A PUBLICATION OF THE AMERICAN BAR ASSOCIATION
SECTION OF CIVIL RIGHTS AND SOCIAL JUSTICE

human

rights

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In the early seventeenth century, Thomas Benton built a pigsty. It was so close to his neighbor’s house that the odor of the swine made the home unbearable, “stopping... wholesome air.” Benton’s neighbor, William Aldred, claimed that the stench was enough to deprive him of his property and personal dignity and was, therefore, a violation of his rights. In what is known as Aldred’s case, the king’s court determined that:

“A man has no right to maintain a structure upon his own land, which, by reason of disgusting smells, loud or unusual noises, thick smoke, noxious vapors, the jarring of machinery, or the unwarrantable collection of flies, renders the occupancy of adjoining property dangerous, intolerable, or even uncomfortable to its tenants.” William Aldred’s Case, (1611) 77 Eng. Rep. 816.

This same principle was affirmed by William Blackstone in his Commentaries on the Laws of England, which opposed the nuisance that would deprive a neighbor of the use and benefit of his house. Prior to the enactment of restrictions on land...
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By Elayne Weiss

Each year that President Donald Trump has been in office and has sent his annual budget request to Congress, he has proposed massive cuts to federal affordable housing programs, as well as other essential programs that ensure basic living standards for low-income Americans. For this upcoming fiscal year, President Trump proposed to slash the budget for the Department of Housing and Urban Development (HUD) by a whopping $9.6 billion or 18 percent below fiscal year (FY) 2019’s congressionally enacted funding levels. The president proposed eliminating several programs, including funding that ensures public housing agencies (PHAs) have the money they need to address their most pressing capital needs, like fixing leaking roofs or replacing outdated heating systems. Additionally, the president proposed to reduce housing benefits by increasing rents and imposing harmful work requirements on some of our country’s poorest families who are lucky enough to receive federal housing assistance from PHAs and private owners who are subsidized by HUD.

In the past 20 years alone, HUD has provided housing assistance to more than 35 million households. Without the opportunity that HUD has provided, many of these families would be homeless, living in substandard or overcrowded conditions, or unable to afford other basic necessities because so much of their limited incomes would be spent on rent. In fact, the U.S. Census Bureau’s most recent supplemental poverty measure showed that housing assistance raised almost 3 million people out of poverty in 2017. But despite their proven track record, HUD’s affordable housing programs are chronically underfunded.

It’s a bitter truth that three out of four American households who are eligible for HUD assistance do not receive it because of lack of funding. Unlike other basic needs programs, affordable housing is not an entitlement in this country. Families often languish on waitlists for years, and some housing providers close their waitlists altogether to avoid giving people a sense of false hope. According to the National Low Income Housing Coalition, there is a shortage of 7 million homes that are affordable and available to America’s poorest families. If the Trump budget were ever enacted, it would greatly exacerbate this dire situation. If anything, our government should be increasing critical investments in programs that ensure families have decent, accessible, and affordable places to call home.

Thankfully, Congress has largely ignored President Trump’s budget requests with lawmakers in both parties turning
to an old Washington, D.C., saying: “The President proposes, Congress disposes.” The past two years, Congress has increased HUD’s budget to ensure the renewal of housing assistance and to target new resources to help vulnerable populations. However, while the Trump administration has failed to enact its proposed cuts, it has used its budget request as a blueprint for the further demolition and disposition of our nation’s remaining public housing stock that is home to almost 1 million households, the majority of whom have a senior or disabled family member.

Public housing has seen decades of underfunding during both democratic and republican administrations. As a result, public housing now faces a backlog of capital repair needs of at least $50 billion, threatening the quality and even the existence of these homes. While we ought to determine what public housing can be preserved and what cannot, the Trump administration has taken an aggressive approach to getting rid of all public housing one way or another. Last November, HUD’s Office of Public and Indian Housing (PIH) sent a letter to PHAs signaling the agency’s intent to dramatically reduce its public housing stock, euphemistically calling it “repositioning public housing.”

HUD cited the capital backlog as the reason to provide PHAs with “additional flexibilities” to reposition their housing stock. HUD’s immediate goal is to reposition 105,000 public housing units by September 2019. HUD later updated this goal in the agency’s most recent budget request to 125,000 units—more than 10 percent of the remaining public housing stock—to be repositioned by the end of FY 2020. HUD listed four means of repositioning public housing: utilizing the Rental Assistance Demonstration (RAD) program, demolishing public housing, facilitating the voluntary conversion of public housing to vouchers, and releasing PHAs from their declarations of trust with HUD.

PHAs have already taken note of the Trump administration’s goals and are now planning accordingly. Just recently, in response to the PIH memo, the Orlando Housing Authority decided to demolish more than 1,000 aging public housing units instead of trying to repair and rehabilitate them. The Orlando Housing Authority is planning to provide vouchers to public housing residents, who will now have to contend with one of the tightest rental markets in the country. According to Zillow, rents in the metro Orlando area rose more quickly in 2018 than any other major U.S. city.

At the same time, HUD Secretary Carson continues to push Congress to lift the cap on the number of public housing units eligible to be transferred to the private sector under the RAD program. Initially set at 60,000 public housing units, the cap is currently set at 455,000. The RAD program was created to address the unmet capital needs of public housing properties by converting them to project-based rental assistance with private ownership. Secretary Carson repeatedly touts RAD as a way to build public-private partnerships that can better serve the American people than big government. While RAD is not perfect—and tenants and advocates have every right to be concerned with how HUD and PHAs are implementing the program—it does offer a platform to better preserve some public housing (albeit through a different subsidy structure), and there are examples that prove the point.

However, for the RAD program to work as intended, the federal government still has a role to play in providing the federal rental assistance that has been contractually obligated to private owners who agreed to participate in the program. If the government’s commitment to provide this assistance seems shaky, private owners and investors are more likely to walk away from the program, as they become uncertain that projects will be able to meet their debt servicing and operating obligations, impairing investment and increasing financing costs.

Some private owners participating in HUD programs were recently put in a precarious financial position when President Trump’s failure to compromise with Congress led to a 35-day shutdown of the federal government, the longest in U.S. history. Lawmakers from President Trump’s own party implored him to reopen the government, to which he capitulated only after deciding to declare a national emergency to secure funding for his controversial plan to build a wall along the southwest border.

With no spending bill in place to fund the government, HUD had to scramble to find funding for private owners whose rental assistance payment contracts expired during the shutdown. Furloughed HUD employees were called back to the office and worked many long—and at the time, unpaid—hours to renew as many contracts as possible with money Congress had previously appropriated to the agency. HUD provided little communication with housing stakeholders, including private owners, but advised those owners with expired contracts to dip into their own individual funding reserves, where available, to cover shortfalls. Had the shutdown continued much longer, advocates were alarmed that owners would have to resort to cutting services and repairs, or in worst case, raising rents on low-income residents, many of whom live on fixed incomes. Moreover, the shutdown certainly did nothing to encourage
private owners to participate in the RAD program. If anything, it likely led some owners to consider giving up providing HUD-subsidized housing altogether, especially owners with properties in gentrifying areas where market rents have increased.

These owners again face funding uncertainty, as Congress and the administration continue to disagree on whether to raise the austere limits on federal spending in FY 2020. When the Budget Control Act of 2011 was signed into law, it created very low spending caps, restricting federal funding for discretionary programs. Since then, Congress and the White House have reached short-term agreements to provide limited budgetary relief, however the spending caps return for the FY 2020 budget. If they are not lifted, the caps could lead to devastating cuts to affordable housing. Congress and the administration must work together to not only provide relief from the caps but also increase funding for affordable housing programs so that housing providers, including private owners, can continue to serve low-income families without disruption. On top of that, lawmakers should increase funding for affordable housing outside the appropriations process to fully meet the need. Potential opportunities to provide this funding include housing finance reform and an infrastructure spending package.

While it is unclear to what extent HUD has reached out to owners to help rebuild trust and assure them of future funding, so far, the actions of the Trump administration have only undermined the very solution it has proposed to address the problem of our nation’s crumbling public housing stock.

At the time this article was written, Elayne Weiss worked as a senior policy analyst at the National Low Income Housing Coalition.
and Lanham Act pre-WWII, and FHA and VA loans post-War. Urban renewal programs, part of President Truman’s Fair Deal, purported to provide decent homes and a suitable living environment for every American and, further, the 1949 Housing Act was enacted to revitalize city centers. The benefits of these laws, however, were limited in reach.

Housing policy in the United States has consistently disadvantaged people of color and low-income communities in what Richard Rothstein refers to in The Color of Law: A Forgotten History of How Our Government Segregated America as a “state-sponsored system of segregation.” The Supreme Court’s decision in the 1926 landmark zoning case of Village of Euclid v. Ambler Realty, Co., for example, legitimized the use of zoning ordinances as a constitutional exercise of police power to provide for health, safety, and welfare. Euclid spoke to the importance of housing, but highlighted the preference toward single-family detached units, pointing out that “very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surroundings created by the residential character of the district.” Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365, 394 (1926).

Roosevelt’s 1933 Homeowner’s Loan Act created the Home Owners’ Loan Corporation (HOLC), which provided opportunities for improved mortgage terms for white homebuyers, but was also the origin of the “Residential Security Maps” used to deny mortgages to African Americans through redlining. The Federal Housing Administration, established as part of the National Housing Act of 1934, refused to insure mortgages in and near African American neighborhoods while simultaneously subsidizing the mass-production of white subdivisions built with the proviso that no homes be sold to African Americans. Slum clearance and urban renewal, addressed under Title I of the 1949 Housing Act, not only had a detrimental effect on the urban fabric, but also reinforced segregation and impoverishment. Local renewal agencies, under the direction of the Housing Administrator, were given the power of eminent domain and federal funding to condemn “blighted” neighborhoods; the law allowed newly cleared land to be sold to private developers at a reduced price. The Act, intended to stimulate large-scale, private investment in cities, in practice displaced more than 300,000 people between 1955 and 1966. The burden once again fell disproportionately on people of color; two-thirds of those displaced during urban renewal were African American. This continued with the Federal-Aid Highway Act, which sought to connect the country through a series of highways, but either completely eliminated or divided predominantly urban, African American communities.

Limited federal actions impacting housing during the 1960s reflected the social concerns of the time. This was first reflected in Executive Order 11063, which required equal opportunity in housing. Title VI of the Civil Rights Act extended this to ensure nondiscriminatory practices in federally assisted programs and in Title VII, which delineated the Fair Housing Act. Despite the progress of these laws, and of course the civil rights movement, however, federal housing projects still segregated tenants by race. These decades-old discriminatory federal policies created a foundation for economic inequality, decreasing opportunities for upward mobility for those living in segregated neighborhoods. For example, though African American incomes average about 60 percent of white incomes, African American wealth is about 5 percent of white wealth. As middle-class families derive wealth from home equity, this disparity is clearly attributable to twentieth-century federal housing policy. Unfortunately, these federal policies barely scratch the surface of the multitude of regulations that have led to segregation. At the local level, for example, ordinances were used not only to prohibit African Americans from living in some neighborhoods, but in some instances create sundown towns mandating African Americans leave by sundown.

Decades later, the same African American communities that banks had long ignored were targeted with subprime loans. These risky investments, although tremendously profitable for the banks, carried higher fees and interest rates and resulted in a housing crash. The discriminatory nature of these loans was clear. At the height of the housing boom in 2006, African American and Latino families earning more than $200,000 a year were more likely on average to be provided a subprime loan than white families making less than $30,000 a year. Jacob William Faber, Segregation and the Geography of Creditworthiness: Racial Inequality in a Recovered Mortgage Market, 28 Housing Policy Debate 215–247 (2017). The impacts of the 2006 subprime mortgage crisis, sometimes called reverse redlining, will have lasting impacts on those that faced foreclosures. These discriminatory practices led to a number of lawsuits, such as City of Baltimore v. Wells Fargo, 1:08-cv-00062 (D. Md. 2012), in which the city alleged that Wells Fargo had coerced minorities into subprime loans, providing them with less favorable rates than white borrowers and ultimately foreclosed on hundreds of Baltimore homes. The result was the creation of blight and increased public safety costs. Wells Fargo and the city eventually reached a settlement agreement whereby the lender would pay $175 million to settle accusations that its brokers discriminated against African American and Latino borrowers.

These same communities face not only economic inequities, but also live where they must bear a disproportionate burden of environmental ones. And problems far more caustic than the noxious air created by Benton’s pigsty plague housing in America today. For example, people of color in the Northeast and mid-Atlantic live with 66 percent more air pollution, which can lead to increased incidents of lung and heart ailments, asthma, diabetes, developmental problems in children, and premature death (African Americans are exposed to 61 percent more pollution from burning gasoline, Asian Americans 73 percent more, and LatinX 75 percent more). (See Inequitable Exposure to Air
Pollution from Vehicles in the Northeast and Mid-Atlantic (2019), Union of Concerned Scientists, https://www.ucsusa.org/clean-vehicles/electric-vehicles/northeast-air-quality-equity.) Pipelines crept across the homelands of the Standing Rock Sioux in North Dakota, leaking almost immediately after coming into operation. Now massive compressor stations for a fracked gas pipeline threaten the historically African American Union Hill community in Virginia. Perhaps the best case reflecting the disproportionate burdens of environmental contamination coupled with the political and legal failures in addressing these burdens is the now five-year-old health crises created when Flint, Michigan, switched its water source, exposing nearly 100,000 residents to lead-tainted drinking water. Not only has the state failed to find any official accountable, but the Department of the Attorney General is also dropping all charges related to the investigation—including one involuntary manslaughter charge against a top health official.

Housing and neighborhoods can also go ignored for decades only to eventually face the devastating impacts of gentrification and displacement. The term “gentrification” was first coined by British sociologist Ruth Glass in the 1960s to give a name to what was occurring in the working-class neighborhoods in London, which “one by one, [were] invaded by the middle class.” Economic development in disinvested neighborhoods, although in some ways positive, when left unchecked can go too far. Existing residents may be forced from their homes due to decreasing housing stock, increased rents, and even landlord harassment (e.g., cutting off utilities, ignored maintenance, or letting garbage accumulate). This can come about as a result of economic or physical change. Communities like Brooklyn or Harlem exemplify such an economic development impact.

Physical change may be represented by the changes associated with Brownfields redevelopment. Gentrification has also been linked to simply locational advantage. Research on real estate values in Miami, Florida, for example, has shown that higher elevations bring higher property values, demonstrating the impending issue of climate gentrification. (See Jesse M. Keenan, Thomas Hill, and Anurag Gumber, Climate Gentrification: From Theory to Empiricism in Miami-Dade County, Florida, 13 Environmental Research Letters 054001 (2018).) The most obvious impact of gentrification is physical displacement; however, political and cultural displacement also affect those residents that remain in gentrifying neighborhoods.

Healthful, affordable housing and anti-displacement measures are not only critical to individual health but also to environmental health. For example, consider the lack of housing options in cities across the country where there is a significant imbalance between jobs and housing, particularly affordable housing near transit options. This imbalance between jobs and housing, particularly in urban areas near public transportation, prevents people from living near their place of employment. Where low-income residents can afford to live near transit options, they experience health, community, and environmental benefits. (See ACT-LA, Transit for All. Achieving Equity in Transit-Oriented Development (ND), http://www.allianceforcommunitytransit.org/wp-content/uploads/2015/02/ACT-LA-Transit-for-All-Achieving-Equity-in-Transit-Oriented-Development.pdf.)

Further, there is a connection between transit use and income levels. When low-income households reliant on public transportation are displaced, transit use decreases. Stephanie Pollack, et al., Maintaining Diversity in America’s Transit-Rich Neighborhoods: Tools for Equitable Neighborhood Change. DRS (2010), https://repository.library.northeastern.edu/files/330193. Where there is a required commute for affordable housing, sprawl often follows, which in turn negatively impacts air and water quality; affects energy use; and contributes to the loss of farmland, open space, forest, and other habitats. Providing developers incentives for creating or maintaining affordable housing, like allowing for additional density or parking reductions, or speeding up approvals for infill developments near transit options would result in climate benefits, reduce pollution, and improve public health.

That adequate housing is a human right is a widely recognized concept. The right is protected in Article 25 of the Universal Declaration of Human Rights; Article 11 of the International Covenant on Economic, Social, and Cultural Rights; Article 27 of the Convention on the Rights of the Child; Article 5 of the Convention on the Elimination of All Forms of Racial Discrimination; Article 14 of the Convention on the Elimination of All Forms of Discrimination against Women; and Article 11 of the American Declaration on Rights and Duties of Man. Housing is also included as an element of the UN Sustainable Development Goals. Goal 11, which seeks to “make cities inclusive, safe, resilient and sustainable” posits that sustainability requires addressing the shortage of adequate housing and advances the idea that by 2030, all countries must “ensure access for all to adequate, safe and affordable housing and basic services and upgrade slums.”

Unfortunately, despite these lofty international conventions, as is evident in the contributions of this issue’s authors, the United States is far from addressing the lasting impacts of historic and continuing injustices. Unfortunately, housing has ultimately been commodified and, therefore, disconnected from its social function. It reflects income inequality and environmental injustice. From federal- to local-level laws impacting air and water, along with homeowners and the home- less, regulatory processes that influence where and how people live have an immediate and profound effect on shaping public health. It is essential to address how these regulations affect communities that have suffered from the distributional disparities of environmental and economic harm concurrent with the disproportionate protection of the law.

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Environmental Injustice in Uniontown, Alabama, Decades after the Civil Rights Act of 1964: It’s Time for Action

By Marianne Engelman-Lado, Camila Bustos, Haley Leslie-Bole, and Perry Leung

On December 22, 2008, more than a billion gallons of highly toxic coal ash burst from an impoundment and spilled into the Emory River channel in Kingston, Tennessee, covering approximately 300 acres. A by-product of coal-fired power plants, coal ash contains pollutants such as arsenic, mercury, and lead, and its particles can travel deep into lungs. More than 10 years after the Kingston spill, workers who cleaned up the coal ash at the Kingston site are still suffering the after-effects of exposure, including brain cancer, lung cancer, and leukemia, and are pressing their claims in court. (See Joel K. Borune, Coal’s Other Dark Side: Toxic Ash that Can Poison Water and People, National Geographic (Feb. 29, 2019), https://www.nationalgeographic.com/environment/2019/02/coal-other-dark-side-toxic-ash.) The impacts of this spill, however, stretch far beyond the town and those involved in the cleanup efforts, affecting the lives of hundreds of people across state lines in Uniontown, Alabama, a low-income, predominantly African American community. Ultimately, the fate of this coal ash would demonstrate the failure of environmental and civil rights laws to protect vulnerable communities.

In 2010, with the approval of the Alabama Department of Environmental Management (ADEM), the Tennessee Department of Environment and Conservation (DEC), and the Tennessee Valley Authority (TVA), the coal ash was moved to Uniontown, Alabama. The move was intended to provide interim storage for the coal ash while a long-term solution was being developed. However, the move was not without controversy. Uniontown is a predominantly African American community with a history of environmental injustice. The move was met with strong opposition from the community, who were concerned about the potential health risks and environmental impacts.

Sewage overflows from the broken sprayfield in Uniontown, Alabama.
valley authority transported 4 million cubic yards of coal ash from the Kingston spill to Arrowhead Landfill in Uniontown, Alabama. The Kingston cleanup took place under the regulatory authority of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), otherwise known as the nation’s superfund law. Under CERCLA, the coal ash was considered hazardous in Tennessee, but once the ash was transported to Uniontown, it was classified as nonhazardous under the Resource Conservation Recovery Act (RCRA). In 2016, Esther Calhoun, a resident of Uniontown and president of Black Belt Citizens Fighting for Health and Justice, a community-based group organized in 2005, stated in written testimony submitted to the U.S. Commission on Civil Rights:

I’ve asked over and over . . . why this coal ash was considered hazardous when it left Kingston, Tennessee, and the area of the spill was declared a superfund site, but then was no longer considered hazardous when it arrived in our community, a predominantly black town? We saw pictures of people in hazmat suits loading the coal ash in Kingston, while in Uniontown, workers were provided with little protection and community members with nothing. Workers at the Arrowhead Landfill washed the train cars after unloading, but there was no system for washing the cars of the workers as they came in and out of the site, spreading coal ash across the town. I understand that the laws are different, that the spill falls under the superfund law while the coal ash becomes solid waste and falls under the Resource Conservation and Recovery Act (RCRA) when it arrives at the Landfill. But coal ash is still coal ash—it still contains exactly the same toxic chemicals whatever name you give it.

For purposes of this article, we will assume that none of the decision-makers involved in approving the disposal of coal ash in Uniontown intentionally discriminated on the basis of race. We leave to another time a broader discussion of the role of unconscious or implicit bias in decision-making. (See, e.g., Kirwan Institute for the Study of Race & Ethnicity, Ohio State University, State of the Science: Implicit Bias Review (2017), http://kirwan institute.osu.edu/wp-content/uploads/2017/11/2017-SOTS-final-draft-02.pdf.) But isn’t the failure of decision-makers to protect the people of Uniontown—and, generally, the broader set of policies that lead to the disproportionate exposure of people of color to pollution from landfills and other toxic sources—a denial of equal protection, which civil rights laws were designed to address?

In 1963, events in the county seat of Marion, Alabama, just 20 miles away from Uniontown, would lead to the historic march from Selma to Montgomery to demand voting rights for African American citizens. The march would ultimately lead to the passage of the Voting Rights Act of 1965. Now, more than 60 years later and only minutes down the county road, residents in Uniontown continue to struggle to have their equal rights to clean air and clean water recognized.

Approximately 90 percent of Uniontown’s population of approximately 2,300 are African American, and with a per capita income of less than $10,000. More than 40 percent of the population live under the poverty line. When ADEM was preparing plans to build Arrowhead Landfill, residents formed coalitions and signed petitions to oppose the facility, knowing that it would bring pollution to their community. In 2007, however, Perry County Commissioners approved the permit anyway. Then in 2010, the County Commission, ADEM, and the U.S. Environmental Protection Agency (EPA) all approved the decision to send coal ash from Kingston, Tennessee, to Uniontown. Notably, in 2016, the U.S. Commission on Civil Rights wrote a scathing report highlighting the EPA’s failure to protect Uniontown by either implementing principles of environmental justice or by enforcing civil rights. (See U.S. Commission on Civil Rights, Environmental Justice: Examining the Environmental Protection Agency’s Compliance and Enforcement of Title VI and Executive Order 12,898 62-69 (September 2016), https://www.usccr.gov/pubs/2016/Statutory_Encroachment_Report2016.pdf.)

Esther Calhoun and Black Belt Citizens have continued raising concerns about coal ash and other community health hazards. “If you come to Uniontown, [Alabama] you’ll see this mountain of coal ash,” Calhoun told staff at the nonprofit Earthjustice. “You would see that no one should live this close to coal ash. No one in their right mind would want to live this close to coal ash.” (See https://earthjustice.org/blog/2016-february/coal-ash-dump-in-alabama-s-black-belt-another-symbol-of-racism-s-staying-power.)

Despite the continued objection of residents, the community still bears the burden of the landfill, which is licensed to received waste from communities in 33 states—including the entire Eastern seaboard. Moreover, despite the community’s outcry against the impacts of coal ash on their health and way of life, Arrowhead Landfill continues to advertise to power plants for more coal ash and waste such as contaminated soils, debris, asbestos, and petroleum contaminants. On its website, the current owner of the landfill touts its suitability for the “efficient and environmentally responsible disposal solution” for handling coal ash, adding that characteristics of the site allow “customers to mitigate risks and limit liability.” (See https://arrowheadenvironmentalpartners.com/about/why-arrowhead/responsibly-handling-coal.)

Unfortunately, coal ash is not the only health hazard and environmental injustice that Black Belt Citizens is fighting. Uniontown has an antiquated sewage system with open-air spray fields that have been the subject of a Clean Water Act enforcement action that has languished in state court for years. In addition, Harvest Select operates a catfish processing plant that sends large volumes of wastewater to the faulty sewage system. The catfish plant, along with the Southeastern Cheese Corporation’s facilities, periodically emits odors that interfere with the enjoyment of property and raise concerns about the health and welfare of community residents.

Uniontown residents are also being forced to defend the memory of their ancestors as Arrowhead Landfill encroaches on New Hope Church Cemetery. The cemetery is located adjacent to the landfill and is the final resting place of former plantation
workers, sharecroppers, and people who were enslaved. While the cemetery’s boundaries and deed are in controversy, actions taken by landfill operators have physically altered the site and raised questions about the integrity of burial plots for ancestors and loved ones, including Esther Calhoun’s brother and other family members, as well as the loved ones of other Uniontown residents. In the face of such glaring injustices, why haven’t laws provided protection for the residents of Uniontown?

THE PROMISE AND FAILURE OF CIVIL RIGHTS ENFORCEMENT

Since Arrowhead Landfill first opened in 2007, Uniontown residents have filed multiple complaints with ADEM and testified at public hearings. Then, in 2013, 35 residents living within one mile of the landfill and other interested persons submitted a complaint to the EPA’s Office of Civil Rights (OCR) alleging that ADEM’s decision to reissue and modify the operating permit for Arrowhead Landfill violated Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and agency regulations, 40 C.F.R. Part 7. The complaint described several health and nonhealth impacts, including interference with sleep, frequent emission of odors, irritation of nose, throat, and eyes, dizziness, nausea, an increase in the vector population in and around homes close to the landfills, and increased noise from the operation of heavy machinery.

Between 2013 and 2018, the complainants continued to submit additional letters, photographs, and documentary evidence of these impacts. In addition, in 2016 the complainants filed a second complaint with the EPA asking it to address ADEM’s failure to protect them from retaliation and intimidation. After having exercised their civil rights to raise concerns about the landfill’s impacts, Arrowhead Landfill filed a $30 million lawsuit against residents in an attempt to silence them. Although the landfill eventually withdrew the suit, it was yet another way to target and threaten the community.

Despite all of this evidence and additional interviews, site visits, inspection reports, and studies submitted by complainants, the Office of Civil Rights, now named EPA’s External Civil Rights Compliance Office (ECRCO), dismissed the complaint in March 2018, declaring that there was “insufficient evidence” to conclude that ADEM violated Title VI and the EPA’s nondiscrimination regulations. In evaluating the sufficiency of evidence, ECRCO focused largely on whether Arrowhead Landfill was in compliance with federal air and water quality monitoring regulations and had capped the coal ash according to requirements. In evaluating the impact of the landfill on air quality, the EPA relied on data from an air monitor miles away from town, which had little relevance to whether community members experience problems with air pollution at fence line. Moreover, the EPA declined to conduct testing or monitoring itself, and refused even to consider impacts on property value, asserting instead that it has “substantial discretion to determine the types of harms, on a case by case basis, that warrant investigatory resources.” The EPA provided no further explanation for its decision that “it would not investigate substantively the alleged harm of diminution of property values.” Ultimately, the EPA’s decision to close the case was based on inappropriate reliance on standards developed in accordance with environmental laws and a failure to fully investigate or recognize the full range of harms to the community caused by ADEM’s decision to permit the landfill.

Title VI of the 1964 Civil Rights Act prohibits recipients of federal funds from discriminating on the basis of color, race, or national origin. 42 U.S.C. § 2000d. Under the EPA’s interpreting regulations—and the regulations of every other federal agency that promulgated Title VI regulations—even if a specific policy, practice, or project is facially neutral, it cannot have unjustified disparate impacts. 40 C.F.R. § 7.35 (b), (c). In the environmental justice context, Title VI should be a powerful legal framework to address disparities in siting, operations, and environmental enforcement by public and private recipients of federal funding.

Like other agencies that disburse federal funds, the EPA is in charge of ensuring that recipients of federal funds, whether public or private, are accountable for complying with Title VI. Under federal regulations, the EPA has authority to conduct affirmative compliance reviews, though it rarely if ever initiates investigations. 40 C.F.R. §§ 7.110 (preaward compliance), 7115 (postaward compliance). The EPA receives and investigates Title VI complaints, overseeing whether states, cities, and businesses that receive federal funds are fulfilling their civil rights obligations. After a complaint is filed, the EPA has 20 days to determine whether it merits an investigation and 180 days to issue a preliminary finding. If the EPA makes a finding of discrimination, it must request that the recipient of funds address the problem voluntarily. If the recipient refuses to come into compliance with the law, the EPA can refuse to continue providing federal funds.

While affected residents used to be able to file a Title VI complaint in court and therefore demand judicial relief for the adverse impacts they faced, the Supreme Court held in 2001 that there was no private right of action under disparate impact regulations. Thus, in Alexander v. Sandoval, 532 U.S. 275 (2001), the Court closed the doors to private litigants seeking relief based on evidence of disparate impact, forcing communities to rely on federal agency enforcement of challenges to decisions that further exacerbated disparities and placed disproportionate environmental burdens on communities of color.

The promise of civil rights suggested by civil rights law provided no relief for residents of Uniontown. Indeed, other communities of color in Alabama have brought civil rights complaints to challenge discriminatory permitting practices at ADEM, including ADEM’s refusal to monitor its civil rights compliance by evaluating whether its actions have a disparate impact, to no avail. As far back as 2003, OCR cautioned ADEM that its “failure to adequately consider socio-economic impacts (including race) at any point in the siting and permitting process for municipal solid waste landfills in Alabama” created a “significant potential for failing to comply with Title VI. See Letter from Karen D. Higginbotham, Dir., EPA OCR, to Luke Cole, Ctr. on Race, Poverty & the Env’t, and Cal. Rural Legal Assistance Found., & James W. Warr, Dir, ADEM, at 7 (July 1, 2003) (filed in EPA File No. 28R-99-R4) (emphasis in original). OCR stated, “[t]his potential failure of consideration could lead, in the future, to ADEM-permitted landfills that have an
to comply with regulatory deadlines for processing Title VI complaints, ERCO issued findings of discrimination in the Genesee Power case, which had been languishing at the EPA since the 1990s, finding that African Americans were treated less favorably than other groups during permit hearings of a power plant from 1992 through 1994. In 2018, a federal court ruled that the EPA violated the law by waiting a decade or more to investigate the Genesee Power complaint as well as four other civil rights complaints submitted by Californian’s for Renewable Energy (CARE), Ashurst Bar/Smith Community Organization, Citizens for Radioactive Dumping, Sierra Club, and one individual, Michael Boyd (CARE v. EPA, Case C 15-3292 SBA, U.S. District Court for the Northern District of California Oakland Division). To provide a point of comparison, according to the U.S. Department of Education (https://www2.ed.gov/documents/press-releases/title-vi-enforcement.pdf), the Office for Civil Rights and Education handled nearly 5,500 Title VI-related complaints and opened more than 55 investigations between 2009 and 2011.

THE GAPS IN ENVIRONMENTAL LAW

Uniontown is one of many communities across the nation where environmental hazards disproportionately burden vulnerable communities and environmental law has also afforded insufficient protection. Environmental laws such as the Clean Air Act (CAA), the Clean Water Act (CWA), and the Toxic Substances Control Act (TSCA) have reduced exposure to toxins and pollution since they were passed by Congress in the 1970s. As the EPA’s website suggests (https://www.epa.gov/clean-air-act-overview/progress-cleaning-air-and-improving-peoples-health#breathe), Americans “breathe less pollution and face lower risks of premature death and other serious health effects” as a result of the CAA, for example. The benefits of these landmark environmental laws, however, do not reach all communities equally. Studies have shown that race, more than income or any other factor, is the strongest predictor of a community’s proximity to a polluting facility and, subsequently, to its exposure to toxic substances. Uniontown is a clear example of this inequity.

Ironically, in cases of environmental justice, the EPA has used federal environmental regulations to deflect claims that state and regional permitting decisions and polluting facilities are having adverse and discriminatory effects. In response to a 1998 Title VI complaint challenging a decision by the state of Michigan to approve a proposal by Select Steel Corporation to build a steel mini-mill in Flint, Michigan, a community already overburdened by polluting facilities, the EPA claimed that despite the fact that the facility was admittedly going to emit dangerous pollutants such as lead, which creates risk at any level of exposure, the EPA could not find cognizable impacts from the facility if the permit complied with environmental regulations. (Select Steel Corp., Permit No. 579-97, Docket No. PSD 98-21, 9 (Envt’l Appeals Board, Sept. 11, 1998).) Notably, all facilities will claim that they plan to comply with environmental regulations when seeking a permit, and facilities found in violation of a permit offer plans to come into compliance. The EPA argued, however, that since standards are set at a level that protects human health, the levels of pollution that would be released from the steel mill would be safe.

The precedent set by Select Steel took the form of a “rebuttable presumption,” suggesting that adverse health impacts could not be considered as long as a facility was in compliance with environmental regulations. In 2010, however, the EPA issued a Civil Rights Compliance Toolkit that eliminated the “rebuttable presumption” from its analysis. The toolkit states that compliance with environmental laws “does not necessarily mean” that a recipient’s policy or practice is not causing adverse health effects. The agency is now required to determine “site specific” levels of pollution and their impacts on health. In the Uniontown case, however, ERCO nonetheless dismissed residents’ clear evidence of suffering, finding instead that Arrowhead Landfill was in compliance with its permit and, therefore, that there was insufficient evidence that the facility was causing health impacts. Despite the EPA’s stated intention to stop applying the rebuttable presumption, ERCO seemed to use the same logic to dismiss residents’ claims in Uniontown.

Environmental laws like the CWA,
CAA, and TSCA can only protect people if they are enforced—and enforced equally in low-income communities and communities of color. Neither the EPA, ADEM, nor the city of Unicontown have expressed an interest in testing the air, soil, or water in Unicontown despite obvious pollution from a number of sources. ECRCO stated that Arrowhead Landfill is in compliance with its permit, but failed to perform its own assessment to validate the landfill’s self-reporting. Without any action by the local, state, or federal government, Unicontown residents continue to worry about exposure to numerous polluting sources, with cumulative and unjust impacts on their health and welfare.

**A WAY FORWARD**

Despite the lack of success with formally pursuing justice and real change through civil rights and environmental law, the efforts of Unicontown residents and Black Belt Citizens has not been in vain. Their voices continue to raise national awareness about environmental justice issues in their state and are building momentum for reform. Black Belt Citizens partners with various organizations, including Black Warrior Riverkeeper, universities, and nonprofits to document community health outcomes and work toward civil rights enforcement. In addition, their current vice president, Ben Eaton, has become a Perry County commissioner and will provide oversight for the landfill in that role. Nonetheless, the situation in Unicontown urgently needs attention at local, state, and federal levels. Unicontown residents deserve better.

The federal government’s commitment to civil rights enforcement is at best in contention in the year 2019. On the other hand, though still inadequate, the Civil Rights Act has deeply established protections against discrimination in voting, housing, employment, education, and transportation. In the area of environmental decision-making, however, civil rights enforcement not only lags behind but still seems beyond the public imagination. Critics believe ECRCO does not have adequate resources, has been unwilling to enforce civil rights law as an independent source of duty from environmental law, is reactive to complaints rather than proactive in identifying issues, and has failed to set precedent for addressing discrimination in the environmental context.

In the short term, all states, including Alabama, need to develop and enforce environmental justice and civil rights policies. ADEM has the power to protect community members in Unicontown, Dothan, and Tallassee from injustice but has neglected to do so and repeatedly dismissed the testimony of residents who are suffering. The EPA should also exercise its affirmative authority to enforce civil rights and issue clear programmatic guidance to recipients of federal funds and comprehensive and uniform standards for investigating complaints. The latter will also serve communities by providing clarity on what evidence they can collect to protect themselves from environmental health concerns.

But those steps will not be enough. In the long term, it will also be important for Congress and the federal government to take action. The Environmental Justice Act of 2017, first introduced on October 24, 2017 as S. 1996, https://www.congress.gov/bill/115th-congress/senate-bill/1996, by Senator Corey Booker and Congressman Ruiz in the House would, if passed, overrule *Alexander v. Sandoval* by allowing private parties to bring actions against recipients of federal funds that are engaging in discriminatory practices rather than relying on the federal government to act on their behalf. The bill would also amend the CWA and the CAA to require consideration of the cumulative impacts of pollutants in permitting. More ambitiously, Congress and the next administration should consider a wholesale revamping of the civil rights enforcement system to create greater accountability and standardization across all agencies, including, for example, a strengthened coordination role for the Department of Justice. These solutions would centralize authority and responsibility to build capacity for civil rights enforcement and reduce reliance on dispersed agencies that also allocate resources for other goals.

As our political leaders grapple with how to protect civil and environmental justice rights, longtime Unicontown residents like Dorothy McCampbell continue to struggle with the impacts on her communities from the surrounding polluting sources. During a recent visit by the authors, McCampbell explained that she just wanted her grandchildren to enjoy their visits to her home when they were in town and to look back fondly on their time spent there. Instead, they refer to Unicontown as “stinky town” and both she and her husband deal with the daily health impacts of sore throats and asthma, which only developed after the landfill opened down the road from her house.

“I’d like to see the EPA do justice,” Esther Calhoun commented in her testimony before the U.S. Commission on Civil Rights. “I’d like our voices to be heard.”

The authors are grateful for the leadership and courage of Black Belt Citizens Fighting for Health and Justice. We also want to thank the Yale School of Forestry and Environmental Studies for its continued support and our classmates from the spring 2019 Environmental Justice Capstone Course, each of whom we have learned from. For a more elaborate explanation of future recommendations discussed in this article, see Marianne Engelman-Lado, No More Excuses: Building a New vision of Civil Rights Enforcement in the Context of Environmental Justice, UNIV. OF PENN. J. OF L. & SOCI. CHANGE (2019) (forthcoming).

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RURAL AMERICA’S DRINKING WATER CRISIS
By Madison Condon

While Flint, Michigan, rightfully captures headlines, another water crisis affecting millions of Americans continues to go largely unnoticed. All across rural America, small community water systems are failing to protect public health due to a perfect storm of forces. Poor regulation of agricultural waste and other pollutants, shrinking populations, and aging infrastructure all contribute to the increasing incidents of water quality violations dotting the rural landscape. There are nearly 60 thousand community water systems in the United States and 93 percent of them serve populations of fewer than 10,000 people—67 percent serve populations of fewer than 500 people. In 2015, 9 percent of all water systems had a documented violation of water quality standards, exposing 21 million people to unhealthy drinking water. These violations were more likely to occur in rural areas, where communities often have trouble finding the funds to maintain their systems.

Many water supply systems were designed and built decades ago, and old systems are susceptible to a variety of failures. Corroding pipes can leach lead and copper directly into the drinking supply. Some need technological updates to keep pace with stricter pollutant standards that reflect our evolving scientific understanding of risk exposure. Pollutant levels are also just much higher than they used to be. Water supplies in farming communities often have harmfully high levels of nitrates, which seep into the groundwater from fertilizer and manure. Yet, 85 percent of the communities with nitrate violations have no treatment systems for removing the chemical. The costs of compliance can be huge. Systems that
can handle the treatment of nitrate range from the hundreds of thousands to several million dollars. The town of Pretty Prairie, Kansas, population 650, was recently forced to build a water treatment system to address nitrate levels, at a cost of $2.4 million. This cost of roughly $3,600 per resident is a substantial burden in a town with a median income of $33,000. The Environmental Protection Agency (EPA) estimates that updating rural America’s water infrastructure (just those systems serving populations of less than 10,000) would require $190 billion of investment in the coming decades. Where this funding will come from has been left unanswered. Water infrastructure is typically paid for by the rates charged to individual users. But regional economic changes and demographic shifts mean that decades old water systems in need of repair sometimes now serve rate-paying populations just a fraction of the size they were initially built to serve. Some communities have a hard time simply finding a qualified technician to oversee the water treatment process. The job requires training and certification, yet pays part-time hours in towns often populated mainly by retirees.

Some, including President Trump, have proposed utility privatization, or public-private partnerships, as a funding solution, but this strategy still requires water rates paid by consumers to fund projects over the long term. In tiny communities with average incomes well below the national average, it’s not clear if users will be able to shoulder the tripling or quadrupling of water rates necessary to entice private investors. Further, because they require a profit margin not sought by public operators, private utilities charge households 59 percent more on average than local governments for drinking water service.

For some communities, regionalization might be a more palatable alternative to privatization. Under this scheme, water utilities are consolidated across communities, spreading operation costs across a broader population and enabling towns to reap the advantages of the same economies of scale that private operators are able to facilitate. For the residents of O’Brien, Texas, a regionalization agreement with a neighboring town was a welcome alternative to privatizing—the town leadership just had to put aside their longstanding football rivalry in order to come to the table. Rather than attracting investors to build a new treatment facility, O’Brien’s population of just over a hundred people now receive water from its neighbors and share some of the operation costs.

Regionalization is not a panacea, however. Some communities are too isolated to make cost-sharing economical. And others have conflicts far more complicated than high school sports that prevent political cooperation. In Delaware, for example, many rural communities are unincorporated and not part of any organized town or city government. This means that they are often not included in the closest town’s centralized municipal water or sewer system. While the most cost-effective solution might be to extend a town’s water and sewer lines to its rural neighbors, only town citizens can vote on whether to do this. Those living outside the towns, who for historical reasons are disproportionately poor and people of color, are unable to vote on their own access to clean water. While federal funding can help pay for the expansion, it cannot directly address this representational challenge.

Present levels of federal funding are woefully inadequate to address America’s mounting drinking water crisis. In 2019, just $2.8 billion was allocated through appropriations for all water infrastructure projects nationwide—less than one half of a percent of the amount of investment the EPA estimates is needed. Not only are water quality violations more likely to occur with water systems that service minority or low-income populations, but oft-discussed solutions to America’s rural drinking water crisis, such as privatization and regionalization, fail to address the unique barriers that poor communities and communities of color face. In the end, a massive influx of government funding is needed to make sure that millions of Americans are not left exposed to health-harming pollutants put in their drinking water by under-regulated industries.

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Higher Ground: Protecting Human Rights as the Climate Crisis Forces Coastal Retreat

By Robin Bronen

The Intergovernmental Panel on Climate Change predicts that climate change will displace 150 million people by 2050. Erosion and sea level rise causing the permanent disappearance of land and extreme weather events, such as hurricanes, will be the primary causes. The scale and geographic scope of this type of population displacement is the greatest human rights challenge of our time. Every coastline will be impacted by sea level rise. No binding international human rights instrument exists to guide nation-state governments to prepare and respond, creating an enormous protection gap for hundreds of millions of people.

People will be displaced in many different ways. While some may be forced to cross international borders, the majority of people will be internally displaced, creating complex governance challenges. Most countries do not have any governance framework to manage the internal movement of people within their boundaries. Extreme weather events cause mass population displacement, evacuations, and a humanitarian crisis with efforts focused on returning people to the places where they lived prior to displacement. The planned relocation of people from disappearing coastlines, and other locations no longer able to sustain human settlements, is a disaster risk reduction process that can prevent the humanitarian crisis often connected to extreme weather events. Relocation is a long-term planning process that not only requires the building of infrastructure, but also involves the movement of people, whose livelihoods must be sustained, and most importantly, cultural and kinship connections maintained. This article focuses on this type of internal population movement, which affects the rights to life and self-determination, as well as a wide range of social, economic, and cultural rights. Understanding how climate change affects local ecosystems is critical to the protection of these rights.

Our failure to reduce greenhouse gas emissions is causing air and ocean temperatures to increase, melting the frozen regions of the world and causing sea levels to rise. East coast cities in the United States, such as Miami, Florida, and Charleston, South Carolina, are regularly inundated with “sunny day” flooding caused by high tides, not storm surges. The U.S. National Oceanic and Atmospheric Administration proclaimed 2016 as the hottest year in its 137-year record, the third consecutive year of record warm years with 2018 a close second. The 2015 UN Framework Convention on Climate Change Paris Agreement seeks to prevent a global temperature increase of 2 degrees Celsius from preindustrial levels and includes aspirational language to limit the global temperature increase to 1.5 degrees Celsius (2.7 degrees Fahrenheit). But in the Arctic, winter temperature increases have surpassed the freeze-thaw threshold, spiking 20–40 degrees above normal several times since November 2016. In Alaska, the only arctic state in the United States, temperatures have already far surpassed the goal of the Paris Agreement, with winter temperatures now approximately 3.5 degrees Celsius (7 degrees Fahrenheit) above normal. In March 2019, average temperatures were 11 degrees Celsius (20–30 degrees Fahrenheit) above normal, shattering previous records.

Only one degree is the difference between ice and water. For the indigenous peoples who live in villages on the Bering and Chukchi seas in Alaska, such a difference is life threatening. Just south of the Arctic Ocean, these northern seas separate Alaska from Russia and historically freeze during the winter. Blanketing millions of miles, sea ice forms when the water temperature dips below freezing. Fastening to the coast, the ice creates a seawall protecting villages from the storms that arrive in the fall with hurricane-strength winds. September and October were traditionally the months when the Bering and Chukchi seas began to freeze for the winter. But now these seas may not freeze until December or later. Record minimum levels of arctic sea ice have been recorded since 2007. Arctic sea ice is now 40 percent of its 1979 size, when satellites began capturing this data. Scientists predict that there will no longer be arctic sea ice in the summer within 30 years. The loss of arctic sea ice not only profoundly impacts the health and well-being of Alaska Native communities located along the west coast of the United States but is also linked to changing of the polar jet stream, which is increasing the intensity of storm events and drought in lower latitudes.

With diminishing arctic sea ice extent to protect coastal communities, usteq, a Yup’ik word meaning catastrophic land collapse, occurs and threatens the ability of Alaska Native communities to remain in the places they call home. Usteq is caused by the combination of erosion, flooding, and thawing permafrost. Permafrost is permanently frozen ground and the glue that keeps the land intact and habitable and is critical to maintaining the structural integrity of infrastructure. Increasing
temperatures are causing permafrost to thaw and the land on which infrastructure is built to sink. These environmental changes are now causing indigenous communities in Alaska to be some of the first communities to decide that community relocation is the best long-term adaptation strategy.

In 2009, the U.S. Government Accountability Office found that 12 Alaska Native communities had made this decision. Shishmaref, Kivalina, and Newtok are three of the most imperiled Alaskan communities. Each community decided decades ago that relocation was the only long-term solution to protect community residents and ensure their cultural survival. Federal and state government agencies agree, yet relocation has not occurred, as of 2019, because of the quagmire of statutory barriers as well as the lack of a government agency that has the mandate and funding for the relocations. Only one community, Newtok, is actively in a relocation process.

The policy and practical challenges to relocation are enormous. President Obama designated the Denali Commission, a federal agency, to be the lead coordinating agency for relocation in Alaska. Yet the Denali Commission did not receive any new funding to take on this role and, more importantly, they were not given any authority to require other federal agencies to provide funding to facilitate relocation. Complex governance issues must be resolved in order to facilitate relocation, including the process to determine when protection in place is no longer possible and community relocation is required.

A new governance framework must be created that can provide guidelines for institutions to shift their efforts from protecting people in the places where they live to creating a relocation process when environmental and social thresholds are surpassed and harm the health and well-being of community residents. Determining which communities are most likely to encounter displacement requires a sophisticated assessment of a community’s ecosystem vulnerability to climate change, as well as the vulnerability of its social, economic, and political structures. Human rights principles must be embedded in any relocation governance framework because severe economic, social, and environmental consequences can occur in the relocation process.

Governments have forcibly relocated people for geopolitical motives for millennia. Development projects, particularly dams, have caused the forcible relocation of approximately 300 million people since 1997—approximately 15 million people are displaced annually. These government-mandated relocations have been uniformly disastrous for the people displaced, weakening community institutions and social networks, disrupting subsistence and economic systems, and impacting the cultural identity and traditional kinship ties within a community. In Alaska this occurred most recently during World War II when the federal government forced the Unangan people to relocate thousands of miles away from their home on the Aleutian Islands. Ten percent of the population died.

Two international human rights documents that address internal displacement are the Guiding Principles of Internal
Displacement and the Inter-Agency Standing Committee (IASC) human rights guidelines to respond to natural disasters. Both are not adequate to address the complex issues and human rights implications of climate-forced community relocations for several reasons.

First, population displacement caused by disasters is clearly different from planned relocations. Both the IASC guidelines and the Guiding Principles on Internal Displacement do not provide for the prospective needs of populations planning their permanent relocation and do not provide any guidance on how communities can sustain themselves and create the necessary infrastructure to provide for basic necessities without the assistance of humanitarian aid. The IASC human rights guidelines to respond to natural disasters were developed to respond to situations when pre-planning is not possible and assume that humanitarian aid organizations will provide basic necessities to populations displaced by natural disasters. The fact that these guidelines do not incorporate mechanisms for community self-sufficiency is a significant protection gap for communities facing permanent relocation.

The Guiding Principles of Internal Displacement also do not provide sufficient human rights protections for those facing climate-forced community relocation. This document is not a binding international treaty or convention, but the UN General Assembly has recognized the Guiding Principles as an important international framework for the protection of internally displaced persons. Although the Guiding Principles include persons displaced by natural disasters, the primary focus of these guidelines is displacement caused by the state's inability or unwillingness to protect populations from political, religious, ethnic, or otherwise discriminatory persecution or violence.

To address these protection gaps, a human-rights based approach to climate-forced community relocation must be based on the collective right to self-determination. Climate-forced relocation affects entire communities whose residents will collectively need protection from the threats caused by climate change. These rights include the collective right to relocate as a community, as well as the collective right to make decisions regarding whether, when, where, and how a community will relocate. No human rights document currently contains a community right to make these decisions.

International human rights conventions, such as the UN Declaration on the Rights of Indigenous Peoples, recognize the principle of collective human rights and that indigenous peoples have the collective right to the fundamental freedoms articulated in the Universal Declaration of Human Rights and international law. Like these documents, a human rights instrument that addresses climate-forced population displacement must ensure the protection of collective rights.

To operationalize this collective right, people need the capacity to assess, document, and predict the rate of environmental changes and sociological impacts and vulnerabilities caused by climate change. Community-based monitoring of environmental change and its impact on the health and well-being of community residents can be the foundational process to protect the collective right to self-determination. In this way, they can determine whether the risks can be mitigated where they currently reside. The ability of this community-based process to foster human rights will depend on the capacity of governance institutions to collaborate, be transparent in decision-making, and be inclusive of all sectors of society.

In Alaska, the Alaska Institute for Justice is creating this community-based process with Alaska Native Tribes. Local governing entities in Alaska Native communities are using community-based environmental monitoring of erosion, permafrost thawing, and storm events to understand how their particular locality is affected by global and regional projections of climate-induced environmental change. Consistent monitoring of environmental change and the impact of these changes on individuals, households, and the larger community captures the dynamic nature of a community's vulnerability and resilience to these environmental changes and can determine whether and when relocation needs to occur.

Community-based social and environmental monitoring can also identify the social and environmental indicators to assess when protection in-place no longer provides a community with long-term sustainable adaptation to climate hazards and guide the transition from protection in-place to community relocation.

Finally, community-based integrated social and environmental monitoring can facilitate communication between community residents and local, state, regional, and national actors to ensure that communities are leading the implementation of climate adaptation strategies, including relocation. In this way, residents, their local governing entity, and state and federal government agencies can implement a dynamic and locally informed institutional response. Through the integration of indigenous knowledge with natural, atmospheric, and social science to implement community-based monitoring, the adaptive capacity of communities is strengthened to respond to risks associated with accelerating environmental change and can be one of the mechanisms that fosters the resilience and human rights of the populations assessing whether relocation is the best long-term adaptation strategy. This community-based process needs to form the basis for a relocation governance framework based in human rights principles. By ensuring the communities have the capacity to protect their collective rights to self-determination, communities will also be able to protect the social, economic, subsistence, and cultural rights critical to long-term resilience and adaptation.

Alaska Native peoples are not the only populations faced with the unprecedented permanent disappearance of their homes. Coastal communities all over the world are watching the ocean swallow land, eat shorelines, and submerge entire islands. Human rights principles must be the foundation upon which people determine whether, when, and if they need to find higher ground.

Robin Bronen is executive director of the Alaska Institute for Justice.
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POLAR VORTEX HIGHLIGHTED
THE HARSH REALITIES OF HOMELESSNESS

By Paul W. Hamann

Chicago’s homeless population faces challenges year-round, but the conditions of their lives are brought into stark relief during extreme weather, such as the polar vortex that descended upon the region in January 2019. The work done by organizations that serve these community members, such as The Night Ministry, a nonprofit that provides housing, health care, and human connection to individuals experiencing homelessness or poverty, is also highlighted, as well as complicated, by weather emergencies.

As the polar vortex settled in, members of The Night Ministry’s Street Medicine Team visited homeless encampments across the city, checking body temperatures, offering blankets, gloves, hats, socks, hand warmers, and food, and providing information on shelters and warming centers. The Street Medicine Team brings free health care, survival supplies, and supportive services directly to individuals who have the most difficulty accessing traditional means of assistance.

In these vortex conditions, however, even a basic well-being check can be difficult. Clients are reluctant to remove the layers of clothing they are wearing. And while the Street Medicine Team offered rides to emergency shelters, none of the clients they encountered accepted. Many individuals living on the streets are reluctant to go to shelters—fear of losing their possessions, concerns about safety, or having to separate from a family member or partner are among the many reasons. One client with a dangerously low body temperature did accept a lift to the nearest public library to warm up. A few others rode with the team to a nearby fast food restaurant, where a Street Medicine volunteer physician treated an infection on a client’s leg in the washroom.

Exposure to extremely low temperatures can lead to frostbite and hypothermia. But living outside during cold weather can create or exacerbate other health challenges. The Night Ministry’s health care professionals see more arthritic symptoms among their patients during winter, as sleeping on cold pavement puts extra stress on the body. Meanwhile, foot care, already a challenge year-round, can be particularly difficult in the winter, as the moisture that builds up in wet shoes, worn for days on end, breaks down skin tissue. Prevalence rates for asthma are higher among individuals experiencing homelessness than the general population. And in the winter, catching the cold or the flu or just breathing in cold, dry air can trigger an asthma attack.

The City of Chicago responded to the polar vortex by adding 500 extra shelter beds, running two 24-hour warming centers, expanding hours at others, and setting up a handful of public transit buses as warming facilities. With support from the city, some overnight shelters stayed open around the clock. But, with an estimated 16,000 individuals living on the streets or in shelters in Chicago, capacity is never enough. Some individuals who chose not to seek indoor shelter used propane to heat their tents. Unfortunately, a propane tank explosion in an encampment in the South Loop neighborhood triggered the evacuation of the campsite, displacing dozens of individuals.
One of the programs that operated 24/7 during the week of the polar vortex was The Crib, The Night Ministry’s emergency shelter for young adults, which is usually only open overnight. Twenty-three guests stayed at The Crib over the course of five nights; staff members worked double-shifts to keep the program open. Donations of blankets proved a blessing, as the shelter’s laundry service provider was not available, and its washer and dryer, mainly utilized by guests to wash their clothes, were not made to clean linens for all the beds.

In a city where nearly 20 percent of households live below the federal poverty level and more than a third are severely cost-burdened, many of those who do have four walls around them often find themselves in precarious housing situations. Over half of clients who visit The Night Ministry’s Health Outreach Bus, which brings free health care, HIV/STI testing, food, and other resources to seven underserved communities, live in apartments or houses. When winter moves in, more of them inquire with the bus’s case manager about rent and utility assistance programs as well as legal resources to prevent eviction. In addition, many clients, having spent the majority of their income on housing-related costs, ask for information about food pantries, including those whose food stamp benefits aren’t robust enough to keep shelves and refrigerators stocked for a whole month.

Phenomena like the polar vortex give communities the chance to reflect on how they are serving their most vulnerable members. The hope is that they will continue to have these conversations, and recognize the need to provide support, 365 days of the year.

When Hurricane Maria made landfall in September 2017, it devastated the tiny island of Puerto Rico. The level of damage proved far more severe than the territory’s government could bear. More than a year and a half following the devastating hurricane, thousands of people in the U.S. territory are still living in damaged homes.

In Puerto Rico, there are about 1,237,180 million homes. Of those, 1,138,843 (92 percent) were damaged by the hurricane. And of those damaged, 1,118,862 (98 percent) applied for the Federal Emergency Management Agency’s (FEMA) Individuals and Households Program (IHP) as of May 2018. These figures came from Ron Roth, a FEMA spokesperson who noted to NBC News that the number of approved applications totaled 452,290—with 335,748 denied.

This means that about 40 percent of those who self-identified as being in need were not awarded assistance. Although many people have decided to rebuild on their own, a large percentage of these U.S. citizens still live with blue tarps over their houses, as they lack the funds necessary to repair their roofs. Unfortunately, this leaves them vulnerable to inclement weather—especially during hurricane season. Without a way to protect their homes from further inclement weather, families stand the risk of losing even more.

This concern has alarmed many who note that, should another hurricane hit, almost two years after Maria, many of these affected families still do not have a safe place to live. In light of this, why
is it that FEMA rejected hundreds of thousands of assistance applications? This article addresses the current state of housing in Puerto Rico and how the lack of proving ownership may be crippling the territory’s recovery. In addition, this article will summarize some policy responses proposed by advocates.

HOUSING IN PUERTO RICO
Puerto Rico has a history of informal construction. Anywhere between 585,000–715,000 (45–55 percent) of homes and commercial buildings in Puerto Rico have been constructed without building permits or following land use codes, according to a 2018 study of the Puerto Rico Builders Association. Furthermore, the vice president of the Society for Puerto Rican Planners, David Carrasquillo, estimates that 260,000 homes in Puerto Rico do not have titles or deeds. The reasons, to be discussed in the following paragraphs, are varied.

There is undoubtedly a history of what is commonly referred to as “illegal” home building, although known as “rescuing” land by those who have engaged in the practice. Because of their lack of resources, many Puerto Ricans in the past have taken to building homes on vacant land—whether they own it or not. This land often turns out to be public land owned by the state. About 45 percent of Puerto Ricans, according to the 2017 five-year estimates American Community Survey, live below the poverty level.

Though there still may be cases in which citizens “illegally” build houses on land that is not theirs, much of the issue related to not having titles is not because of illegality, but rather it has to do with a lack of historical documentation. This results from the fact that in Puerto Rico many people live on land that has been subdivided generationally in their families, though they never went through a formal process of subdividing the land. Similarly, many heirs have not gone through the process of declaring inheritance. In Puerto Rico, it is common to see someone occupying a home still under the name of deceased parents or family members because the new occupant never resolved the ownership of the property. Furthermore, for many in Puerto Rico, the proper documentation is not commonplace when a family acquires the property. One might have bought land lawfully and have no title merely because the person who owned it before did not have one.

For these reasons, hundreds of thousands of people in the nation are living on land to which they do not hold a formal title. In many ways, this does not pose a problem in day-to-day life, as other individuals may not claim the land. Most families have decided not to resolve these issues because it can cost thousands of dollars in lawyers’ fees, take a lot of time to find adequate information, and requires them to visit many governmental offices, which might be towns apart to “solve” what many considered a nonissue.

LOCAL AND FEDERAL OWNERSHIP LAWS
FEMA’s adherence to strict homeownership regulations precludes individuals living in these homes from gaining access to federal aid. As noted above, of the 1.1 million households that applied, only about 40 percent (452,290) were approved, representing $1.39 billion in grants. This means that about 60 percent were not approved either because they were deemed ineligible (335,748) or they were simply denied (330,824). FEMA sent letters to
applicants with 41 reasons or codes for denying aid, from insufficient damages to pre-existing conditions.

According to organizations such as Ayuda Legal Huracán María and Fundación Fondo de Acceso a la Justicia, FEMA’s number one reason for denying households aid was precisely because of their inability to prove ownership.

Although the number of those dismissed from IHP because of not being able to show evidence of ownership has not been made public, Ayuda Legal Huracán María has a record of 48,000 families in Puerto Rico living on untitled property, affected by the disaster, and denied from assistance.

One of the primary reasons FEMA has denied these applications is because of its inability to recognize Puerto Rico’s Civil Code and property rights framework, which derives from Spanish law. Under Puerto Rican law, one can be the legal owner of a property without having a formal title, presenting deeds, and so on. However, FEMA asked for such documentation to obtain assistance, leaving thousands unable to apply or receive help.

The issue proves more complicated than most may think. In many ways, FEMA’s policies look to avoid unlawful claims by those who do not own property. On the other hand, they punish hardworking citizens who rightfully own their homes, but lack the documents to prove it.

However, these issues might be explained by a closer look at the manner in which FEMA provides aid to owners as established in section 408 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (Stafford Act, 1974, 42 U.S.C. 5151 et seq.). The Stafford Act, under the Emergency Management and Assistance, 44 C.F.R. § 206.111 (2018), defines owner-occupied residence as a home occupied by (1) the legal owner; (2) a person who does not hold formal title to the residence and pays no rent, but is responsible for the payment of taxes or maintenance of the residence; or (3) a person who has lifetime occupancy rights with formal title vested in another. It is important to note the striking similarities between the Puerto Rico Civil Rights Code and the Stafford Act in which one should not have to provide a title to be considered an owner.

The National Low-Income Housing Coalition (NLIHC), through their Disaster Housing Recovery Coalition (DHRC) in collaboration with local organizations in Puerto Rico such as Ayuda Legal Huracán María and Fundación Fondo de Acceso a la Justicia, have been keeping an eye on the situation and have raised concerns to FEMA, noting that FEMA should provide an alternative way of proving ownership in accordance to both the local and the federal laws, where a title is not needed.

**THE DECLARATIVE STATEMENT**

Because FEMA requires that some form of ownership documentation be produced, thousands of individuals lost access to the aid they need to repair their homes. For these households, then, there may be no proof other than their own word that they own their property. A sworn declaration was created by the DHRC of the NLIHC in order to help those individuals without deeds or titles. In this statement, the owner needs to provide their personal information and an address of the property that needs repairs.

Given that many heirs occupy homes and, as a result, have a proprietary interest, but are not mentioned in the deed of the property, they could use the declarative statement to qualify for assistance. This also applies for those families who have not subdivided their land, those who bought property without a title, and those who took a building or a vacant lot where the owners have not come forward to make claims.

In the declarative statement, people needed to swear that no other person can claim ownership rights to the property or that after an effort to locate rightful owners they could not be found. The owner was encouraged to provide alternative documentation instead of a title such as tax receipts, home insurance, a utility bill, a letter of credit from the utility company, receipts from repairing the property, or any other documentation that would support that they were currently occupying and maintaining the home.

The DHRC of the NLIHC worked with FEMA to craft the language of the
marketing behind the effort, despite it not being directly related to the agency. It is a move the DHRC believes could help relieve the burden felt by Puerto Rican citizens, as these sworn documents allow those who have been denied assistance the opportunity to prove their ownership.

However, as many Puerto Ricans remain in the dark about this form, its utility has been marginal. Because the sworn declaration is not a FEMA document, FEMA issued a press release, but it did not take additional measures to raise awareness of the document among those who have been denied assistance. Until now, Ayuda Legal Huracán María, Fundación Fondo de Acceso a la Justicia, among other organizations in the island that are part of DHRC, has been promoting the sworn statement on their own as well as informing homeowners at workshops, through news and social media, as well as at Disaster Recovery Centers across the island.

Since October 2018, the DHRC has been laying out the guidelines on how this education campaign could be accomplished. This included “educating Disaster Recovery Center (DCR) staff and staff handling appeals about the availability of the sworn declaration, making the sworn declaration available at the DRC, and sending another letter to those denied assistance with a copy of, or instructions on how to access, the sworn declaration.” Using these recommendations, it may be possible to ameliorate the problem of inequitable access to repair funds in Puerto Rico.

CONCLUSION

The current situation in Puerto Rico is unsustainable. With a vast swath of the population living without proper shelter, the territory’s citizens are at risk of increased injury or damage in the event of any future hurricanes. The extent of the issue can prove alarming to outside viewers. A look at the nation reveals a populace still reeling from the effects of Hurricane Maria nearly two years later. Inefficacious attempts by FEMA to alleviate the situation have left people living in unsafe and dire conditions.

FEMA denials mostly stem from homeowners’ inability to produce deeds, titles, or other forms of documents proving that they have ownership of their homes. These requirements, however, prove too hard for many Puerto Ricans to overcome because, though they are not transactions that are costly, they are not part of the culture.

Because of this, many—but most notably the DRHC of the NLIHC—have called into question the utility of FEMA’s restrictive policies that prevent hundreds of thousands from getting the aid that they need. In some cases, families desperate for a way to repair their homes have made multiple appeals unsuccessfully to the federal organization for rebuilding assistance.

Advocacy groups have begun to speak out in the hopes that FEMA will change restrictive policies to better consider the context of the island. By recognizing the history of the territory, the building and cultural practices there, they argue, FEMA can better accommodate the needs of a highly at-risk population.

Even though advocates have attempted to address the problem by designing a sworn statement in collaboration with FEMA to help homeowners get the required documentation, more action is needed from FEMA’s side. This slow-going process for making sure that homeowners receive the FEMA assistance they need has left many wondering when these households will have a safe place to call home.

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AN ATTACK ON HOUSING EQUALITY
By Kathy Trawick

One week after Dr. Martin Luther King Jr. was assassinated, on April 11, 1968, the Fair Housing Act (42 U.S.C. § 3601 et. seq.) was passed. The Office of Fair Housing and Equal Opportunity within the Department of Housing and Urban Development (HUD) is charged with the administration and enforcement of the Act. The Act aims to protect individuals from discrimination in housing and being treated differently based on race, color, religion, national origin, sex, familial status, or disability. This protection extends to all residential housing, whether subsidized or not; and to sales, lending, insurance, and zoning transactions that involve residential housing.

HUD has long recognized that certain policies that seem neutral can have a discriminatory effect, or disparate impact, on certain groups of people. On February 15, 2013, HUD published a final rule that unequivocally prohibits policies that seem neutral in theory, but when put into practice, disproportionately harm people who the Fair Housing Act intends to protect (24 C.F.R. § 100.500). Courts have allowed disparate impact claims for over 45 years. The U.S. Supreme Court affirmed the use of disparate impact in a 2015 ruling in Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507 (2015).

One Step Forward, Two Steps Back
Here we are in 2019, only a year after the eye-opening #METOO movement swept the nation and shone a harsh light on the reality that women continue to face discrimination in employment in the form of sexual harassment, forcing employers to step up and enforce laws intended to keep members of a protected class safe. And yet, disparate impact, a significant tool in the battle for housing equality is about to be gutted.

If HUD is successful in changing the rule, 45 years of protection against covert discrimination will be destroyed and significant numbers of people will be harmed. Access to affordable housing is not the same as fair housing. However, many neutral policies have had a disparate impact on people with disabilities, families with children, and communities of color or certain nation origins contributing to a lack of access to affordable housing. Many policies that have contributed to the gentrification of our neighborhoods have their roots in disparate impact theories.

HUD’s proposed new rule imposes burden of proof so high, it has been suggested this is intended to be virtually impossible to meet. In what some have referred to as a game of “whack-a-mole,” victims must guess what justifications a defendant might use and preemptively counter them. Even more disheartening, the new rule seems to suggest that if a policy is profitable to the business, the victim must demonstrate that an alternative non-discriminatory practice would be as profitable—valuing money over people.

Why Everyone Should Care
Disparate impact affects much more than housing and many more protected classes. Disparate impact has played a critical part in advancing the rights of families with children, people with disabilities, women, LBGTQ people, people of faith, and communities of color. Education, employment, health care, the environment, transportation, the criminal justice system are but a few additional areas that have protections advanced by the disparate impact theory.

The largest number of housing discrimination cases across the country impact people with disabilities. As we age, we will all have a physical or mental impairment that substantially limits one or more major life activity. In other words, we will qualify as a person with a disability under the Fair Housing Act at some point in our lives. Additionally, many of us are, or know someone who is, a survivor of domestic violence. In other words, just about all of us are members of at least one protected class, or will be at some time in our life.

Families could face homelessness because landlords will be able to enforce leases that hold victims of domestic violence responsible for disturbing their neighbors’ quiet enjoyment. Landlords or mortgage companies could exclude applicants who don’t work full time, effectively excluding people with disabilities who are otherwise eligible. Families with children could be barred from certain apartments or forced to rent larger, more expensive apartments if landlords are allowed to implement a one person per room requirement.

This change will likely harm you or someone you know.

What You Can Do
First and foremost, educate yourself. HUD is currently seeking comments on the proposed rule through October 18, 2019, so time is short. The proposed rule can be found in the Federal Register/Vol. 84, No. 160/Monday, August 19, 2019/Proposed Rules or this link https://www.govinfo.gov/content/pkg/FR-2019-08-19/pdf/2019-17542.pdf.

Visit www.defendcivilrights.org for a more in-depth discussion of the rule and a link for submitting comments.

Kathy Trawick is the executive director at the Tennessee Fair Housing Council.
Hooker Chemical Company, a subsidiary of Occidental Petroleum, had used Love Canal as an industrial dump for dozens of compounds, 12 of which were suspected carcinogens. Hooker’s waste permeated stream beds, contaminated the local water supply, and leached up through the soil into backyards, basements, and the public schoolyard. Neighborhood accounts describe corroding waste disposal drums breaking through grounds eroded by heavy rainfall, trees, and gardens dying, and puddles of noxious substances. Clusters of unexplainable illnesses and congenital disabilities plagued the community, including Gibbs’ son.

After identifying this toxic chemical exposure as the root of her community’s health crises, the young mother transformed into the strong-minded grassroots organizer who would become known as the Mother of Superfund. Fighting for her family and her home, Gibbs formed the Love Canal Homeowners Association (LCHA), leading the community in a battle against local, state, and federal governments. Gibbs and her organization held rallies, raised money, conducted research, staged protests, made public speeches, and used the media to confront government bureaucracy and push for the permanent relocation of Love Canal families. Two years of tireless efforts from Gibbs and the LCHA resulted in President Jimmy Carter’s October 1980 announcement that the government would purchase Love Canal homes at fair market value—a combined value of $15 million. The federal government eventually evacuated more than 800 families, and cleanup of Love Canal began.

National press coverage of the disaster made Gibbs a household name. She received thousands of letters from across the country asking for advice on how to resolve toxic waste problems. In response, Gibbs formed the Citizens Clearinghouse for Hazardous Waste in 1980, which would become the Center for Health, Environment and Justice (CHEJ).

The “environmental justice” movement began in 1968 with the Memphis Sanitation strike and exploded with sit-ins against the Warren County, North Carolina, PCB landfill; however, the work of Lois Gibbs in Niagara, New York, advanced the cause significantly. Love Canal emerged as a symbol of the looming environmental disasters that could occur at toxic waste sites scattered across the country, and Gibbs’ work was instrumental in the creation of the 1980 Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and the Emergency Planning and Community Right-to-Know Act of 1986. Gibbs continues to aid in grassroots campaigns for the health and safety of children and communities at risk, seeking to empower citizens to advocate for themselves for a clean, healthy environment and for a role in the decision-making process. CHEJ has assisted thousands of grassroots groups in stopping existing polluters and preventing new sites from being developed.
Human Rights Hero: The Mother of Superfund

By Emily Bergeron

Lois Gibbs was living the American dream. She grew up one of six children in Grand Island, New York, married soon after graduating from high school, and shared two children—Michael and Melissa—with her husband. In 1972, the family moved into a three-bedroom home in the Love Canal neighborhood in Niagara. It would take nearly eight years for Gibbs to discover that buried beneath her son’s elementary school was more than 20,000 tons of toxic chemical waste.

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