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## Courting Disaster: Environmental Justice and the US Court System

DAVID ROSNER

**I**N THE SUMMER OF 1967, 10 YOUNG LAWYERS AND SCIENTISTS IN Stony Brook, New York, challenged the widespread use of DDT, the insecticide that had gained wide notoriety following the publication of Rachel Carson's *Silent Spring*.<sup>1</sup> Frustrated by the slow pace of legislative action at the state and federal levels, they decided to sue cities, states, and chemical companies in an effort to halt the pollution of the nation's land, streams, and lakes.

The group, searching for a model, looked to the NAACP's Legal Defense Fund (LDF), which in 1954, in *Brown v Board of Education*, had changed American history by persuading the US Supreme Court to overturn *Plessy v Ferguson*, the 1896 "separate but equal" decision that had given sanction to legal segregation. They named their group the Environmental Defense Fund (EDF) in the hope of affecting the future of environmental policy in as fundamental a way as the LDF had affected American race relations. Shortly thereafter, in 1970, the Natural Resources Defense Council (NRDC) was formed, and along with the EDF, powerful legal voices emerged in the coming battles over environmental protection.

This consortium of lawyers and scientists sued cities and states across the nation.<sup>2</sup> At the time, the idea that the courts could be the means of shaping broad environmental policies was untested and virtually unheard of, not to mention controversial.

For the most part, the formulation of state and national policies was a slow, uneven process in which legislative bodies listened to industry spokespeople and scientists, academics, and occasional consumer advocates debate the merits of, or problems with, various legislative proposals. In post-World War II America, when chemicals were synonymous with America's economic dominance and equated in many minds with "better living" and when industry propaganda promoted the idea that "progress" was industry's "most important product," legislative reform

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to protect our environment was difficult. The EDF, the NRDC, and environmental activists therefore turned to the courts and forced the nation to finally pay attention to a century of unrestrained industrial growth.

The fortuitous joining of court challenges and growing environmental awareness fostered some dramatic victories. The 1970s witnessed the birth of the Environmental Protection Agency (EPA), the Occupational Safety and Health Administration (OSHA), the Mine Safety and Health Administration (MSHA), the National Institute of Occupational Safety and Health (NIOSH), and the Consumer Product Safety Commission (CPSC). The decade saw the passage of major federal legislation like the Toxic Substances Control Act of 1976 (TSCA), the Clean Water Act of 1977 (CWA), the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), and many others.

During this same period, university-based scientists joined community activists to press the federal government to ban the production of polychlorinated biphenyls (PCBs) for use in electrical transformers, capacitors, carbonless copy paper, adhesives, paints, and a host of other products; lead was eliminated from paint; and asbestos was eliminated from caulking. In cleaning up the messes we had collectively created, it was quite a decade, the likes of which we have not seen since.

The sweeping legislative actions of the 1970s were virtually brought to a halt with the election of Ronald Reagan. Administrators were appointed purposely to shrink government and dismantle regulatory agencies. Examples were Anne Gorsuch, who was determined to downsize the EPA and to dismantle its activist agenda, and Thorne Aughter, at OSHA, who was determined to “provide industry with relief from the burdens of onerous government regulation.”<sup>3</sup> As the federal government withdrew from its environmental agenda, the courts took on an ever increasing role to address environmental pollution.

Since the 1990s, the courts have become central to environmental and occupational activists. Lawsuits seem to have replaced the legislatures in efforts to remedy the damage done by virtually unrestrained uses of chemicals and materials that our legislative and regulatory bodies seem incapable of controlling. What the EDF and NRDC initiated as an untested challenge has now become a critical arrow in the arsenal of workers poisoned on the job, individuals poisoned in their communities, and entire populations subjected to toxins in the air they breathe, the land they walk on, and the homes they live in.

Earlier in the century, lawsuits were brought by individuals damaged by accidents on the job or by poisons with which they came in contact in the industrial setting. But this slowly changed as we became more aware of chronic diseases of long latency associated with industrial pollution of entire communities. For example, in the 1970s, the Love Canal, New York community used protests and the courts to mitigate the chemicals that had seeped into their basements. In the 1980s, Times Beach, Missouri, sued after discovering that dioxins and other chemicals had destroyed their town. More recently, environmental lawsuits have expanded in scope, addressing not only liability for individuals or localities but also damage to major cities and even states.

We have entered a new era in which more and more lawsuits are being brought against companies not only to recover the costs of past misdeeds but also to prevent future damage to health. It is ironic that even governments themselves are now bringing suit, demanding that industries pay to clean up the messes they made before children are poisoned by lead or people ingest PCBs.

Rhode Island accordingly sued the paint pigment industry for the costs of removing lead from the state's walls, arguing that the companies had knowingly sold lead paint, thereby creating a public health hazard that they should clean up. A jury awarded a massive judgment only to see it overturned in the state's supreme court. A similar suit went forward in California, where a judge awarded \$1.15 billion in cleanup costs to the health departments of Los Angeles, San Francisco, San Diego, Oakland, and other cities and towns. That decision is now under appeal. And San Diego is now suing Monsanto to clean up its harbor decades after PCBs were dumped there.<sup>4</sup>

The suppression of regulatory activity, the general mistrust of government, and the general concerns about the economic impact of environmental regulation have led to a poisonous conundrum. We all would agree that evidence and science should shape rational legislation. But sadly, even current efforts to update the 40-year-old Toxic Substances Control Act are being shaped to accommodate corporate interests rather than national health needs in a paralyzed Congress.<sup>5</sup> The courts, where competing experts confront juries and judges, might not be the "ideal" place to shape policy. But they might be a critical arena for a national debate over environmental pollution and responsibility for damage and disease.

The EDF and NRDC model of legal contretemps and lawsuits may have real relevance once again.

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