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ARTICLES

ENVIRONMENTAL RACISM: A SKEPTIC'S VIEW

KENT JEFFREYS*

Those who argue that environmental racism is a serious problem in America, and their numbers are growing, are correct in at least one of their assertions: distinctions based upon race are pervasive in American society. Racism exists. Environmental problems exist. These facts, however, do not reveal whether or not environmental racism has occurred in any given instance. This might be an unimportant distinction but for the fact that some argue that civil rights laws be applied to pollution events and related regulatory violations. Before politicians embark on this course, they should consider the likely impact on the very individuals they seek to help. In an era of constrained budgets and sluggish economic expansion, there are precious few resources to divert to low-priority agenda items. The fact remains that even if one-hundred percent of the environmentally "disparate" impact

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were eliminated, the real problems confronting poor and minority communities would still be unaddressed.

Much of the confusion arises from the fact that most, if not all, disparate environmental impact can be traced to the legacy of prior discrimination in housing, employment, and education. Thus, even the proponents of environmental racism as a new cause of action under civil rights laws are forced to include many nonecological items within the scope of their complaint.

As one might expect, the topic of environmental racism elicits powerful responses from friend and foe alike. It is unfortunate, however, that the issue is becoming polarized along the traditional conservative-versus-liberal lines of politics. Conservatives abdicate their responsibilities as defenders of individual liberty if they deny even the possibility of the existence of environmental racism, even when it is defined narrowly. Furthermore, for years conservatives fought against federal civil rights laws, often on the basis that "society" was not ready for such changes. This leaves them open to the charge of hiding their bigotry behind an intellectual fig leaf. Too often, the accusation has proved accurate. On the other hand, it appears that much of what makes the issue attractive to liberals is the opportunity to bash industry and conservatives while seeking political gain. That may accurately reflect how the game is played, but it does little to benefit the true victims or to identify the real problems.

I. WHAT IS ENVIRONMENTAL RACISM?

It was inevitable that someone would associate these two potent political forces.¹ Dr. Benjamin F. Chavis was the first to use the term during protests over the siting of a PCB disposal facility in Warren County, North Carolina in 1982.²

More recently, Dr. Chavis (then-executive director of the United Church of Christ Commission for Racial Justice), in testimony before the U.S. House Committee on the Judiciary's subcommittee

¹ If one takes an ecological view, it is not surprising that the environmental racism "niche" would eventually be filled by an opportunistic political species.

² *Environmental Racism: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. (1993) [hereinafter *Hearings*] (testimony of Dr. Benjamin F. Chavis, Jr., Executive Director of United Church of Christ, Commission for Racial Justice).

on Civil and Constitutional Rights defined environmental racism as:

racial discrimination in environmental policy making and the unequal enforcement of environmental laws and regulations. It is the deliberate targeting of people of color communities for toxic waste facilities and the official sanctioning of a life threatening presence of poisons and pollutants in people of color communities. It is also manifested in the history of excluding people of color from the leadership of the environmental movement.³

At the same hearing Robert D. Bullard, then Professor of Sociology at the University of California at Riverside, defined environmental racism more broadly. In Dr. Bullard's view, "[e]nvironmental racism refers to any policy, practice, or directive that differentially affects or disadvantages (whether intended or unintended) individuals, groups, or communities based on race or color."⁴

There are important distinctions between these two definitions. In the former, Chavis suggests that intent is necessary, while in the latter, Bullard suggests that unintentional results qualify as racism. It is this notion of disparate impact without intent that has created the environmental racism movement.

Regardless of whether any particular case fits the definition of environmental racism, the fact remains that environmental problems, from a minority perspective, are rather trivial in comparison to the larger economic and civil liberty issues; solve these and you have solved most, if not all, environmental inequities.⁵

Taking a global view, the environmental problems which confront the vast majority of people on this planet are not recent (nor even human) in origin. Microbial contamination of water and food remain the primary environmental risks faced by human beings. Yet in America, with isolated exceptions, even poor members of minority groups find most of these worries to be greatly reduced, if not eliminated. The environmental issues most often debated in

³ *Id.*

⁴ *Hearings, supra* note 2 (testimony of Robert D. Bullard).

⁵ To a certain degree, the expansion of the term "environment" to include all impacts on humans can be socially beneficial. After all, contaminated groundwater is a near-zero risk, while crack cocaine is a high risk to individuals. Thus, so long as priorities are maintained within the total set of "environmental risks," the most significant problems are likely to be dealt with first.

Congress are largely irrelevant to the average person: global climate change, ozone depletion, acid rain, endangered species, and so on. The animal species dominating inner cities across America—pigeons, rats and roaches—are hardly endangered. Much has been said of potentially harmful levels of lead in the bloodstream of inner-city minorities. Yet the primary risk of “lead poisoning” in urban areas comes from the mouth of a gun rather than a water faucet or a paint can. Murder is the leading cause of death among young male African Americans. While over 400 people were murdered in Washington, D.C. last year, not a single person died because of groundwater contamination from a hazardous waste site. Environmental issues should be placed in perspective.

II. THE RIGHT SITE?

Much of the original support for the theory of environmental racism was derived from studies of the siting of hazardous waste facilities. It is difficult to assess hazardous waste facility siting decisions without complete information. However, the definition of “minority community” seems to vary widely in the published reports. In one instance it may refer to a county, in another, a particular neighborhood or postal ZIP code area. It seems that a concerted effort is often made to maximize the apparent racial disparity of hazardous waste siting decisions or pollution events.

As an illustrative example, consider the published reports of the *National Law Journal* (“*NLJ*”), an organization that has strongly pushed the notion of environmental racism. The *NLJ* reported, as evidence of environmental inequity, that “small fines in minority areas have been lodged against industrial giants: a \$22,000 air pollution penalty against Proctor & Gamble Co. in Staten Island, N.Y.”⁶

However, Staten Island, overall, is eighty-five percent white. It is also the site of Fresh Kills, the world’s largest landfill, which takes in garbage and waste from the other boroughs of New York (which have much higher minority populations). In addition, it is hard to imagine that air pollution on Staten Island can be confined to a particular minority enclave.

⁶ Marianne Lavelle, *Negotiations Are Key to Most Fines*, *NAT’L L.J.*, Sept. 21, 1992, at S6.

Yet in other cases, the *NLJ* cites county population as conclusive evidence of racial discrimination. For example, the infamous PCB disposal facility case⁷ in North Carolina arose in "the county with the highest percentage of minority residents in the state."⁸ Yet we are not told whether that county also has a low population density, thus providing a nonracial reason to site such a facility. High population densities may be avoided because of a fear of accidents. This would make it more likely that rural sites would be selected. Other considerations that may play a role in site selection include transportation access, existing infrastructure, geophysical conditions, and even climate.

Furthermore, it is often irrelevant (from a human health perspective) how close one is to a site containing potential groundwater contamination. Without knowing the hydrology of an area, it is impossible to predict the flow of the contaminant. Thus, it may actually migrate away from the minority community. Of course, the residents must also rely on the contaminated water source or there will be no human exposure. It would seem likely that the major motivating factor behind such protests is frustration with a political process that permits nuisances (noise, odor, traffic) to move into or near residential neighborhoods or rural communities. Nevertheless, without a consistent standard by which to judge individual cases, "racism" will be in the eye of the beholder. While no empirical study can eliminate the possibility that racism motivated some local decisions, the most thorough national study to date determined that hazardous waste facilities were just as likely to be found in working class white neighborhoods as in any other areas.⁹

Unmentioned through most of this debate is the fact that even the experts on Superfund sites (believed to comprise most of the "worst" waste sites in the country) admit that the health risks from groundwater contamination are low. Undaunted, some have called for an expansion of Superfund to include considerations related to environmental equity.¹⁰ Yet Superfund is an almost com-

⁷ NAACP v. Gorsuch, No. 82-768 (E.D.N.C. August 10, 1982).

⁸ Marcia Coyle, *Lawyers Try to Devise New Strategy*, NAT'L L.J., Sept. 21, 1992, at S8.

⁹ Douglas L. Anderton et al, *Hazardous Waste Facilities: "Environmental Equity" Issues in Metropolitan Areas*, EVALUATION REV. April 1994, at 123-40.

¹⁰ Among the Superfund issues explored by the National Advisory Council on Environmental Policy and Technology ("NACEPT") were environmental justice and nondiscrimina-

plete failure, and racist motivations might be the least of the problems associated with the program. Measured by any reasonable standards, Superfund does not provide significant health or environmental benefits to the American public. Many Superfund sites have required over thirty-million dollars in environmental "cleanup" expenditures. Which minority community would not find it more useful to turn at least a portion of such sums toward higher priority expenditures? What if such funds were to some degree available for alternative community investments such as health clinics, scholarship and tutorial funds, public parks, or private police protection?¹¹ An individual's quality of life is the product of many variables. Focusing on one, in this case the environment, to the exclusion of others may be ineffective or even counterproductive.

In any event, most of the information available on hazardous waste sites does not indicate the actual exposures to potentially hazardous substances. Living next door to a state-of-the-art waste handling facility may expose an individual to less risk than drinking a morning cup of coffee.¹²

III. LOW LAND VALUES

Poor people and minorities do not necessarily attract polluters merely because they are poor or people of color or because the polluters are racists. Low-cost land attracts industry for some of the same reasons that it attracts poor people. In many industrial regions, including most of those now condemned as physical evidence of "environmental racism" (the South Side of Chicago, for example) minorities were given their first access to the American Dream. Employers motivated by the capitalistic urge to make a profit, regardless of their personal racism or lack thereof, hired the best workers they could find at the lowest wage they could pay. Regardless of our current attitudes, this often worked to the benefit of the economically disadvantaged, especially minorities,

tory implementation and enforcement. NACEPT provided its findings to EPA Administrator Carol Browner toward the end of 1993.

¹¹ In fact, it would appear that nonecological amenities and services are the final goal for many within the anti-environmental racism movement. As any political scientist can tell you, public policy surrogates are often utilized to achieve one's true goals.

¹² See Lois Swirsky Gold et al., *Rodent Carcinogens: Setting Priorities*, 258 SCIENCE 261 (1992). See generally STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION passim* (1993).

giving them their first opportunity to enter the industrial workplace and achieve a decent standard of living. In addition, workers preferred to live close to their place of employment, for obvious reasons. Thus, they moved to the general vicinity of the pollution sources. In fact, this century has witnessed the largest internal migration in American history as rural-born African Americans moved to industrial urban areas. Even with the pollution and the low-wage jobs, their lives were greatly improved. How ironic that the very economic forces that eventually spawned the civil rights movement would be condemned as environmental racism today.

IV. NATIVE AMERICAN ISSUES

Environmental racism issues, of course, are not limited to African-American communities. Environmental conditions in Hispanic and Native American communities, among others, are also being examined for evidence of racism.¹³

Admittedly, Native American reservations suffer from enormous problems. However, most of them stem from the welfare-state conditions that result from anachronistic federal policies. The reservation system is comprised of apartheid-style homelands, and it suffers from many of the same flaws that its more famous descendant displayed in South Africa. To a large extent, environmental hazards, of the sort typically contemplated by the EPA, are frivolous matters when compared to the very real problems of alcoholism, inadequate health care, inadequate education, inadequate housing, inter alia, that are the rule on reservations. American apartheid is complex: it could not exist without the support of the federal government, which is hopelessly entangled with treaty obligations and patronizing politicians. Moreover, many tribal leaders are willing co-conspirators in the suppression of their kin. Consequently, property rights and individual civil liberties are often ignored or trammelled. These are the results of true racism.

Yet many conclude that hazardous or solid waste siting decisions are always motivated by racism when Native American reservations are involved. Considering that many of the problems confronting reservation residents stem from unemployment, any

¹³ See generally U.S. E.P.A., ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES *passim* (1992).

effort to bring in jobs would at least hold the potential of mitigating the negative effects of the reservation system. The condescending attitude of many well-intentioned individuals, that minorities cannot handle their own affairs, is resultant of the cultural and racial bigotry which permeates this debate.

V. INTERNATIONAL EXAMPLES OF ENVIRONMENTAL RACISM

Of course, racism is not a uniquely American phenomenon. Any examination of current global events would show that race, culture, and religion are the sources of much conflict in the world today. Environmental problems are also universal. Thus, it would be inaccurate to suggest that environmental racism is a purely American phenomenon. In addition, developing countries rarely have sufficient resources or proper political institutions to deal effectively with the environmental agenda of the industrialized nations. Nevertheless, Western standards are often imposed on less developed nations, evoking images of the imperialism of the colonial era. Two of the major issues in this regard are population control and wildlife preservation.

A. *Population Control*

Many environmental groups are publicly supportive of population control efforts.¹⁴ Such efforts disproportionately affect people of color around the world, whether intentionally or not. A near constant refrain within the environmental lobby is the claim that the population of the world must be controlled. This demand influences the highest levels of government, as demonstrated by Vice President Albert Gore. In his book, *Earth in the Balance*, Gore outlines five strategic goals necessary "to save the global environment."¹⁵ Gore's first strategic goal is "the stabilizing of world population."¹⁶ Furthermore, the environmental lobby demands that economic growth and aspirations around the world be severely limited, especially in developed nations. However, not all of the scholarly literature supports the assumptions underlying

¹⁴ Consider the existence of groups such as Zero Population Growth, Negative Population Growth, and the Carrying Capacity Network as well as the population control projects of most major environmental organizations.

¹⁵ ALBERT S. GORE, *EARTH IN THE BALANCE* 305 (1992).

¹⁶ *Id.*

overpopulation concerns.¹⁷ Recently, the African Academy of Sciences rejected international demands for population control measures. According to the official statement: "For Africa, population remains an important resource for development without which the continent's natural resources will remain latent and unexploited."¹⁸

B. *Wildlife Protection*

For years, Richard Leakey, a white man, was Kenya's Director of Wildlife Conservation. Dr. Leakey took his job very seriously; so seriously, in fact, that he created a small, well-armed platoon which was authorized to "shoot to kill" suspected animal poachers. Leakey was a passionate protector of wildlife. He was also a spokesman for Rolex watches. A single Rolex watch costs several times the \$400 per capita annual income of black Kenyans. Leakey was also strongly supported by many environmental organizations which do not seem to grasp the antihuman aspects of his stance on wildlife issues. Yet Dr. Leakey's boss, Minister of Tourism and Wildlife Noah Katana Ngala, considered him to be arrogant and racist.¹⁹

Only in recent years has the general public begun to realize that wildlife should not be cherished above human life. For example, the *New York Times* documented how inappropriate international policies were imposed on native Africans by the environmental lobby.²⁰ This article exposed the hypocrisy and counterproductive effects of the ban on commerce in ivory. Until the people of Africa are permitted to own the local wildlife, and profit from that ownership, both human rights and wildlife will remain in peril. Two-legged Africans should receive at least the same respect from environmentalists as do four-legged Africans.

¹⁷ See, e.g., DAVID OSTERFELD, *PROSPERITY VERSUS PLANNING: HOW GOVERNMENT STIFLES ECONOMIC GROWTH* (1992); JULIAN SIMON, *POPULATION MATTERS* (1990); JULIAN SIMON, *THE ULTIMATE RESOURCE* (1981).

¹⁸ K.S. Jayaraman, *Science Academies Call for Global Goal of Zero Population Growth*, *NATURE*, Nov. 1993, at 3.

¹⁹ See Fiammetta Rocco, *Endangered Species*, *ESQUIRE*, April 1994, at 50.

²⁰ Raymond Bonner, *Crying Wolf Over Elephants*, *N.Y. TIMES*, Feb. 7, 1993, at M17. See generally RAYMOND BONNER, *AT THE HAND OF MAN: PERIL AND HOPE FOR AFRICA'S WILDLIFE* (1993).

VI. DO ENVIRONMENTALISTS HATE THE POOR?

Such provocative statements are not being made solely by right wing ideologues seeking politically correct cover. Even avowed socialists have noticed the elitist nature of traditional environmental histories.²¹

The EPA has typically responded to an elite constituency, not minorities or the poor. In most cases, the agenda of the environmental elitists does not coincide with the interests of minorities. As a brief case study, consider the recurrent battle over automobile fuel efficiency. Arguments are sometimes made that higher fuel efficiency would benefit the poor by lowering their cost of transportation. This is simply a political justification seized upon to cover the real impact of these regulations. Higher mileage is strongly correlated with lower vehicle weight. Lower weight unambiguously leads to higher rates of injury and death in car crashes.²² Recently, a federal circuit court declared that the federal government had distorted and disregarded safety data in an effort to justify higher fuel efficiency standards.²³

The poor, who are disproportionately comprised of minorities, are even more directly impacted by President Clinton's call for higher gasoline taxes (hidden within his overall BTU Tax Proposal). In his first State of the Union Address, President Clinton claimed higher energy taxes would benefit the environment, among other miraculous results.²⁴ However, Clinton was forced to admit that gas taxes are punishingly regressive, taking a much bigger bite from the paychecks of the poor than of the rich. Clinton's solution: he cynically proposed to offset the gas tax's impact on the poor by enlarging the federal food stamp program. This is environmental elitism at its worst. Under the guise of an "environmentally important" energy tax, Clinton would take money from the poor and replace it with food stamps. The *Washington Post* reported that Clinton's tax proposal "has the strong support

²¹ See Marcy Darnovsky, *Stories Less Told: Histories of U.S. Environmentalism*, 92 *SOCIALIST REV.* 111, 118 (1992).

²² Robert W. Crandall & John D. Graham, *The Effect of Fuel Economy Standards on Automobile Safety*, 32 *J.L. & ECON.* 97 (1989).

²³ *Competitive Enter. Inst. v. NHTSA*, 956 F.2d 321 (D.C. Cir. 1992).

²⁴ President's Address to Joint Session of Congress on Administrative Goals, 29 *WEEKLY COMP. PRES. DOC.* 215 (Feb. 17, 1993).

of only one bloc: the environmental lobby."²⁵ Such environmental policies reduce the independence and well-being of minorities and the poor and compensate them by making them more dependent on the state.

Even if the economic impact of higher energy taxes were quite small, there is an indisputable relationship between human health and human wealth.²⁶ On average, wealthier is healthier. Around the world, greater prosperity is closely associated with longer life expectancy. Thus, wasting resources in a fruitless search for perfectly safe environments may, in fact, reduce societal well-being. While the United States can afford to spend well over \$120 billion on compliance with environmental regulations each year,²⁷ in developing countries there is no money available for basic health matters, let alone to address minute environmental risks from trace contaminants.

Yet even in America, wasting resources on trivial environmental risks can lower the net wealth of a community, and result in higher mortality rates over time. In other words, environmental regulations should not be based merely on a calculation of costs versus benefits, but rather on risk versus risk.²⁸ This research should be applied to the question of environmental racism to determine if we are, in fact, overlooking important increases in income which more than offset increases in pollution exposure. After all, one of the most unhealthy conditions known to researchers is unemployment. Simply creating jobs in minority communities may correct for any past environmental degradation.

While it can be demonstrated that health improves along with increases in wealth, it appears that personal attitudes also change with economic status. There is much information to suggest that environmental concern rises with prosperity. International studies consistently find that at around \$5000 in per capita income, nations begin to stress environmental quality to a relatively

²⁵ Thomas W. Lippman, *Energy Tax Proposal Has "Green" Tint*, WASH. POST, Mar. 2, 1993, at D-1.

²⁶ See Ralph L. Keeney, *Mortality Risks Induced by Economic Expenditures*, 10 RISK ANALYSIS 147 (1990). Keeney's work served as the basis for Judge Stephen F. Williams' concurring opinion in *UAW v. OSHA*, 938 F.2d 1310 (D.C. Cir. 1991).

²⁷ ALAN CARLIN, ENVTL. PROTECTION AGENCY, INVESTMENTS: THE COST OF A CLEAN ENVIRONMENT 2-3 (1990). Carlin calculates 1993 aggregate pollution control costs (in 1986 dollars) as being over \$123 billion. *Id.* Adjusting for inflation would give an approximate figure of \$140 billion (in 1993 dollars).

²⁸ See generally AARON WILDAVSKY, *SEARCHING FOR SAFETY passim* (1988).

higher degree.²⁹ An American researcher found that the "demand" for environmental quality was similar to the market demand for luxury goods.³⁰ When the economy grows by a few percent, sales of both BMWs and environmental regulations increase by an even larger percentage.

VII. CANCER ALLEY

But perhaps the poor and people of color *are* being poisoned by the effluence of our affluent society. Indeed, some have suggested that "people of color are the proverbial canaries in the coal mine"³¹ because of inordinate exposure to toxic chemicals. If true, something certainly should be done to protect individuals from what amounts to assault and battery with a deadly chemical. This topic has generated the most passionate arguments from those who detect widespread environmental racism.

Easily the strongest dread generated by environmental concern is the fear of cancer. This is evident in the term coined for the industrial corridor stretching from Baton Rouge to New Orleans, Louisiana, "Cancer Alley."³² There is no question that the prevalence of petrochemical plants and other industrial activities has strongly impacted the local environment. But was the industrialization motivated by racist impulses? The fact that "Cancer Alley's" hydrocarbon deposits and Mississippi River barge traffic exist independent of skin color or socioeconomic class refute most, but not all, claims of environmental racism in the region. More specific claims of disparate impact and facility siting decisions have been explored by the Louisiana Advisory Committee to the U.S. Commission on Civil Rights.³³ The Committee's report found, unsurprisingly, that conditions in poor, predominantly minority communities were worse than elsewhere. In other words, the Committee found evidence of disparate impact.

²⁹ See generally GENE M. GROSSMAN & ALAN B. KREUGER, ENVIRONMENTAL IMPACTS OF A NORTH AMERICAN FREE TRADE AGREEMENT *passim* (1991).

³⁰ See DON COURSEY, THE DEMAND FOR ENVIRONMENTAL QUALITY 14 (1992).

³¹ Steve Curwood, *Environmental Justice: Continuing the Dialogue*, Opening Remarks at the National Conference of the Society of Environmental Journalists, Durham, N.C. (Oct. 22-23, 1993).

³² Conger Beasley, *Of Poverty and Pollution: Keeping Watch in "Cancer Alley"*, BUZZWORM, July/Aug. 1990, at 39-45.

³³ LOUISIANA ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, THE BATTLE FOR ENVIRONMENTAL JUSTICE IN LOUISIANA GOVERNMENT, INDUSTRY, AND THE PEOPLE (1993) [hereinafter BATTLE].

However, simply documenting "disparate impact" is not the same as documenting harm, to either individuals or the community at large. All impact is, to a greater or lesser degree, "disparate." To make the case that general environmental exposures in minority communities have measurably harmed individuals, much attention has been granted to cancer and miscarriage rates, especially in Louisiana.

Thus, much of the debate over the existence of community harm has focused on cancer mortality rates, widely considered to be proof of the "Cancer Alley" thesis. It is true that cancer mortality rates in south Louisiana are higher than the national average. Yet this is largely due to the lack of adequate medical care. Therefore, the cancer incidence rate is considered a better indicator of the risk of developing cancer.

For example, one study examined cancer rates in southern Louisiana.³⁴ "The study found that in contrast to the State's well-documented cancer mortality rates, incidence rates for all cancers combined in south Louisiana are either the same as, or lower than, the national rates."³⁵ The American Cancer Society's Louisiana division confirmed these findings.³⁶ Similar results were generated by an examination of purportedly high rates of miscarriages in St. Gabriel, Louisiana.³⁷ Thus, much of the report focused on non-medical impacts such as nuisance and community disruption or displacement. This begins to shift the complaint onto more familiar territories of property and tort law.

VIII. LEGAL HURDLES

As the statistics seem to indicate, even if environmental racism is practiced in a community, its health effects may be too subtle to detect. This highlights the fact that the primary obstacle to demonstrating the existence of environmental racism is the burden of proof. Most cases have failed to demonstrate racial motivation.³⁸

³⁴ See *id.* at 38 (citing LSU Medical Center in New Orleans's, *Cancer Incidence in South Louisiana, 1983-1986*).

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 39 (citing TULANE UNIVERSITY SCHOOL OF PUBLIC HEALTH AND TROPICAL MEDICINE, ST. GABRIEL MISCARRIAGE INVESTIGATION EAST BANK OF IBERVILLE PARISH, LOUISIANA (1989)).

³⁸ See, e.g., *Washington v. Davis*, 426 U.S. 229, 246 (1976) (must show intent to discriminate); *United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1216 (2d Cir. 1987) (impact alone not sufficient, must show intentional discrimination); *East Bibb Twiggs Neighbor-*

That is the result, quite simply, of its absence. However, that has not prevented some from assuming the primary motivation was racial and that justice was thwarted by exceedingly high judicial standards.³⁹ Because actual intent to discriminate along racial lines is normally lacking or impossible to document, many commentators have suggested replacing "intent" with "disparate impact."⁴⁰

This is not to suggest, however, that racism does not or cannot exist. In fact, there can be no doubt that racism has been expressed in numerous zoning and siting decisions around the country.⁴¹ However, when it comes to environmental racism, the facts are more confused and the conclusions more ambiguous.⁴² Tinkering with the burden of proof or the weight of evidence required in such cases will not change the underlying facts.

CONCLUSION

Much of what is declared to be environmental racism in America today would be more properly described as elitism. Class privilege and political power are unlikely to be completely eliminated or even satisfactorily dealt with through political action alone. Thus, it would seem that much of the debate over so-called environmental racism is misplaced.

With regard to siting decisions for polluting industries, there should be little doubt that political elites are better situated to influence, even to veto, site selection. Even when elite groups find themselves out-voted, they have a final option often unavailable to poor minorities: they move. Particularly in urban areas, this is how poor and minority neighborhoods are created in the first instance. Migration and demographic shifts will continue to confound simple calculations of institutional racism.

hood Ass'n v. Macon-Bibb Planning & Zoning Comm'n, 706 F. Supp. 880, 886 (M.D. Ga. 1989) (evidence insufficient to establish that land use development motivated by racial discrimination); *Bean v. Southwestern Waste Mgmt. Corp.*, 482 F. Supp. 673, 677 (S.D. Tex. 1979); .

³⁹ See Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394 *passim* (1991).

⁴⁰ See *Hearings*, *supra* note 2, at 12 (testimony of Robert D. Bullard).

⁴¹ See CLINT BOLICK, *GRASSROOTS TYRANNY: THE LIMITS OF FEDERALISM* 169-72 (1993) (describing actions of city government of Yonkers, New York).

⁴² See Keith Schneider, *Plan for Toxic Dump Pits Blacks Against Blacks*, N.Y. TIMES, Dec. 13, 1993, at A12.

Although racism may permeate society, to date, the examples given have been largely ambiguous and do not make the case that environmental racism is a common variety. Nevertheless, the assumption that civil rights laws will create political and bureaucratic pressures to spend more money on environmental quality in minority communities is probably true, if somewhat exaggerated. Unfortunately, money intended for the poor must run a gauntlet of open palms. This aspect of reality does not change simply because the expenditures are for environmental cleanup rather than food stamps or section 8 housing. Most environmental cleanup money is wasted, just as most welfare program expenditures never make it past the middle class.

The real problem is that America already has over-politicized environmental issues. Since the government now determines how much pollution is appropriate or legally acceptable, the politically powerful, who are best able to focus their attention on state mechanisms of control, will be more likely to have their interests protected.⁴³ Making environmental racism a political issue will not alter this fact.

However, if the states assume their proper role and explore property rights-based solutions to pollution, a decentralized, self-policing process can arise. Respect for contract and private property will solve much of the apparent dilemma over racially disparate environmental results.

⁴³ In the opinion of this author, at least since the Progressive era, government has essentially condemned an easement in favor of pollution across all property (and all people) in America.

