent analysis that may be useful for legislators and policymakers in drafting future legislation. The inclusion of definitions and provisions for “protected communities” and “affected communities” in S.B. 693/H.B. 987 and S.B.

lebnikov/2020/07/03/senate-sleeps-on-house-democrats-15-trillion-infrastructure-bill-heres-why-its-doomed/?sh=5f01c88d6ee8.

112. Environmental Justice For All Act, S. 4401.5986, 116th Cong. (2020).

113. *See infra* Appendix I, Table 5.

114. *Id.*

115. *Id.*

116. PEW CHARITABLE TRUSTS, MARYLAND’S 2016 CRIMINAL JUSTICE REFORM (2017), <https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2017/11/marylands-2016-criminal-justice-reform> 48.

Hard Life of Environmental Justice Legislation

398/H.B. 820, respectively, codifies Maryland communities that are categorized as being special and of need of additional resources or consideration.¹¹⁷ Another beneficial feature shared by the bills was the inclusion of CIAs. Maryland currently does have state-level NEPA regulations, but these regulations do not include language related to the assessment of cumulative impacts. Another route to include CIAs is amending the state-level NEPA law also known as the Maryland Environmental Policy Act (“MEPA”).

Based on past and recent efforts by Maryland, there are multiple steps that should be taken by the state to pass cumulative impacts legislation. Among the most important parts of the policy process is the brainstorming and crafting phase. Good policy practice is to include all impacted stakeholders to produce comprehensive policy, which takes into consideration the multiple interests and needs of those affected. Future legislation crafting will need an increased dedication to this practice and other forms of participation and input from the public particularly members of frontline and fence-line communities burdened by the cumulative impacts of chemical and non-chemical stressors.

Additionally, the development of future legislation in Maryland must include a review of relevant laws in other states. For example, California’s Senate Bill 43 (2013), Senate Bill 375 (2007), and New York’s Assembly Bill 8510 (2011) require CIAs in the permitting process.¹¹⁸ Lessons can be learned from how these bills were successfully passed. There have also been efforts in Massachusetts and at the federal level to pass cumulative impacts legislation, though these efforts have not been successful. Furthermore, EJ issues in Maryland need to be better presented to and understood by stakeholders and lawmakers. The issues that Marylanders face vary, some communities are overburdened and others lack resources; lawmakers need to properly understand and adequately assess these issues to create legislation that can be passed into law that may address environmental injustice and cumulative impacts.

117. *See infra* Appendices D–F, Vignettes 1–3.

118. *See* S. 43, 2012 Leg., Reg. Sess. (Cal. 2012); S. 375, 2007 Leg., Reg. Sess. (Cal. 2007); S.A. 8510, 2011 Leg., Reg. Sess. (N.Y. 2011).

APPENDIX A

Evaluation Criteria For Potential Impact
Effectiveness
Unintended Consequences
Equity
Parameters Used To Evaluate Each Policy
Acceptability
Feasibility
Cost

APPENDIX B

Table 1. Stakeholder Interview Questions
(1) Which bill(s) did you contribute to and at what capacity?
(2) What was the significance of the bill(s)?
(3) What community/environmental research was required to develop the bill(s)?
(4) What environmental justice issues were targeted?
(5) What was the process for developing the bill(s)?
(6) Other than this bill, have you contributed to any other environmental justice bill(s)? Which?
(7) If so, were these bills successful?
(8) If successful, what differences most likely contributed to its success versus the failed bill(s)?
(9) What were/are some of the major barriers that hinder the success of bills in the state of Maryland?
(10) What recommendations/changes can be made to improve the success of future environmental justice bills?
(11) What were some positive impacts from the failure to pass the bills?
(12) Any best practices or lessons learned you would like to highlight in the manuscript?
(13) Anything else you would like to add?

APPENDIX C

Table 2. Overview of Legislative Bills	
<i>S.B. 706/H.B. 1210</i>	
Year	2014
Name	Environment-Permit Determinations-Cumulative Impacts Assessments
Sponsor (House)	Swain and V. Turner
Sponsor (Senate)	Beson, Madaleno Manno, Pinsky Ramirez, and Rosapepe
House Committee	Environmental Matters
Senate Committee	Education, Health, and Environmental Affairs
Environmental Justice Relevance	Permitting, Cumulative Impacts, Air Pollution
<i>S.B. 693/H.B. 987</i>	
Year	2015
Name	Environment-Ambient Air Quality Control-Cumulative Air Impact Assessment
Sponsor (House)	Lam, Angel, Barron, Beidle, Carr, Fennell, Fraser Hidalgo, Gilchrist, Gutierrez, Hill, Korman, Lafferty, Lierman, Moon, Morales, Morhaim, Tarlau, A. Washington, M. Washington, and K. Young
Sponsor (Senate)	Benson, Ramirez, Currie, Guzzone, Lee, Manno, Montgomery, Rosapepe, and Young
House Committee	Environment and Transportation
Senate Committee	Education, Health, and Environmental Affairs
Environmental Justice Relevance	Air Pollution, Cumulative Impacts, Permitting

Hard Life of Environmental Justice Legislation

<i>S.B. 398/H.B. 820</i>	
Year	2016
Name	Environmental Degradation for the Underserved Through Community Engagement (“REDUCE Act”)
Sponsor (House)	Lam, Carr, Beidle, Ebersole, Fraser-Hidalgo, Haeley, Hill, Jalisi, Knotts, Lafferty, Lierman, Lisanti, Luedtke, Morhaim, Platt, S.Robinson, Smith, Tarlau, and M. Washington
Sponsor (Senate)	Ramirez, Benson, Guzzone, Nathan-Pulliam, and Raskin
House Committee	Environment and Transportation
Senate Committee	Education, Health, and Environmental Affairs
Environmental Justice Relevance	Vulnerable Communities, Permitting

APPENDIX D

Vignette 1. S.B. 706/H.B. 1210 (2014)
<i>Purpose</i>
Two co-filed bills, Senate Bill 706 and House Bill 1210, were introduced to their individual chambers proposing to ameliorate permitting inequities through the utilization of cumulative impact assessments. The bills proposed that permit applicants be required to “conduct and submit to the Department a cumulative impact assessment before the department prepares a tentative determination” for the application.
<i>Modifications to Current Policy</i>
<p>The co-filed bill would amend Maryland Environment Code §1-604 to include a summary of the results of a cumulative impacts assessment as a factor in MDE’s tentative determination of permits. During the legislative process, Senate Bill 706 was amended, changing its content significantly from House Bill 1210. The bill made special requirements for applications in unincorporated communities in Prince George’s County, specifying that an assessment be made when a permit is: “bordered to the north by a U.S highway and to the south by a State highway; is within 2 miles of a parkways maintained by the National Park Service; is within 1 mile of a metro station; is within 1.5 miles of the District of Columbia; has experienced air quality alert days of dangerous air quality for sensitive populations; and is located near several heavily trafficked state and county roads that carry both truck and automobile traffic.” This specific focus within Prince George’s County was absent in House Bill 1210. However, the assessment and permitting process was similar between both versions of the bill.</p> <p>The assessment itself was intended to “address the likely impact on the environment and on human populations that will result from the incremental impact of the proposed facility or activity authorized under the permit when added to the impact of other past and present sources of pollution.” After receiving the cumulative impact assessment from the permit applicant, MDE would review the assessment and have the discretion to make a permit determination or “propose</p>

Hard Life of Environmental Justice Legislation

any permit limitations or conditions” that MDE sought fit to mitigate “adverse impacts on the environment and human populations.” MDE would then be required to publish cumulative impact assessments on their website and provide “local government planning and zoning authority in the jurisdiction where the proposed activity or facility authorized under the permit will be located, for review and consideration in any future land use decisions.” Lastly, the proposed legislation provided that MDE “may adopt regulations necessary to implement” the cumulative impacts assessment provisions.

APPENDIX E

Vignette 2. S.B. 693/H.B. 987 (2015)
<i>Purpose</i>
House Delegates and Senators of the Maryland General Assembly cross-filed cumulative impacts bills focused on ambient air quality control. House Delegates and Senators submitted uniform bills requiring “MDE to conduct a Cumulative Air Impacts Assessment upon receipt of an application for an air quality permit to construct in a ‘protected community.’”
<i>Modifications to Current Policy</i>
<p>The proposed legislation would add provisions to Section 2-1301-1306 of the Maryland Environment Code, governing air quality permits, to create specific instances where a Cumulative Air Impact Assessment would affect the permitting process. If a Cumulative Air Impact Assessment finds that “the proposed activity will have an impact, MDE is required to take specific actions on the permit, potentially including the denial of the permit.” Additionally, the bill required the establishment of an enhanced public participation procedure and required “MDE and the Department of Health and Mental Hygiene to study the negative effects of cumulative impacts of pollution.”</p> <p>This co-filed bill would have required, upon an application for a specific permit related to air quality, a cumulative air impact assessment to be conducted in the immediate area of a protected community to determine the environmental and public health effects. A protected community is an area within a zip code that is experiencing economic disadvantage, poor health outcomes, or which MDE has deemed necessary to protect based on the “negative impacts of pollution and other stressors.” Under the proposed bill, MDE could not issue an air quality permit to construct or a certificate of public convenience and necessity until a cumulative air impacts assessment shows the permitted action’s effects on air quality, allowable emissions levels, and public health at least a year before the tentative determination of a permit. A Cumulative Air Impact conclusion score was given for proposed activities as having “no impact,” “some impact,” or a</p>

Hard Life of Environmental Justice Legislation

“significant impact on the immediate area, and denied, modified, or accepted permit applications accordingly. Depending on their characteristics, permitted activities with “some impact” on air quality will be granted a conditional permit with specific limitations, whereas activities with “significant impacts” will be denied a full permit or granted a permit that prohibits all expected air pollution. Lastly, final permit determinations must address any recommendations by MDE and the Department of Health and Mental Hygiene.

The bill required a distinctive notice and comment process. Within 15 days of receiving an air quality permit application, MDE would be required to mail notice to all residents and property owners located within the immediate area, elected officials who represent any portion of the immediate area, and post notice at the source and all public facilities within the immediate area. Notice would include all involved parties and their contact information and instructions for submitting comments. Unlike normal notice requirements, MDE would hold a mandatory informational meeting in the immediate area, which begins a prolonged comment period of 90 days. MDE would then be required to hold a public hearing, which extends the comment period another 90 days. Additionally, MDE and the Department of Health and Mental Hygiene would be required to make data available on their websites concerning the environmental and public health effects of poor air quality and develop a “list of zip codes that qualify as protected and update” it annually.

APPENDIX F

Vignette 3. S.B. 398/H.B. 820 (2016)
<i>Purpose</i>
<p>House Delegates and Senators utilized concepts from 2014’s S.B. 706/H.B. 1210 and 2015’s S.B. 693/H.B. 987 to create the Reducing Environmental Degradation for the Underserved Through Community Engagement Act (REDUCE ACT). This Act created the concept of an “affected community” using a more reliable source and refocused upon specific types of air pollutants. An affected community is “a U.S. Census Tract in which: (1) the median household income is less than or equal to 2 times the federal poverty rate for a household of four individuals; or (2) the portion of the state’s population that identifies as a race other than White including individuals who identify their race or ethnicity as Hispanic or Latino, is greater than 35%,” and where “a source or proposed source is located.”</p>
<i>Modifications to Current Policy</i>
<p>The bill attempted to regulate the permitting process for the construction of a new or modified source that would result in a “significant net increase in emissions of any pollutant from the source.” Additionally, the source must be located in an affected community and engage in the following activities: “the use of crushers, hammermills, shredders, grinders, or classifying screens of 5 tons (4,540 Kilograms) or more per hour throughput; coal or ore export loading or unloading installations; or asphalt blowing or asphalt building products saturation or roll coating installations; or hot-mix asphalt concrete production installations.” To receive a permit for these activities, MDE would require applicants to “estimate and report” the number of diesel vehicle trips needed to meet the construction and operational needs of the site and “the associated emissions from” these trips. Applicants would also be required to solicit input from the affected community and its advisory board on diesel vehicle trips and routes, “impacts on road safety and infrastructure, and idling policies.”</p> <p>The REDUCE Act also stipulated that MDE would be required, by affected individual request, to solicit the appropriate county health</p>

Hard Life of Environmental Justice Legislation

department about the health effects of allowing the above mentioned activities and coordinate with the permit applicant to distribute this health information to “representatives of the affected community, local businesses, advocacy organizations,” and “elected officials of the affected community” before granting a permit. This information would also be published on MDE’s website for public access. The REDUCE ACT employed simplicity over its meticulously crafted and lengthy predecessors.

APPENDIX G

Table 3: Policy Content Evaluation						
<i>Content</i>	<i>Legislative Bill</i>					
	S.B. 706	S.B. 693	S.B. 398	H.B. 1210	H.B. 987	H.B. 820
Is it Statewide?	NO	YES	YES	YES	YES	YES
Does it require a comprehensive Cumulative Impact Assessment and Plan?	NO	YES	YES	NO	YES	YES
Does it have a significant and measurable local effect?	YES	YES	NO	YES	YES	NO
Does it have a significant effect on small businesses?	YES	YES	NO	YES	YES	NO
Does it modify or directly affect Permit Regulation or Procedure?	NO	YES	NO	NO	YES	NO
Does it include specific provisions or protection for vulnerable communities?	NO	YES	YES	NO	YES	YES
Does it include specific enforcement action or penalties?	NO	NO	NO	NO	NO	NO
Does it require involvement or action from multiple state agencies or lower governmental bodies?	YES	YES	YES	NO	YES	YES
Does it include provisions for the direct participation of stakeholders?	NO	YES	YES	NO	YES	YES
Does it define specific target locations or industries?	YES	NO	YES	NO	NO	YES

APPENDIX H

Table 4. Policy Evaluation Positive Component Summary
<i>Key Findings</i>
<ul style="list-style-type: none">• All bills require use of Cumulative Impact Assessment (“CIA”) or Cumulative Air Impact Assessment (“CAIA”) in permitting process for several types of permits, which additionally have a public participation requirement under current law or additionally creating a public participation requirement if not under current law.• S.B. 693/H.B. 987 (2015) mandates Maryland Department of the Environment (MDE) to create lists for zip codes meeting “Protected community” definition under the bill.• S.B. 398/H.B. 820 (2016) defines “affected community” and S.B. 693/H.B. 987 (2015) defines “protected community,” and both bills create provisions for proposed projects requiring specific permits in these areas while S.B. 706 (2014) focuses on unincorporated Prince George’s County.• S.B. 693/H.B. 987 (2015) requires that “by October 1, 2017,” MDE and Department of Health and Mental Hygiene identify factors contributing to adverse cumulative impacts of environmental stressors to communities, as well as review current status of science on environmental justice screening and cumulative impacts.

APPENDIX I

Table 5. Summary of Interview Findings
<i>Key Findings</i>
<ul style="list-style-type: none">• “...as drafted, it lacked sufficient specificity to be truly useful.” (Interviewee in reference to S.B. 706/H.B. 1210)• S.B. 693/H.B. 987 (2015) was much narrower in scope than S.B. 706/H.B. 1210 (2014) and more targeted to modify and improve permitting, while S.B. 398/H.B. 820 (2016) had a narrower scope than both previous bills.• Subsequent bills evolved each legislative session due to feedback, with the content being adjusted and modified based on criticism and recommendation.• “The significance of the bills, were they to pass, would be the integration of environmental justice into the decision-making processes of our government agencies. The actual significance was a learning process for advocates and hopefully a learning moment for elected officials, as well.” (Interviewee in reference to the significance of each bill)• Extensive research went into S.B. 693/H.B. 987 (2015) with less, but narrower, research going into S.B. 398/H.B. 820 (2016) due to its narrow focus on diesel emissions.• In aftermath of failed bills, equity has become a bigger issue for the environmental advocacy community and being incorporated into legislation more broadly.
<i>Key Recommendations</i>
<ul style="list-style-type: none">• More educating of legislators on issues and legislative contents, in addition to simplifying bills• More guidance from the USEPA on methods of addressing environmental justice in permitting• Need for large scale, community and constituent-driven efforts to bring issues to decision makers and funders<ul style="list-style-type: none">○ State-wide campaign○ Proposing local solutions for specific issues across the state• Improved efforts to connect environmental justice with other

Hard Life of Environmental Justice Legislation

forms of injustice which have more support for legislative solutions

- Develop bills targeted to address specific discrete issues that create serious risks to human health and safety with concerns that have been widely reported because they are easy for the public and legislators to understand and what the solution is as presented in the bill (Based on a successful policy at the local level)

NOTE

Imitation Is Not Flattery When You Don't Get Credit: Protecting Intellectual Property in the Age of Fast Fashion, Social Media, and “Culture Vultures”

KATHERINE SAWCZYN*

Introduction	493
I. The Current Intellectual Property Legal Framework in Fashion Does Not Protect the Majority of Fashion Designers' Works	496
A. Current Trademark Protections	497
B. Current Copyright Protections	497
C. Current Patent Protections	499
1. Utility Patents	499
2. Design Patents	500
II. The Weak Intellectual Property Protections in the Fashion Industry Have Facilitated Cultural Appropriation	501
A. The History of Cultural Appropriation in the Fashion Industry	502
B. Copying in the Fashion Industry	505

* Katherine Sawczyn, Howard University School of Law Class of 2021. I want to thank my faculty advisor, Professor Mariessa Terrell, for her guidance while writing this Note. I want to thank my family and friends, especially my mother, Lucy, and sister, Theresa, for their unwavering love and support throughout law school. I also want to thank the Howard Law Intellectual Property Patent Clinic for instilling in me a passion for intellectual property and a motivation to use intellectual property law to create social change. Finally, I want to thank the *Howard Law Journal*, specifically my fellow Executive Board members, for their hard work and encouragement during this process.

1. Copying By a Fast-Fashion Brand	507
2. Copying By a Celebrity	509
III. Possible Solutions to Stop the Imitation and Cultural Appropriation of Independent Black Designers’ Works.....	510
A. Expanding Current Intellectual Property Law	511
1. Patents.....	511
2. Copyrights	512
3. Trademarks	512
B. Social Shaming	513
C. Reparations.....	516
D. Crediting the Original Designer	517
E. Environmental Regulations	519
Conclusion	520

The billionaire celebrity family, the Kardashian-Jenners, is known for many things, one of these being the practice of co-opting and imitating fashion designs originally made by Black designers. This practice is not limited to celebrities, as much of the fashion industry depends on the copy-and-paste method to remix designs and create and promote trends. In order to operate as it does, the fashion industry relies on limited intellectual property protections for designers, claiming that creativity thrives without these legal restrictions.

This Note addresses the implications of current intellectual property jurisprudence on independent fashion designers, specifically independent Black designers. This Note argues that the absence of strong intellectual property protections in the fashion context negatively impacts independent Black designers in a unique way, as it facilitates cultural appropriation and maintains structural inequality. First, this Note explains the current state of intellectual property law in the United States as it pertains to fashion and why the current landscape does not sufficiently protect independent designers. Next, this Note confronts the relationship between intellectual property and cultural appropriation, addressing how independent Black designers face unique challenges. Finally, this Note introduces possible solutions to the lax intellectual property laws within fashion.

INTRODUCTION

“There is [] something deeply uncomfortable about someone with Khloé [Kardashian]’s wealth and power appropriating designs and fashion directly from a [B]lack woman with a small business without crediting her, making cheap knockoffs, and then attempting to threaten her into silence.”¹

In June 2017, Kylie Jenner, reality TV star of *Keeping Up with the Kardashians*, billionaire, and social media influencer, launched a camouflage-themed collection on her e-commerce website.² Jenner’s collection included a variety of items, such as camo jackets, pants, hats, and swimwear.³ These camo designs spread quickly through social media as people began to note the similarity between Kylie’s designs and those of PluggedNYC, a Black-owned business whose designs have been worn by celebrities like Rihanna and Keke Palmer.⁴ Tizita Balemlay, founder and creative director of PluggedNYC, agreed that Jenner’s designs certainly imitated her own, and revealed that Jenner’s team had previously contacted her to order custom clothes from PluggedNYC.⁵ In fact, according to Balemlay, Jenner was “the first person to receive PluggedNYC’s camo set when it originally launched,” and Jenner has previously posted herself wearing a piece from the brand.⁶

While neither Jenner nor Balemlay invented the idea of camouflage pants or swimwear, it is undeniable that Jenner’s designs were imitations of Balemlay’s work. This is evident given not only the

1. Destiney Bleu, founder of d.bleu.dazzled®. *About Us*, D.BLEU.DAZZLED, <https://www.dbleudazzled.com/pages/about-us> (last visited Apr. 13, 2021); Amy Zimmerman, *How Kylie Jenner and Khloe Kardashian Profit Off Black Creativity*, DAILY BEAST (June 12, 2017), <https://www.thedailybeast.com/how-kylie-jenner-and-khloe-kardashian-leech-off-black-creativity>.

2. Trace William Cowen, *Kylie Jenner Accused of Ripping Off Camo Designs From Black-Owned Business*, COMPLEX (June 9, 2017), <https://www.complex.com/pop-culture/2017/06/kylie-jenner-ripping-off-camo-designs-pluggednyc>.

3. *Id.*

4. Gabby Noone, *IS KYLIE JENNER’S LATEST MERCH COLLECTION RIPPING OFF AN INDIE DESIGNER?*, MTV (June 9, 2017), www.mtv.com/news/3019351/kylie-jenner-camouflage-controversy/.

5. *Id.*; Lakin Starling, *It Looks Like Kylie Jenner Stole New Clothing Designs From The Black-Owned Brand Plugged NYC*, FADER (June 9, 2017), <https://www.thefader.com/2017/06/09/kylie-jenner-stole-designs-plugged-nyc>.

6. Zimmerman, *supra* note 1; Kylie Jenner (@kyliejenner), INSTAGRAM (Apr. 30, 2017), <https://www.instagram.com/p/BTgwjPsBg3Y/>; see PluggedNYC Store (@pluggednycstore), INSTAGRAM (Apr. 29, 2017), https://www.instagram.com/p/BTfHY0SAZof/?utm_source=ig_embed; see also PluggedNYC Store (@pluggednycstore), INSTAGRAM (Apr. 30, 2017), <https://www.instagram.com/p/BTiHtiWg-D6/>.

brand's certain level of fame,⁷ but particularly because Jenner's stylist had previously emailed PluggedNYC and because Jenner herself has sported some of their designs.⁸ Although social media users called for recognition and compensation for Balemlay, the designer admitted that there was little she could do to stop Jenner from releasing and profiting off the camo designs.⁹

There are very few options for any fashion designer seeking to prevent others from copying their work, as intellectual property laws in the United States do not provide a viable solution to the dilemma of copycat practices in the fashion industry. The most common intellectual property protections afforded to the fashion industry—trademarks, copyrights, and patents¹⁰—while helpful to some larger companies, fail to limit the financial hardships caused by copycat design companies. However, even with these types of intellectual property protections, it is extremely difficult for designers to protect their fashion designs from being copied and sold at lower price points or by more well-known brands.

The historically weak intellectual property protections for fashion designs in the United States have exposed minority designers to other issues that can cripple their brands, such as cultural appropriation, the practice of individuals, and brands stealing designs from minority designers without giving the original creators credit or compensation.¹¹ Due to the economic and size disparities between Black and white designers, cultural appropriation is not just an insulting and frustrating obstacle—it can be the difference between success and failure in the

7. Noone, *supra* note 4.

8. Nora Crotty, DO THESE LITERAL RECEIPTS PROVE KYLIE JENNER RIPPED OFF AN INDIE LABEL?, FASHIONISTA, <https://fashionista.com/2017/06/kylie-jenner-shop-camo-knockoff> (last updated Oct. 16, 2018) (Balemlay posted alleged emails between herself and Kylie Jenner's assistant on her Instagram. The emails show a relationship between Jenner and PluggedNYC, with inquires such as, "Kylie is loving these tops . . . I wanted to ask if it'd be possible to make custom tops for her in different colors?"); Sam Stryker, *Kylie Jenner Is Being Accused of Stealing this Designer's Camo Swimsuit Line*, BUZZFEED (June 9, 2017), https://www.buzzfeed.com/samstryker/did-kylie-jenner-just-steal-this-swimsuit-design-from?bfsouce=bbf_enus&utm_term=.rk6mGgXyj#.jvMMQg807; PluggedNYC Store (@pluggednycstore), INSTAGRAM (Apr. 29, 2017), https://www.instagram.com/p/BTFHY0SAZof/?utm_source=ig_embed (An Instagram post from PluggedNYC showing Kylie Jenner wearing its items with the caption "@kyliejenner welcome to the #pluggedarmy in our Tan Knit Crop #pluggednyc #kyliejenner.").

9. Starling, *supra* note 5.

10. Christopher Buccafusco & Jeanne C. Fromer, *Fashion's Function in Intellectual Property Law*, 93 NOTRE DAME L. REV. 51, 52–53 (2017).

11. See generally Natasha Reed, *Cultural and Intellectual Property Appropriation: Disputes Over Culturally-Inspired Fashions*, TRADEMARK & COPYRIGHT L. BLOG (Feb. 8, 2019), <https://www.trademarkandcopyrightlawblog.com/2019/02/cultural-and-intellectual-property-appropriation-disputes-over-culturally-inspired-fashions/>.

fashion industry.¹² While some argue that cultural appropriation is a natural and innocent happening of our fluid fashion industry, “[w]hen the powerful appropriate from the oppressed, society’s imbalances are exacerbated and inequities are prolonged.”¹³ Cultural appropriation adds an additional hardship to minority designers, who not only have to fight to protect their designs from copiers like everyone else, but are also burdened with the social implications of cultural appropriation and the history of design theft from their communities. Although intellectual property law has historically been unsuccessful in protecting designers against cultural appropriation, there have been a few successes.

In 2016, the Navajo Nation settled a five-year-long trademark lawsuit over the use of the Navajo name on products sold at Urban Outfitters.¹⁴ Recent mechanisms, like the separability test from *Star Athletica L.L.C. v. Varsity Brands, Inc.*, have made it easier to protect traditional garment designs.¹⁵ These examples demonstrate that intellectual property jurisprudence can, indeed, be used to fight against cultural appropriation; that we do not have to be content with the seemingly inevitable cultural appropriation that stems from the fashion industry’s current norms.

Despite the potential to fight cultural appropriation, currently, there is no test or law that addresses the problem of brands copying non-traditional designs and items from Black designers, nor addresses the implications of that long practice. The solution to this problem is difficult to conceptualize within the current intellectual property pro-

12. Vanessa Friedman, *Fashion’s Racial Divide*, N.Y. TIMES (Feb. 11, 2015), <https://www.nytimes.com/2015/02/12/fashion/fashions-racial-divide.html> (“It’s a paradox, really. African-Americans have generally been the purveyors of style in our country for much of our history, and yet African-American designers have such trouble breaking out and creating businesses of any scale.”); Erika Adams, *Examining Fashion’s Absence of African-American Designers*, RACKED (Feb. 12, 2015, 9:53 AM), <https://www.racked.com/2015/2/12/8025297/fashion-diversity>.

13. LAUREN MICHELE JACKSON, *WHITE NEGROES: WHEN CORNROWS WERE IN VOGUE. . . AND OTHER THOUGHTS ON CULTURAL APPROPRIATION* 4 (2019).

14. David Schwartz, *Navajo Nation Settles Trademark Suit Against Urban Outfitters*, REUTERS (Nov. 18, 2016, 6:15 PM), <https://www.reuters.com/article/us-navajo-urbanoutfitters-idUSKBN13D2QA>.

15. Sahara Farzaneh, *Cultural Appropriation of Traditional Garment Designs in the Post-Star Athletica Era*, 37 CARDOZO ARTS & ENT. L. J. 415, 425 (2019); *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1007 (2017) (holding that a feature incorporated into the design of a useful article is eligible for copyright protection only if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated).

tections of trademarks, copyrights, and patents. Regarding trademarks, a group of individuals may not have a particular title, word, or symbol associated with it that can be trademarked and placed on items, as was the case for the Navajo Nation.¹⁶ Copyright protections do not extend to a garment as a whole, and a particular culture may not have a traditional print that can be copyrighted under the *Star Athletica* test.¹⁷ Finally, in order for clothes to be patentable, they have to meet a strict set of guidelines, including being of a certain unique structure, which is difficult to achieve in the fashion world.¹⁸

Part I of this Note further explains the current state of intellectual property law in the United States as it pertains to fashion and why the current landscape does not sufficiently protect independent designers. Part II confronts the relationship between intellectual property and cultural appropriation and addresses how independent Black designers face unique challenges in the cut-and-paste world that is the fashion industry. Finally, Part III introduces possible solutions to the lax intellectual property laws that would reduce the imitation and cultural appropriation of Black designers' intellectual property.

I. THE CURRENT INTELLECTUAL PROPERTY LEGAL FRAMEWORK IN FASHION DOES NOT PROTECT THE MAJORITY OF FASHION DESIGNERS' WORKS

Intellectual property refers to ownership rights granted to tangible creations of the mind, such as inventions and literary and artistic works.¹⁹ These ownership rights create a monopoly in the property that allows the property owner to protect their unique designs from being copied or exploited by others.²⁰ The purpose of intellectual property protections is to “provid[e] an incentive to inventors to produce works for the benefit of the public by regulating the public’s use of such works in order to ensure that authors and inventors are compensated for their efforts.”²¹ However, current intellectual property laws in the fashion industry do not serve such a noble purpose, as the

16. Schwartz, *supra* note 14.

17. *Star Athletica*, 137 S. Ct. at 1007.

18. 35 U.S.C. § 101 (2018); 35 U.S.C. § 171 (2018).

19. *What Is Intellectual Property?*, WIPO, <https://www.wipo.int/about-ip/en/> (last visited Apr. 5, 2021).

20. *Intellectual Property*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/intellectual_property (last visited Apr. 5, 2021).

21. *Id.*

laws do not sufficiently protect designers' rights in their works. There are three main categories of intellectual property protections—trademarks, copyrights, and patents,²² and each one provides a unique set of protections and challenges to fashion designers.

A. Current Trademark Protections

Under the Lanham Act, trademarks are words, names, symbols, or other devices that serve as source identifiers for goods or services and distinguish them from others in the marketplace.²³ Trademark protection is based on the distinctiveness, or uniqueness, of the trademark and prevents others from using a mark that would cause a “likelihood of confusion” as to the source of the same or similar goods among consumers.²⁴ However, possession of trademark rights does not prevent other manufacturers from making or selling the same goods under a clearly different mark.²⁵

The weakness of trademark protections in fashion is that only the particular mark is protected, not the entire design or product, such that other designers can make an exact replica of an existing design, short of copying the trademark or using a confusingly similar mark, and not violate the trademark owner's rights.²⁶ Trademarks are arguably only useful for large, well-known brands whose marks are easily recognizable and whose consumers value the trademark as a status symbol.²⁷ “When small, emerging designers or indie designers get copied, typically the copiers will take everything but the trademark; the trademark is unknown and therefore not as valuable.”²⁸

B. Current Copyright Protections

Under the Copyright Act, authors obtain copyright protection for “original works of authorship fixed in any tangible medium of expression”²⁹ and have exclusive rights to reproduce, distribute, perform, display, and make derivative works based on the copyrighted mate-

22. Buccafusco & Fromer, *supra* note 10, at 52–53.

23. 15 U.S.C. § 1127 (2018).

24. 15 U.S.C. § 1127 (2018); *About Trademark Infringement*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/page/about-trademark-infringement> (last modified June 2018).

25. U.S. PAT. & TRADEMARK OFF. *supra* note 24.

26. Tyler McCall, COPYRIGHT, TRADEMARK, PATENT: YOUR GO-TO PRIMER FOR FASHION INTELLECTUAL PROPERTY LAW, FASHIONISTA, <https://fashionista.com/2016/12/fashion-law-patent-copyright-trademark> (last updated Nov. 14, 2017).

27. *Id.*

28. *Id.*

29. 17 U.S.C. § 102(a) (2018).

rial.³⁰ While literary works are probably the most common work of authorship associated with copyrights, there are eight categories in the Copyright Act that can receive copyright protection, including “pictorial, graphic, and sculptural works,” like two- and three-dimensional works of art.³¹ However, a pictorial, graphic, or sculptural work does not typically receive copyright protection if it is a useful article that has an intrinsic utilitarian function that goes beyond the appearance of the article.³² There is an exception: a design on a useful article can be a pictorial, graphic, or sculptural work eligible for copyright protection only if “such design incorporates pictorial, graphic, or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”³³ This is known as the separability doctrine.³⁴

Fashion designs can fit into this exception and be eligible for copyright protection under certain circumstances. For instance, surface designs such as lines, shapes, and patterns appearing on the surface of an article of clothing may be copyrightable, as well as embroidered or decorative stitching.³⁵ In other words, fashion designers can obtain copyright protection for an artistic drawing or image on the article of clothing, but not the entire item, making copyright law insufficient for fashion designers who want to stop other designers from copying their entire pieces. A competing designer can copy the structure, cut, and fabric of the article of clothing and simply alter the printed artistic design enough to avoid copyright infringement. Even though fashion designers may seek protection through copyright, it has historically been difficult for articles of clothing to receive copyright protections because the U.S. Copyright Office, along with numerous judicial decisions, has decided that, generally, clothing, no matter how elaborate, is inherently functional and thus not copyrightable.³⁶

30. § 106(1)–(6).

31. § 102(a); § 101.

32. § 101.

33. *Id.*

34. *See* *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1007 (2017) (emphasizing the distinction between useful articles of clothing and the artistic designs imprinted on such clothing).

35. Anne Kearns, *Copyrights in the Fashion Business? It All Depends. . .*, MAKER’S ROW (Feb. 20, 2018), <https://makersrow.com/blog/2018/02/copyrights-in-the-fashion-business-it-all-depends/>.

36. McCall, *supra* note 26.

C. Current Patent Protections

The most enigmatic type of intellectual property protection to obtain is a patent. The two types of patents that are pertinent to the fashion industry are utility patents, which protect inventions or discoveries of “any new and useful process, machine, article of manufacture, or composition of matter, or any new and useful improvement thereof,”³⁷ and design patents, which protect inventions of “any new, original, and ornamental design for an article of manufacture.”³⁸ The Patent Act grants protections against anyone who “makes, uses, offers to sell, or sells any patented invention.”³⁹

1. Utility Patents

Unlike trademark and copyright protections, utility patent protections are specifically available for useful and functional works.⁴⁰ “The term ‘useful’ in this connection refers to the condition that the subject matter has a useful purpose.”⁴¹ While courts have categorized articles of clothing as “functional” and, thus, unavailable for copyright protection, the functionality is often not enough to qualify for utility patent protection.⁴² Functional products such as zippers and clasps are afforded utility patent protections.⁴³ Athletic shoes have been able to receive utility patents, particularly if the shoe has a specific innovation that can make someone run faster or jump higher.⁴⁴ Lingerie has been able to receive utility patents, traced back to 19th century corsets and hoop skirts, which served an innovative function and were not just merely a design.⁴⁵ However, other types of clothing have historically not been afforded utility patents. Obtaining a utility patent for a fashion design is difficult because usually the design is not new or useful. Brands that do obtain utility patents are usually large, mainstream brands that have the resources to obtain them.

37. 35 U.S.C. § 101.

38. § 171.

39. § 271.

40. § 101; *General Information Concerning Patents*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/patents/basics/general-information-patents> (last visited Aug. 11, 2021).

41. U.S. PAT. & TRADEMARK OFF. *supra* note 40.

42. McCall, *supra* note 26.

43. *Id.*

44. *Id.*

45. *Id.*

2. Design Patents

Another type of patent is a design patent, which protects “any new, original, and ornamental design for an article of manufacture.”⁴⁶ A design patent protects the way an article looks, which differs from a utility patent that protects the way an article is used and works.⁴⁷ For purposes of a design patent, an eligible design “consists of the visual ornamental characteristics embodied in, or applied to, an article of manufacture A design for surface ornamentation is inseparable from the article to which it is applied and cannot exist alone. It must be a definite pattern of surface ornamentation, applied to an article of manufacture.”⁴⁸ Design patents are obtainable for designs consisting of an ornamental or decorative aspect of the otherwise functional item.⁴⁹ Examples of items that can receive design patent protection include a decorative heel on a Nike shoe and ornamental hardware on a handbag.⁵⁰

Design patents are not the most practicable solution for independent designers attempting to prevent others from copying non-luxury items like everyday apparel. First, the designs that are being copied, like camo pants, are usually not the type of designs that would qualify for design patents unless the design’s appearance is new or unique. Assuming the design would qualify for design patent protection, design patents are not accessible to the average creator. A design patent takes typically ten to twelve months to receive, fewer in exchange for additional fees, and can cost between \$4,000 and \$10,000.⁵¹ Perhaps more importantly, the fashion industry is propelled by constantly changing trends and “the next big thing,” so it may not be worth it to an independent designer to spend the time and money to obtain a design patent just for the industry to move on and their design to become irrelevant.⁵² Due to the significant costs and time it takes to

46. 35 U.S.C. § 171 (2018).

47. McCall, *supra* note 26.

48. *Design Patent Application Guide*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/patents-getting-started/patent-basics/types-patent-applications/design-patent-application-guide> (last visited Oct. 26, 2019).

49. McCall, *supra* note 26.

50. *Id.*; see also *Clothing Design Patent: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/clothing-design-patent> (last updated July 6, 2020).

51. McCall, *supra* note 26; Elizabeth Ferrill & Tina Tanhehco, *Protecting the Material World: The Role of Design Patents in the Fashion Industry*, 12 N.C. J. L. & TECH. 251, 296 (2011) (explaining the ways to mitigate the costs of design patents, as small designers can qualify for half-price fees); UP COUNSEL, *supra* note 50.

52. *Id.*

obtain a design patent, the brands that have access to these protections are typically large brands that want to protect staple items in their lines.⁵³ “Brands that have significant accessory lines—such as Louis Vuitton—tend to benefit from design patents more than others.”⁵⁴

The current law of intellectual property—trademark, copyright, and patent—is insufficient to protect the works of the vast majority of fashion designers. The fashion industry has thrived as an industry without stringent intellectual property laws, as the global market was worth \$1.9 trillion in 2019, with the American market worth \$292 billion in 2016.⁵⁵ However, the measure of success for the industry focuses on the monetary gains for all and does not take into account the toll that imitation without permission takes on independent designers; in fact, the success of the industry would not be as great without the accessibility of copycat culture.⁵⁶ Yet, many independent designers view these practices as detrimental to their businesses and are looking for a new way to protect their designs.⁵⁷

II. THE WEAK INTELLECTUAL PROPERTY PROTECTIONS IN THE FASHION INDUSTRY HAVE FACILITATED CULTURAL APPROPRIATION

In order to understand intellectual property rights today, it is imperative to recognize the power struggles embedded within the development of intellectual property law.⁵⁸ The lack of intellectual property protections in the fashion industry uniquely harms Black designers because it facilitates cultural appropriation. To understand the unique problem of celebrities and fast-fashion⁵⁹ brands replicating designs originally made by Black designers, it is critical to understand

53. *Id.*

54. *Id.*

55. M. Shahbandeh, *U.S. Apparel Market – Statistics & Facts*, STATISTA (Apr. 26, 2021), <https://www.statista.com/topics/965/apparel-market-in-the-us/>.

56. *Why Knockoffs Are Good for the Fashion Industry*, NPR (Sep. 10, 2012, 3:28 AM), <https://www.npr.org/2012/09/10/160746195/why-knockoffs-are-good-for-the-fashion-industry>.

57. Joan Summers, *Next in Fashion’s Eliminated Designers On the Fight for the Soul of Streetwear*, JEZEBEL (Feb. 3, 2020, 1:45 PM), <https://themuse.jezebel.com/next-in-fashions-eliminated-designers-on-the-fight-for-1841393792>; Friedman, *supra* note 12.

58. Madhavi Sunder, *IP3*, 59 STAN. L. REV. 257, 262 (2006).

59. “Fast-fashion” refers to the relatively recent phenomenon of the “cheaply produced and priced garments that copy the latest catwalk styles and get pumped through stores in order to maximiz[e] on current trends.” Rashmila Maiti, *Fast Fashion: Its Detrimental Effect on the Environment*, EARTH.ORG (Jan. 29, 2020), <https://earth.org/fast-fashions-detrimental-effect-on-the-environment/>.

the concept and history of cultural appropriation in the fashion world and how intellectual property jurisprudence has facilitated cultural appropriation.

A. The History of Cultural Appropriation in the Fashion Industry

Cultural appropriation has historically been deemed “the adoption or co-opting, usually without acknowledgment, of cultural identity markers associated with or originating in minority communities by people or communities with a relatively privileged status.”⁶⁰ The history of cultural appropriation is tied to colonialism, when “all manner of tangible cultural heritage of indigenous peoples (from design patterns to artifacts to body parts, even the people themselves) were looted, stolen, traded, bought, and exchanged by colonials of every status.”⁶¹ When colonizers displayed the stolen property, whether in their own homes or museums, the items became available for imitation and appropriation.⁶² Cultural appropriation is harmful to the source community in various ways. It is harmful when the source community is depicted in offensive or stereotypical ways, which perpetuates harmful misconceptions of the community, and when it is offensive to religious or cultural beliefs of the source community.⁶³ Additionally, and what will be the focus of this discussion, cultural appropriation is injurious because it excludes the source community from financially benefitting from their own ideas and works because the source community is rarely credited or economically compensated.⁶⁴

With the rise of social media and increased accessibility of the fashion industry, the use of the term “cultural appropriation” has moved from primarily academic circles describing imperialism and

60. *Cultural Appropriation*, DICTIONARY.COM, <https://www.dictionary.com/browse/cultural-appropriation?s=t> (last visited Apr. 5, 2021).

61. Peter Shand, *Scene from the Colonial Catwalk: Cultural Appropriation, Intellectual Property Rights, and Fashion*, 3 *CULTURAL ANALYSIS* 47, 52 (2002).

62. *Id.*

63. Sari Sharoni, *The Mark of a Culture: The Efficacy and Propriety of Using Trademark Law to Deter Cultural Appropriation*, 26 *FED. CIR. B.J.* 407, 413 (2017).

64. *Id.*; Elizabeth L. Rosenblatt, *Copyright's One-Way Racial Appropriation Ratchet*, 53 *U.C. DAVIS L. REV.* 591, 624 (2019) (“Drawing on the common-pool resources of other cultures is a low-cost, low-risk way for dominant-culture creators to generate material. There is no owner of those resources. Yet when fashion designers copy native designs onto textiles, for example, they gain copyright in the textile patterns. When dominant culture authors retell histories and legends, they gain copyright in their retellings. They thus place themselves higher on the ladder of appropriation than those from whom they draw, and higher than those who derive their work from already-owned sources.”).

colonialism to the mainstream vernacular describing the actions of celebrities, fashion brands, and ordinary individuals.⁶⁵ This Note argues that while the copying of fashion designs from Black designers may not fall into the traditional definition of “cultural appropriation” because it is not always the copying of cultural identity markers or traditional dress, it is still copying from Black designers while denying original creators from obtaining the profits of their designs. Thus, for purposes of this Note, the term “cultural appropriation” will be used to describe the practice within the fashion industry of people and brands stealing ideas and designs from Black designers without giving the original creators credit or compensation.

Cultural appropriation is deeply embedded in the history of copying within the fashion industry and can appear in a variety of ways, some less obvious than others. From catwalks to Instagram feeds, cultural appropriation is pervasive throughout every domain of the fashion industry. Designers talk about the “streetwear”⁶⁶ trend or taking inspiration “from the street,”⁶⁷ which is arguably a way of reframing “cultural appropriation” as a brand just simply being inspired by lesser-known creators. Recently, there has been greater awareness and condemnation of the rampant cultural appropriation in the fashion industry. Examples of brands and celebrities accused of cultural appropriation include Gucci,⁶⁸ Marc Jacobs,⁶⁹ Chanel,⁷⁰ Ariana Grande,⁷¹ and of course, the Kardashian-Jenner family, including Kim Kardashian, Khloé Kardashian, Kylie Jenner, and Kendall Jenner.⁷²

65. *Cultural Appropriation*, OXFORD REFERENCE, <https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095652789> (last visited Apr. 5, 2021); *Cultural Appropriation*, CAMBRIDGE DICTIONARY, <https://dictionary.cambridge.org/us/dictionary/english/cultural-appropriation> (last visited Apr. 5, 2021).

66. Summers, *supra* note 57.

67. Johanna Blakley, *Lessons From Fashion's Free Culture*, TEDxUSC, https://www.ted.com/talks/johanna_blakley_lessons_from_fashion_s_free_culture/up-next?language=en (last visited Apr. 5, 2021); USC Annenberg, *Ready to Share: The Ecology of Creativity in Fashion*, YOUTUBE (June 13, 2008), <https://www.youtube.com/watch?v=lczVcgwheWk>.

68. Matthew Harden, *A Short History of Design Theft in Fashion*, ACCLAIM, <https://acclaim-mag.com/style/a-short-history-of-design-theft-in-fashion/> (last visited Oct. 26, 2019).

69. Mackenzie Wagoner, *The Dreadlock Debate: How Hair Is Sparking the Conversation of the Moment*, VOGUE (Sept. 21, 2016), <https://www.vogue.com/article/dreadlocks-hair-debate-moment>.

70. Olivia Blair, *Chanel Has Been Accused of Cultural Appropriation Over Its \$2,000 Boomerang*, BUS. INSIDER (May 16, 2017, 10:34 AM), <https://www.businessinsider.com/chanel-accused-of-cultural-appropriation-over-2000-boomerang-2017-5>.

71. Carolyn Twersky, *11 Celebrities Who Have Been Accused of Cultural Appropriation*, SEVENTEEN (Feb. 4, 2019), <https://www.seventeen.com/celebrity/g22363821/cultural-appropriation-examples-celebrities/>.

72. *Id.*; Madison Breaux, *16 Times the Kardashians Caused Controversy on Social Media*, STIR (July 2, 2018), <https://thestir.cafemom.com/celebrities/212886/kardashians-social-media->

Cultural appropriation certainly is not new, but social media makes it seem more frequent because instances of cultural appropriation can be easily highlighted and instantly shared.⁷³

The PluggedNYC incident was not the first time that the Kardashian-Jenners were accused of replicating designs from smaller designers, particularly Black designers.⁷⁴ Just the week before the PluggedNYC incident, Jenner's older sister, Khloé Kardashian, was accused of replicating a bodysuit from a Black-owned brand, *d.bleu.dazzled*.⁷⁵ The owner of the brand, Destiney Bleu, took to Twitter to assert her frustration with the celebrity.⁷⁶ In response, Kardashian's legal team issued Bleu a cease-and-desist letter in which the team claimed that Bleu's accusations were defamatory and that Kardashian's designs for her brand, Good American, were "inspired by the 1990's [sic] and are evocative of clothing worn by Cher and others at the time," and that "Good American's design team had never heard [Bleu's] name and never saw [her] samples."⁷⁷

Bleu then released correspondence between herself and Kardashian's Good American team, revealing Bleu was in contact with Kardashian's stylist, who bought clothes that Bleu claimed were then copied by Good American.⁷⁸ Compounded by Kardashian's misuse of Bleu's intellectual property, "[t]here is also something deeply uncomfortable about someone with Khloé's wealth and power appropriating designs and fashion directly from a [B]lack woman with a

controversy/236983/kim_accused_of_doing_blackface_for_her_makeup_lin. . . ; Channing Hargrove, *All the Time Kylie Jenner Has Been Accused of Plagiarizing Other Designers*, BRIT+CO (June 8, 2017), https://www.brit.co/kylie-jenner-accused-of-stealing-designs/?utm_source=389818&sscid=81k3_sanjk; Mekita Rivas, *Kendall and Kylie Jenner Settle Lawsuit Over Tupac T-shirt*, TEENVOGUE (Apr. 5, 2018), <https://www.teenvogue.com/story/kendall-kylie-jenner-settle-lawsuit-tupac-t-shirt>.

73. Harden, *supra* note 68.

74. Zimmerman, *supra* note 1.

75. *Id.*; Connie Wang, *Khloé Kardashian Sends Destiney Bleu a Cease & Desist, but Bleu Has the Receipts*, REFINERY29, (June 9, 2017, 2:10 PM) <https://www.refinery29.com/en-us/2017/06/158425/khloe-kardashian-stealing-designs-receipts-proof>. *D.bleu.dazzled*® has been worn by a multitude of celebrities and performers. *As Seen On*, D.BLEU.DAZZLED, <https://www.dbleudazzled.com/pages/as-seen-on> (last visited Apr. 6, 2021).

76. Destiney Bleu (@destineybleu), TWITTER (June 2, 2017, 4:07 PM), <https://twitter.com/destineybleu/status/870733561682210820>; Zimmerman, *supra* note 1.

77. Wang, *supra* note 75.

78. Wang, *supra* note 75; Jamie Feldman, *Designer Accusing Khloe Kardashian of Copying Appears to Have Major Receipts*, HUFFPOST (June 9, 2017), https://www.huffpost.com/entry/khloe-kardashian-copied-designer_n_593aea8fe4b0c5a35c9f1db5 (revealing alleged emails between Khloe Kardashian's assistant and Destiney Bleu dating back to 2016, as well as invoices for three purchases that list Kardashian associates and "KK" as the customer).

small business without crediting her, making cheap knockoffs, and then attempting to threaten her into silence”—as Bleu said.⁷⁹

While one may argue that replicating arbitrary designs and trends from smaller Black brands or from independent Black designers does not rise to the level of cultural appropriation, this Note argues that by looking at these examples within the context of the systematic exclusion of Black creators from the intellectual property realm, these practices fit within the definition of cultural appropriation.⁸⁰ Bleu articulated that same sentiment when she noted how Khloé Kardashian, an extremely wealthy white celebrity, was copying designs directly from her, a Black designer, without any credit or recognition given to its creator.⁸¹ This is the exact type of problem that intellectual property protections should be able to prevent, yet the current jurisprudence frequently fails to protect independent Black designers. Instead, current intellectual property laws arguably facilitate this type of cultural appropriation, as intellectual property laws are typically only effective to protect large, wealthy brands with the disposable income to spend on not only obtaining these types of protections but also enforcing their protections against smaller, minority brands and designers.

B. Copying in the Fashion Industry

The Kardashian-Jenner family is certainly not the only perpetrators of design imitation. Other celebrities and influencers, along with a slew of fast-fashion brands like Fashion Nova, Forever 21, Zara, and H&M, are frequently accused of imitating the works of other designers.⁸² This practice of copying in the fashion industry is not a new development, and luxury brands have a history of suing smaller brands and stores for copying their designs.⁸³ Arielle Elia, curator of a

79. Zimmerman, *supra* note 1.

80. Summers, *supra* note 57 (“They take our ideas and then try to resell them to us as if it’s their ideas. That’s what really pissed us off in that instant; Ghetto until proven fashionable.”); Friedman, *supra* note 12 (explaining how the lack of Black representation in the fashion industry is striking for many reasons, including the fact that the fashion industry finds “inspiration” in Black culture in very vocal and active ways).

81. Zimmerman, *supra* note 1.

82. Denisse F. Garcia, *Fashion 2.0: It’s Time for the Fashion Industry to get Better-suited, Custom-tailored Legal Protection*, 11 DREXEL L. REV. 337, 339–40 (2018).

83. Mary Hanbury, *Target Is Being Sued by Burberry, and It Reveals One of the Biggest Problems Facing the Clothing Industry*, BUS. INSIDER (May 9, 2018, 12:39 PM), <https://www.businessinsider.com/target-sued-by-burberry-reveals-big-problem-fashion-2018-5>; see also Lizzie Crocker, *The Big Business of Fashion Counterfeits*, DAILY BEAST (July 12, 2017, 7:29 PM), <https://www.thedailybeast.com/the-big-business-of-fashion-counterfeits>.

museum exhibition called “Faking It: Originals, Copies, and Counterfeits”, spoke about the early history of copying fashion designs once they were shown at fashion shows, saying “[f]ive [] [employees from competing brands] would attend a show and each one would memorize a certain part of a garment.”⁸⁴ “Then they would go to a hotel afterward and combine the parts they have remembered in one sketch.”⁸⁵ Coco Chanel called knockoffs “the ransom of success,” viewing them as inevitable.⁸⁶ When commenting on fast-fashion’s “copy-and-paste” method, fashion mogul Tom Ford said of his designs, “if I’m lucky and I did the right thing, they will be at Zara way before I can get them in the store”⁸⁷ The bottom line is that no matter if you are an independent designer or a large luxury brand, your designs are likely going to be copied by another brand.

Due to the nature of the fashion industry, designers at every level of success get imitated. However, while high-end brands are not immune from duplication and fast-fashion practices, they are typically not impacted in a severe way. As Tom Ford acknowledges, people who are in the market for copies or counterfeits are not his target demographic: “the counterfeit customer was not our customer.”⁸⁸ Fashion moguls and designer brands can retain their target markets and profits even with imitation. Small brands, however, can be crippled by imitation, as they cannot offer the design at the price point of their imitators. They may lose sales to the imitator because of the lower price or because of the greater name recognition of their imitator, and small brands do not get the name recognition they deserve for their designs. This certainly happened to Destiney Bleu, who told Revelist that her brand has decreased in value by almost \$100,000 since Fashion Nova and subsequent other indie boutiques copied her signature crystal-encrusted Midnight Sky Tights, once worn by Kylie Jenner.⁸⁹

84. Crocker, *supra* note 83.

85. *Id.*

86. Helena Pike, *The Copycat Economy*, BUS. FASHION (Mar. 14, 2016, 5:30 PM), <https://www.businessoffashion.com/community/voices/discussions/what-is-the-real-cost-of-copycats/fashions-copycat-economy>.

87. Matt Welty, *Tom Ford Calls Out Zara for Copying Designs*, COMPLEX (Apr. 15, 2013), <https://www.complex.com/style/2013/04/tom-ford-calls-out-zara-for-copying-designs>.

88. USC Annenberg, *supra* note 67.

89. Marquaysa Battle, *Black Designers Expose Fashion Nova For Knocking Off Their Designs*, REVELIST, <https://www.revelist.com/style-news/fashion-nova-knock-off-designers/15005> (Apr. 26, 2019, 12:01 PM). On March 26, 2021, Fashion Nova tweeted a link to purchase their rhinestone stockings. Bleu responded, “[t]his company needs a class action suit,” alluding to the numerous accusations that Fashion Nova’s copies designs made by independent designers.

Independent designers are most hurt by the industry's blatant "copy-and-paste" method of production, and within the sphere of independent designers, Black designers are frequently targeted by fast-fashion brands.⁹⁰ The practice of fast-fashion brands imitating designs from Black designers introduces questions of cultural appropriation and "culture vultures," or people who frequently imitate and profit from another culture.⁹¹

1. Copying By a Fast-Fashion Brand

A prime example of the pervasiveness of the problem comes from arguably the most talked-about fast-fashion brand,⁹² and one that has been under scrutiny for claims of cultural appropriation:⁹³ Fashion Nova. Jai Nice, a Black designer and owner of Kloset Envy, designed and produced cropped hoodies with unique, puffy sleeves.⁹⁴ In 2018, Nice accused Fashion Nova of purchasing two of her hoodies, returning them, and then selling a replica of the sweatshirts on their website.⁹⁵ Nice posted images on social media of the returned hoodies, which were sent back in a box with a shipping label from Fashion Nova Returns.⁹⁶ She claims the hoodies were bought under a separate individual's name to conceal the brand's identity.⁹⁷ Nice said directly to the brand, "you make enough money, you culture vulture," commenting on the numerous times the brand has been accused of cultural appropriation.⁹⁸

Destiney Bleu (@destineybleu), TWITTER (Mar. 26, 2021, 1:02 PM), <https://twitter.com/destineybleu/status/1375493306315014146?s=20>.

90. Summers, *supra* note 57; see Jackie Aina, *Unpopular Opinions: Your Fave IG Fashion Brands!!* — Jackie Aina, YOUTUBE (Mar. 28, 2019), <https://www.youtube.com/watch?v=2BbCA76NfjM>.

91. Rina Cakrani, *Kardashian Culture Vultures*, WHITMAN WIRE (Feb. 22, 2018), <https://whitmanwire.com/opinion/2018/02/22/kardashian-culture-vultures/>.

92. Fashion Nova was the most searched fashion term on Google in 2018. Battle, *supra* note 89.

93. See generally Daryl Nelson, *Fashion Nova Accused of Stealing Designs: 'Stop Stealing From the African-American Community'*, ATLANTA BLACK STAR (July 25, 2018), <https://atlantablackstar.com/2018/07/25/fashion-nova-accused-of-stealing-designs-stop-stealing-from-the-african-american-community/>; Battle, *supra* note 89; Sabrina Barr, *FASHION NOVA SPARKS CONTROVERSY WITH 'RACIALLY INSENSITIVE' GEISHA COSTUME*, INDEPENDENT (Oct. 8, 2018), <https://www.independent.co.uk/life-style/fashion/fashion-nova-geisha-costume-cultural-appropriation-halloween-native-american-a8572971.html>; Aina, *supra* note 90.

94. Nelson, *supra* note 93.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

Unfortunately, Fashion Nova's blatant imitation of Nice's design did not have many consequences beyond outrage on social media. It is shocking that Fashion Nova did not even bother to return the hoodies under the original purchaser's name.⁹⁹ Fashion Nova's unapologetic purchase and return of Nice's designs, without bothering to try to conceal its identity, is evidence that large brands like Fashion Nova know that these actions are non-consequential. As Nice said,

I understand them wanting to make things affordable, but there's something to be said about making money off of other people's designs I know they have like 100 styles or something new every week, [so] their constant copying is greed. It's not that they are just trying to provide affordable things. They are being greedy because they are promoting overconsumption.¹⁰⁰

This incident is a perfect example of an independent Black designer who has evidence that a brand blatantly ripped off their designs, and yet has no substantive recourse. Beyond calling out Fashion Nova on social media, there was nothing that Jai Nice could do to seek compensation and protect her designs from further imitation because the current intellectual property jurisprudence did not provide adequate protection.

The intellectual property protections available to Jai Nice would not have been sufficient to ward off the copy-and-paste tactic from Fashion Nova. Other than the trademark—"Kloset Envy"¹⁰¹—Nice does not have intellectual property protections for her puffy-sleeved hoodies. The trademark does not protect Nice from the actions of Fashion Nova, as Fashion Nova did not use "Kloset Envy" in the replica or branding. Nice would not be able to obtain or protect her hoodies through copyright, as the design of the puffy sleeves is not an artistic and separable design from the hoodies—the sleeves are an integral part of the design. The sleeves would not qualify for a utility patent, as they are not a new or useful functional invention. Nice's hoodies may have qualified for a design patent, if the shape of the puffy sleeves were new, ornamental designs. However, as previously addressed, many independent designers do not have the interest, or the opportunity, to file for a design patent.

99. *Id.*

100. Battle, *supra* note 89.

101. Found on Kloset Envy website: "klosetenvy ®." *About Us*, KLOSET ENVY, <https://www.klosetenvy.com/pages/about-us> (last visited Apr. 5, 2021).

Since Jai Nice did not have any legal recourse against Fashion Nova, she took to social media to vent her frustrations.¹⁰² Although Nice received support on social media and there was a large backlash against Fashion Nova's tactics, there were no real repercussions for the fast-fashion brand.¹⁰³ The shaming tactics of modern society did not work on the well-developed and wealthy brand.¹⁰⁴

2. Copying By a Celebrity

Like the powerhouse brand Fashion Nova, celebrities wield incredible power in their wealth and influence on social media. Tizita Balemlay fell victim to the power of a celebrity, one of the most influential celebrities in the world at the moment: Kylie Jenner. Balemlay, whose camo designs were imitated by Kylie Jenner, said in a statement to Complex:

At the end of the day money is power and the [K]ardashians have both. It doesn't matter if she wore my stuff previously then literally shoots [the] same [c]oncept with [the] same shoes and all[]. But at the end of day this will be all blown over tomorrow, her sales will continue, I can never have a billboard in the middle of the city. Money is power, they can take a whole movement just [because] of prices. Money rules the world if you haven't noticed.¹⁰⁵

Balemlay draws a line from money and power to the ability to get away with copying designs. Jenner, a billionaire who has 226 million followers on Instagram,¹⁰⁶ was able to start her own fashion line and has not, and likely will never, face any real repercussions that would deter her from continuing to copy other designers' works. Balemlay

102. Battle, *supra* note 89.

103. *Id.*

104. Another example of a fast-fashion brand copying an independent Black designer's work comes from PrettyLittleThing, who copied a dress design from Anifa Mvuemba, founder of Hanifa. Mvuemba went viral in May 2020 when she used 3-D animation technology to host a model-less online fashion show. She took to Twitter to voice her frustrations with the fast-fashion brand but, unsurprisingly, the brand did not suffer repercussions. Anifa Mvuemba (@AnifaM), TWITTER (Jan. 17, 2021, 12:06 PM), <https://twitter.com/AnifaM/status/1350852031024664577>; see generally Devine Blacksher, *The Designer Who Sent Ghost Models Down the Runway: Anifa Mvuemba Always Does Things Her Own Way*, CUT (Sept. 14, 2020), <https://www.thecut.com/2020/09/hanifa-designer-anifa-mvuemba-on-her-pink-label-congo-show.html>.

105. Cowen, *supra* note 2.

106. Natalie Robehmed, *At 21, Kylie Jenner Becomes the Youngest Self-Made Billionaire Ever*, FORBES (Mar. 5 2019, 5:00 AM), <https://www.forbes.com/sites/natalierobehmed/2019/03/05/at-21-kylie-jenner-becomes-the-youngest-self-made-billionaire-ever/#1cacdf812794>; Kylie Jenner (@kyliejenner), INSTAGRAM, <https://www.instagram.com/kyliejenner/?hl=en> (last visited Apr. 22, 2021).

recognized how little power she has in an industry that offers such lax intellectual property protections.

The intellectual property protections available to Balemlay would not have been sufficient to stop Kylie Jenner from copying the camouflage designs. Other than the trademark, d.bleu.dazzled®, Balemlay does not have intellectual property protections for the camo pants and matching top. The trademark does not protect Balemlay, as Kylie Jenner did not use “d.bleu.dazzled®” in the replica or branding. Balemlay could not obtain a copyright in the pants or top, as the outfit is functional. Although the camouflage design is an artistic pattern that is separable from the pants and top, Balemlay would not be able to obtain or protect the pattern of her work with a copyright, assuming she did not create the specific camouflage pattern she used. The pants and top would not qualify for a utility patent, as they are not new or useful functional inventions. The two items may have qualified for design patents, if the shape of the items were new, ornamental designs.

Like Jai Nice, Tizita Balemlay took to social media and even online magazines to call out Kylie Jenner.¹⁰⁷ Balemlay received a lot of attention, but like Fashion Nova, Jenner did not receive any real repercussions; she received negative comments but also received support.¹⁰⁸ Overall, the shaming tactic did not work on the influential mogul.

III. POSSIBLE SOLUTIONS TO STOP THE IMITATION AND CULTURAL APPROPRIATION OF INDEPENDENT BLACK DESIGNERS' WORKS

As the world moves towards a new industrial revolution, intellectual property will be the new measure of wealth.¹⁰⁹ In order to provide equal opportunities for creators to obtain intellectual property rights, we must “mind the innovation gap,” or the “disparities between classes of people, caused by societal hindrances, which prevent

107. Carly Ledbetter, *Like Her Sister Khloe, Kylie Jenner Is Also Accused of Ripping Off a Designer*, HUFFPOST (June 12, 2017), https://www.huffpost.com/entry/kylie-jenner-ripped-off-designs_n_593e9904e4b02402687b17db; Stryker, *supra* note 8.

108. See generally Stryker, *supra* note 8; see also Almie Rose, *Accusations of Theft Against Kylie Jenner Exposes Much Bigger Problem*, ATTN (June 8, 2017), <https://archive.attn.com/stories/17570/accusations-theft-against-kylie-jenner-expose-much-bigger-problem>.

109. Raymond Millien, *The Real McCoy Part 2: I am a Man Who Thinks and My Thoughts are Valuable*, IPWATCHDOG (Nov. 13, 2012), <https://www.ipwatchdog.com/2012/11/13/the-real-mccoy-part-2-i-am-a-man-who-thinks-and-my-thoughts-are-valuable/id=29867/>.

them from securing the [intellectual property] rights necessary to economically exploit the fruits of their creativity.”¹¹⁰

This Note proposes that the following solutions could help stop the imitation and cultural appropriation of independent Black designers’ intellectual property. These solutions are effective and realistic, but they are certainly not the only reasonable solutions.

A. Expanding Current Intellectual Property Law

The current jurisprudence of intellectual property law is insufficient to protect against the copy-and-paste methodology of the fashion industry, and is even more incapable of protecting against cultural appropriation of intellectual property. Expanding existing intellectual property rights is the most straight-forward solution to this problem.

1. Patents

Design patents, if made more accessible to independent designers, could be extremely useful tools in protecting their fashion designs from imitators. The subject matter of a design patent may pertain to the configuration or shape of the article of clothing, an ornamental design on the surface of the article of clothing, or a combination of the two.¹¹¹ In this way, it is possible to protect common clothing items like blouses, trousers, etc., if the design is unique enough.

However, there are barriers to obtaining design patents. One of the biggest barriers to obtaining design patents for independent designers is the cost. Design patent applications rely heavily on the patent drawings, which can cost around \$600 for high quality drawings from third parties, and the USPTO filing fee for one design patent is \$220.¹¹² Cheaper mechanisms for design patent drawings and reduced

110. *Id.*

111. U.S. PAT. & TRADEMARK OFF., *supra* note 48 (“A design for surface ornamentation is inseparable from the article to which it is applied and cannot exist alone. It must be a definite pattern of surface ornamentation, applied to an article of manufacture.”).

112. *Design Patent Cost: Everything You Need to Know*, UPCOUNSEL, <https://www.upcounsel.com/design-patent-cost> (last visited Apr. 5, 2021) (clarifying that the USPTO filing fee may be reduced for smaller entities); *Patent Fees*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/learning-and-resources/fees-and-payment/uspto-fee-schedule#Patent%20Fees> (last visited Apr. 13, 2021) (outlining the fee schedule providing information and fee rates for USPTO products and services).

filings fees could make design patents more accessible to independent designers.¹¹³

Another barrier to obtaining design patents for independent designers is establishing novelty in the fashion industry. The fashion industry not only expands every day, with the fast-fashion industry churning out designs seemingly daily, but it also relies on establishing trends. The enormous amount of clothing and fashion designs makes it hard for patent-seekers to ensure that they have identified all prior art to ensure that they are not infringing other design patents. The trend-driven fashion industry relies on similar styles made by a variety of brands. In this way, design patents may be difficult to obtain since the appearance of the designs will be similar. Due to the nature of the fashion industry, it may not be practical for independent designers to try and obtain design patents for their items; but if they do want that protection, they can be strategic and file an application during the beginning phases of design and file using an expedited examination procedure.¹¹⁴

2. Copyrights

It has historically been difficult for articles of clothing to receive copyright protections because courts have decided that clothing, no matter how elaborate, is inherently functional, and thus not copyrightable.¹¹⁵ First, the Supreme Court should rethink the way it views clothing and functionality. While the Court has agreed that patterns can be copyrightable if they are able to be separated from the clothing,¹¹⁶ copyright protections could be expanded to include copyrightability of the entire work; if the pattern is copyrightable, the entire work could be protected. This will protect entire articles of clothing whose outer designs fall within the separability doctrine.

3. Trademarks

Like other intellectual property protections, the weakness of trademarks in the fashion industry is that the protection does not encompass the entire work, but only the particular aspects of the work

113. Ferrill & Tanhehco, *supra* note 51, at 296 (stating that currently, small designers may already qualify for reduced fees); U.S. PAT. & TRADEMARK OFF., *supra* note 112 (allowing for reduced fees upon establishment of small entity status or micro entity status).

114. *Id.* at 297.

115. McCall, *supra* note 26.

116. *Star Athletica v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017).

that fall within current intellectual property law.¹¹⁷ However, the expansion of trademark protections would not necessarily be useful to independent designers.

There has been movement towards increased intellectual property protections under trademark law for a concept called “quasi-designs,” which are “patterns or shapes that walk the line between logos and designs.”¹¹⁸ A famous example of a quasi-design is Christian Louboutin’s bright lacquered red on the outsoles of its high heels, for which it has received trademark protections.¹¹⁹ Courts have “signaled an increas[ed] willingness to grant protections to quasi-designs—protections that [] plaintiffs would not have been able to secure under copyright or patent law, and that give designers certain rights against design copyists.”¹²⁰ However, even this expansion of trademark law favors established designers to the detriment of emerging ones, as the quasi-design must still have obtained “significant recognition of its uniqueness.”¹²¹

Overall, modifying existing intellectual property rights, specifically making design patents more accessible and expanding copyright protections to include protection of the entire work, could provide more substantial intellectual property protections for independent fashion designers.

B. Social Shaming

The widespread use of Instagram and other social media platforms to call out specific brands and designers for copying other works has given rise to “social shaming.”¹²² Social media gives independent designers the platform to fire back at bigger brands and celebrities when they are copied, and provide the public with clear evidence of the copier’s actions.¹²³ If an accusatory post goes viral, it can create public relations issues for a brand and occasionally pressure the brand to take ownership of its actions and apologize.¹²⁴ There are a couple downsides to this avenue or solution. For example, public shaming

117. McCall, *supra* note 26.

118. *The Devil Wears Trademark: How the Fashion Industry has Expanded Trademark Doctrine to its Detriment*, 127 HARV. L. REV. 995, 995 (2014).

119. *Id.* at 1005.

120. *Id.* at 1009.

121. *Id.* at 1013.

122. *10 Legal Trends at Play in the Fashion Industry*, TFL (Mar. 16, 2018), <https://www.thefashionlaw.com/10-legal-trends-that-the-fashion-industry-experienced-in-2017/>.

123. Harden, *supra* note 68.

124. *Id.*

may provide some relief, but monetary relief is relatively impossible to get.¹²⁵ In addition, the widespread use of social media, which is used to spread awareness of imitation in the fashion industry, has also made it much easier for copiers to imitate designs.¹²⁶

Further, individual independent designers calling out individual instances of copying is not effective on a large scale. A large platform that posts fashion designers that copy other brands would, in theory, be beneficial in stopping the blatant copy-and-paste practices of the fashion industry. However, it will not make a significant impact on brands or designers to stop their practices. While fashion designers typically have Twitter and Instagram accounts and will see the latest accusations of copying, social media only reaches a small percentage of the purchasing American population. Not every consumer will know that their favorite brand has ripped-off a design from another designer, and thus are not able to be persuaded to either boycott the brand or refuse to buy the pieces that have been copied. People that have social media accounts and view social shaming may not be influenced either. The problem with social shaming is that while it promotes outrage initially, social media quickly moves on to the next scandal, and such scandals are easily forgotten. This is evidenced by the numerous luxury brands that have undergone scandals that were quickly forgotten, sometimes after an apology from the brand, other times not. To name a few: Gucci's infamous blackface sweater; Gucci's headscarf dubbed "Indy Full Turban"; Burberry's noose hoodie; Kim Kardashian's shapewear brand initially named "Kimono"; Zara's "Holocaust uniform" children's shirt; Bstroy's hoodies reading the names "Stoneman Douglas," "Sandy Hook," "Virginia Tech," and "Columbine."¹²⁷

There have been large-scale efforts to shame copycats publicly. The Instagram account Diet PradaTM is a verified Instagram account that is dedicated to calling out fashion brands that knock off other

125. *10 Legal Trends at Play in the Fashion Industry*, *supra* note 122.

126. McCall, *supra* note 26; *see also* UPCOUNSEL, *supra* note 50.

127. Layla Ilchi, *The Biggest Fashion and Beauty Brand Controversies of 2019*, WWD (Dec. 24, 2019), <https://wwd.com/fashion-news/fashion-scoops/biggest-brand-controversies-2019-fashion-beauty-gucci-blackface-kim-kardashian-kimono-louis-vuitton-michael-jackson-1203241522/>; Marianna Cerini, *2019's biggest fashion controversies*, CNN (Dec. 29, 2019), cnn.com/style/article/biggest-fashion-controversies-2019/index.html; Zara's 'Holocaust Uniform' and Other Clothing Errors, BBC NEWS (Aug. 27, 2014), <https://www.bbc.com/news/blogs-magazine-monitor-28944516>; Hilary George-Parkin, *Designers of 'Sandy Hook' and 'Columbine' hoodies made an awful blunder*, CNN (Sept. 19, 2019) <https://www.cnn.com/2019/09/19/opinions/bstroy-school-shooting-hoodies-fashion-week-george-parkin/index.html>.

brands.¹²⁸ The account has called out numerous brands from Fashion Nova for copying a vintage Versace dress worn by Kim Kardashian¹²⁹ to Louis Vuitton for copying a Christian Dior belt.¹³⁰ Diet Prada mostly calls out fast-fashion brands for copying large brands, but it has illuminated large brands imitating smaller brands' designs.¹³¹ It would arguably be more difficult to track the imitation of smaller brands, as the original work would not have been well known, making these types of social shaming platforms not as effective to protect independent brands. Another hurdle is the reach of the social shaming platform. Diet Prada has 2.7 million followers and 1,540 posts; not enough to make the national impact that it would need to have an impact to stop the copycats or change the intellectual property laws.¹³²

Black designers suffer a unique harm through copy-and-paste practices, as the harm is magnified by and facilitates cultural appropriation. Thankfully, cultural appropriation is increasingly being called out on social media, and there is a greater awareness of the unfairness and injustice of the practice. Unfortunately, this has historically not been enough to prohibit the widespread cultural appropriation in the fashion industry. In fact, large brands may purposefully engage in cultural appropriation for the shock value, as it gets social media talking about their brand. Additionally, our society's shift towards reliance on social shaming "threatens to embed us in a culture governed increasingly by shame rather than law" and becomes an excuse not to address intellectual property inequities through legal channels.¹³³ Given the continued practice of cultural appropriation in the fashion industry despite the greater awareness of the injustice of cultural appropriation, it does not appear that social shaming will stop fast-fashion brands or celebrities any time soon. Therefore, there needs to be other avenues of solutions to address the imitation of independent Black fashion designers' works.

128. Diet Prada (@diet_prada), INSTAGRAM, https://www.instagram.com/diet_prada/?hl=en (last visited Apr. 22, 2021).

129. Diet Prada (@diet_prada), INSTAGRAM (Dec. 12, 2019), <https://www.instagram.com/p/B5-onrmd3s/?hl=en>.

130. Diet Prada (@diet_prada), INSTAGRAM (Nov. 7, 2019), <https://www.instagram.com/p/B4khHPInHO4/?hl=en>.

131. Diet Prada (@diet_prada), INSTAGRAM (July 12, 2019), https://www.instagram.com/p/Bz0qQgfnPgA/?utm_source=ig_web_copy_link (illuminating the similarity of designs by Victoria's Secret and Fleur du Mal, a smaller lingerie company, after Victoria's Secret's associate buyer placed a \$12,656 order from Fleur du Mal).

132. Diet Prada (@diet_prada), *supra* note 129.

133. Amy Adler & Jeanne C. Fromer, *Taking Intellectual Property into Their Own Hands*, 107 CAL. L. REV. 1455, 1459, 1513–15 (2019).

C. Reparations

When discussing reparations for Black Americans, it is imperative that we include a discussion about intellectual property. Furthermore, we must recognize the intellectual property of fashion and the influence of Black Americans on the broader American fashion culture.¹³⁴ Writer Faith Cummings says, “[a]s long as [B]lack ideas are filtered through the point-of-view of white creatives, they will be acceptable. Yet, we—the ideators—are still struggling to garner a seat at the table. Even though we’ve oft built the table ourselves.”¹³⁵ The systematic exclusion of Black inventors has been prevalent throughout the history of the United States and its legacy continues today.

Throughout this country’s history, lawmakers have purposefully prohibited Black inventors from receiving the same intellectual property rights and protections as white inventors. In 1861, the Confederate States of America passed the following law:

That in case the original inventor or discoverer of the art, machine or improvement for which a patent is solicited is a slave, the master of such slave may take an oath that the said slave was the original inventor; and on complying with the requisites of the law, shall receive a patent for said discovery or invention, and have all the rights to which a patentee is entitled by law.¹³⁶

The legal jurisprudence of intellectual property and contract, “situated in a matrix hostile to both Black cultural production and to Black economic autonomy, failed to protect the interests of Black creative artists on a grand scale (notwithstanding that certain individual artists accrued benefit from the system).”¹³⁷ This systematic denial of intellectual property rights warrants action for reparations for Black Americans who have been denied protection for their inventions. “Reparations for the failure to recognize creators’ inherent rights to their works, like reparations in other contexts, can serve to remedy the past exploitation of a disadvantaged group.”¹³⁸

134. K.J. Greene, “Copynorms,” *Black Cultural Production, and the Debate over African-American Reparations*, 25 *CARDOZO ARTS & ENT. L.J.* 1179, 1187 (2008) (“Black artistic creativity has long been at the forefront of American culture.”).

135. Faith Cummings, *Gucci, Dapper Dan, and How the Fashion Industry Fails Black People*, *TEENVOGUE* (June 1, 2017), <https://www.teenvogue.com/story/gucci-dapper-dan-cultural-appropriation>.

136. JAMES M. MATTHEWS, *The Statutes at Large of the Provisional Government of the Confederate States of America*, Sess. II, Ch. 46, Sec. 50, 148 (1861) (emphasis added).

137. Greene, *supra* note 134, at 1217.

138. J. Carolina Chavez, *Copyright’s “Elephant in the Room”: A Realistic Look at the Role of Moral Rights in Modern American Copyright*, 36 *AIPLA Q.J.* 125, 143–44 (2008).

Reparations can be given in terms of damages based on the unjust enrichment of the party that took the intellectual property. Unjust enrichment is an equitable doctrine, which seeks to provide compensation to an injured party when the injurer has received a benefit at the injured party's expense.¹³⁹ Elements of an unjust enrichment claim are "(1) benefits conferred on one party by another, (2) appreciation of such benefits by the recipient, and (3) acceptance and retention of these benefits under such circumstances that it would be inequitable for the recipient to retain the benefits without the payment of their value."¹⁴⁰ Typically, it is not necessary to show wrongful intent on the part of the benefited party to establish unjust enrichment.¹⁴¹

The disease of cultural appropriation within the fashion industry and the taking of intellectual property from independent Black designers by large brands provide a basis for unjust enrichment claims. Large fashion brands have taken ideas from independent Black designers, have received monetary gains from such actions, and have retained those benefits without giving the independent Black fashion designers monetary compensation. Unjust enrichment claims can be useful for independent Black fashion designers who seek compensation from brands that imitate their fashion designs and can aim to combat the history of systematic exclusion of Black inventors from intellectual property protections.

D. Crediting the Original Designer

Copying fashion designs prohibit the original designer from partaking in the economic benefits and profits of their work. A solution to this problem is for designers who want to imitate a design, usually big brands imitating small designers' works, to collaborate with the original creator. In this way, designers can engage with other cultures and cultural expressions without committing cultural appropriation by expressly giving credit and profits to the original creator. The World Intellectual Property Organization ("WIPO") published an article outlining four principles that designers can follow to ensure they are properly crediting the original designers and culture.¹⁴² They can do

139. 16 SUMM. PA. JUR. 2D COMMERCIAL LAW § 2:2 (2D ED.).

140. *Id.*

141. *Id.*

142. Brigitte Vezina, *Curbing Cultural Appropriation in the Fashion Industry with Intellectual Property*, WIPO (Aug. 2019), https://www.wipo.int/wipo_magazine/en/2019/04/article_0002.html.

this by: (1) understanding and respecting the holders of traditional cultural expressions, (2) respecting transformation and reinterpretation of traditional cultural expressions, (3) acknowledging and recognizing the holders of traditional cultural expressions, (4) and engaging with the holders of traditional cultural expressions through requests for authorization and collaborative partnerships.¹⁴³ Some brands have begun such partnerships through capsule collections, which are “condensed version[s] of a designer’s vision,” where a designer creates a few key pieces for a bigger brand to market and sell, and the two share profits.¹⁴⁴ This type of crediting to the original designer can give the designer exposure and name recognition, and thus may increase their profits and influence in the fashion industry.

A famous example of this type of crediting of the designer is Gucci’s relationship with Dapper Dan, the renowned Black fashion designer and tailor from Harlem.¹⁴⁵ Dapper Dan gained notoriety in the 1980s and 1990s for imitating famous designer logos, including Gucci’s, in his own designs.¹⁴⁶ In 2017, Gucci knocked off one of Dapper Dan’s designs in their Cruise 2018 collection.¹⁴⁷ The parties then collaborated on a capsule collection, and Gucci supported Dapper Dan’s new studio in Harlem and made him the face of their special tailoring campaign.¹⁴⁸ As said by Dapper Dan in light of his collaboration with Gucci, “[e]veryone paid homage to Dapper Dan, but no one ever paid him.”¹⁴⁹ Dapper Dan undoubtedly increased Gucci’s influence and revenue in the 1980s and 1990s by imitating their designs, and it is important that Gucci finally recognized Dapper Dan’s influence on the fashion industry, and on Gucci’s influence within the industry, by collaborating with him.

143. *Id.*

144. Alfonso Segura, *Capsule Collection in Fashion*, FASHION RETAILER (Sept. 12, 2017), <https://fashionretail.blog/2017/09/12/collaborations-in-fashion-capsule-collection/>.

145. DAPPER DAN IS HOLDING GUCCI ACCOUNTABLE FOR CONTROVERSIAL “BLACKFACE SWEATER,” FASHIONISTA (Feb. 16, 2019), <https://fashionista.com/2019/02/dapper-dan-gucci-black-face-sweater> (Feb. 16, 2019).

146. *Id.*

147. *Id.*

148. *Id.*; see Lauren Alexis Fisher, *Gucci and Dapper Dan’s First Collection Is Here and It’s Really Good*, HARPER’S BAZAAR (July 17, 2018, 2:49 PM), <https://www.harpersbazaar.com/fashion/designers/g22220847/gucci-dapper-dan-collection/>; see also Gucci, *Dapper Dan Confirm Collab Following Cruise Collection Snafu*, TFL (Sept. 10, 2017), <https://www.thefashionlaw.com/home/gucci-dapper-dan-confirm-collab-following-appropriation-incident>.

149. Whitney Bauck, *PEEK INSIDE DAPPER DAN’S NEW GUCCI-BACKED HARLEM ATELIER*, FASHIONISTA (Dec. 14, 2017), <https://fashionista.com/2017/12/gucci-dapper-dan-harlem-studio-atelier>.

In April 2019, Christian Dior presented a Cruise 2020 collection in which Dior designer Maria Grazia Chiuri collaborated with Uniwax, a company based in Abidjan, Ivory Coast.¹⁵⁰ It was meant to honor the creativity and skill of African creators of wax print fabrics made by Uniwax, one of the few fabric manufacturers still using traditional methods.¹⁵¹ Chiuri said that the collection “proposed a dialogue between the Dior wardrobe and African fashion’ and was her way of actively supporting African fashion and the tradition of wax fabric, which is under threat from cheap, digitally-produced copies.”¹⁵² It is important to shine light on the creativity and skill of other cultures’ fashion designs. More importantly, Christian Dior collaborated with the Ivory Coast-based company, Uniwax, instead of plucking the designs from the Ivory Coast and passing them as their own, which is too often the practice of luxury brands.

While capsule collections do not solve all the problems embedded in the copy-culture of the fashion industry, they do provide an opportunity for smaller and minority designers to partner with large brands to obtain name recognition and economic benefits. Capsule collections and collaborations are a way for large brands to go against the norm of the fashion industry, which is for large brands to take ideas from smaller brands and pass them off as their own. Attribution can bolster an emerging designer’s reputation, which can not only lead to financial rewards, but expressive rewards by making the emerging designer feel seen and also valued.¹⁵³ The problem with this solution is enforcement. The examples of brands crediting the original designer have been because the brand took the initiative, not because they were forced by any law. With the increased visibility of the copycat culture of fast-fashion, brands may be pressured into crediting the original designer or even collaborating with the designer; but it will ultimately be up to the large, power-wielding brand to decide.

E. Environmental Regulations

Fast-fashion not only raises intellectual property concerns but environmental concerns as well. Globally, humans consume around 80 billion new pieces of clothing every year, which is up 400 percent from

150. Vezina, *supra* note 142.

151. *Id.*

152. *Id.*

153. Adler & Fromer, *supra* note 133, at 1500.

just 20 years ago.¹⁵⁴ Even worse, 85 percent of all textiles end up in landfills every year—680,000,000,000 articles of clothing.¹⁵⁵ Producing 10 percent of all humanity’s carbon emissions, the fashion industry is the second-largest polluter in the world, harming not only the United States but our global society too.¹⁵⁶ The fast-fashion industry facilitates and thrives off of consumers’ desires for the next new trend; and, therefore, does not have an incentive to make quality, sustainable articles of clothing that would potentially limit the negative environmental impacts. Environmental regulations could target the fast-fashion industry and decrease its presence within the broader fashion industry, which would indirectly help independent Black designers with their intellectual property concerns. While environmental regulations will not be a direct solution to fixing the lax intellectual property laws in the United States, it can be a roundabout way of limiting the fast-fashion industry and thereby limiting the imitation of Black designers’ works.

CONCLUSION

Intellectual property is going to be a new measure of wealth in the growing technological world. It is clear that the current state of intellectual property jurisprudence in the United States as it pertains to fashion does not sufficiently protect independent designers. The rampant copycat culture in the fashion industry makes it extremely difficult to protect one’s fashion designs from fast-fashion brands that quickly turn out knockoff designs, as well as from large luxury brands and celebrities who constantly look for “inspiration” from smaller brands. This lack of protection disproportionately harms independent Black designers, as the lax laws facilitate the harms of cultural appropriation and the continued systematic exclusion of Black designers from owning intellectual property protections. Possible solutions that could help stop the imitation and cultural appropriation of Black designers’ intellectual property include: (1) the expansion of current intellectual property jurisprudence, (2) social shaming platforms, (3) reparations by means of unjust enrichment claims, (4) crediting of the original designer, and (5) environmental regulations.

154. *Fast Fashion Quick to Cause Environmental Havoc*, UNIV. QUEENSLAND: SUSTAINABILITY, <https://sustainability.uq.edu.au/projects/recycling-and-waste-minimisation/fast-fashion-quick-cause-environmental-havoc> (last visited May 20, 2021).

155. Maiti, *supra* note 59.

156. *Id.*; *Fashion’s Environmental Impact*, SUSTAIN YOUR STYLE, <https://www.sustainyourstyle.org/old-environmental-impacts> (last visited Apr. 5, 2021).

NOTE

A Breath of Fresh Air: How Judges’ Embrace of Legal Realism Can Aid in the Fight for Environmental Justice

RYAN G. THOMAS*

Introduction	522
I. Diametric Opposites, Legal Formalism v. Legal Realism	526
A. Legal Formalism	527
B. Legal Realism	529
II. How Legal Formalism Fails Environmental Justice Plaintiffs	532
A. Legal Formalism Fails to Account Adequately for the Impact of Race on a Judge’s Decision-Making Ability	533
B. Legal Formalism Fails Black Plaintiffs’ Environmental Claims by Putting Them at the Mercy of Unfettered Judicial Discretion Instead of Neutral and Objective Policies	536
1. 12(b)(1): Political Question and Standing	536

* J.D. Candidate 2021, Howard University School of Law. For his tremendous support, guidance, and vision of this Note, I would like to thank my faculty advisor, Professor Carlton Waterhouse. His dedication in helping me bring this idea together, and his willingness to listen and brainstorm with me is much appreciated. I am sincerely grateful to my parents, Caprice Bragg and Larry Thomas, and my brother, Jordan Thomas, for their unwavering support and encouragement of this Note, even when it was incredibly difficult. To them I am appreciative for pushing me to strive for excellence at all times, their continued support of my legal ambitions, and being a true constant in my life. I am, because they are. Next, I want to thank my friends and law school family who read this Note countless times, giving me substantive feedback each round. Each of you played a role in pushing this Note to the finish line, and I am eternally grateful. Finally, I would like to sincerely thank the *Howard Law Journal*. I am perpetually inspired by the *Journal’s* hard work and contributions to the legal profession and our beloved alma mater. It has truly been a privilege to be a member of such an illustrious publication.

2. 12(b)(6): Motion to Dismiss 539

III. How Legal Realism Can Aid Environmental Justice Efforts 542

A. Legal Realism Explicitly Recognizes the Role of Race in Judicial Decision-Making..... 542

B. Legal Realism Allows For Judicial Preference to Evaluate Contexts and Consequences 545

Conclusion 547

My inspiration for this Note came while I was enrolled in Jurisprudence. After learning about different legal philosophies, I found legal formalism and legal realism fascinating. My interest peaked upon learning how deep legal formalism’s roots are in our country’s judicial system, while also understanding that judging requires more than just the law. Beyond the law, judges are human. Upon learning about the philosophical backgrounds of legal formalism and legal realism, I was determined to examine an issue of monumental consequence: environmental racism. Recently, the NAACP declared environmental racism as one of the biggest threats to Black communities in the United States. Especially in the wake of the Trump administration, Black communities find themselves suffering from environmental racism at an alarming rate. Following my discovery of legal philosophy, and the NAACP’s declaration, I was determined to combine these concepts.

Accordingly, this Note explores legal formalism and legal realism. More specifically, this Note examines why the judiciary’s embrace of legal formalism has stymied the Black community’s environmental justice suits in federal court. This Note argues that legal formalism has failed by (1) not recognizing race as a crucial factor in judicial discourse, and (2) refusing to account for significant judicial discretion. This Note argues that a shift toward legal realism can provide a viable path forward to Black communities who have been left behind by the political process and judicial decisions.

INTRODUCTION

In his 1971 single, “Mercy Mercy Me,” Marvin Gaye sang “poison is the wind that blows from the north and south and east.”¹ Fifty years later, the ominous lyric remains a reality for many. Black communities across the United States find themselves disproportionately af-

1. MARVIN GAYE, WHAT’S GOING ON (Tamla 1971).

ected by environmental racism, resulting in devastating health effects and consequences.² Consider Kilynn Johnson, whose battle with environmental racism represents so many.³ In 2015, Ms. Johnson, a Philadelphia resident, found herself severely ill, experiencing shortness of breath.⁴ As her condition worsened, she was taken to the hospital, where doctors diagnosed her with an aggressive form of gallbladder cancer.⁵

To survive, she quickly underwent surgery, radiation, and chemotherapy.⁶ After the initial shock of her diagnosis, Ms. Johnson wondered how she had developed such a rare form of cancer.⁷ Upon reflection, she quickly identified a potential cause: toxic pollutants from Philadelphia's largest refinery located directly across the highway from her home.⁸ In considering her hypothesis, she tallied the number of friends and family in her neighborhood with newly-diagnosed diseases.⁹ Her findings were alarming; she knew of at least a dozen people who had developed cancer.¹⁰ Over time, it became clear to Ms. Johnson and others that her illness was the physical manifestation of environmental racism—policies that disproportionately burdened her and the Black community's health.¹¹

Members of predominately Black communities, like Ms. Johnson, fall victim to policies that intentionally target them via zoning laws

2. Rachel D. Godsil, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 395 (citing Charles Lee, *Toxic Waste and Race in the United States*, in PROC. MIC. CONF. ON RACE & INCIDENCE ENV'T HAZARDS 6, 8 (Paul Mohai & Bunyan Bryant eds., 1990) (noting that "Reverend Benjamin Chavis, Jr. coined the term 'environmental racism,' referring to both the intentional and unintentional disproportionate imposition of environmental hazards on minorities")); *Environmental Justice & Environmental Racism*, GREEN ACTION FOR HEALTH & ENV'T JUST., <http://greenaction.org/what-is-environmental-justice/> (last visited Apr. 16, 2021) (noting that environmental racism refers to the rules, regulations, government and corporate policies and decisions that target certain communities for locally undesirable land uses and relaxed zoning policies, resulting in those communities being disproportionately exposed to toxins and hazardous waste based on race); see also Associated Press, *Washington University Reports Severe Impact of Environmental Racism in Black Communities*, NBC NEWS (Sept. 28, 2019, 6:24 PM), <https://www.nbcnews.com/news/nbcblk/washington-university-reports-severe-impact-environmental-racism-black-communities-n1059926>.

3. Linda Villarosa, *Pollution is Killing Black Americans. This Community Fought Back.*, N.Y. TIMES (July 28, 2020), <https://www.nytimes.com/2020/07/28/magazine/pollution-philadelphia-black-americans.html>.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

and government actions, consequently resulting in higher exposure rates of airborne toxins and chemicals.¹² Those policies have increasingly put Black communities at risk.¹³ From Flint to Philadelphia, Black neighborhoods continue to suffer from decades of inadequate resources, racist zoning and land use policies, and a deliberate disregard to community health.¹⁴ Studies reflect this precarious position. For example, a 2017 NAACP report found that more than one million Black people live within half a mile of a natural gas facility, resulting in an elevated risk of cancer due to toxic air emissions, often violating air quality standards, and leading to higher asthma rates.¹⁵ Furthermore, another study found that long-term exposure to a toxic chemical, anthropogenic particulate matter, is most commonly associated with racial segregation.¹⁶ Finally, a 2016 Environmental Protection Agency (“EPA”) study reported that the refinery overlooking Ms. Johnson’s neighborhood was responsible for a majority of the toxic air emissions in Philadelphia, despite being fined more than \$500,000 over the past nine years for failure to comply with the Clean Air Act.¹⁷

Despite this dismal truth, the political branch has largely failed to act.¹⁸ The Trump Administration exacerbated existing divides by significantly cutting the budget of the Office of Environmental Justice in

12. Barteas Cox, *Environmental Racism Has Left Black Americans Three Times More Likely to Die from Pollution*, QUARTZ (Mar. 13, 2018), <https://qz.com/1226984/environmental-racism-has-left-black-americans-three-times-more-likely-to-die-from-pollution/>.

13. Villarosa, *supra* note 3.

14. Paul Egan, *Michigan Civil Rights Panel: Flint Water Crisis Rooted in ‘Systemic Racism’*, CHI. TRIBUNE (Feb. 18, 2017, 7:26 AM), <https://www.chicagotribune.com/nation-world/ct-michigan-civil-rights-panel-flint-water-crisis-racism-20170218-story.html> (noting that “[t]he Flint drinking water crisis has its root causes in historical and systemic racism, the Michigan Civil Rights Commission said Friday”); *see also* MICH. CIV. RIGHTS COMM’N, *THE FLINT WATER CRISIS: SYSTEMIC RACISM THROUGH THE LENS OF FLINT* (2017), https://www.michigan.gov/documents/mdcr/VFlintCrisisRep-F-Edited3-13-17_554317_7.pdf.

15. Lesley Fleischman & Marcus Franklin, *Fumes Across the Fence-Line: The Health Impacts of Air Pollution from Oil & Gas Facilities on African American Communities*, 30 (2017), <https://www.naacp.org/climate-justice-resources/fumes-across-fence-line/>.

16. Vann R. Newkirk II, *Trump’s EPA Concludes Environmental Racism Is Real*, ATLANTIC (Feb. 28, 2018), <https://www.theatlantic.com/politics/archive/2018/02/the-trump-administration-finds-that-environmental-racism-is-real/554315/>.

17. Villarosa, *supra* note 3.

18. P.R. Lockhart, *Environmental Racism Is Dangerous. Trump’s EPA Doesn’t Seem to Care.*, VOX (July 9, 2018, 4:00 PM), <https://www.vox.com/identities/2018/7/9/17542240/environmental-racism-justice-scott-pruitt-donald-trump> (noting that “[w]ith the Trump administration in the White House, it appears that groups looking to advance environmental justice at the federal level are currently shut out of power. And while the EPA’s leaders are changing, the agency’s limited willingness to address environmental racism probably won’t move any needles.”).

the EPA.¹⁹ Moreover, EPA Administrator, Scott Pruitt,²⁰ has further widened racial divides by systematically deregulating the Clean Water Act, the Mercury and Air Toxic Standards, and the Clean Power Plan.²¹ To further complicate matters, Black communities have historically been excluded from climate change conversations.²² In spite of recent widespread recognition²³ and renewed activism,²⁴ tangible political progress remains slight given congressional deadlock and hyper-partisanship. Outside of the political process, courts have also failed to protect Black communities from the perils of environmental racism.²⁵ Despite being viewed by some as a protector of minority rights,²⁶ the judiciary has wholly failed to redress environmental racism.²⁷ Moreover, while courts have generally struggled to reconcile

19. Villarosa, *supra* note 3 (noting that the Environmental Protection Agency released a study concluding that people of color are more likely to live near hazardous chemical producers).

20. Brady Dennis, *Scott Pruitt, Longtime Adversary of EPA Confirmed to Lead the Agency*, WASH. POST (Feb. 17, 2017, 6:49 PM), <https://www.washingtonpost.com/news/energy-environment/wp/2017/02/17/scott-pruitt-long-time-adversary-of-epa-confirmed-to-lead-the-agency/> (noting that while serving as Oklahoma Attorney General, Mr. Pruitt repeatedly sued the EPA for its efforts to regulate mercury, smog, and other forms of pollution); *see also* Felice Stadler, *Pruitt Has Made Environmental Injustice the Norm at EPA: 5 Shocking Examples*, ENV'T DEF. FUND (Apr. 5, 2018), <https://www.edf.org/blog/2018/04/05/pruitt-has-made-environmental-injustice-norm-epa-5-shocking-examples> (describing that as EPA Administrator, Mr. Pruitt attempted to defund the EPA's office of environmental justice, while also deregulating toxic waste producers).

21. Amy Patronella & Saharra Griffin, *Communities of Color Bear the Brunt of Trump's Anti-Environmental Agenda*, CTR. FOR AM. PROGRESS (Feb. 27, 2020, 9:04 AM), <https://www.americanprogress.org/issues/green/news/2020/02/27/480820/communities-color-bear-brunt-trumps-anti-environmental-agenda/>.

22. Rachel Jones, *The Environmental Movement Is Very White. These Leaders Want to Change That*, NAT'L GEOGRAPHIC (July 29, 2020), <https://www.nationalgeographic.com/history/2020/07/environmental-movement-very-white-these-leaders-want-change-that/#close>.

23. Maggie Astor, *Environmental Justice Was a Climate Forum Theme. Here's Why.*, N.Y. TIMES (Sept. 5, 2019), <https://www.nytimes.com/2019/09/05/us/politics/environmental-justice-climate-town-hall.html>; *see also* Christopher Flavelle, *Democrats Detail a Climate Agenda Tying Environment to Racial Justice*, N.Y. TIMES (June 29, 2020), <https://www.nytimes.com/2020/06/29/climate/house-democrats-climate-plan.html>.

24. Denise Chow, *Why 'I can't breathe' Is Resonating with Environmental Justice Activists*, NBC NEWS (June 10, 2020, 5:01 AM), <https://www.nbcnews.com/science/environment/why-i-cant-breathe-resonating-environmental-justice-activists-n1228561> (noting that the murder of George Floyd drew national attention to various types of institutional racism, including climate change).

25. *See generally* Julie Lynne Hershenberg, *Pursuing Environmental Justice Through the Courts: An Overview of the Process and Why It has Failed*, INST. FOR POL'Y & ECON. DEV. (Oct. 2001), https://scholarworks.utep.edu/cgi/viewcontent.cgi?article=1011&context=iped_techrep.

26. *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (noting that prejudice against minorities may require a more searching judicial inquiry); *see also* JOHN HART ELY, *DEMOCRACY & DISTRUST* 151–52 (1980).

27. *See generally* E. Bibb Twigg's Neighborhood Ass'n v. Macon-Bibb Cnty. Planning & Zoning Comm'n., 706 F. Supp. 880 (M.D. Ga. 1989), *aff'd*, 896 F.2d 1264 (11th Cir. 1989); *see also* R.I.S.E. v. Kay, Inc., 768 F. Supp. 1144 (E.D. Va. 1991) (providing an example of the judicial system denying a plaintiff's equal protection environmental justice claims).

climate change suits,²⁸ the racialized nature of environmental justice has only exacerbated the problem.

This Note argues that the judiciary's blind adherence to legal formalism has failed to protect Black plaintiffs from the perils of environmental racism. By relying on legal formalism, federal courts have left Black communities in a precarious situation. More specifically, this Note argues that legal formalism has failed Black communities' quest for environmental justice by (1) failing to account for race as a significant factor in a judge's decision-making, and (2) refusing to acknowledge that a judge's application of supposedly neutral legal doctrines requires substantial discretion, and that discretion often hinders environmental justice claims. By doing so, plaintiffs are left without redress. However, legal realism can provide an avenue for justice by accounting for legal formalism's failures. By considering race and context in discretionary matters, legal realism can provide the justice so rarely achieved in environmental racism cases. By casting aside the façade of impartiality and mechanical decision-making, judges can consider the context and slew of racist and discriminatory legislative actions that have culminated into the current problem.

Moreover, by embracing legal realism, judges can account for and curb their own biases and preferences that are hidden behind seemingly neutral standards. This Note proceeds in the following order. Section I lays the philosophical foundations of legal formalism and realism. Section II details why legal formalism fails for environmental justice claims. Finally, Section III explains why legal realism provides a better avenue moving forward.

I. DIAMETRIC OPPOSITES, LEGAL FORMALISM V. LEGAL REALISM

Legal formalism and legal realism have been described as two foundational theories of jurisprudence.²⁹ These theories are diametric opposites of each other, and in today's political hyper-partisanship and polarization, they seemingly correlate to opposite sides of the po-

28. *Juliana v. United States*, 947 F.3d 1159, 1165 (9th Cir. 2020) (dismissing a plaintiff's class-action suit as a political question).

29. See HON. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 24–25 (1990).

litical spectrum. Despite widespread criticism,³⁰ legal formalism has largely hailed as the victor of judicial legal philosophy.³¹

A. Legal Formalism

Largely developed by the common law,³² legal formalism is a philosophy that simply advocates for judges to apply the law without influence of external factors, considerations, or bias.³³ More specifically, legal formalism advances three principles: (1) judges find, not make, law; (2) judging is a mechanical process; and (3) non-legal externalities and rationales have no bearing on the decision-making process.³⁴ In short, legal formalism approaches judgments as simple applications of laws to facts. Ideas of mechanical decision-making have historically dominated Anglo-American legal philosophy.³⁵ For example, in 1642, Sir Edward Coke, largely considered to be one of the greatest English jurists,³⁶ famously said, “[i]t is the function of a judge not to make, but to declare the law, according to the golden meet-wand of the law and not by the crooked cord of discretion.”³⁷ Moreover, in discussing a judge’s responsibility in legal interpretation, Sir William Blackstone³⁸ stated that judges “do not pretend to make a new law, but to vindicate the old one from misrepresentation.”³⁹

Given its shared English history and common law tradition, America quickly adopted legal formalism.⁴⁰ Its adaptation is reflected by the founding fathers’ endorsements of its principles. For example, James Wilson, co-drafter and signer of the Declaration of Indepen-

30. See generally Jason Iuliano, *The Supreme Court’s Noble Lie*, 51 U.C. DAVIS L. REV. 911, 964–65 (2018) (discussing the dangers of legal formalism to the Court’s legitimacy).

31. See Ofer Raban, *Between Formalism and Conservatism: The Resurgent Legal Formalism of the Roberts Court*, 8 N.Y.U. J.L. & LIBERTY 343, 344 (2014) (discussing that the Roberts Court is very formalistic in its jurisprudence).

32. See generally Richard A. Posner, *Legal Formalism, Legal Realism, and the Interpretation of Statutes and the Constitution*, 37 CASE W. RES. L. REV. 179, 186 (1986).

33. CORNELL LEGAL INFO. INST., *Legal Formalism*, https://www.law.cornell.edu/wex/legal_formalism (last visited Apr. 19, 2021).

34. Iuliano, *supra* note 30, at 921.

35. Gareth H. Jones, *Sir Edward Coke: English Jurist*, BRITANNICA, <https://www.britannica.com/biography/Edward-Coke> (last visited Dec. 26, 2020).

36. *Id.*

37. Iuliano, *supra* note 30, at 921 (citing E. COKE, INSTITUTE OF THE LAWS OF ENGLAND, 51 (1642)).

38. Eds. of Encyclopedia Britannica, *Sir William Blackstone*, BRITANNICA, <https://www.britannica.com/biography/William-Blackstone> (last visited Dec. 30, 2020) (noting that Sir Blackstone’s *Commentaries on the Laws of England* has become the basis of university legal education in England and North America).

39. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 69 (1807) (ebook).

40. Iuliano, *supra* note 30, at 921.

dence, wrote that, “every prudent and cautious judge will appreciate . . . his duty and his business is, not to make law, but to interpret and apply it.”⁴¹ Furthermore, Thomas Jefferson stated that the role of judges is to be “mere machines.”⁴² Thus, from its founding, America conceived of a judiciary engaged in impartial decision-making, without external influences or considerations. Their vision was somewhat realized in *Marbury v. Madison*, when Chief Justice John Marshall famously wrote, “[i]t is emphatically the province and duty of the judicial department to say what the law is”⁴³ A premise of that declaration is that judges are to say strictly what the law is, not what it should be.⁴⁴

Over time, the judiciary wholly embraced legal formalism.⁴⁵ Perhaps, its widespread acceptance is best reflected in Supreme Court nomination hearings. For example, consider Chief Justice John Roberts’s nomination hearing, where he reflected the principles of legal formalism when he compared the role of a judge to that of a baseball umpire⁴⁶:

Judges and Justices are servants of the law, not the other way around. Judges are like umpires. Umpires don’t make the rules; they apply them. The role of an umpire and a judge is critical. They make sure everybody plays by the rules. But it is a limited role. Nobody ever went to a ball game to see the umpire . . . I have no agenda, but I do have a commitment. If I am confirmed . . . I will decide every case based on the record, according to the rule of law, without fear or favor, to the best of my ability. And I will remember that it’s my job to call balls and strikes and not to pitch or bat.⁴⁷

Over time, acting as an objective umpire calling balls and strikes has become the model for judicial nominees.⁴⁸ Moreover, in his confirmation hearing, Justice Alito reflected the principles of legal for-

41. JAMES WILSON, COLLECTED WORKS OF JAMES WILSON, VOL. 2, 144 (2007) (ebook).

42. NAT’L ARCHIVES, *From Thomas Jefferson to Edmund Pendleton, 26 August 1776*, <https://founders.archives.gov/documents/Jefferson/01-01-02-0210> (last visited Apr. 17, 2021).

43. *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

44. *See Osborn v. Bank of United States*, 2 U.S. 738, 866 (1824) (writing that “judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing.”).

45. Neil S. Siegel, *Umpires at Bat: On Integration and Legitimation*, 24 CONST. COMMENT. 701, 702–03 (2007) (“Politically, Roberts’ use of the umpire analogy was an instant success”).

46. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States Before the S. Comm. On the Judiciary*, 109th Cong. 55, 56 (2005) (statement of Judge John G. Roberts, Jr.).

47. *Id.*

48. Siegel, *supra* note 45, at 702–03.

malism, stating, “what the judge has to do is make sure that the judge is being true to the principle that is expressed in the Constitution and not to the judge’s principle, not to some idea that the judge has.”⁴⁹ Recently, Justice Barrett reflected the principles of legal formalism when comparing her judicial philosophy to that of the late Justice Scalia’s, stating that “his judicial philosophy was straightforward: A judge must apply the law as written, not as the judge wishes it were”⁵⁰ The embrace of legal formalism is not just limited to conservative judges, but it appears to be a bipartisan exercise. During her confirmation hearing, Justice Sotomayor described her task simply as: “Fidelity to the law. The task of a judge is not to make law, it is to apply the law.”⁵¹ As reflected in the aforementioned Supreme Court nomination hearings, legal formalism has firmly established itself as the accepted philosophy of judicial decision-making.

B. Legal Realism

Legal realism developed in the early twentieth century largely in response to legal formalism.⁵² Principally influenced by Justice Oliver Wendell Holmes,⁵³ legal realists rejected legal formalism’s strict and narrow view of law as an aggregate of rules and judicial decision-making as mechanical.⁵⁴ Instead, legal realists sought to examine critically and understand how social conditions served as an important variable in judicial discourse.⁵⁵ To legal realists, the abstract nature of legal

49. *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 14, 379 (2006).

50. Jemima McEvoy, *Amy Coney Barrett Says She Will Be an Impartial Justice in Opening Remarks*, FORBES (Oct. 11, 2020, 11:20 AM), <https://www.forbes.com/sites/jemimamcevoy/2020/10/11/amy-coney-barrett-says-she-will-be-an-impartial-justice-in-opening-remarks/?sh=2c2a2bc53973> (“Facing scrutiny over recent revelations about ties to a strict religious group and strong personal opinions on *Roe v. Wade*, Judge Amy Coney Barrett, President Trump’s pick for the Supreme Court, will defend herself as an impartial interpreter of the law in opening remarks to the Senate on Monday.”).

51. Peter Baker & Neil A. Lewis, *Sotomayor Vows ‘Fidelity to the Law’ as Hearings Start*, N.Y. TIMES (July 13, 2009), <https://www.nytimes.com/2009/07/14/us/politics/14confirm.html> (“Judge Sonia Sotomayor opened her case for confirmation to the Supreme Court on Monday by assuring senators that she believes a judge’s job ‘is not to make law,’ but ‘to apply the law,’ as the two parties used her nomination to debate the role of the judiciary.”).

52. Hon. Arrie W. Davis, *The Richness of Experience, Empathy, and the Role of a Judge: The Senate Confirmation Hearings for Judge Sonia Sotomayor*, 40 U. BALT. L.F. 1, 11 (2009).

53. Oliver Wendell Holmes served as an Associate Justice of the Supreme Court of the United States from 1902 to 1932. Edmond Fuller, *Oliver Wendell Holmes, Jr.*, BRITANNICA, <https://www.britannica.com/biography/Oliver-Wendell-Holmes-Jr/The-Common-Law> (last visited June 23, 2021).

54. Alan B. Handler, *Judicial Jurisprudence*, 205 N.J. L. 22, 30 (2000).

55. Hon. Davis, *supra* note 52, at 11.

precedent, terminology, and rules served as a beginning, not an end, in determining how judges made decisions.⁵⁶ Accordingly, they believed that black letter law was of limited importance in understanding decisions.⁵⁷ At its core, legal realism “implores the recognition of the use of social condition as a variable in decision making, in lieu of mere reliance on legal rules which may advance outdated or dysfunctional policies.”⁵⁸ In rejecting legal formalism, legal realists highlighted that judgments inherently invite discretion because rules and standards are open to varied interpretations.⁵⁹ In turn, that interpretation reflected a judge’s ideology.⁶⁰ Early legal realists like Jerome Frank⁶¹ described discretion and ideology as a judge’s “personal element.”⁶² As Justice Holmes described,

the personal element is unavoidable in judicial decisions. Being unavoidable, it should be recognized as such and not treated as negligible and unimportant. It is childish, unwise and dangerous here as in all important human affairs to ignore unavoidable and to pretend that they do not exist. Since the personal element exists, the sensible course is to cope with it and, so far as possible, perfect it. Indeed, like many unavoidable, bravely and intelligibly faced, it can be made to yield some advantages.⁶³

Furthermore, legal realism rejected legal formalism for failing to explore that personal element and how it ultimately affected the administration of justice.⁶⁴ To them, the personal element essentially was the judge’s lenses as colored by their biases, preferences, and background.⁶⁵ Additionally, they believed that political affiliations and social considerations, such as race,⁶⁶ were important indicators in predicting the resolution of matters.⁶⁷ In recognizing the personal element, legal realism presumptively recognized that no two judges could perceive a case identically, as their personal element ultimately in-

56. *Id.*

57. *Id.*

58. G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 Sw. L.J. 819, 821 (1986).

59. *Id.*

60. *Id.*

61. *Id.*

62. See Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17, 25 (1931).

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* (citing Richard Posner, *The Role of the Judge in the Twenty-First Century*, 86 B.U.L. REV. 1049, 1053 (2006)).

67. *Id.*

formed their impressions, and subsequently, their decisions.⁶⁸ Finally, legal realism also rejected legal formalism for failing to consider that judges are often called to balance society's competing interests.⁶⁹

Despite legal formalism's entrenchment, judges often mirror legal realist principles in their reflections.⁷⁰ Consider former Wisconsin Supreme Court Justice Shirley S. Abrahamson,⁷¹ who candidly stated that "[j]udging requires more than such a mechanical application of pure reason to legal problems . . . the blindfolded judge who is blind to the real world in which the parties live is blind indeed, bereft of a basis on which to make an intelligent, let alone fair, decision."⁷² Furthermore, in reflecting on the role of his personal experience when deciding a case, Justice Alito stated,

I can't help but think of my own ancestors It's not my job to change the law or to bend the law to achieve any result. But when I look at those cases, I have to say to myself, and I do say to myself, this could be your grandfather. This could be your grandmother. They were not citizens at one time, and they were people who came to this country.⁷³

Other Justices have opined similar thoughts.⁷⁴ Thus, despite their acceptance of and acquiescence to legal formalism, judges have quietly endorsed legal realism by accepting that their decisions are not purely mechanical and often reflect multiple variables.

68. *Id.* at 17 (discussing his theory that the judicial decisions are not fundamentally grounded in legal precedent but rather the result of a multiplicity of factors including judges' perceptions about society).

69. *Id.*

70. Hon. Davis, *supra* note 52, at 14 ("Notably, Supreme Court justices, on numerous occasions, have expressed how social identification is relevant to their consideration of a case.").

71. Justice Shirley S. Abrahamson served on the Wisconsin Supreme Court from 1976 to 2019. Shirley S. Abrahamson, WIS. ACAD. SCI., ARTS & LETTERS, <https://www.wisconsinacademy.org/contributor/shirley-s-abrahamson> (last visited June 23, 2021).

72. Shirley S. Abrahamson, *Commentary on Jeffrey M. Shaman's The Impartial Judge: Detachment or Passion?*, 45 DEPAUL L. REV. 633, 641 (1996).

73. *Confirmation Hearings on the Nomination of Samuel A. Alito, Jr. to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. On the Judiciary*, 109th Cong. 475 (2006).

74. See Justice Ruth Bader Ginsburg, *Distinguished Lecture on Women and the Law: A Conversation with Justice Ruth Bader Ginsburg*, 56 REC. ASS'N BAR CITY N.Y. 9, 16–17 (2001) (Justice Ginsburg states, "But we also bring our life's experience, which is different. A very important difference: Are you male? Are you female? Are you a girl from the golden west? . . . All those differences, I think, make the Supreme Court bench, make all the benches in the country, ever so much better than they were when only one kind of person sat in the seat of judgment."); see also Sandra Day O'Connor, *Madison Lecture: Portia's Progress*, 66 N.Y.U. L. REV. 1546, 1548–49 (1991).

II. HOW LEGAL FORMALISM FAILS ENVIRONMENTAL JUSTICE PLAINTIFFS

Despite its widespread acceptance,⁷⁵ legal formalism has failed in perception and application.⁷⁶ As previously discussed, judges look beyond the four corners of the law when making decisions, often reflecting on their personal experiences that, in turn, give meaning to neutral legal principles. Furthermore, despite its quest for judicial neutrality, an increasing number of Americans believe that the Court is politically biased, especially in the wake of several contentious nomination hearings.⁷⁷

While legal formalism has proved to be generally misguided, it has especially stymied environmental justice claims. By failing to accept the candid realities of judicial discourse, legal formalism has hindered Black communities' quest for environmental justice. Its failures are two-fold. First, by accepting legal formalism, judges fail to account for their racial lenses that color their perceptions and decisions.⁷⁸ In doing so, judges disregard and ignore their biases under the guise of impartiality that legal formalism demands. Consequently, not only do judges ignore their racial biases, but they also fail to consider the importance of the plaintiff's race when considering an environmental justice claim. Second, under legal formalism, judges fail environmental justice plaintiffs by refusing to acknowledge that a judge's application of supposedly neutral legal rules requires substantial discretion that legal formalism presumptively rejects. Environmental justice claims are particularly susceptible to judicial discretion via procedural hurdles.⁷⁹

This Section proceeds by first examining how legal formalism has failed environmental justice plaintiffs by failing to acknowledge race as a significant factor in judicial decision-making. Next, this Section

75. See *supra* Part I.

76. See generally John Sides, *White People Believe the Justice System Is Color Blind. Black People Really Don't*, WASH. POST (July 22, 2013, 12:20 PM), <https://www.washingtonpost.com/news/wonk/wp/2013/07/22/white-people-believe-the-justice-system-is-color-blind-black-people-really-dont/> ("Black[people] are extraordinarily skeptical that the system can be fair, while white[people] see the system as essentially color blind.").

77. The Hill Staff, *Hill.TV Poll: 43 Percent of Voters Say Supreme Court Is Biased*, HILL (Sept. 4, 2018), <https://thehill.com/hilltv/what-americas-thinking/404956-43-of-americans-say-su-preme-court-is-biased-says-hilltv-poll>.

78. Pat K. Chew & Robert E. Kelley, *The Realism of Race in Judicial Decision Making: An Empirical Analysis of Plaintiffs' Race and Judges' Race*, 28 HARV. J. RACIAL & ETHNIC JUST. 91, 96 (2012).

79. See Ramzi Kassem, *Implausible Realities: Iqbal's Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PENN. ST. L. REV. 1443, 1446 (2010).

considers how judges' adherence to legal formalism fails to protect environmental justice claims by allowing for unfettered discretion, which legal formalism rejects.⁸⁰ To do so, this Section examines how judicial discretion through two common procedural defenses, motions to dismiss pursuant to 12(b)(1)⁸¹ and 12(b)(6),⁸² has stymied environmental justice claims. Such defenses are informative because while environmental justice plaintiffs are forced to rely on tenuous, disparate and uncertain legal theories,⁸³ the federal rules apply evenly to all environmental justice plaintiffs in federal courts.⁸⁴

A. Legal Formalism Fails to Account Adequately for the Impact of Race on a Judge's Decision-Making Ability

Legal formalism handicaps Black plaintiffs' environmental justice claims by failing to accept that race is a significant factor in judicial decision-making. As previously noted, legal formalism advocates for judges simply to apply legal principles to facts, without consideration of social factors.⁸⁵ Thus, under legal formalism, social constructs like race have no bearing on a judge's ability to call balls and strikes. This philosophy is detrimental to environmental justice claims in two ways. First, it allows judges to ignore their racial perspectives and biases, which are crucial when predicting outcomes.⁸⁶ Second, by only inquiring about the four corners of the law, legal formalism fails to examine the social and political factors that have contributed to today's environmental divide.

First, legal formalism is misguided because it fails to accept that judges are influenced by their implicit and explicit racial biases. Numerous studies suggest that judges are more likely to rely on their intuitive assessments of a case, the result of unconscious bias, rather than engage in deliberate decision-making.⁸⁷ Moreover, other studies suggest that one's belief of their own objectivity actually gives greater

80. *Id.*

81. FED. R. CIV. P. 12(b)(1).

82. FED. R. CIV. P. 12(b)(6).

83. Jeff Todd, *A Fighting Stance in Environmental Justice Litigation*, 50 ENV'T. L. 557, 573 (2020).

84. Suzette M. Malveaux, *Clearing Civil Procedural Hurdles in the Quest for Justice*, 37 OHIO N.U. L. REV. 621, 623 (2011) (discussing that the federal rules of civil procedure are "trans-substantive," meaning that the rules apply to all cases regardless of the substantive right being pursued).

85. CORNELL LEGAL INFO. INST., *supra* note 33.

86. See generally Chew & Kelley, *supra* note 78, at 96.

87. See Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 3 (2007).

license to act on their own unconscious biases.⁸⁸ By failing to account for and mitigate biases, legal formalism fails to consider how judges' racial biases have historically stymied environmental justice efforts, like those of the plaintiffs in *Bean v. Southwestern Waste Management, Inc.*, where the judge's racial animus was a key factor in the plaintiff's loss.⁸⁹ In *Bean*, African American plaintiffs fought to keep a sanitary landfill out of their community, challenging the claim under a civil rights law.⁹⁰ To support their claim, plaintiffs pointed to figures showing that for roughly fifty years, over eighty percent of Houston's household garbage landfills and incinerators were placed in mostly Black neighborhoods, even though Black people made up only twenty-five percent of the city's population.⁹¹ Plaintiffs also pointed to the lack of zoning codes to further bolster their point that Black populations were bearing the brunt of Houston's waste facilities.⁹² Despite their strong claim and evidence, their claim ultimately failed when it went to trial, with the judge repeatedly referring to the Black plaintiffs and their lawyer as "Niggras."⁹³ This level of racial animus displayed by a judge highlights the lack of impartiality and demonstrates what is all too well known: that judges harbor racial biases that ultimately affect their decisions. While racial biases and animus are inherent, especially in the United States, legal formalism's need for impartiality fails Black plaintiffs by refusing to acknowledge how their claims are impacted by race. More specifically, as in *Bean*, this has left Black plaintiffs' environmental justice claims without relief.

Second, by rejecting race, legal formalism fails to consider and account for decades of intentional racist policies that have disproportionately affected Black communities, leaving them particularly vul-

88. Lauren Stiller Rikleen, *When It Comes to Unconscious Bias, Are Judges at Risk?*, ABA J. (Oct. 31, 2019, 7:00 AM), <https://www.abajournal.com/voice/article/are-judges-at-risk-for-unconscious-bias> ("In the courtroom, research demonstrates that judges more often rely on their intuitive assessments than on deliberative judgments, potentially leading to erroneous decision-making.").

89. Robert D. Bullard, *Environmental Justice for All*, NAT'L HUMANS. CTR., <http://nationalhumanitiescenter.org/tserve/nattrans/ntuselnd/essays/envjust.htm> (discussing the role of race in *Bean v. Southwestern Waste Management, Inc.*, "the judge repeatedly referred to the black plaintiffs and the residents of Houston's black neighborhoods as 'Niggras.' Anyone growing up in the South knows that 'Niggra' is another way some southern call black people the other 'N' word.").

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* ("Anyone growing up in the South knows that 'Niggra' is another way some southerners call [B]lack people the 'N' word.").

nerable to environmental harms.⁹⁴ By failing to consider context, legal formalism essentially demands that judges evaluate such claims in a vacuum. Without explicitly considering the circumstances of Black plaintiffs, judges fail to consider that communities of color are routinely targeted to be hosts of negative environmental impacts.⁹⁵

Study upon study has shown that environmental hazards—chemical plants, manufacturing facilities, incinerators, water treatment, landfills, and toxic dumps—are concentrated in poor communities of color. Race, not income, is the biggest determinant Lower-income Black communities have fewer resource and less political know-how and clout to fight sitings. Corporations knowingly exploit those deficits.⁹⁶

Thus, by refusing to consider context, legal formalism stymies environmental justice claims by failing to account for the intentional discrimination that has poisoned Black communities. Environmental justice claims raised under the Equal Protection Clause highlight this phenomenon.⁹⁷ For example, consider *R.I.S.E. v. Kay, Inc.*, where plaintiffs alleged that a fourth proposed waste facility in their predominantly Black neighborhood violated the equal protection clause by impermissibly targeting their community based on their race.⁹⁸ To meet their burden of proving discriminatory intent, plaintiffs pointed to the fact that the sole facility in the predominantly white area of town was closed due to lowered property values and potentially negative health effects.⁹⁹ While the court noted the disparate impact of the decisions, the judge ultimately held for the defendants, stating that the plaintiffs had failed to demonstrate intent as required by *Arlington Heights*.¹⁰⁰ In doing so, the judge failed to con-

94. Carlton Waterhouse, *Abandon All Hope Ye That Enter*, 20 FORDHAM ENV'T. L. REV. 51, 65 (2009) (discussing that *Bean v. Southwestern Waste Management Corporation* is illustrative of the hurdles faced by environmental justice litigants, including the court's failure to consider past and present government decisions that adversely affect Black communities).

95. Brian Palmer, *The History of Environmental Justice in Five Minutes*, NRDC (May 18, 2016), <https://www.nrdc.org/stories/history-environmental-justice-five-minutes>.

96. Baris Gursakal & Cole Bradley, *The Pandemics: Decades of Environmental Racism Is Making COVID-19 More Deadly in Black Communities*, HIGH GROUND NEWS (Aug. 20, 2020), https://www.highgroundnews.com/features/Toxic_Environment_COVID_NorthMemphis.aspx.

97. *Id.*

98. *See generally* *R.I.S.E. v. Kay, Inc.*, 768 F. Supp. 1144 (E.D. Va. 1991).

99. *Id.* at 1149–50.

100. *Id.* (“In *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, the U.S. Supreme Court identified the following factors to be considered in determining whether an action was motivated by intentional race discrimination: (1) the effect of the official action; (2) the historical background of the decision; (3) the specific sequence of events leading up to the challenged decision; (4) departures from normal procedures; (5) departures from normal substantive criteria; and (6) the administrative history of the decision.”).

sider that such policies are often the result of implicit biases, rather than the “smoking gun” that Arlington Heights demands.

R.I.S.E. illustrates how legal formalism’s rejection of externalities such as race and context fail Black plaintiffs by evaluating claims narrowly, rather than evaluating the purpose of the law, which is to protect them. By doing so, judges’ applications of legal formalism fail plaintiffs by essentially missing the forest for the trees, and allows judges to make decisions without holistically evaluating the claims. Furthermore, the court’s ruling in *R.I.S.E.* essentially made the success of environmental justice claims contingent upon finding intentional discrimination, which is seldom the “smoking gun” the Supreme Court has required, and is virtually impractical to uncover before discovery. Thus, judges’ application of legal formalism fails Black plaintiffs by refusing to consider the context that has contributed to the environmental racial divide.

B. Legal Formalism Fails Black Plaintiffs’ Environmental Claims by Putting Them at the Mercy of Unfettered Judicial Discretion Instead of Neutral and Objective Policies

1. 12(b)(1): Political Question and Standing

Justiciability defenses such as the political question doctrine and standing doctrine, raised under rule 12(b)(1),¹⁰¹ are threshold questions that can end federal cases.¹⁰² Environmental justice cases are particularly vulnerable to these challenges.¹⁰³ The Supreme Court has held that a political question exists where there is no “textually demonstrable constitutional commitment” to a coordinate branch of government or lack of judicially manageable standards for resolving a case.¹⁰⁴ Even in the absence of a “textually demonstrable constitutional commitment of the issue to a coordinate political department,”¹⁰⁵ a case may still be classified as a political question if it lacks judicially manageable standards.¹⁰⁶ Despite its perceived neutrality, the political question doctrine undermines legal formalism by relying on judicial discretion via the judge’s preferences and opinions in making that assessment rather than well-defined objective principles.

101. FED. R. CIV. P. 12(b)(1).

102. Todd, *supra* note 83, at 574.

103. *Id.*

104. *See Baker v. Carr*, 369 U.S. 186, 217 (1962).

105. *Id.*

106. Todd, *supra* note 83, at 575.

Such discretion is particularly challenging to plaintiffs given environmental racism's controversial nature.¹⁰⁷ Like politicians, judges have varying opinions on environmental racism and the role of courts in redressing the matter. Climate change provides a microcosm of how disparate judicial opinions on whether an issue presents a political question can subsequently affect outcomes. "Some commentators argue that courts lack judicially manageable standards for fashioning emissions caps because climate change is a complex global phenomenon that results from multiple natural and anthropogenic sources of GHGs; accordingly, this type of relief may better left to the legislative or executive branches"¹⁰⁸

Unsurprisingly, circuit courts are split on the matter. For example, in *Bell v. Cheswick Generating Station*, the Third Circuit held that the plaintiffs' claim seeking damages for harms caused by an adjacent coal-fired electric generating plant did not present a political question.¹⁰⁹ Whereas in *Juliana v. United States*, the Ninth Circuit held that the plaintiffs' class-action suit seeking damages for the federal government's failure to address climate change's effects presented a political question, stating, "we conclude that such relief is beyond our constitutional power. Rather, the plaintiffs' impressive case for redress must be presented to the political branches of government."¹¹⁰ Judge Staton's dissenting opinion highlights how judges' disparate opinions on the matter reflect their ideology and preference.¹¹¹ He opines,

[m]y colleagues throw up their hands, concluding that this case presents nothing fit for the Judiciary. On a fundamental point, we agree: No case can singlehandedly prevent the catastrophic effects of climate change predicted by the government and scientists. But a federal court need not manage all of the delicate foreign relations and regulatory minutiae implicated by climate change to offer real relief, and the mere fact that this suit cannot alone halt climate

107. See Phillip Bump, *Jim Inhofe's Snowball has Disproven Climate Change Once and for All*, WASH. POST (Feb. 26, 2016, 5:16 PM), <https://www.washingtonpost.com/news/the-fix/wp/2015/02/26/jim-inhofes-snowball-has-disproven-climate-change-once-and-for-all/> (highlighting the controversy surrounding climate change by discussing Sen. Jim Inhofe's (R-Okla.) stunt of bringing a snowball to the senate floor to refute climate change's existence).

108. Todd, *supra* note 83, at 575.

109. *Bell v. Cheswick Generating Station*, 734 F.3d 188, 188–89, 192, 198 (3d Cir. 2013).

110. *Juliana v. United States*, 947 F.3d 1159, 1165 (9th Cir. 2020).

111. *Id.* at 1175 (Staton, J., dissenting).

change does not mean that it presents no claim suitable for judicial resolution.¹¹²

While those cases represent climate change claims, such variances in judicial opinions are only exacerbated when race is also a factor. For example, dissimilarities of opinions are highlighted by racial differences in perceptions of judicial fairness.¹¹³ Those perceptions of fairness surely permeate into environmental justice. Thus, the political question doctrine highlights how legal formalism fails environmental justice efforts through its influence of personal opinions on supposedly neutral principles, consequently undermining the objectivity that legal formalism seeks.

The standing doctrine also presents challenges to environmental justice plaintiffs.¹¹⁴ Standing requires a plaintiff to have a genuine interest in the matter.¹¹⁵ To meet that burden, a plaintiff must plead facts to demonstrate that they (1) suffered a concrete injury; (2) that causation is “fairly traceable” to the defendant’s alleged wrong; and (3) the injury is redressable by the court.¹¹⁶ The second inquiry of whether causation is fairly traceable to a defendant’s actions is particularly susceptible to judicial discretion.¹¹⁷ Accordingly, scholars have criticized that inquiry as unpredictable, ideological, and essentially “a mirror in which the judge can perceive her own preferences—when an injury is ‘fairly traceable’ is simply a question of what a judge regards as fair.”¹¹⁸

Demonstrating standing for environmental justice is challenging given the existence of multiple factors that contribute to a plaintiff’s injury.¹¹⁹ For example, consider Ms. Johnson’s story.¹²⁰ While Ms. Johnson hypothesized that her cancer was the cause of nearby illicit

112. *Id.*

113. See generally Jon Hurwitz & Mark Peffley, *Explaining the Great Divide: Perceptions of Fairness in the U.S. Criminal Justice System*, 67 J. POL. 762–63, 765–66 (2005) (explaining that fairness judgments play a major role in guiding citizens’ interpretations of the actions of legal authorities).

114. Todd, *supra* note 83, at 576.

115. See generally *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (holding that a plaintiff must have suffered an “injury in fact,” an invasion of a legally protected interest that is concrete and particularized).

116. *Id.* at 560–61.

117. Daniel A. Farber, *Standing on Hot Air: American Electric Power and the Bankruptcy of Standing Doctrine*, 121 YALE L.J. F. 121, 122 (2011).

118. *Id.*

119. Shea Diaz, *Getting to the Root of Environmental Injustice*, 29 GEO. ENV’T. L. REV. 767, 784 (2017), <http://www.mjdeal-online.org/getting-to-the-root-of-environmental-injustice/>.

120. Villarosa, *supra* note 3.

factory pollution,¹²¹ there are endless possibilities of the proximate cause. Consequently, this forces the judge to determine whether a plaintiff's injuries, like Ms. Johnson's, are traceable to a defendant's conduct. Moreover, plaintiff's lack of power and information, prior to discovery, makes these claims fragile.¹²² As a result, the judge's determination is essentially a hunch rather than a detailed examination or an objective balancing act, which ultimately undermines legal formalism's objective nature.

2. 12(b)(6): Motion to Dismiss

Additionally, a judge's determination of a defendant's motion to dismiss, pursuant to rule 12(b)(6), impedes environmental justice efforts and undermines legal formalism by asking the judge to evaluate a claim's plausibility based on common sense rather than objective principles. A motion to dismiss allows a defendant to end the plaintiff's cause of action by stating that the plaintiff has failed to state a claim for which relief may be granted.¹²³ Following the Supreme Court's decision in *Ashcroft v. Iqbal*, a court examining a defendant's motion to dismiss is not required to accept legal conclusions framed as factual allegations as true,¹²⁴ and only those "plausible" claims may withstand dismissal.¹²⁵ In determining a claim's plausibility, a judge is to rely on their judicial experience and common sense.¹²⁶ By making plausibility the yardstick, and common sense the measurement, the Court systematically eroded legal formalism and disproportionately hindered environmental justice claims by making their recovery contingent upon a judge's experience and common sense determinations with environmental racism.¹²⁷ The common-sense standard hinders environmental justice as such harmful experiences and viewpoints are unlikely to be shared by a majority of judges:

By setting "common sense" as a metric by which to determine plausibility, the Court specifically calls on judges to rely on views that will likely privilege mainstream over minority perspectives by virtue of them being "common." Having the common view as the appro-

121. *Id.*

122. *See generally* Kassem, *supra* note 79, at 1470.

123. FED. R. CIV. P. 12(b)(6).

124. *Ashcroft v. Iqbal*, 556 U.S. 662, 696 (2009).

125. *Id.* at 663.

126. *Id.* at 664.

127. Adam Liptak, *Supreme Court Ruling Altered Civil Suits, to Detriment of Individuals*, N.Y. TIMES (May 18, 2015), <https://www.nytimes.com/2015/05/19/us/9-11-ruling-by-supreme-court-has-transformed-civil-lawsuits.html>.

priate standard is unsettling as it can be intrinsically prejudicial in cases where a minority perception of discrimination undergirds an equal protection claim.¹²⁸

The lack of diversity in the federal judiciary further exacerbates this issue.¹²⁹ Moreover, increasing homogenization makes it unlikely that a majority of judges will have tangibly experienced environmental racism.¹³⁰ This disparity of experience is reflected in the fact that, compared to their white counterparts, Black communities have higher exposure rates to air pollution, live closer to hazardous waste facilities, and drink more contaminated water.¹³¹ Thus, by asking a judge to make their common sense and experiences the benchmark, the Court inevitably harms Black communities fighting for environmental justice as many white judges have little to no experience with the tangible harms of environmental racism. As a result, white judges, who occupy the majority of the federal bench, may not interpret a plaintiff's claim as plausible. In doing so, courts erode legal formalism by allowing for a wide latitude of subjectivity.

[T]he new plausibility test—determined by “judicial experience and common sense”—is so subjective that it fails to give judges enough guidance on how to determine if a complaint should be dismissed. Based on differences among judges, one judge may dismiss a complaint while another concludes that it survives, solely because of the way each judge applies his or her “judicial experience and common sense.”¹³²

This subjectivity is further exacerbated considering significant differences in perception among racial groups over the existence of racial discrimination.¹³³ For example, a poll released by the New York Times found that seventy-five percent of white respondents said that there has been real progress in getting rid of racial discrimination,

128. Kassem, *supra* note 79, at 1450.

129. Democracy and Gov't Reform Team, *Examining the Demographic Compositions of U.S. Circuit and District Courts*, CTR. FOR AM. PROGRESS (Feb. 13, 2020), <https://www.americanprogress.org/issues/courts/reports/2020/02/13/480112/examining-demographic-compositions-u-s-circuit-district-courts/>.

130. Ian Millhiser, *The Absurd Whiteness of America's Court System*, in 2 *Charts*, VOX (Oct. 3, 2019), <https://www.vox.com/policy-and-politics/2019/10/3/20893643/whiteness-federal-judiciary-diversity-obama-trump>.

131. Jasmine Bell, *5 Things to Know About Communities of Color and Environmental Justice*, CTR. FOR AM. PROGRESS (Apr. 25, 2016), <https://www.americanprogress.org/issues/race/news/2016/04/25/136361/5-things-to-know-about-communities-of-color-and-environmental-justice/>; *see also* Cox, *supra* note 12.

132. Malveaux, *supra* note 84, at 624.

133. *A Growing Divide on Race*, N.Y. TIMES (July 23, 2015), <https://www.nytimes.com/interactive/2015/07/23/us/race-relations-in-america-poll.html>.

whereas only fifty-six percent of Black respondents answered affirmatively.¹³⁴ Forty-one percent of Black respondents claimed that there was no tangible progress.¹³⁵ Moreover, in addition to varying opinions on racial discrimination, discriminatory intent is often difficult to uncover before discovery, in part because discrimination has become more subtle and institutional.¹³⁶ Instead of the explicit discriminatory action a plaintiff may be expecting, discrimination has become “less overt and transparent,”¹³⁷ making a plaintiff’s burden under a motion to dismiss harder to achieve. Finally, like other claims, unequal access to evidence and information presents unique problems for Black plaintiffs before discovery, which is contingent upon successfully bypassing a defendant’s motion to dismiss. “In the absence of discovery, it is particularly difficult for civil rights claims to survive dismissal when plaintiffs cannot get access to information that is exclusively in the defendant’s possession, such as defendant’s intent or institutional practices. This unequal access to information—informational inequality—between the parties is unfair.”¹³⁸ All of these factors contribute to a pleading standard that disproportionately impacts Black plaintiffs and allows for their environmental justice causes of action to end before they ever get the chance to begin.

While some have defended *Iqbal*, arguing that judges do not act on pure skepticism and impulse when considering whether to dismiss a claim, their argument largely fails to account for implicit racial biases.¹³⁹ Additionally, their contention fails to consider not whether this wide latitude of judicial discretion is appropriate, but whether the standard serves its intended purposes when it habitually stymies claims prematurely. This is not to argue that white judges do not have the capability to consider substantively whether a Black plaintiff’s environmental justice claim is plausible; rather, this is to note that the common-sense standard makes it more likely that they would not have the requisite tangible experience to form a common-sense opinion on whether the claim is plausible. While the common-sense standard under *Iqbal* promotes the efficiencies that the federal court system requires, the overwhelming lack of diversity in the judiciary

134. *Id.*

135. *Id.*

136. Malveaux, *supra* note 84, at 626.

137. *Id.*

138. *Id.*

139. Daniel W. Robertson, *In Defense of Plausibility: Ashcroft v. Iqbal and What the Plausibility Standard Really Means*, 38 PEPP. L. REV. 111, 155 (2010).

creates further problems for Black plaintiffs by placing them at the mercy of a judge's discretion.

III. HOW LEGAL REALISM CAN AID ENVIRONMENTAL JUSTICE EFFORTS

Despite the judiciary's embrace of legal formalism, historically lawyers have utilized legal realist principles to rectify inequities unobtainable through the political process.¹⁴⁰ For example, Charles Hamilton Houston's¹⁴¹ social engineering philosophy reflected legal realism by advancing litigation strategies that partially persuaded judges through social considerations such as public opinion and grassroots support.¹⁴² In implementing his vision of social engineering, Houston believed his teachings would enable Black activists to force reforms not possible through politics.¹⁴³ Despite progress reflected in legal realism,¹⁴⁴ the judiciary has remained committed to legal formalism.

This Section argues for judges to drop the façade of legal formalism, and embrace legal realism. Moreover, this section argues that legal realism can be beneficial for Black communities' environmental justice claims in two ways. First, by recognizing race as a significant factor in judicial discourse, judges would be forced to acknowledge that their racial biases are an important factor in their decision-making. Such acceptance could in turn allow for mitigation. Second, by accepting discretion as an important aspect of judging, legal realism could encourage judges to use their discretion to evaluate environmental justice claims holistically including context and policy decisions that have disproportionately affected Black communities.

A. Legal Realism Explicitly Recognizes the Role of Race in Judicial Decision-Making

Given that environmental justice claims are partially hindered by judicial bias, legal realism potentially provides a viable path forward

140. *See Legal Realism and the Race Question: Some Realism About Realism on Race Relations*, 108 HARV. L. REV. 1607, 1607 (1995) [hereinafter *Legal Realism*].

141. *See generally* EDS. ENCYCLOPEDIA BRITANNICA, *Charles Hamilton Houston*, BRITANNICA (2020), <https://www.britannica.com/biography/Charles-Hamilton-Houston> (noting that Charles Hamilton Houston was an American lawyer and educator who was instrumental in laying the groundwork that ultimately led to the Supreme Court's subsequent decisions outlawing racial segregation).

142. *Legal Realism*, *supra* note 140, at 1622.

143. *Id.*

144. *Id.*

by first recognizing race as a significant factor in judicial discourse. Such an acknowledgment would dissipate legal formalism's false veil of objectivity and explicitly ask judges to examine their biases before rendering decisions instead of overlooking them or ignoring them as legal formalism demands. In its quest to understand moral and political discourse within supposedly neutral legal doctrines, legal realism accepts race as a consequential factor in the administration of justice.¹⁴⁵

Effectively, legal realism recognizes that a judge's robe does not blind them of their racial biases. Furthermore, legal realism implicitly acknowledges that "[e]ach person is a complex combination of race, gender, geography, age, marital status, religion, experience, education, wealth, health, culture, political affiliation, beliefs, values, feats, sexuality, and countless other factors. Identity is the lens that filters everything and everyone we encounter."¹⁴⁶ Ultimately, those lenses affect outcomes because, "[j]udges must engage in balancing tests, considering what a 'reasonable' person would believe, what norms exist in a community, and what rights society is willing to protect. These inquiries necessarily involve value judgments that are colored by life experiences."¹⁴⁷ Thus, such legal standards are not innately objective as legal formalism avers. Recently, the ABA endorsed this proposition stating,

Our interpretation is that race affects a judge's ability to appreciate the perspective of a plaintiff of another race. Thus, White judges as a group are less able to identify and empathize with African American plaintiffs, making it inherently more difficult to find the plaintiff's arguments plausible and credible. This interpretation helps explain why White judges deny African American plaintiff's claims so often.¹⁴⁸

Studies support this position. For example, a recent study¹⁴⁹ found that in workplace harassment claims¹⁵⁰ the judge's race was the

145. *Id.*

146. Noël Wise, *America's Judiciary Doesn't Look Like America*, ATLANTIC (Oct. 13, 2020), <https://www.theatlantic.com/ideas/archive/2020/10/americas-judiciary-doesnt-look-like-america/616692/>.

147. *Id.*

148. Mike Green, *Report: Race Matters in Judicial Decision-Making*, HUFFINGTON POST (Dec. 6, 2017), https://www.huffpost.com/entry/report-race-matters-in-ju_b_461526.

149. *See generally* Chew & Kelley, *supra* note 78, at 95.

150. *See id.* at 99. Note that these racial harassment claims presented a common nucleus of fact: plaintiff-employees allege that they were harassed because of their race, resulting in a racially hostile-work environment. Overwhelmingly, these plaintiffs are African American, while the judges presiding over them are white. Therefore, often, a white judge is tasked with assess-

single most important factor in predicting the likelihood of a plaintiff's success.¹⁵¹ Additionally, the study suggests that a judge is influenced by the party's race, and their own.¹⁵² The study also rejects judging as purely mechanical, given the different outcomes, despite the claim's common nucleus of facts.¹⁵³ More broadly, the findings suggest that plaintiffs' environmental justice claims are impacted by race. As the ABA study suggests,¹⁵⁴ race may potentially impede a judge's ability to find such claims plausible, or credible, especially considering the judiciary's racial composition.¹⁵⁵ As previously noted, historically, environmental justice claims have suffered from explicit judicial bias and racial animus.¹⁵⁶ An embrace of legal realism can aid these claims by allowing judges to admit that their racial biases affect their decisions. Acceptance, in turn, could allow for mitigation, which could aid Black plaintiff's environmental justice claims. This is not to suggest that legal realism alone can provide the sole solution for curbing implicit biases that hinder environmental justice plaintiffs, but rather to suggest that an embrace of legal realism could be beneficial by allowing judges to grapple with their biases actively.

Perhaps these judges would come to the same ultimate conclusions. However, it is unlikely if they were actively encouraged to explore whether a plaintiff's race was an unconscious factor in their subsequent determinations and outcomes. Indeed, such an exploration would further legal realism's exploration of the "personal element" and practical inquiry of judicial decision-making. While the Court has partially staked its legitimacy on legal formalism by imploring the public to believe its noble lie—that justices are "neutral umpires who never invoke anything other than their apolitical, technical expertise about legal rules,"¹⁵⁷—a majority of the public already

ing the credibility of African American employees' perceptions of racial harassment by their white supervisors or co-workers.

151. *Id.* at 103–04 (noting also that no evidence suggested that plaintiffs of a particular racial group brought stronger or weaker cases, or that their attorneys were more sophisticated or persuasive regarding their legal arguments. Furthermore, the results of the study concluded that African American judges were most likely to rule in favor of the plaintiffs with a 42.2 percent success rate compared to the overall 22.2 percent success rate. Comparatively, plaintiffs had significantly worse outcomes before a white judge with a 20.6 percent success rate, and 15.6 percent success rate before a Hispanic judge.).

152. *Id.* at 107.

153. *Id.* at 113.

154. Green, *supra* note 148.

155. *Id.*

156. See discussion, *supra* Part II.

157. Iuliano, *supra* note 30, at 920.

does not believe the lie. In a recent survey, a majority of Americans polled believed that the Supreme Court was split politically on grounds similar to Congress.¹⁵⁸ Moreover, opinions on the Court are also impacted drastically by race, with Black communities and white communities holding different levels of support for the Court.¹⁵⁹ Thus, a shift to legal realism would ask for judges to do what they already do: consider race. However, this time, it would be an explicit evaluation of subconscious and explicit bias, and how that could potentially affect outcomes for environmental justice plaintiffs.

B. Legal Realism Allows For Judicial Preference to Evaluate Contexts and Consequences

A shift towards legal realism would also facilitate an acceptance of subjective judicial discretion that in turn would allow judges to use that discretion to evaluate environmental justice claims holistically—including context and historical factors—instead of rigidly assessing a claim’s veracity narrowly. Moreover, an embrace of legal realism would allow judges to consider the social consequences of such decisions explicitly. Under legal formalism, judges are not supposed to consider context but instead mechanically apply the law to the set of facts.¹⁶⁰ Not only does this model fail to recognize that judges already consider the consequences of their decisions, but also fails to account for the role of unfettered judicial discretion via common procedural hurdles.¹⁶¹ Thus, by embracing legal realism, judges can use their discretion to understand rules and concepts in terms of their social consequences.¹⁶²

This would assist environmental justice claims by specifically asking judges to consider the impact of their decisions on communities like Ms. Johnson’s when confronted with a common procedural challenge. Such a perspective could allow plaintiffs to overcome procedural barriers by demanding that judges not have tunnel vision when considering claims and insisting that judges think broadly about claims rather than narrowly. This would also inherently recognize the role

158. Jessica Estepa & Richard Wolf, *Poll: Majority of People Believe SCOTUS is Split into Parties*, USA TODAY (Mar. 17, 2017, 10:57 AM), <https://www.usatoday.com/story/news/politics/onpolitics/2017/03/17/poll-majority-people-believe-scotus-split-into-parties/99300156/>.

159. See generally James L. Gibson & Gregory A. Caldeira, *Blacks and the United States Court: Models of Diffuse Support*, 54 J. POL. 1120, 1129 (1992).

160. See discussion, *supra* Part I.

161. See discussion, *supra* Part II.

162. *Legal Realism*, *supra* note 140, at 1616.

that discretion plays in the process. For example, in Ms. Johnson's case, under a legal realist framework, a judge could potentially find the following. First, plaintiffs like Ms. Johnson statistically bear the burden of racist policy decisions. Second, significant power disparities exist between the parties. Third, determining the cause of Ms. Johnson's illness is challenging given multiple factors but plausible given environmental factors and the factory's illicit production. Finally, Ms. Johnson will not have access to specific facts of the factory's wrongdoing until after discovery to rebut the factory's defense. These potential findings clearly go beyond legal formalism's narrow confines and think broadly about the claim and the context.

Beyond the procedural barriers, a judge's embrace of legal realism could aid a plaintiff's substantive claims. Environmental justice claims under the Equal Protection Clause highlight this phenomenon and also demonstrate how a judge's embrace of legal realism could aid their efforts. As previously discussed, such claims are particularly susceptible to judges' failure to consider context and, subsequently, fail because plaintiffs often cannot plead enough facts to demonstrate intent at the pleading stage, and sometimes at trial. For example, in *Bean*, the court examined the specific census tract of an existing waste facility without considering the census tract's relationship to the broader community, ultimately finding no racial bias was associated with the city's placement of a new facility, despite its placement in a predominantly Black voting district with other unwanted facilities.¹⁶³ *Bean* represents how courts often miss the forest for the trees when evaluating environmental justice claims by relying solely on the four corners of the law, and not the spirit of the law. As Professor Carlton Waterhouse notes in discussing this phenomenon,

In fact, a string of decisions show the unstated but implicit contemporary presumption that in the absence of explicit racial classifications or a direct link to past de jure segregation patterns, governments act without discriminatory purpose when substantial evidence to the contrary is lacking. This presumption can create an insurmountable hurdle for environmental justice litigants who routinely lack direct evidence of racial animus. Environmental justice and other litigants seeking to surmount the mount of joy may find themselves trapped in a legal hell occupied by the spirits of past litigants who hoped for racial justice.¹⁶⁴

163. *Bean v. Sw. Waste Mgmt. Corp.*, 482 F. Supp. 673, 679 (S.D. Tex. 1979).

164. Waterhouse, *supra* note 94, at 69.

An embrace of legal realism can support these claims by requiring judges to consider all factors in Equal Protection causes and other disparate causes of action. While legal realism does not substantively shift the measuring post for relief, it would implore judges to evaluate the claim differently and potentially lower barriers to success. Moreover, this would facilitate judges to think about the social consequences of their decisions on these types of cases explicitly. Surely, judges already do consider social consequences, but legal realism seeks to understand laws supposedly neutral in nature within their social consequences. Thus, Equal Protection environmental justice claims would be understood not by whether a plaintiff alleged specific intent but rather whether the plaintiff was the subject of impermissible discrimination that the law seeks to avoid. While not a perfect solution to mitigate all the unforeseen challenges associated with environmental justice, legal realism would allow judges to think about and utilize their discretion differently and explicitly consider and understand their decisions within a host of factors that color the law.

CONCLUSION

Legal formalism's wide acceptance has failed to protect Black communities' pursuit of environmental justice. In its mechanical decision-making, it has failed judges by not considering their racial lenses that often color their perceptions and decisions. Doing so allows judges to disregard and ignore their biases under the façade of impartiality that legal formalism demands. Moreover, legal formalism has failed environmental justice plaintiffs by failing to account for significant judicial discretion that legal formalism presumptively rejects. Meanwhile, plaintiffs like Ms. Johnson suffer and others suffocate in their communities seeking relief that is nonexistent in the political realm, and has proved implausible in the judicial branch. Through a slew of decisions, legal formalism has wholly failed Black plaintiffs' fight for environmental justice. However, an adoption of legal realism provides a breath of fresh air and a viable path forward by fundamentally reconsidering judicial decision-making and asking judges to consider a host of factors that have traditionally halted progress. While progress has assuredly been made over the decades in awareness and recognition, work still remains as Black communities find themselves increasingly at greater risk. The courts remain the likely place to do so, and can serve their function of protecting vulnerable Black communities facing such environmental threats, by casting aside the veil of

perceived objectivity and embracing legal realism as a change in ideology that can alleviate traditional barriers and provide a new way to consider an issue of monumental importance and consequences.

