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Racializing Environmental Justice

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FOREWORD TO THE REPUBLICATION OF *RACIALIZING ENVIRONMENTAL JUSTICE*

ERIC K. YAMAMOTO* & SUSAN K. SERRANO**

“Systemic racism!” The burgeoning 2020 Black Lives Matter protests vaulted this formerly whispered phrase into mainstream public consciousness. Through news headlines, social media, educational classes, opinion essays, word of mouth, and more, America¹ grappled with the enormity of racism as a form of oppression of people and communities, as something far more insidious than simple unequal treatment of individuals because of skin color.

And, at year’s end, President Biden’s selections to head the Interior Department (Native American Deb Haaland) and Environmental Protection Agency (Black American Michael Regan) signaled a new presidential agenda putting “environmental justice front and center.” Those cabinet leaders were touted as keys to realizing the President’s “promises to combat climate change . . . and address environmental racism.”²

*Fred T. Korematsu Professor of Law and Social Justice, William S. Richardson School of Law, University of Hawai‘i. Copyright Eric K. Yamamoto 2021. The first part of this Foreword is written in my voice. The concluding part is written in a collaborative voice shaped mainly by Professor Susan K. Serrano.

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1. We acknowledge that the use of “America” and “Americans” to refer to the country and people of the United States excludes millions of North, Central, Caribbean, and South Americans, and is viewed by many inhabitants of the Americas as reflecting U.S. imperialism. See, e.g., Pedro A. Malavet, *Reparations Theory and Postcolonial Puerto Rico: Some Preliminary Thoughts*, 13 BERKELEY LA RAZA L.J. 387, 423 (2002) (using “United States” or “U.S.” and “United States/U.S. citizens” or “estadounidenses” to purposefully avoid “the imperialistic appropriation of the terms ‘America’ and ‘American’ to describe only one nation and its citizens”); Berta Esperanza Hernández-Truyol, *Introduction*, to MORAL IMPERIALISM: A CRITICAL ANTHOLOGY 15 n.5 (Berta Esperanza Hernández-Truyol ed., 2002) (noting the “the imperialistic practice of denominating the United States as ‘America’”). For purposes of this essay, we use the terms “America” and “American” “to invoke the social meanings that become associated with those terms as they are commonly used in the United States.” Natsu Taylor Saito, *Model Minority, Yellow Peril: Functions of “Foreignness” in the Construction of Asian American Legal Identity*, 4 ASIAN L.J. 71, 95 (1997).

2. Juliet Ellperin, Dino Grandoni, & Brady Dennis, *With Historic Picks, Biden Puts Environmental Justice Front and Center*, WASH. POST. (Dec. 17, 2020)

SYSTEMIC RACISM AND ENVIRONMENTAL INJUSTICE

But what do we—encompassing policymakers, courts, communities, scholars and media—mean when we say, “America must address its systemic racism”? Particularly when social-legal systems of racial oppression are linked to what is expansively called “the environment”? Nearly twenty years ago, as I attempted to craft answers, I ran headlong into a conceptual-practical challenge: a seemingly one-size-fits-all approach to environmental racism.

The prevailing approach tended to roughly link an environmental resource (land) to a civil rights violation (unequal treatment) in the siting of hazardous or undesirable facilities. A significant advance. But the approach fostered legal claims devolving into fights about proof of racially discriminatory intent, often missing in language, claims, and outcomes what was really at stake for differing communities—and indeed how those communities interacted with and valued “the environment.”

As I wrote then in my Article, *Racializing Environmental Justice*,³ in this law review, co-authored with then-law student Jen-L Wong Lyman, the

established environmental justice framework tends to treat racial minorities as interchangeable and to assume for all communities of color that health and [equal] distribution of environmental burdens are main concerns. For some racialized communities, however, . . . and particularly for some indigenous peoples, environmental justice is mainly about cultural and economic self-determination [rather than equal treatment] and belief systems that connect their history, spirituality, and livelihood to the natural environment.⁴

RACIALIZING ENVIRONMENTAL JUSTICE FRAMEWORK

I then offered a “racializing environmental justice” method of inquiry and analysis that built on concepts of “differential racialization” and “differential empowerment.”

<https://www.washingtonpost.com/climate-environment/2020/12/17/deb-haaland-interior-secretary-biden/> [https://perma.cc/E5QP-AYW8].

3. Eric K. Yamamoto and Jen-L Wong Lyman, *Racializing Environmental Justice*, 72 U. COLO. L. REV. 311 (2001).

4. *Id.* at 311.

To better . . . grapple concretely with the ‘racism’ and ‘justice’ components of environmental justice, the racializing environmental justice method inquires into the ways racial (and Native) communities acquire differing identities, status, and power, and how those differences affect their respective connections to ‘the environment.’ By acknowledging . . . [those] distinctions, the method also frees those communities and their advocates to identify, and [meaningfully] coalesce around, the similarities of treatment by public and private entities with political and economic power.⁵

Drawing from my earlier Critical Race Theory writing,⁶ I thus suggested that “[w]hat is needed is a framework that more subtly interrogates social, political, historical, cultural and power interactions among whites and racial and indigenous groups.” “Differential racialization, within a historical setting marked by white supremacy,⁷ fosters a kind of inquiry . . . that addresses often substantial differences among immigrant racial populations in America, imported slaves, and conquered indigenous peoples.”⁸ Only after grasping the particularities of the “injustice”—suffered by groups in specific situations—can we begin to fashion individual or collective reparative approaches to *doing environmental justice*.

Especially for Native Americans and Native Hawaiians, the threshold inquiry into environmental *injustice* “focuses on the effects of land disposition, culture destruction, loss of sovereignty, and, in turn, on claims to self-determination” in managing land and water and to “nationhood (rather than to equality and integration).”⁹ And it “urges us . . . to begin treating racial and Native communities and their relationship to the environment with greater complexity based on each community’s

5. *Id.* at 342. In crafting this analysis, I acknowledge considerable debt to Michael Omi and Howard Winant for their path-forging theory of “racial formation.” See MICHAEL OMI & HOWARD WINANT, *RACIAL FORMATION IN THE UNITED STATES* (3rd ed. 2014).

6. See Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997).

7. Yamamoto and Lyman, *Racializing Environmental Justice*, *supra* note 3, at 347–49 (“unraveling the often hidden strands of white influence and privilege” not only in government decision-making but also in the environmental movement itself).

8. *Id.* at 341.

9. *Id.* at 342.

cultural, historical, and political experience, and its specific needs and goals.”

Back then I employed the framework to illuminate the struggles of a historically significant Black American church in challenging a local government’s approval of a nearby landfill. In rejecting the lawsuit’s “unequal treatment” claim, the court found inadequate evidence of “discriminatory intent.” Significantly, the lead claimant-group in the suit was a predominantly white-led environmental group. It first raised its own environmental claims about traffic and noise pollution. Only later did the claimant invoke racially disproportionate siting. It did so, though, without advancing the real environmental injustice: the spiritual and cultural desecration of a sacred place founded by freed slaves that served as a hub for worship and Southern Black community life for generations. By the time the church fully entered the fray, it was too late. The court’s ruling “undermined the black community’s ability to call the local government to account for the potentially devastating social and cultural impacts” on the community’s “environment.”¹⁰

I also employed the framework to examine a water controversy in Hawai‘i. A range of private and public disputants initially framed the dispute as bolstering a tourist-driven state economy through agriculture and development at the minimal cost of diverting water flow for a few farmers, environmentalists, and Native Hawaiians. The racializing environmental justice inquiry reframed the injustice: The century-old wrongful diversion of nearly all water from windward streams—originally by agribusiness and currently by developers—decimated Hawaiian communities and traditional indigenous land and cultural practices. And it also recast the remedial imperative—restorative justice for Native Hawaiians. This meant partially reinstating traditional water flows back to windward streams to resurrect native cultural practices, to reanimate spiritual and economic interconnections among land, water, and people, and to serve values of indigenous self-determination.¹¹

10. *Id.* at 238.

11. *Id.* at 351. See D. Kapua‘ala Sproat, *Wai Through Kānāwai: Water for Hawai‘i’s Streams and Justice for Hawaiian Communities*, 95 MARQ. L. REV. 127 (2011) [hereinafter Sproat, *Wai Through Kānāwai*].

CONTINUING IMPORT: INDIGENOUS PEOPLES

That was then. Today, environmental justice is marked by considerable progress, both in theory and practice.¹² And with the intense pressures of global warming and inter-state energy development—and the largely anti-environment practices of the former Trump Administration—the recognized “injustices” sustained by the environment have expanded manifold. Among them are the “long-standing burdens low-income and minority communities have shouldered when it comes to dirty air and water” that the Biden Administration now signals it will address.¹³

Yet, conceptual and practical challenges remain in grappling with environmental racism in this fashion. On the one hand, the one-size fits all approach still often carries the day. The linguistic lumping together of “low-income and minority communities” flattens the problem and hence remedial pathways. On the other, the environmental injustices suffered by racial communities no longer subsume those of Indigenous Peoples.

In the wake of Black Lives Matter protests, the State of California approved path-forging 2020 legislation creating a California task force to conduct a sweeping examination of slavery in California and the United States and to assess the historical and contemporary socio-economic consequences of widespread discrimination against freed Black slaves and their descendants.¹⁴ Standing side-by-side with this initiative, California also has apologized to Native Americans and established a “Truth and Healing Council” to construct a clarified historical record on the state’s systemic oppression of Native peoples and to foster

12. See, e.g., Kristoffer Tigue, *Will 2021 Be the Year for Environmental Justice Legislation? States Are Already Leading the Way*, INSIDE CLIMATE NEWS (Jan. 15, 2021), <https://insideclimatenews.org/news/15012021/environmental-justice-in-2021-legislation/> [<https://perma.cc/3CXQ-WUPM>]; Rick Mullin, *The Rise of Environmental Justice*, CHEMICAL AND ENGINEERING NEWS (Aug. 24, 2020), <https://cen.acs.org/environment/pollution/rise-environmental-justice/98/i32> [<https://perma.cc/HW72-VY2Z>]; Keith Rushing, *Environmental Justice Leaders to Stand Strong in the Trump Era*, EARTHJUSTICE (Dec. 16, 2016) <https://earthjustice.org/blog/2016-december/environmental-justice-leaders-to-stand-strong-in-the-trump-era> [<https://perma.cc/3VAX-YMFZ>].

13. Ellperin, et al., *supra* note 2 (reporting on President Biden’s plans).

14. See Taryn Luna, *California task force will consider paying reparations for slavery*, L.A. TIMES (Sept. 30, 2020).

tribal self-governance and management of land trust resources “in the spirit of truth and healing.”¹⁵

That effort examines the extensive physical, cultural, and environmental harms to California’s numerous Native American groups to promote, among other things, “stewarding and protecting this land that we now share.” The Council’s work is partly premised on political recognition that environment-related injustices suffered by Indigenous Peoples often differ culturally, physically, and spiritually from the disproportionate pollution and siting burdens suffered by “low income and minority communities.” One size need not fit all.

Native Hawaiian scholars, teachers, and others are expanding this inquiry into environmental justice for Indigenous Peoples, employing and refining the earlier proffered *racializing environmental justice* analytical framework. A glimpse into NATIVE HAWAIIAN LAW: A TREATISE,¹⁶ law journal articles,¹⁷ and law fellow projects¹⁸ sheds light on the significance of native self-determination and restorative justice in the face of environmental injustice.

Native Hawaiian legal scholar D. Kapua‘ala Sproat draws on the *racializing environmental justice* inquiry to craft a restorative justice framework linking Indigenous environmental justice claims and human rights principles of self-determination.¹⁹ Acknowledging the often stark differences between groups seeking “equality” and those seeking a form of self-determination, she interrogates the legal controversy over the decades-long diversion of water from Nā Wai ‘Ehā, the “Four Great Waters” of Central Maui. Employing an expanded framework emanating from local legal regimes, she also maps the contours of an

15. OFFICE OF THE TRIBAL ADVISOR, <https://tribalaffairs.ca.gov/state-government/> [<https://perma.cc/7H8Z-DARS>] (describing Governor Newsom’s June 2019 Executive Order N-15-19 creating the Truth and Healing Council).

16. NATIVE HAWAIIAN LAW: A TREATISE (MacKenzie, Serrano & Sproat eds., 2015).

17. See *infra* notes 19–22 and accompanying text.

18. For example, a monthly speaker series at the William S. Richardson School of Law, organized by and often featuring Ka Huli Ao Post-Juris Doctor Legal Fellows, has employed a restorative justice framing to assess Native Peoples’ claims to self-determination, including the return and restoration of ancestral land and resources in the Pacific Islands and on the U.S. continent, and State of Hawai‘i’s trust obligations pursuant to the Hawaiian Homes Commission Act, which seeks to rehabilitate Native Hawaiians (individuals of at least fifty percent Hawaiian blood) by returning them to the land as homesteaders.

19. Sproat, *Wai Through Kānāwai*, *supra* note 11, at 137.

Indigenous right to environmental self-determination through the crafting of meaningful remedies for climate change's impacts on land, water, and Indigenous subsistence and cultural practices.²⁰

More explicitly employing the *racializing environmental justice* framework, legal scholars Melody Kapilialoha MacKenzie and Susan Serrano, and attorney Koalani Kaulukukui, characterized three modern-day Native Hawaiian land reclamations as more than attempts to preserve Hawai'i's natural environment; they were "hard-fought efforts to restore to Native Hawaiians a measure of self-determination, cultural restoration, and economic self-sufficiency."²¹ While the land and environmental controversies were partly about the imposition of disproportionate environmental burdens on Hawaiian communities—the bombing of Kaho'olawe, drilling in the Wao Kele o Puna forest, and commercial development in Waimea Valley—an Indigenous "environmental justice" approach revealed the "complexity of the Native Hawaiian experience by integrating cultural values, history, socioeconomic power, and group needs and goals in defining environmental problems and fashioning meaningful remedies."²²

The forthcoming second edition of *NATIVE HAWAIIAN LAW: A TREATISE* similarly employs a contextual approach that in part embraces the *racializing environmental justice* inquiry as part of a restorative justice framing of Native Hawaiian law. Its "Traditional and Customary Rights and Practices" chapter describes Hawai'i state law's commitment to restorative environmental justice most significantly through several 1978 landmark

20. D. Kapua'ala Sproat, *An Indigenous People's Right to Environmental Self-Determination: Native Hawaiians and Climate Change Devastation*, 35 *STAN. ENVTL. L.J.* 157 (2014).

21. Melody Kapilialoha MacKenzie, Susan K. Serrano & Koalani Laura Kaulukukui, *Environmental Justice for Indigenous Hawaiians: Reclaiming Land and Resources*, 21 *NAT. RESOURCES & ENV'T* 37, 79 (2007).

22. *Id.*; see also Elena Bryant, *Innovation or Degradation?: An Analysis of Hawai'i's Cultural Impact Assessment Process as a Vehicle of Environmental Justice for Kānaka Maoli*, 13 *ASIAN-PAC. L. & POL'Y J.* 230, 234 (2011) (employing the *Racializing Environmental Justice* framework to rethink Hawai'i's environmental laws as vehicles for restorative justice for Native Hawaiians, and to assess the cultural impacts of potential renewable energy projects); Trevor N. Tamashiro, *Moloka'i: Resurrecting 'Aha Moku on the "Last Hawaiian Island,"* 12 *ASIAN-PAC. L. & POL'Y J.* 295, 300 (2010) (using the *Racializing Environmental Justice* framework to propose a return to Native Hawaiian natural resource management systems on Moloka'i Island to foster Native Hawaiian self-governance over natural resources).

amendments to Hawai‘i’s Constitution, including the recognition of and protection for traditional and customary practices and the adoption of the public trust doctrine.²³

Indeed, the historic Native Hawaiian resistance movement to block the construction of the Thirty Meter Telescope atop Mauna Kea, Hawai‘i’s largest and most sacred mountain, can be understood as an Indigenous environmental justice issue. Decades of state mismanagement on a mountain already crowded with thirteen telescopes caused well-documented natural and cultural destruction.²⁴ But the struggle on the mountain is about much more: it is emblematic of the longstanding damage of U.S. colonization (land dispossession, cultural destruction, and the loss of political sovereignty), and in turn represents an Indigenous restorative justice movement for self-determination, including the return and restoration of ancestral land and resources.²⁵

Native American scholars and others similarly illuminate the *racializing environmental justice* themes in their analyses of Native Peoples’ movements to protect land, resources, and sacred spaces. Global Studies scholar Jaskiran Dhillon contends that the Standing Rock Sioux resistance to the Dakota Access Pipeline “illustrates that a fight for environmental justice must be framed, first and foremost, as a struggle for Indigenous sovereignty.”²⁶ American Studies scholar Nick Estes similarly

23. David M. Forman & Susan K. Serrano, *Traditional and Customary Rights and Practices*, in *NATIVE HAWAIIAN LAW: A TREATISE* (MacKenzie, Serrano, Sproat, and Tuteau eds., 2nd. ed. forthcoming 2022).

24. See Office of Hawaiian Affairs, Mauna Kea, <https://www.oha.org/maunakea/#:~:text=As%20a%20result%2C%20the%20state,this%20be-loved%20and%20sacred%20place.&text=Left%20with%20no%20other%20re-course,documented%20mismanagement%20of%20Mauna%20Kea> (last visited 1/14/21 9:44 AM) [<https://perma.cc/LF4G-P4KU>] (compiling records showing longstanding state mismanagement).

25. See Trisha Kehaulani Watson-Sproat, *Why Native Hawaiians Are Fighting to Protect Maunakea from a Telescope*, VOX (Jul. 24, 2019), <https://www.vox.com/identities/2019/7/24/20706930/mauna-kea-hawaii> [<https://perma.cc/F49U-W58E>] (connecting the state’s mismanagement of Hawai‘i’s natural resources to the colonization of Native Hawaiians); see also Elias König, *Why the Mauna Kea Protests Are So Challenging to the Mainstream Climate Movement*, TRUTHOUT (Oct. 3, 2019), <https://truthout.org/articles/why-the-mauna-kea-protests-are-so-challenging-to-the-mainstream-climate-movement/> [<https://perma.cc/73KF-H5Z7>] (characterizing the Mauna Kea struggle as both an “ecological” and “anti-colonial” fight).

26. Jaskiran Dhillon, *What Standing Rock Teaches Us About Environmental Justice*, in *STANDING WITH STANDING ROCK: VOICES FROM THE #NODAPL MOVEMENT* (Nick Estes & Jaskiran Dhillon eds., 2019) (contending that “DAPL

asserts that a July 2020 court ruling halting oil flow through the Dakota Access Pipeline is “part of a broader movement for decolonization that seeks to restore land to Indigenous people and implement a much more comprehensive framework for environmental justice.”²⁷ A sampling of other recent books and law review articles also reveals similar themes of Indigenous self-determination in the face of tailored notions of environmental injustice.²⁸

MOVING FORWARD

In the face of mounting environmental desecration, the new Biden-Harris Administration highlighted environmental justice as a high priority.²⁹ How that commitment plays out in the policy halls and courts will depend in part on how disparate groups, government officials, and scholars grapple with how

must be viewed as the most recent incarnation of environmental harm that has found its legitimation and footing in colonialism and occupation”); *see also* Andrew Curley, *Beyond Environmentalism: #NoDAPL as Assertion of Tribal Sovereignty*, in *STANDING WITH STANDING ROCK*, *supra* (asserting that while Indigenous Peoples’ struggles are linked to environmental justice campaigns, they are better understood as struggles for self-determination and territorial independence).

27. Nick Estes, *The Supreme Court Ruling on Oklahoma Was Welcome, but Indigenous People Deserve More*, NBC News (Jul. 11, 2020) <https://www.nbcnews.com/think/opinion/supreme-court-ruling-oklahoma-was-welcome-indigenous-people-deserve-more-ncna1233526> [https://perma.cc/Q37U-SB8Q]; *see also* Nick Estes, *The Battle for the Black Hills*, HIGH COUNTRY NEWS (Jan. 1, 2021), <https://www.hcn.org/issues/53.1/indigenous-affairs-social-justice-the-battle-for-the-black-hills> [https://perma.cc/S5GQ-4XBS].

28. *See, e.g.*, INDIGENOUS ENVIRONMENTAL JUSTICE 9–11 (Karen Jarratt-Snyder & Marianne O. Nielsen eds., 2020) (articulating an Indigenous environmental justice framework by, in part, connecting environmental justice issues to ongoing impacts of colonization, including loss of land, resources, lives and religious freedom); DINA GILIO-WHITAKER, *AS LONG AS GRASS GROWS: THE INDIGENOUS FIGHT FOR ENVIRONMENTAL JUSTICE FROM COLONIZATION TO STANDING ROCK* (2019) (asserting that Indigenous Peoples’ assertions of sovereignty have led to advances in distinguishing “Indigenized environmental justice” from more traditional environmental justice); Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1625 (2007) (constructing an Indigenous right to environmental self-determination that would allow Indigenous Peoples to protect their traditional, land-based cultural practices and prevent climate change practices that jeopardize their physical and cultural survival); Danielle Delaney, *Under Coyote’s Mask: Environmental Law, Indigenous Identity, and #NoDAPL*, 24 MICH. J. RACE & L. 299 (2019) (highlighting the disconnect between environmental laws and Indigenous demands for justice).

29. *See* The Biden Plan to Secure Environmental Justice and Equitable Economic Opportunity, <https://joebiden.com/environmental-justice-plan/> (last visited 1/15/21 1:17 PM) [https://perma.cc/PNM6-WUVT].

“environmental injustice” is experienced on the ground by cultural communities. The *racializing environmental justice* framework advanced twenty years ago sought to infuse complexity into that assessment and encourage nuance in fashioning tailored *justice* remedies. And it emphasized the multifaceted nature of environmental justice for Indigenous Peoples.

This Foreword points to both the persistence of the original narrow framing as well as a substantial remaking of understandings of environmental justice particularly for Native Hawaiians and Native Americans. What will come next?