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**Environmental Law, Civil Rights and Sustainability:
Three Frameworks for Environmental Justice**

Eileen Gauna

Prominent environmental justice activist Deoohn Ferris once quipped, “We are all in a sinking ship, people of color and poor are just closer to the hole.”¹ This metaphor captures the intuitive idea that we really cannot get to a sustainable level of development until we deal with the very hard set of issues that have been raised by those in the environmental justice movement.

When thinking about the connections between environmental justice and sustainability generally, I began to reflect upon all of the twists and turns in the way participants in this area have talked about environmental justice. In some ways there has been a disjunction in the various discourses. In the domestic context, for example, activists have employed the language of civil rights,² basic fairness, the precautionary principle, and human rights.³ Parallel conversations in the international context also use a human rights framework, at times analyze environmental justice issues as the continuation of a colonial legacy, and view these injustices as stemming from the dominance of a neoliberal

¹ See Veronica Eady, *Warren County and the Birth of a Movement: The Troubled Marriage Between Environmentalism and Civil Rights*, 1 GOLDEN GATE U. ENVTL L. J. 41, 42 (2007)(explaining how Deoohn Ferris, of the Lawyers Committee for Civil Rights used this phrase to articulate the disproportionate impact on people).

² Tseming Yang, *Melding Civil Rights and Environmentalism: Finding Environmental Justice’s Place In Environmental Regulation*, 26 HARV. ENVTL. L. REV. 1 (2002).

³ CLIFFORD RECHTSCHAFFEN, EILEEN GAUNA & CATHERINE O’NEILL, ENVIRONMENTAL JUSTICE: LAW, POLICY & ENVIRONMENTAL REGULATION, 24 (2d ed. 2009)(the Principles of Environmental Justice reflect a rights orientation, and specifically refer to human rights).

economics model.⁴ On both fronts, these views have been met by a discourse more influenced by economic, scientific, and engineering frameworks.⁵

This article focuses on the domestic context, where the issues have more concretely crystallized around viewing environmental justice issues from a civil rights framework, and also from a competing environmental law framework. The article will begin with a discussion of the limitations of each of these frameworks, and will then explore the current “disconnect” between these two models, ending with an exploration of how the principles of sustainability fit into the picture. As to the latter point, sustainability is a double-edged sword. It might be used to maintain the inequity of the status quo; and, particularly in light of climate change, sustainability might be used to unintentionally create a new kind of inequity. On the more positive side, a framework oriented towards sustainability, if coupled with sensitivity towards environmental justice concerns, might help bridge the chasm in the current discourse about environmental justice, and provide the space, in a manner of speaking, where more common ground can be meaningfully explored.

Now, “common ground” sounds, well, kind of nice. However, it also sounds anemic, too weak for the social dynamics that have caused many people of color and the poor to live in unacceptable conditions for such a long time.⁶ That may well be the case. Yet, sometimes when

⁴ See, e.g. Carmen Gonzales, *The Global Food Crisis: Law, Policy, and The Elusive Quest for Justice*, 13 YALE HUM. RTS. & DEV. L.J. 462 (2010)(discussing historic roots of food security and critiquing market ideologies)

⁵ Eileen Gauna, *The Environmental Justice Misfit, Public Participation and the Paradigm Paradox*, 17 STAN. L. J. 3 (1998) (discussing environmental justice and the ideal of expertise in environmental regulation).

⁶ RECHTSCHAFFEN, *supra* note 3, 35-72 (evidence of environmental justice)

perception shifts slightly, some interesting things start to happen. And therein lies the potential. Before that is discussed, let us consider environmental justice and civil rights.

Environmental justice, identified as such, is now about three decades old.⁷ The charge as originally expressed was one of “environmental racism,”⁸ a harsh indictment. The claim was particularly provocative because the term was not aimed at segregationists or white supremacists, but instead at well-meaning regulators and liberal leaning environmentalists. Of course, by the early 1980s, our understanding of racial dynamics was more nuanced. We knew racism did not go away

⁷ The spark of the environmental justice movement, as identified as such, began with the 1982 Warren County demonstrations. Eady, *supra* note 1, at 4.

⁸ The phrase “environmental racism” has been attributed to Dr. Benjamin Chavis, former Executive Director of the United Church of Christ Commission for Racial Justice, who during the release of a seminal study documenting exposures to hazardous waste sites, noted:

“Racism is the intentional or unintentional use of power to isolate, separate and exploit others. This use of power is based on a belief in superior racial origin, identity or supposed racial characteristics. Racism confers certain privileges on and defends the dominant group, which in turn sustains and perpetuates racism. Both consciously and unconsciously, racism is enforced and maintained by the legal, cultural, religious, educational, economic, political, environmental and military institutions of societies. Racism is more than just a personal attitude; it is the institutionalized form of that attitude.”

BENJAMIN F. CHAVIS, COMMISSION FOR RACIAL JUSTICE UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES, ix-x (1987) [hereinafter TOXIC WASTES AND RACE]; *see also*, Richard J. Lazarus, “*Environmental Racism! That’s What It Is*,” 2000 U. ILL. L. REV. 255, 259 (2000).

when overt bigotry, so captured by the iconic images from the civil rights area, became safely tucked away in archives and history books. But still, the term was surprising. In the 1980s, we understood the dynamics of more subtle forms of discrimination such as unconscious bias and institutional racism, which manifested, for example, in employment and workplace decisions.⁹ But few had thought of the possibility that embedded within environmental regulation, within the technicalities of permitting, standard setting, cleanup and enforcement, were practices that by any stretch could be called racist.

Yet, there it was. And activists were insistent. What else could explain the oppressive pollution loads in people of color communities?¹⁰ Why did these particular communities get the bad smells, unrelenting truck traffic, dust, and noise?¹¹ Why did these people end up with high rates of respiratory illnesses, unexplained rashes, and numerous instances of rare cancers?¹² To them, the answer was obvious. It was racism, sometimes intentional and sometimes not, but it was racism.¹³ The disparity seen by just looking around, and what they were experiencing in their communities, soon found validation in empirical study.¹⁴

⁹ Charles R. Lawrence, III, *The Id, Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

¹⁰ RECHTSCHAFFEN, *supra* note 3, at 3-5 (History of the Movement).

¹¹ *Id.*, at 35-71 (discussing the evidence of environmental disparities).

¹² *Id.*

¹³ See TOXIC WASTES AND RACE, *supra* note 8.

¹⁴ *Id.* This was the first high-profile national study, but it was not the first. See RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE, 166 (Bunyan Bryant & Paul Mohai eds. 1992) (table summarizing studies indicating exposure to air pollution disproportionate by race and income); see also RECHTSCHAFFEN, *supra* note 6

Understandably, there was pushback. Nobody wants to be called a racist, especially if one thinks it is simply not true. The initial response was that the studies were not well done and could not be said to validate the charge.¹⁵ Then came the observation that, even if there was an existing pattern of disparity, that said nothing about its cause.¹⁶ There was also the argument that the pattern was not the result of discrimination, but instead was the result of more neutral market forces.¹⁷ Residential land near polluting facilities becomes cheap.¹⁸ People then move to those areas. No one forced them to do so. And, since these were voluntary choices, those making them must believe themselves to be better off buying and renting in these areas, accepting the tradeoff of lower housing costs but more pollution.¹⁹ Unfortunate, perhaps, but racist, hardly. A softer version of the market dynamics theory would concede that while racial disparities should not be so glibly assumed to be neutral or

(discussing more recent studies).

¹⁵ Christopher Boerner & Thomas Lambert, *Environmental Injustice*, 118 THE PUBLIC INTEREST 61 (Winter 1995). For a discussion of the debates about methodology, see, e.g., Robert Bullard, *Environmental Justice: It's More Than Waste Facility Siting*, 77 SOCIAL SCIENCE Q. 493 (1997); James T. Hamilton, *Testing for Environmental Racism: Prejudice, Profits, Political Power?*, 14 J. POL. ANALYSIS & MANAG. 107 (1995); Paul Mohai, *The Demographics of Dumping Revisited: Examining the Impact of Alternate Methodologies in Environmental Justice Research*, 14 VA. ENVTL. L. J. 615-650-651 (1995); Vicki Been, *Analyzing Evidence of Environmental Justice*, 11 J. LAND USE & ENVTL. L. 1, 16 (1995).

¹⁶ See generally, RECHTSCHAFFEN, supra note 3, 73-106 (Theories of Causation).

¹⁷ Lynn E. Blais, *Environmental Racism Reconsidered*, 75 N. C. L. REV. 75 (1996).

¹⁸ Douglas L. Anderton, Andy B. Anderson, Peter H. Rossi, John Michael Oakes, Michael R. Fraser, *Environmental Equity: The Demographics of Dumping*, 31 DEMOGRAPHY 229 (May 1994).

¹⁹ Blais, supra note 17.

acceptable, attempting to redistribute by site shifting some of these facilities (under a progressive siting scheme, for example) would be futile because market dynamics would simply cause the same pattern to emerge over time.²⁰

To be fair, the debate as just characterized is an oversimplification. Those at both ends of the spectrum, as well as those that fall somewhere in the middle, soon came to realize environmental disparities stem from a complicated, interrelated mix of factors.²¹ To be sure, there are likely those siting decisions borne of a conscious intention to take advantage of people in weaker positions, including those in people of color communities, although direct proof of such would be exceedingly hard to come by.²² In addition, some of the existing disparity stems from the

²⁰ Professor Vicki Been was the most prominent of commentators who expressed this view. See e.g., Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?* 103 YALE L.J. 1383 (1994); Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOLOGY L.Q. 1 (1997).

²² An often cited example of this kind of evidence is a report, written by the political consulting firm Cerrell Associates of Los Angeles and entitled *Political Difficulties Facing Waste-to-Energy Conversion Plant Siting* (popularly known as the Cerrell Report), which set out “to assist in selecting a site that offers the least potential of generating public opposition.” The report acknowledged that “since the 1970s, political criteria have become every bit as important in determining the outcome of a project as engineering factors.” The Cerrell Report suggests that companies target small, rural communities whose residents are low income, older people, or people with a high school education or less; communities with a high proportion of Catholic residents; and communities whose residents are engaged in resource extractive industries such as agriculture, mining, and forestry. Ideally, the report states, “officials and companies should look for lower socioeconomic neighborhoods that are also in a heavy industrial area with little, if any, commercial activity.” See RECHTSCHAFFEN, *supra* note 3, at 83 (citing the report).

legacy of historical discrimination in land use, zoning, and residential sales.²³ Demographic shifts and conditions that weaken informal social structures are also part of this mix. For example, communities that are undergoing what has been referred to as “ethnic churning,”—an area whose demographics are changing from being predominantly one ethnic minority to another—are less able to organize to oppose unwanted land uses in their neighborhoods.²⁴ Furthermore, the way that environmental laws are implemented may be part of the cause as well. This latter point is important because, as environmental laws were perceived to be part of the problem and not the solution, it was only natural to look instead to equal protection theories and civil rights laws to challenge these practices. Equal protection challenges were soon abandoned because of the high evidentiary burden involved in showing a specific intent to discriminate.²⁵ However, civil rights challenges appeared to be more fruitful because a disparate impact alone could support a claim; there was no need to show anyone actually intended to discriminate.²⁶ What then resulted from this legal strategy was a clash between looking at environmental justice issues

²³ Robert W. Collin, *Environmental Equity: A Law and Planning Approach to Environmental Racism*

11 VA. ENVTL. L. J. 495 (1992).

²⁴ Manuel Pastor, Jr., Jim Sadd & John Hipp, *Which Came First? Toxic Facilities, Minority Move-In, and Environmental Justice*, 23 J. URBAN AFFAIRS 1 (2001).

²⁵ See generally, Philip Weinberg, *Equal Protection*, in THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008); Alice Kaswan, *Environmental Laws: Grist for the Equal Protection Mill*, 70 U. COLO. L. REV. 387 (1999).

²⁶ Bradford C. Mank, *Title VI*, in THE LAW OF ENVIRONMENTAL JUSTICE (Michael B. Gerrard & Sheila R. Foster eds., 2d ed. 2008).

through a civil rights lens and looking at these issues through the requirements of environmental laws.²⁷

This clash is significant, particularly so when considering potential remedies. For example, an environmental justice scenario that has been hotly debated over the years is the deceptively simple act of permitting a facility to emit pollution under federal environmental law. State

²⁷ Professor Tseming Yang explains that the law and policy in civil rights and environmental protection are based on fundamentally different paradigms:

Environmental protection relies in large part on a conception of environmental degradation identified by Garrett Hardin in his seminal article *Tragedy of the Commons*, well as by Rachel Carson in her book *Silent Spring*. In contrast, civil rights laws and cases have in large part responded to issues of discrimination which are implicit in the Supreme Court's opinion in *Brown v. Board of Education*. . . . Under . . . "the tragedy of the commons," the quintessential focus of environmental regulation is on actions by individuals that, while advantageous and beneficial to that particular individual, are harmful for the community overall. The result is that environmental regulation, like many other forms of government regulations, is primarily directed at protecting the collective from the irresponsible or selfish actions of individuals or small groups....

That perspective is entirely reversed in anti-discrimination law. The underlying premise of *Brown v. Board of Education* is that prejudice and minority oppression requires the law to focus its protections on minority groups against the majority. Because it was necessary to protect African Americans against continuing discrimination and oppression by whites following the Civil War, the Fourteenth Amendment's Equal Protection Clause was specifically designed to be counter-majoritarian in character.

Tseming Yang, *Melding Civil Rights and Environmentalism: Finding Environmental Justice's Place In Environmental Regulation*, 26 HARV. ENVTL. L. REV. 1, 2-14 (2002).

environmental agencies often have federally delegated authority to issue permits²⁸ to new facilities, but more often issue renewal permits to existing facilities. However, surrounding these facilities are residents in largely people of color communities who say they already have far more pollution than is healthy, and, by the way, far more pollution than one will find in wealthier, white communities. Issuing the permit under those circumstances thus constitutes an act of racial discrimination. Since Title VI of the Civil Rights Act precludes recipients of federal funds from using criteria or methods that result in a discriminatory impact, they argue, the state-permitting agency must refuse to issue the permit.

Phrasing the issue in this way puts in stark relief the difficult choice presented. The permit would undoubtedly go forward under the environmental laws. The correct pollution-control equipment is in place (or will be in place) and the permit applicant has met all of the specific requirements applicable to its operations. To go a step further, state permitting authorities claim their hands are tied and they have no authority to deny the permit even if they wanted to do so.²⁹ So here we have it. Are we really going to demand the permit be denied, causing the shutdown of a huge facility like an oil refinery? What about the attendant job loss and

²⁸ Richard J. Lazarus & Stephanie Tai, *Integrating Environmental Justice into EPA Permitting Authority*

²⁶ ECOLOGY L. Q. 617 (1999) (discussing various permitting authorities under federal environmental statutes); see also Eileen Gauna, *EPA at 30: Fairness in Environmental Protection*, 31 ENVTL. L. REP. 10,528, 10,534 (2001)(discussing permit appeals raising environmental justice issues).

²⁹ NATIONAL ADVISORY COUNCIL FOR ENVIRONMENTAL POLICY & TECHNOLOGY, REPORT OF THE TITLE VI IMPLEMENTATION ADVISORY COMMITTEE: NEXT STEPS FOR EPA, STATE, AND LOCAL ENVIRONMENTAL JUSTICE PROGRAMS, 72 (1999) available at <http://www.epa.gov/ocem/nacept/titleVI/titleprpt.html> [hereafter Title VI FACA Report].

economic dislocation? What about the implications for national energy security? Worse still, what if shutting down the plant will help conditions somewhat, but it will not remedy the disproportionate impact because of other polluting activity in the area?³⁰

Yet, isn't that the whole point of civil rights laws, to prevent discrimination even where it arises by the application of laws that are neutral on their face? Granted, there is no overt bigotry there, no injustice in that sense. But pollution stemming from business practices motivated by profit is just as harmful as pollution generated from practices motivated by discriminatory intent.³¹ And to bring environmental policy into the mix, it is time, advocates argue, to prevent the piecemeal rebuilding and expansion of these facilities (largely grandfathered under current environmental law) from imposing discriminatory impacts—impacts that they have been imposing for years.³² So, from that perspective, civil rights claims resonate with what these overburdened communities have been experiencing, and a civil rights effects-based remedy should work. But that has not been the case.

A civil rights remedy has not worked in the environmental law context for several reasons. First, the Supreme Court cut off a private right of action for a claim premised upon disparate impact.³³ This left only administrative investigations and the remedy of a potential cut-off of federal funding to state agencies whose regulatory practices cause or

³⁰Gauna, *supra* note 26, at 10545-46 (discussing Title VI in the context of permit renewals).

³¹Title VI FACA Report, *supra* note 29, at 81.

³²*Id.*

³³Alexander v. Sandoval, 532 U.S. 275, 284-85, 293 (2001).

exacerbate disparate impacts. While there is much discussion about what are called “Title VI cases,”³⁴ meaningful remedial action has been, according to some, virtually nonexistent. Thus far, the EPA has formally made a preliminary finding of a disparate impact and pursuant to a settlement imposed a remedy in one recent case in California. The remedy in that case was, essentially, additional monitoring and community outreach.³⁵ This lone (and to some ignominious) remedy stands out from the scores of civil rights complaints filed with the EPA thus far which have either been dismissed or have never been resolved.³⁶

Why has this happened? Here is where environmental law enters the picture. State regulators, in response to these civil rights claims, have insisted they have no authority to impose permit requirements other than

³⁴ See *Major Milestones of EPA’s Title VI Policy Development*, U.S. EPA, (Nov. 10, 2010) <http://www.epa.gov/ocr/milestones.htm>; see also U.S. EPA, PLAN 2014 SUPPLEMENT, ADVANCING ENVIRONMENTAL JUSTICE THROUGH TITLE VI DRAFT (Apr. 12, 2012) <http://www.epa.gov/compliance/ej/resources/policy/plan-ej-2014/plan-ej-civil-rights.pdf>.

³⁵ Letter from Rafael DeLeon, Dir., U.S. EPA Office of Civil Rights, to Christopher Reardon, Acting Dir., Cal. Dep’t of Pesticide Regulation (Apr. 22, 2011), available at <http://www.epa.gov/ocr/TitleVICases/title6-c42211-preliminary-finding.pdf>; see also U.S. EPA, FACT SHEET ON ANGELITA C. DECISION (May 10, 2012), <http://www.epa.gov/ocr/TitleVICases/title6-c-factsheet.pdf>.

³⁶ As of December 22, 2008 the EPA had processed a total of 211 complaints since 1993. Rechtschaffen, *supra* note 3, at 354. Of those, 40 (19%) were still pending, and 171 (81%) had been closed. Of the closed cases, 127 (60%) had been rejected and 44 (21%) had been dismissed. *Id.* From 2009 through April 2012, approximately 50 additional cases have been filed. See U.S. EPA, TITLE VI COMPLAINTS LISTING AS OF APRIL 2012 http://www.epa.gov/ocr/docs/extcom/2012_04_title_vi_open-complaints.pdf, (last visited May 10, 2012); see also Deloitte Consulting LLP, *Evaluation of the EPA Office of Civil Rights 2* (2011), available at http://www.epa.gov/epahome/pdf/epa-ocr_20110321_finalreport.pdf.

those explicitly called for under the environmental statutes and regulations.³⁷ Many believe such authority does not extend to remedying causally complicated social ills, or cultural and economic impacts.³⁸ In this context, regulators argue, civil rights remedies are necessarily limited in the environmental law arena because the authority under environmental law is limited.

What that authority, by the way, is itself highly contested. Organizations, such as the Environmental Law Institute and the National Association of Public Administrators, have analyzed federal environmental statutes and have concluded there is indeed significant authority there to address environmental justice concerns;³⁹ however, the EPA and the states remain cautious about exercising that authority.⁴⁰

³⁷ See generally Lazarus, *supra* note 28, 657-660 and accompanying text; see also Title VI FACA Report, *supra* note 29, at 74.

³⁸ Title VI FACA Report, *supra* note 29, at 6.

³⁹ See *Opportunities for Advancing Environmental Justice: An Analysis of U.S. EPA Statutory Authorities*, ENVTL. LAW INST. 137 (2001), <http://www.epa.gov/environmentaljustice/resources/reports/annual-project-reports/eli-opportunities4ej.pdf>; *Models for Change: Efforts by Four States to Address Environmental Justice*, NATIONAL ACADEMY OF PUBLIC ADMINISTRATION. 27 (2002), <http://www.epa.gov/environmentaljustice/resources/reports/annual-project-reports/napa-epa-model-4-states.pdf>; *Environmental Justice in EPA Permitting: Reducing Pollution in High-Risk Communities is Integral to the Agency's Mission*, NATIONAL ACADEMY OF PUBLIC ADMINISTRATION. 17 (2001), <http://www.epa.gov/environmentaljustice/resources/reports/annual-project-reports/napa-epa-permitting.pdf>.

⁴⁰ As early as 2000, EPA's Office of General Counsel (OGC) found numerous potential authorities under federal statutory provisions for addressing environmental justice issues in the permitting process. See Memorandum from Gary Guzy, U.S. EPA General Counsel, to Steven A. Herman et al., assistant administrators of the U.S. EPA, 1 (Dec. 1,

The importance of resolving the issue of legal authority under the environmental statutes cannot be overstated. This is because, in the environmental justice context, there is an obvious limitation to using civil rights remedies. For example, poor white communities are not within a traditionally protected category. But, if there is sufficient legal authority under the environmental statutes to address racial disparities in order to remedy civil rights claims based thereon, that same legal authority could be used to address disparities in poor white communities as well.

Notwithstanding the legal authority issue, environmental justice activists also insist the EPA is conflating civil rights laws with environmental laws; they maintain that in essence, civil rights are not limited by environmental laws, they should override the environmental laws.⁴¹ Thus, on the civil rights front, the impasse continues.

What about the environmental law front? It might help to first look more broadly at why there is such a disjunction between the civil rights approach and the environmental law approach. As pointed out by Professor Tseming Yang, civil rights laws aim to provide justice to the individual and do so largely by protecting minorities from majoritarian

2000), *available at*

http://www.epa.gov/environmentaljustice/resources/policy/ej_permitting_authorities_memo_120100.pdf. However, in the memo, the General Counsel noted that “[a]lthough the memorandum presents interpretations of EPA’s statutory authority and regulations that we believe are legally permissible, it does not suggest that such actions would be uniformly practical or feasible given policy or resource considerations or that there are not important considerations of legal risk that would need to be evaluated.” *Id.*

⁴¹ Letter to Lisa Jackson from Title VI advocates, dated July 3, 2012 (letter on file with author)

preferences,⁴² even where doing so may be economically inefficient. In the civil rights area, we see case-by-case adjudication of individual rights and sometimes the imposition of remedies that may supersede the application of otherwise facially neutral criteria. In contrast, environmental laws aim to provide an optimal level of pollution control, one with a majoritarian focus,⁴³ which aims to be reasonably protective for all, but does not provide a risk-free environment. Environmental law relies less upon court ordered remedies; it is largely regulatory.⁴⁴ However, through the rulemaking process, standards are often relaxed to address concerns about cost and feasibility in regulated industries. Even when environmental standards are supposedly health-based only, i.e., “cost blind,” environmental regulators remain very much aware of compliance costs⁴⁵ and the standards often end up being insufficiently protective for environmental justice communities as well. One example is the national ambient air quality standards (“NAAQS”) program under the Clean Air Act. These standards are implemented by averaging pollution concentrations over periods of time in a large air shed.⁴⁶ This averaging

⁴² Tseming Yang, *The Form and Substance of Environmental Justice: The Challenge of Title VI of the Civil Rights Act of 1964 for Environmental Regulation*, 29 B.C. ENVTL. AFF. L. REV. 143, 173 (2002).

⁴³ *Id.* at 172-75; *see also* Yang, *supra* note 27.

⁴⁴ ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE AND, POLICY, 128 (5th ed. 2005) (Figure 2.6: The Principal Federal Environmental Laws Classified by Type of Statute and Regulatory Targets).

⁴⁵ *Id.* at 572 (citing MARK LANDY ET AL., THE ENVIRONMENTAL PROTECTION AGENCY: ASKING THE WRONG QUESTIONS, ch. 3 (1990)) (noting commentators who critique the NAAQS approach as flawed because while EPA cannot explicitly discuss costs, it is necessary to consider these costs).

⁴⁶ *Id.* at 477 (Figure 5.7 National Ambient Air Quality Standards Primary (health related)). What if, because of this averaging over time, the air quality in the air shed is

can hide concentrated localized pollution that might be affecting a community whose residents live in poverty and have health vulnerabilities, such as abnormally high rates of asthma. This is the “toxic hot spot” concern that affects so many environmental justice communities.

In addition, regulatory activity is supported by risk assessment. To be sure, risk assessments often employ conservative assumptions and, as a result, are often criticized as being overprotective and too costly.⁴⁷ But, while a chemical risk assessment may seem overprotective in isolation, such perceived over-protectiveness may well turn into under-protectiveness once one confronts the pervasive scientific uncertainty that arises from attempting to account for the cumulative and synergistic effects of multiple chemicals.⁴⁸ This is the “chemical stew” problem that confronts impacted communities, particularly in highly industrialized areas.

Another reason why environmental laws do not adequately address environmental justice concerns is environmental regulations often must be cost-justified, and the various methodologies employed in cost-benefit analysis, such as discounting human lives in long latency scenarios, necessarily tend to disadvantage environmental justice communities. In addition, as pointed out by various commentators, the cost-benefit

determined to meet the standard, but there is a hot spot, so to speak, within a poor neighborhood within that larger area? What if these communities are more vulnerable, e.g., have high rates of respiratory illnesses, and some residents--say children with asthma--are impacted by spikes of pollutants that have a more localized effect?

⁴⁷ See generally, CASS R. SUNSTEIN, *RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT* (2002), and STEPHEN BREYER, *BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION* (1993).

⁴⁸ See generally, Robert R. Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, 1996 U. ILL. L. REV. 103 (1996).

enterprise is highly subject to manipulations resulting in some counterintuitive, and at times outright bizarre, approaches to monetizing things that do not have a dollar value, such as an I.Q. point, a debilitating illness, or even a human life.⁴⁹

One more structural issue in the environmental regulatory arena should be noted. That is the inability of underfunded community-based groups to have their concerns adequately addressed because well-resourced, concentrated interest groups speaking in technical language that the average person cannot understand dominate the arena.⁵⁰ In the thirty-some years environmental justice has been part of the regulatory landscape, there is still an unlevel playing field in this respect.⁵¹ Add to this basic problem the looming challenges climate change will bring to particularly vulnerable communities,⁵² and you have an already dire

⁴⁹ See generally FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING, 61 (2004); Sidney A. Shapiro & Christopher H. Schroeder, *Beyond Cost-Benefit Analysis: A Pragmatic Reorientation*, 32 HARV. ENVTL. L. REV. 433 (2008).

⁵⁰ Gauna, *supra* note 5, at 13-14.

⁵¹ The EPA acknowledges as much, noting that effective public outreach in permitting would potentially include providing third party attorneys and scientists as resources for communities. U.S. EPA, PLAN EJ 2014: CONSIDERING ENVIRONMENTAL JUSTICE IN PERMITTING, 10 (September 2011), <http://www.epa.gov/environmentaljustice/resources/policy/plan-ej-2014/plan-ej-permitting-2011-09.pdf>.

⁵² INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE 2007, SUMMARY FOR POLICYMAKERS, IN: CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY. CONTRIBUTION OF WORKING GROUP II TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, 12 (M.L. Parry, et. al., eds. 2007), <http://www.ipcc.ch/pdf/assessment-report/ar4/wg2/ar4-wg2-spm.pdf>; CONGRESSIONAL BLACK CAUCUS FOUNDATION, AFRICAN AMERICANS AND CLIMATE

situation that will only grow worse. For the sake of all concerned, something must be done to break the logjam and move forward in a sensible way.

Could principles of sustainability have anything positive to add to this difficult conversation? I think they do. First, employing the language of sustainability might broaden the more narrow frames previously discussed, i.e., the individual right focus of civil rights and chemical-by-chemical, cost justified approach of environmental law.

The often-quoted definition of sustainability is “development that meets the needs of the present without compromising the ability of future generations to meet their own needs,” which is taken from the sentiment expressed in Principal 3 of Agenda 21 of the Rio Declaration.⁵³ There is a lot more to this simple definition than meets the eye. As noted by Professor John Dernbach, sustainable development is not about development in the usual sense; it is about pursuing social, economic, environmental, and security goals in ways that are more mutually reinforcing or supportive over time, not contradictory or antagonistic.⁵⁴ You can see a more expansive articulation of these principles within Agenda 21. One of the more exciting aspects here is that principles of

CHANGE: AN UNEQUAL BURDEN, 3 (2004),
http://www.sustainlex.org/BlackCaucusfullCBCF_REPORT_F.pdf.

⁵³ UNITED NATIONS, U.N. CONFERENCE ON ENV'T AND DEV., ANNEX I: RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT, A/Conf. 151/26 (Vol. I) (1992)(Principle 3), available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm/>.

⁵⁴ John C. Dernbach, *Synthesis*, in STUMBLING TOWARDS SUSTAINABILITY, 7 (John C. Dernbach, ed., 2001) [hereafter STUMBLING TOWARD SUSTAINABILITY], see also John C. Dernbach, *Progress Towards Sustainability: A Report Card and a Recommended Agenda*, 39 ENVTL L. REP. 10275 (2009), available at <http://ssrn.com/abstract=1389878>.

sustainability not only consider poverty issues, but also deliberately place an antipoverty agenda within the core mission.⁵⁵ Taken as a whole, sustainability takes the focus off of “parts”—the individual part, the environment part, the economic part—and begins the task of looking at the integrated whole.

This seems like a tall order, and my initial concern would be, much like environmental justice and its close cousin the precautionary principle, the overarching principal of sustainability will likewise be criticized as being too vague and amorphous and, as such, not reasonably translatable into coherent policy. Scholars in this area are undaunted, however, and are looking for common sense ways to move from the aspirational goals of Agenda 21 to policies and legal frameworks that implement sustainability in common sense ways. They have done so first by creating a broad spectrum of indices of sustainability and have set out to examine where we are currently in multiple categories.⁵⁶ For example, we see indices in categories as diverse as ambient toxics in air and water, fresh water supply, biodiversity, forestry, ocean resources, use of nuclear and fossil fuels, agriculture, municipal solid waste and contaminated properties, and population and per capita consumption, to name a few.⁵⁷ Scholars have also looked to identify sustainable practices that already exist within those categories. From that inventory, the work of integrating over the long haul economic efficiencies and social justice can begin.

Another interesting aspect of a sustainability framework is that, like environmental justice, it can manifest as a bottom-up approach. Because so much of environmental justice problems stem from

⁵⁵ STUMBLING TOWARDS SUSTAINABILITY, *supra* note 54, at 13.

⁵⁶ *Id.* at 1-42.

⁵⁷ *Id.*

shortsighted land use decisions, when principles of sustainability are introduced by various ways into local land use decisions, this too is where it gets interesting. As noted by Professor Patricia Salkin, states are starting to become more vigilant about the impacts of local land use decisions that cause adverse disproportionate impacts.⁵⁸ This, coupled with the largely citizen-generated push for “smart growth,” might together result in more environmentally just, sustainable local land use decisions. The implementation phase of various smart growth recommendations is still in its infancy, and it remains to be seen to what extent various levels of government actors and public and private sector funding will incorporate environmental justice concerns within that framework. If they can manage to do so, however, there is potential to significantly change conditions in highly impacted and blighted urban areas. One area where there are positive signs of this is in certain brownfield redevelopment projects.⁵⁹

In many respects, the interplay of brownfield redevelopment and environmental justice is still a mixed bag, even after decades of progress.⁶⁰

⁵⁸ Patricia E. Salkin, Land Use, in STUMBLING TOWARDS SUSTAINABILITY, *supra* note 54, at 375. For an exploration of the link between sustainability and equity, *see generally*, ROBIN MORRIS COLLIN AND ROBERT WILLIAM COLLIN, THE ENCYCLOPEDIA OF SUSTAINABILITY: VOLUME III: EQUITY AND FAIRNESS (2009).

⁵⁹ The EPA defines brownfields as “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.” *Brownfields and Land Revitalization*, U.S. EPA (Sept. 27, 2012), *available at* <http://www.epa.gov/brownfields>.

⁶⁰ From the beginning of the concerted effort to reuse brownfield sites, there has been a steady interest in the connection between environmental justice and brownfield development. *See, e.g.* Veronica Eady Famira, *Recycling Brownfields Sites*, in THE LAW OF ENVIRONMENTAL JUSTICE: THEORIES AND PROCEDURES TO ADDRESS DISPROPORTIONATE RISKS 605 (Michael B. Gerrard & Sheila R. Foster, eds., 2d ed. 2008); *see also*, Steven Bonorris and Nicholas Targ, *Environmental Justice in the*

While there are no comprehensive studies to confirm whether as a whole this is a successful endeavor, some anecdotal accounts in federal brownfield initiatives suggest there may be a tendency to bring the affected community into the process at an earlier stage,⁶¹ to learn about their concerns,⁶² and that there is greater sensitivity to potential health and nuisance impacts. Importantly, project sponsors are more willing to leave behind the check-the-box mentality and make sure that the affected community benefits from the project.⁶³ If there is sufficient attention to designing truly protective engineering and institutional controls to contain

Laboratories of Democracy, 23 NAT. RES. & ENVT 44 (Fall 2010); Luke W. Cole, *Environmental Justice and Entrepreneurship: Pitfalls for the Unwary*, 31, W. NEW ENG. L. REV. 601 (2009); Joel B. Eisen, *Brownfields at 20: A Critical Reevaluation*, 34 FORD. URB. L.J. 721 (2007) (noting that it is a mistake to think that all brownfield "stories" are the same); William T.D. Freeland, *Environmental Justice and the Brownfields Revitalization Act of 2001: Brownfields of Dreams or a Nightmare in the Making?*, 8 J. GENDER RACE & JUST. 183 (2004); Kirsten H. Engel, *Brownfield Initiatives and Environmental Justice: Second-Class Cleanups or Market-Based Equity?* 13 J. NAT. RES. & ENVT L. 317 (1998).

⁶¹ See NATIONAL ENVIRONMENTAL JUSTICE ADVISORY COUNCIL, WASTE AND FACILITY SITING SUBCOMMITTEE, U.S. EPA REPORT NO. 500-R-96-002, ENVIRONMENTAL JUSTICE, URBAN REVITALIZATION, AND BROWNFIELDS: THE SEARCH FOR AUTHENTIC SIGNS OF HOPE (December 1996)[hereafter AUTHENTIC SIGNS OF HOPE]; .S. ENVT. PROT. AGENCY, REPORT NO. 500-R-99-003, BROWNFIELDS TITLE VI CASE STUDIES: SUMMARY REPORT (June 1999).

⁶² As one author notes, "In almost every case study analyzed, carefully orchestrated public outreach and involvement plans were implemented from the outset. Without this critical community buy-in, many project participants note, their efforts easily could have fallen apart." See EDITH M. PEPPER, LESSONS FROM THE FIELD: UNLOCKING ECONOMIC POTENTIAL WITH AN ENVIRONMENTAL KEY 22 (1997).

⁶³ AUTHENTIC SIGNS OF HOPE, *supra* note 61.

on-site contamination,⁶⁴ then these projects start to look more like what an integrated sustainable approach would call for. It is through projects of this nature that we can start to develop workable, pragmatic approaches to sustainable practices.

That is the good news. But just as there is potential for good, there is great potential to lose our way. There are a few unjust ways the language of sustainability can be used. One way, for example, is to use anti-sprawl, smart growth development to justify gentrification and displacement of communities in the core of our urban areas.⁶⁵

In a related vein, what appears to be a good thing might also unduly limit the concept of sustainability. There appears to be an embracing of the general concept of sustainable practices from the business and industry sector.⁶⁶ However, it is not certain the thinking here would include the explicit integration of social, economic, and environmental missions. Nor is it certain that poverty eradication is core

⁶⁴ John Pendergrass, Institutional Controls in the States: What Is and Can Be Done to Protect Public Health at Brownfields, 35 CONN. L. REV. 1303,1312 (2003); Andrea Ruiz-Esquide, *The Uniform Environmental Covenants Act -- An Environmental Justice Perspective*, 31 ECOLOGY L. Q. 1007 (2004); Robert Hersh & Kris Wernstedt, *Out of Site, Out of Mind: The Problem of Institutional Controls*, 8 RACE POVERTY & THE ENVT 15 (Winter 2001) .

⁶⁵ For an interesting exchange on the impact of gentrification, see john a. powell & Marguerite L. Spencer, Giving Them the Old "One-Two": Gentrification and the K.O. of Impoverished Urban Dwellers, 46 HOW. L.J. 433 (2003) and J. Peter Byrne, Two Cheers for Gentrification, 46 HOW. L.J. 405 (2003); see also, Henry W. McGee, Jr., Seattle's Central District, 1990-2006: Integration or Displacement?, 36 URB. LAW. 167 (2007).

⁶⁶ From a perusal of various company websites, one can gain an appreciation this. See generally, William L. Thomas, *Business and Industry, in STUMBLING TOWARDS SUSTAINABILITY*, *supra* note 54, 541-592.

to a business-oriented conception of sustainability. So, while it is important to look for and examine sustainable business practices with the view towards expanding those practices, it is equally important not to become complicit in the repackaging of business as usual within the garb of sustainability. It has to be more than recycling or energy efficient production processes that occur without sensitivity to their distributional impacts.

Another troubling aspect of a more limited view of the concept of sustainability might be hidden in its close tie to climate change concerns. What can happen here is we become so single-focused on mitigation and retooling our infrastructure to carbon-friendly energy production that we give environmental justice concerns short shrift. Here, we may begin to create a new and more pernicious kind of inequity, moving from inequity that is generated from the powerful mix of incentives that currently maintain the status quo to what we might call the new inequity of imperative. We take the imperative of climate change, and the unquestionable need to do something fast, and use that to justify the siting of carbon-friendly, but still troublesome facilities in those communities that historically have been at the end of the path of least resistance. Examples might include the newly invigorated interest in uranium mining in Indian country without consideration of radioactive contamination still in the environment from past mining practices,⁶⁷ as well as the new siting of uranium enrichment facilities, waste-to-energy plants, bioenergy facilities, hydraulic fracturing projects, and the like.⁶⁸ All of these can be justified on climate change and energy security grounds.

⁶⁷ See, e.g., *Morris v. U.S. Nuclear Regulatory Commission*, 598 F.3d 677 (10th Cir. 2010).

⁶⁸ See, e.g., Energy Justice Network, at <http://www.energyjustice.net/> (mission to support communities threatened by polluting energy and waste technology).

A subtler version of this conflict was apparent recently in the debates surrounding opposition, by environmental justice activists, to California's greenhouse gas emissions market. They maintained that direct methods of greenhouse gas control on large facilities had great potential to reduce more localized co-pollutants and that California had, in effect, rushed to judgment in deciding upon carbon trading; thus, the environmental justice implications had not been thought through adequately. This was a difficult issue, and time constraints preclude a more detailed description of the various positions.⁶⁹ I use the example here to raise an important point. The advocates' main concern seemed to be the localized, co-pollutant effect of market oriented mitigation,⁷⁰ if you

⁶⁹ *Id.*, see also, Alice Kaswan, *Greening the Grid and Climate Justice*, 39 ENVTL. L. 1143 (2009) (describing tension between a more narrow focus on reducing greenhouse gases and incorporating environmental justice into climate policy).

⁷⁰ See, e.g., Center on Race, Poverty & Environment (CRPE), explaining its position:

After supporting the passage of AB 32, which included strong language to protect low-income communities and communities of color, the California Air Resources Board outraged environmental justice activists and community groups by adopting a plan based on the industry-preferred approach of using a market-based "Cap and Trade" program. **Cap and Trade is an ineffective system because it does not require major polluters to reduce their carbon emissions.** Cap and Trade allows major emitters of greenhouse gases to buy "reductions" from other polluters instead of reducing their own pollution. Polluters may also avoid reducing their emissions by purchasing "offsets." Offsets can be bought from a source nearly anywhere in the world and go to fund ecofriendly projects. So while trees are being planted in Canada, corporations can continue to pollute back home in California at levels equal to or even greater than they did before AB 32. Cap and Trade deprives nearby residents from the benefits of toxic, smog, and particulate matter pollution reductions that would accompany local greenhouse gas reductions. Environmental justice communities burdened by huge industrial concentrations of pollution would likely

will, sustainability at the more local level. Precisely, this is a vision of sustainability that, as noted earlier, pursues social, economic, environmental, and security goals in a way that is mutually reinforcing over time, not antagonistic.⁷¹ Recalling the “sinking ship” metaphor described earlier, communities opposing the carbon market are communities that are those “closer to the hole in the hull.” Their position against this important, cutting edge climate initiative did go against what was the conventional wisdom of the time, that carbon trading was the most viable solution to controlling greenhouse gas emissions on a large scale. One does not have to take a particular position on the relative merits of each of these positions to appreciate that what appears to be a good idea for promoting sustainability at one scale may present a barrier to sustainability at another scale. There are difficult tradeoffs to be sure. But we must start thinking in terms of sustainability as including distributional equity, and be particularly wary of believing that an overriding climate imperative can justify even more environmental sacrifice from already vulnerable communities. If we do that, we might be able to devise solutions that are more just and, yes, politically viable over the long run. Again, it is a tall order, and I hope that collectively we are up to the task.

see no benefits when major polluters buy, instead of reduce, their pollution. Laws like the Clean Air Act – which also includes an offset scheme called New Source Review – do not protect nearby communities from these expansions.

CRPE, at <http://www.crpe-ej.org/crpe/index.php/campaigns/climate-justice>. (last visited May 13, 2012)(emphasis in original). For a thoughtful discussion of co-pollutant considerations under market strategies compared to traditional forms of stationary source regulation under the Clean Air Act, see Alice Kaswan, *Climate Change, the Clean Air Act and Industrial Pollution*, 30 UCLA J. ENVTL. LAW & POL’Y, 51 (2012).

⁷¹ See *supra* note 54 and accompanying text.

But I do believe that it is the way to repair that “hole in the hull.” We cannot get to sustainability unless we go through environmental justice.