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The Twilight of Critical Theory:
A Reply to Litowitz

Robert C. Ellickson*

A half-century ago C.P. Snow located literary intellectuals and physical scientists at the opposite poles of the academy, separated by dismaying differences in method and perspective.¹ A similar gulf threatens to separate the legal scholars who are wedded to the humanities and those who are inspired by economics and the other harder social sciences.² Humanists exult in the variety and complexity of social life. Social scientists, by contrast, aspire to develop overarching theories of human behavior. Although a social scientific theory must simplify—that, after all, is the point of theory—it can nevertheless offer a humanist a possible framework for interpretation and a potential guide to fruitful inquiry. A rich humanistic narrative about the human condition is unlikely to leave a lasting impression if it lacks some underlying theoretical structure. A creative tension between the yin of social-scientific universalizers and the yang of humanistic particularizers thus promises to benefit all participants in the legal academy. Douglas Litowitz’s lively essay, provoked by my book Order Without Law, regretfully does little to advance this conversation.³ In essence it is a yawp—a primal call to dismiss positivistic social-science across the board. I urge the readers of this journal to reject this entreaty. A tolerant and broadly engaged humanist,

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even one who lacks any comparative advantage in the social sciences, can ill afford to ignore this vast body of scholarly work.

I. THE AIM OF ORDER WITHOUT LAW

Litowitz correctly characterizes my book as a positivistic effort. Ronald Coase, in an article that eventually helped him garner a Nobel Prize, had offered a vision of how law might affect bargaining between a rancher running livestock and a neighboring farmer whose vegetation tempted the rancher's animals.\(^5\) To gauge the realism of Coase's vision in a concrete setting, I engaged in a field study in a rural area northeast of Redding, the principal city of Shasta County, California. In some portions of my study area (its "closed range"), the legal system generally held animal owners to be strictly liable for damage caused by their trespassing beasts; in other portions ("open range"), the law generally placed this risk of loss on the neighbor whose foliage was lost.\(^6\) I made special efforts to interview ranchers whose spreads straddled a boundary between closed- and open-range. I found that most of them knew not only that a "range" boundary crossed their lands but also of its general legal relevance in trespass cases.

One of my basic findings was that most Shasta County ranchers, irrespective of the applicable legal rule, regarded themselves bound by an informal norm that an owner of livestock is responsible for trespass damage. I also discovered that informal norms were trumping California statutes that nominally governed how adjoining neighbors should share the costs of boundary fencing. Contrary to what Litowitz implies, however, these twin findings hardly induced me to conclude that these Shasta County ruralites were "living outside the law."\(^7\) A motorist who struck a wayward steer on a rural Shasta County highway typically would not hesitate to file an insurance claim, or, if necessary a lawsuit, against the steer's owner (usually a relative stranger). In short, as stakes increased and the social distance between disputants grew, the legal system became more influential.

The first half of Order Without Law is a thick description of my spadework in Shasta County. In the second half, I offer a general theory of social norms. My fieldwork had made me curious about the content of norms. Why had the residents of rural Shasta County informally pinned responsibility for trespass damage on livestock owners who could have fenced in their livestock, and not on the trespass victims who could have fenced the animals out? Why did Shasta County norms forbid a neighbor

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6. At the time of my study, only about 1% of the County's land was in fact being used for the growing of harvested crops. ORDER WITHOUT LAW, supra note 2, at 16-17 (cited at Litowitz, supra note 3, at 320). Pastures and forests, often scrubby in appearance, predominated.
7. Litowitz, supra note 3, at 328.
from taking an animal-trespass or fence-repair dispute into the legal system, but permit a motorist to pursue a collision claim in court?

Eager to learn others' ideas about the content of norms, I scoured a wide variety of library sources, including the works of many of the scholars Litowitz most admires (Durkheim and Weber in particular). Finding that few of them had pinpointed the issue I was considering, I induced the general positive hypothesis that, to govern their workaday affairs, the members of a close-knit group adopt norms that enhance the welfare of the group's membership in the aggregate. To bolster the credibility of the hypothesis, I presented evidence of norms that had arisen in social contexts quite different from those in rural Shasta County. These included the (varying) norms that high-seas whalers used in the nineteenth century to decide which hunting ship had the superior claim to a whale carcass, and that professors apply today to decide whether they are privileged to photocopy copyrighted material for distribution to their students.

The hypothesis that the norms of a close-knit group are utilitarian for group members is crisp and simple, but undoubtedly overly so. I therefore also offered some caveats about its plausibility and implications. In particular I stressed that, because the norms that help a group's insiders may be detrimental to outsiders to the group, the hypothesis plainly does not support a blanket normative conclusion that the rule of law should give way to a rule of norms.

II. HOW LITOWITZ FAILS TO CONNECT WITH ORDER WITHOUT LAW

I admire the vividness and fervency of Litowitz's critique and am gratified that my decade-old book so stirred him. Regrettably, however, his essay is decentered from both the geographic and social subjects on which I had concentrated.

First, Litowitz lacks interest in rural Shasta County. He wishes that I had spent more time talking to employees at the Redding Wal-Mart and less to owners of land in my study area near Oak Run. He even seems willing to accept my report that interneighbor relations in barbed-wire country are relatively harmonious. What basically irks him, I infer, is that I painted a picture in which rural neighbors, with some notable exceptions, were routinely succeeding in cooperating with one another to mutual advantage. This riles him because, like most of his compatriots on the far left, he regards American life as thoroughly infected with classism, racism, sexism, and related forms of oppression. He implies that I chose to

8. Id. at 317-19, 327-28.
9. Id. at 326.
10. ORDER WITHOUT LAW, supra note 2, at 29-39, 56-64 (discussing Shasta County ranchers who failed to adequately control their livestock).
study a rural setting in order to paper over the less sunny aspects of American social life and hence to defend the status quo.\textsuperscript{11}

Litowitz’s critique would have been more pertinent if he had had the patience to fish in the same pond that I had frequented. I of course had chosen the Oak Run area of Shasta County as my laboratory because it promised to be especially revealing about Coase’s hypothetical account of interneighbor bargaining in a rural setting. The urban venues in Shasta County, including its Wal-Mart, surely are also worthy of study, but \textit{Order Without Law} was not about them.

I devoted three separate chapters to the issues of cattle trespass, fencing costs, and highway collisions involving livestock. Litowitz has nothing whatsoever to say about any of these specific issues and the norms that govern them. Based on his grounding in Critical theory, he is confident that norms throughout Shasta County are time-bound, shaped by what he regards as the County’s particularly sordid history, and influenced by structural forces of racism, sexism, and classism that he thinks pervade all aspects of American life.\textsuperscript{12} But, because he declines to speculate about how these various forces might shape the particular rural norms I analyzed, his critique in the end is no more than overly abstract bluster. What are Litowitz’s thoughts on how social structure and power differences might have shaped the evolution of (for example) Shasta County fencing norms? On these sorts of grounded questions his Critical toolbox proved to be of no help.

Second and relatedly, Litowitz is not interested in the subset of the social world beyond Oak Run that I chose to analyze in \textit{Order Without Law}, particularly in its theoretical second half. There I put forth the hypothesis that members of a close-knit group tend to develop norms that promote behavior that serves the interests of the group’s members in the aggregate. A group is close-knit, I said, “when power is broadly

\textsuperscript{11} Litowitz, \textit{supra} note 3, at 317, 321, 335-36, 342. As it happens, I’ve devoted much of my scholarly career to less sunny issues, such as exclusionary land use controls and homelessness. \textit{See}, e.g., Robert C. Ellickson, \textit{Suburban Growth Controls: An Economic and Legal Analysis}, 86 YALE L.J. 385 (1977); \textit{The Homelessness Muddle}, PUBLIC INTEREST, No. 99, at 45 (Spring 1990).

\textsuperscript{12} \textit{See} especially Litowitz, \textit{supra} note 3, at 323-27, 333-35. In fact, neighbors in urban and nonwhite settings seem to interact in much the same way that neighbors in Shasta County do. \textit{See \textit{Order Without Law}, supra note 2, at 271 n.15 (citing sources that indicate that urban neighbors in the United States prefer informal dispute resolution). Field investigators studying the resolution of land-use disputes in the great metropolises of East Asia also report a strong preference for avoiding resort to courts and other governmental entities with coercive power. \textit{See} Mark D. West, \textit{The Resolution of Karaoke Disputes: The Calculus of Institutions and Social Capital}, 28 J. JAPANESE STUD. 301, 319-29 (2002) (reporting the results of an empirical study of noise pollution disputes in urban Japan, where a victim usually starts by informally negotiating with the polluter, and, if that fails, then files a complaint not in court but with a local-government pollution complaint counselor); Bradley Klein & Haini Guo, \textit{Bargaining in the Shadow of Community: Neighborly Dispute Resolution in Beijing Hutongs} 3-4 (May 9, 2003) (unpublished manuscript, on file with author) (reporting that the poor residents of Beijing’s traditional alley neighborhoods primarily rely on informal norms when resolving neighborhood disputes, mainly because they regard legal institutions as both untrustworthy and expensive).
distributed among group members and the information pertinent to informal control circulates easily among them. Many social environments indeed are closely knit—typically a law faculty, the repeat players at a playground, the members of a bridge club. This large subsector of social life seems to bore Litowitz, perhaps because at bottom he may share my belief that it is relatively free of conflict. He plainly would have preferred that I had written about social contexts where the power of participants is vastly unequal (and thus, by my definition, not close-knit). Again his archetype is the relationship between the Redding Wal-Mart and one of its employees (into which he makes no direct inquiry). One can understand why a social critic as caustic as Litowitz would aspire to seek out and describe the most anomic sectors of American life. Order Without Law, however, was not about those sectors.

III. LITOWITZ’S SLAPDASH INVESTIGATORY METHODS

Litowitz is an effective polemicist, but his efforts at empirical, statistical, and historical research fail to meet scholarly standards. Whatever its weaknesses, my fieldwork in Shasta County was painstaking and grounded, ultimately involving seventy-three interviews. In his essay, Litowitz does not mention a single conversation he had with anyone in Shasta County. As far as one can tell, during his four-day visit he mostly drove around and peered through his windshield. He suspects that the Oak Run area may have experienced significant demographic and economic changes during the past two decades. If so, he might have stopped to question the proprietor of the Oak Run general store about the matter. When Litowitz spied a Wal-Mart in Redding, he imagined it a place of misery. A true humanist would have seen fit talk to the employees and consumers there to determine to what extent they share that perspective. Bent on painting Order Without Law as a sly cover-up of the reality of human suffering, Litowitz combed the internet for data that might cast Shasta County in the worst possible light. Regrettably, his use of the statistics he found is selective and misleading. For example, the California Institute for County Government (CICG) maintains a website that provides data on how each California county compares to the state as a

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13. ORDER WITHOUT LAW, supra note 2, at 177-78 (emphasis added).
15. An employee’s main source of leverage against an institutional employer is the threat of quitting. Litowitz thinks this power is toothless because low-wage workers face a monopsonistic set of employers. Id. at 321 n.64, 330. In 1998, the 44,000 Shasta County workers employed by private non-farm businesses were employed by 4,380 different establishments. See U.S. DEP’T OF COMMERCE, CENSUS BUREAU, COUNTY & CITY DATA BOOK: 2000, at 309 (13th ed., Mar. 2002) [hereinafter cited as COUNTY DATA BOOK, 2000]. These data, not to mention the help-wanted sections of the Redding Record Searchlight’s classified ads, cast doubt on Litowitz’s assessment.
16. Litowitz rightly praises Barbara Ehrenreich for her immersing herself into the world of low-wage employment. Litowitz, supra note 3, at 321 n.64.
whole on two dozen social and economic indicators. Of those two dozen, Litowitz chooses to cite only the three indicators—arrest rates, mental health treatment rates, air pollution emissions—on which Shasta County fairs worst in comparison to the rest of the state.\textsuperscript{17} On many other CICG indicators, however, the County significantly outperforms the rest of California; among them: homeownership, prenatal-care, voter-turnout, SAT scores, absence of crime.\textsuperscript{18}

He similarly expresses dismay at a variety of Shasta County social statistics that he cites in isolation instead of in a comparative context. He notes, for example, that in 2000 the County's population was 89\% Caucasian—"shockingly white" in his eyes.\textsuperscript{19} But how shocking when Oregon, the state just to the north, was 87\% white? Litowitz flags the incidence of child poverty in Shasta County,\textsuperscript{20} but on that dimension in 2000 the County was generally in line with both California as a whole and the other counties in Superior California.\textsuperscript{21} He asserts that 21\% of Shasta County housing is "substandard" but the sources he seems to cite as support offer no data on that issue.\textsuperscript{22} (For what it's worth, the 2000 Census reported that 99.4\% of occupied housing units in Shasta County had complete plumbing facilities.\textsuperscript{23})

Litowitz's uses of history are just as self-serving. His assemblage of a parade of horrors from Shasta County's past is akin to a television sportscaster stitching together a videotape of isolated misses of lay-ups to produce a lowlight film of the performance of a basketball team. Litowitz would like to portray Shasta County as a place devoid of successes, of acts of cooperation, of altruism. He correctly identifies the Iron Mountain Mine (located far from Oak Run, across the Sacramento River) as a major source of water pollution, but wrongly asserts that it is "dumping" toxics into the Sacramento River.\textsuperscript{24} Mining operations at Iron Mountain ceased in 1963. The current problem is that the old mine works are causing a natural leaching of toxics. Remediation measures instituted over several decades

\begin{itemize}
\item \textsuperscript{17} \textit{Id.} at 321.
\item \textsuperscript{18} \textit{See} Cal. Inst. for County Gov., 2003 County Profiles, \textit{available at} http://www.cicg.org/publications/profiles/shasta_county.pdf (last visited June 30, 2003) (on file with author). Note that Litowitz cites the report for 2001, which was no longer available when I visited this website.
\item \textsuperscript{19} Litowitz, \textit{supra} note 3, at 322.
\item \textsuperscript{20} \textit{Id.} at 321.
\item \textsuperscript{21} Shasta County's rate of child poverty in 2000 (28.2\%) was somewhat higher than California's (24.6\%), but equal to or below the rate of four of the six counties that Shasta County abuts. \textit{See} COUNTY DATA BOOK, 2000, \textit{supra} note 15, at 212-13 (reporting data for Lassen, Modoc, Plumas, Siskiyou, Tehama, and Trinity Counties).
\item \textsuperscript{22} \textit{See} sources cited at Litowitz, \textit{supra} note 3, at 321 nn.66-67.
\item \textsuperscript{23} \textit{See} http://factfinder.census.gov/b0/_lang=en\_vt\_name=DEC\_2000\_SF3\_U\_DP4\_geo\_id =05000US06089.html (last visited on June 30, 2003).
\item \textsuperscript{24} Litowitz, \textit{supra} note 3, at 324.
\end{itemize}
have substantially improved the situation.\textsuperscript{25} In sum, the latest chapters of the Iron Mountain Mine saga feature successful collective endeavors toward environmental improvement.

Litowitz deems the County's history "particularly brutal"\textsuperscript{26} and backhandedly accuses rural Shastans of a virulent racism—of a desire to "driv[e] out" those who are different.\textsuperscript{27} He bases these assertions primarily on massacres of members of the Wintu tribe that occurred near Redding during the 1850s and 1860s.\textsuperscript{28} (The Oak Run area that I studied actually was not in Wintu territory, but in that of the Yana, a tribe that also suffered massacres.\textsuperscript{29}) While the treatment of Native Americans in Shasta County during that period indeed was brutal, it was not exceptional. At that time, Anglos throughout California were engaging in genocidal practices.\textsuperscript{30} Litowitz also is too quick to assume that these remote historical events have had lasting influence. In 1850, long before railroad tracks were extended north to Redding, Shasta County's population was 364.\textsuperscript{31} How can Litowitz be confident that pre-Civil-War events in a sparsely settled frontier setting are still influencing racial attitudes in the County? To plumb present-day conditions, would it not be more pertinent to dig up contemporary data on the incidence of anti-discrimination lawsuits and hate crimes? Or to interview individuals who might currently be targets of "drive-out" campaigns?\textsuperscript{32}

Shasta County is no utopia and Redding and Oak Run are hardly fancy venues. Per capita income in the County measures 81% of that for the United States as a whole\textsuperscript{33} and college graduates are much scarcer than

\textsuperscript{26} Litowitz, supra note 3, at 323.
\textsuperscript{27} Id. at 326.
\textsuperscript{28} Id. at 325.
\textsuperscript{29} Jerald Jay Johnson, Yana, in 8 HANDBOOK OF NORTH AMERICAN INDIANS: CALIFORNIA 361, 361-63 (Robert Heizer ed., 1978) [hereinafter cited as CALIFORNIA INDIANS].
\textsuperscript{30} "The overwhelming assault upon the subsistence, life, and culture of all California natives during the short period from 1848 to 1865 has seldom been duplicated in modern times by an invading race." Sherburne F. Cook, Historical Demography, in CALIFORNIA INDIANS, supra note 29, at 91, 92; see also id. at 91 (asserting that the Native American population in California fell from 310,000 in 1770 to 20,000 in 1900); Edward D. Castillo, The Impact of Euro-American Exploration and Settlement, in CALIFORNIA INDIANS, supra note 29, at 99, 107-13 (offering general review of war between Anglos and Native Americans in California during 1848-1865, referring to the travails of members of a total of fifteen different tribes, but not mentioning the Wintu or Yana).
\textsuperscript{31} Decennial Census of 1850.
\textsuperscript{32} In 2000 the fraction of the Shasta County population that was Native American was almost three times larger than the fraction for California as a whole. COUNTY DATA BOOK, 2000, supra note 15, at 69 (reporting that 2.7% of the residents of Shasta County identified themselves as at least partly either "American Indian or Alaska Native," compared to 1.0% of the residents of California). Although this statistic hardly proves that the County is especially tolerant of Native Americans, it torpedoes the notion that County residents have systematically engaged in "drive-out" efforts.
\textsuperscript{33} COUNTY DATA BOOK, 2000, supra note 15, at 357 (1998 data).
elsewhere in California.\textsuperscript{34} But neither is Shasta County a hellhole. Most residents, like people everywhere, are proud of their community. And some visitors discover features of enduring appeal. Despite its brutally hot summers, the County more than doubled in population between 1970 and 2000,\textsuperscript{35} a rate of increase twice that of California as a whole. Litowitz's dystopian drive-by imaginings during his four-day visit tell us more about his dyspepsia than about Shasta County itself.

IV. THE CRACKED LENS OF CRITICAL THEORY

In the 1970s the Critical Legal Studies (CLS) movement burst upon the American law school scene with great energy and brashness.\textsuperscript{36} By the late 1980s, however, CLS had lost upward momentum and since then it has gone into deep decline. In law journals the rate of citations to CLS work fell by roughly one-half between 1988-1990 and 2000-2002.\textsuperscript{37} By 1996, Duncan Kennedy, previously CLS's pied-piper-in-chief, was asserting that the movement was "dead."\textsuperscript{38}

Litowitz identifies himself as a Critical theorist. In the text he quotes the work of Habermas, Marcuse, Geertz, and the many others who help inspire the founders of CLS.\textsuperscript{39} He makes no mention, however, of the leading CLS scholars themselves (Horwitz, Kelman, Kennedy, Unger).\textsuperscript{40} This omission is itself a sign of the decreasing visibility of CLS proper. Litowitz's essay illustrates some core weaknesses of the Critical paradigm, ones that have helped send CLS scholarship into eclipse.

A. The Rejection of Positivist Epistemology

Litowitz recoils from my mode of analysis in \textit{Order Without Law}—namely, positivist inquiry into the nature and function of informal norms. Like most Critics, Litowitz embraces some version of the post-

\begin{itemize}
\item \textsuperscript{34} \textit{Id.} at 212-13 (indicating that 14\% of Shasta County residents had Bachelor's degrees in 1990, compared to 23\% of Californians as a whole).
\item \textsuperscript{35} According to decennial Census data, in 1970 the County's population was 78,000, and in 2000, 163,000.
\item \textsuperscript{36} \textit{See Mark Kelman, A GUIDE TO CRITICAL LEGAL STUDIES} (1987) (describing the CLS approach); \textit{see also Neil Duxbury, PATTERNS OF AMERICAN JURISPRUDENCE} 421-501 (1995) (negatively assessing the movement).
\item \textsuperscript{37} I arrived at this figure by applying the methods described in Robert C. Ellickson, \textit{Trends in Legal Scholarship: A Statistical Study}, 39 J. LEGAL STUD. 517, 521-23, 541-43 (2000). Accessing WestLaw's JLR database data in April 2002, I calculated that the index number for citations to the phrase \textit{critical legal studies} in 2000-2002 was 72. The comparable index number for 1988-1990 was 137. \textit{Id.} at 527.
\item \textsuperscript{38} Remarks at the Yale Legal Theory Workshop, Dec. 19, 1996. \textit{But compare Duncan Kennedy, A CRITIQUE OF ADJUDICATION} 8-10 (1997) (stressing the decline of CLS as a social movement, not as an academic approach).
\item \textsuperscript{39} On the intellectual forebears of CLS thought, see Donald F. Brosnan, \textit{Serious but Not Critical}, 60 S. CAL. L. REV. 259 (1987).
\item \textsuperscript{40} In the footnotes there are single passing references to works by Kelman, Tushnet, and Horwitz. Litowitz, \textit{supra} note 3, at 308 n.19, 316 n.48, 341 n.122.
\end{itemize}
modernist view that truth is in the eyes of the beholder. He announces that he is "against positivism" and indicates that he regards normative analysis as the only defensible form of legal scholarship.41

The excessive pretensions of some social scientists help spawn this postmodernist overreaction. Like scholars of all stripes, social scientists are prone to exaggerate both their accomplishments and objectivism. Those who generate abstract models and regression analyses commonly attribute too much to their results. And, as Litowitz nicely puts it, "Human behavior is messy, complex, multidimensional, and resistant to formulae."42 In practice, even the most committed quantifiers and modelers fall back at times on intuition and storytelling. An investigator commonly brings a strong initial bias to a project, but later may either intentionally or subconsciously attempt to disguise it. Skepticism about claims made by social scientists thus is healthy, and humanists as a group are well positioned to offer it.

That said, postmodernism becomes a laughingstock when it lapses into total nihilism about the possibility of factual knowledge.43 This is the assessment not only of devotees of law-and-economics, but also of scholars such as Ronald Dworkin and Catharine MacKinnon, whose world-views are far different.44 When the New York Times terminated journalist Jayson Blair in the spring of 2003 for fabricating stories about human events, would Litowitz have defended Blair’s concoctions on the ground that they were “just another perspective” on reality? I would think not. Early on Litowitz articulates the most nihilistic version of postmodern theory, but as the essay progresses he retreats. By the end he comes close to arriving at the utterly uncontroversial position that while certain physical facts (such as the height of Mount Shasta) can be verified, it is normative judgments that are always contestable.45

Positivists themselves, of course, standardly distinguish between facts and values. To them, assertions about social facts, such as the wage rates of those employed at the Redding Wal-Mart and the extent of starvation in Shasta County, are potentially subject to falsification. On the other hand, a claim like Litowitz’s that Wal-Mart wages are “inadequate” is a value judgment that is arguable but not refutable.

41. Id. at 329-37 (Section II.C (“Against Positivism”)).
42. Id. at 333.
43. This is not the place, and I am not the author, for a lengthy inquiry into the philosophy of science. For discussion of these issues, including the limitations of Karl Popper’s version of logical positivism, see Thomas E. Ulen, A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law, 2002 U. ILL. L. REV. 875.
45. Litowitz, supra note 3, at 329-31, 339.
46. Id. at 330. Cf. id. 308 n.19 (asserting a “historical reality of starvation wages”).
Litowitz believes that the existence of a particular norm in Shasta County is not an issue like the height of Mount Shasta, but rather a social text that cannot be verified or falsified. In such situations, he asserts that commentators can do no better than to offer alternative interpretations, none of which can be dismissed as false. I disagree. A proposition about the presence of a norm is a factual assertion, one potentially capable of verification and refutation. When one observes law students engaging in negative gossip about “gunners” (students who talk too much in class), one has evidence of the existence of norm against gunning. Litowitz somehow regards descriptive propositions about norms as statements that are themselves normative in content. For example, he oddly asserts that my view, that the norms of a close-knit group can work to the disadvantage of outsiders, “cuts the heart out” of my analysis. How so, if my goal was to describe norms, not to praise them?

In fact, when Litowitz’s motor starts to run, he dumps both factual and moral relativism in a heartbeat. While he once refers to Redding as “Anytown, USA,” he mainly attempts to portray Shasta County as one of California’s chief cesspools. In this effort Litowitz abandons his epistemic skepticism. He asserts one historical and demographic fact after another and shows no reluctance to draw conclusions about their proper normative interpretation. Indeed, he eventually comes to the decidedly positivistic conclusion that I “provide a false picture of a harmonious community.” This is hardly a postmodern assessment of another’s interpretation of a “social text.”

**B. The Stereotyping of Social-Scientific Theories of Human Behavior**

The Critical leftists in the legal academy rarely engage in mutually advantageous exchanges with those involved in mainstream social-scientific study of legal issues. Those who ignore this huge body of academic work typically feel compelled to put forward some rationalization for their aversion to it. Like many CLS scholars before him, Litowitz resorts to the stereotype that economists, public-choice theorists, and the like are overly wedded to a rational-actor model of human behavior that is disqualifyingly simplistic. In my view, this

47. *Id.* at pp. 305, 318, 340-41.
48. *See ORDER WITHOUT LAW,* supra note 2, at 130.
49. Litowitz, supra note 3, at 335.
50. *Id.* at 322.
51. *Id.* at 317, 321-26.
52. *Id.* at 322 (emphasis added).
54. Litowitz assumes that a devotee of methodological individualism must embrace a rational-actor model. *See,* e.g., Litowitz, supra note 3, at 312. This isn’t so. A methodological individualist
position had some credibility in the 1970s when Chicagoans were excessively privileging the parsimony of theory over predictive power.\textsuperscript{55} Many of the gods in Litowitz's pantheon—Foucault, Geertz, Habermas, and so on—made their names by challenging social-scientific orthodoxies that prevailed in the 1960s and 1970s.

But the academic world has moved on.\textsuperscript{56} The unalloyed rational-actor models once applied by Chicagoan analysts are now widely regarded as inconsistent with an overwhelming body of evidence that people commonly cooperate in social contexts where selfish and rational actors would not. Currently some of hottest topics in the academy are the interrelated issues of trust, social capital, socialization, and norms.\textsuperscript{57} Investigators trained in a wide variety of disciplines are tackling these issues, using the tools of game theory, experimental economics, cognitive psychology, evolutionary biology, even the brain sciences. The most ambitious work is self-consciously interdisciplinary. An example is Herbert Gintis's effort to combine core concepts from sociology, biology, and economics to explain human cooperation.\textsuperscript{58}

Litowitz's essay includes numerous citations to portions of this emerging literature. Nonetheless the import of this intellectual tide eludes him. In the crunch he reverts to this dated Critical stereotype of the hard-edged social sciences: "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 their actions."\textsuperscript{59} "Isolated monads?"\textsuperscript{60} "Freely choose?" The central point of Order Without Law and others' kindred work is that individuals are constrained by a multitude of intertwined external forces—among them:

\begin{itemize}
\item \textsuperscript{55} See Robert C. Ellickson, Bringing Culture and Human Frailty to Rational Actors, 65 CHI.-KENT L. REV. 23 (1989) (cited at Litowitz, supra note 3, at 335 n.107).
\item \textsuperscript{56} See, e.g., Symposium, Empirical Legal Realism: A New Social Scientific Assessment of Law and Human Behavior, 97 NW. U.L. REV. 1075 (2003).
\item \textsuperscript{57} Litowitz's essay usefully assembles much of the legal scholarship that draws on the multidisciplinary work on these topics. See, e.g., sources cited at Litowitz, supra note 3, at 301-03 nn.1-8 (social norms) and at 322 n.69 (behavioral law and economics). The trendsetting MacArthur and Russell Sage Foundations have begun to support social-scientific research on these topics. See http://www-unix.oit.umass.edu/~gintis/ (last visited on July 7, 2003) (on the MacArthur supported Network on Norms and Preferences); Russell Sage Foundation, "Examining the Role of Trust in Society," http://www.russellsage.org/about/trust_news.pdf (last visited on July 7, 2003).
\item \textsuperscript{58} Herbert Gintis, Solving the Puzzle of Prosociality, 15 RATIONALITY & SOC'Y 155 (2003). See also Vernon L. Smith, Constructivist and Ecological Rationality in Economics, 93 AM. ECON. REV. 465 (2003) (discussing the same puzzle).
\item \textsuperscript{59} Litowitz, supra note 3, at 332.
\item \textsuperscript{60} The metaphor has venerable roots. Karl Marx seems to have coined it in On the Jewish Question (1843), reprinted in THE MARX-ENGELS READER 26, 42 (Robert C. Tucker ed., 2d ed. 1978).
\end{itemize}
law, inherited emotional dispositions, cognitive biases, norms internalized through socialization, and uninternalized norms enforced by peers.\textsuperscript{61} The Critical trope that social-scientists standardly conceive of humans as “isolated monads” is not only tired but, as the years pass, increasing ludicrous.

\textit{C. Unrelenting, Yet Unconstructive, Criticism}

CLS foundered in part because most of its practitioners shied away from developing a credible program of affirmative social engineering.\textsuperscript{62} A critic as insistent as Litowitz must anticipate being asked what he would do to rescue the people of Shasta County from the squalor, poverty, and oppression that he thinks engulfs them. If Litowitz truly regards the Oak Run area as a Dogpatch consisting of “some dilapidated shacks with burned out cars”\textsuperscript{63} (a reckless assertion in itself),\textsuperscript{64} what housing and anti-poverty policies would he advocate? If he desires to diminish the role of corporations in the American economy, with what would he replace them? Litowitz criticizes Dan Kahan’s ideas on crime in the inner city for lacking “deep structural analysis,” but offers no hint about the specific policies that such an analysis would yield.\textsuperscript{65}

\textbf{V. TOWARD A DIALOGUE BETWEEN THE HUMANITIES AND THE SOCIAL SCIENCES}

Scholars in both the humanities and social sciences can benefit from cross-fertilization. In my own scholarly work I have been deeply dependent on humanistic sources. At various points earlier in this essay, for example, to add vividness I invoked the powerful imagery of Walt Whitman, Karl Marx, and the cartoonist Al Capp. In my work on whalers’ norms, Herman Melville’s \textit{Moby-Dick} proved to be invaluable.\textsuperscript{66} On issues of homelessness and poverty in the United States, the fieldwork of journalists such as Celia Dugger and William Finnegan was more illuminating than most efforts by academicians.\textsuperscript{67} In my various historical

\begin{itemize}
\item \textsuperscript{61} See, e.g., \textit{ORDER WITHOUT LAW}, supra note 2, at 131 (presenting a table that lays out elements of a comprehensive system of social control).
\item \textsuperscript{63} Litowitz, supra note 3, at 326.
\item \textsuperscript{64} See supra note 23 and accompanying text (on incidence of substandard housing in Shasta County).
\item \textsuperscript{65} Litowitz, supra note 3, at 316 n.49.
\item \textsuperscript{67} See citations at Robert C. Ellickson, \textit{Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-Space Zoning}, 105 YALE L.J. 1165, 1205 n.206, 1218 n.296 (1996) [hereinafter cited as \textit{City Spaces}].
\end{itemize}
essays I have borrowed copiously from works by historians; some notables among them: J.M. Postgate (ancient Mesopotamian land regimes), 68 Esther Kingston-Mann (Russian peasant villages), 69 Eric H. Monkkonen (policing of American skid-rows), 70 Seymour Toll (zoning in New York City). 71 I have drawn much from the work of anthropologist Sally Engle Merry on gossip, 72 anthropologist Melville Herskovits on preliterate’s property systems, 73 sociologist Peter Rossi on homelessness, 74 and sociologist Donald L. Black on systems of social control. 75 There is no need to go on. Absent humanistic input, most of my scholarly work would have been impoverished. And most law-and-economics scholars could tell a similar tale.

Humanists, conversely, have much to gain from social scientists. A legal scholar oriented toward the humanities who refuses to keep an eye on developments in the social sciences risks the shame of insularity. Beyond that, humanists can borrow social-scientific constructs to sharpen their own stories and analyses. Best of all, they can offer pertinent and careful criticisms of what they read when they venture beyond their home turf. The humanistic impulse to particularize and complexify is an essential counterweight to the reductionist tendencies of scholars who are more mathematically inclined.

Opportunistically appealing to this Journal’s core readers, I assert that Coase and I have a humanistic outlook on social life. We anticipate that individuals and households, even when largely left to their own devices, commonly will do a passable job of collectively meeting the challenges of daily life. By contrast, many Critics, despite their professedly egalitarian ideology, seem to regard the capabilities of ordinary people with contempt. Litowitz thinks that all Shasta County residents are defenseless when dealing with corporate employers, prone to domineer one another, and mired in an ugliness of their own creation. One detects a particular condescension toward people who live in manufactured housing, a


69. See the multiple citations to various of Kingston-Mann’s works in footnotes at Robert C. Ellickson, Property in Land, 102 YALE L.J. 1315, 1393-94 (1993) [hereinafter cited as Property in Land].


72. See the multiple citations to various of Merry’s works in ORDER WITHOUT LAW, supra note 2.

73. See the multiple citations to MELVILLE J. HERSKOVITS, ECONOMIC ANTHROPOLOGY (1952) in Property in Land, supra note 69.

74. See the copious citations to PETER H. ROSSI, DOWN AND OUT IN AMERICA: THE ORIGINS OF HOMELESSNESS (1989) in City Spaces, supra note 67.

75. See the multiple citations to various of Black’s works in ORDER WITHOUT LAW, supra note 2.
dissonant note from a commentator professedly concerned about classism. From the very beginning of his project Litowitz regarded the residents of Redding and Oak Run not as individuals but as—how else to say it?—isolated monads.

76. See, e.g., Litowitz, supra note 3, at 326 ("... depressing trailer [sic] park.")