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In the 1970s and 1980s, the U.S. Congress passed a series of laws that were milestones in environmental protection, including the Clean Air Act and the Clean Water Act. But by the 1990s, it was clear that environmental benefits were not evenly distributed and that poor and minority communities bore disproportionate environmental burdens. The Clinton administration put these concerns on the environmental policy agenda, most notably with a 1994 executive order that called on federal agencies to consider environmental justice issues whenever appropriate. This volume offers the first systematic, empirically based evaluation of the effectiveness of the federal government's environmental justice policies.

CHAPTER 8

ENVIRONMENTAL JUSTICE IN THE COURTS

Elizabeth Gross and Paul Stretesky

The environmental justice movement recognizes the importance of social equity when assessing environmental burdens and benefits (Bullard 1990; Gould, Pellow, and Schnaiberg 2008). As a result, environmental justice concerns are diverse and focus on a variety of issues. As Bunyan Bryant (1995, 6) makes clear, environmental justice “refers to those cultural norms and values, rules, regulations, behaviors, policies, and decisions to support sustainable communities where people can interact with confidence that the environment is safe, nurturing, and productive [and is] supported by decent paying safe jobs, quality school and recreation; decent housing and adequate health care; democratic decision-making and personal empowerment.”

The focus of this chapter is on environmental justice in the courts, which makes up only one small portion of the movement’s overall concerns and activities. More specifically, this chapter emphasizes corrective justice, or the role of contemporary U.S. courts in punishing environmental offenders and/or reversing environmental injustices (Weinrib 2012). Prior to examining the way courts function with respect to environmental justice we briefly examine major federal environmental justice policies that attempt to direct environmental enforcement. We focus on federal environmental justice policy because this is the level of governance at which a significant amount of court activity has occurred. We draw upon that policy to examine whether federal agencies have pursued environmental justice goals set out in those policies in the courts.

President Clinton's executive order on environmental justice did not stress the role of the courts as a way to address environmental equity. In fact, the only mention of judicial review in Executive Order 12898 (EO 12898) highlighted its limits. Nevertheless, evaluating environmental justice in the courts is important to consider for a couple of reasons. First, the courts are often the end point of enforcement cases brought by the EPA and other agencies against regulated entities for violating environmental laws. Their decisions, therefore, are a critical component of enforcement. Second, many in the environmental justice scholarly and advocacy community have argued that the courts provide an important venue for holding government accountable under existing statutes. This was reflected in President Clinton's memorandum that accompanied Executive Order 12898 (EO 12898), which emphasized that Title VI of the Civil Rights Act of 1964 and the National Environmental Policy Act were important vehicles through which environmental justice claims might be addressed.

For these reasons, consideration of environmental justice in the courts is an important component in any evaluation of federal environmental justice policy. With this in mind, the first part of the chapter, examine if the courts encourage environmental injustice by providing lenient sentences to some environmental offenders. Overall, the research on this issue suggests that the monetary fines and penalties that are handed down from the courts are not directly discriminatory – that is they don't appear to disproportionately penalize industries in white and affluent communities and ignore violations in poor and minority communities. Instead, it appears that if discrimination in sentencing exists it is likely to be indirect.

In the next section we question whether the courts are correcting environmental injustice by ruling that the unequal siting of facilities violates civil rights law. We look to see if courts, as potential agents of positive change, diminish environmental injustice by opening up

opportunities for communities to challenge discriminatory siting. We carry out this investigation in the case of Title VI of the federal Civil Rights Act, the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, the National Environmental Policy Act (NEPA), and litigation of state environmental justice claims. Unfortunately, we discover that although the Environmental Protection Agency (EPA) continually emphasizes the need for effective implementation of Title VI, the courts appear hesitant to use the Civil Rights Act to achieve environmental justice. This is most apparent in the U.S. Supreme Court decision *Alexander v. Sandoval* (2001), which, while not an environmental justice case itself, does operate to significantly limit the effectiveness of the Civil Rights Act for environmental justice plaintiffs. We suggest that the cases coming out of *Alexander v. Sandoval* demonstrate the lack of commitment within courts to support environmental justice efforts. We, unfortunately, discover a similar lack of commitment with regard to the Equal Protection Clause and NEPA in environmental justice cases.

Finally, we conclude this chapter by proposing potential studies and strategies for addressing environmental injustice and achieving favorable environmental justice outcomes.

Federal Environmental Justice Policy and the Role of the Courts

The role of courts in environmental policy has a long history in the United States (McSpadden 1995; Melnick 1983; O’Leary 1993). Courts may adjudicate environmental violations, shape the definition of environmental problems through their interpretations of environmental law, decide whether environmental laws are constitutional, determine which agencies have authority over environmental management issues, and engage in judicial review of agency decisions (Burns, Lynch, and Stretesky 2009). As a result, courts influence

environmental justice outcomes through cases brought before them for adjudication, appeal, and/or review. Because agency priorities may influence the types of cases that are brought before the courts we highlight the priorities identified in EO 12898, the EPA's recently developed environmental justice strategy, Plan EJ 2014, as well as the role of Title VI.

Among the most important environmental justice policy developments in the U.S. was the issuance of EO 12898 on February 11, 1994, by President Bill Clinton (Bowers 1995; Bullard and Johnson 2000; O'Neil 2007). Section 1-1 of EO 12898 states, "Each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities." Importantly, EO 12898 applies to all federal agencies, two of which are especially important to the order's ideals: the Environmental Protection Agency (EPA) and the Department of Justice (DOJ). The EPA issues pollution permits, may bring administrative and civil actions against offenders that violate environmental regulations, and participates in the mitigation of uncontrolled and abandoned waste sites throughout the country, a practice that often involves courts. The DOJ may initiate criminal cases against offenders who violate environmental laws (Burns, Lynch, and Stretesky 2009). Unfortunately, research on the effectiveness of EO 12898 appears to suggest that the policy has had little impact on environmental justice outcomes in either agency (Konisky, 2009a; Murphy-Green and Leip 2002; O'Neil 2007; Sims 2013). Bonner (2012, 100) perceives, "while the objectives of EO 12898 aim to mitigate the adverse impact of environmental policies on minorities, it is unclear whether it has been successful." It is also important to point out that EO 12898 is not directly enforceable in the courts.

As discussed below, EO 12898 can potentially influence the EPA and DOJ through its

implementation and use of Title VI of the Civil Rights Act of 1964. This point was emphasized in President Clinton's memo that accompanied the order (Clinton, 1994). Specifically, the president states,

In accordance with Title VI of the Civil Rights Act of 1964, each Federal agency shall ensure that all programs or activities receiving Federal financial assistance that affect human health or the environment do not directly, or through contractual or other arrangements, use criteria, methods, or practices that discriminate on the basis of race, color, or national origin.

Title VI stops discrimination by entities that receive federal funds. In theory the EPA can use Title VI to prevent the federal funding of state and local governments that issue pollution permits that create a disparate impact. Thus, Title VI has been viewed as a powerful weapon in fighting environmental injustice, especially given the priorities in EO 12898. According to the EPA there are, however, relatively few Title IV investigations and even fewer Title VI settlements (<http://www.epa.gov/civilrights/TitleVICases/index.html>). The DOJ has not, as of yet, brought any Title VI cases forward. The lack of Title VI cases suggests that the courts have played a very limited role in achieving environmental justice through Title VI. As discussed later in this chapter, the court has also interpreted Title VI narrowly, especially in relation to private actions, and this interpretation has limited its effectiveness and therefore conflicts with the spirit of EO 12898 as Clinton (1994) first envisioned it.

When EO 12898 was established, EPA Administrator Carol M. Browner (1994, 13) reported in the agency's *Environmental Justice Strategy* that "strong and effective enforcement of environmental and civil rights laws is fundamental to virtually every mission of EPA". Recently environmental justice organizations have renewed their attempts to advocate for civil rights through Title VI. As a result, federal agencies appear to have a renewed interest in achieving environmental justice outcomes. For example, the EPA recently reconvened the

Federal Interagency Working Group on Environmental Justice in 2010 for the first time in over a decade.. Currently, the EPA (2013, 1) states in the Plan EJ 2014 Progress Report that “for the first time in its 42 year history, the U.S. Environmental Protection Agency (EPA) has laid the cornerstones for fully implementing its environmental justice (EJ) mission of ensuring environmental protection for all Americans, regardless of race, color, national origin, income or education.” Plan EJ 2014 includes a new emphasis on Title VI, and the EPA (2011a, 31) highlights that “administrator Lisa Jackson has made a commitment to reform and revitalize the Agency’s Title VI program, which includes ensuring that recipients of EPA Federal Assistance comply with their Civil Rights requirements.”

In addition to the focus on using Title VI, the Council on Environmental Quality has used EO 12898 to guide National Environmental Policy Act (NEPA) assessments and environmental impact statements that describe the effects of federal agency actions. The idea is that NEPA must take environmental justice issues into consideration when preparing impact statements. When potential environmental injustice is identified, proposed mitigating efforts should be considered. Unfortunately, the federal government is not required to adopt environmental justice recommendations within NEPA. Because agencies need only consider environmental impacts, EO 12898 may be prevented from being a more effective policy tool for achieving environmental justice (Bratspies et al. 2008). As we suggest below, NEPA is still not used to achieve environmental justice. Nevertheless, the EPA (2011a, 32) has recently suggested that NEPA will be used much more aggressively in the future.

The Distribution of Court Penalties

The environmental justice movement has a long history in the U.S. and can be interpreted as emerging from a series of complex historical events that have brought together civil rights activists, traditional environmentalists, anti-toxic activists, workers, and academics (Taylor 2000; Cole and Foster 2001). Within the movement these groups of actors share common “motives, background, and perspectives” (Cole and Foster 2001, 32). In particular, academics are one set of actors that have produced studies that are used in the courts to demonstrate how environmental hazards are distributed by race and class (e.g., Bullard, 1983; Mennis, 2005). For example, Robert Bullard’s work on waste incinerators in Houston, Texas, is seen as critically important to the movement’s academic roots. (Bullard 1990; Cole and Foster 2001). Bullard’s early efforts at bringing empirical evidence of environmental inequity directly to the courts has generated considerable attention from the movement, as these studies provide an opportunity to help frame grievances (see Cole and Foster 2001, 25).

The first academic study to examine whether courts are biased in their application of penalties did not occur until 1992, when Lavelle and Coyle published an article that examined whether race and class inequalities exist in the distribution of monetary penalties imposed by the courts for violations of the Clean Air Act (CAA); the Clean Water Act (CWA); the Safe Drinking Water Act (SDWA); the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); and the Resource Conservation and Recovery Act (RCRA). Importantly, their study examined only the distribution of penalties among all federal violations contained in the EPA DOCKET database, looking at administrative and civil violations between the years of 1985 and 1991. While their results are limited to noncriminal actions in federal courts, the implications for environmental justice are significant. As Ringquist (1998, 1151)

notes, “The study received a good deal of press coverage [and] is often cited by environmental justice advocates as an example of how government actions discriminate against minorities and the poor to perpetuate inequalities in exposure to pollution.”

Lavelle and Coyle (1992) studied injustice in the courts by obtaining the racial and economic demographics of each zip code where environmental violation(s) occurred. Zip codes were ranked by race and income and then compared according to the mean monetary penalties reported in DOCKET. The researchers found that violations in white zip codes received penalties that averaged \$153,607 while violations that occurred in minority zip codes received penalties that averaged \$105,028. They also discovered that the mean penalty in high-income zip codes was higher (\$146,993) than the mean penalty in low-income zip codes (\$95,564). But these results did not hold up when the authors examined the type of violation. For example, CERCLA violations received *higher* fines in minority zip codes than in white zip codes. In addition, higher penalties were found in low-income zip codes than in high-income zip codes except in the case of CWA violations. Lavelle and Coyle’s results are suggestive of environmental injustice in the courts in the case of race, but their findings are far from definitive, especially in the case of income. Importantly, the researchers did not control for competing variables that may have produced the differences they observed.

Ringquist (1998) also examined penalties between the years 1974 and 1991 and found little evidence of environmental injustice in sentencing disparity after adjusting for case characteristics, judge attributes, and the political environment. Moreover, his analysis suggested that a 1 percent increase in the percentage of minorities living in a given zip code was associated with a 1 percent *increase* in an environmental fine. This relationship is the opposite of what the

environmental injustice hypothesis would predict, since penalties in zip codes that are predominately African American are larger than penalties in zip codes that are largely white.

One additional study by Atlas (2001) also examined the DOCKET database to see if there is significant discrimination against minorities and the poor in the case of civil penalties for environmental violations. Atlas (2001) examined DOCKET violations by census tracts rather than zip codes and controlled for many of the same variables as Ringquist. Atlas (2001) discovered that minority neighborhoods were fined an average of \$133,808 while white areas were fined an average of \$113,791, leading him to conclude that there is little “basis for concluding that penalties are lower in disproportionately minority or low-income areas.” Taken together, research on civil penalties suggests that courts do not discriminate by race or income when penalizing environmental violators.

These findings of no relationship between court decisions and punishment can be generalized to other types of court penalty studies as well. For example, Lynch, Stretesky, and Burns (2004) examined environmental fines leveled against 153 petroleum refineries for administrative, civil, and criminal violations of environmental laws. These environmental violations were primarily adjudicated in federal courts. The authors used race and economic demographics at both the census tract and zip code levels to study the community characteristics around refineries that violate the law. When studying census tracts they discovered that, after controlling for the type of crime and company characteristics, court-ordered fines were approximately equal for refineries operating in white and minority areas. This was not the case for zip codes. Cross-sectional results suggest that a 1 standard deviation increase in the percentage of Hispanic residents was associated with a 95% decrease in the penalty amount. The researchers could not rule out the possibility of aggregation effects but noted that this result

suggests that refineries situated in Hispanic zip codes are much less likely to be punished by the courts than refineries located in white zip codes.

Research has also been conducted on criminal violations. Greife (2012), for example, examined environmental justice issues in the case of penalties against companies found guilty for criminal violations of environmental law. Greife focused only on violations adjudicated by the DOJ, and found that while crime seriousness and company characteristics were good predictors of monetary penalties, the average income of residents living within three miles of the violation location was also an important predictor. Specifically, a 1 percent increase in residents earning more than \$75,000 in annual income was associated with an increase in criminal penalties on the order of \$236,297. He did not find evidence of environmental injustice with respect to race. Greife also conducted a post hoc analysis, and argues that prosecutors “overcharge” those environmental offenders who commit their crimes near wealthy residents. He demonstrates this argument empirically by showing that maximum allowable fines are elevated in high-income neighborhoods and that this elevated potential is what leads the court to give higher-than-average penalties to offenders. Greife’s results are interesting in that they are similar to those of Ringquist and Atlas. However, with respect to criminal violations, the economic injustice that may be occurring when punishing environmental offenders may be a function of prosecutors and not the court.

More research is needed to examine the behavior of investigative agencies and prosecuting attorneys when examining environmental penalties. As Sims (2013, 16) notes, “Environmental justice advocates have long protested . . . relative inattention of environmental enforcement officials to violations that primarily affect these communities.” Specifically, researchers should examine where and how investigations are carried out and the willingness of

prosecutors and regulatory attorneys to enforce environmental violations by filing those violations in the courts. Our review suggests that there is little discrimination in courts sentencing environmental offenders. This is not surprising given that prosecutors and regulatory attorneys have considerably more discretion than judges, because prosecutors and regulatory attorneys have the discretion to move a case forward. As a result, biases in sentences may not appear because prosecutors have brought forth only cases that are “worthy” of enforcement (Davis 1998). Missing from statistical analysis of sentencing disparity are cases that may not receive attention because of community characteristics. We therefore encourage future researchers to examine the potential role of investigators and prosecutors in detecting environmental violations and bringing them forward to the courts. Specifically, do extra legal case characteristics determine if cases are brought forward to prosecutors and/or the courts? Do community characteristics influence inspection levels or the severity of charges filed in court? Answering these questions is critical to understanding how environmental injustice develops and if courts can play a role in mitigating that injustice.

The Role of Courts in Achieving Environmental Justice

The general role of the courts in environmental justice–related claims is to consider the plaintiff’s claim and determine whether a violation of law has been proven and, if so, what action will be taken to address the proven violation. Often, environmental justice claims are brought by citizens who sue the government on the grounds that it made a siting or permitting decision that adversely affects or will affect their community (Cole, 1993). The courts consider evidence and argument and, if a violation is established, could issue an injunction to prohibit the government’s action from taking effect. Depending on the kind of case and claims proven, the court could,

theoretically, order damages. In practice, it is difficult to prove a violation of law on environmental justice grounds, and, as a result, the courts have generally not issued orders against alleged environmental justice offenders.

In this section we examine common legal claims asserted by plaintiffs in the courts. We examine the extent to which these lawsuits result in outcomes that may reduce environmental injustice in the case of Title VI, the Equal Protection Clause, the National Environmental Policy Act, and litigation of state environmental justice claims.

Title VI of the 1964 Civil Rights Act

Environmental justice plaintiffs often utilize Title VI of the Civil Rights Act of 1964 in their efforts to establish that they have been illegally subjected to disproportionate environmental consequences. A large body of legal scholarship has outlined various arguments for using Title VI to redress violations of environmental justice (e.g., Cole 1991; Godsil 1991; Hammer 1996; Mank 1999a 1999b, 2008). The EPA itself issued guidance over the years to clarify the agency's interpretation and implementation of Title VI. In 1998, the EPA issued draft guidance establishing how the agency would investigate Title VI complaints and environmental justice challenges to permits (U.S. EPA 1998). This guidance, particularly the portion that outlined the disparate impact analysis that the Agency would use to evaluate state-issued permits, was met with stiff resistance. State and local governments, represented by groups such as the Environmental Council of the States, the National Governors Association, the National Association Counties, and the U.S. Conference of Mayors complained that the guidance was too vague and infringed on their local land use authority. Government officials, joined by members of the business community, also objected on the grounds that the guidance would interfere with

efforts to economically revitalize urban areas (Ringquist 2004; U.S. Commission on Civil Rights 2003). Members of Congress complained that the guidance would stifle economic development, and from 1998-2001, it enacted appropriations bills that suspended EPA's authority to accept new Title VI cases. The EPA issued revised guidance in 2000 to address some of the previously raised concerns, but they remain unsatisfactory to many environmental justice stakeholders.

Important Case Law

The extent to which environmental justice claims can be redressed through Title VI is also highly-dependent on case law. Two provisions of Title VI – Section 601 and Section 602 – are most relevant. Section 601 of Title VI provides that no person shall, "on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" (Civil Rights Act, 1964). But in order to prevail on a Section 601 claim, plaintiffs must prove intentional discrimination. For example, in *Alexander v. Sandoval* (2001, 275, 280), the United States Supreme Court stated that "it is . . . beyond dispute . . . that § 601 prohibits only intentional discrimination." However, it has been recognized that racial and ethnic discrimination is an "often-intractable problem" and that "it is often difficult to obtain direct evidence of [the] motivating animus" (306, 307n13 [dissent]). The observation that it is difficult to find direct evidence of discrimination is confirmed by scientific studies that find that racial and economic segregation around environmental hazards may intensify over time in what can only be described as indirect discrimination (Stretesky and Hogan 1998). As a result, the court's focus on direct discrimination is unlikely to increase environmental equity. Specifically, it ignores larger social forces that may be discriminatory and therefore contribute to environmental injustice (Stretesky

and Hogan 1998). In addition, it is well-recognized that it is exceedingly hard to establish proof of direct discrimination (Davis 1998).

One example of the way Section 601 of Title VI may play out in courts is through cases such as *South Camden Citizens in Action v. New Jersey Department of Environmental Protection* (2006, hereafter *South Camden*), a case which was first heard in U.S. District Court for the District of New Jersey in 2001, was appealed to the Court of Appeals for the Third Circuit, and was then remanded back to the district court level for further proceedings. In that case the New Jersey Department of Environmental Protection issued a permit for the construction and operation of a grinding facility in a neighborhood where 91 percent of the residents were minority. South Camden Citizens argued intentional discrimination in the siting of the facility and introduced statistical evidence by Mennis (2005) to show a pattern of environmental injustice in New Jersey (*South Camden* 2006). While the court recognized that the environmental effects of the facility siting could bear more heavily on minorities than non-minorities, it cited Mennis's own testimony that "any disparate impact that exists does not, by itself, support a finding of a discriminatory purpose on the part of NJDEP" and then concluded that "this impact alone is not determinative..." (*South Camden* 2006, 75-6). The court suggested in a footnote that South Camden citizens "should direct their efforts prospectively to the appropriate legislative and agency forums and work towards a sensible and meaningful environmental equity policy for the future" (116).

Just as environmental justice plaintiffs have encountered difficulty in successfully prosecuting environmental justice claims under Section 601 of Title VI, they have also had difficulty using Section 602 of the Civil Rights Act to achieve justice. Section 602 of Title VI (Section 2000d-1) provides that

each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d [Section 601] of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing financial assistance in connection with which the action is taken.

Section 602 provides the groundwork for the EPA to make regulations that prohibit EPA funding recipients from engaging in actions that have a discriminatory effect. As discussed above, the EPA has enacted regulations that attempt to prohibit recipients of EPA funding from administering programs that have a discriminatory effect. More specifically, the EPA regulations provide that

A recipient shall not use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex. (Nondiscrimination in Programs Receiving Federal Assistance from the Environmental Protection Agency 2012).

The EPA's focus on "effect" rather than "intent" is promising. For instance, when the South Camden Citizens first took their case forward to the U.S. District Court for New Jersey in 2001, it looked as though it would be a victory for the environmental justice movement. Plaintiffs asserted that Section 602 provides a private cause of action under Title VI (*South Camden* D.N.J. 2001). Specifically, the plaintiffs argued that Section 602's authorization of the EPA to issue the rule prohibiting discriminatory effects provided plaintiffs with the power to sue "on a theory of disparate impact discrimination in the administration of a federally funded program" (474). The court proceeded to consider the "novel question of whether a recipient of EPA funding has an obligation under Title VI to consider racially discriminatory disparate impacts when determining whether to issue a permit, in addition to compliance with applicable environmental standards"

(474). In its analysis, the court initially recognized that “Section 602 of Title VI clearly authorizes federal agencies, such as the EPA, to promulgate regulations implementing Section 601” (475). Further, the court noted that the EPA has interpreted Title VI to prohibit EPA funding recipients from “utilizing ‘criteria and methods’ which have the ‘purpose or effect’ of discrimination against individuals based on their race, color, or national origin” (475, quoting 40 C.F.R. § 7.35(b)). The court also found that these EPA regulations applied to permitting decisions (*South Camden* D.N.J. 2001). Ultimately, the *South Camden* court granted the plaintiffs’ request for a declaratory judgment that the state agency “violated Title VI of the Civil Rights Act by failing to consider the potential adverse, disparate impact of the [] facility’s operation on individuals based on their race, color, or national origin, as part of its decision to permit [the] proposed facility” (481). The *South Camden* court further granted the plaintiffs’ request for a preliminary injunction, vacating the permits New Jersey granted to the facility and asking the NJDEP to develop a protocol to ensure Title VI compliance (*South Camden* D.N.J. 2001). This decision in *South Camden* to recognize the private right of action for environmental justice plaintiffs under Section 602, to recognize that environmental justice plaintiffs may prevail by showing a discriminatory impact, and to issue the declaratory relief and preliminary injunction, demonstrates what must occur if there is any hope of achieving social equity.

As previously noted, the victory for the environmental justice movement that was achieved in *South Camden* was temporary (Garland 2007, 22–23). Five days after the decision in New Jersey, the U.S. Supreme Court issued its decision in *Alexander v. Sandoval* (2001) that there is no private right of action for individuals to sue the government under Section 602. The court said, however, that individuals may sue under Section 601 that prohibits intentional discrimination (*Alexander v. Sandoval* 2001, 282–286). Nevertheless, the court noted that a

private right to enforce regulations didn't exist under Section 601. As a result, *South Camden* was not a victory for the environmental justice movement in the case of Section 601 or 602.

It must be acknowledged that some U.S. circuit courts of appeal, including the Tenth Circuit, do not read *Alexander v. Sandoval* to preclude all claims brought to enforce disparate-impact claims (e.g., *Robinson v. Kansas* 2002). Rather, the Court's *Alexander* decision has been read to bar only disparate-impact claims brought by private parties directly under Title VI. The Tenth Circuit has stated that disparate-impact claims may still be brought against state officials under 42 U.S.C. § 1983 to enforce Section 602 regulations (*Robinson v. Kansas* 2002). To sustain a Section 1983 claim, the plaintiff must prove that the act complained of was committed by a person acting under color of state law and that such conduct deprived the plaintiff of a right, privilege, or immunity secured by the Constitution or the laws of the U.S. (see *Wilder v. Virginia Hospital Assoc.* 1990). Specifically, a plaintiff must prove that (1) that they are the intended beneficiary of the provision sought to be enforced; (2) that the right asserted is not so “vague and amorphous” that its enforcement strains judicial competence; and (3) that the provision unambiguously imposes a binding obligation on the State (see *Lucero v. Detroit Public Schools* 2001). Nevertheless, the circuits are split concerning whether *Alexander v. Sandoval* effectively precludes a Title VI plaintiff from bringing suit under Section 1983. Indeed, the Third, Sixth, and Ninth Circuits have interpreted that case to mean that plaintiffs cannot enforce regulations promulgated pursuant to Section 602 through a private cause of action under 42 U.S.C. § 1983 (see *Save Our Valley v. Sound Transit* 2003; *South Camden* 2001; *Wilson v. Collins* 2008).

In sum, Section 601 of Title VI requires proof of intentional discrimination and, although Section 602 does not necessarily require proof of intentional discrimination, the U.S. Supreme Court curtailed any private cause of action under Section 602 in *Alexander v. Sandoval*. As a

result Title VI is largely ineffective for environmental justice plaintiffs to seek justice in the courts. Still, in some circuits, the door is open for plaintiffs to pursue Title VI claims under Section 1983. To the extent that plaintiffs are able to prove discriminatory intent, Title VI *could* provide a useful framework for pursuing environmental justice claims, regardless of whether the court recognizes a plaintiff's right to pursue a private right of action under Section 602. As a result, one specific recommendation that environmental justice activists have been calling for is to amend Title VI so that it clearly allows for a private right of action in the case of any discriminatory outcome (Lawyers' Committee for Civil Rights Under Law 2010). Such an approach would make the courts more effective at promoting environmental justice.

EPA Handling of Title VI Complaints

Outside of the courts there is also controversy regarding the EPA's failure to use Title VI to fight environmental injustice. A more extensive agency effort would occur in the agency itself through the EPA Office of Civil Rights (OCR). The EPA OCR accepts Title VI complaints but emphasizes that it does not represent "recipients" or "complainants" in the process (EPA <http://www.epa.gov/civilrights/docs/t6guidefaq2.pdf>). Thus, while EPA Title VI complaints would not be decided in court, it is possible that they could eventually be adjudicated in courts upon appeal outside of the agency. Moreover, some Title VI complaints may be linked to civil and/or criminal violations so could be adjudicated in federal court in the traditional enforcement process (Hiar 2011).

Unfortunately, Title VI complaints that have been filed with the OCR do not appear to be taken seriously by the EPA (Lawyers' Committee for Civil Rights Under Law 2010). None of the hundreds of Title VI complaints, for instance, have been recognized as necessitating that

federal funding is withdrawn (Deloitte Consulting 2011; Hiar 2011). As the Lawyer's Committee for Civil Rights Under the Law (2010) point out, the total number of Title VI cases that are dismissed or rejected by the EPA are simply extraordinary (Deloitte Consulting 2011).

A report produced for the EPA by Deloitte Consulting (2011, 15-16) suggests that this lack of attention to Title VI cases is a reflection of the fact that the EPA OCA "lost sight of its mission and priorities." As one example of this assertion Deloitte indicates that Title VI complaints are backlogged as long as four years. Specifically, the failure of the EPA OCA to act on Title VI cases has put the agency at odds with the environmental justice ideals set out in EO 12898. As a solution, the agency should seek to provide more resources to Title VI complaints to avoid delayed justice (Deloitte 2010). The EPA OCR may also consider working more closely with private parties to provide guidance and resources that ensure that cases are successfully brought forward to help eliminate environmental injustice as opposed to adopting a "hands off" approach to the investigative process. Such an approach within the EPA allows for the vague and inconsistent handling of complaints and does little to reduce environmental injustice.

Equal Protection Clause

Environmental justice plaintiffs have also focused on the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. The Equal Protection Clause provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." In order to show a violation of the Equal Protection Clause, plaintiffs must demonstrate defendants' actions resulted in a discriminatory impact and that the defendants intentionally or purposefully discriminated against them "based upon plaintiffs' membership in a protected class" (*Committee Concerning Community Improvement v. City of Modesto* 2009, 702–703).

The U.S. Supreme Court has recognized that “an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the [policy] bears more heavily on one race than another” (*Washington v. Davis* 1976, 242). The court further recognized that the “impact of an official action is often probative of why the action was taken in the first place since people usually intend the natural consequences of their actions” (*Reno v. Bossier Parish School Bd.* 1997, 487). But a facially neutral law is not necessarily invalid just because it “may affect a greater proportion of one race than of another. Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution” (*Washington v. Davis* 1976, 242).

To show that facially neutral conduct is intentionally discriminatory in violation of the Equal Protection Clause, a plaintiff must demonstrate that the government “selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group” (*Personnel Administrator of Massachusetts v. Feeney* 1979, 279). For example, the plaintiff may show that the policy was “applied in a discriminatory manner” or that it was adopted out of discriminatory animus (*South Camden D.N.J.* 2006, citing *Yick Wo v. Hopkins* 1886, 373–374; *Hunter v. Underwood* 1985). “Determining whether invidious discriminatory purpose was a motivating factor [in the adoption of a facially neutral policy] demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available” (*Village of Arlington Heights v. Metropolitan Housing Development Corp.* 1977, 266). In addition, the court may consider the historical background of the decision; the sequence of events leading up to the decision; any departures from the normal procedural or substantive sequence; the legislative or administrative history, including statements by decision-making

officials; and the foreseeability of any disparate impact of the action (266; *see also Columbus Bd. Of Education v. Penick*, 1979, 464).

It is important to note that when a challenged governmental policy is "facially neutral," plaintiffs may also demonstrate discriminatory intent, in both Title VI and Equal Protection cases, by showing "gross statistical disparities" that show that "some invidious or discriminatory purpose underlies the policy" (*Committee Concerning Community Improvement v. City of Modesto* 2009, 703). Indeed, the courts have recognized that a showing of "gross statistical disparities" alone may provide sufficient proof of intent to discriminate (703). But such cases are rare; generally, plaintiffs must show more than just a discriminatory impact and should, as discussed above, offer other evidence of discriminatory purpose or intent such as historical information and legislative or administrative history (*Committee Concerning Community Improvement v. City of Modesto* 2009).

In an Equal Protection challenge, once plaintiffs meet the burden of establishing a discriminatory purpose based on race, the burden then shifts to the government to demonstrate that even in the absence of discriminatory animus, the same decision would have resulted (see *South Camden* D.N.J. 2006).

The Equal Protection Clause may, at first glance, appear to be a viable way for environmental justice plaintiffs to successfully challenge a discriminatory governmental action, especially given the potential under this clause to prove discriminatory intent through a showing of discriminatory impact. In practice, however, plaintiffs have had little success challenging governmental actions based on an Equal Protection argument because plaintiffs have difficulty establishing intent. For example, in *Bean v. Southwestern Waste Management Corp.* (1979), plaintiffs challenged the issuance of a landfill permit on the grounds that the governmental

agency was behaving in a discriminatory fashion when granting permits (Garland 2007). The court found that although the three sets of data that were offered, “at first blush, look[ed] compelling”, “...these statistics break down under closer scrutiny” and ultimately, the plaintiffs were unable to prove discriminatory intent. (Bean 1979, 678). , *East Bibb Twiggs Neighborhood Association v. Macon Bibb Planning & Zoning Commission* (1989) is another example of the courts’ refusing to find intentional discrimination when plaintiffs have asserted an Equal Protection claim after the siting of a landfill facility. (Garland 2007). The court found that while the landfill was located in a minority community, the decision was not motivated by a discriminatory intent. Because one landfill also existed in a census tract having a majority white population, the court could not find a “clear pattern unexplainable on grounds other than race” under the *Village of Arlington Heights* standard (*E. Bibb Twiggs Neighborhood Association v. Macon Planning & Zoning Commission* 1989). As Garland (2007, 17) recognizes, the *Bean* and *Twigg* cases “illustrate that proving discriminatory intent is a highly challenging standard of proof to meet.” As a result of these strict and unrealistic standards of direct evidence of discrimination there is not much hope that environmental injustice related to the distribution of hazards will be attenuated through court intervention and application of the Equal Protection Clause.

National Environmental Policy Act

Environmental justice plaintiffs have also attempted to assert claims under NEPA on the grounds that some federal agency acted in a biased, arbitrary, or capricious way. NEPA requires that federal agencies “take a ‘hard look’ at the environmental consequences” of a major federal action before taking such action (*Baltimore Gas & Elec. Co. v. Natural Resources Defense*

Council, Inc. 1983). NEPA does not require a particular result and does not require that no environmental harm occur; rather, it imposes a mandatory review process (*Lujan v. Defenders of Wildlife* 1992, 605). Agencies must prepare a “detailed statement” so that a reviewing court may determine whether the agency has made a good faith effort to consider the NEPA values (National Environmental Policy Act of 1969, 42 U.S.C. § 4332(1)(C)). Federal agencies must prepare an environmental impact statement (EIS) for “major Federal actions significantly affecting the quality of the human environment” (National Environmental Policy Act of 1969, 42 U.S.C. § 4332(1)(C)), but may first prepare an environmental assessment (EA) to determine whether an EIS is required (National Environmental Policy Act of 1969, 40 C.F.R. § 1508.9(a)(1)). The EA is a concise document that provides enough evidence and analysis for determination of whether to prepare an EIS or a finding of no significant impact (FONSI) (National Environmental Policy Act of 1969 40 C.F.R. § 1508.9(a)(1)). For example, environmental justice researchers and plaintiffs have alleged that an agency failed to properly consider environmental justice concerns in an EA prepared in connection with its NEPA review of a particular project (see Outka 2006; *One Thousand Friends of Iowa v. Mineta* 2002; *Saint Paul Branch of the NAACP v. U.S. Dept. of Transportation* 2011).

One of the bigger challenges for environmental justice plaintiffs in NEPA cases is establishing standing (*Saint Paul Branch of the NAACP v. U.S. Dept. of Transportation* 2011). That is, do environmental justice organizations lack standing when harms cannot be directly described and an agency determines that the project will have no significant impact on the environment? In order to establish standing, plaintiffs must show (1) that at least one of its members has suffered a concrete injury that is actual or imminent, not hypothetical; (2) that the injury is traceable to the defendant’s action; and (3) that it is likely that the injury will be

redressed by a favorable court decision (see *Friends of the Earth, Inc. v. Laidlaw Environmental Services* 2000). However, as a bar to standing, it has been held that “any obligation of [the federal agency] to consider environmental justice is not judicially enforceable” (*One Thousand Friends of Iowa v. Mineta* 2002, 1071). Further, it has been acknowledged by some federal district courts that environmental justice is not a right that can be used to appeal a lower court decision (1084; see also *ACORN V. U.S. Army Corps of Engineers* 2000) Finally, it has been stated that “the failure to consider ‘environmental justice’ in and of itself cannot support a finding [that the federal agency] acted in an arbitrary and capricious manner” (*One Thousand Friends of Iowa v. Mineta* 2002, 25608 at *21; see also *Sur Contra La Contaminacion v. E.P.A.* 2000).

Other courts, however, have acknowledged that even though EO 12898 does not create a private right to judicial review, an action may still be subject to environmental justice review under NEPA and the Administrative Procedures Act. For example, the District of Columbia Court of Appeals addressed whether the Federal Aviation Administration (FAA) adequately considered environmental justice concerns in its review of an airport expansion plan (*Communities Against Runway Expansion, Inc. v. Federal Aviation Administration* 2004). In that case the city of Boston initiated the environmental justice claim, arguing that the FAA’s use of the entire county as the “potentially affected area”, rather than the circumscribed greater Boston metropolitan area, was unreasonable. While the court disagreed, and thus the environmental justice claim failed, it bears noting that some courts will entertain environmental justice NEPA claims. Similarly, in *Mid States Coalition for Progress v. Surface Transportation Board* (2003), the Eighth Circuit Court of Appeals entertained an environmental justice NEPA claim and expressly recognized that “the purpose of an environmental justice analysis is to determine

whether a project will have a disproportionately adverse effect on minority and low income populations” (*Mid States Coalition for Progress v. Surface Transportation Board* 2003). That court further noted that “[t]o accomplish this, an agency must compare the demographics of an affected population with demographics of a more general character (for instance, those of an entire state)” (541).

The Fifth Circuit Court of Appeals has also recognized that although EO 12898 does not create a private right of action, an agency’s consideration of environmental justice issues is subject to review under the Administrative Procedure Act’s “arbitrary and capricious” standard (*Coliseum Square Association, Inc. v. Jackson* 2006, 232).

In short, NEPA may, theoretically, be a viable basis on which to successfully assert an environmental justice claim. That is, if plaintiffs can establish that the federal agency was arbitrary or capricious in considering and disclosing the environmental justice impacts of a proposed action a plaintiff may be able to prevail in court. While this has not been tested in any court there may be hope for court victories in this approach because it is increasingly clear that environmental justice is not examined in any systematic way across or within federal agencies. For example, Vajjhala, Van Epps, and Szambelan (2008) studied whether environmental justice issues increased in EISs and regulatory impact statements after EO 12898. While the researchers found that environmental justice issues were more likely to show up in EIS reports as a result of EO 12898, they also found high levels of inconsistency in the way environmental justice was addressed in those statements. They also discovered that few reports were arbitrary in the way they address environmental justice and did not “contain enough data to assess whether EJ impacts are significant” (Vajjhala, Van Epps and Szambelan, 2008, 2). In one agency (Department of Transportation) the use of “environmental justice” actually decreases over time

(Vajjhala, Van Epps, and Szambelan, 2008). It should not be surprising, then, that environmental justice activists have recommended that NEPA be modified to require consistency and “identify environmental justice as an issue in NEPA compliance documents” (Lawyers’ Committee For Civil Rights 2010, 17). Federal Agencies would then use EIS reports to ensure that environmental justice issues are monitored and that injustice is mitigated. Even if a plaintiff were to successfully assert an environmental justice claim under NEPA, such a win would not necessarily stop environmental injustice, but the agency would likely reconsider the impacts of such action on the plaintiff before making its decision.

Conclusions and Moving Forward

In this chapter we reviewed environmental justice policy and litigation in the federal courts. We argue that courts are in a unique position to contribute to or reduce environmental injustice through their sentencing duties and common law interpretation functions. In short, courts may help shape the environmental justice landscape. In the case of administrative, civil, and criminal adjudication for environmental violations we find that courts have done little to ameliorate the problem of environmental injustice. However, it also appears that courts have done little to contribute to the problem. Overall, the studies by environmental justice academics appear to suggest that the monetary fines and penalties handed down from the courts are not discriminatory. Instead, these penalties may be the result of complex factors that include the type of violation that is pursued by state regulatory agencies. If discrimination in sentencing exists, we suggest that it is indirect and may be more appropriately situated in the hands of the prosecutor or state regulatory attorney who brings those charges to the courts. There is considerable precedence for this assertion in the criminology literature, where it has been well

established that prosecutors have significantly more power than judges in determining the outcome of any particular case (Bibas 2003). We therefore propose that more attention be focused on prosecutorial discretion when examining environmental enforcement.

In the case of facility siting we also find that federal courts have done little to combat environmental injustice. We recognize that Title VI has not been used as President Clinton proposed in Executive Order 12898. Moreover, the EPA appears to continually reemphasize the importance of EO 12898 and the use of Title VI, but it does little to ensure environmental justice in the courts. Recently, the EPA (2011b) suggested that the agency is “pursuing long overdue, vigorous, robust, and effective implementation of Title VI.” As of yet this enforcement of Title VI in the courts has yet to take place in any serious fashion. Importantly, few Title VI cases have been brought forward. Thus, there is really very little that courts do that promote equality under Title VI. As we have noted, the courts appear to rule in ways that facilitate and support indirect forms of discrimination because they refuse to acknowledge the disparate impact in permitting and siting decisions. As a result, we suggest that courts focus more on statistical evidence of indirect discrimination in overburdened communities, which should prove especially beneficial for those communities that already face disproportionate hazards. This might mean that the EPA identifies communities where environmental hazards exist and ensures that no additional hazards are sited in those communities. It may also mean that enforcement agencies should spend more time inspecting facilities that operate in communities that face significant hazards.

While the DOJ has supported a right of private enforcement of Title VI regulations, we find little evidence that the agency has continued to develop proactive policies that address environmental justice through the use of the courts in any significant way (Bratspies et al. 2008). Instead, the DOJ has focused on drug enforcement and gang activities in minority communities

through anti-drug programs such as “Weed and Seed.” This means that environmental hazards, including lead, will continue to threaten low-income communities. DOJ, in combination with the EPA, should redirect its efforts toward ensuring equality in environmental enforcement—especially prosecution. This approach might begin with a focus on lead poisoning and children and locate those areas where empirical evidence suggests that lead poisoning still presents a serious threat to low-income and minority children and may lead to future problems such as learning disabilities, deviance, and even crime (Grandjean 2013). However, to achieve more environmental justice through the courts any approach will need to go beyond simply talking about environmental justice in agency documents. Instead, the DOJ might identify those communities that have the greatest need for enforcement efforts in the form of investigation and prosecution. We believe that such a proactive and active approach will bring more attention to environmental injustice in the courts and help facilitate corrective justice (see also Konisky, 2009b). While additional efforts for achieving environmental justice are being pursued in Plan EJ 2014, these efforts appear to have yet to produce changes in the courts, which are notably absent in that planning document (US EPA 2011a).

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