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# DISTRIBUTION IN ENVIRONMENTAL JUSTICE: IS THERE A MIDDLE GROUND?

RICHARD J. LAZARUS\*

At the outset, I must abandon "the Center." It is very hard to hold on to the Center when you have Dr. Greve on the panel because he pushes things so far over that the Center ends up being pretty far to the Left. To try, nonetheless, to bring things back to the Center, what I would like to do is take up the question that Professor Gregory raised in the first instance, and that is the challenge of the very title of this panel—"Racism or Economics"—which presents a false dichotomy.

It is a misguided and false dichotomy at three different levels. The factors, racism and economics, are not mutually preclusive; they are not unrelated; and the dichotomy misapprehends what environmental justice is all about.<sup>1</sup>

First, the factors are not mutually preclusive. Why not both? Why not sometimes racism, sometimes economics, and sometimes both? Why does not the possibility of "both" mean the problem may be twice as large, rather than half as large, as one might think. Why one and not the other? I do not doubt that there are instances when it is more racism than economics, and that there are instances when it is more economics than racism. But I would like to see somebody defend the thesis that it is just economics. What would make environmental protection so special that it

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This contribution to the symposium is a slightly edited version of oral remarks presented by Professor Lazarus at St. John's University, School of Law. It seeks to retain the flavor of that presentation. The footnotes were subsequently added by the editors of the *St. John's Journal of Legal Commentary*.

<sup>1</sup> See Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 Nw. U. L. Rev. 787, 825 (1993). "The pursuit of 'environmental justice' within the context of environmental law is necessarily problematic because to define the issue exclusively in those terms misapprehends the nature of the problem in the first instance. The distributional inequities that appear to exist in environmental protection are undoubtedly the product of broader social forces." *Id.*

would somehow be immune from the kinds of racist attitudes ranging from the most venal to the most subconscious stereotypical decisionmaking that we know otherwise influence decision-making on a day to day basis?<sup>2</sup>

Why should we suppose that environmental protection law policymakers are somehow unencumbered by those same kinds of attitudes? We know that such attitudes affect who is hired, who is fired in the employment sector. We know they affect where one attends school. We know they affect the level of health care that is obtained. We know that they affect the price that one pays for a car. We know that they affect the interest rate one gets for a loan. We know that they affect the extent to which one is arrested, convicted, and the sentence that one receives, including, many believe, the death sentence. We know these attitudes affect who one dates, who one marries. (I have yet to see an interracial couple on the *Love Connection*).<sup>3</sup>

What is so special about environmental pollution and law? Why would environmental pollution and environmental protection be somehow immune from all these attitudes?<sup>4</sup> Why would the distribution, the benefits, and burdens associated with it, unlike all these other well-established areas, not suffer from these same well-established tendencies?<sup>5</sup> I doubt it. And I think that the recent studies that suggest there is an economic dimension to who is subject to pollution and who benefits from cleanup do not question that there is simultaneously a racial dimension.

Second, race and economics is a false dichotomy because the two are clearly interrelated. Racism and economics are not independent variables. They are dependent variables. Economics is unrelated to race no more than politics is unrelated to race, which is another false dichotomy I have seen in this area.

<sup>2</sup> See Thomas A. Aleinikoff, *A Case for Race-Consciousness*, 91 COLUM. L. REV. 1060, 1066-69 (1991); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322-23 (1987).

<sup>3</sup> See Aleinikoff, *supra* note 2, at 1067.

<sup>4</sup> See Derrick A. Bell Jr., *After We're Gone: Prudent Speculations on America in a Post-Racial Epoch*, 34 ST. LOUIS U. L.J. 393, 397-400 (1990). Professor Bell's "Chronicle of the Space Traders," in which white Americans trade the freedom of black Americans for environmental protection, is one of the most dramatic statements of the proposition that racism can play a significant role in environmental protection issues. *Id.*; Derrick A. Bell Jr., *Racism: A Prophecy for the Year 2000*, 42 RUTGERS L. REV. 93, 98 (1989).

<sup>5</sup> See Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1214 (1991); see also BURTON A. WEISBROD ET AL., *PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS* 103, 555 (1978).

There was a notable *Wall Street Journal* Op-Ed piece recently, which said, "it's not racism, it's just politics."<sup>6</sup> Those two are no more related or unrelated than yellow is to green. There is, at bottom, a relationship between the two. Yellow is after all part of green, and race is part of the economy. Race is part of politics.

The fact that African-Americans and persons of color generally have less economic power, less choice, are less able to resist the risks caused by environmental degradation; is that unrelated to racism?<sup>7</sup> To say that their immediate cause may, in some instances, be market forces is not to say it is unrelated to race.

After all, a fairly fundamental reason why persons of color have less economic power is related to decades of de jure legalized racist laws in this country and their continuing vestiges, which cause African-Americans and other persons of color to have less economic power and less political power.<sup>8</sup> It is no more sensible to say that the distribution of such power is unrelated to race than to posit that school segregation patterns are unrelated to race, and just a matter of economics. Can one fairly posit that the reason why there are fewer persons of color in the wealthy suburban schools is merely because they just do not happen to live there, because it costs more to live there? It is therefore simply the result of economics. It is not race. I doubt it.

Finally, "racism or economics," the asserted dichotomy presupposes that siting is what environmental justice is all about. But it is not. If you take one thing away from the session this morning, it should be this: Environmental justice is not just about siting. It is not a code for "Not In My Backyard." It is symptomatic of a much broader issue. Environmental justice is about distribution. It is about distribution in the first instance, and it is about distribution over time.

Environmental justice takes into account the fact that the environmental protection laws that are supposed to redress pollution

<sup>6</sup> David Schoenbrod, *Rule of Environmental "Injustice" Is About Politics, Not Racism*, WALL ST. J., Feb. 23, 1994, at A21.

<sup>7</sup> See Lazarus, *supra* note 1, at 812. "Minority interests have traditionally had little voice in the various points of influence that strike the distributional balances necessary to get environmental protection laws enacted, regulations promulgated, and enforcement actions initiated." *Id.*; see also Kenneth L. Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1165 (1978). See generally EDWARD O. LAUMANN & FRANZ V. PAPPI, NETWORKS OF COLLECTIVE ACTION—A PERSPECTIVE ON COMMUNITY INFLUENCE SYSTEMS 5-9 (1976) (describing theory of "social structural analysis").

<sup>8</sup> See Aleinikoff, *supra* note 2, at 1073-75.

distribute benefits and they distribute harms. They distribute benefits in terms of jobs.<sup>9</sup> They distribute harms in terms of lost jobs, but they also distribute benefits in terms of improved environmental quality. And they distribute harms in terms by shifting environmental risks.<sup>10</sup> Environmental laws do not eliminate all risks. They reduce them and they move them.<sup>11</sup> They change their location. They change their physical status.

What environmental justice is all about is an explicit accounting of the distributional factors. Not just focusing on allocation efficiency and allowing distribution to occur by default. But instead, to think about and focus on distribution and its distinct public policy implications. What happens to those benefits and burdens in the first instance? Environmental justice, and why it is so significant for those like myself who have been involved in environmental law over the years, is that environmental justice challenges us to rethink our settled premises and threshold assumptions. It forcibly challenges the assumption that environmental law is about allocational efficiency and is not at all concerned about distributional fairness.

For years, environmental law was thought to be just about allocational efficiency.<sup>12</sup> The task facing environmental policymakers was to figure out what was the right amount of pollution. What level of pollution is the right amount? Then, how should society get there? Whether we should do it through a command and control approach; or whether we should get there through market incentives? There was little overt consideration about the distributional effects and implications of the different techniques that society might choose.<sup>13</sup>

<sup>9</sup> See *Business Gains from CAA Exceeding \$50 Billion Projected in Draft EPA Study*, INSIDE EPA, Jan. 17, 1992, at 1, 10.

<sup>10</sup> See Lazarus, *supra* note 1, at 794 (discussing conversion of one form of environmental hazard to another, and effects on minority neighborhoods). See generally CONSERVATION FOUNDATION, CONTROLLING CROSS-MEDIA POLLUTANTS 8-9 (1984).

<sup>11</sup> See Lazarus, *supra* note 1, at 794-95 (discussing counterproductiveness of shifting types and concentrations of pollution).

<sup>12</sup> See *id.* at 787 (discussing focus of most scholars on effects of environmental regulation on large industries, as opposed to smaller groups of people); William Tucker, PROGRESS AND PRIVILEGE: AMERICA IN THE AGE OF ENVIRONMENTALISM (1982) (stressing environmentalism's favoring big businesses at expense of small businesses).

<sup>13</sup> See Ken Sexton, *Cause for Immediate Concern: Minorities and the Poor Clearly are More Exposed*, EPA J., Mar./Apr. 1992, at 38, 39 (author is Director of EPA's Office of Health Research).

The basic assumption was that it was safe to focus on allocation efficiency because distribution would take care of itself. At worst, the resulting distribution would be neutral, and at best it would be progressive. Everyone assumed, with reason, that since poor and minority communities suffer more from pollution in the first instance, that the environmental protection laws would likely be progressive, rather than regressive, and that distribution was somebody else's problem.

Distribution was not the problem of a technical agency like the Environmental Protection Agency ("EPA"). It was a problem for a social welfare agency. That is the kind of agency that should be concerned with civil rights issues. That is the agency that should be concerned with distributional issues, not the EPA.

The focus on allocation efficiency resulted, however, in policy-makers ignoring several countervailing factors. First of all, how certain cultural assumptions affect the environmental protection standards in the first instance. For instance, there are several assumptions that regulators make in establishing environmental protection standards about the kinds of persons being protected, including their lifestyles, habits and physical characteristics. The most classic example here has been the assumptions that EPA has made about fish consumption in promulgating water quality standards. There are communities within this country in which more, rather than less, fish are consumed on a daily basis. EPA made, however, certain averaging assumptions, ignoring those distinct communities, about how much fish was consumed.<sup>14</sup> As a result, EPA promulgated water quality standards that are not protective of those communities.<sup>15</sup>

Second, EPA took little account of risk aggregation.<sup>16</sup> What the environmental laws generally do is reduce pollution. You have a series of sites, and you can claim that Bullard, Greve, Lazarus,

<sup>14</sup> See *supra* note 12 (regarding lack of concern for small groups of people in environmental pollution allocation decisions).

<sup>15</sup> See Lazarus, *supra* note 1, at 843. "Two kinds of statutory reforms could address this problem. One possibility would be to require formal agency consideration of the distributional impacts associated with a particular decision. Such consideration could be required where the agency establishes rulemaking agendas, promulgates implementing regulations, and determines enforcement priorities. It could also be required when the agency allocates grant monies and technical assistance. The second, more ambitious, reform would be to establish equitable benchmarks that would provide standards for judging discretionary agency determinations with significant distributional impacts." *Id.*

<sup>16</sup> See Donald T. Hornstein, *Reclaiming Environmental Law: A Normative Critique of Comparative Risk Analysis*, 92 COLUM. L. REV. 562, 593 (1992).

Samp and Taibi are all individual sources of pollution, and today maybe we are. What the environmental protection laws do is reduce the level of pollution at each of these sources. They do not take it down to zero. They may take air pollution and turn it into an ash. They may take air pollution and turn it into a sludge. They may take water pollution and turn it into ash. And with every possible scenario, one level of pollution is turned into a lower level of pollution.<sup>17</sup>

Society as a whole is better off. But what happens to those residual risks? But what happens to those residual risks is that they tend to aggregate. The twenty or forty units at each of those areas of pollution reduction are often taken and moved to a new place. Society as a whole is better off, but not everybody is better off. It is not a pareto optimal situation where no one is worse off and everybody is better off. Society is better off, to be sure, but there are places that may end up being worse off because they end up with a disproportionate amount of the aggregated risks.<sup>18</sup>

What environmental policymakers also ignored was how priorities affect actual environmental quality; what the legislature defines in the first instance to be an environmental problem.<sup>19</sup> To what extent are the problems of the urban environment considered a priority rather than the problems in rural areas and in public lands? EPA's determination of agency priorities is critical to distributional concerns.<sup>20</sup> EPA has had over a thousand deadlines imposed on it since the early 1970's. But EPA has complied with about fifteen percent of those deadlines. Which deadlines does EPA comply with? No one has systematically considered how the discretion EPA exercises in deadline compliance affects actual environmental quality and, more importantly, its distribution.

<sup>17</sup> See *supra* note 10 (regarding shifting forms and locations of environmental hazards).

<sup>18</sup> See Manley W. Roberts, Comment, *A Remedy for the Victims of Pollution Permit Markets*, 92 YALE L.J. 1022, 1027-28 & n.40 (1983); see also Leonard P. Gianessi & Henry M. Peskin, *The Distribution of the Costs of Federal Water Pollution Control Policy*, 56 LAND ECON. 85, 97 (1980).

<sup>19</sup> See Daniel A. Farber, *Politics and Procedure in Environmental Law*, 8 J.L. ECON. & ORGAN. 59, 64-65 (1992); Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 454-59 (1989) (describing how policy preferences of various players fashioned compromises necessary to secure passage of Clean Air Act Amendments of 1977).

<sup>20</sup> See Craig N. Oren, *The Clean Air Act of 1990: A Bridge to the Future*, 21 ENVTL. L. 1817 (1991); Craig N. Oren, *The Protection of Parklands from Air Pollution: A Look at Current Policy*, 13 HARV. ENVTL. L. REV. 313 (1989); Arnold W. Reitze, Jr., *Environmental Policy—It is Time for a New Beginning*, 14 COLUM. J. ENVTL. L. 111, 117-18 (1989).

Finally, and perhaps most significantly, is the distributional dimension to enforcement.<sup>21</sup> The environmental statutes are not self-executing. They offer a certain level of promised environmental protection, but the extent to which you have actual environmental quality depends upon enforcement. It depends upon compliance, and EPA does not possess anywhere near the level of resources necessary to ensure actual compliance with the laws.<sup>22</sup>

Ultimately, what policymakers failed adequately to consider was that leaving matters such as priorities and enforcement to default—not paying direct attention to their distributional implications—has led to a disproportionate skewing to the detriment of persons of color. Because of racist attitudes. Because of the vestiges of years of racism in terms of economic power and political power. And, because of the absence of any overt consideration in the first instance by the policymakers about the problems of aggregation.<sup>23</sup> The result has been aggregation of environmental risk in communities of color and low-income communities, and, making matters worse, relatively less enforcement in those areas.<sup>24</sup>

Nor should this be surprising. How does EPA decide to allocate its enforcement authorities? How does EPA decide which deadlines to comply with? EPA inevitably responds to those with leverage and the wherewithal to bring matters to the agency's attention. Who can make the necessary phone calls? Who can exert power over EPA? Which committees have oversight authority?

Missing from the public policy debate over these years has been a voice able to bring attention to the distinct problems faced by the communities that have aggregated environmental risks.<sup>25</sup> You

<sup>21</sup> See Farber, *supra* note 19, at 63, 69, 75.

<sup>22</sup> See Clifford S. Russell, *Monitoring and Enforcement*, in PUBLIC POLICIES FOR ENVIRONMENTAL PROTECTION 243, 243-70 (Paul R. Portney ed., 1990).

<sup>23</sup> See generally Paul Mohai & Bunyon Bryant, *Environmental Racism: Reviewing the Evidence*, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE 13-176 (Bunyon Bryant & Paul Mohai eds., 1992); Marianne Lavelle & Marcia Coyle, *Unequal Protection—The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S1-S12 (asserting existence of disparity, based on race or income, of EPA's allocation of enforcement resources and leverage). *But see* E. Donald Elliott, *A Cabin on the Mountain: Reflections on the Distributional Consequences of Environmental Protection Programs*, 1 KAN. J.L. & PUB. POL'Y 5, 7 (1991) (suggesting minorities and poor, since they live in more potentially hazardous areas, probably benefit disproportionately from environmental protection measures).

<sup>24</sup> See Russell, *supra* note 22, at 243-70.

<sup>25</sup> See Errol Meidinger, *The Politics of "Market Mechanisms" in U.S. Air Pollution Regulation: Social Structure and Regulatory Culture*, in DISTRIBUTIONAL CONFLICTS IN ENVIRON-



end up, therefore, with the worst problems in the worst places with the least enforcement. Little government enforcement and very little citizen suit backup.<sup>26</sup>

So what do we do about it? The first thing we do is recognize that unfair distribution is a legitimate problem, and that race is a factor. As Dr. Bullard said, "It is not just economics." That has important symbolic value. We are undoubtedly here today because of the racial dimension to the environmental justice issue.

Second, you have to recognize the legitimacy of the issue: distributional fairness is a legitimate part of environmental law and environmental policymaking. Equity has intrinsic value. It is worthy of expenditure of resources independent of allocation efficiency. Renewed emphasis on distributional fairness is also likely to promote allocation efficiency because we are going to end up with more enforcement in those areas where we have the biggest problems. It is illusory to pretend that distribution is not important.<sup>27</sup> It is the driving force behind all the laws, as Dr. Greve recognizes in his own quite forceful writings in this area.

Distribution is, after all, what gets the laws passed. Distribution in terms of the competing public interest groups meeting in the hallways and back rooms of Congress where they seek to influence how laws like the Clean Air Act and the Clean Water Act are drafted. It is completely unrealistic to assume that distribution has nothing to do with those laws. Distribution has everything to do with those laws. And explains many of their most peculiar provisions. But what has happened is one important voice has not been heard in those debates that do occur.

MENTAL RESOURCE POLICY 150-86 (Allan Schnaibert et al. eds., 1986). *But see* Herbert Inhaber, *Of LULUs, NIMBYS, NIMTOOs*, 107 PUB. INTEREST 52 (1992).

<sup>26</sup> See *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1144, 1149 (E.D. Va. 1991) (reflecting an Equal Protection challenge to the siting of a regional landfill in an area populated primarily by blacks), *aff'd*, 977 F.2d 573 (4th Cir. 1992); *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673, 677 (S.D. Tex. 1979) (illustrating pitfalls of reliance on Equal Protection litigation theories), *aff'd without op.*, 782 F.2d 1038 (5th Cir. 1986); *Harrisburg Coalition Against Ruining the Env't v. Volpe*, 330 F. Supp. 918, 926 (M.D. Pa. 1971) (raising environmental justice claim in siting context); *see also Lazarus, supra* note 1, at 832 ("The existing case law, therefore, does not give minority plaintiffs much reason to be optimistic about their likelihood for successfully challenging particular actions or decisions based on an equal protection theory.")

<sup>27</sup> See *Lazarus, supra* note 1, at 792. Virtually all laws have distributional consequences, including those laws designed to further a particular conception of the public interest. *Id.*; *see also* BURTON A. WEISBROD ET AL., *PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS* 103, 555 (1978); Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1214 (1991).

Distribution should not, though, be a matter of pork, which is too often what now occurs in Congress. The environmental laws are all too often used as a source of pork distribution. Distributional concerns should be properly focussed on more legitimate policy matters.<sup>28</sup> Most simply put, the environmental protection laws—both their terms and their implementation—need to be reformed to take into account distributional fairness. The first step is consideration, but the second step is to impose some kind of substantive fairness norms.<sup>29</sup>

There are already several proposals to do so. There are some promising proposals on Capitol Hill, which Congress is considering, one of which was endorsed by then Senator Gore before he became Vice President, which should make its passage somewhat more possible.<sup>30</sup> There is a recent presidential Executive Order<sup>31</sup> to which Dr. Bullard referred. But also necessary is the enforcement of existing laws, including Title VI of the Civil Rights Act of 1964,<sup>32</sup> which is a very promising, yet little utilized legal basis for addressing environmental justice concerns.<sup>33</sup>

Existing laws simply need to be enforced. We do not necessarily need completely new laws. We need to rethink standard setting. We need to take into account the fact that certain cultures in this society, that certain communities, engage in activities like fish consumption, which subject them to greater exposure to risks. We need to rethink enforcement priorities.<sup>34</sup>

The Department of Justice just brought a suit a few weeks ago, which I think is a good example of what can be done. The lawsuit was brought under the Safe Drinking Water Act, against the oper-

<sup>28</sup> See Lazarus, *supra* note 1, at 854. "Environmental protection should be seen as a legitimate basis for promoting human welfare and opportunity and, in particular, for redistributing environmental amenities (and risks) more fairly among all persons." *Id.*; see also MARK SAGOFF, *THE ECONOMY OF THE EARTH—PHILOSOPHY, LAW, AND THE ENVIRONMENT* 155-58, 167-70 (1988); Richard J. Lazarus, *Debunking "Environmental Feudalism": Promoting the Individual Through the Collective Pursuit of Environmental Quality*, 77 *IOWA L. REV.* 1739, 1768-74 (1992).

<sup>29</sup> See Lazarus, *supra* note 1, at 853. "Governmental and nongovernmental organizations that currently dominate the process need to promote minority participation in the dialogue and, even more fundamentally, they need to educate themselves about minority concerns." *Id.* at 850; see also Marcia Coyle et al., *Washington Brief—Justice Voices*, *NAT'L L.J.*, Dec. 28, 1992, at 9.

<sup>30</sup> See S. 2806, 102d Cong., 2d Sess. (1992).

<sup>31</sup> Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994).

<sup>32</sup> 42 U.S.C. § 2000d (1988).

<sup>33</sup> See James H. Colopy, *The Road Less Travelled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 *STAN. ENVTL. L.J.* 125 (1994).

<sup>34</sup> See Lazarus, *supra* note 1, at 817-20.

ator of a mobile home community where the quality of the drinking water for that minority community was very unhealthy and inadequate, while an adjacent city was receiving very high quality water.<sup>35</sup> Environmental enforcement priorities and environmental justice are being linked up in this case.<sup>36</sup> Historically, no enforcement suit would have been brought. What the environmental justice movement accomplishes is that it makes it a priority for EPA and for the Justice Department to make sure that those areas that are not otherwise likely to get enforcement attention, do get that attention.

There are many more other similar opportunities for harmonizing environmental law and civil rights. This is an exciting and challenging time for those like myself involved in environmental law. It is also a challenging time for policymakers to face up to the issues and not to resist them. I am glad that these issues are finally being debated. After years of being on the backburner, they are now, largely thanks to people like Dr. Bullard, on the frontburner. To that end, I would like to thank the organizers of this conference at St. John's for hosting this symposium on environmental justice.

<sup>35</sup> United States v. Merritt, No. 94-026 (D. Wyo. filed Feb. 4, 1994).

<sup>36</sup> See Lazarus, *supra* note 1, at 853; cf. Derrick A. Bell, Jr., *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 6-7 (1985).