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A Taxonomy of Environmental Justice

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A Taxonomy of Environmental Justice

Robert R. Kuehn

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ARTICLES

A Taxonomy of Environmental Justice

by Robert R. Kuehn

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injustices, environmental justice is an amorphous term that wrongly suggests racial-based or class-based animus or, at the very least, indifference to the public health and welfare of distressed communities. The company may believe it did not even create, or at most only plays a small role in causing or solving, the community’s problems. To government officials often the target of environmental justice activists’ ire, the term may imply that they are executing their responsibilities in a biased or callous manner. Caught in the middle between local residents and industry, the call for environmental justice may pressure agency officials to move from a well-established, technocratic decisionmaking approach to a largely undefined, populist approach that encompasses issues beyond the comfortable domain of the agency.

Efforts to understand environmental justice are further complicated by the term’s international, national, and local scope; by its broad definition of the environment—where one lives, works, plays, and goes to school; and by its broad range of concerns—such as public health, natural resource conservation, and worker safety in both urban and rural environs. Disputes at the international level include allegations that governments and multinational corporations are exploiting indigenous peoples and the impoverished conditions of developing nations. At the national level, although an overwhelming number of studies show differences by race and income in exposures to environmental hazards, debate continues about the strength of that evidence and the appropriate political and legal response to such disparities. At the local level, many people of color and lower income communities believe that they have not been treated fairly regarding the distribution of the environmental benefits and burdens.

Over the past decade during which communities, academics, regulated firms, and government officials have struggled with issues of the relationship of environmental quality to race and class, the quest to explain the essence of the problems underlying environmental justice disputes has been manifested in the varying terminology and definitions used to refer to such disputes. This Article contends that such efforts have largely failed to capture the essence and breadth of the different types of environmental justice concerns alleged at the international, national, and local levels. The Article instead proposes a four-part categorization of environmental justice issues: (1) distributive justice; (2) procedural justice; (3) corrective justice; and (4) social justice. This taxonomic approach, which moves beyond definitions and expands upon the earlier works of Dr. Robert

“Environmental justice” means many things to many people. To local communities feeling overburdened by environmental hazards and left out of the decisionmaking process, it captures their sense of the unfairness of the development, implementation, and enforcement of environmental laws and policies. To regulated entities facing allegations that they have created or contributed to

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Bullard and others,¹ offers a method of collapsing the seemingly broad scope of environmental justice and identifying common causes of and solutions to environmental injustice. At its heart, this taxonomy seeks to identify the “justice” embodied in the concept of environmental justice.

Shifting Perspectives and Uses of Terms

The U.S. Environmental Protection Agency (EPA) initially used the term “environmental equity,” defined as the equitable distribution of environmental risks across population groups, to refer to the environmental justice phenomenon.² Because this term implies the redistribution of risk across racial and economic groups rather than risk reduction and avoidance, it is no longer used by EPA, though it is still used by some states.³

In some instances, the phrase “environmental racism,” defined as “any policy, practice or directive that differentially affects or disadvantages (whether intended or unintended) individuals, groups, or communities based on race or color,”⁴ is used to explain the differential treatment of populations on environmental issues. Commentators disagree over the proper usage of this term, particularly over whether an action having an unequal distributive outcome across racial groups would in itself be a sufficient basis to label an action environmental racism or whether the action must be the result of intentional racial animus.⁵ Today, many environmental justice advocates and scholars avoid the term “environmental racism,” though the phrase continues to be employed and is useful in identifying the insti-

tutional causes of some environmental injustices. This shift is attributable to a desire to focus on solutions rather than mere identification of problems, as well as a desire to encompass class concerns and not to be limited by issues of intentional conduct.

In 1994, President Clinton issued Executive Order No. 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” and adopted the phrase “environmental justice” to refer to “disproportionately high and adverse human health or environmental effects . . . on minority populations and low-income populations.”⁶ Rather than explicitly defining the phrase, the Executive Order elaborated on its meaning by requiring each federal agency to develop strategies to achieve environmental justice by, at a minimum: (1) identifying and addressing disproportionately high and adverse human health or environmental effects of agency programs, policies, and activities on minority populations and low-income populations; (2) promoting enforcement of all health and environmental statutes in areas with minority or low-income populations; (3) ensuring greater public participation; (4) improving research and data collection relating to the health and environment of minority and low-income populations; and (5) identifying differential patterns of consumption of natural resources among minority and low-income populations.⁷

The Executive Order’s use of the term “environmental justice” is significant in at least three respects. First, the Executive Order focuses not only on the disproportionate burdens addressed by the term environmental equity, but also on issues of enforcement of environmental laws and opportunities for public participation. Second, the Executive Order identifies not just minorities but also low-income populations as the groups who have been subject to, and entitled to relief from, unfair or unequal treatment. Finally, the Executive Order, and in particular the accompanying memorandum, refers to environmental justice as a goal or aspiration to be achieved, rather than as a problem or cause.

In 1998, EPA’s Office of Environmental Justice set forth the Agency’s “standard definition” of environmental justice:

The fair treatment of people of all races, cultures, incomes, and educational levels with respect to the devel-

1. Professor Bullard was the first to propose classifying environmental justice concerns and defined three different equity categories: procedural, geographic, and social. See ROBERT D. BULLARD, *DUMPING IN DIXIE* 116 (2d ed. 1994); Robert D. Bullard, *Overcoming Racism in Environmental Decisionmaking*, 36 ENV’T 11, 12-15 (1994). Professor Kenneth Manaster later argued that three concepts of justice support the philosophical foundations of environmental law: distributive justice, corrective justice, and procedural justice. KENNETH A. MANASTER, ENVIRONMENTAL PROTECTION AND JUSTICE 23 (1995). Professor Alice Kaswan organized environmental justice into two categories: distributive justice and political justice. Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and “Justice,”* 47 AM. U. L. REV. 221, 230 (1997). Professor Dorceta Taylor observed that the environmental justice movement is concerned with two kinds of justice: distributive justice and corrective or commutative justice. Dorceta E. Taylor, *The Rise of the Environmental Justice Paradigm*, 43 AM. BEHAV. SCI. 508, 537 (2000).

2. See U.S. EPA, REDUCING RISK FOR ALL COMMUNITIES, VOL. 1: WORKGROUP REPORT TO THE ADMINISTRATOR 2 (1992).

3. See Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L.Q. 1, 27-29 (1995).

4. Robert D. Bullard, *Environmental Racism and “Invisible” Communities*, 96 W. VA. L. REV. 1037, 1037 (1993-1994); Robert D. Bullard, *Leveling the Playing Field Through Environmental Justice*, 23 VT. L. REV. 453, 465 (1999). The phrase “environmental discrimination” has also been used to refer to the “disparate treatment of a group or community based on race, class, or some other distinguishing characteristic” and includes the “process of defending one group’s privilege gained at the expense of another.” BULLARD, *DUMPING IN DIXIE*, *supra* note 1, at 24-25. Professor Dorceta Taylor defines environmental racism or environmental discrimination as “the process by which environmental decisions, actions, and policies result in racial discrimination.” Taylor, *supra* note 1, at 536.

5. See Jill E. Evans, *Challenging the Racism in Environmental Racism: Redefining the Concept of Intent*, 40 ARIZ. L. REV. 1219, 1273-77 (1998); Sheila Foster, *Race(al) Matters: The Quest for Environmental Justice*, 20 ECOLOGY L.Q. 721, 733-38 (1993); Gerald Torres, *Introduction: Understanding Environmental Racism*, 63 U. COLO. L. REV. 839, 839-40 (1992).

6. Exec. Order No. 12898, 3 C.F.R. 389 (1994), reprinted in 42 U.S.C. §4321 (1994), ADMIN. MAT. 45075. The federal government’s Interagency Working Group on Environmental Justice states that a “low-income population” should be identified using the U.S. Census’ annual statistical poverty thresholds from the U.S. Bureau of Census. INTERAGENCY WORKING GROUP ON ENVIRONMENTAL JUSTICE, GUIDANCE FOR FEDERAL AGENCIES ON KEY TERMS IN EXECUTIVE ORDER 12,898 (1995), reprinted in COUNCIL ON ENVIRONMENTAL QUALITY, EXECUTIVE OFFICE OF THE PRESIDENT, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT, app. A (1997). The Interagency Working Group guidance defines “minority” as any person who is American Indian or Alaskan Native; Asian or Pacific Islander; Black; or Hispanic. “Minority populations” are where either the minority population of the affected area exceeds 50% or the minority percentage is meaningfully greater than the minority population in the general population or other appropriate unit of geographic analysis.

7. Exec. Order No. 12898, *supra* note 6, §1-103(a). For a further discussion of the Executive Order and its terms, see the memorandum accompanying the Executive Order and the Interagency Working Group’s guidance on key terms in the Executive Order. Presidential Memorandum Accompanying Executive Order 12898, 30 WEEKLY COMP. PRES. DOC. 279 (Feb. 11, 1994) (available from the ELR Document Service, ELR Order No. AD-1134); INTERAGENCY WORKING GROUP ON ENVIRONMENTAL JUSTICE, *supra* note 6.

opment and enforcement of environmental laws, regulations, and policies. Fair treatment implies that no population should be forced to shoulder a disproportionate share of exposure to the negative effects of pollution due to lack of political or economic strength.⁸

Going beyond the issues of disproportionate exposures and participation in the development and enforcement of laws and policies, EPA further elaborated that environmental justice:

is based on the premise that: 1) it is a basic right of all Americans to live and work in “safe, healthful, productive, and aesthetically and culturally pleasing surroundings”; 2) it is not only an environmental issue but a public health issue; 3) it is forward-looking and goal-oriented; and 4) it is also inclusive since it is based on the concept of fundamental fairness, which includes the concept of economic prejudices as well as racial prejudices.⁹

Professor Bunyan Bryant defines environmental justice as referring “to those cultural norms and values, rules, regulations, behaviors, policies, and decisions to support sustainable communities, where people can interact with confidence that their environment is safe, nurturing, and protective.”¹⁰ Some critics of environmental justice contend that these definitions of environmental justice by government agencies and environmental justice advocates are so broad and aspirational as not to state clearly the ends of environmental justice.¹¹

An alternative approach to defining environmental justice that does state its desired ends, albeit very ambitious ones, was developed by environmental justice leaders during the 1991 First People of Color Environmental Leadership Summit. Its “Principles of Environmental Justice” sets forth a 17-point paradigm that includes, inter alia, a call for the cessation of the production of all toxins, hazardous

wastes, and radioactive materials; recognizes the fundamental right to political, economic, cultural, and environmental self-determination of all peoples; holds all producers of waste strictly accountable for damages and protects the right of victims of environmental injustice to receive full compensation and reparations; demands the right to participate as equal partners at every level of decisionmaking; affirms the right of all workers to a safe and healthy work environment; and recognizes the special legal and natural relationship of native peoples to the U.S. government.¹²

Dr. Robert Bullard has distilled the principles of environmental justice into a framework of five basic characteristics: (1) protect all persons from environmental degradation; (2) adopt a public health prevention of harm approach; (3) place the burden of proof on those who seek to pollute; (4) obviate the requirement to prove intent to discriminate; and (5) redress existing inequities by targeting action and resources.¹³ In his view, environmental justice seeks to make environmental protection more democratic and asks the fundamental ethical and political questions of “who gets what, why and how much.”¹⁴

Though these definitions and principles are essential to understanding the environmental justice phenomenon, my experience in teaching the subject suggests that neither fully informs the audience of the similarity of themes and concerns that arise in environmental justice disputes. Students and lawyers are often left without an understanding of unifying themes or common political, legal, or economic approaches to addressing allegations of injustice. The classification method set forth in this Article seeks to overcome this shortcoming and to advance the understanding of environmental justice by disassembling the term into the four traditional notions of “justice” that are implicated by allegations of environmental injustice.

Environmental Justice as Distributive Justice

Of the four aspects of justice implicated by the use of the term environmental justice, distributive justice concerns have received the most attention from government officials, scholars, and communities.

The Meaning and Relevance of “Distributive Justice”

Distributive justice has been defined as “the right to equal treatment, that is, to the same distribution of goods and opportunities as anyone else has or is given.”¹⁵ Aristotle is often credited with the first articulation of the concept and explained it as involving “the distribution of honour, wealth, and the other divisible assets of the community, which may

8. Memorandum from Barry E. Hill, Director, Office of Environmental Justice, EPA, to Deputy Regional Administrators, EPA et al. (Dec. 16, 1998) (on file with author) (quoting OFFICE OF SOLID WASTE AND EMERGENCY RESPONSE, U.S. EPA, GUIDE TO ENVIRONMENTAL ISSUES—EARTH DAY 25 EDITION (EPA/OSWER Directive No. 520/B-94-001 (Apr. 1995)). For an earlier and slightly less expansive definition, see U.S. EPA, ENVIRONMENTAL JUSTICE STRATEGY: EXECUTIVE ORDER 12898 1-2 (1995) (available from the ELR Document Service, ELR Order No. AD-1177).

According to EPA, to be classified as an “environmental justice community”:

residents must be a minority and/or low income group; excluded from the environmental policy setting and/or decision-making process; subject to a disproportionate impact from one or more environmental hazards; and experience a disparate implementation of environmental regulations, requirements, practices and activities in their communities.

U.S. EPA, *What Is Environmental Justice?* (visited Mar. 9, 2000) <<http://es.epa.gov/oeca/main/ej/faq.html>>.

9. Memorandum from Barry E. Hill, *supra* note 8. A somewhat more expansive government definition by the National Institute of Environmental Health Sciences states: “[Environmental justice] upholds those cultural norms and values, rules, regulations, and policies or decisions to support sustainable communities . . . is supported by clean air, water and soil . . . is supported by democratic decisionmaking and personal empowerment.” NATIONAL INST. OF ENVTL. HEALTH SCIENCES, SYMPOSIUM ON HEALTH RESEARCH AND NEEDS TO ENSURE ENVIRONMENTAL JUSTICE: EXECUTIVE SUMMARY OF RECOMMENDATIONS ii (1994).

10. Bunyan Bryant, *Introduction*, in ENVIRONMENTAL JUSTICE: ISSUES, POLICIES, AND SOLUTIONS 1, 6 (Bunyan Bryant ed., 1995).

11. See CHRISTOPHER H. FOREMAN JR., THE PROMISE AND PERIL OF ENVIRONMENTAL JUSTICE 11-13 (1998).

12. Principles of Environmental Justice, First National People of Color Environmental Leadership Summit (Oct. 27, 1991), reprinted in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE 215-17 (Bunyan Bryant & Paul Mohai eds., 1992), and in JIM SCHWAB, DEEPER SHADES OF GREEN 441-43 (1994). For an extended analysis of the Principles of Environmental Justice, see Taylor, *supra* note 1, at 537-45.

13. Robert D. Bullard, *Environmental Justice for All*, in UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE & COMMUNITIES OF COLOR 3, 10-11 (Robert D. Bullard ed., 1996); Bullard, *Leveling the Playing Field Through Environmental Justice*, *supra* note 4, at 454-57.

14. *Id.*; see also Robert D. Bullard, *Environmental Justice for All: It's the Right Thing to Do*, 9 J. ENVTL. L. & LITIG. 281, 307 (1994).

15. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 273 (1977).

be allotted among its members.”¹⁶ The focus of this aspect of justice is on fairly distributed outcomes, rather than on the process for arriving at such outcomes.

In an environmental context, distributive justice involves the equitable distribution of the burdens resulting from environmentally threatening activities or of the environmental benefits of government and private-sector programs. More specifically, in an environmental justice context, distributive justice most commonly involves addressing the disproportionate public health and environmental risks borne by people of color and lower incomes.¹⁷

Dr. Bullard labels this aspect of environmental justice “geographic equity,” referring to the location and spatial configuration of communities and their proximity to unwanted land uses.¹⁸ Although many distributive justice issues do involve the proximity of populations to threatening land uses, issues of distribution are also impacted, for example, by nongeographic allegations that certain racial, ethnic, or income groups are disproportionately exposed to occupational hazards.

The Executive Order on environmental justice focuses predominantly on distributive justice concerns by directing agencies to develop strategies for identifying and addressing disproportionately high and adverse human health and environmental effects on minority and lower income populations.¹⁹ The Principles of Environmental Justice address distributive justice when demanding that all peoples be free from any form of discrimination and calling for universal protection from, and the cessation of the production of, harmful materials and wastes.²⁰

Distributive justice concerns are also reflected in complaints under Title VI of the Civil Rights Act of 1964 alleging that a recipient of federal financial assistance has unlawfully created, through an environmental program or decision, a “disproportionate burden” or “disparate impact” on a racial class.²¹ Similarly, equal protection clause lawsuits alleging racial discrimination in landfill siting decisions have all involved allegations of distributive injustice.²²

Distributive justice in an environmental justice context does not mean redistributing pollution or risk. Instead, environmental justice advocates argue that it means equal protection for all and the elimination of environmental hazards and the need to place hazardous activities in any community.²³ In other words, distributive justice is achieved through a lowering of risks, not a shifting or equalizing of existing risks.

With such a strong focus on the inequitable distribution by race and income of environmental hazards, an often overlooked aspect of distributive justice is that it also involves the distribution of the benefits of environmental programs and policies, such as parks and beaches, public transportation, safe drinking water, and sewerage and drainage.²⁴

Allegations of Distributive Injustice

At the international level, distributive justice concerns have been raised, for example, by reports that a Taiwan plastics company, unable to find a location in Taiwan to dispose of its mercury wastes, shipped the hazardous waste to Cambodia, where it ended up in an open pit, killing a local worker and threatening water supplies.²⁵ Questions of distributive justice are also raised by the actions of U.S. oil companies in harming the natural resources of indigenous populations in South America, and by the practice of shipping pesticides banned for use in the United States to developing countries and their less protected farmworkers.²⁶ In a controversial 1991 memo, Lawrence Summers, now Secretary of the Treasury in the Clinton Administration, argued that, regardless of distributive justice concerns, the World Bank should encourage more exportation of waste to the least-developed countries: “I think the economic logic behind dumping a load of toxic waste in the lowest-wage country is impeccable and we should face up to that.”²⁷

Although the first national environmental justice protest occurred in 1982 over the planned disposal of polychlorinated biphenyl (PCB) wastes in Warren County, North Carolina, widespread allegations of inequality in the distribution of environmental risks emerged on the national scene in 1987 with the release of a study by the United Church of Christ. The study, “Toxic Wastes and Race in the United States,” reviewed the demographic characteristics around commercial hazardous waste facilities and found that race was the most significant factor in predicting the likelihood of living near such a facility—communities with the greatest number of commercial hazardous waste facilities had the highest composition of racial and ethnic resi-

16. ARISTOTLE: THE NICHOMACHEAN ETHICS, BOOK V 267 (H. Rackham trans., Cambridge Univ. Press 1982). Relying on Aristotle’s definition of distributive justice, some philosophers argue that “a political authority must define and particularize the scope or criterion of any scheme of distribution.” Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 989 (1988).

17. Kaswan, *supra* note 1, at 230-33.

18. Bullard, *Overcoming Racism in Environmental Decisionmaking*, *supra* note 1, at 13; BULLARD, DUMPING IN DIXIE, *supra* note 1, at 116.

19. Exec. Order 12898, *supra* note 6, §§1-101, 103(a).

20. Principles of Environmental Justice, *supra* note 12, at nos. 2, 4, 6.

21. See 42 U.S.C. §2000d (1994). This focus on disproportionate impacts or effects, rather than intent, is not unique to environmental justice and is also present in government actions addressing childhood health risks. See Protection of Children From Environmental Health Risks and Safety Risks, Exec. Order No. 13045, §1-101, 3 C.F.R. 198 (1997), reprinted in 42 U.S.C.A. §4321 (West Supp. 1999), ADMIN. MAT. 45088; Michael E. Mattheisen, *The U.S. Environmental Protection Agency’s New Environmental Civil Rights Policy*, 19 VA. ENVTL. L.J. 183, 192 n.45 (1999).

22. See R.I.S.E., Inc. v. Kay, 768 F. Supp. 1146 (E.D. Va. 1991), *aff’d without decision*, 977 F.2d 573 (4th Cir. 1992); East Bibb Twiggs Neighborhood Ass’n v. Macon-Bibb Planning & Zoning Comm’n, 706 F. Supp. 880 (M.D. Ga.), *aff’d*, 896 F.2d 1264 (11th Cir. 1989); Bean v. Southwestern Waste Management Corp., 482 F. Supp. 673 (S.D. Tex. 1979), *aff’d without decision*, 782 F.2d 1038 (5th Cir. 1986).

23. See, e.g., Bullard, *Overcoming Racism in Environmental Decisionmaking*, *supra* note 1, at 43; Deoohn Ferris, *A Challenge to EPA: An Environmental Justice Office Is Needed*, 18 EPA J., Mar./Apr. 1992, at 28.

24. See Michael Gelobter, *The Meaning of Urban Environmental Justice*, 21 FORDHAM URB. L.J. 841, 844, 852-53 (1994).

25. *What to Do With All That Waste?*, BUS. WK., Jan. 18, 1999, at 26.

26. See Marcia Coyle, *Suits Test Environmental Jurisdiction*, NAT’L L.J., Feb. 8, 1999, at B1 (reporting on lawsuits alleging that Texaco damaged the Oriente region of the Amazon rain forest and threatened the public health of indigenous tribes); Diana Jean Schemo, *U.S. Pesticide Kills Foreign Fruit Pickers’ Hopes*, N.Y. TIMES, Dec. 6, 1995, at A12 (reporting on allegations that the pesticide DBCP, banned in the United States in 1977, was later exported to Latin America, Africa, and the Philippines).

27. *Let Them Eat Pollution*, ECONOMIST, Feb. 8, 1992, at 66.

dents.²⁸ A 1994 update of the original study found that distributional inequities were increasing—the concentration of people of color living around commercial hazardous waste facilities had increased by almost 25% between 1980 and 1993.²⁹

A persistent national distributive justice problem involves pesticides and farmworkers. Ninety percent of the hired farmworkers in the United States are people of color, an occupation that exposes them to significant amounts of pesticides and leaves them unprotected by the Occupational Safety and Health Act, the National Labor Relations Act, and some provisions of the Fair Labor Standards Act.³⁰ Besides the obvious issue that, as farmworkers, people of color receive less protection from the law and are disproportionately exposed to greater amounts of harmful pesticides, environmental justice advocates note that EPA has often taken quick action to address possible threats to the general public from consuming pesticide-tainted foods but has been painfully slow to regulate pesticides that pose threats to farmworkers.³¹

Native American tribes have complained that their lands have been targeted for waste disposal facilities and disproportionately impacted by mining and nuclear weapons testing, resulting in harm to natural resources and public health with little direct benefit to tribal members.³² Congress' initial failure to authorize tribes to obtain environmental regulatory authority comparable to the states and the continuing lack of adequate funding to address environmental problems on Indian lands also raise issues of distributive justice—the benefit of environmental protection programs has not been fairly distributed to tribes and their members.³³

Three systematic reviews of available empirical evidence concluded that studies overwhelmingly indicate that the distribution of pollution is inequitable by race and income, with race the most strongly correlated indicator. Professors Mohai and Bryant found that in 16 of 17 studies, the distribution of pollution was inequitable by race, and in 17 of 21, inequitable by income; in 7 of the 10 cases where distribution was analyzed by both income and race, race was more strongly related to the incidence of pollution than income.³⁴ Benjamin Goldman reported that all but one of the 64 empirical studies of possible disparities found that people of color and lower income groups face greater environmental impacts than other population groups, regardless of the kind of environmental concern or the level of geographic specificity examined.³⁵ Racial disparities were found more than income disparities, and when race and income were compared to see if either factor was more significantly related to the environmental disparity, race proved to be more important in nearly three-quarters of the tests.³⁶ Finally, an unpublished 1995 Colorado State University review of 30 studies on the distribution of 46 different environmental risks found that over 80% of the results showed race and class disparities.³⁷

Some researchers have questioned the methodology used in some studies finding racial or class disparities,³⁸ and a

28. COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, *TOXIC WASTES AND RACE IN THE UNITED STATES* 13-14 (1987). The United Church of Christ study confirmed an earlier study by the U.S. General Accounting Office that found that African Americans comprised the majority of the population around three of the four hazardous waste landfills in the southeastern United States. U.S. GAO, *SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH THE RACIAL AND SOCIO-ECONOMIC STATUS OF THE SURROUNDING COMMUNITIES* (1983).

29. BENJAMIN A. GOLDMAN & LAURA FITTON, *TOXIC WASTES AND RACE REVISITED* 2-3 (1994). The report did not determine the cause of the increase, which could be due, for example, to an influx of people of color into areas with waste facilities, "white flight" from such areas, the closure of facilities in predominantly white areas, or the siting of new facilities in predominantly people of color neighborhoods.

30. Marion Moses et al., *Environmental Equity and Pesticide Exposure*, 9 *TOXICOLOGY & INDUS. HEALTH* 913 (1993); Marion Moses, *Farmworkers and Pesticides*, in *CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS* 161 (Robert D. Bullard ed., 1993); Ivette Perfecto & Baldemar Valasquez, *Farm Workers: Among the Least Protected*, 18 *EPA J.*, Mar./Apr. 1992, at 13.

31. See Robert D. Bullard, *Conclusion: Environmentalism With Justice*, in *CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS* 195, 199 (Robert D. Bullard ed., 1993) (comparing EPA's quick response to the Alar scare with its slow action to regulate Parathion).

32. See, e.g., Tom B.K. Goldtooth, *Indigenous Nations: Summary of Sovereignty and Its Implications for Environmental Protection*, in *ENVIRONMENTAL JUSTICE: ISSUES, POLICIES, AND SOLUTIONS* 138, 143-45 (Bunyan Bryant ed., 1995) (summarizing disparate environmental impacts on indigenous lands); Joe Sanchez, *The Western Shoshone: Following Earth Mother's Instructions*, 3 *RACE, POVERTY & ENV'T*, Fall 1992, at 10.

33. See Dean B. Suagee, *The Indian Country Environmental Justice Clinic: From Vision to Reality*, 23 *VT. L. REV.* 567, 577, 581 (1999) (noting that Congress enacted several environmental statutes and EPA issued a host of regulations in the 1970s that either totally overlooked or barely mentioned tribes and that tribal environmental programs are underfunded and understaffed).

34. Paul Mohai & Bunyan Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 *U. COLO. L. REV.* 921, 925-27 (1992); see also Paul Mohai & Bunyan Bryant, *Environmental Racism: Reviewing the Evidence*, in *RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE* 163, 165-69 (Bunyan Bryant & Paul Mohai eds., 1992).

35. BENJAMIN A. GOLDMAN, *NOT JUST PROSPERITY: ACHIEVING SUSTAINABILITY WITH ENVIRONMENTAL JUSTICE* 8 (1994). The 64 studies examined proximity to industrial facilities, human exposure to toxic substances, ambient concentrations of air pollutants, regulatory costs and benefits, and health effects. *Id.* at 4. The level of geographic specificity analyzed included national, metropolitan statistical areas, counties, cities, ZIP codes, and census tracts. *Id.*

Professor Vicki Been also has documented the results of a number of studies of distributional inequities. Vicki Been, *Environmental Justice and Equity Issues*, in 4 *ZONING AND LAND USE CONTROLS* 25D-10 to 27 (Patrick J. Rohan ed., 1995).

36. GOLDMAN, *supra* note 35, at 8.

37. See Evan J. Ringquist, *Environmental Justice: Normative Concerns and Empirical Evidence*, in *ENVIRONMENTAL POLICY: NEW DIRECTIONS FOR THE TWENTY-FIRST CENTURY* 232, 241 & n.32 (Norman J. Vig & Michael E. Kraft eds., 2000) (reporting the results of a paper presented by David Allen, James Lester, and Kelly Hill, "Prejudice, Profits, and Power: Assessing the Eco-Racism Thesis at the County Level," at the annual meeting of the Western Political Science Association, Portland, Oregon, 1995).

Other reviews have found racial and income disparities in environmental exposures. After examining the available scientific literature and information obtained from site visits, the National Research Council's Committee on Environmental Justice concluded that minority and low-income communities "experience higher levels of exposure to environmental stressors in terms of both frequency and magnitude." COMMITTEE ON ENVIRONMENTAL JUSTICE, INSTITUTE OF MEDICINE, *TOWARD ENVIRONMENTAL JUSTICE* 6 (1999). EPA similarly concluded in its 1992 report on environmental equity: "Racial minority and low-income populations experience higher than average exposures to selected air pollutants, hazardous waste facilities, contaminated fish, and agricultural pesticides in the workplace." U.S. EPA, *REDUCING RISK FOR ALL COMMUNITIES* *supra* note 2, at 3.

38. See, e.g., THOMAS LAMBERT ET AL., *A CRITIQUE OF "ENVIRONMENTAL JUSTICE"* 4-6 (1996); Rae Zimmerman, *Issues of Classification in Environmental Equity: How We Manage Is How We Measure*, 21 *FORDHAM URB. L.J.* 633 (1994); John J. Fahs Bender, *An Analytical Approach to Defining the Affected Neighborhood in the Environmental Justice Context*, N.Y.U. *ENVTL. L.J.* 120 (1996).

few recent individual studies have not found evidence of distributive inequities. A 1994 University of Massachusetts study, for example, found no significant differences between the racial or ethnic compositions of areas around commercial hazardous waste facilities and those areas that do not contain such facilities.³⁹ However, when similar comparison populations are used, the University of Massachusetts study yields results that support the conclusions of the United Church of Christ study.⁴⁰

A 1995 U.S. General Accounting Office study found that minorities and low-income people were not overrepresented near a majority of nonhazardous municipal landfills; its review of 10 existing studies on hazardous waste facilities found varied results on whether minorities or lower income persons were overrepresented near such facilities.⁴¹

Professor Vicki Been's research revealed that although the percentage of African Americans or Hispanics in a census tract is a significant predictor of whether or not the tract hosts a commercial hazardous waste facility, it provides no significant evidence as to African Americans, but does as to Hispanics, that the percentage of minorities in the census tract affected the probability that the area would be chosen to host a facility.⁴² While Been's findings do not negate claims of present distributional inequities, they do raise questions about the causes of, and possible solutions to, racial disparities in the proximity of populations to waste facilities.

Some of the best known local environmental justice disputes have involved dramatic evidence of distributive inequities.

In *Chester Residents Concerned for Quality Living v. Seif*,⁴³ residents of Chester, Pennsylvania, alleged that the

state's issuance of a permit for a new waste facility would create an unlawful disparate impact on African-American residents. As evidence, they noted that Chester, with a population of 42,000, 65% of which are African American, had become the designated dumping grounds for the rest of Delaware County, with a population of 502,000, 91% of which are white.⁴⁴ Though one-twelfth the size of the county, Chester already has five permitted waste facilities, while the rest of Delaware County has only two. All of Delaware County's municipal waste and sewage is processed in Chester, although only 7.5% of the county's population resides in the town.⁴⁵ Most dramatically, the permitted capacity for the waste facilities in the much smaller city of Chester are 1,500 times greater than the permitted capacity for the remaining facilities in Delaware County (2.1 million tons vs. 1,400 tons), and the capacity per person for the waste facilities in the 65% African-American Chester area is almost 18,000 times greater than the capacity per person for the facilities in 91% white Delaware County.

The dispute over a proposal by Shintech to build a new polyvinyl chloride (PVC) plant in the lower income, 84% African-American community of Convent, Louisiana, also raised substantial distributive justice concerns. An analysis of toxic air emissions from the 10 existing petrochemical plants in the Convent area revealed that residents were already exposed to 251,179 pounds of toxic air pollution per square mile per year, and Shintech proposed to emit an additional three million pounds of air pollution per year, over 600,000 pounds of which would be toxic.⁴⁶ This existing cumulative impact on the 84% African-American Convent-area residents is 67 times greater than the toxic air pollution burden for the rest of St. James Parish (the third most polluted parish in the state and 43.5% African American), 93 times greater than the average toxic air pollution exposure per square mile for the heavily polluted Louisiana Mississippi River industrial corridor (36.8% African American), 129 times greater than Louisiana's average exposure per square mile (the second most polluted state in the nation and 30.8% African American), and 658 times higher than the average toxic air pollution exposure per square mile in the United States (12% African American). EPA's disparate impact analysis, using its "relative emissions burden ratio" method, found that, were Shintech permitted to operate, African Americans in St. James Parish would experience a

39. Douglas L. Anderton et al., *Environmental Equity: The Demographics of Dumping*, 31 DEMOGRAPHY 229, 243-44 (1994). A later study by other researchers at the University of Massachusetts using 29 measures of environmental quality found just the opposite: "Race and ethnicity are strongly associated with a lack of environmental quality." John A. Hird & Michael Reese, *The Distribution of Environmental Quality: An Empirical Analysis*, 79 Soc. Sci. Q. 694, 694 (1998).

40. Hird & Reese, *supra* note 39, at 711; Paul Mohai, *The Demographics of Dumping Revisited: Examining the Impact of Alternate Methodologies in Environmental Justice Research*, 14 VA. ENVTL. L.J. 615, 617-28; Fahs Bender, *supra* note 38, at 165.

41. U.S. GAO, HAZARDOUS AND NONHAZARDOUS WASTE: DEMOGRAPHICS OF PEOPLE LIVING NEAR WASTE FACILITIES 4 (1995). For a discussion of conflicting study results, see John E. Milner & John Turner, *Environmental Justice*, 13 NAT. RESOURCES & ENV'T 478 (1999).

42. Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOLOGY L.Q. 1, 33 (1997). Been's research did show that the percentage of Hispanics at the beginning of a decade increased the probability that the tract would be selected to host a facility in that decade. *Id.* A 1995 study of St. Louis area housing found that poor and minority residents moved into low-cost housing after polluting facilities were already built. See CHRISTOPHER BOERNER & THOMAS LAMBERT, ENVIRONMENTAL JUSTICE IN THE CITY OF ST. LOUIS: THE ECONOMICS OF SITING INDUSTRIAL AND WASTE FACILITIES (Center for the Study of American Business Working Paper No. 156, 1995).

43. 132 F.3d 925, 28 ELR 20487 (3d Cir. 1997), *vacated*, 524 U.S. 974 (1998). Although the U.S. Supreme Court granted certiorari in the case to decide whether or not a private cause of action exists under EPA's Title VI regulations, the Court vacated the case as moot when the company withdrew its permit application. Since the Supreme Court's action on the *Chester* appeal, the Third and Eleventh Circuits have recognized, although not in environmental justice cases, a private cause of action under Title VI for violations of a federal agency's disparate impact regulations. See *Powell v. Ridge*, 189

F.3d 387, 397-400 (3d Cir.), *cert. denied*, 120 S. Ct. 579 (1999); *Sandoval v. Hagan*, 197 F.3d 484, 501-07 (11th Cir. 1999); *but see New York City Envtl. Justice Alliance v. Giuliani*, 50 F. Supp. 2d 250, 253-54 (S.D.N.Y. 1999) (holding it is unlikely a private right of action is available under EPA's Title VI regulations), *aff'd on other grounds*, No. 99-7713, 2000 WL 694152 (2d Cir. May 31, 2000).

44. 132 F.3d at 927 n.1, 28 ELR at 20488 n.1.

45. Mark Jaffe, *Minority Areas Gain in Suit on Waste Sites*, PHIL. INQUIRER, Jan. 1, 1998, at A1.

46. Analysis based on 1995 U.S. EPA toxics release inventory data for the 50-square-mile area displayed in map, "Convent Area School and Toxic Release Inventory Sites With 1995 Total Air Emissions (1998)," prepared by Charles A. Flanagan. See FROM PLANTATIONS TO PLANTS: REPORT OF THE EMERGENCY NATIONAL COMMISSION ON ENVIRONMENTAL AND ECONOMIC JUSTICE IN ST. JAMES PARISH, LOUISIANA 7, 9 (1998) (includes Flanagan map); *Public Notice, Louisiana Dep't of Environmental Quality, Air Quality Division, Request for Public Comment and Notification of a Public Hearing on a Proposed Air Pollution Source, St. James Chemical Production Complex, Shintech Inc. and Its Affiliates, Convent, St. James Parish, Louisiana*, ADVOCATE (Baton Rouge, La), Nov. 7, 1996, at 10C (projected air pollution emissions for Shintech facility).

71% to 242% greater toxic air pollution burden than non-African Americans in the parish.⁴⁷

The proposal to develop a uranium enrichment facility in the poor, 97% African-American communities of Center Springs and Forest Grove in Claiborne Parish, Louisiana, also triggered allegations that low-income and minority communities were being asked to assume disproportionate environmental risks. In testimony before the Nuclear Regulatory Commission, an expert witness demonstrated that at each progressively more selective stage in the uranium company's site selection process, the level of poverty and African Americans in a one-mile radius around possible sites rose dramatically—from 28% African American during the initial review of 78 sites, to 37% African American when the sites were narrowed to 37, to 65% when the focus was narrowed to 6 sites in Claiborne Parish, until finally settling on the proposed site with a 97% African-American population.⁴⁸ This testimony also revealed how institutionalized racism and the subconscious biases of those involved in the site selection process result in the selection and application of siting criterion that create the disproportionate siting of environmentally risky operations in lower income and African-American communities.⁴⁹

A somewhat different twist on allegations of distributive injustice is presented by the air pollution trading strategy developed by California's South Coast Air Quality Management District. The District's program creates "smog markets" that allow Los Angeles-area industries to buy and scrap old, high-polluting automobiles driven by area residents and, in return, get credits that allow the industries to avoid reducing air pollution at their facilities.⁵⁰ Environmental justice advocates complained that, although such trades may lead to improved air quality over the entire air quality region, they shift air pollution to and create "hot spots" in the communities around the facilities, which are disproportionately lower income and minority.⁵¹

The adverse impacts encompassed by complaints of distributive inequities need not involve only threats from pollution or the loss of natural resources. Noise, odors, blowing trash, aesthetic concerns, increased traffic, termites, decreased property values and uses, fires, accidents, psycho-

logical harm, and other nuisance or quality-of-life impacts also may support a claim of distributive injustice.⁵²

Finally, local environmental justice struggles have involved allegations that people of color and lower income communities have not received their fair share of public health services and other environmental amenities. Although not labeled at the time as an environmental justice case, African-American residents successfully sued a Florida town under the Equal Protection Clause in *Dowdell v. Apopka*⁵³ to obtain equal municipal services such as park and recreational facilities, sewerage and stormwater drainage, a water distribution system, and paving and maintenance of streets. The disparity of environmental amenities between white, well-to-do neighborhoods and those where people of color and lower incomes live is also evidenced by New York City's actions some years ago in creating 225 neighborhood parks, with only 2 in African-American communities.⁵⁴

More recently, environmental justice advocates in Atlanta and Los Angeles alleged that transportation planning and spending was disparately impacting low-income and minority populations by, among other things, failing to address the transportation needs of inner-city residents and by favoring suburban residents.⁵⁵ In Atlanta, these allegations resulted in a significant shift in transportation spending toward older neighborhoods, which will now obtain not only improved public transportation, but also upgraded sidewalks, trees, and lighting.⁵⁶ Given the significant environmental and social impacts as well as the large amounts of money involved in road projects, distributive justice issues are likely to arise more frequently in proposed transportation projects.⁵⁷

47. U.S. EPA, TITLE VI ADMINISTRATIVE COMPLAINT RE: LOUISIANA DEPARTMENT OF ENVIRONMENTAL QUALITY PERMIT FOR PROPOSED SHINTECH FACILITY: SUMMARY DOCUMENTATION OF DRAFT REVISED DEMOGRAPHIC ANALYSIS, Table C5 (Apr. 1998).

48. In re Louisiana Energy Servs., L.P. (Claiborne Enrichment Center), 45 N.R.C. 367, 386 (1997), 1997 WL 458771 (N.R.C.), 1997 NRC LEXIS 20 (Atomic Safety and Licensing Board May 1, 1997), *aff'd in part & rev'd in part*, 47 N.R.C. 77 (1998), 1998 WL 191132 (N.R.C.), 1998 NRC LEXIS 7 (Nuclear Regulatory Commission Apr. 3, 1998).

49. *Id.*, 45 N.R.C. at 385-89. See also Bullard, *Leveling the Playing Field Through Environmental Justice*, *supra* note 4, at 473-76.

50. See Marla Cone, *Civil Rights Suit Attacks Trade in Pollution Credits*, L.A. TIMES, July 23, 1997, at A1; see also Scott Kuhn, *Expanding Public Participation Is Essential to Environmental Justice and the Democratic Decisionmaking Process*, 25 ECOLOGY L.Q. 647, 650-53 (1999).

51. Under a new EPA draft guidance, states must ensure that communities populated by minorities or people with low incomes are not disproportionately impacted by economic incentive programs. OFFICE OF AIR & RADIATION, U.S. EPA, DRAFT ECONOMIC INCENTIVE PROGRAM GUIDANCE 47-51 (Sept. 1999).

52. See, e.g., North Baton Rouge Env'tl. Ass'n et al., Complaint Under Title VI of the Civil Rights Act, No. 10R-97-R9 (June 8, 1998) (alleging broad range of nuisance and quality of life impacts from proposed landfill in Alsen, Louisiana); see also OFFICE OF CIVIL RIGHTS, U.S. EPA, DRAFT REVISED GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS §VI.B.2.a & app. A (June 2000) (adverse impacts, or "stressors," may include physical factors such as noise and odors), reprinted in 65 Fed. Reg. 39649 (June 27, 2000) (available from the ELR Document Service, ELR Order No. AD-4516) [hereinafter DRAFT REVISED TITLE VI GUIDANCE].

53. 511 F. Supp. 1375 (M.D. Fla. 1981), *aff'd in part & rev'd in part on other grounds*, 698 F.2d 1181 (11th Cir. 1983); see also Johnson v. Arcadia, 450 F. Supp. 1363 (M.D. Fla. 1978) (inequality of services and facilities to black residents with respect to street paving, parks and recreation, and water supply system violated plaintiffs' constitutional rights). Similarly, a recent Title VI administrative complaint filed with EPA against the city of Indianapolis alleges that city officials have disproportionately spent more money for improvements to sewer systems in neighborhoods with low percentages of minority residents and neglected the needs of areas with larger minority populations. *Indiana Environmental Justice Case Provides EPA With "Easy Win,"* INSIDE EPA, Oct. 29, 1999, at 23.

54. Gelobter, *supra* note 24, at 853 (citing ROBERT A. CARO, THE POWER BROKER 510 (1974)); see also Vernice D. Miller, *Planning, Power and Politics: A Case Study of the Land Use and Siting History of the North River Water Pollution Control Plant*, 21 FORDHAM URB. L.J. 707, 714 (1994).

55. See Mark Murray, *Seeking Justice in Roads and Runways*, 32 NAT'L J., Mar. 4, 2000, at 712.

56. David Goldberg, *Transit Priorities Shifting: No New Road Money in Plan*, ATLANTA J., June 24, 1999, at C1.

57. See *Agencies Advocate Rights Reviews in Transportation Planning Processes*, 30 Env't Rep. (BNA) at 1376 (Nov. 26, 1999); *Title VI Issues Seen Increasing in Transportation Projects, Plans*, Daily Env't Rep. (BNA), Feb. 4, 2000, at A-10; see also 65 Fed. Reg. 33921 (May 25, 2000) (proposed revisions to regulations governing the development of metropolitan and statewide transportation plans and programs; includes regulatory language to implement Executive Order No. 12898).

Implications of Distributive Injustice

Dramatic as these instances of disparity are, they do not provide a standard for determining when a disparate impact is inequitable. To date, there is no consensus as to what constitutes a “minority” or “low-income” community, the appropriate boundary of the “affected community,” or the appropriate “reference community.”⁵⁸ Furthermore, there is no agreed methodology or standard for determining the degree of disparity that might be legally significant under Title VI, and the issue of what would constitute an “adverse” impact, while addressed in the circumstances of EPA’s decision in *St. Francis Prayer Center v. Michigan Department of Environmental Quality (Select Steel)*⁵⁹ case, remains controversial. Even were agreement reached on the methodological issues and a legally actionable disparate impact found, there is no consensus on what would be a fair way to address the inequities, with proposals ranging from doing nothing, to ensuring compensation for affected communities, to banning activities that will add to the disparity.⁶⁰

The inability to articulate standards for resolving allegations of distributive injustice does not make the claims of affected communities any less legitimate or the evidence of distributive inequities any less disturbing. It does mean, however, that until legislatures, agencies, or courts confront these political and legal issues, instances of distributive injustice are likely to go unresolved.

Environmental Justice as Procedural Justice

Claims of procedural injustice also are common in environmental justice disputes, and it is not usual for people of color and low-income communities to complain about both the distributive and procedural aspects of an environmental policy or decision. Indeed, in many situations, a community’s judgment about whether or not an outcome was distributively just will be significantly determined by the perceived fairness of the procedures leading to the outcome.⁶¹

58. For a discussion of proposed methodologies to address these issues, see DRAFT REVISED TITLE VI GUIDANCE, *supra* note 52, §VI.5; U.S. EPA & SCIENCE ADVISORY BOARD, AN SAB REPORT: REVIEW OF DISPROPORTIONATE IMPACT METHODOLOGIES (Dec. 1998); REGION 2 ENVIRONMENTAL JUSTICE WORK GROUP, U.S. EPA, IMPLEMENTATION GUIDANCE TO THE U.S. EPA REGION 2 DRAFT INTERIM POLICY ON IDENTIFYING EJ AREAS—PART II (June 1999).

59. See DRAFT REVISED TITLE VI GUIDANCE, *supra* note 52, §VI.B.6 (“for both demographic disparity and disparity of impact, there is no fixed formula or analysis to be applied”); TITLE VI IMPLEMENTATION ADVISORY COMMITTEE, U.S. EPA, REPORT OF THE TITLE VI IMPLEMENTATION ADVISORY COMMITTEE 6-7 (Mar. 1, 1999) (committee disagrees about whether a facility’s compliance with existing regulatory requirements should defeat a Title VI claim and about the degree of disparity needed to support a Title VI complaint); Letter from Ann E. Goode, Director, Office of Civil Rights, U.S. EPA, to Father Phil Schmitter, Co-Director, St. Francis Prayer Center, et al. (Oct. 30, 1998) (*Select Steel* decision letter holds that, because emissions from the proposed facility are within EPA’s presumptively safe health-based standards, no adverse effect would result from the permitted facility).

60. See Vicki Been, *What’s Fairness Got to Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1027-68 (1993); Seth D. Jaffe, *The Market’s Response to Environmental Inequity: We Have the Solution; What’s the Problem?*, 14 VA. ENVTL. L.J. 655, 656 (1995).

61. Jeffrey Rachlinski, *Perceptions of Fairness in Environmental Regulation*, in STRATEGIES FOR ENVIRONMENTAL ENFORCEMENT 339, 347 (Barton H. Thompson Jr. ed., 1995).

The Meaning and Relevance of “Procedural Justice”

Procedural justice has been defined as “the right to treatment as an equal. That is the right, not to an equal distribution of some good or opportunity, but to equal concern and respect in the political decision about how these goods and opportunities are to be distributed.”⁶² Aristotle referred to this as a status in which individuals have an “equal share in ruling and being ruled.”⁶³ It involves justice as a function of the manner in which a decision is made, and it requires a focus on the fairness of the decisionmaking process, rather than on its outcome.

Dr. Bullard terms this aspect of environmental justice “procedural equity”—the need for democratic decisions—which encompasses inclusiveness, representation, parity, and communication.⁶⁴ Professor Kaswan refers to it as “political justice,” reflecting her belief that achieving environmental justice will require changing the political dynamic so that all groups are treated fairly in decision-making processes.⁶⁵

The Executive Order on environmental justice has a strong focus on procedural justice, directing agencies to ensure greater public participation and access to information for minority and low-income populations.⁶⁶ The Principles of Environmental Justice demand that public policy be based on mutual respect and justice for all peoples and free from bias or discrimination, affirm the fundamental right to self-determination, and insist on the right to participate as equal partners at every level of decisionmaking.⁶⁷

Environmental justice complaints raise both *ex ante* and *ex post* considerations of procedural fairness.⁶⁸ Looking at the process in advance of its use (*ex ante*), they question whether the decisionmaking and public participation procedures are fair to all concerned or whether they favor one side over the other. Also, looking back (*ex post*), the complaints question whether the completed decisionmaking process did, in fact, treat all with equal concern and respect.

One way to judge procedural justice *ex ante* is to determine if those to be affected by the decision agree in advance on the process for making the decision. Thus, procedural justice requires looking not just to participation in a process but to whether the process is designed in a way to lead to a fair outcome.⁶⁹ In this respect, environmental decisionmaking processes have been roundly criticized by commentators who have examined issues of environmental justice and public participation. One common observation is

62. DWORKIN, *supra* note 15, at 273.

63. Steven J. Heyman, *Aristotle on Political Justice*, 77 IOWA L. REV. 851, 863 (1992); see also ARISTOTLE, POLITICS III.13 (Carnes Lorde trans., 1984).

64. BULLARD, DUMPING IN DIXIE, *supra* note 1, at 116; U.S. EPA, GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA’S NEPA COMPLIANCE ANALYSIS 42-43 (1998) (explaining the characteristics of Dr. Bullard’s public involvement strategies) (available from the ELR Document Service, ELR Order No. AD-3856); Bullard, *Overcoming Racism in Environmental Decisionmaking*, *supra* note 1, at 12.

65. Kaswan, *supra* note 1, at 224.

66. Exec. Order No. 12898, *supra* note 6, §§1-103(a), 5-5.

67. Principles of Environmental Justice, *supra* note 12, at nos. 2, 5, 7.

68. See generally Bruce L. Hay, *Procedural Justice—Ex Ante vs. Ex Post*, 44 UCLA L. REV. 1803 (1997).

69. JOHN RAWLS, A THEORY OF JUSTICE 85-86 (1971).

that the predominant expertise-oriented, interest-group model of environmental decisionmaking favors those with resources and political power over people of color and low-income communities.⁷⁰ Even the civil republican process, which outwardly seeks to advance community interests over private interests, may obscure the true private interests at issue and the continuing disparities in resources, power, and influence.⁷¹ In general, to achieve procedural justice, observers advocate developing more deliberative models of decisionmaking, providing disadvantaged groups with greater legal and technical resources, and ensuring equal access to decisionmakers and the decision-making process.⁷²

Environmental justice communities also commonly complain about the implementation of the process (i.e., the ex post aspect) as set forth in the allegations of procedural injustice described below.

Allegations of Procedural Injustice

Internationally, the American Anthropological Association has chronicled an array of procedural abuses in the International Financing Corporation's funding of a dam project in an area populated by the Pehuenche, an indigenous group in Chile.⁷³ These abuses involved failing to identify the Pehuenche as among those affected by the project, failing to provide opportunities for the Pehuenche's participation in decisionmaking, negotiating impact agreements without the awareness or involvement of the native peoples, manipulating language on project impacts, and withholding a report on potential damage from the dam.⁷⁴ Secrecy and lack of public participation also are typical of the circumstances surrounding the export of toxic wastes to developing countries.⁷⁵

A common procedural justice complaint at the national level is that people of color and lower income communities have had little influence on the decisionmaking processes of legislatures and environmental agencies. "[Racial minorities] have not been well represented among the interest groups lobbying and litigating before government authorities on environmental protection issues. Nor have they been well represented, especially at the national level, within those governmental organizations actively involved in the relevant environmental process."⁷⁶ Thus, while overexposed to environmental risks, people of color and lower income communities are underrepresented in environmental policymaking agencies and commissions, have fewer technical, legal, and other resources to participate effectively in decisionmaking processes, and are able to exert less political influence over the officials that make environmental decisions.⁷⁷ Even where citizens are able to participate, environmental decisionmakers are skeptical of the validity of citizen information and are biased in favor of the scientific data submitted by regulated industries.⁷⁸

Underrepresentation on the technical or scientific boards and commissions that make environmental decisions and recommendations is also a problem, particularly since the actions of these boards often reflect politics and personal values.⁷⁹ For example, the 48-member EPA Science Advisory Board (SAB) committee that issued the influential report comparing the relative risks of various environmental hazards and helped set the Agency's regulatory agenda contained only one representative of community and environmental groups, much less a representative of the interests of lower income or people of color populations.⁸⁰ There also has only been token representation of workers on committees that recommend workplace exposure standards and of affected communities on other EPA advisory committees.⁸¹

Another procedural justice aspect is the manner in which the government collects and analyzes data on environmen-

70. See, e.g., Denis J. Brion, *An Essay on LULU, NIMBY, and the Problem of Distributive Justice*, 15 B.C. ENVTL. AFF. L. REV. 437, 441-47 (1988); Sheila Foster, *Justice From the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 801-02, 832-33 (1998); Eileen Gauna, *The Environmental Justice Misfit: Public Participation and the Paradigm Paradox*, 17 STAN. ENVTL. L.J. 3, 31-47 (1998); R. Gregory Roberts, *Environmental Justice and Community Empowerment: Learning From the Civil Rights Movement*, 48 AM. U. L. REV. 229, 253-54 (1998).

71. Gauna, *supra* note 70, at 49-50.

72. See, e.g., OFFICE OF CIVIL RIGHTS, U.S. EPA, DRAFT TITLE VI GUIDANCE FOR EPA ASSISTANCE RECIPIENTS ADMINISTERING ENVIRONMENTAL PERMITTING PROGRAMS §II.B.2 (June 2000), reprinted in 65 Fed. Reg. 39649 (June 27, 2000) (available from the ELR Document Service, ELR Order No. AD-4517); NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL, U.S. EPA, THE MODEL PLAN FOR PUBLIC PARTICIPATION 2-5 (Nov. 1996); NICHOLAS A. ASHFORD & KATHLEEN M. REST, PUBLIC PARTICIPATION IN CONTAMINATED COMMUNITIES VII-5 to 19 (1999); John Applegate, *Beyond the Usual Suspects: The Use of Citizen Advisory Boards in Environmental Decisionmaking*, 73 IND. L.J. 903, 952-56 (1998); Foster, *supra* note 70, at 833-37; Gauna, *supra* note 70, at 51-71.

73. See Jeffrey B. Gracer, *Protecting Citizens of Other Countries*, in THE LAW OF ENVIRONMENTAL JUSTICE 718, 726 (Michael B. Gerrard ed., 1999); Committee for Human Rights, American Anthropological Ass'n, *The Pehuenche, the World Bank Group and ENDES S.A.* (visited Apr. 19, 2000) <<http://www.aaanet.org/committees/cfhr/rptpehuenc.htm>>.

74. Committee for Human Rights, *supra* note 73.

75. See, e.g., Mutombo Mpanya, *The Dumping of Toxic Waste in African Countries: A Case of Poverty and Racism*, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE 204 (Bunyan Bryant & Paul Mohai eds., 1992); Ibrahim J. Wani, *Poverty, Governance, the Rule of Law, and International Environmentalism*, 1 KAN. J.L. & PUB. POL'Y 37 (1991).

76. Richard J. Lazarus, *Pursuing "Environmental Justice" The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 819-20 (1992).

77. See Paul Mohai & Bunyan Bryant, *Race, Poverty, and the Environment*, 19 EPA J., Mar./Apr. 1992, at 6, 7.

78. Ann Bray, *Scientific Decision Making: A Barrier to Citizen Participation in Environmental Agency Decision Making*, 17 WM. MITCHELL L. REV. 1111, 1128 (1991) (reporting results of a survey of environmental agency staff). The institutional bias of environmental agencies is revealed by the finding that, while skeptical about the accuracy of citizen information, "[a]gency staff were more likely to view industry data as accurate despite the inadequacy of agency resources to test the data." *Id.*

79. See Robert R. Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, 1996 U. ILL. L. REV. 103, 165 (noting that agency scientific committees "issue recommendations that go far beyond objective science and enter the realms of politics and values. The scientific review process that the boards undertake, however, 'appears not to be the objective, dispassionate process that its advocates represent it to be.'")

80. Mary O'Brien, *A Proposal to Address, Rather Than Rank, Environmental Problems*, in WORST THINGS FIRST? 87, 91-92 (Adam M. Finkel & Dominic Golding eds., 1994). One public interest scientist observed that, had the committee been more representative of those exposed to the hazards, it would have ranked relative environmental risks differently. *Id.* at 91-92.

81. See Barry I. Castleman & Grace E. Ziem, *Corporate Influence on Threshold Limit Values*, 13 AM. J. INDUS. MED. 531, 554 (1988) (noting the lack of workers on occupational safety and health committees); Gauna, *supra* note 70, at 60 (noting the failure of EPA's New Source Review Subcommittee to include any representative from impacted communities).

tal exposures and public health. In one case, EPA and the National Institutes of Health announced a \$15 million, 10-year epidemiological study on the health of farmers and farmworkers that would omit Hispanics from the study, even though farmworkers are largely Hispanic.⁸² The justification for the omission? The difficulty of tracking the highly mobile Hispanic population.⁸³

In addition, commentators have questioned whether the use of risk assessment and cost-benefit analysis in environmental decisionmaking may prejudice peoples of color and lower income populations.⁸⁴ They point out, among other concerns, that these analytical methods may fail to recognize and protect susceptible subpopulations, squeeze out consideration of nonquantitative information, undervalue those without money, and exclude disadvantaged groups from the decisionmaking process.⁸⁵

The continuing failure of EPA to investigate and resolve Title VI complaints raises concerns about the Agency's commitment to treating all with equal concern and respect. Although mandated to render a decision within 180 days of accepting a Title VI complaint for investigation,⁸⁶ EPA's Office of Civil Rights has issued only 1 decision on the merits, and has a backlog of over 40 Title VI complaints, some pending since 1993.⁸⁷ In contrast, under pressure from the state of Michigan and business interests, EPA issued a decision (its only decision on the merits) denying the Title VI complaint in the *Select Steel* case within 90 days of accepting the complaint for investigation.⁸⁸ Congress likewise has shown little concern for fair treatment of those alleging environmental discrimination, having twice inserted riders in EPA's appropriations that prohibit the Agency from implementing its Title VI interim guidance with respect to complaints filed after October 21, 1998.⁸⁹

In addition to concerns about the swiftness with which EPA decided the *Select Steel* case, EPA's Office of Civil Rights has been criticized for the manner in which it made

its decision. A coalition of Title VI complainants alleged that, in addition to factual and legal errors in the decision, EPA did not comply with the steps outlined in its own guidance for investigating Title VI administrative complaints, did not follow its own guidance on cumulative impacts, ignored the recommendation of EPA's SAB, relied on incorrect information from the target of the investigation, and denied complainants the opportunity to review and rebut the state's information, thereby raising questions about the Agency's credibility and "the due process accorded the complainants."⁹⁰

The breadth of national procedural justice concerns is reflected in a 1990 letter from environmental justice groups to the 10 largest national nonprofit environmental organizations. The community groups complained that the national environmental organizations had failed to hire sufficient numbers of people of color and requested that the organizations take immediate steps to diversify their staffs and boards.⁹¹

Native Americans often raise procedural justice issues arising from their treaty rights, cultural and religious beliefs, or unique sovereign status. The Mattaponi Tribe filed a lawsuit and Title VI complaint against state agencies that approved the construction of the King William Reservoir in Virginia. The tribe alleged that during the permit application process the agencies were willing to consider non-Indian fishing, recreational, wetland, forest, and agricultural interests but refused to consider tribal treaty rights and cultural values.⁹² The Assiniboine and Gros Ventre Tribes successfully challenged the failure of the Bureau of Land Management to consider and protect tribal resources from the adverse impacts of off-reservation mining activities.⁹³ A number of tribes have objected to the failure of government officials and private developers to respect and protect places that have religious and cultural importance for Indian tribes,⁹⁴ and President Clinton issued an executive order in

82. *NIH Omits Hispanics in Farmworker Study*, 18 COSSMHO REP., Apr. 1993 - Oct. 1993, at 1 (a publication of the National Coalition of Hispanic Health & Human Services Organizations).

83. *Id.* When an Hispanic organization complained, the National Institute of Environmental Health Sciences stated that another study was being planned that would later focus on Hispanic farmworkers. *Id.*

84. See, e.g., Carl F. Cranor, *Risk Assessment, Susceptible Subpopulations, and Environmental Justice*, in THE LAW OF ENVIRONMENTAL JUSTICE 307 (Michael B. Gerrard ed., 1999); Lisa Heinzerling, *The Rights of Statistical People*, 24 HARV. ENVTL. L. REV. 189 (2000); Kuehn, *supra* note 79; Thomas O. McGarity, *A Cost-Benefit State*, 50 ADMIN. L. REV. 7 (1998).

85. See Cranor, *supra* note 84, at 326-33; Heinzerling, *supra* note 84, at 192-95; Kuehn, *supra* note 79, at 116-49; McGarity, *supra* note 84, at 50-74.

86. 40 C.F.R. §7.115(c)(1) (1999).

87. Office of Civil Rights, U.S. EPA, *Status Summary Table of EPA Title VI Administrative Complaints (04/17/00)* (visited May 26, 2000) <<http://www.epa.gov/civilrights/docs/t6stapr2000.pdf>>; Office of Civil Rights, U.S. EPA, *Title VI Complaints Filed with EPA* (visited May 26, 2000) <<http://www.epa.gov/civilrights/doc/t6csapr2000.pdf>>.

88. See Luke W. Cole, "Wrong on the Facts, Wrong on the Law": *Civil Rights Advocates Excoriate EPA's Most Recent Title VI Misstep*, 29 ELR 10775, 10776 (Dec. 1999).

89. See Appropriations for Departments of Veterans Affairs and Housing and Urban Development and for Sundry Independent Agencies for Fiscal Year Ending September 30, 2000, Pub. L. No. 106-74 (H.R. 2684), 113 Stat. 1047, 106th Cong. tit. III (1999); Appropriations for Departments of Veterans Affairs and Housing and Urban Development and for Sundry Independent Agencies for Fiscal Year Ending September 30, 1999, Pub. L. No. 105-276 (H.R. 4194), 112 Stat. 2461, 105th Cong. tit. III (1998).

90. Joint Petition to Re-Open Select Steel Investigation, or, in the Alternative, to Set Aside Investigative and Analytical Methods, EPA No. 5R-98-R5, at 27-31 (Mar. 1, 1999) (on file with author). EPA denied the joint petition without providing a formal response to the allegations. Cole, *supra* note 88, at 10780 & n.48 (citing letter from Ann E. Goode, Director, Office of Civil Rights, EPA, to Luke W. Cole et al. (July 29, 1999)).

91. See Claudia MacLachlan, *Tension Underlies Rapport With Grassroots Groups*, NAT'L L.J., Sept. 21, 1992, at S10.

92. See Petition for Appeal, *Mattaponi Indian Tribe v. Virginia Dep't of Env'tl. Quality*, No. 30001-RW (Newport News Va. Cir. Ct. 1998) (on file with author); Letter from Hope M. Babcock & Jeffrey C. Nelson, Institute for Public Representation, Georgetown University Law Center, to Ann E. Goode, Director, Office of Civil Rights, EPA (June 16, 1998) (on file with author). The trial court dismissed the lawsuit for lack of standing, and this decision was affirmed on appeal. *Mattaponi Indian Tribe v. Virginia*, 524 S.E.2d 167 (Va. App. Ct. 2000).

93. *Indian Mountain Protectors*, 144 I.B.L.A. 168, 183-85 (Interior Bd. Land Appeals 1998) (holding that the Bureau of Land Management's (BLM's) trust obligation to a tribe extends to actions BLM takes off-reservation that uniquely impact tribal members or property on a reservation).

94. See, e.g., Gwyn Mellinger, *Suit Centers on Religious Practices*, LAWRENCE J.-WORLD (Lawrence, Kan.), Mar. 28, 1997 (reporting on objections to the construction of the South Lawrence Trafficway in Lawrence, Kansas, through sacred grounds on the Haskell Indian Nations University campus); James Brooke, *Highway Plans a Monument to Suburban Sprawl*, CHI. TRIB., May 17, 1998, at 1 (reporting on opposition to the construction of a six-lane highway through the Petroglyph National Monument outside Albuquerque, New Mexico). A plaintiff in the lawsuit to stop the South Lawrence Trafficway

1996 requiring federal agencies to accommodate tribal access to sacred sites and to avoid adverse impacts on the physical integrity of the sites.⁹⁵ The widely publicized attempts to site waste facilities on Native American lands also raise procedural justice concerns, including the issue of the right of sovereign tribes to make their own decisions as to the use of their lands and to have those decisions respected by government agencies and environmental organizations.⁹⁶

The Shintech case again dramatically illustrates the extent of local procedural justice issues. As is common in environmental justice disputes, local residents opposing the petrochemical plant complained about the lack of sufficient public notice, inconvenient times and places for public hearings, exclusion from agency meetings, and inaccessibility of important documents.⁹⁷ Additional procedural justice problems arose from the governor of Louisiana's position that equal treatment of all persons was not the goal of the air permitting process: "The [Louisiana Department of Environmental Quality's] job is to go out and make it as easy as they can [for Shintech] within the law."⁹⁸ These efforts by the state involved not only approving a 34-page, single-spaced

analysis, with 28 technical appendices, of the likely environmental and social impacts of the huge project within a day of its submission and instructing state employees to "be sure we do everything we can to prevent them [Shintech opponents] from tying up the permit application process,"⁹⁹ but also the surreptitious use of an employee in the office of the secretary of the Louisiana Department of Environmental Quality (LDEQ) to organize a local group to support Shintech and the use of taxpayer funds and state employees to investigate and compile dossiers on plant opponents.¹⁰⁰ The governor derided community environmental justice leaders, mostly women, as "a bunch of housewives" who should not be making public policy.¹⁰¹

One judge noted, after reviewing allegations of over 40 instances of bias by the state in the permitting process, that the LDEQ official in charge of issuing the air permits had specifically instructed his staff to treat the local residents as adversaries of the state agency.¹⁰² The local parish government, during the time it was considering a request by Shintech for a coastal use permit, used taxpayer funds to mail an anonymous flyer to local residents urging them to support Shintech.¹⁰³ The parish president also secretly compiled dossiers for Shintech detailing the race, sex, and attitudes of 18 parish officials whose approval was needed in order to build the plant; the dossiers were destroyed when plant opponents sought to obtain a copy.¹⁰⁴

Efforts to limit the ability of Shintech opponents to participate in the decisionmaking process even included threats by the governor to cut off Tulane University's tax-exempt status and efforts to get business interests to boycott the university, all because the school's environmental law clinic was providing free legal assistance to local residents.¹⁰⁵

remarked: "All we ask is the same kind of respect . . . that our ancestors extended to your ancestors when they first arrived fleeing religious oppression. I don't think that's a very unreasonable thing to ask." Mellinger, *supra* note 94.

The failure of laws and government officials to recognize and protect sacred sites may also be viewed as a distributive justice issue since the religious and cultural values of Native Americans are not provided the same treatment accorded to the values of European Americans.

95. Exec. Order No. 13007, 61 Fed. Reg. 26771 (1996), reprinted in 42 U.S.C.A. §1996 (2000). The order does not create any new right, benefit, or trust responsibility. *Id.* §4.

96. See Foster, *supra* note 70, at 805-07. Professor Foster argues that both racial paternalism and cultural imperialism arise where government agencies or those with environmental interests do not respect the right of a tribe to make its own decisions. *Id.* at 806. "[I]n Indian country, a vision of environmental justice must include the tribal right of self-government. . . . This means that tribal governments must be involved in performing the full range of functions that governments are expected to do in protecting the environment: making the law, implementing the law, and resolving disputes." Suagee, *supra* note 33, at 572.

The National Environmental Justice Advisory Council has issued a draft guidance on consultation and public participation issues relating to tribal governments and environmentally impacted tribal communities. NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL, U.S. EPA, WORKING DRAFT—GUIDE ON CONSULTATION AND COLLABORATION WITH INDIAN TRIBAL GOVERNMENTS AND THE PUBLIC PARTICIPATION OF INDIGENOUS GROUPS AND TRIBAL CITIZENS (Aug. 1999).

97. See Amended Complaint Under Title VI of the Civil Rights Act, Re: Louisiana Dep't of Env'tl. Quality/Permit for Proposed Shintech Facility, No. 04R-97-R6 (July 16, 1997) (on file with author) (documenting public participation problems); Motion to Recuse DEQ Officials, In re Shintech, Inc. and Its Affiliates (LDEQ Mar. 6, 1998) (on file with author) (same); see also Luke W. Cole, *Civil Rights, Environmental Justice and the EPA: The Brief History of Administrative Complaints Under Title VI of the Civil Rights Act of 1964*, 9 J. ENVTL. L. & LITIG. 309, 326-69 (1994) (documenting similar procedural concerns plead by complainants in the nine Title VI complaints accepted for investigation by EPA as of September 1994).

98. Lolis Eric Elie, *A Call From the Governor*, TIMES-PICAYUNE (New Orleans, La.), Sept. 4, 1998 at B-1. The governor also characterized environmental regulation as a form of harassment against honest businesses and called EPA "our only enemy" when it questioned the state's behavior during the Shintech permitting process. Ed Anderson, *Foster Likes Casino Deal's Chances in Special Session*, TIMES-PICAYUNE (New Orleans, La.), Mar. 1, 1998, at A-10; *A Welcome Focus on Environment*, ADVOCATE (Baton Rouge, La.), Oct. 28, 1997, at 18B.

99. See Motion to Recuse DEQ Officials, *supra* note 97; Ed Anderson & Chris Gray, *Foster Endorses Probes of Shintech Adversaries*, TIMES-PICAYUNE (New Orleans, La.), Nov. 7, 1997, at A-3; Vicki Ferstel, *Shintech's Opponents Tracked*, ADVOCATE (Baton Rouge, La.), Nov. 5, 1997 at 1A; Memorandum from Kevin P. Reilly Sr., Louisiana Dep't of Economic Development, to Harold Price, Louisiana Dep't of Economic Development (Nov. 15, 1996) (on file with author).

100. Motion to Recuse DEQ Officials, *supra* note 97; Vicki Ferstel, *Groups Want DEQ Officials Off Shintech Case*, ADVOCATE (Baton Rouge, La.), Dec. 9, 1997, at 1A; Chris Gray, *State Favors Shintech Plant, Opponents Say*, TIMES-PICAYUNE (New Orleans, La.), Dec. 9, 1997, at B-3.

101. John McQuaid, *Burdens on the Horizon*, TIMES-PICAYUNE (New Orleans, La.), May 21, 2000, at J-5. Governor Foster is quoted as saying: "This [actions by female environmental justice activists] is a great way to stop development, but that is not good public policy. If you want a bunch of housewives making public policy, that's a good approach." *Id.*; see generally Robert R.M. Verchick, *In a Greener Voice: Feminist Theory and Environmental Justice*, 19 HARV. WOMEN'S L.J. 23, 27 (noting that women dominate the leadership and ranks of grass-roots environmental justice organizations).

102. Written Reasons for Judgment, *St. James Citizens for Jobs & the Env't v. Louisiana Dep't of Env'tl. Quality*, No. 448928 (19th La. Dist. Ct. Aug. 31, 1998) (on file with author).

103. Ron Nixon, *Toxic Gumbo*, S. EXPOSURE, Summer/Fall 1998, at 11, 14 (parish president's office anonymously mailed pro-Shintech flyer, using public funds, to more than 400 parish residents on a job waiting list).

104. Leah Bankston, *Economic Development or Environmental Racism?*, GRIS GRIS (Baton Rouge, La.), Jan. 1998, at 17; Vicki Ferstel, *Shintech Plans Draw Environmentalist Suit*, ADVOCATE (Baton Rouge, La.), June 14, 1997, at 1B.

105. Marcia Coyle, *Governor v. Students in \$700M Plant Case*, NAT'L L.J., Sept. 8, 1997, at 1; Susan Hansen, *Backlash on the Bayou*, AM. LAW., Jan./Feb. 1998, at 50; Marsha Shuler, *Foster: Threat Against Tulane Is Appropriate*, ADVOCATE (Baton Rouge, La.), July 24,

Frustrated with Tulane's refusal to back down, the governor and business interests later were successful in pressing a majority of the elected justices of the Louisiana Supreme Court to impose new restrictions on the state's law clinics that would prevent them from providing free legal assistance to communities raising claims of environmental injustice.¹⁰⁶ Although local residents complained to EPA that Louisiana's widespread actions to discourage local residents and their attorneys from raising environmental justice claims violated the Agency's regulation prohibiting any person from intimidating, threatening, coercing, or discriminating against any individual or group because they have participated in any way in a Title VI investigation, EPA has failed to act on the complaint.¹⁰⁷

In addition to the procedural justice issues arising from the manner in which the state handled the permitting process, the Shintech case illustrates the ex ante obstacles that people of color and lower income communities confront. Under the state permitting process, the permit applicant has an automatic right, if requested, to an adjudicatory hearing, yet local residents have no such right.¹⁰⁸ In the view of the LDEQ, the permit applicant may also, upon a minimal showing that the proceeding lacks the appearance of com-

plete fairness, force the recusal of an agency decisionmaker and have a neutral, third-party appointed to decide the merits of the permit application; again, local residents have no such right.¹⁰⁹ Thus, the process is designed to accord more procedural rights to a permit applicant, even where the applicant is not a state resident, property owner, or taxpayer and employs no person in the state, than it does to citizens who have lived in the affected area all their lives, own homes in the area, send their children to schools in the area, and work in the area.

The county's handling of a permit to build a hazardous waste incinerator near the Hispanic community of Kettleman City, California, illustrates the procedural barriers often encountered by ethnic communities. Despite the repeated, strong interest expressed by Hispanic-speaking residents to participate in the permitting process, environmental impact documents, meeting notices, and public hearing testimony were never provided in Spanish. The court in *El Pueblo Para el Aire y Agua Limpio v. County of Kings*¹¹⁰ held that the meaningful involvement of local residents was effectively precluded by the failure to provide Spanish translations and set aside the local permit. When similar translation concerns were raised by Vietnamese-speaking residents regarding efforts to reopen the Marine Shale hazardous waste incinerator in Amelia, Louisiana, the state responded that it would take care of the inability of the Vietnamese community to participate in the public hearing process after the permit was issued.¹¹¹

Implications of Procedural Injustice

An unresolved aspect of procedural justice is whether a fair process can negate a claim that a disproportionate outcome is unjust. Some argue that if the decisionmaker has given impartial attention to and consideration of competing claims to different benefits, an outcome would not be unjust even if the result were to subordinate one group to another.¹¹² A number of states have argued that, provided the

1997, at 1A. For an extended discussion of the ethical and social issues implicated in the attack on Tulane, see Robert R. Kuehn, *Denying Access to Legal Representation: The Attack on the Tulane Environmental Law Clinic*, 4 WASH. U. J.L. & POL'Y (forthcoming 2000).

106. *Frontline: Justice for Sale* (PBS television broadcast, Nov. 23, 1999); Chris Gray, *Court Reins in Student Lawyers*, TIMES-PICAYUNE (New Orleans, La.), June 18, 1998, at A-1; Mark Schleifstein, *Foster, Clinics Face Off on Rules*, TIMES-PICAYUNE (New Orleans, La.), Aug. 2, 1998, at A-1; Peter Joy, *Political Interference With Clinical Legal Education*, 74 TUL. L. REV. 235 (1999); *60 Minutes II: Buying Judges?* (CBS television broadcast, Mar. 27, 2000).

107. See Letter from Lisa W. Lavie & Robert R. Kuehn, Tulane Evtl. Law Clinic, to Michael Mattheisen et al., EPA (Dec. 9, 1997) (on file with author) (documenting efforts of Governor Foster and his staff to intimidate and threaten the Tulane Environmental Law Clinic and its clients); Letter from Elizabeth Teel, Tulane Evtl. Law Clinic, to Ann E. Goode, Director, Office of Civil Rights, EPA (Aug. 10, 1999) (on file with author) (further detailing efforts by state to threaten, intimidate, and discriminate against complainants and their attorneys and protesting failure of EPA to take action on the complaint); see also 40 C.F.R. § 7.100 (EPA's Title VI anti-interference regulation).

A similar, but also unaddressed, complaint of intimidation and discrimination against Louisiana residents raising environmental justice claims was filed with EPA over the actions of an LDEQ employee who showed up uninvited at a community meeting in Alsen, disrupted the meeting, and was abusive and insulting toward local residents. North Baton Rouge Evtl. Ass'n et al., Complaint Under Title VI of the Civil Rights Act, *supra* note 52; see Mike Dunne, *Group Claims DEQ Staff Disrupted Meeting*, ADVOCATE (Baton Rouge, La.), May 26, 1998, at B-1. Unidentified persons have also made unlawful threats and efforts to intimidate the leaders of the Chester, Pennsylvania, movement for environmental justice. See Foster, *supra* note 70, at 822-23.

108. See LA. REV. STAT. ANN. §30:2024 (West 2000) (if the LDEQ does not provide the requested adjudicatory hearing, the permit applicant may obtain de novo judicial review of the agency's decision); In re Carline Tank Servs., Inc., 626 So. 2d 258, 261 (La. App. Ct. 1993) (decision to grant an adjudicatory hearing to someone other than the permit applicant is strictly within the discretion of the LDEQ).

The LDEQ even argues that local residents who submit written comments on a proposed permit are not entitled to notice of the agency's final permit decision, except for any notice printed in the legal classified advertising section of the official state newspaper, and that the period for any appeal by local residents of an LDEQ decision begins to run when the permit applicant, not the affected residents, receives notice of the decision by certified mail. See In re Natural Resources Recovery, Inc., 752 So. 2d 369, 373-75 (La. App. Ct. 2000).

109. See In re Rollins Evtl. Servs., Inc., 481 So. 2d 113, 119 (La. 1985) (permit applicant may obtain recusal of LDEQ official upon showing that the agency proceeding lacks the appearance of complete fairness); In re Shintech & Its Affiliates, 734 So. 2d 772 (La. App. Ct.) (citizens may not obtain judicial review of the LDEQ's denial of their request that, because of bias, agency must recuse itself from the permitting decision), *writ denied*, 746 So. 2d 601 (La. 1999).

110. 22 ELR 20357 (Cal. Super. Ct. Dec. 30, 1991); see also Luke W. Cole, *The Struggle of Kettleman City for Environmental Justice: Lessons for the Movement*, 5 MD. J. CONTEMP. LEGAL ISSUES 67 (1993-1994).

111. See Petition—Thinh Cau, Oct. 10, 1991 (on file with author) (petition to LDEQ from members of local Vietnamese community complaining that they have been prevented from participating in the permit proceedings); Mark Schleifstein, *DEQ Clears Waste Burner*, TIMES-PICAYUNE (New Orleans, La.), Feb. 23, 1999, at A3 (final LDEQ permit includes requirement that emergency notifications also be made in Vietnamese); Electronic mail from Julie Delaune to Robert R. Kuehn (May 9, 2000) (the LDEQ repeatedly told local residents they would deal with their concerns after the permits were issued).

112. See H.L.A. HART, *THE CONCEPT OF LAW* 167 (2d ed. 1994) (arguing that a disparate distribution of benefits may be considered just if impartial attention was given to competing claims to the benefits); Michael Greenberg, *Proving Environmental Inequity in Siting Locally Unwanted Land Uses*, 4 RISK 235, 236 (1993) (if appropriate criteria are applied to every area, then the results of the siting decision are fair even if they disproportionately burden some groups and benefit others).

state establishes a collaborative process to address environmental justice concerns, the state should either be immune from citizen complaints alleging violations of Title VI of the Civil Rights Act or EPA should accord some deference to the state in judging an action's legality under Title VI.¹¹³

While environmental justice requires, at a minimum, a procedurally just process, the emphasis on disparate effects, rather than discriminatory intent, in the Executive Order, Principles of Environmental Justice, and Title VI's implementing regulations indicates that a fair process alone will not negate claims of distributive injustice.¹¹⁴ In addition, because communities have so little satisfaction with the processes and criteria employed in existing decisionmaking models, even if the process were carried out with perfect fairness, the use of an inherently biased model would lead many to believe that procedural and distributive injustices still prevail. Without an agreement in advance by all affected parties on a fair process, procedural, as well as distributive, justice will remain elusive.

Although there has been a great deal of discussion about the need to reform existing public participation models and although many government agencies now recognize their failure to ensure meaningful participation by disadvantaged populations, EPA's refusal to require that waste facilities and permitting agencies "make all reasonable efforts to ensure equal opportunity for the public to participate in the permitting process,"¹¹⁵ the antagonistic attitudes of some state officials toward allegations of environmental justice,¹¹⁶ the hostility of environmental justice critics toward government grants to community groups for environmental education and outreach efforts,¹¹⁷ and the assertions by some regulated entities that increased public participation is not appropriate¹¹⁸ do not bode well for finding consensus on the format of a fair decisionmaking process or for avoiding future allegations of procedural injustice.

Environmental Justice as Corrective Justice

The third aspect of justice encompassed by the term environmental justice is "corrective justice," a notion of justice that is sometimes referred to by other names and may be subsumed within claims for distributive or procedural justice.

The Meaning and Relevance of "Corrective Justice"

"Corrective justice" involves fairness in the way punishments for lawbreaking are assigned and damages inflicted on individuals and communities are addressed. Aristotle referred to this aspect of justice as "rectificatory" as "it treats the parties as equals and asks only whether one has done and the other suffered wrong, and whether one has done and the other has suffered damage"; if so, it attempts to restore the victim to the condition she was in before the unjust activity occurred.¹¹⁹ Corrective justice involves not only the just administration of punishment to those who break the law, but also a duty to repair the losses for which one is responsible.¹²⁰

The Executive Order on environmental justice reflects notions of corrective justice by directing agencies to develop strategies to promote enforcement of health and environmental statutes in minority and low-income populations and to collect, maintain, and analyze information on the race, national origin, and income of populations surrounding facilities or sites that became the subject of a substantial federal enforcement action.¹²¹ EPA's environmental justice definition encompasses corrective justice concerns in calling for "fair treatment . . . with respect to the development and enforcement of environmental laws, regulations, and policies."¹²²

The Principles of Environmental Justice express a strong corrective justice theme, calling for all producers of toxins and hazardous waste to be held strictly accountable for detoxification and defining environmental justice as protecting the right of victims of environmental injustice to receive full compensation and reparations for damages, as well as quality health care.¹²³ Similarly, Dr. Bullard's environmental justice framework invokes corrective justice in placing the burden of proof on those who seek to pollute and in redressing existing inequities by targeting enforcement and cleanup actions.¹²⁴

Therefore, as reflected in claims made in the environmental justice context, corrective justice encompasses many aspects of wrongdoing and injury and includes the concepts of "retributive justice,"¹²⁵ "compensatory jus-

113. See, e.g., TITLE VI IMPLEMENTATION ADVISORY COMMITTEE, *supra* note 59, at 26-29; New Jersey Department of Environmental Protection, "New Jersey Proposal for State Involvement in Environmental Equity Process" (undated) (on file with author); but see OFFICE OF CIVIL RIGHTS, U.S. EPA, DRAFT TITLE VI GUIDANCE FOR EPA ASSISTANCE RECIPIENTS ADMINISTERING ENVIRONMENTAL PERMITTING PROGRAMS, §II.C (EPA refuses to defer to a state's non-Title VI approaches but will accord "due weight" in appropriate circumstances to the results of analyses submitted by states).

114. See DRAFT REVISED TITLE VI GUIDANCE, *supra* note 52, §II ("it is possible to have a violation due to discriminatory public health or environmental effects without the presence of discrimination in the public participation process.") EPA also notes that it is possible to have a violation of Title VI based solely on discrimination in the procedural aspects of permitting without a finding of discrimination in the substantive outcome of that process. *Id.*

115. 60 Fed. Reg. 63417, 63420 (Dec. 11, 1995) (dropping language from Resource Conservation and Recovery Act public participation regulations due to concerns that the proposed language "was ambiguous, making compliance with the requirements difficult to evaluate and enforce, and could engender disputes and litigation").

116. See, e.g., Anderson, *supra* note 98 (Louisiana governor refers to EPA as "our only enemy" because of its investigation of environmental justice complaints filed against the state); David Mastio, *Engler Fights EPA Policy*, DETROIT NEWS, Sept. 2, 1998, at B1 (Michigan governor "intends to go on the offensive" against EPA's environmental justice policy).

117. See, e.g., David Mastio, *EPA Aids Activists Groups*, DETROIT NEWS, June 5, 1998, at A1.

118. See, e.g., *Fracas at Roundtable Shows Pitfalls of Public Involvement*, *Industry Says*, INSIDE EPA, Oct. 25, 1996, at 20.

119. Ellen Frankel Paul, *Set-Asides, Reparations and Compensatory Justice*, in NOMOS XXXIII: COMPENSATORY JUSTICE 97, 100-01 (John W. Chapman ed., 1991) (citing ARISTOTLE, NICOMACHEAN ETHICS, 1132a, 4-7 (Martin Ostwald trans., 1962)).

120. Jules L. Coleman, *The Practice of Corrective Justice*, 27 ARIZ. L. REV. 15, 30 (1995).

121. Exec. Order No. 12898, *supra* note 6, §§1-103(a), 3-302(b).

122. Memorandum from Barry E. Hill, *supra* note 8.

123. Principles of Environmental Justice, *supra* note 12, at nos. 6, 9.

124. Bullard, *Environmental Justice for All*, *supra* note 13, at 10.

125. NORMAN E. BOWIE, TOWARDS A NEW THEORY OF DISTRIBUTIVE JUSTICE 4 (1971). The concept of retributive justice is reflected in the notion "that fairness to citizens who make sacrifices by obeying the law requires that violators be punished rather than reap benefits for disregarding legal standards." Kent Greenawald, *Punishment*, 74 J. CRIM. L. & CRIMINOLOGY 343, 349 (1983).

justice,"¹²⁶ "restorative justice,"¹²⁷ and "commutative justice."¹²⁸ I adopt the term corrective justice here because environmental justice seeks more than just retribution or punishment of those who violate legal rules of conduct. Corrective justice is also preferred over the phrase compensatory justice because the latter term may imply that, provided compensation is paid, an otherwise unjust action is acceptable. It is also important to note that although some concepts of corrective justice view fault or wrongful gain as a necessary condition for liability,¹²⁹ environmental justice principles impose responsibility for damages regardless of fault (e.g., the polluter-pays principle). Corrective justice, therefore, is not used in the narrow Aristotelian rectificatory sense but instead in a broader, applied sense that violators be caught and punished and not reap benefits for disregarding legal standards and that injuries caused by the acts of another, whether a violation of law or not, be remedied.

Some actions that raise questions of corrective justice may also implicate distributive or procedural justice. Evidence that environmental laws are enforced less often or less stringently in certain communities could be an issue of distributive justice since an environmental program benefit, enforcement, is not equally distributed to all populations. Lax enforcement also can reflect a failure of government officials to treat all persons with equal concern and respect and a failure to ensure procedural justice.¹³⁰

Despite the overlap, viewing corrective justice as a distinct notion of environmental justice is preferable since environmental justice is concerned not just with unequal enforcement by government agencies but also with private party conduct that may damage individuals or communities yet not be subject to any possible governmental enforcement action. For example, toxic tort lawsuits and community requests for relocation may not implicate the government or rise to the level of a violation of the law. In addition, injury may occur to communities of color and lower incomes even where the process for making an environmental decision appears to be fair (i.e., where a claim of procedural

injustice is not present) and it is important that such damages are addressed within an environmental justice scheme.

Allegations of Corrective Injustice

Indigenous populations in South America assert that U.S. oil companies have unjustly damaged their health and natural resources and have asked U.S. courts to order the companies to clean up the damages caused by oil development and to compensate local residents for their injuries.¹³¹ Farmworkers in Latin America allege that pesticide manufacturers, by exporting pesticides banned for use in the United States, have caused sterility, birth defects, and cancer and seek monetary damages; the pesticide companies argue that they violated no U.S. environmental laws and deny the allegations.¹³² The city of Philadelphia contended that it was too poor to spend \$200,000 to clean up 8 million pounds of toxic ash from the city's municipal waste incinerator that was illegally dumped on a Haitian beach 10 years ago.¹³³

The most publicized national empirical review of the corrective justice aspects of environmental justice is the 1992 study of EPA enforcement by the *National Law Journal*, "Unequal Protection—The Racial Divide in Environmental Law."¹³⁴ The *National Law Journal* reviewed all EPA civil enforcement actions between 1985 and 1991 and found that the average penalties imposed for violations of environmental laws in "white" areas (defined as the quartile with the highest white population) were 46% higher than in "minority" areas (the quartile with the lowest white population).¹³⁵ Looking at income, the study found that the average penalties imposed for violations of all environmental laws were 52% higher in "high-income" communities (the quartile with the highest median household income) than in "low income" communities (the quartile with the lowest median household income), although this pattern varied so markedly depending on the particular environmental law examined that the authors concluded that "the income of a community is not a reliable predictor of whether those who pollute will be dealt with more harshly."¹³⁶

Two subsequent reviews of EPA enforcement actions have questioned the *National Law Journal's* findings. Mark Atlas, relying on a more refined EPA enforcement database and using different measures of income and race, found that "there is no evidence that violations of environmental laws in areas that are disproportionately minority or low income

126. Paul, *supra* note 119, at 102-03; Been, *supra* note 60, at 1047 & n.248. Compensatory justice attempts "to bring the victim to the condition he would have been in, or its equivalent, had the injurious event never occurred." Paul, *supra* note 119, at 103.

127. Richard O. Brooks, *A New Agenda for Modern Environmental Law*, 6 J. ENVTL. L. & LITIG. 1, 27 (1991). Professor Brooks distinguishes corrective justice (correction of environmental abuses) from retributive justice (retribution or punishment for environmental abuses or violations) and restorative justice (the fair restoration of nature). *Id.*; see also THOMAS M. HOBAN & RICHARD O. BROOKS, GREEN JUSTICE: THE ENVIRONMENT AND THE COURTS 167-68 (1996). Aristotle's rectificatory justice is also restorative in that "it attempts to restore the victim to the condition he was in before the unjust activity occurred." Paul, *supra* note 119, at 101.

128. See Taylor, *supra* note 1, at 537. According to Professor Taylor, "corrective or commutative justice" is "concerned with the way individuals are treated during a social transaction." *Id.*; see also JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 177-84 (1980) (tracing the origins of and explaining the term "commutative justice").

129. For a discussion of the differences among philosophers and legal scholars on the role of fault or wrongful conduct in defining corrective justice, see Heidi M. Hurd, *Correcting Injustice to Corrective Justice*, 67 NOTRE DAME L. REV. 51 (1991).

130. Kaswan, *supra* note 1, at 238 ("To the extent governmental decision-makers place less priority on enforcement in communities of color and low-income communities, these communities may not receive 'equal concern and respect.'"); Bullard, *Overcoming Racism in Environmental Decisionmaking*, *supra* note 1, at 12 ("Procedural equity refers to fairness—that is, to the extent that . . . enforcement are applied in a nondiscriminatory way.").

131. See, e.g., Jota v. Texaco, Inc., 157 F.3d 153, 29 ELR 20181 (2d Cir. 1998); Sequihua v. Texaco, Inc., 847 F. Supp. 61 (S.D. Tex. 1994); Robert F. Kennedy Jr., *Oriente Diary: Amazon Crude*, AMICUS J., Spring 1991, at 24; Anita Parlow, *Worlds in Collision*, AMICUS J., Spring 1991, at 33.

132. See Schemo, *supra* note 26.

133. *Philadelphia Dumps on the Poor*, RACHEL'S ENV'T & HEALTH WKLY., Apr. 23, 1998. The ash, falsely characterized as fertilizer, was dumped from the infamous vessel "Khian Sea" after a 14-month voyage in search of a country that would accept the waste. *Id.* After lying on a Haitian beach for more than a decade, the toxic ash was recently dug up, put on barges, and shipped to the United States for disposal—not in Philadelphia but, after being rejected by Georgia and Florida, in Louisiana. Mike Dunne, *Philadelphia Garbage Ash La. Bound*, ADVOCATE (Baton Rouge, La.), May 2, 2000, at 1-A.

134. Marianne Lavelle & Marcia Coyle, *Unequal Protection—The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S1.

135. *Id.* at S2.

136. *Id.* at S2, S4.

tend to be penalized less than violations elsewhere.”¹³⁷ He concluded that EPA penalties were most influenced by the characteristics of the case, not of the communities surrounding the facilities.¹³⁸ Professor Evan Ringquist’s review of EPA civil cases confirmed the conclusions of the *National Law Journal* that EPA fines were higher in white areas than in minority areas from 1986 to 1991, but found that fines in minority areas were higher during the 1974-1985 and 1974-1991 time periods.¹³⁹ He concluded that minorities are not disadvantaged by judicial enforcement case outcomes, and the case for class bias in outcomes is weak.¹⁴⁰ The few studies of racial discrimination in environmental enforcement at the state level are conflicting.¹⁴¹

Regarding the cleanup of waste sites, the *National Law Journal* study found that Superfund sites in minority areas took 20% longer to be placed on the national priorities list (NPL) than sites in white areas and that EPA chose less protective remedies at minority sites.¹⁴² The study also found a difference between rich and poor communities in the pace of cleanup and permanence of remedies selected, but not as great as the differences between minority and white communities.¹⁴³ Professors Hamilton and Viscusi likewise concluded that EPA Superfund cleanups were less stringent for sites in communities with a higher percentage of minorities, finding that while there was not much difference in the pace of cleanup, regulators did treat sites differently in terms of the cleanup remedies selected and the cost expended per cancer case averted based on the racial characteristics of the community exposed.¹⁴⁴ Other published studies of EPA’s enforcement of the Superfund program have found that: eligible rural poor sites were placed on the Superfund NPL at half the rate of sites in other areas, but they were receiving the same level of EPA attention for site inspections and

emergency removal actions¹⁴⁵; the higher the percentage of black population around a Superfund site, the less likely it is that EPA has yet issued a record of decision¹⁴⁶; the pace of cleanup depended not on socioeconomic factors but mostly on the site’s potential hazard¹⁴⁷; and neither the level of contamination deemed to require cleanup nor the level of permanence in the remedies chosen by EPA was related to the racial composition or median income of the communities surrounding Superfund wood preservation sites.¹⁴⁸

The theme of corrective justice also figures prominently in the efforts of indigenous people to achieve environmental justice. Native Americans have long complained that the federal government and mining and oil companies have failed to take responsibility for and address contamination caused by their nuclear testing and resource development activities on Indian lands.¹⁴⁹ In addition, hundreds of open dumps, many originally operated by the Indian Health Service, currently exist in Indian country and are in need of cleanup.¹⁵⁰ The recent, expanded ability of tribes to obtain authority to implement federal environmental laws presents tribal governments with the opportunity to promote corrective justice by directly enforcing compliance with environmental statutes on tribal lands, rather than having to rely on federal agencies, yet finding the financial and technical resources to carry out that authority remains a problem.¹⁵¹

137. Mark Atlas, *Rush to Judgment: An Empirical Analysis of Environmental Equity in U.S. Environmental Protection Agency Enforcement Actions* 43 (2000) (unpublished manuscript on file with author).

138. *Id.*

139. Evan J. Ringquist, *A Question of Justice: Equity in Environmental Litigation, 1974-1991*, 60 J. POL. 1148, 1153-54 (1998).

140. *Id.* at 1162. Atlas alleges that Ringquist’s misunderstandings of EPA’s enforcement database and of the substantive aspects of EPA’s civil judicial enforcement actions, as well as questionable or erroneous methodological decisions, mean that the results “cannot be relied upon to address the question of what factors, including environmental equity characteristics, affect penalties.” Atlas, *supra* note 137, at 21.

141. See Robert R. Kuehn, *Remedying the Unequal Enforcement of Environmental Laws*, 9 ST. JOHN’S J. LEGAL COMMENTARY 625, 628-34 (1994) (discussing national and state empirical studies of possible unequal enforcement of environmental laws); see also Been, *supra* note 35, at 25D-30 (discussing a study by the Virginia General Assembly finding that waste facilities in minority communities tended to be inspected less frequently than facilities in other communities and, when inspections revealed violations, the median length of time facilities took to comply was approximately nine months longer in predominantly minority communities).

142. Lavelle & Coyle, *supra* note 134, at S2, S6.

143. *Id.* at S2, S4.

144. JAMES T. HAMILTON & W. KIP VISCUSI, *CALCULATING RISKS: THE SPATIAL AND POLITICAL DIMENSIONS OF HAZARDOUS WASTE POLICY* 187-88 (1999). As to the issue of the distribution of risks, their study also found that minorities are more likely to be exposed to hazardous waste sites. *Id.* at 186. The authors view these results as consistent with their theory that those who are less politically active (such as communities with high minority population percentages) receive less environmental protection in the remediation process. *Id.* at 183.

145. CLEAN SITES, HAZARDOUS WASTE SITES AND THE RURAL POOR: A PRELIMINARY ASSESSMENT 45-46, 48-49 (1990).

146. Rae Zimmerman, *Social Equity and Environmental Risk*, 13 RISK ANALYSIS 649, 660-61 (1993); see also RAE ZIMMERMAN, *AN ENVIRONMENTAL EQUITY STUDY FOR INACTIVE HAZARDOUS WASTE SITES* 69-72 (1994) (finding no relationship between the timing of the steps in EPA’s Region II Superfund cleanup process and the racial, ethnic, or income characteristics of the site’s surrounding population).

147. John A. Hird, *Environmental Policy and Equity: The Case of Superfund*, 12 J. POL’Y ANALYSIS & MGMT. 323, 335-37 (1993).

148. Shreekant Gupta et al., *Do Benefits and Costs Matter in Environmental Regulation? An Analysis of EPA Decisions Under Superfund*, in *ANALYZING SUPERFUND: ECONOMICS, SCIENCE, AND LAW* 83, 93-94 (Richard L. Revesz & Richard B. Stewart eds., 1995) (reviewing records of decisions only for NPL sites involving wood preserving and PCB contamination); Shreekant Gupta et al., *Paying for Permanence: An Economic Analysis of EPA’s Cleanup Decisions at Superfund Sites*, 27 RAND J. ECON. 563, 577 (1996) (same). For a discussion of various studies of possible racial and class disparities in EPA’s implementation of the Superfund program, see Kuehn, *supra* note 141, at 634-38.

149. See, e.g., SCHWAB, *supra* note 12, at 321-30 (1994); Goldtooth, *supra* note 32, at 143; William P. Robinson, *Uranium Production and Its Effects on Navajo Communities Along the Rio Puerco in Western New Mexico*, in *RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE* 153 (Bunyan Bryant & Paul Mohai eds., 1992); Sanchez, *supra* note 32, at 11; Valerie Taliman, *Healing Global Wounds*, 3 RACE, POVERTY & ENV’T, Fall 1992, at 18; Margaret L. Knox, *Their Mother’s Keepers*, SIERRA, Mar./Apr. 1993, at 50; John McQuaid, *Uranium Held Promise, Curse*, TIMES-PICTAYUNE (New Orleans, La.), May 23, 2000, at A-8.

150. Dean B. Suagee, *Turtle’s War Party: An Indian Allegory on Environmental Justice*, 9 J. ENVTL. L. & LITIG. 461, 473-79 (1994). Professor Suagee argues that too much attention has been given to the problem of waste merchants trying to peddle their wares in Indian country and not enough paid to the problem of how to clean up existing dumps. *Id.* at 477.

151. See Pamela A. D’Angelo, *Waste Management Industry Turns to Indian Reservations as States Close Landfills*, 21 Env’t Rep. (BNA) 1607, 1610 (Dec. 28, 1990); Suagee, *supra* note 33, at 577-78; Suagee, *supra* note 150, at 477-79. Authorizing tribes to enforce federal environmental laws may also be viewed as a procedural justice issue since it enhances their ability to make decisions that affect the health and welfare of tribal members.

Local efforts to achieve corrective justice are illustrated by community efforts to address contamination from lead smelters in West Dallas—“[t]he classic example of government inaction and callous disregard for the law.”¹⁵² As early as 1972, Dallas officials were aware of significantly elevated lead levels in the blood of children living in a minority neighborhood near a lead smelter that had repeatedly violated the law.¹⁵³ EPA’s own study in 1981 confirmed the high lead concentrations in children living near the smelters.¹⁵⁴ In spite of repeated complaints by local residents, government officials took no action; EPA even rejected a voluntary cleanup plan, preferring still further tests of local children and suggesting that spreading dirt and planting grass would be sufficient.¹⁵⁵ To local residents, their requests for action to address the illegal activities were “ignored because they were poor, black, and politically powerless.”¹⁵⁶ Finally, after 50 years of operation without necessary local permits and 20 years after government officials became aware of the public health problems caused by the illegally operated smelter, authorities closed the facility and started a comprehensive cleanup program.¹⁵⁷ Residents made similar charges of racism against state officials over the nine-year delay in cleaning up arsenic contamination on the Kingsley Park Playground in an African-American area of Buffalo.¹⁵⁸

A number of communities of color and lower income residents have alleged that government agencies have failed to enforce environmental laws in their communities. Residents of the 130-year-old African-American community of Oakville, Louisiana, filed a Title VI complaint with EPA alleging that the LDEQ has failed to provide them with corrective justice.¹⁵⁹ On over 40 different occasions since 1985,

agency inspectors documented violations of environmental laws at the adjacent Industrial Pipe waste facility, yet the LDEQ has not issued a single penalty nor, in spite of a 1988 closure order, forced the site to shut down.¹⁶⁰ The LDEQ has even failed to take action against the facility for submitting, as the state itself found, a forged waiver of a 200-foot buffer zone requirement allegedly signed by an adjacent landowner.¹⁶¹ The forged waiver not only misspelled the landowner’s name, but the man was deceased (for over three years) at the time the waiver was supposedly executed.¹⁶² Title VI complaints from communities in Texas and California also allege a lack of enforcement of environmental laws by the state, both at individual sites and as part of a pattern of lax enforcement.¹⁶³

Efforts to achieve corrective justice through relocation or buyouts are increasingly common. In New Orleans, residents living on top of the Agriculture Street Landfill allege that the federal government, through a redevelopment program designed to turn the working poor into homeowners, enticed unsuspecting African Americans to buy homes on the old landfill.¹⁶⁴ Although EPA later designated the residential area a Superfund site, the federal government has refused to buy out the homes of nearby residents, forcing them to remain in their homes during cleanup and to live thereafter in homes protected only by two feet of new soil and a permeable mesh mat from buried hazardous wastes such as lead and arsenic.¹⁶⁵ Reportedly, it would cost EPA \$8 million less to relocate the residents permanently than to proceed with the Agency’s partial removal

152. Bullard, *Environmental Racism and “Invisible” Communities*, *supra* note 4, at 1043.
153. BULLARD, DUMPING IN DIXIE, *supra* note 1, at 47-48; Regina Austin & Michael Schill, *Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 KAN. J.L. & PUB. POL’Y, Summer 1991, at 43, 45. The lead smelter, owned by RSR Corporation, was located next to an elementary school and across the street from a 3,500-unit public housing project and day care center. Bullard, *Environmental Racism and “Invisible” Communities*, *supra* note 4, at 1043.
154. BULLARD, DUMPING IN DIXIE, *supra* note 1, at 48.
155. Bullard, *Environmental Racism and “Invisible” Communities*, *supra* note 4, at 1043.
156. BULLARD, DUMPING IN DIXIE, *supra* note 1, at 49. A West Dallas community leader argued that had the lead smelter been located in one of the affluent, white areas of Dallas, EPA would have promptly closed the facility. *Id.* West Dallas residents filed a lawsuit alleging that numerous hazardous waste sites in their community would have been addressed but for the fact that a majority of West Dallas residents are members of racial and ethnic minority groups. See West Dallas Coalition for Env’tl. Justice v. United States, No. Civ.A.3:91-CV-2615R, 1999 WL 102810 (N.D. Tex. Feb. 22, 1999) (holding that plaintiff’s Administrative Procedure Act, Fifth Amendment, and racial discrimination claims are not barred by §113(h) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §9613(h), ELR STAT. CERCLA §113(h)).
157. Bullard, *Environmental Racism and “Invisible” Communities*, *supra* note 4, at 1044.
158. David Thigpen, *The Playground That Became a Battleground*, NAT’L WILDLIFE, Feb./Mar. 1993, at 14; Jerry Zremski, *Congress Told of Kingsley Park Poisons*, BUFFALO NEWS, Feb. 26, 1992, at A-10. Residents complained that the cleanup still did not address deeply buried concentrations of lead or include long-term health testing of residents. *Id.*
159. Letter from Percy Johnson, President, Oakville Community Action Group, to Dan Rondeau, Office of Civil Rights, EPA et al. (May 22,

1996) (on file with author) (EPA Title VI Complaint No. 3R-96-R6). See also Sandra Barbier, *Oakville Activist Fights Landfill; Racial Injustice Claims Investigated by EPA*, TIMES-PICAYUNE (New Orleans, La.), July 14, 1999, at B-1.

160. See Letter from M. Madeleine Boshart & Andres R. Jacques, Tulane Env’tl. Law Clinic, to Clarice Gaylord & Shirley Augurson, EPA (Apr. 21, 1997) (on file with author) (includes exhibit documenting results of LDEQ inspections); Letter from Frank Trainor & Elizabeth Teel, Tulane Env’tl. Law Clinic, to Clarice Gaylord & Shirley Augurson, EPA (Dec. 12, 1997) (on file with author) (alleging that the company has a long history of violating state and local permits and of failing to comply with mandated corrective measures, yet the LDEQ has failed to take any enforcement action).
161. Amended Notice of Intent to Revoke Permit, LDEQ, No. SE-O-96-0153A (Aug. 15, 1996); Letter from H.M. Strong, Assistant Secretary, LDEQ, to Kennett Stewart, Industrial Pipe, Inc. (Sept. 27, 1996) (rescinding amended notice of intent to revoke permit).
162. Letter from M. Madeleine Boshart & Andres R. Jacques, *supra* note 160.
163. See Cole, *supra* note 97, at 363 (Mothers Organized to Stop Environmental Sins (MOSES) alleges that the Texas Natural Resources Conservation Commission’s (TNRCC’s) unenforcement of environmental laws against the Gibraltar Chemical facility violates Title VI); *Two Environmental Groups File Civil Rights Complaint Against TNRCC Over Air Permits*, 30 Env’t Rep. (BNA) 1715 (Jan. 1, 1999) (reporting on Title VI complaint alleging that the failure of the TNRCC to prevent pollution violations at the Crown Central Petroleum facility is part of a pattern of lax enforcement by the state); Residents of Sanborn Court, Complaint Under Title VI of the Civil Rights Act, No. 2R-95-R9 (Aug. 3, 1995) (alleging, among other Title VI violations, lack of enforcement against facility adjacent to migrant labor housing complex).
164. See Christi Daugherty, *Digging Up Dirt*, GAMBIT WKLY. (New Orleans, La.), Nov. 3, 1998, at 20; John McQuaid, *Living a Nightmare*, TIMES-PICAYUNE (New Orleans, La.), May 23, 2000, at A-10; *Responsibility for Ag Street*, TIMES-PICAYUNE (New Orleans, La.), Sept. 6, 1998, at B-6.
165. *Id.*

of the contaminated soil.¹⁶⁶ The Agricultural Street residents have not been successful, thus far, in forcing EPA to relocate them.¹⁶⁷

A number of communities have been successful in obtaining relocation. In Escambia County, Florida, EPA agreed to move over 350 families living adjacent to a dioxin-contaminated Superfund site.¹⁶⁸ In Texarkana, Texas, African-American owners of homes built on contaminated land obtained a congressional appropriation for relocation, but unsuccessfully challenged on racial discrimination grounds the compensation paid by the federal government for their homes.¹⁶⁹ Recently, government agencies agreed to relocate residents of a housing project in Portsmouth, Virginia, after a lawsuit was filed alleging that forcing the residents to live on a Superfund site violated their constitutional rights.¹⁷⁰

Petrochemical companies facing potential liability for personal injuries and property damages have bought out the African-American communities of Morrisonville, Reveilletown, Good Hope, and Sunrise in Louisiana, and financed primarily by the city, state, and federal governments, the working poor community of Wagner's Point in Baltimore.¹⁷¹

Another increasingly popular approach to corrective justice is toxic tort suits. In a lawsuit for injuries allegedly suffered as a result of a tank-car explosion in New Orleans, attorneys for the plaintiffs successfully argued to the jury that punitive damages should be imposed because of the defendants' attitude toward the surrounding minority neighbor-

hood before and after the explosion. Over objections that plaintiffs' attorneys had improperly used inflammatory racial rhetoric, the jury returned a punitive damages award of \$2.5 billion against the railroad company, a verdict that was later reduced to \$850 million.¹⁷² African Americans in Bogalusa, Louisiana, similarly alleged that race was a factor in the evacuation of residents after a gas leak at a Gaylord Chemical Corporation plant, charging that punitive damages were in order because the town's black neighborhoods were evacuated much later than the predominantly white neighborhoods.¹⁷³ Residents of Kennedy Heights in Texas likewise used a toxic tort suit to press their claim that homes were marketed to them because the contaminated property could not be sufficiently cleaned up to sell to white buyers; the case settled in 1999 for \$8 million.¹⁷⁴

Implications of Corrective Injustice

The National Environmental Justice Advisory Council has recommended a number of actions to strengthen government enforcement in minority and low-income areas, including targeting EPA enforcement in these communities, increasing state identification of and enforcement in minority and low-income neighborhoods, enhancing tribal enforcement resources, and fostering the ability of communities to monitor compliance and enforce environmental laws.¹⁷⁵ EPA determined in 1994 that there is "broad authority" available to the Agency under existing environmental laws to address environmental justice issues in enforcement.¹⁷⁶ Thus, when it comes to greater governmental efforts to address allegations of corrective injustice, the issue is not generally one of lack of legal authority but rather lack of resolve. As environmental justice advocate Richard Moore sees it: "We don't have the complexion for protection."¹⁷⁷

166. Daugherty, *supra* note 164. EPA states it will only consider relocation when it is not possible to correct an environmental problem and keep a community intact. *Id.*

167. *See* New Orleans v. Browner, No. CIV.A.99-0756, 1999 WL 179347 (E.D. La. Mar. 31, 1999) (rejecting, on jurisdictional grounds, lawsuit challenging EPA's cleanup remedy).

168. *See* Julie Hauserman, *Relocations Near Toxic Sites Disputed*, ST. PETERSBURG TIMES, Aug. 16, 1998, at 1B; Adam Nossiter, *Breaking Containment: Relocation Is Only Alternative Neighbors of Polluted Site Desire*, CHI. TRIB., Jan. 5, 1997, at 5K. At the urging of the National Environmental Justice Advisory Council, EPA issued an interim policy on permanent relocations at Superfund sites. 64 Fed. Reg. 37011 (July 8, 1999). U.S. EPA, INTERIM POLICY ON THE USE OF PERMANENT RELOCATIONS AS PART OF SUPERFUND REMEDIAL ACTS (June 30, 1999) (available from the ELR Document Service, ELR Order No. AD-4205).

169. *See* Boyd v. Browner, 897 F. Supp. 590, 593-94 (D.D.C. 1995) (dismissing Title VI and Fair Housing Act claims against EPA and the U.S. Army Corps of Engineers), *aff'd*, 107 F.3d 922 (D.C. Cir. 1996).

170. *Parties to Public Housing Suit Agree to Settlement Requiring Buildings' Demolition*, Daily Env't Rep. (BNA), Feb. 16, 2000, at A-10 (referring to the settlement in Washington Park Lead Comm. v. EPA, No. 2:98:421 (E.D. Va.)). The plaintiffs alleged that the site, immediately adjacent to a lead foundry, was chosen in the 1960s only because it was to be public housing for African Americans and that the government's proposed cleanup remedy perpetuates and exacerbates conditions originally imposed by the policies and practices of de jure segregation. *Id.*

171. LOUISIANA ADVISORY COMMITTEE, U.S. COMMISSION ON CIVIL RIGHTS, THE BATTLE FOR ENVIRONMENTAL JUSTICE IN LOUISIANA . . . GOVERNMENT, INDUSTRY, AND THE PEOPLE 46-52 (1993); Heather Dewar & Joe Mathews, *Residents Want Out of Industrial Ghetto*, BALT. SUN, Apr. 19, 1998, at 1A; Taylor, *supra* note 1, at 555; *see also* Anne Rochell Konigsmark, *Louisianans Want Oil Giant to Buy Out Homes*, ATLANTA CONST., Nov. 5, 1999, at C-2 (reporting on efforts of residents living next to the Motiva/Shell refinery in Norco, Louisiana, to get the company to buy out their homes); Joe Mathews, *Paying Neighbors to Move*, BALT. SUN, Dec. 6, 1998, at 1A (noting the efforts to buy out the community of Mossville, Louisiana).

172. *Court Cuts Damages in Tank-Car Explosion From \$2.5 Billion to \$850 Million*, CSX Says, Daily Env't Rep. (BNA), Nov. 18, 1999, at A-12; Pamela Coyle, *Gentilly Tank Car Damages Slashed; State Judge Finds Award Excessive*, TIMES-PICAYUNE (New Orleans, La.), Nov. 6, 1999, at A-1; Margaret Cronin Fisk, *\$2.5 Billion in Punitives Pared in La. Rail Explosion Case*, NAT'L L.J., Nov. 29, 1999, at A11.

173. Glen Justice, *Group: Gas Leak Response Racist*, TIMES-PICAYUNE (New Orleans, La.), Oct. 29, 1995, at B-1. "There is a pattern of total disrespect by the chemical plant for the black community. How do we change this? One way is compensatory damages—make them pay. I also suggest punitive damages. We want to punish them." *Id.* (quoting lawyer Paul Stephen Adams).

174. *Environmental Justice: Tentative \$8 Million Accord Reached in Texas Environmental Racism Litigation*, Daily Env't Rep. (BNA), Mar. 11, 1999, at A-1. The special master who negotiated the settlement stated that, although Chevron had agreed to establish a settlement fund to pay for property devaluation, the company had no legal obligation to do so as there was no evidence of harmful contamination of the soil, water, or air. *Id.*

175. NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL ENFORCEMENT SUBCOMMITTEE, U.S. EPA, ACHIEVING ENVIRONMENTAL PROTECTION: COMPLIANCE, ENFORCEMENT AND ENVIRONMENTAL JUSTICE (Nov. 1995); NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL ENFORCEMENT SUBCOMMITTEE, U.S. EPA, REPORT OF THE ENVIRONMENTAL JUSTICE ENFORCEMENT AND COMPLIANCE ASSURANCE ROUNDTABLE (Oct. 1996).

176. Memorandum from Howard F. Corcoran, Associate General Counsel, EPA, to Jean C. Nelson, General Counsel, EPA (Feb. 25, 1994). For a discussion of remedies to unequal enforcement of environmental laws, see Kuehn, *supra* note 141, at 642-66.

177. Karl Grossman, *The People of Color Environmental Summit*, in UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE & COMMUNITIES OF COLOR 272, 281 (Robert D. Bullard ed., 1996) (quoting Richard

The legal remedies available to people of color and lower incomes to address corrective injustices on their own may be of limited availability or utility. Lawsuits alleging inadequate enforcement by government agencies are often dismissed because of sovereign immunity, ripeness, or prosecutorial discretion defenses.¹⁷⁸ Citizen suits by affected communities against government entities or private firms that do not comply with environmental laws are a possibility, but resource, procedural, and substantive constraints limit their utility.¹⁷⁹ The use of Title VI to address corrective injustice is, as yet, unproven.¹⁸⁰

Buyouts are not without controversy and are not universally sought by those living along the fencelines of industrial facilities. By merely moving residents away from polluting facilities, buyouts treat the community, rather than the pollution, as the problem and dissolve long-standing communities. Most buyout agreements also require local residents to relinquish all claims for injuries resulting from years of exposure to toxic pollutants, and many residents complain that the amounts of money offered for their homes do not fairly compensate them for relocating.

Using toxic tort suits to address claims of corrective justice likewise is not without significant problems. Commentators repeatedly warn of the limitations of using lawsuits to address the underlying political and economic causes of environmental injustice.¹⁸¹ In addition, issues of proof, multiple sources of possible causation, a history of poor medical care and lack of medical records, and risks associated with dangerous occupations and different lifestyles “make it more difficult for low-income minorities to prove to a middle-class jury that they have suffered harm as a result of their environmental victimization.”¹⁸² While racial bias and disparate treatment have been alleged in the toxic tort suits noted above, rules of evidence may not allow consideration of such issues.¹⁸³ Finally, even where the demo-

graphics of the affected community may be admissible, as a toxic tort case in Louisiana demonstrated, white or more affluent jurors may be biased against the efforts of minorities and those with lower incomes to seek monetary redress for the damages caused by living in close proximity to industrial facilities.¹⁸⁴

Just as communities will continue to press claims of corrective injustice, those charged with violating the law or causing injuries will continue to deny such charges and to contest the right of the communities for redress. Though such denials are not unexpected, one overlooked benefit of ensuring that communities receive more corrective justice is that it could lessen opposition to the siting and permitting of potentially harmful activities.¹⁸⁵ As the Shintech case demonstrated,¹⁸⁶ if local residents do not have assurances that they will receive corrective justice, then government officials and regulated entities cannot expect communities to welcome facilities that threaten their health and welfare.

Environmental Justice as Social Justice

The fourth and final aspect of justice implicated by the term environmental justice is “social justice,” a far-reaching, and some say nebulous, goal of the environmental justice movement.

The Meaning and Relevance of “Social Justice”

Social justice is “that branch of the virtue of justice that moves us to use our best efforts to bring about a more just ordering of society—one in which people’s needs are more fully met.”¹⁸⁷ “The demands of social justice are . . . first, that the members of every class have enough resources and enough power to live as befits human beings, and second, that the privileged classes, whoever they are, be accountable to the wider society for the way they use their advantages.”¹⁸⁸

Moore, co-director of the SouthWest Organizing Project). Dr. Bullard uses the phrase “invisible communities” to explain the failure to protect people of color and lower incomes. Bullard, *Environmental Racism and “Invisible” Communities*, *supra* note 4.

178. See Kuehn, *supra* note 141, at 648-58.

179. See Gauna, *supra* note 3, at 40-79. Professor Gauna proposes strengthening the availability and effectiveness of citizen suits by training communities to detect noncompliance, increasing attorney fee awards to successful citizen suit plaintiffs, enhancing penalties where there is a history of noncompliance in poor and minority communities, and creating nondiscretionary duties on agencies to address environmental justice issues. *Id.* at 79-86.

180. DRAFT REVISED TITLE VI GUIDANCE, *supra* note 52, §I.C (application of Title VI to allegations concerning enforcement-related matters will be addressed in future EPA guidance documents).

181. See, e.g., Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGICAL Q.* 619, 648-49 (1992); Luke W. Cole, *Environmental Justice Litigation: Another Stone in David’s Sling*, 21 *FORDHAM URB. L.J.* 523, 541 (1994); Foster, *supra* note 70, at 819-20; Allan Kanner, *Assisting Injured Individuals*, in *THE LAW OF ENVIRONMENTAL JUSTICE* 619, 620 (Michael B. Gerrard ed., 1999).

182. Kanner, *supra* note 181, at 620.

183. See Serena M. Williams, *The Fight for Environmental Justice: Is the Courthouse the Appropriate Battleground?*, 1 *PUB. INTEREST L. REP.*, Spring 1996, at 17, 27; Karen Smith, *How the Legal System Has Failed the Environmental Justice Movement*, 12 *J. NAT. RESOURCES & ENVTL. L.* 325, 341 (1996-1997). One legal scholar proposes a new tort of “racially disproportionate exposure to environmental burdens” that would explicitly allow consideration of evidence of racial bias and disparate impacts. Kathy S. Northern, *Battery and Beyond: A Tort Law Response to Environmental Racism*, 21 *WM. & MARY ENVTL. L. & POL’Y REV.* 485, 493 (1997).

184. See Rhonda Bell, *Jury Sides With Shell Plant*, *TIMES-PICAYUNE* (New Orleans, La.), Sept. 3, 1997, at A-1. One juror stated his concern that if the jury had awarded damages the residents might have chosen to remain in the community and sue the plant again: “I kind of wish they wouldn’t have dropped the relocation issues . . . Since they dropped that, it looked like they were just looking for the money.” *Id.*; see also Allan Kanner, *Environmental Justice, Torts and Causation*, 34 *WASHBURN L.J.* 505, 509 (1995) (“the poor and minorities are less able to fend off allegations of having brought suit to get ‘something for nothing’”).

185. See TITLE VI IMPLEMENTATION ADVISORY COMMITTEE, *supra* note 59, at 54 (allowing communities to assess the compliance of permitted facilities may ease community anxiety about the health and environmental risks posed by individual facilities).

186. See Chris Gray, *Contamination Was Kept Quiet, Opponents Say*, *TIMES-PICAYUNE* (New Orleans, La.), Feb. 19, 1998, at A-9 (the LDEQ agrees, at Shintech’s request and in order not to harm “community relations,” to suppress information that the proposed plant site is contaminated); Joe Macaluso, *Where Does Foster Stand?*, *ADVOCATE* (Baton Rouge, La.), Jan. 7, 1997, at 16C (Governor Foster: “I believe DEQ should not be policemen.”); Manuel Roig-Franzia, *Pollution Penalties Lowest in 10 Years*, *TIMES-PICAYUNE* (New Orleans, La.), June 12, 1998, at A-1 (pollution citations and fines in Louisiana dropped to a 10-year low during Governor Foster’s first full year in office).

187. Robert E. Rodes Jr., *Social Justice and Liberation*, 71 *NOTRE DAME L. REV.* 619, 620 (1996).

188. *Id.* at 626. Rodes observes that efforts to reform unjust institutions and achieve social justice give rise to a class struggle: “The victims have a stake in reform, while the beneficiaries have an equal stake in the status quo.” *Id.* at 624.

Environmental justice has been described as a “marriage of the movement for social justice with environmentalism” integrating environmental concerns into a broader agenda that emphasizes social, racial, and economic justice.¹⁸⁹ Dr. Bullard refers to this aspect of environmental justice as “social equity: . . . an assessment of the role of sociological factors (race, ethnicity, class, culture, lifestyles, political power, and so forth) in environmental decisionmaking.”¹⁹⁰

Professor Sheila Foster has argued that a narrow focus on issues of distributive justice neglects the search for social structures and agents that are causing the environmental problems.¹⁹¹ A social justice perspective presents environmental justice as part of larger problems of racial, social, and economic justice and helps illustrate the influence of politics, race, and class on an area’s quality of life.¹⁹² This broader social perspective contrasts with traditional environmentalism and its narrower focus on wilderness preservation and the technological aspects of environmental regulation.¹⁹³

Environmental justice’s focus on social justice reflects reality. As one community organizer explained, oppressed people do not have compartmentalized problems—they do not separate the hazardous waste incinerator from the fact that their schools are underfunded, that they have no day care, no sidewalks or streetlights, or no jobs.¹⁹⁴ The reason disadvantaged communities do not separate these problems is that their quality of life as a whole is suffering and the political, economic, and racial causes are likely interrelated. As the Reverend Benjamin Chavis observed, “Sometimes we get too single-issue to see how various social justice issues are interrelated, . . . But in this movement, there is a perception at the grassroots level of how one manifestation of racial injustice is related to another.”¹⁹⁵

Social justice influences can work in two ways. The same underlying racial, economic, and political factors that are re-

sponsible for the environmental threats to the community also likely play a significant role in why the area may suffer from other problems like inadequate housing, a lack of employment opportunities, poor schools, etc. In turn, the presence of undesirable land uses that threaten the health and well-being of local residents and provide few direct economic benefits negatively influences the quality of life, development potential, and attitudes of the community and may lead to further social and economic degradation.¹⁹⁶

Government officials are often hesitant to embrace the social justice aspects of environmental justice, reflecting a reluctance to take on the broader systemic causes of environmental injustice or to consider issues outside the narrow technical focus of the agency.¹⁹⁷ Nonetheless, the President’s Executive Order acknowledges the significance of social justice by directing each federal agency to consider the economic and social implications of an agency’s environmental justice activities, and the memorandum accompanying the Executive Order requires analysis of the economic and social, not just environmental, effects of federal actions on minority and low-income communities.¹⁹⁸

EPA recognizes that environmental justice “is also inclusive, since it is based on the concept of fundamental fairness, which includes the concept of economic prejudices as well as racial prejudices.”¹⁹⁹ The Agency’s new draft guidance on Title VI provides that economic development from the permitting action may justify an otherwise unlawful disparate impact if the benefits are delivered directly to the affected community.²⁰⁰

Not unexpectedly, the Principles of Environmental Justice are grounded in ideals of social justice. They broadly call for economic alternatives that contribute to the development of environmentally safe livelihoods; political, economic, and cultural liberation; policies based on mutual respect and justice for all peoples and free from any form of discrimination; cleaning up and rebuilding cities and rural areas; honoring the cultural integrity of communities; and providing fair access for all to the full range of society’s resources.²⁰¹

Some criticize the environmental justice movement for focusing on social and racial causes, arguing that, in the process, the movement overlooks the predominant role the market plays in creating a community’s problems. To these critics, the real cause of not only unjust environmental assaults but of other serious problems in people of color and

189. Dana A. Alston, *Introduction*, in *WE SPEAK FOR OURSELVES: SOCIAL JUSTICE, RACE AND ENVIRONMENT* 3 (Dana Alston ed., 1990); see also Gauna, *supra* note 3, at 12 (environmental justice activists see environmental problems as only one part of the larger social issues of racism and cultural and economic injustice).

190. Robert D. Bullard, *Unequal Environmental Protection: Incorporating Environmental Justice in Decision Making*, in *WORST THINGS FIRST?* 237, 258 (Adam M. Finkel & Dominic Golding eds., 1994); see also BULLARD, *DUMPING IN DIXIE*, *supra* note 1, at 116; Bullard, *Overcoming Racism in Environmental Decisionmaking*, *supra* note 1, at 14.

191. Foster, *supra* note 70, at 790-92.

192. See Miller, *supra* note 54, at 714 (arguing that a political and historical perspective is important to understand how issues of race, socioeconomic class, and prejudice influence planning and development processes); Peggy M. Shephard, *Issues of Community Empowerment*, 21 *FORDHAM URB. L.J.* 739, 755 (1994) (arguing that urban policy decisions involve struggles over the control of production and distribution of profits and are really debates over resources and power). To illustrate how environmental justice integrates social justice concerns, Professor Angela Harris explains that an environmental justice approach to crime would see it as one aspect of a larger problem of social and economic justice and focus on building community. Angela P. Harris, *Criminal Justice as Environmental Justice*, 1 *J. GENDER, RACE & JUST.* 1, 44 (1997).

193. BULLARD, *DUMPING IN DIXIE*, *supra* note 1, at 9-12; Gauna, *supra* note 3, at 11-12; Taylor, *supra* note 1, at 523.

194. *A Place at the Table*, *SIERRA*, May/June 1993, at 51, 58 (comments of Scott Douglas, community organizer with the Sierra Club’s Southeast Office); see also Bullard, *supra* note 14, at 282-84.

195. Marcia Coyle, *When Movements Coalesce*, *NAT’L L.J.*, Sept. 21, 1992, at S10 (quoting Rev. Benjamin F. Chavis Jr., executive director of the United Church of Christ’s Commission on Racial Justice).

196. See Foster, *supra* note 70, at 786 (noting that a pattern of waste facilities in a community creates a reputation that adversely molds the aesthetics and economy of the area, leading to further economic and social decline). Zulene Mayfield, an environmental justice advocate in Chester, Pennsylvania, complained that although a waste incinerator was supposed to bring new businesses to the town, the only new businesses have been prostitution and drugs. *Id.* at 786.

197. See, e.g., U.S. EPA, *REDUCING RISK FOR ALL COMMUNITIES*, *supra* note 2, at 10 (acknowledging that socioeconomic factors may influence the inequitable distribution of environmental risks but characterizing such issues as “beyond the scope of this report”).

198. Exec. Order No. 12898, *supra* note 6, §1-103(a); Presidential Memorandum Accompanying Executive Order 12989, *supra* note 7.

199. Memorandum from Barry E. Hill, *supra* note 8.

200. *DRAFT REVISED TITLE VI GUIDANCE*, *supra* note 52, §VII.A.1; see also *TITLE VI IMPLEMENTATION ADVISORY COMMITTEE*, *supra* note 59, at 81-89.

201. Principles of Environmental Justice, *supra* note 12, at pmb1., nos. 2, 12.

lower income communities is lack of economic opportunity, and the solution is not a discussion of race, class, or power but ensuring that affected communities share in the economic benefits resulting from activities that may impose environmental risks.²⁰² Environmental justice advocates obviously agree that the environmental problems of a community are often interlinked with other social problems and due in large part to lack of economic opportunities. However, they tend to be skeptical of market-based solutions, given the historical failure of a market approach to protect or benefit disadvantaged communities, and argue that the long-term viability of a community requires that issues of social justice be identified and addressed.²⁰³

Moreover, as the examples below illustrate, it is through allegations of social injustice that, as the market advocates desire, communities broaden their focus beyond the facility's pollution to include the role the polluting facility and others may play in contributing to or solving the community's interrelated social and economic problems.

Allegations of Social Injustice

Multinational corporations operating in developing countries increasingly must confront demands that they take a greater role in the social welfare of the host communities. In Nigeria, Mobil Oil finds itself under intense criticism not just for pollution damages but also because it has failed to address the potholed roads, rundown schools, lack of running water, and general impoverishment of the areas in which it operates.²⁰⁴ Even though over 70% of the country's oil revenues go to the federal government, it is the oil companies' lack of investment in the local communities, not the government's, that is most widely resented by local residents.²⁰⁵ Indigenous peoples in South America and Asia have made similar allegations that multinational oil and mining companies bring not only pollution but also severe social disruption while, in return, providing few benefits to local residents.²⁰⁶

Discussions of the social justice aspects of national environmental policies often focus on the fact that, as a result of the vestiges of racist laws and policies, minorities possess significantly less economic and political power, making it "much more probable that racial minorities will receive an unfavorably disproportionate share of the benefits (less) and burdens (more) of living in society, including those associated with environmental protection."²⁰⁷ These vestiges

manifest themselves in housing discrimination, residential segregation, and education and employment policies that compel minority populations to live, work, and play in more polluted areas.²⁰⁸ These same factors "create[] the potential for what some have dubbed 'environmental blackmail,' as the community finds it more difficult to oppose the siting of a facility that, notwithstanding significant environmental risks, offers the possibility of immediate short-term economic relief."²⁰⁹

Environmental justice advocates also argue that social injustice in national environmental protection policies is evidenced by the lack of people of color in governmental, nongovernmental, and private-sector environmental organizations, by the failure of minorities to enjoy their fair share of the jobs created by environmental protection, and by the disproportionate number of jobs minorities lose as a result of stricter environmental controls.²¹⁰ One economist has urged environmental justice advocates to focus even more on social justice by emphasizing the positive effects that environmental restrictions can have on jobs, incomes, and economic growth.²¹¹

Brownfields implicate a number of justice concerns, including the role of brownfields redevelopment in advancing social justice. Plans by developers and government entities for redevelopment of the lower income, people of color communities where brownfields are found often have failed to create tangible benefits for local residents. Outside labor is used to build the new facilities, full-time jobs either go to outsiders or do not produce liveable wages, and through "gentrification" poorer residents may no longer be able to afford to live in the redeveloped community.²¹² The National Environmental Justice Advisory Council has called for coordinating brownfields redevelopment with broader social justice strategies of job creation and training, career development, and local business startup and nurturing.²¹³

Race-based influences on attitudes toward the concept of environmental justice are revealed in a joint poll by the American and National Bar Associations finding that, while 52% of African-American lawyers believe there is "very much" racial bias currently in the justice system, only 6.5% of white lawyers believe there is "very much" institutional

202. See, e.g., Jaffe, *supra* note 60; Kent Jeffreys, *Environmental Racism: A Skeptic's View*, 9 ST. JOHN'S J. LEGAL COMMENTARY 677, 679 (1994); LAMBERT ET AL., *supra* note 38, at 9; Nelson Smith & David Graham, *Environmental Justice and Underlying Social Problems*, 27 ELR 10568, 10568-69 (Nov. 1997).

203. See, e.g., Gauna, *supra* note 3, at 16 & n.51 (reporting on the Michigan Coalition's criticism of EPA's 1992 environmental equity report for failing to mention housing discrimination, poverty, or imbalances in political access and power).

204. Roger Cohen, *Mobil Spill Bares Ebb Tide of Nigerian Land*, N.Y. TIMES, Sept. 20, 1998, at 1.

205. As one local fisherman framed the social justice issue: "They [Mobil] have been making a lot of money here, and we've been left like monkeys out here in the swamp." *Id.*

206. See, e.g., Parlow, *supra* note 131; Eyal Press, *Freeport-McMoRan at Home & Abroad*, NATION, July 31, 1995, at 125; Greg Roberts, *The Battle of Freeport*, GOOD WEEKEND (Sydney, Australia), Apr. 6, 1996, at 26.

207. Lazarus, *supra* note 76, at 808.

208. Bullard, *Overcoming Racism in Environmental Decisionmaking*, *supra* note 1, at 6; see also Lazarus, *supra* note 76, at 808 (arguing that the economic plight of many minority communities, compounded by the lingering results of racist policies, "confines its members as a practical matter to the less healthy residential areas").

209. Lazarus, *supra* note 76, at 808. Professor Lazarus cites as an example the statement by a utility company official on why the company chose to site a nuclear power plant in an economically depressed community: "The town is sort of down on its uppers; it's sort of poor. . . . They are a better kind of people to deal with." *Id.* at 808 n.88.

210. Gelobter, *supra* note 24, at 843.

211. See Roger H. Bezdek, *The Net Impact of Environmental Protection on Jobs and the Economy*, in ENVIRONMENTAL JUSTICE: ISSUES, POLICIES, AND SOLUTIONS 86, 106 (Bunyan Bryant ed., 1995).

212. John C. Chambers & Michelle A. Meertens, *Community Participation in Brownfields Redevelopment*, in BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY 183, 185 (Todd S. Davis & Kevin D. Margolis eds., 1997).

213. WASTE FACILITY SITING SUBCOMMITTEE, NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL, U.S. EPA, ENVIRONMENTAL JUSTICE, URBAN REVITALIZATION, AND BROWNFIELDS: THE SEARCH FOR AUTHENTIC SIGNS OF HOPE 37-38 (Dec. 1996); see also Kirsten H. Engel, *Brownfield Initiatives and Environmental Justice: Second-Class Cleanups or Market-Based Equity?*, 13 J. NAT. RESOURCES & ENVTL. L. 317, 336 (1997-1998).

bias.²¹⁴ The attitudes of lawyers on environmental justice show the same racial divide. While 83% of African-American lawyers believe that minority individuals should be able to use civil rights laws to sue governments over decisions that permit environmental polluters to operate in their neighborhoods, only 42% of white lawyers believe they should have such opportunity.²¹⁵ These dramatic differences in perspective, no doubt based in part on personal experiences, perhaps explain why some see social justice as a legitimate and necessary goal of environmental justice and others see it as an inflammatory, unproductive side issue.

Native Americans have long struggled for social justice, and the social justice issues arising out of their environmental disputes are rooted in the country's history of colonialism and threats to Native American cultures.²¹⁶ A common complaint is that tribes and their members have enjoyed few of the benefits from natural resource exploration and development on tribal lands.²¹⁷ Recent efforts to site waste facilities on tribal lands raise significant social justice disputes even within tribes, as some members focus on the putative economic benefits from such facilities while others look to the environmental and cultural damages that may result.²¹⁸

Concerns about the employment aspects of social justice figured prominently in some of the most publicized local environmental justice disputes. In the Shintech case, Louisiana offered Shintech, which was already realizing an annual \$750,000 per-employee after-tax profit at its comparable PCV plant in Texas,²¹⁹ a taxpayer-financed subsidy of almost \$800,000 for each permanent job created.²²⁰ In return, the state did not require Shintech, nor did the company commit, to hire any Convent, St. James Parish, or Louisiana resident, contractor, or supplier, though the company did pledge to "comply with all applicable federal and state employment laws."²²¹ Moreover, because of Shintech's need for employees with computer knowledge and the low educational levels of most Convent residents, the staff director of the state

agency promoting the plant admitted that "very few" of the permanent jobs created by the company would go to local residents.²²² This admission was consistent with a job survey in an adjacent community that found that only 8.7% of almost 1,900 permanent jobs at 10 local chemical plants were held by local residents, with just 1% held by African Americans.²²³

Similarly, residents of West Harlem complain that although they are saddled with a disproportionate number of New York's sewage treatment plants, no minority contractors were hired to construct the most recent \$1.1 billion plant; the few local minorities that were hired as plant workers were all gone within a year.²²⁴ In the Genesee Power Station case, no minorities from the majority African-American area were hired to construct or were working at the \$80 million plant, and the owners all resided outside the community.²²⁵ The judge found these facts "to be appalling" and opined that, in permitting industrial facilities, society ought to take into consideration that the people living in the polluted surrounding communities get no job benefits from the plants.²²⁶ Robbins, Illinois, stands as an example of a town that thought that its support of a new waste incinerator would bring jobs and economic development but finds itself "arguably worse off than before" as the economic benefits never materialized and the town is now "saddled with a soaring, smoke-belching trash burner that shoos away commercial investment like a scarecrow guarding a cornfield."²²⁷

Social justice is also implicated by taxpayer-subsidized assistance to polluting firms that locate in people of color and lower income communities. In the Shintech case, concerns over the minimal benefits to local residents were heightened by information that approximately \$27 million that Shintech would otherwise pay in property taxes over a 10-year period to fund local schools would be exempted by the subsidy.²²⁸ These tax breaks would cost each of the parish's taxpayers over \$10,000 in lost tax revenues otherwise available for public schools.²²⁹ Opposition to the Select Steel proposal in Flint, Michigan, also was fueled by concerns that the company was being provided with tax breaks of more than \$100,000 per job yet there was no guarantee

214. Terry Carter, *Divided Justice*, A.B.A. J., Feb. 1999, at 42.

215. Steven Keeva, *Pursuing the Right to Breathe Easy*, A.B.A. J., Feb. 1999, at 48, 49.

216. See Celene Krauss, *Women of Color on the Front Line*, in *UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE & COMMUNITIES OF COLOR* 256, 267-69 (Robert D. Bullard ed., 1996).

217. See, e.g., Knox, *supra* note 149, at 57; McQuaid, *supra* note 149; Robinson, *supra* note 149, at 161.

218. Compare Kevin Gover & Jana L. Walker, *Escaping Environmental Paternalism: One Tribe's Approach to Developing a Commercial Waste Disposal Project in Indian Country*, 62 U. COLO. L. REV. 933, 935 (1992) ("Looking at the waste industry as a form of economic development, in many respects it can be a good match for tribal communities."), with Knox, *supra* note 149, at 57 ("Many projects come and go, all accompanied by big promises, but few Indians have gotten richer from them."); see also Jane Kay, *Indian Lands Targeted for Waste Disposal Sites*, S.F. EXAMINER, Apr. 10, 1991, at A-10.

219. See LOUISIANA ENVIRONMENTAL ACTION NETWORK, *THE MYTH OF SHINTECH JOBS (SELLING FALSE HOPES TO LOCAL RESIDENTS)* (1998).

220. See Memorandum from Paul Adams, Louisiana Dep't of Economic Development, to Kevin Reilly, Secretary, Louisiana Dep't of Economic Development (Mar. 24, 1997) (on file with author). The total subsidy would be approximately \$130 million; the plant would employ 165 permanent workers. *Id.*

221. See Shintech Inc., Environmental Economic Development Program Agreement (undated) (on file with author). Shintech also agreed to "provide equal opportunity to qualified citizens of St. James Parish to compete for employment with Shintech at its new facility consistent with its staffing needs." *Id.*

222. Memorandum from Paul Adams, *supra* note 220. A comparison of the environmental "costs" with the job-creation benefits of Shintech revealed that the company would emit 3,488 pounds of toxic air pollution per year for each permanent job created, a ratio two times higher than the rest of Louisiana's chemical industry, almost four times higher than Texas' industry, and almost seven times higher than the U.S. chemical industry's average. FROM PLANTATIONS TO PLANTS, *supra* note 46, at 23 (reprinting results of "release/job" ratios calculated by Professor Paul Templet of Louisiana State University).

223. East Iberville Parish & Town of St. Gabriel Employment Survey (Sept. 1995) (on file with author); FROM PLANTATIONS TO PLANTS, *supra* note 46, at 22-23 (citing survey); LOUISIANA ENVIRONMENTAL ACTION NETWORK, *supra* note 219 (citing to Jan. 24, 1998, public hearing testimony of Leroy Alfred, former St. Gabriel Alderman); see also Chris Gray, *Experts Say Shintech May Not Deliver Jobs*, TIMES-PICAYUNE (New Orleans, La.), Jan. 25, 1998, at B-1.

224. Miller, *supra* note 54, at 713.

225. Transcript of Court's Decision at 23-24, NAACP-Flint Chapter v. Engler, No. 95-38228-CV (Genesee Cty. Cir. Ct. May 29, 1997).

226. *Id.* at 24.

227. Jon Jeter, *Poor Town That Sought Incinerator Finds More Problems, Few Benefits*, WASH. POST, Apr. 11, 1998, at A3.

228. FROM PLANTATIONS TO PLANTS, *supra* note 46, at 24.

229. LOUISIANA ENVIRONMENTAL ACTION NETWORK, *supra* note 219.

that any of the jobs would go to local residents.²³⁰ In the Kettleman City case, of the \$7 million that Chemical Waste Management pays annually in taxes to the county for its existing landfill, little is spent in the Hispanic local community targeted for the new hazardous waste incinerator.²³¹

Of course, company officials believe that their operations do help local employment and tax bases. Shintech countered that even though it would receive \$130 million in tax breaks, it would pay over \$6 million in one-time sales taxes during construction and over \$2 million per year thereafter.²³² In the *Select Steel* case, the Genesee Township treasurer argued that it would gain more than \$111,000 in tax revenues over 12 years from the plant, but also acknowledged that if the local government gave the company all the tax abatements available and did all the infrastructure improvements “it would probably cost the township money for Select Steel to come here.”²³³ In almost all local environmental justice debates, company, and often state, officials see the development activities as improving economic opportunities for local residents, not making their lives worse, and characterize environmental justice as a job killer that harms, not advances, social justice in economically distressed communities.²³⁴

Local residents also note the social justice issues of racism and neglect by politicians that make their communities so attractive to undesirable land uses. The 98% African-American community of Alsen, Louisiana, founded by freed slaves shortly after the Civil War, finds itself in the middle of an intensely polluted, heavily industrialized area that contains 15 polluting facilities, 2 Superfund sites, and at least 24 current and former landfills. In their Title VI complaint, the Alsen residents allege that one reason there are so many petrochemical and waste facilities sited in their community is because the residential area was zoned heavy industry by white politicians at a time when the residents were denied the right to vote because of their race.²³⁵ In the Louisiana Energy Services case, Forest Grove and Center Springs residents noted that a history of neglect by local politicians made their community a prime target for the uranium enrichment plant. During the siting process, the company concluded that the community’s absence of stores, schools, medical clinics and businesses, unpaved or poorly maintained homes, lack of public drinking water, and segregated and substandard schools made it preferable to other

areas that enjoy greater public benefits and a higher quality of life.²³⁶

Implications of Social Injustice

A common result of local struggles for environmental justice, and the expanded discussions of social justice problems that such struggles stimulate, is greater subsequent political involvement by local residents on a host of other social and political issues. For example, as a result of their involvement in the dispute over the proposed Louisiana Energy Services uranium enrichment plant, a member of the local environmental justice organization was elected to the Homer town council, another was elected to the parish school board, a third now serves on the parish police jury, and a supporter was elected the first African-American mayor of Homer.²³⁷ Elsewhere in Louisiana, the Carville/St. Gabriel residents who filed the first Title VI complaint accepted by EPA were later able to incorporate the area as a means to obtain greater control over future land uses and to ensure that more benefits flowed to the local community.²³⁸ Similarly, the environmental justice struggle over the North River Sewage treatment plant in West Harlem has galvanized the community, sparking the residents into action on other social problems and increasing voter participation.²³⁹ The SouthWest Organizing Project (SWOP), although focused on a range of environmental justice issues, has actively pursued voter registration, economic diversification, tax policies, employment discrimination, and other social justice issues since the early 1980s.²⁴⁰

These examples suggest that criticism of environmental justice as too myopic and a diversion of scarce resources away from other more important social and public health problems is not well-founded.²⁴¹ Most often, environmental justice efforts do not wastefully divert a community’s attention but instead bring residents together to focus on a broad array of social justice problems. These examples also indicate that government officials and firms seeking community acceptance for environmentally risky projects must as a practical, if not also moral, matter consider whether social justice is served by their projects. For if the environmental and other social burdens of a proposed project are imposed on the local community while the economic and other benefits flow elsewhere, “community opposition will be fierce and the chances for success lessened.”²⁴²

230. Julie H. Hurwitz, Executive Director, NLG/Sugar Law Center, Written Statement to Environmental Justice Symposium (May 25, 1999) (unpublished statement on file with author and at *Environmental Justice Issues Presented to Congressional Leaders* (visited Mar. 10, 2000) <<http://www.ejrc.cau.edu/ejcongsyp.htm>>).

231. Cole, *supra* note 110, at 76; Charles J. McDermott, *Balancing the Scales of Environmental Justice*, 21 *FORDHAM URB. L.J.* 689, 704 (1994).

232. Shintech Press Release (Nov. 20, 1996) (on file with author).

233. Jeff Karoub & Nick Chiappetta, *Genesee Twp. Still Might Get Steel Mill*, *FLINT J.* (Flint, Mich.), Mar. 3, 1999, at C1.

234. See, e.g., John LaPlante, *Shintech’s Not Trashing Tulane*, *ADVOCATE* (Baton Rouge, La.), July 31, 1997, at 9B; Sherry Sapp, *Foster Plans Romeville Follow-Up*, *ADVOCATE* (Baton Rouge, La.), Aug. 5, 1997, at 1B; but see Bezdek, *supra* note 211 (urging environmental justice advocates to stress the positive effects that greater environmental restrictions would have on jobs, income, and economic development).

235. North Baton Rouge Env’tl. Ass’n et al., *supra* note 52, at 2 (citing Florence T. Robinson, *Problems Along the Mississippi: A Case Study* (Update, Jan. 8, 1998)); see also John McQuaid, *Too Close for Comfort*, *TIMES-PICTAYUNE* (New Orleans, La.), May 21, 2000, at J-2.

236. In re Louisiana Energy Servs., L.P. (Claiborne Enrichment Center), 45 N.R.C. 367, 386-88 (1997), 1997 WL 458771 (N.R.C.), 1997 NRC LEXIS 20 (Atomic Safety and Licensing Board May 1, 1997), *aff’d in part & rev’d in part*, 47 N.R.C. 77 (1998), 1998 WL 191132 (N.R.C.), 1998 NRC LEXIS 7 (Nuclear Regulatory Commission Apr. 3, 1998).

237. Electronic mail from Nathalie Walker, EarthJustice, to Robert R. Kuehn (May 9, 2000).

238. Cole, *supra* note 97, at 329-30.

239. Miller, *supra* note 54, at 722.

240. See *Taking Back New Mexico*, 4 *RACE, POVERTY & ENV’T*, Fall 1993, at 30.

241. See FOREMAN, *supra* note 11, at 115-36; but see Ringquist, *supra* note 37, at 251 (comparing Foreman’s attack on environmental justice to criticizing crime policy for diverting attention and resources away from education because the latter may have a larger effect on addressing certain social ills than the former).

242. McDermott, *supra* note 231, at 704. Chemical Waste Management’s director of government affairs acknowledged the importance of addressing social justice concerns in arguing that those most affected by a proposed site need better access to the benefits created “[o]therwise, as in this case [Kettleman City], community opposition will be fierce and the chances for success lessened.” *Id.*

Conclusion

The pervasiveness of environmental justice concerns in current policy debates is illustrated by recent congressional hearings on the federal government's \$7.8 billion plan for the restoration and preservation of the Everglades. In the midst of discussions about the need to take corrective action to protect species of rare or endangered plants and animals, African-American and Hispanic congresswomen expressed concerns about effects on low-income and minority populations and questioned the distributive, procedural, and social justice impacts of the plan.²⁴³ Noting that only 10 out of 4,000 pages of an impact study considered low-income and minority concerns, the congresswomen asked whether some interests were being treated more favorably than others and questioned why there was no effort to ensure that low-income and minority persons could participate in the economic benefits of the restoration. In a sense, the proponents of the plan had neglected to evaluate their proposal from an expanded environmental justice perspective, with the predictable result that some were now questioning the fairness of the proposal.

The four-part taxonomy presented in this Article offers a means to ensure that environmental justice concerns are ap-

propriately integrated into environmental decisionmaking. While some may contend that analyzing environmental justice through its constituent notions of justice simply broadens the already ambitious scope of the problems that environmental justice encompasses, this taxonomy also suggests a path to avoid environmental injustice—government officials and private entities undertaking activities with environmental impacts on peoples of color and lower incomes must address the distributive, procedural, corrective, and social justice aspects of their actions.

As the allegations of injustice set forth in this Article demonstrate, the proponents of the facilities that have triggered many of the most highly publicized environmental justice disputes have not sought to ensure that their proposals did justice to the impacted communities, with the predictable result that the projects failed to win the support of the communities. Compliance with the law, while perhaps sufficient to gain necessary government approvals or avoid the imposition of legal liability, is no longer sufficient if one wishes to achieve environmental justice. This taxonomy offers the opportunity for greater awareness of what justice means to impacted people of color and lower income communities and to help them attain the liveable communities and improved environmental conditions that are the shared goals of all Americans.

243. *Impact of Restoration Project on Minority, Poor Citizens Should Be Weighed, Panel Told*, Daily Env't Rep. (BNA), Mar. 3, 2000, at A-9.