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Elena D. Gartner

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From Civil Rights to Human Rights: The Pandemic's Aftermath Requires Environmental and Reproductive Justice Mechanisms to Reinforce Global Public Health

*Elena D. Gartner**

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* Elena D. Gartner is a J.D. student at American University Washington College of Law interested in environmental law as it relates to human rights. She has worked with grassroots environmental campaigners in Iowa as well as across the Mekong Region in Southeast Asia. She wants to thank Professor David Hunter for inspiring her to think creatively, interdisciplinarily, and transnationally in his International Environmental Law course, for which this Article was originally written.

Introduction

Environmental law has antiracist work to do. This work requires integrating reproductive justice¹ into environmental advocacy, dissolving mainstream disciplinary distinctions in order to center racial justice in environmental law. Environmental issues — which are essentially issues of public health — are inextricable from race, class, and fundamental rights. In the era of COVID-19, public health is the paramount global concern from the grassroots to the international level, and the growing awareness of linkages between environmental issues, social injustices, and health emergencies could create the political will necessary to push for international legal change that can amplify grassroots campaigns around the world.² Thus, the current global political climate presents a window of opportunity for environmental lawyers to work with reproductive justice advocates to advance new international legal levers in order to facilitate future environmental litigation that addresses the multiple dimensions of social inequality. Global mechanisms, like an international agreement on global health and an updated Rio Declaration, should incorporate rights-based environmental and reproductive justice provisions which litigators can refer to in crafting legal arguments on behalf of grassroots clients,

Part I of this Article argues that environmental justice and reproductive justice lawyers share common goals, and Part II shows that the time has arrived for international environmental law to embrace this new framework. Part III proposes an international and intersectional³ response to public health crises through a rights-based approach.

¹ SisterSong Women of Color Reproductive Justice Collective (a network of eighty grassroots organizations) defines reproductive justice as “the human right to maintain personal bodily autonomy, have children, not have children, and parent the children we have in safe and sustainable communities.” SISTERSONG, <https://www.sistersong.net/reproductive-justice> (last visited July 20, 2020).

² Madeleine Somerville, *Want to Help Fight Climate Change? Start with Reproductive Rights*, THE GUARDIAN (May 31, 2016), <https://www.theguardian.com/lifeandstyle/2016/may/31/climate-change-women-reproductive-rights-birth-control> (citing then-Chilean president Michelle Bachelet’s remarks at the 2014 UN Climate Summit regarding the vulnerability of women in the event of a global climate crisis, given that women and children are 14 times more vulnerable than men in floods or droughts; women are more likely to die in natural disasters; women are more likely to become caregivers for the sick or wounded; and women have so much more to lose in the event of environmental catastrophe — particularly in the realm of unwanted pregnancies and access to reproductive services); Bailey Borchardt, *Fighting for the Future of Our Planet is Reproductive Justice*, REWIRE.NEWS (Oct. 9, 2019, 1:16 PM), <https://rewire.news/article/2019/10/09/climate-change-reproductive-justice/>.

³ Law professor Kimberlé Crenshaw coined the term “intersectionality” over 30 years ago and recently described it as “basically a lens, a prism, for seeing the way in which various forms of inequality often operate together and exacerbate each other.” Steinmetz, Katy, *She Coined the Term ‘Intersectionality’ Over 30 Years Ago. Here’s What It Means to Her Today*, TIME (Feb. 20, 2020), <https://time.com/5786710/kimberle-crenshaw-intersectionality/>. Thus, bringing an intersectional lens to environmental litigation would draw from intersectional feminist approaches and de-center white environmentalist thought throughout the litigation process.

I. There Are Shared Strategic Interests Between Environmental and Reproductive Justice Movements.

Environmental and reproductive justice lawyers share overlapping goals. They both want to stop harmful pollution and stabilize the climate for the well-being of future generations, increase public participation, transparency, access to lawyers, and proper dissemination of data and medical research.⁴

Even prior to COVID-19, advocates from the environmental and reproductive justice⁵ fields have called attention to the intersectional relationship between reproductive health and environmental harms.⁶ Already, a growing body of scientific data reveals how structural and environmental

⁴ See, e.g., NYLPI, <https://nylpi.org/our-work/> (last visited July 20, 2020) (“NYLPI works to eliminate the unfair burden of environmental hazards borne by low-income communities and communities of color, and to create a more equitable and sustainable city.”); EARTHJUSTICE, <https://earthjustice.org/> (last visited July 20, 2020) (describing Earthjustice as the “legal backbone for the environmental movement, representing [its] clients free of charge” since 1971 because “the earth needs a good lawyer.”); IF/WHEN/HOW, <https://www.ifwhenhow.org/> (last visited July 20, 2020) (describing the mission of the organization, which has chapters in law schools across the United States, being to “transform the law and policy landscape through advocacy, support, and organizing so all people have the power to determine if, when, and how to define, create, and sustain families with dignity and to actualize sexual and reproductive wellbeing on their own terms”); Abigail Abrams, *‘We Are Grabbing Our Own Microphones’: How Advocates of Reproductive Justice Stepped Into the Spotlight*, TIME (Nov. 21, 2019, 7:33 AM), <https://time.com/5735432/reproductive-justice-groups/> (“The framework demands consideration of all the ways reproductive health can be affected by other factors, from race, religion or sexual orientation to financial, immigration or disability status to environmental conditions.”); Borchardt, *supra* note 2 (discussing how one way to ensure that anyone can raise their families in safe, sustainable communities is “addressing major issues like climate change through a reproductive justice lens . . .”). Health lawyers have also recognized important lessons from environmental and reproductive justice. Lindsay F. Wiley, *Health Law as Social Justice*, 24 CORNELL J. L. & PUB. POL’Y 47, 53-63 (2014) (encouraging health law to look to the fields of environmental justice and reproductive justice in reimagining the goals and boundaries of the subject).

⁵ See A. Tianna Scozzaro, *Reproductive Rights and Environmental Justice Are Deeply Connected*, SIERRA CLUB (May 22, 2019), <https://www.sierraclub.org/articles/2019/05/reproductive-rights-and-environmental-justice-are-deeply-connected> (last visited July 20, 2020) (noting that protecting “access to health care—including comprehensive reproductive health services—is essential to [environmental and social justice] . . .”); Alice Kurima Newberry, *Why We Can’t Have Environmental Justice Without Reproductive Justice*, GREENPEACE (May 31, 2019), <https://www.greenpeace.org/usa/envirojusticexreprojustice/> (“Access to abortion and reproductive healthcare is fundamentally tied to environmental justice” because “autonomy and choice to people’s bodies [ensures] they are making reproductive decisions without fear of environmental factors.”); *If You Really Care about Environmental Justice, You Should Care about Reproductive Justice*, Nat’l Women’s Law Center and Law Students for Reprod. Justice, <https://nwlc.org/wp-content/uploads/2015/08/FactSheetEnvironmentalJusticeandReproJustice.pdf> (last visited July 20, 2020) (discussing reproductive justice as an environmental justice issue because “[b]y endorsing the principles of Reproductive Justice—including the right to bear and raise children in healthy environments—you are advancing [e]nvironmental [j]ustice”).

⁶ See, e.g., Colin Dwyer, *New York City’s Latinx Residents Hit Hardest By Coronavirus Deaths*, NPR (Apr. 8, 2020, 1:06 PM), <https://www.npr.org/2020/04/08/829726964/new-york-citys-latinx-residents-hit-hardest-by-coronavirus-deaths> (discussing the disproportionate impact Coronavirus has had on the Latinx community—which represents twenty-nine percent of New York City’s population but thirty-four percent of its COVID-19 deaths—and the Black community—which represents about twenty-four percent of the city’s population but almost twenty-eight percent of its known COVID-19 deaths); John Eligon et al., *Black Americans Face Alarming Rates of Coronavirus Infection in Some States*, N.Y. TIMES (Apr. 7, 2020), <https://www.nytimes.com/2020/04/07/us/coronavirus-race.html> (noting

factors lead to marginalized populations being among those most susceptible to and harmed by COVID-19, such as Black, brown, and Indigenous communities in the United States⁷ as well as around the world, such as in the socially excluded populations of Singapore and Peru.⁸

In the United States, infectious diseases like COVID-19 are just one of many health hazards rooted in environmental problems in non-white communities that the law has failed to address. Specifically, Black and brown women have disproportionately suffered the harms of chemical spills, toxic waste, and air pollution due to environmental racism;⁹ these harms are compounded

that the University of Wisconsin Population Health Institute's analysis of County Health Rankings conducted before Coronavirus determined that "high levels of segregation" is why "white Chicagoans had an average life expectancy of 8.8 years longer than [B]lack residents"); Rebecca Nagle, *Native Americans Being Left Out of US Coronavirus Data and Labelled as "Other"*, THE GUARDIAN (Apr. 24, 2020), <https://www.theguardian.com/us-news/2020/apr/24/us-native-americans-left-out-coronavirus-data> (discussing the problems with categorizing Native Americans under the "other" label in many of the state health departments' released racial demographic data that analyzes Coronavirus' impact).

⁷ A Harvard study found that a small increase in long-term exposure to air pollution leads to a large increase in COVID-19 death rate, and counties that already had high levels of air pollution before COVID-19 have higher death rates. *A National Study on Long-Term Exposure to Air Pollution and COVID-19 Mortality in the United States*, <https://projects.iq.harvard.edu/covid-pm>. In the United States, nonwhite women make up most of low-income essential workers; 83 percent of healthcare workers who earn less than \$30,000 are women, while 50% are nonwhite. Campbell Robertson & Robert Gebeloff, *How Millions of Women Became the Most Essential Workers in America*, N.Y. TIMES (Apr. 18, 2020), <https://www.nytimes.com/2020/04/18/us/coronavirus-women-essential-workers.html>. Nearly one-third of nursing assistants are Black women. *U.S. Nursing Assistants Employed in Nursing Homes: Key Facts*, <https://phinational.org/wp-content/uploads/legacy/phi-nursing-assistants-key-facts.pdf>. Black people suffer from higher rates of contracting and dying from COVID-19. Matt Blitz, *Black D.C. Residents Have Been Diagnosed With COVID-19 at Twice the Rate of Their White Peers*, DCIST (Apr. 8, 2020, 1:52 PM), <https://dcist.com/story/20/04/08/black-d-c-residents-have-been-diagnosed-with-covid-19-at-twice-the-rate-of-their-white-peers/>. According to recent EPA studies, Black communities are exposed to 1.54 times more fine-particle pollution in the air than the overall population, as compared to non-white communities generally — 1.28 time more than overall population — and communities living under the poverty line — 1.35 times more than overall population. Natasha Geiling, *EPA Study Shows Dangerous Air Pollution Overwhelmingly Impacts Communities of Color*, THINKPROGRESS (Feb. 23, 2018, 10:52 AM), <https://thinkprogress.org/epa-study-pollution-impacts-communities-of-color-59fe867d560d/>. Coal-fired power plants are disproportionately concentrated near communities of color. Brett Israel, *Coal Plants Smother Communities of Color*, SCI. AM. (Nov. 16, 2012), <https://www.scientificamerican.com/article/coal-plants-smother-communities-of-color/>.

⁸ Kirsten Han, *A Perfect Storm for an Outbreak*, WE, THE CITIZENS (Apr. 23, 2020), <https://wethecitizens.substack.com/p/wtc-long-read-a-perfect-storm-for>; Maria Cervantes, *Peru Indigenous Warn of "Ethnocide by Inaction" as Coronavirus Hits Amazon Tribes*, REUTERS (Apr. 24, 2020, 4:38 PM), <https://www.reuters.com/article/us-health-coronavirus-peru-indigenous/peru-indigenous-warn-of-ethnocide-by-inaction-as-coronavirus-hits-amazon-tribes-idUSKCN22639A>.

⁹ Megan Mayhew Bergman, *"They Chose Us Because We Were Rural and Poor:" When Environmental Racism and Climate Change Collide*, THE GUARDIAN (Mar. 8, 2019), <https://www.theguardian.com/environment/2019/mar/08/climate-changed-racism-environment-south>; *Environmental Racism in America: An Overview of the Environmental Justice Movement and the Role of Race in Environmental Policies*, GOLDMAN ENVTL. PRIZE (last visited July 20, 2020), <https://www.goldmanprize.org/blog/environmental-racism-in-america-an-overview-of-the-environmental-justice-movement-and-the-role-of-race-in-environmental-policies/>; Vann R. Newkirk II, *Trump's EPA Concludes Environmental Racism Is Real*, THE ATLANTIC (Feb. 28, 2018),

by other factors such as interpersonal prejudice, lack of legal representation, and poorly functioning or nonexistent legal protections.¹⁰

II. The Reproductive and Environmental Justice Movements Breathe Life into International Environmental Legal Efforts.

The environmental concept of “sustainable development,” while historically instrumental in bringing about a shift in understanding,¹¹ has long been criticized for lacking inclusivity — in contrast, grassroots movements based in the global south or led by communities of color have been using the terms “environmental justice” and “reproductive justice.”¹² While environmental lawyers have historically operated in institutional silos led by predominantly white and privileged lawyers based in Europe and North America, a new approach is needed given persistent growing global inequalities.

Thus, international environmental law needs an update in order to align with grassroots movements and meet the needs of this current moment. Historically, public support has fueled the development of this area of law: environmental law rode a wave of momentum in the 1970s in the United States and international environmental law experienced a similar groundswell of support through the 90s and 2000s.¹³ But recently, the Trump Administration’s dismantling of domestic legal protections

<https://www.theatlantic.com/politics/archive/2018/02/the-trump-administration-finds-that-environmental-racism-is-real/554315/>.

¹⁰ *Intersections in an American Indian Community Impacted by Environmental Contamination*, <https://www.tandfonline.com/doi/abs/10.1080/23251042.2017.1381898?tab=permissions&scroll=top>; Kristen Zimmerman & Vera Miao, *Fertile Ground: Women Organizing at the Intersection of Environmental Justice and Reproductive Justice*, <https://www.racialequitytools.org/resourcefiles/zimmerman.pdf>.

¹¹ David Hunter et al., INT’L ENVTL. L. 169 (Foundation Press, 5th ed. 2015) (discussing sustainable development after the UN Conference on Environment and Development).

¹² See Samantha Willis, *Black Women Are Leading the Way in Environmental Justice*, ESSENCE (Jan. 11, 2019), <https://www.essence.com/news/black-women-are-leading-the-way-in-environmental-justice/> (“what began in 1982 as a small group of Black men and women protesting the construction of a hazardous-waste center in their Warren County, North Carolina, community is now widely regarded as the catalyst of the environmental-justice movement”); see also Borchardt, *supra* note 2 (“[B]y addressing major issues like climate change through a reproductive justice lens, our solutions can be all-encompassing.”). These movements are transnational and deeply understand the interrelationships between environmental issues and reproductive justice. See e.g. *Realizing Sexual and Reproductive Justice* (last visited August 14, 2020), <http://resurj.org/pages/about-us> (“Our members [are feminist activists] . . . working for sexual and reproductive justice through national, regional, and international advocacy and movement building strategies in Africa, Asia, Pacific, Latin America, Europe, and the Middle East . . . [and] are engaged in different movements . . . for example, women, youth, human rights, HIV, development, economic ecological and environmental justice. . .”).

¹³ See Edith Brown Weiss, *The Evolution of International Environmental Law*, 54 JAPANESE Y.B. INT’L L. 1, 4, 10 (2011) (explaining that the 1972 UN Stockholm Conference on the Human Environment marked the beginning of the development of the basic framework for international environmental law, and the 1992 UN Rio Conference on Environment and Development kicked off a period of nearly two decades of maturation of international environmental law); Brett Milano, *The Evolution of American Environmental Law from Nixon to Trump*, HARV. L. TODAY (Nov. 7, 2017), <https://today.law.harvard.edu/evolution-american-environmental-law-nixon-trump/> (“[T]he environmental movement barely existed before 1970, the year of the first Earth Day. The impetus was a string of

has captivated the public gaze and caused U.S. lawyers to focus their advocacy inwards. Yet, the COVID-19 pandemic brings into sharp focus how international environmental health issues intersect with existing inequalities to devastating effect, highlighting the need for stronger international coordination and safeguards.

III. Tackling Global Health, Environmental, and Reproductive Injustice Is Possible Through an International Rights-Based Framework.

The pandemic reveals the gulf in life experiences between those who are protected by environmental laws and those who the law systematically leaves behind. The growing body of scientific evidence that links environmental pollution with issues of women's health, fertility, and morbidity¹⁴ will aid in making legal arguments for redressability and damages for environmental harms. The technical expertise of environmental law¹⁵ can complement efforts to improve public health infrastructure for women. Doing so would allow lawyers to build cases that push for changes in international law to address this gulf. For instance, lawyers experienced with environmental torts cases that require a high bar for medical evidence to prove causation¹⁶ can contribute to reproductive justice arguments that relate to broader environmental health problems such as air pollution.

Amidst the COVID-19 pandemic, countries may be more willing to enter into a binding treaty that provides for tort-like liability framed around public health, but that explicitly addresses race, gender, and class. Environmental and reproductive justice lawyers should advocate for new international legal instruments to complement existing advocacy at the grassroots level and growing public awareness of the ties between legal disempowerment and uneven public health outcomes. For example, imagine an international public health treaty that closes the legal gaps that created the structural conditions for the pandemic's disproportionate impact on communities of

environmental disasters: The Cuyahoga River catching fire, the Santa Barbara oil spill, the near-death of Lake Erie and the near-extinction of the bald eagle.").

¹⁴ Am. Acad. of Pediatrics Council on Env'tl. Health, *Toxic or Environmental Preconceptional and Prenatal Exposures*, PEDIATRIC ENVIRONMENTAL HEALTH, 4th ed., Etzel RA (Ed) (2019); Aolin Wang, Amy Padula, Marina Sirota, & Tracey J. Woodruff, *Environmental Influences on Reproductive Health: the Importance of Chemical Exposures*, 106 FERTILITY & STERILITY 905 (2016); *Reproductive and Birth Outcomes and the Environment*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://ephtracking.cdc.gov/showRbBirthOutcomeEnv.action> (last updated Nov. 8, 2017).

¹⁵ *Chapter 1: An Overview of Environmental Law*, YALE LAW SCHOOL (2018), available at https://law.yale.edu/sites/default/files/area/departments/cdo/document/cdo_environmental_law_public.pdf ("environmental law practice often requires extensive knowledge of administrative law and aspects of tort law, property, constitutional law, and land use law").

¹⁶ See, e.g. *Sterling v. Velsicol Chemical Corp.*, 1988 U.S. App. LEXIS 6957, at *58 (6th Cir. 1988) (finding that calculations of plaintiffs' damages on increased susceptibility to cancer and other diseases after drinking contaminated water needed to be based upon a *reasonable medical certainty* that the future disease or condition would occur) (emphasis added).

color. Such a mechanism would create institutional space and financial resources for lawyers to provide services to the most vulnerable communities affected by environmental pollution, and perhaps the associated harms of climate change. This instrument would create legal hooks for domestic litigation and an impetus for national governments to enact legislation that implements the treaty and strengthens domestic law. Litigators could bring cases complaining of tangible and localized harms to their environmental and reproductive rights, citing the treaty and any implementing legislation, for damages or injunctive relief.

To do this, governments should negotiate a mechanism that utilizes a rights-based framework and strengthen the ones that already exist. A rights-based approach has already proven useful in the realm of international environmental law, particularly in the Inter-American system.¹⁷ Human rights instruments such as the Convention on the Elimination of Discrimination against Women¹⁸ and the Escazú Agreement on Environment and Human Rights,¹⁹ will be instructive in helping lawyers craft provisions into new international law. Additionally, the upcoming 50th anniversary of the Stockholm Convention in 2022 provides an opportunity for international environmental lawyers to push for a binding Rio Declaration that includes similar provisions.²⁰ For now, environmental lawyers must play the right cards in the immediate aftermath of COVID-19 — including reaching out to and strengthening bonds with reproductive justice lawyers. The public health challenges facing society are intertwined and our response must be similarly unified.

¹⁷ See David Hunter et al., INT'L ENVTL. L. 1323 (Foundation Press, 5th ed. 2015) (discussing the interrelationship between human rights and the environment in international law).

¹⁸ Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

¹⁹ Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean, (Escazú), art. 1, Mar. 4, 2018, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-18&chapter=27&clang=_en

²⁰ Declaration of the United Nations Conference on the Human Environment, adopted June 16, 1972, U.N. Docs. A/CONF.48/14, reprinted in 11 I.L.M. 1416 (1972); Rio Declaration on Environment and Development, adopted June 14, 1992, U.N. Doc. A/CONF.151/5/Rev. 1 (1992).