

CHAINS DON'T FLOAT: THE INCOMPATIBILITY OF CARCERAL LOGIC AND ENVIRONMENTAL JUSTICE

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When societies in distress are faced with nuanced and pernicious social ills, they often respond by falling into a default posture of criminalization and incarceration. In answer to the drug epidemic, escalating homelessness, and acute mental health crises, governments—and the United States especially—seek solutions in the tried-and-true tools with which they are most familiar: police, prosecution, and prison. The result is a political philosophy that revolves around the prison, a “carceral logic” that pervades policy domains and transcends party affiliation. Climate change, which presents uniquely severe and complex problems for society, supplies a new operative arena for carceral logic. This Note urges those who subscribe to the ideals of environmental justice to take notice of this development and recognize a simple truth: carceral logic is not good for environmentalism. While some may consider the prosecution of polluters or the construction of “green” prisons to be essential elements of progress, the overuse of carceral machinery invites more harm than it solves. In the modern era of worsening climate conditions, policing and prosecutorial practices have stifled environmental activism and suppressed the movements of climate refugees. Dilapidated prisons expose their populations to toxins and natural disasters, and mass incarceration disenfranchises overincarcerated communities by depriving them of the resources needed to resist the creep of managed pollution. The result is a fundamental and growing tension between the operations of carceral logic and the aspirations of environmental justice. Moving forward, the environmental justice movement ought to formally embrace decarceral ends and advocate for reduced reliance on the tools of the carceral state.

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INTRODUCTION

In August of 2021, the rainy gusts of Tropical Storm Elsa were fast approaching Dixie County, Florida.¹ As hurried and frightened residents were preparing to hunker down and seek shelter from the foreseeable flood risk,² one seemingly forgotten group was forced to linger in the storm's path: the incarcerated population of the Cross City Correctional Institution.³ Hundreds of incarcerated people watched as “the yard between buildings filled with water,” and in their cells “fetid water started coming up through the drains.”⁴ Correctional staff reportedly “told all the prisoners to pack what they could into a pillowcase and prepare to evacuate,” but the incarcerated “spent hours locked in [their] cell[s] with the filth,” amidst ankle-deep septic water “with human waste floating by.”⁵ By the time the residents of the Cross City Correctional Institution were finally evacuated, they were wading “through knee-deep water” festering with snakes and insects.⁶

1. Alleen Brown, *Trapped in the Floods: With Floodwaters Rising, Prisoners Wait for Help in Floating Feces*, THE INTERCEPT (Feb. 12, 2022), <https://perma.cc/US7E-2HB8>.

2. See *id.* (“The rising waters were predictable, according to an Intercept analysis that cross-referenced flood risk data from the First Street Foundation with the locations of more than 6,500 carceral facilities across the U.S.”).

3. *Id.*

4. *Id.*

5. *Id.* (“The smell was unlike anything I have ever encountered.”).

6. *Id.* (“There were snakes and bugs swimming in the water as we made our way to the bus.”).

The experiences of the Dixie County prisoners are not uncommon in today's world.⁷ With man-made climate change's rapid acceleration,⁸ the prevalence and severity of natural disasters have grown, exponentially increasing their destructive capabilities.⁹ Among those most vulnerable to this ever-intensifying status quo are incarcerated populations¹⁰ who lack the agency, resources, and information required to navigate an emergency. Aside from the acute dangers of disaster, incarcerated populations also uniquely suffer from other, more mundane forms of environmental harm, such as rising temperatures¹¹ and persistent exposure to toxic pollutants.¹² These challenges represent a growing nexus between the carceral state and deteriorating environmental conditions, which "prison ecology" scholars have explored in recent years.¹³ Another, related body

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7. For instance, during the recent Hurricane Milton, some carceral facilities were not evacuated at all. See Jonah Valdez, *Florida Counties Refuse to Evacuate Jails in Hurricane Milton Flood Zones*, THE INTERCEPT (Oct. 9, 2024), <https://perma.cc/6JX4-ZND7> ("[A]t least three county jails in Florida that sit within mandatory evacuation areas have decided that detainees will ride out the storm."); see also *id.* (recounting other incidents for Hurricane Michael in 2018, Hurricane Ian in 2022, and Hurricane Helene in 2024). In the wake of Hurricane Katrina, Human Rights Watch reported that one prison was altogether abandoned by correctional staff, leaving the incarcerated locked in their cells. *New Orleans: Prisoners Abandoned to Floodwaters*, HUM. RTS. WATCH (Sept. 21, 2005), <https://perma.cc/3YVH-435Y>. The problem is not isolated to hurricanes; similar instances of dismissal and abandonment have occurred in the shadow of impending wildfires. See, e.g., Alleen Brown, *Dark, Smoky Cells: As Wildfires Threaten More Prisons, the Incarcerated Ask Who Will Save Their Lives*, THE INTERCEPT (Feb. 12, 2022), <https://perma.cc/U3WR-E4W3>; *A Punishment Profiteer*, INQUEST (May 24, 2022), <https://perma.cc/7BCY-9TLF> ("[E]ven as the fire came within seven miles of CCC and evacuation orders were in effect throughout surrounding areas, no effort or intention was made to evacuate any of CCC's thousands of prisoners.").
 8. See, e.g., 1 U.S. GLOB. CHANGE RSCH. PROGRAM, CLIMATE SCIENCE SPECIAL REPORT: FOURTH NATIONAL CLIMATE ASSESSMENT 185 (2017), <https://perma.cc/8YKS-KUCH> ("Annual average temperature over the contiguous United States has increased by 1.2°F (0.7°C) for the period 1986–2016 relative to 1901–1960 and by 1.8°F (1.0°C) based on a linear regression for the period 1895–2016. . . .").
 9. See *id.* at 231 (describing increases in droughts, heat waves, floods, and wildfires). See generally Sandra Banholzer, *The Impact of Climate Change on Natural Disasters*, in REDUCING DISASTER: EARLY WARNING SYSTEMS FOR CLIMATE CHANGE 21 (Zinta Zommers & Ashbindu Singh eds., 2014).
 10. Florida, for example, has the highest number of carceral facilities in extreme danger of flooding, with fifty-two decaying facilities at risk. See Brown, *supra* note 1 ("Florida is in especially bad shape. Cross City is one of 52 jails, prisons, and detention centers in the state that face major to extreme flood risks over the next 30 years.").
 11. See DANIEL W.E. HOLT, SABIN CTR. FOR CLIMATE CHANGE L., HEAT IN US PRISONS AND JAILS: CORRECTIONS AND THE CHALLENGE OF CLIMATE CHANGE, at i (2015); see also Alleen Brown, *Boiling Behind Bars: In Sweltering Texas, Prisons Without Air Conditioning Are About to Get a Lot Hotter*, INTERCEPT (Feb. 12, 2022), <https://perma.cc/EPS9-9N9N>.
 12. See, e.g., Abby Cunniff & Summer Sullivan, *This Prison in California Forced Incarcerated People to Drink Arsenic for Years*, TRUTHOUT (Feb. 13, 2022), <https://perma.cc/9C95-RN7V>.
 13. See, e.g., David N. Pellow, *Introduction to DAVID N. PELLOW ET AL., GLOB. ENV'T JUST. PROJECT, U.C. SANTA BARBARA, IMPACT OF LAW AND POLICY ON PRISON ENVIRONMENTAL*

of scholarship in the decarceral space scrutinizes prisons more directly, interrogating the negative impacts prisons have on marginalized communities outside the environmental context.¹⁴

This Note contributes to the burgeoning scholarly nexus¹⁵ by dissecting the relationship between the carceral state's underlying ideology, what is herein termed "carceral logic," and the objectives of environmental justice. It asserts that unfettered carceral logic is hostile to and incompatible with environmental justice principles,¹⁶ suggesting that a complete environmental justice agenda should also recognize decarceral goals.¹⁷ My argument proceeds in four parts.

JUSTICE, at vi, vii (2022); Dashka Slater, *Prison Ecology*, SIERRA CLUB (Oct. 5, 2015), <https://perma.cc/Y8DW-3KPR>.

14. See generally, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW* (10th Anniversary ed., 2020); REBECCA M. MCLENNAN, *THE CRISIS OF IMPRISONMENT: PROTEST, POLITICS, AND THE MAKING OF THE AMERICAN PENAL STATE, 1776–1941* (2008); DOUGLAS A. BLACKMON, *SLAVERY BY ANOTHER NAME: THE RE-ENSLAVEMENT OF BLACK AMERICANS FROM THE CIVIL WAR TO WORLD WAR II* (2008).
15. I note that I am not the first to place environment justice principles in conversation with decarceral ideals. In lieu of absolute novelty, this Note hopes to synthesize the case for decarceral environmentalism, and bring into focus under-considered topics implicated by the subject. Existing commentary focuses on the pollutive qualities of prisons themselves—that is, their status as point-source polluters and the toxicity faced by incarcerated populations. See, e.g., Nicole Greenfield, *The Connection Between Mass Incarceration and Environmental Justice*, NAT. RES. DEF. COUNCIL (Jan. 19, 2018), <https://perma.cc/L6YA-M2VT>; Leah Wang, *Prisons Are a Daily Environmental Injustice*, PRISON POL'Y INITIATIVE (Apr. 20, 2022), <https://perma.cc/XPZ4-CZP9>. Less explored are the broader implications of carceral logic for climate migrants, climate activists, and disaster survivors, see *infra* Part III, to say nothing of the ties between prison entrenchment and mass disinvestment, see *infra* Part IV.B.
16. Another way of understanding the question is to ask whether environmental justice activists would approve of a "green" prison system, which is more environmentally conscious but still fundamentally carceral. Cf. Nathan Stephens-Griffin, *Embracing "Abolition Ecology": A Green Criminological Rejoinder*, 31 *CRITICAL CRIMINOLOGY* 433, 433 (2022). If prisons were overhauled to no longer be polluters, emitters, and sites of toxic exposure, would they also cease to be an environmental issue? This Note builds upon a chorus of growing voices interrogating this question, and answering with an emphatic 'no.' See, e.g., *id.* at 433–34; Yvonne Jewkes & Dominique Moran, *The Paradox of the "Green" Prison: Sustaining the Environment or Sustaining the Penal Complex?*, 19 *THEORETICAL CRIMINOLOGY* 451, 465 (2015) ("We would not deny that the incorporation of 'green' technology into new prison builds and retrofits . . . may deliver some genuine gains, but our aim here has been to underline that they also usefully function to counteract critiques of mass incarceration."); Dominique Moran & Yvonne Jewkes, "Green" Prisons: Rethinking the "Sustainability" of the Carceral Estate, 69 *GEOGRAPHICA HELVETICA* 345, 352 (2014). I argue that prisons, even if they were no longer sites of primary pollution, would continue to be drivers of environmental injustice, and decarceral aims would continue to be the purview of environmental justice activists.
17. Importantly, in drawing this conclusion, I do not distinguish between gradations of decarceral thought. Alongside the great and growing body of prison scholarship that has emerged in recent decades are myriad visions for overhauling domestic prison systems. Some recognize progress in reforming the prison within existing paradigms, fighting for better treatment for incarcerated populations and reductions in nonviolent sentencing. See, e.g., ACLU & GLOB. HUM. RTS. CLINIC, UNIV. OF CHI. L. SCH., *CAPTIVE LABOR: EXPLOITATION OF*

First, I define “carceral logic,” exploring how it has driven social policy and sculpted the emergence of modern mass incarceration. Second, I argue that carceral logic and environmental injustice are sprouts of the same ideological seed, rooted in well-studied histories of racialized subordination and socioeconomic class stratification. Third, I interrogate how carceral logic functions as a policy tool to confront varying crises with violence and surveillance, to the detriment of climate activists, displaced migrants, and disaster survivors. Finally, I assert that the everyday operation of carceral logic, and the mass incarceration it perpetuates, is a kind of forced disinvestment, constructing conditions which render vulnerable those within the prison and emaciating those outside its walls.

I. CARCERAL LOGIC DEFINED

Nations around the world, and the United States especially,¹⁸ count prisons among their many tools to address social ills. The hope is that prisons, or

INCARCERATED WORKERS 86 (2022) (laying out a reformist agenda for prison labor); *Federal Sentencing Reform*, AM. BAR ASS'N, <https://perma.cc/BT8X-U7T5> (listing bipartisan efforts to reform sentence lengths). Others, who may be termed “abolitionists,” contend prisons are an altogether unjust exercise of state power, insisting that we must instead envision a future defined by alternative measures of criminal justice and accountability. *See, e.g.*, Bill Keller, *Reform or Abolish?*, N.Y. REV. (Nov. 3, 2022), <https://perma.cc/8HB4-FDGL> (recounting the views of activists Mariame Kaba and Ruth Wilson Gilmore, who argue that “a commitment to the principles of prison abolition is incompatible with the idea that prison is a just or appropriate solution for interpersonal harms—*ever*”). *See generally* Rachel E. Barkow, *Promise or Peril?: The Political Path of Prison Abolition in America*, 58 WAKE FOREST L. REV. 245 (2023) (describing abolitionist principles). Though some have suggested that environmental justice necessitates abolition, *see* Ray Levy Uyeda, *Prison Abolition is Environmental Justice*, PRISM REPS. (Mar. 22, 2023), <https://perma.cc/BS7S-ESSD>, this Note does not portend to wade into this divergence of proposed solutions. It is enough, rather, for this Note’s purposes to say that by “decarceral goals,” I mean any efforts aimed at combating, in general, the expansive ubiquity of carceral logic, and diminishing the role prisons play in the American criminal justice system. This neutrality should not be confused for ambivalence. If nothing else, one unwavering assertion of this Note is that environmental justice activists should resist calls to *embrace* carceral logic as a solution to industrial pollution or other environmental harm, as existing law permits. *See, e.g.*, Council Directive 2024/1203, of the European Parliament and of the Council of 11 April 2024 on the Protection of the Environment Through Criminal Law and Replacing Directives 2008/99/EC and 2009/123/EC, O.J. (L 1203), 1, 2 (EC) [hereinafter, Council Directive 2024/1203] (committing to new criminal enforcement of environmental laws); *Locking Up the Polluters*, EDIE (May 14, 2007), <https://perma.cc/P8AT-3UX7> (recounting efforts by the EU to expand criminal penalties for environmental crime). Although I do not comment on the fervor with which activist movements must embrace decarceral ends, I strongly contend that *carceral* ends are fundamentally at odds with environmental justice.

18. *See* THE SENTENCING PROJECT, MASS INCARCERATION TRENDS 1 (2024) (“Between 1985 and 1995 alone, the total prison population [in the United States] grew an average of eight percent *annually*. And between 1990 and 1995, all states, with the exception of Maine, substantially increased their prison populations, from 13% in South Carolina to as high as 130%

the mere threat of prison, will both stymy and cordon-off violent, malicious behavior that directly threatens the safety or prosperity of the polity. However, over the last two centuries prisons have been forged into overinclusive institutions that incarcerate the public for all manner of conduct, including behavior deemed socially odious—often amidst personal or communal distress spurred by sparse public resources.¹⁹ This ballooning of the penal state reveals an essential, underlying ethos driving modern mass incarceration, or “carceral logic,” defined herein as the racially²⁰ and politically²¹ animated impulse to use prisons, policing, and surveillance as a kind of policy “catch-all.”²² Carceral logic is a

in Texas. The federal system grew 53% larger during this five-year period alone.”). It is well known the United States incarcerates more of its own citizens than any other major nation in the world, but even at the state level, incarceration rates are staggering; if each state was its own country, they would claim nine of the ten spots for the most incarceration-heavy nations in the world. See Emily Widra, *States of Incarceration: The Global Context 2024*, PRISON POL’Y INITIATIVE (June 2024), <https://perma.cc/4D9L-JE29>.

19. See Monica C. Bell et al., *Investing in Alternatives: Three Logics of Criminal System Replacement*, 11 U.C. IRVINE L. REV. 1291, 1299 (2021) (“[P]enal institutions have become the primary available response to a wide range of social problems, including not only violence but also mental illness, substance abuse, and other behavioral health issues.”).
20. As later discussed, the history of mass incarceration has its roots in racial struggle. See *infra* Part II.B.
21. For instance, racialized mass jailing was central to the “law and order” prong of the “southern strategy” in the 1960s and 1970s, which helped President Nixon win the White House. See Terence McArdle, *The ‘Law and Order’ Campaign that Won Richard Nixon the White House 50 Years Ago*, WASH. POST (Nov. 5, 2018), <https://perma.cc/GQ3G-9832>; Leonidas K. Cheliotis, *Manufacturing Concern: Inside Richard Nixon’s ‘Law and Order’ Campaign*, CRIMINOLOGY & CRIMINAL JUST. 1 (forthcoming) (“Fear was at the core of the approach Nixon followed in the build-up to the 1968 presidential election. Both his bid for the Republican nomination and his campaign for the presidency thereafter were dominated by alarmist references to what he broadly referred to as the ‘problem of order.’”); *Causes of Mass Incarceration*, VERA INST., <https://perma.cc/TQJ6-VBPP>. Today, politicians clamor over themselves to avoid the dreaded label of “soft on crime,” which is readily hung as an ill-defined albatross around the necks of liberal politicians every election cycle. See, e.g., David A. Graham, *Caught Between the Electorally Disastrous and the Morally Monstrous*, THE ATLANTIC (Nov. 8, 2022) (“In key races, Republicans have accused Democrats of being soft and ineffective on crime. They’ve attacked incumbents for presiding over rising violence and challengers for having supported cuts in police spending.”).
22. See Sunita Patel, *Transinstitutional Policing*, 137 HARV. L. REV. 808, 812 (2023) (“[P]olicing operates in multiple locations . . . in conjunction with social structures and the carceral logics of public institutions.”); see also *id.* at 815 n.24 (“Carceral logic can be understood as a punishment mindset that permeates noncarceral locations or functions.”); Christy E. Lopez, *Abolish Carceral Logic*, 17 STAN. J.C.R. & C.L. 379, 386 (2022) (“Carceral logic can be understood as a punishment mindset that views retribution and control, including by physical constraint (e.g. imprisonment), surveillance (e.g. electronic monitoring via ankle bracelet), or violence, as central components of a public safety system.”). Carceral logic has been studied as an inhibitor to wellbeing in many different contexts. See, e.g., Melissa Barragan et al., *Triaged Out of Care: How Carceral Logics Complicate a ‘Course of Care’ in Solitary Confinement*, 10 HEALTHCARE 289, 291 (2022) (reviewing carceral logic’s impact on healthcare).

hammer that spies a nail in every public ill; it confronts crises and undesirable acts not with tailored policy measures but with force, ranging from the overwhelmingly brutal to the insidiously indirect. This reactionary instinct, which pervades numerous policy domains and transcends party affiliation, may take the form of arrest, intrusive search, or outright imprisonment, and is routinely carried out by a diverse array of actors within the criminal justice sphere, all operating within the orbit of carceral logic's central institution: the prison. The ever-growing role of prisons across differing social crises reveals the ubiquity of carceral logic, including the drug crisis and the epidemic of people experiencing homelessness.²³

Drug use in the United States remains a persistent social and individual health crisis. In 2022, 70.3 million Americans over the age of twelve used illicit drugs.²⁴ Further, nearly fifty million had recognized substance use disorders (SUDs), including most commonly among those aged eighteen to twenty-five.²⁵ This is not a new problem. The United States has waged a “war on drugs” since 1971, following a declaration made by President Nixon that has since been furthered by presidents of both political parties.²⁶ These bipartisan efforts have survived well into the post-COVID era,²⁷ but their focus has not been to streamline access to drug clinics, improve sobriety programs, or conduct novel research into addiction.²⁸ Instead, the core of the American war on drugs has been the

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23. A third example is mental health. In Latin America, rates of mental illness among the incarcerated are nearly sixteen times what they are for the general public, or an estimated three in five people. Helen Gómez-Figueroa & Armando Camino-Proano, *Mental and Behavioral Disorders in the Prison Context*, 24 REV. ESP. SANID. PENIT. 66, 68 (2022). In the United States, racialized policing of mental illness and “wellness checks” often lead to the incarceration of and violence against those experiencing acute mental distress. See Patel, *supra* note 22, at 851–61. Here, too, carceral logic supplies no solution to mental illness, as it cages the mentally ill instead of treating them, often to the detriment of their health—and in a now-familiar pattern, often with the specific targeting of people of color. See *id.* at 851.
 24. SUBSTANCE ABUSE AND MENTAL HEALTH ADMIN., KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2022 NATIONAL SURVEY ON DRUG USE AND HEALTH 14 (2022).
 25. *Id.* at 33.
 26. See Jamila Hodge & Nazish Dholakia, *Fifty Years Ago Today, President Nixon Declared the War on Drugs*, VERA INST. (June 17, 2021), <https://perma.cc/3NS7-L4C6>.
 27. See, e.g., Hannah L.F. Cooper et al., *Dismantling War on Drugs Policies in Covid-19's Aftermath*, 112 AM. J. PUB. HEALTH 24, 24 (2022) (“The pandemic collided with the US racialized war on drugs policies—such as police drug crackdowns targeting predominately BIPOC and Latinae neighborhoods—and exacerbated their harms.”).
 28. Indeed, even those incarcerated for drug use often do not receive addiction treatment, despite such treatment being proven to help prevent reoffending. See Redonna K. Chandler, Bennett W. Fletcher & Nora D. Volkow, *Treating Drug Abuse and Addiction in the Criminal Justice System: Improving Public Health and Safety*, 301 J. AM. MED. ASS'N 183, 184–85 (2009) (“[A] large disconnect remains between addiction research and the treatment of addiction in general, particularly within the criminal justice system. This is evidenced in that most prisoners (80%–85%) who could benefit from drug abuse treatment do not receive it.”); Steven Belenko, Matthew Hiller & Leah Hamilton, *Treating Substance Use Disorders in the Criminal*

heavy criminalization and subsequent incarceration of drug users, suppliers, and dealers,²⁹ mostly within communities of color.³⁰ Nixon's focus on incarceration over treatment has "dominated legislative enactments since the 1970s, virtually ignoring those who argue that drug addiction should be viewed as a public health issue rather than a criminal enterprise."³¹ And unfortunately, these retributive methods are not confined to the United States—other countries, inspired by Nixon's rhetoric, have similarly centered incarceration in their drug policies.³² This obsessive focus on caging, rather than treating, demonstrates the essence of carceral logic: punishing people embroiled in a perceived social ill without addressing the ill itself.

The pattern of punishing people, rather than solving problems, persists in the face of America's homelessness epidemic. On a single night in 2023, "653,100 people—or about 20 of every 10,000 people in the United States—were experiencing homelessness."³³ This represents "the highest number of people reported

Justice System, 15 CURRENT PSYCH. REP. 415, 415–16 (2013) ("Because there are effective treatment models for offenders, expanding access to these is likely to help break the links between drug use and crime."). Contrary responses to certain drugs in the United States have shown that an alternative path is possible. In recent years, with a surge in painkiller abuse among white suburban users, local governments and police forces have increasingly addressed drug addiction as a health epidemic instead of a criminal activity. See Katherine Q. Seele, *Massachusetts Chief's Tack in Drug War: Steer Addicts to Rehab, Not Jail*, N.Y. TIMES (Jan. 24, 2016), <https://perma.cc/5CZ3-QVJC>; Ekow N. Yankah, *When Addiction Has a White Face*, N.Y. TIMES (Feb. 9, 2016), <https://perma.cc/CMX7-GJ78>.

29. See André Douglas Pond Cummings, *All Eyes on Me: America's War on Drugs and the Prison-Industrial Complex*, J. GENDER, RACE & JUST., Spring 2012, at 417, 418 ("Politicians such as Nixon, Barry Goldwater, and Nelson Rockefeller advocated for harsh drug laws and severe criminal sanctions because they argued that a strong correlation existed between drug addiction and crime."); Roberto Abadie et al., *"It Ruined My Life": The Effects of the War on Drugs on People who Inject Drugs (PWID) in Rural Puerto Rico*, 51 INT'L J. DRUG POL'Y 121, 121 (2017) ("The War on Drugs has raised the incarceration rates of racial minorities . . . , profoundly stigmatized drug users, and redirected resources from drug prevention . . . to militarizing federal and local law enforcement.").
30. See Nkechi Taifa, *Race, Mass Incarceration, and the Disastrous War on Drugs*, BRENNAN CTR. FOR JUST. (May 10, 2021), <https://perma.cc/P5N7-BWA6>; see also sources cited *infra* note 106 (tracking racial disparities in drug enforcement).
31. Cummings, *supra* note 29, at 418; see also Carlos Dobkin & Nancy Nicosia, *The War on Drugs: Methamphetamine, Public Health, and Crime*, 99 AM. ECON. REV. 324, 324–32 (2009).
32. See generally, e.g., Abadie et al., *supra* note 29; Marylee Reynolds, *The War on Drugs, Prison Building, and Globalization: Catalysts for the Global Incarceration of Women*, 20 NAT'L WOMEN'S STUD. J. 72, 74 (2008); Benjamin T. Smith, *New Documents Reveal the Bloody Origins of America's Long War on Drugs*, TIME (Aug. 24, 2021), <https://perma.cc/X7KG-DECD> ("But the real effect of Nixon's speech occurred abroad. Here, rhetoric became reality; metaphor got real. Nixon's speech let drug cops off the leash. And it sparked off a wave of extreme violence, which many drug producing countries in Central and Latin America are still living with.").
33. U.S. DEP'T OF HOUS. & URB. DEV., THE 2023 ANNUAL HOMELESSNESS ASSESSMENT REPORT (AHAR) TO CONGRESS, PART 1: POINT-IN-TIME ESTIMATES OF HOMELESSNESS 2 (2023).

as experiencing homelessness on a single night since reporting began in 2007.”³⁴ To be sure, there is no silver bullet to cure homelessness. A litany of factors³⁵ may play a role in diminishing the supply of available housing,³⁶ to say nothing of why people are unable to afford the housing that *does* exist.³⁷ Consequently, lacking solutions, the United States has regarded its homeless population as a security threat to be policed and, if necessary, incarcerated—reflecting the sentiments of the voting public.³⁸

34. *Id.*

35. One recent inquiry into causes of housing shortage centers the role of investors. One study found that in cities like Miami and San Diego, more than twenty percent of new housing stock was scooped up by private investors. Lily Katz, *Investor Home Purchases Post Biggest Increase in Two Years*, REDFIN (Aug. 15, 2024), <https://perma.cc/22RC-DPP6>. Another suggested that private equity firms accounted for nearly half of all home purchases during the third quarter of 2022. Alcynda Lloyd, *Home Flippers Are Having a Tough Time Selling to Regular People Who Need a Mortgage, So They're Offloading Their Properties to Big Investors Instead*, BUS. INSIDER (Nov. 8, 2022), <https://perma.cc/CJ2E-VA69>. Such concerns have drawn attention from Congress. See Stop Wall Street Landlords Act of 2022, H.R. 9246, 117th Cong. (2022); Will Parker, *Wall Street Has Spent Billions Buying Homes. A Crackdown is Looming*, WALL ST. J. (Apr. 29, 2024), <https://perma.cc/99MN-R4XC>. Though, these claims are contested. See, e.g., Logan Mohtashami, *No, Wall Street Investors Haven't Bought 44% of Homes this Year*, HOUSINGWIRE (Dec. 10, 2023), <https://perma.cc/T792-LWVK>.

36. The precise scope of the shortage is debated, though if anything, current estimates seem to understate the problem. See FREDDIE MAC, HOUSING SUPPLY: A GROWING DEFICIT 1 (2021) (updating estimates of housing shortages from a predicted 2.5 million units to 3.8 million); KEVIN CORINTH & HUGO DANTE, IZA INST. OF LAB. ECON., THE UNDERSTATED “HOUSING SHORTAGE” IN THE UNITED STATES 4 (2022) (“We estimate a national housing shortage of 20.1 million homes, 14.1 percent of the U.S. housing stock. . . . Our national housing shortage estimate is 13 times the 1.5 million estimate cited by the White House to contextualize the scope of its Housing Supply Action Plan, and between 4 and 5 times the shortage cited in previous studies.”); FANNIE MAE, THE U.S. HOUSING SHORTAGE FROM A LOCAL PERSPECTIVE 2 (2022) (“[O]ur analysis relies on 2019 data. Since that year, however, home prices, rent levels, and new housing supply constraints have worsened.”).

37. Accordingly, the problem may be better described as a shortage of *affordable* housing, as opposed to shortages in housing stock. See, e.g., Lance Freeman, *America's Affordable Housing Crisis: A Contract Unfulfilled*, 92 AM. J. PUB. HEALTH 709, 709 (2002); Max Spaan & Yewande S. Abraham, *Barriers to and Enablers of Affordable Housing Construction: Insights from Construction Industry Professionals*, 53 ENG. PROC. 36, 36–37 (2023).

38. See INVISIBLE PEOPLE, WHAT AMERICA BELIEVES ABOUT HOMELESSNESS 24 (2020) (“Respondents living in places with higher rates of unsheltered homelessness express more judgmental views of homeless people. When there is a high unsheltered population, the public is more likely to link homelessness to addiction and mental health. They’re also more likely to associate homelessness with danger, crime, and nuisance.”); Chris Herring, *Complaint-Oriented Policing: Regulating Homelessness in Public Space*, 84 AM. SOCIO. REV. 769, 770 (2019) (“Between 2006 and 2016, bans on sitting and lying increased by 52 percent, citywide camping bans by 69 percent, prohibitions on loitering and loafing citywide by 88 percent, and bans on living in vehicles rose 143 percent, the fastest increases of such ordinances in U.S. history.”).

In managing its homeless population, the United States has frequently deployed robust force from police.³⁹ Police have an overwhelming presence in the daily lives of the homeless,⁴⁰ conducting surveillance and encampment “sweeps” that force people experiencing homelessness away from the public eye.⁴¹ People experiencing homelessness cannot dwell in private spaces without fear of being treated as trespassers, and merely sleeping in public spaces can lead to incarceration.⁴² Indeed, recently the Supreme Court candidly affirmed the legality of criminalizing the presence of homeless people in public spaces. In *City of Grants Pass v. Johnson*,⁴³ the Court reviewed a putative class action brought by the homeless population of Grants Pass, Oregon, challenging an ordinance which—among other things—restricted encampments on public property.⁴⁴ The lower court had struck down the ordinance on Eighth Amendment grounds, relying on Ninth Circuit precedent that declared such ordinances to be cruel and unusual.⁴⁵ Justice Gorsuch, writing for the majority, reversed.⁴⁶ First addressing the ordinance from a policy perspective, Justice Gorsuch opined

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39. See, e.g., Herring, *supra* note 38, at 769–70 (“Over the past 30 years, police forces across the United States have adopted forms of quality-of-life policing as a renewed commitment to addressing order maintenance . . . Central to these efforts have been the passage of local ordinances aimed at curbing visible poverty, ‘anti-social behavior,’ and homelessness.” (citations omitted)); see also Thalia Anthony et al., *Hyper-policing the Homeless: Lived Experience and the Perils of Benevolent and Malevolent Policing*, CRITICAL CRIMINOLOGY (forthcoming), <https://perma.cc/D5DV-3XEZ> (detailing the same in Australia). Heightened police involvement may also be deployed coterminously with housing assistance. Consider that recently, Governor Gavin Newsom—the Governor of what is widely considered to be one of the most liberal states in the Union—issued Executive Order N-1-24, which boasted “unprecedented investments to address the homelessness crisis head on” while simultaneously ordering mass sweeps of homeless encampments. Cal. Exec. Order No. N-1-24 (July 25, 2024), <https://perma.cc/6VVKR-9EAC>.
40. See generally ALISA DEWALD ET AL., POLICING AND THE PUNITIVE POLITICS OF LOCAL HOMELESSNESS POLICY, Boston Univ., (May 31, 2023), <https://perma.cc/MK2F-PU8P>; POLICE EXEC. RES. FORUM, THE POLICE RESPONSE TO HOMELESSNESS (2018).
41. See JORDY COUTIN, HOMELESSNESS POL’Y RSCH. INST., POLICING HOMELESSNESS: A REVIEW OF THE LITERATURE ON POLICING POLICY THAT TARGET HOMELESSNESS AND BEST PRACTICES FOR IMPROVING OUTCOMES 1 (2021), <https://perma.cc/ZJ3J-BLKZ>. Notably, such sweeps can “create cycles of incarceration and property loss that have adverse consequences for [people experiencing homelessness] including psychological and physical harm.” *Id.*; see also Patel, *supra* note 22, at 842 (“When police ‘sweep’ tent encampments and sanitation workers throw away the occupants’ belongings, the houseless risk losing medications, important documents, identification cards, and personal items they need for overall well-being.”).
42. See Herring, *supra* note 38, at 15; Patel, *supra* note 22, at 840 (“In general, police are used to remov[e] disabled and unhoused persons from street corners and encampments where businesses and middle-class Americans deem them unwelcome.”).
43. 144 S. Ct. 2202 (2024).
44. *Id.* at 2208.
45. *Id.* at 2211–13 (citing *Martin v. City of Boise*, 920 F.3d 584 (9th Cir. 2019)).
46. *Id.* at 2226.

that cities should not be barred from using the “full panoply of tools in the policy toolbox” to tackle the “complicated issues of housing and homelessness,”⁴⁷ as “[w]ith encampments dotting neighborhood sidewalks, adults and children in these communities are sometimes forced to navigate around used needles, human waste, and other hazards to make their way to school, the grocery store, or work.”⁴⁸ Continuing with an analysis of the Eighth Amendment, Justice Gorsuch dismissed the plaintiffs’ attempts to liken homelessness to nicotine addiction or other “involuntary” acts and statuses whose criminalization has been held unconstitutional under the clause.⁴⁹ In drawing this distinction, Justice Gorsuch stressed that “involuntariness” is an elusive concept, and only a subset of a given city’s homeless population may be considered “involuntarily” homeless.⁵⁰ Following the Court’s decision in *Grants Pass*, cities are free to criminalize ordinary “biological necessit[ies],” including sleep, provided they are undertaken by the homeless in public spaces.⁵¹ In so holding, the Court implicitly endorsed the employment of carceral logic, recognizing that criminal enforcement is a legitimate—and, to the Court’s mind, necessary—means of responding to the existence of homeless populations.

The application of carceral force in the context of America’s homelessness epidemic further elucidates the conditions under which carceral logic is most appealing. As Justice Gorsuch himself explained, homelessness is a complex problem perceived to disrupt communities.⁵² Without a ready panacea for homelessness, and faced with a “panoply” of logistically challenging and politically unpopular noncarceral responses,⁵³ cities and states adopt a kind of “default posture” of carcerality—making use of the preexisting, familiar infrastructure of prisons and police that can sweep the problem away from public perception. Of course, just because carceral infrastructure is convenient does not mean it is effective in the long term. Predictably, enhanced exposure to police has resulted

47. *Id.* at 2211 (internal citation omitted); *see also id.* at 2207 (“Homelessness is complex. Its causes are many. So may be the public policy responses required to address it.”).

48. *Id.* at 2209.

49. *Id.* at 2217–20.

50. *Id.* at 2221–22 (“Start with this problem. Under *Martin*, cities must allow public camping by those who are ‘involuntarily’ homeless. But how are city officials and law enforcement officers to know what it means to be ‘involuntarily’ homeless, or whether any particular person meets that standard?”).

51. Justice Sotomayor, in the very first line of her dissent, revealed the problem with the majority’s reasoning. As she astutely phrased it, “[s]leep is a biological necessity, not a crime. For some people, sleeping outside is their only option.” *Id.* at 2228. A straightforward understanding of “involuntary” conduct lends itself to rejecting the choice the majority foisted on America’s homeless population: “[e]ither stay awake or be arrested.” *Id.*

52. *See id.* at 2209, 2226.

53. *See, e.g., id.* at 2222 (explaining the logistical challenges of providing adequate housing for homeless populations seeking shelter).

in high rates of incarceration for homeless populations.⁵⁴ And those emerging from prison face considerable housing insecurity upon their release—an insecurity often perpetuated by their status as ex-offenders,⁵⁵ constructing a revolving door between the prison and the sidewalk.⁵⁶ As exemplified by the American response to homelessness, then, rather than merely failing to resolve the root causes of criminalized conduct, carceral logic may in fact *entrench* the conduct it criminalizes,⁵⁷ exacerbating the harms it purports to address. Carceral logic, as implemented in the American criminal justice system, is thereby the epitome of a short-term solution that spawns long-term problems.

Why is carceral logic so ubiquitous despite its shortcomings, and what has it wrought? There are manifold justifications given: to provide law and order,⁵⁸ to address public perceptions of hyper-criminality and “crime waves,”⁵⁹ and even

54. See NAT'L COAL. FOR HOUS. JUST., POLICING- AND PUNISHMENT-BASED APPROACHES: A REALLY EXPENSIVE WAY TO MAKE HOMELESSNESS WORSE 1 (2021) (breaking down the criminalization of homelessness); Coutin, *supra* note 41, at 1 (noting a marked increase in arrests in the Los Angeles area for homeless people).

55. Social bias and stigma are major contributors to economic inopportunity amongst formerly incarcerated people, including in the housing space. This is discussed in depth below. See *infra* Part IV.B.

56. See NAT'L HEALTH CARE FOR THE HOMELESS COUNCIL, INCARCERATION & HOMELESSNESS: A REVOLVING DOOR OF RISK 1 (2013) (“Incarceration and homelessness are mutual risk factors for each other. . . . [R]esearchers generally estimate that 25-50% of the homeless population has a history of incarceration.”).

57. Aside from this entrenchment, frequent interactions with police have other measurable harms on people experiencing homelessness. See, e.g., Tanya L. Zakrisson, Paul A. Hamel & Stephen W. Hwang, *Homeless People's Trust and Interactions with Police and Paramedics*, 81 J. URBAN HEALTH 596, 602–03 (2004) (finding that the more homeless populations interact with police, the less likely they are to call police in an emergency).

58. See McArdle, *supra* note 21; Trevor George Gardner, *Law and Order as the Foundational Paradox of the Trump Presidency*, 73 STAN. L. REV. 141, 147–48 (2021) (enumerating the uses of “law and order” rhetoric by the Trump campaign); Koh Ewe, *DNC Produces Law & Order Parody Video Featuring Prosecutor Harris, Criminal Trump*, TIME (Aug. 19, 2024), <https://perma.cc/CG6G-QYTG> (describing the Harris campaign’s efforts to co-opt the “law and order” narrative by adapting the “Law & Order” television show, featuring President Trump as a criminal and former Vice President Harris as a prosecutor).

59. The most pronounced example of public hysteria over rampant crime was the perceived “crime wave” of the 1990s. While the numbers reveal that violent crime peaked in the early 1990s, researchers, now with the benefit of hindsight, have found much of the concern over crime was ill-supported. See Matthew Thompson, *The Lessons of the Crime Wave that Didn't Happen*, N.Y. TIMES (Jan. 29, 2024), <https://perma.cc/FJ4K-2QM2>; MATTHEW FRIEDMAN, AMES C. GRAWERT & JAMES CULLEN, BRENNAN CTR. FOR JUST., CRIME TRENDS: 1990–2016 at 1 (2017) (“This report concludes that although there are some troubling increases in crime in specific cities, there is no evidence of a national crime wave.”); Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSPS. 163 (2004) (“Crime fell sharply in the United States in the 1990s, in all categories of crime and all parts of the nation.”).

to produce a steady supply of labor for states and corporations.⁶⁰ Whatever the reason, however, the prevalence of carceral logic endures because it is popular. Not only did a carceral-hungry electorate win Richard Nixon the White House in 1968,⁶¹ but even now fifty-eight percent of the public believes the criminal justice system “is not tough enough in its handling of crime.”⁶² This is at a time when the American government incarcerates more of its own citizens than any other nation in the world,⁶³ including approximately two million people today—a five hundred percent increase from forty years ago.⁶⁴ The sheer breadth and scale of modern incarceration is staggering, processing millions of people each year.⁶⁵ Approximately seventy-seven million Americans—or one in every three adults—had a criminal record in 2018,⁶⁶ and over seven hundred thousand people are serving sentences of ten years or longer, representing a little over half of the American prison population.⁶⁷ Consequently, in shaping American criminal justice policy throughout the last century, carceral logic has produced an enduring, popularized system of force that impacts millions, culminating in the phenomenon now recognized as “mass incarceration.”⁶⁸

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60. See Note, *Climate Carceralism: The Future of Climate-Linked Prison Labor*, 137 HARV. L. REV. 706, 709–12, 720–22 (2023) (tracing the racialized history of American penal labor, and defining incentives to increase incarceration to gain access to labor). See generally ACLU & U. CHICAGO L. SCH., *supra* note 17.
61. See sources cited *supra* note 21; Cheliotis, *supra* note 21, at 11–12 (explaining that Nixon’s “law and order” campaign shored up support among the conservative elements of the American electorate, allowing Nixon to take more moderate, popular proposals in other areas of policy).
62. Megan Brenan, *Americans More Critical of U.S. Criminal Justice System*, GALLUP (Nov. 16, 2023), <https://perma.cc/KN2K-J6J7>; see also Mark Mauer, *Why Are Tough on Crime Policies So Popular?*, 11 STAN. L. & POL’Y REV. 9, 9 (1999).
63. *United States Profile*, PRISON POL’Y INITIATIVE, <https://perma.cc/4XK4-NEKR> (“With nearly two million people behind bars at any given time, the United States has the highest incarceration rate of any country in the world.”); James Cullen, *The History of Mass Incarceration*, BRENNAN CTR. FOR JUST. (July 20, 2018), <https://perma.cc/5AWA-EBN6>.
64. *Prison Population Over Time*, SENT’G PROJECT, <https://perma.cc/GZJ7-YLY7>. Even factoring in considerable growth in the U.S. population, incarceration rates increased by 342% between 1975 and 2004, from 111 people per 100,000 to 491. Robert DeFina & Lance Hanon, *The Impact of Mass Incarceration on Poverty*, 59 CRIME & DELINQUENCY 562, 563 (2013). See generally COMM. ON LAW & JUST., NAT’L RSCH. COUNCIL, *THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES* (2014).
65. Zhen Zeng, *Jails Report Series 2022 Preliminary Data Release*, BUREAU OF JUST. STAT. (Sept. 2023), <https://perma.cc/S724-F6F6> (“Jail facilities reported 7.3 million admissions from July 2021 to June 2022.”).
66. CHIDI UMEZ & REBECCA PIRIUS, *BARRIERS TO WORK: IMPROVING EMPLOYMENT IN LICENSED OCCUPATIONS FOR INDIVIDUALS WITH CRIMINAL RECORDS 1* (2018).
67. Nazgol Ghandnoosh & Ashley Nellis, *How Many People Are Spending Over a Decade in Prison?*, SENT’G PROJECT (Sept. 8, 2022), <https://perma.cc/2SPJ-GN8C>.
68. In his 2001 book, David Garland coined the phrase “mass imprisonment” to describe the precipitous rise in jailing and prosecution through the end of the 20th century, from which “mass incarceration” would eventually be derived. See generally DAVID GARLAND, *MASS*

II. CARCERAL LOGIC AS IDEOLOGY

Carceral logic, if left unchecked, cannot coexist with environmental justice, which seeks to address the inequitable, crushing environmental and climate harms that fall on marginalized peoples, especially on the economically disenfranchised and communities of color.⁶⁹ This is so for myriad reasons, the first of which is ideological: the principles of environmental justice impliedly oppose carceral logic. That is, carceral logic and environmental *injustice* share the same roots; both are products of extensive histories of marginalization along the dimensions of race and class.

A. *The Foundations of Environmental Justice*

Begin with environmental injustice. The impetus for birthing the environmental justice movement was rooted in a push for racial and class justice, and concerns from communities of color have long animated the movement's development.⁷⁰ The seminal work of the environmental justice movement demonstrates as much; what Rachel Carson's "Silent Spring" was to mainstream environmentalism in the 1960s and 70s,⁷¹ Dr. Robert Bullard's "Dumping in Dixie" was to the environmentally conscious civil rights activists and community leaders⁷² who would form the bedrock of the emerging environmental

IMPRISONMENT: SOCIAL CAUSES AND CONSEQUENCES (2001); Ruth Delaney et al., *Introduction*, VERA INST. (Sept. 2018), <https://perma.cc/B7DV-6EC8>.

69. See, e.g., Sarah Krakoff, *Environmental Justice and the Possibilities for Environmental Law*, 49 ENV'T L. 229, 232 (2019) ("To protect the most vulnerable communities, a recommitment to public investment and public provision of services should be paramount. The tools of anti-poverty law, antidiscrimination, and environmental law can be deployed toward these ends."); Spencer Banzhaf, Lala Ma & Christopher Timmins, *Environmental Justice: The Economics of Race, Place, and Pollution*, 33 J. ECON. PERSP. 185, 186 (2019); Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENV'T L. REP. 10681 (2000) (describing the various aspects of justice implicated in environmental justice, including distributional, procedural, corrective, and social).
70. See, e.g., COMM'N FOR RACIAL JUST., UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES xi–xvi (1987). See generally LUKE COLE & SHEILA FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT (2001); EILEEN MCGURTY, TRANSFORMING ENVIRONMENTALISM: WARREN COUNTY, PCBs, AND THE ORIGINS OF ENVIRONMENTAL JUSTICE (2007); DORCETA TAYLOR, TOXIC COMMUNITIES: ENVIRONMENTAL RACISM, INDUSTRIAL POLLUTION, AND RESIDENTIAL MOBILITY (2014); HARRIET A. WASHINGTON, A TERRIBLE THING TO WASTE: ENVIRONMENTAL RACISM AND ITS ASSAULT ON THE AMERICAN MIND (2019).
71. See Eliza Griswold, *How 'Silent Spring' Ignited the Environmental Movement*, N.Y. TIMES (Sept. 21, 2012), <https://perma.cc/J4DK-88XQ>.
72. One such leader was Hazel M. Johnson. While Bullard is often considered the "father of the environmental justice movement," see Dr. Robert Bullard, *Father of Environmental Justice*, CLEAN AIR COUNCIL, <https://perma.cc/4XS9-LU9J>, Johnson, a life-long environmentalist and public housing activist, is remembered as the "mother" of the movement. See Hazel

justice movement. In his groundbreaking work, Bullard documents the not-so-curious concentration of industrial pollution around communities of color and areas of lower socioeconomic standing.⁷³ These critical observations would eventually transcend Bullard's text to define the movement's ethos. At the first major environmental justice conference, called the First National People of Color Environmental Leadership Summit and held in Washington, D.C., in 1991, a gathering of grassroots activists and organizers from across the country adopted and affirmed a set of principles that were not only conscious of race and class, but centered race and class as primary contributors driving environmental harm.⁷⁴

Bullard and the leaders of the First National People of Color Environmental Leadership Summit were purposeful in centering race and class in the environmental justice movement. After all, race and class are themselves central to the ways in which environmental harm is felt and produced. Decades of scholarship have empirically reinforced Bullard's thesis that marginalized communities are far more likely to suffer harm from neighboring toxic sites than whiter, wealthier communities,⁷⁵ resulting in significant⁷⁶ and inequitably experienced⁷⁷

M. Johnson, 'Mother of the Environmental Justice Movement,' CHI. PUB. LIBR. (Oct. 6, 2018), <https://perma.cc/4GRF-P3FY>.

73. ROBERT BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 30–31 (1990).
74. See THE FIRST NATIONAL PEOPLE OF COLOR ENVIRONMENTAL LEADERSHIP SUMMIT, *THE PRINCIPLES OF ENVIRONMENTAL JUSTICE* xiii (1991) [hereinafter *PRINCIPLES OF ENVIRONMENTAL JUSTICE*] (describing the summit's objective "to build a national and international movement of all peoples of color to fight the destruction and taking of our lands and communities").
75. See, e.g., ROBERT D. BULLARD ET AL., *TOXIC WASTES AND RACE AT TWENTY 1987-2007: A REPORT PREPARED FOR THE UNITED CHURCH OF CHRIST JUSTICE & WITNESS MINISTRIES* x (2007) ("Host neighborhoods of commercial hazardous waste facilities are 56% people of color whereas nonhost areas are 30% people of color."); Paul Mohai et al., *Racial and Socio-economic Disparities in Residential Proximity to Polluting Industrial Facilities: Evidence From the Americans' Changing Lives Study*, 99 *AM. J. PUB. HEALTH* 649, 649 (2009) ("Blacks and respondents at lower educational levels and, to a lesser degree, lower income levels were significantly more likely to live within a mile of a polluting facility. Racial disparities were especially pronounced in metropolitan areas of the Midwest and West and in suburban areas of the South.").
76. See, e.g., Jean D. Brender, Juliana A. Maantay & Jayajit Chakraborty, *Residential Proximity to Environmental Hazards and Adverse Health Outcomes*, 101 *AM. J. PUB. HEALTH* 37, 50 (2011) ("Although their results are mixed, many studies found significant relationships between residential proximity to environmental hazards and adverse health outcomes, such as adverse pregnancy outcomes . . ."); Brittany A. Trottier et al., *Residential Proximity to Metal-Containing Superfund Sites and Their Potential as a Source of Disparities in Metal Exposure Among U.S. Women*, 131 *ENV'T HEALTH PERSP.* 1, 1 (2023) (assessing heavy metal concentrations in women near Superfund sites).
77. See Michael Gochfeld & Joanna Burger, *Disproportionate Exposures in Environmental Justice and Other Populations: The Importance of Outliers*, 101 *AM. J. PUB. HEALTH* 53, 53 (2011) ("Age, poverty, and minority status place some groups at a disproportionately high risk for

health impacts. Bullard himself found that in some parts of the country, racial disparities in toxic exposure were staggering; compared to white communities, communities of color were overrepresented among neighborhoods “hosting” hazardous pollution, reaching as high as 66% in Michigan and 79% in Nevada.⁷⁸ These disparities do not merely coincide with a community’s marginalized status, but are directly produced by it. As Professor David Pellow describes, people “who already experience social, political, economic, and cultural marginalisation are also more likely to experience disproportionate environmental and public health threats from state and corporate institutions than other populations.”⁷⁹ That is, industry site selection and other administrative aspects of hazardous waste production overly target marginalized communities. Consequently, the environmental justice movement concerns itself not only with the inequitable harms of pollutive waste, but also with the procedural inequities of how such waste is managed.⁸⁰

Race and class drive procedural injustice in several important ways. One is animus from administrative actors. Key decisionmakers in government and industry who decide where and how pollutive waste is handled often take actions which manifest racial biases, wielding power in ways that benefit the communities with which they sympathize to the detriment of those they perceive as “other.”⁸¹ A critical example lies in zoning regulations and industrial siting deci-

environmental disease. Such groups are exposed to hazardous chemicals or conditions at levels well above those for the general populations.”); Kristian Larsen, Ela Rydz & Cheryl E. Peters, *Inequalities in Environmental Cancer Risk and Carcinogen Exposures: A Scoping Review*, 20 INT’L J. ENV’T RSCH. & PUB. HEALTH 5718, 5719 (2023) (“[E]xposure to environmental carcinogens is not evenly distributed across populations Exposures are concentrated among socially and/or economically disadvantaged populations who may be especially vulnerable to hazardous exposures due to limited resources at the individual and community level.”); Hanneke Kruize et al., *What Causes Environmental Inequalities and Related Health Effects? An Analysis of Evolving Concepts*, 11 INT’L J. ENV’T RSCH. & PUB. HEALTH 5807, 5808 (2014) (“[M]inorities and those with lower incomes were exposed more often to several air pollutants, hazardous waste facilities, contaminated fish, and agricultural pesticides at the workplace. In addition, black children had significantly higher blood lead levels compared to white children.”); ALLISON GROSSMAN & KELLEY DENNINGS, CTR. FOR BIOLOGICAL DIVERSITY, *THE INFLUENCE OF ENVIRONMENTAL TOXICITY, INEQUITY AND CAPITALISM ON REPRODUCTIVE HEALTH* 5 (2022).

78. BULLARD ET AL., *supra* note 75, at xi.

79. David N. Pellow, *Struggles for Environmental Justice in US Prisons and Jails*, 53 ANTIPODE 56, 57 (2019).

80. See Kruize et al., *supra* note 77, at 5808 (“Environmental justice consists of two dimensions. First of all, it refers to the spatial distribution of environmental risks and amenities and the resulting disparities among socio-economic and racial groups (‘distributional’ or ‘geographical justice’). It includes all places, *i.e.*, where people live, but also where they work, learn, play, and recreate. Second, it refers to the distribution process itself, including access to and participation in decision-making processes and procedures that create environmental risks (‘procedural justice’).”).

81. See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322–41 (1987); Laura Pulido, *Rethinking Environmental*

sions; municipal governments and industry players have long shaped America's urban landscape—and relegated its pollutive elements—along racial lines.⁸² As courts and agencies reviewing industrial siting practices have recognized, this discrimination need not always be intentional, but can arise from institutionally embedded justifications. For example, in *In re: Louisiana Energy Services, L.P.*,⁸³ administrative judges for the Nuclear Regulatory Commission considered and ultimately rejected a siting proposal to construct a uranium enrichment facility on a 442-acre parcel situated between Forest Grove and Center Springs, two predominantly Black communities in Louisiana.⁸⁴ The reviewing court noted that following several rounds of screening by site selectors, “at each progressively narrower stage of the site selection process, the level of poverty and African Americans in the local population rose dramatically, until it culminated in the selection of a site with a local population that is extremely poor and 97% African American.”⁸⁵ Far from dismissing this trend as a statistical anomaly, the court recounted expert testimony finding that the selection criteria were

Racism: White Privilege and Urban Development in Southern California, 90 ANNALS ASS'N AM. GEOGRAPHERS 12, 17–19 (2000) (reviewing literature on discrete, intentional acts of racism in siting decisions); Jeffrey S. McLeod, *Unmasking the Processes and Justifications that Lead to Environmental Racism: A Critique of Judicial Decision-Making, Political and Public Ambivalence, and the Disproportionate Placement of Environmental and Land Use Burdens in Communities of Color*, 5 VA. J. SOC. POL'Y & L. 545, 546–47 (2008) (discussing racial imbalances in agency environmental decisionmaking, and the availability of administrative remedies to environmental harm); see also *id.* at 549–50 (describing theories and judicial recognition of unconscious bias in environmental decisionmaking). Moreover, even if modern actors do not actively further racial animus, many existing regulatory regimes stem from generations of less enlightened decisionmakers. See generally Heidi Gorovitz Robertson, *If Your Grandfather Could Pollute, So Can You: Environmental “Grandfather Clauses” and Their Role in Environmental Inequity*, 45 CATH. UNIV. L. REV. 131 (1995).

82. See, e.g., Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in ZONING AND THE AMERICAN DREAM 101, 101 (Charles M. Haar & Jerold S. Kayden eds., 1989) (“[E]xpulsive zoning practices have been relatively commonplace in black residential areas. . . . [T]hese expulsive zoning practices are entirely consistent with the more general findings of my studies: that the land-use-related policies and practices of government at all levels, but particularly the decisions and initiatives of local government, have been and continue to be instrumental influences on both the creation and perpetuation of racial segregation.”); Julia Mizutani, *In the Backyard of Segregated Neighborhoods: An Environmental Justice Case Study of Louisiana*, 31 GEO. ENV'T L. REV. 363, 364–72 (2019) (“Exclusionary zoning and land use laws often lead these hazards to be placed in segregated black communities because of the fear that such hazards will diminish property values in white communities.”); cf. Sarah Schindler, *Architectural Exclusion: Discrimination and Segregation Through Physical Design of the Built Environment*, 124 YALE L.J. 1934, 1944–53 (“Although legal scholars do not often write directly about architecture as regulation, some—especially law and geography scholars and critical race theorists—have confronted concepts like architecture, the built environment, municipal infrastructure, space, and place in the context of class and race.”).

83. 45 N.R.C. 367 (1997).

84. *Id.* at 370.

85. *Id.* at 386.

designed “to protect the white, middle class lifestyle” of nearby communities.⁸⁶ The court similarly heard evidence that site surveyors, in applying the criteria, had quickly determined that lower income Black communities were ideal choices because they were underpopulated, and dismissed whiter, wealthier communities because of their attractive lakes and landmarks.⁸⁷ At the earliest stages of the process, then, decisionmaker bias can permeate the allocation of pollution.

Even absent racial bias or indifferent exclusion, outwardly neutral forces, such as the market mechanisms that drive the selection of polluting industrial sites, operate to the disadvantage of communities of color and neighborhoods of lower socioeconomic standing.⁸⁸ When industrial decisionmakers are operating on outwardly “objective” metrics, the incentive structures driving their decisions result in skewed outcomes, as “[c]onventional industry wisdom counsels private companies to target sites that are in neighborhoods ‘least likely to express opposition’—those with poorly educated residents of low socioeconomic status.”⁸⁹

86. *Id.* at 386, 394.

87. *Id.* at 386–88.

88. One common source of disparity, for instance, is exposure to particulate matter from industrial emitters. *See, e.g.,* Inhab Mikati et al., *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 AM. J. PUB. HEALTH 480, 480–85 (2018); Gary S. Young et al., *Differential Exposure to Hazardous Air Pollution in the United States: A Multilevel Analysis of Urbanization and Neighborhood Socioeconomic Deprivation*, 9 INT’L J. ENV’T RES. PUB. HEALTH 2204, 2217 (2012) (“Neighborhood characteristics relating to [socioeconomic deprivation] have been associated with differential exposure to air pollution, as well as related to neighborhood disparities in a range of health outcomes.”); Raoul S. Liévanos, *Race, Deprivation, and Immigrant Isolation: The Spatial Demography of Air-Toxic Clusters in the Continental United States*, 54 SOC. SCI. RES. 50, 50–53 (2015); *see also* Suzanne Kershaw et al., *Identifying Inequitable Exposure to Toxic Air Pollution in Racialized and Low-Income Neighbourhoods to Support Pollution Prevention*, 7 GEOSPATIAL HEALTH 265, 274–75 (2013) (supplying an international perspective on the same phenomenon).

89. COLE & FOSTER, *supra* note 70, at 70; *see also* Craig Anthony Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENVER UNIV L. REV. 1, 27 (1998) (“Government and industry decision makers conclude that they will receive less opposition if they put the [locally undesirable land uses (LULUs)] in poor and minority neighborhoods than if they put them in more politically active and economically powerful higher-income, white neighborhoods.”); Robert Mata, *Hazardous Waste Facilities and Environmental Equity: A Proposed Siting Model*, 13 VA. ENV’T L.J. 375, 391 (1994). The problem also works in reverse, as depreciated property values attract lower-income residents to already-polluted communities. *See* Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1388–89 (1994) (“The siting of a LULU can influence the characteristics of the surrounding neighborhood in two ways. First, an undesirable land use may cause those who can afford to move to become dissatisfied and leave the neighborhood. Second, by making the neighborhood less desirable, the LULU may decrease the value of the neighborhood’s property, making the housing more available to lower income households and less attractive to higher income households.”); Jane Kay & Cheryl Katz, *Pollution, Poverty and People of Color: Living with Industry*, SCI. AM. (June 4, 2012), <https://perma.cc/N8XC-D4KT> (“Low-income residents seeking affordable homes end up sharing a fence line with a refinery and a cluster of other polluting businesses.”).

Because sites in a “neighborhood of white people of high socioeconomic status often face strong public opposition,” industry instead “focuses on industrial, or rural, communities, . . . populated predominantly by people of color.”⁹⁰ Further, aside from the prospect of public outcry, industrial actors are also driven to coalesce pollutive infrastructure around marginalized communities because those communities are deemed less “valuable.” For example, in finding that the industrial applicant’s permit request violated President Clinton’s executive order on environmental justice,⁹¹ the court in *Louisiana Energy Services* went beyond scrutinizing the judgment of specific site inspectors and interrogated the criteria the inspectors applied.⁹² They observed that several criteria, which sought to assess the value of candidate communities, were “inherently biased toward the selection of sites in minority and poor areas because these areas generally lack institutions such as schools, hospitals, and nursing homes.”⁹³ In other words, communities which have suffered from economic disinvestment are more likely to be subject to pollutive zoning and industrial site selection, as from an “objective” perspective there is less critical economic or social infrastructure that would be put at risk.

The disempowered status of targeted communities⁹⁴ itself stems from systemic injustice. The constellation of conditions which build community power have, for decades, favored whiter, wealthier demographics over people of color, resulting in disparate economic enfranchisement.⁹⁵ For instance, the practice of racial redlining left people of color unable to build generational wealth as property owners, unlike their white counterparts.⁹⁶ And politically, members of marginalized communities were rarely involved in the construction of existing regulatory regimes,⁹⁷ leaving not only their needs and concerns underappreciated,

90. COLE & FOSTER, *supra* note 70, at 71; *see also id.* at 70–74.

91. *Louisiana Energy Services*, 45 N.R.C. at 412 (citing Exec. Order No. 12898, 3 C.F.R. 859 (1994)).

92. *Id.* at 386–88.

93. *Id.* at 388.

94. *See* Arnold, *supra* note 89, at 26–27 (“Although distributional studies have not identified the causes of environmental injustice, many people argue that such injustice is the result of a lack of power among people of color, low-income people, and their respective communities.”).

95. *See id.* at 27 (noting that the lack of power is “a result of racism and classism, lack of financial resources, language barriers, residential and workplace segregation, and lack of political mobilization”). Further, the fact that many of these communities are overincarcerated also diminishes their economic potential. *See infra* Part IV.B.

96. *See* Brad Plumer & Nadja Popovich, *How Decades of Racist Housing Policy Left Neighborhoods Sweltering*, N.Y. TIMES (Aug. 24, 2020), <https://perma.cc/TY7T-CPEW>; Ryan Best & Elena Mejía, *The Lasting Legacy of Redlining*, FIFTYEIGHT (Feb. 9, 2022), <https://perma.cc/MXD5-3VU4>. *See generally* RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* (2017).

97. In fact, the court in *Louisiana Energy Services* noted that “during the siting process [the site selectors] relied upon the opinions of Homer, a community 5 miles from the actual host community . . . [i]n contrast, the actual host communities of Forest Grove and Center

but also rendering the resulting legal frameworks difficult to navigate.⁹⁸ As Professor Craig Anthony Arnold puts it, “not only did the major environmental law groups ignore and exclude members of grassroots communities, but they also launched a system that was highly inaccessible to the non-lawyer and nonscientist.”⁹⁹ Both the market and regulatory forces that construct environmental disparities, then, are themselves products of disparity, which continue to impose adverse conditions on marginalized communities. As such, environmental justice requires not only alleviating the adverse conditions themselves, but also counteracting and dismantling the systems that *produce* those conditions. Much of the focus of environmental justice activists and lawyers has thereby been to empower local communities to better position them in opposing unwanted industrial interference.¹⁰⁰

B. *The Evolution of the Carceral State*

Like environmental injustice, the modern carceral state—and the logic that gave it form—is rooted in structural subordination along the dimensions of race and class. To begin, modern mass incarceration does not impact everyone equally, but instead systemically targets communities of color¹⁰¹ and those of

Springs were never informed of the siting decision until it was too late for the residents to affect the selection process.” 45 N.R.C. at 388.

98. See Arnold, *supra* note 89, at 27 (“[L]ow-income people and people of color did not play a part in designing the environmental regulatory system, which institutionally discriminates against them. . . . The mainstream environmental movement, composed primarily of lawyers and scientists and overwhelmingly white and middle-class, emerged as a powerful force in the late 1960s and early 1970s. It was responsible for an extensive array of environmental legislation that created a complex regulatory process emphasizing legal and technical expertise.”); Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGICAL L.Q.* 619, 635–42 (1992).
99. Arnold, *supra* note 89, at 28 (citing Cole, *supra* note 98, at 635–42).
100. See, e.g., Arnold, *supra* note 89, at 8 (“Local neighborhoods can use land use planning to articulate visions for what they want their communities to be, and negotiate land use regulations to implement these visions. In other words, they would not be merely late participants in using existing rules to stop (or attempt to stop) current proposals for unwanted land uses, but also pre-siting participants in developing the rules that will determine what will and will not go in their neighborhoods.”); Cole, *supra* note 98, at 621. See generally ROBERT D. BULLARD, *CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS* (1993) (centering the experiences of community leaders on the front lines of opposition). *But see, generally*, Bradford C. Mank, *Environmental Justice and Discriminatory Siting: Risk-Based Representation and Equitable Compensation*, 56 *OHIO ST. L.J.* 329 (1995) (contending that industry should instead offer additional compensation to communities for high-risk siting decisions).
101. See INST. FOR RSCH. ON POVERTY, UNIV. WISCONSIN-MADISON, *CONNECTIONS AMONG POVERTY, INCARCERATION, AND INEQUALITY* (2020), <https://perma.cc/24AZ-SNXA> (“Prison populations disproportionately comprise African American and Hispanic men . . . Most of them are poor.”); CARLTON W. REEVES ET AL., U.S. SENT’G COMM’N, *DEMOGRAPHIC DIFFERENCES IN FEDERAL SENTENCING* 4 (2023).

lower socioeconomic standing.¹⁰² Of those Americans with felony records, the numbers reveal stark racial disparities; through 2010, one in three Black men had a felony conviction, a rate four times greater than that of the general population.¹⁰³ Further, one in three Black men were likely to experience prison in their lives in 1981, and one in five are likely to experience prison today—which is, again, four times the likelihood of similarly situated white men.¹⁰⁴ Black defendants convicted of federal crimes receive, on average, sentences thirteen percent longer than white defendants, and Black men are twenty-three percent less likely to receive probationary sentences.¹⁰⁵ Drug crimes are some of the greatest sources of inequity; Black offenders are “significantly overrepresented” among those arrested for drug delivery and possession.¹⁰⁶ The discrepancy knows neither geography nor party; even in liberal states like Massachusetts, Black Americans are incarcerated at eight times the rate of white Americans.¹⁰⁷

These staggering disparities in the American prison system are not coincidental. As Michelle Alexander wrote, mass incarceration is a means of “racial

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102. See Loïc Wacquant, *Class, Race & Hyperincarceration in Revanchist America*, DAEDALUS: J. AM. ACAD. ARTS & SCI. 74, 78 (2010) (“Class, not race, is the first filter of selection for incarceration.”); Lisa Foster, *The Price of Justice: Fines, Fees and the Criminalization of Poverty in the United States*, 11 U. MIA. RACE & SOC. JUST. L. REV. 1, 13 (2020) (“Nearly half of the people jailed in the United States have individual incomes below \$10,000 per year.”); KAREN DOLAN & JODI L. CARR, INST. POL’Y STUDS., THE POOR GET PRISON: THE ALARMING SPREAD OF THE CRIMINALIZATION OF POVERTY 7 (2015) (explaining how “[p]overty . . . is too often treated as a criminal offense”); Brianna Borelli, Note, *The Interplay of Mass Incarceration and Poverty*, 30 GEO. POVERTY J.L. & POL’Y 287, 297–98 (2023); BERNADETTE RABUY & DANIEL KOPF, PRISON POL’Y INITIATIVE PRISONS OF POVERTY: UNCOVERING THE PRE-INCARCERATION INCOMES OF THE IMPRISONED 1 (2015), <https://perma.cc/445F-5QAT> (“[I]ncarcerated people in all gender, race, and ethnicity groups earned substantially less prior to their incarceration than their non-incarcerated counterparts of similar ages.”).
103. Sarah K. S. Shannon et al., *The Growth, Scope, and Spatial Distribution of People with Felony Records in the United States, 1948–2010*, 54 DEMOGRAPHY 1795, 1796 (2017).
104. NAZGOL GHANDNOOSH, SENT’G PROJECT, ONE IN FIVE: ENDING RACIAL INEQUITY IN INCARCERATION 3 (2023); see also Ruth Delaney et al., *American History, Race, and Prison*, VERA INST., <https://perma.cc/FZ4T-WBK5>.
105. REEVES ET AL., *supra* note 101, at 4. The numbers are equally, if not more troubling for other racial demographics. Hispanic men, for instance, are twenty-six percent less likely to receive probationary sentences. *Id.*
106. Katherine Beckett, Kris Nyrop & Lori Pflingst, *Race, Drugs, and Policing: Understanding Disparities in Drug Delivery Arrests*, 44 CRIMINOLOGY 105, 105–10 (2006); see also Alana Rosenberg, Allison K. Groves & Kim M. Blankenship, *Comparing Black and White Drug Offenders: Implications for Racial Disparities in Criminal Justice and Reentry Policy and Programming*, 47 J. DRUG ISSUES 132, 132–35 (2017) (“Blacks were significantly more likely to have sales and possession charges, significantly more likely to prefer marijuana, a less addictive drug, and significantly less likely to report having severe drug problems.”).
107. ELIZABETH TSAI BISHOP ET AL., CRIM JUST. POL’Y PROGRAM, HARV. L. SCH., RACIAL DISPARITIES IN THE MASSACHUSETTS CRIMINAL SYSTEM 1 (2020).

and social control,” in that it is designed to achieve the outcomes observed.¹⁰⁸ And much like environmental injustice, efforts to construct the modern carceral state can be traced back to historical marginalization. Namely, following the passage of the Thirteenth Amendment and the subsequent abolition of slavery,¹⁰⁹ states—particularly in the newly liberated south—supplanted chattel slavery with prisons as legal centers of racialized subordination.¹¹⁰ After all, the Thirteenth Amendment did not abolish slavery per se, but instead codified involuntary servitude imposed as “punishment for crime.”¹¹¹ States exploited this exception by criminalizing nearly every aspect of Black people’s existence, through laws that “increased the penalties for crimes such as vagrancy, loitering, and public drunkenness,” which “coerc[ed] resistant freed slaves into becoming wage laborers.”¹¹² Throughout the post-Civil War era, prison populations in southern states grew in size, and in particular became increasingly filled with Black prisoners.¹¹³ So extensive was the practice of imprisonment based on race that “[b]y 1900, the South’s judicial system had been wholly reconfigured to make one of its primary purposes the coercion of African Americans to comply with the social customs and labor demands of whites.”¹¹⁴ The practice of enforcing racial subjugation via jailing and policing continued into the Jim Crow era,

108. ALEXANDER, *supra* note 14, at 102; *see also* Earl Smith & Angela J. Hattery, *Incarceration: A Tool for Racial Segregation and Labor Exploitation*, 15 RACE, GENDER & CLASS 79, 79–80 (2008).

109. The racialization of southern prisons did not begin with this period, but instead found new life. Previously, southern prisons had propped up, and were themselves propped up, by chattel slavery. *See, e.g.*, Kelly Birch, *Slavery and the Origins of Louisiana’s Prison Industry, 1803–1861*, at ii–iii (Sept. 2017) (Ph.D. dissertation, University of Adelaide).

110. *See* McLENNAN, *supra* note 14, at 14; ALEXANDER, *supra* note 14, at 25–75.

111. U.S. CONST. amend. XIII, § 1.

112. Kim Gilmore, *Slavery and Prison — Understanding the Connections*, SOC. JUST., Fall 2000, at 195, 198; *see also* Scott W. Duxbury, *Peculiar Institution? The Legacy of Slavery and Prison Expansion in the United States, 1970–2015*, JUST. Q., Mar. 2023, at 1, 3–4. For a more empirical analysis on how slavery shaped the emergence of mass incarceration and the institution of the southern prison, *see generally* Aaron Gottlieb & Kalen Flynn, *The Legacy of Slavery and Mass Incarceration: Evidence from Felony Case Outcomes*, 95 SOC. SERV. REV. 3 (2021). These laws find spiritual successors in the modern legal regimes policing homeless populations. *See supra* Part I.

113. Some southern prisons were even built on old plantations. *See* Liam Kennedy, “*Today They Kill with the Chair Instead of the Tree*”: *Forgetting and Remembering Slavery at a Plantation Prison*, 21 THEORETICAL CRIMINOLOGY 133, 134 (2017); Paul Gardullo, *Angola Prison: Collecting and Interpreting the Afterlives of Slavery in a National Museum*, F.J., Spring 2017, at 21, 23 (describing Angola prison’s roots to slavery).

114. BLACKMON, *supra* note 14, at 7. This policy was motivated by both race and economic need, as the south’s infrastructure had suffered greatly in the Civil War. *See id.* at 68 (“With the southern economy in ruins, state officials limited to the barest resources, and county governments with even fewer, the concept of reintroducing the forced labor of blacks as a means of funding government services was viewed by whites as an inherently practical method of eliminating the cost of building prisons and returning blacks to their appropriate position in society.”).

where any attempt to protest the racialized hierarchy of the south was met with swift, brutal police action.¹¹⁵

The modern era of mass incarceration, launched by President Nixon and continued by his successors, has similar ties to structural racism.¹¹⁶ That is, Nixon's "law and order" campaign and subsequent war on drugs were not neutral, but invidious responses to the liberation and change of the 1960s, seeking to solidify political power and reimpose racial hierarchy following the collapse of Jim Crow. As Nixon advisor John Ehrlichman later admitted, "[t]he Nixon campaign in 1968, and the Nixon White House after that, had two enemies: the antiwar left and black people. . . . [B]y getting the public to associate the hippies with marijuana and blacks with heroin, and then criminalizing both heavily, we could disrupt those communities. We could arrest their leaders, raid their homes, break up their meetings, and vilify them night after night on the evening news."¹¹⁷ In this way, the employment of carceral logic was intended to not only address social ills, but also to provide a systemic, legalistic mechanism to further the project of racial subordination.

The ties between race and the American criminal justice system are neither abstract nor anachronistic. Rather, the pernicious racial targeting of Nixon's campaign lives on in modern prosecutorial practices and street policing. One well known example is the so-called "stop-and-frisk" routine, practiced by city beat cops from the early 2000s to the mid-2010s.¹¹⁸ The practice involved police stopping and patting down "suspicious" individuals to search for weapons or contraband.¹¹⁹ Stop-and-frisk, as implemented in New York, was eventually struck down under the Fourth and Fourteenth Amendments due to the frequent employment of racial profiling.¹²⁰ Less well known, but no less egregious, are the

115. See generally BRANDON T. JETT, *RACE, CRIME, AND POLICING IN THE JIM CROW SOUTH: AFRICAN AMERICANS AND LAW ENFORCEMENT IN BIRMINGHAM, MEMPHIS, AND NEW ORLEANS, 1920–1945* (2021) (observing the vital role that police played in preserving the power structures of the Jim Crow south, and the maintenance of white supremacy).

116. Cf. Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 907 (2019) (contending modern mass incarceration constitutes "slavery behind bars").

117. Dan Baum, *Legalize It All: How to Win the War on Drugs*, HARPER'S MAG. (Apr. 2016), <https://perma.cc/JBY8-V73C>.

118. Although the practice was in use before this period, the years of the Bloomberg Administration in New York City saw the greatest employment of stop and frisk. See *Stop-and-Frisk During the Bloomberg Administration 2002–2013* (2014), NYCLU (Aug. 18, 2014), <https://perma.cc/6JYY-NDDD>.

119. *Terry v. Ohio*, 392 U.S. 1, 16–17 (1968) (describing the procedure involved in a stop and frisk).

120. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 558–59, 563 (S.D.N.Y. 2013) (listing key statistics); *United States v. Broomfield*, 417 F.3d 654, 655 (7th Cir. 2005) ("Whether you stand still or move, drive above, below, or at the speed limit, you will be described by the police as acting suspiciously should they wish to stop or arrest you. Such subjective, promiscuous appeals to an ineffable intuition should not be credited."). The discriminatory nature of stop and frisk also impacted other minorities beyond race. See Maria R. Khan et al., *Racial*

so-called “stash house stings.”¹²¹ For decades, the Bureau of Alcohol, Tobacco and Firearms (“ATF”) engaged in a widespread campaign to entice former offenders into committing crimes with promises of fast cash.¹²² Undercover agents would inform suspects of an incoming drug shipment, which the suspects—together with the agents—could then raid and sell for profit.¹²³ When the suspects would arrive at the designated location, armed and accompanied by those they had recruited, they found ATF officers waiting for them.¹²⁴ Though the drugs were always fictitious, the charges and sentences resulting from these “reverse stings” were very real; because the faux-conspiracy almost always involved drugs and weapons, those caught in the ATF’s trap often faced mandatory sentences of decades in prison, in some cases even extending to life.¹²⁵ This practice, upheld against defenses of entrapment and outrageous government conduct,¹²⁶ eventually

and Ethnic Disparities in “Stop-and-Frisk” Experience Among Young Sexual Minority Men in New York City, PLOS ONE, Apr. 2021, at 1.

121. See Rachel Posner, *Stash-House Stings Carry Real Penalties for Fake Crimes*, NEW YORKER (Oct. 11, 2021), <https://perma.cc/66QE-VU9C>; Marc D. Esterow, Note, *Lead Us Not Into Temptation: Stash House Stings and the Outrageous Government Conduct Defense*, 8 DREXEL L. REV. ONLINE 1, 22–24 (2015).
122. See Posner, *supra* note 121 (recounting the history of the stash house stings as the brainchild of Richard Zayes, an ATF officer who determined that since luring would-be drug robbers with actual drugs often resulted in violence, it would be more convenient to make an arrest before a robbery is made); Esterow, *supra* note 121, at 3–5, 22–24.
123. See Posner, *supra* note 121 (recounting the story of one suspect involved in a stash-house sting); Esterow, *supra* note 121 at 28–29 (describing common practices of placing confidential informants in “bad” parts of town).
124. See Posner, *supra* note 121.
125. Curiously, sentencing revolved around the weight of the fictional contraband the ATF reported to suspects, as there was no actual contraband to measure. See Posner, *supra* note 121 (“The A.T.F. had set the amount of drugs high enough to trigger a mandatory minimum of ten years, so a judge would have little leeway to amend a sentence.”); Esterow, *supra* note 121, at 29 (“[T]he government retains full control over the amount of time its targets spend in prison because it can specify the amount of drugs involved in the fictional conspiracies.”); *United States v. Black*, 733 F.3d 294, 303 (9th Cir. 2013) (“In fictional stash house operations like the one at issue here, the government has virtually unfettered ability to inflate the amount of drugs supposedly in the house and thereby obtain a greater sentence for the defendant.” (quoting *United States v. Briggs*, 623 F.3d 724, 729–30 (9th Cir. 2010))).
126. See, e.g., *United States v. Flowers et al.*, 712 F. App’x 492, 497–98 (6th Cir. 2017) (upholding the convictions of stash-house sting defendants against entrapment and outrageous government conduct defenses); cf. *Black*, 733 F.3d at 303 (establishing a six-factor test to judge the legality of a stash-house sting); *United States v. Dunlap*, 593 F. App’x 619, 620–22 (9th Cir. 2014) (upholding a sting under the test). These decisions were predicated, in part, on other reverse sting and outrageous governmental conduct cases decided before the ATF began ramping up its deceptive practices in 2006. See, e.g., *United States v. Tucker*, 28 F.3d 1420, 1424 (6th Cir. 1994); *United States v. Boyd*, 55 F.3d 239, 241 (7th Cir. 1995). However, although courts lacked a ready avenue to declare these stings unlawful, they found them distasteful in principle, and embarrassing in application. See, e.g., *Flowers*, 712 F. App’x at 511 (Stranch, J., concurring) (“I find the concept of these ‘stash house sting’ operations at odds with the pride we take in presenting American criminal justice as a system that treats

came under scholarly and legal scrutiny, as in selecting their targets, ATF officers overwhelmingly chose Black and Hispanic suspects, amounting to ninety percent of all prosecutions.¹²⁷ Following protracted litigation,¹²⁸ the ATF has reduced its prosecutions of stash house stings,¹²⁹ but many who were prosecuted remain in prison today, serving long sentences for crimes artificially induced by the ATF.¹³⁰ These practices, which were commonplace barely a decade ago, reveal that much of the modern carceral state remains tied to the troubling roots which gave it form, as it continues to operate with damning precision against people of color.

C. Irreconcilable Ideologies

It may be argued that environmental justice need not be fundamentally decarceral, as the prosecution of environmental crimes is a justified—and

defendants fairly and equally under the law.”); *United States v. Kindle*, 698 F.3d 401, 416 (7th Cir. 2012) (Posner, J., concurring in part and dissenting in part), *vacated on other grounds sub nom.*, *United States v. Mayfield*, 771 F.3d 417 (7th Cir. 2014).

127. Brad Heath, *Investigation: ATF Drug Stings Targeted Minorities*, USA TODAY (July 20, 2014), <https://perma.cc/A2SR-HLQJ>; Alison Siegler, *Racially Selective Law Enforcement Litigation in Federal Stash House Cases*, 26 CIR. RIDER 45, 46–47 (2019); Alison Siegler & William Admussen, *Discovering Racial Discrimination by the Police*, 115 NW. U. L. REV. 987, 990 (2021) (“Nationwide, federal law enforcement agencies have overwhelmingly targeted people of color to commit these fabricated crimes. In Chicago, from 2011 to 2013, only one individual out of the fifty-seven charged by the ATF in a stash house operation was white.”); Annie Sweeney & Jason Meisner, *ATF Sting Operation Accused of Using Racial Bias in Finding Targets, with Majority Being Minorities*, CHI. TRIB. (Aug. 9, 2019), <https://perma.cc/2U57-M5JS>; Esterow, *supra* note 121, at 31–32.
128. Professor Alison Siegler at the University of Chicago’s Federal Criminal Justice Clinic represented forty-three defendants involved in stash house stings, ultimately earning plea deals and sentence reductions which resulted in the release of some defendants facing fifteen to thirty-five years in prison, upon a significant showing of racial bias in the ATF’s practices. *See* Siegler & Admussen, *supra* note 127, at 1025; Siegler, *supra* note 127, at 46–47; Jason Meisner, *Under Pressure by Judges, Prosecutors to Offer Plea Deals in Controversial Drug Stash House Cases*, CHI. TRIB. (Aug. 9, 2019), <https://perma.cc/6L6F-RA5J>.
129. As some courts have noted, the ATF’s “abandonment of the practice” has served as grounds for sentence reductions for those who remain incarcerated. *See, e.g.*, *United States v. King*, No. 06-CR-50074-2, 2024 WL 4274793, at *5 (N.D. Ill. Sept. 20, 2024) (“The government’s abandonment of the practice after some defendants had already been sentenced resulted in favorable plea agreements being offered to those defendants who had not yet been sentenced, which created significant disparities between those two groups of defendants.”); *see also* Siegler, *supra* note 127, at 467. *But see* Posner, *supra* note 121 (“After the Chicago class action, the A.T.F. appeared to stop running stash-house stings in the Northern District of Illinois, but the operations have been deployed elsewhere in the country as recently as 2019.”).
130. *See, e.g.*, Letter from Erica Zunkel, Clinical Professor of Law, Univ. Chi. L. Sch., to Hon. Carlton W. Reeves, Chair, U.S. Sent’g Comm’n 4 (Oct. 17, 2022) (“In 2018, after race discrimination litigation in Chicago exposed the egregiousness of these operations, prosecutors offered unprecedented plea deals to all 43 individuals with pending cases. . . . But Dwayne, sentenced nearly a decade prior, was unable to benefit from the government’s disavowal and abandonment of the reverse stings.”).

perhaps even necessary—component of a green agenda.¹³¹ The argument is that there are some individuals who participate in particularly egregious pollutive conduct, and only prison is likely to stop or deter them. This is not an outlier position. Throughout the 1990s, prosecution of environmental crime was a “national priority,”¹³² including during the Clinton Administration, which had formally recognized the principles and policy goals of the budding environmental justice movement.¹³³ This priority was also captured in statutory language. When they were initially passed, hardly any of the major environmental laws had robust criminal enforcement provisions; “[t]oday, [they] all do.”¹³⁴ Accordingly, between 1982 and 1991, the Department of Justice obtained 703 indictments and 517 convictions for environmental crimes.¹³⁵ In the modern era, the FBI and Department of Justice continue to investigate and prosecute environmental crimes,¹³⁶ and just this year the nations of the European Union passed a resolution adopting a hardline stance against such crimes.¹³⁷

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131. I note that not all criminal provisions of environmental statutes result in jail time. In fact, prosecutions under federal environmental law may serve as alternative statutory avenues to impose robust financial accountability on major polluters, as with BP following the Deepwater Horizon Oil Spill. See Joshua Ozymy & Melissa L. Jarrell, *Does the Criminal Enforcement of Federal Environmental Law Deter Environmental Crime? The Case of the U.S. Resource Conservation and Recovery Act*, 11 ENV'T & EARTH L. J. 65, 83 (2021). To the extent criminal provisions are used for this purpose, I do not consider them an offshoot of carceral logic, as they do not function to incarcerate, but are instead akin to civil enforcement provisions. Only provisions resulting in incarceration are of interest.
132. See, e.g., U.S. DEP'T OF JUST., 1996 ANNUAL REPORT OF THE ATTORNEY GENERAL OF THE UNITED STATES 50 (1996) (“Environmental crime is one of the national priorities identified within the FBI’s White Collar Crime Program.”); Dick Thornburgh, *Criminal Enforcement of Environmental Law—A National Priority*, 59 GEO. WASH. L. REV. 775, 775 (1991) (lamenting that “[t]he cost of violating environmental laws seemed to be a small enough price to pay compared to the cost of compliance”).
133. See Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, 59 Fed. Reg. 7629 (Feb. 16, 1994).
134. Thornburgh, *supra* note 132, at 776–77 (“That criminal enforcement of environmental laws has become and will remain a national priority is demonstrated by the amendments that Congress has made to environmental laws to give them effective criminal sanctions. . . . Twenty years ago, none of the major environmental laws in effect contained significant criminal enforcement provisions. Today, [they] all do.”); see also *id.* at 776 n.3 (detailing the history and statutory codification of criminal sanctions in key environmental statutes).
135. *Id.* at 778.
136. See, e.g., *Criminal Enforcement FY 2022 Annual Results*, EPA (Dec. 18, 2023), <https://perma.cc/TUV8-QBK7>; *Environmental Crime*, FBI, <https://perma.cc/2UMK-4G5B>.
137. See Council Directive 2024/1203, *supra* note 17, at 1 (“The existing rules on penalties . . . have not been sufficient to achieve compliance. . . . Such compliance should be strengthened by the availability of effective, proportionate and dissuasive criminal penalties that correspond to the gravity of the offences and can convey more social disapproval than the use of administrative penalties.”).

Notwithstanding these well-intentioned initiatives, unabashedly carceral objectives should be rejected by environmental justice activists. First, the notion that prison operates to significantly deter would-be environmental criminals is historically unfounded. Because environmental crimes are difficult to detect, and even more challenging to prosecute, their deterrent effect is considerably limited by enforcement shortcomings.¹³⁸ The prosecution of bona fide environmental crimes is thereby an unsurprisingly scarce occurrence;¹³⁹ far more common, as explored below, is the detention and incarceration of displaced climate migrants and climate activists.¹⁴⁰ Even if environmental criminal enforcement was effective, however, environmental justice activists still ought to reject it, as the political and racial animus that spurred the adoption of carceral logic is fundamentally at odds with the aspirations of environmental justice. Environmental justice as a movement places emphasis on obtaining relief for marginalized communities, both from direct environmental harms and from systems of oppression that contribute to such harms indirectly. Consider the breadth of the principles derived by the First National People of Color Environmental Leadership Summit: in addition to more predictable declarations such as the right of “victims of environmental injustice to receive full compensation,” the list opposes “military occupation, repression and exploitation of lands, peoples and cultures.”¹⁴¹ As such, environmental justice readily embraces matters that do not strictly implicate the natural environment; its inclusive framework, broadly construed, interrogates and opposes other manifestations of marginalization.

Carceral logic is one such manifestation. As revealed by its history and subsequent incorporation into the status quo, mass incarceration is rooted in the very forces of animus and inequity that the pioneers of environmental justice were concerned with.¹⁴² Like environmental injustice, carceral logic systemically operates to the disadvantage of communities of color and those of lower socioeconomic standing, resulting in harms that are measurably inequitable.¹⁴³ And as with environmental injustice, these harms are not coincidental, but constructed; they are the byproduct of more than a century of policies designed

138. See, e.g., Ozymy & Jarrell, *supra* note 131, at 86 (“Our summary judgement is that given detection and punishment probabilities are fairly low over time, the ability of the federal criminal enforcement regime to deter RCRA crimes appears limited.”).

139. Consider that when prosecuting environmental crimes was a “national priority,” the Department of Justice accomplished only five hundred convictions in the span of nine years. Thornburgh, *supra* note 132, at 778.

140. See *infra* notes 161–184 and accompanying text.

141. PRINCIPLES OF ENVIRONMENTAL JUSTICE, *supra* note 74, at ix, xv; see also *id.* at xiii (“Environmental Justice affirms the right of all workers to a safe and healthy work environment . . .”).

142. See *supra* notes 114–123 and accompanying text.

143. See *supra* notes 108–113 and accompanying text.

to impose disproportionate burdens upon particular peoples, which have survived through generations of policymakers to continue operating against marginalized communities.¹⁴⁴ It is a natural extension of the environmental justice movement's principles, then, to reject carceral logic even as applied to environmental crimes, as to oppose measurable, inequitably imposed harm in one context but not in another would be ideologically untenable. Beyond the realm of principle, any advantages of swallowing carceral logic as a uniform solution—including for environmental problems—are not worth enduring the acrid tang of the resultant consequences, as doing so risks deepening a host of negative policy implications for other actors within the environmental justice ambit. I turn to this point now.

III. CARCERAL LOGIC AS POLICY

The incompatibility of environmental justice and carceral logic extends beyond the ideological. That is, the two are not only oppositional in theory—carceral logic's policy operations frustrate the aims of environmental justice actors and worsen conditions for environmental justice communities. At every turn, those seeking to reform an unjust status quo are, through the ubiquity of carceral logic, met with harassment, surveillance, and incarceration. By now, this should not come as a surprise. Continuing the pattern observed with America's homelessness epidemic, environmental decay presents a nuanced, considerable source of distress for nations around the world. And once again, lacking a clear solution, many nations—including the United States—have turned to the solutions they know and trust: police, prosecution, and prison. Environmental justice actors, then, have joined the multitudes already subjected to the ire of carceral logic.

Climate change and environmental degradation place severe strain on governments all around the world. These stresses have many faces: the increased prevalence and severity of natural disasters,¹⁴⁵ water scarcity,¹⁴⁶ food insecurity

144. See *supra* notes 87–93, 124–136 and accompanying text.

145. See Valdez, *supra* note 7; *New Orleans: Prisoners Abandoned to Floodwaters*, *supra* note 7; Brown, *supra* note 7.

146. See Simon N. Gosling & Nigel W. Arnell, *A Global Assessment of the Impact of Climate Change on Water Scarcity*, 134 CLIMATIC CHANGE 371, 371, 374 (2016) (recognizing that “[e]xisting pressures on water resources will be exacerbated by increases in population and also by climate change,” *id.* at 371, and projecting that “2.4 billion (39%) people are estimated to be living in watersheds exposed to water scarcity” as of 2000, *id.* at 374); Erica DeNicola et al., *Climate Change and Water Scarcity: The Case of Saudi Arabia*, 81 ANNALS GLOB. HEALTH 342, 342 (2015) (“The availability and quality of water will be severely affected, and public health threats from the lack of this valuable resource will be great unless water-scarce nations are able to adapt.”).

and crop loss,¹⁴⁷ coastal erosion and land scarcity,¹⁴⁸ biodiversity loss, and ecological collapse.¹⁴⁹ The costs of these stressors for state coffers and available manpower are difficult to estimate, but all attempts have produced astronomical sums. Since 1980, the United States alone has experienced 376 weather and climate disasters with overall damage costs exceeding \$1 billion, culminating in total damages of over \$2.6 trillion.¹⁵⁰ Of that figure, nearly half—\$1.2 trillion—is estimated to have occurred in just the last ten years, meaning that the last ten years cost roughly the same amount as the thirty-four years that preceded them.¹⁵¹ The numbers only become more startling at the global level. Researchers disagree on precise amounts, but by one estimate the world loses over \$140 billion dollars every year because of extreme weather events spurred by climate change—or \$16 million an hour.¹⁵² Factoring in impacts to loss of

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147. See Tomoko Hasegawa et al., *Risk of Increased Food Insecurity Under Stringent Global Climate Change Mitigation Policy*, 8 NATURE CLIMATE CHANGE 699, 699 (2020) (“Food insecurity can be directly exacerbated by climate change due to crop-production-related impacts of warmer and drier conditions that are expected in important agricultural regions.”); Shouro Dasgupta & Elizabeth J.Z. Robinson, *Attributing Changes in Food Insecurity to a Changing Climate*, 12 SCI. REPS. 4709, 4709 (2022) (“Thus, the results show that the temperature anomaly has not only increased the probability of food insecurity, but the magnitude of this impact has increased over time. Our counterfactual analysis suggests that climate change has been responsible for reversing some of the improvements in food security that would otherwise have been realised [sic], with the highest impact in Africa.”).
148. See Gerd Masselink & Paul Russell, *Impacts of Climate Change on Coastal Erosion*, MARINE CLIMATE CHANGE IMPACTS SCI. REV., Spring 2013, at 71 (“A large proportion of the coastline of the UK and Ireland is currently suffering from erosion (17% in the UK; 20% in Ireland) and of the 3,700 km coastline of England and Wales 28% is experiencing erosion greater than 10 cm per year.”); Eric F. Lambin & Patrick Meyfroidt, *Global Land Use Change, Economic Globalization, and the Looming Land Scarcity*, 108 PROC. NAT’L. ACAD. SCI. 3465, 3465 (2011) (“Land changes are cumulatively a major driver of global environmental change. . . . Agricultural intensification or land use zoning in a country may trigger compensating changes in trade flows and, thus, affect indirectly land use in other countries.”).
149. See Dave Flynn, *Sustainable Development, Climate Change, and Natural Resource Scarcity*, 4 INT’L J. OF CLIMATE CHANGE 61, 62 (2013) (“[T]he movement of 2,000 animals and plants over the past decade away from the equator, from increasing heat, is three times faster than expected.”); Abigail E. Cahill et al., *How Does Climate Change Cause Extinction?*, 280 ROYAL SOC’Y 1, 1 (2012) (“Anthropogenic climate change is recognized as a major threat to global biodiversity, one that may lead to the extinction of thousands of species over the next 100 years.”).
150. Adam B. Smith, *2023: A Historic Year of U.S. Billion-Dollar Weather and Climate Disasters*, NOAA (Jan. 8, 2023), <https://perma.cc/Q5BR-JPVU> (summarizing findings from the 2023 report of the National Oceanic and Atmospheric Administration).
151. *Id.* (noting that these figures are conservative, as they do not reflect the cost of *all* disasters).
152. Rebecca Newman & Ilan Noy, *The Global Costs of Extreme Weather that are Attributable to Climate Change*, 14 NATURE COMM’NS 1, 2 (2023); Paige Bennett, *Climate Change Is Costing the World \$16 Million Per Hour*, WORLD ECON. FOR. (Oct. 12, 2023), <https://perma.cc/7YTT6-ZB6Y>.

life, that number becomes \$431 billion.¹⁵³ And as climate change worsens, countries around the world will have to pay increasingly severe sums to retain some measure of economic normality, particularly within industries that depend on weather or nature.¹⁵⁴

Resource stresses alone are, in a sense, only the surface-level difficulty for governments. At a deeper level, resource stresses produce more concerning and immediate threats to national order and stability, including international conflict, domestic unrest, and mass migration.¹⁵⁵ Resource stresses are expected to considerably increase the likelihood and magnitude of global violence as “threat multipliers,” exacerbating preexisting vulnerabilities in less-developed nations.¹⁵⁶ The threat of conflict and rising global tension is so real that even while the general public remains ambivalent and listless towards the undisputed sciences of climate change, the national security community has recognized climate change as an operational threat since at least 2008.¹⁵⁷

How should governments respond to these crises? Carceral logic and environmental justice offer contrary answers. From an environmental justice perspective, the answer may be transitional justice¹⁵⁸—to chart an equitable future by addressing the needs of vulnerable communities, move away from extraction,

153. Newman & Noy, *supra* note 152, at 2 (“From the 185 events in the dataset—a net of 60,951 deaths are attributable to climate change. . . . The net statistical value of life cost attributed to climate change . . . is United States (US) \$431.8 billion.”).

154. *See, e.g.*, Christian Rixen et al., *Winter Tourism and Climate Change in the Alps: An Assessment of Resource Consumption, Snow Reliability, and Future Snowmaking Potential*, 31 MOUNTAIN RSCH. & DEV. 229, 229–30 (2011) (observing increasing costs to provide snow cover for various winter industries).

155. *See, e.g.*, WHITE HOUSE, FINDINGS FROM SELECT FEDERAL REPORTS: THE NATIONAL SECURITY IMPLICATIONS OF CLIMATE CHANGE 8 (2015) (“Climate change is an urgent and growing threat to U.S. national security, contributing to increased weather extremes which worsen refugee flows and conflicts over basic resources like food and water.”).

156. ALEX EVANS, CTR. ON INT’L COOP., RESOURCE SCARCITY, CLIMATE CHANGE AND THE RISK OF VIOLENT CONFLICT 4 (2010); *see also* NAT’L RSCH. COUNCIL, CLIMATE AND SOCIAL STRESS: IMPLICATIONS FOR SECURITY ANALYSIS 75–95 (2013); Devin C. Bowles et al., *Climate Change, Conflict, and Health*, 108 J. ROYAL SOC. MED. 390, 390–91 (2015). *See generally* JUDITH M. BRETTHAUER, CLIMATE CHANGE AND RESOURCE CONFLICT: THE ROLE OF SCARCITY (2016) (examining three types of resource-scarce countries that experience conflicts: neopatrimonial states, oil-rich states poorly integrated into the global economy, and least developed states).

157. *See* Jim Garamone, *Hicks Defines Need to Focus DOD on Climate Change Threats*, U.S. DEP’T OF DEF. (Aug. 30, 2023), <https://perma.cc/K95M-H695>; *see also* ENV’T & ENERGY STUDY INST., THE NATIONAL SECURITY IMPACTS OF CLIMATE CHANGE 1 (2017) (“In its 2010 Quadrennial Defense Review, the U.S. Department of Defense (DOD) officially recognized climate change as a factor worthy of consideration in future national security planning.”).

158. *See* RACHEL KILLEAN & LAUREN DEMPSTER, BEYOND TRANSITIONAL JUSTICE: TRANSFORMATIVE JUSTICE AND THE STATE OF THE FIELD (OR NON-FIELD), “GREENING” TRANSITIONAL JUSTICE 54–64 (M. Evans ed., 2022); Jasmina Brankovic, *Transitional and Climate Justice: New Opportunities for Justice in Transition*, 17 TRANSITIONAL JUST. 185, 185 (2023) (“One key aspect of the shift towards the environmental in transitional justice has been

and build collective resilience to climate harms. At the very least, it requires governments to cooperate with marginalized communities to address environmental harms and move away from an extraction-centered economy, which furthers the harm.¹⁵⁹ The common thread is transformation: environmental justice seeks to disturb existing mechanisms of power and economic distribution by changing how we think about profit, sustainability, procedural rights, and the climate. Carceral logic, however, counsels differently, as its tools are blunt and unvaried. In times of resource strain, it counsels that any resulting unrest should be met, again, with force. It seduces desperate governments into preserving and enforcing the status quo through the operation of law and, if necessary, outright violence. In so doing, it sets itself against those who would upset the established order.¹⁶⁰ To reiterate, this divergence is not only theoretical; it has manifested into observably fraught policy prerogatives. The tension between environmental justice actors and the subsuming influence of carceral logic is revealed in three arenas: the suppression of climate protesters, the mass detention of climate migrants, and the policing of post-disaster communities.

A. Climate Protest

In the United States and abroad, climate protest is on the rise.¹⁶¹ In the years preceding and following the now-famed “Fridays for Future” climate strikes, spurred by climate activist Greta Thunberg, millions of people around

engagement with climate change—particularly by applying transitional justice ideas and practices within the sphere of climate negotiations and action.”).

159. See PRINCIPLES OF ENVIRONMENTAL JUSTICE, *supra* note 74, at i (“Environmental justice affirms the sacredness of Mother Earth, ecological unity and the interdependence of all species, and the right to be free from ecological destruction.”); Stephanie A. Malin, *Environmental Justice and Natural Resource Extraction: Intersections of Power, Equity and Access*, 5 ENV’T SOCIO. 109, 109 (2019) (“Whether we call it the resource curse, natural resource dependence, or the resource community lifecycle, . . . patterns of inequity develop around sites of extraction, where boom-bust cycles, persistent poverty, and spatial isolation remain significant sources of structural inequity.”).
160. Indeed, Justice Jackson remarked that constitutional constraints on state policing and incarceration are essential, as “no[thing] is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart” as unfettered police power. *Brinegar v. United States*, 338 U.S. 160, 180 (1948) (Jackson, J., dissenting).
161. See, e.g., Noah Gordon & Benjamin Press, *Climate Protests: Tracking Growing Unrest*, CARNEGIE ENDOWMENT FOR INT’L PEACE (Jan. 12, 2023), <https://perma.cc/A6NF-L4M5> (“In France, more than 100,000 demonstrators took to the streets, demanding that the government . . . do more to combat the climate crisis. In Hungary and Brazil, protesters sought to prevent their right-wing governments from relaxing anti-logging restrictions, while in the Netherlands, demonstrators pushed their center-right government to drop plans to cut greenhouse gas emissions by forcing farms to keep fewer livestock.”).

the world have taken to the streets to protest the use of fossil fuels.¹⁶² Though many demonstrations have called for divestment from fossil fuels generally, others have had more specific agendas. For instance, in early 2023, Georgia sought to construct a new police training facility—a so-called “cop city”—outside of Atlanta. In response, hundreds from the community organized in protest, culminating in an event called “Block Cop City.”¹⁶³ The gathering featured both local and out-of-town climate activists wielding gardening tools, who planned to march to the Cop City construction area in the Weelaunee Forest and plant one hundred saplings there.¹⁶⁴ Another, more notorious protest that gained national attention was the longstanding series of demonstrations against the Dakota Access Pipeline, spanning several years and two presidential administrations.¹⁶⁵ In sum, everyday people are not choosing silence when confronted with the climate crisis. However, carceral logic as realized in the United States has perpetuated regimes of policing and prosecution that empower agents of the status quo to violently suppress community action, placing its operation squarely at odds with the central aims and theories of change advanced by environmental justice.

The police responses to these demonstrations exemplify the hostility of carceral logic. At many protests, police react to collective action with overwhelming suppressive action—sometimes even employing deadly force. For instance, police met Dakota Access protesters with highly pressurized water cannons, hospitalizing dozens and wounding hundreds.¹⁶⁶ Protesters in the Block Cop City demonstration were similarly attacked with tear gas, flash bangs, and rubber bullets, before being arrested en masse.¹⁶⁷ One protester, Tortuguita,¹⁶⁸ was shot fifty-seven times by police, sparking further waves of protest.¹⁶⁹ These acts of violence are not isolated or cherry-picked, but represent “an obscene escalation in the decades long war the United States has been waging on climate

162. See *Global: Climate Protests to Call for an End to the Use of Fossil Fuels*, AMNESTY INT’L (Sept. 14, 2023), <https://perma.cc/K5YG-J6U7>; Somini Sengupta et al., *Climate Protesters March on New York, Calling for End to Fossil Fuels*, N.Y. TIMES (Sept. 18, 2023), <https://perma.cc/RJQ3-C82G>.

163. Timothy Pratt, *Atlanta Police Condemned for Heavy-Handed Action at Cop City Protest*, THE GUARDIAN (Nov. 16, 2023), <https://perma.cc/4D66-2JRV>.

164. See Natasha Lennard, *Cop City Protesters Tried to Plant Trees. Atlanta Police Beat Them for It.*, THE INTERCEPT (Nov. 15, 2023), <https://perma.cc/5DEH-KM8P>.

165. See Rebecca Hersher, *Key Moments in the Dakota Access Pipeline Fight*, NPR (Feb. 22, 2017), <https://perma.cc/3MRG-ZE24>.

166. Julia Carrie Wong, *Dakota Access Pipeline: 300 Protesters Injured After Police Use Water Cannons*, THE GUARDIAN (Nov. 21, 2016), <https://perma.cc/M397-N3GQ>.

167. Lennard, *supra* note 164.

168. Media outlets reported the protester’s name as Manuel Esteban Paez Terán. Terán went by Tortuguita. See, e.g., Natasha Lennard, *Police Shot Atlanta Cop City Protester 57 Times, Autopsy Finds*, THE INTERCEPT (Apr. 20, 2023), <https://perma.cc/NB4E-BPDR>.

169. See *id.*; Steven Donziger, *Environmentalist Manuel Esteban Paez Terán’s Death Is Part of a Disturbing Trend*, THE GUARDIAN (Feb. 2, 2023), <https://perma.cc/3L8D-UCT3>.

activists.”¹⁷⁰ Police violence has also not been confined to the United States. In the international context, the United Nations has warned that “as more people around the world organize to defend their lands and demand a green future, violent repression has also increased,”¹⁷¹ including through police action, “criminal prosecution[,] and other forms of legal harassment.”¹⁷²

Carceral logic supplies the means to forcefully oppress protest in several ways. Police violence is the most visible and, consequently, the focus of much journalism and scholarship. Yet there is another, more insidious barb on the state’s stick: criminal prosecution. In Georgia, protesters were not merely arrested and released. Instead, dozens have been prosecuted under the state’s domestic terrorism law,¹⁷³ as prosecutors advance a novel interpretation of the statute’s broad language—enabling the arrests of not only the protestors, but also employees of the legal aid funds that provided protestors bail support.¹⁷⁴ In 2017, Georgia expanded the definition of domestic terrorism to include “attempts to seriously harm or kill people, or to disable or destroy ‘critical infrastructure,’ with the goal of forcing a policy change,” carrying sentences of up to thirty-five years in prison.¹⁷⁵ Outside observers, including the American Civil Liberties Union, have condemned this expansive definition as suppressive of political speech, intended to obstruct and punish lawful political demonstrations.¹⁷⁶ Once again, however, this incident is not unique. Protestors from the Dakota Access Pipeline have been similarly investigated by the FBI under allegations of domestic terrorism,¹⁷⁷ and some have even been prosecuted and convicted for “sabotage.”¹⁷⁸ An NGO report submitted to the United Nations traced the usage of domestic terrorism statutes to suppress civil action back to the 9/11 era, noting that “expanded government authorities, although primarily focused on Muslim, Arab and South

170. Donziger, *supra* note 169.

171. Clément Nyaletsossi Voule, Rep. of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, ¶ 18, U.N. Doc. A/76/222 (July 23, 2021).

172. *Id.* ¶ 29.

173. GA. CODE ANN. § 16-11-220 (2022), <https://perma.cc/V55P-SEBR>; see also Michelle Baruchman, *Domestic Terrorism Bill Passes Senate, Heads to Governor’s Desk*, AJC POLITICS (Mar. 30, 2017), <https://perma.cc/BAS3-DNR2>.

174. See Timothy Pratt, “Cop City” Protest Lawyers Challenge Use of Domestic Terrorism Statute, THE GUARDIAN (June 3, 2023), <https://perma.cc/95A7-4JA3>.

175. GA. CODE ANN. § 16-11-220 (2022); *id.* § 16-11-221, <https://perma.cc/TW8N-J8SA>; Sean Keenan & Rick Rojas, “Cop City” Prosecutions Hinge on a New Definition of Domestic Terrorism, N.Y. TIMES (Feb. 27, 2024), <https://perma.cc/QVR9-W5KY>.

176. See Sarah Taitz & Shaiba Rather, *How Officials in Georgia are Suppressing Political Protest as “Domestic Terrorism,”* ACLU (Mar. 24, 2023), <https://perma.cc/P97M-AFGR>; see also Letter from Human Rights Watch et al. to Christopher M. Carr, Att’y Gen., State of Georgia et al., (Mar. 3, 2023), <https://perma.cc/JGP6-JY7Q>.

177. Sam Levin, *Revealed: FBI Terrorism Taskforce Investigating Standing Rock Activists*, THE GUARDIAN (Nov. 28, 2017), <https://perma.cc/EJP2-D9SS>.

178. William Morris, *Appeals Court Upholds 8-Year Sentence of Des Moines Activist in Dakota Access Pipeline Sabotage*, DES MOINES REG. (June 6, 2022), <https://perma.cc/8RVQ-LUDP>.

Asian communities post-9/11, have been quickly mobilized against other protest movements such as those for racial or environmental justice.”¹⁷⁹

Legalistic suppression of environmental activism is not cabined to the United States. As discussed, carceral force as a policy tool has found popularity abroad,¹⁸⁰ and has likewise resulted in the suppression of climate protest. Poland, which in 2018 hosted the United Nations’ annual conference on climate change (COP24), met heavy criticism for its handling of the event, which involved mass arresting attendees and refusing visas to key conference-goers.¹⁸¹ In fact, the national legislature even passed a dedicated surveillance law to collect information and data on COP24 participants, chilling speech and threatening the conference with looming police action.¹⁸² Four years later, Egypt—hosting COP27—similarly arrested key conference-goers in the leadup to the event.¹⁸³ And in myriad other countries, climate protest is routinely stifled by policing, often as the behest of the very polluters and industry interests that are the subjects of protest.¹⁸⁴ The lesson is clear: whether domestically or abroad, police, prosecution, and surveillance are used to stifle the acts of those who threaten an extractive, harm-intensifying status quo.

179. MOVEMENT FOR BLACK LIVES ET AL., *HOW THE “WAR ON TERROR” HAS METASTASIZED TO SILENCE U.S. SOCIAL MOVEMENTS AND SHRINK CIVIC SPACE* 6 (2023); *see also* Nyaletsossi Voule, *supra* note 171, ¶ 18 (“The attacks have also led at times to the portrayal of climate justice activists as national security threats, rather than as front-line human and environmental rights defenders.”).

180. *See supra* note 32 and accompanying text.

181. *See Poland: Arrests and Refusal of Entry to Environmentalists During the COP24 Climate Talks*, AMNESTY INT’L (Dec. 11, 2018), <https://perma.cc/TSK5-C7BV>.

182. *See* Kate Aronoff, *Poland’s New Surveillance Law Targets Personal Data of Environmental Advocates, Threatening U.N. Climate Talks*, THE INTERCEPT (July 2, 2018), <https://perma.cc/CBX3-7532>; o szczególnych rozwiązaniach związanych z organizacją w Rzeczypospolitej Polskiej sesji Konferencji Stron Ramowej konwencji Narodów Zjednoczonych w sprawie zmian klimatu [Special Solutions Related to the Organization in the Republic of Poland Polish Session of the Conference of the Parties to the U.N. Framework Convention on Climate Change Act] (2018), <https://perma.cc/VM6E-TDGZ>.

183. Nina Lakhani, *Egyptian Regime Criticized as Climate Activist Arrested in Run-Up to COP27*, THE GUARDIAN (Nov. 2, 2022), <https://perma.cc/AC7Q-VDSZ>.

184. Nyaletsossi Voule, *supra* note 171, ¶ 18 (“[T]hese attacks have been led by powerful actors, including transnational fossil fuel, extractive, agribusiness and financial institutions, which have exerted pressure on States to weaken their response to the climate crisis in particular and to environmental issues in general and have supported parastatal organizations engaging in . . . campaigns against climate justice activists, including online and direct violence.”). This is not to suggest foreign nations lack agency in deploying their police forces against activists; many governments act on independent incentives in suppressing climate activism. *See* Miriam Matejova, *The Politics of Repressing Environmentalists as Agents of Foreign Influence*, 72 AUST. J. INT’L AFFS. 145, 145 (2018) (“Backlash against NGOs as foreign agents has been particularly strong in relation to natural-resource extraction, as governments seek to defend economies of extraction against an increasingly connected network of global environmental opposition.”).

B. Climate Migration

As scholars like Professor Nadia Ahmad have observed, “[w]e are a planet of populations on the move.”¹⁸⁵ By some estimates, anywhere from 88 million to 1.4 billion people may be forcibly displaced by 2100 due to climate change.¹⁸⁶ This number varies considerably from region to region; Latin America, sub-Saharan Africa, and Southeast Asia, for instance, are estimated to produce some 143 million more climate migrants by 2050.¹⁸⁷ In the United States, more than three million American adults were displaced¹⁸⁸ by natural disasters in 2022.¹⁸⁹ Millions more face the prospect of being displaced by rising sea levels that threaten coastal and near-inland cities.¹⁹⁰ People “forcibly moved by ‘sudden onset’ weather events”¹⁹¹ are already among us, then, and are set to become an ever more pressing focus for environmental justice; though migration numbers may be hotly debated, “[t]here is near universal agreement that the United States’ existing immigration laws are ineffective for addressing the migration and displacement problems that will result [from climate change].”¹⁹² These migrants are among the most vulnerable people impacted by climate change, originating from populations least responsible for the crisis.¹⁹³ The demand for just

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185. Nadia Ahmad, *Climate Cages: Connecting Migration, The Carceral State, Extinction, Rebellion, and the Coronavirus Through Cicero and 21 Savage*, 66 LOYOLA L. REV. 293, 294 (2020).
186. A.R. Siders & Idowu “Jola” Ajibade, *Introduction: Managed Retreat and Environmental Justice in a Changing Climate*, 11 J. ENV’T STUD. & SCI. 287, 287 (2021). See generally JANE McADAM, CLIMATE CHANGE, FORCED MIGRATION AND INTERNATIONAL LAW (2012).
187. JOHN PODESTA, BROOKINGS INST., THE CLIMATE CRISIS, REFUGEES, AND MIGRATION 2 (2019).
188. See Hannah Perls, Note, *U.S. Disaster Displacement in the Era of Climate Change*, 44 HARV. ENVTL. L. REV. 511, 512 n.2 (2020) (defining displacement as people being “forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of . . . natural or human made disasters”).
189. See Thomas Frank, *Census: Disasters Displaced More than Three Million Americans in 2022*, E&E NEWS (Feb. 6, 2023), <https://perma.cc/HY72-CVAT>.
190. See Matthew E. Hauer et al., *Millions Projected to be at Risk from Sea Level Rise in the Continental United States*, 6 NATURE CLIMATE CHANGE 691, 691 (2016); CLIMATE CENTRAL, OCEAN AT THE DOOR: NEW HOMES AND THE RISING SEA 2 (2019), <https://perma.cc/Z3AH-HD8T>; see also Bertram L. Melix et al., *Locating Neighborhood Displacement Risks to Climate Gentrification Pressures in Three Coastal Counties in Florida*, 75 PRO. GEOGRAPHER 31, 31 (2022); Celia McMichael et al., *A Review of Estimating Population Exposure to Sea-Level Rise and the Relevance for Migration*, 15 ENV’T RSCH. LETTERS 123005, 123007 (2020).
191. Ahmad, *supra* note 185, at 300.
192. Wyatt G. Sassman & Danielle C. Jefferies, *Beyond Emissions: Migration, Prisons, and the Green New Deal*, 51 ENV’T L. 161, 184 (2021).
193. See, e.g., Maxine Burkett, *Behind the Veil: Climate Migration, Regime Shift, and a New Theory of Justice*, 53 HARV. C.R.-C.L. L. REV. 445, 445 (2018) (“[T]he least responsible for climate upheaval will be subject to the most disruption—whether it is as a migrant or a host of those who have moved. In the United States, indigenous communities are at the frontlines of planned relocation with no comprehensive framework for response or a determination of individual and community rights in the process.”).

treatment of migrants is natural, then, from an environmental justice perspective, as climate migrants constitute a community uniquely in need.

Here, too, carceral logic interferes with the aspirations of environmental justice. Whereas the care for and wellbeing of climate migrants is the focus of environmental justice principles,¹⁹⁴ the response from the wider world “has been to detain, imprison, and deport” climate migrants.¹⁹⁵ That is, “from the halls of Congress to the desk of the Oval Office [the answer] has not been to find solutions to the climate crisis, but to restrict mobility and incarcerate Black and Brown people to maximize available land and space for those who are either more affluent and/or of the more preferred race, religion, and national origin.”¹⁹⁶ For example, in 2021, a 7.2 magnitude earthquake shook Haiti, “leaving at least 2,200 dead, 12,200 injured, and more than 650,000 in need of assistance.”¹⁹⁷ When thousands fled to seek refuge in the United States “[d]riven by hunger, economic depravity, and sheer desperation,” they were met by authorities with detention and deportation “[w]ithout so much as an immigration or asylum application.”¹⁹⁸ This system operated as designed, for as dictated by carceral logic, “U.S. immigration and carceral machines respond to the climate crisis with deportations, detentions, and increased incarceration.”¹⁹⁹ As with drugs and homelessness, it ignores other migration solutions²⁰⁰ to prioritize caging communities displaced by climate change. Once more, carceral logic adopts incarceration as a default posture, responding to migration troubles by detaining “the largest non-citizen population in the world.”²⁰¹ And akin to the homelessness epidemic, it does more than merely impede the just treatment of climate

194. See PRINCIPLES OF ENVIRONMENTAL JUSTICE, *supra* note 74, at xiii (affirming the “fundamental right to political, economic, cultural and environmental self-determination of all peoples”); see also, e.g., Aaron Saad, *Toward a Justice Framework for Understanding and Responding to Climate Migration and Displacement*, 10 ENV’T JUST. 98, 99 (2017) (“A framing centered on climate migrants or refugees as wronged parties requires an understanding of the nature of climate injustices for which they are owed redress.”).

195. Ahmad, *supra* note 185, at 314.

196. *Id.* at 294.

197. Nadia B. Ahmad, *The Cliodynamics of Mass Incarceration, Climate Change, and “Chains on Our Feet,”* 49 FORDHAM URB. L.J. 371, 373 (2022).

198. *Id.* at 374; see also *id.* at 375 (“Of the numbers showing up at the border, an almost equal number were turned back to their country of origin. The migrants were sent back with no process and no entry—just chains around their feet, stomach, and their hands.”).

199. *Id.* at 376.

200. See, e.g., U.S. GOV. ACCOUNTABILITY OFF., A CLIMATE MIGRATION PILOT PROGRAM COULD ENHANCE THE NATION’S RESILIENCE AND REDUCE FEDERAL FISCAL EXPOSURE, GAO 24-488 (2020) (suggesting government action to preemptively move communities at risk of displacement to produce a managed retreat, rather than an ad hoc one).

201. DAVID N. PELLOW ET AL., GLOB. ENV’T JUST. PROJECT, ENVIRONMENTAL JUSTICE BEHIND BARS: TOXIC IMPRISONMENT IN AMERICA 25 (2018) (placing the number of detainees in 2018 at over forty thousand).

migrants—it actively intensifies the harms they experience through the conditions of detention.²⁰²

Noncarceral international responses to climate migration are still in their infancy. The first mention of climate displacement in an international agreement came from the 2010 COP16 in Cancun, which adopted a framework “[i]nvit[ing] all Parties to enhance action on adaptation” by, among other things, taking “[m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation.”²⁰³ The United Nations Framework Convention on Climate Change, following the adoption of the Paris Agreement in 2015,²⁰⁴ took the further step of creating a task force to “develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change.”²⁰⁵ Most recently, 167 nations adopted the Global Compact for Safe, Orderly and Regular Migration, which included several provisions explicitly recognizing the problem of climate displacement.²⁰⁶ However, the Global Compact is non-binding,²⁰⁷ instead facilitating further study and defining only surface-level migration objectives.²⁰⁸ In the main, then, international law still imposes no binding obligation on nation states to accept migrants specifically fleeing from adverse climate conditions.²⁰⁹ Instead, existing international

202. See, e.g., *id.* at 28–35 (collecting reports of violence, abuse, and maltreatment in detention facilities); Ahmad, *supra* note 185, at 314 (“In one moment, climate change is forcing populations into climate cages in the form of prisons and detention centers. In the next moment, these populations face harsh conditions in prison due to inadequate heating and cooling systems in prisons.”); Alleen Brown, *Migrants Fleeing Hurricanes and Drought Face New Climate Disasters in Ice Detention*, INTERCEPT (Mar. 31, 2022), <https://perma.cc/FBC5-H93P>.

203. U.N. Framework Convention on Climate Change, *The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action Under the Convention*, U.N. Doc. FCCC/CP/2010/7/Add.1, ¶ 149(f) (Mar. 15, 2011).

204. Notably, the Paris Agreement itself has no provisions relating to climate migration, and only briefly mentions migrants in the preamble. See generally Paris Agreement to the U.N. Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104.

205. U.N. Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Twenty-First Session*, ¶ 49, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016).

206. G.A. Res. 73/195, ¶¶ 18(h-1), 21(h) (Jan. 11, 2019) [hereinafter Global Compact] (adopting the Global Compact for Safe, Orderly and Regular Migration); see also G.A. Res. 73/151, Global Compact on Refugees, ¶ 8 (Dec. 17, 2018).

207. See Global Compact for Migration, INT’L. ORG. FOR MIGRATION, <https://perma.cc/VT4D-F5PU> (“It is a non-binding document that respects states’ sovereign right to determine who enters and stays in their territory and demonstrates commitment to international cooperation on migration.”); PODESTA, *supra* note 187, at 3 (“However, these agreements are neither legally binding nor sufficiently developed to support climate migrants.”).

208. See, e.g., Global Compact, *supra* note 205, at 6–7 (listing agreed-upon objectives).

209. See PODESTA, *supra* note 187, at 4 (“The current system of international law is not equipped to protect climate migrants, as there are no legally binding agreements obliging countries to support climate migrants.”); Caitlan M. Sussman, *A Global Migration Framework Under Water: How Can the International Community Protect Climate Refugees?*, 2 CHI. J. INT’L L. ONLINE 41, 48–49 (2023) (“The 1951 Convention relating to the Status of Refugees . . . and

treaties acknowledge and protect migrants' refugee status only in narrow and inapposite situations, such as for migrants fleeing genuine political persecution.²¹⁰ Though some scholars suggest climate refugees can be integrated into existing legal paradigms,²¹¹ until international law is modernized to reflect the impending reality of mass climate displacement, climate migrants will likely continue to be met with the harsh and inflexible tools of traditional border management: walls, cages, and courtrooms.

C. Post-Disaster Communities

Natural disasters are, in a sense, equalizers. Before the inferno of a raging wildfire or the howling winds of a tropical typhoon, identity, status, and social positionality lose all meaning, and the need for survival becomes universal.²¹² Authors like Rebecca Solnit have recognized the ways in which disasters can bring people together, both during and after their occurrence. In *A Paradise Built in Hell*, Solnit writes that “[i]n the wake of an earthquake, a bombing, or a major storm, most people are altruistic, urgently engaged in caring for themselves and those around them, strangers and neighbors as well as friends and loved ones. The image of the selfish, panicky, or regressively savage human being in times

its 1967 Protocol Relating to the Status of Refugees . . . are the only binding global treaties that address the rights and legal status of refugees. They do not, however, cover climate refugees.” (citations omitted)).

210. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14 (Dec. 10, 1948) (“Everyone has the right to seek and to enjoy in other countries asylum from persecution.”); U.N. Convention Relating to the Status of Refugees, art. IV.D, July 28, 1951, 189 U.N.T.S. 150; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223; 606 U.N.T.S. 267.
211. See, e.g., E. Tendayi Achiume, *Migration as Decolonization*, 71 STAN. L. REV. 1509, 1531–32 (2019) (summarizing sources); Heather Alexander & Jonathan Simon, “Unable to Return” in the 1951 Refugee Convention: Stateless Refugees and Climate Change, 26 FLA. J. INT’L L. 531, 533–34 (2014); Bonnie Docherty & Tyler Giannini, *Confronting a Rising Tide: A Proposal for a Convention on Climate Change Refugees*, 33 HARV. ENVTL. L. REV. 349, 374 (2009); Jessica B. Cooper, Note, *Environmental Refugees: Meeting the Requirements of the Refugee Definition*, 6 N.Y.U. ENV’T L.J. 480, 486 (1998).
212. One analogue that demonstrates this phenomenon can be found in California’s conservation camps, commonly dubbed “fire camps,” which pit incarcerated firefighters against the Golden State’s seasonal wildfires. As some scholars have noted, this incentivizes the firefighters to set aside the differences that separate them in prison. See, e.g., Philip Goodman, *Race in California’s Prison Fire Camps for Men: Prison Politics, Space, and the Racialization of Everyday Life*, 120 AM. J. SOCIO. 352, 352, 355 (2014) (“[P]risoners . . . will fight natural disasters side by side . . . but separate into racial groups when in the camp itself.” *Id.* at 352.). This unity also extends to incarcerated firefighters and their civilian peers. See Joshua Daniel Bligh, *Confessions of an Inmate Firefighter*, INT’L ASS’N WILDLAND FIRE (Feb. 2016), <https://perma.cc/YNG6-54HR> (“We lived at fire camp with the civilian and government crews. . . . In a sense, we were the same.”).

of disaster has little truth to it.”²¹³ She cites several historical narratives for this observation, such as the San Francisco earthquake,²¹⁴ the earthquake of Mexico City,²¹⁵ and New Orleans in the wake of Hurricane Katrina.²¹⁶ From an environmental justice perspective, Solnit’s idyllic retelling captures the very essence of the movement’s core aspirations. Environmental justice does not merely perceive environmental harm to be an existential threat, but a communal one—which should be shouldered by all,²¹⁷ with recognition of the distinct vulnerabilities and needs of discreet communities.²¹⁸

Carceral logic confounds this framing. Following disaster, law enforcement expects a baser reaction from civilians,²¹⁹ constructing the very visage of the “regressively savage human being” that Solnit decries.²²⁰ Consider the police response in the wake of Hurricane Katrina. As Solnit herself recognizes, when Hurricane Katrina struck New Orleans “[h]undreds of people died . . . because

213. REBECCA SOLNIT, *A PARADISE BUILT IN HELL: THE EXTRAORDINARY COMMUNITIES THAT ARISE IN DISASTER 2* (2010); see also Erik Auf der Heide, *Common Misconceptions About Disasters: Panic, the “Disaster Syndrome,” and Looting*, in *THE FIRST 72 HOURS: A COMMUNITY APPROACH TO DISASTER PREPAREDNESS* 340, 343–47, 362–63 (Margaret R. O’Leary ed., 2004) (measuring the rarity of public panic, and providing examples).

214. Solnit, *supra* note 213, at 13–69.

215. *Id.* at 135–80.

216. *Id.* at 1 (“Thousands of people survived Hurricane Katrina because grandsons or aunts or neighbors or complete strangers reached out to those in need all through the Gulf Coast and because an armada of boat owners from the surrounding communities and as far away as Texas went into New Orleans to pull stranded people to safety.”).

217. See, e.g., *PRINCIPLES OF ENVIRONMENTAL JUSTICE*, *supra* note 74, at xiii.

218. The reality is that disasters are not felt equally; some communities both experience more damage and receive less aid to recover. See *Advancing Environmental Justice Through Improved Responses to Extreme Weather Events*, NAT’L INST. FOOD & AG. (Sept. 27, 2023), <https://perma.cc/AFE2-8GFQ> (“Climate change is contributing to an increase in the frequency and severity of extreme weather events such as hurricanes, wildfires, heatwaves and flooding, which can have devastating consequences for communities, ecosystems and economies.”); Christopher Flavelle, *Why Does Disaster Aid Often Favor White People?*, N.Y. TIMES (Oct. 27, 2021), <https://perma.cc/ST2D-JL52>; Christopher Flavelle, *FEMA Says It’s Still Working to Fix Racial Disparities in Disaster Aid*, N.Y. TIMES (Oct. 27, 2021), <https://perma.cc/3AQS-G49F>.

219. See, e.g., Heide, *supra* note 213, at 341 (“The popular image of disaster has often centered on the theme of personal chaos. . . . Disaster research studies demonstrate that this image is believed by the public, by members of emergency and public safety organizations (for example, by police and fire departments. . . and the military), by governmental officials, and by the news media.”). See generally HENRY W. FISCHER III, *FACT VERSUS FICTION AND ITS PERPETUATION* (3d ed. 2008); DENNIS E. WENGER ET AL., *DISASTER BELIEFS AND EMERGENCY PLANNING* (1985).

220. SOLNIT, *supra* note 213, at 2. Often, these moralistic judgments about the “savage” individual are highly racialized, as are terms like “brute” and “thug.” See, e.g., Calvin John Smith & David Fakunle, *From “Brute” to “Thug:” The Demonization and Criminalization of Unarmed Black Male Victims in America*, 26 J. HUM. BEHAV. SOC. ENV’T 350, 350 (2016) (“Misconceptions and prejudices manufactured and disseminated through various channels such as the media included references to a ‘brute’ image of Black males.”).

others, including police, vigilantes, high government officials, and the media, decided that the people of New Orleans were too dangerous to allow them to evacuate the septic, drowned city . . . Rumors proliferated about mass rapes, mass murders, and mayhem that turned out later to be untrue, though the national media and New Orleans's police chief believed and perpetuated those rumors.²²¹ As social scientists have come to understand, the police response in the days after Hurricane Katrina is an instructive instantiation of carceral logic. After all, although the city was slow in its evacuation,²²² it was quick to incarcerate; “the first institution to be ‘in business’ after the city’s destruction” was the jail.²²³ And following historical trends, the media’s portrayal of the looting necessitating police response was highly racialized against Black communities.²²⁴

Hurricane Katrina is not an isolated example.²²⁵ Carceral logic thrives on—and indeed, requires—quasi-moralistic judgment against the people and communities it operates against to legally and publicly justify punishment.²²⁶ Often, these critical judgments can be predicated on unspoken assumptions and phantasmic standards,²²⁷ providing ample room for bias, animus, and socialized

221. SOLNIT, *supra* note 213, at 1.

222. See U.S. INST. OF MED., *Hurricane Katrina: Challenges for the Community*, in ENVIRONMENTAL PUBLIC HEALTH IMPACTS OF DISASTERS: HURRICANE KATRINA 14, 16 (2007) (“In the initial days following the storm flooding of Hurricane Katrina, the state evacuated approximately 12,000 caregivers and their patients from 25 hospitals. This was a slow process. In some cases patients were evacuated, one or two at a time, by boat to a helipad where they were transferred to a helicopter that brought them to the airport, from which they were flown to other states.”).

223. Sarah Kaufman, *The Criminalization of New Orleanians in Katrina’s Wake*, SOC. SCI. RSCH. COUNCIL (June 11, 2006), <https://perma.cc/3ZY6-R8YS> (citing an article in the *Times Picayune* reporting that “[s]tate officials have set up a temporary booking and detention center in New Orleans to deal with those accused of killing, raping, looting and otherwise terrorizing the tens of thousands of people who were trapped in the aftermath of Hurricane Katrina” (citation omitted)); see also Ko Bragg, *The Lie of the Storm: Katrina, Ida, and Resisting the “Looting” Myth*, COLUM. JOURNALISM REV. (Nov. 10, 2021), <https://perma.cc/S6HB-DVBS>.

224. See MICHAEL G. LACY & KATHLEEN C. HASPEL, CRITICAL RHETORICS OF RACE 21–47 (2011) (describing “the media’s framing of Black looters, shooters, and brutes in Hurricane Katrina’s aftermath”); Kirk A. Johnson, Mark K. Dolan & John Sonnett, *Speaking of Looting: An Analysis of Racial Propaganda in National Television Coverage of Hurricane Katrina*, 22 HOWARD J. COMM’NS 302, 302–04 (2011).

225. See also SOLNIT, *supra* note 213, at 34–48 (describing the American military’s response in the wake of the San Francisco earthquake, and the general’s orders to “shoot to kill” any civilians thought to be constituting a “mob”).

226. A famous example of this phenomenon is “broken windows theory,” which theorizes that the best way to bring about order in a community is to ardently police lower-level offenses in more “dangerous” neighborhoods. See George L. Kelling & James Q. Wilson, *Broken Windows*, THE ATLANTIC (Mar. 1982), <https://perma.cc/2KGV-KJTC>; Charles C. Lanfear et al., *Broken Windows, Informal Social Control, and Crime: Assessing Causality in Empirical Studies*, 3 ANN. REV. OF CRIMINOLOGY 97, 97 (2020).

227. For instance, the critical legal concept of a “high crime area,” which justifies many acts of street policing, is a largely ethereal concept, which pops up wherever and whenever the

“experience” to creep in.²²⁸ Natural disasters provide a critical theater for such judgments to be made. When governmental triage is needed and marginalized communities are most in need of aid, carceral logic counsels they be met with force and cages to quell their “violent tendencies,” just as it does with desperate climate migrants or rightly agitated climate protesters.²²⁹ And as the great majority of cases indicate, this prescription, predicated on the erroneous assumption that looters will run the streets of post-disaster communities,²³⁰ is not only contrary to the aims of environmental justice, but is often counterproductive to successful disaster relief.²³¹

IV. CARCERAL LOGIC AS DISINVESTMENT

Finally, even when carceral logic does not specifically target environmental justice actors, its “neutral” everyday operation produces and reinforces conditions that undercut environmental justice objectives.²³² Carceral logic is more than a policy framework—it influences the wealth and organizational capacities of the communities caught within its maw. Through its agents and institutions, such as prisons and police, it deploys force against the civilian polity. In so doing, carceral logic acts as a kind of forceful disinvestment: it constructs vulnerable

police need it to. *See generally* Ben Grunwald & Jeffrey Fagan, *The End of Intuition-Based High-Crime Areas*, 107 CAL. L. REV. 345 (2019); James M. Doyle, *Stop and Fix? How the “High-Crime Area” Defense Has Licensed Bad Policing*, CRIME REP. (June 24, 2019), <https://perma.cc/C8H9-CCSG>; Stephen Lurie, *There’s No Such Thing as a Dangerous Neighborhood*, BLOOMBERG (Feb. 25, 2019), <https://perma.cc/ZBA4-ZS56>.

228. Recall, for instance, the practices of stop and frisk and the ATF’s stash-house stings, which required subjective target selection by law enforcement. *See* sources cited *supra* notes 119–31 and accompanying text.

229. *See supra* Part III.A; Part III.B.

230. *See* Heide, *supra* note 213, at 362–64 (collecting no fewer than ten contrary examples).

231. *See id.* at 364 (“In disasters, a greater problem for police than looting is the need for traffic control, so that emergency units can get to the scene and patients can get to hospitals. . . . While a police presence will help to assure residents and business owners worried about looters, units should not be unnecessarily diverted from traffic or other emergency duties to deal with the presumption that massive looting will occur.”).

232. There are several ways in which this is true. Although this Note prioritizes framing impacts to incarcerated populations and overly incarcerated communities, passive prison operations also spur environmental degradation in more traditional ways, such as by contributing to global greenhouse emissions and hastening overconsumption of resources. *See* Julius A. McGee, Patrick T. Greiner & Carl Appleton, *Locked into Emissions: How Mass Incarceration Contributes to Climate Change*, 8 S. SOCIO. SOC’Y 1, 2 (Nov 25, 2020) (“We argue that as the percentage of people incarcerated increases over time, the demand to construct and maintain prisons will increase the amount of fossil fuels used in industrial development. Furthermore, . . . the increasing percentage of incarcerated people will result in more emissions from industrial processes as economic activity grows, because incarceration facilitates industrial expansion through coerced consumption of industrial goods and increased industrial activity within prisons.”).

communities within the prison and emaciates communities outside the prison, both economically and politically.

A. Incarceration and the Production of the Toxic Prison

What makes an environmental justice community? Though definitions differ, one working description offered by the EPA suggests that an environmentally overburdened community is one that “potentially experience[s] disproportionate environmental harms and risks,” in the form of “greater vulnerability to environmental hazards, lack of opportunity for public participation, . . . [and] an accumulation of negative or lack of positive environmental, health, economic, or social conditions.”²³³ Under any or all of these standards, incarcerated people fit the definition of an overburdened community, revealing that carceral logic does not only stifle positive environmental change, but actively constructs the conditions for environmental harm.

Incarcerated people bear all relevant indicia of being vulnerable to climate harm. As already discussed, prisons are often rife with toxins, contamination, and crumbling infrastructure, leaving those inside vulnerable to disease, disaster, and the elements.²³⁴ Like those traditionally recognized as environmental justice communities, incarcerated populations are also frequently located in close proximity to sources of industrial waste and pollution.²³⁵ One investigation found that among “11 jails in the three biggest county jail systems in America—Los Angeles, New York City, and Chicago . . . [8] are in the 90th percentile or higher for pollution-related cancer risk, respiratory hazards, and diesel pollution exposure.”²³⁶ These conditions are not merely an unfortunate byproduct of under-resourced institutions, but a manufactured element of mass incarceration. American hyper-incarceration has filled prisons faster than new prisons can be built and existing prisons expanded, rendering the conditions

233. *Environmental Justice EJ 2020 Glossary*, EPA, <https://perma.cc/XPD3-M2RN>.

234. See *supra* notes 1–12 and accompanying text; Elizabeth A. Bradshaw, *Tombstone Towns and Toxic Prisons: Prison Ecology and the Necessity of an Anti-prison Environmental Movement*, 26 *CRITICAL CRIMINOLOGY* 407, 407 (2018) (“[T]here is growing evidence to suggest a systemic pattern of prisoners being exposed to environmental injustices resulting from their proximity to federal Superfund and other contaminated sites.”); Cynthia Golembeski et al., *Climate Change and Incarceration*, THINK GLOB. HEALTH (Apr. 29, 2022), <https://perma.cc/L586-AU2H>.

235. See, e.g., Adam Mahoney, *America’s Biggest Jails Are Frontline Environmental Justice Communities*, GRIST (Apr. 15, 2021), <https://perma.cc/9RNQ-ZDZE> (“[T]hose detained inside Men’s Central Jail are situated closer to toxic wastewater and hazardous waste than 96 percent of the country. Their lifetime cancer risk from the inhalation of air toxics is in the 100th percentile, meaning there is virtually no place in the country where it’s higher.”).

236. *Id.* The same study found that “[n]ine of the facilities are located closer to toxic wastewater than at least 97 percent of the country, and all 11 are in the 90th percentile or higher for proximity to hazardous waste.” *Id.*

within unlivable—sometimes unconstitutionally so.²³⁷ This is not for lack of funding; spurred in part by prison-conditions litigation throughout the 1970s and 1980s, states and the federal government have spent billions on their prison systems, and Florida alone “spent one in every 11 budget dollars on corrections” in 2007.²³⁸

Poor conditions are not the only aspect of the problem, however. In addition to being subject to intolerably harmful surroundings, incarcerated people themselves are on average exceedingly vulnerable to prison conditions.²³⁹ Namely, the current prison population “is graying, with one in ten prisoners now 55 or older”; moreover, “[o]besity, hypertension, and asthma are commonplace[, and] [l]arge numbers of inmates take medications that compromise the body’s ability to handle heat.”²⁴⁰ Prison medical facilities are notoriously too ill-equipped (and often,

237. In California, the state’s prison populations were so severely inflated that several courts, including the Supreme Court, ordered reductions and early releases on Eighth Amendment grounds. *See, e.g.*, *Brown v. Plata*, 563 U.S. 493, 545 (2011); *Coleman v. Schwarzenegger*, 922 F. Supp. 2d 882, 1003 (E.D. Cal. 2009) (“[D]efendants shall provide the court with a population reduction plan that will in no more than two years reduce the population of the CDCR’s adult institutions”); Order Granting in Part Plaintiffs’ Motion for Further Enforcement Order at 1–2, *Coleman v. Brown*, No. 90-cv-00520 (E.D. Cal. Apr. 19, 2017).

238. Heather Schoenfeld, *Mass Incarceration and the Paradox of Prison Conditions Litigation*, 44 *LAW & SOC’Y REV.* 731, 756 (2010). When President Nixon expanded the size and scope of the criminal justice system, he also deepened its pockets. “In 1970, Congress passed four anticrime bills that revised Federal drug laws and penalties, addressed evidence gathering against organized crime, authorized preventive detention and ‘no-knock’ warrants, and provided \$3.5 billion to state and local law enforcement.” Pamela K. Lattimore, *Reflections on Criminal Justice Reform: Challenges and Opportunities*, 47 *AM. J. CRIM. JUST.* 1071, 1078 (2022). This trend continued for the next thirty years, with the most notable increase in funding stemming from the Crime Act of 1994, which provided “\$9.7 billion in funding for prisons.” *Id.* Beyond that, “expenditures increased roughly 50% in real dollars between 1997 and 2017—from \$188 billion to more than \$300 billion dollars.” *Id.* at 1079 (citing EMILY D. BUEHLER, *BUR. JUST. STATS., U.S. DEP’T OF JUST., JUSTICE EXPENDITURES AND EMPLOYMENT IN THE UNITED STATES, 2017* (2021)). It is well understood that prisons are terribly costly; after all, “[o]nce constructed, prisons most closely resemble large hospitals, in that they operate round the clock, are densely occupied and consume more energy on an annual basis than typical commercial or residential buildings.” Jewkes & Moran, *supra* note 16, at 460.

239. *See* AISHAH ABDALA ET AL., *UCLA LUSKIN SCH. OF PUB. AFFS. & ELLA BAKER CTR. FOR HUM. RTS., HIDDEN HAZARDS: THE IMPACTS OF CLIMATE CHANGE ON INCARCERATED PEOPLE IN CALIFORNIA STATE PRISONS* 7 (2023) (“CDCR prisons are highly susceptible to climate hazards because they are located in or near remote areas, have an aging infrastructure and population, and are overcrowded. As of January 2023, CDCR operated 34 prison facilities at 108.5% of its design capacity.”); *see also id.* (“Incarcerated people are distinctly vulnerable to climate hazards because they are entirely reliant upon CDCR for preparedness, response, and recovery.”).

240. HOLT, *supra* note 11, at ii; *see also* Golembeski et al., *supra* note 234 (“Given the high rates of comorbid conditions and accelerated aging within prison populations, addressing how health conditions and medications may increase health risks associated with extreme temperature exposure is critical.”).

too unwilling) to take the health and safety of prison populations seriously,²⁴¹ leaving this vulnerable population with higher rates of chronic illness²⁴² and without resources to build resilience. As temperatures rise, “[h]eatstroke and other heat-related illnesses have claimed the lives of numerous inmates in recent years,”²⁴³ to say nothing of those poisoned or injured by other toxic conditions.

Furthermore, incarcerated people are among the most disempowered members of the national polity.²⁴⁴ Recall that environmental justice concerns itself not only with disparity in harm, but also disparity in procedural power; one of the hallmark features of an environmental justice community is that locals often have little to no say over what industry players do to their neighborhood.²⁴⁵ Prison takes this generalized phenomenon to the extreme. To be imprisoned is to be deprived of control over the most basic forms of autonomy,²⁴⁶ let alone the collective agency needed to fight for improved conditions.²⁴⁷ Incarcerated people live under a climate of suppression and rule by force that stifles most acts of resistance.²⁴⁸ Even when incarcerated people are removed from the physical prison itself, the threat of carceral force and its many deprivations ensures

241. See, e.g., E. Bernadette McKinney, *Hard Time and Health Care: The Squeeze on Medicine Behind Bars*, 10 AM. MED. ASS'N J. ETHICS 116, 116 (2008) (“Spending on prisoner health care is unpopular; providing health care to people who have violated society’s norms and rules, especially when resources are extremely scarce, invites anger and criticism and sometimes results in inappropriate and unethical compromise.”).

242. See Hoag Levins, *Reviewing the Flaws of U.S. Prisons and Jails’ Health Care System*, UNIV. PENN.: LEONARD DAVIS INST. OF HEALTH ECONS. (Mar. 6, 2023), <https://perma.cc/TN9T-AW7J> (“[I]ncarcerated individuals have more chronic diseases than members of the general population when they enter prison; they receive sparse longitudinal care while inside; leave prison sicker than when they come in; and, on the outside, are often cut off from community health care access by a number of barriers.”).

243. HOLT, *supra* note 11, at ii.

244. Consider, for instance, that only two states in the union allow imprisoned persons to vote, and twenty-five states restrict voting rights for even those who have completed their sentence. See *Felony Disenfranchisement Laws*, ACLU, <https://perma.cc/ADN3-XRJ4>.

245. See *supra* Part II.A.

246. See, e.g., Olga Cunha et al., *The Impact of Imprisonment on Individuals’ Mental Health and Society Reintegration: Study Protocol*, 11 BIOMED CENT. PSYCH. 215, 216 (2023) (“The prison environment can be inherently damaging to mental health due to the consequent disconnection from family, society, and social support, *loss of autonomy*, diminished meaning and purpose of life, . . . and other aversive experiences.” (emphasis added)); André van der Laan & Veroni Eichelsheim, *Juvenile Adaptation to Imprisonment: Feelings of Safety, Autonomy and Well-Being, and Behavior in Prison*, 10 EUR. SOC’Y CRIMINOLOGY 424, 424–26 (2013) (same for juvenile offenders).

247. See, e.g., *supra* notes 88–100 and accompanying text (discussing siting decisions for industry, and how community opposition is central to fighting industry interests).

248. See, e.g., Dave Davies, *How the Attica Prison Uprising Started—And Why It Still Resonates Today*, NPR (Oct. 27, 2021), <https://perma.cc/SM6V-UEQZ> (describing the famous uprising in Attica over prison conditions, which was violently suppressed, costing thirty-nine lives).

continued obedience.²⁴⁹ Compounding the problem, many states would sooner see incarcerated people as a threat than a vulnerable population, especially in times of disaster. “Of the forty-seven states with public emergency planning documents, ‘only 32% . . . identified inmates as a vulnerable population; that same percentage of states also define inmates . . . as a ‘hazard’ because they are viewed as a threat to public safety.’”²⁵⁰ Procedural injustice and stigma, then, compromise state duties to care for their incarcerated populations, leading to environmental harm.

To balance the scales, incarcerated people largely rely on courts to obtain relief—often, to no avail. Though a new wave of prison-conditions litigation has emerged as a result of climate change,²⁵¹ the courts and Congress have invented myriad mechanisms to insulate prisons and carceral staff from legal liability.²⁵² For instance, the Supreme Court has held that to state an Eighth Amendment claim against improper prison conditions, a plaintiff must demonstrate that the conditions reflect the prison staff’s “deliberate indifference” to “a substantial risk of serious harm to an inmate.”²⁵³ Although the Court acknowledged that

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249. *Climate Carceralism*, *supra* note 60, at 715 (“Moreover, even in the [fire] camps, incarcerated people are driven to ‘volunteer’ for hard labor by prison conditions.”); Matthew Hahn, Opinion, *Sending Us to Fight Fires Was Abusive. We Preferred It to Staying in Prison.*, WASH. POST (Oct. 15, 2021), <https://perma.cc/3VN5-ZNE9> (“The conditions in California prisons are so terrible that fighting wildfires is a rational choice.”); Sebastian Miller, *The Phantom Prison*, INQUEST (June 4, 2024), <https://perma.cc/2WRY-EG58> (“Those working in the fire camps have not escaped the prison; they remain in an alternative prison space, wherein the prison has followed them outdoors. Each day it demands that they face the flames or return to a more familiar kind of suffering.”).
250. *Climate Carceralism*, *supra* note 60, at 717 (quoting Cambria Wilson & Elijah Baker, *Prison Labor and Vulnerability: From Environmental Disasters to Disasters of Consumer Capitalism*, in GLOB. ENV’T JUST. PROJECT, U.C. SANTA BARBARA, ENVIRONMENTAL JUSTICE STRUGGLES IN PRISONS AND JAILS AROUND THE WORLD 14, 18 (2020)).
251. See, e.g., *Ball v. LeBlanc*, 988 F. Supp. 2d 639, 644 (M.D. La. 2013), *aff’d in part, vacated in part*, 792 F.3d 584 (5th Cir. 2015); *Cole v. Collier*, No. 14-CV-01698, 2017 WL 3049540, at *31 n.27 (S.D. Tex. July 19, 2017); *Bird Marella Team Works on Louisiana Pro Bono Prison Matter*, BIRD MARELLA (Aug. 5, 2013), <https://perma.cc/X3MT-37HW>.
252. Beyond the barriers discussed, limitations on due process claims and the doctrine of qualified immunity supply additional roadblocks to relief. See, e.g., *Rhodes v. Michigan*, 10 F.4th 665, 683–85 (6th Cir. 2021) (analyzing and then rejecting substantive due process claims brought under the state-created-danger doctrine); *Henry v. Rowe*, No. 17-cv-273, 2019 WL 1430403, at *3 (N.D. Fla. Feb. 25, 2019) (noting that correctional defendants had tried asserting qualified immunity as a defense to an Eighth Amendment claim).
253. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994); see also *Helling v. McKinney*, 509 U.S. 25, 32 (1993) (“[A]lthough accidental or inadvertent failure to provide adequate medical care to a prisoner would not violate the Eighth Amendment, ‘deliberate indifference to serious medical needs of prisoners’ violates the Amendment because it constitutes the unnecessary and wanton infliction of pain contrary to contemporary standards of decency.”); *Wilson v. Seiter*, 501 U.S. 294, 297 (1991) (“[A] prisoner advancing such a claim must, at a minimum, allege ‘deliberate indifference’ to his ‘serious’ medical needs.”); *Estelle v. Gamble*, 429 U.S. 97, 104–05 (1976).

deliberate indifference may be proven by showing prison officials were subjectively aware of the risk,²⁵⁴ the standard remains a considerable hurdle for incarcerated litigants to vindicate their rights under the Eighth Amendment.²⁵⁵ For its part, Congress has only added to the hurdle's height; in passing the Prison Litigation Reform Act,²⁵⁶ Congress instructed courts to reject Section 1983 challenges from incarcerated litigants unless proper administrative remedies are first exhausted.²⁵⁷ The Act further "calls for federal courts to screen prisoner complaints *sua sponte* as soon as practicable after docketing, and to dismiss those that are frivolous, malicious, or fail to state a claim, and to dismiss claims for monetary relief against defendants who are immune from such relief."²⁵⁸ In practice, the PLRA, in combination with doctrinal requirements to properly plead a constitutional claim, operate to deny most incarcerated people civil relief from their conditions.

In sum, incarcerated populations are exposed to toxic, climate-intensive conditions; they are uniquely vulnerable due to medical comorbidities and institutional neglect; and they are politically, administratively, and judicially disempowered from seeking meaningful changes to their circumstances. What are we to call these features if not traits of a vulnerable environmental justice community? And if the incarcerated comprise an environmental justice community, is their distress not manufactured and maintained by carceral logic? The terrible conditions, rampant suppression, and even the incarceration to begin with are all manifestations of carceral logic. Judicial and statutory barriers to civil relief further serve the purpose of protecting carceral logic's machinations, ensuring that prison operations are not unduly disrupted by constitutional checks. Compelling, then, is the conclusion that through environmentally compromised prisons, carceral logic's operations build, preserve, and oppress a uniquely vulnerable environmental justice community, rendering its activities squarely at odds with the aims of environmental justice.

254. See *Farmer*, 511 U.S. at 828.

255. See Joel H. Thompson, *Today's Deliberate Indifference: Providing Attention Without Providing Treatment to Prisoners with Serious Medical Needs*, 45 HARV. C.R.-C.L. L. REV. 635, 636-37 (2010) ("Courts are generally reluctant to conduct thorough examinations of the alleged inadequacies in care and to determine whether they amount to deliberate indifference in violation of the Eighth Amendment. Prisoner litigants often lack the legal expertise and expert witnesses necessary to aid the court's examination."); see also *id.* at 650-52.

256. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321, 1321-66 (1996) (codified as amended in scattered sections of the U.S. Code).

257. 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted."); see also *Porter v. Nussle*, 534 U.S. 516, 524 (2002); *Woodford v. Ngo*, 548 U.S. 81, 88 (2006).

258. Thompson, *supra* note 255, at 650 n.41 (citing 28 U.S.C. § 1915A); see also 42 U.S.C. § 1997e(c) (1).

B. *Emaciation and the Diminution of Community Power*

Prisons also drive environmental harm in the wider community.²⁵⁹ Environmental harm manifests in many ways, but one prominent source is industrial pollution.²⁶⁰ As discussed, industry siting decisions often turn on expected community pushback; that is, the more organized, affluent, and educated a community is, the more resistance it can muster against the creep of nearby industrial activity.²⁶¹ Those communities possessing wealth and social status are disfavored targets for “development,” whereas those which have long been the subjects of economic disinvestment and institutional marginalization are prime choices for selection.²⁶² Consequently, significant scholarship and activist work has gone into strengthening the relative positional power of marginalized communities

259. Indeed, some scholars have provocatively claimed that environmental injustice is itself a form of criminalization, in that “prisons represent a way of understanding how particular bodies and communities can suffer the brutality of environmental racism as criminalization from birth through death, from living in toxic homes and residential communities that are also occupied by police forces to attending schools that are inundated with toxics *and* occupied by police.” Pellow, *supra* note 79, at 6 (citations omitted).

260. *See, e.g.*, UNITED CHURCH OF CHRIST, *supra* note 70, at xi–xvi (outlining industrial activities and pollution).

261. *See, e.g.*, *supra* notes 88–100 and accompanying text; Stephen R. Couch & Steve Kroll-Smith, *Environmental Controversies, Interactional Resources, and Rural Communities: Siting Versus Exposure Disputes*, 59 RURAL SOCIO. 25, 25–30 (1994) (describing the siting disputes’ potential to unite a community); BETTY H. MORROW, CMTY. & REGIONAL RESILIENCE INITIATIVE, COMMUNITY RESILIENCE: A SOCIAL JUSTICE PERSPECTIVE 1 (2008) (defining resilient communities); Pamela Neumann, *Toxic Talk and Collective (In)action in a Company Town: The Case of La Oroya, Peru*, 63 SOC. PROBS. 431, 432 (2016) (listing the ways in which industry actors will attempt to prevent mobilizing communal opposition to siting decisions). *See generally* MICHAEL R. EDELSTEIN, CONTAMINATED COMMUNITIES: THE SOCIAL AND PSYCHOLOGICAL IMPACTS OF RESIDENTIAL TOXIC EXPOSURE (1984) (studying the character and habits of communities which are subjected to toxic exposure); VALERIE GUNTER & STEVE KROLL-SMITH, VOLATILE PLACES: A SOCIOLOGY OF COMMUNITIES AND ENVIRONMENTAL CONTROVERSIES (2007) (same). Community resilience is also important in other contexts, such as natural disaster relief and recovery. *See* Shaikh M. Kais & Md Saidul Islam, *Community Capitals as Community Resilience to Climate Change: Conceptual Connections*, 13 INT’L J. ENV’T RES. & PUB. HEALTH 1211, 1213–14 (2016); Vicente Sandoval et al., *Resilience and Environmental Justice: Potential Linkages*, 18 PROCEDIA ECON. & FIN. 416, 417 (2014). *See generally* Brian Mayer, *A Review of the Literature on Community Resilience and Disaster Recovery*, 6 CURRENT ENV’T HEALTH REPS. 167 (2019).

262. *See, e.g.*, UNITED CHURCH OF CHRIST, *supra* note 70, at xi–xvi; NAT’L ACAD. OF PUB. ADMIN., ADDRESSING COMMUNITY CONCERNS: HOW ENVIRONMENTAL JUSTICE RELATES TO LAND USE PLANNING AND ZONING 18 (2003); Margaret Egan, *The Environmental Justice Act: Same Problems with No Solution?*, 13 PUB. INTEREST L. REP. 75, 75 (2008) (describing “low income, minority and urban neighborhoods” as among the most vulnerable communities). This disparity occurs similarly in the natural disaster context. *See generally* Malini Ranganathan & Eve Bratman, *From Urban Resilience to Abolitionist Climate Justice in Washington, DC*, 53 ANTIPODE 1 (2021).

in the hopes of decreasing harmful environmental exposure.²⁶³ Prisons fit into this picture as a force of disinvestment;²⁶⁴ they emaciate communities by sapping them of the wealth, stability, and physical presence of persons needed to mount an effective resistance against industrial encroachment. These “overincarcerated communities” are thereafter rendered all the more vulnerable to disparate market mechanisms that drive inequitable harms of pollution.²⁶⁵

The first aspect of communal emaciation is removal. Imprisonment can be described as an “act of disappearance,” which physically separates the incarcerated person from the people they care about, resulting in an immediate and lasting reduction in the incarcerated person’s ability to be involved in the matters which implicate their community.²⁶⁶ A great many of America’s prisons are located in rural, isolated parts of the country,²⁶⁷ making it difficult

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263. See sources cited *supra* note 100; Nicholas Freudenberg, Manuel Pastor & Barbara Israel, *Strengthening Community Capacity to Participate in Making Decisions to Reduce Disproportionate Environmental Exposures*, 101 AM. J. PUB. HEALTH 123, 123 (2011) (“By strengthening community capacity, advancing authentic participation, and building democratic power, it might be possible to alter current patterns of health inequities.”). Indeed, some of the most lauded early environmental activists set their roots down in community organizing. See, e.g., Hazel M. Johnson, “Mother of the Environmental Justice Movement,” *supra* note 72 (describing the efforts of Hazel Johnson to “educate[] Altgeld Gardens residents on toxic waste and empower[] them to play a positive role in their community”).
264. See JANJALA CHIRAKIJA, NW. U., *THE LOCAL ECONOMIC IMPACTS OF PRISONS* (2018) (describing the mere presence of prisons as a form of economic disinvestment, which “prompt[s] higher-income households to move out of neighborhoods”). But see KELLY MCGEEVER, *CORRECTIONAL FACILITY ESTABLISHMENTS AND NEIGHBORHOOD HOUSING CHARACTERISTICS 1* (2019) (finding that property values do not decline merely with the presence of prisons in urban communities).
265. Many scholars have noted that mass incarceration has wide-reaching impacts on the communities whose members are disproportionately incarcerated. See, e.g., *Mass Incarceration as a Public Health Issue*, in NAT’L ACADS. OF SCIS., ENG’G, AND MED., *THE EFFECTS OF INCARCERATION AND REENTRY ON COMMUNITY HEALTH AND WELL-BEING: PROCEEDINGS OF A WORKSHOP 11*, at 14 (Steve Olson & Karen M. Anderson eds., 2020) (“People leaving jail and prison typically return to communities characterized by poor health outcomes and limited access to primary care. Controlling for a range of factors that affect health, counties with higher incarceration rates have 3 percent higher mortality rates compared with communities with low incarceration rates.”); Mark L. Hatzenbuehler et al., *The Collateral Damage of Mass Incarceration: Risk of Psychiatric Morbidity Among Nonincarcerated Residents of High-Incarceration Neighborhoods*, 105 AM. J. PUB. HEALTH 138, 138–40 (2015) (finding significantly higher rates of depression and anxiety in neighborhoods with high incarceration rates). I propose disinvestment is one more impact.
266. Lindsey Raisa Feldman, *Anti-heroes, Wildfire, and the Complex Visibility of Prison Labor*, 16 CRIME MEDIA CULTURE 221, 222 (2020); see also M. Eve Hanan, *Invisible Prisons*, 54 U.C. DAVIS L. REV. 1185, 1185 (2020).
267. See U.S. CENSUS BUREAU, *CORRECTIONAL FACILITY AND INMATE LOCATIONS: URBAN AND RURAL STATUS PATTERNS 1* (2017) (“We find that a disproportionate share of prisons and inmates are located in rural areas, while a disproportionate share of inmates are from urban areas.”).

for more urban-based communities to remain in touch.²⁶⁸ From an organizing perspective, this loss of community is substantial, as it diminishes the raw number of community members from which resistance activity may be marshalled.²⁶⁹ And even when incarcerated people are returned to their communities, the time away may leave them socially and emotionally hesitant to reincorporate.²⁷⁰ The absence also has profound consequences for the people who remain in the community. For instance, one recognized casualty of modern mass incarceration is the stability of families, as many Black fathers have spent considerable time in prison instead of with their loved ones.²⁷¹ This, in turn, has destabilizing impacts on children's education²⁷² and future interactions with the law.²⁷³

A second aspect of communal emaciation is impoverishment. Siting decisions²⁷⁴ and recovery from disaster²⁷⁵ both prioritize communities with greater property values, along with other indicia of wealth. Carceral logic exacerbates the

268. See Thomas Keen, *A "Warm Closure,"* INQUEST (July 26, 2021), <https://perma.cc/LW6W-VS2A> (describing the "compounding of geographic disparities" as being of great significance, since it enhances "enormous struggles families and friends already endure just to visit . . . when the person they'd like to see is cast to an isolated unit").

269. In fact, one reason why rural communities are often the target of industrial pollution may be that they have fewer people, which—while arguably pragmatic—also means there is relatively less capacity for resistance. See COLE & FOSTER, *supra* note 70, at 70.

270. See Precious Skinner-Osei & Desiree Stepteau-Watson, *A Qualitative Analysis of African American Fathers' Struggle with Reentry, Recidivism, and Reunification After Participation in Re-entry Programs*, 28 J. HUM. BEHAV. SOC. ENV'T 240, 240 (2018) ("Unaddressed childhood trauma and post-release stress emerged as the major barriers to successful transition from incarceration.").

271. See Dara Lewis & Philip Young P. Hong, *Incapacitated Fatherhood: The Impact of Mass Incarceration on Black Father Identity*, 8 J. QUALITATIVE CRIM. JUST. & CRIMINOLOGY 329, 329 (2020) ("Many black fathers are not absent, uncommitted, or deadbeats . . . but far too many of them . . . are in fact, 'warehoused in prison, locked in cages.'").

272. See Christopher Wildeman, *Parental Imprisonment, the Prison Boom, and the Concentration of Childhood Disadvantage*, 46 DEMOGRAPHY 265, 265 (2009) ("[B]y age 14, 50.5% of black children born in 1990 to high school dropouts had a father imprisoned."); WADE C. JACOBSEN, *PUNISHED FOR THEIR FATHERS? SCHOOL DISCIPLINE AMONG CHILDREN OF THE PRISON* 4 (2016) (suggesting an intergenerational link between prison and academic discipline).

273. See Precious Skinner-Osei & Dhiny Mercedes, *Collateral Consequences: The Impact of Incarceration on African American Fathers and Their Sons*, 7 J. FORENSIC SOC. WORK 1, 2 (2023) ("Children with a parent in jail or prison are five to six times more likely to become offenders . . . Intergenerational incarceration is higher for African American boys as many of their fathers inherited incarceration from their fathers."); Precious Skinner-Osei & Jill S. Levenson, *Trauma-Informed Services for Children with Incarcerated Parents*, 21 J. FAM. SOC. WORK 421, 421 (2018); Eric Martin, *Hidden Consequences: The Impact of Incarceration on Dependent Children*, NAT'L INST. JUST. (Mar. 1, 2017), <https://perma.cc/YSY2-ZTJY>.

274. See COLE & FOSTER, *supra* note 70, at 70 (contending that communities rife with "poorly educated residents of low socioeconomic status" are more likely to be targeted for industrial development and pollution).

275. See, e.g., Rebecca Hersher & Robert Benincasa, *How Federal Disaster Money Favors the Rich*, NPR (Mar. 5, 2019), <https://perma.cc/WG3R-59DN>.

disparity in available resources to communities and, consequently, the presence of pollution by reinforcing conditions of poverty. At the outset, people entering prison are already often of lesser economic means.²⁷⁶ After completing their sentences, they face new, trying markets for jobs, housing,²⁷⁷ and healthcare,²⁷⁸ to say nothing of considerable fines, restitution, and fees they may be burdened with.²⁷⁹ Consider employment: incarcerated people lose an estimated \$70.5 billion per year in lost wages while imprisoned, before proceeding to lose an estimated \$230 billion in lifetime earnings when released.²⁸⁰

The link between incarceration and economic immobility is not coincidental. Prisons deny wealth and political power to overly incarcerated communities by economically punishing those they release with socially imposed stigma and legally imposed collateral consequences. Begin first with stigma; much of the reason why formerly incarcerated people struggle to regain their economic footing is that they face severe social biases upon return to civilian life, hampering their employability.²⁸¹ Not only does their time in prison limit their employability for outwardly facing neutral reasons, such as lack of access

276. See sources cited *supra* note 102; Bruce Western & Becky Pettit, *Incarceration and Social Inequality*, DAEDALUS: J. AM. ACAD. ARTS & SCI. 8, 8 (2010) (“The inequality is cumulative because the social and economic penalties that flow from incarceration are accrued by those who already have the weakest economic opportunities.”).

277. See KATHERINE H. BRADLEY ET AL., CMTY. RES. FOR JUST., NO PLACE LIKE HOME: HOUSING AND THE EX-PRISONER 1 (2001) (“For the returning prisoner, the search for permanent, sustainable housing is more than simply a disagreeable experience. It is a daunting challenge—one that portends success or failure for . . . reintegration.”).

278. See Elizabeth T. Tyler & Bradley Brockmann, *Returning Home: Incarceration, Reentry, Stigma and the Perpetuation of Racial and Socioeconomic Health Inequality*, STIGMA & HEALTH, Winter 2017, at 545, 546–52 (describing the health challenges released individuals face over the course of their incarceration and reintegration).

279. See, e.g., ROBINA INST. CRIM. L. AND CRIM. JUST., UNDERSTANDING THE LANDSCAPE OF FINES, RESTITUTION, AND FEES FOR CRIMINAL CONVICTIONS IN MINNESOTA 2 (2023) (“[V]irtually any sentence for a criminal conviction in Minnesota can include financial obligations in the form of a fine and restitution. In addition, there are numerous fees that can be imposed at multiple points in the criminal justice system, including when a person is booked into jail, at the point of conviction, and while serving their sentence.”); MARIA RAFAEL, VERA INST. OF JUST., THE BURDEN OF COURT DEBT ON WASHINGTONIANS 3 (2023).

280. MICHAEL McLAUGHLIN ET AL., INST. FOR JUST. RSCH. & DEV., THE ECONOMIC BURDEN OF INCARCERATION IN THE UNITED STATES 6–7 (2022); see also Grey Gordon & Urvi Neelakantan, *Incarceration’s Life-Long Impact on Earning and Employment*, FED. RESERVE BANK OF RICHMOND (Mar. 2021), <https://perma.cc/FWK4-3MRE>; accord Sarah Payne, *The Economic Impact of Prison Labor for Incarcerated Individuals and Taxpayers*, PRINCETON LEGAL J. (Feb. 8, 2023), <https://perma.cc/WAU2-244L>.

281. See Terri A. Winnick & Mark Bodkin, *Anticipated Stigma and Stigma Management Among Those to be Labeled “Ex-con,”* 29 DEVIANT BEHAV. 295, 296 (2007) (“We know that few prisoners are afforded opportunities to acquire job training or skills while incarcerated. . . . Most will encounter nonreceptive employers. Or they may be offered only the lowest paid and most menial jobs, not only because of poor job skills, but also because felons are banned from filling some positions.” (internal citation omitted)).

to training and education,²⁸² but criminal histories chill employers' enthusiasm to hire otherwise-qualified job applicants.²⁸³ Accordingly, formerly incarcerated people consistently experience some of the highest rates of unemployment²⁸⁴ and reduced earnings²⁸⁵ in the country. Social stigma has other manifestations as well,²⁸⁶ many of which translate to personal and communal disinvestment. In fact, the mere presence of formerly incarcerated people can depress neighborhood property values, further contributing to economic emaciation.²⁸⁷ As a result, communities that are overpoliced and overincarcerated struggle to muster intergenerational wealth sufficient to build collective resilience, since the implicit branding that follows formerly incarcerated people functions to bar ordinary avenues of mobility.

Carceral logic also furthers the impoverishment of formerly incarcerated people through codified, constitutionally sanctioned²⁸⁸ mechanisms. For those

282. See Leah Wang, *The State Prison Experience: Too Much Drudgery, Not Enough Opportunity*, PRISON POLY INITIATIVE (Sept. 2, 2022), <https://perma.cc/J499-CZ6L> (“Because most work assignments involve menial tasks that are unlikely to help people find skilled work upon release, it seems likely that job training programs would be popular among incarcerated skill-seekers. But the *Survey* data show that only one-third (33%) of people in state prisons report ever having participated in job training.”).

283. See Sandra S. Smith & Jonathan Simon, *Exclusion and Extraction: Criminal Justice Contact and the Reallocation of Labor*, RUSSELL SAGE FOUND. J. SOC. SCIS., Mar. 2020, at 1, 5–10; Debra A. Harley et al., *Vulnerability and Marginalization of Adult Ex-Offenders with Disabilities in Community and Employment Reintegration*, J. APPLIED REHAB. COUNSELING, Winter 2014, at 4, 7–9.

284. See Leah Wang & Wanda Bertram, *New Data on Formerly Incarcerated People's Employment Reveal Labor Market Injustices*, PRISON POLY INST. (Feb. 8, 2023), <https://perma.cc/R6M7-4ASM>.

285. See TERRY-ANN CRAIGIE ET AL., BRENNAN CTR. FOR JUST., CONVICTION, IMPRISONMENT, AND LOST EARNINGS 6–7 (2020); McLAUGHLIN ET AL., *supra* note 280 at 6–7; Grey Gordon & Urvi Neelakantan, *supra* note 280.

286. Some of the most measurably pronounced impacts of incarceration are on a person's mind and body. See, e.g., Kelly E. Moore, Jeffrey B. Stuewig & June P. Tangney, *The Effect of Stigma on Criminal Offenders' Functioning: A Longitudinal Mediation Model*, 37 DEVIANT BEHAV. 196, 196 (2015) (“Being labeled as a stigmatized person has substantial effects on the way people think and feel about themselves, as well as how they expect to be treated by others in their environment.”); Benjamin A. Howell et al., *The Stigma of Criminal Legal Involvement and Health: a Conceptual Framework*, 99 J. URB. HEALTH 92, 92–93 (2022) (“The experience of incarceration has a profound impact on health both during and after release. During episodes of incarceration, exposure to infectious diseases and the structural violence of the correctional system affect individuals' health.”). See generally John L. Worrall & Robert G. Morris, *Inmate Custody Levels and Prison Rule Violations*, 91 PRISON J. 131 (2008) (suggesting those labeled as “inmates,” as opposed to those whose charges were dropped, are more likely to recidivate).

287. See McLAUGHLIN ET AL., *supra* note 285, at 13 (estimating the value of depreciation at \$11 billion annually).

288. Time and time again, collateral consequences have withstood challenges on equal protection grounds. Formerly incarcerated people do not constitute a suspect class, see, e.g., *Kaemmerling v. Lappin*, 553 F.3d 669, 685 (D.C. Cir. 2008) (applying rational basis because

released from prison, the shadow of incarceration does not abate even with a return to civilian life; instead, formerly incarcerated people struggle under a comprehensive system of continued punishments in the form of “collateral consequences,” defined as “legal disabilities imposed by law as a result of a criminal conviction regardless of whether a convicted individual serves any time incarcerated.”²⁸⁹ These consequences, which those facing sentencing may not even be aware of,²⁹⁰ have many faces. One is the denial of welfare benefits; both

“prisoners are not a suspect class”); *Boivin v. Black*, 225 F.3d 36, 42 (1st Cir. 2000) (“From a constitutional standpoint, prisoners simply are not a suspect class.”); *Webber v. Crabtree*, 158 F.3d 460, 461 (9th Cir. 1998) (per curiam); *Zehner v. Trigg*, 133 F.3d 459, 463 (7th Cir. 1997) (calling the idea of prisoners being a suspect class “completely unsupported”), despite some academic advocacy to the contrary, see Ben Geiger, *The Case for Treating Ex-Offenders as a Suspect Class*, 94 CALIF. L. REV. 1191, 1215 (2006). Consequently, the laws codifying collateral challenges are evaluated under the exceedingly forgiving “rational basis” standard. See *Brown v. Hotel & Restaurant Emps. Int’l Union Local 54*, 468 U.S. 491, 494 (1984) (permitting ban on union officers with criminal convictions from collecting dues from employees); *N.Y. Transit Auth. v. Beazer*, 440 U.S. 568, 571 (1979) (enforcing ban on hiring drug addicts against those who finished first year of methadone rehab); *De Veau v. Braisted*, 363 U.S. 144, 160 (1960) (allowing ban on union officers having felony records from collecting or soliciting union dues); *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298, 1299 (5th Cir. 1988), *aff’d in part, rev’d in part, vacated in part*, 493 U.S. 215 (1990) (permitting exclusion of people formerly convicted of sex crimes from sex-related businesses); *Hill v. City of Chester*, No. 92-4357, 1994 WL 463405 (E.D. Pa. 1994) (upholding the firing of an administrative assistant who was a two-time ex-offender); *Upshaw v. McNamara*, 435 F.2d 1188, 1190 (1st Cir. 1970) (allowing ban on appointing ex-felons to police); *Hill v. Gill*, 703 F. Supp. 1034, 1037 (D.R.I. 1989) (upholding employment ban for ex-felons from serving as school bus drivers); *Schanuel v. Anderson*, 546 F. Supp. 519, 525 (S.D. Ill. 1982), *aff’d*, 708 F.2d 316 (7th Cir. 1983) (permitting ten-year ban on ex-felons from working as security guards); *Dixon v. McMullen*, 527 F. Supp. 711 (N.D. Tex. 1981) (upholding mandatory exclusion of ex-felons from police officer certifications); *Carlyle v. Sitterson*, 438 F. Supp. 956 (D.N.C. 1975) (same for firefighters with arson records).

289. CRIM. JUST. SECTION, AM. BAR. ASS’N, *COLLATERAL CONSEQUENCES OF CRIMINAL CONVICTIONS JUDICIAL BENCH BOOK 4* (2018); see also Sam McCann, *How “Collateral Consequences” Keep People Trapped in the Legal System*, VERA INST. (Nov. 29, 2023), <https://perma.cc/3689-H2HZ>. Notably, the concept of collateral consequences is not an American invention, but traces its origins back to the Roman concept of mediate infamia, or “indirect infamy,” and the European concept of “civil death.” Alessandro Corda, *The Collateral Consequences Continuum: Comparative Genealogy, Current Trends and Future Scenarios*, 77 *STUD. L., POL. & SOC’Y* 69, 72 (2019); see also *id.* at 73 (explaining that following the collapse of the Roman Empire, “Germanic tribes revived civil death as ‘outlawry’ for particularly serious crimes”). However, the United States has distinguished itself from other nations in that it does not recognize collateral consequences as a discreet kind of “punishment.” *Id.* at 81 (“Seemingly with little remorse, the US courts appear to have bought into the idea that [collateral consequences] constitute mere ‘side effects’ of conviction, totally unrelated to the criminal justice process and criminal law principles.”).
290. Under the traditional *Brady* test, prosecutors are obligated to disclose “direct” consequences of incarceration for a plea to be voluntary, whereas collateral consequences are “indirect.” See *Brady v. United States*, 397 U.S. 742, 755 (1970) (explaining that the voluntariness standard for plea bargains requires that the defendant is made “fully aware of the direct consequences”

federal and state policies condition vast swathes of their respective welfare systems on a person's criminal history.²⁹¹ For instance, in 1996 Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act,²⁹² which bars by default any person convicted of "the possession, use or distribution of a controlled substance" from accessing cash welfare benefits or federally funded food stamps.²⁹³ Though a multiplicity of states have opted out of the federal ban,²⁹⁴ other states have gone even further and imposed their own restrictive regimes,²⁹⁵ resulting in mass food insecurity for formerly incarcerated people.²⁹⁶

of a guilty plea (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957), *rev'd on other grounds*, 356 U.S. 26 (1958)); CRIM. JUST. SECTION, *supra* note 289, at 4 ("Despite . . . adverse consequences flowing from collateral consequences, defendants are generally not entitled, as a matter of due process, to be warned of these consequences, either before accepting a plea or upon conviction."). See generally Michael Pinard, *An Integrated Perspective on the Collateral Consequences of Criminal Convictions and Reentry Issues Faced by Formerly Incarcerated Individuals*, 86 B.U. L. REV. 623 (2006). Though, some courts have embraced a minority view that collateral consequences must be disclosed. See *United States v. Littlejohn*, 224 F.3d 960, 969 (9th Cir. 2000) (holding that the automatic denial of welfare benefits renders a consequence direct, instead of collateral); *State v. Bellamy*, 835 A.2d 1231, 1238 (N.J. 2003) (insisting a trial court must inform a defendant "when the consequence of a plea may be so severe that a defendant may be confined for the remainder of his or her life"); *Cronin v. O'Leary*, 13 Mass. L. Rptr. 405, 407 (Mass. Super. Ct. 2001) (finding that a collateral consequence depriving ex-cons of employment opportunities involved a Fourteenth Amendment liberty interest, necessitating a procedural due process right to a hearing prior to the deprivation).

291. See Naomi F. Sugie, *Punishment and Welfare: Paternal Incarceration and Families' Receipt of Public Assistance*, 90 SOC. FORCES 1403, 1403–05 (2012).
292. Pub. L. No. 104–193 (1996).
293. Cynthia Godsoe, *The Ban on Welfare for Felony Drug Offenders: Giving a New Meaning to "Life Sentence,"* 13 BERKELEY WOMEN'S L.J. 257, 257 (1998); see also Pub. L. No. 105–33, § 5516(a), 111 Stat. 251, 620 (1997).
294. See generally COLLATERAL CONSEQUENCES RES. CTR., ACCESSING SNAP AND TANF BENEFITS AFTER A DRUG CONVICTION: A SURVEY OF STATE LAWS (2023) (finding twenty-five states and D.C. have all waived the ban).
295. One resource, the Collateral Consequences Inventory, has established a comprehensive database of collateral consequences broken down by state, type of offense excluded, and the kind of consequence imposed. Texas, for instance, has twenty-eight additional restrictions on government benefits for formerly incarcerated people. See *Collateral Consequences Inventory*, NAT'L INVENTORY OF COLLATERAL CONSEQUENCES OF CONVICTION, <https://perma.cc/9LAS-488X>.
296. See Testa Alexander & Dylan B. Jackson, *Food Insecurity Among Formerly Incarcerated Adults*, 46 CRIM. JUST. & BEHAV. 1493, 1495 (2019) (reporting an estimated—though not entirely representative—ninety-one percent food insecurity rate among formerly incarcerated adults); Ian K. McDonough, *Criminal Incarceration, Statutory Bans on Food Assistance, and Food Security in Extremely Vulnerable Households: Findings from a Partnership with the North Texas Food Bank*, 41 APPLIED ECON. PERSPS. & POL'Y 329, 329 (2019); Jenny Landon & Alexi Jones, *Food Insecurity is Rising, and Incarceration Puts Families at Risk*, PRISON POL'Y INST. (Feb. 10, 2021), <https://perma.cc/AF2X-RP3W>.

For a population already among the least well-off economically, this denial of benefits can be ruinous.

Collateral consequences also facilitate the gatekeeping of employment licenses. Although federal regulations prohibit private employers from using an applicant's ex-con status to deny them outright,²⁹⁷ many states—and the federal government itself—impose sweeping prohibitions on obtaining essential licenses for those of ex-con status.²⁹⁸ For instance, in California, formerly incarcerated veterans of the state's Conservation Camp Program (commonly dubbed “fire camps”) have struggled to obtain the EMT licenses needed to become wildlands firefighters upon their release,²⁹⁹ despite such career opportunities being a central selling point of the program.³⁰⁰ In this and many other licensing regimes,³⁰¹ formerly incarcerated people are denied the chance for gainful employment. As with the withholding of welfare benefits, this deprivation exacerbates the felt conditions for formerly incarcerated people.

Finally, beyond physical removal and impoverishment, prisons diminish the power of overincarcerated communities by extracting their residents from the voting population. Some collateral consequences result in wholesale removal from the democratic polity by denying formerly incarcerated people the right to vote and serve on juries. Most states categorically disqualify certain formerly incarcerated people from jury service; Massachusetts, for instance, bars from its juries anyone “convicted of a felony within seven years.”³⁰² In fact, Maine is the only state in the union that places no barrier for formerly incarcerated people

297. See, e.g., U.S. EQUAL EMP. OPPORTUNITY COMM'N, EEOC915002, ENFORCEMENT GUIDANCE ON THE CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT (2012).

298. See UMEZ & PIRIUS, *supra* note 66, at 3 (“Many state licensing laws include . . . automatic prohibitions for people with criminal records—particularly for felony convictions that are deemed ‘violent’ or ‘serious’ offenses.”).

299. See Cameron Kimble & Ames Grawert, *Collateral Consequences and the Enduring Nature of Punishment*, BRENNAN CTR. JUST. (June 21, 2021), <https://perma.cc/28GR-GJZM>; Erika D. Smith, *Why Is It Still So Hard for Former Prisoners to Become Firefighters in California?*, L.A. TIMES (June 4, 2021), <https://perma.cc/H7QX-AU9K>; Nick Sibilla, *Federal Judge: Californians Who Fought Fires in Prison Can't Become Career Firefighters*, FORBES (Feb. 16, 2021), <https://perma.cc/AAT5-4L4F>.

300. Although the state has modified its laws to allow camp veterans to expunge their records, see CAL. PENAL CODE § 1203.4b (West 2023), this process can take months or even years of court appearances, see Smith, *supra* note 299.

301. See, e.g., MICHELLE N. RODRIGUES & BETH AVERY, NAT'L EMP. L. PROJECT, UNLICENSED & UNTAPPED: REMOVING BARRIERS TO STATE OCCUPATIONAL LICENSES FOR PEOPLE WITH RECORDS 1–2 (2016).

302. KATY NAPLES-MITCHELL & HARUKA MARGARET, HARV. KENNEDY SCH., INEQUITABLE AND UNDEMOCRATIC: A RESEARCH BRIEF ON JURY EXCLUSION IN MASSACHUSETTS AND A MULTIPRONGED APPROACH TO DISMANTLE IT 3 (2023); see also James M. Binnal, *The Exclusion of Convicted Felons from Jury Service: What Do We Know?*, 31 CT. MANAGER 26, 26 (2016). See generally James M. Binnal, *Summoning Criminal Desistance: Convicted Felons' Perspectives on Jury Service*, 43 L. & SOC. INQUIRY 4 (2018).

to serve on juries.³⁰³ In the realm of voting, many states are similarly restrictive; forty-eight states have laws restricting voting rights for those with felony convictions, resulting in the disenfranchisement of approximately 4.4 million Americans—most of whom have completed their sentences.³⁰⁴ Even in states where people can be “restored” to their civil rights, the processes for doing so are often byzantine or arbitrary; for instance, three states grant plenary discretion to state governors to determine whether ex-cons may be re-enfranchised, but do not impose any binding conditions under which that discretion is exercised.³⁰⁵

The Supreme Court’s equal protection jurisprudence has blessed this practice. In *Richardson v. Ramirez*,³⁰⁶ the Supreme Court considered a challenge to a state law depriving formerly incarcerated people of their voting rights.³⁰⁷ As the Court had previously recognized voting to be a fundamental right,³⁰⁸ there was a precedential impetus to strike down the state law by applying strict scrutiny. Nevertheless, the Court refused to do so.³⁰⁹ Writing for six Justices,³¹⁰ Justice Rehnquist held that the state law was permissible under a broad reading of section 2 of the Fourteenth Amendment, which singles out individuals disenfranchised for “participation in rebellion, or other crime.”³¹¹ The Court read this provision to expressly permit laws that disenfranchise formerly incarcerated people, and that “the understanding of those who adopted the Fourteenth Amendment, as reflected in the express language of [section] 2 . . . is of controlling significance in distinguishing such laws from those other state limitations on the franchise which have been held invalid under the Equal Protection Clause.”³¹² Though *Richardson* and the Court’s historical account of section 2 have drawn much scholarly scrutiny,³¹³ the case demonstrates that even at the

303. See Binna, *The Exclusion of Convicted Felons from Jury Service*, *supra* note 302, at 26.

304. Christopher Uggen et al., *Locked Out 2022: Estimates of People Denied Voting Rights*, SENT’G PROJECT (Oct. 25, 2022), <https://perma.cc/E63B-7NMB>; see also Matt S. Whitt, *Felon Disenfranchisement and Democratic Legitimacy*, 43 SOC. THEORY & PRACTICE 283, 283 (2017) (noting that thirty-five states also restrict post-release enfranchisement in some form).

305. See Michael Wines, *A Legal Fight Over Whether Governors Can Deny Thousands the Vote*, N.Y. TIMES (Oct. 16, 2023), <https://perma.cc/3SAA-LLPF>.

306. 418 U.S. 24 (1974).

307. *Id.* at 26–27.

308. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) (“Undeniably, the Constitution of the United States protects the rights of all qualified citizens to vote, in state as well as in federal elections.”); *Lucas v. Forty-Fourth Gen. Assembly of the State of Colo.*, 377 U.S. 713, 736–37 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964).

309. *Richardson*, 418 U.S. at 56.

310. Justices Marshall and Douglas both wrote dissents, with Justice Marshall being joined by Justices Douglas and Brennan. *Id.* at 26, 56.

311. U.S. CONST. amend. XIV, § 2.

312. *Richardson*, 418 U.S. at 55.

313. See, e.g., Geiger, *supra* note 288, at 1231–40; Abigail M. Hinchcliff, Note, *The “Other” Side of Richardson v. Ramirez: A Textual Challenge to Felon Disenfranchisement*, 121 YALE L.J. 194, 197 (2011) (suggesting that “advocates should work within *Ramirez*’s central holding . . . to limit the constitutional approval for felon disenfranchisement”); David J. Zeitlin, Note,

high water mark of protected interests, the Equal Protection Clause provides no safe harbor for those designated as “ex-con,” and prevailing doctrine leaves ample room for carceral logic to deprive formerly incarcerated people of their civil rights.

Taken together, pervasive social stigma and the web of collateral consequences eviscerate community resilience to environmental harm, particularly in the United States.³¹⁴ Existing regulatory regimes reward communities that are able to mobilize and mount collective resistance to industrial siting decisions—a dynamic historically enjoyed by white, affluent neighborhoods.³¹⁵ Thanks to the efforts of environmental justice activists, more work is being done to educate and empower marginalized communities to correct for historical imbalances.³¹⁶ However, long term solutions require addressing the imbalances themselves, to ensure that historically marginalized communities have access to the wealth, social mobility, and political prowess to secure lasting resilience. Prisons, and the collateral consequences that follow, deny all three to overincarcerated communities. While in prison, the incarcerated are separated from their families

Revisiting Richardson v. Ramirez: The Constitutional Bounds of Ex-Felon Disenfranchisement, 70 ALA. L. REV. 259, 281–92 (2018).

314. Although collateral consequences exist in other countries, they arise from altogether “differing basic ideologies of punishment and criminal justice.” Corda, *supra* note 289, at 83; *see also* JAMES WHITMAN, *HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING DIVIDE BETWEEN AMERICA AND EUROPE* 85–86 (2003) (noting “Europeans have fully abolished ‘civil death’” as opposed to the “American notion that every felon should instantly be classed as something less than a full citizen”); Michael Pinard, *Collateral Consequences of Criminal Convictions: Confronting Issues of Race and Dignity*, 85 N.Y.U. L. REV. 457, 511 (2010) (“While Canada and England have adopted crime control policies . . . that are similar to those of the United States, they have stopped short of adopting the vast network of collateral consequences that besets individuals in the United States.”). *But see* Alessandro Corda, Marti Rovira & Andrew Henley, *Collateral Consequences of Criminal Records from the Other Side of the Pond: How Exceptional is American Penal Exceptionalism?*, 23 BRITISH SOC’Y CRIMINOLOGY 528, 532 (2023) (finding American practices to still be exceptional, but perhaps not immensely so). Namely, “European criminal justice policies and punishment schemes, including [collateral consequences], are enacted and justified with hyperspecific rationales and an intense focus on proportionality.” Corda, *supra* note 289, at 83; *see also id.* (explaining that “[p]enal systems in Europe distinguish between main and ancillary criminal sanctions and ‘courts are required to consider the impact of all combined sanctions on the defendant and society in light of the purposes of punishment’” (quoting Nora V. Demleitner, *U.S. Felon Disenfranchisement: Parting Ways with Western Europe*, in *CRIMINAL DISENFRANCHISEMENT IN AN INTERNATIONAL PERSPECTIVE* at 79, 86 (A. Ewald & B. Rottinghaus eds., 2009))). Those subject to collateral consequences also have more agency to challenge the imposition of disproportionate punishment in foreign courts. *See* Corda, *supra* note 289, at 84–85 (citing key interpretive decisions to demonstrate that in Europe, “unlike what happens in the US system, formally civil or regulatory sanctions may be challenged on ex post facto grounds,” and “collateral ramifications may be challenged on grounds of vagueness—that is lack of clarity making the overall punitive response following a conviction unpredictable”).

315. *See supra* Part II.A; sources cited *supra* notes 94–99.

316. *See* sources cited *supra* note 106.

and neighbors, hampering the prospects of their progeny and sowing discord into their neighborhoods. Even after release, formerly incarcerated people are denied economic opportunity and political participation through pervasive collateral consequences. In this way, carceral logic—as manifested through mass incarceration—further the disparate community conditions that give rise to the harms the environmental justice movement is primarily concerned with, even when it does not specifically seek to stymy progress. The mere implementation of carceral logic is sufficient to frustrate justice.

CONCLUSION

Carceral logic is a policy framework that confronts any undesirable act with one fixed set of prescriptions: criminalize it, police its occurrence, and incarcerate those who practice it. Due to its inflexibility, carceral logic is a limited and often counterproductive remedy for many of society's more nuanced ills. Yet, it has nevertheless become one of the most prolific tools of social and political redress, implicating the most marginalized among us. As the gears and levers of this monolithic machine turn, its operation runs contrary to the values and aims of the environmental justice movement. Reasoning from first principles, those committed to ending environmental injustice should also be opposed to carceral logic, and environmentally minded organizations should embrace and integrate decarceral ends in their respective missions.

This ideological reorientation is proper for at least three reasons. Both environmental injustice and carceral logic have sprouted from the same seed of racialized, class-oriented subjugation, resulting in disparate harms inflicted upon marginalized communities. More concretely, carceral logic has been wielded politically by governments experiencing environmental strain and domestic turmoil to suppress climate activists, detain displaced migrants, and police survivors of natural disasters. Finally, even when not targeting discrete allies of the environmental justice movement, the everyday operations of carceral logic intensify the burdens of climate harm. By preserving the vulnerability of incarcerated peoples and robbing communities of the resources needed to build resilience, carceral logic quietly counteracts the principles and organizing efforts of the movement. As such, calls for environmental justice ought to be accompanied by calls to end the prevalence of carceral logic, and curtail the mass vanishing it has wrought.

In a world of rising tides, the chains of incarceration don't float. It is incumbent on those with a mind for justice to ensure that the incarcerated are not left to drown.

