

ENVIRONMENTAL LAW INSTITUTE

# ENVIRONMENTAL JUSTICE <sup>3<sup>RD</sup></sup> EDITION

LEGAL THEORY AND PRACTICE



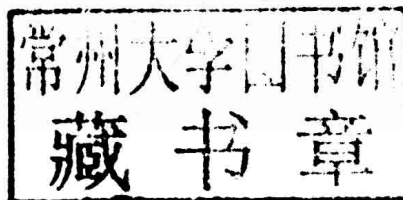
BARRY E. HILL

# ENVIRONMENTAL JUSTICE: LEGAL THEORY AND PRACTICE

## 3RD EDITION

by

Barry E. Hill



ENVIRONMENTAL LAW INSTITUTE

Washington, D.C.

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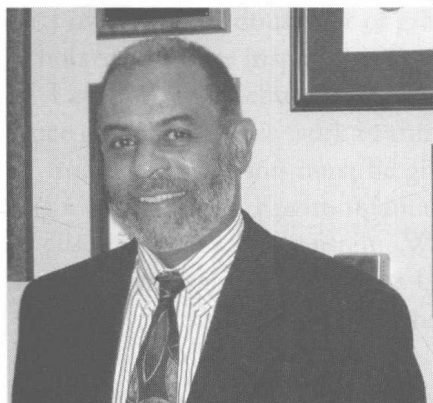
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Published February 2009. Second Edition published May 2012.  
Third edition published November 2014.

ISBN 978-1-58576-170-8

## Biography



Barry E. Hill is an Adjunct Professor of Law at Vermont Law School, where he has taught an environmental justice and sustainable development course for 20 years. Mr. Hill is Senior Counsel for Environmental Governance, Office of International and Tribal Affairs, U.S. Environmental Protection Agency (EPA). Previously, Mr. Hill was Director of EPA's Office of Environmental Justice from 1998-2007. Prior to that, he was the U.S. Department of the Interior's Associate Solicitor, Division of Conservation and Wildlife, and the Director, Office of Hearings and Appeals. Prior positions include: Of Counsel to the law firm of Dickstein Shapiro, LLP, where he practiced environmental law; Project Manager of the Superfund Business Unit of ICF International, an international consulting firm; Special

Counsel to the Attorney General of the District of Columbia; Legal Counsel to the Inspector General of the U.S. EPA; Law Secretary to the Deputy Administrative Judge of New York City (Criminal Division); and an Assistant District Attorney in Brooklyn, New York.

Mr. Hill has been a Visiting Scholar at the Environmental Law Institute from 2010-2012. Mr. Hill has lectured in the Middle East, Africa, South and Central America, and the Caribbean on the following topics: establishing an environmental law and policy framework for national governments; environmental justice and sustainable development; capacity-building training in environmental law for judges, prosecutors, government regulators, citizens, and the bar; citizen involvement in the environmental enforcement process; and the impact of global warming on indigenous populations. In 2011, Mr. Hill delivered the Distinguished Lecture for the Trinidad & Tobago Environmental Commission, and the Supreme Court of Trinidad & Tobago.

In 2011, Mr. Hill was presented the "Distinguished Alumni Award" by Brooklyn College of the City University of New York for his "commitment to environmental justice and sustainable development, and pioneering leadership in the field of environmental law and policy in the U.S. and abroad."

In 2001, Mr. Hill was presented the "Award for Distinguished Achievement in Environmental Law and Policy" by the American Bar Association for his work—teaching, research, and leadership—in the areas of environmental justice and sustainable development, and environmental law and policy.

Since 1999, Mr. Hill has been a Fellow of the American Bar Association's American Bar Foundation in recognition of his professional accomplishments, distinguished service, and commitment to the study of law and legal research.

Mr. Hill received his B.A. degree in Political Science from Brooklyn College; M.A. degree in Political Science from Howard University; and a J.D. degree from the Cornell University Law School. In 2012, Mr. Hill received an honorary Doctor of Laws degree from the Thomas Jefferson School of Law, since he "steadfastly fought environmental injustice by taking action to decrease environmental risks and to raise awareness of these issues, and by providing communities with the appropriate tools needed to address serious environmental problems."

# Acknowledgments

I owe a tremendous debt of gratitude to the Environmental Justice Movement activists, advocates, and scholars who have inspired my keen interest and work in this area.

I am deeply indebted to the various authors and publishers who have granted me permission to reproduce excerpts of their work in this textbook/handbook.

Special recognition must be given to my colleagues on the American Bar Association's (ABA's) Standing Committee on Environmental Law—particularly, Dinah Bear, Hope Babcock, David Baker, Tommy Wells, and Elissa Lichtenstein. We made history. Through our efforts, in 1993, the ABA became the first mainstream organization in the United States to recognize and seek to address the issue of environmental justice. The resolution on environmental justice that was unanimously adopted by the House of Delegates became official policy of the ABA. Since then, the ABA has embarked on a myriad of progressive initiatives such as identifying lawyers, law school clinics, and legal services organizations nationwide who agreed to provide pro bono legal services to community-based organizations; and conducting 50-state surveys to identify what states are doing with respect to addressing the issue through legislation, regulations, and policies, as well as supplemental environmental projects that address the environmental and public health concerns of communities.

I am indebted to the talented team of attorneys and other professionals that comprised the District of Columbia Bar Association's Coalition on Environmental Justice—notably, Fran Dubrowski and Leslie Turner. Through our efforts, in 1995, the D.C. Bar became the first state bar association in the country to pass an environmental justice resolution and to embark on a number of groundbreaking initiatives to seek to address the issue of environmental justice in the nation's capital.

I gratefully acknowledge the help and encouragement of the team at the Environmental Law Institute—specifically, Scott Schang, Rachel Jean-Baptiste, and Bill Straub—for their efforts, support, and advice in publishing this textbook/handbook.

My sincere appreciation is extended to my sister, Sherry Yvonne Hill, whose expert typing skills and patience contributed immensely to the successful completion of this book.

Finally, I am grateful to my beloved family and dear friends who helped me more than they could ever imagine as I spent countless hours researching and writing in the lonely confines of my study. When I would emerge periodically, they were always there. Thank you all.

Be Well; Be Balanced; and Be Happy!!!

Barry E. Hill

*The inner city, whatever its precise boundaries, is recognized by its inferior environment. Air pollution, a problem for nearly all of the Nation, lays its pall most heavily over the inner city in many metropolitan areas. Open spaces, parks, and recreational opportunity are high priorities for a better environment. Yet in the inner city they are lacking to a higher degree than in other parts of the urban complex. Problems of noise, sanitation, and congestion affect nearly all sectors of the larger cities. But overcrowding, rats, flaking leaded paint, deteriorating housing, and ever present litter and garbage are afflictions more typical of the inner city. . . . For many inner city residents, the overwhelming concern is poverty and its accompanying ills—inadequate housing, high crime rates, poor health, unsanitary conditions, inadequate recreation, and drug addiction—all of which are exacerbated by racial discrimination. These factors may not be environmental when looked at individually. But their net effect is to lower the quality of life.<sup>1</sup>*

—President's Council on Environmental Quality

*At the beginning of the environmental movement in this country, the concept of environmental justice was rarely discussed. It was widely presumed that environmental risk was blind, that it posed similar problems to all people, regardless of their racial or economic differences. There is no longer any doubt that as we undertake programs to reduce risks we must explicitly recognize the ethnic, economic, and cultural makeup of the people we are trying to protect. We now believe that people of color and low income are disproportionately affected by some environmental risks—the risk of living near landfills, municipal waste combustors, hazardous waste sites; the risk posed by lead or asbestos in old, poorly maintained housing; the risk of exposure to pesticides in farm fields; and the risk of eating contaminated fish when fish is a mainstay of their diet.<sup>2</sup>*

—Carol M. Browner  
Administrator U.S. Environmental Protection Agency

*Pollution and poisoning are mental as well as physical phenomena, subjective as well as objective phenomena. The struggle for an environment ensuring a happier life could reinforce, in individuals themselves, the instinctual roots of their own liberation. When people are no longer capable of distinguishing between beauty and ugliness, between serenity and cacophony, they no longer understand the essential quality of freedom, of happiness.<sup>3</sup>*

—Herbert Marcuse  
Philosopher, Sociologist, and Political Theorist  
Frankfurt School

- 
1. Council on Environmental Quality, *Environmental Quality—The Second Annual Report of the Council on Environmental Quality* 189-91 (1971).
  2. Prepared remarks for the Joint Hearings Before the Environment, Energy, and Natural Resources Subcommittee, and the Legislation and National Security Subcommittee of the Committee on Government Operations of the House of Representatives, 189, May 6, 1993, available from the Hathi Trust Digital Library, at <http://babel.hathitrust.org/org/cgi/pt?num=185&cu=1&seq=199&view=1up&size=100&cid=mdp.39015042701725#view=1up;seq=1>.
  3. Herbert Marcuse, *Ecology and Revolution*, in *ECOLOGY: KEY CONCEPTS IN CRITICAL THEORY* 51, 53-54 (Carolyn Merchant ed., 1999).

# Table of Contents

<b>Table of Cases</b> .....	ix
<b>Biography</b> .....	xi
<b>Acknowledgments</b> .....	xiii
<b>Introduction — Environmental Justice: Legal Theory and Practice</b> .....	1
<i>Environmental Justice, Sustainable Development, and the Human Right to a Clean and Healthy Environment</i> .....	1
<i>Interrelationship Between Environmental Justice and Sustainable Development</i> .....	2
<i>Environmental Justice Movement</i> .....	6
<b>Chapter 1 — Defining the Problem</b> .....	13
1.1 <i>Overview: Who Bears the Burden?</i> .....	13
1.2 <i>Social, Health, Environmental, and Economic “Facts”</i> .....	15
1.2.1 <i>Siting Decisions</i> .....	15
1.2.2 <i>Equal Enforcement of Environmental Laws</i> .....	41
1.2.3 <i>Health Impacts</i> .....	48
1.2.4 <i>Toxic Torts</i> .....	68
1.3 <i>Zoning and Land Use Laws</i> .....	80
1.3.1 <i>The Relationship of Zoning and Land Use Decisions to Environmental Injustice</i> .....	81
<b>Chapter 2 — Growth of the Environmental Justice Movement: Organizing the Grassroots</b> .....	99
2.1 <i>Overview</i> .....	99
2.2 <i>The Grassroots Environmental Justice Movement</i> .....	99
2.2.1 <i>Grassroots Activism</i> .....	100
2.3 <i>Organizing the Grassroots</i> .....	115
2.3.1 <i>First National People of Color Environmental Leadership Summit</i> .....	115
2.4 <i>Tactics</i> .....	116
2.4.1 <i>Louisiana—A Hotbed of Community Activism</i> .....	117
2.4.2 <i>Negotiation</i> .....	133
2.4.3 <i>Collaborative Problem-Solving</i> .....	138
<b>Chapter 3 — Addressing the Problem: The Legislative Branches</b> .....	157
3.1 <i>Overview</i> .....	157
3.2 <i>Federal Legislation</i> .....	158
3.2.1 <i>In the Absence of Specific Environmental Justice Legislation</i> .....	158
3.3 <i>State Legislation</i> .....	186

3.3.1 A Potpourri of Legislative Initiatives.....	186
<b>Chapter 4 — Addressing the Problem: The Executive Branches .....</b>	<b>217</b>
4.1 <i>Overview</i> .....	217
4.2 <i>Federal Government</i> .....	217
4.2.1 Early EPA Experience .....	217
4.2.2 Presidential Action: The Environmental Justice Executive Order.....	220
4.2.3 U.S. EPA’s “Toolkit for Assessing Potential Allegations of Environmental Injustice” .....	236
4.2.4 The Office of Enforcement and Compliance Assurance’s “Environmental Justice Smart Enforcement Assessment Tool” .....	242
4.2.5 U.S. EPA’s “Environmental Justice Geographic Assessment Tool” .....	244
4.2.6 U.S. EPA Administrator Johnson’s Memorandum, “Reaffirming the U.S. Environmental Protection Agency’s Commitment to Environmental Justice,” and the Chief Financial Officer’s Supplemental Guidance .....	245
4.2.7 U.S. EPA Administrator Jackson’s Memorandum, “Our Top Priorities,” and the FY 2011-2015 Strategic Plan Regarding Environmental Justice and Children’s Health .....	249
4.2.8 U.S. EPA Administrator McCarthy’s Memorandum, “EPA’s Themes—Meeting the Challenge Ahead” .....	263
4.2.9 U.S. EPA’s EAB Decisions .....	268
4.3 <i>States</i> .....	276
4.3.1 New Mexico’s Environmental Justice Executive Order.....	276
4.3.2 New Jersey’s Environmental Justice Executive Orders.....	278
4.3.3 Maryland’s Environmental Justice Executive Order .....	281
4.3.4 Michigan’s Environmental Justice Executive Directive .....	283
4.3.5 Oregon’s Environmental Justice Executive Order.....	285
4.4 <i>Sustainable Development</i> .....	286
4.4.1 ABA Resolution on Sustainable Development and Report to the House of Delegates.....	287
4.4.2 U.S. EPA Office of Sustainable Communities.....	294
4.4.3 Bethel New Life, Inc. ....	297
4.4.4 Wilson Study, “How Planning and Zoning Contribute to Inequitable Development, Neighborhood Health, and Environmental Injustice” .....	303
4.4.5 Ransom Article, “Pursuing Health Equity: Zoning Codes and Public Health” .....	304
<b>Chapter 5 — Addressing the Problem: The Judicial Branches .....</b>	<b>309</b>
5.1 <i>Overview</i> .....	309
5.2 <i>The Anti-Discriminatory Law Approach</i> .....	312
5.2.1 Formulation of the Equal Protection Doctrine—Proving Intent.....	312



5.2.2 Utilizing the Equal Protection Doctrine in Environmental Justice Litigation .....	327
5.3 <i>The Title VI Approach</i> .....	367
5.3.1 Siting of Highways .....	368
5.3.2 Urban Renewal .....	374
5.3.3 Challenges to State Agency Decisionmaking .....	385
5.3.4 DOT's Federal Transit Administration Withholds Stimulus Funds Under §602 .....	428
5.3.5 Implied Private Right-of-Action Under §602 .....	436
5.3.6 Implied Private Right-of-Action Under §1983 .....	463
5.3.7 Intentional Discrimination Under §601 .....	467
5.4 <i>The Environmental Law, With a Twist Approach</i> .....	472
5.4.1 Siting .....	473
5.4.2 Scope of Inquiry and Standard of Review.....	500
<b>Chapter 6 — Addressing the Problem: The Private Bar and Corporate America</b> .....	<b>535</b>
6.1 <i>Overview</i> .....	535
6.2 <i>Private Bar</i> .....	535
6.2.1 American Bar Association .....	535
6.2.2 State Bar Associations .....	555
6.3 <i>Corporate America</i> .....	570
6.3.1 Mixed Signals .....	570
6.3.2 Collaborative Problem-Solving: The Experiences of Two Companies.....	586
6.3.3 Lexmark International's Environmental and Social Justice Policy .....	605
<b>Chapter 7 — Human Right to a Clean and Healthy Environment</b> .....	<b>607</b>
7.1 <i>Overview</i> .....	607
7.2 <i>Rights-Based Approach to Enforce the Human Right to a Clean and Healthy Environment</i> .....	608
7.2.1 Rights-Based Approach at the International Level and in the United States .....	608
<b>Index</b> .....	<b>653</b>

# Table of Cases

Administrative Complaint Involving the Oakland Airport Connector Project and the Bay Area Rapid Transit District.....	428
Administrative Complaint Involving Shintech Inc. and the Louisiana Department of Environmental Quality .....	387
Alexander v. Sandoval .....	458
Ball et al. v. Union Carbide Corp. ....	364
Bean v. Southwestern Waste Management Corp. ....	328
Board of Commissioners v. Great Lakes Transfer, LLC .....	518
Communities Against Runway Expansion, Inc. v. Federal Aviation Administration .....	523
Darensburg 192 v. Metropolitan Transportation Commission .....	331
Eagle Environmental II, L.P. v. Commonwealth of Pennsylvania .....	506
East-Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Commission .....	336
El Pueblo Para el Aire y Agua Limpio v. County of Kings (Plaintiff's Brief) .....	473
El Pueblo Para el Aire y Agua Limpio v. County of Kings (Opinion).....	478
Elizondo et al. v. Royal Metal Finishing, Inc. ....	353
Hartford Park Tenants Ass'n v. Rhode Island Dep't of Environmental Management .....	482
Hartford Park Tenants Ass'n v. Rhode Island Dep't of Environmental Management (Settlement Agreement).....	488
Hinds County v. Mississippi Commission on Environmental Quality .....	515
Houston et al. v. City of Cocoa et al. (Complaint) .....	374
Houston et al. v. City of Cocoa et al. (Consent Decree) .....	381
Houston et al. v. City of Cocoa et al. (Order) .....	383
In re American Marine Rail, Ltd. Liability Co.....	501
In re Chemical Waste Management of Indiana, Inc. ....	269
In re Envotech, Ltd. Partnership .....	270
In re Knauf Fiber Glass, GmbH.....	274
In re South Bronx Unite! et al. v. New York City Industrial Development Agency et al. ....	93
In the Matter of Amendment to the Madison County Solid Waste Management Plan (Re Addition of North County Line Municipal Solid Waste Landfill).....	511
In the Matter of the Application of Rhino Environmental Services (Colonias Development Council v. Rhino Env'tl. Servs., Inc.) .....	490
In the Matter of Louisiana Energy Services L.P. (ASLB 1997) .....	123
In the Matter of Louisiana Energy Services, L.P. (NRC 1998) .....	125
Johnson et al. v. Orleans Parish School Board et al. ....	73
Latin Americans for Social and Economic Development v. Federal Highway Administration.....	370
Miller et al. v. City of Dallas.....	344
Mossville Environmental Action Now v. United States, Inter-Am. C.H.R. (petition) .....	622
Mossville Environmental Action Now v. United States, Inter-Am. C.H.R. (response) .....	628
Mossville Environmental Action Now v. United States, Inter-Am. C.H.R. (ruling).....	631
Neighbors for a Toxic Free Community et al. v. Vulcan Materials Co.....	133
Nonnon et al. v. City of New York (Complaint).....	69
Padres Hacia Una Vida Mejor et al. v U.S. Environmental Protection Agency et al. ....	412
Phillips v. The City of New York (Stipulation of Settlement) .....	72
Robinson Township, Washington County, PA et al. v. Commonwealth of Pennsylvania et al. ....	638
Rosemere Neighborhood Association v. U.S. Environmental Protection Agency (9th Cir.).....	402
Rosemere Neighborhood Association v. U.S. Environmental Protection Agency (W.D. Wash.) .....	406

Rosemere Neighborhood Association v. U.S. Environmental Protection Agency (Settlement Agreement) .....	407
R.I.S.E., Inc. v. Kay et al. ....	340
Senville v. Peters .....	525
South Camden Citizens in Action v. NJDEP (D.N.J. 2001) .....	441
South Camden Citizens in Action v. NJDEP (3d Cir. 2001) .....	464
South Camden Citizens in Action v. NJDEP (D.N.J. 2006).....	468
Souther v. The Commonwealth.....	313
Taliaferro et al. v. Darby Township Zoning Board et al. ....	95
United States of America and State of Louisiana v. City of Baton Rouge and Parish of East Baton Rouge (Complaint in Intervention) .....	526
United States of America and State of Louisiana v. City of Baton Rouge and Parish of East Baton Rouge (Memorandum in Support of Motion to Intervene) .....	530
United States of America and State of Louisiana v. City of Baton Rouge and Parish of East Baton Rouge (Ruling on Motion to Intervene) .....	531
Village of Arlington Heights v. Metropolitan Housing Development Corp.....	323
Washington Park Lead Committee, Inc. v. U.S. Environmental Protection Agency et al. (Decision).....	355
Washington Park Lead Committee, Inc. v. U.S. Environmental Protection Agency et al. (Consent Decree).....	361
Yick Wo v. Hopkins .....	319

# Introduction

## Environmental Justice: Legal Theory and Practice

### Environmental Justice, Sustainable Development, and the Human Right to a Clean and Healthy Environment

This book focuses on two interrelated but distinct concepts: environmental justice and sustainable development. With respect to environmental justice, this textbook/handbook examines the issue not only from an environmental law perspective, but also from a civil rights law, and a human rights law perspective. It explores how environmental justice concerns are framed and addressed/resolved in the United States through acts of civil disobedience; federal, state, and local government initiatives; litigation and alternative dispute resolution; and/or mediation. The complex dynamic of environmental justice concerns comprises environmental, social, economic, health, and political problems in minority and/or low-income communities. The concept of environmental justice involves a discussion of various substantive areas, including, but not limited to, the following:

- Environmental Law
- Constitutional Law
- Human Rights Law
- Environmental Policy Development and Implementation
- History
- Sociology
- Health Sciences
- Economics
- Political Science
- Public Policy
- Media Relations
- Urban Planning
- Race Relations
- Community Organizing/Empowerment
- Land Use Planning
- Civil Rights Movement
- Environmental Movement
- Climate Change/Global Warming

With respect to sustainable development, this book examines how environmental law is an essential tool for a national, state, or local government to achieve “sustainable communities.”<sup>4</sup> Environmental law provides the foundation for governmental policies and actions for the preservation/protection of the environment and human health, and for ensuring that the use of natural resources is both equitable and sustainable.

This textbook/handbook examines not only the interrelationship between the concepts of environmental justice and sustainable development but also the community sentiment for a human right to a clean and healthy environment. According to Prof. Stephen M. Johnson, the human right to a clean and healthy environment could be an aspect of the U.S. market-based environmental protection regulatory programs which could, in turn, address environmental justice concerns. Professor Johnson has stated that:

[S]everal European countries have created a constitutional right to a clean or healthy environment. The creation of a constitutional right to a clean environment could, theoretically, transform the market for environmental rights as fundamentally as a prohibition on actions that disparately impact communities. More than [50] countries . . . including Austria, Switzerland, the Netherlands, Spain and Portugal have established this type of constitutional “right.” Similarly, several international declarations, including the Stockholm Declaration, the Declaration of the Hague, and the Rio Declaration recognize a “right” to a healthy environment.

4. As stated by EPA:

Sustainable communities are places that provide homes working families can afford; safe, reliable, and economical transportation options; and access to jobs, schools, parks, shopping, and cultural destinations. Not only do all of their residents enjoy the same protection from environmental and health hazards, but they also share in the economic and social benefits that come from development.

U.S. EPA, PARTNERSHIP FOR SUSTAINABLE COMMUNITIES: SUPPORTING ENVIRONMENTAL JUSTICE AND EQUITABLE DEVELOPMENT 1 (EPA-231-F-10-002) (Dec. 2010).

While the United States has acted more aggressively than many European countries in creating access to justice and strengthening public participation, information access, technical assistance, and environmental assessment requirements, it has not taken the bold step of constitutionally recognizing the importance of environmental protection.

While critics argue that many of the provisions are merely aspirational and unenforceable, the “endowment effect” created by government recognition of the right to a minimal level of environmental quality could play an important role in the marketplace for environmental rights. Thus, a constitutional environmental right could be a valuable tool in the battle for environmental justice in Europe, and the United States could import the concept. It is important to frame the “right” narrowly, to ensure its enforcement. Instead of a “right to a clean or healthy environment,” it may be useful to establish a right to be free from government action that affects the environment in a way that harms human health. If the United States were to adopt that approach, it would empower low-income and minority communities in the United States in at least two ways. First, if plaintiffs challenged government actions as a violation of equal protection or due process guarantees, the courts may subject government action to a higher level of scrutiny due to the constitutional recognition of a fundamental right to a certain level of environmental protection. More importantly, litigants would have a separate cause of action, in addition to equal protection, due process, and other existing causes of action, to pursue if the government were to take some action that threatened to harm their health by harming the environment.”<sup>5</sup>

Currently, states with constitutional provisions for a right to a clean and healthy environment include Hawaii, Massachusetts, Montana, New York, Pennsylvania, and Rhode Island.<sup>6</sup> However, without waiting for this narrowly framed “right to be free from government action that affects the environment in a way that harms human health” or a “right to a clean and healthy environment” to be inserted into the U.S. Constitution and, subsequently, to be enforced by federal courts, residents of Mossville, Louisiana, filed a petition at the Inter-American Commission on Human Rights in March 2005 concerning the U.S. government’s failure to protect their human rights. The Mossville residents alleged that their human rights to life, health, equality and freedom from racial discrimination, and privacy as it related to the inviolability of the home have been violated by the U.S. government.<sup>7</sup> The Mossville residents argued that the toxic contaminants spewed by 14 industrial facilities in and around the small unincorporated community of 375 households have been polluting the air, water and land for years. As remedies, the residents sought the provision of medical services, relocation, a moratorium on issuing permits, and a reform of the existing environmental regulatory system. On March 29, 2010, the Inter-American Commission on Human Rights, which is headquartered in Washington, D.C., declared that the environmental racism case against the U.S. government was admissible.<sup>8</sup> This case, which is discussed more fully in Chapter 7, “Human Right to a Clean and Healthy Environment,” is an excellent example of how the concepts of environmental justice and sustainable development, as well as the human right to a clean and healthy environment are inexorably intertwined.

## Interrelationship Between Environmental Justice and Sustainable Development

Environmental justice, as a public policy issue in the United States, addresses the human health concerns and the environment of all communities, regardless of the race and/or the economic status of the residents. The U.S. Environmental Protection Agency (EPA) defines the term as follows:

5. Stephen M. Johnson, *Economics v. Equity II: The European Experience*, 58 WASH. & LEE L. REV. 417, 469-71 (2001). See also Robin Kundis Craig, *Should There Be a Constitutional Right to a Clean/Healthy Environment?*, 34 ELR 11013 (Dec. 2004); Robert V. Percival, “Greening” the Constitution—Harmonizing Environmental and Constitutional Values, 32 ENVTL. L. 809 (2002); J.B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don’t Measure Up*, 74 NOTRE DAME L. REV. 245 (1999).
6. HAW. CONST. art. XI, §9; ILL. CONST. art. XI, §§1, 2; MASS. CONST. amend. art. XLIX; MONT. CONST. art. II, §3; N.Y. CONST. art. XIV, §§4 & 5; PA. CONST. art. I, §27; and R.I. CONST. art. I, §17. See also April S. Karin, *A Right to a Clean and Healthy Environment: A Proposed Amendment to Oregon’s Constitution*, 14 U. BALT. J. ENVTL. L. 37 (2006).
7. Second Amended Petition of Mossville Environmental Action Now and Mossville Residents at 8. Mossville Environmental Action Now Against the United States, No. P-242-05 (Inter-Am. C.H.R., 2008), available at [http://www.ehumanrights.org/docs/Mossville\\_Amended\\_Petition\\_and\\_Observations\\_on\\_US\\_2008.pdf](http://www.ehumanrights.org/docs/Mossville_Amended_Petition_and_Observations_on_US_2008.pdf).
8. See Mossville Environmental Action Now Against the United States, No. 12.755, Inter-Am, C.H.R. Report No. 43/10 (2010), available at [http://www.ehumanrights.org/docs/IACHR\\_Ruling-Mossville\\_petition\\_admissible.pdf](http://www.ehumanrights.org/docs/IACHR_Ruling-Mossville_petition_admissible.pdf).

*Environmental Justice* is the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. *Fair Treatment* means that no group of people, including racial, ethnic, or socioeconomic groups, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state and local, and tribal environmental programs and policies. *Meaningful Involvement* means that: (1) potentially affected community residents have an appropriate opportunity to participate in decisions about a proposed activity that will affect their environment and/or health; (2) the public's contribution can influence the regulatory agency's decision; (3) the concerns of all participants involved will be considered in the decision-making process; and (4) the decision-makers seek out and facilitate the involvement of those potentially affected.<sup>9</sup>

A special concern of the EPA is the adverse impact on the health of community residents who have been environmentally overburdened and who are, consequently, exposed disproportionately to environmental harms and risks in comparison to other communities. Environmental justice advocates argue that because of the continuing effects of historical overt racism and acts of discrimination in this country, and passive, race-neutral permitting and regulatory actions, these communities tend to be minority and/or low-income, whether urban or rural.

Many community activists, civil rights lawyers, poverty lawyers, and noted scholars believe that racism influences environmental decisionmaking as it does so many other aspects of American life—housing, transportation, economic development, education, access to quality health care, etc.—based upon uncontested facts in U.S. history. They argue that public policies have reinforced, and, in some cases caused, racially and economically segregated neighborhoods in American cities and suburbs. The quest for social equity—and, by extension, the struggle for racial justice—is integral to the concept of environmental justice. They believe that environmental racism is a poison, and that environmental justice is the antidote to that poison.

Closely related to the issue of environmental justice is the issue of sustainable development. The 40-year history of the development of the concept of sustainable development is as follows:

- United Nation's Conference on the Human Environment (1972) (Stockholm, Sweden)—examined, for the first time, the effect of human activity on the environment, and the tension between economic development and environmental protection.
- Brundtland Commission Report—Our Common Future: The World Commission on Environment and Development (1987)—introduced the widely accepted definition of “sustainable development,” which is: “Development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”<sup>10</sup> Sustainable development, thus, basically means: (1) that today's progress must not come at tomorrow's expense; and (2) that human progress must be sustained not just in a few places for a limited number of years, but for the entire planet into the distant future.
- Earth Summit (1992) (Rio de Janeiro, Brazil)—The Rio Declaration on Environment and Development (Agenda 21)—introduced a plan for achieving sustainable development in the 21st century and was intended to foster international cooperation to promote sustainability and environmentally sound development. Chapter 2 of the Rio Declaration specifically stated that:

The international economy should provide a supportive international climate for achieving environment and development goals by:

- (a) Promoting sustainable development through trade liberalization;
- (b) Making trade and environment mutually supportive;

9. U.S. EPA, TOOLKIT ASSESSING POTENTIAL ALLEGATIONS OF ENVIRONMENTAL INJUSTICE (2004) (EPA 300-R-04-002) (emphasis added).

10. The Secretary General, Report of the World Commission on Environment and Development: Our Common Future, delivered to the General Assembly, U.N. Doc. A/42/427 (Mar. 20, 1987), available at <http://www.un-documents.net/ocf-02.htm#IV>.

- (c) Providing adequate financial resources to developing countries and dealing with international debt; [and]
  - (d) Encouraging macroeconomic policies conducive to environment and development.<sup>11</sup>
- World Summit on Sustainable Development (2002) (Johannesburg, South Africa)—The Johannesburg Declaration on Sustainable Development—introduced a plan (Plan of Implementation of the World Summit on Sustainable Development (POI)) that was intended to foster international cooperation to promote, among other things, good environmental governance in order to implement the vision of sustainable development. Paragraphs 138 and 163 of the POI specifically stated:

Good [environmental] governance is essential for sustainable development. . . . Each country has the primary responsibility for its own sustainable development, and the role of national policies and development strategies cannot be overemphasized. All countries should promote sustainable development at the national level by, inter alia, enacting and enforcing clear and effective laws that support sustainable development. All countries should strengthen governmental institutions, including by providing necessary infrastructures and by promoting transparency, accountability and fair administrative and judicial institutions.<sup>12</sup>

The World Summit was a meeting intended to review progress on achieving sustainable development throughout the world.

- U.N. Conference on Sustainable Development (Rio + 20 Conference) (2012) (Rio de Janeiro, Brazil)—The objective of the conference, according to the U.N. Conference Secretariat, was “to secure renewed political commitment for sustainable development, assess the progress to date and the remaining gaps in the implementation of the outcomes of the major summits on sustainable development, and address new and emerging challenges.”

The two main themes for Rio+20 were set by the U.N. General Assembly in 2009 as: (a) a green economy in the context of sustainable development and poverty eradication; and (b) the institutional framework for sustainable development. The official conference outcome, entitled “The Future We Want,” includes a broad recognition of the importance of a green economy as a tool for sustainable development, new arrangements for the institutional framework for sustainable development, and highlights several key issues including oceans, cities, and energy. Among other things, the 53-page report acknowledges the fundamental role played by the private sector and civil society in achieving sustainable development, and underscores the importance of public participation, access to information, and judicial and administrative proceedings.<sup>13</sup>

Community-based environmental justice organizations have recognized for years the link between the struggles for environmental justice and sustainable communities in the United States and the struggles for sustainable development internationally. According to the Executive Director of the West Harlem Environmental Action, Inc. (WE ACT), New York’s first environmental justice community-based organization:

For more than a decade, the [environmental justice] movement has understood the impacts of globalization on residents in this country and abroad and has sought to interact with other activists internationally by sending delegations to the United Nations conventions including the 1992 Earth Summit in Rio; the Conference on Racism in Durban, South Africa, in 2001; and the World Summit on Sustainable Development in Johannesburg in 2002.<sup>14</sup>

11. Rio Declaration on Environment and Development, Agenda 21, Chap. 2, available at <http://habitat.igc.org/agenda21/a21-02.htm>.

12. Johannesburg Declaration on Sustainable Development, Plan of Implementation of the World Summit on Sustainable Development, Aug. 26-Sept. 4, 2002, available at <http://www.un-documents.net/jburgpln.htm>.

13. U.N. Conference on Sustainable Development (Rio + 20 Earth Summit) in Rio de Janeiro, Brazil. *The Future We Want*, available at <http://www.UNCSD2012.org/content/documents/727The%20Future%20We%20Want%2019%20June%2013pm.pdf>.

14. Peggy M. Shepard & Kizzy Charles-Guzman, *The Roots of Environmental Justice*, in *BREAKTHROUGH COMMUNITIES: SUSTAINABILITY AND JUSTICE IN THE NEXT METROPOLIS* 43 (M. Paloma Pavel ed., MIT Press 2009).

WE ACT and other U.S. community-based environmental justice organizations and their international counterparts have recognized the similarities between the three pillars of environmental justice and sustainable development: economic growth; environmental protection; and social equity.

Other U.S.-based environmental organizations have recognized the theoretical and practical similarities between the two concepts. In an October 2002 article entitled, *One Species, One Planet: Environmental Justice and Sustainable Development*, the Center for International Environmental Law (CIEL) concluded that environmental justice and sustainable development are virtually synonymous. CIEL stated:

The concepts of sustainable development and environmental justice share many critical and defining characteristics. Each requires taking into account and integrating policies relating to social justice, environmental protection, and economic development. Furthermore, each involves focusing on real life conditions now facing individuals and local communities, while also addressing the impacts that different policy options may have in the future—to ensure, on one hand, that development is sustainable and, on the other, that policy choices not only achieve equitable results in the short term, but also do not cause or perpetuate injustice in the longer term. Similarly, achieving sustainable development requires transparent decision-making processes and meaningful opportunities for public participation, as does environmental justice.<sup>15</sup>

Furthermore, in the introduction to the book entitled, *Breakthrough Communities: Sustainability and Justice in the Next American Metropolis*, the editor, M. Paloma Pavel, stated that:

Sustainable communities have also been defined by the “three e’s”: economically prosperous, environmentally sound, and socially equitable. . . . Social equity is still too often undervalued and left out of the equation of sustainability. The accepted definition provides a powerful global context for addressing issues of concentrated poverty in the United States. However, environmental organizations in industrialized countries have often misinterpreted the concept of sustainability, ignoring social equity. . . . The Brundtland Report, aptly titled “Our Common Future,” explicitly refers to goals of reducing poverty and inequality as central to sustainable development.

To highlight the importance of the equity dimension, social scientist Julian Agyeman coined the term “just sustainability,” which he defines as “the need to ensure a better quality of life for all, now and into the future, in a just and equitable manner, while living within the limits of supporting ecosystems.”

Sustainability, as seen through the lens of social equity, also requires healing the land, caring for its vitality, and—in many regions—transforming toxic legacies of someone else’s making in order to create a viable economic future. The “triple bottom line”—economy, environment, and equity—is not an abstract principle of accounting, nor is it simply a new turn of phrase. Rather, a commitment to the three e’s results in policies aligned with conditions that improve the quality of life for all citizens in the future as well as in the present.<sup>16</sup>

In sum, since the concepts of environment justice and sustainable development are based on a social equity dimension, as well as environmental protection and economic development for all, they are, indeed, synonymous.

However, the concepts of environmental justice and sustainable development have not evolved and progressed at the same pace. Although both concepts were introduced to the general public through seminal reports issued in 1987 (“Toxic Waste and Race in the United States: A National Report on the Racial and Socio-Economic Characteristics of Communities With Hazardous Waste Sites” for environmental justice; and “Our Common Future: The World Commission on Environment and Development” for sustainable development), environmental justice has grown significantly as a public policy issue; whereas, the growth of sustainable development has stalled. For example, permits have not been issued or have been stalled because of environmental justice concerns. No permits, however, have been denied or stalled based upon the concept of sustainable development. There have been, furthermore, environmental justice legislation on the state levels; executive orders on the federal and state levels; and numerous federal, state, and local government initiatives. Conversely, there has been no sustainable development legislation on the federal or state levels, or executive orders issued by governors, or public policy initiatives by state governments.

15. Center for International Environmental Law, *One Species, One Planet: Environmental Justice and Sustainable Development* (Oct. 2002), available at [http://www.ciel.org/Publications/OneSpecies\\_OnePlanet.pdf](http://www.ciel.org/Publications/OneSpecies_OnePlanet.pdf).

16. M. Paloma Pavel, *Introduction*, in *BREAKTHROUGH COMMUNITIES*, *supra* note 14, at xxxi-xxxii.



Moreover, the American Bar Association was the first mainstream organization to recognize the validity of the environmental justice issue in August 1993 when the House of Delegates declared it to be official policy of the Association that needed to be addressed. Whereas, the American Bar Association did not declare sustainable development as official policy of the Association until August 2003, a decade later.

In a spring 1998 law review article, Prof. J.B. Ruhl explored how both environmental justice and sustainable development were evolving towards enforceable hard law in the United States.<sup>17</sup> He argued that both these legal and policy ideas have had to move through the following seven degrees of real-world relevance:

- First Degree: The idea becomes widely expressed through a generally accepted norm statement.
- Second Degree: Advocating the opposite of the norm is no longer a tenable policy position.
- Third Degree: The charge of acting contrary to the norm can no longer be left unaddressed.
- Fourth Degree: Failure affirmatively to portray an action as consistent with the norm is seen as a significant deficiency.
- Fifth Degree: Important governmental authorities establish the norm as an explicit policy goal.
- Sixth Degree: Actions are denied or delayed necessary authorization on the basis of a perceived failure to facilitate the norm.
- Seventh Degree: The norm is fully transformed into law to apply measurable, rationalized, routine standards of environmental evaluation, authorization and performance.<sup>18</sup>

Professor Ruhl concluded that sustainable development and environmental justice were at different stages of development. He concluded that sustainable development was not at the Sixth Degree yet, given that “[a]t the federal level, no new laws have been enacted and no existing laws have been interpreted as mandating what amounts to sustainable development. No federal court has imposed such a standard on any project as a matter of constitutional requirement or raw judicial fiat.”<sup>19</sup> With respect to environmental justice, however, he stated:

Environmental justice has not reached the point at which a body of law to apply has formed that embodies the norm statement. There certainly is no independent body of environmental justice law. For now, government authorities must employ other legal regimes as surrogates in order to take an environmental justice focus. Although that approach does not preclude explicit consideration of environmental justice issues, it provides only an indirect way of forming hard law out of the policy content.<sup>20</sup>

In his view, he concluded that environmental justice had reached the Sixth Degree, but had not reached the Seventh Degree. This textbook/handbook, however, will show that environmental justice has reached the Seventh Degree because a body of hard law has been formed: while, on the other hand, sustainable development appears to continue to be mired in the Fifth Degree since EPA and other federal agencies are the only important governmental authorities that have established sustainable development as an explicit policy goal.

Professor Ruhl’s article is set forth in §3.2.1.1 of Chapter 3, “Addressing the Problem—The Legislative Branches,” of this book.

## Environmental Justice Movement

The modern environmental movement has evolved through three distinct stages,<sup>21</sup> each characterized by its unique goals, achievements, and principal actors.

17. J.B. Ruhl, *The Seven Degrees of Relevance: Why Should Real-World Environmental Attorneys Care Now About Sustainable Development Policy?*, 8 DUKE ENVTL. L. & POL’Y F. 273 (1998).

18. *Id.* at 277-89.

19. *Id.* at 288.

20. *Id.* at 289.

21. Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 634-39.