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**Author**

Hagman, Donald G.

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# Foreword to the First Issue of the UCLA Journal of Environmental Law and Policy

*Donald G. Hagman\**

“Peter spoke . . . ‘Lord . . . I will make three tents . . . one for you, one for Moses and one for Elijah.’”<sup>1</sup> I feel like Peter as I make an encampment for Professors Ellickson, Krier, Stewart and Tarlock, outstanding law professors who meet in these pages to constitute the first issue of *UCLA Journal of Environmental Law and Policy*.<sup>2</sup> Before introducing their symposium on utilizing economics in environmental law or land use law courses, I’d like to mention another giant and present some background material.

“But for” Neal Roberts, as some law professors say to explain causality, this new environmental journal would not be. Indeed, its sponsoring organization, the UCLA Environmental Law Society (UCLAELS) should number Neal among the critical mass of folks who constitute its founding members. Professor Roberts regularly teaches at Osgoode Hall Law School in Toronto. But in 1978–79, the UCLA School of Law had the pleasure of his company as a visiting professor of law. Neal has a non-cynical, can-do optimism about things and his views about the earth and air and water struck sympathetic sentiments in a number of persons in his section of first year property. Those persons, together with some student sparkplugs from elsewhere in the UCLAW community, led to the formation of the UCLAELS in the Fall of 1978.

While environmentalism and altruism may be virtually synonymous concepts, even altruists sometimes need money. Professor Roberts took it upon himself to raise it. Through his connection as a member of its faculty, Neal persuaded the Lincoln Institute of Land Policy to provide some funds for the UCLAELS. Part

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\* Professor of Law, UCLA

1. *Matthew* 17:4.

2. Professor Hagman introduces only those articles derived from the Lincoln Institute symposium. Professor Rooney’s article presents an economist’s non-lawyer perspective of the use of economics in environmental courses.

of those funds brings you this journal. Neal also had the Institute sponsor a conference at which the papers in this first issue were delivered, and he offered the publication rights to the journal.

Meanwhile, Professor Roberts returned to Canada. I counselled the students to publish a journal with the term "land use" in its title. I still believe that there is an absence of specialized land use law publications and that there is an excess of specialized environmental law publications; rightly, the students pointed out, the term environment can connote the subsumption of land use, but the converse would not be true. (Sophisticated environmentalists understand that most pollution problems end as land use problems, but that datum is too subtle to dictate the name for a journal).

Despite their debt to Roberts, all members of the UCLAELS responsible for publication of the journal were not enthusiastic about publishing the conference papers. While I counselled them that publishing anything with the names Ellickson, Krier, Stewart and Tarlock attached was a real coup for a first issue of a new law journal, Roberts had exposed some of them to the Stewart and Krier *Environmental Law and Policy* materials in this Fall 1978 environmental law class. From that experience, they knew that Stewart-Krier are environmental law scholars of the first order; they also there learned that Stewart-Krier are not identifiably part of the environmental movement. It's hard to state what I mean here, for almost everyone thinks of himself or herself as being concerned about the environment, Stewart-Krier included. Hardly anyone goes around proudly wearing a label "polluter." Stewart and Krier are probably the type who would be comfortable working for oil companies. They are not Saxists.<sup>3</sup> The students might not have known it, but Ellickson and Tarlock are the type who would be comfortable working for developers or polluters.<sup>4</sup>

The students were not all enthusiastic about a law and economics symposium as their first issue for another reason. While it is not necessarily so, economics is often used to confront environmentalism, not to justify it. The purer environmentalists of the UCLAELS did not wish to have their virginal issue prostituted. Fortunately, arguments about the need for a "balanced" journal prevailed and so this first issue is dominated by those (including me) who are somewhat anathema in some environmental circles.

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3. Joseph Sax, a leading legal scholar, whose repute is very pro environmentalist.

4. Ellickson, as distinguished from Krier-Stewart, has made his repute more in land use than in environmental law. Tarlock does important work in both fields.

Be assured that this first issue does not represent the ambience of all future issues to come.

While the papers herein have their moments, their authors would likely admit a how-I-do-it format is not exactly one which felicitously accommodates the building of a scholarly contribution repute. Indeed, those of us who teach more law than economics can take some comfort in realizing from the papers that even these best of the law and economics teachers have difficulty preaching a persuasive gospel that economics should have a larger role in the law school.

## I.

### ELLICKSON

An emphasis on economics means something else must be left out. For example, Ellickson eschews including planning theory.<sup>5</sup> His forthcoming land use book and his land use course include economics, I read him as saying, but not much on planning. By way of contrast, my land use book says, "this book contains materials from the planning, economics, public administration, political science and sociology literature."<sup>6</sup> That statement reflects my view that when a book or a course involves a subject matter, such as land use planning, or environmental matters, the literature and concepts from that subject matter should have a first right to the limited resource of book pages or class time. I'd expect, for example, that a course in jurisprudence would more naturally include materials from non legal philosophers than it would from economists (which is not to say, of course, that some efficiency analysis would be inappropriate in a legal philosophy course).

Part I of Professor Ellickson's paper<sup>7</sup> uses the problem of remedies against excessive development charges as an application of noncontroversial economics. I'm not sure what he means by "noncontroversial," although his Part II, titled "controversial economics"<sup>8</sup> deals with a "positive and normative"<sup>9</sup> theory. Part I, then, is noncontroversial because it deals with procedure, I guess, not with substantive rights. Maybe that's why it is, or at

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5. See Ellickson at 1.

6. D. HAGMAN, PUBLIC PLANNING AND CONTROL OF URBAN AND LAND DEVELOPMENT I (2d ed. 1980).

7. See Ellickson at 2.

8. *Id.* at 6.

9. *Id.* at 6-7.

least I agree that it is, a relatively noncontroversial application of economics to law. He uses an example to illustrate that *if* illegal development charges are exacted from developers by local governments, then, when the developer sues the local government for a refund, the illegal charges should be returned to the developers from whom they were exacted. Since that conclusion is the same as the result produced by least sophisticated intuition, it is important to know Ellickson's reasons. The developer should get the refund, not on the ground that the refund should go to the person who was overcharged and who is thus suing (the most unsophisticated, intuitive result) but to the "cheapest right enforcer," which is the developer.

The student is made more sophisticated by the example in Ellickson's paper. For instance, the conclusion current in both developer and planning literature these days is that development charges are passed on to the housing consumer. As Ellickson demonstrates, this next higher level from gut intuition is probably wrong. While it is probably true that the developer does not "really" pay these charges, since their incidence is usually elsewhere, the incidence is not necessarily on the housing consumer. It may well be on the landowner or on other factors of production.

Ellickson stops at that level of analysis because that's as far (I guess) as rigorous, scientific economics goes. In so doing, he denies the students the possibility of more sophisticated understanding. For example, some students might wonder if it is fair that the developer gets the refund if he does not "really" pay the charge. Ellickson would probably answer that some unfairness is the price of efficiency. Only the developer faces transactions costs low enough to take on the illegally exacting local government. If the developer does not do it, the illegally acting government will get to keep the illegal exaction. (One might consider that while a refund to the developer is not necessarily fair, it is *fairer* than the illegal actor keeping it.)<sup>10</sup>

By combining less rigorous economics, hunches, reading between the lines, political theory and knowledge of the industry, Ellickson could give his students more. I usually deal with the same

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10. Compare Freeman, *Give and Take: Distributing Local Environmental Control Through Land-Use Regulation*, 60 MINN. L. REV. 883 (1976), and Rabin, *Nuisance Law: Rethinking Fundamental Assumptions*, 63 VA. L. REV. 1299 (1977), who attempt respectively to use "merit" and "fairness" to improve on Ellickson, *Alternatives to Zoning: Covenants Nuisance Rules, and Fines on Land Use Controls*, 40 U. CHI. L. REV. 681 (1973).

problem by asking the following question: Why do developers get so exercised about excessive development charges so as to lead them to sue? Not burdened by the need to be rigorous and do graphs, I find that the students quite easily see where the incidence of the charges might be (not that anyone knows for sure). I then ask subordinate questions like: Are developers often also landowners? If they are, the suit by a developer is really a landowner suit in a masquerade. Many developers are long-term, speculative holders of land kept in the "warehouse" for a long time. But even if the developer buys land only at the last moment before development, paying a price based on expected development charges, if his expectations are too low (*i.e.*, the illegal exactions curve is faster rising than the developer realizes), then the developer really does "eat"<sup>11</sup> the charge. In the long run, developers don't eat the charge because they'll be smarter the next time, but in the short run, there's a developer facing bankruptcy. As a matter of fact, most developers are reluctant to play a public interest law firm role (suing to make governments stop exacting illegally). They want to do business in that town again. That statement is a little lore which could come from economics, because economists analyze everything, but it's also an insight drawn from human nature, human behavior, behavioral science political theory, or seat-of-the-pantsism; a hunch economists could probably "prove" right by a "rigorous" analysis.

The ordinary developer's reluctance to sue reminds me to observe that Ellickson may be wrong about the developer being the "cheapest right enforcer." With the evolution of class actions, relaxed rules on standing, and recovery of fees and costs under the substantial benefit or private attorney general theory, the home buyers may be the "cheapest right enforcer." Knowledge of those topics, however, requires one to teach *law*, not economics, and my book has at least some materials on each of those topics, although obviously only as a sampler, since courses in civil procedure or remedies should be exploring those topics in depth.

Individual developers may care about exactions not because the level of charges is illegally high, but because the charges are uneven. Once illegality starts, it's difficult to know whether I, as a developer, am paying more than my competitors. Rather than efficiency suffering, there is an affront to fairness, "nice guys finish last," and a gut sense of outrage about violation of equal

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11. My colloquial non-jargonistic synonym for incidence.

protection sets in. (It reminds me of this analogy: Most law professors don't much care that they are paid less than equally competent etc. lawyers, but among themselves they care if less competent, less senior, less dedicated etc. members of the same law faculty are paid more than the more competent, etc.).

If I'm right that very few individual developers do or can afford to care enough to sue for return of illegal exactions, how do I explain that associations of developers do sue? Here, Ellickson may be right about cheapest right enforcers: The developer association may already be organized and there is not much an illegally exacting local government can do to get back at an association. So the developer *association* can be plaintiff as the "cheapest right enforcer."

Why are these suits brought? There are a number of reasons. First, it's a topic that the association's executive director can get her members stirred up about. Second, she can do this on "principle" because many of the members are red-blooded capitalists who believe in the American way, namely, that the government (*i.e.*, the existing community) not the new residents or developers (wearing their landowner hat) should subsidize new growth. Third, if housing does increase in price (*i.e.*, the less sophisticated assumption is correct), the development industry will shrink because consumers will shift to alternative expenditures. Developers are not likely to be impressed with the theoretical observation of economists that they regard themselves as investors. If housing prices get too high, and the building industry must shrink, a developer-investor can always open up a McDonalds or build toasters. Many developers are in development because they like to build. There's something macho about turning raw land into housing while at the same time exercising their smarts in a highly competitive, high risk industry that for all its size is still dominated by a lot of hunch and personality rather than scientific management.

By this point, one has perhaps noted, I have lost touch with Ellickson's hypothetical because, while a developer's association could sue, I'm not sure that the association could sue for damages as distinguished from an injunction. In any event, the above discussion may lead one to a more sophisticated (albeit more confused) understanding of the problem of remedies for illegal exactions; Ellickson's rigorous economic analysis comes to an answer which is more certain but, I think, less sophisticated and perhaps wrong.

Ellickson's Part II is Controversial Economics: The Phenome-

non of Government Sales of Development Rights. Ellickson there speaks of his attempt to teach his students the insights contained in his article *Suburban Growth Controls: An Economic and Legal Analysis*.<sup>12</sup> His thesis in that article was that exactions are too high if they increase over what they were in the past. In addition to being controversial because he tries to be normative with economics, Ellickson also is controversial because, in my opinion, his norms lead him to get it wrong.

I don't think that exactions can be too high or that change (particularly if not too fast) in their level is undesirable, at least as a matter of economics. But I have already confronted Ellickson in debate on this point,<sup>13</sup> and I use his views<sup>14</sup> followed by mine<sup>15</sup> in my new book, where one can review the encounter.

At the end of his Part II<sup>16</sup> and in his Part III, Ellickson turns regretful about the limits of economics. His paper describes his new appreciation of philosophy, which he applies to land use, by his description of "community self-determination," a concept he attributes to Professor Michelman.

I've recently been struck by the thought that much of the controversy in land use is over who has control. The traditional view is that the local government should have the control right. That view replaced an earlier view that the individual owner was predominant, a view that economists find comfortable, since economics tends to be an "aggregation of the individual values and interests."<sup>17</sup> There is also the view that the control right should be assigned to the neighborhood,<sup>18</sup> a view I find more intriguing than that it should be assigned to the region, state or nation,<sup>19</sup> although I confess to being of two minds on the matter.<sup>20</sup>

12. 86 YALE L.J. 385 (1977).

13. ALI-ABA COURSE OF STUDY, THE COMPENSATION ISSUE: THE LIABILITY OF GOVERNMENTS AND THEIR EMPLOYEES IN DAMAGES FOR PLANNING AND LAND USE CONTROLS (Jan. 4, 1979).

14. D. HAGMAN, PUBLIC PLANNING AND CONTROL OF URBAN AND LAND DEVELOPMENT 916 (2d ed. 1980).

15. *Id.* at 919.

16. See Ellickson at 9.

17. *Id.* at 10.

18. Babcock & Bosselman, *Citizen Participation: A Suburban Suggestion for the Central City*, 32 LAW & CONTEMP. PROB. 220 (1967); R. NELSON, ZONING AND PROPERTY RIGHTS (1977).

19. F. BOSSELMAN & D. CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROLS (1970).

20. Hagman, *Regionalized-Decentralism: A Model for Rapprochement in Los Angeles*, 58 GEORGETOWN L.J. 901 (1970).

At any rate, either out of modesty or lack of recognition of his own metamorphosis, Ellickson fails to mention his latest effort, which combines economics with community concepts, to produce Ellickson's *Public Property Rights: A Government's Rights and Duties when its Landowners Come into Conflict with Outsiders*.<sup>21</sup> This is the first of his highly regarded essays where I think he got it right.

## II.

### KRIER-STEWART

The Krier-Stewart paper, in addition to describing how to use economics in teaching environmental law, describes the use of economics in the Stewart-Krier book, *Environmental Law and Policy*. Their paper was of interest to me for a number of reasons. First, I had a modest hand in the book and feel somewhat paternal concerning it.<sup>22</sup> Second, having had a chance to teach environmental law for the first time in 1979-80,<sup>23</sup> I used the Stewart-Krier book. I had never before used a book so explicitly dominated by economics, and I found the experience fascinating. Among other consequences of the choice was that the students did not learn much environmental law. That is so for two reasons: First, there is not that much law in the book and, second, the number of pages one can cover in class when it is necessary to work through the economics as well as the law is less than if one were dealing only with law. So long as not learning much law does not trouble the law student as consumer, who assumedly comes to law school to

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21. 52 S. CAL. L. REV. 1627 (1979). The publication came out after his paper herein was written, so that may explain its non-mention.

22. The year before Professor Krier arrived at UCLA, the Ford Foundation insisted on giving some money to UCLA Law School to evolve environmental and land use materials and programs. Upon Krier's arrival, I was able to spin half the funds off to him to support an environmental effort and was able to pursue the land use half myself. The funds helped support Professor Krier to do the first edition of the book, J. KRIER, ENVIRONMENTAL LAW AND POLICY (1971).

23. Krier monopolized the course at UCLA until he went to Stanford, and Neal Roberts taught it the following year. 1979-80 was my first chance to teach it. Now that Krier has decided to come back to UCLA, I'm going to engage in hand to hand combat with him, with the victor earning the right to teach environmental law. He can teach land use law—it would be good for him (since all environmental law problems, as I have said earlier, ultimately come down to land use). One of the delights in teaching environmental law was the insights I was able to bring to the students from land use and the insights teaching environmental law gave me about land use.

learn law, not covering much law does not bother me much because, with Stewart and Krier (and a number of other colleagues), I too would just as soon be paid to learn about something other than the law. I confess to being somewhat more than ordinarily troubled about the students as consumers in my environmental law course. Over half of the class I taught were from other parts of the university who were taking the course to be sensitized in law. I was teaching them economics. Clearly, some of them needed economics. Many of the students were in an environmental science and engineering program and had as little knowledge of economics (and as great a need) as they had for law. Still, should it not be their choice to take law or economics and if the latter, by taking a formal course in environmental economics rather than by taking a course in that subject from me at the law school.

Setting these consumer misrepresentation problems aside, I turn to the four Krier-Stewart justifications for economics in environmental law. First, they say that teaching environmental law is an aggregation of too much law undergoing change too rapidly to track. It is that. But what field of law other than some of the basic courses is not that? Krier-Stewart postulate that there is no integrated corpus of common-law doctrine or organizing principle for environmental law, but it seems to me that private and public nuisance is common law and that environmental law with its two major heads of pollution and impact analysis are both species of nuisance law written more sensitively. I can certainly appreciate the appeal of not having to deal with all the details of environmental law. Who, after all, wants to have to understand those 50-page opinions in the *Federal Reporter* interpreting some obscure EPA regulation which is likely to be changed next year.

Their second reason for including economics is that using economics challenges students to think through competing values. Their book does that. Students who are altruistic in their environmentalism do not want to believe what Krier-Stewart is teaching. The problem is reminiscent of religious parents not wanting to send their children to secular schools of higher education because there will be atheists teaching there.

Does the atheist teacher have the obligation to present all sides? To my mind, there is no such obligation. Moreover, it is not much fun. When I teach, I want to present my view of the world. After all, given the limited class time as a resource, and believing that my years of research and thought have led me to some insights, I do not want to have to present the insights of others.

My only obligation, it seems to me, is to help assure that the insights of others are available to students in their other courses. I think any powerful theory "converts" students. In a way, I'd be disappointed if it were not so. And I think Krier and Stewart would be disappointed if their economics did not lead students to an abandonment of student value systems in exchange for a Krier-Stewart value system based on economics. To be sure, there will be a few students who will either bring with them a powerful value system of their own or who will be challenged to develop one on their own, but they will get precious little help from the Krier-Stewart book and perhaps little help from Krier-Stewart or Hagman as teacher. Perhaps a book has an obligation to be more balanced than does a teacher. Perhaps an ideal combination is for a teacher to use a book whose value system collides with the teacher's own.

Krier-Stewart's third point, that economics is important and that environmental law is an especially felicitous course in which to teach economics, is also not a persuasive assertion. There are a number of economics buffs, one would wager, who teach economics in law school courses and who could make an equal claim about their courses. Finally, Krier-Stewart argue that familiarity with economic analysis is helpful to future environmental lawyers. It is probably equally useful to lawyers in a great many areas.

I suspect that Krier-Stewart would have trouble persuading many that if economics were to be taught only in connection with one course in the law school, that environmental law should be that course. There are probably dozens of courses that qualify as well. Any attempt by Krier-Stewart to "take over" the law and economics function would probably be met with resistance. Ellickson, for example, who does not teach environmental law, but who does teach land use, might object. Would Tarlock, who teaches both courses, teach economics in environmental law rather than in land use if he were forced to a choice? If in every law course felicitous to teaching economics, economics received as much emphasis as in the Stewart-Krier book, most law schools would be more properly named the economics and law department.

It seems to me that the justification Krier and Stewart have for teaching economics in the context of environmental law is that they want to do it. Hardly any of us can scientifically justify what we teach, how many hours should be devoted to what courses, which courses should come first in the law school curriculum, etc., so I do not think Krier-Stewart should have any particular burden to justify what they want to teach.

A nagging question is, as with my comments on Ellickson—what is left out? In his book review,<sup>24</sup> environmental lawyer/environmentalist advocate Thomas J. Graff believes that Stewart-Krier have left out quite a lot. The law included does not seem to be as up to date as it could have been, says Graff (an impression that I also formed when using the book) and several environmental issues are treated only cursorily. The Stewart-Krier table of contents is not very variegated, for example, when compared to some of the “cover-the-waterfront” environmental law books with which they compete.

Moreover, instead of having economics and the choice between regulation and markets being an organizing focus, Graff believes conservation and resource exploitation,<sup>25</sup> centralization and federalism, or technology might be appropriate organizing foci. He may be right.

In order to determine whether Stewart and Krier successfully pulled off the intended purpose of their book, and to test student ability to deal with the policy analysis they were supposed to be learning from Stewart-Krier, I examined my students in environmental law by asking them a policy question.<sup>26</sup> The exam gave the students the Krier-Stewart points 1 through 4 described above, and a paragraph summarizing their approach.<sup>27</sup> The exam then told the students that they were being considered to teach environmental law next year and whether they were hired or not depended on their intelligent evaluation of the Stewart-Krier book in light of the extracted portions from the Krier-Stewart paper.

The students suggested a number of organizing principles, including conservation (as did Thomas Graff), technology, and nuisance (as have I) and added a few of their own: humanism, endogeneity, systems (rather than conflict resolution) analysis, comprehensive planning, social policy, environmental advocacy, administrative law, carrying capacity, futurism. Of course, asserting a notion as an organizing principle (and many of them are a

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24. Graff, *Book Review*, 93 HARV. L. REV. 282 (1979).

25. DiMento, *et al.* (including Hagman), *Land Development and Environmental Control in the California Supreme Court: The Deferential, the Preservationist, and the Preservationist Erratic Eras*, 27 UCLA L. REV. 959 (1980), examines a great many California Supreme Court land development and environmental control decisions. The dominant organizing force turned out to be preservation vs. development, a concept similar to conservation and resource exploitation.

26. I always ask such a policy question as well as a traditional law school question and some objective questions.

27. See Krier at 14–16.

bit vague) does not mean such a notion could be applied in the form of a finished book. Nevertheless, one doubts that Stewart-Krier did a cost-benefit analysis of these other organizing principles before leaping to economics.

A number of students were concerned that the Stewart-Krier emphasis on efficiency masked distributional issues. While that may be true, since environmental law for the most part is likely both inefficient and inequitable, to make it jump through efficiency hoops may at least result in a bigger pie so there's more crumbs for the poor. Inefficiency means we're all poorer.

A number of students noted that a cost-benefit analysis in environmental law was likely inadequate, and economic analysis would thus tend to favor polluters. The reason for polluter favoritism, many suggested, is that the costs of environmental degradation and the benefits from a good environment are less obvious and less quantifiable than are the costs of pollution control. One student exam, for example, pointed out that we should remember "all the free services that are done by nature, *e.g.* decomposition by microorganisms, without which we would all be up to our eyebrows in dead shit, removal of CO<sub>2</sub> and O<sub>2</sub> by photosynthetic plants or marine algae. If these were to be given economic value their work would far outweigh the value of all other business combined." "Perhaps the only difference between the economists and the environmentalists," said another student, "is not that the environmentalist wants environmental protection 'at all costs' or that the economist wants development 'at all cost,' but that there must be a more complete cost-benefit analysis." In fairness to Krier-Stewart, I think they would agree. They make the point in their book.

On the plus side, some students thought the Stewart-Krier economics approach enabled one to ask hard questions of the unquantifiable and particularly illuminated the "warts" in the legislative and administrative process. For example, some of the more scientifically oriented students in the class became so appalled by the inadequacy of the scientific basis for some of the draconian impositions the EPA was laying on the country that they thought EPA scientists should be descienced (or whatever is to science as disbarment is to law) for their participation in the process. (I tried to explain that it was Congress' fault for laying on impossible scientific duties). Economic analysis also helped the students understand the inconsistencies in the Clean Air Act.

On the other hand, and inevitably, the economics approach

had costs. Some students thought that the approach “slowed the class down,” as indeed it did (but perhaps it’s well worth it). Another student complained that the book demystified economics but in the process mystified administrative and judicial decision-making. That economics took away their need for a quick fix solution was lamented by a number of students. Economics robs environmentalism of its urgency and human impact, said one student. Economic analysis assures only questions, not answers, said another. Is society better off if we are all numbed to inaction because, on further analysis, nobody knows what to do?<sup>28</sup>

I find myself in general agreement with Thomas Graff and the student consumers—the cost-benefit jury is still out on the Krier-Stewart attempt to apply fairly rigorous economic analysis as an organizing principle for teaching environmental law. But the bottom line is, it’s still one very good book.

### III.

#### TARLOCK

Dan Tarlock’s literate paper is last but not most. Reading it reminds me of my sorrow that Tarlock, who began his teaching-writing career at UCLA, was allowed to slip from our grasp and due to familial obligations is probably now affixed in the midwest permanently.

Tarlock discusses why and how he uses economics, particularly efficiency concepts, in his course on land use. If he, with his co-author Ellickson, execute their forthcoming land use book as elegantly as Tarlock describes his methodology, I can see my competing book is in real trouble.

In his Part I, Tarlock asserts that planning has failed to provide the “grundnorms” for land use law and so efficiency is about the only consensus, starting point left. He’s probably right about planning, although race and poverty anecdotes (redistribution) provide (to me anyway) much more dramatic evidence to discredit applied land use law than does efficiency calculus.

When I add redistribution of wealth to the efficiency analysis

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28. I’ve noticed a number of contexts in which we have massive uncertainty these days as compared with, say, fifteen years ago. John Kennedy’s decision to go to the moon in ten years would surely now be a question: Shall we go to the moon? The question rather than the quest would take ten years, at least, to answer, and almost half of the people would be unhappy regardless of the decision.

in my land use book, I have the same sense that Tarlock has about his efficiency analysis. I have shifted the burden to the students to come up with something better. After all, isn't asking questions what academics are good at? The students might well ask "What's the answer to inefficiency and race and poverty in land use in America?" "Ah," say I, "that's for you to find out." If planning has not been the answer, maybe we're left with non-governmental (market) solutions.

The students are likely to be inclined to respond that the market is only a procedure, not a substance—it's a mechanism for finding answers, but what is the answer? Can efficiency analysis be grundnorm? If we haven't taught grundnorms, is our book or our teaching adequate? That is a troublesome question.

Professor Tarlock's paper attempts an answer to the question, I guess, although it is more a description of the answer than a telling of how he teaches the answer or how his book will present the answer. His answer, as I understand it, is public choice theory. The market is not sufficient because there are market failures. These failures are two-fold. First, the market has transactions costs which prevent the market from eliminating "bads." Second, these same costs prevent the market from providing "goods." As a result, the public (usually through some governmental entity) needs to intervene to prevent bads and provide goods. These concepts, which one can follow, emerge as the public choice model, although I do not find Tarlock particularly clear on the point. It is somewhat clearer that to Tarlock, public choice theory, which in his introduction he identifies (I think) as the Harvard-Oxford counterattack against the law and economics movement, is merely an extension of market economics. It is an extension in two senses. First, public choice rather grows out of economics as a sort of necessary evil to cure market failure. Second, public choice is only economic analysis writ large, where instead of having an individual actor, as in the market, one has entities (collections of individuals) acting together. Efficiency is still the most important goal. In the process of moving from individuals to the public, Tarlock comments on Michelman's notion of "community choice." So far as I can make out, Tarlock conceives of community choice as differing from public choice in two major ways. First, public choice involves the whole public whereas community choice is something less than the whole public. Second (although I see no essential reason why this need be), public choice puts efficiency as a primary value whereas community choice puts

efficiency last after other values, such as fairness, equality, reciprocity, altruism, etc. have been achieved.

Tarlock rejects the community choice model, so far as I can tell, because he wants efficiency to be in the driver's seat and because, with community choice, one can still have intercommunity public "bads" and "goods." So, just as there is a kind of market failure, Tarlock believes there is a need for public choice to cure community choice failure.

Perhaps I didn't get Tarlock quite right, but he is there to be read. My own theory, up from the bottom regionalized-decentralism, is that both individuals and communities ought to be free to decide what is best for them and to do it, so long as the externalities imposed on the public (the sum of other individuals affected or the sum of communities affected) are not clearly adverse. My own biases lead me to think that the pure efficiency folks, the community choice folks, and the public choice folks all have something of value to say. I don't much care if their contributions should be properly understood as an expansion of efficiency notions (a difference in degree, as we lawyers say) or as a Harvard-Oxford counterattack (a difference in the kind of analysis).

I'm more troubled that neither analysis, as Tarlock describes them, is anything more than a process for deciding or a determination of the appropriately sized group for decisionmaking. Just as efficiency analysis is a tool for testing the wisdom of alternatives, but does not tell one what alternative to choose, I would think that to whom the choice goes, whether it be individual, community or public, does not tell one what should be decided.

I have the sense that Tarlock thinks of efficiency, fairness, equality, reciprocity, altruism, etc. (to use the choices mentioned in Tarlock's paper) as a series of screens through which an idea must pass before it is implemented. I would rather like to see the choices as a series of substantive (dare I say) planning goals that any measure, in its design, should strive to achieve.

Ellickson and Tarlock think a lot alike, at least as manifested in their papers and as I know them to be, and since they also seem to be compatible co-authors of a book, there are some comments one would make on Tarlock's paper which I have already made in commenting on Ellickson.

There are two further comments which might be useful. First, Part II of Tarlock's paper goes through the law of consent ordinances and referenda and uses the *City of Eastlake v. Forest City*

*Enterprises, Inc.*<sup>29</sup> decision as a foil to illustrate misguided economic analysis (from Tarlock's introduction) or misguided legal analysis (from the closing paragraph of Part II) as an example. I'm not sure there is agreement that *Eastlake* was misdecided or that if it was, those who use economic analysis would agree with others who use economic analysis or with the other schools of choicemakers (community, public). Even regionalized-decentralism folks have a hard time with *Eastlake*, which was also hard for the court (being a 5 to 2 decision). If one can say that the majority got it wrong, it was either because the community did not pay adequate attention to fundamental constitutional rights of the landowner or that, given the context of the controversy, the community decision externalized too badly on the extraterritorial public.

Can Tarlock's preferred public choice model (efficiency writ large) accommodate the notion that community self determination, including the suppressing of individual rights and some externalizing of "bads," is proper? The "good" of internal self determination should surely be able to offset some "bads" of externalization. So it is not clear to me that the public choice model, if applied, would have led the court to a different result in *Eastlake*.

Finally, subjected to cost-benefit analysis, one must wonder whether the opportunity costs of using economics in law teaching are greater than the benefits. For example, Tarlock indicates that one benefit of economic analysis is that it leads one to alternatives which might otherwise not have been considered. But so does environmentalism. Comparative materials can also provide ideas. As a result, my land use book contains a number of concepts found in land use law in other countries. That the concepts actually exist in practice somewhere may suggest that they are worthy of practical consideration in America. An alternative in an economic model, often based on unreal assumptions, on the other hand, is only a kind of "test tube" alternative, probably with "bugs" which would make it unworkable in the real world. I do not mean to eschew the absolute value of economic analysis for its ability to produce alternatives. I do mean to assert that those of us who purport to be interested in more than the law have a wide range of disciplines and practices and non-law experiences from which

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29. 426 U.S. 668 (1975).

to draw. There is little need to feel intimidated if we are not as much into economics as Ellickson, Krier, Stewart and Tarlock.

Those four colleagues are able to present the case for economics in law as well as any four advocates. Yet, for the reasons this foreword has given, I remain agnostic about the desirability of any primacy being given to economics in the teaching of either environmental or land use law.

