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ENVIRONMENTAL JUSTICE AND THE TEACHING OF ENVIRONMENTAL LAW

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I'd like to take this opportunity to consider the significance of the environmental justice issue for environmental law professors. My feeling is that those of us who are environmental law professors should celebrate environmental justice from every possible perspective, as teachers, as scholars, and (for many of us), as people who like to play a role in the public policy arena. Environmental justice is an extraordinarily helpful topic, and an exceedingly important one.

The most important central lesson of environmental justice— and often the hardest to grasp—is that it's not about siting, not just another code and expression for NIMBY.¹ The siting issue is part of the problem, but it's just a symptom of the environmental justice issue. It's a false issue, for example, to suggest that the merits of an environmental justice case involving siting turn on the temporal question of whether the subject neighborhood was a racially minority community at the time of the siting decision, or whether it subsequently became that. That is a relevant question, because as Professor Vicki Been has suggested, it is relevant to *remedy*,² but it is just one issue in a much broader context.

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1. For those unfamiliar with environmental jargon, "NIMBY" is an abbreviated version of "Not In My Back Yard."

2. See Vicki Been, *Market Dynamics and the Siting of LULUs: Questions to Raise in the Classroom About Existing Research*, 96 W. VA. L. REV. 1069 (1994).

Rather, as Dr. Bullard has said, environmental justice is ultimately about distribution.³ Environmental justice forces us to take account of the distributional implications of environmental law in the first instance—how environmental protection law should not just be about allocational efficiency, allowing the distributional implications to fall as they may, relying on the market and existing political processes by default.

Environmental justice at its bottom challenges the assumption historically made by most of us in the environmental law area that environmental law is about allocational efficiency only. For years, the focus in environmental law classes has been on environmental law as an allocational efficiency question (in contrast to natural resources law where distributional issues have traditionally been much more a matter of discussion). Environmental law instead has wrestled with other questions—like how much pollution is the right amount of pollution, and what's the right way to get to that right amount of pollution, whether we should rely on command and control regulatory systems, or on market incentives, and so on. There has been very little overt discussion in the classroom and among policymakers about distributional implications.

The assumption, if you talk to players from the 1970s or look at the literature of mainstream policymakers of that time, was that you could legitimately and fairly focus on allocation efficiency because the distributional implications of environmental protection laws were most likely to be progressive. Since a great deal of the existing pollution affected communities of low income and of color in the first place, it seemed that the most likely result of environmental protection systems would be progressive, and at worst neutral. So distributional concerns were really somebody else's problem. If there was a social welfare problem, it was simply the result of an existing market problem of maldistribution of income. Or maybe it was a civil rights problem. But it wasn't an environmental law problem. It was not what environmental law professors and policymakers were supposed to spend their time on. I consider myself a culprit, along with most everyone else in-

3. Robert Bullard, *Environmental Racism and 'Invisible Communities'*, 96 W. VA. L. REV. 1037 (1994).

volved in environmental law in the 1970s and 1980s. I can remember quite clearly, for instance, as recently as 1989 sitting in on a meeting at the World Wildlife Fund designed to identify the major issues that should be enshrined in the report on national priorities to be prepared by Russell Train's National Commission on the Environment. We brainstormed for a whole day on what exactly should be in that report, and at one point, someone sort of raised some distributional concerns. We, myself included, quickly shunted the issue off to the side, saying, "Well, that's just too complicated," and "That's not really something for us to think about, that's something for other kinds of law to worry about," and "Environmental law can't deal with everything."⁴

Here's what we all largely ignored over the last 20 to 25 years (and all of this is fairly simple, if one spends a little time thinking about it). The first thing that we ignored is that our environmental statutes aren't Pareto optimal—they don't make everybody better off and nobody worse off. They don't take pollution down to zero. What they do, in crude terms, is figure out what is the "right" amount of pollution in some isolated sense, and then they proceed to try to reduce pollution over here, here, and there; they try to reduce risk down from let's say 120 units over here, and 120 units over there And all this is in the best of worlds, assuming actual compliance and enforcement.

Theoretically our environmental control regimes reduce pollution and risk, but often what they really do is merely achieve irregular reductions and a change of form—from water to air, from air to land, from land to water. You end up with a lot of residual risks, a 20 of this, a 20 of that, over here and over there. And what happens to those 20s? The problem is that they don't necessarily stay right there. They often move geographically, and ultimately they tend to *aggregate*. You end up with this 20, this 20, this 20, and this 20, someplace, and their cumulative sum now probably is 100. Overall, in such situations, society as a whole may actually be better off. We've reduced the total amount of pollution, and many communities may have environments that are significantly improved. We now have come to

4. The report, however, fortunately did ultimately include some discussion of distributional concerns.

realize, however, that some other communities can end up *worse* than they were before, because of the aggregation of risk. Aggregation of risk is something that environmental statutes have paid little if any attention to.

A second issue that we paid very little attention to was the distributional implications of priorities. The selection of the problems that the statutes would address in the first place, and the regulatory concerns that EPA would spend its energies upon, have enormous distributional implications. EPA has been able to comply with only 14% of the statutory deadlines that it has been given over the last 25 years, because of limited resources and bureaucratic problems.⁵ EPA's staff inevitably have to pick and choose what their priorities are. How do they pick and choose what they are going to deal with first?

In the setting of these administrative priorities, if the process is left to default, there is great reason to suspect that the winners and losers will reflect a distributional skewing. The losers are going to be low income persons, persons of color, and their communities.

Finally, there is enforcement. Actual environmental quality depends upon compliance, which, at least in America, depends upon a credible enforcement threat. Actual environmental quality is very different from the theoretical environmental quality promised by the statutes. Here too there has been substantial distributional skewing in the allocation of enforcement resources, and again the agency people and we in the academy have given little or no consideration to these issues—they are left to default, left to the marketplace, left to political influence—and a very real problem gets overlooked.

5. Richard J. Lazarus, *The Tragedy of Distrust in the Implementation of Federal Environmental Law*, 54 LAW & CONTEMP. PROBS. 311, 323-24 (1991); see also Richard N.L. Andrews, *Long-Range Planning in Environmental and Health Regulatory Agencies*, 20 ECOLOGY L.Q. 515 (1993). Andrews explains that:

Over twenty-three years, EPA has met only about fourteen percent of its 800 or more congressional deadlines. As of 1991, the Agency had regulated only seven hazardous substances emitted into the air. As of 1984, it had registered less than half of the 600 active pesticide ingredients and fewer than 100 of the approximately 50,000 potentially toxic chemicals in commerce. Furthermore, EPA had completed cleanup at less than fifty of the thousands of abandoned hazardous waste sites.

Id. at 516 (footnotes omitted).

We have also ignored other reasons why just leaving environmental protection priorities to default was likely to lead to skewing. One is the simple fact that this society is pervaded by racist attitudes. One would like to think not, and obviously such attitudes are widely condemned, but none of us should be so naïve as to think that racism and racist attitudes have somehow disappeared now that we have non-discrimination mandates and statutes. These attitudes are still prevalent amongst all of us. There's no reason to think that the people involved in environmental law decisionmaking at the federal, state, and local levels are somehow immune—that because they deal with environmental protection, they must be good people who do good, and thus could not harbor racist attitudes. But we do, and these attitudes range from some of the worst and most venal, to stereotypical judgments: “Persons of color don't really care as much about these environmental issues; they are more concerned about jobs.” These may just be subconscious attitudes, but they affect decision making.

People in these communities are also much more susceptible to environmental health effects because of stress. Most of the pollution categories regulated by the environmental statutes really are just exacerbating factors. What causes human health effects is the quality of life in general—how stressful it is. Individuals acting under greater stress tend to be more susceptible to human health effects aggravated by pollution than those who aren't.

Environmental justice also reflects years of *de jure* racist rules in this country, which have led to disproportionately fewer economic and political resources, which in turn obviously plays a significant role in the distributional skewing of the implementation of environmental protection laws. Persons of low income and of color find themselves in a much lessened position to resist and avoid environmental problems in their neighborhoods.

And within the political sphere, the varying degrees of political clout that different communities possess obviously play a major role in deciding what priorities are addressed by what congressional committees on Capitol Hill, what rules are promulgated by EPA, and where the EPA regions' scarce enforcement resources are finally allocated. As a result, over the past 25 years virtually no major players in the gov-

ernance process have really been thinking openly about this problem—if we just leave things up to default, we are very likely going to end up with a major distributional skewing of the benefits and burdens associated with environmental statutes.

Although there has been little overt discussion, however, don't think for a second that distributional considerations haven't played a major role in the fashioning of environmental law over the past 25 years. Everyone at the table—whether at EPA, or on Capitol Hill, or otherwise—that has been engaged in the lobbying and the forming and fashioning of these statutory systems has undoubtedly been very well aware of their distributional implications. The utility curves they've had in mind, though, have been their own. The Clean Air Act amendment process, for example, was once quite accurately described as a "special interest feeding frenzy," and that was because of its distributional implications for the players.⁶

But the distributional implications for persons of low income and color and their communities, *those* distributional implications were not seriously considered. Consideration in the political process is given to people who are more savvy about the process and have technical access to the remarkable complexity and detail of these statutes. The Clean Air Act,⁷ for example, is a relatively inaccessible statute, as all of us know who try to teach the class. It is hard for students to understand it, it is hard for anyone to be expert enough to engage in the technical and policy dialogues that may convince decision makers. A tremendous amount of resources are required to be an expert in the area, to attend the regulatory bargaining sessions, and to engage the people who are making the decisions in some kind of debate. The fact that persons of low income and color and their communities have such

6. See Robert Glicksman & Christopher H. Schroeder, *EPA and the Court: Twenty Years of Change and Beyond*, 54 LAW & CONTEMP. PROBS. 241, 285 (1991) ("West Virginia and Ohio will get billions of dollars to build 'clean coal' plants. Steel mills in a few states will have 30 years to control poisonous emissions, instead of the 10 years given other industrial polluters. Florida power companies will get a \$400-million, 10-year break on pollution control costs. Senators get more than exemptions for their home state.") (quoting Michael Kranish, *Politics and Pollution*, BOSTON GLOBE, Apr. 9, 1990, at A1).

7. 42 U.S.C. §§ 7401-7671(q) (1988 & Supp. 1991).

a pronounced lack of such resources is a further exacerbating factor in this area.

What are the opportunities for teachers, for environmental law professors, to draw from and build upon this issue? I think they are tremendous. First, a great opportunity for an environmental law professor as teacher is to use environmental justice to provide an organizing theme for your entire course, or for significant portions of it. As Luke Cole has said, don't just think about having an Environmental Justice Day in your classes.⁸ Think about the field generally and think about the existing statutory programs through this new perspective. If you, like so many of us now, are pretty tired of having the same old organizing themes—the uncertainty and scientific complexity associated with pollution regulation, or the tensions between moral outrage and cooler-headed analysis, or the subtle administrative law distinctions between hard looks and soft glances—try environmental justice for a change. Don't just think about allocational efficiencies, but about distributional implications as well.

Just within the Clean Air Act, for example, think about what it is supposed to mean when you try to identify a "sensitive population" in coming up with national ambient air quality standards under sections 106 and 107, and then compare that to what has historically been defined administratively as a sensitive population.⁹ Think about the implications of moving to marketable permits, and some of the distributional skewing and problems of hot spots that may occur, (indeed inevitably will occur) if we move wholesale to marketable permits. This doesn't mean we cannot and should not move to some degree toward marketable permits, but it means that if we do, we'd better think about it, because there is another major concern, environmental injustice, that may be involved. Think about what factors the decision makers can take into account when a new major source is seeking a permit under sections 173 or 174 of the Clean Air Act.

8. Luke W. Cole, *Environmental Justice in the Classroom: Real Life Lessons for Law Students*, 96 W. VA. L. REV. 1051 (1994).

9. See, e.g., ROBERT D. FRIEDMAN, SENSITIVE POPULATIONS AND ENVIRONMENTAL STANDARDS 4-12 (1981).

There is a very interesting recent case to think about in this regard—the *Genesee Power* case decided by the EPA’s Environmental Appeals Board¹⁰ this past fall, where the decision was whether to grant a PSD permit or not.¹¹ One of the claims being made was an environmental racism claim. In their original decision of September 8, 1993, the Board rejected the environmental racism claim on two grounds: (1) they didn’t think that environmental justice was a relevant concern under the appropriate section of the Clean Air Act, and the state agency implementing the statute and issuing the permit had no legal authority to consider environmental justice; and (2) in any event, there had been no discriminatory intent proved in the case.¹² In response, the EPA Office of General Counsel (OGC) filed a motion for re-hearing, requesting the Environmental Appeals Board to re-think the authority issue, saying that OGC believed that environmental justice *is* relevant and a very important consideration. Taking account of distributional concerns in the Clean Air Act permitting process is a major item on the agenda of the EPA right now, they said.

On October 22, 1993, the Board withdrew its original decision in the *Genesee Power* case and issued a new order and decision.¹³ The Board said, in effect, “You don’t seem to understand the relative role of the Environmental Appeals Board and the Office of General Counsel. We are not just another arm of EPA, we are a court, a court that makes up our own minds.” (It is actually very interesting from our legal process perspective to study these interactions within the agency). The Board denied the claim again, but in the new opinion they eliminated all the prior discussion about how environmental justice was an irrelevant consideration.¹⁴ They relied simply on their second ground that there was no discriminatory intent evidence in this particular

10. The Environmental Appeals Board is a new administrative “court” within EPA, a very able tribunal that issues very significant decisions.

11. In the Matter of Genesee Power Station Limited Partnership Permittee, PSD Appeal Nos. 93-1 through 93-7, 1993 PSD LEXIS 1 (Sept. 8, 1993).

12. *Id.*

13. In the Matter of Genesee Power Station Limited Partnership, 1993 WL 484880 (E.P.A. Oct. 22, 1993).

14. *Id.* at *4-*6.

case,¹⁵ thereby leaving to another day the question to what extent distributional concerns can be taken into account in granting a major source permit under non-attainment or PSD provisions under the Clean Act.

Cases like this are a great vehicle for teaching!

Under the Clean Water Act,¹⁶ to take another statutory example, Dr. Robert Bullard and Luke Cole have previously raised some of the obvious issues that lend themselves to environmental justice analysis, like the question of water quality standards.¹⁷ To what extent do water quality standards assume certain things about culture and behavior and make certain “homogenizing” assumptions?

Under RCRA,¹⁸ note the significance of some of the exceptions within RCRA’s definitions of hazardous waste.¹⁹ What are the cost of those exceptions, and who tends to bear the brunt of those exceptions? And of course the siting questions which are a part of the problem under RCRA as well as CERCLA.

CERCLA distribution issues are fascinating, too, indeed so fascinating that they have led to at least the appearance of a split within the environmental justice community about what is the right approach to CERCLA. There is a split between the NAACP and some of the more regional environmental justice groups about how best to reform CERCLA and what kind of statutory scheme should exist.²⁰

Beyond the pollution-regulating statutory structures, moreover, think about how many environmental justice issues lie at or just below the surface of many of the nonstatutory areas that figure in modern environmental law—in eminent domain issues as in the *Poletown*

15. *Id.* at *6.

16. 33 U.S.C. §§ 1251-1387 (1988).

17. See Bullard, *supra* note 3; Cole *supra* note 8.

18. 42 U.S.C. §§ 6901-6992(k) (1988).

19. See, e.g., 42 U.S.C. § 6921 (1988).

20. NEPA, for its part, has major socio-economic consequences that can reflect environmental justice issues, and so on.

case,²¹ public trust cases like *Overton Park*²² and *Paepke*,²³ tort cases like *Boomer*,²⁴ or a host of toxic contamination cases, Native American cultural rights as in the Mt. Graham observatory case,²⁵ cases of strip-mining and their impact on mountain communities, belated prosecution for unsafe sweatshop working conditions as in *Film Recovery*²⁶ and its progeny,²⁷ and so on.²⁸

Finally, international environmental law is all about distribution. What was the major stumbling block and the major issue at the 1992 United Nations Conference on Environment and Development (the Earth Summit) in Rio de Janeiro? It was a distributional question, a question of the developed nations facing the need to make various transfer payments and distributions if they were going to ask some of the developing nations to stop the exploitation of certain areas. Distributional concerns were at the top of the agenda at Rio.

There are other environmental justice opportunities for us as teachers. There are new courses, seminars, and clinical offerings to be launched in the field—clinical courses like those that Hope Babcock and others across the country have begun teaching. Georgetown is doing it, Boston College is doing it, Tulane is doing it, Berkeley is doing it, I believe Yale now is going to be doing it, as is Stanford.

Environmental justice also presents great opportunities for research and scholarship. Are you tired of lender liability under CERCLA?

21. *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981).

22. *Citizens to Preserve Overton Park, Inc., v. Volpe*, 401 U.S. 402 (1971).

23. *United States v. Paepke*, 550 F.2d 385 (7th Cir. 1977).

24. *Comm. to Preserve Boomer Lake Park v. Dep't of Transportation*, 4 F.3d 1543 (10th Cir. 1993).

25. *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441 (9th Cir. 1992).

26. *People of Illinois v. Film Recovery Systems*, 550 N.E.2d 1090 (Ill. App. 1990), *cert. denied*, 553 N.E.2d 400 (Ill. 1990).

27. See generally Michael T. Cimino, Note, *Criminal Prosecution of Workplace Safety Violations*, 94 W. VA. L. REV. 1007 (1992).

28. See, e.g., ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 431-35, 545-52, 558-60, 376-79, 102-11, 199-219, 233-37, 327-34 (West 1992) (a casebook which also first includes a section on environmental justice in its supplementary materials). See also TEACHER'S MANUAL TO ACCOMPANY ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 342-53 (1992); 1993-94 UPDATE SUPPLEMENT FOR TEACHERS 198-203 (1993).

Tired of reading and rereading the debates between Howard Latin²⁹ and Bruce Ackerman and Richard Stewart³⁰ regarding the relative merits of command and control versus market incentives? Then think about environmental justice! It provides a new perspective for thinking about environmental law and writing about it.

Potential draft legislation in the environmental justice area designed to redress these complex problems—like the currently proposed Environmental Justice Act³¹—are ripe for scholarship. The Presidential Environmental Justice Executive Order³² provides another intriguing target for scholarly analysis, building on various previous studies of executive orders like Executive Order 12291.³³

Native American tribal sovereignty issues involving natural resources and pollution, chronicled elsewhere by Rob Williams,³⁴ are another range of questions sorely deserving of thoughtful academic analysis on their own terms as an environmental justice inquiry, not merely as a footnote to the issue.

Professor Vicki Been's research offers some other possibilities, including those arising in the siting context, such as the fashioning of techniques to ensure the full exaction of economic rent on behalf of

29. Howard Latin, *Ideal Versus Real Regulatory Efficiency: Implementation of Uniform Standards and 'Fine-Tuning' Regulatory Reforms*, 37 STAN. L. REV. 1267, 1332 (1985) (arguing that economic incentive-based regulation would increase decisionmaking costs and create "opportunities for manipulative behavior by regulated parties.").

30. Bruce A. Ackerman & Richard B. Stewart, Comment, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1364 (1985) ("[t]o focus on administrative costs, without considering the societal benefits of more intelligent regulation, produces penny-wise but pound-foolish public policies"); see also Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law: The Democratic Case for Market Incentives*, 13 COLUM. J. ENVTL. L. 171, 189 (1988) (technology-based regulation focuses public attention on arcane technological questions rather than the more normative question, "[d]uring the next n years, should we instruct the EPA gradually to decrease (or increase) the number of pollution rights by x percent?").

31. See 139 CONG. REC. E-1243-02 (1993); 139 CONG. REC. S8085-03 (1993); S. 1161, 103d Cong., 1st Sess. (1993).

32. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994).

33. Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (1981).

34. Robert A. Williams, Jr., *Large Binocular Telescopes, Red Squirrel Piñatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World*, 96 W. VA. L. REV. 1133 (1994).

those communities who ultimately host environmentally risky facilities.³⁵

Finally, environmental justice offers exciting opportunities for those of us who want to play a more significant role in the public policy arena. Are you tired of being mired in the CFR trying to figure out the definition of hazardous waste? Then become inspired again! The environmental justice movement needs many voices, including middle-class white people's voices as well as those of others.³⁶ For those of you who became interested in environmental law because of personal commitment and beliefs, but have long since become ensnarled in the technical minutiae—and for those of you who long for those yesterdays when environmental law and its teaching seemed dominated by discussion of NEPA's lofty goals and ideals—environmental justice offers an opportunity to become involved again at the formative stages of an important time.

This is an exciting time for environmental law. It is an exciting time to be an environmental law professor. I urge you to join in the excitement and the challenges that environmental justice presents to all of us as legal academics.

35. See Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383 (1994); Been, *supra* note 2.

36. All too often white people and political institutions will listen only when white people speak.