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## Whose Environmental Justice? Social Identity and Institutional Rationality

The recent decision in *Alexander v. Sandoval*<sup>1</sup> has seriously limited the available opportunities for minorities to argue their claims for environmental justice. Prior to *Sandoval*, plaintiffs alleging disparate impact as a result of the policies implemented by a federally funded agency met with moderate success under Title VI section 602.<sup>2</sup> After *Sandoval*, however, the chances of success in private litigations for the aggrieved communities look decidedly bleak. Although the Court in *Sandoval* admitted a private right of action under Title VI section 601,<sup>3</sup> it interpreted section 601 to depend upon a showing of intentional discrimination. This restriction poses

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<sup>1</sup> *Alexander v. Sandoval*, 532 U.S. 275 (2001). A deeply divided Supreme Court held that no private right of action exists to enforce Title VI of the Civil Rights Act of 1964, section 602. Section 602 provides that: “Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity . . . is authorized and directed to effectuate the provisions of section 2000d of this title . . . by issuing rules, regulations, or orders of general applicability . . . .”

<sup>2</sup> *See, e.g., Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3rd Cir. 1997), *vacated*, 524 U.S. 974 (1998).

<sup>3</sup> Section 601 of Title VI provides that: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

insurmountable evidentiary burdens for plaintiffs.<sup>4</sup> Furthermore, the opportunity for plaintiffs to avail themselves of the “backdoor” of 42 U.S.C. § 1983,<sup>5</sup> as suggested by Justice Stevens in his dissent in *Sandoval*, remains unclear. In respect to claims of environmental discrimination, the circuit courts have held that the administrative regulations implemented through Title VI do not create an enforceable interest under section 1983.<sup>6</sup> In a post-*Sandoval* context, minorities discriminated against have lost significant legal leverage in using courts to redress the discrimination. The responsibility for enforcing environmental compliance under Title VI now rests almost entirely with the agencies themselves.<sup>7</sup>

In the wake of *Sandoval*, the reliance on administrative relief and the Court’s tendency towards “implicit legislation,” may move modern regulation away from the types of goals that communities and their resident groups might seek on their own or demand from their political allies. Arguments and legislative debates surrounding a contested social practice illustrate that marginalized social groups are often faced with a seemingly impossible choice, especially when the state is divided against itself.<sup>8</sup> If they are to pursue their claims successfully, these plaintiffs are required to frame their arguments in accord with the dominant themes of the cultural myths that define the

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<sup>4</sup> See *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977).

<sup>5</sup> Section 1983 provides in relevant part that:

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

<sup>6</sup>

[A]n administrative regulation cannot create an interest enforceable under section 1983 unless the interest already is implicit in the statute authorizing the regulation, and that inasmuch as Title VI proscribes only intentional discrimination, the plaintiffs do not have a right enforceable through a 1983 action under the EPA’s disparate impact discrimination regulations.

*S. Camden Citizens v. N.J. Dep’t of Env’tl. Prot.*, 274 F.3d 771, 774 (3d Cir. 2001). See also *Save Our Valley v. Sound Transit*, 335 F.3d 932 (9th Cir. 2003).

<sup>7</sup> Note, *After Sandoval: Judicial Challenges and Administrative Possibilities in Title VI Enforcement*, 116 HARV. L. REV. 1774, 1774 (2003).

<sup>8</sup> See THEDA SKOCPOL, SOCIAL POLICY IN THE UNITED STATES: FUTURE POSSIBILITIES IN HISTORICAL PERSPECTIVE 253-59 (1995) (discussing the development of several policies targeting the poor which eventually impacted negatively the very categories those policies were supposed to protect).

moment at hand. This requires them to draw heavily upon scientific, economic, and political resources that are traditionally beyond their reach.<sup>9</sup> This search for common ground from which to launch a credible response to the challenge of balancing incommensurable ends<sup>10</sup> often results in these plaintiffs coming to adopt the very conclusions they originally sought to oppose. At the end of the day, minority plaintiffs are bound to discover that they have surrendered all vestiges of the once distinctive voice which had marked them as an identifiable social group.<sup>11</sup> If administrative agencies remain the sole enforcers of environmental compliance, it is imperative that they develop policies more sensitive to the specific needs and distinctive voices which give identity to the environmental justice movement.

The assumption that the environmental justice movement has always had a distinct identity outside the context of struggle within the legal system is wrong. The identity of this movement emerged gradually through interaction with the actors that contested it, such as the courts, the administrative agencies and the agents of harm. This identity was shaped most obviously in the strategic negotiation of claims about the basis for identity as an aggrieved class. It is important to understand the ways in which the identity of this movement has been expressed and transformed by its expression within the administrative machinery of formal legal proceedings. The identity of the plaintiffs in these cases has been shaped by the requirements of the adversarial legal process. This process begins and ends at the local level with an assertion of community status.

This Article analyzes the arguments and evidentiary claims that have characterized three high profile cases in which plaintiffs asserted that decisions made by government agencies have been marked by racial definitions. The purpose of this Article is twofold. First, the Article investigates how plaintiffs resolve the tension between their desire to achieve justice under the rules governing legal discourse and their need to preserve the social identity of their community. Second,

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<sup>9</sup> See, e.g., Kim Lane Scheppelle, *Manners of Imagining the Real*, 19 LAW & SOC. INQUIRY 995 (1994) (discussing the difficulties of proving violence against women when the claims are formulated in a counter-dominant cultural frame).

<sup>10</sup> See, e.g., CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 70 (1997).

<sup>11</sup> M. Linda Miller, *Public Argument and Legislative Debate in the Rhetorical Construction of Public Policy: The Case of Florida Midwifery Legislation*, 85 Q.J. SPEECH 361, 372-73 (1999) (showing how the attempt of Florida midwives to engage the testimony of their opponents medicalized their discourse; consequently, pro-midwifery legislation later passed fostered the assimilation of lay midwifery into nurse midwifery).

the Article argues that the diminished power of claims that are framed according to the traditional discourse of civil rights and distributive justice deserve attention. Because judicial discourse is a point of intersection between critically different systems of public discourse (legal, political, economic, scientific, and ethical), it is possible to explain the rate at which the social identity of the environmental justice movement is collapsing.

Part I reviews the selected cases and the main players. Part II outlines the main elements of the community rhetoric used by the plaintiffs to assert their claims. Part III illustrates the strategic value of community rhetoric in constructing a basis for social identity, as well as its contested potential as a point of dissention among legal adversaries. Part IV identifies several legal constraints that further shape the emerging identity of the movement. Finally, the conclusion evaluates the extent to which the community rhetoric can overcome traditional distinctions based on race while furthering the relevance of more inclusive constructions based on social class.

## I

### THE ENVIRONMENTAL JUSTICE MOVEMENT

The environmental justice movement is a relatively recent and fundamentally distinct adjunct to the traditional environmental movement. The overwhelming majority of environmental groups between 1961 and 1990 have been concerned with wildlife, animal protection, or more generally, the conservation of land and water resources.<sup>12</sup> Periodic mobilizations against perceived threats from atomic energy and pesticides have tended to dwarf the corresponding types of mobilization that have marked the environmental justice wing.<sup>13</sup>

During the relatively short period of its development, the environmental justice movement has been associated with three related, but meaningfully distinct labels: environmental racism, environmental equity, and environmental justice.<sup>14</sup> Charges of

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<sup>12</sup> FRANK BAUMGARTNER & BRYAN D. JONES, AGENDAS AND INSTABILITY IN AMERICAN POLITICS 184, 185-86 (1993) (discussing the growth of environmental groups).

<sup>13</sup> See generally Giovanna Di Chiro, *Nature as Community: The Convergence of Environment and Social Justice*, in UNCOMMON GROUND: TOWARD REINVENTING NATURE 298 (William Cronon ed., 1995).

<sup>14</sup> See Barry E. Hill, *Chester, Pennsylvania—Was it a Classic Example of Environmental Justice?* 23 VT. L. REV. 479, 486 (1999).

environmental racism emphasize the ways in which racism shapes environmental policy.<sup>15</sup> Environmental equity includes a broader range of local community groups who felt that they were being forced to assume a disproportionate share of environmental hazards and risks. Concepts of environmental justice expanded the scope of the movement by directing the movement's attention to the process and results of making determinations about the distribution of benefits and burdens. The expansion of public concern to include communities that may have been victimized on the basis of income and social class is particularly important. Environmental Poverty Law is a new specialty developed by lawyers and others providing support to victimized communities.<sup>16</sup>

Understandably, the identity of the movement that developed under the environmental racism framework has been shaped by its adoption of the strategies and tactics of the civil rights movement.<sup>17</sup> The movement's identity has been adjusted in order to fit within the Equal Protection Clause of the Fourteenth Amendment. To some degree, this has meant pursuing traditional civil rights goals under Title VI of the Civil Rights Act.<sup>18</sup>

Important parallels exist between the contemporary struggles of the environmental justice movement to challenge administrative decisions concerning the siting of hazardous facilities and an earlier movement that emerged in order to oppose the grant or renewal of broadcast licenses by the Federal Communications Commission (FCC). The ability of movement groups to participate directly in administrative hearings, or to challenge administrative decisions within the courts, were actively pursued by representatives of communities of color. Originally, the FCC denied standing to petitioners who could not provide evidence of either economic injury or electronic interference of their signal.<sup>19</sup> The Court reminded the Commission of its own earlier decisions regarding standing that were not based on a concern for private interests, but the public interests they were licensed to serve. The initial petition charged the station with failing to give a

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<sup>15</sup> Richard J. Lazarus, *Environmental Racism! That's What It Is.*, 2000 U. ILL. L. REV. 255, 259 (2000).

<sup>16</sup> Hill, *supra* note 14, at 489.

<sup>17</sup> See Alice Kaswan, *Environmental Laws: Grist for the Equal Protection Mill*, 70 U. COLO. L. REV. 387, 393 (1999).

<sup>18</sup> 42 U.S.C 2000d (1994).

<sup>19</sup> *United Church of Christ v. FCC*, 359 F.2d 994, 1000 (D.C. Cir. 1966).

“fair and balanced presentation of controversial issues, especially those concerning Negroes, who comprise almost forty-five percent of the total population within its prime service area.”<sup>20</sup>

Still, the success of the environmental justice movement may be measured by something other than formal court decisions and administrative agency rulings. Negotiated agreements between corporations and environmental justice communities have provided substantial benefits to members of these communities because of the importance of environmental justice claims.<sup>21</sup>

The environmental justice movement argues for an equitable distribution of the costs and benefits of maintaining a suitable environment in which to live. This goal is frequently expressed in negative terms, such as limiting disparities in the distribution of noxious facilities. Critical assumptions often inform the environmental justice movement of the ways in which racism and class-based inequalities in power operate to generate disparate impacts. While primarily local in character<sup>22</sup> and linked to mobilization against a specific decision by a government agency, the movement also enjoys the support of a large network of organizations traditionally concerned with long-standing civil rights and anti-poverty goals.<sup>23</sup>

One observer indicates that the vast majority of people active within the environmental justice movement are low-income women of color. These activists are also referred to as “new environmentalists” because of their recent efforts to extend their traditional social justice concerns to the environmental arena.<sup>24</sup>

### *A. Cases*

In each of the selected cases, the plaintiffs relied upon statistical comparisons to support claims that they were members of a protected class and victims of illegal discrimination. In each case, the plaintiffs

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<sup>20</sup> *Id.* at 998.

<sup>21</sup> Lazarus, *supra* note 15, at 270-73.

<sup>22</sup> See Sherry Cable & Michael Benson, *Acting Locally: Environmental Injustice and the Emergence of Grass-roots Environmental Organizations*, 40 SOC. PROBS. 464, 465 (1993).

<sup>23</sup> See Lisa A. Binder, *Religion, Race, and Rights: A Rhetorical Overview of Environmental Justice Disputes*, 6 WIS. ENVTL. L.J. 1, 13 (1999).

<sup>24</sup> See Di Chiro, *supra* note 13, at 298-320.

also were required to provide the court with compelling evidence of discriminatory intent.

1. *Bean v. Southwestern Waste Management Corp.*

*Bean v. Southwestern Waste Management Corp.* was among the first cases holding that a decision to site a landfill may have violated an African-American community's rights to equal protection under the law.<sup>25</sup> The plaintiffs' initial motion for a preliminary injunction challenged the decision by the Texas Department of Health to grant a permit to operate a solid waste facility in their community. The approved site was within 1700 feet of the local high school. Plaintiffs claimed that the siting decision was racially motivated. However, they were unable to provide the courts with the statistical data and analysis that would support the conclusion that substantial racial disparity and racial animus was the reason why the community was being exposed to risks the waste treatment facility represented.

The U.S. district court denied the community's request for a preliminary injunction in 1979, arguing that the plaintiffs had failed to make a compelling case. Although he characterized the initial siting decision as both "unfortunate and insensitive," the judge concluded that the plaintiffs had not yet "established a substantial likelihood of proving that the decision to grant the permit was motivated by purposeful racial discrimination."<sup>26</sup> Following the procedural route implied by the court, the petitioners continued to pursue their cause. In 1985, the district court issued a highly critical assessment of the plaintiffs' statistical evidence and impugned the motives of the plaintiffs' expert witness in the case. The court then dismissed the plaintiffs' complaint and assigned them the costs of the court.<sup>27</sup>

2. *Chester Residents Concerned for Quality Living v. Seif*

The residents of Chester, Pennsylvania, pursued their case against the Pennsylvania Department of Environmental Protection all the way to the U.S. Supreme Court.<sup>28</sup> This case is significant in the history of the environmental justice movement because of the legal issues that it raised, the visibility it enjoyed, and the status it was granted through

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<sup>25</sup> See 482 F. Supp 673, 676 (S.D. Tex. 1979).

<sup>26</sup> *Id.* at 680.

<sup>27</sup> Memorandum and Order at 16, *Bean v. Southwestern Waste Mgmt.*, Civ. A. No. H-79-2215 (Feb. 1985).

<sup>28</sup> See *Chester Residents Concerned for Quality Living v. Seif*, 524 U.S. 915 (1998).

the support of the Clinton Administration.<sup>29</sup> The case is also important because of its implications for the probative value of evidence of disparate impact under statutes designed to offer protection from intentional discrimination, as well as its failed attempt to establish a private right of action against an administrative agency. This case is especially important because of the claim that a “race-neutral” permitting program could generate a racially disparate outcome.

Chester residents claimed that construction of a waste treatment facility in their community would add to an already intolerable, and inequitably distributed, burden of pollution on a poor African-American community. The district court denied their petition primarily on the basis of a poorly-crafted initial complaint. However, Judge Dalzell’s comments suggested that arguments and evidence provided in a response brief might have been successful had they been part of the original complaint.<sup>30</sup>

The plaintiffs interpreted EPA regulations as clearly incorporating a discriminatory effect standard, due to the difficulty of demonstrating intentional discrimination by the Pennsylvania Department of Environmental Protection (PADEP).<sup>31</sup> On appeal, the circuit court concluded that a private right of action did exist.<sup>32</sup> Then the Supreme Court granted certiorari on the state environmental agency’s appeal, but the case was never heard after the commercial operator rendered the issue moot with the withdrawal of its permit application.<sup>33</sup>

### 3. South Bronx Clean Air Coalition v. Metropolitan Transportation Authority

Residents of a South Bronx community alleged that the Metropolitan Transportation Authority and the New York City Transit Authority failed to adequately consider the adverse impact that the transformation of a former bus garage into a multi-use industrial facility would have on their health and well-being. They claimed that

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<sup>29</sup> An amicus curiae brief in opposition to the defendants motion to dismiss was filed by the United States Department of Justice and the Environmental Protection Agency.

<sup>30</sup> *Chester Residents Concerned for Quality Living v. Seif*, 944 F. Supp. 413, 416 (E.D. Pa. 1996).

<sup>31</sup> *See Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 929-30 (3d Cir. 1997).

<sup>32</sup> *Id.* at 930.

<sup>33</sup> *Seif v. Chester Residents Concerned for Quality Living*, 524 U.S. 974, 974 (1998), *vacating as moot* 132 F.3d 925 (3rd Cir. 1997).

the actions of the defendants were part of a discriminatory policy in which the state sited “obnoxious environmental activity” in minority neighborhoods, while avoiding the neighborhoods of the state’s white residents.<sup>34</sup>

The district court dismissed the plaintiffs’ disparate impact claim for lack of evidence, noting that the plaintiffs’ counsel had admitted in oral testimony that, “our evidence there is not persuasive at this point.”<sup>35</sup>

### ***B. Principal Players***

This section identifies the main social actors likely involved in a typical environmental justice lawsuit. It shows the ways in which the primary actors in each of these cases contributes, perhaps unintentionally, to an important modification of the identity of the environmental justice movement. The nature of these constructed identities define the scope of future interactions.

#### *1. Courts*

A series of judicial panels, from the local district court to the Supreme Court of the United States, have rendered decisions and opinions that have helped shape the ways in which other players negotiate the meaning of environmental justice.

A set of specific expectations regarding the form of identity of the plaintiffs that the courts will accept should help shape the markers of identification that plaintiffs in these cases can emphasize in their briefs, motions, and complaints. Depending upon the strategy of identification accepted by the courts, plaintiffs will produce either statistics or personal anecdotes in support of a preferred reading of the relevant facts.

#### *2. Administrative Agencies*

In each case, a governmental agency is in charge of making a decision that results in the siting of one or more facilities that are expected to increase the environmental burden on the surrounding community. Plaintiffs are generally required to include the permitting agency among the defendants and articulate a connection between the

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<sup>34</sup> South Bronx Clean Air Coalition v. Metro. Transp. Auth., 20 F. Supp. 2d 565, 572 (S.D. N.Y. 1998).

<sup>35</sup> *Id.* at 573.

agency's action and any actual or likely consequences. These agencies often argue for their exclusion from the proceedings. In some cases the agencies claim a constitutional shield of immunity. Alternatively, in other cases the agencies claim that responsibility for decisions resides at the local level.

The local, state, and federal agencies assigned responsibility for assessing the environmental impact of each facility they approve have consistently failed to consider the complex interactions or cumulative impact of prior decisions that they, or other agencies, may have reached. Agencies have also been blind to the interactions between noxious emissions and the cultural practices of surrounding communities that might exacerbate the risks of routine exposure. This can cause, for example, increased risk to people with diets high in fish and vegetables that absorb toxic substances introduced into the local environment.<sup>36</sup>

### *3. The Federal Administration*

The Clinton Administration became actively involved in shaping the character and orientation of the environmental justice movement in February, 1994, when the president issued Executive Order 12,898.<sup>37</sup> This order was designed to bring greater attention to the environmental conditions and the character of life in poor and minority communities. The order sought to improve conditions by implementing regulations designed to reduce the discriminatory impact of decisions made by federal agencies. The Clinton Administration hoped for increased participation by members of poor and minority communities in governmental decisions that would most likely affect their health and safety.

Clinton's Executive Order encouraged administrative agencies to have greater sensitivity and reflexive monitoring, especially agencies with responsibility for health and environmental policy. Unfortunately, the Executive Order provided little guidance to the

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<sup>36</sup> U.S. DEP'T OF ENERGY, OFFICE OF MINORITY ECON. IMPACT, INCORPORATING ENVIRONMENTAL JUSTICE PRINCIPLES INTO THE CERCLA PROCESS, DOE/EH-413 9812, 6 (1998) (suggesting that the site assessment phase of the remediation process should take note of "differential patterns of consumption of fish and wildlife or plants that introduce otherwise unanticipated pathways and the potential for increased risks due to multiple and cumulative exposures" as these would be "environmental justice situations that can alter the outcome of the site assessment.").

<sup>37</sup> Exec. Order No. 12,898, 3 C.F.R. 859 (1995), *reprinted in* 42 U.S.C 4321 (2000).

agencies, and the critical response of interested parties in the environmental justice movement have barely increased.<sup>38</sup>

As the controversy regarding the environmental justice movement increased, the label of “Environmental Justice Communities” emerged to identify the unique status of the minority and poor communities.<sup>39</sup>

The Environmental Protection Agency (EPA) issued a series of draft guidelines intended to establish a standard for investigating complaints about permits that raised environmental justice concerns. A coalition represented by the Center on Race, Poverty, & the Environment expressed disappointment and dismay over the direction the EPA appeared to take in its guidelines. The coalition argued that:

[I]n almost every policy decision in the Guidance, EPA has chosen to hurt the civil rights complainant, and help the civil rights violator. . . . Because the Guidance is a significant step backward by EPA, and would virtually ensure that no Title VI civil rights complaint filed with EPA would ever be successful,<sup>40</sup> we request that EPA scrap the current Guidance and begin again.

The response from industry was that “[u]nfortunately, the draft revised investigation guidance [did] not provide the predictability and certainty . . . crucial to any effective environmental-permitting process.”<sup>41</sup> Therefore, the Business Network for Environmental Justice concluded that the Investigative Guidance would still require “substantial revision.”<sup>42</sup>

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<sup>38</sup> See Valerie P. Mahoney, Note, *Environmental Justice: From Partial Victories to Complete Solutions*, 21 CARDOZO L. REV. 361, 401-03 (1999) (discussing responses to the Executive Order).

<sup>39</sup> See, e.g., Richard J. Lazarus & Stephanie Tai, *Integrating Environmental Justice into EPA Permitting Authority*, 26 Ecology L.Q. 617, 621-22 (1999) (referring to environmental justice communities as communities that have “historically lacked the resources needed to monitor polluting facilities in their neighborhoods for possible violations and, if found, to negotiate their correction, to persuade federal or state enforcement officials to take action, or to bring citizen suit enforcement actions against violating facilities.”).

<sup>40</sup> See Letter from Luke Cole, Director, Center on Race, Poverty, and the Environment, to Carol Browner, Administrator, U.S. EPA 2 (Aug. 26, 2000), available at [http://www.epa.gov/civilrights/docs/t6com2000\\_071.pdf](http://www.epa.gov/civilrights/docs/t6com2000_071.pdf).

<sup>41</sup> See Letter from Keith W. McCoy, Director of Environmental Quality, National Association of Manufacturers, to the U.S. EPA, Office of Civil Rights 1 (August 28, 2000) available at [http://www.epa.gov/civilrights/docs/t6com2000\\_054.pdf](http://www.epa.gov/civilrights/docs/t6com2000_054.pdf).

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

#### *4. The Agents of Harm*

The evolution of the environmental justice movement has been accompanied by a shifting emphasis from the activities of individual polluters to the decisions made by administrative agencies. Decisions approving of the routine practices of agencies combine to make life in poor and minority communities intolerable.

The agents of harm are typically involved in the management of waste, the production of energy, or the production of goods and services that have accompanying “spillover effects.” Spillover effects include externalities that impose costs on individuals and communities who may, or may not, be compensated for that harm. Traditional perspectives within the discipline of welfare economics assume that action by a government agency is warranted in order to control the production and distribution of these harms.<sup>43</sup> A more conservative view, generally associated with the Nobel laureate, Ronald Coase, argues that a better response to spillover effects is to pursue transactions between those who injure, and those who are injured.<sup>44</sup> Framing the issue in this way normalizes the production of spillover effects. The issue becomes the assignment of rights: the right to engage in commercial activities that generate noxious spillovers, or the right to live and raise one’s family in a healthy environment.

In the absence of compensation, or the requirement that spillovers be contained, granting the right to pollute is a political act that legitimates the distribution of harm. Welfare economists generally agree that if amenity rights are assigned to the victims, instead of the polluters, then the optimal level of spillover would be smaller.<sup>45</sup> While the Coasean perspective views negotiation between polluters and local property owners as superior to government intervention, critics suggest that the assumptions of equality between contending parties simply do not hold in most negotiations of this type.<sup>46</sup> Unlike the traditional environmentalists who directed their efforts toward the reduction of noxious spillovers, the environmental justice movement focused its attention on managing the distribution of spillovers.

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<sup>43</sup> See E.J. MISHAN, WHAT POLITICAL ECONOMY IS ALL ABOUT 137, 144-45 (1982) (discussing environmental spillovers and the law).

<sup>44</sup> See MELVIN W. REDER, ECONOMICS: THE CULTURE OF A CONTROVERSIAL SCIENCE 223-28 (1999) (discussing the Coase Theorem and the role of the state).

<sup>45</sup> MISHAN, *supra* note 43, at 141.

<sup>46</sup> REDER, *supra* note 44, at 227.

5. *The Aggrieved Community*

In the *Bean*, *Chester Residents*, and *South Bronx* cases, community based organizations have assumed, or have been assigned, the role of plaintiff. In some cases, the community organizations have claimed to represent the interests of a class of victims. In each case, it is reasonable to characterize these plaintiffs as making progress toward developing a collective identity as a community-based social movement.

With rare exceptions, the voice of the community is heard through the motions, briefs, and testimony of their attorneys. Lawyers who have communities, rather than corporations or individuals as their clients, represent a unique legal practice.<sup>47</sup> It seems likely that the lawyers who help shape the meaning of environmental justice through a community-based practice will develop a collective identity not unlike those of the lawyers whose arguments before the nation's courts shaped the identity of the civil rights movement.<sup>48</sup>

One practitioner describes the practice of community lawyers as being "located in poor, disempowered, and subordinated communities" and "dedicated to serving the communities' goals."<sup>49</sup> He argues that "the goal for community lawyers should include assisting clients to create power and lasting institutions with the ability to influence the clients' environment, rather than solely the creation or enforcement of rights or providing remedies to legal wrongs."<sup>50</sup> The power of a community-based social movement within the law may be overwhelmed in courtrooms and administrative hearings where corporate actors and agency representatives can display a wealth of talent and resources.<sup>51</sup>

Michael Diamond's discussion of community lawyering emphasizes concerns and activities generally understood to be outside

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<sup>47</sup> See Michael Diamond, *Community Lawyering: Revisiting the Old Neighborhood*, 32 COLUM. HUM. RTS. L. REV. 67, 69 (2000).

<sup>48</sup> See JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA*, 214-15, 268 (1976) (discussing the role of Howard University trained lawyers in the early days of the civil rights movement and the expansion of the traditional concerns of that movement and its advocates to include economic inequality).

<sup>49</sup> *Id.* at 75.

<sup>50</sup> *Id.* at 108-09.

<sup>51</sup> See generally R. Gregory Roberts, Comment, *Environmental Justice and Community Empowerment: Learning from the Civil Rights Movement*, 48 AM. U. L. REV. 229, 246, 253-54 (1998).

the bounds of conventional legal practice.<sup>52</sup> He also takes notice of the methods in which community representation ultimately shapes conventional legal practice.<sup>53</sup> Challenges faced by public interest lawyers working on behalf of impoverished communities include competing interests, incompatible goals, and reliance on different strategies.

Similar concerns have been raised by Regina Austin regarding the evolving constructions of the “black community.”<sup>54</sup> Like Diamond, Austin appreciates the problem of conflict within the community for those who provide legal advice and representation to the community. In reflecting on the problem of “lawbreakers” within the African-American community, Austin underscores the importance of having legal advocates who are willing and able to “work the line” between the legal and the illegal.<sup>55</sup>

In addition, substantial differences of opinion exist within the community about whether the trade-offs between opposing an environmentally-risky industrial facility or welcoming that same facility as a prospective employer represent a good deal or a “beggars’ choice.”<sup>56</sup>

Because of such differences in perspective, shoring up the identity of the “community of concern” will be difficult for the administrative agencies charged with environmental justice responsibilities.<sup>57</sup> In addition, courts required to assess the nature and extent of the disparate impacts of discrimination may have significant difficulties.

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<sup>52</sup> Diamond, *supra* note 47, at 69.

<sup>53</sup> *Id.* at 108.

<sup>54</sup> See Regina Austin, “The Black Community,” *Its Lawbreakers, and a Politics of Identification*, in CRITICAL RACE THEORY: THE CUTTING EDGE 293, 293 (Richard Delgado ed., 1995).

<sup>55</sup> *Id.* at 301.

<sup>56</sup> A divided African-American community in St. James Parish, Louisiana disagreed about the costs and benefits that would be derived from the development of a polyvinyl chloride plant along the Mississippi River. Lisa A. Binder, *Religion, Race, and Rights: A Rhetorical Overview of Environmental Justice Disputes*, 6 WIS. ENVTL. L.J. 1, 37-59 (1999) (discussing the Shintech case).

<sup>57</sup> Daniel Isales, *Environmental Justice and Title VI: The Administrative Remedy*, 18 TEMP. ENVTL. L. & TECH. J. 125, 130-31 (2000).

## II

ELEMENTS OF A THEORY OF COMMUNITY IN THE CONTEXT OF  
THE ENVIRONMENTAL JUSTICE MOVEMENT

The community rhetoric can be a useful tool with which to study the environmental justice movement. A central concern of the movement is the notion of an "endangered community"<sup>58</sup> or a "defended neighborhood."<sup>59</sup> Several key elements in the rhetoric of community are used strategically by the proponents of the environmental justice movement in their claims.

The growing complexity of the modern society poses a difficult problem for community studies. The concept of community as an organizational framework proved inadequate for depicting aspects of society in which empirical propositions could be formulated, tested, and generalized. However, parallel to the demise of the concept of community as a useful abstraction<sup>60</sup> and its subsequent replacement with different terms like neighborhood or locale,<sup>61</sup> the idea of "community" gained increasing relevance as a rhetorical tool in public speech.

The concept of community as discourse emerged as an integrative framework for understanding how social actors index the notion of community to their individual experience.<sup>62</sup> The key point in this paradigmatic change regards community not exclusively as an institutional structure or social action, as sociology did until the 1960s,<sup>63</sup> but rather as a commonality of meanings.<sup>64</sup> The classic

<sup>58</sup> Clarice E. Gaylord & Geraldine W. Twitty, *Protecting Endangered Communities*, 21 *FORDHAM URB. L.J.* 771, 771-86 (1994).

<sup>59</sup> Cf. GERALD D. SUTTLES, *THE SOCIAL CONSTRUCTION OF COMMUNITIES* (1972) (defining "defended neighborhood" as a residential group that seals itself through the creation of symbolic borders as a result of, for example, its forbidding reputation).

<sup>60</sup> Margaret Stacey, *The Myth of Community Studies*, 20 *BRIT. J. SOC.* 134, 134 (1969).

<sup>61</sup> See Graham Day & Jonathan Murdoch, *Locality and Community: Coming to Terms with Place*, 41 *SOC. REV.* 82, 82-111 (1993).

<sup>62</sup> A. C. Pratt, *Discourses of Locality*, 23 *ENV'T & PLAN.* 257, 257-67 (1991).

<sup>63</sup> Day & Murdoch, *supra* note 61, at 82.

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We confront an empirical phenomenon: people's attachment to community. We seek understanding of it by trying to capture some sense of their experience and of the meanings they attach to community. Thus, moving away from the earlier emphasis our discipline placed on structure, we approach community as a phenomenon of culture: as one, therefore, which is meaningfully constructed by people through their symbolic prowess and resources.

ANTHONY P. COHEN, *THE SYMBOLIC CONSTRUCTION OF COMMUNITY* 38 (1987).

analyses of the Chicago School regarding the social ecology of community transitioned to an emphasis on the symbolic ecology of social groups employing boundaries as metaphors.<sup>65</sup> From this point of view, community as discourse emphasizes “the shared base of stories, [the] realities . . . conveyed, and even how [the] stories are told.”<sup>66</sup> The downside of this approach, however, is the tendency to represent community as univocal discourse, either because of the common geographical space of the social actors (community as locale), their common position in respect to some institutional discourse (community as audience), their common placement on the political board (communities of interest), or their common habitual practices (community of choice<sup>67</sup>). Consequently, an accounting is required of the manner in which the explicit engagement with various social networks is shaping the experience and identity associated with the notion of community<sup>68</sup> and, conversely, how community and communal identity are shaping institutional sites.

The placement of a toxic facility is responsible for affecting the entire community dynamic, from disrupting everyday life and stigmatization, to new patterns of organizational involvement.<sup>69</sup> Minority communities confronted with the threat of toxic exposure regard their experience as similar to that of other communities in the same situation. The significance of the disruptive event and the solidarity with communities in similar situations are critical elements in the establishment of a sense of community.<sup>70</sup> Claims of solidarity and significance represent strategic rhetorical resources with which

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<sup>65</sup> See, e.g., Margaret E. Montoya, *Border/Ed Identities: Narrative and the Social Construction of Legal and Personal Identities*, in *CROSSING BOUNDARIES: TRADITIONS AND TRANSFORMATIONS IN LAW AND SOCIETY RESEARCH*, 129-59 (A. Sarat et al. eds., 1998) (discussing the formation of Latino/a identities).

<sup>66</sup> David R. Maines & Jeffrey C. Bridger, *Narrative, Community, and Land Use Decisions*, 29 *SOC. SCI. J.* 363, 377 (1992).

<sup>67</sup> Carlos A. Ball, *Communitarianism and Gay Rights*, 85 *CORNELL L. REV.* 443, 450 (2000) (using the term “communities of choice” to describe communities formed through voluntary associations, such as communities of gays and lesbians).

<sup>68</sup> Day & Murdoch, *supra* note 61, at 82. This is also the position advocated by Bulmer when he argues for making an explicit link between modern neighborhoodism and political engagement. See Martin Bulmer, *The Rejuvenation of Community Studies? Neighbours, Networks and Policy*, 33 *SOC. REV.* 430, 430-48 (1985).

<sup>69</sup> Michael R. Edelstein & Abraham Wandersman, *Community Dynamics in Coping with Toxic Contaminants*, in *NEIGHBORHOOD AND COMMUNITY ENVIRONMENTS* 69 (Irwin Altman & Abraham Wandersman eds., 1987).

<sup>70</sup> David B. Clark, *The Concept of Community: A Re-Examination*, 21 *SOC. REV.* 397, 404 (1973).

communities express their identity. Therefore, the basis for asserting solidarity and significance in the context of the environmental justice movement must be understood.

### A. *Solidarity*

Communities can derive various forms of solidarity from the perception of an environmental threat. A community's identity may be defined in terms of race, ethnicity, class, culture, or simply by its relation to a common place (understood as geographic locale, physical boundary, or social space).<sup>71</sup>

#### 1. *Identity as Common Perception of Environmental Threat*

The perception of environmental threat increases the sense of solidarity among the residents of the affected areas. An example is the locally organized opposition of African-American residents in Warren County, North Carolina in 1982, in which more than 500 people rallied in opposition to the dumping of PCB waste near their community.<sup>72</sup> However, unlike mainstream environmentalism, illustrated by the struggle at Love Canal twelve years earlier, environmental justice solidarity is constituted from the interplay between environment, identity, and rights.<sup>73</sup> A section of the environmental justice rhetoric is framed in opposition to environmentalism that attempts to preserve the purity of nature abstracted from the people that populate it, while admitting risk uncertainties dictated by market efficiency. For nontraditional environmental justice proponents, the new endangered species are people of color and low socioeconomic status.<sup>74</sup>

The focus on rights and their relation to racial identity is crucial in determining the legal venue residents will choose when pursuing their claims. Communities seeking environmental justice typically start their litigation as a claim of unconstitutional discrimination and

<sup>71</sup> Donna M. Johnson, *Who Is We? Constructing Communities in U.S.-Mexico Border Discourse*, 5 DISCOURSE AND SOC'Y 207, 215-17 (1994) (discussing discursive strategies of enforcing solidarity through references to a common place).

<sup>72</sup> Robert D. Bullard & Glenn S. Johnson, *Environmental Justice: Grassroots Activism and Its Impact on Public Policy Decision Making*, 56 J. SOC. ISSUES 555, 556 (2000).

<sup>73</sup> See also Di Chiro, *supra* note 13, at 298.

<sup>74</sup> Gaylord & Twitty, *supra* note 58, at 771; see also ENVT'L HEALTH COALITION, TOXIC-FREE NEIGHBORHOODS: COMMUNITY PLANNING GUIDE, SAN DIEGO (1993) (associating demand for ecological policies in balance with nature with the need to honor the cultural integrity of the community).

demand equitable relief, rather than claiming toxic risk and demanding civil and financial liability under the mass torts doctrine. Interestingly, although plaintiffs seeking relief under environmental laws are thought to have much higher chances of success,<sup>75</sup> communities often opt to pursue claims under the Equal Protection Clause. The statistical sophistication demanded by the judges in environmental justice trials in respect to harm and minority definition<sup>76</sup> differ with the common sense, general social standards employed by the judge in *Chester v. Delcora*:<sup>77</sup>

The odor emission regulation may not be precise, but statutes do not become unconstitutional because of an absence of “mathematical certainty.” The Court will not strike the regulation down under [the] due process clause simply because society has not developed a scientific<sup>78</sup> methodology for measuring certain forms of air pollution.

The legal venue chosen by affected communities in environmental justice trials attests to the importance of racial and ethnic identity, used both as a means of identification and as a warrant for the assignment of blame. Perhaps, the tendency of mass tort litigation to focus on monetary settlement rather than the non-monetary harm to the plaintiff<sup>79</sup> renders that type of legal action much less rhetorically attractive to the communities.

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<sup>75</sup> According to some estimations, 70% of the toxic substances cases succeed under the tort doctrine. Neil Vidmar, *Maps, Gaps, Sociolegal Scholarship, and the Tort Reform Debate*, in *SOCIAL SCIENCE, SOCIAL POLICY, AND THE LAW* 170 (Patricia Edwick et al. eds., 1999).

<sup>76</sup> See *Bedford-Stuyvesant Block Ass’n v. Cuomo*, 651 F. Supp. 1202; 1209-10 (E.D. N.Y. 1987) (discussing Pearson’s formula for testing the correlation between non-Hispanic whites and the number of homeless in the community district).

<sup>77</sup> *Chester Residents Concerned for Quality Living v. Delcora Sewage*, No. C.A. 94-5639, 1994 U.S. Dist. LEXIS 15875, at \*1 (E.D. Pa. 1994); the plaintiff (which we find also in *Chester Residents v. Seif*) alleged federal and state law violations caused by “malodorous air contaminants” from Delcora Sewage Treatment Plant, under Clean Air Act, 42 U.S.C. § 4701 et seq. and Pennsylvania Air Pollution Control Act, 35 P.S. § 4001 et seq. The Defendant rebutted the claim on grounds of vagueness, subjectivity and ambiguity in the statute definition of “malodors”.

<sup>78</sup> *Id.* at \*5.

<sup>79</sup> D.R. HENSLER, *THE REAL WORLD OF TORT LITIGATION: EVERYDAY PRACTICES AND TROUBLE CASES* 170 (1998).

## 2. *Racial and Ethnic Identity*

Racial and ethnic identity is widely recognized as both the product and the source of many of the complex relationships between people and institutions that are included in discrimination.<sup>80</sup>

The nature and salience of an individual's identity is not fixed at birth.<sup>81</sup> Indeed, we are increasingly interested in discovering the nature of the cues that are present in particular interpersonal contexts that activate the racial and ethnic identities of the participants in such encounters. Note, for example, that the importance of racial or ethnic identity, as it relates to one's self-concept, not only varies across racial and ethnic groups, but varies across the settings within which routine interactions with others may be marked by more or less conflict and risk. First, racial identity is more important to African-Americans than it is for other groups in society. Evidence also suggests that for African-Americans, racial identity is more important at work than at home, in the neighborhood, or in the general public.<sup>82</sup>

Recognition of an individual's identity as a member of a group is also important and may be determined in part by common features observable by others. The old adage, "if it looks like a duck," also includes behavioral indicators such as, "walks like a duck, swims like a duck, eats and sounds like a duck," that point conclusively to an individual's membership in the community of ducks. Because of the strong correlation between behavioral attributes and group membership, discriminatory intent may be hidden behind reference to behaviors, rather than the names or labels by which disfavored groups and communities are known.<sup>83</sup>

Identity may facilitate, or limit the development of a multiracial social movement on the basis of a common class position. Such a movement would have to overcome the difficulties associated with the development of oppositional racial identities, especially among African-American youth in the nation's cities. At the extreme, an

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<sup>80</sup> Deborah Frable, *Gender, Racial, Ethnic, Sexual, and Class Identities*, 48 ANN. REV. PSYCHOL. 139, 147-48 (1997).

<sup>81</sup> STEPHEN CORNELL AND DOUGLAS HARTMANN, *ETHNICITY AND RACE* 72 (1998).

<sup>82</sup> Charles Jaret & Donald Reitzes, *The Importance of Racial-Ethnic Identity and Social Setting for Blacks, Whites, and Multiracials*, 42 SOC. PERSP. 711, 724 (1999).

<sup>83</sup> See Jason Leckerman, Comment, *City of Brotherly Love?: Using the Fourteenth Amendment to Strike Down an Anti-Homeless Ordinance in Philadelphia*, 3 U. PA. J. CONST. L. 540, 562 (2001) (discussing references to behavior, rather than group identity).

oppositional identity invites and reinforces alienation from potential partners within a social movement.<sup>84</sup>

There are important differences within and between the categories that define racial and ethnic groups.<sup>85</sup> Plaintiffs differ in the precision with which they define the racial composition of the groups they claim to represent. Plaintiffs emphasize differences between the victims and the oppressors, while defendants seek to exploit the differences among plaintiffs.

### *3. Identity as a Link to an Identifiable Physical Space*

One's identity as a member of a community is traditionally based upon residence within the confines of an identifiable physical space. Although we think of space in terms of physical markers, the selection of those markers is not random and will always reflect the exercise of power and influence. Spatial relations between community residences, community resources, and noxious facilities and activities play a central role in defining the communities at risk. Distance from facilities is generally the critical spatial index.

Consider, for example, the use of a map to indicate the location of a community, and the proposed site for a treatment facility. Two maps, assumed to represent the same physical space, may differ in terms of the completeness and accuracy with which attributes of that space are represented on the map. Maps exist to serve a particular interest, and quite often the interests being served are hidden from view.<sup>86</sup> Consider the rules that determine which features of the environment are "permanent enough" to justify the creation of a symbol for use in printing topographic maps by the U.S. Geological Survey. While the maps may characterize the "hard or improved surface" road that carries the garbage through the community, neither the trucks nor their noxious loads are likely to appear on those maps. Smells, sounds, and other things that cannot be photographed are also absent from maps.<sup>87</sup> Not even a map developed by the local

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<sup>84</sup> See William E. Cross, *Oppositional Identity and African American Youth: Issues and Prospects*, in *TOWARD A COMMON DESTINY: IMPROVING RACE AND ETHNIC RELATIONS IN AMERICA 185* (Willis Hawley & Anthony Jackson eds., 1995) (discussing alienation between middle class whites and blacks).

<sup>85</sup> See Eric Yamamoto & Jen-L W. Lyman, *Racializing Environmental Justice*, 72 U. COLO. L. REV. 311, 323 (2001) (arguing against the general tendency of the courts to assume that the interests of all minority groups are the same).

<sup>86</sup> DENIS WOOD, *THE POWER OF MAPS*, 70-94 (1992).

<sup>87</sup> *Id.* at 85.

environmental protection agency would capture these forms of environmental pollution.

*a. Differential Social Spaces*

The commentators of the environmental justice movement have usually overlooked the fact that the notion of community encompasses very different social space and treats communities interchangeably. The difference between a suburban community and a city neighborhood, for example, rests both in the array of concerns and in the social organization of the residents around different notions of space. Since toxic landfills are usually located in the suburbs, claims of discriminatory noxious sitings are more characteristic for suburban communities. In contrast, concern for the discriminatory enforcement of public policies such as zoning, housing, and access to public services is likely to be in the realm of neighborhoods.

A neighborhood is a social entity that exists in structural, rather than sentimental, relation to the physical space. This means that neighborhood solidarity, in this case, is based on complex and heterogeneous identities resulting from racialized spaces and class cleavages, coupled with the awareness of a common fate before the city planners, who may or may not draw the same cognitive maps and boundaries as the residents of the neighborhood.<sup>88</sup> Therefore, community and neighborhood are not synonymous.

*b. Boundaries*

The boundaries of communities are the product of social, economic, and historical processes. These processes include migrations, the enforcement of racially discriminatory zoning policies that reproduced and amplified the results of discriminatory mortgage lending practices.<sup>89</sup> The racial composition of communities also varies substantially. Although the evidence is hard to gather, racial prejudice, especially with regard to African-Americans, continues to be a powerful determinant of residential segregation.<sup>90</sup> Highly segregated neighborhoods are the result of urban planning policies.

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<sup>88</sup> SUTTLES, *supra* note 59, at 33-37.

<sup>89</sup> See Peter E. Mahoney, *The End(s) of Disparate Impact: Doctrinal Reconstruction, Fair Housing and Lending Law, and the Antidiscrimination Principle*, 47 EMORY L.J. 409, 441-42 (1998).

<sup>90</sup> Camille Z. Charles, *Neighborhood Racial-composition Preferences: Evidence from a Multiethnic Metropolis*, 47 SOC. PROBS. 379, 401 (2000).

Urban renewal projects of the 1960s relocated residents and produced urban wastelands. The more modern aesthetic ideologies of the 1980s then caused the migration of wealthier residents to neighborhoods with “historic ambiance,” which drove property values up and caused less affluent residents to move out.<sup>91</sup> As the proportion of African-American residents in a neighborhood varies, racial tension and conflicts increase. As a result, the salience of racial identity for residents in those neighborhoods tends to be higher.<sup>92</sup>

Researchers prefer to regard neighborhoods as entities with shifting borders defined by physical obstructions (railroads, streets, etc.) that limit the access of outsiders. In contrast, suburban or rural communities have borders that are usually defined by natural geographical markers. However, neighborhoods may define themselves as political units, such as city districts. Also, in contrast to rural communities whose traditional attachment to the land acts as a liaison between residents,<sup>93</sup> the neighborhood is regarded as a nexus of mixed loyalties. A neighborhood is likely to enter into temporary alliances with different neighborhoods in order to prevent a public policy that would impact its identity. An example is the coalition between block associations of African-Americans in East Elmhurst and the white Jackson Heights neighborhoods to prevent the New York Port Authority from building an automated guided train to La Guardia airport.<sup>94</sup>

The boundaries of neighborhoods and communities are often changed to modify the effective political power that residents are able to wield through elections. Gerrymandering is a term that describes drawing geopolitical boundaries in an effort to control the exercise of political power. Racial redistricting in some southern states used to be used to ensure that there would be no legislative districts in which African-Americans would be the majority of registered voters. Following the Voting Rights Act of 1982, the creation of jurisdictions

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<sup>91</sup> A. Dan Tarlock, *City Versus Countryside: Environmental Equity in Context*, 21 *FORDHAM URB. L.J.* 461, 482 (1994).

<sup>92</sup> Jaret & Reitzes, *supra* note 82, at 725-26.

<sup>93</sup> David R. Maines & Jeffrey C. Bridger, *Narratives, Community and Land Use Decisions*, 29 *SOC. SCI. J.* 363, 371-76 (1992) (exemplifying the construction of local communitarian identity in Lancaster County, PA through narratives of land use).

<sup>94</sup> STEVEN GREGORY, *BLACK CORONA: RACE AND POLITICS OF PLACE IN AN URBAN COMMUNITY 190-93* (1998) (presenting a highly detailed ethnographic analysis of the residents in Corona and East Elmhurst, in the borough of Queens, New York).

where African-Americans would be in the majority became a controversial affirmative public policy.<sup>95</sup>

Following the mobilization of opposition to affirmative action and other race-based programs, the Clinton Administration welcomed the development of place, rather than race-based, interventions.<sup>96</sup> Nevertheless, the selection of places based on income or social class encounters problems of community identity brought about by the presence of whites who are not traditionally poor.

However, the traditional reluctance of the Supreme Court to interfere with state policies of resource allocation, coupled with the legal ambiguity of class (as defined by wealth) as a legal basis for classification and the refusal to recognize the connection between race and wealth, make the claims of neighborhood discrimination particularly difficult to succeed. For example, in an early case of discrimination concerning education funds, the Supreme Court maintained that the class of poor people is not definable and that “[i]t is not within the constitutional prerogative of the United States Supreme Court to nullify statewide measures for financing public services merely because the burdens or benefits thereof fall unevenly depending upon the relative wealth of the political subdivisions in which citizens live.”<sup>97</sup>

### *B. Significance*

The significant *we* is defined by both similar and different communities. *We* is contrasted with the *otherness* represented by industry and government officials.<sup>98</sup> These officials are generally perceived as unhelpful and unconcerned for the residential quality of

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<sup>95</sup> KEITH REEVES, *VOTING HOPES OR FEARS* 93-111 (1997).

<sup>96</sup> See Miguel de Oliver & Teresa Dawson-Munoz, *Place-not-race?: The Inadequacy of Geography to Address Racial Disparities*, 25 REV. BLACK POL. ECON. 37, 39 (1996).

<sup>97</sup> Mexican-American residents of the Edgewood Independent School District in Bexar County, Texas, challenged all the school districts in the San Antonio metropolitan area and alleged that the Texas statutory system that allowed each independent school district to supplement the funds received from the state by collecting taxes for use exclusively within that particular school district, had a discriminatory impact on poor districts and violated the equal protection right of the children in those districts. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

<sup>98</sup> See Binder, *supra* note 23, at 34-35 (analyzing the hearing at the Louisiana Department of Environmental Quality in the context of Shintech's proposed facility, and noting that the label of "outsider" applied to the siting advocates, who were accused of seeking to exploit the community for their own benefits and according to their own agenda).

life and usually suspected of mixed motivations.<sup>99</sup> The ideographical<sup>100</sup> use of community is created in opposition to the actions of external agencies. Community significance is constructed by its internal identification as a symbolic unit, its dependence or autonomy to a larger unit that contributes to the development of a symbolic border as a means for external identification, and the emphasis on the common experience of oppression.

### 1. Identity as Symbolic Unit

As symbolic units, communities are identified by name. The names of communities often reveal a particular aspect about the residents and their identity. The names assigned to neighborhoods may reflect their historical origins, their physical characteristics, or the ways in which their residents were regarded by those in authority. Philadelphia, often described as a “city of neighborhoods,” has had many names that describe the race and ethnicity of its residents in the past (Germantown, The Black Bottom, Jewtown, Irishtown). Media amplification of police banter has recently earned one neighborhood the distinction of being named “The Badlands.”<sup>101</sup>

### 2. Identity as Symbolic Boundary

Geopolitical boundaries are symbolic boundaries. These boundaries are defined by levels of aggregation and errors due to assumptions made about the characteristics of the populations within those aggregations.<sup>102</sup> Data provided by the United States Census

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<sup>99</sup> See generally Stephanie A. Welcomer et al., *Resisting the Discourse of Modernity: Rationality Versus Emotion in Hazardous Waste Siting*, 53 HUM. REL. 1175 (2000) (analyzing the opposition of a community in Clarion County, PA, to the siting of several waste disposal facilities by Concord Resources Group, Inc. The authors identify mistrust as one of the main discursive categories of the community residents. This research was the result of a 16-month participatory observation and content analysis of public texts. The analysis emphasizes the disruption of identity and the residents’ adversarial framing of their engagement with industry and government officials).

<sup>100</sup> For a theoretical discussion of ideographs as ideologically-loaded words employed strategically in public rhetoric to influence the decision in a particular situation, see generally Michael Calvin McGee, *The Ideograph: A Link Between Rhetoric and Ideology*, 66 Q.J. SPEECH 1 (1980).

<sup>101</sup> PHILADELPHIA INFORMATION LOCATOR SERVICE, PHILADELPHIA NEIGHBORHOODS AND PLACE NAMES, at <http://www.phila.gov.phils/Docs/otherinf/placname.htm> (last visited Sept. 23, 2004).

<sup>102</sup> MARK MONMONIER, HOW TO LIE WITH MAPS 12-17 (1991). See also GARY KING, A SOLUTION TO THE ECOLOGICAL INFERENCE PROBLEM (1997) (discussing the problems with drawing inferences from aggregate data).

Bureau are often relied upon in characterizing the population of aggregates such as a state and the smallest definable unit as a city block.<sup>103</sup> Other administrative units, such as congressional districts and zip codes, are also used as the basis for defining a community. Geographic Information Systems (GIS) provide a technological means for assessing the relationships between attributes that define and differentiate communities.<sup>104</sup> Geodemographic segmentation is one process that reflects the adaptation of spatial data to the needs of economic and political strategists.<sup>105</sup> The link between the zip code and the identity of the community or neighborhood it refers to, is established empirically by means of proprietary cluster analysis routines designed to maximize similarity within, and differences between, the communities identified by the method. Depending upon the needs of the client, or the techniques developed by the analysts,<sup>106</sup> the thousands of unique communities definable at the zip code level are grouped into a small number of neighborhood types.

The periodic reassessment of the status of communities identified through clustering analysis reveals some of the ways in which change takes place. Communities in transition can go from primarily black to white, through a process of gentrification. Transition also goes from white to black, often “tipping” quite rapidly once the process starts. Neighborhoods in transition are rarely communities because whites and blacks are clustered into separate enclaves within the zip cluster. Such communities are hybrid, rather than integrated communities.<sup>107</sup>

Clearly there are no well developed standards that specify the appropriate racial identity of a community. The correct proportion of the population within a particular geopolitical unit required to be African-American for that community to be identified as a black community is unknown. This balance evokes memories of the history of racial classification more generally. At different stages in the history of the United States an unstable mix of rules determined whether or not an individual would be identified under the law as a

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<sup>103</sup> Five digit zip codes may include 2,320 households; a census tract around 1,270; and a census block approximately 340 households.

<sup>104</sup> MICHAEL R. CURRY, DIGITAL PLACES 45-47 (1998).

<sup>105</sup> MICHAEL J. WEISS, THE CLUSTERING OF AMERICA 10-15 (1988).

<sup>106</sup> Jonathan Robbin’s initial clustering solution developed for his PRIZM service identified forty “lifestyle clusters” and assigned characteristic names like “Hard Scrabble,” “Public Assistance,” and “Money and Brains” to each of 36,000 zip codes in the United States. *Id.* at xi-xvi.

<sup>107</sup> *Id.* at 251-59 (discussing “communities in transition”).

Negro. The so-called “one-drop rule,” or the rule of “hypo-descent,” meant that having a single black or African ancestor was sufficient for an individual to be assigned a legal designation as black in many southern states.<sup>108</sup>

### 3. *Common Experience of Oppression*

Communities may identify and be identified by their common experience of oppression or victimization.<sup>109</sup> The nature of this oppression is frequently illustrated by reference to, or comparison with, the experience or status of others, or by the identification of a pattern of discriminatory acts over time. Identification by race and class, therefore, usually involves comparing the benefits of the privileged, whether determined by race, class, or some combination. The dependence or autonomy of the community to a larger unit, such as the region or the city, are especially salient as the allegations of discrimination are likely to rest on statistical comparisons between the aggrieved community and white communities or the larger geographic, economic, or social unit to which the aggrieved community belongs. Such comparisons usually draw on the racial composition of the community, the disproportionate amount of burdens, the level of health risk, and statistical proof of disadvantages.

Identity as the basis of assumed common experience is articulated as a theory of “linked fate.”<sup>110</sup> The greater the sense of linked fate, the more consistently a person’s race predicts his or her support for, or opposition to, public policies that might determine fate. Thus, African-Americans who strongly identify with their racial group are likely to support affirmative action, reparations, and other policies that benefit African-Americans. Belief in common fate is also associated with shared perceptions of relative risk.<sup>111</sup>

Identity may also be based on a claim to shared rights. African-Americans have claimed that the Fourteenth Amendment establishes a

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<sup>108</sup> F. JAMES DAVIS, *WHO IS BLACK? ONE NATION’S DEFINITION* 113 (1991).

<sup>109</sup> Cornell and Hartmann offer a “constructionist” explanation for the existence and salience of racial and ethnic identities that includes due consideration of oppressive relations. *Supra* note 81, at 72.

<sup>110</sup> MICHAEL DAWSON, *BEHIND THE MULE: RACE AND CLASS IN AFRICAN AMERICAN POLITICS* 76-80 (1994).

<sup>111</sup> Oscar H. Gandy, Jr., *Racial Identity, Media Use, and the Social Construction of Risk Among African Americans*, 31 *J. BLACK STUD.* 600, 613-14 (2001).

basis for rights under the law equivalent to the rights enjoyed by people identified as white. In this regard, racial identification, as a criterion of membership, becomes a token of entitlement, and a valued resource akin to property.<sup>112</sup>

Rights based on experience, and the assumption of discrimination or victimization, have been developed through legislative and judicial action taken on behalf of people with disabilities.<sup>113</sup> These rights have much in common with rights established for people defined by race, gender, or sexual orientation. Membership in these communities tends not to be voluntary, and is marked by an assumption of within-group homogeneity, rather than difference.

Other group perspectives formulate group identity based on a perception of common injury, although in many cases the harm thus defined is an injury to self-esteem, rather than a substantial material or structural harm.<sup>114</sup> However, a sense of linked fate is the primary basis for the development of a community-based social movement.

### III

#### THE NEGOTIATION OF THE COMMUNITY-BASED SOCIAL IDENTITY

In attempts to pursue justice before the courts, representatives of communities have had to apply for class certifications on the basis of inadequately defined, logically incompatible, and statistically insignificant group distinctions.

##### *A. Race, Class, and Culture as the Basis of Community Identity*

Explicit references to the race, class, and culture of the plaintiffs in their complaints have been designed to both influence and comply with the demands of the judicial process. The broad functions and the polarizing character of these claims have varied as the environmental justice movement evolved over time.

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

The complaint in *Bean* claimed a violation of due process and asserted that the Fourteenth Amendment established that rights

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<sup>112</sup> See Cheryl Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1736 (1993).

<sup>113</sup> See Eric J. Mitnick, *Taking Rights Spherically: Formal and Collective Aspects of Legal Rights*, 34 WAKE FOREST L. REV. 409, 438-40 (1999).

<sup>114</sup> See Mariana Valverde, *Identity Politics and the Law in the United States*, 25 FEMINIST STUD. 345, 347 (1999) (discussing the perspective of Wendy Brown).

enjoyed by white citizens should be the basis for comparison in due process claims. The defendants, Southwestern Waste Management (SWM), were accused of discrimination, but members of the plaintiff class were not identified by race.<sup>115</sup> Therefore, the defendant challenged an unstated assumption of racial homogeneity within the class. In its motion to dismiss, SWM denied “that the class of all property owners described . . . [was] proper because such class certainly included persons of various racial and ethnic backgrounds[,] all of whom cannot simultaneously have a cause of action. . . .”<sup>116</sup>

In their amended complaint, plaintiffs moved closer to identifying themselves by race. They argued that the defendant’s action was “part of a pattern, practice or scheme . . . to unconstitutionally discriminate against racial minorities . . . by placing such facilities in areas that are predominantly Black and minority.”<sup>117</sup> They claimed that the geographic area that defined the community was over 75% minority and over 54% African-American.

Distinctions between the interests of Mexican-Americans and African-Americans have occasionally been made in Texas courts.<sup>118</sup> However, the plaintiffs in *Bean* sought to erase, rather than emphasize those distinctions. Subsequent briefs and responses referred almost exclusively to the neighborhoods as “minority areas.”<sup>119</sup>

Following the decision of the district court in 1979 to deny their request, partly on the basis of their failure to prove discriminatory intent, the plaintiffs continued to pursue their goal. In an amended class certification motion submitted to the court in 1981, the plaintiffs identified their neighborhood as being “predominately black.”<sup>120</sup> They identified their subpart of Census Tract (224.03) as being 82.6% black. The neighborhood reportedly laid within a “virtually all black

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<sup>115</sup> Complaint at 1-3, *Bean v. Southwestern Waste Mgmt.*, Civ. A. No. H-79-2215 (Oct. 1979).

<sup>116</sup> Defendant’s Motion to Dismiss at 3, *Bean* (Civ. A. No. H-79-2215).

<sup>117</sup> Plaintiffs’ Amended Complaint at 4, *Bean* (Civ. A. No. H-79-2215).

<sup>118</sup> Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1132, 1158-59 (1997) (discussing claims by the League of United Latin American Citizens (LULAC) that the exclusion of Mexican-Americans from jury service in Texas was a denial of equal protection under the Fourteenth Amendment; the court reasoned that the Amendment was concerned only with the interests of whites and Negroes, and not Hispanics as a third racial class).

<sup>119</sup> Plaintiffs’ More Definite Statement at 1, *Bean* (Civ. A. No. H-79-2215).

<sup>120</sup> Plaintiffs’ Third Amended Complaint at 4, *Bean* (Civ. A. No. H-79-2215).

school district” and a “predominately black city council district.”<sup>121</sup> Thus, they charged that the decision to site the landfill in their community was done “because it is a predominately black area.”<sup>122</sup>

This altered strategy may have reflected the plaintiffs’ response to the defendant’s earlier motion in opposition to their certification as a class.<sup>123</sup> Defendants argued that the plaintiffs erred in the definition of their class because not all residents were black. The defendants distinguished among the class and argued that “not only does the class proposed by plaintiffs include a large group of non-whites, of which the plaintiffs are not a member, but the plaintiffs actually stand in a conflicting position with respect to other members of the class they purport to represent.”<sup>124</sup> This class conflict was contradicted by testimony from two of the plaintiffs’ witnesses who were identified as being white. One, a long term resident of the community, argued that the siting permit was granted only after the number of minorities in the neighborhood had increased.<sup>125</sup> The witness’ testimony can be understood in terms of the distinction between present and future identity and the rates at which “tipping” or racial composition changes.<sup>126</sup>

Further, defendants argued that black plaintiffs “would clearly not be in a position to fairly and adequately represent the interests of non-black members of the proposed class.”<sup>127</sup>

Even if no actual racial conflict between white and black members of the community existed, defendants argued that there was still a logical impossibility that challenged the identification of a cohesive class. They claimed that “white resident members of the purported class could not possibly have been discriminated against on the basis of being blacks.”<sup>128</sup> The possibility that the white residents might

<sup>121</sup> Plaintiffs’ Amended Class Certification Motion at 1-2, *Bean* (Civ. A. No. H-79-2215).

<sup>122</sup> Plaintiffs’ Amended Class Certification Motion at 6, *Bean* (Civ. A. No. H-79-2215).

<sup>123</sup> Defendants’ Motion and Memorandum in Opposition to Plaintiffs’ Motion for Certification of the Class at 6, *Bean* (Civ. A. No. H-79-2215).

<sup>124</sup> *Id.*

<sup>125</sup> Plaintiffs’ Post-Trial Brief at 10-11, *Bean* (Civ. A. No. H-79-2215).

<sup>126</sup> Oscar H. Gandy, Jr., *Community Pluralism and the “Tipping Point,”* in MASS MEDIA, SOCIAL CONTROL, AND SOCIAL CHANGE 159-81 (David Demers & K. Viswanath eds., 1999).

<sup>127</sup> Defendants’ Motion and Memorandum in Opposition to Plaintiffs’ Motion for Certification of the Class at 7, *Bean* (Civ. A. No. H-79-2215).

<sup>128</sup> *Id.*

have been victimized because they lived among blacks was not considered, even though that argument had been made in a related matter by plaintiffs before a Georgia court.<sup>129</sup>

In 1984, the district court settled the issue of racial identity in this particular case by certifying the plaintiffs as a class consisting of all of the black residents of the Northwood Manor Division at the time the siting permit was granted.<sup>130</sup> By 1980, this neighborhood had undergone a remarkable shift in its racial composition. In 1970, African-Americans were approximately 30% of the population. Ten years later, the African-American population exceeded 82%.<sup>131</sup> The court held that although the permit to operate the landfill was not approved until the community had become predominantly black, the defendants had recommended siting the landfill within the community when it was still predominantly white.<sup>132</sup> Thus, racial animus on the part of the agency could not have been a determining factor in the defendants' decisions.<sup>133</sup>

## 2. Chester Residents Concerned for Quality Living v. Seif

President Clinton's Executive Order No. 12,898 was explicit in defining the scope of environmental justice concerns to include minority and low income populations.<sup>134</sup> The residents of Census Tract 4056 in the City of Chester, Pennsylvania were identified as an "environmental justice community" because of the preponderance of African-Americans (more than 70%) among the group.<sup>135</sup>

The plaintiffs in this case included eighteen named individuals. They were explicitly identified by race or ethnicity, but without reference to their economic status. Of the eighteen, twelve were identified as African-American, four were identified as white, and two as Hispanic. The complaint noted that the proportion of African-Americans (66.7%) was similar to the proportion of African-

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<sup>129</sup> See *Cherry v. Amoco Oil Co.*, 490 F. Supp. 1026, 1028 (N.D. Ga. 1980) (discussing a claim by a white woman living in a predominately black neighborhood who argued that she was a victim of discrimination because of the rating assigned to her community).

<sup>130</sup> Memorandum and Order at 2, *Bean* (Civ. A. No. H-79-2215).

<sup>131</sup> *Id.* at 3.

<sup>132</sup> *Id.* at 8.

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

<sup>134</sup> Exec. Order 12,898, 3 C.F.R. 859 (1995), *reprinted in* 42 U.S.C. 4321 (2000).

<sup>135</sup> Complaint at 2-3, *Chester Residents Concerned for Quality Living v. Seif*, Civ. A. No. 96-CV-3960 (1996).

Americans in the City of Chester (65.2%).<sup>136</sup> Census Tract 4056 had a somewhat larger proportion of African-Americans (73.9%).<sup>137</sup> The plaintiffs alleged that the Pennsylvania Department of Environmental Protection failed to ensure that a racially discriminatory burden of noxious waste would not be placed upon African-American communities while white communities enjoyed the benefits of its removal. This was a claim of disparate impact rather than a claim of intentional discrimination motivated by racial animus.

The defendants in the case argued that they had, consistent with constitutional and statutory provisions, pursued a policy of racial neutrality in their permitting decisions.<sup>138</sup> Defendants also made few acknowledgments of the racial, ethnic, or class character of the Chester community. In their motion to dismiss, the defendants suggested that the responsible governmental actor for the distribution of noxious facilities would be the “duly elected officials of the City of Chester.”<sup>139</sup>

In their subsequent brief, plaintiffs attempted to meet the evidentiary requirements for demonstrating both disparate impact and discriminatory intent. They argued that it was the “so-called race-neutral” program that was “in fact an intentionally discriminative program. . . .”<sup>140</sup> They argued that the failure to take into account the racial composition of the communities being granted permits was the mechanism through which those communities would be assured a continuing discriminatory impact. The plaintiffs believed such an outcome was especially likely because ignoring a community’s racial composition made it impossible to see the ways in which the distribution of noxious facilities exemplified a racially-biased system.

The U.S. Department of Justice and the Environmental Protection Agency submitted an amicus curiae brief<sup>141</sup> supporting the plaintiffs that emphasized the “heavily minority community surrounding the site” of the proposed plant.<sup>142</sup>

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<sup>136</sup> *Id.* at 7.

<sup>137</sup> *Id.* at 9.

<sup>138</sup> Defendants’ Brief at 3-4, 12, *Chester Residents* (Civ. A. No. 96-CV-3960).

<sup>139</sup> Defendants’ Motion to Dismiss at 12, *Chester Residents* (Civ. A. No. 96-CV-3960).

<sup>140</sup> Plaintiffs’ Brief in Opposition to Dismissal at 9, *Chester Residents* (Civ. A. No. 96-CV-3960).

<sup>141</sup> Brief of Amici Curiae United States at 16, *Chester Residents* (Civ. A. No. 96-CV-3960).

<sup>142</sup> *Id.* at 16.

Judge Dalzell referred to the plaintiffs as members of the “African-American community in Chester” in his memorandum denying them a private right of action.<sup>143</sup> The Third Circuit referred to the City of Chester as a “predominantly black community” in its decision.<sup>144</sup> Thus, this racial definition of the community assisted in establishing a private right of action under Title VI. The court used the same rationale as that applied with Title IX that established a similar right with reference to sex.<sup>145</sup>

### 3. South Bronx Clean Air Coalition v. Metropolitan Transportation Authority

The South Bronx Clean Air Coalition did not identify its members by race or ethnicity in its formal complaint. However, the New York City Environmental Justice Alliance, a party to the complaint, identified itself as an advocate for the interests of low-income neighborhoods and communities of color.<sup>146</sup> The complaint identified the plaintiffs as residents of the affected neighborhoods, and noted that most of these residents “are members of minority groups.”<sup>147</sup> Similar to prior cases, plaintiffs charged that a government policy sited “obnoxious environmental activity in minority neighborhoods” and tended to “exclude such activities from neighborhoods occupied by white residents of the State.”<sup>148</sup>

In their amended complaint, the plaintiffs provided an example of an agreement that in effect barred “garbage haulage by rail in predominantly white neighborhoods and focus[ed] all garbage transfer activity in the South Bronx, a minority neighborhood.”<sup>149</sup> The state’s siting policy allegedly “disproportionately site[d] garbage transfer facilities in non-white communities” because the sites were barred from white neighborhoods.<sup>150</sup>

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<sup>143</sup> Memorandum at 3, *Chester Residents* (Civ. A. No. 96-3960).

<sup>144</sup> *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925, 927 (3d. Cir. 1997).

<sup>145</sup> *Id.* at 934 n.12.

<sup>146</sup> Complaint at 3, *South Bronx Clean Air Coalition v. Metro. Transp. Auth.* (98 Civ. 4404) (AGS).

<sup>147</sup> *Id.* at 7.

<sup>148</sup> *Id.*

<sup>149</sup> Plaintiffs’ Amended Complaint at 12, *South Bronx* (98 Civ. 4404).

<sup>150</sup> *Id.* at 16.

Affidavits submitted in opposition to defendants' motion to dismiss provided greater detail about the racial and ethnic composition of the neighborhoods. In one affidavit, a neighborhood identified as the "Melrose section of the South Bronx," also known as the Melrose Commons Urban Renewal Area, was said to be one of the poorest neighborhoods in the United States. The population was reported to be 98% Hispanic and African-American.<sup>151</sup> This community reportedly organized in order to ensure its survival after having been "slated for annihilation."<sup>152</sup>

A resident of a community known as Lower Washington Heights cited Census data in support of his claim that 79% of the people in his area, also known as Community District 12, were Hispanic and African-American.<sup>153</sup> Finally, comparisons between the aggrieved South Bronx community and the community that had been spared revealed that "the South Bronx [was] poor and minority, while much of Long Island [was] mostly middle class and white."<sup>154</sup>

### ***B. Place Matters***

The identification of a community with a particular place is critically important to the pursuit of that community's common interests. These spaces are defined in physical, geographic, political, historic, and cultural terms. The race, class, and health status of its residents are the basis for comparisons with the people who live in other places.

#### *I. Bean v. Southwestern Waste Management Corp.*

In their initial complaint, plaintiffs identified the members of the class as "present and future residential property owners in the area generally referred to, but not limited to, as the Northwood Manor Addition in the City of Houston and Harris County, Texas."<sup>155</sup> In addition, the community included eight Census Tracts, and the geographic area bounded by specific bodies of water, roads, and railroad tracks.<sup>156</sup> The complaint also indicated that the solid waste

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<sup>151</sup> Affidavit from Yolanda Garcia at 2, *South Bronx* (98 Civ. 4404).

<sup>152</sup> *Id.* at 1.

<sup>153</sup> Affidavit from John Culpepper at 1, *South Bronx* (98 Civ. 4404).

<sup>154</sup> Plaintiffs' Memorandum in Opposition to Cross Motions to Dismiss at 5, *South Bronx* (98 Civ. 4404).

<sup>155</sup> Complaint at 3, *Bean v. Southwestern Waste Mgmt.*, Civ. A. No. H-79-2215 (1979).

<sup>156</sup> *Id.*

treatment plant would be sited within the community's borders by specifying its geographic location.

The defendants made explicit reference to the community's boundaries in calling attention to the fact that "people of various racial and ethnic backgrounds . . . live within the geographic boundaries of the class alleged by the plaintiffs."<sup>157</sup>

The plaintiffs' post-trial brief referenced other geopolitical boundaries in order to emphasize the status of Houston as a "highly segregated city," especially in relation to African-Americans. The plaintiffs also identified the North Forest Independent School District, and a newly created city council district as closely matching the boundaries of the community. The boundaries were described by means other than zoning because zoning does not exist in Houston.<sup>158</sup>

Plaintiffs called attention to the limitations on appropriate identification that reliance on census tracts represents. While two treatment plants were sited in tracts that had a majority of white residents, those plants were actually located in sections of those tracts whose residents were primarily African-American.<sup>159</sup>

In the plaintiffs' amended class certification motion, only a single census tract is mentioned, but a smaller portion, a block group, is identified. The Northwood Manor community boundaries are said to conform generally to the boundaries of a specific subpart of that block group (224.03).<sup>160</sup>

The court made the conflict over the definition of neighborhoods explicit in 1985.<sup>161</sup> Dr. Robert Bullard was the plaintiffs' primary expert witness. Bullard reportedly changed his definition of community to specific neighborhoods rather than census tracts. According to Bullard, neighborhoods should be defined in part by a "recognized geographic location," and the residents and others must consider it as part of a single community. Thus, a formally recognized residential subdivision might not constitute a neighborhood if Bullard's criteria were followed. However, the court

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<sup>157</sup> Defendants' Motion to Dismiss at 3, *Bean* (Civ. A. No. H-79-2215).

<sup>158</sup> Plaintiffs' Post-trial Brief at 6, *Bean* (Civ. A. No. H-79-2215).

<sup>159</sup> *Id.* at 8.

<sup>160</sup> Plaintiffs' Amended Class Certification Motion at 2, *Bean* (Civ. A. No. H-79-2215).

<sup>161</sup> Memorandum and Order at 6, *Bean* (Civ. A. No. H-79-2215).

found Bullard's definitions subjective,<sup>162</sup> preferring to rely instead upon census tracts in its comparative analysis.<sup>163</sup>

## 2. Chester Residents Concerned for Quality Living v. Seif

In this case, the plaintiffs identified their community as falling within a specific census tract (4056) in which African-Americans represented the majority of its residents (73.9%). Plaintiffs were also defined by residing within a one-half, or a one-mile radius of waste facilities within Tract 4056.<sup>164</sup> Because geographic identification moves outward in jurisdictional terms, the City of Chester and nearby Chester Township were in Delaware County, Pennsylvania. The racial composition of the rest of Delaware County was a means of underscoring the extent to which racial identity is spatially bound.

Defendants emphasized that the identity of the community fell within the jurisdiction of the local municipality and that the Chester City Council had adopted the zoning ordinances that governed the distribution of waste facilities within the city.<sup>165</sup> However, plaintiffs consistently argued that the right to deny these applications remained with the defendants, without regard to the existence of local zoning codes.<sup>166</sup> The PADEP is a recipient of federal funds and is expected to comply with federal policies regarding environmental justice, thus establishing a jurisdictional scope larger than that of the Chester City Council.<sup>167</sup>

## 3. South Bronx Clean Air Coalition v. Metropolitan Transportation Authority

Although references to the community in this case are most often limited to the "South Bronx," plaintiffs defined the community geographically as bound by 155th and 179th Streets at the north and south, and the Hudson River and the East River to the west and

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<sup>162</sup> *Id.* at 7.

<sup>163</sup> *Id.* at 18, n.10.

<sup>164</sup> Complaint at 10, *Chester Residents Concerned for Quality Living v. Seif*, Civ. A. 96-Civ-3960 (1996).

<sup>165</sup> Brief in Support of Defendant's Motion to Dismiss at 17, *Chester Residents* (Civ. A. 96-Civ-3960).

<sup>166</sup> Plaintiffs' Brief in Opposition of Defendant's Motion to Dismiss at 19, *Chester Residents* (Civ. A. 96-Civ-3960).

<sup>167</sup> Brief of Amici Curiae United States at 19, *Chester Residents* (Civ. A. 96-Civ-3960) (opposing Defendant's Motion to Dismiss).

east.<sup>168</sup> Plaintiffs also make reference to areas of “northern Manhattan” as a nearby area likely to be affected by activities of the defendants.<sup>169</sup>

Streets that run through the South Bronx community were identified by name and linked with the environmental harms and safety risks that industrial traffic represents.<sup>170</sup> Sites where the Environmental Protection Agency (EPA) placed air quality monitors to gather data on pollution levels within the community were also identified by name and street address.<sup>171</sup>

### ***C. The Difference Between Us and Them***

A successful claim of discrimination or disparate impact depends upon clear and compelling evidence of differential exposure to harm, risk, or insult to communities defined by their racial composition.

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

Initially, the plaintiffs did not allege themselves as members of a particular race class. Rather, they alleged discrimination based on specified rights “as enjoyed by white citizens.”<sup>172</sup> The operational definition of the class was not initially limited to considerations of race. Considerations of “class and socioeconomic factors” were also identified as having influenced the decision to grant a permit to Southwestern Management Corporation (SMC).

By pursuing relief through class action, however, plaintiffs were compelled to assert that there was “no conflict as between any individual named plaintiff and other members of the class.”<sup>173</sup> The plaintiffs identified the class as consisting of “all past, present and future residential property owners in the area.” This specification made no reference to the race or class status of those persons. This claim of solidarity was challenged by defendants on the basis of essentialist assumptions about the racial basis of interests in the

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<sup>168</sup> *South Bronx Clean Air Coalition v. Metro. Transp. Auth.*, 20 F. Supp. 2d 565, 573 (S.D. N.Y. 1998).

<sup>169</sup> Complaint at 5, *South Bronx Clean Air Coalition v. Metro. Transp. Auth.*, 98 Civ. 4404 (1998).

<sup>170</sup> Affidavit of Yolanda Garcia at 2, *South Bronx* (98 Civ. 4404).

<sup>171</sup> Affidavit of John Culpepper at 2, *South Bronx* (98 Civ. 4404).

<sup>172</sup> Complaint at 1, *Bean v. Southwestern Waste Mgmt.*, Civ. A. H-79-2215 (1979).

<sup>173</sup> *Id.* at 3.

community and the motivations behind corporate and government actions.<sup>174</sup>

However, white residents of a community that had been discriminated against because of its mostly black residents, may have sought the very same relief and recognized a common sense of oppression and victimization by a racist act. Members of this community organized to oppose a government decision that they believed to be part of an historically racist tradition.

Upon learning about the impending landfill many of the residents of Northwood Manor Addition immediately organized to protest the landfill so close to their property and within 1700 feet of one of their high schools. Strongly convinced that their area had been selected for the site because it is predominantly minority, they circulated petitions, picketed the site and the offices of BFI, and raised funds to take legal action to prevent the opening of the site.<sup>175</sup>

Plaintiffs made reference to the neighborhood as a common good, claiming that they “stand to lose their neighborhood” as well as “their childrens’ safety and self-esteem.”<sup>176</sup> The injury that the residents sought to avoid included the losses associated with the stigma of becoming a poor black community. Once this mark was made, the stigma associated with the presence of noxious facilities was likely to multiply and accelerate the losses.<sup>177</sup>

Despite this basis for solidarity, plaintiffs occasionally wavered in defining their class and its common minority status.<sup>178</sup> The plaintiffs emphasized the common status of residents as victims, rather than as members of a racial group, as the basis for their status as a class in

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<sup>174</sup> Defendant’s Motion to Dismiss and Original Answer at 3, *Bean* (Civ. A. No. H-79-2215).

<sup>175</sup> Plaintiffs’ Post-Trial Brief at 2, *Bean* (Civ. A. No. H-79-2215).

<sup>176</sup> *Id.* at 19.

<sup>177</sup> See generally Robin Gregory et al., *Risk Perceptions, Stigma, and Health Policy*, 2 HEALTH & PLACE 213, 213, 217 (1996) (discussing the ways in which places become stigmatized through association with a blemish or taint).

<sup>178</sup> The Statement of Facts identifies plaintiffs as “minority residential homeowners.” Plaintiffs’ Memorandum of Law at 1, *Bean* (Civ. A. No. H-79-2215). The plaintiffs’ Second Amended Complaint, filed two days later (November 29, 1979) continued to use the earlier, more comprehensive identification of the class. However, in the plaintiffs’ Post-Trial Brief (December 10, 1979), the class seeking relief was again identified as “a group of minority homeowners.” Plaintiffs’ Post-Trial Brief at 1, *Bean* (Civ. A. No. H-79-2215).

1981.<sup>179</sup> Defendants contended that the class was not racially homogenous and should have been disqualified on that basis. The defendants suggested that common status as minorities was not sufficient because the proposed class included “a large group of non-whites, of which plaintiffs [were] not . . . member[s].” Further, defendants argued that the plaintiffs (presumably black) “actually stand in a conflicting position with respect to other members of the class they purport to represent.”<sup>180</sup> The possibility of group solidarity was further denied by defendants in their assertion that “black plaintiffs . . . would clearly not be in a position to fairly and adequately represent the interests of non-black members of the proposed class.”<sup>181</sup> While “white resident members of the purported class could not possibly have been discriminated against on the basis of being blacks,” they certainly could feel solidarity because of their common loss by virtue of their common status as residents of a community in which the majority of the residents are African-American.<sup>182</sup>

Their basis for certification as a class for the purpose of the suit was that they had been discriminated against “because they live in a predominantly [b]lack area” not because they were necessarily black themselves. However, despite the efforts of the plaintiffs to define this class more broadly, the court ultimately certified a racially-defined class.<sup>183</sup>

## 2. Chester Residents Concerned for Quality Living v. Seif

By 1996, following the lead established in President Clinton’s Executive Order (12,898) and the subsequent draft environmental justice strategy issued by the EPA, identifying Chester residents as low income and minority residents who were concerned about the health effects that may result from being surrounded by waste

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<sup>179</sup> Plaintiffs’ Notice and Motion to Maintain a Class Action at 7, *Bean* (Civ. A. No. H-79-2215).

<sup>180</sup> Defendant’s Motion and Memorandum in Opposition to Plaintiffs’ Motion for Certification of the Class at 6, *Bean* (Civ. A. No. H-79-2215).

<sup>181</sup> *Id.* at 7.

<sup>182</sup> *Cherry v. Amoco Oil Co.*, 490 F. Supp. 1026, 1028 (N.D. Ga. 1980) (plaintiff argued that she had standing to complain of racial discrimination because even though she was white, she was adversely affected by the fact that she lived in a predominantly non-white zip code).

<sup>183</sup> Memorandum and Order at 2, *Bean* (Civ. A. No. H-79-2215) (noting the decision made on July 9, 1984).

treatment facilities, the plaintiffs still characterized the offense they suffered in terms of discrimination against African-Americans.<sup>184</sup> The named plaintiffs were explicitly identified as African-American, Hispanic and white. Although they shared a common residence in the City of Chester, in and around Census Tract 4056, they were not identified as representatives of a class.

Plaintiffs sought to compare Census Tract 4056 with other jurisdictions in terms of their population, racial composition, and environmental burden. The plaintiffs noted, for example, that the “land area concentration of waste facilities in Census Tract No. 4056 . . . is 286 times as great as the land area concentration in Delaware County outside the City of Chester/Chester Township area.”<sup>185</sup> Comparisons of the City of Chester with Delaware County in terms of the life expectancy, age-adjusted cancer mortality, infant mortality, and rates of low birth weight babies also served to characterize this community as one that was burdened by ill health.<sup>186</sup>

Residents of the City of Chester share a number of commonalities with other low-income, minority communities. These commonalities include an inability to oppose the siting of waste facilities with the same success enjoyed by “[c]ommunities of wealth and political power.”<sup>187</sup> This inequity means that less powerful communities bear more of the burden of waste facilities, while other communities reap the benefits. Plaintiffs noted that those who derive the benefits are primarily white, while those who bear the burdens are primarily African-American.<sup>188</sup>

Even though residents of Census Tract 4056 were not all African-American, plaintiffs argued that a discriminatory effect still resulted “because a majority of the residents are African Americans.”<sup>189</sup> Thus, while the complaint appeared to identify the residents in terms of their special status as a community that is poor, it was their status as a community of color that was required to serve as the primary aspect of their identity. It was color, rather than class, that could be the basis of their identity as a protected class. Yet, the failure of the

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<sup>184</sup> Complaint at 36, *Chester Residents Concerned for Quality Living v. Seif*, Civ. A. No. 96-CV-3960 (1996).

<sup>185</sup> *Id.* at 18.

<sup>186</sup> *Id.* at 22.

<sup>187</sup> *Id.* at 30.

<sup>188</sup> *Id.* at 32.

<sup>189</sup> *Id.* at 34.

permitting agency to take this attribute of their identity into account was the basis of their defense. Indeed, the defendants argued that taking race into account in a decision to permit would be unconstitutional.<sup>190</sup>

However, a concern about the due caution reserved for matters involving race should not extend to considering the cumulative impact of past decisions regarding the placement of waste treatment facilities in communities. A “standard of equivalent responsibilities,” that defines communities in terms of localities, does not need to consider other attributes of those communities, such as race or class.<sup>191</sup>

Plaintiffs argued that PADEP knew, or should have known, that this community had been assigned a massively disproportionate burden of waste treatment facilities.<sup>192</sup> No consideration of race would have been required for them to respond with concern. The community’s identity could have been defined in terms of its history of abuse without regard to its race or socioeconomic class. Except as required by Title VI, this abuse did not need to have been assessed in racially-comparative terms. The disparity in “land areas concentration” of waste treatment facilities between Chester Township and the rest of Delaware County should have been hard for an environmental protection agency to ignore if a standard of distributive justice was in place. The fact that community residents often angrily reminded the department of this fact was also noted by the plaintiffs.<sup>193</sup> Indeed, the historically poor environmental status of Chester had earned the community a special place of honor within the EPA and its newly created Office of Environmental Justice.<sup>194</sup>

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<sup>190</sup> Brief in Support of Defendants’ Motion to Dismiss at 13, *Chester Residents* (Civ. A. No. 96-CV-3960).

<sup>191</sup> We note the case of rural communities in western New York State that struggled against being assigned what they felt was an unfair burden in relation to the large urban centers that generated much of the waste. See Gary Abraham, *Concepts of Community in Environmental Disputes: Farmersville and Western New York’s Garbage Wars*, 7 *BUFF. ENVTL L.J.* 51, 105 (2000).

<sup>192</sup> Plaintiffs’ Brief in Opposition to Defendants’ Motion to Dismiss at 6-7, *Chester Residents* (Civ. A. No. 96-CV-3960).

<sup>193</sup> *Id.* at 8.

<sup>194</sup> Chester, Pennsylvania was the poster child of the environmental justice movement. In the Environmental Justice Strategy issued by the EPA in April of 1995, the activities of the EPA Region 3 office in Chester were described as one of the model projects that were designed in response to Clinton’s Executive Order (12,898). It is in this document that we find a detailed description of the environmental burden and health consequences that made Chester a candidate for special attention. See ENVIRONMENTAL PROTECTION AGENCY,

### 3. South Bronx Clean Air Coalition v. Metropolitan Transportation Authority

The plaintiffs in the South Bronx identified themselves as people who “live and are attempting to raise children” in the areas affected by decisions of the transportation agency.<sup>195</sup> The poor health status of the residents in this community is presented as a central feature of its identity. The areas affected by the MTA’s policies were described as having “the highest rates of respiratory disease in the nation,” and according to plaintiffs, “the death rate for asthma in these neighborhoods is up to eight times the national average.”<sup>196</sup>

In the amended complaint, plaintiffs provided greater detail about the health status of the community surrounding the Harlem River Yard. The areas that would be affected by the challenged decisions were said to “have the highest rates of hospitalization, disability and death attributable to respiratory disease in the nation.”<sup>197</sup> These statistical claims were provided with a human face as one Hispanic resident of the Melrose community described the death of her 27 year-old son as being caused by an “illness that should not be fatal.”<sup>198</sup> Beyond injuries attributed to pollution, the plaintiffs also provided examples of other health related consequences from the routing of trucks through residential neighborhoods.<sup>199</sup>

Plaintiffs associated themselves with numerous other minority neighborhoods in New York state, which they suggested have been forced to bear similar burdens, while white communities in the state have been sheltered.<sup>200</sup> The sense of linked fate that supports the development of a common identity among the victims of land use policies is also described in terms of these communities’ limited economic and political resources. A presumed inability to “go it alone” reportedly led these groups to join forces with other

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THE EPA’S ENVIRONMENTAL JUSTICE STRATEGY 18 (1995), available at [http://www.epa.gov/compliance/resources/policies/ej/ej\\_strategy\\_1995.pdf](http://www.epa.gov/compliance/resources/policies/ej/ej_strategy_1995.pdf) (last visited Sept. 24, 2004).

<sup>195</sup> Plaintiffs’ Complaint at 2, *South Bronx Clean Air Coalition v. Metro. Transp. Auth.* (98 Civ. 4404).

<sup>196</sup> *Id.* at 4.

<sup>197</sup> Plaintiffs’ Amended Complaint at 10, *South Bronx* (98 Civ. 4404).

<sup>198</sup> Affidavit of Yolanda Garcia in Opposition to Defendant’s Motion to Dismiss the Complaint at 2, *South Bronx* (98 Civ. 4404).

<sup>199</sup> In her affidavit, Yolanda Garcia cited a recent case of a young woman in Hunts Point who was killed by a large truck passing through the neighborhood. *Id.*

<sup>200</sup> Plaintiffs’ Amended Complaint at 20, *South Bronx* (98 Civ. 4404).

environmental justice groups, such as the New York City Environmental Justice Alliance,<sup>201</sup> in the hope of preserving their communities.<sup>202</sup> A comparison is made with Long Island, a region characterized as being “mostly middle class and white,”<sup>203</sup> that has been spared the types of environmental harms that would ordinarily accompany the use of the Long Island Railroad to transport garbage through their communities.

#### IV

##### THE BASIS OF JUDICIAL DECISIONS ABOUT IDENTITY AND RISK

Communities came together in opposition to the corporate boards and the administrative agencies that appeared to have combined forces against them. These communities would have preferred to state their claims in their own terms and characteristic styles. While they could make use of a broad range of rhetorical tools in an effort to win public opinion,<sup>204</sup> they faced considerable constraints in their formal submissions to the court. They have had to learn, and at least appear to adopt, a set of modernist assumptions regarding the benefits of science, reason, and rationality.<sup>205</sup> While this was more familiar ground for the managers of waste, the judges were also reluctant to adopt an unfamiliar set of tools for the finding of facts and the recognition of wisdom in the discourse of probable cause.<sup>206</sup>

##### A. *Standing*

A central concern in each of these three cases is the need for plaintiffs to achieve legal standing in order to place a claim before the court. In each case, a debate continued regarding the extent to which there was a private right of action to challenge the decisions of

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<sup>201</sup> NYCEJA is identified as a “city-wide umbrella organization of community based organizations that are actively engaged in environmental work in low-income communities of color,” that included efforts to “secure compliance with Executive Order 12,898.” At the time, eight of their fifteen member organizations were based in the South Bronx and Northern Manhattan. Affidavit of Leslie H. Lowe in Opposition to Defendants’ Motion to Dismiss the Complaint at 2-3, *South Bronx* (98 Civ. 4404).

<sup>202</sup> Affidavit of Yolanda Garcia at 3-4, *South Bronx* (98 Civ. 4404).

<sup>203</sup> Plaintiffs’ Reply Memorandum of Law at 5, *South Bronx* (98 Civ. 4404).

<sup>204</sup> Binder, *supra* note 23, at 1.

<sup>205</sup> Welcher, *supra* note 99, at 1175 (discussing this conflict and constraint).

<sup>206</sup> Erica Beecher-Monas, *A Ray of Light for Judges Blinded by Science: Triers of Science and Intellectual Due Process*, 33 GA. L. REV. 1047, 1109 (1999) (discussing judges’ possible use of a probabilistic approach as suggested in EPA proposed guidelines).

administrative agencies. The fact that the basis for the claims are related to the guarantee of civil rights and equal treatment under the law has meant that a massive body of case law and judicial interpretation may be called upon by all parties in an effort to advocate their positions.

In each case, plaintiffs claimed standing on the basis of harms that they suffered or expected to suffer as a result of the actions of defendants. These harms were identified as harms to person and property, as well as to the community itself and included financial, physical, and psychological harms. Claims regarding emotional harms, including threats to self-esteem, are especially salient in the development of claims about discrimination. Disparity in the distribution of goods, including respect, are understandable in terms of the loss of self-esteem.<sup>207</sup>

Only one of the cases in this Article actively pursued certification as a class. The benefits of class certification must be weighed against the burdens of proof and the risks of failure. In the *Bean* case, the efforts of the plaintiffs to win certification as a class provides powerful insight into one of the ways in which the requirements of the court shape the identification of the community and its social movement. Plaintiffs met little difficulty in demonstrating that the class was large, and that the pursuit of class interests would be more efficient than having plaintiffs pursue their individual interests. The plaintiffs encountered more difficulty attempting to demonstrate that all of the relevant concerns would be the same for all members of the class. Pursuit of a class action implied that individual differences and distinctions were insignificant. Defendants had a strategic interest, which they pursued vigorously, to demonstrate that there would be important differences that could be assumed to exist as a result of fundamental incompatibilities that existed within the proposed class.

The plaintiffs in *Bean* waived in the way by which they announced their common identity. At one point, they adopted the status of racial minorities,<sup>208</sup> but in all other motions, they resisted making such a claim. Instead, they consistently defined themselves and their class as being composed of residential property owners.

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<sup>207</sup> Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1025-26 (1995).

<sup>208</sup> Plaintiffs' Memorandum of Law in Resistance to Defendants' Motion to Dismiss at 1, *Bean v. Southwestern Waste Mgmt.*, Civ. A. No. H-79-2215 (1979) (identifying plaintiffs as "minority residential homeowners"), and Plaintiffs' Post-Trial Brief at 1, *Bean* (Civ. A. No. H-79-2215).

Perhaps the plaintiffs felt that the relationship between the ownership of land and the rights of citizens in the United States had been too closely tied to be ignored.<sup>209</sup>

Residential property ownership is a critical first step, and one that has been particularly difficult for African-Americans to take. Realization of the economic, social, and political benefits of residential property ownership is more difficult and unlikely due to environmental racism. The values placed at risk when communities are threatened by the siting of obnoxious or hazardous facilities extend far beyond the market prices of residential properties. According to one observer, “landownership has had multiplier effects for the African-American community. These positive benefits include evidence of increased levels of political participation, education, and psychological well-being.”<sup>210</sup> The special importance of property to African-Americans was a point that might have been made by plaintiffs in *Bean*, but was ignored.

However, courts have not recognized the value of community to the extent that its survival would be treated as equal to, or even superior to, other economic goals.<sup>211</sup>

Additional challenges facing plaintiffs are not fully examined here. These challenges include decisions which indicate that courts actually have recognized a collective interest in the character of a community. Prior to the passage of civil rights laws that elevated the value of competing state interests, restrictions designed to protect a white community from the disruptive impact of “invasions”<sup>212</sup> of African-Americans had been treated as legitimate by administrative agencies. When community activists now seek to protect African-American communities from the destructive impact of waste treatment facilities, their efforts have been far less successful.

Of course, ownership of property is not necessary for individuals to assert a claim of interest. Such a claim can be based on an

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<sup>209</sup> Phyllis Craig-Taylor, *To Be Free: Liberty, Citizenship, Property, and Race*, 14 HARV. BLACKLETTER L.J. 45, 87 (1998).

<sup>210</sup> Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence, and Community Through Partition Sales of Tenancies in Common*, 95 NW. U. L. REV. 505, 532 (2001).

<sup>211</sup> *Id.* at 553.

<sup>212</sup> This terminology was commonly used by sociologists concerned with the “human ecology” of neighborhoods. Racial and ethnic change in urban neighborhoods were discussed in terms of invasion and succession. See NOEL P. GIST & L. A. HALBERT, URBAN SOCIETY 170-71, 185-86 (1956).

individual's use of that property. Margaret Jane Radin considers the case of a tenant organization that seeks the establishment or maintenance of rent control in order to avoid the dispersion of its members, and the loss of community that would result if individuals were forced to leave the community in search of affordable housing.<sup>213</sup> Radin suggests that in such cases, "real community (in the spiritual sense) may be preserved even at some expense of fungible property interests of others, at least where the group affirms through local political action[,] like rent control[,] that it seeks continuity."<sup>214</sup> Of particular importance in these cases is the claim that these harms are the result of intentional and direct, as well as unintentional and indirect, actions on the part of defendants.

Additionally, many alleged harms include the cumulative impact on residents of low income communities. Defendants have argued that they bear no responsibility for any of the adverse health effects claimed by plaintiffs because particular emissions were within established standards. However, courts, and recently the EPA, have argued that the cumulative impact of emissions and other pernicious externalities experienced over time ought to be considered in the context of "environmental justice communities."<sup>215</sup> Plaintiffs invite consideration of parallels in the mythical tale of the "last straw that broke the camel's back," which in their view effectively weighed far more than any of those that went before. Questions regarding the relative weight or consequences of additional facilities are not matters that ordinary citizens can answer for themselves. The EPA and the courts seem then bound to rely upon the expertise of the permitting agency.<sup>216</sup>

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<sup>213</sup> MARGARET JANE RADIN, REINTERPRETING PROPERTY 87 (1993).

<sup>214</sup> *Id.*

<sup>215</sup> OFFICE OF ENFORCEMENT AND COMPLIANCE ASSURANCE, U.S. ENVIRONMENTAL PROTECTION AGENCY, INTERIM GUIDANCE FOR INVESTIGATING TITLE VI ADMINISTRATIVE COMPLAINTS CHALLENGING PERMITS 4 (Feb. 4, 1998) (making reference to investigations of disparate impacts, and suggesting that "OCR will conduct a factual investigation to determine whether the permit(s) at issue will create a disparate impact, or add to an existing disparate impact, on a racial or ethnic population").

<sup>216</sup> In rejecting an appeal for administrative review of a decision by its Region V office, the EPA Review Board ignored references to "stigma" as a discriminatory effect, and agreed with the regional office that "[s]ince all of the existing facilities have the potential for visible emissions, noise, and odors, the existing facilities will likely have a greater effect on property values than the EDS facility." Environmental Disposal Sys., Inc., 98-1 & 98-2 Env'tl. App. Bd. 35-36 (Oct. 15, 1998).

In Chester, Pennsylvania, the well-being of the natural environment itself is treated as being of greater importance than the health status of the humans who live within it. Defendants in *Chester Residents* referred to statutory guidelines that were designed to protect perennial streams to support the claim that the Pennsylvania Department of Environmental Protection (PADEP) was “authorized to review the location only to insure that the facility [would] not violate the environmental rules and regulations.”<sup>217</sup> No statutory regulation in the Commonwealth of Pennsylvania was cited that had been designed to protect the humans who were perennial victims of environmental disregard.

***B. The Nature and Distribution of Hazard and Risk***

Significant arguments and evidence considered in these cases concern specifying the nature and extent of alleged harms. Plaintiffs may seek special attention from the courts on the basis of membership in a protected class, identified by race or national origin, and on the basis of the risk posed to particular valuables considered fundamental, therefore entitling a higher level of judicial scrutiny. This Article asserts that there is a substantial state interest in ensuring that people have a place to live and that home ownership is a fundamental right of American citizens. The pursuit of anti-discrimination goals in housing policy, including non-discriminatory access to mortgages and financial services, as well as land use policy, is indicative of that general assertion.<sup>218</sup>

The loss of community may eventually rise to a level of fundamental necessity, but the response by the courts involved in the environmental justice cases does not reflect any movement in that direction. A historical preservation movement, like environmental conservation more generally, is concerned more about the material, rather than the social meaning of community.

In each of the cases reviewed above, plaintiffs charged that the harms were problematic on their face, but because they were disproportionately visited upon poor and minority communities the weight of the harms should have been multiplied before the courts. Under the assumptions of a civil rights regime, an adverse impact,

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<sup>217</sup> Defendants’ Reply to Amicus Curiae Brief at 6-7, *Chester Residents Concerned for Quality Living v. Seif*, Civ. A. No. 96-3960 (1996).

<sup>218</sup> Mitchell, *supra* note 210, at 505.

which is unequally distributed, invites an attentive response, especially if these disparities break down along the color line. Because the evidentiary burden of demonstrating disparate impact in *South Bronx* had not been met by plaintiffs, the question of whether or not they had sufficient standing to pursue a claim under Section 602 of Title VI was irrelevant.<sup>219</sup>

### *C. The Identification of Reference or Comparison Communities*

Disparate impact requires a reliable basis for comparing the burdens being imposed upon a protected community with the experiences of an equivalent community that differs only by race, ethnicity, or a limited set of other distinctions to warrant strict judicial scrutiny. Assumptions regarding the functional equivalence of spatial and political aggregations such as census tracts and zip codes are easily and often challenged. For example, despite the fact that two census tracts may have the same proportion of African-American residents, their distribution within those tracts may differ quite dramatically.

In *Bean*, the community of Whispering Pines went from being a majority of white citizens to a black majority in less than ten years.<sup>220</sup> Comparisons made at different points in time can err in the identification of a community or in assessing the harms to which it is exposed.

Demonstrating the equivalence of communities *ceteris paribus* was a burden beyond the ability of the plaintiffs in each case examined above.

### *D. Proof Versus Statistical Inference*

The development of an evidentiary standard based on statistical comparisons also seems likely to burden petitioners who are making civil rights claims. The courts are faced with the problem of assigning weight and value to intangibles, like the injuries to the spirit that accompany insults, disrespect, and disregard composing the "black tax" of everyday racism.<sup>221</sup>

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<sup>219</sup> *South Bronx Clean Air Coalition v. Conroy*, 20 F. Supp. 2d 565, 572 (S.D. N.Y. 1998).

<sup>220</sup> Memorandum and Order at 2-3, *Bean v. Southwestern Waste Mgmt.*, Civ. A. No. H-79-2215 (Feb. 1985).

<sup>221</sup> JODY D. ARMOUR, *NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA* 115-18 (1997).

The courts seem incapable of establishing a consistent basis for assigning responsibility. The probative weight of statistical significance adds uncertainty to the process. First, the problem of establishing causation by statistical means remains difficult.<sup>222</sup> Next, the causal requirements of the courts vary with the claims and charges being made.<sup>223</sup> As a result, the advice provided by experts often conflicts, can be confusing, and is not readily understood by courts.<sup>224</sup> The evidentiary standards are especially problematic when the charge is discrimination.<sup>225</sup>

Evidence that demonstrates by statistical means a strong association between race and exposure to environmental hazards cannot prove that race was taken into account in the administrative decisions. However, a statistically significant correlation may convince the court that a significant disparity bears the scar of racism, even if the individual decisions that produced it are free of its scent.

### *E. Actual Versus Potential Harm or Adverse Impact*

Plaintiffs also struggle to demonstrate that the siting of a treatment plant, or other insult to the environment, extends harm to the surrounding community and its residents. First, plaintiffs are in a markedly weakened position when they have to appeal for relief from harms that *might come* in the future. It is far easier to seek relief from a present condition that is likely to continue.

A retroactive assessment of the correlation between the racial composition of zip codes and the presence of pollution-generating facilities within them can convince a sympathetic court if the association is especially strong.<sup>226</sup> A prospective assessment is

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<sup>222</sup> See Larry V. Hedges, *The Role of Construct Validity in Causal Generalizations*, in CAUSALITY IN CRISIS: STATISTICAL METHODS AND THE SEARCH FOR CAUSAL KNOWLEDGE IN THE SOCIAL SCIENCES 337-39 (Vaughn R. McKim & Stephen R. Turner eds., 1997).

<sup>223</sup> See generally STATISTICS AND THE LAW (Morris H. DeGroot et al. eds., 1994).

<sup>224</sup> Beecher-Monas, *supra* note 206, at 1047 (discussing the problems that judges face in making decisions based on scientific evidence).

<sup>225</sup> See generally DAVID C. BALDUS & JAMES W. L. COLE, STATISTICAL PROOF OF DISCRIMINATION (1980).

<sup>226</sup> *South Camden Citizens in Action v. New Jersey Dep't of Env'tl. Prot.*, 145 F. Supp. 2d 446 (D. N.J. 2001). Plaintiffs' consultant argued that "the odds that there was no relationship between the percentage of non-white residents and the number of facilities in a ZIP Code area are less than 3 in 10 million." *Id.* at 492. Judge Stephen Orlofsky concluded that the statistical evidence demonstrated a "causal link" between the agencies' permitting practice and a disparate impact. *Id.* at 495.

considerably more demanding. This assessment depends upon establishing the equivalence between communities and its members on an unspecified, but arguably relevant number of dimensions. Epidemiological studies that reveal a historical association between exposure to particular chemicals and an increased risk of disease are often introduced in support of plaintiffs' claims about damage that is likely to be done. Defendants can generally successfully challenge the quality of the studies by demonstrating that the statistical models are poorly specified or incomplete.<sup>227</sup> In many of these analyses the so-called "effect" of race is reduced to non-significance when other factors that correlate with race are included in the statistical models.

#### *F. The Need to Balance Competing Interests*

Environmental justice advocates do not deny the economic benefits that flow from industrial development, transportation, and waste management. However, advocates argue that the distribution of the benefits and the costs is inequitable, and thereby unjust. Still, it seems unlikely and unreasonable to expect plaintiffs representing low income or minority communities to argue for relief on the basis of a cost/benefit analysis which traditionally ignores distributions.

The EPA efforts to achieve balance among these interests enraged movement activists, provoking one to respond that:

Inviting such "stakeholders"—the objects of civil rights complaints and the industries accused of poisoning communities of color—to hammer out civil rights policy would be analogous to convening meetings [with] the KKK and segregationist southern governors to come up with an "acceptable" civil rights policy in 1960. The product in 2000 [was] no less offensive.<sup>228</sup>

#### **CONCLUSION: THE IDENTITY OF THE ENVIRONMENTAL JUSTICE MOVEMENT IS AT RISK**

Group membership is important in pursuing anti-discrimination claims because it is likely that the plaintiff, acting like an attorney general, acts in the interests of others who may have, or would have,

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<sup>227</sup> Warren Kriesel et al., *Neighborhood Exposure to Toxic Releases: Are There Racial Inequities?*, 27 GROWTH & CHANGE 479 (1996) (discussing the importance of model specification in shaping the conclusions and policy recommendations that flow from analyses of toxic releases by Census block groups).

<sup>228</sup> Letter from Luke Cole, *supra* note 40, at 6.

been victims of some discriminatory act.<sup>229</sup> Victims of environmental injustice need not be members of the same racial or ethnic group in order to suffer from the harms to which their community is exposed. Living within or near communities that have a substantial number of low-income and minority group residents should be sufficient to place all residents and visitors at risk.

However, there are distinctions related to problems associated with the identification of risk. Clearly, those who are able and inclined to rely on exit rather than voice to reduce their exposure to risks are different from their neighbors. Those who remain, and identify as a member of the community as they pursue interests that arise on the basis of membership in that community, produce benefits that are enjoyed by other members of the community. This is a classic positive externality.

The sense of linked fate that raises the salience of group identity seems capable of overcoming the barriers that race, class, and gender might ordinarily impose. It is not clear whether the use of terms of reference like “environmental justice community,” will serve to reduce the salience of race and ethnicity. A host of additional forces appear to be weakening the power of more essentialist forms of racial identity, especially in urban areas.<sup>230</sup>

A critical question to be pursued is whether the efforts by the Clinton Administration to introduce considerations of class or income into the discourse of equal rights<sup>231</sup> will become the defining feature of the environmental justice movement. A distinction exists between the language used in Clinton’s Executive Order 12,898 and the memorandum that conveyed the order to the heads of departments and agencies. The memorandum consistently refers to minority and low-income communities, while the executive order consistently refers to minority and low-income persons and populations. Communities, and

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<sup>229</sup> Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 833, 860 (2001).

<sup>230</sup> Shirley Brice Heath, *Race, Ethnicity, and the Defiance of Categories*, in TOWARD A COMMON DESTINY 39-70 (Willis Hawley & Anthony Jackson eds., 1995) (describing the merging of racial and ethnic identities among urban youth).

<sup>231</sup> Clinton’s Executive Order (12,898) and its accompanying memorandum makes a distinction between “minority communities” and “low-income communities” and refers to them so consistently in this way, that it would appear that he intended to extinguish the correlation between the two. See Memorandum on Environmental Justice, 30 WEEKLY COMP. PRES. DOC. 279 (Feb. 11, 1994).

the social movements that originate within them, do not exist within the order.<sup>232</sup>

The number of identifiable groups or populations that have become entitled to protections against “simple discrimination,” as well as to “reasonable accommodation” have also expanded.<sup>233</sup> Although the disabled population is poorly defined, court decisions in civil cases will solidify this definition by virtue of their membership in those groups. The meaning of group membership is the central issue. It is the very same issue pursued in the attempt to define the environmental justice community and the nature of the rights of that community.

A sense of community solidarity may be able to overcome the distinctions that race and class have reinforced in the past. The framing of the environmental justice movement in terms of race and class is likely to narrow the scope of the movement. In *Bean*, a class defined as homeowners was as concerned about the loss in property values as they were concerned about threats to the health of the youngsters who would attend the local high school. In *Chester Residents* and *South Bronx*, though health and safety emerged as the motivating concerns, the plaintiffs’ status as low-income communities seemed more important than their racial or ethnic characteristics. Therefore, the equitable distribution of environmental benefits and burdens may be well served by adding “economic status” to the list of protected groups.

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<sup>232</sup> See Exec. Order 12,898, 3 C.F.R. 859 (1995), reprinted in 42 U.S.C. 4321 (2000).

<sup>233</sup> Kelman, *supra* note 229, at 841, 893.