Penn State Environmental Law Review

Volume 3 | Number 1 Article 2

9-1-1993

Environmental Injustice: The Failure of American Civil Rights and Environmental Law to Provide Equal Protection from Pollution

Robert M. Frye

ENVIRONMENTAL INJUSTICE: THE FAILURE OF AMERICAN CIVIL RIGHTS AND ENVIRONMENTAL LAW TO PROVIDE EQUAL PROTECTION FROM POLLUTION

"An injustice anywhere is a threat to justice everywhere."
-Martin Luther King, Jr.

I. Introduction

The conventional wisdom prevalent in the United States is that environmental pollution and degradation are problems faced equally by every member of society. Furthermore, it is presumed that environmental laws have been enacted and implemented to provide protection from these problems to everyone.[1] Nevertheless, over the past decade this misconception has slowly been eroded, as evidence has been compiled and disseminated which reveals that minorities are disproportionately burdened with the environmental hazards of our modern industrial society. Pollution and waste are the inevitable by-products of modern industrialization. Such externalities of industrial capitalism have fallen on those sectors of society that can least resist them -- poor and minority communities.[2]

The phenomenon of siting locally unwanted land uses in minority communities is not a new one.[3] People of color[4] not only bear a disproportionate burden of pollution problems, but are also more likely than white people to live near freeways, sewage treatment plants, landfills, incinerators, heavy industries, and other noxious facilities.[5] The natural result of such disparate siting and land-use patterns is elevated health risks to nearby inhabitants.[6] As

---

*Robert M. Frye, J.D. Candidate, May 1994, Indiana University School of Law - Indianapolis

1. Paul Mohai & Bunyan Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 U. COLO. L. REV. 921 (1992).

2. Robert W. Collin, *Environmental Equity: A Law and Planning Approach to Environmental Racism*, 11 VA. ENVTL. L.J. 495, 496 (1992).

3. ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY 4 (1990).

4. "People of color" is a phrase used in the literature on environmental racism to mean, generally, common ethnic minority groups; e.g., African Americans (Blacks), Latinos (Hispanics), Asian/Pacific Islanders, Native Americans, and other non-white persons. This term is used interchangeably in this paper with the term "minority." The terms "minority community" and "communities of color" are used here to mean a geographic area with a high concentration of minority residents. See Collin, *supra* note 2, at 500; Robert D. Bullard, *In Our Backyard: Minority Communities Get Most of the Dumps*, EPA JOURNAL, Mar.-Apr. 1992 at 11; Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394 (1991), note 4.

5. Robert D. Bullard, *The Threat of Environmental Racism*, NATURAL RESOURCES & ENVIRONMENT, Winter 1993, at 23; Regina Austin & Michael Schill, *Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 KAN. J.L. & PUB. POL'Y 69 (1991).

6. BULLARD, *supra* note 5, at 23.

pointed out by one commentator, "[d]espite the numerous laws, mandates, and directives by the federal government to eliminate discrimination in housing, education, and employment, government has made few attempts to address discriminatory environmental practices."[7]

The general objective of each of the major environmental statutes in force in this country is essentially the same: to restore, maintain, and protect the quality and integrity of the nation's natural resources so as to promote the public health and welfare.[8] There are eight generic compliance obligations or regulatory approaches which are utilized in some combination by virtually all of the American environmental laws.[9] These eight approaches are as follows:

(1) notification: to advise appropriate authorities, employees, and often the public of intended or actual releases of pollutants, violations, . . . and of the commencement of activities . . . which may have significant environmental impacts;[10]

(2) discharge limits: to prevent or acceptably minimize the release of pollutants into the environment;[11]

(3) process controls: to reduce the quantities, prevent the release and minimize the hazardous characteristics of wastes which are generated;[12]

(4) product controls: to assure that products are designed, formulated, packaged or used so that they themselves do not present unreasonable risks to human health and the environment when either used or disposed of;[13]

(5) activity controls: to protect resources, species or ecological amenities;[14]

---

7. Robert D. Bullard, *In Our Backyards: Minority Communities Get Most of the Dumps*, EPA JOURNAL, Mar.-Apr. 1992 at 11.

8. *See* National Environmental Policy Act (NEPA) of 1969 §§ Pub. L. No. 91-190, 83 Stat. 852 (1970) (codified as amended at 42 U.S.C. §§ 4321-4370a (1988)); Federal Water Pollution Control Act (FWPCA), 33 U.S.C. §§ 1251-1376 (1986); Solid Waste Disposal Act (SWDA) 42 U.S.C. §§ 6901-6992(k) (1988); Resource Conservation and Recovery Act of 1976 (RCRA) amended by the Solid Waste Disposal Act Amendments of 1984 (SWDA) 42 U.S.C. §§ 6901-6992 (1988 & Supp. III 1991); Clean Air Act (CAA) 42 U.S.C. §§ 7401-7671q (1990); Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA or "Superfund"), Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601-9675 (1988)).

9. J. GORDON ARBUCKLE ET AL., ENVIRONMENTAL LAW HANDBOOK 3 (1991).

10. *Id.* at 4.

11. *Id.* at 4.

12. *Id.* at 5.

13. *Id.* at 5.

14. J. GORDON ARBUCKLE, ET AL., ENVIRONMENTAL LAW HANDBOOK 3 (1991).

(6) transportation standards: to acceptably minimize the risks inherent in transportation of hazardous wastes or materials, oil or other potentially harmful substances;[15]

(7) response and remediation requirements: to clean up pollutants which have been released, prevent the threat of release or pay costs of that clean-up or prevention;[16]

(8) compensation requirements: to make responsible parties pay private parties . . . for damages done to their health or environment or to permit self-appointed representatives of the "public interest" to recover for injuries done to public assets.[17]

The foregoing regulatory approaches illuminate a recurring theme in Congress' purpose in enacting environmental legislation: to provide for the protection of the health and welfare of the citizens of the United States. Though Congress has never specifically declared as the purpose or policy of any environmental law, that protection from environmental hazards shall be provided equally to all, equal protection is presupposed in the passage of any statute through the Fifth and Fourteenth Amendments to the United States Constitution. [18] Concomitantly, the various civil rights laws[19] guarantee that all citizens will be provided equal protection under the law. The question must then be posed: given the myriad environmental laws and regulations -- federal, state, and local -- combined with the security of equal protection, how is it that communities of color and low income have borne the brunt of our environmental pollution, waste and contamination?

This paper will examine the claim that minorities are disproportionately affected by environmental hazards, discuss the causes thereof, and scrutinize the failure of existing law to prevent such conditions. Potential remedies for the situation are beyond the scope of this paper, though the considerable body of literature on the subject proposes many possibilities. The purpose here is to educate the reader about this ignominious situation and, hopefully, to rouse the reader's sense of justice in a way that compels action. Every American citizen

---

15. *Id.* at 6.

16. *Id.* at 7

17. *Id.* at 7.

18. The Equal Protection Clause of the Fourteenth Amendment applies only to state and local governments. Nevertheless, as is indicated, *infra*, most environmental regulatory schemes are carried out on the state and local level. Moreover, if federal laws classify persons in a way which would violate the Equal Protection Clause, they will be held to contravene theDueProcess Clause of the Fifth Amendment. J. Nowak, R. Rotunda & J. N. Young, CONSTITUTIONAL LAW 524 n.6 (1986).

19. *See* 42 U.S.C. § 1981 (1991) (Equal Rights Under the Law); 42 U.S.C. § 1982 (Property Rights Of Citizens), 42 U.S.C. 1983 (1988) (Civil Action for Deprivation of Rights); 42 U.S.C. 1985(3) (1988) (Depriving Persons of Rights or Privileges); 18 U.S.C. § 241 (1988) (Conspiracy Against Rights of Citizens); 18 U.S.C. § 242 (1976) (Deprivation of Rights Under Color of Law); Nowak, *supra* note 18, at 803.

benefits from the positive aspects of the modern industrial era, and likewise, each of us should be made to bear our fair share of the consequences.

II. Environmental Racism

A. Defining the Term

The term "environmental racism" was coined in 1982 by Dr. Benjamin Chavis, Jr.[20] Dr. Chavis defines the term as follows:

> Environmental racism is defined as racial discrimination in environmental policy making and the unequal enforcement of environmental laws and regulations. It is the deliberate targeting of people of color communities for toxic waste facilities and the official sanctioning of a life threatening presence of poisons and pollutants in people of color communities. It is also manifested in the history of excluding people of color from the leadership of the environmental movement.[21] Institutionalized discrimination, the oppression and exploitation of people of color, has a long and sordid history in the United States.[22] Racist activities have been described as those 'which support or justify the superiority of one racial group over another.'[23] Therefore, the designation of an environmental decision, policy, or practice as racist is really a statement that 'the predictable distributional impact of that decision [or policy, or practice] contributes to the structure of racial subordination and domination that has similarly marked many of our public policies in this country.'[24] In other words, the failure to consider the racial impacts of such actions 'contributes to the subordination of identifiable racial groups.'[25] These principles are embodied in Dr. Chavis's definition of environmental racism.

---

20. In 1982, the Reverend Chavis was a leader of the Southern Christian Leadership Conference. *Bullard, supra* note 3, at 37. He coined the term "environmental racism" in response to protests of the siting of a hazardous waste landfill in a predominately black community in North Carolina. See *infra*, notes 20-21, 31-40. Dr. Chavis later became Executive Director of the United Church of Christ Commission for Racial Justice, which conducted a landmark study on the correlation between the location of hazardous waste sites and racial composition of surrounding communities. See *infra*, notes 49-54. On April 9, 1993, Dr. Chavis was named Executive Director of the National Association for the Advancement of Colored People (NAACP). *Civil Rights Vet Chosen for Top Job at NAACP*, THE INDIANAPOLIS STAR, April 10, 1993, at A1.

21. TESTIMONY OF DR. BENJAMIN F. CHAVIS, JR., EXECUTIVE DIRECTOR, UNITED CHURCH OF CHRIST COMMISSION FOR RACIAL JUSTICE, submitted to the UNITED STATES HOUSE OF REPRESENTATIVES SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS (Mar. 3, 1993).

22. Gerald Torres, *Understanding Environmental Racism*, 63 U. COLO. L. REV 839 (1992); Collin, *supra* note 2, at 497.

23. *Id.* note 22, at 840.

24. *Id.*

25. *Id.*

B. The Evidence

Knowledge of the inequitable distribution of environmental hazards is not new. Professors Paul Mohai and Bunyan Bryant of the University of Michigan investigated the existence of studies that examined the socioeconomic allocation of pollution and found that several such studies have been conducted over the past two decades.[26] Most notably perhaps, the anomalous distribution of pollution was first identified by the President's Council on Environmental Quality (CEQ) in its 1971 annual report.[27] The timing of this report is significant: it was issued near the inception of the modern environmental movement. Only two years prior to the issuance of this report, the National Environmental Policy Act (NEPA)[28] had been enacted; and only one year prior, in 1970, the Environmental Protection Agency (EPA) was created and the first Earth Day celebration was staged.[29] As asserted by Professors Mohai and Bryant, "it has evidently taken some time for public awareness to catch up to the issues of environmental injustice."[30]

Awareness of the inequitable distribution of environmental hazards has grown tremendously in the past decade. Such awareness has spawned a new activism by minority citizens that has become known as the environmental justice movement.[31] This movement was sparked in 1982 by a decision by the state of North Carolina to site a landfill to dispose of soil contaminated by polychlorinated biphenyls (PCBs)[32] in the community of Afton, in Warren County.[33] The population of Afton is 84% African American.[34] Moreover, the

---

26. Mohai & Bryant, *supra* note 1, at 923, 925.

27. *Id.* 925; COUNCIL ON ENVIRONMENTAL QUALITY, THE SECOND ANNUAL REPORT OF THE COUNCIL ON ENVIRONMENTAL QUALITY (1971).

28. The Council on Environmental Quality (CEQ) was created by NEPA § 202, 42 U.S.C. § 4342 (1970) for the purpose of advising the President on environmental trends and matters see NEPA § 204, 42 U.S.C. § 4344 (1970) for the duties and functions of the CEQ.

29. Mohai & Bryant, *supra* note 1, at 925.

30. *Id.*

31. *See generally* BULLARD, *supra* note 3, Chapter 1; Dorceta Taylor, *The Environmental Justice Movement*, EPA JOURNAL, Mar.-Apr. 1992 at 23.

32. PCBs are synthetic chemicals used primarily as an insulating medium in electrical capacitors and transformers. Prior to 1971 they were used in a variety of consumer products. PCBs are extremely stable and persistent chemicals in the environment, and have been found to concentrate in the fatty tissues of predatory animals. Known effects of exposure to PCBs by humans include stillbirths, miscarriages, birth defects, skin disorders (chloracne), neurological disorders, visual impairment, hearing loss, gastrointestinal symptoms, and jaundice. T. Jackson, *PCB Time Bomb: The Growing Menace of Polychlorinated Biphenyl Pollution*, in ENVIRONMENTAL PROBLEMS: PRINCIPLES, READINGS, AND COMMENTS 195-201 (1979). PCBs also are unique among all the chemical substances in existence; they are the only substances specifically named and specially regulated in the Toxic Substances Control Act (TSCA) § 6(e), 15 U.S.C. § 2605(e) (1986). Arbuckle, *supra* note 9, at 312. See also, *infra* notes 36-37.

33. BULLARD, *supra* note 3, at 35-36.

34. BULLARD, *supra* note 3, at 36.

County of Warren has the highest percentage of African American residents in North Carolina, at 63.7%, and is also among the poorest of counties in that state.[35]

The decisions to dispose of the PCBs in a landfill and to site the landfill in Warren County were clearly political.[36] EPA regulations require that the bottom of a PCB landfill be at least fifty feet from the historical high water table;[37] however, the EPA modified the permit for the facility, allowing it to be sited in Warren County, where the water table is no more than fifteen feet below the surface.[38] Local residents, fearful of the potential for groundwater contamination[39] and convinced that the siting decision was racially motivated, organized to oppose the landfill. With the support of civil rights leaders, environmental activists, African American elected officials, and labor leaders,[40] the residents staged demonstrations reminiscent of the marches and protests of the 1960's civil rights movement.[41]

Though unsuccessful in stopping the landfill, the protesters succeeded in bringing national attention to the insufferable environmental conditions in many minority communities.[42] The Warren County protests resulted in the arrests of more than 400 people, including Congressman Walter E. Fauntroy,[43] who subsequently requested that the United States General Accounting Office (GAO) study the racial and economic status of communities

---

35. Despite their lack of wealth, over 75% of the residents of Warren County own their own homes, including 64 percent of the African American residents. Only 45% of Afro-Americans in the United States own their own homes. *Id.* at 36. The population of Warren County, North Carolina is also four percent Native American. Dick Russell, *Environmental Racism: Minority Communities and Their Battle Against Toxics*, 11 AMICUS JOURNAL 22, 24 (1989).

36. *See* BULLARD, *supra* note 3, at 36, 38. In fact, the director of the EPA's hazardous waste branch, William Sanjour, was opposed to the decision to landfill the contaminated soil over the more scientifically sound alternatives of incineration or on-site neutralization. Mr. Sanjour even made an appearance at a rally to encourage those protesting the landfill. *Id.* at 38.

37. 40 C.F.R. § 761.75(b)(3) (1993), promulgated pursuant to the Toxic Substances Control Act, § 6(e), 15 U.S.C. § 2605(e) (1986). These regulations were in force at the time of the Warren County PCB landfill siting, being promulgated at 44 Fed. Reg. 31542 (May 1, 1979).

38. BULLARD, *supra* note 3, at 36-38; Dick Russell, *Environmental Racism: Minority Communities and Their Battle Against Toxics*, 11 AMICUS JOURNAL 22, 24 (1989); Dr. Benjamin F. Chavis, Jr., then Executive Director of the United Church of Christ's Commission for Racial Justice at the SIXTH ANNUAL NATIONAL ASSOCIATION OF ENVIRONMENTAL LAW SOCIETIES CONFERENCE (January 29, 1993), Bloomington, Indiana [hereinafter Remarks of Dr. Chavis]. The federal regulations governing the land disposal of PCBs do provide for waivers of the technical requirements (found at 40 C.F.R. § 761.75(b)) (1993) where the owner or operator of the landfill can show that it "will not present an unreasonable risk of injury to health or the environment. . . ." 40 C.F.R. § 761.75(c)(4) (1993).

39. BULLARD, *supra* note 3, at 37. All of the residents of Warren County obtain their drinking water from wells. *Id.*

40. BULLARD, *supra* note 3, at 37; Dick Russell, *Environmental Racism: Minority Communities and Their Battle Against Toxics*, 11 AMICUS JOURNAL 22, 24 (1989).

41. Remarks of Dr. Chavis, *supra* note 38. African American mothers were lying in the road to block the passage of trucks carrying the PCB-laden soil to the landfill. Bullard, *supra* note 3, at 37.

42. BULLARD, *supra* note 3, at 37.

43. BULLARD, *supra* note 3, at 37-38. The Honorable Walter E. Fauntroy was the Congressional Delegate for the District of Columbia. *Id.* at 38. It is also significant to note that the arrests in Warren County were the first arrests in the United States for attempting to stop a hazardous waste landfill. *Id.*

near hazardous waste landfills.[44] The resulting GAO report[45] examined only offsite hazardous waste landfills located in the eight southeastern states which comprise EPA Region IV.[46] The GAO found that there are four such landfills in that Region.[47] Three of the four communities where these landfills are located were found to have a majority African American population, most of whom have incomes below the poverty level.[48]

The Warren County protests, in combination with the striking findings of the GAO, stimulated interest in environmental justice and compelled activists to document and publicize further the environmental afflictions of minority communities.[49] In 1983, the National Association for the Advancement of Colored People (NAACP) took a position condemning the uneven distribution of hazardous waste sites.[50] In 1986, an investigation by the Center for Third World Organizing disclosed that large quantities of radioactive waste are disposed of on Native American lands, and that some tribes suffer cancer at rates greater than the national average.[51] These events and findings spurred the United Church of Christ's Commission for Racial Justice to conduct the first comprehensive national study of the distribution of hazardous waste sites and the racial and economic composition of the communities surrounding them.[52] The resulting report, *Toxic Wastes and Race*,[53] hailed as a landmark in the movement for environmental justice, documented a national pattern of

---

44. Congress, in enacting the Resource Conservation and Recovery Act of 1976 (RCRA), declared as national policy that waste is to be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment, RCRA § 1003(b), 42 U.S.C. § 6902(b) (1993 Supp.). RCRA created a comprehensive regulatory program to manage solid and hazardous waste. A solid waste must be regulated as hazardous if it has been listed by EPA in 40 C.F.R. Part 261, Subpart D, (1993) or if it exhibits any of four characteristics of hazardous waste defined in 40 C.F.R., Part 261, Subpart C. (1993). These regulations were promulgated pursuant to RCRA § 3001, 42 U.S.C. § 6921 (1984).

45. UNITED STATES GENERAL ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES (1983) [hereinafter SITING OF HAZARDOUS WASTE LANDFILLS].

46. *Id.* at 1. The report defined offsite landfills as those not part of or contiguous to an industrial facility. *Id.* at 1. EPA Region IV includes: Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee. *Id.* at 2.

47. *Id.* at 1.

48. *Id.* at 1, 4. In two of the four communities, 100% of the African American population lived in poverty, while in the other communities, 90 and 92% of the African American population were poor. *Id.* at 4.

49. Mohai & Bryant, *supra* note 1, at 921-923.

50. BULLARD, *supra* note 3, at 42.

51. Dick Russell, *Environmental Racism: Minority Communities and Their Battle Against Toxics*, 11 AMICUS JOURNAL 22, 24 (1989). The report, TOXICS AND MINORITY COMMUNITIES, found that two million tons of radioactive uranium tailings were dumped on Native American lands and that teenage Navajos suffer from reproductive organ cancer at a rate 17 times the national average. *Id.* at 24.

52. Mohai & Bryant, *supra* note 1, at 925.

53. COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIOECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987).

disproportionate siting of hazardous waste facilities in people communities of color.[54] Using multivariate statistical techniques,[55] the Commission determined that, while poor persons of all races were more likely than their wealthier counterparts to live near hazardous waste sites, the predominant factor in the location of commercial hazardous waste facilities was race.[56] Among the significant findings of the Commission are the following:

(1) over fifteen million of the twenty six million blacks and over eight million of the fifteen million Hispanics in the United States live in communities with one or more uncontrolled toxic waste sites;[57]

(2) the proportion of minorities residing in communities where a commercial hazardous waste facility is located is double that of communities without such facilities; where two or more such facilities are located, the proportion of minority residents is more than triple;[58]

(3) three of the five largest commercial hazardous waste landfills, accounting for 40% of the nation's total estimated hazardous waste landfill capacity in 1986, are located in predominately black or Hispanic communities.[59]

Another recent report disclosed equally striking findings. In 1990, Greenpeace released its study of the locations of hazardous waste incinerators.[60] Greenpeace found that communities with existing incinerators have minority populations 89% higher than the national average, and areas targeted for proposed incinerator construction have a 60% greater minority population than the national average.[61] Furthermore, it was reported that the mean income in the communities that are currently home to incinerators is 15% less than

---

54. Mohai & Bryant, *supra* note 1, at 922. The study differentiated between commercial hazardous waste facilities, defined as those that accept hazardous wastes "from a third party for a fee or other renumeration," from uncontrolled toxic waste sites which are "those closed and abandoned sites on the EPA's list of sites which pose a threat to human health and the environment." Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394 (1991), at 397, notes 24 and 25.

55. Multivariate statistical techniques analyze the interrelationships of two or more variables. ALAN AGRESTI & BARBARA AGRESTI, STATISTICAL METHODS FOR SOCIAL SCIENCES 14 (1979).

56. Collin, supra note 2, at 505; Mohai & Bryant, *supra* note 1, at 922; Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394 (1991), at 397. Other factors examined include average household income, home ownership rate, and property values.

57. Russell, *supra* note 51, at 24; Bullard, *supra* note 7 at 12.

58. Mohai & Bryant, *supra* note 1, at 922.

59. BULLARD, DUMPING IN DIXIE, *supra* note 3, at 40; Bullard, *In Our Backyards*, *supra* note 7, at 12; Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394-95 (1991).

60. Pat Costner & Joe Thornton, PLAYING WITH FIRE: HAZARDOUS WASTE INCINERATION, A GREENPEACE REPORT (1990). Collin, *supra* note 2, at 505.

61. Collin, *supra* note 2, at 505-506; Bullard, *supra* note 7, at 12.

the national average.[62] In addition, property values are 38% lower than the national mean in communities with incinerators, and are 35% lower in areas where incinerators are being proposed.[63]

Other studies, reports, and anecdotal evidence of specific situations exist which clearly demonstrate that minorities are overburdened with waste and pollution.[64] As mentioned above, Professors Mohai and Bryant examined sixteen existing studies of the socioeconomic allocation of pollution.[65] The professors found that most of the studies (ten of sixteen) were on the distribution of air pollution.[66] The distribution of solid and hazardous waste has only been recently examined, and, as noted by Mohai and Bryant, systematic studies of the social distribution of other types of environmental hazards are needed.[67] Several noteworthy facts emerged from this probe of existing studies. First, the studies vary in terms of their scope (*i.e.*, urban areas vs. regions vs. national), indicating that the pattern of findings is not limited to a particular pool of samples; that is, "regardless of the scope of the analysis, the findings point to a consistent pattern."[68] The pattern pointed to is that nearly every study found the hazard analyzed to be distributed inequitably by income.[69] Moreover, twelve of the thirteen studies that examined race as a factor found the distribution to be inequitable by race.[70] Finally, of the nine studies where it was possible to weigh the relative importance of race and class as factors in the distribution of pollution, six found race to have a greater relationship to exposure to pollution than income.[71] Professors Mohai and Bryant concluded the following:

---

62. Collin, *supra* note 2, at 506; Bullard, *supra* note 7, at 12.

63. Collin, *supra* note 2, at 506; Bullard, *supra* note 7, at 12.

64. *See generally*, Paul Mohai & Bunyan Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 U. COLO. L. REV. 921 (1992).

65. *See supra* notes 26-30 and accompanying text; Mohai & Bryant, *supra* note 1.

66. Mohai & Bryant, *supra* note 1, at 925.

67. *Id.* at 925. The authors listed water pollution, pesticide exposure, and asbestos exposure as other hazards in need of study.

68. *Id.* at 925-26.

69. *Id.* at 926.

70. Mohai & Bryant, *supra* note 1, at 926-927.

71. *Id.*

> [t]aken together, the findings from these sixteen studies indicate clear and unequivocal class and racial biases in the distribution of environmental hazards. And . . . the results also appear to support the argument that race has an additional effect on the distribution of environmental hazards independent of class. Indeed, the racial biases found in these studies have tended to be greater than class biases.[72]

C. The Causes

The United Church of Christ report, TOXIC WASTES AND RACE, concluded that it is "virtually impossible" that the inequities in the distribution of hazardous waste have happened merely by chance.[73] If the inequitable distribution of pollution is not a product of happenstance, then what is the cause of its existence, and who is responsible? Of course, there is no singular cause of such a complex and enduring problem. The causes are historical and institutional in nature. Institutionalized barriers such as housing, employment, and educational discrimination, residential segregation, and minorities' lack of political organization and representation have combined to create the unenviable situation that people of color face today.[74] Such barriers create a lack of mobility for minorities, regardless of wealth,[75] that enable their white counterparts to "vote with their feet"[76] and escape miserable living conditions. Commentators have suggested alternative development patterns as plausible explanations for the proximity of poor and minority people to environmental hazards.[77] For instance, one commentator proposed the notion that population distributes itself in response to relative pollution levels.[78] That is, high levels of air pollution

---

72. Paul Mohai & Bunyan Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 U. COLO. L. REV. 921 (1992).

73. *Id.* at 922-923.

74. Collin, *supra* note 2, at 496.

75. In 1989, 54.8% of all urban African Americans and 70.9% of poor urban African Americans resided in poverty areas, whereas only 16.7% of all urban whites and 40% of poor urban whites lived in poverty areas. Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 399 (1991). Thus, even African Americans with higher incomes still tend to live in segregated areas, whereas more than half of the whites with incomes below the poverty level did not live in concentrated areas of poor persons. This is evidence of the greater ability of whites to move freely.

76. BULLARD, *supra* note 3, at 105. See note 74, *supra*.

77. *See generally* Regina Autsin & Michael Schill, *Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 KAN. J.L. & PUB. POL'Y 69 (1991).

78. Peter Asch & Joseph J. Seneca, *Some Evidence on the Distribution of Air Quality*, 54 LAND ECONOMICS 278, 294 (1978).

drive away persons of wealth and "attract," so to speak, low income persons, partly through housing price mechanisms.[79]

Another development pattern espoused is that pollution sources follow population characteristics;[80] that is, polluting enterprises may locate in response to the political influence of local populations, a factor reflected in income, race, and education.[81] This pattern moves the focus away from the premise of institutionalized discrimination as a cause of environmental racism, to the supposition that industrial practices and attitudes are also a cause. Economic efficiency dictates that industrial waste facilities are frequently located where land is the cheapest.[82] Even seemingly neutral siting criteria for waste disposal facilities, such as low population density and remote locations, have potential for inequitable results.[83] For example, in the southern United States, a sparse concentration of inhabitants is correlated directly with poverty and race.[84] Moreover, industrialists know that communities comprised of low-income, minority, and working-class people are vulnerable because they lack the education and resources necessary to assemble and carry out an effective opposition.[85] Rural residents cannot match even poor urban dwellers' resources for organizing the community against unwanted facilities.[86]

Another corporate practice is to entice low income and minority communities into accepting disposal or other noxious facilities with the promise of economic benefit.[87] Offers of compensation in an amount to outweigh the perceived risks of a facility, the promise of good paying jobs, and an increased tax base are used as strategies to minimize citizen

---

79. *Id.* at 294. This is illustrated by the fact that because of a smaller pool of willing buyers in minority neighborhoods (since whites generally are reluctant to move into an areas as little as 20% black), land values are correspondingly lower. Cheap land attracts developers of noxious facilities. However, because of segregation, poor whites are able to live in more economically varied areas (see *supra* note 68), thereby benefitting from middle-class organization and political power. African Americans, lacking in the same mobility and the resulting socioeconomic variability, tend to be concentrated in areas of cheaper land and are thereby subject to disproportionate sitings of land uses unwanted elsewhere. Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 399-400 (1991).

80. Asch & Seneca, *supra* note 77, at 294.

81. *Id.*

82. Collin, *supra* note 2, at 516. *See also* note 78, *supra.*

83. Regina Autsin & Michael Schill, *Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 KAN. J.L. & PUB. POL'Y 69, 70 (1991); TESTIMONY OF CHARLES J. MCDERMOTT, DIRECTOR OF GOVERNMENT AFFAIRS, WASTE MANAGEMENT, INCORPORATED, submitted to the UNITED STATES HOUSE OF REPRESENTATIVES SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS on March 3, 1993 [hereinafter, TESTIMONY OF CHARLES MCDERMOTT].

84. Austin & Schill, *supra* note 82, at 70.

85. *Id.*

86. Bullard, *supra* note 3, at 48. Note that the four hazardous waste landfills in EPA Region IV examined by the GAO in 1983 were in the South. The populations of those four communities were each under 850 persons. GAO, SITING OF HAZARDOUS WASTE LANDFILLS, *supra* note 45, at 4.

87. Austin & Schill, *supra* note 82, at 70; Bullard, *supra* note 3, at 90-91.

opposition.[88] Once the facility is located in the community, and the monetary benefits begin to be realized, the local residents may be reluctant to relinquish such capital advances even where they are accompanied by pollution, increased traffic noise, spills, and other noxious externalities.[89] In addition, and as often occurs, the economic benefits do not always materialize as promised once the facility begins to operate in the community.[90] Whether or not a facility brings economic good fortune to a low income and minority community should not be the ultimate inquiry in determining the appropriateness of the siting decision. A moral issue is raised by such compensation practices -- that is, "should society pay those who are less fortunate to accept the risks that others can afford to escape?"[91]

As has been discussed, two broad and complex categories of causes of environmental injustice have emerged from the research and commentary: institutionalized discriminatory practices and corporate discriminatory practices.[92] Most often, institutional racism occurs without any specific intent to discriminate.[93] Recall, however, that any practice that results in distributional impacts which contribute to the subordination and domination of or fails to consider the impacts upon, an identifiable racial group, is racist in nature.[94] Unfortunately, it seems that some corporate practices are intentionally discriminatory.[95] An illustration of this is a 1984 confidential report prepared by the consulting firm of Cerrell Associates for the California Waste Management Board (CWMB) to aid the Board in the siting of three privately-operated incinerators for the disposal of municipal garbage, the proposed Los

---

88. Bullard, *supra* note 3, at 90-91.

89. Austin & Schill, *supra* note 82, at 70

90. *Id.* For example, Chemical Waste Management (CMW) operates the nation's largest hazardous waste landfill in Emelle, Sumter County, Alabama. CMW's annual payroll is 10 million dollars. In addition, a portion of a state tax on the wastes received goes to Sumter County, with a minimum annual guarantee of over four million dollars. TESTIMONY OF CHARLES MCDERMOTT, *supra* note 82. While the facility has helped to upgrade public services, it has not been the economic boon promised. BULLARD, *supra* note 3, at 71. Sumter County's population is 70% African American and 30% of its residents live below the poverty line, including nearly all of the African American residents. Austin & Schill, *supra* note 82, at 70; BULLARD, *supra* note 3, at 39, 70. Moreover, some charge that the high paying jobs at the facility have gone to people who live outside the area. BULLARD, *supra* note 3, at 72. (Note that there is some dispute here. CWM states that 60 percent of the employees at its Emelle facility are residents of Sumter County. TESTIMONY OF CHARLES MCDERMOTT, *supra* note 82. Nonetheless, an African American civil rights leader from the area claims that only about 50 local residents work at the plant (out of 400 to 500 employees). BULLARD, *supra* note 3, at 72).

91. BULLARD, *supra* note 3, at 91.

92. One could argue that only one broad category -- institutional racism -- exists, and that discriminatory practices of corporations are a subset thereof.

93. Torres, *supra* note 22, at 840.

94. *Id.*

95. Note that, as shall be seen, *infra*, the courts have not found any intent to discriminate in any siting decisions challenged as discriminatory. The view espoused here is that such practices are racist under the definition provide by Dr. Chavis. *See* supra note 22 and accompanying text.

Angeles City Energy Recovery Project (LANCER).[96] The Cerrell report, uncovered by an opponent of LANCER in 1987, defined for the Board the demographics of areas where it could expect opposition: liberal, college-educated, young or middle-aged, mid-to-high income groups in urban areas.[97] The report also outlined where the least opposition is likely to be incurred: lower socioeconomic neighborhoods, falling in some category of economic need, heavily industrialized and with little commercial activity.[98] The report counseled the Board to target likely opponents based on these criteria in a "public participation program and public relations program."[99] Such tactics epitomize the allegations of environmental justice activists that the "unwritten law governing corporate decision-making about toxics seems to have been '[d]o what you can get away with.'"[100]

D. The Counterclaim: Environmental Racism vs. Classism

Some commentators raise as an objection to the charge of environmental racism that the inequitable distribution of pollution is a function of poverty, as opposed to race.[101] Such critics urge that the more appropriate term to use when analyzing disproportionate environmental impacts is environmental "classism."[102] In responding to a question about the existence of systematic racism as a cause of the disparate distribution of environmental risks, Robert Wolcott, Chairman of the EPA's Environmental Equity Workgroup,[103] stated, "I don't think so. It's more economic class. It comes down to resources to locating oneself in

---

96. Russell, *supra* note 51, at 25. LANCER was the City Bureau of Sanitation's proposal to build a network of three 1,600-ton-per-day incinerators. LANCER 1 was approved for siting in a declining South-Central Los Angeles neighborhood, after the Bureau had enlisted the support of a long-time African American councilman by promising a ten million dollar community improvement fund for the surrounding area. The neighborhood surrounding the site contained over 3,000 homes, several schools, a population of young, poor people who spoke little English, and the highest unemployment rate in the city. *Id.* at 26.

97. *Id.*

98. *Id.* at 25-26.

99. *Id.* at 26.

100. Dick Russell, *Environmental Racism: Minority Communities and Their Battle Against Toxics*, 11 AMICUS JOURNAL 22, 24 (1989). A quotation from Charles Lee, director of research for the Commission for Racial Justice and principal author of the United Church of Christ's landmark study, TOXIC WASTES AND RACE.

101. Mohai & Bryant, *supra* note 1, at 923 n.15.

102. *See* Alice L. Brown, *"Environmental Racism": Fact or Fiction?*, ENVIRONMENTAL LAW (Quarterly Newsletter of the American Bar Association Standing Committee on Environmental Law), Fall-Winter 1992-93, at 1; *See also* Matthew Rees, *Black and Green*, THE NEW REPUBLIC, March 2, 1992, at 15 (In 1986, the United States Commerce Commission (UCC) found that only 41 residential areas in the nation possessed more than one commercial waste facility. Additionally, the residential areas with more than one commercial waste facility possessed a median income of $23,934.)

103. At the urging of environmental justice activists, William Reilly, then-Administrator of the EPA, formed the Environmental Equity Workgroup in 1990, a task force of Agency personnel charged with assessing the evidence that minority and poor citizens are exposed to greater environmental risks than the population as a whole. The Workgroup released its draft report in February, 1992. William K. Reilly, *Environmental Equity: EPA's Position*, EPA JOURNAL, Mar.-Apr. 1992 at 18.

jobs and homes that avoid exposure. In many cases, *"racial minorities don't have the capital to exercise that mobility."*[104]

Mr. Wolcott's answer is internally inconsistent. First, it states that the problem is one of economic class, and then it admits that people of color do not have the "capital" necessary to move out of squalid conditions. The environmental classism theory amounts to an argument that minorities are disproportionately burdened by environmental hazards "simply because they are disproportionately poor."[105] This view of the issue begs a most fundamental question: why are minorities disproportionately poor in the first place?[106] To attempt to answer this question brings the analysis full circle, back to the root cause, institutional racism. Systematic racial discrimination in housing, employment, and education has served to lock much of the minority population in the United States into perpetual impoverishment. Viewing the problem as exclusively a function of socioeconomic classification is an oversimplification of the problem. The evidence reiterates time and time again that among all of the factors examined, "the factor of race ultimately cannot be avoided."[107]

III. The Failure of the American Legal System to Provide Equal Protection From Pollution

A. The Failure of Environmental Law

In 1976, in response to the perceived crisis in the handling and disposal of hazardous wastes, Congress enacted the Resource Conservation and Recovery Act (RCRA).[108] RCRA created a system for identifying and listing hazardous wastes, and a comprehensive "cradle-to-grave" regulatory tracking system for the generation, transportation, storage, treatment, and disposal of such wastes.[109] Despite the extensive requirements for the disposal of hazardous wastes,[110] RCRA only gave "rudimentary treatment" to the siting of hazardous waste disposal facilities, and left to the states the burden of developing siting mechanisms that would meet broad and ambiguous federal guidelines while protecting the public health and the environment.[111]

---

104. Michael Weisskopf, *Minorities' Pollution Risk Is Debated: Some Activists Link Exposure to Racism*, THE WASH. POST, Jan. 16, 1992, at A25 (emphasis added).

105. Mohai & Bryant, *supra* note 1, at 923.

106. *Id.* at 923, note 15; *see* note 75, *supra*.

107. Mohai & Bryant, *supra*, note 1, at 923.

108. *See* note 44, *supra*.

109. R. PERCIVAL, ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY, 215 (1992); ARBUCKLE, *supra* note 9, at 406-408.

110. RCRA § 3004, 42 U.S.C. § 6924 (1984).

111. Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 401 (1991).

Historically, land use has been controlled in the United States by local zoning regulations.[112] Early practices of local planning and zoning boards systematically excluded people of color.[113] Although exclusionary zoning practices are now unlawful,[114] the effect of such practices continue through racially restrictive covenants, housing price mechanisms, tenant distribution procedures in public housing, and other forms of institutional discrimination.[115] When Congress delegated to the states the authority to site hazardous waste disposal facilities, it was certain that the systematic discriminatory attitudes and practices that have pervaded traditional regulation of land use would affect siting decisions.[116] In this respect, and as the following discussion will illustrate, RCRA has failed in lessening (and perhaps has added to) the burden of environmental risks on people of color.

In siting solid and hazardous waste facilities, states must overcome the obstacle of public opposition to such facilities, known as the NIMBY ("Not In My Back Yard") Syndrome. Over the past twenty years, white, educated, mid-to-upper income citizens have become more aware of the environmental and aesthetic risks associated with such facilities, and they have organized to fight proposals to locate waste disposal sites in their areas.[117] Industry has responded to this trend by targeting those communities where the residents are likely to be less organized and vocal in their opposition.[118] Sociologist Robert D. Bullard has termed the response of public officials and private industry to the NIMBY phenomenon as the PIBBY ("Place In Blacks' Back Yard") principle.[119] In an effort to defeat or avoid local opposition, states have established siting mechanisms that follow one of three general approaches: super review, site designation, or local control.[120]

Commentators have maintained that none of these approaches helps to alleviate the

---

112. Collin, *supra* note 2, at 507.

113. Collin, *supra* note 2, at 508-509; Weisskopf, *supra* note 103, at A25.

114. *Id.* at 508; 42 U.S.C. § 3604(b) (1992) provides:
It shall be unlawful [t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin. *Id.*

115. Collin, *supra* note 2, at 508; *see also* notes 72-80, *supra.*

116. For a general discussion of local control of facility siting decisions see Neil R. Shortridge & S. Mark White, *The Use of Zoning and Other Local Controls for Siting Solid and Hazardous Waste Facilities,* NATURAL RESOURCES & ENVIRONMENT, Winter 1993, at 3.

117. Sarah Crim, *The NIMBY Syndrome in the 1990s: Where Do You Go After Getting to 'No'?*, 21 ENVTL. REP. (Envtl. L. Inst.) 9999 (May 4, 1990).

118. *See* notes 96-100, *supra.*

119. BULLARD, *supra* note 3, at 5.

120. Godsil, *supra* note 111, at 403, citing Bram D.E. Canter, *Hazardous Waste Disposal and the New State Siting Programs*, 14 NAT. RESOURCES LAW 421 (1982). For an extensive discussion of how each of these approaches operate see Godsil, *Remedying Environmental Racism, supra* note 111.

inequitable distribution of waste facilities.[121] For example, under the super review approach,[122] the most common approach, a private entity that proposes to site a facility selects a potential site and applies to the appropriate state agency for a land use permit.[123] If the state approves the application, a special administrative panel is appointed to allow for public participation.[124] The intent of this approach is to encourage informed debate and to give local residents a forum at which to voice their concerns.[125] The super review approach fails to assuage the effects of environmental racism for several reasons. First, since facility developers choose the sites, economic factors combine with the corporate tendency toward the path of least resistance and the forces of institutionalized discrimination to result in site selections skewed toward communities with cheap land and inhabited by the poor and people of color.[126] Second, states that employ the super review approach also have preemption clauses, which effectively allow the appointed board or panel to ignore public opposition.[127] Finally, the approach does not curtail the NIMBY problem. In addition to public comments and protests, better-educated, funded, and organized citizens can litigate[128] or use their informal connections in state government to prevent the siting.[129] Litigation requires resources that people of color and modest means do not typically have access to, and such people normally wield little, if any, political influence.

Perhaps a more concrete demonstration of the failure of environmental law to provide everyone with an equally clean environment is the evidence uncovered by a special investigation by *The National Law Journal*.[130] Two Journal reporters conducted an eight-month analysis -- utilizing census data, the civil court docket of the EPA, and the EPA's own

---

121. *See, e.g.*, Collin, *Environmental Equity*, *supra* note 2, at 511-513; Godsil, Note, *Remedying Environmental Racism*, *supra* note 111, at 403-411.

122. Indiana's hazardous waste facility site approval process, IND. CODE ANN. § 13-7-8.6 (Burns, 1992), is classified as a super review approach. Godsil, *supra* note 111, at 403-404. See also, Ellen C. Siakotos, Note, *Citizen Standing in Environmental Licensing Procedures: Not In My Neighborhood!*, 18 IND. L. REV. 989 (1985).

123. Godsil, *supra* note 111, at 403; *see* IND. CODE ANN. § 13-7-8.6-5 (Burns, 1992).

124. Godsil, *supra* note 111, at 403. In Indiana, the approval authority consists of five persons from around the state appointed by the governor, with four others from the county where the proposed facility is to be located to be added once the application is approved. IND. CODE ANN. §§ 13-7-8.6-1 and 13-7-8.6-3 (Burns, 1992).

125. Godsil, *supra* note 111, at 404.

126. Godsil, *supra* note 111, at 405; Collin, *supra* note 2, at 511-512.

127. Godsil, *supra* note 111, at 405; *see* IND. CODE ANN. § 13-7-8.8-13 (Burns, 1992).

128. *See, e.g.*, Indiana Environmental Management Board v. Town of Bremen, 458 N.E. 2d 672 (Ind. Ct. App. 1984), *trans. denied* (Ind. Sup. Ct. 1984), where the court held that the local town and individual citizens had standing to sue to stop the siting of a sanitary landfill, and that their due process rights were violated by the siting authority's failure to follow the proper procedures.

129. Godsil, *supra* note 111, at 405.

130. Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, THE NATIONAL LAW JOURNAL, Sept. 21, 1992, at S1.

records of performance -- of every civil environmental lawsuit concluded between 1985 and 1991 and every residential toxic waste site in the EPA's Superfund program.[131] The report concluded that minority communities are neglected by the EPA in its enforcement of federal environmental laws, and that this neglect occurs whether or not the minorities affected are poor or not.[132]

As for enforcement, the investigation found that the average monetary penalty imposed in court for a violation of RCRA was 506% higher in white areas ($335,556) than in minority areas ($55,318).[133] This disparity did not hold true when analyzed by income, with the average penalty in areas of the lowest median income ($113,491) being 3% higher than the average penalty in areas of the highest median income ($109,606).[134] Interestingly, however, one of the highest RCRA fines ever levied ($350,000) was against a facility located in a 91% white area in Cleveland, Ohio with the low median income ($19,925), while one of the lowest such fines ($60,000) was against a facility in Industry, California where the population is 63% Hispanic, and the median income ($33,572) is among the highest of the areas studied.[135] When the average penalties from enforcement of all federal environmental laws were examined together, the penalties in white areas ($153,067) were 46% higher than those in minority areas ($105,028).[136] As for the category of median income, low income areas see higher fines overall.[137] However, in two types of cases violators in wealthier areas incur substantially higher fines than in lower income areas so that the average penalties for high income areas comes out higher.[138] First, in Clean Water Act cases, fines against violators were 91% higher in high-income areas.[139] Second, in multi-media cases, where EPA pursues penalties for violations of several different laws, the

---

131. *Id.* at S2. Superfund was created in 1980 by Congress' enactment of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), P.L. 96-510, 94 Stat. 2767, (codified and amended at 42 U.S.C. § 9601 (1988)). CERCLA § 111, 42 U.S.C. § 9611, created a revolving trust fund, dubbed the Superfund, to be funded through taxes on chemical manufacturing, to be used to remediate abandoned hazardous waste sites and to respond to spills and releases of chemical substances.

132. *Id.* at S2.

133. *Id.*

134. Marianne Lavelle & Marcia Coyle, *Race and Income Variations on a Trend, The Minority Equation*, THE NATIONAL LAW JOURNAL, Sept. 21, 1992, at S2.

135. Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, THE NATIONAL LAW JOURNAL, Sept. 21, 1992, at S1.

136. *Id.*

137. *Id.* In Clean Air Act cases, fines in poor areas were 29% higher than in wealthier areas; in Superfund cases, 24% higher; and in Safe Drinking Water Act cases, 63% higher. *Id.* at S2.

138. *Id.*

139. *Id.*

average fine in high-income areas ($315,000) was 1,650% higher than in low-income areas ($18,000).[140]

EPA decision-making in the cleanup and remediation of contaminated Superfund sites was also shown to have a bias toward people with higher incomes who are white.[141] While the Journal study did find that only in Superfund enforcement cases were the fines higher in minority areas than in white areas, by nine percent, other aspects of the Superfund cleanup process were not as beneficial to communities of color and the poor.[142] For instance, minority and poor communities have had to wait nearly 20% longer on average to have abandoned toxic waste sites placed on the National Priorities List (NPL) than did white and high-income areas.[143] Moreover, once a site is placed on the NPL, it takes an average of 10.4 years to begin the cleanup in minority areas, compared to 9.9 years in white areas.[144]

Perhaps most telling of the differences in resources, representation, and political clout among industry, white individuals, and minority individuals, is the discrepancy in the type of remedial action that will be taken at any given site.[145] In 1986, CERCLA was amended.[146] Among the more significant revisions was the addition of CERCLA § 121, which made clear Congress' strong preference for "treatment" over "containment" or "disposal" as a remedial action.[147] The *Journal* investigation revealed that treatment was chosen 22% more frequently than containment at sites in white areas.[148] However, at minority sites, *containment* was chosen seven percent more frequently than remedial actions involving treatment.[149]

---

140. Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, THE NATIONAL LAW JOURNAL, Sept. 21, 1992, at S1.

141. *Id.* at S4.

142. *Id.*

143. *Id.* CERCLA § 105, 42 U.S.C. § 9605 (1982), requires EPA to develop criteria for prioritizing sites to be remediated and to develop and maintain a list of such "national priorities." Once a site is identified as potentially needing remedial action, EPA assesses the site to determine whether it merits placement on the National Priorities List. ARBUCKLE, *supra* note 9, at 477.

144. Lavelle & Coyle, *supra* note 130, at S6. The pattern is much more uneven among the EPA Regions, where most Superfund decisions are made. In three Regions (II, IV, and X), cleanups have begun more quickly at minority sites than in white areas (11, 8, and 36 percent faster, respectively). In Region III, the pace is even, and in the remaining six Regions, the time between site discovery and the commencement of site cleanup ranges from 8 to 42% less in white areas than in minority areas. *Id.* at S6.

145. Lavelle & Coyle, *supra* note 129, at S6.

146. Superfund Amendments and Reauthorization Act of 1986 (SARA), P.L. 99-499.

147. ARBUCKLE, *supra* note 9, at 471, 482. Section 121 was added by the SARA of 1986, Pub. L. No. 99-499 (SARA). Treatment is meant as action which "permanently and significantly reduces the volume, toxicity or mobility of the hazardous substances", and is to be preferred over other actions not involving such treatment. Containment is meant as leaving the contamination in place, but taking actions to prevent its migration offsite. Offsite disposal without such treatment is the least favored alternative action. CERCLA § 121(b), 42 U.S.C. § 9621(b) (1993 Supp.).

148. Lavelle & Coyle, *supra* note 129, at S6.

149. *Id.*

The above findings are striking. The remedial action implemented at any given site is dependent on a variety of circumstances, such as the type and extent of contamination and the geologic conditions of the area. Nevertheless, it is difficult to fathom that the bulk of contaminated sites where remedial actions other than treatment are the preferred alternative are located in communities of color. Clearly, the Journal investigation demonstrates that the Executive Branch of the United States government cannot be relied upon to effectively carry out the mandates of Congress, and, moreover, cannot be trusted to select the safest option for remediating contaminated properties in communities of color.

B. The Failure of Civil Rights Law

The National Law Journal report serves to reinforce all of the socioeconomic and anecdotal evidence of the disproportionate impact of environmental hazards on the poor and people of color. As with any other situation of inequitable treatment under the law, parties adversely affected by discriminatory environmental decisions would expect to have a judicial remedy available to them. Yet, no plaintiff has prevailed using a civil rights argument to stop a proposed siting decision viewed as discriminatory.[150]

As discussed above, decisions and practices need not be intentional to be deemed racist.[151] Nonetheless, the sparse case law in the area of environmental racism has given rise to a requirement to establish "intent" to discriminate on the part of a government agency in making its decision on the siting of a facility.[152] This has proven to be an insurmountable obstacle to judicial relief.

The starting point to mounting a successful equal protection challenge to an environmental decision is to meet the criteria set forth in by the Supreme Court in *Village of Arlington Heights v. Metropolitan Housing Development Corporation.*[153] There, the Court held that proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause of the Fourteenth Amendment.[154] Although official action will not be held unconstitutional solely because it results in racially disproportionate impact, discriminatory

---

150. Luke W. Cole, *Remedies For Environmental Racism: A View From The Field*, 90 MICH. L. REV. 1993 (1992). There are no reported cases challenging an environmental cleanup or enforcement action on the basis of discrimination. Mary Kelly, *Environmental Equity: Overview of Legal Issues*, in ALI-ABA COURSE OF STUDY, HAZARDOUS WASTES, SUPERFUND, AND TOXIC SUBSTANCES, Oct. 29, 1992 *available in* WESTLAW: File No. C778 ALI-ABA 253.

151. *See* notes 21-25, *supra.*

152. Mary Kelly, *Environmental Equity: Overview of Legal Issues*, in ALI-ABA COURSE OF STUDY, HAZARDOUS WASTES, SUPERFUND, AND TOXIC SUBSTANCES, Oct. 29, 1992 *available in* WESTLAW, File No. C778 ALI-ABA 253.

153. 429 U.S. 252 (1977). This case was a challenge to a local zoning board's denial of a change in zoning needed for a developer to build low- and moderate-income housing.

154. *Id.* at 265.

purpose or intent may be shown by either direct or circumstantial evidence.[155] The Court in *Arlington Heights* recommended five factors for consideration as evidence of discriminatory intent or purpose:

(1) the impact of the official action and whether it bears more heavily on one race than another;

(2) the historical background of the decision, especially if it 'reveals a series of official actions taken for invidious purposes;'

(3) the sequence of events preceding the decision;

(4) any departures, substantive or procedural, from the normal decision-making process; and

(5) the legislative or administrative history, specifically contemporary statements, minutes of meetings, or reports.[156]

As has been clearly documented, many environmental decisions have had disproportionate impacts on racial minorities in the United States. However, despite the roadmap laid out in *Arlington Heights*, plaintiffs still have the onerous burden of producing evidence of discriminatory intent, even though they are usually the party with the least access to evidence of probative value.[157]

The first case of record to dispute a decision to site a waste facility on the basis of racial discrimination was *Bean v. Southwestern Waste Management Corp.*[158] That case involved a challenge to the decision to issue a permit for a sanitary landfill as racially discriminatory in violation of 42 U.S.C. § 1983.[159] Two legal theories were advanced by the plaintiffs.[160] First, they argued that the decision by the Texas Department of Health (TDH) was part of a pattern or practice of discrimination in the placement of solid waste sites.[161] In support, the plaintiffs introduced voluminous statistical evidence of the siting of landfills in the Houston area.[162] The court concluded that because as many as one-half of the solid waste sites in the

---

155. *Id.* at 264-265, upholding the decision in *Washington v. Davis*, 426 U.S. 229 (1976), at 242; Godsil, Note, *supra* note 110, at 413. Note that a showing of discriminatory intent or purpose of a governmental body in making a decision by direct evidence would be rare.

156. 429 U.S. at 266-268.

157. Godsil, Note, *supra* note 103, at 414.

158. 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd per curiam*, 782 F. 2d 1038 (5th Cir. 1986).

159. *Id.* at 674 n.1.

160. *Id.* at 677.

161. *Id.*

162. *Id.* at 674.

target area[163] were located in census tracts with a minority population of less than 25%, the statistical evidence alone did not establish a clear pattern or practice of discrimination.[164] In addition, the court found that the plaintiffs introduced no supplemental evidence as to the five factors suggested by the court in *Arlington Heights*.

The second theory advanced by the plaintiffs was that TDH's decision, in light of the historical placement of solid waste sites and the events surrounding the application for the site in question, constituted discrimination.[165] Again, the plaintiffs offered statistical data in support of its position that waste sites had historically been sited discriminatorily; however, the court found exception to each set of data offered and determined that white areas were proportionately impacted by landfills as were minority areas.[166] Interestingly, the court did find significance in the plaintiffs' non-statistical supplementary evidence, which the court observed "raises a number of questions as to why this permit was granted."[167] First, the site was originally proposed as a landfill site in 1971, but was rejected by the County Commissioners, who at that time had authority over such matters.[168] Second, the site is located within 1700 feet of a high school.[169] The plaintiffs argued that in 1971, the high school had a predominately white student body whereas at the time of TDH's permit approval it was predominately minority.[170] The court observed that "land use considerations alone would seem to militate against granting this permit," and found that the plaintiffs did establish that TDH's decision was "unfortunate and insensitive."[171] Nonetheless, the court held that this evidence was not of the magnitude required by *Arlington Heights* to prove purposeful discrimination.[172]

In *East Bibb Twiggs Neighborhood Association v. Macon-Bibb County Planning & Zoning Commission*, area residents challenged the grant of a conditional use permit for the creation of a private landfill.[173] The residents alleged that they were deprived of equal

---

163. A number of sites that were approved by a differant state agency, which are of questionable relevance to the TDH's citing decision, were included in the figure. *Id.*

164. Bean v. Southwestern Management Corp., 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd per curiam*, 782 F. 2d 1038 (5th Cir. 1986); Collin, *supra* note 2, at 521.

165. *Id.* at 678.

166. *Id.* at 678-679.

167. *Id.* at 679.

168. *Id.*

169. Bean v. Southwestern Management Corp, 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd per curiam*, 782 F. 2d 1038 (5th Cir. 1986).; Collin, *supra* note 2, at 521.

170. *Id.*

171. *Id.* at 679-680.

172. *Id.* at 680.

173. 706 F. Supp. 880 (M.D. Ga. 1989), *aff'd*, 896 F. 2d 1264 (11th Cir. 1989).

protection of the law because of the circumstances under which the Commission made its decision. The Commission had originally denied the request, but later granted the applicant a rehearing, that subsequently resulted in the decision to approve the site.[174] The court found that although the census tract in which the landfill would be located had a 60% African American population, the only other Commission-approved landfill was in a neighboring census track, which had a 76% white population, and therefore, a "clean pattern, unexplainable on grounds other than race" did not exist.[175] The court then proceeded to consider each of the *Village of Arlington Heights* factors in light of the plaintiffs' evidence, and found that it failed to establish an invidious discriminatory purpose in the Commission's decision, and that therefore the plaintiffs were not deprived of equal protection of the law.[176]

One commentator has criticized the court's application of the *Village of Arlington Heights* factors.[177] First, it is noted that three different approaches have been utilized in determining the area to examine in considering whether a disparate impact will result from the siting of a facility: the *East Bibb Twiggs* court measured the percentage of minorities in a census tract, the plaintiffs therein argued that County Commission Districts should be used, and the *Bean* court looked at the "target areas."[178] While acknowledging that there is no one obvious approach a court should take to demarcate the affected population, the commentator suggests an alternative:

> [D]etermine the population of the area physically affected by the siting: the area in which the residents suffer the smell, the traffic, the sight, the lowered land values and the potentially polluted groundwater resulting from the facility. Focusing the inquiry on the physically affected area would better measure the impact for purposes of determining disparate impact than arbitrarily chosen political boundaries.[177] Second, it is observed that the *East Bibb Twiggs* court, in looking to the role of historical discrimination to determine discriminatory intent, only considered actions by the particular government agency challenged in the case.[180] The commentator argues that hazardous waste siting authorities are relatively new, and therefore have no history, or record of past decisions. Without analyzing patterns or practices of decision-making by the controlling state or local government,

---

174. *Id.* at 882-883.

175. *Id.* at 884.

176. *Id.* at 887.

177. *See* Godsil, *supra* note 103, at 418.

178. *See* Godsil, *supra,* note 104 at 413. "Target area" is a term of art used in reference to an area designated by the federal government as low income. *Id.* at note 152.

179. Godsil, *supra* note 104, at 413.

180. *Id. See* 706 F. Supp., at 885. Note that the court in *Bean, supra* note 157, also questioned the relevance of plaintiff's evidence concerning practices of a different agency.

the existence therein of a history of invidious discrimination would be overlooked and the effects of systematic discrimination would be ignored.[181]

While the *Bean* and *East Bibb Twiggs* decisions have created a formidable burden of proof upon claimants of racial discrimination in environmental decision-making, the case of *R.I.S.E, Inc. v. Kay*[182] (R.I.S.E.) has rendered that burden effectively insurmountable. In that case, a non-profit, biracial community organization, Residents Involved in Saving the Environment, challenged the decision of the County Board of Supervisors to site a regional sanitary landfill in rural King and Queen County, Virginia as violative of equal protection.[183] The Board, faced with a lack of suitable landfill space, entered negotiations to create a joint venture landfill with a private entity.[184] After the site had been selected and its acceptability determined, the private party backed out of the deal.[185] Determined to site a landfill at the chosen site and in partnership with a private party, the Board continued its efforts by rezoning the location, pursuing an option to purchase the land, and negotiating with potential operators.[186] The population of the County is approximately 42% minority and 57% white.[187] The population living within a one-half mile radius of the proposed site was 64% African American and 36% white.[188] On the 3.2-mile stretch of road where most of the traffic travelling to and from the landfill would pass were twenty-six homes -- twenty-one inhabited by African American families and five by white families.[189] Despite vocal public opposition (at one public hearing 225 residents attended, fifteen of whom spoke in opposition, and they presented a petition signed by 947 individuals who opposed the landfill), the Board ultimately acquired and approved the site, and entered into a lease with a private operator.[190]

---

181. Godsil, *supra* note 103, at 413.

182. 768 F. Supp. 1141 (E.D. Va. 1991); R.I.S.E, Inc. v. Kay, 768 F. Supp. 1144 (E.D. Va. 1991) (R.I.S.E II). In R.I.S.E. I, the court granted the defendants' motion for summary judgement for alleged violations of the Due Process Clause of the Fourteenth Amendment, and a Virginia statute; however, the court denied the defendants' motion on the plaintiffs' equal protection claim. 768 F. Supp. at 1141; Collin, *supra* note 2, at 527, note 240. R.I.S.E. II is the decision discussed in the text.

183. 768 F. Supp. at 1144.

184. *Id.* at 1146.

185. *Id.*

186. *Id.* at 1146-1148.

187. Collin, *supra* note 2, at 527. In 1990, the population consisted of 3573 whites, 2633 African Americans, 65 Native American, Eskimo or Aleut persons, 10 Asian or Pacific Islanders, and 8 of another race. *Id.* at 527, note 245. In 1988, a federal lawsuit against the County ordered voter redistricting, resulting in an increase in the number of Board members from three to five. The new Board consisted of two newly elected African American members and the three previously elected, white supervisors. *Id.* at 527-528; 768 F. Supp. at 1146.

188. 768 F. Supp. at 1148.

189. *Id.*

190. *Id.* at 1147-1148.

The court in *R.I.S.E.* found that, as a matter of law, the history of landfill sitings in the County had resulted in a disproportionate impact on African American residents.[191] In so finding, the court examined the siting of four landfills between 1969 and the proposed site in question.[192] The first, sited in 1969, had a surrounding population, within a one-mile radius, with an estimated racial composition of 100% African American.[193] The second site, approved in 1971, had an estimated 95% African American population within the two-mile area surrounding the landfill.[194] The third was sited in 1977 in an area where the estimated population within a one-half mile radius was 100% African American.[195] Perhaps most interesting is the fourth and final site examined. That site was a private 120-acre landfill set up by the King Land Corporation, without any of the geotechnical studies necessary to determine the site's suitability as a landfill.[196] At the time the King Land landfill was sited, the County had no zoning ordinance, and the landfill began operation without any local approval.[197] In response to this "environmental disaster," the Board enacted a zoning ordinance and ultimately prevailed in shutting down the King Land landfill operation.[198] Interestingly, the racial composition of the residential area surrounding this landfill is predominately white.[199] The circumstances surrounding the forced closing indicate that it is likely that the main motivating factor for the Board's enactment of a zoning ordinance was the removal of the landfill from the white residential area.[200]

Despite the plaintiffs' success in showing that people of color were disproportionately impacted by landfill siting decisions, the court found that this was only a "starting point" for determining whether official action was motivated by discriminatory intent.[201] The court found that the plaintiffs did not provide any evidence to satisfy "the remainder of the discriminatory purpose equation set forth in *Arlington Heights*," and held that the Equal Protection Clause "does not impose an affirmative duty to equalize the impact of official decisions on different racial groups."[202]

---

191. *Id.* at 1149.

192. *Id.* at 1148-1149.

193. *Rise* I, 768 F. Supp. 1141, 1148 (E.D. Va. 1991).

194. *Id.*

195. *Id.* at 1149.

196. *Id.*

197. *Id.*

198. *Rise* I, 768 F. Supp. 1141, 1149 (E.D. Va. 1991); Collin, *supra* note 2, at 530-531.

199. *Id.*

200. Collin, *supra* note 2, at 530-531, note 284 (citing Brief of Appellants, *R.I.S.E. II* (No. 91-2144)).

201. 768 F. Supp. at 1149.

202. *Id.* at 1149-50.

Notwithstanding the seemingly insurmountable burden of proof created by the *Arlington Heights* decision and its "environmental progeny," environmental justice activists have continued the struggle to obtain a judicial remedy.[203] At least some glimmer of hope has arisen from the recent decision in *El Pueblo Para el Aire y Agua Limpio v. County of Kings*.[204] In that case, the plaintiffs challenged the decision to site California's first hazardous waste incinerator in Kettleman City, a community with a population that is 85% Hispanic, most of whom speak very little, if any, English.[205] The plaintiffs in *El Pueblo* have taken a different approach than those in the cases discussed above by attacking the adequacy of the Environmental Impact Report (EIR) prepared for the site under the State's Environmental Quality Act (EQA).[206] Of significance to the environmental justice movement was that, in addition to a finding of a variety of technical and scientific inadequacies in the EIR, the court found that the County's failure to translate public notices and transcripts of public hearings into Spanish constituted a violation of the EQA's public participation requirements.[207]

Although the *El Pueblo* decision is a positive development in the struggle for equal environmental protection, the decision may be limited to its facts. Additionally, in *Bean*, *East Bibb Twiggs*, and *R.I.S.E.* make clear that the courts are not sympathetic to the plight of those poor people and people of color who bear the disparate burden of environmental hazards. It is evident that the heavy burden of showing invidious discriminatory intent is a nearly unreachable goal.

IV. Conclusion

The opinion of this author is that the federally mandated, locally controlled system of environmental regulation that has developed in this country has failed to provide all citizens equal protection from environmental hazards. Furthermore, aggrieved parties who resort to the court system -- by filing suit alleging that an environmental decision or action is

---

203. *E.g.*, Bordeaux Action Committee v. Metropolitan Nashville, No. 390-0214 (M.D. Tenn. filed Mar. 12, 1990); El Pueblo Para el Aire y Agua Limpio v. Chemical Waste Management, Inc., No. CIV-F-91-578-OWW (E.D. Cal. filed July 7, 1991); Mothers of East Los Angeles v. U.S. Environmental Protection Agency, Nos. 90-70209, 90-70210 (9th Cir. 1991); R.I.S.E. II, No. 91-2144 (4th Cir. 1991). Each of these cases involves some claim of discrimination in an environmental siting decision and in various stages of litigation.

204. No. 366045 (Cal. Super. Ct. Sacramento County Dec. 30, 1991), 22 ENVTL. L. RPTR. 20357 (April, 1992).

205. *Lawyer Profile: Luke Cole*, BARRISTER, Summer 1992, at 15. The translation of the case name is *People for Clean Air and Water v. County of Kings. Id.*

206. *See* ENVTL. L. RPTR., *supra* note 204 at 20358; *See also* Marcia Coyle, *Lawyers Try To Devise New Strategy, in Unequal Protection: The Racial Divide in Environmental Law*, THE NATIONAL LAW JOURNAL, Sept. 21, 1992, at S8.

207. 22 Envtl. L. Rptr., *supra* note 204 at 200358; Marcia Coyle, *Lawyers Try To Devise New Strategy, in Unequal Protection: The Racial Divide in Environmental Law*, THE NATIONAL LAW JOURNAL, Sept. 21, 1992, at S8.

discriminatory under the Equal Protection Clause -- are not assured of a judicial remedy.

Strangely, at least one commentator has argued that we should not view the existence of environmental racism as a failure of, but rather as a success of environmental law![208] In other words, the disproportionate burden of environmental hazards on people of color is perfectly legal under the politicized system of American environmental (and probably civil rights) law.[209] Such viewpoints illustrate a lack of confidence that our institutions and system of justice are adequate to overcome institutionalized discrimination and to provide equal protection to each and every citizen. The United States has spent $1.5 trillion dollars on environmental cleanup and protection[210], and each one of us has shouldered their share of that burden, either directly or indirectly. Unfortunately, it appears that not everyone of us has benefitted equally from our investment. The right to a reasonably clean and healthy environment is a natural right possessed by each and every person.[211] As decisions are made in the future concerning environmental risks and the allocation of scarce resources, the equitable application of law and principles of environmental justice are indispensable elements that must exist for the creation and survival of a free and just society.

---

208. Cole, *supra* note 150, at 1995.

209. *Id.*

210. Reilly, *supra* note 102, at 19.

211. *See generally* Peter Wentz, ENVIRONMENTAL JUSTICE 21 (1988) *and* T. Hoban & R. Brooks, GREEN JUSTICE: THE ENVIRONMENT AND THE COURTS 161, 219 (1987).