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# Strategies for Environmental Justice: Rethinking CERCLA Medical Monitoring Lawsuits

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# STRATEGIES FOR ENVIRONMENTAL JUSTICE: RETHINKING CERCLA MEDICAL MONITORING LAWSUITS

COLIN CRAWFORD\*

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## I. INTRODUCTION

### A. Background

In 1987, the Commission for Racial Justice (CRJ) of the United Church of Christ issued a report (Commission Report) now credited with bringing the concerns of the burgeoning "environmental justice"<sup>1</sup> movement to national attention.<sup>2</sup> The movement dates back to at least 1982, when a group including the United Church of Christ's Executive Director, Dr. Benjamin Chavis, Jr.,<sup>3</sup> was arrested while protesting North Carolina's

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<sup>1</sup> Although the terms "environmental justice," "environmental equity," and "environmental racism" refer to the same set of concerns, they have each taken on a slightly different ideological caste. The federal bureaucracy prefers the term "environmental equity." Activists tend to favor the more inflammatory "environmental racism." This Article adopts the most neutral of the terms, "environmental justice," a phrase that is aspirational but not confrontational.

<sup>2</sup> COMMISSION FOR RACIAL JUSTICE, UNITED CHURCH OF CHRIST, TOXIC WASTES AND RACE IN THE UNITED STATES: A NATIONAL REPORT ON THE RACIAL AND SOCIO-ECONOMIC CHARACTERISTICS OF COMMUNITIES WITH HAZARDOUS WASTE SITES (1987) [hereinafter COMMISSION REPORT].

<sup>3</sup> Others arrested included District of Columbia Congressman Walter E. Fauntroy and Dr. Joseph Lowery, President of the Southern Christian Leadership Conference. COMMISSION REPORT, *supra* note 2, at 2 (providing a partial listing of those arrested in the protest).

On April 10, 1993, Dr. Chavis was named head of the National Association for the Advancement of Colored People (NAACP), succeeding Rev. Benjamin Hooks. See Brenda Gilchrist, *Chavis Challenges NAACP Members as Convention Closes*, DET. FREE PRESS, July 16, 1993, at 5A.

Dr. Chavis's definition of environmental oppression is extremely broad. Along with former New Mexico Governor Toney Anaya, he has argued that environmental racism has a depressingly long history in the United States. Toney Anaya & Benjamin F. Chavis, Jr., *Call a Halt to Environmental Racism: Unscrupulous Toxic-Waste Dumpers Target Minority Communities*, ST. LOUIS POST DISPATCH, Nov. 21, 1991, at 3C. Dr. Chavis and Anaya argue that there was evidence of environmental racism when, [d]uring the 1930s, hundreds of black workers from the Deep South were brought in by Union Carbide Corp. to dig the Hawks Nest tunnel [near Gauley Bridge, West Virginia]. Over a two-year period about 500 workers died and 1,500 were chronically disabled from silicosis, a lung disease similar to black lung. Men literally dropped dead on their feet breathing air so thick with microscopic silica that they could not see more than a yard in front of them. Those who came out for air were beaten back into the tunnel with ax handles. At subsequent congressional hearings, the chief contractor said, "I knew I was going to kill these niggers, but I didn't know it was going to be this soon."

*Id.* Their editorial equates this historical example with current environmental and occupational hazards suffered disproportionately by people of color.

ultimately successful effort to site a dump for highly toxic polychlorinated biphenyls (PCBs)<sup>4</sup> in Warren County, a largely Black<sup>5</sup> area. The Commission Report is best known for its finding, based on an analysis of demographic data and hazardous waste siting information, that race was the "most significant among variables tested in association with the location of commercial hazardous waste facilities" across the United States.<sup>6</sup> The second most important variable was "socio-economic status."<sup>7</sup> Although this variable "appeared to play an important role in the location of commercial hazardous waste facilities,"<sup>8</sup> the CRJ researchers insisted that it

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Perhaps the current environmental justice movement dated back to the lawsuit filed by Linda McKeever Bullard in *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd mem.*, 782 F.2d 1038 (5th Cir. 1986). See *infra* part II.A.1.

The first federal government response to nascent environmental justice concerns came in the wake of the dispute in Warren County, North Carolina. See U.S. GENERAL ACCOUNTING OFFICE, *SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES* (1983) [hereinafter GAO REPORT] (reporting on the correlation between the locations of hazardous waste landfills and minority population concentrations, in response to a request by Congressman Fauntroy on December 16, 1982).

<sup>4</sup> PCBs are a class of chemical compounds that are extremely stable and therefore make excellent coolants and fire retardants. PCBs were widely used in industrial electrical applications beginning in the 1920s. The U.S. Environmental Protection Agency (EPA) cut back on their use in 1976, and Monsanto, the sole domestic manufacturer, unilaterally ceased production and sales in 1977. PCBs are a suspected human carcinogen and have been observed to cause both liver and skin damage. For basic information on PCBs, see RICHARD J. LEWIS, SR., *HAZARDOUS CHEMICALS DESK REFERENCE* 964-65 (2d ed. 1991) (identifying PCBs as a suspected human carcinogen); THE COUNCIL ON ECONOMIC PRIORITIES, *CORPORATE ENVIRONMENTAL DATA CLEARINGHOUSE, BALTIMORE GAS & ELECTRIC COMPANY: A REPORT ON THE COMPANY'S ENVIRONMENTAL POLICIES AND PRACTICES* app. f. (1993).

<sup>5</sup> In the sometimes volatile and always politically weighted area of racial and ethnic nomenclature, this Article will follow the example of Kimberlé Crenshaw and capitalize "Black," a term to be used interchangeably with "African-American." See Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988) ("I shall use 'African-American' and 'Black' interchangeably. When using 'Black,' I shall use an upper-case 'B' to reflect my view that Blacks, like Asians, Latinos, and other 'minorities,' constitute a specific cultural group and, as such, require denotation as a proper noun."). Correspondingly, this Article will also capitalize "White," on the grounds that, in this context, the White majority—and particularly White business and industrial interests—proceeds on a set of cultural assumptions with which the environmental justice advocate must deal.

<sup>6</sup> COMMISSION REPORT, *supra* note 2, at xiii.

<sup>7</sup> The Commission Report's primary measures of "socio-economic status," in addition to the part of "socio" that includes race, were mean income and mean value of owner-occupied homes. See *id.* app. b. at 39-50, 64-65.

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

played a less important role than race.<sup>9</sup> In addition to its finding about the siting of commercial hazardous waste facilities, the Commission Report concluded that minority racial and ethnic populations<sup>10</sup> in the United States were disproportionately burdened by the presence of uncontrolled toxic waste sites in their communities.<sup>11</sup>

Soon after the publication of the Commission Report, social scientists began to treat environmental justice seriously.<sup>12</sup> Some of the researchers who worked on the Commission Report have subsequently devoted themselves almost full-time to the subject, distinguishing themselves as activists and scholars.<sup>13</sup> The University of Michigan School of Natural

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<sup>9</sup> *Id.* at xiii, 13 (stating that race was the dominant correlative factor in the location of commercial hazardous waste facilities). *But see infra* note 64 and accompanying text.

<sup>10</sup> Meaning Blacks, Hispanics, Asian/Pacific Islanders, and American Indians—the categories used by the U.S. Bureau of the Census. Thaa Walker, *Multiracial Residents Pressing for Box on Next Census*, HOUSTON CHRON., Aug. 1, 1993, at A11. Wherever possible, this Article avoids the use of the term “minority.” In this context, the use of the term is problematic because many of the communities in which controversial facilities exist have primarily non-White populations.

<sup>11</sup> COMMISSION REPORT, *supra* note 2, at 16-17 (concluding that as the minority population increases in a community, the statistical probability that some form of hazardous activity will occur also increases). The basic conclusions of the Commission Report were recently confirmed. *See* Marianne Lavelle & Marcia Coyle, *Unequal Protection: The Racial Divide in Environmental Law*, NAT’L L.J., Sept. 21, 1992 (A Special Investigation), at S1, S2 (stating that “[u]nder the giant Superfund cleanup program, abandoned hazardous waste sites in minority areas take 20 percent longer to be placed on the national priority action list than those in white areas.”); *see also* Marianne Lavelle, *Environmental Racism Targeted: Congressional Hearing*, NAT’L L.J., Mar. 1, 1993, at 3, 3 (reporting the anticipated testimonies of various members of the poor and non-White communities at a congressional hearing on environmental justice).

<sup>12</sup> The best known of early contributors is the sociologist Robert Bullard. For a useful summary of his views, *see* ROBERT BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* (1990). He has also edited a collection of writings by academics and activists. *CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS* (Robert Bullard ed., 1993) [hereinafter *CONFRONTING ENVIRONMENTAL RACISM*]; *see also* *RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE* (Bunyan Bryant & Paul Mohai eds., 1992) (collecting essays on racism and the environment by Robert Bullard and other scholars); *A UNIVERSITY OF MICHIGAN SYMPOSIUM ON MARTIN LUTHER KING, ENVIRONMENTAL RACISM: ISSUES AND DILEMMAS* (Bunyan Bryant & Paul Mohai eds., 1991) (same). *See generally* *VOICES FROM THE ENVIRONMENTAL MOVEMENT* (Donald Snow ed., 1992) [hereinafter *VOICES*] (analyzing the environmental justice movement and collecting the stories and experiences of many of its early figures). For extensive nonlegal bibliographies on the environmental justice movement, *see* Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L.Q.* 619, 625-27 nn.17-18 (1992).

<sup>13</sup> For example, Vernice Miller became a co-founder, with Peggy Shepard and

Resources now holds an annual conference on race and the environment,<sup>14</sup> and activists have twice assembled for national conferences to share information and plan strategies for correcting perceived environmental inequities.<sup>15</sup> Others have held smaller, more focused conferences, a trend that shows no signs of abating.<sup>16</sup>

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Chuck Sutton, of West Harlem Environmental Action, a group that has focused public attention on the construction of a sewage treatment plant on the Hudson River, which abuts the historically African-American and now predominantly African-American and Latino community of West Harlem. See Vernice D. Miller, *Planning, Power and Politics: A Case Study of the Land Use and Siting History of the North River Water Pollution Control Plant* (May 10, 1993) (unpublished manuscript, on file with the *Boston University Law Review*) (describing how the location of a sewage treatment plant, originally planned to be adjacent to a largely White, professional community, was changed to abut a predominantly African-American community); see also Hugh Hamilton, *Uptown Eco-Blues: Environmental Woes in Harlem*, CITY SUN, June 5-11, 1991, at A18-A19 (reporting on the dispute over the location of the North River Water Pollution Control Plant). In 1993, Miller was named as the first Director of Environmental Justice Initiatives at the Natural Resources Defense Council (NRDC), a New York-based environmental advocacy group. Miller's appointment to the NRDC, one of the nation's "Big 10" environmental organizations, is significant because of the criticism NRDC and the other large environmental advocacy groups have received for ignoring urban environmental problems and, more specifically, those of poor communities of color. See, e.g., Renee Loth, *Bringing Earth Day Back down to Earth: Grass-Roots Activists Tweak 'Elitist' Brethren*, BOSTON GLOBE, Apr. 21, 1991, at A33 (reporting that in 1991 "Richard Moore, codirector of the Southwest Organizing Project in New Mexico, accused each of the so-called Big 10 environmental organizations—including the Sierra Club, the National Wildlife Federation and the Audubon Society—of 'environmental racism,' noting that just five of 137 members on their combined boards were members of minority groups"); see also *A Place at the Table: A Sierra Roundtable on Race, Justice, and the Environment*, SIERRA, May/June 1993, at 50 (bringing prominent proponents of environmental justice together for a roundtable discussion on race and the environment).

<sup>14</sup> Professors Bunyan Bryant and Paul Mohai of the School of Natural Resources coordinate the conference.

<sup>15</sup> See, e.g., *Minority Groups Protest Pollution, Plan to Protect*, CHI. TRIB., Oct. 25, 1991, § 1, at 10 (describing The First National People of Color Leadership Summit on the Environment, held in Washington, D.C.). Since then, regional summits have been held throughout the country. See, e.g., *Tribes Say Feds Lax on Pollution*, COM. APPEAL (Memphis, Tenn.), May 27, 1993, at 1B (describing a three-day summit by representatives of 30 tribes from Michigan, Minnesota, and Wisconsin); The 1994 New York/Bronx Environmental Justice Summit Coordinating Committee, *Bronx Environmental Coalition Proposal for Environmental Assessment and Remediation Initiatives* (on file with the *Boston University Law Review*) (proposing plans for an October 1994 summit with federal, state, and city officials to discuss disproportionate environmental burdens borne by the Bronx).

<sup>16</sup> One such conference was the Coalition on Native Rights Conference in Cherokee, North Carolina from May 13-15, 1993. The Coalition's work focuses on the interrelation of civil rights and environmental issues. The concern among Native groups

More recently, on February 11, 1994, President Bill Clinton issued an Executive Order recognizing the disproportionate environmental burdens borne by poor communities, and especially communities of color.<sup>17</sup> The Executive Order mandated that "each Federal agency shall make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations."<sup>18</sup> Whether this Executive Order will have more than an "evanescent life," of course, remains to be seen.<sup>19</sup>

### B. *Lawyers' Belated Response*

Lawyers—and legal academics in particular—have been much slower to respond to concerns about environmental injustice. For whatever reason, whether because the subject falls outside the purview of traditional course offerings<sup>20</sup> or, less charitably, because law schools tend to be slower than social science faculties to integrate pressing social issues and adjust their curricula accordingly,<sup>21</sup> legal academics have produced remarkably little writing on environmental justice issues. What does exist is of relatively recent vintage.<sup>22</sup> The reluctance of legal academics to take

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about such issues is timely. Senator Daniel K. Inouye, Chairman of the Select Committee on Indian Affairs, "reports that there are currently 650 solid waste disposal sites located on Indian lands; 108 were in existence prior to RCRA [Resource Conservation and Recovery Act of 1976] standards for such landfills, and only two of those are currently in compliance with RCRA requirements." Anthony R. Chase, *Assessing and Addressing Problems Posed by Environmental Racism*, 45 RUTGERS L. REV. 335, 343 (1993).

<sup>17</sup> Exec. Order No. 12,898, 59 Fed. Reg. 7629 (1994).

<sup>18</sup> *Id.* § 1-101; see Memorandum on Environmental Justice, 30 WEEKLY COMP. PRES. DOC. 279 (Feb. 11, 1994).

<sup>19</sup> *Environmental Justice*, N.Y. TIMES, Feb. 11, 1994, at A34.

<sup>20</sup> See Troyen A. Brennan, *Environmental Torts*, 46 VAND. L. REV. 1, 3 n.6 (1993) (stating that the subject of environmental torts "has not penetrated most law school courses on tort law").

<sup>21</sup> In his recent article, Professor Richard Lazarus thanks one of his law students for teaching him "that this was a topic warranting greater academic inquiry." Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 787 n.\* (1992).

<sup>22</sup> In fact, some of best legal writing in the area has been produced by practitioners, such as Luke Cole, *supra* note 12, and law students, such as Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394 (1991). For a legal bibliography, see Lazarus, *supra* note 21, at 791 n.14. In addition, the *University of Colorado Law Review* devoted the bulk of a recent issue to the subject. National Resources Issue, *Race, Class, and Environmental Regulation*, 63 U. COLO. L. REV. 839 (1992). Other journals are doing the same. See, e.g., 21 FORDHAM URB. L.J. 425 (forthcoming Spring 1994).

on the subject of environmental justice may be changing, but the legal literature remains highly theoretical, largely concerned with exploring equal protection bases for environmental justice lawsuits.<sup>23</sup>

Activist environmental lawyers, however, have been unsuccessful in applying equal protection analysis.<sup>24</sup> Although it is essential for scholars to continue to explore new means of fashioning an equal protection challenge, it is also clear that something more is needed. In particular, lawyers representing communities experiencing current pollution, struggling with the continuing effects of past pollution, and opposing possible siting of additional toxic activities have an immediate, pressing need for strategies and tactics to combat both existing and threatened instances of environmental injustice.

### C. *Rethinking CERCLA Medical Monitoring Lawsuits*

This Article argues that by concentrating largely on expanding the scope of constitutional jurisprudence, lawyers and legal academics have failed to examine possibilities for strategic lawsuits using the elaborate array of existing federal environmental statutes. Specifically, both lawyers and legal academics have needlessly neglected or shied away from the medical monitoring lawsuit available under section 107(a)(4)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),<sup>25</sup> to the disadvantage of potential environmental justice plaintiffs.

In advancing this suggestion, I emphasize that it is offered as an *example* of one possible option available to environmental justice lawyers. Conceivably, there are other legal alternatives worth pursuing.<sup>26</sup>

Ultimately, activist and lawyer Luke Cole may be right when he suggests that the grassroots environmental justice movement will be more

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<sup>23</sup> See, e.g., Jon C. Dubin, *From Junktards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color*, 77 MINN. L. REV. 739, 779-801 (1993) (suggesting that the Fair Housing Act, the Equal Protection Clause, the Thirteenth Amendment, and the substantive due process limits on the police power can support a right to protective zoning for low-income communities of color); Lazarus, *supra* note 21, at 834-42 (examining the Equal Protection Clause, Titles VI and VIII of the Civil Rights Act, and 42 U.S.C. § 1982 as bases for lawsuits); Peter L. Reich, *Greening the Ghetto: A Theory of Environmental Race Discrimination*, 41 KAN. L. REV. 272 (1992) (recognizing the limitations of federal equal protection analysis and arguing for state equal protection claims employing a disparate impact analysis); Edward P. Boyle, Note, *It's Not Easy Bein' Green: The Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal Protection Analysis*, 46 VAND. L. REV. 937 (1993) (suggesting ways of adapting equal protection to guard against true institutional racism while leaving legislative bodies as free as possible).

<sup>24</sup> See *infra* part II.A.

<sup>25</sup> CERCLA, § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1988).

<sup>26</sup> See *infra* part III.

successful if lawyers aim to "empower" their clients to become their own advocates rather than concentrating too much on more traditional lawyering functions such as filing lawsuits and participating in the rule-making processes.<sup>27</sup> However, it should be recognized that, particularly in the short run, very few lawyers are likely to fit Cole's model of the activist-citizen-advocate. In other words, it is probably better to leave environmental lawyers to focus on what they have been trained to do: shape the laws to their clients' advantage and advocate appropriate changes when the laws offer insufficient protection.<sup>28</sup> An activist environmental justice lawyer need not be as suspicious as Cole of the possibilities of using established environmental laws.<sup>29</sup>

#### D. *The Usefulness of the CERCLA Medical Monitoring Lawsuit*

"CERCLA's legislative history makes clear that the statute's basic goal is to protect public health and the environment."<sup>30</sup> In addition, "[a] sec-

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<sup>27</sup> See, e.g., Cole, *supra* note 12, at 659. Cole is speaking specifically about the legal services lawyer's role in fighting environmental justice battles: "The model of empowerment described in this essay is a sympathetic challenge to the traditional legal services model, a gentle push to get legal services lawyers to rediscover empowerment as a goal of lawyering and as a means of social change." *Id.* His views are informed by his central role in a legal and political struggle to stop the siting of a hazardous waste incinerator in Kettleman City, California by Chemical Waste Management, the nation's largest handler of toxic and hazardous wastes. Kettleman City, in the middle of the San Joaquin Valley, is already the site of the nation's fifth-largest hazardous waste landfill. The community is 95% Spanish-speaking. Cole acted as lead counsel for the county in halting the siting on a number of grounds, including the claim that crucial documents should have been translated into Spanish. *Id.* at 674-79 (recounting the Kettleman City struggle).

<sup>28</sup> But see Marcia Coyle, *Lawyers Try to Devise New Strategy*, NAT'L L.J., Sept. 21, 1992, at S8, S8 (quoting Cole as referring to and rejecting this type of lawyering as "the macho law brain approach").

<sup>29</sup> According to Cole:

Environmental laws are not designed by or for poor people. The theory and ideology behind environmental laws ignores the systemic genesis of pollution. Environmental statutes actually legitimate the pollution of low-income neighborhoods. Further, those with political and economic power have used environmental laws in ways which have resulted in poor people bearing a disproportionate share of environmental hazards.

Cole, *supra* note 12, at 642; see also *id.* at 649-50 (describing why the traditional legal system has failed poor communities); cf. MELISSA F. GREENE, PRAYING FOR SHEET-ROCK 187-208 (1991) (describing the successful mobilization of Black voters in a Georgia county during the 1970s when a lawsuit was coupled with grassroots, community activism).

<sup>30</sup> SUSAN M. COOKE, THE LAW OF HAZARDOUS WASTE: MANAGEMENT, CLEANUP, LIABILITY AND LITIGATION § 12.03[4][c] (1993). Although CERCLA's broad purpose is fairly clear and agreed upon, its details, particularly concerning implementation, are heavily debated. See *infra* notes 187-89 and accompanying text.

ond guiding principle underlying CERCLA is that the cost of hazardous waste cleanup should rest on those ultimately responsible for the waste. This is the 'polluter pays' principle."<sup>31</sup> CERCLA's extensive scheme provides for the payment of hazardous waste cleanup in two ways. First, it created a fund—the so-called government "Superfund"—to pay for hazardous waste cleanups.<sup>32</sup> Second, CERCLA imposes strict liability for a wide array of parties having any connection to the creation of hazardous waste sites, including, for instance, anyone who currently owns or operates, or previously owned or operated, a site.<sup>33</sup> In 1986, Congress significantly amended CERCLA with the Superfund Amendments and Reauthorization Act of 1986 (SARA).<sup>34</sup> SARA addressed a wide range of issues, including revised cleanup standards and schedules, as well as litigation and liability questions.<sup>35</sup> SARA significantly increased both the Superfund and the scope and complexity of CERCLA.<sup>36</sup> CERCLA is now scheduled for amendment yet again.<sup>37</sup>

The aims of the CERCLA medical monitoring lawsuit are simple and straightforward.<sup>38</sup> In connection with a CERCLA cleanup, plaintiffs request continuing medical monitoring such as blood, urine, and tissue

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<sup>31</sup> COOKE, *supra* note 30, § 12.03[4][d].

<sup>32</sup> Superfund is financed largely by a tax imposed on oil, petrochemical feedstocks, chemicals, and hazardous waste. *Id.*

<sup>33</sup> The liability provisions appear at 42 U.S.C. §§ 9606-9607 (1988 & Supp. IV 1992).

<sup>34</sup> Pub. L. No. 99-499, 100 Stat. 1613 (codified in scattered sections of 10, 26, 29, 33, and 42 U.S.C.).

<sup>35</sup> COOKE, *supra* note 30, § 12.04.

<sup>36</sup> *Id.* § 12.05.

<sup>37</sup> See, e.g., *Superfund Reauthorization: Hearings Before the Subcomm. on Superfund, Recycling, and Solid Waste Management of the Senate Comm. on Environment and Public Works*, 103d Cong., 1st Sess. (1994) (including a statement by NAACP Executive Director Dr. Chavis); Peter B. Priestley, *The Future of Superfund*, 79 A.B.A. J. 62 (1993) (examining the history, criticisms, and future of CERCLA); John M. Cushman, Jr., *Administration Plans Revision to Ease Toxic Cleanup Criteria*, N.Y. TIMES, Jan. 31, 1994, at A1 (discussing a bill proposed to modify CERCLA); *Not So Super Superfund*, N.Y. TIMES, Feb. 7, 1994, at A16 (discussing current ideas within the EPA for improving CERCLA); see also note 45.

<sup>38</sup> The issue of whether medical monitoring expenses are covered by Superfund was first addressed in a nonlitigation context in Dan A. Tanenbaum, Comment, *When Does Going to the Doctor Serve the Public Health? Medical Monitoring Response Costs Under CERCLA*, 59 U. CHI. L. REV. 925, 944-46 (1992). Recent contributions include Kathryn E. Hand, Comment, *Someone to Watch over Me: Medical Monitoring Costs Under CERCLA*, 21 B.C. ENVTL. AFF. L. REV. 363 (1994) (proposing public health-oriented medical monitoring of all CERCLA response actions). But see Kristin E. Sweeney, Comment, *Daigle v. Shell Oil Company and the Bumpy Road to the Recoverability of Medical Monitoring Expenses Under CERCLA*, 47 VAND. L. REV. 235 (1994) (concluding that CERCLA precludes recovery of medical monitoring expenses).

sample tests to determine the effectiveness and extent of the cleanup. This Article assumes that the appropriate form of medical monitoring would vary depending upon the nature of the cleanup. Although it is beyond the purview of this Article to outline a medical monitoring scheme that is properly the concern of medical professionals, epidemiologists, scientists, and even engineers, it is worth noting that models do exist for long-term medical monitoring to determine the impact of hazardous substances on human health and welfare.<sup>39</sup>

Plaintiffs typically characterize their requests for medical monitoring under CERCLA as a "necessary cost of response" under section 107(a)(4)(B), which provides, in relevant part, that

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for . . . .

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan . . . .<sup>40</sup>

Plaintiffs draft their claims to come within CERCLA's general statutory purpose to protect the public health, welfare, or the environment.<sup>41</sup>

At first glance, the suggestion that lawyers should mount more CERCLA medical monitoring claims is likely to strike many, and particularly experienced practitioners in the area, as a sure losing proposition. The federal district courts are split on whether medical monitoring costs are compensable as "necessary costs of response" under section 107(a)(4)(B).<sup>42</sup> The single federal appellate court decision on the issue resoundingly denied awarding any medically-related response costs under CERCLA.<sup>43</sup> Moreover, during a period of economic uncertainty, critics are likely to greet the suggestion that courts employ yet another tool for assessing liability with extreme skittishness, especially because CERCLA is notorious for its poor draftsmanship and the runaway costs associated

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<sup>39</sup> For example, in *Sterling v. Velsicol Chem. Corp.*, 647 F. Supp. 303, 445 (W.D. Tenn. 1986), *aff'd*, 855 F.2d 1188 (6th Cir. 1988), non-CERCLA medical monitoring consisted of a health questionnaire, blood specimens, urine specimens, and a brief physical exam. See *infra* notes 46-47 and accompanying text.

<sup>40</sup> CERCLA, § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (1988).

<sup>41</sup> See, e.g., *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1535 (10th Cir. 1992) (holding that CERCLA response costs do not include medical monitoring). Plaintiffs usually focus on the public health and welfare language in the definition of remedial or long-term CERCLA actions. 42 U.S.C. § 9601(24). However, language about the statute's role in protecting the "public health or welfare or the environment" appears throughout the statute. See, e.g., *id.* §§ 9602(a), 9660(b).

<sup>42</sup> See *infra* part V.

<sup>43</sup> *Daigle*, 972 F.2d at 1535-37.

with its imperfect enforcement.<sup>44</sup> In addition, courts may be reluctant to expand liability because this controversial statute probably will undergo yet another major revision in the next few years.<sup>45</sup>

Nevertheless, some courts have articulated tests for determining when medical monitoring is appropriate. Although these tests appear in non-CERCLA cases, courts could easily adapt them to CERCLA medical monitoring claims. For example, in *Bocook v. Ashland Oil, Inc.*,<sup>46</sup> a federal district court concluded that under Kentucky law, to recover the

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<sup>44</sup> Courts seeking to restrict CERCLA's scope recite, ad nauseum, dicta in *Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269, 1285 (D. Del. 1987) (asserting that CERCLA response costs do not include compensation for economic damages or personal injuries), *aff'd*, 851 F.2d 643 (3d Cir. 1988) (noting CERCLA's often ambiguous and badly drafted provisions). See, e.g., *Coburn v. Sun Chem. Corp.*, 28 Env't Rep. Cas. (BNA) 1665, 1668 (E.D. Pa. 1988) (quoting *Artesian*, 659 F. Supp. at 1285). CERCLA is routinely criticized by both industry groups and environmentalists for being an ineffective response to hazardous waste cleanup issues. See, e.g., Environmental Research Foundation, *After 12 Years Studying Toxic Dumps, Government Knowledge Remains Sketchy*, RACHEL'S HAZARDOUS WASTE NEWS, Feb. 12, 1992, at 1 ("Spending at least \$7.5 billion over the last 12 years, the [EPA] has managed to clean up only 64 sites."); *Program Wastes Money Addressing Risks EPA Has Exaggerated, Industry Group Says*, [Current Developments] 24 Env't Rep. (BNA) 420 (July 9, 1993) ("The federal superfund program is wasting huge amounts of money to address risks that the [EPA] has greatly exaggerated . . ."); Bruce Van Voorst, *Toxic Dumps: The Lawyers' Money Pit*, TIME, Sept. 23, 1993, at 63 (criticizing the failure to clean up sites and the accompanying boom in litigation).

<sup>45</sup> See, e.g., Priestley, *supra* note 37, at 62, 64-65 (describing suggestions for improving Superfund); see also *Browner to Try Administrative Fixes to Program Before Seeking Legislative Action*, [Current Developments] 24 Env't Rep. (BNA) 39 (May 14, 1993) (summarizing administrative fixes the EPA will attempt before making legislative recommendations for Superfund); *Courts to Blame for Much of Problem with Superfund, Industry Attorney Says*, [Current Developments] 24 Env't Rep. (BNA) 632 (Aug. 13, 1993) (describing items that will be examined during the reauthorization process); *Site Listing, Cleanup Should Be More Fair, Based on Actual Risks, Witnesses Tell Panel*, [Current Developments] 24 Env't Rep. (BNA) 32, 32-33 (May 14, 1993) (describing the Senate hearing testimony of witnesses, including Dr. Chavis, who claimed that the EPA has cleaned up less risky sites and left riskier ones untouched).

In fact, the arguments advanced in this Article would help clarify the appropriate form of future amendments to CERCLA concerned with affecting more efficient cleanups serving CERCLA's original purpose to protect the public health and welfare. CERCLA has been extensively criticized for not meeting these original goals. See, e.g., Van Voorst, *supra* note 44, at 63. Groups with an interest in environmental justice issues clearly appreciate the importance of incorporating their concerns into a revised CERCLA. See *NAACP Joins Groups Seeking Superfund Reform, Including Elimination of Retroactive Liability*, [Current Developments] 24 Env't Rep. (BNA) 1209 (Oct. 29, 1993) (describing a Superfund reform plan jointly developed by the NAACP, business groups, and insurance companies).

<sup>46</sup> 819 F. Supp. 530, 534 (S.D. W. Va. 1993).

costs of future diagnostic testing, each plaintiff must prove not only exposure to toxic substances but also: (1) significant exposure to a proven hazardous substance; (2) a significant increased risk of contracting a serious latent disease; (3) an increased risk that makes periodic diagnostic examinations reasonably necessary; and (4) existing monitoring and testing procedures that make early disease detection possible and beneficial.<sup>47</sup>

This Article therefore suggests reexamining the strategic use of CERCLA medical monitoring lawsuits in the context of the environmental justice movement. Part II discusses the failure of equal protection analysis and argues that it is not likely to result in successful environmental justice lawsuits in the near future, despite some promising notions explored in the legal literature. Part III analyzes the short-term limitations of other proposed legal options available to the environmental justice advocate. Part IV presents some of the advantages of CERCLA medical monitoring claims. Part V proposes incorporating medical monitoring claims into the environmental justice advocate's strategic arsenal and criticizes the reasoning of the case law that has disallowed such claims. Part V also contends that, contrary to the views of some courts, the most influential of the decisions disallowing recovery of CERCLA medical monitoring costs, *Coburn v. Sun Chemical Corp.*,<sup>48</sup> provides an analysis that is neither persuasive nor comprehensive.

This Article concludes that the increased use of medical monitoring would have at least two salutary results. First, incorporating medical monitoring into CERCLA cleanup efforts would help further the drafters' goal of applying CERCLA more efficiently.<sup>49</sup> Second, the recognition of the validity of medical monitoring and surveillance expenses as

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<sup>47</sup> *Id.* (citing *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 852 (3d Cir. 1990), *cert. denied*, 499 U.S. 961 (1991)).

<sup>48</sup> 28 Env't Rep. Cas. (BNA) 1665 (E.D. Pa. 1988).

<sup>49</sup> Increased efficiency would result from providing data that identifies the actual threat to public health and the environment from uncontrolled hazardous waste sites. This is grounded in CERCLA's legislative history. In the wake of the Love Canal disaster, Congress could no longer postpone its work on bills addressing the devastation hazardous dump sites were wreaking on the public health. In his 1979 address to the Senate Committee on Environment and Public Works at the first hearing on CERCLA, Senator Robert Stafford cautioned that

these [committee] hearings deal with more than just the problem of abandoned hazardous waste sites. The orphaned site problem is important, and it is justly receiving a great deal of attention. Not only are water supplies being contaminated, but untold number of innocent persons are exposed to extremely toxic and hazardous chemicals. Some places, such as Love Canal, have become environmental ghettos. . . . What we must explore is the entirety of how and why toxics are entering the environment, whether they are injuring people, and if so, how. S. REP. NO. 848, 96th Cong., 2d Sess. 10 (1980) (quoting COMM. ON ENVIRONMENT AND PUBLIC WORKS, AT JOINT HEARINGS BEFORE THE SUBCOMMITTEES ON ENVIRONMENTAL POLLUTION AND RESOURCE PROTECTION, 96th Cong., 1st Sess. (1979) (statement of Senator Robert T. Stafford)). Although CERCLA's legislative history

one of CERCLA's "necessary costs of response" would serve communities of color and low-income across the nation, by providing them with hard, empirical evidence of the very real toxic threats they face. In this way, medical monitoring suits could amplify and support the evidence of environmental injustice documented in the Commission Report, the conclusions of which some commentators have recently attacked.<sup>50</sup>

## II. THE FAILURE OF EQUAL PROTECTION CHALLENGES

### A. Case Law

Three cases form the basis of the failed efforts to mount an equal protection challenge to the siting of waste disposal facilities.<sup>51</sup> Although each of these cases involves the siting of waste disposal facilities, this Article assumes that the equal protection challenges they advance would also fail in cases involving the sitings of or threats posed by other industrial activities or pollution.<sup>52</sup>

Although other commentators have analyzed these decisions as environmental equal protection cases,<sup>53</sup> this Article considers them in the

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is notoriously unreliable, *see infra* notes 187-89, the above general proposition is uncontradicted in the legislative history.

<sup>50</sup> *See, e.g.,* Lazarus, *supra* note 21, at 802 n.56 (criticizing the statistical methods employed in the Commission Report). The details of his argument aside, it is noteworthy that in his Article's title, Lazarus put the phrase "environmental justice" in quotation marks, *id.* at 787, reflecting the fact that for lawyers the notion is still possibly a questionable one or, at a minimum, a young and unrecognized subject of inquiry. *See* Vicki Been, *What's Fairness Got to Do with It? Environmental Equity and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1010-15 (1993) (analyzing the claims for disproportionate siting of landfills in poor and minority neighborhoods and outlining possible alternatives to ensure fair siting).

<sup>51</sup> *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1144, 1150 (E.D. Va. 1991) (concluding that there was no discriminatory intent in the siting of a landfill in a predominantly Black area), *aff'd mem.*, 977 F.2d 573 (4th Cir. 1992); *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb Planning & Zoning Comm'n*, 706 F. Supp. 880 (M.D. Ga.), *aff'd*, 896 F.2d 1264 (11th Cir. 1989) (same); *Bean v. Southwestern Waste Management Corp.*, 482 F. Supp. 673, 677 (S.D. Tex. 1979) (holding that plaintiffs must show that a permit was granted with the intent to discriminate on the basis of race), *aff'd mem.*, 782 F.2d 1038 (5th Cir. 1986).

Lazarus begins his discussion of the equal protection case law in the environmental justice context with a case concerning plans to construct two highways through a public park in a "minority" neighborhood. Lazarus, *supra* note 21, at 829-31 (discussing *Harrisburg Coalition Against Ruining the Env't v. Volpe*, 330 F. Supp. 918 (M.D. Pa. 1971)). Because the activity challenged in that case was not industrial and did not involve hazardous waste, this Article does not consider it.

<sup>52</sup> *See* Cole, *supra* note 12, at 625 n.17 (listing the environmental hazards facing the poor and providing a bibliography of the literature about efforts to correct them nationwide).

<sup>53</sup> *See, e.g.,* Reich, *supra* note 23, at 290-304; Godsil, *supra* note 22, at 411-21, 424.

context of an argument exploring federal environmental statutory alternatives. Indeed, other commentators may have been too quick to group the cases together, rather than scrutinize their differences—differences of disheartening consequence to the environmental justice advocate.<sup>54</sup> An analysis of the differences illustrates the imaginative, but unsuccessful, efforts of lawyers to challenge environmental siting decisions with traditional equal protection challenges. It also reveals the courts' reluctance to endorse the views of plaintiffs claiming environmental injustice. Moreover, such an analysis exposes the difficulties lawyers are likely to encounter in raising equal protection claims without data evidencing actual physical harm to communities burdened by the siting of undesirable facilities. In sum, this analysis suggests that Professor Derrick Bell's nearly twenty-year-old observation regarding equal protection and other constitutional law enforcement strategies still remains depressingly true: "[M]inority rights are worth only as much as those in the majority responsible for their enforcement are willing to invest."<sup>55</sup> Therefore, it is essential for the environmental justice advocate to build a compelling statistical and evidentiary case that the majority cannot easily ignore.

1. *Bean v. Southwestern Waste Management Corp.*<sup>56</sup>

In *Bean*, the plaintiffs sought to enjoin the decision by the Texas Department of Health (TDH) to grant a solid waste facility permit to the defendant.<sup>57</sup> The preliminary injunction hearing took a remarkable eleven days, apparently owing to the large quantity of statistical data.<sup>58</sup>

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<sup>54</sup> Reich, *supra* note 23, at 293 (finding that the three cases are similar "in both reasoning and result").

<sup>55</sup> Derrick A. Bell, Jr., *Racial Remediation: An Historical Perspective on Current Conditions*, 52 NOTRE DAME LAW. 5, 21 (1976).

<sup>56</sup> 482 F. Supp. 673 (S.D. Tex. 1979), *aff'd mem.*, 782 F.2d 1038 (5th Cir. 1986).

<sup>57</sup> *Id.* at 674-75 & n.3 (alleging that the decision to site the waste facility in Harris County was "at least in part, motivated by racial discrimination").

<sup>58</sup> *Id.* at 674 n.1 (noting that "[a]pproximately twenty-five witnesses testified and eighty exhibits were received into evidence"). An issue not addressed by this Article but requiring further analysis in the CERCLA medical monitoring context and similar cases is the question of the ability of courts to entertain complicated and often contradictory scientific data. Cf. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2793, 2799 (1993) (holding that "general acceptance" of a theory by the scientific community is not a prerequisite to admissibility into evidence, and that Federal Rule of Evidence 702, which assigns to the trial judge the task of ensuring that all presentations rest on reliable scientific foundations, supersedes the *Frye*-test standard).

Furthermore, a major concern for the advocate in this area is that the data on chemical toxicity is comparatively under-developed. See, e.g., BARRY COMMONER, *MAKING PEACE WITH THE PLANET* 50 (1992) (noting that "only 289 of the 700 chemicals currently used in U.S. pesticides have been sufficiently tested to evaluate their side effects; many pesticides that have passed the tests are later found to be harm-

The United States District Court for the Southern District of Texas observed that the plaintiffs appeared to have been *compelled* to bring the matter to court: TDH witnesses "indicated that the agency[,] in keeping with its statutory authority, would not examine allegations of racial discrimination in site selection."<sup>59</sup>

The court then considered the plaintiffs' request for a preliminary injunction.<sup>60</sup> The court acknowledged that the plaintiffs had established a substantial threat of irreparable harm to their constitutional rights and that specifically, "[t]he opening of the facility will affect the entire nature of the community—its land values, its tax base, its aesthetics, the health and safety of its inhabitants, and the operation of Smiley High School, located only 1700 feet from the site."<sup>61</sup> It declined to issue the preliminary injunction, however, because the plaintiffs had not met their burden of proving discriminatory purpose and therefore had not shown a substantial likelihood of success on the merits.<sup>62</sup>

In reaching this conclusion, the court strained to display its ideological

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ful[, yet] each year 750 million pounds of pesticides are sprayed across the U.S. landscape"). As one commentator has observed: "The legal system is playing catch-up with the medical and scientific communities by recognizing the individual and public benefits of early diagnosis of toxic exposure-related diseases." Amy B. Blumenberg, Note, *Medical Monitoring Funds: The Periodic Payment of Future Medical Surveillance Expenses in Toxic Exposure Litigation*, 43 HASTINGS L.J. 661, 682 (1992).

The issue of what scientific evidence to admit and the ability of lawyers to evaluate it will continue to require lawyers' attention in this and related contexts. See, e.g., MARGARET A. BERGER, *PROCEDURAL AND EVIDENTIARY MECHANISMS FOR DEALING WITH EXPERTS IN TOXIC TORT LITIGATION: A CRITIQUE AND PROPOSAL* (1991) (analyzing problems with and proposing improvements to the process of expert and scientific evidence procedures at trial); CARNEGIE COMMISSION ON SCIENCE, TECHNOLOGY AND GOVERNMENT, *SCIENCE AND TECHNOLOGY IN JUDICIAL DECISION MAKING: CREATING OPPORTUNITIES AND MEETING CHALLENGES* (1993) (examining the role of science and expert testimony in court proceedings).

<sup>59</sup> *Bean*, 482 F. Supp. at 675.

<sup>60</sup> *Id.* at 676.

<sup>61</sup> *Id.* at 677.

<sup>62</sup> *Id.* (noting that "plaintiffs must show not just that the decision to grant the permit is objectionable or even wrong, but that it is attributable to an intent to discriminate on the basis of race"). The court expressly relied upon the view, articulated by the United States Supreme Court in *Washington v. Davis*, that "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination." 426 U.S. 229, 242 (1976); see also *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause. Although some contrary indications may be drawn from some of our cases, the holding in *Davis* reaffirmed a principle well established in a variety of contexts." (footnote omitted)). The *Bean* court rejected any inference that the plaintiffs' statistical data rose to the level that demonstrated discriminatory intent on its face. *Bean*, 482 F. Supp. at 677.

sympathy for the plaintiffs' arguments while finding that they could not, on the law, make the required legal showing.<sup>63</sup> The court's analysis reveals a central difficulty for environmental justice lawyers who aspire to succeed on an equal protection theory: Although toxic activities may disproportionately burden racial and ethnic minority communities, the causes are complicated and thus difficult to separate and prove.<sup>64</sup> For example, in *Bean* the plaintiffs argued that census tract information revealed that the TDH had consistently practiced discrimination by granting waste permits to operate in minority neighborhoods.<sup>65</sup> The court noted, however, that "[o]f all the solid waste sites opened in the target area [the geographic area upon which the plaintiffs' lawsuit focused], 46.2 to 50% were located in census tracts with less than 25% minority population at the time they opened."<sup>66</sup>

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<sup>63</sup> *Bean*, 482 F. Supp. at 679-80 (noting that "[i]t simply does not make sense to put a solid waste site so close to a high school").

<sup>64</sup> See Robert Suro, *Pollution-Weary Minorities Try Civil Rights Tack*, N.Y. TIMES, Jan. 11, 1993, at A1 (observing that defendants often argue that no discriminatory intent exists and that the sitings are based on a variety of economic factors). But see Cole, *supra* note 12, at 629 n.28 (citing a report prepared by Cerrell Associates, a private consulting firm, for the California Waste Management Board, identifying the most vulnerable communities for siting undesirable waste disposal facilities as being small, rural, conservative, blue collar, and relatively poorly educated); Matthew Rees, *Black and Green: Race and Environmentalism*, NEW REPUBLIC, Mar. 2, 1992, at 15 (arguing that the Commission Report's data suggests that sitings correlate as much or more with low income as with race).

<sup>65</sup> *Bean*, 482 F. Supp. at 677-78 (arguing that the placements resulted from discriminatory practices by the TDH itself or, alternatively, were discriminatory in the context of the "historical placement" of all waste sites around the city of Houston).

"Census tracts" are defined as "small, relatively permanent subdivisions of a county. . . . Census tracts do not cross county boundaries. The spatial size of census tracts varies widely depending on the density of settlement. . . . However, physical changes in street patterns caused by highway construction, new development, etc., may require occasional revisions . . . ." U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 1990 CENSUS OF POPULATION AND HOUSING, SUMMARY TAPE FILE 3: TECHNICAL DOCUMENTATION A-5 to A-6 (Dec. 1991). The vagueness of the Census Bureau's own definition, to say nothing of the arbitrariness of the classification, is evidence of the inappropriateness of the measure for environmental justice disputes.

<sup>66</sup> *Bean*, 482 F. Supp. at 677. Elsewhere, the court noted that, at that time, "Houston's population [was] 39.3% minority and 60.7% Anglo." The court continued:

The plaintiffs argue, and this Court finds persuasive, a definition of "minority census tracts" as those with more than 39.3% minority population and Anglo census tracts as those with more than 60.7% Anglo population. Using those definitions, Houston consists of 42.5% minority tracts and 57.5% Anglo tracts. . . . Again using those definitions, 42.3% of the solid waste sites in the City of Houston are located in minority tracts and 57.7% are located in Anglo tracts.

*Id.* at 679. Thus, to a significant extent, the plaintiffs' attempt to use census tracts as a definitional measure backfired, providing the court with the numerical cutoff points that would shape its decision. *Id.* (stating that the statistics, if they showed anything,

*Bean* illustrates several problems that typically face the environmental justice advocate who brings an equal protection challenge. The difficulty in presenting a successful case recalls Mark Twain's barb about the eternal malleability of statistical arguments.<sup>67</sup> Not only do plaintiffs' arguments suffer initially from inevitable imprecision in application of the term "minority," both as used by environmental justice advocates<sup>68</sup> and the community at large,<sup>69</sup> but relevant available data on issues such as low economic status also is generally disallowed in the equal protection context, a fact that may weaken the evidentiary force of plaintiffs' cases.<sup>70</sup> In addition, and perhaps most frustrating to activists, equal protection analysis is limited to target area demographics "at the time of their opening."<sup>71</sup> Thus, even though a concentration of waste sites in minority communities may exist in the present, equal protection analysis is of little help if this problem developed *after* the sites opened.<sup>72</sup>

Although the *Bean* court disagreed with the plaintiffs' analysis of the statistics,<sup>73</sup> the court clearly expressed its view of the fundamental equities in the case:

If this Court were TDH, it might very well have denied this permit. It simply does not make sense to put a solid waste site so close to a high school, particularly one with no air-conditioning. Nor does it make sense to put the land site so close to a residential neighbor-

"indicate[d] that minority census tracks have a tiny bit smaller percentage of solid waste sites than one would proportionately expect").

<sup>67</sup> "There are three kinds of lies: lies, damned lies, and statistics." MARK TWAIN, MARK TWAIN'S AUTOBIOGRAPHY 246 (1928) (attributing the remark to Benjamin Disraeli).

<sup>68</sup> See Lazarus, *supra* note 21, at 818 n.125 (criticizing the methodology of Lavelle and Coyle, *see supra* note 11, as misleading, indicating that many of the communities counted as "minority" were "predominantly white," but acknowledging that such communities may "have a different character than communities that are 100% white"); *see also supra* note 10.

<sup>69</sup> See Bell, *supra* note 55, at 24:

Consider the very definition of integration. Irrationally, an "integrated" school, work force or neighborhood is one with no more than a 25 percent black population. If the percentage is substantially greater, it is no longer a legitimately integrated setting for most white Americans, and is referred to as a "changing" school, a neighborhood in danger of "tipping," or a "racially imbalanced" job unit.

<sup>70</sup> See, e.g., *Maier v. Roe*, 432 U.S. 464, 470-71 (1977) (holding that financial need alone does not identify a suspect class for the purposes of equal protection analysis).

<sup>71</sup> See *Bean*, 482 F. Supp. at 677.

<sup>72</sup> This does *not* suggest that disparities in clean-up treatment of toxic waste sites may not be amenable to equal protection claims. See, e.g., Lavelle & Coyle, *supra* note 11, at S2 (noting that toxic waste sites in minority communities are cleaned more slowly, and less stringently, than those in White communities).

<sup>73</sup> *Bean*, 482 F. Supp. at 677-78 (noting that while the data appeared compelling on its surface, it "breaks down under closer scrutiny").

hood. But I am not TDH and for all I know, TDH may regularly approve of solid waste sites located near schools and residential areas, as illogical as that may seem.<sup>74</sup>

Perhaps more importantly, the court suggested the type of analysis that future environmental justice advocates should present in order to mount a successful claim. As a threshold matter, it indicated that a census tract analysis may be less than ideal.<sup>75</sup> The court also encouraged advocates to ask more probing questions about the nature of the site-selection process, suggesting, for example, that a private contractor's choice of a single site in connection with city and county officials would be more dispositive of discriminatory intent than if evidence suggests that a site was chosen from a "relatively limited number of areas" that could serve as sites.<sup>76</sup> Finally, the court encouraged advocates to scrutinize the reasons behind some of the circumstantial evidence, such as questions in this case about why such waste facilities were sited near schools and in residential neighborhoods after earlier applications for the same general area were denied.<sup>77</sup> The court denied the plaintiffs' motion, however, despite its

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<sup>74</sup> *Id.* at 679-80.

<sup>75</sup> The court proposed the following line of inquiry:

How large an area does a solid waste site affect? If it affects an area a great deal smaller than that of a census tract, it becomes particularly important to know where in each census tract the site is located. If it affects an area larger than that of a census tract, then a target area analysis becomes much more persuasive.

*Id.* at 680; *see supra* note 65.

<sup>76</sup> On this point, the court reflected:

How are solid waste site locations selected? It may be that private contractors consider a number of alternative locations and then select one in consultation with city or county officials. If that is so, it has tremendous implications for the search for discriminatory intent. It may be that a relatively limited number of areas can adequately serve as a Type I solid waste site. If that is so, the placement of sites in those areas becomes a lot less suspicious, even if large numbers of minorities live there.

*Id.* (footnote omitted). One problem with this suggestion, of course, is that developers will always argue that they have chosen a site because it is one of the few available, arguing for example, that, in the example of commercial hazardous waste they look for three factors above all others, namely (1) good transportation access; (2) large tracts of lands that can serve as "buffer zones;" and (3) geology that will support toxic activities. *See, e.g.,* USPCI OF MISSISSIPPI, INC., OVERVIEW OF SHUQUALAK MOUNTAIN FACILITY/ USPCI, INC./ SEC. B, RCRA PERMIT APPLICATION 2 (on file with the *Boston University Law Review*) (stating that a proposed hazardous waste landfill location is desirable because it is close to U.S. Highway 45, has a buffer zone, and is surrounded by chalk of low permeability).

<sup>77</sup> *See Bean*, 482 F. Supp. at 679 (allowing that circumstantial evidence may supplement statistical data). In a footnote, the court further suggested that had plaintiffs been aware that a waste facility was proposed for their community, they would have involved themselves earlier in the process and showed their "vociferous opposition." *Id.* at 676 n.5; *see also* Lazarus, *supra* note 21, at 847-48 (suggesting that the EPA take

sympathetic treatment, and was affirmed on appeal without an opinion.<sup>78</sup>

2. *East Bibb Twiggs Neighborhood Ass'n v. Macon-Bibb County Planning & Zoning Comm'n*<sup>79</sup>

*East Bibb Twiggs* involved opposition by citizens of Macon, Georgia to attempts to site a privately-operated solid waste landfill in an approximately 60% Black census tract.<sup>80</sup> The Macon-Bibb County Planning and Zoning Commission (County Commission) initially denied the application, but granted its approval on subsequent reexamination despite the plaintiffs' protest.<sup>81</sup>

The plaintiffs did not limit their equal protection violation claims to the analysis of census tract information. They also pointed the fact that the County Commission district within which the census tract was situated was overwhelmingly Black—approximately 70%.<sup>82</sup> However, the United States District Court for the Middle District of Georgia noted that the majority population of the area's only other census tract containing a County Commission-approved landfill was located in a predominantly White (approximately 76%) census tract.<sup>83</sup> The court discounted other circumstantial evidence suggestive of invidious racial purpose.<sup>84</sup> This evi-

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distributional equity into account when it seeks to minimize social risk factors and noting that the Department of Energy took this approach when analyzing the impact on minorities of the switch to unleaded gasoline).

<sup>78</sup> 782 F.2d 1038 (5th Cir. 1986) (mem.). Plaintiffs' counsel in *Bean* was Linda McKeever Bullard. *Id.* She enlisted the help of her husband, sociologist Robert Bullard, to gather data on disproportionate impact. He is now a major figure in the environmental justice movement. *See supra* note 12; *see also* Coyle, *supra* note 28, at S8 (quoting Bullard on the lack of adequate EPA measures for addressing the environmental problems of minority communities, resulting in overexposure of minorities to health risks, and effectively encouraging sitings in minority communities).

The Bullards later recalled that the rejection of their preliminary injunction, with its sympathetic suggestion of information a court might need to find in their favor, was issued by a Black, female judge. *Id.* Unfortunately for the plaintiffs, the case was transferred before the subsequent hearing to the Chief Judge, who was White. According to Robert Bullard, "[h]e called us 'nigrahs,' . . . In the late '70's, we may still have been 'Negroes.' I know some of us were 'blacks.' But none of us was 'nigrah.'" *Id.*

<sup>79</sup> 706 F. Supp. 880 (M.D. Ga.), *aff'd*, 896 F.2d 1264 (11th Cir. 1989).

<sup>80</sup> *Id.* at 881 (noting that the tract consisted of 3367 Black residents and 2149 White residents).

<sup>81</sup> *Id.* at 882-83.

<sup>82</sup> *Id.* at 885 (presenting the argument that the level of analysis should include geographical areas larger than the census tract in order to show discrimination).

<sup>83</sup> *Id.* at 884.

<sup>84</sup> The *East Bibb Twiggs* court used the *Arlington Heights* methodology in its analysis of the approval process. *Id.* (identifying five contextual factors, such as impact and historical background, that can be useful in assessing discriminatory purpose when no direct evidence of intent is available).

dence included administrative and legislative materials, and anecdotal information contained in newspaper articles about discriminatory zoning practices.<sup>85</sup>

The *East Bibb Twiggs* court, in rejecting the plaintiffs' equal protection claims, looked at two additional, nonstatistical factors. First, it focused on the role of private property:

[T]he court notes that the Commission did not and indeed may not actively solicit this or any other landfill application. The Commission reacts to applications from private landowners for permission to use their property in a particular manner. The Commissioner observed during the course of these proceedings the necessity for a comprehensive scheme for the management of waste and for the location of landfills. In that such a scheme has yet to be introduced, the Commission is left to consider each request on its individual merits.<sup>86</sup>

This argument—that no pattern of discrimination can be detected because the applicants are discrete, private parties—presents a formidable obstacle to the environmental justice advocate.<sup>87</sup>

Second, the court discounted the bulk of the plaintiffs' evidence because it focused on governmental decisions made by *other* agencies, which “shed little if any light upon the alleged discriminatory intent of the Commission.”<sup>88</sup> This aspect of the decision is particularly problematic for environmental justice lawyers because direct evidence of discrimination is generally unavailable.<sup>89</sup> This evidentiary difficulty exists because the causes for the disproportionate environmental burden on minority communities are varied and interrelated.<sup>90</sup> Moreover, the his-

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

<sup>86</sup> *Id.* at 885.

<sup>87</sup> On the reach of the “private/public distinction” and the considerable barriers it can create, see Gerald E. Frug, *Cities and Homeowners' Associations: A Reply*, 130 U. PA. L. REV. 1589, 1600-01 (1982); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1132-33, 1141 (1980).

<sup>88</sup> *East Bibb Twiggs*, 706 F. Supp. at 885.

<sup>89</sup> See Lazarus, *supra* note 21, at 830 (stating that the requirement of specific intent is “devastating to most civil rights claims”); Reich, *supra* note 23, at 294 (commenting that disparate waste siting is “not usually accompanied by evidence of motive”).

<sup>90</sup> See Lazarus, *supra* note 21, at 808 (discussing how the lack of political and economic power due to vestiges of racist policies make it more likely for minority communities to bear the brunt of societal burdens); Thomas F. Pettigrew, *New Patterns of Racism: The Different Worlds of 1984 and 1964*, 37 RUTGERS L. REV. 673, 674-82 (1985) (analyzing the disparities between Black and White demographics in areas of politics, education, housing, occupation, family structure, income, health, and business).

Interrelated causes may include, for example, declining property values in increasingly “minority” areas following White flight, resulting poverty and need for jobs in such areas, and limited educational opportunities that fosters a less-politically active citizenry. See *id.*; cf. Lazarus, *supra* note 21, at 806-11.

tory of individual agencies, taken alone, may not be long enough to prove any discriminatory pattern.<sup>91</sup>

The *East Bibb Twiggs* court's rejection of alternative demographic models and its narrow approach to equal protection analysis have at least two regrettable results. First, the court did not question the historical consequences of the choices made by numerous private property owners as to the use of their land.<sup>92</sup> Second, the court's approach resulted in the rejection of evidence, no matter how persuasive, concerning governmental actors other than those whose siting decisions might immediately affect plaintiffs. The court thus created a series of obstacles that pose almost impossible demands on plaintiffs seeking environmental justice on equal protection grounds.

The United States Court of Appeals for the Eleventh Circuit affirmed the decision virtually without comment.<sup>93</sup>

### 3. *R.I.S.E., Inc. v. Kay*<sup>94</sup>

The most recent major equal protection case involved another challenge to a landfill siting. R.I.S.E. was a bi-racial community organization in King and Queen County, Virginia, consisting mostly of landowners owning property in the area near the proposed landfill, formed solely to combat this project.<sup>95</sup> Defendants were the county's five-person Board of Supervisors.<sup>96</sup>

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<sup>91</sup> For example, in *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd mem.*, 977 F.2d 573 (4th Cir. 1992), the county did not have a zoning ordinance when the landfill began operating in 1986. A zoning ordinance did take effect on August 12, 1986. Thus, if a plaintiff attempted to prove discriminatory intent by the County Zoning Administrator, a court could easily find that there was insufficient evidence, and might not choose to attribute zoning-like decisions before that date to other governmental actors. One can imagine this situation in any number of contexts—all of them posing almost impossible difficulties for environmental justice advocates. The EPA itself was only created in 1970 by President Nixon. Reorg. Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (1970), *reprinted as amended* in 5 U.S.C. app. at 1343 (1988). Twenty-four years might be an insufficient period for proving an invidious, historical period of discrimination. *Cf. Bell, supra* note 55, at 16 (stating that in the context of voting discrimination "it becomes almost impossible [to prove] in many urban districts where there is no recent history of systematic exclusion and election officials are able to offer nonracial justifications for boundaries and procedures that have a discriminatory effect").

<sup>92</sup> See, e.g., Cynthia Hamilton, *Coping with Industrial Exploitation*, in CONFRONTING ENVIRONMENTAL RACISM, *supra* note 12, at 67-69 (examining the relationship between private industry and government and its effect on American cities).

<sup>93</sup> 896 F.2d 1264, 1266-67 (11th Cir. 1990).

<sup>94</sup> 768 F. Supp. 1144 (E.D. Va. 1991), *aff'd mem.*, 977 F.2d 573 (4th Cir. 1992). "R.I.S.E." is an acronym for Residents Involved in Saving the Environment.

<sup>95</sup> *Id.* at 1145.

<sup>96</sup> *Id.* at 1146. The court noted that two of the Supervisors were Black and three

The United States District Court for the Eastern District of Virginia examined the history of landfill siting in the county dating back to 1969 and concluded that "[t]he placement of landfills in King and Queen County has had a disproportionate impact on black residents."<sup>97</sup> In reaching this conclusion, the court did not limit its analysis to census tracts or county commission boundaries, but used a more flexible approach to determine the affected population.<sup>98</sup> Nonetheless, the court still found no evidence of discriminatory purpose:

Careful examination of the administrative steps taken by the Board of Supervisors to negotiate the purchase of the Piedmont Tract and authorize its use as a landfill site reveals *nothing unusual or suspicious*. To the contrary, the Board appears to have balanced the economic, environmental, and cultural needs of the County in a responsible and conscientious manner.<sup>99</sup>

The court added that "the Equal Protection Clause does not impose an affirmative duty to equalize the impact of official decisions in different racial groups. Rather, it merely prohibits government officials from intentionally discriminating on the basis of race. The plaintiffs have not provided sufficient evidence to meet this legal standard."<sup>100</sup>

More starkly than *Bean* or even *East Bibb Twiggs, R.I.S.E.* set a precedent making it almost impossible for environmental justice lawyers to bring successful cases on equal protection grounds. The decision demonstrates, in a bolder fashion than the other two, the reluctance of courts to acknowledge a series of actions that were in some very real sense deliberate and, evidence suggests, completely routine.<sup>101</sup> Despite the clearly dis-

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were White. The Black Supervisors won their posts in a 1988 special election called following a federally-ordered redistricting. *Id.* Originally, the landfill was to be a joint venture between Chesapeake Corporation and the county, but Chesapeake abandoned these negotiations during the summer of 1988. *Id.* In December 1989, the Board voted to execute a purchase option agreement with Chesapeake for the Piedmont Tract in order to develop the landfill. Two of the White Supervisors abstained from voting because they were employees of Chesapeake. *Id.* at 1147.

<sup>97</sup> *Id.* at 1149.

<sup>98</sup> In three of the four cases the court concluded, at the time of site construction, the percentages of African-Americans living within a "one-mile radius," "the immediate area," and "a half-mile radius," finding they were 100%, 95%, and 100%, respectively. *Id.*

<sup>99</sup> *Id.* at 1149-50 (emphasis added). The court in *R.I.S.E.*, like the *East Bibb Twiggs* and *Bean* courts before it, followed *Arlington Heights* and its requirement of discriminatory purpose. Curiously, both the *R.I.S.E.* and *East Bibb Twiggs* courts failed to discuss the *Bean* court's suggestions for a successful equal protection claim. See *supra* text notes 75-77 and accompanying text.

<sup>100</sup> *R.I.S.E.*, 768 F. Supp. at 1150.

<sup>101</sup> See COMMISSION REPORT, *supra* note 2, at 13-14 (statistically connecting the incidence of the location of hazardous waste activity with the location of minority populations); GAO REPORT, *supra* note 3, at 1 (reporting that three out of four haz-

proportionate affect of the facilities upon African-Americans, without a "smoking gun" that proves a premeditated desire to discriminate because of race, the case suggests that equal protection challenges to environmental sitings are unlikely to succeed.

### B. *Modifying Environmental Equal Protection Challenges: Recent Legal Literature*

*R.I.S.E.* in particular indicates the pressing need for exploring other, practical responses to claims of environmental injustice.<sup>102</sup> In response to the difficulty of challenging environmental injustice under traditional equal protection doctrine, certain commentators have endorsed a greater focus on statistical evidence.<sup>103</sup> Professor R. George Wright advocates

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ardous waste landfill sites studied were located in communities in which the majority of the population was Black); Lavelle & Coyle, *supra* note 11, at S2 (reporting a significantly slower cleanup in minority areas than White areas); *see also* Robert W. Collin & William Harris, Sr., *Race and Waste in Two Virginia Communities*, in *CONFRONTING ENVIRONMENTAL RACISM*, *supra* note 12, at 98 (asserting that the *R.I.S.E.* court "turned a blind eye to a clear case of institutional racism").

In a separate decision in this case, handed down the same day, the court in part rejected the defendant's summary judgment motion, holding that "[g]enuine issues of material fact concerning discriminatory intent preclude summary judgment in this case." 768 F. Supp. 1141, 1143 (E.D. Va. 1991). The court did not explain why it chose to issue separate, simultaneous decisions on the summary judgment motion and the merits.

<sup>102</sup> For example, one possible strategy the *R.I.S.E.* plaintiffs could have pursued was a historic preservation claim. Mt. Olive Baptist Church, located near the site, was founded in 1869 by freed slaves. *R.I.S.E.*, 768 F. Supp. at 1147. Some historic preservation claims have been successful in preventing development. *See, e.g.,* Karl S. Coplan, *Protecting Minority Communities with Environmental, Civil Rights Claims*, N.Y. L.J., Aug. 20, 1991, at 1 (describing successful efforts to block the development of a historically Black Florida community into residential, luxury condominiums).

<sup>103</sup> *See* R. George Wright, *Hazardous Waste Disposal and the Problems of Racial and Stigmatic Injury*, 23 ARIZ. ST. L.J. 777, 795 (1991) (stating that "[t]he general unavailability of any admission of conscious, intended racial discrimination in the siting process, then, requires us to choose between relying on the best available statistical evidence, or ignoring the problem of racial discrimination as insufficiently documented"). Wright chooses the former option although he recognizes that some people will be suspicious of statistics. *Id.*

In New York City, environmental justice advocates have begun developing a computer application that will map income and racial data near industrial and toxic activities by zoning lot number, rather than by less precise county, census tract, neighborhood, or even city block tracking. Such an application could have revolutionary implications for future equal protection cases. Interview with Reinerio Hernandez, Director, Office of Community Environmental Development, New York City Department of Environmental Protection (Sept. 2, 1993) [hereinafter Hernandez Interview]. *See generally* GREENPOINT/WILLIAMSBURG ENVIRONMENTAL BENEFITS PROGRAM, NEW YORK CITY DEPT. OF ENVIRONMENTAL PROTECTION (available from

examining the national distribution of hazardous waste sites in order to determine whether a racial bias is detectable.<sup>104</sup> If certain communities are disproportionately affected, Wright favors an enforced spreading of the burden.<sup>105</sup> Wright's vision is appealing but unlikely to be implemented successfully. In particular, he offers no explanation why his form of equal protection analysis would in practice differ from those advanced by the plaintiffs in *Bean*, *East Bibb Twiggs*, and *R.I.S.E.* After all, in each of those cases plaintiffs implicitly advocated, like Wright, the equitable sharing of toxic activities.

Professor Peter Reich similarly concludes that "[i]n order to apply the equality principle to the distribution of environmental hazards, an *effects* rather than an *intent* standard is necessary."<sup>106</sup> He proposes possible alternatives to constitutional equal protection analysis, including legislation modeled on the Civil Rights Acts or an environmental race discrimination bill containing a disparate impact analysis.<sup>107</sup> He concludes, however, that the political obstacles to passing such legislation are probably too great to achieve them.<sup>108</sup>

Ultimately, the real difficulty with equal protection challenges is the incidence of unconscious or rationalized racial bias.<sup>109</sup> Although it was comparatively easy to identify intentional discrimination under Jim Crow, in a world where private parties make private business decisions, political and personal motivations are harder if not impossible to identify.<sup>110</sup> For

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the New York City Dept. of Environmental Protection, Office of Community Environment Protection, 59-17 Junction Boulevard, 10th Floor, Corona, N.Y. 11368) [hereinafter *GREENPOINT*] (describing a comprehensive program established in Brooklyn, N.Y.). This kind of mapping may provide a means to overcome situations like the difficulties encountered by communities of color in reducing air emissions in their neighborhoods because ambient air standards measure large regions and not individual communities, a dilemma discussed by Lazarus, *supra* note 21, at 814-15.

<sup>104</sup> Wright, *supra* note 103, at 792 (asserting that such examination is necessary to determine "governmental responsibility").

<sup>105</sup> *Id.* at 790. Wright argues:

[S]preading the actual disposal among a larger number and variety of technically suitable localities would reduce stigmatic injuries and ultimately contribute to a genuine sense of unity, national solidarity, and the equitable sharing of burdens contemplated not only by the Equal Protection Clause, but by the Commerce Clause itself. If the threat of this enforced sharing leads to political pressure for less production of hazardous waste, or to increased treatment of hazardous wastes to reduce their toxicity, or to safer landfills, so much the better.

*Id.* at 790-91 (footnote omitted).

<sup>106</sup> Reich, *supra* note 23, at 294 (emphasis added).

<sup>107</sup> *Id.* at 294-95.

<sup>108</sup> *Id.* at 295-96.

<sup>109</sup> See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 339-44 (1987) (discussing manifestations of unconscious racism).

<sup>110</sup> See Derrick Bell, *Learning the Three "I's" of America's Slave Heritage*, 68 CHI.-

this reason, it is difficult to agree with Professor Richard Lazarus' conclusion that channeling additional resources to equal protection challenges could produce "some isolated successes."<sup>111</sup>

### III. THE SEARCH FOR ALTERNATIVES<sup>112</sup>

Recognizing the obstacles courts have created to successful equal protection claims in the environmental justice context, practitioners and academics have begun to search for alternatives. Some alternatives either show analytical promise or at least have been clearly articulated. However, for reasons that will become apparent, many of them are not likely to survive judicial scrutiny.

#### A. Title VI Lawsuits

A claim based on Title VI of the Civil Rights Act<sup>113</sup> is a frequently mentioned alternative to equal protection challenges.<sup>114</sup> Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the

KENT L. REV. 1037, 1042 (1993) (commenting that modern racial barriers are more subtle but "for most African Americans hardly less discriminatory than the Jim Crow laws"); Boyle, *supra* note 23, at 950 (commenting that the "appearance of nonracism is not the same as true nonracism"); cf. *supra* note 87.

<sup>111</sup> Lazarus, *supra* note 21, at 829; see Pettigrew, *supra* note 90, at 686-97 (suggesting that even if some legal battles are won, "new patterns of racism" will raise other problems).

<sup>112</sup> The proposals for action by environmental justice advocates considered in this part in no way constitutes an exhaustive list. Other proposals include: exploring the possible use of Title VIII of the Civil Rights Act, Lazarus, *supra* note 21, at 839-42; suggesting that legislation affecting the environment must be better "coordinated" at the federal level, Chase, *supra* note 16, at 360-62; and using common law nuisance suits, Walter Willard, *Environmental Racism: The Merging of Civil Rights and Environmental Activism*, 19 S.U. L. REV. 77, 86-90 (1992).

The most promising alternatives yet advanced may be the use of state law claims. See Reich, *supra* note 23, at 300-13. Because this Article is concerned with encouraging the use of federal claims, it does not address state and local law alternatives.

<sup>113</sup> 42 U.S.C. § 2000d to 2000d-4a (1988).

<sup>114</sup> See, e.g., Jane Perkins, *Recognizing and Attacking Environmental Racism*, 26 CLEARINGHOUSE REV. 390 (1992) (discussing recent cases and their value as alternatives for equal protection claims); Lazarus, *supra* note 21, at 834-39 (analyzing the advantages and limitations of Title VI actions).

More recently, Minnesota Senator Paul Wellstone introduced the Public Health Equity Act, S. 1841, 103d Cong., 2d Sess. (1994), which would apply Title VI language to all federally financed programs affecting the environment. See Wellstone *Introduces Workplace Toxins Bill*, O.S.H. Daily (BNA) (Feb. 16, 1994); "Eco-Racism": *Executive Order to Be Signed "Within Days"*, Greenwire, Feb. 10, 1994, available in LEXIS, Envirn Library, Grnwre File; *Wellstone Bill Aims to Raise Resistances*, Greenwire, Feb. 10, 1994, available in LEXIS, Envirn Library, Grnwre File.

benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."<sup>115</sup> Because the federal government provides funding for a wide range of activities and entities, this provision could be of great use to the environmental justice advocate, but these claims require meticulous attention and considerable planning.<sup>116</sup>

The principal advantage of Title VI lawsuits is that they may not require proof of *intentional* discrimination. Lazarus notes that "[u]ntil recently, it appeared fairly well settled that in the absence of a showing of discriminatory intent, equitable relief was the only remedy available to redress a Title VI violation."<sup>117</sup> Although he suggests other forms of relief may be available in the future,<sup>118</sup> equitable relief as a principal remedy will not be enough for communities that have suffered the presence of one or more toxic industries or activities over decades. For them, damage to health and the habitability of their surroundings may already be considerable.

However, even well planned Title VI lawsuits are not without their limitations. Private industries or state-run enterprises that do not receive federal assistance are beyond the reach of Title VI. For example, the *R.I.S.E.* plaintiffs could not have used Title VI to block the siting of the privately owned and operated King and Queen County, Virginia facility.<sup>119</sup> Thus, many commercial enterprises such as hazardous waste disposal firms, private lead smelters, or petrochemical production plants are likely to be immune from Title VI attack.

Admittedly, this conclusion may be too pessimistic. Title VI covers all federal agencies and federal environmental statutes provide funding to state programs that carry out federally mandated environmental laws.<sup>120</sup> Lazarus argues that because federal environmental regulators play a key role in the administration of state environmental laws, Title VI should reach such state activities.<sup>121</sup> However, he may be minimizing possible problems. For example, plans are currently afoot to site a massive hazardous waste disposal facility in Noxubee County, Mississippi, twenty miles across the border from Emelle, Alabama, the site of the nation's

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<sup>115</sup> 42 U.S.C. § 2000d.

<sup>116</sup> See Perkins, *supra* note 114, at 390 ("These cases require the accumulation of numerous facts and the compilation of a persuasive body of statistical proof. Expert witnesses are also needed. Therefore, while Title VI may indeed form the basis for a legal remedy, advocates should be aware that these claims should not be filed haphazardly.").

<sup>117</sup> Lazarus, *supra* note 21, at 836.

<sup>118</sup> *Id.*

<sup>119</sup> See *supra* part II.A.3.

<sup>120</sup> See Lazarus, *supra* note 21, at 835.

<sup>121</sup> *Id.*

largest hazardous waste landfill.<sup>122</sup> The population of Noxubee County, Mississippi is nearly 70% African-American.<sup>123</sup> Until November 1993, two private firms were competing for the permit to build the facility, which will be awarded by the Mississippi Department of Environmental Protection.<sup>124</sup>

Thus, if the state awards the permit to a *private* entity, plaintiffs would have to argue that the state's role in that process is sufficient to support a Title VI claim. Despite its potential, this type of claim remains untested and would require a court or administrative body to extend significantly the reach of Title VI.<sup>125</sup> This is not to say that Title VI claims will never succeed, only that they may present greater difficulties than many commentators have predicted.<sup>126</sup>

### B. Federal Legislation

Communities looking to safeguard themselves from environmental harm could choose to put their resources into efforts to introduce or amend legislation. However, both implementation and enforcement are not likely to be immediate enough for the most environmentally belea-

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<sup>122</sup> Keith Schneider, *Blacks Fighting Blacks on Plan for Dump Site*, N.Y. TIMES, Dec. 13, 1993, at A12.

<sup>123</sup> *Id.*

<sup>124</sup> Kevin Jones, *Companies Court Noxubee County for Waste Site*, MISS. BUS. J., Sept. 30, 1991, at 1.

<sup>125</sup> On September 2, 1993, the New Orleans office of the Sierra Club Legal Defense Fund, Inc., filed a letter with the U.S. Commission on Civil Rights, objecting to the administration of the State of Mississippi's Hazardous Waste Permitting Program. Letter from Robert B. Wiygul, Staff Attorney, Sierra Club Legal Defense Fund, Inc., to United States Commission on Civil Rights (Sept. 2, 1993) (on file with the *Boston University Law Review*). Sierra Club argued that Title VI prohibits discrimination and that executive branch departments, including the EPA, are subject to Title VI. Sierra Club then cited EPA regulations, which require a recipient of EPA funds, such as Mississippi's Department of Environmental Quality (MDEQ), "not [to] use criteria or methods of administering its program which have the effect of subjecting individuals to discrimination because of their race, [or] color." *Id.* at 6 (quoting 40 C.F.R. § 7.35(b) (1992)) (emphasis added by Sierra Club). Sierra Club also alleged that MDEQ's choice of Noxubee County, the population of which is overwhelmingly African-American, had a discriminatory effect within the meaning of the regulations. *Id.* at 10-11; see also *supra* note 114 (discussing Senator Wellstone's recent proposal).

<sup>126</sup> Lazarus also suggests that "[c]ourts have upheld Title VI challenges to [some] federally financed programs based on their racially disparate effects." Lazarus, *supra* note 21, at 839. In doing so, he may be overestimating the precedential value of Title VI claims for plaintiffs. In fact, the case to which he refers, *Johnson v. City of Arcadia*, 450 F. Supp. 1363 (M.D. Fla. 1978), involved the denial to Black neighborhoods of the same municipal services received by White neighborhoods. However, courts are likely to treat a case involving the *denial* of services as rather different from the decision to *permit* the siting of an income-generating facility (as companies are sure to characterize their activities).

guered communities. In addition, most federal legislation proposed to date has failed to adopt the lessons from the equal protection cases discussed above.<sup>127</sup> For example, legislators have twice introduced an Environmental Justice Act to Congress providing that 100 "Environmental High Impact Areas" may be designated as "the 100 counties with the highest total weight of toxic chemicals present during the course of the most recent 5-year period for which data is available."<sup>128</sup> The counties so designated would merit special administrative and regulatory attention to determine whether activities conducted inside them would affect the environment in a way that is detrimental to the health and well-being of their citizens.<sup>129</sup> In the event that "significant adverse impacts of environmental pollution on human health" are discovered in such areas, no "new toxic chemical facility" may be sited in such an area, *unless* the Secretary of Health and Human Services is shown that the activity is needed and the proposed facility "demonstrates that it will minimize uncontrolled releases into the environment."<sup>130</sup>

The Environmental Justice Act as proposed has at least two serious limitations. First, arbitrary geographic divisions such as county lines or other "appropriate geographic units" may not delineate endangered areas with any precision, a recurring flaw in the equal protection cases discussed in Part II. The equal protection cases also vividly demonstrate the pitfalls of framing arguments based on such boundaries.<sup>131</sup> Second, even if there is a determination of environmental threat, the exceptions noted above give companies considerable leeway that may permit future siting of facilities in poor communities of color. Hazardous waste management companies currently spend considerable resources to demonstrate that they will minimize environmental harm; they may be expected to argue for an exception under the proposed Act just as vigorously.<sup>132</sup>

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<sup>127</sup> See *supra* part II.A.

<sup>128</sup> H.R. 5326, 102d Cong., 2d Sess. § 101(2) (1992); H.R. 2105, 103d Cong., 1st Sess. § 101(2) (1993). A companion bill, S. 1161, 103d Cong., 1st Sess. (1993), largely similar in substance, has been introduced by Senator Max E. Baucus. The bills are basically similar, although both versions of the House bills include the requirement that a moratorium on siting or permitting of toxic chemical facilities will take effect if the Secretary's report identifies possible emissions at health-damaging levels. H.R. 5326, 102d Cong., 2d Sess. § 401 (1992); H.R. 2105, 103d Cong., 1st Sess. § 401 (1993).

<sup>129</sup> H.R. 5326 § 201; H.R. 2105 § 201.

<sup>130</sup> H.R. 5326 § 403; H.R. 2105 § 403; see Reich, *supra* note 23, at 296-97.

<sup>131</sup> See, e.g., *supra* notes 65-66 (noting the problems with using census tracts).

<sup>132</sup> In the proposed siting in Noxubee County, Mississippi, for example, one of the two companies vying for a permit there was estimated to have spent \$12 million in less than two years, much of it on sophisticated scientific modeling and risk assessment. Mac Gordon, *Environmental Technology Company Moving South*, CLARION-LEDGER (Jackson, Miss.), Feb. 19, 1993, at 5B.

Furthermore, as Barry Commoner argues, there is an inherent fallacy in the argument that a company will employ environmental harm minimization devices:

Another legislative proposal is the Environmental Equal Rights Act of 1993,<sup>133</sup> which would "amend the Solid Waste Disposal Act to allow petitions to be submitted to prevent certain waste facilities from being constructed in environmentally disadvantaged communities."<sup>134</sup> This Act would give citizens living in "environmentally disadvantaged communities" the right to petition the EPA Administrator—or the appropriate state authority—for a hearing based on a belief that "the proposed facility may adversely affect—(i) the human health of such community or a portion of such community; or (ii) the air, soil, water, or other elements of the environment of such community or a portion of such community."<sup>135</sup> At a hearing on the petition, the administrative law judge—or state employee—may deny the petition if the respondent establishes either that

there is no alternative location within the State for the proposed facility that poses fewer risks to human health and the environment than the proposed facility . . . and . . . the proposed facility . . . will not release contaminants; or . . . will not engage in any activity that is likely to increase the cumulative impact of contaminants on any residents of the environmentally disadvantaged community.<sup>136</sup>

As with the proposed Environmental Justice Act, the Environmental Equal Rights Act, as written, is overly vulnerable to manipulation by financially powerful waste management firms. For example, the statute lacks criteria for determining whether any alternative location that may be proposed at the hearing is viable or not, based on an evaluation of the site's attendant environmental risks. Without such guidance, there is a danger that firms could build persuasive cases based on voluminous statistical studies, including studies on the geological suitability of the original site or other factors likewise *alleged* to reduce environmental risk. In fact, this scenario is routine.<sup>137</sup>

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"[B]ecause the [pollution] control device is not perfect, continued increase in the pollution-generating activity . . . will gradually overwhelm the device's limited ability to improve environmental quality." COMMONER, *supra* note 58, at 43.

<sup>133</sup> H.R. 1924, 103d Cong., 1st Sess. (1993).

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

<sup>135</sup> *Id.* § 3.

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

<sup>137</sup> For example, Charles F. McDermott described the siting of the nation's largest hazardous waste landfill, in Emelle, Alabama, as follows:

But the story of Emelle starts in 1974 when EPA conducted an audit of all the counties in the United States, looking for the most protective locations for hazardous waste land disposal facilities. EPA's auditors examined every county against a fixed set of criteria, placing a premium on remote locations with access to good transportation systems . . . with geologic conditions suitable for land disposal, and with climate conditions that would naturally inhibit the amount of precipitation that would come in contact with the waste.

Institute for Chemical Waste Management, Testimony Submitted by Charles J.

Similarly, the Environmental Equal Rights Act lacks standards for determining whether or not the proposed facility will "release contaminants" or engage in an increased "cumulative impact of contaminants" on a community. For example, hazardous waste firms typically argue that their incineration technologies are "99.9999%" safe.<sup>138</sup> Without specific statutory or regulatory standards, an administrative law judge may have no way to evaluate either the safety value of that statistic or the danger, if any, represented by the other 0.0001%.

One commentator proposed amending Title VII of the Civil Rights Act of 1990<sup>139</sup> to "create a 'disparate impact' model of discrimination for hazardous waste facility sitings aimed at the *consequences* of site selection, rather than the motivations."<sup>140</sup> The goal of the amendment would be to circumvent the required showing of intent that has derailed the equal protection challenges. However, the amendment is troubling to many because it seems to protect racial and ethnic minority communities over White communities. This runs counter to current efforts to find a solution to the conflict between communities and hazardous waste disposal firms that avoids further racial controversy or polarization.<sup>141</sup> By characterizing the problem only in terms of race and not income as well, the proposed amendment disregards the health and well-being of poor, White communities. Reich, contemplating a similar measure after the passage of the Civil Rights Act of 1991,<sup>142</sup> concludes that any reform patterned after or attempting to incorporate a disparate impact analysis for environmental racial discrimination in Title VII would be a political landmine

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McDermott to the House Judiciary Comm., Subcomm. on Civil and Constitutional Rights 10-11 (Mar. 3, 1993) (on file with the *Boston University Law Review*) [hereinafter McDermott Testimony].

<sup>138</sup> A former waste company executive turned anti-incineration advocate calls this "a gimmick." Telephone Interview with George Baggett (Aug. 10, 1993). An official of the EPA Office of Solid Waste and Emergency Response—and agency whistleblower—says that many incinerators cannot meet the 99.9999% standard for PCBs and dioxin. Telephone Interview with William Sanjour (July 28, 1993); *see also* COMMONER, *supra* note 58, at 116 (discussing the flawed methodology of waste firms, which produce the 99.9999% safe figure).

<sup>139</sup> S. 2104, 101st Cong., 2d Sess. (1990) (enacted as the Civil Rights Act of 1991).

<sup>140</sup> Godsil, *supra* note 22, at 422.

<sup>141</sup> For example, Kaye Kiker, the co-founder of Alabamians for a Clean Environment (ACE) and a nationally-recognized leader in the grassroots campaign against siting of commercial hazardous waste facilities, frequently tells audiences that the goal is not for the waste to go somewhere else, but to rethink the entire system of production and consumption. Telephone Interview with Kaye Kiker (Aug. 12, 1993); *see also* Cole, *supra* note 12, at 645 & n.86 (observing that grassroots campaigns nationwide have shifted industry's focus from pollution control to prevention because of their desire to spare all communities from toxic facilities).

<sup>142</sup> Pub. L. No. 102-166, 105 Stat. 1071 (1991) (codified as amended in scattered sections of 2, 16, 29, and 42 U.S.C.).

with severe enforcement problems.<sup>143</sup>

Unfortunately, one of the most promising pieces of environmental justice legislation was stalled in committee and never enacted. The Community and Residents Education at Hazardous Wastes Sites Act of 1992 (Education Act) would have amended the Solid Waste Disposal Act to authorize the Administrator of the Agency for Toxic Substances and Disease Registry (ATSDR) "to conduct health studies at any hazardous waste facility and take other actions with respect to risks posed by such facility."<sup>144</sup> If enacted, the bill would have compelled the ATSDR Administrator to make plans for health assessments at hazardous waste treatment, storage, or disposal facilities covered by the Solid Waste Disposal Act, focusing efforts on the highest-risk facilities.<sup>145</sup> In addition, the bill would have created stringent peer review procedures for the ATSDR and made education grants available to groups exposed to hazardous wastes at studied sites.<sup>146</sup>

The bill's strength lies in its recognition that communities must be empowered to direct health studies on the effects of toxic exposure and contamination upon them. Conversely, its weakness, like the other legislation discussed in this section, is that its terms are too general. For example, its public participation provision states that "[t]he ATSDR shall involve the public in any health studies it carries out."<sup>147</sup> Given the abysmal record of the ATSDR in addressing community health concerns,<sup>148</sup> this vaguely defined duty is of limited use. Furthermore, the funding of \$5 million per year would be inadequate.<sup>149</sup> Thus, even this promising piece of legislation provides further support for the suggestion that environmental justice advocates should attempt to complete health assessments without government support. Nonetheless, the Education Act at least is encouraging because it demonstrates an awareness of the need for and current lack of money and attention devoted to medical monitoring and health assessment in communities threatened by environmentally dangerous activities.

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<sup>143</sup> Reich, *supra* note 23, at 295-96. Reich notes in particular that codification of a disparate impact analysis was considered and rejected in the Civil Rights Act of 1990, and the fact that the 1991 Act passed only because of unexpected political developments such as pressure on the Bush Administration to show greater support for civil rights issues during the bruising confirmation hearings for Supreme Court Justice Clarence Thomas. *Id.*

<sup>144</sup> H.R. 4571, 102d Cong., 2d Sess. (1992) (proposing that community interests be considered during the cleanup of hazardous waste sites, that residents be assisted in understanding the health risks of these sites, and that further powers be given to the Agency for Toxic Substances and Disease Registry).

<sup>145</sup> *Id.* § 2(K)(2).

<sup>146</sup> *Id.* § 3.

<sup>147</sup> *Id.* § 2(d)(1).

<sup>148</sup> See *infra* note 240.

<sup>149</sup> H.R. 4571, 102d Cong., 2d Sess. § 2(j).

### C. Political Action

The most promising avenue for environmental justice reform, in the end, may be through community empowerment. Luke Cole's view of the lawyer's role in promoting community action<sup>150</sup> and his ideal of communities mobilized to resist a diminished quality of life deserves serious consideration.<sup>151</sup> Moreover, grassroots activists in several communities are devising innovative ways to make their voices heard on environmental matters.<sup>152</sup> But Cole's conception of the *lawyer-activist* may not appeal to those less-equipped for or inclined to activist political strategies. Therefore, it is essential to isolate other, interim means to resist the continuing degradation of the health of poor communities, and especially those of color.

## IV. ADVANTAGES OF CERCLA MEDICAL MONITORING LAWSUITS

For environmental justice advocates, what is the relevance of an effort

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<sup>150</sup> See *supra* notes 27-29 and accompanying text.

<sup>151</sup> Cole is by no means alone in arguing that legal solutions are inadequate to solve to environmental justice problems. See, e.g., YALE LAW SCHOOL CONFERENCE REPORT, EARTH RIGHTS AND RESPONSIBILITIES: HUMAN RIGHTS AND ENVIRONMENTAL PROTECTION 29 (1992) ("Robert Bullard, although he felt that litigation is one important tool for citizen group action, agreed . . . that those in pursuit of environmental justice must also seek other means of taking effective action.").

<sup>152</sup> For example, the New York City Department of Environmental Protection is establishing an "environmental watchperson" to work with the badly polluted Greenpoint-Williamsburg community. See GREENPOINT, *supra* note 103, at 14; Hernandez Interview, *supra* note 103; see also Craig Quintana, *No Minority Voice on Powerful Panel: The Chairman of the Environmental Regulation Commission Wants the Governor to Name a Minority Member*, ORLANDO SENTINEL, Aug. 10, 1993, at B1 (reporting on the effort to name a racial or ethnic minority to Florida's powerful Environmental Regulation Commission).

Legal academics currently are busy as well in exploring other alternatives. Lazarus's argument for incorporating distributional concerns in the rule-making process, for example, is one possible avenue for increased involvement of burdened communities in the environmental decisions that will affect them. Lazarus, *supra* note 21, at 847. See generally *id.* at 839-52 (discussing the means of incorporating distributional concerns within environmental law). Professor Vicki Been is in the process of exploring the role that market dynamics play in the siting of locally undesirable land uses. Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1387 n.12 (1994). Such suggestions deserve attention, notwithstanding Cole's worries about being co-opted by the political process. However, because the focus of this Article is to identify one tactic that can be of immediate use to the environmental justice advocate, it does not discuss these promising but longer-term suggestions. Robert Bullard is in the process of preparing a second edition of the *People of Color Environmental Groups Directory*, which will include a resource listing for various types of organizing being done on these issues. Telephone Interview with Robert D. Bullard (Oct. 12, 1993).

to revive the respectability of the CERCLA medical monitoring lawsuit? Aside from any advantages to a community of color that might accrue by including medical surveillance as part of a CERCLA cleanup action, what benefits would follow for the future of a successful environmental justice movement? There are several advantages to such an approach.

First, a principal advantage of the CERCLA medical monitoring claim is its focus. In contrast to the equal protection challenges described in Part II, a carefully tailored CERCLA medical monitoring claim is more likely to be successful because of its narrow scope. Scientific studies could help determine precisely the continuing extent of risk to human health in order to determine the effectiveness of a CERCLA cleanup.<sup>153</sup> This would in turn further CERCLA's purpose of facilitating a prompt and efficient cleanup of hazardous waste sites in order to protect the public health and the environment. Furthermore, if properly constructed, the medical monitoring claim could be less susceptible to interpretations of geographically limited demographic data that avoid finding evidence of invidious racial discrimination. Statistical information about the extent and success of a cleanup could be collected by testing individuals living within an appropriate geographical delimitation surrounding a cleanup site and comparing them to individuals living in an area of comparable size located further away from the site. Thus, a medical monitoring claim could avoid the pitfalls of tactics already tried by environmental justice advocates.

The data gained in this manner could also increase the likely success of equal protection and other constitutional challenges by providing "demographic data within a particular radius of specific sites" so as to prove "a pattern of discrimination sufficient to establish invidious intent."<sup>154</sup>

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<sup>153</sup> This suggestion could, in practice, be a useful means to allocate funds efficiently, given the tendency of CERCLA cleanups to waste funds. See *supra* note 44 and accompanying text; see also Keith Schneider, *Rules Easing for Urban Toxic Cleanups*, N.Y. TIMES, Sept. 20, 1993, at A12 (discussing the dissatisfaction of Michigan residents with a cleanup that created more problems than it solved).

Medical monitoring could reduce costs to industry in the long run by identifying injuries that may not manifest themselves until years later. Thus, the earlier the detection, the earlier and less-expensive the treatment and cure. Also, by paying for medical monitoring costs in the present, possible defendants could avoid fraudulent claims in the future by ensuring that exposure to hazardous substances are contained or at least rendered negligible.

Despite this reasoning, courts often seem reluctant to award medical monitoring costs for fear that to do so will lead to corporate economic devastation. See, e.g., *Ball v. Joy Mfg.*, 755 F. Supp. 1344 (S.D. W. Va. 1990) (rejecting plaintiffs' medical monitoring claim purely for economic reasons). Although the *Ball* court found meritorious reasons for allowing individuals to recover the costs of medical monitoring, it held that compensating plaintiffs when they had suffered no demonstrable injury could devastate the corporate defendant. *Id.* at 1372.

<sup>154</sup> Chase, *supra* note 16, at 358. Chase stresses that "additional data from a vari-

Medical monitoring lawsuits are a means to do so without raising the always difficult and politically charged determination of racial discrimination. As a strict liability statute, CERCLA does not require proof of "moral misconduct."<sup>155</sup> Statistical data also could be used to effect a major jurisprudential shift in support of a winning equal protection claim. Moreover, an illuminating statistical record developed through successful medical monitoring lawsuits could invigorate the environmental justice movement.

In addition to benefits in the judicial arena, medical monitoring claims could help reap legislative rewards. For instance, CERCLA medical monitoring data could increase the recognition of the problem by Whites.<sup>156</sup> Gradual accumulation of data could force Whites (and non-Whites) in control of the nation's policy-making organs to take notice of the disproportionate environmental poverty of Blacks and other persons of color. Conversely, by providing poor communities of color with statistical ammunition, this data will provide local residents and grassroots activists with persuasive evidence that the long-term costs of siting will be anything but minimal. Moreover, while health effect studies have been conducted mostly on White male workers,<sup>157</sup> CERCLA medical monitoring data may significantly expand the available racial and ethnic information regarding workplace health.<sup>158</sup>

The timeliness of asserting CERCLA medical monitoring lawsuits is great. Industry has a formidable public relations arsenal at its command and has begun to divert the momentum of the environmental justice movement. A medical record of the impact of industry activities would enable environmental justice lawyers to counter industry claims.<sup>159</sup>

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ety of sources are needed to adequately address the issues presented by environmental racism [including] information on health effects of environmental hazards, specifically the relationship between environmental hazards and the health status of minorities." *Id.* He also considers some of the possible uses and law reform consequences of such data. *Id.* at 358-60; *see also infra* note 242.

<sup>155</sup> See S. REP. NO. 848, *supra* note 49, at 34.

<sup>156</sup> See Pettigrew, *supra* note 90, at 686 (pointing out that Black poverty remains largely outside the purview of Whites); *cf.* DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* 8-10, 158-194 (1992) (noting the "stabilizing" role of Blacks in the United States and White resistance to the improvement of Blacks' lives). Incidentally, testing would offer the incremental benefit of aiding in the effort to accumulate information on a national scale to track the impact of toxic activities on the communities where they are conducted, particularly poor communities of color.

<sup>157</sup> Chase, *supra* note 16, at 349.

<sup>158</sup> *Id.* at 358.

<sup>159</sup> Consider WMX Corporation, which until 1993 was known as Waste Management, Inc., the country's largest pollution control corporation. WMX has assigned Charles McDermott, its top Government Affairs' officer, to tackle environmental justice issues. In his testimony before the House Judiciary's Subcommittee on Civil and

Constitutional Rights on March 3, 1993, he announced that WMX accepts "the premise that environmental assets and liabilities in this country are not evenly distributed among racial groups, ethnic minorities or economic groups." McDermott Testimony, *supra* note 137, at 2. However, McDermott then tried to deflect attention from the hazardous waste management industry and focus it instead on industrial waste generators by asserting that "the entire commercial hazardous waste industry handles only 3% of the hazardous waste generated in this country. The other 97% is handled on site by the entity that generates it." *Id.* at 3. Although the commercial hazardous waste industry likes to deflect attention from itself by citing such statistics, these arguments are really beside the point if, nonetheless, statistics also indicate that "minority" communities disproportionately bear the burden and stigma of "hosting" facilities to handle the 3%. Moreover, it is useful to recall that the Commission Report deals not only with commercial sites but also uncontrolled hazardous waste sites. *See COMMISSION REPORT, supra* note 2, at 10. This should concern the environmental justice advocate because without its own body of statistical knowledge and evidence, the movement will be forced into a position of responding to an agenda drafted by industry rather than asking industry to address the issues most important to the movement.

More troubling still, McDermott's remarks evidence the willingness of a company like his to exploit racial tensions. For example, McDermott insisted that companies like WMX were part of the solution in addressing the problem of lead contamination of housing stock and soils. McDermott Testimony, *supra* note 137, at 6. He then described how the EPA contracted his company to remove lead-contaminated soils from a

predominantly Black housing development in West Dallas. . . . As the soils began to arrive at our landfill in Louisiana, which is located in a community which is predominantly white, local residents rose in opposition to wastes coming in from out-of-state. This could have been an opportunity for the environmental equity movement to bring health- and science-based arguments to bear against the parochial interests that commonly object to moving wastes between states.

*Id.* at 6-7. He concluded that "we are hopeful that open discussion will some day soon create coalitions between advocates and remedial service companies." *Id.*

Unfortunately, the scenario McDermott is advocating in effect asks communities of color to pit themselves against "predominantly White" communities. In addition, his emphasis on the Louisiana community's racial demographics is disingenuous: Although the area may be largely White, the Black population is substantial. The Louisiana facility, operated by a WMX subsidiary, is located in Lake Charles, which is in Calcasieu Parish. One survey rates Calcasieu Parish as among the highest in the nation for several measures of toxic and pollution hazards. BENJAMIN A. GOLDMAN, *THE TRUTH ABOUT WHERE YOU LIVE* 143, 175, 191, 193, 195, 201, 205, 211, 221 (1991). According to the 1990 U.S. Census, Calcasieu Parish was over 30% Black, the fourth-largest Black population in Louisiana. It also had Louisiana's fourth-largest Hispanic population. *Census Bureau Delivers Louisiana's 1990 Census Counts*, U.S. BUREAU OF THE CENSUS, at \*7-9, Feb. 5, 1991, available in WESTLAW, Cendata Database (search TI field for "Census Bureau Delivers" and ST field for "Louisiana"). As the Commission Report documents, socio-economic status is a factor—although not the most significant one—related to the location of toxic activities. *COMMISSION REPORT, supra* note 2, at xiii. Therefore, it is likely that the White communities against which McDermott suggests the West Dallas community marshal "health- and science-based arguments" are not economically prosperous.

Above all, CERCLA medical monitoring lawsuits would allow the environmental justice community to begin to view existing environmental legislation as a potential benefit to their cause. As discussed above, Cole argues that environmental statutes legitimate the pollution of low-income neighborhoods, and that the manner in which the political and economic elite manipulate environmental laws has resulted in poor people bearing a disproportionate share of the nation's environmental hazards.<sup>160</sup> This need not be the case. The CERCLA medical monitoring claim is one strategy currently available for environmental justice advocates to bring wider public attention to what Cole calls the grassroots environmentalists' "far more radical and systemic [than mainstream environmentalists'] view of the changes needed to eliminate pollution."<sup>161</sup> Such claims would focus attention on the harm caused by past toxic activities to the physical health and welfare of communities of color and force a corresponding reexamination of environmental priorities that may be the result of environmental groups' past compromises with industry and government.<sup>162</sup>

The compromises to which Cole refers include the tendency of negotiations about environmental management to be reduced to arguments "about how many parts per million of certain chemicals are 'safe' for release into the atmosphere."<sup>163</sup> He points out that certain "citizens' groups are pressing for the elimination of the chemicals themselves and arguing for a change in the processes that produce these chemicals in the first place."<sup>164</sup> Cole might contend that designing a legal strategy including the tactical use of CERCLA medical monitoring claims will only put environmental justice advocates in the position of having to compromise, by forcing them to haggle over how many parts per million of a certain chemical should be deemed hazardous to their health. Thus, he might argue, environmental justice advocates would risk losing sight of their overarching goal of changing the fundamental terms of the environmental debate—effectively focusing on the trees at the expense of the forest.<sup>165</sup>

Such a criticism would, however, misunderstand the nature and purpose of the CERCLA medical monitoring claim advanced in this Article. CERCLA medical monitoring lawsuits should be explored as one of possibly several promising steps that could help effect the larger goal of shifting the terms of the nation's environmental improvement efforts, just as Cole and others have urged. Moreover, the accumulation of information

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<sup>160</sup> Cole, *supra* note 12, at 642.

<sup>161</sup> *Id.* at 644.

<sup>162</sup> See, e.g., *id.* (discussing pollution prevention as an alternative to pollution control).

<sup>163</sup> *Id.*; see *supra* note 138 and accompanying text.

<sup>164</sup> Cole, *supra* note 12, at 644.

<sup>165</sup> A common concern is that by agreeing to work "within the system," those most oppressed by it end up strengthening the institutions that serve most to thwart their aspirations. See, e.g., *id.* at 652 (citing Crenshaw, *supra* note 5, at 1366-69).

through medical monitoring and surveillance could well heighten local involvement in environmental issues, as communities become more informed about the impact of toxic activities upon them and promote the radical reexamination of environmental laws that Cole favors.<sup>166</sup>

Finally, if advanced by environmental justice reformers, CERCLA medical monitoring claims could have the positive result of further breaking down the barriers of specialization that have separated the civil rights and poverty law bars from the environmental law bar.<sup>167</sup> Environmental lawyers need to be "empowered" in their own right to understand how their efforts might be used in service of the environmental justice cause.<sup>168</sup>

## V. JUDICIAL TREATMENT AND LESSONS FOR THE ENVIRONMENTAL JUSTICE ADVOCATE

### A. Background

Much of the dispute about CERCLA medical monitoring turns on the interpretation of the phrase "necessary costs of response" in section 107(a)(4)(B).<sup>169</sup> As courts routinely note with frustration, the phrase is nowhere defined in the statute.<sup>170</sup> However, "response" is defined as "remove, removal, remedy, and, remedial action."<sup>171</sup> "Remove" and "removal" are defined as

[t]he cleanup or removal of released hazardous substances from the environment, such actions as may be necessary [sic] taken in the

<sup>166</sup> Changes in peoples' condition often come about only if the people themselves act. See, e.g., *id.* at 649.

<sup>167</sup> Cole adverts to this division and describes the genesis of what might be called the "scienticization" of the environmental bar. *Id.* at 634-36; see Lazarus, *supra* note 21, at 788. This division is widely identified not only in the legal community, but more generally in the environmental and civil rights' communities. See Charles Jordan & Donald Snow, *Diversification, Minorities, and the Mainstream Environmental Movement*, in VOICES, *supra* note 12, at 75-79 (discussing the historical roots of this division).

<sup>168</sup> Cole describes one shortcoming of the social reform lawyers as their failure to distinguish between serving an ideal and furthering their actual clients' needs. Cole, *supra* note 12, at 652-54. This Article aims to delineate an opportunity for using an existing statutory alternative not only in the service of the client community, but also as a way to advance progress towards the ideal of environmental justice.

<sup>169</sup> See William B. Johnson, Annotation, *What Are "Necessary Costs of Response" Within Meaning of § 107(a)(4)(B) of Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) (42 USCS § 9607(a)(4)(B))*, 113 A.L.R. FED. 1, 45-55 (1993) (discussing cases involving the recovery of medical monitoring costs).

<sup>170</sup> See, e.g., *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1533 (10th Cir. 1992); *Artesian Water Co. v. New Castle County*, 851 F.2d 643, 648 (3d Cir. 1988); *Avnet, Inc. v. Allied Signal, Inc.*, 825 F. Supp. 1132, 1136 n.7 (D.R.I. 1992).

<sup>171</sup> 42 U.S.C. § 9601(25) (1988).

event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.<sup>172</sup>

Furthermore, "remedy" and "remedial action" are, in turn, defined as those actions consistent with permanent remedy taken instead of or in addition to removal actions in the event of a release or threatened release of a hazardous substance into the environment, to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment.<sup>173</sup>

Thus, the statute's key definitions for purposes of understanding what costs are recoverable "costs of response" both link protection of "public health or welfare" with "environment."

Early decisions interpreting CERCLA affirmed that the category of recoverable costs of response under the statute *is* extremely broad, leaving defenses to recovery correspondingly limited.<sup>174</sup> Despite early recognition of CERCLA's broad sweep, in the medical monitoring context courts have increasingly tried to cut back on CERCLA's expansive recovery provisions.

Decisions disallowing medical monitoring are both confusing and troubling. The decisions confuse because they run counter to the statute's express purpose—to protect human health, welfare, and the environment—made clear in the definitions quoted above. The trend of these cases is troubling because their logical result is to formulate law that protects the environment but tolerates the demise of those who inhabit it. This dichotomy is anathema to the environmental justice reformer because it recognizes an "environment" distinct from the people who inhabit it.

Therefore, this Article argues that, for several reasons, the necessary costs of response in CERCLA cost recovery actions include medical monitoring costs. First, the prevailing trend of CERCLA medical monitoring cases, which hold that medical monitoring is not a necessary cost of response, rests upon a thin analytical foundation. In particular, the cases

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<sup>172</sup> *Id.* § 9601(23).

<sup>173</sup> *Id.* § 9601(24).

<sup>174</sup> *Pinole Point Properties, Inc. v. Bethlehem Steel Corp.* 596 F. Supp. 283, 287 (N.D. Ca. 1984) ("Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the cost and responsibility for remedying the harmful conditions they created." (quoting *United States v. Reilly Tar & Chem. Corp.*, 546 F. Supp. 1100 (D. Minn. 1982))).

rely upon the inexplicably narrow reading of section 107(a)(4)(B) advanced in a single federal district court case.<sup>175</sup>

Second, the reasoning in the cases that disallow CERCLA medical monitoring is analogous to the reasoning in the failed equal protection challenges discussed in Part II. Just as in the equal protection cases the courts construed census tracts and county lines and other geographical and administrative demarcations to avoid finding invidious discrimination against racial "minorities," so too the cases disallowing CERCLA medical monitoring follow twists and turns of logic that avoid recovery of costs clearly within CERCLA's scope. Moreover, just as the *Bean* court expressed some discomfort with the justice of its result,<sup>176</sup> several courts reviewing CERCLA medical monitoring claims have evidenced a nagging sense that they have not reached the correct results.<sup>177</sup> Perhaps wary of the possible social and redistributional consequences of allowing such response costs, the courts have shied away from endorsing medical monitoring claims.

At the heart of this misapplication of CERCLA's broad statutory scheme is a misunderstanding of the meaning of "medical monitoring." CERCLA medical monitoring cases indicate that courts routinely confuse monitoring with diagnosis and treatment. Medical monitoring may lead in many cases to the diagnosis and eventual treatment of medical problems. However, in the context of a CERCLA cost recovery action, monitoring would enhance cleanup efforts by focusing on the greatest threats to the public health and the environment.

Because this Article recommends an approach that differentiates medical monitoring costs from other medical expenses, it is necessary to elaborate on what is meant by the term "medical monitoring" in this context. Medical monitoring consists of series of tests such as blood, urine, and tissue sampling and analysis that medical professionals administer over a prescribed period of time to a targeted population. This Article assumes that the targeted population will be of sufficiently small size to measure most possibly affected individuals. Because the appropriate monitoring response will change depending on the nature of the substances to which a population has been exposed, it is impossible to be more precise here as to what "medical monitoring" means. Furthermore, such a term is open to interpretation and scientific debate.<sup>178</sup> However, this should not be

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<sup>175</sup> *Coburn v. Sun Chem. Corp.*, 28 Env't Rep. Cas. (BNA) 1665 (E.D. Pa. 1988); see discussion *infra* part V.B.

<sup>176</sup> See *supra* text accompanying notes 73-74.

<sup>177</sup> See, e.g., *Ambrogi v. Gould, Inc.*, 750 F. Supp. 1233, 1249 (M.D. Pa. 1991); *infra* part V.C.2.

<sup>178</sup> The suggestion that such monitoring may yield uncertain results is no criticism of the value of conducting such studies. See, e.g., MICHAEL R. GREENBERG & RICHARD F. ANDERSON, *HAZARDOUS WASTE SITES: THE CREDIBILITY GAP* 98 (1984) (summarizing the inconclusive findings of the Love Canal studies on health impacts).

used to support an argument against the practice, but rather should be used to encourage debate about the proper means to achieve CERCLA's purpose of protecting public health or welfare, or the environment.

Finally, the task of making the distinction between medical monitoring and medical diagnosis and treatment ultimately falls to the environmental justice advocate. Due to the courts' hostility to allowing recovery for medical treatment expenses, the advocate would probably do best to seek only medical monitoring and surveillance costs, indicating that the activities will serve CERCLA cleanup efforts. At a minimum, if for reasons of expediency or expense it is necessary to seek medical treatment costs in the same action, they should be clearly separated from requests to recover CERCLA medical monitoring costs. The pitfall, as the following analysis of the case law reveals, is that courts may implicitly link monitoring with treatment, and therefore disallow both.

#### B. *Putting Coburn v. Sun Chemical Corp.*<sup>179</sup> in Context

The most influential case in shaping opposition to allowing medical monitoring costs as "necessary costs of response" under CERCLA is *Coburn*. Other courts, including the only federal appellate court yet to have considered this issue, have adopted wholesale the *Coburn* court's analysis of the arguments against CERCLA medical monitoring.<sup>180</sup> Although cases routinely assert *Coburn*'s "in[-]depth analysis,"<sup>181</sup> a close reading of *Coburn* confirms that it is less soundly reasoned than so many courts have claimed.

*Coburn* involved a class action by "all persons who were exposed to well water contaminated with TCE [trichloroethylene] and other hazardous substances released" from the defendants' property in Dublin, Penn-

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On the contrary, increased monitoring will help to achieve the goal of refining health assessment techniques. This is sorely needed, especially given that a U.S. General Accounting Office study concluded that sites on CERCLA's National Priorities List lacked necessary health risk studies. See FRED SETTERBERG & LONNY SHAVELSON, TOXIC NATION 169 (1993); see also *supra* part I.D.

<sup>179</sup> 28 Env't Rep. Cas. (BNA) 1665 (E.D. Pa. 1988).

<sup>180</sup> *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1535 (10th Cir. 1992); see *infra* part V.C.1; see also *Woodman v. United States*, 764 F. Supp. 1467, 1469 (M.D. Fla. 1991) ("Rather than add unnecessarily to the length of this Order, the Court adopts that portion of [*Coburn*,] which discusses CERCLA response costs"); *States v. BFG Electroplating & Mfg. Co.*, 31 Env't Rep. Cas. (BNA) 1350, 1352 (1990) ("[W]e agree with and adopt, as has at least one other court, the reasoning and conclusion reached in *Coburn* . . ."); *Lutz v. Chromatex, Inc.*, 718 F. Supp. 413, 418 (M.D. Pa. 1989) ("Rather than add unnecessarily to the length of this Memorandum, the court will simply adopt the rationale of the *Coburn* court as its own.").

<sup>181</sup> See, e.g., *Ambrogi v. Gould, Inc.*, 750 F. Supp. 1233, 1246 (M.D. Pa. 1991) (relying on the *Coburn* court's analysis to conclude that medical-related costs are not recoverable under CERCLA).

sylvania.<sup>182</sup> The class included people who either resided or worked near the defendants' property.<sup>183</sup> In moving to dismiss the suit, the defendants contended in part "that costs of medical screening and/or future medical monitoring are not 'necessary costs of response' as that term is defined in CERCLA."<sup>184</sup>

The United States District Court for the Eastern District of Pennsylvania agreed with the defendants' formulation of the issue and examined the split among federal district courts. It began by examining cases disallowing medical monitoring, particularly *Chaplin v. Exxon Corp.*<sup>185</sup> The court drew from *Chaplin* the conclusion that while the House and Senate bills that eventually became CERCLA "contained language imposing liability for personal injury as well as medical expenses and economic loss, these specific liability provisions were deleted from the final compromise bill which became CERCLA."<sup>186</sup> Thus, early in its decision to disallow medical monitoring costs, the court adopted the *Chaplin* court's unfounded equation of medical monitoring and surveillance costs with *personal* injury and economic loss.

In this vein, *Coburn*, *Chaplin*, and subsequent cases quote CERCLA's notoriously thin and unreliable legislative history<sup>187</sup> to the effect that the final bill had deleted a federal cause of action for "'medical expenses or property or income loss.'"<sup>188</sup> In fact, CERCLA's legislative history might also support allowing medical monitoring damages. The drafters intended removal costs to include "monitoring for spread of the hazardous substances: biological and other monitoring to determine the extent of contamination."<sup>189</sup>

The *Coburn* court approvingly cited *Chaplin* for the proposition that

<sup>182</sup> 28 Env't Rep. Cas. (BNA) at 1666.

<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 1667. The plaintiffs may have hurt themselves by asking for the costs of the "'taking of such actions as [were] necessary to prevent, minimize or mitigate damage to their health or welfare.'" *Id.* (quoting Plaintiffs' Complaint ¶ 49). This may have focused the court's attention away from medical monitoring per se. Although this pleading choice is based on CERCLA's language, it has repeatedly been a thorn in the side of plaintiffs' counsel seeking compensation for medical monitoring costs. See *infra* text accompanying notes 215-20.

<sup>185</sup> 25 Env't Rep. Cas. (BNA) 2009 (S.D. Tex. 1986) (concluding that CERCLA precludes recovery of medical monitoring expenses).

<sup>186</sup> *Coburn*, 28 Env't Rep. Cas. (BNA) at 1668.

<sup>187</sup> See, e.g., *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1535 (10th Cir. 1992) (quoting *Exxon v. Hunt*, 475 U.S. 355, 373 (1986)); *Ambrogi v. Gould, Inc.*, 750 F. Supp. 1233, 1246 n.16 (M.D. Pa. 1990) ("[T]he legislative history is the weakest link in the decision. . . . Because of its varied and extensive record of passage, the use of CERCLA's legislative history has its limits.").

<sup>188</sup> *Coburn*, 28 Env't Rep. Cas. (BNA) at 1670 (quoting the compromise bill's co-sponsor, Senator Jennings Randolph, 126 CONG. REC. 30,932 (1980)).

<sup>189</sup> S. REP. NO. 848, *supra* note 49, at 54.

when Congress amended CERCLA in 1986,<sup>190</sup> it addressed the extent to which CERCLA would deal with medical matters by expanding the authority of the ATSDR.<sup>191</sup> Thus, the *Coburn* court articulated the two main arguments against medical monitoring and surveillance costs under CERCLA, namely: (1) the characterization of medical monitoring costs as requests for personal and economic loss damages<sup>192</sup> and (2) the claim that the ATSDR is a congressional response to calls for medical monitoring.

The *Coburn* court next considered cases supporting the availability of medical monitoring costs under CERCLA, most notably *Brewer v. Ravan*,<sup>193</sup> but dismissed them as "unpersuasive."<sup>194</sup> In particular, *Coburn* criticized *Brewer's* conclusion that "[p]ublic health related medical tests and screening clearly are necessary to "monitor, assess, [or] evaluate a release," ' ' <sup>195</sup> arguing that this

contravenes the plain meaning of that phrase. Quite simply, we find it difficult to understand how future medical testing and monitoring of persons who were exposed to contaminated well water prior to the remedial measures currently underway will do anything to "monitor, assess, [or] evaluate a release" of contamination from the site.<sup>196</sup>

This statement, the core of *Coburn's* analysis, bears scrutiny for several reasons. First, it assumes that there will be no release of toxins while cleaning up the site. Second, its disregard for situations in which people may have been contaminated prior to the commencement of remedial measures shows a disturbing willingness to use CERCLA to clean up the "environment" but not benefit the people who inhabit it. Third, the statement gives a new spin to the meaning of the word "evaluate." After all, it is reasonable to argue that monitoring is a form of evaluation. Fourth, the court's analysis supports a view contrary to the statutory goal of remedial actions under CERCLA. By contrast to short-term, removal actions, CERCLA remedial actions are intended to be long-term clean-ups.<sup>197</sup> Nonetheless, the *Coburn* court concluded that medical monitor-

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<sup>190</sup> SARA, Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified in scattered sections of 42 U.S.C.).

<sup>191</sup> *Coburn*, 28 Env't Rep. Cas. (BNA) at 1670 (citing *Chaplin*, 25 Env't Rep. Cas. (BNA) at 2012, and 42 U.S.C. § 9604(i) (1988)); see also *infra* note 240.

<sup>192</sup> Perhaps this reflects the court's skittishness about the ultimate redistributive implications of awarding medical monitoring costs.

<sup>193</sup> 680 F. Supp. 1176 (M.D. Tenn. 1988); see discussion *infra* part V.D.

<sup>194</sup> *Coburn*, 28 Env't Rep. Cas. (BNA) at 1670.

<sup>195</sup> *Id.* at 1671 (quoting *Brewer*, 680 F. Supp. at 1179).

<sup>196</sup> *Id.* The court thus folded the language of CERCLA's *removal* definition ("monitor, assess, and evaluate") into a statement about *remedial* action, suggesting that it did not clearly understand the differences between the two types of response costs.

<sup>197</sup> See *United States v. Rohm*, 2 F.3d 1265 (3d Cir. 1993); *General Elec. Co. v.*

ing, a long-term response to a toxic contamination, is disallowed under CERCLA.

### C. *The Misplaced Reliance on Coburn*

#### 1. *Daigle v. Shell Oil Co.*<sup>198</sup>

In *Daigle*, the only federal appellate court to address the issue of CERCLA medical monitoring costs, the Tenth Circuit endorsed *Coburn*'s "comprehensive analysis." *Daigle* arose out of a cleanup at the Rocky Mountain Arsenal, a federally-controlled CERCLA site outside Denver, Colorado.<sup>199</sup> Members of the plaintiff class resided near the Arsenal. As in *Coburn*, the defendant filed a motion to dismiss.<sup>200</sup> The district court denied the motion, holding that medical monitoring claims might constitute "necessary costs of response."<sup>201</sup>

The Tenth Circuit reversed, observing that "[t]his type of action has been increasingly recognized by state courts as necessary given the latent nature of many diseases caused by exposure to hazardous materials and the traditional common law tort doctrine requirement that an injury be manifest."<sup>202</sup> However, it agreed with the *Coburn* court that CERCLA did not permit any recovery for medical monitoring costs.<sup>203</sup>

Although the *Daigle* court took care to quote in full CERCLA's statutory definitions of "remove" or "removal" and "remedy" or "remedial," it nonetheless followed *Coburn*'s lead in assuming that medical monitoring does not play a role in containing, cleaning up, preventing, or minimizing a release of hazardous substances: "Plaintiffs and the *Brewer* court go awry in affording a broad sweep to the 'public health and welfare' language in the definitions."<sup>204</sup> The court concluded that while "[m]edical monitoring would mitigate the potential individual health problems of Plaintiffs, . . . the general provision for prevention or mitigation of 'damage to public health or welfare' must be interpreted consistently with the specific examples of 'removal costs' enumerated in the definition."<sup>205</sup>

The *Daigle* court marshaled unspecified canons of statutory construc-

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Litton Indus. Automation Sys., 920 F.2d 1415, 1419 n.4 (8th Cir. 1990) (holding that a cleanup lasting more than one year may constitute a remedial action under CERCLA), *cert. denied*, 491 U.S. 937 (1991).

<sup>198</sup> 972 F.2d 1527 (10th Cir. 1992). For a recent discussion of *Daigle*, see Sweeney, *supra* note 38.

<sup>199</sup> *Id.* at 1530.

<sup>200</sup> *Id.* at 1531. The United States Government, also a defendant, joined the motion to dismiss.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at 1533.

<sup>203</sup> *Id.* at 1535-37.

<sup>204</sup> *Id.* at 1535.

<sup>205</sup> *Id.*

tion in a manner reminiscent of the way the *East Bibb Twiggs* court played with demographic concepts to avoid finding discriminatory intent.<sup>206</sup> In both cases, the courts ignored available—but inconvenient—evidence suggesting the appropriateness of a contrary result.

The certainty of the *Daigle* court's pronouncement is debatable. CERCLA was, by design, a statute drafted to have a broad sweep with respect to protection of the public health or welfare, or the environment.<sup>207</sup> Moreover, the list of specific examples of "removal costs" enumerated in its definition is *nonexclusive*.<sup>208</sup> The *Daigle* court nonetheless held that it is "only reasonable under traditional statutory canons of construction to conclude that any other recoverable costs must at least be of a similar type."<sup>209</sup> The canon of statutory construction on which the court suggested that it relied was "ejusdem generis," which requires that other examples be of like kind or class.<sup>210</sup> Even assuming the appropriateness of this analysis, the argument falters. The court concluded that "[l]ong[-] term health monitoring of the sort requested by Plaintiffs—to assist plaintiffs and class members in the prevention or early detection and treatment of chronic disease,' . . . clearly has nothing to do with preventing contact between 'a release or threatened release' and the public. The release has already occurred."<sup>211</sup>

This analysis is unsatisfactory for at least two reasons, both of which stem from the incorrect assumption that a cleanup renders a site permanently harmless. First, even under a "like kind or class" analysis, based upon the application of ejusdem generis, the court did not satisfactorily distinguish security fencing or temporary housing from medical monitoring. Is it not conceivable that medical monitoring could provide information to help prevent a future release just as a security fence may provide the public with protection from a release? Medical monitoring could show that even after the completion of a phase of a cleanup, toxics levels

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<sup>206</sup> See *supra* part II.A.2.

<sup>207</sup> See 42 U.S.C. § 9605 (1988); COOKE, *supra* note 30, § 12.03[4][c].

<sup>208</sup> "'Remove' or 'removal' means the cleanup or removal of released hazardous substances from the environment . . . . The term includes, *in addition, without being limited to*, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for . . . ." 42 U.S.C. § 9601(23) (emphasis added).

<sup>209</sup> *Daigle*, 972 F.2d at 1535.

<sup>210</sup> "Ejusdem generis" is defined as "[o]f the same kind, class, or nature" such that "where general words follow the enumeration of particular classes of things, the general words will be construed as applying only to things of the same general class as those enumerated." BLACK'S LAW DICTIONARY 517 (6th ed. 1990). The court drew this analysis from *Ambrogio v. Gould, Inc.*, 750 F. Supp. 1233, 1247 n.17 (M.D. Pa. 1990). However, the *Daigle* court was not at all clear as to what canon it relied upon. Instead, it stated only that it relied upon "traditional" canons of construction.

<sup>211</sup> *Daigle*, 972 F.2d at 1535 (citations omitted).

were still unacceptably high in the tissues or bloodstreams of local residents, indicating an incomplete cleanup or continuing releases.

Second, it is unclear why the court was concerned only with preventing other releases. The statutory definition of "removal" refers not only to prevention but also to cleanup.<sup>212</sup> At least at the summary judgment stage, it is unclear why medical monitoring would not serve this purpose. Similarly, the removal definition provides that removal *may* also include actions "to monitor, assess and evaluate"<sup>213</sup> such releases, as well as measures to minimize and mitigate damages in case of a release or the threat of one.<sup>214</sup> For purposes of summary judgment, it is unclear why medical monitoring could not be considered as a possible method to achieve these ends, and it is difficult to explain in the longer term why medical monitoring is an inappropriate means to satisfy the statute's purpose of monitoring, assessing, and evaluating releases.

The environmental justice advocate should therefore clarify how medical monitoring and surveillance expenses are appropriate CERCLA recovery costs by emphasizing their role in protecting the public health or welfare, or the environment in cleanups. The advocate should also specify that medical monitoring will not involve medical treatment, although such treatment may be a necessary consequence of the medical monitoring data.

The *Daigle* court's conclusion that medical monitoring was inappropriate because "[t]he release has already occurred,"<sup>215</sup> hints at the court's real view of the matter: Medical monitoring is compensation for personal damage or economic loss, as opposed to a means of arresting continuing threats to health, welfare, or the environment. The court went on to observe that the plaintiffs' medical monitoring "smacks of a cause of action for damages resulting from personal injury."<sup>216</sup> The court apparently assumed that compensation for medical monitoring expenses would compensate for personal harm instead of furthering CERCLA's goal of environmental cleanup. Aside from separating the "environment" from the people who inhabit it, the court's conclusion warrants criticism for failing to consider that medical monitoring is not medical treatment, and that monitoring may provide valuable information about the progress of CERCLA cleanups.

The plaintiffs' decision to seek compensation for early detection, prevention, and *treatment* of chronic disease may have influenced the court's

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<sup>212</sup> 42 U.S.C. § 9601(23); *see supra* note 172 and accompanying text.

<sup>213</sup> *Id.*

<sup>214</sup> "Removal" specifically includes "the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or the threat of release." *Id.*

<sup>215</sup> *Daigle*, 972 F.2d at 1535.

<sup>216</sup> *Id.*

decision not to award medical monitoring costs.<sup>217</sup> Although it is unclear from the *prima facie* language of the statute whether prevention *and* treatment satisfy CERCLA's mandate to protect public health or welfare, or the environment,<sup>218</sup> it is politically more difficult to characterize treatment as a part of cleanup and not as a means to compensate for personal damage.<sup>219</sup> In retrospect, the plaintiffs' emphasis "on the additional § 9601(23) phrase referring to 'other actions as may be necessary to prevent, minimize or mitigate damage to the public health or welfare . . .'" was probably mistaken.<sup>220</sup>

Environmental justice lawyers seeking medical monitoring costs should base their claims on *both* the above-quoted provision *and* the provisions defining long-term remedial actions, which state that the purpose of these actions is "to prevent or minimize the release of hazardous substances so that they do not migrate to cause substantial danger to present or future public health or welfare or the environment."<sup>221</sup> This strategy is logically compelling because much medical monitoring will be in the nature of a long-term remedy to ensure the prevention, minimization, or removal of hazardous substances accumulation.

Despite the plaintiffs' error in seeking compensation for treatment, the *Daigle* court may be further criticized for reaching its decision on what it recognized was a "limited construction of the definition of 'response costs.'"<sup>222</sup> Although the court followed the plaintiffs' lead in considering only the definition of removal costs, it also could have considered the possibility of medical monitoring as a long-term remedial action. However, the court made quite clear its view that medical monitoring was

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<sup>217</sup> *Id.*

<sup>218</sup> See *supra* note 207 and accompanying text.

<sup>219</sup> The justification for omitting personal health costs from the broad statutory injunction to protect public health and the environment is taken from statements in the legislative history suggesting that Congress did not intend CERCLA to become a toxic tort recovery statute. See, e.g., *Ambrogi v. Gould, Inc.*, 750 F. Supp. 1233, 1238 (M.D. Pa. 1990) (stating that Congress did not intend CERCLA as "a general vehicle for toxic tort actions"; rather, the Act was designed to spend the limited funds available for cleanup actions efficiently). However, efforts to recover for property damage under CERCLA continue. See, e.g., Recent Developments, [1993 News & Analysis] 23 *Env'tl. L. Rep. (Env'tl. L. Inst.)* 10,555, 10,555 (Sept. 1993) ("[C]itizens residing near a former Superfund site, now the location of a wood treatment plant, may not recover CERCLA response costs or damages for diminution in property values, despite the presence of hazardous substances on their land, because they failed to establish the release of a hazardous substance." (citing *Stewman v. Mid-South Wood Prods. of Mena, Inc.*, 993 F.2d 646 (8th Cir. 1993))).

<sup>220</sup> *Daigle*, 972 F.2d at 1535. Plaintiffs contended that this phrase should be read broadly "to cover any type of monitoring that would mitigate health problems." *Id.*

<sup>221</sup> 42 U.S.C. § 9601(24).

<sup>222</sup> *Daigle*, 972 F.2d at 1535.

neither a removal nor a remedial cost.<sup>223</sup>

Furthermore, the *Daigle* court quoted the legislative history to establish that Congress did not intend to use CERCLA as a means to compensate for personal damage or economic loss.<sup>224</sup> Following *Coburn*, the court also suggested that the ATSDR is a means to assess "health effects of actual and threatened hazardous substance releases."<sup>225</sup>

## 2. *Ambrogi v. Gould*<sup>226</sup>

In *Ambrogi*, the United States District Court for the Middle District of Pennsylvania expanded upon the questionable logic of *Coburn*, articulating a more detailed rationale for the proposition that medical monitoring and surveillance expenses are not recoverable as "necessary costs of response" under CERCLA. This expansion of *Coburn*'s logic presents serious obstacles to anyone interested in commencing a CERCLA medical monitoring lawsuit.

In *Ambrogi*, citizens living near a battery processing plant alleged that the plant had put them at risk of lead contamination.<sup>227</sup> After briefly outlining CERCLA's scope, the court stated that "[i]n passing [CERCLA], . . . Congress did not intend to make injured parties whole or to create a general vehicle for toxic tort actions."<sup>228</sup> After surveying the case law on both sides of the issue, the court followed *Coburn*, concluding that because CERCLA's nonexclusive list of remedial actions did not include the word "medical," the statute did not contemplate recovery for any such costs.<sup>229</sup>

The court also followed *Coburn* in finding that CERCLA's "removal" definition "should logically be confined to activities of the same kind as

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<sup>223</sup> *Id.* As the court explained,

[a]lthough the statute provides that "removal" costs are not limited to these specific examples, we think it only reasonable under traditional statutory canons of construction to conclude that any other recoverable costs must at least be of a similar type. . . . Longterm health monitoring of the sort requested by Plaintiffs . . . clearly has nothing to do with a "release or threatened release" and the public. The release has already occurred.

*Id.* (citations omitted).

<sup>224</sup> *Id.* ("[T]he history of the enactment of CERCLA reveals that both houses of Congress considered and rejected any provision for recovery of private damages unrelated to the cleanup effort, including medical expenses.").

<sup>225</sup> *Id.* at 1536. *But see* discussion *infra* note 240.

<sup>226</sup> 750 F. Supp. 1233 (M.D. Pa. 1990).

<sup>227</sup> *Id.* at 1236-37. For an introductory bibliography on the toxicity of lead, see Colin Crawford, *Trends in the Regulation of Lead*, 2 ENVTL. L. N.Y. 145 (1991), and compare COMMONER, *supra* note 58, at 22-26, 37-42 (reporting a general decline in levels of lead pollution); *supra* note 159; *infra* note 233.

<sup>228</sup> *Ambrogi*, 750 F. Supp. at 1238.

<sup>229</sup> *Id.* at 1246-47 (stating that, as the definition of "removal" did not specify medical monitoring, these costs were not included in the statute).

those enumerated by the more specific items identified in the latter half of the definition."<sup>230</sup> The court offered no authority supporting its view,<sup>231</sup> other than stating that "[t]his conclusion would also comport with the overall purpose of the legislation and is in balance with the contemporary history surrounding the enactment of CERCLA."<sup>232</sup>

This assumption is only correct, however, if one characterizes medical monitoring as recovery for economic loss or personal damages. The *Ambrogi* court's argument makes exactly this assumption, as indicated by the admonition that CERCLA "is not to be used . . . as a universal solution to all ills that originate from a hazardous waste site."<sup>233</sup> The environmental justice advocate need not disagree with this statement, but may respond that CERCLA was intended to promote the public health and welfare, and also to clean up the environment, and that monitoring the health of those exposed to contaminated sites is one effective means to serve these ends. The advocate should further remind the judge that this conclusion is supported by CERCLA's plain statutory language.<sup>234</sup>

Moreover, the *Ambrogi* court's opinion suggests that plaintiffs were not attempting to construe CERCLA so broadly. On the contrary, the opinion states that plaintiffs sought to recover the costs of "medical surveillance, health effect studies, and health assessments."<sup>235</sup> These

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<sup>230</sup> *Id.* at 1247.

<sup>231</sup> The court claimed to derive its reasoning from the principle of *eiusdem generis*, but did not actually employ that principle. See *id.*; *supra* notes 210-12 and accompanying text.

<sup>232</sup> *Ambrogi*, 750 F. Supp. at 1247.

<sup>233</sup> *Id.* at 1248. The court further observed that CERCLA "was enacted 'as a legislative response to the growing problem of toxic wastes, many of which were disposed of before their dangers were widely unknown [sic] and had contaminated precious land and water resources.'" *Id.* at 1247 (quoting *Artesian Water Co. v. New Castle County*, 659 F. Supp. 1269, 1285 (D. Del. 1987)). In the context of a case involving contamination from a lead battery processing plant, this observation is inaccurate. The knowledge about the dangers of lead is ancient. Novelist and chemist Primo Levi wrote of a lead merchant: "[B]ut right there was the lead: I felt it under my feet, turbid, poisonous, and heavy . . . my hands and knees have begun to shake, and my teeth and gums have turned blue . . ." PRIMO LEVI, *THE PERIODIC TABLE* 95 (1984); see, e.g., *Children at Risk*, 278 NATURE 1253 (1970); Thomas J. Haley, *Saturnism, Pediatric and Adult Lead Poisoning*, in *CLINICAL TOXICOLOGY*, Mar. 1971, at 11 (stating that lead exposure and resulting "[s]aturnism or planetism with all its deleterious effects on the human body was well known to the Greeks and Romans"); F.D. Timmins, *The Danger of Lead in Paints*, *ANNALS OF OCCUPATIONAL HYGIENE*, Apr. 15, 1972, at 117 (discussing British lead paint regulations dating back to 1927).

<sup>234</sup> See *supra* text accompanying note 207.

<sup>235</sup> *Ambrogi*, 750 F. Supp. at 1244. The court's disinclination to view the plaintiffs' requests favorably may have been encouraged by plaintiff's having requested costs for "transportation expenses, attendance at public meetings, and the loss of beneficial use of gardens and property, and participation in citizens associations and groups formed to aid an investigation in cleanups efforts," *id.*, in addition to medical costs.

requests were less comprehensive than the medical treatment requested by plaintiffs in *Daigle* and are arguably in line with CERCLA's general purpose of effecting a thorough and efficient cleanup of hazardous waste sites.

In fact, medical monitoring and surveillance information of the type requested in *Ambrogi* could be used as an indicator of the success or failure of a cleanup. For example, data as to the continuing health effects of lead levels in the soil and water around the homes of the *Ambrogi* plaintiffs would be invaluable information in determining the completeness of the cleanup.

However, the burden remains on plaintiffs to frame their pleadings narrowly so as to make courts understand that they are seeking cleanup expenses and not personal damages or reimbursement for past or future economic loss. The *Ambrogi* plaintiffs probably would have done better by linking their request for "health effect" studies to CERCLA's statutory purpose to promote cleanup of the environment and the health of the people who occupy it. The problem for the environmental justice reformer is that there are no clearly distinct terms to indicate when a party seeks monitoring and not treatment. Terms such as "health effects" and "assessment" studies are too ambiguous to clarify the differences between the meanings of the terms.

The advocate therefore must be conscious of the need to educate courts—in pleadings and at oral arguments—as to the differences between each of the following activities: monitoring, diagnosis, and treatment. The advocate should formulate a long-term strategy aiming to seek recovery for medical treatment costs through tort or other causes of action only after sufficient CERCLA medical monitoring data has been collected to provide information about negative health effects before, during, and after a CERCLA cleanup. In addition, plaintiffs should specify exactly what studies they have conducted, and plan to conduct, together with an estimate of costs and other details.<sup>236</sup>

It is crucial to draft pleadings carefully so as to respect the courts' wariness about awarding response costs that might be characterized as efforts to recover for personal damages or economic loss. Such pleadings should

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*See id.* at 1250 (stating that "organizational costs" such as transportation and attendance at public meetings are not covered by the statute). The expansiveness of the plaintiffs' claims may have made the court especially reluctant to grant any of them, for fear of broadening potential avenues for recovery under CERCLA. The lesson for the environmental justice advocate may be, regrettably, that claims for relief sought under CERCLA cost recovery actions should be reduced to the absolute minimum if they are to succeed.

<sup>236</sup> In deciding what studies to conduct and how to conduct them, plaintiffs may avail themselves of existing models. *See supra* note 39 and accompanying text; *supra* text accompanying notes 46-47.

address the question posed by Chief Judge Conaboy, the trial judge in *Ambrogi*, who felt

compelled to respond to one basic and very practical question that has remained unanswered throughout our analysis. That is, if the cost for air, soil, and water testing and monitoring can be recovered under CERCLA, why is the cost for assessing the human condition, through medical screening and other biological testing, not covered under this statute.<sup>237</sup>

His answer was two-fold. First, like the *Coburn* court, he looked to the creation of the ATSDR under SARA as the sole remedial provision for medical monitoring.<sup>238</sup> Second, he argued that "the traditional remedies of state tort actions are available to an aggrieved individual."<sup>239</sup>

Both of these responses miss the point. As one commentator has eloquently argued, the ATSDR was neither intended to serve nor has it been used to conduct the sort of medical monitoring appropriate as evidence of contamination at an individual CERCLA site; the ATSDR is not an exclusive remedy under CERCLA for the assessment of possible damage to health.<sup>240</sup> As even the *Daigle* court recognized, "the liability and fund-

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<sup>237</sup> *Ambrogi*, 750 F. Supp. at 1249.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 1249-50.

<sup>240</sup> Tanenbaum, *supra* note 38, at 945-46 (explaining the role and enforcement of the ATSDR); see also Blumenberg, *supra* note 58, at 677 (recognizing that the ATSDR does not provide compensation for toxic exposure victims' medical monitoring); Environmental Research Foundation, *Congress Creates A Monster: The ATSDR* (pt. 1 of *What Has Gone Wrong?*), RACHEL'S HAZARDOUS WASTE NEWS, July 1, 1992, at 1 (detailing agency mismanagement, limited resources, and lack of focus); *Health Risk Assessments at Waste Sites Assailed Superfund Studies Not Useful*, GAO Says, S.F. CHRON., Sept. 4, 1991, at A2 (describing how the ATSDR "was so rushed that for 165 Superfund sites it simply found documents already prepared for other reasons and called them health assessments"); cf. Brennan, *supra* note 20, at 50 n.175 (citing *In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 852 (3d Cir. 1990), *cert. denied*, 499 U.S. 961 (1991), in which an ATSDR study and ATSDR documents served a significant role in the Third Circuit's decision to overturn the lower court's decision to grant defendant's summary judgment motion). The ATSDR "has established Community Assistance Panels (CAPs) to provide a means of exchanging information with communities during public health assessments." Chase, *supra* note 16, at 365. However, studies continue to validate Tanenbaum's observations of the ATSDR's limitations due to its narrow mandate and sparse resources. See, e.g., *ATSDR Finds Higher-Than-Average Disease Rates Among People Exposed to TCE in Drinking Water*, [Current Developments] 24 Env't Rep. (BNA) 465, 465-66 (July 16, 1993) (discussing a long-term study of 5000 subjects who had been exposed to TCE in which results were compared to the general population and segregated by age and sex, but not by race).

Furthermore, the ATSDR is not funded at levels that will make a serious difference for people affected by environmental injustice. Tanenbaum, *supra* note 38, at 946;

ing for ATSDR costs are separate from response costs.”<sup>241</sup> Furthermore, Chief Judge Conaboy’s suggestion that plaintiffs use state tort claims is an unacceptable solution because some states do not allow recovery of medical monitoring costs, or establish substantial barriers to such recovery,<sup>242</sup>

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see, e.g., *ATSDR Makes \$750,000 Available in 1994 for Site-Specific Health Impact Studies*, [Current Developments] 24 Env’t Rep. (BNA) 638 (Aug. 13, 1993). This amount will be divided into ten awards to be distributed among state, territorial, and Indian public health agencies. Inasmuch as a single cleanup of an uncontrolled hazardous waste site can exceed this amount by several hundred percent, it cannot be said that the ATSDR constitutes a serious commitment to studying the public health threat of individual toxics sites. Cf. Keith Schneider, *E.P.A. Superfund at 13: A White Knight Tarnished*, N.Y. TIMES, Sept. 6, 1993, at 7 (reporting that the average Superfund cleanup now takes more than 10 years and costs on average more than \$30 million).

<sup>241</sup> Daigle v. Shell Oil Co., 972 F.2d 1527, 1537 (10th Cir. 1992).

<sup>242</sup> See, e.g., Ball v. Joy Technologies, Inc., 958 F.2d 36, 38-39 (4th Cir. 1991) (affirming the district court’s ruling that “the common law of West Virginia and Virginia would not allow the plaintiffs to recover damages for emotional distress or the costs of medical surveillance” and citing decisions from “[n]umerous courts [that] have held that exposure to hazardous substances does not constitute a physical injury”). Congress was aware of the limitations of state tort causes of action when it passed CERCLA. The 1980 CERCLA Senate Committee Report cited a Library of Congress study concluding that victims of chemical disasters who resorted to state law remedies found that

the legal mechanisms in the States studied [Alabama, California, Michigan, Missouri, New Jersey, and Texas] are generally inadequate for redressing toxic substances-related harms, and traditional tort law presented substantial barriers to recovery . . . . [S]eeking compensation for pollution-related injuries is usually cumbersome, time-consuming and expensive. In the releases studied (some involving many exposures), few cases were filed and final judgments were rarely obtained . . . . [A]s a consequence of these difficulties, the compensation ultimately provided to injured parties is generally inadequate.

S. REP. NO. 848, *supra* note 49, at 13-14.

State tort laws indicate widely divergent state standards for medical monitoring relief. For example, Delaware, Florida, Illinois, Virginia, West Virginia, and even New Jersey (which was once viewed as an especially progressive jurisdiction for medical monitoring awards) require proof of physical injury—a difficult standard to meet. See *Delaware*: Mergenthaler v. Asbestos Corp. of Am., 480 A.2d 647, 651 (Del. 1984) (requiring direct contact with a toxic contaminant); *Florida*: Eagle-Picher Indus. v. Cox, 481 So. 2d 517, 521 (Fla. Dist. Ct. App. 1985) (intimating a requirement of physical injury and stressing the importance of finality to remove the burden from defendants of protracted litigation and anticipating lawsuits); *Illinois*: Campbell v. A.C. Equipment Serv. Corp., 610 N.E.2d 745, 748 (Ill. App. Ct. 1993) (stating that a cause of action to recover medical monitoring costs will be recognized if current physical injury is present); *Virginia and West Virginia*: Ball v. Joy Mfg., 755 F. Supp. 1344, 1371 (S.D. W. Va. 1990) (finding that both Virginia and West Virginia law preclude recovery without evidence that “future [medical] expenses are reasonably certain to be incurred as a result of an injury of the plaintiff that was proximately caused by the defendant’s actions”), *aff’d*, 958 F.2d 36 (4th Cir. 1991); *New Jersey*: Theer v. Philip

Carey Co., 628 A.2d 724, 733 (N.J. 1993) (stating that the "special compensatory damage" remedy affirmed in *Ayers v. Township of Jackson*, 525 A.2d 287, 311 (N.J. 1987), "is not easily involved," and requires experience of "direct and hence discrete exposure to a toxic substance").

Other states apply less stringent standards, typically requiring evidence of damaging exposure if not actual injury. Nonetheless, the standards vary enormously as to what plaintiffs must show. *See Arizona*: *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 33 (Ariz. Ct. App. 1987) (holding that, in order to obtain medical monitoring costs, the presence of injury is not required if the plaintiff has been seriously exposed to asbestos and is at risk of disease); *California*: *Miranda v. Shell Oil Co.*, 17 Cal. App. 4th 1651, 1657 (Ct. App. 1993) (stating that a toxic-tort plaintiff can obtain medical monitoring costs by demonstrating a reasonable certainty of after-effects due to the toxic substance exposure); *Kentucky*: *Bocook v. Ashland Oil Co.*, 819 F. Supp. 530, 537 (S.D. W. Va. 1993) (determining Kentucky's standard to require only proof of some slight physical harm and concluding that monitoring is desirable because of the benefits of early disease detection); *Michigan*: *Meyerhoff v. Turner Constr. Co.*, 509 N.W.2d 847, 850 (Mich. Ct. App. 1993) (holding that medical monitoring expenses are compensable when the plaintiff has proven "that such surveillance to monitor the effect of exposure to toxic substances . . . is reasonable and necessary" and listing among the factors to be considered in determining whether medical monitoring damages are reasonable and necessary: "[T]he significance and extent of the exposure; the toxicity of the substance; the seriousness of the diseases for which individuals are at risk; the relative increase in the chance of onset of disease in those exposed; and the value of early diagnosis"); *New York*: *Askey v. Occidental Chem. Corp.*, 102 A.D.2d 130, 137 (N.Y. App. Div. 1984) (holding that medical monitoring costs are available if the plaintiff has an increased risk of contracting disease as a result of exposure); *North Carolina*: *Carroll v. Litton Sys., Inc.*, No. B-C-88-253, 1990 WL 312969, at \*51-52 (W.D.N.C. Oct. 29, 1990) (holding that under North Carolina law, a state court would decline to create such a tort and that, at a minimum, such an action could be maintained only if a plaintiff made "a prima facie case on medical causation"); *Ohio*: *Verbryke v. Owens-Corning Fiberglas Corp.*, 616 N.E.2d 1162, 1167 (Ohio Ct. App. 1992) (recognizing that once exposure to asbestos is discovered, "it now becomes medically prudent to monitor [plaintiff's] condition"); *Pennsylvania*: *Merry v. Westinghouse Elec. Corp.*, 684 F. Supp. 847, 850 (M.D. Pa. 1988) (stating that "in order to recover medical surveillance costs, plaintiff must establish (1) exposure to hazardous substances; (2) potential for injury; and (3) the need for early detection and treatment"); *Utah*: *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 979 (Utah 1993) (holding that in order to obtain medical monitoring costs, a plaintiff must prove exposure to a toxic substance caused by defendant's negligence and that the exposure significantly increased the risk of harm to the plaintiff).

This is not to say that state environmental tort claims will always fail. *See Brennan, supra* note 20, at 52-54 (discussing the information-creating aspects of state right-to-know statutes); *cf. Recent Developments*, [1993 News & Analysis] 23 *Env'tl. L. Rep.* (Env'tl. L. Inst.) 10,392, 10,392 (June 1993) (discussing *Escamilla v. Asarco, Inc.*, No. 91 CV 5716 (D. Colo. Apr. 23, 1993), *settlement approved*, *Escamilla v. Asarco, Inc.*, No. 91 CV 5716 (D. Colo. Nov. 5, 1993)):

A Colorado district court, in a class action suit about contamination to real property, entered judgment against the defendant for \$28,125,000. . . . The court held that although a proposed CERCLA settlement between the defendant and Colo-

to say nothing of the considerable burdens such actions place on plaintiffs.<sup>243</sup>

### 3. *Cook v. Rockwell International Corp.*<sup>244</sup>

Of the cases cited in support of the *Coburn* analysis, *Cook* is of special interest. Decided by the United States District Court for the District of Colorado—a court within the Tenth Circuit, which would decide *Daigle* only one year later—*Cook* staked out a moderate position with respect to the recovery of CERCLA medical monitoring costs. Although *Cook* is generally cited as one of the cases to support the *Coburn* position,<sup>245</sup> when read carefully *Cook* takes a more considered view of the issue, one from which environmental justice advocates can learn. In fact, the decision is rich with potential for the environmental justice cause.

In *Cook*, the plaintiffs—individuals and businesses who owned land near the Rocky Flats Nuclear Weapons Plant—sought medical monitoring costs under CERCLA to study both the health and the environmental effects of any releases from the plant.<sup>246</sup> The district court held that some medical monitoring costs were not recoverable under CERCLA.<sup>247</sup>

In part, *Cook* adopted the logic of *Coburn*, as expanded by *Ambrogi*. The *Cook* court favorably noted *Ambrogi*'s emphasis on the availability of medical monitoring through both the ATSDR and state toxic tort actions.<sup>248</sup> The court distinguished between health and environmental monitoring by granting the defendant's motion to dismiss "the portion of plaintiffs' CERCLA claim that seeks to recover the costs of medical testing to monitor the health effects of defendants' releases,"<sup>249</sup> but denying "defendants' motions concerning the portion of plaintiffs' CERCLA claim that seeks to recover the costs of medical testing necessary to monitor the *environmental* effects of defendants' releases."<sup>250</sup> The court explained that "[i]f plaintiffs can show that medical testing is necessary to monitor the *environmental* effects of a 'release' or 'threatened release,' the costs of such medical testing plainly fall within the purview of section 9601(25)."<sup>251</sup>

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rado provides for remediation of the class members' property under the state record of decision, the jury's verdict represents its conclusion, supported by the evidence that the proposed CERCLA settlement is "woefully inadequate" to compensate class members for defendant's negligence.

<sup>243</sup> Blumenberg, *supra* note 58, at 667-75 (discussing the inadequacy of traditional tort analysis when applied to toxic-tort actions).

<sup>244</sup> 755 F. Supp. 1468 (D. Colo. 1991).

<sup>245</sup> See, e.g., *Daigle*, 972 F.2d at 1535.

<sup>246</sup> *Cook*, 755 F. Supp. at 1471.

<sup>247</sup> *Id.* at 1474.

<sup>248</sup> *Id.* (citing *Ambrogi*, 750 F. Supp. at 1248-49).

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 1472.

<sup>251</sup> *Id.* at 1474 (emphasis added). Earlier in the decision, Judge Babcock stated

As argued earlier, the distinction between health and environmental effects is logically insupportable, given that health is directly related to and affected by the environment of which it is a part.<sup>252</sup> Nonetheless, *Cook* provides a precedent from which the environmental justice advocate can articulate and build a CERCLA medical monitoring claim seeking response costs for continuing *medical testing* of the people who live and work in a contaminated *environment*.<sup>253</sup> If plaintiffs have limited financial resources and must therefore request medical treatment, *Cook* suggests that such requests should be clearly bifurcated from requests for relief under section 107(a)(4)(B), and instead be sought under other causes of action—at least until a favorable medical monitoring case law is more fully developed. In this way, plaintiffs may recover for medical monitoring costs as part of a strictly “environmental” assessment.

Admittedly, *Cook* is not entirely sympathetic to CERCLA medical monitoring claims. However, even to the extent that the court disallowed such claims, its decision further suggests that such CERCLA response costs constitute an appropriate alternative for communities seeking to learn the incidence of toxic contamination on them and the environment in which they live. On the one hand, in dicta the court indirectly recognized the difficulty of bringing state tort claims in such cases: “Although Colorado has yet to do so, I conclude that the Colorado Supreme Court

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that costs of recovery for post-judgment studies would not be allowed: “As plaintiffs acknowledge, CERCLA allows recovery only of costs that have been incurred by a plaintiff before judgment.” *Id.* at 1473 (citing *Williams v. Allied Automotive Autolite Div.*, 704 F. Supp. 782, 784 (N.D. Ohio 1988)). However, Judge Babcock failed to note a crucial point in *Williams*, namely “that although *liability* for future costs *can presently be determined and declaratory relief granted*, the Court cannot award costs until they are incurred.” *Williams v. Allied Automotive Autolite Div.*, 704 F. Supp. 782, 784-85 (N.D. Ohio 1988) (citing *United States v. Conservation Chem. Co.*, 628 F. Supp. 391, 407-08 (W.D. Mo. 1985), *Jones v. Inmont Corp.*, 584 F. Supp. 1425, 1430 (S.D. Ohio 1984), *United States v. Northeastern Pharmaceutical & Chem. Co.*, 579 F. Supp. 823, 852 (W.D. Mo. 1984), *State ex rel. Brown v. Georgeoff*, 562 F. Supp. 1300, 1316 (N.D. Ohio 1983)); see *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380, 1387 n.11 (5th Cir. 1989); *Bowen Eng'g v. Estate of Reeve*, 799 F. Supp. 467, 476 (D.N.J. 1992); *Rockwell Int'l Corp. v. IU Int'l Corp.*, 702 F. Supp. 1384, 1388 (N.D. Ill. 1988). Thus, *liability* for future recovery costs—such as medical monitoring—can be established, even though costs cannot be *awarded* until incurred.

<sup>252</sup> See *supra* part V.A.

<sup>253</sup> Tactically, the environmental justice advocate should recognize that courts tend to view ambitious requests for compensation of medical monitoring with extreme suspicion. For example, in *Woodman v. United States*, 764 F. Supp. 1467 (M.D. Fla. 1991), plaintiffs sought medical monitoring costs that included transportation, lodging, and meal costs associated with their attendance at conferences on chemical contamination. *Id.* at 1469. The court rejected these expenses on the ground that they did not further the purpose of cleaning up a hazardous waste site. *Id.* at 1470; see *supra* note 235 and accompanying text.

would probably recognize, in an appropriate case, a tort claim for medical monitoring."<sup>254</sup> On the other hand, the court stated that "the allegation of mere risk of exposure, and not exposure in fact, is inadequate."<sup>255</sup> Herein lies the Catch-22: "[M]ere risk" is not enough to bring a claim, but the "mere risk" may not become "exposure in fact" for years to come.<sup>256</sup> As applied to CERCLA, this logic conflicts with the statute's purpose of completely and thoroughly cleaning up contaminated waste sites. The environmental justice advocate should emphasize that the people who live and work near a site could provide invaluable evidence of the damaging effects of contamination before, during, and after a cleanup. In addition, long-term medical monitoring of these populations will help assure that the statute protects the public health, welfare, and the environment.

The *Cook* court concluded that the Colorado Supreme Court would not

recognize as cognizable plaintiffs' claim for generalized scientific studies.

A medical monitoring claim compensates a plaintiff for diagnostic treatment, a tangible and quantifiable item of damage caused by a defendant's tortious conduct. Such relief is akin to future medical expenses. The claim does not compensate a plaintiff for testing others to determine the odds that a particular person might contract a disease.<sup>257</sup>

Thus, the court appears to state that testing is the first stage in diagnosis, which is in turn the first stage in treatment. As this Article has stressed, there is no statutory basis to support this "slippery slope" argument.

Although *Cook*'s analysis is more favorable for advocates of CERCLA medical monitoring claims than it is usually given credit for, it would be mistaken to view the case as a wholesale endorsement of the position outlined in this Article. For instance, in the above-quoted language, *Cook* suggests that medical monitoring actions should be framed as individual and not as group claims. However, the environmental justice advocate will argue that it is not only conceivable but likely that if one person who lives or works in a particular area shows signs of being affected by contamination, others in the area will manifest comparable symptoms. It is therefore reasonable for a court to permit community plaintiffs as a group to advance medical monitoring claims if some of them evidence exposure symptoms meriting evaluation. Yet the *Cook* court did not explain why *every* member of the community must demonstrate exposure—as opposed to the generalized class—in order to estab-

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<sup>254</sup> *Cook*, 755 F. Supp. at 1477 (emphasis added).

<sup>255</sup> *Id.*

<sup>256</sup> See Blumenberg, *supra* note 58, at 669 (discussing procedural obstacles that may hinder recovery in toxic exposure cases).

<sup>257</sup> *Cook*, 755 F. Supp. at 1478.

lish a medical monitoring claim.<sup>258</sup> The result is that poor people in poor communities cannot pool their resources in support of a common need.

Nonetheless, a careful reading of *Cook* confirms that it is far less dismissive of possible CERCLA medical monitoring claims than other courts—including the *Daigle* court—have claimed. As such, *Cook* acts as a bridge to the cases that are generally held to endorse the proposition that medical monitoring expenses are recoverable costs of response under CERCLA.

D. *The Error of Coburn and Its Progeny: Learning from Brewer v. Ravan*<sup>259</sup>

In uncritically following *Coburn*'s logic, subsequent courts have consistently narrowed CERCLA's scope by ignoring the statutory requirement that liable parties must take all steps necessary in a "removal" action to prevent, minimize, or mitigate damage to the public health or welfare, or to the environment.<sup>260</sup> The environmental justice advocate therefore must simultaneously emphasize the overly narrow readings of CERCLA's response cost provisions—and also, as with *Daigle*, misreadings of medical monitoring decisions—and remain focused on the short-term goal of winning response costs for medical monitoring. The advocate must educate courts that medical monitoring, taken alone, does not transform CERCLA into a toxic tort recovery statute.

In addition to *Cook*, a good source from which to begin to draw such lessons is the opinion of Chief Judge Wiseman in *Brewer*, a class action filed by former employees of a capacitor manufacturing plant and their families in Tennessee.<sup>261</sup> The plaintiffs alleged violations not only of CERCLA, but also of three other major federal environmental laws.<sup>262</sup>

<sup>258</sup> Cf. *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988):

[In] mass tort accidents, the factual and legal issues of a defendant's liability do not differ dramatically from one plaintiff to the next. No matter how individualized the issue of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action. Consequently, the mere fact that questions peculiar to each member of the class remain after the common questions of the defendant's liability have been resolved does not dictate the conclusion that a class action is impermissible.

<sup>259</sup> 680 F. Supp. 1176 (M.D. Tenn. 1988). The environmental justice advocate should note that Chief Judge Wiseman is a federal district court judge within the southeast United States, the geographic area that largely overlaps with EPA Region IV, a region that has one of the highest concentrations of uncontrolled hazardous waste sites in the nation. See COMMISSION REPORT, *supra* note 2, at xiv, 19-20, tbl. B-7 (listing the locations of the highest concentrations of hazardous waste sites along with respective minority populations).

<sup>260</sup> See *supra* part V.C.

<sup>261</sup> *Brewer*, 680 F. Supp. at 1178.

<sup>262</sup> *Id.* (alleging violations of the Resource Conservation and Recovery Act of 1976 (RCRA), 42 U.S.C. §§ 6901-6986 (1988), the Clean Water Act of 1977 (CWA), 33

The defendants moved to dismiss for failure to state a claim upon which relief could be granted.<sup>263</sup>

The court denied the motion with respect to the claim for medical monitoring costs, finding that treatment is a discrete activity, distinguishable from medical testing or surveillance.<sup>264</sup> *Brewer* thus recognized that medical *treatment* costs are not compensable as "necessary costs of response."<sup>265</sup> However, the court also recognized that because "[p]ublic health related medical tests and screening clearly are necessary to 'monitor, assess, [or] evaluate a release,' [they] therefore constitute 'removal' under [CERCLA] section 9601(23)."<sup>266</sup> The court stated further that "[t]o the extent that plaintiffs seek to recover the cost of medical testing and screening conducted *to assess the effect of the release or discharge on the public health or to identify potential public health problems presented by the release*, however, they present a cognizable claim under section 9607(a)."<sup>267</sup> By contrast, *Coburn* relied upon the assumption that at a specific moment "cleanup" is underway and the threat of contamination disappears, thereby removing dangers to the public health and welfare.<sup>268</sup>

Following *Brewer*, a properly constructed medical monitoring plan would test people before, during, and after a CERCLA cleanup. Such a plan would indeed monitor, assess, and evaluate in the preferred dictionary meanings of those words. *Brewer* thus supports the proposition that human beings whose medical conditions are monitored, assessed, and evaluated during and following a CERCLA cleanup can provide evidence of the cleanup's success in eliminating the threat of hazardous wastes.<sup>269</sup>

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U.S.C. §§ 1251-1377 (1988), and the Toxic Substances Control Act of 1976 (TSCA), 15 U.S.C. §§ 2601-2629 (1988)).

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 1179.

<sup>265</sup> *Id.* (noting that "CERCLA's legislative history clearly indicates that medical expenses incurred *in the treatment of personal injuries or disease* caused by an unlawful release or discharge of hazardous substances are not recoverable under section 9607(a)" (citations omitted)).

<sup>266</sup> *Id.* This statement is the one with which the *Coburn* court took exception, explaining that "we find it difficult to understand how future medical testing and monitoring of persons who were exposed to contaminated well water prior to the remedial measures currently underway will do anything to 'monitor, assess, [or] evaluate a release' of contamination from the site." *Coburn v. Sun Chem. Corp.*, 28 Env't Rep. Cas. (BNA) 1665, 1671 (E.D. Pa. 1988).

<sup>267</sup> *Brewer*, 680 F. Supp. at 1179 (second emphasis added).

<sup>268</sup> *Coburn*, 28 Env't Rep. Cas. (BNA) at 1671.

<sup>269</sup> Medical monitoring could reduce costs to industry in the long run by identifying injuries that may not manifest themselves until years later. Thus, the earlier the detection, the earlier and less-expensive the treatment and cure. Also, by paying for medical monitoring costs in the present, possible defendants could avoid fraudulent claims in the future by ensuring that exposure to hazardous substances are contained or at least rendered negligible.

It should be stressed that a successful CERCLA medical monitoring claim must strive not only to satisfy the statute's general mandate to protect the public health or welfare, or the environment—it must also specifically link cost recovery requests to particular, statutorily-mandated activities. The environmental justice advocate should outline the sense in which medical surveillance is necessary to *monitor, assess, and evaluate* the success and efficiency of a cleanup. This may mean devising a plan of action that is backed up with scientific, medical, and engineering data.<sup>270</sup>

Unlike *Coburn*, by allowing plaintiffs to proceed past the motion to dismiss, the decision in *Brewer* supports the notion that a court should have the opportunity to hear adequate expert and other testimony concerning the possible benefits of medical monitoring. During discovery, plaintiffs thus could gather medical, engineering, and scientific evidence as to the possible usefulness of medical surveillance in a thorough and efficient cleanup plan.<sup>271</sup> Precisely because “necessary costs of response” is an ill-defined term in the statute, courts therefore should allow such discovery to explore the possible advantages of medical monitoring.

#### CONCLUSION

The cases disallowing CERCLA medical monitoring and surveillance expenses as necessary costs of response under section 107(a)(4)(B) promote an approach to federal environmental statutes that considers the

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Despite this logic, courts often seem reluctant to award medical monitoring costs for fear that to do so would lead to corporate economic devastation. *See, e.g., Ball v. Joy Mfg.*, 755 F. Supp. 1344 (S.D. W. Va. 1990) (rejecting the plaintiffs' medical monitoring claim purely for economic reasons); *supra* note 242. Although the *Ball* court found meritorious reasons for allowing individuals to recover the costs of medical monitoring, it held that compensating the plaintiffs when they had suffered no demonstrable injury could devastate the corporate defendant. *Id.* at 1372.

<sup>270</sup> The potential costs of obtaining such data can seem daunting to grassroots groups unaccustomed to dealing with—and requesting help from—professionals. However, in my experience, medical professionals often are eager to help testify on behalf of efforts that they see as promoting the larger goal of preventive health care. The same is likely to hold true for scientists and engineers. Part of the task here is to make information about potential resources available to communities. New York City's plan to create neighborhood “environmental watchpersons” is one effort to fill this gap. *See GREENPOINT*, *supra* note 103, at 14; Hernandez Interview, *supra* note 103.

<sup>271</sup> *Brewer* recognized, by contrast, the fact that the motion to dismiss required a more developed factual record: “Although . . . it is unclear whether the medical tests and screening allegedly conducted by plaintiffs were public health related, at this early stage of the proceedings, the Court cannot say that it appears beyond doubt that plaintiffs can prove no set of facts in support of their CERCLA claim.” *Brewer*, 680 F. Supp. at 1179-80; *cf. Hopkins v. Elano Corp.*, 30 Env't Rep. Cas. (BNA) 1782 (S.D. Ohio 1989) (finding that the plaintiffs' summary judgment motion was too early in this context, and allowing that some costs might be compensable).

environment in isolation from the society that inhabits it.<sup>272</sup> In this way, the cases analytically separate environmental concerns from a larger agenda for social reform. They promote a technical, scientific environmental regime that relies upon an alienating array of statistics and regulations criticized by Cole and others. As noted in Part II of this Article, the burgeoning environmental justice movement already is deeply suspicious of this regime. As a consequence, the courts that have disallowed CERCLA medical monitoring have given further justification to the suspicions of those fighting for environmental justice, and have rendered one of our principal federal environmental laws partly ineffective as a means to address concerns of poisoned communities that bear the brunt of our industrial pollution.

If it were not a cause for national disgrace, there would be a particular irony in this. CERCLA was in large part a response to the health problems suffered by residents of places like Love Canal, New York, who lived on top of chemical contamination.<sup>273</sup> Yet tragically, "[o]f the \$4.2 billion spent annually in the United States, less than one percent has gone to study health risks."<sup>274</sup> The CERCLA medical monitoring lawsuit can help redirect the focus of the statute and allow it to accomplish its original goals more effectively.

This Article ultimately is a plea for lawyers to serve a mediating function by using federal environmental laws, along with political empowerment, equal protection challenges, participation in the administrative and rulemaking processes, and state law causes of action, as strategic tools to oppose widespread instances of environmental injustice.

It is my further hope that this Article will prompt environmental lawyers to explore the whole arsenal of federal environmental laws to the advantage of beleaguered, poor communities, and particularly communities of color. For example, lawyers should rely not only upon CERCLA medical monitoring lawsuits, but they also should educate their clients and encourage them to press for more vigorous enforcement of criminal sanctions, under CERCLA, RCRA, TSCA, and other statutes, against corporate officers whose companies pollute.<sup>275</sup> Other options may

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<sup>272</sup> See *supra* part V.B.

<sup>273</sup> See, e.g., S. REP. NO. 848, *supra* note 49, at 8-10.

<sup>274</sup> Environmental Research Foundation, *National Academy Study Says Superfund Dumps Cause Many Illnesses in Humans*, RACHEL'S HAZARDOUS WASTE NEWS, Feb. 5, 1992, at 1 (reprinting Anthony B. Miller, *Assessing the Threat of Toxic Waste Sites*).

<sup>275</sup> For a summary of the most important of these sanctions, see R. Christopher Locke, *Environmental Crimes: The Absence of "Intent" and the Complexities of Compliance*, 16 COLUM. J. ENVTL. L. 311, 314-18 (1991). The environmental crimes section of the U.S. Department of Justice has increasingly come under attack for being too lenient in its prosecution of corporate offenders. See, e.g., Diana R. Gordon, *Can Reno Be the People's Lawyer?*, 258 THE NATION 370, 371 (1994) (alleging that Attorney General Janet Reno "doesn't have a clue" about the failings of the U.S.

include tactics such as opposing emissions trading credits under the revised Clean Air Act<sup>276</sup> when they adversely and consistently affect the poor and communities of color. In short, environmental lawyers should recognize that they have a vital role to play in protecting the public health *and* welfare, *and* the environment.

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Department of Justice's environmental crimes unit (quoting an anonymous environmental lawyer)); *Environmental Crime Unit Probed*, CHI. TRIB., June 10, 1993, at 25.

<sup>276</sup> Clean Air Act, § 173, 42 U.S.C. § 7503 (1988 & Supp. IV 1992) (providing for the granting of permits to new emissions sources so long as emissions are reduced in other nearby locales).