

EQUALITY IS NOT NECESSARILY JUST: TOWARD A PROCEDURAL AND RELATIONAL VIEW OF ENVIRONMENTAL JUSTICE

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ABSTRACT

This paper is the latest in a series of articles I have written to conceptualize an alternative to the distributive paradigm espoused by the environmental justice movement. It is clear that early studies such as the *"Toxic Waste and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites"* prepared by the Commission for Racial Justice of the United Church of Christ exposed the potential our present model of environmental regulation has to create distributional inequities and forced policymakers to identify how the burdens as well as the benefits of environmental protection are spread among groups of persons.

It is also clear to me that distributive theories of environmental justice are inadequate to justify a more just environmental policy or support the aims of the environmental justice movement. I share with Iris Marion Young a view that the distributive paradigm's implicit assumption that social judgments are about what individual person have, how much they have, and how that amount compares with what other persons have and the belief that this focus on possession is limiting. Distributive theories of justice tend to preclude thinking about what people are doing according to what institutionalized rules, how their doings and havings are structured by institutionalized relations that constitute their positions, and how the combined effects of their doings has recursive effects on their lives. What I attempt to do in this paper is to shift the focus of the discussion away from the distribution and on the decision-making structures and procedures which determine what there is to distribute, how it gets distributed, who distributes and what the distributive outcome is. To paraphrase Ms. Young, environmental injustice occurs not simply because some persons have cleaner air and water than others□ environmental injustice derives as much from the corporate and legal structures and procedures that give some persons the power to make decisions that affect millions of other people.²

A. THE DISTRIBUTE RHETORIC OF ENVIRONMENTAL INJUSTICE

The ideology of the environmental justice movement is evolving and untested and, from its beginnings to the present, has been described in distributive terms, e.g., "[p]eople of color throughout the United States are receiving **more than their fair share** of the poisonous fruits of industrial production"³ or, "[t]he incorporation of environmental justice strategies at the local, agency, and national levels in respect to the cleanup process at federal facilities strives to: . . . level the playing field in cases where communities of color and low-income communities have had to bear a **disproportionate** share of environmental and economic degradation."⁴ And, "[t]he nation's environmental laws,

regulations, and policies have not been applied fairly across all segments of the population. Some individuals, groups, and communities receive **less protection** than others because of the geographic, location, race, and economic status."⁵ (Emphasis added.)

The environmental justice movement has enjoyed some success. Not only federal environmental protection policies and practices are being scrutinized for distributional inequities, but those of mainstream environmental organizations as well.⁶ Not surprisingly, the federal response has likewise been couched in distributive terms. In 1994 President Clinton signed Executive Order 12898, "Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations" which directs federal agencies to develop environmental justice strategies that identify and address **disproportionately high** exposure and adverse human health or environmental effects of their programs, policies and activities on communities of color and low-income populations.⁷ (Emphasis added.)

The distributive vocabulary of Executive Order 12898 has led the U.S. Department of Energy to base its response in similar terms. Using geography on one hand, and on race or ethnicity on the other, the DOE identifies defines communities situated within a certain distance from one of its facilities or within a certain distance of proposed transportation corridors as affected. If the affected communities include large sub-communities of racial or ethnic minorities, the DOE then attempts to discern if such sub-communities are disproportionately affected. This is the beauty and simplicity of the distributive paradigm—its ability to accommodate any issue of justice by simply formulating the issue in terms of the distribution of some material or nonmaterial good among various agents. Any social value can be treated as some thing or aggregate of things that some specific agents possess in certain amounts and alternative end-state patterns of distribution of that good among those agents can be compared.⁸ But therein also lie the limitations of the distributive theory of environmental justice.

B. THE LIMITS OF THE DISTRIBUTIVE PARADIGM OF ENVIRONMENTAL JUSTICE

Distributive theorists of justice agree that justice is the primary normative concept for evaluating all aspects of social institutions, but at the same time they along with many environmental justice theorists identify the scope of justice with distribution. This entails applying a logic of distribution to social goods which are not material things or measurable quantities and results in situations or actions similar to the extremely narrow definition of "affectedness" used by the U.S. Department of Energy to determine if it will have to accommodate the concerns of the affected community. According to Ms. Young, applying a logic of distribution to such goods produces a misleading conception of the issues of justice involved. It reifies aspects of social life that are better understood as a function of rules and relations than as things. And it conceptualizes social justice primarily in terms of end-state patterns, rather than focusing on social processes.⁹

The limitations of the distributive paradigm are even more pronounced as it is applied in the context of environmental protection decision-making in the United States. In the

environmental protection context, the distributive paradigm implicitly assumes that social judgments are about what kind of exposure to contaminants, toxins or emissions individual persons experience, how much exposure they experience, and how that amount compares with what other persons experience. This focus on possession tends to preclude thinking about what people are doing, according to what institutionalized rules, how their doings and havings are structured by institutionalized relations that constitute their positions, and how the combined effect of their doings has recursive effects on their lives.¹⁰

1. THE DISTRIBUTIVE PARADIGM IGNORES THE INSTITUTIONAL AND POLICY FRAMEWORK OF ENVIRONMENTAL DECISION-MAKING

Environmental protection in the United States is generally accomplished through a licensing or permitting procedure whereby the licensee or permittee is authorized by a government agency to construct, manufacture, operate, or take any other action provided that such action does not emit, discharge or release pollutants in quantities exceeding the levels authorized in the permit. The typical permitting procedure requires notice and comment that is generally embedded in federal, state or tribal administrative procedure laws. The first step consists of a company completing and submitting lengthy application forms supported by lengthier technical support documents. Many companies use the services of engineering consulting firms and specialized legal counsel at this juncture. After an application is submitted, a federal, state or tribal environmental agency employee will review the application for completeness. If complete, the agency will assign a permit writer to draft a permit.

Once the agency has drafted a permit that it believes satisfies all legal requirements, it formally issues the draft permit to the company, notifies the public, and invites comments from the company and the public. After the comment period closes, the permit writer reviews and responds to all comments and revises the draft permit, after which the agency undertakes a final review and issues the final permit. If the permittee or the public takes still objects to the issuance of the permit, they may appeal the final agency action—first, with an administrative agency and subsequently, with a court.

The power to influence the permitting of a particular discharge or the construction of a factory or waste management facility is generally exercised by a widely dispersed network of agents mediating the decisions of legal, technical, scientific and other experts. These agents can include attorneys and consultants retained by governmental agencies, corporations and public interests groups and environmental organizations. To that extent many people have some power in relation to others, even though they lack the absolute power to decide policies or results. However, the institutional context is not limited to agents. It includes also, any structures or practices, the rules and norms that guide them, and the language and symbols that mediate social interactions within them.

Some of the aims of the environmental movement at once recognizes the "otherness" of the environmental protection institution and entreats it to become less different. For example, the Principles of Environmental Justice issued by the First National People of

Color Environmental Leadership Summit declared, inter alia, that "environmental justice demands that public policy be based on mutual respect and justice for all people, free from any form of discrimination or bias, and demands the right to participate as equal partners at every level of decision-making including needs assessment, planning, implementation, enforcement and evaluation."¹¹ If these principles accurately describe the aspirations of the environmental justice movement, then environmental injustice attaches not only when the community lacks both the absolute authority or power even in this mediated sense to influence the permitting or siting decisions, but also when the myriad networks of agents and processes that comprise the environmental protection institution in the United States excludes the community's participation or when such participation is less than fully knowing and informed.¹² The distributive paradigm of environmental justice and its focus on end-state patterns is not useful in suggesting and justifying the means by which these institutional processes and relationships can be recast to be more environmentally just.

C. ANOTHER PERSPECTIVE OF ENVIRONMENTAL JUSTICE

If the distributive paradigm leads us to an ideological dead-end, what is the alternative? In an earlier paper,¹³ I suggested that the challenge facing the environmental justice movement was to articulate an alternative philosophy that will support a more just environmental policy and the aims of the environmental justice movement. Here I suggest some elements that might be considered in developing that philosophy.

1. ENVIRONMENTAL JUSTICE REQUIRES JUST DECISION-MAKING STRUCTURES AND PROCEDURES

The means are more important than the ends. More artfully stated, "the consequences" or "good" brought about by an action should not be our only concern in moral matters; rather, we should be constrained by rules and duties that are binding on us prior to and notwithstanding the consequences or "good" brought about by an action.¹⁴ The basic idea is that whatever ends we wish to pursue, we cannot violate certain basic rules about how we ought to treat each other while pursuing these goals. My sense is that we need to examine the formal and informal networks of relationships and processes that make up our environmental protection institutions and engage in rational discourse to formulate the just procedures by which these institutions can achieve just ends.

2. ENVIRONMENTAL JUSTICE REQUIRES EMPOWERMENT OF STAKEHOLDERS

Beyond examining the workings of the environmental protection institutions and establishing just procedures, it seems to me that the environmental justice suggests not only community participation in these procedures but also a co-equal standing in the participatory process. This idea is embedded in much of the environmental justice literature. In the federal facility environmental restoration context for example: "[a]n additional obligation is that [tribal consultation and participation in federal facility environmental decision-making] should be knowing and informed." These obligations form the basis for building tribal capacity. Consistent with the government-to-

government relationship that exists between the federal government and Indian tribes, the Committee recommends that specific tribal capacity building programs be negotiated by the relevant federal agencies and Indian tribes.¹⁵

3. ENVIRONMENTAL JUSTICE IS CULTURALLY EGALITARIAN

An interesting dynamic occurs when communities clash with agents of the environmental institutions. Iris Marion Young terms this phenomenon "cultural imperialism." In a discussion where the participants come from different cultural and social groups, and where some groups have greater symbolic or material privilege than others, appeals to a 'common good' are likely to perpetuate such privilege. . . . When discussion participants aim at unity, the appeal to a common good, in which they are all supposed to leave behind their particular experience and interests, the perspectives of the privileged are likely to dominate the definition of that common good. The less privileged are asked to put aside their claims of entitlement or interest must be put aside for the sake of a common good whose definition is biased against them.¹⁶

According to Ms. Young, cultural imperialism involves the paradox of experiencing oneself as invisible at the same time that one is marked out as different. The invisibility comes about when dominant groups fail to recognize the perspective embodied in their cultural expressions as a perspective. These dominant cultural expressions often simply have little place for the experience of other groups, at most only mentioning or referring to them in stereotyped or marginalized ways. This, then, is the injustice of cultural imperialism: that the oppressed group's own experience and interpretation of social life finds little expression that touches the dominant culture, while that same culture imposes on the oppressed group its experience and interpretation of social life.¹⁷

An excellent example of cultural imperialism is cited by E.T. Durie, of the Maori Land Court in New Zealand. "Some decades ago, a Maori elder appeared before the court on a claim of ownership to the Whanganui riverbed, did no more than sing a song of the river. The court noted that he sang a song but had nothing to say. It was, of course, usual for a people without a Land Transfer Office to assert their ownership in their own ways and the old man was simply singing his title in customary style. His song was a declaration of ownership."¹⁸

D. SOME CONCLUDING THOUGHTS

The environmental justice movement is young and its ideology is yet evolving. It takes its ideology from the lessons and its rhetoric from the civil rights movement. Unequal, unfair, disproportionately impacted—these are all, to some degree or another, accurate characterizations of the affects our environmental protection system has had on some communities of color. The response to such distributional characterizations in the civil and human rights arena was to establish affirmative action and other preferential programs to redistribute income, employment and opportunities. The legislative and judicial backlash against these programs seems to me a fair indication of the bankruptcy of such distributive paradigms. The backlash does not negate the real distributive

inequities, but it does implicate the use of such theories and rhetoric in formulating lasting responses to remedy these inequities.

FOOTNOTES

1. Young, Iris Marion, *Justice and the Politics of Difference*, Princeton University Press, Princeton, 1990, p.25.
2. Young, *Justice and the Politics of Difference*, p. 23.
3. Austin, Regina and Schill, Michael, *Black, Brown, Red, and Poisoned*, in *Unequal Protection: Environmental Justice & Communities of Color*, Robert D. Bullard, ed., Sierra Club, San Francisco, 1994, p.53
4. National Environmental Justice Advisory Council, cited in *Final Report of the Federal Facilities Environmental Restoration Dialogue Committee*, April 1996, p.98.
5. Bullard, *Unequal Protection*, p.xi.
6. See Grossman, Karl, *The People of Color Environmental Summit*, in Bullard, *Unequal Protection*, pp. 278-279
7. 59 Fed. Reg. 7629 (Feb. 11, 1994).
8. Young, *Justice and the Politics of Difference*, p.24.
9. Young, *Justice and the Politics of Difference*, p.24-25.
10. Young, *Justice and the Politics of Difference*, p.25.
11. Grossman, Karl, *The People of Color Environmental Summit*, in Bullard, *Unequal Protection*, p.274.
12. Young, *Justice and the Politics of Difference*, p.56
13. Tano, Mervyn L., *Environmental Justice and Federal Facility Environmental Restoration: An Emerging Partnership*, in *Proceedings of the Waste Management Symposium*, Tucson, 1997.
14. Chambers, Simone, *Reasonable Democracy*, Cornell University Press, Ithaca, 1996, p.19.
15. *Final Report of the Federal Facilities Environmental Restoration Dialogue Committee*, april 1996, p.101-102.
16. Young, Iris Marion, *Communication and the Other: Beyond Deliberative Democracy*, in *Justice and Identity: Antipodean Practices*, Wilson, Margaret and Yeatman, Anna, editors, Bridget Williams Books, Wellington, 1995, p.141.
17. Young, Iris Marion, *Justice and the Politics of Difference*. p. 60.
18. Durie, Edward Taihakurei, *Justice Biculturalism and the Politics of Law*, in *Justice and Identity: Antipodean Practices*, Wilson, Margaret and Yeatman, Anna, editors, Bridget Williams Books, Wellington, 1995, p.36.