SITTING DUCKS AND TITLE VI OF THE CIVIL RIGHTS ACT: PREVENTING THE SITING OF NEW PRISONS NEAR HARMFUL POLLUTANTS

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INTRODUCTION

Two key civil rights concerns of our time, environmental injustice and mass incarceration, are connected in ways not often appreciated. People in minority communities are subject to a disproportionate amount of environmental pollution and are significantly more likely to be incarcerated.[1] Inmates, in turn, are often subject to increased environmental hazards because many carceral facilities are built on or near sites of toxic pollution. Today, the intersection of environmental injustice and mass incarceration is receiving increased attention. Activists are fighting to prevent new prisons from being sited near sources of pollution, while legal scholars are researching possible remedies available to incarcerated individuals.[2] The overlap of these issues is no coincidence. Historically, government actors at the federal, state, and local levels have worked deliberately to keep environmental pollution away from middle class, white neighborhoods at the expense of lower income, minority communities.[3] Meanwhile, government policies have imposed new means of oppression on minority communities following the passage of the Civil Rights Act of 1964.[4]

This Note considers whether Title VI of the Civil Rights Act could provide a legal remedy by which state prisoners could prevent the construction of future prisons on sites of environmental pollution. Part I will discuss the rise of the environmental justice movement and its limited success. Next, Part II will discuss the parallel rise of mass incarceration and litigation strategies available to the incarcerated. Part III will consider the overlap between environmental injustice and mass incarceration, while Part IV will examine previously considered legal remedies for this issue. Finally, Part VI will discuss the legal framework of Title

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1. Maggie Leon-Corwin et al., *Polluting Our Prisons? An Examination of Oklahoma Prison Locations and Toxic Releases, 2011-2017*, 22 PUNISHMENT & SOC'Y 413, 414 (2020).

2. *See* Candice Bernd et al., *America's Toxic Prisons: The Environmental Injustices of Mass Incarceration*, Truthout (June 1, 2017), https://truthout.org/articles/america-s-toxic-prisons-the-environmental-injustices-of-mass-incarceration/.

3. *See* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 51–53; 56–57 (2017).

4. 42 U.S.C. § 2000d (1964).

VI, and Part VII will apply this framework to the issue at hand. Unfortunately, this Note will conclude that Title VI is not a viable means to prevent the construction of future prisons on sites of environmental pollution, largely because of restrictions to Title VI jurisprudence.

I. ENVIRONMENTAL JUSTICE AND EXECUTIVE ORDER 12898

The Environmental Protection Agency ("EPA") defines environmental justice as "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies."[5] Historically, minority communities have been subjected to increased levels of environmental toxins due to intentional decisions by the government, as well as disenfranchisement.

Throughout the twentieth century, federal, state, and local governments worked together to segregate residential neighborhoods across the United States.[6] During this same period, manufacturing operations in urban areas were increasing.[7] By locating industrial operations in segregated neighborhoods, local governments ensured that minority communities, rather than white communities, were subject to the health issues which resulted from exposure to environmental toxins.[8] Zoning laws "attempted to protect white neighborhoods from deterioration by ensuring that few industrial or environmentally unsafe businesses could locate in them."[9] Further, when white families protested a proposed location for a new source of pollution, they were taken seriously, but when minority families protested, they were ignored.[10]

The growing issue of environmental injustice came into the national spotlight in 1982, when the North Carolina state government chose to dump 6,000 truckloads of toxic PCB-laced soil in Warren County—a rural, Black community home to a new hazardous waste landfill.[11] Residents protested the pollution for six weeks, and although they ultimately lost, the media attention sparked a new civil rights movement.[12] Following the events in Warren County, a number of studies confirmed that environmental injustice was prevalent across the nation. For example, a 1983 analysis by the U.S. General Accounting Office "concluded that race was so strong a statistical predictor of where hazardous waste facilities

5. *Environmental Justice*, EPA, https://www.epa.gov/environmentaljustice (last visited May 3, 2021).

6. *See* RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 51–53 (2017).

7. *Id.* at 54.

8. *Id.* at 56–57.

9. *Id.* at 57.

10. *Id.* at 56.

11. Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NAT. RES. DEF. COUNCIL (Mar. 17, 2016), https://www.nrdc.org/stories/environmental-justice-movement.

12. *Id.*

could be found that there was only a one-in-10,000 chance of the racial distribution of such sites occurring randomly."[13]

This widespread movement was recognized in 1994 by President Clinton, who issued Executive Order 12898 – Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.[14] Under the Order, federal agencies are directed to identify and address the adverse and disproportionate effects of their actions on the health and environment of minority and low income populations, develop a strategy for implementing environmental justice, prevent discrimination in programs which affect the environment or human health, and promote access to public information as well as the participation of environmental justice communities.[15]

Unfortunately, Executive Order 12898 has not been much help in actual practice, primarily because it has never been taken up by Congress. As a result, the Order "has had little impact on federal regulatory decision making."[16] More often than not, federal agencies have concluded that their actions lacked an environmental justice impact, and therefore found they were not required to comply with the Order.[17] Since the Order was never codified, the EPA has not been able to mandate compliance. Additionally, Executive Order 12898 bars judicial review, preventing individuals subject to environmental injustices from using the Order to obtain relief.[18]

The continued prevalence of environmental injustice across the United States demonstrates how Executive Order 12898 has failed. Although the instances of increased pollution in minority communities are countless, this issue found its way to the national spotlight once again in 2016, when President Obama declared a state of emergency in Flint, Michigan.[19] During the Flint Water Crisis, residents of the primarily Black populated city were exposed to toxic levels of lead.[20] This widespread poisoning was a result of the city switching its water source from treated Detroit River water to polluted Flint River water and failing to prevent corrosion of the city's plumbing.[21] It is notable that this decision was made while Flint was under emergency management, meaning residents were excluded from

13. ROTHSTEIN, *supra* note 2, at 54–55.

14. Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, Exec. Order No. 12,898, 3 C.F.R. §859 (1955), *reprinted as amended in* 42 U.S.C. §4321 (1994 & Supp. VI 1998).

15. *Id.*

16. Elizabeth Bradshaw, *Tombstone Towns and Toxic Prisons: Prison Ecology and the Necessity of an Anti-prison Environmental Movement*, 26 CRITICAL CRIMINOLOGY 407, 410 (2018).

17. *Id.*

18. Nathalie Prescott, *Prisoner (In)consideration in Environmental Justice Analyses*, 1 GEO. ENV'T L. REV. ONLINE, https://gielr.wordpress.com/2016/05/31/prisoner-inconsideration-in-environmental-justice-analyses/ (May 31, 2016).

19. Tim Dickinson, *WTF Is Happening in the Flint Water Crisis, Explained*, ROLLING STONE (Jan. 22, 2016, 5:35 PM), https://www.rollingstone.com/politics/politics-news/wtf-is-happening-in-the-flint-water-crisis-explained-227776/.

20. *Id.*

21. *Id.*

the political process.[22] The Flint Water Crisis demonstrates that, despite decades of national effort, minority communities are still subjected to increased environmental pollution from indifferent government actors and disenfranchisement.

II. MASS INCARCERATION AND PRISONER'S RIGHTS

According to Michelle Alexander, "[s]ince the nation's founding, African Americans repeatedly have been controlled through institutions such as slavery and Jim Crow, which appear to die, but then are reborn in new form, tailored to the needs and constraints of the time."[23] The latest of these institutions is mass incarceration, which began to appear in the 1960s when the term "law and order" was popularized in resistance to the Civil Rights Movement.[24] Those in opposition to the Movement argued that "law and order" was necessary to put an end to the civil unrest increasing crime.[25] When the Civil Rights Act of 1964 was ultimately passed, this narrative gained popularity as advocates for segregation switched their focus to being tough on crime.[26]

This switch in focus, and the laws and policies that followed, led to a 500% increase in the number of people incarcerated over the last forty years.[27] Particularly, the 1980's War on Drugs effectuated this massive increase.[28] While the environmental justice movement was gaining traction, the criminalization of drugs was leading to disproportionate incarceration rates within the same communities overburdened by pollution. "Black men are six times as likely to be incarcerated as white men and Latinos are 2.5 times as likely."[29] While white men have a one-in-seventeen chance of being incarcerated in their lifetime, Hispanic men have a one-in-six chance and Black men have a shocking one-in-three chance.[30] Although the likelihood of incarceration is lower for women overall, the same disparities exist between white, Black, and Hispanic women, with Black women being the most likely to face incarceration.[31] The disparities between these statistics demonstrate the effectiveness of America's racist criminal justice system, as well as a key point of overlap between environmental justice and mass incarceration.

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22. *Id.*

23. MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 21 (rev. ed. 2011).

24. *Id.* at 41.

25. *Id.*

26. *Id.* at 43.

27. *Criminal Justice Facts*, SENTENCING PROJECT, https://www.sentencingproject.org/criminal-justice-facts/ (last visited May 17, 2021).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

42 U.S.C. § 1983

Those held in custody within a state or local prison system can turn to 42 U.S.C. § 1983 to seek judgement for harms suffered during incarceration.[32] 42 U.S.C. § 1983 provides a cause of action to challenge a deprivation of federal civil rights by a state actor.[33] It is notable that because § 1983 only applies to violations by state actors, or those acting "under color of state law," only those incarcerated in state and local prisons are protected under the statute; however, claims against state actors may still be filed in federal court .[34] The Supreme Court has interpreted "under color of state law" to mean a misuse of power by a state actor, resulting in a deprivation of rights, which was possible only because the wrongdoer had the authority of state law.[35] Examples of state actors in the context of criminal justice include correctional officers, heads of correctional institutions, and directors of state correctional departments.[36]

Barriers to Prisoner Litigation

Prisoners face a number of barriers to litigation, making it more difficult for those incarcerated to obtain relief. One such barrier is the Prison Litigation Reform Act ("PLRA"), a 1996 federal law which works to minimize the number of prisoner lawsuits in federal court by making prisoners jump through procedural hoops before they can file a claim.[37] The PLRA states that "[n]o 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."[38] Therefore, pursuant to the PLRA, in order to bring a federal action, prisoners must first file a grievance with a prison official, if possible, and then go through all possible levels of appeal.[39]

Prisoners are additionally limited in the relief they can receive from federal civil actions challenging either the conditions of their confinement or the effect of actions by government officials on them.[40] The PLRA provides:

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32. Danielle C. Jefferis, *Delegating Care, Evading Review: The Federal Tort Claims Act and Access to Medical Care in Federal Private Prisons*, 80 LA. L. REV. 37, 40 (2019).

33. *Id*; *see also* 42 U.S.C. § 1983 (1871).

34. *Id.*

35. Steven L. Winter, *The Meaning of "Under Color of" Law*, 91 MICH. L. REV. 323, 369 (1992), *citing United States v. Classic*, 313 U.S. 299 at 326 (1941).

36. ROGER A. HANSON & HENRY W.K. DALEY, U.S. DEP'T OF JUST., CHALLENGING THE CONDITIONS OF PRISONS AND JAILS: A REPORT ON SECTION 1983 LITIGATION 10 (Dec. 1994), https://www.prisonpolicy.org/scans/bjs/ccopaj.pdf.

37. 42 U.S.C. § 1997e (2013); *see also Know Your Rights: The Prison Litigation Reform Act (PLRA)*, ACLU (Nov. 2002), https://www.aclu.org/sites/default/files/images/asset_upload_file79_25805.pdf.

38. 42 U.S.C. § 1997e(a) (2013).

39. 42 U.S.C. § 1997e(a) (2013); *see also Know Your Rights: The Prison Litigation Reform Act (PLRA)*, *supra* note 32.

40. 18 U.S.C. § 3626 (1997).

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right.[41]

Since its passage in 1996, the barriers presented by the PLRA have caused a significant decline in the number of lawsuits filed by prisoners, as well as prisoners' chance of success in federal court.[42] It is notable that because the PLRA is a federal statute, state courts are not bound by its restrictions. But, unfortunately for inmates seeking redress, a majority of states have their own similar statutes regulating inmates' access to their respective state court systems.[43]

III. THE INTERSECTION BETWEEN ENVIRONMENTAL JUSTICE AND MASS INCARCERATION

Although all residents of Flint, Michigan suffered from the aforementioned Flint Water Crisis, those incarcerated in the city were especially vulnerable to the water pollution and negative health effects it caused. While those on the outside had the option to consume bottled water, people housed in Flint's County Jail "had no option but to drink, shower, and make food with the contaminated city water."[44] What happened to the residents of the Flint County Jail during the Flint Water Crisis demonstrates the first key point of intersection between environmental justice and mass incarceration: the amplification of environmental toxins to which those incarcerated are exposed.

Increased exposure happens for a number of reasons, the most aggravating of which is prison proliferation, or "the process of prison placement."[45] Historically, communities have resisted the placement of carceral facilities in their neighborhoods, just as they would resist a source of pollution.[46] But more recently, depressed rural communities have campaigned to win prison contracts in the hope that their development will lead to economic growth.[47] These communities are often the site of defunct industrial operations, which continue to release environmental toxins.[48] Regardless of whether these facilities are desirable to the

41. 18 U.S.C. § 3626(a)(1)(A) (1997).

42. Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, 5 U.C. IRVINE L. REV. 153, 156, 163 (2015).

43. Kelsey D. Russell, Comment, *Cruel and Unusual Construction: The Eighth Amendment as a Limit on Building Prisons on Toxic Waste Sites*, 165 U. PA. L. REV. 741, 780 (2017).

44. Prescott, *supra* note 14.

45. Maggie Leon-Corwin et al., *Polluting Our Prisons? An Examination of Oklahoma Prison Locations and Toxic Releases, 2011-2017*, 22 PUNISHMENT & SOC'Y 413, 419 (2020).

46. Tara Opsal & Stephanie Malin, *Prisons as LULUs: Understanding the Parallels between Prison Proliferation and Environmental Injustices*, 90 SOCIO. INQUIRY 579, 584–85 (2020).

47. *Id.* at 585.

48. *See id.* at 588–89.

communities where they are placed, the overlap in siting between prisons and industry increases prisoners' risk of exposure to environmental pollution.

This is an increase from the already above-average chance for exposure prior to incarceration faced by those most likely to be locked up. As previously discussed, people of color are significantly more likely to be incarcerated than white people, and, on the outside, Black communities generally experience the greatest exposure to environmental hazards, followed by Hispanic communities.[49] This overlap is another key point of intersection between environmental justice and mass incarceration. Incarcerated populations are "a distinctly vulnerable community from an [environmental justice] perspective," because of the over-representation of minority populations.[50] Further, prisons themselves "produce a lengthy list of environmental hazards" which can negatively impact the communities in which they are placed, as well as the prisoners housed within them.[51] Some of these hazards include the removal of natural resources, high volumes of resource consumption, and high volumes of produced waste.[52]

An additional point of intersection is disenfranchisement. While minority communities' complaints regarding the siting of polluting industry near their residences are largely ignored, those incarcerated have no choice in deciding where they will reside. Further, across the United States, prisoners cannot vote while serving their sentence, or while out on probation or parole.[53] And although people in jails awaiting adjudication are eligible to vote, the vast majority cannot due to lack of access to the voting process.[54]

Each of these issues has been exacerbated with the rise in rates of incarceration. As mass incarceration has developed, the overlap between those most affected by environmental injustice and those most affected by incarceration has become more prevalent. Further, the extreme growth in incarceration has led to the building of over one thousand new prisons over the last four decades.[55] The numerous new prisons needed to support the growing incarcerated population have been increasingly sited near toxic industry, exposing this growing population to dangerous pollutants.[56] Additionally, as prisons have become overpopulated, the harmful effects of prisons on the communities in which they are placed has also increased.[57]

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49. Leon-Corwin et al., *supra* note 40, at 416.

50. Andrea C. Armstrong, *Death Row Conditions Through an Environmental Justice Lens*, 70 ARK. L. REV. 203, 211 (2017).

51. Leon-Corwin et al., *supra* note 40, at 414.

52. *Id.*

53. Nicole D. Porter, *Voting in Jails,* SENTENCING PROJECT (May 7, 2020), https://www.sentencingproject.org/publications/voting-in-jails/.

54. *Id.*

55. Opsal & Malin, *supra* note 41, at 584.

56. *See id.* at 586–89.

57. *See id.* at 590.

Case Studies

Evidence of the intersection of environmental justice and mass incarceration is abundant. For example, in a recent comparison of toxic release emissions across Oklahoma zip codes, researchers found that total emissions were significantly higher in zip codes containing prisons than zip codes free of carceral facilities.[58] Since Oklahoma has an incarceration rate 1.6 times higher than the national average, and the state has been subject to a number of environmental concerns over the past few decades, the study is highly representative of the link between prisons and sources of pollution.[59] This research reveals issues not only for prisoners, but for the free population living in prison zip codes.[60]

Additionally, the COVID-19 pandemic has shed light on this critical intersection. Since the beginning of the pandemic in March 2020, the hardest hit communities have been those that were previously overburdened by poverty, pollution, and the illnesses that come with long-term exposure to environmental toxins.[61] One reason for this correlation is pre-existing conditions caused by pollution. One study found that communities subject to air pollution have been more likely to die from the pandemic due to the health conditions caused by long-term exposure.[62] Disproportionate levels of exposure to environmental toxins is an issue faced by minority communities and prisoners alike. On the outside, minority populations, including Blacks and Hispanics, have faced unequally high infection rates of COVID-19 in comparison to whites and their portion of the general population.[63] On the inside, those incarcerated during the pandemic have been more than five times as likely to be infected by COVID-19, and significantly more likely to die from the virus, than the average American.[64]

While the Oklahoma study and COVID-19 data show the general prevalence of this issue, more specific case studies highlight the true disparate impact of environmental pollution faced by prisoners. For example, the Central Michigan and St. Louis Correctional facilities, housing more than 3,500 prisoners, are located within two miles of the former Velsicol Chemical Corporation plant.[65] Now a Superfund site, the plant has contaminated the surrounding groundwater with

58. Leon-Corwin et al., *supra* note 40, at 425.

59. *Id.* at 414–15, 420.

60. *Id.* at 428.

61. *See* Yvette Cabrera, *Coronavirus Is Not Just a Health Crisis—It's an Environmental Justice Crisis*, GRIST (Apr. 24, 2020), https://grist.org/justice/coronavirus-is-not-just-a-health-crisis-its-an-environmental-justice-crisis/.

62. X. Wu et al., *Air Pollution and COVID-19 Mortality in the United States: Strengths and Limitations of an Ecological Regression Analysis*, 6 SCI. ADVANCES eabd4049 (2020), https://projects.iq.harvard.edu/covid-pm.

63. Daniel Wood, *As Pandemic Deaths Add Up, Racial Disparities Persist—And In Some Cases Worsen*, NPR (Sept. 23, 2020), https://www.npr.org/sections/health-shots/2020/09/23/914427907/as-pandemic-deaths-add-up-racial-disparities-persist-and-in-some-cases-worsen.

64. *Covid-19's Impact on People in Prison*, EQUAL JUST. INITIATIVE (Apr. 16, 2021), https://eji.org/news/covid-19s-impact-on-people-in-prison/.

65. Bradshaw, *supra* note 12, at 407.

hazardous chemicals, including DDT, PBB, and pCBSA.[66] These chemicals are known to cause breast cancer, diabetes, and abnormal estrogen and thyroid levels, among other conditions.[67] Despite the link between these health issues and the chemicals, in 2006, the EPA and Michigan Department of Environmental Quality determined that levels of pCBSA were safe for consumption, leaving prisoners with no choice but to drink the contaminated water.[68]

Further, in Fayette County, Pennsylvania, the State Correctional Institute (SCI) Fayette was built on top of a coal refuse site covered with coal ash in order to prevent further refuse pollution.[69] The refuse site previously produced millions of tons of coal combustion waste, as well as two coal slurry ponds that now surround the prison.[70] The pollution from both the refuse and coal ash has caused toxic metal levels in the groundwater, exceeding state and national safety standards, as well as particulate matter pollution levels in violation of the Pennsylvania Air Pollution and Control Act.[71] A year-long investigation conducted by the Abolitionist Law Center found that prisoners at SCI Fayette are in declining health since being moved to the prison, suffering from symptoms connected to toxic waste and coal ash exposure, including respiratory and sinus issues, lung infections, gastrointestinal problems, skin conditions, and tumors.[72] Residents of the nearby town also suffer from these conditions, and have significantly higher mortality rates than the national average from these medical problems.[73]

EPA's Neglect of Prisoners

The EPA has repeatedly omitted incarcerated populations from its policies, rules, acts, and agendas, resulting in a lack of protection from environmental harms. For example, the EPA has not included prisoners in its environmental justice action agendas, which detail the Agency's strategies to combat issues of environmental injustices. After the EPA failed to include incarcerated populations in its 2014 agenda, the Human Rights Defense Center submitted a public comment urging the EPA to include this group in its next analysis.[74] Even though more than 130 other activist groups signed onto the comment, the EPA once again omitted prisoners in its EJ 2020 Action Agenda Framework.[75] The failure to protect

66. *Id.*

67. *Id.* at 414.

68. *Id.* at 408.

69. *See generally*, DUSTIN MCDANIEL ET AL., NO ESCAPE: EXPOSURE TO TOXIC COAL WASTE AT STATE CORRECTIONAL INSTITUTION FAYETTE (2014), http://abolitionistlawcenter.org/wp-content/uploads/2014/09/no-escape-3-3mb.pdf.

70. *Id.* at 1.

71. *Id.* at 3–4.

72. *Id.* at 1–2.

73. *Id.* at 4.

74. Candice Bernd et al., *America's Toxic Prisons: The Environmental Injustices of Mass Incarceration*, TRUTHOUT (June 1, 2017), https://truthout.org/articles/america-s-toxic-prisons-the-environmental-injustices-of-mass-incarceration/.

75. *Id.*

incarcerated populations is further evidenced by the lack of enforcement actions pursued by the EPA to minimize environmental hazards inside carceral facilities. The EPA has the statutory "authority to enter and inspect facilities, to request information, and assist facilities in developing or remedying violations."[76] Yet, the Agency has activated this authority sparsely and to little effect.[77]

To make matters worse, the EPA is aware of the problems occurring inside carceral facilities. While it would be one thing to not correct a problem to which it was blind, the EPA has specifically addressed environmental justice concerns in prisons. For ten years, ending in 2011, EPA's Region 3 office ran a prison initiative to examine compliance with environmental laws and policies in carceral facilities.[78] In 2003, Region 3 reported that its inspections revealed that "many prisons have room for improvement," citing issues with air, water, and hazardous waste pollution.[79] But little to no action was taken in light of this report, and, in 2015, this information was removed from the Agency's website.[80]

Additionally, as previously discussed, prison proliferation is the main reason incarcerated populations are subject to environmental hazards. Despite this, the EPA does not require prisoners themselves to be considered in the siting of federal prisons. Although this Note focuses on prisoners housed in state and local facilities, who may bring claims under Title VI of the Civil Rights Act of 1964, this omission is still a notable oversight by the Agency. Under one of the EPA's main statutes, the National Environmental Policy Act ("NEPA"), federal agencies are required to prepare Environmental Impact Statements ("EISs"), in which they consider the impacts of their proposed development on both the natural and human environment.[81] Although the Bureau of Prisons ("BOP") is required to consider the impact of a new prison on surrounding minority and low-income populations, it has never considered how the location will affect those who will actually be housed there.[82] The gap in this analysis is amplified by the EPA's mandates for other federal agencies. For example, the Department of Housing and Urban Development is specifically required to consider the future residences of its proposed development when preparing an EIS.[83]

IV. PRIOR ATTEMPTS TO PROTECT PRISONER'S FROM ENVIRONMENTAL INJUSTICE

EIS Complaint

The EPA and BOP's joint failure to consider prisoners in NEPA-required Environmental Impact Statements has not gone unnoticed. Activist groups, including the aforementioned Human Rights Defense Center, recently challenged

76. Armstrong, *supra* note 45, at 220.

77. *See id.* at 221–22.

78. Bernd et al., *supra* note 69.

79. *Id.*

80. *Id.*

81. Prescott, *supra* note 14.

82. *Id.*

83. *Id.*

the BOP's omission of prisoners in an EIS regarding a new prison to be built in Letcher County, Kentucky on top of a former MTR mining operation.[84] This type of mining operation degrades the landscape, polluting the groundwater with carcinogens, which has led to increased rates of cancer and birth defects.[85] In its lawsuit, the activist groups, along with prisoners at risk of being transferred to the facility, argued that the BOP violated NEPA and the Administrative Procedure Act by "failing to consider the direct, indirect and cumulative public health impacts on inmates and correctional officers who will live and work" at the proposed prison.[86] Additionally, plaintiffs alleged that this inconsideration violated the mandate that EISs incorporate Executive Order 12898 when applicable.[87]

Following the plaintiff's filing, the BOP withdrew its siting decision.[88] While the lawsuit was not adjudicated on the merits, the BOP's withdrawal demonstrates how challenging an EIS could estop the BOP from building a prison near a site of harmful environmental pollution. Although, as previously noted, this type of challenge would not apply to state and local carceral facilities outside the BOP's jurisdiction, its success highlights the possibility that other claims regarding environmental injustices in prisons may be taken seriously moving forward.

Eighth Amendment

Another avenue for relief that has been considered is an Eighth Amendment Cruel and Unusual Punishment lawsuit. Prisoners can challenge the conditions of their confinement on these grounds through a § 1983 action against the prison or department of corrections housing them.[89] This claim could be brought in either federal court directly under the Eighth Amendment, or in state court under the Fourteenth Amendment's conveyance of Eighth Amendment protections.[90] Although, historically, the Cruel and Unusual Punishment Clause was not used to address conditions of confinement, the Supreme Court began to recognize these claims, "making it clear that conditions of confinement were subject to Eighth Amendment scrutiny in a line of cases starting with *Estelle v. Gamble*."[91] Today, to maintain a "conditions of confinement" claim, an inmate must show (1) that they were subject to a substantial risk of serious harm and (2) that a prison official acted

84. Bernd et al., *supra* note 69.

85. Second Amended Complaint for Declaratory and Injunctive Relief at 5–6, Barroca v. Bureau of Prisons, No. 1:18-cv-02740 (D.D.C. Apr. 23, 2019).

86. *Id.* at 8.

87. *Id.* at 58.

88. *MEDIA RELEASE: Prisoners and Activists Stop New Prison on Coal Mine Site in Kentucky*, ABOLITIONIST L. CTR. (June 20, 2019), **Error! Hyperlink reference not valid.**https://abolitionistlawcenter.org/2019/06/20/media-release-inmates-and-activists-stop-new-prison-on-coal-mine-site-in-kentucky/.

89. *See* Estelle v. Gamble, 429 U.S. 97 (1976).

90. Russell, *supra* note 38, at 779.

91. *Id.* at 750–51.

with deliberate indifference to that risk, while being aware of it and its harmful effects.[92]

Although not yet challenged under the Cruel and Unusual Punishment Clause, subjecting incarcerated populations to human-made toxic environmental conditions could fall within its scope.[93] Lending support to this assertion, prisoners have succeeded in Eighth Amendment claims against excessive heat in recent years. In *Hope v. Pelzer*, the Supreme Court recognized that prisoners' exposure to extreme heat can constitute Cruel and Unusual Punishment.[94] The Ninth and Fifth Circuits have held the same in *Graves v. Arpaio* and *Ball v. Leblanc*, respectively.[95]

More recently, the Southern District of Texas, Houston Division, granted a preliminary injunction requiring the Wallace Pack geriatric prison facility to provide its residents with clean water during months of excessive heat in *Cole v. Collier*.[96] Plaintiffs brought a § 1983 claim against the Texas Department of Criminal Justice, alleging inmates were exposed to both excessive heat and water with arsenic levels significantly higher than permitted by the EPA.[97] In granting the injunction, the court reasoned that "among the duties imposed by the Eighth Amendment is the duty to provide safe drinking water when the temperatures are so hot that excessive water consumption is recommended, and necessary, to prevent heatstroke or other heat-related injuries."[98] The recognition of water pollution along with excessive heat in this case brings the jurisprudence another step closer to recognizing human-caused conditions. Further, because the Eighth Amendment is flexible, with the definition of cruel and unusual punishment changing along with social values, more recognition of the intersection of environmental justice and mass incarceration could lead to prisoners' success moving forward.[99]

Importantly, it has been suggested that the Eighth Amendment could be used to prevent future prisons from being built on or near hazardous sources of pollution. The first prong of the Cruel and Unusual Punishment standard can be satisfied by forthcoming harm, so long as the plaintiff shows "the injury's seriousness, the likelihood of the injury occurring, and that the risk 'violates contemporary standards of decency to expose anyone unwillingly to such a risk.'"[100] A claim to enjoin construction of a planned prison under the Eighth Amendment "could succeed on the theory that the prison is being designed with deliberate indifference to its future occupants."[101] For example, it has been

92. *Id.* at 745, 756–57.

93. *See* Brenna Helppie-Schmieder, Note, *Toxic Confinement: Can the Eighth Amendment Protect Prisoners from Human-Made Environmental Hazards?*, 110 NW. U. L. Rev. 647, 661 (2016).

94. *Id.* at 658–59.

95. *Id.* at 659.

96. Court Order Granting Preliminary Injunction, Cole v. Collier, No. 4:14-cv-01698, at 2 (S.D. Tex. June 21, 2016).

97. *See id.* at 1.

98. *Id.* at 12.

99. Helppie-Schmeider, *supra* note 88, at 652.

100. *Id.* at 655.

101. Russell, *supra* note 38, at 770.

suggested that an Eighth Amendment claim could have also been pursued to prevent the construction of the prison in Letcher County, Kentucky, mentioned above.[102]

Cutting against the potential for success in this area is the ability for prison officials to rely on reports demonstrating a lack of risk, leading to an inability for prisoners to satisfy the first prong of the legal standard. In the case *Rouse v. Caruso*, inmates at the aforementioned Central Michigan Correctional Facility brought an Eighth Amendment claim, alleging cruel and unusual punishment from the polluted water they were forced to drink.[103] The judge dismissed the claim, stating that prison officials acted reasonably in relying on reports prepared by the EPA and the Michigan Department of Environmental Quality stating that levels of the contaminates in the water were safe.[104]

To overcome such evidence in other cases where the government does not recognize the harms of environmental pollution, it has been suggested that individual scientific studies could be conducted.[105] In the case of SCI Fayette, although the EPA does not classify coal ash as hazardous waste, the Abolitionist Law Center recommends that prisoners could satisfy the substantial harm prong of a Cruel and Unusual Punishment claim through studies showing the seriousness of health risks from coal ash pollution.[106] Additionally, in that case, the deliberate indifference prong could be satisfied by showing that the Pennsylvania Department of Corrections had knowledge of the pollution site prior to construction of the prison, and that it has since ignored the pattern of harm caused by the pollution as evidenced in prisoners' medical records.[107]

V. TITLE VI OF THE CIVIL RIGHTS ACT

Title VI has been described as a "basic accountability system," which prevents federal fund recipients from using those funds to discriminate against protected groups.[108] This prevention is supposed to occur through a framework of Sections 601 and 602 of the Act, which enable judicial action, as well as the administrative complaints process.[109]

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102. *Id.* at 767.

103. Bradshaw, *supra* note 12, at 415–16 (citing Rouse v. Caruso, No. 06-CV-10961-DT, 2011 WL 918327 (E.D. Mich. Feb. 18, 2011), No. 06-CV-10961, 2011 WL 893216 (E.D. Mich. Mar. 14, 2011)).

104. *Id.*

105. *See* McDaniel et al., *supra* note 64, at 18–19.

106. *Id.* at 19.

107. *Id.*

108. Chris Jordan-Bloch et al., *Title VI of the Civil Rights Act of 1964*, EARTHJUSTICE (Mar. 8, 2016), https://earthjustice.org/features/what-you-need-to-know-about-title-vi.

109. 42 U.S.C. § 2000d (1964).

Title VI and Environmental Justice

Title VI is so important because "it is one of the few enforceable civil rights laws that covers environmental actions."[110] In a memorandum, the Assistant Attorney General for Civil Rights stated that "Title VI's breadth of coverage is extensive and it can address a huge array of injustices," including environmental injustice.[111] Formerly, the Department of Justice ("DOJ") also asserted that "[many] types of Title VI cases involve environmental justice issues and could be resolved through the administrative complaint process."[112] The DOJ recognized the overlap between the Civil Rights Act of 1964 and environmental justice, stating that the key principle of environmental justice, that community programs do not overburden certain populations with environmental pollutants, "flows directly from this underlying principle of Title VI."[113] The EPA also purports to support this remedy. Regarding the intersection between Title VI and environmental justice, the Agency's website states that Title VI complaints may raise issues of environmental justice when challenging a funding recipient's activity.[114]

Judicial Action Under Section 601

Section 601 of Title VI of the Civil Rights Act (the "Act") states that "[no] person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[115] The Act defines programs and activities to include all operations of state and local governments, departments, agencies, or other instrumentalities receiving assistance.[116] Further, all actions taken by a recipient of federal funds are subject to Title VI, even if only one part of the entity utilizes the financial assistance.[117] For example, if the DOJ "provides assistance to a state department of corrections to improve a particular prison facility . . . [all] of the operations of the entire state department of corrections—not just the particular prison—are covered by Title VI."[118]

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110. Jordan-Bloch, et al., *supra* note 108.

111. *Federal Coordination of Title VI and Environmental Justice*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/fcs/newsletter/Spring-2015/TitleVIandEJ (last visited May 17, 2021).

112. *Id.*

113. *Id.*

114. *Title VI and Environmental Justice*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/environmentaljustice/title-vi-and-environmental-justice (last visited Mar. 31, 2022).

115. 42 U.S.C. § 2000d (1964).

116. 42 U.S.C. § 2000d-4 (1964).

117. *Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against Origin Discrimination Affected Limited English Proficient Persons*, U.S. DEP'T OF JUST. (Jan. 16, 2001), https://www.justice.gov/crt/federal-coordination-and-compliance-section-191.

118. *Id.*

Section 601 provides a private right of action under which individuals can obtain damages as well as injunctive relief.[119] Unfortunately, the bar to succeed in a claim such as this is high. In *Regents of University of California v. Bakke*, a medical school candidate alleged that the University's admission process was racially discriminatory in violation of Title VI.[120] The Supreme Court held that Title VI protects only racial classifications that violate the Equal Protection Clause of the Fourteenth Amendment or the Fifth Amendment.[121] The Equal Protection Clause prohibits unequal protection of state laws based on race, and "despite its reference to 'state[s],' the Clause has been read into the Fifth Amendment to prevent the federal government from discriminating as well."[122] To show a violation of the Equal Protection Clause, a plaintiff must prove intent.[123] The Supreme Court extended this burden of proof to claims beyond race in *Guardians Ass'n v. Civil Service Commission*, holding that Section 601 reaches only instances of intentional discrimination.[124]

Judicial Action Under Section 602

Under Section 602 of Title VI of the Act, federal agencies and departments providing funding to any program or activity are directed to create their own rules and regulations to uphold the Act.[125] Pursuant to this direction, a number of federal agencies have created "regulations that prohibit the agencies from engaging in practices or distributing federal funds in a way that causes disparate impacts or discriminatory effects."[126] Environmental justice issues often fall under these regulations, since they arise largely from policies that appear unbiased on their face but cause a disparate impact in practice.[127]

Prior to 2001, many federal courts held that Section 602 provided a private right of action for disparate impact claims.[128] But in 2001, the Supreme Court

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119. Memorandum from Accountability Project of the Children's Rights Litigation Committee, ABA Section of Litigation, Disparate Impact under Title VI and the School-to-Prison Pipeline at 3, https://www.njjn.org/uploads/digital-library/disparate-impact-memo-2015.authcheckdam.pdf.

120. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 269–70 (1978).

121. *Id.* at 287.

122. Brian T. Fitzpatrick & Theodore M. Shaw, *The Equal Protection Clause,* NAT'L CONST. CTR., https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xiv/clauses/702 (last visited May 17, 2021).

123. Hartford Park Tenants Ass'n v. R.I. Dep't of Env't. Mgmt., No. C.A. 99-3748, 2005 WL 2436227, at *44 (R.I. Super. Oct. 3, 2005).

124. Alexander v. Choate, 469 U.S. 287, 293 (1985).

125. 42 U.S.C. § 2000d-1 (1964).

126. Albert Huang, *Environmental Justice and Title VI of the Civil Rights Act: A Critical Crossroads*, ABA (Mar. 1, 2012), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2011_12/march_april/environmental_justice_title_vi_civil_rights_act/.

127. *See id.*

128. U.S. COMM'N ON C.R., NOT IN MY BACKYARD: EXECUTIVE ORDER 12,898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE 80 (2003), https://www.usccr.gov/pubs/envjust/ej0104.pdf.

released its opinion in *Alexander v. Sandoval*, barring private claims brought expressly under Section 602.[129] In *Sandoval*, plaintiffs brought a class action suit against the Alabama Department of Public Safety, alleging the Department's English-only driver's license exams violated regulations prepared by the Department of Justice pursuant to Section 602.[130] The *Sandoval* majority, written by Justice Scalia, distinguished Section 602 from Section 601, which contains express private right creating language.[131] The Court reasoned that since Congress did not include this language in Section 602, it did not intend the statute to create a private right of action.[132] As further evidence for this assertion, the Court noted that Congress created alternative remedies within Section 602, including the funding agency's ability to terminate funding and the potential for judicial review of the funding agency's enforcement actions.[133] Due to these alternative remedial schemes, Section 602 foreclosed a private right of action.[134]

Since the plaintiff in *Sandoval* did not raise a § 1983 action, the Supreme Court did not address whether Section 602 claims could be pursued under this statute. In light of *Sandoval*, jurisdictions have varied in their response to this avenue for relief. While some courts have permitted these claims to proceed, others have extended Sandoval to prevent § 1983 actions.[135] For example, in *South Camden Citizens in Action v. New Jersey Department of Environmental Protection*, the Third Circuit held that Section 602 of Title VI of the Civil Rights Act does not create freestanding rights for private individuals enforceable through § 1983 claims.[136] In *South Camden*, plaintiffs sued the New Jersey Department of Environmental Protection for granting an air emission permit for a cement company planning to locate in a minority community already overburdened by industry.[137] In denying the plaintiff's Section 602 claim, the Third Circuit reasoned that the Supreme Court previously foreclosed § 1983 actions when Congress did not provide an express enforceable right under the statute in question, and that the *Sandoval* Court did not believe Congress intended to create this right under Section 602.[138]

Notably, the Supreme Court also ruled in *Gonzaga v. Doe* that there must be clear and unambiguous congressional intent to allow a private right of action under a Congressional spending clause statute.[139] Since Title VI of the Civil Rights Act of 1964 falls within this category, it is unlikely that the Court would uphold a

129. Rachel Flynn et al., DISPARATE IMPACT UNDER TITLE VI AND THE SCHOOL-TO-PRISON PIPELINE 2, https://www.njjn.org/uploads/digital-library/disparate-impact-memo-2015.authcheckdam.pdf; Alexander v. Sandoval, 532 U.S. 275 (2001).

130. *Sandoval,* 532 U.S. at 278-279.

131. U.S. COMM'N ON C.R., *supra* note 122, at 83.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 89 (citing Robinson v. Kansas, 295 F.3d 1183 (10th Cir. 2002)). For example, the Tenth Circuit permitted plaintiffs to bring a disparate impact claim under Section 602 pursuant to § 1983 in *Robinson*.

136. *S. Camden Citizens in Action v. N.J. Dep't of Envtl. Prot.*, 274 F.3d 771 at 774 (3rd Cir. 2001).

137. *Id.* at 774-776.

138. *Id.* at 788

139. *Gonzaga Univ. v.* Doe, 536 U.S. 273, 280 (2002).

Section 602 right of action under § 1983 if the issue was taken up.[140] But since this has not yet been addressed by the Supreme Court, it is important to note the framework under which a disparate impact claim could be brought. To succeed, a plaintiff must first show that a policy, which is neutral on its face, has a disproportionately adverse effect on a protected class by a preponderance of the evidence through statistics, anecdotal evidence, or different treatment.[141] Once a significant impact is established, the burden shifts to the defendant to show the necessity of the practice.[142] If the defendant successfully shows the practice's necessity, the burden then shifts back to the plaintiff to show that there is a less discriminatory practice that would satisfy the same goal.[143]

Litigation in Light of Legal Framework

Since the Title VI legal framework was established, plaintiffs have had mixed success. Although there has been much litigation since the framework developed, the two cases discussed below are particularly relevant to this paper.

In *Franks v. Ross*, a homeowners' association and individual homeowners brought claims in part under Sections 601 and Section 602 via 42 U.S.C. § 1983, challenging the placement of a proposed landfill in an area "home to the largest percentage of African Americans of any municipality in Wake County," which already had "a disproportionate share of Wake County's landfills."[144] Plaintiffs alleged the siting was in violation of Section 601 because it was an act of intentional discrimination.[145] Plaintiffs further alleged that the result of the siting decision would be an unjustifiable disparate impact in violation of Section 602, because the permit was issued by defendants employed at North Carolina Department of Environmental and Natural Resources acting under the color of state law.[146] Although the United States District Court for the Eastern District of North Carolina, Western Division, extended *Sandoval* to prevent Section 602 claims brought under § 1983, the court did find "in addition to alleging disparate impact discrimination, Plaintiffs have alleged intentional discrimination grounds sufficient to state a claim upon which relief may be granted under Title VI, § 601."[147] Therefore, the Section 601 claim survived defendant's motion for summary judgment.[148]

In *Hartford Park Tenants Ass'n v. Rhode Island Department of Environmental Management*, plaintiffs brought Section 601 and Section 602 claims directly and

140. U.S. COMM'N ON C.R., *supra* note 128, at 90.

141. Flynn et al., *supra* note 129, at 6.

142. *Id.* at 7.

143. *Id.* at 10.

144. Franks v. Ross, 293 F.Supp.2d 599, 601, 604 (E.D.N.C. 2003).

145. *See id.* at 605.

146. *Id.* at 607.

147. *Id.* at 605, 608.

148. *Id.* at 605.

under § 1983 following the City of Providence's plan to construct public schools,[149] which would primarily be attended by minority students,[150] on top of a former unauthorized landfill.[151] Although the court initially dismissed plaintiffs' Section 602 actions at a preliminary hearing, it allowed the Section 601 claims to proceed to trial.[152] At trial, despite evidence that defendants waited until the last minute to build new schools in light of an influx of Hispanic students and rejected other options for the new schools' placement,[153] the Superior Court of Rhode Island, Providence, found the defendants did not discriminate intentionally.[154] Citing *Buchanan v. City of Bolivar*, which held that "where the decision maker is motivated by a factor other than the party's race, there can be no intentional discrimination,"[155] the court reasoned that the decision to build the school on the proposed site was "clearly based upon factors other than race."[156] Consequently, plaintiffs' lost both their pure Section 601 claim and their Section 601 claim brought under § 1983.[157]

VI. TITLE VI APPLIED TO EJ IN PRISONS

As discussed throughout this Note, environmental justice issues are especially pertinent in carceral facilities because incarcerated populations are primarily made up of minorities and because prisons are often built on or near sites of hazardous pollution. Therefore, the Title VI framework should apply to prisoners just as it applies to communities subject to environmental injustices on the outside.

In order to bring an action under Title VI of the Civil Rights Act of 1964, a plaintiff's allegation of discrimination or disparate impact must be against a recipient of federal funds.[158] The process of siting a new carceral facility would involve actions by state correctional departments, which receive funding from the Department of Justice ("DOJ").[159] A recent memo by the Principal Deputy Assistant Attorney General for Civil Rights stated that "state and local jails, prisons, and detention centers that receive federal financial assistance must not discriminate on the basis of race, color, and national origin under Title VI of the

149. Hartford Park Tenants Ass'n v. R.I. Dep't of Env't. Mgmt., No. C.A. 99-3748, 2005 WL 2436227, at 1–3 (R.I. Super. Oct. 3, 2005).

150. *Id.* at *14.

151. *Id.* at *27.

152. *Id.* at *4-5.

153. *Id.* at *21, 25-26.

154. *Id.* at *153-155.

155. Hartford Park Tenants Ass'n v. R.I. Dep't of Env't. Mgmt., No. C.A. 99-3748, 2005 WL 2436227, at *50 (R.I. Super. Oct. 3, 2005) (citing Buchanan v. City of Bolivar, 99 F.3d 1352, 1356 (6th Cir. 1996)).

156. *Id.*

157. *Id.* at *55–56.

158. 42 U.S.C. § 2000d (1964).

159. *See Statement by the Principal Deputy Assistant Attorney General for Civil Rights: Leading a Coordinated Civil Rights Response to Coronavirus (COVID-19)*, U.S. DEP'T OF JUST. (Apr. 2, 2021), https://www.justice.gov/file/1382776/download.

Civil Rights Act of 1964 and other statutes."[160] While targeted at facilities already in operation, this directive and others like it would almost certainly apply to facilities not yet built, allowing prospective inmates to challenge the siting of a facility. Additionally, the process of siting a new facility would most likely involve the granting of permits by state environmental agencies, which receive funding from the EPA.[161] It is notable that discriminatory siting and permitting decisions would almost certainly fall under 42 U.S.C. § 1983, the claim to which prisoners in state and local facilities are limited, because the decisions would constitute misuses of power only made possible by the authority of state law. Prospective prisoners of these facilities could challenge state actors such as the directors of their state correctional department and state environmental agency for their participation in or supervision of siting decisions.

Additionally, both the EPA and DOJ have promulgated regulations pursuant to Section 602 of Title VI directing the agencies they fund not to discriminate. Under the EPA's regulations, "EPA-funded agencies are prohibited from taking acts, including permitting actions, that are intentionally discriminatory or have a discriminatory effect based on race, color, or national origin."[162] The DOJ similarly holds that "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity receiving Federal financial assistance from the Department of Justice."[163] In particular, recipients are prevented from discriminating on the basis of race, color, or national origin with respect to the siting of facilities.[164]

Litigation by Prisoners Under Title VI

In order to bring a Title VI action, prisoners would first have to satisfy either the PLRA or their state's equivalent of the PLRA, depending on if they were filing in federal or state court.[165] As previously discussed, the PLRA, and similar state statutes, require a prisoner to first exhaust all administrative remedies prior to filing a claim.[166] It is unclear what administrative remedies a prospective inmate could bring prior to being incarcerated in a new facility. Further, it is notable that the PLRA requires injunctive relief to be narrowly drawn to correct the challenged violation in "the least intrusive means necessary" with respect to the particular

160. *Id.*

161. For example, the Arizona Department of Environmental Quality requires a number of permits for prisons and jails, and also receives federal funds from the EPA. *See Permit(s) Needed for a Prison*, ARIZ. DEP'T OF ENV'T QUALITY (June 14, 2016), https://www.azdeq.gov/node/475; *see also About Us*, ARIZ. DEP'T OF ENV'T QUALITY (Jan. 25, 2021), https://www.azdeq.gov/AboutUs.

162. *Title VI Laws and Regulations*, EPA (Oct. 30, 2019), https://www.epa.gov/ocr/title-vi-laws-and-regulations.

163. 28 U.S.C. § 42.101 (1966).

164. 28 C.F.R. § 42.104(b)(3) (1966).

165. *Know Your Rights: The Prison Litigation Reform Act (PLRA)*, *supra* note 32; Russell, *supra* note 38, at 780.

166. 42 U.S.C. § 1997e(a) (2013); Russell, *supra* note 38, at 780.

plaintiff(s)."[167] To overcome this substantial barrier, prospective inmates would likely need to prove that an alternative location for the carceral facility is the only way to protect them from the negative health effects of nearby environmental pollution.

Presuming the administrative relief requirement of the PLRA or corresponding state statute could be satisfied, and the limited injunctive relief barrier could be overcome, the legal framework of Title VI itself provides additional challenges. First, as previously discussed, to succeed in an action under Section 601, the Supreme Court has held that a plaintiff must demonstrate he or she was subject to intentional discrimination.[168] This is a very high bar to reach, as evidenced by the case *Hartford Park Tenants Ass'n*. The facts of that case are similar to those of a potential prisoner claimant, challenging the siting of a new facility on a previous site of environmental pollution. In *Hartford Park Tenants Ass'n*, the court rejected the claim that siting a new school, which would be attended by primarily minority students, on a former unauthorized landfill constituted intentional discrimination, since the decision was motivated by a factor other than the students' race.[169] Prisoners challenging a siting decision would probably receive the same judgement, since the decision to construct a prison near environmental pollution would most likely not be motivated by the racial makeup of the prospective prisoner population. Additionally, claims by prisoners challenging a siting decision can be distinguished from the fact pattern in *Franks*. In that case, a Black community's challenge of the placement of a proposed landfill in their town, which already had a disproportionate amount of landfills, survived summary judgement on a Section 601 claim.[170] Unfortunately, today the majority of new carceral facilities are constructed in rural, low-income areas that actually bid to have the facility sited there.[171] Therefore, the decision to site a prison in these communities is far from an act of intentional discrimination against the prisoners who will be housed within it.

While Section 601 prohibits only acts of intentional discrimination, Section 602 encompasses disparate impacts caused by policies which are neutral on their face in violation of federal funding agency's regulations. Under both the EPA and DOJ's regulations, funding recipients are prohibited from subjecting individuals to discrimination on the basis of race, color, or national origin.[172] Potential inmates could argue that siting a new carceral facility near a source of hazardous pollution violates these regulations, because the minority population of the prison would have a higher risk of developing negative health conditions due to an increased likelihood of long-term pollution exposure. Under the disparate impact burden shifting framework, plaintiffs would need to demonstrate this higher risk by a

167. 18 U.S.C. § 3626(a)(1)(A) (1997).

168. Alexander v. Choate, 469 U.S. 287, 293 (1985).

169. Hartford Park Tenants Ass'n v. R.I. Dep't of Env't. Mgmt., No. C.A. 99-3748, 2005 WL 2436227 (R.I. Super. Oct. 3, 2005).

170. Franks v. Ross, 293 F.Supp.2d 599, 601, 604, 605 (E.D.N.C. 2003).

171. Opsal et al., supra note 41, at 585.

172. *Title VI Laws and Regulations*, *supra* note 155; 28 U.S.C. § 42.101 (1966).

preponderance of the evidence, most likely through statistics.[173] For example, when the source of pollution would cause respiratory problems, such as those faced by prisoners at SCI Fayette, plaintiffs could point to the increased risk of dying from COVID-19 faced by minority communities subject to long-term air pollution. Although state actors could easily show the necessity of siting a new carceral facility, potential inmates could satisfy the final step in this burden shifting framework by demonstrating that a different location would have a less discriminatory effect in order to succeed in their Section 602 claim.[174]

Although Section 602 appears to be a viable basis for relief, the uncertainty of whether Section 602 claims may be brought under 42 U.S.C. § 1983 presents another barrier to success. Since the Supreme Court barred private rights of action under Section 602 in *Sandoval*,[175] a number of jurisdictions have extended this prohibition to Title VI claims brought pursuant to § 1983, including the Third Circuit in *South Camden*[176] and the Eastern District of North Carolina in *Franks*.[177] Although some jurisdictions have maintained this as a valid cause of action,[178] the Supreme Court would most likely hold that Section 602 claims cannot be brought pursuant to § 1983 if it were ever to take up the issue, based on its dicta in *Sandoval*[179] and its holding in *Gonzaga*.[180]

Administrative Complaints

Along with litigation under Section 601 and 602, Title VI of the Civil Rights Act also allows people to file administrative complaints with a federal agency, alleging a recipient of its federal funds acted in a discriminatory matter.[181] A party may file an administrative complaint with a funding department or agency alleging a recipient of federal funds discriminated based on race, color, or national origin.[182] Similar to actions under Section 602, potential inmates of a new prison in close proximity to an environmental hazard could allege the pollution from this hazard would have a disparate impact on minority inmates in violation of the funding agency's Section 602 regulations. These complaints could be filed with either the EPA or DOJ.

Although many environmental justice communities have pursued relief by filing administrative complaints with the EPA, they have had limited success.[183] The EPA's Office of Civil Rights ("OCR") is supposed to quickly resolve Title VI

173. *See* Flynn et al., *supra* note 129, at 6.
174. *See id.*
175. *Id.* at 2.
176. U.S. COMM'N ON C.R., *supra* note 122, at 86.
177. Franks v. Ross, 293 F.Supp.2d 599, 608 (E.D.N.C. 2003).
178. U.S. COMM'N ON C.R., *supra* note 122, at 89.
179. *Sandoval,* 532 U.S. at 289–90.
180. Gonzaga Univ. v. Doe, 536 U.S. 273, 280 (2002).
181. Jordan-Bloch et al., *supra* note 103.
182. *Id.*
183. *See* Huang, *supra* note 120.

complaints, but in practice this has not been the case.[184] Rather, many complainants have gone years without a response.[185] In 2009, the Ninth Circuit held that the EPA's failure to process complaints was unlawful pursuant to the APA and required the Agency to respond to all future complaints made by the plaintiff in a timely manner.[186] Despite the reprimand, a 2011 report confirmed that the EPA's OCR still had a decade-long backlog of unprocessed or uninvestigated complaints.[187]

More recent litigation shows that this issue is still prevalent. In 2015, Earthjustice brought suit against the EPA on behalf of four community-based groups who never received a response to the civil rights complaints they filed with the EPA between 1992 and 2003.[188] Each of the complaints alleged "racial discrimination in the permitting of polluting facilities by state and regional agencies."[189] One of these complaints, arising in 1992 from Flint, Michigan, alleged Michigan's state environmental agency acted in a discriminatory manner by approving a permit for the Genessee Power Station in an area already burdened by 200 polluting facilities.[190] This complaint demonstrated that Flint was facing environmental justice concerns long before the aforementioned Flint Water Crisis, which brought the city into the national spotlight. In 2017, the EPA finally made a finding of discrimination in response to the Michigan-based complaint, but unfortunately the Agency "closed the case without requiring any remedy."[191]

Prisoners attempting to challenge the permitting of carceral facilities are likely to have even less success in light of the EPA's pattern of neglect. As noted, the Agency has repeatedly omitted incarcerated populations from policies, rules, acts, and agendas targeted to protect vulnerable populations,[192] despite previously acknowledging that prisons face environmental justice concerns.[193] This continuous neglect, coupled with the EPA's failure to address Title VI complaints, demonstrates the lack of viability of this course of action.

Filing a Title VI complaint with the DOJ seems to be a more promising avenue for relief, as the DOJ's OCR previously processed 346 complaints in just four years.[194] This number alone demonstrates that the DOJ's OCR takes

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Court Declares that EPA Failed to Protect Civil Rights*, EARTHJUSTICE (Mar. 30. 2018), https://earthjustice.org/news/press/2018/court-declares-that-epa-failed-to-protect-civil-rights.

189. *Id.*

190. *Federal Court Still Requires EPA to Enforce Civil Rights*, VT. L. SCH. (Oct. 2, 2020), https://www.vermontlaw.edu/news-and-events/newsroom/press-release/federal-court-still-requires-epa-enforce-civil-rights.

191. *Court Declares that EPA Failed to Protect Civil Rights*, *supra* note 181.

192. Bernd et al., *supra* note 69; Armstrong, *supra* note 45, at 220–22; Prescott, *supra* note 14.

193. Bernd et al., *supra* note 69.

194. OFF. FOR C.R., TITLE VI ENFORCEMENT, https://www.ojp.gov/sites/g/files/xyckuh241/files/media/document/ocr_titlevi.pdf (last visited May 17, 2021).

complaints much more seriously than the EPA's OCR. But, unlike complaints made with the EPA regarding the disparate impact of permitting decisions, there is no evidence that anyone has used the DOJ's complaint process to challenge the siting of a new carceral facility. Rather, the complaints they address generally allege "that a funded correctional facility discriminated in the delivery of services to inmates" already housed in that facility.[195] This description evidences the probable novelty of a complaint regarding the siting of a new prison near a source of environmental pollution. Although there is no way to tell how the DOJ's OCR would handle such a claim of disparate impact, a complaint filed with the DOJ would still likely be more fruitful than a complaint filed with the EPA, in light of the Agency's failures to protect prisoners and respond to complainants historically.

Title VI Compared to The Eighth Amendment

The discussion above indicates that the viability of success for a potential inmate of a proposed state or local carceral facility challenging the facility's siting under Title VI is limited to Section 602 claims brought under 42 U.S.C. § 1983 and administrative complaints filed with the DOJ's OCR. Within this limited framework, the chance of success is uncertain since the DOJ's OCR may have never adjudicated such a claim and many courts have extended *Sandoval* to bar these Section 602 actions.[196] While the opportunity to challenge issues of environmental justice with Title VI is narrowing, the Eighth Amendment's legal framework seems increasingly equipped to handle such claims.[197] The "conditions-of-confinement" jurisprudence has expanded in recent years to include claims of excessive heat as well as polluted water, in cases such as *Cole*.[198] Additionally, a number of scholars have suggested this jurisprudence could be expanded to prevent future prisons from being built near sources of hazardous pollution, such as the proposed facility in Letcher County, Kentucky.[199] Since the definition of "cruel and unusual" changes with social values,[200] and the intersection between mass incarceration and environmental justice is beginning to gain recognition, this expansion seems probable. Therefore, the growing legal framework of the Eighth Amendment is likely a more viable cause of action than the shrinking framework of Title VI of the Civil Rights Act.

CONCLUSION

When promulgated, Title VI of the Civil Rights Act of 1964 seemed like a promising avenue for minority communities to receive relief from the government's historic pattern of siting environmental pollutants in their

195. *Id.*

196. U.S. COMM'N ON C.R., *supra* note 122, at 89

197. *See* Russell, *supra* note 38, at 750–51.

198. Court Order Granting Preliminary Injunction, Cole v. Collier, No. 4:14-cv-01698, at 2 (S.D. Tex. June 21, 2016).

199. Russell, *supra* note 38, at 767.

200. Helppie-Schmeider, *supra* note 88, at 652.

neighborhoods. Federal agencies such as the Department of Justice ("DOJ") even boasted that Title VI could be used to solve environmental injustices.[201] But when community groups actually pursued causes of action under Title VI, they had minimal success. While the EPA ignored administrative complaints, the Supreme Court continuously limited Title VI jurisprudence, requiring that Section 601 claims prove intentional discrimination and barring private rights of action under Section 602. Although the Court did not address whether Section 602 claims brought under 42 U.S.C. § 1983 could prevail, a number of jurisdictions have since barred this cause of action as well. Meanwhile, the constraints on discriminatory practices imposed by the Civil Rights Act led segregationists to advocate for "tough on crime" initiatives, resulting in mass incarceration. The significant increase in rates of incarceration over the last four decades[202] has disproportionately affected the same minority communities subject to environmental injustices.[203] Today, many inmates are trapped inside prisons built on or near sites of environmental pollution, exposed to the health risks caused by these pollutants with no means of escape.

This Note considered whether Title VI of the Civil Rights Act could be used to prevent new state and local carceral from being built in close proximity to sites of hazardous pollution. Due to the limitations imposed by the Supreme Court and other jurisdictions following the Court's *Sandoval* decision, Title VI seems like an unlikely avenue for success. Although it is possible that plaintiffs could prevail under the Section 602 burden shifting framework to establish a disparate impact claim, the future viability of Section 602 actions brought under § 1983 is uncertain. Additionally, although the DOJ's OCR has timely addressed administrative complaints, unlike the EPA's OCR, plaintiffs' chance of success is also uncertain, as the DOJ does not appear to have handled a complaint such as this before. These uncertainties lead to the conclusion that an Eighth Amendment Cruel and Unusual Punishment lawsuit would be more likely to merit success, due to the recent developments of "conditions-of-confinement" jurisprudence and advocacy for these claims. Even though Title VI did not turn out to be the grand accountability system communities subject to environmental injustices hoped it would be, the Eighth Amendment's expanding framework leaves potential inmates of proposed facilities with a hopeful cause of action to challenge siting decisions moving forward.

201. U.S. DEP'T OF JUST., *supra* note 111.

202. *Criminal Justice Facts*, *supra* note 27.

203. Leon-Corwin et al., *supra* note 40, at 416.