January 2003

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A Critical Take on Shasta County and the "New Chicago School"

Douglas Litowitz*

INTRODUCTION

Legal scholarship is abuzz with research on social norms—nonlegal rules of behavior that are enforced by private individuals through social sanctions such as gossip and ostracism. Upon a moment’s reflection it is easy to see that social norms affect virtually all of our behavior, from mundane matters of personal hygiene to practical matters, including business negotiations and dispute resolution. In addition to affecting our behavior, social norms tend to become internalized as standards of self-assessment, which means that our thoughts are equally affected by social norms. Until the last decade or so legal scholars devoted little attention to social norms, holding fast to the longstanding assumption (among legal theorists) that law is the dominant constraint on human behavior. Recent scholarship casts doubt on this assumption of "legal centrism" by

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2. Richard Posner provides a concise definition of a "social norm": “A social norm (‘norm’ for short) is a rule that is neither promulgated by an official source, such as a court or legislature, nor enforced by threat of legal sanctions, yet is regularly complied with (otherwise it wouldn’t be a rule). The rules of etiquette, including norms of proper dress and table manners; the rules of grammar; standard business practices; and customary law in prepolitical societies and private associations are all examples of social norms.” See RICHARD POSNER, FRONTIERS OF LEGAL THEORY 288 (2001).

3. See, e.g., Robert Cooter, Against Legal Centrism, 81 CAL. L. REV. 417 (1993) (reviewing ROBERT ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991)); see also Oliver Williamson, Credible Commitments: Using Hostages To Support Exchange, 73 AM. ECON. REV. 519, 520 (1983) (using the term “legal centralism” to describe the view that governments are the chief source of rules for conduct, thereby ignoring non-governmental constraints on behavior and thought). Historically, legal centrism can be traced at least as far back as Thomas Hobbes’ claim that
pointing out that social norms have a more profound affect on our lives than law, at least if we understand law in the narrow sense of formal rules backed by the state’s coercive power. In fact, empirical research suggests that many people (perhaps most people) lack a working knowledge of law and instead find themselves “opting out” of the legal system by resolving disputes according to social norms.4 Within the legal academy there is a growing body of research on social norms (some might say that it has become almost a cottage industry), and in this paper I want to raise some questions about the fundamental orientation of this scholarship.

To begin with, it is somewhat surprising that the dominant scholarship on social norms has emerged from a group of thinkers affiliated in varying degrees with the law and economics movement. In particular, recent scholarship on social norms is associated with members of the so-called “New Chicago School,” a group of young scholars from elite schools who came to notoriety after their work on social norms was profiled in a 1997 feature article in The New Yorker.6 Members of the New Chicago School make clear that their work on social norms continues the tradition of scholarship beginning with the groundbreaking work of professor Robert Ellickson of Yale Law School, whose 1991 book, Order Without Law,7 earned high praise for its detailed portrayal of social norms among farmers and ranchers in Shasta County, California. It is no exaggeration to say that Ellickson’s book is the founding document of the New Chicago School and the starting point for all recent work on social norms.8 Ellickson’s central message, based on extensive fieldwork, is that people tend to

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5. See Lawrence Lessig, The New Chicago School, 27 J. LEGAL STUD. 661 (1998). The “Chicago” in the term “New Chicago School” comes from the fact that most of the scholars in the burgeoning movement were based at the University of Chicago Law School. The term “New” is meant to distinguish the movement from what might be called the “Old Chicago School,” namely the law and economics movement that began with the seminal work of University of Chicago economist Ronald Coase and found expression in the works of University of Chicago Professors Richard Posner, Frank Easterbrook, and Richard Epstein. See Interdisciplinary Program Series Transcript, The New Chicago School: Myth or Reality?, 5 U. CHI. L. SCH. ROUNDTABLE 1 (1998) (transcribing a roundtable dialogue on the New Chicago School moderated by Richard Epstein, who referred to himself as a member of the “old law and economics” and to the New Chicago School as the “new law and economics”) [hereinafter Transcript, The New Chicago School].
8. The new norms scholars describe Order Without Law as “brilliant,” see Lessig, supra note 5 at 665, and they feel that Ellickson’s book “created, or at least anticipated, a burgeoning new subfield of legal studies.” See Richard McAdams, The Origin, Development, and Regulation of Norms, 96 MICH. L. REV. 338, 344 (1998). Overall, there is general agreement that “the recent interest in norms and law almost certainly dates from Bob Ellickson’s important work on Shasta County.” See Randal Picker, Simple Games in a Complex World: A Generative Approach to the Adoption of Norms, 64 U. CHI. L. REV. 1225, 1286 (1997). Even those who are critical of Ellickson’s approach are quick to recognize the central impact of his book. See Lawrence Mitchell, Understanding Norms, 49 U. TORONTO L.J. 177, 236 (1999) (referring to Order Without Law as the “ur-text of the norms school”).
resolve disputes informally without invoking the law and without seeking assistance from state officials such as policemen or judges. Most people are ignorant of the controlling law and are not inclined to invoke legal entitlements in a drawn-out court battle, so they resolve disputes according to a local code followed by members of their community, a code that is backed up with informal private sanctions. As Ellickson explains in the preface to *Order Without Law*, "this book seeks to demonstrate that people frequently resolve their disputes in cooperative fashion without paying any attention to the laws that apply to those disputes."\(^9\) As the title suggests, the absence of law does not lead to anarchy, but to a suitable "order" based on informal but pervasive social norms.

Ellickson's project went beyond merely describing social norms in Shasta County: He also posed the fundamental question of why these particular social norms were adopted instead of others. Now a Marxist might approach this question by looking at the role of class conflict in the formation of social norms; a feminist might look at the role of patriarchy; a critical race scholar might look at race; and so forth. Ellickson, however, eschewed these approaches and instead attempted to explain social norms by using a series of models drawn from the sociological tradition of "methodological individualism"—the notion that sociological phenomena are best explained as the result of individual decision-making as opposed to larger collective forces such as class, race, gender, and ideology.\(^10\) In keeping with methodological individualism, Ellickson holds that social norms must be understood with models drawn from rational choice theory, game theory, evolutionary biology, and economic analysis.\(^11\) The use of these models places Ellickson within the broad umbrella of law and

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9. ELLICKSON, supra note 7, at vii.
10. As Ellickson recently acknowledged:

The new norms scholars all hew to a rational-choice model of human behavior. This methodological individualism—also dominant in economics, evolutionary biology, and public choice theory—supposes that each individual generally is both rational and self-interested. As a result, the new norms scholars have been influenced more by game theorists, who examine the dynamic interactions of purposive actors, than by traditional sociologists, who employ a methodological holism that views aggregations such as cultures and social classes as operative agents in the generation of norms.

Robert Ellickson, The Evolution of Social Norms: A Perspective from the Legal Academy, Text of Address at the University of Texas School of Law (Nov. 3, 2000) (on file with author) (hereafter, Ellickson, Evolution of Social Norms). Ellickson's address was later published with slight modifications as The Market for Social Norms, 3 AM. L. & ECON. REV. 1 (2001) [hereinafter Ellickson, Market for Social Norms]. Ellickson wrote there that "[a] norm is not the product of 'diffuse social forces,' as a sociologist might put it, but rather of the purposive actions of discrete individuals . . . "). Id. at 2.

11. Methodological individualism has been defined succinctly as "the doctrine that all sociological explanations are reducible to the characteristics of individuals." See THE PENGUIN DICTIONARY OF SOCIOLOGY 223 (Nicholas Abercrombie ed., 2000). Because methodological individualism holds that social phenomena must be explained with reference to the decisions of individual actors and not in terms of collective forces, it tends to downplay the determinative effects of supra-individualistic structures such as class, race, gender, history, ideology, religion, bureaucracy, and the division of labor. See, e.g., STEVEN LUKES, Methodological Individualism Reconsidered, in ESSAYS IN SOCIAL THEORY 177 (1977).
economics scholarship, which focuses on the agreements of rational actors and downplays the role of race, class, and gender.

Ellickson's project in Shasta County has proven wildly influential, to the point where it constitutes a kind of blueprint for much of the emerging scholarship on social norms. In the tradition of Order Without Law, many of the norms scholars will conduct fieldwork on social norms in a particular community, followed by rigorous analysis of the social norms using rational choice theory, game theory, and economic analysis. In keeping with Ellickson's insistence on scientific method and positivism, norms scholars are especially interested in providing an account of social norms that generates verifiable predictions and thereby earns the mantle of "science," positioning their work as "science" at the intersection of law, sociology, and economics. Legal scholarship in this vein has become a major force in academic circles.

In my opinion, Ellickson and the New Chicago School deserve credit for bringing the topic of social norms to the forefront of legal scholarship, and for making the important point that a great deal of thought and behavior is not determined by law in the final instance, but rather by social norms enforced by our peers. Having said this, I harbor strong reservations about Ellickson's preferred methods for analyzing social norms. In particular, Ellickson's faith in methodological individualism (and his reliance on rational choice theory, game theory, economic analysis, and evolutionary biology) leads him to ignore some important features of life in Shasta County, most notably the impact of race, class, gender, history, religion, and ideology. These important collective forces do not show up on Ellickson's radar screen, because they are ruled out by his insistence on explaining the norms of Shasta County as the result of individual rationality and bargaining. I applaud Ellickson's work as a seminal step in legal scholarship, but as a critical theorist, I must say that his methods strike me as insufficiently historical, contextual, and critical. He views

12. See, e.g., Rosen, supra note 6, at 174 (discussing how Ellickson's approach has prompted members of the New Chicago School to consult empirical research on such disparate topics as foot-binding in China, dueling in the nineteenth century South, relations between merchants, and inner-city gun violence). At the University of Chicago Law School Roundtable, Professor Lisa Bernstein described her fieldwork exploring the social norms of grain and feed merchants. Transcript, The New Chicago School, supra note 5, at 4-6. Similarly, Professor Tracey Meares insisted that "[a] very important part of this work is not just theorizing . . . but also a willingness to go out there and do the legwork in the eleventh district in the city of Chicago, in the highest crime district in the city, and see what's actually going on." Id.at 11.

13. See ELICKSON, supra note 7, at 158 ("I am a positivist and am therefore interested in making and testing predictions."). Elsewhere, Ellickson faults law and society scholarship for being insufficiently "scientific," and repeats the oft-heard accusation that law and society scholarship is a "swamp." Id. at 147.

14. For example, Dan Kahan describes his work as "trying to negotiate the space between sociology and economics." See Transcript, The New Chicago School, supra note 5, at 2.

15. See Richard McAdams, Signaling Discount Rates: Laws, Norms, and Economic Methodology, 110 YALE L.J. 625, 626 (2001) ("The number of articles using a rational choice framework to discuss the interaction of law and norms is now too large to list even in a law review footnote.").
human behavior through the lens of rational choice theory and celebrates social norms as if they represented the culmination of rational bargains among independent parties, thereby missing the ways in which social norms can be cruel, oppressive, irrational, and racist. Hopefully, my criticisms about methodology will persuade Ellickson (and members of the New Chicago School) to drop the positivist insistence on “science” and the demand for prediction/verification, and instead draw from the rich sociological tradition of critical theory. This tradition includes some very important figures whom Ellickson and his peers probably deem “unscientific” and therefore verboten, such as Marx, Durkheim, Weber, Foucault, Bourdieu, and Habermas, all of whom reject extreme methodological individualism because it fails to provide a robust account of social phenomena. To understand the norms of Shasta County or any other indeterminate social text, there is nothing to be gained by invoking science and verification: The most we can achieve is conversation from multiple perspectives. As with any text (such as a movie, a book, a fashion trend, etc.), the best we can do is to look at the text from various angles—the feminist angle, the Marxist angle, the Freudian angle, the postmodern angle, the rational choice angle, and then argue about which of these interpretations seems to “fit” or “illuminate” the text. That is to say, there is little to be gained by invoking “science” and “prediction” when analyzing social norms.

Part I of this article provides an introduction to Ellickson’s portrait of social norms in Shasta County and traces his impact on the new norms scholarship. Part II is an extended critique of Ellickson’s depiction of Shasta County based on my own library-based research into Shasta County over a six-month period, combined with a four-day visit in the spring of 2003 to the precise area that Ellickson depicted in Order Without Law. Finally, Part III raises some doubts about the viability of continued research grounded in Ellickson’s methodological assumptions.

In considering Ellickson’s depiction of Shasta County, the reader would do well to keep in mind that what Ellickson saw was filtered through his models, which stress rationality, games, and efficiency. These models have a tendency to distort or simply ignore contrary evidence of irrationality, oppression, and inefficiency, all of which can be found in abundance in Shasta County and elsewhere. In short, my argument is that to the extent that Ellickson’s models fail to capture some important dimensions of life in Shasta County, they ought to be supplemented or replaced with critical approaches to social norms. Only with critical models can we coherently explain what Ellickson missed about Shasta County—for example, why Shasta County is overwhelmingly white, why it has a brutal history of environmental devastation and genocide against Native Americans, why most of the property owners are men, why it has shocking rates of child poverty and substandard housing, and why it is being overrun with strip malls and low-wage jobs.
I. ELLICKSON'S DEPICTION OF SHASTA COUNTY

The path to Shasta County began in 1960 with the publication of the seminal text of the law and economics movement, Ronald Coase’s *The Problem of Social Cost.* Coase’s article set forth what has become known as “Coase’s theorem,” which asserts that under conditions of zero transaction costs (that is, assuming that people are rational, fully informed, and patient), parties will bargain around inefficient legal rules to reach an efficient arrangement that maximizes their collective resources. To illustrate this theory, Coase sketched a hypothetical situation where a rancher’s cattle wander onto a neighbor’s farm, causing damage. Under traditional legal analysis (which Coase rejects), the law of negligence places responsibility for the damage on one of the two parties, thereby motivating that person to take precautions in order to avoid liability. For example, if negligence law makes the rancher liable for an errant cow that eats his neighbor’s crops, then the rancher will take precautions against liability by building a fence or reducing his herd. Conversely, if negligence law makes the farmer liable when the errant cow eats the crops, then the farmer will take precautions against liability by moving her crops, building a fence, or ceasing to farm that particular stretch of land. In the end, law has the final word in determining the parties’ behavior because the parties’ behavior is a reaction to the legal rule. Under this traditional way of thinking, judges and legislators play a central role in shaping behavior.

Coase rejected this traditional analysis. According to Coase’s model, the actual rule of law announced by a court or legislature is not dispositive of the parties’ behavior, since the rancher and farmer can always go around the law to create a private loss allocation (sometimes called a “side-agreement”) that would maximize their collective welfare. In other words, the law sets a base-level position from which rational parties start to bargain, but it does not necessarily determine where they will end up. As Coase puts it: “It is always possible to modify by transactions on the market the initial legal delimitation of rights. And of course, if such market transactions are costless, such a rearrangement of rights will always take place if it would lead to an increase in the value of production.”

By stressing the possibility that rational parties will bargain around the law, Coase challenged the longstanding assumption that law is the final word in influencing behavior. Notice that Coase’s model vests judges and legislators with minimal impact on behavior. Indeed, if rational parties are willing to circumvent the law to reach a more efficient allocation than provided by law, there is little to be gained in fussing over the legal question of who should bear the loss, since the parties will probably ignore

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17. *Id.* at 15.
the initial determination of rights anyway. In fact, if the parties have sufficient time and bargaining power, they will reach an efficient outcome regardless of the controlling law—regardless of whether the local law places liability on the farmer or the rancher.

Ellickson summarizes Coase’s theorem formally in the following terms: “[W]hen transaction costs are zero a change in the rule of liability will have no effect on the allocation of resources.” \(^{18}\) He goes on to explain what this means for the hypothetical rancher and farmer:

[Coase’s] theorem predicts that making a rancher liable for damage done by his trespassing cattle would not cause the rancher to reduce the size of his herds, erect more fencing, or keep a closer watch on his livestock. A rancher who is liable for trespass damage has a legal incentive to implement all cost-justified measures to control his cattle. But even if the law were to decline to make the rancher liable, Coase reasoned that potential trespass victims would pay the rancher to implement the identical trespass-control measures. In short, market forces internalize all costs regardless of the rule of liability. \(^{19}\)

Now Coase was quick to point out that his assumption of zero transaction costs was implausible in the real world where parties face significant obstacles and expenses in obtaining information about each other, negotiating the terms of the deal, and so forth. When these transaction costs exceed what the parties can gain by circumventing the law, the parties will end up following the law by default. But as a matter of pure theory, the Coase theorem holds that the law is largely irrelevant in determining behavior because rational parties will circumvent an inefficient law to reach a more efficient allocation of resources.

Coase’s work gained ascendancy in the law and economics movement during the 1970s and 1980s. At the time, Robert Ellickson was a professor at Stanford Law School working in the field of law and economics, which meant that he was well-versed in Coase’s theorem and its hypothetical scenario of the rancher and the farmer. Dissatisfied with library-based scholarship, Ellickson came up with the novel idea of testing Coase’s hypothetical in the real world. To do this properly, he needed to compare how farmers and ranchers behaved in two locations that differed only in terms of the prevailing law of cattle trespass: one location where

\(^{18}\) ELICKSON, supra note 7, at 2.

\(^{19}\) Id. This presumes, of course, that societal conditions are such that the parties have the power, time, and ingenuity to reach an agreement that maximizes their welfare. By focusing on a mythical world free from gross inequalities in bargaining power, Coase does not come to terms with the historical reality of starvation wages, sweatshop conditions, poorhouses, industrial accidents, and the absence of any safety net for the downtrodden. This lacuna in the literature of law and economics has been pointed out by others. See MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 151-85 (1987); Arthur Allen Leff, Economic Analysis of Law: Some Realism About Nominalism, 60 VA. L. REV. 451, 478 (1974) (commenting that in the law and economics view of the world, “[t]here is no place for the word or concept ‘unable.’ Thus, in this system, there is nothing which is coerced.”).
negligence law placed liability on the rancher, and one location where liability was on the farmer. If Coase's model was correct, the parties in both locations would bargain around the controlling law to reach the identical allocations of resources.

Ellickson hit on Shasta County in Northern California as a particularly good testing ground for Coase's model because the rules of trespass liability shifted in different parts of the county depending on whether a patch of land was designated by local authorities as an "open" or "closed" range. In those parts of Shasta County where the range was open, the rancher was generally not liable for damage caused by his cattle, whereas in the closed range he was strictly liable for the damage. Ellickson decided to compare how the ranchers and farmers behaved in the open and closed ranges of Shasta County to see if Coase was correct that they would bargain around the formal rule of law to reach the same arrangement. In other words, Coase's model suggests that ranchers and neighbors would behave the same all over Shasta County, regardless of whether they lived in an area controlled by the law of the "open" range or the "closed" range. Ellickson tested this theory during the 1980s, publishing his findings in a seminal law review article,
Shasta County neighbors, it turns out, do not behave as Coase portrays them as behaving in the Farmer-Rancher Parable. Neighbors in fact are strongly inclined to cooperate, but they achieve active cooperative outcomes not by bargaining from legally established entitlements, as the parable supposes, but rather by developing and enforcing adaptive norms of neighborliness that trump formal legal entitlements. Although the route chosen is not the one that the parable anticipates, the end reached is exactly the one that Coase predicted: coordination to mutual advantage without supervision by the state.22

He later frames this norm of “mutual advantage” in the following terms:

The overarching substantive norm of the rural residents of Shasta County is that one should be a “good neighbor.” This is a general call for cooperative behavior. Because this standard is so general, it is vulnerable to conflicting interpretations in a concrete case. Perhaps as a result, Shasta County residents have developed narrower informal rules to govern certain ordinary interactions. [My] hypothesis asserts that welfare maximization is the most parsimonious explanation of the content of these workaday norms.23

The above quotations represent the two dimensions of Ellickson’s study of Shasta County—an empirical claim that neighbors follow social norms instead of law, followed by a theoretical explanation that social norms happen to be utilitarian because they increase the objective welfare of members within a close-knit community.24

When the time came to examine the phenomenon of social norms more closely, Ellickson found himself having to choose between two theoretical traditions: “law and society” versus “law and economics.”25 For Ellickson, law and society scholars tend to eschew system-building in favor Clifford Geertz’s notion of social explanation as “thick description,” primarily because these scholars “have their roots not in economics but in the more humanistic social sciences such as history, sociology, and anthropology.”26 Like members of the critical legal studies movement, law and society scholars tend to reject the rational actor model that dominates economic analysis and game theory.27 By contrast, Ellickson sees law and economics as a scientific search for verifiable explanations of human behavior, encompassing methodologies such as game theory, rational choice theory, public choice theory, evolutionary biology, and economic

22. Id. at 3.
23. See id. at 185.
24. See id. at 170.
25. Id. at 6, 147.
26. ELICKSON, supra note 7, at 7.
27. Id. at 157-58.
models that, according to Ellickson, generate verifiable predictions. When faced with these competing traditions, Ellickson chose law and economics. To be sure, he offered a few kind words for law and society scholarship on account of its appreciation of fieldwork (and to this extent, Ellickson sees his own work as law and society scholarship), but he expressed a nagging sense that an emphasis on "local knowledge" cannot lead to scientific principles about human behavior. For this reason, Ellickson sided with law and economics and flatly declared that his book was a "gauntlet thrown in the direction" of law and society scholarship. As he explained, law and economics is preferable because of its clarity, scientific method, and program for research: "Anyone who widely reads in both law and economics and law and society literature is bound to come away feeling that economists—although often disturbingly blind to realities—are clearer, more scientific, and more successful in building on prior work."

The reference to science might seem ill-placed for a law professor given that law is an interpretive profession. It would be uncommon nowadays to hear a professor claim, for example, that a majority opinion was scientifically better than a minority opinion. But notice that the decision to favor a "scientific method" is itself highly unscientific: Ellickson lauds the "science" of law and economics, yet his praise of that movement is based on a mere "feeling," which seems incongruous with the paean to science. And just like that, without more (that is, without explaining how law and economics has been more successful than law and society scholarship, or how such success would be judged, or what criterion of "science" or "clarity" he is invoking) Ellickson is off and running into several modes of social explanation consistent with law and economics, touching on game theory, rational choice theory, evolutionary biology, and so forth. All these tools are grounded in the aforementioned tenets of methodological individualism, meaning that they account for social phenomena by referring to the behavior of rational, self-interested individuals. In taking this approach, Ellickson rejects the interpretative

28. See ELICKSON supra note 7, at 158 ("The subsequent analysis applies the rational-actor model and also makes considerable use of game theory. I am a positivist and am therefore interested in making and testing predictions.").

29. See id. at 7 (describing Clifford Geertz' view as holding that fieldwork can lead only to "local knowledge" and "thick" anecdotal accounts of culture). Ellickson also states, however, that "practitioners of law and economics, by contrast, rarely shirk from applying in every context the model of rational, self-interested, human behavior that they borrow from economics proper." Id.

30. Id. at 8.

31. Id. at 147.

32. The most notable person to make this claim was Christopher Columbus Langdell, former Dean of Harvard Law School, who has been derided for the better part of a century for his assertion that legal method was a "science." See Thomas Grey, Langdell's Orthodoxy, 45 U. Pitt. L. Rev. 1, 5 (1983).
tradition of law and society scholarship with its attendant focus on large collective forces such as class, race, gender, religion, or history.

Once Ellickson adopts a theoretical commitment to methodological individualism, he is locked into the notion that people are rational, self-interested, game-playing monads who cooperate with others to gain some type of utility-boost. As he flatly acknowledges, his version of rational choice theory "assumes, first, that each individual pursues self-interested goals, and second, that each individual rationally chooses among various means for achieving those goals." 33 Given that each person (by definition) is an isolated monad acting only for himself in a dog-eat-dog world, Ellickson confronts a "puzzle of cooperation": 34 Why do these self-interested persons come out of their caves, as it were, and cooperate with each other? This puzzle is solved with an excursus into game theory, which suggests that rational people will enter "cooperative" games that are "welfare maximizing" when the players' choices lead to the "largest total objective payoff available." 35 In other words, people will rationally decide to come together and create social norms when the norms increase their objective welfare. This, then, is Ellickson's hypothesis about Shasta County: The farmers and ranchers have agreed on a set of dispute-resolution norms that maximize their objective welfare.

But how does Ellickson—a self-professed positivist who demands empirical evidence—propose to "verify" that a given social norm in Shasta County (say, a social norm that permits farmers to gossip about lazy ranchers) is more welfare maximizing than an alternative social norm? For that matter, how do we prove that the norms of dispute resolution in Shasta County are superior to other possible social norms of dispute resolution, such as fistfights or using a Ouija board? According to Ellickson (who earlier praised law and economics for its "scientific" approach), we decide this question by using our intuition:

In most contexts the objective costs and benefits of alternative norms are impossible to quantify with precision. Therefore, both norm-makers and analysts of norms must fall back on largely intuitive assessments of the utilitarian potential of alternative rules. This is the

33. ELLICKSON, supra note 7, at 156.
34. Id. at 156. Of course, this is only a "puzzle" because game theory assumes, wrongly, that society is composed of self-sufficient adult hermits who can live in isolation and can afford to make a concerted decision whether to cooperate with others. But given that no individual can be formed without the social and public cooperation underlying language, myth, rituals, child-rearing, and education, the "puzzle of cooperation" is not really a puzzle, except in the bizarre sense that I might raise a "puzzle" about why my arm is connected to my torso. To be a human being is to be already imbricated within a network of power relations. Game theory cannot accept that humans come to "games" already situated in power relations and ideologies that determine their decision-making, because this would mean that "games" are determined by factors outside the game itself—class, race, history, ideology, patriarchy, and so forth—which would force game theorists back into the fuzzy interpretive task of explaining how these structures affect the internal dynamics of the game.
35. Id. at 159.
approach taken in the next four chapters [i.e., the remainder of Ellickson's analysis of norms].

So we have gone from science to intuition. And by the end of the book, Ellickson has added significant qualifications to his tentative hypothesis that social norms are welfare maximizing:

The hypothesis that close-knit groups generate norms that maximize the objective welfare of group members was induced from scattered observations in Shasta County and elsewhere. A more formal analysis would have included an attempt to deduce the same hypothesis from explicit axiom. If verified, the hypothesis of welfare-maximizing norms will have several normative implications. The primary one is that, in situations where utilitarian concerns are paramount, lawmakers interested in the resolution of humdrum disputes that arise within a group are unlikely to improve upon the group's customary rules.

These passages portend a dangerous circularity. Ellickson adopts a model of human beings as naturally self-interested/rational/cooperative, and he then concludes (based on inductive reasoning without verification) that people in Shasta County are self-interested/rational/cooperative, and that this cooperation has led them to adopt social norms of dispute resolution that maximize their collective welfare. But this conclusion follows from the model itself, not from the ethnographic data in Shasta County. If you begin with an assumption that people are rational and self-interested, you can easily generate an unverified hypothesis that they adopt practices that are rational and self-interested. But even if Ellickson's conclusions were valid, by his own admission they hold only for internal group affairs on humdrum disputes in close-knit communities where utilitarian concerns are paramount. This means that his approach doesn't extend to most of the controversial issues in law (abortion, affirmative action, reparations, socialized medicine, the minimum wage), nor does his analysis extend to the anonymous encounters that make up the majority of interpersonal contacts in large cities. We are left with what the author concedes to be an 'inductive' and 'unverified' account of 'workaday' norms that arise to govern 'humdrum disputes' within a 'close-knit' group. This hardly sounds like the foundation upon which to build a research platform for understanding a nation that is predominantly modernized, urban, and multicultural.

And there is a puzzling double gesture here, a strange attraction and repulsion to the unique history of Shasta County. On the one hand,
Ellickson professes a deep interest in the particularities of Shasta County, and toward this end he undertakes extensive fieldwork over a multi-year period, throwing himself into the Shasta County culture and seemingly concerning himself with the details of social life. Yet when he tries to get a handle on this fieldwork, he adopts models that are ahistorical, acontextual, uncritical, and which fail to draw upon the unique history and culture of Shasta County. I would suggest that the culprit here is Ellickson’s initial reliance on the Coase theorem, which presents a model that is not sufficiently attuned to the non-welfare-enhancing forces that pervade collective social structures, including oppression, injustice, struggle, alienation, and violence.

These shortcomings in Order Without Law (which are discussed at length in the following Part of this Article) have not blunted Ellickson’s influence on contemporary legal scholarship, especially his influence on the “New Chicago School.” From the beginning, this movement has attracted scholars from elite law schools, especially the University of Chicago.38 Today, the movement is well-respected for its focus on ethnographic research on diverse social groups,39 and for its insistence that social groups often “opt out” of the legal system in favor of pursuing informal mechanisms of social control such as gossip, shunning, mediation, and self-help.40

Whereas Ellickson’s work was largely concerned with defending the rationality of existing social norms, some members of the New Chicago School are keen to suggest ways that the government might go one step further to actually improve social norms, or to use the terminology of the movement, to “seed” positive social norms via “norm entrepreneurship.”41 For example, if gang activity is the result of destructive social norms that predominate in neighborhoods where people feel alienated from the

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38. After the movement was profiled in The New Yorker, see Rosen, supra note 6, a conference was held at the University of Chicago Law School on the question of whether the “New Chicago School” was myth or reality. See Transcript, The New Chicago School, supra note 5. Participants at the conference included University of Chicago professors Lisa Berstein, Dan Kahan, Tracey Meares, Randal Picker, and Eric Posner. Lawrence Lessig, then at Harvard Law School, did not attend. More recently, Robert Ellickson listed the “norms scholars” as including Lisa Bernstein, Dan Kahan, Tracey Meares, Eric Posner, Randal Picker, Richard McAdams, Lawrence Lessig, and Cass Sunstein. See Ellickson, Evolution of Social Norms, supra note 10, at 2.


40. The focus on social norms explains why the movement is also known as “law and social norms” or “the new norm scholarship.” See Ellickson, Evolution of Social Norms, supra note 10, at 3 (referring to the “new norms scholars”); Eric Posner, The Signaling Model of Social Norms: Further Thoughts, 36 U. RICH. L. REV. 465, 465 (2002) (referring to the movement of “law and social norms”).

community, then the government might have success in fighting crime by reintroducing positive social norms through prayer vigils and midnight basketball leagues. 42 Similarly, the government might reduce tobacco consumption by “seeding” anti-smoking norms among teenagers instead of the current tactic of criminalizing teenage smoking and imposing severe taxes on tobacco. 43 This strategy of governmental intervention is not shared by all members of the New Chicago School. Some fear that this strategy is a license for totalitarian mind control and propaganda techniques, 44 while others doubt that the government has the savvy to successfully intervene in the production and dissemination of social norms. 45 In any event, the movement casts doubt on whether law is the most efficient means of social control, and its scholarship is marked by a deep skepticism about governmental intervention. 46 This has prompted one conservative critic to applaud the movement for its “implicit libertarian bias,” 47 while left-leaning critics have voiced suspicions that the movement carries conservative baggage from the Old Chicago School of law and economics, including the tendency to explain social behavior through utilitarian models of analysis, like rational choice theory, game theory, computer models, and market analogies. 48 Even while the

42. See, e.g., Dan Kahan, Social Meaning and the Economic Analysis of Crime, 27 J. LEGAL STUD. 609 (1998) (advocating non-traditional methods such as curfews, public shaming, anti-loitering ordinances, and having students “snitch” on each other for bringing guns to school); Tracey Meares & Dan Kahan, Law and (Norms of) Order in the Inner City, 32 LAW & SOC'Y REV. 805, 832 (1998) (suggesting that inner-city communities be allowed to “choose for themselves the law enforcement policies that will work for them,” such as curfews, community policing, church-police partnerships, and shaming of offenders).

43. These examples are discussed by Tracey Meares and Eric Posner in Transcript, The New Chicago School, supra note 5, at 7, 24.

44. For example, Lessig refers to this as the darker side of the movement: “Every space is subject to a wide range of control; the potential to control every space is the aim of the school. There are good reasons to resist this enterprise. There are good reasons to limit its scope.” Lessig, supra note 5, at 690.

45. See ERIC POSNER, LAW AND SOCIAL NORMS 176 (2000) (arguing that legal intervention often fails to change behavior and may actually trigger destabilizing norm cascades in which behavior changes too rapidly, with destructive consequences).

46. For example, Eric Posner’s position is representatively hesitant even while he acknowledges that certain social norms can be destructive:

[It]’s never clear whether government intervention is going to make people better off or worse off in any give context . . . . Questions about desirable government behavior can only be answered through trial and error and difficult practical judgments. Very little of what I do would shed light on this; I resist any ideological label.”

See Transcript, The New Chicago School, supra note 5, at 27.

47. Id. at 19 (quoting Richard Epstein). This bias seems real. The work of the New Chicago School is more concerned with game theoretical models than with questions of meaning and hermeneutics, such as whether justice requires fundamental rights to abortion, universal health care, affirmative action, and so forth. This being said, there is nothing inherently right-leaning in the movement simply because it focuses on social norms. The conservative bias is largely the result of theoretical models that stress individual decision-making instead of the more holistic concerns about justice, power, and inequality.

members of the New Chicago School resist ideological labels, there is no question that the movement tends to be more popular with law professors on the ideological right (especially those who favor law and economics) than with left-leaning professors who favor critical legal studies, critical race theory, feminist jurisprudence, and postmodernism.\textsuperscript{49} To the extent that the New Chicago School draws its framework from Ellickson's scholarship and, in particular, \textit{Order Without Law}, its work must seek to address the problems that I raise with that book and Ellickson's prevailing approach. Like Ellickson, or perhaps because of him, the movement places too much faith in methodological individualism and a kind of naive positivism that insists upon "science" and "verification" while underestimating the impact of race, class, gender, ideology, and irrational human emotions.\textsuperscript{50}

II. SHASTA COUNTY—WHAT ELICKSON MISSED

I wish to raise three general problems with Ellickson's study of social norms in Shasta County. First, Ellickson's depiction of Shasta County is somewhat distorted by his focus on a small minority of Shasta County residents, namely white male property owners. Starting from models where everyone is roughly equal, rational and autonomous, he has no reason to concern himself with the messy business of figuring out how behavior is affected by the local blend of race, class, gender, and history. A very different picture of Shasta County would have emerged had Ellickson interviewed, say, Hispanic single mothers working at Wal-Mart and living in substandard housing projects, or had he sought out the remaining members of the Wintu tribe, which once populated the county. This is not a conscious mistake on Ellickson's part, but nevertheless he

\textsuperscript{49} For example, Dan Kahan professes to be a political independent and apparently has a bumper sticker saying "Subvert the Dominant Paradigm." Rosen, supra note 6, at 175. But his proposals for crime control (public shaming, loitering ordinances, curfews) are conservative when compared with left-leaning proposals for decriminalization, amnesty, and replacing punishment with treatment. Kahan recognizes the high degree of alienation and hopelessness among inner-city kids who see the legal system (and the police) as illegitimate, but he offers no deep structural analysis for solving this problem other than to suggest schemes for how the community might police itself using non-traditional methods that effectively "privatize criminal law," thereby skirting the whole issue of governmental legitimacy. See Dan Kahan, \textit{Privitizing Criminal Law: Strategies for Private Norm Enforcement in the Inner City}, 46 UCLA L. REV. 1859 (1999); see also Tracey Meares, \textit{Norms, Legitimacy, and Law Enforcement}, 79 OR. L. REV. 391 (2000) (proposing mechanisms for law enforcement in a community that no longer accepts the legitimacy of the law). Needless to say, this way of looking at criminal law ignores the deep questions of underlying racism, violence, and exploitation that have made inner-city kids feel so estranged from the legal system in the first place.

\textsuperscript{50} Consider, for example, Eric Posner's justification for narrowing the focus:

I do not claim that rational choice theory can offer a complete explanation of social norms or of cooperation. Cognition and emotion are not irrelevant. They just are not well enough understood by psychologists to support a theory of social norms, and repeated but puzzled acknowledgments of their importance would muddy the exposition of the argument without providing any offsetting benefits.

POSNER, supra note 45, at 46.
misses the potential biases that are hardwired into the models that he favors. For example, even though Ellickson is a scholar in the field of land usage, he fails to comment on the first thing that strikes any visitor to Shasta County, namely that the county is being overrun by strip malls and low-wage jobs that don’t provide a living wage, health benefits, or a sustainable community. The more one knows about the brutal history of genocide, racism, pollution, and injustice in Shasta County, the more one suspects that Ellickson’s Shasta County is something of a fairy tale, and that like all other fairy tales it performs the ideological function of papering over a depressing reality.

Second, Ellickson is wrong to claim that entire areas of life are lived outside the law. In fact, the law is virtually everywhere in contemporary society because it constitutes social ontology by shaping identity, property, rights, privileges, power, and bargaining position. People in Shasta County and elsewhere do not confront each other “human qua human” as it were, but rather in their legally-mediated classifications: employer-employee, white-black, owner-lessee, creditor-debtor, citizen-alien, and so forth. To talk about “property ownership” and “boundaries” and “employers” is to talk about a society that is already mediated by law. What Ellickson found is not that people live outside the law, but that people can live outside litigation, which is true but not surprising given the cost of litigation.

Third, and most important, Ellickson lapses into a positivism that professes neutrality about the moral and political dimension of the social norms that he is studying, as if law professors are “scientists” who no longer talk about the justice of social practices but instead merely observe the “data” of society. This professed scientific neutrality is doomed to failure because the very terminology employed in the project of discovering and assessing social norms—“objective welfare,” “efficiency,” “utility”—is loaded with fuzzy interpretations and value judgments.51 To say that people in Shasta County maximize their “objective utility” raises questions about what people value, why they value it, and whether they should value it. The honest approach is to admit that we are not engaged in “science” (whatever that means) but in offering fuzzy interpretations of social constructions, openly admitting that the “facts” that we observe are shaped by our normative commitments. Understanding the norms of Shasta County is a project much closer to literary criticism than to science.

51. The hidden normative commitments emerge in Eric Posner’s account of social norms, where he divides people into “good” and “bad” types based on how willing they are to engage in cooperative transactions. Id. at 19. It is not clear how the New Chicago School can offer a “scientific” approach to social norms when theorists say things like, “Poor people can be divided into good types and bad types.” POSNER, supra note 45, at 180. Even assuming (as I do) that this statement is not meant derisively, the very usage of terms like “good” and “bad” as a way of describing people is evidence that the movement cannot escape normative judgments by adopting a pretense of scientific neutrality.
A. Ignoring Social Structure

From reading Order Without Law, one might get the mistaken impression that Shasta County is full of farmers and ranchers, and that the lifestyle is something like a Western movie (indeed, John Wayne is mentioned as an influential figure). This impression arises because Ellickson based his study on interviews with twenty-eight landowners in Shasta County. He acknowledges that he tried to interview people who "had either owned cattle, been victims of trespass incidents, or been active in political battles over closed-range petitions. Particular stress was placed on obtaining interviews with the owners of the largest farms and ranches in the study area." Given this sampling of informants, his empirical conclusions can be expected to reflect a narrow and homogenous subculture of rural landowners. This constraint would be entirely appropriate if the scope of Ellickson's project were limited to a study of homogeneous rural landowners, but Ellickson subtly extends his findings to the rest of the county and beyond. At one time he says that his findings cannot be generalized beyond "close-knit" cultures (for example, he insists that his theory of norms cannot account for interaction at a singles bar in O'Hare Airport), yet the subtitle of the book is "How Neighbors Settle Disputes" (not "How Ranchers and Farmers Settle Disputes"), and the very first line of the book states the general proposition that "people frequently resolve disputes in cooperative fashion without paying any attention to the laws that apply to those disputes." In other words, readers are led to believe that Shasta County is a microcosm of the rest of the country. Certainly, this is how his work is received in the writings of the New Chicago School.

But not so fast. Generalizing about "neighborly" behavior from fieldwork among ranchers and farmers in Shasta County only makes sense if the social conditions in Shasta County are replicated in the rest of the country, a proposition which is doubtful. The noted anthropologist Clifford Geertz warned about generalizing from unrepresentative studies of small towns:

The Jonesville-is-America writ small (or America-is-Jonesville writ large) fallacy is so obviously one that the only thing that needs explanation is how people have managed to believe it and expected others to believe it. The notion that one can find the essence of national societies, civilizations, great religions, or whatever summed up and simplified in so-called "typical" towns and villages is

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52. ELLICKSON, supra note 7, at 292.
53. Id. at vii (emphasis added).
54. For example, I lived in Chicago over a twenty-year period, staying in five different apartment buildings, and I never once knew my neighbors personally. In several of the buildings, one neighbor attacked another, and twice (in college and then in law school) I lived in dormitories where one student killed another. Once I was robbed by a neighbor who stole $100 from my jeans in the laundry room.
palpable nonsense. What one finds in small towns and villages is (alas) small-town or village life. If localized, microscopic studies were really dependent for their greater relevance upon such a premise—that they captured the great world in the little—they wouldn’t have any relevance.55

So there is an immediate question of whether Ellickson’s conclusions hold beyond a narrow subculture of rural landowners. In my opinion, his results cannot be generalized to most of America, or even to most of Shasta County, for that matter.

The jacket cover of Order Without Law depicts a barbed wire fence and a geological survey apropos of a Western motif, but the reality of Shasta County is drastically different. At the time when the book was published, Ellickson conceded that only 1% of the land was used for harvested crops and that most of the land was covered by forests owned by the government and corporations.56 The population of Shasta County is 168,500, with more than 60% of the people living in the three cities of Redding, Anderson, and Shasta Lake, and a good percent more living in the neighboring suburbs.57 Therefore, only a small portion of the county can be characterized as rural. According to the most recent figures that I could find, the federal census found 63,426 households in Shasta County, but the Department of Agriculture found only 850 “farms” (this figure includes both ranches and farms).58 Only 350 of these farms are full-time operations, and only 130 of these have sales of crops or livestock in excess of $25,000.59 All told, only $31 million in agricultural products comes out of Shasta County. By way of comparison, Los Angeles County has more farms and generates $237 million in agricultural sales.60 Shasta County, then, is not a farming and ranching center, and only 1% of its population is

55. CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES 21-22 (1973). In other words, if the behavior of people in Shasta County is representative of American behavior generally, then there is no reason to go all the way to Shasta County to do fieldwork in the first place—you could just as well study “neighbors” in a New York hi-rise building. Ellickson sees Geertz’s work as “insufficiently scientific” for his insistence on microlevel studies that emphasize local knowledge over universal principles. See ELICKSON, supra note 7, at 155.

56. ELLICKSON, supra note 7, at 17.

57. U.S. CENSUS BUREAU, STATE AND COUNTY QUICKFACTS 2000: Shasta County, Cal. (showing figures for 1990 and 2000), available at http://quickfacts.census.gov/qfd/states/06/060891k.html (last visited May 8, 2003) (on file with author). According to these figures, the population of Shasta County has grown by 11% since Ellickson wrote Order Without Law in 1991. Id.


59. Id.

engaged in farming or ranching. Ellickson concedes that most of the land is owned by the U.S. government and a handful of logging companies, hardly the “neighbors” that come to mind when reading *Order Without Law*. In other words, Ellickson based his account of “neighbors” on an atypical and miniscule segment of the population in Shasta County.

If the residents of Shasta County are not “down on the farm,” where are they? Statistically speaking, they are working at chain stores and strip malls. The Shasta County Economic Development Corporation boasts that:

There are 12 major shopping areas including 2 enclosed malls and 9 major shopping centers and factory outlet centers. National chain retailers include: Barnes & Noble, Big 5 Sporting Goods, Circuit City, Costco, Gottschalks, Home Base, JCPenny, K-Mart, Longs Drugs, Mervyns, Montgomery Wards, Office Max, Rite Aid, Sears, Target, Wal-Mart, Walgreen Drugs, WinCo, Home Depot, Macy’s, Office Depot, Ross, ShopKo, Men’s Warehouse, Food4Less, Safeway, Raley’s, and more coming.

Virtually none of these businesses is incorporated or headquartered in Shasta County. They pay minimal wages and do not provide an equity stake for workers, let alone union membership. All of these jobs involve constant interaction with strangers and endless management antagonism. Statistically, more people in Shasta County are working dead-end jobs at Wal-Mart, McDonald’s, and Taco Bell than are engaged in farming and ranching. This data cast doubt on whether Ellickson’s model—based on animal trespass disputes—capture how neighbors behave in the bulk of Shasta County, let alone the rest of the country. Consider this: As of the year 2000, 28.2% of children in Shasta County were living below the poverty level, 21% of the housing was substandard, the county’s arrest and mental health numbers were nearly twice the California average, and


62. ELICKSON, supra note 7, at 16.


64. See, e.g., BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA (2002) Ehrenreich provides a brilliant account of the friction between workers and managers at Wal-Mart and similar mega-stores, and she describes the limited options available to workers: “Sure, you can drive for five minutes and get somewhere else—to Kmart, that is, or Home Depot, or Target, or Burger King, or Wendy’s, or KFC. Wherever you look, there is no alternative to the megascale corporate order, from which every form of local creativity and initiative has been abolished by distant home offices.” Id. at 179.


66. See the figures for the year 2000 in U.S. CENSUS BUREAU, supra note 57.
the county generated nearly double the per-person air pollution of other counties in California.67 In Ellickson’s Shasta County, there is no alienation, poverty, homelessness, anonymity, or class struggle, precisely because the ethnographic research was skewed, so that these issues never arose. And the problem goes back to Coase’s model, which focused on landowners instead of, say, low-wage workers. From reading Order Without Law, a legal scholar might expect to find cowboys and ranchers in Shasta County, yet when I recently visited Shasta County I found the same sterile and depressing landscape that one would find in Anytown, USA—a dilapidated downtown ringed with ugly strip malls, surrounded by concentric circles of mid-level houses and trailer parks.

Ellickson does not mention the race of the people he interviewed, but Shasta County is shockingly white—nearly 90% (whereas California is 59.5%); African-Americans are less than 1% (California: 6.7%); Hispanics are 4% (California: 32%); Asians are less than 2% (California: 11%).68 You get the idea: Ellickson has skewed the ethnographic research to provide a false picture of a harmonious community where people follow social norms instead of law. But the fact that Christian/white/male/middle-class/rural people tend to get along instead of suing each other is not so surprising. The big question—which Ellickson never asks or answers—is how the target population became so homogeneous in the first place. The answer to this question surely requires a complicated examination of history, race, gender, ideology, and economics. Yet Ellickson did not examine these factors because his models focus on rationality and game playing. Again, Coase is the source of the problem: His model is based on homo economicus (“rational man”) and brackets all considerations of race, class, or gender—leading Ellickson, in turn, to ignore these factors.69

There are two lessons here: First, Ellickson’s findings about neighborly

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68. See U.S. Census Bureau, supra note 57.

69. To see the bias inherent in the concept of homo economicus, consider how rarely economists devote attention to persons other than rationally-calculating males who bargain in the public sector. See, e.g., Marianne Ferber & Julie Nelson, Introduction to BEYOND ECONOMIC MAN: FEMINIST THEORY AND ECONOMICS 4, 7 (Marianne Ferber & Julie Nelson eds., 1993) (“Women have been largely absent not only as economic researchers but also as the subjects of economic study.... At a minimum, gender ideology can make a difference in what problems are selected for research, how research is operationalized, and how findings are interpreted.”). In a sign, however, that economics might be relaxing the strict version of homo economicus, the 2002 Nobel Prize in Economics went to a psychologist who challenges the assumption that people always act rationally. See Jon Hilsenrath, Nobel Winners for Economics Are New Breed, WALL ST. J., Oct. 10, 2002, at B1. Some of these points are being incorporated into the emerging movement of “behavioral law and economics,” but even here the focus is not on cultural forces, such as race and gender, but rather on individual proclivities, such as the tendencies of all people to avoid risk, to prefer the status quo, and to be optimistic about the future. See, e.g., BEHAVIORAL LAW & ECONOMICS 1, 4 (Cass Sunstein ed., 2000) (suggesting that theorists in this area seek to “qualify” rational choice models to achieve better predictions of behavior, but not engaging with the broader sociological tradition of thinkers such as Marx, Durkheim, and Weber).
behavior cannot (without further proof) be generalized to more diverse societies, and second, the methods of rational choice theory and game theory cannot capture the full picture of social life. Ellickson has essentially depicted a world where class, race, gender, and history do not matter.

But as the saying goes, race matters.\footnote{CORNEL WEST, RACE MATTERS (1994).} And the same goes for gender and class. These are not just “local” and “surface” variations that can be tacked onto a basic account of primordial human nature in the way that clothes are draped over a mannequin: They are determinative of behavior all the way down. Consider for example H. Rap Brown’s frank discussion of how race affects behavior:

Color is the first thing that Black people in america [sic] become aware of. You are born into a world that has given color meaning and color becomes the single most determining factor of your existence. Color determines where you live, how you live and, under certain circumstances, if you will live. Color determines your friends, your education, your mother’s and father’s jobs, where you play, what you play and more importantly, what you think of yourself.\footnote{H. RAP BROWN, DIE NIGGER DIE! 2 (1969).}

The same can be said of gender and class: They set expectations for the clothes you wear, the accent you use, what church you attend, where you live, what you eat and drink, and how you deal with others.\footnote{See, e.g., BELL HOOKS, WHERE WE STAND: CLASS MATTERS 2 (2000) (“More and more, our nation is becoming class-segregated. The poor live with and among the poor.”); see also PIERRE BOURDIEU, DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE (1984) (using statistical data on consumption habits to map the class distinctions in French society).} Presumably, these factors have an impact on social norms in Shasta County.

And then there is the question of history. Ellickson devotes a mere page or two to the history of Shasta County, even though most sociologists and historians would be inclined to believe that the history of the county is highly relevant in terms of explaining behavior among farmers and ranchers in Shasta County. It turns out that the history of the county is particularly brutal, and worth recounting to get some idea of how ranchers and farmers came to own land there.

As late as the 1830s, there were no white people in what is now Shasta County. The land was technically owned by Mexico but it was basically left to self-governance by the decentralized Native American Indians who lived in the shadow of Mount Shasta—namely the Wintu, Siskiyou, Shastan, and other tribes. The first major white figure in Shasta County was a Mr. Pierson Reading, who in 1844 got a free grant of tens of thousands of acres from the government of Mexico. He secured title to the property by surrendering his citizenship to Mexico. In 1848, the State of California claimed the land from Mexico, and Shasta County was
officially formed two years later. Immediately the whites laid siege to the native Indians, but under a California law enacted in 1850, Indians were not allowed to give testimony against whites, thus denying them legal recourse to stem the atrocities. This was, of course, the era of the California Gold Rush, which brought a massive influx of lawless speculators who blasted the mountains and dredged the streams, destroying the native habitat and terrorizing the Indians. Some time later, the federal Homestead Act of 1862 gave acreage to any citizen with ten dollars to spare, prompting people to purchase the government land and then surreptitiously sell to large landowners, who consolidated the land into larger plots and drove off the Indians. In the following decades, as Ellickson acknowledges, the Southern Pacific Railroad came through the county under a government handout of free acreage for twenty miles on either side of the tracks. The railroad hired Chinese laborers to lay the tracks under conditions of virtual slavery while the local residents formed an anti-Chinese society whose publications have been preserved and are on display for tourists to see at the renovated courthouse in Old Shasta Town (the county courthouse was later moved to nearby Redding). By the end of the century, copper had replaced gold as the key mineral to be found in Shasta County, bringing copper plants that destroyed the environment and had to be closed under court order. To this day, the Iron Mountain Mine in Shasta County is one of the nation's most notorious Superfund sites, dumping hundreds of thousands of pounds of toxic chemicals into the Sacramento River each year. It was recently subject to a consent decree approved by the Environmental Protection Agency. The Iron Mountain Mine discharges one-fourth of all the copper and zinc that pollutes surface waters in the entire nation, prompting an EPA official to

73. Act for the Government and Protection of Indians, Statutes of Cal., ch. 133, sec. 6 (Apr. 22, 1850) ("... but in no case shall a white man be convicted on any offence upon the testimony of an Indian.").

74. See, e.g., The Destruction of California Indians 293 (Robert Heizer ed., 1974) (reproducing copies of articles from Shasta County and San Francisco newspapers that describe in vivid detail the abuses heaped on Indians in Shasta County, including kidnapping, rape, and murder); see also Peter Knudtson, The Wintun Indians of California 15-16 (1977) ("Although the Wintun suffered through years of racial discrimination, forced labor, and violent deaths (the latter were reported quite casually by the newspapers), many fared much better than members of neighboring tribes.").


76. Ellickson, supra note 7, at 20.

77. In one well-known case, the Ninth Circuit reversed an injunction of the Northern District of California, thereby keeping open a highly toxic copper plant. See Mountain Copper v. United States, 142 F. 625 (9th Cir. 1906) (finding that the factory was spewing pollution, but reasoning that the affected land was largely unused, and thus the economic loss of closing the factory outweighed the damage to the environment).

say that the mine is a “huge environmental problem . . . . It’s just mind-boggling.”

The effect of this brutal history is described in a handbook on California Indians:

In 1850, Shasta County was created. Soon thereafter, two massacres occurred. The Whites gave a “friendship feast,” poisoned the food, and killed 100 Trinity Wintu. When the Trinity people tried to warn the wenemem Wintu, they were too late; at least 45 were killed. In 1851, the Whites tried to control the land by forcing the Wintu to the west side of Clear Creek and dynamiting a natural rock bridge crossing. In the town of Old Shasta, miners burned down the Wintu council meeting house and massacred about 300 of the people . . . . 

Throughout the 1860s, the Wintu were hunted down, captured, and forcibly marched to the coastal reservation . . . Copper-processing plants in the 1890s and 1900s poisoned and destroyed natural vegetation and large groves of trees, and farmers of nearby regions had to file lawsuits against them for damages . . . In 1938 work on the Shasta Dam began, and in the 1970s three dams flooded Wintu territory. The dams did more to disperse the last large concentrations of Wintu than any other factor.

The Great Depression saw a massive influx of migrant workers who toiled for subsistence wages and lived in shanty towns, under constant threat of violence for any hint of labor organizing. Noted author John Steinbeck wrote about conditions in the area surrounding the city of Redding in Shasta County, condemning the treatment of workers and minorities. This legacy continues: The State of California recently enacted legislation to protect immigrant farm workers from what the Governor called “threadbare conditions for workers,” with one worker describing the working conditions as follows: “If you argue with your boss about something, he’d call immigration authorities on you and you’d be tossed out of the country.”

This is the history of Shasta County—genocide, corporate welfare, environmental destruction, racism, greed, and exploitation. The past shapes the present. At the very least, it might be relevant in explaining the current behavior of ranchers and farmers. Perhaps the high level of cooperation in Shasta County is the result of a homogeneous population of

whites, a condition built on the marginalization of all other ethnic groups. The “objective welfare” that Ellickson cites among “neighbors” was purchased by driving out all the neighbors who were different. None of this shows up on Ellickson’s radar screen because the models that he favors (rational choice theory, game theory, economic theory) are entirely synchronic—they have no diachronic grasp of history. Even if we concede that Ellickson correctly portrayed a small sliver of life among a tiny rural section of Shasta County in the 1980s, for all practical purposes that world no longer exists. For example, much of Ellickson’s book centers on the Oak Run territory near Round Mountain, but when I drove to that area I found only some scrubby land, steep mountains barely suitable for cattle or crops, a few small farms with a handful of animals, some dilapidated shacks with burned out cars, and a depressing trailer park. While I have no reason to doubt the accuracy of Ellickson’s depiction of that area during the 1980s, I question the continuing veracity of any model of social norms that was drawn from such an ephemeral social configuration, a model that no longer seems applicable to that very part of Shasta County on which it was based, let alone the remainder of Shasta County or the rest of the country. Ellickson’s model is essentially synchronic and ahistorical: He mistook time-bound social norms for universal norms.

It was Nietzsche who first pointed out the mistake of accepting the prevailing morality as if it were raw data without a historical understanding of the power relations that shaped it in the first place, and that is why he insisted on a “Genealogy of Morals” that sought to expose the underlying hypocrisies, contradictions, blind spots, and limitations beneath the ruling morality. Nietzsche knew that it was possible to work within what he referred to as the Christian “slave morality,” but he thought that a more important project was to show how this prevailing morality was not inevitable (and therefore beyond criticism), but was instead highly contingent, representing a reversal of the perhaps superior Greek morality.

One need not agree with Nietzsche’s radical denunciation of Christian morality to recognize his point that we need to dig below the surface morality to expose the power relations that sustain it. More recently, Michel Foucault made a similar point about the need to interrogate the prevailing conception of rationality: “What is this reason that we use? What are its historical effects? What are its limits, and what are its dangers?” In the case of Shasta County, a full picture of social norms should include a historical account of how the present-day norms relate to

83. FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 20 (Walter Kaufmann & R.J. Hollingdale trans., 1989) ("Let us articulate this new demand: we need a critique of moral values, the value of these values themselves must first be called into question and for that there is needed a knowledge of the conditions and circumstances in which they grew. . . . One has taken the value of these ‘values’ as given, as factual, as beyond all question. . . .”).

deeper forces of capitalism, patriarchy, xenophobia, religion, racism, and so forth.

In the chain of scholarly influence extending from Coase to Ellickson to the New Chicago School, there is little appreciation for the role of the theorist in constituting the social reality that he purports to discover. This inattention to perspective is a fundamental deficiency of the prevailing norm analysis that cannot be stressed enough. There is no “Shasta County morality” out there waiting to be discovered in the same way that one finds a rock on the side of a stream. The “social norms” of Shasta County are a theoretical construction shaped by the theorist in his initial choice of whom to interview and which theoretical framework to use when sifting through the ethnographic research. This process of constructing one’s object of study is neither good nor bad—the positing of constructs is inevitable in all social theories. It means simply that a theorist should be aware of the potential distortions of her model and the predispositions that she imposes on the subject matter. This has been a basic point of all inquiry in both the natural and human sciences ever since “Heisenberg’s Principle.” As critical theorist Theodor Adorno warned, “The detached observer is as much entangled as the active participant; the only advantage of the former is insight into his entanglement.” With respect to Shasta County, Ellickson made a choice to interview people who happened to look a lot like himself—white male middle-class landowners. He did not study the social norms of African-Americans, poor white single mothers, Korean shop owners, low-wage workers at Taco Bell, prison inmates, or welfare recipients. He did not seek out the remaining members of the Wintu tribe that once populated Shasta County, nor did he talk to the homeless people, prostitutes, and migrants sleeping under bridges in Redding. None of these people were interviewed because they don’t fit the classical model of a “rational actor,” who is typically a white male property owner. Ellickson picked a target audience based on Coase’s parable of the rancher and farmer without realizing that the parable reflects a moral judgment about the types of persons worthy of investigation.

85. Sociologists going back to Max Weber have explained the need for constructing “ideal types” in sociology. See, e.g., Max Weber, Objectivity in Social Science and Social Policy, in UNDERSTANDING AND SOCIAL INQUIRY 34 (Fred Dallmyer & Thomas McCarthy eds., 1977) (“An ideal type is formed by the one-sided accentuation of one or more points of view and by the synthesis of a great many diffuse, discrete, more or less present and occasionally absent concrete individual phenomena, which are arranged according to those one-sidedly emphasized viewpoints into a unified analytical construct.”).

B. People Don’t Live “Outside the Law”

Ellickson repeatedly asserts that “large sections of social life are located and shaped beyond the reach of law,” 87 and that “[i]n many contexts, law is not central to the maintenance of social order.” 88 He bases these statements on the fact that neighbors rarely pursue formal claims against each other in a court of law, instead resolving disputes according to social norms that provide for informal punishments, such as gossip, payments in-kind, expense-sharing, self-help remedies, and other adjustments short of adjudication. This notion that people live “outside the law” is the claim for which Ellickson is best known in legal circles.

But we have to be careful here not to conflate “law” and “litigation.” Neighbors can live outside litigation (that is, they can resolve disputes without setting foot in a courtroom), but they cannot live outside the law. In fact, there is no place in America that is outside the law; one is always situated within a grid of legal relations, as a citizen, taxpayer, employer/employee, lessee/owner, and so forth. Even “Shasta County” is a legal construct, and it is only by virtue of law that people in Shasta County have a county government that can designate “open” and “closed” ranges, record deeds for property ownership, educate children, and create roads and bridges. Law regulates and shapes the lives of every person who drives a car, pays taxes, votes, owns a home, gets a paycheck, and so forth. Ellickson’s claim that people live outside the law misses the deeper point that law is constitutive of social ontology.

To put the point differently, people who get into disputes already bear the stamp of legal categories (employer/employee, landlord/tenant, creditor/debtor). Law does not merely stand above and regulate a pre-existing society, but is already “on the ground,” causing a society to exist in a particular way, all the way down. 89 Even personal identity is defined by categories and classifications that are legal or quasi-legal, such as citizenship, employment, housing, property holdings, and marital status. All of this suggests that Ellickson and others are wrong to claim that entire areas of life are lived outside the law. One can only guess that they arrived at this conclusion because the dominant legal arrangement in America has become so reified in their eyes that they see it as part of the furniture of the universe. Since they are not personally bumping up against the

87. Ellickson, supra note 7, at 4.
88. Id. at 280.
89. As Pierre Bourdieu explains, law is a method of social construction: “The law is the quintessential form of 'active' discourse, able by its own operation to produce its effects. It would not be excessive to say that it creates the social world, but only if we remember that it is this world which first creates the law.” Pierre Bourdieu, The Force of Law: Towards the Sociology of the Juridical Field, 38 Hastings L.J. 805, 839 (1986).
brutalities and strictures of the law, they are less attuned to its omnipresence.90

C. Against Positivism

Ellickson’s explanatory arsenal is essentially positivistic—he offers no moral or political evaluation of the prevailing norms in Shasta County. Nowhere in Order Without Law does he express shock, disgust, disdain, sympathy, or any other ethical/normative reaction to what he sees in Shasta County. When it comes time to assess the morality of social norms, Ellickson claims only that social norms tend to be welfare maximizing for members of a close-knit group. As for others who happen to come into contact with a social group, there is very little to say: “[T]he hypothesis of welfare-maximizing norms provides no basis for expecting that norms will serve certain ends, such as corrective or distributive justice, that policymakers might regard as relevant, or even paramount.”91 This agnosticism toward the morality of social norms gets picked up in the work of the New Chicago School. For example, Eric Posner’s widely-praised book Law and Social Norms puts forth a descriptive (but not normative) claim that social norms are behavioral regularities whereby people signal to others their capacity and willingness to cooperate.92 Both Ellickson and Posner concede that social norms can become destructive (even the Ku Klux Klan had social norms, after all) but they are strangely silent on how we might go about evaluating social norms. In the name of science, these thinkers try to disconnect their ethical reflexes from their object of study. It is as if they ‘do not want to get too emotional because it might taint their scientific, objective view of social norms, just as a doctor does not want to get too involved with a patient lest it influence the diagnosis. The idea is to study social norms in a scientific way by bracketing out the evaluative moral and political assessments, to study social norms by generating predictions that can be scientifically verified.

This project is doomed to failure. There is no way to talk about “objective welfare,” “efficiency,” or “evolutionary adaptation” without getting involved in messy evaluative matters of morality and politics. To see this point, ask yourself how Ellickson or any member of the New Chicago School would “scientifically” evaluate the social norms at play when a person in Shasta County enters into a contract to work at Wal-

90. See, e.g., Austin Sarat, “... The Law Is All Over”: Power, Resistance and the Legal Consciousness of the Welfare Poor, 2 Yale J.L. & Human. 343, 344 (1990) (finding that “law is, for people on welfare, repeatedly encountered in the most ordinary transactions and events of their lives. Legal rules and practices are implicated in determining whether and how welfare recipients will be able to meet some of their most pressing needs. Law is immediate and powerful because being on welfare means having a significant part of one’s life organized by a regime of legal rules ... ”).

91. ELICKSON, supra note 7, at 283-84.

92. POSNER, supra note 45, at 19, 34. (“To distinguish themselves from bad types, good types engage in actions that are called ‘signals’ ... Social norms describe the behavior regularities that occur in equilibrium when people use signals to show that they belong to the good type.”).
Mart. Do we say that this transaction *increases* the parties' objective welfare, because after all they would not have entered the employment relationship if it was not welfare-maximizing for both sides? Or do we say that the contract is born of desperation and that it will *decrease* objective welfare by perpetuating a cycle of dead-end jobs and alienated labor? Is the shift from mom-and-pop businesses to giant mega-stores in Shasta County consistent with *evolutionary theory*, or is it *devolution*? When poor people apply for a job that pays inadequate wages and provides no health insurance or union membership, is that a *strategy* in a *game*? When Wal-Mart insists that employees remain after-hours on an unpaid basis, and the workers sabotage the merchandise in retaliation, is that a *social norm* that increases *objective welfare*? these concepts—objective welfare, utility maximization, efficiency, and the like—are inherently contestable and subject to interpretation: They are not descriptions, but evaluations, and they invoke an unscientific web of fuzzy beliefs about morality. There is no way to verify "efficiency" or "welfare" by looking at the "raw data" of Shasta County, because the "raw data" is itself a product of interpretation. The best a theorist can do is to offer an interpretation of what is going on in Shasta County, and this interpretation can only be contested by another interpretation, and another, and another, and so on. The "scientific method" that Ellickson finds so laudable can tell us the height of Mount Shasta and the rainfall in the county, but no amount of science can tell us whether a social norm is "welfare-maximizing," any more than science can tell us whether a person is "a good parent." There is no way to coherently talk about a social norm being welfare-maximizing or efficient without asking, "For whom?" and "With respect to what framework?" These are precisely the normative questions that Ellickson and the New Chicago School have bracketed from consideration.

The bigger problem with positivism in the social sciences is that it fetishizes the social constellation as it presently exists, thereby missing the distortions and structural inequalities that undergird the status quo. Ellickson and the New Chicago School tend to adopt the attitude toward social norms that, quoting Hegel, "What is rational is actual; and what is

93. Karen Olsson, *Up Against Wal-Mart*, MOTHER JONES MAGAZINE, Mar./Apr., 2003, at 54, 56 ("Workers in twenty-seven states are suing Wal-Mart for violating wage-and-hour laws; in the first of the cases to go to trial, an Oregon jury found the company guilty in December of systematically forcing employees to work overtime without pay.").

94. With all of this talk about the need for scientific method, it is worth recalling that Einstein, the quintessential scientist of the twentieth century, argued that "science" could not provide criteria for solving social problems: "Science, however, cannot create ends and, even less, instill them in human beings; science, at most, can supply the means by which to attain certain ends . . . For these reasons, we should be on our guard not to overestimate science and scientific method when it is a question of human problems . . . ." Albert Einstein, *Why Socialism?*, in ESSAYS IN HUMANISM 2 (1953).
actual is rational." But a theorist need not take the prevailing norms as rational. Consider, for example, the work of former Yale professor Stanley Milgram, whose classic experiments on obedience to authority (in which people were told to administer "electric shocks" to others) were a mixture of description and criticism. Milgram described the tendency of people to mindlessly obey authority figures, and then he set about explaining the dangers of this tendency and its implications for the future. The need for a critical component to one's research was explained by social critic and philosopher Jürgen Habermas:

The systematic sciences of social action, that is economics, sociology, and political science, have the goal, as do the empirical-analytic sciences, of producing nomological [law-governed] knowledge. A critical social science, however, will not remain satisfied with this. It is concerned with going beyond this goal to determine when theoretical statements grasp invariant regularities of social action as such and when they express ideologically frozen relations of dependence that can in principle be transformed. To the extent that this is the case, the critique of ideology, as well, moreover, as psychoanalysis, take into account that information about lawlike connections sets off a process of reflection in the consciousness of those whom the laws are about. Thus, the level of unreflected consciousness, which is one of the conditions of such laws, can be transformed.

The same point is stressed in clearer language by Herbert Marcuse in his insistence that we go below the level of ordinary discourse to discern the structural constraints that underlie seemingly free actions:

In speaking their own language, people also speak the language of their masters, benefactors, advertisers. Thus they do not only express themselves, their own knowledge, feelings, and aspirations, but also something other than themselves . . . . [W]hat they mean cannot be taken at face value—not because they lie, but because the universe of thought and practice in which they live is a universe of manipulated contradictions.

In other words, the New Chicago School should not assume that people are transparent, rational, and self-concerned; people are just as often internally divided, deluded, and irrational. People have been known to

96. Stanley Milgram, Obedience to Authority 189 (1974) ("The results, as seen and felt in the laboratory, are to this author disturbing.").
97. Jürgen Habermas, Knowledge and Human Interests 310 (Jeremy Shapiro trans., 1971).
follow social norms that are ruinous and hostile to their own deeper interests. The task of the legal theorist is not to mirror or affirm existing norms by positing an underlying rationality beneath the surface of existing culture (to herald the masterful logic of the here-and-now), but to see the culture in light of our deepest commitments to justice and emancipation.

Part of the problem here is that the methodological individualism favored by Ellickson and the New Chicago School brackets all questions of structure and instead views people as isolated monads who freely choose all of their actions. This is a radical discounting of social structure, as if individuals stood on one end of a large field and the rest of society stood on the other end, forcing the individual to decide whether to play the “game” of cooperation with others. Thus, Ellickson reports that “people often choose informal custom over law” because custom is “administratively cheaper” and “more likely to be welfare-maximizing,” while Eric Posner says that “rational self-interest” is what “drives people to cooperate.” This way of thinking incorrectly characterizes the relationship between structure and agency by redefining all of the structures as if they were freely chosen by the agent, when in fact most people do not choose the structures that confine their agency. For example, I did not choose to grow up in a capitalist society, in a democracy, as a middle-class male, or with English as my native language, but these are structures that constrain my agency nonetheless. To say that people in Shasta County choose to cooperate is misleading in the same way as asserting that people in Shasta County choose to eat chicken instead of dog. My point here is that the word “choose” is not appropriate here because it fails to capture the structures that constrain the act of choosing. If you want to know, say, why people eat chicken instead of dog, you will need to investigate the structural, collective forces that have kept dog off the menu, such as our Christian heritage, the role of domesticated animals in English history, the role of animals in American farming, and the like. Human behavior is messy, complex, multidimensional, and resistant to formulae. It will not suffice to claim that “people follow social norms in Shasta County because they choose to do it.” Such a claim is about as devoid of information as saying that people rob banks because that is where the money is.

The methodological individualism favored by Ellickson goes back to John Stuart Mill, who opined that “the laws and phenomena of society are, and can be, nothing but the actions and passions of human beings” acting

99. ELLICKSON, supra note 7, at 283.
100. POSNER, supra note 45, at 8. Oddly, Posner defines self-interest to “include altruism and other forms of interdependent utility.” Id. This exercise in redefinition suggests an underlying inability of rational choice theory to account for the full range of human emotions. Why not simply drop the claim that people are always driven by self-interest and simply admit that people are sometimes egotistical and sometimes altruistic—in other words, people are conflicted and complicated?
pursuant to “laws of human nature.” Mill’s individualism always brings to mind Henri Bergson’s reaction that “it takes centuries of culture to produce a utilitarian like John Stuart Mill.” In other words, only persons of education, wealth, information, freedom, and privilege could come up with a concept of human nature as involving unfettered choices about how to live the good life. Given that structure is just as important as agency, it is a shame that Ellickson and the New Chicago School cast aside the critical insights of the entire sociological tradition from Marx to Bourdieu, who look beneath the “rational actor” to discern the hidden structures that shape and constrain agency.

“Rationality” for Ellickson and the New Chicago School is understood solely with respect to the parochial interests of a lone individual (there is no discussion of what a rational society would look like), and furthermore, rationality is narrowly defined as the capacity to make instrumental decisions about the means to achieve one’s preferences. To be sure, this is one variation of rationality, but it is not the whole story. Theorists in the critical tradition have long stressed the overriding place of substantive and value-laden rationality—the ability to establish ends through discourse about ethics, politics, and justice. A person can be rational in the narrow sense of logically pursuing their own interest, yet simultaneously irrational in the larger sense of participating in an unjust society. A slave-trader in the Old South might have been rational in the narrow sense that Ellickson uses the term, but he is most assuredly irrational in the broader sense of furthering an unjust system of oppression. Social theorists have long pointed out the dangers in narrowly defining reason. This is what Max Weber had in mind early in the twentieth century when he warned that capitalism placed such a premium on instrumental (narrow) rationality that people were beginning to suffer a condition of “disenchantment.” Similarly, critical theorists Max Horkheimer and Theodor Adorno warned that the Enlightenment gave rise to a technological rationality that threatened to become an end in itself and eclipse the use of critical reason. More recently, Jürgen Habermas warned about “colonization of the lifeworld” caused by the application of

101. J.S. MILL, A SYSTEM OF LOGIC ii, 469 (9th ed. 1875), quoted in LUKES, supra note 11, at 177-79. Over a century later, Margaret Thatcher would say the same thing: “[T]here is no such thing as society. There are individual men and women, and there are families.” MARGARET THATCHER, THE DOWNING STREET YEARS 626 (1993).
103. The basic writings of these thinkers can be found in any general introduction to social theory, such as CHARLES LEMERT, SOCIAL THEORY: THE MULTICULTURAL AND CLASSIC READINGS (1998) (containing selections from Marx, Durkheim, Weber, Foucault, Habermas, and Bourdieu); CONTEMPORARY SOCIOLOGICAL THEORY (Chris Calhoun et al. eds., 2002) (containing selections from Foucault, Habermas, and Bourdieu, and discussing the legacy of Marx, Durkheim, and Weber).
104. Critical theory tackles the larger question of societal rationality. See JÜRGEN HABERMAS, TOWARD A RATIONAL SOCIETY (1972); MARCUSE, supra note 98, at 227 ("Critical thought strives to define the irrational character of the established rationality.").
technological and managerial thinking to all other spheres of life. Any critical theorist who is well-versed in these formative thinkers can only shake his head at the New Chicago School’s constant invocations of rationality and welfare-maximization as sufficient explanatory and predictive tools when applied to a country riddled with poverty, which imprisons more people than any other industrial nation, where tens of millions of people lack basic health insurance, where a minuscule percent of the population owns a majority of the wealth, where a reported one in four women has been assaulted, where high school students live in fear of violence, and where the minimum wage cannot support a family at the poverty level. In the face of the many deeply contentious and seemingly intractable problems that riddle contemporary society, are we really in a position to build a theoretical model based on the assumption that people behave rationally.

When faced with evidence of the overwhelming irrationality and injustice of the current arrangement, the scholars associated with the New Chicago School tend to circle the wagons by restricting their vision to intra-group operations. Their standard response to the mention of social evils is to insist that social norms only maximize welfare within a social group, and that when it comes to dealings with outsiders (or among two competing social groups) there is a breakdown in social norms. Consider Ellickson’s view of the social norms of racial prejudice among white people during the 1960s:

All of the norms scholars, even the optimists, agree that a closely knit group may generate a norm that injures outsiders more than it helps insiders. McAdams’s analysis of Southern traditions of racial segregation, for example, indicates how the norms that Southern whites developed to enhance their own status had horrific effects on blacks. A legislature therefore may be wise to enact a statute, such as a Civil Rights Act, that attends to the external costs that a parochial norm has been inflicting.

This represents a giant concession that cuts out the very heart of the movement. If social norms maximize the objective welfare only within a group, then the movement is rendered silent about issues such as abortion, affirmative action, school vouchers, corporate reform, environmental legislation, international treaties, socialized health care, reparations, and other burning issues where social groups are divided. So in the end we have a theory that is silent on society’s most pressing legal issues, which is tantamount to affirming the status quo. To be sure, Ellickson deserves credit for aspiring to pass beyond the threadbare rational-actor model of


classical law and economics, and this is why he insists on taking account of "culture" and "human frailty." But Ellickson insists on seeing culture as the product of rational agreements among individuals, so we return in short order to the rational actor model that haunts classical law and economics. Despite the protestations about the importance of culture, Ellickson’s understanding of culture simply does not extend to the cultural forces of gender, race, class, or history.

The classical economic model that dominates Ellickson’s thinking is inherently conservative because it sees society as a sort of pre-legal utopia of rational actors who are inherently disposed to watch out for their own interests. Given that such people can look out for themselves (they do this almost by definition, one might say), there is no place for law in this framework other than as externally imposed meddling by self-interested outsiders. On the few occasions where Ellickson discusses whether courts should intervene to override social norms, he generally favors a hands-off approach. For instance, in Order Without Law Ellickson suggests that the Uniform Commercial Code properly allows intra-group social norms (say, industry custom among merchants) to be incorporated into commercial contracts, and he opines that imposing a warranty of habitability to protect tenants is not a good idea because it will not have any effect on the mutually beneficial standoff between landlords and tenants.


108. This point was captured wonderfully by the editors of a recent symposium in this Journal: Indeed, some have argued that law and economics must take cultural effects into account. The success of these methods, their ability to provide compelling accounts of particular legal problems or solutions, is endangered by the implausibility of the original picture of the individual as a rational actor. As they seek to provide a more robust framework, these disciplines necessarily take on features of cultural analysis. Ironically, once methods based on economics and rational choice accept the challenge of accommodating cultural influences in their models, they lose most of the advantages of parsimony and objectivity that seemed to separate them from the softer research tradition.


109. I find the latter assertion to be particularly problematic, especially because Ellickson reaches this conclusion on the basis of a market model between landlords and tenants, as if they are equally powerful. See ELLICKSON, supra note 7, at 277 (arguing against rent control and the warranty of habitability). But landlords and tenants are not equal parties with offsetting powers to exert concessions from each other. In reality, landlords have the upper hand. It is precisely for this reason that cities such as Chicago have enacted municipal ordinances that require landlords to return security deposits and to respond promptly to tenant complaints. This was necessary because landlords were refusing to release security deposits and refusing to make needed repairs. See Chicago Residential Landlord-Tenant Ordinance, Chicago, Ill., Mun. Code §§ 5-12-010 (1986); see also Lawrence v. Regent Realty Group, 754 N.E. 2d 334, 339 (Ill. 2001) ("A study cited by plaintiffs and presented to the court showed that failure to pay interest on security deposits is a pervasive problem in the City of Chicago."). In Chicago, most medium to upscale apartment buildings insisted that tenants sign a standard form lease that was drafted by a consortium of property owners, and which gave no meaningful rights to tenants. In other words, there was a market failure that had to be remedied by law, not by social norms. The same goes for consumer protection laws, minimum wage laws, securities laws, and so forth—each of which are areas where social norms proved harmful to weaker parties and had to be fixed with law.
In any event, there is little reason to accept the modest claim that social norms are welfare-maximizing even within a given homogeneous group. You may recall Shirley Jackson’s famous short story *The Lottery*, in which the citizens of a small town ritually kill a random citizen as part of their annual harvest festival,110 or the more recent true story adapted into the film *Bully*, in which a group of Florida teenagers ritually abuse each other to the point of death.111 These cultures, at least, had social norms that were not welfare-maximizing. History is replete with endless examples of intra-group social norms that were irrational and welfare-destroying, from witch-burnings in close-knit Massachusetts towns to the ongoing practice of “female circumcision” in certain cultures. The sweeping claim about social norms being welfare-maximizing often boils down to the circular claim that a particular social norm must be welfare-maximizing or else it would not have been adopted by utility maximizers in the first place. But even if it could be proved once and for all that a particular social norm was utility-maximizing within a close-knit group, we can still ask, “So what?” After all, even a welfare-maximizing social norm ought to be overridden if it runs afoul of our commitment to justice and fairness.

CONCLUSION: IMPLICATIONS FOR THE FUTURE OF THE NEW CHICAGO SCHOOL

Those of us who are critical theorists feel a strange mixture of admiration and disappointment when reading *Order Without Law* and the work of the New Chicago School. Since we are distrustful of legal formalism, we are excited to see a fresh commitment to fieldwork and an attempt to move beyond the classical cookie-cutter doctrinal and policy analysis found in most law review articles. On the other hand, we are disappointed that the ethnographic material emerging from the fieldwork is shaped, and then analyzed, by market-based models that stress rationality, game playing, and other acontextual and ahistorical methods.

Ellickson’s work on Shasta County was responsible for pointing legal studies in a new direction, and for this he deserves tremendous credit and praise. For all its faults, *Order Without Law* has earned respect as a classic text of contemporary legal scholarship. But in a strange way, Ellickson’s book has proven almost too influential, in the sense that his models have passed wholecloth (with limitations intact) to a new generation of scholars, thereby multiplying and magnifying the shortcomings in the original text. By relying on Ellickson’s program, the members of the New Chicago School package their work as sociology of a type,112 but they only

111. BULLY (Lions Gate Films 2001).
skim the surface of that complicated discipline, avoiding the focal issues that sociologists spend a lifetime researching, such as class, race, gender, history, ideology, bureaucracy, and the role of power in the formation of discourses and institutions. Without any grounding in the tradition of critical theory and its call for a reflexive sociology where a theorist recognizes her own biases, the New Chicago School fails to see the ideological component of its own models, often claiming political agnosticism while tacitly espousing a laissez-faire market in social norms that is oddly reminiscent of the laissez-faire worship of markets found in the Old Chicago School of law and economics. Tellingly, Ellickson’s recent work postulates a “market in social norms,” revealing the hegemony of the economic model. Perhaps this is why the so-called New Chicago School has won the praise of Old Chicago School stalwarts such as Richard Posner and Richard Epstein, and why some members of the New Chicago School have expressed a desire to subsume the movement back within the Old Chicago School, which perhaps suggests that the movements are not so different after all.

The key ingredient missing in the body of scholarship running from Coase to Ellickson to the New Chicago School is an appreciation for the central role of interpretation in social theory. Like all positivists, they want to create verifiable predictions, to pass beyond mere interpretations to get at raw data, as if the “Facts of Shasta County” could be written down once and for all on a set of 3 x 5 index cards. Only in this way will their work earn the mantle of “science,” which is important to them. So in order to generate verifiable predictions out of the messy business of human interaction, they privilege simplified models of behavior that bracket all idiosyncratic features of local customs. In Ellickson’s case, we are given a model that assumes that people are autonomous and rational and willing to cooperate to increase their welfare, and then we are told that the data show that social norms arise because people are autonomous and rational and willing to cooperate to increase their welfare. The model has

[References]

116. See Eric Posner, The Signaling Model of Social Norms: Further Thoughts, 36 U. RICH. L. REV. 465, 465 (2002) (expressing hope for “the absorption of Law and Social Norms research into law and economics”); see also Neil Duxbury, Signaling and Social Norms, 21 OXFORD J. LEGAL STUD. 719, 720 (2001) (“Ellickson’s study ought to be regarded as an effort to refine rather than to challenge the law and economics tradition . . . . Thus it is with social norms jurisprudence generally.”).
117. The image comes from Donald N. McCloskey, Some Consequences of a Conjective Economics, in Beyond Economic Man: Feminist Theory and Economics 69, 89.
become reality.\(^\text{118}\) We end up where we began, and we are no wiser about the history of Shasta County or the way that local culture is shaped by forces of ideology, religion, race, class, and gender.

The positivist demand for verification in the human sciences is reactionary and unnecessary. Certainly, there are times when data is helpful, such as when it is necessary to cite census figures or government statistics. And one can imagine some instances where legal scholars put forth hypotheses that are conceivably subject to verification, such as a claim that a change in corporate law will induce businesses to incorporate in a particular state, or that mandatory arbitration will reduce the number of cases that go to trial. If all other factors can be held constant, then perhaps these kinds of claims can be verified. But at best they merely suggest a possible causal connection; they do not explain why the connection exists, or whether it is desirable. When it comes to explaining specific practices ("Why did the Colonists burn witches?", "Why did the early Americans engage in duels?", "Why didn't Brown v. Board of Education solve the problem of segregation?"), most contemporary intellectuals now accept some variation on the notion that explanation requires interpretation instead of prediction/verification, precisely because human action is connected to social meanings and must be decoded and "read" as one would read a text. This position was forcefully articulated by philosopher Charles Taylor in his essay on the role of interpretation in the social sciences:

If we have a science which has no brute data, which relies on readings, then it cannot but move in a hermeneutical circle. A given reading of the intersubjective meanings of a society, or of given institutions or practices, may seem well founded, because it makes sense of these practices or the development of that society. But the conviction that it does make sense of this history itself is found on further related readings. . . . [T]here is no verification procedure which we can fall back on. We can only continue to offer interpretations; we are in an interpretive circle.\(^\text{119}\)

Self-styled positivists such as Ellickson are afraid of the hermeneutic circle because they fear that it leads to a free-for-all of multiple interpretations, none of which can be vindicated as superior by

\(^{118}\) Critical theorist Theodor Adorno long ago pointed out the propensity for circular reasoning in positivist social science: "The technique sets out to investigate an object with an instrument which, through its own construction, decides in advance just what that object is: a simple case of circularity." Theodor Adorno, Sociology and Empirical Research, in Critical Sociology 237, 242 (Paul Connerton ed., 1976).

\(^{119}\) Charles Taylor, Interpretation and the Sciences of Man, in Understanding and Social Inquiry, supra note 85, at 101, 126. Adorno makes the same point: "Empirical social research cannot get around the fact that all the data it investigates, the subjective no less than the objective, are mediated by society. The given, the facts which, according to its methodology, it encounters as its ultimate, are not themselves ultimate but conditional." Adorno, supra note 118, at 255.
verification. This is why Ellickson derisively repeats the canard that law and society scholarship is an unscientific “swamp,” an intellectual sewing circle where radicals, feminists, and ideologues cling blindly to their perspectives and refuse to look at the “facts” and the “evidence” to the same degree as Ellickson and his scientific colleagues. But it is a mistake to believe that anyone (Ellickson included) can use science to understand social norms (in Shasta County or elsewhere) without becoming entangled in fuzzy interpretations and local knowledge. There is no way to avoid the “swamp” because culture is a gigantic swamp, a messy bricolage of history, class, race, economics, religion, biology, ideology, and so forth. This is what makes it so fascinating—that it cannot be reduced to a formula, only discussed in endless conversations from various perspectives. For example, consider the social norm of “neighborliness” that prevails among ranchers and farmers in Shasta County. Scholar A might explain this norm as the result of a common religion; Scholar B might stress the ethics of rural capitalism; Scholar C might focus on the Western tradition, or on race, and so on. These perspectives are all interpretations, and while they will each marshal a certain number of facts in support, there is no way to verify one as better than another. All we can do is say that a given interpretation does not provide as robust (or as “rich” or “full”) an account of the social norm under discussion.

This answer is not acceptable to positivists such as Ellickson, who hope to use the crucible of verification and science to show once and for all that their theory is superior to the guesswork employed by fuzzy critical theorists, feminists, and literary types. As Charles Taylor explains, this is the unreachable goal of positivism: “[Positivism] is a genuine attempt to go beyond the circle of our own interpretations, to get beyond subjectivity. The attempt is to reconstruct knowledge in such a way that there is no need to make final appeal to readings or judgments which cannot be checked further.” In other words, they want to get out of the business of interpretation and get to the raw data, which might serve as a standard against which to test various predictions. This insistence on verification is somewhat odd coming from law professors, who would seem comfortable with the idea of unverifiable multiple interpretations, since most of their day is spent reading and debating the wisdom of appellate decisions that contain majority and minority opinions—in other words, multiple interpretations of the law. No law professor would speak of verifying whether a majority opinion is correct, so it is odd to hear one insist on this standard in the social sciences.

120. ELICKSON, supra note 7, at 147.
121. Taylor, supra note 119, at 104.
122. Perhaps Morton Horwitz was premature in predicting that law and economics could no longer cling to the pretense of “science”: “After twenty years of attempting to claim that they stood above ideology in their devotion to science, the practitioners of law and economics have finally been...
Social norms are important, which is why we need to adopt the most fruitful methods for describing and evaluating them. Ellickson has pointed legal scholarship in an important new direction by stressing the centrality of social norms, and hopefully more critical theorists will jump into the debate over social norms. Critical theory is particularly important to this discussion because it offers a rich, imaginative framework for assessing social norms: It is a self-reflexive approach that not only describes social norms, but criticizes them, and it recognizes the role of race, class, gender, and ideology. If more critical theorists enter the debates on social norms, perhaps we can steer the dialogue closer to some of the seminal themes of sociological theory instead of having the conversation dominated by law and economics.

I do not mean to suggest that we should forever jettison game theory, rational choice theory, and the related tools of economic analysis. These will always have an important but limited role to play in legal scholarship. They are useful tools. Every time someone advocates a change in the law to remedy a problem (e.g., new regulations on corporate disclosures, or new standards for factory emissions) we should ask questions such as, “How will rational, self-interested people react to the proposed law?”, “Will the law create perverse incentives that make things worse?”, and “Will rational parties bargain around the law and thereby nullify its intended effects?”

But when it comes to providing social explanations, these tools are too slender a reed on which to build an account that captures the divisions, antagonisms, contradictions, irrationalities, underlying structures, and injustices of the existing system, and they cannot point the way toward emancipation from oppressive social norms. As Steven Lukes rightfully insists, “No social theory merits serious attention that fails to retain an ever-present sense of the dialectic of power and structure.”

Ellickson and the New Chicago School ignore the structural aspect of this dialectic and instead place all of their emphasis on human agency and rationality. This is why they tend to see social norms as consensually derived, and why they generally criticize government regulation as an unwarranted overriding of voluntary arrangements. Critical thinkers must reject this approach by pointing out that social norms are often the product of irrational and nonconsensual power relations that need to be overridden in the interests of justice. One might say that our task is to look suspiciously at the seeming “normalcy” of prevailing social norms.

forced to come out of the closet and debate ideology with the rest of us.” Morton Horwitz, Law and Economics: Science or Politics?, 8 HOFSTRA L. REV. 905, 912 (1981).

123. See Jeffrey Rachlinski, The Limits of Social Norms, 74 CHI.-KENT L. REV. 1537, 1567 (2000) (“As valuable as the insights from economics and game theory are, they paint a somewhat impoverished portrait of humans as social animals.”); see also W. Bradley Wendel, Mixed Signals: Rational-Choice Theories of Social Norms and the Pragmatics of Explanation, 77 IND. L.J. 1, 56 (2002) (criticizing the recent work on social norms done by the New Chicago School).

124. LUKES, supra note 11, at 29.