Fordham Urban Law Journal

Volume 23 | Number 4 Article 15

1996

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The campaign against environmental injustice is still in its developmental stage, particularly with regard to identifying viable legal strategies. Legal scholarship on the topic has largely been confined to recounting failed attempts to litigate environmental racism claims under the Equal Protection Clause of the 14th Amendment and, recently, suggesting Federal Title VI and VIII as potential remedies. Few have considered state laws. None have considered the options available under New York State constitutional and statutory law. This is surprising because state laws commonly provide remedies when federal laws do not. In fact, it is their historically greater dynamism that makes state laws the most fertile ground for developing environmental remedies.

This article explores strategies specifically available to the New York plaintiff seeking to raise an environmental racism claim. Thus, this article does not intend to imply that federal statutes such as Title VI and Title VIII should not be used where they can offer meaningful relief. Instead, it seeks to encourage plaintiffs to avail themselves of New York State provisions as either primary remedies, using federal statutes for guidance, or in conjunction with federal claims.

Although an exhaustive analysis of environmental racism is beyond the scope of this article, Part I provides a brief overview of the problem labeled "environmental racism." Part II discusses the historical interplay between state and federal law, explaining the superiority of state provisions for developing litigation strategies with regard to new or innovative legal claims. Finally, Part III identifies the areas within New York law—constitutional and statutory—that might be used in such litigation. Each area identified is addressed separately, its federal analogues are analyzed as paradigms, and, finally, its potential for use in environmental racism litigation is assessed.

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I. An Overview of Environmental Racism

A. What Is Environmental Racism

One of the most disturbing trends within, and consequences of, the environmental movement is environmental race discrimination, or as it is more commonly known, "environmental racism." Ben Chavis has defined environmental racism as racial discrimination in environmental policy-making and the unequal enforcement of environmental laws and regulations.[1] He described it as the "deliberate targeting" of communities of color for toxic waste facilities and the official sanctioning of the presence of life-threatening chemicals in these communities.[2] Intent is the defining characteristic of this definition.

While Chavis's definition may offer something in terms of political appeal or momentum, it also invites a more onerous burden. If one defines the problem of environmental racism as *intentional* discrimination, one is then constrained to *prove* intentional discrimination, *i.e.*, racial animus, rather than merely disparate impact.[3]

By contrast, an alternative school of thought focuses on effects. It defines environmental racism as "[A]ny policy, practice, or directive that, intentionally or unintentionally, differentially impacts or disadvantages individuals, groups, or communities based on race or color."[4] Although most authors have not acknowledged the difference between these definitions, the precision of thought exhibited by this approach allows environmental rights activists to avoid already-foreclosed remedial paths at the developmental stage of litigation strategy. Consequently, the Bullard definition of environmental racism appears to be more widely accepted among litigants.

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1. Chavis is credited with coining the term "environmental racism" in his March 1993 testimony before a congressional committee. Although he is credited with coining the term, Chavis is by no means the consensus leader of this movement. He has been severely criticized by community organizations concerning his and the NAACP's collaborating with insurance companies, petroleum companies, and some of the other staunchest opponents of Superfund liability and Superfund toxic waste cleanup, to kill President Clinton's Superfund reauthorization bill. *See* Marianne Lavelle, *Did NAACP's Ben Chavis Switch Sides, or Work to Bring Opponents Together?*, NAT'L L.J., Sept. 5, 1994, at A1.

2. Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENVTL. L. 285, 289 (1995).

3. *See infra* notes 33-36 and accompanying text.

4. Fisher, *supra* note 2, at 289 (quoting sociologist Robert D. Bullard, *Environmental Equity: Examining the Evidence of Environmental Racism*, LAND USE F., Winter 1993, at 6).

B. How the Modern Environmental Movement Has Fostered Environmental Racism

Somewhat ironically, the problem of environmental racism has grown out the environmental movement itself. Because environmental protection laws do not eliminate dangers completely, but, rather, reduce and redistribute them, this seemingly race-neutral field is prone to racism. For decades, the neighborhoods of people of color have borne a disproportionate share of the nation's noxious risks and environmental hazards.[5] The most common of these risks include municipal landfills and incinerators, abandoned toxic waste dumps, and lead-poisoned paint.[6]

The discriminatory effect on people of color is not surprising for environmental protection laws do not eliminate dangers entirely, but merely reduce and redistribute them. This is ensured by the battle cry of NIMBY (Not In My Back Yard) which continues to resonate within modern environmentalism. NIMBY targets waste disposal facilities,[7] assorted group homes and shelters, and low-in-

5. As such hazards are also disproportionately visited upon low-income communities, it has been suggested that the problem of discriminatory siting may be one of income rather than ethnicity.

Investigation, however, has shown that this is not the case. Professor Bullard's studies show that lead poisoning disproportionately affects children of color at every class level. Robert Bullard, *Anatomy of Environmental Racism, in* TOXIC STRUGGLES 26 (Richard Hofrichter ed., 1993). Lead affects three to four million children in the United States, most of whom are Latino or African-American and live in urban areas. *Id.* Among children under 6 years of age, the percentage of African-American children who have excessive levels of lead in their blood far exceeds the percentage of white children who do at all income levels. *Id.* For families earning less than $6,000 per year, 68% of African-American children had lead poisoning whereas only 36% of white children did. *Id.*

Additionally, with regard to Superfund cleanup, communities of color wait up to four years longer than white communities to obtain cleanup. Marianne Lavelle and Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S4. Furthermore, when cleanup was implemented, white communities received permanent treatment remedies 22 times more frequently than did communities of color, who typically received containment technologies. *Id. See generally* COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987); Valerie J. Phillips, *Have Low Income, Minorities Been Left out of the Environmental Cleanup?*, ADVOCATE, Oct. 1994, at 16 (Idaho State Bar Journal).

6. M. Patrice Benford, *Life, Liberty, and Pursuit of Clean Air — Fight for Environmental Equality*, 20 T. MARSHALL L. REV. 269 (1995).

7. Community wastes are primarily hazardous waste and municipal solid waste. Most states have their own siting and disposal operation laws which are subject to federal standards. NEW YORK STATE LEGISLATIVE COMMISSION ON TOXIC SUB-

come housing units.[8] This credo does not end all siting of hazardous facilities,[9] but, instead, moves them from white, affluent suburbs to neighborhoods of those without clout, typically, people of color. Therefore, while one community is relieved of the burden of waste treatment and disposal facilities, another community is burdened. "You do not reduce the risk, but change the identity of the population exposed."[10]

Thus, the movement decrying environmental racism is antithetical to modern environmentalism. The battle is better fought by attorneys seeking to ensure housing equity for people of color than by those within the movement that have caused this inequity.[11] Although some have recently looked to federal civil rights statutes, for the New York practitioner, New York law provides a better starting point for housing equity in the context of environmental racism.

II. Litigating Environmental Racism Claims: The Superiority of State Law

Many who practice civil rights-impacted law have long known that state statutes, including civil rights and human rights enactments, are often better resources than their federal counterparts.

STANCES AND HAZARDOUS WASTE FACILITY SITING: A NATIONAL SURVEY (June 1987).

8. Michael B. Gerrard, *The Victims of NIMBY*, 21 FORDHAM URB. L.J. 495, 496 (1994).

9. Charles J. McDermott, however, has distinguished the environmental equity and environmental justice movements from the movement decrying environmental discrimination. According to McDermott, the "environmental equity" movement seeks to evenly balance the siting of hazardous facilities among all communities. The "environmental justice" movement seeks to relieve all communities of such burdens. Charles J. McDermott, *Balancing the Scales of Environmental Justice*, 21 FORDHAM URB. L.J. 689 (1994).

10. Richard Lazarus, Address at the Annual Mitchell Lecture at the University of Buffalo School of Law (Mar. 3, 1993).

11. The gulf between the civil rights and environmental movements, as well as a fundamental distrust particularly on the part of the former toward the latter, is often noted and hardly surprising: The environmental movement has traditionally focused on the preservation of species and lands. Additionally, there has been an absence of "minority clout" in the environmental law-making process and low membership in the environmental bar. "Minorities fear that mainstream groups will co-opt environmental justice issues, and the people in the environmental groups don't like this issue. It's threatening." *Id.*

Though one author has noted that "environmentalists and civil rights leaders have joined forces" in this movement, Linda Blank, *Seeking Solutions to Environmental Inequity: The Environmental Justice Act*, 24 ENVTL. L. 1109 (1994), this appears to be more wishful thinking than any informed pronouncement of a true joint effort.

This superiority is consistent with the greater dynamism historically seen in the development of state laws.

Indeed, the Federal Bill of Rights was agreed upon only after each of the original 13 states had adopted written constitutions.[12] The oldest of the criminal procedure rights to be incorporated into these federal guarantees, the exclusionary rule, had previously been used by state courts for several years prior to its recognition at the federal level.[13] Other procedural rights were also first recognized by state courts.[14]

State laws may protect a broader category of rights, or protect a broader array of similar rights, than their federal analogues. State constitutions or statutes may protect explicitly what the Federal Constitution protects only implicitly,[15] or lend a broader interpretation to an identically worded clause.[16]

The laws guarding against unreasonable search and seizure offer a clear illustration of New York State law providing greater protection than its federal counterpart. New York employs a four-level predicate-intrusion analysis, granting citizens greater protection from police detention and arrest under the New York Constitution than is provided by the Federal Constitution's Fourth Amendment.[17] In doing so, the Court of Appeals, while acknowleging the similar language and common history of the two provisions, looked beyond the texts to preexisting state statutes and common law de-

12. Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 381 (1980).

13. *See* Mapp v. Ohio, 367 U.S. 643 (1961) (holding that evidence obtained by an unconstitutional search is inadmissible).

14. Among these rights is that of court-appointed counsel for indigent defendants. *See* Carpenter v. Dane County, 9 Wisc. 274, 278 (1859).

15. JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES § 1.03 (1992).

16. State v. Hempele, 576 A.2d 793 (N.J. 1990) (holding that warrant based on probable cause is required to search garbage, rejecting California v. Greenwood, 486 U.S. 35 (1988)); Pimental v. Department of Transp., 561 A.2d 1348 (R.I. 1989) (holding that a roadblock was illegal under the state constitution, which can afford citizens greater protection against government intrusion than the Federal Constitution despite similarities between state and federal language); People v. Sporleder, 666 P.2d 135 (Colo. 1983) (holding that the installation of a pen register without a search warrant supported by probable cause is an unreasonable search and seizure under the state constitution).

Indeed, the NAACP Legal Defense and Education Fund, considering the racial make-up of juries, has argued that the equal protection clauses of particular states' constitutions provide for greater and different protection than their federal analogues. George Kendall, Comments to NAACP Legal Defense and Education Fund, Nov. 1991.

17. People v. DeBour, 40 N.Y.2d 210, 222, 352 N.E.2d 562, 572, 386 N.Y.S.2d 375, 384 (1976).

fining the scope of the individual's right, the traditions of the state regarding that right, and any distinctive attitudes of the state citizenry toward the scope and protection of that right.[18]

Superior protections often evolve from state laws due to the positions that state courts and legislatures hold relative to the larger legal hierarchy. The scope of their authority and the impact of their decisions are limited to their local jurisdictions and constituencies. Since state legislators and jurists are more accountable to and more personally invested in local values and concerns, they may be more willing to tackle new issues and consider innovative approaches to those issues. This may result in state courts being the venue of first impression for novel legal issues. Indeed, historically, state constitutions were enacted to respond to unaddressed social ills. For example, Art. XVII § 1 of the New York State Constitution was adopted "to recognize the responsibility of the State for the aid, care and support of persons in need."[19] Education, health care, and housing have traditionally been considered matters for the states.[20]

Looking to state law first is also logical for plaintiffs. As Justice (then Professor) Linde explained:

> the state constitution should be examined first, before any issue under the federal fourteenth amendment. To begin with the federal claim, as is customarily done, implicitly admits that the guarantees of the state's constitution are ineffective to protect the asserted right and that only the intervention of the federal constitution stands between the claimant and the state.[21]

Consequently, in considering strategies to combat environmental racism, it behooves the New York State practitioner to look first to

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18. Recently, the Court of Appeals disregarded the Supreme Court's decision on the same "plain touch" issue handed down just a few months before. *See* People v. Diaz, 81 N.Y.2d 106, 107, 612 N.E.2d 298, 299, 595 N.Y.S.2d 940, 941 (1993).

The Rehnquist Court has not been a friend to civil rights advocates. For example, the Court has revisited the Civil Rights Act of 1866 and 1871, weakened affirmative action programs by applying strict scrutiny to a contractor set-aside program and permitting liberal use of third party collateral attacks on consent decrees, and, in Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 657 (1989), required the plaintiff to show that "each . . . practice has a significantly disparate impact," and that their statistical analysis was insufficient to make out a prima facie case of disparate impact, to prevail on a Title VII claim. This standard was later legislatively overturned and reduced in the amendments to the Civil Rights Act.

19. Tucker v. Toia, 43 N.Y.2d 1, 371 N.E.2d 449, 400 N.Y.S.2d 728 (1977); Richard A. Halloran, *State Constitutional Protection of Economic Rights*, *in* 6 CIVIL RIGHTS LITIGATION AND ATTORNEY FEES ANNUAL HANDBOOK 256 (1990).

20. Halloran, *supra* note 19, at 256.

21. Hans A. Linde, *Without "Due Process"*, 49 OR. L. REV. 125, 182 (1970).

state constitutional and statutory provisions. As state practitioners, we have the luxury, if not the responsibility, to be legal innovators. Given the nascent state of environmental racism litigation New York courts are free to proceed unhindered by any pre-existing analytical structures and can employ innovative analyses that, in turn, may trickle up to the federal level.[22]

III. New York State Bases for Environmental Discrimination Litigation

In New York State, four potential bases exist for litigating environmental racism claims. They are Article I, § 11 of the New York State Constitution, Article 2-A of the Civil Rights Law, the State Human Rights Law, and local and municipal provisions, most prominent among these, the New York City Administrative Code.

A. Article I, § 11 of the New York State Constitution

Article I, § 11 of the New York State Constitution provides that

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.[23]

The first sentence of this section is an equal protection provision which, like the federal equal protection right, is addressed to "state action."[24] The second sentence prohibits private as well as state

22. Some state courts and advocates analyze an overlapping state constitutional provision only when dissatisfied with the current federal caselaw. This selective use of state law views the state constitution as a supplemental rather than a primary source of rights. FRIESEN, *supra* note 15, at § 1.04.

23. N.Y. CONST. art. I, § 11.

24. Under 21, Catholic Home Bureau for Dependent Children v. City of New York, 65 N.Y.2d 344, 360, n.6, 482 N.E.2d 1, 7, n.6, 492 N.Y.S.2d 522, 528, n.6 (1985); Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 530, 87 N.E.2d 541, 548 (1949), *cert. denied* 339 U.S. 981 (1950).

discrimination as to "civil rights."[25] "State action" is a prerequisite for any claim under this section.[26]

The Court of Appeals has had occasion to consider whether the proscription against "discrimination in civil rights" applies to a person's opportunity to acquire an interest in realty.[27] In *Dorsey*, black plaintiffs sought to bring fair housing rights within the purview of this section. The court, however, declined the invitation, instead holding that the right to be free from racial discrimination in acquiring housing was not a "civil right" within the meaning of this constitutional provision.[28]

Although this appears not to bode well for those looking to the state constitution for remedies against environmental racism, the precedential harm of the case was diminished by the New York State Human Rights Law, which explicitly enumerated housing as a civil right.[29] Thus, this forty-seven year old decision is not a hurdle to the civil rights litigator. Instead, it appears that the strongest barrier to relying on Art. I is caselaw that has employed an analysis identical to that of the Federal Equal Protection Clause.[30]

While recognizing that, "[i]n certain areas, of course, the New York State Constitution affords the individual greater rights than those provided by its Federal counterpart," the Court of Appeals held that the wording of the state constitutional equal protection clause "is no more broad in coverage than its Federal prototype" and that the history of this provision shows that it was adopted to

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25. *Dorsey*, 299 N.Y. at 531, 87 N.E.2d at 548. "The term 'civil rights' was understood by the delegates at the 1938 Constitutional Convention to mean 'those rights which appertain to a person by virtue of his citizenship in a state or community' . . . . 'The Civil Rights Clause is not self-executing, however, and prohibits discrimination only as to civil rights which are "elsewhere declared" by Constitution, statute, or common law.'" People v. Kern, 75 N.Y.2d 638, 651, 554 N.E.2d 1235, 1241, 555 N.Y.S.2d 647, 653 (1990) (citations omitted), *cert. denied*, 498 U.S. 824 (1990).

26. *See Kern*, 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647; *Dorsey*, 299 N.Y. 512, 87 N.E.2d 541; Holy Spirit Ass'n for Unification of World Christianity v. New York State Congress of Parents and Teachers, Inc., 95 Misc. 2d 548, 408 N.Y.S.2d 261 (Sup. Ct. 1978).

27. *Dorsey*, 299 N.Y. at 531, 87 N.E.2d at 548.

28. This rested on the asserted right not being a "civil right" "elsewhere declared." At that time, no statute recognized the right to the acquisition of an interest in real property to be a civil right, the delegates at the Constitutional Convention in 1938 had expressly rejected the designation of such an interest as a civil right, and the Legislature had recently declined to amend the Civil Rights Law to define the opportunity to purchase and lease real property to be a civil right. *Id.*

29. N.Y. EXEC. LAW § 291 (McKinney 1993).

30. The Equal Protection Clause of the 14th Amendment prohibits the state from treating similarly situated individuals differently. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985); Eisenstadt v. Baird, 405 U.S. 438, 447 (1972).

make it clear that New York State, like the federal government, is affirmatively committed to equal protection, and was not prompted by any perceived inadequacy in the Supreme Court's delineation of the right.[31]

Furthermore, in considering the nature of discrimination and its related burdens and proofs, the Court of Appeals has held that differences in the application of laws to different groups do not violate state equal protection guarantees unless the distinction is invidious.[32] Mirroring the federal standard, the party who alleges the discriminatory enforcement carries a heavy burden of showing that purposeful, intentional discrimination has taken place.[33]

This is the very burden one carries in alleging a violation of the Federal Equal Protection Clause.[34] It is this heavy burden that poses the most difficult challenge.[35] One lower court has even held that the breadth of New York's equal protection clause grants no more protection than, but is co-equal to the Federal Equal Protection Clause.[36] A discriminatory effect may be condemned, but it alone is insufficient to sustain an equal protection challenge. Ascertaining whether our state constitutional provision holds promise for litigating environmental racism claims, therefore, requires an examination of the successes and failures of the Federal Equal Protection Clause in response to such claims.

1. The Use of the Federal Equal Protection Clause in Environmental Racism Claims

Until three or four years ago, the Equal Protection Clause of the 14th Amendment of the Federal Constitution had been the most

31. Esler v. Walters, 56 N.Y.2d 306, 313-14, 437 N.E.2d 1090, 1094, 452 N.Y.S.2d 333, 337 (1982); *Dorsey*, 299 N.Y. at 530-31, 87 N.E.2d at 548; Seaman v. Fedourich, 16 N.Y.2d 94, 102, 209 N.E.2d 778, 782, 262 N.Y.S.2d 444, 449 (1965) (state guarantee of equal protection "is as broad in its coverage as that of the Fourteenth Amendment").

32. *In re* Estate of Wilson, 59 N.Y.2d 461, 452 N.E.2d 1228, 465 N.Y.S.2d 900 (1983). *See also* Procaccino v. Board of Elections of City of New York, 73 Misc. 2d 462, 341 N.Y.S.2d 810 (Sup. Ct. 1973).

33. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

34. *Arlington Heights*, 429 U.S. at 252.

35. The federal methodology of equal protection analysis has greatly influenced state courts: Virtually all state courts resort to federal-style equal protection methodology and terminology in applying state equal protection clauses (with the exception of the unique state proscriptions against gender discrimination). FRIESEN, *supra* note 15, at § 3.01.

36. People v. Smith, 97 Misc. 2d 115, 411 N.Y.S.2d 146 (N.Y. Co. Ct. 1978).

common legal basis for challenging environmental racism.[37] More recently, however, its use as a tool in environmental actions has all but been abandoned because of its onerous burden of proof. Recent federal environmental justice cases have directly incorporated the aforementioned burdens.[38] To prevail on an environmental discrimination claim under the Federal Equal Protection Clause, it is not enough to show disparate impact on a suspect class.[39] Instead, a plaintiff must show that "discriminatory intent" played a role in that siting, regardless of whether the actor was a landlord, a corporate polluter, or a state agency.[40]

Adding to the difficult burden of proof this created, the nature of environmental discrimination is often negligent siting or competition among groups to avoid siting. This produces what is truly a disparate impact unlikely to be accompanied by obvious discriminatory motive. Consequently, the nature of the problem itself, *i.e.*, discrimination in siting, is incompatible with the mechanics of an equal protection claim.[41] This forcefully demonstrates the failings in the Chavis definition of environmental racism. Recall that Chavis deems environmental racism as the "deliberate targeting" of communities of color. By so prominently featuring intent in the definition, he takes on the onerous burden of proving intent, rather than being able to rely on disparate impact. This obviously narrows a plaintiff's litigation options.

New York courts have held that, despite additional phraseology, the New York equal protection clause offers no more protection than and demands the same proofs as its federal counterpart.[42] Therefore, the intent barrier associated with environmental litigation under the Federal Equal Protection Clause also exists under the New York State equal protection provision. Consequently, since litigation under the federal clause has been unsuccessful, there is no reason to believe that the equally burdened state provision offers any greater promise in fighting this battle.

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37. Donna Gareis-Smith, *Environmental Racism: The Failure of Equal Protection To Provide a Judicial Remedy and the Potential of Title VI of the Civil Rights Act*, 13 TEMP. ENVTL. L. & TECH. J. 57 (1994).

38. R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd*, 977 F.2d 573 (4th Cir. 1992).

39. *See* Gareis-Smith, *supra* note 37, at 57-58.

40. *Id.* This formidable hurdle has caused some to suggest a federal statute requiring only a showing that siting had a discriminatory impact on communities of color. *See id.*

41. *Id.* at 58.

42. *E.g., Dorsey*, 299 N.Y. at 530-31, 87 N.E.2d at 548.

B. New York State Civil Rights Law

Article 2-A of the New York Civil Rights Law grants "equal rights to publicly-aided housing" to the residents of the state.[43] This law concerns only multiple dwellings that were financed with public monies after 1950.[44] It became effective in 1950, one year after the Court of Appeals decision in *Dorsey*, which held that housing was not a civil right within the meaning of the state equal protection clause.[45]

Article 2-A was enacted under the police power of the state to fulfill and enforce the provisions of the constitution of this state concerning civil rights.[46] Under its terms, it is illegal

> (1) For the owner of any publicly assisted housing accommodation to refuse to rent or lease or otherwise deny or withhold from any person or group of persons such housing accommodation because of the race, color, religion, national origin or ancestry of such person or persons.
> (2) For the owner of any publicly assisted housing accommodation to discriminate against any person because of the race, color, religion, national origin or ancestry of such person in the terms, conditions or privileges of any publicly assisted housing accommodations or in the furnishing of facilities or services in connection therewith.[47]

The scope of Article 2-A is as broad as, and, in some respects broader than, the federal Fair Housing Act[48] of the 1968 Civil Rights Act.[49] At the time of its adoption, the state Civil Rights Law was intended to be the first avenue of recourse for New Yorkers subjected to housing discrimination.[50] Section 18-d of the Article, defining the specific remedies and damages, permits an aggrieved party to seek judicial relief.[51] The party may obtain either money damages[52] or "equitable remedies" including "affirmative relief" "to undo the effects of such violation."[53]

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43. N.Y. CIV. RIGHTS LAW art. 2-A, §§ 18-a to 19-b (McKinney 1992).
44. New York State Comm'n Against Discrimination v. Pelham Hall Apts., Inc., 10 Misc. 2d 334, 338, 170 N.Y.S. 750, 755 (N.Y. Sup. Ct. 1958).
45. *Dorsey*, 299 N.Y. at 531, 87 N.E.2d at 548.
46. N.Y. CIV. RIGHTS LAW § 18(a).
47. N.Y. CIV. RIGHTS LAW § 18(c)(1), (2).
48. 42 U.S.C. §§ 3601 - 3619 (1994).
49. Colon v. Tompkins Square Neighbors, Inc., 289 F. Supp. 104 (S.D.N.Y. 1968).
50. *Id.* at 107.
51. N.Y. CIV. RIGHTS LAW § 18-d(1).
52. N.Y. CIV. RIGHTS LAW § 18-d(2).
53. *Id.*

A mere twelve months later, language virtually identical to that of 2-A was repeated in Section 296(2-A) of the New York Human Rights Law.[54] The Human Rights Law also prohibited discrimination in publicly-assisted housing, and both statutes employed the same definition of publicly-assisted housing accommodations.[55] It appears that the adoption of the Human Rights Law truncated the development of Article 2-A jurisprudence. A review of the caselaw reveals a handful of cases addressing the statute's provisions. Most of those cases define the protections of Article 2-A with reference to the corresponding provisions of the Human Rights Law.[56] The historical primacy of the Human Rights Law may be due to its more expansive scope and its specific investigation and enforcement provisions. Consequently, because Article 2-A jurisprudence has not developed independent of, but by reliance on, the Human Rights Law, the use of Article 2-A in litigating environmental racism claims will be discussed under that section below.

C. The New York State Human Rights Law

1. The Provisions

Seeking a programmatic mechanism[57] to combat discrimination and promote equal opportunity, in 1951 the legislature enacted Article 15 of the Executive Law, also known as the Human Rights Law. Relying on the police power of the state,[58] the Act abolished discrimination in the provision of basic opportunities[59] in New York State.[60] As the statute's purpose clause explained:

> the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its

54. N.Y. EXEC. LAW §§ 290-301 (McKinney 1993).

55. *Compare* N.Y. CIV. RIGHTS LAW §§ 18(c)(3) and 18(b)(3) *with* N.Y. EXEC. LAW §§ 296(2-A) and 292(11).

56. *See, e.g.*, New York State Commission Against Discrimination v. Pelham Hall Apts., Inc., 10 Misc. 2d 334, 170 N.Y.S.2d 750 (Sup. Ct. 1958).

57. Gaynor v. Rockefeller, 15 N.Y.2d 120, 132, 204 N.E.2d 627, 633, 256 N.Y.S.2d 584, 592 (1965).

58. N.Y. EXEC. LAW, art. 15, §§ 290-92 (McKinney 1993).

59. Koerner v. State, 62 N.Y.2d 442, 448, 467 N.E.2d 232, 234, 478 N.Y.S.2d 584, 586-87 (1984).

60. Rochester Hosp. Serv. Corp. v. Division of Human Rights, 92 Misc. 2d 705, 707, 401 N.Y.S.2d 413, 415 (Sup. Ct. 1977).

> inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants.[61]

The proscriptions of the Human Rights Law are directed at discrimination in both privately-owned and publicly-assisted housing.[62] The law provides that it is unlawful for the owner, proprietor, lessee, managing agent of, employee of, or any other person having the right to rent or lease a housing accommodation:

> 5(a)(1) To refuse to sell, rent, lease or otherwise to deny or to withhold from any person or group of persons such a housing accommodation because of the race . . . color, national origin . . . of such person or persons.
>
> 5(a)(2) To discriminate against any person because of the race . . . color, [or] national origin . . . in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or in the furnishing of facilities or services in connection therewith.[63]

Tracking the language of the Civil Rights Law in addressing "publicly-assisted housing," the Human Rights Law made it unlawful "[t]o discriminate against any person because of race . . . color, [or] national origin . . . in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or in the facilities or services therewith."[64]

Notably, the Act proclaimed "equality of opportunity a civil right" and enumerated a variety of human concerns which the term opportunity was intended to encompass, including the "housing accommodations" listed.[65] The Act not only empowered the Division to "eliminate and prevent discrimination in . . . housing

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61. N.Y. EXEC. LAW § 290(3).

62. N.Y. EXEC. LAW § 296(2-A).

63. N.Y. EXEC. LAW § 296(5).

64. N.Y. EXEC. LAW § 296(2-A). "Publicly-assisted housing" includes not only public housing, housing operated under the supervision of the commissioner of housing, and various multiple dwelling or accommodation housing, but also housing constructed after July 1, 1950 which was 1) built with taxes, 2) constructed on land sold below cost by the state pursuant to the federal housing act, 3) constructed on property acquired or assembled by the state through condemnation or otherwise for the purpose of such construction, or 4) "for the acquisition, construction, repair or maintenance of which the state . . . supplies funds or other financial assistance." *Id.*

65. N.Y. EXEC. LAW § 291(2). "'Housing accommodation' includes any building, structure, or portion thereof which is used or occupied or is intended, arranged or designed to be used or occupied, as the home, residence or sleeping place of one or more human beings." N.Y. EXEC. LAW § 292(10).

accommodations" but also, and very importantly, "to take other actions against discrimination as herein provided . . . ."[66]

In applying the statute, courts are guided by three principles: first, that the statute is to be construed liberally to accomplish its objectives; second, that the commissioner possesses broad powers to effectively eliminate the unlawful discriminatory practices enumerated in the statute; and third, that discrimination is usually accomplished "by devious and subtle means" and, therefore, is rarely so obvious or its practices so overt that it is instantly or conclusively recognized.[67]

2. Bringing a Claim Under the New York Human Rights Law

With regard to the mechanics of the statute, New York courts have looked to caselaw pertaining to the Federal Civil Rights Acts for guidance.[68] They have particularly focused on these acts in determining the burdens of proof of the respective parties. For example, the burdens in an employment discrimination claim under the New York State Civil Rights Act are the same as those in a claim under the Age Discrimination in Employment Act.[69] Indeed, the elements of the claims under state and federal law are "virtually identical."[70]

Significantly, the federal anti-discrimination statutes have replaced the demanding "discriminatory intent" standard imposed in an equal protection claim with a showing of "disparate impact." The Supreme Court has explained the difference between discriminatory intent or treatment and discriminatory effect, commonly termed disparate impact:

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less fa-

66. N.Y. EXEC. LAW § 290(3).

67. 300 Gramatan Ave. Assocs. v. State Div. of Human Rights, 45 N.Y.2d 176, 183, 379 N.E.2d 1183, 1188, 408 N.Y.S.2d 54, 58 (1978).

68. Tyler v. Bethlehem Steel Corp., 958 F.2d 1176, 1180 (2d Cir. 1992).

69. The courts have also looked to Title VII actions for guidance. In Kump v. Xyvision, Inc., 733 F. Supp. 554, 559 (E.D.N.Y. 1990), a gender discrimination suit, the court found that the analysis under the New York State Human Rights Law mirrors that of a federal Title VII action. Title VII of the 1964 Civil Rights Act provides:

> It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

42 U.S.C. § 2000e-2(a). Title VII jurisprudence also applies in Title VI cases. Fisher, *supra* note 2, at 321.

70. Song v. Ives Laboratories, Inc., 957 F.2d 1041, 1048 (2d Cir. 1992).

> vorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical. . . . "Disparate impact" [by contrast involves] 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.[71]

As a result, when applying the anti-discrimination statutes, "[e]ffect, and not motivation, is the touchstone."[72] This is not only because discriminatory motivations may easily be concealed, but because "the arbitrary quality of thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme."[73]

Applying this standard to New York State's Human Rights Law, the plaintiff has the burden of showing, by a "preponderance of the evidence,"[74] that there is probable cause to believe that the employer engaged in discriminatory practices.[75] As with Title VII, the plaintiff is not expected to produce direct evidence of discriminatory animus. Instead, the plaintiff need only show disparate impact.[76] Once this prima facie case is established, the defendant must prove that it acted for an independent, legitimate, nonpretextual reason.[77]

In addition to applying the less burdensome disparate impact standard, the Human Rights Law offers other advantages, one of which is forum selection. The law provides each litigant with the

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71. International Board of Teamsters v. United States, 431 U.S. 324, 335-36 n.15 (1977) (defining disparate impact in the employment context).

72. United States v. City of Black Jack, 508 F.2d 1179, 1185 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

73. Hobson v. Hansen, 269 F. Supp. 401, 497 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (*en banc*).

74. Zaken v. Boerer, 964 F.2d 1319, 1325 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 467, 468 (1992); Gonzalez v. State Div. of Human Rights, 74 A.D.2d 596, 424 N.Y.S.2d 519 (N.Y. App. Div. 1980) (requiring "substantial evidence").

75. Boddie v. National Cleaning Contractors, Inc., 112 A.D.2d 421, 492 N.Y.S.2d 80 (N.Y. App. Div. 1985).

76. Tyler v. Bethlehem Steel Corp., 958 F.2d 1176 (2d Cir. 1992) (involving an age discrimination claim under the state Human Rights Law).

77. Belanoff v. Grayson, 98 A.D.2d 353, 356, 471 N.Y.S.2d 91, 93 (N.Y. App. Div. 1984); J. W. Mays, Inc. v. New York State Human Rights Appeals Bd., 84 A.D.2d 817, 444 N.Y.S.2d 123 (N.Y. App. Div. 1981) (citation omitted).

The Civil Rights Act of 1991 makes it more difficult for a defendant in a Title VI or VII (employment) action to rebut a showing of disparate impact: The defendant must prove both the non-racial nature of the program and the necessity for maintaining it in its current form. This Act legislatively reversed *Wards Cove*. *See supra* note 18.

option of bringing her claim before the State Human Rights Commission, a state court, or a local commission on human rights.[78] Although the roles of each forum are, to some extent, mutually exclusive,[79] the choice of forum will be significant in terms of the different evidentiary demands, burdens, and remedies.

If the plaintiff chooses to proceed via a commission on human rights, which has the power to receive, pass on, and investigate complaints,[80] the evidence need not prove unlawful discrimination beyond a reasonable doubt. All that is necessary is that the findings be supported by sufficiently substantial evidence.[81] Once this lesser burden is met, the severely limited scope of appellate review makes these findings almost impervious to review. In reviewing a Commissioner's finding of unlawful discrimination, an appellate court "may not weigh the evidence or reject [the Commissioner's] choice where the evidence is conflicting and room for a choice exists."[82] Furthermore, the court may not annul a finding unless it is "arbitrary and capricious."[83] The Division is afforded this "considerable deference . . . because of its expertise in evaluating discrimination claims."[84]

Finally, because the strict rules of evidence of courts of law or equity do not apply to claims investigated by the Division of Human Rights,[85] and the standard of review is quite stringent, a plaintiff choosing to proceed through the Division can essentially prove more with less.

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78. Scott v. Carter-Wallace, Inc., 147 A.D.2d 33, 35, 541 N.Y.S.2d 780 (N.Y. App. Div. 1989); N.Y. EXEC. LAW § 297(9).

79. *See* Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 307 (1983), *on remand* 136 A.D.2d 229, 232-33, 448 N.E.2d 86, 92, 461 N.Y.S.2d 232, 238 (N.Y. App. Div. 1988).

80. Koerner v. State, 62 N.Y.2d 442, 445, 467 N.E.2d 232, 233, 478 N.Y.S.2d 584, 585 (1984).

81. Pace College v. Commission on Human Rights, 38 N.Y.2d 28, 35, 339 N.E.2d 880, 883, 377 N.Y.S.2d 471, 475 (1975).

82. CUNY-Hostos Community College v. State Human Rights Appeal Bd., 59 N.Y.2d 69, 75, 449 N.E.2d 1251, 1254, 463 N.Y.S.2d 173, 176 (1983).

83. *E.g.*, State Office of Drug Abuse Servs. v. State Human Rights Appeal Bd., 48 N.Y.2d 276, 284, 397 N.E.2d 1314, 1318, 422 N.Y.S.2d 647, 650 (1979); Sidoti v. New York State Div. of Human Rights, 212 A.D.2d 537, 538, 622 N.Y.S.2d 118, 119 (N.Y. App. Div. 1995).

84. *Sidoti*, 212 A.D.2d at 538, 622 N.Y.S.2d at 119. See also Board of Educ. v. New York State Div. of Human Rights, 56 N.Y.2d 257, 261, 436 N.E.2d 1301, 1304, 451 N.Y.S.2d 700, 702 (1982); *Drug Abuse Servs.*, 48 N.Y.2d at 284, 397 N.E.2d at 1318, 422 N.Y.S.2d at 650.

85. For example, hearsay is admissible. State Div. of Human Rights v. Sweet Home Cent. Sch. Dist. Bd. of Educ., 73 A.D.2d 823, 423 N.Y.S.2d 748, 749 (N.Y. App. Div. 1979).

3. *Remedies Under the Human Rights Law*

The State Human Rights Law offers a host of meaningful remedies to victims of discrimination.[86] These are found in section 297 and include cease and desist orders, affirmative remedial actions, filing periodic reports on compliance,[87] compensatory and, in the case of housing discrimination, punitive damages,[88] and payment to the state of any profits obtained from illegal actions.[89] The Division is also empowered to first attempt to formulate a conciliation agreement between the parties. Conciliation agreements may include provisions for the prospective cessation of unlawful discriminatory conduct and may contain other provisions including entry of consent decrees (embodying the terms of the conciliation agreement) in the appropriate county court.[90]

The Court of Appeals has stated that the strong statutory policy of not only eliminating but preventing discriminatory practices gives the Division of Human Rights more discretion in effecting a remedy than would exist under common law.[91] It is essential that any remedies bear a reasonable relationship to the discriminatory action and to the underlying legislative policy of this article.[92] Even then, though the remedies available are broad in scope,[93] there are some limits. For example, preferential policies toward a

86. This had not been true of the Federal Fair Housing Act. Prior to its 1988 amendments, it provided aggrieved persons only trivial economic incentives to initiate corrective lawsuits. John Charles Boger, *Toward Ending Residential Segregation: A Fair Share Proposal for the Next Reconstruction*, 71 N.C. L. REV. 1573, 1583-84 (1993).

87. For example, violator-landlords have been required to file compliance reports and to keep records of vacancies and rejections. State Div. of Human Rights v. Stern, 37 A.D.2d 441, 326 N.Y.S.2d 500 (N.Y. App. Div. 1971).

88. *See* Murphy v. American Home Prods. Corp., 136 A.D.2d 229, 232-33, 527 N.Y.S.2d 1, 3 (N.Y. App. Div. 1988) (punitive damages not available in claim of employment discrimination made before Division rather than state court). *See also* Cullen v. Nassau County Civil Serv. Comm'n, 53 N.Y.2d 492, 425 N.E.2d 858, 442 N.Y.S.2d 470 (1981). *But see* O'Brien v. King World Prods., Inc., 669 F. Supp. 639, 642 (S.D.N.Y. 1987) ("The plaintiff may also be entitled to punitive damages under the New York law"); Selbst v. Touche Ross & Co., 587 F. Supp. 1015, 1017 (S.D.N.Y. 1984) (same).

89. N.Y. EXEC. LAW § 297(4)(c)(i-vi).

90. N.Y EXEC. LAW § 297(3)(a).

91. Batavia Lodge No. 196, Loyal Order of Moose v. New York State Div. of Human Rights, 35 N.Y.2d 143, 146, 316 N.E.2d 318, 320, 359 N.Y.S.2d 25, 27 (1974).

92. Schuck v. State Div. of Human Rights, 102 A.D.2d 673, 478 N.Y.S.2d 279 (N.Y. App. Div. 1984); New York Inst. of Technology v. State Div. of Human Rights, 40 N.Y.2d 316, 324, 353 N.E.2d 598, 603, 386 N.Y.S.2d 685, 690 (1976).

93. *See* State Div. of Human Rights v. General Motors Corp., 107 A.D.2d 1081, 1082, 486 N.Y.S.2d 542, 544 (N.Y. App. Div. 1985) (stating that the Division "has more discretion in formulating remedial relief").

group have been deemed inconsistent with the guarantee of equal protection in article I, section 11 of the New York Constitution.[94]

4. *Federal Paradigms for Environmental Discrimination Litigation*

In addition to sharing their burdens and standards of proof with New York State's Human Rights Law, Title VIII of the 1968 Civil Rights Act and Title VI of the 1964 (Federal) Civil Rights Act provide useful paradigms for asserting environmental racism claims. In fact, the environmental movement has long borrowed the rhetoric and tactics of the civil rights movement.[95]

a. Title VIII

Title VIII, known as the Fair Housing Act, is the principal federal statute created to combat residential discrimination.[96] The Fair Housing Act prohibits 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, or national origin.[97] This Act is construed liberally to ensure prompt and effective elimination of all traces of discrimination within the housing field.[98] A Fair Housing suit may be brought against private actors and those who do not receive federal money.[99] Therefore, Title VIII may be used to challenge the rezoning of residential neighborhoods to allow noxious facilities or other inappropriate land uses.[100]

As previously noted, Title VIII employs a disparate impact test[101] and a shifting burden. The plaintiff must establish a prima facie case that the conduct complained of actually or predictably results in a discriminatory impact.[102] The burden then shifts to the

94. State Div. of Human Rights v. AOS Realty Corp., 36 A.D.2d 970, 971 (N.Y. App. Div. 1971).

95. Robert D. Bullard and Beverly Wright, *The Quest for Environmental Equity: Mobilizing the Black Community for Social Change*, 1 RACE, POVERTY AND THE ENV'T 3 (July 1990).

96. Boger, *supra* note 86, at 1581.

97. 42 U.S.C. §§ 3602, 3603, 3604 (1994).

98. United States v. City of Parma, 494 F. Supp. 1049, 1053 (N.D. Ohio 1980), *aff'd*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982).

99. *See infra* notes 114-115 and accompanying text regarding hurdles to raising a Title VI claim.

100. Luke Cole, *Environmental Justice Litigation: Another Stone in David's Sling*, 21 FORDHAM URB. L. J. 523, 535 (1994).

101. *City of Parma*, 494 F. Supp. at 1054-55.

102. United States v. City of Black Jack, 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975).

defendant to rebut this evidence with proof that its conduct is justified in theory and practice by a legitimate interest and that no feasible alternative course of action would enable that interest to be served with less discriminatory impact.[103]

This is one of its most portentous attributes. Obviously, this more lenient standard benefits environmental racism plaintiffs. Moreover, it is more akin to the type of proof available in these actions. Recall that the problem of environmental racism was first discovered through studies showing a positive correlation between the existence and siting of environmental risks and communities of color. An adverse impact is often more explicitly demonstrated by statistical evidence then by any "smoking gun" testimony or evidence which might be elicited from a defendant.[104]

Furthermore, race need not be the sole or dominant motive underlying the policies and results in question, but need only be one of the factors. The court must evaluate factors such as the discriminatory impact of the policy or practice, the historical background, the sequence of events leading to the challenged conduct, departures from normal procedural sequences and from normal substantive criteria, and the legislative or administrative history of the challenged actions. A court may also consider whether the defendant maintained a practice with knowledge of its discriminatory impact.[105]

Despite its history and purpose of addressing housing discrimination, Title VIII has not been an option embraced by environmental litigators in the past.[106] The avoidance of this statute by environmental litigators may be due to Title VIII's apparently narrow focus on the "provision of services or facilities in connection" with the sale or rental of a dwelling. Although this language seems to limit the scope of conduct that a Fair Housing claim may contemplate, neither the United States Supreme Court nor the majority of the circuit courts have interpreted the scope of the phrase, let alone interpreted it in such a narrow fashion.[107]

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103. *City of Parma*, 494 F. Supp. at 1055.

104. United States Dep't of Hous. and Urban Dev. v. Pfaff, Fair Hous.-Fair Lending (P-H) ¶ 25,085 (1994 WL 592199, at *9) (H.U.D.A.L.J.).

105. Benford, *supra* note 6, at 285; Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

106. Benford, *supra* note 6, at 283 n.123.

107. Richard Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 Nw. U. L. Rev. 787 (1993).

b. Title VI

The more popular federal law sought to be applied by those asserting claims of environmental racism is Title VI of the Federal Civil Rights Act of 1964. Indeed, several commentators have recently looked to Title VI as a potential basis for asserting environmental discrimination claims.[108] Title VI prohibits discrimination on the basis of race, color, gender, or national origin by "any program or activity receiving Federal financial assistance."[109] This includes discrimination in the location of facilities as well as the contracting, hiring, and distribution of benefits and services to communities.[110]

Arguments relying on Title VI are based on the premise that the United States Environmental Protection Agency (EPA) provides funding to various state (typically environmental) agencies.[111] These agencies are responsible for environmental policies, notably hazardous waste enforcement programs and the siting of hazardous facilities and landfills. These state actors and recipients of EPA funding are subject to the antidiscrimination requirements of Title VI.[112] Consequently, if these state actors create a racially discriminatory distribution of hazardous siting, Title VI has been violated.[113]

The major stumbling block to using Title VI to remediate environmental racism claims lies in its federal funding proviso.[114] Title VI applies only to programs or activities receiving federal funds. The receipt of federal funds by one agency within a state government is not sufficient to extend Title VI coverage to the activities of other agencies even when all are subdivisions of the same chartered governmental unit.[115] And, although there may be significant federal financial assistance to state environmental pro-

108. *See, e.g., id.* at 837; Gareis-Smith, *supra* note 37.

109. 42 U.S.C. § 2000d (1994).

110. Gareis-Smith, *supra* note 37, at 58; Fisher, *supra* note 2, at 289.

111. Federal financial assistance to states is considerable. Lazarus, *supra* note 107, at 835.

112. Fisher, *supra* note 2, at 312.

113. *Id.*

114. A Title VI environmental racism claim also requires something against which to measure a disparate impact, a determination of what the impact is, i.e., whether it is siting or actual, physical harm. *Id.* at 322.

115. 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.18 (1992).

grams, many instances of environmental racism are caused by private actors.[116]

5. *Using The State Human Rights Law to Fight Environmental Racism*

Several aspects of Human Rights Law section 296 (5)(1) and (2) bear a striking resemblance to Title VIII, the federal Fair Housing Act. Both specifically address discrimination in housing; both can be asserted against private actors; and both prohibit discrimination against the same enumerated groups. Similarly, Human Rights Law section 296(2-A) (and article 2-A of the Civil Rights Law), parallels Title VI's financial nexus in its public funding requirement. Consequently, the environmental discrimination litigation strategies presently being developed with regard to these federal statutes provide frameworks for contemplating the use of the New York provisions. Nonetheless, the New York provisions hold far more promise for meaningful relief in this area.

a. *"Denial of Housing"*

The Human Rights Law and Title VIII each prohibit discrimination in the sale or rental of housing.[117] This prohibition addresses the traditional forms of housing discrimination, denial of an apartment to a person of color or steering because of color. Since its enactment, 5(a)(1) has been applied to only these traditional types of claims. This history of use, therefore, likely precludes 5(a)(1) from being used in an innovative way independent of traditional types of actions.

It might be possible, however, to piggyback an environmental racism claim with a 5(a)(1) redlining or steering case. For example, where people of color are steered to or away from a particular housing area solely because of race, it is obviously discriminatory. When people of color are steered into housing which is infested with toxic risks, steering is not only discriminatory, but also race-based *environmental discrimination.*

Yet, because the steering practices are already acknowledged as housing discrimination within 5(a)(1), proof of illegal discriminatory steering, alone, will suffice to obtain relief without an environmental component, and, thus, the new environmental racism claim will be unnecessary.

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116. There is no such requirement of a financial nexus in a Title VIII claim.
117. N.Y. EXEC. LAW § 296(5)(a)(1); 42 U.S.C. § 3604.

Nevertheless, this does not mean that environmental racism claims should not be raised in this context. In fact, there are several strategic reasons for asserting environmental racism claims in conjunction with more traditional housing discrimination claims. As civil rights advocates can attest, courts often take considerable time before they are willing to accept new types of claims or claims raised in novel ways. By raising these innovative claims in conjunction with traditional ones, courts can begin to become familiar with them. This serves a degree of judicial education.[118]

Additionally, by piggy-backing claims, it will provide courts with a more vivid illustration of what is going on in these neighborhoods with regard to toxic hazards. This may have a positive spillover effect to the final result as a court will now have the opportunity to take these new arguments into consideration with regard to the ordering the appropriate damages or crafting meaningful remedies. A court will be unable to order meaningful remedies if these components of environmental racism claims are not properly before it.

Similarly, even where a court chooses not to rely on a particular argument presented as the basis for its ultimate decision, it is not uncommon for a court to note, in dicta, that another claim possessed or lacked merit, or was deficient in its briefing or proof. These judicial asides provide litigators with helpful guides to the propensity of the court to accept or reject particular claims so that litigators can amend their future claims.

Finally, by phrasing this type of discrimination as a civil rights or human rights issue offers a valuable symbolic function to communities. It may add a dimension of empowerment, for plaintiffs will be able to state their complaint as one of discrimination based on race.[119]

b. "Furnishing of Services"

Section 296(5)(a)(2) of the Human Rights Law prohibits discrimination "in the furnishing of facilities or services in connection therewith."[120] The second clause of Title VIII similarly prohibits discrimination "in the provision of services or facilities in connec-

118. Cole, *supra* note 100, at 543.

119. The marriage of more traditional housing cases to environmental racism claims is also possible with local and municipal laws pertaining to housing and building codes. One example is the Housing Maintenance Code found in the New York City Administrative Code. The failure of an individual or municipal landlord to abide by these housing codes would be the primary claim to which a claim of environmental racism under the Human Rights Law would be attached. *See infra* Part III.D.3.b.

120. N.Y. EXEC. LAW § 296(5)(a)(2).

tion with such dwelling . . . ."[121] The sole difference between these clauses being the substitution of the term "provision" in the Title VIII for the Human Rights Law's "furnishing."

The "furnishing of services" clause of the Human Rights Law holds more promise as an independent cause of action than does section 296(5)(a)(1). The strategies developed with regard to Title VIII provide a useful model for how one might raise/conceptualize a 5(a)(2) claim.

The "furnishing of services" provision has not yet been contemplated by New York state courts thus providing a clean slate for New York practitioners. The clause need not be interpreted narrowly to encompass only the traditional services of police protection, garbage collection, and snow removal. It also could be interpreted to encompass state agencies that grant permits to waste facilities for dumping and chemical plants that place landfills in neighborhoods.

In almost all cases, the state has some degree, and often, a significant amount of control, over siting via placements, permits, or services regarding waste disposal facilities. Most states have their own siting and disposal operation laws which are subject to federal standards.[122] Municipal solid waste disposal facilities (most landfills and incinerators) are owned by either municipalities or by private companies, often under contract to one or more municipalities.[123] Private companies under state or municipal contract own and operate many of the waste disposal facilities in the United States and are responsible for building new ones.[124]

Furthermore, the *cumulative* decision-making process could be considered. This is not beyond the pale, for Title VIII has been used to challenge the "segregative effect" of decisions, *i.e.*, those decisions that effectively perpetuate segregation.[125] Although a single decision in a process may not directly cause a segregative effect, a series of decisions may. This may be sufficient to show effect.

Following the model of Title VIII suggested litigation, if these neighborhoods are disproportionately burdened by these risks,

121. 42 U.S.C. § 3604.

122. New York State Legislative Commission on Toxic Substances and Hazardous Waste Facility Siting: A National Survey (June 1987).

123. Gerrard, *supra* note 8, at 512.

124. *Id.*

125. *City of Parma*, 494 F. Supp. 1049 (N.D. Ohio 1980). *See also* Cole, *supra* note 100, at 535-36.

risks which the State is responsible for managing, then people have been discriminated against in violation of 5(2).

This can be enhanced by the recent spate of literature concerning the disparate impact on people of color in siting and lack of cleanup of toxic sites underlying Title VIII and Title VI claims. Although New York practitioners do not need to establish a financial link to a federal program in order to fall within the terms of a statute, these paradigms could be borrowed to establish the disparate impact for a prima facie showing of race-based discrimination.

Again, claims can be combined with provisions of local and municipal housing codes. Where a housing code demands particular action from a landlord, this could be interpreted to fall within the "furnishing or services" provision. Where people of color are disproportionately burdened by risks as an outgrowth of these services, or, more likely, the lack of these services, both the housing code and the proscription against discrimination embodied in 5(2) are violated.

For example, in New York, the main cause of lead poisoning, a typical environmental racism element, is poorly maintained housing built prior to the ban on interior lead paint.[126] Nonetheless, since 1982, the City of New York has had a lead abatement law that requires landlords either to remove or cover lead-based paint in apartments.[127] Whereas, in a Title VIII environmental racism action, if in buildings housing people of color a landlord fails adequately to remedy violations, or the City fails to enforce remedies for violations, an environmental racism claim exists.

c. Furnishing Services in Publicly-Assisted Housing

The theory underlying a section 296(5)(a)(2) "furnishing of services" claim can also be applied to article 2-A of the Civil Rights Law. Section 2-A of Human Rights Law[128] and article 2-A of the Civil Rights Law[129] contains language identical to the proscriptions of section 296(5)(a)(2), but pertain solely to "publicly-funded" housing.

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126. Peggy M. Shepard, *Issues of Community Empowerment*, 21 FORDHAM URB. L. J. 739, 743 (1994).

127. Joel Nicholson, *Lead Can Turn Kids Bad, Study Says*, N.Y. DAILY NEWS, Feb. 7, 1996, at 10 (quoting Lucy Billings, Director of Special Litigation, Bronx Legal Services). *See also* NEW YORK, N.Y., ADMIN. CODE § 27-2013 (1996).

128. N.Y. EXEC. LAW § 296(2-A).

129. N.Y. CIV. RIGHTS LAW § 18(c)(2).

2-A's public-funding requirement need not be limiting.[130] It must be kept in mind that the majority of public housing developments house or were built to house lower-income people of color, often, as a result of color-conscious state and federal housing programs intended to remedy the legacy of past discrimination.[131] The federal housing program itself has generated an intense pattern of racial segregation in public housing, sometimes single-handedly creating racial ghettos.[132] Indeed, the U.S. Commission on Civil Rights reported that of all sources of residential segregation, the Federal Government had been most influential in creating and maintaining this segregation.[133] Therefore, neighborhoods with publicly-funded housing are the very neighborhoods disproportionately harmed by environmental risks. Consequently, this "limitation" is not a limitation at all, but, rather, very accurately defines the litigant base.

d. The Purpose Clause

The posture and tone of the Human Rights Law as evidenced by its purpose clause should not be discounted. As opposed to the state and federal constitutional provisions, the Human Rights Law appears to grant positive rights rather than merely negative rights. Negative rights restrict a state from acting in a certain manner.

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130. Recall that Title VI's financial nexus requirement has been cited as a hurdle to using that provision in environmental racism actions. *See supra* notes 114-16 and accompanying text.

131. Deborah Ramirez, *Multicultural Empowerment: It's Just Not Black and White Anymore*, 47 STAN. L. REV. 957 (1995).

132. Michael H. Schill and Susan M. Wachter, *The Spatial Bias of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1291-92 (1995).

The systematic under-maintenance and inefficient management has contributed to the ghettoization of public housing. Provisions for operating expenses or renovation are commonly absent but are to be covered by tenants. As incomes fall due to inflation, these tenants are hard-pressed to maintain housing stocks. Apartments often do not meet local health or safety requirements. *Id.* at 1296-97.

Recently, in response to the problems of severely depressed housing stocks, Congress has insisted that, even if the cost of renovation would exceed that of a new development, renovation is preferable. This is tied to Congress's one-for-one replacement program, requiring that before a public housing development can be demolished, a new one must be built. *See id.* at 1314, n.119 (discussion of Housing and Community Development Act of 1987, 101 Stat. 1815, 1837 (1994)).

New York City has no such provision, and courts have allowed demolition in circumstances where continued losses seem unavoidable. *E.g.* Harmor Operating Co., Inc. v. Vent-O-Matic Incinerator Corp., 1 A.D.2d 551, 151 N.Y.S.2d 445 (N.Y. App. Div. 1956).

133. U.S. COMMISSION ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN: EQUAL OPPORTUNITY IN HOUSING 39 (1975).

American jurisprudence has traditionally been concerned with negative rights. Many civil liberties are negative rights.

By contrast, positive or affirmative rights create an obligation on the part of the state and entitle individuals to demand such obligations from the state. Halloran has denominated these positive rights to include protection from hunger, ignorance, medical need, and lack of adequate housing.[134] Indeed, in enacting the Human Rights Law, the Legislature found that:

> the state has the responsibility to act to assure that every individual within this state is afforded an equal opportunity to enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care, not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants.[135]

Taking on this responsibility to act creates a positive right. The positive right thus allows more progressive action under an interpretation of the Human Rights Law.

This bent, particularly valuable for environmental race discrimination, is far more sophisticated than traditional housing discrimination. The discrimination in housing resulting from environmental racism is allowing the person of color to rent housing but allowing those accommodations to be made unsafe or be left unsafe. The effects of this new breed of discrimination are far-reaching. Environmental racism not only deprives an individual of a safe dwelling by placing them in a toxic home. Often times, it places them in an equally toxic neighborhood. The toxicity cannot be avoided through any action of the tenant, short of moving. Instead, it infests the tenant's body creating innumerable and immeasurable health risks. These infestations emerge as retarded neurological and physical development, nervous system disorders,[136] and toxic encephalitis[137] from lead paint, lung cancer and related caners from asbestos.[138] Environmental exposures may ag-

134. Halloran, *supra* note 19, at 253.

135. Koerner v. State, 62 N.Y.2d 442, 448, 467 N.E.2d 232, 234, 478 N.Y.S.2d 584, 586 (1984); N.Y. EXEC. LAW § 290(3).

136. Louis W. Sullivan, M.D., *Remarks*, *in* PREVENTING CHILDHOOD LEAD POISONING A-3 (1991).

137. George Friedman-Jimenez, *Achieving Environmental Justice: The Role of Occupational Health*, 21 FORDHAM URB. L.J. 603, 631 (1994).

138. *Id.* at 615.

gravate diseases more common in women, such as osteoporosis, and cause them to accumulate a greater portion of lipophilic chemicals like PCBs, DDT, and dioxins.[139] The New York State Department of Health has found a positive correlation between birth defects and maternal residence near toxic facilities.[140] Others have found a positive correlation between residence near a toxic facility and incidence of breast and other cancers.[141] The EPA has either disavowed or downplayed these risks.[142]

These illnesses will ultimately require the diversion of monetary resources to health care, "impooring" the individual. With time, these health problems may affect the person's ability to work as either she is not strong enough to perform a particular type of labor or will suffer increased absenteeism.[143] Furthermore, these toxins may even intoxicate the individual's very disposition. A recent study by researchers at the University of Pittsburgh School of Medicine[144] found that boys with a higher amount of lead in their bones were more likely to steal, set fires, and engage in violent and other anti-social behavior.[145] Previous studies had shown that lead poisoning could cause irreversible brain damage and lower a child's IQ.[146] In New York City, 1,894 children 6 years of age and younger suffered lead poisoning in 1994.[147] Therefore, the problem of environmental racism goes beyond housing discrimination to touch on most of the areas identified for correction and aggressive action[148] by the Human Rights Law. Although the enactors of the Human Rights Law never knew that they would have to deal with the problem of environmental racism, this law can address the heart and scope of the problem.

Adequate remedies to environmental racism will increasingly require showing the full scope of the problem. The affirmative

139. Samara F. Swantson, *Race, Gender, Age, and Disproportionate Impact: What Can We Do About the Failure to Protect the Most Vulnerable?*, 21 FORDHAM URB. L.J. 577, 591-92 (1994).

140. *See id.* at 580.

141. *Id.*

142. *See id.* at n.15.

143. These effects may not surface for years. Asbestos-induced cancers, for example, have a latency period of 15 to 50 years. Friedman-Jimenez, *supra* note 137, at 615.

144. Herbert L. Needleman et al., *Bone Lead Levels and Delinquent Behavior*, 275 JAMA 363 (1996).

145. *Id.*

146. *Id.*

147. Nicholson, *supra* note 127, at 10 (citing City Health Department statistics).

148. *See generally* State Div. of Human Rights v. Board of Educ., 46 A.D.2d 483, 363 N.Y.S.2d 370 (N.Y. App. Div. 1975).

stance of the purpose clause of the Human Rights Law allows this. Thus, practitioners should not overlook the purpose clause when raising environmental racism claims before a reluctant bench.

D. The New York City Administrative Code

Both the New York City Administrative Code's Civil Rights Chapter empowering a Human Rights Commission and its Housing Maintenance Code contain provisions related to housing and housing risks. The two provisions are quite different in their purpose and scope, but both can be useful to environmental racism plaintiffs.

1. New York City Human Rights Commission

Title 8 of the New York City Administrative Code, addressing "Civil Rights," provides for a Commission on Human Rights.[149] Not surprisingly, this provision parallels the Human Rights Law. Recognizing "no greater danger to the health, morals, safety and welfare of the city and its inhabitants than [prejudice]," the city council declared "[p]rejudice, intolerance, bigotry, and discrimination" a menace to the state.[150]

In addition to its duty to work toward "harmonious intergroup relations,"[151] study the problem,[152] issue reports,[153] and enlist other groups to create programs,[154] the Commission is also empowered to "receive, investigate and pass upon complaints and to initiate complaints" into discriminatory practices enumerated in § 8-107.[155]

This section provides that it is an unlawful discriminatory practice to refuse to, *inter alia*, sell, rent, or lease housing accommodations to a person[156] or "to discriminate against any person . . . in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or an interest therein or in the furnishing of facilities or services in connection therewith" because of their perceived race, color, or national origin.[157] The Act defines

149. NEW YORK, N.Y., ADMIN. CODE § 8-103 (1996).
150. NEW YORK, N.Y., ADMIN. CODE § 8-101.
151. NEW YORK, N.Y., ADMIN. CODE § 8-105(1).
152. NEW YORK, N.Y., ADMIN. CODE § 8-105(3).
153. NEW YORK, N.Y., ADMIN. CODE § 8-105(7),(10).
154. NEW YORK, N.Y., ADMIN. CODE § 8-105(2).
155. NEW YORK, N.Y., ADMIN. CODE § 8-105(4).
156. NEW YORK, N.Y., ADMIN. CODE § 8-107(5)(a)(1).
157. NEW YORK, N.Y., ADMIN. CODE § 8-107(5)(a)(2).

"housing accommodation" to include "publicly-assisted housing" accommodations.[158]

The City Human Rights Law provides a litigant with the option of filing a complaint with the Commission.[159] This compliments the provision in the State Human Rights Law permitting an aggrieved individual to bring a claim before a local commission of human rights.[160] Additionally, the Commission, itself, may initiate a complaint alleging unlawful discriminatory action.[161] The Commission may then undertake an investigation,[162] and refer the case to an administrative law judge to be heard.[163]

Like the State Human Rights Law, the City Human Rights Law offers a wide variety of remedies to victims of discrimination. These include mediation and conciliation,[164] cease and desist orders, compensatory and punitive damages, and, most notably, "the extension of full, equal and unsegregated accommodations, advantages, facilities, and privileges."[165] Where it is found that an unlawful practice was practiced willfully, wantonly, or maliciously, a civil penalty of up to $100,000 may be imposed[166] to be paid into the general fund of the city.[167]

2. *New York City Housing Maintenance Code*

An additional provision worth noting in the New York City Administrative Code is the very detailed Housing Maintenance Code.[168] Unlike City Civil Rights/Human Rights provisions, the Housing Maintenance Code does not address discrimination. Instead, as its purpose clause explains, the legislature "found that the enforcement of minimum standards of health and safety, fire protection, light and ventilation, cleanliness, repair and maintenance, and occupancy in dwellings is necessary to protect the people of the city against urban blight."[169] Consequently, "[t]he sound enforcement of minimum housing standards is essential . . . to bring

158. NEW YORK, N.Y., ADMIN. CODE § 8-102(10). *See also* § 8-102(11).
159. NEW YORK, N.Y., ADMIN. CODE § 8-109(a).
160. EXEC. LAW § 297(9).
161. NEW YORK, N.Y., ADMIN. CODE § 8-109(c).
162. Where the Commission has initiated a complaint, no determination of probable cause is needed. NEW YORK, N.Y., ADMIN. CODE § 8-116(a).
163. NEW YORK, N.Y., ADMIN. CODE § 8-119.
164. NEW YORK, N.Y., ADMIN. CODE § 8-115.
165. NEW YORK, N.Y., ADMIN. CODE § 8-120.
166. NEW YORK, N.Y., ADMIN. CODE § 8-126(a).
167. NEW YORK, N.Y., ADMIN. CODE § 8-127(a).
168. NEW YORK, N.Y., ADMIN. CODE tit. 27, ch. 2.
169. NEW YORK, N.Y., ADMIN. CODE § 27-2002.

about the basic decencies and minimal standards of healthful living . . . ."[170]

The Housing Maintenance Code includes provisions addressing repair, occupancy, and safety of housing accommodations as well as enforcement and penalty provisions. For example, it requires landlords to provide lighting in dwellings, entranceways, and yards,[171] and to exterminate rodents and insects.[172] The Code also imposes requirements regarding ventilation in units,[173] and paint and other wall coverings,[174] sewers and drainage,[175] and collection of wastes,[176] the types of services that easily fall within the "furnishing of services" claims discussed above.[177]

Most importantly for environmental discrimination plaintiffs, the Housing Code includes Section 27-2013, a lead abatement law.[178] This law requires landlords to cover or remove interior lead paint in housing accommodations in which a child 6 years or under resides.[179] The failure to enforce this section constitutes a "Class C immediately hazardous violation."[180] Enforcement is mandatory.[181] Violating this section of the Housing Code can result in a civil penalty accruing at the rate of $50 to $150 dollars per day until the risk is abated.[182]

Additionally, criminal penalties may be imposed where one "willfully or recklessly violates any provisions of this chapter," "willfully or recklessly violates, or fails to comply with," an order of the department pertaining to the chapter, or "intentionally fails to act."[183] The criminal penalties that may result are a fine, imprisonment of up to one year, or both.[184]

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170. *Id.*

171. NEW YORK, N.Y., ADMIN. CODE § 27-2037, 27-2040.

172. NEW YORK, N.Y., ADMIN. CODE § 27-2018.

173. NEW YORK, N.Y., ADMIN. CODE § 27-2057.

174. NEW YORK, N.Y., ADMIN. CODE § 27-2016.

175. NEW YORK, N.Y., ADMIN. CODE §§ 27-2026, 27-2027.

176. NEW YORK, N.Y., ADMIN. CODE §§ 27-2020, 27-2021, 27-2022, 27-2023.

177. *See supra* notes 1212-128 and accompanying text.

178. NEW YORK, N.Y., ADMIN. CODE § 27-2013(h).

179. NEW YORK, N.Y., ADMIN. CODE § 27-2013(h)(1).

180. NEW YORK, N.Y., ADMIN. CODE § 27-2013(h)(3).

181. New York City Coalition to End Lead Poisoning v. Koch, 138 Misc. 2d 404, 524 N.Y.S.2d 314 (N.Y. Sup. Ct. 1987), *aff'd*, 139 A.D.2d 404, 526 N.Y.S.2d 918 (N.Y. App. Div. 1988).

182. NEW YORK, N.Y., ADMIN. CODE § 27-2115(a).

183. NEW YORK, N.Y., ADMIN. CODE § 27-2118(a),(b).

184. NEW YORK, N.Y., ADMIN. CODE § 27-2118(a)(3).

3. *Using The New York City Administrative Code Provisions to Fight Environmental Racism*

a. *Human Rights Provisions*

The New York City Human Rights Code, like its state counterpart, forbids discrimination in "furnishing of services." Strategies suggested with regard to these provisions in both privately owned and publicly-assisted housing accommodations, can be applied under this section.

Additionally, under the New York City Civil Rights/Human Rights provisions, fines and damages can be levied. Indeed, if this type of litigation becomes widespread, plaintiffs may, ultimately, be able to convince courts to impose civil damages each with a price tag of up to $50,000. This might cause one of two things: either the economic deterrent finally takes effect, or these penalties, which go into a general city fund, could, with the guiding hand of the Human Rights Commission, be earmarked for improving the toxic premises and neighborhoods.

b. *Housing Maintenance Code*

The discussion of the Human Rights Law and the coordinate City provision spoke of "piggybacking" environmental racism claims onto more traditional or straightforward claims. Housing Maintenance Code violations are precisely the types of claims to which an environmental racism action can be attached. Furthermore, the Housing Code enumerates the types of services or facilities that are frequent components of "model" environmental racism claims. These include the duty of landlords to meet Housing Code requirements concerning ventilation,[185] lead paint,[186] sewage[187] and wastes[188] in dwellings.

For example, in New York, the main cause of lead poisoning is poorly maintained housing built before the ban on interior lead paint.[189] Nonetheless, since 1982, the City of New York has had a lead abatement law that mandates that landlords either remove lead-based paints from apartments or cover it.[190] This is found within the Housing Maintenance Code. Where a landlord fails to

185. NEW YORK, N.Y., ADMIN. CODE § 27-2057.
186. NEW YORK, N.Y., ADMIN. CODE § 27-2016.
187. NEW YORK, N.Y., ADMIN. CODE § 27-2026, 27-2027.
188. NEW YORK, N.Y., ADMIN. CODE §§ 27-2020, 27-2021, 27-2022, 27-2023.
189. Shepard, *supra* note 126, at 743.
190. *See* Nicholson, *supra* note 127 (Comments of Lucy Billings, Director of Special Litigation, Bronx Legal Services).

abate this risk, or the City, entrusted to enforce this provision,[191] systematically fails to enforce lead paint violations or allows landlords simply to cover lead paint in buildings housing people of color, thus disproportionately (as described in the theoretical and litigation paradigms of Title VI and Title VIII) exposing them to this risk, an environmental racism claim exists.

IV. CONCLUSION

Meaningful legal remedies to environmental racism demand innovative approaches, educating courts, and pushing them to think about old laws in new ways. When it comes to innovation, New York courts have traditionally been more progressive than their federal counterparts. Consequently, practioners must be careful not to ignore state bases. Unfortunately, neglect is already too easy for there is virtually no environmental racism litigation on state grounds and legal commentary continues to focus almost exclusively on Federal Title VI and Title VIII.

Although there are certainly instances where a federal program or strong financial nexus is quite visible, and, therefore, it will be appropriate to litigate under the federal statute, there are many instances where state law can compliment, if not supplant, federal law. Indeed, at this developmental stage, it is preferable for early efforts to be directed at the state level rather than allowing federal law to become a harsh standard against which subsequent state claims are measured, thus undermining that independent analysis.

New York provides several options for environmental racism plaintiffs. Foremost among these is the state Human Rights Law. The Human Rights Law includes the "furnishing of services" language so favored in Title VIII, but goes well beyond this prohibiting traditional housing discrimination, discrimination on delivery of services, and discrimination in publicly-funded housing. Moreover, the Human Rights Law was intended to be aggressive, progressive, and expansive, thus making it the superior tool for New York practitioners waging a battle against environmental race discrimination.

Additionally, the New York City Administrative Code provisions regarding discrimination (which lifts the language of the Human Rights Law) and housing standards remind us that municipalities may have their own provisions of varying scopes, remedies, and enforcement mechanisms. These, too, can be used as compo-

191. *Coalition to End Lead Poisoning*, 138 Misc.2d at 190, 524 N.Y.S.2d at 316.

nents in environmental discrimination claims, in some instances providing an independent cause of action and in others providing a more traditional cause of action on which a novel state claim can ride.

Therefore, be they state remedies, municipal remedies, or a combination of both, New York civil rights litigators must remember that as-yet-untested "local" laws exceed any similar laws at the federal level in their promise for protecting people of color from being relegated to toxic housing environments simply because they lack the financial or political clout to avoid being "The Other Person's Back Yard." As we focus the fight against environmental racism, this sword must not be forgotten for it may well prove to be our most piercing weapon.