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Changing the Bathwater and Keeping the Baby: Exploring New Ways of Evaluating Intent in Environmental Discrimination Cases

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CHANGING THE BATHWATER AND KEEPING THE BABY:[1] EXPLORING NEW WAYS OF EVALUATING INTENT IN ENVIRONMENTAL DISCRIMINATION CASES

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ABSTRACT

Minorities in the United States live in areas that are heavily polluted. In addition to dealing with the pollution generated by their neighborhoods, minorities often are exposed to environmental hazards that provide services for the entire community. The problem of the disproportionate placement of environmental hazards in minority communities is well documented. A primary cause of the inequitable distribution of environmental hazards in this country is environmental discrimination based on class and race.

Persons combating environmental discrimination have attempted to get relief relying upon the Equal Protection Clause of the Fourteenth Amendment. Unfortunately, plaintiffs in environmental discrimination cases have hit a brick wall—the requirement that they prove the decision to place the environmental hazard in their neighborhood was motivated by an intent to discriminate on the part of the decision-makers. In response, advocates have proposed replacing intent as the evidentiary requirement in Equal Protection Cases. If properly applied, the intent requirement is a perfectly viable evidentiary method. Therefore, I propose keeping the intent requirement and changing the manner

1. This title is a twist on the proverb: "Don't throw the baby out with the bathwater." There is some controversy surrounding the origin of the proverb. The following is one view:

> Baths equaled a big tub filled with hot water. The man of the house had the privilege of the nice clean water, then all the other sons and men, then the women and finally the children. Last of all the babies. By then the water was so dirty you could actually lose someone in it. Hence the saying, "Don't throw the baby out with the bath water."

More Eccentricities of the English Language, http://www.wordskit.com/language/legends/bathwater.shtml (last visited Feb. 9, 2005).

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in which the courts determine if the plaintiffs have satisfied the requirement. The courts should presume intent if the plaintiffs are able to demonstrate that the decision to place the environmental hazard in their neighborhood was unreasonable.

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INTRODUCTION

Given the United States' legacy of discriminatory activity, in Professor Robert D. Bullard's[2] opinion, it is not surprising that the country's environmental laws, regulations, and policies have not been consistently applied across all sectors of the populace. For instance, low-income families and minorities are forced to tolerate an unequal burden of the country's "pollution problems." Consequently, persons in those communities are exposed to the public health threats that accompany environmental hazards.[3] Professor Bullard was one of the first persons to write about the rampant environmental discrimination in the United States. According to Professor Bullard, the current environmental protection regime is designed to provide greater benefits and protection for white persons living in middle- and upper-income communities while allocating costs to low-income and minority persons.[4] Therefore, Professor Bullard and others advocate reconstructing the current environmental protection regime to address the issue of environmental discrimination.[5]

For years, governmental decision-makers have contributed to the disproportionate placement of environmental hazards in low-income[6] and

2. Bullard is one of the leading experts in the field of environmental justice. He was one of the planners of the First National People of Color Environmental Leadership Summit.

3. Robert D. Bullard, *Introduction* to UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR, at xv, vv (Robert D. Bullard ed., 1994) [hereinafter UNEQUAL PROTECTION].

4. *Id*. at xv–xvi.

5. Bullard states,

> [T]he dominant environmental protection paradigm (1) institutionalizes unequal enforcement; (2) trades human health for profit; (3) places the burden of proof on the "victims," not on the polluting industry; (4) legitimates human exposure to harmful chemicals, pesticides, and hazardous substances; (5) promotes "risky" technologies, such as incinerators; (6) exploits the vulnerability of economically and politically disenfranchised communities; (7) subsidizes ecological destruction; (8) creates an industry around risk assessment; (9) delays cleanup actions; and (10) fails to develop pollution prevention as the overarching and dominant strategy.

Id. at xvi.

6. When dealing with environmental justice issues, advocates have identified the low-income population in an affected area by using the annual statistical poverty thresholds from the Bureau of the Census's Current Population Reports, Series P-60 on Income and Poverty. *See* COUNCIL ON ENVT. QUALITY, EXEC. OFFICE OF THE PRESIDENT, ENVIRONMENTAL JUSTICE: GUIDANCE UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 25 (1997), *available at* http://www.wct.doc.gov/env_justice/pdf/ justice.pdf [hereinafter CEQ GUIDANCE]. However, for the purpose of clarity, I am using the term as defined in the housing area. A "low-income family" is a family that has income that does not exceed 80 percent of the median income for the area where the family resides. 42 U.S.C. § 1437(b)(2) (2000).

minority[7] communities.[8] Environmental discrimination based upon class and race is one possible cause of the unequal distribution of environmental hazards. The recognition that low-income and minority persons have been unequally treated in the environmental protection arena led to the development of the environmental justice movement.[9] "Environmental justice" is the term used to refer to the steps that have been taken to remedy environmental discrimination.[10] Persons discussing the problem of the disproportionate placement of environmental hazards in low-income and minority neighborhoods have also used the terms "environmental racism"[11] and

7. In the environmental justice arena, the term "minority" is used to refer to the following four major racial and ethnic groups: (1) Blacks, (2) American Indians and Alaska Natives, (3) Asians and Pacific Islanders, and (4) Hispanics. CEQ GUIDANCE, *supra* note 6, at 25. In the context of this Article, "minority populations" broadly refers to all persons except non-Hispanic whites. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-95-84, HAZARDOUS AND NONHAZARDOUS WASTE: DEMOGRAPHICS OF PEOPLE LIVING NEAR WASTE FACILITIES 17 n.2 (June 1995), *available at* http://www.gao.gov/archive/1995/rc95084.pdf [hereinafter GAO/RCED-95-84].

8. In this Article, I use the term "environmental hazards" to refer to projects that pollute the environment and those that have the potential to pollute.

9. The United States Environmental Protection Agency (EPA) defines environmental justice as:

> The fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies. Fair treatment means that no group of people, including racial, ethnic, or socioeconomic group should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies.

ENVTL. PROT. AGENCY, FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA'S NEPA COMPLIANCE ANALYSES § 1.1.1 (Apr. 1998), *available at* http://www.epa.gov/compliance/resources/policies/ej/ej_guidance_nepa_epa0498.pdf [hereinafter EPA GUIDANCE]; *see also* Envtl. Prot. Agency, Evironmental Justice, http://www.epa.gov/compliance/environmental justice (last visited Oct. 6, 2005).

10. Major Willie A. Gunn, *From the Landfill to the Other Side of the Tracks: Developing Empowerment Strategies to Alleviate Environmental Injustice*, 22 OHIO N.U. L. REV. 1227, 1235 (1996) (citing Exec. Order No. 12,898, 3 C.F.R. 859 (1995), *reprinted in* 42 U.S.C. § 4321 (1994)).

11. The term "environmental racism" was invented by Dr. Benjamin Chavis, Jr. in 1982. He defined the term as:

> racial discrimination in environmental policy[-]making and the unequal enforcement of environmental laws and regulations. It is the deliberate targeting of people of color communities for toxic waste facilities and the official sanctioning of a life threatening presence of poisons and pollutants in people of color communities. It is also manifested in the history of excluding people of color from the leadership of the environmental movement.

Robert M. Frye, *Environmental Injustice: The Failure of American Civil Rights and Environmental Law to Provide Equal Protection from Pollution*, 3 DICK. J. ENVTL. L. & POL'Y 53, 56 (1993) (quoting *Environmental Racism: Hearings Before the House Subcomm. on Civil*

"environmental equity."[12] In this Article, the term "environmental discrimination" is used to refer to the practice of disproportionately locating environmental hazards in low-income and minority communities. The core premise of this Article focuses on the use of the Equal Protection Clause to combat environmental discrimination. Thus, I will be dealing exclusively with the location of environmental hazards in minority communities.

After an environmental hazard has been placed in a minority community, the residents might not feel the negative impact for several years. Whenever the members of a community experience adverse consequences because of an environmental hazard, persons seeking to help them typically have three main objectives. The first goal is to have the environmental hazard put out of operation.[13] The second goal is to receive compensation for persons who have been injured by the environmental hazard.[14] The final goal is to prevent new environmental hazards from being placed in and near the impacted community.[15] When the persons affected are minorities, one of the primary tools advocates have attempted to use to achieve their goals is the Equal Protection Clause of the Fourteenth Amendment.[16]

A substantial amount of evidence shows that federal, state, and local governmental decision-makers have permitted a disproportionate number of environmental hazards, including hazardous waste incinerators and harmful

and Constitutional Rights, 103d Cong., 1st Sess. (Mar. 3, 1993) (testimony of Dr. Benjamin F. Chavis, Jr., Executive Director, United Church of Christ Commission for Racial Justice); *see also* Rev. Benjamin F. Chavis, Jr., *Foreword* to CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 3, 3 (Robert D. Bullard ed., 1993) [hereinafter GRASSROOTS].

12. The term "environmental equity" has been used by the EPA to refer to "the distribution and effects of environmental problems and the policies and processes to reduce differences in who bears environmental risks." ENVTL. PROT. AGENCY, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES 2 (1992), *available at* http://www.epa.gov/compliance/resources/publications/ej/reducing_risk_com_vol1.pdf [hereinafter ENVIRONMENTAL EQUITY]. According to its workgroup report, the EPA used the term because "it most readily lends itself to scientific risk analysis." *Id.*

13. *See* ROBERT D. BULLARD, DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY 49 (1990) (discussing how members of a predominantly minority community organized to have a lead smelter put out of operation).

14. *Id.* at 44 (discussing how minority residents organized to halt the construction of a landfill in their subdivision).

15. Kathy Seward Northern, *Battery and Beyond: A Tort Law Response to Environmental Racism*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 485, 535 (1997); *see also* Kirsten H. Engel, *Brownfield Initiatives and Environmental Justice: Second-Class Cleanups or Market-Based Equity?*, 13 J. NAT. RESOURCES & ENVTL. L. 317, 329 (1997–1998) (discussing attempts by persons combating environmental discrimination to get "legislative moratoriums" passed to prevent the placement of additional environmental hazards in minority communities that are already over-saturated with pollution-generating activities).

16. U.S. CONST. AMEND. XIV, § 1.

industrial processes, to be placed in minority communities.[17] Governmental authorities also have been remiss in enforcing environmental regulations in those communities.[18] As a consequence of this apparent unequal treatment under the law, advocates have attempted to use the Equal Protection Clause to challenge the placement of environmental hazards in minority communities on the ground that the government decision-maker was racially discriminatory in approving the activity.[19]

Environmental discrimination cases have been largely unsuccessful because plaintiffs have been unable to prove discriminatory intent on the part of the decision-maker.[20] In the absence of negligence, persons usually are only legally accountable for their intentional actions. Hence, discriminatory intent should not be replaced as the standard of proof in environmental discrimination cases. Nonetheless, fairness dictates that the manner in which the courts evaluate whether or not the intent requirement has been met should be modified. Under the current system, even after proving disparate impact, in order to satisfy the intent requirement, a plaintiff must prove that the decision-maker's action was motivated by an intent to discriminate.[21]Instead of mandatory proof of conscious, purposeful discriminatory intent, the court should analyze the facts to see if there is a valid reason to presume discriminatory intent on the part of the decision-maker.

This paper is divided into four parts. Part one consists of a general overview of the problem of environmental discrimination. Part two gives a brief discussion of relevant Equal Protection jurisprudence. The section begins with a summary of general Equal Protection law. Then, the section analyzes the primary cases that established the foundation of modern-day Equal Protection doctrine. Part three examines the current application of the intent requirement in environmental discrimination cases. To that end, the section reviews the outcome of three of the early environmental discrimination cases, and speculates about the components that are necessary to prepare a successful Equal Protection challenge in the environmental arena. Part four consists of an extensive analysis of the debate over the validity of the intent requirement. The section starts by encapsulating a few of the proposed theories put forth to replace or modify the intent requirement. The section ends with my suggestion for refining the current application of the intent standard to make the process fairer to the plaintiffs in environmental discrimination cases.

17. Northern, *supra* note 15, at 535.

18. *Id.*

19. M. Patrice Benford, Note, *Life, Liberty & the Pursuit of Clean Air: Fight for Environmental Equality*, 20 T. MARSHALL L. REV. 269, 275 (1995); *see also* R.I.S.E., Inc. v. Kay, 768 F. Supp 1144, 1149 (E.D. Va. 1991).

20. *See* Part II, *infra*, for a discussion of the three key environmental discrimination cases that proves this assertion.

21. *R.I.S.E.*, 768 F. Supp. at 1149.

I. BRIEF OVERVIEW OF THE PROBLEM

The problem of environmental discrimination has been documented in several studies and discussed in numerous books and law review articles. Therefore, I only will briefly highlight the information contained in those sources.

After a protest by black residents in Warren County, North Carolina,[22] the United States General Accounting Office (GAO) sponsored a study to determine the extent of environmental discrimination in America.[23] As a result of its observations, the GAO concluded that a correlation existed between the decisions to place hazardous waste landfills in an area and the race and income level of the people living in the area.[24]

Governmental agencies were not the only organizations concerned about the adverse impact environmental hazards had on low-income and minority persons. In 1987, the United Church of Christ (UCC) did its own analysis of the problem.[25]After analyzing all of the data, the UCC determined that race, not socioeconomic status, accounted for the fact that certain communities in the United States had more hazardous waste facilities than other communities.[26]

22. In 1982, a coalition of civil rights groups protested the placement of a landfill in a black county. *See* Gunn, *supra* note 10, at 1228 (citing Marcia Coyle, *When Movements Coalesce*, NAT'L L.J., Sept. 21, 1992, at S10.)

23. As a part of the information-gathering process, GAO staff met with an official of the Southern Christian Leadership Conference to discuss racial issues surrounding selection of the Warren County PCB landfill site. GEN. ACCOUNTING OFFICE, GAO/RCED-83-168, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES 2 (1983) [hereinafter GAO/RCED-83-168]. The participants in the study examined landfills in the eight states that compose EPA's Region IV (Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee). *Id.*

24. ENVIRONMENTAL EQUITY, *supra* note 12, § 2.2.1 (citing GAO/RCED-83-168, *supra* note 23). The persons conducting the study discovered that three of the four commercial hazardous waste facilities in the region were in predominately African American communities and the fourth was in a low-income community. GAO/RCED-83-168, *supra* note 23, at 1. Furthermore, at least twenty-six percent of the population living in all four communities had incomes below the poverty level. *Id.* African Americans made up the majority of the persons living in poverty. *Id.*

25. As a part of the study, the UCC examined RCRA commercial hazardous waste facilities across the country. GAO/RCED-95-84, *supra* note 7, at 14 (citing COMM'N FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIOECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987) [hereinafter UCC STUDY]); *see also* BULLARD, *supra* note 13, at 17. The UCC study was more comprehensive than the GAO report because the analysts focused on the entire United States. *See* Frye, *supra* note 11, at 59.

26. According to the UCC's report, communities with a single hazardous waste facility had twice as many people of color as did communities without such a facility. UCC STUDY, *supra* note 25, at xiii, *cited in* Northern, *supra* note 15, at 500. In addition, the study reported that

The GAO and UCC reports spawned considerable debate about the inequitable distribution of environmental hazards. For example, in 1990, at a conference held at the University of Michigan, participants presented various reports studying the distribution of environmental hazards by race and income.[27] Afterwards, the conference members gave the information compiled at the conference to then-EPA Administrator William Reilly and urged the agency to conduct an internal investigation into the matter.[28]

In 1992, a study published by the National Law Journal (NLJ) reported that the EPA consistently was negligent in its enforcement efforts in low-income and minority communities.[29] The NLJ study was based upon findings from an eight-month investigation that focused on the connection between race and socioeconomic status and the enforcement of environmental law.[30] The NLJ reviewed every environmental lawsuit filed in the seven years preceding the study and every residential toxic waste site included in the Superfund program.[31]

Like any form of discrimination, environmental discrimination has been acknowledged as a major problem.[32] Legal scholars and persons seeking to combat environmental discrimination have suggested different solutions to the problem.[33] The next part of the paper deals with the utility of the Equal

communities with two or more facilities had more than three times the population of people of color as communities without such sites. ENVIRONMENTAL EQUITY, *supra* note 12, § 2.2.1.

27. Paul Mohai & Bunyan Bryant, *Environmental Injustice: Weighing Race and Class As Factors in the Distribution of Environmental Hazards*, 63 U. COLO. L. REV. 921, 923 (1992); *see also* Joseph Ursic, Note, *Finding a Remedy for Environmental Justice: Using 42 U.S.C. § 1983 to Fill in a Title VI Gap*, 53 CASE W. RES. L. REV. 497, 499 (2002).

28. Mohai & Bryant, *supra* note 27, at 499.

29. *See* Claire L. Hasler, Comment, *The Proposed Environmental Justice Act: "I Have a (Green) Dream*," 17 U. PUGET SOUND L. REV. 417, 425–427 (1994) (discussing findings of NLJ study); *see also* Robert B. Wiygul & Sharon Carr Harrington, *Environmental Justice in Rural Communities: Part One: RCRA, Communities, and Environmental Justice*, 96 W. VA. L. REV. 405, 419 (1993–1994).

30. Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 ECOLOGY L.Q. 1, 18 (1995).

31. Marianne Lavelle & Marcia Coyle, *The Federal Government, in Its Cleanup of Hazardous Sites and Its Pursuit of Polluters, Favors White Communities over Minority Communities Under Environmental Laws Meant to Provide Equal Protection for All Citizens, A National Law Journal Investigation Has Found*, 15 NAT'L L.J., Sept. 21, 1992, at S2.

32. Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice,"* 47 AM. U. L. REV. 221, 222 (1997); *see also* Robert D. Bullard, *Anatomy of Environmental Racism and the Environmental Justice Movement*, *in* GRASSROOTS, *supra* note 11, at 15–39; C.J. TIMMONS ROBERTS & MELISSA M. TOFFOLON-WEISS, CHRONICLES FROM THE ENVIRONMENTAL JUSTICE FRONTLINE 3–28 (2001); Terence J. Centner et al., *Environmental Justice and Toxic Releases: Establishing Evidence of Discriminatory Effect Based on Race and Not Income*, 3 WIS. ENVTL. L.J. 119, 120 (1996).

33. *See* Ursic, *supra* note 27, at 497; *see also* James H. Colopy, Note, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13

Protection Clause as a legal vehicle for addressing environmental discrimination.

II. THE EQUAL PROTECTION CLAUSE

A. Brief Overview of Relevant Equal Protection Jurisprudence

The Fourteenth Amendment specifically empowers the federal government to act against discriminatory government actions at the state and local level, particularly those made on the basis of race.[34] According to the Equal Protection Clause, no state shall "deny to any person within its jurisdiction the equal protection of the laws."[35] "[T]he purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents."[36] The United States Supreme Court has concluded that the function of the Equal Protection Clause is to ensure that the government treats "all persons similarly situated" the same.[37]

An equal protection claim essentially has two elements: (1) the plaintiff was treated differently from other similarly situated persons, and (2) this different treatment was motivated by one of the following: (a) an intent to discriminate on the basis of a characteristic, such as race or religion; (b) an intent to inhibit or punish the exercise of a fundamental right guaranteed by the Constitution; or (c) a bad faith intent to injure a person.[38] In an equal protection case, after the plaintiff shows that a facially neutral statute has a disproportionate impact on him, he must prove that the governmental decision-maker responsible for the act causing the adverse impact was motivated by an invidious discriminatory purpose.[39]

STAN. ENVTL. L.J. 125 (1994); Benford, *supra* note 19, at 284–289 (advocating the use of Title VIII of the Civil Rights Act of 1968 (Fair Housing Act), 42 U.S.C. §§ 3601–3631, to combat environmental discrimination).

34. Comfort *ex rel*. Neumyer v. Lynn Sch. Comm., 283 F. Supp. 2d 328, 391 (D. Mass. 2003).

35. U.S. CONST. amend. XIV, § 1; *see also* Bluitt v. Houston Indep. Sch. Dist., 236 F. Supp. 2d 703, 734 (S.D. Tex. 2002).

36. Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000) (quoting Sioux City Bridge Co. v. Dakota County, 260 U.S. 441, 445 (1923)).

37. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985) (stating that "[t]he Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike.").

38. *See* Diesel v. Town of Lewisboro, 232 F.3d 92, 103 (2d Cir. 2000) (quoting LeClair v. Saunders, 627 F.2d 606, 609–10 (2d Cir. 1980)).

39. *See* United States v. Hare, 308 F. Supp. 2d 955, 991 (D. Neb. 2004).

The courts have acknowledged intentional discrimination in three contexts. First, courts have been willing to find discriminatory intent in those cases where a law or policy has expressly categorized citizens on the basis of race.[40] In addition, courts have found discriminatory intent in situations where a facially neutral law or policy has been applied differently to citizens because of their race.[41] Finally, courts have noted that discriminatory intent may exist when a facially neutral law or policy, that has been applied evenhandedly, was motivated by discriminatory intent and had a racially discriminatory impact.[42]

The Supreme Court has structured its equal protection analysis by establishing the following three levels of review for challenges to government-supported actions: rational basis, intermediate scrutiny, and strict scrutiny.[43] "When a legislative enactment has been challenged on equal protection grounds, one standard of review is rational basis review, which requires that the law be rationally related to a legitimate government interest."[44] The rational basis test is the lowest level of review. Thus, governmental decisions analyzed under the rational basis test are almost always upheld. The rational basis test is applied to cases where the challenged activity did not impact a person in a protected class or undermine a fundamental right.[45]

The Supreme Court has also developed an intermediate level of scrutiny that lies "[b]etween [the] extremes of rational basis review and strict scrutiny . . . ."[46] Typically, the Court applies intermediate scrutiny when it has to review laws that impact quasi-suspect classifications such as gender or age.[47] When a classification affects "suspect classes" of persons or burdens a fundamental right, "strict scrutiny" applies and a compelling governmental interest must be shown to justify the classification.[48]Strict scrutiny is such a high standard that its application usually results in a victory for the plaintiff. The standard is applied whenever a member of a suspect class can prove discriminatory intent.[49] Therefore, in order to have any level of success,

40. *See* Hunt v. Cromartie, 526 U.S. 541, 546 (1999).

41. *See* Yick Wo v. Hopkins, 118 U.S. 356, 367–68 (1886).

42. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977).

43. Goulart v. Meadows, 220 F. Supp. 2d 494, 501 (D. Md. 2002); *see also* Darren Lenard Hutchinson, *"Unexplainable on Grounds Other Than Race": The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, U. ILL. L. REV. 615, 633–634 (2003).

44. Ramos v. Town of Vernon, 353 F.3d 171, 174–75 (2d Cir. 2003).

45. *See id.*; Joel v. City of Orlando, 232 F.3d 1353, 1358 (11th Cir. 2000).

46. Clark v. Jeter, 486 U.S. 456, 461 (1988).

47. *See* United States v. Coleman, 166 F.3d 428, 431 (2d Cir. 1999) (per curiam); *see also* Craig v. Boren, 429 U.S. 190, 197 (1976).

48. United States v. Extreme Assocs., Inc., 352 F. Supp. 2d 578, 585 (2005).

49. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226 (1995).

> [T]he purpose of strict scrutiny is to "smoke out" illegitimate uses of race by assuring that [a state actor] is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen "fit" this compelling goal so closely that there

environmental discrimination plaintiffs must prove that decisions to place environmental hazards in their communities were motivated by racial considerations. To meet their burden of proof, those plaintiffs must have access to quality information.[50]

B. Seminal Equal Protection Cases

Equal Protection litigation is controlled by two seminal Supreme Court decisions: *Washington v. Davis*,[51] and *Village of Arlington Heights v. Metropolitan Housing Development Corp*.[52]

In *Davis*, Harley and Sellers, two black men, unsuccessfully applied to become police officers in Washington, D.C.[53] Their applications were rejected because they did not pass a written personnel test.[54] Harley and Sellers filed a lawsuit alleging that the police department's recruiting procedures, including the written personnel test, were racially discriminatory in violation of the Due Process Clause of the Fifth Amendment.[55] Instead of claiming intentional discrimination, the plaintiffs contended that the written test bore no relationship to job performance and had a discriminatory effect of screening out black applicants.[56]

The district court made three key conclusions. The first two conclusions the court made were that the number of blacks on the police force was not proportionate to the racial content of the city and that more blacks flunked the test than white applicants.[57] The court also determined that the police department did not validate the test to gauge if it was a reliable indicator of job performance.[58] Nonetheless, the district court refused to find intentional discrimination on the part of the police department and granted the department's summary judgment motion.[59]

In reaching its decision, the district court was influenced by the fact that (1) 44% of the new police recruits were blacks, a percentage that was proportionate to the number of blacks on the police force and equal to the number of 20- to 29-year-old blacks located in the recruiting area; (2) the

is little or no possibility that the motive for the *classification* was illegitimate racial prejudice or stereotype.

Id. (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989)) (emphasis added).

50. The value of information will be discussed in a later section.

51. 426 U.S. 229 (1976).

52. 429 U.S. 252 (1977).

53. *Davis*, 426 U.S. at 232–33.

54. *Id*.

55. *Id*.

56. *Id*. at 235.

57. *Id.*

58. *Davis*, 426 U.S. at 235.

59. *Id*.

police department had affirmatively recruited blacks and had many pass the test, but then fail to report for duty; and (3) the test was a useful indicator of training school performance and was not designed to, and did not, discriminate against otherwise qualified blacks.[60]

In an opinion written by Justice White, the United States Supreme Court affirmed the district court's verdict because it concluded that the written test was facially neutral.[61] The Court decided that the disproportionate impact of the test on black applicants did not necessitate a finding that the test was a purposely discriminatory device.[62] In order to justify its decision, the Court asserted that a governmental action is not unconstitutional just because it has a disparate impact upon the members of a minority group.[63] The Court reasoned that "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution."[64]

Since *Davis*, it has been understood that a facially neutral governmental action may be constitutionally valid even if it disproportionally impacts racial minorities. However, if the evidence shows that an "invidious discriminatory purpose" was a motivating factor behind the action, the government has the burden of proving that the action was taken using racially neutral selection criteria and procedures.[65] Therefore, in order to prove that the law or government action violates the Equal Protection Clause, a person must trace the disparate impact to a discriminatory purpose.[66]

In light of the *Davis* decision, to be successful, environmental discrimination plaintiffs must show that the placement of the environmental hazard in their community was motivated by intentional discrimination. A person who seeks recovery under a theory of purposeful discrimination must demonstrate that the governmental authority implemented the facially neutral policy being challenged "'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[67] After *Davis*, it was clear that in order to bring a successful equal protection case the plaintiff had to prove that the government decision-maker was motivated by discriminatory intent.[68] A few years later, the United States Supreme Court used a case involving a denial of a rezoning request to build low- and moderate-income housing to elaborate upon

60. *Id*. at 235–36.

61. *Id.* at 246.

62. *Id.*

63. *Davis*, 246 U.S. at 242.

64. *Id*.

65. *Id*. at 241–42.

66. Johnson v. Governor of Fla., 353 F.3d 1287, 1310 (11th Cir. 2003).

67. Pryor v. Nat'l Collegiate Athletic Ass'n, 288 F.3d 548, 562 (3d Cir. 2002) (quoting Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979)).

68. *Davis*, 426 U.S. at 239.

its *Davis* decision.[69] In an opinion written by Justice Powell, the Court concluded that if a discriminatory purpose was a motivating factor behind a challenged activity, it may be shown by the introduction of circumstantial rather than direct evidence.[70]

In *Village of Arlington Heights*, the Supreme Court suggested the following relevant factors to use as evidentiary sources: (1) the level of impact the governmental decision has on different races (whether the action bears more heavily on one race than the other);[71] (2) the historical background of the decision (whether there was a series of governmental actions taken for invidious purposes);[72] (3) the sequence of events occurring prior to the challenged action (whether there were departures, substantive or procedural, from the normal decision-making process);[73] and (4) the legislative or administrative history of the challenged activity (whether a review of the contemporary statements made by the decision-makers, the minutes of the meetings regarding the challenged decision, or the reports pertaining to the challenged decision indicate any type of unfair purpose).[74] In addition to the above-mentioned factors, the foreseeability of the adverse consequences may have some bearing on the existence of discriminatory intent.[75]

If a facially neutral law is administered in a way that reveals an overwhelming pattern of discrimination, the pattern of discrimination itself may be enough for the court to infer discriminatory intent. This is especially true in cases where a pattern, unexplainable on grounds other than race, emerges from the challenged governmental action.[76] Courts have emphasized that "[e]specially strong statistical proof may be sufficient to draw an inference of discriminatory intent . . . ."[77]

For example, in some cases, the governmental entity has engaged in a pattern of discrimination so blatant that the Court has found discriminatory purpose based solely on the pattern. This proposition is illustrated by the legal

69. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977).

70. *Id.* at 266–67.

71. *Id.* at 266.

72. *Id.* at 267.

73. *Id.*

74. *Arlington Heights*, 492 U.S. at 268.

75. *See* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 n.25 (1979). In addressing the foreseeability aspect of discriminatory intent, the Court stated that discriminatory intent "implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279 (citation omitted); *see also* Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394, 409–10 (1991).

76. *See* Turner v. Fouche, 396 U.S. 346, 360–61 (1970); *see also* Sims v. Georgia, 389 U.S. 404, 407–08 (1967).

77. Anderson v. Cornejo, 284 F. Supp. 2d 1008, 1050 (N.D. Ill. 2003).

analysis in *Yick Wo v. Hopkins*.[78] In that case, a city ordinance prohibited laundries from operating in wooden buildings without the consent of the city's board of supervisors.[79] At that time, there were approximately 320 laundries in the city and county of San Francisco; 310 of those laundries were constructed of wood.[80] Chinese residents owned 240 of the 320 laundries.[81] The Chinese residents unsuccessfully petitioned the city's board of supervisors for permission to continue operating their wooden laundries.[82] Nonetheless, all of the white residents (except for one woman) who requested permission to continue operating their wooden laundries were granted exemptions from the ordinance.[83]

The Court stated: "The fact that the right to give consent is reserved in the ordinance shows that carrying on the laundry business in wooden buildings is not deemed of itself necessarily dangerous."[84] Based upon that observation, the Court concluded that the purpose of the ordinance was either to close most of the Chinese laundries or to drive the Chinese out of the city and county of San Francisco.[85] According to the Court, although the law was facially neutral, the public authority applied it with "an evil eye and an unequal hand."[86] Therefore, the Court held that the ordinance was unconstitutional based on the city's discriminatory application of its mandates.[87]

Another case decided on the basis of statistics was *Gomillion v. Lightfoot.*[88] *Gomillion* involved an evaluation of the validity of Local Act No. 140. That law, which was passed by the Alabama Legislature, redefined the boundaries of the City of Tuskegee.[89] Prior to the passage of the statute, the city was square in shape, but as a result of the statute's mandates the shape of the city was changed into a strangely irregular twenty-eight-sided figure.[90] The ultimate impact of the law was to remove all except four or five of the black citizens from the city.[91] On the contrary, not a single white resident was

78. 118 U.S. 356 (1886); *see also* David Crump, *Evidence, Race, Intent, and Evil: The Paradox of Purposelessness in the Constitutional Racial Discrimination Cases*, 27 HOFSTRA L. REV. 285, 289–291 (1998).

79. *Yick Wo*, 118 U.S. at 358.

80. *Id.* at 359.

81. *Id.*

82. *Id*.

83. *Id.* at 359.

84. *Yick Wo*, 118 U.S. at 361.

85. *Id*. at 363.

86. *Id.* at 373–74.

87. *Id.* at 363.

88. 364 U.S. 339 (1960).

89. *Id*. at 340.

90. *Id*. at 341.

91. *Id.*

removed from the city.[92] Therefore, the result of the Act was to deprive blacks of the benefits of living in the city, including the right to vote in city elections.[93]

After the passage of the statute, a group of black city residents filed an action claiming that the statute was unconstitutional because it violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution.[94] The district court granted the city's motion for dismissal because it concluded that it lacked jurisdiction to hear the matter and the complaint failed to state a claim upon which relief could be granted.[95] The United States Supreme Court held that the law was probably unconstitutional, so the petitioners were entitled to prove their allegations at trial.[96] In reaching its decision, the Supreme Court reasoned that the act did not appear to be an ordinary geographic redistricting measure. Instead, the Supreme Court noted that it would be easy to conclude that the law was "tantamount . . . to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote."[97]

Cases like the ones discussed above are rare and have been nonexistent in the environmental discrimination context. As a result, the establishment of intent as the standard for proving discrimination has placed an onerous burden on plaintiffs. In order to be successful, these plaintiffs have to introduce evidence showing that the governmental action was clearly motivated by discriminatory considerations. A central reason why plaintiffs in environmental discrimination cases have been unable to meet their burden of proof is the lack of access to quality information. As the results of the environmental discrimination cases discussed in the next section indicate, information is a vital component of putting forth a successful case.

III. CURRENT APPLICATION OF THE INTENT STANDARD IN ENVIRONMENTAL DISCRIMINATION CASES

The following three cases illustrate how the Equal Protection doctrine has been interpreted in cases involving the placement of environmentally hazardous facilities in predominately minority communities. In each case, the court rejected the plaintiffs' equal protection claim, citing an absence of clear evidence of discriminatory intent on the part of the decision-maker. Even though the evidence of disparate impact was clear and acknowledged by some

92. *Id.*
93. *Gomillion*, 364 U.S. at 341.
94. *Id.* at 340.
95. *Id.*
96. *Id.* at 347–48.
97. *Id.* at 341.

of the courts, the courts' adherence to the intent requirement prevented the plaintiffs from prevailing.[98] In each case, the plaintiffs' inability to prove purposeful and conscious intent to discriminate on the part of the decision-maker prevented them from winning their Equal Protection challenge.

A. Bean v. Southwestern Waste Management Corp.[99]

In *Bean*, the plaintiffs sued to contest the Texas Department of Health's decision to grant a permit to Southwestern Waste Management to place a solid waste facility in the East Houston-Dyersdale Road area in Harris County.[100] The plaintiffs claimed that the decision was motivated by racial discrimination because the city had a history of placing solid waste sites in black neighborhoods.[101]

The plaintiffs relied upon statistical data to show a pattern of racial discrimination in the state agency's placement of solid waste sites in minority communities.[102] The first set of data supplied by the plaintiffs dealt with the two solid wastes sites that the City of Houston planned to use.[103] The plaintiffs contended that the selection of those two sites was discriminatory because the area contained 100% of the type-one landfills used by the City of Houston, and only 6.9% of the entire population of the city.[104] The Court found that argument unpersuasive for two reasons. First, the Court reasoned that, because only two sites were involved, the data was statistically insignificant.[105] Second, the Court determined that, of the two proposed sites, one was in a primarily white census tract and the other was in a primarily minority census tract.[106] Therefore, race was probably not a consideration when the city chose the two sites.[107]

The second set of data the plaintiffs submitted focused on the total number of solid waste sites located in the proposed target area.[108] The plaintiffs noted that the target area contained 15% of the city's solid waste sites, but only 6.9% of its population.[109] The plaintiffs argued that most of the solid waste sites

98. *See* Brian Faerstein, Comment, *Resurrecting Equal Protection Challenges to Environmental Inequity: A Deliberately Indifferent Optimistic Approach*, 7 U. PA. J. CONST. L. 561, 566–569 (2004) (discussing cases where the plaintiffs attempted to use the Equal Protection Clause to challenge industrial siting decisions).

99. 482 F. Supp. 673 (S.D. Tex. 1979).

100. *Id.* at 674–75.

101. *Id*. at 675.

102. *Id*. at 678.

103. *Id.*

104. *Bean*, 482 F. Supp. at 678.

105. *Id.*

106. *Id.*

107. *Id*.

108. *Id.*

109. *Bean*, 482 F. Supp. at 678.

were placed in that area because it had a 70% minority population.[110] The court decided that the placement of so many solid waste sites in the target area had nothing to do with race because it was reasonable to place the sites in an area that was sparsely populated.[111] In addition, the court concluded that race was not a factor in the placement of the sites because half of the sites in the target area were in census tracts with more than a 70% white population.[112]

The third set of data put forth by the plaintiffs considered the city as a whole. The data showed that only 32.4% of the sites were located in the western half of the city where 73.4% of the whites lived.[113] In addition, according to the data, 67.6% of the sites were located in the eastern half of the city where 61.6% of the minority population resided.[114] The court disagreed with the plaintiffs' interpretation of the data. After analyzing the data relying on census tracts instead of halves or quadrants of the city, the court stated that "[t]he difference between the racial composition of census tracts in general and the racial composition of census tracts with solid waste sites is . . . only 0.3%."[115] The court found that small difference to be statistically insignificant.[116]

After evaluating all of the statistical evidence, the court rejected the plaintiff's argument and held that, although the siting decision appeared to be "unfortunate and insensitive" the plaintiffs had not proven that the state officials had a discriminatory intent.[117] The court pointed out several weaknesses in the plaintiffs' evidence. Regarding the statistical data, the court indicated that neighborhood data, as opposed to census tract data, would have been more forceful if the plaintiffs had shown that sites located in predominately white census tracts were in minority neighborhoods.[118] Moreover, the court found that the non-statistical data was inadequate to show discriminatory intent.[119] The court stated that, in its opinion, there were too many unanswered questions, including how sites were selected and what factors were used in the placement of the sites.[120]

110. *Id.*
111. *Id.*
112. *Id*.
113. *Id*.
114. *Bean*, 482 F. Supp. at 678.
115. *Id.* at 679.
116. *Id.*
117. *Id.* at 680.
118. *Id*.
119. *Bean*, 482 F. Supp. at 679–80.
120. *Id*. at 680.

B. East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Commission[121]

The minority plaintiffs in *East Bibb* sought to reverse a decision by the local planning board to locate a landfill in a predominately black community.[122] In the case, Mullis Tree Service, Inc. and Robert Mullis applied to the Commission for a conditional use permit to operate a non-putrescible waste landfill in a census tract containing 5,527 people.[123] Of these residents, 3,367 were black and 2,149 were white.[124] The Commission initially voted to deny the application.[125] However, after rehearing the matter, the Commission approved the final site plan for the landfill and issued a conditional use permit to Mullis.[126]

Analyzing the permit decision, the court applied the *Arlington Heights* five-part test to determine whether the plaintiffs' evidence supported a finding of discriminatory intent.[127] After reviewing all of the evidence, the court concluded that the Commission's decision to approve the conditional use permit was not motivated by the intent to discriminate against blacks.[128] The court noted that, since the census tract contained a majority black population, the decision to approve the placement of the landfill in that area had a greater impact on blacks than it did on whites.[129] Therefore, the court conceded that there was glaring evidence of disparate impact.[130] Nevertheless, according to the court, there were "no specific antecedent events which support a determination that race was a motivating factor in the Commission's decision."[131] In making that determination, the court emphasized that the only other Commission-approved landfill was located in a predominately white census tract.[132]

The court's opinion did offer environmental discrimination plaintiffs some guidance. The trial judge noted that the local Commission could not "actively solicit this or any other landfill application,"[133] and the opinion hinted that sudden changes in zoning or relaxations in procedure would be considered

121. 706 F. Supp. 880 (M.D. Ga. 1989).
122. *Id.* at 881.
123. *Id.*
124. *Id.*
125. *Id*. at 882.
126. *East Bibb*, 706 F. Supp. at 883.
127. *Id.* at 884.
128. *Id*.
129. *Id.*
130. *Id.*
131. *East Bibb*, 706 F. Supp. at 886.
132. *Id*. at 884.
133. *Id.* at 885.

highly suspect.[134] The court determined that evidence of past discriminatory decisions by agencies other than the county planning commission was irrelevant to the discrimination issue it was considering.[135] Therefore, courts may refuse to consider the general state or city history of racism and segregation. However, the court did not rule out the possibility of considering past decisions by the Commission that had resulted in a disparate impact on the minority community.[136]

C. R.I.S.E., Inc. v. Kay[137]

In *R.I.S.E.*, a bi-racial citizen group challenged the decision of the local county board to site a landfill in a predominately black community in Virginia.[138] Since the landfills in King and Queen County did not meet the state's new environmental standards, the Board of Supervisors negotiated with the Chesapeake Corporation for a joint venture landfill.[139] During the summer of 1988, after Chesapeake abandoned the negotiations, the board decided to purchase property from Chesapeake to use as a landfill site.[140] Chesapeake offered the board the choice of buying either the Piedmont Tract or the Norman-Saunders Tract.[141] The board selected the Piedmont Tract because tests showed that it was suitable for use as a landfill.[142] After several public hearings, members of the Board unanimously voted to buy the Piedmont Tract for use as a landfill.[143]

The members of the community where the proposed landfill was to be located opposed the project.[144] To hear the concerns of the residents, several board members attended a meeting organized by Reverend Taylor, pastor of Second Mt. Olive Baptist Church.[145] The persons objecting to the project were worried that if the landfill was placed in their neighborhood (1) their quality of life would be diminished; (2) their property values would be lowered; (3) their worship and social functions at Second Mt. Olive Baptist Church would be disrupted; (4) the grave sites on the church grounds would be damaged; (5)

134. *Id*. at 886.
135. *Id.* at 885.
136. *East Bibb*, 706 F. Supp. at 885.
137. 768 F. Supp. 1144 (E.D. Va. 1991).
138. *Id.* at 1148.
139. *Id*. at 1146.
140. *Id.* at 1147.
141. *Id.* at 1146.
142. *R.I.S.E.*, 768 F. Supp. at 1146).
143. *Id*. at 1147.
144. *Id.*
145. *Id.*

local access roads would have to be improved; and (6) the historic church[146] and community would be harmed.[147]

In light of the fact that the three other landfills in the area were all in neighborhoods that were at least ninety-five percent black and that the county had previously refused to site a landfill in a predominately white neighborhood, the court acknowledged that the landfill had a disproportionate impact upon the black community.[148] Nonetheless, the court concluded that the plaintiffs had not satisfied the remainder of the discriminatory purpose equation and rejected the Equal Protection claim.[149]

The court was influenced by the board's need to decide quickly on a location for the landfill.[150] The board's prior attempt to buy landfill space had been unsuccessful.[151] Because the Piedmont Tract had been found environmentally suitable for the purpose of the landfill development, instead of looking at other possible locations, the board took immediate steps to acquire the property.[152] Moreover, the court seemed to give some weight to the fact that the board making the siting decision contained three white members and two black members.[153] Further, the court appeared to suspect R.I.S.E.'s motives in bringing a discrimination action to challenge the siting decision. The court stated that "[r]ace discrimination did not become a significant public issue until it appeared that the initial thrust was failing."[154] The court's skepticism was probably based upon the fact that R.I.S.E. recommended a replacement site that was located in a predominately black area.[155]

D. Components of a Successful Environmental Discrimination Case

The intent requirement has been a major stumbling block for environmental discrimination plaintiffs seeking relief under the Equal Protection Clause.[156] Nonetheless, the courts have acknowledged that if the plaintiffs present the correct type of circumstantial evidence, they can prevail using the Equal Protection Clause. The courts have given no indication that they will substitute the intent requirement for a lesser standard.[157] In order to

146. In 1869, freed slaves built the Second Mt. Olive Baptist Church. *Id.*

147. *R.I.S.E.*, 768 F. Supp. at 1147.

148. *Id.* at 1148–49.

149. *Id.* at 1149.

150. *Id.* at 1150.

151. *Id.*

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

153. *See id.* at 1146.

154. *Id.* at 1148.

155. *Id.*

156. *See* Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 829–33 (1993).

157. Cox v. City of Jackson, 343 F. Supp. 2d 546, 570 (S.D. Miss. 2004).

meet the burden of proof, under the current system, plaintiffs must have access to information. Therefore, persons fighting environmental discrimination should take steps to gather the information necessary to prove discriminatory intent.

In light of the case precedent, this section is an attempt to demonstrate the important role that information plays in preparing a successful equal protection action in the environmental discrimination context. The starting point in preparing an Equal Protection case is still the *Arlington Heights* factors.[158] Therefore, the focus of the discussion is upon the criteria established by that case. A multi-factor approach similar to the one adopted here has been taken by others.[159] The factors dealing with events leading up to the decision and the legislative and administrative history of the decisions are combined.

1. Disparate Impact

The first thing an environmental discrimination plaintiff needs to establish is the existence of racially disparate impact.[160] In order to be successful, it is important for the plaintiff to have good statistical data. According to Bradford Mank, the selection of the population sample for comparison impacts the disparate impact analysis. Mank further asserts that, in order to prove disparate impact, the plaintiff must compare the demographics of those in the adversely affected area with others in the area who are not impacted by the decision.[161] The effort and expense involved in gathering data often leads plaintiffs to conduct their analyses using "pre-ordained units of [population] comparison, such as census tracts or zip codes."[162] Census data is often used because it is readily available in paper and computerized forms.[163] The EPA suggests the use of census data to classify the population in the affected area with regards to race, ethnicity, economic, and educational demographics.[164] However, the agency cautions that census data may not be accurate in some

158. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977).

159. *See e.g.*, Alice Kaswan, *Environmental Law: Grist For The Equal Protection Mill*, 70 U. COLO. L. REV. 387, 411-426 (1999).).

160. East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n, 706 F. Supp. 880, 884 (M.D. Ga. 1989).

161. Bradford C. Mank, *Proving an Environmental Justice Case: Determining an Appropriate Comparison Population*, 20 VA. ENVTL. L.J. 365, 383 (2001).

162. *Id.* at 410; *see also* EPA GUIDANCE, *supra* note 9, at § 2.1.2 (stating that data obtained from the census is one of the most common types of information used to determine the minority status of a community).

163. The EPA opines that the availability of census demographic information in digitized format can be helpful when analyzing environmental justice issues. EPA GUIDANCE, *supra* note 9, at § 5.1.

164. *Id.*

cases.[165] One possible cause of this deficiency is the fact that census data is the result of self-reporting.[166]

In most instances, such as in the *Bean* case, this type of analysis presents problems.[167] In that case, the court reasoned that the plaintiffs' case might have been stronger if they had submitted neighborhood data as opposed to census tract data.[168] The census tract data presented did not provide a true picture of the community affected by the proposed landfill. In justifying its decision not to find a discriminatory purpose, the court noted that the county's other landfill was located in a predominately white census tract.[169]

In order to obtain better information to submit to the court about the composition of the community, the plaintiffs should use other methods. For instance, they may be able to get information from local resources by asking questions, conducting interviews, and doing research.[170] Additionally, the plaintiffs can use a geographic information system (GIS)[171] or a similar mapping system to identify the location and percentage of the minority persons in the community.[172] The EPA has acknowledged that maps, aerial photographs, and GIS can be used to discover geographic areas where possible environmental justice concerns subsist.[173]

It appears that the plaintiffs will have a better claim if they are able to show, for example, that the area immediately surrounding the proposed facility is composed almost exclusively of minority residents and that the population becomes whiter as the distance from the facility increases. Hence, in order to obtain the most useful data, environmental discrimination plaintiffs should use an analytic method that analyzes demographics in terms of proximity to the proposed hazard.[174]

The effects of an environmental hazard frequently occur in inverse proportion to the distance from the location or site of the hazard.[175] For

165. *See id*. at § 2.1.2. "[I]t may be necessary for the EPA NEPA analyst to validate [census] information with the use of additional sources." *Id*. "The additional methods . . . include contacting local resources, government agencies, commercial database firms, and the use of locational/distributional tools." *Id*.

166. *Id.* at § 5.1.

167. Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673, 677 (S.D. Tex. 1979).

168. *Id*.

169. *Id.* at 678.

170. *See generally* EPA GUIDANCE, *supra* note 9, at §§ 2.1.2, 5.1.

171. GIS systems are geographic references or computerized atlases. *See id*. at § 5.1.

172. *Id*.

173. *Id.*

174. *See* Richard D. Gragg, III et al., *The Location and Community Demographics of Targeted Environmental Hazardous Sites in Florida*, 12 J. LAND USE & ENVTL. L. 1, 12–14 (1996) (describing a study conducted in fifteen Florida counties).

175. *See* Julia B. Latham Worsham, *Disparate Impact Lawsuits Under Title VI, Section 602: Can a Legal Tool Build Environmental Justice?*, 27 B.C. ENVTL. AFF. L. REV. 631, 649 (2000)

example, the closer the minority population is to the hazard, the greater the likelihood that those persons will be adversely impacted. Thus, proximity to the environmental hazard usually correlates with the probability that the minority population will be disproportionately affected by the location of the hazard.[176] As a consequence, if environmental discrimination advocates can show that minority persons in the community live nearest to the environmental hazard, they may have a better chance of proving disparate impact. Commentators have suggested the use of "maps, aerial photographs, and information databases" in order to identify the communities that are within close proximity of the proposed project.[177]

2. Historical Background

In *Arlington Heights*, the Supreme Court suggested that courts look to the role of historical discrimination to determine discriminatory intent.[178] The court in *East Bibb*, however, stated that it would only consider relevant discrimination perpetrated by the *particular* government agency that made the decision being challenged by the plaintiffs.[179] In the context of hazardous waste sitings, the agencies are usually newly created, so they may have no history of discrimination. Therefore, environmental discrimination plaintiffs will be at a substantial disadvantage when trying to gather the information necessary to prove discriminatory intent.

Furthermore, it appears that the court's focus may be even narrower than the actions of the agency involved in the case. For instance, in *R.I.S.E.*, while analyzing the past siting decisions of the board, the court pointed out which present board members had been involved in making those decisions.[180] Consequently, it is possible that the plaintiffs could prove discriminatory intent in past siting decisions by the agency at issue, and still fail, if the current members were not a part of the agency at the time those siting decisions were made.

(citing EPA, INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS (1998), and stating that the identity of the population affected is "generally determined by proximity to the facility").

176. Gragg et al., *supra* note 174, at 16–17.

177. Cheryl A. Calloway & Karen L. Ferguson, *The "Human Environment" Requirement of the National Environmental Policy Act: Implications for Environmental Justice*, 1997 DETROIT C. L. MICH. ST. L. REV. 1147, 1165 (1997); *see also* EPA GUIDANCE, *supra* note 9, at § 5.1. Local maps and aerial photographs may give a "snap shot," or big picture of where low-income and minority persons are located in the area and their proximity to the proposed project. *Id.* They may also be used to identify important natural resources that may be affected by the proposed project. *Id.*

178. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 267–68 (1976).

179. East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n, 706 F. Supp. 880, 885 (M.D. Ga. 1989).

180. R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144, 1148 (E.D. Va. 1991).

One potential solution to the problem is for the plaintiffs to have background checks conducted on the individual agency members to determine their attitudes toward racial minorities. This information may also be gained by searching old newspapers.[181] Another potential source of this type of information is minutes from agency meetings or pubic hearings. If the plaintiffs are able to discover insensitive remarks the members have made in their public and/or private capacity, they may be able to convince the court that the remarks are relevant to show that racial discrimination affected the agency's decision-making process. In addition, the plaintiffs may strengthen their case if they can show that an agency member's past behavior indicates that he or she has a tendency to disregard the concerns of the minority community (e.g., associating with a business venture that exploits minorities).

The racial composition of the decision-making body may also come into play under this factor. This seemed to carry some weight in *R.I.S.E.* In that case, when finding no discriminatory purpose, the court emphasized that the board making the decision contained two black members.[182] The court's reliance on that fact to support its finding of no discriminatory purpose is flawed for two reasons. First, the court did not consider the fact that the black members on the board were out-numbered three to two.[183] Thus, even if both black members had voted against the siting decision, the permit probably would have still been approved. Second, the court's reasoning presupposes that blacks are not capable of intentionally discriminating against other blacks. It is entirely possible for an all minority decision-making body to intentionally discriminate against a predominantly minority community.[184] In addition, the court noted that the two black members were elected to the board in a special election, after the federal government ordered a redistricting.[185] The fact that the election was ordered should have indicated to the court that some type of racial tension might have existed in the county.

181. *See East Bibb*, 706 F. Supp. at 885. The court was willing to read newspaper articles to get historical background on decision-makers. *Id*.

182. *R.I.S.E.*, 768 F. Supp. at 1146 (noting the racial composition of the board).

183. *See id.*

184. *See* Castaneda v. Partida, 430 U.S. 482, 503 (1977) (Marshall, J., concurring). Justice Marshall stated:

> Social scientists agree that members of minority groups frequently respond to discrimination and prejudice by attempting to disassociate themselves from the group, even to the point of adopting the majority's negative attitudes towards the minority. Such behavior occurs with particular frequency among members of minority groups who have achieved some measure of economic or political success and thereby have gained some acceptability among the dominant group.

Id.

185. *R.I.S.E.*, 768 F. Supp. at 1146.

3. Departures from Procedure

The *East Bibb* plaintiffs argued that the Commission had deviated from its normal procedures in several ways: the Commission urged participation from the city and county, it granted a rehearing after the petition for a landfill was denied, and it made certain findings of fact.[186] The court acknowledged that the Commission had departed somewhat from the norm, but did not identify any procedural flaws.[187] However, the court did analyze the reasons behind the procedural changes and indicated that sudden changes in procedure would be given a hard look.[188]

Therefore, environmental discrimination plaintiffs should gather information to familiarize themselves with the agency's decision-making procedures by attending meetings dealing with the placement of environmental hazards, reading the agency's regulations or bylaws, and looking through minutes of agency meetings. To support their assertions, the plaintiffs need to present evidence that the decision-making body deviated from its normal practices when it decided to approve the placement of an environmental hazard in their community. This will shift the burden to the agency to justify its actions. Moreover, if the agency has no independent siting criteria, the plaintiff should point that out to the court. The lack of objective criteria for making placement decisions may indicate that the decision-makers were subjective in the selection process. As a result, the courts may be more willing to find discriminatory intent.

4. Events Prior to the Decision

The court may be willing to infer discriminatory intent from relevant actions that occurred before the agency decided to place the environmental hazard in a minority neighborhood. For example, in *Bean*, the court stated that it would have been helpful to know the initial reason the chosen site was selected for consideration.[189] In addition, the *East Bibb* court opined that it would not be proper for the decision-making agency to actively solicit an application to place a site in a certain neighborhood.[190] Hence, the environmental discrimination plaintiff should do discovery as soon as possible to try to find information about the selection process.[191] If plaintiffs are able to prove that the selection of the minority neighborhood was anything but

186. *East Bibb*, 706 F. Supp. at 886.

187. *Id.*

188. *See id.*

189. Bean v. Sw. Waste Mgmt. Corp., 482 F. Supp. 673, 680 (S.D. Tex. 1979).

190. *East Bibb*, 706 F. Supp. at 885.

191. *See Bean*, 482 F. Supp. at 680 (noting that extensive discovery was not conducted in this case).

random, the court may be more willing to question the motives of the decision-makers.

The plaintiff should also try to show that at the time the site was considered the agency members knew that the disparate impact would occur because they were aware that the affected community was already substantially burdened by environmental hazards. It must be noted, however, that in response to that argument, the court in *Bean* stated that a sample of two sites was not a sufficient database to create a statistically significant result.[192] To avoid that problem, the plaintiffs should focus on other types of environmental hazards in addition to the type at issue. For instance, the affected neighborhood may already have major highways running through it, an airport nearby, and several industrial plants located within it. Recognizing that the agency knew that the affected neighborhood already contained these hazards before it made its siting decision may make the court view the decision more critically.

Another factor that the court considered relevant in *East Bibb* was the fact that the county had previously refused to site the landfill at the approved site, and it had apparently not considered siting the landfill in a predominately white neighborhood.[193] Consequently, the plaintiffs may have a strong case for discriminatory intent if they are able to show that the siting agency did not consider any suitable predominately white neighborhoods as a potential location for the environmental hazard.

5. Other Considerations

The formula for proving intent in an environmental discrimination case comes down to the plaintiffs obtaining good information, including statistical and scientific data, by conducting thorough discovery and utilizing other investigative techniques. The need for presenting good statistical data has been addressed in the previous section. Thus, the focus of this section is on the need for good science.

Good scientific testing will enable the plaintiffs to determine if the proposed site is environmentally suitable for the proposed use. It will also allow the plaintiffs to discover if there are other locations in non-minority neighborhoods that could accommodate the proposed project. Additionally, the plaintiffs will take a big step toward proving a discriminatory purpose if they find a site in the area that is almost identical, but for racial composition, to the one selected. Having the scientific expertise will assist the plaintiffs in suggesting alternative sites. If the plaintiffs in *R.I.S.E.* had availed themselves of scientific technology, they might have been able to convince the board to locate the site in another suitable location. The alternative sites recommended

192. *Id.*

193. 706 F. Supp. at 884–85.

by the plaintiffs in *R.I.S.E.* were determined to be "environmentally unsuitable because of the slope of the land and the existence of a stream running through its center."[194]

In the environmental discrimination area, the courts have made it clear that the placement of an environmental hazard in a minority community would be a violation of the Equal Protection Clause if the plaintiffs showed a disparate impact and proved that the placement decision was made with a discriminatory intent. Thus, the earlier the plaintiffs get involved in the siting process the better chance they will have to compile the significant amount of information necessary to use as circumstantial evidence to build a winning Equal Protection case.

IV. THE DEBATE OVER THE VALIDITY OF THE INTENT REQUIREMENT

After showing a disparate impact, in order to convince the court to apply strict scrutiny[195] to a governmental action, the plaintiff has to prove that the action was motivated by a desire to discriminate against the plaintiff because of his race.[196] In the environmental discrimination context, this means that the plaintiff has to prove that the governmental actor decided to allow the environmental hazard to be located in the plaintiff's community because of the race of the residents. Once the plaintiff meets his or her burden of proof, the burden shifts to the governmental actor to justify the government's decision.[197] The first step the governmental actor must take to survive strict scrutiny is to "articulate a legislative goal that is properly considered a compelling government interest."[198] Then, the government must show that the decision it made or action it took was narrowly drawn to achieve that compelling governmental interest.[199]

Proponents have continued to embrace the justifications that the *Washington v. Davis* Court used when advancing the discriminatory intent

194. R.I.S.E., Inc., v. Kay, 768 F. Supp. 1144, 1148 (E.D. Va. 1991).

195. "To survive strict scrutiny, an ordinance must be justified by compelling governmental interests and employ the least restrictive means to effectuate those interests." Deida v. City of Milwaukee, 176 F. Supp. 2d 859, 864 (E.D. Wis. 2001).

196. Johnson v. California, 336 F.3d 1117, 1117–18 (9th Cir. 2003).

197. *See* Sherbrooke Turf, Inc. v. Minnesota Dep't. of Transp., 345 F.3d 964, 969 (8th Cir. 2003); Johnson v. Mortham, 915 F. Supp. 1574, 1576 (N.D. Fla. 1996).

198. *Sherbrooke Turf*, 345 F.3d at 969 (8th Cir. 2003); *see also* United States v. Barre, 313 F. Supp. 2d 1086, 1090 (D. Colo. 2004), *rev'd*, 324 F. Supp. 2d 1173 (2004). "The question is not whether the government has a compelling interest in generally enacting the law. The inquiry under equal protection is whether there is a compelling interest for the *classification* created by the law." *Barre*, 313 F. Supp. 2d at 1090.

199. *Mortham*, 915 F. Supp. at 1576; *see also* Florida A.G.C. Council, Inc. v. Florida, 303 F. Supp. 2d 1307, 1314 (N.D. Fla. 2004).

requirement.[200] According to the Justices in the *Davis* case, one explanation for requiring equal protection plaintiffs to prove discriminatory intent is the need for judicial economy.[201] The Court opined that, if the plaintiffs only had to prove disproportionate impact, the level of governmental action that would be subject to strict judicial scrutiny would increase.[202] As a consequence, legitimate legislative decision-making would be adversely impacted and the validity of governmental actions, including tax, welfare, public service, regulatory, and licensing statutes would be in doubt.[203]

In his article, Professor Charles R. Lawrence III puts forth several other possible justifications for the *Davis* intent requirement.[204] One justification Professor Lawrence states in his article can be characterized as judicial fairness. He states that the Court determined that it would be unfair for the judiciary to impose penalties on innocent persons in order to remedy harms that they did not intentionally cause.[205] In addition, Professor Lawrence contends that the *Davis* Justices' adoption of the discriminatory intent requirement may be defended on the basis of judicial consistency.[206] Making the standard disproportionate impact, as opposed to discriminatory intent, would be inconsistent with traditional equal protection values because, in order to resolve the issue, the judicial decision-maker would have to focus upon the race of the plaintiffs.[207] Finally, Lawrence seems to indicate that the *Davis* Justices' decision to require discriminatory intent may be explained on the basis of judicial responsibility.[208] It may be argued that it would be improper for the courts to adversely impact legitimate social interests in an attempt to remedy the racially disproportionate impact of facially neutral government actions.[209]

The persons who disagree with the discriminatory intent requirement have consistently stated several main reasons for their opposition. One reason put forth by those persons is that the discriminatory intent requirement places an arduous and unfair burden of proof on the plaintiff.[210] The time and expense

200. Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 320 (1987).

201. *See id*. at 383.

202. Washington v. Davis, 426 U.S. 229, 242 (1976).

203. *Id.* at 248 (citing Frank I. Goodman, *De Facto School Segregation: A Constitutional and Empirical Analysis*, 60 CAL. L. REV. 275, 300 (1972)).

204. Lawrence, *supra* note 200, at 320.

205. *Id*.

206. *Id.*

207. *Id*.

208. *Id.* at 320–21.

209. Lawrence, *supra* note 200, at 320–21.

210. *See* Musa Keenheel, *The Need for New Legislation and Liberalization of Current Laws to Combat Environmental Racism*, 20 TEMP. ENVTL. L. & TECH. J. 105, 119 (2001) (stating that

necessary to determine the motive of a governmental actor can be prohibitive, especially since prospective plaintiffs are frequently low-income people and minorities who often do not have the money to hire an attorney or expert witnesses.[211] As a consequence, very few plaintiffs are able to get the courts to recognize and resolve incidents of racial discrimination.[212]

There are also practical things that make it difficult for plaintiffs to obtain the information necessary to prove that the governmental actor has acted with a discriminatory purpose. For example, the task of discovering the intent of the governmental actor will be easier if there is a detailed record of the steps the governmental actor took to reach the challenged decision. The decision to permit the placement of environmental hazards is usually made at the local level, and local governmental agencies often do not maintain detailed records.[213] Therefore, there is not usually a "smoking gun" for the environmental discrimination plaintiff to find.[214]

Opponents also allege that the discriminatory intent constraint ignores three important realities. First, since a person can unconsciously be motivated by racism, the governmental actor may not be aware that his decision is based upon racist beliefs.[215] Specifically, Professor Lawrence argues that

> [t]raditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's beliefs, desires, and wishes.[216]

"proving discriminatory intent has been the albatross around the necks of minority plaintiffs seeking relief from instances of environmental racism").

211. Robert Nelson, *To Infer or Not to Infer a Discriminatory Purpose: Rethinking Equal Protection Doctrine*, 61 N.Y.U. L. REV. 334, 344 (1986); *see also* Godsil, *supra* note 75, at 410; Leslie Ann Coleman, *It's the Thought That Counts: The Intent Requirement in Environmental Racism Claims*, 25 ST. MARY'S L. J. 447, 473–74 (1993).

212. Lawrence, *supra* note 200, at 324; *see also* Donna Gareis-Smith, *Environmental Racism: The Failure of Equal Protection to Provide a Judicial Remedy and the Potential of Title VI of the 1964 Civil Rights Act*, 13 TEMP. ENVTL. L. & TECH. J. 57, 67 (1994).

213. Edward Patrick Boyle, Note, *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, 964–65 (1993).

214. *Id*. at 965.

215. *See* Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1806 (2000); *see also* Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1186 (1995).

216. Lawrence, *supra* note 200, at 322; *see also* Miriam Kim, Note and Comment, *Discrimination in the Wen Ho Lee Case: Reinterpreting the Intent Requirement in Constitutional and Statutory Race Discrimination Cases*, 9 ASIAN L.J. 117, 139 (2002).

Secondly, since most governmental decisions are made by a group and not by individuals, the governmental action results from the interaction of multiple motives.[217] Thus, it is almost impossible to attribute discriminatory intent to a group of people.[218] As a result, each individual decision-maker will be able to argue that his action was based upon racially neutral considerations.[219] Thirdly, in this day of political correctness, governmental decision-makers will be sure to hide any improper motives that may have contributed to their actions.[220] Moreover, opponents of the discriminatory intent requirement argue that the negative impact of unequal treatment is felt by the affected community regardless of whether that negative impact was caused by intentional or unintentional discrimination.[221]

217. *See* Palmer v. Thompson, 403 U.S. 217, 224–25 (1971). Justice Black stated:

> First, it is extremely difficult for a court to ascertain the motivation, or collection of different motivations, that lie behind a legislative enactment. . . . It is difficult or impossible for any court to determine the "sole" or "dominant" motivation behind the choices of a group of legislators. Furthermore, there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its facial content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons.

Id.

218. *See* BULLARD, *supra* note 13, at 15 ("Institutional racism continues to affect policy decisions related to the enforcement of environmental regulations."); *see also* Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?*: *Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 530 (2001); Evan Tsen Lee & Ashutosh Bhagwat, *The McClesky Puzzle: Remedying Prosecutorial Discrimination Against Black Victims in Capital Sentencing*, 1998 SUP. CT. REV. 145, 154–55 (1998); David A. Strauss, *Discriminatory Intent and the Taming of* Brown, 56 U. CHI. L. REV. 935, 956–58 (1989) (addressing the futility of inquiring if a group consciously decided to engage in intentional discrimination).

219. *See* East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n, 706 F. Supp. 880, 883 n.4 (M.D. Ga. 1989). According to the court, on the record, three commissioners stated a neutral reason for voting in favor of or against the approval of the landfill project. *Id.* Commissioner Pippinger contended that he voted to approve the application after he reviewed "all of the details[,] the use of the land and the facts and conclusions . . . ." *Id.* In voting against the project, Commissioner Ingram stated that the proposed project did not satisfy the need for a comprehensive waste management plan. Commission Ingram also objected to reconsidering the application after it had already been denied. *Id.* Commissioner Cullinan voted to grant the landfill permit and stated: "We can't rule on sites until they are brought to use. This site was brought to us. . . . If others are brought to us in North Macon, South Macon, West Macon, we have to be as deliberative and as thoughtful and make an independent assessment there to see whether in fact the land use is adequate." *Id.*

220. Lawrence, *supra* note 200, at 319.

221. *Id.*

A. A Few of the Proposed Alternatives to the Intent Requirement

Since most discrimination is not blatant and decision-makers usually do not leave a paper trail showing discriminatory motive, it will continue to be difficult for environmental discrimination plaintiffs to meet the intent threshold. In addition, at the time the Court established conscious discriminatory intent as the standard equal protection plaintiffs had to meet, in many parts of the country overt racism was commonplace.[222] However, over the last few decades, society has indicated that overt racism will not be tolerated.[223] Thus, in this day of political correctness,[224] the incidences of overt racism by persons in the public eye are immediately condemned.[225] Today, most of the racism in the country is covert.[226] Hence, the plaintiffs in equal protection cases have an almost insurmountable task when it comes to proving blatant intent to discriminate on the part of the governmental actor.[227] Even if environmental discrimination plaintiffs are able to put together a forceful case, the chances of winning are slim because circumstantial evidence is capable of being interpreted in so many different ways. As a result, the environmental discrimination plaintiff is forced to suffer tremendous harm on a daily basis.[228]

Regardless of the decision-maker's intent, minorities feel the impact of discriminatory environmental practices. It is of no help or solace to the communities whose children are poisoned by lead,[229] or to families

222. *See* Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 928 (1999); *see also* Richard Dvorak, *Cracking the Code: "De-coding" Colorblind Slurs During the Congressional Crack Cocaine Debates*, 5 MICH. J. RACE & L. 611, 617–18 (2000).

223. *See* Roger I. Abrams, *Off His Rocker: Sports Discipline and Labor Arbitration*, 11 MARQ. SPORTS L. REV. 167, 171 (2001). In evaluating the harshness of John Rocker's punishment for making racist statements in a magazine interview, the author notes "Rocker's was the harshest player discipline for off-work behavior unconnected to misconduct such as substance abuse and gambling. . . . Ty Cobb was a notorious racist during a time when the country accepted such sentiments as natural and appropriate." *Id.*

224. *See* Charles R. Calleros, *Reconciliation of Civil Rights and Civil Liberties After* R.A.V. v. City of St. Paul*: Free Speech, Antiharrassment Policies, Multicultural Education, and Political Correctness at Arizona State University*, 1992 UTAH L. REV. 1205, 1263–64 (1992).

225. *See* Ross D. Petty et al., *Regulating Target Marketing and Other Race-Based Advertising Practices*, 8 MICH. J. RACE & L. 335, 337–338 (2003) (discussing the treatment of Trent Lott after his remarks at Strom Thurman's birthday party).

226. Jill E. Evans, *Challenging the Racism in Environmental Racism: Redefining the Concept of Intent*, 40 ARIZ. L. REV. 1219, 1275 (1998).

227. *Id*.

228. *See* Nelson, *supra* note 211, at 344.

229. *See* Jane Schukoske, *The Evolving Paradigm of Laws on Lead-Based Paint: From Code Violation to Environmental Hazard*, 45 S.C. L. REV. 511, 516 (1994). "A disproportionately high number of ethnic minority children live in poverty, in dilapidated housing, and are poisoned by lead paint." *Id.* (*citing* KAREN L. FLORINI ET AL., ENVTL. DEFENSE FUND, LEGACY OF LEAD:

experiencing various illnesses as a result of exposure to toxic emissions, that the polluter did not overtly single out minorities to be almost the exclusive recipients of the pollution.[230] Moreover, the discriminatory intent requirement ignores the fact that racist decisions may be motivated by overt racism or the unconscious racist attitudes of the decision-maker. Numerous commentators have argued that proof of discriminatory intent dooms many equal protection cases because unconscious racism, on an individual and an institutional level, is widespread in our society.[231]

The criticism of the intent requirement has led to numerous suggestions for replacement standards. Some commentators have argued that the discriminatory intent requirement should be totally abandoned when legislative actions have a substantial disparate impact on a suspect class.[232] Others, who disagree with the intent requirement, appear to oppose the standard of proof the plaintiffs have to meet to be successful. Thus, they have proposed alternatives that focus upon the type of information the plaintiffs should have to submit to prove discriminatory intent.[233] This section offers a brief summary of a few of the suggested proposals.

AMERICA'S CONTINUING EPIDEMIC OF CHILDHOOD LEAD POISONING, Appendix 1, Table A-1). "In 1988, in metropolitan areas of more than one million, approximately 68% of black children and 36% of white children in households earning under $6,000 have blood lead levels in excess of fifteen milligrams per deciliter, in households with incomes between $6,000 and $14,999, the estimates are 54% of black children and 23% of white children." Schukoske, *supra*, at 516–17 n.30.

230. According to a study released by the Citizens' Environmental Coalition, an advocacy group located in New York, minority neighborhoods are more likely than white neighborhoods to be the location of environmental hazards, including incinerators and bus depots. Paul H.B. Shin, *A Cloud Over Minority Nabes*, N.Y. DAILY NEWS, Mar. 12, 2004, at 28.

231. *E.g.*, Valerie P. Mahoney, *Environmental Justice: From Partial Victories To Complete Solutions*, 21 CARDOZO L. REV. 361, 366 (1999); *see also* Marguerite A. Driessen, *Toward a More Realistic Standard for Proving Discriminatory Intent*, 12 TEMP. POL. & CIV. RTS. L. REV. 19, 41 (2002) (analyzing Charles Lawrence's notion that unconscious racism is "just as pernicious an evil as deliberate discrimination, and . . . has no place in governmental action"); Colopy, *supra* note 33, at 151–52 (illustrating that a required showing of intent for redress in cases of institutional racism "legitimizes the presumption that conscious racism is blameworthy but unconscious racism is not"); Boyle, *supra* note 213, at 938 (discussing how racist attitudes can unconsciously influence decisional actions and informational processing, contributing to the incomplete understanding of racial discrimination).

232. *See* Boyle, *supra* note 213, at 980–81 (proposing the replacement of the intent requirement with an intermediate test in which plaintiffs would have to show that the actions of the government caused significant disparate impact on a suspect class).

233. *See* Lawrence, *supra* note 200, at 355–58 (proposing that plaintiff submit data on "cultural meaning" of a racially discriminatory act).

1. Abandonment of the Intent Requirement (Throwing Out the Baby)

a. Intermediate Scrutiny Theory

Commentator Edward P. Boyle proposes that courts abandon the intent standard and apply an intermediate level of scrutiny to all legislative decisions that have a substantial disparate impact on suspect classes.[234] In evaluating its decision, courts would ask whether the structure of the decision-making process was likely to generate a disparate racial outcome.[235] Under an intermediate-level scrutiny approach, the plaintiffs would first have to show that the governmental act had a significant disparate impact upon the suspect class of which they were members.[236] The class members would meet that burden by showing that an extraordinarily large number or percentage of class members were disadvantaged by the decision-makers' actions.[237] If the class members did not meet their burden on the disparate impact issue, the decision-makers would prevail.[238] In the event that the class members were able to sustain their burden of proof, the decision-makers could still defeat the class members' claim by proving that a significant number or percentage of the persons similarly impacted were not members of a suspect class. If the court found the evidence of impact to be inconclusive, it would look at similar past actions by the decision-makers to determine if any of those prior decisions had a disparate racial impact.[239]

If the class members successfully demonstrated that only the members of their class suffered the disparate impact, the decision-makers would bear the burden of proving that the class members' interests were represented adequately in the decision-making process.[240] The decision-makers could satisfy their burden by showing that the class representatives were part of the decision-making process and that those representatives were fully informed of the threat the decision posed to the class members.[241] Subsequently, the burden would shift to the class members to prove that their interests were inadequately represented or that the decision-making process was defective.[242]

In evaluating the adequacy of representation, the court would consider the following factors: (1) the number of suspect class representatives who were actually decision-makers or otherwise substantially involved in the decision-making process; (2) the process by which the representatives were chosen; (3)

234. *See* Boyle, *supra* note 213, at 980–81.
235. *Id.* at 980.
236. *Id.*
237. *Id.* at 980–81.
238. *Id*. at 981.
239. Boyle, *supra* note 213, at 981.
240. *Id.*
241. *Id.*
242. *Id.*

the level of communication between the impacted parties and their representatives; (4) the quality of information made available to those impacted and their representatives; (5) the amount of consideration that the decision-makers gave to less intrusive options; and (6) the incentives of the representatives, if any, that might have run counter to the interests of the impacted group.[243]

The court's finding on the representation would determine the level of scrutiny the court would apply to the challenged decision.[244] If the court concluded that the interests of the impacted group were adequately represented and not hampered by deficiencies in the decision-making process, the decision-makers would only have to show that they had a rational basis for making their decision.[245] Conversely, if the court found that suspect class representatives did not adequately participate in the decision-making process, it would carefully examine the decision to determine if the decision-makers had given adequate consideration to the interests of those impacted.[246] The court would weigh the severity of the disparate impact on the class members against the extent of the inadequate representation and nature of the governmental interest at stake.[247] Since, in most cases, the class members would lack access to evidence regarding the decision-making process, the court would presume that the decision-makers' decision was discriminatory because of the inadequate representation.[248] The decision-makers could rebut this presumption by presenting evidence that they considered the impacted group's interests despite the inadequacy of representation or that the decision was supported by a compelling government interest.[249] In order for the class members to support their case, they would submit evidence of discrimination in the decision-making process along with a history of the decision-makers' actual discrimination.[250] Under this test, the court's focus would be on whether the decision-making process sufficiently protected the concerns of the impacted class members.[251]

The value of this proposed test is that it would require courts to do a thorough evaluation of the decision-making process instead of just focusing on the individual placement decision.[252] This probing would benefit the plaintiff and the public. The plaintiff would benefit because a critical analysis of the

243. *Id*. at 981–82.
244. Boyle, *supra* note 213, at 982.
245. *Id.*
246. *Id.*
247. *Id.*
248. *Id.*
249. Boyle, *supra* note 213, at 982.
250. *Id.*
251. *Id.*
252. *Id.*

decision-making process is more likely to reveal evidence of racial bias on the part of the decision-maker. In addition, if persons making environmental siting decisions knew that the process, as well as the decision, was subject to judicial scrutiny, they would probably take precautions to ensure the fairness of the process.

In the environmental context, this would mean that the decision-makers would take steps to ensure that members of the impacted community are represented in the decision-making process.[253] Under the current system, decision-makers often choose to approve the placement of environmental hazards in the communities where they are likely to encounter the least amount of resistance. If the interests of persons in minority communities are fully represented in the process, decision-makers may be hesitant to repeatedly place environmental hazards in their communities.

Application of Boyle's proposed test would benefit the public because it would force the decision-makers to make more informed placement choices and to fully consider the consequences of their actions. Further, if the decision-making process does not have the appearance of impropriety, there may be a decline in the number of lawsuits filed against the governmental entity. Thus, the resources spent defending lawsuits may be available to fund projects that benefit the community.

The main weakness of this proposed test is that it recommends that the court apply a standard that is less than strict scrutiny to cases involving allegations of racial discrimination.[254] In those types of cases, the government should always have to satisfy the strict scrutiny requirement.[255] Additionally, Boyle's theory may be just as burdensome on the environmental discrimination plaintiff as the current intent requirement. In order to meet his or her evidentiary burden under Boyle's test, the plaintiff would have to submit a large amount of detailed information to the court. If the plaintiff has access to that kind of information, he or she would probably be able to satisfy the discriminatory intent requirement as it is currently applied.

The problem minorities face is the cumulative impact of the placement of several environmental hazards in their communities. Therefore, any legal tool that permits courts to evaluate the decision-making process instead of the isolated placement decision will be beneficial to persons fighting environmental discrimination. On balance, implementation of Boyle's test

253. *See id.* at 984–87 (analyzing two examples of possible inadequate representation of a suspect class under the intermediate scrutiny theory).

254. *See* Boyle, *supra* note 213, at 981–82 (proposing that the court apply a rational basis or intermediate scrutiny standard when evaluating a case depending on the facts).

255. *See* Johnson v. California, 125 S.Ct. 2410, 2419 (2005) (discussing the importance of applying strict scrutiny in cases involving government-imposed racial classifications).

would provide more benefits than burdens to the persons combating environmental discrimination.

b. Environmental Tort Theory

Professor Kathy Seward Northern proposes creating a new tort to deal with environmental discrimination issues.[256] The tort would be the "intent to cause racially disproportionate exposure to environmental burdens."[257] Under Professor Northern's theory, an owner or operator of an environmental hazard would be subject to liability if his intentional conduct imposed a "racially disproportionate environmental burden."[258] The owner or operator would be liable for "resulting bodily harm, mental distress, or property damage."[259] The plaintiff would have to prove that the owner or operator *intended* to impose the racially disproportionate environmental burden.[260]

Professor Northern proposes using a different definition of intent than the one that is currently required in equal protection cases.[261] The proposed replacement definition of intent would be based upon tort law principles.[262] Thus, in the context of this new tort, intent would include a purpose or desire to bring about a given consequence and a substantial certainty that such a consequence would occur.[263] Courts would apply a reasonable person standard in evaluating whether the defendant had the necessary intent.[264] Therefore, if a reasonable person in the actor's position believed that his action was substantially certain to cause a harmful or offensive contact, the defendant would be treated as though he had intended that result.[265]

One purpose of Professor Northern's proposed tort is to encourage owners and operators of facilities currently located in minority communities to comply fully with environmental regulations.[266] A second purpose is to discourage owners and operators of environmental hazards from concentrating such hazards in minority communities and from placing the hazards in geographically or geologically unsuitable areas.[267]

If Professor Northern's proposal is adopted, it will provide more options for persons combating environmental discrimination. The environmentally

256. Northern *supra* note 15, at 577–78.
257. *Id.* at 578.
258. *Id*.
259. *Id*.
260. *See id.*
261. Northern, *supra* note 15, at 583.
262. *Id.*
263. *Id.*
264. *See id*. at 574.
265. *Id*.
266. Northern, *supra* note 15, at 578–79.
267. *Id.*

discriminated-against plaintiff will benefit from the application of tort law because tort law has a more expansive definition of intent. In tort law there is a presumption that a person intends the natural and probable consequences of his action.[268] Therefore, intent is attributed to a person if he or she acted with purpose or design or with substantial certainty that the result would occur.[269] Expansion of the definition of intent will enable courts to consider unconscious racism. As a consequence, decision-makers will give more consideration to the impact their decisions may have on minority communities.[270]

Another positive aspect of Professor Northern's theory is that it would place the financial burden on the entities that are directly responsible for the disproportionate placement of the environmental hazard. The owner or operator of the facility causing the harm should have to compensate the plaintiffs. Owners and operators are in the best position to make sure that a facility is as environment-friendly as possible. Those persons are also the ones with the most information about the impact an environmental hazard will have on members of the community.

One of the drawbacks of relying on tort law to remedy the disproportionate placement of environmental hazards in minority communities is that the plaintiffs will be deprived of the protections that minority persons receive in constitutional cases. Thus, the standard that decision-makers will have to meet to justify their actions will be less stringent. In addition, the remedies available under tort law may be limited. The primary remedy available under tort law is usually damages.[271] In environmental cases, the plaintiffs may not suffer damages until several years after they have been exposed to the hazards. At that time, the statute of limitations may prevent the plaintiffs from bringing a cause of action.[272] Moreover, the plaintiffs' initial injuries may be minor.

268. Cheek v. Hamlin, 277 N.E.2d 620, 634 (Ind. Ct. App. 1972).

269. "Substantial certainty" has been described as more than "mere knowledge and appreciation of a risk." Pariseau v. Wedge Prods., Inc., 522 N.E.2d 511, 514 (Ohio 1988) (quoting W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON TORTS 36 (5th ed. 1984)).

270. The possibility of tort liability may serve as a deterrent to decision-makers who are inclined to place environmental hazards in minority communities that are already heavily polluted. *See* Northern, *supra* note 15, at 578–79.

271. JERRY J. PHILLIPS ET AL., TORT LAW: CASES, MATERIALS, PROBLEMS 607 (3d ed. 2002).

272. ARTHUR BEST & DAVID W. BARNES, BASIC TORT LAW: CASES, STATUTES, AND PROBLEMS 344 (2003). "A statute of limitations relates to the time a plaintiff should reasonably have known that he or she had a legal claim and bars a claim unless it is filed within a certain period after that time." *Id.*; *see also* GEORGE C. CHRISTIE ET AL., CASES AND MATERIALS ON THE LAW OF TORTS 775 (3d ed. 1997).

> In many jurisdictions, the typical two-year tort statute of limitations is a clock that starts running on the date of "injury" or "occurrence." If "occurrence" could be understood to mean the date of exposure, or if "injury" could be interpreted as the first time when the

However, after the case has been litigated and resolved, the plaintiff may suffer further damages. The plaintiffs may be barred from seeking damages from an injury that occurred as a result of the previously litigated incident.[273] Given the changes that have occurred because of tort reform, the use of tort law may be a limited solution to the problem of the inequitable placement of environmental hazards.[274]

Nonetheless, implementation of the proposed environmental tort would give the minority community another weapon to fight the disproportionate placement of environmental hazards in their neighborhoods. Given the lack of success plaintiffs have had utilizing the Equal Protection Clause, the availability of a tort cause of action would be a welcomed addition to the legal landscape.

2. Modification of the Intent Requirement (Changing the Bathwater)

a. Cultural Meaning Theory[275]

According to Professor Charles Lawrence, unconscious racism results because "Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites."[276] Professor Lawrence proposes replacing the discriminatory intent requirement with a cultural meaning test that focuses upon unconscious racism.[277] In applying the test, courts would look to see if

> toxic substance begins to have any physiological effects, then the plaintiff might find that the clock has run out by the time she actually contracts the disease.

Id.

273. *See* CHRISTIE ET AL., *supra* note 272, at 775 ("Under traditional tort rules, a plaintiff may not 'split' her claim and later seek future damages in a different suit. Rather, she must bring her suit within the statute of limitations, and then seek in that suit all damages flowing from that injury.").

274. *See generally* Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263 (2004) (discussing the damage caps established under new tort reform measures). *See also* CHRISTIE ET AL., *supra* note 272, at 904–17.

275. In his 1994 article, Marco Masoni, then a student at Georgetown University Law Center, applied the cultural meaning test to an environmental discrimination case. As the result of his analysis, Masoni concluded that "[t]he cultural meaning test forces one to take a hard look at a case and, if necessary, probe beneath the apparent neutrality of decisions which disproportionately impact minorities." Marco Masoni, *The Green Badge of Slavery*, 2 GEO. J. ON FIGHTING POVERTY 97, 113 (1994).

276. Lawrence, *supra* note 200, at 322.

277. *Id.* at 355–62.

the governmental action conveyed a symbolic message to which the culture attaches racial significance.[278]

As a part of that analysis, the court would consider evidence regarding the historical and social context in which the decision was made and implemented.[279] If, based upon that review, the court decides by a preponderance of the evidence that a significant portion of the population would think of the governmental action in racial terms, the court would presume that "socially shared, unconscious racial attitudes made evident by the action's meaning had influenced the decisionmakers."[280] As a consequence, the court would infer discriminatory intent and apply heightened scrutiny.[281]

To illustrate his theory, Professor Lawrence gave the example of a government decision to construct a wall between white and black communities.[282] According to Professor Lawrence, the construction of the wall would have a "cultural meaning growing out of a long history of whites' need to separate themselves from blacks as a symbol of their superiority."[283] Since the construction of the wall would conjure up racial inferiority, it would burden blacks living in the affected communities and reinforce a system of racial discrimination.[284] Therefore, the blacks in those communities should not have to prove discriminatory intent in order to get judicial redress because the court should assume that the decision to construct the wall was based upon race.[285]

This test could provide some salvation for persons trying to combat environmental discrimination. In order to get around the discriminatory intent requirement, the plaintiff would have to prove that the decision to place the environmental hazard in a minority neighborhood had a cultural meaning that was based upon the race of the persons living in the impacted area. The placement of an environmental hazard in a minority neighborhood could have a cultural meaning growing out of a long history of whites' beliefs that minority neighborhoods are not fit for anything other than dumping.[286] In addition, the placement of environmental hazards in a predominately minority

278. *Id.* at 356.
279. *Id*.
280. *Id.*
281. Lawrence, *supra* note 200, at 356.
282. *Id*. at 357.
283. *Id*.
284. *Id*. at 358.
285. *See id.* at 356–58.
286. *See* BULLARD, *supra* note 13, at 5 (discussing the fact that toxic dumps and other locally unwanted land uses (LULUs) have historically been placed in minority and low-income communities).

neighborhood may further promote the opinion that minorities are "second class" citizens who do not deserve to live in clean, safe neighborhoods.[287]

The cultural meaning test may impose a heavy burden on the plaintiff. In some situations, that burden may be just as arduous as the one environmental discrimination plaintiffs currently face when trying to prove discriminatory intent. The burden of proof will be difficult to meet because the cultural meaning test employs a subjective standard.[288] A person's background and life experiences will impact the meaning that he or she gives to a particular action. In the environmental arena, the negative cultural meaning that is attached to a placement decision will not be as apparent as in segregation cases. Therefore, in order to prove the cultural meaning attached to a particular placement decision, the plaintiff would have to acquire the services of an expert such as a cultural anthropologist. Low-income persons and minorities usually do not have the financial resources to hire expert witnesses. In addition, since cultural anthropology is not an exact science, the case may be complicated by a battle of expert witnesses. Another concern is that the cultural meaning test may be considered vague and speculative because it does not state the objective parameters that are necessary to prove cultural meaning.

Ultimately, the cultural meaning test is preferable to the current method of determining intent in environmental discrimination cases. Application of the cultural meaning test will allow the court to expose unconscious racism. The cultural meaning test may also be used as a tool for educating decision-makers about unconscious racism. Most decision-makers may be unaware that their underlying biases are influencing the choices they make in their official capacities. Acknowledgment of the cultural meaning phenomenon may lead decision-makers to take steps to make the process more inclusive. Initially, it may be difficult to attach cultural meaning to government actions, however, after a few cases, the necessary data will be available for use by future plaintiffs.

b. Reversing the Groups Theory

Professor David Strauss proposes what he calls a "reversing the groups" test.[289] The test would be used to define what discriminatory intent means. Under the test, courts would ask the following question: Would the government actor have made the same decision if he had known that the challenged governmental action would have adversely impacted whites instead

287. *See id.* (citing Robert Bullard & Beverly Hendrix Wright, *Environmentalism and the Politics of Equity: Emergent Trends in the Black Community*, 12 MID-AM. REV. OF SOC. 21, 28 (1987), and emphasizing that the disdain for minorities led to the "Place in Blacks' Back Yard" (PIBBY) principle).

288. *See* Lawrence, *supra* note 200, at 355–56.

289. Strauss, *supra* note 218, at 956–59.

of blacks?[290] Another way to put the question is: Would the government have made a decision that negatively affected the plaintiffs if they were members of a different race? If the answer to the question is no, the court should decide that the decision was made with discriminatory intent.[291]

If this test is applied to an environmental discrimination case, courts would ask: Would the government actor have decided to place the environmental hazard in the community if the population of the community was predominately white? In order to meet his or her burden of proof under this test, the environmental discrimination plaintiff would have to show that the decision-maker chose to place the hazard in a minority neighborhood even though there was a non-minority neighborhood suitable for the project. Application of this test would have been helpful to the plaintiffs in the *East Bibb* case because they had evidence that the county had previously refused to site the landfill in a predominately white neighborhood.[292] The shortcoming of the proposed test is the fact that the court may not be able to determine the true answer to the question because the government actors can always come up with a non-discriminatory reason for environmental placement decisions.

Like under the current intent requirement, the "reversing the groups" test will place the plaintiff in the difficult position of attempting to attribute a single motive to a group of people. Nonetheless, the "reversing the groups" theory will force decision-makers to at least consider non-minority areas when they are making placement decisions. Having to answer the question posed by this theory in court may be an incentive for decision-makers to consider factors other than race when selecting locations for environmental hazards.

3. My Fair Share Theory

The cement that holds our society together is the belief that the foundation of our society is justice.[293] True justice cannot be achieved if burdens are placed on a few persons in order to benefit the majority of the population.[294] I arrived at my theory by relying on the readings of John Rawls. In *A Theory of*

290. *Id*. at 956–57.

291. *Id*. at 957.

292. East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n, 706 F. Supp. 880, 884 (M.D. Ga. 1989).

293. In *A Theory of Justice*, John Rawls states, "[A] society is well-ordered when it is not only designed to advance the good of its members but when it is also effectively regulated by a public conception of justice." JOHN RAWLS, A THEORY OF JUSTICE 4 (rev. ed., The Belknap Press of Harvard University Press 1999) (1971).

294. *Id.* at 3.

Justice, John Rawls characterizes justice as fairness.[295] Hence, a society cannot be just without a concept of fairness.[296] According to Rawls:

> [A] person is required to do his part as defined by the rules of an institution[297] when two conditions are met: first, the institution is just (or fair), that is, it satisfies the two principles of justice;[298] and second, one has voluntarily accepted the benefits of the arrangement or taken advantage of the opportunities it offers to further one's interests.[299]

Rawls explains that, in a situation where a group of persons are cooperating to achieve a goal, all of the persons should make sacrifices, including restricting their liberties, to benefit the group as a whole. In that circumstance, the members of the group will be equally burdened and equally benefited.[300] Rawls concludes, "We are not to gain from the cooperative labors of others without doing our fair share."[301] In the land use context, the concept of fair share developed as a potential solution to exclusionary zoning.[302] In addressing the issue of exclusionary zoning, one court determined that each community has an obligation to take its "fair share" of low-income persons.[303] In the environmental law context, each community has the responsibility to take its fair share of the environmental hazards located in the area.[304]

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295. *Id*. at 10.

296. *Id.* at 11. Rawls states that the theory of "'justice as fairness' . . . conveys the idea that the principles of justice are agreed to in an initial situation that is fair." *Id.*

297. Rawls refers to an institution as "a public system of rules which defines offices and positions with their rights and duties, powers and immunities, and the like." *Id.* at 47.

298. The two principles of justice for institutions are the following:

> FIRST PRINCIPLE
>
> Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.
>
> SECOND PRINCIPLE
>
> Social and economic inequalities are to be arranged so that they are both:
>
> (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and
>
> (b) attached to offices and positions open to all under conditions of fair equality of opportunity.

RAWLS, *supra* note 293, at 266.

299. *Id*. at 96.

300. *Id.* (citing H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 185f (1955)).

301. *Id*. at 96.

302. "Exclusionary zoning" refers to the practice of closing an entire community to unwanted groups such as low-income and minority persons. Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841, 1870 (1994).

303. *See* S. Burlington County NAACP v. Twp. of Mount Laurel, 336 A.2d 713, 724–25 (N.J. 1975), *cert. denied*, 423 U.S. 808 (1975).

304. When discussing "fair treatment," the Environmental Protection Agency states that "no group of people, including racial, ethnic, or socioeconomic group should bear a disproportionate

Because it is the antithesis of fairness, discrimination is a termite that eats at the foundation of society. Therefore, in order for our society to remain intact, all forms of discrimination must be exterminated. The Equal Protection Clause was enacted to eliminate discrimination by not allowing similarly situated persons to be treated differently.[305] Consequently, the quest for justice should be the desire of all courts, especially when reviewing an allegation of discrimination.

In the United States, it is clear that environmental hazards are not distributed equally.[306] Under the current system, the facilities needed to provide services for the entire community are usually placed in areas containing populations that are mostly low-income and minority.[307] Thus, low-income and minority persons bear the burden of environmental pollution while the majority of the population receives the benefits provided by the pollution producing facilities.[308] Despite recognition of the fact that low-income and minority persons are disproportionately impacted by environmental pollution, persons seeking a remedy in an environmental discrimination case have to overcome a big hurdle—proving discriminatory intent.[309] They must prove that the government actors who made the decision to place the environmental hazard in their community were motivated by discriminatory intent.[310]

share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution of federal, state, local, and tribal programs and policies." Suzanne Smith, Note, *Current Treatment of Environmental Justice Claims: Plaintiffs Face a Dead End in the Courtroom*, 12 B.U. PUB. INT. L.J. 223, 223 (2002) (quoting EPA, INTERIM FINAL GUIDANCE FOR INCORPORATING ENVIRONMENTAL JUSTICE CONCERNS IN EPA'S NEPA COMPLIANCE ANALYSIS 2 (1997)).

305. *See* Green v. City of Tucson, 340 F.3d 891, 896 (9th Cir. 2003) (citing City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985)).

306. *See* Mohai & Bryant, *supra* note 27, at 921–22.

307. For example, in New York State, "communities with a minority population of at least 70 percent have about 18 percent of the state's air pollution sites but only make up about .5 percent of the land area." Danita Chambers, *Pollution High Where Income Is Low*, TIMES UNION, Mar. 12, 2004, at B3; *see also* Jay Rey, *Watchdog Group Accuses State of Environmental Racism*, THE BUFFALO NEWS, Mar. 12, 2004, at B22 (discussing the fact that in New York State, members of "minority communities are exposed to a disproportionate amount of air pollution . . . .").

308. *See* Harvey L. White, *Race, Class, and Environmental Hazards*, *in* ENVIRONMENTAL INJUSTICES, POLITICAL STRUGGLES 65, 67 (David E. Camacho ed., 1998) (stating that "in Detroit, a person of color's chance of living within a mile of a hazardous waste facility is four times greater than a white American's").

309. *See* R.I.S.E., Inc. v. Kay, 768 F. Supp. 1144, 1149 (E.D. Va. 1991); *see also* Luke W. Cole & Shelia R. Foster, FROM THE GROUND UP: ENVIRONMENTAL RACISM AND THE RISE OF THE ENVIRONMENTAL JUSTICE MOVEMENT 64 (2001).

310. East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n, 706 F. Supp. 880, 884 (M.D. Ga. 1989).

The discriminatory intent requirement is such a high standard that it flies in the face of fairness and prevents plaintiffs in environmental discrimination cases from receiving justice. Nonetheless, I am not proposing that the discriminatory intent requirement be replaced with a different standard. A legal standard should not be thrown out simply because it is applied in a manner that disadvantages one side. I am proposing that the courts change the manner in which they evaluate whether or not the plaintiff has proven discriminatory intent.

A disparate impact standard would tilt the table too heavily in favor of the plaintiffs in environmental discrimination cases. It is usually pretty easy to prove disparate impact because it is well documented that minorities are disproportionately impacted by environmental hazards.[311] Disparate impact usually becomes a problem when the community feels the cumulative impact of several environmental hazards. Thus, application of a disparate impact standard would require current decision-makers to be held accountable for the actions of their predecessors.[312]

Current decision-makers should not be held responsible for past decisions to place environmental hazards unless they acted with knowledge that their placement decision would make the situation worse. A person should only be held liable if there is some level of culpability on his or her part. In order to be held liable under the Equal Protection Clause, the persons who made the challenged decision should have some actual knowledge or attributable knowledge of the harm their action would cause to persons living in the impacted neighborhood. On the other hand, strict application of the discriminatory intent standard places an onerous burden on the environmental discrimination plaintiff and advantages the decision-maker.[313]

The intent standard should be maintained to avoid holding persons liable for harms they did not intend to cause. Nonetheless, intent should be defined broadly enough to encompass both conscious and unconscious racism.[314] The underlying basis of my proposal is fairness[315] and social cooperation.[316]

311. *See* Centner et al., *supra* note 32, at 127–28.

312. Lawrence, *supra* note 200, at 320.

313. *See* Mitchell A. Horwich, Comment, *Title VI of the 1964 Civil Rights Act and the Closing of a Public Hospital*, 1981 DUKE L.J. 1033, 1043–45 (1981).

314. Lawrence, *supra* note 200, at 324–25.

315. *See* RAWLS, *supra* note 293, at 301–08 (discussing why fairness is of great importance in a just society).

316. *See* John Rawls, *The Basic Liberties and Their Priority*, *in* LIBERTY, EQUALITY, AND LAW 2, 14 (Sterling M. McMurrin ed., 1987).

> The notion of social cooperation is not simply that of coordinated social activity efficiently organized and guided by publicly recognized rules to achieve some overall end. Social cooperation is always for mutual benefit and this implies that it involves two elements: the first is a shared notion of fair terms of cooperation, which each participant may reasonably be expected to accept, provided that everyone else likewise accepts them.

Fairness should play a part in any equal protection analysis because the amendment was enacted to address the issue of inequality.[317]

For years, the United States was segregated on the basis of race and class. Persons relied on the Equal Protection clause to remedy the harms caused by segregation.[318] Currently, a significant number of minority persons are being segregated in neighborhoods that are plagued with environmental hazards.[319] Those persons should be able to more readily avail themselves of the safeguards afforded by the Equal Protection Clause.

Currently, the courts rely on the *Arlington Heights* factors to determine if the plaintiffs have made a prima facie case of discriminatory intent.[320] As a result, the courts refuse to apply strict scrutiny unless the plaintiff proves that discriminatory intent was the motivating factor behind the government action.[321] It is my contention that fairness dictates that courts evaluate the reasonableness[322] of the decision to place the environmental hazard in a certain

> Fair terms of cooperation articulate an idea of reciprocity and mutuality: all who cooperate must benefit, or share in common burdens, in some appropriate fashion judged by a suitable benchmark of comparison.

Id.

317. *See* Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1, 8 (2000) (claiming that the Equal Protection Clause mandates that the government demonstrates equal concern for all citizens); *see also* Washington v. Davis, 426 U.S. 229, 239 (1976) (stating that "[t]he central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race"); Jay S. Bybee, *The Equal Process Clause: A Note on the (Non)Relationship Between* Romer v. Evans *and* Hunter v. Erickson, 6 WM. & MARY BILL RTS. J. 201, 205 (1997); Jeanmarie K. Grubert, Note, *The Rehnquist Court's Changed Reading of the Equal Protection Clause in the Context of Voting Rights*, 65 FORDHAM L. REV. 1819, 1843–44 (1997).

318. *E.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("[T]he plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."); *see also* Palmer v. Thompson, 403 U.S. 217 (1971) (holding that a city which closed public swimming pools rather than try to operate them as desegregated did not deny equal protection).

319. Robert D. Bullard, *Environmental Justice for All*, *in* UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR 3, 11 (Robert D. Bullard ed., 1994) (stating that "[n]umerous studies[,] dating back to the 1970s, reveal that communities of color have borne greater health and environmental risk burdens than has society at large"); *see also* White, *supra* note 308, at 68–69 (discussing the national pattern of low-income and minorities being disproportionately exposed to environmental hazards).

320. Vill. of Arlington Heights v. Metro. Housing Dev. Corp., 429 U.S. 252, 266–68 (1977); *see also* Johnson v. Bd. of Educ., 188 F. Supp. 2d 944, 970 (C.D. Ill. 2002).

321. *See, e.g.*, Anderson *ex rel*. Dowd v. City of Boston, 375 F.3d 71, 82 (1st Cir. 2004).

322. According to John Rawls,

> [R]easonable persons are characterized in two ways: First, they stand ready to offer fair terms of social cooperation between equals, and they abide by these terms if others do also, even should it be to their advantage not to; second, reasonable persons recognize and

area when deciding the issue of discriminatory intent. To equalize the process, the courts should apply an objective reasonableness test to determine if the decision-maker may have been motivated by the intent to discriminate. If the plaintiffs are able to show that the decision to place the environmental hazard in their neighborhood was presumptively unreasonable, the burden should shift to the decision-makers to prove that they were not motivated by discriminatory intent.

Under the test I propose, like in the current system, the initial burden of proof would be on the plaintiff to prove the placement decision has a disparate impact on a community predominately populated by persons from one racial or ethic group.[323] The next step would be for the court to ask the following question: Was it reasonable to place the environmental hazard in the plaintiff's neighborhood? In answering the question, the court would start with the premise that it is unreasonable to place an environmental hazard in an area that is already oversaturated with environmental hazards. The plaintiff has the burden of proving that his/her neighborhood was oversaturated when the government actor made the decision to place the new environmental hazard in the area. In order to show over-saturation, the plaintiff must present evidence indicating the percentage of the community that lives in the impacted area.

Then, the plaintiff must show the percentage of the community's environmental hazards[324] that are located in the area. If the plaintiff proves that, prior to the placement decision, the percentage of the hazards bore by his/her neighborhood was significantly higher than the percentage of the community's population living in the neighborhood, he/she has proven oversaturation. For example, if the impacted neighborhood makes up twenty percent of the community's population and contains sixty-five percent of the environmental hazards located in the community, a court should consider the area to be oversaturated. An alternative method for determining oversaturation may be to focus on the level of pollution in the impacted community. This would cover the cases where a community with fewer environmental hazards has more pollution. For instance, a community with two chemical plants may be more polluted than a community with four landfills.

Once an area is classified as being oversaturated, there should be a presumption it is unreasonable to place another environmental hazard in the area. Courts should presume that an unreasonable placement decision was

> accept the consequences of the burdens of judgment, which leads to the idea of reasonable toleration in a democratic society.

JOHN RAWLS, THE LAWS OF PEOPLES 177 (1999) (citations omitted). Based upon Rawls's observations, it is my contention that reasonable persons make reasonable decisions that are fair. Thus, the actions of decision-makers should be evaluated using a reasonableness standard.

323. *See* United States v. Hare, 308 F. Supp. 2d 955, 991–92 (D. Neb. 2004).

324. Environmental hazards should be broadly defined to include businesses like gas stations and salvage yards that require government permission to operate in a certain area.

motivated by discriminatory intent. In order for a court to make the presumption, the plaintiff must prove that the decision-maker knew or should have known about the racial make-up and the over-saturation of the selected area. Finally, the decision-makers will have the opportunity to rebut the presumption. The decision-makers may be able to rebut the presumption by proving that the placement of the new hazard in the community did not make the level of pollution in the area any worse. To prove this point, the decision-makers will have to rely upon objective scientific and statistical data.

The fair share test is not a cure-all for environmental discrimination plaintiffs. It still requires them to obtain and submit large volumes of information. However, the information is easily acquired through discovery, investigative techniques, and public hearings. Further, the test only focuses upon the placement of additional environmental hazards and does not provide a mechanism for removing hazards from minority communities. Nonetheless, the fair share theory is a step towards easing the burdens on minorities.

CONCLUSION

The discriminatory intent requirement has caused problems for plaintiffs in environmental discrimination cases. Nonetheless, the requirement of intent for proving discrimination has not lost its usefulness. Hence, the intent requirement should not be discarded as the foundation of an equal protection case. Instead courts should change the manner in which they apply the intent standard. Presently, courts look for evidence of purposeful, conscious intent to discriminate when deciding if a government actor has violated the Equal Protection Clause in siting an environmental hazard. Courts should view "intent" through a broader lens in order to identify situations where the government action was motivated by an unconscious intent to discriminate on the part of the decision-maker.