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# Race and Waste: The Quest for Environmental Justice

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## I. INTRODUCTION

Environmental racism is not a science, but the result of a power dynamic. . . . occur[ring] when people who have power in society choose not to have environmental hazards in their community. This environmental inequity becomes environmental injustice when environmental hazards are placed in a community of disempowered people.<sup>1</sup>

Environmental racism is real. It is as real as the racism found in housing, education, employment and the judicial system. Environmental racism results in the nationwide phenomenon in which minority neighborhoods bear a disproportionately large environmental burden as compared to white neighborhoods.<sup>2</sup> It refers to any policy, practice or directive that differentially affects or disadvantages individuals, groups or communities based on race or color.<sup>3</sup> This is the outcome that the landmark “1987 United Church of Christ report on toxic waste and race claimed

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<sup>1</sup> Judith M. Espinosa and Eileen Gauna, Alliance for Transportation Research Institute, University of New Mexico, Environmental Justice Background Report 7 (2004), <http://www.unm.edu/~ejpc/EJBackgroundReport-Final-Dec08-04.pdf> (quoting statement by Edward Rush of the Center for Health, Environment and Justice).

<sup>2</sup> United Church of Christ Commission for Racial Justice, Toxic Wastes and Race: A National Report on the Racial and Socio-Economic Characteristics of Communities with Hazardous Waste Sites 9-10 (1987) (Commission for Racial Justice) [hereinafter UCC Report]. In using the term “minorities,” I follow the Commission for Racial Justice, which defines them as persons who self-identity on the U.S. Census as non-white or Hispanic. *Id.* Unless defined otherwise, this paper uses “minority neighborhoods” as a general term to refer to geographical areas with a high concentration of minority residents.

<sup>3</sup> See Robert D. Bullard, *Unequal Environmental Protection: Incorporation Environmental Justice in Decision Making*, in *Worst Things First?: The Debate Over Risk-Based National Priorities* 241 (Adam M. Finkel & Dominic Golding eds., 1994).

was not the result of mere coincidence.”<sup>4</sup> Indeed, evidence suggests that this disproportionate economic impact from environmental mismanagement was already considered a decade earlier, albeit without the suggestion of discriminatory intent.<sup>5</sup> It was not until 1987, however, that the term “environmental racism” was coined. It was described as discrimination in environmental policy-making, enforcement of regulations and laws, and the deliberate targeting of communities of color for toxic waste disposal and the siting of polluting industries.<sup>6</sup> It is racial discrimination in light of the fact that the life-threatening presence of poisons and pollutants occurs mainly in communities of color. This was the reality that the United Church of Christ Commission for Racial Justice study uncovered and it is the reality of hundreds of minority communities across the United States.<sup>7</sup> The residents of these communities know what environmental injustice is—they live it every day.

#### A. How the Modern Environmental Movement Has Fostered Environmental Racism

One of the most disturbing and somewhat ironic trends is that the problem of environmental racism has grown out of the environmental movement itself. It would not be possible for environmental protection laws to eliminate the dangers of facilities such as hazardous waste treatment plants completely, so rather these laws must try to reduce and redistribute those dangers. As a result, this seemingly race-neutral field is prone to racism.<sup>8</sup> Whether intended or not, however, the neighborhoods of people of color have borne a disproportionate share of the nation's noxious risks and environmental hazards.<sup>9</sup> Although not a new phenomenon, the cry of NIMBY (Not in My Back Yard) ensures the notion that environmental protection laws just redistribute the dangers of hazardous waste. This credo moves hazardous

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<sup>4</sup> Michael K. Heiman, *Race, Waste, and Class: New Perspectives on Environmental Justice* (2006), <http://www.ejnet.org/ej/rwc.html> (mentioning UCC Report, *supra* note 2).

<sup>5</sup> *Id.*

<sup>6</sup> Benjamin Chavis, *Foreword* to *CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 3*, (Robert Bullard, ed., 1993).

<sup>7</sup> See UCC report, *supra* note 2. The UCC report, entitled *Toxic Waste and Race*, documented the disproportionate burden that minority communities, such as African American, Latino, Native American and Asian American bear as they are the “dumping grounds” for toxic waste and pollution. *Id.*

<sup>8</sup> Robert Bullard, *Anatomy of Environmental Racism*, in *TOXIC STRUGGLES 26* (Richard Hofrichter ed., 1993).

<sup>9</sup> As such hazards are also disproportionately visited upon low-income communities, it has been suggested that the problem of discriminatory siting may be one of income rather than ethnicity. Investigation, however, has shown that this is not the case. Professor Bullard's studies show that lead poisoning disproportionately affects children of color at every class level. Robert Bullard, *Anatomy of Environmental Racism*, in *TOXIC STRUGGLES 26* (Richard Hofrichter ed., 1993). Lead affects three to four million children in the United States, most of whom are Latino or African-American and live in urban areas. *Id.* Among children under 6 years of age, the percentage of African-American children who have excessive levels of lead in their blood far exceeds the percentage of white children who do at all income levels. *Id.* For families earning less than \$6,000 per year, 68% of African-American children had lead poisoning whereas only 36% of white children did. *Id.* Additionally, with regard to Superfund cleanup, communities of color wait up to four years longer than white communities to obtain cleanup. Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S4. Furthermore, when cleanup was implemented, white communities received permanent treatment remedies 22 times more frequently than did communities of color, who typically received containment technologies. *Id.* See generally UCC REPORT, *supra* note 2 (finding that life-threatening presence of poisons and pollutants occurs mainly in minority communities across the United States); Valerie J. Phillips, *Have Low Income, Minorities Been Left out of the Environmental Cleanup?*, ADVOCATE, Oct. 1994, at 16 (Idaho State Bar Journal).

facilities from white, affluent suburbs to neighborhoods of those without clout, particularly people of color. The risk is not reduced, but the identity of the population exposed changes.<sup>10</sup> Thus, the movement decrying environmental racism is antithetical to modern environmentalism.

#### B. The Four Characteristics of Environmental Racism

A study commissioned by the United Church of Christ concluded it was "virtually impossible" that the nation's commercial hazardous waste facilities are distributed disproportionately in minority communities merely by chance; therefore in all likelihood underlying factors related to race play a role in the location of these facilities.<sup>11</sup> These underlying factors include: 1) availability of cheap land; 2) lack of opposition to the siting of the facility due to lack of political resources and clout; 3) inability to "walk with their feet" or lack of mobility resulting from poverty and housing discrimination; and 4) poverty.<sup>12</sup> These characteristics contribute to communities' vulnerability to unfair sitings of waste and polluting industries and, thus, their disproportionate exposure to environmental risk.<sup>13</sup>

This article attempts to shed light on the development of environmental racism as seen through the situation that exists in Chester, Pennsylvania, and to suggest possible legal solutions to the problem, not only in Chester, but nationwide. Part II of this Article examines the environmental injustice that exists in Chester, Pennsylvania and explores the quickly accumulating evidence of the problem. Part III analyzes the traditional legal approach to combating environmental racism. Part IV concludes with a possible solution for the future.

## II. THE DISPROPORTIONATE ENVIRONMENTAL RISKS BORNE BY COMMUNITIES OF COLOR

### A. The Case of Chester, Pennsylvania

Charles Lee, chairperson of the National Environmental Justice Advisory Committee to the Environmental Protection Agency (EPA) called it the worst case of environmental racism he has ever seen.<sup>14</sup> He was talking about Chester, Pennsylvania, a city that exemplifies the problems of environmental justice.

Chester, located just southwest of Philadelphia, is home to 42,000 residents and one of the largest collections of waste facilities in the country.<sup>15</sup> A predominantly black neighborhood, Chester's poverty rate lies at twenty-five percent, which is three

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<sup>10</sup> Richard Lazarus, Address at the Annual Mitchell Lecture at the University of Buffalo School of Law (Mar. 3, 1993).

<sup>11</sup> Paul Mohai & Bunyan Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 U. COLO. L. REV. 921, 922 (1992) (emphasis added).

<sup>12</sup> UCC Report, *supra* note 2.

<sup>13</sup> Rachel D. Godson & James S. Freeman, *Jobs, Trees and Autonomy: The Convergence of the Environmental Justice Movement and Community Economic Development*, 5 MD. J. CONTEMP. LEGAL ISSUES 25, 26 (1994).

<sup>14</sup> Mike Ewall, *Environmental Racism in Chester* (1999), [http://www.ejnet.org/chester/ewall\\_article.html](http://www.ejnet.org/chester/ewall_article.html).

<sup>15</sup> *Id.*

times the national average.<sup>16</sup>

One of Chester's heaviest polluting facilities, the seventh largest garbage-burning incinerator in the nation, is located directly across the street from residential housing in Chester's west-end.<sup>17</sup> One might wonder where all this trash comes from! Although all the trash is burned in Chester, over half of the waste burned at the facility, known as the Westinghouse Incinerator, comes from all over the East Coast.<sup>18</sup>

While there have been many instances of Westinghouse's disregard for the community of Chester, a classic example came in 1993 when a highly radioactive pellet of Cesium-137 was lost.<sup>19</sup> Cesium-137 decays in the environment and is significant because of its prevalence; it has a relatively long half-life and its potential effects on human health are not to be taken lightly. People may be exposed externally to gamma radiation emitted by cesium-137 decaying products.<sup>20</sup> If very high doses are received, skin burns can result.<sup>21</sup> The radiation that is emitted can pass through the human body and deliver doses to internal tissue and organs.<sup>22</sup> People may also be exposed internally if they inhale Cesium-137.<sup>23</sup> Based upon studies, exposure to Cesium-137 can result in malignant tumors and shortening of life.<sup>24</sup> To make matters worse, the community was not notified until several months later.<sup>25</sup> To date, Westinghouse has no idea what happened to the Cesium—it was either vaporized in the incinerator or melted down in the steel plant of one of Westinghouse's contractors.<sup>26</sup> Westinghouse was never fined for the violation.<sup>27</sup>

The newest waste treatment facility in Chester, located adjacent to the Westinghouse Incinerator, is Thermal Pure Systems, the largest infectious medical waste treatment facility in the nation.<sup>28</sup> Although no longer operating, Thermal Pure at one point brought in nearly three times as much medical waste as the amount produced in the entire state of Pennsylvania.<sup>29</sup> The plant often left medical waste lying in the grass outside its boundaries, in public space where children were free to play.<sup>30</sup>

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* The facility, originally operated by Westinghouse until 1997, is permitted to burn 2,688 tons of trash per day. *Id.*

<sup>18</sup> Ewall, *supra* note 14. The trash comes from Pennsylvania, New Jersey, New York, Maryland and Delaware, among other states. *Id.*

<sup>19</sup> *Id.* Westinghouse still has no idea what happened to the Cesium, however they did admit that if someone were exposed to it for as little as six hours, it could prove fatal. *Id.*

<sup>20</sup> EPA Facts about Cesium-137, <http://www.epa.gov/superfund/resources/radiation/pdf/cesium.pdf> (July 2002) (last visited March 23, 2007).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Ewall, *supra* note 14.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> Ewall, *supra* note 14. The waste treated included body parts, bloody bandages, syringes and anything that was considered biohazard. *Id.*

<sup>30</sup> *Id.* In addition, multiple workers were stabbed by needles while handling the waste. Some had been fired after the incidents, leaving them with recurring health problems that medical personnel still have

As if this was not enough, after a problem at the facility forced it to shut down one of their boilers, Thermal Pure left thirty-three trucks of medical waste to sit, unrefrigerated, exposed to the summer sun for four days.<sup>31</sup> They also failed to notify the Department of Environmental Protection (DEP) of the shutdown, which was against regulations.<sup>32</sup> After notifying the Department, residents were told that the trucks could not be moved because doing so might constitute a health hazard,<sup>33</sup> it is ironic in light of the fact that Thermal Pure concluded that leaving the trucks to bake in the sun did not constitute a health hazard.

Another major polluting facility in Chester is the DELCORA sewage treatment facility, located in close proximity to the Thermal Pure plant.<sup>34</sup> DELCORA's huge capacity for wastewater and sewage treatment allows it to treat about ninety-percent of the sewage in Delaware County.<sup>35</sup> On top of that DELCORA treats industrial wastewater with elevated levels of both petroleum and benzene content.<sup>36</sup> This highly toxic industrial sludge is then burned in DELCORA's sludge incinerator, releasing many pollutants including arsenic.<sup>37</sup> The EPA determined the high level of arsenic surrounding the plant was unsafe for the community.<sup>38</sup>

## B. The Body of Evidence

A significant body of evidence supports the contention that in most aspects of human activity—at the workplace, in the home, in the community at large—people of color face more environmental risks than whites. Evidence suggests that race, and not poverty, plays a more significant role in determining the distribution of environmental hazards.<sup>39</sup> This subsection examines the evidence regarding disparate racial impact, particularly in Chester.

### 1. Workplace Hazards

A typical 1970s study showed that African-American men face a sixty percent greater chance of facing health hazards in the workplace.<sup>40</sup> Worker safety issues today are no different, particularly in Chester. For example, the waste processing facilities produce incinerator ash, defined as a hazardous waste under international

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trouble identifying. *Id.*

<sup>31</sup> *Id.* Legally, they are only allowed to leave such waste in those conditions for twenty-four hours. *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Ewall, *supra* note 14.

<sup>35</sup> *Id.* This only accounts for twenty percent of DELCORA's total capacity. *Id.*

<sup>36</sup> *Id.* Local industries include Scott Paper, Sunoco and British Petroleum Oil Refineries. *Id.*

<sup>37</sup> *Id.* Other pollutants, the same as those released by the Westinghouse Incinerator, include HCL, sulfur oxides, nitrous oxides, and dioxins. *Id.*

<sup>38</sup> *Id.* Sludge from three other county sewage plants is also sent to be burned in DELCORA's incinerator. *Id.*

<sup>39</sup> PAUL MOHAI & BUNYAN BRYANT, *Environmental Racism: Reviewing the Evidence*, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS 163, 164 (Bunyan Bryant & Paul Mohai eds., 1992)

<sup>40</sup> Luke Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L.Q.* 619, 628 n.24 (1992) [hereinafter Cole, *Empowerment As the Key*] (interpreting Robert E.B. Lucas, *The Distribution of Job Characteristics*, 56 *REV. ECON. & STAT.* 530, 533 (1974)).

law, yet not regulated as hazardous by U.S. environmental laws.<sup>41</sup> Workers at these Chester facilities pick out unburned rags, wood and paper from the ash.<sup>42</sup> In addition, many workers have limited respiratory protection and no eye protection.<sup>43</sup> Simply breathing the air around these sites puts workers at risk of toxic exposure from the ash dust.<sup>44</sup> At one particular site, Clean Metal, there is no health monitoring for the workers.<sup>45</sup>

## 2. Hazards at Home: Lead Poisoning

The burning of metal in the Westinghouse incinerator and of solid waste in the DELCORA sewage treatment incinerator exposes Chester residents to high levels of environmental lead.<sup>46</sup> This is in addition to the exposure to lead commonly found in one's home, especially in old paint or old pipes.<sup>47</sup> In 1995, the EPA studied the city of Chester and found that children living in Chester have unacceptably high blood lead levels; sixty percent of the samples were above the Center for Disease Control's recommended maximum level.<sup>48</sup> It is not a coincidence that Chester has the highest percentage of low-weight births in the state—lead is linked to low birth weight babies.<sup>49</sup>

## 3. Hazards in the Community

The bottom line is that the siting of hazardous waste facilities affects communities of color more than white neighborhoods.<sup>50</sup> Minority communities, such as those found in Chester, "are disproportionately impacted by the present State and local government systems for permitting and expanding hazardous waste and chemical facilities."<sup>51</sup> Besides lead exposure, Chester's waste treatment facilities emit particulate matter, which causes respiratory diseases and difficulty breathing.<sup>52</sup>

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<sup>41</sup> No More Toxic Ash in Chester! Shut down Clean Metal!, EJNET.ORG: WEB RESOURCES FOR ENVIRONMENTAL JUSTICE ACTIVISTS, Aug. 17, 2003, <http://www.ejnet.org/chester/cleanmetal/> (last visited March 23, 2007).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Jessica Howington and Christina Viola, *Health Effects of Pollutants Released by Facilities*, EJNET.ORG: WEB RESOURCES FOR ENVIRONMENTAL JUSTICE ACTIVISTS, June 22, 1996, [http://www.ejnet.org/chester/health\\_chems.html](http://www.ejnet.org/chester/health_chems.html) (last visited March 23, 2007).

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* The infant mortality rate is also double that of the County as a whole. *Id.*

<sup>50</sup> U.S. GENERAL ACCOUNTING OFFICE, *SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES* (1983) [hereinafter U.S. GENERAL ACCOUNTING OFFICE] (three out of four commercial hazardous waste sites in eight southern states are located in majority African-American communities the fourth in a 38% African-American community); *See also* UCC REPORT, *supra* note 2 (finding that hundreds of minority communities in the United States bear disproportionate exposure to environmental risk).

<sup>51</sup> From Plantations to Plants: Report of the Emergency National Commission on Environmental and Economic Injustice in St. James Parish, Louisiana, [www.ejrc.cau.edu/convent\\_report.html](http://www.ejrc.cau.edu/convent_report.html), quoting the Louisiana Advisory Committee to the U.S. Civil Rights Commission (1993) (quoting the Louisiana Advisory Committee to the U.S. Civil Rights Commission) (last visited March 23, 2007).

<sup>52</sup> *See* Howington & Viola, *supra*, note 46 ("Airborne particulate matter consists of droplets or particles of solid matter. It's a component of soot, vehicle emissions, uncontrolled combustion and the mechanical

The soot and ash emitted from these facilities contains sulfur dioxide, further causing irritation of the eyes, nose and throat, not to mention the possibility of developing lung cancer or bronchitis.<sup>53</sup> The incomplete burning of hydrocarbons that occurs during combustion at these facilities forms carbon monoxide, which can lead to oxygen deprivation, clogged arteries and an increase in blood coagulation.<sup>54</sup> The list goes on and on.<sup>55</sup> In addition to their daily bombardment with pollutants, the residents of Chester face probable physiological effects from their environment.<sup>56</sup> Confronted with ugly facilities, ever-present noxious odors, and daily inundation of the constant noise of rumbling trucks certainly will take a toll on one's daily routine.<sup>57</sup>

The situation in Chester leaves us to ponder several questions. Commentators question whether all of this constitutes racism or simply a matter of classism where poor communities tend to end up with most of society's waste.<sup>58</sup> Because race remains a significant factor when looking at the location of environmental pollutants, even when factoring out the economic class of a community,<sup>59</sup> racism as a justification appears more likely. In fact, middle class communities of color usually tend to have more wastes facilities located in their neighborhood than poor white communities.<sup>60</sup>

The campaign against this environmental injustice is still in its development stage, particularly with regard to identifying viable legal strategies. Legal scholarship on the topic has largely been confined to recounting failed attempts to litigate environmental racism claims under the Equal Protection Clause of the 14th Amendment.

### III. DEVELOPMENT OF A LEGAL APPROACH TO ENVIRONMENTAL RACISM

Despite the weight of evidence which points persuasively to the existence of environmental racism, federal and state law remains too stagnant to give minorities an opportunity to succeed in an environmental racism lawsuit.<sup>61</sup> At the federal level,

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breakup of soil.”).

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* Hydrochloric acid is released in major quantities by combustion and by the burning of paper, plastic and municipal waste. Hydrochloric acid causes irritation of the eyes, mouth, throat, skin and airways. Sources of dioxin in Chester include Delcora's emissions and incinerations of plastics at Westinghouse. It accumulates in living tissue and it's attracted to fats and oils. It can cause liver and kidney toxicity, infertility, endometriosis, and disrupts genes that control synthesis and metabolism of hormones, enzymes, growth factors, among others. *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* The worst part of it all is the mental anguish of knowing that one's family is constantly at risk. *Id.*

<sup>58</sup> Ewall, *supra* note 14. On the other hand, many studies have shown that waste facilities tend to be located in communities of color, above and beyond class considerations. *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> See *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1144, 1149 (E.D. Va. 1991) (refusing to find the *Arlington Heights* requirement of a racially motivated decision despite evidence of racially disproportionate impact; “official action will not be held unconstitutional solely because it results in a racially disproportionate impact. Such action violates the Fourteenth Amendment's Equal Protection Clause only if it is *intentionally* discriminatory”); *East-Bibb Twiggs Neighborhood Ass'n v. Macon Bibb Planning & Zoning Comm'n*, 896 F.2d 1264, 1266-67 (11th Cir. 1989) (affirming district court's denial of an injunction against a landfill, indicating defendants did not act with discriminatory intent, therefore

potential environmental racism plaintiffs have the option of bringing claims under the Equal Protection Clause of the Fourteenth Amendment or Title VI of the Civil Rights Act.<sup>62</sup> Other options include bringing environmental tort actions, such as trespass or public and private nuisance.

#### A. Establishing the Requirements of an Equal Protection Violation

To date, the Equal Protection Clause of the Fourteenth Amendment has been the most common basis for challenging alleged environmental racism in the courts.<sup>63</sup> To mount a successful equal protection challenge, plaintiffs must establish a “disproportionate impact” on a suspect class and the presence of “discriminatory intent.”<sup>64</sup> The discriminatory intent requirement has presented the most significant hurdle for plaintiffs alleging environmental racism.

The “discriminatory intent” requirement is a result of the seminal United States Supreme Court case *Washington v. Davis*.<sup>65</sup> In that case, unsuccessful black applicants for employment as police officers by the District of Columbia brought a class action claiming that recruiting procedures, including a written personnel test administered to determine whether applicants have acquired a particular level of verbal skill, were racially discriminatory.<sup>66</sup> The Supreme Court narrowed the applicability of the equal protection clause, holding that it was not enough that a plaintiff just show that a challenged practice had a discriminatory impact, but that the practice was motivated by discriminatory intent.<sup>67</sup>

The court in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*<sup>68</sup> tried to better define this nebulous element. The Court stated that “determining whether [an] invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”<sup>69</sup> The Court set out five categories of circumstantial evidence from which discriminatory motive may be inferred: (1) the impact of the official action and whether it bears more heavily on a particular race;<sup>70</sup> (2) the decision’s historical background;<sup>71</sup> (3) the sequence of events leading up to the challenged

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finding no violation of the Fourteenth Amendment); *Bean v. Southwestern Waste Mgmt. Corp.*, 482 F. Supp. 673, 679-80 (S.D. Tex. 1979) (stating despite evidence that, in 1975, eleven solid waste sites were placed in sites with 100% minority population, and none were placed in 100% Anglo population, this evidence not establish “purposeful racial discrimination”).

<sup>62</sup> *East-Bibb*, 896 F.2d at 1264 (plaintiffs brought Equal Protection suit seeking injunction against permit to operate a landfill in plaintiffs’ neighborhood); *South Bronx Coalition For Clean Air, Inc. v. Conroy*, 20 F. Supp. 2d 565, 573 (S.D.N.Y. 1998) (plaintiffs filed Title VI suit to enjoin construction of bus depot and solid waste facility).

<sup>63</sup> The Fourteenth Amendment states in relevant part that “no State shall...deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, 1. See *Washington v. Davis*, 426 U.S. 229, 239 (1976) (stating that the central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race).

<sup>64</sup> *Davis*, 426 U.S. at 244.

<sup>65</sup> *Id.* at 229.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 239-242.

<sup>68</sup> 429 U.S. 252, 266-268 (1977).

<sup>69</sup> See *id.*, at 266 (noting that this list was not meant to be exhaustive).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 267.

decision;<sup>72</sup> (4) any departures, substantive or procedural, from the ordinary decision making process;<sup>73</sup> and (5) the action's legislative or administrative history.<sup>74</sup> Subsequent case law indicates that providing proof of a racially motivated decision is the evidentiary hurdle plaintiffs have difficulty clearing in environmental racism cases.

## B. Environmental Racism in the Courts: Struggling with the Intent Requirement

### 1. *Bean v. Southwestern Waste Management Corporation*

The inadequacy of the discriminatory-intent requirement and the need to develop a winning strategy to combat already rampant environmental racism is demonstrated by courts opinions addressing environmental problems in minority communities. In *Bean v. Southwestern Waste Management Corp.*<sup>75</sup> the minority plaintiffs alleged an equal protection violation and sought to enjoin the siting of a solid waste disposal facility within their community in Houston, Texas.<sup>76</sup> The approved solid waste landfill site was located in an eighty-two percent black neighborhood and was within 1,700 feet of a predominantly black high school.<sup>77</sup> The residents relied on two theories to establish discriminatory intent: (1) the permit decision was “part of a pattern or practice” of discrimination in the placement of solid waste sites,<sup>78</sup> and (2) approval of the permit amounted to discrimination in view of the historical placement of landfills and the events surrounding the permit application.<sup>79</sup> Despite establishing a substantial threat of irreparable injury, the plaintiffs failed the Davis test because they did not produce sufficient evidence demonstrating that the siting decision resulted from purposeful discrimination.<sup>80</sup>

### 2. *East Bibb Twiggs Neighborhood Association v. Mason-Bibb County Planning & Zoning Commission*

In *East Bibb Twiggs Neighborhood Association v. Mason-Bibb County Planning & Zoning Commission*,<sup>81</sup> the arduous burden of proving discriminatory intent again proved fatal to the plaintiffs' cause of action despite substantial evidence of discrimination.<sup>82</sup> Here, a permit for a solid waste landfill site in a predominantly African-American community was approved by the local planning and zoning

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *See id.*, at 268 (noting that this list was not meant to be exhaustive).

<sup>75</sup> 482 F. Supp. 673, 677 (S.D. Tex. 1979), *aff'd*, 782 F.2d 1038, 1038 (5<sup>th</sup> Cir. 1986).

<sup>76</sup> *Id.* at 675.

<sup>77</sup> *Id.* at 677.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 678.

<sup>80</sup> *Id.* at 677. To be successful when seeking an order to revoke a permit, certain prerequisites must be met, including as follows: (1) substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) the threatening injury to the plaintiffs outweighs the threatened harm the injunction may do to the defendants, and (4) granting the preliminary injunction will not disserve the public interest. *Id.* at 676.

<sup>81</sup> 706 F. Supp 880, 884 (M.D. Ga.), *aff'd*, 896 F.2d 1264, 1267 (11<sup>th</sup> Cir. 1989).

<sup>82</sup> *Id.* at 881.

commission.<sup>83</sup> The proposed site was located in a census tract in which 3,367 of a total 5,527 residents were African American.<sup>84</sup> By virtue of this demographic analysis, the decision to approve the landfill the site would seem to have a greater impact on the Black population.<sup>85</sup> Opponents of the landfill also cited concerns over the adequacy of the buffer between the site and adjacent residences, potential health threats from vermin and insects, and the effect of the landfill on well water relied on by many of the residents.<sup>86</sup> Like in *Bean*, the court applied the Arlington Heights 5-part test to determine whether the plaintiffs' evidence supported a finding of discriminatory purpose. Focusing on the historical background factor, but applying it more restrictively, the court in *East Bibb* held that evidence of past decisions by agencies other than the county planning commission was irrelevant to the discrimination issue at hand.<sup>87</sup> Thus, the plaintiffs' evidence of disparate impact was inadequate because it focused on decisions made by local authorities other than the zoning commission. Furthermore, the siting of an earlier landfill in a predominantly white neighborhood undermined the claim of a pattern of official decisions explainable only in terms of race.<sup>88</sup> Hence, the Court found neither direct evidence of discriminatory purpose nor facts from which intent could be inferred.

### 3. *R.I.S.E., Inc. v. Kay*

Both the reasoning and result of the above two cases was followed in *R.I.S.E. v. Kay*.<sup>89</sup> Here, the court rejected an equal protection challenge to the siting of the regional landfill in an area populated primarily by African Americans.<sup>90</sup> In *R.I.S.E.*, despite residents' opposition to the siting of a new landfill, the Board of Supervisors for King and Queen County in Virginia approved the plans for the waste site.<sup>91</sup> The citizens then brought suit charging the Board with "maintaining a pattern and practice of racial discrimination in landfill location and zoning," a violation of one of the factors articulated in *Arlington Heights*.<sup>92</sup> The court, however, found that the requirement of a racially motivated decision was lacking.<sup>93</sup> As the above cases demonstrate, while disproportionate effects on minorities were present, the court was not willing to infer any intent to discriminate.

### C. Using Equal Protection to Solve the Problem in Chester, Pennsylvania.

Existing case law does not indicate that minority plaintiffs are likely to succeed in

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<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 884.

<sup>86</sup> *Id.* at 883.

<sup>87</sup> *Id.* at 885.

<sup>88</sup> *Id.* at 884.

<sup>89</sup> 768 F.Supp. 1144, 1149 (E.D. Va. 1991), *aff'd*, 977 F.2d 573, 573 (4<sup>th</sup> Cir. 1992).

<sup>90</sup> *Id.* at 1147.

<sup>91</sup> *Id.* at 1147.

<sup>92</sup> *Id.* at 1142.

<sup>93</sup> *Id.* at 1149. The court acknowledged that the impact of a decision may be an element to consider when determining whether an action involved discriminatory intent. However, the court maintained that action will be unconstitutional only of proof of racially discriminatory intent accompanies the finding of disproportionate impact.

challenging particular actions based on an environmental racism equal protection theory. To date, evidence of disparate impact has not been adequate to overcome the “discriminatory intent” requirement first developed in *Davis*. Although it seems as though Chester would have a better claim than the plaintiffs did in *East Bibb*, it does not seem that citizens of Chester, Pennsylvania would be successful in attempting to bring forward an equal protection claim.<sup>94</sup> As the above cases demonstrate, the court was willing to acknowledge that disproportionate effects on minorities were present in various degrees, but was not keen on inferring any intent to discriminate. The situation in Chester certainly demonstrates the presence of disproportionate effects on minorities. As stated earlier, Chester is home to the highest percentage of low-weight births in Pennsylvania.<sup>95</sup> Furthermore, Chester’s lung cancer mortality rate is sixty percent higher than the rates for Delaware County.<sup>96</sup>

It is clear that Chester, Pennsylvania is a glaring example of environmental injustice. But, being able to prove that the state intended to discriminate is an entirely separate battle. Absent a stark pattern of inequitable treatment emerging from siting decisions, environmental racism claims will continue to be difficult to prove. Although it seems as though the impact of the sitings and their negative effects have an exceedingly greater impact on minority communities, the court would be reluctant to simply infer from these statistics that there was intent to discriminate. Like the evidence found in cases such as *R.I.S.E. and Bean*, there is simply insufficient evidence of intentional discrimination. Even using the *Arlington Heights* factors, the court would most likely refuse to find discriminatory intent.

#### D. Criticism of the Intent Standard

Discriminatory motivation, i.e. the intent standard, has proved to be a formidable obstacle to obtaining judicial relief in suits challenging state action on the basis of environmental racism. It does not seem that reasons given to support the intent standard are sufficient to justify the weighty requirement of an illicit motive in environmental racism claims.<sup>97</sup> One position vehemently taken in defense of the discriminatory purpose requirement is the fear that abandonment of the intent standard will result in an examination of every uneven impact on minorities.<sup>98</sup> However, this assumes incorrectly that the discrimination claims are invalid.<sup>99</sup> As

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<sup>94</sup> As opposed to the siting history of *East Bibb*, where only one other landfill was located in the area, and this was in an area of predominately white residents, the main Chester landfills have *all* been placed in areas where the African-American population is greater. However, it seems as though when these cases reach the court, the judge is less likely to rule against the department that approved the siting perhaps because it is just easier to go along with the party that has political clout and power. This is something that needs to be changed and is considered later on in this paper.

<sup>95</sup> Howington, *supra* note 40 (discussing the effects from the Westinghouse incinerator and DELCORA sewage treatment incinerator on the residents of Chester).

<sup>96</sup> *Id.* Chester, Pennsylvania is located in Delaware County. *Id.*

<sup>97</sup> See Gale Binion, “*Intent and Equal Protection: A Reconsideration*,” 1983 SUP. CT. REV. 397, 403-08 (listing reasons favoring intent standard including preoccupation with process-based theories, apprehension about the perceived alternative, and concern about potential, far-reaching judicial remedies); *East Bibb Twiggs Neighborhood Ass’n v. Macon-Bibb County Planning and Zoning Comm’n*, 706 F.Supp. 880, 884 (M.D. Ga. 1989) (rejecting discrimination claim despite substantial evidence), *aff’d* 896 F.2d 1264, 1267 (11<sup>th</sup> Cir. 1989).

<sup>98</sup> *Id.*

<sup>99</sup> See *Davis*, 426 U.S. at 248 (stating that rule invalidating neutral statute that merely has uneven results

evidenced by the aforementioned cases, the overwhelming evidence presented by the plaintiffs' of disproportionate impact presents a forceful argument that the Equal Protection Clause is being violated.

Moreover, when disproportionate effect is patently obvious, as is the case in environmental racism cases, courts should create a presumption of illicit motive.<sup>100</sup> Perhaps the burden should shift to the defendant, considering the fact that intent is difficult to ascertain.<sup>101</sup> The discriminatory intent standard as it stands is asking the plaintiff to read the minds of decision-makers.<sup>102</sup> A better approach would permit the party in the better position to produce evidence the opportunity to rebut the presumption that discrimination is intended. Perhaps there are already in existence better alternatives to an equal protection claim so as to put the controversy of "intent" on hold.

#### E. TITLE VI—DISPARATE IMPACT ANALYSIS

Title VI of the Civil Rights Act prohibits discrimination based upon race or national origin in federally funded programs or activities.<sup>103</sup> Unlike litigation under an equal protection claim, Section 602 of Title VI only requires proof that an action has resulted in a racially disparate impact—a "lesser" showing than illicit motivation.<sup>104</sup> Thus, where a plaintiff could demonstrate that an agency's siting decision, or its environmental policy governing waste disposal facilities, would have or has had a racially disparate impact, Title VI provides a basis for equitable relief.<sup>105</sup> Because this initial showing comports with the more sympathetic "unequal

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would be far-reaching and could adversely affect minorities).

<sup>100</sup> See, e.g., *McCleskey*, 481 U.S. at 294 (disregarding findings of study demonstrating extreme disparity in sentencing African-Americans to death); *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886) (enforcing law only against Chinese launderers is demonstration of grossly uneven effect); *R.I.S.E. II*, 768 F.Supp. at 1149 (demonstrating disparate impact of siting decisions); Gayle Binion, "Intent" and Equal Protection: A Reconsideration, 1983 Sup. Ct. Rev. 397, 441 (stating that policies resulting in gross disadvantages to minorities should create presumption of intended disadvantage); Kenneth L. Karst, *The Costs of Motive-Centered Inquiry*, 15 San Diego L.Rev. 1163, 1165 (1978) (commenting on heavy burden of persuasion for plaintiffs seeking racial equality).

<sup>101</sup> See Paul Brest, *Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 Sup. Ct. Rev. 95, 120 (1971) (noting typical impossibility of establishing decision-maker's objective). Some Supreme Court cases identified motive when there was little dispute as to intent. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97, 107-09 (1968) (invalidating law prohibiting teaching evolution theories as attempt to introduce religion into schools); *Griffin v. County Sch. Bd.*, 377 U.S. 218, 231 (1964) (determining that law closing public schools in order to segregate Caucasian and African-American students was invalid); *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) (finding law which redrew political lines to be motivated by desire to deprive African-Americans of right to vote).

<sup>102</sup> See Theodore Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 114-17 (1977) (discussing the discriminatory intent requirement and the burden it places on the plaintiff during lawsuits).

<sup>103</sup> See 42 U.S.C. §§ 2000d-2000d-7 (1988) (indicating "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."). Pursuant to statutory language, Title VI applies across a range of federally funded activities including, but not limited to schools, highways, depressed areas, housing, urban renewal, and public health. *Id.*

<sup>104</sup> Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENVTL. L. 285, 311 (1995).

<sup>105</sup> See Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 836 (1992) (noting that the Supreme Court recently allowed damages absent discriminatory intent in a Title IX case, the Court often treats Title IX and Title

results" definition of environmental racism, advocates for the movement are eager to apply it. But is disproportionate pollution in communities of color a civil rights issue?

#### A. Addressing the Arguments against Using Title VI for Environmental Justice

Critics doubt that a demonstration of disparate impact alone justifies a legal claim of racism. At most, critics are willing to concede that heavy pollution in minority areas results from lack of political power in communities of color. They argue, however, that the distribution of pollution can best be explained by market forces and that any racial disparity in environmental quality is a function of poverty rather than prejudice.<sup>106</sup>

Despite the argument that disparate environmental impact is the result of "political clout," it does not support the conclusion that there is no civil rights issue at hand. Under constitutional and statutory civil rights law, a dominant racial group acts illegitimately if it uses its majoritarian power to consciously deprive racial minorities of public benefits.

Title VI also has serious limitations. For example, it is not applicable to government authorities or private entities that do not receive federal financial assistance.<sup>107</sup> Thus, there may be corporate defendants not subject to the reach of Title VI. In addition, in the environmental racism context, Title VI would be, for the most part, limited to equitable relief.<sup>108</sup> While desirable, equitable relief does not provide a complete remedy to those who have been injured by exposure to environmental toxins. Even if Title VI would prohibit a future siting, it would not get rid of the current problems that exist because of sitings already in existence. Title VI may be instrumental in bringing about prospective relief by facilitating an end to, or amelioration of, race "neutral" policies having racially discriminatory effects in the siting of hazardous waste disposal facilities and the allocation of environmental remediation resources, but in order to redress more fully the harm resulting from environmental racism, additional solutions, ones that focus upon remedies for past and present harm, are required.

#### B. Applying Title VI to the Situation in Chester

While Title VI is not the "magic bullet" that some commentators make it out to

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VI similarly, and indicating Title VI provides a basis for both equitable relief as well as recovery of damages).

<sup>106</sup> Robert Wolcott, Chairman of EPA's Environmental Equity Workgroup in 1992, concluded: "It's more economic class [than race]. It comes down to resources and to locating oneself in jobs and homes that avoid exposure. In many cases, 'racial minorities don't have the capital to exercise that mobility.'" Frye, *supra* note 11, at 65-66; *see also* Stephen C. Jones, *EPA Targets 'Environmental Racism'*, NAT'L L.J., at 28 (Aug. 9, 1993) ("The most basic issue -- whether environmental racism actually exists as a phenomenon independent of the many social factors that determine racial disparities in this country -- requires further empirical study.").

<sup>107</sup> *See* 42 U.S.C. § 2000d-1 (1988) (limiting the statute's reach to entities that receive federal assistance); Lazarus, *supra* note 98, at 835 & n.214 (noting that the statute applies only to federally funded entities).

<sup>108</sup> *See* 42 U.S.C. § 2000d-7 (1988) (stating that available damages against the State are the same as any other covered entity); Fisher, *supra* note 97, at 328- 29 (stating "[u]nder Title VI, declaratory and injunctive relief are available once disparate impact has been demonstrated to a court. Damages, however, seem precluded except in cases of intentional discrimination.");

be, Title VI can be a potent weapon against environmental injustice.<sup>109</sup> Applying Title VI to the situation in Chester might prove more successful than using an equal protection claim. Under the rubric of “environmental justice” Title VI could be used to challenge local land use decisions and private business activities that would otherwise be non-reviewable under state and federal laws. An argument relying on Title VI would be based on the premise that the United States Environmental Protection Agency (EPA) provides funding to various state (typically environmental) agencies.<sup>110</sup> These agencies are responsible for environmental policies, notably hazardous waste enforcement programs and the siting of hazardous facilities and landfills. These state actors and recipients of EPA funding are subject to the antidiscrimination requirements of Title VI.<sup>111</sup> Consequently, if these state actors create a racially discriminatory distribution of hazardous siting, Title VI has been violated.<sup>112</sup> In Chester, by 1995, state officials had granted permits to one transfer station and four disposal companies.<sup>113</sup> A fifth waste-treatment permit was granted by the Pennsylvania Department of Environmental Protection (DEP) in one Chester black-majority neighborhood.<sup>114</sup> At this point, a lawsuit could have been brought stating that the residents of Chester suffered discrimination.

In fact, this is exactly what occurred.<sup>115</sup> Unfortunately, the arduous task of making out a disparate impact claim may be moot as the Supreme Court held in 1998, dismissing the Third Circuit case (involving Chester) in which the right to a private cause of action under Section 602 was upheld. Chester Residents Concerned for Quality Living (CRCQL) filed suit complaining about eight commercial waste permits that Pennsylvania issued to facilities located in predominately black communities in the city of Chester.<sup>116</sup> The defendants argued that the claim was now moot because CRCQL’s request for relief concerning the permit for Soil Remediation Systems, Inc. (“SRS”) was all that was left for the court to decide, and since this permit was eventually revoked by the defendant, it rendered the case moot.<sup>117</sup> CRCQL countered that the case was not moot because the claim made out in the complaint was broader than just the SRS permit; the suggestion of mootness

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<sup>109</sup> See, e.g., James H. Colopy, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L.J. 125, 152 (1994) (noting that Title VI provides a broader, easier attack path for victims); Fisher, *supra* note 97, at 311 (discussing the viability of Title VI claims to combat environmental racism); Lazarus, *supra* note 98, at 793; Donna Gareis-Smith, Comment, *Environmental Racism: The Failure of Equal Protection to Provide a Judicial Remedy and the Potential of Title VI of the 1964 Civil Rights Act*, 13 TEMP. ENVTL. L. & TECH. J. 57, 72 (1994) (noting that Title VI has been recently used successfully and is a viable option, however limited it may be).

<sup>110</sup> Federal financial assistance to states is considerable. Lazarus, *supra* note 105, at 835.

<sup>111</sup> Fisher, *supra* note 104, at 312.

<sup>112</sup> *Id.*

<sup>113</sup> Michael Janofsky, *Suit Says Racial Bias Led to Clustering of Solid-Waste Sites*, New York Times, at A15 (May 29, 1996).

<sup>114</sup> Environmental Racism in Chester, <http://www.ejnet.org/chester/>.

<sup>115</sup> See *Seif v. Chester Residents Concerned for Quality Living*, 524 U.S. 974 (1998) (vacating judgment and remanding with instructions to dismiss).

<sup>116</sup> See Brief for Petitioner, *Sief v. Chester Residents Concerned for Quality of Living*, 524 U.S. 974 (1998), 1998 WL 470120, (listing citizens’ complaints) [hereinafter Petitioner’s Brief].

<sup>117</sup> See Brief for Respondent, *Sief v. Chester Residents Concerned for Quality of Living*, 524 U.S. 974 (1998), 1998 WL 435980, (arguing that the case was moot because the contested permit had been revoked).

just a belated attempt to avoid review of the Third Circuit's decision.<sup>118</sup> In the end, the Supreme Court sided against CRCQL. Unfortunately, Chester Residents will never have the chance to argue on the merits whether the right to a private cause of action would have been successful. In 2001, the Court firmly closed the doors on bringing a Section 602 claim, holding that a private cause of action does not exist under the section.<sup>119</sup>

#### IV. ENVIRONMENTAL TORT ACTIONS: A VIABLE SOLUTION?

The disproportionate allocation of environmental burdens to communities of color, and the belief that such disparity interferes with the civil rights of persons living in those communities, has been the central focus of the environmental racism movement. However, the quest for environmental justice is not solely concerned with "civil rights." The ultimate consequences of environmental racism can include adverse physical reactions, increased risks of disease brought about by chronic exposure to environmental toxins, and a marked reduction in the use and enjoyment of property, both public and private. Such consequences are the central concern of tort law.<sup>120</sup> Traditional environmental tort causes of action include trespass, nuisance, negligence, and strict liability for abnormally dangerous activities. These doctrines impose liability upon actors who interfere with protected personal or property interests, thereby causing presently manifested physical injury and/or property damage that substantially interferes with the possession, use or enjoyment of property. It is important to note, however, that the remedies that tort actions allow for are retroactive and do not directly treat the siting issues.

##### A. Trespass Actions

Trespass actions may be particularly useful for recovering damages where the release of noxious or toxic substances into the environment has interfered with an owner's possessory interest in real property.<sup>121</sup> A trespass action requires that a person or instrumentality of such person has physically entered the property of another.<sup>122</sup> A trespass, when caused by the negligence of another, or another's

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<sup>118</sup> See Petitioner's Brief, *supra* note 116, at 2 (arguing that the case was not limited to the revoked permit, and thus was not moot).

<sup>119</sup> See *Alexander v. Sandoval*, 532 U.S. 275, 279-93 (2001) (challenging Alabama's policy of administering its driver's license examinations exclusively in English).

<sup>120</sup> See GERALD W. BOSTON & M. STUART MADDEN, *LAW OF ENVIRONMENTAL AND TOXIC TORTS* (1994) (asserting that "[e]nvironmental and toxic torts compromise harm to person, to property or to the environment due to the toxicity of a product, a substance or a process")

<sup>121</sup> See *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1192 (6th Cir. 1988) (describing a class action brought by plaintiffs for personal injuries and property damage resulting from hazardous chemicals leaking from defendant's landfill); *Grant v. E.I. DuPont de Nemours & Co.*, 1995 U.S. Dist. Lexis 15345, at \*10-13 (E.D.N.C. 1995) (granting summary judgment to defendant chemical manufacturer because plaintiffs' claim of trespass resulting from noxious gases requires actual injury); *Bradley v. American Smelting & Ref. Co.*, 709 P.2d 782, 786 (Wash. 1995) (stating that trespass does not require intent to commit damage but merely the knowledge that there is a high probability of injury to others and behavior that disregards those likely consequences).

<sup>122</sup> See RESTATEMENT (SECOND) OF TORTS § 158 (1979) ("One is subject to liability to another for trespass irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally, a) enters land in the possession of the other, or causes a thing or a third person to do so, or b) remains on the land, or c) fails to remove from the land a thing which he is under a duty to remove.")

engaging in abnormally dangerous activity,<sup>123</sup> must cause significant harm to a protected interest to justify the award of damages.

Although trespass is a useful weapon against interference with possessory interests in land, the trespass doctrine has limitations when used in the context of environmental discrimination. Persons living in communities disproportionately affected by environmentally burdensome enterprises cannot make use of trespass theory unless they can prove that the harm they have suffered, whether personal injury, psychological trauma, or property damage, is a result of the presence of toxic substances on their property. Trespass does little to afford a remedy to persons whose injuries derive from the overwhelming presence of environmentally burdensome enterprises in the community or from exposures that come by avenues other than the invasion of toxins into one's own home or yard. Thus, where residents are exposed to environmental toxins when they are going about their daily activities in the impacted community, the law of trespass is not intended to afford relief. And, even if trespass is shown, the actual damages may be very limited. Typically, damages in a trespass action are measured upon proof of actual damage to property or diminution in property value resulting therefrom. If the plaintiff is the property owner, and is entitled to damages for a diminution in property value, such damages may be relatively small given the already low value placed upon properties in urban minority neighborhoods. Low property values often derive from the fact that those communities are disproportionately low-income and from other societal factors such as perceived high levels of crime and violence. Moreover, in urban communities of color, residents might not own their own homes, but may be tenants in private housing stock or in public housing projects. Tenants may suffer no lost real estate value. Moreover, to the extent that particulate matter is present in "common areas," it is unclear that trespass theory applies.

#### B. Private Nuisance

Environmentally burdensome activities that interfere with one's reasonable use, enjoyment or value of one's property, are actionable as private nuisances.<sup>124</sup> In order to be subject to liability for a private nuisance, the invasion has to be either intentional and unreasonable, or unintentional and otherwise actionable under rules controlling liability for negligence or strict liability of abnormally dangerous activities.

Private nuisance actions are viable in many instances in which the exposure to environmental toxins results in an interference with use and enjoyment of property. On its face, private nuisance would appear to be a viable basis for recovery in environmental racism cases. Companies that choose to locate their environmentally burdensome facilities in close proximity to residential communities may be proven to have acted with knowledge or substantial certainty that its activities would interfere with the residents' use and enjoyment of property. Residents in many cases would be able to demonstrate that the interference was both substantial and

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<sup>123</sup> See *id.* at § 519 (describing the liability resulting from a person engaging in an abnormally dangerous activity).

<sup>124</sup> See *id.* at § 821D (defining a private nuisance as a "nontrespassory invasion of another's interest in the private use and enjoyment of land).

unreasonable. Thus, as the facts in *Bean v. Southwestern Management Corp.* illustrate, the actual operation of a facility that would "affect the entire nature of the community," and that of the individual property owners, might constitute a private nuisance.<sup>125</sup>

In environmental cases involving enterprises that already have caused a significant amount of pollution and demonstrable injury to the person or property, plaintiffs frequently use private nuisance as a means of recovery. The same should be true in cases where the nuisance derives from racially disproportionate effects of an environmentally burdensome enterprise. In resisting the determination that its conduct constitutes a nuisance, a defendant may submit proof concerning the social value the law attaches to the primary purpose of the conduct; the suitability of the conduct to the character of the locality; and the impracticality of preventing or avoiding the invasion.<sup>126</sup>

Examining the situation in Chester, residents there are exposed to several environmental burdens: noxious odors, the threat of the release of environmental toxins, etc. Environmentally overburdened communities, like Chester, often have more than one facility located in or near a community, the area is likely to be zoned for industrial purposes, and one or more government agencies will have approved its operation. If the residents of Chester were to bring a lawsuit against the hazardous waste facility, alleging that the facility has interfered with their use and enjoyment of property, the court is going to need to weigh the benefits provided by the company against the harm that results therefrom.

There are many factors that weight against the citizens of Chester under a private nuisance claim. The court must take into account the utility of hazardous waste management, the suitability of the company's operation to the character of the locality, and the impracticality of preventing or avoiding the invasion. Hazardous waste facilities are necessary evils, and they have to be placed somewhere. While causing harm to a small segment of the population, the company will argue that a significant benefit is conferred on a broad range of society. The character of the locale in Chester is already highly industrialized; indeed, there are already other waste facilities in the area. Moreover, it could be argued that government agencies have already determined that Chester is a suitable location and thus the reason why they have approved these sitings. Chester residents would have a tough time proving that the siting is unreasonable if the government has already approved it.

### C. Public Nuisance

Public nuisance is another option for use in environmental racism cases. A public nuisance is an unreasonable interference with a right common to the general public. A person unreasonably interferes with a public right: 1) where the conduct amounts to a significant interference with the public health, the public safety, the public peace, the public comfort, or the public convenience; 2) where the conduct is proscribed by statute, ordinance, or administrative regulation; or 3) where the

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<sup>125</sup> *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673, 677 (S.D. Tex. 1979), *aff'd mem.*, 782 F.2d 1038 (5th Cir. 1986) (case appears in a "Table of Decisions Without Reported Opinions").

<sup>126</sup> *See supra* note 122, at § 828 a-c (listing the three factors that are important in determining the utility of conduct that causes a private nuisance).

conduct is of a continuing nature or has produced a permanent or long-lasting effect, and, as the actor knows or has reason to know, has a significant effect upon the public right.<sup>127</sup> In the context of environmental racism, it may be argued that a company's decision to site a hazardous waste facility in a community based upon the fact that its residents are a part of a particular racial minority offends public morals. The offense is exacerbated where that decision reflects a pattern of discriminatory conduct or the substantial threat of a racially disproportionate environmental impact. Certainly, the operation of a hazardous waste facility in close proximity to residential neighborhoods, where there exists any significant threat of the release of environmental toxins, can constitute substantial interference with public comfort or convenience. A public nuisance cause of action might also provide relief when public authorities or private developer have planned to locate a public housing project in close proximity to a hazardous waste facility from which the release of toxins is likely to occur. Arguably, this would constitute an act that offends and causes harm to the property, health, safety or comfort of a significant number of citizens.

Public nuisance theory is particularly advantageous for victims of environmental racism because it provides a vehicle for the award of equitable relief. Consequently, a person seeking to enjoin or abate a public nuisance has standing to do so if she is suing as a representative of the general public, as a citizen in a citizen's action, or as a member of a class within a class action.<sup>128</sup> This approach is frequently used in cases involving ongoing pollution. For example, the citizens of Chester may be able to bring a public nuisance claim based upon the fact that they experience nausea, headaches, and insomnia, similar to those experienced by residents in Spokane, Washington, where the court upheld the plaintiff's right to bring a public nuisance action. Because most public nuisance actions are reactive, this would be a viable option for the residents of Chester, where there is an ongoing and present interference with public rights. However, as with a private nuisance, Chester residents would have a tough time proving that the siting is unreasonable if the government has already approved it.

#### D. Negligence

In order for a plaintiff to recover in a toxic tort action for personal injuries, she must prove that the environmental toxins that the defendant released into the environment were a cause-in-fact of a presently manifested personal injury. If a negligent act does not result in a demonstrable physical injury, such as cancer, liability is not imposed. Citizens of Chester trying to use a negligence theory to recover damages would be put into a quandary. For example, Citizen A is exposed to dioxin, a toxin known to be released from facilities in Chester. If within a few years of knowledge of exposure, and in order to deter further exposure as well as obtain compensation for past exposures, Citizen A files a claim based upon negligence, he may not be able to demonstrate a present manifestation of an injury or

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<sup>127</sup> See *id.* at § 821B(2) (listing circumstances that may sustain a holding that an interference with a public right is unreasonable).

<sup>128</sup> See *id.* at § 821C(2)(c) (listing what a party must do in order to maintain a proceeding to enjoin to abate a public nuisance).

disease process.<sup>129</sup> Citizen A may allege causes of action for fear of cancer, the increased risk of cancer, and potential damage to the immune and other biologic systems. Unfortunately, these claims have met with little success.<sup>130</sup> Thus, under traditional tort theory, it is often the case that an individual exposed to toxic substances has suffered no legally recognizable injury entitling him to compensation; at least until he manifests a detectable disease. On the other hand, if Citizen A waits until he has manifested a disease, he then needs to prove with specificity what toxin caused the problem, in addition to the source of such exposure. These often render proof of a causal connection hard to establish. Even if a causal connection is established, the delay in the imposition of liability severely undercuts the deterrent objectives of the tort system.<sup>131</sup> Recognizing these limitations, courts have begun to accept theories of liability that allow someone like Citizen A to recover damages without having to satisfy the traditional causal nexus between exposure and manifested disease.

#### V. THE FUTURE: FINDING A REMEDY

The residents of Chester may already have begun the best approach to finding a solution to environmental injustice. Because minorities possess less political clout, they need to find a way to have their voices heard early in the game, before the court gets involved. Instead of waiting until the state grants a permit for a waste facility siting, those in opposition need to attend the hearings and meetings early when the state is first deciding whether or not to grant the permit. Residents of Chester have begun to use this option by going into DEP hearings and letting those involved know that they do not agree with the siting of waste facilities in their town. By successfully organizing and empowering the residents of Chester into action, Chester Residents Concerned for Quality Living (CRCQL) has been sending a strong message to any waste company that if they intend to come into their community, information about the company's compliance history, suspect dealings and the truth on how they disrupt the community will come out. While residents of Chester have begun this process, it needs to be expanded nationwide, as the problem of environmental injustice is a national problem, not a localized one.

Proposed solutions to the impenetrably high evidentiary bar faced by environmental racism plaintiffs have also included the adoption of a disparate impact model.<sup>132</sup> Under this model, the plaintiff would bear the burden of proving that the

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<sup>129</sup> Allen T. Slagel, Note, *Medical Surveillance Damages: A Solution to the Inadequate Compensation of Toxic Tort Victims*, 63 IND. L.J. 849, 851-52 (1988).

<sup>130</sup> See *Ayers v. Jackson Township*, 525 A.2d 287, 577 (N.J. 1987) (Court upholds refusal to recognize plaintiff's damage claim that is based on enhanced risk.); cf. *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1205 (6th Cir. 1988) (finding that "the mere increased risk of a future disease or condition resulting from an initial injury is not compensable"); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* §30, at 165 (5th ed. 1984) ("The threat of future harm, not yet realized, is not enough.").

<sup>131</sup> See Slagel, *supra* note 129, at 849-50 (noting that even if there is recovery, delaying litigation for toxic tort victims future injuries undermines the objectives of tort deterrence compensation).

<sup>132</sup> See Rachel D. Godsil, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 421 (1991) (explaining that under Title VII a "disparate impact" model exists that does not require that the plaintiff prove discriminatory purpose in order for the court to find that an employment practice is illegal when it has a disparate impact on minorities)

challenged siting decision would result in a disproportionate burden on a minority community as compared to a white community.<sup>133</sup> Once this showing is made, the burden would shift to the defendant who would be given the opportunity to rebut the plaintiff's evidence with a showing that the decision was an "environmental necessity."<sup>134</sup> The burden would then shift back to the plaintiff to provide alternative equally environmentally suitable sites, which the defendant again can rebut by a showing that the challenged site was necessary to safely dispense with hazardous materials.<sup>135</sup> If the defendant is able to show and then prove the "environmental necessity" element, then the challenged facility will be allowed to be built in the plaintiff's community despite the disparate impact, which will result.<sup>136</sup> This model theoretically lowers the evidentiary bar for environmental racism plaintiffs in that they could potentially win relief without a "smoking gun" document proving discriminatory intent. However, the problem of actually proving a disparate impact remains. Cases such as *Bean* demonstrate this difficulty. On the other hand, with a disparate impact model in effect, the plaintiffs in *East-Bibb* and *R.I.S.E.* may have obtained the relief they were seeking, because in both cases the strongest evidence produced was that of the existence of a disparate impact.<sup>137</sup>

It seems as if the disparate impact model remains the most promising solution available. Before it can be successful, however, authorities at the state and federal level must work together. As it currently stands, most states, when considering the suitability of a proposed site, perform some measure of an environmental impact review to determine the effects the proposed facility would have on the community and environment in which it is being built.<sup>138</sup>

#### A. The Incentives Approach

Some states have begun to require compensation to host communities in an effort to eliminate local opposition.<sup>139</sup> The general notion is that state taxpayers or developers should compensate the community targeted for a hazardous waste facility because only that community incurs the costs of the facility while the entire state enjoys the benefits.<sup>140</sup> This compensation, if it actually reflects the costs, may

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 422.

<sup>135</sup> *Id.* at 423.

<sup>136</sup> *Id.*

<sup>137</sup> See *East-Bibb*, 706 F. Supp. at 884 (noting the discriminatory impact of a decision to place a landfill in a neighborhood with a 60% African American population, the plaintiffs here were unable to show intentional discrimination but more clearly argued that there was a disparate impact); *R.I.S.E., Inc.*, 768 F. Supp. at 1149 (despite acknowledging that the placement of landfills in a certain county had a disproportionate impact on black residents, plaintiffs were unable to show intentional discrimination; however, the court found there was a disparate impact).

<sup>138</sup> See *Godsil*, *supra* note 132, at 403-06 (noting that the EPA or other environmental agency will run an environmental impact evaluation when a hazardous waste facility applies for a permit).

<sup>139</sup> Lawrence S. Bacow & James R. Milkey, *Overcoming Local Opposition to Hazardous Waste Facilities: The Massachusetts Approach*, 6 HARV. ENVTL. L. REV. 265, 275 (1982).

<sup>140</sup> *Id.*; See also Bullard, *supra* note 3, at 62-64 (Asserting, however, that the way states measure and distribute compensation differs from state to state.) In Ohio, the state agency makes incentive payments to the host community. OHIO REV. CODE ANN. § 3734.25 (Baldwin 1991). Several states determine compensation as a function of the gross receipts or amount of wastes processed at a facility. CONN. GEN. STAT. ANN. § 22a-132 (West Supp. 1991); IND. CODE § 13-7-8.6- 1 (West 1990); N.J. STAT. ANN. § 13:1E-80 (West 1991). Others authorize the local community to require developers to pay a tax or

eliminate opposition to the facility and ensure that the facility will be built only if the benefits of building the facility outweigh the costs.<sup>141</sup> But are the social costs of hazardous waste facilities compensable? Are communities, such as Chester, going to accept a pay-off in order to have these facilities built in their town? In essence, this compensation is seen as a bribe. It does not seem as though this compensation will satisfy a group such as Chester Residents Concerned for Quality Living when residents in the community are diagnosed with cancer, bear unhealthy children, and are exposed to deadly toxins on a daily basis.<sup>142</sup>

Moreover, civil rights activists reject the incentives approach as extortion and compensation as “blood money.”<sup>143</sup> Civil rights advocates recognize that the compensation may appeal to local politicians representing minority communities in dire need of revenues for basic services, but argue that wealthy communities should not be allowed to pay the disadvantaged to accept risks that the affluent can afford to escape.<sup>144</sup> According to Bullard, “concern about equity is at the heart of blacks’ reaction to industrial facility siting where there is an inherent imbalance between localized costs and dispersed benefits.”<sup>145</sup> The current state hazardous waste management programs thus do not explicitly address the equity issue nor will the approaches they employ resolve it. Minority communities targeted for a hazardous waste facility might look to judicial remedies for relief.

#### B. Suggestions for States

State governments should declare as an objective the eradication of race-based inequalities in the burdens of hazardous waste facilities. States are inadequately addressing distributional equity. States will have to combine the approaches currently in effect and make a direct effort to take into account the racial and socio-economic characteristics of potential hazardous waste sites.<sup>146</sup>

Site designation would best address the question of equity from the state’s perspective. This approach would allow the relevant state agency to assess the current distribution of hazardous waste facilities and determine whether minority communities are particularly affected. If so, the agency can use racial makeup as a criterion when compiling a short list of potential sites. But this alone will not

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license fee. GA. CODE ANN. § 12-8-39 (Michie Supp. 1991); KY. REV. STAT. ANN. § 68.178 (Michie/Bobbs-Merrill 1980).

<sup>141</sup> See Bacow & Milkey, *supra* note 139, at 275-76 (describing how the benefits of a hazardous waste facility, such as increased tax revenue and new jobs, can offset the costs, such as health risks and noise). If the developer or the state does not pay the community for the costs of the facility, those costs are externalities. Thus, there is no way to determine if building the facility is efficient since these externalities are not fed into the cost-benefit analysis.

<sup>142</sup> *Id.* at 276-77.

<sup>143</sup> See Bullard, *supra* note 3 at 63 (referring to “blood money” as a form of blackmail.) The movement against environmental racism tries to fight off this “environmental blackmail”—manipulative promises of benefits to make perceived economic advantages outweigh hazardous risks.; Charles Lee, *Toxic Waste and Race in the United States*, reprinted in THE PROCEEDINGS OF THE MICHIGAN CONFERENCE ON RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS 6, 18 (Paul Mohai & Bunyan Bryant eds., 1990)

<sup>144</sup> Bullard, *supra* note 3, at 63.

<sup>145</sup> *Id.*, at 65.

<sup>146</sup> Commission for Racial Justice, United Church of Christ, *Toxic Wastes and Race in the United States* 25 (1987).

succeed. Chosen communities, such as Chester, will obviously oppose the site. Therefore, states should also use the super review approach.<sup>147</sup> Using the later approach and at the same time giving responsibility to a state agency rather than a developer to designate sites will eliminate one primary criticism of the super review approach: the cost-conscious developer choosing sites. The creation of a special siting board to facilitate communication and information between the state and the locale may minimize opposition.

A state dedicated to ameliorating the disparate impact on minorities could first create a permanent agency or board.<sup>148</sup> This board would be responsible for selecting an inventory of candidate sites for commercial hazardous waste facilities. The number of sites placed on the inventory would depend both on the amount of waste generated and the number of environmentally suitable sites. When evaluating sites, the board should assess environmental suitability,<sup>149</sup> economic feasibility, risks and effects for local residents, adverse effects on agriculture and natural resources,<sup>150</sup> and whether the locale is already burdened by environmental hazards. If the board finds that a number of sites equally satisfy the above criteria, it should take into consideration the racial and socioeconomic makeup of the potential candidate sites. If existing commercial hazardous waste facilities are sited disproportionately in minority communities, the board can remove sites that are predominantly minority from the inventory. This model would ensure that, while protecting environmental considerations, minority communities are not disparately burdened by hazardous waste sites.

### CONCLUSION

Environmental racism is a nationwide problem. Much is at stake in the quest for justice in environmental law and policy. Environmental racism has given new recognition to the fact that the structural oppression of people of color in this society manifests itself in more ways than traditional civil rights-based paradigms have previously recognized. Formal rights to basic necessities such as employment,

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<sup>147</sup> Bram D.E. Canter, *Hazardous Waste Disposal and the New State Siting Programs*, 14 NAT. RES. L. 421, 437 (1982). Minnesota, for example, follows this approach; while not explicitly addressing the distributional equity issue, the plan restricts the state from siting more than one facility in any county. MINN. STAT. ANN. § 115A.21(1) (West 1987). The Minnesota approach is thus useful for constructing a model statute.

<sup>148</sup> See MINN. STAT. ANN. § 115A.055 (West Supp. 1991) (duties of the Office of Environmental Assistance and the director of the office were transferred to the Pollution Control Agency and the commissioner of the Pollution Control Agency by Laws 2005 ).

<sup>149</sup> Environmental suitability would encompass the "intrinsic suitability" of the site as well as whether it complied with all federal and state pollution control and environmental protection rules. See MINN. STAT. ANN. § 115A.20 (West Supp. 1991) (listing factors to consider when evaluating a potential site for a hazardous waste facility).

<sup>150</sup> See MINN. STAT. ANN. § 115A.20 (a), (d), (f) (West Supp. 1991) ("the agency shall consider at least the following factors:(a) economic feasibility, including proximity to concentrations of generators of the types of hazardous wastes likely to be proposed and permitted for stabilization and containment;...(d) the risk and effect for local residents, units of government, and the local public health, safety, and welfare, including such dangers as an accidental release of wastes during transportation to a facility or at a facility, water, air, and land pollution, and fire or explosion; ...(f) the adverse effects of a facility at the site on agriculture and natural resources and opportunities to mitigate or eliminate such adverse effects by stipulations, conditions, and requirements respecting the design and operation of a disposal facility at the proposed site.").

voting, and other amenities in modern life are now secure. There remains the nagging reality that, despite calls for a race-neutral consciousness, racial differences continue to exist in the distribution of benefits and burdens borne by individuals in this society. In the end, the environmental movement needs to meet the challenge of providing social justice by exploring the limitations of the current decision-making process and achieving a safe environment for us all. It seems as though the residents of Chester have helped put this process into motion. It is now time for a nationwide solution.