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A SILVER BULLET: COULD DATA LINKING URBAN HEAT ISLANDS TO HOUSING DISCRIMINATION CURTAIL ENVIRONMENTAL RACISM?

Russell Armstrong*

“[A]ll things share the same breath—the beast, the tree, the man ...the air shares its spirit with all the life it supports.”¹

Google “Chief Seattle” and you will likely find that quote. We now know it is a work of fiction after several misinterpretations and fabrications of Dr. Henry Smith’s original translation.² We also know now that all people, particularly Black Americans, do not all breathe the same air. Instead, Black Americans and other underrepresented minorities are subjected to the toxic effects of climate change at increasingly disproportionate rates. Controlling for income, studies find racial identity is the most significant indicator of exposure to general pollutants and suspended particulates.³ This harsh reality is highlighted by new evidence, finding that many urban heat islands (UHIs) coincide directly with redlined neighborhoods, which were designated as “hazardous” to justify denying home loans and other services to the people living there because of their race.⁴ Some commentators believe this evidence could be used by environmental justice advocates to rectify the deleterious effects of racism in court through the Federal Housing Act (FHA).⁵ However, advocates have rarely used the FHA successfully to remedy environmental harms related to housing policy because it is difficult to prove discriminatory treatment or disparate impact.⁶ Therefore, while the FHA is not some silver bullet to bring about environmental reparations for past harms, data such as that from the Hoffman study showing how Black Americans and other underrepresented minorities are disproportionately impacted by environmental hazards can be used to advocate for more equitable conditions moving forward.⁷

Urban Heat Islands Are Abundant and Create Numerous Health Disparities

The study, published in *Climate*, demonstrates how Black communities are routinely exposed to the UHI effect at far greater rates than predominantly White communities.⁸ The study also explains how U.S. housing policy that created segregated neighborhoods also left those same neighborhoods significantly hotter than adjacent areas.⁹ In ninety-four percent of the 108 cities studied, redlined neighborhoods had higher surface temperatures than non-redlined areas.¹⁰ In fact, temperatures vary as much as ten degrees Celsius amongst neighborhoods within a single urban area.¹¹ UHIs, shown to exist all across the country including Washington, D.C. where half of the city has an elevated heat vulnerability, can now be shown to clearly track with neighborhoods developed through discriminatory housing practices.¹² Additionally troubling is how the UHI effect also leads to serious adverse health risks such as premature births,

asthma attacks, and chronic obstructive pulmonary disease (COPD).¹³

CAN THE FHA SOLVE ENVIRONMENTAL RACISM?

For over twenty years, law students and advocates have discussed ways to use data to connect environmental hazards to discriminatory housing practices.¹⁴ For example, affected persons can file an administrative complaint with the Department of Housing and Urban Development (HUD) and wait for the agency to act, including through enforcement via the Department of Justice, or exercise their right to commence a civil action for the alleged discriminatory housing practice.¹⁵ From a burden of proof standpoint, the FHA is preferable to other more common equitable justice tools such as Title VI of the Civil Rights Act because under the FHA the aggrieved party only needs to establish a discriminatory effect, also known as disparate impact, which is a lower evidentiary bar than having to show that a party discriminated intentionally.¹⁶ In *Texas Department of Housing & Community Affairs v. Inclusive Communities Project*,¹⁷ the Supreme Court held that the FHA can be interpreted to prohibit policies that adversely affect minority groups even when the discrimination is implicit and not the stated policy goal.¹⁸ In *Inclusive Communities Project*, the Court found that Texas’ Department of Housing and Community Affairs disproportionately denied tax credits for developers providing low-income family units to Black families within predominantly White neighborhoods, thus perpetuating segregated housing in violation of the FHA.¹⁹

There have been some notable cases of advocates using civil rights law for environmental justice, such as *Houston v. City of Cocoa*,²⁰ but those cases are usually settled and focus on stopping new development rather than rectifying past harms.²¹ Settlements that are approved by the Secretary of HUD may not assign any fault and may not provide any monetary relief.²² In *City of Cocoa*, Black residents organized and filed a federal class action suit as well as an administrative complaint with HUD to stop a local community redevelopment plan funded through a Community Development Block Grant (CDBG) that would have displaced generations of Black homeowners with high-density commercial and residential real estate.²³ After introducing evidence of a history of local policy changes designed to undermine the flourishing of this historically Black community, both HUD and the community’s independent legal

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counsel, which included the NAACP LDF, agreed to settle for undisclosed damages as litigation fees began to mount.²⁴

The FHA: No Silver Bullet but a Silver Lining for Environmental Justice

City of Cocoa may provide a blueprint for pursuing environmental justice under the current FHA legal regime, but that blueprint requires a good deal of patience, grassroots organizing, and persistence.²⁵ Additionally, the current administration is seeking to significantly raise the burden of proof on FHA disparate impact claims through a proposed rulemaking.²⁶ Despite these hurdles, the FHA at least provides claimants a path to realistically pursue private actions instead of having to rely on the agency determinations of this or any other administration.

Although both Title VI claims of discrimination and violations of other statutes, such as the Clean Air Act, are seen as far more proximate to environmental justice, without a private right of action, advocates are left to the discretion of an agency's bureaucracy.²⁷ A damning report conducted by Deloitte in 2011

found that the Environmental Protection Agency's Office of Civil Rights only accepted or dismissed six percent of Title VI cases within the agency's own time limit.²⁸ That dismal processing rate has left communities such as Orange County, North Carolina, to struggle for decades in pursuit of a cleaner environment to raise families.²⁹

There are other remedies the U.S. government can use to curtail environmental racism. For example, Congress could pass legislation to remove barriers to pursuing a Title VI claim, such as by extending the class to low-income persons or by taking smaller steps such as requiring any environmental and climate-related regulations undergo additional executive branch agency review to determine any disproportionate negative impacts.³⁰ The current administration could also roll back its weakening of the Affirmative Furthering Fair Housing regulations originally introduced in 2015.³¹ But until any of these things happen, using the FHA as a tool for environmental justice is still worth a shot.



ENDNOTES

¹ Rudolf Kaiser, *Chief Seattle's Speech(es): American Origins and European Reception*, in *RECOVERING THE WORD: ESSAYS ON NATIVE AMERICAN LITERATURE*, 525, 525-30 (Univ. of Cal. Press 1987).

² Paul S. Wilson, *What Chief Seattle Said*, 22 ENVTL. L. 1451, 1451-52 (1992); Walt Crowley, *Chief Seattle's Speech*, HISTORYLINK, <https://www.historylink.org/File/1427>.

³ Michel Gelobter, *Toward a Model of Environmental Discrimination*, in *RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS*, 64, 64-81 (Bunyan Bryant & Paul Mohai eds., 1992).

⁴ Jeremy S. Hoffman et al., *The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat: A Study of 108 US Urban Areas*, 8 CLIMATE 1, Jan. 13 2020 at 12 (describing how HOLC maps distinguished neighborhoods that were considered "best" and "hazardous" for real estate investments (largely based on racial makeup), the latter of which was outlined in red, leading to the term "redlining").

⁵ 42 U.S.C. §§ 3601-3619 (2018) (prohibiting discrimination against individuals based on race, color, national origin, religion, sex, familial status, and disability when they are renting or buying a home, getting a mortgage, seeking housing assistance, or engaging in other housing-related activities); Meg Anderson, *Racist Housing Practices from the 1930s Linked to Hotter Neighborhoods Today*, NPR (Jan. 14, 2020), <https://www.npr.org/2020/01/14/795961381/racist-housing-practices-from-the-1930s-linked-to-hotter-neighborhoods-today>.

⁶ David Carpenter, *The Fair Housing Act (FHA): A Legal Overview*, CONG. RES. SERV. 5 (Feb. 2, 2016).

⁷ Hoffman, *supra* note 4, at 1 (revealing that historical housing policies may, in fact, be directly responsible for disproportionate exposure to current heat events).

⁸ Hoffman, *supra* note 4, at 2 (exacerbating urban heat island effect with an overabundance of low-rise, man-made surfaces in contrast to a lack of natural, non-manufactured landscapes).

⁹ Hoffman, *supra* note 4, at 2, 4.

¹⁰ Hoffman, *supra* note 4, at 6, 9.

¹¹ Hoffman, *supra* note 4, at 2.

¹² Hoffman, *supra* note 4, at 2, 3; Randy Smith, *D.C.'s Heat Islands*, D.C. POL'Y CTR. (Aug. 8, 2017), <https://www.dcpolicycenter.org/publications/urban-heat-islands/>.

¹³ Rebecca Lindsey, *Extreme Heat Increases Pregnant Women's Risk of Pre-term Delivery*, CLIMATEWATCH (Sept. 30, 2019), <https://www.climate.gov/news-features/featured-images/extreme-heat-increases-pregnant-women%E2%80%99s-risk-pre-term-delivery>; Alyson Kenward, et al., "Heat

Islands" Cook U.S. Cities Faster Than Ever, CLIMATE CENT. reprinted in SCI. AMERICAN, Aug. 22, 2014), <https://www.scientificamerican.com/article/heat-islands-cook-u-s-cities-faster-than-ever>.

¹⁴ Robert D. Bullard, et al., *Toxic Wastes and Race at Twenty 1987-2007*, UNITED CHURCH CHRIST JUST. & WITNESS MINISTRIES 1, 1 (2007); Terenia Urban Guill, *Environmental Justice Suits Under the Fair Housing Act*, 12 TUL ENV'T L.J. 189, 190-93 (1998); see also Rachael Moshman & John Hardenbergh, *The Color of Katrina: A Proposal to Allow Disparate Impact Environmental Claims*, 7 SUSTAINABLE DEV. L. & POL'Y 15, 16 (2006).

¹⁵ Carpenter, *supra* note 6.

¹⁶ See 42 U.S.C. § 2000d (prohibiting discrimination on the basis of race, color, or national origin in any program or activity that receives Federal funds or other Federal financial assistance); see also *Alexander v. Sandoval*, 532 U.S. 275, 294 (2001) (holding that there is no private right of action for a disparate impact claim under § 602 of Title VI of the Civil Rights Act of 1964); *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 287 (1978) (finding that Title VI of the Civil Rights Act of 1964 only prohibits discriminatory intent).

¹⁷ 135 S. Ct. 2507 (2015).

¹⁸ *Id.* at 2525.

¹⁹ *Id.*

²⁰ No. 89-082-CIV-ORL-19 (M.D. Fla. Oct. 26, 1990).

²¹ See Steven Keeva, *A Breath Of Justice: Along With Equal Employment Opportunity and Voting, Living Free From Pollution Is Emerging As a New Civil Right*, A.B.A. J. 89, 91 (1994) (discussing the impact of *Houston v. City of Cocoa* on civil rights litigation targeted at protecting minority communities).

²² See 42 U.S.C. § 3610(b)(1)-(3) (awarding relief, including monetary relief may come from arbitration that results from a conciliation agreement).

²³ See Judith E. Koons, *Locational Justice: Race, Class, and the Grassroots Protest of Property Takings*, 46 SANTA CLARA L. REV. 811, 814-17 (2006).

²⁴ See *id.* at 814; see also Keeva, *supra* note 21, at 91.

²⁵ See Koons, *supra* note 23, at 814.

²⁶ See generally *Comment in Opposition to Notice of Proposed Rulemaking re HUD's Implementation of the Fair Housing Act's Disparate Impact Standard*, U.S. COMM'N ON CIVIL RIGHTS (Oct. 18, 2019), <https://www.usccr.gov/press/2019/10-18-HUD-Disparate-Impact-Proposed-Rule.pdf> (proposing a rule that eliminates the three-step burden-shifting approach between the plaintiff and defendant and replaces it with a five-step preponderance of the

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