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Environmental Evidence

Seema Kakade

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Environmental Evidence, forthcoming U. Colorado Law review March 2023.

The voices of impacted people are some of the most important when trying to make improvements to social justice in a variety of contexts, including, criminal policing, housing, and health care. After all, the people with on the ground experience know what is likely to truly effectuate change in their community, and what is not. Yet, such lived experience is also often significantly lacking and undermined in law and policy. People with lived experience tend to be seen as both community experts with valuable knowledge, as well as non-experts with little valuable knowledge. This Article explores the lived experience with pollution as evidence in civil environmental enforcement permit litigation. In doing so, it makes three contributions to the literature. First, it articulates a vision for thinking about evidence in civil environmental permit litigation that is not solely focused on conventional “scientific” evidence, but also includes what this Article calls “community” evidence. Community evidence is the range of tools accessible to local communities that document the reality of their experience with pollution, such as lay witness testimony, photos and videos, demographic data, and citizen science. Second, it identifies key challenges with using community evidence in civil environmental enforcement permit cases in both the administrative and judicial contexts. Some cases encounter evidentiary challenges regarding relevancy, reliability, and scope, and others face more practical challenges such as lack of funding and understanding of the legal system. Third, it advocates for increased use of community evidence, in conjunction with conventional scientific evidence, as a mechanism to uplift the influence of the lived experience in environmental enforcement permit cases. Suggestions for how to do so include paying local community members for their expertise, proactively discussing community evidence in briefs and case opinions, and creating rebuttable presumptions for certain kinds of community evidence. The goal is to validate community evidence as a source of knowledge and truth worthy of consideration.