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Keynote Address Equal Protection under the Law: Fact of Fiction?

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KEYNOTE ADDRESS

EQUAL PROTECTION UNDER THE LAW: FACT OR FICTION?

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INTRODUCTION

In the real world, all people, communities, and nations are not equal: some populations and interests are more equal than others. Despite significant improvements in environmental protection over the past several decades, millions of Americans continue to live in an unsafe and unhealthy physical environment. Many economically impoverished communities and their residents are exposed to greater health hazards in their homes, on their

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jobs, and in their neighborhoods, when compared to their more affluent counterparts.

In a sense, all communities do not receive equal protection under the law. Economics, political clout, and race play an important part in sorting our residential amenities. Environmental racism is as real as the racism found in housing, mortgage lending, employment, education, and voting. Environmental racism refers to any policy, practice, or directive that differentially affects or disadvantages - whether intended or unintended - individuals, groups or communities based on race or color.

Environmental racism is reinforced by government, legal, economic, political and military institutions. Environmental racism combined with public policies and industry practices provide benefits for whites, while shifting costs to people of color. In fact, low-income persons and people of color have borne greater health and environmental risk burdens than society at large. Elevated public risks have been found in some populations even when social class is held constant. For example, race is independent of class in the distribution of air pollution, contaminated fish consumption, location of municipal landfills and incinerators, abandoned toxic waste dumps, cleanup of Superfund sites, and lead poisoning in children.

Struggles for equal environmental protection and environmental justice did not just mysteriously appear in the 1990's. Many communities of color and low-income communities have engaged in life-and-death struggles for decades to redress the environmental and public health inequities that they were experiencing. In the specific case of my community of West Harlem, we have been struggling with the State of New York and the City of New York over the North River Sewage Treatment Plant since 1962.[1] So our interest in these issues, and

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1. *See generally* Vernice D. Miller, *Planning, Power, and Politics*, 21 FORDHAM URB. L.J. 707 (1993-94).

our interest in promulgating a set of laws that will really protect all communities, is a 30-year discourse for the West Harlem community.

There is a racial divide in the way that the U.S. Government has cleaned up toxic waste sites and punished polluters. White communities see faster action, better results, and stiffer penalties than communities where people of color live. This unequal protection often occurs whether the community is wealthy or poor. Government has been slow to ask the questions of who gets help and who does not; who can afford help and who can not; why some communities get studied while others get left off the research agenda; why industry is allowed to contaminate some communities and not others; why some populations are protected and others are not protected; why unjust, unfair, and illegal policies and practices are allowed to go unpunished?

I. ENVIRONMENTAL JUSTICE ADVOCACY AND TITLE VI OF THE 1964 CIVIL RIGHTS ACT[2]

From my perspective as an environmental justice advocate, the way the specific case involving my community of West Harlem has been posited in the public discourse belies or disguises the real issues. We started by conceptualizing race as the center of the public policy conundrum. Anything that talks about race in this country is, by its nature, controversial, and so we started from a very controversial place. One of the first major pieces of research ever done, the report by the United Church of Christ Commission for Racial Justice, talked about and defined the rampant environmental racism in this country.[3] Strangely enough, there was

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2. 42 U.S.C. §§ 2000d – 2000d7 (1964).

3. COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON RACIAL AND SOCIO-ECONOMIC

not much opposition or response from the Environmental Protection Agency ("EPA") for a number of years to this report. Many people have since written about environmental racism. There have been symposia, articles, and many organized events that talk about some aspect of environmental justice. I have been involved in this issue from its beginning and very conceptualization. Still, nothing has generated the kind of public debate and focus on environmental justice as EPA's proposed guidance on Title VI of the 1964 Civil Rights Act ("Title VI").

The EPA issued *Interim Guidance for Investigating Title VI Administrative Complaints*[4] ("Interim Guidance") in 1998. Much has been said by states, business and industry groups that claim that the Interim Guidance would hinder local economic development efforts in those communities most in need of economic revitalization. I see no evidence to support these claims. I believe that many of these claims are simply an effort to obscure the fact that states and municipalities have long been in violation of Title VI and are still intent on ignoring its provisions.

II. RACIAL BIAS IN THE SITE SELECTION PROCESS OF A NUCLEAR PLANT: THE LES DECISION

It would be helpful to review some legal cases and the subsequent decisions to draw these issues into sharper

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CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987).

4. *United States Environmental Protection Agency, Interim Guidance For Investigating Title VI Administrative Complaints Challenging Permits* (1998) [hereinafter "*Interim Guidance*"]. The EPA issued this Interim Guidance to "provide a framework for the processing . . . of complaints filed under Title VI of the Civil Rights Act of 1964 . . . alleging discriminatory effects resulting from the issuance of pollution control permits by state and local governmental agencies that receive EPA funding." *Id.*

focus. Since 1989, the Nuclear Regulatory Commission ("NRC") had under review a proposal from the Louisiana Energy Services ("LES")[5] to build the nation's first privately owned uranium enrichment plant. A national search was undertaken by LES to find the "best" site for the plant.[6] The southern United States, Louisiana, and Claiborne Parish, were declared the winners of the site selection process.[7] Residents from Homer, Louisiana, and the nearby communities of Forest Grove and Cedar Springs, predominantly African-American communities closest to the proposed site, disagreed with the site selection process.[8] They organized themselves into a group called Citizens Against Nuclear Trash ("CANT"). CANT charged LES and the NRC staff with practicing environmental racism, and then hired the Sierra Club Legal Defense Fund and sued LES.[9]

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5. As an affiliate of the U.S. Nuclear Regulatory Commission, the scope of LES' responsibility includes regulation of commercial nuclear power reactors; non-power research, test, and training reactors; fuel cycle facilities; medical, academic, and industrial uses of nuclear material; and the transport, storage, and disposal of nuclear materials and waste. *See* LES, *Mission and Organization* (visited March 2, 2000) <http://www.nrc.gov/NRC/WHATIS/mission.html>.

6. *See* United States Nuclear Regulatory Commission, Atomic Safety and Licensing Board, *In the Matter of Louisiana Energy Services L.P., Final Initial Decision*, May 1, 1997 (visited March 13, 2000) <http://www.nrc.gov/OPA/reports/lesfnl.htm>.

7. *See generally LES Is No More* (visited March 2, 2000) <http://www. earthjustice.org/work/commhi1.html>.

8. *See id.*

9. *See* United States Nuclear Regulatory Commission, Atomic Safety and Licensing Board, *supra* note 6. CANT claimed that LES failed to consider the negative economic and sociological impacts of the proposed plant. *See id.* In addition, CANT claimed that LES' site selection process "follows a national pattern of siting hazardous facilities in minority communities and that no steps to avoid or mitigate the disparate impact . . . on this minority community have been

Only after a lengthy and intense public comment did the NRC staff attempt to address the environmental justice and disproportionate impact implications, as required under the National Environmental Policy Act[10] ("NEPA") and under President Clinton's 1994 Executive Order 12898 on Environmental Justice.[11] Still, the NRC staff devoted less than a page of its final environmental impact statement to addressing the environmental justice implications at the proposed uranium enrichment plants.[12] The lawsuit wore on for more than eight years. On May 1, 1997, a three-judge panel of the Nuclear Regulatory Commission, Atomic Safety Licensing Board, issued a final decision in the case.[13] The judges con-

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taken." *Id.* CANT's environmental justice arguments alleged a violation of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1970). *See id. See generally* Marianne Lavelle, *No Uranium Plant in Site in Minority Area NRC Ban Affects Companies With Environment Problems*, 19 NAT'L L.J. 186 (1997); Michael B. Gerrard & Monica Jahan Bose, *The Emerging Arena of 'Justice,'* 218 N.Y.L.J. 186 (1997).

10. 42 U.S.C. §§ 4321-4370 (1970).

11. Exec. Order No. 12,898, 59 FR 7629 (1994). In this Executive Order, the President directs that, "...each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations in the United States." *Id.*

12. In its Final Initial Decision, the Nuclear Regulatory Commission ("NRC") noted, "by limiting its consideration to a facial review of the information ... the [NRC] Staff has failed to comply with the President's directive [Executive Order 12898]." *See* United States Nuclear Regulatory Commission, Atomic Safety and Licensing Board, *In the matter of Louisiana Energy Services L.P., Initial Final Decision*, May 1, 1997 (visited March 13, 2000) <http://www.nrc.gov/OPA/reports/lesfnl.htm>.

13. *See id.*

cluded that racial bias played a role in the site selection process.[14] Overall, CANT's legal victory illustrated the utility of combining environmental and civil rights law, and the requirement of government agencies to comply with Executive Order 12898 in their assessments. This was a major victory, and the first time that a federal agency had actually levied a decision in favor of a community or affirmed a claim of environmental justice under Executive Order No. 12898.

III. THE SHINTECH CASE

As a lifetime resident of a community, that involuntarily hosts several waste and environmentally harmful facilities permitted to operate by the State and City of New York, I want to state for the record that living near a waste facility does not insure economic opportunity or employment. All we derive from living near these facilities is poor air quality and diminished health. In one of the highest profile Title VI complaints that was pending before EPA and then withdrawn, *St. James Citizens for Jobs and the Environment v. Louisiana Department of Environmental Quality* ("*Shintech*"),[15] the citizens charged that claims of expanding economic opportunity in Convent, Louisiana, by the Louisiana Department of Environmental Quality were false, misleading, and otherwise disingenuous.[16]

The rural community of Convent, Louisiana, where the State of Louisiana had granted a permit to construct and operate the second largest polyvinyl chloride

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14. *See* United States Nuclear Regulatory Commission, Atomic Safety and Licensing Board *supra* note 6.

15. *See* St. James Citizens for Jobs and the Environment v. the Louisiana Department of Environmental Quality (*In re* Shintech), 734 So. 2d 772 (La. App. 1999).

16. *See id.*; *see also* Henry Payne, *Planting Prosperity or Sowing Racism, EPA Policy that Bars Polluting Plants Comes Under Attack*, PITTSBURGH POST-GAZETTE, June 15, 1998, *available in* 1998 WL 5256745.

manufacturing ("PVC") plant in the world is already host to several huge chemical manufacturing, grain storage and processing, and petrochemical facilities.[17] Jobs are created at these facilities, but the reality is that rarely do the people who live next to or near these waste facilities or plants find employment within them. These individuals receive all of the environmental and public health burdens of living near these facilities, but none of the economic benefits. The community filed their Title VI claim, because they believed that they had already been disproportionately impacted by Louisiana's policy-making apparatus that consistently found their community the most desirable location to build some of the most environmentally impacting facilities in the state.

The reality was that the neighboring community was not deriving any benefits from these policies. All the beneficial things industry claims will happen when they build these facilities are inconsistent with the facts. Industry claims they will create an expanded tax base in many places that have no tax base or a negative tax base. Industry says that they will create new economic opportunities and jobs, and that they will improve the quality of life for people who live where these facilities are located. However, I have yet to see, in my 15 years of working in this area across this country a single place where an impacting environmentally polluting facility has improved the quality of life for the people who live near it. I would be happy to see such a place because at least it would hint that there is a possibility that these facilities can be good neighbors. It might be possible technologically, but for some reason it does not happen where people of color live. This is the nature of the Title VI debate: the industry side says that race is not a factor in the determination of where they site and locate their facilities. However, the LES decision clearly

17. *See* Jim Motavalli, *Toxic Targets: Polluters That Dump On Communities of Color Are Finally Being Brought To Justice*, E-THE ENVIRONMENTAL MAGAZINE, July-August 1998.

showed one example in which federal judges found that race was a key-determining factor in the site selection process.

Very few people and very few small communities have the resources to engage in an eight-year legal battle with a huge corporation, and with the state environmental apparatus. Moreover, very few organizations and communities have the kinds of resources that organizations such as the Natural Resources Defense Council ("NRDC"), the Earth Justice Legal Defense Fund, and others, can provide.[18] The *Shintech* case was really a bellwether case in terms of raising the profile of the Title VI issue. The *Shintech* lawyers were six law students and a supervising attorney from the Tulane University Law School Environmental Law Clinic.[19] They wrote brief after brief, comment after comment. They consulted with environmental groups around the country. Many of us came together to support their effort, but, essentially this was about a local community having the right to determine what happens, where it lives, and what the future of that community is going to be like.

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18. The Natural Resources Defense Council ("NRDC") headquarters are in New York; three regional offices are located in Washington, San Francisco and Los Angeles. For a description of NRDC's activities, see *About NRDC Menu on NRDC Online* (visited March 2, 2000) <http://www.nrdc.org/nrdc/comm/nrdclist.html>. The Earthjustice Legal Defense Fund, formerly the Sierra Club Legal Defense Fund, goes to court to protect public lands, preserve endangered species and wildlife habitat, prevent toxic contamination, and achieve environmental justice. *See Earthjustice Legal Defense Fund* (visited March 2, 2000) <http://www.earthjustice.org/about/index.html>.

19. For a background discussion of the involvement of the Tulane Law School Environmental Law Clinic's involvement in this case, see Southern Christian Leadership Conference, Louisiana Chapter v. Supreme Court of the State of Louisiana 61 F. Supp. 2d 499, 501 (E.D. La. 1999).

In the environmental justice and civil rights community, we have been filing Title VI lawsuits and administrative complaints with the EPA for the last 10 to 12 years. Currently, there are approximately 60 administrative Title VI complaints backlogged in the EPA's Office of Civil Rights.[20] However, there was no apparatus at EPA to deal with, adjudicate, process and decide these cases. Part of the *Shintech* case was precisely about forcing EPA to fulfill its mandate under the Civil Rights Act of 1964.[21]

Recently a Japanese journalist, who writes for the Tokyo Times, which is a New York Times subsidiary in Japan, visited me. I originally met him in 1992, when I worked at the United Nations. He was researching and investigating environmental justice issues. Imagine a Japanese journalist who really cared enough about these issues to spend two years here on a Fulbright Fellowship[22] researching and writing about environmental justice. We talked about the state of environmental justice, environmental racism, and what has happened over the intervening years. I told him that I was curious to know, from the perspective of the Japanese public and those who read his newspaper, whether they knew about the *Shintech* case? Did it mean anything in a Japanese context? He said there had been a tremendous amount of press about it. He also said Green Peace brought some principal community organ-

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20. For a list of all Title VI complaints filed with the EPA as of January 24, 2000, see *Environmental Protection Agency, Title VI Complaints Filed with EPA* (visited March 13, 2000) <http://www.epa.gov/ocrpage1/docs/t6csjan2000.pdf>.

21. *See supra* note 15

22. Fulbright Fellowships are prestigious grants awarded by the United States Information Agency. They allow national and international scholars to conduct research or lecture abroad. *See Institute of International Education, USIA Fulbright Program* (visited March 2, 2000) <http://www.iie.org/fulbright.html>.

izers from Convent to Japan to do a tour of the facilities there and meet with the press, so that they could raise the profile of this issue.

He questioned whether I understood the underlying subtext of this issue. He explained that in Japan, you cannot produce, transport, import, or use products made with PVC because the product has been completely banned under the International Basel Convention protocols. You cannot bring PVC polymer into the country, you cannot even bring it onto the land of places that are held or owned by Japan, so island nations that are owned by Japan are included. You can not fly PVC over Japan, you can not even go around Japan on a ship with PVC in its waters.

Shinitzu, which is the Japanese parent company of Shintech Corporation, has decided to look at the global marketplace. PVC is a hugely successful product in terms of how it is used. In the United States of America, all plumbing systems have PVC piping. So imagine all of the plumbing in New York City, all of the lines that carry waste water to the North River Sewage Treatment Plant, PVC pipes connect that waste water from where you live to the sewage line that goes to the waste treatment plant. This is true all over the country. Imagine how much PVC we use in this country.

So this is really about the ability to enter into an international marketplace and make a tremendous amount of money. Ironically, this plan does not include Japan, not in a way that would cause harm or environmental destruction to the people and the ecology of Japan; yet, it is okay to do it in the United States, because our laws do not exclude the use and production of PVC. The United States constricts what you can do with the PVC, how you produce it, and how workers are exposed to the vinyl polymers as they are made and manufactured, but they do not prohibit the use of PVC. So, in one sense, Japan is psychologically far ahead of the United States in their understanding of ecosystem de-

struction, and serious long-term environmental consequences.

CONCLUSION

The environmental protection apparatus in this country is broken and needs to be fixed. The current paradigm institutionalizes unequal enforcement, trades human health for profit, places the burden of proof on those impacted by pollution, not on the polluting industries, and legitimates human exposure to harmful chemicals, pesticides and hazardous wastes. It promotes risky technologies, exploits the vulnerability of economically and political disenfranchised communities, subsidizes ecological destruction, creates an industry around risk assessment, delays cleanups, and fails to develop pollution prevention, waste minimization, and cleaner technologies and production methods as the overarching goal.

Governments, local, state, federal and tribal, must live up to their mandate of protecting all peoples and the environment. The call for environmental and economic justice does not stop at the U.S. borders, but extends to communities and nations that are threatened by the export of hazardous waste, toxic products, and environmentally unsound technologies from the United States. The environmental justice movement has set out clear goals for eliminating unequal enforcement of environmental civil rights and public health laws.

The solution to environmental justice lies in the realm of equal protection of all individuals, groups, and communities. Many of these problems could be eliminated if existing environmental health, housing, land use, and civil rights laws were vigorously enforced in a nondiscriminatory way. No community should be allowed to fall outside the protections of our legal system. A nation that decries the uniqueness of its democratic system of government to the world, but denies its full protections

to all of its people, is hypocritical, at best, and insidious at worst. The dawning of the new century demands that we not drag the scourge of racism, injustice and inequality to the new age with us.