TOXIC DISCRETION: ENVIRONMENTAL INEQUALITY AND THE DISCRETIONARY FUNCTION EXCEPTION

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INTRODUCTION

Experts called it "a story of government failure, intransigence, unpreparedness, delay, inaction, and environmental injustice."[1] By this point, the Flint Water Crisis is well-known in most households. In 2014, the State of Michigan opted to switch the water supply of Flint, Michigan from Lake Huron to the Flint River.[2] A series of "avoidable and abject failure[s]"[3] by both state and federal authorities led to mass lead and legionella poisoning of the community.[4] Michigan's Governor entrusted a task force of two doctors, a water expert, and two former state lawmakers with investigating the causes of the crisis and creating recommendations for a path forward.[5] Their final report stated:

> The facts of the Flint water crisis lead us to the *inescapable conclusion that this is a case of environmental injustice.* Flint residents, who are majority Black or African American and among the most impoverished of any metropolitan area in the United States, did not

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1 FLINT WATER ADVISORY TASK FORCE, FINAL REPORT 1 (2016) [hereinafter FWATF REPORT].

2 Derrick Z. Jackson, *Environmental Justice? Unjust Coverage of the Flint Water Crisis*, HARV. KENNEDY SCH.: SHORENSTEIN CTR. ON MEDIA, POL. & PUB. POL'Y (July 11, 2017), https://shorensteincenter.org/environmental-justice-unjust-coverage-of-the-flint-water-crisis/ [https://perma.cc/MG2P-EJA7].

3 Carla Campbell, Rachel Greenberg, Deepa Mankikar & Ronald D. Ross, *A Case Study of Environmental Injustice: The Failure in Flint*, INT'L J. ENV'T RSCH. & PUB. HEALTH, Sept. 2016, at 10:1, 1.

4 FWATF REPORT, *supra* note 1, at 46.

5 *See id.* at 2.

> enjoy the same degree of protection from environmental and health hazards as that provided to other communities.[6]

Not only did the relevant authorities negligently fail to prevent the poisoning of the citizens in Flint, Michigan—they knew about it and failed even to warn them. This included the Environmental Protection Agency (EPA).

This is nowhere near a new phenomenon. In 1981, the EPA learned that an industrial scrap yard in Detroit, Michigan was contaminated with dangerous levels of polychlorinated biphenyls (PCBs) by Carter Industrial, Inc.[7] Over the years to come, periodic testing by the EPA revealed that the contamination had spread and was detectable off-site at nearly forty-seven times the acceptable level of 50 parts per million (ppm).[8] Still, the EPA declined to take action against Carter based on "insufficient evidence" and simply ordered further monitoring; moreover, they failed to warn nearby residents of the contamination.[9] In 1986, the EPA was forced to take action when it discovered that Carter did in fact have contaminated equipment and testing showed PCB levels as high as 90,000 ppm.[10] Only then did the EPA finally order an emergency cleanup and issue notices to the media and nearby residents.[11]

By that time, the backyards of the family homes of Willie Mae Lockett and her neighbors near the site had PCB levels of 1,800 ppm.[12] Their community, homes, even the air they were breathing had been "drenched with toxins," and by the time they brought suit against the EPA in *Lockett v. United States* they "face[d] the specter of crippling illness and death."[13] Though the EPA had allowed the contamination to continue unabated for over five years before warning the plaintiffs, their suit was dismissed.[14]

The government was able to successfully argue that its failures were protected by the discretionary function exception to the Federal Tort Claims Act (FTCA).[15] The FTCA serves as a waiver of the government's sovereign immunity for tortious claims.[16] However, when

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6 *Id.* at 54 (emphasis added). These findings were against both state and federal environmental agencies. *See id.* at 6–9.

7 Lockett v. United States, 938 F.2d 630, 631 (6th Cir. 1991).

8 *See id.* The nearby soil testing showed PCBs at 2,340 ppm. *Id.*

9 *See id.* at 631–32.

10 *See id.*

11 *Id.*

12 *See id.* at 639 (Edwards, J., dissenting).

13 *See id.*

14 *See id.*

15 Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680 (2018). The discretionary function exception is contained in § 2680(a).

16 *See infra* Section I.A.

Congress enacted it they also strictly circumscribed the claims in many instances and specifically legislated for certain exceptions to shield the government from liability.[17] The discretionary function exception is the most robust of these exceptions, preventing government liability for actions "based upon the exercise or performance or the failure to exercise or perform a discretionary function . . . whether or not the discretion involved be abused."[18]

In the case of *Lockett*, the Sixth Circuit determined that the EPA had indeed acted within its discretion to decide not to take action against Carter or warn the community about the contamination. It concluded that the decision was a "judgment call[]" properly "grounded in social, economic, and political policy."[19] The court also noted that it is the "EPA administrators who must balance the environmental, economic, and social implications of each enforcement decision, knowing the limits of resources available to them."[20]

These types of arguments about weighing social implications and resource distribution when it comes to dangerous environmental contamination ring hollow generally. They become intolerable when one considers the racial and socioeconomic factors at play that put the communities of Black, Indigenous, and other People of Color (BIPOC) on the front lines of environmental contamination. Robert Bullard, one of the first pioneers of what is known today as the Environmental Justice movement,[21] wrote in 1993 that "[w]hether by conscious design or institutional neglect, communities of color in urban ghettos, in rural 'poverty pockets,' or on economically impoverished Native-American reservations face some of the worst environmental devastation in the nation."[22] That has not changed in the thirty years since.[23]

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17 *See infra* Section I.A.

18 *See* 28 U.S.C § 2680(a).

19 *Lockett*, 938 F.2d at 638–39.

20 *Id.* at 639.

21 *See Environmental Justice*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/environmentaljustice [https://perma.cc/VP4K-JWPU].

22 Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*, *in* CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 15, 17 (Robert D. Bullard ed., 1993).

23 *See* ENV'T PROT. AGENCY, PUB. NO. 230R20002, EPA ANNUAL ENVIRONMENTAL JUSTICE PROGRESS REPORT FY 2020, at 5 (2020) ("Low-income, minority, tribal, and indigenous communities are more likely to be impacted by environmental hazards and more likely to live near contaminated lands."); *see also* Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NAT. RES. DEF. COUNCIL (Aug. 22, 2023), https://www.nrdc.org/stories/environmental-justice-movement [https://perma.cc/BN54-RAJ5] ("Those who live, work, and play in America's most polluted environments are commonly people of color and those living in poverty.").

The environmental plight of these communities cannot be overstated, and the government neglect takes many forms. From Flint and Detroit, to Louisiana's "Cancer Alley," to the tribal reservations in Nevada, low-income and BIPOC communities across the country live at higher rates of close proximity to environmental hazards and suffer disproportionately from resulting health outcomes.[24]

> Census tracts where the majority of residents are people of color experience about 40% more cancer-causing industrial air pollution on average than tracts where the residents are mostly white. In predominately Black census tracts, the estimated cancer risk from toxic air pollution is more than double that of majority-white tracts.[25]

Due to this proximity and vulnerability, government failures to warn a community of environmental contamination disparately impact these groups and put them directly in danger of severe illness and death.

Environmental racism is far reaching and insidious, and each of these devastating instances and the institutional factors that led to them could and should be the subject of entire books in their own right. The EPA and other agencies of the United States government are complicit in multiple ways, not least of all through their abject failures to properly regulate private industry pollution in BIPOC communities.[26] However, this Note has cabined its analysis to the government's failure to warn these communities of environmental contamination, and what happens when it hides behind the discretionary function exception in ensuing litigation. To provide necessary context, Part I serves as a primer on the discretionary function exception, beginning with sovereign immunity and the Federal Tort Claims Act generally and then tracking the Supreme Court's treatment of the exception. Part II reviews the lower courts' application of the exception in cases where the government has failed to warn of environmental contamination, analyzing the unworkability of the current jurisprudence and the resulting exacerbation of environmental inequalities. After that, however, it goes on to highlight several cases in which courts declined to apply the exception and discuss the possible implications of their reasoning. Part III analyzes the government's duty to warn of environmental contamination, and argues that such failures are not a

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24 *See What is Environmental Racism?*, NAT. RES. DEF. COUNCIL (May 24, 2023), https://www.nrdc.org/stories/what-environmental-racism [https://perma.cc/PC3G-NPN3].

25 Lylla Younes, Ava Kofman, Al Shaw & Lisa Song, *Poison in the Air*, PROPUBLICA (Nov. 2, 2021, 5:00 AM), https://www.propublica.org/article/toxmap-poison-in-the-air [https://perma.cc/AY94-E8BA].

26 *See, e.g.*, Sarah Elbeshbishi, *A Black Community in West Virginia Sues the EPA to Spur Action on Toxic Air Pollution*, PROPUBLICA (Sept. 20, 2023, 3:00 PM), https://www.propublica.org/article/institute-west-virginia-sues-epa-to-spur-action-toxic-air-pollution [https://perma.cc/2Z86-GHBV].

permissible exercise of discretion such that the failures would be excepted from liability under the Federal Tort Claims Act, particularly in light of overriding considerations of environmental justice and the EPA's own policy to mitigate environmental racism.

I. THE DISCRETIONARY FUNCTION EXCEPTION

A. Background on Sovereign Immunity and the Federal Tort Claims Act

The sovereign immunity of the federal government is, for better or worse, a bedrock principle that permeates "as a foundational concept" through all litigation with the United States government.[27] Though scholars debate the proper nature and source of this privilege,[28] and indeed the Constitution is silent on the subject,[29] early on the Supreme Court considered its existence to be without doubt.[30] Regardless of its origins, it is well established today that the government maintains the privilege of immunity from suit without its express permission via statutory waiver.[31] Congress has over time gradually "lowered the shield" of sovereign immunity, choosing to expose the government to certain suits in an attempt to balance competing interests.[32]

Historically, sovereign immunity served as an "insurmountable barrier" to recourse against the government from an injury in tort; the only means of recovery was a private bill passed by Congress.[33] In 1946, Congress took steps to rectify this by passing the FTCA,[34] which subjects the United States to tort liability for the wrongful acts and omissions of its employees under the same circumstances that a private

27 GREGORY C. SISK, LITIGATION WITH THE FEDERAL GOVERNMENT 93 (2d ed. 2023).

28 *See e.g.*, *id.*; Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201 (2001); Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 523–36 (2003).

29 Jackson, *supra* note 28, at 523.

30 United States v. Lee, 106 U.S. 196, 207 (1882) ("[T]he exemption of the United States . . . from being subjected as defendants to ordinary actions in the courts . . . has never been discussed or the reasons for it given, but it has always been treated as an established doctrine."). *But see* Thomas E. Bosworth, Comment, *Putting the Discretionary Function Exception in Its Proper Place: A Mature Approach to "Jurisdictionality" and the Federal Tort Claims Act*, 88 TEMP. L. REV. 91, 93–94 (2015) ("Since this country's independence from Great Britain, the legitimacy of the sovereign immunity doctrine has rested upon shaky grounds." *Id.* at 93).

31 *See* Gregory C. Sisk, *The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States*, 71 GEO. WASH. L. REV. 602, 602 (2003).

32 *See id.* at 602–03.

33 *See* SISK, *supra* note 27, at 116 (quoting 1 LESTER S. JAYSON & ROBERT C. LONGSTRETH, HANDLING FEDERAL TORT CLAIMS § 2.01 (2023)).

34 *See* Sisk, *supra* note 31, at 603.

person would be liable in that state.[35] The basic standard for liability under the FTCA is expressed in § 1346(b) and § 2674, which provide that the federal government is liable in tort

> 1) for personal injury, death, or property damage, 2) caused by negligent or wrongful acts or omissions, 3) by a Government employee acting within the scope of his office or employment, 4) in the same manner and to the same extent as a private person under like circumstances, 5) in accordance with the law of the place (state) where the act or omission occurred, and 6) for money damages, but not for interest before judgment or for punitive damages.[36]

Two essential aspects of this deserve special note: first, the FTCA elements are also jurisdictional and must be plausibly alleged in order for a court to have jurisdiction over the claim; second, liability under the FTCA is predicated on the claim being recognized under the law of the relevant state.[37]

The FTCA is part of a "statutory regime [that] expresses a general legislative intent that the federal government should be held responsible for its obligations and accountable for its misdeeds."[38] At the same time, it was enacted against the pervasive backdrop of sovereign immunity, and so the FTCA's specific contours afford the government generous exceptions to standard tort liability.[39]

B. Introduction to the Discretionary Function Exception

Aside from the specific statutory structure that outlines the government's substantive liability, the FTCA explicitly provides for various exceptions to liability as well. Importantly, these exceptions are *not* jurisdictional and should instead be considered affirmative defenses that the government can raise.[40]

The most important and widely litigated of these protections is the discretionary function exception.[41] Located at § 2680(a), the statutory scope of the provision is twofold. First, it immunizes the government from claims based on the "execution of a statute or regulation" so long as the employee was "exercising due care," regardless of the

35 *See* Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671–2680 (2018).

36 *See* SISK, *supra* note 27, at 140–41 (citing 28 U.S.C. §§ 1346(b), 2674).

37 *See id.* at 141; Gregory C. Sisk, Foreword, *Official Wrongdoing and the Civil Liability of the Federal Government and Officers*, 8 U. ST. THOMAS L.J. 295, 300 (2011).

38 Sisk, *supra* note 37, at 295.

39 *See id.* These include restrictions on standard of liability, bars to certain types of claims, exceptions for certain governmental functions, and exclusion of certain types of plaintiffs. *See id.* at 300.

40 *See* SISK, *supra* note 27, at 162.

41 28 U.S.C. § 2680(a).

validity of the statute or regulation.[42] This essentially means that the government cannot be held liable for implementing statutes or promulgating regulations thereof.[43]

Second, and more notoriously, the provision excepts claims "based upon the exercise or performance or the failure to exercise or perform *a discretionary function* or duty on the part of a federal agency or an employee of the Government, *whether or not the discretion involved be abused*."[44] It is this part of the subsection that is referred to as the discretionary function exception, which broadly immunizes the government from "discretionary function[s]" but fails to provide any additional guidance on what exactly *is* a discretionary function.[45] It has thus been left to the courts to delineate the borders of this exception.[46] At its best, the discretionary function exception ensures separation of powers in the government and prevents "judicial 'second-guessing'" of the political branches' decisions.[47] At its worst, the overapplication of the exception creates a "monstrous joker now threatening to engulf the entire Act in a twilight zone."[48]

C. The Exception's Doctrinal Development in the Supreme Court

Given the vagueness of the statutory language of the exception, our analysis of its application in failure-to-warn cases is helpfully informed by a brief timeline of the development of the doctrine at the Supreme Court. Since 1946, the Court has "interpreted and reinterpreted" the exception, yet still "has failed to provide a consistent standard."[49]

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42 *Id.*

43 *See* William P. Kratzke, *The Supreme Court's Recent Overhaul of the Discretionary Function Exception to the Federal Tort Claims Act*, 7 ADMIN. L.J. AM. U. 1, 18 (1993) ("Establishing programs and promulgating regulations to implement general provisions of a regulatory statute are activities that are immune from liability.").

44 28 U.S.C. § 2680(a) (emphasis added).

45 Harold J. Krent, *Preserving Discretion Without Sacrificing Deterrence: Federal Governmental Liability in Tort*, 38 UCLA L. REV. 871, 876 (1991) ("The word 'discretionary' is far from clear—no indication of the contemplated discretionary functions or duties is given.").

46 *See* D. Scott Barash, Comment, *The Discretionary Function Exception and Mandatory Regulations*, 54 U. CHI. L. REV. 1300, 1301 (1987) ("Because the drafters of the FTCA failed to define the term 'discretionary function,' the discretionary function exception has become the most litigated provision of a much litigated statute.").

47 *See* United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines), 467 U.S. 797, 814 (1984).

48 Hugh C. Stromswold, *The Twilight Zone of the Federal Tort Claims Act*, 4 AM. U. INTRAMURAL L. REV. 41, 42 (1955).

49 *See* Daniel Cohen, *Not Fully Discretionary: Incorporating a Factor-Based Standard into the FTCA's Discretionary Function Exception*, 112 NW. U. L. REV. 879, 881 (2018).

The Court first addressed the scope of the discretionary function exception in *Dalehite v. United States* in 1953, just a few years after the passage of the FTCA.[50] The tragic backstory arose from the food shortages in Europe caused by World War II and the federal government's decision to ship fertilizer overseas to assist in the region's agriculture production. While docked at Texas City, Texas, one such ship exploded, killing nearly 600 people and wounding over 3,000.[51] The Court held that this was protected conduct under the discretionary function exception.[52]

In reaching that conclusion, the Court touched on the legislative history of the discretionary function exception. It noted that "the draftsmen did not intend it to relieve the Government from liability for such common-law torts as an automobile collision."[53] Rather, the Court concluded that Congress proposed to protect "the Government from claims, however negligently caused, that affected the *governmental functions*" and the subordinates who actually carry those functions out.[54] Unsurprisingly (and unhelpfully), the Court declined "to define, apart from [that] case, precisely where discretion ends."[55] Instead the Court chose to broadly note that "[w]here there is room for policy judgment and decision there is discretion."[56] The Court also specifically distinguished between conduct that is of a planning stage and that of an operational level, noting that only the former would be immunized from liability.[57]

The Justices unanimously agreed that the decision to implement the fertilizer program at all was a high-level policy decision that would be covered by the exception.[58] Additionally, the majority also found that the specific decisions regarding the production, storage, labeling, and transport of the fertilizer were covered by the discretionary function exception, considering them to be of a planning stage since they

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50 346 U.S. 15 (1953).

51 *See id.* at 19–23; HISTORY.COM EDITORS, *Fertilizer Explosion Kills More Than 500 in Texas*, HIST. (Apr. 14, 2020), https://www.history.com/this-day-in-history/fertilizer-explosion-kills-581-in-texas [https://perma.cc/X9VT-FKKK].

52 *See Dalehite*, 346 U.S. at 42.

53 *See id.* at 34.

54 *See id.* at 32, 36 (emphasis added).

55 *Id.* at 35.

56 *Id.* at 36; *see also id.* at 35–36 (noting discretion "includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations").

57 *See id.* at 42 ("The decisions held culpable were all responsibly made at a planning rather than operational level . . . ."). This distinction was later eliminated. *See infra* note 86 and accompanying text.

58 *See Dalehite*, 346 U.S. at 37; *id.* at 57 (Jackson, J., dissenting). Justices Douglas and Clark did not participate in the decision.

implicated decisions of cost and efficiency of the program.[59] It failed to state what exactly it *would* consider decisions at an operational level, if even those did not qualify.

Justice Jackson expressed a similar concern in his dissent. He noted that the government failed to provide any evidence that those decisions "involved a conscious weighing" of any policy decisions.[60] The dissent warned that such a broad application of the discretionary function exception could not only "swallow" the FTCA, but would allow the government to "clothe official carelessness with a public interest."[61] Perhaps most damning of all, he closed that the FTCA must apply more broadly than the majority held, otherwise "the ancient and discredited doctrine that 'The King can do no wrong' has not been uprooted; it has merely been amended to read, 'The King can do only little wrongs.'"[62]

Two years later, the Court considered these concepts in *Indian Towing Co. v. United States*.[63] *Indian Towing* was not specifically a discretionary function exception case because the government conceded that the exception could only relieve "liability for negligent 'exercise of judgment' . . . not involved here."[64] However, much of the case centered around the operational level and governmental function issues, and so it is helpful to briefly touch on. The Court imposed liability on the government for the plaintiff's lost cargo after their ship ran aground because the Coast Guard had negligently failed to repair a lighthouse.[65] The Court rejected the government's attempts to read in a general "uniquely governmental" exception, finding it "inherently unsound" and contrary to the overall scheme of the FTCA.[66] Further, the Court took for granted the principle from *Dalehite* that the FTCA "provide[s] for liability in some situations on the 'operational level' of its activity."[67] This was used to bolster the Court's contention that the "uniquely governmental" factor was unworkable because "it is hard to think of any governmental activity on the 'operational level' . . . which is 'uniquely governmental,' in the sense that its kind has not at one time or another been, or could not conceivably be, privately

59 *See id.* at 37–42 (majority opinion).

60 *Id.* at 57, 57–58 (Jackson J., dissenting).

61 *See id.* at 57, 50. "In this area, there is no good reason to stretch the legislative text to immunize the Government or its officers from responsibility for their acts . . . . Many official decisions even in this area may involve a nice balancing of various considerations, but this is the same kind of balancing which citizens do at their peril . . . ." *Id.* at 60.

62 *Id.* at 60.

63 350 U.S. 61 (1955).

64 *Id.* at 64.

65 *See id.* at 69.

66 *Id.* at 64–65.

67 *Id.* at 64.

performed."[68] Ultimately, the government was liable under a Good Samaritan theory, because "once it exercised its discretion" to operate a lighthouse it was obligated to exercise due care in that operation.[69]

This remained the test for thirty years, during which time lower courts struggled to apply this "planning stage" versus "operational level" distinction, usually finding that "broad policies formulated by government were protected, but applications of those policies were not."[70] Ultimately in 1984, the Supreme Court unanimously decided *United States v. S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines)*.[71] The case was brought to the Court after plaintiffs from two airplane crashes alleged that the Civil Aeronautics Agency (today, the Federal Aviation Administration) failed to properly inspect the aircrafts and detect the error in design that caused the crashes.[72] The Court found the conduct covered under the discretionary function exception.[73]

There are several particularly important takeaways from *Varig Airlines*. First, the Court once again found that "it is unnecessary—and indeed impossible—to define with precision every contour of the discretionary function exception."[74] Second, the Court eliminated the "operational level" distinction that had reigned since *Dalehite*, holding that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies."[75] Third, the Court grounded the discretionary function exception in separation of powers principles and emphasized the need to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy."[76] Finally, the Court indicated that the exception should be broadly applied in the regulatory context, finding that it was "plainly . . . intended to encompass the discretionary acts of the Government acting in its role as a regulator of the conduct of private individuals."[77] Ultimately, the Court concluded that the "FAA has a statutory duty to *promote* safety in air transportation, not to insure it."[78]

Just a few years later, in *Berkovitz v. United States*, the Court narrowed some of these factors and established a two-prong test for the

68 *See id.* at 68.
69 *See id.* at 69.
70 *See* Krent, *supra* note 45, at 880.
71 467 U.S. 797 (1984).
72 *See id.* at 799–800, 802–03.
73 *Id.* at 815–16.
74 *Id.* at 813.
75 *See id.*
76 *Id.* at 814.
77 *See id.* at 813–14.
78 *Id.* at 821.

application of the discretionary function exception.[79] First, the conduct in question must "involve[] an element of judgment or choice."[80] The exception does not apply if "a federal statute, regulation, or policy specifically prescribes a course of action," because then there is no room for discretion.[81] If, however, there is room for discretion, then "a court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield," which requires that it be "based on considerations of public policy."[82] Additionally, the Court walked back the broad language of *Varig Airlines* regarding the scope of the exception in the regulatory context, noting that it "was designed to cover not all acts of regulatory agencies and their employees, but only such acts as are 'discretionary' in nature."[83]

Alas, in 1991 the Court decided the last of its doctrinal cases developing the discretionary function exception in *United States v. Gaubert*.[84] However far wide "*Berkovitz* [had] opened the door to Government liability in tort based on regulation of private conduct, *Gaubert* clarified that the door is not open very wide."[85] Though *Gaubert* reaffirmed the first prong of the *Berkovitz* test, it significantly narrowed the second and created a strong presumption in favor of the government. Indeed, the Court stated that "if a regulation allows the employee discretion, the very existence of the regulation creates a strong presumption that a discretionary act authorized by the regulation involves consideration of the same policies which led to the promulgation of the regulations."[86] Further, *Gaubert* hammered the final nail on the coffin of the "operational level" distinction, finding that "[d]iscretionary conduct is not confined to the policy or planning level."[87] Even more broadly, the Court declared that the "focus of the inquiry" is not the actual subjective intent involved in the employee's decisionmaking, but is "on the nature of the actions taken and on whether they are *susceptible to policy analysis.*"[88]

Practically, this standard has facilitated the government's ability to claim the application of the discretionary function exception, creating a "sweeping immunity" for wrongdoing even in areas of mundane activity and "levitat[ing]" failures in public safety to "imaginary policy

79 486 U.S. 531 (1988).
80 *Id.* at 536.
81 *Id.*
82 *Id.* at 536–37.
83 *See id.* at 538.
84 499 U.S. 315 (1991).
85 *See* SISK, *supra* note 27, at 173 (footnote omitted).
86 *Gaubert*, 499 U.S. at 324.
87 *Id.* at 325.
88 *Id.* (emphasis added).

meditations."[89] In the aftermath of *Gaubert*, the government has been much more frequently successful in asserting the discretionary function exception as an affirmative defense. Indeed, not only has the government asserted the discretionary function exception twice as often since *Gaubert*, but it has had a success rate of 76.3% in doing so.[90] The discretionary function exception, particularly armed with the *Gaubert* susceptible to policy analysis, has "greatly restricted the federal government's tort liability for all but the most mundane transgressions."[91]

II. FAILURE TO WARN IN TOXIC TORTS: AN EXERCISE OF DISCRETION?

The United States government is frequently sued under the FTCA for the failure to warn of some known danger or hazard in a variety of contexts.[92] Recent decades have seen this failure to warn become the basis of litigation against the federal government for toxic torts, which are environmental tort claims resulting from a plaintiff's exposure to toxic substances.[93] In this environmental context, the possible liability occurs when the EPA or other government agency learns of or suspects a violation or hazard involving a toxic substance and, even after determining that contamination exists above an acceptable threshold, still fails to warn at-risk individuals.[94] For plaintiffs who ultimately discover that they have been exposed to contamination that the government failed to warn them about, the FTCA has served as the mechanism for such litigation on a toxic tort failure-to-warn theory.[95] In turn, the government has asserted that the failure to warn was a protected exercise of discretion and is shielded by the discretionary function exception.[96]

Far too often, courts have agreed, finding that the failure to warn affected parties of dangerous, even deadly, environmental

89 *See* SISK, *supra* note 27, at 176.

90 *See* Cohen, *supra* note 49, at 896.

91 *See* Bruce A. Peterson & Mark E. Van Der Weide, *Susceptible to Faulty Analysis:* United States v. Gaubert *and the Resurrection of Federal Sovereign Immunity*, 72 NOTRE DAME L. REV. 447, 448 (1997).

92 *See* David S. Fishback, *The Federal Tort Claims Act Is a* Very Limited *Waiver of Sovereign Immunity—So Long as Agencies Follow Their Own Rules and Do Not Simply Ignore Problems*, DEP'T JUST. J. FED. L. & PRAC., Jan. 2011, at 16, 24–25 (collecting cases); *see also* Terri Stilo, Note, *Failure to Warn of a Known Environmental Danger: Limits on United States Liability Under the Federal Tort Claims Act (FTCA)*, 6 PACE ENV'T L. REV. 589, 589 (1989).

93 *See* Stilo, *supra* note 92, at 589; Bill Charles Wells, *The Grin Without the Cat: Claims for Damages from Toxic Exposure Without Present Injury*, 18 WM. & MARY J. ENV'T L. 285, 287 (1994).

94 Jamon A. Jarvis, Note, *The Discretionary Function Exception and the Failure to Warn of Environmental Hazards: Taking the "Protection" Out of the Environmental Protection Agency*, 78 CORNELL L. REV. 543, 544 (1993).

95 *See* Stilo, *supra* note 92, at 589.

96 *Id.* at 591.

contamination was a permissible "discretionary function" of the EPA or other government agency and dismissing the suit.[97] This next Section will first highlight some of these cases, analyzing the basis of these arguments and the reasoning used by courts to demonstrate that the vague and unclear nature of the discretionary function exception has led to uneven and concerning application by courts in this context. To that end, it will introduce the important backstory missing from the courts' opinions: the disparate impact that the post-hoc attempts at discretionary policy justifications asserted by the government have on low-income and BIPOC communities that have been exposed to environmental contamination with the government's knowledge.

However, in some circumstances courts have in fact refused to permit the federal government to assert the discretionary function exception in environmental failure-to-warn cases. This Part will also analyze some of those cases, in particular one that provides a potential path forward for toxic torts plaintiffs in failure-to-warn cases and possibly even a glimmer of hope for environmental justice: Flint, Michigan.

A. Continued Poisoning as a Permissible Policy Choice: Why Does Otis Fagan Have 5 Years Left to Live

It seems appropriate to continue where this Note began, with *Lockett*.[98] As discussed, the plaintiffs in *Lockett* were those families in Detroit, Michigan whose homes and community were exposed to astronomical levels of PCBs, all while the government knowingly failed to warn them of the nearby source of contamination for over five years.[99] This case came to judgment even before *Gaubert* expanded the breadth of the discretionary function exception. Still, the Sixth Circuit held that the decision not to take action or notify the community passed the two-prong *Berkovitz* test,[100] finding that this failure was "rooted in

97 For the purposes of this Note, I am focusing on failure-to-warn instances that involve the government's knowledge of environmental contamination and failing to warn the surrounding community. I am excluding circumstances where the exposure originated from a military base and the plaintiffs were military personnel on base, as those claims are not pertinent to the environmental inequalities at issue for this Note and because of the difference in governing principles of *Feres v. United States*, 340 U.S. 135 (1950), when military personnel are plaintiffs. To review the outcomes in some of those cases, see, for example, *In re Joint Eastern & Southern District New York Asbestos Litigation*, 897 F.2d 626 (2d Cir. 1990) (permitting claims from military personnel stemming from asbestos exposure during World War II); *Clendening v. United States*, 19 F.4th 421, 435 (4th Cir. 2021); and *In re Camp Lejeune North Carolina Water Contamination Litigation*, 263 F. Supp. 3d 1318 (N.D. Ga. 2016), *aff'd*, 774 F. App'x 564 (11th Cir. 2019).

98 Lockett v. United States, 938 F.2d 630 (6th Cir. 1991).

99 *See supra* notes 7–20 and accompanying text.

100 *See supra* notes 79–81 and accompanying text.

social, economic, or political policy" and was "the kind of discretionary judgment" that Congress intended to protect.[101]

In reaching this conclusion, the Sixth Circuit analyzed what it considered to be the relevant statutory and regulatory requirements bearing on the EPA's potential obligation to warn. This focused primarily on the Toxic Substances Control Act (TSCA), which authorizes the EPA to regulate toxins such as PCBs.[102] The Sixth Circuit pointed to several specific instances throughout the statute that seemed to indicate discretion was involved, primarily that the EPA "may" file a civil suit to seize hazardous chemicals (which has no bearing on the warning of the public).[103] The plaintiffs for their part cited to specific regulations promulgated pursuant to the TSCA and policy manuals which dictated mandatory and speedy responses by the EPA regarding cleanup and notification requirements for PCB contamination above acceptable levels.[104] The majority dismissed these regulations and policy statements as neither directly applicable nor mandating a particularized response, also noting that the policy manuals "were not promulgated as EPA regulations," even though the discretionary function exception specifically lists such unenacted policies separate from legislation and regulations.[105] Notably, as the dissent observes, the complex statutory and regulatory scheme also has multiple provisions that *do* require nondiscretionary enforcement actions in response to PCB contamination.[106]

Despite these nuanced arguments, the basis of the majority's position rested on one broad provision within the general policy statement of the TSCA, which reads: "It is the intent of Congress that the Administrator [of EPA] shall carry out this chapter in a reasonable and prudent manner, and that the Administrator shall consider the environmental, economic, and social impact of any action the Administrator takes or proposes to take under this chapter."[107] Relying almost solely on that single sentence, the court read in a discretionary nature to the entire statutory scheme of the TSCA and the regulations promulgated thereby. The court therefore determined that the EPA's inaction and failures were "discretionary decisions, based upon 'judgment

101 *See Lockett*, 938 F.2d at 634, 639.

102 Toxic Substances Control Act of 1976, 15 U.S.C. §§ 2601–2629 (1988).

103 *See id.* § 2606(a); *Lockett*, 938 F.2d at 634–35.

104 *See Lockett*, 938 F.2d at 635–36 (first citing 15 U.S.C. § 2605(e) (1988); then citing Polychlorinated Biphenyls (PCBs), 40 C.F.R. §§ 761.1–.218 (1990); and then citing Polychlorinated Biphenyls Spill Cleanup Policy, 52 Fed. Reg. 10688, 10688 (Apr. 2, 1987) (to be codified at 40 C.F.R. pt. 761)).

105 *See id.* at 637.

106 *See id.* at 640–41 (Edwards, J., dissenting).

107 *See id.* at 634 (majority opinion) (alteration in original) (quoting 15 U.S.C. § 2601(c) (1988)).

calls' concerning the sufficiency of evidence . . ., the allocation of limited agency resources, and determinations about priorities of serious threat to public health."[108]

Detroit, the Blackest city in America, has been an epicenter of pollution and environmental injustice for decades.[109] Southwest Detroit has some of the highest levels of air pollution in the country.[110] Within the region is the infamous 48217 district, owing its title of "Michigan's most polluted zipcode" to its unmatched concentrations of emitters of particulate matter sulfur dioxide and nitrous oxides.[111] As a result of historically discriminatory housing practices, 71% of the population of that district is Black.[112] Death by "toxic poisoning," respiratory issues, and acid rain are common; the sky also looks like it is on fire.[113]

The Carter Industrials Site (later designated a Superfund Site, or a contaminated site due to hazardous waste dumping that was left out or improperly managed),[114] was just a few miles away.[115] The area surrounding the Carter Industrials Superfund Site at the heart of *Lockett* is a historically Black neighborhood that today remains 83.9% Black.[116]

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108 *See id.* at 639. This allocation of resources argument refers to a general EPA concern at the time with "waste oil haulers." *See id.* at 638, 638–39.

109 *See* Drew Costley, *The Blackest City in the US Is Facing an Environmental Justice Nightmare*, GUARDIAN (Jan. 9, 2020, 5:00 AM), https://www.theguardian.com/us-news/2020/jan/09/the-blackest-city-in-the-is-us-facing-an-environmental-justice-nightmare [https://perma.cc/KGW6-F68L]. Recent census data indicates that Detroit generally is 77.8% Black. *QuickFacts: Detroit City, Michigan; United States*, U.S. CENSUS BUREAU (July 1, 2022), https://www.census.gov/quickfacts/fact/table/detroitcitymichigan,US/PST045222 [https://perma.cc/Z3G8-EXBB].

110 *See* Alexander Restum, *Air Quality in Southwest Detroit: A Public Health Crisis*, HARV. MED. SCH. CTR. FOR PRIMARY CARE: PERSPS. IN PRIMARY CARE (Apr. 19, 2022), https://info.primarycare.hms.harvard.edu/perspectives/articles/air-quality-southwest-detroit [https://perma.cc/C2T5-BVXD]; *Identifying Air Pollution Sources in Southwest Detroit*, U. MICH. SCH. PUB. HEALTH (July 6, 2023), https://sph.umich.edu/news/2023posts/identifying-air-pollution-sources-in-southwest-detroit.html [https://perma.cc/CM7K-BS[J].

111 *See* Costley, *supra* note 109.

112 *See id.*

113 *See id.*

114 *See What Is Superfund?*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/superfund/what-superfund [https://perma.cc/MX52-MSKC].

115 Its address was 4690 Humboldt, Detroit, Michigan 48208. *See Superfund Site: Carter Industrials, Inc., Detroit, MI*, U.S. ENV'T PROT. AGENCY, https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0502729 [https://perma.cc/2LZK-VJRA].

116 *See Stats and Demographics for the 48208 ZIP Code*, U.S. ZIP CODES.ORG, https://www.unitedstateszipcodes.org/48208/#stats [https://perma.cc/D85F-WD2V]. This area historically served as a "nexus of African American leadership," as a large Black population settled there because of discriminatory housing and regulatory policies in other areas of the city. *See* FINAL REPORT: PROPOSED KING SOLOMON BAPTIST CHURCH HISTORIC DISTRICT 6102 AND 6125 FOURTEENTH STREET, CITY OF DETROIT CITY COUNCIL HISTORIC DESIGNATION ADVISORY BOARD 5 (2010), https://detroitmi.gov/sites/detroitmi.localhost/files/2018-08

This means that the EPA's "policy judgment" in *Lockett* to fail to protect, let alone warn, the community being poisoned by Carter Industrial's PCB contamination was at the sacrifice of the almost entirely Black community who lived in the surrounding neighborhood.[117] When the EPA defends its choices with arguments of prioritization and resource allocation supposedly grounded in social considerations, whether intentionally or not those social considerations are that these neighborhoods are less of a priority for resources. *Lockett* is further demonstrative of the post-hoc "choose your own adventure" ability of the government and courts to cherry-pick which statutes or regulations to analyze, and how broadly or how narrowly to define the governing law to determine whether or not a discretionary decision was at play. In *Lockett*, all it took was a vague introductory policy statement for the court to determine that any action taken under the statute or resulting regulations must inherently be discretionary.

"*Lockett* is the [r]ule, [n]ot the [e]xception."[118] Indeed, courts in other circuits have also reached the same result in environmental failure-to-warn cases where the government has invoked the discretionary function exception. Even other pre-*Gaubert* cases similarly afforded the EPA "broad deference . . . at virtually any level without any clear explanation for such deference."[119] In *Cisco v. United States*, for instance, the Seventh Circuit gave only a cursory analysis of the Resource Conservation and Recovery Act of 1976 when analyzing the EPA's decision not to warn residents of Jefferson County, Missouri, that dirt contaminated with 2,3,7,8-Tetrachlorodibenzo-p-dioxin (2,3,7,8-TCDD) had been used as residential landfill in their community.[120] Noting an absence of a notification provision, the court declared that "Congress has left to the EPA to decide the manner in which, and the

/King%20Solomon%20Baptist%20Church%20HD%20Final%20Report.pdf [https://perma.cc/F28Y-C69L]. It is further home to an important landmark of the Civil Rights Movement, the King Solomon Church, which served as a community center for the neighborhood and was the largest African American-owned auditorium in Detroit. *See id.*; *Our History*, HIST. KING SOLOMON CHURCH, https://www.kingsolomonchurch.org/ [https://perma.cc/6GBE-W33M]; *14 Lesser-Known African American Historical Sites in Detroit*, VISIT DETROIT, https://visitdetroit.com/inside-the-d/lesser-known-african-american-historical-sites-in-detroit/ [https://perma.cc/N5JM-6MS9].

117 For an argument that this is a nationwide phenomenon when it comes to industrial air pollution, see Ken Ward Jr., *How Black Communities Become "Sacrifice Zones" for Industrial Air Pollution*, PROPUBLICA (Dec. 21, 2021, 5:00 AM), https://www.propublica.org/article/how-black-communities-become-sacrifice-zones-for-industrial-air-pollution [https://perma.cc/F6J2-X8QZ].

118 Jarvis, *supra* note 94, at 553.

119 *See id.*

120 *See* 768 F.2d 788, 789 (7th Cir. 1985).

extent to which, it will protect individuals and their property from exposure to hazardous wastes."[121]

In *Wells v. United States*, plaintiffs lived in homes and housing projects in West Dallas, Texas, while the EPA failed to warn them of the gratuitous lead poisoning emanating from three lead smelters in their neighborhood, leading to brain damage and developmental impairments.[122] While the EPA was aware of and had been monitoring this pollution for many years, the D.C. Circuit found its failure to warn nearby residents was a protected exercise of discretion.[123] Though *Berkovitz* had walked back the hefty presumption that regulation of private individuals was inherently discretionary, the court in *Wells* relied heavily on language from *Varig Airlines* to that end.[124] Moreover, the D.C. Circuit addressed no regulatory or statutory provisions that would allegedly endow the EPA with the discretion not to take action or warn the public. Instead, they referenced three vague quotes from the oversight hearings Congress eventually held about the West Dallas pollution, which primarily cited concerns of setting precedent for future "negotiations" that if they cleaned up this site, then other individuals might want their pollution remediated as well.[125] Thus, the court considered this to be a permissible exercise of discretion on the part of the EPA and dismissed the suit.[126] The legitimatized contamination of these neighborhoods and ensuing struggle for environmental justice has become a well-studied incident of our nation's historical environmental inequity for BIPOC communities.[127]

The three lead smelter plants had been operating in this predominantly low-income Black and Hispanic West Dallas neighborhood for over half of a century; the population within a half-mile radius of the smelter was approximately 86% Black.[128] It is important to note that the nearby housing projects were created as a part of a "slum clearance" program built specifically to address the "Negro housing problem," and made the Dallas Housing Authority the largest landlord in

121 *Id.* at 789.

122 *See* 851 F.2d 1471, 1472 (D.C. Cir. 1988); Daniel G. Rodeheaver & Jennifer G. Cutrer, *Environmental Equity and the Case of West Dallas*, *in* AN AGING POPULATION, AN AGING PLANET, AND A SUSTAINABLE FUTURE 203, 210 (Stanley R. Ingman et al. eds., 1995).

123 *Wells*, 851 F.2d at 1472.

124 *See id.* at 1476.

125 *See id.* at 1477.

126 *Id.* at 1478.

127 *See, e.g.*, Rodeheaver & Cutrer, *supra* note 122; ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY 54–61 (1990).

128 *See* Rodeheaver & Cutrer, *supra* note 122, at 211; *Dallas Soil Tainting: Relocation Urged*, N.Y. TIMES, Apr. 25, 1983, at A10.

West Dallas.[129] They built the projects directly next to a smelter releasing 269 tons of lead into the air annually and contaminating soil, sediment, and groundwater by dumping waste in landfills.[130] The pollution in the area had become so severe that the Dallas Housing Authority eventually recommended the relocation of over 400 families to public housing units farther from the sites, and soil samples at a nearby day care center contained ninety-two times the acceptable levels of lead contamination.[131] Testing revealed that the level of lead in the blood of children in West Dallas was 36% higher than children tested from control areas.[132] Unfortunately, this is but one incident in a long, sordid history of environmental racism in West Dallas, Texas.[133]

Years later, when testifying about the prolonged effects of the lead poisoning his community, one community member said this:

> *Otis Fagan wants to know why does he have 5 years left to live?* Mr. Hernandez wants to know how long is he going to live with the heart attacks that he's having? My father has hespitosis. Mom has half a lung. Mr. Rodriguez has heart attacks. . . .
>
> . . . .
>
> And I'm finding problems after problems after problems of EPA shutting us out of elevators. They don't want to hear what we have to say because we are poor, we are minorities, we are on the other side of the railroad tracks.[134]

The discretionary function exception has served to shield other branches of the United States government from liability for failure to warn of environmental hazards. In 1985, the Ninth Circuit found in *Begay v. United States* that the exception applied to the decision of the

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129 DAVID E. NEWTON, ENVIRONMENTAL JUSTICE: A REFERENCE HANDBOOK 6 (2d ed. 2009); Gregg P. Macey & Lawrence E. Susskind, *The Secondary Effects of Environmental Justice Litigation: The Case of* West Dallas Coalition for Environmental Justice v. EPA, 20 VA. ENV'T L.J. 431, 458 (2001).

130 NEWTON, *supra* note 129, at 6; DOWNWINDERS AT RISK, CLINTON GLOB. INITIATIVE U, SMU MASD & PAUL QUINN COLL. URI, DALL. ENV'T INJUSTICE ARCHIVE (Jan. 31, 2023) [hereinafter DALL. ENV'T INJUSTICE ARCHIVE], https://storymaps.arcgis.com/stories/9e53cb23ede64985a67000437644215a [https://perma.cc/RV56-PSST].

131 *Dallas Soil Tainting: Relocation Urged*, *supra* note 128, at A10.

132 *See* NEWTON, *supra* note 129, at 6. Earlier testing done by Medicaid had not shown increased levels of lead poisoning, because they had been using a nutrition indicator designed to detect anemia and malnutrition. *See* Macey & Susskind, *supra* note 129, at 460.

133 *See, e.g.*, DALL. ENV'T INJUSTICE ARCHIVE, *supra* note 130; Sona Chaudhary, *How West Dallas Is Leaving a History of Environmental Racism in the Dust*, DALL. FREE PRESS (May 5, 2022), https://dallasfreepress.com/west-dallas/west-dallas-history-environmental-injustice-timeline-concrete/ [https://perma.cc/GG5U-7WAG].

134 *Lead Poisoning (Part 2): Hearing on Impacts of Lead Poisoning on Low-Income and Minority Communities Before the Subcomm. on Health & the Env't of the H. Comm. on Energy & Com.*, 102d Cong. 156 (1992) (statement of Luis D. Sepulveda) (emphasis added).

Public Health Service (PHS) not to warn a group of Navajo Nation tribe members of the dangers of the uranium mining they had been contracted to do on their tribal land under the supervision of the PHS, among other agencies.[135] The plaintiffs, some who were miners themselves and others the surviving family members of miners, were among 200 Native individuals attempting to bring suit as a result of the cancers and other diseases they had developed due to their radiation exposure.[136] The PHS defended its decision not to warn out of concerns that the miners would quit and that the nation's necessary uranium supply would be interrupted.[137] Even more shocking, however, was another given reason: the PHS wanted to study the miners to determine the long-term effects of uranium radiation exposure.[138] Affirming the district court's dismissal, the Ninth Circuit held that it was within PHS discretion, at the behest of the Surgeon General, to decide that it was in the public interest not to disclose information, even if it suspected that "some miners would suffer injury from radiation exposure."[139]

It is difficult to overstate the disproportionate burden of environmental inequities that indigenous communities face, indeed land injustices generally. To start, the theft of their native lands and displacement onto reservations has forced them to live in areas that are on average more vulnerable to climate change hazards such as extreme heat and drought.[140] Additionally, Indian land has historically been subjected to high rates of mining of coal, natural gas, oil, uranium, and other minerals, and it has been an extremely attractive option to build industrial sites for production and waste disposal.[141] This is in part due to the "lesser degree of environmental regulation, oversight, and enforcement" on tribal lands by environmental regulatory officials, exacerbated by structural inequalities that block meaningful participation in environmental decisionmaking.[142] According to our best census data, around 7% of all Indians live within three miles of a Superfund

135 768 F.2d 1059, 1062 (9th Cir. 1985).

136 *Id.* at 1060.

137 Begay v. United States, 591 F. Supp. 991, 995–96 (D. Ariz. 1984), *aff'd*, 768 F.2d 1059 (9th Cir. 1985).

138 *See id.*

139 *Begay*, 768 F.2d at 1065–66.

140 *See* Rachel Treisman, *How Loss of Historical Lands Makes Native Americans More Vulnerable to Climate Change*, NPR (Nov. 2, 2021, 7:00 AM), https://www.npr.org/2021/11/02/1051146572/forced-relocation-native-american-tribes-vulnerable-climate-change-risks [https://perma.cc/ERZ4-TKSB].

141 *See* NEWTON, *supra* note 129, at 48.

142 Elizabeth Hoover et al., *Indigenous Peoples of North America: Environmental Exposures and Reproductive Justice*, 120 ENV'T HEALTH PERSPS. 1645, 1647 (2012).

site.[143] Indian Country is home to approximately 25% of superfund sites in the United States generally.[144] The "policy decisions" at play in these exercises of discretion are in truth the sacrifice of certain groups of people in the name of the public interest. The overapplication of the discretionary function exception in toxic tort failure-to-warn cases has directly endorsed further environmental inequalities on American Indian and Alaskan Natives. For the United States to be granted permission by the federal courts to knowingly subject Indians to bodily harm from environmental hazards under the cloak of a permissible exercise of discretion is unacceptable.

It cannot be said that these cases are a relic of the past. In 2012, the First Circuit upheld a dismissal under the discretionary function exception in *Sánchez ex rel. D.R.-S. v. United States*.[145] The case stemmed from the United States Navy's failure to warn fisherman and cattle herders on the Vieques Island of Puerto Rico of the hazardous and toxic waste contamination (including uranium radiation) from the Navy's munitions training and testing on the island.[146] Though the Navy had been repeatedly notified of the resultant contamination, it failed to issue a warning to the residents of Vieques, and even granted

143 *See Community-Engaged Research Addresses Health Concerns on Tribal Lands*, NAT'L INST. ENV'T HEALTH SERVS., https://tools.niehs.nih.gov/srp/news/view.cfm?newsitem_ID=2256 [https://perma.cc/832E-JNL3]. Recent data shows 500,000 Native Americans live within that proximity, while there are approximately 6.79 million total in the United States. *See Native American Population by State 2023*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/native-american-population [https://perma.cc/7YC8-R8GP]. This number likely does not capture the full extent of the Native population living in close proximity to superfund sites. Native Americans living on reservations have been undercounted in census data; the net undercount rate in 2020 was 5.64%. *See* Hansi Lo Wang, *The 2020 Census Had Big Undercounts of Black People, Latinos and Native Americans*, NPR (Mar. 11, 2022, 12:09 AM) https://www.npr.org/2022/03/10/1083732104/2020-census-accuracy-undercount-overcount-data-quality [https://perma.cc/6PZ8-FBWA]. It can sometimes be difficult to obtain a complete picture of data regarding American Indian and Alaska Native demographics, as these individuals are often misclassified or erroneously grouped in an opaque "Other" category. Melissa A. Jim, Elizabeth Arias, Dean S. Seneca, Megan J. Hoopes, Cheyenne C. Jim, Norman J. Johnson & Charles L. Wiggins, *Racial Misclassification of American Indians and Alaska Natives by Indian Health Service Contract Health Service Delivery Area*, 104 AM. J. PUB. HEALTH 295, 295 (2014) (noting that AI/IN persons are misclassified 30% more than persons of other races). This occurs in part due to the unique politicization of the Indian identity and the complications of tribal membership and federal recognition requirements, which make the Indian classification not just a categorization of race-ethnicity but also a political status. *See generally* Emily A. Haozous, Carolyn J. Strickland, Janelle F. Palacios & Teshia G. Arambula Solomon, *Blood Politics, Ethnic Identity, and Racial Misclassification Among American Indians and Alaska Natives*, J. ENV'T & PUB. HEALTH, 2014, at 1. This difficulty has negative public health consequences. *See id.*

144 Jessica Ditmore, *Nothing is Over: FTCA Claims for Toxic Torts on Native Lands*, 8 AM. IND. L.J. 218, 219 (2019).

145 671 F.3d 86 (1st Cir. 2012).

146 *See id.* at 89–92.

them permission to enter, fish, and graze their cattle in contaminated parts of the island. The First Circuit determined that the Navy's failure to warn was a discretionary decision that was susceptible to policy judgment, as the Navy had to weigh "competing interests between 'secrecy and safety, national security and public health.'"[147] It found that the Navy had "engaged in both choice and judgment" by permitting the residents to enter the lands and waters, as "the Navy would have had to balance its military and national security needs against any perceived benefits to public health and safety in light of the risks and burdens of a warning program and the great public anxiety warnings could create."[148] However, at no point does the First Circuit explain specifically *what* military and national security needs would be endangered by, at a minimum, preventing the native residents from entering and obtaining their food supply from an area with known contamination.

The history of Vieques Island, Puerto Rico demonstrates a legacy of colonial domination and abuse, first by Spain and then by U.S. military occupation. In 1941, the United States expropriated most of Vieques and Culebra, two smaller islands in the Puerto Rico commonwealth, and declared that the majority of the islands were military property fully surrounding only a few remaining pockets of native civilian communities.[149] From that time, the military continuously used the island to conduct intensive military exercises on the air, land, and sea until they were forced to stop in 2003: they dropped bombs, launched missiles, shot at the island from the sea, ran operations practicing a full-scale invasion, and even tested Napalm and Agent Orange.[150] As expected, this invasion came at the expense of the Vieques environment and agricultural industry, plunging the economy into despair, and occasionally causing the death of innocent Viequenses.[151]

The colonial history and military occupation of Vieques led to a perfect conflagration of environmental injustice: the destruction of both the natural environment and devastating health inequities for the people who live there.[152] Test results confirmed that the plaintiffs, some as young as nine years old, had toxic levels of lead, cadmium, aluminum, and arsenic.[153] Studies conducted on the residents of the

147 *Id.* at 100 (quoting Abreu v. United States, 468 F.3d 20, 26 (1st Cir. 2006)).

148 *Id.* at 102–03.

149 *See id.* at 104 (Torruella, J., dissenting).

150 *See* Jeffrey Sasha Davis, Jessica S. Hayes-Conroy & Victoria M. Jones, *Military Pollution and Natural Purity: Seeing Nature and Knowing Contamination in Vieques, Puerto Rico*, 69 GEOJOURNAL 165, 165–68 (2007).

151 *See id.* at 167–68; *1999: Vieques Island Protests*, LIBR. OF CONG: RSCH. GUIDES, https://guides.loc.gov/latinx-civil-rights/vieques-island-protests [https://perma.cc/4WMA-FEA2].

152 *See, e.g.*, Shane Epting, *The Limits of Environmental Remediation Protocols for Environmental Justice Cases: Lessons from Vieques, Puerto Rico*, 18 CONTEMP. JUST. REV. 352, 357 (2015).

153 *Sánchez*, 671 F.3d at 111–12 (Torruella, J., dissenting).

island showed astronomically high rates of cancer, hypertension, cirrhosis, and diabetes, as well as higher infant mortality and poor health outcomes, compared to other residents of Puerto Rico.[154] The history of colonialism, military occupation, and systematic racism that led to this case is, of course, unforgivable. But the government imposed further injustices on this already ravaged community when it labeled the failure warn of the incredibly dangerous contamination that resulted as a permissible exercise of discretion and shielded itself from liability. Such conduct cannot be squared with the supposed U.S. commitment to self-determination of its colonies and its stated mission of environmental justice for BIPOC and vulnerable communities.[155]

To be sure, this is just a sampling of cases in which courts accepted the government's defense that the failure to warn of dangerous environmental contamination was a permissible exercise of discretion. Atomic testing in Tennessee primarily impacting a segregated Black neighborhood and the failure to warn of the contamination was covered under the exception.[156] Same with the failure to warn entire Native American reservations who lived downwind of the nuclear radiation from Nevada Test Site, particularly the Shoshone and Southern Paiute tribes.[157] Certainly not every application of the discretionary function exception in environmental failure-to-warn cases has obvious racial implications.[158] However, this Section has demonstrated an alarming trend that the government's failure to warn of environmental contamination frequently perpetuates environmental inequities, protected by the discretionary function exception as a "Get Out of Jail Free Card."

C. Lowering the Shield on Failure to Warn

In contrast to the veritable floodgate of cases in the previous Section, it was an alarmingly difficult task to locate cases where courts

154 *Id.*

155 *See* Brad Simpson, *The United States and the Curious History of Self-Determination*, 36 DIPLOMATIC HIST. 675, 675 (2012); Exec. Order No. 14096, 88 Fed. Reg. 25251, 25251–52 (Apr. 26, 2023).

156 *See* Harper v. Lockheed Martin Energy Sys., Inc., 73 F. Supp. 2d 917, 921 (E.D. Tenn. 1999); J. Linn Allen, *Atomic Research Casts Shadow on Tennessee Town*, CHI. TRIB. (Aug. 20, 2021, 4:54 PM), https://www.chicagotribune.com/news/ct-xpm-2001-02-18-0102180396-story.html [https://perma.cc/RH52-43PN].

157 *See* Allen v. United States, 816 F.2d 1417, 1419 (10th Cir. 1987); Eric Frohmberg, Robert Goble, Virginia Sanchez & Dianne Quigley, *The Assessment of Radiation Exposures in Native American Communities from Nuclear Weapons Testing in Nevada*, 20 RISK ANALYSIS 101, 101, 103 (2000).

158 *See, e.g.*, Loughlin v. United States, 393 F.3d 155 (D.C. Cir. 2004); Ross v. United States, 129 F. App'x 449 (10th Cir. 2005); Daigle v. Shell Oil Co., 972 F.2d 1527 (10th Cir. 1992).

found that the government's failure to warn of an environmental hazard was *not* covered by the discretionary function exception and is still good law today.[159] However, two more recent district court decisions suggest a possible hopeful trend of lower courts demonstrating restraint in their application of the discretionary function exception in these circumstances.

1. Hurricane Katrina and *In re FEMA*

After Hurricane Katrina made landfall on August 29, 2005, it was "described as the most destructive natural disaster in United States history."[160] Its powerful winds and 27-foot storm surges led to the collapse of multiple canals and levees throughout New Orleans, killing over 1,320 people, rendering 300,000 homes uninhabitable, and displacing hundreds of thousands of people.[161] In response, President George W. Bush declared Louisiana, Mississippi, and Alabama the sites of "major disasters" under the Stafford Disaster Relief and Emergency Assistance Act[162] and authorized FEMA to respond.[163] Accordingly, FEMA began to secure emergency housing for these individuals as "the primary mechanism to assist individuals and households in their recovery from damages caused by a disaster."[164] It relied primarily on emergency housing units (EHUs) that consisted of travel trailers and park model trailers, ostensibly to provide adequate housing while keeping displaced individuals near their impacted communities to encourage recovery and rebuilding.[165]

Evidently, many of these EHUs were contaminated with dangerous levels of formaldehyde. Shortly after the program began, FEMA received several complaints about the potential contamination, and testing by the Occupational Safety and Health Administration (OSHA) at FEMA's request revealed dangerous levels of contamination and led to the implementation of safety precautions for the FEMA staff.[166]

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159 There are numerous examples of cases where courts refused to apply the discretionary function exception but were later abrogated. *See, e.g.*, W.C. & A.N. Miller Cos. v. United States, 963 F. Supp. 1231 (D.D.C. 1997), *abrogated by* Loughlin v. United States, 286 F. Supp. 2d 1 (D.D.C. 2003), *aff'd* 393 F.3d 155 (D.C. Cir. 2004); Dube v. Pittsburgh Corning, 870 F.2d 790 (1st Cir. 1989), *abrogated by* United States v. Gaubert, 499 U.S. 315 (1991), *as recognized in* Shanksy v. United States, 164 F.3d 688, 692 & n.4 (1st Cir. 1999).

160 *In re* FEMA Trailer Formaldehyde Prods. Liab. Litig., 583 F. Supp. 2d. 758, 762 (E.D. La. 2008).

161 *See id.*

162 Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5206 (2000).

163 *In re FEMA*, 583 F. Supp. 2d at 762.

164 *Id.*

165 *See id.* at 763–64.

166 *See id.* at 776–77.

Despite this, FEMA permitted hurricane victims to remain in these contaminated trailers without any notification or warning of the potential danger.[167] Notably, emails between FEMA staff and lawyers during this time expressed concerns about "overreacting to the formaldehyde issue," and many of the conversations seemed focused on properly positioning the agency for potential litigation.[168] In April 2007, a year and a half after it learned of the contamination, FEMA still had not issued a warning to inhabitants; instead, it advertised a program where hurricane victims could purchase their EHU "at a fair and equitable price."[169] It was not until July of that year, after they had received over 200 complaints and Congress initiated hearings on "FEMA's Toxic Trailers," that FEMA issued its first formal notice to the occupants.[170]

In the ensuing litigation, FEMA asserted that its decision not to warn the residents was a proper exercise of discretion and moved to dismiss the suit under the discretionary function exception.[171] In its analysis, the U.S. District Court for the Eastern District of Louisiana noted the existence of "certain *general* policy pronouncements" in the Code of Federal Regulations that seemed to imbue FEMA with some discretion in the implementation of its housing assistance program that are quite reminiscent of the general policy statement relied upon by the Sixth Circuit in *Lockett*.[172] However, the court declined to follow *Lockett*'s example. Instead, it noted the absence of a "*specific* statute, regulation, or policy giving precise direction" and moved onto an analysis under the second *Berkovitz* prong of whether the decision not to warn was "susceptible to policy analysis" within those general policy declarations.[173]

The court ultimately denied FEMA's request to shield its failure to warn under the discretionary function exception. It relied on a then-recent Ninth Circuit decision, *Whisnant v. United States*,[174] to find that FEMA's decision to "ignore potential health concerns . . . did not involve any permissible exercise of policy judgment,"[175] because

167 *See id.* Tests had revealed levels that were dangerous when exposure exceeded fourteen days and were at a level that the EPA recognized would manifest "acute health effects." *Id.*

168 *See id.* at 778–80.

169 *See id.* at 779.

170 *See id.* at 779–80.

171 *Id.* at 767.

172 *Id.* at 774; *see supra* notes 107–08 and accompanying text.

173 *See In re FEMA*, 583 F. Supp. 2d at 774–75.

174 *See* 400 F.3d 1177 (9th Cir. 2005) (finding that the Navy's failure to warn a commissary employee of toxic mold was not susceptible to policy analysis and therefore not protected by the discretionary function exception).

175 *See In re FEMA*, 583 F. Supp. at 783.

"matters of scientific and professional judgment—*particularly judgments concerning safety*—are rarely considered to be susceptible to social, economic, or political policy."[176] Rather, "FEMA's duty to quickly and adequately respond to concerns and complaints of formaldehyde was not a policy choice of the type that the discretionary function exception shields."[177] This is because "[w]hen an agency is faced with a matter of public safety, donning the litigation battle armor should not be confused with weighing policy considerations and responding reasonably and promptly in such a way that can be considered to be 'susceptible to policy analysis.'"[178] What's more, the court focused on *who* was making the decisions, finding them not to be individuals who have the discretion to direct such a response, and definitively noted that FEMA could not excuse its failure "solely on the grounds of inadequate government resources."[179]

2. Flint, Michigan

This brings us at last to Flint. As noted previously, the Flint Water Crisis arose out of the April 2014 decision to switch the water source of Flint, Michigan from Lake Huron to the Flint River.[180] Some citizens immediately became concerned that they could detect a decrease in their water quality as compared to the water sourced from Lake Huron, which was treated by the Detroit Water and Sewage Department to control for potential copper, lead, or other contaminants.[181] Though the decisions up until then had been entirely under the responsibility of the Michigan Department of Environmental Quality (MDEQ) and local Flint authorities, the EPA's regional office serving Michigan (Region 5) started to receive complaints and began conducting background research and communicating with state officials.[182] In early 2015, Region 5 received a direct complaint from one Flint citizen that testing by the City showed water from her home had highly elevated lead and iron levels.[183] Though MDEQ and the City brushed off the results as coming from the home's plumbing, Region 5 officials quickly learned that the home had exclusively plastic plumbing that could not

176 *Id.* (emphasis added) (quoting *Whisnant*, 400 F.3d at 1181).

177 *Id.* at 783–84.

178 *Id.* at 784.

179 *Id.* The court applied reasoning from a Tenth Circuit case on the failure to warn of the dangers of falling boulders in national parks, which stated that "insufficient government resources alone do not a discretionary function make." *See* Duke v. Dep't of Agric., 131 F.3d 1407, 1412 (10th Cir. 1997).

180 *See supra* note 2 and accompanying text.

181 *In re* Flint Water Cases, 482 F. Supp. 3d 601, 608–09 (E.D. Mich. 2020).

182 *Id.* at 609.

183 *Id.* at 610.

have been the source and became concerned about a potentially widespread lead issue.[184] Subsequent investigation and testing by the EPA demonstrated that other homes also had noncompliant lead levels, and the EPA discovered that the City was not implementing corrosion control treatment, was "preflushing" samples before testing for lead, and was excluding samples that detected high levels of lead against EPA's direction.[185]

By June 2015, Region 5 officials had repeatedly expressed concerns that the MDEQ and City of Flint were not taking proper water quality precautions and were "flushing away the evidence."[186] However, viewing it as MDEQ's responsibility to warn the citizens, the EPA still took no formal action and instituted no warning program.[187] All the while, the EPA knew that MDEQ and City officials were assuring the residents that there was no issue and even that "the EPA [had] found the City in compliance with safe water standards."[188] What's more, the EPA knew that pediatric testing had demonstrated a shocking rise in the blood lead levels of Flint's children after the switch to the Flint River.[189] By October, Flint switched back to sourcing treated water from Lake Huron, but the damage to the infrastructure had already been done: the corrosive water from the Flint River had eroded away all protective coatings in the City's lead pipes, rendering them extremely dangerous.[190] A state of emergency was declared in the City of Flint by December.[191]

In January 2016, the EPA at last issued an emergency order[192] under Section 1431 of the Safe Drinking Water Act (SDWA), which grants the EPA emergency powers in the event of an "imminent and substantial endangerment to the health of persons," and outlines certain actions that the EPA "may take" if state and local authorities have not taken adequate actions.[193] Later that year, the EPA Office of Inspector General determined that Region 5 had sufficient authority and information to issue such an order as early as June of 2015.[194] The resulting litigation brought claims against the EPA for its failure to issue such an order, to provide necessary advice and technical assistance under Section 1414, and, of course, for its failure to warn the citizens of Flint,

184 *See id.*
185 *See id.* at 611–13.
186 *See id.* at 611–12.
187 *See id.* at 613.
188 *Id.*
189 *Id.*
190 *See id.*
191 *See id.* at 614.
192 *Id.*
193 Safe Drinking Water Act § 1431, 42 U.S.C. § 300i (2012).
194 *See In re Flint*, 482 F. Supp. 3d at 614.

Michigan that their drinking water was contaminated with lead.[195] Though the government moved to dismiss the suit under the discretionary function exception, the U.S. District Court for the Eastern District of Michigan found that none of the EPA's actions were shielded, including the failure to warn.[196]

Echoing the logic of *In re FEMA Trailer Formaldehyde Products Liability Litigation* and *Whisnant*, the court in *Flint* considered it to be a "general principle that scientific and professional judgments are not the types of decisions that are susceptible to policy analysis," again highlighting that this particularly applies to "judgments concerning safety."[197] The district court took great pains to distinguish the present matter from *Lockett*, reframing the situation there as simply a "detected safety violation" that affected only a small neighborhood and focused on the EPA's questions of "sufficient evidence,"[198] while dubbing the situation in Flint a "public health crisis."[199] Notably, though the court agreed that the general structure of the SDWA may have afforded the EPA some discretion, it declined to follow *Lockett*'s example and determine that the existence of some overarching discretionary options necessitate that any related action is, also, discretionary and protected.[200]

The court acknowledged that often decisions of "whether to warn of potential danger" are covered under the discretionary function exception, but determined that its application is properly analyzed under an "ad hoc" basis that depends on the facts of each case, rather than a categorical approach.[201] It then held that the lead contamination was "a safety hazard so blatant that [the EPA's] failure to warn the public could not reasonably be said to involve policy considerations."[202] In sum, the court found the EPA's failure to warn the residents of Flint, Michigan was so objectively unreasonable it could not possibly have been susceptible to policy analysis, and refused to shield it behind the

195 *See id.* at 619.

196 *See id.* at 626.

197 *See id.* at 634–35 (first quoting Whisnant v. United States, 400 F.3d 1177, 1181 (9th Cir. 2005); and then citing Anestis v. United States, 749 F.3d 520 (6th Cir. 2014)).

198 *See id.* at 636. This author notes that while the court was required to distinguish *Lockett* as it is binding precedent in the Sixth Circuit, such distinctions seem relatively superficial when human life is at stake, and moreover the EPA's assertion of insufficiency of the evidence in *Lockett* seems more akin to an ostrich burying its head in the sand.

199 *Id.* at 636.

200 *Cf. supra* notes 107–08 and accompanying text. Further, the court still found that the EPA's actions under the discretionary provision were not properly susceptible to policy analysis. *See In re Flint*, 482 F. Supp. 3d at 633–38.

201 *See In re Flint*, 482 F. Supp. 3d at 637 (first quoting Edwards v. Tenn. Valley Auth., 255 F.3d 318, 324 (6th Cir. 2001); and then quoting Graves v. United States, 872 F.2d 133, 137 (6th Cir. 1989)).

202 *See id.* (quoting S.R.P. *ex rel.* Abunabba v. United States, 676 F.3d 329, 340 n.6 (3d Cir. 2012)).

discretionary function exception. It therefore denied the government's motion to dismiss,[203] along with its subsequent motion for interlocutory appeal.[204]

Despite this win, the Flint Water Crisis is still ongoing. As of May 2024, ten years after the crisis began, Flint still had not finished replacing its lead service lines and has missed every deadline since 2019.[205] Meanwhile, Flint's citizens have been without weekly water bottle donations since the end of 2022.[206] Given the nature of lead poisoning, it will take decades to see the full effects this crisis will have on the citizens of Flint, Michigan. However, the ultimate effects of even a low level of lead exposure generally include damage to the brain and nervous system, slowed growth and development, learning and behavioral problems, hearing and speech problems, increased high blood pressure, heart disease, kidney disease, and reduced fertility.[207] Already, we are seeing that children born to mothers in Flint who were exposed to the lead have significantly lower birth weights than average, particularly among Black newborns.[208]

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203 *Id.* at 639.

204 *See In re* Flint Water Cases, 627 F. Supp. 3d 734, 736 (E.D. Mich. 2022).

205 *See* Anna Clark & Sarahbeth Maney, *Ten Years After the Flint Water Crisis, Distrust and Anger Linger*, PROPUBLICA (May 4, 2024, 5:00 AM), https://www.propublica.org/article/flint-michigan-water-crisis-ten-years-after [https://perma.cc/5CRF-HDGD]; Arpan Lobo, *'It's Just Devastating': Flint Reels as Water Crisis Prosecution Comes to an End*, DETROIT FREE PRESS (Nov. 1, 2023, 5:34 PM), https://www.freep.com/story/news/local/michigan/2023/11/01/flint-water-crisis-residents-say-state-failed-delivering-convictions-justice/71397342007/ [https://perma.cc/E292-BGRB]; Kelly House, *Flint Misses New Deadline in Long-Overdue Lead Line Replacement Effort*, BRIDGE MICH. (May 4, 2023), https://www.bridgemi.com/michigan-environment-watch/flint-misses-new-deadline-long-overdue-lead-line-replacement-effort [https://perma.cc/5BN7-K7Q5]; James Felton & Hannah Mose, *Flint Residents Want Answers After Pipe Replacement Deadline*, WNEM (Aug. 2, 2023, 6:11 PM), https://www.wnem.com/2023/08/02/flint-residents-want-answers-after-pipe-replacement-deadline/ [https://perma.cc/YWA7-Q68T].

206 *See* Kiara Alfonseca, *Flint Residents Urged to Filter Water as Bottled Water Donations End Amid Ongoing Water Crisis*, ABC NEWS (Jan. 19, 2023, 11:13 AM), https://abcnews.go.com/US/flint-residents-urged-filter-water-bottled-water-donations/story?id=96531880 [https://perma.cc/Z6YU-C52J].

207 *See* Perri Zeitz Ruckart, Adrienne S. Ettinger, Mona Hanna-Attisha, Nicole Jones, Stephanie I. Davis & Patrick N. Breysse, *The Flint Water Crisis: A Coordinated Public Health Emergency Response and Recovery Initiative*, J. PUB. HEALTH MGMT. & PRACT., Jan./Feb. 2019 supp., at S84.

208 Matthew Kristofferson, *Flint Water Crisis Worsened Birth Outcomes, Disproportionally Affected Black Babies, YSPH Study Finds*, YALE SCH. PUB. HEALTH (Oct. 19, 2021), https://ysph.yale.edu/news-article/flint-water-crisis-worsened-birth-outcomes-disproportionally-affected-black-babies-ysph-study-finds/ [https://perma.cc/D3AE-LSFT].

Though they have limited precedential value as district court decisions, the *In re FEMA* and *In re Flint Water* cases demonstrate a potential new, more restricted path forward for application of the discretionary function exception in environmental failure-to-warn cases. Both courts exhibited a hesitancy to allow the federal government to shield its decisions not to warn citizens of their continued exposure to dangerous environmental contaminants as policy decisions. Applying parallel reasoning from failure-to-warn cases outside of the toxic torts context, both holdings recognized that there is something inherently distinct about these situations that made disclosure nondiscretionary. Indeed, they found that environmental failure-to-warn decisions are not actually grounded in policy, but in scientific and professional judgment. Moreover, as the court in *Flint* stated, some dangers are so blatantly hazardous that a failure to warn simply is not susceptible to policy analysis, regardless of potential discretionary options in the relevant statute.[209]

III. THE FAILURE TO WARN: NOT-SO-SUSCEPTIBLE TO POLICY ANALYSIS

When laid out in the harsh light, the government's failure to warn of environmental contamination feels egregious. It seems obvious that the public has a right to know of its exposure to toxic substances, and the government by default has an obligation to warn them. This was inherently recognized by the cases discussed in Section II.C which rejected the broad protections normally afforded to government failures to warn, citing overriding public health concerns that made it objectively unreasonable *not* to warn the exposed communities.

Though the right of the public to know of environmental hazards is often assumed and used as the justification for disclosure requirements, in order to thoroughly address the government's FTCA liability for failure to warn it is helpful to consider the actual nature and extent

209 Notably, though, this does not give rise to a potential counterargument that these two cases are simply so exceptional that no reasonable discretionary judgment could have led to a failure to warn. I struggle to see how either of these circumstances are more egregious than knowingly subjecting Navajo miners to uranium exposure. Or encouraging the poisoning of the indigenous population of an island under military siege. Or forcing the Black population of West Dallas into lead-soaked government-owned housing. It is possible that in the modern era, email correspondence and digital recordkeeping have simply brought to light some of the decisionmaking processes (or lack thereof) that have previously stayed hidden in the shadows of these cases. This hopefully represents a trend where government actors are less able to slap on false justifications after-the-fact to their failures to warn. Unfortunately, the fact remains that existing, binding caselaw endorsing overly broad application of the exception will hinder many claimants' abilities to even obtain such discovery if permitted to continue unrestricted.

of this right and why it should not generally be susceptible to policy analysis under the discretionary function exception.[210]

As shown in Part II, there are many potential statutes, each extremely complex, that could be implicated in the EPA's failure to warn of a toxic substance depending on the nature and source of the contamination. Further, as Part II also demonstrated it is not necessarily the EPA that is responsible for the failure to warn, but sometimes another government agency or even the military. Regardless, courts often analyze failure-to-warn claims as distinct from the government's potential statutory obligations or discretionary options to regulate or prevent the contamination. Therefore, rather than perform a detailed analysis of the obligation to warn under each of the potentially applicable regulatory schemes, this Part will discuss the government's obligations to warn of environmental contamination in a more general sense.[211] Ultimately, the discretionary function exception must be applied restrictively in environmental failure-to-warn cases as a result of their inherent qualities and in light of overriding interests in human health, liberty, and self-government.

A. The Right to a Healthy Environment; the Right to Know When It's Not

The right of the public to know of environmental contamination, and the corresponding obligation of the government to disclose certain information to that public, has multiple potential sources and can best be understood in relation to interests in scientific knowledge, self-government, human health, and the environment.[212] As a basic premise, the right to know about the environment is grounded in the human right to a healthy environment generally. The precise contours of human rights change and expand over time.[213] In general, a human right can be defined as "a universal moral right . . . which all [people] everywhere, at all times, ought to have, something of which no one may be deprived without a grave affront to justice, something which is owing to every human being simply because he is human."[214] Such rights are universal and unalienable, ranging "from the most fundamental–

210 *See* Shannon M. Roesler, *The Nature of the Environmental Right to Know*, 39 ECOLOGY L.Q. 989, 991 (2012).

211 For an overview of the EPA's major environmental statutes, see generally CONG. RSCH. SERV., RL30798, ENVIRONMENTAL LAWS: SUMMARIES OF MAJOR STATUTES ADMINISTERED BY THE ENVIRONMENTAL PROTECTION AGENCY (2013).

212 *See* Roesler, *supra* note 210, at 991.

213 Melissa Thorme, *Establishing Environment as a Human Right*, 19 DENVER J. INT'L L. & POL'Y 301, 302 (2020) ("The concept of what constitutes a human right clearly varies over time.").

214 MAURICE CRANSTON, WHAT ARE HUMAN RIGHTS? 67–68 (1973) (emphasis omitted).

–the right to life—to those that make life worth living."[215] The right to a "healthy and humane environment" certainly falls within any of these definitions, as an environment "worth living in is essential to the physical existence of every citizen."[216] Indeed, "[h]uman life and the human environment are inseparable."[217] A healthy environment is required to live, and for that life to be worth living.

The human right to a healthy environment first emerged globally in 1968, and was formally recognized by the United Nations in 1972 when the U.N. Conference on the Human Environment asserted that "[m]an has a fundamental right to freedom, equality, and adequate conditions of life in an environment of quality that permits a life of dignity and well-being."[218] This right has received increasing recognition in recent years on the international stage: In 2022, the U.N. General Assembly passed a resolution acknowledging that a "clean, healthy and sustainable environment" is a basic human right;[219] the International Covenant on Economic, Social and Cultural Rights recognized that a healthy environment is a basic necessity that must be respected, protected, and promoted;[220] and the right to a healthy environment is constitutionally protected in more than 100 nations.[221]

The United States government itself has recognized a right to a healthy environment. On a general scale, it has increasingly acknowledged a need to promote and protect the environment for all Americans and has enacted various policies designed to combat environmental racism and inequality. This recognition first came in Title VI of the Civil Rights Act of 1964, which requires federal agencies, particularly the EPA, to ensure that their programs do not directly or indirectly discriminate on the basis of race, color, or national origin.[222] Congress soon after passed the National Environmental Policy Act (NEPA) in 1969, which codified a national policy of considering issues of environmental protection and declared that "each person should enjoy a

215 *What Are Human Rights?*, U.N. HUM. RTS.: OFF. OF THE HIGH COMM'R, https://www.ohchr.org/en/what-are-human-rights [https://perma.cc/85Z6-4EKH].

216 Thorme, *supra* note 213, at 310.

217 *Id.* at 301.

218 *See* Thorme, *supra* note 213, at 303 (quoting *Report of the U.N. Conference on the Human Environment, Stockholm,* U.N. Doc. A/Conf.48/14/Rev. 1, at 4 (1974)).

219 *See* G.A. Res. 76/300, ¶ 1 (July 28, 2022).

220 *See* International Covenant on Economic, Social and Cultural Rights art. 12, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

221 *What Are Your Environmental Rights?*, U.N. ENV'T PROGRAMME, https://www.unep.org/explore-topics/environmental-rights-and-governance/what-we-do/advancing-environmental-rights/what-0 [https://perma.cc/STP7-JQ3Y].

222 *See Title VI and Environmental Justice*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/environmentaljustice/title-vi-and-environmental-justice [https://perma.cc/C6ED-8BVY].

healthful environment."[223] Since 1994, a series of executive orders have been issued expressing a government-wide commitment to addressing and combating the adverse environmental and human effects of federal actions on BIPOC and low-income communities.[224] Foundational to these steps is the federal government's acknowledgment that all Americans deserve a healthy environment and should therefore "enjoy the same degree of protection" from environmental hazards.[225]

Stemming from the right to a healthy environment is the general right of the public to know when the environment is *not* healthy. The right to know about environmental contamination in various forms is well established. As mentioned, to start, there is in place a complex web of statutes and regulations that impose certain notification and warning obligations on the EPA.[226] Additionally, Congress enacted the Emergency Planning and Community Right-to-Know Act (EPCRA) in 1986, which imposes strict reporting and public notification requirements in the instance of a release of certain toxic chemicals into a community, albeit by the polluting entity itself rather than the government.[227] However, the right to know about the environment is particularly necessary to combat deeply entrenched environmental injustices that exacerbate inequality. Indeed, the federal government has recognized in several contexts that all citizens must have "equal access to the decision-making process to maintain a healthy environment in which to live, learn, and work."[228] Crucial to participation in a decisionmaking process is knowledge of environmental hazards. To that end, in April of 2023, the White House issued Executive Order 14096, which imposes binding public notification requirements on the whole of the federal government "[t]o ensure that the public, including members of communities with environmental justice concerns, receives timely information about releases of toxic chemicals that may affect them and health and safety measures available to address such releases."[229] The federal government has thus explicitly recognized the right of the public to know about dangers in their environment, and that this right imposes a corresponding obligation to provide that knowledge.

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223 *See* National Environmental Policy Act of 1969, Pub. L. No. 91-1990 § 2, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. § 4331).

224 *See, e.g.*, Exec. Order No. 12898, 3 C.F.R. 859, 860 (1995); Exec. Order No. 14008, 3 C.F.R. 477, 489 (2022).

225 *See Learn About Environmental Justice*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/environmentaljustice/learn-about-environmental-justice [https://perma.cc/5XGA-UVJA].

226 *See supra* note 211.

227 *See* Emergency Planning and Community Right-to-Know Act of 1986 §§ 301–305, 42 U.S.C. §§ 11001–11005 (2018).

228 *See Learn About Environmental Justice*, *supra* note 225.

229 Exec. Order No. 14096, 88 Fed. Reg. 25251, 25258 (Apr. 26, 2023).

More broadly, though a "complex concept," the "community right to know" has been recognized since America's founding, when James Wilson opined at the Constitutional Convention that "the people have a right to know what their agents . . . have done."[230] It is debated, however, specifically what the *philosophical* foundation of that right is in the environmental context. For instance, a deontologically duty-based perspective would require considerations of justice and supports a precautionary principle mandating that measures be taken if "an activity raises threats of harm to human health or the environment."[231] By contrast, consequentialist or utilitarian theories would focus on the risk assessment and allocation of resources to the greater overall good and would find no issue with the environmental injustices outlined in this Note.[232] It is also posited that the government's obligation to warn stems from public trust principles, as the government holds the environment as a natural resource in trust for the public and consequently owes it certain disclosures as the trust's beneficiaries.[233]

Regardless, several foundational principles are clear: a community must be informed about their environmental risks to facilitate their participation in the care of and democratic governance of their community;[234] individual liberty and autonomy require that people have enough information to make informed choices about their exposure;[235] and full and clear disclosures advance the interests of human health and the environment.[236] These rights and the government's corresponding obligations extend to *every* member of public, and are necessary to combat the environmental injustices discussed in this Note and beyond.

B. No Lazy Leviathans

Justice Marshall famously pronounced in *Marbury v. Madison* that "every right, when withheld, must have a remedy."[237] Though this

230 *See* SUSAN G. HADDEN, A CITIZEN'S RIGHT TO KNOW: RISK COMMUNICATION AND PUBLIC POLICY 4–5 (1989).

231 Timothy William Lambert, Colin L. Soskolne, Vangie Bergum, James Howell & John B. Dossetor, *Ethical Perspectives for Public and Environmental Health: Fostering Autonomy and the Right to Know*, 111 ENV'T HEALTH PERSPS. 133, 134 (2003).

232 *See id.* at 133–34; Roesler, *supra* note 210, at 1031 ("Some obligations arising out of the environmental right to know will conflict with utilitarian considerations . . . .").

233 *See* Roesler, *supra* note 210, at 1028–30.

234 *See id.* at 1027–28; Lambert et al., *supra* note 231, at 135.

235 *See* Roesler, *supra* note 210, at 1044.

236 *See id.* at 1015–16.

237 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 147 (1803) (citing 3 WILLIAM BLACKSTONE, COMMENTARIES *109).

dictum has proven elusive in many contexts,[238] that is not and should not be the case when the government fails to warn of environmental contamination. The FTCA was designed to provide a remedy when the United States commits a tort against its citizens. The government cannot categorically claim discretionary policy deliberation each time it knowingly commits a toxic tort and permits the continued poisoning of its people, particularly at the expense of low-income and BIPOC communities.

In failure-to-warn cases, the decision to act on one particular source of contamination as opposed to another can hypothetically be couched in terms of resource allocation nearly every time because "[b]udgetary constraints underlie virtually all governmental activity."[239] Moreover, "almost any government decision can be framed as a balancing of safety against cost."[240] This is precisely where the rubber meets the road. It is the very *nature* of the strength of the federal government, as described at the Founding, that it oversees the "resources of the country, directed to a common interest."[241] What is the federal government if not a coordinating body, allocating resources and budgets to oversee the general and common interests of the American people?

This is particularly true for environmental issues, which at their core are a part of the public trust emblematic of the "tragedy of the commons" and require submission to the federal government as a Leviathan for their coordination.[242] The government is, necessarily, the primary regulator of the environment. It thus has the unilateral ability to detect environmental contamination, coordinate its remediation, and, of course, warn the public of its existence. Each aspect of this consists of resource allocation. When the government knows, or should know, of dangerous environmental contamination and fails to allocate resources to fulfill its obligations to even warn the public, this cannot categorically be considered an exercise of discretion. In many instances, the government is, at best, acting as a lazy Leviathan. At worst, a malicious one.

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238 *See generally* Richard H. Fallon, Jr., *Constitutional Remedies: In One Era and Out the Other*, 136 HARV. L. REV. 1300 (2023).

239 *See* Whisnant v. United States, 400 F.3d 1177, 1183 (9th Cir. 2005) (quoting ARA Leisure Servs. v. United States, 831 F.2d 193, 196 (9th Cir. 1987)).

240 Eric Wang, *Tortious Constructions: Holding Federal Law Enforcement Accountable by Applying the FTCA's Law Enforcement Proviso Over the Discretionary Function Exception*, 95 N.Y.U. L. REV. 1943, 1970 (2020).

241 THE FEDERALIST NO. 11, at 87 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

242 *See* William Ophuls, *Leviathan or Oblivion?*, *in* TOWARD A STEADY-STATE ECONOMY 215, 215–30 (Herman E. Daly ed.) ("Because of the tragedy of the commons, environmental problems cannot be solved through cooperation . . . and the rationale for world government with major coercive powers is overwhelming." *Id.* at 228.).

Concerns that the exception will swallow the rule are therefore never more poignant than in the context of the government's failure to take a necessary course of action, where "simple failures in public safety have regularly been levitated into imaginary policy meditations."[243] A more circumscribed approach to the discretionary function exception in toxic tort failure-to-warn cases would not subject the government to unlimited liability. Were these cases permitted to proceed past the complaint stage and be decided on their merits, plaintiffs would still have a huge hurdle to win their suits: they would have to prove that, under the law of the applicable state, the government in fact had an affirmative, legal obligation to warn and the failure to do so both factually and proximately caused an actual injury.[244]

When properly conducted, toxicity assessments involve a series of scientific analyses that should examine human dose responses, the effects of long- and short-term exposure, the demographic make-up of the exposed community, environmental conditions, and other similar factors.[245] However, if regulators and policymakers are permitted to impose value judgments onto their analyses, such as resource allocation and the prioritization of certain communities, they can become susceptible to bias and political manipulation that undermine the interests laid out in the previous Section.[246] Decisions to warn of dangerous environmental hazards are undoubtedly decisions that are properly grounded in technological and professional judgment, not policy, if they are done correctly. They should not be considered susceptible to policy analysis. If application of the discretionary function exception is left unchecked and these failures are protected by an imaginary "policy" shield, the right to know will be impeded by barriers constructed by the very parties that are supposed to be protecting the public and facilitating these rights.[247]

CONCLUSION

In 1953, when the discretionary function exception was still nascent, Justice Jackson warned that its overapplication would mean that "[t]he King can do only little wrongs."[248] Never does this warning ring truer than when courts categorically sweep the government's permitted exposure of entire communities to toxic substances under the rug of discretion.

243 *See* SISK, *supra* note 27, at 176.
244 MARGIE SEARCY ALFORD, 1 A GUIDE TO TOXIC TORTS § 3.02 (2023 ed. 1987).
245 *See id.* at 1024–25.
246 *See id.* at 1025; *supra* Section III.A.
247 *See* HADDEN, *supra* note 230, at 89.
248 Dalehite v. United States, 346 U.S. 15, 60 (1953) (Jackson, J., dissenting).

To begin to hold the King accountable for some of its most serious wrongs, courts should apply the discretionary function exception according to the principles of *Whisnant*, as recognized by *In re FEMA* and *In re Flint Water*, to recognize that decisions on whether to warn of environmental contamination are based in technological and professional judgment, not policy, and that broad application of the exception is inappropriate for matters of public safety. Whatever the source of the government's obligation to warn its citizens of environmental contamination, there is something inherent in the public's right to know of environmental dangers that removes the government action from the normal specter of the exception.

The post-hoc rationalizations proposed by the government to justify that its failures *could* have been susceptible to policy analysis require courts to essentially pick and choose at what level of generality they analyze the agency's mandatory or discretionary options. In the context of failure to warn, this has resulted in a standard that is difficult for courts to apply and has led to inconsistent results that have perpetuated environmental health disparities for vulnerable communities across the country. Moreover, courts' continued acquiescence to these failures only facilitates the government's ability to further shirk its stated obligations and policies to promote environmental justice for all of its citizens. Courts must recognize that the failure to warn of certain health hazards is so objectively unreasonable that, in the end, the decision simply cannot be susceptible to policy analysis.