

SELECTED SYMPOSIUM ADDRESSES

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First of all, I want to thank everyone here at *Ole* Miss for inviting me to come speak to you. And I get to say that because I am a brown girl from New Mexico. *Ándale Ole* Miss!

Professor Alex Dunn is very clever. She first asked me to do a panel presentation, and I thought, “Yeah, I can do that. I can go and sit on a panel, put in my two-cents worth, and then sit back and listen and learn a lot.” But that was not to be. Alex decided I needed to earn my lunch and gave me bigger marching orders and said, “Oh, by the way, you have to lay the ground work, the foundation, for this whole thing.” I said, “Oh, gee, thanks a lot.”

But now I have to thank her because it really did get me to reflect upon environmental justice—the whole movement—in a much broader way. Reflection of this nature is important at this particular conference for several reasons. Here we have an ABA conference for the section members combined with law students at Ole Miss. That is an interesting mix, but it puts me in a dilemma because I have two distinct audiences. I solved that dilemma, however, because I said to myself, “Oh heck, I’m just going to talk to the students and the lawyers can just deal.” So my remarks are targeted mainly to law students, but hopefully there will be some insight for the lawyers as well.

Secondly, this is a conference on facility siting, expansion, and permitting. Those issues continue to be important issues in environmental justice and it’s certainly the genesis of the movement. But the movement has moved way beyond that, and activists have found themselves dealing with a much wider range of issues. For example, environmental justice has gone international, and is now dealing with energy and climate policy, as well as disaster response. That said, a tough nut to crack is the cluster of issues at the basic siting and permitting stage. I’m glad to see that attention is still being paid to these issues.

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In doing a quick bit of math, I realized that the environmental justice movement is now about thirty years old. The roots go back further than that, but the movement *per se* came to national prominence as “environmental justice” at that time. There have been victories and there have been disappointments; there have been changes in strategy and changes in recourse to legal remedy; there has been a scientific advancement of our understanding of these impacts in communities of color and poor communities; and there has been an ever-widening sphere of influence that these issues have over environmental policy. So really, setting this groundwork—the legal and historical framework—is a pretty big task and there isn’t sufficient time to do it justice. I could recite the milestones, but that doesn’t tell the real story either. For a generation of new law students who may want to work in this area, I think doing that would miss the flavor of this remarkable endeavor. So instead, I’m going to tell the story of the environmental justice movement and pepper it with some of the memorable people in it, as well as the landmarks that some of us may be more familiar with. I hope that I can do so in a way that imparts what this journey has been like and why, in particular, the legal developments are so important.

Imagine isolated community groups throughout the United States, each in its own way trying to address a variety of problems. Imagine communities living at the fence line of big industrial complexes, too near large transportation corridors, near mining, oil, and gas extraction activities, near animal factory farms. Imagine communities that are impacted by contaminated land, poisoned aquifers, degraded waterways, deteriorated rangelands, and other types of assaults upon their environments. On one end of the spectrum, you have communities from remote Native American reservations and desert areas, and on the other end of the spectrum, enclaves in congested industrial areas of our inner cities. Respiratory ailments—too common. Unexplained rashes, cancer clusters, birth defects. And then you have quality-of-life issues: unbearable odors, noise, dust—and fewer environmental amenities like parks and open spaces.

At first, each of these individual problems seemed local and isolated, but eventually it became apparent that they were all part

of a national pattern. People with very different backgrounds and different cultures got together, and they began to compare conditions and find commonalities. They thought deeply about how they would work together and move forward together. But crossing cultural, geographic, world-view lines wasn't easy. Here you see the first wave of activists: Dana Alston, Damu Smith, Deohn Ferris, Vernice Miller, Pam Tau Lee, Tom Goldtooth, Richard Moore, Ruben Solis, Gail Small, Jeanne Gauna, Jose Bravo, and many others. They came together in the early nineties to very intentionally draft, debate, and ultimately adopt the principals of environmental justice. That was at the first National People of Color Environmental Leadership Summit—a gathering that allowed the movement as a whole to take shape.

At the same time, within the larger environmental policy sphere—which was occupied largely by conventional environmental groups, business interests, and governmental agencies—there was this assumption: people of color and the poor really don't care about environmental problems. And if these people have a problem, well it is because they moved to these areas because land was cheap and so it is just “the market.” And if these people made a fuss, then they were put in that category of those NIMBYs, those not-in-my-backyard folk. Within this arena, conventional stakeholders were not used to dealing with these communities, and so not surprisingly—at this early stage—exclusion, and sometimes outright hostility, were not uncommon occurrences.

That was the flavor of this earlier time—when you see the first landmarks of environmental justice begin to emerge, with direct action strategies like the big 1982 demonstrations in Warren County. That is perhaps the earliest and the most prominent example, but there are others. It was a real up-hill battle. Few resources, no real law addressing environmental justice *per se*, a mountain of anecdotal accounts of the conditions that people were experiencing, but little in the way of the kind of hard empirical evidence that regulators and judges like to see. Academics and lawyers began to get involved in this effort: Bob Bullard, Beverly Wright, Paul Mohai, Bunyan Bryant, Charles Lee, Luke Cole. They really laid the important groundwork for the empirical and legal work that was to follow. You had people like

Wilma Subra, who did a lot of on the ground chemical testing. In the legal academy you had people like Professor Richard Lazarus, and others, who began to write about the way that the implementation of environmental law itself helped to perpetuate these inequities, albeit unintentionally.

In those days—I have to say—there was a lot of energy, a lot of hope. There were long meetings followed by late night sessions. In conferences, often crowded in someone's hotel room, there would be groups of people talking about all of the issues and how, with such pitifully few resources, they could move forward in a sensible way. There were frustrating times and really funny times. Richard Moore tells this story—now, I wasn't there personally—but he tells this story about some activists getting intentionally locked out of the elevators at the EPA headquarters. He describes how you had all these out of shape but totally ticked-off people trudging up the stairwell. The way that he tells the story is hilarious, and I'm sure that over the years it's been embellished just a wee bit. But this much I'll tell you, I would not have wanted to be the agency person at the end of that little trek.

Lawyers and academics, us eggheads, were spared no mercy. You just had to check your ego, and often your dignity, at the door. I have a cartoon penned by Carlos Marentes, who is a wonderful caricaturist. We were sitting at a long meeting, and he passes me this sketched picture of me. Well, suffice it to say it's not a very flattering portrait. At another meeting I was sitting by Luke Cole, who spontaneously started scribbling madly, and then he passed to a few of us a really, really irreverent poem. We started giggling, and the people at the head of the table glared at us, and we got into trouble. A couple of times, again to relieve the tediousness of a really long meeting or otherwise provide comic relief, someone would pen an outrageous, fictitious press statement, stating therein what he or she would *really* like to say. Jose Bravo, in particular, was an incorrigible practical joker, and *nobody* was spared from his creative prankstering.

So, as serious as it all was, in a lot of ways it was just a lot of fun. Several of these people, Damu, Dana, Jeanne, and more recently Luke, have tragically passed on, and we miss them. But others remain. They're white haired now, and still soldiering on.

But I digress; back to the thread of my story. Around this time the empirical evidence started rolling in. The first was a landmark study by the United Church of Christ Commission for Racial Justice, *Toxic Waste and Race in the United States*. Professors Paul Mohai and Bunyan Bryant subsequently undertook a comprehensive literature review and compiled a book with the important findings in this area. Findings that, at that time, were in various places, probably on shelves gathering dust. Looking at these studies in the context of a charge of “environmental racism” got the attention of many. In the academic circles, this sparked a round of vigorous debate about methodology, but all of this was good because it led to refinement of the methodology and further study. Those subsequent studies largely tended to confirm the findings of the earlier ones. It became fairly well established that there is a significant racial dimension to environmental disparities, and there is a class dimension as well. Part of what we are also dealing with here is historical discrimination in zoning and land use, and also current siting criteria that then relies upon, in part, the legacy of those practices. We have also come to understand that demographic shifts and conditions that weaken informal social structures are part of this complex mix. And yes, at times, there are decisions, straight up business decisions, that take advantage of people in weaker positions. But more often than not, there are well-meaning industry, agency, and governmental actors that are making decisions without a full appreciation of the potential for these kinds of disparities.

The direct action campaigns, a lot of community organizing, and empirical work led to another landmark: the 1994 signing of an Executive Order on Environmental Justice by then-President Bill Clinton. This order ushered in a suite of regulatory responses at the federal level. To be sure, those regulatory responses have waxed and waned over the subsequent years, but these early efforts have begun to bear fruit recently; I’ll pick up on that thread in a minute.

But first, I want to consider another development that was heating up around that early time. Lawyers got busy and started to sue. The earliest lawsuits, based on the Equal Protection Clause of the U.S. Constitution, were almost always unsuccessful,

largely because of the evidentiary difficulty of proving discriminatory intent. There was a greater measure of success in suits under the environmental statutes. At the EPA, for example, the Environmental Appeals Board began to take seriously the executive order on environmental justice and strongly endorsed the use of an environmental justice analysis in permit proceedings.

But the more high profile legal remedy was Title VI of the Civil Rights Act of 1964. Now, this remedy was particularly important for a couple of reasons. First of all, a civil rights claim resonated with what these communities were experiencing. Instead of debating the technical requirements of the environmental laws, this claim spoke directly to the racial impacts that many believed were engineered—or at least exacerbated—by the methods and criteria being used by state environmental regulators in continuing the practice of issuing, and reissuing, permits to emit pollutants in areas that already had too much pollution. The remedy in this context was for federal agencies to withdraw funds from some of the state permitting agencies and importantly, at that time, there was also the legal ability to institute a lawsuit asking a court to enjoin some of these practices. So it was a potent legal tool, and communities began to put a lot of hope into this Civil Rights law.

The Environmental Protection Agency, one of the major funding agencies, was under a huge amount of pressure from state regulators and the regulated community, who stood to be significantly affected by what state regulators were being asked to do—i.e., stop issuing permits to pollute in highly-impacted communities. It was a volatile time. And so in the late 1990s, EPA convened the Title VI Federal Advisory Committee. I was on that committee, and through this work I came to appreciate what a legally and factually complex area this is. There are no easy answers, one way or another. But just to give you a sense how high the stakes were back then, so great was the controversy that there were congressional riders on appropriation bills precluding the EPA from using appropriated funds to investigate these types of Title VI claims.

Then, in 2001, the Supreme Court in the *Sandoval* decision cut off a private right of action under Title VI for disparate impact

regulations. For communities this was a huge disappointment because it left only EPA administrative investigations as a possibility under Title VI. From the perspective of many communities, EPA has failed them in this regard. It has allowed claims to languish for years, and it has dismissed a lot of those claims. Many believe the EPA has been too quick to dismiss a complaint on grounds that are too nit-picky and technical. Certainly from an environmental justice standpoint, the statistics on these administrative claims are pretty dismal.

But the positive part of the Title VI saga, I think, is that it did get people with very different perspectives at least talking to each other. And the participants, both the participants on the advisory committee itself and EPA personnel, began to visit impacted areas throughout the country and began to appreciate in a very real way just what these communities were facing every day. Unfortunately, people move on from their positions in agencies and in law firms, and I think a lot of the visceral value of this education has been lost over time.

But at this point in the story, circa the century's turn, we have advocates faced with bad case law, and facing a federal administration that wasn't sympathetic to environmental justice and was unwilling to tackle these issues in a big way. Although there were individuals within the agencies that were committed to environmental justice and continued to do what they could do, by and large there appeared to be a standstill at the federal level during this time.

Interestingly, the states then became the innovators. We saw the enactment of a few state laws, like those in California, that deal quite explicitly with environmental justice, as well as state gubernatorial orders on environmental justice. We began to see a range of regulatory initiatives, some state rulemakings explicitly dealing with environmental justice, and helpful case law. In short, throughout the first decade of 2000, a lot of activity at the state level, not so much at the national level, where the issue of environmental justice lost its visibility.

That might be changing. Recently, we've seen some interesting developments. The EPA, in particular, is for the first time attempting to move environmental justice "upstream" in environmental regulation. It's high time. The usual order of

business was to address environmental justice, if at all, at the tail end of regulatory activity, like in a permit proceeding or in an enforcement action—at a point where there are sunk costs and fierce resistance. Now, we are starting to see more attention to these issues at an earlier time, in the standard setting arena, at the rule-making level, and within a new generation of strategic plans. Now we've seen those plans before, during the Clinton administration, but perhaps strategic planning can now get at environmental justice issues in a more sophisticated, innovative, and more effective way than those earlier efforts. For example, I was recently on an EPA work group that was looking at screening tools, in this case it was the “Environmental Justice Smart Enforcement Assessment Tool” (EJSEAT), a method that uses nationally consistent databases to systematically and uniformly identify broader areas of environmental justice concern. At the federal level, you can't screen with ideal resolution, however, because you are not able to use local land use data, it's an important start in addressing environmental justice issues in a more comprehensive way.

There are also attempts to make information about environmental conditions more readily available to impacted communities, and in a more understandable form. Recently, for example, there was a “TRI training conference” for communities to use data from the Toxic Release Inventory to help them better understand the pollutants that are being emitted in their areas.

I believe these small steps, in the aggregate, will help us refine what this technically difficult thing called “an environmental justice analysis” is going to look like. Now, for some of us, this may seem like a very odd concept: identifying communities of concern? We've been to the industrial areas of Chicago, the Wilmington/San Pedro area in California, the petrochemical corridor that runs through part of Louisiana. You know it when you see it. It is pretty obvious that these are environmental justice communities. But to be fair, the reality is that in a lot of instances, it is not so obvious. There are communities in the West and the Southwest that have severe groundwater contamination, and some Native American communities are still experiencing the legacy of very bad uranium

mining practices. These communities don't look like they might have a problem, so it's not as easy as it may seem.

You need good tools that will allow agencies to identify problems with greater precision, so that regulatory action is supportable. You need a legal framework that will provide adequate authority and allow for better regulatory guidance. You need a process to work out these issues in ways that fairly considers the interests of everyone involved. You need to refine and convey information in an understandable and useful form to impacted communities. But most importantly, you need people who are willing to come together in good faith to try to alleviate some of these conditions. You need people who won't get derailed from this task because of the bottom line or because it becomes too politically difficult to do so. Simply put, you need people who are willing to do the right thing in all of the little corners we happen to be working in.

Whether we will really solve this problem still remains to be seen. These conditions are remarkably persistent. We need conviction and vision, and talking about ideals is critically important because it orients us and helps keep us inspired. But you know, there's an awful lot of detailed hard work that needs to be done. This is where a new generation of organizers, empiricists, public health workers, lawyers, and public servants are being handed the torch. Today, we only have to take a look at our program, and we'll see that this symposium is very, very much a part of this effort.

So for the students in the room, my hope is that some of you will decide to work in this area. It is interesting and rewarding, and sometimes it is a lot of fun. I hope that some of the attorneys here, whether you are in government or private firms, will use this symposium to think about ways that will help us move beyond "minimizing the controversy" or "containing the issue" and together figure out how to approach these problems in a way that has a better chance of actually changing conditions on the ground. We need to do that. These communities have been waiting a long time.

Thanks for listening. I hope I have imparted a glimpse of the wonderful humanity that is behind this remarkable endeavor.

Again, whatever little part in this complex drama each of us plays, we need to seize upon that and move forward together.