Legal Barriers to Achieving Environmental Justice: Houston, Texas

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Environmental justice is a relatively new movement, yet has shown much potential for success, even in the face of tremendous setbacks and legal failure. The movement provides a venue in which many disempowered groups may pursue equal treatment, using the legislation created in response to the Civil Rights movement in order to display disparate conditions based on a discriminating factor. However, the movement has experienced a difficult beginning, with many legal cases challenging environmental discrimination either being dismissed before proceedings or having an unfavorable ruling after being argued in court. Although the basis by which one argues cases of environmental discrimination initially seem accommodating; the applicable laws were not designed for the unique approach the movement takes. The laws do not apply in a comprehensive fashion, which creates a loophole that is taken advantage of by defendants. This creates a high failure rate for those cases that may exhibit valid circumstances of discrimination, but are tasked with an unreasonable burden of financial and legal obligations that delay or prevent justice. Additionally, the laws do not always support each other, and while one law might say one thing, defendants are able to cite other provisions of the same law that create strict parameters under which nearly all cases will not fall within. Environmental justice is a movement of utmost importance; since it uses our laws as a vehicle by which we may protect the environment, punish those who don't, and take a step in the direction of increased social-conscientiousness. Two legal cases in Houston, Texas support the theory of embedded legal obstacles that contribute to a delay or prevention of achieving environmental justice. Examination will be performed to determine how both cases were disserved by our legal system, and how the cases could have turned out, based on the merits of their claims.

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Chapter 1: Introduction

One of the basic principles our country has been founded upon was based on discrimination from our ancestors' previous homelands. Although our laws entitle all to equal opportunity, one can see that the system can fail some who need it most. Poor inner-city neighborhoods are comprised of predominantly minority low-income groups. These groups' access to public service or fair representation is not the same as those who are of a different race in a neighborhood of higher income. Today, discrimination in America has become less subjective and more objective. African-Americans are not made to sit on the back of the bus, or use different bathrooms, as occurred in the 1960's. Discrimination, while still based on race, class, socioeconomic status, religion, creed, sexual preference, etc., has manifested itself in our societal practices. It occurs quietly in the form of how environmental hazards and waste are disproportionately allocated in communities comprised of disempowered residents. Statistical data shows that solid waste facilities, bus barns, highways, and other such environmentally-damaging occurrences are disproportionately situated in areas populated by communities of disenfranchised status, based on a shared attribute (Bullard 1994). Since discrimination today exists in this manner, it is not simply enough to argue that it is taking place due to a single attribute of a community such as race. Instead, the common characteristic is that this practice is occurring in communities comprised of disempowered citizens, meaning that a discriminating factor has given them less entitlement and access to the laws all Americans should be guaranteed to. In the United States, laws exist to prevent discrimination, yet that does not necessarily mean that those laws are being designed, applied, and enforced to the best of our ability. While intentions of anti-discrimination laws might have good intentions, a narrow interpretation of the

law is used in application to a broad set of problems. The scope of the outdated laws used for environmental discrimination do not adequately serve those pursuing justice, but rather create many loopholes in which defendants may achieve victory. What are the barriers to pursuing legal justice in cases of environmental discrimination?

Houston, Texas provides an excellent location to study environmental discrimination. The city is unique in many ways, and much of the city's history has been plagued by discrimination on behalf of the city and state government, as well as private entities (Bullard 1994). In particular, the lack of zoning has made environmental discrimination more prevalent (Bullard 1994). Coupled with the large African-American and Hispanic population, the city provides a rich example to study the ways in which disempowered communities are disadvantaged when it comes to environmental justice. The cases of *Bean v. Southwestern Waste Management Corp.*, and *Kennedy Heights v. Chevron* are two environmental discrimination cases that occurred in Houston. Both witnessed failure in the legal system, despite having reasonable claims that support the existence of discrimination. Due to the narrow application of the law, the plaintiffs were not able to reach justice, and in both cases, the power of the defendants created an insurmountable obstacle for the pursuit of environmental justice.

Chapter 2: Environmental justice

Environmental justice is a relatively new field of study. Formed in the latter part of this century, it aims to investigate the disproportionate manner in which disempowered groups exist, as pertaining to housing, air, water, and soil quality (Sandler et al. 2007). Reverend Benjamin F. Chavis, Jr., of the United Church of Christ, conceived the term 'environmental racism' in 1982, in reference to the siting of a toxic waste facility in Warren County, North Carolina (Keenheel 2001). The placement of the facility was in a predominantly African-American area, thus the relation to the word 'racism'. The field originated in an attempt to challenge the societal practice of allocating environmentally-disproportionate conditions in areas inhabited by minorities (Sandler et al. 2007). Originally, the focus was on minority groups, mainly African-Americans and Hispanics. Later on, the focus expanded to include all groups that were disadvantaged in the environment they worked or resided in (Sandler et al. 2007). The field has encountered much criticism since its inception, and has had difficulty in being recognized. The most prevalent argument against the field is known as the 'and then what?' argument, in which the field does not specify what should be done to resolve incidences of environmental discrimination (Bullard 1994). This suggests that the field is comprised of racial hysterics that provide no solution to the problem of environmental discrimination. Additionally, the field has been said to be too similar to the parent field of environmentalism, to the extent that the validity of this field of study is not always observed (Bullard 2001).

The field of environmental justice has undergone restructuring in order to validate its message, and move beyond the criticism it has faced in order to promote awareness of the issue and work for justice for the disenfranchised (Bullard 1994). In order for the movement to reach full potential, steps must be taken to ensure that the field's terminology is not limiting the effect

of the efforts in the field. There exists an array of terms that are associated with the field of environmental justice. The field itself has been referred to by several different names: environmental justice is the most common; however it is also called environmental equity and environmental discrimination (Sandler et al 2007). The aim of the field is not accurately described by some of the terms used. The goal of the environmental justice movement is to promote an awareness of the environment, and also where, how, and to who do we subject the harmful environmental processes (Bullard 1987). Environmental racism implies intent based solely upon race, as the name indicates. Although race certainly plays a factor in cases of environmental justice, using this term limits the implied scope of the larger field. In the very least, racism is a sub-category within environmental justice. By simply referring to an entire field in such terms, it would effectively limit justice to those who are discriminated on the basis of other attributes. Environmental justice picks up where environmentalism left off, and takes it further. Arguably, the field is able to commit more to enforcing, and could be said to have more 'teeth' than its parent predecessor, environmentalism. Environmental justice takes an environmentally-discriminating situation, attempts to correct it and achieve justice.

Although thought of as a movement to protect *humans* from disparate environmental conditions, it would be hypocritical to say that such things cannot be done to humans, and should instead be moved to an alternate location, where our animal counterparts would be subjected to environmental harm (Bullard 1987). The animal kingdom cannot write to their congressman about such issues. Ideally, environmental justice embodies everything the environmental movement is all about (Bullard 1994). People cannot choose to be an 'environmentalist' or not: we all seek the same elementary necessities. Clean air, water, land and food are among the few qualities all humans are entitled to (Bullard 1994). The same qualities are also entitled to all

living organisms we share this planet with. The aim of the field then, is perhaps to redefine the environmental movement, while also giving mention and creating awareness to how disparate environmental conditions exist, who is being affected, and how (Sandler et al. 2007).

Legal World of Environmental Justice

The foundations of the environmental justice movement rose from the remains of the civil rights era, during which time leaders such as Martin Luther King, Jr. fought for equality, mainly on behalf of African-Americans in the face of intense discrimination. Using this approach employs much of the same legislation and tactics used during the civil rights movement for a different purpose. This becomes problematic in several regards. Most importantly, following the current laws and statutes require one to prove some sort of intent when attempting to pursue legal action in an environmental discrimination case (Foster 1998). It is not sufficient to display to the legal system that disempowered communities are receiving the burden of environmental hazards in a disproportionate fashion (Godsil 1991). Instead, one must be able to prove that the intents of the entities involved specifically carried out those actions due to any number of attributes of a community.

Additionally, the law does not take into account a practical perspective of the resources available to those attempting to challenge a situation of environmental discrimination. Due to the intricacy of the laws and the lack of modern practical application to the environmental justice movement, the disenfranchised party can expect a lengthy court battle. This is costly and ineffective, in addition to being a detracting aspect when considering whether or not to pursue environmental justice. The law does not take into account the ability of the defendants to delay the case in an attempt to exhaust the plaintiffs of financial and legal resources.

1964 Civil Rights Act, Title VI

Title VI of the 1964 Civil Rights Act provides the first route in which instances of environmental discrimination can be challenged. In brief, Title VI states:

> "Title VI of the Civil Rights Act of 1964 provides a statutory basis for the nondiscrimination protections of the Constitution, and is the primary mechanism of seeking relief from discriminatory activity in federally funded programs and activities. It provides administrative relief, usually in the form of a federal agency revoking, amending, or suspending a permit issued by its state or local funding recipient, or withholding federal funds from the state and local permitting authorities if their programs are determined to violate Title VI." (Exec. Order No. 12,898. 2003).

The scope of the definition of 'discrimination' under Section 601 states that: "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

Agencies responsible for distributing federal funds are mandated under Section 602 to implement the provisions of section 601 in their programs and that methods and processes for dealing with complaints of discrimination. In order to establish a solid case of discrimination under the realm of environmental permitting, plaintiffs must prove that the decision was made with discriminatory intent, as per section 601. Section 602 however, contends that proof of a violation can be done by adequately showing an instance of unintentional discrimination (Exec. Order No. 12,898. 2003).

42 U.S.C. § 1983

When one's rights have been violated or deprived, Section 1983 Title 42 of the United States Code (U.S.C.) outlines the provisions by which one can challenge the situation. In brief, Section 1983 states:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable (Exec. Order No. 12,898. 2003).

Section 1983 provides a basis by which many cases of environmental discrimination can be challenged, and those being discriminated against may assert their rights as has been provided under this law (Exec. Order No. 12,898. 2003).

Chapter 3: Kennedy Heights v. Chevron

Background

Kennedy Heights is a predominantly African-American, low-income neighborhood in South Houston. During the mid 1990's, a class-action lawsuit was filed against Chevron U.S.A., by some 2,000 collective plaintiff residents of Kennedy Heights. Chevron was allegedly responsible for not cleaning up the site upon which the Kennedy Heights neighborhood was built upon, which was a former oil storage facility (Nixon 2008). The original owner of the site was Gulf Oil Corporation, but was eventually bought out by Chevron in a merger (Macey 2009). Evidence shows that much thought was given throughout the ownership of the land as to what should be done with it when it reached the end of its use to the company. The site held several crude oil storage tanks during its use to Gulf Oil (Nixon 2008). Normally, the site would require some fashion of remediation before it could be sold to the next owner; namely excavating contaminants and pumping out sludge and leftover matter from the previous industrial activity (Macey 2009). The lawsuit alleges that insufficient measures were taken in preparation before selling the facility, and that the company's carelessness caused a large amount of residents to be exposed to dangerous chemicals and compounds, resulting in abnormal incidence rates of disease in the neighborhood (Macey 2007). The case worked its way through the court system for almost a decade before a settlement was finally agreed upon (Response to Petition for Review 2006).

History

The area upon which the Kennedy Heights neighborhood was built upon was at one time called the Mykawa Tank Farm. Built in the 1920's, the facility consisted of three underground storage tanks, connected by a pipeline to the Pierce Junction Oil storage facility. Each tank had a capacity of 300,000 gallons of crude oil. In 1927, a hurricane damaged the tops of the storage wells, which led to the decision of the owner –Gulf Oil Company- to cease use of the tanks. The facility was unused until the 1960's, when Gulf Oil decided to have the land appraised, to prepare to sell the land (Nixon 2008). During the appraisal, it was mentioned that the land would be an excellent "site for a Negro residential and commercial development.". After the appraisal, it was determined that the value of the land was worth less than it would cost for a full cleanup of the facility, given the heavy industrial activity that had occurred on the land. The property was sold in 1968 to Log Development Company, which expressed an interest in developing it as a housing complex for low-income African-American Houstonians (Macey 2009). It was originally assumed by Gulf Oil that Log Development's intentions were to use the property as housing for Caucasians, in which case it was suggested by the company that the large storage tanks be removed from the premises and the area fully cleaned up (Macey 2007). However, after Gulf Oil learned it was to be developed for Houston's African-American clientele, it was decided to not be of importance, and nothing was done in order to ensure full safety of the facility. The oil pits were simply filled in, instead of the full remediation measures of completely excavating all contaminated soil (Macey 2009).

The housing complex was eventually built and named Kennedy Heights. The development was marketed to a low- income group of African-American residents. The development sold well, since to the eyes of those who purchased a house on the land; it was their

first opportunity to own a house, and part of 'living the dream'. However, not long after all houses were occupied, the residents noticed that there were some problems with the area. Many of the sidewalks started to dip and buckle, and foundations on which some of the houses rested upon began to sink. Foul smells and a terrible taste to the water were noticed. The residents had to deal with their water mains –which ran underneath the houses- breaking very frequently. Others report of domestic pets dying suddenly, and almost all reported getting illnesses and diseases that were not even in their family history. High rates of sickness were being reported by the residents, who were affected by cancer, and lupus, of which they had never suffered from before they moved into the Kennedy Heights housing complex (Macey 2009).

The concerned residents began to voice their complaints, which resulted in several agencies -both public and private- to investigate the manner. By then, Chevron U.S.A. had purchased Gulf Oil Company, and represented the previous owner (Macey 2007). Chevron was one of the entities that looked into the matter, and from the very start, tried to minimize its involvement with the project, setting caps on how much it would spend during the ordeal. The Texas Railroad Commission also investigated the matter, and agreed to split the cost with Chevron, but with the understanding that the sum of procedures would not exceed $2,500 (Macey 2009). Evidence shows a close working relationship between the Texas Railroad Commission and Chevron.

Unbeknownst to the residents of Kennedy Heights, the City of Houston was also looking into the matter from a parallel perspective. Despite twenty years of urging from local residents to replace the water mains in the area, the City of Houston Capital Projects Department did not carry out the order until 1991. That year; the city hired Pas-Key Construction under contract to repair the water main that led to the Kennedy Heights neighborhood from a work site located on

Murr Way. While excavating the main, one of the workers collapsed. The contracting company immediately ceased all operations and, upon noticing a creosote-like odor in the air, advised the City of Houston's Department of Health that they had encountered a possible petroleum contamination. The City of Houston did not advise the residents of Kennedy Heights of this situation, despite the imminent proximity of the work site to their neighborhood. Public utilities personnel were dispatched to the area and found the presence of 1,1,1 trichloroethene, a volatile organic compound. The City of Houston then hired a private contractor to investigate the contamination. The contractor: Lockwood, Andrews and Newnam (LAN), concluded that there was a petroleum contamination. Recommendation was made that construction should continue, so that new pipes could be put in and higher pressures run through them, in order to avoid contamination (Macey 2009).

Legal Action

In 1995, Houston attorney John O'Quinn was consulted to help in seeking legal action regarding the situation (Nixon 2008). O'Quinn filed suit against Chevron on behalf of the Kennedy Heights residents affected by the contamination. The case wound its way through the legal system for nearly a decade before the case finally saw its end (Response to Petition for Review 2006). Due to the extensive legal process, Mr. O'Quinn moved to resolve the issue via arbitration towards the end of his contract with the plaintiff body. This was due to the plaintiff body's unwillingness to accept Chevron's monetary settlement amount, which was regarded as insufficient. Without any way of being able to resolve the case, an arbitrator was selected, and a settlement was reached (Nixon 2008). The defendant and Mr. O'Quinn both agreed on the amount. The plaintiff body of Kennedy Heights residents alleged they were not a part of the process and did not agree to the arbitration conditions. The plaintiff body fired Mr. O'Quinn, and

filed a simultaneous lawsuit against him, in order to challenge his misrepresentation of them. When Mr. O'Quinn was originally hired as legal counsel, his contract stated that he reserved the right to settle the matter through arbitration, in which case he did (Response to Petition for Review 2006).

Chapter 4: Bean v. Southwestern Waste Management Corp.

Background

Despite its failure in the legal system, the class-action case known as *Bean v. Southwestern Waste Management Corp.* is frequently referenced in the environmental justice community as a landmark case (EJRC Achievements and Milestones 2010). The case was unprecedented in the aspect that it was the first case to use civil rights law to challenge the decision made by a government agency as it applied to environmental discrimination (EJRC Achievements and Milestones. 2010).

History

The case originates in Houston, Texas, in the vicinity of East Houston-Dyersdale Road, Harris County, in the subdivision of Northwood Manor (Godsil 1991). The area affected was a middle-income neighborhood populated predominantly by African-American Houstonians (Godsil 1991). The majority of residents owned their own houses, and most were single family dwellings. The area was home to Smiley High School, also predominantly African-American. In 1978, the Texas Department of Health (TDH) granted a permit to Brown-Ferris Industries (BFI) and Southwestern Waste Management to operate a Type I. solid waste facility (Keenheel 2001). The proposed location of the facility was highly inconvenient and insensitive to the community. The site would be in the middle of a neighborhood, and in the immediate vicinity of the high school. Furthermore, the high school –which did not have air conditioning- relied on open windows to cool the building (Godsil 1991). Many members of the community took civic action to address the matter, forming the Northeast Community Action Group (NECAG) (Keenheel 2001). Despite the public response, the permit was granted, and the company moved to set up operations.

Unlike Kennedy Heights, the issue does not lie with actions taken against the individuals of the neighborhood. Instead, the issue lay in the matter of solid waste facility siting in Houston at the time. A non-statistical report was available during the time of the case's inception which showed that almost all of the solid waste facilities in Houston at the time were located in African-American neighborhoods. The only exception was one waste facility, which was located in a Hispanic area of Houston. The population of Houston at the time consisted of 28% African-American (Keenheel 2001). This was shown in contrast to the fact that there were no facilities operated in Caucasian neighborhoods. The data brought forth was to signify disparate conditions, sharing a common factor of race.

Legal Action

On October 26, 1979, Linda McKeever Bullard initiated the class-action case of *Margaret Bean, et al. Plaintiffs, v. Southwestern Waste Management Corp., et al. Defendants* in the United States District Court for the Southern District of Texas, Houston Division in the form of a Motion for Preliminary Injunction and Temporary Restraining Order as well as a formal complaint against Browning-Ferris Industries, Southwestern Waste Management, and the Texas Department of Health (Margaret Bean, Et Al. Plaintiffs, v. Southwestern Waste Management Corp., Et Al., Defendants. Civ. A. No. H-79-2215. 1979). This legal action was taken on behalf of the several hundred families who live in the neighborhood, by Linda McKeever Bullard, the plaintiff's legal counsel. Several things would be accomplished with the filings: first it would halt the order issued by the Texas Department of Health, rendering the process of implementing the solid waste facility null. Secondly, the injunction would give the opportunity to challenge the decision in order to reverse the licensure. If the ruling were in favor of the plaintiffs, the court

would be able to issue an order to reverse the decision of TDH, and could effectively prevent Southwestern Waste Management from setting up operations in the neighborhood.

When pertaining to creating solid waste facilities, the decision of licensure falls upon the Texas Department of Health (Keenheel 2001). Under that authority, TDH exercises the choice of where to locate solid waste facilities. In 1979, the Texas Department of Health had several guidelines for selection of areas to be used for a solid waste facility (Bullard 1994). The Resource Conservation and Recovery Act (RCRA) was a federally-issued body of statutes governing all decisions and processes related to the disposal and transport of solid waste, which governed such practices at the time (Resource Conservation and Recovery Act. 2010). Despite the existence of the act, the Texas Department of Health had not sufficiently or completely followed the best course of action when selecting solid waste facilities. Although much of the procedural aspects of setting up a solid waste facility were followed (as per RCRA), the choice of location was not always the best. This is apparent given the data regarding the intersection of ethnicity and solid waste facilities in Houston at the time.

The defendants in the case immediately moved for the court to refrain from addressing the case, due to three factors. First, the plaintiffs did not partake in any of the remedial legal provisions under state law to accomplish the same result (Margaret Bean, Et Al. Plaintiffs, v. Southwestern Waste Management Corp., Et Al., Defendants. Civ. A. No. H-79-2215. 1979). Being that the desired outcome would be to prevent the solid waste landfill from being established in the Northwood Manor subdivision, other venues could have been chosen instead of filing an order of preliminary injunction. The method being suggested by the defendants is a petition of the Texas Department of Health for revocation of a permit, provided under the Solid Waste Disposal Act (Resource Conservation and Recovery Act. 2010). The court found that such

a measure does not apply to the matter, and could not have been used (Margaret Bean, Et Al. Plaintiffs, v. Southwestern Waste Management Corp., Et Al., Defendants. Civ. A. No. H-79-2215. 1979). The process, under the Solid Waste Disposal Act states that a permit may be revoked for "reasons pertaining to public health, air or water pollution, land use, or violation of this Act or of any other applicable laws or regulations controlling the disposal of solid waste." (*Tex.Rev.Civ. Stat.Ann.,* art. 4477-7, § 4(e)(8)). The situation brought forth by the plaintiffs concerns an alleged violation of 42 U.S.C., and does not fall under any of the categories outlined by the Solid Waste Disposal Act. This indicates that pursuing this option would have been fruitless.

Second, the defendants argue that dismissal of the case should be granted on the basis of the equitable doctrine of laches (Margaret Bean, Et Al. Plaintiffs, v. Southwestern Waste Management Corp., Et Al., Defendants. Civ. A. No. H-79-2215. 1979). Also known as the doctrine of stale demand which is the circumstance of delaying assertion of rights, oftentimes used to create prejudice for an opposing party (Ballentine's Law Dictionary 2010). The defendants claimed that this situation was created by the plaintiffs, in hopes of creating a more adverse situation for their case, which would adversely affect the defendants' chances in the case. The court found that this was not applicable to the case (Memorandum Opinion and Order 1979). This was determined after review of three independent criteria to determine the existence of laches. First, "the defendant must be able to show a delay in asserting a right or claim", second, there was no excuse for the delay, and third, that "there was undue prejudice to the party against whom the claim is asserted." (*Save Our Wetlands v. U. S. Army Corps of Engineers,* 549 F.2d 1021, 1026 (5th Cir.), *cert. denied,* 434 U.S. 836, 98 S.Ct. 126, 54 L.Ed.2d 98 (1977)).

Third, the defendants maintain that the case should not be reviewed due to an alleged un-involvement of the state (Margaret Bean, Et Al. Plaintiffs, v. Southwestern Waste Management Corp., Et Al., Defendants. Civ. A. No. H-79-2215. 1979). The defendants are questioning the level of involvement in the two private entities, Browning-Ferris Industries and Southwestern Waste Management, and whether the actions being contested by the plaintiffs are mostly state action, or are on behalf of the two companies. The court denied this request, stating that the plaintiffs are contesting the issuance of a permit by the Texas Department of Health (Margaret Bean, Et Al. Plaintiffs, v. Southwestern Waste Management Corp., Et Al., Defendants. Civ. A. No. H-79-2215. 1979). This is clearly action from the state. The question was raised as to how involved the operations of the Browning-Ferris Industries and Southwestern Waste Management were with the state. If it is revealed that the operations were not so related, it could warrant dismissal against BFI and SWW. This situation did not present itself clearly enough at the time of this deliberation to warrant making such a decision (Memorandum Opinion and Order 1979). The land for the solid waste facility was selected by Southwestern Waste Management, and was subsequently ratified by the Texas Department of Health. The issue at hand is which entity should be blamed for the decision to locate a solid waste facility in the Northwood Manor subdivision. The plaintiffs maintain that reasonable proof exists that the majority of solid waste facilities in Houston were disproportionately located in African-American neighborhoods. Therefore, are Southwestern Waste Management and Browning-Ferris Industries responsible for creating such a disparate condition, or is the Texas Department of Health to blame for actually licensing the solid waste facility?

A matter that was addressed before proceedings began was the absence of the Texas Department of Water Resources in the case, as pertaining to filing charges against this agency as

well. The Texas Department of Water Resources is an agency that must sign off on a request for licensure before the request can be granted. Under the law, a state agency cannot put a stamp of approval on any act or policy that is discriminatory, even if the agency was not responsible for initiating the act, policy or practice (Memorandum Opinion and Order 1979). The plaintiffs submitted large quantities of data about solid waste facilities in Houston that were operating under the sponsorship of the Texas Department of Water Resources. The matter at hand is whether the data being presented is relevant to the case. Since the data is being used to prove discriminatory practices in the selection process of solid waste facilities in Houston, and those statistics were known by the TDWR, it should be considered as to how much involvement this agency has in the matter (Memorandum Opinion and Order 1979).

The case was able to proceed after the defendants' three abstention matters were turned down. The plaintiffs' legal counsel brought to light the guidelines that govern the licensure process and solid waste facility situation in the Solid Waste Disposal Act. Using this showed that when deciding on the location for a solid waste facility, the responsible agency must take into account the various factors that the facility would impact, including local population, environment, water, and population density (Bullard 1987). It was shown but not proven that the practices of the Texas Department of Health were not entirely in accordance with the guidelines set forth by RCRA and the Solid Waste Disposal Act (Anderton et al. 1994). This, however was not a crime in itself, since the federally-mandated guidelines were passed down to the state and municipal agencies, which exercised complete authority over the matter (Resource Conservation and Recovery Act 2010). The court ruled that the plaintiffs did show disparate conditions that seemed to be related to race, based upon the data from Texas Department of Water Resources on solid waste facility citing in Houston (Memorandum Opinion and Order 1979). The court stated

that although the plaintiffs were able to demonstrate that conditions of discrimination did exist, there was no proof that the actions of the defendants were motivated by discrimination. The practice of the defendants was said to be ‘insensitive’ by the court, and agreed that the process should have occurred differently. The court ultimately ruled in favor of the defendants (Memorandum Opinion and Order 1979).

Chapter 5: Discussion

Kennedy Heights v. Chevron

In the case of Kennedy Heights, several groups can be held accountable. First and foremost is Gulf Oil Company, now merged with Chevron (Nixon 2008). Their heavy industrial activities combined with a careless disregard to the environment and the well-being of the residents to inhabit the site represents the main factor in the case. Due to their negligence in operating, the site was heavily polluted (Macey 2009). In addition, the fact that they knew this, yet opted not to clean it up furthers their implication in the matter. The best indication of their intent in discrimination was seen in their correspondence with Log Development Company, in which they recommended the land be cleaned up before being used as a housing development (Macey 2007). However, once they learned that the housing development was for African-Americans, the matter was disregarded completely, solely due to the race of the inhabitants-to-be (Nixon 2008).

While the actions of Log Development Company did not contaminate the property in the first place, their willful negligence and intent to continue with the project despite the health risks places huge blame on the company. They too, were aware of the hazards of the site, what it had been used for prior to their purchase, yet decided not to disclose these facts nor seek any action to make the property any safer for the residents (Macey 2009).

The Texas Railroad Commission also had a role in the situation. In Texas, the Railroad Commission is actually bestowed with the responsibility of regulating any and all petroleum industry activity within the state, giving it a very important and pivotal role, despite its unassuming name (*The Railroad Commission of Texas* 2010). This responsibility is what involved the commission with the project in the first place. From the very start of the case, the

commission had a close working relationship with Chevron, and worked together on many of the matters (Macey 2007). Due to the nature of their business, it is not difficult to imagine that a non-objective environment may have existed within this state agency due to their close working relationship with the petroleum industry. Under this assumption, the argument could be made that the commission was working with the interests of the industry in mind, rather than of the residents of the state of whom they are to serve. Findings of the Railroad Commission were frequently watered down, or portrayed to reduce the severity of the situation. Additionally, there are many documented occurrences of the City of Houston's failure to inform the residents of Kennedy Heights of the dangers, as well as the lax effort given in both investigating and remediating problems stemming from the contamination (Macey 2009). There was willful negligence in duties, and a blatant failure to inform the residents of the hazards that existed.

Many different conditions came together to work against the Kennedy Heights community leading up to and during the lawsuit. Several entities were responsible for willful negligence and criminal actions in the events leading up to the problem. The case was fought out for nearly a decade before a forced agreement was reached, which was still not to the satisfaction of the plaintiff body. Most obvious in this case is the Goliath of a company the residents were fighting against, given the community's limited legal and financial resources, as well as arguably an overall lower education level in the community, given a lower social status (Macey 2007). Chevron had several reasons to put up a prolonged fight against the residents. An immediate payout of settlement to the plaintiffs would be against the company's financial interests, since in lawsuits; the plaintiff always wants more than the defendant wants to give. Additionally, Chevron had to maintain their stance. Settling on the plaintiffs' terms would be acknowledging a wrongdoing, which would be poor business for the company. This –potentially- could frame the

company as eager to settle, setting the tone for any future lawsuits the company would have to battle. By fighting the case, the company was looking after their interests from several different angles. The longer the case went on, the more important it became for Chevron to not back down, and instead maintain their position.

Chevron is able to carry out an extensive court battle due to a nearly unlimited supply of finance and expert legal resource, of which the plaintiffs do not have. Despite having a seemingly well-qualified attorney, the plaintiffs and their legal counsel were not as united as the defendants with their legal counsel. John O'Quinn accepted the case out of reasonable expectation to be paid a reasonable amount of a potentially sizeable settlement. However, after the case wound its way through the courts year after year with no exit in sight, Mr. O'Quinn began to worry about covering his end of the bargain. Mr. O'Quinn was in the practice to make a living. The plaintiffs were involved in the case because their quality of life –as well as their rights- was being trampled upon in the hands of business interests. The plaintiff body, however, most likely had their own jobs to support them, and were not depending on the outcome of the lawsuit in order to make a living. It is quite understandable that Mr. O'Quinn would have desired to exercise his right to arbitration, as provided in his contract. By moving for arbitration, Mr. O'Quinn was not acting upon the prejudiced interests that environmental justice is concerned with. He had, after all, represented the plaintiffs for nearly ten years with no upfront payment.

The motion for arbitration was initiated without the consent of the plaintiff body. This represents the fissure between the legal counsel, and the Kennedy Heights resident plaintiffs, as their interests clearly divided. The legal system made Mr. O'Quinn a prisoner of the case, after he had invested enough time and money that he could no longer recover. Although the other option would have been for John O'Quinn to end his contract, doing so would obviously leave

him at a financial loss due to the fruitless effort he had poured into the case. Chevron realized this situation, and acted upon it. Although the company was steadfast in fighting the case out, they realized the separation of interests between Mr. O'Quinn and the Kennedy Heights residents, and took advantage of it. Chevron was most likely aware that Mr. O'Quinn was looking to close out his involvement in the case and recover payment via arbitration, and that Chevron could make an attractive offer for settlement, effectively cutting the Kennedy Heights residents out of the picture completely.

The arbitration resulted in a $12 million settlement, which was acceptable to Mr. O'Quinn, but not the Kennedy Heights plaintiffs. Understandably, the residents objected, and felt violated by Mr. O'Quinn's actions, yet weren't in a position to effectively challenge the issue. This represents an imbedded flaw in the legal system, in which lawsuits against large corporations are unable to be fought, and the plaintiffs in environmental discrimination cases are left disserved in the end. It is not apparent whether or not the strategy of Chevron was to exhaust the resources of the plaintiffs; it is however, a very viable strategy for any corporation in their position to use. Currently, this exists as a legal loophole, and does not ensure a fair playing field for legal action. A possible solution for this is to provide a government representative for plaintiffs in environmental discrimination cases. When a plaintiff body such as those in Kennedy Heights is facing a large and powerful entity, government assistance for the plaintiffs could ensure a more fair trial. Before a case goes to court, plaintiffs should have the chance to argue in a preliminary hearing that the case has the merits and qualifications of environmental discrimination. This does not mean that blame or responsibility has to be decided. However, if a court does find that the case has the qualities of environmental discrimination, legal counsel for the plaintiffs could be either provided or funded (partially or entirely) by the local, state and/or

federal government. This models the American criminal court setting, in which a defendant of limited means has the option of being appointed legal counsel by the court, free of charge.

Log Development Company never was brought to court over the issue, yet held a pivotal role in the existence of the problem in the first place. Almost to the misfortune of Chevron, Log Development chose not to remediate the site before building upon it. After Chevron sold the land, it effectively left their control. At the time, there was no legal reason to clean up such pollution before selling the land. However, Log Development knew what the land was going to be used for, and decided not to invest the money to clean up the hazards (Macey 2007).

Bean v. Southwestern Waste Management

This class-action case failed under the legislation it attempted to employ to reach justice on the matter. During the time, the provisions of the law allowed one to bring forth charges of environmental discrimination. The plaintiffs' legal counsel attempted to base the case off on an initial violation of 42 U.S.C. Section 1983 (Margaret Bean, Et Al. Plaintiffs, v. Southwestern Waste Management Corp., Et Al., Defendants. Civ. A. No. H-79-2215. 1979). This was cited as the primary complaint of the plaintiffs' case; they contended that they had experienced discrimination, and were entitled to due process under the law. The issue that brought the case there was different, however. Being that the issue at hand was the placement of a solid waste facility, several entities were involved: the Texas Department of Health, Southwestern Waste Management Corp., Browning-Ferris Industries, and –questionably- the Texas Department of Water Resources. Under the Texas law at the time, the process of issuing a permit to open up and operate a solid waste facility was as follows: a site is selected by the applicant (Southwestern Waste Management and Browning-Ferris Industries), and then site is reviewed by the Texas

Department of Health (Keenheel 2001). Provisions exist under state law as to what the criteria should be for determining the worth of a site under consideration (Resource Conservation and Recovery Act. 2010). Consideration must address the effect on the area, population density, demographics, environment, etc (Godsil 1991).

As previously mentioned, Title VI of the 1964 Civil Rights Act establishes that any agency (state or local) that receives federal funding may not take part in any form of discrimination (Resource Conservation and Recovery Act. 2010). Although the letter of the law outlines this as a required operating guideline, the letter of the law stops there. The matter is left in the hands of the agency, which determines whether a site gets a license. It is entirely possible that a state, county, or municipal agency would have economic improvements and capital gain from taxation when allowing a particular industry to operate within its jurisdiction. The revenue collected from licensing and taxes makes for a non-objective position for these agencies, and the interest of the citizens cannot be ensured under such a system. Having the federal government as a secondary agency in the matter ensures objectivity, since the federal government would not be waned by provincial financial motivations that could trump the rights of citizens.

Given the process of licensure, another issue is brought up: which agency is responsible for the alleged act of discrimination? Many different arguments could be made, and arguably; all of the agencies are at fault in some form or another. Browning-Ferris Industries and Southwestern Waste Management Corp. chose the site without regard to the local population. Evidence of this is shown through the placement of the facility, which was 1,700 ft. from Smiley High School (Godsil 1991). The court moved to decide that although there was not sufficient evidence of discrimination, the decision to locate the solid waste facility at that site was

insensitive in the very least, even going so far as to state that if the court were placed in that situation, they would have not decided on that location (Memorandum Opinion and Order 1979). Additionally, even though the Texas Department of Health did not choose the location of the proposed solid waste facility, the process could not go through without their approval and ensuing licensure of the facility.

Lastly, there is peripheral consideration of the Texas Department of Water Resources' culpability in the matter. Examination of TDWR's role in the matter was inadvertently brought to light through the plaintiffs' extensive use of data regarding solid waste facility placement in Houston at the time. Much of this data was found to be under the control of the Texas Department of Water Resources, and the court questioned why the TDWR had no action on the matter, given their knowledge of the many prior placements of solid waste facilities that were situated in a disproportionate and disenfranchising fashion. However, Title VI, Section 601 of the 1964 Civil Rights Act allowed the plaintiffs to place blame on the Texas Department of Health (Godsil 1991). The TDH was a recipient of federal funding, and under the aforementioned law, could not engage in any discriminating activities or practices. During the case, there was no consideration as to whether the Texas Department of Health had implemented procedures for ensuring that the statutes of Section 601 were followed (Margaret Bean, Et Al. Plaintiffs, v. Southwestern Waste Management Corp., Et Al., Defendants. Civ. A. No. H-79-2215. 1979). Therefore, it is not known whether the TDH had implemented a policy for dealing with complaints or accusations pertaining to instances of discrimination. This is due to the fact that the plaintiffs' had motioned for a preliminary injunction against the defendant parties, instead of pursuing the matter through the Texas Department of Health in a bureaucratic, non-judicial setting. Since this was not done, it is not known whether the TDH would also have been

in violation of the provision of Section 601, in which they are required to have a policy and a process for dealing with those complaints and accusations of discrimination. The matter was brought up in a crude fashion in the proceedings leading into the case. The defendants motioned for abstention from the case because the plaintiffs had not exhausted other means of resolving the actions (Margaret Bean, Et Al. Plaintiffs, v. Southwestern Waste Management Corp., Et Al., Defendants. Civ. A. No. H-79-2215. 1979).

For the plaintiffs, part of their legal strategy was to stop the implementation of the solid waste facility in their neighborhood. Possibly, if the plaintiffs were to have gone through the Texas Department of Health first, the landfill would not have been stopped, and another problem would be created. Additionally, the defendants attempted to motion for court abstention based on the equitable doctrine of laches, which was denied (Margaret Bean, Et Al. Plaintiffs, v. Southwestern Waste Management Corp., Et Al., Defendants. Civ. A. No. H-79-2215. 1979). Had the plaintiffs addressed their problems through the Texas Department of Health, failed, and then pursued legal action to have the then-existent solid waste facility removed, a stronger argument could be made that their delay created unfavorable conditions for the defendants, and simultaneously creating favored conditions to further the plaintiffs' argument.

Since the case was a motion for preliminary injunction, restraining order and formal complaint, the case is quite different in many regards from the class-action civil lawsuit of *Kennedy Heights v. Chevron*. First, the case of Kennedy Heights was a class-action lawsuit, filed in civil court, with the intentions of collecting monetary compensation for damage done due to neglect and intentional discrimination, and was done *post facto* to the class-action lawsuit. *Bean v. Southwestern Waste Management Corp.* was filed with the intentions of preventing an occurrence, yet revealed the established practice of environmental discrimination, through the

use of plaintiffs' supporting data. The first goal of the case was to halt the progress on establishing the solid waste facility, then proceeding with revoking the license. Lastly, the restraining order ensured –to some degree- that there would be no chance of another solid waste facility being opened up in Northwood Manor subdivision in the future.

The case was tried on an alleged violation of 42 U.S.C. Section 1983 (Margaret Bean, Et Al. Plaintiffs, v. Southwestern Waste Management Corp., Et Al., Defendants. Civ. A. No. H-79-2215. 1979). However, under Title VI, Section 601 of the 1964 Civil Rights Act, the burden of proof is on the plaintiffs (Mohai et al. 2009). Not only did the plaintiffs have to show discrimination, they also had to prove that this discrimination was willful, and occurred on the basis of a characteristic of the plaintiffs (Forsythe 2010). The burden of intent was unrealistic and highly irrelevant, yet was the law at the time. Using Civil-Rights-era law to challenge Environmental discrimination cases will create failure. To prove intentional discrimination in such a case would be futile, since intent has nothing to do with the case in the first place.

Environmental justice's aim is to show how society disproportionately allocated environmental hazards in disempowered communities (Mohai et al. 2009). The finding of the court in *Bean v. Southwestern Waste Management* contends that it is simply not enough to display discrimination; one must show intent (P.G. Lewis 2000). Their finding is technically in violation of the provisions of 42 U.S.C. Section 1983, which primarily states that discrimination is not allowed (Exec. Order 12,898. 2003). However, the court based their finding through consideration of Title VI, Section 601 of the 1964 Civil Rights Act, which requires that one show intent (B. Lewis 2006). Section 602 was later included to provide for such an instance, and requires that one only show conditions of discrimination, without conditions of intent (Forsythe 2010). The plaintiffs' argument also had to refer to Title VI, Section 601, in order to be able to

place blame (B. Lewis 2006). Had the plaintiffs not used this strategy, a finger-pointing game would have taken place in the court, with each entity maintaining that they did not have responsibility on the matter.

It is safe to say that intent did not have the least bit to do with the case. Southwestern Waste Management Corp. and Browning-Ferris Industries were most likely not motivated by race when they selected the site; rather it probably just made good business sense. It could be further argued that the Texas Department o Health did not have discriminatory intent when the license was given for a solid waste facility in the Northwood Manor subdivision; rather it was the practice of the time, since 18 of the 19 solid waste facilities existent at the time were all located in similar environments: in neighborhoods of a predominantly African-American community (Keenheel 2001). 42 U.S.C. Section 1983 provided protection for the plaintiffs' case as was proved with their use of solid waste facility data, which showed that 18 of the 19 solid waste facilities existent at the time were in predominantly African-American communities (Keenheel 2001). However, Title VI, Section 601 did not correspond with 42 U.S.C. Section 1983. The two laws conflicted, and any hope of success for the plaintiffs could not be realized.

Trends

Many aspects of these two cases posed challenges to the plaintiffs, and prevented justice from being served. Ideally, the legal system should provide a fair playing field for two parties to resolve a dispute. However, in both cases, the defendants were large companies, both with ties to state agencies. In *Bean v. Southwestern Waste Management,* evidence shows that the Texas Department of Health had working ties with Browning-Ferris Industries and Southwestern Waste Management Corp., due to their responsibility of being the licensing agency for solid waste facilities (Keenheel 2001). As pertaining to *Kennedy Heights v. Chevron,* the Texas Railroad

Commission also had working ties to Chevron, being that the commission was responsible for all petroleum activity in the state (*The Railroad Commission of Texas* 2010).

Both cases consisted of a large class of plaintiffs which experienced conditions of environmental discrimination. Under the law set up to prevent such situations, their cases possessed the merits to warrant intervention. However, due to the lack of specificity and accuracy of these laws, the plaintiffs' cases were turned against them, mostly in the respect that they were required to show that the defendants had intent to discriminate. With Bean v. Southwestern Waste Management, the letter of the law was twisted to the extent that none of the defendants could truly be responsible for anything. The Texas Department of Health could claim that their choice to grant the license was simply following the standard practice at the time. After all, of the 19 solid waste facilities in Houston at the time, 18 were in African-American communities (Keenheel 2001). Therefore, the counter-argument could be posed: why hadn't any action started for any of the previous sitings?

On a larger scale, the shared characteristic of the two cases presented itself in the inability of the two plaintiff teams to mount as thorough and lengthy legal battle as did the defendants. The size and strength of the defendant parties provided ample legal and financial resources that the plaintiffs were simply not able to match. This is perhaps the single most important aspect shared, since it contributed directly to the inability of the Kennedy Heights residents to pursue their case, and for Linda McKeever Bullard to continue to battle against the conflicting laws under which she had to show intent.

Chapter 6: Conclusion

The unfortunate failure of the two cases illustrates how laws designed to serve the people can actually end up working against them. The conflicting meanings of the laws caused the plaintiffs to get lost in a myriad of technicalities that were completely unrelated to environmental discrimination. This is not a discovery by any means: the story of the two cases shows evidence that the defendants knew the obscurity of the laws being used, and took advantage of this as their primary legal strategy. Although laws existed to prevent and remediate conditions of environmental discrimination, the legal system did not take into account the imbalance of the playing field, namely when given the large size of the defendants and the limited means of the plaintiffs. Ultimately, the failure of these cases can be attributed to using legislation that does not accommodate the scope of environmental justice. The laws being used were based on a narrow interpretation of discrimination as was experienced during the Civil-Rights era. The plaintiffs adequately demonstrated the existence of discrimination in their case. However, the laws designed to work for them actually hindered their efforts, and did not provide a reasonable opportunity for the plaintiffs to pursue justice.

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