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ON FERTILE GROUND:

THE ENVIRONMENTAL AND REPRODUCTIVE JUSTICE MOVEMENTS AS A UNIFIED FORCE FOR REFORMING TOXIC CHEMICAL REGULATION

By Angie McCarthy*

The Environmental Justice (“EJ”) and Reproductive Justice (“RJ”) movements share important common ground: They aim to improve socioeconomic conditions for those living in poverty, increase involvement of traditionally marginalized communities in policy decisions affecting them, and recognize the right of women to have healthy pregnancies and of parents to raise healthy children.¹ The time is ripe for the EJ and RJ movements to collaborate² and harness their joint potential to effect policy reform and ensure that vulnerable women are not exposed to toxic chemicals that harm their reproductive health.

In the United States, the Toxic Substance Control Act is the primary law ensuring use of safe chemicals,³ but a lack of Congressional attention since 1976 has made it almost impossible for the EPA to require testing or regulation of chemicals based on their adverse health effects.⁴ This inaction’s effect is highlighted in studies that show that people who live and work in the most polluted environments in the United States are people of color and the poor.⁵ Further, because women of color are more likely than other Americans to be low-wage workers, they are “disproportionately exposed to . . . hazardous chemicals [in the workplace], including agricultural pesticides, home cleaning products, industrial cleaning products, and chemicals used in hair and nail salons.”⁶

Despite the clear links between toxic chemical exposure and harm to reproductive health, reproductive rights organizations have traditionally ignored the EJ movement.⁷ Today, the RJ movement’s expansion from a rights-based framework to a broader justice-based framework provides RJ advocates a new opportunity to join with EJ advocates. The new RJ framework encompasses “the right to parent [children] in safe and healthy environment[s] . . . [and] is based on the human right to make personal decisions about one’s life, and [government and society’s obligation] to ensure that . . . conditions are suitable for implementing one’s decisions.”⁸ Similarly, the EJ movement

calls for “the fair treatment and meaningful involvement of all people . . . with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”⁹

The movements’ shared policy objectives and commitment to community-based intervention creates the perfect atmosphere for movement building and joint advocacy. To date there have been several successful collaborations, including efforts to: “regulate, disclose and eliminate toxic ingredients in consumer products;”¹⁰ “expand chemical reform campaigns to include workplace exposure;”¹¹ and integrate gender justice into climate change policy analysis.¹² For example, an EJ/RJ collaboration in California yielded a successful education campaign on the harmful impact of toxic chemicals used in nail salons on Asian women’s reproductive health, which in turn led to legislative victories.¹³

By building on this momentum, EJ and RJ advocates have the opportunity to come together to pass strong legislation reforming outdated toxic chemicals regulations. Currently, two such bills are pending before Congress: The Toxic Chemicals Safety Act of 2010¹⁴ and The Safe Chemicals Act of 2011.¹⁵ Both bills aim to improve reproductive health by requiring that all chemicals meet a safety standard that will protect vulnerable populations, including pregnant women and workers.¹⁶ They also include provisions to reduce disproportionate toxic chemical exposure faced by people of color, low-income individuals, and indigenous communities.¹⁷ RJ and EJ movements should recognize this legislation’s contribution to their shared goals and join in support of its passage. Doing so will move our government and society a necessary step closer to recognizing the universal right of “every woman to bear and raise healthy children and live in healthy communities.”¹⁸



* Angie is a J.D. candidate, May 2013, at American University Washington College of Law.

Endnotes: On Fertile Ground: The Environmental and Reproductive Justice Movements as a Unified Force for Reforming Toxic Chemical Regulation

¹ *If You Really Care About Environmental Justice, You Should Care About Reproductive Justice!*, LAW STUDENTS FOR REPRODUCTIVE JUSTICE 1 (2012), http://www.nwlc.org/sites/default/files/pdfs/enviromental_justice_reproductive_justice_factsheet_10-9-12.pdf.

² *Executive Summary: Gender, Organizing, and Movement Building at the Intersection of Environmental Justice and Reproductive Justice*, MOVEMENT

STRATEGY CENTER 4 (2000), http://movementbuilding.movementstrategy.org/media/docs/9946_FertileGround_ExecSum.pdf.

³ 15 U.S.C. § 2601 (1976).

⁷³ Lazarus, *supra* note 2, at 827 (emphasis added).

⁷⁴ Criticism in this regard can be levied equally at government policymakers and at mainstream environmental organizations. This latter group, which has been largely responsible for defining the nature and scope of the environmental debate over the past several decades, is firmly rooted in the classic environmental mindset and has its own set of institutional traditions that have proven amazingly resistant to change.

⁷⁵ *Fisher v. Univ. of Tex.*, 132 S.Ct 1536 (2012) (granting cert again in the context of university admission policies).

⁷⁶ See *Grutter*, 539 U.S. at 328 (“The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School’s assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their amici. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university.”); *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 314 (1978).

⁷⁷ See *Bakke*, 438 U.S. at 313 (1978); *Grutter*, 539 U.S. at 324.

⁷⁸ Of course the Court has effectively cabined its grant of leave for race-conscious decision-making by relying on the special solicitude afforded universities in the name of “academic freedom.” *Bakke*, 438 U.S. at 319; *Grutter*, 539 U.S. at 324, 329. However the rationale for encouraging diversity in certain public policymaking is implicit in Powell’s rationale in *Bakke*: the “nation’s future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this nation of many peoples.” *Bakke*, 438 U.S. at 313. If such diversity of thought is important in education, should it be considered any less critical to our nation’s future within the institutions that make and implement important public policy?

⁷⁹ Notably, indicators of “sameness” – sometimes described in terms of whether a person is a “good fit” – often emerge as a “factor” in hiring decisions with the effect preventing diversity (with respect to race, gender, disability, or otherwise) and furthering the creep toward institutional homogeneity. See DAVID M. BLANCHARD, REPRESENTING EMPLOYEES IN DISCRIMINATION CASES 4 (2012) (“Millions of Americans have lost their jobs because they were not a ‘good fit’ or because the company wanted to move in a ‘different direction.’”). In such instances ultimately the burden is on the applicant to prove that the employer’s stated reason is a “pretext.” *Id.* at 1.

⁸⁰ See CULTURAL DIVERSITY CHALLENGES FOR EPA: A STRATEGY FOR BOLD ACTION, ENVTL. PROT. AGENCY 3, 13 (1992) (“1992 Diversity Strategy”) (recognizing that “organizations benefit from a broad range of perspectives” which can stimulate “creative thinking, problem solving [and] innovation”).

⁸¹ U.S. EPA, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES (1992), available at http://www.epa.gov/environmentaljustice/resources/reports/annual-project-reports/reducing_risk_com_voll.pdf.

⁸² *Environmental Justice: Basic Information*, U.S. EPA, <http://www.epa.gov/compliance/ej/basics/ejbackground.html> (last updated May 24, 2012); 58 Fed. Reg. 59,723, 59,723 (Nov. 10, 1993) (EPA Notice of Establishment of the National Environmental Justice Advisory Council and Request for Suggestions of Candidates for Membership).

⁸³ The IWG was also a creature of E.O. 12898. See E.O. 12898, *supra* note 57, at § 1-102 (describing the EJ IWG’s composition and duties, which includes providing guidance to federal agencies “on criteria for identifying disproportionately high and adverse human health or environmental effects on minority populations and low-income populations”). See also *Federal Interagency Working Group on Environmental Justice*, U.S. EPA, <http://www.epa.gov/>

<http://www.epa.gov/compliance/ej/interagency/index.html> (last updated Sept. 13, 2012) (stating that the role of the Environmental Justice Interagency Working Group is “to guide, support and enhance federal environmental justice and community-based activities”).

⁸⁴ See Memorandum from Gary Guzy, U.S. EPA General Counsel, regarding EPA Statutory and Regulatory Authorities under which Environmental Justice Issues may be Addressed in Permitting (Dec. 1, 2000), available at http://www.epa.gov/environmentaljustice/resources/policy/ej_permitting_authorities_memo_120100.pdf (reporting that the Environmental Appeals Board (EAB) directly addressed the environmental justice issues in RCRA hazardous waste permits in a 1995 report and found that “when the Region has a basis to believe that operation of the facility may have a disproportionate impact on a minority or low-income segment of the affected community, the Region should, as a matter of policy, exercise its discretion to assure early and ongoing opportunities for public involvement in the permitting process.”).

⁸⁵ Even today, more than 82% of the 2,400 employees comprising the EPA’s senior career staff (grade GS 15) are white (non-Hispanic). See Letter from James H. Johnson, Jr., Chair, National Advisory Council for Environmental Policy and Technology, to Lisa P. Jackson, Administrator, U.S. EPA (Dec. 22, 2011), available at http://www.epa.gov/ocempage/nacept/reports/pdf/2011_1222_nacept_diversity_letter.pdf. One could say this group exhibits all the diversity of Mercy College in Des Moines, Iowa, or St. Olaf College in Northfield, Minnesota. *Mercy College Quick Facts*, MERCY COLLEGE OF HEALTH SCIENCES, <http://www.mchs.edu/quick-facts.cfm> (last visited Nov. 1, 2012); *St. Olaf College 2012 Profile*, ST. OLAF COLLEGE 1, available at <http://www.stolaf.edu/about/StOlafProfile.pdf>. That said, whites made up about 90% of GS 15 employees in 1994 (70% of whom were males). See U.S. EPA, FY 1994 AFFIRMATIVE EMPLOYMENT PROGRAM ACCOMPLISHMENT REPORT AND FY 1995 PLAN UPDATE: STRATEGIC PLAN FOR DIVERSITY 77 (1995), available at <http://www.epa.gov/nsccep/index.html>.

⁸⁶ See generally *Environmental Justice*, U.S. EPA, <http://www.epa.gov/environmentaljustice/index.html> (last updated Oct. 15, 2012) (asserting the EPA’s commitment to promoting environmental justice, which the EPA defines as “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”); and *Strengthening and Revitalizing the EPA’s Civil Rights and Diversity Programs*, U.S. EPA, <http://www.epa.gov/epahome/ocr-statement.htm> (last updated April 24, 2012). While EPA has by no means solved all of its longstanding issues (especially as they relate to the enforcement of Title VI of the Civil Rights Act of 1964), the efforts within the administration have been significant and seemingly genuine.

⁸⁷ Exec. Order No. 13,583, 76 Fed. Reg. 52,847 (Aug. 18, 2011) (establishing a Coordinated Government-wide Initiative to Promote Diversity and Inclusion in the Federal Workforce, and *inter alia*, acknowledging that “[a] commitment to equal opportunity, diversity, and inclusion is critical for the Federal Government as an employer,” that the federal government has a “special obligation to lead by example,” and that the government “must create a culture that encourages collaboration, flexibility, and fairness to enable individuals to participate to their full potential”).

⁸⁸ Memorandum from Lisa P. Jackson, Administrator, U.S. EPA, to All EPA Employees regarding Seven Priorities for EPA Action, available at <http://blog.epa.gov/administrator/2010/01/12/seven-priorities-for-epas-future/> (emphasis added).

Endnotes: ON FERTILE GROUND: THE ENVIRONMENTAL AND REPRODUCTIVE JUSTICE MOVEMENTS AS A UNIFIED FORCE FOR REFORMING TOXIC CHEMICAL REGULATION *continued from page 20*

⁴ *Reproductive Health Analysis of the Toxic Chemicals Safety Act (H.R. 5820)*, REPRODUCTIVE HEALTH TECHNOLOGIES PROJECT 1 (2010) http://www.poder-texas.org/files/TSCA_Reform_Bill.pdf.

⁵ Renee Skelton & Vernice Miller, *The Environmental Justice Movement*, NATIONAL RESOURCE DEFENSE COUNCIL (2006), <http://www.nrdc.org/ej/history/hej.asp>, (last visited Oct. 26, 2012) (CITING *TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES*, COMM’N FOR RACIAL JUSTICE OF THE UNITED CHURCH OF CHRIST (1986), <http://www.ucc.org/about-us/archives/pdfs/toxwrace87.pdf>. This study was updated twenty years later with similar findings. See *TOXIC WASTES AND RACE AT TWENTY 1987-2007: GRASSROOTS STRUGGLES TO DISMANTLE ENVIRONMENTAL RACISM IN THE UNITED STATES*, UNITED CHURCH OF CHRIST

JUSTICE AND WITNESS MINISTRIES (2007), <http://www.ejrc.cau.edu/2007%20UCC%20Executive%20Summary.pdf>.

⁶ LAW STUDENTS FOR REPRODUCTIVE JUSTICE, *SUPRA* NOTE 2 AT 1.

⁷ Chinue Turner Richardson, *Environmental Justice Campaigns Provide Fertile Ground for Joint Efforts With Reproductive Rights Advocates*, 9 GUTTMACHER POL. REV. 14, 17 (2006), available at <http://www.guttmacher.org/pubs/gpr/09/1/gpr090114.pdf>.

⁸ *Why is Reproductive Justice Important to Women of Color?*, SISTER SONG, http://www.sistersong.net/index.php?option=com_content&view=article&id=141&Itemid=81 (last visited Oct. 28, 2012).

⁹ See *Environmental Justice*, ENVTL. PROTECTION AGENCY, <http://www.epa.gov/environmentaljustice/> (last visited Oct. 28, 2012); see also 17 PRINCIPLES OF

ENVIRONMENTAL JUSTICE, ENERGY JUSTICE NETWORK (1996), <http://www.ejnet.org/ej/principles.html> (last visited Oct. 28, 2012).

¹⁰ Kristen Zimmerman & Vera Miao, *Fertile Ground: Women Organizing at the Intersection of Environmental Justice and Reproductive Justice*, MOVEMENT STRATEGY CTR. 6 (2009), available at <http://funderservices.movementstrategy.org/a/wp-content/uploads/FertileGround.pdf>.

¹¹ *Id.*

¹² MOVEMENT STRATEGY CENTER *SUPRA* NOTE 2, AT 8.

¹³ Karen Hu et al., *Removing the Topcoat: Understanding Federal Oversight of Nail Salons*, THE NATIONAL ASIAN PAC. AM. WOMEN'S FORUM 4 (2011), <http://nailsalonalliance.org/storage/Removing%20the%20Topcoat%20May2011.pdf>.

¹⁴ Toxic Chemicals Safety Act of 2010, H.R. Res. 5820, 111th Cong. (2010).

¹⁵ Safe Chemicals Act of 2011, S. Res. 84, 112th Cong. (2011).

¹⁶ REPRODUCTIVE HEALTH TECHNOLOGIES PROJECT, *SUPRA* NOTE 4 AT 1.

¹⁷ *Id.*

¹⁸ *Integrate Strategies to Improve Environmental and Reproductive Justice*, NAT'L INST. FOR REPRODUCTIVE HEALTH 2 (2009), available at <http://www.urbaninitiative.org/SiteContent/Static/Docs/AgendaCh9Environment.pdf>.

Endnotes: A LEGAL STANDARD FOR POST-COLONIAL LAND REFORM *continued from page 28*

²¹ See, e.g., *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (declaring that the right to exclude is “universally held to be a fundamental element of the property right”); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (emphasizing the importance of the right to exclude, calling it “one of the most treasured strands in the owner’s bundle of property rights”).

²² JOSEPH W. SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* (5th ed. 2010).

²³ *Id.*

²⁴ See *id.* (explaining that rights language justifies property regimes or rules because they are right, i.e. they describe ways in which people ought to behave towards each other).

²⁵ *Id.*

²⁶ *Id.*

²⁷ See *People First – Zimbabwe’s Land Reform Programme 2*, Ministry of Lands, Agriculture and Rural Settlement in conjunction with the Department of Information and Publicity, Office of the President and Cabinet, (2001) (describing three consecutive land reform programs and one joint government/large-scale commercial white-farmer program implemented by the government to address the clear imbalance in land ownership between black and white Zimbabweans at independence).

²⁸ *Id.* at 14.

²⁹ *Id.*

³⁰ In the 1980s, Zimbabwe thrived on a strong agricultural sector. Exports of crops such as tobacco ranked high on the world market. Today, Zimbabwe is primarily an importer of commodities, including many food products. See Pazvakavambwa & Hungwe, *supra* note 5, at 137.

³¹ Land Tenure Act (Zimbabwe 1969).

³² See Pazvakavambwa & Hungwe, *supra* note 5, at 139.

³³ See Carol Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 88 (1985) (“[T]he common law gives preference to those who convince the world that they have caught the fish and hold it fast . . . one has, by ‘possession,’ separated for oneself property from the great commons of unowned things.”).

³⁴ See Singer, *supra* note 22, at 17 (describing the historical “finders keepers” concept as a simple and workable rule to allocate ownership of unpossessed or abandoned objects).

³⁵ *Id.*

³⁶ See, e.g., JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (1988) (explaining that the fact that one grabs something is not a strong enough reason for others to recognize his rights to control it unless those others have similar opportunity to obtain property); see also, Singer, *supra* note 22, at 17.

³⁷ The series of clashes through which the indigenous Africans were driven from their lands includes the First Chimurenga, or First War of Independence, in which the Shona and Ndebele uprising in opposition to displacement was violently quelled in 1897 by the Pioneer Column, a group of settlers sent to the region by the British South African Company in search of gold and diamonds. See Pazvakavambwa & Hungwe, *supra* note 5, at 138.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ LOCKE, *supra* note 1, at 21.

⁴² *Id.* at 19.

⁴³ *Id.*

⁴⁴ For an excellent summary of the agrarian profile of Zimbabwe leading up to the year 2000, see Thomas W. Mitchell, *The Land Crisis in Zimbabwe: Getting Beyond the Myopic Focus Upon Black and White*, 11 IND. INT’L & COMP. L. REV. 588 (2001); see also, United Nations Development Program (UNDP), Interim Mission Report, *Zimbabwean Land Reform and Resettlement: Assessment and Suggested Framework for the Future* 3, Jan. 2002 available at [\[www.eisa.org.za/PDF/zimlandreform.pdf\]\(http://www.eisa.org.za/PDF/zimlandreform.pdf\). Colonial legislation created land classification and barred blacks from ownership of land in “veldts” where the soil and weather conditions best promoted agriculture on a large-scale. The Land Apportionment Act of 1965, authorized the colonial government to move indigenous populations to marginal lands in the predominantly dry agricultural zones. Human Rights Watch, *Fast Track Land Reform in Zimbabwe*, A1401 \(8 March 2002\), available at <http://www.unhcr.org/refworld/docid/3c8c82df4.html>. As a result, as Zimbabwe celebrated independence from Great Britain in 1980, about 4,500 large-scale commercial farmers, consisting of less than one per cent of the population, occupied 45 per cent of the agricultural land. *Id.* This grossly disproportionate land-ownership profile can be traced back to the Land Apportionment Act of 1931, a law passed by the colonial government which created a land apartheid scheme, with land being designated black or white, as well as by the type of activity the land would be used for. Under this legislation alone, 51 percent of land was allocated to about 3,000 white farmers, and 1.2 million indigenous Zimbabweans were confined to Native Reserves \(later renamed “communal lands”\) consisting of 30 percent of Zimbabwean land. See Pazvakavambwa & Hungwe, *supra* note 5, at 138-139.](http://</p></div><div data-bbox=)

⁴⁵ LOCKE, *supra* note 1, at 21.

⁴⁶ See Rugadya, *supra* note 20, at 3 (explaining that, in the context of Ugandan land reform, prior to the colonization era none of the communities in Uganda recognized individual ownership of land and that individual rights of possession and use of land existed but were subject to sanction by the holder’s family, clan, or community).

⁴⁷ For example, one planted seed in the ground to trigger a communally recognized right to access the land until harvest time. Local leaders divided the land among members of the community according to each man’s ability and willingness to put the land to productive use. Grazing was carried out in common, often intermingling livestock and rotating them across the entire expanse of land in a collective effort to ensure adequate access to pasture for all. See Thomas Griffiths, *Indigenous People, Land Tenure and Land Policy in Latin America*, FOOD & AGRICULTURAL ORGANIZATION 47 (2004).

⁴⁸ While no one held title to land under customary law, the colonial system and its titling model introduced a system of individual land ownership in line with the Jeremy Bentham’s theory of property as a justified expectation. See JEREMY BENTHAM, *THE THEORY OF LEGISLATION* 111-113 (C.K. Ogden ed. 1931) (stating that property is nothing but a basis of expectation of deriving certain advantages from a thing which we possess; this expectation, can only be the work of law).

⁴⁹ See Griffiths, *supra* note 47, at 51.

⁵⁰ *Id.* (citing P. Garcia, TERRITORIOS INDIGENAS: TOCANDO A LAS PUERTAS DEL DERECHO. REVISTA DE INDAS, LXI (223)).

⁵¹ *Id.*

⁵² *Id.*

⁵³ See Miranda, *supra* note 10 (and accompanying text).

⁵⁴ See *infra* Parts II and III (drawing on international law to outline a legal standard for land reform policy).

⁵⁵ Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948), art. 17.

⁵⁶ See Poul Wisborg, *Are Land Rights Human Rights? Online debate on Human Rights Day* (Dec. 10 2011, available at <http://landportal.info/content/are-land-rights-human-rights-online-debate-human-rights-day-10th-december-2011>) (identifying the protection of land rights as governing the idea and the institutions of property); see also, Universal Declaration of Human Rights, *supra* note 55.

⁵⁷ Elizabeth Wickeri and Anil Kalhan, *Land Rights Issues in International Law*, INSTITUTE FOR BUSINESS AND HUMAN RIGHTS, available at <http://www.ihbr.org>.