

# Michigan Law Review

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Volume 90 | Issue 7

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1992

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### Recommended Citation

Luke W. Cole, *Remedies for Environmental Racism: A View from the Field*, 90 MICH. L. REV. 1991 (1992).

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## CORRESPONDENCE

### Remedies for Environmental Racism: A View from the Field

Luke W. Cole\*

The *Michigan Law Review's* recent Note, *Remedying Environmental Racism*,<sup>1</sup> is an important and timely analysis of a civil rights law-based approach to environmental justice work — one of the first to emerge from legal academia.<sup>2</sup> It correctly points out the high hurdles

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\* Staff Attorney, California Rural Legal Assistance Foundation. A.B. 1985, Stanford; J.D. 1989, Harvard. — Ed. I would like to thank Ralph Santiago Abascal for his input on an earlier version of this correspondence.

1. Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394 (1991).

2. See, e.g., Regina Austin & Michael Schill, *Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 KAN. J.L. & PUB. POLY. 69 (1991); Kelly M. Colquette & Elizabeth A. Henry Robertson, *Environmental Racism: The Causes, Consequences, and Commendations*, 5 TUL. ENVTL. L.J. 153 (1992). Lawyers and law students are belatedly entering the fray: sociologists, urban planners, public health professionals, and activists have written about the disproportionate impact of environmental hazards on poor people and people of color for years. See, e.g., J.E. Davies et al., *Problems of Prevalence of Pesticide Residues in Humans*, 2 PESTICIDE MONITORING J. 86 (1968) (stating that, in survey in Dade County, Florida, blacks had higher DDT levels than whites in blood and fat tissue); A. Myrick Freeman III, *The Distribution of Environmental Quality*, in ENVIRONMENTAL QUALITY ANALYSIS 243, 264-69 (Allen V. Kneese & Blair T. Bower eds., 1972) (finding air pollution distributed inequitably by income in Kansas City, St. Louis, and Washington, D.C.); Kathryn R. Mahaffey et al., *National Estimates of Blood Lead Levels: United States, 1976-1980*, 307 NEW ENG. J. MED. 573 (1982) (finding "significantly higher prevalence" of lead poisoning in children whose families had incomes under \$6000 compared to those with incomes over \$6000); U.S. GENERAL ACCOUNTING OFFICE, *SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES* (1983) (noting that three out of four commercial hazardous waste sites in eight southern states were located in majority black communities, the fourth in a 38% black community); Robert D. Bullard, *Solid Waste Sites and the Black Houston Community*, 53 SOC. INQUIRY 273 (1983) (finding garbage dumps in Houston placed disproportionately in black neighborhoods); Robert Bullard & Beverly Hendrix Wright, *The Politics of Pollution: Implications for the Black Community*, 47 PHYLON 71, 77 (1986) (noting that black neighborhoods, which comprise one quarter of Houston, housed six of the city's eight garbage incinerators and all five city-owned garbage landfills); COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, *TOXIC WASTES AND RACE IN THE UNITED STATES* (1987) (finding mean minority percentage of areas with toxic waste sites four to five times greater than that of areas without toxic waste sites; race a more reliable predictor of location of hazardous waste sites than income; three of the five largest hazardous waste landfills in United States in black or Latino communities); Rebecca Villones, *Women in the Silicon Valley*, in MAKING WAVES: AN ANTHOLOGY OF WRITINGS BY AND ABOUT ASIAN AMERICAN WOMEN 172, 173 (Asian Women United of California eds., 1989) (finding people of color, and especially immigrant workers, concentrated in most dangerous and lowest paying jobs in electronics industry); Cynthia Hamilton, *Women, Home & Community: The Struggle in an Urban Environment*, RACE, POVERTY & THE ENVTL., April 1990, at 3 (finding working class women of color motivated to organize around toxic threats to their neighborhoods).

that toxic racism's victims must overcome to successfully pursue such a strategy. Godsil's piece will hopefully spur more academic and on-the-ground work in this nascent legal field, which I call "environmental poverty law" — that is, representing low-income communities (often, in this field, communities of color) facing environmental hazards.<sup>3</sup> As a practitioner of environmental poverty law who has used civil rights law to fight a toxic waste incinerator, I want to offer a view from outside the academy on several of Godsil's points.

The environmental poverty law field is ripe for work. Study after study confirms that poor people and people of color bear the disproportionate burden of not only toxic waste facilities, but air pollution, lead poisoning, pesticide poisoning, and garbage dumps.<sup>4</sup> Here in California, our three Class I toxic waste dumps — the dumps permitted to take almost every chemical known to science — are all situated in communities of people of color.<sup>5</sup> More difficult than merely identifying the problem is coming up with a solution to it.

I agree with Godsil's doubts about obtaining judicial remedies under the Equal Protection Clause of the Fourteenth Amendment or section 1983 of the Civil Rights Act of 1866.<sup>6</sup> Aside from the two cases the Note cites,<sup>7</sup> at least three other federal suits have alleged violation of civil rights laws for a variety of environmental abuses: the siting of a garbage dump,<sup>8</sup> the operation of a garbage dump,<sup>9</sup> and the

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3. See Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L.Q.* (forthcoming 1992).

4. See Paul Mohai & Bunyan Bryant, *Environmental Racism: Reviewing the Evidence*, in *RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE* (Bunyan Bryant & Paul Mohai eds., 1992); see also sources cited *supra* note 2.

5. Those facilities are in Buttonwillow, Kern County, 52% Latino and 10% black; Kettleman City, Kings County, 95% Latino; and Westmorland, Imperial County, 72% Latino. U.S. DEPT. OF COMMERCE, 1990 CENSUS DATA, TABLE 5: AGE BY RACE AND HISPANIC ORIGIN [hereinafter CENSUS DATA].

6. 42 U.S.C. § 1983 (1988) (discussed in Godsil, *supra* note 1, at 408).

7. *East Bibb Twiggs Neighborhood Assn. v. Macon-Bibb County Planning & Zoning Commn.*, 706 F. Supp. 880 (M.D. Ga.), *affd.*, 896 F.2d 1264 (11th Cir. 1989); *Bean v. Southwestern Waste Mgmt.*, 482 F. Supp. 673 (S.D. Tex. 1979), *affd. without opinion*, 782 F.2d 1038 (5th Cir. 1986).

8. *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1144 (E.D. Va. 1991). The court rejected the allegation of Residents Involved in Saving the Environment (RISE), a biracial community organization challenging the siting of a regional garbage dump near their community in King & Queen County, Virginia, that the county had violated their civil rights by placing the landfill in a 64% black neighborhood. The court, using the analysis established in *Village of Arlington Heights v. Metropolitan Development Housing Corp.*, 429 U.S. 252 (1977), found that RISE had not provided sufficient evidence of intentional discrimination by the county government, which, according to the court, was making an economic and environmental decision in the landfill siting process. *R.I.S.E.*, 768 F. Supp. at 1149-50. The case is currently on appeal.

9. *Bordeaux Action Comm. v. Metropolitan Nashville*, No. 390-0214 (M.D. Tenn. filed Mar. 12, 1990). This suit alleged improper oversight of a solid waste landfill in a 70% black commu-

siting of a toxic waste incinerator.<sup>10</sup> So far, no plaintiff has prevailed using a civil rights approach, although in a closely related case based on California environmental law, a Sacramento Superior Court judge recently ruled that a local governmental agency must translate environmental review documents into Spanish to ensure “meaningful involvement” by residents of Kettleman City, who have been fighting a toxic waste incinerator that Chemical Waste Management, Inc. has slated for their town.<sup>11</sup>

Having worked with dozens of grassroots environmental groups throughout California and represented Kettleman City residents in the two challenges mentioned above, I offer these comments on Godsil’s remedies. I do not mean to criticize (though my comments do take issue with some of her proposals), but merely to add another voice to a conversation large enough for many to join.

*The State’s Role in Siting.* In discussing state control over toxic waste facility siting, Godsil asserts that “the state, unlike [a private] developer, is not motivated by profit.”<sup>12</sup> In this era of government retrenchment — marked by deep federal budget cuts under Presidents Reagan and Bush — and increasing state and local government insolvency, states will certainly be considering land values of potential hazardous waste sites. “Profit” will, in fact, motivate — cost conscious states will replace “cost conscious developers.”<sup>13</sup> Only because states are more susceptible to political pressure than private corporations, *not* because of economics, does Godsil’s thesis — that state site selec-

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tion. The preliminary injunction that plaintiff sought was denied, according to Walter Searcy, attorney for plaintiffs.

10. *El Pueblo para el Aire y Agua Limpio v. Chemical Waste Mgmt. Inc.*, No. CIV-F-91-578-OWW (E.D. Cal. filed July 7, 1991). This case alleged that Chemical Waste Management (Chem Waste) had engaged in a pattern and practice of siting toxic waste incinerators in communities of color nationwide. Chem Waste currently operates three commercial toxic waste incinerators: one on the south side of Chicago in a neighborhood that is 80% black and Latino; one in Sauget, Illinois, a 75% black community; and one in Port Arthur, Texas, in a 77% black and Latino neighborhood. See CENSUS DATA, *supra* note 5. The company is now trying to site an incinerator at its Kettleman Hill facility just outside Kettleman City, which is 95% Latino and 40% monolingual Spanish-speaking. See CENSUS DATA, *supra* note 5.

Judge Sandra Brown Armstrong granted defendants’ motion to dismiss on grounds of ripeness, dismissing the claim without prejudice on October 17, 1991. Chem Waste argued, and Judge Armstrong agreed, that even though the company had sought for more than four years to place an incinerator in Kettleman City, the facility was not yet “sited” because it did not have all required permits, and thus no harm to plaintiffs had taken place.

Plaintiffs also alleged due process violations by Kings County, which had refused to translate the Environmental Impact Report on the proposed incinerator and affirmatively denied plaintiffs the use of an interpreter at the sole public hearing on the project. The court has ordered that claim held in abstention pending a final judgment in a related state court case. See *infra* note 11.

11. *El Pueblo para el Aire y Agua Limpio v. County of Kings*, Sacramento Superior Court No. 366045, Gunther, J., Ruling on Submitted Matter, Dec. 30, 1991, at 10.

12. Godsil, *supra* note 1, at 406.

13. *Id.* at 426.

tion has more promise to ameliorate environmental racism than private site selection — hold true.

The proposed remedies also presume a state's neutrality in the siting process, or, further, the state's playing an equalizing role. This is simply not the case in the real world.<sup>14</sup> Increasingly, states have set up processes to site toxic waste facilities over local opposition — whether that opposition is by people of color or not.<sup>15</sup> Additionally, the U.S. Environmental Protection Agency has threatened at least one state, North Carolina, with loss of Superfund monies if it does not site a toxic waste incinerator.<sup>16</sup>

*Affected Population.* The Note calls for federal legislation on the issue of environmental racism, in part to “end confusion and litigation over what constitutes the relevant population affected” by a particular unwanted facility. The proposed approach would rely on the Environmental Impact Statement (EIS) prepared for a particular site to identify those “physically or financially harmed” by the site.<sup>17</sup> While a noble goal, this part of an act would be difficult to implement: most EISs prepared for toxic waste facilities, in my experience, conclude that those facilities will have *no* significant impact on the surrounding communities. For example, two Environmental Impact Reports done on Chem Waste's Kettleman Hills Facility near Kettleman City, one for an expansion of a toxic dump in 1985 and one for a proposed toxic waste incinerator in 1990, concluded that neither facility would significantly affect nearby residents or the environment. Similarly, the U.S. Environmental Protection Agency and the South Coast Air Quality Management District both recently ruled that because a proposed toxic waste incinerator near East Los Angeles<sup>18</sup> would have “no significant environmental impact,” an EIS did not even have to be prepared for the project.<sup>19</sup> The project would have been California's first toxic

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14. In many areas, state and federal governments are avidly seeking to site locally unwanted facilities, and not always based on environmental grounds. *See, e.g., CERELL ASSOCIATES, POLITICAL DIFFICULTIES FACING WASTE-TO-ENERGY CONVERSION PLANT SITING 17-30 (1984)* (report commissioned by the California Waste Management Board to find those least likely to oppose the siting of garbage incinerators, identifying communities with a population under 25,000, rural communities, “old timer” residents, blue collar workers, conservatives, and those with less than a high school education).

15. *See, e.g., CAL. HEALTH & SAFETY CODE §§ 25199-25199.14 (West Supp. 1992)* (allowing panel appointed by governor to override local land use decisions on toxic waste facilities).

16. *See North Carolina; Order to Recomence Proceedings to Determine Whether to Withdraw Hazardous Waste Program Approval, 54 Fed. Reg. 15,940 (1989).*

17. Godsil, *supra* note 1, at 422.

18. Not coincidentally, a 95% Latino community. *See CENSUS DATA, supra* note 5.

19. *See Supplemental Brief of Petitioners Re: Mootness, at 2, Mothers of East Los Angeles v. U.S. Environmental Protection Agency (9th Cir. 1991) (Nos. 90-70209, 90-70210)* (noting that EPA required no EIS); *South Coast Air Quality Management Dist. v. Security Envtl. Sys., No B044023, slip op. at 4, 6, 9 (Cal. Ct. App. Feb. 20, 1991)* (noting declarations of SCAQMD that

waste incinerator<sup>20</sup> and was to be sited in the most polluted and most populous air basin in the country. Most environmental impact statements find that there is no "relevant population affected," although such "scientific" fiction has proved false at other toxic waste sites around the country, where people have become sick or died.<sup>21</sup>

*Reliance on Law.* Perhaps the central flaw in using a civil rights law-based approach to attack the disproportionate burden of toxic waste sites borne by people of color is, simply, that it relies on the law.<sup>22</sup>

The siting of unwanted facilities in neighborhoods where people of color live must not be seen as a *failure* of environmental law, but as a *success* of environmental law. While we may decry the *outcome*, the laws are working as they were designed to work. The disproportionate burden of environmental hazards borne by people of color is legal under U.S. environmental (and probably, civil rights) laws.<sup>23</sup> The laws are products of a political process from which communities of color have been historically excluded and in which people of color are grossly underrepresented today. Because siting decisions are political decisions, the outcome — more facilities in people of color's communities — is neither surprising nor unpredictable. As Richard Delgado points out, people of color face "more discrimination, stress, insecurity, school failure, and psychological and physical health problems" than whites, even at comparable income levels.<sup>24</sup> This is true not *in*

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incinerator posed no significant threats). Surrounding residents, believing differently, took the agencies to court — and lost. Prolonged community activism and another lawsuit ultimately beat the incinerator. See *Mothers of East Los Angeles v. U.S. Environmental Protection Agency* (9th Cir. Aug. 16, 1991) (No. 90-70209) (order dismissing appeal as moot) (noting decision not to construct incinerator); Letter from Charles A. Klinge, attorney for respondent-intervenors California Thermal Treatment Services, Inc. and Security Environmental Systems, Inc. to Cathy A. Catterson, Clerk, 9th Cir. (June 6, 1991) (on file with author) (announcing decision not to build incinerator as a result of lawsuits and public pressure). As a result of EPA and SCAQMD's actions, the local assembly member from the district, Lucille Roybal-Allard, introduced legislation requiring Environmental Impact Reports (California's EIS equivalent) for all toxic waste incinerators. The legislation became California law in 1989. CAL. PUB. RES. CODE § 21151.1 (West Supp. 1992).

20. See *South Coast Air Quality Management Dist.*, No. B044023, slip op. at 5.

21. See, e.g., DAVID OZONOFF ET AL., *MEDICAL EVALUATION OF THE BILLERICA STREET RESIDENTS* (1989); Jack Griffith et al., *Cancer Mortality in U.S. Counties with Hazardous Waste Sites and Groundwater Pollution*, 44 ARCHIVES OF ENVTL. HEALTH 69 (1989); see also CALIFORNIA ASSEMBLY OFFICE OF RESEARCH, *TODAY'S TOXIC DUMP SITES: TOMORROW'S TOXIC CLEANUP SITES* (1986) (stating that all nine major hazardous waste landfills then operating in California were leaking, and none had adequate groundwater monitoring programs).

22. See, e.g., Gerald P. López, *Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration*, 77 GEO. L.J. 1603, 1700-05 (1989).

23. See, e.g., *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1144, 1149-50 (E.D. Va. 1991) (determining that because disproportionate impact was justified under environmental laws, it was legal under civil rights laws).

24. Richard Delgado, *Recasting the American Race Problem*, 79 CAL. L. REV. 1389, 1391

spite of our system of laws, but *because* of our system of laws.

Godsil's final pages note in passing the real answer to environmental racism (and ultimately, all racism): grassroots activism, which offers a solution not found in law for at least four compelling reasons. First, grassroots activists around the country, by stopping the siting of toxic waste disposal facilities in their communities, have forced industry to move from a pollution *control* to a pollution *prevention* mode of operation.<sup>25</sup> Because so few waste disposal sites exist, the price of disposal has risen to a point where companies are seriously working at replacing toxic materials in their manufacturing processes so that they do not produce toxic waste as a byproduct.<sup>26</sup> By forcing a permanent solution to toxic waste disposal problems, grassroots activists have done what hundreds of federal laws and regulations on pollution control have failed to do: they have reduced toxic waste. This reduction means that fewer facilities will be sited, and — hopefully — that fewer facilities will be sited in communities of people of color.

Second, as mentioned above, the decision to site a toxic waste facility is a political and economic decision, not a legal one. Thus, a political tool is required to change that decision: a community-based movement to bring pressure on the person or agency which has made the decision. Legal tools are blunt and slow; as Godsil has so cogently pointed out, legal tools simply do not fit the task at hand.

Third, taking environmental problems out of the streets and into the courts plays right into the polluters' hands. Struggles between a polluter and its host community pit the power of money against the power of people. Polluters generally have the money, while communities resisting toxic intrusion have the people. Thus, to take a dispute into court, where the polluters have the best lawyers, scientists, and government officials money can buy, can be a tactical mistake. It will often disempower community activists to take a struggle out of their hands and into court, where they have to rely on "experts" and outside help rather than their own actions.

Finally, civil rights law has so far miserably failed to combat racism,<sup>27</sup> so why should we think that it will be better able to combat

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(1991) (reviewing ROY L. BROOKS, *RETHINKING THE AMERICAN RACE PROBLEM* (1990)). Delgado concludes that our national civil rights strategy has done little to disrupt the racism to which people of color are exposed. *Id.* at 1390.

25. See, e.g., Calif. Dept. of Health Services, *State and Industry Join Together to Reduce Hazardous Waste* (press release, Sept. 7, 1990) (announcing goal of 50% reduction in generation of incinerable hazardous wastes in California by 1992 because the state lacks incineration capacity); see also BARRY COMMONER, *MAKING PEACE WITH THE PLANET* 103-40, 178-90 (1991).

26. The Note recognizes that pollution prevention, also called source reduction, is the ultimate answer to toxic waste disposal problems. Godsil, *supra* note 1, at 396 n.11.

27. See, e.g., DERRICK BELL, *AND WE ARE NOT SAVED* (1987); Delgado, *supra* note 24;

environmental racism? The very real change that the civil rights movement of the 1950s and 1960s brought about — change wrought less by laws than by hundreds of thousands of activists taking to the streets across the country — has been sapped away by increasingly conservative courts. Sadly, bringing new legal theories for expanding civil rights into court will not be met with sympathy in most parts of the country. Like the civil rights activists of yesterday, we must return to the streets with our demands.

Despite all of this, we environmental poverty lawyers *do* have a role to play in the fight against environmental racism and for environmental justice. The courts are an arena in which sometimes it is impossible not to play; we must be there when our client groups call on us to take the struggle into that forum. Civil rights suits are also important vehicles for educating the public and decisionmakers, as well as generating publicity for — and building morale in — local struggles. But any legal strategy not firmly grounded in, and secondary to, a community-based political organizing strategy is ripe for failure. Let's get to work.

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Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978).