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## Down and Dirty: Remedies and Reparations for Intersected Environmental and Reproductive Justice

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# Down and Dirty

## REMEDIES AND REPARATIONS FOR INTERSECTED ENVIRONMENTAL AND REPRODUCTIVE JUSTICE

### INTRODUCTION

In 2016, Flint, Michigan's water crisis captured the nation's attention and prompted widespread conversations concerning environmental racism.<sup>1</sup> In the fall of 2021, claims, including a class action suit, brought by city residents culminated in a historic \$626 million award.<sup>2</sup> But today, even after this settlement, many Flint residents still mistrust city water and rely on bottled water for drinking.<sup>3</sup> The water crisis began in 2014, when Flint switched water sources from Lake Huron to the Flint River and negligently began supplying dirty water to its predominantly low-income and Black residents.<sup>4</sup> Upon notice from residents, Flint attempted to resolve the water problems with a chlorine treatment.<sup>5</sup> The chlorine, however, corroded the pipelines, which leached unsafe amounts of lead into the water, in turn causing a Legionnaires' disease outbreak.<sup>6</sup> Residents faced widespread lead poisoning that caused dire health consequences, including impaired reproductive capabilities.<sup>7</sup> Unfortunately, Flint is just a drop in the bucket; it is

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<sup>1</sup> *Toxic Exposure*, TRIAL, Dec. 2021, at 92, 94; Brady Dennis & Brittany Greeson, *Flint Has Replaced Over 10,000 Lead Pipes. Earning Back Trust Is Proving Harder.*, WASH. POST (Sept. 17, 2021), <https://www.washingtonpost.com/climate-environment/interactive/2021/flint-clean-water-crisis-photos/> [<https://perma.cc/7JBK-NU9F>].

<sup>2</sup> *In re Flint Water Cases*, No. 5:16-CV-10444, 2021 WL 5237198, at \*1 (E.D. Mich. Nov. 10, 2021), *motion to certify appeal denied*, No. 5:16-CV-10444, 2021 WL 5833416 (E.D. Mich. Dec. 8, 2021); see also *'We've Made History': Flint Water Crisis Victims to Receive \$626m Settlement*, GUARDIAN (Nov. 10, 2021, 8:00 PM), <https://www.theguardian.com/us-news/2021/nov/10/weve-made-history-flint-water-crisis-victims-to-receive-626m-settlement> [<https://perma.cc/T4AY-E2EL>].

<sup>3</sup> The crisis in Flint has even been credited in creating national mistrust in tap water. Michael Phillis, *U.S. Pushes for Better Tap Water but Must Win Over Wary Public*, ABC NEWS (Jan. 30, 2022, 12:14 PM), <https://abcnews.go.com/Politics/wireStory/us-pushes-tap-water-win-wary-public-82563921> [<https://perma.cc/4ZQE-APPT>]; Dennis & Greeson, *supra* note 1.

<sup>4</sup> *In re Flint Water Cases*, 960 F.3d 303, 310 (6th Cir. 2020); see also *'We've Made History': Flint Water Crisis Victims to Receive \$626m Settlement*, *supra* note 2.

<sup>5</sup> *In re Flint Water*, 960 F.3d at 310.

<sup>6</sup> *Id.*

<sup>7</sup> See Dennis & Greeson, *supra* note 1; Sunil Kumar, *Occupational and Environmental Exposure to Lead and Reproductive Health Impairment: An Overview*, 22

not uncommon for similarly situated communities to face reproductive consequences of pollution.<sup>8</sup>

Environmental injustices run the gamut throughout the country, from dirty air to polluted soil to contaminated water.<sup>9</sup> But the resulting harms are not evenly distributed—Black, Indigenous, People of Color (BIPOC)<sup>10</sup> communities disproportionately feel the impact.<sup>11</sup> Many of the health effects from pollution bear directly on reproductive functions: proximity to pollutants compromises fertility, interferes with the capacity to carry a pregnancy to term, can cause birth defects and disabilities, and may handicap the physical ability to breastfeed.<sup>12</sup> These harms are violations of the ability to choose parenthood or to enable one’s family to flourish and are further indicative of the “long, sordid history in which others have controlled the reproductive lives of nonwhite people.”<sup>13</sup> The pathway to correction lies at the intersection of environmental justice and reproductive justice (EJ/RJ).

Both EJ and RJ are movements with complicated histories which tended to center white narratives and goals.<sup>14</sup> Today, however, they are not only intertwined with one another, but with

INDIAN J. OCCUPATIONAL & ENV’T MED. 128, 128–37 (2018) (explaining that lead exposure can affect libido and sperm’s motility, viability, integrity, and DNA integrity, all of which contribute to reduced fertility potential and increased chances of miscarriages and preterm birth and that exposure to lead also adversely affects female reproductive health by altering menstruations, delaying conception time, varying hormonal production, as well as directly impacting pregnancy).

<sup>8</sup> See *id.*; e.g., *Beyond Flint: In the South, Another Water Crisis Has Been Unfolding for Years*, NPR (Feb. 16, 2016, 6:20 AM), <https://www.npr.org/2016/02/06/465702398/beyond-flint-in-the-south-another-water-crisis-has-been-unfolding-for-years> [https://perma.cc/HHZ8-S8QJ] (noting that a town much farther south, St. Joseph, Louisiana, experienced similar contamination); Aria Bendix, *Newark’s Lead Contamination Crisis Could Be Worse than Flint’s. Residents Say the City Is Handling It All Wrong*, BUS. INSIDER (Aug. 19, 2019, 10:02 AM), <https://www.businessinsider.com/newark-water-crisis-worse-than-flint-2019-8> [https://perma.cc/2LFF-4Z2A] (acknowledging Newark’s water crisis); Hazar Kilani, *‘Asthma Alley’: Why Minorities Bear Burden of Pollution Inequity Caused by White People*, GUARDIAN (Apr. 4, 2019, 2:00 AM), <https://www.theguardian.com/us-news/2019/apr/04/new-york-south-bronx-minorities-pollution-inequity> [https://perma.cc/WAG6-ZDJV] (discussing the environmental inequality experienced by Black and Hispanic residents in the South Bronx).

<sup>9</sup> See sources cited *supra* note 8; Khiara M. Bridges, *Beyond Torts: Reproductive Wrongs and the State Birth Rights and Wrongs: How Medicine and Technology Are Remaking Reproduction and the Law*, 121 COLUM. L. REV. 1017, 1054 (2021).

<sup>10</sup> The acronym BIPOC is imperfect, because, like other collective descriptors such as “people of color” it groups multiple identities together. The objective in using BIPOC in this note is not to diminish the uniqueness of those identities but to underscore the experiences to which nonwhite Americans are collectively subjected because of their nonwhiteness.

<sup>11</sup> See Bridges, *supra* note 9, at 1057.

<sup>12</sup> Dominique R. Shelton, *The Prevalent Exposure of Low Income and Minority Communities to Hazardous Materials: The Problem and How to Fix It*, 32 BEVERLY HILLS B. ASS’N J. 1, 3 (1997); Staci Jeanne Krupp, *Environmental Hazards: Assessing the Risk to Women*, 12 FORDHAM ENV’T L. REV. 111, 121–22 (2000).

<sup>13</sup> Bridges, *supra* note 9, at 1072.

<sup>14</sup> Annika Fuller, *Environmental Justice Is Reproductive Justice and Reproductive Justice Is Environmental Justice*, PLANNED PARENTHOOD (July 1, 2020, 9:35 PM), <https://bit.ly/389ckLA> [https://perma.cc/6TB2-UXYC].

racial justice generally.<sup>15</sup> The EJ movement, in its current inclusive form, calls for the equitable consideration, treatment, and participation of all persons in the “development, implementation and enforcement of environmental laws, regulations, and policies.”<sup>16</sup> Similarly, the RJ movement recognizes and elevates the right of every person to bodily autonomy, which inherently includes the right to both have and abstain from having children and to parent in “safe and sustainable communities.”<sup>17</sup> These frameworks have become intrinsic to racial justice, as private and public pollution impacts BIPOC communities most severely—consequently, BIPOC communities are disproportionately affected by the reproductive harms that follow.<sup>18</sup> Confronting those injustices that excessively plague BIPOC communities<sup>19</sup> requires new legislative actions to provide relief, equity, and restorative justice.

This note explores why the current legislative landscape fails BIPOC Americans and proposes federal and local remedies for the historic and ongoing harm caused by environmental pollution. Proceeding in three parts, this note addresses the systemic reproductive harms inflicted upon Black and Brown communities by public and private pollution and examines the course of correction, including clear and direct pathways to reparative and restorative solutions. Critically, this requires a federal mandate extending healthcare coverage for infertility and fertility preservation treatments as well as reparations for the communities that have suffered for generations. This note does not propose to solve pollution, but rather seeks to confront its harms in the form of acknowledgement, aid, and funds.

Part I outlines the historic and present reality of reproductive harms and their disproportionate impact on BIPOC communities, and especially on women from those communities. Part II addresses the current systemic shortcomings that fail to protect or provide pathways for relief. Part III proceeds in an examination of solutions. The central solutions proposed are federal acknowledgement of environmental harms to BIPOC communities, expanded insurance coverage to increase healthcare access, and monetary reparations to fund restorative measures. In addition to detailing these solutions’ precedents for

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Bridges, *supra* note 9, at 1034, 1055.

<sup>19</sup> Megan Mayhew Bergman, *They Chose Us Because We Were Rural and Poor: When Environmental Racism and Climate Change Collide*, GUARDIAN (Mar. 8, 2020, 6:00 AM), <https://www.theguardian.com/environment/2019/mar/08/climate-changed-racism-environment-south> [<https://perma.cc/M3VY-KW2D>].

success, the counterarguments and concerns that follow are addressed. Finally, Part IV applies these solutions and discusses the importance of moneyed solutions. Central to these solutions is restoring power to those most impacted by pollution and allowing those communities to direct and tailor solutions to best suit them. For communities that have been systematically and historically stripped of wealth, remedies must include funds to build those literal and metaphoric structures necessary for EJ/RJ.

## I. IN THE CROSSHAIRS OF ENVIRONMENTAL AND REPRODUCTIVE INJUSTICE

Polluted environments can and do confound reproductivity, complicating everything from the ability to conceive to the capacity to care for children.<sup>20</sup> Generally, in EJ cases, reproductive impacts are a mere footnote to the harms inflicted—a pollutant may correlate with a rise in breast cancer cases for a nearby community, but rarely is the consequential inability to breastfeed discussed. Such was the case in the Flint water crisis settlement, where the sixty-page appellate decision never mentioned the reproductive consequences for Flint residents.<sup>21</sup> Still, using the RJ framework<sup>22</sup> as a guide, the scope of state-inflicted reproductive coercion through pollution can be laid bare.<sup>23</sup>

### A. *Restricting Reproductive Freedom and the Harms to BIPOC Communities*

Different types of pollutants are linked to various reproductive diseases and impediments. Most common are cancers—particularly cervical and breast.<sup>24</sup> While RJ centers reproductive liberty and equality regardless of gender, it is impossible to dismiss the fact that pollution hits women and children the hardest due to various biological factors, including

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<sup>20</sup> KRISTEN ZIMMERMAN & VERA MIAO, MOVEMENT STRATEGY CTR., FERTILE GROUND: WOMEN ORGANIZING AT THE INTERSECTION OF ENVIRONMENTAL JUSTICE AND REPRODUCTIVE JUSTICE 12 (2009), <https://wearefre.org/docman/rj-toolkit-documents-1/4-fertile-ground-women-organizing-at-the-intersection-of-environmental-justice-and-reproductive-justice/file> 12 [<https://perma.cc/LQ99-RK4V>]; Bridges, *supra* note 9, at 1054.

<sup>21</sup> See *In re Flint Water Cases*, No. 5:16-cv-10444, 2021 WL 5237198, at \*1 (E.D. Mich. Nov. 10, 2021), *motion to certify appeal denied*, No. 5:16-CV-10444, 2021 WL 5833416 (E.D. Mich. Dec. 8, 2021).

<sup>22</sup> Martine Lappé et al., *Environmental Politics of Reproduction*, 48 ANN REV. ANTHROPOLOGY 133, 136 (July 12, 2019) (“RJ framework recasts definitions of choice to mean the right to conceive, bear, and raise children in positive [conditions].”).

<sup>23</sup> Bridges, *supra* note 9, at 1020.

<sup>24</sup> Krupp, *supra* note 12, at 119.

body fat percentage, hormones, and development.<sup>25</sup> Further, such impacts on reproduction are felt most deeply by low-income BIPOC communities.<sup>26</sup> Today, an estimated 70 percent of contaminated waste sites within the United States are situated near low-income housing, “most of them in low-income communities and communities of color.”<sup>27</sup> For decades, that proximity has dealt blows to those communities’ procreative and caretaking capabilities.<sup>28</sup>

### 1. Protecting BIPOC Communities’ Reproductive Rights Requires Examining the Cyclical Nature of Poverty

Environmental pollution is more likely to compromise the reproductive abilities of BIPOC communities, and the poverty that pervades many BIPOC communities means that they are most likely to be held in financial straits by a lack of reproductive freedoms.<sup>29</sup> Abortion bans that disallow terminating fetuses due to malformations create a twist to state interference with reproduction.<sup>30</sup> Whether intentionally or negligently, some states create an environment that not only complicates procreation and compromises fetal development, but also compels the birth of children who are already suffering the effects of pollution.<sup>31</sup> Unquestionably, environmental effects contribute to higher rates of disability among BIPOC children.<sup>32</sup> Considering the reality that BIPOC communities are often low-income, the financial burdens of caring for disabled children can contribute to generational financial woes. Furthermore, such state restrictions specifically harm BIPOC women who more often experience poverty than their white counterparts; low-income women are less able to travel for an abortion or to employ other methods to avoid late-term abortion regulations.<sup>33</sup>

Seemingly in conflict with some states forcing women to carry out pregnancies, many government actors want to compel *lower* birthrates for low-income, nonwhite individuals.<sup>34</sup> For instance, in the 1970s, a Los Angeles County hospital serving

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<sup>25</sup> *Id.* at 113.

<sup>26</sup> Aneesh Patnaik et al., *Racial Disparities and Climate Change*, PRINCETON STUDENT CLIMATE INITIATIVE (Aug. 15, 2021), <https://psi.princeton.edu/tips/2020/8/15/racial-disparities-and-climate-change> [<https://perma.cc/LQ99-RK4V>].

<sup>27</sup> Bergman, *supra* note 19.

<sup>28</sup> *Id.*

<sup>29</sup> Bridges, *supra* note 9, at 1061; Robert R.M. Verchick, *In a Greener Voice: Feminist Theory and Environmental Justice*, 19 HARV. WOMEN’S L.J. 23, 81 (1996).

<sup>30</sup> Bridges, *supra* note 9, at 1061.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1063–64.

mostly Medicaid-reliant BIPOC individuals coerced several low-income Latinx patients into sterilization.<sup>35</sup> Some had been informed that medical attention would be denied and they would be left to deliver alone unless they gave “consent” to the sterilization procedure[s].<sup>36</sup> Still, others discovered hysterectomies had been performed on them unknowingly in the course of their deliveries.<sup>37</sup> Such deplorable practices were seen as solutions to a rampant social issue, cultivated in part by former President Reagan’s condemnation of the “welfare queen” and only now, in 2022, are cities and towns beginning to offer reparations.<sup>38</sup> Though the theory of preventing low-income births to cure society of high crime rates, poverty, and unemployment has been accepted by some, it is wholly unfounded.<sup>39</sup>

Both racism and classism contribute to the creation of poverty “solutions” which hinge upon restricting the ability of poor women to bear children, particularly for young and unwed women.<sup>40</sup> In reality, choosing not to have children will not better low-income women’s financial circumstances.<sup>41</sup> Studies instead show that women voluntarily limit their number of planned pregnancies both when they receive sexual health education and also when there is reasonable certainty that their babies will not die in infancy.<sup>42</sup> Additionally, in improved socioeconomic and environmental circumstances, infant and maternal mortality both decrease.<sup>43</sup> By relying upon initiatives central to the RJ movement such as access to education and contraceptives, low-income BIPOC women, those most impacted by environmental injustices, stand a better chance of actively participating in the safeguarding of their reproductive health.

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<sup>35</sup> See *id.* (discussing the ensuing class action lawsuit against the hospital in California, *Madrigal v. Quilligan*, 639 F.2d 789 (9th Cir. 1981) (unpublished table decision)).

<sup>36</sup> *Id.* at 1063.

<sup>37</sup> *Id.* at 1064.

<sup>38</sup> *Id.* at 1064; see Michele Estrin Gilman, *The Return of the Welfare Queen*, 22 AM. U. J. GENDER SOC. POLICY & L. 247, 260 (2014) (canonizing, through Reagan’s campaigns and presidency, the mythic welfare queen as one seeking “to maximize government largesse for her benefit by having multiple children and refusing to work” and who is simultaneously “lazy, [and] promiscuous”); see *supra* note 254 and accompanying text.

<sup>39</sup> See Bridges, *supra* note 9, at 1063–64.

<sup>40</sup> *If You Really Care About Environmental Justice, You Should Care About Reproductive Justice!*, NAT’L WOMEN’S L. CTR., <https://nwl.org/wp-content/uploads/2015/08/FactSheetEnvironmentalJusticeandReproJustice.pdf> [<https://perma.cc/GGT5-K37W>].

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

## 2. Protecting Indigenous Communities' Reproductive Rights Requires EJ

EJ/RJ are uniquely integral to protecting Indigenous peoples'<sup>44</sup> cultures, due in large part to their traditional relationship with water and food sources, as well as a general reciprocal bond to and with their land.<sup>45</sup> Consequently, Indigenous peoples' communities feel the compounded effects of toxic exposure and colonized land to the detriment of reproductive capacity.<sup>46</sup>

For instance, in the 1990s, pregnant women living on a Washington State Reservation of the Shoalwater Tribe began suffering miscarriages.<sup>47</sup> In fact, between 1997 and 1998, of the thirteen pregnancies on the reservation, only one resulted in a live birth of a healthy baby.<sup>48</sup> The Centers for Disease Control and Prevention (CDC) posited that the issue was genetic; a result of poor diet, or the expectant mothers' ingestion of drugs and alcohol.<sup>49</sup> The Shoalwater Tribe, on the other hand, hypothesized that their exposure to pesticides was responsible.<sup>50</sup> Due in part to the complexity of fetal development and how difficult it is to monitor chemicals and pesticides, the cause of harm has still not been determined.<sup>51</sup> Because risk assessments failed to determine a single cause for these reproductive harms, litigation has been impossible, prompting a difficult choice for expectant mothers on the reservation: stay and risk losing a wanted child or leave their community.<sup>52</sup>

Such a phenomenon is not uncommon, nor is it unique to the United States. A Canadian reserve populated by the Aamjiwnaang First Nation, confined to a small area of its traditional territory by colonialist law, lives along a river that first runs through an industrial corridor that produces 40 percent of all of Canada's chemicals before passing through

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<sup>44</sup> There are many ways to refer to Indigenous peoples, who are those communities with pre-existing sovereignty to land prior settler populations. This note refers to these peoples collectively as Indigenous and specific tribe or nations individually. *Native American and Indigenous Peoples FAQ*, UCLA EQUITY, DIVERSITY & INCLUSION, <https://equity.ucla.edu/known/resources-on-native-american-and-indigenous-affairs/native-american-and-indigenous-peoples-faqs/> [<https://perma.cc/Z75X-QWMV>].

<sup>45</sup> Zimmerman & Miao, *supra* note 20, at 12.

<sup>46</sup> *Id.*

<sup>47</sup> Nancy Langston, *Toxic Inequities: Chemical Exposures and Indigenous Communities in Canada and the United States*, 50 NAT. RES. J. 393, 394 (2010).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 395.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 394–95.



the reserve.<sup>53</sup> The Aamjiwnaang Tribe has been surrounded by industry since World War II and after nearly a century of petrochemical production, the consequences are stark.<sup>54</sup> That community has seen a decrease in the birth of healthy boys so pronounced that its sex ratio (the number of males born relative to females) is the lowest documented in the world.<sup>55</sup>

For many Indigenous communities, chronic exposure to pollutants is just the latest in a string of colonial blows that threaten their cultures and reproductive futures.<sup>56</sup> US military and mining activities desecrate sacred sites, compromise traditional food sources, and impact cultural practices.<sup>57</sup> The most persistent tyranny against Indigenous peoples by the US government is strategic reproductive oppression, including the violent acts of forced sterilization and the breaking up of families.<sup>58</sup> Adding insult to injury, cases like *Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers* do not discuss the reproductive stakes or other far-reaching cultural consequences of pollution, further attempting to erase the history of harms inflicted upon Indigenous peoples.<sup>59</sup>

In 2016, the Standing Rock protests, which ran parallel with the *Standing Rock Sioux Tribe* litigation over the construction of the Dakota Access Pipeline, captured the public's attention—police injured nearly three hundred people by using water cannons in subfreezing temperatures to disperse protestors.<sup>60</sup> The protests brought together some two hundred tribes in solidarity with the Standing Rock Sioux Tribe, whose ancestral burial grounds would be destroyed and water supply poisoned by the pipeline construction.<sup>61</sup> The *Standing Rock Sioux Tribe* legal actions culminated in seemingly endless and contradictory orders back and forth to empty the pipeline of oil, demands for new environmental impact studies, and, as of May 2021, a green light for pipeline operations to restart.<sup>62</sup> Yet even in

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<sup>53</sup> Dayna Nadine Scott, *Body Polluted: Questions of Scale, Gender, and Remedy*, 44 LOY. L.A. L. REV. 121, 127 (2010).

<sup>54</sup> *Id.*; Langston, *supra* note 47, at 399–400.

<sup>55</sup> Scott, *supra* note 53, at 125–27.

<sup>56</sup> *Id.* at 127.

<sup>57</sup> Zimmerman & Miao, *supra* note 20, at 12.

<sup>58</sup> Emily R. Champlin, *Battling Colonization: Why the #NoDAPL Is a Fight for Reproductive Justice*, IF WHEN HOW (Dec. 9, 2016), <https://www.ifwhenhow.org/battling-colonization-why-the-nodapl-is-a-fight-for-reproductive-justice/> [<https://perma.cc/L7RF-63XN>].

<sup>59</sup> See *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 985 F.3d 1032, 1032–54 (D.C. Cir. 2021).

<sup>60</sup> *Stand with Standing Rock*, AM. C.L. UNION, <https://www.aclu.org/issues/free-speech/rights-protesters/stand-standing-rock> [<https://perma.cc/XY5P-4Y3G>].

<sup>61</sup> *Id.*

<sup>62</sup> See *Standing Rock Sioux Tribe*, 985 F.3d at 1033.

such high profile cases, when considering the potential impacts of a pipeline spill, the looming effects on reproduction are not discussed or even mentioned in passing in court decisions.<sup>63</sup>

While the potential or recognized reproductive harms may not be explicitly discussed when matters of environmental injustice are adjudicated, that does not mean these injustices do not exist. By approaching EJ jointly with RJ, there is an essential opportunity to connect societal, empirical, theoretical, and legal topics—an approach that marginalized communities and others with few options for housing away from pollutants desperately need.<sup>64</sup>

### B. *EJ/RJ are Predominantly Women’s Issues*

While both men and women<sup>65</sup> are at risk for environmental reproductive health problems, ranging from infertility to cancers of reproductive organs, women are impacted at a higher rate.<sup>66</sup> And women and children are more likely to endure serious health and social consequences due to pollutants and environmental exposures.<sup>67</sup> As women are often primary caretakers, children with conditions caused by air pollution, such as asthma, are often under their supervision; even when their own health is not compromised, women often directly feel the blows of environmental injustice.<sup>68</sup>

#### 1. The Risks for Women Generally

The unique nature of women’s bodies renders them physiologically more susceptible to reproductive harms caused by pollutants. For example, many women are smaller in stature than men and have higher body fat percentages.<sup>69</sup> Because most

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<sup>63</sup> *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng’rs*, 255 F. Supp. 3d 101, 140 (D.D.C. 2017) (“Standing Rock . . . is based downstream of the Oahe crossing and could be affected by an oil spill . . . . But these statements are not enough to reasonably support the conclusion that the Tribe will not be disproportionately affected by an oil spill in terms of adverse human health or environmental effects.”); *see also Standing Rock Sioux Tribe*, 985 F.3d at 1045 (acknowledging that the harm from an oil spill would be “substantial”).

<sup>64</sup> *See* Lappé et al., *supra* note 22, at 135–37.

<sup>65</sup> The following presented facts are rooted in generalizations and rely upon traditionally binary definitions of the female physiology. Impacts upon the trans and nonbinary BIPOC communities are not well-researched, reflective of this burgeoning area of law’s need to expand its research.

<sup>66</sup> *If You Really Care About Environmental Justice, You Should Care About Reproductive Justice!*, *supra* note 40.

<sup>67</sup> *See* Felicia Isaac, *Climate Change Is Hurting Expectant Black Mothers*, NAT. RES. & ENV’T, Winter 2021, at 57, 58.

<sup>68</sup> *Id.*

<sup>69</sup> Krupp, *supra* note 12, at 113.

pollutants can accumulate within fatty tissue, the ratio between height and fat percentages means that women store more pollutants within their bodies.<sup>70</sup> Pregnant women, who typically gain weight during pregnancy and tend to consume more food and water, are even more susceptible to toxin accumulation than their nonpregnant counterparts.<sup>71</sup> And during post-pregnancy weight loss, stored toxins that accumulated during pregnancy are released.<sup>72</sup>

Further, female hormones, ranging from menstrual hormones to pregnancy hormones, contribute to the unique consequences environmental pollution has on women's health.<sup>73</sup> Vacillations in progesterone levels throughout the menstrual cycle may make women uniquely vulnerable to ozone exposure.<sup>74</sup> Likewise, hormonal changes throughout pregnancy and menopause have a correlation with sensitivity to environmental threats.<sup>75</sup> The reproductive impacts can ultimately include ovarian failure, abnormally formed reproductive organs, early or delayed first menstrual periods, infertility, compromised fertility (requiring assistance getting pregnant), recurrent miscarriages, birth defects, low birth weights, damage to fetal reproductive organs, premature menopause, and uterine fibroids.<sup>76</sup>

The risks for pregnant women are further compounded, as pollutants affect fetuses and newborns as well.<sup>77</sup> Despite a historical misconception that umbilical cord blood protected fetuses from environmental pollutants, that cord passes the same pollutants to the baby from the mother.<sup>78</sup> According to a study led by the Environmental Working Group (EWG), researchers found more than two hundred industrial chemicals and pollutants within the cord blood from ten babies born in 2004 in US hospitals.<sup>79</sup> Of those chemicals detected, 180 are known to cause cancer and nearly all can cause abnormal

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<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Diet culture and the accompanying cyclical weight gain and loss pose the same problem. *See id.* at 114.

<sup>73</sup> *Id.* at 114–15.

<sup>74</sup> *Id.* (citing Susan D. Fox et al., *Enhanced Response to Ozone Exposure During the Follicular Phase of the Menstrual Cycle*, 101 ENV'T HEALTH PERSPS. 242, 242–44 (1993)).

<sup>75</sup> *Id.*

<sup>76</sup> *Chemicals and Reproductive Health*, ALASKA CMTY. ACTION ON TOXICS, [https://www.akaction.org/tackling\\_toxics/body/reproductive\\_health/](https://www.akaction.org/tackling_toxics/body/reproductive_health/) [<https://perma.cc/M2FK-RH8B>].

<sup>77</sup> *See Isaac, supra* note 67, at 57–58.

<sup>78</sup> Jane Houlihan et al., *Body Burden: The Pollution in Newborns*, ENV'T WORKING GRP. (July 14, 2005), <https://www.ewg.org/research/body-burden-pollution-newborns> [<https://perma.cc/S2C9-B5SC>].

<sup>79</sup> *Id.*

development and birth defects in animal tests.<sup>80</sup> The EWG did not provide the race, place of residence, or occupation of the women whose cords were tested; instead, the study presents the troubling facts as unbiased risk to pregnancy due to general environmental pollution.<sup>81</sup>

## 2. The Unique Risks Posed to BIPOC Women and Children

While women generally are more susceptible to environmental impacts, the risk is compounded further for BIPOC women, who are more likely to encounter toxins than their white counterparts.<sup>82</sup> BIPOC women are more likely than other Americans to be low-wage workers, where they are “disproportionately exposed to . . . hazardous chemicals [in the workplace], including agricultural pesticides, home cleaning products, industrial cleaning products, and chemicals used in hair and nail salons.”<sup>83</sup> In fact, certain illnesses, notably cancers, are more common in people employed as domestic workers.<sup>84</sup> Though underresearched, a study that investigated the chemical hazards linked with domestic work has identified the unique threat that toxic and carcinogenic exposures pose in that work.<sup>85</sup> Evidently, such exposures disproportionately impact the women who make up more than 90 percent of US workers in the cleaning industry.<sup>86</sup>

Although women are certainly more impacted by pollutants and toxins, men also suffer reproductive effects from environmental pollutants. Those harms, however, are critically linked to women. Among boys and sexually mature men, key trends of impacted reproductive health include undescended testes, malformed reproductive organs, malformed sperm, compromised sperm quality, and testicular dysgenesis syndrome (TDS).<sup>87</sup> TDS, a cluster of effects including “undescended testes or malformed reproductive organs, testicular cancer, and decreased sperm quality,” is particularly of note because it has a single hypothesized origin—namely, toxic chemical exposure

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<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*; Angie McCarthy, *On Fertile Ground: The Environmental and Reproductive Justice Movements as a Unified Force for Reforming Toxic Chemical Regulation*, 13 SUSTAINABLE DEV. L. & POL'Y 20, 20 (2013).

<sup>83</sup> McCarthy, *supra* note 82, at 20 (quoting *If You Really Care About Environmental Justice, You Should Care About Reproductive Justice!*, LAW STUDENTS FOR REPROD. JUST. 1 (2012)).

<sup>84</sup> Krupp, *supra* note 12, at 116–17.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 117.

<sup>87</sup> *Chemicals and Reproductive Health*, *supra* note 76.

in utero.<sup>88</sup> Thus, even when the reproductive effects are felt by boys, it can often be traced back to the mother's exposure.<sup>89</sup>

### C. *The Generational Calamity of Cancer*

Living environments can impose both stressors and toxins that impact health, disproportionately so for BIPOC communities, resulting in elevated cancer rates.<sup>90</sup> The prevalence of cancer within our society has contributed greatly to reproductive troubles.<sup>91</sup> As a result, oncofertility, the interdisciplinary field bridging oncology and reproductive medicine, has become increasingly commonplace and necessary.<sup>92</sup> As oncology advancements raise survival rates for cancer patients, many go on to lead full lives postdiagnosis.<sup>93</sup> However, cancer survivors (even infants) often struggle with infertility after life-saving treatment.<sup>94</sup> And unfortunately, access to and the ability to afford groundbreaking and future-oriented treatments can depend on race.<sup>95</sup>

Various obstacles stand in the way of patients receiving fertility preservation treatments.<sup>96</sup> Because many candidates for such treatments also suffer from cancer, those oncology prognoses determine whether fertility preservation is even a viable option.<sup>97</sup> However, Black patients' illnesses are often detected later compared to other demographics, meaning their prognosis is often worse or more urgent.<sup>98</sup> Age, cost barriers, and geographical availability of treatment in the patient's area all contribute to limitations on prognoses that are anything but race neutral.<sup>99</sup>

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<sup>88</sup> *Id.*

<sup>89</sup> *See id.*

<sup>90</sup> *See* Abdur Rahman Amin, *Redefining Healthcare to Address Racial Health Disparities & Inequities*, 43 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 1, 14–15 (2021).

<sup>91</sup> *See* Seema Mohapatra, *Fertility Preservation for Medical Reasons and Reproductive Justice*, 30 HARV. J. RACIAL & ETHNIC JUST. 193, 194–201 (2014).

<sup>92</sup> *Id.* at 195.

<sup>93</sup> *Id.* at 195–96.

<sup>94</sup> *Id.* at 195 (discussing an eighteen-month-old chemotherapy patient who had doctors “harvest one of her ovaries, freeze the tissue, and later graft it back . . . when she decided to have children during adulthood”).

<sup>95</sup> *Id.* at 198.

<sup>96</sup> *See Ensuring Equitable Access to Infertility Care in the United States: Guiding Principles for Policies Mandating Insurance Coverage*, CTR. FOR REPRODUCTIVE RTS. (July 31, 2021) [hereinafter *Ensuring Equitable Access to Infertility Care*], [https://reproductiverights.org/wp-content/uploads/2021/07/Guiding-Principles-for-Ensuring-Equitable-Access-to-Infertility-Care\\_July-7\\_Final.pdf](https://reproductiverights.org/wp-content/uploads/2021/07/Guiding-Principles-for-Ensuring-Equitable-Access-to-Infertility-Care_July-7_Final.pdf) [<https://perma.cc/M8KU-NDP5>].

<sup>97</sup> Mohapatra, *supra* note 91, at 199 (“If the cancer must be treated immediately, there may be no time to delay treatment to undergo fertility preservation.”).

<sup>98</sup> *Id.*; *see* Melanie K. Gross, Note, *Invisible Shackles: Alexander v. Sandoval and the Compromise to the Medical Civil Rights Movement*, 47 HOW. L.J. 943, 945 (2004).

<sup>99</sup> *Ensuring Equitable Access to Infertility Care*, *supra* note 96.

Indeed, Black women use assisted reproductive technology (ART) with less frequency than other races due to both an apparent lack of access and insurance coverage.<sup>100</sup> A study cited by ART scholars underscores this disparity, showing that it is even evident in fertility clinic website photos, more than half of which only feature pictures of white babies, a heavy handed hint at the typical clientele.<sup>101</sup> ART critics find the “technology largely reserved for the wealthy and the White,” which is troubling particularly given that the overwhelming number of infertile women are Black.<sup>102</sup> As BIPOC women struggle with infertility thrust upon them either directly by the government or as a result of lackluster regulation around environmental pollution, the cycle of reproductive struggles becomes generational.<sup>103</sup>

## II. MINDING AND FILLING THE LEGISLATIVE GAPS

There is a legislative and regulatory vacuum that not only leaves many BIPOC communities behind, but also renders these communities the bearers of devastating and worsening harm. Today, California is the only state in the nation that has legislation explicitly addressing reproductive consequences of environmental harms. However, those laws are not designed with an EJ/RJ lens and, as a result, do not aim to repair harmed individuals—instead, they incentivize against pollution.<sup>104</sup> At the intersection of EJ/RJ, conversely, is the opportunity to recognize that harm and correct it. The EJ and RJ movements share important common goals of improving the socioeconomic conditions for impoverished individuals, increasing involvement of communities that are typically marginalized from participating in policymaking, and recognizing the right to healthy pregnancies and to raise healthy children.<sup>105</sup> The disparities in access to those rights can and should be mitigated by the implementation and enforcement of environmental laws

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<sup>100</sup> *Id.*; Mohapatra, *supra* note 91, at 211.

<sup>101</sup> Mohapatra, *supra* note 91, at 211–12; Jim Hawkins, *Selling ART: An Empirical Assessment of Advertising on Fertility Clinics’ Websites*, 88 IND. L.J. 1147 (2013) (positing two theories about racial disparities of babies pictured: picturing only white babies is a reflection of the clientele or it is an active pursuit to dissuade nonwhite patients from seeking treatment).

<sup>102</sup> Mohapatra, *supra* note 91, at 211–12 (quoting Kimberly M. Mutcherson, *Transformative Reproduction*, 16 J. GENDER, RACE & JUST. 187, 222 (2013)).

<sup>103</sup> Houlihan et al., *supra* note 78.

<sup>104</sup> See *infra* notes 169–192 and accompanying text detailing California safety laws and Proposition 65.

<sup>105</sup> McCarthy, *supra* note 82, at 20.

that take into account the reproductive harms from which these communities have been suffering for generations.<sup>106</sup>

Title VI of the Civil Rights Act, the Toxic Substance Control Act of 1976, and the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA) reflect current EJ initiatives, but since their respective enactments, congressional oversight and action have handicapped the Environmental Protection Agency (EPA) in its attempts to regulate chemical use based on adverse health consequences.<sup>107</sup> What is more, the ability of claimant communities to find relief under any of these standards is difficult, if not impossible, because of judicial and legislative narrowing.<sup>108</sup> Consequently, there is a need for retooled standards, focused studies, and a sweeping overhaul reflective of the existing damage.<sup>109</sup> Together with the reparative solutions proposed by this note, lasting change is possible.

#### A. *The Existing Safeguards Designed for EJ Fall Short*

Though the available laws are not nearly as protective as necessary, the relevant canon of law was created in part due to the birth of the EJ movement.<sup>110</sup> That birth came about in conjuncture with many tributary events including the labor movement, the second wave traditional environmental movement, civil rights, and Indigenous peoples' struggles.<sup>111</sup> The popular term "environmental racism" originated in 1987 and stemmed from the United Church of Christ Commission for Racial Justice's report, "Toxic Wastes and Race."<sup>112</sup> As a result, the EJ movement began spawning legislation that impacts the ongoing crisis of environmentally impacted reproduction.

##### 1. The History of the EJ Movement

The EJ movement has, much like feminism, come in "waves," and each wave has hatched legislative and legal

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<sup>106</sup> Brittany Whited, *With Environmental Rollbacks, Communities of Color Continue to Bear Disproportionate Pollution Burden*, STATE ENERGY & ENV'T IMPACT CTR. (June 19, 2019), <https://www.law.nyu.edu/centers/state-impact/press-publications/center-commentary/environmental-justice-juneteenth-2019> [https://perma.cc/XF6M-B38W].

<sup>107</sup> Christopher D. Ahlers, *Race, Ethnicity, and Air Pollution: New Directions in Environmental Justice*, 46 ENV'T L. 713, 720 (2016); see McCarthy, *supra* note 82, at 20.

<sup>108</sup> See Ahlers, *supra* note 107, at 727.

<sup>109</sup> See Whited, *supra* note 106.

<sup>110</sup> Candice Youngblood, Note, *Put Your Money Where Their Mouth Is: Actualizing Environmental Justice by Amplifying Community Voices*, 46 ECOLOGY L.Q. 455, 460 (2019).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 461.

initiatives, strategies, and shortcomings.<sup>113</sup> The first wave centered upon protecting the American wilderness, pushing preservation and conservation efforts.<sup>114</sup> It was followed by the wave of the 1960s and 1970s that emphasized individual activism and protecting the environment and natural resources.<sup>115</sup> It was this wave that produced the current regulation of air and water pollution.<sup>116</sup> However, many spearheading the EJ movement believe that the structure of these laws disadvantage BIPOC populations by design.<sup>117</sup> The environmental catastrophes that occur within the confines of the United States, such as “[t]he toxic rivers of Mississippi’s ‘Cancer Alley,’ the extensive poisoning of rural Indian land, and the mismanaged cleanup of the weapons manufacturing site in Hanford, Washington” may be indicative of legislators either intentionally or negligently sacrificing BIPOC communities for the white and wealthy.<sup>118</sup>

As with most matters concerning discrimination on a racial basis, the EJ movement has essential ties to Title VI of the Civil Rights Act of 1964.<sup>119</sup> However, because communities, rather than individuals, bring EJ claims, there are complications when utilizing Title VI.<sup>120</sup> Claims within this context often dispute the lawfulness of a permitting decision.<sup>121</sup> To utilize Title VI, the claimant must assert that the disputed decision was based on hostility towards a protected class.<sup>122</sup> This would occur, for instance, if a developer wanted to establish a landfill in a specific location *because* it would be near a predominantly Black neighborhood. However, this framing necessitates motivation by pure animus—a requirement that is not only difficult to identify, but also difficult to prove.<sup>123</sup> It is more likely that a decision to permit an industrial facility in a BIPOC community is motivated by both lawful reasons (low property costs) as well as unlawful (disregard for the community).<sup>124</sup> And yet, courts have not

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<sup>113</sup> Verchick, *supra* note 29, at 38.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 81–82.

<sup>118</sup> *Id.* at 83.

<sup>119</sup> Ahlers, *supra* note 107, at 720.

<sup>120</sup> *Id.* at 719 (“[T]he reason that so many race discrimination complaints fail is not that such complaints lack merit . . . [I]t is difficult to unequivocally tie an action to an unlawful reason, as opposed to a lawful reason. Consequently . . . it is difficult to successfully pursue a claim for discrimination.” (footnote omitted)).

<sup>121</sup> *Id.* at 721.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 721–22.



recognized the more complex “mixed-motive” in cases alleging discrimination and environmental harms from industrial siting.<sup>125</sup> As a result, such claims of discrimination have been largely unsuccessful under Title VI due to the pure animus bar.<sup>126</sup>

What little success claimants saw in the 1990s under Title VI was quashed by *Alexander v. Sandoval*, in which the Supreme Court held there was no private right of action for discrimination based only on a disparate impact.<sup>127</sup> For BIPOC communities, for which the central allegation of harm turns on the fact that their neighborhoods and towns are disparately targeted, this limitation acts more as an altogether bar to these claims. Ultimately, Title VI’s threshold for discrimination is set too high for EJ claimants.<sup>128</sup> As such, different avenues for relief have been created, but their effectiveness is questionable.

## 2. Orders, Acts, and Shortcomings of the Past (and Present)

The United Church of Christ Commission for Racial Justice’s 1987 report detailed the relationship between race and the establishment of hazardous waste facilities, calling for the president to mandate federal agencies to consider environmental impacts on minority-majority communities.<sup>129</sup> Since the report’s publication, both the executive and legislative branches have made efforts to mitigate environmental harms to BIPOC communities. Whether those efforts have been in good faith or are mere lip-service, however, is debatable.<sup>130</sup>

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<sup>125</sup> Ahlers, *supra* note 107, at 722 n.36 (“No reported decisions could be found applying a mixed-motive approach to the siting of an industrial facility under Title VI. The closest case that could be found was a decision of the United States Court of Appeals for the Second Circuit . . . . But this case was not framed as an environmental justice case.”).

<sup>126</sup> *See id.* at 721–22. Title VI claims, even if unsuccessful, can strategically block permitting in other ways. *See, e.g.*, *Chester Residents Concerned for Quality Living v. Seif*, 944 F. Supp. 413, 414 (E.D. Pa. 1996), *rev’d*, 132 F.3d 925 (3d Cir. 1997), *vacated*, 524 U.S. 974 (1998) (mem.) (residents challenging construction of a waste facility under Title VI led to the developer withdrawing its permit application, making the lawsuit a practical rather than legally successful use of Title VI).

<sup>127</sup> *Alexander v. Sandoval*, 532 U.S. 275, 285–86, 293 (2001); *see* *S. Camden Citizens in Action v. N.J. Dep’t of Env’t Prot.*, 145 F. Supp. 2d 446, 450–52 (D.N.J. 2001), *opinion modified and supplemented*, 145 F. Supp. 2d 505 (D.N.J. 2001), *rev’d*, 274 F.3d 771 (3d Cir. 2001) (granting an injunction to plaintiffs who sought to block the construction of a cement producing plant in their community, which would ultimately be reversed by *Sandoval*’s limitation on disparate impact claims).

<sup>128</sup> Ahlers, *supra* note 107, at 727 (“[E]nvironmental justice plaintiffs are unable to set forth facts sufficient to show a disparate impact because of the uncertainties of science and technology—a fundamental challenge for any environmental plaintiff, regardless of race or ethnicity.”).

<sup>129</sup> Youngblood, *supra* note 110, at 461.

<sup>130</sup> *See id.* at 461 (discussing the origins of EJ recognition as “merely affirmation” of existing harms rather than a revelation for low-income and BIPOC communities).

As a result of the report, for instance, then President Clinton issued Executive Order (EO) 12898 in 1995, requiring the incorporation of EJ goals within federal agency missions.<sup>131</sup> To achieve these goals, the agencies were instructed to identify and combat the “disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.”<sup>132</sup> Despite the purported intention to serve communities plagued by environmental injustice, the call to action lacked force and clarity and failed to yield substantive, let alone lasting, change.<sup>133</sup> As some have pointed out, EJ will not be actualized without the requisite recognition for and participation of community voices.<sup>134</sup>

On the heels of Clinton’s EO, Congress enacted the EPCRA, requiring producers, processors, and users of certain toxic chemicals to file regular reports detailing the environmental releases of those chemicals with the EPA and state environmental agencies.<sup>135</sup> As a result, the EPA and state agencies must then make that information available to federal, state, and local governments as well as the public, including the citizens of communities surrounding covered facilities.<sup>136</sup> Such reports must include “each facility at which the chemicals are manufactured, processed, or used, the name, location, and principal business activities of the facility; a certification of accuracy by responsible management officials; and, as to each covered toxic chemical known to be present at the facility.”<sup>137</sup>

The EPCRA further requires the report to detail (1) whether the toxic chemical at each facility is “manufactured, processed, or otherwise used” and how the chemical is used; (2) an estimate of the ranges and maximum amount of the chemical present within the facility at any time during the year; (3) the waste treatment or method of disposal employed by the facility and its efficacy; and (4) the yearly quantity of the chemical entering the environment via disposal or use.<sup>138</sup> This manner of protection, however, focuses on the toxin rather than the

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<sup>131</sup> *Id.* at 464.

<sup>132</sup> Exec. Order No. 12,898, 3 C.F.R. § 859 (1995), *reprinted in* 42 U.S.C. § 4321 (1994).

<sup>133</sup> Youngblood, *supra* note 110, at 465.

<sup>134</sup> 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).

<sup>135</sup> Community Right-to-Know Reporting Requirements, 55 Fed. Reg. 30,632, 30,632 (July 26, 1990) (to be codified at 40 C.F.R. pts. 350, 355, 370, 372); *Troy Corp. v. Browner*, 120 F.3d 277, 280 (D.C. Cir. 1997).

<sup>136</sup> *Troy Corp.*, 120 F.3d at 280; *see* 42 U.S.C. § 11023(h).

<sup>137</sup> *Troy Corp.*, 120 F.3d at 280.

<sup>138</sup> Community Right-to-Know Reporting Requirements, 55 Fed. Reg. at 30,633; *Troy Corp.*, 120 F.3d at 280; 42 U.S.C. § 11023(g)(1)(C)(i)–(iv).

impacts on communities and does not offer recourse for injury. More generally, within the EJ context, “right-to-know laws” like the EPCRA do not go far enough.

First and foremost, these laws are difficult to enforce because agencies’ abilities to make the necessary enforcement efforts are seriously handicapped by staffing shortages as well as budgetary restraints.<sup>139</sup> This in turn forces citizens to enforce the right-to-know laws privately, which requires both hefty legal fees and time—resources which are not plentiful for most low-income residents of afflicted communities.<sup>140</sup> Perhaps most important to note is that, notwithstanding the legitimate obstacles to enforce public information laws, right-to-know laws only grant individuals the right to participate in the legal process rather than affirm the importance of living in an environment free from harmful toxins.<sup>141</sup>

The Trump administration stalled or rolled back many of the federal regulations that aimed to make US environments healthier, forcing the Biden administration to spend precious time reversing harmful policies rather than building upon existing infrastructure or putting forth new environmental laws.<sup>142</sup> In 2019, for example, the EPA both rolled back power plant emission standards and announced impending changes to fuel efficiency standards.<sup>143</sup> By the EPA’s own estimations, doing away with the Obama-era “Clean Power Plan,” which maintained standards on coal fired power plants, would likely result in more than 15,000 premature deaths by 2030.<sup>144</sup> Further, the EPA predicted Trump’s repeal of the “Clean Power Plan” would lead to a marked increase of new cases of respiratory ailments as well as missed school days, both of which would disproportionately affecting BIPOC communities.<sup>145</sup> Critically, the Biden administration implemented EO 13990 to address such concerns.<sup>146</sup>

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<sup>139</sup> Shelton, *supra* note 12, at 15.

<sup>140</sup> *See id.*

<sup>141</sup> *Id.* (emphasis omitted).

<sup>142</sup> *See* Youngblood, *supra* note 110, at 465; Elena D. Gartner, *From Civil Rights to Human Rights: The Pandemic’s Aftermath Requires Environmental and Reproductive Justice Mechanisms to Reinforce Global Public Health*, 24 HUM. RTS. BRIEF 42, 46–47 (2020); Amber Polk, *President Biden’s Executive Orders on the Environment: Praiseworthy Policy, Political Red Herring, or . . . Both?*, 2021 U. ILL. L. REV. ONLINE 152, 153 (2021).

<sup>143</sup> Nadja Popovich et al., *The Trump Administration Rolled Back More Than 100 Environmental Rules. Here’s the Full List.*, N.Y. TIMES (Jan. 20, 2020), <https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html> [<https://perma.cc/TR4A-F5BF>]; Whited, *supra* note 106.

<sup>144</sup> Whited, *supra* note 106.

<sup>145</sup> *Id.*

<sup>146</sup> *See* Polk, *supra* note 142, at 152.

This EO reaffirms the essential role of science in addressing environmental issues and also articulates several policies regarding pollution.<sup>147</sup> This includes limiting exposure to dangerous toxins, ensuring availability of and access to both safe water and clean air, and holding polluters accountable.<sup>148</sup> Importantly, EO 13990 also directs executive agencies to review all anti-environment agency actions undertaken during the Trump administration.<sup>149</sup> Still, many feel that Biden is not advancing meaningful changes and is only reversing Trump-era harms.<sup>150</sup>

Indeed, the problem is that most existing laws are designed to curb the release and dictate the disposal of hazardous waste and pollutants rather than preclude their creation altogether.<sup>151</sup> This is because environmental law does not generally aim to stop pollution.<sup>152</sup> Rather, regulation focuses on the amount of pollution released into the environment.<sup>153</sup> So, even if all environmental laws were perfectly obeyed and enforced as written, pollution would still exist. And to that end, even lawful pollution harms people. The question, then, is if the harm to low-income and BIPOC communities is ameliorated, where will the balance of pollution go?

### *B. Environmental Standards Do Not Consider BIPOC Communities*

In many ways, existing regulations for health protection fail to utilize scientific data.<sup>154</sup> Although the EPA is fully aware of sensitive subpopulations, it has historically failed to adequately protect the most vulnerable.<sup>155</sup> The agency has even permitted targeted pollution despite its awareness that BIPOC and low-income communities are already disproportionately polluted.<sup>156</sup> While the EPA has had environmental equity and justice on its agenda since 1992 and has been essential in

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<sup>147</sup> Exec. Order No. 13,990, 86 Fed. Reg. 7037, 7037 (Jan. 20, 2021).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> See Polk, *supra* note 142, at 154–57.

<sup>151</sup> Shelton, *supra* note 12, at 2; Bridges, *supra* note 9, at 1059–60.

<sup>152</sup> Shelton, *supra* note 12, at 7, 15.

<sup>153</sup> For example, the Clean Air Act of 1990 simply calls for emission “limitation,” as opposed to a ban of emissions. See Clean Air Act of 1990, 42 U.S.C. §§ 7401–7431.

<sup>154</sup> See Linda Villarosa, *Pollution Is Killing Black Americans. This Community Fought Back.*, N.Y. TIMES (July 28, 2020), <https://www.nytimes.com/2020/07/28/magazine/pollution-philadelphia-black-americans.html> [<https://perma.cc/9CXB-AG4C>]; Samara F. Swanston, *Race, Gender, Age, and Disproportionate Impact: What Can We Do About the Failure to Protect the Most Vulnerable?*, 21 FORDHAM URB. L.J. 577, 588 (1994).

<sup>155</sup> Swanston, *supra* note 154, at 588.

<sup>156</sup> *Id.*

providing studies and data on racial inequity in pollution,<sup>157</sup> the agency still makes many decisions regarding national regulatory initiatives based on a so-called “average person.”<sup>158</sup>

By focusing on this “average” person, the EPA ransoms those most susceptible to pollution.<sup>159</sup> Indeed, the mythic “average” person is a white male who is, “generally young, but not too young, healthy, disease-free, and not subject to any genetic conditions or nutritional deficiencies that affect risk.”<sup>160</sup> This standard assumes pollutant exposure is over the lifetime of an average white male, who lives to be seventy years old, ignoring the fact that the average woman lives longer, resulting in lengthier exposure and therefore a higher risk.<sup>161</sup> Thus, the “average” person is not and has never been reflective of the general population, yet the EPA’s continued reliance on the concept harms those most in need of the agency’s protection.

Since the 1990s, the EPA has insisted its shortcomings are due to poor data which it has been striving to improve.<sup>162</sup> But in 2022, with data and technology that has improved leaps and bounds from the 1990s, communities feel the EPA is sacrificing them.<sup>163</sup> To be sure, better and more accurate data is necessary, but the evergreen call for “more data,” if made without substantive action, can itself be damaging. Data collection may swap “imaginative horizons of ‘how’ and ‘why’ in favor of ‘how much.’”<sup>164</sup> For example, solutions focused on quantitative harms to fetuses and infants can fail to capture general social context or leave out women-centered approaches.<sup>165</sup> Even inclusive data can be used in unwanted and unanticipated ways that return to communities harmfully.<sup>166</sup> Any model of health carries normative assumptions, from a “healthy” BMI to “normal” sexual maturation, and as such, data must be collected and shaped carefully.<sup>167</sup> Though the EPA’s

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<sup>157</sup> U.S. ENV’T PROTECTION AGENCY, OFFICE OF ENVIRONMENTAL JUSTICE IN ACTION, TOOLS AND PRODUCTS FOR ENVIRONMENTAL JUSTICE ACTION, [https://www.epa.gov/sites/default/files/2017-09/documents/epa\\_office\\_of\\_environmental\\_justice\\_factsheet.pdf](https://www.epa.gov/sites/default/files/2017-09/documents/epa_office_of_environmental_justice_factsheet.pdf) [<https://perma.cc/HAA7-G5LD>]; *see also* U.S. ENV’T PROTECTION AGENCY, EPA 430-R-21-003, CLIMATE CHANGE AND SOCIAL VULNERABILITY IN THE UNITED STATES: A FOCUS ON SIX IMPACTS (2021), [https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability\\_september-2021\\_508.pdf](https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability_september-2021_508.pdf) [<https://perma.cc/E57Q-F6HL>]; *Environmental Justice*, U.S. ENV’T PROTECTION AGENCY, <https://www.epa.gov/environmentaljustice> [<https://perma.cc/H532-AGC6>].

<sup>158</sup> Swanston, *supra* note 154, at 590.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 591; *see also* Krupp, *supra* note 12, at 116.

<sup>161</sup> Krupp, *supra* note 12, at 130.

<sup>162</sup> *See id.* at 116, 131.

<sup>163</sup> *See* Villarosa, *supra* note 154.

<sup>164</sup> Lappé et al., *supra* note 22, at 140.

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

relied upon “average person” is an admittedly neutral individual, he is an improper conduit for necessary changes to aid BIPOC communities.

### C. *The California Model and Its Inadequacies*

To date, California is the only state with a policy that in part addresses reproductive consequences of environmental toxins, creating in turn an express legal pathway to pursue solutions to reproductive harms caused by pollutants.<sup>168</sup> Proposition 65 was adopted by California in 1986 and as a result, the state required that “at least once per year, the Governor shall cause to be published ‘a list of those chemicals known to the state to cause cancer or reproductive toxicity within the meaning of this chapter.’”<sup>169</sup> The law hinges upon public awareness and corporate responsibility.

Under Proposition 65, businesses are prohibited from discharging chemicals in a manner where the chemical can contaminate drinking water sources.<sup>170</sup> Further, companies that expose their consumers to carcinogens or reproductive toxins must provide “clear and reasonable warning” before exposure, creating a public notice component.<sup>171</sup> To that end, Proposition 65 states that a chemical causes cancer or reproductive toxicity if qualified experts categorize it as such, “through scientifically valid testing.”<sup>172</sup> The goal of Proposition 65 is to bolster the public’s right to know and prevent businesses from exposing individuals to carcinogens and reproductively harmful chemicals.<sup>173</sup> Much like the EPCRA,<sup>174</sup> however, “right-to-know” laws lack force and efficacy to

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<sup>168</sup> Claudia Polsky & Megan Schwarzman, *The Hidden Success of A Conspicuous Law: Proposition 65 and the Reduction of Toxic Chemical Exposures*, 47 *ECOLOGY L.Q.* 823, 830 (2020). Proposition 65 is a “nationally unique” state law in that it reaches beyond national standards set for the safe consumption of chemicals but also explicitly contemplates reproductive toxicity. Jennifer Butler, *Xenoestrogens: Legal Implications and Obstacles for Detection and Relief of Estrogen-Mimicking Compounds*, 25 *J. LAND RESOURCES & ENV’T. L.* 317, 327–28 (2005) (discussing the importance of Proposition 65 and defining “reproductive toxicity”). While other states including New York and Washington have contemplated or even passed similar bills, the bills do not address reproductive harms although Washington’s bill does address vulnerable individuals including pregnant women and children. See *Why Are We Still Talking About California Prop 65?*, *NAT’L L. REV.* (Aug. 16, 2019), <https://www.natlawreview.com/article/why-are-we-still-talking-about-california-prop-65> [<https://perma.cc/6V8X-GCET>].

<sup>169</sup> *Mateel Env’t Just. Found. v. Off. of Env’t Health Hazard Assessment*, 234 Cal. Rptr. 3d 198, 224 (2018); see also CAL. HEALTH & SAFETY CODE § 25249.7 (West, Westlaw through ch. 770 of 2021 Reg. Sess.).

<sup>170</sup> § 25249.5 (Westlaw).

<sup>171</sup> Shelton, *supra* note 12, at 14 (quoting CAL. HEALTH & SAFETY CODE § 25249.7).

<sup>172</sup> § 25249.8(b) (Westlaw); *Mateel Env’t Just. Found.*, 234 Cal. Rptr. 3d at 225.

<sup>173</sup> *Env’t L. Found. v. Beech-Nut Nutrition Corp.*, 185 Cal. Rptr. 3d 189, 192–93 (2015).

<sup>174</sup> See *supra* notes 135–141 and accompanying text.

ameliorate harm.<sup>175</sup> In fact, some have said that Proposition 65 gives Californians “the right to know almost nothing.”<sup>176</sup>

Critics argue that the purpose of Proposition 65—to encourage big polluters to replace harmful ingredients and to stop polluting—has been obscured by private lawsuits which almost always end in settlements without any presentation of evidence or science.<sup>177</sup> Many companies attach Proposition 65 warnings without testing or attempting to reformulate because the issue central to the law is *notice*, not the reduction of harm.<sup>178</sup> While this law is intended to provide plaintiffs with direct means to confront polluting businesses, in practice it has become a tool of corporations to evade responsibility.<sup>179</sup> Proposition 65 has spawned a tremendous amount of litigation and, while there have been notable landmark cases with large settlements paid out to plaintiffs, it has done little to stem the release of pollutants.<sup>180</sup>

Though Proposition 65 recognizes reproductive harms from exposure to toxins, the law is not about remedying injuries. Most suits brought under Proposition 65 hinge upon the notice element (the balance being whether or not a chemical should be listed).<sup>181</sup> The law allows individuals to recoup damages for violations, which might provide a pathway for toxic torts claims when a plaintiff’s reproductive health is compromised.<sup>182</sup> However, it does not conquer the hurdle of causation that all torts plaintiffs face. For example, in the Court of Appeals, Second District of California case *Cottle v. Superior Ct.*, plaintiffs claimed that dumped oil, industrial hazardous wastes, and other byproducts from a construction site caused injuries, including cancers, birth defects, and stillbirths.<sup>183</sup> The thrust of their complaint was that they did not receive warning about the

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<sup>175</sup> Geoffrey Mohan, *You See the Warnings Everywhere. But Does Prop. 65 Really Protect You?*, L.A. TIMES (July 23, 2020), <https://www.latimes.com/business/story/2020-07-23/prop-65-product-warnings> [<https://perma.cc/8ZZS-3V89>].

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> *See* Mateel Env’t Just. Found. v. Off. of Env’t Health Hazard Assessment, 234 Cal. Rptr. 3d 198, 202–03 (2018); Cal. Chamber of Com. v. Brown, 126 Cal. Rptr. 3d 214, 216 (2011); Exxon Mobil Corp. v. Off. of Env’t Health Hazard Assessment, 87 Cal. Rptr. 3d 580, 583–84 (2009); W. Crop Prot. Ass’n v. Davis, 95 Cal. Rptr. 2d 631, 633 (2000).

<sup>180</sup> Shelton, *supra* note 12, at 14 & n.94 (mentioning *People v. Safeway Stores, Inc.*, see No. 897576 (S.F. Sup. Ct. Sept. 20, 1988), which provided a “\$900,000 settlement . . . against tobacco companies and retail grocery chains for the sale of cigars and pipe tobacco,” and *People v. Botanicals Int’l, Inc.*, see No. BC 006060 (L.A. Sup. Ct. July 18, 1990), which reached a “\$500,000 settlement of suit [for] ethylene oxide emissions”).

<sup>181</sup> Mohan, *supra* note 176.

<sup>182</sup> CAL. HEALTH & SAFETY CODE § 25249.7 (West, Westlaw through ch. 770 of 2021 Reg. Sess.).

<sup>183</sup> *Cottle v. Superior Ct.*, 5 Cal. Rptr. 2d 882, 883–84 (1992).

dumpsite.<sup>184</sup> However, the case turned on plaintiffs' ability to prove the requisite medical connection between their reproductive ailments and pollutants to establish a *prima facie* case of personal injury.<sup>185</sup> In fact, the trial court disallowed all evidence of plaintiffs' personal injuries because none of the plaintiffs could establish exactly when and to which toxin they were exposed, which appellate court affirmed.<sup>186</sup> For the reproductive toxicity plaintiff, this is a common problem, as noted by the dissent.<sup>187</sup>

Thus, while at first glance a torts pathway to recovery for reproductive harms seems appealing, ultimately it falls short. From the viewpoint of the toxic tort plaintiff, the advantage of laws requiring warning of possible toxic exposure is that exposure occurring before the warning might be actionable.<sup>188</sup> But plaintiffs must draw clear legal connections between a polluter, a toxin, and their injury, which can be difficult. Even if the plaintiff can prove a *prima facie* tort, tort law is a poor pathway to correct collective harm, as it focuses on the monetary recoupation for the individual rather than on correcting systemic problems.<sup>189</sup> Furthermore, the conservative nature of torts makes tort law poorly poised to combat a problem that is so deeply related to race.<sup>190</sup> As torts for loss of life consider the potential earning capacity of an individual based on gender and race, cash payments for miscarried or stillborn BIPOC children would likely be low considering the average income of BIPOC Americans.<sup>191</sup> It should be noted, however, that California is an exception due to its prohibition of factoring of "race, ethnicity, or gender" in torts calculations.<sup>192</sup> If more states were to follow California's lead here, the ability to recoup monetary damages for reproductive toxicity claims could be worth a plaintiff's while. The problem of collective harm, however, remains unmitigated.

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<sup>184</sup> *Id.* at 883.

<sup>185</sup> *Id.* at 884.

<sup>186</sup> *Id.* at 883.

<sup>187</sup> *Id.* at 902 ("[S]cores or hundreds of different environmental factors can cause or contribute to most forms of cancer and other injuries and diseases typically confronted in toxic tort cases. Consequently, when a plaintiff is exposed to a toxic and subsequently suffers some disease or injury no expert honestly can testify the toxic caused that particular individual to experience that particular disease or injury.").

<sup>188</sup> KAREN A. GOTTLIEB, TOXIC TORTS PRACTICE GUIDE § 11:3, Westlaw (database updated Nov. 2021).

<sup>189</sup> See Bridges, *supra* note 9, at 1041.

<sup>190</sup> Jesse Schwab, *The Problem with Defining Tort Damages in Terms of Race and Gender*, HARV. C.R.-C.L. L. REV. (Nov. 25, 2019), <https://harvardcrl.org/the-problem-with-defining-tort-harms-in-terms-of-race-and-gender/> [<https://perma.cc/KNA6-HPHS>].

<sup>191</sup> Interview with Professor Anita Bernstein, Anita and Stuart Subotnick Professor of Law, Brooklyn Law School (Oct. 11, 2021) (notes on file with author); Faye Ginsburg & Rayna Rapp, *The Politics of Reproduction*, 20 ANN. REV. ANTHROPOLOGY 311, 327 (1991) ("It is only among certain class sectors in fully capitalized societies that children become 'priceless.'").

<sup>192</sup> Schwab, *supra* note 190.



### III. MODEL SOLUTIONS IN HEALTHCARE AND FEDERAL REPARATIONS

Unquestionably, the impact of pollution on reproductive health requires updated environmental data and subsequent evidence-based laws. Legislators must urgently address the past harms as well as the future harms that will inevitably perpetuate due to the socioeconomic structures imposed on BIPOC communities. Two solutions are necessary to begin rectifying the pervasive harms of reproductive injustices in this country. First, equitable access to healthcare—specifically fertility and reproductive healthcare—is essential to help mitigate the harms inflicted upon BIPOC communities.<sup>193</sup> Additionally, the persistent, costly, and devastating impacts of environmental injustice on reproductive capabilities warrants reparations to financially right the wrongs BIPOC communities face.<sup>194</sup> Fortunately, there is evidence of both the propriety of these solutions as well as instances of their successful application.

#### A. *Filling the Holes in Healthcare Coverage*

Extending healthcare coverage for reproductive issues is essential, and the gaping holes in current coverage has further compounded the harms BIPOC communities have suffered. ART is an increasingly essential element in RJ, yet access to reproductive assistance is starkly divided based on race and class due to expense.<sup>195</sup> The expense of this healthcare alone is prohibitively high and is exacerbated by the accompanying high cost of and, for many, the altogether lack of, insurance coverage.<sup>196</sup> In 1998, the Supreme Court recognized infertility as such a pervasive and significant medical condition that it rose to the level of a disability.<sup>197</sup> Unfortunately, however, there is no federal mandate to cover infertility treatments, which leaves the burden on the states to mandate such coverage.<sup>198</sup>

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<sup>193</sup> See *Ensuring Equitable Access to Infertility Care*, *supra* note 96 (noting that “[d]eeply entrenched racial and ethnic disparities in health disproportionately impact Black women of all socioeconomic backgrounds, including in rates of infertility”).

<sup>194</sup> See discussion *infra* Sections III.A.1, III.A.2.

<sup>195</sup> Aziza Ahmed, *Race and Assisted Reproduction: Implications for Population Health*, 86 FORDHAM L. REV. 2801, 2806 (2018).

<sup>196</sup> *Id.*

<sup>197</sup> See *Bragdon v. Abbott*, 524 U.S. 624, 639 (1998) (holding that reproduction is “a major life activity” under the Americans with Disabilities Act of 1990).

<sup>198</sup> Elpida Velmahos, *Fertile Ground for Change: Infertility, Employee-Based Health Insurance, and an Unprotected Fundamental Right*, 17 J. HEALTH & BIOMEDICAL L. 267, 283 (2021).

In recent years, state legislatures have recognized infertility as a public health concern and, as a result, required many private health insurance plans to cover infertility diagnosis and treatment.<sup>199</sup> It is worth noting, though, that Medicaid, the income-dependent health insurance and largest public funder for health-related services of low-income Americans, does not, with the exception of New York, cover fertility treatment, and *no* state Medicaid insures for artificial insemination or in vitro fertilization (IVF).<sup>200</sup> As of 2021, seventeen states had laws mandating some private insurance coverage for ART.<sup>201</sup> Many of these states, however, do not cover IVF, the most expensive ART treatment.<sup>202</sup> Further, there are restrictions in access such as limiting coverage to only one round of IVF<sup>203</sup> or putting in place specific and limiting prerequisites for patients to qualify for coverage.<sup>204</sup> But such restrictions and limitations in coverage place IVF out of reach for many—the average cost for a single cycle (out-of-pocket) can range on the lower end of around \$15,000 and up to \$30,000,<sup>205</sup> not to mention the cost of time and transportation for a patient to attend the numerous appointments required.<sup>206</sup>

Despite the trend in state insurance mandates, many individuals still do not receive such coverage. States with legislation in place for infertility treatments either have “mandate to cover” laws or “mandate to offer” laws.<sup>207</sup> States that

<sup>199</sup> Infertility treatment meaning procedures that medically aid conception; namely, in vitro fertilization treatments. See *Ensuring Equitable Access to Infertility Care*, *supra* note 96.

<sup>200</sup> Gabriela Weigel et al., *Coverage and Use of Fertility Services in the U.S.*, KAISER FAM. FOUND. (Sep. 15, 2020), <https://www.kff.org/womens-health-policy/issue-brief/coverage-and-use-of-fertility-services-in-the-u-s/> [<https://perma.cc/X2SK-DFUW>].

<sup>201</sup> See *State Laws Related to Insurance Coverage for Infertility Treatment*, NAT'L CONF. OF STATE LEGIS. (Mar. 12, 2021), <https://www.ncsl.org/research/health/insurance-coverage-for-infertility-laws.aspx> [<https://perma.cc/FESV-FLYF>].

<sup>202</sup> Jo Craven McGinty, *How Many IVF Cycles Should Women Try?*, WALL ST. J. (Jan. 22, 2016, 11:56 AM), <https://www.wsj.com/articles/how-many-ivf-cycles-should-women-try-1453481782> [<https://perma.cc/GW9D-YDQT>].

<sup>203</sup> The average number of rounds of IVF for a patient to become pregnant is around two or three. *Id.*

<sup>204</sup> Ahmed, *supra* note 195, at 2806–07.

<sup>205</sup> In 2009, the out-of-pocket cost was estimated to be around \$12,500, but as of 2021, the cost is estimated to range from \$15,000 to \$20,000 and can even cost in excess of \$30,000 depending upon a patient's needs. Weigel et al., *supra* note 202 (speculating that the average cost of an IVF cycle has risen since 2009); Marissa Conrad, *How Much Does IVF Cost?*, FORBES (Sept. 28, 2021, 9:44 AM), [https://www.forbes.com/health/family/how-much-does-ivf-cost/#how\\_much\\_does\\_ivf\\_cost\\_section](https://www.forbes.com/health/family/how-much-does-ivf-cost/#how_much_does_ivf_cost_section) [<https://perma.cc/ZR35-HBZR>] (establishing the most current cost range since 2009).

<sup>206</sup> See Ahmed, *supra* note 195, at 2807.

<sup>207</sup> Velmahos, *supra* note 198, at 283 (quoting *State Law Related to Insurance Coverage for Infertility Treatment*, NAT'L CONF. OF STATE LEGISLATURES (June 2019)); *State Law Related to Insurance Coverage for Infertility Treatment*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 12, 2021), <https://www.ncsl.org/research/health/insurance-coverage-for-infertility-laws.aspx> [<https://perma.cc/FESV-FLYF>].

“mandate to cover” have laws requiring that health insurance plans cover particular services.<sup>208</sup> On the other hand, states that “mandate to offer”, require insurers to offer coverage, but the policy purchaser (whether it be an individual or a company) is not required to extend that coverage for a specific service.<sup>209</sup> So, while states may mandate infertility coverage, employers may opt out because state laws only apply to the insurers, not the employers providing the insurance.<sup>210</sup> This is significant—approximately half of those insured receive health insurance through their employer, resulting in a significant number of individuals who are left without coverage.<sup>211</sup>

Further, there is no federal or state-mandated coverage of fertility *preservation*, and few private insurers voluntarily choose to extend coverage.<sup>212</sup> This lack of mandate means that a patient’s fertility preservation treatment or operations may not be covered, even when such preservation is medically necessary rather than a safeguard against a ticking biological clock.<sup>213</sup> Practically speaking, most fertility patients have a short window between diagnosis of a condition that compromises or threatens their fertility and treatment, making it ill-advised or impossible for those denied coverage to even attempt to overturn their insurers’ decisions.<sup>214</sup> Because fertility preservation is not typically covered by any insurance, public or private, it is primarily available to those who can pay at personal expense, creating a socioeconomic disparity in coverage.<sup>215</sup>

Covering fertility preservation, not just infertility, is critical to the RJ movement’s goal to extend to everyone the choice to become, or not become, a parent. Nearly a decade ago, the American Medical Association advocated for covered fertility preservation and pushed for a federal mandate that would require insurance company to pay for medically necessary fertility preservation.<sup>216</sup> Relatedly, California passed CA Bill AB 912, extending insurance coverage for the expenses resultant from

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<sup>208</sup> Velmahos, *supra* note 198, at 283.

<sup>209</sup> *Id.*

<sup>210</sup> See *Saks v. Franklin Covey Co.*, 316 F.3d 337, 346 (2d Cir. 2003) (holding that a health plan excluding infertility treatment was not discriminatory under the Pregnancy Discrimination Act or the Americans with Disabilities Act because it denied treatments to both infertile men and women).

<sup>211</sup> Velmahos, *supra* note 198, at 269.

<sup>212</sup> Preservation here refers mainly to procedures that safeguard the ability to biologically reproduce in the future including freezing eggs and embryos. Mohapatra, *supra* note 90, at 193, 204.

<sup>213</sup> See *id.* at 193–94, 207–08.

<sup>214</sup> *Id.* at 193.

<sup>215</sup> *Id.* at 193–94, 212.

<sup>216</sup> *Id.* at 193–94.

fertility preservation treatments when the patient's infertility was a brought on by another medical treatment.<sup>217</sup> By acknowledging and treating infertility and the risk of becoming infertile as medical conditions rather than choices, such policies would recognize the social and personal importance of biological motherhood.<sup>218</sup>

### 1. Counterarguments to Coverage Expansion

Some may argue that extending fertility coverage without first expanding healthcare access will only bolster historic inequalities.<sup>219</sup> Due in large part to income trends, BIPOC patients account for the majority of uninsured and Medicaid insured Americans—49 percent of Black women alone are part of this collective.<sup>220</sup> Nearly 14 percent of Black women in the United States are uninsured.<sup>221</sup> Regardless of insurance status, oncologists treating Black cancer patients are less likely to present or discuss options for fertility preservation than they do with their white patients, regardless of patient income.<sup>222</sup>

Additionally, fertility treatments, like IVF, tend to be less successful for Black women compared to their white counterparts.<sup>223</sup> Data from epidemiological studies suggest that people who use ART treatments are largely white regardless of whether they live in a state with fertility service insurance coverage—an unsurprising fact considering the insurance hurdles and prohibitively high cost of out-of-pocket payment.<sup>224</sup> The limited number of Black patients who do partake in ART treatment are less likely to become pregnant and more likely to miscarry a pregnancy.<sup>225</sup> In one study that included three hundred Black women, only 24% successfully became pregnant

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<sup>217</sup> *Id.* at 194.

<sup>218</sup> *See id.* at 193–94.

<sup>219</sup> *Id.* at 194.

<sup>220</sup> Jennifer Jones, *Bakke at 40: Remediating Black Health Disparities Through Affirmative Action in Medical School Admissions*, 66 UCLA L. REV. 522, 544 (2019); Kenya Glover, *Can You Hear Me?: How Implicit Bias Creates A Disparate Impact in Maternal Healthcare for Black Women*, 43 CAMPBELL L. REV. 243, 246 (2021) (citing *Black Women Experience Pervasive Disparities in Access to Health Insurance*, NAT'L P'SHIP FOR WOMEN & FAMS. (Apr. 2019), <https://www.nationalpartnership.org/our-work/resources/health-care/black-womens-health-insurance-coverage.pdf> [<https://perma.cc/ZE9G-XF68>]).

<sup>221</sup> *Black Women Experience Pervasive Disparities in Access to Health Insurance*, NAT'L P'SHIP FOR WOMEN & FAMS. (Apr. 2019), <https://www.nationalpartnership.org/our-work/resources/health-care/black-womens-health-insurance-coverage.pdf> [<https://perma.cc/ZE9G-XF68>].

<sup>222</sup> Mohapatra, *supra* note 91, at 194; Gross, *supra* note 98, at 944–45.

<sup>223</sup> *Ensuring Equitable Access to Infertility Care*, *supra* note 96.

<sup>224</sup> Ahmed, *supra* note 195, at 2807.

<sup>225</sup> Ahmed, *supra* note 195, at 2807; Dr. Chantel Cross, *Fertility for Black Families*, FERTILITYIQ, <https://www.fertilityiq.com/black-african-american-fertility/success-rates> [<https://perma.cc/V66L-FUBW>].

after one IVF cycle compared to 36% of the white women studied.<sup>226</sup> Of those who became pregnant, 29% of the Black women miscarried while only 15% of white women miscarried.<sup>227</sup> Why these disparities exist along racial lines for IVF patients is not readily apparent—even studies explicitly aiming to answer the conundrum seem to conclude with a question mark and an evergreen call for more data.<sup>228</sup>

It is clear that, at present, ART has its own racial disparities to grapple with. Thus, expanding insurance coverage for ART may not solve the issue—extending coverage of costly fertility procedures that are likely necessary for women impacted by pollution may have a limited impact. But such a limited view cuts the RJ movement off at the knees—extending every opportunity to access the right to parenthood is crucial. Expanding insurance coverage for ART can in and of itself push reproductive technology to answer unanswered questions, correct disparities, and thus improve for everyone.<sup>229</sup>

## 2. Solutions Need Not Be Singular to Be Right

Expanded healthcare coverage can still mitigate harm. Though the counterargument to expansion has some merit, this note posits that layered solutions are the best answer to the complex and deeply ingrained problem of environmental and reproductive injustice in the United States. Equitable access to sexual and reproductive healthcare can help correct the harms BIPOC communities are suffering, provided it is approached intelligently.<sup>230</sup> Mandated coverage for both fertility preservation as well as infertility treatments would afford increased autonomy in family planning, provided it is coupled with physical accessibility of clinics

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<sup>226</sup> Cross, *supra* note 225.

<sup>227</sup> *Id.*

<sup>228</sup> See, e.g., Nadine White, *Black Women Least Likely to Have Successful IVF Treatment, New Study Shows*, INDEPENDENT (Mar. 23, 2021, 4:02 PM), <https://www.independent.co.uk/news/health/black-women-ivf-treatment-b1821151.html> [<https://perma.cc/P6AA-RVTK>] (noting that “in the absence of clear explanations for these health disparities between patients of different ethnicities, [data] is ‘crucial’” (quoting Sally Cheshire, former chair of the UK’s Human Fertilisation & Embryology Authority)); *Ethnic Diversity in Fertility Treatment 2018*, HUMAN FERTILISATION & EMBRYOLOGY AUTHORITY (Mar. 2021), <https://www.hfea.gov.uk/about-us/publications/research-and-data/ethnic-diversity-in-fertility-treatment-2018/> [<https://perma.cc/F3XD-FE5K>] (concluding that additional research should be conducted by the Royal College of Obstetricians and Gynecologists’ recently established Race Equality Taskforce to examine inequalities in women health outcomes in connection with ethnic disparities).

<sup>229</sup> See Jim Hawkins, *Selling Art: An Empirical Assessment of Advertising on Fertility Clinics’ Websites*, 88 IND. L.J. 1147, 1167 (2013); *Ensuring Equitable Access to Infertility Care*, *supra* note 96.

<sup>230</sup> See *Ensuring Equitable Access to Infertility Care*, *supra* note 96.

offering these services.<sup>231</sup> Likewise, the care and the facilities would both need to be of good quality, “meaning that they ‘are evidence-based and scientifically and medically appropriate and up-to-date.’”<sup>232</sup> But perhaps most importantly, law and policy-makers must look beyond the private insurance market.

Medicaid rarely, if ever, covers infertility testing or care.<sup>233</sup> This restriction makes both the diagnosis of and treatments for infertility both inaccessible and exorbitantly expensive for the approximately seventy-five million who depend upon Medicaid insurance.<sup>234</sup> Expanding infertility and reproductive care coverage mandates to Medicaid alone would cover more BIPOC individuals and families than the current legislative landscape.<sup>235</sup> New York and Utah have respectively enacted and put forth legislation to update their Medicaid coverage for IVF and fertility treatments—such developments should only be the starting point.<sup>236</sup>

### B. *Community-Based Reparations for Community Harms*

The losses BIPOC communities endure from environmental harms are costly and necessitate compensation. Reparations consider not just bygone harms, but those that perpetuate with lasting effects that infringe upon fundamental rights.<sup>237</sup> The case for reparations stems from the subjugation of Black Americans: the systemic exclusion from policy, denial of capital, and marginalization in housing and education.<sup>238</sup> To

<sup>231</sup> *Id.*

<sup>232</sup> *Id.* (quoting Comm. on Econ., Soc. & Cultural Rts., General Comment No. 22: On the Right to Sexual and Reproductive Health (article 12 of the International Covenant on Economic, Social and Cultural Rights), ¶ 21, U.N. Doc. E/C.12/GC/22 (2016)).

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> Estimates show that only 15.2 percent of those aged zero to sixty-four who are covered by Medicaid are white. *Medicaid Coverage Rates for the Nonelderly by Race/Ethnicity*, KAISER FAM. FOUND. (2019), <https://www.kff.org/medicaid/state-indicator/nonelderly-medicaid-rate-by-raceethnicity/?currentTimeframe=true> [<https://perma.cc/G6DU-A7RL>]; *Ensuring Equitable Access to Infertility Care*, *supra* note 96.

<sup>236</sup> *Ensuring Equitable Access to Infertility Care*, *supra* note 96, at n.23 (“In June 2019, New York announced that its Medicaid fee-for-service and Medicaid Managed Care benefits would include ‘medically necessary’ ovulation enhancing drugs and attendant medical services for members between 21 and 44 years of age. Coverage includes up to three cycles of ovulation induction.”). Utah enacted legislation in 2020 to provide coverage for IVF and genetic testing to Medicaid patients who have a genetic trait associated with cystic fibrosis, spinal muscular atrophy, Morquio Syndrome, myotonic dystrophy, or sickle cell anemia and who intend to undergo IVF with a partner who is diagnosed with the same qualifying condition. UTAH CODE ANN. § 26-18-420 (LexisNexis through the 2021 Second Spec. Sess. of the 64th Leg.).

<sup>237</sup> Daniel P. Sutor, Essay, *Winning What’s Owed: A Litigative Approach to Reparations*, 105 MINN. L. REV. HEADNOTES 391, 394 (2021).

<sup>238</sup> P.R. Lockhart, *What Slavery Reparations from the Federal Government Could Look Like*, NBC NEWS (May 12, 2021, 8:00 AM), <https://www.nbcnews.com/news/nbcblk/slavery-reparations-federal-goverations-looks-2021-rcna900> [<https://perma.cc/UZ6S-J79X>].

many, the course of correction lies in the wealth gap between Black and white Americans—the same today as it was in 1970—justifying reparations in the form of direct payments.<sup>239</sup> For some, this brings up questions: who gets paid, how much will they receive, and where will the money come from?<sup>240</sup> However, reparative justice is not limited to direct cash payments. Three other types of reparations exist: truth commissions, apologies, and community-based reparations.<sup>241</sup>

Congressman John Conyers, Jr. of Detroit marked every congressional session from 1989 until his resignation with his introduction of the H.R. 40 reparations commission bill—a bill calling for a congressional study of slavery, its lingering effects, and recommendations for “appropriate remedies.”<sup>242</sup> Since 2017, the bill has attracted 150 additional co-sponsors.<sup>243</sup> Indeed, in April 2021, the bill acquired the necessary votes to pass to the next legislative steps, a first since Congressman Conyers introduced it in 1989.<sup>244</sup> The most recent groundswell of support for reparations is likely attributable to the centered conversation on racism in the United States following George Floyd’s murder in 2020.<sup>245</sup> But what is fundamental to understanding the bill is that it does not mandate monetary compensation or the establishment of entitlement programs for the decedents of enslaved people.<sup>246</sup> Instead, the bill’s principal’s objective is to recognize the injustices stemming from slavery that perpetuate the modern day Black experience.<sup>247</sup> After

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<sup>239</sup> *Id.*; Ta-Nehisi Coates, *The Case for Reparations*, ATLANTIC (June 14, 2014), <https://www.theatlantic.com/magazine/archive/2014/06/the-case-for-reparations/361631> [<https://perma.cc/V8XP-XVHA>].

<sup>240</sup> Coates, *supra* note 239.

<sup>241</sup> Christopher Burton, *3/5ths to 1/10th, How to Make Black America Whole: Exploring Congressional Act H.R.40-Commission to Study and Develop Reparation Proposals for African-Americans Act*, 54 UIC J. MARSHALL L. REV. 530, 547 (2021).

<sup>242</sup> *Id.* at 536–37 (“Since Representative Conyers’s resignation, Texas Democratic Representative Sheila Jackson Lee has taken the baton, sponsoring the current version of H.R. 40 in the 117th Congress.”); Coates, *supra* note 239; *see also* Yamiche Alcindor, *John Conyers to Leave Congress Amid Harassment Claims*, N.Y. TIMES (Dec. 5, 2017), <https://www.nytimes.com/2017/12/05/us/politics/john-conyers-election.html> [<https://perma.cc/D763-MT2U>].

<sup>243</sup> Suitor, *supra* note 237, at 400.

<sup>244</sup> *Id.*

<sup>245</sup> Jamey Keaten, *UN Rights Chief: Reparations Needed for People Facing Racism*, AP NEWS (June 28, 2021), <https://apnews.com/article/united-nations-death-of-george-floyd-racial-injustice-race-and-ethnicity-government-and-politics-8fa368dced6c7e34af4e4ecc3fdbccb4> [<https://perma.cc/28YG-64NZ>].

<sup>246</sup> *See* Maija Sikora, *Explained: H.R. 40 and the Possibility of Reparations*, RACQUET PRESS (July 23, 2019), [theracquet.org/6476/news/explained-h-r-40-and-the-possibility-of-reparations/](https://theracquet.org/6476/news/explained-h-r-40-and-the-possibility-of-reparations/) [<https://perma.cc/G9Q4-R9LG>] (explaining that “[t]he end goal of H.R. 40 is not the disbursement of cash, checks or any other kind of direct deposit”); Burton, *supra* note 241, at 536; Commission to Study and Develop Reparation Proposals for African-Americans Act, H.R. 40, 116th Cong. § 2 (2019).

<sup>247</sup> Burton, *supra* note 241, at 536–37.

studying the issues, a commission would then be charged with recommending to Congress the necessary reparations to atone for past injustices.<sup>248</sup>

This past year, Evanston, Illinois became the first American city to make reparations to its Black residents.<sup>249</sup> The Evanston City Council passed the first of several phases of reparations “to acknowledge the harm caused by discriminatory housing policies, practices and inaction going back more than a century.”<sup>250</sup> Evanston plans to grant \$25,000 to eligible Black households to defray or cover the costs of down payments, property purchases, and even home repairs.<sup>251</sup> The Chicago suburb’s bold moves may be due in part to the 2002 resolutions passed in Chicago which require companies doing business within the city to “disclose their connections to slavery.”<sup>252</sup> Even earlier, in 1992, Congress made reparations to Native Americans in the form of returned human remains and property under the Native Graves Repatriation Act.<sup>253</sup> These landmark decisions take various forms of reparations and demonstrate there is no “one-size-fits-all” solution to the harm BIPOC communities have historically suffered in the United States.

Reparations for the environmental harms inflicted upon BIPOC reproductive capabilities is not a far leap. Indeed, after lengthy lobbying efforts, California recently approved monetary reparations for reproductive harms stemming from the 1909 practice of eugenics-fueled forced sterilization.<sup>254</sup> However, returning to the torts framework, direct monetary compensation for the perpetuated reproductive harms endured by BIPOC communities is not necessarily reparative. Unlike the wealth gap or housing, the price point on lost potential life is not easily

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<sup>248</sup> *Id.* at 537.

<sup>249</sup> *Id.* at 544; Mark Guarino, *Evanston, Ill., Leads the Country with First Reparations Program for Black Residents*, WASH. POST (Mar. 22, 2021, 9:52 PM), [https://www.washingtonpost.com/national/evanston-illinois-reparations/2021/03/22/6b5a308c-8b2d-11eb-9423-04079921c915\\_story.html](https://www.washingtonpost.com/national/evanston-illinois-reparations/2021/03/22/6b5a308c-8b2d-11eb-9423-04079921c915_story.html) [<https://perma.cc/7WER-9WJS>].

<sup>250</sup> Guarino, *supra* note 249.

<sup>251</sup> Burton, *supra* note 241, at 544.

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 544–45.

<sup>254</sup> *California Launches Program to Compensate Survivors of State-Sponsored Sterilization*, OFF. OF GOVERNOR GAVIN NEWSOM (Dec. 31, 2021), <https://www.gov.ca.gov/2021/12/31/california-launches-program-to-compensate-survivors-of-state-sponsored-sterilization/> [<https://perma.cc/4L3Y-VAMN>]. “Efforts to compensate forced sterilization victims in California have been in the works for years, but never have come this close to the finish line . . . .” Derek Hawkins, *California Once Forcibly Sterilized People by the Thousands. Now the Victims May Get Reparations*, WASH. POST (July 9, 2021, 6:24 PM), <https://www.washingtonpost.com/nation/2021/07/09/california-once-forcibly-sterilized-people-by-thousands-now-victims-may-get-reparations/> [<https://perma.cc/EY65-ACW3>].



calculated without relying on harmful practices.<sup>255</sup> And while a price tag can be easily attached to healthcare expenses, that alone fails to address the many nuances of EJ/RJ. For these reasons, community-based reparations are the most appropriate measure to work towards correcting these enduring injustices.<sup>256</sup>

#### IV. PROPOSED SOLUTIONS FROM THE EJ/RJ INTERSECTION WITH A MONETARY FOCUS

The overarching purpose of both expanded healthcare coverage and community-based reparations is to not only to work towards tangible goals, like making ART more accessible, but also to broadly restore agency to the communities that have been stripped of their power. Central to the EJ and RJ movements is ensuring that those most at risk of harms are provided the information pertinent to their humanity as well as the ability to make decisions about their lives.<sup>257</sup> Because much of BIPOC subjugation in the United States directly enforces and worsens the racial wealth gap, it is important to rely upon solutions that confront the monetary roots of environmental and reproductive harms.<sup>258</sup>

##### A. *Expanding Healthcare Coverage Would Close the ART Access Racial Disparity While Contributing to Healthcare Equity More Broadly*

Healthcare coverage is important because it not only increases accessibility but can also help restore trust between the BIPOC community and medical providers. For good reason, BIPOC patients historically mistrust healthcare.<sup>259</sup> Studies indicate that Black patients are less likely to maintain regular visits with healthcare practitioners and that they receive less preventative care as well as less intensive hospital care.<sup>260</sup> Low-income communities, likely to be predominantly populated by BIPOC individuals, as a whole suffer.<sup>261</sup> Physicians serving these

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<sup>255</sup> See *supra* notes 190–192 and accompanying text referring to the practice of attaching higher value to white life than BIPOC life.

<sup>256</sup> “Community-based reparations are the most popular form of reparations among advocates for Black American reparations.” Burton, *supra* note 241, at 552.

<sup>257</sup> See *supra* notes 14–16 and accompanying text.

<sup>258</sup> Catarina Saraiva, *The Historical Reasons Behind the U.S. Racial Wealth Gap*, BLOOMBERG (May 24, 2021, 12:01 AM), <https://www.bloomberg.com/news/articles/2021-05-24/the-historical-reasons-behind-u-s-racial-wealth-gap-quicktake> [https://perm a.cc/AP6N-79XW].

<sup>259</sup> See Gross, *supra* note 98, at 951.

<sup>260</sup> *Id.* at 951–53.

<sup>261</sup> Poverty is racialized in the U.S.—21.2% of African Americans and 17.2% of Latinx individuals live below the poverty level, starkly compared to 9.0% of white

communities are often working in facilities that are overcrowded, creating time pressures, which in turn, inhibit their ability to accurately assess their patients.<sup>262</sup> Furthermore, those facilities experience high turnover of doctors, constraining Black patients' ability to establish relationships and resultant trust.<sup>263</sup>

Expanding coverage would therefore not only be essential to increasing accessibility for ART treatment but would also provide a stepping-stone towards a more equitable healthcare culture. The problems that EJ/RJ seek to resolve are deep rooted and necessitate a similarly complex solution. With federally mandated coverage for fertility treatment (including fertility preservation), BIPOC women in particular would be able to treat the reproductive complications they disproportionately face and also be more likely to see a doctor.<sup>264</sup> When coupled with community-based reparations, expanded healthcare coverage works at untangling a systemic knot of biases and subjugation.

### B. *Community-Based Reparations for Environmental and Reproductive Injustice*

Reparations generally are not just about the money—they are also about a public acknowledgement of wrongdoing. The appeal of community-based reparations is that they are more multilayered than direct reparation payments to individuals; this is crucial because the injuries endured, though specific in nature, stem from complex harms.<sup>265</sup> Looking beyond the hopeful passage of H.R. 40, reparations to BIPOC

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Americans and 9.7% of Asian Americans. See *Poverty Rate by Race/Ethnicity*, KAISER FAM. FOUND. (2019), <https://www.kff.org/other/state-indicator/poverty-rate-by-race-ethnicity/?currentTimeframe=0&selectedDistributions=white—black—hispanic—asian-native-hawaiian-and-pacific-islander—american-indianalaska-native—multiple-races&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> [<https://perma.cc/KYD2-TXUF>] (providing a table comparing white, Black, Hispanic, Asian/Native Hawaiian and Pacific Islander, American Indian/Alaska Native, and Multiple Races); see also Seema Mohapatra, *Reproductive Injustice and Covid-19*, 50 STETSON L. REV. 389, 394 (2021).

<sup>262</sup> Gross, *supra* note 98, at 951–53.

<sup>263</sup> See INST. OF MED. OF THE NAT'L ACADS., *UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE* 154 (Brian D. Smedley et al. eds., 2003), <http://www.nap.edu/openbook/030908265X/html/R1.html> [<https://perma.cc/6X95-HTJX>] (noting that minority patients “are more likely to receive care in hospital clinics and other settings characterized by rapid staff turnover and lack of continuity of care providers”); Gross, *supra* note 98, at 951.

<sup>264</sup> It is generally accepted that healthcare not covered by insurance is not accessed by low-income populations. See generally Malcolm Gladwell, *The Moral-Hazard Myth*, NEW YORKER (Aug. 21, 2005), <https://www.newyorker.com/magazine/2005/08/29/the-moral-hazard-myth> [<https://perma.cc/FB5T-AFZC>] (discussing that uncovered services, especially dental, are not utilized by the uninsured because the cost elevates care to a luxury).

<sup>265</sup> Lockhart, *supra* note 238.

communities would result in a much-needed injection of capital to fund public necessities.

Central to community-based reparation is the variety and flexibility of its structure.<sup>266</sup> This form of reparations provides direct monetary assistance to communities through programs offering robust educational, occupational, and healthcare opportunities.<sup>267</sup> Importantly, this is not a handout or a form of white charity, but long overdue compensation for the capital, infrastructure, and opportunities that were stripped or withheld from many BIPOC communities. The goal is to foster services historically inaccessible at worst and difficult to access at best.<sup>268</sup> In terms of access to healthcare specifically, this would join the short-term solution of increased insurance coverage with the long-term reparative goal. Community-based reparations also allow for “institution building” and economic stability in communities that have historically been stripped of these essentials, championing the concept that the “magnitude of the harm determines the amount of relief.”<sup>269</sup> Most important is the fact that community-based reparations allow directly impacted communities to be the driving force behind their own reparative justice.<sup>270</sup> In this way, those harmed are not just given a seat at the table—they are at the head of it.

## CONCLUSION

At the intersection of EJ/RJ lies the pathway to reparative and restorative solutions. The environmental harms inflicted upon BIPOC communities are numerous and dire, especially as they concern the ability to grow family lines. These harms stemming from pollution mirror larger systemic issues of policy and enforcement in the United States that subjugate some populations as the price for prioritizing others. But “[t]he costs associated with exposing a significant portion of our community to hazardous materials are ultimately borne by all of us.”<sup>271</sup> From both a moral and a practical standpoint, the country has an obligation to provide the basic dignities of health to its citizens. This obligation is deeply rooted in the recognized right to choose to have a family, and the accompanying right to a family that can flourish in the environment it is planted in. To follow through

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<sup>266</sup> Burton, *supra* note 241, at 552 n.159.

<sup>267</sup> *Id.* at 552–53.

<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 554 (quoting ALFRED L. BROPHY, REPARATIONS PRO & CON 174 (2006)).

<sup>270</sup> *Id.*

<sup>271</sup> Shelton, *supra* note 12, at 20.

on such obligations, federal intervention providing equitable and comprehensive reproductive healthcare is necessary. Legislating to make these opportunities equally available to all Americans is essential and requires both the passing of H.R. 40 and the implementation of community-based reparations. The root of these injustices is a disregard for and intentional sacrificing of BIPOC communities, and it will take these layered solutions to rectify centuries of reproductive harms. Ultimately, such actions must be taken—it is a matter of empowering communities that have, for centuries, been done dirty.

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