

Evaluating COVID-19 In Prisons As An Environmental Justice Issue

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INTRODUCTION

The coronavirus (COVID-19) pandemic has underscored the racial, social, and economic disparities that have long plagued every part of American society—including the health of our environment. The pandemic has reinforced the need to address environmental injustice in minority and low-income communities, who bear a disproportionate share of our nation’s air and water pollution. These communities face negative health outcomes from poor environmental quality, making them more vulnerable to viruses such as COVID-19. Consequently, America’s most polluted communities are the same communities that have been hit the hardest by COVID-19.¹

Given the disproportionate impact of COVID-19 on minority communities across the country, government officials have focused their efforts on an equitable COVID-19 response. These efforts, however, have ignored marginalized individuals who are incarcerated.² The disparate impact of COVID-19 on marginalized communities is worse within prison walls. The rate

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1. See J. Mijin Cha et al., *Coronavirus and Climate Hit Communities of Color Hardest*, DATA FOR PROGRESS (Apr. 23, 2020), <https://www.dataforprogress.org/blog/4/23/coronavirus-climate-communities-of-color>.

2. See *Prisoners forgotten in COVID-19 pandemic, as crisis grows in detention facilities*, AMNESTY INT’L (Mar. 18, 2021), <https://www.amnesty.org/en/latest/news/2021/03/prisoners-forgotten-in-covid-19-pandemic-as-crisis-grows-in-detention-facilities/>.

of COVID-19 cases in prisons has been high—nearly three times greater than the general population.³ Minority and low-income individuals constitute a significant portion of America’s prison population because they are more likely to be incarcerated by this nation’s criminal justice system.⁴ The correctional facilities where they are housed were not built to handle a pandemic, with large groups of people in close proximity.⁵ Compounding on this problem, prisons are often built near contaminated land in rural communities and are surrounded by poor air and water quality.⁶

Environmental justice focuses on procedural, distributive, corrective, and social justice in minority and low-income communities. With its interdisciplinary approach, the environmental justice framework may provide a meaningful tool to effectively respond to the impact of COVID-19 in prisons. This Article outlines the relationship between environmental justice, incarceration, and public health in the context of the COVID-19 pandemic. Part I provides an overview of environmental justice in the United States (U.S.). Parts II and III broadly⁷ address how incarceration and COVID-19 each intersect with environmental justice. Part IV argues that COVID-19 in prisons should be evaluated as an environmental justice issue. Finally, Part V suggests that government officials should include incarcerated individuals who are disproportionality impacted by COVID-19 in environmental justice reforms.

I. WHAT IS ENVIRONMENTAL INJUSTICE?

To assess the intersection of the environment, incarceration, and the COVID-19 crisis, it is important to understand what environmental justice means in the United States. The Environmental Protection Agency (EPA) defines “environmental justice” as the “fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations, and policies.”⁸ Although people of color defined the principles of

3. See Dashiell Young-Saver, *Examining the Math and Ethics of Covid-19 in Prisons*, N.Y. TIMES (May 4, 2021), <https://www.nytimes.com/2021/05/04/learning/examining-the-math-and-ethics-of-covid-19-in-prisons.html>.

4. See John Gramlich, *The Gap Between the Number of Blacks and Whites in Prison is Shrinking*, PEW RSCH. CTR. (Apr. 30, 2019), <https://www.pewresearch.org/fact-tank/2019/04/30/shrinking-gap-between-number-of-blacks-and-whites-in-prison/>.

5. See Young-Saver, *supra* note 3.

6. See DAVID NAGUIB PELLOW, *WHAT IS CRITICAL ENVIRONMENTAL JUSTICE?* 84-85 (2018).

7. This Article is intended to provide a broad overview of environment justice, mass incarceration, and public health for readers that may be unfamiliar with the intersection of these issues. Existing scholarship has explored the link between environmental justice and incarceration in-depth. See, e.g., David Pellow, *Struggles for Environmental Justice in US Prisons and Jails*, ANTIPODE at 56 (2019); Andrea C. Armstrong, *Death Row Conditions Through an Environmental Justice Lens*, 70 ARK. L. REV. 203 (2017); Thompson, Ki’Amber, *Prisons, Policing, and Pollution: Toward an Abolitionist Framework within Environmental Justice* (2018) (B.A. Thesis, Pomona College).

8. *Learn about Environmental Justice*, U.S. ENVTL. PROT. AGENCY, [https://www.epa.gov/environmentaljustice/learn-about-environmental-justice#:~:text=Environmental%20justice%20\(EJ\)%20is%20the,environmental%20laws%2C%20regulations%20and%20policies](https://www.epa.gov/environmentaljustice/learn-about-environmental-justice#:~:text=Environmental%20justice%20(EJ)%20is%20the,environmental%20laws%2C%20regulations%20and%20policies) (last updated Sept. 24, 2020).

environmental justice in 1991,⁹ environmental justice was not recognized by the U.S. government until 1994, when President Clinton adopted Executive Order No. 12898.¹⁰ The order directed federal agencies to identify and address the disproportionately high adverse human health and environmental effects of their actions on minority and low-income communities.¹¹ But by the time the order was issued, it was already clear that America's most polluted environments were communities where people of color and low-income individuals "live, work, and play."¹²

A. *Burdens on Minority and Low-Income Communities*

Low-income communities of color across the nation deal with higher rates of exposure to air pollution, hazardous waste, lead poisoning, and water contamination than their white, non-Hispanic counterparts.¹³ A prominent report entitled "Toxic Waste and Race at Twenty" concluded that the majority of communities residing within 1.86 miles of toxic waste facilities that contribute to air pollution consist of people of color.¹⁴ Race also proved to be the most significant variable in association with the location of commercial waste facilities.¹⁵ This problem persists today—"the closer you are to a Superfund site [a contaminated area requiring clean up] the more likely you will find African American families."¹⁶

The cumulative impact of pollution from multiple sources, such as air and water, has resulted in devastating health disparities for minorities. Air pollution alone contributes to respiratory and cardiovascular diseases, reduced birth weight, cancer, and premature death.¹⁷ Black Americans for example, face 23.9 asthma deaths per 1 million people compared to 7.4 deaths per one million people

9. In 1991, delegates to the multinational People of Color Environmental Leadership Summit in Washington, D.C. adopted "Principles of Environmental Justice" that have defined the environmental justice movement. These principles affirm the "sacredness of Mother Earth," the "fundamental right to political, economic, cultural and environmental self-determination of all peoples," demand public policy that is based on "mutual respect and justice for all peoples," and mandate the "right to ethical, balanced and responsible uses of land." People of Color Environmental Leadership Summit, *The Principles of Environmental Justice (EJ)*, (Washington, D.C., 1991).

10. Exec. Order No. 12898, 32 C.F.R. 651.17 (1994).

11. Robert Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. L. REP. 10, 681 (2000).

12. See Brian Palmer, *The History of Environmental Justice in Five Minutes*, NRDC (May 28, 2016), <https://www.nrdc.org/stories/history-environmental-justice-five-minutes>.

13. See Jasmine Bell, *5 Things to Know About Communities of Color and Environmental Justice*, AM. PROGRESS (Apr. 25, 2016), <https://www.americanprogress.org/issues/race/news/2016/04/25/136361/5-things-to-know-about-communities-of-color-and-environmental-justice/>.

14. See Robert D. Bullard et al., *Toxic Wastes and Race at Twenty*, UNITED CHURCH OF CHRIST 51 (1987), <https://www.ucc.org/wp-content/uploads/2021/03/toxic-wastes-and-race-at-twenty-1987-2007.pdf>.

15. *Id.* at 102.

16. David E. Kramar et al., *A Spatially Informed Analysis of Environmental Justice: Analyzing the Effects of Gerrymandering and the Proximity of Minority Populations to U.S. Superfund*, 11 ENVIRONMENTAL JUSTICE 36 (2018), <https://www.liebertpub.com/doi/10.1089/env.2017.0031>.

17. Iris T. Stewart et al., *The Uneven Distribution of Environmental Burdens And Benefits In Silicon Valley's Backyard*, 55 APPLIED GEOGRAPHY 266, 266 (2014).

for white Americans.¹⁸ These disparities may be exacerbated by climate change because minority and low-income communities take longer to bounce back from natural disasters because they have less access to information and resources.¹⁹ According to a team of over 300 experts from both the government and private sectors, climate change will make minority communities more vulnerable to heart and lung disease, heat stroke, and bacterial infections.²⁰

B. Historical Context

Toxic facilities are disproportionately located in or near minority and low-income communities across the United States because of inequitable government policies. Redlining, a discriminatory lending practice that can be traced back to the Great Depression over eighty years ago, color-coded and “classified neighborhoods...based on the perceived security of investments.”²¹ Communities of color were “marked by the color red to indicate they were risky for investment based on racial biases.”²² Redlined communities were denied loans and other forms of investment,²³ resulting in “poor infrastructure that increase[d] vulnerability to environmental hazards.”²⁴ Subsequently, redlined communities have been filled with industrial plants and urban highways that contribute to negative health outcomes.²⁵ Today, individuals from historically redlined neighborhoods are “more than twice as likely as their peers to visit emergency rooms for asthma.”²⁶

State siting practices have also contributed to environmental injustices by exploiting the lack of political power in impoverished communities.²⁷ California has a history of overburdening communities of color with toxic facilities, despite being one of the first states in the nation to codify environmental justice in statute.²⁸ In 1984, the California Waste Management Board commissioned the

18. See Sari Harrar, *Sharp Disparities in Asthma Rates and Care in BIPOC Communities*, EVERYDAY HEALTH (Dec. 27, 2020), <https://www.everydayhealth.com/asthma/disparities-in-asthma-incidence-management-and-care-among-bipoc-communities/>.

19. See Carmin Chappell, *Climate Change Will Hurt Poor People the Most*, CNBC (Nov. 28, 2016), <https://www.cnbc.com/2018/11/26/climate-change-will-hurt-poor-people-the-most-federal-report.html>.

20. *Id.*

21. Kara Manake, *Historically Redlined Communities Face Higher Asthma Rates*, BERKELEY NEWS (May 22, 2019), <https://news.berkeley.edu/2019/05/22/historically-redlined-communities-face-higher-asthma-rates/>.

22. Danielle Vermeer, *Redlining and Environmental Racism*, UNIV. OF MICH.: SCH. FOR ENV'T & SUSTAINABILITY (August 16, 2021), <https://seas.umich.edu/news/redlining-and-environmental-racism>.

23. *Id.*; Manake, *supra* note 21.

24. Vermeer, *supra* note 22.

25. See Daniel Cusick, *Past Racist “Redlining” Practices Increase Climate Burden on Minority Neighborhoods*, E&E NEWS (JAN. 21, 2020), <https://www.scientificamerican.com/article/past-racist-redlining-practices-increased-climate-burden-on-minority-neighborhoods/>.

26. Manake, *supra* note 21.

27. See Shea Diaz, *Getting to the Root of Environmental Injustice*, HARV. ENVTL. L. REV. (Feb. 6, 2016), <https://harvardelr.com/2016/02/01/elrs-getting-to-the-root-of-environmental-injustice/>.

28. See *What is Environmental Justice?*, CalEPA, at <https://calepa.ca.gov/envjustice/> (last accessed Feb. 27, 2022); *Brief History of the Movement in the United States*, CalRecycle, at <https://calrecycle.ca.gov/envjustice/history/> (last accessed Apr. 16, 2022).

“Cerrell Report,” a document produced by a consulting firm with the purpose of advising the Board on where to site trash incinerators.²⁹ The report notably concluded that “all socioeconomic groupings tend to resent the nearby siting of major facilities, but the...upper-socioeconomic strata possess better resources to effectuate their opposition” so those neighborhoods “should not fall at least within one-mile... of the proposed site.”³⁰ Instead, the groups least likely to resist siting of facilities were identified as communities that are low-income, rural, and open to the promise of economic benefits.³¹ The report also listed Catholics as a group least likely to resist.³² Two-thirds of Catholics in California are Hispanic.³³ The state eventually renounced the report, but it continues to illustrate the government’s historical involvement in perpetuating environmental injustice by preying upon minority communities and treating them as “expendable.”³⁴

C. *The Traditional Environmental Justice Framework*

The environmental justice movement has historically focused on achieving procedural, distributive, corrective, and social justice to address the systematic problems causing environmental harm in marginalized communities.³⁵ Procedural justice focuses on the “meaningful involvement of all people” because the communities with the highest exposure rates to environmental hazards are often left out of government decisionmaking processes.³⁶ Distributive justice demands fair environmental treatment of all populations, regardless of their economic or political strength.³⁷ It requires reducing or eliminating environmental burdens, such as air pollution or hazardous waste, in disadvantaged communities without redistributing those burdens to other communities.³⁸ It also demands equity in the distribution of environmental benefits—such as parks and open green spaces—that are typically enjoyed by white and wealthy communities.³⁹ In contrast, corrective justice is backwards-looking and involves “fairness in the way punishments for lawbreaking are assigned and damages inflicted on individuals and communities are

29. See Diaz, *supra* note 27; See *Political Difficulties Facing Waste-to-Energy Conversion Plant Siting*, CERRELL ASSOCIATES (1984), <http://www.ejnet.org/ej/cerrell.pdf>.

30. See Cerrell Associates, *supra* note 29 at 26.

31. *Id.* at 50.

32. *Id.* at 52.

33. See Michael Lipka, *A Closer Look at Catholic America*, PEW RSCH. CTR. (Sep. 14, 2015), [https://www.pewresearch.org/fact-tank/2015/09/14/a-closer-look-at-catholic-america/#:~:text=In%20the%20two%20most%20populous,Texas%20\(72%25\)%20are%20Hispanic.](https://www.pewresearch.org/fact-tank/2015/09/14/a-closer-look-at-catholic-america/#:~:text=In%20the%20two%20most%20populous,Texas%20(72%25)%20are%20Hispanic.)

34. See Pellow, *supra* note 6 at 26.

35. Kuehn, *supra* note 11 at 681.

36. U.S. EPA, *supra* note 8.

37. Kuehn, *supra* note 11 at 682.

38. *Id.*

39. California’s Santa Clara County illuminates this problem. Although it is very diverse, socially vulnerable populations in the area are predominantly Hispanic and “more likely to be exposed to environmental hazards.” See Stewart, *supra* note 17. Meanwhile, white and wealthy populations in the county are more likely to have access to environmental benefits. *Id.*

addressed.”⁴⁰ Finally, social justice focuses on the social structures that lead to inequities. Social justice is therefore, a “far-reaching” goal of the environmental justice movement that encompasses larger problems of race, ethnicity, culture, political, and economic power.⁴¹

The interdisciplinary, intersectional approach of the environmental justice movement, particularly its focus on race and class, distinguishes it from the traditional environmental movement that has historically consisted of primarily white organizations.⁴² The movement has been described metaphorically as “a river, fed over time by many tributaries” including the civil rights movement, the labor movement, and indigenous struggles.⁴³ For example, Martin Luther King, Jr. led the Memphis Sanitation Strike in 1968, the first time Black Americans mobilized at a national level to oppose environmental injustices.⁴⁴ Around the same time, Cesar Chavez led Latinx farm workers in the fight for labor rights, including concerns about harmful pesticides used in California’s Central Valley.⁴⁵ These early leaders recognized a systemic problem that persists today—state-sanctioned violence against disadvantaged communities in the form of environmental hazards.

II. PRISONS AND ENVIRONMENTAL JUSTICE

Incarceration is not usually assessed as an environmental problem, but there are legitimate environmental justice concerns surrounding prisons because of the land on which they are built, the communities in which they are located, and the people they hold. Prisons are likely to be sited on the least desirable and contaminated lands, producing “internal threats to the bodies of prisoners and corrections officers who work and live on site.”⁴⁶ At least 589 federal and state prisons are located within three miles of a Superfund site and more than 100 of those are within just one mile.⁴⁷ California has chosen to build its prisons in areas where individuals are most likely to contract “valley fever,”⁴⁸ which is an illness

40. Kuehn, *supra* note 11 at 693.

41. *Id.* at 698.

42. See Ki’Amber, *supra* note 7 at 10.

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

See Renee Skelton & Vernon Miller, *The Environmental Justice Movement*, NRDC (Mar. 17, 2016), <https://www.nrdc.org/stories/environmental-justice-movement>.

44. See *Environmental Justice Timeline*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/environmentaljustice/environmental-justice-timeline#:~:text=The%20environmental%20justice%20movement%20was,families%2C%20their%20communities%20and%20themselves> (last updated June 2, 2017).

45. *Brief History of the Movement in the United States*, CalRecycle, at <https://calrecycle.ca.gov/envjustice/history/> (last accessed Apr. 16, 2022).

46. Pellow, *supra* note 6 at 91.

47. *Investigation Reveals Environmental Dangers in America’s Toxic Prisons*, EQUAL JUSTICE INITIATIVE (June 6, 2017), <https://ej.org/news/investigation-reveals-environmental-dangers-in-toxic-prisons/#:~:text=Prisons%20are%20also%20a%20source,detention%20centers%20across%20the%20nation>; Candice Bernd et al., *America’s Toxic Prisons: The Environmental Injustices of Mass Incarceration*, TRUTHOUT (Jun. 1, 2017), available at <https://truthout.org/articles/america-s-toxic-prisons-the-environmental-injustices-of-mass-incarceration/>.

48. See Equal Justice Initiative, *supra* note 47; see also Bernd et al., *supra* note 47.

caused by a fungus that lives in the soil of the Central Valley.⁴⁹ Incarcerated individuals contract valley fever at eight times the rate of the average person in California,⁵⁰ and individuals of African and Filipino descent generally have a higher risk of becoming seriously ill or dying from the fever.⁵¹ The environmental and health risks that incarcerated individuals face can be differentiated from the environmental injustices that take place in most marginalized communities outside of prison because incarcerated individuals are held captive to contamination. They cannot leave to protect themselves from environmental harm, and when they become ill, it is difficult to acquire effective treatment because correctional healthcare is “difficult to access” and is of “low-quality.”⁵²

Prison siting is, in part, a procedural justice issue because incarcerated individuals do not get a say on where they are imprisoned or what environmental hazards they are exposed to. Decisions about where prisons are built are left to federal and state governments. Statutes such as the National Environmental Policy Act (NEPA) and the California Environmental Quality Act (CEQA) require agencies to analyze the environmental impacts of their actions on low-income and minority populations.⁵³ These traditional safeguards are often used to challenge the siting of hazardous facilities because they provide communities the opportunity to comment on environmental assessments for projects that may impact them.⁵⁴ Accordingly, NEPA and CEQA have served as important tools for local communities to voice their environmental justice concerns.⁵⁵ However, incarcerated individuals do not have the opportunity to voice their concerns about the siting of prison facilities because they are housed in those facilities well after environmental assessments are conducted. And agencies are unlikely to consider future prison populations in their environmental analyses, even though they “still comprise the same... individuals targeted” by the law.⁵⁶

Prisons also lead to an inequitable distribution of environmental hazards because they are often built in low-income, rural communities.⁵⁷ Prison

49. Barbara Feder Ostrov & Harriet Blair Rowan, *Valley Fever Cases Climb In California's Central Valley—And Beyond*, KHN (Dec. 17, 2019), <https://khn.org/news/valley-fever-cases-climb-in-californias-central-valley-and-beyond/>.

50. Ki'Amber, *supra* note 7 at 68.

51. Donald Specter et al., *Valley Fever and CDCR Housing*, PRISON L. OFFICE (April 2019), <https://prisonlaw.com/wp-content/uploads/2019/04/Valley-Fever-info-April-2019.pdf>.

52. *Public Health*, PRISON POLICY INITIATIVE, <https://www.prisonpolicy.org/health.html#:~:text=People%20in%20prisons%20and%20jails,quality%20and%20difficult%20to%20access.>

53. Nathalie Prescott, *Prisoner (In)consideration in Environmental Justice Analyses*, GEO. ENVTL. L. REV. ONLINE (May 31, 2016).

54. *Id.*

55. *Id.*

56. *Id.*; see also Bernd et al., *supra* note 47 (“Most of the [Environmental] Impact Statement for a prison will be devoted to issues of the local economy and environment external to the prison, such as traffic, commerce, employment, burden on the local healthcare system, or the local utilities system, as well as impact on any wildlife and natural resources. In practice, the physical health and general well-being of prisoners are not taken into consideration through this process.”).

57. Pellow, *supra* note 6 at 91; Tracy Huling, *Building a Prison Economy in Rural America*, The News Press (2002), <https://www.prisonpolicy.org/scans/building.html>.

structures, which “function like a small city packed into one building,”⁵⁸ can serve as a source of environmental harm to those on the outside. In 2004, California’s Men’s Colony state prison was fined \$600,000 for spilling 220,000 gallons of raw sewage into a creek.⁵⁹ Despite the fine, the toxic spills continued until 2017.⁶⁰ In the early 2000s, activists opposed the Delano II prison in California’s San Joaquin Valley over anticipated impacts on water systems and increased traffic congestion that would mean additional air pollution for surrounding neighborhoods.⁶¹ The increase in traffic after a prison is built can be partially attributed to prison staff that travel a distance nearly double the average commuter range.⁶² This is because the majority of public prison jobs do not go to people already living in the community.⁶³ Instead, higher-paying jobs in public prisons require levels of education that many rural residents do not have, and as a result, the jobs go to veteran correctional personnel from other, non-local prisons.⁶⁴ Consequently, “prisons rarely bring significant economic improvements to rural communities where they are pitched as salvation.”⁶⁵

Finally, the environmental harm caused by prisons raises social justice concerns because incarceration disproportionately affects low-income and minority populations. The U.S. prison system is the largest of any on Earth⁶⁶ and “looks substantially different from the demographics of the country as a whole”⁶⁷ due to discriminatory policies, such as the war on drugs.⁶⁸ The rate of incarceration for Black Americans is six times that of whites, while the rate of incarceration for Latinx is twice that of whites.⁶⁹ Prison and jail populations would decline by almost 40 percent if Black Americans and Hispanics were incarcerated at the same rates as whites.⁷⁰ Therefore, the marginalized

58. Linda Poon, *How Mass Incarceration Takes a Toll on the Environment*, BLOOMBERG CITYLAB (July 30, 2015), <https://www.bloomberg.com/news/articles/2015-07-30/how-mass-incarceration-takes-a-toll-on-the-environment-nearby-communities-and-prisoners>.

59. Equal Justice Initiative, *supra* note 47.

60. *Id.*

61. David Pellow, et al., *Exposing Deliberate Indifference: The Struggle for Social and Environmental Justice in America’s Prisons, Jails, and Concentration Camps*, UCSB’S PRISON ENVIRONMENTAL JUSTICE PROJECT 12, https://gejp.es.ucsb.edu/sites/secure.lsit.ucsb.edu/envs.d7_gejp-2/files/sitefiles/publication/Exposing%20deliberate%20indifference%20.pdf.

62. Huling, *supra* note 57.

63. *Id.*

64. *Id.*

65. Tom Meagher & Christie Thompson, *So You Think a New Prison Will Save Your Town?*, MARSHALL PROJECT (Jun. 14, 2016), <https://www.themarshallproject.org/2016/06/14/so-you-think-a-new-prison-will-save-your-town>.

66. Pellow, *supra* note 6 at 67.

67. Gramlich, *supra* note 4.

68. *See* Bernd, *supra* note 47.

69. *See* Gramlich, *supra* note 4; Pellow, *supra* note 6 at 80.

70. These statistics do not account for individuals locked up in juvenile facilities or immigration detention centers. *See Criminal Justice Fact Sheet*, NAACP, <https://www.naacp.org/criminal-justice-fact-sheet/>.

communities that are over-policed and over-incarcerated⁷¹ are the same communities that carry the burden of pollution.⁷²

III. COVID-19 AND ENVIRONMENTAL JUSTICE

The COVID-19 pandemic is aggravating existing environmental and health disparities, disproportionately impacting racial, ethnic, and underserved communities.⁷³ The nation's first reported deaths from COVID-19 came in February 2020,⁷⁴ when Black, Latinx, and Native American populations were overrepresented in both the rate of infections and deaths.⁷⁵ By November of 2020, Black and Latinx Americans represented more than 50 percent of hospitalizations despite only making up 13 and 18 percent of the nation's population respectively.⁷⁶ Nationwide, cumulative mortality rates calculated through March 2021 showed that Indigenous, Latinx, and Black Americans were 3.3, 2.4, and 2 times more likely to have died from COVID-19 than White Americans respectively.⁷⁷ As of February 2022, these groups are still overrepresented in the number of infections, hospitalizations, and deaths than their white counterparts.⁷⁸

To explain why racial and ethnic groups are disproportionately impacted by the pandemic, the Center for Disease Control and Prevention (CDC) outlined five social determinants of health: (1) neighborhood and physical environment (affordable housing, clean environment); (2) health and healthcare; (3) occupation and job conditions (essential vs. non-essential workers); (4) income and wealth; and (5) education.⁷⁹ The CDC acknowledged that “discrimination, which includes racism and associated chronic stress, influences each of these key topic areas.”⁸⁰ The social determinants of health outlined by the CDC align with

71. *Id.*

72. Bell, *supra* note 13.

73. See Don Bambino Geno Tai et al., *The Disproportionate Impact of COVID-19 on Racial and Ethnic Minorities in the United States*, 14 CLINICAL INFECTIOUS DISEASE 4, <https://academic.oup.com/cid/article/72/4/703/5860249>.

74. See Lisa A. Cooper & Deidra C. Crews, *COVID-19, Racism, and the Pursuit of Health Care and Research Worthy of Trust*, J. OF CLINICAL INVESTIGATION (July 30, 2020), <https://www.jci.org/articles/view/141562>.

75. See Yvette Cabrera, *Coronavirus is Not Just a Health Crisis—It's an Environmental Justice Crisis*, GRIST (Apr. 24, 2020), <https://grist.org/justice/coronavirus-is-not-just-a-health-crisis-its-an-environmental-justice-crisis/>.

76. See Abdullah Shihpar, *Declare Racism a Public Health Emergency*, N.Y. TIMES (Mar. 7, 2021), <https://www.nytimes.com/2021/03/07/opinion/racism-public-health-emergency.html>.

77. APM Research Lab Staff, *The Color of Coronavirus: COVID-19 Deaths By Race And Ethnicity In The U.S.*, APM RESEARCH LAB (Mar. 5, 2021), <https://www.apmresearchlab.org/covid/deaths-by-race-03-05-21>.

78. *Risk for COVID-19 Infection, Hospitalization, and Death By Race/Ethnicity*, CDC (Feb. 1, 2022), <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html>.

79. See *COVID-19 Racial and Ethnic Health Disparities*, CDC (Dec. 10, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/health-equity/racial-ethnic-disparities/index.html>.

80. *Id.*

environmental justice concerns—structural inequities that burden minority and low-income communities.

The link between COVID-19 and environment justice was explicit from the start of the pandemic because the communities hit the hardest by COVID-19 were the same communities also overburdened by pollution, poverty, and illness.⁸¹ Environmental advocates urged government leaders to analyze the pandemic not just as a health crisis, but also as an environmental justice crisis in order to address the longstanding inequities that the pandemic underscored.⁸² The Biden Administration recognized distributional concerns in its initial COVID-19 response.⁸³ In January 2021, Biden issued Executive Order 13995, *Ensuring an Equitable Pandemic Response and Recovery*.⁸⁴ The order established a COVID-19 Health Equity Task Force to gather data and identify disparities in rates of exposure, illness, hospitalization, and death.⁸⁵ The Administration also focused on distributing vaccines in an equitable manner across the nation.⁸⁶ In March 2021, the “[A]dministration announced an effort to invest \$250 million to encourage COVID-19 safety and vaccination among underserved populations.”⁸⁷

In addition to its COVID-19 response, the Biden Administration also promised to create stronger protections for the environment in light of racial tensions within the country and growing concerns over climate change.⁸⁸ Consistent with this commitment, Biden nominated Michael Regan to head the EPA.⁸⁹ He is the first Black man to hold the position and has vowed to place environmental justice at the center of the agency’s decisionmaking.⁹⁰ In January

81. See Cha, *supra* note 1.

82. *Id.*

83. See Marianne Lavelle, *Environmental Justice Plays a Key Role in Biden’s Covid-19 Stimulus Package*, INSIDE CLIMATE NEWS (Mar. 14, 2021), <https://insideclimatenews.org/news/14032021/environmental-justice-plays-a-key-role-in-bidens-covid-19-stimulus-package/>; Francesca Chambers & Michael Wilner, *Biden Tries to Balance Racial Equity, Speed in Rolling Out COVID-19 Vaccinations*, BRADENTON HERALD (Mar. 19, 2021), <https://www.bradenton.com/news/coronavirus/article250060089.html>.

84. Exec. Order No. 13995, 86 F.R. 7193 (2021).

85. *Id.*; see also Sheryl Gay Stolberg, *As Biden Pushes for Racial Equity in Vaccination, Data Is Lagging*, N.Y. TIMES (Mar. 3, 2021), <https://www.nytimes.com/2021/02/09/us/politics/biden-vaccination-race-data.html>.

86. See Chambers, *supra* note 82.

87. *Biden Administration to Invest \$250 Million in Effort to Encourage COVID-19 Safety and Vaccination Among Underserved Populations*, HHS (Mar. 8, 2021), <https://www.hhs.gov/about/news/2021/03/08/biden-administration-to-invest-250-million-in-effort-to-encourage-covid-19-safety-and-vaccination.html>; States also prioritized allocating vaccine doses to disproportionately affected areas and conducted outreach to increase COVID-19 awareness. See Nambi Ndugga et al., *How are States Addressing Racial Equity in COVID-19 Vaccine Efforts?*, KFF (Mar. 10, 2021), <https://www.kff.org/racial-equity-and-health-policy/issue-brief/how-are-states-addressing-racial-equity-in-covid-19-vaccine-efforts/>.

88. See David Konisky, *Biden Has Pledged to Advance Environmental Justice—Here’s How the EPA Can Start*, CONVERSATION, <https://theconversation.com/biden-has-pledged-to-advance-environmental-justice-heres-how-the-epa-can-start-152512>.

89. *Id.*

90. See Jennifer A Dlouhy & Stephen Lee, *New EPA Chief Michael Regan Vows Assault on Environmental Injustice*, BLOOMBERG GREEN (Mar. 16, 2021),

2021, Biden also signed Executive Order 14008, which includes a section on securing “environmental justice and equitable economic opportunity.”⁹¹ The new Order organized the White House Environmental Justice Advisory Council and the White House Environmental Justice Interagency Council, which are responsible for ensuring an all-of-government approach to addressing environmental injustice.⁹² The Order also created a National Climate Task Force that “will engage with all sectors of the economy...to...increase climate resiliency.”⁹³ Finally, the White House Council on Environmental Quality has been working on a Climate and Economic Justice Screening Tool to “help federal agencies ensure that the benefits of the nation’s climate, clean energy, and environmental programs are finally reaching the communities that have been left out and left behind for far too long.”⁹⁴

Although the government response to COVID-19 in marginalized communities and environmental justice is a step in the right direction, it does not account for incarcerated individuals. But if incarceration and COVID-19 in marginalized communities are each interconnected with environmental injustice, then COVID-19 *in* prisons should also be evaluated as an environmental justice issue.

IV. COVID-19 IN PRISONS IS AN ENVIRONMENTAL JUSTICE ISSUE

The U.S. prison system has been especially vulnerable to the COVID-19 pandemic because of overcrowding, poor ventilation, substandard healthcare, and insufficient testing.⁹⁵ In December 2020, it was reported that “one in every five state and federal prisoners in the [U.S.] tested positive for the coronavirus, a rate more than four times as high as the general population.”⁹⁶ The mortality rate for COVID-19 among incarcerated individuals was also 45 percent greater than the overall rate nationwide.⁹⁷ To combat the structural issues exacerbating COVID-19 in facilities, prisons limited visitation rights and placed incarcerated individuals testing positive for COVID-19 in solitary confinement—making the

<https://www.bloomberg.com/news/articles/2021-03-16/new-epa-chief-regan-vows-assault-on-environmental-injustice>.

91. Exec. Order No. 14008, 86 F.R. 7619 (2021).

92. See Renee Cho, *A Guide to the Biden Administration’s All-of-Government Approach to Environmental Justice*, COLUM. CLIMATE SCH. (Mar. 4, 2021), <https://news.climate.columbia.edu/2021/03/04/biden-administration-environmental-justice/>.

93. *Id.*

94. Ella Nilsen, *Biden Administration Prioritizes Environmental Justice Funding Without Mentioning Race, Hoping to Fend Off Legal Challenge*, CNN (Feb. 18, 2022), <https://www.cnn.com/2022/02/18/politics/justice40-environmental-benefits-race-biden-climate/index.html>.

95. See Beth Schwartzapfel & Katie Park, *1 in 5 Prisoners in the U.S. Has Had COVID-19*, MARSHALL PROJECT (Dec. 18, 2020), <https://www.themarshallproject.org/2020/12/18/1-in-5-prisoners-in-the-u-s-has-had-covid-19>.

96. *Id.*

97. Infection and mortality rates may be even higher, because nearly every prison system has significantly fewer people in prison today than when the pandemic began, so rates represent a conservative estimate based on the largest known population. *Id.*

situation even more inhumane for the people inside.⁹⁸ The steps taken in state and federal facilities fell short as “people in prison [were] roughly three times more likely to die of Covid-19 than the general population.”⁹⁹ Since the start of the pandemic, “prisons and ICE detention centers across the U.S. have reported at least 597,698 total cumulative cases among incarcerated people” and “3,081 total cumulative deaths among incarcerated people.”¹⁰⁰ These numbers will continue to increase, as nearly three quarters of prisons are experiencing outbreaks in light of the recent and contagious Omicron variant.¹⁰¹ For comparison, there have only been 1,543 death penalty executions since 1976.¹⁰² The number of incarcerated individuals that have died from COVID-19 is thus nearly double the amount of death penalty executions.

The impact of COVID-19 in prisons goes beyond the people incarcerated to prison staff and nearby communities. Although testing information on prison staff is limited, there were 114,237 cases of COVID-19 reported among prison staff through June 2021, including 209 deaths.¹⁰³ Correctional officers, nurses, wardens and other workers “have the potential to carry [COVID-19] both into facilities and back out to their communities.”¹⁰⁴ In the first year of the pandemic alone, the mismanagement of the COVID-19 risk in correctional settings resulted in 500,000 community infections.¹⁰⁵

In addition to the structural issues underlying COVID-19 rates in prisons, the racial and ethnic disparities in our nation’s prison population “compound the disproportionate toll the pandemic has taken on communities of color.”¹⁰⁶ The same people that are at a higher risk of contracting COVID-19 outside of prisons—because of the environment they grew up in or the pre-existing

98. See Daniel Moritz-Rabson, *‘A living hell’: Inside US prisons during the COVID-19 pandemic*, ALJAZEERA, <https://www.aljazeera.com/features/2021/2/26/a-living-hell-inside-us-prisons-during-the-covid-19-pandemic>.

99. Nicholas Florko, *Despite Biden’s Big Promises and a Far Better Understanding Of The Virus, Covid-19 Is Still Raging Through The Nation’s Prisons*, STAT NEWS (Feb. 2, 2022), <https://www.statnews.com/2022/02/02/biden-promises-covid19-prisons/#:~:text=Nearly%203%2C000%20incarcerated%20people%20have,the%20prison%20population%20skews%20younger>.

100. *COVID Behind Bars Data Project*, UCLA LAW (2021), <https://uclacovidbehindbars.org/>.

101. Emily Widra, *State Prisons and Local Jails Appear Indifferent To COVID Outbreaks, Refuse To Depopulate Dangerous Facilities*, PRISON POLICY INITIATIVE (Feb. 10, 2022), https://www.prisonpolicy.org/blog/2022/02/10/february2022_population/.

102. *Facts about the Death Penalty*, DEATH PENALTY INFORMATION CENTER (Feb. 22, 2022), <https://documents.deathpenaltyinfo.org/pdf/FactSheet.pdf>.

103. See *A State-by-State Look at Coronavirus in Prisons*, MARSHALL PROJECT (May 7, 2021), <https://www.themarshallproject.org/2020/05/01/a-state-by-state-look-at-coronavirus-in-prisons>.

104. *Id.*

105. Gregory Hooks & Wendy Sawyer, *Mass Incarceration, COVID-19, and Community Spread*, PRISON POLICY INITIATIVE (Dec. 2020), <https://www.prisonpolicy.org/reports/covidspread.html>.; See also Chandra Bozelko, *Prisons are long-term care facilities. So why don’t inmates get priority for Covid-19 vaccination?*, STAT NEWS (Mar. 17, 2021), <https://www.statnews.com/2021/03/17/prisons-long-term-care-why-dont-inmates-priority-covid-vaccine/>; Bill Chappell, *Crowded U.S. Jails Drove Millions of COVID-19 Cases, A New Study Says*, NPR (Sept. 2, 2021), <https://www.npr.org/2021/09/02/1033326204/crowded-jails-drove-millions-of-covid-19-cases-a-new-study-says> (“The spread of the coronavirus between jails and communities ‘likely accounts for a substantial proportion of the racial disparities we have seen in COVID-19 cases across the U.S.’”).

106. See Schwartzapfel, *supra* note 94.

conditions they are susceptible to—are the same communities that are at a higher risk inside of prisons. This risk/susceptibility may be even further compounded because, as discussed earlier, prison facilities themselves expose people to environmental hazards. Despite the significant risk COVID-19 poses to incarcerated individuals however, government officials have been slow to address the crisis in prisons.

Early measures taken by federal and state officials in response to the spread of COVID-19 in prisons were largely unsuccessful. From the start of the pandemic, prisons were unprepared to deal with the virus due to poor healthcare and a lack of resources, such as protective gear.¹⁰⁷ In fact, many states put incarcerated individuals to work during the pandemic to manufacture coronavirus supplies at a wage that is on average between fourteen and sixty-three cents an hour.¹⁰⁸ As it became clear that the prison system was not equipped to handle a pandemic, several states attempted to reduce prison populations, but reductions have been moderate. For example, California reduced its state prison population by 22 percent in the first year of the pandemic but in January 2021, the state's prisons were still at 103 percent capacity.¹⁰⁹ Moreover, the reduction of prison populations is more attributable to a reduction in prison admission than releases by state officials.¹¹⁰ Finally, vaccine distribution offered one of the best preventative and short-term solutions to the COVID-19 crisis in prisons¹¹¹ but was mismanaged. In contrast to other confined, congregate living facilities such as nursing homes, prisons were not prioritized for vaccine distributions despite the underlying health conditions and inadequate access to health care that people in prison experience.¹¹² Over a year into the pandemic, it appeared that incarcerated individuals in over nineteen states were receiving vaccines only after every free and willing person in the community received it.¹¹³

In early 2021, much of the discussion around COVID-19 vaccinations was focused on the limited supply and how government officials should decide whom

107. Amnesty International, *supra* note 2.

108. *States Are Putting Prisoners to Work Manufacturing Coronavirus Supplies*, CONVERSATION (Apr. 21, 2020), <https://www.usnews.com/news/best-states/articles/2020-04-21/states-are-putting-prisoners-to-work-manufacturing-coronavirus-supplies>.

109. Emily Widra, *How Much Have COVID-19 Releases Changed Prison And Jail Populations?*, PRISON POLICY INITIATIVE (Feb. 3, 2021), <https://www.prisonpolicy.org/blog/2021/02/03/january-population-update/>.

110. *Id.*

111. Wendy Netter Epstein, *A Healthy Sentence: Why Vaccinating Prisoners Should Be a Priority*, US NEWS (Feb. 19, 2021), <https://www.usnews.com/news/health-news/articles/2021-02-19/vaccinating-prisoners-against-covid-19-should-be-a-priority>.

112. See Emily A. Wang et al., *The Case for Prioritizing COVID-19 Vaccines in Prisons and Jails*, APPEAL (Feb. 22, 2021), <https://theappeal.org/the-lab/report/covid-19-vaccines-in-prisons-and-jails/>.

113. See Bozelko, *supra* note [104]; see also Florke, *supra* note [98] (69.4% of the federal prison population is now fully vaccinated); Emily Widra, *Since You Asked: What Information Is Available About COVID-19 And Vaccinations In Prison Now?*, PRISON POLICY INITIATIVE (Dec. 16, 2021), https://www.prisonpolicy.org/blog/2021/12/16/covid_data/ (“[Current] data on COVID-19 vaccinations and booster doses — our strongest protection in the face of COVID-19 — are scarce and incomplete across the nation’s prison systems.”).

to prioritize. Incarcerated individuals, often viewed as undeserving, were not ranked high on any list. The CDC's Advisory Committee on Immunization Practice included correction officers as groups that should be prioritized in the early phases of vaccine distribution, but was silent on prioritization for incarcerated individuals.¹¹⁴ Moreover, the Federal Bureau of Prisons (BOP) guidance recommended vaccinating incarcerated individuals only after all prison employees were offered vaccinations.¹¹⁵ But "by any reasonable standard, incarcerated people should [have] rank[ed] high on every...priority list" since the rate of infection and death were higher than the general population.¹¹⁶ Even when California began vaccinating incarcerated individuals, it did not include people in the twenty-five hardest hit prisons, such as San Quentin and Avenal State Prison that were overwhelmed by infections.¹¹⁷ Purely as a public health issue, vaccinating incarcerated individuals would have prevented the spread of the virus not just among the prison population, but also among the staff and nearby communities of color.

Although Congress focused its efforts on funding for an equitable COVID-19 response and environmental justice, incarcerated individuals were overlooked. In March 2021, the American Rescue Plan Act allocated \$100 million dollars to the EPA to address health disparities resulting from pollution and COVID-19.¹¹⁸ About \$50 million was directed to environmental justice grants, "more than the \$40 million that EPA has spent on environmental justice grants in the 26 years it has been administering the program."¹¹⁹ The Environmental Justice for All Act was also reintroduced to the U.S. Senate and recognizes how segregation and racist zoning has made communities of color vulnerable to pollution and climate change, resulting in health disparities.¹²⁰ The bill aims to engage these disadvantaged communities in government decisionmaking processes but does not acknowledge or encompass the environmental threats faced by minorities in prison.¹²¹

Responding differently to the disparate impact of COVID-19 on marginalized communities inside of prisons compared to those communities outside of prisons is counterintuitive. Environmental injustice occurs in minority and low-income communities that are dealt the greatest environmental burdens and health risks. Individuals from those communities are more likely to be

114. See Epstein, *supra* note 110.

115. Katie Rose Quandt, *Incarcerated People and Corrections Staff Should Be Prioritized In COVID-19 Vaccination Plans*, PRISON POLICE INITIATIVE (Dec. 8, 2020), <https://www.prisonpolicy.org/blog/2020/12/08/covid-vaccination-plans/>.

116. *Id.*

117. *California Begins Vaccinating Inmates, but Not at Its Hardest-Hit Prisons*, N.Y. TIMES (Jan. 25, 2021), <https://www.nytimes.com/live/2021/01/02/world/covid-19-coronavirus>.

118. See *Environmental Justice Funding in COVID-19 Relief Bill*, SIDLEY AUSTIN LLP (Mar. 15, 2021), <https://www.lexology.com/library/detail.aspx?g=554b51ec-dd17-4067-8e23-b554e7bf06ab>.

119. Lavelle, *supra* note 81.

120. See Yvette Cabrera, *A Groundbreaking Environmental Justice Bill Is Poised to Become Law*, GRIST (Mar. 19, 2021), <https://grist.org/equity/democrats-congress-environmental-justice-tammy-duckworth/>.

121. *Id.*

incarcerated as a result of the U.S. criminal justice system. When marginalized individuals are incarcerated, they are exposed to additional environmental hazards in prisons and their bodies are especially vulnerable to viruses like COVID-19.¹²² Thus, COVID-19 in prisons, like COVID-19 outside of prison, is an environmental justice issue and should be treated as such.

CONCLUSION

COVID-19 is still raging in prisons across the nation and the root causes of climate change increase the risk of future pandemics,¹²³ underscoring the need for an effective approach to reduce and prevent outbreaks. The efforts to address COVID-19 and environmental injustice in minority and low-income communities should apply to prisons as well. Treating incarcerated individuals differently from other communities dealing with environmental injustice and COVID-19 only perpetuates the narrative that certain groups of people are expendable. Applying the environmental justice movement's interdisciplinary approach to the COVID-19 crisis in prisons may force reform in a country that leaves incarcerated individuals vulnerable to environmental harm. It may also serve as an impetus for recognizing the right of incarcerated individuals to live in a healthy environment, even in a post-pandemic world.

122. Although prison staff are similarly exposed to environmental hazards due to their profession, they do not live within prisons and are less likely to have pre-existing health conditions that aggravate COVID-19. See Andre G. Montoya-Barthelemy, *Covid-19 and the Correctional Environment: The American Prison as a Focal Point for Public Health*, PMC (Apr. 17, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7164863/>. (“Prisoners have a high prevalence of chronic diseases and mental health illness, and prisons house an increasingly aging population, which will contribute directly to higher rates of severe viral illness and death.”).

123. See *Coronavirus, Climate Change, and the Environment*, HARV. T.H. CHAN SCH. OF PUB. HEALTH, <https://www.hsph.harvard.edu/c-change/subtopics/coronavirus-and-climate-change/#:~:text=Many%20of%20the%20root%20causes,or%20people%20and%20share%20germs.>