STANFORD LAW SCHOOL
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An Early Legal Challenge to LULU Sitings: Northwood Manor, Texas

Most people trace the birth of the Aenvironmental justice@ movement to the 1980s and, in particular, to demonstrations against the building of the PCB waste facility in Warren County, North Carolina. In fact, there have been many isolated challenges to environmental inequities for decades. Dr. Martin Luther King went to Memphis, Tennessee, in 1968, for example, to support striking garbage workers in what was in part an environmental mission. It was there that Dr. King was shot.

The first legal challenge to the siting of a waste facility actually arose four years prior to the Warren County dispute. In 1978, a group of African American homeowners in Houston filed a constitutional action challenging the siting of a non-hazardous landfill in their community. Although the group failed to kill the project, the environmental justice movement rose in large part out of the legal action.

The lawsuit involved the residents of Houston=s Northwood Manor, a suburban, middle-class neighborhood of homeowners, and Browning-Ferris Industries, a private disposal company based in Houston. The background of the lawsuit is told in the following excerpt from an article by Professor Robert D. Bullard in the May 1994 issue of *Environment*.

> More than 83 percent of the residents in the subdivision owned their single-family detached homes. Thus, the Northwood Manor neighborhood was an unlikely candidate for a municipal landfill except that, in 1978, it was more than

Barton H. ("Buzz") Thompson, Jr., Robert E. Paradise Professor of Natural Resources Law, and Flora Y. F. Chu, Lecturer, Stanford Law School, prepared this case study as a basis for classroom discussion rather than to illustrate either effective or ineffective handling of an environmental matter. Some or all of the characters or events may have been fictionalized for pedagogical purposes.

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82 percent black. An earlier attempt had been made to locate a municipal landfill in the same general area in 1970, when the subdivision and local school district had a majority white population. The 1970 landfill proposal was killed by the Harris County Board of Supervisors as being an incompatible land use; the site was deemed to be too close to a residential area and a neighborhood school. In 1978, however, the controversial sanitary landfill was built only 1,400 feet from a high school, football stadium, track field, and the North Forest Independent School District=s administration building. Because Houston has been and continues to be highly segregated, few Houstonians are unaware of where the African American neighborhoods end and the white ones begin. In 1970s, for example, more than 90 percent of the city=s African American residents lived in mostly black areas. By 1980, 82 percent of Houston=s African American population lived in mostly black areas.

Houston is the only major U.S. city without zoning. In 1992, the city council voted to institute zoning, but the measure was defeated at the polls in 1993. The city=s African American neighborhoods have paid a high price for the city=s unrestrained growth and lack of a zoning policy. Black Houston was allowed to become the dumping ground for the city=s garbage. In every case, the racial composition of Houston=s African American neighborhoods had been established before the waste facility were sited.

From the early 1920s through the late 1970s, all five of the city-owned sanitary landfills and six out of eight of Houston=s municipal solid waste incinerators were located in mostly African American neighborhoods. The other two incinerator sites were located in a Latino neighborhood and a white neighborhood. One of the oldest waste sites in Houston was located in Freedman=s Town, an African American neighborhood settled by former slaves in the 1860s. The site has since been built over with a charity hospital and a low-income public housing project.

Private industry took its lead from the siting pattern established by the city government. From 1970 to 1978, three of the four privately owned landfills used to dispose of Houston=s garbage were located in mostly African American neighborhoods. The fourth privately owned landfill, which was sited in 1971, was located in the mostly white Chattwood subdivision. A residential park or Abuffer zone@ separates the white neighborhood from the landfill. Both government and industry responded to white neighborhood associations and their NIMBY (not in my backyard) organizations by siting LULUs according to the PIBBY (place in blacks= backyards) strategy.

At the time that the controversy arose, Linda Bullard was a young lawyer who had just opened up her own office in Houston, Texas. A local minister, the Reverend Willie Hunter, went to Ms. Bullard and asked her to speak to some of the residents of Northwood Manor. According to Ms. Bullard, the residents

were very upset that they were getting a landfill. The people had seen the construction going on in the neighborhood, but they had been told they were getting a shopping center. So you can imagine their shock and dismay the day they learned they were getting garbage trucks instead of a shopping center. Because if you looked at the entrance at the time, if anything it looked like you were going into a park, a very tranquil verdant setting. Obviously it was designed deliberately that way so they wouldn=t know—and there was no way to know while the project was under construction—that they were actually getting a landfill [and that a permit had already been granted]. When they came to me the permit had been granted and the landfill was due to open.

> They wanted to know what could be done. I remember saying at the time, half-seriously, Awell, you could always try laying down in front of the trucks.@ I had no idea of what to do to stop a landfill. I was very honest about that when I talked to them. When I talked with Willie Hunter, I told him, AI have no idea how you stop a landfill. A landfill? What *is* a landfill, by the way?@ I knew nothing about the situation. But I started hearing over and over again that people were saying, AThey picked us because we=re Black, they picked this neighborhood because it=s Black.@ Now that resonated with me, and I immediately thought about using the Civil Rights Act if that were in fact true, but I had no way of knowing. The other problem was that we were under the gun, because the landfill was due to open. It was a question of trying to stop them before they opened or having a more difficult time trying to stop them after the fact.
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> [We did not have any type of lawsuit under the environmental laws.] You see, the company argued that they had given proper notice, they had given everyone the opportunity to be heard, there was a hearing that was held and nobody showed up, and therefore, case closed. And they were absolutely right. To have gone down that road, and to have challenged them on anything other than the issue of race would have played right into their hands. In fact, they were waiting for us, they *wanted* us to argue the suitability of the site and the geological surveys and such, they wanted us to argue the technical aspects, because we would have lost.[1]

Linda Bullard therefore decided to challenge the siting decision on constitutional grounds. It is unlawful under the Fourteenth Amendment to the United States Constitution for the government to discriminate on the basis of race, creed, or color. In Ms. Bullard=s view, the Texas Department of Health (TDH) engaged in exactly such discrimination in choosing to site the landfill in Northwood Manor. The problem was proving it. In several decisions in the 1970s, the United States Supreme Court had held that anyone challenging a governmental action as discriminatory had the burden of proving discriminatory *intent*Ci.e., of producing evidence that the government had intentionally discriminated. Discriminatory *effect* by itself was insufficient. Absent the statement of a government official that the government had meant to discriminate, however, that is fairly hard to prove. Some cases therefore had held that Aintent@ could be inferred from a Apattern and practice@ of discrimination. If one could show a statistical pattern of governmental discrimination (e.g., always supplying less money to schools with majority minority populations), the courts would presume that intent was present. Ms. Bullard thus set out to try to show a Apattern and practice@ by the TDH of siting waste facilities in African American communities.

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[1] These and other comments of Linda Bullard are drawn from *A Pioneer in Environmental Justice Lawyering: A Conversation with Linda McKeever Bullard*, RACE, POVERTY, & THE ENVIRONMENT, Fall 1994/Winter 1995, at 17.

Linda Bullard was married to Robert Bullard, who was then starting out his career as an anthropologist at Texas Southern University and was examining residential segregation in Houston. Ms. Bullard went home and

> begged Bob to help me. I mean, literally, begged him. I knew that I needed an expert. I knew that if I was going to argue Apattern and practice@Ca pattern and practice of locating these kinds of facilities in Black neighborhoodsCI needed someone to testify to that effect. My people had no money. They didn=t have the funds to really finance that case, and so I knew I had to have an expert, someone who would work free or at a minimum rate and the only person I could think of who would do that was Bob. .... I knew that he could make the leap very easily [from studying residential segregation] to looking at, in addition to housing patterns, where the landfills were. If I gave him a list of landfills, he could plot them.

After collecting data and studying where landfills had been located in Houston, Ms. Bullard went into court to seek a Atemporary restraining order@ or TRO blocking the landfill. Although most court hearings on TROs are very short, the hearing in this case took 11 days. According to Ms. Bullard,

> I thought we had a good shot. We had shown a solid pattern [of waste facilities being located in African American areas], and there was not a reasonable explanation that the defendants could offer why this existed, other than on the basis of race. I didn=t think that they had articulated a good faith business reason for that situation as a defense and so I felt that it would be very difficult for [the judge, an African-American woman who had spent much of her career litigating cases under the Civil Rights Act] to just say no to us.
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> We had a printout of all the sites, including those of the different agencies involved which granted permits for different kinds of thingsCwe just used everything and we wound up with a hundred sites. We also used census tracts. All we had to do was to put the sites in the tract and just by looking at the predominantly Black tracts and where most of those sites fell there was a graphic pattern. Just looking at the predominantly Black tracts and where most of those sites fell there was a graphic pattern. Just looking at it, you=d pause to wonder, Awhy are all of these sites in the Black census tracts?@ When you looked at it that way it was really overwhelming.
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> The defendants argued that, Awell, that=s not fairCyou have to look at who is actually *living* in the tracts since there are white people who live in a predominantly Black tract and they may be living next to a landfill.@ Now, they just raised those questions. They never proved that.
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> But really, I thought that the evidence was overwhelming. Under the circumstances, considering what little time we had and the pressure we were

> under, it was amazing what we did, what we were able to put together, what Bob was able to put together.

The TRO hearing was held between November 7 and 28, 1979. On December 21, 1979, the court issued its opinion. (See Exhibit A.)

Although the residents of Northwood Manor lost the TRO, the case was not yet over. Her hopes raised by the latter part of the judge=s opinion, Ms. Bullard later attempted to get an injunction against the landfill. She lost again, however, and when she appealed the decision, the federal Court of Appeals affirmed without even writing an opinion. According to Robert Bullard, however, the lawsuit was not a total loss:

> Although the Northwood Manor residents lost their lawsuit, they did influence the way the Houston city government and the state of Texas addressed race and waste facility siting. Acting under intense pressure from the African American community, the Houston city council passed a resolution in 1980 that prohibited city-owned trucks from dumping at the controversial landfill. In 1981, the Houston city council passed an ordinance restricting the construction of solid waste disposal sites near public facilities such as schools. And the Texas Department of Health updated its requirements of landfill permit applicants to include detailed land use, economic, and sociodemographic data on areas where they proposed to site landfills. Black Houstonians had sent a clear signal to the Texas Department of Health, the city of Houston, and private disposal companies that they would fight any future attempts to place waste disposal facilities in their neighborhoods.
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> Since *Bean v. Southwestern Waste*, not a single landfill or incinerator has been sited in an African American neighborhood in Houston. Not until nearly a decade after that suit did environmental discrimination resurface in the courts. A number of recent cases have challenged siting decisions using the environmental discrimination argument: *East Bibb Twiggs Neighborhood Association v. Macon-Bibb County Planning & Zoning Commission* (1989), *Bordeaux Action Committee v. Metro Government of Nashville* (1990), *R.I.S.E. v. Kay* (1991), and *El Pueblo para El Aire y Agua Limpio v. County of Kings* (1991). Unfortunately, these legal challenges are also confronted with the test of demonstrating Apurposeful@ discrimination.@

Questions for Thought

1. What should the law require to invalidate a siting decision?

a. Should it be sufficient for an opponent to show that landfills or other waste facilities have been located disproportionately in communities of color? Or should the opponent of a siting decision also have to show some other evidence of discriminatory motivation? If the opponent demonstrates disproportionate sitings in communities of color, should the siting

decision be approved if the proponent can show a Anon-discriminatory@ motivation for the decision (e.g., land was cheaper)? Consider these questions in the context of the following hypotheticals:

> Hypothetical # 1: Linda Bullard is able to show that the Texas Department of Health (TDH) has sited every landfill since 1960 in a community with greater than 50% minority population, but she does not provide any direct evidence of discriminatory motivation. Should the law block siting of the proposed landfill in Northwood Manor?
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> Hypothetical # 2: The TDH counters the evidence in Hypothetical # 1 by showing that its decision of where to put the landfills was based every time on the price of the land needed for the landfill and that the cheapest land turned out to be in minority neighborhoods. Assuming that you believe TDH, should that change the result?
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> Hypothetical # 3: The TDH counters by showing that a team of environmental engineers reviewed a variety of potential sites each time a new landfill was proposed (always including sites in non-minority neighborhoods) and that the engineering team each time found that the chosen site minimized the expected risk to the population as a whole. Should that change the result?
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> Hypothetical # 4: The TDH counters by showing that it always chose the potential site with the lowest population density nearby (in an effort to reduce the total number of people exposed to the landfills) and that these areas turned out to be minority neighborhoods. Should that change the result?

Although the United States Supreme Court has held that challenges under the Equal Protection Clause of the United States Constitution must show a Aracially discriminatory purpose,@ several federal statutes may provide siting opponents with an opportunity to successfully block a proposed landfill or waste facility on a simple showing of disparate impact. Title VI of the Civil Rights Act of 1964, for example, provides that ANo person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.@ The courts have held that disparate impact is sufficient to establish a case under Title VI; you do not need to prove discriminatory intent. Title VI only applies, however, where the waste facility will receive federal funds.

As described in the following legal excerpt, another statute with potential implications for the siting of landfills and other waste facilities is Title VIII of the Civil Rights Act:

> Title VIII offers environmental justice attorneys another possible statutory base for a civil rights claim. Title VIII bars the refusal Ato sell or rent ... or otherwise make unavailable, or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin,@ and bars discrimination

Aagainst any person in the ... sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status or national origin.@ Although there has yet to be a reported case involving an environmental justice dispute, it is an intriguing statute for several reasons.

First, the statute does not require proof of intentional discrimination to establish a prima facie case of discrimination. A plaintiff need only prove that the conduct of the defendant actually or predictably results in racial discrimination, i.e. that it has discriminatory impact. To rebut a prima facie case, a defendant must then prove that its conduct is justified in theory and practice by a legitimate interest, and that no feasible alternative course of action would serve the interest with less discriminatory impact.

Second, the statute applies to local government agencies and, more importantly, to those agencies= zoning decisions. This offer environmental justice advocates a tool with which to challenge government rezoning of residential neighborhoods in communities of color to allow noxious facilities or other inappropriate land usesCa historical practice which Yale Rabin calls Aexpulsive zoning.@

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

Fourth, although the statute is written to narrowly apply to fair housing cases, it has been used to challenge the Asegregative effect@ of government decisionsCthat is, decisions which have the impact of increasing or perpetuating segregation. In some environmental justice disputes, it could be argued that zoning changes which allow inappropriate land uses in residential communities are both (1) closely enough related to the Aprovision of services or facilities@ for sale or rental of housing that they implicate Title VIII, and (2) have a segregative effect. These two hurdlesCthe nexus to housing and the actual segregative effect of a proposed land useCare high, but may be surmountable in the right case. ....

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

Luke W. Cole, Environmental Justice Litigation: Another Stone in David=s Sling, 21 Fordham Urb. L.J. 523 (1994).

* b. What type of evidence of discriminatory impact should courts or administrative bodies demand? How should courts or administrative bodies resolve the disagreements, discussed in the earlier reading from Professor Vicki Been, over statistically how to determine whether landfills or other waste sites are being disproportionately sited in neighborhoods of color? What level of statistical significance should courts or administrative bodies demand of siting studies?

One of the major disputes in the *Bean v. Southwestern Waste Management Corp.* case was how to geographically define a Acommunity@ for purposes of examining for disparate impact. The court focused on census tracts, but the Bullards argued in favor of using sociologically defined geographical units that reflected how communities actually defined themselves. Which is the proper Acommunity@ to examine, or is another geographical unit (e.g., zip code areas or the region within a 1-mile radius of the landfill) more appropriate? What factors should be considered in determining the proper Acommunity@? What academic disciplines might be helpful in answering this question: history? sociology? environmental engineering? Is the definition of the proper Acommunity@ a Ascientific@ or political question? To think about these questions in a more concrete setting, which of the following two definitions is more appropriate: (1) the geographical boundaries of community as perceived by the local residents (i.e., the Bullard approach), or (2) the region around the proposed facility that environmental engineers believe is at potential health risk.

As discussed earlier, Professor Been in her most recent study concluded that waste facilities were not sited more frequently in African American communities than in other communities because, although there was a correlation between the percentage of African Americans in a community and the decision to site a facility there, the correlation was not statistically significant at the 95 percent level? Should courts and administrative agencies require that statistical evidence meet the 95 percent confidence level? If so, why? If not, what level of statistical significance should be required? Why do statisticians demand confidence at a 95 percent level?

2. Could science have been useful in trying to stop the siting of a landfill in Northwood Manor? If you had been Ms. Bullard, what type of scientific information, if any, would you have sought? How would you have used the information? Do you see any danger in invoking scientific arguments to try to stop landfills?

As far as we can tell, scientific and engineering information played no role in the fight to stop the Northwood Manor landfill. Why do you think Ms. Bullard did not pursue this avenue?

*3. Should the focus of the environmental justice Amovement@ be on the siting of facilities or on the safety of facilities? Given that generated waste must go somewhere, isn=t it more important to ensure that facilities are safe than to argue over where the facilities should go?

Recall that Linda Bullard considered, and rejected, the option of suing under federal, state, and local environmental laws that regulate the operation of waste facilities: the landfill developers Awere waiting for us, they *wanted* us to argue the suitability of the site and the

geological surveys and such, they wanted us to argue the technical aspects, because we would have lost.@ She doesn=t explain why. One possibility is that she thought there was a strong technical case to be made for the siting decision and for the safety of the facility. Another possibility is that she thought that, no matter what the technical pros and cons of the particular site and facility, the developers would have had a tactical advantage. Why might the developers have an advantage in arguing technical environmental issues?

The federal Resource Conservation and Recovery Act (RCRA) regulates waste facilities throughout the United States. Most of RCRA deals with hazardous waste facilities, but a portion also regulates non-hazardous dumps and municipal landfills. RCRA regulates location (e.g., it imposes severe restrictions on the location of landfills in seismic areas) and the facility=s design (e.g., it requires liners and leachate collection systems). RCRA requires the operator of the landfill to monitor groundwater (unless it can show that there is no potential risk) and authorizes the Environmental Protection Agency to require corrective actions where necessary. RCRA also sets basic operating criteria (e.g., it requires daily cover, monitoring for methane generation, control of precipitation run-on and run-off, and limits on the disposal of bulk liquids). State and local regulations provide further protections of neighboring populations and the environment in general. Shouldn=t the issue be the effective enforcement of these laws rather than debates over the siting of particular facilities?

4. Is *Bean v. Southwestern Waste Management* really an environmental dispute? If you believe that it is, what is the Aenvironmental@ issue? Can it be an environmental issue without any evidence that the landfill would harm the people or resources of Northwood Manor?

5. What does the Houston case study teach us about the effectiveness of a purely legal approach to combating the siting of waste facilities in impoverished communities or communities of color? Do you believe that other strategies would have been more successful? If so, what strategies, and why do you believe that they would have been more effective?

Recall from the history of the Houston dispute that, when local community members initially approached Linda Bullard and asked her what they should do about the proposed waste dump, that Ms. Bullard responded Ahalf-seriously, >well, you could always try laying down in front of the trucks.= I had no idea of what to do to stop a landfill.@ Would the local residents have been more successful if they had laid down in front of the trucks? What would you have told the residents if you had been Ms. Bullard?

Luke Cole, who is a staff attorney with the California Rural Legal Assistance Foundation, has argued that legal litigation can often be a counterproductive approach to environmental justice disputes. Consider the arguments that Mr. Cole makes in the following passage. Are the arguments convincing? Do the arguments suggest that communities like Northwood Manor should never engage a lawyer to file a lawsuit? What would Mr. Cole have recommended to the residents of Northwood Manor?

> Poor people and people of color also understand that most problems faced by their communities are not legal problems, but political and economic ones.

Even if the law is Aon their side,@ unless poor people have political or economic power as well, they are not likely to prevail. Given this experience, poor people understand that environmental hazards are not legal problems, but political problems: someone in the government has decided to allow a company to dump in their neighborhood, or to pollute their air. Thus, a *political* tool is required to change that decision: a community-based movement to bring pressure on the person or agency making the decision. Using a legal strategy, rather than a political one, would likely fail these communities: a legal victory does not change the political and economic power relations in the community that led to the environmental threat in the first place.

Even if environmental laws had been designed by poor people and solutions to their environmental problems could be found through the legal system, the traditional practice of environmental law would still fail poor communities on a tactical level. We can examine the problem by asking three questions: Who is in charge? Whose turf do we play on? And what are we winning?

1. Who=s in Charge?

Pollution will not be stopped by people who are not being polluted. If environmental degradation is stopped, it will be stopped by its victims. They can only stop it if they work at it together. The lawyer who wants to serve pollution=s victims must put her skills to the task of helping those people organize themselves and must try to understand their conception of the environmental problem. If ... environmental lawyers are to make environmental lawyering relevant to the people, [the lawyers] must follow their lead. Solutions to poor peoples= environmental problems should be found by the victims of those problems, not by environmental lawyers.

This stance is in direct opposition to traditional environmental lawyering, which has relied on an implicitly paternalistic model of the lawyer as the expert, imposing her ideas on the rest of us. Most mainstream environmental groups are not responsible to those communities most affected by their actions, nor are they accountable to their memberships. ....

2. Whose Turf Do We Play On?

Tactically, taking environmental problems out of the streets and into the courts plays to the grassroot movement=s weakest suit. Unlike traditional environmental groups, who are comfortable in court, most poor people find the legal system foreign and intimidating. They do not see it as an arena in which they have power. In struggles between a polluter and its host community, two types of power exist: the power of money and the power of people. Polluters generally have the money, while communities have the people. Thus, it is a

tactical mistake to take a dispute into court, where polluters have the best lawyers, scientists and government officials money can buy. In court, the community must rely on Aexperts@ and outside help rather than their own actions; this strategy necessarily involves just one or two people speaking for the community. On the other hand, a community-based political organizing strategy can be broad and participatory, including all members of the community. Taking a struggle into court**C**and away from community activists and the power of people**C**may thus actually disempower the community and its activists.[2]

At the same time, there is a role for outsiders. Most community groups in low-income areas desperately need scientific expertise and sensitive legal representation**C**legal representation that fits within a community-based organizing strategy and that is controlled by the community. Both environmental and poverty lawyers can help community groups wade through the tortuous administrative processes involved in siting facilities. Although residents of these communities are experts in their own right, they often do not have the training in law and science needed to decipher the regulations and scientific reports and must go outside their communities to secure such expertise.

3 What Are We Winning?

The traditional law practice of serving individual clients can actually disempower people and hinder the organizing efforts necessary to wage a successful struggle. This may prevent a community=s victory in the first at hand and dampen prospects for long-term change. Such disempowerment can happen in at least four ways.

First, even if plaintiffs win in court, they may not be organized enough to take advantage of, or enforce, that victory. As two early anti-poverty advocates recognized in working with migrant farmworkers,

> [F]armworkers are not necessarily benefited just because they win in court. Winning a case in the Supreme Court might be widely reported, but it gives no assurance that the case=s beneficiaries will demand their new rights or that the losers will terminate their illegal practices. Clearly farmworkers can best realize their rights by organizing themselves to counterbalance the powers of the corporate agribusinesses that employ them.

[2] APeople just sat back and kind of shut up once the lawsuit was underway,@ reports community activist Florence Robinson regarding her community=s struggle against a toxic waste incinerator.

> Second, winning an easy victory may remove an important organizing tool from the community, making it more difficult to build and sustain a lasting community power base. As long-time poverty lawyer Gary Bellow put it, A[t]he worst thing a lawyer can doCfrom my perspectiveCis to take an issue that could be won by political organization and win it in the courts.@
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> Third, the traditional style of lawyering, where there is no attempt to build a community group, but only to represent individual clients, may hurt Apoor people by isolating them from each other.@ This is especially true if collective struggle is translated into an individual lawsuit, with the result that the momentum of the community=s struggle is lost.
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> Finally, to the extent that the Alaw serves largely to legitimize the existing social structure and, especially, class relationships within that structure,@ the use of the law itself may deter one=s clients from thinking of or implementing more far-reaching remedies. Working Awithin the system@ will most often strengthen, rather than challenge, the institutions which work daily against poor people.

Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY LAW QUARTERLY 619, 648-652 (1992).

6. Is a statutory solution needed to the concerns stemming from the siting of hazardous waste facilities in impoverished communities and communities of color?

Consider the following views from a student law review note. Do you agree with the student=s arguments? What do you think of her suggestions?

V. External Factors Affecting Decision Making:
Why Intent May Not Be an Issue

> While various methods exist to dispose of wastes incident to society, there is no procedure for eliminating waste altogether. As a result, there will continue to be a need for waste-disposal facilities as well as an accompanying demand for locations for the landfills. Fear arising from the threat of having a waste facility placed in a community often results in the protests, petitions, and other related activities designed to oppose a decision to locate an undesirable land use in close proximity to one=s home. A related concept, APlace in Blacks= Back Yard@ (PIBBY), is often the consequence of an offensive launched by a well-organized and well-informed citizenry. Anticipating an attack on a decision authorizing operation of a waste facility, waste-site locators often follow the path of least resistance and target traditionally less powerful, less notified minority communities.
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> The NIMBY and PIBBY syndromes demonstrate that the decision to place undesirable land uses in minority neighborhoods may not be so much an issue of

intent as it is a reaction to societal factors. External factors unrelated to the formal decision-making process itself, such as NIMBY and PIBBY, indirectly result in minority communities= shouldering an unequal share of society=s waste facilities. This consequence further supports the position that the intent requirement be modified in environmental racism claims. The activities of national environmental organizations devoted to protecting the country=s natural resources also result in effects analogous to NIMBY protests. Although regarded as effectively combating the diverse issues they address, environmental groups are composed of only a very small percentage of minorities. This underrepresentation of minorities as both members and employees of environmental groups may divert attention from environmental discrimination issues, leaving a void in the space reserved for a champion of minority individuals= rights.

Thus, all of the external factors that play a role in inequitable siting decisions will not satisfy the purposeful discrimination requirement of an equal protection claim. As a result, minorities utilizing an equal protection theory to challenge a disparate-siting decision caused by an external factor, rather than intent, will be denied relief. Because environmental racism plaintiffs are concerned with the outcome of decisions that create a disproportionate dispersal of waste facilities to their communities, claims and remedies should focus on the consequences of site selection rather than the motivation behind the decision-making process. Intent or no intent, the fact remains that minority communities host a disparate share of undesirable land uses. ....

VI. Recognizing the Need for a Revised Approach to Environmental Racism

....

B. The Statutory Approach: Mandating Equitable Planning

Statutes requiring site selection to be conducted in such a way as to ensure equal distribution of facilities throughout neighborhoods would help prevent minority communities from disproportionately hosting undesirable land uses. One commentator suggests an act of Congress based on Title VII. Title VII creates a Adisparate impact@ model that focuses on the consequences of an action, not simply the motivation. An environmental racism cause of action pursuant to the Adisparate impact@ model would involve two elements: (1) disproportionate or disparate impact and (2) Aenvironmental necessity.@ The Title VII-type approach would require the plaintiff to maintain the fundamental burden of providing any disparate impact resulting from a siting decision. Once the plaintiff had established disparate impact, the burden would then shift to the defendant, who would have to convince the court that the decision was an environmental necessity. The environmental necessity standard would allow the defendant to

locate a facility in an area, despite the resulting disproportionate impact, if the defendant could show that no alternative sites were available and that the chosen site was necessary to dispose properly of waste materials.

New York City is presently drafting a charter that fits the above statutory description. The charter requires an accounting of existing land uses in a community before any new facilities may be located in that area. The results of the inventory will be used to determine where new facilities will be placed to ensure equitable distribution. Under the New York Charter, the lower cost of land in certain areas will not weigh in favor of locating a site in that particular area. A case may be made, however, asserting a Acritical need@ for a facility in one neighborhood over another, even though the chosen site contains more facilities than the city-wide ratio.

C. The Community Participation Approach

Community involvement and participation in land-planning decisions is a [another] method of combating environmental racism before the issue reaches the courthouse. Including residents in siting decisions reduces the sting often felt by minorities subjected to decisions made without regard to the minority community=s interests. Acknowledging that unwanted facilities must be placed somewhere, minority residents sharing in the location process can draw attention to possible inequitable siting decisions. Negotiations between minorities and authorizing officials have the potential to produce fewer disparate effects in siting undesirable but necessary facilities, as well as to create a more harmonious community atmosphere.

The benefits that emerge when residents and officials are united in siting decisions also serve to alleviate the NIMBY syndrome. The distrust, hostility, and fear which lead to the NIMBY syndrome are reduced when neighborhood residents gain information regarding the possibility of a new facility=s being placed in the community before the decision is finalized. Individuals who would traditionally gather support for a NIMBY campaign to resist the unwanted facility would be more inclined to evaluate the provided information and compromise with surrounding communities as to placement of facilities.

Leslie Ann Coleman, *It=s the Thought that Counts: The Intent Requirement in Environmental Racism Claims*, 25 ST. MARY=S L.J. 447, 471-492 (1993).

7. Although the descriptions of both the Houston and Warren County disputes make it sound like the communities were united in their opposition to the waste facilities, some members of a community generally favor the facility because of the potential employment or tax revenues that the facility might bring to the community. How should policymakers deal with such community proponents?

Consider the following arguments of two major critics of the environmental justice movement:

> Poverty-stricken African Americans in Brooksville, Mississippi, fully understand the downside of discouraging the construction of industrial and waste facilities in poor and minority communities. Because Brooksville rests upon a layer of impermeable chalk that would enclose wastes and prevent seepage, Federated Technologies Industries of Mississippi (FTI) proposed to construct an incinerator and waste landfill in the town. While a local environmental group (Protect the Environment of Noxubee) and a group of middle-class black educators and ministers (African Americans for Environmental Justice) opposed toxic dumping in Brooksville and decried FRI=s proposal as environmental racism, the local chapter of the NAACP supported construction of the facility.
>
> Instrumental in the local NAACP=s decision to support FTI were the economic benefits the company promised the community. In addition to normal tax payments, FTI agreed to pay $250,000 every year into the county=s general revenue fund. An additional $50,000 a year would be paid to the county for roadway construction and maintenance. Moreover, FTI agreed to build a civic center for the community, to finance a research center (to be a part of Mississippi State University), and to allot between 70 an 80 percent of the proposed facility=s jobs to local residents.
>
> A group of local business owners also opposed construction of the dump in Brooksville. Their opposition may have stemmed from the fact that FTI guaranteed starting wages of between seven and eight dollars an hour. Most of the factories and other businesses in Brooksville pay employees minimum wage or only slightly above. Indeed, the local NAACP argued that many of those opposing the dump were trying too prevent a new employer from altering the area=s low wage scale, thus keeping poor blacks Asocially and economically oppressed.@
>
> The residents of Brooksville, Mississippi, were denied their chance to reap the economic benefits of hosting a waste treatment facility. In late November 1993, FTI scrapped plans to build in Brooksville. Other economically disadvantaged communities, however, have been more successful at working out lucrative partnerships with waste and industrial facilities. Consider the controversial Emelle landfill in Sumter County, Alabama. While often identified as an instance of discriminatory siting, the actual rationale for siting Emelle in

> Sumter County was the area=s sparse population, arid climate, and location atop the Aselma chalk formation@C700 feet of dense, natural chalk. These factors, along withy millions of dollars of state-of-the-art technology, make Emelle one of the world=s safest landfills.
>
> Furthermore, the landfill provides over 400 jobs (60 percent of which are held by county residents), a $10 million annual payroll, and a guaranteed $4.2 million in annual tax revenue. This money has enabled the community to build a fire station, and begin reversing the rates of illiteracy and infant mortality. Black officials in Sumter County are apparently quite happy hosting the landfill. The all-black county commission has opposed state proposals that would reduce the amount of waste the Emelle landfill accepts. AFinancially, the landfill=s been positive, very positive for the county,@ states Robert Smith, a black elementary school principal who now chairs the county commission.

Does the fact that impoverished communities can economically benefit from landfills affect the justice of siting landfills in those communities? Consider, in possible rebuttal to the arguments just made, the following comment from Arthur James, the manager of urban greening and rehabilitation for Earth Island Institute=s Urban Habitat Program.

> Although [James] agrees on the need for economic development [in low-income communities], he cautions that some companies may be using Aeconomic blackmail@ to push their pollution into communities. AWe will work with industries to develop ways to mitigate certain hazardous operations,@ he says. AWe want development, but we want it to be safe.@

Case Study Exhibits

Exhibit A: Bean v. Southwestern Waste Management Corp., United States District Court for the Southern District of Texas, 1979, 482 F. Supp. 673.