

## ***Defending the Planet: A Columbia Law Podcast*** **Episode 6: “Environmental Justice”**

[00:00:04] **Ruth Santiago:** Environmental justice is a fusion of the civil rights movement in the environmental context.

[00:00:12] **Olati C.A. Johnson:** What has always struck me about the environmental justice movement is the continual presence of groups who have, in a sustained way, organized around this work.

[00:00:22] **Santiago:** The way that we need to go about addressing the climate needs to center communities that have shouldered the burden of disproportionate pollution.

[00:00:34] **Michael B. Gerrard:** This is *Defending the Planet* from Columbia Law School. I’m your host, Michael Gerrard, I’m a professor at Columbia Law School, where I teach courses on environmental and energy law and serve as faculty director of the Sabin Center for Climate Change Law. Each week, I’ll be joined by guests who are experts in the field, including several of my colleagues at Columbia. In this series, we’ll be talking about combating the climate crisis through one of the most important and effective sets of tools at our disposal: the law. It is well documented that low-income communities and communities of color are more likely to live near contaminated land and to have greater exposure to air and water pollution that are harmful to health. And while an Office of Environmental Justice has existed within the U.S. Environmental Protection Agency for nearly 30 years, efforts to redress those disproportionate impacts in court and in administrative agencies have not fared well. As we confront global climate change, questions about equity and fairness take on new levels of complexity. It’s clear that major action is needed to address environmental injustices and ensure that marginalized communities have input on governmental policies and decisions. What existing legal tools can we draw on to effectively advance environmental justice? What new legal tools should we develop? How do the pandemic, the push for racial justice, and other recent events inform a global climate movement? And what will successful advocacy look like in the years ahead? My guests today are Olatunde Johnson and Ruth Santiago. Olati Johnson is Jerome B. Sherman Professor of Law at Columbia Law School. Her research has helped shape the national conversation on the role of courts, Congress, administrative agencies, and social movements in addressing discrimination and inequality. She serves as chair of the Poverty and Race Research Action Council, which focuses on environmental justice, among other issues. Columbia Law School alumna Ruth Santiago is a resident of southeastern Puerto Rico, where she’s worked with environmental groups and other community organizations for over 30 years on numerous projects. She’s a member of the White House Environmental Justice

Advisory Council and recently has worked on cases related to energy projects and integrated resource plans and has published articles on energy issues in Puerto Rico. Welcome, Ruth and Olati.

[00:03:23] **Johnson:** Thank you.

[00:03:24] **Santiago:** Thank you.

[00:03:26] **Gerrard:** Let's start with this basic question: Ruth, what does environmental justice mean?

[00:03:32] **Santiago:** So one of the founders of the environmental justice movement said to me a few years ago that environmental justice is a fusion of the civil rights movement in the environmental context. So the terms—it's obviously a term of art, and it does mean a lot of different things to different people—but obviously, as you just laid out, Michael, it has to do with equity and lessening the burdens of overburdened environmental justice communities that are mostly Black, brown, and other people of color and poor communities that are, I guess, the term that's often used are disadvantaged or overburdened by environmental pollution. That's on the one hand, right? And then the other thing is then, obviously, equity means enjoying the benefits of open spaces, clean water, clean air—yeah, what are generally benefits enjoyed by more affluent communities.

[00:04:38] **Johnson:** I think about it in exactly those terms about thinking about both the harms and the benefits and how they're not distributed equally, that communities of color and communities that have faced historic disadvantage are not getting clean air and clean water. And for reasons that we really can track, right? So it has both to do with the concentration sometimes of real burdens on their communities because of government policy, because of private policy, because of historic segregation. And it also has to do with the kind of failure to respond, right, when people notice or highlight those burdens, when they ask for those impacts to be redressed, when government doesn't respond equally. So I think of environmental justice as both the condition and a set of actions, but also the movement that has arisen over the last few decades to try to address these inequities.

[00:05:41] **Gerrard:** A short definition that I often use is the idea that disadvantaged communities should not be disproportionately exposed to environmental hazards and should have a full voice in the nature of the environment that they live in. Ruth, President Biden appointed you to the White House Environmental Justice Advisory Council. Can you tell us a little bit about that council and what its focus will be and what you hope it will accomplish?

[00:06:07] **Santiago:** About 26 people around the nation were invited to form part of this White House Environmental Justice Advisory Council back in March. So we've come together and work on three different areas, three related areas, I should say. There's a work group created within the WHEJAC, as we call it, to promote the priorities, the suggestions, recommendations for what is known as the Justice 40 initiative within the executive order, which is that 40% of the benefits of government investments should go

to environmental justice communities. And that starts right now. That would also, we indicate, include things like the American Jobs Act or Plan.

[00:06:54] **Gerrard:** These are the investments in the various infrastructure programs that the president is putting forward, right?

[00:07:00] **Santiago:** Right. So the areas, the clean energy and energy efficiency, clean transit, the safe and affordable and sustainable housing, training workforce, training and workforce development, remediation and reduction of legacy pollution, develop critical clean-water infrastructure, climate mitigation and resiliency, and we added an intersectional recommendation, which is the community and university collaborations or partnerships we think are very important because in our experience as environmental justice activists, we found that often academic institutions are our biggest allies in environmental justice communities. So that's one area where we've started to work. The other two working groups have to do with the screening tool to determine what areas and how to define more precisely the communities that will receive these benefits and that are overburdened. And then, of course, then there's a work group on how we need to update, maybe, in the order, executive order on environmental justice, right, that was, as you know, signed by President Clinton decades ago in 1992, '94. So it certainly needs updating. And what do we hope that will come of it? We're interested in really in addition to making these recommendations—we've already made some—to follow through on the implementation, right? To see this through in terms of becoming a reality, in terms of, so communities not being overburdened by polluting activities and having those benefits that we mentioned.

[00:08:50] **Gerrard:** As I said at the outset, it's well documented that environmental justice communities are disproportionately exposed to pollution. But efforts to use the equal protection clause of the Constitution or the civil rights statutes have not fared so well in court. Olati, can you explain why that is?

[00:09:10] **Johnson:** Legally, some of the challenges have been that there's a kind of disconnect between what is going on out there in the world, the real environmental impacts that have been long documented, the communities of color face. And there's a disconnect between that and the legal tools that we have to remedy it. And I still, in the end, tend to be optimistic about the possibility of using law, as long as we think of law expansively, but there are some real challenges. So one is you mentioned the equal protection clause. So many of us, when we think about civil rights, we think this is the core, right: equal protection. And that's true in a lot of respects. But there are limitations to the equal protection clause as it has been interpreted by the Supreme Court. And a key thing that the Supreme Court said many years ago—decades ago—that shapes all litigation is that you have to prove intentional discrimination. So that means that that is something that's often possible. As I said, sometimes governments don't respond to communities the same way, but it's hard to document and sometimes hard to prove. So that creates a kind of a legal barrier that comes up sometimes in litigation. Then you have a very important civil rights statute: 1964 Civil Rights Act, a key component of which is Title VI that prohibits anyone who is receiving federal funds from discriminating on the basis of race, ethnicity. And the point was to implement *Brown v. Board of Education*. And there's a lot written about how you wouldn't have even had the progress with regard to school desegregation if you hadn't had Title VI. So it's an incredibly

important civil rights statute. It applies in health, environmental equity issues, transportation. And the wonderful thing about Title VI is that from the start, it's had both an intentional discrimination prong; you have to show intent. But it also has a disparate impact prong, which means that unjustified disparate impacts—if there's a pattern or disproportionate impact—and there's no reason for that impact, that can violate Title VI. So that has always been a promising tool in the environmental justice area. But in 2001, the Supreme Court, in a case called *Alexander v. Sandoval*, said that you could not bring private claims in court to enforce the disparate impact prong. So what that means practically is that that cuts out another potential route of enforcement, which is litigation through Title VI. People who are affected by environmental harms, they can still bring complaints directly to federal agencies like the Environmental Protection Agency, and that continues to be done. The challenge is that the EPA, it's, you know, numerous challenges. They've never been adequately staffed or trained. There's never been enough enforcement attention. And then there's also challenges in how they're defining what is remediable under the act, under Title VI. And so here, this is something, Michael, I know you know a fair amount about, right? That the EPA sometimes has a standard that says, well, if it doesn't violate general environmental laws, the fact that there are impacts that are disproportionate on communities of color is not enough to get relief under Title VI. So not really taking into account the disproportion or cumulative impacts, the fact that a lot of different environmental burdens may come together to harm communities, those, that has also impacted enforcement.

[00:12:49] **Gerrard:** EPA has taken the position that if a factory or facility is not going to cause a violation of the health based air-quality standards or water-quality standards, that it's not a negative impact and therefore, even if a certain community gets more air pollution than another, as long as you're within the standard, they won't take action. And since EPA won't grant or allow a state to grant a permit for a facility that would violate those standards, they never get to the civil rights end of it. And so that's been one of the barriers to that kind of litigation.

[00:13:28] **Johnson:** I think that part of the solution is litigation is going to be one piece of it, and I would love to see Congress restore the private right of action under Title VI. It's a federal statute so Congress can enact legislation that says, yes, you can bring suit in court, and this will affect a whole number of different areas, including environmental justice. But I would also think it's important that other tools are used of the kind that Ruth described that say we're going to put an affirmative requirement on all grantees, that if they're going to take federal funds, OK—and true of federal agencies, too—that they take steps to mitigate environmental impacts, including those that are racially and ethnically disproportionate.

[00:14:18] **Gerrard:** We all know that, as mentioned in 1954, the Supreme Court declared school segregation to be illegal in the *Brown v. Board of Education* case, but it took a long time for the schools actually to be desegregated. Are there lessons in that that would also apply to environmental justice?

[00:14:39] **Johnson:** Yeah, they're mixed lessons, right? Even in just how you just described it. I mean, I think what you learn from the litigation in *Brown*, I think, is a real model of how to use litigation over the course of decades, really, to transform the meaning of constitutional provision that had seemed to be impossible, right? They just

sort of slowly chipped away at it. I think it's also a model for thinking about how you interact with social movements. I mean, what has always struck me about environmental justice litigation and the environmental justice movement is just the continual presence of groups on the ground who have in a sustained way organized around this work. And I know when I've worked on environmental justice cases, our clients have been groups of plaintiffs, not just individuals, right? And they are people who will continue their organizing in different forms alongside litigation, which is very useful for changing public opinion, and also because court remedies can be slow even if you get the outcome you want. So I think those are some of the things that you learn. But as you know, I mean, today, our schools are not fully desegregated. There's still massive segregation in schools. So you also really learn about the limits of the law and the way in which you have to change strategies continually and, and also the difficulty of getting at embedded forms of and systemic forms of racism.

[00:16:18] **Santiago:** I think one of the things we're seeing nowadays is that there's a much more intersectional approach in these processes and these struggles and these battles. And I think there's a realization that we really need to bring together different sectors and different kinds of struggles that seem sort of siloed but have to come together in order to achieve the transformation that is required not just for to achieve environmental justice but also to achieve the climate justice that there's some overlap there, but also the racial justice and equity in a general aspect. And I think that means including the claims of working people and the poor communities that, taken together, can be a much stronger force.

[00:17:14] **Gerrard:** Olati, how are the strategies that are used by public interest litigators these days affected by the current composition of the U.S. Supreme Court?

[00:17:25] **Johnson:** I mean, I think that there is sometimes a strategy to go to state courts instead of federal courts and avoid the Supreme Court because there's a fear of not having decisions that might come out in your favor, and we've seen this in litigation around climate change. So this question of choosing courts, I think, is one of the big areas. A lot of environmental law, as you well know, is really administrative law. And I'd say that when you look at all of these claims brought under administrative law, I'm not sure what story I'd be interested in, what story you would tell, Michael, about how the federal courts have been in terms of allowing federal agencies to regulate in this area—EPA specifically—and how they bend in terms of the deregulatory parts of the Trump agenda. Thinking about what arguments will prevail under administrative law and what the Supreme Court will sustain is a really big part of the strategy in this area, but I don't think the Supreme Court has been uniformly hostile to regulation in the environmental area, even if it probably hasn't gone as far as in sustaining regulation as a lot of advocates would like.

[00:18:42] **Gerrard:** In the enforcement of conventional environmental laws, the federal courts have been strong. But in coming up with new doctrines, they haven't, and in recent years, environmental plaintiffs have tried to stay out of the Supreme Court for the most part because the Supreme Court in the last decade or so has not handed down many pro-environmental decisions.

[00:19:05] **Johnson:** The other trend, I would say, in addition to avoiding federal court, is also taking advantage of state laws. The standards that I described under federal equal protection may not necessarily apply in all states, right? If I were going to look for novel claims that are of a constitutional variety, state law might be more promising than state constitutional law.

[00:19:32] **Santiago:** Can I say something on that? So, yeah, the state law is interesting that states like New Jersey are enacting environmental justice legislation, and we're very hopeful that that trend will catch on and that these laws will be, you know, have enforcement, real enforcement mechanisms. But you do worry about state laws and state regulation for a long time being part of the race to the bottom, right, that led us to less and less regulation and protections of all communities and especially environmental justice communities. I think there's an argument to be made for a unitary fiat here, as we're seeing with the taxation issue, right? The global taxation measures being uniform to a certain extent, that there's a case to be made for that, right? And environmental laws have always been—many of them, right—like RCRA and others are seen as a floor that the states cannot go below but can improve upon. We just have not seen a lot of that. And speaking from a jurisdiction like Puerto Rico where enforcement is almost nonexistent—and I think we hold the record, for example, for no action assurances against polluters—last year we saw months and months and months of no action assurances granted to power companies here.

[00:21:00] **Gerrard:** These are documents that the EPA or State Environmental Agency gives to a company saying we're not going to go after you even if you're violating the law.

[00:21:10] **Santiago:** That's exactly right. And we saw a huge amount of that going on last year, right? So, I mean, I am hopeful and certainly even going beyond state laws, we've seen many small jurisdictions. We had a case here with the AES coal-fired power plant and their coal ash waste where municipalities were part of a movement to get municipalities to ban the disposal of the coal ash waste within different municipalities. But that often gets struck down, right, once the state agency comes in and maybe lowers the standards. So I think there's a really strong case to be made for a uniform kind of approach here.

[00:21:55] **Johnson:** I really agree with that caution, I think it's just true across all sorts of different areas as we talk about it in civil rights. I mean, you don't have, you didn't have until the Supreme Court's decision federal protection against sexual orientation discrimination at state-level and local-level protection. You need states as innovators. They've always been innovators in civil rights law, for instance. But then you have places that are race-to-the-bottom places, and you worry about that, especially with companies relocating to places where they might not have to be subject to the same laws. I think people of color have often been losers in systems that depend a lot on state protection. At the same time, we have to acknowledge things like the California effect, right? Like, you know, when they regulate in a particular area, it also can benefit people, so I think that's something that we're going to continue to have to think about and sort out.

[00:22:51] **Gerrard:** Ruth, you were talking about the idea of on-the-ground collaboration. Can you give some examples of where that has actually worked in the environmental justice area?

[00:23:02] **Santiago:** Yeah, absolutely. So, for example, here in Puerto Rico, we are working in an alliance or coalition called We Want Sun—Queremos Sol. And it's across different sectors of civil society here that include not just community, environmental justice communities, and environmental groups but also include labor organizations—which is, I think, critical, to get labor on board towards what our proposal is saying—to transform, for example, the electric system here quickly towards renewables and storage and especially on-site or rooftop solar. And so getting those other groups, professional groups, as we said, academia, getting all those other groups working together is what has made at least some impact locally in energy policies.

[00:23:59] **Gerrard:** President Biden has put environmental justice very high on his list of priorities, and he's appointed people of color to head three of the agencies with the greatest responsibilities: EPA, the Department of the Interior, and the Council on Environmental Quality within the White House. At the end of four years, how would you measure President Biden's success in advancing environmental justice?

[00:24:23] **Johnson:** We're going to, we're going to make Ruth do it all.

[00:24:28] **Santiago:** Well, we do plan, as I mentioned in the WHEJAC council, we do plan to monitor the actual implementation of these policies that have been laid out in the executive orders and are probably going to culminate in some kind of legislation as well. And so how do we measure it? Obviously, on the ground, we measure it in terms of distributive justice. So how have we unburdened environmental justice, or are we on the way to unburdening environmental justice communities and really lessening the impact of pollution for everyone, but especially starting with communities most impacted? How are, in terms of just procedural justice, how our environmental justice communities and others able to participate in decisions and access information to begin with, right, about decisions that are being made with respect to different developments. We also, of course, we're talking about enforcement and corrective justice, what is known as corrective justice within the environmental justice movement. We need to see a great deal of that, and we have not seen too much of it in environmental justice communities. And then in terms of social justice, right, that people in environmental justice communities can enjoy the amenities that other communities have.

[00:25:51] **Gerrard:** Can you say a word about what you mean by corrective justice?

[00:25:54] **Santiago:** I'll go to, let's say, reparations. I'll go that far. I think that one of the areas in the executive order and one of the charges of the WHEJAC are to make sure that we have some kind of restorative justice and have places that have been so heavily contaminated get reparations in order to decontaminate and provide clean air, clean water, access to clean areas.

[00:26:25] **Johnson:** I think this is really important just to keep ourselves grounded in the idea that communities didn't just get constituted naturally. It's a result of public policy that created forms of segregation, that then you have environmental burdens layered on

top of that and interacting with it. And there is a larger movement, discussion, dialogue around this question of how you are going to repair. I do think we have to think about repair and restoration because of this intersection with all these very deliberate social policies and, that were enacted by the federal government and by states and localities. I was going to say that, you know, another component that is, I think there with what Ruth said in terms of success, is that she's absolutely right on the ground: Success is, you know, A number one, how we know there have been real changes. And on the route to get there, I would add to the procedural element of it, just the idea that there is a pervasive requirement that around doing assessments, around mitigation, around inclusion that's there for every federal agency. In the Biden administration, in addition to the specific directives it has around environmental justice, has an executive order that says that every agency needs to do equity assessments and consider the ways in which its practices are furthering and policies and program design or furthering inequity. And it needs to take steps to do something different.

[00:28:08] **Gerrard:** It's quite a contrast to the executive order that President Trump issued shortly after taking office, requiring each federal agency to look at the ways its actions were interfering with the use of fossil fuels and try to try to get rid of those. And of course, President Biden quickly revoked that and moved in the opposite direction. Another thing we hear discussed is the concept of climate gentrification. Can you tell us what that is about?

[00:28:34] **Johnson:** I actually think that when I've heard the word, the term used in the environmental context, its meaning is something quite specific about the idea that wealthier communities can, and individuals can, move to neighborhoods or areas of a city or region that are more protected from the effects of climate change—that they're able to do that. And the flip side of that is that communities of color and poor or low-income communities are not given the resources in order to make themselves and help them be resilient in ways that would mitigate the harms of climate change.

[00:29:16] **Santiago:** I would chime in and say that we saw that in Miami. Maybe one of the best examples is how brown and Black communities that are a little further inland and high, on higher land are now being displaced by people who are in the coastal, more coastal areas on Miami Beach, for example, that are seeing sunny-day flooding and are living the sea level rise, and not to mention the impact of the more intense and frequent hurricanes. Here in Puerto Rico, there is some climate gentrification, but also we're still seeing climate denial. And what we're seeing is that luxury hotels and housing developments are wanting to continue to build on those beaches. Hard, very hard to understand. Traditionally here, and I think in many places, brown, Black people, people of color, poor people were sort of pushed to the margins of the land, right? Anything that was not wanted by the people in power, were relegated to communities, and those happen to be the areas that are now being primarily impacted by the sea level rise. So certainly there's been also a movement by more-affluent interests to keep building here in those areas. But we're seeing that still E.J. communities are more impacted by sea level rise here.

[00:0:47] **Gerrard:** What do you see as the future of the environmental justice movement, both as a political force and a legal force?

[00:30:54] **Santiago:** Well, certainly environmental justice is a core part of the climate activism that we're seeing just because the sources, the big sources of environmental injustice—like polluting power plants, landfills that emit a lot of methane, et cetera—are impacting environmental justice communities. And so there's an overlap there in the struggles. I think that, again, we're seeing a movement, a more general movement in society. Like when you see the board of ExxonMobil get two or three new board members that are interested in addressing the issue, certainly that is broader than what the environmental justice—I mean, I have never seen them, I don't know, a corporation interested in addressing environmental injustice.

[00:31:46] **Gerrard:** Well, of course, this was all forced by shareholder activism.

[00:31:49] **Santiago:** Right.

[00:31:50] **Gerrard:** Exxon management didn't want that to happen.

[00:31:51] **Johnson:** Yeah, we didn't mention that as another front of legal advocacy. But I mean, I agree. I mean, I, when I was a law student, you know, some of the first cases that I worked on were environmental justice cases. And some of this was five years after this report had come out by the United Church of Christ on, that some people think of as being sort of the modern incarnation of the EJ movement. I'll say that that was,

[00:32:20] **Gerrard:** That was 1987.

[00:32:21] **Johnson:** Yeah, 1987. And, you know, I remember working—so this, this, they issued a report that showed that the pollution polluting facilities were concentrated disproportionately in communities of color. And so I see that birth, that time of real energy when you'd say, "Oh, I'm working on E.J.," and it felt like a really novel issue—in fact, I'm not even sure we did the shorthand at the time—to now, where it's more of a standard part of what I'd call mainstream environmental justice groups. And then, as Ruth just mentioned, I see more recently that groups that are E.J. groups or communities of color and in the global context and in the United States being more active in the climate crisis movement. I see those changes as ones where there's no taking that, you know, out again. Like, it's just this is how we talk about environmental advocacy. I see it in my students, the kinds of work they generate, the organizations they're working with. And I'm sure you see it, too, Michael, in your students that this is just how they understand the issue.

[00:33:36] **Gerrard:** The human-caused pollutant that has the greatest impact on climate change is carbon dioxide. But carbon dioxide at the levels we're talking about doesn't have local impacts. It has terrible global impacts, but it doesn't really have much of an effect near where it is generated. But how does that play out in the environmental justice context?

[00:34:00] **Santiago:** Yeah, absolutely. There are a whole very long list of emissions pollutants from power plants and other sources of contamination that stay locally and create what are known as hotspots, right? And so people who live near power plants often have to deal with nitrogen oxides, sulfur dioxide emissions, volatile organic

compounds that lead to, as we know, increased cancer rates, respiratory disease, cardiovascular ailments, you name it, the whole list. And so addressing as you're implying, right, that just the climate warming gases does not do much for those other co-pollutants that are present in many of these industries.

[00:34:48] **Gerrard:** Are there tensions between the environmental justice movement and the overall climate movement?

[00:34:55] **Santiago:** I am optimistic. I'm seeing more and more collaboration and a recognition that the way that we need to go about addressing the climate movement needs to center environmental justice communities, needs to center communities that have shouldered the burden of disproportionate pollution.

[00:35:16] **Johnson:** Yeah, I mean, I think there will always be issues of are you representing enough? You know, who's at the table, who gets to shape policies and movements? And I think there will always be questions about urgency and priorities. And there are even specific policy debates, as you know. But like Ruth, I am optimistic. I mean, I see more discussion, more collaboration. And it feels like a muscle that everyone knows how to use now, right? I think it's just it's now being built into a lot of the work. And maybe one explanation is the crisis is kind of unifying, and it doesn't necessarily have to be, but I think that just being able to see who it's affecting in such an urgent way it's just not the time to have divisions among all of us who are trying to work on these issues. And that doesn't mean that there aren't legitimate, you know, policy differences or approach differences, tactical differences. But I do see an effort in spirit towards collaboration when I observe the groups working together.

[00:36:30] **Gerrard:** Olati and Ruth, thank you so much for joining us.

[00:36:33] **Johnson:** That was great. I learned so much.

[00:36:36] **Santiago:** Likewise.

[00:36:38] **Gerrard:** My guests today were Olati Johnson and Ruth Santiago. Thank you for joining us for *Defending the Planet*. Make sure to follow us and find the entire series wherever you get your podcasts. Thanks so much for listening. *Defending the Planet* is brought to you by Columbia Law School and is produced by the Office of Communications, Marketing, and Public Affairs at Columbia Law School. Our executive producer is Michael Patullo. Julie Godsoe, Nancy Goldfarb, and Cary Midland, producers. Editing and engineering by Jake Rosati. Writing by Martha Moore and Dan Shaw. Production coordination by Zoë Attridge. Special thanks to Michael Burger and the Sabin Center for Climate Change Law. If you like what you hear, please leave us a review on your podcast platform. The more reviews we have, the more people who get to listen. If you're interested in learning more about the law and climate change, visit us at [law.columbia.edu](http://law.columbia.edu) or follow us on [Facebook](#), [Twitter](#), and [Instagram](#). You can also follow the Sabin Center on Twitter [@SabinCenter](#).