

## Structural Racism, Structural Pollution and the Need for a New Paradigm

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Any serious attempt to address the issues of poverty, wealth and the working poor would do well to learn from the Environmental Justice movement, a broad-based national social movement that has emerged from the ground up over the past twenty years.<sup>1</sup> The movement operates at the intersection of race, poverty and the environment, and offers hope in an otherwise bleak landscape of environmental and social justice advocacy. The movement offers a new paradigm for community leadership and control.

This Article explores the need for that new paradigm, using one community's struggle against toxic intrusion to illustrate the failure of the traditional paradigms of environmental and civil rights law.<sup>2</sup> The experiences of residents of the Waterfront South neighborhood of Camden, New Jersey, demonstrate the need to address the structural nature of both pollution and racism, and we offer an environmental justice approach as a start.

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1. See Robert D. Bullard, *Environmental Justice in the Twenty-First Century*, in THE QUEST FOR ENVIRONMENTAL JUSTICE: HUMAN RIGHTS AND THE POLITICS OF POLLUTION 19 (Robert D. Bullard ed., 2005); see also Olga D. Pomar & Luke W. Cole, *Camden, New Jersey, and the Struggle for Environmental Justice*, 36 CLEARINGHOUSE REV. 94, 94-95 (2002); Olga Pomar, *Toxic Racism on a New Jersey Waterfront*, in THE QUEST FOR ENVIRONMENTAL JUSTICE, *supra*, at 126.

2. Pomar & Cole, *supra* note 1, at 104-06.

## I. WATERFRONT SOUTH AND THE FAILURE OF ENVIRONMENTAL LAW

Camden, New Jersey, is an economically depressed community across the Delaware River from Philadelphia. Following the collapse of its industrial base, Camden became one of the most blighted areas of the northeastern United States;<sup>3</sup> when its manufacturing jobs disappeared, all that was left were heavily polluted industrial sites and abandoned factories.<sup>4</sup> Camden became the poorest city in the state, and one of the poorest in the nation, with a per capita income of less than \$8000 in 2002.<sup>5</sup>

One Camden neighborhood is even more devastated and environmentally degraded than the rest—Waterfront South, a neighborhood of less than a square mile in South Camden between the river and an interstate.<sup>6</sup> Waterfront South contains the South Jersey Port Corporation, which used to be a major shipbuilder, homes, boarded up stores, two federal Superfund sites,<sup>7</sup> thirteen other known contaminated sites, four junkyards, a petroleum coke transfer station, a scrap metal recycling plant, numerous auto body shops, a paint company, a chemical company, three food processing plants, and other heavy industrial use sites.<sup>8</sup> The huge U.S. Gypsum plant abuts the neighborhood to the north.<sup>9</sup>

Despite this concentration of polluting facilities—and the attendant diesel truck traffic they require—decision-makers in Camden County and at the state level continue to target Waterfront South for undesirable land uses.<sup>10</sup> The County chose Waterfront South as the site of a sewage treatment plant that serves thirty-five municipalities, and of an open-air sewage-sludge-composting facility

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3. *Id.* at 98.

4. *Id.*

5. *Id.*

6. *Id.* at 99.

7. “Superfund” refers to a federal initiative to clean up abandoned hazardous waste sites authorized by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), which was enacted by Congress in 1980. *See* 42 U.S.C. §§ 9601–75 (2000). Only sites that pose a serious danger to public health or the environment are eligible to be listed on the National Priority List as “Superfund sites.” For more information on Camden’s Superfund sites, see Pomar & Cole, *supra* note 1, at 99 n.26.

8. Pomar & Cole, *supra* note 1, at 99.

9. *Id.*

10. *Id.*

next to the treatment plant.<sup>11</sup> They also chose to put the garbage incinerator for the entire County's trash in Waterfront South, followed by a massive co-generation power plant.<sup>12</sup> The New Jersey Department of Environmental Protection (DEP) granted permits for all of these projects, over local opposition.<sup>13</sup>

"For years, Waterfront South residents endured sewage odors, diesel truck fumes, dust, and noise. The rates for asthma and other respiratory problems rose dramatically. At the same time, the area became more blighted, housing values dropped," and it became increasingly difficult for the remaining residents to move out of the area.<sup>14</sup> As of 2002, Waterfront South contained slightly more than 2000 residents.<sup>15</sup> Almost half of them were children, who are most vulnerable to pollution.<sup>16</sup>

Thus, in 1999, when the St. Lawrence Cement Company (SLC) announced plans to build a huge cement-grinding facility in Waterfront South that would emit an additional one hundred tons of air pollutants each year, local residents said "enough is enough."<sup>17</sup> They mobilized to fight the plant, but their efforts were hampered by several factors. First, because SLC would construct and operate its plant within the boundaries of the South Jersey Port Corporation, a state agency, the plant was exempt from review by local Camden authorities.<sup>18</sup> Thus, those decision makers closest to the residents—their own local elected officials—had no role in the permit approval process.

Second, under New Jersey law, companies that submit a completed permit application to the DEP may begin to construct their facility prior to its approval, "at risk," while the DEP processes the permit application.<sup>19</sup> SLC completed its application and began construction in November, 1999, nine months before the first

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11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.* at 99–100.

15. *Id.* at 100.

16. *Id.*

17. *Id.* at 100–01.

18. *Id.* at 101.

19. N.J. STAT. ANN. § 26:2C-9.2(j) (West 1996); N.J. ADMIN. CODE § 7:27-8.24 (2005).

opportunity for public comment on the project.<sup>20</sup> By the time of the only public hearing on the matter, in August, 2000, construction of the plant was more than half finished.<sup>21</sup> The DEP made no changes whatsoever to the facility as a result of public input, and granted SLC its permit in October, 2000.<sup>22</sup> New Jersey Governor Christine Todd Whitman attended the ribbon-cutting ceremony for the plant, which the DEP heralded as a much-needed new investment in Camden.

Local residents secured legal representation, and, with their lawyers, quickly realized that the new plant was “legal” under environmental law. The DEP had taken the necessary procedural steps in permitting the plant and would not be vulnerable to a legal challenge on environmental grounds.<sup>23</sup>

The experience of Waterfront South residents illustrates the failure of environmental law to protect communities like Camden. Despite the overwhelming congregation of polluting industry in the neighborhood and the environmental health hazards faced by its residents, nothing in environmental law provided a means of stopping the facility.<sup>24</sup> Under the law, the community’s input was heard only *after* construction of the facility was underway, and the DEP did not alter a single permit provision in response to that input. Clearly, the old paradigm of environmental law did not work for Waterfront South.<sup>25</sup>

## II. WATERFRONT SOUTH AND THE FAILURE OF CIVIL RIGHTS LAW

There is another piece to the Camden picture: after thirty years of “white flight,” the city is home to an almost exclusively African-American and Latino population.<sup>26</sup> Ninety-four percent of Waterfront

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20. Pomar & Cole, *supra* note 1, at 102.

21. *Id.*

22. *Id.*

23. Pomar, *supra* note 1, at 134. In the interest of full disclosure, the senior author is counsel to the community residents and represented them (along with lead counsel Olga Pomar of South Jersey Legal Services and co-counsel Jerome Balter and Michael Churchill of the Public Interest Law Center of Philadelphia) in the civil rights actions described in this Article.

24. South Camden Citizens in Action v. N.J. Dep’t of Env’tl. Prot. (*Camden I*), 145 F. Supp. 2d 446, 469 (D.N.J. 2001).

25. Sheila Foster, Remarks at the Washington Univ. Sch. of Law Poverty, Wealth and the Working Poor Conference (Mar. 31–Apr. 1, 2005).

26. Pomar & Cole, *supra* note 1, at 99.

South's residents are people of color.<sup>27</sup> Camden's status as a community overwhelmingly made up of people of color and one of the most polluted cities in New Jersey is unfortunately not unique, nor unpredictable. Indeed, nationally, the Environmental Justice Movement arose as a community-based response to the well-documented fact that low-income communities and communities of color bear a disproportionate burden of pollution.<sup>28</sup> Beyond the empirical studies, the impact of environmental racism is something we understand intuitively.<sup>29</sup> Think about the community in which you grew up, or in which you live now—where is the “wrong side of the tracks,” the heavy industrial neighborhood? Who lives there? And are we surprised? We know that inequality abounds, and that discrimination exists in the housing arena, the criminal justice system, educational settings, and labor markets, to name just a few. Why would environmental policy and the distribution of environmental benefits and burdens be any different?

Given the overwhelming concentration of polluting facilities permitted by the DEP in Waterfront South, it was not difficult for the community residents' experts to find that the DEP's actions had a disparate impact on the community.<sup>30</sup> The expert's studies found disparate impact not only in Camden, but throughout New Jersey—black people bore more environmental burdens than white people.<sup>31</sup> Professor Michel Gelobter, looking at the distribution of polluting facilities on a statewide basis, found that ZIP codes with higher than the state-wide average of 20.6% non-white residents had more than twice the air polluting facilities (13.7 facilities per ZIP code) than

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27. Pomar, *supra* note 1, at 126.

28. See, e.g., LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 167 (2001) (providing an annotated bibliography of studies and articles that document the disproportionate impact of environmental hazards by race and income).

29. See Manuel Pastor, Jr. et al., *Environmental Inequity in Metropolitan Los Angeles*, in THE QUEST FOR ENVIRONMENTAL JUSTICE, *supra* note 1, at 108, 110.

30. The community alleged a violation of their rights under Title VI of the Civil Rights Act, which required proof of disparate impact. See *Camden I*, 145 F. Supp. 2d at 450, 484. The litigation is discussed further *infra* Part II.A.

31. *Camden I*, 145 F. Supp. 2d at 461, 491–92 (“[I]n the State of New Jersey there is a strong, highly statistically significant, and disturbing pattern of association between the racial and ethnic composition of communities, the number of EPA regulated facilities, and the number of facilities with Air Permits.”) (internal quotations omitted); Pomar, *supra* note 1, at 126.

those with a below-average number of non-white residents.<sup>32</sup> Waterfront South had 2.3 times as many polluting facilities as the average New Jersey ZIP code.<sup>33</sup>

Similarly, Professor Jeremy Mennis examined DEP's permitting and enforcement.<sup>34</sup> He found that in New Jersey, race was a significant predictor of proximity to air polluting facilities.<sup>35</sup> On the enforcement side, he found that air-polluting facilities in communities of color had both less enforcement and lower penalties when violations were found.<sup>36</sup>

### *A. The Civil Rights Lawsuit*

Facing a cement-grinding facility that was legal under environmental law, residents turned to the statutes ostensibly enacted to protect people of color—civil rights law. Their experience demonstrates the failure of the old paradigm of civil rights law, as well. The community sued SLC and the New Jersey DEP, alleging intentional discrimination under Title VI of the Civil Rights Act of 1964,<sup>37</sup> and discriminatory effect, or disparate impact discrimination, under the Title VI regulations of the U.S. Environmental Protection Agency (EPA).<sup>38</sup>

Title VI was the Congressional response to the Civil Rights movement, and it bars discrimination by any entity that receives funding from the federal government.<sup>39</sup> When Title VI was enacted, every federal agency implemented regulations to give it life; these regulations barred recipients of federal money from acting in a manner that had a disparate impact on people of color and other

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32. *Camden I*, 145 F. Supp. 2d at 491.

33. *Id.* at 492.

34. Jeremy L. Mennis, *The Distribution and Enforcement of Air Polluting Facilities in New Jersey*, 57 PROF. GEOGRAPHER 411 (2005).

35. *Id.* at 419.

36. *Id.* at 420.

37. 42 U.S.C. § 2000d (2000).

38. See 40 C.F.R. §§ 7.10–.135 (2004); *South Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot. (Camden I)*, 145 F. Supp. 2d 446, 452 (D.N.J. 2001).

39. 42 U.S.C. § 2000d (2000) (“No person in the United States shall, on the grand of race, color, or national origin, . . . be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

protected classes.<sup>40</sup> Unfortunately, since Title VI's passage in 1964, the Supreme Court has systematically eviscerated the statute, stripping the concept of discriminatory impact from Title VI itself and holding in a series of decisions that one must prove *intentional* discrimination in order to establish a violation of section 601 of the statute.<sup>41</sup> However, actions having an unjustifiable disparate impact could still be redressed through agency regulations promulgated under section 602 of Title VI,<sup>42</sup> and these regulations provided the basis of the Camden residents' suit.

On April 19, 2001, Judge Orlofsky of the federal District Court in Camden issued an injunction against the cement plant prohibiting its operation.<sup>43</sup> He found that there was indeed a disparate impact as prohibited by EPA regulations.<sup>44</sup> The community's experts had demonstrated that blacks in New Jersey were twice as likely to live near a polluting facility than whites.<sup>45</sup> In a key part of Judge Orlofsky's decision, he noted that this facility had all of its environmental permits—it was *legal* under environmental law—but that it still violated civil rights law.<sup>46</sup>

The community's victory was short-lived. On April 24, 2001, the U.S. Supreme Court decided *Alexander v. Sandoval*<sup>47</sup> (an unrelated case concerning drivers' licenses in Alabama), holding that there is no private right of action to enforce the disparate impact regulations promulgated by federal agencies under section 602 of Title VI.<sup>48</sup> In response, the Third Circuit quickly lifted Judge Orlofsky's injunction, and, citing *Sandoval*, ruled that the Camden plaintiffs could not sue

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40. See, e.g., 40 C.F.R. § 7.35 (2004).

41. *Alexander v. Choate*, 469 U.S. 287, 293 (1985) (interpreting various opinions of *Guardians Association v. Civil Service Commission of New York*, 463 U.S. 582 (1983)); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (holding that Title VI proscribes only those racial classifications that would violate the Equal Protection clause or the Fifth Amendment).

42. *Choate*, 469 U.S. at 293 (citing *Guardians Ass'n*, 463 U.S. at 584).

43. *Camden I*, 145 F. Supp. 2d at 505.

44. *Id.* at 492.

45. *Id.* at 491–92.

46. *Id.* at 469.

47. 532 U.S. 275 (2001).

48. *Id.* at 293.

under a disparate impact theory.<sup>49</sup> Although the district court found discriminatory impact as a result of DEP's decisions—factual findings not overturned on appeal—Camden residents were left without judicial recourse. The old question, “What good is a right if you can't enforce it?,” demonstrates the failure of the old paradigm of civil rights law for communities like Camden.<sup>50</sup>

The Supreme Court in *Sandoval*, in taking away the public's right to enforce disparate impact regulations promulgated under section 602 of Title VI, granted federal agencies the sole discretion to enforce these anti-discrimination measures.<sup>51</sup> The experience of Camden residents illustrates the empty promise of the Supreme Court's decision.

### *B. EPA's Title VI Administrative Complaint Process*

Camden residents also filed an administrative complaint with the EPA under the agency's Title VI regulations.<sup>52</sup> They might appear to have had an easy route to victory with this administrative complaint—after all, a federal judge had already found discriminatory disparate impact in violation of the EPA's own regulations.<sup>53</sup> However, a unique political situation, combined with an utter failure by the EPA to enforce its own regulations, doomed the Camden residents' chances at redressing the civil rights violations in this manner.

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49. *South Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot. (Camden II)*, 274 F.3d 771 (3d Cir. 2001).

50. As lead counsel Olga Pomar noted:

[The] Third Circuit Court's decision thus placed the SCCIA in the peculiar position of having obtained a ruling, still in effect, that the state environmental agency's practices violated civil rights, and of having no ability to benefit from that ruling. Meanwhile, the cement company continues to operate, releasing invisible but dangerous particulates from its smokestack.

Pomar, *supra* note 1, at 135.

51. *Sandoval*, 532 U.S. at 293; *see also* Pomar, *supra* note 1.

52. *See* Letter from Jerome Balter, Attorney, Pub. Interest Law Ctr. of Phila., to Anne Goode, Dir., Env'tl. Prot. Agency (Oct. 4, 2000) (on file with author).

53. *South Camden Citizens in Action v. N.J. Dep't of Env'tl. Prot. (Camden I)*, 145 F. Supp. 2d 446, 493 (D.N.J. 2001).

It is instructive to remember the political circumstances that existed in early 2001. The newly-appointed EPA administrator, to whom Camden residents appealed, was, in an unfortunate coincidence, former New Jersey Governor Christine Todd Whitman. Thus, the residents asked the very governor whose DEP had approved the SLC permit, and who had attended the ribbon-cutting for the opening of the SLC plant, to now declare her own gubernatorial administration's actions a violation of civil rights. Given this situation, the residents were unlikely to prevail in their administrative complaint, and, to no one's surprise, they did not.<sup>54</sup>

But it would be a mistake to ascribe the failure of EPA to act on the Camden residents' complaint to this unique circumstance. Indeed, their complaint fared no differently than almost 150 other civil rights complaints filed under Title VI with the EPA.<sup>55</sup> Since 1992, when the first environmental justice Title VI complaints<sup>56</sup> were filed with the agency, it has never ruled in favor of a complainant.<sup>57</sup> It has dismissed a majority of the complaints on procedural grounds, sometimes appropriately, sometimes speciously.<sup>58</sup> It has tortured its own regulations and policy to rule against the complainants in every case in which it has made a decision on the merits.<sup>59</sup> And it has allowed cases to die from malnutrition, withering away for lack of

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54. Pomar, *supra* note 1, at 140.

55. See Letter from Anne Goode, Dir., Env'tl. Prot. Agency, to Jerome Balter, Attorney, Pub. Interest Law Ctr. of Phila. (Mar. 30, 2001) (on file with author) (refusing to process the complaint).

56. That is, complaints about environmental hazards, rather than about employment discrimination.

57. EPA OFFICE OF CIVIL RIGHTS, TITLE VI COMPLAINTS FILED WITH EPA (2005), <http://www.epa.gov/civilrights/docs/t6csjuly05.pdf>; see also Julie R. Domike & Arthur W. Ray, *Courts Focus on Title VI Issues in Locating Industrial Plants in Low-Income Areas*, NAT'L L.J., Dec. 1, 1997, at C1; Cheryl Hogue, *Environmental Justice: Permits Cited in Civil Rights Complaints Have Remained Valid, EPA Official Says*, 152 Daily Env'tl. Rep. (BNA) (Aug. 7, 1998).

58. TITLE VI COMPLAINTS FILED WITH EPA, *supra* note 57; Paul Connolly, *Environmental Justice: Mayors Rap EPA at Meeting with Browner for Failure to Consult on Interim Guidance*, [1998] 29 Env'tl. L. Rep. (Env'tl. Law Inst.) 658 (July 24, 1998) (noting that as of July 1998, EPA had rejected a significant number of the complaints filed with the agency); Hogue, *supra* note 57, at A9.

59. Luke W. Cole, *Wrong on the Facts, Wrong on the Law: Civil Rights Advocates Excoriate EPA's Most Recent Title VI Misstep*, [1999] 29 Env'tl. L. Rep. (Env'tl. Law Inst.) 10,775 (Dec. 1999) (discussing the first administrative Title VI complaint that EPA decided on the merits).

attention over the years.<sup>60</sup> Several cases filed in 1994 and 1995 have yet to be resolved. So, the EPA is no protector of civil rights in the environmental context.<sup>61</sup> The seeming futility of expecting a federal agency to follow and enforce its own regulations starkly illustrates the failure of the old civil rights paradigm.

### III. THE LESSONS OF WATERFRONT SOUTH

The *Camden* case is emblematic of the failure of both civil rights and environmental law to protect communities facing these environmental hazards. We need a new paradigm. This need is further illustrated by examining the theoretical approaches some scholars have taken to the disparate impact of environmental hazards.

In the “old paradigm,” poverty is a result of individual inadequacy—the poor are to blame for their situation. Consequently, collective responsibility for that poverty is limited.<sup>62</sup> This argument has its analogy in the environmental injustice context, in which Vicki Been is among the most prominent theorists in this camp. She has written extensively on how the disparate impact of some environmental hazards might be explained by the fact that people are “coming to the nuisance,” that is, the polluting industry was there first, and poor people and people of color proceeded to move into the neighborhood.<sup>63</sup> Under this formulation, environmental inequity is essentially volitional. It is the *choice* of poor people and people of color to live near polluting industries. That is just the “free market.”<sup>64</sup>

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60. *Id.* at 10,776; see also TITLE VI COMPLAINTS FILED WITH EPA, *supra* note 57; U.S. COMM’N ON CIVIL RIGHTS, NOT IN MY BACKYARD: EXECUTIVE ORDER 12,898 AND TITLE VI AS TOOLS FOR ACHIEVING ENVIRONMENTAL JUSTICE (2003), <http://www.usccr.gov/pubs/envjust/ch3.htm>.

61. NOT IN MY BACKYARD, *supra* note 60.

62. See Beverly H. Wright, *Effects of Occupational Injury, Illness, and Disease on the Health Status of Black Americans: A Review*, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE 114, 118–19 (Bunyan I. Bryant & Paul Mohai eds., 1992) (explaining “victim blaming”).

63. Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 *ECOLOGY L.Q.* 1, 27 (1997).

64. Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics*, 103 *YALE L.J.* 1383, 1388–92 (1994); see also THOMAS LAMBERT & CHRISTOPHER BOERNER, ENVIRONMENTAL INEQUITY: ECONOMIC CAUSES, ECONOMIC SOLUTIONS 16 (1995); James Hamilton, *Testing for Environmental Racism: Prejudice, Profits, and Political Power?* 14 *J. POL’Y ANALYSIS & MGMT.* 107 (1995).

Within this “old paradigm,” there are both liberal and conservative camps, just as in the broader poverty debate.<sup>65</sup> The conservatives say, “We should not interfere with the marketplace, let the free market work.”<sup>66</sup> Basically, the status quo is acceptable.<sup>67</sup> Christopher Boerner and Thomas Lambert, apologists for the disparate impact, write that people choose to assume the risk to get the “benefit” of lower housing prices.<sup>68</sup> On the other hand, the liberals say, “Let’s make sure that if any industry is located where people live, it is following all of its permits, and if new industry wants to come in, that the people who live there are fully involved.”<sup>69</sup> Basically, if industry follows the rules, then no remedy is needed. These outcomes are the natural functionings of our economy, and that is that.

To analogize, let us imagine a busy roadway, with cars and trucks whizzing along. A man waiting on one side of the roadway sees his opportunity to cross, and starts to do so. He is hit by a truck. Two “old paradigm”-ers are watching this situation, one liberal, the other conservative. The liberal says, “Oh my gosh! Did you see if the light was red or green?” Because if the light was green—that is, if the truck had permission to be whizzing along—then her response is different than if the light were red, and the truck was violating the law. The conservative says, “He knew what the risk was in crossing the street, and he assumed that risk. That’s the free market.”

Though the analyses of liberal and conservative old paradigm thinkers are different in this exaggerated example, their ultimate conclusions are the same. Analogous outcomes are reached when these groups evaluate the disparate impact of environmental hazards. In the conservative position, the disparate impact of environmental hazards is fine because the residents chose to live in that community and assumed the risk; that is just the market working. In the liberal position, if the facility has all of its permits and is not violating them, and the process for siting that facility was “fair,” then the community

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65. Cf. Mark Rank, *Toward a New Understanding of American Poverty*, 20 WASH. U. J.L. & POL’Y 17 (2006).

66. LAMBERT & BOERNER, *supra* note 64.

67. *Id.*

68. *Id.*

69. Been & Gupta, *supra* note 63.

bearing the brunt of the subsequent pollution has no recourse. In essence, the facility had a green light.

The old paradigm, in both its draconian conservative guise and in its concerned liberal mode, ignores the structural nature of both pollution and racism in our society.<sup>70</sup> Relying on the market to redress environmental injustice is unreasonable. As Bill Quigley observes, “[e]xpecting only the unguided market to steadily create good jobs at good wages is like expecting your car to watch your kids. It cannot happen.”<sup>71</sup> Similarly, expecting the market alone to “solve” the problem of pollution and its disparate impacts is simply unrealistic. The market is not designed to protect people from pollution—indeed, under our market-based system, there is little disincentive to pollute, as pollution is an externality.<sup>72</sup> Instead, we need to look beyond the market and examine the structural nature of pollution and racism in our society.

#### IV. A STRUCTURAL UNDERSTANDING OF POLLUTION AND RACISM

It is important to recognize that both pollution and racism have structural underpinnings which will inevitably lead to racist outcomes unless affirmatively attacked and prevented.

##### *A. Pollution is Structural*

Pollution is an externality—a cost of a product that is not borne by the producer or the consumer, but by society at large.<sup>73</sup> This means that the producer is making more profit, as the cost of polluting is less

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70. Their factual assumptions are simply wrong as well. Empirically, “the disproportionate location of hazardous waste treatment, storage, and disposal facilities in communities of color is the result of facility siting decisions and not simply a market-induced move-in of poor residents of color to lower-rent areas that are already affected by environmental hazards.” Pastor, Jr., *supra* note 29, at 121.

71. WILLIAM P. QUIGLEY, *ENDING POVERTY AS WE KNOW IT: GUARANTEEING A RIGHT TO A JOB AT A LIVING WAGE* 7 (2003).

72. See LAMBERT & BOERNER, *supra* note 64, at 17–18. “Economists refer to pollution as an ‘external cost’ or ‘negative externality’: negative because it is undesirable, and an externality because it affects those who are outside of (i.e. who have no control over) the process that creates it.” *Id.*

73. *Id.*

than the cost of purifying the waste prior to discharge.<sup>74</sup> In fact, the market economy tends to create more pollution—by externalizing costs, the producer can lower prices, increase the quantity of goods sold, gain more market share, and eventually reap greater profits.<sup>75</sup> Because profit is the ambition of the market economy, then the market by its very nature creates more pollution as an inevitable by-product of its operation. It is only government intervention into the market, in the form of regulation, that controls pollution. And *control* is the operative word—the Clean Air Act, the Clean Water Act, and other environmental laws do little to eliminate pollution, instead setting up elaborate systems for regulating its discharge.<sup>76</sup> As anyone who has lived next to a polluting plant can tell you, whether or not it is “legal” pollution—that is, whether or not the emissions are within that factory’s permitted limits—it still causes disease, illness, and death. It still triggers asthma, even if the plant is not violating its permit. Our market system operates to create pollution, and our regulatory system is designed to control it, but it still exists. It is part of the structure of our economy.

### *B. Racism is Structural*

Racism in this country is also structural, and therefore the simple workings of the marketplace have a racially disproportionate—indeed, a racist—outcome. Facially neutral decisions can lead to the silent violence of toxic racism.

For example, suppose a business owner in 2006 wants to build a new factory that will emit a certain amount of toxic pollution. There are three main criteria the owner will likely evaluate to find a location for the factory: appropriate zoning, access to transportation, and cheap land.<sup>77</sup> Using these “neutral” criteria, the factory will often be

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74. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1245 (1968).

75. Producers have no incentive to change this situation, making effective regulation difficult. *See, e.g.*, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 352 (3d ed. 1986) (“In the deliberations before the . . . agency leading to the formulation of the [pollution control] standard, the affected industry has an incentive to propose the cheapest pollution control method, regardless of its efficacy.”).

76. *See, e.g.*, Clean Air Act, 42 U.S.C. §§ 7401–7671q (2000); Clean Water Act, 33 U.S.C. §§ 1251–1387 (2000).

77. *See* COLE & FOSTER, *supra* note 28, at 73.

sited in a low-income community of color because each of the three criteria have a racial component.<sup>78</sup> None are “neutral” in their history or in their present day application.

Since its inception in the early part of the last century, zoning has been used to regulate land use.<sup>79</sup> It has also been used to regulate where people live—to segregate people.<sup>80</sup> Environmental racism is found at the intersection of those two uses. Economist Yale Rabin has documented the racial—and racist—history of zoning, wherein predominately white decision-making bodies systematically “down-zoned” the classification of stable residential communities of people of color to allow for industrial uses.<sup>81</sup> White decision-makers routinely placed black neighborhoods next to or within industrial areas or in areas where unpleasant land uses such as stockyards were located. While *de facto* segregation is no longer legal, the land use patterns (and the industrial zoning) created by these decision-makers still controls in many communities across the country. So if a business person in 2006 seeks to develop an industrial site and looks solely in areas zoned for industrial uses, in many cases that factory is more likely to end up near communities of color than white communities.<sup>82</sup>

Producers want their factories to be located near freeways, making them more accessible for trucks carrying raw materials in and finished products out. One must then ask, where are the freeways? Why are they there? The decision-making of the 1950s and early 1960s about the placement of our highway system in urban areas was explicitly racial, and racist.<sup>83</sup> “Urban renewal” of that period meant tearing down or running freeways through the “ghettos”—often

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78. *Id.* at 70–74.

79. See Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in *ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP* 101, 103–06 (Charles M. Haar & Jerold S. Kayden eds., 1989).

80. *Id.* at 106–08.

81. *Id.* at 108–19 (collecting anecdotal evidence of “expulsive zoning,” the permitted intrusion into black neighborhoods of disruptive incompatible uses that diminish the quality and undermine the stability of those neighborhoods).

82. COLE & FOSTER, *supra* note 28, at 70–74.

83. Robert D. Bullard, *Introduction to HIGHWAY ROBBERY: TRANSPORTATION RACISM & NEW ROUTES TO EQUITY* 1, 4–5 (Robert D. Bullard et al. eds., 2004).

stable residential African-American communities.<sup>84</sup> Thus, if a business makes a siting decision based on proximity to freeways, it is disproportionately likely to end up in a black community.

Putting aside the impact of heavy industrial zoning (which drives down land values) and proximity to freeways (which drives down residential land values), land values in and of themselves also have a racial component.<sup>85</sup> Sociologists Douglass Massey and Nancy Denton, in their groundbreaking book *American Apartheid*, documented the willingness of white people to pay a premium in order to avoid living near or among black people.<sup>86</sup> Because of this racism, land in white communities is more expensive than land in black communities. Therefore, decisions based on land values will steer factories and other businesses toward African-American communities.

In relying on the “neutral” criteria of zoning, access to transportation and land values, the non-racist business owner in 2006 is silently and unwittingly guided by society’s structural racism into siting a new polluting plant in a manner that has a racially disparate impact. As Mark Rank notes, “American poverty is largely the result of structural . . . failings.”<sup>87</sup> This observation has equal application in the environmental context—the inequitable distribution of environmental hazards in this country is the result of structural failings. Until that is recognized, environmental injustice cannot be appropriately remedied.

## V. THE NEW PARADIGM: ENVIRONMENTAL JUSTICE

The Environmental Justice movement has contributed a series of significant theoretical perspectives to the discourse on how to solve environmental problems. We briefly discuss three such perspectives here to illustrate their potential for reframing the environmental

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84. See Omar Freilla, *Burying Robert Moses’ Legacy in New York*, in HIGHWAY ROBBERY, *supra* note 83 (describing the devastating and long-lasting effects of Robert Moses’ transportation policies in New York City in the 1920s–60s).

85. Been, *supra* note 64.

86. DOUGLASS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS* (1993).

87. Rank, *supra* note 65, at 26.

debate: the ideas of communities speaking for themselves, of pollution prevention, and of the precautionary principle.<sup>88</sup>

*A. "We Speak for Ourselves"*

One of the central tenets of the Environmental Justice movement is that communities should speak for themselves—that is, when decisions are being made, those affected by the decisions should have a prominent place at the table.<sup>89</sup> As Bill Quigley advises, “a radical revolution of values prizes the perspective of those at the margins.”<sup>90</sup> This is a fundamental teaching of the Environmental Justice movement.

*B. Pollution Prevention*

When the toxic waste industry asked the question, “Where should we put this incinerator if not in your backyard?” environmental justice activists responded with their own paradigm-shifting question: “Why produce the toxic waste in the first place?” Rather than trying to determine the best way to treat lead poisoning, environmental justice activists ask, why not remove lead from homes so children are not poisoned?<sup>91</sup> Rather than accepting the status quo of pollution, these activists seek to change production practices upstream so that pollution is eliminated. In many cases they have been successful, and indeed the concept of pollution prevention is now being embraced by the federal government.<sup>92</sup>

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88. The Environmental Justice Framework was developed by countless community activists across the United States over the past decade, and most cogently articulated by Bob Bullard in *Environmental Justice in the Twenty-first Century*, in *THE QUEST FOR ENVIRONMENTAL JUSTICE*, *supra* note 1, at 25, 25–30.

89. *WE SPEAK FOR OURSELVES: SOCIAL JUSTICE, RACE, AND ENVIRONMENT* (Dana A. Alston ed., 1990).

90. William P. Quigley, *Revolutionary Lawyering: Addressing the Root Causes of Poverty & Wealth*, 20 WASH. U. J.L. & POL’Y 101, 125 (2006).

91. Bullard, *supra* note 88, at 26.

92. *See* Pollution Prevention Act of 1990, 42 U.S.C. § 13101(b) (2000) (“The Congress hereby declares it to be the national policy of the United States that pollution should be prevented or reduced at the source whenever feasible.”).

### *C. The Precautionary Principle*

Perhaps the central failure of environmental regulation is that companies are allowed to pollute until that pollution is deemed harmful. Then, after the harm is found, the pollutant is regulated, or regulated more stringently. The onus of proving a chemical harmful is on those seeking to regulate it, which often means that chemicals with a dramatic and long-term impact on society—DDT or chlorofluorocarbons or methyl bromide—take years to remove from the market. Environmental justice activists have pushed to reframe this debate as well, shifting the presumption of harmful pollution from “innocent until proven guilty” to “guilty until proven innocent.” The idea, called the precautionary principle, is that companies must demonstrate that a chemical is safe before it can be introduced for widespread use.<sup>93</sup>

These three principles are the foundational underpinnings of a new paradigm—one that directly involves those affected by environmental hazards in decisions about those hazards; one that challenges industry to change its processes to eliminate, rather than merely control, pollution; and one that forces industry to prove that chemicals are safe before they can be employed, rather than using communities as live testing laboratories for the effects of toxic chemicals. While it is too late for these concepts to help the Camden residents fight the SLC cement-grinding facility, which has operated now for four years, it is not too late for these concepts to prevent the next toxic intrusion into that community, or into yours. All it takes is the determination to shift the paradigm. As Robert Bullard points out:

Change in the dominant environmental protection paradigm did not come from an effort made by regulatory agencies, the polluting industry, academia or the industry built around risk management. Instead, impetus for the change came from a movement led by a loose alliance of grassroots and national environmental and civil rights leaders who questioned the foundation of the current environmental protection paradigm.<sup>94</sup>

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93. Bullard, *supra* note 88, at 28.

94. *Id.* at 30.

## VI. CONCLUSION

By allowing the over-pollution of certain areas that host a disproportionate number of polluting facilities, environmental laws have failed communities like Camden. In part because of judicial evisceration and executive non-enforcement, civil rights laws have also failed such communities. Only through a paradigm shift away from these models can we address the structural nature of pollution and racism. Environmental justice is one such new paradigm pointing the way to a healthier, more just future for communities like Camden.