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DRIVING THE ENVIRONMENTAL JUSTICE MOVEMENT FORWARD: THE NEED FOR A PATERNALISTIC APPROACH

I. INTRODUCTION

Since the early twentieth century, Americans have been concerned about the environment. The environmental agenda has evolved as society changed and public awareness of environmental concerns has grown. In the post-industrial age, communities across the country have been forced to deal with increased adverse effects of development that have soured the environment. As a direct result of the fact that not all communities are able to deal adequately with the problem, this country has seen the rise of one of the newest environmental concerns: the disproportionate impact of environmental hazards on poor and minority populations. Today, this is viewed as one of the most serious environmental problems facing our nation and, as a result, thousands have joined in the quest for "environmental justice."

Currently, there are several different approaches being used and advocated to attack the problem of environmental inequities. To date, non-paternalistic approaches have been the main route for advocates of environmental justice. Yet, despite the availability of numerous non-paternalistic avenues for correcting this problem, there is a disturbing absence of real improvement on the large scale. Therefore, this Comment suggests that a paternalistic approach is needed in the short term.

This country has a strong tradition of criticizing paternalistic legislation.¹ Recently, this attitude is beginning to resurface with

1. The Supreme Court opined early in this century that paternalistic statutes are "meddlesome interferences with the rights of the individual." *Lochner v. New York*, 198 U.S. 45, 61 (1905) (holding a statute that limited the working hours of bakers unconstitutional as it did not fall within the police power exemption). However, recently the Supreme Court has stated that "rational paternalism is a legitimate legislative goal." *Walters v.*

respect to the plethora of paternalistic initiatives being generated by governments to address environmental inequities.² In addition, many commentators continue to advocate pure non-paternalistic solutions to this problem.³ However, this paper will show that although there are clear benefits to a non-paternalistic approach, it is not feasible because of the inability of members of the affected communities to both develop and activate an initiative themselves. Therefore, this paper does not endorse a paternalistic approach to the problem of environmental injustice because it is inherently "good;" rather it proposes that some form of a paternalistic initiative by the government is a necessary interim step.

Part II of this Comment provides background on the adverse effects that low-income, minority communities suffer through a brief discussion of the relevant statistical evidence. It goes on to contemplate why poor minorities are disproportionately affected. Part III discusses the concept of paternalism in general and, specifically, surveys paternalistic and non-paternalistic solutions to environmental inequities. Part IV begins by acknowledging the benefits of a non-paternalistic solution, yet illustrates why a non-paternalistic approach is not an adequate short-term alternative. This Comment concludes by suggesting that a non-paternalistic future initiative will be strengthened by an interim paternalistic step.

II. THE CURRENT SITUATION

A. *What Do the Studies Show?*

Over the past fifteen years, in accordance with the increasing momentum of the environmental justice movement, there have been numerous studies commissioned to analyze distributional effects of

National Ass'n of Radiation Survivors, 473 U.S. 305, 323 (1985). See David Shapiro, *Courts, Legislatures and Paternalism*, 74 VA. L. REV. 519, 539-40 (1988) (discussing why and how the Supreme Court came to recognize and tolerate the distributive motives of protectionist legislation).

2. See, e.g., Johnnie J. Brown, *Chasing the "Tail" of Environmental Racism; Who is the Pit Bull?*, ILL. LEGAL TIMES, Sept. 1994, at 10 (noting that the federal government's initiative on environmental equity is paternalistic and "predictably wrong-footed: it will make it harder, if not impossible, to do business in poor and minority neighborhoods").

3. See, e.g., Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 ECOLOGY L.Q. 619, 648 (1992) [hereinafter, Cole, *Empowerment as the Key*] (contending that "a political tool is required to change . . . [an unfair] decision: a community-based movement to bring pressure on the person or agency making the decision").

various activities affecting the environment. These studies seek to determine if the distributional effects are more severe in minority and/or low income neighborhoods. Two notable investigations have found evidence which supports the nexus between environmental hazards and low income, minority communities.⁴

The first major study was performed by the General Accounting Office (GAO).⁵ The study, completed in 1983, examined four hazardous waste landfills.⁶ Of these four, three were found to be located in predominately poor, black communities.⁷ Because of its limited scope, the GAO study was useful primarily as a catalyst for other investigations into disproportional environmental policies.⁸

The main study that resulted from the GAO findings was performed by the United Church of Christ's Commission for Racial Justice. The Commission's findings, published in a report entitled *Toxic Wastes and Race in the United States*, focused primarily on whether race was a valid indicator of environmental hazards.⁹ The Commission concluded that in the 35,749 zip code regions studied, race was the single most significant factor in the location of commercial hazardous waste facilities.¹⁰

Significantly, other commentators also note that minority communities receive less government protection than non-minority communities. A study recently completed by the *National Law Journal* analyzed the federal government's response, both in terms of its clean-up of hazardous waste sites and its pursuit of pollut-

4. Regina Austin & Michael Schill, *Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, KAN. J.L. & PUB. POL'Y, Summer 1991, at 69, 69.

5. This study was advocated by Congressman Walter E. Fauntroy after massive protests followed an announcement by state officials in North Carolina that they intended to locate a poly-chlorinated biphenyl landfill near a predominately black community. Paul Mohai & Bunyan Bryant, *Environmental Injustice: Weighing Race and Class as Factors in the Distribution of Environmental Hazards*, 63 U. COLO. L. REV. 921, 921 (1992).

6. U.S. GEN. ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES 3 (1983).

7. *Id.* at 12.

8. *Id.*

9. 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 15 (1987).

10. *Id.* The study also establishes that whereas 87.7 percent of white Americans enjoy living in neighborhoods free from operational commercial hazardous waste treatment, storage and disposal facilities, the same is true for only 12.3 percent of minority Americans. *Id.* at 14.

ers.¹¹ Notably, this investigation concluded that penalties for violations of hazardous waste laws are higher in white communities, and that the Environmental Protection Agency (EPA) chooses containment over treatment more frequently at minority sites.¹²

Numerous other, less comprehensive studies, when combined with anecdotal evidence, suggest that race and income class are factors in both the distribution and the lack of clean-up of environmental hazards.¹³ This is not to say that this evidence is immune from challenge.¹⁴ Yet, one can start with the premise that poor, minority communities suffer disproportionately from environmental hazards.

11. Marianne Lavelle & Marcia Coyle, *A Special Investigation: Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L.J., Sept. 21, 1992, at S2.

12. *Id.* It is interesting to note that the study concluded that the lack of government protection is correlated solely with race, not income status. *Id.* Cf. WILLIAM J. BAUMOL & WALLACE E. OATES, *THE THEORY OF ENVIRONMENTAL PROTECTION* 253 (2nd ed. 1988) (noting that "on balance programs for environmental improvements promote the interests of higher-income groups more than those of the poor").

13. See Paul Mohai & Bunyan Bryant, *Environmental Racism: Reviewing the Evidence*, in *RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS* 163, 174 (Bunyan Bryant & Paul Mohai eds., 1992); Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?* 103 YALE L.J. 1383, 1393 n.40 (1994) (providing a comprehensive list of the most recently completed studies). See also Mohai & Bryant, *supra* note 5, at 925 (discussing prominent studies).

14. The first main criticism of these studies is that they are limited in scope. As illustrated, both the GAO study and the United Church of Christ study focused on hazardous landfills. Charles Lee, *Toxic Waste and Race in the United States*, in *RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS*, *supra* note 13, at 10, 15 (noting that other problems such as air pollution, work place exposure, pesticides, and asbestos are of equal importance and, therefore need to be analyzed). See also Joan Z. Bernstein, *The Siting of Commercial Waste Facilities: An Evolution of Community Land Decisions*, KAN. J.L. & PUB. POL'Y, Summer 1991, at 83, 86 (noting that all the studies done addressing the relationship between income, race, and the location of commercial treatment, storage, and disposal facilities "have been limited in scope or flawed some way in their methodology"). The research performed to date has also been attacked on the grounds that it does not address how locally undesirable land uses have affected the demographics of their host communities. Been, *supra* note 13, at 1390 (stating that the "correlation between the location of landfills and the socioeconomic characteristics of neighborhoods may be a function of aspects of our free market system other than, or in addition to, the siting process"). Finally, because the majority of studies have focused on race, there is a lack of systematic evidence that documents exactly how income factors in, and at what level the lower classes are disproportionately affected. Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. 787, 796 (1993).

B. Why Do Poor Minorities Suffer a Disproportionate Impact?

It is important to first consider the victims of environmental hazards. There are certain underlying factors, unique to lower class minority status, that contribute to the disproportionate environmental impact they suffer. As will be illustrated, all of these factors present a significant challenge to the struggle for environmental equity.

1. Industry Has Perceived Benefits

The most obvious factors that explain the environmental dangers minorities face are directly related to their lack of income. The poor are more likely to tolerate and, in fact, even encourage commercial development in their communities.¹⁵ Clearly, with the growth of industry in any given area, environmental hazards are likely to result.¹⁶ Yet, the poor, because of their economic deficit, focus on the economic benefits industry offers rather than on the threat of negative environmental effects that are endemic to industry.¹⁷ These benefits include new jobs, increased taxes, and civic improvements.¹⁸

The environmental risks, therefore, are seen as an unavoidable trade-off for the benefits.¹⁹ "Faced with a choice between increased income or improved environmental quality, those with less income tend to vote for the former."²⁰ Even if a low income family discovers that the economic benefits are not enough to counter

15. See Carolyn M. Mitchell, *Environmental Racism: Race as a Primary Factor in the Selection of Hazardous Waste Sites*, 12 NAT'L BLACK L.J. 176, 177-79 (1993) (discussing examples of communities encouraging commercial development because of the economic benefits presented). Cf. Austin & Schill, *supra* note 4, at 69-70 (noting that persons from commuting neighborhoods tend to gain from new employment whereas host communities have not extracted significant benefits).

16. Bernstein, *supra* note 14, at 85.

17. Austin & Schill, *supra* note 4, at 70. It is interesting to note that when jobs are reduced because of pollution control costs, those without seniority are the ones displaced. Lazarus, *supra* note 14, at 812. Minority and low income individuals "typically make up a disproportionately large percentage of those employees with lower seniority." *Id.*

18. Austin & Schill, *supra* note 4, at 70. The authors note the example of Emelle, Alabama, which is the locus of the nation's largest hazardous waste landfill. Although that landfill is leaking, because it is in a poor, minority neighborhood, support is lacking to take action against the plant. This is because the landfill's operations have contributed approximately \$15.9 million to the local economy. *Id.*

19. ROBERT D. BULLARD, *DUMPING IN DIXIE: RACE, CLASS, AND ENVIRONMENTAL QUALITY* 32 (1990).

20. Lazarus, *supra* note 14, at 823.

the ill effects, it may not have the financial resources to "buy their way out" into a more environmentally desirable neighborhood.²¹

This attitude, "a kind of 'don't bite the hand that feeds you' sentiment, has aided in institutionalizing risks [in low-income communities] at levels that are unacceptable in the larger society."²² Indeed, when industry factors this mindset into its analysis of where to locate and considers that land values in lower-income neighborhoods are significantly lower, it decides to target these communities as prime locations.²³ "The disproportionate burden is not coincidental: low-income communities and communities of color are the targets of waste dumpers and other developers."²⁴ Significantly, the problem for the poor is compounded by the fact that once an area becomes the locus for a hazardous environmental activity, it is likely that similar hazardous activities are soon to follow.²⁵

2. High Barriers to Mobilization

Not all poor minorities want to encourage industry. Yet, those that do not often face very high barriers to effective mobilization against toxic threats.²⁶ The lack of education is clearly the single most crippling limitation.²⁷ It cannot be contested that education is

21. Mohai & Bryant, *supra* note 5, at 924. *See also* Been, *supra* note 13, at 1390 (noting that the dynamics of the housing market are likely to cause the poor and minorities to remain in neighborhoods with locally undesirable land uses).

22. BULLARD, *supra* note 19, at 33.

23. Bernstein, *supra* note 14, at 84. *See also* Austin & Schill, *supra* note 4, at 69-70. The authors propose four different trends to account for the poor's proximity to pollution. *Id.* First, the residential areas where the poor now live were formally occupied by the wealthy who worked in the industry. The higher-income families abandoned the community as their status improved, and the poor took their place. *Id.* Second, housing was built for poor and minorities in high industry areas because the land was inexpensive. *Id.* Third, the sources of toxic pollution were sometimes placed in poor and minority communities because of the characteristics of the land, the low population density and the lack of resistance. *Id.* Finally, with regard to facilities for toxic disposal, these are best placed in the areas where the waste to be incinerated exists, namely, the low income, minority communities. *Id.*

24. Cole, *Empowerment as the Key*, *supra* note 3, at 629-30.

25. Lazarus, *supra* note 14, at 811 (noting that a similar industry or activity in the area is a reason to favor more of the same in that area, especially since the poor lack the resources to fight further development).

26. Austin & Schill, *supra* note 4, at 71.

27. UNITED STATES DEP'T OF COMMERCE, ET AL. 1993, STATISTICAL ABSTRACT OF THE UNITED STATES 154. *See also* Julius Menacker, *Poverty As a Suspect Class in Public Education Equal Protection Suits*, 54 Educ. L. Rep. 1085 (1989). The author notes that evidence is available to support the proposition that poverty has a negative influence on educational opportunity. *Id.* The author provides a survey of the available studies which

the cornerstone of any successful effort to plan and mobilize.²⁸ “[I]t furnishes the public with knowledge and information about the environment’s importance and its vulnerability to degradation. Education can equip the public to analyze and understand the proposals, options, alternatives and explanations put before it with respect to a given environmental effect.”²⁹ Without education, access to information is useless; it is nothing more than a simple transmission of data.³⁰

The problem of inadequate education is compounded by the fact that poor minorities, having more pressing concerns, lack the time to become actively involved.³¹ Necessity demands that their time be allocated to more basic needs.³² In addition, for some, a language barrier exists³³ and for others, a feeling of inability to induce social change plays a prominent role.³⁴ All of these factors make it difficult, if not impossible, for low income minority communities to take a stand and challenge the causes of their problems. Indeed, EPA Administrator Carol M. Browner has recognized that “[t]here is clearly a disproportionate amount of pollution in communities where the residents do not have the resources to fight.”³⁵

support the relationship between poverty and substandard academic achievement. *Id.*

28. The importance of education has been recognized at several levels. For example, the *Draft American Declaration of the Environment* dictates that educational programs be included in plans to reform. Neil A.F. Popovic, *The Right to Participate in Decisions that Affect the Environment*, 10 PACE ENV'T L. REV. 683, 692 (1993). Similarly, the EPA Environmental Equity Workgroup recognized that improved education and communication are necessary to involve racial minority and low income communities in environmental policy making. ENVIRONMENTAL EQUITY WORKGROUP, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ENVIRONMENTAL EQUITY: REDUCING RISK FOR ALL COMMUNITIES 28, 29 (1992).

29. Popovic, *supra* note 28, at 692.

30. *Id.* at 691 (listing seven elements of effective participation).

31. Mohai & Bryant, *supra* note 5, at 924.

32. See Dorceta E. Taylor, *Blacks and the Environment*, 1989 ENV. & BEHAV. 175, 182. The author notes that under the “hierarchy of needs theory,” environmental issues can only be attended to after basic needs have been met. *Id.*

33. Austin & Schill, *supra* note 4, at 71. See also Luke W. Cole, *The Struggle of Kettleman City: Lessons for the Movement*, MD. J. CONTEMP. L. ISSUES, 1993-94, at 67, 74 [hereinafter Cole, *The Struggle of Kettleman City*]. The author describes the battle between residents of Kettleman City and Chem Waste. *Id.* The people of Kettleman, 40% monolingual Spanish speakers and 95% percent Latino, asked that the Environmental Impact Report be translated into Spanish. In the end, the 1000-page Environmental Impact Report was translated into a five-page “executive summary.” *Id.*

34. Lazarus, *supra* note 14, at 823. See also Taylor, *supra* note 32, at 195 (noting that “political inefficacy . . . is closely related to failure to recognize advocacy channels and low levels of political participation”).

35. Gary Lee, *Clinton Executive Order Gives Boost to Mission*, WASH. POST, Feb. 17,

It is important to note, however, that the lack of involvement is not necessarily the result of lack of political concern.³⁶ Studies have established that the poor are not simply disinterested in the environment.³⁷ What is clear, however, is that political concern is not enough to lead to action. Instead, the likelihood of participation derives from a combination of the presence of attitude strength, personal efficacy, and resource availability.³⁸ "An individual who may have a high level of environmental concern, but a low level of personal efficacy and resource availability has a low probability of becoming politically active."³⁹

3. Poor Minorities are Not Adequately Involved in Mainstream Environmental Decision-Making

The environmental decision-making process excludes poor minorities to a significant extent.⁴⁰ A close look at how the process works illustrates of this point. First, environmental legislation is the product of the mainstream movement.⁴¹ The "process has often depended upon the forging of alliances between diverse interests both within the environmental public interest community and

1994, at A21.

36. Mohai & Bryant, *supra* note 5, at 927. *But see* Charles Jordan & Donald Snow, *Diversification, Minorities, and the Mainstream Environmental Movement*, in VOICES FROM THE ENVIRONMENTAL MOVEMENT 71, 79-83 (Donald Snow ed. 1992) (discussing the theory that a lack of concern on the part of poor minorities bars involvement).

37. Paul Mohai, *Public Concern and Elite Involvement in Environmental-Conservation Issues*, 66 SOC. SCI. Q. 820, 821 (1985). In addition, concern about the environment does not arise so easily with the poor. *Id.* at 184. This is because the poor typically experience poor physical conditions and, as a result, are "less aware that they live, work and play in polluted, overcrowded conditions." *Id.*

38. *Id.* at 823.

39. Taylor, *supra* note 32, at 197.

40. In addition to the process through which environmental law is created, the substance of the law is also problematic. Federal laws all involve a complex process which requires the government to set standards, prescribe technology to meet the standards, monitor compliance, and take enforcement actions. Peter Montague, *What We Must Do: A Grass-roots Offensive Against Toxics in the '90s*, 14 THE WORKBOOK 90, 93 (1989). Industry has taken advantage of both experts and lawyers to delay the process and weaken the standards. *Id.* In addition, because of a severe lack of resources, it is often difficult for the government to detect a violation and bring an enforcement action to compel compliance. Lazarus, *supra* note 14, at 817.

41. Cole, *Empowerment as the Key*, *supra* note 3, at 634-35 (noting that the mainstream movement was largely responsible for the creation of the substantive environmental law and was institutionalized in groups such as the National Resources Council and the Sierra Club Legal Defense Fund). The term "mainstream movement" refers to environmental organizations which are national in scope, advocacy, and membership. *Id.* at 635 n.45.

within government bureaucracy."⁴² Thus, the legislation addresses only some of the environmental problems.⁴³ The final result, including which problems are confronted and where the discrepancies and gaps occur, reflects the priorities of groups that held the greatest influence and resources in the political process.⁴⁴

The mainstream movement succeeded both in raising environmental awareness and in institutionalizing environmental issues as a set of political concerns that could not be ignored.⁴⁵ Yet, the mainstream movement is "overwhelmingly white and upper middle class, scornful of popular sentiment, and self-righteous in the extreme."⁴⁶ Therefore, it is clear that the interests of the poor are not adequately reflected in the final result.⁴⁷

There are other reasons beyond the exclusivity of the mainstream movement that have contributed to the interests of the poor not being recognized. First, as previously discussed, the poor lack the resources to mobilize and fight for their causes.⁴⁸ The resulting lack of political power means they have less clout with which to become involved or to make their interests heard.⁴⁹

42. *Id.* at 813.

43. For example, the law created by the mainstream movement is reflective of the white, upper-middle class perspective. Jordon & Snow, *supra* note 36, at 623. Yet, for the poor, this perspective is foreign. Austin & Schill, *supra* note 4, at 72. See also Daniel Zwerdling, *Poverty and Pollution*, PROGRESSIVE, Jan. 1973, at 25, 26 (contending that the point is not that the environmental mainstream's battles are worthless, but rather that "they take place in a context which seems to affect the elite and ignore the poor").

44. Lazarus, *supra* note 14, at 814. The author gives several examples to illustrate this point. First, air pollution is of great concern to minority communities yet, the control efforts have focused mainly on entire metropolitan areas rather than "toxic hot spots" in any one area. *Id.* As a result of the EPA focusing on ambient pollution standards, the toxic emissions prohibition has suffered and, therefore, toxic air emissions continue to be a concern for poor, minority communities. *Id.* at 815. A second example is that resources have been directed at improving air and water quality in nonurban areas and, as a result, "their return in terms of overall public health may be less than pollution control programs directed at improving the environmental quality of urban America's poorer neighborhoods" *Id.*

45. Montague, *supra* note 40, at 93.

46. *Id.*

47. See Mimi L. Becker, *The International Joint Commission and Public Participation: Past Experiences, Present Challenges, Future Tasks*, 33 NAT. RESOURCES J. 235, 238 (1993). The author notes that "decisions made with input from interested persons are more likely to result in an adequate specification of problems, an assessment of alternative solutions and the integration of cultural and social values than would otherwise occur." *Id.* Without participation of the poor, therefore, none of these phenomena occur.

48. See *supra* notes 26-35 and accompanying text.

49. Austin & Schill, *supra* note 4, at 70. See also Lazarus, *supra* note 14, at 811. For minorities, racist attitudes are an additional cause of environmental inequalities. *Id.* The

Second, the fact that elected officials are typically of non-minority, middle-to-upper class origin is also significant at both the state and federal levels.⁵⁰ The upper-middle class representatives have difficulty directly speaking to the poor because they lack the perspective that an experience with poverty would provide. In this sense, one could state that the law is responsible for the disproportionate burden because the laws "are products of a political process from which communities of color [and, necessarily, low-income communities] have been historically excluded and in which [these] people . . . are grossly underrepresented today."⁵¹

The political effects are not only seen at the federal and state level. Often times, local policy is determined according to the needs of those who wield the most political power and influence.⁵² In addition, typically, city leaders of middle-to-upper class origin, not local citizens, are making decisions relevant to the communities.⁵³ A poignant example of this theory is found in California, where poor Hispanic families have been suffering the ill effects of working with pesticides.⁵⁴ As one worker explained the situation:

If we speak out too loudly about our problems, we get into trouble. Those of us who can vote are sometimes told in no uncertain terms who to vote for. The Governor's biggest supporters in the state are the growers in the valley. In return, he has appointed many of them to important positions on the agricultural boards. How can the lowly worker possibly be treated fairly in such a system?⁵⁵

Thus, it is clear that there are several reasons why these communities suffer a disproportionate impact. The struggle for environ-

author notes that "[c]ertainly there is no reason to suppose that environmental protection is somehow immune from actions based on societal attitudes that, while widely condemned, are nevertheless prevalent." *Id.* at 812.

50. Lazarus, *supra* note 14, at 812.

51. Luke W. Cole, *Remedies for Environmental Racism: A View from the Field*, 90 MICH. L. REV. 1991, 1995 (1992) [hereinafter Cole, *Remedies for Environmental Racism*].

52. BULLARD, *supra* note 19, at 90.

53. *Id.* at 90-95 (noting that the local citizens are not involved in the decision of whether the economic trade-offs mitigate a siting decision). In a survey of residents from various neighborhoods, more than 70% "saw industrial facilities as more of a 'burden' than a 'benefit' to their communities." *Id.* at 95.

54. Conger Beasley, *Of Pollution and Poverty: Reaping America's Unseemly Harvest*, Buzzworm: ENVTL. L.J., May-June 1990, at 40.

55. *Id.* at 47.

mental equity is complicated by all of these factors: a desire of some for economic benefits, the inability of others to mobilize and fight industry, and finally, the process by which the substantive law is developed. Any successful solution is contingent on recognizing and addressing these factors.

III. ALTERNATIVE APPROACHES TO THE PROBLEM

The methods used to address environmental justice issues can be divided into non-paternalistic and paternalistic in character. Both of these approaches have benefits and limitations. However, as will be shown, the limits of a non-paternalistic approach render it an ineffective solution in the short term, and mandate that some form of paternalistic initiative be utilized.

A. *The Non-Paternalistic Approach*

The non-paternalistic approach to advocating environmental justice involves the members of the affected communities taking action in their own interest: through direct involvement they decide whether industry should locate in their communities. Commentators who advocate this strategy speak in terms of "empowering" poor minorities in order that they may take a stand.⁵⁶ This non-paternalistic is epitomized by the grassroots environmental movement.⁵⁷

56. See, e.g., Robert D. Bullard, *Environmental Justice For All*, in UNEQUAL PROTECTION 3, 21 (Robert D. Bullard, ed. 1994) (stating that "acceptance of the public as an active and equal partner in research and environmental decision making is a first step"); Ken Geiser & Gerry Waneck, *PCBs and Warren County*, in UNEQUAL PROTECTION, *supra* note 56, at 43, 48 (stating that community action is the source of real solutions); Austin & Schill, *supra* note 4, at 74 (noting that community empowerment is a fundamental goal); Cole, *Empowerment as the Key*, *supra* note 3, at 648.

57. In addition to fighting through the grassroots movement, the other main non-paternalistic route for individuals to utilize is filing a lawsuit. An individual can file suit against an existing or proposed facility under common law theories, citizen suit provisions, the Civil Rights Act and/or the Equal Protection Clause. This Comment does not address this approach to fighting environmental inequities because thus far litigation has not proven to be effective. See generally Barry Boyer & Errol Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFF. L. REV. 833, 849-50 (1985) (explaining why the right to file a citizen suit is limited); Cole, *Empowerment as the Key*, *supra* note 3, at 651-52 (noting that litigation is often not a feasible option for the poor and even if a particular suit is successful, the remedy is restricted as a low income plaintiff may not be organized enough to take advantage of the money or enforce the victory); Ora Fred Harris, *Toxic Tort Litigation and The Causation Element: Is There Any Hope of Reconciliation?*, 40 SMU L. REV. 909 (1986) (discussing the difficulty of establishing causation in environmental torts, including an analysis of the impact of the limited availability of knowledge on toxic or hazardous exposure injury).

The grassroots movement developed in local communities. It seeks pollution prevention and reduction in the use of toxic substances.⁵⁸ Today, there are more than 5000 such groups engaging in local battles, most of which trace their origins to local neighborhood struggles against hazardous waste facilities or other industrial related-problems which contributed to their unhealthy environment.⁵⁹

Grassroots groups utilize political activism techniques to fight their battles.⁶⁰ Activism includes such activities as community organizing, administrative advocacy, and/or media pressure.⁶¹ In addition, these groups focus on developing effective lobbying techniques to make their concerns known, in order to counter the pressures of the white, middle-class mainstream movement and industry.⁶² This effort is aided by various non-paternalistic government initiatives, which seek to educate, provide resources, and provide new avenues for challenging industry.⁶³ Therefore, the grassroots movement is non-paternalistic because it is the people in the affected communities who are empowered; they take action on their own

58. Jordon & Snow, *supra* note 36, at 87.

59. *Id.*

60. James H. Colopy, *The Road Less Traveled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964*, 13 STAN. ENVTL. L.J. 124, 127 (noting that most community organization techniques empower the affected communities and are reminiscent of those used on the Civil Rights movement).

61. Cole, *Empowerment as the Key*, *supra* note 3, at 640. See also Carol Countryman, *Getting the Lead Out*, PROGRESSIVE, Nov. 1993, at 13, 13 (discussing that the methods of Texas United, a grassroots movement, include writing letters, storming city council meetings, picketing EPA meetings, and dumping contaminated dirt around Dallas).

62. Pamela Duncan, *Environmental Racism: Recognition, Litigation and Alleviation*, 6 TUL. ENVTL. L.J. 317, 16 (1993).

63. Legislation which only seeks to identify the problem and educate the public is not paternalistic. See, e.g., VA H.J.R. 529, Reg. Sess. (1993) (formally recognizing the problem of environmental justice and forming a commission to study the problem and provide recommendations for action). This is because providing information is not an interference with individual liberty. Gerald Dworkin, *Paternalism*, in PATERNALISM, 19, 21 (Rolf Sartorius ed. 1983) (noting that truth-in-advertising acts such as the Pure Food and Drug Act are often incorrectly attacked as paternalistic).

Additionally, some of the proposed legislation can be characterized as non-paternalistic as it relies solely on community action to challenge a proposed siting. See, e.g., The Environmental Equal Rights Act of 1993, H.R. 1924, 103d Cong., 1st Sess. This Act provides that citizens may challenge the construction or operation of a facility in an environmentally disadvantaged community. *Id.* § 3. That petition will be granted unless industry is able to show that (1) there is no alternative location that poses fewer health and environmental risks; and (2) the facility will not release contaminants or engage in any activity that is likely to increase the cumulative impact of contaminants on the environmentally disadvantaged community. *Id.*

behalf.

B. *The Paternalistic Approach*

An action is paternalistic where an individual or entity acts in order to benefit a particular group, without verifying the specific nature of that group's wishes.⁶⁴ In the field of environmental justice, both state and federal governments have attempted to redress environmental inequities by passing and proposing legislation which mandates government action. The majority of the law and proposed legislation is paternalistic, at least to some degree.⁶⁵

These provisions are paternalistic because the government is the key actor, controlling the location or expansion of industry. In addition, it is clear that they all are motivated by a desire to benefit poor, minority communities.⁶⁶ Finally, because all the provisions start with the premise that locating or expanding industries in these communities is wrong, it can be argued that they ignore wishes of the particular members of each of these areas.⁶⁷

The approaches taken by the government initiatives vary. Some initiatives are straight prohibitions on new industry locating or expanding in environmentally disadvantaged communities. These substantive measures operate as flat prohibitions in areas designated by the government.⁶⁸ At the other end of the spectrum of initia-

64. Donald H. Regan, *Justifications for Paternalism*, in *THE LIMITS OF LAW* 189, 190 (J. Roland Pennock & John W. Chapman eds., 1974).

65. See Shapiro, *supra* note 1, at 528 (noting that paternalism is "weak" where the recipient cannot act in his or her own capacity and it is likely that he or she would consent if the incapacity were removed; the "action moves from weak to strong paternalism to the extent that either or both of these conditions are not present").

66. This is evidenced by the fact that the majority of the governmental reforms were motivated by legislators who wanted to play an active role in promoting environmental justice.

67. See *supra* notes 15-21 and accompanying text (noting that some communities want and even encourage industry to locate in their neighborhoods).

68. There are several examples of this approach. First, the proposed Environmental Justice Act is designed to ensure compliance with all environmental, health and safety laws by facilities with potential of releasing toxic chemicals. H.R. 2015, 103d Cong., 1st Sess. § 201 (1993); S. 1161, 103d Cong., 1st Sess. § 5(d)(2)(A) (1993). It sets out to accomplish this goal by identifying 100 "Environmental High Impact Areas". H.R. 2015 § 102; S. 1161 § 5. To the extent that any "acute and chronic impacts on human health" are found, the siting or permitting of any new toxic chemical facility is forbidden until all the levels of toxic release are reduced to safe levels. H.R. 2015 § 403; S. 1161 § 6. There are also examples at the state level. In Minnesota, current law requires that there no more than one site per county can be selected as a candidate site for "commercial stabilization and containment facilities for hazardous waste." MINN. STAT. § 115A.21(1) (1993). In addition, Pennsylvania is currently considering legislation which makes it illegal

tives are those reforms that mandate that the area in question be analyzed before a new facility is located.⁶⁹ Although in some instances it is unclear what role these standards for "fairness" in siting play, one can presume they are to have some effect on the decision-making process.

In analyzing these initiatives, one might assume that the flat prohibition is more paternalistic than the survey approach. However, these two approaches do not differ in degree of paternalism. Both of these approaches are equally paternalistic because they both involve the government acting for the target community's benefit without first considering the preferences of the members of that community.

The difference between the two approaches is in their breadth of application. While the straight prohibition is a substantive bar on industry locating in certain communities, that bar only applies to a *limited number* of areas. Because the number of areas selected is bound to be underinclusive, this approach will be less limiting on industry. In contrast, the survey approach analyzes the demographics of all potential sitings and expansions and this will presumably influence the permitting process in *all* communities.⁷⁰

to site a facility in a predominantly low income, minority community. Pa. S.B. 1725, Reg. Sess. § 1 (1994).

69. For example, the New York legislature is currently considering a proposal which is designed to promote equity of location of environmental facilities for all communities. N.Y. A.B. 7140, Reg. Sess. § 1 (1993). It proposes requiring a survey indicating the location and type of facility if the proposed location is within a five-mile radius of a minority and/or low income community. *Id.* § 4(1). Before any permit to build, construct or manage any new facility will be granted, the Agency would have to refer to the survey. *Id.* See also Cal. A.B. 2212, Reg. Sess., § 1 (1993). This provision is very similar to the proposed New York legislation in that it mandates that a permit for a potentially high impact development project can not be approved unless the application includes a description of the site demographics. As with New York, there are no provisions for community involvement. *Id.* [hereinafter the survey approach].

70. See, e.g., NEW YORK CITY PLANNING COMM'N, CRITERIA FOR THE LOCATION OF CITY FACILITIES (1990). These criteria were designed to aid the equitable distribution of city facilities. When considering a siting proposal, the criteria mandate that *the agency* consider the extent to which a neighborhood may be adversely affected and whether the site is inconsistent with neighborhood or borough plans. *Id.* art. 4. Further, with regard to waste management decisions, *the agency* must also consider the number of existing facilities with similar environmental effects located within a half-mile radius of the proposed site. *Id.* art. 6.42.

IV. ANALYSIS

A. *Concerns Over Adopting a Paternalistic Approach*

Paternalistic legislation has long been viewed as contrary to the democratic system of government.⁷¹ Indeed, the Founding Fathers wrote a Constitution which was designed to let people control the government.⁷² Because any type of paternalistic action is viewed as an encroachment upon our personal autonomy, proponents of paternalistic legislation often bear the burden of persuasion.⁷³ In addition to being contrary to traditions expounded in American political theory, commentators note that all paternalistic legislation is potentially counterproductive.⁷⁴

There are several undesirable characteristics of paternalistic legislation. First, it inhibits social progress because it deprives individuals of a chance to focus the direction of their lives.⁷⁵ "Neither one person, nor any number of persons, is warranted in saying to another human creature of ripe years, that he shall not do with his life for his own benefit what he chooses to do with it."⁷⁶ Yet, the environmental justice paternalistic initiatives do exactly that. It cannot be disputed that some communities would welcome industry because of the employment and economic benefits it offers.⁷⁷ "There is good reason to believe that disinvestment is a

71. Shapiro, *supra* note 1, at 519. See also Peter Huber, *The Old-New Division in Risk Regulation*, 69 VA. L. REV. 1025, 1103 (1983) (describing the concept of paternalism as "an almost 'un-American' rationale for any type of governmental activity").

72. John Fund, *Rediscovering Economic Liberties*, 41 RUTGERS L. REV. 779, 779 (1989).

73. Shapiro, *supra* note 1, at 530 (stating that antipaternalism is the dominant strain). See also Dworkin, *supra* note 63, at 33 (noting that "in all cases of paternalistic legislation, there must be a heavy and clear burden of proof placed on the authorities to demonstrate the exact nature of the harmful effects (or beneficial consequences) to be avoided (or achieved) and the probability of their occurrence").

74. Geoffrey P. Miller, *Rediscovering Economic Liberties*, 41 RUTGERS L. REV. 773, 778 (1989). See also Shapiro, *supra* note 1, at 546 (noting that contemporary scholars have emphasized "the value of personal autonomy as essential to the development of our individual faculties").

75. Cheryl T. Farson, *At What Cost Paternalism? A Call to State Legislation to Reconsider the Propriety of Merit Review of Securities Offerings*, 22 ARIZ. ST. L.J. 963, 977 (1990) (noting that even though the nation's mood is shifting toward individual responsibility, governments continue to pass paternalistic legislation).

76. JOHN STUART MILL, ON LIBERTY 142 (Gertrude Himmelfarb ed., 1985).

77. See *supra* notes 15-21 and accompanying text. See, e.g., Keith Schneider, *Plan For Toxic Dumps Pits Blacks Against Blacks*, N.Y. TIMES, Dec. 13, 1993, at A12 (describing a debate in Noxubee County, Missouri, between blacks concerned about exposure to toxic

greater problem in poor minority areas than bad investment."⁷⁸ Yet, with the proposed paternalistic legislation, a community would not be able to voice its desires because the government controls the process.

Paternalistic legislation also fosters dependency on the government and, therefore, is detrimental to an individual's sense of responsibility and motivation.⁷⁹ This concern is clearly applicable in this context. As has been illustrated, members of poor, minority communities suffer from a sense of inability to induce social change.⁸⁰ Arguably, having the government make the decision about industry locating for them will worsen this feeling as it negates any desire they may have to be informed or educated about the environmental problems new or expanded industry presents.

Using a paternalistic approach also threatens to sacrifice the practical benefits of a non-paternalistic solution. First, because the problems are political in nature, non-legal tactics may be the best approach.⁸¹ In addition, thus far activism has proven to be a much more effective method because it has pushed polluters from pollution control to prevention.⁸² Finally, reliance on direct community involvement creates an avenue of real participation for the poor;⁸³ this type of activity also has generated a strong sense of community and comradery in these neighborhoods.⁸⁴

B. *Why A Non-Paternalistic Approach Fails*

Although there are legitimate concerns over adopting a paternalistic stance, it is unlikely that the affected communities will be able to embrace a non-paternalistic approach to effectively cure

waste and those hopeful for jobs and minority-owned business opportunities).

78. Lydia B. Duff, *Beyond Environmental LULUs: Thoughts of an Urban Environmental Lawyer*, MD. J. COMTEMP. L. ISSUES, 1993-94, at 49, 56.

79. AUBERON HERBERT, *THE RIGHT AND WRONG OF COMPULSION BY THE STATE* 180 (1978) (concluding that "[t]o have our wants supplied by a huge state machinery, to be regulated and inspected by great armies of officials . . . will in the long run teach us nothing").

80. See *supra* note 34 and accompanying text.

81. Cole, *Empowerment as the Key*, *supra* note 3, at 667.

82. Cole, *Remedies for Environmental Racism*, *supra* note 51, at 1996. See also Montague, *supra* note 40, at 100 (noting that the grassroots movement is largely responsible for the recent difficulty industry has had with siting hazardous landfills and incinerators).

83. Lee, *supra* note 14, at 16.

84. Montague, *supra* note 40, at 97.

environmental inequities. First, the ideal participants lack sufficient education. As was previously illustrated, the majority of the victims in these communities have not attained a high level of education.⁸⁵ This problem has been recognized by commentators; most literature on the subject advocates aggressive education as a necessary element for any solution.⁸⁶

The second main limitation is the immediacy of this problem. Even if education were a feasible option, it would take a great deal of time to accomplish. However, "[d]isproportionate exposure to environmentally hazardous activities results in disproportionate exposure to health threats."⁸⁷ While the problem is left untreated,⁸⁸ members of these communities are suffering from exposure to unacceptable levels of water contamination, air pollutants, toxic pesticides, radioactive substances and lead poisoning.⁸⁹ Further, new facilities will continue to appear.⁹⁰ Clearly, action must be taken now in order to stifle the growing inequities born by these communities.

Finally, the communities do not have the resources available to solve the problem of disproportionate impact on their own.⁹¹ Partly due to limited resources and the local nature of grassroots organizations, single instances of disproportionate impact are the main focus of non-paternalistic action.⁹² Although this is clearly benefi-

85. See *supra* notes 27-30 and accompanying text.

86. See, e.g., Becker, *supra* note 47, at 239 (noting that any effective public participation program depends on an informed, educated public); Cole, *supra* note 33, at 79 (stating that the focus must be on educating the public).

87. Deeohn Ferris, *A Broad Environmental Justice Agenda: Mandating Change Begins at the Federal Level*, MD. J. CONTEMP. L. ISSUES, 1993-94, at 115, 118. See also Bullard, *supra* note 56, at 18 (noting that the mounting waste problem is adding to potential health threats and that "some health problems cannot wait for the tools to catch up with common sense").

88. Ferris, *supra* note 87, at 115 (noting that the fact that disproportionate exposure has persisted for 26 years underscores the fact that few attempts have been made to rectify the inequities).

89. *Id.* at 118 (citing numerous studies that have established all of these hazards at elevated levels in poor, minority communities).

90. Bunyan Bryant & Paul Mohai, *Summary*, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS, *supra* note 13, at 215, 218.

91. See, e.g., Bullard, *supra* note 56, at 21 (contending that an environmental justice framework needs to be incorporated into a national policy on facility siting and that the federal EPA needs to take the lead); Deeohn Ferris, *A Call for Justice and Equal Environmental Protection*, in UNEQUAL PROTECTION, *supra* note 56, 298, 300 (noting that although the Environmental Justice Transition Group supports the members of the affected communities speaking for themselves, proposals for involvement of the federal EPA are also necessary).

92. Dorceta Taylor, *Can the Environmental Movement Attract and Maintain the Support*

cial at some level, there is a need to work to prevent the problem altogether rather than just focusing on existing violators.

All of these limitations must be considered together. The uncertain success of education, combined with the immediate need for a solution and the lack of resources, makes this approach inferior to paternalism. Until the victims can attain the level of education, information, and resources needed, the benefits of a non-paternalistic approach must be secondary to finding a short-term solution. Paternalism works immediately to prevent the problem from worsening and improve a future non-paternalistic approach.

C. *Paternalism for the Short Term*

In the environmental justice arena, justifications for paternalistic legislation vindicate a paternalistic approach. Paternalistic legislation is justified where there is a small intrusion which protects against a large risk.⁹³ Arguably, a short-term initiative which serves to limit the expansion or development of industry is a relatively small intrusion for protection against a large risk. This type of initiative is a small intrusion because it would only work to limit temporarily the direct involvement of these communities in the decision of industry development.⁹⁴ However, the risk avoided, continued exposure to environmental hazards at levels that are not accepted in the general community, is great.

Paternalism is also justified where that approach is more effective than a non-paternalistic approach. In this context, there are several practical benefits to paternalistic action. First, the governments' response could be more immediate.⁹⁵ In addition, whereas main focus of the grassroots movement is on attacking

of *Minorities?*, in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS, *supra* note 13, at 41.

93. *Id.* This justification is often presented in the context of mandatory motorcycle helmet and seat belt laws.

94. Considering that in some areas there is no community involvement in the decision to locate industry, there is potential for no intrusion.

95. The ability of government to act immediately is evidenced by the fact that some have already taken action. On the federal level, President Clinton has handed down an executive order designed to determine whether current regulations adversely affect minorities or the poor. Exec. Order No. 12,898, 59 Fed. Reg. 7629, § 3-301(a)-(b) (1994). It also mandates that data be collected in order to understand the depth of this problem. *Id.* (ordering that data and research specifically focus on high risk levels in minority and low income communities, and to identify multiple and cumulative exposures). Further, some states have already taken action. *See supra* notes 68-70 and accompanying text (discussing Minnesota and New York legislation).

single instances of disproportionate exposure, governments' approach can be broader and all-inclusive.⁹⁶ Finally, governments also have more resources available and have the ability to allocate those necessary for an effective program.

The above justifications vindicate governments' role as decision-maker for poor minority communities. However, it can be argued that where the person or group being regulated is incapacitated, the action is not paternalistic.⁹⁷ This argument is based on the premise "that ignorance is a sort of unfreedom."⁹⁸ Therefore, because the person or group is not "free" to begin with, any interference is not a limitation of personal autonomy; the conflict surrounding freedom never arises.⁹⁹ In the environmental justice arena, the group being regulated is incapacitated in the sense that they lack the requisite information and education needed to effectively cure environmental inequities. Therefore, arguably a government initiative is not paternalistic because poor minorities are "unfree." Yet, while these limitations may only warrant education, not coercion, an immediate solution is needed. One cannot rely on education in the short term.¹⁰⁰

This Comment therefore contends that a strong, paternalistic initiative should be adopted for the short term. The purpose of this initiative would be twofold: (1) to prevent the problem from escalating on the large scale and (2) to prepare the members of the affected communities for taking over the fight by providing education and resources. Periodically, the progress of the initiative would be evaluated, and once the basis for an effective non-paternalistic approach is in place, governments should cease in their role as decision-makers, and continue only in their roles as educators¹⁰¹

96. See generally Ferris, *supra* note 56, at 300-06 (asserting that the EPA has the potential to shift its institutional focus so that all communities are safeguarded from facing disproportionate pollution exposures).

97. It is argued that any incapacity an individual faces arguably does not give governments a right to make his or her decision, but only a warrant to correct that incapacity. Regan, *supra* note 64, at 191 (asking "if the reason we feel justified in forbidding drugs is because we don't think users realize the danger themselves, should we not concentrate on informing them of the danger, and then let them do as they please?").

98. Donald H. Regan, *Freedom, Identity and Commitment*, in *PATERNALISM*, *supra* note 63, at 114.

99. *Id.*

100. *Id.* at 155 (stating that one situation where coercion may be justified is where "there simply will not be time to educate the party coerced, as when someone threatens to act in a way that will do her irreparable damage before we can convince her of what the facts are").

101. An important part of educating the public is making sure that the people have

and resource providers.¹⁰²

V. CONCLUSION

Advocating a paternalistic approach may seem naive or idealistic, especially because it involves reliance on the government. But the fact is that the people in poor minority communities cannot cure environmental inequities by themselves. This leaves only two other immediate possibilities: industry or the government. Between these two, government is the better approach, especially if it is only for the short term and, therefore, has the potential to move toward a non-paternalistic solution in the long term.

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access to all relevant information. *See, e.g.*, Superfund Reform Act, H.R. 3800, 103d Cong., 2d Sess. (1994). Under this proposal, the President is required to provide all nonprivileged information to the public throughout all phases of the response action. *Id.* § 101. Additionally, it establishes a Citizen Information and Access Office within each state. *Id.* § 102.

102. *See, e.g.*, The Proposed Environmental Justice Act. It authorizes the Department of Health and Human Services to provide grants of up to \$50,000 to any individual or group who suffers from toxic chemical release. H.R. 2015, 103d Cong., 1st Sess. § 301 (1993); S. 1161, 103d Cong., 1st Sess. § 7 (1993).