

William & Mary Environmental Law and Policy Review

Volume 21 (1997)
Issue 3

Article 2

June 1997

Battery and Beyond: A Tort Law Response to Environmental Racism

Kathy Seward Northern

Follow this and additional works at: <https://scholarship.law.wm.edu/wmelp>



Part of the [Environmental Law Commons](#), and the [Torts Commons](#)

Repository Citation

Kathy Seward Northern, *Battery and Beyond: A Tort Law Response to Environmental Racism*, 21 Wm. & Mary Envtl. L. & Pol'y Rev. 485 (1997), <https://scholarship.law.wm.edu/wmelp/vol21/iss3/2>

Copyright c 1997 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
<https://scholarship.law.wm.edu/wmelp>

BATTERY AND BEYOND: A TORT LAW RESPONSE TO ENVIRONMENTAL RACISM

KATHY SEWARD NORTHERN*

As the millennium approaches, the quest for environmental justice—the fair and equitable allocation of environmental benefits and burdens—constitutes a challenge of Herculean proportions.

INTRODUCTION

Over the past ten years, a consensus has evolved that, in the United States, racial and ethnic minorities bear a significant and disproportionate burden with respect to the location of hazardous waste facilities, the distribution of funds available for the remediation of hazardous waste sites, and the imposition of a myriad of other environmental burdens. Indeed, race, as an independent factor irrespective of class, has been found to be the single best predictor of the distribution of air pollution, the location of municipal landfills, and the siting of hazardous waste facilities.¹ The magnitude of this environmental dilemma is illustrated in a story from ancient Greek mythology.

*Assistant Professor of Law, The Ohio State University College of Law. B.A., Williams College, 1980; J.D., Harvard University Law School, 1983. I would like to thank the students whose research assistance and insight have been invaluable: Yvette Barrett, Michael Beekhuizen, Imani Chiphe, Andrea Cleland, and John Hanusz. Special thanks to my colleagues Howard Fink, Jim Meeks, Deborah Merritt, Peter Swire, and Nancy Rapoport who took the time to read this long piece and whose comments were extremely helpful. Special thanks also to Michele Whetzel-Newton whose patience and skill are priceless.

¹ See COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES xiii, 15 (1987) [hereinafter TOXIC WASTES AND RACE]; Rachel D. Godsil, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 397-400 (1991).

In Greek mythology, we are regaled with the epic adventures of Hercules, a human endowed with great physical prowess and special gifts, who constantly strove with both gods and humans to overcome evil.² In his arrogance, Hercules offended the gods, who required him to perform twelve labors.³ We are told that Augeias, King of Elis, was, in terms of flocks and herds, the wealthiest man on earth. By divine dispensation, his sheep and cattle were unfailingly fertile and immune to disease. As a consequence, his flocks and herds were the largest and most productive in the known world.⁴ As do most successful commercial enterprises, the herds created a significant amount of waste by-product. For many years, King Augeias disposed of this waste excrement on-site.⁵ The dung in Augeias' cattle yard and sheepfolds was not cleared away and thus presented a significant environmental challenge.⁶ Although its highly offensive stench did not affect the beasts themselves, the dung spread a pestilence across the Peloponnese.⁷ Moreover, the valley pastures could no longer be ploughed for grain because they were so deep in dung.⁸

Hercules proposed to King Augeias that he would remedy the problem and cleanse the cattle yard before nightfall in return for one-tenth of the cattle.⁹ Hercules proposed this seemingly impossible task because he already had arranged with the river gods for their assistance.¹⁰ First, Hercules "breached the wall of the yard in two places, and next diverted the neighboring rivers Alpheus and Peneius so that their streams rushed through the yard, swept it clean, and then went on to cleanse the sheepfolds and the valley pastures."¹¹ Thus, Hercules accomplished his labor in a single day, restoring King Augeias' land to pristine condition, and revitalizing the

² See 2 ROBERT GRAVES, GREEK MYTHS 101-58 (1958).

³ See *id.* at 101.

⁴ See *id.* at 116.

⁵ See *id.*

⁶ See *id.*

⁷ See *id.*

⁸ See *id.*

⁹ See *id.*

¹⁰ See *id.*

¹¹ *Id.* at 117.

surrounding Peloponnese.¹² The river gods, of course, did not ask their riparian neighbors whether they wished to have the rivers used for this purpose. One only can imagine the horrific environmental impact Hercules' waste management program had on the Rivers Alpheus and Peneius and the King's poorer, less powerful downstream neighbors.

While this Herculean saga illustrates our current waste disposal dilemma, Garrett Hardin explains it in *The Tragedy of the Commons*.¹³ Hardin argues that efforts to maximize individual or corporate wealth can lead to the disproportionate allocation of environmental burdens.¹⁴ He asks us to picture a pasture that is open to all to use.¹⁵ Herdsmen are attracted to the pasture for its ample resources.¹⁶ It is to be expected that each herdsman will try to keep as many cattle as possible on the commons. That is, each herdsman will attempt to use the available resources to maximize his own wealth.¹⁷ Such an arrangement works for a while, and circumstances such as war, pestilence, and other natural phenomena keep the total number of cattle in check.¹⁸ In time, an increase in the number of herdsmen, social stability,

¹² See *id.*

¹³ 162 Sci. 1243 (1968).

¹⁴ See *id.* at 1244-46.

¹⁵ See *id.* at 1244.

¹⁶ See *id.*

¹⁷ See *id.*

As a rational being, each herdsman seeks to maximize his gain. Explicitly or implicitly, more or less consciously, he asks, "What is the utility *to me* of adding one more animal to my herd?" This utility has one negative and one positive component.

1) The positive component is a function of the increment of one animal. Since the herdsman receives all the proceeds from the sale of the additional animal, the positive utility [of acquiring that animal] is nearly +1.

2) The negative component is a function of the additional overgrazing created by one more animal. Since, however, the effects of overgrazing are shared by all the herdsmen, the negative utility for any particular decision-making herdsman is only a fraction of -1.

Id.

¹⁸ See *id.*

and scientific advancement allow the cattle to flourish.¹⁹ At this point, the inherent logic of the commons can lead to a tragic conclusion.

[T]he rational herdsman concludes that the only sensible course for him to pursue is to add another animal to his herd. . . . But this is the conclusion reached by each and every rational herdsman sharing a commons. Therein is the tragedy. Each man is locked into a system that compels him to increase his herd without limit—in a world that is limited. Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of a commons. Freedom in the commons brings ruin to all.²⁰

Hardin argues that the inverse of this picture of the tragedy of the commons is found in the picture of pollution.²¹

Here it is not a question of taking something out of the commons, but of putting something in—sewage, or chemical, radioactive, and heat wastes into water; noxious and dangerous fumes into the air. . . . The calculations of utility are much the same as before. The rational man finds that his share of the cost of the wastes he discharges into the commons is less than the cost of purifying his wastes before releasing them. Since this is true for everyone, we are locked into a system of “fouling our own nest,” so long as we behave only as independent, rational, free-enterprisers.²²

The rational man, upon fouling his nest, seeks to clean it up. He may very well decide that he can best cleanup by removing the waste to the farthest

¹⁹ See *id.*

²⁰ *Id.*

²¹ See *id.* at 1245.

²² *Id.*

corner of the commons.

The commons, known as the United States, has developed into one of the wealthiest, most productive, and most advantaged nations in the world. In large part, it has done so because of the breadth of its physical commons, the wealth of its resources, and the labor, both forced and free, of its people. Its citizens, both public and private, benefit to varying degrees from its technological and economic prowess. The same commercial enterprises that generate this wealth and supply these benefits, however, also generate environmental toxins and impose other forms of environmental burdens. As a technologically advanced, consumption-oriented society, we must resolve how to fairly allocate scarce environmental resources, justly distribute environmental burdens, and remediate existing environmental degradation. To accomplish this we must first recognize what appears as an intractable truth—while each of us hopes to benefit from living in this society, few of us want to shoulder the burden of the unwanted by-products of our prosperity, to endure the inconvenience and discomfort of living near a malodorous facility, or to risk exposure to harmful levels of environmental toxins. Therefore, until industry fully complies with environmental regulations, commits adequate resources to remediate environmental pollution, and finds methods to altogether eliminate hazardous waste generation, the environmental protection mechanisms currently in place must be implemented in fair and just ways—ones that do not disproportionately affect people of color and the poor. As a society, we must acknowledge those who derive the greatest benefits from the technological and industrial prowess of this nation and not allow them to dispose of their “stable waste” by concentrating its disposal in those areas of the commons occupied by people of color and the poor.

From the beginning of the industrial revolution, commercial enterprises have generated pollution and other waste by-products and imposed the associated environmental burdens upon others in surrounding communities.²³ As the millennium comes to an end, the sheer magnitude of

²³ The environmental problems of this nation are widely documented. From the latter part of the nineteenth century to the enactment of environmental protection statutes in the 1960s and 1970s, the industrial and economic growth of this nation often was accompanied by a

the problems involved in remediating past environmental degradation and mitigating the effects of present-day waste generation presents one of this country's most daunting challenges. As a society, we must garner the political will to resolve how to fairly allocate scarce economic, social, and environmental resources dedicated to the enforcement of environmental regulations, and how to locate appropriately both solid and hazardous waste disposal facilities.²⁴ In addition, we must commit the necessary resources to

laissez faire approach to natural resource management and pollution control. See F. William Futrell, *The History of Environmental Law*, in ENVIRONMENTAL LAW: FROM RESOURCES TO RECOVERY 1-49 (Celia Campbell-Mohn, Barry Breen, and F. William Futrell eds., 1993). The enormity of the problem is described in the legislative history of environmental protection legislation. See, e.g., Resource Conservation and Recovery Act ("RCRA"), Pub. L. No. 94-580, 90 stat. 2795 (codified in scattered sections of 42 U.S.C. (1994)); Clean Water Act of 1972, amended by 33 U.S.C. §§ 1251-1387; Safe Drinking Water Act of 1974, amended by 42 U.S.C. §§ 300f-300t-13; Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992k (1994); Clean Air Act of 1977, 42 U.S.C. §§ 7401-7671q (1994); Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-9675 (1994). See also Frank P. Grad, *A Legislative History of the Comprehensive Environmental Response, Compensation and Liability ("Superfund") Act of 1980*, 8 COLUM. J. ENVTL. L. 1 (1982) (providing the legislative history of CERCLA); Robert J. Rauch, *The Federal Water Pollution Control Act Amendments of 1972: Ambiguity as a Control Device*, 10 HARV. J. LEGIS. 565 (1973) (providing the legislative history of the Clean Water Act of 1972).

²⁴ In *A New Agenda for Modern Environmental Law*, Richard Brooks states:

Most current environmental policy is guided toward the effective achievement of environmental objectives yet the proper goal of environmental law is not only effectiveness or efficiency but also environmental justice—the proper distribution of environmental amenities, the fair correction and retribution of environmental abuses, the fair restoration of nature, and the environmentally fair exchange of resources. . . . Any balancing of economics and environmental protection must take into account the different notions of justice—distributive, corrective, retributive, restorative, and exchange—all of which can arguably play a role in environmental protection policy.

6 J. ENVTL. L. & LITIG. 1, 26-27 (1991); see also KENNETH A. MANASTER, ENVIRONMENTAL PROTECTION AND JUSTICE—READINGS AND COMMENTARY ON ENVIRONMENTAL LAW AND PRACTICE 19 n.1 (1995) (providing a broader definition of "environmental justice" than addressed in this article, which focuses on the demands of communities of color for equitable environmental enforcement and facility siting).

develop effective and affordable waste disposal technologies.

It is only in the last decade that social scientists, legal scholars, and environmental policy analysts have focused their efforts to address the unequal distribution of environmental burdens. In *Environmental Justice/Racism/Equity: Can We Talk?*,²⁵ Marc Poirer considers the historical reasons why people of color and the poor have borne the disproportionate burden of "environmental disamenities." He observes that "[f]rom the very beginning of the environmental movement, in the early 1970s and even before, expressions of concern . . . about the disproportionate impact of various environmental stresses on racial minorities and the urban and rural poor were available."²⁶ Little was done, however, to address the disparities. Indeed, it was not until the 1980s that the disparities attained widespread recognition as "problems."²⁷ Poirer explains that, until the latter part of the 1980s, the divergent demographics and the differing political discourse of the primarily white, middle class environmental movement and the African-American civil rights movement precluded a convergent approach to issues of environmental and social justice.²⁸ These historical divergences are reflected in the range of current environmental justice/racism/equity theoretical approaches.²⁹ Although tort doctrine is used widely by advocates in both the environmental and civil rights movements, few proponents have argued for tort-based approaches in the context of environmental racism.³⁰ As in many other areas of social policy, however, tort law has its role in this marketplace of ideas. This article suggests that tort law, through the rubric of the intentional tort doctrine, provides a viable substantive approach to the

²⁵ 96 W. VA. L. REV. 1083 (1994) (considering the historical reasons why environmental justice/racism/equity received little attention until the 1980s).

²⁶ *Id.* at 1085 & n.4 (providing examples of early studies relating to the disproportionate impact of environmental stresses on racial minorities).

²⁷ *See id.* at 1084 n.3 (providing a brief discussion of the period when the environmental justice/equity/racism movement took hold).

²⁸ *See id.* at 1086.

²⁹ *See id.* at 1086-88.

³⁰ *See, e.g.,* Serena M. Williams, *The Anticipatory Nuisance Doctrine: One Common Law Theory for Use in Environmental Justice Cases*, 19 WM. & MARY ENVTL. L. & POL'Y REV. 223, 223 (1995).

problem of environmental racism.

Tort law has long recognized the preeminence given to the right of an individual, regardless of race or socio-economic status, to be free from uninvited, non-consensual, harmful, or offensive contacts with his or her person.³¹ Tort law protects the right of all individuals to use, possess, and enjoy their own property free of unreasonable interference, and to prevent interference with such rights that individuals have in common with the general public.³² Moreover, the law recognizes, through constitutional interpretation and legislative initiative, the right of ethnic and racial minorities to be treated equally with their white counterparts with respect to the availability of certain entitlements and in the protection of civil rights.³³ Equality of treatment in the distribution of public accommodations, public benefits, public protections, and public burdens is a fundamental notion of distributive justice, a central concern to the law of torts. Tort law is a tool often used by citizens to vindicate both individual rights and public policy.³⁴ The disproportionate allocation of environmental burdens to low income areas and persons of color³⁵ is not only unfair, it is offensive; it interferes with the use and enjoyment of both public and private property, and it fundamentally increases the risk of exposure to environmental toxins. It is

³¹ See discussion of battery *infra* note 306 and accompanying text.

³² See discussion of toxic tort theories—trespass, nuisance, and strict liability *infra* Part II.C.1-4.

³³ See discussion of civil rights *infra* Part II.A-B.

³⁴ For example, the tort of wrongful, or retaliatory, discharge is available to an at-will employee who can demonstrate that their employment was terminated for reasons contrary to public policy. See, e.g., *Tate v. Browning-Ferris, Inc.*, 833 P.2d 1218, 1225 (Okla. 1992) (concluding racially motivated discharge would contravene public policy and constitute an exception to employment-at-will doctrine); *Collins v. Rizkana*, 652 N.E.2d 653, 656 (Ohio 1995) (recognizing that wrongful discharge on the basis of sexual harassment states a cause of action and constitutes a public policy exception to the general rule of employment-at-will).

³⁵ The problems detailed in this Article affect both people of color and the poor. However, when controlled for socio-economic factors, many of the studies indicate that the disproportionate allocation is greatest in communities of color. See *infra* Part I.B.1. Therefore, the main focus of this article is upon communities of color. As will be indicated where appropriate, however, the proposed theories of relief also may apply to those disproportionately impacted because of their presence in low-income communities.

a problem, then, to which tort law should speak.

This article begins in Part I.A. with an explanation of how a person who lives in a community in close proximity to a hazardous waste disposal site or other source of environmental burdens may become exposed to, or affected by, those toxins, and the types of harms such exposures might cause. It continues in Part I.B. with an examination of evidence that there is a disproportionate concentration of such environmentally burdensome facilities in minority communities. Part I.C. describes historical patterns of discrimination in housing, land use planning, and distribution of public benefits—in addition to current political and economic influences—that have caused and continue to perpetuate the disproportionate distribution of environmental burdens in minority communities, specifically with respect to solid and hazardous waste disposal activities.

Part II focuses upon the failures and limitations of current equal protection and Title VI litigation theory and environmental tort theory. Such theories have been used to address the unique injuries suffered by persons living in communities of color who have been forced to endure a disproportionate share of environmental harm.

Part III suggests that the tort of battery, specifically with respect to liability for a harmful or offensive contact with environmental toxins, may provide a viable, though limited, basis to address harms arising from exposure to environmental toxins and the dignitary harms arising from environmental racism. Part IV moves beyond battery to explore whether tort theory supports the recognition of a new tort, “racially disproportionate exposure to environmental burdens.” This new tort would provide a distinct cause of action in those cases in which an actor³⁶ intentionally engages in an environmental management practice or course of conduct that disproportionately exposes people of color, and those who are in the community with them, to environmental toxins. This article concludes that

³⁶ As documented in Part I, government decisions also may contribute to environmental racism. This Article focuses on claims against private actors because of the special problems of sovereign immunity and limited duties associated with government actors. Note, however, that imposing tort constraints on private actors would contribute significantly to reducing environmental racism.

these intentional tort theories can be useful tools to protect individual interests and to facilitate community activism.

I. CURRENT STATUS OF ENVIRONMENTAL RACISM IN THE UNITED STATES

The central feature of environmental racism is that residents living in minority communities often are surrounded by environmentally burdensome facilities, and at times, inundated with environmental toxins.³⁷ In order to assess the resulting burden, first it is necessary to understand the mechanisms of exposure.

A. *Mechanisms of Exposure to Environmental Toxins*

The basic premise of this article is that hazardous waste disposal facilities and other pollution generating enterprises can, and often do, release sufficient quantities of noxious or toxic substances into their environs to discommode nearby communities and, at times, cause their residents physical harm. A hazardous waste disposal facility, an unregulated landfill, or an industrial complex can release hazardous material into the environment in several ways. Chemicals may be released into the atmosphere through smoke stacks, effluent pipes, or other emission devices.³⁸ Landfills may leach their contents into the ground or ground water sources.³⁹ Releases can occur when

³⁷ See Robert D. Bullard, *Decision Making*, in *FACES OF ENVIRONMENTAL RACISM: CONFRONTING ISSUES OF GLOBAL JUSTICE* 3 (Laura Westra & Peter S. Wenz eds., 1995). Professor Bullard has written widely on the issues of environmental racism and justice in the past ten years and is a key figure in the environmental justice debate.

³⁸ See, e.g., *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 873 (N.Y. 1970) (explaining that discharge of large quantities of dust upon plaintiffs' properties and excessive blasting deprived nearby property owners of reasonable use of their property, entitling them to payment for nuisance).

³⁹ See, e.g., *State v. Schenectady Chem. Inc.*, 459 N.Y.S.2d 971, 974 (N.Y. Sup. Ct. 1983) (reviewing allegations regarding chemical dump site located in low-lying swamp that was used by agent of chemical manufacturer and contained chemicals such as phenol, benzene, toluene, xylene, vinyl chloride, lead, copper, chromium, and arsenic that migrated into air, surface, and groundwater, contaminating local drinking wells and threatening to pollute aquifer that served as sole source of water for thousands of area residents).

cargoes of waste are transported to, received by, and transferred for further treatment or handling within, the waste disposal site.⁴⁰ A variety of factors determine the risk of human exposure, including circumstances of disposal or release, ambient air or water temperature, hydrogeological structures, wind conditions, and physical properties of the chemicals in question.⁴¹ For example, the movement of chemicals through soil may be fairly slow and is influenced by the discontinuities of soil composition, permeability of soil substrate, porosity of soil structure, viscosity of the chemical, the chemical's stability in water, its temperature, and chromatographic properties of the soil.⁴² In contrast, because of the natural movement of both air and water, chemicals dispersed therein can come into contact with people a significant distance away.⁴³

Airborne pollution presents a significant challenge to communities near a hazardous waste incinerator or other chemical manufacturing or processing facility. A contaminant released as a gas eventually is distributed throughout the air.⁴⁴ Liquid and solid materials released into the air as particulate matter also can become widely dispersed, depending, in part, on their size and density.⁴⁵ Larger particulates are likely to settle to the ground;

⁴⁰ See JAMES T. O'REILLY, SHEPARD'S ENVIRONMENTAL LAW SERIES, TOXIC TORTS PRACTICE GUIDE §3.31, at 3-79 (2d ed. 1995).

⁴¹ See *id.*

⁴² See *id.* at 3-80.

⁴³ See, e.g., *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1212 (6th Cir. 1988) (noting pollutants from defendant's landfill contaminated property within a three-mile radius).

⁴⁴ See O'REILLY, *supra* note 40, § 3.03, at 3-6.

⁴⁵ See *id.* Particulate matter dispersed in the air may be classified into at least seven forms: *Aerosol* - a dispersion of solid or liquid particles of microscopic size in a gas; *dust* - solid particles larger than colloidal and capable of temporary suspension in air or other gases; *fog* - visible aerosols usually formed by condensation; *fumes* - solid particles generated by condensation from the gaseous state, generally after volatilization, often accompanied by a chemical reaction such as oxidation; *mist* - dispersion of liquid particles large enough to be individually visible; *smog* - a combination of smoke and fog; *smoke* - small gas borne particles resulting from incomplete combustion. See *id.* at 3-7 (citing B. Dinman, *The Mode of Entry and Actions of Toxic Materials*, in 1 PATTY'S INDUSTRIAL HYGIENE AND TOXICOLOGY 136 (G. Clayton ed., 1978)).

smaller ones may remain suspended.⁴⁶ The larger the particulate mass, the more likely it is to contaminate an area in close proximity to the source. Smaller particles may travel greater distances.⁴⁷ If the particulates do settle, they are likely to become deposited on someone's property.⁴⁸ It is also possible that the particulates will land in the water or on food supplies. Even if the particulates remain suspended, they still may be harmful if they are inhaled by people located within the dispersion region. The movement of toxins through air, soil, and water, the potential for their wide-ranging dispersion, their toxicity relative to their concentration in a given medium, and the mechanism of exposure determine their effect upon surrounding communities.⁴⁹ It follows then that persons residing in communities or using public facilities in close proximity to an environmentally burdensome enterprise, or those who draw their water from an affected water supply, are those most likely to be "impacted" by the exposure, or potential for exposure, to these air and water-borne toxins.⁵⁰

It is not only actual or threatened physical exposure to environmental toxins that affects persons residing in close proximity to environmentally burdensome enterprises. Such enterprises also may produce foul and discomfiting odors or fumes that plague local residents, thereby reducing

⁴⁶ See *id.* at 3-8.

⁴⁷ See *id.*

⁴⁸ The inevitability of this fact was recognized in *Bradley v. American Smelting & Ref. Co.*, 709 P.2d 782 (Wash. 1985), wherein the court noted:

The defendant has known for decades that sulfur dioxide and particulates of arsenic, cadmium and other metals were being emitted from the tall smokestack. It had to know that the solids propelled into the air by the warm gases would settle back to earth somewhere. It had to know that a purpose of the tall stack was to disperse the gas, smoke and minute solids over as large an area as possible . . . but that while any resulting contamination would be diminished as to any one area or landowner, that nonetheless contamination, though slight, would follow.

Id. at 786.

⁴⁹ See O'REILLY, *supra* note 40, at §§ 3.03-3.04.

⁵⁰ See *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1212 (6th Cir. 1988) (recognizing different zones of contamination, and proportionate degrees of property damage, based upon distance from landfill).

their use and enjoyment of property and overall quality of life.⁵¹ The interference with everyday living conditions caused by the noxious odors is particularly exacerbated in poorer communities, where air conditioning is rare or unavailable and windows are opened to allow air into the home. With respect to waste disposal facilities, the wastes often are transported by trucks, sometimes hundreds a day, causing a constant stream of traffic in and through the community.⁵² The mere presence of an environmentally burdensome enterprise, as well as the threat or perceived threat of exposure to environmental toxins, can depress property values, decrease use of public facilities, and generally degrade community lifestyles.⁵³ Moreover, the greater the concentration of environmental burdens, the more significant the actual and perceived harm to surrounding communities. These mechanisms of exposure, and the potential risks arising therefrom, are central to the grave concern over environmental racism.⁵⁴

B. Disproportionate Exposure to Environmental Burdens Experienced by Those Residing in Minority Communities

Although there was a delayed acknowledgment of the disproportionate allocation of environmental burdens,⁵⁵ there is presently a

⁵¹ See, e.g., *Bartleson v. United States*, 96 F.3d 1270, 1275 (9th Cir. 1996) (recognizing that the classic example of a continuing nuisance includes foul odor).

⁵² See *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb Planning & Zoning Comm'n*, 706 F. Supp. 880, 882 (M.D. Ga. 1989), *aff'd*, 896 F.2d 1264 (11th Cir. 1989) (explaining that siting commission initially denied a conditional use permit, in part, because the facility would subject the area to heavy truck traffic).

⁵³ See *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd mem.*, 782 F.2d 1038 (5th Cir. 1986); see also discussion of West Dallas smelter *infra* text accompanying notes 117-49.

⁵⁴ See generally Patsy Ruth Oliver, *Living on a Superfund Site in Texarkana*; Regina Austin & Michael Schill, *Black, Brown, Red, and Poisoned*; Jane Kay, *California's Endangered Communities of Color*, in *UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR* (Robert Bullard ed., 1994) [hereinafter *UNEQUAL PROTECTION*] (surveying community reactions to the presence of significant environmental burdens).

⁵⁵ See generally Poirer, *supra* note 25.

strong consensus that, in the United States, the benefits associated with industrial and economic growth inure to the rich and politically empowered, but the burdens associated with the national effort to control pollution fall on those who are poor or politically weak.⁵⁶ Those living in low-income and minority communities⁵⁷ are more likely to be exposed to hazardous environmental conditions than are their more affluent/majority counterparts.⁵⁸

1. *Statistical Analyses*

The emerging national awareness about both racial and economic disparities in exposure to environmental hazards can be traced, in part, to the release of two studies: a 1983 study by the United States General Accounting Office ("GAO")⁵⁹ and a 1987 study by the United Church of Christ,

⁵⁶ See Richard J. Lazarus, *Pursuing "Environmental Justice:" The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 792-96 (1992). Lazarus states that "[e]nvironmental protection confers benefits and imposes burdens in several ways. To the extent that the recipients of related benefits and burdens are identical, no problem of discrimination is presented. . . . But identical recipients are rarely, if ever, the result." *Id.* at 792. It also should be noted that the disproportionate allocation of environmental disamenities is not limited to the United States. See generally, Hussien M. Adam, *Somalia: Environmental Degradation and Environmental Racism*, in *FACES OF ENVIRONMENTAL RACISM* 181, *supra* note 37.

⁵⁷ Racial minorities include African-Americans and others of African, Asian, Hispanic, Indian Sub-Continental, Native American, and Pacific Islander descent. Ethnic minorities in this country, particularly recent immigrant populations, may experience similar problems of distribution.

⁵⁸ Many studies have been conducted which demonstrate that race, not economic status, is the best predictor for exposure to environmental toxins. See, e.g., *TOXIC WASTE AND RACE*, *supra* note 1, at xiii, 15. Of course, people of color are significantly more likely to be in a "low-income" category. For purposes of this article, the analysis will focus upon racially disproportionate exposure to environmental toxins. Although many of the references pertain to studies of race based disparities, I believe that the solutions proposed may be viable in predominantly white, low-income communities that can demonstrate a disproportionate environmental burden.

⁵⁹ UNITED STATES GENERAL ACCOUNTING OFFICE, *SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES* (1983) [hereinafter GAO]. There is some debate about whether the

Commission for Racial Justice ("UCC").⁶⁰ These studies came about as a direct result of an unsuccessful grassroots effort to stop the siting of a hazardous waste facility in Warren County, North Carolina.⁶¹

The GAO study found that three of the four major hazardous waste landfills in the South⁶² were located in communities that were predominantly African-American and living below the poverty line.⁶³ The Report further concluded that the siting pattern could not be attributed solely to socio-economic status because similar facilities in the South were not located in low-income white communities.⁶⁴

The UCC study examined the location and distribution of controlled and uncontrolled hazardous waste facilities throughout the United States and determined that there was a national pattern demonstrating a disproportionate allocation of commercial hazardous waste sites in minority communities.⁶⁵ Specifically, the UCC study found that, on a nationwide basis, the greatest number of hazardous waste facilities were located in communities with the

methodology used in the studies, can be used to determine the "chicken and egg" dilemma, that is, whether the sites were located in communities because the residents were black and poor or whether the poor and racial or ethnic minorities ended up living near the industrial sites because they are affordable. See Paul Mohai & Bunyan Bryant, *Environmental Racism: Reviewing the Evidence*, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE 163 (Bunyan Bryant & Paul Mohai eds., 1992). For purposes of this article, the author believes that those studies reliably illustrate that there presently exists a disproportionate allocation of environmental burdens. For reasons later stated, the proposed tort analysis will apply whether the pollution came to the people or the people came to the pollution.

⁶⁰ TOXIC WASTES AND RACE, *supra* note 1.

⁶¹ See Warren County Case Study discussion *infra* notes 151-58 and accompanying text.

⁶² Specifically, the GAO study looked at Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee. See ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY 32 (2d ed. 1994) (citing GAO, *supra* note 59).

⁶³ See *id.* at 33 (citing GAO, *supra* note 59, at 4). The study found, for example, that four of the South's nine hazardous waste landfills were located in minority zip codes, representing approximately 63% of the South's total hazardous waste disposal capacity.

⁶⁴ See *id.*

⁶⁵ See TOXIC WASTES AND RACE, *supra* note 1, at xiii-xv, 15-17.

highest composition of racial and ethnic minorities.⁶⁶ The study further demonstrated that the proportion of minorities residing in communities that had a commercial hazardous waste facility was about double the proportion of minorities in communities without such facilities.⁶⁷ Where two or more such facilities were located, the proportion of residents who were minorities is more than triple.⁶⁸ Further, the report indicated that three out of the five largest commercial hazardous waste landfills in the United States, accounting for approximately forty percent of the total commercial landfill capacity, were overwhelmingly located in African and Hispanic-American communities.⁶⁹

The two studies compose part of a larger body of evidence demonstrating that people of color suffer a disparate impact due to the location of environmental disamenities and exposure to environmental toxins.⁷⁰ Benjamin Goldman, in a 1994 report prepared for the National Wildlife Federation's Corporate Conservation Council, reviewed and summarized empirical findings from sixty-four studies: *all but one* of those studies, the one conducted by WMX Technologies (formerly Waste Management Technologies), found environmental disparities either by race or income.⁷¹ The studies were grouped into five basic categories of concern: location of industrial waste facilities that pose environmental hazards,⁷²

⁶⁶ See *id.* at xiii.

⁶⁷ See *id.*

⁶⁸ See *id.*

⁶⁹ See *id.*; see also Godsil, *supra* note 1, at 398 n.26. Note that at the time of the study African-Americans comprised only 11.7% of the population. See TOXIC WASTE AND RACE, *supra* note 1, at 19. The percentage of Hispanics was even less. See *id.*

⁷⁰ See Mohai & Bryant, *supra* note 59, at 163. The UCC study is not without its critics. See e.g., CHRISTOPHER BOERNER ET AL., ENVIRONMENTAL JUSTICE? 4-6 (1994) (criticizing the methodology used in the EPA and UCC studies and questioning whether the findings are valid); Douglas L. Anderton et al., *Hazardous Waste Facilities: "Environmental Equity" Issues in Metropolitan Areas*, 18 EVALUATION REV. 123, 135-36 (1994).

⁷¹ BENJAMIN GOLDMAN, NOT JUST PROSPERITY: ACHIEVING SUSTAINABILITY WITH ENVIRONMENTAL JUSTICE 8, 13 (1994) (study commissioned by National Wildlife Federation Corporate Conservation Council).

⁷² See *id.* at 4. Twenty-seven studies included facilities that generate, process, or contain hazardous, radioactive, or solid wastes, and enterprises that have reported the release of conventional pollutants into air, water, or land. See *id.* Studies of hazardous waste facilities

human exposures to toxic substances,⁷³ ambient concentrations of conventional air pollutants,⁷⁴ estimates of regulatory costs and benefits,⁷⁵ and reports of adverse health effects.⁷⁶ Race proved more important than socioeconomic status as a predictor in nearly three-quarters of the tests.⁷⁷ Goldman found that all but one of the twenty-seven studies of noxious facilities and toxic releases showed environmental disparities by race or

controlled for economic status showed that in 22 of 30 tests (73%) race was more important a predictor than income with respect to toxic and radioactive releases. *See id.* at 8, Table 4.

⁷³ *See id.* at 4. Twelve studies of this type "included levels of pesticides or lead present in blood and fat, consumption of fish contaminated by toxic chemicals, and occupational exposures to hazardous chemicals that exceeded 'Permissible Exposure Limits' set by the Occupational Safety and Health Administration." *See id.* Occupational health exposures, pesticide exposures, and toxic fish consumption, when controlled for economic factors, all showed that race was a better predictor of exposure than any other factor. *See id.* at Table 3.

⁷⁴ *See id.* 4. Ten studies measured the ambient concentrations of such conventional air pollutants as: carbon monoxide, lead, nitrogen dioxide, ozone, particulates, and sulfur dioxide. *See id.* at 4. Several studies found that minorities were significantly more likely to live in non-attainment areas than whites. *See id.* at 15.

⁷⁵ *See id.* at 4. Nine studies measured "estimated regulatory costs or benefits in terms of: the economic value of per capita impacts; the severity of penalties; the priority, speed, and rigor, of clean-up; and the strictness of state environmental policies." *Id.* Of the three studies in this group that looked at regulatory costs and benefits to determine whether race was more important than income, each showed race to be a better indicator. *See id.* at Table 3.

⁷⁶ *See id.* at 4. Goldman considered nine studies to be focused upon adverse health effects encompassing "injuries, illnesses, or fatalities, that can be directly attributed to specific exposures, accidents in the work environment or outside of the home." *Id.* *See also* Mary Haan et al., *Poverty & Health: Prospective Analysis From Alameda County Study*, 125 AM. J. EPIDEMIOLOGY 989, 994 (1987). Similarly, researchers from Human Population Laboratory in Alameda, California, conducted a study analyzing the differences in overall morbidity and mortality between low income and minority groups and their more affluent white counterparts. The researchers compared health levels of Oakland residents living in the city's federally designated poverty area to those that lived in remaining areas of the city. Researchers controlled for certain risk factors including blood pressure, heart disease, employment status, access to medical care, health insurance coverage, smoking, alcohol consumption, physical activity, body fat, and marital and social status and found an average age adjusted difference in mortality of over fifty percent. The ninety-five percent confidence interval, is approximately 1.5-2.20.

⁷⁷ *See* GOLDMAN, *supra* note 71, at 8.

income.⁷⁸ He observed that there appeared to be greater racial disparities for communities with the newer operating facilities than for those with older, closed, or abandoned waste disposal sites.⁷⁹ This disparity may be explained, in part, by the actions of the Environmental Protection Agency ("EPA") itself. In 1974, using a variety of evaluation factors, including demographics, the EPA provided a list of ten counties it deemed most appropriate for locating large hazardous waste processing facilities.⁸⁰ An analysis of census data for those designated counties revealed that "more than one million people of color live in these EPA recommended counties for large hazardous waste facilities, comprising a 58-percent greater share of their total population than the average for the country as a whole (32% as compared to 20% in the U.S.)."⁸¹

In sum, Goldman suggests that 1) "race proved more significantly associated with the location of commercial hazardous waste facilities than any other factor examined;"⁸² 2) researchers applying multi-variate statistical techniques concluded that race is the single best predictive factor with respect to the siting of commercial hazardous waste facilities, even when other socio-economic characteristics of communities are taken into account; and 3) race has been found to be an independent factor, irrespective of economic class, in predicting the distribution of air pollution in our society,⁸³ the site location

⁷⁸ See *id.* The WMX study failed to show race or income related disparities. See *id.* at 13

⁷⁹ See *id.* at 12. One study discloses that while planned expansion of commercial waste facilities were not significantly greater in non-white or lower income communities than those without such plans, communities with planned reductions in hazardous waste capacity were significantly greater in white communities. See *id.* (citing James T. Hamilton, *Politics and Social Cost: Estimating the Impact of Collective Action On Hazardous Waste Facilities*, 24 RAND J. ECON., 101-25 (Spring 1993)).

⁸⁰ See *id.* at 13.

⁸¹ *Id.* at 13.

⁸² *Id.* at 11 (citing Toxic Wastes and Race, *supra* note 1); see also Bryant & Mohai, *supra* note 59, at 925-27.

⁸³ See A. Myrick Freeman III, *Distribution of Environmental Quality*, in ENVIRONMENTAL QUALITY ANALYSIS 264-65 (Allen V. Kneese & Blair T. Bower eds., 1972); Leonard Graners et al., *The Distributional Effects of Uniform Air Pollution Policy in the U.S.*, 93 Q. J. ECON. 281-301 (1979); D.R. Wernette & L.A. Nieves, *Breathing Polluted Air: Minorities are Disproportionately Exposed*, EPA J., Mar.-Apr. 1992, at 16-17.

of municipal landfills and incinerators,⁸⁴ and lead poisoning in children.⁸⁵

The evidence demonstrating the disproportionate burden of exposure to environmental toxins neither begins nor ends with hazardous waste facility siting determinations. Nor does the environmental burden occur exclusively from industrial processes. Bullard notes that "[w]hether by conscious design or institutional neglect, communities of color in urban ghettos, in rural 'poverty pockets,' or on economically impoverished Native-American reservations, face some of the worst environmental devastation in the nation."⁸⁶ Exposure to harmful environmental burdens is, in many respects, associated with living in communities of color. The environmental burdens may include vermin-infested living conditions, poor public sanitation and trash removal, and dilapidated housing stock.⁸⁷

Taken together, inadequate living conditions and industrial processes can lead to devastating results. Increasingly, researchers recognize that there are strong links between "environmental toxins" such as airborne particulates in smog, and "natural causes" such as exposure to roaches, pollen or mold that can lead to the onset of asthma in adults, as well as the worsening of conditions in children.⁸⁸ For example, in certain areas of the South Bronx, residents, especially children, suffer from an extremely high incidence of

⁸⁴ See BULLARD, *supra* note 62, at 32-36, 102-03.

⁸⁵ See *id.* at 99 (citing AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY, THE NATURE AND EXTENT OF LEAD POISONING IN CHILDREN IN THE UNITED STATES (1988)).

⁸⁶ Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*, in CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS (Robert D. Bullard ed., 1993).

⁸⁷ See Adam Nossiter, *Asthma Common and on Rise in Crowded South Bronx*, N. Y. TIMES, Sept. 5, 1995, at A1. Similar problems were reported recently both in Roxbury and Dorchester, Massachusetts, predominantly African-American communities where asthma rates reflect the national trend—one that indicates asthma rates among young African-Americans have doubled between 1980 and 1993. See Delores Kong, *Out of Breath*, BOSTON GLOBE, May 13, 1996, available in 1996 WL 6861283.

⁸⁸ See David Berglund & David Abbey, *Long-Term Effects of Air Pollution*, W.J. MED., Sept 1, 1996, at 140, available in 1996 WL 9351442 (reporting study that found a significant link between air pollution and respiratory diseases such as asthma).

asthma.⁸⁹ In those Bronx neighborhoods served by Lincoln Hospital, dubbed "Asthma Alley," an average of 2500 asthma cases are admitted to the hospital each year.⁹⁰ Dr. Harold Osborn, on staff at Lincoln Hospital, reports that in the past two years, twenty-two people—*ten times* the national average—have died of asthma-related causes.⁹¹ The emerging asthma epidemic in the South Bronx is reflected in hospitalization rates as high as 17.3 per 1000 people and death rates as high as 11 per 10,000—eight times the national average.⁹² It is reported that as many as one out of three students in a local elementary school has asthma and carries a bronchodilator each day.⁹³ Indeed, in a 1994 published study⁹⁴ of New York City residents, researchers found that, compared with Caucasians, the rate of hospital admissions for asthma-related problems was 4.91 times greater for Hispanics and 4.16 times greater for African-Americans.⁹⁵

Hazardous waste treatment facilities increasingly are being placed into these communities, which already are staggering under the burden of disproportionate public health concerns. The Hunts Point and Port Morris areas of the South Bronx, predominantly Hispanic and African-American communities, became home in 1993 to the Bronx-Lebanon medical waste incinerator, which burns twenty-four tons of medical waste each day.⁹⁶ In

⁸⁹ Asthma is a disease affecting the ability of sufferers to breath. It arises from an irritation of bronchial passages that leads to severe breathing impairments. During a severe attack, the limited amount of oxygen in the blood can lead to death.

⁹⁰ See Valerie Burgher, *Rail Against the Machine, Environmentalists Go Head to Head in the Bronx*, THE VILLAGE VOICE, May 14, 1996, at 13.

⁹¹ See *id.*

⁹² See Nossiter, *supra* note 87 at A1.

⁹³ See *id.* at B2.

⁹⁴ See Vera A. De Palo et al., *Demographic Influences on Asthma Hospital Admission Rates in New York City*, 106 CHEST 447, 448 (1994).

⁹⁵ See *id.* at 448.

⁹⁶ See Raphael Sugarman, *Hunts Point Has Gripe to Air*, N.Y. DAILY NEWS, Feb. 4, 1996, at 1 (reporting that the Bronx-Lebanon Hospital Incinerator has been cited with more than 561 violations of state pollution standards since it opened in 1993); see also, Raphael Sugarman, *They'd Trash Hospital Incinerator*, N.Y. DAILY NEWS, Dec. 14, 1995, at 82. Sister Pat Hovell, principal of St. Lukes School located just a few blocks away from the incinerator, is quoted as stating that "[a]t lunchtime, when our students are out playing, the

1993, the same area became home to the New York Organic Fertilizer Company.⁹⁷ Introduction of these facilities into communities already burdened with poverty and other environmental disamenities may have an exacerbating impact on those communities that is significantly greater than if the same facility were introduced into a middle-class community.⁹⁸

The disparate impact of environmental burdens is similarly evident in the enforcement of environmental regulations. In a detailed and comprehensive analysis of every environmental lawsuit concluded from 1985 through 1992, the *National Law Journal* ("NLJ") found that penalties for pollution law violations in minority communities are lower than those imposed for violations in largely white communities.⁹⁹ In an analysis of every residential toxic waste site in the then twelve-year-old Superfund program, the NLJ discovered that, with regard to minority communities, the government takes longer to address environmental hazards, and it accepts solutions less stringent than those recommended by the scientific

smell from the incinerator is so bad their eyes start watering, their noses run, and the children with asthma or other lung problems can't breathe." Browning Ferris, who recently has acquired the incinerator, is planning to implement new safeguards—and increase capacity to 48 tons per day. *See id.*

⁹⁷ *See* Sarah Kershaw, N.Y. TIMES, June 30, 1996, at B8. The New York Organic Fertilizer Company, (NYOFC) daily converts 40-50 truckloads, carrying an average of 750 total tons of sludge, about 70% of New York City's sewer sludge, into fertilizer.

⁹⁸ *See* BARBARA BLUM, CITIES: AN ENVIRONMENTAL WILDERNESS 3 (1978). "Suburbanites are exposed to less than half of the environmental health hazards inner-city residents face. . . . The inner-city poor—white, yellow, brown, and black—suffer to an alarming degree from what are euphemistically known as diseases of adaptation. These are not health adaptations, but diseases and chronic conditions from living with bad air, polluted water and continued stress." *Id.* Moreover, diseases such as asthma have been found to be aggravated by the presence of roaches. While roaches are somewhat ubiquitous, their concentration in urban areas causes them to be especially problematic. *See generally* David L. Rosenstreich, et al., *The Role of Cockroach Allergy and Exposure to Cockroach Allergen in Causing Morbidity Among Inner-City Children With Asthma*, 336 NEW ENG. J. MED. 1356 (1997).

⁹⁹ *See* Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S2. The study was based upon computer-assisted analysis of census data, the civil court case docket of the Environmental Protection Agency, and the agency's own record of performance at 1117 Superfund sites. *See id.*

community.¹⁰⁰ The most striking imbalance between white and minority communities in the NLJ analysis of EPA enforcement efforts was a 506% disparity in fines under RCRA.¹⁰¹ The average fine for the areas with the greatest white population was \$335,566, as compared to \$55,318 in the areas with the greatest minority populations.¹⁰² Thus, in areas where the environmental burden is already significant, remedial assistance is disproportionately deficient.

Further evidence supports assertions that people of color are exposed to greater quantities of toxins both in the workplace¹⁰³ and in the home.¹⁰⁴

¹⁰⁰ See *id.* Treatment of contaminated waste sites is a preferred remedy. See 42 U.S.C. § 9621(b) (1994). The study showed that in white communities treatment of the waste at contaminated sites, a process designed to eliminate its toxicity, was chosen twenty-two percent more often than containment. In African-American communities, containment was chosen seven percent more frequently than treatment. See Marianne Lavelle, *Examining EPA's Scoring System*, NAT'L L.J., Sept. 21, 1992, at S6.

¹⁰¹ See Marianne Lavelle, *The Minorities Equation*, NAT'L L.J., Sept. 21, 1992, at S2.

¹⁰² See Lavelle & Coyle, *supra* note 99, at S2. The NLJ found that penalties under hazardous waste laws at sites having the greatest white population were about 500 percent higher than penalties at sites with the greatest minority population. The NLJ study reached several other significant conclusions.

Hazardous waste, meanwhile, is the type of pollution experts say is most concentrated in minority communities. For all federal environmental laws aimed at protecting citizens from air, water and waste pollution, penalties in white communities were 46 percent higher than in minority communities. Under the giant Superfund Program, abandoned hazardous waste sites in minority areas take 20 percent longer to be placed on the national priority list than those in white communities. . . . At the minority sites, the EPA chooses containment, the capping or closing off of a hazardous waste site, 7 percent more frequently than the clean-up method preferred under the law, permanent "treatment," to eliminate the waste or rid it of its toxins. In white communities, the EPA ordered treatment 22 percent more often than containment.

Id.

¹⁰³ See generally Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for an Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 628 (discussing a number of empirical studies demonstrating that people of color are concentrated in jobs that present a high risk of harm from exposure to toxic substances); see also Ivette Perfecto, *Pesticide Exposure of Farm Workers and the International Connection*, in RACE AND THE

Lead poisoning is a particularly cogent example of an adverse impact resulting from a racially disproportionate exposure to environmental toxins.¹⁰⁵ As of 1988, lead poisoning affected between three and four million children in the United States—primarily African-American and Latino children residing in urban communities. The federal Agency for Toxic Substance and Disease Registry found that sixty-eight percent of African-American families earning less than \$6000 annually, as compared to thirty-six percent of Caucasian children in the same depressed economic category, had lead poisoning.¹⁰⁶ Even in families whose incomes exceeded \$15,000 a year, more than thirty-eight percent of African-American children had lead poisoning, as compared to twelve percent of Caucasian children.¹⁰⁷ Although lead poisoning is largely attributable to exposure to lead paint in the home,¹⁰⁸ in many urban locations external environmental exposures also play a significant role.¹⁰⁹

The Center for Disease Control classifies a blood lead (“BPb”) level of 10 $\mu\text{g/dL}$ as lead poisoning.¹¹⁰ Lead is a heavy metal with no known

INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE, *supra* note 59, at 180; James C. Robinson, *Racial Inequality and the Probability of Occupation-Related Injury or Illness*, 62 MILBANK. Q. 567 (1984).

¹⁰⁴ See ENVIRONMENTAL EQUITY WORKGROUP, U.S. ENVIRONMENTAL PROTECTION AGENCY, ENVIRONMENTAL EQUITY: REDUCING RISKS FOR ALL COMMUNITIES, 11-12 (1992) (finding that lead levels in the blood of urban African-American children under the age of five greatly exceed the levels found in similarly-aged white children living in various cities).

¹⁰⁵ See discussion of effects of lead poisoning *infra* notes 106-14 and accompanying text.

¹⁰⁶ See BULLARD, *supra* note 62, at 99 (citing AGENCY FOR TOXIC SUBSTANCES AND DISEASE REGISTRY).

¹⁰⁷ See *id.*

¹⁰⁸ See Committee on Environmental Health, *Lead Poisoning: From Screening to Primary Prevention*, 92 PEDIATRICS 176, 178 (1993).

¹⁰⁹ See Peter A. Baghurst et al., *Environmental Exposure to Lead and Children's Intelligence at the Age of Seven Years: The Port Pirie Cohort Study*, 327 NEW ENG. J. MED. 1279, 1282-83 (1992); Committee on Accident and Poison Precautions, Committee on Environmental Hazards, *Statement on Childhood Lead Poisoning*, 79 PEDIATRICS 457, 458-60 (1987). See *infra* Part I.C. for a discussion of the causes of disproportionate environmental risks in minority communities.

¹¹⁰ See Committee on Environmental Health, *supra* note 108, at 176.

physiological value in humans.¹¹¹ It is "an extremely toxic metal: even a single atom of lead, once in the human body, binds to a protein and induces some damages; the greater the exposure, the more serious the effects."¹¹² Relatively low blood lead levels have been shown to "be associated with IQ deficits, behavior disorders, slowed growth and impaired hearing."¹¹³ Asymptomatic exposure to lead, reflecting low to moderate levels of blood lead, may be associated with decreased bi-lateral coordination, visual motor control, and fine-motor development.¹¹⁴

As a society, we are only beginning to assess the social, physical, and economic costs attendant to this disproportionate exposure to environmental toxins. Some researchers contend that even relatively low levels of lead may cause serious adverse psychological and developmental effects upon children that may in turn, lead to life long consequences.¹¹⁵ Certainly, lead is not the sole cause of low academic achievement or crime in communities of color.¹¹⁶ A myriad of social processes contribute to those phenomena. However, the

¹¹¹ See Committee on Accident and Poison Precautions, Committee on Environmental Hazards, *supra* note 109, at 457; Susan R. Lucas et al., *Relationship Between Blood Lead and Nutritional Factors in Preschool Children: A Cross-Sectional Study*, 97 PEDIATRICS 74, 74 (1996).

¹¹² Sergio Piomelli, *Childhood Lead Poisoning in the '90s*, 93 PEDIATRICS 508, 508 (1994).

¹¹³ Committee on Environmental Health, *supra* note 108, at 176. Recent evidence suggests that early exposure to lead can result in lasting detrimental effects. In one study, first and second graders with high lead levels were seven times more likely not to graduate from high school and six times more likely to have difficulty performing at grade level. See *id.* at 175.

¹¹⁴ See Kim N. Dietrich et al., *Lead Exposure and the Motor Developmental Status of Urban Six-Year-Old Children in the Cincinnati Prospective Study*, 91 PEDIATRICS 301, 301, 305-06 (1993).

¹¹⁵ See Herbert L. Needleman, et al., *The Long-Term Effects of Exposure to Low Doses of Lead in Childhood*, 322 NEW ENG. J. MED. 83, 86 (1990); Anthony J. McMichael, et al., *Port Pirie Cohort Study: Environmental Exposure to Lead and Children's Abilities at the Age of Four Years*, 319 NEW ENG. J. MED. 468, 474 (1988).

¹¹⁶ It has been suggested that there exists a strong relationship between lead poisoning and disciplinary problems in school, juvenile crime, and adult crime. See Deborah W. Denno, *Considering Lead Poisoning as a Criminal Defense*, 20 FORDHAM URB. L.J. 377, 384-93 (1993); DEBORAH W. DENNO, *BIOLOGY AND VIOLENCE: FROM BIRTH TO ADULTHOOD* 4, 106-07 (1990).

potential that there exists an environmental basis to difficult social problems argues for greater attention to be paid to environmental inequity.

2. Case Studies

Case studies reinforce the conclusions of the statistical analyses. Robert Bullard, a sociologist, has written extensively over the past decade about the problem of racially disproportionate allocation of environmental burdens. One such study involved community efforts to rid a Dallas, Texas, community of an environmental pariah.¹¹⁷ At the time of Bullard's case study in 1980, Dallas was the seventh-largest city in the nation, with a population of 904,078.¹¹⁸ The 265,594 blacks who lived in Dallas constituted approximately 29.4% of the city's overall population.¹¹⁹ At that time, more than eight of every ten blacks lived in majority black enclaves such as West Dallas.¹²⁰ The total population of the West Dallas study area at the time of the study was 13,161, of whom more than eighty-five percent were black.¹²¹ This West Dallas neighborhood initially developed as a rural black settlement on the fringe of Dallas.¹²² In 1909, citizens built the Thomas R. Edison School, a facility that continued in use through the time of the case study.¹²³ Historically, West Dallas has been a dumping area for the city's solid waste.¹²⁴ In 1934, Murph Metals, later known as the RSR Corporation, began operating a smelting operation on a sixty-three-acre lot in the West Dallas community near the Thomas Edison School.¹²⁵ As was typical of many African-American communities in the South, West Dallas was not annexed to the City of Dallas, nor provided with basic services, until 1954.¹²⁶

¹¹⁷ See BULLARD, *supra* note 62, at 45.

¹¹⁸ See *id.*

¹¹⁹ See *id.* at 45-46.

¹²⁰ See *id.* at 46.

¹²¹ See *id.*

¹²² See *id.*

¹²³ See *id.*

¹²⁴ See *id.*

¹²⁵ See *id.*

¹²⁶ See *id.*

In 1956, despite the presence of industry spewing a highly toxic material into the environment, the Dallas Housing Authority built a 3500 unit public housing project in West Dallas that covered more than 500 acres.¹²⁷ Two-thirds of the families in West Dallas had incomes below poverty level.¹²⁸ Many of the local residences were torn down to make way for the public housing development.¹²⁹ The project was sited just north of the lead smelter property line and in the direct path of the prevailing southerly winds.¹³⁰ There also existed a secondary smelter that recovered lead from used automobile batteries and other materials.¹³¹ The company also disposed of unused battery chips by turning them into landfill to be used throughout West Dallas.¹³² During peak operations in the 1960s, the plant pumped more than 269 tons of lead particles a year into the West Dallas air.¹³³ Few households were air-conditioned.¹³⁴ Therefore, particles were blown by prevailing winds through open windows and doors of residences and onto streets, ballparks, and children's recreational facilities, where they could be inhaled by residents and ingested by young children who placed dirty and dusty hands into their mouths.¹³⁵ At the time RSR first moved into West Dallas, at the time the public housing authority built projects adjacent to the facility, and throughout the city's history of enforcement "efforts," the community was, by reason of its residential character and the location of its educational and recreational facilities, wholly inappropriate as a location for a lead smelter.

For over five decades, the populace of West Dallas was exposed to

¹²⁷ See *id.*

¹²⁸ See *id.*

¹²⁹ See *id.*

¹³⁰ See *id.*

¹³¹ See *id.*

¹³² See Ronald Robinson, *West Dallas Versus the Lead Smelter*, in UNEQUAL PROTECTION 92, 97 (Robert D. Bullard ed., 1994).

¹³³ See BULLARD, *supra* note 62, at 46; Bob Paynter, *Legacy of Lead: Children in Smelter's Shadow compensated for Life Impairment*, DALLAS MORNING NEWS, Dec. 7, 1986, at 1A, available in 1986 WL 4353859.

¹³⁴ See BULLARD, *supra* note 62, at 46.

¹³⁵ See *id.*

ongoing and unabated lead particulate contamination.¹³⁶ Although an ordinance placing strict limitations on lead emissions was passed in 1968,¹³⁷ Dallas officials failed to enforce it.¹³⁸ As a result, children—the group most vulnerable to lead poisoning¹³⁹—were exposed to elevated levels of lead in soil, air, and households.¹⁴⁰ Although in 1974 the City of Dallas finally sued RSR and other local smelters to enforce compliance with environmental regulations (and later settled for only \$35,000 in fines), the emissions did not abate.¹⁴¹ It was not until 1981, when the *Dallas Morning News* ran a story about “potentially dangerous” lead levels having been discovered by EPA officials, that the City of Dallas and State of Texas took stronger legal action.¹⁴² At the same time several class action suits were filed.¹⁴³ It was 1984 before the smelters were closed permanently.¹⁴⁴

The environmental impact upon West Dallas of years of unremitted lead particulate contamination was staggering. Soil lead levels found near the West Dallas Boys Club—located a short distance from the 300 foot smoke stack of the RSR smelter—were sixty times higher than those considered

¹³⁶ See *id.* at 47.

¹³⁷ See *id.* The ordinance prohibited the emission of lead compounds in excess of 5 µg/m³. See *id.*

¹³⁸ See *id.* In 1972, the Dallas Health Department study found that living near smelters was associated with a thirty-six percent increase in blood lead level. See *id.* No action was taken by city officials. See *id.* at 48.

¹³⁹ See Dietrich et al., *supra* note 114, at 301-07. It is reported that one woman, Alicia Hracheta, ordered gravel for her driveway in 1982. See Robinson, *supra* note 132, at 97. The gravel company delivered crushed battery casings instead of soil. See *id.* The lead level in her home was tested at 99,000 parts per million (“ppm”), far in excess of the 250 ppm considered a health risk for residents. See *id.* at 98.

¹⁴⁰ See BULLARD, *supra* note 62, at 47.

¹⁴¹ See *id.* at 48.

¹⁴² See *id.*

¹⁴³ See *id.*

¹⁴⁴ See Bruce Tomaso & Bob Paynter, *City's Lead Pollution Saga Began More Than 40 Years Ago: The Legacy of Lead*, DALLAS MORNING NEWS, Dec. 7, 1986, at 31A, available in 1986 WL 4353861.

potentially dangerous to children.¹⁴⁵ The West Dallas Boys Club and the Maro Booth Day Care Center were forced to close in 1983 because of lead contamination problems.¹⁴⁶ In 1990, when *Dumping in Dixie*¹⁴⁷ was first published, although the smelter was closed, much of the contaminated soil remained on-site.¹⁴⁸

West Dallas residents could demonstrate, relatively easily, the potential harm to them from the failure to comply with, and to enforce, environmental regulations. In one sense, West Dallas residents were "lucky" they were burdened by a single toxin where the source of the exposure was easily demonstrated, the extent of exposure was documented, and the potential for resulting health risks well-established.¹⁴⁹ Thus, proof of harm in a traditional environmental tort action was possible. Unfortunately, in many environmental tort actions, there are a number of potential defendants, a variety of toxic substances, and only a paucity of persuasive medical or scientific data establishing clear causal links between chronic exposure and

¹⁴⁵ See BULLARD, *supra* note 62, at 48-49. The potential danger to children may extend beyond those discussed in notes 105-111 and accompanying text. A recent study suggests that lead contamination in young, inner city children is associated with increased levels of violent or otherwise anti-social conduct. See Denno, *Considering Lead Poisoning as a Criminal Defense*, *supra* note 116, at 384-93.

¹⁴⁶ See BULLARD, *supra* note 62, at 49. The West Dallas Boys Club enrolled more than 1200 youths between the ages of 6 and 28; the Maro Booth Day Care Center, a facility served children from seventy-five low income families. See *id.* These closures suggest that the children were not only subjected to toxic levels of lead, but that they lost access to important social organizations intended to promote their social and educational development.

¹⁴⁷ See generally *id.*

¹⁴⁸ See *id.* at 50.

¹⁴⁹ In connection with the West Dallas case study, it should be recognized that the plaintiffs in that case were ultimately able to bring a class action lawsuit against the smelter on behalf of 370 children and in fact settled the case for a purported 20 million dollars. See Tomaso & Paynter, *Secret Settlement to Victims Estimated at \$20 Million*, Dallas Morning News, Dec 7, 1986, at 1A, available in 1986 WL 4353864. It may have been that a separate cause of action was not necessary in that case, or it may have been that an intentional personal injury cause of action, if available, would have allowed the residents to go forward to shut the smelter down without waiting for the Dallas officials to take action.

physical harm.¹⁵⁰ These factors render it extremely difficult, if not impossible, to establish the elements of traditional environmental tort doctrine.

In another case study, Bullard relates that, in 1978, a Jamestown, New York trucking operation obtained, for purposes of resale, 32,000 cubic yards of soil contaminated with poly-chlorinated bi-phenyl ("PCBs") from a Raleigh, North Carolina, transfer company.¹⁵¹ At about the same time, the EPA banned the resale of toxic soil.¹⁵² The waste haulers, unable to resell the contaminated soil, dumped it along 270 miles of roadway in North Carolina where it remained for four years.¹⁵³ In 1982, the governor of North Carolina decided to bury the contaminated soil in the community of Afton in Warren County.¹⁵⁴ Afton was one of the poorest counties in North Carolina and had the highest percentage of African-Americans in the state.¹⁵⁵ The Afton site was not geologically suitable for the burial of this waste.¹⁵⁶ In particular, the water table at the site of the landfill was only five to ten feet below the surface, and the residents of the community derived all of their drinking water from those wells.¹⁵⁷ Thus, the risk of contamination was significant, and the

¹⁵⁰ See Christopher McAuliffe, Comment, *Resurrecting an Old Cause of Action for a New Wrong: Battery as a Toxic Tort*, 20 B.C. ENVTL. AFF. L. REV. 265 (1993).

¹⁵¹ See BULLARD, *supra* note 62, at 30. In 1982, state officials in North Carolina decided to locate a PCB landfill near a predominately black community. *See id.* at 30. A large group of African-American citizens engaged in protests reminiscent of the 1960s Civil Rights movement. *See id.* at 31. More than 500 people were arrested in the course of the protests. The protests were unsuccessful in preventing the siting of the landfills. *See id.* Congressman Walter E. Fauntroy, who had participated in the protests, subsequently requested that the United States General Accounting Office ("GAO") investigate the socio-economic and racial composition of the communities surrounding the four major hazardous waste landfills in the South. *See id.* at 32.

¹⁵² *See id.* at 30.

¹⁵³ See Ken Geiser & Gerry Waneck, *PCBs and Warren County*, in UNEQUAL PROTECTION, *supra* note 54, at 43, 50.

¹⁵⁴ See BULLARD *supra* note 62, at 30.

¹⁵⁵ Warren county had a population of 16,232 in 1980. *See id.* at 30. Afton was more than 84% black. *See id.*

¹⁵⁶ See Geiser & Waneck, *supra* note 153, at 51.

¹⁵⁷ *See id.*

presence of the disposal site decried. The protests, however, fell on deaf ears. These failed protests led to the GAO study in 1983.¹⁵⁸

West Dallas and Warren County are examples of communities burdened primarily by a single facility or enterprise. Other communities of color endure a much more staggering scenario; they are, in effect, the dumping grounds for this nation. This concentration of environmentally burdensome facilities is illustrated by Alsen, Louisiana, an unincorporated, African-American community that is home to the fourth-largest hazardous waste facility in the country, a facility owned by the Rollins Corp.¹⁵⁹ The landfill, and an incinerator that processed 80 million pounds of hazardous waste in 1992, disposed of medical waste, heavy metals, pesticides, and radioactive wastes.¹⁶⁰ The Rollins Co. is responsible for groundwater contamination and has received numerous fines for violations of environmental laws.¹⁶¹ The Rollins facility is not the only environmentally burdensome enterprise that calls Alsen home. Petro Processors (which has created two Superfund sites), the Grow Chemical Company, the Union Tank Company, Schuylkill Metals, Allied Signal, La Chem Chemical Co., Deltech, Reynolds Aluminum Petroleum Coke division and an Exxon Resin plant also are located in and around the Alsen community.¹⁶²

Similarly, in Noxubee County, Mississippi, the African-Americans for Environmental Justice Organization opposed the siting of additional hazardous waste landfills and an incinerator in their community.¹⁶³ Noxubee County has the highest percentage of non-white residents and the lowest per capita income of any county in Mississippi considered suitable for a hazardous waste facility.¹⁶⁴ The complaint filed by the group alleges that the proposed facility sits on top of the same drinking water aquifer as the

¹⁵⁸ See BULLARD, *supra* note 62, at 32.

¹⁵⁹ See *id.* at 55-56; Michael Fisher, *Environmental Racism Claims Brought Under Title VI of the Civil Rights Act*, 25 ENVTL. L. 285, 307 n.103 (1995).

¹⁶⁰ See Fisher, *supra* note 159, at 307 n.103.

¹⁶¹ See *id.*

¹⁶² See *id.*

¹⁶³ See *id.* at 323.

¹⁶⁴ See *id.*

hazardous waste landfill at Emelle, Alabama, just fifteen miles away from the Noxubee County line.¹⁶⁵ In neighboring Lowndes County, a permitted hazardous-waste-burning kiln was located just five miles from the Noxubee County line.¹⁶⁶ Although Lowndes County was primarily white, the location of the kiln in Lowndes County was in close proximity to a predominately African-American community.¹⁶⁷ In addition, at the time of the complaint in 1993, the town of Brooksville in Noxubee County was the proposed location for a 50,000 ton per year incinerator and a 340,000 ton per year landfill.¹⁶⁸ Nearby Shuqualok Mountain was the proposed site for a second landfill with a 200,000 ton per year capacity.¹⁶⁹ Taken together, although the entire state of Mississippi produces about 45,000 tons of hazardous waste each year, Noxubee County was intended to become the annual dumping ground for over 130,000 tons of hazardous waste.¹⁷⁰ Anecdotal evidence, and case studies such as these, serve to illustrate further the disproportionate environmental burdens experienced by racial and ethnic minorities in this country.

C. Causal Factors in the Creation and Perpetuation of Environmental Racism

Although the above statistical analyses and case studies support a growing consensus that there exists a racially disproportionate allocation of environmental burdens and misallocation of environmental enforcement mechanisms, there is less consensus as to the cause of the disparities.¹⁷¹ Much of the discussion and analysis pertaining to the disproportionate allocation of environmental burdens focuses upon one aspect of the

¹⁶⁵ See *id.* at 323-24.

¹⁶⁶ See *id.* at 324.

¹⁶⁷ See *id.*

¹⁶⁸ See *id.* at 324 n.200

¹⁶⁹ See *id.*

¹⁷⁰ See *id.* at 324.

¹⁷¹ See Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1398-1406 (1994) (reviewing several studies on siting disparities).

phenomenon described above—that of “environmental racism.”¹⁷² Environmental racism is defined as racial discrimination in environmental policymaking and the unequal enforcement of environmental laws and regulations.¹⁷³ “In short, when we label an environmental practice as an example of environmental racism we are saying that the predictable distributional impact of that decision contributes to the structure of racial subordination and domination that has similarly marked many of our public policies in this country.”¹⁷⁴ Torres acknowledges that “[i]n many cases, this subordinating impact will be the result of an unconscious process, . . . if the perception of the affected class is that the impact is fundamentally racially targeted then we must assume that the substantive effect is racist unless a better or different justification can be put forward.”¹⁷⁵ Thus, willful ignorance of the fact that seemingly neutral environmental regulations and administrative practices have the potential for causing racial impact, even in the absence of overt racial animus, itself may be racist in that such ignorance

¹⁷² There are several explanations for this focus. First, as discussed above, the statistical information, when controlled for income and other facts, continues to demonstrate a strong correlation between race and exposure to environmental toxins. See Nancy A. Denton & Douglas S. Massey, *Residential Segregation of Blacks, Hispanics, and Asians by Socioeconomic Status and Generation*, 69 SOC. SCI. Q. 797 (1988) (Describing U.S. census data showing racial discrimination was just as significant when controlling for other factors such as income, education, and occupation status levels, and concluding that race limited their mobility more than income). Second, the “mere” fact that poorer districts are subjected to significantly higher levels of exposure to toxic substances is unlikely to trigger a strict scrutiny equal protection analysis. See, e.g., *San Antonio Ind. v. Rodriguez*, 411 U.S. 1, 23-24 (1973) (stating that where wealth is involved, equal protection analysis does not require absolute equality or precisely equal advantages).

¹⁷³ See ENVIRONMENTAL RACISM: HEARINGS BEFORE THE HOUSE SUBCOMM. ON CIVIL RIGHTS AND CONSTITUTIONAL RIGHTS, 103d Cong., 1st Sess. (Mar. 3, 1993) (testimony of Dr. Benjamin F. Chavis, Jr.); 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, 129 n.7 (“This author [Colopy] defines environmental racism as the burdening of communities of color with higher than average amounts of pollution without a concomitant equitable share of benefits from environmental regulations.”)

¹⁷⁴ Gerald Torres, *Introduction: Understanding Environmental Racism*, 63 COLO. L. REV. 839, 840 (1992).

¹⁷⁵ *Id.*

results in a racially disproportionate allocation of environmental burdens.¹⁷⁶ Although an in-depth analysis of the causes of environmental racism/injustice is beyond the scope of this Article,¹⁷⁷ some discussion is necessary in order to understand the limitations of current theory that provides the rationale for the proposed tort action.

The term "environmental racism" carries with it a great deal of social and legal history. In a social context, the term "racism" evokes strong reaction arising from this nation's history of slavery and both overt and covert race-centered oppression.¹⁷⁸ Courts have construed the label "racist" or "racism" to apply to conduct that is intentionally or purposefully governed by consideration of race, or where consciousness of race is a motivating factor.¹⁷⁹ Thus, "[l]abelling the outcomes that correlate race and exposure to environmental hazards as 'racist' invites the demand for evidence of an overt, race-conscious impetus and a 'single bad actor.'"¹⁸⁰ In cases alleging race discrimination in the siting of hazardous waste facilities, such evidence is extremely difficult to provide.

¹⁷⁶ See *id.*

¹⁷⁷ For excellent discussions of the root causes of environmental racism, see generally *FACES OF ENVIRONMENTAL RACISM: CONFRONTING ISSUES OF GLOBAL JUSTICE*, *supra* note 37; Torres, *supra* note 152, at 840 (defining racism as "those activities which support or justify the superiority of one racial group over another"); Edward Patrick Boyle, *It's Not Easy Bein' Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis*, 46 VAND. L. REV. 937, 967-79 (1993).

¹⁷⁸ See Torres, *supra* note 174, at 839 ("The term racism draws its contemporary moral strength by being clearly identified with the history of the structured oppression of African-Americans and other people of color in this society.")

¹⁷⁹ See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 318-19 (1987) (explaining the establishment of the intent/purpose requirements in *Washington v. Davis*, 426 U.S. 229 (1976), and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), and their further inculcation in equal protection/race discrimination jurisprudence as a necessity in establishing actionable racism. Because of the intent requirement, a showing of racial disparate impact of a facially neutral law or decision is insufficient without demonstrating specific racial animus.)

¹⁸⁰ Sheila Foster, *Race(ial) Matters: The Quest for Environmental Justice*, 20 ECOLOGY L.Q. 721, 732 (1993).

Moreover, there is, to some extent, a "chicken and egg" problem presented with respect to determining the cause of the disproportionate distribution of environmentally burdensome facilities. For example, it is unclear whether some communities were "minority" communities at the initial siting of the facility, and its status as a minority community contributed to the siting decision, or whether the community only became a "minority community" when everyone else who was able to do so moved out.¹⁸¹ There is some evidence that the presence of hazardous waste and other environmental disamenities will cause those who have sufficient residential mobility to move out of an environmentally impacted community. The relative lack of mobility for many racial or ethnic minorities, resulting both from poverty and housing discrimination, traps them in communities where such facilities come to be located.¹⁸² If the value of housing stock is lowered by unwanted land uses moving into a neighborhood, whether a minority community or not, persons of color previously unable to afford housing in the area may thereby be drawn to the neighborhood, creating a cycle of increasing disparate impact. The decline in relative value of the surrounding properties may, in turn, attract even more locally undesirable environmental land uses.¹⁸³ In most causes of action that provide redress for harms resulting from racist conduct, plaintiffs must demonstrate a well-delineated correlation between the cause of the racial injury and intentional conduct on the basis of race. Without evidence that communities had a disproportionate minority population at the time the facilities are sited, in addition to other evidence that the siting decision was racially motivated, the charge of environmental racism will likely not stand up in court.¹⁸⁴ "Indeed, the invariable judicial response to claims of environmental racism has been a rejection of those

¹⁸¹ The GAO and UCC studies, and the multitude statistical analyses that followed, focused upon current allocational practices and resulting environmental impacts, not upon the historical demographics. See *supra* Part I.B.1.

¹⁸² See Robert D. Bullard & Beverly Hendrix Wright, *Environmentalism and the Politics of Equity: Emergent Trends in the Black Community*, 12 MID-AMER. REV. OF SOC. 21, 32-33 (1987); Robert D. Bullard and Beverly H. Wright, *The Politics of Pollution: Implications for the Black Community*, 47 PHYLON 71, 71-72 (March 1986).

¹⁸³ See Been, *supra* note 171, at 1388.

¹⁸⁴ See *infra* Part IV.B.

claims for failure to prove the requisite discriminatory intent and causation, notwithstanding demonstrations of disparate impact and discriminatory outcomes."¹⁸⁵ Thus, in traditional legal contexts used to combat racism, it matters whether communities of color are "targeted" by the government or private industry for siting such facilities because of their racial composition or "merely" because low-income communities have lower property values. The conclusion that toxic waste or other environmentally burdensome facilities are disproportionately located in communities of color is, therefore, not enough to attach liability.

However, there is significant anecdotal evidence that communities of color, long viewed by public officials and others as less valued residential areas, attract locally unwanted land uses. The underlying reasons are both simple and complex.¹⁸⁶ Blatantly race-motivated conduct, and the residual implicit, institutional, or unconscious effects of that racism, market forces, regulatory influences, and political opportunism further cause or contribute to the presently demonstrable disproportionate allocation of exposure to environmental hazards. Thus, "[t]o appreciate the meaning of environmental racism, ... one must acknowledge the institutionalization of unconscious biases, exclusionary processes, and normative judgments that influence racially meaningful social structures, which in turn manifest racially disparate outcomes."¹⁸⁷

¹⁸⁵ Foster, *supra* note 180, at 733.

¹⁸⁶ See Michael Gelobter, *Toward a Model of "Environmental Discrimination,"* in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS, *supra* note 59, at 73-76. Gelobter argues that an understanding of environmental racism requires a framework that retains a broad structural view of economic and social forces in influencing discriminatory outcomes. A realistic analysis of structural processes must include a consideration of social forces that influence market operation and the activities of bureaucracies. Thus, factors both external to environmental enforcement agencies, such as demographic changes and the locational patterns of polluters, and internal to those agencies, such as patterns of environmental regulation, enforcement, and implementation should be used to develop the concept of environmental racism. See *id.* at 73-80.

¹⁸⁷ Foster, *supra* note 180, at 735.

The historical racism that influences these processes and structures is antecedent to the effects produced by those structures and exposes forces that are already at work. There is no distinct phenomenon of

1. *Historical Zoning Practices*

The history of environmental discrimination in America is well-documented.¹⁸⁸ Overt racial practices have influenced housing patterns in a way that significantly contributes to environmental discrimination.¹⁸⁹ Racial discrimination in the sale and rental of private housing often relegates people of color to the least desirable neighborhoods, regardless of their income level.¹⁹⁰ Housing options may be limited by individual real estate brokers and rental agents refusing to show available houses, local refusal to establish public housing, and redlining by insurers and lenders.¹⁹¹ Much of the racial

environmental racism, if seen as a manifestation of historical racism and antecedent structural forces influenced by that racism. Environmental racism is thus less prescriptive and more descriptive of forces that manifest themselves in racially disparate outcomes in hazardous environmental exposure. In that sense, "environmental:" not only modifies "racism," but ultimately corroborates it.

Id.

¹⁸⁸ See Leslie Ann Coleman, *It's the Thought That Counts: The Intent Requirement in Environmental Racism Claims*, 25 ST. MARY'S L.J. 447, 450-55 (1993) (detailing judicial and legislative support for patterns of discrimination); Robert W. Collin, *Environmental Equity: A Law and Planning Approach to Environmental Racism*, 11 VA. ENVTL. L.J. 495, 497 (1992) (recognizing this nation's history of exploiting African-Americans and other people of color, especially with respect to land use issues); Jon C. Dubin, *From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 757-64 (1993) (discussing discriminatory zoning practices and their effects on African-American communities and addressing the history, development, and legal ramifications of government's failure to provide protective zoning to low-income communities of color).

¹⁸⁹ See Denton & Massey, *supra* note 172, at 803-05, 814; Karl Taeuber, *The Contemporary Context of Housing Discrimination*, 6 YALE L. & POL'Y REV. 339, 339 (1988); Robert D. Bullard, *The Threat of Environmental Racism*, NAT. RESOURCES & ENV'T., Winter 1993, at 23 (claiming that exclusionary zoning practices perpetuates discrimination); see generally PETER MIESZKOWSKI, *STUDIES OF PREJUDICE AND RACIAL DISCRIMINATION IN URBAN HOUSING MARKETS* (1979) (discussing the continuing prevalence of racial discrimination in housing markets).

¹⁹⁰ See Denton & Massey, *supra* note 172, at 805; Bullard, *supra* note 189, at 24; Taeuber, *supra* note 189, at 344-45.

¹⁹¹ See generally *id.*

segregation in urban neighborhoods historically arises from exclusionary zoning practices designed to keep poor people out of suburban or affluent neighborhoods.¹⁹² Exclusionary zoning practices have long held the attention and attracted the opprobrium of legal scholars.¹⁹³ These exclusionary zoning practices include setting of lot sizes, frontages and other "aesthetic" requirements that preclude the development of low- or moderate- income housing. There may be prohibitions on multi-unit dwellings or other limitations that have similar effects. For example, in *Southern Burlington County NAACP v. Township of Mount Laurel* ("Mount Laurel I"),¹⁹⁴ citizens challenged certain zoning ordinances that, in effect, prohibited low-income housing from existing within its municipal limits.¹⁹⁵ These ordinances included, among other things, a five-acre minimum lot requirement for a single family in a non-residential zone.¹⁹⁶ The court ordered the municipalities to affirmatively afford a realistic opportunity for the construction of low- and moderate-income housing.¹⁹⁷ Mt. Laurel continued to oppose the implementation of the court's order. Thus, in a second appeal,¹⁹⁸ the court acknowledged that the municipal authority purposefully zoned land for public housing in an inaccessible, and environmentally hazardous, industrial zone.¹⁹⁹ Specifically, the court found that

13 acres . . . totally surrounded by industrially zoned land, virtually isolated from residential uses, has no present access to other parts of the community, no water or sewer

¹⁹² See REPORT OF THE NATIONAL ADVISORY COMMISSION OF CIVIL DISORDERS 1 (U.S. Gov't Printing Office, 1968 (citing suburban exclusion as one of the principal causes making America "two societies, one black, one white--separate and unequal."))

¹⁹³ See, e.g., JAMES A. KUSHNER, FAIR HOUSING § 7.08 (1995) (collecting cases and observing "the extraordinary attention of scholars to the problems of exclusionary zoning").

¹⁹⁴ 336 A.2d 713 (N.J. 1975).

¹⁹⁵ See *id.* at 729

¹⁹⁶ See *id.* at 720-21.

¹⁹⁷ See *id.* at 724.

¹⁹⁸ See *Southern Burlington County NAACP v. Township of Mt. Laurel* (Mount Laurel II), 456 A.2d 390, 462 (N.J. 1983).

¹⁹⁹ See *id.* at 462.

connections nearby, is in the path of a proposed high speed railroad line, and is subject to possible flooding. It would be hard to find . . . a less suitable parcel for lower income or any other kind of housing.²⁰⁰

The widespread practice of housing the economically disadvantaged, a group containing a disproportionate number of racial and ethnic minorities, in large public housing projects further exacerbates the problem of exclusionary practices. Those who rely upon public housing often are forced²⁰¹ to live in economically depressed areas,²⁰² or in close proximity to environmental hazards. Indeed, public housing projects frequently are proposed to be, or are built on or adjacent to, industrial complexes and other hazardous waste sites.²⁰³ For example, in Chicago, one can find Altgeld Gardens, a housing project surrounded by municipal and hazardous waste landfills.²⁰⁴ More than seventy percent of the residents of Altgeld Gardens are African-American, and eleven percent are Hispanics. It is alleged that community residents suffer from elevated levels of cancer and birth defects.²⁰⁵ The 2000 families who reside in the Altgeld Gardens call it "the toxic doughnut" because they are inundated with pollutants from a nearby sludge plant, a steel mill, a paint company, a huge incinerator, and an eighty-foot-high landfill.²⁰⁶

²⁰⁰ *Id.*

²⁰¹ The use of the word force is deliberate. Some have argued that people of color could always relocate, move away from the unwanted land use, and therefore their continued presence in an area in which they are subject to exposure to environmental toxins is by choice. For those who rely on public housing, the "choice" often is to live in the designated housing project or on the streets. Acquiescence where there are no viable alternatives is not "choice," rather, in this context, it is the functional equivalent of force.

²⁰² See *Walker v. United States Department of Housing and Urban Development*, 734 F. Supp. 1289 (N.D. Tex. 1989) (finding that housing authority deliberately located public housing in "Negro slum areas").

²⁰³ See *supra* text accompanying notes 189-93.

²⁰⁴ See Bullard, *Environmental Justice of All*, in *UNEQUAL PROTECTION*, *supra* note 54, at 14.

²⁰⁵ See Lavelle & Coyle, *supra* note 99, at S3.

²⁰⁶ See John Elson, *Dumping on the Poor*, *TIME*, Aug. 13, 1990, at 46.

Just as racially discriminatory exclusionary zoning patterns and housing practices have had a significant impact upon the disproportionate allocation of environmental disamenities, so too has so-called "expulsive zoning." Expulsive zoning is a term coined by Yale Rabin to apply to the practice of depriving communities of color the benefit of protective zoning and of superimposing incompatible zoning on such communities.²⁰⁷ The net effect of such zoning practices is to cause piecemeal replacement of residents with the superimposed uses and their owners.²⁰⁸ Professor Rabin concludes that the imposition of lower-grade zoning, or zoning authorizing noxious commercial or industrial uses, undermines the quality of the residential environment and discourages continued residencies.²⁰⁹ Thus, these residents deprived of zoning protections are vulnerable to various problems ranging from commonplace inconveniences to dangerous or environmentally toxic hazards.²¹⁰ Thus, expulsive zoning decisions, specifically with reference to expanding permissible industrial uses in communities of color, often result, not in people "coming to the hazard," but in the hazard coming to the them. An early litigated example of this practice is illustrated in the case of *R.I.S.E. Inc. v. Kay*,²¹¹ an action involving environmental racism. Plaintiffs alleged that the county supervisors had rezoned a rural, traditionally black community for the location of a landfill that would receive waste for an entire region.²¹² The county's other existing landfills were also in areas containing between ninety and one-hundred percent African-American populations.²¹³ The only landfill that had been located in a predominately Caucasian community was closed down after residents protested.²¹⁴ The expulsive

²⁰⁷ See Yale Rabin, *Expulsive Zoning: The Inequitable Legacy of Euclid*, in *ZONING AND THE AMERICAN DREAM* 101, 101 (Charles M. Haar & Jerold S. Keyden eds., 1989).

²⁰⁸ See Durbin, *supra* note 188, at 742-43.

²⁰⁹ See *id.* at 742.

²¹⁰ See *id.*

²¹¹ 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd mem.*, 977 F.2d 573 (4th Cir. 1992).

²¹² See *id.* at 1147-48.

²¹³ See *id.* at 1148.

²¹⁴ See Robert W. Collin & William Harris, Sr., *Race and Waste in Two Virginia Communities*, in *CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS*, *supra* note 86, at 93, 97.

zoning was upheld as a rationally based decision unrelated to racial animus.²¹⁵ However, the court acknowledged that in a city in which fifty percent of the residents were African-American, the multiple siting of such facilities did have a disparate impact upon their communities.²¹⁶

The interplay of these exclusive and expulsive zoning practices is a significant cause of the disproportionate allocation of environmental burdens on communities of color. However, social and political factors, while less overtly racist, are equally problematic.

2. *Social and Political Influences*

Social and political dynamics play a crucial role with respect to a corporation's decision regarding where to locate environmentally burdensome enterprises. Efforts to site locally unwanted land uses are not based solely, or even primarily, upon scientific or environmental grounds. Such decisions are more often politically expedient than environmentally justified. In the past twenty years, we have become much more informed about environmental issues in general, and environmental risks in particular. As we have acquired more knowledge about the risks of toxins in the environment, we have become increasingly concerned (perhaps even paranoid) about our own exposure to environmental toxins, the threat of associated health risks, the diminution of quality of life, and the devaluation of property. This rising level of concern has motivated politically powerful and economically influential middle- and upper-income communities to publicly and vociferously oppose the siting of locally unwanted and environmentally burdensome land uses in or near their communities.²¹⁷ The response from these communities often involves protests, petitions, and other activities designed to oppose a decision to locate an undesirable land use in

²¹⁵ See *R.I.S.E.*, 768 F. Supp. at 1150.

²¹⁶ See *id.* at 1149-50.

²¹⁷ See Denton E. Morrison, *How and Why Environmental Consciousness Has Trickled Down*, in *DISTRIBUTIONAL CONFLICT IN ENVIRONMENTAL RESOURCE POLICY* 187 (Allan Schnaiberg et al. eds., 1986).

close proximity to one's home.²¹⁸ This refusal of middle- and upper-income citizens to share in the burden of this highly industrialized society's environmental waste dilemma, and the resulting organized opposition to the siting of environmentally burdensome enterprises, gives rise to the "Not-In-My-Backyard" ("NIMBY") Syndrome.²¹⁹

As these communities become increasingly successful in their opposition, demanding that the facilities be located "somewhere else,"²²⁰ the disproportionate distribution of burdens is exacerbated. In order to avoid the legal and other costs associated with fighting well organized NIMBY groups, hazardous waste facility operators and local governments avoid those neighborhoods in which organized resistance is likely to be forthcoming.²²¹ The political ramifications of siting unwanted land uses in politically influential and economically affluent communities, and the legal costs associated with fighting those battles, seems to have resulted in the development of a related syndrome, "Place In Blacks' Backyards" ("PIBBY").²²² In *Dumping in Dixie*, Bullard contends that industry and public officials anticipating an attack or a coordinated citizen reaction to a decision authorizing the placement of a hazardous waste facility or other environmental disamenity often respond by targeting less politically powerful, less well-organized minority or low-income communities.²²³ Leslie

²¹⁸ See Linda Starnato, *In Their Own Backyards: Community Organizations and Siting Controversies*, 77 NAT'L CIVIC REV. 315 (1988) (detailing the nature and strength of response of community reaction to proposed siting of an unwanted land use).

²¹⁹ See BULLARD, *supra* note 62, at 37-38.

²²⁰ *Id.* at 38.

²²¹ See Bullard & Wright, *The Politics of Pollution: Implications for the Black Community*, *supra* note 182, at 74, 78.

²²² See Vicki Been, *What's Fairness Got to Do With It? Environmental Justice and the Siting of Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1002-03 (1993); Fisher, *supra* note 159, at 307-08.

²²³ See BULLARD, *supra* note 62, at 3-7 (asserting that African-American communities historically have been targets of waste sites because of low resistance); Dubin, *supra* note 166, at 764-68 (1993) (recognizing the powerlessness of African-American communities as a factor in siting decisions); David Lampe, *The Politics of Environmental Equity*, 81 NAT'L CIVIC REV. 27, 28 (1992) (arguing that process of siting hazardous waste facilities targets less resistant communities).

Coleman asserts that

the NIMBY and PIBBY syndromes demonstrate that the decision to place undesirable land uses in minority neighborhoods may not be so much an issue of intent as it is a reaction to societal factors. External factors unrelated to the formal decision-making process itself, such as NIMBY and PIBBY, indirectly result in minority communities' shouldering an unequal share of society's waste facilities.²²⁴

Moreover, public officials do not always respond equally to all segments of the population.²²⁵ After facilities have been in operation, and the threat of health risks or other environmental harms materialize, officials are often reluctant to acknowledge the problem.²²⁶ When authorities do concede the existence of a hazardous situation, they often are slow to respond and do so with less vigor than in white, middle class communities.²²⁷

²²⁴ Coleman, *supra* note 188, at 477-78.

²²⁵ See Marianne Lavelle, *A Toxic Refuge*, NAT'L L.J., Nov. 23, 1992, at 1, 24. Marianne Lavelle chronicles the efforts of some middle-class Hispanic families to improve their quality of life by leaving congested New York City and moving to Warren Court, a largely minority-occupied subdivision on the Hudson River. *See id.* at 1, 24. Three years later, the Guarinos learned that the homes in Warren Court had been built on a waste site composed of decomposing gypsum board that was emitting hydrogen sulfide gas, a substance poisonous at high levels of concentration. *See id.* at 1. Over 10,000 cubic yards of rotting gypsum board were buried under Warren Court. *See id.* The discovery of the gypsum board accounted for the persistent rotten-egg smell and, plaintiffs alleged, revealed the cause of their family's illnesses including headaches, irritated eyes, unexplained high fevers, rashes, gastric distress, and an eye infection that required surgery. *See id.* at 24. The response of local authorities was less than overwhelming. Sellers' brokers claimed that the smell was from the Hudson River and referred to it as an odor problem. *See id.*

²²⁶ *See* West Dallas Case Study, *supra* notes 117-49.

²²⁷ *See* Lavelle & Coyle, *supra* note 99, at S2. The conclusion of a study of Superfund programs conducted by the *National Law Journal* found that the government took a longer time to address environmental hazards in minority residential areas than in Caucasian communities. *See id.* In addition, placement on the national priority action list of abandoned hazardous waste sites found in minority communities took twenty percent longer than placement of sites located in Caucasian areas. *See id.*

One might conclude that if citizens in low-income communities of color are concerned with the siting of environmentally burdensome facilities, then they should just protest as vigorously as their more affluent counterparts. Indeed, they often do.²²⁸ For many reasons, such as the lack of adequate political and economic influence, the results of such protests are not the same.²²⁹ For example, in a report commissioned by the California Waste Management Board to identify those populations least likely to oppose the siting of garbage incinerators, the Board determined that communities with populations under 25,000, in rural areas, with "old timer" residents, blue collar workers, conservatives, and those with less than a high school education were viable sites.²³⁰ A more explicit and infinitely more telling comment in the report favoring the strategy of siting environmental hazards in less politically powerful neighborhoods states that "[a]ll socioeconomic groupings tend to resent the nearby siting of major facilities, but middle and upper socioeconomic strata possess better resources to effectuate their opposition. Middle and higher socioeconomic strata neighborhoods should not fall within the one- mile and five-mile radius of the proposed site."²³¹ Thus, the efforts of grass-roots activists to influence environmental policymaking in the absence of sufficient political and economic clout "may not only fail to reduce political inequality, but may actually exacerbate the division between those who can exploit the political culture and those who

²²⁸ Examples include groups such as Toxic Avengers, West Harlem Environmental Action, Mothers of East Los Angeles, Concerned Citizens of South Central Los Angeles, and Native Americans for a Clean Environment. See Dorceta E. Taylor, *Environmentalism and the Politics of Inclusion*, in CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS, *supra* note 86, at 53, 56; see also *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd mem.*, 977 F.2d 573 (4th Cir. 1992).

²²⁹ See Harvey L. White, *Hazardous Waste Incinerators and Minority Communities*, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS, *supra* note 59, at 126 ("Minority communities do not have the resources, or contacts, to initiate or sustain the proactive behavior found in more affluent communities.").

²³⁰ See Luke W. Cole, *Remedies for Environmental Racism: A View from the Field*, 90 MICH. L. REV. 1991, 1994 n.14 (1994) (citing CERELL ASSOCIATES, POLITICAL DIFFICULTIES FACING WASTE-TO-ENERGY CONVERSION PLANT SITING 17-30 (1984)).

²³¹ Bullard, *supra* note 86, at 18 (quoting CERELL ASSOCIATES, POLITICAL DIFFICULTIES FACING WASTE-TO-ENERGY CONVERSION PLANT SITING 43 (1984)).

cannot, thereby increasing the alienation and frustration that the whole participatory process is designed to eliminate."²³²

Political influences are also important with respect to circumstances in which there is "environmental blackmail." There is an internal struggle in many communities of color: while the presence of waste disposal facilities may provide the potential for exposure to a variety of toxins, they may also provide a glimmer of hope, from promises made, if not yet realized, of economic salvation for an impoverished community.²³³ "Communities that agree to host hazardous-waste and other noxious facilities are promised compensation in an amount such that the perceived benefits outweigh the risks."²³⁴ The "economic trade-off" is that the existence of environmental burdens in minority communities will bring jobs to "poverty pockets," creating, perhaps, the hope of earning enough money to move out and move up. The carrot—extended by companies that offer economic incentives in the form of job promises, infrastructure improvement, and increased tax base—is often combined with the stick—companies threaten that a change in environmental enforcement practices, or opposition to toxic facility siting, will result in plant closures, layoffs, tax revenue depletion, and economic dislocation.²³⁵ The "incentives" are too often unrealized, and the "threats" are too often carried out. Because they are beset by rising unemployment, abject poverty, a diminishing tax base, and decaying business infrastructures, communities of color, or at least their elected representatives, often are

²³² W.R. Derrick Sewell & Timothy O'Riordan, *The Culture of Participation in Environmental Decision Making*, 16 NAT. RESOURCES. J. 1, 19 (1976).

²³³ See Michelle Campbell, *Incinerators Divide Ford Heights-Neighbors See Risks, Politicians See Hope*, CHI. SUN-TIMES, Feb. 7, 1996, at 1, available in 1996 WL 6730644. In Ford Heights, a lower-income suburb of Chicago, some residents fear the tire burning incinerator, an enterprise that stores tires within thirty feet of the nearest public housing complex. The plant is intended to burn 7.2 million tires a year. In contrast, "village officials see economic salvation." *Id.* See also Keith Schneider, *Plan for Toxic Dump Pits Blacks Against Blacks*, N.Y. TIMES, Dec. 13, 1993, at A12 (describing debates over the siting of a hazardous waste facility in Noxubee County, Mississippi between blacks concerned about the area being a "dumping ground" for toxic wastes and blacks hopeful for jobs and minority owned business opportunities).

²³⁴ BULLARD, *supra* note 62, at 84.

²³⁵ See *id.* at 84-85.

vulnerable to the siren song inducements and thus minimize their opposition to proposed facility sitings.

Even if the community agrees to accept the environmental burden and some increased economic prosperity comes to the locality, the result may still be manifestly unjust. "Environmental blackmail" policies raise a moral issue: should one part of society (the affluent) pay another part of society (the disadvantaged) "to accept risks that others can afford to escape?"²³⁶ The "consent" of those who live in closest proximity to the facility, or those who are subjected daily to its fall-out, may have been induced by false promises. The promised benefits are often not forthcoming, and the true extent of the potential detriment is not disclosed. As demonstrated by the NIMBY syndrome, the more informed the community is about the health risks, the less likely it is to welcome potentially hazardous facilities or to tolerate their negligent operation.

3. *Market Force Factors*

With respect to siting issues, hazardous waste facilities are locally unwanted land uses that tend to be located upon the road to profit maximization and along the path of least resistance. Thus, in addition to social pressures, economic factors, or so-called "market forces," influence the siting of hazardous waste facilities and often determine the likelihood of environmental remediation.²³⁷ Owners and operators of waste disposal and reclamation facilities and landfills desire to make a profit. Compliance or non-compliance with environmental regulations is similarly profit-motivated,²³⁸ and to the extent that costs can be avoided or minimized, they

²³⁶ *Id.* at 85. The process is reminiscent of another process that was prevalent in the last century, that of permitting persons with money to avoid conscription by paying another to go in their place.

²³⁷ See Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1214 (1991); BURTON ALLEN WEISBROD ET AL., *Public Interest Law: An Economic and Institutional Analysis* (1978).

²³⁸ See ZYGMUNT J.B. PLATER ET AL., *ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY* 29 (West 1992).

Rational choice theory aids those who seek to alter polluter behavior.

are. Indeed, the explanation given by industry representatives who select certain sites for the siting of hazardous waste or other environmental disamenities has less to do with racial animosity than their desire to minimize costs and maximize profits.²³⁹

Private industry tends to give race-neutral explanations for its decisions. Indeed, its decisions often are made with an express purpose of "helping" these communities, or returning economic prosperity to the region. Thus, entrepreneurs in the hazardous waste management business tend to favor sparsely populated locations where land can be obtained at low cost; land tends to be cheaper in low-income and minority communities, especially in rural enclaves.²⁴⁰ In urban or semi-urban areas, land in and around low-income and minority communities already may be zoned for commercial use, a factor that further reduces the start-up costs of a new operation.²⁴¹ This desire for wealth maximization, though "rational," causes a concentration of wastes in portions of the common often resulting in a disparate impact upon

Presumably, excessive air and water pollution will continue to recur until rational maximizers find it less profitable to pollute than to make other arrangements for disposal of unwanted by-products. Rational choice theory predicts that making pollution more expensive to the polluter than other environmentally less harmful methods of disposal will effect a reduction in pollution with a corresponding improvement in environmental quality. Law intersects with this simple economic analysis because the devices that change the calculus facing polluters are imposed by the legal system Regardless of the legal means adopted, belief in rational choice theory undergirds the strategy: those making the law expect that regulated parties, [or those subject to common law liability] in order to minimize costs, will reduce pollution.

Id.

²³⁹ See Joan Z. Bernstein, *The Siting of Commercial Waste Facilities: An Evolution of Community Land Use Decisions*, 1 KAN. J.L. & PUB. POL'Y 83, 83-84 (1991) (describing historical site selection as being governed by economic factors).

²⁴⁰ See Mohai & Bryant, *supra* note 59, at 169-74 (discussing study of the siting of hazardous waste sites in Detroit).

²⁴¹ Minority and low-income communities that are located in areas not currently zoned for commercial facilities or for hazardous waste purposes cannot count on that zoning not to change as a result of the legal and financial pressures brought by commercial facilities wishing to establish themselves in those areas. See generally Dubin, *supra* note 188.

people of color and the poor.

The burgeoning literature on the topic of environmental racism/justice attempts to discern not only the causes of the disproportionate allocation of environmental burdens, but also tries to devise solutions to the problem. Various disciplines have addressed how to create a set of incentives that will motivate hazardous waste companies to make siting and operational decisions that will cease to have a disproportionate impact upon minority communities. They have suggested persuading industry to remediate hazardous environmental conditions and to force compliance with environmental laws in low-income or minority communities, at least as thoroughly and expeditiously as in white, middle-income communities (in their own backyard).

II. CURRENT APPROACHES TO THE REDRESS OF ENVIRONMENTAL RACISM

"We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness."²⁴² Historically, these truths have been neither self-evident or self-actuating.²⁴³

²⁴² THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

²⁴³ At the time these words were written, Native Americans were "savages," a people whose land was to be taken at almost any cost, including the decimation of Native American cultures. Persons of African descent, slave or free, were considered chattel-fit only to be bought and sold upon the open market place. See *Scott v. Sanford*, ("Dred Scott"), 19 How. 399, 406 (1856). In *Scott* Justice Taney stated:

[N]either the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then [at the time of the Constitution's adoption] acknowledged as a part of the people, nor intended to be included in the general words used in that instrument; [that] the negro might justly and lawfully be reduced to slavery for his benefit. He was 'bought and sold' and treated as an ordinary article of merchandise and traffic, whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race.

Justice Taney further summarized,

[t]he question is simply this: Can a negro, whose ancestors were imported into this country, and sold as slaves, become a member of the political

However, with the passage of time, and great social upheaval, these truths have become, if not "self-evident," more widely espoused. In the United States, there is now a broad consensus that people are equal before the law, and are entitled to equal treatment under the law, without regard to race, gender, ethnicity, or nationality. The goal of environmental racism theory is to implement equality and treatment with respect to the distribution of environmental benefits and burdens. Current environmental racism jurisprudence rests upon traditional discriminatory intent and disparate impact analysis. Such analysis, at its core, reflects these essential founding principles.

In our jurisprudence, the protection of life, liberty, and the pursuit of happiness is realized in two relational contexts. First, these rights are discerned in the relationship of individuals to their government—the context preeminent in the Declaration of Independence. Rights established in the Constitution and the Bill of Rights have been extended to people of color and others through constitutional amendment and legislative enactment. These "civil" rights are based, in part, upon citizenship (status as a member of this society), and in part upon group identity (status as a member of readily identifiable "communities" within the broader society). Civil rights are concerned largely with protecting individuals against invasions of protected interests by the actions of government and those acting on its behalf.

The right to protect life, liberty, and the pursuit of happiness may be discerned in the relationship of individuals to each other. A myriad of tort, contract, and property doctrines seek to balance an individual's right to

community formed and brought into existence by the Constitution and as such become entitled to all the rights, and privileges, and immunities, guaranteed by that instrument to its citizens. . . . We think they are not.

Id. at 403-04. Asians, although suitable to be used as laborers in the development of the railroad, were likewise excluded from the vision set forth in the Declaration of Independence: "There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States, persons belonging to it are, with few exceptions, absolutely excluded from our country. I allude to the Chinese race." *Plessy v. Ferguson*, 163 U.S. 537, 561 (1895) (Justice Harlan, dissenting). In his dissent, Harlan argued that Negroes were allowed to become citizens and should have certain rights accorded to them. The allusion to the Chinese race was to demonstrate that Negroes were not similarly excluded.

protect his own person, pursue his own interests, and to make use of his own property against the exercise of similar rights by others. There is a unifying theme undergirding both civil rights and individual interests jurisprudence. Principles of equity, dignity, and fairness underlie the breadth of civil rights legislation and jurisprudence and infuse the environmental justice movement. A similar concern for individual dignity, equitable treatment, and personal autonomy pervades tort law—for a wrong done, or a right denied, there may be found access to a remedy at law or in equity. Increasingly, where the free exercise of “individual” rights clashes with the enjoyment of “civil rights” the result is an expansion of common law doctrine.²⁴⁴

Environmental racism causes those who reside in communities of color to suffer both a deprivation of their civil rights and an invasion of their individual interests. However, neither the current civil rights litigation strategy, nor an individual rights tort law approach, fully addresses the panoply of issues arising in the context of environmental racism. For a complex, multifaceted problem such as environmental racism there is no panacea. Accordingly, proposed strategies must recognize the strengths and weaknesses of both traditions and build upon them.

At present, the panoply of legal and political approaches available to address the environmental racism problem is expanding—but is far from complete.²⁴⁵ They include sociological analysis,²⁴⁶ civil rights litigation,²⁴⁷

²⁴⁴ Thus, for example, under the employment-at-will doctrine an employer may fire an employee for a good reason, bad reason, or no reason at all. An employer has the right to decide who it will employ and for how long. However, if the termination contravenes established public policy, i.e. state anti-discrimination law, common law tort remedies may be available in addition to, and in support of, statutory relief. See *Tate v. Browning-Ferris, Inc.*, 833 P.2d 1218, 1220 (Okla. 1992). Thus, “[w]here an at-will employee terminated by a private employer files suit alleging facts that, if true, violate state and federal statutes providing remedies for employment discrimination” the employee may state a cause of action, based upon the same facts, for racially motivated or retaliatory discharge.

²⁴⁵ See Poirer, *supra* note 25, at 1097-98 (delineating a variety of approaches and some of the main proponents of each approach). The following updated, but not exhaustive, listing belies the complexity not only of the problem, but the solution(s) as well.

²⁴⁶ See 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); Carolyn M. Mitchell, *Environmental Racism: Race as a Primary Factor in the Selection of*

environmental law legislation,²⁴⁸ the poverty law/organizer tradition,²⁴⁹ the land use approach,²⁵⁰ a jurisprudential approach,²⁵¹ various native sovereignty perspectives,²⁵² and sustainable development paradigms.²⁵³ These legal and regulatory approaches to remedy disparity in the allocation of environmental burdens essentially boil down to two devices: (1) regulations that would directly limit or prohibit future industrial siting in minority and disadvantaged communities, and (2) penalties against presently active polluting and waste facilities that disproportionately impact minorities.²⁵⁴ The threat of such penalties "would motivate facility owners to relocate or site future developments in non-minority neighborhoods."²⁵⁵ In this section, I address

Hazardous Waste Sites, 12 NAT'L BLACK L.J. 176 (1993).

²⁴⁷ See Fisher, *supra* note 159, at 311-33; Boyle, *supra* note 177, at 950-62; Godsil, *supra* note 1, at 408-21; Lazarus, *supra* note 56, at 827-42 (summarizing additional sources).

²⁴⁸ See Colin Crawford, *Strategies for Environmental Justice: Rethinking CERCLA Medical Monitoring Lawsuits*, 74 B.U. L. REV. 267, 293-97 (1994).

²⁴⁹ See Cole, *supra* note 103, at 661-72; Cole, *supra* note 230, at 1997.

²⁵⁰ See generally Been, *supra* note 171; Been, *supra* note 222; Collin, *supra* note 188.

²⁵¹ See Joseph P. Tomain, *Distributional Consequences of Environmental Regulation: Economics, Politics, and Environmental Policymaking*, 1 KAN. J.L. & PUB. POL'Y. 101 (1991).

²⁵² See Kevin Gover & Jana L. Walker, *Escaping Environmental Paternalism: One Tribe's Approach to Developing a Commercial Waste Disposal Project in Indian Country*, 63 U. COLO. L. REV. 933 (1992).

²⁵³ See generally Laura Pulido, *Sustainable Development at Ganados del Valle*, in CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS, *supra* note 86.

²⁵⁴ See BOERNER ET AL., *supra* note 70, at 7-10, 18-19. Such a threat, if credible, also might influence facility owners to move from pollution control to pollution prevention. Cole, *supra* note 103, at 645.

Grassroots activists around the country, by stopping the siting of toxic waste disposal facilities in their communities, have begun to force industry to move from pollution control to pollution prevention. Put simply, because so few waste disposal sites exist, and because it is so difficult to establish new sites, the price of toxic waste disposal has risen to the point where companies are seriously working to replace toxic inputs to their manufacturing processes in order to minimize the production of toxic waste.

Id.

²⁵⁵ Cole, *supra* note 103, at 645.

current legal approaches to the problem of environmental racism and the limitations of those approaches.

A. Equal Protection Litigation-Discriminatory Purpose Analysis

One of the primary goals of the environmental justice movement is to prevent new waste disposal facilities from being located in communities of color that are, or will become, disproportionately impacted with environmentally burdensome enterprises. Evidence exists that federal, state, and municipal authorities have disproportionately operated, and/or issued permits to operate, landfills, hazardous waste incinerators, and noxious industrial processes in communities of color. The same federal, state, and local governmental authorities have been remiss in enforcing environmental standards in these neighborhoods. Based upon this evidence of unequal treatment under the law, civil rights activists instituted litigation based upon the Fourteenth Amendment guarantees of equal protection.²⁵⁶ The guarantee of equal protection to all persons is designed to prohibit state actions that treat classes of people differently based upon arbitrary facts such as race or national origin. However, the mere fact that governmental action has a less favorable impact on one race than it does on another is not sufficient to infringe this guarantee. Rather, plaintiffs must demonstrate an intent to discriminate on the basis of race; racial animus must motivate the governmental policy or practice.²⁵⁷

Civil rights based litigation strategies offer several advantages to the litigant. First, civil rights statutes are concerned with injuries that arise by virtue of one's membership in a group; therefore, the available remedies, often equitable in nature, benefit not just the individual, but the group as well. Second, governmental authorities are entitled generally to sovereign immunity from suit, or immunity from judgment, for "discretionary

²⁵⁶ The Fourteenth Amendment provides in relevant part: "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

²⁵⁷ See *Washington v. Davis*, 426 U.S. 229, 239 (1976).

functions.”²⁵⁸ Discretionary functions include legislative and adjudicatory decision-making processes.²⁵⁹ Although many states have waived their sovereign immunity for certain classes of torts, specifically in the environmental context, agencies responsible for regulatory oversight—enforcing zoning regulations, licensing waste disposal facilities, or issuing operations permits—are not typically subject to liability for any harm that flows from their decisions.²⁶⁰

However, even in the context of the exercise of discretionary functions, where the acts of a governmental authority²⁶¹ infringe upon constitutionally protected or statutorily created rights, sovereign immunity will not bar suit.²⁶² In The Civil Rights Act of 1871,²⁶³ Congress provided:

²⁵⁸ See Federal Torts Claims Act, 28 U.S.C. §§ 1346(b), 2680(a) (1988) (providing a general waiver of sovereign immunity and permitting tort actions to be filed against the federal government, it does not include in this waiver the implementation or exercise of policy functions: “[a]ny claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.”).

²⁵⁹ See *Dalehite v. United States*, 346 U.S. 15 (1953). The purpose of the discretionary function exemption is to permit the Government to make planning-level decisions without fear of suit. That discretion “includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations. Where there is room for policy judgment and decision there is discretion.” *Id.* at 35-36. However, the *Dalehite* test has been narrowed to exclude what are essentially operational functions. See *Dickerson, Inc. v. United States*, 875 F.2d 1577, 1584 (11th Cir. 1989) (asserting discretionary functions exception did not apply to governmental liability under the Tort Claims Act for failure to ensure that contracts hired to dispose of PCB if did not do so properly); see also *Diagle v. Shell Oil Co.*, 972 F.2d 1527, 1541-42 (10th Cir. 1992) (stating exemption does encompass the decision of how to remediate the contamination).

²⁶⁰ See, e.g., *Kenny v. Scientific Inc.*, 497 A.2d 1310, 1314 (N.J. Super. 1985) (finding state immune from liability for licensing or failure to revoke licensing of companies transporting wastes); *Rumbough v. City of Tampa*, 403 So. 2d 1139, 1142 (Fla. Dist. Ct. App. 1981) (explaining decision to expand landfill in direction of plaintiff’s property constituted a discretionary function that could not create liability).

²⁶¹ See, e.g., *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690 (1978) (holding municipalities are persons within the scope of § 1983).

²⁶² See *Maine v. Thiboutot*, 448 U.S. 1, 4-8 (1980).

²⁶³ 42 U.S.C. § 1983 (1871).

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State of Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.²⁶⁴

Thus, where a state or local municipal official makes decisions that violate equal protection guarantees, individuals may sue to prevent the violation or sue for damages resulting from it. This waiver of sovereign immunity otherwise may not be available to the community harmed by the decision to site a waste disposal facility and, is seen as a significant factor favoring a "civil rights," as opposed to a tort law approach.

Finally, litigation undertaken pursuant to civil rights statutes such as 42 U.S.C. § 1983 or Title VI²⁶⁵ have an important additional advantage—if the plaintiff prevails in the action, attorney's fees may be recovered from the defendant in addition to any equitable relief or monetary damages that are awarded.²⁶⁶ This ability to shift legal fees to the proven wrongdoer is atypical in American jurisprudence, but is attractive to individuals who struggle to provide their families with daily necessities and who cannot afford to finance protracted complex litigation. More important, because the goal in these cases is to prevent the siting of a facility, the remedy of injunctive relief is explicitly available.

Unfortunately, thus far, efforts to obtain legal redress through traditional civil rights litigation approaches have proven largely unsuccessful. This lack of success is largely attributable to the requirement that the

²⁶⁴ *Id.*

²⁶⁵ 42 U.S.C. §§ 2000d-2000d-7 (1988); *see also* discussion of Title VI *infra* Part II.B.

²⁶⁶ *See* 42 U.S.C. § 1988 (1988) ("[i]n any action or proceeding to enforce a provision of Section . . . 1983, Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, et seq. . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.").

defendant be proven to "have intended" the harm, a standard that is construed as requiring proof of a racially invidious motive or purpose. Proof on this issue often is found wanting when there is no direct evidence of a racially invidious motive and statistical evidence of discrimination can be attributed to socio-economic factors other than, or in addition to, race.

In the late 1970s and early 1980s residents in communities targeted for the siting of a waste disposal facility filed several lawsuits raising Equal Protection challenges.²⁶⁷ For example, in *Bean v. Southwestern Waste Management Corp.*,²⁶⁸ plaintiffs sought to enjoin the decision of the Texas Department of Health that granted the Southwestern Waste Management Corporation a Type I solid waste facility permit to operate in East Houston.²⁶⁹ Plaintiffs alleged that the decision was part of a pattern and practice of discrimination in the placement of solid waste sites and was therefore in violation of 42 U.S.C. § 1983.²⁷⁰ The court acknowledged that siting a solid waste facility so close to an unairconditioned high school and to a residential area did not make sense.²⁷¹ The court agreed that plaintiffs had established the existence of a substantial threat of irreparable harm to their constitutional rights; "the opening of the facility will affect the entire nature of the community—its land values, its tax base, its aesthetics, the health and safety of its inhabitants, and the operation of the Smiley High School located only 1700 feet from the site."²⁷² However, the court held that plaintiffs were required to show "not just that the decision to grant the permit is objectionable or even wrong, but that it is attributable to an intent to discriminate on the basis of race."²⁷³ Thus, the mere existence of a racially disparate environmental impact, in the absence of overwhelming statistical evidence establishing that a specific defendant followed a pattern or practice of discrimination in the siting of similar facilities from which one could

²⁶⁷ See Crawford, *supra* note 248 (summarizing these efforts).

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

²⁶⁹ See *id.* at 675.

²⁷⁰ See *id.*

²⁷¹ See *id.* at 681.

²⁷² *Id.* at 677.

²⁷³ *Id.*

conclude that a racially motivated discriminatory purpose exists, is not enough to succeed on the merits on an equal protection claim.²⁷⁴

Similarly, in *East Bibb Twiggs Neighborhood Association v. Macon-Bibb County Planning and Zoning Commission*,²⁷⁵ and *R.I.S.E., Inc. v. Kay*,²⁷⁶ the courts acknowledged that the permitted facilities would have a disproportionate adverse impact upon a minority community,²⁷⁷ yet rejected plaintiffs' §1983 claims based upon a failure to establish a clear pattern of racially motivated siting determinations.²⁷⁸ Both courts stated that traditional civil rights protections are in place to protect against racially motivated action or purposeful discrimination, therefore, proof of disparate impact in the siting of one or more hazardous waste facilities was not enough to demonstrate a racially invidious motive.²⁷⁹ Proof of racially invidious motive is most often less than persuasive because of the predominance of evidence implicating financial and political considerations as the basis for site selection.²⁸⁰ Therefore, in order to apply the principle of equality before the law to the distribution of environmental hazards, an effects, rather than an intent, standard is necessary.²⁸¹

The requirement of state action, the difficulty in proving racial

²⁷⁴ See *id.*

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

²⁷⁶ 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd mem.*, 977 F.2d 573 (4th Cir. 1992).

²⁷⁷ In *R.I.S.E., Inc.*, county supervisors rezoned a rural, traditionally black community for a landfill which would receive waste from an entire region. The county's three existing landfills were located in areas with ninety to one-hundred percent African-American populations, and one waste site that had been operated for a brief time in a white suburb had been shut down. See *id.* at 1148-49. The court admitted that the county's placement of landfills "had a disproportionate impact on black residents," but that was not enough to infer invidious intent. See *id.* at 1149-50.

²⁷⁸ See *R.I.S.E., Inc.*, 768 F. Supp. at 1149-50; *East Bibb Twiggs Neighborhood Ass'n*, 706 F. Supp. at 887.

²⁷⁹ See *R.I.S.E., Inc.*, 768 F. Supp. at 1149; *East Bibb Twiggs Neighborhood Ass'n*, 706 F. Supp. at 885-86.

²⁸⁰ See *R.I.S.E., Inc.*, 768 F. Supp. at 1150; *East Bibb Twiggs Neighborhood Ass'n*, 706 F. Supp. at 886.

²⁸¹ See Peter Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 U. KAN. L. REV. 271, 290-97, 298-305 (1992).

animus, the lack of sufficient statistical analysis to resolve the "chicken or egg" conundrum, and the multi-faceted nature of factors leading to disproportionate siting practices all but preclude effective use of traditional civil rights statutes to resolve what is, in reality, both a race-influenced and class-influenced dilemma.²⁸²

B. Title VI—Disparate Impact Analysis

Environmental justice proponents also have suggested litigation under Title VI of the Civil Rights Act of 1964,²⁸³ which prohibits discrimination based on race or national origin in federally funded programs and activities.²⁸⁴ Unlike Section 1983 litigation, which is based upon equal protection language in the Fourteenth amendment and requires proof of discriminatory motive or purpose, Title VI only requires proof that an action has resulted in

²⁸² See Crawford, *supra* note 248. The central difficulty for environmental justice lawyers who attempt to succeed on an equal protection theory is that "although toxic activities may disproportionately burden racial and ethnic minority communities, the causes are complicated and thus difficult to separate and to prove." *Id.* at 282. Further, plaintiff's arguments suffer from inevitable imprecision in application of the term "minority," both as used by environmental justice advocates and the community at large, the disallowance of relevant economic status in an equal protection analysis, and the fact that equal protection analysis is limited to target area demographics at the time the facility is opened. *See id.* at 283. The latter requirement constitutes a significant barrier in minority communities with a high concentration of hazardous waste sites where it is not known what the racial composition was at the time the facility opened or where the predominant minority composition was attained only after the sites were opened, a status one might presume was caused, in part, by the presence of the waste sites. *See id.*

²⁸³ See, e.g., Fisher, *supra* note 159, at 311-33; Colopy, *supra* note 173; Lazarus, *supra* note 56, at 827-39.

²⁸⁴ See 42 U.S.C. §§ 2000d-2000d-7 (1988). Title VI provides: "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." Civil Rights Act of 1964 § 601, 42 U.S.C. § 2000d (1988). 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. The Civil Rights Act of 1964, at 93 (BNA Operations Manual at 1964).

a racially disparate impact—a “lesser” showing.²⁸⁵ 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.²⁸⁶

In this regard, Title VI offers a significant advantage over Section 1983. In a thorough discussion of the merits of a Title VI approach, Michael Fisher states that “Title VI can be a potent weapon for the environmental justice movement, both in its basic legal application, and in its aptness as a tool for building and broadening the movement.”²⁸⁷ Fisher delineates Title VI’s administrative complaint process,²⁸⁸ identifies proper defendants in a Title VI action,²⁸⁹ discusses the merits of a Title VI action,²⁹⁰ and describes the proof necessary to demonstrate disparity, impact, and feasible, non-

²⁸⁵ See Fisher, *supra* note 159, at 316.

²⁸⁶ See Lazarus, *supra* note 56, at 836.

²⁸⁷ Fisher, *supra* note 159, at 311. Fisher describes the basic Title VI argument as follows:

The U.S. Environmental Protection Agency (EPA) provides large amounts of federal funds to state environmental agencies. These state agencies, in turn, are the governmental bodies responsible for much of the nation’s environmental policy—the enforcement of pollution standards, the permitting of waste treatment and disposal facilities and industrial polluters, and the siting of those facilities. If the actions of those federally-funded state agencies create a racially discriminatory distribution of pollution, then a violation of Title VI has occurred and a civil rights lawsuit is warranted.

Id. at 287.

²⁸⁸ See *id.* at 315-16.

²⁸⁹ See *id.* at 317. “In general, two types of suits can be filed under Title VI: suit against the recipient of federal funds, or a suit against the funding agency itself.” *Id.* Suits against state departments of natural resources that implement a RCRA, CWA, or CAA enforcement program would be permitted. See *id.*

²⁹⁰ See *id.* at 319-21. Fisher observes that federal courts have interpreted Title VI according to Title VII case law, and discusses in some detail a proposed analysis of environmental racism under Title VII jurisprudence and the Civil Rights Act of 1991. He concludes that environmental justice activists would be required to make a *prima facie* showing that a particular practice results in a disparate impact and the defendant would then be subject to liability unless it could prove the non-racial nature of the program and the necessity for retaining it in its current form. See *id.* at 321.

discriminatory alternatives.²⁹¹ He sets forth a strong argument that Title VI suits promise significant strategic advantages to the environmental justice movement and facilitate positive changes by unifying the efforts of the civil rights community and environmental activists.²⁹²

However, Title VI litigation has certain serious limitations. For example, it is not applicable to government authorities or private entities that do not receive federal financial assistance.²⁹³ 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.²⁹⁴ While desirable, equitable relief does not provide a complete remedy to those who have been injured by exposure to environmental toxins. 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

²⁹¹ See *id.* at 321-28.

²⁹² See *id.* at 331-33.

The utility and applicability of Title VI, however, goes beyond its legal effectiveness. . . . [It] can serve as a conceptual bridge between the environmental and civil rights legal communities. . . . [T]he fact-intensive, statistical, and scientific nature of a Title VI disparate impact showing will hopefully continue to draw resources and support from mainstream environmental groups.

Id. at 332-33.

²⁹³ See 42 U.S.C. § 2000d-1 (1988); Lazarus, *supra* note 56, at 835 & n.214.

²⁹⁴ See 42 U.S.C. § 2000d-7 (1988); Fisher, *supra* note 56, 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."); *Guardians Ass'n v. Civil Serv. Comm'n of N.Y.*, 463 U.S. 582, 599-600, 607 & n.27 (1983). Justice White explains that a majority of the divided Court "would not allow compensatory relief in the absence of proof of discriminatory intent." *Id.* at 607 & n.27. As noted above, proof of discriminatory intent is a significant, often insurmountable, burden. Moreover, to the extent such cases involve "environmental classism," Title VI does not apply.

present harm, are required.

C. Environmental Tort Actions—Interference with Interests in Person and Property

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.

Traditional environmental tort causes of action include trespass, nuisance, negligence, and strict liability for abnormally dangerous activities.²⁹⁵ 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. In personal injury actions, significant problems of proof often preclude a finding of liability against the

²⁹⁵ For an excellent delineation and analysis of these remedies, see GERALD W. BOSTON & M. STUART MADDEN, *LAW OF ENVIRONMENTAL AND TOXIC TORTS* 21-139 (1994). The authors distinguish between environmental torts and toxic torts.

The term "toxic" is more narrow than the term "environmental," for while many environmental tort cases do involve exposure to toxic substances, certainly many do not. For example, litigation concerning disagreeable odors from a landfill, or airborne ash from an incinerator, may not have toxic implications, although they do represent environmental harm or degradation. To be contrasted, the term "toxic," while lacking a consistent application to all cases, is understood generally to mean substances that by inhalation, ingestion, dermal exposure or otherwise can or do cause personal physical injury or disease. . . . [N]early all toxic tort cases are comprehended by the phrase "environmental torts."

Id. at 1-2.

defendant enterprise. Limitations upon the nature of compensable harms are also problematic. Moreover, in the majority of cases, these doctrines do not adequately address the threat of future invasions,²⁹⁶ nor are they intended to protect against interference with mental or emotional tranquility, individual dignity, and/or civil rights.²⁹⁷

1. *Trespass Actions*

Trespass actions are particularly useful for recovering damages, and in some cases injunctive relief, where the release of noxious or toxic substances into the environment has interfered with an owner's possessory interest in real property.²⁹⁸ A trespass action requires that a person, his agent, or an instrumentality he has set in motion physically enter the property of another.²⁹⁹ Generally, an intentional trespass entitles the property owner to compensation for the invasion itself and for all harm to the property or to other protected interests that flow from the trespass, whether or not such harm is foreseeable.³⁰⁰ A trespass, when caused by either the negligence of

²⁹⁶ See Williams, *supra* note 30, at 239-49 (1995) (suggesting that in a limited number of circumstances, trespass and nuisance doctrine may allow for prospective injunctive relief).

²⁹⁷ While a tort such as the intentional infliction of emotional distress provides relief in the context of "extreme and outrageous" misconduct, conduct so extreme in degree as to go beyond all possible bounds of decency, and may be available in cases in which the defendant has been guilty of repeated and egregious violations of environmental law, it is not a "typical" environmental tort claim. See RESTATEMENT (SECOND) § 46 cmt. d (1979).

²⁹⁸ See *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1192 (6th Cir.1988); *Grant v. E.I. DuPont de Nemours & Co.*, 1995 U.S. Dist. Lexis 15345, at *10-13 (E.D.N.C. 1995); *Bradley v. American Smelting & Ref. Co.*, 709 P.2d 782, 786 (Wash. 1995); AMERICAN BAR ASSOCIATION, ENVIRONMENTAL LITIGATION 93-97 (J. Kole & L. Espel eds., 1991).

²⁹⁹ 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.

³⁰⁰ An intentional trespass may occur by way of the invasion of particulate matter, the typical scenario in environmental tort litigation. However, in the case of particulate matter, plaintiff typically must show that the trespass has resulted in actual and substantial damage,

another, or another's engaging in abnormally dangerous activity,³⁰¹ must cause significant harm to a protected interest to justify the award of damages. Trespass actions are used often in environmental tort litigation and can be quite successful.³⁰²

Although it is a useful weapon against interference with possessory interests in the land, the trespass doctrine has important limitations in the environmental racism context.³⁰³ 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 subject to exposure 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.

Even if trespass is shown, the actual damages award may be 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

to a protected interest. See *Bradley v. American Smelting & Ref. Co.*, 635 F. Supp. 1154, 1156-57 (citing *Borland v. Sanders Lead Co.*, 369 So. 2d 523, 529 (Ala. 1979)).

³⁰¹ See RESTATEMENT (SECOND) OF TORTS § 519 (1965).

³⁰² See *Sterling*, 855 F.2d at 1192 (6th Cir. 1988); *Miller v. Cudahy Co.*, 592 F. Supp. 976, 1007 (D. Kan. 1984), *aff'd in part, rev'd in part, remanded*, 858 F.2d 1449 (10th Cir. 1988).

³⁰³ For a detailed analysis of the problems with trespass causes of action see McAuliffe, *infra* note 345.

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.

2. *Private Nuisance*

Environmentally burdensome activities that do not result in an actual invasion of one's property, but instead substantially³⁰⁴ interfere with its reasonable use, enjoyment, or value are actionable as private nuisances.³⁰⁵ One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land and the invasion is either intentional and unreasonable, or unintentional and otherwise actionable under rules controlling liability for negligence or strict liability for abnormally dangerous activities. A plaintiff in a private nuisance action based upon intentional conduct must demonstrate that she has suffered substantial, unreasonable interference with her use or enjoyment of property, that the interference was caused by the defendant's use of its land, and that the defendant acted with knowledge, or substantial certainty, not that harm would ensue from its conduct, but that an interference with the plaintiff's protected interest would take place.³⁰⁶

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. Enterprises that choose to locate their environmentally burdensome enterprises in close proximity to residential communities or in appropriate hydrogeologic locations may be proven to have acted with knowledge or substantial

³⁰⁴ See RESTATEMENT (SECOND) OF TORTS § 821F (1979) ("There is liability for nuisance only to those to whom it causes significant harm, of a kind that would be suffered by a normal person in the community or by property in a normal condition and used for a normal purpose.").

³⁰⁵ See *id.* § 821D.

³⁰⁶ See *id.*

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 unreasonable. Thus, as the facts in *Bean v. Southwestern Management Corp.* would illustrate, the actual operation of a Type I facility that would "affect the entire nature of the community," and that of the individual property owners, might constitute a private nuisance.³⁰⁷

Plaintiffs in a private nuisance action may seek damages or injunctive relief.³⁰⁸ In an action for damages, plaintiffs may demonstrate that the intentional interference with the use and enjoyment of their property is unreasonable³⁰⁹ if the gravity of the harm outweighs the utility of the actor's conduct,³¹⁰ or if the resulting harm is serious and the financial burden of compensating for this and similar harm to others would not render the continuation of the conduct infeasible.³¹¹ Typically, an award of damages is appropriate even if the utility of the conduct outweighed the significance of the harm.³¹² Thus, an award of damages may be available if the environmentally burdensome facility was a "best available alternative" for the

³⁰⁷ See *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).

³⁰⁸ See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 88A, at 631 (5th ed. 1984).

³⁰⁹ See RESTATEMENT (SECOND) OF TORTS § 826 (1979).

³¹⁰ In determining the gravity of the harm from an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important: a) the extent of the harm involved; b) the character of the harm involved; c) the social value which the law attaches to the type of use or enjoyment invaded; d) the suitability of the particular use or enjoyment invaded to the character of the locality; e) the burden of the person harmed of avoiding the harm.

Id. § 827.

³¹¹ In determining the utility of conduct that causes an intentional invasion of another's interest in the use and enjoyment of land, the following factors are important: a) the social value that the law attaches to the primary purpose of the conduct; b) the suitability of the conduct to the character of the locality; and c) the impracticality of preventing or avoiding the invasion. See *id.*

³¹² See *id.* § 826 cmt. f (1979).

disposal of certain hazardous wastes and the harm though significant, is not critical. However, the ability to recover damages may be limited by the magnitude of the award. The more serious and widespread the interference, the more significant the award of damages. If the award of compensatory damages to plaintiffs and others similarly situated is so great as to cause the enterprise to close down—if the harm is widespread the enterprise would be forced to internalize the true costs of its operation—a court might decide that a request for monetary relief is tantamount to a request for injunctive relief and consider whether, in effect, the facility should be shut down. In cases of widespread environmental contamination, courts resort to the standard typically used in conjunction with requests for injunctive relief—whether the gravity of the harm outweighs the utility of the actor's conduct.³¹³ In such cases, especially where the nature of the harm is intangible, as in cases of emotional or psychological harm, this balance test would likely come out in favor of the defendant.

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.³¹⁴

³¹³ *But see* *Carpenter v. Double R. Cattle Co., Inc.*, 701 P.2d 222, 227 (Idaho 1985). Plaintiff homeowners lived near cattle feed lot that had expanded to contain over 9000 cattle. *See id.* at 224. Plaintiffs alleged that the "spread and accumulation of manure, pollution of river and ground water, odor, insect infestation, increased concentrations of birds . . .," and other significant events interfered with their use and enjoyment of land. *Id.* at 224. The court rejected § 826b and held that the utility of the conduct was a factor to be considered in defendant's favor even though it was an action for damages only. *See id.* at 227. "The State of Idaho is sparsely populated and its economy depends largely upon the benefits of agriculture, lumber, mining, and industrial development. To eliminate utility of the conduct and other factors . . . would place an unreasonable burden upon these industries." *Id.* at 228.

³¹⁴ *See* RESTATEMENT (SECOND) OF TORTS § 828 a-c (1979).

In the absence of demonstrable physical harm or significant property damage, use of the private nuisance theory to vindicate the interference with an individual's interest in being free from racially disproportionate exposure to environmental burdens, while feasible, faces significant theoretical and practical barriers. Assume that in Noxubee County, Mississippi, with a population of approximately 12,000,³¹⁵ 5000 residents live within a three-mile radius of the proposed hazardous waste landfills. Assume that those residents will be exposed to some environmental burdens, whether in the form of noxious odors, additional traffic, or the threat of the release of environmental toxins. Environmentally overburdened communities, like Noxubee, often have more than one facility located in or near the community, the area is likely to be zoned for industrial purposes, and one or more governmental agencies will have approved its operation. Assume further that twenty-five residents from the area immediately surrounding the facility file a complaint alleging that the hazardous waste facility has interfered with their use and enjoyment of property, and that a court would find that each of the 5000 residents were potentially entitled to \$5000 in damages for the interference with their use and enjoyment of property. If the total damage award of twenty-five million dollars could cause the owners of the facility to go out of business the defendant is likely to argue that the court must weigh the benefits provided by the enterprise with the harms resulting therefrom.

In this scenario, defendant will argue that the court must take into account the utility of hazardous waste management, the suitability of the enterprise'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. In essence, defendant will argue that the enterprise confers a significant benefit on a broad range of society, while causing harm to only a small segment of the population. The character of the locale in Noxubee is already heavily industrialized: indeed, it already has other landfills in place. Moreover, to the extent that zoning rules apply, or regulatory provisions have been satisfied, it can be argued that the governmental authorities have already determined Noxubee to be a

³¹⁵ 1990 Census of Population and Housing, Noxubee County, Mississippi. Search of Westlaw, CENDATA database, Population of Counties: 1990 & 1980 (June 21, 1997).

suitable location. Plaintiffs will have a difficult, if not impossible, task of prevailing on a nuisance claim (at least in the absence of physical harm). Finally, defendants may bring forth information that the enterprise must exist, and that it is impossible to completely eliminate the harm.

Thus, in the context of environmental racism, the root causes of the disproportionate allocation of environmental burdens, i.e. racially discriminatory exclusive or expulsive zoning practices, the NIMBY syndrome, and "market forces" may provide the best defenses in an action for private nuisance.

3. *Public Nuisance*

Public nuisance is another option for use in environmental tort actions, an option that may prove to be valuable in certain cases of environmental racism.³¹⁶ A public nuisance is an unreasonable interference with a right common to the general public; it has its basis in criminal law.³¹⁷ 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 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.³¹⁸ Thus, a public nuisance

consists of conduct or omissions that offend, interfere with or cause damage to the public in the exercise of rights common to all in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure

³¹⁶ A full explanation of the potential for public nuisance as an alternative basis for liability will be undertaken in *Environmental Injustice: The Quintessential Public Nuisance* (unpublished manuscript, on file with author).

³¹⁷ See RESTATEMENT (SECOND) OF TORTS § 821B (1979); KEETON ET AL., *supra* note 308, at 587, 619.

³¹⁸ See RESTATEMENT (SECOND) OF TORTS § 821B(2) (1979).

the property, health, safety or comfort of a considerable number of persons.³¹⁹

Some states define the pollution of public waters or open air as a public nuisance for which an entity may be subject to penalty.³²⁰

In the environmental racism context, it may be argued that a defendant's decision to site a hazardous waste facility in a community based upon the fact that its residents are old or uneducated, members of a racial or ethnic minority, or politically and economically powerless to fight the decision, will offend the public morals.³²¹ 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. Moreover, operation of the facilities in an area that

³¹⁹ *State v. Schenectady Chems., Inc.*, 459 N.Y.S.2d 971, 976 (1983) (citations omitted), *aff'd as modified*, 479 N.Y.S.2d 1010 (1984).

³²⁰ For example,

Ohio Adm. Code 3745-15-07(A) states: ' . . . the emission or escape into the open air from any source or sources whatsoever, of smoke, ashes, dust, dirt, grime, acids, fumes, gases, vapors, odors, or any other substances. . . , in such a manner or in such amounts as to endanger the health, safety or welfare of the public, or cause unreasonable injury or damage to the health, safety or welfare of the public, or cause unreasonable injury or damage to property, is hereby found and declared to be a public nuisance.

Brown v. County Comm'rs of Scioto, 622 N.E.2d 1153, 1159 (1993). However, under Ohio law, an individual plaintiff who claims that a waste facility operating pursuant to governmental authority has created or is maintaining a public nuisance must demonstrate that the defendant is negligent in its operations. *See id.* at 1160.

³²¹ *See* discussion of the NIMBY syndrome *supra* text accompanying notes 219-27.

is geographically³²² or geologically³²³ inappropriate is likely to restrict the public's use of its public places, such as schools, churches, or recreational facilities. A public nuisance cause of action might also provide relief when public authorities or private developers have planned to locate a public housing project or other public accommodations on top of or in close proximity to a hazardous waste or other facility from which the release of environmental toxins is likely to occur. The siting of a 3500-unit public housing project fifty feet north of a lead smelting operation, or the construction of a public housing project on top of a former landfill in the midst of an already heavily industrialized zone, would arguably constitute an act that offends and causes harm to the property, health, safety, or comfort of a significant number of citizens.

One benefit of a public nuisance action is that persons who reside in communities disproportionately impacted on the basis of race, or perhaps class, can argue with some moral force that any additional burden is patently offensive and will have a demonstrably adverse affect on the interests of the community at large.³²⁴ The outrage at being subject to such risks because of one's race or economic status may come about despite promises that the facility will be "safe," or that it presents no real threat to the public. There is harm that may occur because one believes he has been placed at risk of physical injury as a result of his skin color. The legacy of racism in communities of color, particularly in the context of environmental racism where there is palpable day-to-day impact, gives rise to feelings of hopelessness, frustration, and despair that may manifest themselves in

³²² See discussion *infra* text following note 431. In essence, a location is geographically unsuitable if, in the event there is a release of toxic substances, those substances are substantially certain to expose local residents. Proximity to schools, public housing projects, recreational areas, etc. are of this type.

³²³ See discussion *infra* text following note 431. Geologically unsuitable areas would include close proximity to vulnerable water supplies, fault zones, or other unstable areas.

³²⁴ See, e.g., *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1144, 1147 (E.D. Va. 1991), *aff'd mem.*, 977 F.2d 573 (4th Cir. 1992); *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).

socially undesirable behavior.³²⁵ These factors, taken together, render the disproportionate allocation of environmental burden as much of a public nuisance in today's society as an adult bookstore or a topless bar.³²⁶

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.³²⁷ This approach is frequently used in cases involving ongoing pollution. For example, in *Miotke v. City of Spokane*,³²⁸ individual owners of waterfront property and representatives of a local environmental organization³²⁹ sued both state and local governmental authorities for declaratory and injunctive relief after the city of Spokane discharged raw sewage into the Spokane River. The discharge released fecal matter, solids, toilet paper, prophylactics and other material into the waters of the river and an adjoining lake. The plaintiffs alleged that the sewage filled the air with rancid, noxious, and repulsive odors. Plaintiffs prevailed on their claims.

³²⁵ For a look at how perceptions of racism can affect health and mental status, see David R. Williams et al., *The Concept of Race and Health Status in America*, 109 PUB. HEALTH REPORTS 26, 34-36 (1994). Increased synergistic effects of exposure to environmental toxins and stress are related to smoking or alcohol use. See *id.* at 35. In turn, the prevalence of alcohol problems is high for Native American, Mexican American, Puerto Rican, and African American males. Alcohol is a mood altering substance that is frequently used to obtain relief from adverse living and working conditions induced by large social structures and processes. Feelings of powerlessness and helplessness are predictors of drinking frequency, quantity and problems.

Id.

³²⁶ See, e.g., *State ex rel Miller v. Star Struck, Inc.*, 677 N.E.2d 1226 (Ohio Ct. App. 1996) (finding adult bookstores a public nuisance); *City of Cleveland v. Bosak*, 662 N.E.2d 851 (Ohio Ct. App. 1995) (holding commercial trucks in parking lots longer than necessary constitutes a public nuisance).

³²⁷ See RESTATEMENT (SECOND) OF TORTS § 821C(2)(c) (1979).

³²⁸ 678 P.2d 803 (Wash. 1984).

³²⁹ See *Armory Park Neighborhood Ass'n. v. Episcopal Community Servs.*, 712 P. 2d 914 (Ariz. 1985) (recognizing the right of a citizen group to seek equitable relief for a public nuisance).

Having found that the plaintiffs had effectuated an important public policy that benefited a large class of people, the court considered them to be acting as private attorneys general and upheld the award of attorney's fees in addition to damages for their efforts to obtain injunctive relief. The Washington Supreme Court upheld the plaintiffs' right to bring a public nuisance action based on the fact that they had experienced nausea, headaches, nervousness, and insomnia, reactions not dissimilar to those experienced by many residents in the "Toxic Doughnut" of Altgeld Gardens, or by residents of Emelle, Alabama.

Most public nuisance actions are reactive, not proactive. The actions are brought to enjoin or to abate an ongoing activity that constitutes a present interference with public rights. Although quite useful in the context of communities that already are impacted disproportionately by the concentration of environmentally burdensome facilities, public nuisance would not be as effective in combating prospective nuisances, at least where the nuisance is defined as the release of environmental toxins, unless plaintiff can prove that it is highly probable that the operation of a facility will lead to the release of toxic substances.³³⁰ However, one might argue, to the extent to which it can be demonstrated, it is highly probable that the siting of a facility will have a disproportionate racial impact, and that the disproportionate racial impact is deemed to be a substantial interference with a public right. In appropriate circumstances, a court may grant prospective injunctive relief. The likelihood that such an approach might enjoy some success will be enhanced if used in conjunction with the proposed tort.

4. *Negligence and Strict Liability*

Negligence theory is used often in causes of action for personal injury due to exposure to environmental toxins. In traditional tort actions for personal injury based upon negligence, the primary goal is to compensate the victim for physical injuries suffered as a result of the defendant's creation of an unacceptable risk of injury. In addition to a wrong, there must be a

³³⁰ See, e.g., *Village of Wilsonville v. SCA Servs. Inc.*, 426 N.E.2d 824 (Ill. 1981); KEETON ET AL., *supra* note 308, § 89, at 641.

recognized physical loss or detriment. Thus, in order for plaintiff to recover in a toxic tort action for personal injuries, she must prove that the environmental toxins that defendant released into the environment were a cause-in-fact of a presently manifested physical injury. If a negligent act does not result in a demonstrable physical injury such as cancer or neurological harm, liability is not imposed. This "no [physical] harm—no [legal] foul" may present a substantial barrier for plaintiffs in toxic tort litigation.³³¹ The plaintiff in a toxic tort action is in a quandary. If he files within a few years following knowledge of his exposure to a toxin, usually with the desire to deter further exposure as well as to obtain compensation for past exposures, he may not be able to demonstrate a present manifestation of an injury or disease process.³³² Plaintiffs in this position may allege causes of action for fear of cancer, the increased risk of cancer, and potential damage to the immune and other biologic systems. Although there are exceptions, these claims have met with limited success.³³³ Thus, under traditional tort principles regarding personal injury, it is often the case that an individual exposed to a toxic substance has suffered no legally recognized injury entitling him to compensation unless or until he manifests a detectable disease.

If the plaintiff waits until he has manifested a disease or other physical injury known or reasonably believed to be caused by chronic exposure to an environmental toxin, he must attempt to identify the source of his exposure or exposures over the course of a ten- to thirty-year period, must attempt to identify with some specificity which toxins are involved, and otherwise follow what may be a very stale trail of evidence to support his

³³¹ Copious academic and judicial resources have been expended describing this dilemma. For a small sample of the literature see Daniel A. Faber, *Toxic Causation*, 71 MINN. L. REV. 1219 (1987); William R. Ginsburg & Lois Weiss, *Common Law Liability for Toxic Torts: A Phantom Remedy* 9 HOFSTRA L. REV. 859 (1981); Allen T. Slagel, Note, *Medical Surveillance Damages: A Solution to the Inadequate Compensation of Toxic Tort Victims*, 63 IND. L.J. 849 (1988).

³³² See Slagel, *supra* note 331, at 851-52.

³³³ See *Ayers v. Jackson Township*, 525 A.2d 287 (N.J. 1987); *but cf.* *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188 (6th Cir. 1988); *see, e.g.* KEETON ET AL., *supra* note 308, at § 30, at 165 ("The threat of future harm, not yet realized, is not enough.").

claim. Witnesses may no longer be available, and the defendant itself may no longer exist. These problems, in addition to the difficulty of identifying responsible defendants from the field of possible defendants, often render proof of a causal connection between the exposure and the harm difficult, if not impossible, to establish.³³⁴ Even if a causal connection is established, the delay in the imposition of liability severely undercuts the tort system's deterrence objectives.³³⁵

Recognizing the limitations of traditional approaches to tort compensation, courts have begun to accept theories of liability that allow plaintiffs to recover damages without having to satisfy the traditional causal nexus between exposure and manifested disease. The most widely recognized alternative to traditional damages for presently manifested injury are those available for medical monitoring. These damages, while significant with respect to the increased risk of disease, can do little or nothing to compensate for the unique harms suffered as a result of environmental racism or to prevent the siting of a disproportionate allocation of hazardous waste facilities.

Traditional approaches in environmental tort claims have been somewhat successful in providing redress where the defendant's intentional or negligent conduct interferes with individual rights, and the individual suffers a present physical injury, sustains demonstrable property damage, or endures the loss of use and enjoyment of property. The law also provides some relief for harms resulting from an unreasonable interference with rights common to the public in general. However, specific aspects of each of these traditional torts call into question whether, as they are currently understood, any one of them can be expanded to provide a sufficient remedy for the distinct harms falling upon those who are disproportionately burdened with environmental toxins by virtue of their membership in a community of color.

Where constitutional construct, legislative enactment, executive edict, and common law doctrine prove unable to resolve fully conflicts between

³³⁴ See Slagel, *supra* note 331, at 853; John S. Forstrom, *Victim Without a Cause, The Missing Link Between Compensation and Deterrence in Toxic Tort Litigation* 18 ENVTL L. 151, 156, 157 (1987).

³³⁵ See Slagel, *supra* note 331, at 849-50; Forstrom, *supra* note 334, at 151.

individuals and their government or between individuals and commercial enterprise, tort law is equipped to evolve in such a way as to provide justice for wrongdoing and remedy for harm done. Tort law is an ideal mechanism to permit society to respond to deprivations of "civil rights" by private actors or to invasions of individual rights that take place in non-traditional ways. Traditional tort law theories may be adapted to meet new social and technological realities. A successful response to the challenge of environmental racism must take into account the complexity of the issues involved. This article focuses upon one aspect of that response and proposes the use of tort law responses specifically directed to the problem of racially disparate exposure to environmental hazards.

III. TRADITIONAL TORT LAW BATTERY DOCTRINE: A VIABLE RESPONSE TO ENVIRONMENTAL RACISM

While all of the law present in society is intended to influence human behavior, tort law is unique in its ability to permit individual litigants not only to receive compensation for harm done to them, but to influence the behavior of others and to affect how society resolves conflict.³³⁶ "Perhaps more than any other branch of law, the law of torts is a battleground of social theory [T]he twentieth century has brought an increasing realization . . . that the interests of society in general may be involved in disputes in which the parties are private litigants."³³⁷ An essential premise in tort law is that in

³³⁶ For an enlightening analysis of current thought with regard to the deterrence value of tort law see generally Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 U.C.L.A. L. REV. 377 (1994).

³³⁷ KEETON ET AL., *supra* note 308, § 2, at 6.

The influence of public policy on tort law is apparent, . . . when a court is deciding a 'case of first impression'. . . [s]ociety has a twofold interest. First, society has an interest in having a single dispute between individuals resolved fairly and promptly. Second, society has an interest in the outcome because of the system of precedent on which the entire common law is based. Thus, others now living and even those yet unborn may be affected by a decision made today.

Id. at 15-16.

a civilized society individuals need a peaceful and orderly means to redress invasions of, or interferences with, their rights and interests.³³⁸ Indeed, the purpose and function of tort law is to resolve disputes and to facilitate a structure for the organization of a just society—in a word, to provide justice.³³⁹

Tort law is, therefore, well suited to provide redress for harms caused by environmental racism. Tort law's paradigm is one of evolution;³⁴⁰ it expands and adapts to changes in social policy and advances in technology.

New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression in which the court has struck out boldly to create a new cause of action, where none was recognized before. . . . The law of Torts is anything but static, and the limits of its development are never set.³⁴¹

On occasion, a new tort arises out of the recognition that the constraints of present doctrine cannot, or ought not, be stretched to meet an existing

³³⁸ "[T]he purpose, or function, of the law of torts can be stated fairly simply. Arising out of the various and ever-increasing clashes of the activities of persons living in a common society, . . . owning property which may in any of a thousand ways affect the persons or property of others — in short, doing all the things that constitute modern living — there must of necessity be losses, or injuries of many kinds sustained as a result of the activities of others."

Cecil A. Wright, *Introduction to the Law of Torts*, 8 CAMB. L.J. 238, 238 (1944). "The purpose of tort law is to adjust these losses and to afford compensation for injuries sustained by one person as the result of the conduct of another." *Id.*

³³⁹ See *Rubanick v. Witco Chemical Corp.*, 593 A.2d 733 (N.J. 1991).

³⁴⁰ "The common law does not consist of absolute, fixed and inflexible rules, but rather of broad and comprehensive principles based on justice, reason and common sense. It is of judicial origin. The principles of the common law are determined by the needs of society and are changed with changes in such needs." *Kane v. Quigley*, 203 N.E.2d 338, 343 (Ohio 1964) (Gibson, dissenting).

³⁴¹ KEETON ET AL., *supra* note 308, § 1, at 3.

problem.³⁴²

Present environmental tort doctrine may address some, but not all, of the harms resulting from environmental racism. However, those who have endured the disruption of their mental or emotional well being, physical health, or personal dignity, because of environmental racism, are entitled to utilize tort law to assist in the legal effort to allocate fairly the loss arising out of environmental pollution control activities and to distribute justly the environmental burden.

A. The Law of Battery Provides an Appropriate Model to Impose Liability in Certain Cases of Toxic Exposures Due to Environmental Racism

Persons living in communities of color experience racially disparate exposure to environmental toxins: 1) where there are a disproportionate number of environmentally burdensome enterprises such as landfills, waste treatment facilities, or polluting enterprises located in or in close proximity to the community; 2) where government officials fail to provide equal and effective enforcement of environmental regulations on behalf of, or withhold adequate remediation resources from the community; or 3) where an individual company's record of compliance with environmental regulations in other similar communities is disproportionate to its record of compliance in white communities. The following sections suggest ways in which the laws governing intentional torts are presently suited, or can be adapted, to meet the challenge of providing a viable remedy at law, and in equity, for harms resulting from racially disproportionate exposure to environmental toxins.

The traditional tort of battery, which provides a remedy for harmful or offensive contacts, is a viable alternative to traditional civil rights and personal injury litigation. It may overcome certain limitations inherent in those approaches and help to redress the adverse effects upon physical health and individual dignity resulting from racially disproportionate exposure to environmental toxins.

³⁴² See *id.* § 3, at 15-20 & Supp. at 3-9.

In the context of environmental racism, the law of battery may provide two separate bases for liability. First, a failure to comply with environmental regulations or to remediate environmental pollution that results in a person coming into direct contact with environmental toxins may be "harmful," and therefore actionable, according to "traditional" battery analysis. Second, to the extent that "environmental racism" causes an exposure to environmental toxins, it can be argued that, as a violation of both civil and personal rights, such contacts are patently offensive and are the basis for liability.

The cause of action for battery rests upon what has long been recognized as the basic right to have one's body protected from intentional and non-consensual physical contact by another or by an agency the other has set in motion.³⁴³ A person is subject to liability for battery if that person acts intending to cause a harmful or offensive contact with another person, and a harmful or offensive contact occurs.³⁴⁴

In order to establish the first element in a cause of action for environmental battery,³⁴⁵ a plaintiff must demonstrate that the defendant has caused him to come into contact with a toxic or noxious substance. A person may come into contact with a toxic substance when she breathes in contaminated air, drinks contaminated water,³⁴⁶ or touches contaminated soil.

³⁴³ See KEETON ET AL., *supra* note 308, § 9, at 40 ("Proof of the technical invasion of the integrity of the plaintiff's person by even an entirely harmless, but offensive, contact entitles the plaintiff to vindication of the legal right by an award of nominal damages.").

³⁴⁴ See RESTATEMENT (SECOND) OF TORTS § 13 (1979).

³⁴⁵ The basic argument for the use of the traditional battery doctrine in the context of environmental torts is set out in McAuliffe, *supra* note 150, at 265. (stating that under modern battery law plaintiffs are to be compensated for non-consensual violations of their bodily integrity and this makes battery uniquely adopted to hazardous substance injuries. Extension of battery to include exposure to environmental toxins is not without its critics).

³⁴⁶ See, e.g., *Ayers v. Township of Jackson*, 525 A.2d 287 (N. J. 1988). Defendant landfill operator had failed to monitor quantity and types of liquid wastes stored at its dump and ignored its duty to control and limit the depth of the trenches. See *id.* at 292. As a result, plaintiffs' wells were contaminated with acetone, benzene, chlorobenzene, methylene chloride, and seven other toxic chemicals. See *id.* Contact was established, necessitating the award of medical monitoring relief. See *id.* See also *Elam v. Alcolac, Inc.*, 765 S.W.2d 42 (Mo. Ct. App. 1988). In *Elam* plaintiffs sought action against the owners and operators of

The contact does not have to be a direct physical touching by the defendant; it can result from a force or agency that the defendant has set in motion.³⁴⁷ Environmental toxins that disperse or persist in the environment, typically as some form of minute particulate matter, constitute an agency set in motion when released. Much of this particulate matter will eventually settle to the ground, thereby invading a protected interest in property or person. In *Martin v. Reynolds Metal Co.*,³⁴⁸ the courts first acknowledged the "trespassory" nature of environmental pollution when it recognized that particulate matter was capable of invading protected property interests in the context of actions for trespass to land. The court held that gaseous and particulate fluorides from an aluminum smelter constituted a physical invasion of the land. Similarly, in *Bradley v. American Smelting and Refining Co. ("ASARCO")*,³⁴⁹ the court held that particulate matter emitted into the atmosphere during the smelting process and deposited on plaintiff's property four miles away was, under the Restatement, foreign matter capable of invading another's possessory interest in their property.

Just as the essence of trespass to land is a physical invasion of an interest in property, the essence of environmental battery is a trespass to person, a physical invasion of the interest in bodily integrity. In both actions, the defendant has set in motion a force or series of events resulting in a toxic substance interfering with a protected interest.

As is true in trespass to land, in which toxic substances in drinking water may be present unbeknownst to property owners for an extended period of time, persons exposed to an environmental toxin may be unaware of the

a chemical manufacturing facility based on theories of nuisance (for diminished market value of residences) and negligence (for personal injuries). See *id.* at 49. In this lengthy opinion, the court details defendant's history of faulty plant operations, repeated chemical releases, poor regulatory enforcement efforts, and resulting substantial environmental impact. See *id.* at 50-68. *Elam* is worth reading for its unusually detailed discussion of individual factual circumstances and the medical analysis underlying plaintiffs' allegations of harm.

³⁴⁷ See KEETON ET AL., *supra* note 308, § 9, at 40 ("[I]t is no longer important that the contact is not brought about by a direct application of force such as a blow, and it is enough that the defendant sets a force in motion which ultimately produces the result.").

³⁴⁸ 342 P.2d 790 (Or. 1959), *cert denied*, 362 U.S. 918 (1960).

³⁴⁹ 709 P.2d 782 (Wash. 1985).

contact. Many environmental toxins are odorless or tasteless, and have no immediately recognizable physical effects. For example, one can ingest contaminants in the water supply and be unaware of the contact. Such contact is actionable, even if the plaintiff was unaware of the contact at the time.³⁵⁰ The cause of action for battery would not arise until one knows, or should know, that the harmful or offensive contact has taken place. Arguably, one may have a continuing battery analogous to a continuing trespass where the toxin is not removed from the body.

Once the fact of a contact has been established, plaintiff must demonstrate that the contact was either harmful or offensive. For purposes of the battery doctrine, a harmful contact is broadly defined as any physical impairment of the condition of the body, however slight.³⁵¹ It can include a change in body function, a disruption of ordinary body processes, an alteration in body chemistry, or a change in a biological system.³⁵² Few courts have addressed whether exposure to environmental toxins constitutes an actionable battery. Although plaintiff's mere exposure to contaminated air and drinking water may not have caused him to suffer from injury in the form of chromosomal damage, or a presently manifested disease or illness, damage to the cardiovascular and immune systems may have taken place already. It can be argued that these types of precursor injuries, i.e. subcellular changes that *may* one day generate disease processes, are harmful contacts.³⁵³

³⁵⁰ See KEETON ET AL., *supra* note 308, § 9, at 40. "Interest in personal integrity still is entitled to protection, although the plaintiff is asleep or under an anesthetic, or otherwise unaware of what is going on." *Id.* For example, the physician who fondles a patient while the patient is under anesthesia is subject to an action for battery. See *id.*

³⁵¹ See RESTATEMENT (SECOND) OF TORTS §15, cmt. a (1979) (explaining bodily harm is any physical impairment of the condition of another's body, or physical pain or illness).

³⁵² Not all chemicals released into the environment cause harm, even at a subcellular level. The types of chemicals that can cause harm, and the concentrations necessary to bring about a physiological change, would continue to be subject to proof at trial. See, e.g., *Sterling v. Velsicol Chem. Corp.*, 647 F. Supp. 303 (W.D. Tenn. 1986), *aff'd in part, rev'd in part, remanded*, 855 F.2d 1188 (6th Cir. 1988).

³⁵³ See *Werlein v. United States*, 746 F. Supp. 887, 901 (D. Minn. 1990), *vacated by* 794 F. Supp. 898 (1992); *Anderson v. W.R. Grace & Co.*, 628 F. Supp. 1219, 1226-27 (D. Mass. 1986) (explaining subcellular harm is not speculative where it can be proven to exist through expert medical testimony); see also *Brafford v. Susquehanna Corp.*, 586 F. Supp. 14, 17-18

An argument can be made based upon some medical monitoring decisions that contact with an environmental toxin gives rise to an actionable harm.³⁵⁴ Moreover a harmful contact resulting from exposure to an environmental toxin may be demonstrated by examining human tissue samples. Relatively low blood lead levels have been shown to "be associated with IQ deficits, behavior disorders, slowed growth and impaired hearing."³⁵⁵ Low to moderate levels of blood lead, reflecting asymptomatic exposure to lead, may be associated with decreased bi-lateral coordination, visual motor control, and fine-motor development.³⁵⁶ These types of alterations in normal physiological and development processes would constitute a harmful contact. Finally, the requirement for a harmful contact may be satisfied by persons who are presently suffering from illnesses such as asthma, and those who experience the aggravation of pre-existing physical conditions, where the aggravation or exacerbation is known to be causally connected to chemical exposure.³⁵⁷ Thus, use of an environmental battery action may, in appropriate circumstances, provide a viable claim for damages where a negligence claim would otherwise fail for lack of a presently manifested physical injury.

Non-consensual contacts with environmental toxins need not result in bodily harm in order to provide a basis for an action in battery; an offensive contact is sufficient. A cause of action for battery may be stated against anyone who acts intending to cause an offensive contact with the person of another and an offensive contact either directly or indirectly takes

(D. Colo. 1984) (explaining that a claim for physical injury was allowed to proceed where evidence showed that chromosomal damage caused by radiation operated to deprive plaintiffs of a certain degree of immunity); *Barth v. Firestone Tire & Rubber Co.*, 661 F. Supp. 193, 196 (N.D. Cal. 1987) (holding injury to the immune system, if proven, is sufficient to constitute a present injury even in absence of clinically diagnosable illnesses).

³⁵⁴ See, e.g., *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 806 (Cal. 1993).

³⁵⁵ Committee on Environmental Health, *supra* note 108, at 176.

³⁵⁶ See Dietrich et al., *supra* note 114, at 305-06.

³⁵⁷ Examples of such illnesses would be chloracne from exposure to Agent Orange, developmental difficulties from exposure to lead, leukemia from exposure to benzene, and asbestosis or mesothelioma from exposure to asbestos. See, e.g., *In re Agent Orange Product Liability Litigation v. Dow Chemical Company*, 611 F. Supp. 1267, 1276 (E.D.N.Y. 1985); *Industrial Union Dep't. v. American Petroleum Inst.*, 448 U.S. 607, 619-25 (1980) (discussing link between benzene and leukemia).

place.³⁵⁸ While the determination that a contact with an environmental toxin is harmful must be based upon expert testimony, the determination that it is offensive will be within the jury's province.³⁵⁹ An actionable contact is one that offends a reasonable sense of personal dignity.³⁶⁰ To "offend" means "[t]o create or excite anger, resentment, or annoyance in; to affront . . . [t]o cause displeasure . . . [t]o violate a moral or divine law."³⁶¹ "Offensive" has been defined as "disagreeable or nauseating or painful because of outrage to taste and sensibilities or affronting insultiness."³⁶² McAuliffe has put forth a plausible argument that in the ordinary environmental tort context, intentionally causing environmental toxins to contact another's person, in the absence of consent—indeed in the face of protest is—at the very least, disagreeable or insulting.³⁶³ The basic cause of action for environmental battery would be available without regard to the racially or economically disparate nature of the impact.

The argument for expanding traditional battery doctrine to encompass environmental battery resulting from an offensive contact resonates with the underlying concerns of environmental justice. Persons addressing broader issues of environmental justice can argue that acting with knowledge, or substantial certainty, that one's conduct will place an identifiable group of persons at significant risk of exposure to an environmental toxin, especially when that risk results from a decision to site one's facility where there is already a high concentration of environmental burdens, is offensive to a reasonable sense of personal dignity. Similarly, the failure to comply with environmental laws or remediate environmental contamination are acts

³⁵⁸ See RESTATEMENT (SECOND) OF TORTS § 18b, cmt. a (1979) (particulate matter is capable of making contact).

³⁵⁹ See *id.* § 18, at 30.

³⁶⁰ See *Leichtman v. WLW Jacor Communications, Inc.*, 634 N.E.2d 697, 699 (Ohio Ct. App. 1994) (citing *Love v. Port Clinton*, 524 N.E.2d 166, 167 (Ohio 1988)).

³⁶¹ AMERICAN HERITAGE DESK DICTIONARY 862-63 (2d ed. 1982).

³⁶² *State v. Phipps*, 389 N.E.2d 1128, 1131 (Ohio 1979).

³⁶³ See McAuliffe, *supra* note 150, at 286-90.

offensive to a reasonable sense of personal dignity.³⁶⁴ The premise that uninvited contacts with an environmental toxin is offensive is supported by studies done with regard to the public's perception of risk.

Currently, public concern about the health risks associated with exposure to toxins released from hazardous waste facilities or other environmentally burdensome enterprises is substantial. Public concerns about such health risks extend beyond, and may be unrelated to, scientific assessment concerning the actual annual mortality rate from exposure to environmental toxins.³⁶⁵ However, an act need not be physically harmful to be deemed legally offensive. Public beliefs about these risks, and attitudes toward the non-consensual exposure to such risks, are the key factors in determining whether a particular contact with an environmental toxin will be deemed to be offensive for purposes of a battery cause of action. A consideration of factors influencing public beliefs about risks supports the argument that such contacts are offensive.

Risk perception scholars identify at least eighteen so-called "outrage" factors that influence public perception of risk.³⁶⁶ In addition to real or perceived understanding of the risks generated by an enterprise,³⁶⁷ these

³⁶⁴ It is beyond the scope of the present article to address all of the factors supporting socio-economic discrimination as an "offensive act" in a market based economy—it is, however, an argument I believe can be made in the environmental justice context.

³⁶⁵ See Peter M. Sandman, *Risk Communication: Facing Public Outrage*, EPA J., Nov. 1987, at 21-22.

³⁶⁶ These factors include: catastrophic potential, familiarity, understanding, uncertainty, controllability, voluntariness of exposure, effects on children, manifestation of effects on future generations, identification of victims, dread, trust in institutions, media attention, accident history, equity, benefits, reversibility, personal stakes and origin. See Vincent T. Covello et al., *Guidelines for Communications About Chemical Risks Effectively and Responsibly*, in *ACCEPTABLE EVIDENCE: SCIENCE AND VALUES IN RISK MANAGEMENT* 67 (D. Mayo & R. Hollander eds., 1991).

³⁶⁷ See Holly L. Howe, *Public Concern about Chemicals in the Environment: Regional Differences Based on Threat Potential*, 105 PUB. HEALTH REPORTS 186 (1990). Public health survey encompassing area in western New York where there is a high density of toxic dump sites, Long Island where there is a shallow ground water aquifer, and the remainder of the state, [excluding New York City] demonstrated that public's concerns about contaminations of the environment were highest among respondents who believed they lived

factors include voluntariness, control, diffusion in time and space, and fairness. For example, researchers have found that a voluntarily encountered risk is more acceptable to people than one that is coerced.³⁶⁸ Risk perception is affected by one's sense of control over the risk-producing event; if the opportunity to prevent or mitigate harm is perceived to be within one's control, the perception of risk is correspondingly lessened.³⁶⁹ The public's perception of risk also is related to diffusion in time and space. If hazard A kills fifty anonymous people a year across the country, and hazard B has one chance in ten of wiping out its entire neighborhood of 5000 in the next decade, the two groups have the same expected annual mortality rate, i.e. the same statistical risk, but risk A is experienced as a more acceptable risk than risk B.³⁷⁰ Fairness considerations are also important to one's perception of risk; researchers have found that people who must endure greater risks than their neighbors, without access to greater benefits, i.e. those who are denied distributive justice, are naturally "outraged" and have a higher perception of risk—a result compounded if the rationale for burdening them looks more political than scientific.³⁷¹ Further exacerbating one's perception of risk is the ability to become informed about the risk producing activity and to

either close or very close to a toxic dump site or an area of high commercial or residential pesticide use. *See id.*

³⁶⁸ For example, we witness the number of people who smoke, abuse alcohol, or over eat even though they place themselves at a greatly increased risk of lung cancer, liver disease, or heart disease. This distinction is also recognized in the law of torts. It is a fundamental principle of the common law that *volenti non fit injuria*—to one who is willing, no wrong is done. *See KEETON ET AL., supra* note 308, § 18, at 112.

³⁶⁹ *See id.* Witness the number of people who are fearful of flying, but who drive without a second thought each day even though one is much more likely to be injured in a car accident than an airplane mishap.

³⁷⁰ *See Covello et al., supra* note 366, at 74-75. For example in the airplane/road mishap scenario, sustaining injury in an automobile accident is a more diffuse risk than having an entire airplane crash. Thus, as a society we are much more accepting of the risk that cars will crash than the risk that the airplane will although statistics weigh heavily in favor of death in auto crashes.

³⁷¹ *See id.* at 72.

participate in the process by which the risk is imposed.³⁷² Researchers have determined that if the decision maker comes across as trustworthy, concerned, and responsive to community concerns, the public's risk perception is likely to be reduced.³⁷³ However, if the decision maker comes across as dishonest, arrogant, or unresponsive to citizen concerns, risk perception is increased.³⁷⁴ Another important factor in the public's perception of risk is the element of dread. Certain diseases, especially immune system deficiencies and cancer, are more feared than others.³⁷⁵ The long latency period preceding many cancers, the difficulty of knowing whether one has been exposed to a carcinogen, and the nature of the disease process, add to the dread and thus to the perceived risk from the exposure.³⁷⁶

Each of these risk-exacerbating factors is present with respect to a minority community that has been disproportionately affected by environmental toxins.³⁷⁷ In many instances, living in close proximity to a waste disposal facility is not voluntary. In tort law, a choice to encounter a risk is not truly voluntary if the person is not fully informed as to the nature and extent of the risk or has no viable opportunity to avoid encountering the risk. The lack of voluntariness is true whether a governmental authority has decided to locate a public housing project on a landfill, or a waste management company seeks to site a waste incinerator in or near a low-income residential area or a community of color.³⁷⁸ The lack of voluntariness may be present even if someone moves into the community after the waste disposal facility is in place and in operation. In many instances, persons moving into communities may or may not know that a hazardous waste facility is within a one-to-five-mile radius. Often, persons living in proximity

³⁷² See *id.* This aspect of receiving information and participating in the decision making process are the factors essential to one's ability to consent to a risk.

³⁷³ See *id.* at 68-72.

³⁷⁴ See *id.* at 71-72.

³⁷⁵ See *id.* at 69-70; see also Sandman, *supra* note 365, at 22.

³⁷⁶ See Cavello et al., *supra* note 366, at 68-72.

³⁷⁷ Similarly, the same factors may account for the NIMBY Syndrome. See *supra* text accompanying notes 219-27.

³⁷⁸ Such factors, if present, would support a claim for offensive environmental battery based upon disproportionate economic impact as well as disproportionate racial impact.

to a facility that releases environmental toxins are not advised that such a release is ongoing. Moreover, persons potentially affected by such releases may have neither the information nor ability to avoid contact. In addition to a lack of voluntariness, a lack of honesty in the siting and operation of many waste disposal facilities, the utter absence of responsiveness to citizen concerns, the lack of control or opportunities for effective participation in decisionmaking processes, and a perceived lack of fairness all characterize many zoning and siting scenarios. These factors can cause significant outrage in communities of color—further indication of a high perception of risk. Indeed, persons making siting decisions often seek out communities they can effectively ignore and control.³⁷⁹ Risk perception also is heightened in a community when residents believe that the facility has released toxins into the environment and responsible officials are being dishonest with regard to the release and/or attendant risks.

Assume HazMatCo, a hazardous waste disposal enterprise, seeks to locate in Home County. HazMatCo undertakes a feasibility study based upon the advice contained in the *Cerell Associates* report.³⁸⁰ HazMatCo determines that CenterLake Heights is located in a semi-rural community near the northeast quadrant of Home County. HazMatCo further determines that the surrounding community is a low- to low-middle-income blue collar community with a population that is twenty-five percent African-American, twenty percent Hispanic, and twelve percent Asian-American, with reasonable access to major thoroughfares. The rest of Home County has less than a five percent minority population. Property values have been depressed in recent years due to a number of plant closings or “downsizings.” HazMatCo further determines that no local ordinances require public notice of intent to site a waste disposal facility. When it first acquires its permit to site a facility, local residents ask for information regarding the nature of the

³⁷⁹ See Cole, *supra* note 230, at 1994, n.14 (citing CERELL ASSOCIATES, POLITICAL DIFFICULTIES FACING WASTE TO ENERGY CONVERSION PLANT SITING 17-30 (1984) (finding those least likely to oppose siting of garbage incinerators are “communities with populations less than 25,000, rural communities, ‘old timer’ residents, blue collar workers, conservatives, and those with less than a high school education”)).

³⁸⁰ See *id.*

materials to be deposited at the site. The community perceives a risk that the transportation of wastes through, and the disposal of hazardous substances in, their community presents a significant threat. They believe if a release takes place, they will be exposed to the environmental toxins. This heightened degree of risk perception is based in part on the fact that HazMatCo is not providing adequate information, and knowledge that HazMatCo has had some "problems" in the past at another of its facilities. In addition, the solid waste disposal facility just over the county line already has had problems. The residents in northeast Home County, especially in the Heights, use well water for household purposes and are concerned further about risks of underground water pollution.

HazMatCo applies for and receives the applicable construction permits and zoning variances. There is a hearing before the zoning board, and a number of residents living in the Heights show up to state their opposition to the facility siting. Other speakers, primarily local business owners and residents from other locations in the county, argue that the facility will bring much needed jobs to the county and will enhance its tax base. Residents from the other communities further argue that the Heights has proven to be a good location for such facilities; there is already a landfill in that area. In fact, other disposal sites had previously been sited in or near the CenterLake Heights area in an adjacent county. Unfortunately, none of the zoning board members are residents of the Heights and the Board has never been particularly responsive to that community's concerns. The waste disposal facility is approved.

In this scenario, residents of CenterLake Heights attempt to protest vigorously the siting of the hazardous waste disposal facility. Company representatives refuse to divulge to the community leaders precisely what wastes will be processed and where those wastes will originate. However, HazMatCo has sought EPA permits that would allow extremely toxic substances to be placed in the planned landfill or processed through the waste incinerator.

Residents have not volunteered to have a hazardous waste disposal facility located in the area contiguous to their community; in fact, they have attempted unsuccessfully to block the facility siting. The absence of voluntariness, the lack of political control, and the perceived discounting of their concerns in the political process may bring about a high level of outrage—an indication of a high level of perceived risk. CenterLake Heights residents do not want the facility sited in their backyards or on the edges of

their community—but it is not their decision to make. This perceived lack of control, over both the decision making process and the risk producing activity, as well as the fear that an “accident” could lead to cancer or other latent disease processes, contribute to a heightened perception of risk. Additionally, CenterLake Heights residents are left knowing that their community literally has, once again, been dumped on by the more affluent residents in central and southern Home County. Taken together, these factors exacerbate the perception of risk and the sense of outrage. If the facility is sited, and if residents experience physical contact with those toxins, residents should be able to successfully argue that the contact was, at the very least, offensive. Similarly, even if the release has taken place in violation of applicable permits, if the company develops a history of regulatory violations, or if the company has in any way “covered up” the release, there is a sense of outrage and a jury may well find that an offensive contact has occurred.

In response to the proposal for an environmental battery based upon the offensiveness of the contact, opponents will argue that merely offensive contacts should not be actionable because they are a necessary concomitant of living in a highly industrialized, technologically driven, consumption-oriented society.³⁸¹ This argument relies on the idea that all unconsented-to contacts that an individual may deem to be offensive should not be treated as such by the courts. In a crowded, industrial society, some amount of unpermitted contact is inevitable, customary, and reasonably necessary. Consent to these minimally offensive contacts is presumed of one's membership in the community. Thus, courts may take the view that such

³⁸¹ See *Potter v. Firestone Tire & Rubber Company*, 863 P.2d 795, 811-12 (Cal. 1993) (citing to Terry Morehead Dworkin, *Fear of Disease and Delayed Manifestation Injuries: A Solution or A Pandora's Box?* 53 *FORDHAM L. REV.* 527, 576 (1984)).

As a starting point in our analysis, we recognize the indisputable fact that all of us are exposed to carcinogens every day. . . . It is difficult to go a week without news of toxic exposure. Virtually everyone in society is conscious of the fact that the air they breathe, water, food, and drugs they ingest, land on which they live, or products to which they are exposed are potential health hazards. Although few are exposed to all, few also can escape exposure to any.

Id.

exposure is not a battery, but rather an ordinary contact that is customary and reasonably necessary to the common intercourse of life.³⁸² The circumstances surrounding the act will necessarily affect whether it is perceived as unpermitted, and so will the relations between the parties.³⁸³

In most environmental racism contexts, such unwelcome contacts with environmental toxins would be "offensive to an ordinary person not unduly sensitive to personal dignity."³⁸⁴ However, the NIMBY syndrome, caused in large part by public perception of risk, the filing of myriads of environmental tort actions, and the nascent trend toward adopting environmental justice statutes, demonstrate rather convincingly that most people do not consider exposure to environmental toxins as ordinary or reasonably necessary to the common intercourse of life.³⁸⁵

Assuming that the exposure to environmental toxins is an offensive contact, then how much greater is the offense, the affronting insult, for

³⁸² In effect, courts hold that such contacts take place in the context of implied consent — if there is consent to the contact, there is no battery. See, e.g., *McCracken v. O.B. Sloan*, 252 S.E.2d 250 (N.C. Ct. App. 1979) (finding that smelling smoke from a cigar being smoked by a person in his own office is a contact, but that such contact was customary and reasonably necessary to the common intercourse of life). Cases have reserved the question of whether exposure to second-hand smoke would constitute a battery where harm can be shown. Cf. *Pechan v. Dynapro, Inc.*, 622 N.E.2d 108 (Ill. App. Ct. 1993) (finding that physical reactions to second hand smoke established contact for purposes of battery action and for purposes of establishing injuries under Worker's Compensation law). It may be that the additional studies suggesting a causal link between cancer and exposure to second hand smoke will change a court's consideration of offense in this context. Because proof of offense is contextual, one might expect second hand smoking decisions to change as societal tolerance for such exposure changes.

³⁸³ See KEETON ET AL., *supra* note 308, § 10, at 43-46.

³⁸⁴ See *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627, 629 (Tex. 1967) (explaining plaintiff sued in assault and battery for damages from humiliation when a manager of the club at which he was attending a luncheon snatched his plate and indicated he would not be served because he was a negro).

³⁸⁵ See Leslie S. Gara, *Medical Surveillance Damage: Using Common Sense and the Common Law to Mitigate the Dangers Posed by Environmental Hazards*, 12 HARV. ENVTL. L. REV. 265, 270 (1988) ("The potential severity of the disease that could result from a toxic contact makes the contact more than one of the inconveniences that citizens of a modern industrial society must bear.").

persons who experience disproportionately higher levels of contact with environmental toxins in large part because they live in minority communities? While battery is underappreciated in the typical environmental tort context, it has special relevance to cases involving environmental racism. The disproportionate siting of environmentally burdensome enterprises in communities of color has excited anger, resentment, and annoyance among residents and those who are affected thereby.³⁸⁶ Indeed, disproportionate exposure to a presently unpleasant, and potentially harmful, substance, where the disparity is related to the effects from conscious or unconscious racism, must be deemed offensive. Situations where the disproportionate exposure to environmental toxins results not from a "neutral" siting decision but from an enterprise's pattern or practice of noncompliance with environmental regulations magnify the offense. To the extent that the siting or concentration of hazardous waste facilities in communities such as Afton, North Carolina, Noxubee, Mississippi, Alsen, Louisiana, and Emelle, Alabama, is a result of racism, overt or covert, direct or derivative, conscious or unconscious, their presence is offensive to those who subsequently suffer the disparate impact. Even in those cases where the facility preceded the coming together of a community of color, a pattern or practice of unequal compliance with, or enforcement of, environmental regulations is equally offensive.

To sustain a battery claim, a plaintiff must prove that the defendant caused a harmful contact and that the defendant acted with intent.³⁸⁷ Intent with respect to exposure to environmental toxins has been discussed most

³⁸⁶ See *supra* Part I.B.2.

³⁸⁷ See KEETON ET AL., *supra* note 308, § 8, at 36.

An actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other . . . and (b) a harmful contact with the person of the other directly or indirectly results; or (c) an offensive contact with the person of the other directly or indirectly results.

RESTATEMENT (SECOND) OF TORTS §13 (1965). In battery, the intent requirement is not premised upon malice or evil motivation "[r]ather, it is an intent to bring about a result which will invade the interests of another in a way that the law forbids." KEETON ET AL., *supra* note 308, § 8, at 36.

frequently in the context of workplace exposures.³⁸⁸ In recent years, various courts have held that exposure to toxic substances in the workplace could give rise to a cause of action in battery, both civil and criminal.³⁸⁹ For example, in *Cunningham v. Anchor Hocking, Corp.*³⁹⁰ plaintiff alleged that the developer: diverted a smoke stack for dangerous fumes back into the building, causing the fumes to come in contact with plaintiffs' skin, eyes, and respiratory systems; failed to advise plaintiffs of known toxic exposure hazards or to provide safety equipment; knowingly failed to heed levels of toxic substances that were airborne in the plant; failed to repair ventilation systems; removed manufacturer's warning labels; and, knowingly exposed plaintiffs to a high concentration of the toxic substances with specific intent to injure.³⁹¹ The court held that "[p]laintiffs' allegations that injury from such conduct was a 'substantial certainty' were sufficient to state a cause of action in battery."³⁹² Further support for a battery cause of action in the context of environmental toxins may be found in the literature,³⁹³ especially with reference to exposure to second-hand cigarette smoke.³⁹⁴

³⁸⁸ As a general matter, worker's compensation laws preclude suit for injuries arising out of workplace exposure to toxic substances. The primary exception to the exclusivity bar occurs when an employer has acted with the requisite intent with respect to the worker's injury. Accordingly, there are a number of reported cases in the employer/employee context.

³⁸⁹ See *State v. Chicago Maquet Wire Corp.*, 534 N.E.2d 962, 963 (Ill. 1989) (noting that counts of indictment charged defendants with aggravated battery, alleging that "defendants exposed the employees to the toxic substances with 'the awareness that a substantial probability existed' that their conduct would cause the employees to take by deception [of the employer], for other than medical purposes, poisonous and stupefying substances. . .").

³⁹⁰ 558 So. 2d 93 (Fla. Dist. Ct. App. 1990).

³⁹¹ Intent in the context of a worker's compensation case may require more stringent proof of intent, and therefore some cases of toxic exposure do not satisfy the intent requirement in this context. See *Sanford v. Presto Co.*, 594 P.2d 1202 (N.M. Ct. App. 1979).

³⁹² *Cunningham*, 558 So. 2d at 97.

³⁹³ See McAuliffe, *supra* note 150, at 265 (stating that under modern battery law plaintiffs are compensated for non-consensual violations of their bodily integrity, and that this characteristic makes battery uniquely adapted to hazardous substance injuries).

³⁹⁴ See Irene Scharf, *Breathe Deeply: The Tort of Smokers' Battery*, 32 HOUSTON L. REV. 615 (1995); David S. Ezra, *Smoker Battery: An Antidote to Second-Hand Smoke*, 63 S. CAL. L. REV. 1061, 1085 (1990) (advancing proposition that "[a] sound legal approach to conflicts that arise during the interactions between smokers and non-smokers includes civil actions for

In the civil rights litigation context, the requirement that the plaintiff prove intent is one of the most significant barriers to a plaintiff's recovery. In the environmental battery context, proof of intent is likely to be a plaintiff's greatest strength. Intent, in this context, encompasses not only a purpose or desire to bring about a given consequence, but extends to those consequences that the actor believed would be substantially certain to follow from its conduct³⁹⁵ even if the actor was well-meaning and his purpose worthwhile.³⁹⁶ The practical application of this principle to an action for battery has come to mean that when a reasonable person in the actor's position would believe that a harmful or offensive contact was substantially certain to follow, he will be dealt with as though he had intended that result.³⁹⁷ In an environmental racism context, the cause of action for environmental battery is dependent upon proof of invidious motive, racial animus, or desire to harm—although such proof would, of course, satisfy the intent requirement. In this context, plaintiff would need to demonstrate only that a reasonable person in the defendant's position knew, or was

battery against smokers who subject unwilling persons to sidestream or exhaled smoke produced by cigarettes, cigars, or pipes."); *Leichtman v. WLW Jacor Communications, Inc.*, 634 N.E.2d 697 (Ohio Ct. App. 1994) (ruling that the plaintiff stated a claim for battery by alleging that defendant deliberately blew cigar smoke in plaintiff's face); *Richardson v. Hennley*, 434 S.E.2d 772, 774-75 (Ga. Ct. App. 1993).

³⁹⁵ See *KEETON ET AL.*, *supra* note 308, § 8, at 34.

³⁹⁶ *Id.* § 8, at 36. As discussed *infra* in text following note 430, intent in the context of an intentional tort is, for this reason, a much broader concept than is intent in the context of a §1983 discrimination action, or a Title VI disparate impact claim.

³⁹⁷ See, e.g., *Bradley v. American Smelting & Ref. Co.*, ("ASARCO"), 709 P.2d 782, 786 (Wash. 1985). *ASARCO* provides a statement of this proposition in an environmental tort case. In *ASARCO*, the court noted that intent to trespass could be found where,

[t]he defendant has known for decades that sulfur dioxide and particulates of arsenic, cadmium, and other metals were being emitted from the tall smokestack. It had to know that the solids propelled into the air by the warm gases would settle back to earth somewhere. It had to know that a purpose of the tall stack was to disperse the gas smoke and minute solids over as large an area as possible and as far as possible, but that while any resulting contaminants would be diminished as to anyone area or landowner, that nonetheless contamination, though slight, would follow.

Id.

substantially certain, that the siting of a hazardous waste facility in unreasonably close proximity to residential areas, domestic water supplies, or public accommodations; the failure to comply with environmental regulations; or the failure to remediate environmental contamination was substantially certain to cause a harmful or offensive contact to persons residing in the affected communities.³⁹⁸ Evidence that such conduct was related to the low-income or minority status of the community, or knowledge that such conduct would result in a racially disproportionate environmental burden, goes to the nature and extent of the offense.

The defendant's liability for harm resulting from contact with environmental toxins includes not only the resulting medical expenses, lost wages, and pain and suffering, but also the mental disturbance, humiliation, and anxiety resulting from an offensive contact.³⁹⁹ Moreover, liability for damages is not limited to those harms reasonably foreseeable to the defendant at the time of the contact.

The defendant's liability for the resulting harm extends, as in most other cases of intentional torts, to consequences which the defendant did not intend, and could not reasonably have foreseen, upon the obvious basis that it is better for unexpected losses to fall upon the intentional wrongdoer than upon the innocent victim.⁴⁰⁰

The battery cause of action emphasizes the right of the individual to be protected from non-consensual bodily contacts, especially those that are offensive. Therefore, claims that one has become ill because of an exposure to a toxin, or that one has suffered a change in physiology, or endured an

³⁹⁸ Defendant could be owner/operator of facility or agency official—note that as to the latter, certain defenses may result in Title VI being the only viable alternative.

³⁹⁹ See *KEETON ET AL.*, *supra* note 308, § 9, at 40 ("Proof of the technical invasion of the integrity of the plaintiffs' person by even an entirely harmless, but offensive, contact entitles the plaintiff to vindication of the legal right by an award of nominal damages, and the establishment of a tort cause of action entitles the plaintiff also to compensation for the resulting mental disturbance, such as fright, revulsion or humiliation.").

⁴⁰⁰ *Caudle v. Betts*, 512 So. 2d 389, 392 (La. 1987).

offense because of disproportionate exposure to toxic substances based upon one's minority status or residence in a community of color uniquely suits this tort.⁴⁰¹

Use of an environmental battery claim presents certain distinct advantages. In addition to overcoming the strenuous proof requirement present in civil rights litigation, if the plaintiff's claim is focused upon the occurrence of an offensive battery, plaintiff only need prove that the intentional act caused an offensive contact. Plaintiff would be relieved of the burden to prove a presently manifested physical injury. Costs of litigation could, therefore, be greatly reduced. If the circumstances giving rise to the offensive battery were sufficiently outrageous, punitive damages would be available.⁴⁰²

Although the battery doctrine extends liability to certain of the injuries involved in the environmental racism/justice situation, the doctrine's limitations preclude it from providing a complete remedy. Battery requires that actual contact with the environmental toxin take place. In some circumstances, the proof of contact may be very difficult, and many persons who reside in communities disproportionately exposed to environmental toxins may not be able to provide adequate proof. The requirement of actual contact does not permit a cause of action based on harm arising from the fear and anxiety about the possibility of contact. Traditional battery tort doctrine provides a cause of action for assault to address this "apprehension of contact" problem. However, in order to establish an assault, the apprehension must arise from the concern that a contact is imminent. Apprehension of some future contact, which may or may not occur, is not enough. In a traditional battery context, it is anticipated that persons can protect themselves or otherwise avoid non-imminent threatening contacts. In fact,

⁴⁰¹ The use of battery in the context of exposure to environmental toxins has been explored to a limited extent. See Carl B. Meyer, *The Environmental Fate of Toxic Wastes, the Certainty of Harm, Toxic Torts and Toxic Regulation*, 19 ENVTL. L. 321; McAuliffe, *supra* note 150.

⁴⁰² See KEETON ET AL., *supra* note 308, § 9, at 40 ("Since battery usually is a matter of the worst kinds of intentions, it is a tort which frequently justifies punitive damages . . ."); see, e.g., *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 817 (Cal. 1993).

if one anticipates, or should anticipate, the contact, and fails to avoid it, courts could construe the non-avoidance of the contact as implied consent. However, in the present context, persons apprehending exposure to environmental toxins may have no way to anticipate when such a contact might take place or whether it already has occurred. This very uncertainty, to some degree, drives the anger, frustration, and anxiety inherent in the environmental justice movement.

Finally, one of the greatest needs in environmental racism jurisprudence is a theory that will enable plaintiffs to prevent the siting of hazardous waste sites in communities already burdened with environmental risks. It is not clear that a battery theory fully contemplates prospective equitable relief as a viable remedy. Thus, a more complete remedy to environmental justice harms necessitates traveling beyond battery.

IV. BEYOND BATTERY: INTENT TO CAUSE RACIALLY DISPROPORTIONATE EXPOSURE TO ENVIRONMENTAL BURDENS

In the proposal to go beyond battery, my central concern is to articulate a workable tort theory effective both at discouraging practices that result in racially disproportionate environmental impacts and ensuring compensation for any resulting harms. Current concern about and condemnation of environmental racism—taken together with recognized rights of freedom from racial discrimination in property ownership, access to housing and public accommodations—provide evidence of the strong public policy that would favor the creation of a new tort.⁴⁰³ The proposed tort represents a modest expansion of common law protections presently accorded physical integrity, individual dignity, mental tranquility, the use and enjoyment of property, and the enjoyment of rights common to the general

⁴⁰³ See RESTATEMENT (SECOND) OF TORTS § 866 (1979). “[O]ne who is under a noncontractual duty to furnish facilities to the public without discrimination is subject to liability to a person entitled to the facilities for violation of the duty.” Thus, “a person who has been denied or discriminated against in the use of a public utility or other facilities that by the rules of the common law is under a duty to furnish reasonable facilities to those who apply, if the denial or discrimination is a breach of duty to him.” *Id.* at § 866, cmt. a.

public. This tort, the intent to cause racially disproportionate exposure to environmental burdens, provides that one who owns or operates an environmentally burdensome enterprise, and whose intentional conduct imposes upon another a racially disproportionate environmental burden, is subject to liability for resulting bodily harm, mental distress, or property damage. This tort protects against intentional interference with another's interest in freedom from racially disparate treatment. It provides a mechanism to vindicate the important social and political interests fundamental to discouraging racial discrimination, whether overt or covert, conscious or unconscious, direct or consequential, where environmental management practices threaten physical health, individual dignity, economic well-being and public peace.

We do not live in an ideal world. We are unlikely to eliminate totally our need for hazardous waste disposal facilities for some time,⁴⁰⁴ and there is no "safe" place to dispose of many environmental toxins. Few locations are so remote that the presence of a waste disposal facility will not affect some nearby community. Indeed, to serve their function, the facilities often must be near adequate transportation routes and an available workforce. Total remediation of environmental contaminants is an extremely costly proposition; available resources are limited. Recognizing these practical constraints, and acknowledging that for the foreseeable future we all must bear a reasonable portion of the environmental burdens resulting from a consumption-oriented lifestyle, my goal in proposing a new environmental racism cause of action is to reduce, as much as possible, the current racially inequitable distribution of those environmental burdens. The proposed cause of action is intended to discourage owners and operators of environmentally burdensome facilities from concentrating such facilities in communities of color and from placing such facilities in geographically or geologically unsuitable areas. Further, it is intended to encourage owners and operators of facilities already located in communities of color to comply fully with

⁴⁰⁴ A cynic might argue that if the facilities were located near the homes of their owners and operators, and the governmental officials that approve them, we quickly would see the elimination of hazardous waste disposal facilities. That day might arrive sooner rather than later.

environmental regulations. A more even distribution of the environmental burden may have the salutary effect of increasing the political will to reduce the overall environmental burden on society. The proposed tort seeks to redress the unique and troubling harms which are imposed upon individuals, communities, and society as a whole, when subjected to racially disproportionate levels of environmental burden, especially when the disproportionate impact diminishes or destroys a reasonable quality of life.

A. Restatement Section 870 Analysis

An examination of recent expansions in common law intentional tort doctrine led the American Law Institute ("ALI") to adopt the *Restatement (Second) of Torts* § 870. The ALI intended this section to establish a set of coherent guidelines for determining "when liability should be imposed for harm that was intentionally inflicted, even though the conduct does not come within the requirements of one of the well established and named intentional torts."⁴⁰⁵ The *Restatement (Second) of Torts* § 870 provides in part: "One who intentionally causes injury to another is subject to liability to the other for that injury, if his conduct is generally culpable and not justifiable under the circumstances."⁴⁰⁶ In its determination whether to impose liability for an intentional interference with another's person or property, a court is to consider whether there is an invasion of a legally protected interest, the culpable character of the actor's conduct, and the unjustifiable character of the actor's conduct under the circumstances.⁴⁰⁷ The Restatement proposes a four factor test to be used in the evaluative process: "1) the nature and seriousness of the harm to the injured party, 2) the nature and significance of the interests promoted by the actor's conduct, 3) the character of the means used by the actor and 4) the actor's motive."⁴⁰⁸

As in other areas of intentional torts, my analysis begins with the recognition that a certain degree of environmental burden must be tolerated

⁴⁰⁵ RESTATEMENT (SECOND) OF TORTS § 870 cmt. a (1977).

⁴⁰⁶ *Id.* § 870.

⁴⁰⁷ *See id.* § 870 cmt. e.

⁴⁰⁸ *Id.*

as an unfortunate necessity of life in modern society.⁴⁰⁹ We all are "at risk" of incidental daily exposure to environmental toxins from a wide variety of sources: neighbors may use inordinate amounts of pesticides on their lawns or gardens, there may be toxins in the workplace, we may become exposed to secondhand smoke at home. Therefore, the mere fact that one is a person of color, or resides in a community of color, and is exposed to an environmental toxin is not a basis for liability under the proposed tort. However, when an actor's intentional conduct causes significant environmental burdens to be unevenly distributed along racial or ethnic parameters, a legally cognizable harm has occurred. Accordingly, remedies at law and in equity should be available to injured parties.

Under the proposed cause of action, one is subject to liability for intentional conduct that is the legal cause of racially disproportionate exposure to significant environmental burdens.⁴¹⁰ The racially disproportionate exposure to environmental burdens is significant if it results, or is likely to result, in a harmful or offensive exposure to environmental toxins; interferes with the use or enjoyment of private property; interferes with an individual's access to or enjoyment of rights or legally protected interests common to the general public; or unreasonably deprives one of a sense of personal dignity. Thus, where an actor conducts his enterprise in a manner that is known, or is substantially certain, to impose an environmental burden upon a community of color, and the burden is disproportionate to that imposed upon similarly situated majority communities, the actor should be subject to liability.

In order to prevail, plaintiff must prove the defendant intended⁴¹¹ that its conduct have a racially disproportionate environmental impact upon a

⁴⁰⁹ See *supra* text following note 381.

⁴¹⁰ For purposes of analysis, the discussion focuses upon the problem of exposure to environmental toxins. However, the analysis applies with equal force to other types of environmental burdens.

⁴¹¹ The phrase "knew or was substantially certain" and "intended" will be used interchangeably in this section of the analysis.

community,⁴¹² or that the defendant intended a disproportionate exposure, or significant risk of exposure, to environmental toxins upon a community of color.⁴¹³

In theory, persons that may be subject to liability under this proposed tort include both private and governmental⁴¹⁴ owners or operators of environmentally burdensome enterprises. This article focuses upon the liability of private owners and operators for damages to protected interests arising from racially disproportionate exposure to environmental burdens.⁴¹⁵ Additionally, if a substantial likelihood that there will be an interference with protected legal interests can be proven, those who oppose the initial siting of a hazardous waste disposal facility may use the proposed theory to prevent

⁴¹² The adverse environmental impact could include, but is not necessarily limited to, overall decrease in the quality of life in the surrounding community, a decrease in property values, significant risk of harm to individuals residing within the "zone of danger," or exposure to environmental toxins. This approach is analogous to the rationale underlying equal protection analysis. Liability should attach wherein a defendant acts knowing that its conduct will cause a racially disparate impact. Unlike the equal protection claims, however, no racial animus must be shown. Substantial certainty that one's conduct will result in the disparate impact is sufficient to trigger liability.

⁴¹³ This approach is analogous to that found in Title VI. Often, a defendant acts with knowledge or substantial certainty that its conduct will cause the surrounding community to suffer an adverse environmental impact. If the impact that results is racially disproportionate to that experienced in the general population, then a racially disparate impact has grown out of a facially neutral pattern or practice.

⁴¹⁴ Federal, state, and local governmental owners and operators are typically immune from liability for damages in tort unless there has been legislative or judicial waiver of such immunity. *See, e.g.*, Federal Tort Claims Act, 28 U.S.C. § 2674 (1994). Such entities may be subject to actions for declaratory or injunctive relief. Many waivers of immunity do not extend to intentional torts, or to the exercise of policy or discretion functions such as the licensing or permitting of a hazardous waste facility. Title VI promises to provide some relief in this regard.

⁴¹⁵ This limitation is undertaken for several reasons. First, a thorough analysis of the proposed tort as applied against a public official or governmental agency would require an analysis of state sovereign immunity, waivers or exceptions to such immunities, and related issues with respect to local governmental authorities which are beyond the scope of this article. Second, the remedies presently addressed in the literature, especially Title VI, tend to be focused upon governmental actions; thus, focus on the liability of private enterprise is desirable.

the siting from going forward. The tort is intended to encompass, *inter alia*, currently operating hazardous or solid waste storage or disposal facilities, chemical manufacturing or processing plants, and facilities that reclaim toxic substances from recycled or waste products. The tort also includes owners or operators of facilities at which hazardous wastes have been disposed of improperly in the past but not yet remediated.

The proposed tort for harm arising from the racially disproportionate exposure to environmental burdens differs in several respects from traditional environmental tort causes of action. In battery, recovery is limited to those who actually have suffered a harmful or offensive contact with an environmental toxin. The proposed tort extends protection to those who suffer harm or offense because of a significant threat of such contact.⁴¹⁶ In private nuisance and trespass, recovery is limited to interference with an individual's right to the use, enjoyment, and ownership of land. The proposed cause of action extends the protection of private property based rights and protects against interference with the community's interest in a clean environment and freedom from unequal treatment.⁴¹⁷ To that extent, the proposed tort expands an interest already partly protected by public nuisance doctrine.

Two potential approaches to defining the environmental racism tort exist. First, a defendant may act with knowledge or substantial certainty that its conduct will have a racially disproportionate impact upon an identifiable community, and members in that community suffer harm as a result of that conduct. Alternatively, a defendant may act with the intent that its conduct will impose a significant environmental burden upon an identifiable group, and if that burden disproportionately impacts a community of color, then the defendant is liable for any resulting harm. Like public nuisance, but unlike

⁴¹⁶ In this regard, the tort is analogous to that of assault, which protects against the threat of an imminent battery. See KEETON ET AL., *supra* note 308, § 10, at 43-46.

⁴¹⁷ It is important to recognize the right for individuals to vindicate community interests. Defendant enterprises may manipulate the political and regulatory process by targeting those communities whose influence over the political process is minimal, by offering economic inducements to municipal authorities (i.e., we will hire many new workers) or by exercising economic coercion (i.e., we will take the project somewhere else). When this takes place, the community is harmed.

most other environmental torts, the proposed tort initially focuses upon group interests. However, individuals within the community who suffer harm as a result of the burden imposed upon the community may recover damages.

B. Intent to Cause Racially Disproportionate Environmental Burdens: Prospective Approach to Siting Disputes

In the prototypical environmental racism case, specifically with reference to cases such as *R.I.S.E., Inc. v. Kay*⁴¹⁸ or *Bean v. Southwestern Management Corp.*,⁴¹⁹ plaintiffs will allege that the defendant's plan to locate a waste disposal facility in their community is certain to impose upon them a disproportionate environmental burden. In this type of environmental racism case, plaintiffs' goal is to stop a corporation from siting its facility in the neighborhood. In this category, a defendant is subject to liability if it knows, or believes it to be substantially certain, that its decision to site the facility will result in a minority community shouldering more than its proportionate share of the city, state, region, or nation's environmental burden. This aspect of the proposed tort is reflective of the current equal protection analysis, but with one crucial difference: the showing of intent does not require proof of racial animus or motive. Plaintiff only need show intent as it has been defined for tort purposes. Thus, if the plaintiffs in *Bean* pursued an action for injunctive relief under the proposed tort, they would be able to prove that the operator of the hazardous waste facility knew that it was going to site the facility in a community of color, that "[t]he opening of the facility will affect the entire nature of the community—its land values, its tax base, its aesthetics, and the health and safety of its inhabitants,"⁴²⁰ and that, based upon the location of similar facilities in the same vicinity, this adverse impact would be disproportionate to that shouldered by other non-minority communities.

The proposed tort is concerned with hazardous waste and other facilities that impose disproportionate environmental burdens upon

⁴¹⁸ 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd mem.*, 977 F.2d 573 (4th Cir. 1992).

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

⁴²⁰ *Id.* at 677.

communities of color. Whether seeking to demonstrate that defendant acted with intent as conventionally understood or with knowledge of a substantially certain outcome, the plaintiff must first delineate the boundaries of the "community" upon which the significant environmental burden has been or is likely to be imposed.⁴²¹ (This area may be thought of as the "zone of impact.") The criteria for defining the community's parameters will depend, in large part, upon the nature and extent of the environmental burden. In most circumstances, this analysis would focus upon the location of the burdened population, a group that may or may not be coterminous to those who live in geographic proximity to the facility.⁴²² As discussed in Part I with respect to the burden of exposure to environmental toxins, the predominate mechanisms of exposure are through airborne distribution of particulate matter and pollution of the water supply.⁴²³ Once the extent of the environmental burden and the varying degrees of impact within that area are determined, the zone of impact may be defined. All persons living within the defined radius of the offending facility, or within a non-contiguous zone of impact, have standing to bring a cause of action. Liability could extend as far as the demonstrable (or projected) dispersion of environmental toxins or other burdens.⁴²⁴

⁴²¹ See Rae Zimmerman, *Issues of Classification in Environmental Equity: How We Manage Is How We Measure*, 21 FORDHAM URB. L.J. 633, 645-59 (1994). See also Michael R. Edelstein, CONTAMINATED COMMUNITIES: THE SOCIAL AND PSYCHOLOGICAL IMPACTS OF RESIDENTIAL TOXIC EXPOSURE 17-42 (1988) (case study of Jackson Township, New Jersey).

⁴²² While environmental impacts are often greatest within the region immediately surrounding an environmentally burdensome facility, such is not always the case. It may be that wind patterns, or the flow of water, carries an environmental toxin some distance. Thus, the fact that fish in a river are consumed downstream by low-income people, where that group is disproportionately composed of racial or ethnic minorities, may be a defining factor in describing the zone of impact.

⁴²³ See *supra* notes 38-50 and accompanying text.

⁴²⁴ Some might argue that this expansive approach to defining an appropriate class of plaintiffs will "open the floodgates" and invite unlimited litigation. If a company wishes to limit its potential liability, however, it can do so by taking into account existing environmental burdens before it sites a facility, by locating a reasonable distance away from populated areas, or by complying with environmental regulations thereby limiting the amount and distribution of toxins or other noxious substances into the environment.

In appropriate circumstances, the definition of the "target" community can extend to non-residents. If a person lives outside the "target" community, but regularly and foreseeably uses public facilities located within the zone such as public schools, parks, or day care facilities, then this associational criteria is an appropriate basis to expand the class of potential plaintiffs.⁴²⁵ Thus, the anticipated mechanisms by which the exposure to an environmental toxin would take place, or the context in which a burden is experienced, would act as a defining limit on the plaintiff class.

Once the "target" community has been defined, the plaintiff must demonstrate that the significant environmental burden imposed is racially disproportionate. A racially disproportionate environmental impact occurs when a policy, pattern, or operational practice produces a substantially greater effect upon a community in which racial minorities are found in proportions greater than their overall representation in the relevant society.⁴²⁶ Identifying disproportionate environmental impacts requires the examination of racial disparities in the distribution of 1) environmental amenities, 2) environmental disamenities, 3) benefits of environmental improvements, and 4) costs of environmental improvements.⁴²⁷ Thus, if the facility in question is a landfill, and it accepts waste from a five-county area, the demographics of the impacted community needs to be compared to the demographics of the region served. If the minority population in the target region is twenty percent, but the minority population in the affected community is forty percent, then the environmental burden shouldered by residents in that community is racially disproportionate. Similarly, if the facility is a waste incinerator, and it serves an entire state or region of the country, the appropriate comparison is between the community burdened by the incinerator and the communities served by

⁴²⁵ For example, in West Dallas, not only were the individuals who lived in the public housing adversely impacted by the lead released in the environment, so were those children who used the day care facilities, and others who used the recreational areas. See *supra* notes 117-49 and accompanying text.

⁴²⁶ It is possible, albeit less likely, that a community of Hispanics, Caucasians, or Native Americans will be a racial minority in a predominately African-American city. If that community is shouldered with a disproportionate environmental burden, its members would have standing to pursue this claim.

⁴²⁷ See Goldman, *supra* note 71, at 3.

the incinerator.⁴²⁸

If the community has been subjected to a racially disproportionate environmental burden, plaintiff must then prove that the defendant knew, or was substantially certain, that its conduct would, in fact, impose a significant environmental burden on that community. Proof of intent may be either objective or subjective. Objective intent may be shown based upon available demographic information and upon the character of the locality chosen for the facility. For example, given the demographics of the "zone of impact," if the defendant knew that there were already a number of other environmentally burdensome facilities in the zone, or knew that by reason of the facility's geographic proximity to residential areas or public places that its conduct would have a racially disproportionate impact, even if that impact were not in any way a motivating factor in the conduct, defendant has acted in a tortious manner towards the community as defined.

In the context of siting controversies, proof of intent to cause a racially disproportionate environmental impact may be shown from a consideration of the factors contributing to defendant's decision to site a

⁴²⁸ In some circumstances, pre-existing units of measurement based upon locational proximity to the environmentally burdensome facility, such as census tracts or zip code areas, may be used. See Zimmerman, *supra* note 421, at 652-59. However, such an approach may prove problematic if used as the sole basis for defining the community whose rights have been invaded. See Fisher, *supra* note 159, at 323. Discussing appropriate units of measurement for Title VI disparate impact cases, Fisher notes:

The first problem is that the *size* of the study area bears no relationship to the area impacted by the polluting facility. If the census tract is larger than the impacted area, for example, whites might be counted as "impacted" when they are not, reducing the statistical disparity apparent in the plaintiff's study. Even if the census tract and the impacted area are coextant, the *degree* of impact is ignored since the method equates the effect on persons at the outer edge of the impacted area with the effect on people of color who are the incinerator's neighbors. The second problem with using "pre-studied" units of comparison is that the *boundaries* of the study area are uncorrelated to the area affected by the facility. Thus if the census tract lines cut close to an incinerator, minority residents who live in close proximity to the facility but across the boundary line will not be counted among the impacted.

Id.

waste disposal facility in a community of color. Practically speaking, communities of color may be the preferred location to site new waste disposal facilities or other environmentally burdensome enterprises because of the availability of relatively inexpensive land, pre-existing zoning patterns, perceived lack of political influence, or historical patterns of placing locally unwanted land uses in such communities. This preference may in turn lead to a concentration of industry in communities of color; this greatly increases the likelihood that a significant release of environmental toxin will take place and harm its residents. However, in such circumstances it would be substantially certain that any environmental burden imposed would have a disproportionate impact. Certainly, evidence that race was a factor in the defendant's decision to locate an environmentally burdensome enterprise in a community would be sufficient to sustain plaintiff's burden on this issue. Thus, evidence that the decision to site the facility was based, in whole or in part, upon a recognition that minority citizens tend to have less political or economic influence in a region, or are less organized within a given city or state, (thus less likely to effectively combat the decision) may be probative of the requisite intent.⁴²⁹ Similarly, if a specific defendant has a pattern or practice of siting its facilities in minority communities, that pattern or practice would be evidence that the actor intended to locate its facility in an area wherein it would have a racially disproportionate impact.⁴³⁰ Thus, if plaintiffs can demonstrate that the owner or operator of a facility regularly chooses to site its facilities in, or in close proximity to a minority community, whether for reasons of economics, zoning, or NIMBY pressures from other communities, and that the facility imposes an environmental burden

⁴²⁹ The facility owner must have the approval of local, state, or federal authorities in order to build a waste disposal facility. Evidence that the governmental authority responsible for the licensing or regulating the facility is aware of the disproportionate impact, that it was responding to NIMBY pressures, or that it had a history of exclusive or expulsive zoning practices would be relevant to this determination.

⁴³⁰ See Laura Westra, *The Faces of Environmental Racism: Titusville, Alabama, and BFI*, in *FACES OF ENVIRONMENTAL RACISM: CONFRONTING ISSUES OF GLOBAL JUSTICE*, *supra* note 37, at 113. Author notes that a "True or False," handout by TAG, Total Awareness Group, Titusville Neighborhood Association, stated that twenty-six of twenty-eight Browning-Ferris Industries waste facilities in Alabama were located in African-American neighborhoods. *Id.*

disproportionate to that of the burden shouldered by other communities served by the facility, then plaintiffs have established their prima facie case.

Proof of intent also may be based upon the actor's knowledge that the planned location of the facility is geographically or geologically unsuitable for a hazardous waste or other environmentally burdensome enterprise and is, therefore, substantially certain that the facility will impose a disproportionate environmental burden.

In evaluating the geographic suitability of a new facility location, consideration must be given to current uses. A location is geographically unsuitable if it is located too near a residential community or a public facility, such as a school or hospital, and/or would be located in an already environmentally burdened community. Thus, a location may be deemed geographically unsuitable for the proposed use even if that location is, or may be, zoned for such use. Historical expulsive and exclusive zoning practices often have resulted in lower income minority communities being deemed as "appropriate" for unwanted land uses. These protective zoning ordinances have contributed to the disproportionate concentration of environmentally burdensome facilities in communities of color. An institutionalized pattern of racism that has permitted, if not encouraged, unsuitable land uses in the past should not provide the basis for a defendant to conclusively argue that the proposed location is geographically suitable because similar facilities are already in operation. Communities of color already burdened with more than their fair share of environmental burdens should not be forced to shoulder an even greater load.

The principle of geographically unsuited land uses is illustrated in *Bean v. Southwestern Management Corp.*⁴³¹ where the Texas Department of Health granted a Type I solid waste facility permit to Southwestern Waste Management to build a hazardous waste disposal facility even though the waste would be located within 1700 feet of a non air-conditioned high school and in extremely close proximity to a residential area. The court in *Bean* recognized that local residents ran the potential risk of exposure to environmental toxins and acknowledged the variety of anticipated harms to

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

property, but held that the stringent requirement of proving racial animus had not been met. No matter how inappropriate the siting decision, the court could not intervene. In contrast, the intent requirement in my proposed tort is broad enough to encompass the decision to site the solid waste facility at issue in *Bean*.

A location may be geologically unsuitable where surrounding topographical or hydrogeological structures provide substantial certainty that a release of environmental toxins would result in human exposure. Thus, in Warren County, North Carolina, the decision to bury 32,000 cubic yards of PCB laden soil in a small residential area where the water table at the site of the landfill was only five to ten feet below the surface and the residents derived all of their drinking water from wells supplied by that aquifer would have constituted an "act intending to cause a harmful or offensive environmental contact with an environmental toxin" within the meaning of the proposed tort. A similar argument may be made with respect to Noxubee County, Mississippi where the two proposed landfills and waste incinerators were to be located on an aquifer already subject to harm from the hazardous waste facility at Emelle, Alabama.

In the first category of environmental racism cases, plaintiffs' goal is prohibit the siting or to alter the defendant's siting decision in such a way as to minimize the anticipated environmental burden. In seeking an injunction, plaintiff must persuade the court of the appropriateness of the remedy.⁴³² Relevant to this determination is:

- (a) the nature of the interest to be protected, (b) the relative adequacy to the plaintiff of injunction and of other remedies, (c) any unreasonable delay by the plaintiff in bringing suit, (d) any related misconduct on the part of the plaintiff, (e) the relative hardship likely to result to defendant if the injunction is granted and to plaintiff if it is denied, (f) the interests of third persons and of the public, and (g) the practicability of framing and enforcing the order of judgment.⁴³³

⁴³² See RESTATEMENT (SECOND) OF TORTS § 936 (1979).

⁴³³ *Id.*

Injunctive relief for anticipated harm is a well-established, if sparingly applied, component of environmental tort remedy.⁴³⁴ Anticipatory nuisance cases typically require the plaintiff to demonstrate that an action at law will not provide adequate relief.⁴³⁵ Additionally, "where it is highly probable that [the defendant's conduct] will lead to a nuisance, although if the possibility is merely uncertain or contingent he may be left to his remedy of damages until after the nuisance has occurred."⁴³⁶

In the typical environmental tort case, plaintiff would be required to prove that future releases of toxic substances are highly probable and that plaintiff will almost certainly sustain injuries as a result of their exposure. That burden is often very difficult to meet. However, in the context of environmental racism, the protected interests involve a community's right to be free from the racially discriminatory siting of environmentally burdensome facilities. If it can be shown, as in *Bean*⁴³⁷ and *R.I.S.E.*,⁴³⁸ that it is highly probable that the "mere" siting of a facility will have a racially disproportionate impact upon a community, and that the community will be harmed by that impact, plaintiff may be able to demonstrate entitlement to injunctive relief.⁴³⁹

A plaintiff organization acting on its own behalf, or as a private

⁴³⁴ See *Village of Wilsonville v. S.C.A. Servs.*, 426 N.E.2d 824, 836 (Ill. 1981); Andrea H. Sharp, Comment, *An Ounce of Prevention: Rehabilitating the Anticipatory Nuisance Doctrine*, 15 B.C. ENVTL. AFF. L. REV. 627 (1988); Charles J. Doane, Comment, *Beyond Fear: Articulating a Modern Doctrine in Anticipatory Nuisance for Enjoining Improbable Threats of Catastrophic Harm*, 17 B.C. ENVTL. AFF. L. REV. 441 (1990). However, a detailed analysis of this tort's suitability to remedy through anticipatory injunctive relief is beyond the scope of this article.

⁴³⁵ See KEETON ET AL., *supra* note 308, § 89, at 640-41.

⁴³⁶ *Id.* For a detailed analysis of what tests courts use in anticipatory nuisance cases, see Sharp, *supra* note 434.

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

⁴³⁸ 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd mem.*, 977 F.2d 573 (4th Cir. 1992).

⁴³⁹ Some states have liberalized their anticipatory nuisance laws in a way that would support this approach. See, e.g., ALA. CODE § 6-5-125 (1993) ("Where the consequences of a nuisance about to be erected or commenced will be irreparable in damages and such consequences are not merely possible but to a reasonable degree certain, a court may interfere to arrest a nuisance before it is completed."); GA. CODE ANN. § 41-2-4 (1994).

attorney general, could seek to block the defendant from siting a facility on the basis that the facility's operation was substantially certain to result in a racially disproportionate environmental burden upon the designated community. Environmental burdens can include disruption of peaceful use of private or communal spaces because of increased dust, noise, or traffic. Further, this approach addresses those intangible mental and dignitary harms that inure to an individual or a community who will suffer from the knowledge that, if they lived in a different neighborhood, the defendant would not have placed the facility in their community or, at the very least, would have worked with the community to alleviate its concerns. The focus is, therefore, on the differential experience of environmental burdens even if the disproportion was "because of" economic or other considerations. As in *Bean*,⁴⁴⁰ plaintiffs can sustain the burden of proof that such an impact is certain to occur. Unlike prospective nuisance cases wherein the plaintiffs have to prove that the interference with the use and enjoyment their private property is substantially certain to occur, in the present action plaintiffs do not have to prove that toxins will encroach upon their property or that they are reasonably certain to suffer actual physical harm. The harm derives from the very presence of the facility. It is the facility's presence in a geographically or geologically unsuitable location that "affect[s] the entire nature of the community—its land values, its tax base, its aesthetics, the health and safety of its inhabitants."⁴⁴¹ The racially disproportionate impact deprives the residents in the community of rights to which they are entitled by virtue of their membership in this society, *i.e.* the right to be free from unequal treatment under the law.

C. Intention to Cause Racially Disproportionate Environmental Burdens: Recovery of Damages

In many instances, at the time a facility began its operation, it would not have created a racially disproportionate environmental impact. In some cases, the defendant's facility existed prior to, or has grown up alongside, a

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

⁴⁴¹ *Id.* at 677.

community of color. It may be that the location was initially on the outskirts of town, and the population has grown up around it. It may be that a local government authority has chosen to build public housing in close proximity; or it may be that the community was historically low-income and the racial and ethnic make-up of the community simply has changed over time. In any event, the facility is now located in or near a minority community. Although its presence may adversely impact community residents, under these circumstances presence alone should not be sufficient to impose liability. However, if the owners or operators of the facility intends to impose an unreasonable environmental burden upon the surrounding community, and that burden disproportionately impacts persons of color, the defendant should be subject to liability, both for resulting personal injury or property damage, and for the interference with the community's and individual's right to be free from racially discriminatory treatment. This approach reflects that found in Title VI wherein a facially neutral policy or pattern of practice has a racially disparate impact.

For example, assume that defendant's toxic waste incinerator is located on the southern edge of a city and people live within a five-mile radius. Within that radius, the majority of middle- and upper-income residents live in the city and are connected to city water and sewer services. The water is drawn from an aquifer approximately ten miles away from the incinerator and is hydrogeologically separate from the area surrounding the incinerator. On occasion, the incinerator emits fumes that are noxious and residents within the five-mile radius experience transitory discomfort from the fumes. However, the neighborhood to the south of the plant is more rural and is not connected to city services. This neighborhood is predominately African-American and Hispanic. Residents in that community derive their water from wells that draw from an aquifer that has become polluted by the company. Complaints about fumes from the facility have caused the company to install scrubber mechanisms that have reduced greatly both the frequency and the concentration of the fumes emitted. However, complaints concerning water quality from the community that relies upon well water have gone unaddressed. Although the area within a five-mile radius affected by the facility's fumes is predominately white, it can be shown that the defendant has acted with the intent to cause a racially disparate environmental impact.

The necessary intent to cause a racially disproportionate exposure to an environmental toxin also may be shown in those circumstances where

there is a failure to comply with or to enforce environmental regulations with respect to an ongoing operation, or where there has been a failure or refusal to remediate environmental contamination. These circumstances have been used to establish intent in other environmental tort contexts and are useful here. The failure to comply with environmental regulations, or remediate environmental contamination, is a central concern of the environmental justice movement. In many of the examples discussed in this article, the unrepentant failure to abide by governmental regulations and the ineffectual enforcement of those regulations by state and local officials are a significant cause of harmful and offensive exposures to environmental toxins. The attitude demonstrated by corporate or a governmental disregard for environmental protection laws, and the resultant health risks and interference with property rights, fuels the outrage of the environmental racism debate. The proposed tort should, with its prospect of both compensatory and punitive damages for physical injury, property damage, or emotional distress, would serve as a clarion call for commercial entities to sit up and take notice of environmentally related health and social concerns in communities of color.

Once it is demonstrated that a person or entity has acted with the intent to cause a racially disproportionate exposure to environmental toxins, standing to assert a claim is conferred by membership in the community of color that has experienced a racially disproportionate exposure to environmental toxins: standing is not based upon the race or ethnicity of the individual plaintiff. This tort is not designed to permit a person of color living in a predominately white community to sue a nearby owner or operator of an environmentally burdensome enterprise on the basis that she is a minority and has been exposed to environmental toxins. The exposure must result from the disparate impact upon a community of color. Conversely, one who resides in or foreseeably and routinely uses affected public facilities in a community of color, has standing to sue under this tort. Whether one is a person of color or not, if one is disproportionately exposed to environmental toxins because she resides in a community of color, then she has suffered a legally cognizable injury within the scope of this tort. Otherwise, the anomalous result would be reached that an African-American who was placed at a disproportionate risk of exposure to environmental toxins could recover, while his white neighbor could not. Traditional concepts of

transferred intent support the approach to standing set forth above.⁴⁴²

D. *Affirmative Defenses*

One of the defenses to the proposed tort, reflective of its roots in battery, trespass, and other intentional torts, is the defense of informed consent. The doctrine of informed consent is a necessary corollary to one's right to be free from non-consensual interference with one's person or property. As members in this society, citizens are entitled to consent to an invasion of a legally protected interest, to assume the risks associated with the acts of others. If one has effectively consented to the conduct of another that intentionally invades her interests in bodily integrity, mental tranquillity, possessory property interests, or rights as a member of the public, she cannot recover for the conduct or for harmful contact resulting therefrom.⁴⁴³ Effective consent must be given by one who has the capacity to consent, or by a person empowered to consent for her.⁴⁴⁴ Consent is effective only to the particular conduct or substantially similar conduct understood and anticipated by the person providing consent.⁴⁴⁵ The consent may be conditioned or restricted; it may be limited as to time, place, or circumstance.⁴⁴⁶ If consent to the conduct is in some way conditioned or restricted, and the actor fails to comply with the condition or exceeds the specified limit, harm caused thereby is actionable as battery.⁴⁴⁷ Moreover, consent to an invasion of one's interests may be vitiated if it has been obtained through the actor's misrepresentation or duress.⁴⁴⁸

If the person consenting . . . is induced to consent by a substantial mistake concerning the nature of the invasion of

⁴⁴² See KEETON ET AL., *supra* note 308, § 8, at 37-9.

⁴⁴³ See RESTATEMENT (SECOND) OF TORTS § 892A.

⁴⁴⁴ See *id.*

⁴⁴⁵ See *id.*

⁴⁴⁶ See *id.* § 892A(3).

⁴⁴⁷ See *id.* § 892A(4).

⁴⁴⁸ See *id.* § 892B.

his interests or the extent of the harm to be expected from it and the mistake is known to the other or is induced by the other's misrepresentation, the consent is not effective for the unexpected invasion or harm.⁴⁴⁹

One of the underlying rationales for this tort as it applies to the siting of hazardous waste facilities is to provide a remedy for the lack of distributional equity. Lack of distributional equity occurs when community of color has been selected to bear the environmental burdens of a consumption-oriented society even though it has not shared in many of the benefits of that society. Lack of distributional equity is magnified when benefits that are promised in the form of jobs and tax revenue do not materialize—at least not with respect to persons of color living near the facility. Recognizing that hazardous waste disposal sites are a growth industry, some communities actively lobby, or tacitly welcome, a hazardous waste disposal site. The acceptance may arise from the hope of secure employment in the community. In Noxubee County, and in other places, the community often is split—fear and hope set the community asunder.

Several proposals have been put forward to allow compensated siting efforts.⁴⁵⁰ Compensated siting permits a company wishing to site a hazardous waste facility to provide financial incentives to communities and residents in exchange for their consent to the siting decision. If those lobbying for hazardous waste disposal facilities secured informed consent from those persons living in an appropriate spatial relationship to the facility, and if that consent was truly informed, then the siting activity would not be actionable under the proposed tort. Consent would act as an affirmative defense to liability for the disparate impact of the siting. Moreover, if the basis for the consent was later found to be fraudulent, the consent to the siting would be vitiated and the privilege withdrawn. If the facility failed to put in place promised safeguards, if it failed to comply with environmental regulations, or if it otherwise exceeded the scope of the consent, then it would be liable in damages.

⁴⁴⁹ See *id.* § 892B(2).

⁴⁵⁰ See *Been*, *supra* note 171.

Another available affirmative defense might be that of public necessity. The existence of a public necessity provides a privilege "to commit an act which would otherwise be [an intentional tort] if it is or is reasonably believed to be reasonable and necessary"⁴⁵¹ to protect the actor or a third party from serious harm. If at the time a siting decision was made, there existed a demonstrable public necessity that its construction go forward in an area already burdened by other facilities or in a geographically and/or geologically inappropriate locale, then the construction could go forward without liability under this tort. "The right of defense and self-preservation is a right inherent in communities as well as individuals."⁴⁵² Although, it is difficult to construct a scenario in which the exigencies of hazardous waste storage would require its location in an inappropriate locale, if such a situation should arise, the owner or operator of a facility would be able to avoid liability.

Finally, where the enterprise is located in a community that attained its status as a "community of color" subsequent to commencement of its operation, the enterprise should not be subject to liability under this tort because the enterprise becomes, over time, a part of the disproportionate distribution of environmentally burdensome facilities. However, if that facility can be shown to have created or contributed to a disproportionate allocation of environmental burdens after the character of the community has changed, or otherwise imposes environmental burdens upon the surrounding community in a racially disproportionate manner, then liability would still follow.

CONCLUSION

Individual harms from environmental racism may include a loss of personal dignity, a disruption of mental tranquility, injury to bodily integrity,

⁴⁵¹ RESTATEMENT (SECOND) OF TORTS § 262.

⁴⁵² *Harrison v. Wisdom*, 54 Tenn. (7 Heisk.) 99, 113 (1872) (holding that defendants' destruction of large stocks of whiskey during the Civil War, in advance of the arrival of riotous soldiers who had just defeated the closest fort, was deemed justified by reason of the exigencies of the moment).

and interference with the use and enjoyment of property. Moreover, courts already have recognized the significance of harm where the conduct alleged consists of the release or threatened release of environmental toxins and such release presents a significant risk of injury to person or property. In many environmental racism cases, there is much anger, frustration, and fear that results from the knowledge that the community is being exposed to significant risks from the increased levels of environmental toxins in the air, drinking water, food supplies, or the public areas in which children play. This interference with mental tranquility is exacerbated because the exposure occurs without the community's consent, perhaps even without its knowledge. Moreover, the knowledge that the community is disproportionately subject to such exposure and that there is a relative lack of political and economic clout to reduce or eliminate the threat of such exposure contributes to the offense. Presently, the loss of mental tranquility and a reasonable sense of personal dignity is protected against intentional invasions. Especially when the invasion has a racially disparate impact, courts may find that the nature and type of harm is actionable in tort.

Without question, this society has a significant interest and concern related to, the disposal of hazardous wastes and the control of environmental pollution. As a society, we are ready to recognize that environmental racism is unjust, and that the imposition of disproportionate environmental burdens upon low-income communities of color contravenes important societal and individual interests in reducing or eliminating conduct that is discriminatory in intent or in effect.⁴⁵³ The importance of the interests promoted by hazardous waste and other environmentally burdensome facilities is given due consideration by available defenses and limitations placed upon the proposed tort. The mere siting of a facility, or the presence of an environmentally burdensome enterprise is not sufficient to subject the actor to liability under this proposed tort. Defendants have no legally cognizable interest in violating environmental regulations or in refusing to remediate

⁴⁵³ United States courts have recognized wrongful discharge claims at the common law where it is alleged that the defendant has terminated a worker for racial reasons. President Clinton's Exec. Order No. 12866 and the proposed environmental justice initiatives underscore this interest.

environmental harms. Cases in which communities are "targeted" by reason of political expedience or lack of political power; cases in which there is a failure to fully inform the community of potential risks, hazards or the existence of chemical releases; and cases in which there has been a misrepresentation for the purpose of inducing community cooperation or complacency, indicate improper means and motive and support imposition of tort liability and damages. To the extent that the proposed tort is premised upon such conduct, it is a useful supplement to the present approaches. Although the defendants have an interest in conducting their businesses, and in locating those businesses in areas where land is inexpensive, transportation convenient, and workers available, that interest should not supersede the rights of potentially impacted communities to keep the facilities out where that community already is shouldered with other environmental burdens, or where the proposed location is geographically or geologically unsound.

Finally, in cases of environmental racism, the actor's motive may not be explicitly racist. More likely, it is grounded in political expediency and economic efficiency. Although in our society these motives are not necessarily rejected as immoral, they often must give way where the conduct that results interferes with an individual's rights to live in a community in which they have access to and enjoyment of rights common to the general public, to make full use and enjoyment of their own property, and to protect their physical health and well being.