

# Put Your Money Where Their Mouth Is: Actualizing Environmental Justice by Amplifying Community Voices

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*This Note seeks to paint a picture of what working toward environmental justice should look like. Focusing on the demands that environmental justice communities voiced through the Principles of Environmental Justice, it posits that three key components are necessary to comprehensively achieve environmental justice: distributive justice, recognitional justice, and procedural justice. Common understandings of environmental justice often miss either one or both of the latter two components. This Note puts a name on work that simultaneously addresses all three: comprehensive environmental justice work. By developing a common understanding of comprehensive environmental justice, this Note aims to ensure that those who care about achieving environmental justice understand the need to address each component. For environmental justice supporters and partners who are eager to contribute to the movement in the most efficient and effective way, a common understanding of comprehensive environmental justice work can aid in identifying which organizations deserve their resources. For lawyers who aim to aid the movement, a common understanding will contextualize their role in the movement and the components they are addressing.*

*Part I recounts the events leading up to the First National People of Color Environmental Leadership Summit and adoption of the Principles of Environmental Justice. Part II traces the government's attempts to implement environmental justice. Part III evaluates the role of the lawyer in actualizing this*

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*understanding of comprehensive environmental justice. Part IV assesses an Earthjustice-led coalition's role in alleviating blood-lead-level disparities in environmental justice communities in a recent Ninth Circuit case. Part V briefs policy implications of a fragmented understanding of environmental justice. Finally, by identifying good practices that large organizations are currently employing, I conclude with some guideposts for empowering rather than usurping the communities who founded the environmental justice movement.*

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## INTRODUCTION

The Flint Water Crisis is the most recent incident that brought the intersection between environmental health,<sup>1</sup> race, and class back into conversation across the United States. Largely a government failure at the public's expense, the crisis left many wondering whether "Michigan's state government [would] have responded more quickly and aggressively to complaints about its lead-polluted water" if "Flint were rich and mostly white."<sup>2</sup> Although the majority of those exposed to lead were either black, poor, or both, recently released emails authored by former Michigan Governor Rick Snyder revealed that race did not once arise in his conversations about the crisis.<sup>3</sup> While attention focused on the pressing issue—getting Flint residents clean water—the Environmental Justice Work Group that Snyder created provided

1. See *Environmental Health*, WORLD HEALTH ORG., REG'L OFFICE FOR SE. ASIA, [http://www.searo.who.int/topics/environmental\\_health/en/](http://www.searo.who.int/topics/environmental_health/en/) ("Environmental health addresses all the physical, chemical, and biological factors external to a person, and all the related factors impacting behaviours. It encompasses the assessment and control of those environmental factors that can potentially affect health. It is targeted towards preventing disease and creating health-supportive environments. This definition excludes behaviour not related to environment, as well as behaviour related to the social and cultural environment, and genetics.") (emphasis added).

2. John Eligon, *A Question of Environmental Racism in Flint*, N.Y. TIMES (Jan. 21, 2016), <https://www.nytimes.com/2016/01/22/us/a-question-of-environmental-racism-in-flint.html>.

3. *Id.*

recommendations beyond the issue of distribution.<sup>4</sup> Rather, their recommendations focused on systemic issues to ensure these issues will not arise again.<sup>5</sup>

The nation is keenly aware of the risk of lead exposure through our water. The first listed challenge in the U.S. Environmental Protection Agency's (EPA) environmental justice<sup>6</sup> strategic plan is eliminating disparities in childhood blood-lead levels, with specific mentions of drinking water.<sup>7</sup> But drinking water is not the primary path through which Americans are exposed to lead. We are most vulnerable to lead exposure in our own homes.<sup>8</sup> Children under the age of six have an increased risk of exposure through lead-contaminated dust and soil.<sup>9</sup> Dust is commonly contaminated when lead-based paint deteriorates, posing severe concerns for children more likely to ingest this dust.<sup>10</sup> The health implications of consistent, low exposure to lead are severe: learning disabilities, behavioral problems, growth impairment, hearing and visual impairment, and other brain and nervous system damage.<sup>11</sup>

Congress tasked EPA with protecting children through the Toxic Substances Control Act (TSCA) and the Residential Lead-Based Paint Hazard Reduction Act of 1992. TSCA defines lead-based paint hazards as “conditions of lead-based paint and lead-contaminated dust and soil that ‘would result’ in adverse human health effects.”<sup>12</sup> EPA is tasked with promulgating rules to define the lead levels necessary to constitute lead-based paint and lead-based paint hazards.<sup>13</sup> These standards apply to “target-housing” and are important for determining whether identified lead poses a risk.<sup>14</sup> Homeowners and landlords

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4. See generally ENV'TL JUSTICE WORK GROUP REPORT (Mar. 2018), available at [https://www.michigan.gov/documents/snyder/Environmental\\_Justice\\_Work\\_Group\\_Report\\_616102\\_7.pdf](https://www.michigan.gov/documents/snyder/Environmental_Justice_Work_Group_Report_616102_7.pdf).

5. See EXECUTIVE DIRECTIVE 2018-3, STATE OF MICHIGAN (July 25, 2018), available at [https://www.michigan.gov/documents/snyder/ED\\_2018-3\\_628640\\_7.pdf](https://www.michigan.gov/documents/snyder/ED_2018-3_628640_7.pdf) (proposing mechanisms “to expand the ease with which communities can proactively inform the State above and beyond typical ‘public comment’ periods for specific regulatory activities” and formalized environmental justice training for state and local employees).

6. Henceforth, I will use “EJ” to refer to all use of “environmental justice” as an adjective.

7. EJ 2020 ACTION AGENDA: EPA’S ENVIRONMENTAL JUSTICE STRATEGY, EPA, iii (2016) available at [https://www.epa.gov/sites/production/files/2016-05/documents/052216\\_ej\\_2020\\_strategic\\_plan\\_final\\_0.pdf](https://www.epa.gov/sites/production/files/2016-05/documents/052216_ej_2020_strategic_plan_final_0.pdf).

8. Lead; Identification of Dangerous Levels of Lead, 62 Fed. Reg. 30302 (proposed June 3, 1998) (to be codified at 40 C.F.R. pt. 745).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. 15 U.S.C. § 2683 (2012).

14. Hannah Chang, *Why Lead Standards Matter*, EARTHJUSTICE (Dec. 27, 2017), <https://earthjustice.org/blog/2016-october/why-lead-standards-matter>. The Consumer Product Safety Commission banned lead paint in 1977. See 42 Fed. Reg. 44, 199. Target-housing is therefore those homes that were built before the ban and are still likely to have lead paint.

must take measures to abate or at least reduce lead in homes when the risk falls within these standards.<sup>15</sup>

Since EPA last updated its lead-based paint standards, science has demonstrated that those standards are now inadequate for protecting children.<sup>16</sup> In August 2016, a coalition of community organizations led by Earthjustice brought a suit under the Administrative Procedure Act (APA) against EPA for failing to update the standards for lead-based paint and lead-based paint hazards.<sup>17</sup> The core of their arguments focused on the children six and younger who continue to face unhealthy exposure to lead every day because of these outdated standards.<sup>18</sup> More specifically, the petitioners noted that “EPA’s delay prejudices already overburdened environmental justice communities and prevents petitioners from pursuing administrative and judicial remedies.”<sup>19</sup> As Earthjustice put it, “[t]his, then, is a matter of justice . . . . And it’s not right or just for the EPA to do this when it knows full well that ‘lead exposure remains one of the top childhood environmental health problems that impacts minority and/or low-[in]come populations.’”<sup>20</sup> Once the Ninth Circuit ruled in favor of the petitioners, it ordered EPA to begin a rulemaking.<sup>21</sup> But despite the petitioners’ insistence that this was “a matter of justice,” EPA’s statutory and regulatory compliance check for the Proposed Rule—in which the agency chose not to update its definition of lead-based paint—concluded otherwise.<sup>22</sup> The agency “believe[d] that this action does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations[,] and/or indigenous peoples.”<sup>23</sup>

This raises the question whether this successful case constitutes successful EJ work. The answer is no. Rather, I posit that Earthjustice’s case was a successful environmental health case that begins updating standards that will improve communities—including EJ communities—across the nation. Lack of a common understanding of what “environmental justice” means has created fragmentation in the ways in which outside actors<sup>24</sup> engage in EJ work. This

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15. *Id.*

16. See Petition for Writ of Mandamus, *In re A Community Voice*, 878 F.3d 779 (9th Cir. 2017) at 12–13 (“[A]t the current dust-lead hazard standards, half of children in families informed that their home does not contain a dust-lead hazard would nevertheless develop elevated blood lead levels, with the associated irreversible neurological impacts, as a result of leaded dust in the home. The American Academy of Pediatrics has concluded that EPA’s dust-lead hazard standards are ‘obsolete,’ ‘remain too high to protect children,’ and merely ‘provide an illusion of safety.’”).

17. *Id.*

18. *Id.*

19. *Id.* at 35.

20. Chang, *supra* note 14.

21. *In re A Community Voice*, 878 F.3d 779, 788 (9th Cir. 2017).

22. See Review of the Dust-Lead Hazard Standards and the Definition of Lead-Based Paint, 83 Fed. Reg. 30889, 30901 (July 2, 2018).

23. *Id.*

24. I use “outside actors” to refer to those outside of EJ communities who address environmental injustices.

Note seeks to unpack what the EJ movement envisioned EJ work actually entailing. It frames the Principles of Environmental Justice<sup>25</sup> as the EJ movement's constitution and concludes that the vision set forth by the Principles entails three key components for environmental justice: distributive justice, recognition justice, and procedural justice.<sup>26</sup> While this may seem obvious, a common understanding of environmental justice is often missing at least one of these components. As a result, although government agencies, private firms, and nonprofits have strived to incorporate environmental justice into their work, their efforts often only address one or two of the three components of environmental justice. Comprehensive EJ work, as envisioned by the movement's founders, simultaneously addresses all three components. This not only rids communities of environmental harms; it empowers communities.

Those who hope to engage in comprehensive EJ work need a common understanding of environmental justice to better identify organizations and actors who are doing EJ work. By better understanding the three components of EJ work, EJ movement supporters and partners can more efficiently and effectively identify which organizations need their resources. Organizations that tackle comprehensive EJ work—most often grassroots organizations—most effectively protect EJ communities. Larger organizations that engage in pieces of EJ work must be mindful of how their role can impact comprehensive EJ work by shifting attention and resources from grassroots organizations that are working directly with EJ communities.

Because environmental justice emphasizes the notion “we speak for ourselves,” a proper understanding of environmental justice must begin with the vision that people of color set forth in the Principles of Environmental Justice. Thus, Part I recounts the events leading up to the First National People of Color Environmental Leadership Summit and adoption of the Principles. Part II examines the federal government's efforts to recognize environmental justice and implement it in agency decision making. Part III evaluates the role of the lawyer in actualizing this understanding of comprehensive environmental justice. In this Part, I look at three models for practicing EJ law: environmental lawyering, social justice lawyering, and EJ lawyering—a model framed around community-based lawyering. I suggest that this last model most comprehensively fulfills the intent of the Principles' framers. Part IV assesses the role that the Earthjustice-led coalition in *In re A Community Voice* played in alleviating blood-lead-level disparities in EJ communities. By assessing that role, I suggest that Earthjustice's campaign is environmental health-oriented, which

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25. See *infra* Part I, in which I detail the events leading up to the First National People of Color Environmental Leadership Summit and the Principles of Environmental Justice that were drafted there.

26. Accord David Schlosberg, *The Justice of Environmental Justice: Reconciling Equity, Recognition, and Participation in a Political Movement*, in MORAL AND POLITICAL REASONING IN ENVIRONMENTAL PRACTICE 77, 87 (Andrew Light & Avner De-Shalit eds., 2003). Schlosberg concludes that environmental justice entails all three of these concepts, whereas this Note posits that those three concepts come from the Principles of Environmental Justice.

includes environmental justice implications. But this work must be supplemented to achieve environmental justice for communities facing blood-lead-level disparities. Part V briefs implications of a fragmented understanding of what EJ work entails. I conclude with guideposts for empowering, rather than usurping, the communities who founded the EJ movement.

#### I. RECORDING THE REVOLUTION

*[T]he Leadership Summit is not an independent “event” but a significant and pivotal step in the crucial process whereby people of color are organizing themselves and their communities for self-determination and self-empowerment around the central issues of environmental justice. It is living testimony that no longer shall we allow others to define our peoples’ future. The very survival of all communities is at stake.*<sup>27</sup>

The birth of the EJ movement cannot be attributed to a single event. Rather, the movement is “a river, fed over time by many tributaries,” including the civil rights movement, Native American struggles, the Labor Movement, and the traditional environmental movement.<sup>28</sup> The 1982 Warren County protests in North Carolina are credited for helping unite these tributaries.<sup>29</sup> The protests responded to the discharging of polychlorinated biphenyl (PCB) in a rural community—an act that violated the TSCA.<sup>30</sup> Although the community was predominantly African American, the initial opposition was led by a community group of mostly white landowners.<sup>31</sup> After three years of unsuccessful litigation, the group recognized the need for taking direct, disruptive action.<sup>32</sup> But they did not have the experience or knowledge to lead that effort.<sup>33</sup> They began building coalitions with people of color—some of whom were seasoned Civil Rights activists—and taking direct action.<sup>34</sup> More than five hundred people protested for six weeks, and many were arrested in acts of civil disobedience.<sup>35</sup> The protests garnered national attention, began bridging the Civil Rights and

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27. Vernice D. Miller, *Building on Our Past, Planning for Our Future: Communities of Color and the Quest for Environmental Justice*, in TOXIC STRUGGLES: THE THEORY AND PRACTICE OF ENVIRONMENTAL JUSTICE 128 (Richard Hofrichter ed., 1993).

28. LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 20–32 (2001).

29. *Id.* at 20.

30. Eileen Maura McGurty, *Warren County, NC, and the Emergence of the Environmental Justice Movement: Unlikely Coalitions and Shared Meanings in Local Collective Action, Society & Natural Resources*, 13 SOC’Y & NAT. RESOURCES 373, 375 (2000).

31. *Id.* at 376.

32. *Id.*

33. *Id.*

34. *Id.* at 378.

35. COLE & FOSTER, *supra* note 28, at 21.

environmental movements, and shed light on a problem that communities of color routinely faced.<sup>36</sup>

In 1987, “environmental racism” was first recognized<sup>37</sup> as a phenomenon in a report by the United Church of Christ Commission for Racial Justice.<sup>38</sup> The report, *Toxic Wastes and Race*, documented a relationship between community racial identity and the siting of hazardous waste facilities in the United States.<sup>39</sup> Among its findings was a correlation between a geographic area’s amount of commercial hazardous waste sites and percentage of racial and ethnic minority communities.<sup>40</sup> But the report went beyond mere evidence of environmental racism. The report called upon the president to issue an executive order mandating federal agencies to consider their impacts on racial and ethnic communities.<sup>41</sup> It urged EPA to establish an office that would deal with these discrete issues, and state governments to reform their policies as well.<sup>42</sup> Importantly, it implored civil rights and political groups to use voter registration campaigns to empower communities to effectively respond to these issues and put these issues on legislative agendas, and it recommended that local communities educate their peers on these issues.<sup>43</sup> But it did not call upon environmental organizations. While *Toxic Wastes and Race* documented environmental racism as a phenomenon for the first time, this was not a revelation for low-income communities and communities of color across the country.<sup>44</sup> For those communities, this was merely affirmation and validation.

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36. See *id.*; Mike Ewall, *Legal Tools for Environmental Equity vs. Environmental Justice*, 13 SUSTAINABLE DEV. L. & POL’Y 4, 4 (2012); Robert D. Bullard, *Environmental Justice for All*, in UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR, 5–6 (Robert D. Bullard, ed., 1994) (“[t]he protests marked the first time African Americans had mobilized a national broad-based group to oppose what they defined as environmental racism”).

37. Rev. Benjamin Chavis—one of the authors of *Toxic Wastes and Race*—coined the term “environmental racism” as he “scold[ed] the environmental movement as too white and unconcerned with which portion of the population had to bear the presence of noxious sites.” See Neil A. Lewis, *Man in the News: Benjamin Franklin Chavis Jr.; Seasoned by Civil Rights Struggle*, N.Y. TIMES (Apr. 11, 1993), <https://www.nytimes.com/1993/04/11/us/man-in-the-news-benjamin-franklin-chavis-jr-seasoned-by-civil-rights-struggle.html>.

38. See generally COMM’N FOR RACIAL JUSTICE (UNITED CHURCH OF CHRIST), TOXIC WASTES AND RACE IN THE UNITED STATES (1987). The report relied on the following definition of racism: “Racism is racial prejudice plus power. Racism is the intentional or *unintentional* use of power to isolate, separate, and exploit others. This use of power is based on a belief in superior racial origin, identity or supposed racial characteristics. Racism confers certain privileges on and defends the dominant group, which in turn sustains and perpetuates racism. Both consciously and *unconsciously*, racism is enforced and maintained by the *legal*, cultural, religious, educational, *economic*, *political*, *environmental*, and military *institutions of societies*. Racism is more than just a personal attitude; it is the institutionalized form of that attitude.” *Id.* at ix–x (emphasis added).

39. *Id.*

40. *Id.*

41. *Id.* at xv.

42. *Id.*

43. *Id.*

44. Miller, *supra* note 27, at 129.

Three years later, several frustrated civil rights and minority groups signed on to a letter from the SouthWest Organizing Project (SWOP) to eight major environmental organizations to condemn their hiring practices.<sup>45</sup> While the SWOP letter did not accuse the organizations of having malicious intent, the letter declared that “the national environmental movement was isolated from the poor and minority communities that it said were the chief victims of pollution.”<sup>46</sup> In contrast to the mainstream environmental organizations, black people, Latinx people, and women led the grassroots environmental organizations “whose members and constituents [were] often those directly exposed to environmental threats.”<sup>47</sup> It was clear that the national organizations leading the fight against polluters needed to broaden their member base and narrowly defined agendas to incorporate concerns of various racial, ethnic, and socioeconomic groups.<sup>48</sup> Over a hundred community leaders signed on to the SWOP letter, and ultimately it was published in the *New York Times*.<sup>49</sup> This prompted Reverend Benjamin Chavis, executive director of the United Church of Christ Commission for Racial Justice, to beseech environmental, civil rights, and community groups via a CNN interview to convene for an emergency summit to address these issues.<sup>50</sup>

People of color responded to the call; a few years later, delegates to the First National People of Color Environmental Leadership Summit met in Washington, DC.<sup>51</sup> Sponsored by the United Church of Christ Commission for Racial Justice, over three hundred delegates and four hundred observers and supporters met for three days.<sup>52</sup> Some sessions featured tense discussions with leaders from the mainstream environmental organizations.<sup>53</sup> Others included emotional recounts of the exposure communities faced every day.<sup>54</sup> The Summit also had “several exercises in democratic process and collective decision-making [*sic*].”<sup>55</sup> But, ultimately, they all had the same goal: preservation of EJ communities.

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45. Letter from SouthWest Organizing Project to “Group of Ten” National Environmental Organizations (Feb. 21, 1990); see also Philip Shabecoff, *Environmental Groups Told They are Racists in Hiring*, N.Y. TIMES (Feb. 1, 1990), <https://www.nytimes.com/1990/02/01/us/environmental-groups-told-they-are-racists-in-hiring.html>.

46. Shabecoff, *supra* note 45.

47. *Id.*

48. See Sheila Foster, *Race(ial) Matters: The Quest for Environmental Justice*, 20 ECOLOGY L.Q. 721, 753 (1993).

49. COLE & FOSTER, *supra* note 28, at 31.

50. *Id.*

51. PRINCIPLES OF ENVIRONMENTAL JUSTICE, <https://www.ejnet.org/ej/principles.html> (last visited Oct. 5, 2018).

52. Vernice D. Miller, *Building on Our Past, Planning for Our Future: Communities of Color and the Quest for Environmental Justice*, in TOXIC STRUGGLES: THE THEORY AND PRACTICE OF ENVIRONMENTAL JUSTICE 128 (Richard Hofrichter ed., 1993).

53. Miller, *supra* note 27, at 129.

54. *Id.*

55. *Id.* at 130.



By the Summit's end, delegates had drafted and adopted the Principles of Environmental Justice.<sup>56</sup> The Preamble—declared by “We, the People of Color”—establishes a movement to

re-establish our spiritual interdependence to the sacredness of our Mother Earth; to respect and celebrate each of our cultures, languages[,] and beliefs about the natural world and our roles in healing ourselves; to ensure environmental justice; to promote economic alternatives which would contribute to the development of environmentally safe livelihoods; and, to secure our political, economic[,] and cultural liberation that has been denied for over 500 years of colonization and oppression, resulting in the poisoning of our communities and land and the genocide of our peoples.<sup>57</sup>

The delegates then set forth seventeen principles that, like *Toxic Wastes and Race*, recognize the need to protect communities from toxic exposure.<sup>58</sup> But the Principles go beyond demanding a balance of environmental benefits and burdens. The Second Principle, for example, “demands that public policy be based on mutual respect and justice for all peoples, free from any form of discrimination or bias.”<sup>59</sup> The Fifth Principle “affirms the fundamental right to political, economic, cultural[,] and environmental self-determination of all peoples.”<sup>60</sup> The Sixteenth Principle emphasizes the importance of community storytelling by “call[ing] for the education of present and future generations which emphasizes social and environmental issues, based on our experience and an appreciation of our diverse cultural perspectives.”<sup>61</sup>

Three key components can be discerned from the Principles: distributive justice, procedural justice, and recognitional justice.<sup>62</sup> Distributive justice is the common understanding of environmental justice. Justice in this context means “the appropriate division of social advantages,” such as the environmental racism documented in *Toxic Wastes and Race*.<sup>63</sup> Procedural justice focuses on process, “including the demands for broader and more authentic public participation.”<sup>64</sup> Several Principles refer directly to political democracy. The Seventh Principle, for example, “demands the right to participate as *equal* partners at every level of decision-making [*sic*], including needs assessment, planning, implementation, enforcement[,] and evaluation.”<sup>65</sup>

But the tenet most often absent from conversation about environmental justice is recognitional justice, or recognizing group difference.<sup>66</sup> Without

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56. *Id.*

57. *Id.*

58. *See id.*

59. Miller, *supra* note 27, at 130.

60. *Id.*

61. *Id.*

62. Schlosberg, *supra* note 26, at 78.

63. *Id.* at 79.

64. *Id.* at 84.

65. PRINCIPLES OF ENVIRONMENTAL JUSTICE, *supra* note 51 (emphasis added).

66. Schlosberg, *supra* note 26, at 81.

addressing the existence of difference between society's dominant and subordinate groups, the societal issues that create environmental injustices will continue to do so.<sup>67</sup> Rather than merely solving the distributive inequities, recognitional justice attacks the root of the problem. In the context of this movement, recognitional justice requires white people, decision makers, and traditional environmental organizations to recognize their differences from communities who actually live with environmental injustices. They "must acknowledge the institutionalization of unconscious biases, exclusionary processes, and normative judgments that influence racially meaningful social structures, which in turn manifest racially disparate outcomes."<sup>68</sup> A "[l]ack of recognition, then, is a harm—an injustice—as much as a lack of adequate distribution of various goods is."<sup>69</sup> In sum, these three components define "what, *exactly*, is meant by the *justice* of environmental justice."<sup>70</sup>

Because EJ communities voiced the Principles themselves, I view the Principles as the constitution of the EJ movement.<sup>71</sup> In both origin story and physical framework, the Principles resemble the U.S. Constitution.<sup>72</sup> Both were drafted and adopted by people seeking liberation from systemic oppression. They are demands made by those who did not have a place in a mainstream movement and therefore created their own space. And because the Principles were drafted by those who bear environmental burdens—and the EJ movement emphasizes the notion "we speak for ourselves"—they must carry the most weight in shaping our understanding of what comprehensive environmental justice looks like.<sup>73</sup>

## II. ENVIRONMENTAL JUSTICE ON THE BOOKS

*The "equity" versus "justice" framing is more than mere semantics. It represents the fundamental difference between the concepts of "poison people equally" and "stop poisoning people, period!"*<sup>74</sup>

Three years after the Summit, President Bill Clinton responded by issuing Executive Order 12898, which mandated that federal agencies incorporate "achieving environmental justice" into their missions.<sup>75</sup> To do this, each agency must identify and address the "disproportionately high and adverse human health

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67. *Id.*

68. Foster, *supra* note 48, at 735.

69. Schlosberg, *supra* note 26, at 82.

70. *Id.* at 78 (emphasis in original).

71. *Accord* PRINCIPLES OF ENVIRONMENTAL JUSTICE, *supra* note 51 ("The Principles have served as a defining document for the growing grassroots movement for environmental justice.")

72. *Accord* COLE & FOSTER, *supra* note 28, at 31 (The Summit "was also, in some ways, a declaration of independence from the traditional environmental movement; a telling statement from attendees was, 'I don't care to join the environmental movement, I belong to a movement already.'")

73. *Id.* at 1.

74. Ewall, *supra* note 36, at 4.

75. Exec. Order No. 12898, 3 C.F.R. § 859 (1995), *reprinted in* 42 U.S.C. § 4321 (1994) [hereinafter Executive Order].

or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”<sup>76</sup> They were also directed to establish an EJ strategy to revise each agency’s programs, policies, and rulemakings concerning human health or the environment.<sup>77</sup> These revisions were intended to increase environmental enforcement in EJ communities, ensure greater EJ community public participation, and improve research and data on environmental justice.<sup>78</sup> During his administration, President Obama reaffirmed Executive Order 12898’s importance and formally renewed the Executive Order’s procedures and processes.<sup>79</sup>

But a plain dichotomy exists between how people of color defined environmental justice in the Principles and the definition of environmental justice in Executive Order 12898. While Clinton’s executive order addresses both distributive and procedural justice, its call to action lacks the force found in the Principles’ demands. “Greater participation,” for example, will not necessarily be the equal partnership that the Principles call for. Nor does the Executive Order try to recognize community difference and expertise. “[O]ne must have recognition in order to have real participation; one must have real participation in order to get real equity; further equity would make more participation possible, which would bring further recognition, and so on.”<sup>80</sup> In other words, environmental justice will not be actualized without all three parts. Furthermore, the Trump Administration has not reaffirmed a commitment to the Executive Order.

Congressmembers have also made attempts to create EJ rights of action. In 2006, a senator introduced a bill to enact the Environmental Justice Enforcement Act of 2006.<sup>81</sup> Under the proposed act, plaintiffs had a statutory right to sue for disparate impacts under section 601 of Title VI of the Civil Rights Act of 1964.<sup>82</sup> Those accused would bear the burden of “demonstrat[ing] that the challenged policy or practice is related to and necessary to achieve the nondiscriminatory goals of the program or activity alleged to have been operated in a discriminatory manner.”<sup>83</sup> Plaintiffs could prove discrimination by showing that a less discriminatory practice or policy existed and that the accused refused to adopt that alternative.<sup>84</sup> Recovery could be equitable relief, attorney’s fees, costs, and

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76. *Id.*

77. *Id.* at 1–103.

78. *Id.*

79. See MEMORANDUM OF UNDERSTANDING ON ENVIRONMENTAL JUSTICE AND EXECUTIVE ORDER 12898, EPA (Feb. 17, 2017). The Trump Administration has not renewed the Executive Order.

80. Schlosberg, *supra* note 26, at 96.

81. Ewall, *supra* note 36, at 10.

82. *Id.*

83. *Id.*

84. *Id.*

in some instances, punitive damages.<sup>85</sup> The bill was reintroduced in 2008 by a senator and a congresswoman, but to no avail.<sup>86</sup>

On the regulatory front, EPA has better encapsulated all three components in its definition of environmental justice. EPA defines environmental justice as “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”<sup>87</sup> In its 2010 Interim Guidance on Considering Environmental Justice During the Development of an Action, EPA’s definition of fair treatment is essentially the same as distributive justice.<sup>88</sup> “Meaningful involvement” is broken down into four parts:

1) potentially affected community members have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; 2) the public’s contribution can influence the regulatory agency’s decision; 3) the concerns of all participants involved will be considered in the decision-making process; and 4) the decision[ ]makers seek out and facilitate the involvement of those potentially affected.<sup>89</sup>

Importantly, the Interim Guidance states that

[p]romoting meaningful involvement often requires special efforts to connect with populations that have been historically underrepresented in decision[ ]making and that have a wide range of educational levels, literacy, or proficiency in English. It will likely be necessary to tailor outreach materials to be concise, understandable, and readily accessible to the communities you are trying to reach.<sup>90</sup>

Moreover, the Interim Guide clarifies that the EJ considerations should not occur “only in the *development* of the action, but also in the *implementation* of the action.”<sup>91</sup> The guide therefore goes beyond procedural justice and acknowledges the need to promote recognition justice. But while the Interim Guide adequately effectuates the Principles’ vision, it is important to note that its impact may not weather political climates. The Interim Guide disclaims setting forth any mandatory requirements or being either a rule or regulation.<sup>92</sup>

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85. *Id.*

86. *Id.*

87. *Environmental Justice*, EPA, <https://www.epa.gov/environmentaljustice> (last visited Aug. 27, 2018).

88. EPA’S ACTION DEVELOPMENT PROCESS: INTERIM GUIDANCE ON CONSIDERING ENVIRONMENTAL JUSTICE DURING THE DEVELOPMENT OF AN ACTION, EPA, 3 (2010), <https://www.epa.gov/sites/production/files/2015-03/documents/considering-ej-in-rulemaking-guide-07-2010.pdf> (“Fair treatment means that no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.”).

89. *Id.*

90. *Id.* at 13.

91. *Id.* at 10 (emphasis in original).

92. *See* EPA’S ACTION DEVELOPMENT PROCESS: INTERIM GUIDANCE ON CONSIDERING ENVIRONMENTAL JUSTICE DURING THE DEVELOPMENT OF AN ACTION, EPA, ii (2010),

Despite the government's efforts to address environmental justice, communities are still left without any causes of action that are specific to environmental justice. As discussed later,<sup>93</sup> the government's failure to create a clear hook for EJ litigation has made it difficult for litigation to effectuate change for EJ communities and for lawyers to figure out how to be effective in aiding the movement. And EPA's failure to create binding policies has allowed EJ communities to slip through the cracks when the agency engages in rulemakings.

### III. LAWYERING FOR ENVIRONMENTAL JUSTICE

*Put simply, neither the environmental movement nor the social justice movement are capable of winning their fights on their own. We must come together to realize the goals of both movements.*<sup>94</sup>

To best support and partner with EJ communities, it is important for lawyers to assess the role they expect to play in the EJ movement. Because EJ communities must be at the forefront of all EJ work, lawyers must understand how to use their skills to empower rather than displace communities. This Part analyzes three types of lawyering that are often used to aid EJ communities.

#### *A. Atticus Finch, or the Social Justice Lawyer*

Both the environmental justice and civil rights movements are rooted in an understanding that distributive inequities are not random phenomena, but instead are produced by the social and economic oppression that is embedded in our social structures.<sup>95</sup> The EJ movement's early beginnings at the Warren County protests reflect the utility of the civil rights movement's direct action and political empowerment tactics.<sup>96</sup> Only after coalition building with people of

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<https://www.epa.gov/sites/production/files/2015-03/documents/considering-ej-in-rulemaking-guide-07-2010.pdf> ("Disclaimer: This document identifies internal Agency policies and recommended procedures for EPA employees who are participants or managers developing or reviewing an action in the Action Development Process. This document is not a rule or regulation and it may not apply to a particular situation based upon the circumstances. This Guide does not change or substitute for any law, regulation, or any other legally binding requirement and is not legally enforceable. As indicated by the use of non-mandatory language such as 'guidance,' 'recommend,' 'may,' 'should,' and 'can,' it identifies policies and provides recommendations and does not impose any legally binding requirements."). This distinction is important because an agency's legislative rules—as opposed to guidance documents—create rights and obligations, and an agency can be challenged for violating those rights and obligations. *See* Am. Bus. Ass'n v. Rogoff, 649 F.3d 734, 743 (D.C. Cir. 2011); *Block v. Cmty. Nutrition Inst.*, 467 U.S. 340, 351 (1984) (defining a legislative rule as one that creates rights and obligations and does not allow agency to retain discretion).

93. *See infra* Part III.

94. Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L. Q.* 619, 634 (1992).

95. COLE & FOSTER, *supra* note 28, at 21. Both movements are rooted in an understanding that distributive inequities are not random phenomena, but instead are produced by the social and economic oppression that is embedded in our social structures.

96. *Id.*

color and taking direct action did a revolution begin.<sup>97</sup> But while the civil rights movement's strategies and goals lend tremendous help to the EJ movement, social justice advocates often see environmental justice as falling within the purview of environmentalists rather than social justice advocates.<sup>98</sup> By extension, they seldom engage in comprehensive EJ work.

The framework for social justice lawyering better recognizes communities than environmental lawyering does. Social justice, and particularly civil rights work, focuses on a comparative status of different groups, and thus recognitional justice is inherent in disparate impact and discriminatory intent lawsuits. The two movements share an ethos of distrust in decision makers and a fight for livelihood. But on the other hand, social justice lawyers do not always display an understanding of recognitional justice in practice. These attorneys are often isolated from the communities they represent.<sup>99</sup> Social justice law students often come to law school with a "misplaced savior complex."<sup>100</sup> Attorneys may find "tension between their vision of the 'public interest' and their clients' interests."<sup>101</sup> This misplaced savior complex can leave them disenchanted when their clients and their goals deviate from their expectations of what social justice work looks like.<sup>102</sup>

This savior complex may be due in part to Harper Lee's novel *To Kill a Mockingbird*, which many social justice-oriented students cite as their inspiration for pursuing law school.<sup>103</sup> *Mockingbird*, which was published at the height of the civil rights movement, tells the story of a man who came to be known as the archetype social justice lawyer.<sup>104</sup> Set in Alabama, the story focuses on the narrator's father, a lawyer named Atticus Finch. Atticus serves as the court-appointed lawyer for Tom, a black man falsely accused of raping a white

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97. Critics have noted that the protests' direct action, and not the litigation, began the EJ movement. See McGurty, *supra* note 30, at 376 ("This collaboration, while unsuccessful in its immediate goal to stop the construction of the landfill, has had a lasting impact on the environmental movement and environmental policy."); Foster, *supra* note 48, at n. 124 ("[a]lthough the protests were unsuccessful in halting the landfill construction, they marked the first time blacks mobilized a nationally broad-based group to protest environmental inequities.").

98. This is an observation from personal experience.

99. Cole, *supra* note 94, at 653.

100. Katie Rose Guest Pryal, *American lawyers have an Atticus Finch complex, and it's killing the profession*, QUARTZ (Mar. 31, 2016), <https://qz.com/651270/the-american-legal-system-has-an-atticus-finch-complex-and-its-killing-the-profession/>.

101. *Id.*

102. See Cole, *supra* note 94, at 653 ("Poverty lawyers have also struggled with the tension between their vision of the 'public interest' and their clients' interests . . . 'Of . . . concern are the moral implications of a group of independent lawyers free to choose their own version of the public interest.'"); Guest Pryal, *supra* note 100.

103. See Scott Timberg, *Atticus Finch was never a hero: "This book taught white people how to talk about race, and it did so badly,"* SALON (July 16, 2015), [https://www.salon.com/2015/07/15/atticus\\_finch\\_was\\_never\\_a\\_hero\\_this\\_book\\_taught\\_white\\_people\\_how\\_to\\_talk\\_about\\_race\\_and\\_it\\_did\\_so\\_badly/](https://www.salon.com/2015/07/15/atticus_finch_was_never_a_hero_this_book_taught_white_people_how_to_talk_about_race_and_it_did_so_badly/).

104. Katie Pryal, *Walking in Another's Skin: Failure of Empathy in To Kill a Mockingbird*, in HARPER LEE'S TO KILL A MOCKINGBIRD: NEW ESSAYS 149, 153 (Michael J. Meyer ed., 2010).

woman.<sup>105</sup> Although Atticus did not provide white readers with useful tools to examine privilege and constructively engage with racism, the character did make surface-level considerations of race relations more palatable.<sup>106</sup> Yet in *Mockingbird*, the background of Atticus's client Tom is hardly fleshed out. The book never addresses the bigger systemic issues that result in a black man being arrested for a crime against a white woman, only to be saved by a white man parachuting into the action. Rather, *Mockingbird* is about the hero: Atticus Finch. Likewise, many social justice attorneys—albeit in good faith—work toward the symbolic victory of changing social structures without working with communities to make systemic change.<sup>107</sup>

In addition to an issue of mindset, the civil rights legal framework is partly to blame for ways in which social justice lawyers navigate EJ work. Social justice lawyers traditionally litigate under civil rights statutes or constitutions. Both of these avenues are inferior to environmental laws for achieving distributive justice.<sup>108</sup> Civil rights statutes center around the deprivation of a right to a member of a protected class. Because many civil rights statutes require a smoking gun that indicates an intent to discriminate against a protected class, causation has often been fatal to successful EJ litigation under both federal<sup>109</sup> and state<sup>110</sup> statutes. While studies have proven that the disproportionate siting of toxic waste facilities has been intentional in the past,<sup>111</sup> these siting outcomes are more often than not a reflection of unequal power paired with “unconscious cultural and social attitudes.”<sup>112</sup> For the purpose of civil rights litigation, the subordinate social conditions inherent in EJ communities are insufficient causes

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105. See generally HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

106. See Timberg, *supra* note 103 (“It’s changed our cultural consciousness – it did. This book taught white people how to talk about race, and it did so badly.”).

107. Cole, *supra* note 94, at 653.

108. See Foster, *supra* note 48, at 746; Luke W. Cole, *Environmental Justice Litigation: Another Stone in David’s Sling*, 21 *FORDHAM URB. L.J.* 523, 526 (1994) (listing a four-tier hierarchy for environmental justice litigation avenues, with civil rights statutes and constitutions coming in third and fourth, respectively).

109. See, e.g., *Darensburg v. Metro. Transp. Comm’n*, 636 F.3d 511, 523 (9th Cir. 2011). Under Title VI of the Civil Rights Act, plaintiffs alleged that the Metropolitan Transportation Commission’s “disproportionate emphasis on rail expansion projects over bus expansion projects . . . illegally discriminate[d] against minorities, who constitute[d] 66.3% of San Francisco Bay Area bus riders.” *Id.* The Ninth Circuit found that “[p]laintiffs’ statistical evidence show[ed] that minorities make up a greater percentage of the regional population of bus riders than rail riders,” but it did not “necessarily follow that an expansion plan that emphasize[d] rail projects over bus projects [would] harm minorities.” *Id.* at 514–15. As such, plaintiffs could not prove a disparate impact or intentional discrimination. See *id.* at 515.

110. See, e.g., *Comunidad en Accion v. L.A. City Council*, 219 Cal. App. 4th 1116, 1121 (2013). Under California Government Code 11135, a community group challenged the City of Los Angeles’ siting of waste facilities in a predominantly Latino community in Sun Valley. *Id.* at 1121. Because section 11135 requires a direct connection between the state’s funding and the program producing the discriminatory impact, the court dismissed the case. *Id.*

111. See generally CERRELL ASSOCIATES, *POLITICAL DIFFICULTIES FACING WASTE-TO-ENERGY CONVERSION PLANT SITING* (1984) (defining communities that are least and most likely to resist Locally Undesirable Land Uses).

112. Foster, *supra* note 48, at 733.

of action.<sup>113</sup> Often, “there may not even be a legal solution to the problem faced by the community.”<sup>114</sup> Thus, civil rights litigation is seldom able to give communities distributive justice, procedural justice, or recognitional justice.

Because litigation under these statutes is limited to single instances of discriminatory behavior, a success for one community will not necessarily deliver a widespread impact that prevents other communities from facing disproportionate siting in the future. Civil rights court holdings also often reflect changing social and cultural attitudes rather than pushing changes in attitude.<sup>115</sup> To dismantle environmental racism, political and systemic changes need to be done first. Without this underlying change, environmental hazards will continue to be disproportionately sited in EJ communities, and EJ communities will continue to seek court reparations for each new unjust siting.

### B. *The Lorax, or the Environmental Lawyer*

My first exposure to environmental lawyering came in a children’s book: Dr. Seuss’s *The Lorax*. *The Lorax* was published in 1971, around the time that most of our key environmental laws were enacted.<sup>116</sup> Throughout the book, Dr. Seuss addresses themes of environmentalism and corporate greed to persuade the reader to care about protecting the environment.<sup>117</sup> But one of the more important lines in the book is proclaimed upon the titular character’s first appearance: “I am the Lorax. I speak for the trees. I speak for the trees for the trees have no tongues.”<sup>118</sup>

Like the Lorax, environmental lawyers are used to speaking on nature’s behalf. Nature is a client who will not express differing goals. Furthermore, environmental lawyers have traditionally wielded litigation as their primary weapon.<sup>119</sup> Litigation, however, does not have the same effect for communities as it does for natural spaces. A legal approach to EJ work can “radically disempower a client community” because “[t]ranslating a community’s problems into legal language may render them meaningless.”<sup>120</sup> Environmental legal briefs are often highly technical. The lawyer must draft the community’s concerns and struggles in terms to which courts can respond, and “litigation often

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113. *Id.* at 741.

114. Cole, *supra* note 94, at 667.

115. See, e.g., *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).

116. Cole, *supra* note 94, at 635–36 (listing the “National Environmental Policy Act, . . . the Clean Air Act, the Clean Water Act and the rest of the environmental alphabet soup, such as RCRA, CERCLA, FIFRA, TSCA, and SARA”).

117. See Eliza Darling, *The Lorax Redux: Profit Biggering and Some Selective Silences in American Environmentalism*, 12 CAPITALISM NATURE SOCIALISM 51, 52 (2001).

118. DR. SEUSS, *THE LORAX* 19 (1971).

119. Cole, *supra* note 94, at 636. The executive director of the Sierra Club Defense Fund—now named Earthjustice—stated in 1988, “[l]itigation is the most important thing the environmental movement has done over the past fifteen years.” *Id.*

120. *Id.* at 667.



abstracts, sanitizes, and transforms human rage and pain and sorrow into a legally appropriate product.”<sup>121</sup> Litigation also takes EJ issues off the ground and into the courtroom. In court, the community loses home court advantage. There, adversaries are often polluters who can pay for the best lawyers and experts.<sup>122</sup> Relatedly, the community often has no choice but to rely on experts in court. In contrast to political avenues, where community outcries can loudly be heard through activism, the community voice can easily be stripped from the scene in court.

Although environmental organizations tend to engage in EJ work more often than social justice organizations, EJ communities often view environmental organizations “as obstacles to progress, if not out-right enemies.”<sup>123</sup> Some of these sentiments can likely be traced back to the SWOP letter calling out the Big Ten environmental groups. But there are three important characteristics separating the environmental movement from the EJ movement: motives, background, and perspective.<sup>124</sup> Traditional environmental lawyers are “lovers of wilderness,” who, like Teddy Roosevelt and John Muir, are champions of preserving public lands and wildlife.<sup>125</sup> In contrast, environmental justice is a fight for homes and human lives. This disconnect is exacerbated by the difference in background: environmental lawyers are predominantly white and middle class and face challenges relating to EJ communities’ experiences of living with environmental burdens.<sup>126</sup> While these characteristics do not inherently cause tension between EJ work and an environmental lawyer’s goals and strategies, they can make it more difficult for the environmental lawyer to empathize with the community’s ultimate goal of dismantling systemic oppression.

This disconnect can also be viewed as a difference in ethos: the EJ movement is more social justice-oriented than the environmental movement.<sup>127</sup> EJ communities seek changes to social structures that will alleviate social and economic oppression. Empowering the community to advocate for itself during proceedings requires non-litigation tools. In contrast, environmental lawyers’ use of litigation operates on “an implicitly paternalistic model of the lawyer as the expert, imposing her ideas on the rest of us.”<sup>128</sup> Because the environmental lawyer is product-oriented and views successful litigation as the victory, she may leave communities disempowered after litigation. Once litigation is over,

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121. *Id.*

122. Cole, *supra* note 94, at 650.

123. *Id.* at 638; *see also id.* at n. 60 (summarizing opinions from several EJ organizations regarding the traditional environmental law movement).

124. *Id.* at 639.

125. *Id.* at 634.

126. *Id.* at 640.

127. *Id.* at 641.

128. Cole, *supra* note 94, at 649.

communities may not know how to continue the fight without the lawyer or ensure that the court's order is adequately enforced.<sup>129</sup>

In some ways, the environmental legal framework is well-situated to address distributive justice.<sup>130</sup> Environmental laws, in contrast to civil rights laws, are preventative rather than remedial.<sup>131</sup> Many statutes, such as TSCA, are designed to assess the risk of harm occurring and to set safety thresholds.<sup>132</sup> But studies show that enforcement of environmental laws is significantly lower in low-income communities and communities of color than in white or affluent communities.<sup>133</sup> As demonstrated by the Flint Water Crisis, environmental laws will not deliver distributive justice unless they are adequately enforced in EJ communities.

With regard to procedural and recognitional justice, however, the environmental legal framework is lacking. “The importance of the political process is heightened by the procedural emphasis of many environmental laws.”<sup>134</sup> Statutes such as the National Environmental Policy Act (NEPA) and California Environmental Quality Act (CEQA) are designed to create environmental impact statements, upon which communities can provide public comment.<sup>135</sup> In theory, these statutes allow everyone an opportunity to participate as an equal partner in the decision-making process. But these statutes involve complex administrative processes. Environmental lawyers do not routinely stick around post-litigation to ensure that EJ communities—who “often enter the decision-making process with fewer resources than communities that are less disadvantaged”—understand how to navigate those processes after the lawyer's technical assistance is gone.<sup>136</sup> And “[u]ndoubtedly, information, education, and an understanding of risk communication are necessary for members of the public to discuss issues with experts and bureaucrats.”<sup>137</sup> Lawyers and decision makers must recognize that without recognitional justice, opportunities for procedural justice will be rendered meaningless.

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129. See, e.g., Mike Pearl, *The Town Erin Brockovich Rescued Is Basically a Ghost Town Now*, VICE (Apr. 15, 2015), [https://www.vice.com/en\\_us/article/xd7qvn/the-town-erin-brockovich-rescued-is-now-almost-a-ghost-town-992](https://www.vice.com/en_us/article/xd7qvn/the-town-erin-brockovich-rescued-is-now-almost-a-ghost-town-992) (detailing the post-litigation poverty faced by the community portrayed in the film *Erin Brockovich*).

130. See Foster, *supra* note 48, at 741–44.

131. *Id.* at 742.

132. *Id.*

133. See, e.g., David M. Konisky & Christopher Reenock, *Regulatory Enforcement, Riskscares, and Environmental Justice*, 46 POL'Y STUDIES J. 7, 7 (2018).

134. Cole, *supra* note 94, at 646.

135. Foster, *supra* note 48, at 750.

136. Sheila Foster, *Public Participation*, in *THE LAW OF ENVIRONMENTAL JUSTICE* 186 (Michael B. Gerrard ed., 1999).

137. *Id.*

C. *The Community Voice, or the Environmental Justice Lawyer*

EJ lawyering,<sup>138</sup> which relies on the legal services model,<sup>139</sup> involves three central tenets: “client empowerment; group representation; and law as a means, not an end.”<sup>140</sup> Because there is often no legal hook for environmental justice,<sup>141</sup> and communities have more power outside of the courtroom, political tools are often needed for comprehensive EJ work. With environmental justice, “lawsuits are most successful in the context of a broad, political organizing campaign conducted by a community group.”<sup>142</sup> In the EJ lawyering model, the lawyer wields litigation as a hammer, but the hammer is one tool in the toolbox. That is because environmental justice is understood as a *political* rather than *legal* problem. And the community, rather than the lawyer, is the community’s advocate.

The distinction between the environmental lawyer’s legal solutions and the EJ lawyer’s political solutions is highlighted by their distinct use of the NEPA/CEQA. As information-based statutes, NEPA/CEQA aim to provide decision makers with the most information possible before deciding on a project that will have significant impacts on the environment. This information can and often does include the impacts that a project will have on an EJ community.<sup>143</sup> When an environmental lawyer uses NEPA/CEQA, the environmental lawyer often looks at fixing a legal error in the assessment and sends the assessment back to the decision makers. The project is then either approved or denied.<sup>144</sup> For an EJ lawyer, NEPA/CEQA is more of a legal tool used for political

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138. Although Luke Cole refers to this model as “environmental poverty lawyering,” I refer to it as environmental justice lawyering. The model that Cole refers to is currently the popular model relied upon in environmental justice organizations. See Cole, *supra* note 94, at 641.

139. For a definition of the “legal services model,” see Cole, *supra* note 94, at 655 (“The vision of those who created the legal services program was to “design new social, legal, and political tools and vehicles to move poor people from deprivation, depression, and despair to opportunity, hope and ambition . . .”). Two important facets of the legal services model are “the community-based law office” and “a practice based in part on client empowerment[.]” See *id.*

140. Cole, *supra* note 94, at 661.

141. *Id.* at 667.

142. Cole, *supra* note 108, at 545.

143. See Clifford Rechtschaffen, et. al., *Environmental Review: The National Environmental Policy Act and State Environmental Policy Acts*, in ENVIRONMENTAL JUSTICE LAW, POLICY AND REGULATION 309 (2nd ed., 2009) (“NEPA or its state analogues frequently will be implicated in environmental justice matters, particularly the siting of new facilities. Some of NEPA’s provisions seem particularly well-suited for incorporating environmental justice concerns into the agency decision-making process. For example, unlike most pollution control statutes, NEPA requires that agencies evaluate the cumulative impacts of proposed projects. This arguably imposes a duty on agencies to consider the pre-existing concentration of industrial facilities, health risks, and environmental exposures in a community.”); STATE OF CAL. DEP’T OF JUSTICE, ENVIRONMENTAL JUSTICE AT THE LOCAL AND REGIONAL LEVEL (2012), [https://oag.ca.gov/sites/all/files/agweb/pdfs/environment/ej\\_fact\\_sheet.pdf](https://oag.ca.gov/sites/all/files/agweb/pdfs/environment/ej_fact_sheet.pdf) (detailing that CEQA comprises at least two sources of environmental justice-related responsibilities for local governments).

144. This is a personal observation.

solutions.<sup>145</sup> The goal is to involve communities in this process to ensure that the assessment creates informed and therefore accountable decision making because decision makers are required to respond to submitted comments.<sup>146</sup>

Moreover, the EJ lawyer is inherently oriented around achieving recognitional justice. The EJ lawyer works from the ground up, recognizing that her clients have tongues and can speak for themselves and that direct action is needed to achieve community goals.<sup>147</sup> By positing that the key to community empowerment involves “[r]ecognizing community residents as experts and validating their experiences and knowledge,”<sup>148</sup> EJ lawyering fills in the recognitional gap produced by social justice and environmental lawyering. This model actualizes recognitional justice by focusing on the lawyer’s role in empowering communities to speak for themselves.<sup>149</sup> The community must have a role in solving the EJ issue for the issue to be solved, so the EJ lawyer “must put her skills to the task of helping those people organize themselves and must try to understand their conception of the environmental problem.”<sup>150</sup> Thus the community’s opinions on a political or legal strategy can be as valuable as those belonging to “traditional experts.”<sup>151</sup>

Acknowledging that these campaigns involve legal and political tools, EJ lawyering still values the role of the “traditional” expert. Because low-income communities are in dire need of scientific and legal expertise, EJ lawyers can still be essential in helping communities “wade through the tortuous administrative processes involved in siting facilities.”<sup>152</sup> But in contrast to the environmental lawyer, the EJ lawyer “leaves the community stronger than when she arrived.”<sup>153</sup> The EJ lawyer also achieves procedural justice by working with the communities to educate them and train them to be their own advocates. “By practicing law in a way that empowers people, that encourages the formation and strengthening of

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145. See, e.g., Cole, *supra* note 94, at 678 (detailing the events in Kettleman City, in which a court overruled approval of an incinerator project in an EJ community because exclusion of Spanish-speakers in the CEQA review process precluded meaningful involvement).

146. Rechtschaffen, *supra* note 143, at 309–10 (“[I]ikewise, NEPA requires agencies to provide for meaningful public involvement in their environmental review process . . . . Agencies also are required to respond to all public comments submitted on draft EISs. To facilitate public review, NEPA’s regulations require that EISs must be written in ‘plain language . . . so that decisionmakers and the public can readily understand them.’ 40 C.F.R. § 1502.8. Some courts have invalidated EISs that were too dense for average persons to understand.”).

147. Cole, *supra* note 94, at 649–50.

148. *Id.* at 663. Warren County is a good example of litigation failing to shake things up. The early opposition relied on the tools that traditional environmental lawyers do: “the proposed solution was simply to present a reasoned argument for siting the landfill elsewhere.” See McGurty, *supra* note 30, at 376. After landowners recognized the predominantly African American activists in their community and the value their role could play, the protests became an important catalyst for the EJ movement.

149. Cole, *supra* note 94, at 649–50.

150. *Id.* at 649 (“Following Wexler, pollution will not be stopped by people who are not being polluted. If environmental degradation is stopped, it will be stopped by its victims.”).

151. *Id.* at 662.

152. *Id.* at 651.

153. *Id.* at 662.

client groups, and that sees legal tactics in the context of broader strategies, attorneys can be part of the movement for environmental justice.”<sup>154</sup>

#### IV. EARTHJUSTICE TAKES THE LEAD

*As the War on Poverty took form in the years following John F. Kennedy’s assassination, the links between poverty, housing, and racism became increasingly apparent to many Americans. Lead poisoning—particularly from peeling paint in slum housing—became a signature disease of poverty.*<sup>155</sup>

While EPA has repeatedly stated that no level of lead exposure has been determined safe, separate “levels of concern” exist that require medical treatment for children.<sup>156</sup> Although great strides have been made since 1978—when 4.7 million children had levels of concern—progress has since stagnated.<sup>157</sup> EPA’s own survey found that between 2001 and 2004, 250,000 U.S. children still had levels of concern.<sup>158</sup> The hazardous level of lead in dust standards were last updated in 2001, and the definition of lead-based paint has not been updated since 1992.<sup>159</sup> Science has since proven these standards inadequate for protecting children.<sup>160</sup>

There are two reasons why these outdated standards are significant. First, the lead-based paint hazards standards are the levels under which personnel determine that a hazard is present in a home, and abatement by official personnel is focused around bringing the levels below those thresholds.<sup>161</sup> Second, the amount of lead allowed in what EPA’s current definition deems non-lead-based paint is ten times the levels the Consumer Product Safety Commission (CPSC) used for banning the production and sale of lead-based paint for residential use in 1978.<sup>162</sup> New homeowners and lessees therefore will not be informed if dangerous levels of lead are actually present in their homes. And even if they were informed of dangerous levels of lead, abatement would only bring the risk down to the lead-based paint hazard level—a level currently inadequate for protecting children.

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154. *Id.* at 654.

155. GERALD MARKOWITZ & DAVID ROSNER, LEAD WARS: THE POLITICS OF SCIENCE AND THE FATE OF AMERICA’S CHILDREN 327 (2013).

156. Letter from National Center for Healthy Housing et. al., to Lisa Jackson, Administrator, Environmental Protection Agency (Aug. 10, 2009); *see also* WHAT DO PARENTS NEED TO KNOW TO PROTECT THEIR CHILDREN?, CTR. FOR DISEASE CONTROL AND PREVENTION, [https://www.cdc.gov/nceh/lead/acclpp/blood\\_lead\\_levels.htm](https://www.cdc.gov/nceh/lead/acclpp/blood_lead_levels.htm) (last updated May 17, 2017) (“Until 2012, children were identified as having a blood lead ‘level of concern’ if the test result is 10 or more micrograms per deciliter of lead in blood. CDC is no longer using the term ‘level of concern’ and is instead using the reference value to identify children who have been exposed to lead and who require case management.”).

157. Letter from National Center for Healthy Housing et. al., *supra* note 156.

158. *Id.*

159. *Id.*

160. *Id.*

161. Petition for Writ of Mandamus, *supra* note 16, at 9.

162. *Id.* at 14.

On August 10, 2009, therefore, several nonprofit organizations began a campaign to update those standards by petitioning EPA to begin a rulemaking pursuant to its authority under the TSCA to lower both the dust-lead hazard standards to 10  $\mu\text{g}/\text{ft}^2$  for floors and 100  $\mu\text{g}/\text{ft}^2$  for window sills, and the standard for lead-based paint to 0.06 percent lead by weight.<sup>163</sup> Two months after the petition was filed, EPA sent the petitioners a letter merely stating that it was “grant[ing] [their] request.”<sup>164</sup> EPA then created a Science Advisory Lead Review Panel to advise the agency, in conjunction with public input, on setting lead-based paint standards.<sup>165</sup> The panel ultimately determined that technology could feasibly detect lower levels of lead dust.<sup>166</sup> So EPA began coordinating with the Department of Housing and Urban Development (HUD) to survey target housing.<sup>167</sup> But EPA’s actions ceased in October 2015.<sup>168</sup> On August 24, 2016—seven years after the administrative petition was filed—Earthjustice filed a mandamus petition on behalf of a coalition of organizations, including four of the aforementioned petitioners.<sup>169</sup> Earthjustice asserted that EPA had a duty to update its standards under both the TSCA and the APA, and that EPA’s rulemaking delay was unreasonable.<sup>170</sup>

The Earthjustice-led coalition devoted an entire section of its brief to EPA’s delay prejudicing “already overburdened environmental justice communities.”<sup>171</sup> Earthjustice argued that EPA’s delay was especially unreasonable given the delay’s implications for EJ communities, communities where children are particularly vulnerable to lead exposure given the magnitude of other burdens these children face living amid large racial and socioeconomic inequalities. EPA’s failure to improve its lead standards “perpetuates stark societal inequities” since childhood lead poisoning “exacerbate[s] the inequalities of opportunity already experienced by low-income communities and communities of color.”<sup>172</sup> As Earthjustice noted, Congress was also aware of

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163. Letter from National Center for Healthy Housing et. al., *supra* note 156.

164. *In re A Community Voice*, 878 F.3d at 783.

165. *Id.*

166. *Id.*

167. *Id.* at 784.

168. *Id.*

169. Petition for Writ of Mandamus, *supra* note 16.

170. *See id.* at 3. To demonstrate an unreasonable delay, the Ninth Circuit uses the D.C. Circuit’s six factor framework set forth in *Telecommunications Research and Action Center v. F.C.C. (TRAC)*, 750 F.2d 70, 80 (D.C. Cir. 1984). *In re A Community Voice*, 878 F.3d at 786 (citing *TRAC*, 750 F.2d at 80 (“(1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.”)).

171. Petition for Writ of Mandamus, *supra* note 16, at 35.

172. *Id.* at 35–36.

this disproportionate impact on disadvantaged communities when it passed the Residential Lead-Based Paint Hazard Reduction Act.<sup>173</sup> Protecting those communities, therefore, was part of EPA's mandate.

Outside of court, Earthjustice continued to highlight the EJ implications of this delay. In a 2016 blog post titled “Why Lead Standards Matter,” Hannah Chang—lead counsel for the *In re A Community Voice* plaintiffs—pointed to EPA's strategic plan and argued that EPA knew exactly what its delay allowed to happen.<sup>174</sup> Indeed, EPA's 2020 strategic plan noted that lead is especially toxic to young children and that “[l]ead from paint, including lead-contaminated dust, is one of the most common causes of lead poisoning.”<sup>175</sup> As Chang wrote, “[I]t's not right or just for the EPA to do this when it knows full well that ‘lead exposure remains one of the top childhood environmental health problems that impacts minority and/or low-[in]come populations.’”<sup>176</sup>

In December 2017, the Ninth Circuit somewhat agreed. The court found that EPA had a duty under both the TSCA and the APA to engage in a rulemaking, and that it had unreasonably delayed doing so.<sup>177</sup> The court noted that “failing to find a duty would [have] create[d] a perverse incentive for the EPA.”<sup>178</sup> To do so would allow EPA to “grant” petitions and delay rulemaking indefinitely, therefore avoiding judicial review and leaving petitioners without any recourse.<sup>179</sup> Moreover, a view that EPA had no duty would “leave[] the agency unaccountable and our children unsafe.”<sup>180</sup> The “length of delay, absence of a reasonable timetable, and harm to health” were additional factors warranting granting mandamus.<sup>181</sup> In so doing, the court required EPA to set forth a proposed rule within ninety days and to promulgate the final rule within a year.<sup>182</sup>

Since then, EPA issued a proposed rulemaking on July 2, 2018—seventeen years after its last update, and nine years after it was petitioned to engage in a rulemaking.<sup>183</sup> The agency stated that after evaluating its standards, it proposed lowering the dust-lead hazard standard “from 40 mg/ft<sup>2</sup> and 250 mg/ft<sup>2</sup> to 10

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173. *Id.* n. 16 (“When Congress passed the Residential Lead-Based Paint Hazard Reduction Act, it recognized that ‘low-level lead poisoning is widespread among American children, afflicting as many as [three million] children under age [six], with minority and low-income communities disproportionately affected.’ P.L. 102-550 § 1002.”).

174. Chang, *supra* note 14.

175. EJ 2020 ACTION AGENDA: EPA'S ENVIRONMENTAL JUSTICE STRATEGY, EPA, 47–48 (2016), [https://www.epa.gov/sites/production/files/2016-05/documents/052216\\_ej\\_2020\\_strategic\\_plan\\_final\\_0.pdf](https://www.epa.gov/sites/production/files/2016-05/documents/052216_ej_2020_strategic_plan_final_0.pdf).

176. *Id.*

177. *In re A Community Voice*, 878 F.3d at 788.

178. *Id.* at 785.

179. *Id.* at 786.

180. *Id.*

181. *Id.* at 786–87.

182. *Id.* at 788.

183. Review of the Dust-Lead Hazard Standards and the Definition of Lead-Based Paint, 83 Fed. Reg. 30889, 30889 (July 2, 2018).

mg/ft<sup>2</sup> and 100 mg/ft<sup>2</sup> on floors and windowsills, respectively.”<sup>184</sup> But EPA “propos[ed] no changes to the current definition of [lead-based paint] due to insufficient information to support such a change.”<sup>185</sup> When reviewing the proposed rule in the context of Executive Order 12898, EPA concluded that the proposed rule “does not have disproportionately high and adverse human health or environmental effects on minority populations, low-income populations[,] and/or indigenous peoples.”<sup>186</sup>

It is important to recognize that the *In Re A Community Voice* campaign is not illustrative of comprehensive EJ work. Rather, Earthjustice employed traditional environmental lawyering to solve an environmental health problem. Environmental health work often includes an element of environmental justice, because EJ communities disproportionately face environmental health issues. Here, blood-lead-level disparities are certainly an EJ issue that deprives communities of distributive, procedural, and recognitional justice. The key distinction between environmental health and environmental justice here is the absence in the room: a community voice. Rather than working from the ground up, Earthjustice is making change from the top down.

This environmental health campaign will likely have a positive impact with regard to distributive justice for EJ communities. Earthjustice identified blood-lead-level disparities as an issue that disproportionately burdens “low-income urban children, and predominantly African-American children.”<sup>187</sup> It identified that EPA’s outdated standards contributed to this disproportionate burden by preventing “effective risk assessment, hazard abatement, and disclosure.”<sup>188</sup> Thus, Earthjustice challenged those standards and continued to do so by submitting a comment that flagged numerous flaws in EPA’s proposed rule.<sup>189</sup> Should EPA make the necessary changes, these updated standards will help alleviate blood-lead-level disparities. Should EPA fail to do so, Earthjustice will have another legal battle to fight to achieve distributive justice. Further, distributive justice will not be actualized in EJ communities unless actions are taken on the ground to ensure enforcement of the updated standards.

Even if distributive justice is actualized, the *In re A Community Voice* campaign does not advance recognitional justice. Recognitional justice requires acknowledging the communities who face blood-lead-level disparities. Despite Earthjustice’s effort to frame the dialogue around environmental justice in its brief, the Ninth Circuit’s opinion never once mentions race, class, income, or environmental justice. Nor does EPA’s proposed rulemaking acknowledge the

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184. *Id.*

185. *Id.*

186. *Id.* at 30901.

187. Petition for Writ of Mandamus, *supra* note 16, at 35.

188. *Id.* at 36.

189. See Comments on Review of the Dust-Lead Hazard Standards and the Definition of Lead-Based Paint, Proposed Rule (July 2, 2018), EPA-HQ-OPPT-2018-0166.



existence of a disparate impact on EJ communities.<sup>190</sup> This is in part because there is no legal hook for environmental justice, and therefore there was no need for the Ninth Circuit to address environmental justice. But even Earthjustice's submitted comment did not push back on EPA's assurance that its action would not impact EJ communities.<sup>191</sup> And there, Executive Order 12898's mandate provided a clear hook.

Nor does this campaign substantially advance procedural justice. Rather than working with communities, Earthjustice represented a coalition of organizations from across the nation.<sup>192</sup> This is likely because the standards apply nationally and affect EJ communities nationally. And while many of the organizations that Earthjustice represented do work with EJ communities—particularly those who are disproportionately exposed to lead—Earthjustice was not responding to the communities' strategy goals or ensuring that, after the course of litigation, the communities knew their rights. Here, Earthjustice's role was focused around this single instance of litigation that will impact all communities across the country. In this regard, Earthjustice's role was that of a traditional environmental lawyer.<sup>193</sup>

Nevertheless, this environmental health campaign has significant potential for aiding the EJ movement in the fight against lead. Granted, Earthjustice is traditionally an environmental law firm and is therefore best situated to aid the movement through traditional environmental lawyering. But to achieve environmental justice, this campaign will need to be supplemented with recognition and procedural justice work from the ground up. The root issue producing blood-lead-level disparities is the failure of the government to recognize the communities who are burdened by these issues and respond with adequate enforcement.<sup>194</sup> Assuming the rules are adequately updated, communities will need EJ lawyers on the ground that will engage in community routes to ensure that enforcement happens. This includes ensuring that homeowners are hiring adequately certified personnel to conduct lead inspection, assessment, and abatement. Moreover, the updated rules may not improve the lives of poor communities living in single-family homes in isolated areas unless someone invests the money for abatement there. For communities facing blood-lead-level disparities, this moment is only the beginning of a path toward environmental justice.

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190. See Review of the Dust-Lead Hazard Standards and the Definition of Lead-Based Paint, *supra* note 22, at 30901.

191. See Comments on Review of the Dust-Lead Hazard Standards and the Definition of Lead-Based Paint, *supra* note 189.

192. Telephone Interview with Hannah Chang, Staff Attorney, Earthjustice (Sep. 14, 2018).

193. *Id.*

194. *Id.* Hannah Chang stated that the coalition's organizations had expressed that the root issue was the lack of enforcement.

V. IMPLICATIONS OF A FRAGMENTED UNDERSTANDING OF ENVIRONMENTAL JUSTICE

While comprehensive EJ work has traditionally been done at the grassroots level, larger environmental and social justice organizations<sup>195</sup> in both the private and public sectors, like Earthjustice, have begun to include environmental justice in their dockets. There are several reasons why these larger organizations have made good faith attempts to engage in the movement. The first and most obvious reason for mainstream environmental organizations to include EJ work hails back to 1990, when the SWOP letter called upon mainstream environmental organizations to diversify their membership and agenda.<sup>196</sup> The letter “demanded that the environmental groups take steps within the next 60 days to assure that 30 to 40 percent of their staffs are members of minority groups.”<sup>197</sup> Spokespeople from some of the organizations, including the Sierra Club and Natural Resources Defense Council (NRDC), “agreed that they had a poor record of hiring and promoting minority employees.”<sup>198</sup>

In response to the SWOP letter, NRDC’s founder and president met with environmental justice leaders and attended the First National People of Color Leadership Summit.<sup>199</sup> NRDC then “made a long-term commitment to both diversity and environmental justice,” incorporating environmental justice in its mission statement and hiring staffers to work with environmental justice communities.<sup>200</sup> Nationally, the Environmental Defense Fund (EDF) has sponsored environmental justice mini-grant projects.<sup>201</sup> The Sierra Club responded by founding its Environmental Justice Program, which is included in the organization’s timeline of pivotal Diversity, Equity, and Inclusion Initiatives.<sup>202</sup> Both the Sierra Club and Earthjustice have hired vice presidents of diversity and inclusion.<sup>203</sup> Although the environmental movement remains homogenous, these organizations have made considerable strides since the

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195. See “Environmental Justice,” NAACP LDF, <https://www.naacpldf.org/our-impact/economic-justice/environmental-justice/> (last visited Mar. 16, 2019).

196. Letter from SouthWest Organizing Project, *supra* note 45.

197. See Shabecoff, *supra* note 45. As of the date of the *New York Times* article, February 1, 1990, the organizations had not responded to the letter.

198. *Id.*

199. Marty Durlin, *Group of 10 Respond*, HIGH COUNTRY NEWS (Feb. 1, 2010), <https://www.ejnet.org/ej/swopresponse.pdf>.

200. *Id.*

201. *Id.* However, while EDF found the SWOP letter to be important, it also pushed back on the call to stop operations in communities of color. “Nowhere do we ‘speak for’ communities,” EDF’s president said. Rather, “[w]e partner with them and bring our expertise to goals established—and pursued—by those communities.”

202. *Id.*; see also *Our Journey So Far*, SIERRA CLUB, <https://www.sierraclub.org/dei/our-journey-so-far> (last visited Mar. 16, 2019).

203. *Earthjustice Announces New Vice President of Diversity & Inclusion*, EARTHJUSTICE (Sept. 28, 2015), <https://earthjustice.org/news/press/2015/earthjustice-announces-new-vice-president-of-diversity-inclusion>.

1990s. Still, none of these EJ initiatives addresses all three components of comprehensive EJ work.

Another reason nonprofits wish to engage in EJ work is recruitment. After the 2016 election, law school admissions saw a substantial increase in applications.<sup>204</sup> In searching for internships and summer jobs during law school, students may scan dockets for mention of EJ work—particularly amongst organizations that are prestigious amongst public interest students, such as Earthjustice, NRDC, NAACP LDF, and ACLU.<sup>205</sup> But the result of organizations marketing themselves as engaging in environmental justice means that smaller, grassroots organizations that carry less prestige, but that engage in truly comprehensive EJ work, may appeal less to lesser informed law students.

Claiming to engage in EJ work can be an advantage in fundraising. Because of Earthjustice's role in Standing Rock<sup>206</sup> and NRDC's role in the Flint Water Crisis,<sup>207</sup> a curious philanthropist will likely encounter these organizations in a cursory search for organizations doing important EJ work. While it is important to fund mainstream organizations, those organizations less often work directly with communities of color that face environmental injustice. Between 2007 and 2009, "only 15 percent of environmental grant dollars were classified as benefitting marginalized communities, and only 11 percent were classified as advancing 'social justice' strategies, a proxy for policy advocacy and community organizing that works toward structural change on behalf of those who are the least well off politically, economically[,] and socially."<sup>208</sup> As is the case in *In re A Community Voice*, mainstream organizations typically engage in social justice or environmental lawyering that will have positive impacts on EJ communities. But by funding those organizations with the expectation that environmental justice will be most effectively achieved, philanthropists and donors are diverting funding from the organizations that engage in comprehensive EJ work.

#### CONCLUSION<sup>209</sup>

Amplifying the community's voice is vital to actualizing environmental justice, and efficient and effective solutions are needed from the ground up. The revolution that sparked the EJ movement began with direct actions, and the

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204. Stephanie Francis Ward, *The 'Trump bump' for law school applicants is real and significant, survey says*, ABA JOURNAL (Feb. 22, 2018), [http://www.abajournal.com/news/article/the\\_trump\\_bump\\_for\\_law\\_school\\_applicants\\_is\\_real\\_and\\_significant\\_survey\\_says](http://www.abajournal.com/news/article/the_trump_bump_for_law_school_applicants_is_real_and_significant_survey_says). In a survey of five hundred pre-law students, nearly a third said they were applying to law school in response to Trump's election. *Id.*

205. This is an observation from personal experience.

206. *The Standing Rock Sioux Tribe's Litigation on the Dakota Access Pipeline*, EARTHJUSTICE, <https://earthjustice.org/features/faq-standing-rock-litigation> (last updated Nov. 1, 2018).

207. *Flint Water Crisis*, NRDC, <https://www.nrdc.org/flint> (last visited Mar. 16, 2019).

208. SARAH HANSEN, CULTIVATING THE GRASSROOTS: A WINNING APPROACH FOR ENVIRONMENT AND CLIMATE FUNDERS 1 (2012).

209. I do not consider or propose changes that the federal government should make due to political feasibility.

movement has continued to make some of its biggest strides when efforts have been focused on the ground. This is largely because EJ communities are experts on environmental injustices. These communities face the disproportionate burdens of environmental hazards, endure being excluded from the decision-making processes that produce these injustices, and experience the realities of policy solutions that fail to recognize their differences from other societal groups. Delegates at the First National People of Color Environmental Leadership Summit recognized this, codifying seventeen principles that collectively seek distributive, procedural, and recognition justice for EJ communities.

As the government, nonprofits, lawyers, and philanthropists began to actively work toward environmental justice, a fragmented understanding of “environmental justice” arose. In their good faith efforts to empower EJ communities, outside actors have most often addressed the need to work toward distributive justice while missing the mark on recognition justice. This presents the need for developing a common understanding of “comprehensive EJ work,” identifying organizations that engage in that work, and assessing how other actors can empower and supplement that work through good practices.

Organizations that redirect their resources through partnerships with EJ organizations can help empower communities. For example, the *In re A Community Voice* campaign demonstrates a partnership between a mainstream environmental organization and several smaller organizations. While Earthjustice is making change from the top down, the smaller organizations work closer to communities from the ground up. If larger environmental organizations do not have the resources or ability to connect directly with communities, it is important that they choose clients who *are* working from the ground up. Moreover, Earthjustice routinely names these smaller organizations in brief captions. In sharing news about the case, Earthjustice also frames its role as “partnering with community groups to fight for just and protective EPA standards for lead in the dust and paint in our homes.”<sup>210</sup> At the same time, the organization plays an important role by being a big-name nonprofit. Uninformed readers who have heard of Earthjustice may be more likely to engage with Earthjustice’s literature than a smaller grassroots organization’s blog.

Because legal remedies are often insufficient for solving an inherently political problem, larger organizations have an ethical duty to create post-litigation strategies for communities if they chose to engage in this work. Not every organization is well-suited to engage in comprehensive EJ lawyering. Many are comprised of accomplished environmental and social justice lawyers who are successful in obtaining consent decrees or settlements that are great lawyer wins. But when those lawyers leave, the status quo is left undisrupted and violators return to violating because they can. By focusing organizational resources on empowering communities with long-term, post-litigation strategies, larger organizations can play powerful roles in achieving procedural justice and

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210. Chang, *supra* note 14.

recognitional justice. For example, attorneys at NRDC's Santa Monica office have held workshops to educate communities about CEQA in Spanish.<sup>211</sup> This is important because CEQA is routinely used by EJ communities in California, and California EJ communities are often Spanish-speaking. By teaching communities about the statute in their native language, NRDC is achieving recognitional justice, and by extension, increasing the likelihood that procedural justice will also be achieved.

Philanthropists can take four steps to redirect monetary resources in support of the EJ movement.<sup>212</sup> First, donors should be specific in identifying their intended beneficiaries and set aside a significant percent of grant dollars to explicitly benefit communities of the future.<sup>213</sup> Universal gifts fail to achieve recognitional justice as they “fail[] to acknowledge that different people and communities are differently situated in relationship to environmental injustice.”<sup>214</sup> Second, donors should invest a set percentage of grant dollars in grassroots advocacy, organizing, and civic engagement.<sup>215</sup> Organizations such as the Asian Pacific Environmental Network and Communities for a Better Environment “are educating and activating people of color in much larger numbers, not only winning key campaigns in the present, but also making possible bigger, proactive wins in the future.”<sup>216</sup>

The last two recommendations are more systemic. Donors should focus on building supportive infrastructure.<sup>217</sup> Grassroots groups are often valuable for having “roots in and knowledge of local communities, representation of and influence within demographic communities that are becoming the majority[,] and [the] desire to stay with issues from legislation to implementation and enforcement.”<sup>218</sup> In addition to directly donating to grassroots groups, donors can support those groups by supporting partner organizations that direct their technical expertise toward grassroots groups.<sup>219</sup> Last, donors should “take the long view,” and “prepare for tipping points.”<sup>220</sup> In the context of environmental justice, this means that grassroots organizations will need time to dismantle the systems that produce environmental injustices. Donors should be mindful that results will often be distant, and they will need to support organizations for the long term in order to achieve environmental justice.

Lastly, larger nonprofits should be conscious of not displacing community routes to achieving environmental justice. This may require coordination with

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211. This is an observation from personal experience.

212. See HANSEN, *supra* note 208, at 3. This report made four recommendations for philanthropy, which I further endorse.

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.* at 23.

217. *Id.* at 34.

218. HANSEN, *supra* note 208, at 34.

219. *Id.*

220. *Id.* at 36.

grassroots organizations or community groups when simultaneously tackling an issue.<sup>221</sup> Larger nonprofits may also consider diverting resources to support grassroots organizations. A specific example is EDF's Diversity and Justice Grants, which "are given to EDF projects focused on incorporating diversity into [their] program and department's mission and goals."<sup>222</sup> The grants are intended to foster partnerships with other organizations and EJ communities.

At its core, environmental justice is about overcoming systemic oppression. People of color created the EJ movement because the environmental movement did not seem to have a place for them. To best support EJ communities, outside actors should heed two pieces of advice. First, without respecting the differences between EJ communities and other communities, outside actors will not effectively support comprehensive EJ work. Because larger organizations may absorb the limelight and resources, organizations should be mindful of the role they assume in the EJ movement so as to not further oppress EJ communities. As Atticus Finch tells his daughter in *To Kill a Mockingbird*: "You never really understand a person until you consider things from his point of view . . . until you climb into his skin and walk around in it." The second piece of advice is a reminder that outside actors are in powerful positions to assist communities in their fight to realize environmental justice. Or as Dr. Seuss puts it: "Unless someone like you cares a whole awful lot, [n]othing is going to get better. It's not."

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221. Earthjustice does this in its *In re A Community Voice* campaign. Although Earthjustice does not work directly with the communities, each of the petitioner organizations does coordinate with community groups across the nation. Thus, Earthjustice achieves this coordination by "channeling" of sorts, which leaves other organizations to tackle the recognitional and procedural components.

222. *Diversity, equity and inclusion at EDF*, EDF, <https://www.edf.org/diversity> (last visited Mar. 16, 2019).

**We welcome responses to this Note. If you are interested in submitting a response for our online journal, Ecology Law Currents, please contact [cse.elq@law.berkeley.edu](mailto:cse.elq@law.berkeley.edu). Responses to articles may be viewed at our website, <http://www.ecologylawquarterly.org>.**