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## Book Reviews

### An Appeal for the “Liberal” Use of Law and Economics: The Liberals Fight Back

HARD HEADS, SOFT HEARTS: TOUGH-MINDED ECONOMICS FOR A JUST SOCIETY. By Alan S. Blinder.† Reading, Mass.: Addison-Wesley Publishing Co., 1987. Pp. xi, 236. \$17.95.‡

Reviewed by Alex M. Johnson, Jr.\*

As a liberal Democrat<sup>1</sup> who grew up in an urban environment in the late sixties, in a home in which it was a crime not to vote a straight Democratic ticket, my decision to accept an offer to teach at the University of Virginia School of Law—an institution nationally known for its faculty’s conservatism and adherence to “Chicago School” economic analysis of law<sup>2</sup>—surprised quite a few people, including myself. At worst, I assumed, I would encounter what I naively perceived to be the “right-wing” economic analysis of law employed by such noted scholars as Judge Richard Posner and Professor Richard Epstein. I further anticipated that after an appropriate learning period, I would emerge from my descent into the lion’s den of law and economics sufficiently educated and ennobled to expose the inherent deficiencies of that school of thought. I thought I would join other committed liberals (but not proponents of Critical Legal Studies, who seem to have their own nihilistic agendas) in repudiating the use of economics to analyze legal issues. Thus, I went to Virginia with a plan: learn thine enemy better than

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‡ Hereinafter cited by page number only.

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1. In this post-Dukakis era, a term other than “liberal” might be more palatable to Democratic Party leaders. However, I embrace the “L” word and feel it accurately describes, in a shorthand fashion, my political beliefs. See also *infra* notes 13-14 and accompanying text.

2. My reference to “Chicago School” economic analysis of law is to that body of scholarship best represented by Judge Richard Posner’s prominent and influential work. Posner’s writings are too numerous to list here, but they include probably the most important work in the field, R. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986), which focuses on microeconomics and the normative and positive implications of the use of economics to analyze law. For a further discussion of Chicago School economic analysis and how it differs from that of the “Yale School,” see *infra* text accompanying notes 53-55.

thymself.<sup>3</sup>

Imagine my surprise when I realized that instead of merely learning the basic principles of economic analysis of law as presented by my colleagues in their scholarly works, I was beginning to embrace elements of economic analysis as a method of analyzing problems "in a systematic way [in] areas of law that did not avowedly regulate economic relationships."<sup>4</sup> Terms of art such as "Coase Theorem," "the cheapest cost-avoider," "rational economic actor," and "internalization of externalities" began to creep into the teaching material of the first-year property course that I have taught for the last five years. My scholarship likewise began to reflect this growing fascination with the economic analysis of law.<sup>5</sup>

Friends and colleagues began to question my political philosophy and the allegedly conservative conclusions I reached in discussing such controversial topics as the merits of rent control. How could I, a previously committed liberal, come to use, if not believe in, all of this law and economics gobbledygook? Did I really believe, as I had concluded in an article, that tenants are better off in the long run when lessors can arbitrarily withhold consent to an assignment or a sublease merely to extract higher rent?<sup>6</sup> I tried to explain that when a decision maker fails to account for simple economic principles, well-intentioned attempts to help the poor may be doomed and may hurt the very class of individuals they purport to benefit. Examples that came to mind included legislative enactments of rent control regulations<sup>7</sup> and judicial decisions that (1) refused to enforce "due on sale" clauses in mortgages<sup>8</sup> and (2) allowed

3. See ARISTOPHANES, *THE BIRDS* (414 B.C.), reprinted in 5 *GREAT BOOKS OF THE WESTERN WORLD* 542, 547 (R. Hutchins ed. 1952) ("Yet to clever folk a foeman / Very useful hints may show").

4. R. POSNER, *supra* note 2, § 1.3, at 16.

5. See, e.g., Johnson, *Correctly Interpreting Long-Term Leases Pursuant to Modern Contract Law: Toward a Theory of Relational Leases*, 74 VA. L. REV. 751, 767-801 (1988) [hereinafter Johnson, *Long-Term Leases*] (predicting that judicial decisions restricting alienability of leaseholds may produce dire economic consequences); Johnson, *Modern Real Estate: A Constitutional Approach*, in *BLESSINGS OF LIBERTY: THE CONSTITUTION AND THE PRACTICE OF LAW* 175, 188-96 (American Law Inst. & American Bar Ass'n 1988) (arguing that the expansive interpretation given to the commerce clause is necessary, efficient, and apolitical, because economic incentives are not sufficient to achieve beneficial, uniform rules among the states).

6. See Johnson, *Long-Term Leases*, *supra* note 5, at 801-08.

7. For commentary on such legislative enactments, see Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093 (1971); Kennedy, *The Effect of the Warranty of Habitability on Low Income Housing: "Milking" and Class Violence*, 15 FLA. ST. U.L. REV. 485 (1987); Markovits, *The Distributive Impact, Allocative Efficiency, and Overall Desirability of Ideal Housing Codes: Some Theoretical Clarifications*, 89 HARV. L. REV. 1815 (1976); Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517 (1984).

8. See, e.g., *Patton v. First Fed. Sav. & Loan Ass'n*, 118 ARIZ. 473, 478-79, 578 P.2d 152, 157-58 (1978) (holding that due on sale clause cannot be enforced unless transfer of property jeopardizes

tenants to freely transfer leaseholds.<sup>9</sup>

Still, the schizophrenic feelings about my “conversion” to the law and economics camp produced an almost apologetic embrace of its major tenets. Although I began to see and appreciate the strength of economic analysis of legal problems, I resisted the normative implications of my conversion. My conclusions remained largely theoretical and divorced from my political views and philosophy. The law was my job; politics involved my personal life.

I then read a book that resolved many of the problems I confronted in my new role as a “conservative” law and economics proponent. I read *Hard Heads, Soft Hearts: Tough-Minded Economics for a Just Society*, Professor Alan Blinder’s well-written exposition of the proper use of macroeconomics in our political process, and was delighted to confirm that embracing law and economics, and espousing efficiency in certain contexts, did not necessarily brand me a right-wing conservative.

Blinder demonstrates an ability to turn a phrase and to retain the reader’s interest in a topic that, at first glance, would appear extremely wearisome, at least to anyone outside the author’s field of expertise.<sup>10</sup>

security); *Wellenkamp v. Bank of Am.*, 21 Cal. 3d 943, 952, 582 P.2d 970, 976-77, 148 Cal. Rptr. 379, 385-86 (1978) (holding that a due on sale clause contained in a promissory note or deed of trust cannot be enforced upon the occurrence of an outright sale unless the lender can demonstrate that enforcement is reasonably necessary to protect against impairment of its security or the risk of default); *Nichols v. Ann Arbor Fed. Sav. & Loan Ass’n*, 73 Mich. App. 163, 174, 250 N.W.2d 804, 809 (1977) (finding enforcement of a due on sale clause solely to maintain a bank’s portfolio at the same interest rate an unreasonable restraint on alienation). For discussions of *Wellenkamp*, see Crane, *Wellenkamp v. Bank of America: A Victory for the Consumer?*, 31 HASTINGS L.J. 275 (1979); Dunlavy, *Wellenkamp’s Wake: California Courts Divide on the Continued Enforceability of Due-On Clauses*, 3 WHITTIER L. REV. 517 (1981); Note, *Wellenkamp v. Bank of America: Invalidity of Automatically Enforceable Due-On-Sale Clauses*, 67 CALIF. L. REV. 886 (1979); Note, *Wellenkamp v. Bank of America: A De-Stabilizing Shift in California Real Estate Financing*, 10 GOLDEN GATE U.L. REV. 851 (1980); cf. Maxwell, *The Due-On-Sale Clause: Restraints on Alienation and Adhesion Theory in California*, 28 UCLA L. REV. 197, 198 (1980) (arguing that courts should examine problems created by due on sale clauses through adhesion and free alienation theories).

9. See, e.g., *Kendall v. Ernest Pestana, Inc.*, 40 Cal. 3d 488, 496, 709 P.2d 837, 841-42, 220 Cal. Rptr. 818, 822-23 (1985) (holding that “consent may be withheld only where the lessor has a commercially reasonable objection to the assignment”); see also Johnson, *Long-Term Leases*, *supra* note 5, at 761-67 (tracking the development of the minority rule that a lessor must act reasonably in withholding consent to the alienation of a lease).

10. An example of the author’s dry wit and his ability to turn a remarkable phrase while maintaining a concise and elegant writing style partially explains the title of the book:

The early years of Reaganomics marked instead the abandonment of the celebrated Republican hard head. Where once we got cool-headed rationality, sharp-penciled calculations, and fiscal rectitude, we started to get wishful thinking, rosy scenarios, and unbounded deficits. Thus did Reaganomics offer up the worst of both worlds: a soft head and a hard heart.

This book points us toward the other combination, the one that Murphy’s Law says we will never get—an economic policy that is both hard-headed and soft-hearted. To achieve this happy blend, we must join the rational economic calculation of the conservative Republican to the compassion of the liberal Democrat.

Even though Blinder hardly discusses the law and lawyers as such,<sup>11</sup> the book's subject matter applies directly to the controversy currently raging over the proper (and improper) use of economic analysis in the study of law. Blinder teaches insightful lessons that lawyers and legal scholars should learn and apply to the use of economic analysis.

In Part I of this Review, I summarize the salient points of the book, emphasizing the neutral content of economics as a discipline and the particular strength of economics as a tool for prediction. Blinder's book illustrates, through macroeconomic analysis and policy, that ceding economics to conservatives is a serious, potentially disastrous mistake. Just as there are liberal economists, there should be liberal law and economics scholars. In Part II, I use Blinder's approach to draw a correlation to current literature that evaluates and promotes the use of economic analysis of law. I further illustrate both political (normative) and apolitical (positive) uses of economic analysis of law in current scholarship and argue that the former is suspect because of its potentially biased view. I conclude that the integration of the apolitical, positive use of economics into law school curricula would benefit all concerned, scholars and students alike, because of the manner in which this view illuminates and clarifies certain otherwise obscured legal issues.

## I. The Proper Use of Economic Theory

Like many others, I assumed that because most of the vocal and well-known proponents of economics as a means of analyzing law are conservatives, the use of law and economics represents a step to the right politically.<sup>12</sup> Blinder illustrates that contrary to popular misconception, one can act rationally in an economic sense and still retain traditional liberal qualities—that is, maintain a “hard head” and a “soft heart.”<sup>13</sup> Here he makes an eye-opening point. Although he does not write with legal scholars or lawyers in mind, Blinder establishes by analogy (a technique with which all good lawyers or students should be familiar) that “good” economic analysis of law is not swathed in political agenda. In

11. Chapter five discusses the proper use of environmental regulation, *see* pp. 136-59, and Chapter six analyzes the “miracle”—in the author's opinion—of the Tax Reform Act of 1986, *see* pp. 160-90. In addition, the book contains a short discussion of the futility of rent control as a method of maintaining habitable and affordable dwellings for the poor. Pp. 194-95. It should be emphasized, however, that this book is *not* about the economic analysis of law.

12. The belief that the use of economics by legal scholars conceals a conservative bias or agenda is not new; it is, however, very persistent. *See* R. POSNER, *supra* note 2, § 2.3, at 24 (“Another common criticism of the ‘new’ law and economics—though it is really not a criticism but rather a reason for the distaste with which the subject is regarded in some quarters—is that it manifests a strongly conservative political bias.”).

13. *See* pp. 23-31.

essence, economics is content neutral, at least if one assumes, as do most “liberals,”<sup>14</sup> that a capitalist economy premised on utility<sup>15</sup> is here to stay, or at least that it will not be replaced in the immediate future.

On one level, Blinder’s book is simplistic, because it espouses the view that commentators can use macroeconomic theories and policies for “good” or “evil” purposes, depending on their intent and the degree of sophistication of the issues involved.<sup>16</sup> To mix metaphors, it is not the medium that is at issue but the messenger. In this sense, those who decry economics as an oppressive tool that favors the wealthy at the expense of the poor should recognize that “pure” economics, like mathematics or statistics, is neutral, though the messenger may be biased.

Blinder freely admits that he is also proselytizing;<sup>17</sup> his book is designed to convince the reader that society can use economics for “good” (that is, effectuating the redistribution of wealth to those in lower income brackets) as well as “evil” (in other words, distributing windfall benefits to the wealthy at the expense of the downtrodden masses). What is more important, however, is Blinder’s painstaking analysis of mainstream macroeconomics as a neutral vehicle that we should not exploit for its normative implications (for it is here that politics inevitably becomes wedded to the analysis) but instead should harness for its positive predictive ability. Simply put, both liberals and conservatives can gain from an understanding of rudimentary economic principles.

A perfect example of Blinder’s penetrating analysis is his discussion of the misuse of protectionist legislation to “save” American jobs.<sup>18</sup> Starting with the premise that economists agree on many issues<sup>19</sup> and establishing that economists agree almost unanimously that implement-

14. For the purposes of this Review, I adopt Blinder’s definition of “liberal”:

Some of the economic policies advocated in this and subsequent chapters have traditionally been associated with conservatism; others have been associated with liberalism. All, I hope, are associated with common sense and derive from the same underlying philosophy of what an economic system should do for society. I would like to call this philosophy “liberal” in both the eighteenth- and twentieth-century senses of the word, for it combines profound respect for the virtues of free markets with profound concern for those the market leaves behind.

Pp. 12-13.

15. For the definition of “utility” that I use in this Review, see Posner’s definition, which, in contrast to Bentham’s “pleasure principle,” equates “utility” with “value.” See R. POSNER, *supra* note 2, § 1.2, at 11-12.

16. See pp. 9, 12-14, 201-02.

17.

The premise of this book is that there is a better way, if only our political leaders had the will and vision to follow it—or if the electorate would force them to do so. This is a proselytizing book. It points to paths not followed and argues that we should follow them. Such a book is by nature opinionated; and this one surely is. But it is not partisan.

P. 12.

18. See pp. 109-37.

19. See pp. 1-3.

ing trade tariffs or imposing import quota restrictions is both inefficient and detrimental to economic health,<sup>20</sup> Blinder demonstrates that the controversy over protectionist legislation is a political rather than an economic issue. Assuming, *arguendo*, that the primary purpose of such legislation is to protect jobs and that tariffs and quotas are the most efficient vehicles for saving those jobs, protectionist legislation is economically inefficient, because preserving unproductive jobs ultimately diminishes productivity, wages, and the overall standard of living.<sup>21</sup> More importantly, Blinder shows that protectionism makes little sense when tested by the other major policy goal advocated in the book: the achievement of equitable results. Blinder's analysis of any policy always implicates two major questions: "Is it efficient?" and "Is it equitable?" It is in answering the latter question that we meet the "soft heart," perhaps the most important and interesting concept in the book, and the one most difficult to explain. Blinder discusses his notions of equity at length:

The hard-hearted attitude is that our wonderful market system is so essential, and so fragile, that we must not tamper with it in order to aid the underprivileged, the shortsighted, the indolent, or even the unlucky. Let everyone compete on an equal basis, the argument goes, and let the chips fall where they may. If some of the players are lame or injured, that's a shame. But they must be left to nurse their own wounds, for efforts to assist them would be futile at best and harmful at worst. . . .

The soft-hearted attitude holds that we ought to soften the blows for those who play the economic game and lose, or who cannot play it at all. That objective can be served by making the game less vigorous and risky—which is the rationale for Medicare, social security, and unemployment insurance. Or it can be done by making the victors share some of the spoils with the vanquished—via welfare benefits, public housing, Medicaid, and progressive taxation. Liberals generally favor such public generosity. But, of course, society as a whole has no Daddy Warbucks. If benefits are

20. See pp. 109-10.

21.

The damage to economic efficiency [caused by protectionism] is most obvious. Keeping "cheap foreign goods" out of our markets means we must pay more for some of the things we buy. And so the standard of living of the typical American falls. Protectionism also distorts patterns of resource allocation, thereby making the economic machine function less smoothly. When we protect inefficient industries from foreign competition, we keep labor and capital smugly ensconced where, in [Adam] Smith's phrase, they have no advantage—when we should be helping them move into areas in which they will be more productive. Jamming market signals in this way reduces the productivity of American industry. And lower productivity, not freer trade, is what truly brings lower wages. Lower standards of living, lower productivity, and lower wages all go hand in hand. And each goes hand in hand with protectionism.

P. 115.

to be provided to the underdogs (or losers), the favorites (or winners) must foot the bill.

Which attitude is the correct one? Which attitude more nearly captures the ethical notion of fairness? There are no objective, scientific answers to these questions . . . Liberals instinctively favor public generosity. Conservatives draw the line after equality of opportunity. But more than just a knee-jerk reaction leads me and many others to find the soft-hearted attitude more appropriate.<sup>22</sup>

Having analyzed the efficiency of protectionist legislation, Blinder examines it against this backdrop of equity. Arguably, attempts to attain social policy goals should justify some market inefficiencies. According to Blinder, the only goal to which efficiency should succumb is equitable redistribution.<sup>23</sup> Thus, the key question—in fact, the only relevant question—is whether the gains that result from a redistribution of wealth to those in need outweigh the costs of inefficiency and loss from protectionist policies. Blinder demonstrates that the answer is an emphatic no.<sup>24</sup>

Why, then, does protectionism remain so popular in the face of overwhelming evidence that it produces neither gain in our economic efficiency nor benefit in the form of equitable redistribution? The answer lies in political, not economic, analysis. Intentionally or not, politics and economics frequently intertwine and blur—an important point that Blinder repeatedly urges throughout the book.

Quotas and tariffs offer a politically attractive mix. They impose small costs—often just a few dollars per year—on each of a large number of people to secure large benefits for each member of a tiny minority. They levy hidden taxes on the many to pay highly visible bounties to the few. Never mind the annoying fact that the costs add up to less than the benefits. Adding up is for egghead economists and green-eyeshaded accountants, not for red-blooded politicians. In politics, the principle of reelection overwhelms the principles of both equity and efficiency. Economic vice can be

22. P. 24. Blinder states further:

If we believe that the poor are needier than the rich, it follows that society benefits from the . . . transfer [of wealth from the wealthy to the poor].

. . . Unless something is inherently distasteful about using government action . . . to redistribute income, or unless taxes and transfers create serious disincentives that damage the market mechanism, our conclusion should be the same: the transfer of income makes society better off.

Many . . . philosophers and economists have found this line of argument persuasive for more than a century. I call it the *Principle of Equity*. It is the intellectual foundation of the soft heart.

Pp. 25-26 (footnote omitted).

23. See p. 29.

24. Pp. 116-18 (arguing that protectionism is a “disgracefully wasteful” policy that acts as a “hidden tax on the average family”).

political virtue.<sup>25</sup>

Switching from the language of macroeconomics to microeconomics, Blinder demonstrates that politics represents the epitome of inefficient behavior, because it thrives on producing and championing externalities.<sup>26</sup> In order to advance their political agendas, politicians knowingly create externalities. These externalities include the additional costs that tariffs impose on our society—costs that consumers and voters do not take into account. Moreover, the cost of bringing the effect to bear on the affected individuals' decisions is too high to make the effort worthwhile. That cost is essentially the cost of educating voters on the harmful economic effects of tariffs—a complicated subject that might require a substantial overhaul of the American educational system to include economics at earlier grade levels.<sup>27</sup>

The pristine neutrality of economics remains unchallenged. Instead, politics emerges as the culprit that filters in normative choices. Moreover, it is the populace's lack of familiarity with basic economic concepts that permits politicians to mischaracterize the argument on the utility of protectionism as involving an "economic dispute" in which economists disagree significantly.

Blinder makes the same point in addressing an issue with which lawyers and legal scholars may feel more familiar: What is the most efficient way to clean up the environment? In Chapter five, Blinder explains why an overwhelming majority of economists favor taxing polluters rather than continuing the direct controls that our legal system now imposes on industry.<sup>28</sup> In so doing, Blinder demonstrates a fundamental fact that both liberals and conservatives ignore all too often in discussing a "political" issue like pollution. Irrespective of one's political views, the bottom line—the ultimate arbiter of pollution control—is cost. Measuring this cost includes an accounting of not only the short-term costs of control

25. Pp. 121-22.

26. See pp. 121-27, 134-35. In an essay that Posner has described as "one of the pathbreaking articles in the 'new' law and economics," R. POSNER, *supra* note 2, § 3.2, at 34 n.2, Harold Demsetz defined "externality" as

an ambiguous concept. For the purposes of this paper, the concept includes external costs, external benefits, and pecuniary as well as nonpecuniary externalities. No harmful or beneficial effect is external to the world. Some person or persons always suffer or enjoy these effects. What converts a harmful or beneficial effect into an externality is that the cost of bringing the effect to bear on the decisions of one or more of the interacting persons is too high to make it worthwhile, and this is what the term shall mean here. "Internalizing" such effects refers to a process, usually a change in property rights, that enables these effects to bear (in greater degree) on all interacting persons.

Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348 (1967).

27. For a discussion of problems created by the lack of familiarity with economics, see *infra* text accompanying note 60.

28. P. 137.

but also the long-term costs of failing to act to reflect the true cost of pollution.<sup>29</sup>

Blinder tells us that “[t]he nation is, in effect, shopping for cleaner air and water in a high-priced store when a discount house is just around the corner.”<sup>30</sup> Adopting the claim of Bruce Ackerman and Richard Stewart that we rely on a “‘counterproductive system of technology-based environmental controls,’”<sup>31</sup> Blinder argues that a system of effluent charges or permits is economically superior to the current, inefficient system.<sup>32</sup> His treatment of this issue, along with the arguments that he marshals on behalf of his thesis, establishes once again that efficiency is not necessarily a tool unique to the right wing.

One obvious criticism of the book, and of economic analysis of law generally, is that it trivializes important individual and societal rights—valuable, inalienable rights—by placing a dollar value on everything. Critics of the use of economic analysis within certain decision-making frameworks like to point out that certain rights are “inalienable” and should remain so.<sup>33</sup> They allege that society cannot put a price on certain rights and that the right to a pollution-free environment is one that society should guarantee to all citizens, whatever the cost.<sup>34</sup>

Blinder rebuts this argument by demonstrating that the goal of eradicating all pollution is futile. He convincingly builds the case that such an approach is short-sighted, disastrous, and impossible to achieve. He demonstrates that it is possible to wed the soft heart to the hard head to

29. Pp. 138-40. This, I think, is the ultimate failure of many of the policies that are representative of what has come to be known as Reaganomics, especially in environmental matters. Reaganomics epitomizes the exploitation of the environment for the use and benefit of the current generation at the expense of later generations who have no voice and no representation in the decision-making process. Only time will tell if the choices made were correct ones.

30. P. 137.

31. P. 137 (quoting Ackerman & Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1333 (1985)).

32. P. 137.

33. For an examination of the role of inalienable rights in our economic system, see Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970, 970-71 (1985) (alleging that restrictions on alienation are justified to control externalities or to achieve distributive goals); Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 932 (1985) (arguing that some forms of restrictions on transfer do have valid, noneconomic public policy justifications in a democratic society).

34.

Economists think of environmental degradation as an economic problem, a consequence of a flaw in the market system that can and should be corrected. . . . But many environmentalists see the issue differently. To them, pollution is a moral issue that should not, indeed must not, be reduced to the crass dollars-and-cents calculus of the economist. As David Doniger, a lawyer for the National Resources Defense Council put it: “We take the view that there are rights involved here, rights to be protected from threats to your health, regardless of the cost involved.”

P. 138 (quoting Wall St. J., Jan. 13, 1986, at 46, col. 1).

effect the best strategy for pollution control. Blinder starts from a premise that many would find unacceptable or uncomfortable: that pollution is a necessary by-product of industrial society and thus impossible to eradicate.<sup>35</sup> Blinder concludes that the right to a pollution-free environment is not inalienable but unattainable.<sup>36</sup>

Of course, this does not mean that Blinder condones pollution or defends polluters. Indeed, Blinder seems to have little regard for polluters.<sup>37</sup> What he brings to the complicated problem of pollution is an economist's approach. Blinder understands why companies and individuals pollute and, more importantly, what incentive structure will effectively deter and minimize harmful pollution. The key here is "harmful" pollution. Once the pollution control issue is characterized as a problem of "more or less" rather than of "yes or no," rational analysis of proposed solutions becomes possible.<sup>38</sup>

Pollution represents the ultimate externality. Blinder artfully demonstrates a concept that I, as a property law teacher, attempt to convey to my students at the beginning of my course. I assign from the casebook that I use in this course<sup>39</sup> a portion of Harold Demsetz's article *Toward a Theory of Property Rights*<sup>40</sup> to introduce students to the concept of externality. Most students, lacking backgrounds in economics, find the reading to be very intimidating.

In his dissection of the pollution problem, on the other hand, Blinder deftly illuminates many principles that we teachers attempt to demonstrate and convey to our students. The book is delightful in its explication of basic economic principles in a clear and lucid fashion that is devoid of mind-numbing charts and graphs. Blinder's discussion in Chapter five of economically sound methods to clean the environment is a primer on the apolitical, positive use of economics. In the future, I will use this brief chapter to familiarize my students with the concept of externality and other complicated economic topics. Without ever stating so explicitly, Blinder shows that companies pollute because they do not in-

35. See p. 139.

36. Part of the weakness of Blinder's analysis is his failure to recognize the argument that certain rights are inalienable or nontransferable and thus not subject to the workings of the marketplace. See Rose-Ackerman, *supra* note 33, at 961-68 (arguing that certain citizenship rights such as voting and jury duty should not be subject to the workings of the marketplace). Blinder does not differentiate between those rights that should be subject to the operation of the marketplace and those that should not. For further criticism of Blinder's cost-benefit approach to the resolution of every problem, see *infra* text accompanying notes 46-47.

37. See pp. 136-37.

38. P. 139.

39. J. DUKEMINIER & J. KRIER, PROPERTY (2d ed. 1988).

40. Demsetz, *supra* note 26.

ternalize or account for the cost and harm of their pollution.<sup>41</sup>

The remainder of the chapter contains a textbook explanation of why a system of emission permits or taxes is the most efficient method for controlling pollution, and why it is far superior to the current system of inefficient and costly penal regulations. Once the problem is properly diagnosed as one involving externalities, the solution is to force the actor to internalize the costs of his harmful action. Although Blinder is not unique in concluding that emission taxes or permits would best accomplish this internalization,<sup>42</sup> he uses this conclusion effectively to demonstrate that the apolitical, positive use of economics does not necessarily promote a political agenda. Indeed, once the political system establishes and articulates a normative goal, be it the reduction of pollution or the efficient delivery of health services and housing to the poor, it can and should enlist economics to accomplish the desired objective.

Liberals who distrust the market instinctively oppose fees, though the reasons they give rarely stand up to close scrutiny.

. . . If we are to construct a hard-headed and soft-hearted policy to protect our environment, the relative merits of pollution fees versus direct controls must be decided on the basis of logic and fact, not ideology and instinct.<sup>43</sup>

The chapter on pollution concludes, predictably enough, with a call for the eventual free market purchase and sale of emission permits or fees.<sup>44</sup> Herein lies my only major criticism of Blinder's approach. Blinder's complete reliance on the free market to sort things out assumes that the market works efficiently to bring about a proper allocation of resources. If recent events have taught us anything, however, it is that the market may not work properly and may be subject to imperfections that cause the inefficient utilization of resources.<sup>45</sup> Blinder's process of channeling problems exclusively to the free market may founder upon such imperfections. On the other hand, if Blinder can merely get his readers to think about the efficient utilization of the market mechanism and the efficacious use of resources, he has done his job well.

As I have noted elsewhere,<sup>46</sup> the only other weakness of this book

41. Pp. 139-40.

42. See, e.g., Ackerman & Stewart, *supra* note 31, at 1341-42 (arguing that a system of transferable permits gives polluters an incentive to develop environmentally superior products and manufacturing processes).

43. Pp. 137-38.

44. See pp. 156-57.

45. One specific example of market failure is discussed in Juskow, *Commercial Impossibility, the Uranium Market, and the Westinghouse Case*, 6 J. LEGAL STUD. 119 (1976). For a general discussion of market failure and its causes, see R. COOTER & T. ULEN, *LAW AND ECONOMICS* 45-49 (1988); Rose-Ackerman, *supra* note 33, at 938-40.

46. See *supra* notes 35-36 and accompanying text.

for which Blinder may be mildly criticized is his global cost-benefit approach to complex problems. He contends that the economically correct approach will yield the optimal amount of a desired good, be it decreased pollution, cheaper housing, lower inflation, or increased employment.<sup>47</sup> What Blinder fails to discuss is the nature of the benefit. One must agree with his definition of the benefit in order for his approach to make sense. Blinder defines benefit solely in terms of widgets—that is, products. He fails, unapologetically, to address such concerns as fairness, distributive justice, and what I will call, for lack of a better term, substantive human fairness. In other words, Blinder's approach works only if you can quantify the desired objectives. Intangible rights such as peace, harmony, and aesthetics have a quantifiable cost but no quantifiable benefit. The analysis is somewhat biased, therefore, in favor of productivity.

## II. A Call to Action

The emergence of economics in legal scholarship and analysis has been one of the most startling developments in the law in recent decades. Starting with the renowned work of Judge Posner, law and economics has developed into a heuristic discipline for the study of law.<sup>48</sup> Yet many legal scholars resent the inroads that law and economics has made and decry its so-called conservative bias.<sup>49</sup> The problem with this criticism is its failure to recognize the differentiation between the normative (political) and predictive (positive) uses of law and economics.

Blinder effectively advocates a predictive, positive use of economics—a method that is essential to any serious legal scholar concerned with the effect of legal rules. Moreover, the predictive, positive use of economics is content neutral and apolitical. The most important aspect of law and economics, at least as used by its proponents, is its ability to predict the consequences of a given rule or regulation. For example, one may agree or disagree with the statement that killing foxes and coyotes is a “good” for society that the legal structure should promote. Thus,

47. Blinder discusses his proposed approach to inflation and unemployment in Chapter two. I leave to the reader the task of discovering his rather unique solution to the problem.

48. The many excellent articles that urge the adoption of law and economics as a methodology or that explicate the benefits of analyzing legal problems from an economic perspective are too numerous to list here. However, the many excellent texts include: W. HIRSCH, *LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS* (1979); A. POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* (1983); R. POSNER, *supra* note 2. In my estimation, the best of the lot is R. COOTER & T. ULEN, *supra* note 45, which will no doubt be the subject of many reviews. That law and economics is now in the mainstream of legal education is illustrated by the existence of an excellent casebook that addresses this area: C. GOETZ, *CASES AND MATERIALS ON LAW AND ECONOMICS* (1983).

49. See *supra* note 12; cf. Donohue & Ayres, Book Review, 39 *STAN. L. REV.* 791, 812 (1987) (stating that “economic reductivism systematically favors Posner's conservative platform”).

farmers, wildlife conservationists, and vivisectionists may disagree on the issue of whether killing foxes or coyotes is a valid societal goal merely because it promotes the production of game or livestock at lower cost. However, once lawmakers decide on the normative goal and deem the eradication of noxious beasts desirable, the manner in which that eradication occurs should reflect economic rationality—that is, efficiency and the optimal use of resources. Thus, the rule of capture as set out in *Pier-son v. Post*<sup>50</sup> may represent the most efficient mechanism for achieving the desired goal.

I cannot overemphasize the point that the apolitical, positive use of law and economics is a remarkably elucidative tool that all theorists, liberal and conservative alike, must use once the desired goal is established. By contrast, the political use of law and economics represents the exploitation of economics, of cost-benefit analysis, to justify the adoption of a desired goal. These two uses of economics are often intertwined and hard to separate, but there is a difference.

To demonstrate the difference, consider the issue of housing, or more precisely, of affordable, habitable housing for the poor. The normative economic argument against rent control, the implied warranty of habitability,<sup>51</sup> and other so-called pro-tenant legal doctrines imply that governmental intervention in the marketplace is inefficient. As a result, this argument goes, lawmakers should reject rent control and other various pro-tenant regulatory devices. The apolitical or predictive use of economic analysis of law in this situation seeks to determine whether the market or government can better achieve the “desirable” goal of adequate housing in light of the economic structure and the ability of individuals or entities to adapt to rules and regulations.<sup>52</sup> To paraphrase Blinder, once you adopt the soft-hearted position to help the needy, the downtrodden, the helpless, you must not lose a hard head and fail to maximize the benefits of that position.

Bruce Ackerman has described the difference between the normative and the predictive uses of law and economics as the difference be-

50. 3 Cai. R. 175, 179 (N.Y. 1805). For discussions of the rule of capture, see Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1224-25, 1231 (1979); Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 76 (1985).

51. See 2 R. POWELL, THE LAW OF REAL PROPERTY ¶ 230[1] (rev. ed. 1988); R. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT §§ 3:16-:28 (1980).

52. See Ackerman, *supra* note 7, at 1177 (arguing that government-coerced improvements in housing stock are less efficient than cash payments to tenants for use in the housing market); Markovits, *supra* note 7, at 1838-39 (arguing that individual consumers are better informed about their own housing interests than government decision makers); Rabin, *supra* note 7, at 578-84 (evaluating whether the loss of rental housing outweighs the benefits accruing from the “revolution” in landlord-tenant law).

tween the University of Chicago-style school of law and economics and the Yale University-style school.<sup>53</sup> It is an easily recognized distinction that explains the differences between the normative and positive uses of economics as a tool in legal analysis. Briefly, Ackerman argues that there are two types of lawyer-economists: strong and weak. Strong or imperialistic lawyer-economists, those who adhere to the Chicago School, believe that economic analysis provides the only way to dissect legal issues. Weak lawyer-economists, those who adhere to the Yale School, hold that economic analysis should merely play a role in the resolution of legal issues.<sup>54</sup> In other words, proponents of the Yale School believe that lawmakers should integrate economic analysis into the decision-making process.<sup>55</sup> Like Ackerman, I am a weak lawyer-economist who believes that it is short-sighted and wrongheaded to ignore economic analysis in resolving legal disputes. In his penetrating work on the structure of the American legal system, Ackerman outlines the benefits of the proper use of law and economics:

Instead of coming to terms with [law and economics], some have sought to dismiss it as an ideological smokescreen for a reactionary legal assault upon the American activist state—which should be resisted by all progressive lawyers everywhere. . . . I hope to persuade you that [resisting] it is both superficial and counterproductive. Superficial, because it is based on a failure to investigate those deeper cultural structures that critical legal analysts claim to emphasize in their work of demystification. Counterproductive, because this superficial explanation will encourage the profession to disdain those constructive skills that are essential if the profession is to aid in the legal achievement of the progressive values the critics profess to champion. Rather than a hostile assault, “law and economics” permits a vast enrichment of the conversational resources available to lawyers trying to make sense of the legal foundations of an activist state.<sup>56</sup>

In fact, the distinction I draw between the normative (political) and positive (apolitical) uses of economic analysis of law arguably represents two distinct forms of “normative” economic analysis. In his review of Posner’s book *The Economics of Justice*,<sup>57</sup> Jules Coleman describes the two normative approaches:

One form [of normative economic analysis] advocates deploying

53. See Ackerman, *Law, Economics, and the Problem of Legal Culture*, 1986 DUKE L.J. 929, 929-30.

54. *Id.*

55. *Id.*

56. B. ACKERMAN, RECONSTRUCTING AMERICAN LAW 43-44 (1984).

57. Coleman, *The Normative Basis of Economic Analysis: A Critical Review of Richard Posner’s The Economics of Justice* (Book Review), 34 STAN. L. REV. 1105 (1982).

the principles of neo-classical microeconomic theory to evaluate, and where necessary repair, existing legal and political institutions and policies. This mode of analysis assumes that it is appropriate and desirable for courts, legislatures, and other policy-making bodies to pursue economic efficiency. If the rules these institutions fashion are "efficient," that counts strongly in their favor; if not, they are to be replaced by efficient ones.

. . . Posner's work is at the forefront of the second form of normative economic analysis, a form of inquiry that turns the mirror of analysis inward. Instead of asking whether a legal rule is efficient, Posner tries to answer the more fundamental question of why the law or public policy should promote efficiency: What, if anything, justifies efficiency?<sup>58</sup>

Whether what I have termed the positive, apolitical use of economic analysis of law, what Ackerman has labeled as the Yale School, and what Coleman has described as one form of the normative basis of economic analysis of law are one and the same (and I think they are) is largely irrelevant. What is important is defining the battlefield. The basic question appears to be whether one believes economic analysis of law is the only way to analyze legal issues or whether one believes that economic analysis of law is one of many useful tools for analyzing difficult and complex legal issues that confront the decision makers of our society. Adopting the latter view and promoting the apolitical, positive use of law and economics does not necessarily entail appropriating the normative implication that efficiency, as opposed to fairness or distributive justice, is the only criterion. My point, which echoes Bruce Ackerman's thesis,<sup>59</sup> is that by employing the positive use of economic analysis of law, one may more easily achieve progressive, instrumental goals such as fairness and distributive justice.

### III. Conclusion

Although it is not written for lawyers or law students, *Hard Heads, Soft Hearts* should be required reading for any scholar or student exposed to economic analysis as a technique to study law. The book artfully illustrates that at one level, economics is content neutral, like any other "science." Unfortunately, as in any other science, an underlying political philosophy may manipulate neutral facts. However, the ability of conservatives or liberals to manipulate neutral economic data should not lead to the repudiation of economics as a vehicle for analyzing legal problems. No one calls for the repudiation of historical analysis of legal

58. *Id.* at 1105.

59. *See supra* text accompanying note 56.

problems merely because of “new left” historians who have a bias against our current political system. Instead, as Blinder illustrates, scholars should embrace economic analysis as an analytical tool that, when divorced from political content, can serve as a wonderfully illuminating device.

In other words, liberals should not concede the use of economics to the radical right. It is much too powerful a tool. Those of us in the center or on the left have an obligation to understand it, to use it, and to expose its misuse when it is employed to camouflage a political agenda with which we vehemently disagree. Conceding the use of economic analysis of law to those on the right would be catastrophic.

Unfortunately, students and even academics often regard with fear the very economic principles that should be considered in every major legal decision. Their fear stems simply from a lack of familiarity with basic economic tenets. Basic economics, unlike history, literature, and foreign languages, does not often claim a place in secondary school curricula.<sup>60</sup> Colleges do not ordinarily require even an introductory economics course for graduation. The resulting ignorance of or lack of familiarity with economics often translates into hostility toward its use. This must change, however; Professor Blinder’s book demonstrates the disservice that will result from ceding economics, and by implication economic analysis of law, to the right wing of the political arena.

60. See, e.g., Newberry, *U.S. High Schoolers Flunk Economics Test*, U.S.A. Today, Dec. 29, 1988, at B1, col. 4 (noting that the Joint Council on Economic Education “urges schools to begin teaching economics in grade school and to require economics for high school graduation”); *Economics Is a Foreign Language for Teenagers*, Austin American-Statesman, Dec. 29, 1988, at F4, col. 1 (quoting Paul Volcker, former Federal Reserve Board chairman, as saying that “[e]conomic education is ‘not in the kind of shape we want it to be’”).

# Letters Between Giants: The Legacy of Leon Green and Charles McCormick

THE CORRESPONDENCE BETWEEN LEON GREEN AND CHARLES MCCORMICK, 1927-1962. Edited by David W. Robertson† and Robin Meyer.‡ Littleton, Colo.: Fred B. Rothman & Co., 1988. Pp. x, 222. \$27.50.††

Reviewed by Thomas M. Reavley\*

*The Correspondence Between Leon Green and Charles McCormick, 1927-1962* contains 35 years of correspondence by 161 letters between two princes of legal thought and education. This little book incorporates thorough explanatory annotations about the people and events mentioned in the correspondence.

The editors tell us in the preface that the book is “a resource for scholars, an insiders’ minihistory of American university legal education, and a unique memento for the thousands of surviving friends, disciples, and students of Green and McCormick.”<sup>1</sup> The editors claim further that the correspondence “is also a colorful commentary on the political and social life of the nation and of several states during the 1930s, 1940s, and 1950s.”<sup>2</sup> I can understand how the book could be a useful resource for legal historians, though I am dubious about its use as a commentary on the political and social life of the nation. For those of us who knew and admired these two masters, however, reading these exchanges is certain to be an enlightening and enjoyable experience.

Before discovering this book, I knew little of the relationship between Green and McCormick, which began during the four years (1922-1926) when both taught at the University of Texas School of Law. The differences in their personalities made it difficult for outside observers to gauge the depth of their friendship. Green always appeared to be more

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†† Hereinafter cited by page number only.

\* Judge, United States Court of Appeals for the Fifth Circuit. Judge Reavley attended the University of Texas School of Law during Dean Charles McCormick’s tenure.

1. P. vii.
2. P. vii.

impatient and outspoken, and McCormick more reserved and precise. Their letters reflect these characteristics: for example, Green was more likely than McCormick to misspell a word or to fling a caustic comment about some political figure.<sup>3</sup>

Green's style must have contributed to his reputation as a dynamic teacher who opened up horizons for his students. Students in classes he taught in his late eighties reported that his teaching excelled that of most younger professors. By contrast, McCormick, my teacher in a 1941 equity course, produced neither humor nor electric display. But his analysis of problems in the cases, problems often missed not only in student preparation but also by the judges who wrote the opinions we studied, combined with the precision of his presentations to create a model of legal instruction.

Green, outspoken of manner, was not reluctant to criticize the mistakes of government or the university.<sup>4</sup> He also brought his criticism to bear on the judiciary. Green often voiced displeasure with the performance of appellate judges.<sup>5</sup> Because Justice Jack Pope was aware of this fact, he felt complimented when he received a letter from Green about an opinion Pope had written for the San Antonio Court of Appeals, the letter concluding: "Not always do I find your opinions uninformative."<sup>6</sup>

3. See, e.g., p. 53 ("I do not think it makes any difference what ground Mr. Hoover takes. He will only tend to weaken the ground."); p. 113 ("This fellow Roosevelt just can't keep his hand out of important things like setting Thanksgiving and Christmas, can he? Incidentally, I had exactly the same feeling about voting for him as you express, and had Dewey measured up would have been found on his side. But the longer he talked the littler he got."); p. 170 ("Ike is not only a disappointment—his weakness is downright dangerous. Talk about the mess in Washington!"); p. 205 ("A lame duck president is bad enough any time but lame duck Ike is a catastrophe for the country and maybe for the world. It is often said that the situation brings forth the man. I'm waiting for him to make his appearance. I hope it doesn't [*sic*] come via little Nixon.").

4. See, e.g., p. 106 ("I am greatly offended at the President at the way he treated [Henry] Wallace. I think it was the most stupid error of his career and that he will pay for it. It occurs to me that some group wanted Truman out of the Senate as badly as Wallace out of the picture and imposed upon the President to kill two birds with one stone. As a matter of fact the President has more and more come into the hands of people whom I do not trust." (footnote omitted)); p. 175 ("Well Ike seems content to continue to play the puppet for [U.S. Treasury Secretary George M.] Humphreys [*sic*] et al. In allowing the indictments against [Roy A.] Roberts and [E.H.] Thornton [Jr.] to be dismissed he split his robe of morality wide open if it were not already tattered." (footnote omitted)).

5. See, e.g., p. 49 ("Judge [John M.] O'Conner [of the Illinois Court of Appeal] has just recently handed down an opinion greatly impairing, if not destroying, the equitable jurisdiction of the Municipal Court."); p. 166 ("I have just turned in a little article to the typist and am so relieved that I can begin to think about what I should have said. It's a little broadside at the [Texas] supreme court for the way it handled a suit against some loan sharks. It's one of [Justice Few] Brewster's worst—outstrips the mule case." (footnote omitted)); pp. 183-84 ("While [Justice Roger] Traynor swallowed your theories, and correctly so, it seems to me he didn't [*sic*] apply them. . . . [I]t is my impression that while Traynor is keen on the doctrines he very frequently gets himself all tied up in them and gets a bad result. . . . He is a smart guy but is so doctrinally enmeshed that he destroys himself as a first rate judge.").

6. Pope, *Dean Leon Green*, 56 TEXAS L. REV. 567, 567 (1978).

It was not unusual for Green to write to the judge who authored an appellate opinion. Green's remarks were constructive and courteous, and he always had his reasons for writing; at the same time, he would tell you exactly what he thought. I know about this, because I was on the receiving end of some of those letters. Sometimes—only sometimes—I enjoyed receiving them, but I always profited from them.

On the other hand, I cannot imagine Dean McCormick writing similar letters to a judge—unless the judge initiated the correspondence or was a long-time, close friend. Yet this certainly did not mean that McCormick regarded appellate judges dispassionately. McCormick wrote to Green in 1957, when the latter was visiting at Hastings, that he had just received a copy of an article by Professor Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*.<sup>7</sup> When he wrote the letter, McCormick had read only enough of the article to note that Wright had begun with quotations from Green. From this beginning, McCormick concluded that "it should be good."<sup>8</sup> After reading the full article, however, McCormick dissented from its précis that the appellate courts were exercising too much power and overriding the trial courts too often. When he later presented Wright with a copy of the third edition of *Cases and Materials on Federal Courts*<sup>9</sup> by McCormick and Chadbourn, McCormick had written on the flyleaf, "To my friend Charles Alan Wright, hoping it will restore his faith in the omniscience of appellate courts. Charles T. McCormick."<sup>10</sup> Wright, who became a coauthor of the next edition of that work, has told me that having Green and McCormick "as colleagues was one of the most important and beneficial influences in [his] professional career."<sup>11</sup>

Despite their differences of personality, Green and McCormick were alike in many ways. Both were unfailingly courteous and kind and considerate of the feelings and welfare of others. They were honest and fair, sincere and unpretentious, free of vanity and guile. Both were happily married and devoted to their wives, Irelene McCormick and Notra Green.<sup>12</sup> Both were courageous in private life. McCormick may have known of the diagnosis of his affliction with Parkinson's disease long

7. Wright, *The Doubtful Omniscience of Appellate Courts*, 41 MINN. L. REV. 751 (1957).

8. Pp. 188-89.

9. C. MCCORMICK & J. CHADBURN, *CASES AND MATERIALS ON FEDERAL COURTS* (3d ed. 1957).

10. Conversation with Charles Alan Wright, Professor of Law, The University of Texas School of Law (Sept. 1988).

11. *Id.*

12. The McCormicks had no children; the Greens had a son and a daughter. The correspondence reveals that the illness of Green's daughter influenced his move from Northwestern to Texas to a greater extent than has previously been understood. *See* pp. 134-35.

before the ailment took its devastating toll, but he never acknowledged that to others. Green cared for his mentally disturbed daughter to the very end of his life without complaint.

I recall now my last personal encounter with Leon Green, in Townes Hall. I expressed my desire for an extended visit with him, but he was not encouraging about the prospects. He described his daily schedule and declared his dissatisfaction, even disgust, with his physical limitations. I recall, however, that he presented the matter as an unavoidable fact, without a note of personal misfortune. Then ninety years old, Green died a few months later.

Green and McCormick were both prolific and successful scholars. The *Texas Law Review* has published a bibliography of Green's scholarly works<sup>13</sup> and an annotated discussion of McCormick's writings.<sup>14</sup> It was written of McCormick:

When McCormick resigned as dean in 1949, his profound scholarship had already been widely recognized. Since that time it has been acclaimed in all corners of the Anglo-American world. There are few volumes of current reports that do not reflect the influence of his writings in evidence, damages, and federal procedure. His casebooks are in use in many law schools. Over this period he has been sought as a teacher by leading schools of the country and has accepted many short-term assignments. His committee work on the national scene has been important and extensive, and his services have been sought for institutes much greater than he could render. . . . [T]here is no one in sight who gives promise of challenging his productive record over so broad an area of general law.<sup>15</sup>

The writer was Leon Green. Green's own seminal ideas have earned extensive recognition. The *Texas Law Review* has published several articles dedicated to him, including a notable piece written by Professor David Robertson,<sup>16</sup> an editor of this collection of letters.

The correspondence contained in this book demonstrates that Green and McCormick shared common views and were intimate friends. McCormick wrote to Green: "We agree fundamentally about most things but we have just enough areas of divergence to keep each other interested in our respective points of view."<sup>17</sup> And again: "I seem to have a more complete and genial mutual understanding with you than

13. *Bibliography of Leon Green*, 56 TEXAS L. REV. 381 (1978).

14. Ray, *McCormick's Contributions to the Law of Evidence*, 40 TEXAS L. REV. 185 (1961).

15. Green, *McCormick's Influence on the Texas Law School*, 40 TEXAS L. REV. 180, 182 (1961).

16. Robertson, *The Legal Philosophy of Leon Green*, 56 TEXAS L. REV. 393 (1978).

17. P. 85.

with any other of my friends.”<sup>18</sup> After reading Green’s article *Leadership in Legal Education*,<sup>19</sup> McCormick wrote to Green:

If any man should know [of my part in legal education], it is you, for with you more than any other I have exchanged those long, youthful, excited plans and aspirations that in later years become translated into actions. There is so much of your influence and inspiration discernible in whatever I have done, that you needs must view my career indulgently. Friendship has guided the critic’s pen.<sup>20</sup>

Green constantly praised McCormick’s work and teaching ability in these letters. Once, reporting to McCormick on how students at Hastings College of the Law had described McCormick as the best teacher they had ever had, Green told his friend that in the classroom, “[y]ou are nothing less than a legal Marilyn [*sic*] Monroe or Elizabeth Taylor.”<sup>21</sup>

As one might expect, these letters most often address the subjects of law schools and legal education. Some of that discussion is timeless. McCormick wrote that “[t]he pay-off in learning is not the coruscations of the classroom, but it is the hours of solitude, when a student gnashes his teeth over a tough problem, scratches his head, and toughs it through. Whatever you get that’s worth getting, you get for yourself.”<sup>22</sup> Green was not optimistic about refresher courses for practicing lawyers, because “the practicing lawyer is as incapable of getting something without working for it as is the law student. . . . [I]t is not refreshing they need, but some genuine study and understanding.”<sup>23</sup>

Curiosities appear to the modern reader. In our day of the copying machine, it is strange to read of McCormick’s asking Green to return the copy of an enclosed article.<sup>24</sup> Then there is the matter of salaries. In 1947, distinguished professors at the University of Texas received from sixty-five hundred to eight thousand dollars per year.<sup>25</sup> McCormick was then dean at Texas, and Green, who had retired from the same position at Northwestern, was forced to move south for the health of his daughter. McCormick undertook to amend the Texas budget to make a place for Green on the Texas law school faculty. By 1947 Leon Green was nationally known, had been dean at Northwestern since 1929, and had previously declined an appointment as Solicitor General of the United

18. P. 94.

19. Green, *Leadership in Legal Education*, 28 TEXAS L. REV. 3 (1949).

20. P. 156.

21. P. 189.

22. P. 101.

23. P. 85.

24. See p. 96.

25. See p. 137.

States.<sup>26</sup> McCormick undertook extra effort to create a place for Green at the eight-thousand-dollar salary.<sup>27</sup>

After McCormick retired as dean and, beside Green, remained as a distinguished professor on the University of Texas faculty, one might have expected their presence to pose problems for the leadership of then law school dean Page Keeton. Some scholars, as I trust I may safely say, are prone to become prima donnas, especially after winning a measure of recognition. But Dean Keeton has said that Green and McCormick gave him constant support rather than difficulty, not only because of their own experience as administrators but also because of their natures and values.<sup>28</sup>

The letters also reveal some of the political interests of the two men. McCormick took his place in that long line of persons who have tried to modernize the Texas courts. He proposed a system in which the Chief Justice of the Texas Supreme Court would appoint the other justices, as well as lower court judges.<sup>29</sup> Green predicted that McCormick's views would "have a great deal of weight."<sup>30</sup> But the legislature and other office holders disregarded those views, as they did most other proposals for modernization.

For his part, Green expressed hope that courts would continue to take on an active role in shaping the law. Green rejected the notion that the Supreme Court's constitutional interpretation should be limited to the "original intent" of the Constitution's makers. He maintained that the powers of the Court must necessarily remain undefined.<sup>31</sup> In his ninetieth year, he wrote that "[t]he law will continue to grow and change

26. Robertson, *supra* note 16, at 396.

27. See pp. 135-41.

28. Conversation with W. Page Keeton, Professor of Law, The University of Texas School of Law (Sept. 1988); see also Green, *supra* note 15, at 181 ("[P]robably no other dean has received more loyal or more complete support for his programs from a predecessor than Keeton has received from McCormick.").

29. McCormick, *Modernizing the Texas Judicial System*, 21 TEXAS L. REV. 673, 679-80 (1943) (suggesting several reforms, including appointment of judges by the Chief Justice followed by popular reelection, higher education and experience requirements for judicial appointment, and increased use of en banc review). Green apparently believed that McCormick had proposed popular election of the Chief Justice. See p. 88. Actually, McCormick had described with approval several selection systems for the Chief Justice, all involving some form of appointment. See McCormick, *supra*, at 675-80; see also McCormick, *Judicial Selection—Current Plans and Trends*, 30 ILL. L. REV. 446, 461 (1935) ("It has been suggested that the Chief Justice, alone of all the judges, should be elective, but this brings in at the front door all the evil progeny of the popular election of judges." (footnote omitted)); McCormick, *Modernizing the Courts of Texas*, PUB. AFF. COMMENT, May 1957, at 1, 2 (continuing to support the appointment of judges, as in the federal court system, but advocating the "more hopeful possibility" of executive appointment for a term, with popular vote at the expiration of the term to give "[t]he people . . . an opportunity at the polls to oust an unworthy appointee").

30. P. 88.

31. See, e.g., Green, *Political Freedom of the Press and the Libel Problem*, 56 TEXAS L. REV. 341, 354 (arguing that the Supreme Court, in expanding first and fourteenth amendment protections,

and die as do people and their other creations.”<sup>32</sup> For those who regard the Court as the undemocratic branch of government and who think the Court is not entitled to change its interpretation of the Constitution, he said:

[N]either we nor the Court should ever forget that its understanding of the people at the time of its decisions is why there are nine judges of different minds, drawn at different times from different areas and approved by a host of politically minded officials, themselves chosen by people of many minds from many areas. Of all our officials there are none who can claim higher democratic approval than those who are chosen “from the people and for the people” as are the Supreme Court justices of our nation. Let them judge freely . . . .<sup>33</sup>

Green wrote often about politics and about the political leaders with whom he was generally displeased. He said in 1949 that “[t]here is really no challenge in any of the [political] parties this fall—a bunch of second and third raters.”<sup>34</sup> Congressmen were the most frequent objects of Green’s ire; he once graded them to be “a conglomerate group of morons.”<sup>35</sup> He wrote in 1955: “Our national affairs still seem to be very poorly handled as you so temperately put it. I have come to the conclusion that our troubles are due to simple dishonesty.”<sup>36</sup> As might be expected, Green took early and strong exception to Senator Joe McCarthy, calling the Senator “nefarious” and one who “might well become a Hitler.”<sup>37</sup>

McCormick was not quite so acerbic in his assessment of political affairs, but neither was he happy with the current level of political performance. On one occasion he wrote: “It is an eternal mystery that we cannot manage through democratic means to do a better job of governing. . . . Sometimes I think that we should use something like the lie detector to ascertain whether a man has a passion for justice.”<sup>38</sup> In 1953 he wrote:

Theoretically, I am nonpartisan and prepared to do honor to the Republicans when they merit it, but practically I find it very hard to recognize anything meritorious in what they actually do. Maybe it’s just that Congress, under any party, is getting too big

“had the good sense and the responsibility to keep the nation’s law, as developed by the courts, geared to the growth, development, and welfare of its people”).

32. *Id.* at 379.

33. *Id.* at 373.

34. P. 152.

35. P. 100.

36. P. 177.

37. P. 159.

38. P. 103.

for its boots, and instead of working on its own job of legislation, is spending most of its energy in trying to run the executive branch, foreign policy, education, and the policing of subversion, the F.B.I.'s job.<sup>39</sup>

Although the reader is likely to agree with many of the comments of these two correspondents, hindsight helps us to disagree on some counts. For example, McCormick stated that an acquaintance, New York lawyer Grenville Clark, had come "closer to reality than almost anyone" by insisting that the way to deal with Russia in 1948 was "to get around the table . . . and lay all the cards down" in all-out negotiation.<sup>40</sup> Looking back, however, we can see that Clark's idea, with which McCormick apparently agreed, would have meant negotiation with Joseph Stalin.

I found two statements in the letters with which I agree strongly. First, McCormick wrote to Green about a celebration dinner sponsored by the University of Texas School of Law for four of its long-time great professors, including both Green and McCormick. Green was then teaching at Hastings and missed the tribute. McCormick told Green that he and Professor George Stumberg had agreed "that the best way to enjoy these ordeals is in absentia."<sup>41</sup>

The second statement is contained in a letter or memorandum that Green wrote to his dean (McCormick) shortly after he returned to Texas. The transmittal concerned Green's belief that the Texas law faculty should unite in the effort to "get to the bottom of the problems of legal education."<sup>42</sup> Green wanted to work toward solutions and improvement, and he wanted the best efforts from everyone—exerted together. Leon Green spoke—and speaks, not just to law school faculty but also to members of multijudge courts—with these words:

Twenty or more individual faculty members, each going his own way, do not make a faculty, a school or a program. They have to organize themselves into a striking force. Unification is not easy. It requires in addition to much effort the spirit of democracy that impels the individual to accept his full responsibility to the group as well as the spirit of democracy that insures to each individual full participation in the group's affairs. It requires a high quality of spirituality to be a working member of an intellectual group which has the responsibility of training the lawyers of this or any other state.<sup>43</sup>

It has always surprised me to see that busy people have retained

39. P. 165.

40. Pp. 149-50.

41. P. 211.

42. P. 144.

43. P. 145.

their personal correspondence. I would expect to see two corresponding law professors, usually denied adequate secretarial and support staff, discard their old letters after several cross-country moves. Fortunately for many of us, Charles McCormick and Leon Green saved theirs.

