Review Essay

Order without Lawyers: Ellickson on How Neighbors Settle Disputes

John Brigham

Robert C. Ellickson, *Order without Law: How Neighbors Settle Disputes.* Cambridge: Harvard University Press, 1991. 302 pages.

This is a wonderful book to review because the author's project is ambitious and he has done a great deal of work to establish the authority of his contribution. The project tries to bridge the gap between formal and cultural analysis in law. This enterprise, specifically the marriage between Law and Economics and Law and Society, could disappoint partisans in both camps. My sense, however, is that it won't disappoint because we want to see the gap as bridgeable through careful research. Even if one can't quite grant the coming together of these two worlds, whether for political or metaphysical reasons, the book contains vivid portrayals of community norms and jurisprudential scrutiny of assumptions in the social sciences of law.

Ellickson is a distinguished legal scholar who has contributed substantially to the study of property over the past 20 years. His work includes a score of law review articles and the case book *Land-Use Controls* (1981). Recently, he has taken his theoretical interest in politics and law to a variety of settings and confronted both Critical and Economic scholars on various issues surrounding ownership and possession (1989a, 1982b). He has appeared on symposia dealing with property as political philosophy and public policy (1982b; 1989b; Shearmur 1988; Fischl 1983) and on programs of the Federalist Society which examined property in relation to the welfare state and "beyond" (1988, 1990).

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In *Order without Law*, Ellickson turns to jurisprudential disputes emerging from law and economics scholarship. Like his colleagues who do this sort of work, Ellickson pays homage to the Coase Theorem, which drew on cattle trespass to lay the fondations for the field. The result is something very different from the original, a rich ethnographic study demonstrating a feeling for the ranch lands of Northern California. Although the *Harvard Law Review* (1992) found this book to have a narrow focus, the object of his attention is an engaging community and it makes a vivid case study. The research was done in the 1980s and began to appear as early as 1986 (Ellickson 1986). With its barbed wire logo and evocative references to the majesty of Mount Shasta, there is little doubt that in this book the current Walter E. Meyer Professor of Property and Urban Law at Yale Law School has carried some of the California foothills back to academe. His prose is lively and his characterizations of Shasta County are vivid.[1] In fact, this treatment cannot be reviewed today without feeling the tragedy of a forest fire that ravaged the area in the fall of 1992.

Ellickson has been in the property law business for a long time (see Ellickson 1973) and contributed a great deal to the contemporary study of land-use policy. In addition to his text, there are a number of influential articles which amplify the principles of Law and Economics for property. Ellickson's enthusiasm not only for the Chicago School but for intellectual inquiry about law permeates the book. We are introduced to conversations and inquiries that link Ellickson to a core tradition in legal academics and taken to visit some related goings on like Law and Society and Legal Anthropology. In a 1989 article, Judge Richard A. Posner of the Seventh Circuit addressed Ellickson's theses that the Law and Economics Movement had stopped growing and that the movement might grow again if its practitioners drew from the social sciences of psychology and sociology. Judge Posner treats Ellickson's approach as an interesting proposition—at least until it appears that the other social sciences amount to "a movement away from the central need in the economic analysis of law, which is . . . for the use of scientific methods to enlarge our meager knowledge of the legal enterprise" (Posner 1989:61; emphasis omitted). The goal for Posner is prediction and control. He considers adding the "other social sciences" to the domain of economics to be "bells and whistles." Ellickson, on the other hand, is a little more interested in jurisprudential insight.

Nevertheless, although he works very hard in this book, Robert Ellickson asks very little of law. In this regard, *Order*

[1] "Because an alien bull often enters in pursuit of cows in heat, owners of female animals fear illicit couplings that might produce offspring of an undesired pedigree" (p. 41).

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without Law exemplifies the current propensity to see law as handling less responsibility than it once did. Law, we are told, can't make us better, doesn't keep us in line, and is generally overrated. Like scholars from Critical Legal Studies and some in the Republican party, Ellickson believes that too much has traditionally been expected of law and he would relieve it of some of this burden. The burden is jurisprudential, not practical, although it bears on social responsibility. And, there may be little else that connects Republicans to Critical Legal Studies, but the view of law as encumbered has serious problems and distinct political implications.

Cowboys and Communities

This work represents a revisionist strain in Law and Economics—a return to basics and an infusion of society. Where Ronald Coase (1960) and others (Mnookin & Kornhauser 1979) had initially suggested bargaining took place "in the shadow" of the law, Ellickson discovers bargaining well beyond the shadow. In the context he explores, but not his framework, the bargaining is in the foothills of law's High Sierra. The general demeanor he finds in the community is "neighborliness and the expectation that ranchers are responsible for their animals." "The longtime ranchers of Shasta County pride themselves on being able to resolve their problems on their own. Except when they lose animals to rustlers."[2] Noting that actors on each side of these disputes do not go to court—and following the lead of scholars who conclude that parties often reciprocally choose the alternative of "lumping it"—Ellickson puts trespass in the context of social life, not law (Macaulay 1963).

Thus, the struggle between the open range "Traditionalists" and the "Modernists" of the barbed wire fence is the basis for the disputes focus. The traditionalists—called cattlemen—let their cattle roam through the unfenced areas around Mount Lassen in the northern Sierra Nevada in the summer and down into the more populated foothills green from Pacific storms in the winter. The mountain meadows are leased from the federal government through the Bureau of Land Management and from various large timber companies like Georgia Pacific and Weyerhauser (p. 23). The foothill pastures are owned by the cattlemen and the newcomers, who Ellickson characterizes in terms of their ownership of small parcels under 200 acres, which he calls "ranchettes." These terms become a sort of nom de propertie, a facet of the constitutive dimension at the root of these disputes.

[2] Although "ranchette owners . . ., unlike the cattlemen, sometimes respond to a trespass incident by contacting a county official who they think will remedy the problem" (p. 59).

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Ellickson is drawn by the issue of cattle trespass to the study of fencing. But where Coase described "the sole benefit of a fence to be the reduction of trespass damage to crops," Ellickson, turning from legal economics to social anthropology, found cattlemen enclosing their lands "largely to prevent damage to their own livestock" (p. 25). There are still marginal utilities involved by less active trading. Yet, as one should expect when starting from Law and Economics, "the market" comes to play a large role in the activities. In describing the renegade Mr. Ellis, Ellickson says, "The banks seized Ellis' cattle, and creditors lined up with claims on his ranch" (p. 38) when the price of cattle dropped to where he couldn't make his payments. Soon Ellis was gone and the disputes he had generated went with him.

Of much grander jurisprudential significance, Ellickson's attention to all that goes on beyond "the shadow" in a throwback frontier community of agreeable neighbors is brought to Law and Economics as lessons from the real world. According to the author, the findings "may serve as a caution to law-and-economics scholars who have underestimated the impact of transaction costs" (p. 52). Before he finishes, he develops "A Theory of Norms" that reaches well beyond the locus of his disputes. Although presented separately, in the second part of the book, this theory draws on the cattle trespass examples from California and adds a review of other material, mostly historical studies of the whaling industry around Nantucket, to develop the larger normative propositions. The result is a picture of law in terms of two romantic situations, one on either coast, the cowboy and the whaler. And, while both draw their romance from the material of rugged individualism, from John Wayne and Captain Ahab, the message in each case is that the communities work as a market and develop ways of cooperating that preserve the peace.

Local Knowledge

Both of the "Law and . . ." movements brought together by Ellickson actually start with disputes rather than law. They don't begin with judicial decisions, police, or even lawyers, not on the surface at least. In both, the question is, What difference does the law make? The view is from the bottom up. Here, the bottom is Shasta county in the 1970s. It is an unstable region. In California at the time the pressure for development was heavy. Although it is hours from the nearest metropolis, the area has been "fast growing." The problems, even though viewed as "cattle trespass," are problems of growth and change. Generally, however, these problems get settled without

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resort to lawyers or state officials, that is, without regard to law as Ellickson defines this phenomenon.

Like H. Laurence Ross (1970) in his study of drunk driving, Ellickson found the legal rules in practice were simpler than they were on the books. Like the Law and Society community he found "reciprocal lumping" and that trespass had to be seen in the context of social life (pp. 54–55). There are some exogenous variables offered as the reason to "go to law." According to Ellickson, "Although ranchette owners also use the self-help remedies of gossip and violence, they, unlike the cattlemen, sometimes respond to a trespass incident by contacting a county official who they think will remedy the problem" (p. 59). In a typical year, insurance companies may receive fewer than ten damage claims from Shasta County residents which have to do with animal trespass. These usually involve the newcomers. The insurance adjusters interviewed by the author could not recall a single claim brought by traditional ranchers against each other over a 20-year period (p. 62).

Two disputes in Shasta County that found their way to attorneys are considered unusual, involving "bad apples" or "odd ducks" with a propensity to make trouble (p. 64). We shouldn't doubt, according to research on litigiousness, that this small proportion of disputes going to attorneys is typical. The only disputes that get this far are ones with a depth of feeling and where bad faith is an issue. They reveal a sense of entitlement to legal protection and turn to the formal agents of the law as an exception in society (Merry 1990). Such cases seem to be a good indication that neighborliness has broken down, and they tell us something about the relationship between social structure and the apparatus of enforcement we associate with law (see Yngvesson 1993). But it does not follow that they are an equally good indication of the irrelevance of law to disputes.

In mistakenly making that leap, Ellickson falls victim to a number of bad tendencies. One tendency is generalizing from the present to the past. In the Ellickson study the past is represented by the traditionalists—who, of course, happen to live in the present. The present and perhaps the future is represented by newcomers whose attachment to more official mechanisms may simply be a function of their socialization in communities with more prominent forms of official dispute resolution. Another tendency is to equate law with either the formal rules that perhaps only law professors know or the official institutions that stand as the arms of the law. I will suggest that just as disputes have significant range, from misunderstandings to disagreement cutting deeply into the social context of the place, law itself must have a comparable range. It cannot just be what lawyers know. To characterize the terrain of law this superficially is to be guilty of formalism, and this is tragic since the

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author shows so much sensitivity to avoiding formalism when looking at disputes. In short, sociologists of law may have made disputes into society's reality, but we are wrong to place the disputes or their reality outside the law.

One-dimensional Law

Beginning with disputes, Ellickson views law in a distinctive way. In six succinct pages, he draws out the legal rules of animal trespass law. With references ranging from Blackstone, who said, "A man is answerable for not only his own trespass, but that of his cattle also" (Blackstone 1979:211), to California's codes, and a variety of local ordinances, to himself (Ellickson 1986), we get a rich picture of the kind of law the author holds out as a standard. This picture of law takes doctrine, statutes, and the statements of public officials as characteristic of the institution. In this way, the law school variety of law becomes the standard for assessing the reach and vitality of law's empire.

In this realm, Ellickson tells us, the standard jurisprudential practice amounts to "one of the most venerable English common law rules of strict liability in tort," the rule that the owner of livestock is liable for damage to neighboring property even in the absence of negligence (ibid., p. 42). But in the open ranges of the American west a "fencing-out rule" exists that is favorable to cattlemen. It holds that a victim of animal trespass can recover damages only when he has built a "lawful fence" around his property. With increased settlement, however, the California legislature passed the Estray Act of 1915 which adopted the English rule for most of California except the six northern counties.[3] Ultimately, Shasta County gained from the legislature a power to designate some of its range as closed (1945 Cal. Stat. 1538).[4]

Ordinary people don't know much about this law of statutes and shared powers and, consequently, they don't talk about it very much. When folks do get the law right, Ellickson believes that it is their "penchant for simplicity." This enables them, for instance, to identify the old strict liability rule on cattle trespass, the one that formally applies in closed range (pp. 50–51). However, the idea that negligence should have to be shown in cases of trespass, which is the predominant view among specialists, is wrong with regard to the closed range. Generally, Ellickson's rural residents knew little about subtleties in the law. The were unfamiliar with terms like "estray" and "lawful fence." In addition, they did not realize that a fence "elevates a farmers

[3] Shasta, Del Norte, Lassen, Modoc, Siskiyou, and Trinity.

[4] Current version at California Food & Agricultural Code (1968).

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rights to recover" or that "intentional herding on his neighbors' open range" was in violation of the law (p. 50). Similarly those who settle insurance claims operate at some distance from this law. "The liability rules that these adjusters apply to routine trespass claims seemed largely independent of formal law" (p. 51). Thus, law is seen as government rules rather than "double institutionalization" or the reproduction of popular convention.

Going after the Law

In Part II of the book, the theoretical part, Ellickson proposes a distinction between procedural and constitutive norms. Procedural norms govern duty to transmit information and they are meant to minimize disputes. One such norm is that in cattle country you go to the neighbor, not to the police. We know from lots of work that this kind of neighborliness is indeed common throughout America and that the litigation explosion ideology does not accurately portray law in America. But norms about when you call the police are not all that there is to normativity. For Ellickson, norms that go deeper are constitutive. "Constitutive norms," he says, "govern a member's obligations to sustain the group" (p. 230). In the foothills, these norms seem tied to the cowboy symbolism of hats, rifles, and pickup trucks, and the reciprocity that leads cowboys to "avoid the law." At this important level of community relations, the community is presented in opposition to or "outside" the law.

Law, in this sense, is an institution of control from above, a Leviathan that never really gets operationalized. Constitutive norms, as defined by Ellickson, don't seem very lawlike and indeed, they tell us very little of law although they indicate some very important things about community. The law that constitutes, as I have been using the term, would be evident at the level Ellickson calls constitutive and would also include procedural norms. For example, in this book the ethnographic focus is a county. It has people, cattle, and boundaries. It is identified in various ways—the "Towering cone of Mount Shasta, *actually in Siskiyou County*, stands fifty miles due north" (p. 15; my emphasis). Or the "ranchette owners nevertheless admire both the cattleman and the folkways traditionally associated with rural Shasta County" (p. 21). Here social life is romantically situated in a place conventionally treated as natural. But the county is not just a romantic foothill region; it is obviously a legal entity which, among other things, determines the legal authority over cattle trespass. The study made sense to Ellickson for Shasta County because in 1973 the County Board of Supervisors voted to "close the range" in a 56 square mile rectangle of the

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county. Ellickson notes that the landowners interviewed *did* know whether their own lands were within the open or closed range designation. However, he speculates that the level of knowledge was probably "atypically high" because the range law had been the subject of political controversy (p. 49). Law in this sense reaches to how the ways we know ourselves and the ways we behave, whether as cowboys or cops, are at their core legally generated.

The problem lies in deciphering the implications about law to be drawn from Ellickson's work. Some of his disputes are as unconstituted by law as the red dirt in the foothills and the mythical presence of Mount Shasta. Some, like those that emerge in land development, are widely recognized as presenting problems for understanding the law. When the law is viewed as outside or separate from disputes, its significance is underplayed. This is true when law is held to operate separate from "the market." Yet, the buying and selling that makes the market relies on law. Not all economic phenomena are legally constituted and some that start outside the law get brought in. Ellickson describes the natural boundaries to contain cattle, the ridges, gulches, etc. These are written into leases and law gives them special meaning. Technology is also constitutive. Throughout the book, most artistically as a design element on each page, barbed wire is an essential element to the closed range. With nature, this prickly metal device joins with the rules of law and convention to delineate the boundaries of property. A lawful fence must have posts at least 16.5 feet apart and consist of three strands of wire.

Characterizing law as the archaic lawyer's law of trespass/liability rather than the practice of ownership is a limitation in this study of law's power. The practices of ownership are all over the pages. Among other things these practices define the crucial class distinction between old owners and new owners. When we ask the meaning law has in constituting these relations in property or the more familiar relations in the family, we get at a level of relations missed in the law school–oriented view (Glendon 1989; Minow 1985). Property law is no more neutral than the law of the family. The law enforces ideals and generally changes as they change, or at least in relation to their change. We recognize that in property law and family law there are social relationships. Here we need to recognize the role law plays in delineating obligations. In a family, law is easier to see after divorce. With property, law is often hard to see unless there is something like a divorce. In either case it is naive not to see the law's role, but when we fail in this regard we are simply not getting the whole story. In a divorce, all the law that romance hides becomes more evident. There is a lot of romance

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in Ellickson's story, and the resulting view of law in cattle country is insufficient.

If we did heighten our perception, of course, we wouldn't have order without law anymore. We would have order, and perhaps law itself, without lawyers, and that might be more compelling than what Ellickson offers us.

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