

WHAT EJ HAS TO DO WITH IT: VICKI BEEN'S EMPIRICISM
IN THE FORGE OF ENVIRONMENTAL JUSTICE

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Vicki Been is well-known for her insistence that her views on law have empirical support. Of course, she is well-known for other things too—notably her scholarly contributions to legal issues in land use and housing, and her willingness to step out of the academy and into the heated commotion of New York's housing administration. But in these endeavors too, she has insisted on empirical evidence to justify policy.

How did Vicki's empirical bent get started? That is the subject of this Essay, focusing on her first major foray into empirical work. The subject of this early work was in the environmental area, and more specifically it concerned the distributional aspects of environmental problems. Her main contributions in this area took place during a period of a little over a year in 1993–1994, and this Essay will center on that brief but significant year.

During 1993–1994, while Vicki was still a junior professor at New York University Law School,¹ she came out with a series of articles on what was initially known as “environmental racism” and later as “environmental justice” or sometimes “environmental equity.” Because of the heated controversies around this topic, the year of Vicki's most intense involvement was probably not the happiest or smoothest in her career. But the year was certainly productive; it included a flurry of six articles, including four conferences and conference papers. Moreover, and most important for this Essay, Vicki's powerful engagement with environmental issues marked a distinct turn to empiricism. This is not to say that the signs were not already on the wall. Just a short time before, Vicki had published a *Columbia Law Review* article that was to be widely cited on issues of land use exactions; it too made considerable use of empirical

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1. At the time of the Brigham-Kanner Property Rights Conference in Vicki's honor in October 2021, her husband Ricky Revesz told me that she was also pregnant during much of that year.

material.² But in Vicki's rendezvous with environmental justice, empirical issues were sharply contested and thus front and center.

Much of the disquiet over what is called "environmental racism" or "environmental justice" has involved and continues to involve the location of polluting facilities in or near communities of color or low-income areas. A more general concern over the siting of undesirable uses has a long history in land use, and such uses had even acquired a name by 1981: "LULU" for "locally unwanted land use," a name invented in that year by Frank Popper, a land use scholar of the 1970s and the following decades.³ Some of the earlier LULU issues included funeral homes in residential neighborhoods⁴ and the operation of adult bookstores,⁵ followed by neighborhood objections to half-way houses⁶ and low-income housing.⁷

LULUs, as the name discloses, raise issues of land use, and Vicki was undoubtedly familiar with these siting issues by the early 1990s because of her interest in land use. A decade earlier, however, the discussion of LULUs had crossed paths with concerns over racism, and specifically over the burden of environmental hazards in predominantly minority or low-income areas. In 1983, the Government Accounting Office (GAO) published a study of a few large hazardous waste sites in predominantly African-American areas.⁸ In the same year, sociologist Robert Bullard published an article—to be followed by his many other articles and books—about the relatively high number of environmentally hazardous facilities in predominantly

2. Vicki Been, *Exit As a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 511–28 (1991) (discussing empirical evidence for thesis that local governments compete for residents).

3. Frank Popper, *Siting LULUs*, 47 PLANNING, no. 4, 1981, at 9.

4. *See, e.g.,* *Rockenbach v. Apostle*, 47 N.W.2d 636 (Mich. 1951) (in spite of zoning compliance, funeral home enjoined as nuisance after neighbors' complaints that it would cause increased traffic, air pollution, reminder of death).

5. *See, e.g.,* *State ex rel. Field v. Hess*, 540 P.2d 1165 (Okla. 1975) (upholding injunction against adult bookstore's display of materials considered obscene as public nuisance).

6. *See, e.g.,* Gilda M. Tuoni, *Deinstitutionalization and Community Resistance by Zoning Restrictions*, 66 MASS. L. REV. 125, 135 (1981) (describing community objections to half-way houses, including concern of overload on particular communities).

7. *See, e.g.,* *Nucleus of Chicago Homeowners Ass'n. v. Lynn*, 524 F.2d 225 (1975) (ruling HUD action arbitrary and capricious for failing to conduct NEPA review before siting low-income residential project in middle-class neighborhood).

8. U.S. Gen. Accounting Office, *Siting of Hazardous Waste Landfills and Their Correlation with Racial and Economic Status of Surrounding Communities* (1983).

African-American areas of Houston.⁹ The United Church of Christ followed in 1987 with a study of the siting of hazardous waste facilities in predominantly minority and low-income areas.¹⁰

All these early studies claimed that the siting of environmental hazards was due at least in large part to racism. The implication was that waste facilities and other centers of environmentally harmful activities were sited where they were because of intentional discrimination, or at least casual indifference to the harm that they could cause to the minority and low-income residents of the affected areas. More publications followed over the next few years in the later 1980s and early 1990s, with Professor Bullard becoming a chief spokesperson for claims of racism in these environmental siting issues.

In 1993, junior law professor Vicki Been from New York University exploded onto this academic scene with an article entitled *What's Fairness Got to Do with It?: Environmental Equity and the Siting of Locally Undesirable Land Uses*.¹¹ The article came out in the *Cornell Law Review*, and despite its attention-grabbing title—explicitly referencing Tina Turner's hit song, "What's Love Got to Do with It?"¹²—the article was heavily and carefully researched. I was teaching Environmental Law shortly after the article appeared, and in a note to my class on recent writings on environmental justice issues, I referred to it as a friendly corrective to some of the previous work in the area (and I also commented on its astonishing number of footnotes).

I may have overstated the friendliness aspect in my comment, however, because in retrospect it appears that love may indeed not have had much to do with the whole subject. What Vicki's article had to do with was not love but data and the inferences that one could reasonably draw from data. One takeaway from the article, and probably the most notable one, was the following: one cannot assert that facility siting has discriminated against racial minorities

9. Robert Bullard, *Solid Waste Sites and the Black Houston Community*, 53 SOCIO. INQUIRY 273 (1983).

10. United Church of Christ Commission for Racial Justice, *Toxic Wastes and Race In the United States: A National Report On the Racial and Socio-Economic Characteristics of Communities Surrounding Hazardous Waste Sites* (1987).

11. Vicki Been, *What's Fairness Got to Do with It? Environmental Equity and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001 (1993).

12. *Id.* at 1001.

and low-income groups simply by observing the current demographics of the sites, because the current population statistics may have resulted at least in part from the operation of a free market in housing.¹³ That assertion poses the question, did African-American and low-income persons arrive before the siting decision? Or did the siting of a LULU make the surroundings decline in value, making them more affordable for lower-income and predominantly minority residents? As Vicki reeled off paragraph after paragraph, and citation after citation, the message was clear: if you do not have a grip on causation issues and their directions, you cannot realistically address solutions to the very real issue of the disproportionate environmental burdens on disadvantaged groups.¹⁴

Another major theme of the article was less noticed at the time, but still important: Vicki argued that the then-current environmental justice literature lacked a well-articulated position about goals—that is, what fairness would really mean in this context.¹⁵ I will come back to her arguments on that topic shortly, but for now simply note that the causation issue was the one that took center stage in the debates that ensued over the next year. That was the issue that dominated the series of articles and conferences that Vicki took part in during 1993–1994.

I am probably making some errors, but as closely as I can piece together the dates in this tumultuous year, the first was a conference at the University of Maryland in April 1993,¹⁶ in which I believe Vicki presented the outlines of her first big environmental justice article, *What's Fairness Got to Do with It?* Just from looking at the list of participants, none of whom would have been on the defensive about Vicki's comments, my guess is that conference was relatively calm. Vicki's big *What's Fairness* article then came out in the fall of 1993.

The next significant step came in January 1994, at a session on environmental justice at the Association of American Law Schools'

13. *Id.* at 1016–18.

14. See, e.g., Vicki Been, *Market Dynamics and the Siting of LULUs: Questions to Raise in the Classroom About Existing Research*, 96 W. VA. L. REV. 1069, 1071 (1994).

15. Been, *supra* note 11, at 1027–68 (Section III of article, laying out possible conceptions of fairness and complications).

16. See Richard Lazarus, *The Meaning and Promotion of Environmental Justice*, 5 MD. J. CONTEMP. LEGAL ISSUES 1 (1994) (dating conference as April 2, 1993).

section meeting on environmental law.¹⁷ I have a hunch that the temperature was going up at this conference; the *What's Fairness* article had been out long enough to attract some attention and no doubt some responses. More conferences on environmental justice followed in the spring of 1994: one at Fordham Law School in New York, which appears from the subsequent symposium issue to have had a mix of views;¹⁸ and then soon afterwards a conference at West Virginia University College of Law.¹⁹ The latter was probably quite heated, given that Robert Bullard was a participant.

While all this was going on, Vicki was publishing the results of her research, in language that was always calm but pulled no punches. She had a major piece in the *Yale Law Journal* in 1994, entitled *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*²⁰ As the title suggests, this article again stressed the importance of distinguishing between siting discrimination and market dynamics, and it drilled down hard on the empirics of this question.

At this point I am not entirely sure of the sequence, but I believe the next publication came after the Yale article, with the appearance of a different article based on the paper she had given at the Fordham conference earlier in the year.²¹ This article explored the topic of compensating local communities for the siting of LULUs, but it also discussed the difficulties of comparing one LULU to another. Shortly after that came two brief articles from the University of Maryland conference,²² and another follow-up article from the conference at West Virginia University.²³

17. See Patrick C. McGinley, *Environmental Injustice and Racism: Making the Connection in Classrooms and Courtrooms*, 96 W. VA. L. REV. 1017, 1022–23 (1994) (describing AALS section meeting and participants in January 1994).

18. See Bruce A. Green, *Foreword*, 21 FORDHAM URB. L.J. 425 (1994) (introducing symposium).

19. See John Douglas Moore, *Environmental Justice: A Growing Union*, 96 W. VA. L. REV. 1015 (1994) (introducing symposium).

20. 103 YALE L.J. 1383 (1994).

21. Vicki Been, *Compensated Siting Proposals: Is It Time to Pay Attention?*, 21 FORDHAM URB. L.J. 787 (1994).

22. Vicki Been, *Conceptions of Fairness in Proposals for Facility Siting*, 5 MD. J. CONTEMP. LEGAL ISSUES 13 (1994); Vicki Been, *Siting of Locally Undesirable Land Uses: Directions for Further Research*, 5 MD. J. CONTEMP. LEGAL ISSUES 105 (1994).

23. Been, *supra* note 14, at 1069.

Now let me pause to let all that sink in: these appearances and articles were all compressed into a period of a little over a year in 1993–1994. There were two lagging articles on the causation issue in environmental justice sitings, one in 1995²⁴ and a second co-authored piece in 1997.²⁵

My surmise is that this flurry of activity and writing was a genuine turning point in Vicki's academic career. It must have been a grueling period, and she dropped the topic of environmental justice after those articles. But despite that fact, those articles gave a certain preview of what was to come later.

First, after all that activity and all those publications, it was entirely predictable that any views that Vicki Been put forth were going to have sensible arguments backed up by careful analysis of a mass of data. And second, it was entirely predictable that she was the kind of person who would be courageous enough to take on some genuinely difficult real-world tasks—like the administration of housing policy in New York City. One cannot predict either of those traits about very many other people.

But now, I want to turn to a few more specific observations about Vicki's scholarship on issues relating to environmental justice. One is on that central question of causation. Vicki's chief antagonist appears to have been the well-known UCLA sociologist Robert Bullard, whose work she criticized most clearly.

Even after Vicki's critical observations, Bullard continued to insist that the maldistribution of environmentally damaging sites was chiefly a problem of white racism.²⁶ But he may not have realized that the factor of market dynamics was actually far more radical than intentional discrimination, however odious the latter may be. As Vicki pointed out, the factor of market dynamics gives scholars the leverage to interrogate much more pervasive and subtle

24. Vicki Been, *Analyzing Evidence of Environmental Justice*, 11 J. LAND USE & ENV'T. L. 1 (1995).

25. Vicki Been & Francis Gupta, *Coming to the Nuisance or Going to the Barrios? A Longitudinal Analysis of Environmental Justice Claims*, 24 ECOLOGY L.Q. 1 (1997).

26. Robert D. Bullard, *Environmental Racism and Invisible Communities*, 96 W. VA. L. REV. 1037, 1040–41 (1994) (giving example of racist siting rather than “market dynamics” in scare quotes); Robert D. Bullard, *The Legacy of American Apartheid and Environmental Racism*, 8 ST. JOHN'S J. OF LEGAL COMMENT. 445, 460 (1994) (describing discrimination as “chief cause of social, economic and environmental inequities”; disputing “market dynamics” as cause of disproportionate siting of unwanted environmental facilities in minority communities).

forms of discrimination, in many more areas than siting alone: employment, housing, lending practices, unequal provision of public services, to name just some; all these parts of the economy feed into market dynamics.²⁷ Ultimately, pursuing the impact of market dynamics could lend itself to a critique of the free market itself, particularly insofar as the market reflects aggregate preferences, including what economist Gary Becker famously called the “taste for discrimination.”²⁸

Vicki made important points about environmental justice aside from the debate about causation of siting, and here too she raised questions of continuing relevance. What, for example, are the ethics of compensation for undesirable, or at least unwanted, land uses? Is it just to pay people to accept land uses that may affect their health or their anxiety levels or both?²⁹ But from another perspective, if the producers of LULUs have to compensate the neighborhood, they might be incentivized to produce fewer or less undesirable products; and indeed, some neighborhoods might be willing to accept LULUs if offered compensation. How do those considerations weigh in the ethics of compensation?³⁰ Lest anyone think this is only a problem from the past, market approaches still raise these questions about current environmental issues, including trades of emission allowances.³¹

Another issue of continuing relevance appears in Vicki’s very subtle discussion of the many possible meanings of fairness. This appears in that first *What’s Fairness* article in the *Cornell Law Review*,³² and in some others as well.³³ This issue too has continued to percolate in more recent discussions. A very crude version of the issue is whether the essence of fairness is *equality of opportunity* (or in this negative context, *equal chances of exposure to risks*); or whether, on the other hand, fairness means *equal outcomes*. This issue is reflected today in some subtle turns of language, contrasting *equal opportunity* to what is called *equity*.

27. Been, *supra* note 20, at 1391–92.

28. GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* 14–17 (2d ed. 1971).

29. See Been, *supra* note 11, at 1040–46, 1052–60 (describing cost internalization but also some ethical and practical problems with compensation remedies).

30. Been, *supra* note 21, at 787–826 (describing rationales for compensation schemes in siting as well as studies and experience).

31. Michael J. Sandel, *It’s Immoral to Buy the Right to Pollute*, N.Y. TIMES, Dec. 15, 1997, at A23.

32. Been, *supra* note 11, at 1027–68.

33. See, e.g., Been, *supra* note 22 (discussing various meanings of fairness in environmental justice literature).

There is an empirical component to this issue too, particularly with respect to weighing one LULU against another: Is a landfill the equivalent of a chemical factory? How does either measure up against a series of half-way houses or homeless shelters? Among those affected, it is unlikely that all are affected equally or in the same way; should these differences be taken into account, and if so, how?³⁴

Vicki raised those questions, and they continue to run through many environmental controversies. But these questions also go beyond empirics, and going beyond empirics is also a part of Vicki's work. They signal why her first big empirical contributions were so important when they first appeared, and why they continue to be important now. All these questions occurred in that flurry of investigation in 1993–1994. Vicki was then, and continues to be now, someone who investigates empirical matters. But she was then, and continues to be now, someone who also wants to investigate justice as well.

34. Been, *supra* note 11, at 1034; Been, *supra* note 22, at 19–20.