

Foreword: A Jeremiad on Environmental Justice and the Law

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Over the past ten years, the environmental justice movement has grown from a scattering of local struggles around the United States into a national force with which to be reckoned. With this new national prominence has come the trappings of power: a presidential Executive Order on environmental justice, a national advisory committee appointed by the Environmental Protection Agency, and a flurry of legislation introduced in Congress. After a long period of inaction, the legal profession has also jumped wholeheartedly onto the environmental justice bandwagon, bringing lawsuits, sponsoring symposia, initiating environmental justice classes and clinics in law schools, and writing law review articles. Each day, there is some new legal activity on the environmental justice front.

These two developments—national prominence in the form of activity in Washington, D.C., and the upsurge in legal activity—are connected, and are potentially dangerous developments for a movement founded on, and dedicated to, grassroots empowerment. In this foreword, I want to talk about the second development, the rise of interest and activity within the legal profession in relation to environmental justice struggles. My message is simple: the movement should privilege neither the law nor the lawyers.

THE NEW FASCINATION WITH ENVIRONMENTAL JUSTICE

The concept of environmental justice has finally taken hold of the legal profession; whether this is a positive development has yet to be seen. The signs of the interest and involvement of the legal

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profession are many: lawyers and law students have produced an ever-growing number of lawsuits, administrative complaints, symposia, classes, and articles on environmental justice during the past three years. Even the American Bar Association has weighed in, passing a resolution on environmental justice at its 1993 annual meeting.¹

Community groups, environmental and civil rights organizations, and private attorneys have filed dozens of lawsuits in community struggles for environmental justice in the last five years. Some of these lawsuits have used environmental laws, some have been straight up civil rights suits, and some have been creative blends of the two. Others have used a variety of seemingly unlikely state and federal statutes—from those governing Medicaid to the federal highway statutes—to try to promote environmental justice. Many of these suits have been successful, and the legal piece to the environmental justice movement is becoming ever more sophisticated.

The legal struggle has moved beyond the courtroom as well. In the past fifteen months, more than twenty administrative complaints alleging environmental racism have been filed with the U.S. Environmental Protection Agency (“EPA”) under Title VI of the Civil Rights Act of 1964, with more being filed each month. The EPA has accepted nine of the complaints for investigation; the outcome of its investigations will influence the extent to which this strategy is pursued in the future.

The interest in environmental justice is not limited to practitioners; in fact, there may be greater interest in law schools than anywhere else. Dozens of law school symposia have been held, at schools in every region of the country, addressing the topic of environmental justice. With Golden Gate and Tulane leading the way, offering the first classes just two years ago, law schools around the country are adding environmental justice courses to their curricula, in many cases inviting actual practitioners of the legal specialty to teach. More than a dozen such classes have been offered at schools nationwide in the past two years. In the 1994-95 school year, I know of at least seven law schools that will offer environmental justice classes to their students; several of these schools have instituted environmental justice clinical programs, about which more later.

Legal scholars were prominently silent on the topic of environ-

1. Steven Keeva, *A Breath of Justice*, A.B.A. J., Feb. 1994, at 88, 90.

mental justice for some two decades while activists, journalists, and social scientists documented and fostered the movement. Now, though, that silence has ended and a veritable blizzard of articles has resulted. The first law review article pointing out the disparate environmental risks faced by the poor and people of color was published only three years ago.² Since that time, however, more than 150 law journal articles on environmental justice have been published, with more arriving each month.³

Amidst all this activity, however, exist some significant pitfalls. The environmental justice movement is in danger of being overwhelmed by the attention of its "friends." Legal strategies themselves can be dangerous for community groups, and the rise of legal institution-building in the environmental justice arena threatens to displace ongoing community organizing efforts and to prevent new ones from beginning.

WHY THE LAW IS DANGEROUS

Volumes have been written about why legal strategies are often a bad choice in particular local struggles: using the law can be disempowering because it takes the struggle out of a realm in which the community has control over it; because it involves one or two people speaking on behalf of a community rather than the community speaking for itself; because it requires the translation of raw anger at broad societal injustice into legally cognizable claims; because it transforms a collective struggle into an individual lawsuit, and because it may legitimate an illegitimate system.

Legal strategies may also have a detrimental effect on a national, movement-wide level. A focus on the law at the national level is dangerous when groups engaged in legal and legislative strategies lose sight of the goals of the movement because they are so caught up in playing the legal game. One symptom of this is that groups begin to devote ever-increasing amounts of resources to legal and legislative strategies at the expense of other, more participatory, community-based strategies, a tendency that is self-perpetuating and self-reinforcing. This is what happened to the traditional environmental movement.

The traditional environmental movement—institutionally rep-

2. Regina Austin & Michael Schill, *Black, Brown, Poor and Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 KAN. J.L. & PUB. POL'Y 69 (1991).

3. The *Stanford Environmental Law Journal* publishes an important addition to this field with Hope Babcock's article in this issue.

resented by the "Big Ten" environmental groups, including the Environmental Defense Fund, the Natural Resources Defense Council, the National Wildlife Federation, and the Sierra Club—began its most recent wave of activity as a grassroots movement in the late 1960s. (The earliest environmental activity after that of Native Americans was by elite preservationists and conservationists around the turn of the century, and was hardly "grassroots.") The environmental movement of the late 1960s borrowed tactics from the contemporaneous Civil Rights Movement, including mass demonstrations such as Earth Day in 1970, which involved millions of people. Shortly after Earth Day, however, the traditional environmental movement began to turn away from its grass roots to focus on national policy. And it directed that focus from Washington, D.C., seeking to become a national player through federal legislation and lawsuits. Lawyers became increasingly dominant within the traditional environmental movement as professionalization took hold, and by the early 1980s lawyers were running most of the Big Ten groups. The traditional groups moved away from a broad, participatory strategy of protest to an insider strategy of trying to influence and shape environmental law—both before it was made, by lobbying Congress, and after it was passed, by bringing numerous lawsuits to refine it. As the head of one traditional environmental outfit boasted in 1988, "Litigation is the most important thing the environmental movement has done over the last 15 years."⁴

The legal strategy is self-reinforcing, because the more a group invests its resources and public image in being a "litigator for the environment," the more the group will rely on litigation, the more the group will think of itself as a litigation shop, and so on—whether or not that litigation is the best way to protect the environment and public health. I submit that this focus on the law is one of the reasons the traditional environmental movement is in deep trouble.

The law is dangerous to social movements because it is a cocooning and self-referential game in which its players believe they are important simply because they are playing—whether or not they are losing or winning. Certainly there is a role for law and lawyers in any social movement, and one measure of a movement's success is the codification of its goals: the right of women to vote is

4. Tom Turner, *The Legal Eagles*, AMICUS J., Winter 1988, at 25, 27 (quoting Fredrick Sutherland, then executive director of the Sierra Club Legal Defense Fund).

now part of the Constitution, the right to desegregated schools and the right to an abortion are the law of the land. But without a broad social movement to back up those laws, to insist on their enforcement, to push for their strengthening, to defend against their evisceration, the laws mean little. As we have learned by watching the traditional environmental movement do its work in Washington, we who live by the pen can die by the pen: if our “victories” are won in back room deals in Congress, or in court, then so can they be lost in the next back room bargaining session, or in the next lawsuit.

REPRODUCTION OF HIERARCHY:
LEGAL GROUPS JUMP ON THE ENVIRONMENTAL
JUSTICE BANDWAGON

The rush of legal groups with no prior experience in environmental justice (such as the Big Ten environmental outfits and several national civil rights groups) into the field has several implications, both theoretical and practical, for the environmental justice movement. Put simply, the field of environmental justice is being colonized by lawyers and legal groups. On a theoretical level, the embracing of “environmental justice” by Washington-based and -oriented groups means an institutionalization of the idea within the system and a consequent dilution of its power. This happens because the national legal groups have, by history and design, a *national* focus and a *legal* orientation. This stands in direct contrast to the environmental justice movement, which has historically had a *local* focus and a *community* orientation. When the legal groups get hold of the concept of environmental justice, they redefine it to fit their focus and orientation, although they are in direct opposition to the essence of environmental justice. The “answer” to environmental racism becomes laws and litigation, rather than community empowerment in local decisionmaking—after all, if the only tool one has is a hammer, many problems come to look like nails.

Because the legal groups are national, they have more influence in defining terms in the media and among D.C.-based decisionmakers than does the decentralized environmental justice movement; thus their definitions of “environmental justice,” and their responses to it, become the standard story. What began as a vibrant community movement gets redefined as just another issue for which we need legislation or a new legal strategy. Such redefi-

nition, which reinforces the existing social/political hierarchy by favoring legal "expertise" over community action, is completely at odds with the environmental justice movement.

On a practical level, the rush of the major players to get involved has meant that money that might have supported actual grassroots work in environmental justice is now being siphoned off to Big Ten and other national groups working on what they define as "environmental justice." Major national groups are competing with local environmental justice groups for funding from the same small pool of foundations. The Big Ten groups have been successful in raising funds—far more successful, not coincidentally, than well-established, highly effective community groups actually *doing* environmental justice work. This success is based on two factors.

The first factor is a Catch-22: those organizations which have never received a foundation grant find it impossible to get one, while those which have had years of success raising money have found no difficulty in raising money to do what they call environmental justice work. Ironically, the call in 1990 by grassroots activists for the Big Ten to pay more attention to environmental justice issues may have had the unintended effect of causing Big Ten groups to appropriate much of the meager foundation money available for environmental justice work.

The second factor is related to the effect that legal groups have had on the movement: legal groups, because they play within the system, are much less of a threat to that system and are thus more attractive grantees than the more radical grassroots groups. Employees of the legal groups look and think like the funders, and are largely drawn from the same social class, in contrast to the racially and economically diverse environmental justice movement.

The disproportionate funding of legal groups contributes to the trend mentioned above: because increased funding creates (and, dialectically, is created by) greater stature, the legal groups are increasingly able, through their work and contacts in the press, to describe and define environmental justice. For them, however, environmental justice does not mean the fundamental, systemic change that it signifies for many grassroots activists. Thus, as "environmental justice" becomes more and more a part of discussions on a national level, to the extent that those discussing it come from the legal groups, its meaning is changed. The colonization of the movement by legal groups dilutes the movement's premises, taking the power of environmental justice as a potentially transformative

social movement and turning it into "just another" issue among the many on which the legal groups are working.

In a very real way, the legal groups are re-creating one of the roots of environmental injustice: the making of decisions by people not affected by those decisions. Thus, on both the theoretical and practical levels, the entrance of legal groups into the environmental justice field is in many ways a detriment to the movement, blunting its ideological edge and diverting its limited resources.

IMPLICATING THE CLINICS

The new wave of environmental justice clinics could also pose problems for the environmental justice movement. As a product of a clinical legal education, it is hard for me to argue with the pedagogical effectiveness of clinics. However, clinics in the context of a *movement* may play a different role than clinics that operate in traditional poverty law areas such as housing or public benefits. In their best incarnation, clinics do cutting edge legal and political advocacy with a community, helping that community to empower itself and to use every means, including the law, at its disposal. Such partnership is unfortunately rare in the history of clinics, as it is rare in *any* area of the law, even in law offices committed to movement work.⁵ Clinics create some of the same problems that other legal outfits do, such as competition for resources, but they also pose a different type of challenge for community groups. Clinics operate directly in the same communities as the local groups, but generally have different goals: community organizers focus on building a movement, while clinics must concern themselves with educating their students. Professor Babcock's article in this issue of the *Journal*, for example, suggests that the Georgetown Environmental Justice Clinic cannot always pursue projects supported by the community either because the projects do not include sufficient legal content, or because they do not offer opportunities for broad legal reform. While clinics justify this tension by claiming that "we are creating new environmental justice advocates," this justification is questionable; like most law graduates, many of the clinics' graduates go on to work in corporate law firms, sometimes the very firms that communities come up against in their struggles. In

5. The Tulane Environmental Law Clinic, for one, has established itself as a trusted and valuable ally to the environmental justice movement in Louisiana, and has pushed the boundaries of the law with novel strategies such as a Title VI administrative complaint. Some other clinics have, however, had less success in establishing a community base.

a sense, clinical students who later become anti-environmental corporate lawyers are, during their clinical legal education, being taught by their clients how to *subvert* the environmental justice movement. This is not to say that clinics do not do valuable work: the work they provide is sometimes essential to their clients, who often would otherwise have no representation. But that fact does not obviate the need to ask hard questions about the role of clinics in the environmental justice movement.

THE SELF-REFERENTIAL QUALITY OF LEGAL ACADEMIA

The environmental justice movement is also in danger from another legal source: legal academia, particularly law review scholarship. This danger is considerably more subtle, and probably not as direct a threat, as the use of the law and the bandwagoning of environmental groups and clinics. Legal academia, through its self-referential nature, instead poses a threat to the movement's ability to define itself.⁶ Legal academics, as they seek to define and describe the environmental justice movement, increasingly rely on themselves as sources, rather than consulting primary sources in the field.

One symptom of the self-referential character of legal thought is what I call the "Godsil Phenomenon." This phenomenon, which I name after my friend and colleague in the movement, Rachel Godsil, occurs in legal academia in the following way: Many of those who have written in law reviews seem to be under the mistaken impression that Godsil's Note in the *Michigan Law Review*⁷ was the first article ever published on environmental justice, or at least their citations would so indicate. Many who have written on environmental justice summarize the activity in the environmental justice movement, and then cite to Godsil: "There was an environmental justice movement," footnote Godsil. Now, Ms. Godsil's work was an important, even trail-blazing, legal article, among the first in legal academia. But it was by no means the first article on the subject, which entertained the scholarly interest of sociologists, public health professionals, historians, epidemiologists, doctors,

6. Legal academia has failed to serve the environmental justice movement in another way, by producing article after article about strategies that have failed the movement (such as civil rights equal protection suits, mentioned in perhaps 75% of all articles thus far published on environmental justice) and focusing little attention on creative new strategies that might actually work.

7. Rachel Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394 (1991).

and most importantly, grassroots activists, for at least twenty-five years before Godsil published her article.

Why is this seemingly minor point important? First, writers who fall prey to the Godsil Phenomenon are engaging in second-rate scholarship. Citing only to law review texts about environmental justice ignores the richness and texture of the primary sources, which are often accounts by or about the very people involved in local struggles. One of the central tenets of the movement is “We speak for ourselves”—people who have for too long been denied a voice should be the ones defining and describing their own communities. The primary sources of research in the environmental justice movement range from interviews with participants to newspaper articles to epidemiological studies to sociological treatises. Their diversity of perspective and content is missed entirely by the legal academic who relies solely on other law review articles to research his own article.

Second, the Godsil Phenomenon goes to the historical construction of knowledge and ownership of that knowledge. By continually citing Godsil’s work, rather than looking to primary sources, legal academics create and then reinforce the idea that Godsil, a white woman, was the first to write on the topic. This steals recognition from those who actually *were* the first to write on the topic: people like sociologist Robert Bullard,⁸ who besides being the most prolific author in the field is also an activist in the environmental justice movement, and African-American. By building and strengthening the myth that a white person wrote the first article on environmental justice, and ignoring the real creators of knowledge about the topic, who are largely people of color, the legal academy engages in what Richard Delgado calls “imperial scholarship,”⁹ appropriating as its own the work of others. Ironically, Godsil’s piece was not even the first *law review* article on the subject: an African-American woman, Regina Austin, co-authored an article that appeared five months earlier than Godsil’s note.¹⁰

8. Godsil herself recognizes Bullard’s preeminence in the field and cites him frequently throughout her piece.

9. Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561 (1984).

10. Austin & Schill, *supra* note 2. Austin & Schill’s piece was based in part on several dozen interviews with environmental justice activists and attorneys, a mode of intellectual inquiry unfortunately not widely imitated in legal academia.

CONCLUSION:
THE TRADITIONAL ENVIRONMENTAL MOVEMENT SHOULD
EMULATE THE ENVIRONMENTAL JUSTICE MOVEMENT, NOT THE
OTHER WAY AROUND

Too much of the focus of the traditional environmental movement has been on law and legal tools; this misapplication of resources threatens to infect the environmental justice movement as well. All of the jumping on the environmental justice bandwagon by legal groups and academics threatens to break the wagon's wheels—or redirect the wagon in the wrong direction. For the environmental justice movement to stay vibrant, oppositional, creative, and strong, it must reject the self-reinforcing tendency to use a legal strategy as its primary strategy. Instead of looking to the law, traditional environmental groups should use the grassroots, community-based and community-led environmental justice movement—which is broader in its goals and healthier as a *movement* than the traditional environmental movement—as a model.

As the Gulf Coast Tenants Organization reminds us, “lawyers are no better or worse than any other member of the movement, and should be judged by the same standards.”¹¹ We must always remember the slogan of the 1960s, that the movement needs “lawyers on tap, not lawyers on top.”¹²

11. Pat Bryant & the Gulf Coast Tenants Organization, *Environmental Justice and the Law*, 5 RACE, POVERTY & THE ENV'T 1 (Winter 1995) (forthcoming).

12. *Id.*

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