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the Courts: An Overview of the Process
and Why It has Failed

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**PURSUING ENVIRONMENTAL JUSTICE
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AND WHY IT HAS FAILED**

By

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Environmental Justice: A New Chapter in the Civil Rights Debate

*Justice is not to be taken by storm.
She is to be wooed by slow advances.*

Benjamin N. Cardozo

Introduction

After more than three decades of modern environmentalism, inequities in the distribution of toxic waste sites in minority communities remain commonplace in America. The Civil Rights Movement is once again revisited, however this time it is in regards to the segregation of minorities concerning environmental hazards. The leading issue of the civil rights movement – the fair treatment of people of color, has now been extended to include the fair treatment of people of color in the distribution of environmental benefits and burdens.¹ The issue is sometimes described as environmental inequity or environmental racism, terms that refer to the generally accepted view that environmental hazards are not equally distributed among various groups of people in the United States.

This thesis will explore the difficulties involved in looking solely towards the judicial system to remedy environmental racism, which refers to “a policy, practice, or directive that differentially affects or disadvantages (whether intended or unintended) individuals or communities on the basis of race or color.”² To date, three primary means have been used to pursue environmental justice: litigation, legislation, and environmental justice strategies developed by executive branch agencies pursuant to President Clinton's Executive Order 12898. Each of these strategies will be analyzed in this thesis. The basis of "environmental racism" claims are supported in a multitude of studies, which have revealed some disturbing statistics. Studies have shown that not all people are equally exposed to pollution. The ethnic composition of a neighborhood is the single most important factor in predicting the location of hazardous-waste sites in the United States.³ Studies of environmental hazards with race and income included as variables, have found disparities of race being the more significant variable in almost seventy-five percent of the studies. These studies have found that hazards that are disproportionately distributed across minority communities include but are not limited to; exposure to lead, pesticides, air and water pollutants, the siting of municipal landfills, incinerators, polluting industrial facilities and occupational hazards.⁴

Hypothesis

The focus of this thesis will be the ineffectiveness of the legal system to adequately address the issue of “environmental racism.” In the United States, everything of importance is resolved by the court system. American society remains resistant to finding other avenues of recovery. Even at times when we are faced with the realization that the law is not equipped to handle a certain problem, there continues to be strong resistance to handling matters by non-legal means. It is my contention that “environmental racism” is a political issue and therefore needs to be first addressed through the efforts of grassroots movements and civic activism.

Society tends to view the courts as administrators of justice. However, justice is subjective, therefore how can we as a society rely on bureaucrats and politicians to decide what is just? This view of the courts does a disservice to democracy in that it de-emphasizes justice as something pursued by citizens. For example, the purpose of the Supreme Court is not to ensure that Americans' civil rights are protected, but rather to interpret the constitution, irrespective of the rights that might be infringed upon. Rawls' theory of justice holds that society has an obligation to correct inequalities in the distribution of resources.⁵ Rawls further states that men must make decisions concerning what they deem just and unjust in their society. This decision is based on the individual's own perception of what is good. "The choice in which rational men would make in this hypothetical situation of equal liberty, assuming for the

present that this choice problem has a solution, determines the principles of justice."⁶

Racial discrimination is an issue that the courts have been addressing for over a century. While *Brown v. Board of Education*⁷ was a milestone in the efforts of the Civil Rights Movement, it was many years before the decision was actually enforced. It was the efforts of the Movement itself that forced the issue of desegregation. It was the highly visible direct action campaigns such as the Montgomery bus boycotts, the Freedom Rides, the lunch counter sit-ins, and the March on Washington that created the social climate and organized muscle to win civil rights legislation. This thesis will also attempt to show the similarities between the Civil Rights Movement and the Environmental Justice Movement and how victims of "environmental racism" must use a similar approach in order for their concerns to be adequately addressed and remedied.

Tort law is the law of accidents and personal injury and is widely believed to be a "public-spirited undertaking designed for the protection of the ordinary consumer and worker, the hapless accident victim, the 'little guy'."⁸ Although tort law is ever changing in an effort to reflect the values of society, the courts traditionally favor the corporation. The burden that is placed on plaintiffs to prove their environmental injuries is sometimes insurmountable because of archaic legal traditions. The added burden of proving purposeful discrimination in the siting decisions of environmental justice cases makes legal remediation of environmental racism even more difficult to achieve. At the time of this writing, the few environmental justice cases that have been litigated were all unsuccessful in meeting these burdens. While stricter environmental legislation is needed, the process of enacting statutes is lengthy, costly and political. Problems surrounding environmental statutes are the enforcement authority of the statutes, the layers of bureaucracy related to enforcement and the enormous associated costs such statutes impose on businesses. Also, the statutory rules begin to take over with no comprehensive goal. It is my contention that environmental inequities based on race is a political issue and therefore needs to be remedied by the political participation of those who are facing environmental racism.

Grass roots movements and civic environmentalism are the needed approaches to eliminate the inequities of environmental burden distribution in minority communities. Political participation in these groups on a wide scale will help to shape the nation's development patterns, particularly when it comes to environmental impacts and land use.⁹ In order to affect the political process, the environmental justice movement and others like it, must develop those strategies that will empower local communities, enabling them to exert pressure on the decision making process of hazardous site locations.

Methodology

The research for this thesis will focus on both primary and secondary sources. Sociologist Robert Bullard has published extensively on the subject of environmental justice. I will use several of his books, as well as the articles that he has authored or co-authored. Other "environmental justice" experts will also be relied upon, including opponents of the movement who rely upon market dynamics to explain environmental disparities. Original case law, legal casebooks and law journals will be relied on to analyze the ineffectiveness of tort law in response to "environmental racism" claims, as well as the limitations of current environmental legislation. Environmental handbooks and information supplied by the Environmental Protection Agency, as well as a personal interview granted by a leading toxicologist, will be used to explain important environmental statutes, as well as the reasoning behind their enactment.

Finally, I will use literature on the history of important grassroots movements, with an emphasis on the Civil Rights Movements, to illustrate the importance of civic activism. Law journals discussing the role of Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race or national origin in federally funded programs and activities, litigated in "environmental racism" cases will also be relied on.

The Chapters

The first chapter will examine the nature and growth of the environmental justice movement, as well as the philosophy that underlies much of its work today. The findings of important studies concerning the relationship between hazardous waste sites and minorities will be presented in an effort to support the claims of the Environmental Justice Movement that “environmental racism” exists in the siting decisions of hazardous waste facilities. Important concepts in this chapter will be “Environmental Justice”, “Environmental Racism”, “Environmental Inequities”, Locally Undesirable Land Uses (LULUs), the “Not In My Backyard” syndrome (NIMBY) and the issue of causation. Operational definitions will be provided for the above terms, as well as what constitutes a “minority neighborhood” and a “low income neighborhood.”

The second chapter will trace the growth and development of the law of torts. This chapter will explore the history of tort law in an effort to explain the evolution of the courts’ reasoning behind personal injury jurisprudence. Perhaps more than any other area of the law torts has been responsive to social needs and desires, reflecting changes in the values that we attach to various activities in society. As industrialization became prevalent in America, the courts encouraged expansion by oftentimes favoring the defendant in injury cases. This ideology of encouraging business lingers in tort law principles and will be analyzed in this chapter in order to stress the difficult burden that is placed on plaintiffs in most environmental injury cases.

The legal issue of causation is addressed in an effort to explain the difficulties that an environmental justice plaintiff has in proving injury and purposeful discrimination in siting practices. Proving causation in everyday injuries is difficult, however proving causation in environmental injuries is even more difficult. Environmental litigation will be analyzed in order to showcase the difficulties in proving this burden. Important concepts in this chapter will be the doctrine of “nuisance,” both public and private, theories of negligence, strict liability and the issue of causation. A detailed chart listing the elements of a torts cause of action is provided, as well as a listing of possible defenses. The chapter concludes with a detailed study of the events that took place in the environmental case of *Anderson v. W. R. Grace Co., et al.*

The third chapter begins with the early attempts of Congress to construct effective environmental legislation. Environmental law is more than simply a collection of statutes on environmental subjects. It is a complicated array of statutorily defined regulations that require a thorough understanding of environmental regulations and the vast majority of administrative policies that have evolved over time. Over the past few decades, environmental law has evolved into a system of statutes, regulations, guidelines, factual conclusions and case-specific interpretations. Studies have shown that laws passed to reduce environmental impacts have overall, in some cases, had an unfair impact on minority and poor communities.¹⁰ Court decisions interpreting these laws and regulations will be analyzed in this chapter. I have chosen to highlight the major environmental regulations relevant to environmental justice, and will include the backgrounds of the legislation and the reasoning behind them. The role of the EPA in enforcing environmental legislation will be presented in this chapter. The courts and the environmental movement are presented in this chapter as well as theories of the distribution of environmental equities.

The fourth chapter forms the crux of the thesis as the power of civic activism is addressed through grassroots movements. Environmentalism and the Civil Rights Movement have been two of the most important and effective social movements of the past half-century. These two movements are becoming intertwined as the environmental justice movement confronts the nation’s debate on civil rights. The first section will provide a theoretical framework regarding civic activism and people’s motivation to participate in political life. It will analyze various theories on political participation as well as collective group action and Downs’ “rational choice theory.” These various theories on civic activism are included in order to develop an understanding of why grassroots movements are formed and what types of people are most likely to join them.

The second section of the chapter will examine the Civil Rights Movement and the impact that it had on public policy and the emergence of the Environmental Justice Movement. The growth and success of grassroots movements in the United States are addressed, as well as the individual goals behind these movements and the impact that they have had on affecting social change.

The final chapter will consist of conclusions and a prognosis for the future of environmental justice plaintiffs, future environmental legislation, and the Environmental Justice Movement itself. I contend that political participation amongst those most affected by the inequities of environmental racism will help to create effective legislative and regulatory control in the elimination of placing hazardous waste material and toxic dumping sites solely in minority and impoverished communities. Most environmental disputes revolve around siting issues, involving government or private industry.¹¹ By drawing national attention to the disparities of race in these siting decisions, the Environmental Justice Movement is facilitating environmental equity for future generations. President Clinton's Executive Order 12898 and the EPA's role in enforcing the order will be discussed as a tribute to the success of the movement.

Definitions

The concept of "environmental racism" was first used by Reverend Benjamin F. Chavis, Jr., of the United Church of Christ Commission for Racial Justice in 1987, and refers to "a policy, practice, or directive that differentially affects or disadvantages (whether intended or unintended) individuals or communities on the basis of race or color."¹² This term goes beyond acknowledgement of environmental inequities and suggests racism as the reason. Chavis began actively using the term after the findings of the Racial Commission were released, and he further defined it on March 3, 1993, when he was summoned to appear before the U.S. House of Representatives Subcommittee on Civil and Constitutional Rights. In his testimony he stated:

Environmental racism is defined as racial discrimination in environmental policy-making and the unequal enforcement of environmental laws and regulations. It is the deliberate targeting of people of color communities for toxic waste facilities and the official sanctioning of a life-threatening presence of poisons and pollutants in people of color communities. It is also manifested in the history of excluding people of color from the leadership of the environmental movement.¹³

"Equity" is defined as "The quality, state, or ideal of being just, fair, and impartial."¹⁴ The term, "environmental equity" refers to the equal enforcement and protection of environmental laws¹⁵, while the term "environmental inequity," refers to a pattern in which hazardous waste sites, polluting industries, nuclear waste dumps, and other environmental are located in minority or poor communities.¹⁶ Dr. Beverly Wright, Director of the Deep South Center for Environmental Equity, further defines the term as "the right of all people to benefit from the environment and to be equally protected from the effects of human use and abuse of it."¹⁷ The Clinton Administration adopted the term, "environmental justice" and is defined in Executive Order 12898 as "those cultural norms and values, rules, regulations, behaviors, policies, and decisions to support sustainable communities, where people can interact with confidence that their environment is safe, nurturing, and productive."¹⁸

These terms are not mutually agreed upon by all of the various environmental justice advocates, however, for the purpose of this analysis, I have chosen to accept the above-mentioned definitions, as well as the following definitions that were provided in the report published by the United Church of Christ Commission for Racial Justice.¹⁹ A minority community is comprised of a population classified by the U.S. Bureau of the Census as African American, Hispanic American, Asian and Pacific American,

American Indian, Eskimo, Aleut, and other non-white persons, whose composition is at least 25% of the total population of a defined area or jurisdiction. Low-Income Communities refer to a population classified by the U.S. Bureau of the Census as having an aggregated mean income level for a family of four that correlates to \$13,359.00, adjusted through the poverty index using a standard of living percentage change where applicable, and whose composition is at least 25% of the total population of a defined area or jurisdiction.²⁰

The Birth of the Environmental Justice Movement

In 1982, in a rural, mostly African American county in North Carolina, an issue of “environmental racism” was transformed from a local problem to a national movement. The citizens of Warren County protested a proposed polychlorinated biphenyl (“PCB”) landfill. PCBs are members of the family of halogenated aromatic hydrocarbons. This family also contains DDT and TCDD (Dioxin). These are considered some of the most toxic substances known.²¹ The properties that make PCBs so hazardous, as well as attractive to industry are that they are virtually indestructible. The EPA listed PCB as a “suspected carcinogen,” although there are no reported cases in the United States of humans having contracted cancer from exposure to PCB, studies involving rats show a relation.²² The full toxic potential of most environmental chemicals is not completely known. Thus, the cancer-producing potential of omnipresent environmental contaminants such as DDT or PCBs remains undefined.²³ Warren County was selected as the disposal site for PCB-tainted soil over fourteen other North Carolina counties. Over 500 demonstrators were arrested, including national figures such as District of Columbia Delegate Walter Fauntroy, chairman of the Congressional Black Caucus at the time; Reverend Benjamin E. Chavis, Jr., of the United Church of Christ Commission for Racial Justice (current director of the NAACP); and Reverend Joseph Lowery, head of the Southern Christian Leadership Conference.²⁴ The demonstrators were the first Americans jailed for protesting the siting of a waste facility.

The Warren County protesters did not succeed in blocking the landfill, however they drew national attention to the inequities in siting and provoked African American church leaders, civil rights organizers, and grassroots activists to rally in support of environmental issues facing minority communities.²⁵ The organized group began what is known as the Environmental Justice Movement. The movement represents a merging of civil rights and environmentalism. It embodies three of the world’s greatest social dilemmas: “the struggle against racism and poverty; the effort to preserve and improve the environment; and the need to shift social institutions from class division and environmental depletion to social unity and sustainability.”²⁶ A writer for the Citizens Clearinghouse for Hazardous Waste’s newsletter says of the movement:

Environmental justice is a people-oriented way of addressing “environmentalism” that adds a vital social, economic and political element...the new Grassroots Environmental Justice Movement seeks common ground with low-income and minority communities, with organized workers, with churches and with all others who stand for freedom and equality...Environmental justice is broader than just preserving the environment. When we fight for environmental justice, we fight for our homes and families and struggle to end economic, social and political domination by the strong and greedy.²⁷

The Studies

In 1983 after participating in the Warren County protest, Delegate Fauntroy requested an investigation by the U.S. General Accounting Office (GAO) of the relationship between hazardous waste landfills and minorities in eight southeastern states. The GAO found that “blacks make up the majority of population in three of the four communities where the landfills are located...and at least 26 percent of the population in all four communities have income below the poverty level.”²⁸ Although the GAO study was modest in its scope, it brought the issue of environmental equity to the attention of the general

public. For the first time, the association between race, income and the exposure to environmental hazards was presented as interconnected. The study also highlighted the serious lack of fundamental research on the issue.²⁹

Robert D. Bullard conducted another important study that same year. Bullard's research focused on the siting of municipal landfills, incinerators, waste transfer stations, and other waste disposal facilities in Houston, Texas. His findings were similar to those published by the United Church of Christ Commission for Racial Justice.³⁰ All five of the city-owned landfills in Houston were located in predominantly African American communities and six of the eight garbage incinerators were located in similar communities.³¹ Vicki Been, Associate Professor of Law at New York University School of Law conducted a study of her own by recalculating and recreating Bullard's study of Houston. Been located demographic data from Houston's past in order to discover the racial composition of the areas before the sites had been built. She noted that in some instances the poor or minority residents living in those areas hosting the locally undesirable land uses (LULUs) came to that area after the decision to site a LULU there had already been made.³² From her analysis, Been argued that no conclusive evidence of discriminatory intent or unfair siting practices were evident. She maintained that the black neighborhoods formed after the construction of the waste sites and many of these areas, prior to the siting decisions, had in fact been comprised of a majority of white individuals.³³ Been concluded that racial environmental inequities are discriminatory only if the inequities arose from a racist intent in the siting process itself:

If neighborhoods were minority neighborhoods at the time they were selected to host LULUs, the choice of sites may have been racially discriminatory...but, if the neighborhoods were not minority neighborhoods when they became LULU hosts, some factor other than discrimination must account for the fact that they now are disproportionately populated by minorities. That factor may be the dynamics of the housing market...[Moreover, even when]...siting choices have a disproportionate impact upon African-Americans...this does not necessarily mean that the process was discriminatory. Siting decisions may be based upon land prices, proximity to sources of waste, transportation networks, or other factors unrelated to race or poverty that nevertheless have an incidental, disproportionate effect upon people of color or the poor.³⁴

Bullard disputed Been's conclusions, stating that the data she had used was incomplete.³⁵

In an effort to expand on the scope of the GAO study, the United Church of Christ Commission for Racial Justice conducted an extensive national study on the environmental problems faced by minority and poor communities. The study examined the commercial hazardous waste incineration industry and the demographics of the areas in which their plants were located.³⁶ The purpose of their study was to determine whether the sites were disproportionately located in racial minority neighborhood.³⁷

The study reported the following:

1. People of color are twice as likely to live in a community with a commercial hazardous waste site than white people.¹

¹ In Chicago, for example, more than 81.3% of Hispanics and 76% of African Americans live in communities with abandoned toxic waste sites, compared with 59% of whites. In Houston, 81.3% of Hispanics and 69.8% of African Americans in the Houston metropolitan area live in communities with toxic waste sites, compared with 57.1% of whites.

2. About 60 percent (15 million) of African Americans live in communities² with an abandoned hazardous waste site.³
3. The average annual income of people living in communities with a hazardous waste site is significantly less than those living in communities without such a site.
4. Race, more than income, is a more reliable factor in predicting the presence of a hazardous waste site.⁴
5. Three of the five largest hazardous waste sites, accounting for about 40 percent of the nation's total landfill capacity, are located in communities that are predominantly African American or Hispanic.
6. Fifteen million African Americans and eight million Hispanics live in communities with one or more hazardous waste sites.
7. Of the six cities with the largest number of hazardous waste sites, African Americans make up a far greater fraction of residents than do whites. The numbers for those cities are as follows: Memphis (43.3 percent African Americans; 173 sites); St. Louis (27.5 percent; 160 sites); Chicago (37.2 percent; 103 sites); Atlanta (46.1 percent; 94 sites). African Americans make up 11.7 percent of the general U.S. Population.³⁸

The study concluded that, "although socio-economic status appeared to play an important role in the location of commercial hazardous waste facilities, race still proved to be more significant."³⁹ The Commission recommended that the EPA give high priority to the clean up of hazardous waste sites in minority communities. They further urged the President to issue an executive order requiring environmental equity as well as require the EPA to implement a separate office to deal solely with the issue.⁴⁰

The methodology used in the 1987 study, comparing census data arranged by zip codes, became the standard for further equity studies. Demographic and income data were collected from the population surrounding hazardous waste sites and compared to census tracts from areas where there were no hazardous waste sites. The 1987 study was revised in 1994 and showed an increase in environmental inequities. The study reported that the percentage of minorities living near hazardous waste facilities rose from 25 percent in 1987 to 31 percent in 1993.⁴¹ Many environmental justice advocates believe that these findings are a clear indication that environmental concerns have reached the agenda set by the civil rights movement. Upon publishing the findings, the Commission's executive director, Reverend Ben Chavis stated:

Race is a major factor related to the presence of hazardous wastes in residential communities throughout the United States. As a national church-based civil rights agency, we believe that the time has come for all church and civil rights organizations to take this issue seriously. We realize that involvement in this type of research is a departure from our traditional protest methodology. However, if we are to advance our struggle in the future, it will depend largely on the availability of timely and reliable information.⁴²

² The UCC study did not define "communities".

³ Three out of five African Americans live in communities with abandoned toxic waste sites.

⁴ The UCC study failed to describe exactly how reliable race was in predicting the presence of a hazardous waste site.

According to “environmental justice” advocates, the fact that the wealth of a community is not nearly as good a predictor of hazardous-waste locations as is the ethnic background of the residents reinforces the conclusion that racism is involved in the selection of sites for hazardous-waste disposal.⁴³

In 1992, the National Law Journal published its findings of a study in which the enforcement of environmental laws in minority areas, namely the Resource Conservation and Recovery Act (RCRA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), also known as Superfund were analyzed. A more in depth study of these major environmental laws will be discussed in chapter three. The Study investigated the EPA’s civil court case docket and performance record at 1,177 Superfund sites. The study showed that (1) penalized environmental polluters in minority communities paid about half as much in fines as polluters in white communities⁵; (2) abandoned hazardous waste sites took over 20 percent longer to be placed on the National Priorities List (NPL) in minority areas than similar sites in white areas; (3) The EPA was 12 to 42 percent slower cleaning up NPL sites in minority communities than in white areas; and (4) the EPA opted for ‘containment’ over ‘treatment’ of Superfund sites 7 percent more often in minority areas while in white communities treatment was chosen 23 percent more often than containment. The authors of the findings maintained that this final point was a clear indicator of environmental racism because treatment, rather than containment, is the preferred method of cleaning up Superfund sites according to the EPA.⁴⁴

Theories of Causation

Social scientists, economists and proponents of the Environmental Justice Movement have debated the issue over what causes environmental inequities in minority communities. While environmental justice advocates purport the idea of purposeful discrimination in the siting practices of LULUs, economists and some social scientists maintain that it is simply a product of market dynamics. Kent Jeffreys, a Senior Fellow in the Washington office of the National Center for Policy Analysis (a think tank headquartered in Dallas, Texas) writes concerning this argument:

Poor people and minorities do not necessarily attract polluters merely because they are poor or people of color or because the polluters are racists. Low-cost land attracts industry for some of the same reasons that it attracts poor people. In many industrial regions, including most of those now condemned as physical evidence of ‘environmental racism’ minorities were given their first access to the American Dream. Employers motivated by the capitalistic urge to make a profit, regardless of their personal racism or lack thereof, hired the best workers they could find at the lowest wages they could pay. Regardless of our current attitudes, this often worked to the benefit of the economically disadvantaged, especially minorities, giving them their first opportunity to enter the industrial workplace and achieve a decent standard of living. In addition, workers preferred to live close to their place of employment, for obvious reasons. Thus, they moved to the general vicinity of the pollution sources. In fact, this century has witnessed the largest internal migration in American history as rural born African Americans moved to industrial urban areas. Even with the pollution and the low-wage jobs, their lives were greatly improved. How ironic that the very economic forces that eventually spawned the civil rights movement would be condemned as environmental racism today.⁴⁵

Jeffreys’ comments illustrate the “cause-and-effect” relationship between hazardous waste sites and the large minority population in these areas. According to him, the reason for environmental inequities is simple: landfills and incinerators are unattractive and they bring down property values. These factors drive

⁵ The NLJ study does not specify whether socioeconomic factors influenced the courts’ decision.

out those that can afford to move and makes the properties more affordable for those with a lower income to move in. Those communities that are on the lower end of the economic scale tend to be minorities.

While some minority groups are fighting to rid their communities of these hazardous waste sites, others are petitioning for new ones to be built. Minority and impoverished communities find it difficult to oppose the siting of a facility that offers the possibility of immediate economic relief.⁴⁶ Additionally, people with less economic means simply cannot afford the "luxury" of declining available work, regardless of the environmental risks associated with the job. The down side of those employed at hazardous waste sites is that when jobs are displaced due to pollution control costs and other EPA compliance standards, those with less seniority are the ones who will lose their jobs.⁴⁷ Minorities typically make up a disproportionately large percentage of those employees with lower seniority, thus making the issue of environmental equity a "double-edged sword."⁴⁸ According to Bullard, industries oftentimes use the potential for expanding the local tax base as a selling point and incentive to gain entry into a community. Charles Streadit, president of Houston's Northeast Community Action Group addressed this issue of economic versus environmental trade-offs:

We need all the money we can get to upgrade our school system. But we shouldn't have to be poisoned to get improvements for our children. When my property values go down, that means less for the schools and my children's education . . . A silent war is being waged against black neighborhoods. Slowly, we are being picked off by the industries that don't give a damn about polluting our neighborhoods, contaminating our water, fouling our air, clogging our streets with big garbage trucks, and lowering our property values. It's hard enough for blacks to scrape and save enough money to buy a home, and then you see your dream shattered by a garbage dump . . . No amount of money can buy self respect.⁴⁹

Another explanation that is used to understand environmental inequity is the "Not-In-My-Backyard" (NIMBY) syndrome. The phrase is used to describe the opposition of individuals who oppose the siting of any environmentally harmful facility anywhere near the property they own or reside in.⁵⁰ Affluent neighborhoods routinely use lawsuits to block unwanted land uses, while the poor who cannot afford lawyers, are forced to put up with all kinds of nonresidential uses near their homes. Decisions as to where hazardous waste sites, radioactive storage sites, and other LULUs are to be located, are commonly made by governmental bodies, such as city councils, planning departments, or zoning committees.⁵¹ According to Bullard, it is not unusual for land-use decisions to come from zoning boards that are heavily influenced by developer and real estate interests. Low-income and minority neighborhoods oftentimes find themselves in the middle of expanding industrial markets.⁵² These same neighborhoods lack the political clout to direct the expansion away from their neighborhoods, especially when they do not have representation on the zoning boards. Often times, these local bodies consist of a disproportionate number of the local "power structure", namely white males.⁵³

Market-based arguments offered by Jeffreys and industry representatives, maintain that their theories provide more appropriate explanations for the disproportionate environmental burdens placed on poor and minority communities, as opposed to the "environmental racism" argument. This type of explanation is perhaps one of the reasons that these hazardous waste industries have been able to successfully avoid legal liability. Under the American judicial system, businesses can only be held responsible for intentional acts of discrimination in the choosing of their waste sites. Whether they are intentional acts or not, the results of land-use decisions reveal status hierarchies of race and class, in which affluent whites are favored over the poor and minorities.⁵⁴ Proving intent is a burden that is placed on plaintiffs of "environmental racism" cases. It is one that has yet to be proven in environmental cases and is a subject that will be analyzed further in chapter two.

Notes

¹ Alice Kaswan, "Environmental Laws: Grist for the Equal Protection Mill," Colorado Law Review 70 (Spring 1999): 389.

² Patrick Novotny, Where We Live, Work and Play: The Environmental Justice Movement and the Struggle for a New Environmentalism (Connecticut: Praeger Publishers, 2000): 7.

³ Novotny: 8.

⁴ Jill E. Evans, "Challenging the Racism in Environmental Racism: Redefining the Concept of Intent," Arizona Law Review 40 (Fall, 1998): 1226.

⁵ Erica A. Sullivan, Environmental Justice: The Study of Hazardous Waste Sites in the State of Texas. MA Thesis, The University of Texas at El Paso, 2000: 15.

⁶ John Rawls, A Theory of Justice (Cambridge: Belknap P of Harvard UP, 1971): 11.

⁷ Brown v. Board of Education, 347 U.S. 483 (1954).

⁸ Peter W. Huber, Liability: The Legal Revolution and its Consequences. (New York: Basic Books Inc., 1988): 5.

⁹ Robert D. Bullard, Dumping In Dixie: Race, Class, and Environmental Quality (Boulder: Westview Press, 1990): 116.

¹⁰ Gale L. Carr, "Environmental Equity: Does it Play a Role in WTE Siting?" Journal of Hazardous Materials 47 (Spring 1996): 308.

¹¹ Bullard: 109.

¹² Robert D. Bullard, "The Threat of Environmental Racism" Natural Resources & Environment (Winter 1993): 23.

¹³ David E. Newton, Environmental Justice (Santa Barbara: Instructional Horizons, Inc., 1996): 4.

¹⁴ "Equity." Websters II New Riverside University Dictionary. 1984.

¹⁵ Gregory R. Roberts, "Environmental Justice and Community Empowerment: Learning from the Civil Rights Movement," The American University Law Review 48 (October 1998): 232.

¹⁶ Newton: 3.

¹⁷ Roberts: 233.

¹⁸ Bunyan Bryant, Environmental Justice: Issues, Policies, and Solutions (Boulder: Westview Press, 1992): 5.

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- ¹⁹United Church of Christ Commission for Racial Justice. Toxic Wastes and Race in the United States, A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites. New York: United Church of Christ, 1992.
- ²⁰United States Census Bureau. Online Internet. <http://www.census.gov>. January 24, 2001.
- ²¹Bullard, *Dumping in Dixie*: 44.
- ²² Personal Interview with Mark Harris, President of Harris Environmental Risk Management, Inc., November 20, 2000.
- ²³United States Environmental Protection Agency, Online Internet. <http://www.epa.gov/epahome/toxic.htm> November 28, 2000.
- ²⁴ Michael Fisher, "Environmental Racism Claims Brought Under Title VI of the Civil Rights Act", Northwestern Environmental Law Review 25 (Spring 1995): 296.
- ²⁵ Bullard, *Dumping in Dixie*: 36.
- ²⁶ Roberts: 233.
- ²⁷Newton: 50.
- ²⁸ United States General Accounting Office, *Siting of Hazardous Waste Landfills and their Correlation with Racial and Economic Status of Surrounding Communities* (1983).
- ²⁹Newton: 20.
- ³⁰United Church of Christ Commission for Racial Justice. Toxic Wastes and Race in the United States: A National Study of the Racial and Socioeconomic Characteristics of Communities with Hazardous Waste Sites. New York: United Church of Christ, 1987.
- ³¹Newton: 21.
- ³² Gale L. Carr, "Environmental Equity: Does it Play a Role in WTE Siting?" Journal of Hazardous Materials 47 (Spring 1996): 309.
- ³³ Liam Downey, "Environmental Injustice: Is Race or Income a Better Predictor?" Social Science Quarterly 79 No. 4 (December 1998): 769.
- ³⁴ Vicki Been, "What's Fairness Got to Do With It?: Environmental Justice and the Siting of Locally Undesirable Land Uses." Cornell Law Review (September 1993): 1014.
- ³⁵Robert W. Williams, "Environmental Injustice in America and its Politics of Scale." Political Geography 18 (1999): 62.
- ³⁶UCC Study (1987)
- ³⁷Richard J. Lazarus, "Pursuing Environmental Justice: The Distributional Effects of Environmental Protection." Northwestern University Law Review 87 (Spring 1992): 802.

³⁸Newton: 20-21.

³⁹UCC Study (1987).

⁴⁰Carr: 306.

⁴¹Carr: 307.

⁴² Bullard, Environmental Racism: 18.

⁴³ Novotny: 3.

⁴⁴Carr: 308.

⁴⁵Williams: 64.

⁴⁶Lazarus: 808.

⁴⁷Williams: 69.

⁴⁸Lazarus: 809.

⁴⁹Bullard, Dumping in Dixie: 94.

⁵⁰Newton: 253.

⁵¹Williams: 75.

⁵²Bullard, Dumping in Dixie: 86.

⁵³Newton: 33.

⁵⁴Bullard, Dumping in Dixie: 89.

Torts: The Common Law Remedy for Injuries

*The law is the witness and external deposit of our moral life.
Its history is the history of the moral development.*

-Oliver Wendell Holmes, Jr.

As our society continues to be driven by the exploration of technology, those who have been injured in the process are finding it increasingly difficult to place liability on those who cause environmental injuries. Society turns towards our judicial system to punish the perpetrators of environmental crimes, yet it is often difficult to prove violations in the courtroom. As corporations and technology continue to dominate our culture, questions surrounding injuries are becoming harder to answer. Who should be held responsible for the injuries caused by chemical waste and pollution? Should we as a society expect corporations to be held liable for injuries that are unforeseeable? Questions surrounding liability for injuries sustained and when it is appropriate to allow punitive damages are ongoing factors in the evolution of the judicial system. Often times, tort law is the only remedy for the private citizen seeking redress for injuries caused by environmental pollution. Torts is one of the oldest branches of law, and since its conception has become a popular tool for redressing injuries. This chapter will explore the history of the law of torts in an effort to explain the evolution of the courts' reasoning behind personal injuries.

The King's Court

England in the thirteenth Century used the King's Courts to redress their countrymen's injuries. By the time of Edward I, the development of torts was manifested in a concept known as "writ of trespass". In order to address compensation for injury, the writ required the plaintiff to show three essential elements: 1) that there has been an injury to the plaintiff's person or property in possession of the plaintiff, 2) that the injury was immediate and direct, and 3) that the injury resulted from an act of force.¹ In order to prove the third element, the plaintiff had to claim that he had been injured as a result of "force and arms" by the defendant. This concept later came to mean "any willful act done by a person, regardless of intent to harm the other person."² If the plaintiff could prove these three elements, he was given monetary damages in order to attempt to make him "whole." As society became more industrialized, people began to come into contact with each other more frequently, thus increasing the likelihood of injuries. The old law of trespass proved to be insufficient to address the rising needs of an urbanized society. As new questions in law arose, namely how, why and where the line of liability should be drawn, the courts began to redefine the law. These concerns were manifested in the case of *Scott v. Sheperd*, 2 Wm. Bl. 892, 96 Eng. Rep. 525 (1773), "The real question certainly does not turn upon the lawfulness or unlawfulness of the original act....[T]he true question is, whether the injury is the direct and immediate act of the defendant."³ Restrictions imposed on recoveries in law, discouraged petitioners to seek relief for their injuries, thus pressuring the courts to adopt further means of remedies.⁴

English Common Law

The inequities of the writ of trespass and its limited conception of what injuries may be remedied, forced the courts to create what we now refer to as the common law.⁵ The common law differs from statutory law in the sense that it is not made by a legislative body or written in codes and documents, but is made through judicial decisions. It is developed around cases previously decided by judges in a doctrine known as *stare decisis*, a policy of the courts to stand by precedent and not disturb the settled point.¹

¹ Black's Law Dictionary 6th ed., (St. Paul: West Publishing Co., 1990): 1406.

Subsequent cases, however, may reveal new and different facts and considerations, such as changing social or technological conditions. A common-law judge may depart from precedent and establish a new rule. This new decision then sets a new precedent as it is accepted and used by different judges in other cases. In this manner, common law retains a dynamic for change.⁶

The writ system disappeared under the *Common Law Procedure Act of 1852*. It was no longer necessary for the plaintiff to select a particular and recognized form of action. The injured party could now argue in his pleadings the relevant facts on which he based his allegations. The matter was then left up to the courts to determine whether or not a remedy could be granted.⁷ “Trespass on the case,” commonly referred to as “case,” was added to the original action in trespass and allowed recovery for consequential actions, rather than direct and immediate injury. The courts viewed the public as responsible for their own actions and consequently held people to act at their own peril. If an action caused an injury, theoretically, liability would almost always be against the party taking the action. This was a strict liability regime that remained in the courts until it was replaced by the fault principle of negligence. The move from strict liability to negligence operates in a way that shields business from liability during developing economic periods.⁸

Modern Tort Law and the Shift Towards Negligence

Oliver Wendell Holmes, Jr., wrote concerning the common law in the early 19th century, “The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”⁹ Holmes believed that the future of the law belonged to “the man of statistics and the master of economics.”¹⁰ Holmes’ theories were later proven when judges began to balance competing interests of society in their decisions during the industrial revolution. Economics drive industry and as industry became more prevalent in American society, the courts’ attitude toward holding defendants strictly liable for their actions changed in order to not impede the changing focus of the country.¹¹

The growth of industry and machinery coupled together with the rise of manufactured products and devices caused the former tradition of holding an injurer liable without fault to be replaced by a new formulation for liability based on negligence.¹² Negligence in law is the failure to use such care as a reasonable, prudent and careful person would use under similar circumstances.² The burden to prove negligence was fixed firmly on the plaintiff, and oftentimes this proved to be insurmountable. The leading case that illustrates the courts’ transition from strict liability to negligence is *Brown v. Kendall, 6 Cush. 292, 60 Mass. (1850)*. In *Brown*, a man accidentally hit his neighbor in the eye with a stick while trying to break up a fight between two dogs. In trespass this action should have given rise to strict liability, because there was a direct and immediate invasion of the plaintiff’s rights.¹³ Chief Justice Lemuel Shaw of the Massachusetts Supreme Court held, however, that there was no liability in the absence of some wrongful intent or negligence.¹⁴ The decision in *Brown* became the rule rather than the exception and, as William L. Prosser, the leading authority on the law of torts wrote, “the case is now uniformly followed.”¹⁵

The importance of *Brown* was that the court now recognized that it was not enough for a person to be injured, the injury had to be *foreseeable*. This proved to be beneficial to businesses and corporations, who became shielded from liability for unforeseeable injuries they might cause their workers or the consumer who bought their products. The shift from strict liability to negligence was a way of subsidizing technology in a growing industrial nation and thus nurtured the “machine-age.” The advent of the railroad industry for example, caused numerous injuries and deaths. The courts understood the importance of the railroads however, and despite the growing number of injuries, the courts changed tort law in a manner that enabled the system to expand and prosper.¹⁶ The point is illustrated in the case of *Wood v. Pennsylvania*

² *Black’s Law Dictionary* 6th ed., (St. Paul: West Publishing Co., 1990): 1032.

R.R. Co., 177 Pa. 306, 35 A. 699 (1896). The plaintiff sued the railroad for damages because while standing on the platform waiting for his train, a dead woman's body struck him and caused him injury. The plaintiff alleged that the train must have hit the woman as she was crossing the railroad tracks and thus was the cause of his injuries. The question posed to the court was whether the negligence of the defendant was the proximate cause of the plaintiff's injuries. The court ruled that the railroad was not liable because of the unforeseeability of the circumstance in which the plaintiff was injured. They defended their reasoning by stating:

The probable consequences of crossing a railroad in front of a near and approaching train is death, or serious injury.... He [the railroad engineer] knows death and injury are the probable consequences of his neglect of duty; therefore he gives warning. But does anyone believe the natural and probable consequence of standing 50 feet from a crossing, to the one side of a railroad, when a train is approaching, either with or without warning, is death or injury? Do not the most prudent, as well as the public generally, all over the land, do just this thing every day, without fear of danger?... [A]lthough it is possible a train may strike an object, animate or inanimate, on the track, and hurl it against them, such a consequence is so highly improbable that it suggests no sense of danger....He [the plaintiff] fails because his injury was a consequence so remote that defendant could not reasonably foresee it....

The court ruled against the plaintiff because the injury was unforeseeable and underlies today's toxic tort decisions. Although it is probable that a person will suffer from exposure to harmful pollutants, it is not necessarily foreseeable. This is due, in part, to the unknown effects of a person's exposure to certain toxins and the unforeseeability of future health problems.

The Rise of Duty of Care

The concept of man's duty to one another is an elusive one. Prosser himself described the concept from a legal perspective as he wrote:

There is a duty if the court says there is a duty; the law, like the constitution is what we make it. Duty is only a word with which we state our conclusion that there is or is not to be liability; it necessarily begs the essential question.... The word serves a useful purpose in directing attention to the obligation to be imposed upon the defendant, rather than the causal sequence of events; beyond that it serves none.¹⁷

Historically, the common law has been very weary of creating duties between parties.¹⁸ Law imposed duties of care began to increase however, as society became more intertwined. There are four elements in a negligence cause of action: duty, breach, causation, and injury. The defendant must have a "special" relationship that creates a duty of care to the plaintiff. The defendant must have breached that duty and by doing so caused an injury to the plaintiff. The injury can only be redressed if it was a foreseeable harm. This could be a physical injury, a mental injury or an economic injury. All of these elements must have occurred before an action in negligence can be presented to a jury. During the 19th century, a person was obligated to exercise care on behalf of others in a limited range of circumstances.¹⁹ With the onset of factories and urbanization however, people were exposed to each other in ways that they had not previously been. The advent of steam-powered transportation, for example, exposed individuals to each other in greater numbers and multiplied the likelihood of sudden debilitating injuries.²⁰ The growing number of factory workers in ill-equipped plants also contributed to the increase in duties of care.

The most recognized tort case involving the question of duty of care and the foreseeability of an injury is *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (1928). The plaintiff was injured through unusual circumstances, while standing on the platform awaiting the arrival of the train. While waiting, another train pulled into the station and two men ran towards it with one of them carrying a package under his arm. One of the men reached the platform of the car without mishap, however the other man carrying the package, jumped aboard the train and seemed unsteady, as if about to fall. An employee of the railroad trying to assist the passenger caused the package to fall onto the railroad tracks. The unmarked package contained fireworks that exploded and overturned some scales that subsequently fell upon the plaintiff causing physical and emotional injury. Speaking for a majority of four, the renowned Justice Benjamin Cardozo held that no liability existed because there was no negligence toward the plaintiff herself. Cardozo held that “Negligence, like risk, is thus a term of relation. Negligence in the abstract, apart from things related, is surely not a tort, if indeed it is understandable at all...proof of negligence in the air, so to speak, will not do.” Cardozo’s ruling meant that negligence was a matter of relationship between the parties founded upon the foreseeability of harm to the person injured. Thus, the defendant’s conduct was not a wrong towards the plaintiff merely because negligence was directed towards someone else. More concisely, Palsgraf must “sue in her own right for a wrong personal to her, and not as the vicarious beneficiary of a breach of duty to another.”³ Virtually immediately after the Palsgraf decision, the Restatement of Torts accepted the majority view in that case--that there is no duty, and hence no negligence and, therefore, never liability to the “unforeseeable plaintiff.”²¹

Despite the increased rise of duty the law continued to show a tender regard for employers and the emerging industry.²² Beginning in the early 20th century, the workplace became the setting for injuries and oftentimes death to employees. Contracts of employment often required the worker to assume the risks of his employment, and in the event that there was no such assumption, the courts often found that the employee had assumed the risks simply by working there.²³ The Mad Hatter depicted in *Alice in Wonderland* was a reflection of environmental diseases that were commonplace in the hat-making industries. The term “Mad Hatter” dates from the 19th century when felt hatmakers showed effects of mercury poisoning resulting from their exposure to mercury salts during the production process. A common saying among the workers was: “Furriers must pay with their health for the privilege of working.”²⁴

The courts insulated the workplace from liability in an effort to encourage the economy by providing more jobs. The “fellow-servant” rule protected employers from liability in cases where one employee injured another. The injured employee could not recover damages from his employer, unless the employer was found to be negligent in his actions.²⁵ The burden to prove negligence was firmly fixed on the plaintiff who asserted it, and often times this was an insurmountable burden. In an action for negligence, contributory negligence of the plaintiff, his assumption of risk either expressed or implied, and the fellow servant rule were all potential obstacles to his claim. In the event that the injured plaintiff was negligent, he could not recover irrespective of whether the defendant was also negligent.²⁶

Once industry had grown and matured court opinions increasingly began to reflect the needs of the consumer. Previously, contract law had been used as a way to insulate manufacturers of products from liability for injuries that their products caused to consumers. Manufacturers of defective products, for example, were only held liable for damages that their products caused if a contractual relationship between the manufacturer and the injured party existed.²⁷ This was known as the “privity doctrine.” This doctrine provided immunity for the manufacturer from tort liability, simply because he owed no duty of care to a person that he did not know or deal with. In 1916, Cardozo caused the downfall of the privity doctrine in a brilliant opinion he wrote in *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916):

If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be

³*Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then irrespective of contract, the manufacturer of this thing of danger is under duty to make it carefully.²⁸

Cardozo's decision creatively eliminated the protection privity afforded to manufacturers. The privity rule gave a young industry the protection it needed from liability in order to thrive. As industry matured and grew, the balance for liability tipped in favor of the individual consumer causing the privity rule to crumble, thus reflecting another shift in the courts' perspective of tort liability.²⁹

Common Law Nuisance

The courts have been addressing issues pertaining to the environment since the early nineteenth century. A doctrine of law referred to as "nuisance" was the starting point in the evolution of environmental law. Prosser described the meaning of nuisance as "incapable of any exact or comprehensive definition." Prosser further wrote, "There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance'. It has meant all things to all men, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie."³⁰ The courts first used the language of "nuisance" in English law to describe interferences with the rights to the free use of land. Offenses that were recognized as "public nuisances" gradually enlarged to include any "act not warranted by law, or omission to discharge a legal duty, which inconveniences the public in the exercise of rights common to all Her Majesty's subjects."³¹ It was not until the sixteenth century that the court recognized that a private individual could have a civil action in tort based upon the denial of his rights in the use or enjoyment of land.

In tort law, there are two types of nuisances, private and public, each of which can be litigated on three bases: intentional conduct, negligence, or strict liability.³² A private nuisance is a civil wrong that affects a single individual or a definite small number of persons in the enjoyment of private rights not common to the public. A public nuisance is an offense that interferes with the rights enjoyed by citizens as a part of the public. In order to constitute a public nuisance, the nuisance must affect a considerable number of people or an entire community or neighborhood.³³ These offenses could include anything from the obstruction of a highway, smoke from a lime-pit or indecent exposure.³⁴ Both private and public nuisances require that substantial interferences with the interests involved have occurred. In the case of *Wade v. Miller, 188 Mass. 6, 73 N.E. 849 (1905)*, the courts defined an interference of a plaintiff's rights to mean "the ordinary comfort of human existence as understood by the American people in their present state of enlightenment."³⁵ The case surrounded the question of whether poultry odor and noises could be regarded as offensive to the ordinary citizen. The courts held that these "nuisances" were not regarded as offensive and thus did not interfere with a person's right to the enjoyment of land.³⁶

In subsequent cases, the courts began to balance the benefits of the activity against its harms.³⁷ In *Whalen v. Union Bag & Paper Co., 208 N.Y. 1, 101 N.E. 805 (1923)*, the court addressed the problem of disparity in economic consequences arising out of "nuisance" complaints. The case involved a pulp mill that had polluted a stream that ran through the plaintiff's farm. The mill had invested over a million dollars in production, while the damage suffered by the plaintiff was small in comparison. The presiding Judge Werner noted, "Although the damage to the plaintiff may be slight as compared with the defendant's expense of abating the condition, that is not a good reason for refusing an injunction."³⁸ The court ruled in favor of the plaintiff and thus followed the rule of law that "whenever the damage resulting from a nuisance is found not unsubstantial, the injunction will be granted."³⁹ This was an important decision in the courts because economic disparities would no longer be reason enough to deny the plaintiff injunctive relief.

Boomer v. Atlantic Cement Company, Inc.

The classic case of *Boomer v. Atlantic Cement Company, Inc.*, 26 N.Y.2d 219, 309 N.Y.S. 2d 312, 257 N.E (1970), serves as a case study of private intentional torts, defenses, strategies and environmental remedies in the law.⁴⁰ It is presented here in order to develop the ecological, economic, and political undertones that are present in most environmental cases. In *Boomer*, the victims of air pollution brought suit against a factory that caused cement particles to blow onto their property. The plaintiffs sought an injunction and damages due to alleged injury to property from dirt, smoke and vibration brought about by the factory. The court found for the plaintiffs on the count of “nuisance,” and damages were allowed, however, the injunction was denied on the grounds that it would “produce great...public hardships.”⁴¹

The refusal to allow the plaintiffs an injunction in *Boomer* was a departure from the rule established in *Whalen*. If the court followed the *Whalen* rule the plant would have to close down. The court chose instead to grant permanent damages to the plaintiff in lieu of the injunction. In modern environmental tort cases, the granting of injunctions is not automatic. The courts balance the equities (weighing the impact of the injuries to respective parties involved in litigation) involved in cases.⁴² If the plaintiff is able to establish the defendant’s liability, however, the court will award compensatory damages. These damages include, but are not limited to, recovery for health and property damage, lost profits and earnings, and pain and suffering. In the distribution of benefits and their related burdens, discrimination can and does arise, as is discussed in subsequent chapters.

The decision in *Boomer* to deny the requested injunction and instead award damages became the trend in corporate liability cases. However, in many of these environmental injury cases, money that is awarded is hardly a sufficient remedy for the victims. Furthermore, because science and the medical profession still do not understand all of the various health risks involved in toxic exposure, those who will have adverse side effects from the poisons will not be compensated for future illnesses. Because the law requires an injury to have already taken place, those who have been exposed to toxins and other deadly poisons that do not portend imminent injuries have no recourse. Some types of toxic exposure may take years to manifest its harmful effects in the body. *Boomer* involved property damages but modern environmental cases present a list of other damage claims, including physical illnesses, violation of aesthetics, fear of cancer and other health risks posed to the plaintiffs.⁴³

Classification of Torts

Prosser classified torts based on three grounds: (1) the intent of the defendant to interfere with the plaintiff’s interest; (2) negligence; and (3) strict liability, or liability without fault. **Intentional torts** require judgments to be made about what is on the mind of the defendant at the time of the action. In order to punish the defendant, the court must find that he intended to do what he is accused of. **Negligence**, as discussed previously, can arise when a defendant performs actions in a manner that does not employ reasonable care. What is *reasonable*, however depends upon the circumstances involved. Negligence can also arise out of a failure to maintain control of an item, person, or animal. It can also be inferred from a particular set of facts in a case. Finally, negligence can be determined through economic calculation. Economic analysis in tort law has had enormous influence on how liability is distributed. **Liability without fault**, or strict liability, means that a defendant is held liable for injury caused regardless of whether or not he was acting reasonably or exercising reasonable care. Even though the theory of negligence had been introduced, the courts still felt it necessary to hold people strictly liable for their actions. Certain activities are so inherently dangerous that the person undertaking them assumes full responsibility for consequences that may arise. The uses of explosives or the transportation of ultra hazardous materials, for example, are activities that draw strict liability when they cause injury.⁴⁴

The most recognized torts under this classification and the defenses that apply to them are included in the outline on the following page

Causation

As previously discussed, the plaintiff in a tort claim must demonstrate a causal link between the

defendant's actions and the plaintiff's injuries. As our environment becomes more technical the issue of causation becomes more difficult to prove, especially in environmental injuries. For example, as the elements in our atmosphere and water become more toxic, how do victims single out which factor caused the illness? Does the corporation that is spewing toxins into the atmosphere owe a duty of care to the surrounding communities? If it does, then how does a plaintiff prove that the corporation's pollution is the cause of his injuries? In the event that the injury is caused by more than one person, how does the court determine who will bear the burden of cost?

The leading case that illustrates the difficulties in proving causation is *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948). The case involved three friends in a hunting accident. Both defendants shot at a quail in the direction of the plaintiff. One shot struck the plaintiff in the eye and another in his upper lip. The problem in this case was that there was insufficient evidence to prove which defendant had been guilty of negligence, therefore the court ruled that both defendants were jointly liable. The rule that was established in *Summers*, was that in the event that two or more parties act negligently towards a plaintiff and are unable to prove which one caused the injury, all parties are liable. The importance of this case is that the burden of proof is now shifted from the plaintiff to the defendant in order that the "innocent wronged party should not be deprived of his right to redress..."⁴ In a civil liability case, the burden of proof for the plaintiff must show that the defendant "more probably than not" committed the acts as alleged in the pleadings. In *Summers*, the facts of the case make it impossible for the plaintiff to meet that burden, as each defendant is only fifty percent likely to have caused plaintiff's injuries. The holding in *Summers* set precedence and exacted enormous social and monetary consequences in a case litigated thirty-two years later.

Sindell v. Abbot Laboratories

The case of *Sindell v. Abbot Laboratories* 449 U.S. 912 (1980), involved a woman who brought a class action suit against eleven drug companies who manufactured diethylstilbesterol (DES), a drug given to pregnant women to prevent miscarriage. In 1947, the Food and Drug Administration (FDA) authorized the marketing of DES on an experimental basis, with a requirement that the drug contain a warning label

TORTS

WILLFUL (INTENTIONAL)	NEGLIGENCE	ABSOLUTE LIABILITY (WITHOUT FAULT)
1. Trespass to land or chattels 2. Battery 3. Assault 4. False Imprisonment 5. Conversion 6. Deceit 7. Defamation Libel	Basic Elements: -Duty -Breach of Duty -Direct Causation -Injury (Negligence, proximate cause and damages)	1. Activity involving a high degree of danger 2. Keeper of ferocious animals 3. Employer's liability (Workmen's Compensation) 4. Some cases of product

⁴ *Summers v. Tice* 33 Cal.2d 80, 199 P.2d 1 (1948).

<p>Slander 8. Malicious prosecution 9. Invasion of privacy 10. Nuisance 11. Interference with economic relations 12. Infliction of emotional distress</p> <p><u>DEFENSES*</u></p> <p>(1) Privilege (2) Mistake (3) Consent (4) Self Defense, defense of others (5) Defense of property and property of others (6) Necessity (7) Recaption</p> <p>*These defenses are a form of privilege which will keep the defendant's conduct from being wrongful</p>	<p>DEFENSES: a. No negligence b. Contributory negligence</p> <p>EXCEPTIONS: Last clear chance Gross negligence of defendant Discovered peril Comparative negligence</p> <p>c. Assumed risk d. Contributory negligence e. Unavoidable accident f. Sudden Emergency g. Fellow servant rule</p>	<p>liability</p> <p><u>DEFENSES*</u> consent Act of God Misuse or change of product</p> <p>*One may always defend by challenging the factual basis of the plaintiff's suit: e.g., an activity did not involve a high degree of danger; an animal inflicting harm was not ferocious or was not owned by the defendant; the worker's compensation claimant was not the defendant's employee or the employee was not acting in the scope of his employment when the injury occurred.⁵</p>
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to that effect. DES may cause cancerous vaginal and cervical growths in the daughters exposed to it before birth, because their mothers took the drug during pregnancy. In 1971, the FDA ordered the defendants to cease marketing and promoting DES, and to warn physicians and the public that the drug should not be used by pregnant women because of the danger to their unborn children. Nevertheless, defendants continued to advertise and market the drug as a miscarriage preventative on an unlimited basis rather than as an experimental drug, and they failed to warn of its potential danger. As a result of the DES ingested by her mother, the plaintiff developed a malignant bladder tumor. She suffered from adenosis and must constantly be monitored by biopsy or colposcopy to insure early warning of future malignancy. The issue for the court to decide was whether a plaintiff injured as a result of a drug administered to her mother during pregnancy, who knows the type of drug involved but cannot identify the manufacturer of the precise product, hold liable for her injuries, a maker of a drug produced from an identical formula.

The difference between this case and *Summers*, is that all parties who could have been responsible for the injury were the defendants. In *Sindell*, there were over 200 drug companies that made DES, any of which might have manufactured the injury-producing drug. The court held that joined defendants need only produce a substantial percentage of the product in question to enable the plaintiffs to shift the burden to defendants to show they were not the cause of the injury to the plaintiff. The importance of this case is that because of the precedent set by *Summers*, the burden of proof is now shifted to the defendants to prove that they were not liable for the plaintiffs' injuries. This shift represents the courts' realization that in a technological society, it is sometimes difficult to identify the tort-feasor conclusively, however, the case is not followed in all jurisdictions, and is disfavored by most courts.

⁵ Table is a compilation of tort outlines provided by Prosser's classification of torts, emanuel law outlines, and excerpts from Hudspeth's Cases on Torts.

A Civil Action: The Case in Woburn

Although *Summers* highlighted the difficulties in proving causation where defendants were easily identifiable, the case of *Anderson v. W. R. Grace Co.* MA 628 F. Supp. 1219 U.S. Dist.(1986) illustrates these difficulties on a larger scale much like *Sindell*: one in which the defendants become harder to identify. In 1982, six families in Woburn, Massachusetts, filed a lawsuit against the plant of W. R. Grace Co., the John J. Riley Tannery Co., Beatrice Foods Co., and other unnamed defendants, alleging that chemicals dumped by those defendants in nearby wells, had reached the plaintiffs' drinking water, causing leukemia in members of those families. The judge presiding over the case, Walter Skinner, ruled that in the first phase of the trial, the plaintiffs would have to show that the wells had become contaminated as a result of actions by Grace and Beatrice and that the contamination had resulted in leukemia and the other illnesses alleged in the suit.⁴⁵

Following a 78-day trial, the judge dismissed the charges against Beatrice based on the plaintiffs failure to show a causal relationship between them and the contaminated wells, Grace however was shown to be at fault. Grace later agreed to an \$8 million settlement with no admittance of wrongdoing on their part.⁴⁶ Several of the plaintiff's requests for damages were denied based on issues of causation and the idea of possible future injuries:

To view the risk of a future illness as part of damages is to ignore the question of whether a cause of action has occurred. Defendants argue that the cause of action for any future serious illness, including leukemia and other cancers, has not yet accrued because the injury has not yet occurred. The record is insufficient to determine whether leukemia and other cancers are part of the same disease process as the other illnesses alleged to have resulted from exposure to the contaminated water.... A further reason for denying plaintiffs' damages for the increased risk of future harm in this action is the inevitable inequity, which would result if recovery were allowed. To award damages based on a mere mathematical probability would significantly under compensate those who actually do develop cancer and would be a windfall to those who do not.... In such a case, the defendant would overcompensate the injured class.⁴⁷

Jan Schlichtmann, who had represented the Woburn families, was forced to file personal bankruptcy and later handed the case over to the EPA for further evaluation.⁴⁸ The details of the Woburn case were documented in a best selling novel and later made into a movie titled, "A Civil Action."

The Woburn case is presented here to illustrate the point that the issue of causation as it relates to injuries caused by toxic chemicals is one that is both difficult and costly to prove. Schlichtmann's firm took the Woburn case on a contingency fee basis. The high costs of expert testimony, scientific research and legal expertise literally left Schlichtmann and his partners bankrupt, yet after seven years of legal maneuvering and millions of dollars spent on attorney fees, scientific tests and financial settlements, not one of the 28 surviving plaintiffs were ever given the opportunity to take the witness stand and tell their story to a jury.⁴⁹

The difficulties involved in winning an environmental injury case, leads one to ask, "how much more of an uphill battle does the "environmental justice movement" face?" Based on the concepts that have been discussed in this chapter, the plaintiffs of "environmental racism" must first prove the elements of negligence; duty, breach, causation and injury. They then must be able to prove *intentional* discrimination with regard to the siting practices of chemical waste companies, which is possibly even more difficult than proving causation. As illustrated in Woburn, in the environmental law context, substantial resources are generally required to discover a violation of an environmental quality standard. It is even more costly to bring an enforcement action against the violator and attempt to monitor future violations. State governments have proven unwilling or unable to commit the resources or efforts to ensure such compliance.⁵⁰ Finally, the "environmental justice" plaintiffs must convince a law firm with resources to take their case on a contingency basis. This proves to be difficult, however, because of the virtually

limitless resources of large corporations and few law firms are willing to invest the time and money it takes to litigate against them.

As mentioned above, the Woburn case was finally turned over to the EPA which had the resources to reexamine the case. The EPA ordered the cleanup of the contaminated water in Woburn, which would take an estimated fifty years to complete at a cost of over \$69.4 million. They filed suit against both Grace and Beatrice and successfully recovered the cleanup costs.⁵¹ However, the parents of the Woburn victims were not seeking monetary damages. The real purpose behind their lawsuit was contrition on the part of these toxic polluters for the deaths of their children, which they have yet to receive. The people of Woburn are not unique in their treatment by the legal system. The reason that they were able to get as far as they did was due to the determination of their attorney. After nine years of fighting for “justice,” Schlichtmann, obsessed with the case, ultimately lost his practice, his home and his belief in the system.⁵²

Unlike statutorily defined regulations, the common law consists of broad principles that generally permit adjustment based on the circumstances, which establishes a fair starting point. Uniform application of a detailed rule, however, will almost always favor one group over another. Universal requirements that leave no room for adjustments are almost never fair, even when the sole point is to provide fairness.⁵³ Victims of environmental contamination, however, must rely on common theories of liability in order to recover damages as a result of toxic waste contamination for injuries, because there simply is not a statutory remedy. The environmental justice plaintiffs have had to rely on civil rights legislation, the Equal Protection Clause of the Fourteenth Amendment and both federal and state environmental laws. The creation of the EPA, environmental statutes and their role in modern environmental tort cases are discussed at length in the following chapter.

Notes

¹L. B. Curzon, English Legal History, 2nd Edition (Great Britain: The Chaucer Press, 1979) 252-258.

²Curzon: 256.

³*Scott v. Sheperd*, 2 Wm. Bl. 892, 96 Eng. Rep. 525 (1773).

⁴Leif Carter et al., New Perspectives on American Law: An Introduction to Private Law in Politics and Society. (North Carolina: Carolina Academic Press, 1997) 207-212.

⁶Walter F. Murphy et al., Courts, Judges, and Politics: An Introduction to the Judicial Process, 4th ed. (New York: Random House, 1986): 3.

⁷Curzon: 253.

⁸Carter: 215.

⁹Oliver Wendell Holmes Jr., The Common Law. (Boston: Little, Brown, 1881): 1.

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- ¹⁰Richard A. Posner, The Essential Holmes. (Chicago: The University of Chicago Press, 1992): 128.
- ¹¹Carter: 213.
- ¹²Murphy: 5.
- ¹³Carter: 214.
- ¹⁴William L. Prosser, Handbook of the Law of Torts (Minnesota: West Publishing Co., 1964): 145.
- ¹⁵Prosser: 145.
- ¹⁶Carter: 236.
- ¹⁷Johnson et al., Studies in American Tort Law. (Durham: North Carolina Academic Press, 1994): 217.
- ¹⁸Carter: 224.
- ¹⁹Johnson: 218.
- ²⁰C. M. Hudspeth, Cases on Torts (A Baker's Dozen). 2nd Edition (Houston: Gulf Publishing Co. 1976): 3.
- ²¹Johnson: 223.
- ²²Hudspeth: 5.
- ²³Hudspeth: 7.
- ²⁴Helen E. Sheehan et al., Toxic Circles. (New Brunswick: Rutgers University Press, 1993): 47.
- ²⁵Carter: 253.
- ²⁶Hudspeth: 7.
- ²⁷Hudspeth: 15.
- ²⁸*MacPherson v. Buick Motor Co.*, 217 N.Y. 382 (1916): 14.
- ²⁹Carter: 254.
- ³⁰Prosser: 592.
- ³¹Prosser 593.
- ³²Zygmunt B. Plater et al., Environmental Law and Policy: Nature, Law, and Society 2nd Edition (Minnesota: West Publishing Co. 1998): 158.

³³George C. Christie et al., Cases and Materials on The Law of Torts 3rd Edition (Minnesota: West Publishing Co. 1997): 976.

³⁴Prosser: 597.

³⁵Hudspeth: 17.

³⁶Prosser: 599.

³⁷Christie: 971.

³⁸*Whalen v. Union Bag & Paper Co.*, 208 N.Y. 1, 101 N.E. 805 (1923).

³⁹Christie: 967.

⁴⁰Plater: 157.

⁴¹*Boomer v. Atlantic Cement Company Inc.*, 26 N.Y.2d 219 (1970).

⁴²Thomas P. Sullivan, ed., Environmental Law Handbook. 14th ed. (Maryland: Government Institutes, Inc., 1997): 11.

⁴³Plater: 162-167.

⁴⁴Carter: 216-217.

⁴⁵*Anderson v. W. R. Grace Co.* MA 628 F. Supp.(1986).

⁴⁶Jonathan Harr, A Civil Action. (New York: Random House, Inc., 1996): 451.

⁴⁷*Anderson v. W. R. Grace Co.*, MA 628 F. Supp. (1986): 31.

⁴⁸Harr: 491.

⁴⁹Harr: 492.

⁵⁰ Richard J. Lazarus, "Pursuing Environmental Justice: The Distributional Effects of Environmental Protection." Northwestern University Law Review 87 (Spring 1992): 816.

⁵¹Lazarus: 817.

⁵²Harr: 492.

⁵³Philip K. Howard, The Death of Common Sense. New York: Warner Books Inc., 1994: 34.

The Courts Shift from A Retrospective to Regulatory Ideology

“...it must be borne in mind that the courts do not sit, nor are they empowered, to resolve every dispute that anyone may wish to bring before them.”

-U.S. District Judge Robert Schnacke

San Francisco Tomorrow v. Romney, 4 ERC 1065 (1972)

As modern environmental cases became more frequent and complex, common law torts gave way to statutorily defined causes of action. The creation of these environmental statutes and their role in modern environmental cases are the focus of this chapter. With the rise of the industrial revolution, America began to pay closer attention to the social costs of reckless, unregulated natural resource use.¹ The rapid settlement of cities, the growth of factories, the increase of urban living and an unparalleled wave of immigration from Europe, created social problems that forced policy makers to acknowledge the existence of social costs that had not previously existed.² Water supply and sewage disposal could not keep up with various cities' expansion and due to the natural inclination of injured parties to seek relief through litigation, the courts were the first to respond to twentieth century water pollution.³

Early Attempts of Environmental Regulation

The first legislative bodies to take action in the fight against air pollution were the large industrial municipalities. People considered “dirty air” a local problem rather than a regional or national concern and thus relied on their own cities to fix the problem.⁴ Air pollution ordinances that were enacted by city councils traditionally fell into three categories. Among the most common were ordinances that stated; (1) the emission of dense smoke from any chimney or smokestack within the city was a public nuisance, and (2) those who caused the emission of this smoke were liable to a fine, not to exceed \$100.⁵ Although the ordinance typically declared the emission of thick, dense smoke a public nuisance, public officials were not empowered to locate or abate these nuisances. These early efforts of the municipalities to regulate air pollution failed. Jan Laitos, in his 1975 article on air pollution cited three specific reasons for the failure of the early ordinances: (1) the industries that externalized their costs in the form of pollution continued to grow in both size and political influence. These industries ultimately began to dominate local governments through their control over jobs and municipal tax bases, as well as common law courts through their enhanced access to information, legal assistance, and scientific experts; (2) there was comparatively little scientific evidence to tie pollution, especially toxic pollution, to specific public health threats; (3) attempts to control pollution through municipal ordinances and judicial decrees were primitive and ineffectual. The ordinances were incapable of dealing adequately with transboundary impacts, as well as multiple and uncompromising polluters.⁶

Due to the failure of local governments and common law courts to deal adequately with the problem of modern pollution, state regulatory systems developed. These early state efforts also proved to be ineffective in dealing with pollution. Mid-century pollution control statutes were described as “review-and-permit” statutes.⁷ In 1949 Michigan adopted the **Michigan Water Resources Commission Act**, which called for the polluter to furnish information about its anticipated discharge to a Water Resources Commission that had been provided for in the statute. The commission would then review the discharge and issue a permit that included restrictions on the discharge. The act further stated that pollution would not be permitted if it would “injure public health and welfare or the aquatic ecosystem.”⁸ The act also added “any pollution which is deemed by the commission to be unreasonable and against public interest” was prohibited under §323.5. The importance of highlighting this example of mid-century pollution control is to understand the importance of interpretive standards. The restriction imposed by the 1949 statute was vague and open to interpretation.⁹ What exactly constituted “injurious to the public health and

welfare”? Although the commission recognized the need for precise definitions, they concluded that only those who provided the clearest cases of injury would be defined as violators.¹⁰

Despite the shortcomings of the **Michigan Water Resources Commission Act**, it was “pioneer legislation” in the sense that it applied to both ground water and surface water.¹¹ Pollution control laws, both past and present rarely take on ground water contamination. Furthermore, the law addressed water quantity concerns in the environmental effects of diminished stream flow as well as pollution issues.¹² As pollution became an increasing problem, environmental lobbyists became a powerful political voice and beginning in the late 1960s, major pollution control statutes emerged from state legislatures, as policy makers began to look towards the states for relief.

Environmental Legislation

As environmental cases began to become more complicated, activists and legislators began proposing bills that eventually became public statutes. The migration from private to public nuisances exploded onto the scene in the late 1950’s as pressure for a more *ad hoc* way of handling problems increased.¹³ Traditionally, the law was designed as a retrospective way of handling injuries. In personal injury law, an injury must have already occurred before it can be remedied in the courts, unlike equitable actions. With industry and technology becoming so vital to American society, the rise of toxic torts forced the courts to shift towards a more preventative shift. An outbreak of lawmaking concerning pollution and the environment occurred at the national level during the 1960s and 1970s. During this time period some of the most important environmental regulatory statutes were enacted.

Environmental law is dominated by legislation. The principal sources of federal environmental law are statutes enacted by Congress, regulations enforced by the EPA and interpretive decisions handed down by the courts.¹⁴ As environmental cases became increasingly more complicated, activists and legislators began proposing bills that eventually became public statutes. The national statutes, as well as a larger body of regulations promulgated by the EPA constitute a rather impressive system of national regulation known to American law. Depending on the Presidential agenda, environmental legislation can be amended by adding stricter regulations to what some environmentalists refer to as “weak” legislation.¹⁵ Today, because of the impact of these environmental regulations, virtually all discharges into the land, water or air, require either direct or indirect permission from the government.¹⁶ The regulations that have had the most dramatic impact on environmental protection are listed below along with the penalties for violation:

Federal Food, Drug, and Cosmetic Act (FDCA), 21 U.S.C.A. §301 et seq. (1938)

In 1938 the Federal Food, Drug, and Cosmetic Act was passed and administered by the EPA. The act prohibits the introduction or delivery into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded. The act regulates the occurrence of pesticide residues on raw agricultural commodities. The Delaney Clause (§409) prohibits additives that cause cancer when ingested by humans or animals, and was interpreted to include slightly carcinogenic pesticide residues in processed food. The courts’ interpretation of the Delaney clause will be a source of tension for the EPA, as will be discussed later. Violators of the Federal Food, Drug and Cosmetics Act face both civil and criminal penalties.¹⁷

Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C.A. §135 et seq. (1972)

In 1947, Congress, primarily as a consumer protection statute to regulate the manufacture, sale, distribution and use of pesticides, passed The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The act required that pesticides be registered with the U.S. Department of Agriculture prior to marketing. Additionally, a label complete with the manufacturers’ name, address, brand and trademark of the product, net contents, ingredient list, warning statement to prevent injury, and directions for use were

required. In 1959, FIFRA was amended to further classify the regulations and uses of certain chemical agents. An amendment requiring that all pesticide labels contain a Federal Registration Number and caution words such as, “warning”, “danger”, “caution”, and “keep out of reach of children” was added in 1964. In 1972, FIFRA was again amended in order to enable the EPA to regulate pesticides in order to prevent unreasonable adverse effects on the environment. Other major amendments to FIFRA were passed in 1975, 1978, 1980, 1988, and 1996 and shifted the statutory emphasis from labeling and efficacy to health and the environment. The amendments also provided the EPA with greater flexibility in controlling dangerous chemicals. Prior to FIFRA, the only law regulating insecticides was the Federal Insecticide Act of 1910, which was designed to protect farmers from substandard products.¹⁸ FIFRA provides civil and criminal penalties (§ 14) but has no citizen enforceability provision.¹⁹

Clean Water Act, 33 U.S.C.A. §1251 et seq. (1972)

By the end of World War II, policies to control obvious forms of pollution were gradually developed at the local, state and federal levels. In 1948, Congress enacted the Federal Water Pollution Control Act, which established funding for basic water pollution research and cleanup programs. The federal government began assisting local authorities in the building of sewage treatment plants. The act was amended in 1972 in order to strengthen federal law on water pollution and is now referred to as the Clean Water Act (CWA). The act authorized the EPA to establish national standards on technology based industry and continued the requirements to set water quality standards for contaminants in surface waters. Under this act, it is unlawful for any person to dump any pollutant from a point source (e.g., factories and sewage treatment plants) into U.S. waters unless a permit is obtained. A wide range of civil and criminal penalties is included in §309 and several citizen suit provisions frequently used in environmental litigation are contained in §505.²⁰

Clean Air Act, 42 U.S.C.A §§7521 et seq. (1970)

The Clean Air Act is the leading example of modern environmental federal statutes. The act amended the Air Quality Control Act of 1967, after legislators realized that the original act had failed to achieve its’ goal of cleaning up the air.²¹ The act is a comprehensive Federal law that regulates air emissions from area, stationary, and mobile sources. In the common law, it was held that no one had an absolute right to be free from air pollution. The courts balanced the harmful effects of air pollution against the benefits of industrial activity and the costs associated with cleanup. This was the first time that mandatory air quality control had ever been legislated. This law authorized the EPA to establish the National Ambient Air Quality Standards (NAAQS) for the protection of the public’s health as well as the environment, and is instructed to give no weight whatsoever to economic considerations. By enacting this type of legislation, Congress declared that “every American has a statutory right to be protected from any known or anticipated adverse effects associated with air pollution, regardless of the cost.”²² The act became the model for future measures. It established national air-quality standards, gave states the responsibility for developing and enforcing plans to use these standards, and set up compliance schedules. The act was further amended in 1990 in order to meet modern environmental concerns such as acid rain, ground-level ozone, stratospheric ozone depletion and air toxins.²³

National Environmental Policy Act of 1969, 42 U.S.C.A. §4321 et seq. (1970)

Often referred to as the Magna Carta of environmental statutes, the National Environmental Policy Act of 1969 (NEPA) required an environmental assessment of all federally funded projects. It further required environmental impact statements to be prepared for all “major federal actions significantly affecting the quality of the human environment.” The act established a national policy for the environment, revised the missions of all federal agencies and established the Council on Environmental Quality (CEQ). As stated in Section 2, the purpose of the act is “to declare a national

policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.” Additionally, the act made federal funding available to states to assist in their efforts. Although NEPA does not contain a citizen suit provision, the courts have recognized a lawsuit for violations of NEPA’s “procedural” obligations – i.e., the responsibility of the lead agency to make full disclosure of the proposal’s alternatives and environmental impacts, as well as the agency’s balancing process between environmental protection and economic development. Once full disclosure has been made, an agency decision to implement a proposal cannot be overturned in court unless it is found to be arbitrary and capricious.²⁴

Occupational Health and Safety Administration, 29 U.S.C.A. §651 et seq. (1970)

In 1970 Congress created the Occupational Health and Safety Administration to regulate and ensure employee and workplace safety. The main goal of this act is to ensure that employers provide their workers a place of employment free from recognized hazards to safety and health that cause or are likely to cause death or serious physical harm. The creation of OSHA was the first effective legislation designed to prevent occupational disease.²⁵ Reflecting Theodore Roosevelt’s belief that human health was a natural resource worthy of protection, OSHA’s mission was to ensure that every working man and woman in the nation had safe and healthful working conditions. The Secretary of Labor is charged with the responsibility of promulgating national safety standards and established federal safety standards. The Secretary of Labor can establish emergency standards when employees are exposed to grave dangers from toxic materials. If an employer is in violation of a standard, a federal inspector is authorized to issue a citation.²⁶ Section 17 outlines various civil penalties for violations.

Safe Drinking Water Act, 42 U.S.C.A. §3007 et seq. (1974)

In 1974 the Safe Drinking Water Act (SDWA) was established in order to protect the quality of drinking water in the U.S. This law concentrates on all waters designed for human consumption, whether from above ground or underground sources. The act authorizes the EPA to establish enforceable health standards for contaminants in drinking water and requires all owners or operators of public water systems to follow health-related guidelines. The act requires public notification of water systems’ violations and annual reports to customers on contaminants found in their drinking water. Additionally, the SDWA establishes a multi-billion dollar state revolving loan fund for water system upgrades and requires an assessment of the vulnerability of all drinking water sources to contamination.²⁷

Resource Conservation and Recovery Act of 1976, 42 U.S.C.A. §6901-6992(k) (1976).

Following the enactment of the Hazardous Materials Transportation Act, the Resource Conservation and Recovery Act of 1976 (RCRA) directed the EPA to establish regulations ensuring the safe management of hazardous waste from “cradle to grave,” in order to eliminate endangerment from present and future waste disposal (§3001). The act was amended in 1984 to include newly imposed technology-based standards on landfills handling hazardous wastes and required the phase out of land disposal for certain untreated wastes. RCRA created a tracking system that monitors hazardous waste from the time of generation through treatment, storage, and disposal (§3002-4). The act authorized the EPA to seek significant civil and criminal penalties for violations of these provisions.

Toxic Substance Control Act, 15 U.S.C.A, §2601 et seq. (1976)

The Toxic Substance Control Act (ToSCA) was enacted by Congress to enable the EPA to track the 75,000 industrial chemicals that are currently produced and or imported into the United States. The EPA is required to screen these chemicals and report on, as well as test those that may pose an environmental or human-health hazard. The EPA is authorized to ban the manufacture and import of those

chemicals that pose an unreasonable risk. ToSCA requires the premanufacture notification of EPA for new chemicals or significant new uses of chemicals. ToSCA provides for civil and criminal penalties (§16) as well as citizen enforceability (§20).

Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C.A. §9601 et seq. (1980)

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), commonly known as Superfund, was enacted by Congress in 1980. CERCLA created broad Federal authority to remediate contamination from past waste disposal practices that now endanger, or threaten to endanger, public health or the environment. CERCLA does this (1) by imposing strict liability on those parties responsible for the release of hazardous substances (§107); (2) by creating a “Superfund” to finance actions to clean up such releases (§111); and (3) by imposing the cleanup costs upon the parties who generated and handled hazardous substances. (§§107, 113). This law created a tax on the chemical and petroleum industries and within five years collected over \$1.6 billion dollars for the cleanup of abandoned or uncontrolled hazardous waste sites.²⁸ CERCLA provides for civil and criminal penalties, natural resource damages and citizen enforceability (§310).

In 1986 Congress made several important amendments to CERCLA, known as the **Superfund Amendments and Reauthorization Act** (SARA). SARA stressed the importance of permanent remedies and innovative treatment technologies in cleaning up hazardous waste sites and raised the focus on human health problems posed by these sites. The act increased State involvement in every phase of the Superfund program and most importantly, encouraged greater citizen participation in making decisions on how sites should be cleaned up.²⁹

How Effective are Environmental Statutes?

At face value, the statutes are an impressive array of environmentally sound legislation, however, it is merely a magician’s “smoke and mirrors” act. The requirements are both costly and more importantly comprised of rules that do away with common sense. Unlike the common law, which consists of broad principles such as the “reasonable person” standard and permits room for adjustments depending on the circumstances, environmental statutes are so rigid that they are oftentimes impossible to comply with. Not to mention the fact that the cost of litigating one of these cases is astronomical. The previous chapter gave an example of the time and money that it took to litigate the *Woburn* case. The judge ruled that the jury would have to sit through months of environmental experts testifying as to the various violations of W. R. Grace Co., and Beatrice Foods and scientists detailing the harm to the residents’ groundwater. The *Woburn* jury was comprised of uneducated, poor industrial residents. Is it likely then that they understood the evidence placed before them that would decide the corporations’ legal culpability?

The answer to these questions leads one to ask, “who then are these statutes created for and what level of understanding is required to interpret them?” These statutes are understandable to scientists, environmentalists and environmental attorneys, but what about ordinary people in need of protection from toxic industries? Legal philosopher H.L.A. Hart once observed that “in all fields of experience, not only that of rules, there is a limit, inherent in the nature of language, to the guidance that words can provide.” He further wrote regarding legislation, “...definitions of law that start by identifying laws as a species of rule usually advance our understanding of law no further.”³⁰ If environmental legislation is drafted for the benefit of the public, shouldn’t the public be able to understand how to comply with the statutes, as well as how to proceed when a violation has occurred? As an EPA official once observed, over 95 percent of a toxic problem could be solved quickly and efficiently, yet because of the complexity of the statutes themselves, it takes years and billions of dollars to solve.³¹ This analysis leads to the question then of “who can afford to litigate an environmental violation?” Does the EPA serve as a legal protector of public health against toxic polluters? If so, are they willing to litigate on behalf of all communities who have

been injured by these violators, or is it a question of whoever has the political influence and money to buy their protection?

The Role of The Environmental Protection Agency

The United States Code is the official record of all federal laws. As discussed earlier, the common law is not made by a legislative body or written in codes and documents, but rather it is made through court judgements. Similarly, the U.S. Code does not include all the details of the statutes. In order to interpret statutes and apply them to everyday life, Congress authorizes governmental agencies to create regulations and enforce them; The United States Environmental Protection Agency is one such agency. Regulations set specific rules about the legality of certain acts.³² The EPA is responsible for the environmental well-being of the country as defined through numerous specific pieces of legislation. The formation of the United States Environmental Protection Agency (EPA) was an outgrowth of the inability of the courts to handle the increasing numbers of toxic torts plaintiffs. This new proactive approach was believed to circumvent the need for court actions by preventing pollution in the first place.

In 1970, in response to pressure from consumer and environmental groups for effective environmental protection laws, President Nixon proposed legislation that created the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency (EPA). Nixon created the EPA to fix national guidelines and to monitor and enforce them. His administration undertook a number of important reforms in welfare policy, civil rights, law enforcement, the environment, and other areas and called it the “New Federalism,” which provided state and local governments with billions of federal tax dollars.³³ Although Nixon was by no means an enthusiastic supporter of the environmental movement, his signature on NEPA sent a strong message to the country that no politician could afford to ignore the demands being made by the environmental movement.³⁴ The EPA was initially charged with the administration of the Clean Air Act (1970), the Federal Environmental Pesticide Control Act (1972) and the Clean Water Act (1972). By the mid-1990s the EPA was enforcing 12 major statutes, including laws designed to control uranium mill tailings, ocean dumping, safe drinking water; insecticides, fungicides, and rodenticides, and asbestos hazards in schools.³⁵

The Distribution of Environmental Equality

Over the last several decades, environmental policy has been almost exclusively concerned with two basic issues: (1) what is an acceptable level of pollution; and (2) what kinds of legal rules would be best suited for reducing pollution to that level.³⁶ Policy-makers however, have paid much less attention to the distributional effects involving the inequities of environmental protection.³⁷ Because legislative and regulatory priorities are established through this lawmaking process, those wielding greater political influence over the process are more likely to have their problems receive greater attention.³⁸ Environmental protection confers benefits and imposes burdens in several ways. All laws have distributional consequences, especially those having to do with public interest. The equitable distribution of goods and services such as the potential benefits of epidemiology, the study of epidemics and diseases in a given population, for example, is grounded in ethical principles of justice; principles that are of fairness and equity in the distribution of benefits and risks.³⁹ Problems of discrimination arise out of disparities between the distribution of these perceived benefits and their related burdens.⁴⁰ Under this theory, minority and disadvantaged neighborhoods would seem to be receiving an unfair distribution of the types of industry that are targeting their communities.⁴¹ For example, living in a medium sized city, in which the main industries are computers, universities, hospitals and other “clean” industries is more desirable than living in a large city, which produces steel, automobiles and leather tanning.⁴² Furthermore, how the

distribution of benefits and burdens are determined in our society can greatly depend on the way in which various groups are perceived.

Throughout history, racial minorities have been victims of various forms of discrimination. Racist attitudes and false stereotyping, whether conscious or not, contribute to the unequal distribution of public interest benefits. These attitudes have influenced various decisions relating to environmental protection.⁴³ Public officials trying to decide where to locate an industrial or waste treatment storage or disposal facility for example, may perceive a minority community as more concerned with economic concerns than environmental issues. Plant location then becomes a "double-edged sword" for the minorities and the poor, because while these hazardous waste facilities are endangering the health of residents, they also provide jobs. Residents must make the difficult choice between their health and their ability to provide for their families. If the EPA becomes involved, the choice is simply taken away from the residents; unemployment and despair now become the benefits of a government agency designed to protect public interests. Disadvantaged minority communities are also perceived as having less access and influence over political structures. This perceived lack of political organization would make them unable to resist a polluting facility as effectively as a more informed community and thus provides an open invitation for similar facilities.⁴⁴

The EPA's guidelines released in June 2000 stipulate that "both the demographic disparity and the disparity in rates of impact must be at least a factor of two times higher in the affected population" for the EPA's Office of Civil Rights to pursue civil rights cases against companies.⁴⁵ These types of governmental guidelines lead one to ask, "whose interests are being protected and who is receiving the benefit of the regulations?" Neither the policies of polluters nor the language of laws regulating the environment make any express mention of race, yet it is clear that racial status affects the individual's experience with the environment and the governmental agencies designed to protect his health.⁴⁶

The Environmental Movement and the Courts

In 1962, Rachel Carson awakened environmental consciousness by exposing the effects of DDT and other pesticides in her book *Silent Spring*.⁴⁷ Carson warned of the grave dangers posed by the indiscriminate use of DDT and related pesticides. The title suggested a time when birds, their populations greatly reduced by pesticides, could no longer be heard singing in the Spring. Carson argued that humans as well as wildlife were at risk and issued a call to action.⁴⁸ On April 22, 1970, approximately 20 million Americans gathered at various sites across the country to protest corporate and governmental abuse of the environment.⁴⁹ Earth Day, as it became known, the events leading up to it, and its aftermath transformed American culture.

Environmental awareness became much more commonplace during the 1970s and numerous grassroots environmental organizations were established to work for political change. These movements included the Environmental Defense Fund in 1967, Friends of the Earth in 1968, Greenpeace in 1970, the Natural Resources Defense Council in 1970, and the Sierra Club Legal Defense Fund in 1971.⁵⁰ Environmental advocacy groups have regularly taken to the courts in defense of the environment. Suits have been filed against the federal government in the hopes of compelling its various agencies to enforce congressionally mandated acts. As each piece of environmental legislation is modified or comes before Congress for reauthorization, battles are fought between those who believe industry and development are being unnecessarily stifled and those who contend that the environment is being irreparably damaged.⁵¹ Additionally, advocacy groups have sued corporations directly for failing to follow various environmental laws. Historically, the types of groups that these advocates have represented have been politically and environmentally active. The Sierra Club's critics for example, have complained that it has become too bureaucratic and is largely made up of older, predominately white members.⁵²

Patrick Novotny wrote concerning environmental advocates:

The nation's largest environmental organizations, such as the Sierra Club, are seen out of touch with the realities of places like South Central Los Angeles, where the environment tends to be refracted through impoverishment. Environmentalists have a "negative history" and a politics of privilege and insensitivity that is too often disconnected from poorer communities.⁵³

One reason for this position is that mainstream environmentalist groups tend to be largely white and middle to upper class. A study of the membership of these environmental groups in the 1970s, for example, found that 96 percent of the 1,468 respondents classified themselves as Caucasian/European. Almost half of them had a total family income of more than \$10,000, and 15 percent had a total family income of more than \$25,000. For comparison, only 10 percent of American families made \$13,000 or more at the time of the survey.⁵⁴ Additionally, most mainstream environmentalist groups traditionally have had little interest in issues faced by poor, minority, urban people. Some minority leaders describe environmentalism as "a deliberate attempt by a bigoted and selfish white middle-class society to perpetuate its own values and protect its own lifestyle at the expense of the poor and underprivileged."⁵⁵ One prominent black elected official was even more outspoken against the movement, "The nation's concern with the environment has done what George Wallace has been unable to do; distract the nation from the human problems of black and brown Americans."⁵⁶

Apart from the political process, the only check on agency action is the courts, however the courts are limited in their ability to hear environmental cases. Courts cannot possibly hear every claim against a governmental agency that has violated an environmental statute. Plaintiffs seeking to bring such a claim, must first demonstrate that they are the proper individuals to challenge the government action and that the issues they are raising are those that the court is authorized to consider. This requirement is known as the legal doctrine of "standing" and the requirement that the issues are suitable for judicial examination is the doctrine of "reviewability."⁵⁷ The Supreme Court considered the issue of standing in over seven major environmental cases. The first was the case of *Sierra Club v. Morton*, 405 U.S. 727 (1972) in which a plan by Walt Disney Enterprises to build a \$35 million resort in the Mineral King Valley was challenged. The Court described the Valley as "an area of great natural beauty nestled in the Sierra Nevada Mountains." The Sierra Club opposed construction of the resort on the ground that approval of the plan by the Forest Service had violated several federal statutes, however no member of the club would be directly injured by the violation. Therefore the issue for the court was whether the Sierra Club had met the requirement of "standing." The Court relied on a general test for "standing" under the *Administrative Procedures Act*. The test requires that the plaintiff seeking judicial review of agency action show two things: (1) an "injury in fact"; and (2) an interest "arguably within the zone of interests to be protected or regulated" by the statute that the agency is claimed to have violated.⁵⁸ The Court held that a mere allegation of a sincere interest in a problem was not enough to constitute "injury in fact" and ruled in favor of the defense.

The holding in *Sierra* is addressed in this chapter to illustrate the importance of who has the right to protest against environmental injury and who will represent that right. When a hazardous waste facility is being built in a disadvantaged neighborhood does it seem likely that members of the Sierra Club will take an interest? When members of the Sierra Club were asked in the 1970s whether the club should concern itself with the conservation problems of such special groups as the urban poor and ethnic minorities, over 40 percent said "no," and only 15 percent said "yes." When a similar poll was conducted more than a decade later, a proposal to increase involvement in environmental issues faced by the urban poor and communities of color was defeated by a vote of three to one.⁵⁹ It is hardly surprising then that advocates for the Environmental Justice Movement feel isolated from mainstream environmentalists. Nevertheless, regardless of the racial makeup of these groups, the fact remains that

environmental organizations have paved the way for protesting issues such as air and water pollution, hazardous waste disposal, and land use issues.

Grassroots movements such as the Acid Rain Foundation, the Citizens' Clearinghouse for Hazardous Wastes (founded by Lois Gibbs, a resident of Love Canal), the Environmental Action Foundation, and the Friends of the Earth have all made contributions to the environmental movement. These organizations are evidence that political power can be gained through the efforts of people working together toward a common goal. A more in depth discussion of the power of grassroots movements and their successes is detailed in the following chapter.

Notes

¹Norman J. Vig and Michael E. Kraft, Environmental Policy in the 1990's (Congressional Quarterly Press 1994): 1-4.

²Zygmunt J.B. Plater et al., Environmental Law and Policy: Nature, Law, and Society 2nd Edition (Minnesota:West Publishing Co. 1998): 300.

³Plater: 302.

⁴Plater: ref.

⁵Jan Laitos, "Legal Institutions and Pollution: Some Intersections Between Law and History," 15 Natural Resources Law Journal (1975): 430.

⁶Laitos: 427.

⁷Plater: 303-306.

⁸MCLA§323.6.

⁹Laitos: 430.

¹⁰Vig: 7.

¹¹Plater: 296.

¹²Plater: 303-306.

¹³Lettie M. Wenner, The Environmental Decade in Court. (Bloomington: Indiana University Press, 1982): 7.

¹⁴ Robert L. Fischman et al., An Environmental Law Anthology (Ohio:Anderson Publishing Co. 1996): 65.

¹⁵Vig: 35.

¹⁶EPA: 1.

¹⁷Plater: ref. 55-54.

¹⁸EPA: 2

¹⁹Plater: ref. 54.

²⁰Plater: ref. 52.

²¹Fischman: 78.

²²Clean Air Act, 42 U.S.C.A §§7521 et seq. (1970).

²³Fischman: 71.

²⁴Plater: ref. 57.

²⁵Helen E. Sheehan and Richard P. Weden, Toxic Circles: Environmental Hazards from the Workplace into the Community (New Jersey: Rutgers University Press 1993): 9.

²⁶United States Environmental Protection Agency. Summary of Occupational Safety and Health Act: U.S. EPA Region 5. 17 Aug. 2000. <http://www.epa.gov/region5/defs/html/osha.htm>.

²⁷EPA Region 5: 3.

²⁸United States Environmental Protection Agency. Superfund. 17 Aug. 2000. <http://www.epa.gov/superfund/whatissf/cercla.htm>.

²⁹EPA Superfund: 1.

³⁰H.L.A. Hart, The Concept of Law. 2nd ed. (Oxford: Clarendon Press, 1994): 15.

³¹ Philip K Howard, The Death of Common Sense. (New York: Warner Books Inc., 1994): 47.

³²United States Environmental Protection Agency. Introduction to Laws and Regulations. 17 Aug. 2000. <http://www.epa.gov/epahome/lawintro.htm>.

³³Fischman: 77-80.

³⁴Fischman: 1.

³⁵The United States Environmental Protection Agency, Introduction to Laws and Regulations. 17 Aug. 2000. <http://www.epa.gov/epahome/lawintro.htm>.

³⁶ Richard J. Lazarus, "Pursuing Environmental Justice: The Distributional Effects of Environmental Protection." Northwestern University Law Review 87 (Spring 1992): 787.

³⁷Fischman: 46.

³⁸Lazarus: 810.

³⁹Steven Coughlin, "Environmental justice: The Role of Epidemiology in Protecting Unempowered Communities from Environmental Hazards." The Science of the Total Environment. 184 (1996): 70.

⁴⁰Lazarus: 792.

⁴¹Coughlin: 72.

⁴²Walter Block and Roy Whitehead. "The Unintended Consequences of Environmental Justice." Forensic Science International. 100 (1999): 62.

⁴³Fischman: 52.

⁴⁴Gloria Helfand and L. James Peyton. "A Conceptual Model of Environmental Justice." Social Science Quarterly 80.1 (March 1999): 74.

⁴⁵Juleyka Lantigua, "The Menace of Environmental Racism." El Paso Times 13 July 2000: 11A.

⁴⁶George Lipsitz, "Toxic Racism." American Quarterly 47.3 (Sep. 1995): 421.

⁴⁷Howard: 57.

⁴⁸Fred Rose, Coalitions Across the Class Divide: Lessons from the Labor, Peace, and Environmental Movements. (Ithaca: Cornell University Press, 2000): 23.

⁴⁹Terry H. Anderson, The Movement and The Sixties. New York: Oxford University Press, 1995: 27.

⁵⁰Lettie M. Wenner, The Environmental Decade in Court. (Bloomington: Indiana University Press, 1982): 7.

⁵¹David E. Newton, Environmental Justice (Santa Barbara: Instructional Horizons, Inc., 1996): 137.

⁵²Newton: 17.

⁵³Patrick Novotny, Where We Live, Work and Play: The Environmental Justice Movement and the Struggle for a New Environmentalism. (Connecticut: Praeger Publishers, 2000): 63.

⁵⁴Newton: 19.

⁵⁵Lazarus: 788.

⁵⁶Lazarus: 789.

⁵⁷Roger W. Findley et al., Environmental Law: In A Nutshell. 5th ed. (St. Paul: West Group, 2000): 2.

⁵⁸Findley: 3-4.

⁵⁹Newton: 17.

Environmental Justice: A Call for Civic Action

“We came to see that, in the long run, it is more honorable to walk in dignity than ride in humiliation. So in a quiet dignified manner, we decided to substitute tired feet for tired souls, and walk the streets of Montgomery until the sagging walls of injustice had been crushed by the battering rams of surging justice.”

-Martin Luther King, Jr.

On December 1, 1955, a 44-year-old black seamstress had just finished a long day of work and was anxious to get home to her family. Tired from walking, Mrs. Parks boarded a bus for home. She glanced around for a seat, and noticed that the “reserved seats” were partially filled, but the seats just behind the reserved section were vacant and she quickly sat down. It was the practice in 1955 to reserve the first half of the bus for “white citizens” only. Separate facilities for whites and blacks became a basic rule in southern society. In *Plessy v. Ferguson*, an 1896 case involving the segregation of railroad passengers, the Supreme Court held that “separate but equal” public facilities did not violate the Constitution.¹ Segregation was the “law of the land” and bus drivers enforced the policy. Blacks were made to stand rather than allowing them to sit in the “reserved section”, regardless of whether the seats were unoccupied. Furthermore, it was an unspoken rule that in the event the “reserved section” was filled, black riders had to give up their seats to white riders.² The practice of “reserved seats” was a source of great public humiliation for the black citizens of Montgomery, Alabama, and on this particular day, when Mrs. Parks was told by the driver to surrender her seat to a white man, she refused.³ Within a few moments, police were summoned by the bus driver and promptly placed Mrs. Parks under arrest. As word of the arrest spread throughout the black community, concerned citizens and members of the NAACP scrambled to find someone to lead them in protests against Mrs. Parks’ arrest. The citizens decided to ask the 27-year-old pastor of Mrs. Parks’ church. Calling for a peaceful form of resistance, the young minister urged his people to boycott the buses of Montgomery. The pastor’s name was Martin Luther King, Jr.⁴

Rosa Parks has been called the “mother of the Civil Rights Movement” and one of the most important citizens of the 20th century. Her refusal to give up her seat sparked a citywide boycott of the bus system that lasted 382 days and introduced the world to Martin Luther King, Jr., who went on to become the leader of the Civil Rights Movement. Because of the boycott, on November 13, 1956 the United States Supreme Court held that Montgomery’s bus segregation was unconstitutional and ordered the immediate integration of bus seating.⁵ In her recently published book entitled, *Quiet Strength* (Zondervan Publishing House, 1994) Mrs. Parks writes concerning the bus incident: “I kept thinking about my mother and my grandparents, and how strong they were. I knew there was a possibility of being mistreated, but an opportunity was being given to me to do what I had asked of others...” Rosa Parks’ story is an important reminder of not only the difference that one person can make, but also the unlimited possibilities of civic activism.

Theories on Activism

Anthony Downs attempted to explain political activism from an economist’s perspective in his 1957 work, *An Economic Theory of Democracy*. He theorized that parties act to maximize votes and citizens behave rationally in politics.⁶ He constructs a model in which “self interest” is used to explain the behavior of government and its’ inhabitants. Downs asserts that government is only interested in the votes of the people, therefore it tends to ignore those citizens who do not impact the political process.⁷ He contends that “the more information a citizen has, the more influence over government he is likely to exercise—provided he informs the government what his preferences are. Conversely, the less a citizen

knows about policy alternatives, the fewer specific preferences he can have, and the more likely it is that government will ignore him in making decisions.”⁸

According to Downs, those citizens who become active in the political process do so out of self-interest and expect something in return from the government. Downs admits that government does not view every voter equally. Those whose resources go beyond a ballot increase their potential influence over government policy. Memberships in groups or organizations, for example, claiming to represent the will of the voters, tend to have larger influence over the political process.⁹ In analyzing the leaders of these groups, and their motivations to influence others, he asserts that all leaders are driven by the desire to improve their own positions in society. The benefits that they derive from leadership will either be economic, political or social.¹⁰

Mancur Olson, Jr., parallels Downs’ argument in his widely acclaimed 1965 analysis of “collective action.” Olson’s work focused on the size of organized groups and their capacity to attain the desired collective good. Olson revisits the notion of “self-interest,” however his analogies focus on the individual group members’ selfishness. While he agrees that the group must have a common interest, Olson argues that each member has his own social incentive that forms his motivation to participate. These incentives range from social status to personal prestige and self-esteem.¹¹ These types of incentives, according to Olson, are the very kind needed to mobilize potential groups. This view seems to support Downs’ argument that self-interest produces rational action and is a necessary good for society. For Olson, as long as individuals in a large group or organization behave rationally, meaning that their objectives are to be pursued effectively and efficiently, their motives are really unimportant.¹²

Herbert Maccoby (1958) conducted a case study of an action group formed for the sole purpose of meeting the needs of the community. The study showed that participation in this one voluntary association is related to political activity in that participants were more likely to be voters than were non-participants, they were more likely to remain voters, and those who had not voted in prior elections were more likely to vote in subsequent elections. This same process affected non-participants proportionately less because they were both less predisposed to political involvement and in less contact with politically active persons. Maccoby’s study supported the following assumptions: because the objective of the association was community action, the persons attracted to it were fundamentally predisposed to participate in community affairs in general, including political activity in particular. Participants were in contact with highly concentrated groups comprised of politically predisposed and politically active members, both within the particular association, and especially within other organizations to which they belonged. These contacts tended to activate or reinforce those latent predispositions of participants who were drawn towards political involvement.¹³

Sidney Verba eloquently summed up the importance of political activism when he wrote: “Political participation affords citizens in a democracy an opportunity to communicate information to government officials about their concerns and preferences and to put pressure on them to respond.”¹⁴ Political scientists and social scientist have written countless articles concerning civic activism and the different factors that will enable them to predict who will become involved. Verba, however, has published the most extensive research to date on the subject. He explores the question of civic activism more fully by examining one’s motivation to participate in political life as well as their predisposition.¹⁵ Although traditionally, the role of socioeconomic status (SES), which refers to income, levels of education, and occupation, has been the dominant factor that theorists use to explain political activism, Verba applies SES differently in his Civic Voluntarism Model. The various elements of SES are separated into different categories in order to show how each separate component is differentially relevant to different kinds of participation.¹⁶ By separating the components of SES, he is better able to explain how factors of SES interact with one another and enhance political participation.

In his Citizen Participation Study (1993), the scale included the following activities that Verba defined as political, with the percentages of those engaging in them in parenthesis: voting in the 1988 presidential election (70%); working in a campaign in the 1988 presidential election (8%); making a campaign contribution in the 1988 election cycle (24%); contacting a government official within the past year (34%); attending a protest, march, or demonstration within the past two years (6%); working informally with others in the community to deal with some community issue or problem within the past

year (25%); and serving in a voluntary capacity on a local governing board or attending meetings of such a board on a regular basis within the past two years (3%). Verba concluded that the civic skills acquired through involvement with an organization had a significant impact on future political participation. He further concluded that the resources of time, money, and skills are also powerful predictors of political participation in America.¹⁷ He contends that activists tend to be representatives of a more advantaged group, namely the well educated, wealthy, white males.¹⁸

While Verba's generalization could readily be applied to the vast majority of the environmental movements of the 1970s, it fails to explain the participants of the Civil Rights Movement in the 1950s, the Women's Rights Movements and Labor Movements of the 1960s, or the Environmental Justice Movement of the 1990s. Civil Rights activists were poor, uneducated Blacks who sought relief from White oppression. The Women's Movement received little support in the beginning because most women lacked the educational and economic resources that would enable them to challenge the prevailing social order. During the period of the Women's Movement, women shared similar disadvantages with the majority of working class men, minorities and the poor, primarily because most social, economic, and political rights were restricted to the wealthy elite.¹⁹ Cesar Chavez, a migrant worker with a sixth grade education, formed the United Farm Workers, comprised of "illiterate, indigent migrant workers" in the California grape fields. Chavez organized the formerly powerless migrant farm workers and forced growers to provide them with better wages and living conditions. Chavez went on to become the leader of the Mexican-American Civil Rights Movement.²⁰

The Civil Rights Movement and Nonviolent Direct Action

The Montgomery bus boycott was an important turning point in the Civil Rights Movement. It was in Montgomery where King learned of the importance of collective action.²¹ During the Civil Rights Movement of the 1950s and 1960s, it was the highly visible direct action campaigns such as the Montgomery bus boycotts, the Freedom Rides, the lunch counter sit-ins, and the March on Washington that created the social climate and organized muscle to win civil rights legislation.²² The solidarity and unity that the black community displayed throughout the boycott gave them the needed strength and determination to rise up against their oppressors.²³ King introduced the black community to ideas he gained from reading Thoreau's essay on civil disobedience. Gandhi's struggles in India and his "*Satyagraha*" movement against British rule also heavily influenced King.²⁴ In his famous "*Letter from a Birmingham Jail*," King laid out his plans for positive, nonviolent action using some of the same strategies as Gandhi:

In any nonviolent campaign there are four basic steps: collection of the facts to determine whether injustices are alive; negotiation; self-purification and direct action. You may well ask: 'Why direct action? Why sit-ins, marches, etc.? Isn't negotiation a better path?' You are exactly right in your call for negotiation. Indeed, this is the purpose of direct action. Nonviolent direct action seeks to create such a crisis and establish such creative tension that a community that has constantly refused to negotiate is forced to confront the issue. It seeks so to dramatize the issue that it can no longer be ignored.²⁵

The strategy worked in Montgomery and throughout the South. King accepted the fact that he and his activists were going to be physically hurt. He would often recite these words to his followers about their oppressors: "We will match your capacity to inflict suffering with our capacity to endure suffering.... We will soon wear you down by our capacity to suffer."²⁶ King's message of nonviolence was meant to encourage a black population that had been terrorized by the white population for generations. He taught them that no matter what whites did to them, they could stand up and endure the brutality. Regardless of the events that would take place, these dedicated activists would not be deterred from their mission. For King, the most important impact of the nonviolent direct action approach was the impact that it would have on the blacks themselves:

The nonviolent approach does not immediately change the heart of the oppressor. It first does something to the hearts and souls of those committed to it. It gives them new self-respect; it calls up resources of strength and courage that they did not know they had.²⁷

In 1957, King co-founded the Southern Christian Leadership Conference, whose primary goal was to eliminate racial discrimination in transportation facilities, public accommodations, hiring practices, and voting rights.²⁸ Repeatedly beaten, arrested, and threatened with death. King and his followers continued their civil disobedience approach even in the face of guns, fires and vicious police dogs. For many, the image of dogs biting at the limbs of peaceful protesters became a symbol of the viciousness of the southern way of life.²⁹ On June 11, 1963, President Kennedy addressed the nation's concerns with the most important speech on race relations since the Reconstruction.

If an American, because his skin is dark, cannot eat lunch in a restaurant open to the public; if he cannot send his children to the best public school available; if he cannot vote for the public officials who represent him; if, in short, he cannot enjoy the full and free life which all of us want, then who among us would be content to have the color of his skin changed and stand in his place?³⁰

Kennedy promised to enact strong civil rights legislation and urged King to be patient, however the momentum of King's movement could not be stopped. On August 28, 1963, over 250,000 citizens from across America gathered together in front of the nation's capital. The most memorable moment came when King delivered his poignant "I Have A Dream" speech. As black-activist Dick Gregory once remarked, "Never in the history of the world have that many people ever been able to come together with a three hundred year old gripe and not fight. That is strength. That is power."³¹

On November 22, 1963, just three months after the march on Washington, President Kennedy was assassinated. The loss of the President was a major blow to the country and those in the Civil Rights Movement felt that his death would end the work that they had wanted to achieve. To their surprise, Kennedy's successor, President Johnson proved to be a strong ally. In June, Johnson signed into law the Civil Rights Act of 1964, which made it illegal to discriminate against an individual because of race, color, or sex in public accommodations or employment.³² King's "dream" had been partially realized, however the right to vote was not ensured by the new legislation. The Nobel Peace Prize was awarded to King shortly after the march, though his greatest triumph was realized in 1965 when President Johnson signed the Voting Rights Act into law.³³ Congress finally recognized that after living in this country for over three centuries, African American citizens were protected by the Constitution. King successfully established the power of nonviolent direct action and had paved the way for other movements seeking to eliminate racial inequality in the United States

Race, Income and the Environment

Extensive research has been devoted to analyzing social movements in the United States. Hundreds of volumes have been written in the past several years on the environmental, labor, antiwar, and civil rights movements. However, few social scientists have studied environmentalism among blacks and other ethnic minorities. Robert Bullard has been the leading sociologist researching and writing on the subject of environmental racism.³⁴ Bullard maintains that in spite of the progress made during the Civil Rights Movement in the 1960s, minorities still remain underrepresented in government positions, and as a result, the interests of the predominately white industrial boards, zoning commissions, and governmental regulatory agencies will often conflict with those of minority communities.³⁵ As Chavis observed: "Sometimes we get too single-issued to see how various social justice issues are interrelated. But in this movement, there is a perception at the grassroots level of how one manifestation of racial injustice is related to another."³⁶ In its quest for social justice, the environmental justice movement must overcome the

same fundamental obstacles faced by the Civil Rights Movement, namely the powerlessness of poor and minority communities, both economically and politically.³⁷

The environmental theme resounded in civil rights struggles long before the term “environmental racism” was ever used. In 1967, two African American student groups staged a demonstration against the siting of a city-owned garbage dump in Houston, Texas, where an eight-year old girl had recently fallen in and died. The dump was located in a heavily populated African American community. The group demonstrated for several days, until a violent confrontation with Houston police led to the arrest of hundreds of students. This demonstration was the first account of protests against environmental racism recorded.³⁸ Martin Luther King, Jr. was preparing to protest on behalf of sanitation workers, who had struggled with unequal pay and unsafe working conditions when he was assassinated in Memphis, Tennessee on April 4, 1968.³⁹ President Johnson declared a national day of mourning, and on that Sunday hundreds of thousands of Americans, both black and white, marched together in their cities in honor of King. A few days later, Memphis increased pay and benefits for sanitation workers, thus ending the strike.⁴⁰ King’s widow, Coretta Scott King wrote concerning the strike, “The Memphis officials must bear some of the guilt for Martin Luther’s assassination. The strike should have been settled several weeks ago. The lowest paid in our society should not have to strike for a more just wage.”⁴¹

Race and class are often factors in environmental struggles, because communities of color and low-income communities have less political power to resist the location of toxic waste plants and fewer means to relocate.⁴² In 1979, a middle-income Houston neighborhood brought the first lawsuit challenging discriminatory waste facility siting under Title VI of the Civil Rights Act. The neighborhood was selected as the site for a municipal solid waste landfill and concerned citizens voiced their disapproval to an African American attorney named Linda McKeever Bullard, who argued at trial “the placement of the landfill in the black community is a classic case of institutional racism.”⁴³ Although the lawsuit was unsuccessful, the citizens were able to convince the city council to adopt an ordinance restricting the location of waste facilities. These early protests and lawsuits paved the way for the incident that created the Environmental Justice Movement.

Grassroots Movements

The Civil Rights Movement and its emphasis on grassroots democratic activism strongly influenced the development of other social change movements, such as the environmental and women’s movements. In the 1960s, the political atmosphere regarding the status of women in the United States had changed dramatically. An influential book by Betty Friedan, *The Feminine Mystique* (1963), challenged traditional attitudes and false perceptions of women. The civil rights movement had given women a model upon which they could base their own fight for equal rights.⁴⁴ Friedan founded the National Organization for Women (NOW) in 1966 in an effort to increase women’s political power in the United States. The Equal Rights Amendment (ERA), a proposed amendment to the Constitution, provided for the equality of sexes under the law and won congressional approval in 1972 as the 27th Amendment, however it was never ratified and consequently did not become part of the Constitution.⁴⁵

In 1962 Cesar Chavez, gained much attention as the leader of a nationwide boycott of California table grapes in an effort to improve the working conditions of migrant farm workers. Chavez organized the formerly powerless migrant farm workers and forced growers to provide an increase in pay wages and better working conditions for workers. In 1968, he produced the first nationwide boycott of grapes. Chavez established the United Farm Workers labor movement and after a 2-year strike wine-grape growers in California reached a collective bargaining agreement. Shortly after King’s death, Chavez expressed his gratitude to King’s widow:

It is my belief that much of the courage which we have found in our struggle for justice in the fields has had its roots in the example set by your husband and by those multitudes who followed his non-violent leadership. We owe so much to Dr. Martin Luther King that words alone cannot express our gratefulness.⁴⁶

As previously mentioned, traditional environmentalists have had a “negative history” and are viewed by many in the black community as having a “politics of privilege and insensitivity” and tend to be disconnected from poor, minority communities.⁴⁷ Furthermore, proponents of the Environmental Justice Movement has criticized environmental groups for becoming too involved in the “procedural intricacies and political intrigues” of judicial hearings, legislative lobbying and bureaucratic politics. The groups’ contention was that these political distractions undermined the more important issues facing the movement.⁴⁸

Grassroots movements have been the environmental consciousness for minority and disadvantaged neighborhoods. For years, working-class communities, irrespective of race, have played an important part in the efforts to reduce hazardous waste. In the summer of 1978, the dramatic and widely publicized revelations of toxic exposure to the people of Love Canal, New York, appeared in the national media. The Love Canal story depicted the hardships of blue-collar life for millions of people.⁴⁹ Residents of the Love Canal area in Niagara Falls were forced to evacuate when hazardous wastes leaking from a former disposal site threatened their health and homes. One of the most notorious cases of toxic waste leakage, the crisis received attention on both local and national levels. America watched in disbelief as images of working families and children evacuating their homes, were seen on the nightly news.⁵⁰ Several states passed stricter regulations on industrial waste disposal and allocated billions of dollars for the cleanup of Love Canal and similar contaminated areas. Lois Gibbs, a housewife and resident of Love Canal formed the Citizens’ Clearinghouse on Hazardous Waste, which is now considered to be a major network in the toxic waste movement.⁵¹

Womens’ Roles in the Movement

An interesting feature of the modern environmental justice movement is the critical role played by women. Mothers, housewives, secretaries and rural women have long been at the forefront of protests, community action, leafleting, public testimony and other actions on issues concerning environmental inequities and civil rights. Coretta Scott King recently spoke to a group of citizens in Montgomery, commemorating the 50th anniversary of the bus boycotts. She spoke of the efforts of the women and children who are seldom recognized for their vital roles in the Civil Rights Movements. It was the housewives and children who spent their days distributing pamphlets throughout the community, while the men were at work. Theorists suggest that the active roles that women are taking in the environmental justice movement are due in part to the fact that environmental justice issues strike close to the home. These issues tend to arouse more interest among housewives and mothers than issues connected with mainstream environmentalism, such as the protection of endangered species or the development of national parks.⁵²

The Mothers of East Los Angeles (MELA) are a shining example of what can be achieved when people are united in working towards a common goal. MELA is comprised of a group of stay at home mothers who organized on May 24, 1984 with the sole purpose of fighting the construction of a proposed State Prison in the East Los Angeles neighborhood of Boyle Heights. After successfully defeating the state, a Bill was passed, declaring that, “no state prisons could be built in Los Angeles County.” Their victory gave them the needed confidence to take on the toxic waste industries. In the 1987 Lanser Project, MELA played an integral role in stopping construction of a municipal waste incinerator. That same year, they joined a city-wide coalition in order to fight the building of an oil pipeline that would have gone three feet under a Junior High School in East Los Angeles. This project was sponsored by powerful and wealthy companies, yet the community stood together and fought the system.

Within the next two years, they threatened to sue the City of Vernon, and California Thermal Treatment Systems (a Garden Grove based Corporation) when the threat of another toxic incinerator emerged. MELA also successfully thwarted the efforts of a toxic waste plant that attempted to treat 60,000 gallons of cyanide and other hazardous chemicals, across the street from one of the largest high schools in the Los Angeles Unified School District. The members of MELA all came from uneducated, disadvantaged minority communities who refused to tolerate exploitation and abuse of their community. They employ local High School students to go door to door and educate the community of the dangers of

lead poison. Community members are then referred to local county health clinics in order to get their children tested. They have fought many other battles, including the Casmalia Dump Site in Northern California, the toxic incinerator in Kettleman City, California, and malathion spraying.⁵³

Linda Marquez lives on Cottage Street in Huntington Park. Her neighborhood is a working-class community that does not have any political power, nor does it have the funds to buy it. After four years of grassroots effort, however, its mostly Spanish-speaking residents won a decisive battle in the most publicized environmental justice struggle to date, after successfully convincing the neighborhood to ban together and “fight city hall.” When the 1994 Northridge earthquake hit, huge chunks of the broken Santa Monica freeway soon began arriving in dump trucks, and a mountain of concrete suddenly towered over what had been a quiet residential neighborhood. Marquez’ family and others described the taste of grit from the concrete dust between their teeth, which caused asthma and other respiratory problems for many of their children. Marquez attributes the success of her neighborhood to its’ residents, who had the courage to stand up and fight for their rights and urges others to do the same:

A group of working-class residents, not highly-educated and with few resources, taught the politicians and the bureaucrats to be afraid. If they can do it, so can others." "We're united," Marquez concludes. "That's what gave us our strength. The city is run by its government, but it's the people who make a difference."⁵⁴

The Government Responds to the Movement

In January 1990, the University of Michigan School of Natural Resources held the “Conference on Race and the Incidence of Environmental Hazards.” A group of social scientists and civil rights leaders formed at the meeting, informally calling themselves the Michigan Coalition. Following the conference, the Coalition wrote a letter to the Administrator of the U.S. Environmental Protection Agency (EPA), William K. Reilly, requesting a meeting, as well as Agency action on a number of points relating to environmental risk in racial minority and low-income communities. The Coalition’s proposals for EPA consideration included:

- Undertake research geared toward understanding environmental risks faced by minority and low-income communities;
- Initiate projects to enhance risk communication targeted to minority and low-income population groups;
- Require, on a demonstration basis, that racial and socioeconomic equity considerations be included in Regulatory Impact Assessments;
- Include a racial and socioeconomic dimension in geographic studies of environmental risk;
- Enhance the ability of minority academic institutions to participate in and contribute to the development of environmental equity;
- Appoint special assistants for environmental equity at decision-making levels;
- Develop a policy statement on environmental equity.

The EPA responded to the Coalition’s proposals by forming the EPA Environmental Equity Workgroup in July 1990.⁵⁵ After analyzing the previous studies of environmental equity and researching the EPA’s own policies, the workgroup released its findings in June 1992. Although there were clearly distinct differences in disease and death rates among racial groups, there was not sufficient data to determine how environmental factors had contributed to the differences.⁵⁶ Additionally, the group reported that low-income and minority communities were exposed to higher than average levels of air pollutants, hazardous waste, contaminated fish, and agricultural pesticides. The study reported that in families earning

less than \$6000 per year, the percentage of black children with high blood lead levels¹ was 68 percent versus 36 percent for white children.⁵⁷ The report recommended that the EPA: 1) increase the priority it gives environmental equity; (2) collect more data broken down by income and race; (3) consider environmental equity issues when conducting risk assessments; (4) identify high risk populations and work to reduce their risk; (5) consider the distribution of risks in its rulemaking and initiatives; (6) revise its permit and grant procedures so that they account for risks to minority and low-income populations; (7) improve its communication with minority and low-income communities; and (8) establish mechanisms to ensure that environmental equity concerns are incorporated into long-term planning decisions.⁵⁸ As a result of this report, the EPA formally established the Office of Environmental Equity in November 1992.

Executive Order 12898

The movement began to see even more progress in governmental action when Bill Clinton became President in 1992. Clinton appointed both Benjamin Chavis and Robert Bullard to serve on his transition team in the area of Natural Resources, which included the EPA and Departments of the Interior, Energy and Agriculture. The Environmental Justice Movement realized its greatest achievement on February 11, 1994, when President Clinton enacted Executive Order 12898 and established an Office of Environmental Justice within the EPA and a National Environmental Justice Advisory Council (NEJAC). The order required all federal agencies to promote environmental justice “to the greatest extent practicable and permitted by law.”⁵⁹ Additionally, the order required each federal agency to make “achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States and its territories and possessions, the District of Columbia, the Commonwealth of Puerto Rico, and the Commonwealth of the Marianas islands.”⁶⁰ The goal of this executive order is to make environmental justice part of each federal agency’s mission, however environmental racism is usually a state or local problem, not a federal one.

At the same time President Clinton released the executive order, he also released a presidential memorandum to accompany it. The presidential memorandum laid out specific things that he wanted the EPA and other federal agencies to do. The memorandum states: “In accordance with Title VI of the Civil Rights Act of 1964, each Federal Agency shall ensure that all programs or activities receiving Federal financial assistance that affect human health or the environment do not directly, or through contractual or other arrangements, use criteria, methods, or practices that discriminate on the basis of race, color, or national origin.”⁶¹ Additionally, the order included considering race and income levels under the National Environmental Policy Act (NEPA). NEPA requires all federal agencies to prepare Environmental Impact Statements when considering certain major actions that may affect the quality of the environment, including proposals for legislation.⁶²

Clinton’s action was arguably the most important step forward in the Environmental Justice Movement’s short history. The creation of the Office of Environmental Justice and the NEJAC provided the mechanism, as well as the financial support, that made it possible for those concerned about environmental justice issues to meet at regular intervals, design programs of research, present their concerns directly to the federal administration, hold public meetings at which groups and individuals can testify, and discuss federal programs that are relevant to environmental inequities. The NEJAC consists of over two-dozen member representing community-based groups, business and industry, academics, tribal governments, non-governmental organizations, and various environmental groups. They are broken into four subcommittees, (1) Waste and Facility Siting; (2) Enforcement; (3) Health and Research; (4) and Public Participation and Accountability.⁶³

¹ In 1987, the EPA established the National Ambient Air Quality Standard, limiting airborne lead to an average of 1.5 milligrams per cubic meter of air averaged over a 90-day period. Children living near lead smelters had higher levels of lead in their blood than those that did not live near a smelter.

Environmental Justice Litigation

Several environmental justice plaintiffs have attempted to seek remedy from the courts, however they have been unsuccessful. There are currently three ways in which environmental racism is being litigated: (1) the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution; (2) civil rights laws, primarily Title VI; and (3) federal and state environmental laws. Equal Protection Clause, prohibits a state from denying to any person within its borders “the equal protection of the laws.”² Courts enforced the Equal Protection Clause sparingly for nearly a century. In 1883 in the *Civil Rights Cases* the Supreme Court held that the Equal Protection Clause applies only to activities carried out by the states themselves, not by private citizens. This decision permitted racial segregation in private facilities such as hospitals, restaurants, and hotels. In 1896, in the notorious case of *Plessy v. Ferguson*, the Supreme Court ruled that a state could officially segregate blacks and whites as long as the black facilities were “equal.” This separate-but-equal doctrine lasted until 1954 when the Court ruled in the landmark case *Brown v. Board of Education* that schools racially segregated by government decree can never be equal. In *Bolling v. Sharpe* that same year, which involved segregated schools in the District of Columbia, the Court ruled that the Due Process Clause of the Fifth Amendment binds the federal government under the same equal protection rule.³

In the case of *Arlington Heights v. Metropolitan Housing Development Corp.* 429 U.S. 252 (1977), the village of Arlington Heights refused to grant a building permit to Metropolitan Housing for the purpose of constructing racially integrated low and moderate-income housing. Arlington Heights claimed that such a development would damage property values in the village. The court then applied a five-pronged test and ruled that none of the required conditions existed, thus ruling in favor of the defendants.⁴ In order to determine whether or not a decision has been motivated by discriminatory intent, courts must consider five specific aspects of the criticized action; (1) The impact of the federal action and whether it bears more heavily on a particular race; (2) The historical background of the decision; (3) The sequence of events leading up to the challenged decision; (4) Any departures, substantive or procedural, from the standard decision-making process; and (5) The action’s legislative and administrative history. This test is referred to as the Arlington Heights analysis.⁶⁴ In order to meet the requirements of the Equal Protection Clause, proof of racially discriminatory intent or purpose is required. The court reasoned that after the test was conducted, no evidence of discriminatory intent was apparent and ruled in favor of the defendants.⁶⁵

Cases involving environmental inequities have been difficult to pursue partly because of the U.S. Supreme Court’s decision in the case of *Washington v. Davis* 426 U.S. 229 (1976). *Washington* has played an important role in court cases involving environmental equity, and is likely to continue to play such a role, because of the standard of “discriminatory intent” that it established. In *Washington*, a case based on a violation of Title VII of the Civil Rights Act of 1964, the court ruled that a plaintiff must be able to prove that harmful actions taken by an individual, a group, or a corporation were intended to cause harm to the plaintiff and not that the harm occurred as an unexpected by-product of the action.⁶⁶ The court concluded:

Under Title VII, Congress provided that when hiring and promotion practices disqualifying substantially disproportionate numbers of blacks are challenged, discriminatory purpose need not be proved, and that it is an insufficient response to demonstrate some rational basis for the challenged practices....We are not disposed to adopt this more rigorous standard for the purposes of applying the Fifth and the Fourteenth Amendments in cases such as this. A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate a whole range of tax, welfare, public

² U.S. Const. Amend. XIV, §1.

³“Constitution of the United States,” *Microsoft® Encarta® Encyclopedia 2000*.

⁴ *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977)

service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white....However, in our view, extension of the rule beyond those areas where it is already applicable by reason of statute, such as in the field of public employment, should await legislative prescription.⁶⁷

The above examples of early environmental justice cases are provided in order to illustrate not only the difficulties facing these plaintiffs, but also to provide insight into the limitations of the court. Environmental justice plaintiffs have favored the civil rights approach, however, virtually none of those suits has been successful. The reason for the losses is because the existing equal protection doctrine does not prove favorable to the kinds of arguments upon which environmental justice claims have depended on.⁶⁸ As noted previously, the court determines the outcome of a case based on the evidence provided and what is statutorily defined. This is not to say that all environmental class action cases end in defeat, as this final example will show.

Erin Brockovich

Pacific Gas & Electric Corporation's National Energy Group is one of the nation's leading competitive power producers, has natural gas facilities that connect major producing regions to some of the fastest-growing markets in North America, and operates one of the top energy trading businesses in the country.⁵ PG&E is the world's largest utility company and after four decades of dumping 370 million gallons of cancer-causing *Chromium 6*⁶ into unlined ponds in Hinkley, California, a civil class action lawsuit forced them to pay damages to the victims. If dumping harmful chemicals into Hinkley's groundwater was not bad enough, after being informed by the State of California that Chromium 6 was detected in PG&E's wells, they informed the residents of the pollution and under the pretense of a cleanup program, offered them money to buy their homes and distributed flyers which gave false information about the chemical. The flyers read:

Chromium occurs in 2 forms. The form that is present in groundwater can cause health effects in high doses. The cleanup program, however, will result in chromium levels that meet the very conservative drinking water standards set by the EPA. **In addition, the form of chromium that will be left on soils after irrigation is nontoxic. In fact, chromium in this form is a naturally occurring metal that is an essential ingredient in the human diet, one that is often included in multiple vitamin/mineral supplements.**⁷

The residents of Hinkley, comprised of poor working-class families with little or no education, began contracting various forms of cancer, as well as lung diseases and other respiratory problems, which for many, resulted in mastectomies, sterility, hysterectomies, and death.⁶⁹ Erin Brockovich, a formerly unemployed, single mother working for an attorney named Ed Masry, discovered the medical records of Hinkley residents in a real estate file that she was assigned. Acting on sheer instinct, Brockovich interviewed the families living near the contaminated wells, recorded their medical histories, and ultimately convinced her employer to take on a "David v. Goliath" class action lawsuit. The plaintiffs had to prove medical causation, reconstruct a complex hydro-geological water system and prove the extent of PG&E's knowledge of the illegal dumping. In a landmark settlement for environmental cases, the residents of Hinkley were compensated in the amount of \$333 million, PG&E was required to clean up the environment

⁵ <http://www.pge.com>

⁶The EPA has classified Hexavalent Chromium 6 as a carcinogen, however only if it is inhaled. The EPA does not consider ingested chromium through food or liquid to be a carcinogen.

⁷Quoted from the transcripts of *Anderson v. PG&E*.

and discontinue the use of Chromium 6. The settlement is the largest on record for an environmental civil class action lawsuit.⁷⁰ The case was made into a multi-million dollar motion picture and put the issues of “corporate poisoning” into the minds of American families. There are many more “Brockovich” stories to be told, but it is unlikely that Hollywood will take any notice of them and more importantly, neither will anyone else.

Future of the movement

Community participation has become the key ingredient for the development of successful environmental policies. Legal analysts have given various explanations for reasons that minority communities tend to receive an unequal burden of LULUs. Six concrete explanations are: (1) relative lack of power; (2) economics; (3) lack of participation in the environmental movement; (4) racism; (5) NIMBY;⁸ and (6) segregated housing and immobility.⁷¹ In order to affect the political process, the environmental justice movement must develop those strategies that will empower local communities, enabling them to exert pressure on the decision making process.⁷² Without substantial representation, any legislation that is passed could very well be ineffectual. The bottom-up approach of traditional grassroots movements, which seek to empower and organize communities, is what is needed to influence the decision-making process.⁷³

In most siting cases, it is the states that establish committees to oversee the issuance of permits to hazardous facilities, or the decision is left to the local county boards. With such important siting decisions left in the hands of the states and local zoning boards, it is little wonder then that an increasing number of environmental groups have accused local and state government agencies of environmental racism.⁷⁴

The environmental justice movement presents a new chapter in the nation’s debate on civil rights. The struggle for environmental equity is an uphill battle for minority and low-income neighborhoods. Environmental Justice activists have taken to the courts in search of a remedy, however the difficulties of proving discriminatory intent are usually insurmountable. The campaign against environmental injustice is still in its developmental stage, with regard to identifying viable legal strategies.⁷⁵ The Civil Rights Movement demonstrated that community empowerment strategies were an effective means of overcoming powerlessness. The strategies employed by the Civil Rights Movement are just as effective today as they were almost forty years ago. Those strategies empowered individuals, communities, and ultimately produced a national movement. In order for the Environmental Justice Movement to succeed, it must do the same. After all, in the words of King himself, “You don’t win against a political power structure when you don’t have the votes.”⁷⁶

Notes

¹Norman Vieira, Constitutional Civil Rights In A Nutshell (St. Paul: West Publishing Co., 1998): 70-71.

²Peter Levy, The Civil Rights Movement (Connecticut: Greenwood Press 1998): 9.

³Jo Ann Gibson, The Montgomery Bus Boycott and the Women Who Started It (Knoxville: University of Tennessee Press, 1987): 35.

⁸NIMBY syndrome is an acronym used for the “Not In My Backyard” phenomenon in which affluent neighborhoods block the siting of LULUs, Locally Undesirable Land Uses.

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- ⁴Adam Fairclough, Martin Luther King, Jr. (Georgia: University of Georgia Press, 1995): 16.
- ⁵Gibson: 42.
- ⁶Anthony Downs, An Economic Theory of Democracy (New York: Harper & Brothers 1957): 300.
- ⁷Downs: 248.
- ⁸Downs: 249.
- ⁹Downs: 93.
- ¹⁰Downs: 88.
- ¹¹Mancur Olson, The Logic of Collective Action, (Cambridge: Harvard University Press, 1965): 60.
- ¹²Olson: 65.
- ¹³Herbert Maccoby, "The Differential Political Activity of Participants in a Voluntary Association," *American Sociological Review* 23 (October 1958): 532.
- ¹⁴Sidney Verba et al., Voice and Equality: Civic Voluntarism in American Politics (Cambridge: Harvard University Press, 1995): 37.
- ¹⁵Verba: 15.
- ¹⁶Verba: 5.
- ¹⁷ Sidney Verba et al., "Citizen Activity: Who Participates? What Do They Say?" *The American Political Science Review*, 87 (June 1993): 314.
- ¹⁸Verba, Citizen Activity: 2.
- ¹⁹ Terry H. Anderson, The Movement and The Sixties (New York: Oxford University Press 1995): 311.
- ²⁰Anderson: 301.
- ²¹Fairclough: 10.
- ²² Novotny: 62.
- ²³ Jack M. Bloom, Class, Race, and the Civil Rights Movement: The Changing Political Economy of Racism (Bloomington: Indiana University Press, 1987): 143.
- ²⁴ Fairclough: 37.
- ²⁵ Martin Luther King, Jr., "Letter From A Birmingham Jail" 1963.
- ²⁶ David L. Lewis, King: A Critical Biography (New York: Praeger, 1970): 194.

²⁷Lewis: 194.

²⁸ Theodore J. Lowi and Benjamin Ginsberg, American Government: Freedom and Power (New York: W. W. Norton & Company, Inc., 1998): 132.

²⁹Levy: 21.

³⁰Levy: 24.

³¹Levy: 26.

³²Bloom: 181.

³³Bloom: 184.

³⁴ Robert D. Bullard, Dumping in Dixie: Race, Class, and Environmental Quality. Boulder: Westview Press, 1990: 2.

³⁵Bullard: 26.

³⁶R. Gregory Roberts, "Environmental Justice and Community Empowerment: Learning from the Civil Rights Movement", The American University Law Review, 48, (October 1998): 232.

³⁷Roberts: 234.

³⁸Robert D. Bullard, et al., "Grassroots Flowering" Amicus Journal, 16, No. 1 (Spring 1994): 32.

³⁹Fairclough: 78.

⁴⁰Anderson: 192.

⁴¹Coretta Scott King, My Life With Martin Luther King, Jr. (New York: Holt, Rinehart and Winston, 1969): 359.

⁴²Rose: 103.

⁴³Bullard, Grassroots: 34.

⁴⁴Anderson: 314.

⁴⁵Lowi: 95.

⁴⁶Anderson: 193.

⁴⁷Anderson: 63.

⁴⁸Carmen Sirianni and Lewis Friedland, Participatory Democracy in America. (Mass:Cambridge University Press, 2000): 17.

⁴⁹Novotny: 68.

⁵⁰Lois Marie Gibbs, Love Canal: My Story (Albany: State University of New York Press, 1982): 51.

⁵¹Sirianni: 23.

⁵²David E. Newton, Environmental Justice (Santa Barbara: Instructional Horizons, Inc., 1996): 25.

⁵³Luke W. Cole and Sheila R. Foster. From the Ground Up: Environmental Racism and the Rise of the Environmental Justice Movement. (New York: New York University Press, 2001): 122.

⁵⁴Newton: 27.

⁵⁵United States Environmental Protection Agency
<http://www.epa.gov/opperspd/history7/equity/chapt2.htm>. 11 November 2000: 1-5.

⁵⁶Carr: 307.

⁵⁷Environmental Protection Agency, Environmental Equity: Reducing Risk for all Communities, Vol. 1: Workgroup Report to the Administrator, EPA230-R-92-008, June 1992, pp. 6-8.

⁵⁸Carr: 307.

⁵⁹The White House, Office of the Press Secretary. February 11, 1994. Executive Order 12,898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations.” Washington D.C: The White House.

⁶⁰Executive Order 12898.

⁶¹Executive Order 12898.

⁶²United States Environmental Protection Agency, <http://www.epa.gov/epahome/NEPA.htm> 17 August 2000.

⁶³Newton: 23.

⁶⁴Roberts: 235.

⁶⁵*Arlington Heights v. Metropolitan Housing Development Corp.* 429 U.S. 252 (1977)

⁶⁶Newton: 142.

⁶⁷*Washington v. Davis* 426 U.S. 229.(1976).

⁶⁸Roberts: 828.

⁶⁹http://www.lawbuss.com/famous_trials/erin_brockovich. 4 August 2000.

⁷⁰*Anderson v. PG&E*, Superior Court for the County of San Bernadino, Barstow Division-File BCV 003.00.

⁷¹Roberts: 250.

⁷²Roberts: 247.

⁷³Roberts: 248.

⁷⁴Sandra L Geiger, "An Alternative Legal Tool for Pursuing Environmental Justice: The Takings Clause." Columbia Journal of Law and Social Problems 201 (Winter 1998): 208.

⁷⁵Fisher: 298.

⁷⁶Bloom: 174.

Conclusion: Environmental Justice: Is There A Remedy In Sight?

“When it shall be said in any country in the world, my poor are happy; neither ignorance nor distress is to be found among them; my jails are empty of prisoners, my streets of beggars; the aged are not in want, the taxes are not oppressive...; when these things can be said, then may that country boast of its constitution and its government.”

-Thomas Paine

While it is evident that our legal system is imperfect, it is still considered to be the most superior in the world. The reason that the courts are ill-equipped to address the issues of environmental justice is because they have a long history of failure in dealing adequately with the main concerns of the movement, namely prevention of civil rights. The combinations of these two elements spell disaster for future environmental justice plaintiffs based on the courts' past failures in addressing these issues. As previously stated, if future plaintiffs are relying on the courts to remedy the problems associated with environmental racism, they are destined to fail. The issue of racism and civil rights is clearly a political one and needs to be remedied as such. If the Civil Rights Movement has taught us anything, it is that injustice requires action. Legal action is not going to remedy the problem because obviously the system is designed to benefit those who have the financial means to litigate. These are not the people that are victims of environmental racism in the first place.

For reasons already mentioned in prior chapters, it remains the same story of the rich vs. the poor. Those who can afford to live in a neighborhood without the fear of contaminated ground water, or noxious odors in the air do so. Is it then a question of racism or socioeconomic factors? Is it then by virtue of their ethnicity that minorities are plagued with environmentally unsafe communities, or rather their socioeconomic status? Bullard's studies and others have concluded that the primary factor in determining the location of hazardous waste sites was race, but how accurate are these studies if they do not take socioeconomic factors into consideration? Furthermore the issue of which came first, the hazardous waste facility or low-income and minority communities has been neglected by the research studies mentioned in previous chapters. Vicki Been, for example reanalyzed the demographics of the studies done by Bullard and the GAO. In her studies, she found that four of the communities used in the GAO's study of hazardous waste locations, were originally occupied with predominantly low-income and minority communities. She found that neither the proportion of low-income residents nor the proportion of minority individuals increased after the sitings. In Bullard's Houston case studies, she found that minority populations, but not low-income populations, occupied the sites before the facilities were built. After they were constructed, however, the percentage of low-income residents dramatically increased. Been concluded:

...research examining the socioeconomic characteristics of host neighborhoods at the time they were selected, then tracing changes in those characteristics following the siting, would go a long way toward answering the question of which came first—the LULU or its minority or poor neighbors. Until that research is complete, proposed “solutions” to the problem of disproportionate siting run a substantial risk of missing the mark.¹

The term NIMBY (“Not In My Backyards”) stems from wealthy communities refusing to allow toxic waste plants into their communities. Are we to conclude then that there are no wealthy minorities that live in those same communities? It is the poor and disadvantaged who cannot afford to move into a healthier neighborhood and do not have the necessary means to be placed on the judicial docket. If race needs to be used in order to put the issue of environmental inequity in the forefront of mainstream consciousness, then so be it, but there are many more issues attached to environmental justice that Bullard

and others simply do not address. As Toqueville pointed out, there are few important political controversies in the United States that do not eventually become legal issues.¹ Throughout our history the most important issues of the day have been brought to the courts to adjudicate. We are decidedly a nation of legalists. The question arises then as to why we feel compelled to seek justice through the courts, when clearly justice is not their job in the case of environmental racism.

Important case law and landmark decisions have been decided by the interpretive standards of fallible human beings. Holmes himself looked to judges only to be impartial and competent, not omnipotent. Justice is subjective. In *Boomer*, did the courts provide justice when they refused to issue an injunction against the cement company and instead paid a sum of money to the plaintiffs? The company continued to pollute the air and the plaintiffs continued to have health problems due to the pollution. In tort law, money is the equivalence of justice, however the environmental justice plaintiffs need more than money to remedy the problem. Environmental justice plaintiffs need injunctions against the LULUs, stricter legislation on the siting of hazardous waste plants and an order from the courts to mandate these companies to clean up the toxic waste has spilled over into their communities. Because litigation has proven unsuccessful, poor communities seeking justice from the courts need to look elsewhere.

It was not until the Civil Rights Movement became an issue of economics that the movement began to see change. The owners of the Montgomery bus company, for example were losing large amounts of money during the boycott. Developers are interested in cheap land costs, therefore from an economic perspective it is more cost-effective to place hazardous waste sites in areas that will provide the path of least resistance. If placing these toxic facilities in minority and poor communities becomes less cost-effective due to stricter legislation, zoning boards with minority members, and threats of legal costs, the developers will move elsewhere. Therefore, the concerns of the Environmental Justice Movement will not be remedied, until society views them as political concerns. Until a candidate seeking political office cannot gain votes without addressing environmental inequities, the movement is moot. It must be in the forefront of every politician's mind that is seeking the minority vote. Without political support, the movement becomes simply another cause.

While it is more likely than not that public and private officials trying to decide where to locate an industrial or waste treatment will seek out poor communities, their rationale in doing so seems to be approved by the courts. A company will place its plant in a location that will minimize costs and maximize returns. Those neighbors who can afford to move away because they dislike being near the hazardous plant will do so. The diminished willingness to move into the area tends to lower property values. As property values decline, real estate prices and housing rents become more affordable for lower income families. This type of market-based analysis could explain the greater percentages of persons of color around hazardous facilities, which would explain why environmental justice plaintiffs are losing their cases based on their inability to prove intentional discrimination.² Firms do not deny that extra-local factors, like global competition, exist when choosing a site. In order to sue a firm for environmental racism, the law requires that businesses are liable for intentional acts of discrimination committed, however they cannot be held liable for the exigencies of global competition.³ These are just some of the excuses that corporate America uses to hide its mistreatment of minorities and the poor. The issues that the Environmental Justice Movement faces go beyond ordinary racism. The real issues are political voice and representation in both the governmental realm and the courtroom. Until these issues are addressed, the movement will remain in the grassroots.

Although environmental injustice is inherently a "political" problem, Congress is not the appropriate body to remedy the problem. The difficulty in passing legislation goes to the central issue of environmental injustice – the political and economic powerlessness of minority and poor communities. Who then will speak on behalf of the interests of the disadvantaged when environmental justice legislation is brought before Congress? Because the poor and minorities are underrepresented in virtually every sector of government, it follows then that civic activism is the needed approach to push environmental justice issues to the forefront of political consciousness. Those underrepresented groups that are facing

¹ See Alexis De Tocqueville's Democracy In America, (New York: New American Library, 1956): 251.

discriminatory toxic dumping are the real victims in a struggle that began long before the Civil Rights Movement.

If the success of the Civil Rights Movement has taught us anything, it is that the power of collective action knows no limit. People working together towards a common goal is our country's greatest strength. King proved that and now it is up to the Environmental Justice Movement to put his tactics into action for their cause. Coretta Scott King wrote her biography shortly after King's death. She appealed to all Americans to continue the journey that her husband had started and to acknowledge that racism is intolerable. Mrs. King recognized that regardless of how far the Civil Rights Movement had come, the fight for racial equality was not over. She implored the movement to continue civic activism, rather than relying on the courts and legislation and their interpretations of "justice":

A century after Emancipation, and after the enactment of the 13th, 14th and 15th Amendments, it should not have been necessary for Martin Luther King, Jr., to stage marches in Montgomery, Birmingham and Selma, and go to jail over twenty times trying to achieve for his people those rights which people of lighter hue get by virtue of their being born white.... To paraphrase the immortal words of John Fitzgerald Kennedy, permit me to say that Martin Luther King, Jr.'s unfinished work on earth must truly be our own.⁴

Notes

¹David E. Newton, Environmental Justice. (Santa Barbara: Instructional Horizons, Inc., 1996): 42-43.

²Robert W. Williams, "Environmental Injustice in America and its Politics of Scale." Political Geography 18 (1999): 63.

³Williams: 65.

⁴Coretta Scott King, My Life With Martin Luther King, Jr. (New York: Holt, Rinehart and Winston, 1969): 359.