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Luke W. Cole

ENVIRONMENTAL JUSTICE LITIGATION: ANOTHER STONE IN DAVID'S SLING

Luke W. Cole†

I. Introduction

Many people credit a Texas civil rights case as the parent of environmental justice litigation. That case, brought in 1979 by Linda McKeever Bullard on behalf of residents of Houston's Northwood Manor, was the first suit in the country to challenge the siting of an unwanted waste facility on civil rights grounds.[1] The suit charged that the City of Houston and Browning Ferris Industries were discriminating against the mostly African American residents of Northwood Manor by placing a garbage dump in that neighborhood.[2] This ground-breaking lawsuit was the inspiration for the legal piece to the environmental justice movement, a movement which was then in its infancy.

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† Staff attorney, California Rural Legal Assistance Foundation; General Counsel, Center on Race, Poverty & the Environment. A.B. Stanford University; J.D. Harvard University. The thoughts and strategies in this Article have been developed by dozens of grassroots activists and attorneys in the environmental justice movement throughout the country in the last five years, and are drawn from my experiences in that movement. Many of the insights on litigation are drawn from my colleague and teacher, Ralph Santiago Abascal, who serves as Executive Director of the Center on Race, Poverty & the Environment, and who provided helpful comments on earlier drafts of this Article.

1. Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673 (S.D. Tex. 1979).

2. *Id.*; *see also* ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS AND ENVIRONMENTAL QUALITY 53 (1990); *infra* notes 78-82 and accompanying text.

Many lawsuits have been brought as part of the environmental justice movement since Linda Bullard's historic case, and community groups and attorneys in the movement have learned a great deal in the past fifteen years. In this Article, I hope to synthesize some of the lessons we as movement lawyers have learned in order to offer a practitioner's perspective on environmental justice cases. My ambition in setting out these lessons is to allow community groups and attorneys entering the struggle to learn from our mistakes, emulate our successes, and avoid re-inventing the wheel.

Before a community group embarks on a legal course, however, a threshold question must be answered: Will a lawsuit help or hurt the community's struggle? There are serious strategic and tactical drawbacks to lawsuits generally and civil rights lawsuits particularly.[3] Because environmental justice struggles are at heart political and economic, not legal, a legal response is often inappropriate or unavailable. In fact, bringing a lawsuit may ensure loss of the struggle at hand, or cause significant disempowerment of the client community. Without addressing the strategic and tactical drawbacks of litigation, which I and others have detailed elsewhere,[4] this Article assumes that a community group has decided to pursue litigation.

This Article will only discuss siting cases, as siting disputes have been the primary context for environmental justice litigation thus far.[5] Other legal avenues, such as citizen enforcement[6] and pres-

3. These drawbacks are more fully laid out in Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 641-52 (1992) [hereinafter Cole, *Environmental Poverty Law*] and Luke W. Cole, *Remedies for Environmental Racism: A View from the Field*, 90 MICH. L. REV. 1991, 1997 (1992) [hereinafter Cole, *Remedies for Environmental Racism*].

4. *See, e.g.*, Michael Bennett & Cruz Reynoso, *California Rural Legal Assistance (CRLA): Survival of a Poverty Law Practice*, 1 CHICANO L. REV. 1, 20 (1972) (stating that farmworkers are not necessarily benefitted from winning cases in Supreme Court if they are not organized to take advantage of victory); Michael J. Fox, *Some Rules for Community Lawyers*, 14 CLEARINGHOUSE REV. 1, 5-6 (1980) (discussing deflation of community group by legal action).

5. This Article does not discuss personal injury suits brought on behalf of victims of toxic poisoning, which have disempowered and disillusioned many low-income communities and communities of color. While some community members may in the long run receive compensation for their injuries, many plaintiffs in such suits see little money, if any at all, in these suits, which often last for years. *See*, Marcia Coyle & Claudia MacLachlan, *Getting Victimized by the Legal System*, NAT'L L.J., Sept. 9, 1992, at S8.

6. *See, e.g.*, Vernice Miller, *Planning, Power and Politics: A Case Study of the Land Use and Siting History of the North River Water Pollution Control Plant*, 21 FORDHAM URB. L.J. 707, 718-22 (1994).

suring agencies to adopt meaningful regulations,[7] have sometimes proved successful and are fertile ground for further exploration. Lawyers in the movement should continue to try novel ideas in hopes of developing new legal approaches.[8]

The Article proposes a hierarchy of litigation strategies for attorneys to consider when structuring environmental justice cases, based on our experiences at California Rural Legal Assistance's Center on Race, Poverty & the Environment[9] (CRPE), and that of dozens of other attorneys and community groups around the country. This litigation hierarchy has four tiers: reliance on traditional environmental law claims, unusual environmental law claims, statutory civil rights claims, and Constitutional civil rights claims, in that order. To give context to these recommendations, the Article briefly summarizes the experiences of attorneys alleging civil rights violations in environmental justice suits.

Finally, the Article discusses the politics of bringing civil rights claims in environmental justice cases. In our experience, alleging civil rights claims—especially as part of a lawsuit that also uses environmental laws—can be useful in building morale, raising the

7. For example, a series of cases to get states to adopt meaningful lead poisoning screening tests has had an important effect in getting more children tested for such poisoning. The cases, masterminded by an historic coalition of legal services attorneys (National Health Law Project), community groups (People United for a Better Oakland), environmentalists (Natural Resources Defense Council), and civil rights groups (NAACP Legal Defense Fund), has had success in California and Texas, successes which caused the Medicaid system nationally to adopt the lead screening medical test sought by the groups. *See* Thompson v. Raiford, No. 3-92 CV 1539-R (N.D. Tex. filed Oct. 21, 1992); Mathews v. Coye, No. C-90-3620-EFL (N.D. Cal. Oct. 16, 1991) (Stipulation for Settlement and Dismissal Without Prejudice); Jane Perkins, *Lead Poisoning and Poor Children*, 1 ENVTL. POVERTY L. WORKING GROUP NEWS 13 (1993) (discussing the cases and strategy).

8. One such approach would be to use lead poisoning as a defense in eviction proceedings, or even criminal suits. *See* Deborah W. Denno, *Considering Lead Poisoning as a Criminal Defense*, 20 FORDHAM URB. L.J. 377 (1993). Denno's work is an intriguing extension of Richard Delgado's "societal fault" proposal for criminal law, in which society (rather than an individual) is held responsible for failing to eliminate crime-causing factors that could have been prevented. Richard Delgado, *"Rotten Social Background": Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?* 3 L. & INEQUALITY J. 9, 89 (1985).

9. The Center serves as a mini back-up center for legal services offices nationwide, offering resources, technical assistance, consultation, training, and co-counseling in environmental justice cases. The Center also coordinates the national Environmental Poverty Law Working Group, and publishes two newsletters, *Environmental Poverty Law Working Group News* and *Race, Poverty & the Environment.* Through this work we interact with lawyers and community groups around the country who face a variety of environmental problems.

profile of a community's struggle and educating the public and government officials about environmental racism.

II. A Litigation Hierarchy

Based on our work, research and consultations with other community activists and attorneys nationwide, we at CRPE have developed a litigation hierarchy which we recommend using in environmental justice siting cases. This hierarchy suggests using the following legal tools, in the following order:

1. Environmental laws, especially those which focus on procedure, applied in a traditional manner.
2. Environmental laws, particularly those which mandate public participation, used with a twist.
3. Civil rights laws, particularly Title VI[10] and Title VIII[11] of the Civil Rights Act of 1964.
4. Constitutional claims, based on the equal protection clause of the Fourteenth Amendment.

Our approach is a studied response to a simple problem: we as a movement are not winning civil rights cases. At the same time, we don't want to completely abandon the potentially fruitful and educational effects of using civil rights claims in environmental justice litigation. Using civil rights laws in conjunction with environmental challenges allows community groups to continue to push the boundaries of the law while also having a chance to win.

A. Environmental Law, Straight Up

Generally, it is easiest to block a facility using environmental laws. Judges are familiar with such challenges and understand them; the law is fairly clear and generally supports credible challenges to improperly permitted facilities. Thus, we put traditional use of environmental laws at the top of the litigation hierarchy.[12]

Litigation on behalf of poor communities and communities of color fighting environmental dangers dates at least to the 1960s, although those bringing the suits did not see themselves as part of

10. 42 U.S.C. § 2000d (1988).

11. 42 U.S.C. §§ 3601-3619, 3631 (1988).

12. Richard Lazarus, although no longer a practitioner, has come to the same recommendation based on the relative success rates of environmental suits and civil rights suits. *See* Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 827 (1993).

the environmental justice movement.[13] Before Linda Bullard's Houston suit, legal services attorneys had brought suits to ban dangerous pesticides on behalf of farmworkers,[14] and to stop strip mining on behalf of poor rural residents.[15] Since the *Bean* case, legal services and other attorneys have brought dozens of suits on behalf of low-income communities, many of them communities of color, in environmental justice struggles.[16] Most of these suits—many of them successful—were based on environmental, rather than civil rights, laws. Environmental law challenges in the context of environmental justice struggles have a proven track record of success.

The elementary lesson of practicing environmental law is focus on *procedure.* Many state and federal environmental laws, especially those related to permitting facilities, are procedurally oriented. They set out a series of procedural hoops to be jumped

13. However, those involved in early suits, both client groups and attorneys, considered themselves parts of other social movements such as the civil rights, labor or farmworker rights movements.

14. In fact, a case brought by California Rural Legal Assistance on behalf of six women farmworkers, later joined by the fledgling Environmental Defense Fund, succeeded in banning DDT. *See* Environmental Defense Fund v. Environmental Protection Agency, 510 F.2d 1292 (D.C. Cir. 1975); Environmental Defense Fund v. Dep't of Health, Educ. & Welfare, 428 F.2d 1083 (D.C. Cir. 1970); Environmental Defense Fund v. Hardin, 428 F.2d 1093 (D.C. Cir. 1970).

15. *See, e.g.*, Haynes v. Pioneer Coal Company, No. Civ. 4385 (Letcher Cir. Ct. filed Sept. 3, 1971) (case by legal services office Appalachian Research and Defense Fund of Kentucky to prevent strip mining of property); APPALACHIAN RESEARCH AND DEFENSE FUND OF KENTUCKY, 1973 ANNUAL REPORT 8 ("The legal staff has been very active on behalf of citizens groups in the mountains in environmental litigation and in attempting to see that meaningful environmental legislation and regulations are passed."). I thank my friend and colleague John Rosenberg, a long-time environmental poverty lawyer and director of Appalachian Research and Defense Fund in Prestonsburg, Kentucky, for these historical cases.

16. *See, e.g.*, Jeffrey Avina, *California Communities at Risk: California Rural Legal Assistance and the CRLA Foundation*, ENVTL. POVERTY LAW WORKING GROUP NEWS, Summer 1992, at 7; Kerry Bader, *Coalfield Lawyers: Appalachian Research and Defense Fund of Kentucky*, ENVTL. POVERTY L. WORKING GROUP NEWS, Summer 1992, at 3; Lucy Billings, *Poor Losing Some Federal Protection*, ENVTL. POVERTY LAW WORKING GROUP NEWS, Fall 1992, at 19; Carl Christensen, *The Unique Land Use Controversies of Hawaii: Native Hawaiian Legal Corporation*, ENVTL. POVERTY LAW WORKING GROUP NEWS, Summer 1992, at 8; Cole, *Environmental Poverty Law*, *supra* note 3, at 670-71 n.227; Miles Dolinger, *Fighting Back Through Education: South Chicago Legal Clinic's Environmental Law Program*, 1 ENVTL. POVERTY LAW WORKING GROUP NEWS, Summer 1992, at 5; *Legal Services Tackles Lead Poisoning*, ENVTL. POVERTY LAW WORKING GROUP NEWS, Fall 1992, at 24; Jane Perkins, *Lead Poisoning and Poor Children*, ENVTL. POVERTY LAW WORKING GROUP NEWS, Fall 1992, at 5, 13; Catherine Ruckelshaus, *My Health or My Job*, ENVTL. POVERTY LAW WORKING GROUP NEWS, Fall 1992, at 17; Gina Snyder, *On the Front Lines: A Summary of One Program's Response to the Crisis of Childhood Lead Poisoning*, ENVTL. POVERTY LAW WORKING GROUP NEWS, Fall 1992, at 15.

through, and once an applicant has successfully jumped through the hoops, the applicant receives a permit.

This tier of the hierarchy looks the most similar to "traditional"[17] environmental lawyering. While the clients look different, and the case should be done in the context of a political organizing drive, the legal tools used are the same. To be a good environmental justice lawyer, one must be a good environmental lawyer. This nuts-and-bolts knowledge of arcane statutes is the least sexy part of environmental justice law, to be sure, but perhaps the most important. In this tier of the hierarchy, traditional environmental law groups can be most helpful to the environmental justice movement[18] by sharing their skills and knowledge of environmental law.

B. Environmental Law, With a Twist

We also believe there is great latitude for pushing the boundaries of environmental laws, especially those which stress public participation. Again, this strategy relies on attacks on the *procedure* of granting permits, rather than its substance or the outcome. This tier involves creative uses of environmental laws, approaches which read and employ the laws in non-traditional ways.

Sometimes this approach means only a literal reading of a statute. In our representation of the community group *El Pueblo para el Aire y Agua Limpio* of Kettleman City, California in its challenge to the siting of a toxic waste incinerator, we made a simple argument based on the public participation language of the Califor-

17. I use "traditional" rather than "mainstream" self-consciously, although I have for years used "mainstream" to describe the so-called "Big Ten" environmental groups. Several activists with the SouthWest Organizing Project recently pointed out to me that the grassroots movement is far more "mainstream" in its community-based tactics and heterogenous make-up than are the traditional, litigation-oriented environmental groups, overwhelmingly run and staffed by middle- and upper-class white men. Charles Jordan & Donald Snow, *Diversification, Minorities, and the Mainstream Environmental Movement, in* VOICES FROM THE ENVIRONMENTAL MOVEMENT: PERSPECTIVES FOR A NEW ERA 71, 73 (Donald Snow ed., 1991). I thus join the mini-movement to reclaim the "mainstream" mantle for grassroots organizers, and thank Jean Gauna and Louis Head for this insight.

18. I make this recommendation with the significant caveat that traditional environmental law groups have different perspective, tactics, motives, and goals from grassroots environmentalists. Robert D. Bullard & Beverly Wright, *The Quest for Environmental Equity: Mobilizing the Black Community for Social Change*, 1 RACE, POVERTY & THE ENV'T 3 (July 1990); Cole, *Environmental Poverty Law*, *supra* note 3, at 639-47. Chief among the differing tactics is the traditional environmental law groups' central reliance on litigation. As the executive director of the Sierra Club Legal Defense Fund stated in 1988: "Litigation is the most important thing the environmental movement has done over the past fifteen years." Tom Turner, *The Legal Eagles*, 10 AMICUS JOURNAL 25, 27 (1988).

nia Environmental Quality Act (CEQA).[19] As California courts have explained, ultimately public participation is not an end in itself. Rather, it is the means to the larger ends of self-government and the accountability of public servants to those they serve, the citizenry. Full compliance with CEQA and similar public information statutes is required to enable the public to "determine the environmental and economic values of their elected and appointed officials, thus allowing for appropriate action come election day should a majority of the voters disagree."[20] One of CEQA's central purposes is to provide for informed self-government through public participation.[21]

CEQA requires public participation in the environmental review of proposed facilities, including public comment on the environmental impact report (EIR) prepared to analyze such facilities. As Kings County, the local agency, published the EIR in English, although Kettleman City is ninety-five percent Latino and forty percent monolingual Spanish-speaking, community residents felt they had been excluded from participation in environmental review. In our suit to block the incinerator, we argued that CEQA's public participation language required Spanish translation of the

19. CAL. PUB. RES. CODE §§ 21000-22080 (1970). CEQA is modelled on the federal National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370 (1988); many states have mini-NEPA statutes similar to CEQA.

20. People v. County of Kern, 39 Cal. App. 3d 830, 842 (1974).

21. The inclusion of the public in the environmental review process is the cornerstone of environmental impact review statutes such as CEQA and NEPA. The CEQA Guidelines make this clear:

> The basic purposes of CEQA are to:
>
> (1) *Inform* governmental decisionmakers and *the public* about the potential, significant environmental effects of proposed activities.
>
> . . . .
>
> (4) *Disclose to the public* the reasons why a governmental agency approved the project in the manner the agency chose if significant environmental effects are involved.

CEQA Guidelines § 15002(a) (emphasis added).

These requirements enable officials and members of the public considering a project to make an "independent, reasoned judgment" about the proposed project and its impact on the environment. Santiago County Water Dist. v. County of Orange, 118 Cal. App. 3d 818, 831 (1981). For this reason, California Courts have consistently interpreted CEQA to call for the fullest possible participation by the public: "[T]he 'privileged position' that members of the public hold in the CEQA process . . . is based on a belief that citizens can make important contributions to environmental protection *and on notions of democratic decision-making* . . . ." Concerned Citizens of Costa Mesa, Inc. v. 32d Dist. Agric. Ass'n, 42 Cal. 3d 929, 936 (1986) (quoting Daniel P. Selmi, *The Judicial Development of the California Environmental Quality Act*, 18 U.C. DAVIS L. REV. 197, 215-16 (1984)).

EIR documents in such situations.[22] The judge relied on this claim, among others, in overturning the County's approval of the toxic waste incinerator. He ruled that Spanish-speaking people had been excluded from the decision-making process—in effect, that their rights to public participation had been violated.[23]

When trying a new twist, we strongly recommend that it be part of a lawsuit with more traditional allegations of violations of environmental law. In this way, the attorney protects the interests of the community group in the event that a judge feels the twist is too radical.

C. Civil Rights Statutes

The third level of the hierarchy is civil rights statutes. The movement for environmental justice owes much of its history, inspiration and tactics to the Civil Rights Movement,[24] and it is thus no surprise that the legal activity growing out of the movement should try to use civil rights laws. Adding civil rights claims as part of an environmental law suit allows a community group to paint a fuller picture for the judge about what is actually going on in a community.[25] It also has significant political import, as discussed below.[26]

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22. Our experience with this case is another recommendation for community involvement in framing the legal issues: our legal theory—that CEQA's public involvement necessitated translation of documents into Spanish—came directly from the residents of Kettleman City, who continually requested translation so as to take part in the environmental review process.

23. El Pueblo para el Aire y Agua Limpio v. County of Kings, 22 Envtl. L. Rep. (Envtl. L. Inst.) 20,357 (Sup. Ct. Dec. 30, 1991). This case, while only a trial court case and thus having no precedential value, has galvanized community activists to demand translation in other community struggles and has led the California Department of Toxic Substances Control to provide interpreters and translation of documents in other Spanish-speaking rural communities in California. *See, e.g.*, DEP'T OF TOXIC SUBSTANCES CONTROL, CAL. ENVTL. PROTECTION AGENCY, AVISO PUBLICO DEL PERMISO PRELIMINAR PARA EL ALMACENAJE, TRATAMIENTO, Y RECICLAMIENTO DE DESECHOS PELIGROSOS DE LA PLANTA PURE ETCH, SALINAS, CALIFORNIA (1994) (public notice).

24. Bullard & Wright, *supra* note 18.

25. This strategy has its roots in a case from the early 1970s which sought to block the construction of the Century Freeway in Los Angeles. Brought on both civil rights and environmental grounds, the suit prevailed on environmental grounds and the civil rights claims were not reached. Keith v. Volpe, 352 F. Supp. 1324 (C.D. Cal. 1972), *aff'd en banc sub nom*, Keith v. California Highway Comm'n, 506 F.2d 696 (9th Cir. 1974), *cert. denied*, 420 U.S. 908 (1975). In a later action to enforce the consent decree arising out of the case, Title VIII claims were used to force local government agencies to provide replacement housing for those people displaced by the freeway project. Keith v. Volpe, 858 F.2d 467, 482-86 (9th Cir. 1988), *cert. denied*, 493 U.S. 813 (1989).

26. *See infra* notes 90-100 and accompanying text.

If a community group wishes to bring civil rights claims as part of its legal strategy, it behooves their attorney to look at civil rights *laws* and regulations, especially those that allow proof of a violation based on discriminatory *impact* rather than discriminatory *intent.*[27] In our experience, lawyers have relied far too much on allegations of Constitutional violations, which require a group to prove discriminatory intent and are thus very difficult to win.

Title VI and Title VIII are two central civil rights statutes which are potentially available and appropriate in environmental justice struggles. A brief overview of each statute and some potential approaches to using them follows.

1. Title VI

Title VI prohibits discrimination on the grounds of race, color, and national origin by "any program or activity receiving Federal financial assistance."[28] While litigants under Title VI itself must prove that a defendant intentionally discriminated, the *regulations* implementing Title VI across the federal government generally state that discriminatory effect (or disparate impact) alone is enough to show unlawful discrimination.[29]

The discriminatory effect standard is codified in the regulations of most federal agencies that one might encounter in an environ-

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27. The difference between discriminatory intent (also known as "disparate treatment") and discriminatory effect (or "disparate impact") was set out by the Supreme Court in the employment context as follows:

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. *Proof of discriminatory motive is crucial* . . . .
>
> Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involves employment practices that are facially neutral in the treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by a business necessity. Proof of discriminatory motive, we have held, is not required under a disparate-impact theory . . . . Either theory may, of course, be applied to a particular set of facts.

International Bhd. of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977) (emphasis added).

28. 42 U.S.C. § 2000d (1988).

29. Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 591-04 (1983); *see id.* at 618-21 (Marshall, J., dissenting); Scokin v. Texas, 723 F.2d 432 (5th Cir. 1984). *But see* NAACP v. Medical Ctr., Inc., 657 F.2d 1322 (3d Cir. 1981) (holding that disparate impact may be adequate to establish unlawful discrimination).

For a complete list of all federal cabinet Departments with Title VI regulations codifying the discriminatory effect standard, see Paul K. Sonn, *Fighting Minority Underrepresentation in Publicly Funded Construction Projects After Croson: A Title VI Litigation Strategy*, 101 YALE L.J. 1577, 1581 n.25 (1992).

mental justice suit, including the Environmental Protection Agency[30] and the Departments of Agriculture,[31] Defense,[32] Energy[33] and the Interior.[34] Because many state agencies receive federal funding (often channeled through particular federal agencies), and because Title VI broadly defines "program or activity receiving Federal financial assistance,"[35] Title VI may be applied to state and local agencies. Title VI applies to an entire agency if even one part of that agency receives federal funding.[36] Because of this broad coverage, most state agencies likely to be encountered in an environmental justice suit are probably subject to Title VI.[37]

Strategies for employing Title VI in environmental justice and other cases have been well discussed in legal literature,[38] and the approach has been used in a series of cases.[39] So far, environmental justice cases have relied on the regulations implementing Title VI, rather than the statute itself. These regulations, used in the context of challenging freeway sitings, have given the environmental justice movement one of its only Title VI legal victories thus far.

In that case, residents of the African-American Crest Street neighborhood in Durham, North Carolina intervened in the siting process for a freeway which was to be built through their commu-

30. 40 C.F.R. § 7.35 (1993).

31. 7 C.F.R. § 15.3(b)(2) (1993).

32. 32 C.F.R. § 195.3 (1993).

33. 10 C.F.R. § 1040.13(c)-(d) (1993).

34. 43 C.F.R. § 17.3 (1993).

35. 42 U.S.C. § 2000(d-4a) (1988). For a compendium of the various federal grants to state and local governments, consult sources such as OFFICE OF MANAGEMENT AND BUDGET & U.S. GENERAL SERVICES ADMINISTRATION, 1991 CATALOG OF FEDERAL DOMESTIC ASSISTANCE (1991) or ADVISORY COMMITTEE ON INTERGOVERNMENTAL RELATIONS, A CATALOG OF FEDERAL GRANT-IN-AID PROGRAMS TO STATE AND LOCAL GOVERNMENTS: GRANTS FUNDED FY 1989 (1989).

36. 42 U.S.C. § 2000(d-4a) (1988). As Paul Sonn points out, however, "in order for Title VI limits to attach, federal funds must go to the particular program or activity funded. Receipt of funds by one agency within a state government is not sufficient to extend Title VI coverage to activities of other agencies, even when all are subdivisions of the same chartered governmental unit." Sonn, *supra* note 29.

37. This is particularly true in the hazardous waste area, where most states receive federal monies under the Resource Conservation Recovery Act and the Comprehensive Environmental Response, Compensation and Liability Act ("Superfund"). *See* Lazarus, *supra* note 12, at 835 n.211.

38. James H. Colopy, *The Road Less Travelled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L.J. 125 (1994); Lazarus, *supra* note 12, at 834-39; Sonn, *supra* note 29, at 1577.

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

nity.[40] The Crest Street Community Council, represented by the local legal services office, North Central Legal Assistance Program, used Title VI in a complaint to the US Department of Transportation (DOT) challenging the state's freeway construction plans. Upon investigation, DOT informed the state that there was "reasonable cause to believe that the construction of the expressway along the alignment proposed in the Draft [Environmental Impact Statement] would constitute a prima facie violation of Title VI."[41] In a negotiated settlement, the state agreed to reroute the proposed freeway and modify an interchange to preserve the community church and park.[42] To this author's knowledge, this represents the first successful use of Title VI to stop a locally-unwanted land use, albeit at the administrative level.

Another freeway case, arising out of Cleveland, did not fare as well.[43] In the Cleveland case, although the community group Concerned Citizens Against I-670 demonstrated that the routing of the proposed I-670 freeway would be through neighborhoods that ranged from fifty to ninety percent African-American—according to the Court a "*prima facie* showing of disparate effect upon racial minorities"[44]—the defendant was able to overcome that hurdle by showing that alternative routes would have had *more* negative impact on African American neighborhoods.[45] A third freeway case,

40. North Carolina Dep't of Transp. v. Crest St. Community Council, Inc., 479 U.S. 6, 9 (1986).

41. *Id.* at 9.

42. *Id.* at 10. The lawsuit that emerged out of the *Crest Street Community Council* case went all the way to the Supreme Court not on the siting issue but on the issue of whether or not the community group's attorneys were entitled to attorneys' fees for their work. In another narrow reading of civil rights laws, Justice O'Connor found that the attorneys, although successful at the administrative level in resolving the civil rights dispute in favor of the community group, should not be compensated because they had not brought a lawsuit at the same time. *Id.* at 6. This bizarre reading of the law was vigorously opposed by the dissenting opinion signed by Justices Brennan, Marshall and Blackmun. *Id.* at 16.

43. Coalition of Concerned Citizens Against I-670 v. Damian, 608 F. Supp. 110 (S.D. Ohio 1984).

44. *Id.* at 127.

45. "[I]t is plain from the record that construction of I-670 would have substantially less impact upon racial minorities than would the construction of a freeway along 17th Avenue, the major alternative location for a freeway." *Id.* This narrow reading of the law allowed the end result of a disparate impact on the African American community simply because the agency building the freeway had looked at another route that would have an even *greater* impact on African Americans in Cleveland. Under the somewhat twisted ruling of *Damian*, it would appear that government agencies could discriminate at will in the siting of facilities, as long as they also considered even more discriminatory siting possibilities as well.

arising out of Oakland, California, has yet to be decided on the merits.[46]

The results in *Crest Street Community Council*, as well as in Title VI cases in other areas such as municipal service provision,[47] indicate that Title VI cases have promise. The lesson of *Crest Street* may be that intervention using civil rights statutes at the administrative level is the strategy with the most chance of success.[48] It is up to us to continue to make Title VI work in environmental justice cases.

2. *Title VIII*

Title VIII offers environmental justice attorneys another possible statutory base for a civil rights claim.[49] Title VIII[50] bars the refusal "to sell or rent . . . or otherwise make unavailable, or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin,"[51] and bars discrimination "against any person in the. . . sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status or national origin."[52] Although there has yet to be a reported case involving an environmental justice dispute, it is an intriguing statute[53] for several reasons.

First, the statute does not require proof of intentional discrimination to establish a *prima facie* case of discrimination.[54] A plain-

46. Clean Air Alternatives Coalition v. United States Dep't of Transp., No. C-93-0721-VRW (N.D. Cal. filed March 2, 1993).

47. *See, e.g.*, Johnson v. City of Arcadia, 450 F.Supp. 1363 (M.D. Fla. 1978) (finding Title VI and Equal Protection Clause were violated when black residents were not provided same municipal services as white residents); *see infra* notes 69-74 and accompanying text.

48. However, attorneys are not eligible for attorneys fees unless the dispute actually goes to court. *Crest Street Community Council*, 479 U.S. at 16.

49. For a more extended treatment of Title VIII, see Robert G. Schwemm, HOUSING DISCRIMINATION: LAW AND LITIGATION, ch. 10-13; and Jon C. Dubin, *From Junkyards to Gentrification: Exploiting a Right to Protective Zoning in Low Income Communities*, 77 MINN. L. REV. 739 (1993).

50. 42 U.S.C. §§ 3601-3619, 3631 (1988).

51. *Id.* § 3604(a).

52. *Id.* § 3604(b).

53. We included a Title VIII claim in our case, El Pueblo para el Aire y Agua Limpio v. Chemical Waste Management, Inc., No. C-91-2083-OWW (E.D. Cal. filed July 8, 1991), but it was not reached because we won a related state court case which blocked the incinerator in question. Title VIII strategies and drawbacks are briefly explored in Lazarus, *supra* note 12, at 153-55.

54. United States v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974), *cert. denied* 422 U.S. 1042 ("effect, not motivation, is the touchstone"); Burney v. Housing Auth. of Beaver County, 551 F.Supp. 746, 770 (D. Pa. 1982); Williamsburg Fair Hous. Comm. v. New York City Hous. Auth., 493 F.Supp. 1225 (S.D.N.Y. 1980).

tiff need only prove that the conduct of the defendant actually or predictably results in racial discrimination, *i.e.* that it has discriminatory impact.[55] To rebut a *prima facie* case, a defendant must then prove that its conduct is justified in theory and practice by a legitimate interest, and that no feasible alternative course of action would serve the interest with less discriminatory impact.[56]

Second, the statute applies to local government agencies[57] and, more importantly, to those agencies' zoning decisions.[58] This offers environmental justice advocates a tool with which to challenge government rezoning of residential neighborhoods in communities of color to allow noxious facilities or other inappropriate land uses—a historical practice which Yale Rabin calls "expulsive zoning."[59]

Third, in contrast to Title VI, which reaches only recipients of federal funds, Title VIII reaches private and governmental defendants without regard to their receipt of federal monies.[60]

Fourth, although the statute is written to narrowly apply to fair housing cases,[61] it has been used to challenge the "segregative effect" of government decisions—that is, decisions which have the impact of increasing or perpetuating segregation.[62] In some environmental justice disputes, it could be argued that zoning changes which allow inappropriate land uses in residential communities are both 1) closely enough related to the "provision of services or facilities" for sale or rental of housing that they implicate Title VIII, and 2) have a segregative effect. These two hurdles—the nexus to

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55. *City of Black Jack*, 508 F.2d at 1184-85.

56. United States v. City of Parma, 494 F.Supp. 1049, 1055 (N.D. Ohio 1980), *aff'd*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982).

57. *See, e.g., City of Black Jack*, 508 F.2d at 1183-84 (Title VIII applies to municipal corporation).

58. *Id.*; NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir.), *aff'd* 488 U.S. 14 (1988); Familystyle of St. Paul, Inc. v. City of St. Paul, 728 F.Supp. 1396 (D. Minn. 1990), *aff'd* 923 F.2d 91 (cir. 1991).

59. Yale Rabin, *Expulsive Zoning: the Inequitable Legacy of Euclid*, *in* ZONING AND THE AMERICAN DREAM 101 (Charles Haar & Jerrold Kayden eds., 1990). An example might be changing zoning laws to allow an automobile manufacturing plant in a residential community. *See id.* at 109-13; Bob Anderson, *Industries Crowding out Communities: Lack of Siting Law Leaves Tiny Towns Enclosed, Enraged*, BATON ROUGE SUNDAY ADVOCATE, May 10, 1992, at 1A (local decisionmakers quick to change zoning laws to allow industry into residential neighborhoods).

60. *See* Schwemm, *supra* note 49, § 12.3. Title VIII even reaches the federal government, which is not subject to Title VI. *Id.* § 12.3(4)(d).

61. Some of the limitations on Title VIII approaches are discussed in Lazarus, *supra* note 12, at 153-55.

62. *See, e.g.*, U.S. v. City of Parma, 494 F.Supp. 1049 (N.D. Ohio 1980) (challenging city's actions in preventing people of color from taking up residence).

housing and the actual segregative effect of a proposed land use—are high, but may be surmountable in the right case.

One recent case involving siting provides instructive clues for surmounting the first hurdle. In the case, which challenged the siting of a baseball stadium to house the Chicago White Sox, members of the South Armour Square Neighborhood Association argued that the site was selected, and the neighborhood accordingly destroyed, for discriminatory reasons.[63]

In *Laramore v. Illinois Sports Facilities Authority*, the Neighborhood Association alleged that the building of the stadium would isolate plaintiff residents "from their neighbors and from shopping and other services[,] constitut[ing] discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling, in violation of § 3604(b)" of Title VIII.[64] The court dismissed the claim, stating:

> The scope of § 3604(b) depends on whether the language "in connection with" refers to the "sale or rental of a dwelling" or more broadly to a "dwelling." The Court finds that the most natural reading of the statute is the narrower reading. *See Southend Neighborhood Improvement Ass'n v. County of St. Clair*, 743 F.2d 1207, 1210 (7th Cir. 1984)(§ 3604(b) prohibits "discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling"). Even under a broad reading, however, "services or facilities" refers to "services generally provided by governmental units such as police and fire protection or garbage collection." *Id.* Section 3604(b) cannot be extended to a decision such as the selection of a stadium site and plaintiffs therefore do not state a cause of action under Title VIII.[65]

The *Laramore* case is interesting in that in a "kitchen sink" approach, it also involved Title VI and equal protection challenges to the siting. *Id.* at 448-452. Of particular interest to environmental justice advocates, in ruling on the equal protection claim, the Court found "no reason to dismiss an otherwise properly pleaded equal protection claim on the sole ground that the challenged actions concern issues of land use and eminent domain." *Id.* at 451.

The second hurdle, proving segregative effect, may be less difficult to overcome. Anecdotally, and based on common sense, one can easily argue that once a locally unwanted land use is allowed

63. Laramore v. Illinois Sports Facilities, 722 F. Supp. 443 (N.D. Ill. 1989).
64. *Id.* at 452.
65. *Id.*

into a neighborhood, whites tend to move out—thus the facility has had the effect of increasing segregation. This has been true in several situations in California,[66] as well as in new looks at old studies on the disproportionate impact of garbage dump sitings.[67] Such proof in a case involving the siting of a new facility might involve longitudinal studies looking at a series of similarly situated communities and charting the demographic make-up of a community when a facility is first built and over the years following. If indeed, as one might suspect, the siting of the facilities had segregative effect in similar communities, it could be plausibly argued that the proposed facility would have similar effect and thus violate Title VIII. In a situation of renewing a permit for an existing facility, or for the expansion of such a facility, studies of the demographics of the surrounding neighborhood before the facility was sited, when it was sited, and at various intervals since it was sited would be useful. If permit renewals or expansions have been approved in the past, the resulting effect (if any) of those government actions on the racial composition of the neighborhood could similarly be charted.

One problem with Title VIII claims is that even if a plaintiff group can make a *prima facie* case of discrimination, a defendant can argue that the siting or zoning decision is based on a legitimate interest, and that no alternative course of action could be taken that would serve the interest with less discriminatory impact.[68]

3. *Other Possibilities*

Another line of argument, derived from the municipal service cases of the 1970s and 1980s, deserves more attention. In a series of cases brought under the 14th Amendment and Title VI, courts

66. Kettleman City, for example, was 84% Latino in the 1980 Census, just one year after the Chemical Waste Management toxic dump was sited nearby, and 95% Latino ten years later in the 1990 Census.

67. In a reevaluation of Professor Robert Bullard's ground-breaking studies of solid waste landfill siting in Houston, Vicki Been determined that "[t]he number of African-Americans as a percentage of the population increased between 1970 and 1980 in all the neighborhoods surrounding the landfills. That increase was by as much as 223%, compared to a 7% increase in the African-American population of Houston as a whole. . . . This trend continued between 1980 and 1990." Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1403-04 (1994). *But cf. id.* at 1399 (percentage of African-American residents near two toxic waste sites in South Carolina *decreased* between 32 and 35% from 1970 to 1990).

68. United States v. City of Parma, 494 F.Supp. 1049 (N.D. Ohio 1980). Title VIII regulations expressly prohibit discriminatory provision of municipal services. 24 C.F.R. § 100.70(d)(4) (1993).

held that municipal services must be provided in a non-discriminatory fashion.[69] Gerald Torres, writing in this volume, discusses some of the analogies that might be drawn between the provision of municipal *benefits* and the imposition of municipal *burdens*, in environmental justice disputes.[70] As Derrick Bell points out, however, "issues concerning municipal services are rarely as clear cut in large urban areas as in small towns,"[71] a cautionary note which applies to environmental justice cases as well. Although civil rights claims have not yet met with success, as Richard Lazarus notes, "[t]heoretically, there is no obvious reason why those two types of cases should be treated differently by the courts."[72]

D. Constitutional Challenges

So far, almost every environmental justice civil rights case brought has alleged only a violation of the equal protection clause of the Constitution. And so far, no plaintiff has prevailed alleging such a claim in an environmental justice suit, although this strategy has been tried in numerous jurisdictions around the country.[73] All

69. *See, e.g.*, Hawkins v. Town of Shaw, 437 F.2d 1286 (5th Cir. 1971), *aff'd en banc*, 461 F.2d 1171 (5th Cir. 1972) (finding situation in which 97% of town's unpaved streets were in black neighborhoods, some of which also had no sewer system and open ditches as a drainage system, violated the 14th Amendment); Dowdell v. City of Apopka, 511 F.Supp. 1375 (M.D. Fla. 1981), *aff'd* 698 F.2d 1181 (11th Cir. 1983) (finding intentional discrimination in provision of municipal services violates 14th Amendment and Title VI); Johnson v. City of Arcadia, 450 F. Supp. 1363 (M.D. Fla. 1978) (finding intentional discrimination in provision of municipal services violates 14th Amendment and Title VI). For an excellent discussion of this line of cases, see DERRICK BELL, RACE, RACISM AND AMERICAN LAW 28-33 (2d ed. & Supp. 1984).

70. Gerald Torres, *Environmental Burdens and Democratic Justice*, 21 FORDHAM URB. L.J. 431, 444-46 (1994); *see also* Rachel Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 393, 416-21 (1991).

71. BELL, *supra* note 69, at 31 (1984). For this reason, Bell correctly predicts that it will be difficult to use the municipal service cases as precedent when challenging actions in an urban area. *Id.* In an illustrative example of Bell's position, civil rights groups have had difficulty in expanding on the municipal services cases in urban hospital closings. *See, e.g.*, NAACP v. The Medical Center, Inc., 657 F.2d 1322 (3d Cir. 1981); Bryan v. Koch, 627 F.2d 612 (2d Cir. 1980); Jackson v. Conway, 620 F.2d 680 (8th Cir. 1980) (all upholding the closing of hospitals even though the impact fell disproportionately on black residents); BELL, *supra* note 69, at 31-33.

72. Lazarus, *supra* note 12, at 146-47. Rachel Godsil is more pessimistic. *See* Godsil, *supra* note 70, at 420.

73. R.I.S.E. Inc. v. Kay, 768 F.Supp. 1144 (E.D. Va. 1991) (siting of garbage dump); El Pueblo para el Aire y Agua Limpio v. Chemical Waste Management, No. CV-F-91-578-OWW (E.D. Cal. filed July 7, 1991) (siting of a toxic waste incinerator); Bordeaux Action Comm'n v. Metro. Nashville, No. 390-0214 (M.D. Tenn. filed March 12, 1990) (operation of garbage dump); East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n, 706 F.Supp. 880 (M.D. Ga.), *aff'd* 896 F.2d 1264 (11th Cir. 1989) (siting of garbage dump); NAACP v. Gorsuch, No. 82-768-

plaintiffs have lost because of the high hurdle of proving that the discrimination evident in the siting cases was intentional on the part of government decisionmakers, under the Supreme Court's holdings in *Washington v. Davis*[74] and *Arlington Heights v. Metropolitan Housing Development Corp.*[75] Under the *Washington v. Davis* standard, showing discriminatory *impact* is not enough; plaintiffs must show that decisionmakers had discriminatory *intent* as well.

The case widely regarded as kicking off the legal piece to the environmental justice movement, *Bean v. Southwestern Waste Management*,[76] was an equal protection suit. The facts and holding of the suit have been extensively detailed elsewhere in this volume[77] and in the literature.[78] While the Northwood Manor residents ultimately lost the suit because of the intent requirement, it had at least three important, lasting outcomes. First, Houston restricted the dumping of garbage near public facilities such as schools, a form of zoning that was unprecedented in the only major U.S. city without zoning laws.[79] Second, the idea of using civil rights law to combat environmental racism was born. And third, the lawsuit channelled Linda Bullard's husband, Robert Bullard, into the ground-breaking sociological research on environmental justice he has continued to this day.[80]

CIV-5 (E.D.N.C. August 10, 1982) (siting of PCB dump); Bean v. Southwestern Waste Management, 482 F.Supp. 673 (S.D. Tex. 1979), *aff'd without op.*, 782 F.2d 1038 (5th Cir. 1986) (siting of garbage dump).

74. 426 U.S. 229 (1976).

75. 429 U.S. 252 (1977).

76. 482 F.Supp. 673 (S.D. Tex. 1979).

77. *See* Torres, *supra* note 70, at 440-42; Rae Zimmerman, *Issues of Classification in Environmental Equity: How We Manage Is How We Measure*, 21 FORDHAM URB. L.J. 633, 660-62 (1994).

78. *See, e.g.*, BULLARD, *supra* note 2, at 50-54; Anthony Chase, *Assessing and Addressing Problems Posed by Environmental Racism*, 45 RUTGERS L. REV. 335, 355 (1993); Robert W. Collin, *Environmental Equity: A Law and Planning Approach to Environmental Racism*, 11 VA. ENVTL. L.J. 495, 518-24 (1992); Godsil, *supra* note 70, at 413-16; Lazarus, *supra* note 12, at 850.

79. BULLARD, *supra* note 2, at 54. Bullard also lists several other local ramifications of the suit: the Houston City Council prohibited city-owned trucks from dumping at the landfill, the Texas Department of Health began to require demographic data from landfill proponents, and residents sent a message through their protests that they would fight any future attempts to site unwanted facilities in their neighborhood. *Id.*

80. Bullard has become the pre-eminent and most prolific writer in the field. *See* BULLARD, *supra* note 2, at 138-39 (bibliography of Professor Bullard's extensive publications); *see also*, ROBERT D. BULLARD, PEOPLE OF COLOR ENVIRONMENTAL GROUPS DIRECTORY (1992); Bullard & Wright, *supra* note 18; Robert D. Bullard, *Waste and Racism: A Stacked Deck?*, FORUM FOR APPLIED RESEARCH & PUBLIC

All the subsequent equal protection suits which have been decided by the courts have encountered the same problem of proving intentional discrimination: after *Washington v. Davis* and *Arlington Heights*, the equal protection clause is no longer a viable cause of action in most cases.[81] In two other reported cases, *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Commission*,[82] and *R.I.S.E. v. Robert A. Kay*,[83] community groups were tripped up by the intent requirement. In both cases, neighborhood groups challenged the siting of a garbage dump in a predominantly African-American neighborhood on equal protection grounds, and in both cases the neighborhood groups lost because the courts held the groups had not shown an intent to discriminate on the part of local decisionmakers.[84] The *R.I.S.E.* facts demonstrate the difficulty of proving intent: although the court noted that the proposed landfill would be in a majority African-American neighborhood, that all three of the currently operating garbage dumps run by the local County (sited during the preceding 25 years) were also located in predominantly black areas, that the County solicited the approval of a wealthy white landowner but ignored the wishes of the African American community, and that a landfill proposed for a majority-white community had been rejected by the same County board, it still held that the County had not acted with the requisite "intent" to discriminate.[85]

Because of the *Washington v. Davis* intent requirement, civil rights lawyers have opined that environmental justice cases using

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POL'Y 29 (1993); Robert D. Bullard, *Race and Environmental Justice in the United States*, 18 YALE J. OF INT'L LAW 319 (1993); Robert D. Bullard, *The Threat of Environmental Racism* 73 NATURAL RESOURCES & THE ENV'T 23 (1993).

81. *Cf.* Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?* 76 CORNELL L. REV. 1151 (1991) (analyzing the actual results in all 316 published post-*Washington v. Davis* cases through early 1988). The authors show that the success rate (40% in District Court cases) is higher than commentators' casual predictions and suggest a multiplicity of reasons for this. The reasons are quite nuanced; any litigator facing the intent standard could profit from reviewing Eisenberg and Johnson's analysis.

82. 706 F.Supp. 880 (M.D. Ga.), *aff'd*, 896 F.2d 1264 (11th Cir. 1989).

83. R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991)

84. Both cases have been extensively discussed in the literature. *See, e.g.*, Torres, *supra* note 70 (*R.I.S.E.*); Chase, *supra* note 78, at 355-58 (*East Bibb* and *R.I.S.E.*); Robert W. Collin, *Environmental Equity: A Law and Planning Approach to Environmental Racism*, 11 VA. ENVTL. L.J. 495, 524-33 (*East Bibb* and *R.I.S.E.*); Godsil, *supra* note 70, at 411-13 (*East Bibb*); Lazarus, *supra* note 12, at 145-46 (*East Bibb & R.I.S.E.*).

85. *R.I.S.E., Inc.*, 768 F. Supp. at 1148-49.

federal equal protection claims will be "certain losers."[86] While there may still be hope for these claims,[87] because of the difficulty of proving discriminatory intent such claims are at the very bottom of our litigation hierarchy.[88] While one may wish to bring a Constitutional claim for its political value, it should only be brought alongside environmental and statutory civil rights claims.

III. The Politics of Environmental Justice Cases

Because the struggles in the environmental justice movement are primarily *political* and *economic* struggles, not legal ones, as lawyers in the movement we strongly recommend *against* lawsuits whenever possible. But given the fact that sometimes a community group must go to court,[89] the group should understand not only the legal angles of the suit, but its potential political ramifications as well. Environmental justice lawsuits must be brought in recognition of their political nature, in order to lift a community's morale, strengthen the community group, raise the profile of the group, and build the political momentum necessary to win such struggles. As Derrick Bell notes, "Litigation can and should serve lawyer and client as a community-organizing tool, an educational forum, a means of obtaining data, a method of exercising political leverage, and a rallying point for public support."[90]

Some of the political benefits we have found in using civil rights claims in environmental justice suits include:

Naming names. Bringing a civil rights suit against local government officials can be very satisfying for the community group involved, because it calls the problem what it is: a violation of civil

86. Environmental Racism: Recognizing and Combatting this Civil Rights Menace, American Public Health Association Conference (Oct. 25, 1993) (remarks of Bill Lan Lee). Mr. Lee is senior counsel of the NAACP Legal Defense Fund in Los Angeles.

87. In the ideal world, the Supreme Court would overturn *Washington v. Davis* and do away with the intent standard, or Congress would pass a second Civil Rights Restoration Act that accomplished the same purpose.

88. As Richard Lazarus writes, "Burdens of proof are difficult to overcome under existing doctrine, but if litigation efforts were to receive additional resources, some isolated successes might be achievable." Lazarus, *supra* note 12, at 828.

89. "The courts are an arena in which sometimes it is impossible not to play; we must be there when our client groups call on us to take the struggle into that forum .... But any legal strategy not firmly grounded in, and secondary to, a community-based political organizing strategy, is ripe for failure." Cole, *Remedies for Environmental Racism supra* note 3, at 1997.

90. Derrick A. Bell, *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 513 (1976).

rights.[91] It is one high-profile way of saying that the official being sued is engaging in racist practices. This act alone makes such suits worthwhile to some groups with long-term experiences with racist decision-makers—filing a suit allows a community to say "officially" what has existed for a long time, and builds morale within the group.

Publicity. Civil rights lawsuits in environmental struggles are still relatively new, and thus command media attention—especially if you are suing a corporate giant.[92] In the Kettleman City incinerator struggle, the civil rights and environmental suit we brought was written about in national publications like the *Wall Street Journal* and *Christian Science Monitor*, and the community was featured on national news shows such as the MacNeil-Lehrer News Hour—publicity that was important in drawing even more attention to the community's struggle and building our momentum.[93] As part of its story about the suit, *Business Week* did a small chart titled "Did Chem Waste Discriminate?"[94] The chart listed all of Chem Waste's incinerator facilities around the country—each of which is in a neighborhood that is 80 percent or more people of color. That little chart said it all, and was an incredibly effective educational tool.

The publicity surrounding an environmental justice case may also encourage other, similarly situated communities to take collective action; seeing or hearing their own situation described on TV or in the papers, and seeing what one community has done to fight that situation, other communities may be inspired to fight back.[95]

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91. *See* William L. F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming and Claiming . . .* 15 L. & SOC'Y REV. 631 (1981).

92. *See* Steven Keeva, *A Breath of Justice*, 80 ABA J. 88 (Feb. 1994).

93. "Exposure through the press—building a community's movement through public education and consciousness raising—is crucial to a successful struggle." Luke W. Cole, *The Struggle of Kettleman City for Environmental Justice: Lessons for the Movement*, 5 MD. J. CONT. LEGAL ISSUES (forthcoming 1994).

94. Julia Siler Flynn, *Environmental Racism: It Could Get Messy*, BUS. WEEK, May 20, 1991, at 116.

95. For a lawsuit to have such effect, it must be collectivized and politicized. Felstiner et al. describe one such incident:

> Following a recent television program in Chicago in which a woman subjected to a strip search during a routine traffic citation described her successful damage claim against the police department, *hundreds* of women telephoned the station with similar stories. In this instance, a legal victory transformed shame into outrage, encouraging the voicing of grievances, many of which may have become disputes. When the original victim chose a legal mechanism for her complaint, a collective grievance against police practices was individualized and depoliticized. When she broadcast her legal victory on television, the legal dispute was collectivized and repoliticized.

Political education. By calling an environmental dispute by a different name—a civil rights dispute—and through the attendant publicity surrounding such a suit, a community group can educate its members, politicians and other communities. It may help local residents, decision-makers and company officials see the problem differently. More importantly, renaming the problem raises consciousness in the general public about the issue of environmental racism.[96]

Gaining allies. By calling a dispute a civil rights struggle, a group may gain allies from other organizations in the region who previously may not have recognized the civil rights implications of the community's struggle for environmental justice. (At the same time, the group may lose allies who are squeamish about talking about race issues.)

Judicial education. A last potential benefit of bringing civil rights claims in environmental justice suits is judicial education. While courts have not yet ruled favorably on an environmental justice civil rights case, the increasing number of such cases being brought may be having an effect in educating the judiciary. This judicial education, along with mass political movement, was what made civil rights claims possible in other areas such as school and public facilities desegregation. Many of the first cases brought under civil rights laws to challenge such segregation failed,[97] and it was only through years of strategically brought lawsuits—many of them unsuccessful—that civil rights lawyers finally prevailed in court. For this to be a successful strategy in the environmental justice movement, however, three things must happen. First, we need to be more strategic in the way we bring cases, rather than simply bringing them in the *ad hoc* way we have up to this point;[98] as a start,

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Felstiner et al., *supra* note 91, at 643. The authors caution that "[i]deology—and the law—can also instill a sense of disentitlement. The enactment of worker's compensation as the 'solution' to the problem of industrial accidents early in this century may have helped convince workers to rely on employer paternalism to ensure their safety and relinquish claims to control the workplace." *Id.*

96. One potential problem which has been identified by commentators such as Gerald Torres is the diluting effect of calling every struggle one of "environmental racism." Torres argues, not unconvincingly, that part of the power that the term "racism" has is contained in its sparing use. Gerald Torres, *Understanding Environmental Racism*, 630 COL. L. REV. 847 (1992).

97. *See, e.g.*, Giles v. Harris, 189 U.S. 475 (1903); Plessy v. Ferguson 163 U.S. 537 (1896).

98. This strategic approach could mirror the carefully orchestrated efforts by the NAACP Legal Defense Fund to end exclusion of African Americans from voting and segregation in public schools, strategies which began in the 1920s and still continue to this day. *See, e.g.*, DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 140, 301,

this would involve following the hierarchy of legal theories laid out in this Article. Second, we need to use these claims in factually good cases, rather than in just any case, or risk poisoning the well for those who come after us.[99] And third, when we bring the cases, we need to make them as legally compelling as possible, relying primarily on civil rights statutes rather than Constitutional claims.[100]

IV. Conclusion

The history of the legal piece of the environmental justice movement is long and varied. Several lessons have emerged from the experiences of a number of grassroots groups which have used

375, 411 (2d ed. 1980); RICHARD KLUGER, SIMPLE JUSTICE (1976). To be more strategic, we need to ensure that all necessary political work is being done by our clients in a community as we do a lawsuit, we need to coordinate with other environmental poverty lawyers and community groups around the country to be conscious of what each other are doing, we need to network communities fighting the same companies to come up with collective responses, and we need to bring cases in courts that are likely to be sympathetic to civil rights claims.

99. Gerald Torres makes this point in a broader way in discussing the use of the term "environmental racism":

> [R]acism has been and should be a term of special opprobrium. We risk having the term lose its condemnatory force by using it too often or inappropriately. By calling something racist when another term might suffice risk subjecting the word to a kind of verbal inflation.

Torres, *supra* note 96, at 847. Similarly, calling every environmental justice dispute a civil rights dispute will lessen the impact of the charge—as well as creating bad case law if the charge is made, and lost, in court.

100. This operates on two levels. First, we need to be sure that we bring winning cases; while the cases bringing Constitutional claims, discussed *supra* notes 73-88 and accompanying text, may have had political value, their *legal* value at this point is largely in showing us what not to do. Second, we need to be sure that we do all our homework before we get into court so that we do not become victims of perceived procedural flaws in our cases, because hostile judges will be looking for ways to get rid of these cases without dealing with them on the merits. Three cases in the last three years in the San Francisco Bay Area are instructive. In *El Pueblo para el Aire y Agua Limpio v. Chemical Waste Management, Inc.*, the companion case to our state case in the Kettleman City incinerator struggle, the judge dismissed one civil rights claim against Chem Waste on grounds of ripeness, with the judge agreeing with Chem Waste's claim that because the incinerator had just one of the four permits it needed to be built, our suit was not ripe for adjudication. In another civil rights suit arising in California challenging the placement of a garbage dump, Aiello v. Browning-Ferris, Inc., 1993 WL 463701 (N.D. Cal. Nov. 1993), the suit was dismissed because the statute of limitations had run. In Clean Air Alternatives Coalition v. United States Dep't of Transp., C-93-0721-VRW (N.D. Cal. filed July 16, 1993), the lead plaintiffs were dropped from the suit because they claimed in the complaint that they were an incorporated community group when in fact they incorporated *after* the suit was filed. That the success (or failure, in these cases) of such suits rests on such real or imagined procedural defects is testament to the hostile climate in the courts, and to the need to do good lawyering as well as visionary lawyering.

legal approaches as part of their struggles for environmental justice.[101] First, that lawsuits are most successful in the context of a broad, political organizing campaign conducted by a community group. Second, that legal challenges based on environmental laws have the best chance of success in court. Third, that civil rights challenges based on statutes, rather than the Constitution, have greater legal potential. And finally, that civil rights suits have intrinsic political value, often creating benefits for the community group involved whether or not the group wins in court. This Article has briefly sketched the context and content of these lessons; let us go forward and use them wisely in the service of the environmental justice movement.

101. These conclusions are offered with a significant caveat: We need always remember that each situation presents a need for creative lawyering, and that no one model or litigation hierarchy will fit every case. As Gerald Torres reminds us, "there is no single model, or single slogan available to assess or to criticize the deficiencies of current environmental policy. Easy reliance on slogans risks being both counter-productive and ineffective." Torres, *supra* note 96, at 847.