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# Respect for Community Narratives of Environmental Injustice: The Dignity Right to be Heard and Believed

Helen H. Kang

*Golden Gate University School of Law*, [hkang@ggu.edu](mailto:hkang@ggu.edu)

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# RESPECT FOR COMMUNITY NARRATIVES OF ENVIRONMENTAL INJUSTICE: THE DIGNITY RIGHT TO BE HEARD AND BELIEVED

HELEN H. KANG\*

## INTRODUCTION

Communities that bear the brunt of environmental pollution and lack basic amenities, such as clean drinking water, have a story to tell. One such community is the Bayview-Hunters Point community of San Francisco, California. There, the U.S. Navy extensively contaminated a now-shuttered shipyard with nuclear waste. After twelve years of cleanup under the Navy's direction, the shipyard is still contaminated. As widely reported, a federal contractor faked the cleanup through falsifying sampling results, manipulating data, and leaving still radioactive soil on-site rather than disposing of it at a licensed facility. The fraud was so extensive that Public Employees for Environmental Responsibility has characterized it as "the biggest case of eco-fraud in U.S. history."<sup>1</sup> Remedying this fraud is predicted to cost more than \$100-300 million,<sup>2</sup> not to mention any other potential liability in tort cases for the numerous actors involved. In the meantime, nearby residents will continue to endure living near the contaminated shipyard and experience years more of contaminated soil being disturbed, kicking up dust—all where the wind is famously strong. Most of these residents likely have no means or, based on deep roots in the community, desire to relocate.

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\* Helen Kang is a Professor of Law and Director of the Environmental Law and Justice Clinic at Golden Gate University School of Law. The clinic was founded in 1994 to provide legal services to communities of color and low-income neighborhoods heavily burdened by pollution. She began directing the clinic's Clean Air Accountability Project in 2000 and has directed the clinic's entire program since 2007. Profound thanks go to Dr. Raymond Tompkins, Shirley Moore, and J. Michelle Pierce who encouraged and inspired me to write this article. I also thank Steve Castleman who provided comments on an early draft of the article and others who provided source material, including Lindsey Dillon and M. Tyler Sullivan.

<sup>1</sup> Cynthia Dizikes & Michael Cabanatuan, *SF shipyard activists frustrated by naval officials on alleged soil test fraud*, S.F. CHRON. (Apr. 12, 2018), <https://www.sfchronicle.com/bayarea/article/SF-shipyard-activists-frustrated-by-naval-12827438.php>.

<sup>2</sup> Letter from Laura Duchnak, Dir. of Base Alignment and Closure Program Mgmt. Off., Dep't. of the Navy, to Judge James Donato of the N.D. Cal., 2-3 (Mar. 15, 2018) [hereinafter Duchnak Letter]; Liz Wagner, Rachel Witte & Bethney Bonilla, *Fraud by Former Tetra Tech Worker Caused 'Widespread Harm' To Navy*, NBC BAYAREA (May 4, 2018, 8:35 PM), <https://www.nbcbayarea.com/news/local/Fraud-by-Former-Tetra-Tech-Worker-Caused-Widespread-Harm-To-Navy--481811031.html> [hereinafter Wagner NBC May 4, 2018 Report].

The shipyard story is a particularly egregious example of injustice. That would be so even if based solely on the radioactive characteristics of the contamination, which raises its own special alarm bell because of the slow decay and the harms associated with radioactivity. But the historical context of this neighborhood also makes this predicament unjust: the composition of the shipyard neighborhood was predominantly black because of government-created segregation in the post-war years.<sup>3</sup> Even beyond this invidious distinction, the shipyard story is emblematic of a larger problem. These environmental injustice stories illustrate a confluence of systemic failures, one of which is the failure of various actors in the legal and administrative system to respect community voices.

As was the case in the highly publicized Flint water contamination crisis,<sup>4</sup> community activists in Bayview-Hunters Point had long known of the contamination among their midst and suspected that the site was not free of dangerous contamination when various government agencies informed them that certain parts of the site were clean and harmless. These activists also suspected the fraud was more extensive than initially characterized. Had these voices been heeded, the government agencies would likely have avoided the terribly botched cleanup and the community's prolonged exposure to radioactive contamination.<sup>5</sup> The millions of dollars that were ultimately wasted could have been spent instead on meaningfully protecting public health.

Using the shipyard case study as a focal point, this article explores the necessity of listening to these stories of environmental injustice from those who are directly affected. Specifically, the article discusses how advocates

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<sup>3</sup> See RICHARD ROTHSTEIN, *THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA* 28–30 (2017).

<sup>4</sup> A state-appointed manager switched the drinking water supply for the residents of Flint, Michigan, as a cost-cutting measure, from Detroit's water department to Flint River. The corrosive quality of the river water then caused hazardous lead in old pipes to leach, resulting in high concentrations of lead in drinking water. The Flint water contamination was widely publicized after resident concerns failed to capture the attention of responsible government officials; swift action that should have followed to ensure delivery of safe drinking water failed to materialize. See, e.g., Perri Zeitz Ruckart et al., *The Flint Water Crisis: A Coordinated Public Health Emergency Response and Recovery Initiative*, 25 J. PUB. HEALTH MGMT. & PRAC. S84 (2019); Michael Mohammad et al., "I Think That's All a Lie ... I Think It's Genocide": *Applying a Critical Race Praxis to Youth Perception of Flint Water Contamination*, 28 ETHNICITY & DISEASE 241 (2018) ("Residents of Flint reported concerns about the water to officials; however, the concerns were ignored for more than a year."); Nathalie Baptiste, *Officials Say Flint's Water Is Safe. Residents Say It's Not. Scientists Say It's Complicated*, MOTHER JONES (Apr. 16, 2018, 6:00 AM), <https://www.motherjones.com/environment/2018/04/officials-say-flints-water-is-safe-residents-say-its-not-scientists-say-its-complicated/> ("After nearly two years of complaints from people living in the city and denials from state and city officials, an emergency was declared and Michigan attorney general Bill Schuette opened an investigation into the crisis.").

<sup>5</sup> The terms "nuclear" and "radioactive" are interchangeably used in referring to the radiological contamination at the shipyard.

and clinical teachers addressing environmental injustice should respect the dignity of community narratives by making space for the meaningful telling of these stories. The article advocates that the storytelling should be valued in and of itself, apart from the traditional reasons for appreciating client narratives, such as for providing client-centered legal services and as an integral tool for solving the client's problem.

Part I of this article covers the history of the shipyard at Hunters Point in San Francisco and, as told through stories and voices of residents, the disregard government agencies overseeing the cleanup showed the community. Part I also discusses the massive cleanup fraud that has prolonged the cleanup of nuclear contamination at the shipyard.<sup>6</sup> Part II of the article connects environmental injustice storytelling to the dignity of communities overburdened by pollution. Part III discusses how advocates and teachers, in particular professors of environmental clinics, can better integrate these narratives in environmental justice advocacy and teaching, in the classroom and beyond.

#### I. CASE STUDY: THE SHUTTERED HUNTERS POINT NAVAL SHIPYARD, THE CLEANUP FRAUD, AND THE STILL UNFOLDING AFTERMATH

The former Hunters Point Naval Shipyard is located in the City of San Francisco, in the southeast area of Hunters Point, abutting a neighborhood known as Bayview. The Bayview-Hunters Point neighborhood has historically been home to African Americans who were compelled to migrate out of the Jim Crow south in search of a better life; among those pioneering residents were Pullman porters, members of the military, and civilian workers at the shipyard.<sup>7</sup> The neighborhood has traditionally enjoyed high

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<sup>6</sup> The facts about the cleanup were gathered mostly as of June 2018 when this article was written. Because some important studies were published after June, I cite to a select few but in a limited way.

<sup>7</sup> ALBERT S. BROUSSARD, *BLACK SAN FRANCISCO: THE STRUGGLE FOR RACIAL EQUALITY IN THE WEST, 1900-1954* 133-34 (1993) [hereinafter Broussard]; S.F. ENV'T ET AL., *SAN FRANCISCO HEALTHY HOMES PROJECT: COMMUNITY HEALTH STATUS ASSESSMENT 9*, available at [http://www.sfenvironment.org/sites/default/files/fliers/files/sfe\\_ej\\_sfhh\\_community\\_health\\_status\\_assessment.pdf](http://www.sfenvironment.org/sites/default/files/fliers/files/sfe_ej_sfhh_community_health_status_assessment.pdf) (African Americans once a majority of the population in Bayview-Hunters Point); Jennifer Liss Ohayon, *Addressing Environmental Risks and Mobilizing Democracy?: Policy on Public Participation in U.S. Military Superfund Sites*, in *PROVING GROUNDS: MILITARIZED LANDSCAPES, WEAPONS TESTING, AND THE ENVIRONMENTAL IMPACT OF U.S. BASES 183* (Edwin A. Martini ed., 2015) [hereinafter PROVING GROUNDS]; see also City & Cty. of S.F., *HPS Public Art: Marion Coleman*, SFOCII, <http://sfocii.org/hps-public-art-marion-coleman> (last visited Mar. 24, 2019) (art being proposed for the shipyard documents the rich black history of the Bayview-Hunters Point area, including the history of women shipyard workers who played on an integrated softball team, called the Honey Bee); see also Lindsey Dillon, *Redevelopment and the Politics of Place in Bayview-Hunters Point*,

homeownership by African Americans who had stable employment and created a desirable community.<sup>8</sup> The neighborhood is still home to many remaining African Americans who are children and grandchildren of the original residents.

But the neighborhood has been in transition in recent years. The demographic of the neighborhood, which is in one of the most expensive cities in the country, has changed dramatically and rapidly as a result of the displacement of people of color from other parts of the city to Bayview-Hunters Point. The most current data show Asian Americans and Latinos—even separately—far outnumber African Americans.<sup>9</sup> African American residents, once the majority, now are at ten percent of the neighborhood population—the same percentage as white residents.<sup>10</sup> As a comparison, the neighborhood was seventy-two percent African American according to the 1970 census.<sup>11</sup>

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ISSI WORKING PAPERS SERIES 2010-2011.53 U.C. BERKELEY 1, 7–10 (2011), available at <https://escholarship.org/uc/item/9s15b9r2> [hereinafter Dillon ISSI Paper].

<sup>8</sup> S.F. ENV'T ET AL., *supra* note 7, at 9; Dillon ISSI Paper, *supra* note 7, at 15; U.S. Census Bureau, *Census Explorer*, <http://www.census.gov/censusexplorer/censusexplorer.html> (last visited March 30, 2019) (census tracts 231.03, 232, and 234 show home ownership data).

<sup>9</sup> I use the terms “African American” and “black” mostly interchangeably as my clients from Bayview-Hunters Point do with me or use them based on the conventions used by data collectors. Here the lens I employ is the one that Richard Rothstein reminds us of:

this shifting terminology [of how we refer to blacks] should not distract us from this underlying truth: We have created a caste system in this country, with African Americans kept exploited and geographically separate by racially explicit government policies. Although most of these policies are now off the books, they have never been remedied and their effects endure.

ROTHSTEIN, *supra* note 3, at vii. See S.F. ENV'T ET AL., *supra* note 7, at 9 (African Americans once a majority of the population in Bayview-Hunters Point). Data show the rapid changes in recent years. Compare S.F. ENV'T ET AL., *supra* note 7, at 15 Figure 6, (relying on 2010 census data, which shows African Americans comprising about 28 percent of the neighborhood), and Ohayon, *supra* note 7, at 183 n.25 (a 2010 Nielsen survey had black/African Americans, as self-identified, at about twenty percent), with *American Community Survey 1 year estimates, retrieved from Census Reporter Profile for San Francisco County (South Central)—Bayview & Hunters Point PUMA, CA*, U.S. CENSUS BUREAU (2017), <https://censusreporter.org/profiles/79500US0607507-san-francisco-county-south-centralbayview--hunters-point-puma-ca/> (revealing the dramatic change in just six years: the historically black neighborhood now is comprised of 43 percent Asian-Pacific Islanders, 35 percent Hispanic, 10 percent black, and 10 percent white).

<sup>10</sup> *American Community Survey 1-year estimates, supra* note 9.

<sup>11</sup> Dillon ISSI Paper, *supra* note 7, at 15.

### A. A Brief History of the Shipyard

The approximately 900-acre shipyard includes about 400 acres of tidally submerged lands and is on a peninsular promontory surrounded by the San Francisco Bay.<sup>12</sup> It is a picturesque place that is considered to have better weather than the rest of San Francisco because it tends to be sunnier. In 1989, the shipyard was placed on the National Priorities List, which essentially is a compilation based on a calculation of relative danger to the public of the nation's most contaminated sites needing cleanup or at least assessment for such cleanup as part of the federal Superfund process.<sup>13</sup>

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<sup>12</sup> See *Treasure Island Naval Station-Hunters Point Annex, San Francisco, CA*, U.S. EPA, <https://cumulis.epa.gov/supercpad/cursites/csinfo.cfm?id=0902722> (last visited Mar. 26, 2019). Bayview-Hunters Point is less foggy than the rest of the city, even as the fog is diminishing because of climate change. Photographs that depict the shipyard as it is now are available from news articles cited throughout here. See, e.g., Chris Roberts, *Almost half of toxic cleanup at Hunters Point Shipyard is questionable or faked, according to initial review*, S.F. CURBED (Jan. 26, 2018), <https://sf.curbed.com/2018/1/26/16916742/hunters-point-shipyard-toxic-cleanup>. Some of the government websites associated with the cleanup also have photographs. See, e.g., *Former Naval Shipyard Hunters Point*, NAVAL FACILITIES ENG'G. COMMAND, [https://www.bracpmo.navy.mil/brac\\_bases/california/former\\_shipyard\\_hunters\\_point.html](https://www.bracpmo.navy.mil/brac_bases/california/former_shipyard_hunters_point.html) (last visited Mar. 26, 2019). Roberts won an award in 2019 from the Society of Professional Journalists of Northern California for having “doggedly pursued public records to reveal fraud by a contractor hired by the U.S. Navy to clean the heavily polluted former shipyard at Bayview-Hunters Point.” *SPJ Norcal Honors 2019 James Madison Freedom of Information Award Winners*, SPJ N. CAL. (Jan. 28, 2019), <https://spjnorcal.org/2019/01/28/spj-norcal-honors-2019-james-madison-freedom-of-information-award-winners/>.

He obtained documents that showed cleanup records were falsified. When city government did not immediately release records from its internal meetings regarding the falsified testing to Roberts, he got San Francisco's Sunshine Ordinance Task Force, the city's open-government watchdog commission, to hold officials accountable. Roberts' stories, first published by Curbed SF, reverberated throughout local and national media.

*Id.*

<sup>13</sup> See National Priorities List for Uncontrolled Hazardous Waste Sites, 54 Fed. Reg. 48184, 48187 (Nov. 21, 1989) (listed as “Treasure Island Nav. Sta-Hun Pt An.”); National Priorities List, 83 Fed. Reg. 46460, 46465 (Sept. 13, 2018) (proposing to change the name of the site from “Treasure Island Naval Station-Hunters Point Annex” to “Hunters Point Naval Shipyard”). See generally Comprehensive Environmental Response, Compensation, and Liability Act § 103, 42 U.S.C. § 9605(a)(8)(A) (2012); 40 C.F.R. § 300.425 (the National Priorities List “is the list of priority releases for long-term remedial evaluation and response”); 1 CAROLINE N. BROUN & JAMES T. O'REILLY, RCRA AND SUPERFUND: A PRACTICE GUIDE § 11:12 (3d ed. 2018).

## 1. Historical uses of the shipyard

Once a commercial dry dock, the Navy assumed control of the shipyard site from its previous owner in December 1940 and began to use it for shipbuilding, repair, and maintenance.<sup>14</sup> The shipyard eventually provided as many as 17,000 jobs as the largest wartime employer in the city, attracting to the area African Americans—primarily from the south—many settling in Hunters Point as a result of the city’s discriminatory housing policies.<sup>15</sup> The shipyard was put to many uses that resulted in extensive contamination of the site with a wide range of radioactive material as well as hazardous wastes such as asbestos and PCBs.

Until more recently, the extent and scope of the radiological contamination were not well understood by the general public and even perhaps by regulators:

Many people have been led to believe that these activities were primarily associated with a couple of ships with some radioactivity that were temporarily berthed at Hunters Point and some other unspecified but limited activities.

However, the magnitude of operations with large amounts of a wide array of radionuclides over many decades at [the shipyard] was far greater than generally understood.<sup>16</sup>

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<sup>14</sup> Naval Facilities Eng’g Command, *Hunters Point Annex Parcel A Record of Decision* 8 (Nov. 16, 1995), available at <https://semspub.epa.gov/work/09/88183852.pdf> [hereinafter Parcel A ROD]; Naval Facilities Eng’g Command, *Hunters Point Shipyard Final Historical Radiological Assessment: History of the Use of General Radioactive Materials, 1939-2003* 6-2 (Aug. 2004), available at [https://www.bracpmo.navy.mil/content/dam/bracpmo/california/former\\_naval\\_shipyard\\_hunters\\_point/pdfs/all\\_documents/environmental\\_documents/radiological/hps\\_200408\\_hra.pdf](https://www.bracpmo.navy.mil/content/dam/bracpmo/california/former_naval_shipyard_hunters_point/pdfs/all_documents/environmental_documents/radiological/hps_200408_hra.pdf) [hereinafter 2004 Radiological Assessment]. See *Superfund Site: Treasure Island Naval Station – Hunters Point Annex San Francisco, CA*, U.S. EPA (2018), <https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.docdata&id=0902722#Fact> (providing a link to website that identifies the August 2004 publication date of the 2004 Radiological Assessment).

<sup>15</sup> Ohayon, *supra* note 7, at 182–83 (discriminatory housing policy and number of jobs); BROUSSARD, *supra* note 7, at 175. Some say there were 18,500 jobs at the shipyard, perhaps including military positions. Gretchen Lemke-Santangelo & Charles Wollenberg, *A Day’s Work: Hunters Point Shipyard Workers, 1940-1945*, FOUNDSF, [http://www.foundsf.org/index.php?title=A\\_Day%27s\\_Work:\\_Hunters\\_Point\\_Shipyard\\_Workers,\\_1940-1945](http://www.foundsf.org/index.php?title=A_Day%27s_Work:_Hunters_Point_Shipyard_Workers,_1940-1945) (last visited Mar. 30, 2019).

<sup>16</sup> Daniel Hirsch, Taylor Altenbern, Maria Caine, Haakon Williams, Devyn Gortner, Lucien Martin, Lauren DiQuattro, & Faylenn McDonough, *Hunters Point Naval Shipyard: The Nuclear Arms Race Comes Home i* (Oct. 2018), available at [https://drive.google.com/file/d/1W7t\\_D6ToVRnugtExWYKTWSLwRYCOC9ON/view](https://drive.google.com/file/d/1W7t_D6ToVRnugtExWYKTWSLwRYCOC9ON/view) [hereinafter Hirsch Report]. Why the general public was unaware is an interesting subject to

From 1948 to 1969, the Navy used part of the shipyard to house the Naval Radiological Defense Laboratory.<sup>17</sup> The number of people employed at the lab, at its height 600, gives a good sense of how extensive the operation was.<sup>18</sup> First, and most dramatically, during the Cold War years, the lab and the surrounding areas, such as the piers, were extensively involved in the so-called “decontamination efforts” of hundreds of ships and vessels returning from Operation Crossroads which, rather than eliminating radioactive waste, involved spreading it throughout the site through sandblasting, combustion, and landfilling:

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probe on its own. In part, even government documents described shipyard “activities” rather generally and tentatively, at least as to waste disposal. In contrast to the details in the 2004 Radiological Assessment, which had extensively catalogued the many ways in which the site was contaminated, a 2009 U.S. EPA document setting forth the cleanup remedy decision for a part of the shipyard, for example, noted that the site activities included “potential” disposal:

(1) potential disposal of decontamination materials from ships used during atomic weapons testing in the South Pacific during the 1950s that were decontaminated at the shipyard, (2) radiological decontamination of personnel, (3) storage of samples from atomic weapons testing, (4) radiological sample counting, (5) storage and disposal of radioluminescent devices, (6) non-destructive testing and gamma radiography, and (7) storage of low-level radioactive waste. . . .

... Initial tasks for the laboratory focused on the study of the effects of atomic weapons, including research into decontamination methods, personnel protection, and development of radiation detection instrumentation. Laboratory responsibilities grew to also include practical and applied research into the effects of radiation on living organisms and on natural and synthetic materials, in addition to continued decontamination experimentation.

*Final Amended Parcel B Record of Decision for Hunters Point Shipyard, San Francisco, California* 2-1 (Jan. 14, 2009), available at <https://semspub.epa.gov/work/09/100002083.pdf>. News reports also omitted detailed information until more recently.

<sup>17</sup> 2004 Radiological Assessment, *supra* note 14, at G-9, 6-22 to 6-23. The U.S. EPA and the Navy identify different end dates for the lab operation. U.S. EPA states that the lab operated until 1960; the Navy, 1969. See *Final Radiological Addendum to the Feasibility Study Report for Parcel E* 2-17 (Aug. 2012), available at [https://www.bracpmo.navy.mil/content/dam/bracpmo/california/former\\_naval\\_shipyard\\_hunters\\_point/pdfs/all\\_documents/environmental\\_documents/parcel\\_e\\_e2\\_uc3/hps\\_201208\\_parcele\\_ra\\_addendum\\_feasibility\\_study\\_report.pdf](https://www.bracpmo.navy.mil/content/dam/bracpmo/california/former_naval_shipyard_hunters_point/pdfs/all_documents/environmental_documents/parcel_e_e2_uc3/hps_201208_parcele_ra_addendum_feasibility_study_report.pdf) [hereinafter 2012 Radiological Addendum]. As noted earlier, the bulk of this article was drafted by June 2018, before the publication of the Hirsch Report. The Hirsch Report uses two documents, one of which is the 2004 Radiological Assessment, which I had reviewed and used, and another government report that I had not reviewed: 1 RADIOLOGICAL CONTROL OFFICE, PEARL HARBOR NAVAL SHIPYARD & INTERMEDIATE MAINTENANCE FACILITY HISTORICAL RADIOLOGICAL ASSESSMENT, HUNTERS POINT ANNEX, NAVAL NUCLEAR PROPULSION PROGRAM, 1966-1995 3-14 (2000). This report discusses the nuclear contamination at the shipyard in detail.

<sup>18</sup> Lindsey Dillon, *War’s Remains: Slow Violence and the Urbanization of Military Bases in California*, 8 ENVTL. JUST. 1, 3 (2015).



The Shipyard was the site for radiological decontamination efforts and disposal of ships involved in Operation Crossroads, the two underwater nuclear blasts at Bikini Atoll in 1946, as well as ships involved in other atomic weapons tests. . . . The [lab] decontaminated . . . irradiated warships of residual plutonium from bombs and fission products through sandblasting ship bodies... [The lab] also conducted research on nuclear by-products sent from other laboratories. Although much of the wastes were removed in barrels to be sunk near the Farallon Islands, thirty miles offshore, radionuclides were discharged into the sewer and storm drain lines from buildings used for radiological research and maintenance, littered the lab and storage rooms, and also went into an on-site landfill.<sup>19</sup>

Notably, Operation Crossroads was an elaborate experiment designed to study the impact of nuclear blasts specifically on naval ships with two atomic bombs the same size as the one that hit Nagasaki:<sup>20</sup>

A fleet of more than ninety vessels were assembled at varying distances around the Lagoon as a target. The target fleet consisted of older U.S. warships and submarines, three captured German and Japanese ships, and other surplus auxiliary and amphibious vessels. Some of the ships were loaded with live animals, such as pigs and rats, to study the effects of the nuclear blast and radioactive fallout on animals.<sup>21</sup>

All told, 240 vessels were involved, and hundreds of ships had to be decontaminated in the aftermath.<sup>22</sup> After discovery of serious plutonium contamination of the ships caused concerns about decontaminating them in the Marshall Islands, with inadequate facilities and untrained personnel, “[t]he most heavily contaminated ships were ordered to proceed” to the

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<sup>19</sup> Ohayon, *supra* note 7, at 182; *see also* 2004 Radiological Addendum, *supra* note 14, at 5–6.

<sup>20</sup> *Operation Crossroads*, ATOMIC HERITAGE FOUND. (July 1, 2014), <https://www.atomicheritage.org/history/operation-crossroads> [hereinafter *Operation Crossroads*]; 2004 Radiological Addendum, *supra* note 14, at 6–12.

<sup>21</sup> *Operation Crossroads*, *supra* note 20.

<sup>22</sup> 2004 Radiological Assessment, *supra* note 14, at 6–14.

Hunters Point shipyard.<sup>23</sup> Ultimately, about a third of the ships and vessels involved in Operation Crossroads ended up at the shipyard:

Eighteen target ships and 61 support ships returned to HPS [the shipyard]. The most heavily contaminated of these ships were the six target vessels that were towed to HPS because extensive damage prevented them from operating under their own power. . . . All of the ships but [one] remained at HPS for research and decontamination.<sup>24</sup>

Such decontamination operations were considered so hazardous that those dangers and, ironically, not the impacts of the bombing on the islands and their peoples, were precisely the basis for ultimately scrapping the last part of Operation Crossroads itself:

Operation Crossroads was terminated on August 10, 1946 due to radiation safety concerns. Army Colonel Dr. Stafford Warren, Chief of the Medical Section during the Manhattan Project, concluded that the effort to decontaminate the target vessels for a scheduled third test . . . was futile and dangerous.

The unprotected sailors tasked with decontaminating the [ships] were stirring up radioactive material and contaminating their skin, clothing, and presumably, their lungs. As a result, Warren demanded an immediate halt to the entire cleanup operation. He was especially concerned about plutonium, which could not be detected by Geiger counters.<sup>25</sup>

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<sup>23</sup> *Id.* at 6–15. The story is incomplete without recounting the heavy toll exacted from the Marshallese, where our government “deliberately exposed the Marshallese people to radiation as part of a medical experiment code-named Project 4.1.” Valerie Kuletz, *The Movement for Environmental Justice in the Pacific Islands*, in *THE ENVIRONMENTAL JUSTICE READER: POLITICS, POETRY, & PEDAGOGY* 125, 129 (Joni Adamson, Mei Mei Evans & Rachel Stein eds., 2002) [hereinafter Adamson]. The Marshallese bear witness to “jellyfish babies,” who are born without eyes, heads, arms, or legs. *Id.* at 128.

<sup>24</sup> 2004 Radiological Assessment, *supra* note 14, at 6–17.

<sup>25</sup> *Operation Crossroads*, *supra* note 20. At the shipyard, some of this dangerous work had to have been done by black workers as “[t]he Bay Area’s shipyards . . . hired black workers in large numbers.” BROUSSARD, *supra* note 7, at 145; *see also id.* at 165 (during wartime, blacks held semiskilled and skilled jobs); *id.* at 210 (most black shipyard workers remained in these jobs during the war). “Between Operation Crossroads and subsequent tests, the U.S. conducted a total of 23 nuclear detonations at Bikini between 1946 and 1958.” *Id.* It is unclear how many of the ships other than from Operation Crossroads were decontaminated at the shipyard. Aside from the vessels involved in Operation Crossroads, two other ships are specifically mentioned

The lab also disposed of the fuel contained in the boilers of the ships brought back for decontamination:

Three of the towed target ships presented a special problem for the Navy; [they] contained radioactively contaminated fuel oil. This may have occurred on other ships that came back under their own power but the fuel would have been burned during the voyage back to HPS. The fuel oil of the three target ships was contaminated with low levels of plutonium and mixed fission products.<sup>26</sup>

Activities related to Operation Crossroads resulted in “a wide range of fission products, activation products, and unfissioned plutonium and uranium, *totaling a hundred or more different radionuclides*, [which were] brought back to or otherwise used at Hunters Point and was available to contaminate the whole site.”<sup>27</sup>

Aside from the Navy’s activities related to Operation Crossroads, the lab also conducted experiments on live animals to study the effects of radiation, including through injection.<sup>28</sup> It was there that the lab experimented on creatures as small as bees and as large as cows, as well as cats, monkeys, and dogs, “for a wide variety of research involving radioactivity and radioactive materials.”<sup>29</sup> These experiments continued until the lab was closed in 1969.<sup>30</sup> Bayview-Hunters Point residents also recount childhood stories from adults who used to haul dead, irradiated animals from the lab to be buried for disposal on site.<sup>31</sup>

Yet another activity that contaminated the shipyard with radioactive material was the use of radioluminescence (the type that the movie “Radium Girls” depicted being used), which was quite common throughout Navy ships and the shipyard; the shipyard also had a radium paint shop.<sup>32</sup> “Prodig[i]ous quantities of radium-226, strontium-90, tritium and promethium-147 were used at [the shipyard] for radioluminescent devices and deck markers.”<sup>33</sup> At

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as having been decontaminated at the shipyard. 2004 Radiological Assessment, *supra* note 14, at 6–11.

<sup>26</sup> 2004 Radiological Assessment, *supra* note 14, at 6–17.

<sup>27</sup> Hirsch Report, *supra* note 16, at 8 (emphasis in original).

<sup>28</sup> 2004 Radiological Assessment, *supra* note 14, at 6–33.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

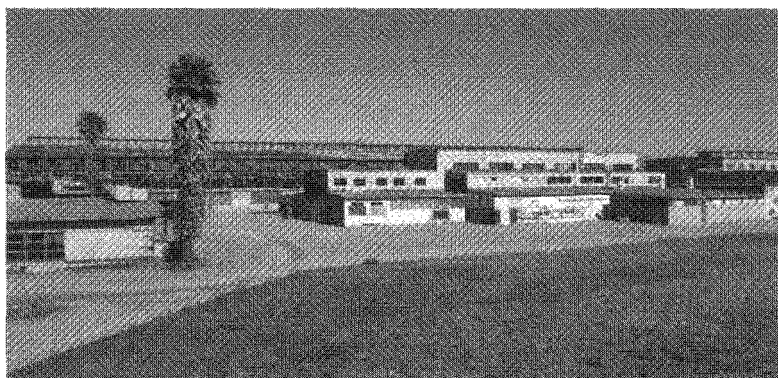
<sup>31</sup> Interview with Dr. Raymond Tompkins, former resident, Bayview-Hunters Point (various dates, including likely July 15, 2014); Interview with J. Michelle Pierce, resident, Bayview-Hunters Point (June 21, 2018).

<sup>32</sup> 2012 Radiological Assessment, *supra* note 17, at 6.

<sup>33</sup> Hirsch Report, *supra* note 16, at ii.

that time, burial of radioluminescent devices was a common disposal practice, as was disposing of liquid waste containing radium down the drains and sewers.<sup>34</sup>

These are only some of the activities that contaminated the shipyard with radioactive waste. Other significant activities were also known to third-generation Bayview-Hunters Point residents, like J. Michelle Pierce of Bayview-Hunters Point Community Advocates. Ms. Pierce has described the shipyard to me and my clinic students as one of the places, along with the Manhattan Project, where extensive radiological research was done. The lab engaged in bulk handling and storage of “immense quantities” of radioactive material for onsite uses and by others around the nation,<sup>35</sup> as well as bulk handling of radioactive wastes from its own operations at the shipyard, other military bases, educational institutions, research laboratories, and decades of maintenance and repair of nuclear-powered marine vessels. Finally, the lab collected, stored, and experimented on nuclear fallout waste collected and brought to the lab from atom and hydrogen bomb tests from 1950 to 1958.<sup>36</sup> In short, the lab “participated in every nuclear weapons test” in that period.<sup>37</sup>



The now-shuttered shipyard, looking eastward toward the San Francisco Bay. Photo by Helen Kang (Oct. 21, 2018).

In summary, these multitudinous operations contaminated soil, air, and water with various harmful chemicals and 108 radionuclides.<sup>38</sup> These

<sup>34</sup> 2004 Radiological Assessment, *supra* note 14, at 6–7.

<sup>35</sup> Hirsch Report, *supra* note 16, at 9–10.

<sup>36</sup> *Id.* at 9, 19. Independently, gamma radiation, which leaked, may have also contaminated the site. *Id.* at 5, 10.

<sup>37</sup> *Id.* at i, 9.

<sup>38</sup> See generally Hirsch Report, *supra* note 16; DANIEL HIRSCH, MARIA CAINE, TAYLOR ALTENBERN, HAAKON WILLIAMS, & DEVYIN GORTNER, THE GREAT MAJORITY OF HUNTERS POINT SITES WERE NEVER SAMPLED FOR RADIOACTIVE CONTAMINATION AND THE TESTING

radioactive materials include Plutonium-239, with a half-life of 24,000 years, and Cesium-137, with a half-life of 30 years.<sup>39</sup> Other material that was disposed of includes Radium-226, with a half-life of 1,566 years, and Strontium-90, with a half-life of about 29 years.<sup>40</sup> According to a declaration signed under penalty of perjury by a health physicist with U.S. Environmental Protection Agency (“U.S. EPA”), these “radionuclide contaminants at the [shipyard] ... pose a threat to human health and the environment.”<sup>41</sup>

## 2. The Navy’s continuing mismanagement of the site

By 1974, the Navy stopped using the shipyard for repairs. It then leased the shipyard to a private company, Triple A Machine Shop, Inc., from May 1976 to June 1986, which operated a commercial ship repair business. It, too, contaminated the site with hazardous wastes,<sup>42</sup> and the San Francisco District Attorney’s Office raided the company, as a prelude to prosecution.<sup>43</sup> Triple A itself may also have disposed of shipboard devices containing radioactive material, according to the Navy’s assessment.<sup>44</sup> The pollution did not stop there. Subsequently, yet another lessee and the Navy were also sued for

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THAT WAS PERFORMED WAS DEEPLY FLAWED 1, 10-11 (Oct. 2018), available at <http://committeetobridgethegap.org/wp-content/uploads/2018/10/HuntersPointReport2.pdf>.

<sup>39</sup> 2004 Radiological Assessment, *supra* note 14, at 6–32.

<sup>40</sup> *Id.* at 6–7.

<sup>41</sup> Declaration of David J. Kappelman in Support of Government’s Supplemental Sentencing Memorandum Re: Lack of Sentencing Disparity and Risk of Harm, *United States v. Hubbard*, No. CR-17-278-JD (N.D. Cal. Mar. 21, 2018). He attests to the harms this way: as to plutonium, “[t]he main health effect from exposure to plutonium is cancer which may occur years after exposure ... [.] likely ... cancers of the lung, bones, and liver.” *Id.* at 3. U.S. EPA recognizes it as a known human carcinogen. *Id.* So, too, is Strontium, which can cause cancer at high levels as well as anemia. *Id.* As to cesium, it “binds strongly to moist soils and does not travel far below the surface,” *id.*, and is therefore easily available in the environment.

<sup>42</sup> See *supra* note 6 and accompanying text. This commercial operator was found to be disposing of waste illegally and further contaminated the shipyard; the operator and was criminally and civilly prosecuted. Jim Herron Zamora & Jane Kay, *Triple A Machine Shop Toxic Case*, S.F.GATE (Dec. 9, 1996, 4:00 AM), <https://www.sfgate.com/news/article/TRIPLE-A-MACHINE-SHOP-TOXICS-CASE-3110790.php>; *Triple A Machine Shop v. State*, 261 Cal. Rptr. 493, 495–98 (Cal. Ct. App. 1989) (recounting state Department of Health inspector’s discovery of illegal hazardous substance practices and the criminal prosecution of the company and its officer for illegal hazardous substance disposal practices). In 1992, a jury convicted the company for state hazardous waste law violations; although the state judge in the case levied a \$9.2 million criminal penalty against the company, then the largest such penalty for toxic dumping in California ever, according to a newspaper, the court of appeals reduced the penalty to \$115,000. *Id.* The civil case also settled for a miniscule amount – compared to the estimated cleanup costs – after the City of San Francisco elected a new District Attorney and the lead attorney on the case changed. *Id.*

<sup>43</sup> Ohayon, *supra* note 7, at 182.

<sup>44</sup> 2004 Radiological Assessment, *supra* note 14, at 6–11.

environmental law violations.<sup>45</sup> These were highly publicized events, well known to San Francisco residents and especially to those living in the Bayview-Hunters Point neighborhood.

In 2000, another event reminded the residents of the shipyard's legacy: an underground fire started<sup>46</sup> at the very landfill where waste from the shipyard operations, including from the lab, were buried.<sup>47</sup> The fire sent "yellowy-green smoke into the air for several weeks."<sup>48</sup> The public was assured by government agencies that the smoke was not harmful.<sup>49</sup> The residents were not assured. They were suspicious of the fire because the fire had started spontaneously, they knew nuclear wastes were buried at the landfill, and they could see the odd colors of the smoke and smell the fire.<sup>50</sup> The Navy faced criticism for the fire and the failure to maintain a fire brigade.<sup>51</sup>

In 2006, disturbance of the soil during grading operations by a company selected to develop part of the shipyard site generated still another controversy. Residents were already concerned about releases of harmful particulate matter and asbestos dust near two elementary schools during site preparation work.<sup>52</sup> Then, it turned out that the consultant hired to monitor the asbestos levels had failed to record data for over a month; the consultant was levied a fine of \$515,000, one of the larger penalties assessed by the local

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<sup>45</sup> The Environmental Law and Justice Clinic represented groups that sued the Navy and Astoria Metals (documents on file with author).

<sup>46</sup> Lindsey Dillon & Julie Sze, *Police Power and Particulate Matters: Environmental Justice and the Spatialities of In/Securities in U.S. Cities*, 54.2 ENG. LANGUAGE NOTES 13, 16–17 (2016).

<sup>47</sup> See Dillon, *supra* note 18, at 3; see also *supra* notes 19, 34, and accompanying text.

<sup>48</sup> Dillon & Sze, *supra* note 6, at 16–17.

<sup>49</sup> *Id.* at 17.

<sup>50</sup> *Id.* See also Edwin A. Martini, *Introduction in PROVING GROUNDS*, *supra* note 7, at 9 (assurances about Agent Orange). I would hear deep discontent about this fire from time to time from community advocates with whom the clinic interacted.

<sup>51</sup> *EPA Faults Navy Handling of 4-Week Landfill Fire*, L.A. TIMES (Sept. 12, 2000), <http://articles.latimes.com/2000/sep/12/news/mn-19730>.

<sup>52</sup> More on why the shipyard is being developed is covered in the next section. The monitoring was required under state law because of naturally occurring asbestos in the proximity of two elementary schools to the shipyard site being developed. BAY AREA AIR QUALITY MGMT. DIST., REPORT OF DIVISION ACTIVITIES FOR THE MONTH OF JUNE 2005 Agenda 4 (July 20, 2005), available at [http://www.baaqmd.gov/~media/files/board-of-directors/2005/brd\\_agenda\\_072005.pdf](http://www.baaqmd.gov/~media/files/board-of-directors/2005/brd_agenda_072005.pdf). Particulate matter kills people; in the words of the medical community and agencies, it "causes premature death." According to the Bay Area Air Quality Management District, particulate matter is responsible for "more than 90 percent of premature mortality related to air pollution in the Bay Area." Helen H. Kang, Andrew Graf, Joseph Baskin, Francisco Martinez, Kendra Tietjen & Whitney Wu-Chu, *Letter to the City of San Francisco Concerning Hunters Point Candlestick Park Implosion*, ENVTL. L. & JUST. CLINIC (Nov. 18, 2014), available at <https://digitalcommons.law.ggu.edu/eljc/29>. [hereinafter Kang letter]. Asbestos is a known carcinogen that causes other serious diseases. *Health Effects of Asbestos*, ATSDR, [https://www.atsdr.cdc.gov/asbestos/health\\_effects\\_asbestos.html](https://www.atsdr.cdc.gov/asbestos/health_effects_asbestos.html) (last visited May 14, 2019).

air regulator.<sup>53</sup> Even though the consultant represented to regulators and the public in its reporting forms that it “detected no asbestos dust at the site,” the monitors in fact had failed to record any data, while nearby monitors detected violations of limits.<sup>54</sup> In reality, the residents did not need monitors to know that dust was a problem. They could see, ingest, and experience the dust.<sup>55</sup>

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<sup>53</sup> Liz Wagner & Mark Villareal, *Controversy Brews at Embattled Hunters Point Naval Shipyard*, NBC BAY AREA (Mar. 11, 2017), <https://www.nbcbayarea.com/news/local/Controversy-Brews-at-Embattled-Hunters-Point-Naval-Shipyard-415957623.html> (“In the spring of 2006, CH2M Hill reported that it detected no asbestos dust at the site, but discovered months later in August that it couldn’t confirm any of those results.”). You can view the video at the NBC Bay Area Investigative Unit website. *Id.* See also Memorandum from Meeting Overview: Hunters Point Shipyard Briefing On Status of Hunters Point Clean-Up (Dec. 15, 2016), available at <https://www.documentcloud.org/documents/3459777-DRAFT-12-15-16-Hunters-Point-TIGER-Team-Meeti.html>; John Shutt, *Navy’s pick to review Shipyard cleanup fraud also faked data*, S.F. BAY VIEW (Mar. 9, 2017), <http://sfbayview.com/2017/03/navys-pick-to-review-shipyard-cleanup-fraud-also-faked-data/>; S.F. DEP’T OF HEALTH, U.S. EPA REVIEW OF DUST/NATURALLY OCCURRING ASBESTOS CONTROL MEASURES AND AIR MONITORING AT THE FORMER HUNTERS POINT NAVAL SHIPYARD, (June 9, 2010), available at <https://www.sfdph.org/dph/files/EHSdocs/ehsHuntersPointdoc/EPAReviewDust.pdf> [hereinafter EPA Review of Dust] (inoperable monitor); Ahimsa P. Sumchai, *Polluter pays!*, S.F. BAY VIEW (Nov. 25, 2008), <http://sfbayview.com/2008/11/polluter-pays/>; Sarah Phelan, *US EPA, SF Health Department, and Lennar accused of asbestos collusion*, S.F. BAY GUARDIAN ARCHIVE (Mar. 21, 2011), <http://sfbgarchive.48hills.org/sfbgarchive/2011/03/21/us-epa-sf-health-department-and-lennar-accused-asbestos-collusion/>.

The SLAM Coalition of Bayview Hunters Point Community Organizations and the New Orleans-based Advocates for Environmental Human Rights held a press conference outside U.S. EPA Region 9’s San Francisco office today to protest the contents of a string of emails they obtained through a Freedom of Information Act request that they claim ‘show conspiracy by the US Environmental Protection Agency Region 9 and the San Francisco Health Department officials to cover-up dangers of the Lennar Corp.’s development project at the Hunters Point Shipyard.

*Id.*; Marie Harrison & Eric Brooks, *Getting the facts straight about Lennar’s environmental violations*, S.F. EXAM’R. (Nov. 20, 2016), <http://www.sfexaminer.com/getting-facts-straight-lennars-environmental-violations/>. Since September 2000, I have closely followed the penalties the Bay Area Air Quality Management District—the local air regulator—has assessed to violators through subscribing to its email alerts announcing settlements and by reviewing settlement documents obtained from the District.

<sup>54</sup> Harrison & Brooks, *supra* note 53. See Lindsey Dillon, *The Breathers of Bayview Hill: Redevelopment and Environmental Justice in Southeast San Francisco*, 24 HASTINGS ENVTL. L. J. 227 (2018).

<sup>55</sup> Dillon, *supra* note 54, at 231 (discussing residents’ complaints about construction dust for years).

### 3. Site cleanup and plans for transfer to the City of San Francisco for massive development

In 1991, after the site had been placed on the National Priorities List in 1989 for federal cleanup, the Navy began a process to shutter the shipyard as part of its Base Alignment and Closure program.<sup>56</sup> For cleanup, the Navy serves as the lead agency responsible for the investigation and cleanup of the site, which the U.S. EPA, as the lead regulatory agency, oversees along with the California Environmental Protection Agency.<sup>57</sup> Once cleaned up under the Superfund program, the property is to be transferred to the City of San Francisco for massive redevelopment, which eventually will be marked as the biggest redevelopment in the city's modern history and among the most nationally significant investments.<sup>58</sup> The development envisions creating 12,000 housing units alongside commercial space, cultural centers, parks, and schools.<sup>59</sup>

In 2004, the Navy made its first transfer of seventy-five acres (referred to as Parcel A) to the City's redevelopment agency, with the remaining acreage to be transferred once the cleanup is complete.<sup>60</sup> The transfer was made based

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<sup>56</sup> See *supra* note 13 and accompanying text. Base Realignment and Closure ("BRAC") is a program to trim and manage parts of the vast military base holdings to meet changing needs. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-13-149, *MILITARY BASES: OPPORTUNITIES EXIST TO IMPROVE FUTURE BASE REALIGNMENT AND CLOSURE ROUNDS* (2013).

<sup>57</sup> *Treasure Island Naval Station – Hunters Point Annex San Francisco, CA*, U.S. EPA (Oct. 23, 2018), <https://cumulis.epa.gov/supercpad/SiteProfiles/index.cfm?fuseaction=second.cleanup&id=0902722>.

<sup>58</sup> The developer advertises the plans this way:

Set along the bay, this 750-acre project expanding from the Bayview-Hunters Point to Candlestick Park will have approximately 12,000 homes, 350 acres of public space, 1 million square feet of retail, and over 4 million square feet of planned office and research and development space. With over 350 homeowners that now call The San Francisco Shipyard home, these new homes offer a truly unique opportunity to live in one of the nation's hottest and highest valued markets.

*New Homes at The SF Shipyard*, LENNAR, [https://www.lennar.com/New-Homes/California/San-Francisco-Bay-Area/San-Francisco/Promo/BAULEN\\_Shipyard\\_General\\_Landing\\_Page\\_Mod?utm\\_source=sfsy&utm\\_medium=website&utm\\_campaign=baulen\\_website\\_sfsy\\_masterplan](https://www.lennar.com/New-Homes/California/San-Francisco-Bay-Area/San-Francisco/Promo/BAULEN_Shipyard_General_Landing_Page_Mod?utm_source=sfsy&utm_medium=website&utm_campaign=baulen_website_sfsy_masterplan) (last visited March 31, 2019). Lennar made a \$400,000 contribution to Brookings Institute, which then named the shipyard development one of the three "transformative investments" in the country. Eric Lipton & Brooke Williams, *How Think Tanks Amplify Corporate America's Influence*, N.Y. TIMES (Aug. 7, 2016), <https://www.nytimes.com/2016/08/08/us/politics/think-tanks-research-and-corporate-lobbying.html>.

<sup>59</sup> See *supra* note 57 and accompanying text.

<sup>60</sup> Jason Fagone & Cynthia Dizikes, *Radioactive object found near homes at Hunters Point shipyard*, S.F. CHRON. (Sept. 14, 2018),



on the Navy's conclusion that no remedial action was necessary at Parcel A to protect health and the environment.<sup>61</sup> It has since been developed.<sup>62</sup> Housing developed there is high-end, with the cheapest units being offered for more than \$600,000 for less than 700 square feet of space,<sup>63</sup> which is not something displaced San Francisco residents or children of longtime Bayview-Hunters Point residents can readily afford.<sup>64</sup>

### *B. Fake Sampling and Fake Cleanup at the Shipyard*

Distrust of government regulators among community members near the shipyard has registered high. Even after closure of the site, the Navy just could not seem to get anything right. Not only did its lessee, Triple A Machine Shop, notoriously add to the contamination at the shipyard, but, as mentioned earlier, the site landfill burned for weeks. The difficulty continued

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<https://www.sfchronicle.com/bayarea/article/Radioactive-object-found-near-homes-at-Hunters-13228476.php>.

<sup>61</sup> See Parcel A ROD, *supra* note 14, at 13–14. The decision document states, “based on current information, no action is required at Parcel A because the sites do not pose an unacceptable risk to health and the environment.” *Id.* at 14. The Navy made this conclusion despite noting that the “Navy used one building on Parcel A as a radiation laboratory.” *Id.* at 8. The Parcel A ROD, however, was issued in 1995, predating the extensive 2004 Radiological Assessment. The Parcel A ROD probably should have been revised after 2004. EPA, which concurred as to the no-action remedy, *id.* at 10, later characterized Parcel A as harmless, without mentioning the lab use:

Parcel A was originally used by the Navy primarily for housing, and as such, there were only small amounts of contamination on the property. The Navy completed environmental cleanup work at Parcel A to residential standards and transferred it to the City of San Francisco in 2004.

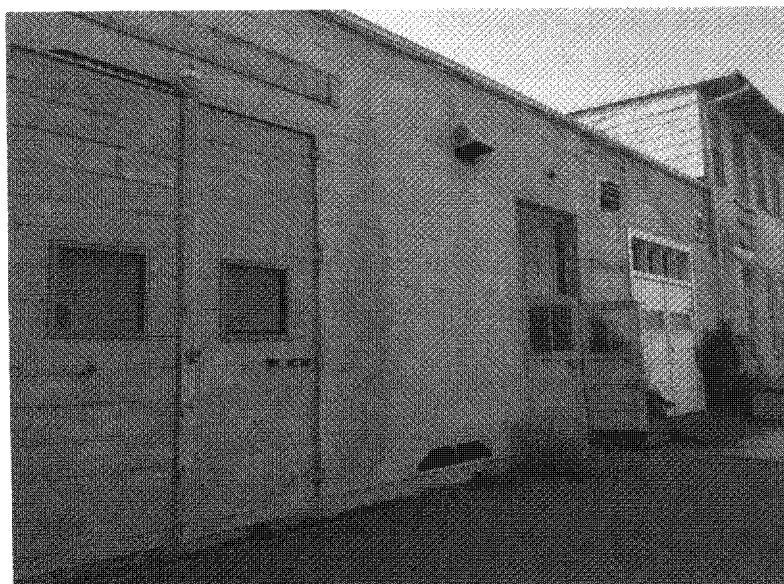
EPA's Review of Dust, *supra* note 53, at 1.

<sup>62</sup> *New Homes at the SF Shipyard*, *supra* note 58. The parcel designations are for the purposes of cleanup; there are ten parcels total, named at various stages of the Base Realignment and Closure and cleanup processes. See 2012 Radiological Addendum, *supra* note 17, at 2-1 to 2-2. Many parcel maps exist, but the map accessible from NBC Bay Area is very accessible to the public: Vicky Nguyen, Liz Wagner & Felipe Escamilla, *Former Contractors Claim Hunters Point Cleanup is Botched*, NBC BAY AREA (May 23, 2014), <https://www.nbcbayarea.com/investigations/Former-Contractors-Claim-Hunters-Point-Cleanup-is-Botched-259871511.html> [hereinafter Wagner NBC May 23, 2014 Report].

<sup>63</sup> Fagone & Dizikes, *supra* note 60.

<sup>64</sup> In an area within the neighborhood, the median income, according to the last census, was \$19,704, as compared to \$70,040 for the city as a whole. U.S. Census Bureau, *supra* note 8 (census tract 231.03); S.F. ENV'T ET AL., *supra* note 7, at 15. Many residents there at the time Parcel A was being developed were living 200% below the federal poverty level in this famously expensive city, where a family of four earning \$117,400 is considered “low income.” *Id.*; Michelle Robertson, *A six-figure salary is considered 'low income' in San Francisco, and the threshold is rising*, S.F.GATE (June 26, 2018), <https://www.sfgate.com/expensive-san-francisco/article/low-income-families-sf-bay-area-hud-statistics-13024580.php>.

through the cleanup process, where inadequate protection of the neighborhood from the shipyard contamination continued to concern neighbors and workers alike.<sup>65</sup> In the end, the asbestos monitoring problem at Parcel A and the landfill fire turned out to be just a few of many scandals that would affect nearby residents, numerous schools within a mile of the shipyard site,<sup>66</sup> and onsite artists.<sup>67</sup>



One of the artist studios at the shipyard. Photo by Helen Kang (Oct. 21, 2018).

### 1. The Government contractor's extensive fraud

Tetra Tech EC Inc. ("Tetra Tech"), the government contractor hired to clean up the extensive radiological waste at the site, has been found to have committed fraud so extensive that Public Employees for Environmental Responsibility ("PEER") has characterized it as "the biggest case of eco-fraud in U.S. history," alongside the Volkswagen emissions device cheating

<sup>65</sup> See Wagner NBC May 23, 2014 Report, *supra* note 62 (whistleblower Bert Bowers talking about contamination leaving the site).

<sup>66</sup> 2012 Radiological Addendum, *supra* note 17, at Table 3-5 (listing many daycares and elementary and middle schools within a one-mile radius of the shipyard).

<sup>67</sup> Since 1983, about 300 artists have also been a notable presence at the shipyard. See HUNTERS POINT SHIPYARD ARTISTS, <https://www.shipyardartists.com/> (last visited Mar. 30, 2019).

scandal.<sup>68</sup> In June 2018, two Tetra Tech supervisors who pleaded guilty were sentenced to eight months in prison.<sup>69</sup>

According to our clinic's detailed interview of company whistleblowers—done on behalf of the clinic's client, Greenaction for Health and Environmental Justice (“Greenaction”)—and criminal indictments from the United States government, Tetra Tech's onsite management ordered extensive falsification of sampling results and cleanup records to make it appear that the site was cleaned of radiological contaminants when it was not.<sup>70</sup> Tetra Tech also covered up the fraud, which delayed its discovery by years.<sup>71</sup>

The full extent of the fraud, in fact, should have been uncovered much earlier. In October 2012, a Navy official “during a routine telephone call” with Tetra Tech “point[ed] out a possible discrepancy in sampling results” that indicated that thirty-six soil samples might have been collected from locations other than as identified in the sampling forms.<sup>72</sup> All of the samples that aroused the Navy official's initial suspicion were from Building 517, where, in part, the Naval Radiological Defense Laboratory ran animal irradiation experiments.<sup>73</sup> The Navy official had noticed that the sampling results should have shown a higher level of radiation: the samples were radiologically too clean, in the context of other samples from the same area the officer knew about, which had higher levels of radiation.<sup>74</sup> In other words, as Dr. Ahimsa Porter Sumchai—who has deep knowledge of the area and the shipyard—writes, radiation in “ambient levels [are] so high that . . . the

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<sup>68</sup> Chris Roberts, *Faked cleanup at Hunters Point Shipyard much worse than Navy estimates*, S.F. CURBED (Apr. 10, 2018), <https://sf.curbed.com/2018/4/10/17219434/hunters-point-shipyard-navy-cleanup-san-francisco-faked>; Jason Fagone & Cynthia Dizikes, *2 sentenced for falsifying reports on soil samples at Hunters Point*, S.F.GATE (May 3, 2018), <https://www.sfgate.com/crime/article/Two-sentenced-for-falsifying-reports-on-soil-12886564.php#photo-15500518>; Wagner NBC May 4, 2018 Report, *supra* note 2.

<sup>69</sup> See *supra* note 67 and accompanying text.

<sup>70</sup> Golden Gate University School of Law, *Greenaction for Health and Environmental Justice, Petitioner v. Tetra Tech, EC, Inc. Licensee*, ENVTL. L. & JUST. CLINIC (June 28, 2017), [available at https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1027&context=eljc](https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?article=1027&context=eljc) (Petition Before the U.S. Nuclear Regulatory Commission) [hereinafter Greenaction NRC Petition]. Steve Castleman, who has been working with law students in our clinic in the representation of Greenaction in the Tetra Tech matter, has a long history with the shipyard. He prosecuted Triple A Machine Shop, *see supra* note 42, when he was a Deputy District Attorney in that office.

<sup>71</sup> Greenaction NRC Petition, *supra* note 70, at 32, 33.

<sup>72</sup> TETRA TECH EC, INC., INVESTIGATION CONCLUSION: ANOMALOUS SOIL SAMPLES AT HUNTERS POINT NAVAL SHIPYARD, REVISION 1 ES-1, ES-4 (Apr. 2014), [available at https://www.documentcloud.org/documents/1312386-tt-report-2.html](https://www.documentcloud.org/documents/1312386-tt-report-2.html) [hereinafter Tetra Tech Conclusion].

<sup>73</sup> *Id.* at 3; 2004 Radiological Assessment, *supra* note 14, at 6–39, Table 6-5A, Table 6-5B, 8-159, Table 8-1.

<sup>74</sup> Tetra Tech Conclusion, *supra* note 72, at 1.

U.S. Navy detected discrepancies in post remediation soil samples submitted by Tetra Tech field workers because the concentrations of radioactive potassium and Radium 226 were suspiciously *low*!”<sup>75</sup> The call from the Navy official led to an internal investigation by Tetra Tech that resulted in a report at the end of the year, which was provided to the Navy.<sup>76</sup> According to Tetra Tech, it took the Navy nearly a year to call for a meeting to seek additional information after the initial report was provided to the Navy.<sup>77</sup> A final report incorporating the additional information that the Navy requested was then issued in April 2014, a year and a half after the 2012 call from the Navy official. By way of an eye-opening, even if a slightly ridiculous comparison, the forty-seven-volume Pentagon Papers were compiled in the same amount of time.<sup>78</sup>

Tetra Tech’s 2014 investigation ultimately acknowledged that the soil samples had indeed been switched, and there were 2,500 other sampling results with the characteristics that had prompted the Navy official’s initial inquiry (that is, radiological levels that were too low).<sup>79</sup> Tetra Tech revealed several additional problems. It identified additional areas where soil samples were not collected as indicated on the forms; at least one worker had listed on sampling forms that he collected samples from two different places at the same time,<sup>80</sup> a physical impossibility. Even so, the Navy allowed Tetra Tech to continue the work, after assurances that it had taken corrective measures. Tetra Tech took disciplinary action against offenders, such as imposing a month of leave without pay, issuing letters of caution, providing retraining to workers, and resampling areas that were associated with suspicious sampling practices.<sup>81</sup>

Surprisingly, Tetra Tech revealed in its investigation that it had not interviewed some of the very workers who were listed in the forms that had led to the Navy’s original inquiry. Tetra Tech justified this questionable choice, stating that the workers were no longer employed at the site.<sup>82</sup> Despite Tetra Tech’s failure to interview these employees who had collected fraudulent samples and revelations of additional sampling “anomalies” that had been uncovered as a result of the 2014 investigation, the Navy for itself

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<sup>75</sup> Dr. Ahimsa Porter Sumchai, *Shipyards workers demand environmental justice*, S.F. BAYVIEW (Feb. 1, 2015), <http://sfbayview.com/2015/02/shipyards-workers-demand-environmental-justice/>. Dr. Sumchai is founding chair of the shipyard’s Restoration Advisory Board Radiological Subcommittee and a contributor to the shipyard’s radiological assessment. *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> HANNAH ARENDT, *CRISES OF THE REPUBLIC: LYING IN POLITICS; CIVIL DISOBEDIENCE; ON VIOLENCE; THOUGHTS ON POLITICS AND REVOLUTION* 3 (1972).

<sup>79</sup> Tetra Tech Conclusion, *supra* note 72, at 8, 15, 18.

<sup>80</sup> *Id.* at 16.

<sup>81</sup> *Id.* at 20–22.

<sup>82</sup> *Id.* at 18–19.

also failed to interview any of the employees identified in the suspicious sampling forms.

Then, a month after the Tetra Tech's 2014 investigation report was finalized, NBC Investigative Unit broke a story based on whistleblower accounts. As reported there, Bert Bowers, the project's radiation safety officer, concluded that serious fraud marred the entire cleanup effort—it was “botched.”

“It’s playing Russian Roulette with the health and wellbeing of the general public, the people that handle it, and the environment,” said Bert Bowers, a former radiation safety officer hired by Tetra Tech, the Navy contractor overseeing the cleanup of Hunters Point. He was tasked with maintaining compliance with federal mandates relevant to radiation protection and the management of radioactive materials.

Bowers has worked at nuclear plants and radiological remediation sites across the country, and even worked as a radiation protection officer with the U.S. Department of Energy. He said compared to other projects, what he experienced at Hunters Point “was the most egregious violation of standard protocol” he had encountered in his 35-year career.

...

Standard operating procedure dictates that before a truck leaves the job site it must pass through a “portal monitor” to get screened for radiological contamination. The sensors would determine whether the soil was clean or radioactive, and ultimately where the dirt was to be disposed of.

...

According to [the] journal [of another whistleblower, Susan Andrews], in just one week in October 2011 more than 70 trucks “failed the portal monitor” but were still “released to go off site.”

Shortly after Bowers reported his concerns to the [Nuclear Regulatory Commission] in January 2011, he

lost his job with Tetra Tech. Andrews also lost her job after she contacted federal regulators in October 2011.<sup>83</sup>

Even with these allegations that questioned the very integrity of the cleanup, the Navy did not conduct further investigations. The Navy chose instead to accept the results and assurances provided in Tetra Tech's investigation report. The willingness to actively overlook the extent of the fraud extended to other agencies involved—both the U.S. and California EPA overseeing and enforcing the cleanup, as well as the City of San Francisco. None of the responsible government actors stepped up in the 2012 to 2014 period to determine the true extent of the fraud and what it might mean for the expensive cleanup of radioactive contamination. Had Tetra Tech or any of the governments involved done a competent investigation genuinely geared at addressing these issues, including interviews of whistleblowers, Anthony Smith would have been interviewed because he is one of the workers listed in the forms. He also is one of the whistleblowers who later disclosed details of Tetra Tech's extensive fraud both to the media and to our clinic.

The Nuclear Regulatory Commission ("NRC" or "Commission") also deserves special attention here. As Tetra Tech whistleblowers again reported, the Commission was aware of the allegations from numerous complaints.<sup>84</sup>

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<sup>83</sup> Wagner NBC May 23, 2014 Report, *supra* note 62. Bowers also signed a declaration that our clinic submitted in support of Greenaction's petition to the Nuclear Regulatory Commission. See Greenaction NRC Petition, *supra* note 70. For "provid[ing] credible internal information about Tetra Tech's flawed practices to regulatory agencies and media organizations," Bowers won an award in 2019 from the Society of Professional Journalists of Northern California. See *SPJ Norcal Honors 2019 James Madison Freedom of Information Award Winners*, *supra* note 12.

<sup>84</sup> According to the whistleblowers, the Commission did nothing:

After sharing their concerns within the company, they [i.e., the whistleblowers] took them to the Nuclear Regulatory Commission (NRC) and submitted 30 formal complaints between them to the agency.

The Investigative Unit obtained NRC reports that indicate regulators traveled to Hunters Point for three days in March 2011 and January 2012 to investigate Bowers' and Andrews' claims. The reports show that in each instance, inspectors were unable to substantiate the allegations.

"As an American, I believed in the NRC," [Susan Andrews, a whistleblower] said. "I'm not so sure I believe in them anymore."

Wagner NBC May 23, 2014 Report, *supra* note 62. Paradoxically, the Commission counts as perhaps the only agency that has denied a permit (in a different case) because of "questions raised over siting a [uranium enrichment facility] in an African American community." DANIEL FABER, *CAPITALIZING ON ENVIRONMENTAL INJUSTICE: THE POLLUTER-INDUSTRIAL COMPLEX IN THE AGE OF GLOBALIZATION* 134 (2008) (citing LUKE W. COLE

Nevertheless, the Commission, which had started its own investigation even before the Navy's call to Tetra Tech in 2012,<sup>85</sup> concluded it in 2015 by proposing a penalty of \$7,000 directed to Tetra Tech and a notice of violation directed to one of the supervisors (later indicted by the U.S. Attorney's Office in San Francisco).<sup>86</sup> Tetra Tech chose to go into mediation, and the Commission ultimately agreed to forego even the small penalty of \$7,000; in return, Tetra Tech agreed to "emphasize" the importance of not committing fraud "not engaging in willful activities" in violation of Commission regulations and to provide "refresher training."<sup>87</sup> The Commission also represented to the public that it "is not aware of any subsequent willful violations of NRC regulations by [Tetra Tech] employees since June 4, 2012."<sup>88</sup>

## 2. Greenaction's petition to the Nuclear Regulatory Commission and the ensuing pressure on the Navy

Even after Tetra Tech's disclosure of additional problems in 2014 and serious allegations from whistleblowers questioning the cleanup, the Navy remained adamant about the integrity of the site assessment. Concerned about the Navy's immovable blinders and remorseful of what they had done to the community by participating in the fraudulent un-cleanup, whistleblowers sought out Greenaction, which turned to the clinic for legal assistance to help put the spotlight on the fraud.

In June 2017, the clinic and co-counsel filed a petition before the Nuclear Regulatory Commission, on behalf of Greenaction, to seek institution of a proceeding to revoke Tetra Tech's materials license obtained under NRC regulations.<sup>89</sup> Tetra Tech's materials license enables it to perform

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& SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 161–62 (2001)).

<sup>85</sup> See Wagner NBC May 23, 2014 Report, *supra* note 62 (referencing to March 2011 travel by NRC employees, which took place before the October 2012 call from the Navy to Tetra Tech).

<sup>86</sup> Greenaction NRC Petition, *supra* note 70, at 3–4.

<sup>87</sup> In the Matter of Tetra Tech EC, Inc., 81 Fed. Reg. 73,144, 73,145 (Oct. 24, 2016).

<sup>88</sup> *Id.*

<sup>89</sup> See Greenaction NRC Petition *supra* note 70 at 1. The petition was filed pursuant to 10 C.F.R. § 2.206 (2015), which allows any person to file a request for the Commission to institute a proceeding to modify, suspend, or revoke a license, or for any other appropriate action. *Id.* § 2.206(a). If the Commission begins such a proceeding, it must do so by serving an order on the licensee that provides the following:

- (1) Allege the violations with which the licensee or other person subject to the Commission's jurisdiction is charged, or the potentially hazardous conditions or other facts deemed to be sufficient ground for the proposed action, and specify the action proposed;

radiological cleanup that Tetra Tech was hired to do at the shipyard.<sup>90</sup> The petition, supported by numerous declarations of Tetra Tech's former workers signed under penalty of perjury, comprehensively details the extensive fraud committed at the behest of Tetra Tech management that throws into question the integrity of the entire assessment and cleanup efforts at the shipyard.<sup>91</sup> At least as far back as 2008, Tetra Tech's onsite managers directed the workers to fake the samples and cleanup.<sup>92</sup> The workers took samples from places known to be "clean" and substituted them for samples from places that should have been cleaned but were not;<sup>93</sup> manipulated computer data files to ensure that "dirty" numbers did not appear so;<sup>94</sup> and placed still radioactive soil as backfill in trenches on-site.<sup>95</sup> In short, the contractor faked the cleanup through faking sampling results and disposed of still contaminated soil and other material at places unlicensed for disposal of such radioactive material. The whistleblowers also disclosed practices dating back to 2006, where scanning machines were set not to detect radioactivity before equipment and soil were sent offsite.<sup>96</sup>

The clinic distributed the petition and the declarations to the government agencies involved in the cleanup and redevelopment, including to U.S. EPA. The filing of the petition generated immense pressure on the Navy and the City of San Francisco because of the significant media attention at the time of the filing, not to mention the sustained media interest that followed.<sup>97</sup>

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(2) Provide that the licensee or other person must file a written answer to the order under oath or affirmation within twenty (20) days of its date, or such other time as may be specified in the order;

(3) Inform the licensee or any other person adversely affected by the order of his or her right, within twenty (20) days of the date of the order, or such other time as may be specified in the order, to demand a hearing on all or part of the order, except in a case where the licensee or other person has consented in writing to the order;

(4) Specify the issues for hearing; and

(5) State the effective date of the order; if the Commission finds that the public health, safety, or interest so requires or that the violation or conduct causing the violation is willful, the order may provide, for stated reasons, that the proposed action be immediately effective pending further order.

*Id.* § 2.202(a).

<sup>90</sup> In the Matter of Tetra Tech EC, Inc., 81 Fed. Reg. at 73,144.

<sup>91</sup> Greenaction NRC Petition, *supra* note 70 at 1, 10–35.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 11–14.

<sup>94</sup> *Id.* at 21–22, 36.

<sup>95</sup> *Id.* at 28–29.

<sup>96</sup> *Id.* at 17–19, 31, 35.

<sup>97</sup> See, e.g., Liz Wagner & Michael Horn, *Hunters Point Whistleblowers Expose More Alleged Fraud In Connection with Shipyard Cleanup*, NBC BAY AREA (June 29, 2017), <https://www.nbcbayarea.com/investigations/Hunters-Point-Whistleblowers-Expose-More->



Then, in May 2018, six years after some of the sampling shenanigans surfaced and nearly a year after Greenaction's NRC petition was filed, the Navy and U.S. EPA concluded "*all* Tetra Tech radiological work areas need[ed] to be retested."<sup>98</sup> This announcement marked a 180-degree turnabout. The residents had fervently hoped for this reassessment and complete retesting but thought it nearly impossible to achieve. While such an outcome was plainly sensible, as community advocates have long insisted, the community had long lost trust in the very government agencies that should be protecting them. Even after Greenaction's NRC petition was filed, the Navy had maintained that retesting or reassessment was unnecessary—all without having interviewed any of the whistleblowers. Up until then, "the Navy was on notice for years that it had a major data meltdown on its hands yet [had been] still trying to cook the books."<sup>99</sup> Moreover, residents had long ago given up hope in their city representatives and other politicians whom they saw as tied to the developer's money,<sup>100</sup> after all, community representatives had been repeatedly telling the Navy and U.S. EPA that fraud

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Alleged-Fraud-of-Shipyard-Cleanup--431638053.html; J.K. Dineen, *Ex-SF Navy shipyard workers allege fraud in radiation cleanup*, S.F.GATE (June 29, 2017), <https://www.sfgate.com/bayarea/article/Ex-SF-Navy-shipyard-workers-allege-fraud-in-11257774.php>. Television news also reported the story.

<sup>98</sup> *Timely Topics*, NAVFAC (May 2, 2018), [https://bracpmo.navy.mil/brac\\_bases/california/former\\_shipyard\\_hunters\\_point/timely\\_topics/timelytopics.html](https://bracpmo.navy.mil/brac_bases/california/former_shipyard_hunters_point/timely_topics/timelytopics.html) (emphasis added).

<sup>99</sup> *SF-Owned Hunters Point Parcels Soil Testing Falsified*, PEER (Jun. 4, 2018), <https://www.peer.org/news/press-releases/sf-owned-hunters-point-parcels-soil-testing-falsified.html>.

<sup>100</sup> See *Hunters Point Shipyard Cleanup Called into Question*, KQED (Apr. 12, 2018, 9:30 AM), <https://www.kqed.org/forum/2010101864720/hunters-point-shipyard-cleanup-called-into-question>; see also *infra* note 158. Dr. Sumchai wrote to the San Francisco Board of Supervisors, alerting them of Tetra Tech's 2014 investigation. Sumchai, *supra* note 75. Nothing came of it then. Greenaction's Marie Harrison told the same body in 2018:

My name is Marie Harrison. I am a board member of Greenaction for Environmental Justice and before that I was a staff member for over 20 years. I've lived worked, played, and prayed at Bayview Hunters Point for more than most of you are old, let's put it that way so you know that I've been there a while, ... You told me that you regretted not listening to us in the beginning when we told you about the shipyard. All hell had to break lose out there and it did before you started to listen.

Appellant Marie Harrison of Greenaction, Statement at the Hearing Before the San Francisco Board of Supervisors: Appeal of Final Environmental Impact Report Certification – India Basin Mixed-Use Project (Oct. 2, 2018), [http://sanfrancisco.granicus.com/MediaPlayer.php?view\\_id=10&clip\\_id=31481&meta\\_id=636949](http://sanfrancisco.granicus.com/MediaPlayer.php?view_id=10&clip_id=31481&meta_id=636949) (video clip starting 1:11:25) [hereinafter India Basin-Mixed Use Project].

marred the radiological cleanup efforts at the shipyard.<sup>101</sup> But these knowledgeable spokespeople had been repeatedly ignored.

So what changed?

Foremost, the Navy conducted a review of Tetra Tech's data for reliability, in large part as a response to the publicity generated and the details supplied in the declarations submitted with Greenaction's NRC petition.<sup>102</sup> After this review, in December 2017, the U.S. EPA stated to the Navy that "the data analyzed demonstrate a widespread pattern of practices that appear to show deliberate falsification, failure to perform the work in a manner required to ensure [Superfund cleanup] requirements were met, or both."<sup>103</sup>

And, eventually, even the Navy conceded the wide-ranging consequences of the fraud, from "a complete loss of trust in the Navy by the local community" to the delay in shipyard cleanup.<sup>104</sup> As the Director of the Navy's Base Realignment and Closure program, Laura Duchnak, attested in

<sup>101</sup> Ahimsa Porter Sumchai, *Is the Shipyard Safe? Dr. Sumchai writes EPA opposing transfer of more Hunters Point Shipyard land to San Francisco and Lennar, as NBC questions radiation testing*, S.F. BAYVIEW (May 13, 2015), <http://sfbayview.com/2015/05/is-the-shipyard-safe-dr-sumchai-writes-epa-opposing-transfer-of-more-hunters-point-shipyard-land-to-san-francisco-and-lennar-as-nbc-questions-radiation-testing/>.

<sup>102</sup> The Navy continues to make questionable choices. When it finally decided that Tetra Tech's data needed to be reviewed, the Navy awarded the contract to CH2MHill. CH2MHill was the contractor who had been fined over \$500,000 over the asbestos monitoring scandal at Parcel A. See Shutt, *supra* note 53.

<sup>103</sup> Letter from John Chesnutt, Manager, Pacific Islands and Federal Facilities Section, Superfund Division, EPA Region IX, to George ("Pat") Brooks, U.S. Dep't of the Navy (Dec. 27, 2017), [https://www.peer.org/assets/docs/epa/4\\_9\\_18\\_EPA\\_comment\\_summary.pdf](https://www.peer.org/assets/docs/epa/4_9_18_EPA_comment_summary.pdf). Someone was working hard over the holidays to speak the truth. And yet this December 2017 letter was not released to the public and did not come to light until in response to a Freedom of Information Act request. *SF-Owned Hunters Point Parcels Soil Testing Falsified*, *supra* note 99. That this damning letter was withheld, despite intense public interest in the cleanup and the retesting, sowed further distrust. For EPA's part, in October 2017, it awarded Tetra Tech, Inc., which wholly owns Tetra Tech EC, Inc., a contract worth \$85 million to assess abandoned uranium mines in the Navajo lands, further enraging Greenaction and its allies. See *EPA Awards Tetra Tech Inc. \$85 Million Contract to Assess Navajo Abandoned Uranium Mines*, U.S. EPA (Oct. 11, 2017), <https://www.epa.gov/newsreleases/epa-awards-tetra-tech-inc-85-million-contract-assess-navajo-abandoned-uranium-mines-0>. In light of EPA's December 2017 letter, government agencies should further review whether Tetra Tech engaged in a purposeful cover-up to mislead the Navy and the NRC, both actors that appear very much willing to be misled rather than face the consequence of a botched cleanup. Particularly worth examining is Tetra Tech's 2014 assurance to the Navy and the public that it had "not had a recurrence of the type of anomalous soil sample results that led to this investigation, indicating that the corrective actions have addressed the problem." Tetra Tech Conclusion, *supra* note 72, at 23. Tetra Tech has continued to insist that the scandal is owed solely to a few "rogue employees." J.K. Dineen, *In Hunters Point Shipyard cleanup scandal, supes push for redoing botched test*, S.F. CHRON. (May 14, 2018, 9:40 PM), <https://www.sfchronicle.com/bayarea/article/In-Hunters-Point-Shipyard-cleanup-scandal-supes-12914669.php>.

<sup>104</sup> Wagner NBC May 4, 2018 Report, *supra* note 2.

a victim impact statement submitted in the sentencing of the Tetra Tech employees who pleaded guilty to directing the fraud,

[she] estimates [the fraud] has set back the planned transfer of the [shipyard] property [to the City of San Francisco] by a decade. She said the delay has caused “ire and frustration” by San Francisco city officials, members of congress and local activists. The scandal has brought on “negative media attention” and caused residents who moved into new condos next to where the cleanup is taking place to worry about their safety, she said.

“The development of [the Hunters Point Shipyard] was supposed to revitalize the community and provide jobs and affordable housing; all of that is now on hold indefinitely as the Navy and the regulatory agencies have determined that Tetra Tech’s work is unreliable,” Duchnak said.

...

Duchnak said the scandal has caused regulatory agencies to lose trust in the Navy’s ability to implement its radiological remediation program, and that the EPA no longer has confidence in the work performed by Tetra Tech.<sup>105</sup>

Thus, nearly thirty years after being on the National Priorities List and twelve years of cleanup—efforts that have cost the public more than \$270 million for the radiological work alone—the site is still not cleaned up. Further, the “cost of the required rework is likely to rise as high as \$578 million.”<sup>106</sup>

But, even before U.S. EPA could reach its damning conclusion that all of Tetra Tech’s work must be redone, much had happened; and, perhaps, U.S. EPA could do its important work because of what came before. Credit properly goes to the sustained organizing efforts of community groups, such as the clinic’s client, Greenaction, which have been involved in the shipyard issues from the beginning (and thus enabled the whistleblowers to seek Greenaction out); the whistleblowers themselves who came forward and

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<sup>105</sup> *Id.*

<sup>106</sup> See National Priorities List, *supra* note 13; Wagner NBC May 4, 2018 Report, *supra* note 2. Superfund is underfunded (really a Super-underfund), and “the slow pace of these cleanups has rendered Superfund a ‘superfailure.’” FABER, *supra* note 84, at 145. Failure of Superfund in low-income, people of color communities in particular has received much attention. See, e.g., *id.*

continued to speak despite, at first, being ignored; residents who continued to speak out about the issue; NBC Investigative Unit's careful and continued coverage; and San Francisco Bayview's sustained coverage of all aspects of the shipyard cleanup and redevelopment. Moreover, the San Francisco Chronicle published numerous editorials after U.S. EPA's pronouncement, emphasizing the importance of a comprehensive cleanup.<sup>107</sup> These efforts each contributed to U.S. EPA's review and the Navy's complete change in position—to commit to redo all of Tetra Tech's work. Most of all, the work of the clinic and its multiyear pro bono efforts, in extensively interviewing the whistleblowers, compiling their sworn testimonies, and serving as a watchdog of the resampling efforts, cannot be ignored.<sup>108</sup>

Still, the proof will be in the pudding: the Navy's commitment has already wavered,<sup>109</sup> and organizers and advocates will continue to scrutinize all aspects of the resampling plan and other aspects of the cleanup process. As to the NRC, it has yet to take action to grant or deny the petition to institute its own proceedings for taking action on Tetra Tech's license.

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<sup>107</sup> See, e.g., Chronicle Editorial Board, *San Francisco needs a sense of urgency about Hunters Point shipyard cleanup*, S.F. CHRON. (May 1, 2018, 3:37 PM), <https://www.sfchronicle.com/opinion/editorials/article/Editorial-San-Francisco-needs-a-sense-of-urgency-12879380.php>. Chronicle Editorial Board, *After scandal, the Hunters Point Shipyard needs a comprehensive cleanup*, S.F. CHRON. (May 16, 2018, 6:42 PM), <https://www.sfchronicle.com/opinion/editorials/article/Editorial-After-scandal-the-Hunters-Point-12920730.php>. Chronicle Editorial Board, *Retesting at the Hunters Point Shipyard is frustrating, but necessary*, S.F. CHRON. (June 18, 2018), <https://www.sfchronicle.com/opinion/editorials/article/Editorial-Retesting-at-the-Hunters-Point-13005200.php>. See also Roberts, *supra* note 12.

<sup>108</sup> I mention the role of our clinic to highlight the importance of pro bono assistance, especially where larger environmental groups were absent in this long struggle. Since the fall of 2016, the clinic has committed a full-time faculty lawyer's time, as well as numerous hours from staff lawyers and students, to different aspects of the shipyard cleanup. This effort has in part been recognized by media. See, e.g., *Hunters Point Shipyard Cleanup Called into Question*, *supra* note 100; J.K. Dineen, *Navy plans to re-examine soil at Hunters Point After false data reporting*, S.F. CHRON. (Jan. 31, 2018, 10:29 AM), <https://www.sfchronicle.com/science/article/Navy-plans-to-re-examine-soil-at-Hunters-Point-12537966.php> (recognizing some of the fraud discovered by clinic students). The role of the clinic has been under-recognized, partly because the clinic ensures that its clients receive press.

<sup>109</sup> Since the writing of this article, the Navy has revisited its change in position, and the community's fight is still ongoing. See, e.g., Cynthia Dizikes & J.K. Dineen, *EPA blasts Navy for plan to retest soil at former SF shipyard*, S.F. CHRON. (Aug. 17, 2018, 9:15 PM), <https://www.sfchronicle.com/bayarea/article/EPA-blasts-Navy-for-plan-to-retest-soil-at-former-13164851.php>. Other controversies are brewing that have come to light after June 2018, including the discovery of a radioactive dial at Parcel A, which this article does not cover.

## II. “WE SPEAK FOR OURSELVES”: THE DIGNITY RIGHT TO TELL ENVIRONMENTAL JUSTICE STORIES<sup>110</sup>

Human beings have an inherent need to tell stories, to tell them their way, and to have them heard. Otherwise, human beings feel disrespected—sometimes to the core of their being. Psychologists explain that storytelling is part of our human need as cognitive beings to order and understand ourselves and the world around us—indeed, one might say, our very existence.<sup>111</sup> With few exceptions, the legal system has traditionally failed to acknowledge the necessity of client stories.

### A. *Respect for Stories of Injustice*

I start with a story far removed from environmental harm—the abuse of athletes by Larry Nassar. While serving as a doctor with USA Gymnastics and Michigan State University, Nassar sexually abused hundreds of girls entrusted to his care.<sup>112</sup> In sentencing him after he pleaded guilty, Judge Rosemarie Aquilina created space for survivors to confront Nassar and gave them affirmation as they told their stories.

She told the women speaking, again and again, how strong they were, how powerful, how full of potential. After [one of the women] spoke about how Nassar turned “the sport I fell in love with as a kid into my personal living hell,” Judge Aquilina commended her courage: “You are so strong and brave and you are not broken,” she said. “You are glued back together perfectly. Thank

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<sup>110</sup> This rallying cry is “one of the stronger tenets that has emerged from the environmental justice movement: that impacted communities should ‘speak for themselves.’” CLIFFORD RECHTSCHAFFEN, EILEEN GAUNA, & CATHERINE A. O’NEILL, ENVIRONMENTAL JUSTICE: LAW, POLICY & REGULATION 33 (2d ed. 2009).

<sup>111</sup> Jonathan M. Adler & Dan P. McAdams, *Time, Culture, and Stories of the Self*, 18 PSYCHOL. INQUIRY 97 (2007). “From the age of three, human beings tell stories about their own experiences . . . [I]f stories weave together the reconstructed past, the perceived present, and the anticipated future in an effort to provide the self with a feeling of purpose and unity.” *Id.* See also Ty Alper et al., *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLINICAL L. REV. 1, 5 (2005); Robert D. Dinerstein, *A Meditation on the Theoretic of Practice*, 43 HASTINGS L.J. 971, 973, 974 (1992) (a client who was willing to risk jail to tell “her story”).

<sup>112</sup> Will Hobson, *Larry Nassar, former USA Gymnastics doctor, sentenced to 40-175 years for sex crimes*, WASH. POST (Jan. 24, 2018), [https://www.washingtonpost.com/sports/olympics/larry-nassar-former-usa-gymnastics-doctor-due-to-be-sentenced-for-sex-crimes/2018/01/24/9acc22f8-0115-11e8-8acf-ad2991367d9d\\_story.html?utm\\_term=.278dcce102d1](https://www.washingtonpost.com/sports/olympics/larry-nassar-former-usa-gymnastics-doctor-due-to-be-sentenced-for-sex-crimes/2018/01/24/9acc22f8-0115-11e8-8acf-ad2991367d9d_story.html?utm_term=.278dcce102d1).

you for being part of the sister survivors. Your voice means everything.”<sup>113</sup>

She respected their need to tell the stories, encouraged them to tell the stories, and allowed time for the stories to be told. In total, 156 women testified about their experience of abuse and how it affected their lives.<sup>114</sup>

What if judges and agency representatives actually said to clinic clients what Judge Aquilina said to these women?<sup>115</sup> “You have been fighting injustice done to your community for longer than anyone could imagine; yet, you are whole. You are brave, and your voice means everything.” That so far has not happened to clinic clients in environmental cases.<sup>116</sup>

### *B. Barriers to Listening to Environmental Injustice Stories*<sup>117</sup>

The shipyard story illustrates a confluence of systemic failures. One such failure is the failure of various actors in the legal and administrative system to respect community voices. This common thread is woven into many stories of environmental injustice.

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<sup>113</sup> Sophie Gilbert, *The Transformative Justice of Judge Aquilina*, ATLANTIC (Jan. 25, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/judge-rosemarie-aquilina-larry-nassar/551462/>.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* The judge has been criticized for her support of the survivors. “One of Aquilina’s colleagues, the Ingham County Circuit Judge William Collette, ... found her comments baffling and inappropriate. ‘Doing justice is one thing,’ he said. ‘It is not a judge’s function to get people healed.’” Judge Collette’s crabbed definition of justice fails to take into account a broader conception of justice such as restorative justice. In finding Judge Aquilina’s view of justice inspiring, however, I realize that rich scholarship addresses the propriety of victim impact statements. It is not my intent here to endorse victim impact statements in general.

<sup>116</sup> I have, however, heard judges comment on the importance of businesses who are defendants in environmental cases. My clients’ contributions are at times recognized at the stage where they have to prove the public interest benefit the cases have provided for fee recovery under the private attorney general doctrine. *See, e.g.*, *Ctr. for Biological Diversity v. Cty. of San Bernardino*, 185 Cal.App.4th 866, 893–94, 111 Cal.Rptr.3d 374, 397 (Cal. Ct. App. 2010) (petitioners [represented by the author] enforced “an important right of the public pertaining to air quality” and “protected an important right by advancing water preservation goals and the Legislature’s intent that a public agency consider the water supply for a project before its approval rather than after”) (emphasis deleted).

<sup>117</sup> Experts on narrative theory and practice make distinctions between stories and narratives: “story” is “what is told” and “narrative” is “how the story is transmitted.” “Story is the events that transpire (what is told) and narrative is the representation of those events (how the story is transmitted).” *See* CAROLYN GROSE & MARGARET E. JOHNSON, *LAWYERS, CLIENTS & NARRATIVE: A FRAMEWORK FOR LAW STUDENTS AND PRACTITIONERS* (2017); H. PORTER ABBOTT, *THE CAMBRIDGE INTRODUCTION TO NARRATIVE* 12–13 (2002) (narrative is “the representation of an event or a series of events”). Here, I may not make that careful distinction. But in using the word “story,” I do not mean that they are false or made up. *See also* GROSE & JOHNSON, *supra*, at 21–23 (they are not “dirty words”).

Communities telling stories of environmental injustice receive varying degrees of respect from their audience in the legal system. To be sure, government actors are not monolithic, and they display different degrees of respect for environmental injustice narratives. As ultimate decision makers, however, agencies are generally not seen as respectful of community narratives of environmental injustice, both in providing a forum to tell the stories and responding to them. Opportunities for public comment in government decision making is one glaring example. Core environmental justice principles, which many government agencies have adopted, include the recognition that communities have a right to participate in environmental decision making, including the right to comment publicly. In practice, however, public comment opportunities are restricted, both in scope and time. In the City of San Francisco, for example, a citizen appealing a land use decision is provided ten minutes of time to make what can be very involved arguments, and the public is provided three minutes of comment time.<sup>118</sup> In some instances, the comment time is halved for translation.<sup>119</sup> Sometimes, police are called in with K-9 units to a public forum where environmental decisions are being made.<sup>120</sup> Thus, rather than make community participants feel part of the process, these public comment procedures amplify the impression that their stories are not worthy of airing and are of little or no consequence in the legal arena. Over time and over repeated experiences of similar, small and large incidents involving different polluting facilities, and reinforced by legal procedures that restrict public participation, the message is that their experiences do not matter.<sup>121</sup> At the

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<sup>118</sup> See India Basin Mixed-Use Project, *supra* note 100.

<sup>119</sup> This is commonplace in the clinic's experience. For example, when mostly monolingual residents of Kettleman City, about 96% Latinx, commented publicly to oppose the expansion of the largest hazardous waste landfill in the western United States, they were provided half of the time available to other residents because their comments were translated into English from Spanish. See Complaint Under Title VI of the United States Civil Rights Act of 1964 at 3, 7, 24, *El Pueblo Para El Aire y Agua Limpia et al., v. Dept. of Toxic Substances Control & California EPA*, (March 19, 2015), <http://greenaction.org/wp-content/uploads/2016/08/Title-VI-Kettleman-City-civil-rights-complaint-March-19-2015.pdf>.

<sup>120</sup> *Id.* at 4; Jacques Leslie, *What's Killing the Babies of Kettleman City?*, MOTHER JONES (July/Aug. 2010), <https://www.motherjones.com/environment/2010/09/kettleman-city-toxic-birth-defect-cluster/>. In commenting before the Board of Supervisors of Kings County, California, who are "white ranchers," a "15-year-old Miguel Alatorre, leader of a youth group that helped conduct the health survey" showing birth defects in babies of Kettleman City said, "We're people just like you .... We're not dogs." *Id.* "The supervisors listened impassively." *Id.*

<sup>121</sup> I have personally observed these instances. Years ago, when a representative of the Bay Area Air Quality Management District, for example, made a site visit to a yeast manufacturer in West Oakland, another San Francisco Bay Area community overburdened by pollution, like Bayview-Hunters Point, he remarked that he did not smell anything, when the community members who lived there had regularly documented the intense stench that they experienced many days in a month, over years. It may very well have been true that he could not smell the

same time, these community participants perceive that voices of others who have more resources appear to matter more. This experience is corrosive to our clients' view of politicians who are paid to represent them and the system as a whole.<sup>122</sup>

A key barrier to accommodating and responding to these stories of environmental injustice is of course race—the issue that the Black Lives Matter movement and, even more recently, the Poor People's Campaign have brought importantly to the fore, even as some powerful people mistakenly believe that we are blissfully in a post-racial period.<sup>123</sup> Another key barrier is how we view low-income people.<sup>124</sup> And, much has been written about

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stench at that very moment, but the community heard something very different: he disrespected their experience. I have also been in the same room when the top lawyer at that time from the very same agency rolled his eyes as my clients told him about the experiences of pollution. Now, multiply that experience, not limiting it just to narratives of environmental injustice, but including every other aspect of their lives, and you can imagine the experience, even if full comprehension may not be possible for outsiders. You do not have to trust me on this point. Pick up any account of environmental injustice stories, and you will be met with accounts of government disdain of community accounts of experiences and illnesses. *See, e.g.,* Andrea Simpson, *Who Hears Their Cry? African American Women and the Fight for Environmental Justice in Memphis, Tennessee*, in ADAMSON, *supra* note 23, at 82–98 [hereinafter Simpson].

<sup>122</sup> The true testament of disrespect is when nothing is done in response to credible proof of violations of the law. The Bay Area Air Quality Management District, for example, knew that one of the largest foundries in the nation had been operating without a proper federal permit required by the Clean Air Act, but failed to issue a permit for over a decade and did not take any enforcement action against the company for that violation. *See* NICHOLAS C. MAIDEN, BAY AREA AIR QUALITY MANAGEMENT DISTRICT SYNTHETIC MINOR OPERATING PERMIT REVISION, ENGINEERING EVALUATION REPORT, APPLICATION 14029 PACIFIC STEEL CASTING 2, 11, Appendix B (June 2018), available at [http://www.baaqmd.gov/~media/files/engineering/title-v-permits/e2605-smop/e2605\\_06\\_25\\_18\\_revision\\_smop\\_final\\_eval\\_clean\\_14029-pdf.pdf?la=en](http://www.baaqmd.gov/~media/files/engineering/title-v-permits/e2605-smop/e2605_06_25_18_revision_smop_final_eval_clean_14029-pdf.pdf?la=en) (mentioning no enforcement action for this violation). *See also* Steve Castleman, Amber Bryant, & Kawika Kaulukukui, *Concrete Manufacturers and the Regulatory Role of the Bay Area Air Quality Management District*, ENVTL. L. J. CLINIC 6–7 (describing the lax enforcement policies of the agency.).

<sup>123</sup> *See* Darensburg v. Metro. Transp. Comm'n, 636 F.3d 511 (9th Cir. 2011). A Ninth Circuit judge found preposterous that a government agency might discriminate in the provision of regional transportation funding, relying no more on his own instincts about the culture of the San Francisco Bay Area and a New York Times article on young people's attitudes toward race.

<sup>124</sup> *See* Lucie E. White, *Mobilization on the Margins of the Lawsuit: Making Space for Clients to Speak*, 16 N.Y.U. REV. L. & SOC. CHANGE 535, 543, 544 nn.41–42 (1988) (explaining the many ways in which the legal system can disempower low-income clients' narratives). *See also* JOYCE M. BARRY, *STANDING OUR GROUND* 105 (2012) (exploring the connection between stereotypes of Appalachia and mountain top removal in coal extraction). Quoting Coal River Mountain Watch's co-founder, she states:

Appalachia is not a woe-begotten place filled with illiterate people lost in poverty. ... This is a common stereotype created by the land barons and the out of state corporations that robbed the people of their land and mineral rights.... This image



how and why stories from environmental justice communities are discounted: race, sex, and class have everything to do with it.<sup>125</sup> Just as much has been written about the challenges lawyers may have in accommodating client narratives because of similar reasons.<sup>126</sup>

### III. HOW ADVOCATES AND TEACHERS CAN BETTER INTEGRATE COMMUNITY NARRATIVES

If we cannot imagine judges and other actors in the legal system having a transformative vision similar to Judge Aquilina's for environmental justice, we can at least broaden our vision of our own teaching and advocacy. As we, clinical teachers and advocates, strive to seek redress for environmental injustice, what can we do to better integrate community narratives in the spheres where we have influence, such as in the classroom and in advocacy

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is used to strip us of our humanity so that no one will feel obligated to care about us. For them, we are throwaway people.

*Id.*

<sup>125</sup> See, e.g., Simpson, *supra* note 121, at 93 (speaking of stereotypes that Doris Bradshaw, an African American environmental justice advocate, pervade her fight for her community, family, and the environment); EDUARDO LAO RHODES, ENVIRONMENTAL JUSTICE IN AMERICA: A NEW PARADIGM 91 (2003) ("Some advocates of environmental justice, as well as community activists, charge that the EPA has never been a friend of the poor"); CHAD MONTRIE, A PEOPLE'S HISTORY OF ENVIRONMENTALISM IN THE UNITED STATES 154 (2011) (grassroots activists, no matter their expertise and direct knowledge, are often ignored); Robert D. Bullard, *Introduction*, in CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 8 (1993) ("Grassroots activists in the environmental justice movement are concerned citizens (often women) who see 'their families, homes, and communities' threatened by toxic waste and other pollutants."); Lucie E. White, *Subordination, Rhetorical Survival Skills, & Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFFALO L. REV. 1 (1990) (race, gender, and class subordination). See also RHODES, *supra*, at 86 (writing in 2003, the author states, "it is likely that many of the EPA's rank-and-file professionals – or those of any other ENR [environmental and natural resource] agency, for that matter – give little more than lip service to the concept of environmental justice."). *Id.* at 87–88 ("an employee in the EPA's senior executive service . . . with both regional and headquarters experience, when asked in 1993 about the problem of environmental justice, began by describing the issue as 'a bunch of crap'" and "investigation of the issue was a waste of valuable resources, merely a response to uninformed activists with a misguided sense of injustice or injury" despite EPA's official policy on environmental justice). *Id.* at 89 (describing graduate students in 1998 studying environmental protection who dismissed environmental justice concerns as "inappropriate for environmental studies"). *Id.* at 90 (concluding that "EPA still is dominated . . . by professionals who come from a culture that is wanting in sensitivity to social justice"). Moreover, environmental justice problems are difficult for regulators because they deeply believe that there must be a measuring stick of environmental injustice before the problem can be acknowledged. However, "[t]he ultimate decision about the existence or causes of an environmental-justice problem . . . is a value judgment dependent as much on nonquantitative evaluation as on quantitative analysis." *Id.* at 120.

<sup>126</sup> See, e.g., White, *supra* note 124, at 545.

settings? Better yet, how can we make community narratives central in our teaching?

I suggest four ways for advocates and teachers to respect community narratives of environmental injustice, using the shipyard as a focus (for convenience, advocates and teachers are referred to as advocates in this section). Here, I am addressing the value of environmental justice narratives, separately from other functions narratives may serve, such as for building lawyer-client relationships and as an integral tool for problem solving. I am talking about giving dignity to the narratives themselves: we, as advocates, must dignify the rights of our clients to tell stories about systemic injustice and their sustained, resilient struggle.<sup>127</sup>

First, we advocates should begin by reviewing our own advocacy, teaching, and our state of knowledge to reflect upon how we could ready ourselves to dignify narratives of environmental injustice. Second, we should make a central space for community members to tell stories of environmental injustice in the classroom or in a law school setting. By providing a forum, we can dignify narratives of community representatives that have not traditionally been respected in environmental decision making settings. In showcasing these stories, advocates should allow the stories to be told in their sociopolitical context—that is, the stories should not be situated merely within its environmental law and policy context, but as a story of systemic injustice. In providing context, the community’s persistence in fighting systemic injustice should also be included. To listen to environmental injustice stories, we advocates also have to ready ourselves to be able to understand all of these multifaceted contexts, by reading and learning beyond our field of expertise. Finally, we should reflect on the kinds of responsibilities that listening to these stories create and seek to fulfill these responsibilities.

#### *A. Critically, Start by Reviewing Our Own Advocacy and Teaching*

As a clinic teacher in a law school setting and a legal advocate for community groups fighting for environmental justice, I, too, have in some ways failed to integrate client stories of injustice. Our seminar time is already over-packed with the pressures of cramming in skills training, site visits, and

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<sup>127</sup> Relatedly, in advocacy, scholars have long talked about the importance of making clients the heroes of their journey. See, e.g., Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey*, 29 SEATTLE U. L. REV. 767, 768–69 (2006). Some clinics, including ours, have also conducted community listening projects “designed to identify the most pressing needs.” Alicia Alvarez et al., *Teaching and Practicing Community Development Poverty Law: Lawyers and Clients as Trusted Neighborhood Problem Solvers*, 23 CLINICAL L. REV. 577, 583–84 (2017). Still, centralizing the client narratives as teachers and advocates, as explored here, serves distinct functions from either of these valuable purposes.

field visits, as well as meeting litigation deadlines and client needs.<sup>128</sup> Although we have meetings with client representatives, our clients, with a few exceptions, are organizational clients, and the representatives are not necessarily residents of the places that are the subject of our cases. This is not to say that we do not meet with residents. We do, and when we do, we schedule long meetings, often without an agenda or an end time, to hear their stories as fully as time will allow. However, a semester could go by without one of those meetings. I need to do better; we environmental justice teachers need to do better. Students will remember those stories better than reading something about environmental justice.

In fact, this article was borne of my own reflection about the shipyard. I had heard about the Tetra Tech fraud some years ago, probably in 2014, around the time I represented Bayview-Hunters Point residents when the City of San Francisco's planning agency approved a developer's plan to implode a famous sports stadium, the Candlestick Park stadium, by setting charges. An old-time resident and activist, Dr. Raymond Tompkins, who alerted me to the possibility of implosion said in passing that I should look into the Tetra Tech fraud. When we agreed to represent Greenaction in 2016, I wondered why I had not looked into the matter back in 2014 when Dr. Tompkins first told me about the potential fraud. There were many reasons, including, again, the press of other cases. However, I also recall that, at the time, I thought that U.S. EPA, which was reportedly looking into it, would take care of it and did not trust in our ability to tackle fraud if it were that extensive. Frankly, I could not have imagined in a million years that fraud so extensive had taken place. I was skeptical. Needless to say, I have much reflection to do myself.<sup>129</sup>

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<sup>128</sup> In our attempts to address skills necessary to practice law, we have added research and writing modules over the years to our environmental justice seminar curriculum. While those units have used documents from past clinic cases that illustrate environmental justice advocacy, the skills focus in the seminar could have the effect of overlooking the basic mission of the clinic – to teach about environmental injustice, i.e., to help students make “connections between poverty, racism, and the ecological problems [author's note: and I would also add the lack of ecological benefits] in America's urban neighborhoods, barrios, Native lands, Chicano farming districts, and poor rural communities of color.” FABER, *supra* note 84, at 6 (discussing what the environmental justice movement seeks to address in a book exploring corporate polluters' selective oppression of people of color and working-class families).

<sup>129</sup> It would have been good to invite community members of the now-defunct Restoration Advisory Board who participated in numerous meetings with the Navy and knew so much about the cleanup. They believe the Navy disbanded the Board for essentially speaking out on behalf of residents for integrity in the cleanup. See DEP'T. OF THE NAVY, BASE REALIGNMENT AND CLOSURE PROGRAM MANAGEMENT OFFICE WEST, PROPOSAL TO DISSOLVE THE HUNTERS POINT RESTORATION ADVISORY BOARD I (Sept. 1, 2009) [hereinafter *Dissolution Proposal*], *available at* [https://www.navfac.navy.mil/niris/SOUTHWEST/HUNTERS\\_POINT\\_NS/N00217\\_003592.PDF](https://www.navfac.navy.mil/niris/SOUTHWEST/HUNTERS_POINT_NS/N00217_003592.PDF) (the Director of Base Realignment and Closure's West Office determining that the Board “is no longer fulfilling its intended purpose of advising and providing community input” to the program – that “[r]ules of order are regularly ignored during meetings, interruptions of individuals are common, and meeting facilitators do not receive cooperation”); Tony Kelly,

*B. Stories in Context: How Can We Teachers and Advocates Do Better?*

Teachers and advocates can and should make space for community members to tell stories of environmental injustice in their sociopolitical context, both in historical context and in the context of other injustices. The stories must be enabled not simply as a narrative of an environmental problem, but as a story of a systemic problem and the community's sustained persistence in fighting systemic injustice. To properly make this space to listen, we ourselves must learn.

For teachers and advocates outside the field of environmental law, such as criminal justice, antipoverty, and civil rights, this idea – that we seek to make central the stories of our clients in the classroom – may not be anything new. In the environmental field, however, we deal with organizational clients whose representatives are often lawyers and not necessarily community advocates or residents in heavily-polluted neighborhoods. In addition, many of us environmental advocates may not have background in movement lawyering or racial justice. Some of us may be still learning about environmental justice lawyering and, if we honestly assess our own attitudes, we may even have to say that we share more than we would like to admit with agency representatives who dismiss community residents.<sup>130</sup>

To integrate narratives of environmental injustice into the classroom in the context of the broader injustices, we, as advocates, thus need to educate ourselves by reading broadly and learning. Without locating environmental injustice in the context of its origins – historical, political, and economic oppression – and in its current context, the Black Lives Matter movement, we are decontextualizing environmental injustice by divorcing it from its roots. A good starting point may be to explore Black Lives Matter's Movement Lawyering Bootcamp Readings.<sup>131</sup> We should also read broadly about subjects that affect the communities whose interests we represent in environmental cases – criminal justice, neighborhood history, fiction, poetry, art, and music.<sup>132</sup> We can exchange reading lists and share books with our

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*Opinion: How to fix the toxic Hunters Point Shipyard mess*, 48 HILLS (June 25, 2018), <https://48hills.org/2018/06/opinion-how-to-fix-the-toxic-hunters-point-shipyard-mess/>.

<sup>130</sup> See RHODES, *supra* note 125.

<sup>131</sup> See 2017 *Movement Lawyering Bootcamp Readings*, LAW FOR BLACK LIVES <http://www.law4blacklives.org/movement-lawyering-bootcamp-readings/> (last visited May 15, 2019).

<sup>132</sup> So many amazing works exist other than those cited elsewhere in this article. See generally JAMES FORMAN JR., *LOCKING UP OUR OWN: CRIME AND PUNISHMENT IN BLACK AMERICA* (2017); TA-NEHISI COATES, *BETWEEN THE WORLD AND ME* (2017); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012); GILBERT KING, *DEVIL IN THE GROVE: THURGOOD MARSHALL, THE GROVELAND BOYS, AND THE DAWN OF A NEW AMERICA* (2012); DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); and any works of James Baldwin, including *NOBODY KNOWS MY NAME* (1992).

environmental law colleagues and students. We should not be afraid to admit, as I do here, that we are still learning. Because more and more environmental clinics nationwide consider environmental justice to be one of the most important matters to address,<sup>133</sup> I hope this exploration of community narratives and learning among teachers will continue.

*C. Environmental justice stories are multifaceted and takes a long time to tell and listen to*

Environmental justice stories take a long time to tell, listen to, and digest. Consider the Bayview-Hunters Point's environmental justice story, without which the shipyard story is incomplete and decontextualized. The long story encompasses the history of blacks in this nation and discrimination that is very much alive – virulent, even, in this day – and corrosive to the soul. The story encompasses the history of blacks in what is assumed by most to be a progressive city, the impact of pollution on blacks in Bayview-Hunters Point, and ultimately their rapid displacement, even as the area is getting cleaned up and beautified for largely newcomers. The story encompasses the repeated disrespect that various regulatory actors in the system have shown residents of Bayview-Hunters Point through failing to listen and achieve meaningful changes.

1. Contextualizing the storytelling

We teachers and advocates run the same risk if we do not contextualize environmental injustice<sup>134</sup> – both in historical context and in the context of other injustices. The stories must be enabled not simply as a narrative of an environmental problem, but as a story of a systemic problem and the community's sustained persistence in fighting systemic injustice.

In the legal system, however, there is little room for this long story. It certainly does not exist in the decision documents for the cleanup, and the legal community would consider such history irrelevant and out of place in a Superfund document. In legal settings, any mention of this kind of history and context is typically dismissed as irrelevant.<sup>135</sup> But, these histories and

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<sup>133</sup> A survey of thirty-nine law school environmental clinic faculty revealed environmental justice as the top priority for such clinics to address. Data from the University of Maryland Carey School of Law (Nov. 2017) (on file with author). This result would have been unthinkable in 2000 when I first became a clinical faculty member.

<sup>134</sup> See, e.g., BARRY, *supra* note 124, at 93 (“environmental degradation and social exploitation go hand in hand”); MONTRIE, *supra* note 125, at 121.

<sup>135</sup> See, e.g., Dissolution Proposal, *supra* note 129, at 2–3 (the Director of Base Realignment and Closure's West Office determining that the Restoration Advisory Board should be disbanded because its “meetings are spent discussing unrelated issues” such as problems from the developer's work at the property adjacent to the shipyard, likely referring to Parcel A work (see discussion *supra* notes 52, 53 and accompanying text), and contracting

context are tremendously relevant to the residents of Bayview-Hunters Point. Environmental injustice is but an aspect of systemic injustice against people of color, which is manifested most predominantly against African Americans.

a. The broader context of racial and economic injustice to blacks in our nation is important to our clients' stories

For communities of color facing environmental injustice and advocates who have long represented the interests of these communities, the source of environmental injustice is obvious: it is all part of the same problem of racial and economic injustice. In particular, racism runs deep – both in our history, ourselves, and politics.<sup>136</sup> As a National Research Council committee concerned with measuring racial discrimination noted, “race is a salient aspect of social, political, and economic life.”<sup>137</sup>

Study after study document the pervasiveness of racial disparities, from cradle to grave, painting a particularly damning picture of the persistent disparities that pervade the lives of African Americans and indigenous peoples as compared to other population groups in the U.S. These studies document disparities in income, housing, education, food access, medical treatment, pollution, and open or green space and park access and quality.<sup>138</sup>

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issues involving “disposal of radiologically impacted soil”). Even though disposal of soil clearly relates to the shipyard cleanup, the Dissolution Proposal states that such work is unrelated to the work of the Restoration Advisory Board because the contracting is done through the Army Corps of Engineers, not the Navy. Discussion Proposal, *supra* note 129, at 3.

<sup>136</sup> MONTRIE, *supra* note 125, at 120 (positing that white low-income residents allied themselves with black residents in the fight to stop construction of a landfill designed for PCBs in Warren County, North Carolina, despite “deep misgivings about doing anything to empower blacks,” citing a resident).

<sup>137</sup> NAT'L RES. COUNCIL DIV. OF BEHAV. & SOC. SCI. & EDUC., *MEASURING RACIAL DISCRIMINATION 3* (Rebecca M. Blank, Marilyn Dabady, & Constance F. Citro, eds., 2004).

<sup>138</sup> See, e.g., *Race, Ethnicity, and Language Data: Standardization for Health Care Quality Improvement*, AHRQ, <https://www.ahrq.gov/research/findings/final-reports/iomracereport/reldata1.html> (last visited May 15, 2019) (“[s]trong evidence exists that there are disparities in health and the quality of health care received by different populations”); James Salzman et al., *The Most Important Current Research Questions in Urban Ecosystem Services*, 25 DUKE ENVTL. L. & POL'Y F. 1, 16–19 (2014) (disparities in tree cover, park access); Kevin T. Smiley et al., *More Inclusive Parks Planning: Park Quality and Preferences for Park Access and Amenities*, 9 ENVTL. JUST. 1, 1–2, nn.2–3 (2016) (disparity in park access and quality); Helen H. Kang, *Pursuing Environmental Justice: Obstacles and Opportunities – Lessons from the Field*, 31 WASH. U. J. L. & POL'Y 121, 126–27, nn.12–14, 16 (2009) (disparities in pollution, open space access, food access, economic opportunities, and health outcomes); BD. ON HEALTH SCI. POL'Y INST. OF MED., *UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE* (Brian D. Smedley, Adrienne Y. Stith & Alan R. Nelson eds., 2003) (“A large body of published research reveals that racial and ethnic minorities experience a lower quality of health services, and are less likely to receive even

One recent study, for example, highlighted income and upward mobility disparities between black and indigenous Americans compared to white Americans, using comprehensive data of U.S. population from 1989 to 2015.<sup>139</sup> Even after controlling for income, family characteristics (e.g., parental marital status, education, wealth) and neighborhood characteristics (e.g., quality of schools), black and indigenous Americans not only remain entrenched in earning a low income, but become downwardly mobile.<sup>140</sup>

As some prominent thinkers have pointed out over generations in different forms, and most recently, Alicia Garza of the Black Lives Matter movement and Ta-Nehisi Coates, bell hooks and James Baldwin before them, black lives have not mattered. This context, in every way, matters to our clients in the discussion of environmental justice. Without that recognition, as teachers and students, we will fail to connect with our clients and respect their dignity.

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routine medical procedures than are white Americans,” including receiving appropriate medication, controlling for income, insurance status, age, and other factors).

<sup>139</sup> Raj Chetty, Nathaniel Hendren, Maggie R. Jones, & Sonya R. Porter, *Race and Economic Opportunity in the United States: An Intergenerational Perspective* (Working Paper, Mar. 2018) <https://scholar.harvard.edu/hendren/publications/race-and-economic-opportunity-united-states-intergenerational-perspective>. In the study, “blacks” are non-Hispanic blacks; and “whites” are non-Hispanic whites. *Id.* at 1 n.1. Three particular findings of the study are oppressively disturbing:

1. “[B]lack Americans have substantially lower rates of upward mobility and higher rates of downward mobility than whites, leading to large income disparities that persist across generations.” In contrast, Hispanic Americans “have relatively high rates of intergenerational income mobility.”
2. Differences in ability and family and neighborhood characteristics “explain very little” of the disparity in mobility and income gap. That is, “black and white men who grow up in two-parent families with similar levels of income, wealth, and education” still have disparate incomes.
3. Surprisingly, in low-poverty areas (with poverty rates below 10%), the gap is larger for boys. That is, in those areas, “low levels of racial bias among whites and high rates of father presence among blacks” are “strongly” associated with smaller racial gaps. Only 4.2 percent of black children spend their childhood in such areas.

*Id.* at 1, 4–6, 41. Put plainly, “[w]hite boys who grow up rich are likely to remain that way. Black boys raised at the top, however, are more likely to become poor than to stay wealthy in their own adult households;” “a black man raised by two parents together in the 90th percentile — making around \$140,000 a year — earns about the same in adulthood as a white man raised by a single mother making \$60,000 alone;” “[t]he worst places for poor white children are almost all better than the best places for poor black children.” Emily Badger, Claire Cain Miller, Adam Pearce, & Kevin Quealy, *Extensive Data Shows Punishing Reach of Racism for Black Boys*, N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/interactive/2018/03/19/upshot/race-class-white-and-black-men.html> See also Janelle Jones, John Schmitt & Valerie Wilson, *50 Years After the Kerner Commission: African Americans Are Better Off in Many Ways But Are Still Disadvantaged by Racial Inequality*, ECON. POL’Y INST. (Feb. 26, 2018), <https://www.epi.org/files/pdf/142084.pdf>.

<sup>140</sup> Badger et al., *supra* note 139; Janelle Jones et al., *supra* note 139.

b. Local context of racial and economic injustice to blacks is important to our clients' stories

Equally important as the broad context of race and socioeconomics is the local context of environmental justice. As Vernice Miller-Travis, the founder of WE ACT for Environmental Justice, stated,

I also learned that if you really want to get to the bottom of environmental injustice, then you have to understand the relationship between race, land use and zoning. In communities of color, local government has set in place a practice of residential segregation. That was the case in the 1940s and 50s, and it is still the case today.<sup>141</sup>

For Bayview-Hunters Point residents, that context includes what happened when the first black residents moved into Bayview—that is, government-created segregation at Hunters Point. The context also includes the history of displacement of black residents from the Fillmore-Western Addition neighborhood in the city, which was once a thriving cultural center for the city's black residents. In the name of “redevelopment,” black residents from Fillmore-Western Addition were forced to move. Some of the residents displaced from Fillmore-Western Addition moved to Bayview-Hunters Point. That history of massive displacement is still fresh in the minds of community leaders.<sup>142</sup> Redevelopment is an idea that historical residents of Bayview-Hunters Point distrust.<sup>143</sup>

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<sup>141</sup> Jessica A. Knobloch, *Race & Environmental Justice: A Conversation with Activist Vernice Miller-Travis*, EARTHJUSTICE (Feb. 9, 2016), <https://earthjustice.org/blog/2016-february/race-environmental-justice-a-conversation-with-activist-vernice-miller-travis>; *New Homes at the SF Shipyard*, *supra* note 58. The parcel designations are for the purposes of cleanup; there are ten parcels total, named at various stages of the Base Realignment and Closure and cleanup processes. See 2012 Radiological Addendum, *supra* note 17, at 2-1 to 2-2. Many parcel maps exist, but the map accessible from NBC Bay Area is very accessible to the public: Vicky Nguyen, Liz Wagner & Felipe Escamilla, *Former Contractors Claim Hunters Point Cleanup is Botched*, NBC BAY AREA (May 23, 2014), <https://www.nbcbayarea.com/investigations/Former-Contractors-Claim-Hunters-Point-Cleanup-is-Botched-259871511.html> [hereinafter Wagner NBC May 23, 2014 Report].

<sup>142</sup> Rochelle Metcalf, *'I Heard That': Black Media Roundtable with Mayor Lee; The State of Black San Francisco*, S.F. BAYVIEW (Mar. 1, 2011), <http://sfbayview.com/2011/03/i-heard-that-black-media-roundtable-with-mayor-lee-the-state-of-black-san-francisco/>; Dillon ISSI Paper, *supra* note 7, at 16. Dr. Ray Tompkins, a longtime former resident of Bayview and client representative of the Environmental Law and Justice Clinic, reminds me of this history almost every time we discuss environmental issues that worry him.

<sup>143</sup> Conversation with Dr. Raymond Tompkins (various dates in 2014-2015). Dr. Tompkins refers also to the history of Japanese Americans who were displaced from the Fillmore district when they were sent to internment camps, which allowed in part the city's black residents to move into that neighborhood. See also India Basin-Mixed Use Project, *supra* note 100; BROUSSARD, *supra* note 7, at 159, 173 (blacks in Fillmore-Western Addition).



Also relevant to this local context is the racialization and marginalization of Bayview-Hunters Point and its residents. “Since the 1960s, powerful representations have depicted the Bayview as fundamentally distinct from the rest of the city, binding the area’s physical decay, poverty, and other urban problems together with a perceived cultural and racial difference.”<sup>144</sup> This type of characterization, “popularized in the mass media, depoliticized the problem of black poverty and related social inequalities by locating their origins in the moral economy of the isolated ‘ghetto’ household, rather than in the political economy of the greater society.”<sup>145</sup> Thus, as Professor Lindsey Dillon argues, even as Bayview-Hunters Point activists contributed greatly to local, national, and international discourse on equity and race and made contributions to economic, social, and political life, they were viewed as different.<sup>146</sup> In other words, they were viewed as “other.”

Moreover, and possibly as a result of such marginalization, city politicians and administrators have long excluded Bayview-Hunters Point residents from many decisions that have affected them.<sup>147</sup> Decisions from which they have been excluded include many of the environmental decisions affecting the neighborhood in the redevelopment of the shipyard and nearby Candlestick Park stadium area. (As noted earlier, this development is one of the largest in the history of the city.) Remarkably, in September 2014 – just months after Tetra Tech released its conclusion about the first discovery of sampling fraud and the NBC Investigative Unit reported additional fraud – the city’s Office of Community Investment and Infrastructure decided that it would use explosive devices to implode Candlestick Park stadium, without any input from nearby residents.<sup>148</sup> Implosion, which this agency approved as a method of demolition, is a much cheaper method than mechanical demolition, but unsuitable for a windy and densely populated areas, such as the Bayview-Hunters Point neighborhood.<sup>149</sup> Implosion of the stadium likely would have involved a great amount of harmful particulate matter. Although

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<sup>144</sup> Dillon ISSI Paper, *supra* note 7, at 2. Residents know this to be true from their own experience.

<sup>145</sup> *Id.* at 19 (quoting STEVEN GREGORY, BLACK CORONA: RACE AND THE POLITICS OF PLACE IN AN URBAN COMMUNITY 6 (1998)).

<sup>146</sup> *Id.* at 6, 20–24.

<sup>147</sup> *Id.* at 16.

<sup>148</sup> See Kang letter, *supra* note 2; see generally Dillon, *supra* note 54, at 228. The city’s decision to allow developer Lennar Urban’s implosion in itself needs to be put into context as one of many where the city violated California’s bedrock law, the California Environmental Quality Act, by failing to notify (or in statutory words, disclose and analyze) residents of large project changes. The clinic had earlier successfully challenged the city’s decision to allow the conversion of an animal rendering facility into a large biodiesel plant. Biodiesel sounds nice but it uses animal carcasses, which can stink, and the community had repeatedly dealt with odor problems. Note that the Office of Community Investment and Infrastructure is the agency involved in the shipyard redevelopment and the successor agency to the Redevelopment Agency, which had approved the Fillmore-Western Addition redevelopment.

<sup>149</sup> See Kang letter, *supra* note 52.

the city did not provide information on the tonnage of concrete that would be reduced to dust, the buildings at Candlestick Point used 200,000 tons of concrete and, thus, implosion would have produced a phenomenal amount of particulate matter.<sup>150</sup> Up to one-third of the total dust that would have been generated from the stadium demolition would have been released within a matter of minutes from implosion,<sup>151</sup> in a neighborhood that already suffers from high rates of asthma and ischemic heart disease, conditions particulate matter could worsen.<sup>152</sup> The air pollution would have spread to a large area, aided by the windy conditions of the neighborhood. At least one health study expresses concerns about even brief exposure to implosion dust: “[t]he difficulties in protecting public health in the large downwind geographic area affected by implosion dust clouds suggest that implosions in metropolitan areas should be prohibited.”<sup>153</sup> Nevertheless, the city chose to document this implosion decision in an “addendum” to environmental review documents, which by law is not required to be publicly noticed. The addendum itself, labeled simply as “Addendum 3 to Environmental Impact Report,” gave no indication that the stadium would be imploded – something nearby residents who lived a football’s throw from the stadium would consider highly relevant.<sup>154</sup>

In hiding, at worst, or neglecting to make available the information in a meaningful fashion, the city planning and redevelopment offices kept in the dark local activists that they suspected would oppose the plan. The city succeeded, such that the president of the Bayview Hill Neighborhood Association, which represents residents living near the stadium, did not know of the plan until shortly before the planned implosion.<sup>155</sup> In failing to engage

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<sup>150</sup> *Id.* at 5.

<sup>151</sup> Press Release, John Hopkins Sch. Of Pub. Health, Building Implosions Not a Spectator Sport (Mar. 2001), *available at* <http://www.implosionworld.com/news/jhsph.htm>.

<sup>152</sup> See Kang letter, *supra* note 52.

<sup>153</sup> *Id.* at 6 (quoting Dennis Stefani et al., *The Implosion of The Calgary General Hospital; Ambient Air Quality Issues*, 55 J. AIR & WASTE MGMT. ASS’N. 52, 59 (2005)).

<sup>154</sup> See Kang letter, *supra* note 52, at 5. The reams of environmental review documents for the Candlestick Park stadium development did not mention any method of demolition. The city, in fact, continues to make changes that significantly affect the neighborhood with addenda.

<sup>155</sup> Shirley Moore, the president of the group, has been a longtime activist known to city officials. She found out about the implosion only after another longtime activist, Dr. Raymond Tompkins, asked me and my students to keep an eye out for any announcements about the demolition because he did not want what had happened to Geneva Towers to recur. Reportedly, a resident there died after inhalation of dust from the intense plume generated by implosion there. The clinic’s graduate fellow, who weekly checked the environmental documents repository on the web for the stadium development, discovered that Addendum 3 dealt with implosion. Had the city produced a supplemental environmental impact report, it would have been required to analyze the environmental impact of the implosion and alternative methods that could be used in the demolition. Residents also would have had notice of the method of implosion. Much of the information in this footnote about Geneva Towers

the nearby community, the city offices even rejected the advice of air district staff, who counseled the developer, Lennar Urban, “to concentrate on a robust and transparent community outreach,” and “to fully explain the implosion plan to the community.”<sup>156</sup> In response, in an unusually frank and tone-deaf written acknowledgement of the disturbing attitude underlying community engagement in the neighborhood, the city and the developer rejected group meetings to explain implosion: apparently, Lennar Urban wanted to “avoid a ‘herd mentality.’”<sup>157</sup> Such explicitly coded wording was rightly offensive to nearby residents (and reprehensible to me, their legal counsel).

As we would later learn, implosion appears never to have been used in modern history in San Francisco except perhaps once: to demolish Geneva Towers, public housing with a large number of African American residents. In affluent neighborhoods, mechanical demolition was used with an expensive dust suppression method, for example, to take down a highway near San Francisco’s largest mansions.

Without these local contexts, it is difficult to understand some of the distrust residents have of the cleanup necessary to redevelopment of the shipyard and the actors involved, including the city and its agency, the Office of Community Investment and Infrastructure, not to mention the developer Lennar Urban, now Five Point.<sup>158</sup>

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was discussed at a meeting between the clinic and Shirley Moore and Raymond Tompkins on January 14, 2015. See notes on file with author.

<sup>156</sup> Kang letter, *supra* note 52, at 7.

<sup>157</sup> See Kang letter, *supra* note 52.

<sup>158</sup> *Five Point, The SF Shipyard & Candlestick Point*, TRANSPARENTHOUSE, <https://www.transparenthouse.com/project/the-shipyard-lennar-urban/> (last visited May 15, 2019) (“Lennar Urban (now Five Point)”). This third largest national developer of residential properties is slated to develop multiple former military sites in the San Francisco Bay Area alone. Dillon, *supra* note 18, at 1. Lennar needs a close look. Residents talk about the political contributions Lennar makes to politicians at all levels of government and link those to the silence of many politicians for many years who are speaking out only now. Politicians have received money from Lennar or are connected to financing Lennar. Max Cherney, *5 Corrupt Ways to Influence San Francisco Politics*, S.F. WEEKLY (Sept. 14, 2016), <http://www.sfweekly.com/news/news-news/5-corrupt-ways-influence-san-francisco-politics/> (Mayor Lee); Lisa P. White, *Concord Mayor Tim Grayson accepted campaign donations from firms linked to a company vying to be master developer for the naval weapons station*, SANTA CRUZ SENTINEL (Aug. 25, 2015), <https://www.santacruzsentinel.com/2015/08/25/concord-mayor-tim-grayson-accepted-campaign-donations-from-firms-linked-to-a-company-vying-to-be-master-developer-for-the-naval-weapons-station/> (former mayor Brown is a principal in Golden Gate Global, which finances Lennar Urban). A former mayor of the City of Concord returned campaign contributions from those with connections to Lennar Urban after it was disclosed that he changed his mind on the selection bid for who would be developer at the Concord Naval Station. Lisa P. White, *Concord: Investigation finds improper lobbying in weapons station developer selection*, EAST BAY TIMES (Feb. 11, 2016), <https://www.eastbaytimes.com/2016/02/11/concord-investigation-finds-improper-lobbying-in-weapons-station-developer-selection/>.

c. The prevalence of pollution in the neighborhood is important context to our clients

Another important aspect that is relevant to client stories is something at least environmental justice teachers and advocates are familiar with: pollution sources. The Bayview-Hunters Point neighborhoods host the largest percentage of industrial sites, brownfields, and leaking underground fuel tanks in the City of San Francisco, as compared to other parts of the city.<sup>159</sup> The area also has historically been home to most of the city's largest air pollution sources. Such sources historically included the only two power plants in the city that were shut down through community efforts. One of two wastewater treatment plants in the city that handles a majority of the city's sewage and emanates unpleasant odors still stands there.<sup>160</sup> Other pollution sources include a biodiesel plant that renders animal waste into tallow and uses a chemical process to produce biodiesel; concrete batching facilities that have supplied the Bay Area's building boom and generates harmful air pollution; wrecking yards and recycling facilities that handle materials such as lead and copper; large bus yards and packing and shipping distribution centers that draw traffic, with attendant air pollution; and numerous auto body shops that dot thoroughfares and highways that bisect and surround the neighborhood that themselves are sources of pollution from cars and trucks.<sup>161</sup> These sources emit strong odors and air pollution that mark

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<sup>159</sup> S.F. ENV'T ET AL., *supra* note 7, 17–18; S.F. Redevelopment Agency & S.F. Planning Dep't, Candlestick Point-Hunters Point Shipyard Phase II Development Plan Project: Comments and Responses C&R-5, C&R-73 (May 13, 2010), available at [https://sfgov.org/sfplanningarchive/ftp/files/MEA/2007.0946E\\_Candlestick\\_CR\\_3a.pdf](https://sfgov.org/sfplanningarchive/ftp/files/MEA/2007.0946E_Candlestick_CR_3a.pdf) [hereinafter FEIR Comments & Responses]. Bayview Hunters Point Mothers Environmental Health & Justice Committee's report catalogued hundreds of hazardous waste handlers and brownfield sites in the area. Dillon ISSI Paper, *supra* note 7, at 13.

<sup>160</sup> Helen H. Kang, *Fighting for Environmental Justice Takes Long-Lasting Coalitions*, 45 CLIMATE CHANGE L. & POL'Y. 158 (2011); *Southeast Treatment Plant*, S.F. WATER POWER SEWER, <https://sfwater.org/index.aspx?page=616> (last visited May 15, 2019) (the sewage treatment plant handles 80 percent of the city's wastes). Residents have long complained of sewage overflows into their homes and of odor from the facility. See, e.g., Dominic Fracassa, *SFPUC Oks plan to upgrade southeast sewage plant and downgrade odor*, S.F.GATE (Mar. 13, 2018), <https://www.sfgate.com/news/article/SFPUC-OKS-plan-to-upgrade-southeast-sewage-plant-12751204.php>.

<sup>161</sup> The General Plan for the City of San Francisco acknowledges that Bayview-Hunters Point "has been the focus of some of the city's most noxious and unhealthy heavy industries, including steel manufacturing, ship repair, junkyards, and auto wrecking." *Bayview Hunters Point Area Plan*, S.F. PLANNING DEP'T, [http://generalplan.sfplanning.org/Bayview\\_Hunters\\_Point.htm](http://generalplan.sfplanning.org/Bayview_Hunters_Point.htm) (last visited May 15, 2019); S.F. ENV'T ET AL., *supra* note 7, at 17–19. See also *Bayview Hunters Point Environmental Justice Response Task Force's IVAN Map*, <https://www.bvhp-ivan.org/index.php?r=incident/map> (last visited May 15, 2019) (see complaints from residents about pollution, odor, and garbage dumping); STEVE CASTLEMAN ET AL., A REPORT FOR

everyday life in the community. Construction also has increased in the area with the implementation of the city's redevelopment of Parcel A and the former Candlestick Park stadium complex, which has resulted in more air pollution at least since 2006.<sup>162</sup>

For these and other reasons, the Bay Area Air Quality Management District designated the Bayview-Hunters Point area a Community Air Risk Evaluation ("CARE") neighborhood deserving of special protection based on its socio-economic characteristics and toxic air contaminant releases.<sup>163</sup> Similarly, the State of California designed the area as a disadvantaged community using a comprehensive tool called CalEnviroScreen.<sup>164</sup>

In addition to bearing the burden of diverse and numerous pollution sources, the neighborhood has within it the only Superfund site in San Francisco, which is the shipyard itself.<sup>165</sup> As James Baldwin reportedly said about the city's Fillmore-Western Addition neighborhoods when the city's so-called redevelopment plan shrank the city's African American population

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GREENACTION FOR HEALTH AND ENVIRONMENTAL JUSTICE: CONCRETE MANUFACTURERS AND THE REG. ROLE OF THE AIR QUALITY MGMT. DISTRICT, (Golden Gate Uni. Sch. L., May 25, 2017), available at <http://greenaction.org/wp-content/uploads/2017/05/Concrete-Manufacturers-Regulatory-Role-of-Bay-Area-Air-District-May-2017.pdf>; Jaxon Van Derbeken et al., *Is San Francisco's Building Boom Taking a Toll on Poorest Neighborhoods?*, NBC BAY AREA (May 24, 2017), <http://www.nbcbayarea.com/investigations/Is-San-Franciscos-Building-Boom-Taking-a-Toll-on-Poorest-Neighborhoods-424196063.html> (NBC Bay Area Investigative Unit's story based on our investigation features one of our clinic students who investigated the many violations at concrete batching plants); see Kang, *supra* note 138, at 121, 149; see also Kang letter, *supra* note 52 (describing pollution sources and health disparities in Bayview-Hunters Point). Major roadways such as U.S. Highway 101, Interstate 280, and Third Street crisscross the area; the Port of San Francisco is a known air pollution source. See, e.g., S.F. ENV'T ET AL., *supra* note 7, at 58.

<sup>162</sup> Kang letter, *supra* note 52.

<sup>163</sup> PHILLIP MARTIEN ET AL., IMPROVING AIR QUALITY & HEALTH IN BAY AREA COMMUNITIES: COMMUNITY AIR RISK EVALUATION (CARE) PROGRAM RETROSPECTIVE & PATH FORWARD (2004-2013) 92 (April 2014), available at [http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CARE%20Program/Documents/CARE\\_Retrospective\\_April2014.ashx](http://www.baaqmd.gov/~media/Files/Planning%20and%20Research/CARE%20Program/Documents/CARE_Retrospective_April2014.ashx) [hereinafter CARE Retrospective].

<sup>164</sup> Cal. Env'tl. Protection Agency, Designation of Disadvantaged Communities Pursuant to Senate Bill 535 (De León) 1, 17 (April 2017), available at <https://calepa.ca.gov/wp-content/uploads/sites/6/2017/04/SB-535-Designation-Final.pdf>.

<sup>165</sup> *Superfund Site: Treasure Island Naval Station-Hunters Point Annex, San Francisco, CA*, U.S. EPA, <https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0902722> (last visited May 15, 2019). "Toxic remediation and urban redevelopment are large, earth-moving operations . . . [involving] hundreds of thousands of cubic yards of soil." Dillon, *supra* note 54, at 228 (locating the residents' dust campaign "within a longer struggle against airborne redevelopment dust" and theorizing "breathing space" as a political site in which to fight urban racism).

to half through displacement, “[t]his is the San Francisco Americans pretend does not exist.”<sup>166</sup>

d. Another aspect important to client narratives is the disparity in health outcomes

Health information, while important to understand, is difficult to compile without technical assistance. Nevertheless, any just telling of clients’ environmental justice story must encompass health data (or at least gaps in such data). Residents of the shipyard area have long borne the burden of a disproportionate share of environmental hazards. Again, without this context, the shipyard story is incomplete.

To sum it up in the city’s own words, “development of Bayview Hunters Point as a predominantly industrial and residential area was thereby achieved at extensive costs to environmental health.”<sup>167</sup> The city also considers it “well established that residents [there] have poorer health outcomes than San Francisco as a whole.”<sup>168</sup> The residents “have substantially higher rates of hospitalizations and emergency room visits” for asthma, one of the major health issues in the neighborhood, and congestive heart failure.<sup>169</sup>

These health harms undoubtedly contribute to the disparities in life expectancy between the residents in Bayview-Hunters Point and elsewhere: residents there “live fewer years than residents in most other neighborhood.”<sup>170</sup> In more disturbing terms, “on average, residents of [Bayview-Hunters Point] can expect to live 14 years less than their counterparts in the [affluent] Russian Hill neighborhood,” although not all of those years are attributable to environmental factors.<sup>171</sup> This disparity is not

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<sup>166</sup> Justin Slaughter, *Poor Is the New Black: Segregation in San Francisco Today*, S.F. PUB. PRESS (Mar. 26, 2014), <https://sfpublicpress.org/news/2014-03/poor-is-the-new-black-segregation-in-san-francisco-today>.

<sup>167</sup> *Bayview Hunters Point Area Plan*, *supra* note 161.

<sup>168</sup> FEIR Comments & Responses, *supra* note 159, at C&R-68 (citing health studies).

<sup>169</sup> *Id.* The FEIR also concludes that “asthma and lung cancer are major health issues in BVHP.” *Id.* at C&R-70. Diseases that cause the most deaths for Bayview-Hunters Point residents are ischemic heart disease, tracheal, bronchial, and lung cancer. *Id.* at C&R-69-70. The latest data available show that African Americans in San Francisco suffer almost the double the rate of ischemic heart disease than all of the city residents. S.F. DEPT. OF PUB. HEALTH, SAN FRANCISCO STRATEGIC PLAN FOR POPULATION HEALTH 37–38 (June 2014), *available at* <https://www.sfdph.org/dph/files/hc/HCCommPublHlth/Agendas/2014/May%2020/SF%20Strategic%20Plan%20Draft%20May%2015%202014-1.pdf>. Such data are not available for Bayview-Hunters Point in particular.

<sup>170</sup> FEIR Comments & Responses, *supra* note 159, at C&R-68.

<sup>171</sup> SF ENV’T ET AL., *supra* note 7. As to air pollution, this report concluded that the area did not disproportionately suffer from air pollution as compared to the rest of the city. But the report appears to have assessed limited data such as daily traffic-related PM 2.5, *id.* at 18 (citing to Map 10, which relates only to traffic), and the results of monitoring reported in 2006

atypical: nationwide, the disparity is present in segregated cities.<sup>172</sup>

e. Finally and importantly, the community's sustained persistence in fighting systemic injustice, as well as its successes, provides a critical context.

As documented by a historian, “[b]lack San Franciscans established the state’s earliest black schools, press, churches, political conventions, protest organizations, and benevolent societies. They were also the most prominent figures in the struggle for civil rights throughout the state during the nineteenth and early twentieth centuries.”<sup>173</sup> Anyone would be hard-pressed to name another community in San Francisco that has fought so long and hard and succeeded in many battles against injustice, including environmental injustice. To name just a few, residents who have contributed to the beauty of the area, even as polluting facilities multiplied, include the iconic “Big Five” (Julia Commer, Osceola Washington, Ruth Williams, Rose Williams, and Elouise Westbrook);<sup>174</sup> Espanola Jackson; editors of and contributors to San Francisco Bayview and Spokesman; founders of Bayview Hunters Point Community Advocates; founders of Southeast Alliance for Environmental Justice; resident-advocates from Greenaction; and leaders of Bayview Hill Neighborhood Association. They successfully fought back corporate giants, like PG&E and Mirant, to ensure that no more power plants would be built there and that PG&E would clean up its shuttered and contaminated power plant site properly. Further, they fought back the Navy when it violated the Clean Water Act, and fought Lennar Urban and the city

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from measurements made at one site, *id.* at 18 n.19 (appears to cite to FEIR Comments & Responses, *supra* note 9, at C&R-71). The monitoring reported in 2006 by its very nature does not capture the increase in PM from construction activities and increased activities at the port since that time. Since then, other reports have pointed to hot spots of toxic pollution in the area. See also CARE Retrospective, *supra* note 163, at 18.

<sup>172</sup> Olga Khazan, *Being Black in America Can Be Hazardous to Your Health*, ATLANTIC 77 (July/Aug. 2018), [https://www.theatlantic.com/magazine/archive/2018/07/being-black-in-america-can-be-hazardous-to-your-health/561740/?utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=politics-daily-newsletter&utm\\_content=20180611&silverid-ref=MzEwMTkxNDcyNTI3S0](https://www.theatlantic.com/magazine/archive/2018/07/being-black-in-america-can-be-hazardous-to-your-health/561740/?utm_source=newsletter&utm_medium=email&utm_campaign=politics-daily-newsletter&utm_content=20180611&silverid-ref=MzEwMTkxNDcyNTI3S0).

African Americans have more stress-related wear and tear in their bodies than white people do, and the difference widens with age. By measuring telomere length [in chromosomes] in hundreds of women, Geronimus estimated that black women were, biologically, about seven and a half years older than white women of the same age.

*Id.* at 81. “Thomas LaVeist, the dean of Tulane’s School of Public Health and Tropical Medicine, has found, for example, that even among people earning \$175,000 a year or more, blacks are more likely to suffer from certain diseases than whites are.” *Id.*

<sup>173</sup> BROUSSARD, *supra* note 7, at 2.

<sup>174</sup> Dillon ISSI Paper, *supra* note 7, at 16 n.10.

against implosion of Candlestick Park stadium.<sup>175</sup>

Just as Judge Aquilina said of the rape survivors in her case, these advocates have been fighting injustice and have even won fights that were stacked against them against well-resourced opponents. They are not supplicants seeking the benefaction of government agencies. Rather, they are demanding the government to govern justly.

## 2. Providing a forum for listening to the narratives of environmental injustice

In our clinic, we bring our clients to our school, as many clinics do. Our clients appreciate coming to an institution of learning and imparting their knowledge to law students. Unlike in other legal contexts where their stories have been dismissed, we actively listen. Our students are most clearly struck by the clients' expertise and knowledge of history – the context that I was talking about earlier in this article – especially if they themselves have not ever lived in neighborhoods similar to Bayview-Hunters Point.

As I said earlier, however, our clinic could do better to make client narratives a central feature of the classroom, even if it means students do not get that one additional writing lesson, however valuable we may have thought it to be. Perhaps this is part of rebellious lawyering, too.<sup>176</sup> Despite the pressures of litigation and having to integrate skills lessons to prepare them for litigation, we – I – need to make a commitment to bring client voices into the classroom. They are the ones who will say the obvious: “[w]e need to breathe also” (Dr. Tompkins, opposing implosion of the Candlestick stadium implosion).<sup>177</sup>

### *D. Listening Creates Responsibilities*

Our clients tell us the stories of their community because we are problem solvers. When we listen to their stories and do nothing, it does little to dignify their narratives. Listening to the narratives of injustice creates responsibilities. Perhaps that is one of the reasons why I did not respond to the allegations of fraud when Dr. Tompkins raised the issue in 2014.

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<sup>175</sup> See generally Dillon ISSI Paper, *supra* note 7; Kang letter, *supra* note 52, at 143. Because of the clinic's work on these matters, I am familiar with all of these battles – community organizing joined with legal support – that resulted in successes. Of course, sadly, the people who fought to better the community are getting pushed out, reinforcing what residents say: “they’re fixing things up, but it ain’t for us” (speaking of a municipal rail project connecting the area’s new developments to downtown). Dillon ISSI Paper, *supra* note 7, at 24.

<sup>176</sup> Gerald P. López, *Transform-Don't Just Tinker with-Legal Education (Part II)*, 24 CLINICAL L. REV. 247, 427–28 (2018) (advocating broader education of law students).

<sup>177</sup> Dillon, *supra* note 54, at 235. Dr. Tompkins has inspired many of our clinic projects, including the investigation of the concrete batching facilities.



### 1. Err on the side of believing

Another part of making meaning of the clients' stories, which I have learned through the shipyard case study, is that I need to practice embracing the stories – to err on the side of believing. Unbelievable things happen to our communities, as you may conclude from the case study. These things happen often, as I have seen in the nineteen years of practicing in the clinic with my students. Some of the things, one might say, border on conspiracy theories – “the Planning Commission is going to hide implosion”; “the Navy knows the cleanup is botched but is hiding it.” Yet, both ended up being true, and the public outreach plan even confirmed why the government was not planning to notify residents for a long time – it was afraid of what it called a “herd” mentality. Similarly, the Navy held onto the U.S. EPA critique in the shipyard case, and the community would not have learned of it, except for PEER's Freedom of Information Act success. Yet, it is easy not to believe; even colleagues who are sympathetic found it difficult to believe that fraud as extensive had been committed right under the nose of the regulators at the shipyard. I heard, in response, from a colleague: “[f]raud is a serious charge.” He could not believe that it had actually happened.

In choosing to err on the side of believing even the most unbelievable things, we are choosing to step off the bandwagon – that travels the well-traveled road. In the beginning of the shipyard voyage, our clients were alone with their community groups and the voice of San Francisco Bayview; then, the whistleblowers came; and then, NBC Investigative Unit made a commitment to investigative journalism and interviewed people from the community and the whistleblowers. We need to step off the bandwagon at the beginning and join the shipyard voyage at the beginning. In advocating for believing what seems unbelievable, I do not in any way mean to suggest that we should do less than excellent legal work. We, of course, must be absolutely careful not only to provide the best legal services, but also to protect our clients' and our own credibility and professionalism. But without embracing the stories, we risk not only disrespecting our clients' narratives, but also missing opportunities to do the right thing. So far, our clients have an excellent batting average in spotting environmental problems. They have not led me astray.

### 2. Document the injustices and preserve stories

We, as advocates, can and should seek to document narratives of injustice so that they can be used by themselves and others in future advocacy and policymaking. Making a connection between the narratives and policymaking is an important way to dignify the narratives.

Fortunately, as to the shipyard, many writers have been engaged in documenting such narratives, and some newscasters are doing a very good job of interviewing residents at the shipyard. But the clinic should also help advocate for collection of oral histories and push for the Navy and the city to do so. (Indeed, they should have planned an oral history project before the project began.)

At least one example exists of preserving oral history with a project that resulted in uprooting communities. As a result of a Title VI civil rights complaint filed before the Federal Highway Administration, oral history was collected. The complaint was filed to “address [the discriminatory and disparate impacts on Hillcrest neighborhood residents of a new highway planned to run through [two] neighborhood[s] already hemmed in by a ship channel, refineries, and an interstate highway.”<sup>178</sup> As part of a settlement that Dr. Robert Bullard called historic for addressing racism, the Texas Department of Transportation proposed collecting oral histories of the communities, whose lives will forever be changed by the highway project, to “chronicle stories . . . as told by the people who live there[,] . . . to mark how live will change in the two neighborhoods when the [project] gets underway and after it’s finished.”<sup>179</sup> In that case, the oral history project cost was \$60,000, a mere fraction of the \$900 million project.<sup>180</sup>

Only through preserving these stories will we learn what our clients consider important and the consequences of not heeding them. For example, in the Flint water crisis, scholars, scientists, and journalists are documenting not only the stories, but the lessons they provide. These lessons are applicable not just to Flint, but to many environmental struggles. Through collecting stories, policy makers are able to understand that residents in communities affected by pollution want clear communication about risks posed by the pollution problem (as do residents near the Hunters Point shipyard).<sup>181</sup> Moreover, these stories of injustice demonstrate that communities that have been left out of the process have much to contribute: had residents been listened to about the shipyard and Flint much earlier, the problem could have been dealt with earlier to the benefit of public health, democratic governance, and government coffers.

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<sup>178</sup> Press Release, Lawyers’ Committee for Civil Rights Under Law, Historic Agreement Resolves Environmental Justice Complaint in Corpus Christi, Texas (Dec. 18, 2015), available at <https://lawyerscommittee.org/press-release/historic-agreement-resolves-environmental-justice-complaint-in-corpus-christi-texas/>.

<sup>179</sup> Chris Ramirez, *Northside History Production to Be Released in the Fall*, CALLER-TIMES (Apr. 2, 2016), in Tex. Dept. of Trans., Harbor Bridge Project, Northside Neighborhood Voluntary Acquisition Project Quarterly Report 241, 242 (2016), available at <https://ccharborbridgeproject.files.wordpress.com/2012/03/northside-neighborhoods-voluntary-acquisition-program-quarterly-report-ed-2.pdf>.

<sup>180</sup> *Id.*

<sup>181</sup> See, e.g., Ruckart, *supra* note 4, at S88.

## CONCLUSION

As part of an institution of learning, clinical teachers can dignify the narratives of environmental injustice for itself, not for any learnings that they may impart, although surely they will, even more so than textbooks. In dignifying such community narratives, we will be borrowing from the finest traditions of other clinics that have been involved in social justice advocacy. We will not be fixing the systemic failures that led to the problems our clients bring to us. But we will be recognizing the important value of community voices in environmental work, normally populated by organizational clients. By making community narratives central, we can provide one of the few forums that currently exist for our clients' dignity to tell their stories their way, and to place the stories within a sociopolitical context to properly explore the roots of environmental injustice.