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GREENING THE GHETTO REVISITED:
THREE DECADES OF ENVIRONMENTAL JUSTICE LAW
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GREENING THE GHETTO REVISITED: THREE DECADES OF ENVIRONMENTAL JUSTICE LAW

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This essay is dedicated to the memory of Luke W. Cole (1962-2009), lawyer-activist, mentor, and friend.¹

I. INTRODUCTION

Greening the Ghetto was one of the first law review articles to explore the phenomenon of environmental racism or, in its affirmative phrasing, environmental justice (abbreviated hereinafter as EJ).² In that essay I defined environmental racism as “the disproportionate placement of toxic hazards in minority areas, the exclusion of people of color from environmental planning, and the destruction of traditional communities.”³ I elaborated on the parameters of the problem, including the historic concentration of people of color in polluted areas, such as the century-old African-American towns located in what became “Cancer Alley,” the oil production riverscape between Baton Rouge and New Orleans, Louisiana.⁴ I then detailed the inadequacy of federal legal doctrines, such as the discriminatory intent requirement to prove a Fourteenth Amendment Equal Protection violation; the limitations of the National Environmental Policy Act (NEPA) meant to ensure participation in the planning process; and the

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1. For a summary of Luke Cole’s accomplishments, see *Luke’s Legacy*, CENTER FOR RACE, POVERTY, AND THE ENVIRONMENT, <https://crpe-ej.org/donate-main/luke-legacy> (last visited Mar. 1, 2024) (Among these are his representing the residents of Kettleman City, California, in their successful efforts to stop Chemical Waste Management from building the state’s first toxic waste incinerator, and his being named by *American Lawyer* magazine as one of forty-five young lawyers “whose vision and commitment are changing lives.” Luke also founded the nonprofit and journal *Race, Poverty, and the Environment*, whose motto, “[l]awyers on tap, not on top,” underlined its prioritizing community organizing over litigation. He concisely encapsulated his views in Luke W. Cole, *Remedies for Environmental Racism: A View from the Field*, 90 MICH. L. REV. 99 (1992)).

2. Peter L. Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 UNIV. KAN. L. REV. 271 (1992). The article was preceded by Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394 (1991).

3. *Id.* at 272 (The United Church of Christ (UCC) brought the issue to widespread public attention in COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES (1987). The UCC’s overview was followed several years later by ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY (1990), an empirical study which demonstrated that in Houston, Texas, seven of the city’s eight waste incinerators, all five city landfills, and five of the six private landfills were located in majority African-American census tracts.)

4. Reich, *supra* note 2, at 279-80.

disregard of risks impacting entire communities.⁵ Arguing for the potential of state law remedies, I specified that many state constitutions' equality provisions were judicially interpreted as having a disparate impact rather than an intent standard (as in school financing cases); that some state planning access guarantees were broader than parallel federal rules (requiring, for example, Spanish translation of impact statements); and that certain states recognized community-wide harms.⁶ The article has been anthologized, excerpted, and widely cited.⁷

Tracing what has happened in the EJ field since 1992, this essay looks briefly at subsequent empirical analyses, legal scholarship, federal and state case law, and administrative regulation to evaluate the extent to which approaches have changed and progress has been made. In this article I am not attempting to be comprehensive, but rather aim to provide a snapshot of the most salient developments demonstrating EJ's current role as an aspect of restorative justice.

II. EMPIRICAL STUDIES

Research at the national and local levels has shown that environmental injustice continued to characterize American life after 1992. In a thorough correlation of residential proximity with air pollution, using U.S. census data from West Virginia, Louisiana, and Maryland and the EPA's toxic release inventory (TRI), three scholars documented that African-American households were younger, poorer, and living closer to the nearest industrial emissions source than were White households, as well as residing within two miles of multiple such sources.⁸ A state-level study focused on Michigan applied Geographic Information Systems (GIS) to analyze TRI and other data, and thereby revealed a "strong association" between the ten most chemically polluted zip codes, especially those with high incinerator

5. *Id.* at 290-300.

6. *Id.* at 300-13.

7. See 2 ENVIRONMENTAL LAW ANTHOLOGY 599 (Allison P. Zabriskie ed. 1993) (compiling significant environmental law essays published the previous year); KENNETH A. MANASTER, ENVIRONMENTAL PROTECTION AND JUSTICE: READINGS ON THE PRACTICE AND PURPOSES OF ENVIRONMENTAL LAW 196, 281-83, 291-93 (3rd ed. 2007) (reproducing sections on the language barrier and equal protection); https://heinonline.org/HOL/AuthorProfile?action=edit&search_name=Reich%2C%20Peter%20L.&collection=journals (recording 73 citations as of Mar. 1. 2024).

8. Susan A. Perlin, David Wong & Ken Sexton, *Residential Proximity to Industrial Sources of Air Pollution: Interrelationships among Race, Poverty, and Age*, 51 J. AIR AND WASTE MANAGEMENT ASS'N. 406, 419 (2001).

emissions, and those with large minority populations.⁹ The United States Commission on Civil Rights, in its 2016 report on environmental justice, highlighted the then-under-researched risks of coal ash to all major human organs, and noted that the percentage of minorities and low-income people living within disposal facilities' catchment areas was disproportionately high compared to the national average.¹⁰ One of the EJ movement's pioneering scholars, Robert Bullard, summarized investigations into continued risk inequality resulting from racial redlining, including urban heat islands without natural land cover, and flood damage.¹¹ It is unclear whether the environmental racism situation has improved or is worse than in 1992, but this sampling of studies indicates that serious health hazards to people of color and in poverty certainly remain.

III. LEGAL SCHOLARSHIP

Academics proposing legal remedies for environmental injustice have been active in the last three decades. Sheila Foster emphasized the necessity for solid community organizing as a precursor to litigation.¹² Robert Kuehn, who as director of Tulane University's Environmental Law Clinic litigated numerous complaints against the Louisiana petrochemical industry, provided a useful classification of different aspects of the EJ problem.¹³ The inconsistency between environmental regulation in general and remedying unfairness to specific communities was explored by Tseming Yang.¹⁴ In a piece expanding *Greening the Ghetto's* argument that state constitutions' equal protection provisions could serve as a model for applying disparate impact in the EJ context, Robert Klee probed the potential and the challenges of utilizing school finance litigation as precedent.¹⁵ And Tony

9. John Callewaert, *Environmental Injustices in Michigan: A Spatial Analysis of the Interactions between Race, Income, and the Distribution of Environmental Hazards*, UNIV. OF MICHIGAN, <https://websites.umich.edu/~csfound/545/1997/cal/johnfin.html> (last visited Mar. 1, 2024).

10. U.S. COMMISSION ON CIVIL RIGHTS, ENVIRONMENTAL JUSTICE: EXAMINING THE ENVIRONMENTAL PROTECTION AGENCY'S COMPLIANCE AND ENFORCEMENT OF TITLE VI AND EXECUTIVE ORDER 12,893 4 (Sept. 2016).

11. Robert D. Bullard, *Introduction: Environmental Justice—Once a Footnote Now a Headline*, 45 HARV. ENV'T'L. L. REV. 243 (2021).

12. Sheila B. Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775 (1998). Subsequently, Foster and Luke Cole co-wrote a more comprehensive survey of local EJ activism. See LUKE W. COLE & SHEILA R. FOSTER, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT (2001).

13. Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENV'T'L. L. REP. 10681 (2000). These include distributive, procedural, corrective, and social justice.

14. Tseming Yang, *Melding Civil Rights and Environmentalism: Finding Environmental Justice's Place in Environmental Regulation*, 26 ENV'T'L. L. REV. 1 (2002).

15. Robert J. Klee, *What's Good for School Finance Should be Good for Environmental Justice: Addressing Disparate Environmental Impacts Using State Courts and Constitutions*, 30 COLUM. J. ENV'T'L. L. 138 (2005).

Arnold laid out various land use regulatory mechanisms that EJ advocates could deploy at the local level to implement their visions.¹⁶

These analyses have not been restricted to the potential of domestic law. Lauren Bartlett suggested that international human rights caselaw as well as “soft law” (declarations, resolutions, and recommendations) might be introduced in U.S. EJ litigation.¹⁷ And in a discussion of recent Chilean water law, Alejandro Vergara Blanco noted that even within a privatized water regime, that nation’s supreme court has sometimes protected indigenous people’s ancestral usage rights, which have more often been sacrificed to economic development.¹⁸

IV. JURISPRUDENCE

During the last three decades, claims of environmental racism have met with varying levels of success in federal and state courts. The most active area of litigation has been Title VI of the 1964 Civil Rights Act, which prohibits discrimination based on race, color, or national origin by “any program or activity receiving federal financial assistance.”¹⁹ This approach has had its proponents, including Luke Cole, and its detractors, such as Thom Lambert, who debated whether Title VI incorporates a disparate impact remedy for private plaintiffs.²⁰

In *Chester Residents Concerned for Quality Living v. Seif*, a 1997 case in which Pennsylvania permitted five out of seven commercial waste facilities in a city with a sixty-five-percent African-American population, the Third Circuit Court of Appeals held that private plaintiffs could maintain a discriminatory effect action against the state under Title VI.²¹ However, the U.S. Supreme Court vacated the opinion as moot when the state revoked

16. Craig Anthony (Tony) Arnold, *Planning Milagros: Environmental Justice and Land Use Regulation*, 76 DENV. UNIV. L. REV. 1, 105-06 (1998). These include comprehensive plans, zoning ordinances, flexible zoning techniques, and exactions.

17. Lauren E. Bartlett, *Human Rights Guidance for Environmental Justice Attorneys*, 97 UNIV. DET. MERCY L. REV. 373, 393-94 (2020).

18. Alejandro Vergara Blanco, *Regularización de derechos consuetudinarios de aguas: crítica a la jurisprudencia vacilante de la Corte Suprema*, 151 ESTUDIOS POLÍTICOS 59 (2018). See also Anna Berti Suman, *THE HUMAN RIGHT TO WATER IN LATIN AMERICA: CHALLENGES TO IMPLEMENTATION AND CONTRIBUTION TO THE CONCEPT* 77-82 3 BRILL RESEARCH PERSPECTIVES IN INTERNATIONAL WATER LAW 1, 77-82 (2018) (criticizing Chilean neoliberal water model for encouraging maldistribution).

19. 42 U.S.C. 2000d (2023).

20. See Luke W. Cole, *Environmental Justice Litigation: Another Stone in David’s Sling*, 21 FORDHAM URB. L. J. 523, 531-32 (1994) (arguing that because the effects standard is codified in many federal agencies’ regulations these entities can be privately sued); Thom Lambert, *The Case Against Private Disparate Impact Suits*, 34 GA. L. REV. 1155, 1251-52 (1994) (asserting that disparate impact rules are internal regulations unenforceable by parties outside the agencies).

21. *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997).

the relevant facility operating permit.²² The next year, a federal district court in New York ruled against a Title VI claim that a rail freight venture would disproportionately impact an African-American community, basing its finding on lack of evidence comparing the location with other potential sites.²³ In 1999 the Fourth Circuit dismissed a Title VI effect suit against a Maryland highway construction project as time-barred, but did grant plaintiffs' request for a supplemental environmental impact statement.²⁴ The Third Circuit dealt the Title VI disparate impact argument a major blow in 2001 when it held that private plaintiffs could not sue under the effect theory to enjoin a New Jersey air quality permit for a cement plant in a predominantly minority neighborhood.²⁵ The appellate panel considered itself bound by a recent U.S. Supreme Court ruling that there was no private right of action to challenge the disproportionate impact of the state's English-only driver's license exams.²⁶

Following these decisions, the members of the U.S. Commission on Civil Rights endorsing that body's 2003 report on EJ noted that, due to the foreclosure of Title VI effect claims, "communities have been forced to rely even more on what should be—but often is not—vigorous agency enforcement to remedy environmental justice complaints."²⁷ According to the Commission's 2016 EJ Report, multiple organizations have criticized the EPA for failure to process Title VI complaints in a timely or effective fashion.²⁸

Yet EJ plaintiffs have achieved some minor successes arguing Fourteenth Amendment equal protection violations in federal court. As mentioned in *Greening the Ghetto*, at the federal level this cause of action requires proof of discriminatory intent, which is more difficult to show than disparate impact.²⁹ Notwithstanding this stricter standard, in 2001 a Nevada indigenous tribe won a summary judgment motion in U.S. district court on the grounds that a city's refusal to grant it sewer hookups, while providing the service to non-tribal individuals, violated the Fourteenth Amendment's

22. *Seif v. Chester Residents Concerned for Quality Living*, 524 U.S. 915, *vacated as moot*, 524 U.S. 924 (1998).

23. *See South Bronx Coalition for Clean Air v. Conroy*, 20 F. Supp. 2d 565 (S.D.N.Y. 1998).

24. *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180 (4th Cir. 1999).

25. *South Camden Citizens v. New Jersey Dep't of Env't Prot.*, 274 F.3d 771 (3d Cir. 2001).

26. *Id.* at 791 (citing *Alexander v. Sandoval*, 532 U.S. 275 (2001)).

27. U.S. COMMISSION on CIVIL RIGHTS, *Not in My Backyard: Executive Order 12,898 and Title VI as Tools for Achieving Environmental Justice*, 179-80 (Statement of Chairperson Mary Frances Berry, Vice Chairperson Cruz Reynoso, and Commissioners Christopher Edley, Jr., and Elsie Meeks, Oct. 2003).

28. U.S. COMMISSION on CIVIL RIGHTS, *supra* note 10, at 25, 88.

29. Reich, *supra* note 2, at 290-94. *See Washington v. Davis*, 426 U.S. 229 (1976) (holding that disproportionate Black applicant failure rate on police entrance exam does not per se violate equal protection).

equal protection clause.³⁰ And in a subsequent decision, the Fourth Circuit reversed a lower court's dismissal of an African-American community's complaint alleging intentional discrimination by a county's landfill siting, despite the plaintiffs' not having identified the precise defendant responsible for the facility's operation.³¹ These equal-protection rulings on arbitrary government action and a pleading issue, respectively, show that the federal courts are not entirely closed to EJ claims.

At the state level, results have been mixed. A Texas appellate court held in 1998 that a nonprofit organization had "associational standing" to challenge the state's renewal permit for a solid waste facility sited in a minority neighborhood, based on a Hispanic member's allegedly suffering adverse health effects.³² But a Michigan Court of Appeals panel denied relief to African-American plaintiffs challenging the state's locating a waste incinerator in their already heavily polluted neighborhood under the state constitution's equal protection clause—Michigan precedent interpreted the provision as identical to the Fourteenth Amendment, so proof of intentional discrimination was needed.³³ And in a parallel nuisance case, a Louisiana appellate court upheld a plastics plant's permit against a nonprofit's argument that the facility was unfairly sited in an African-American community, agreeing with a lower court finding that the area's being industrially zoned did not appear to be "intentionally racist."³⁴ The court did not factually evaluate the relative priority of the community and the zoning, which inquiry would have illuminated whether the plant was deliberately placed in an existing minority area—manifesting intentional discrimination—or whether people of color moved later to an already degraded location.³⁵

VI. ADMINISTRATIVE REGULATION

Compared to the courts, regulatory agencies have played a more vigorous role in shaping the current EJ landscape. At the national level, President Clinton's Executive Order No. 12898, issued in 1994, required

30. *Fallon Paiute-Shoshone Tribe v. City of Fallon*, 174 F. Supp.2d 1088 (D. Nev. 2001).

31. *Franks v. Ross*, 313 F.3d 184, 199 (4th Cir. 2002).

32. *Heat Energy Advanced Technology v. West Dallas Coalition for Environmental Justice*, 962 S.W.2d 288, 294-95 (Tex. App. 1998).

33. *NAACP-Flint Chapter v. Governor of Michigan*, No. 205264 (unpublished, Mich. Ct. App. 1998), <https://law.justia.com/cases/michigan/court-of-appeals-unpublished/1998/19981124-c205264-0147-205264-opn.html> (last visited Mar. 1, 2024).

34. *North Baton Rouge Env't Ass'n v. Louisiana Dep't of Env't Quality*, 805 So.2d 255, 263 (La. Ct. App. 2002).

35. *See id.* It should be noted that in Louisiana's "Cancer Alley," where this plant was permitted, many of the African-American towns were founded post-Civil War by ex-slaves, before the petroleum industry developed. *See Reich, supra* note 2, at 279-80.

that every federal agency “make achieving environmental justice part of its mission.”³⁶ A 2001 survey found that four of these were more effective than others in implementing this goal: the Environmental Protection Agency (EPA), Housing and Urban Development (HUD), the Department of Transportation (DOT), and the National Institute of Environmental Health (NIEHS).³⁷ Specifically, the EPA made EJ a factor in its permitting decisions; HUD initiated several demonstration projects in underserved areas, including Hispanic *colonias* (unincorporated settlements) on the U.S.-Mexico border lacking adequate services; the DOT revised its annual highway certifications to address EJ concerns; and the NIEHS gave grants to relevant health care providers.³⁸ More recently, a study of the Bush, Obama, and Trump administrations showed that President Obama’s budgets increased spending to enforce EJ goals, and implemented guidance to help agencies consider them in their rulemaking processes.³⁹ The Obama-era policy was revived by the Biden White House, when the Department of Justice (DOJ) reached an agreement with the Alabama Department of Public Health to repair or replace failing septic tanks in a rural African-American community, preventing the state from punishing people not in compliance with local sanitation requirements.⁴⁰

We may zero in on California’s particularly extensive administrative accomplishments. In 2012 the state legislature required the California Environmental Protection Agency (CalEPA) to “identify disadvantaged communities for investment opportunities,” including areas disproportionately affected by pollution or other hazards that can lead to negative health effects or environmental degradation, or concentrations of low-income “sensitive populations.”⁴¹ The Public Resources Code was also amended, in 2016, to define “environmental justice” as a healthy environment; the elimination of pollution burdens so their effects are not disproportionately borne by those most vulnerable to them; meaningful participation in all phases of environmental and land use decision-making; and serious consideration of recommendations from impacted populations and communities.⁴² Implementing these provisions, CalEPA’s

36. Exec. Order No. 12898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

37. Denis Binder et al., A Survey of Federal Agency Response to President Clinton’s Executive Order No. 12898 on Environmental Justice, 31 *Env’tl. L. Rep.* 11133, 11134 (2001).

38. *Id.* at 11141, 11144-45, 11147, 11149.

39. Mollie Soloway, Measuring Environmental Justice: Analysis of Progress under Presidents Bush, Obama, and Trump, 51 *ENV’T L. REP.* 10038, 10052-53 (2021).

40. Debbie Elliott, Landmark environmental justice case aims to fix an Alabama county’s sewage problems, NPR broadcast, Oct. 11, 2023, <https://www.npr.org/2023/10/11/1205245131> (last visited Mar. 1, 2024).

41. CAL. HEALTH & SAFETY CODE §39711 (West 2023).

42. CAL. PUB. RESOURCES CODE §30107.3 (West 2023).

Environmental Justice Task Force undertook six regional initiatives from 2013 to 2019, focusing on fundamentals such as inspections, screenings, and workplans in Stockton, Imperial County, Pomona, Oakland, Los Angeles, and Fresno.⁴³ In 2018 California's Attorney General's Office established the Bureau of Environmental Justice, which has submitted comment letters in various environmental impact proceedings for rezoning and building projects.⁴⁴

Groundwater pollution is one of the most intractable problems plaguing California's disadvantaged populations. This issue involves runoff from concentrated animal feeding operations (CAFOs), and small towns lacking sufficient wells or hookups to larger water systems—especially in the Central Valley, where many poor Hispanic agricultural laborers live.⁴⁵ The Central Valley is heavily polluted by pesticide residues, which impose medical hardships on the farmworker population, including miscarriages, birth defects, and learning disabilities.⁴⁶ In 2015 the state required groundwater basins to form groundwater sustainability agencies (GSAs) for managing and allocating subsurface water, and the Water Code was amended in 2017 to mandate that they consider all beneficial users, such as “disadvantaged communities, including . . . those served by private domestic wells or small community water systems.”⁴⁷ A recent study found that of the twenty-eight GSAs in Fresno and Tulare counties, both in the Central Valley, eight had identified disadvantaged communities and four were in the process of doing so.⁴⁸ Indicating how much more needs to be done, none of the GSAs surveyed had published their formation notices in Spanish.⁴⁹

43. Environmental Justice Task Force, <https://calepa.ca.gov/enforcements/environmental-justice-compliance> (last visited Mar. 1, 2024).

44. Rob Bonta, Attorney General, *Environmental Justice*, <https://oag.ca.gov/environment/justice> (last visited Mar. 1, 2024).

45. Hanna Chandoo, *With Liberty, Justice, and Contamination for All: The Unequal Distribution of Groundwater Pollution in California*, 36 WHITTIER L. REV. 307 (2015); Miriam Pawel, *Too many towns are waiting for clean water*, L.A. TIMES, Jan. 22, 2024, at A11.

46. Yxta Maya Murray, “We have to hope that things will change.” Interview with Rocio Madrigal, Loyola Law School Legal Studies Paper No. 2023-29 (Sept. 2023), <https://ssrn.com/abstract=4600852> (last visited Mar. 1, 2024). It should be noted that EJ issues confronting farmworkers are not unique to California but exist nationwide. See REBECCA E. BERKEY, ENVIRONMENTAL JUSTICE AND FARM LABOR 38-50 (2017) (discussing occupational injury, lack of access to healthcare, pesticide-related illness, inadequate housing, hunger, insecure immigration status, sexual violence, child labor, insufficient wages, employment instability, and inability to organize).

47. CAL. WATER CODE §10723.2(i) (West 2023).

48. Shampa A. Panda, *The Exclusivity of Inclusion: Involving Environmental Justice Communities in California's Central Valley in the Sustainable Groundwater Management Act*, CALIFORNIA WATER LAW JOURNAL (2023), <https://waterlawjournal.com/the-exclusivity-of-inclusion> (last visited Mar. 1, 2024).

49. *Id.* See also Reich, *supra* note 2, at 308 (discussing the lack of participation in environmental planning when stakeholders are monolingual non-English speakers and no translations are provided).

VI. CONCLUSION

Since 1992, the record of progress towards environmental justice has been mixed. In the federal courts, disparate impact analysis has not been applied as envisioned in *Greening the Ghetto*, although there have been a few small successes using an equal protection argument. Similarly, state jurisprudence has shown relatively few advances. Administrative agency responses have proven to hold greater potential than do those of the judiciary, with California leading the way. In other parts of the country regulation is incorporating EJ concerns, as in an Indiana and Kentucky five-county planning agency's identification of disadvantaged communities within the metro Louisville area for purposes of managing transportation congestion and improving air quality.⁵⁰ One of the most promising avenues for achieving EJ goals may be informal agreements between different administrative levels, such as the DOJ's initiative with Alabama to address septic tank deterioration.⁵¹ In the long sweep of changing public consciousness, the examples cited in this article demonstrate that EJ as a form of civil rights restoration has been firmly implanted, and that the means of achieving it continue to evolve.

50. See Kentuckiana Regional Planning and Development Agency, *Environmental Justice Resource Document* (2019), <https://kipda.org/wp-content/uploads/2019/12/Environmental-Justice-Resource-Document.pdf> (last visited Mar. 1, 2024).

51. See *supra* text accompanying note 40.