

Environmental Regulation, Tort Law and Environmental Justice: What Could Have Been

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I. INTRODUCTION

In recent years, one of the most salient aspects of environmentalism has been the environmental justice movement and its complaints of discrimination against the poor and racial minorities in the administration and enforcement of the nation's environmental laws. One of the most severe criticisms has been the claim that environmental laws were not merely doing too little for the poor and people of color but that they were in fact the cause of some of the racism and injustice. Given this background, the question arises "what could have been" if the environmental regulatory revolution had not happened — if Congress had not enacted the major environmental statutes of the 1970s and if President Nixon had not created the Environmental Protection Agency (EPA). In particular and most relevant to the focus of this symposium on tort law and environmental protection is the question: How might environmental justice activists have fared within the confines of tort law? This essay suggests that environmental justice activists could potentially have fared better in some respects under such a counter-factual world than under the present state of affairs.

Environmental justice activists have long asserted that environmental laws actually contribute to the plight of the poor and racial minorities.¹ Environmental regulations exacerbate such existing inequalities by perpetuating and re-establishing pre-existing inequalities in the regulatory treatment of polluting facilities and the communities that they impact.² At the same time, few activists would argue that environmental laws as a whole have been detrimental to the welfare of the poor and people of color. After all, cleaning up our rivers, air, and land benefits everybody, even if it does so to a lesser extent for environmental justice communities or in spite of other adverse consequences for them.

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1. See, e.g., Luke W. Cole, *Empowerment as the Key to Environmental Protection: The Need for Environmental Poverty Law*, 19 *ECOLOGY L.Q.* 619 (1992); Alice Kaswan, *Environmental Justice: Bridging the Gap Between Environmental Laws and "Justice,"* 47 *AM. U. L. REV.* 221, 268-71 (1997).

2. See, e.g., Sheila Foster, *Justice From the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 *CAL. L. REV.* 775 (1998); Heidi Gorovitz Robertson, *If Your Grandfather Could Pollute, So Can You: Environmental "Grandfather Clauses" and Their Role in Environmental Inequity*, 45 *CATH. U. L. REV.* 131 (1995).

My purpose here is not to set out to conclusively prove or fully articulate this proposition. Rather, the importance and merits of the arguments supporting this proposition lie in their ability to help us gain a better understanding of some of the deficiencies of the existing environmental regulatory system and to provide some insights into the changes that are necessary to improve it. It is in this spirit that this essay has been prepared.

Part I will sketch out the background of the environmental justice movement. Part II will provide an overview of the complaints of environmental justice activists and various explanations by commentators of these problems. Finally, part III will argue that environmental justice activists might have fared better in some respects in a counterfactual world in which tort law principles govern pollution and environmental protection concerns rather than the existing environmental laws. In particular, I will focus on the effect of federal pesticide laws, the problem of causation in toxic torts and other environmental harms, and the problem of dignitary harms.

II. THE ENVIRONMENTAL JUSTICE MOVEMENT

Even though the environmental justice movement has commanded significant attention by the public and policy-makers only since the 1980s, these concerns have long pre-dated the creation of the modern environmental laws.³ The enactment of the modern environmental statutes in the late 1960s and early 1970s raised many concerns about the distributional impacts of environmental protection efforts on racial minorities. These concerns focused on the risk that the new attention on environmental issues might not only distract the nation from the unsolved problem of discrimination's effects on African-Americans and other racial minorities, but also drain resources and attention away from the issues more pressing for racial minorities.⁴ Reality bore out many of these concerns.⁵

In 1983, protests and civil rights movement-style acts of civil disobedience in Warren County, North Carolina, against the establishment of a PCB waste disposal site brought concerns about racism in environmental regulation to the forefront of public attention. In these

3. For example, residential segregation provided an easy mechanism by which municipalities could limit not only the benefits of municipal services such as sanitary sewers, street lighting, and potable water supplies, but arguably also the shift of undesirable facilities, such as waste facilities and polluting industries to minority neighborhoods. *See, e.g.,* *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971). *See also* Vicki Been, *What's Fairness Got To Do With It? Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001, 1003 n.9 (1993); Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 Nw. U. L. REV. 787, 807, 833 (1993).

4. *See Lazarus, supra* note 3, at 788-89.

5. *See id.* at 789, 836-38 (conscious decision by EPA to enforce anti-discrimination requirements of Title VI of the Civil Rights Act less than aggressively).

protests, a community made up predominately of African-American and poor individuals sought to prevent the disposal of toxic PCBs within their county by blocking trucks carrying the hazardous wastes and other activities.⁶ Ultimately, the community was unsuccessful in its specific goal of preventing the establishment of the waste disposal site. However, their activities galvanized other racial minority and poor communities to organize and fight against being targeted for waste facilities and other undesirable land uses.

The Warren County protests also highlighted the need for more information and studies about the claims of racism and discrimination in the siting of hazardous waste facilities. As a result, the General Accounting Office (GAO),⁷ the Commission for Racial Justice of the United Church of Christ,⁸ and others conducted studies inquiring into the correlation between decisions to site hazardous waste facilities in particular communities and the racial make-up of the host communities. Some of these results were disturbing. The GAO study found that of four offsite hazardous waste landfills located within the eight-state jurisdiction of EPA's Region IV, three were located in predominately African-American communities even though they only made up twenty percent of the region's population.⁹ The Commission for Racial Justice study found that three of every five African and Hispanic Americans lived in communities with uncontrolled toxic waste sites, and that race proved to be the most significant among the variables tested in association with the location of commercial hazardous waste facilities.¹⁰ Other studies reached a similar conclusion of disproportionate impacts.¹¹

6. See, e.g., Dale Russakoff, *As in the '60s, Protesters Rally; But This Time The Foe Is PCB*, WASH. POST, Oct. 11, 1982, at A1. See generally UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR (Robert D. Bullard ed., 1994); CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS (Robert D. Bullard ed., 1993).

7. U.S. GEN. ACCOUNTING OFFICE, SITING OF HAZARDOUS WASTE LANDFILLS AND THEIR CORRELATION WITH RACIAL AND ECONOMIC STATUS OF SURROUNDING COMMUNITIES Rep. No. RCED-83-168 (1983) [hereinafter SITING OF HAZARDOUS WASTE LANDFILLS].

8. COMM'N 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) (on file with author).

9. SITING OF HAZARDOUS WASTE LANDFILLS, *supra* note 7, at 2.

10. COMM'N FOR RACIAL JUSTICE, *supra* note 8, at xiii-xiv.

11. For example, a 1992 study by the National Law Journal, examining government enforcement of environmental laws at 1,177 Superfund toxic waste sites, concluded that "penalties under hazardous waste laws assessed at sites having the greatest white population were about 500 percent higher than penalties at sites with the greatest minority population." Marianne Lavelle & Marcia Coyle, *A Special Investigation, Unequal Protection: The Racial Divide in Environmental Law*, NAT'L L. J., Sept. 21, 1992, at S2. The same study also found that "for all the federal environmental laws aimed at protecting citizens from air, water and waste pollution, penalties in white communities were 46 percent higher than in minority communities." *Id.* at S2. Problems of racism and discrimination have also extended into the environmental movement itself. For example, during the first half of the twentieth century membership rules among some of the Sierra Club's chapters were exclusionary of racial minorities and outright racist. Charles Jordan & Donald Snow, *Diversification, Minorities, and the Mainstream Environmental Movement*, in VOICES FROM THE ENVIRONMENTAL MOVEMENT: PERSPECTIVES FOR A NEW ERA 71,

The grass-roots organizing and activism around such issues not only led to more public awareness about the problems of race and equity in environmental protection but also increased its legitimacy as a bona fide environmental protection issue.¹² President Clinton issued an Executive Order directing federal agencies to consider the environmental justice implications of their decision-making processes.¹³ EPA established both an Office of Environmental Justice and a federal advisory committee focused on environmental justice issues. In recent years, EPA has made efforts to devise a formal administrative complaint system process with regard to disparate impact allegations under Title VI of the Civil Rights Act of 1964.

The problems of race and equity that the environmental justice movement have raised have remained intractable. Criticisms and concerns about EPA's actions and inactions in this area have continued. To gain a better understanding of the issues raised by the environmental justice movement, it is appropriate to consider the issues raised by activists more carefully.

III. ENVIRONMENTAL INJUSTICE

A. *The Claims of the Environmental Justice Movement*

Many of the complaints of environmental justice activists can be traced to three deficiencies of the environmental regulatory system: 1) the failure of regulations to provide adequate substantive environmental protections for minorities and the poor, 2) inequality and disproportionality in the distribution of the burdens and benefits of regulations, and 3) the inability of minority groups and the poor to participate actively and effectively in environmental decision-making processes.¹⁴

Substantively inadequate protections and standards for the poor and racial minority groups against environmental health risks surface in a number of contexts.¹⁵ For example, existing water quality standards have been criticized as too lax and insufficiently protective of poor and racial minority groups who engage in subsistence fishing as a means to supplement their diet. Such standards, designed in part to

75-78 (Donald Snow ed., 1992) (Sierra Club's California chapters prohibited membership by racial minority individuals up until the 1950s).

12. See Karl Grossman, *The People of Color Environmental Summit*, in UNEQUAL PROTECTION: ENVIRONMENTAL JUSTICE AND COMMUNITIES OF COLOR 274-75 (Robert D. Bullard ed., 1994); see also MARK DOWIE, *LOSING GROUND: AMERICAN ENVIRONMENTALISM AT THE CLOSE OF THE TWENTIETH CENTURY* 151-55 (1995).

13. Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 11, 1994).

14. See, e.g., Richard J. Lazarus & Stephanie Tai, *Integrating Environmental Justice into EPA Permitting Authority*, 26 *ECOLOGY L.Q.* 617, 621-24 (1999).

15. See Robert R. Kuehn, *The Environmental Justice Implications of Quantitative Risk Assessment*, 1996 *U. ILL. L. REV.* 103 (1996).

protect humans against water pollutants and toxins that bio-accumulate in fish caught in contaminated waters, have largely been based on the fish consumption habits of the occasional white sports fisher. Accordingly, they fail to take into account the exposure levels of poor racial minority groups, including members of some Indian tribes, who depend on fish caught in contaminated waters for subsistence purposes and thus consume much higher levels of contaminated fish than the official standards presume.¹⁶

A similar case involves the toxic exposures of farmworkers, most of whom are members of racial minority groups.¹⁷ Farmworkers are routinely exposed to pesticides in their work environment. However, not surprisingly, protections afforded them are significantly lower than the protections provided to the public-at-large via pesticide residue tolerances in farm products. As a theoretical matter, the pesticide labeling requirements and worker protection standards of Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) are designed to provide some protections. Such requirements govern pesticide application and the safety precautions taken to protect workers and others who come into contact with pesticides.¹⁸ Yet, there is a widespread acknowledged reality that because of lack of training in such protective measures, compliance failures by employers, and lack of enforcement of such requirements, many of these measures have not been effective in guaranteeing worker safety.

Disproportionality of environmental health risks has been another point of contention of environmental justice activists. For example, statistics have shown that African-American infants are more likely to suffer from lead poisoning than their white counterparts, irrespective of income levels.¹⁹ Likewise, as noted above, the siting of hazardous waste facilities has been correlated to racial minority groups as well as the poor.²⁰ While there has been much debate as to

16. Patrick West et al., *Minorities and Toxic Fish Consumption: Implications for Point Discharge Policy in Michigan*, in ENVIRONMENTAL JUSTICE: ISSUES, POLICIES, AND SOLUTIONS 124 (Bunyan Bryant ed., 1995); Catherine A. O'Neill, *Variable Justice: Environmental Standards, Contaminated Fish, and "Acceptable" Risk to Native Peoples*, 19 STAN. ENVTL. L. J. 3 (2000).

17. See, e.g., U.S. GEN. ACCOUNTING OFFICE, PESTICIDES: IMPROVEMENTS NEEDED TO ENSURE THE SAFETY OF FARMWORKERS AND THEIR CHILDREN Rep. No. RCED-00-40 (2000).

18. In essence, the primary approach of the pesticide regulatory system toward ensuring the health and safety of farmworkers consists of shifting the burden of taking appropriate safety measures to the workers. The disturbing nature of such an approach to safety should become clear if one imagines dealing with pesticide risks in the same fashion in the consumer context. Public reaction would clearly not be as muted as to the plight of farmworkers if instead of requiring that agricultural produce be safe for human consumption, federal law and regulation simply required only the labeling of dangers and the posting of instructions at the grocery store on how customers can wash and otherwise treat produce to make it safe for human consumption. It should be apparent that information-based approaches, such as safety instructions and warnings, only have limited effectiveness and cannot substitute for substantive safety requirements.

19. U.S. EPA, ENVIRONMENTAL EQUITY: REDUCING RISKS FOR ALL COMMUNITIES, EPA 230-R-92-008 (1992).

20. See *supra* notes 6-7.

whether such disproportionate siting in minority and poor communities actually translates into higher environmental health risks, increased health risk concerns are not the only burdens that such facilities raise. Increased truck traffic, dust, and noise also significantly affect such neighborhoods. When such facilities are industrial manufacturing plants, waste transfer stations, or incinerators, foul odors and stench can contribute to such burdens, virtually imprisoning residents in their homes in hot summers. For example, a community in Chester, Pennsylvania, has struggled hard against the toxic waste industry:

During the summer, the stench and noise force residents to retreat into their dwellings. Recent visitors to Chester are quoted as saying that the "air is thick with acrid smells and, often, smoke. Dump trucks rumble through throughout the day," and "the first thing you notice is the smell." . . . [H]uge trucks . . . would rumble through their neighborhoods at all times of the day and night, disturbing their sleep and their children's recreational time, and damaging the overall character and peace of their community. Noise and vibration from the constant stream of waste trucks have caused the foundations of nearby houses to crack and property values to plummet. Residents have felt imprisoned in their own community.²¹

Finally, another important complaint has been the "exclusion" of minority groups and the poor from environmental decision-making, whether because of their inability to participate effectively in notice-and-comment rule-making and permit issuance or their ability to have their concerns otherwise considered and incorporated by environmental regulators. The barriers to participation are manifold. In non-English-speaking communities, inability to comprehend notices or official documents prevents participation. For example, during the environmental approval process for a toxic waste incinerator in Kettleman City, California, a community overwhelmingly Latino and containing a large segment of individuals monolingual in Spanish, the county government refused to translate the 1000 page environmental impact report into Spanish.²²

Reliance on channels such as the Federal Register to publish government action also effectively forecloses actual notice to many communities of color and the poor. And the technical nature of many environmental documents creates special barriers to understanding and participation that even English-speaking individuals frequently cannot overcome. Of course, some of these barriers to participation and influencing environmental decision-making are encountered by others as well. However, ongoing discrimination, the lingering effects of past discrimination, and other reasons for marginalization within

21. Foster, *supra* note 2, at 780.

22. Cole, *supra* note 1, at 674.

the political community present obstacles to participating in political processes in general. The result is that the poor and communities of color, unlike many other communities, do not have the wealth and access to political decision-makers that can provide for adequate alternative channels and options to influence environmental decision-making and address environmental concerns.

B. *The Roots of Environmental Injustice*

Explanations for the failure of the environmental regulatory system to respond to the complaints of the environmental justice movement adequately have been manifold. At one level, the burdens experienced by communities of color and the poor have been attributed to acts of prejudice and racism of individuals — environmental regulators, environmental activists, and industry officials.²³ Hence, the initial claims of environmental racism.²⁴ The failure of government to provide a remedy to such problems has accordingly been traced to the failure of equal protection doctrine and civil rights laws to do their job in protecting such communities in the environmental context.²⁵

Such an explanation of the roots of environmental injustice undoubtedly correctly characterizes many past circumstances and actions that have led to the complaints of environmental justice activists, and assuredly continues to be applicable in many current instances. With the long history of racial segregation and the ingrained nature of discrimination within this society, it would almost seem anomalous if environmental protection efforts were exempted from such social forces. But it is also an over-broad generalization that does not fairly describe many other situations. For example, the vast majority of government staff involved in environmental decision-making today, especially at the EPA, and the actions that raise environmental justice concerns currently cannot fairly be described as racist or as motivated by racially discriminatory attitudes, in the traditional sense of being associated with racial bigotry.²⁶

23. See, e.g., Dowie, *supra* note 12.

24. According to Benjamin Chavis:

Environmental racism is racial discrimination in environmental policymaking . . . the enforcement of regulations and laws . . . the deliberate targeting of communities of color for toxic waste [facilities] . . . the official sanctioning of the life-threatening presence of poisons and pollutants in [our] communities . . . [a]nd . . . the history excluding people of color from [leadership in the environmental movement].

Rev. Benjamin F. Chavis, Jr., *Foreword* to CONFRONTING ENVIRONMENTAL RACISM: VOICES FROM THE GRASSROOTS 3 (Robert D. Bullard ed., 1993).

25. See, e.g., Rachel D. Godsil, Note, *Remedying Environmental Racism*, 90 MICH. L. REV. 394 (1991).

26. I make this statement based on my own observations in my contacts and work with other government agency staff while I was an attorney at the Environment and Natural Resources Division at the U.S. Department of Justice. I suspect that many others would agree.

More problematically, it provides the impression that if, with some magic wand, one were able to change the racial identity of all personnel within the environmental regulatory agencies into that of racial minorities, environmental discrimination and injustice would cease to exist. After all, what better way to do away with discrimination against racial minorities in environmental protection? Few would be so naive as to believe that doing so would solve everything.

Another explanation that has been provided in response to the complaints of environmental justice activists has been the persistent under-representation of minorities and the poor, and accordingly their interests, in environmental decision-making processes. Pre-existing social and racial inequalities exacerbate these conditions.²⁷ Such explanations point to underlying unequal social relationships and dynamics as replicators of discrimination and inequality in the environmental regulatory context independent of the particular motivations of individual actors. The explanatory power of this understanding rests in its ability to relate larger social problems of racial and socio-economic inequality, including the lingering effects of past discrimination, to the specific context of inequality and unfairness in environmental matters.

One important response and long-term strategy to under-representation has been to promote political empowerment and increased public participation by the poor and racial minorities in governmental decision-making, and in particular in environmental decision-making. While such a remedy might be a useful prescription for how community activists should act, this process-based approach is less useful in articulating decision-making criteria for industry and government officials who desire to act responsibly with regard to the concerns of the environmental justice movement.

More troubling, the community empowerment approach could be construed as letting industry and government off the hook too easily when dealing with poor and minority communities.²⁸ Those opposing environmental justice claims might argue that it is only when poor and

See, e.g., Michel Gelobter, *Toward a Model of "Environmental Discrimination,"* in RACE AND THE INCIDENCE OF ENVIRONMENTAL HAZARDS: A TIME FOR DISCOURSE 64 (Bunyan Bryant & Paul Mohai eds., 1992). However, I would also agree with Gerald Torres' argument that willful ignorance of serious racially disparate impacts of environmental decisions can easily amount to or be evidence of some deeper-lying prejudicial or racist attitude. See Gerald Torres, *Introduction: Understanding Environmental Racism*, 63 U. COLO. L. REV. 839 (1992).

27. Cole, *supra* note 1, at 621-34; Foster, *supra* note 2, at 808; Lazarus, *supra* note 3, at 795-96.

28. In that sense, I think that traditional legal discourse in advancing the interests of racial minorities, the poor, and members of other marginalized groups remains important. Cf. Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 404-05, 424 (1987) (noting the importance of assertions of legal rights in helping minorities and poor in spite of criticisms of traditional legal discourse by the Critical Legal Studies Movement).

minority communities vocally object to an environmental decision that industry and government should be concerned about environmental justice. Relying on community empowerment may create the impression that more specific decision-making policy reforms are not needed, or that unorganized communities, including communities that have not yet, or that have been unable to build a broader coalition to address environmental justice issues, are in no need of “environmental justice.”²⁹

A third, intermediary explanation of environmental justice problems focuses on the structural characteristics of environmental regulation and of civil rights law, two legal frameworks that activists have largely looked to for remedies to their complaints. According to such an explanation, the complaints of activists are traceable to structural characteristics of the regulatory system and thus can only be addressed by remedies correcting these structural deficiencies.³⁰

In particular, the environmental regulatory system has emphasized the importance of quantifiable considerations because of the pre-eminence of scientific and economic analysis in formulating environmental policy. Scientific analysis has been significant because of its importance in providing a better understanding of the causes and effects of environmental degradation, while economic analysis has been critical as a tool for addressing the collective action problems (as exemplified by Garret Hardin’s “Tragedy of the Commons”) raised by the environmental commons. However, the goals and desires of environmental justice activists have largely been shaped by civil rights law, which has been primarily designed to vindicate incommensurable, dignitary interests, such as equality and autonomy.

Another important structural aspect of environmental regulations has been their majoritarian focus. The commons problem explicated by Garrett Hardin has strongly influenced environmental regulation. The quintessential concern of environmental regulation has been to prevent actions by individuals that, while advantageous and beneficial to that particular individual, are harmful to the commons and thus to the community as a whole.³¹ As a result, environmental regulation has relied on processes that are majoritarian in nature, such as institutional reliance on a politically-controlled federal agency rather than the courts.³²

29. See Foster, *supra* note 2, at 808-09.

30. See generally Tseming Yang, *The Form and Substance of Environmental Justice* (forthcoming B.C. ENVTL. AFF. L. REV. (2002)).

31. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968).

32. Even regulatory approaches, such as open decision-making and explicit consideration of environmental interests, see National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1994 & Supp. 1999), or information dissemination about pollution and toxics, see Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. § 11044 (1994), all rest on the

The implications of such structural mismatches for activists representing minority groups and the disenfranchised should be apparent. Without significant access to and influence on the political process, minorities and the poor are unable to affect a decision-making process that focuses on the needs of the many rather than the few. The failure of environmental standards to adequately protect minorities and the poor, for example, from the bio-accumulated toxins in fish or the work-hazards associated with pesticide applications illustrate this problem. At the same time, many of the goals advanced by activists simply are not easily addressable through the traditional regulatory decision-making approaches. After all, a decision-making process that seeks to scientifically analyze and economically quantify problems is unable to make sense of calls for greater community control over polluting facilities and demands for equality, goals that cannot be analyzed or quantified in such a fashion.

More insidiously, the majoritarian focus and the concern with quantifiables delegitimizes the quest for risk elimination and the values associated with views of environmental protection rooted in dignitary and incommensurable concerns. Justifying polluting activities and the resulting risks through cost-benefit analysis and the needs of the larger society is in many respects not just a simple methodology for decision-making but also an ideology that tends to submerge the interests of marginal groups.³³

These approaches have greatly affected our thinking with regard to government intervention in questions of risk elimination or, alternatively, compensation for the imposition of risk. In a world that is not risk-free, even in the absence of industrial pollution, and given a premise that everybody is obligated to bear some risks and burdens in order for modern civilizations to function, risk elimination requires a compelling justification. An approach that focuses on the interests of the public at large, rather than particular individuals or marginal groups, and which uses quantitative analysis to balance the benefits against the attendant costs of polluting activities will inevitably find the interests of small and marginal groups to be of insufficient significance for regulatory attention.

In the end, the existing environmental regulatory structures and institutions are a significant cause for environmental inequities. They are not just symptoms of pre-existing inequalities, but also perpetuat-

assumption that regulators and polluters will be more responsive to and take better care of environmental interests if they can be held accountable by political processes and public pressure. However, utilizing and enhancing political processes, of course, promotes majoritarian decision-making. See Yang, *supra* note 30.

33. That is not to say that they are illegitimate means of deciding difficult issues. However, it is important to remember such a methodology has certain consequences for such groups.

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ing causes of environmental inequality and injustice. The most common response to these problems is: How can one improve the environmental regulatory system to address these deficiencies? That is an inquiry that many have engaged in elsewhere. A question that has not been the subject of much inquiry is “what could have been” if Congress and the President had not responded to concerns about environmental problems through enactment of the modern environmental statutes and the creation of the EPA. The answer to that question is important in particular to the normative claims that the existing environmental regulatory system is responsible for the injustice. In particular, for our purposes here, could the courts have responded to the pressures for a legal response to the nation’s environmental problems through expansion and development of tort law principles?

IV. WHAT MIGHT HAVE BEEN

As a form of private law, tort law is often times seen as focused primarily on issues of compensation. However, its function as a regulatory system is little different from the modern environmental statutes. Rather than relying on a centralized system that seeks to regulate activities degrading the environment in a comprehensive and prospective fashion, tort law utilizes judicial adjudication to affect behavior through *ad hoc*, case-by-case decision-making. As an alternative then, tort law might be thought of as regulating through deterrence by imposing liability for prohibited actions.³⁴

Tort law has certain advantages in vindicating the interests of environmental justice communities. Its very nature as a form of private law designed to promote the interests of particular individuals, rather than the more general public at-large, promotes outcomes that are more sensitive to the particular interests, including corrective justice claims, of these communities. For example, tort law can provide compensatory remedies that can address the disparate burdens imposed on minority and poor communities. In contrast, while many environmental statutes provide for citizen suits, which allow private individuals to bring enforcement actions against polluters, such actions generally provide for no private damages. Any monetary penalties that are assessed against a polluter must be paid to the federal government.

A related consequence of this lack of a private damages remedy is the unavailability of funds, available in tort claims, out of which

34. See, e.g., *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (“The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.” (quoting *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959))).

attorneys fees may be paid. The result is to make it more difficult for such communities to find and pay for legal representation.³⁵ But most importantly, the judicial system arguably has taken the concerns of individual plaintiffs and the goal of individualized justice more seriously than administrative processes.

Given the above-noted criticism of the environmental regulatory system and the advantages of tort law, one might ask whether the judicial system and tort law principles could have done better in addressing the complaints of environmental justice activists in the absence of the enactment of the modern environmental laws and creation of the EPA. This question is obviously counter-factual in nature, and we can never answer this question with great certainty. But the response might very well be an affirmative one in some respects. After all, it is highly unlikely that the public and political pressures that led to the creation of the environmental regulatory system in the first place would have simply dissipated if Congress and the President had not acted. It is more likely that these pressures would have found other outlets and sought responses elsewhere, maybe by state legislatures, and very likely by the courts through the adjustment of tort principles and doctrine.

Three instances illustrate situations where 1) the environmental laws have affirmatively limited the reach of existing tort law and limited the remedies available for victims, 2) tort law might have accomplished the same functions as environmental laws, and 3) tort law could have filled gaps that exist currently in the environmental regulatory system.

A. *FIFRA and Farmworkers*

As the federal statute that creates EPA oversight authority over pesticide use, FIFRA³⁶ provides the EPA with regulatory jurisdiction over pesticides. Under FIFRA, the EPA has the authority to require the registration of pesticides and to regulate their use, sale, and labeling.³⁷

The EPA may enforce FIFRA's regulatory requirements by stopping the sale, use and removal as well as by seizing and condemning products that are in violation of FIFRA.³⁸ It may also assess civil pen-

35. Of course, attorneys fees can be recovered if a citizen suit is successful. However, Eileen Gauna has pointed out that there are other obstacles to making citizen suits a practical avenue for vindicating environmental justice concerns. See Eileen Gauna, *Federal Environmental Citizen Provisions: Obstacles and Incentives on the Road to Environmental Justice*, 22 *ECOLOGICAL L.Q.* 1 (1995).

36. Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136-136y (2000).

37. *Id.* at § 136, 136j; see also *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 601 (1991).

38. 7 U.S.C. § 136k(a)-(b).

alties of up to \$5,000 per violation and criminal penalties of up to \$50,000 and/or one year's imprisonment for knowing violations.³⁹ At the same time the EPA can refuse or cancel registration of a label or impose restrictions.⁴⁰

Because of the needs for uniformity in this regulatory scheme, FIFRA bars states from imposing additional labeling requirements on manufacturers.⁴¹ This includes preemption of any state tort claim, such as a tort claim alleging a failure to warn, based on the failure of the pesticide warning labels to adequately warn purchasers or users about product hazards.⁴²

Preemption is troubling for a number of reasons, not only because of the weakness of the regulatory scheme but also because of the process by which the EPA approves pesticide warning labels.⁴³ There has also been persistent criticism that enforcement of FIFRA's requirements has been inadequate.⁴⁴

At its core, FIFRA's original mission, as a statute designed to protect farmers and other pesticide users against misleading claims by manufacturers, has withstood many of the congressional transformations that have sought to configure FIFRA into a law aimed at protecting the environment and humans adversely affected by pesticide use. This is most clearly exemplified by the standards that govern the EPA registration approval of a new pesticide. The EPA must register a pesticide if, in addition to requirements pertaining to the pesticide's effectiveness as claimed and compliance with information submission and labeling requirements, the EPA finds that the product will not cause "unreasonable adverse effects on the environment," either when used as intended or "when used in accordance with widespread and commonly recognized practice."⁴⁵ In the pesticide use context, "unreasonable environmental effects" means "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide."⁴⁶ While such balancing is not unusual in environmental regulation, its explicit attempt to balance human health and environmental risks against industry profits and other economic gains is particularly stark.

39. *Id.* at § 1361(a)(1), (b)(1).

40. *Id.* at § 136d(b).

41. *Id.* at § 136v. FIFRA disclaims any other preemptive effect. *See id.*

42. *See, e.g.,* *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993); *see also* *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992). However, product liability claims alleging defective design or testing are not considered preempted. *See, e.g.,* *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995).

43. *See generally* WILLIAM H. RODGERS, JR., *HANDBOOK ON ENVIRONMENTAL LAW* 445-80 (2d ed. 1994).

44. *See, e.g.,* Daniel B. Nelson, *No Cause For Relief: FIFRA's Preemptive Scope After Cipollone v. Liggett Group, Inc.*, 1995 ANN. SURV. AM. L. 565, 570-71 (1996).

45. 7 U.S.C. § 136a(c)(5).

46. *Id.* at § 136(bb).

Those standards are especially troubling when the registration process itself is examined. For example, it has been noted that FIFRA's registration process relies primarily on manufacturers to submit their own data to support the safety of a pesticide and appropriateness of its self-designed and worded warning label.⁴⁷ The EPA conducts no independent analysis to determine the reliability of the data, but instead only considers if the registration applicant used acceptable methodology to obtain the submitted results.⁴⁸ Thus, the EPA makes its registration decisions based primarily on information supplied by the registration applicant itself rather than through its own independent investigation. The consequences for the reliability of the EPA's registration decision in this light ought to be obvious — safety and environmental effects determination can be no better than the data submitted by the applicant. The same is true of EPA-approved labels, since they are also based on the data submitted by the applicant.

What recourse exists when a manufacturer fails to submit relevant data or submits erroneous instructions to the EPA, which approves the label, and a user suffers harm as a result of the missing or erroneous information? Unfortunately, victims are left without a remedy. Most courts have held that FIFRA preempts any state failure to warn claims arising from or implicating an EPA approved label.⁴⁹ State courts have concurred in that conclusion.⁵⁰

For example, in Wisconsin, a farmer, following guidelines of an EPA-approved herbicide label, planted corn following a soybean crop on which the herbicide had been applied. The result was damage to the corn crop. This occurred twice to the farmer, and later the company admitted it had knowledge of damage to corn crops caused by the herbicide. Despite this knowledge, the American Cyanamid Company failed to change its warning label. A federal court later held FIFRA preempted the farmer's claims against the manufacturer.⁵¹

47. See *id.* at § 136a.

48. See *Burke v. Dow Chem. Co.*, 797 F. Supp. 1128, 1135 (E.D.N.Y. 1992); see also Pesticide Programs, Data Requirements for Registration, 40 C.F.R. § 158.80 (2001); Tybe A. Brett & Jane E.R. Potter, *Risks to Human Health Associated with Exposure to Pesticides at the Time of Application and the Role of the Courts*, 1 VILL. ENVTL. L.J. 355, 359 (1990).

49. See *Taylor AG Indus. v. Pure-Gro*, 54 F.3d 555, 560-61 (9th Cir. 1995); *Bice v. Leslie's Poolmart, Inc.*, 39 F.3d 887, 888 (8th Cir. 1994); *MacDonald v. Monsanto Co.*, 27 F.3d 1021, 1024-25 (5th Cir. 1994); *Worm v. Am. Cyanamid Co.*, 5 F.3d 744, 748 (4th Cir. 1993); *King v. E.I. Du Pont De Nemours & Co.*, 996 F.2d 1346, 1347-51 (1st Cir. 1993); *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 371 (7th Cir. 1993); *Papas v. Upjohn Co.*, 985 F.2d 516, 520 (11th Cir. 1993); *Arkansas-Platte & Gulf P'ship v. Van Waters & Rogers, Inc.*, 981 F.2d 1177, 1179 (10th Cir. 1993). Some courts have extended preemption to include even claims of breach of express or implied warranties. See, e.g., *Taylor AG Indus.*, 54 F.3d at 562-63. But see *Burke*, 797 F. Supp. 1128.

50. See, e.g., *Etcheverry v. Tri-Ag Serv. Inc.*, 993 P.2d 366 (Cal. 2000); see also Scott A. Smith & Duana Grage, *Federal Preemption of State Products Liability Actions*, 27 WM. MITCHELL L. REV. 391, 401 (2000).

51. See *Kuiper v. Am. Cyanamid Co.*, 131 F.3d 656 (7th Cir. 1997); see also *Worm*, 5 F.3d at 748.

One might look to FIFRA enforcement provisions to alleviate some of these problems. Yet, even private law firm lawyers representing pesticide manufacturer interests on a regular basis have noted the comparative weakness of FIFRA's enforcement provisions in relation to those of most other environmental statutes.⁵² FIFRA has lower penalties than many other environmental statutes. It also happens to be one of the few environmental statutes that lacks a citizen suit provision.⁵³

FIFRA does allow individuals with standing to petition the EPA to suspend or cancel a registration⁵⁴ or to seek judicial review of agency decisions.⁵⁵ However, it has been noted that “[c]onsumers will not ordinarily bring such petitions, absent a catastrophe, intervention by environmental groups or voluntary action by the manufacturer”⁵⁶ This is especially true of farmworkers and members of poor and minority communities. Further, after harm or damage has already occurred, such review or petitioning serves little help to those injured and seeking compensation.

In addition, commentators have also noted serious concerns about the EPA's ability to utilize its existing authorities to fully enforce FIFRA requirements.⁵⁷ A 1990 study by the GAO suggested that the EPA lacked resources to enforce against misleading advertising claims by manufacturers.⁵⁸ In a more recent inquiry, the GAO found that the EPA lacked resources to keep track of injuries due to pesticide exposures.⁵⁹ Further, in 1993, under the EPA's own estimate, the agency was at least four years behind in re-registering older pesticides due to hazards surfacing since their initial registration.⁶⁰ With little EPA enforcement, correspondingly little is done to ensure that manufacturers are not taking advantage of the statutory scheme, FIFRA procedures, or the people using their products.

52. Linda J. Fisher et al., *A Practitioner's Guide to the Federal Insecticide, Fungicide and Rodenticide Act: Part I*, 24 ENVTL. L. REP. 10,449, 10,655 (1994).

53. Contrast this with Toxic Substances Control Act, 15 U.S.C. § 2619 (2000); Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1365 (1994); Solid Waste Disposal Act, 42 U.S.C. § 6972 (1994); Clean Air Act, 42 U.S.C. § 7604 (1994); Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9659 (1994).

54. See *Envtl. Defense Fund, Inc., v. Hardin*, 428 F.2d 1093 (D.C. 1970); *Burke v. Dow Chem. Co.*, 797 F. Supp. 1128, 1135 (E.D.N.Y. 1992).

55. See Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136n(a) (2000).

56. *Burke*, 797 F. Supp. at 1135.

57. Nelson, *supra* note 44, at 570.

58. U.S. GEN. ACCOUNTING OFFICE, *LAWN CARE PESTICIDES: RISKS REMAIN UNCERTAIN WHILE PROHIBITED SAFETY CLAIMS CONTINUE* Rep. No. RCED-90-134, at 4, 18 (1990).

59. U.S. GEN. ACCOUNTING OFFICE, *PESTICIDES: REGISTRATION DELAYS JEOPARDIZE SUCCESS OF PROPOSED REFORMS* Rep. No. T-RCED-94-48 (1993).

60. *Id.* At the same time, “FIFRA leaves states with no authority to police manufacturers' compliance with the federal procedures.” *Papas v. Upjohn Co.*, 985 F.2d 516, 519 (11th Cir. 1993).

These inadequacies of FIFRA have affected farmworkers most severely. Eighty-five percent of farmworkers belong to racial minority groups.⁶¹ Additionally, farmworkers as a group tend to have a lower level of education compared to the rest of the population, possess lesser English-speaking skills, and are less familiar with U.S. laws.⁶² For example, in the rural California farming community of Kettleman City, ninety-five percent of residents are Latino, most are farmworkers, and forty percent speak only Spanish.⁶³ Further, sixty percent of migrant and seasonal farmworkers in Idaho are Hispanic, presumably many speaking only Spanish.⁶⁴ Additionally, only fifty-five percent of juvenile farmworkers finish high school.⁶⁵

It should be obvious that warning and use labels, regardless of their accuracy or comprehensiveness, cannot assure safety and be effective unless labels and instructions are comprehensible, understood, and followed by the user. The reality is that language barriers, lack of understanding of the health and safety risks of pesticides, or simply lack of time result in a failure to properly comprehend the warnings or follow the use instructions designed to protect them against the hazards of pesticides. As a result, warning labels and use instructions have not been effective in insuring farmworker safety and health. Some estimate that pesticides poison as many as 300,000 farmworkers each year through occupational exposure.⁶⁶ Further, the U.S. Bureau of Labor Statistics indicates that farmworkers suffer the highest rate of chemical-related illness of any occupational group.⁶⁷

Lack of enforcement by the EPA and the lack of influence of farmworkers on the regulatory process gives manufacturers little incentive to insure the accuracy and effectiveness of warning and use labels once a product has been registered. After all, FIFRA preemption of state tort law claims related to pesticide warning and use labels effectively insulates manufacturers from the potentially expensive tort claims connected to pesticide harms. Even strict compliance with warning labels rarely eliminates all risks of exposure. Most insidiously, reliance on warning labels alone to ensure safety effectively leads manufacturers to substitute warnings for efforts to make a product or a design safer.

61. See Sara Hoffman Jurand, *Human Rights Group Reports Poor Working Conditions For Child Farmworkers*, 36 TRIAL 98, Sept. 2000, at 99.

62. Valerie J. Phillips, *Have Low Income, Minorities Been Left Out Of The Environmental Cleanup?*, 38 ADVOCATE 16, Oct. 1995, at 18.

63. *Id.* at 17.

64. *Id.* at 18.

65. See Jurand, *supra* note 61, at 99.

66. See Phillips, *supra* note 62, at 16, 18.

67. *Id.*

As a result, preemption of such traditional common law tort claims leaves injured farmworkers not only without compensation for many of their harms due to pesticide exposure, but also without an effective private law tool to compel manufacturers to make their pesticide products safer, whether it be through warning mechanisms and use instructions that *actually* lead to safer use of such pesticides or through product improvements that make the pesticide itself less dangerous to the user.⁶⁸

In the end, even though the EPA regulatory oversight in other areas of environmental law has presented a vast improvement over common law approaches to pollution and toxics, courts have noted that the “EPA oversight will not be nearly as protective of persons exposed to pesticides as state tort law.”⁶⁹

B. *Toxic Torts and Causation*

One of the main areas in which environmental laws have traditionally been considered to be far superior to the operation and capabilities of tort laws has been causation. Most aptly demonstrated in the context of toxic torts, proof of causation, both general and specific, has been one of the most significant hurdles for plaintiffs. Thus, scientific uncertainty about the actual effects of some toxics and pollutants, the various causal origins of diseases, including the effects of life-style and other contributions, as well as the manifold sources of toxins in the environment have made establishment of the causal connection between the defendant’s actions and the plaintiff’s harm problematic.

Environmental statutes have sought to circumvent these problems by embarking on a precautionary and preventive path that seeks to curb environmentally harmful actions before they result in such injuries. Rather than punishing actions that have proven to be harmful, and thereby deterring similar conduct in the future, federal environmental laws have essentially sought to mandate, preventively through permits and standards, that polluting activities occur only

68. While warning and use instructions are certainly important mechanisms for protecting users of pesticides from hazards by warning about the risks and dangers of substances as well as appropriate use and handling instructions as ways of minimizing such risks and dangers, harm to humans and the environment have occurred despite such warnings. For example, Howard Latin has persuasively raised a number of reasons why warning labels often do not adequately assure the safety of those using the products. Users may be functionally illiterate because they cannot read the instructions, they may rely on their own experience with other pesticides or word-of-mouth instructions, they may simply not understand the labels (including the instructions) even if they can read them, they may not be able to comply because of time considerations, and they may simply have no alternative to improper usage. See Howard Latin, “*Good*” *Warnings, Bad Products, and Cognitive Limitations*, 41 *UCLA L. REV.* 1193, 1206-49 (1994).

69. *Burke v. Dow Chem. Co.*, 797 F. Supp. 1128, 1135 (E.D.N.Y. 1992).

within particular margins of safety, or minimize the risk they pose to the environment and human health.

Could in a counter-factual world, without the EPA and the environmental statutes, the tort law system have accomplished the same? The difficulties that toxic tort plaintiffs have encountered in proving their claims, such as the account of the law suit by citizens of Woburn, Massachusetts against W.R. Grace and Beatrice Foods in *A Civil Action*,⁷⁰ suggests that current principles are insufficient. However, what would the tort law system have looked like in the absence of the modern federal environmental regulatory system. While speculative, it is conceivable that courts would have responded to the challenges of probabilistic causation and risk through further adjustment and relaxation of causation standards.

For example, the “but-for” test, used to show cause-in-fact, has presented problems in the past when multiple potential tortfeasors existed, yet only one could have been the precipitating cause-in-fact. For example, in the well-known case *Summers v. Tice*,⁷¹ the plaintiff was shot in the eye by one of two defendants who had fired their guns negligently in the vicinity of the plaintiff.⁷² The plaintiff could not identify which defendant had actually fired the injurious shot, though it was clear that one of them was the tortfeasor. Rather than absolving both defendants, since the plaintiff could not prove with specificity the responsibility of either one, the court shifted the burden of proof to the defendants in an attempt to provide corrective justice to the plaintiff. Forcing each of the defendants to prove that they were not responsible for the injuring shot significantly increased the plaintiff's chance of recovering damages.⁷³

While courts have rejected this form of alternative liability for products liability cases, they have developed a related doctrine in the market share principle. First applied in the DES products liability context, market share liability was designed to impose liability on each “defendant only for a percentage represented by that defendant's share of the market in the harmful product.”⁷⁴ Its importance arose in this context because of the difficulty of tracing, just as in *Summers v. Tice*, the origin of the particular product that actually caused the harm to the plaintiff.⁷⁵ Rather than let the defendants escape liability be-

70. JONATHAN HARR, *A CIVIL ACTION* (1995).

71. 199 P.2d 1 (Cal. 1948).

72. *Summers v. Tice*, 199 P.2d 1 (Cal. 1948).

73. *Id.* at 5. The *Summers* theory has been accepted by the Restatement. RESTATEMENT (SECOND) OF TORTS § 433(b) (1965). However, some courts have objected to it. *See, e.g.*, *Namm v. Charles E. Frosst & Co.*, 427 A.2d 1121, 1127-28 (N.J. Super. Ct. App. Div. 1981) (when all possible tortfeasors were not before the court).

74. DAN B. DOBBS, *THE LAW OF TORTS* § 176, at 430 (2000).

75. *See Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980). DES was a prescription drug manufactured by hundreds of companies to help prevent pregnant women from having miscar-

cause of the virtual impossibility of tracing a product that generically resembled that of multiple other manufacturers and that came to the plaintiff through the consumer market, the court shifted the burden of proof to the defendants. Plaintiff could as a result recover on a basis proportional to the defendant's market share. Of course, not all courts have unanimously applied this theory.⁷⁶

Finally, the introduction of the loss-of-chance doctrine has allowed plaintiffs to circumvent other obstacles to recovery created by traditional causation doctrine. Developed in the context of medical malpractice actions, its purpose has been to allow recovery for reduction in the victim's chance of survival by a physician's negligent actions. For instance, while a negligent delay in the diagnosis of a fatal disease reduced the patient's chances of survival by some statistical percentage amount, an earlier diagnosis might not necessarily have prevented death.⁷⁷ Such a scenario presents serious causation problems in the traditional but-for sense, as the patient would have died regardless of the negligent act or omission. In contrast, under the loss-of-chance doctrine, recovery is permitted when the plaintiff can prove that the defendant increased the risk of harm. However, courts have not adopted this doctrine uniformly and broadly.⁷⁸

The general principles inherent within these cases are arguably applicable to modern toxic tort problems. In particular, the problems confronting plaintiffs in the above scenarios are the same problems faced by potential victims of environmental harms. Given these parallels, one could easily imagine courts applying the principles of *Tice* and *Sindell* by allowing plaintiffs to shift the burden of proof to defendants and by simplifying inquiries about responsible parties once harm from industry-specific toxins or pollutants has been shown. Such an approach would avoid issues of who in fact produced or introduced into the environment particular chemicals or toxins and simplify questions of which other parties or factors contributed to the victim's injuries.

Courts might also allow recovery for exposures to toxins and pollutants even without proof of present harm.⁷⁹ The approach would simplify claims because it would circumvent the necessity of showing

riages. Many years later, it was discovered that DES caused reproductive system cancers in female offspring of some DES users.

76. See, e.g., *Gorman v. Abbott Labs.*, 599 A.2d 1364 (R.I. 1991) (rejecting market share liability theory in DES case).

77. See *Wollen v. DePaul Health Ctr.*, 828 S.W.2d 681 (Mo. 1992). See generally Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353 (1981).

78. See, e.g., *Weymers v. Khera*, 563 N.W.2d 647 (Mich. 1997) (where the court refused to apply loss of chance doctrine to a case other than loss of chance for life); *Jones v. Owings*, 456 S.E.2d 371 (S.C. 1995).

79. See DOBBS, *supra* note 74, at 570-72.

current manifestations of harms.⁸⁰ Application of principles of market share liability and loss of chance would ease recovery for exposures to toxic chemicals and harmful pollutants, allowing environmental justice activists to gain compensation for the risks imposed on communities while creating deterrent incentives that would reflect more accurately the burdens imposed by industry and manufacturers.

C. *Intangible Harms and Claims about Incommensurables*

Another line of cases demonstrates that a counter-factual tort system might have been able to address issues that have largely remained unresolved by the current environmental regulatory system. As suggested above, one of the main deficiencies of the existing environmental regulatory system has been its failure to account for the incommensurable harms that environmental justice activists complain of. While the regulatory system does not *per se* foreclose the consideration of incommensurables, its heavy reliance on scientific studies and economic analysis does not lend itself easily to the incorporation of such unmeasurable, and usually intangible, factors. Even if part of the decision-making process, the significance of such incommensurables is usually dwarfed by the presence of quantifiable factors.

In contrast, tort law has had significant familiarity with harms to incommensurables, as the commonplace nature of claims for pain and suffering as well as the tort claims of more recent vintages have demonstrated. While assault and its interest in securing peace of mind has existed for many centuries in the common law, it is only in more recent times that legal claims for harms to intangible interests independent of physical harm, for example intentional infliction of emotional distress (IIED), have become more widely accepted in a broader form.⁸¹

The claim of IIED arose first as an exception to the more general rule that damages for stand-alone emotional harms could not be recovered. The American Law Institute itself recognized within the First Restatement of Torts a separate tort for IIED only in 1948.⁸² Over the years, the requirements for establishing the claim have been relaxed. While early cases involved acts of violence or exceedingly

80. RESTATEMENT (SECOND) OF TORTS § 432(2) (1965). Commentators have also suggested that the "substantial factor" test can significantly facilitate recovery. *See, e.g.,* Shelly Brinker, *Opening the Door to the Indeterminate Plaintiff: an Analysis of the Causation Barriers Facing Environmental Toxic Tort Plaintiffs*, 46 UCLA L. REV. 1289 (1999).

81. *See, e.g.,* DeWolf v. Ford, 86 N.E. 527 (N.Y. 1908) (innkeeper); *Wilkinson v. Downton*, [1897] 2 Q.B. 57; *Cole v. Atlanta & W.P.R. Co.*, 31 S.E. 107 (Ga. 1897) (common carrier).

82. *See* DOBBS, *supra* note 74, at 825. The current restatement formulation of this tort requires that the defendant 1) intentionally or recklessly, 2) cause severe emotional distress, and 3) by extreme and outrageous conduct. RESTATEMENT (SECOND) OF TORTS § 46 (1965).

cruel pranks,⁸³ contemporary cases have involved more sensitive and difficult issues, including racial slurs and sexual harassment.⁸⁴

The expansion of this tort has not stopped with claims by the intended victim of the outrageous and extreme conduct but has also allowed those negligently harmed to recover. Gradual liberalization from initial limitations allowing recovery only for those within the zone of danger of the act at issue, usually conduct that created a fear of physical harm,⁸⁵ led to doctrines that only require that emotional distress to the harmed party be foreseeable.⁸⁶

The liberalization of emotional distress claims have also led some courts to permit claims based on fear of future harm or disease, such as cancer. Thus, courts have permitted claims for emotional distress for an increased risk of cancer because of excessive X-ray doses.⁸⁷

The historical development of emotional distress claims suggests that common law courts and tort doctrines may be friendlier to the concerns of environmental justice activists than traditional environmental regulatory processes. The pervasive acceptance of the emotional distress claims indicates not only the courts' understanding of incommensurable values and interests but also suggests a willingness to address the intangible harms that environmental justice activists claim.⁸⁸ It is conceivable that in a counter-factual tort system, courts might have provided not only relief for the emotional distress such communities suffer because of disparate environmental burdens, but also for claims raising discrimination, destruction of their communities, and other harms that significantly impair the quality of life. Attention to such concerns would address the concerns of environmental justice communities much more comprehensively than the environmental regulatory approaches currently in existence.

V. CONCLUSION

The environmental regulatory system has provided many benefits to society, including environmental justice communities. And there

83. See DOBBS, *supra* note 74, at 829; see also *State Rubbish Collectors Ass'n v. Siliznoff*, 240 P.2d 282 (Cal. 1952).

84. See, e.g., *Alcorn v. Anbro Engineering, Inc.*, 468 P.2d 216 (Cal. 1970); *Ford v. Revlon, Inc.*, 734 P.2d 580 (Ariz. 1987).

85. *Amaya v. Home Ice, Fuel & Supply Co.*, 379 P.2d 513 (Cal. 1963).

86. See *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968). *But see* *Thing v. La Chusa*, 771 P.2d 814 (Cal. 1989) (narrowing *Dillon*).

87. *Ferrara v. Galluchio*, 152 N.E.2d 249 (N.Y. 1958).

88. Of course, in real contemporary cases, courts have not yet allowed emotional distress claims based on environmental contamination and exposure alone. In *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993), the California Supreme Court denied such a claim by plaintiffs who had sued the defendant for releasing toxic wastes that had leached into the plaintiffs' groundwater. While none of the landowners had any cancerous or precancerous condition, each one had an enhanced, but unquantified risk of developing cancer in the future due to the exposure. The court found this claim to be insufficient to allow recovery.

are many arguments why the poor and racial minorities would have been worse off without the existing environmental regulatory system.

However, the analysis here does point out that in a counter-factual world, a tort law approach to environmental issues might have had significant merits for addressing environmental justice concerns. That means that the creation of the environmental regulatory system did not come only with a price tag expressed in dollars and cents, through the costs imposed by regulation, but that it also had a significant opportunity cost — a different regulatory system that might have addressed some of the environmental justice deficiencies of the existing system. In a counter-factual reality, the tort law system might have been able to address a number of environmental justice issues.

Thus, the burdens complained of by environmental justice activists are neither an inherent price of environmental protection nor the claims of a special interest group for preferential treatment. They are the consequences of the government's choice among competing regulatory systems with different distributional effects. In that sense, addressing the environmental justice movement's demands for relief is not only necessary as a matter of justice, but also important for preserving the legitimacy of the government's choice of the existing regulatory system over a tort law system that might have existed in a counter-factual world.