“LULU and the Law”

94-03

Benjamin Davy
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I. Introduction

LULUs are locally unwanted land uses. Some examples for LULUs are power plants, waste treatment facilities, or affordable housing projects. I want to use the siting of hazardous waste treatment facilities to discuss problems of «LULU and the law».

My first encounter with «LULU and the law», however, involved a drug therapy center in a small village near Vienna. Local residents opposed the siting of the center because they disliked the idea of living next door to drug addicts. This interest is not supported by law in Austria. The local residents therefore filed objections with the Provincial Governor who had to decide on the center's application to permit the sewage drain. They argued that patients secretly would bring drugs and would flush these drugs down the toilet whenever they feared a police search. The threat of drug-infested sewage, leaking into groundwater, kept the Provincial Governor, the Ministry of Agriculture and even the Austrian Administrative Court busy for
some time. Eventually the permit was granted under the condition that the center added a purification device to clean the sewage from cannabis and heroin.

I would like you to keep the most important fact of this case in mind: If law is employed to block a LULU, it might very well appear as if there is a serious legal problem. But frequently it will be just used as an excuse to support the opponents. And if a development is »legal«, it might very well appear as if all serious problems have been solved. Frequently, law will be just used as an excuse for not having to address the »real« problems.

Supporters of a proposed development frequently do not even want to consider the problem which is presented by locally unwanted land uses in other terms than in denouncing its »foes«. They show contempt for those who do not want an undesirable land use »in their backyard« (NIMBY). The Austrian equivalent of the NIMBY-syndrome, the Floriani-principle, puts even more stress on the sheer egoism which allegedly motivates opposition against a LULU:

»Saint Florian, Saint Florian,
please save my house and
burn that of another man!«

This fast and fervent prayer shall turn away lightning-strokes during a thunderstorm, even at the cost of the destruction of the property of someone else. But is it safe to assume that opponents of noxious facilities wish others to be hurt?

Putting the NIMBY-tag on the opponents of a LULU and accusing them of selfish myopia will not make them change their attitude, but will rather elicit a »Not In Anybody's Backyard« (NIABY) or »Not On Planet Earth«
(NOPE) reply. Eventually, the dispute over land uses will lead to a "Build Absolutely Nothing Anywhere Near Anything" (BANANA) deadlock.

In this talk, I want to try to discuss four aspects of LULU and the law with you.

First, I shall sketch the case of the East Liverpool (Ohio) hazardous waste incinerator, a true story about a LULU and the law. This incinerator has been sited during the early 1980s. Although it is currently in limited post-trial-burn operation, it hardly can be described as a success story. Second, I shall describe the NIMBY problem as the symptom of the unjust and unfair distribution of externalities which is established by law. Third, I shall touch the general issue of justice and the law, and I shall raise the question what kind of justice would be appropriate to establish environmental justice. And fourth, I shall tell you a story.

II. The Case of the East Liverpool (Ohio) Hazardous Waste Incinerator

At an Environmental Justice Summit in December 1993, Al Gore said: "Let us join hands and become partners in the struggle to be sure that the mistakes in America's past don't become part of America's future." The hazardous waste incinerator in East Liverpool, Ohio, is one of the projects which have been accused of environmental injustice. A veteran of the local struggle against the incinerator did not answer friendly to Mr. Gore's statement. He said: "With all due respect to the vice president, when I hear this rhetoric, there are times I just want to throw up."

What's the background of this controversy?
East Liverpool is a town of 13,000 residents in Ohio, near the borders to West Virginia and Pennsylvania. At East Liverpool, the Federal Route 30 crosses the Ohio River. There, a partnership known as Waste Management Industries (WTI) pursues the project of a hazardous waste incinerator. Located within 1500 feet of the site are a school and houses for residential living.

Although the project in the beginning had been supported by the local community, it also met considerable local opposition as soon as permit procedures started. WTI received the necessary federal and state permits in 1983. Legal remedies proved futile.

Construction at the site in East Liverpool, Ohio, started in Spring 1991. In June 1991, actor MARTIN SHEEN led about 50 opponents in a demonstration against the incinerator. «You're always going to have opposition for this type of facility,» a WTI spokeswoman said, and this statement reflects that the partnership hardly was prepared for the following gauntlet.

The incinerator was challenged by different persons or groups and because of different reasons.

Opponents to the development included residents of East Liverpool, a local group known as Tri-State Environmental Council, Greenpeace, the West Virginia Attorney General, the City of Pittsburgh, US senators, US EPA officials (frequently referred to as «whistle blowers»), the Ohio Attorney General, university professors, and ALBERT GORE.

Among the reasons given for the opposition against the development were the claims that the incinerator would cause harm for health and the environment and that the site in the vicinity of the Ohio river was inappro-
priate. It was claimed that WTI was not the owner of the incinerator, but Von Roll Aktiengesellschaft from Switzerland. It also was argued that the Ohio and the US EPA were biased in favor of the development, and that the incinerator permits were invalid.

In early December 1992, the Vice President-elect stated that the Clinton administration would halt the incinerator until the General Accounting Office (GAO) had have enough time to investigate the permitting process, the ownership of the plant, and the compliance with environmental law.

This widely reported announcement turned the local land use dispute into a national conflict. Supporters of the incinerator bought full-page advertisements in major newspapers and picketed the Greenpeace national headquarters in Washington, D.C. The inauguration still ahead, the US EPA approved a trial burn for the incinerator in East Liverpool.

During 1993, the events took one unexpected turn after the other.

The lawsuit Greenpeace v. Waste Management Industries was filed with a US District Court. The judge issued a temporary restraining order which blocked the begin of the trial burn. This was welcomed by opponents because to them the main purpose of the lawsuit was to win time for the Clinton administration to stop the incinerator. The first step of action by the US EPA came as a surprise, however: The newly appointed Administrator, due to a conflict of interest, recused herself from any agency involvement with the WTI incinerator.

At court, the testimony of several expert witnesses revealed weak spots in the risk assessment that had led to the
US EPA's permit. Indirect exposure to toxic emissions and food-chain contamination had not been sufficiently considered, they said. This evidence later led to further deliberations at the US EPA on how the risk assessment for incinerators could be improved. In March 1993, the District Court allowed WTI to begin the eight-day trial burn, but enjoined the post trial burn period of operation. The judge found that «the post trial burn period of operation may cause imminent and substantial endangerment to health and the environment».

WTI started the trial burn shortly after the ruling, but also appealed against the decision which denied their right to limited operation after the trial burn. The US Court of Appeals for the 6th Circuit (Cincinnati) granted a stay of the District Court's order.

Since the courts had cleared the way for WTI to continue, Al Gore's campaign promise was challenged. The promise was not kept, though. The US EPA announced that due to the appellate court's ruling the Government would not block WTI from continuing with their plans. Only one day later, a group of eight opponents staged a sit-in during a tour of the White House. In mid-April 1993, after approval by the US and the Ohio EPA, the East Liverpool incinerator started limited commercial operation. In May 1993, the US EPA announced an eighteen-month moratorium for the development of new hazardous waste incinerators.

A nationwide bus tour, organized by Greenpeace, brought protesters to Washington, D.C. Dozens of people who urged Clinton and Gore to keep their promise, were arrested when they handcuffed themselves to a mock incinerator near the White House. «We will do whatever it
takes to get justice and protection for our children,« one of them said.

In June 1993, the US EPA found that the incinerator emitted »excessive« amounts of dioxin. The Ohio Attorney General presented his report on WTI to the Ohio EPA. The investigation found that the incinerator in East Liverpool was not owned by Waste Industries Management, but by Von Roll. The Ohio EPA responded with asking Von Roll to undergo a new public review of the state permit.

In November 1993, the US Court of Appeals ruled on Greenpeace v. Waste Technologies Industries: »Because the district court erred in concluding that it had subject matter jurisdiction over this case, we reverse.« The Court did not look at the evidence or at the allegations that the incinerator would cause harm or risk to the life and health of residents. »A hazardous waste operator's compliance with the terms of its RCRA permit precludes district court jurisdiction ... to challenge properly permitted activity,« the Court ruled.

By the end of 1993, the WTI incinerator in East Liverpool, Ohio, was operating.

However, there are many loose ends. The US EPA still is designing a new concept for risk assessment and the evaluation of the indirect effects of toxic waste burn. The Ohio authorities have yet to decide on Waste Technologies Industries' application to change its permit to represent the new ownership of the incinerator in East Liverpool. The General Accounting Office is still investigating the allegations against the US EPA and the plant's owners. The Ohio and the Federal moratorium on the siting of new incinerators pending, the future of US hazardous waste treatment facilities looks rather gloomy.
Why is the case of the East Liverpool (Ohio) incinerator no success story, after all? Let me just list a few reasons: First, Waste Technology Industries managed to have a successful siting turned into a case of severe NIMBY after all permits have been obtained and construction was under way. Second, actions and reactions of the developer, agencies, government officials, and politicians almost completely destroyed all foundations of trust. And third, »law« was not used to find and keep a balanced solution of the land use conflict, but to delay, circumvent, exclude, and marginalize.

### III. NIMBY-movements as Struggle Against Externalities

The NIMBY syndrome is the result of a critical distribution of externalities. This distribution, established and protected by law, is frequently too unfair to members of a host community to suffer the adverse consequences of a LULU.

A hazardous waste treatment facility creates costs and benefits. The price for services rendered by an incinerator reflects the costs and benefits which are internalized in the cost-benefit-calculations of all parties who participate in the transaction. If all costs and benefits are accounted for in the succession of buying and selling goods and services which eventually leads to the development of an incinerator, the equilibrium between demand and supply reflects an optimal balance of the preferences of all members of society. If, on the other hand, some of the costs and benefits are not sufficiently considered -- if there are »spillovers« --, the »invisible hand« of the market fails to strike a true balance of the preferences of all members of society. These
costs and benefits are known as external costs and external benefits, or the *externalities* of an activity.

What constitutes an internal cost or benefit and, *vice versa*, what constitutes an external cost or benefit? From the point of view of the law, the answer to this question is embedded in the distribution of legal rights and obligations. In other words: *Law is society's tool to distribute externalities.*

If A can bring legal action against B for toxic emissions from B's incinerator, B has to consider the disadvantage of being blocked from further operation of the incinerator. Either B will decide that paying A off is the best solution to this problem, or B will invest in equipment to avoid harmful pollution, or B will decide to retreat from the incinerator business and turn to more profitable activities. In giving A the right to sue B, law has taken care of some of the harmful effects caused by the incinerator. The law considers A's costs to be relevant and internalizes these costs, thus opening the way to further economic considerations and decision making.

On the other hand, law also determines which effects and consequences of the incinerator have *not* to be taken into account. If A cannot sue B for imposing the »residual risk« of accidents on A, or for increasing traffic and decreasing land values in the vicinity of the facility, or for tainting the public image of A's hometown (which now is known as »Garbageville«), B will do nothing to mitigate these effects. It would take a lot of money and other resources to solve these problems, and after all, B is only enjoying his or her property within the given legal restrictions.

The siting problem -- the host of unsolved LULU disputes -- indicates that environmental and land use law has
not yet internalized all relevant externalities of the locally unwanted land uses. The siting of hazardous waste treatment facilities creates a considerable amount of external costs. In the US as well as in Europe, many people feel that the given distribution of the externalities of LULUs is unfair and inequitable. The disturbances of an unbalanced market have created a rift in the local communities and in society. This rift, of course, is "the NIMBY-syndrome".

To some extent, NIMBY movements are local struggles against the given legal distribution of externalities. They do not only attract parochial stakeholders, however, because the acronym does not only convey the infamous "Not In My Backyard!", but also the anxious "Next, It Might Be You!"

In many European countries, this aspect has contributed to the success of the Green parties and has led to considerable changes in the political landscape. The American environmental justice movement also draws from the discomfort with the performance of the facility siting market. The well documented fact that hazardous waste facilities frequently sit in communities with poor and/or minority population reflects the legally established distribution of externalities. Under the given legal requirements for siting, the "invisible hand" almost necessarily will push LULUs towards poor communities.

A solution of the NIMBY problem seems to require a change of the given legal distribution of externalities, or -- in other words -- more justice and fairness in siting hazardous waste treatment facilities. Certainly, this sounds like a noble task. I have some doubts, however, whether law really can be used to provide for more justice in severe cases of locally unwanted land uses.
IV. Law and Justice

»Ius est ars boni and aequi,« states the introduction to the Corpus Iuris Civilis, a codification of classical Roman law from the 6th century, »Law is the art of the good and the just.« Endowing the fascinating role on lawyers to be the priests of the law, the Corpus continues: »Justice is the constant and permanent task ... to live in honor, to hurt nobody, and to grant his or her share to everyone.«

Lawyers are not always »the priests« of the law, trained in the art of the good and of justice. In the movie »A Dry White Season« MARLON BRANDO plays an attorney of law. To a client who is seeking for justice in a court of law, he refers to justice and law as distant cousins who are not on speaking terms.

I have been educated in the tradition of legal positivism. I have been trained to agree rather to the second statement. A legal positivist will not ask: »What would be a fair and equitable solution to this case?«, but will ask: »What is law's solution to this case?« The critical feature of this position becomes clear when a legal positivist has to deal with a provision of valid law which is unfair or unjust. »It's law anyway«, he or she will argue, and »What's justice after all?«

In the »dreamtime« of modern European law, legal scholars claimed that there is no »natural law« and that law cannot be derived from pre-positive principles, such as the divine revelation of justice. Both sides in the war which raged between Catholics and Protestants from 1618 to 1648 claimed to fight a »bellum iustum«, a just war. The conflict could not be settled by law, because the divine natural law had has lost its legitimizing foundations. The war lasted for thirty years -- given the military resources
and equipment of the 17th century, this was how long it took until almost everybody who was willing to fight had been killed.

This was the lesson to be learned from the dreadful experience: If you want conflicts to be resolved by law, you must not trust that law is (i.e. pre-positive law), but that law has to be made (i.e. positive law [the word derives from the Latin word ponere, to lay down]).

The doctrine of legal positivism (which was the lawyer's way to learn this lesson) distrusts any concept of justice outside of or adverse to the positive law. Justice is only a dangerous illusion, legal positivists claim. They insist that »justice« must not be considered as relevant to the application of the law. A court or an administrative authority decides a case by applying either common law or statutory law. To search for a fair or equitable solution is neither required nor encouraged. Modern legal systems are efficient not because they have successfully incorporated the ideas of justice, but because they can be operated without paying much attention to justice.

However, many people feel that justice is important. »Justice is the foundation of good government«, they claim, or they call for »equal justice under law«. But they start to disagree when they argue a case according to their views on justice. They agree on the principle, but not necessarily on its application. Their disagreement repeats the dilemma of natural law theory and confirms the suspicion that law cannot be gained from a singular notion of justice or fairness (which, in a nutshell, is the task of any natural law theory).

On the other side, any considerable lack of justice weakens the law. Although LULU disputes keep administrative agencies and the courts busy, the call for justice,
raised by opponents of hazardous waste treatment facilities, remains unheard. Their problems are not addressed by the rules and regulations of environmental and land use law. Therefore, NIMBY disputes hardly can be settled by law.

It may be worth to reconsider the relationship of justice and environmental law. I doubt that any grand scheme of equity and fairness will prove helpful. Certainly, I can live in honor, cause harm to nobody, and grant his or her share to everyone, and still put hazardous waste facilities in poor communities. What kind of justice would mitigate the burden of people suffering from the externalities of LULUs?

I want to suggest that an answer to this question can be derived from law; not from a specific statute or case, but from law in general. Even if there is no justice outside the law, there may be some justice embedded in law. People who made law at different times and in different places put their idea of justice into the law. If you remove all the peculiar details, clauses, and exceptions, you might very well find particles of these ideas.

If you look at legal systems in different places and at different times, you will notice considerable differences. Legal positivism holds that these differences prove that there is no common denominator, no idea of justice which is shared by all people. «What seems to be fair to you, does not seem to be fair to me», is a frequent observation in discussions on justice and fairness. Assume, however, that these differences are an intrinsic value of justice. In other words: To some extent it is very important to allow the different expectations of justice to contribute to the making of law. The NIMBY syndrome indicates that there are too many people whose expectations of justice have
not been accepted as a contribution to the making of the law. Their views should be considered much more not despite they are different, but because they are different from the conventional ideas of justice which underlie the given legal framework of siting hazardous waste treatment facilities.

Another result of a general examination of different legal systems is the rule of *Do ut des*: »I give, so that you give« or »I give to you to make you give to me«. Much more than any other principle of justice, the rule of *Do ut des* can be identified as a leading principle of law. Inquiries into the nature of justice and fairness usually focus on the question if transactions between individuals or between citizens and the government are »fair« or »equitable«. From this point of view, environmental justice would have to provide standards for transactions, e.g. a limit for siting noxious facilities in poor communities. I want to suggest that the *possibility* of transactions is even more important than fair standards for transactions. Once a framework for *Do ut des* is established, you can start worrying what will be exchanged for what (i.e. the key issue of conventional discussions on justice). If that framework is missing, however, there will be no exchange at all. As a result of an unfair distribution of externalities, the NIMBY syndrome also indicates the lack of a framework for negotiations between a developer, the government, the host community, and the affected citizens. *Do ut des* is a prerequisite of justice. Unless affected communities or concerned citizens are not included in the exchange of information, control, and benefits, they are forced only to give. They act quite rational, I think, when they are resenting all kinds of proposed developments.
I want to add that in my opinion the key to solving the NIMBY problem cannot be found in a financial bargaining between developers and opposing residents. Financial compensation is a necessary, but not a sufficient tool for siting. It is much more important to introduce the Great Unknown Player to the siting arena, who is nobody else but the consumer. Consumers' decisions and habits, after all, have created the mounting garbage crisis. I do not know what results would come from Do-ut-des-negotiations between the nationwide group of consumers and the local community and its residents. I assume, however, that drastic efforts to avoid and reuse waste would be a key issue in these negotiations.

V. The Scales of the Baleks

To cover a wide field of topics, ranging from Latin Law to visions of negotiated virtues in a post-garbage society, rather emphasizes than hides that I hold a rather dark view on environmental justice. At last, I want to address this pessimism by telling you a story by the German author and Nobel prize winner HEINRICH BÖLL, titled »The Scales of the Baleks«.

The story describes a small village at the turn of the century. The people earn their living by working for the Balek factory, breaking flax. They breathe the dust, they drink peppermint tea, they die slowly, and they are patient and happy.

After school, the children have to go into the woods and look for mushrooms, herbs, peppermint, and wild flowers. The woods, the fields, and the only factory belong to the Balek family. The Baleks' manor-house sits in the middle of the village. Next to the large kitchen is a
small room. There, the Baleks keep a pair of scales. The children wait patiently in front of the scales of the Baleks. They watch Lady Balek balancing their mushrooms, herbs, peppermint, and wild flowers with brass weights, which she carefully puts on the scales. Lady Balek notes down the precise weight and price of each lot in a large, leather-bound book, and she pays the children their due reward. To them, the scales of the Baleks is justice. It has been this way for many generations, and the great-grandparents of the children already had to stand in front of the scales, patiently waiting for the weighing to be done.

The Baleks have made a law for the village: No one is allowed to own a pair of scales. Nobody dares to question this law, because whoever disobeys will be dismissed from the factory and the Baleks will take care that the lawbreaker will not be employed anywhere else. The people in the village do not mind the peculiar ordinance: For generations, they have trusted the scales of the Baleks, and anyway, they are too poor to worry about owning a pair of scales.

Each Christmas, the Balek family hands out coffee packages as gifts for the people in the village. The villagers send their children to receive the packages and to show their respect and gratitude. The children get the free coffee in the small room next to the large kitchen where usually the trading is done.

At one time, a boy has to fetch the coffee for four families. Lady Balek who already has given several packages of coffee to the boy notices that the box which holds the one-pound packages of coffee is empty. She leaves the room to get another box. Waiting for her return, the boy stands alone in front of the scales of the Baleks. He sees that Lady Balek has left a brass weight on one of the scales.
It is a one-pound weight. Reluctantly, the boy puts a coffee package on the other scale. The pair of scales trembles, and slowly the scale with the brass weight raises a bit. Just a bit, however. The boy feels his heart pounding. Quietly, he takes a pebble from his pocket and puts it beside the one-pound coffee package. He has to add four more pebbles until the brass weight is properly balanced. With his hands shaking, the boy removes the five pebbles and wraps them in his handkerchief.

When Lady Balek returns with the box of coffee, merrily enjoying her generosity, she finds the boy to be very pale. Without a word, he leaves the manor-house.

After Christmas, the boy takes a very long walk to the city, carrying the five pebbles in his pocket. He asks the pharmacist to weigh the pebbles. »This is what is missing from justice,« the boy explains. Suddenly he remembers his father and grandfather and all the children who brought their mushrooms, herbs, peppermint, and wild flowers to the Baleks' manor-house. He thinks about the five pebbles which are missing from one pound of justice. He starts to cry.

The news spread like wildfire. Anguished people from the village break into the manor-house of the Baleks and steal the large, leather-bound book. They gather at the tavern to calculate how much money the Balek family has cheated from generations of villagers. Eventually, police troops arrive to stop the riot. Some resist and they fight, but they are just workers and quickly defeated. The local minister is made to demonstrate to his parish in public that the scales of the Baleks are perfectly calibrated. Order is restored and the workers return to the factory.

The boy's family has to leave the village. They travel from village to village, but they stay nowhere for long.
They tell the story of the scales of the Baleks and of the five pebbles which were missing from justice. Almost nobody listens to them.

VI. Conclusions

The short story by Heinrich Böll is a statement on the importance of justice for the establishing of social order. If injustice occurs, people will fight back. A pair of scales has been used to symbolize justice for centuries, and to tamper with the scales of justice has disrupted more than one regime. The story also tells, however, that justice often does not work for the poor, the weak, and the uneducated. They will »breath the dust«, as long as the powerful ones play by the rules (rules which have been established by them, anyway). Only extraordinary or unusual forms of injustice create enough energy among the victims to resist and to fight back. To them, the costs of redistributing their chances within a given society are high. They might lose their peppermint tea, their free coffee at Christmas, and the opportunity to earn a bit on the side by selling mushrooms.

Like any work of art, »The Scales of the Baleks« is open to different interpretations.

Maybe the story is not about injustice, but about ignorance. One could argue that nothing in the story indicates that Lady Balek knew that anything was wrong with her scales, or that she purposefully betrayed the children. When the villagers turned against her and her family, they did not give her the benefit of the doubt. They were unfair in their rebellion as they had been ignorant in their misery.
One could also argue that justice was done among the villagers, because everybody was treated equally under the same standard. Compared to other villages, the village of the Baleks maybe was a deflationery zone (a pound of mushrooms was priced a bit less than anywhere else). Given the over-all predicaments of the villagers, this was hardly a pivotal element of their hardship.

The story also is about appearances. The woods and fields belong to the Baleks. It could be argued that they only bought from the children what already belonged to the Balek family. This was quite smart because it accustomed the children to working for the Baleks, following the Baleks’ rules. The argument could continue that the Baleks were totally free to choose the terms of bargaining because the mushrooms and the wild flowers were their property anyway. Read in this way, the story suggests that the Baleks made a wrong choice when they tampered with the scales. Being too greedy, they paid no respect to the illusion of justice. This illusion allows justice to be wrong; it does not allow to make it look wrong, though.

How does the puzzle of the Balek tale fit into the discussion of siting hazardous waste treatment facilities and environmental justice?

I want to compare the Baleks to the developer of a hazardous waste treatment facility, and the villagers resemble the residents of the host community. They are poor and ignorant, but this is part of their way of living. The development forces a new and unprecedented form of burden upon them, just as the boy’s disclosure revealed an unprecedented form of exploitation to the villagers. The »five pebbles« symbolize the externalities of the hazardous waste treatment facility. Among these externalities are real costs, such as a loss in land value or the consequences of
misinformation, as well as perceived costs, e.g., the perception of unfair treatment. It does not matter, whether five pebbles really are missing from justice (or whether the developer purposefully framed the host community). If the residents of the host community believe that they are treated unfairly, they will object to the development, and, as it has transpired in many NIMBY cases, they will use all available means to fight it.

To put it differently, I want to argue that anyone who is favored by a given distribution of externalities has to be prepared that others will hold him or her responsible for this situation. If a developer, even in full compliance with the law of the land, does not share information with the host community, or if society does not attempt to compensate the host community and its residents for undue burden, they will be hold responsible. The residents of the host community may be poor and ignorant, but they will recognize a bad bargain when they see one.