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Environmental Law as Segregation

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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.

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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 spaces[7] 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]

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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

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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]

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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.pdf6'61.

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. . .
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> 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.
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> 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 law[68] 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]

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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-

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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 Crits—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/.