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Clarifying the Normative Dimension of Legal Realism: The Example of Holmes's *The Path of the Law*

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Clarifying the Normative Dimension of Legal Realism: The Example of Holmes’s *The Path of the Law*

EDMUND URSIN*

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I. INTRODUCTION

In a recently published article, I examined the Legal Realism found in Leon Green’s and Karl Llewellyn’s tort scholarship.¹ Brian Leiter had previously presented an insightful “philosophical reconstruction” of Legal Realism.² In articulating what he sees as the descriptive and

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1. Edmund Ursin, *The Missing Normative Dimension in Brian Leiter’s “Reconstructed” Legal Realism*, 49 SAN DIEGO L. REV. 1 (2012). It should be noted that, in response to Francis Bohlen’s having labeled him a “legal realist” and then—in Green’s view—having distorted his scholarship, Green wrote, “I subscribe to no label I have never used the word ‘realism’ in my writings, and while I have no prejudice against it, I do not know what it means.” Leon Green, *Innocent Misrepresentation*, 19 VA. L. REV. 242, 247 (1933). One wonders if Green had in mind Karl Llewellyn’s recently published article, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930), when he wrote this.

2. See, e.g., BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* (2007); Brian Leiter, *American*

normative aspects of Legal Realism, Leiter drew most of his examples from the field of commercial law, which was the main focus of Llewellyn's scholarship. In this context he wrote that most Legal Realists made a descriptive claim about judicial decisions or, more specifically, decisions of appellate courts.³ Stated in its most succinct form, this descriptive claim was that judicial decisions fall into discernible patterns, correlated with the underlying factual scenarios of disputes (or "situation types"), as opposed to formal legal rules.⁴ My examination of Green's and Llewellyn's tort scholarship confirmed this thesis.

On the normative front, Leiter wrote that most Legal Realists, including Llewellyn, were "quietists."⁵ Some quietists believed that because an irremediable fact about judging is that judges respond to fact situations, it "makes no sense to give normative advice."⁶ "A more subtle version of quietism," linked to Llewellyn, advised judges that they "ought to do what it is that they largely do anyway."⁷ Leiter wrote that the quietism of the Legal Realists "contrasts markedly with the *normative* ambitions of contemporary jurists like Ronald Dworkin," who want to "reform [the] practice [of judges] in line with [their] theor[ies] of adjudication."⁸

My focus on the *tort* scholarship of Green and Llewellyn, however, revealed an ambitious normative agenda. Under the umbrella of what is now known as the theory of enterprise liability, these scholars urged courts to rewrite tort law to reflect the values of twentieth-century America by adopting expansive liability rules and eliminating barriers to recovery that protected even negligent defendants from liability. This made them, in Leiter's terms, "non-quietistic."⁹ Nonquietists believed that "judges should simply adopt, openly, a legislative role, acknowledging

Legal Realism, in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 50 (Martin P. Golding & William A. Edmundson eds., 2005) [hereinafter Leiter, *American Legal Realism*]; Brian Leiter, *Classical Realism*, 11 PHIL. ISSUES 244 (2001) [hereinafter Leiter, *Classical Realism*]; Brian Leiter, *Legal Realism*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 261 (Dennis Patterson ed., 1996) [hereinafter Leiter, *Legal Realism*]; Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267 (1997) [hereinafter Leiter, *Rethinking Legal Realism*]; Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138 (1999) [hereinafter Leiter, *Positivism*] (reviewing ANTHONY SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE (1998)).

3. Leiter, *Positivism*, *supra* note 2, at 1148.

4. *Id.*

5. Leiter, *Legal Realism*, *supra* note 2, at 276.

6. *Id.* at 277.

7. Leiter, *American Legal Realism*, *supra* note 2, at 58.

8. Leiter, *Classical Realism*, *supra* note 2, at 258.

9. Leiter, *Legal Realism*, *supra* note 2, at 277-78.

that . . . courts . . . make judgments on matters of social and economic policy.”¹⁰

Thus, contrary to what one would expect from reading Leiter, in their tort scholarship Green and Llewellyn *resemble* Dworkin, precisely because they wanted to reform the practice of judges in line with their normative theories of adjudication. In fact, Green laid out the policy framework that the California Supreme Court, beginning in the 1960s, would write into law as it adopted expansive liability rules and limited or

10. Leiter, *American Legal Realism*, *supra* note 2, at 58. Green and Llewellyn also pursued their policy goals with legislative agendas. Green urged legislatures to adopt no-fault compensation plans modeled after workers’ compensation plans. *See* Ursin, *supra* note 1, at 10. For his part, Llewellyn sought to incorporate the doctrine of strict products liability in a proposal that would become the Uniform Commercial Code. *See id.* at 26.

Leiter uses Felix S. Cohen’s article, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935), as an example of nonquietism. *See* Leiter, *American Legal Realism*, *supra* note 2, at 58–59; Leiter, *Legal Realism*, *supra* note 2, at 277. That article criticized the conceptual approach that the New York Court of Appeals had taken in answering the question of whether a corporation incorporated in one state could be sued in the courts of another state. Instead of asking, “Where is a corporation?” the court, in Cohen’s view, should have acted in the manner that a competent legislature would act. Cohen, *supra*, at 810. It should have made a “factual inquiry into the practice of modern corporations in choosing their sovereigns and into the actual significance of the relationship between the corporation and the state of its incorporation.” *Id.* Then,

[i]t might have considered the difficulties that injured plaintiffs may encounter if they have to bring suit against corporate defendants in the state of incorporation. It might have balanced, against such difficulties, the possible hardship to corporations of having to defend actions in many states, considering the legal facilities available to corporate defendants.

Id. At that point, “[o]n the basis of the facts revealed by such an inquiry, and on the basis of certain [economic, sociological,] political or ethical value judgments as to the propriety of putting financial burdens upon corporations,” the New York Court of Appeals might “have attempted to formulate some rule as to when a foreign corporation should be subject to suit.” *Id.* (emphasis omitted).

The resemblance to Green’s approach is striking. In place of traditional conceptual analysis based on “fault,” Green offered his own scheme for determining both common law duties and whether legislative compensation plans should displace traditional tort law in particular categories of accidents (or situation types). *See* Leon Green, *The Duty Problem in Negligence Cases* (pt. 2), 29 COLUM. L. REV. 255, 255–57 (1929). He urged courts to focus on five factors: (1) the administrative factor—the practical workability of a rule; (2) the moral factor—or considerations of fault; (3) the economic factor—including the impact on economic activity; (4) the prophylactic factor—concerned with the prevention of future harm; and (5) the justice factor. *Id.* at 255. The latter factor was, at the time, seen as “synonymous [with] the capacity to bear the loss.” Calvert Magruder, Book Review, 45 HARV. L. REV. 412, 415 (1931). Based on these factors, Green suggested that courts might adopt a rule holding that industrial landowners owe a full duty of care to adult trespassers, and perhaps to all persons, on their property. Green, *supra*, at 275.

eliminated defenses and no-duty rules that protected even negligent defendants from liability.¹¹ Similarly, the policy-driven doctrine of strict products liability, a key component of the enterprise liability theory, can be traced to Llewellyn's famous 1930 casebook on the law of sales.¹²

One might ask at this point: Which was Llewellyn? The quietist depicted by Leiter? Or the nonquietist that I found? The answer is that he was both. And there is nothing anomalous about this. This Essay explains why this is so. But in doing so, it reveals that quietism and nonquietism are an unfortunate choice of terms—and that it is a mistake to divide Legal Realists into quietist and nonquietist camps. My previous article used these terms because, in the context of that article, they proved adequate. In other contexts, however, they are less adequate—and, indeed, can be misleading.

II. NONQUIETISM, LEGAL PRAGMATISM, AND “ACTIVISM”

The simplest explanation for why it is not anomalous to characterize Llewellyn both as a quietist and a nonquietist is that a Legal Realist might be a quietist in one substantive area of law (commercial disputes) and a nonquietist in another (such as tort law)—a point consistent with Leiter's passing reference to the fact that different substantive areas of law may call for different types of Legal Realist analysis.¹³ But there is more to it than this. Nonquietism is not the opposite of quietism.

Nonquietism, Leiter explains, reflects the view that “judges should simply adopt, openly, a legislative role, acknowledging that . . . courts . . . make judgments on matters of social and economic policy.”¹⁴ A Legal Realist who held this nonquietist view (judges have a legislative role) might conclude that, as a matter of social and economic policy, courts in commercial disputes should enforce the norms of commercial culture. If courts were already routinely doing this, this Legal Realist might reach the conclusion that it makes no sense to give normative advice. But this

11. See, e.g., *Rowland v. Christian*, 443 P.2d 561, 567–68 (Cal. 1968) (abolishing traditional landowner rules). See generally VIRGINIA E. NOLAN & EDMUND URSIN, UNDERSTANDING ENTERPRISE LIABILITY: RETHINKING TORT REFORM FOR THE TWENTY-FIRST CENTURY 30–37, 71–87 (1995); Edmund Ursin, *How Great Judges Think: Judges Richard Posner, Henry Friendly, and Roger Traynor on Judicial Lawmaking*, 57 BUFF. L. REV. 1267, 1335–38 (2009).

12. KARL N. LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES 341–42 (1930); see NOLAN & URSIN, *supra* note 11, at 8.

13. See Leiter, *Rethinking Legal Realism*, *supra* note 2, at 314 (contrasting Legal Realist analysis of commercial law and constitutional law).

14. Leiter, *American Legal Realism*, *supra* note 2, at 58.

fits the definition of a quietist (it makes no sense to give normative advice).¹⁵

What this reveals is that, contrary to what one might infer, nonquietism is not the opposite of quietism. Nonquietism is a view of the *lawmaking role* of judges (judges are legislators—they make law). Quietism reflects a *conclusion* (it makes no sense to give normative advice) in an area of law in which, for example, courts routinely are deciding cases in the manner that the Legal Realist thinks is correct (for example, enforcing commercial norms).¹⁶ Thus, there is nothing anomalous about the previously discussed jurisprudential nonquietist (courts make law based on policy) reaching a quietist conclusion (it makes no sense to give normative advice). This analysis clarifies why a Legal Realist might be a quietist in one substantive area of law (as Leiter reports Llewellyn was with respect to commercial disputes) and a nonquietist in another (which, we have seen, Llewellyn was in the area of products liability).¹⁷

At best the use of these terms is apt to lead to confusion. But this confusion is needless because a better, more familiar term exists for this view of the judicial role. Leiter's nonquietist, who believed that courts have a legislative as well as adjudicatory role—and that policy plays a role in their lawmaking—is the equivalent of Judge Posner's legal pragmatist who also believes that at times “judges in our system are

15. Of course, the reasoning of the quietist is different from that of the nonquietist. The quietist believed that it was an “irremediable fact about judging” that “judges respond primarily to the stimulus of the facts.” Leiter, *Legal Realism*, *supra* note 2, at 276–77. Because of this, “[i]t makes no sense to give normative advice.” *Id.* at 277. The nonquietist believed that “judges should simply adopt, openly, a legislative role, acknowledging that . . . courts . . . make judgments on matters of social and economic policy.” Leiter, *American Legal Realism*, *supra* note 2, at 58. As just discussed, if courts were already responding in the manner dictated by policy considerations, the nonquietist might reach the (quietist) conclusion that it makes no sense to give normative advice.

16. Thus, Leiter writes that “[i]t is quite clear . . . that quietists like Llewellyn thought it was *good* that judges were inclined in commercial disputes to try to enforce the norms of commercial culture.” Leiter, *American Legal Realism*, *supra* note 2, at 59.

17. Not all courts were imposing strict liability in food products cases. These courts, Llewellyn wrote, were “hampered in their vision.” LLEWELLYN, *supra* note 12, at 342. Some of these courts no doubt were formalistic or Langdellian in their mode of decision and thus not responsive to the stimulus of facts. But others, consistent with the core claim, may have been responsive to the situation type. These courts may simply have approached products liability cases from an ideological starting point or policy perspective at odds with that of Llewellyn and the courts that imposed strict liability.

legislators as well as adjudicators”¹⁸ and that policy judgments are at the core of judicial lawmaking.¹⁹ Leiter has, in fact, recognized as much in noting that we could call the nonquietist Legal Realists “‘Proto-Posnerians,’ to mark their anticipation of a view familiar in our own day.”²⁰

The jurisprudence of Green and Llewellyn certainly can be described as pragmatic. And Fowler Harper, a contemporary of Green and Llewellyn, made precisely this point in a brief 1929 article surveying developments in both the constitutional and common law realms.²¹ Harper captured an important aspect of the Legal Realists’ quest to find solutions, through social and economic legislation or judicial lawmaking, to the problem of accidental injury brought on by the maturation of American industry.²² And he gave it the name “juristic pragmatism,”²³ a term that foreshadowed Judge Posner’s later use of the term “legal pragmatism.”²⁴

Building on themes developed by Holmes and Green, Harper wrote, “[a]s law for Justice Holmes means prophecies of what the court will do; so, just law for the pragmatist jurist means prophecies of what will produce the most satisfactory and most desired consequences.”²⁵ And this law could be produced by legislatures or courts. Thus, Harper wrote, judicial decisions that even in the midst of the *Lochner* era “made possible the great flood of social legislation . . . , completely revolutionizing the legal conception of ‘due process of law,’ proceed from a deep-rooted pragmatist thinking.”²⁶ For example, “[s]tatutes alleviating conditions of employment . . . have higher working values than decisions which emanated from natural law but left the laborer ‘free to starve.’”²⁷

Similarly, “[t]he common law . . . affords constant evidences of the juristic pragmatism which alone can solve its philosophic problems.”²⁸ Leon Green’s tort scholarship provided Harper with his common law example.²⁹ In examining conflicting case law on the effect of the violation of a statute, Green had written that “[t]he question was one of sound policy and the Wisconsin court took one view while the Vermont

18. RICHARD A. POSNER, *HOW JUDGES THINK* 118 (2008).

19. *Id.* at 13, 238.

20. Leiter, *American Legal Realism*, *supra* note 2, at 58.

21. See Fowler Vincent Harper, *Some Implications of Juristic Pragmatism*, 39 INT’L J. ETHICS 269, 273–74 (1929).

22. *See id.* at 285–86.

23. *Id.* at 285.

24. POSNER, *supra* note 18, at 13.

25. Harper, *supra* note 21, at 273–74.

26. *Id.* at 285.

27. *Id.*

28. *Id.* at 286.

29. *See id.* at 286–87.

court took the other.”³⁰ As to which was right, Green observed that “[i]t is a matter of judgment, good taste, an interpretation of the community’s desires; in short, law making.”³¹ Harper wrote that “when jurists talk of judicial decision, not in terms of a logically determined system . . . but in terms of ‘judgment,’ ‘good taste,’ and ‘interpretation of the community’s desire,’ they are talking in terms of working hypotheses, offensive to any form of natural law.”³² For Harper this type of analysis was “juristic pragmatism.”³³ So why not pick up on the terminology of Posner and Harper and describe Legal Realists like Green and Llewellyn as legal pragmatists, thus eliminating the confusion caused by calling them nonquietists?

Moving beyond this clarification, two observations are worth making, one obvious and one not. First the obvious: Legal Realists opposed legal formalism. The descriptive claim of formalists was that “judges respond primarily—indeed, perhaps exclusively—to . . . applicable rules of law and modes of legal reasoning.”³⁴ The normative view was that “judges ought to be primarily rule- and legal-reason-responsive.”³⁵ The Legal Realist view, in contrast, was that “in deciding cases, judges respond primarily to the stimulus of the facts of the case, rather than to legal rules and reasons.”³⁶ Regarding the lawmaking role of courts, Legal Realists such as Green and Llewellyn believed that courts are lawmakers; they exercise a legislative as well as an adjudicative function, and policy plays a role in their lawmaking. The formalist, in contrast, believed that courts do not make law—and that policy has no role in judicial decisionmaking.

Less obvious is the fact that a nonquietist is not necessarily an “activist.” At the time that the Legal Realists wrote, the United States Supreme Court was considered an activist court because decisions such as *Lochner v. New York* had overturned social and economic legislation.³⁷

30. *Id.* at 286 (quoting Leon Green, *Contributory Negligence and Proximate Cause*, 6 N.C. L. REV. 3, 15 (1927)).

31. *Id.*

32. *Id.* at 286–87.

33. *Id.* at 287.

34. Leiter, *Rethinking Legal Realism*, *supra* note 2, at 277–78.

35. *Id.* at 278 n.54. A Legal Realist, such as Green, might concede that Judge Posner is correct in his statement that many judicial decisions, though not the most important ones, are responsive to legal rules. See POSNER, *supra* note 18, at 8.

36. Leiter, *American Legal Realism*, *supra* note 2, at 52.

37. See 198 U.S. 45 (1905).

Repelled by the perceived abuses of the *Lochner* era, Legal Realists called for judicial restraint and a respect for the separation of powers.³⁸ But in calling for courts to change the way they were deciding cases—by adopting a nonactivist posture—these Legal Realists would be characterized as nonquietist. They were giving normative advice. And this nonquietist call for judicial restraint followed in the path forged by Oliver Wendell Holmes, whom Posner identifies as a legal pragmatist.³⁹

III. THE EXAMPLE OF HOLMES'S *THE PATH OF THE LAW*

Leiter cites Holmes's famous 1897 essay, *The Path of the Law*,⁴⁰ as an example of normative quietism.⁴¹ He notes that Holmes complained in *The Path of the Law* that judges had “failed adequately to recognize their duty of weighing considerations of social advantage.”⁴² Leiter acknowledges that this statement *might* be seen to situate Holmes as a nonquietist.⁴³ But, Leiter continues, Holmes thought that this weighing of considerations of social advantage was “really going on . . . anyway.”⁴⁴ Despite what judges said, Holmes wrote, there was “a concealed, half-conscious battle on the question of legislative policy.”⁴⁵ This was, in fact, “inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations [was] simply to leave the very ground and foundation of judgments inarticulate, and often unconscious.”⁴⁶ Holmes emerges, according to Leiter, as a quietist. What “Holmes really call[ed] for is for judges to do explicitly (and perhaps more successfully, as a consequence) what they do unconsciously anyway.”⁴⁷ Thus “[n]ormative theory . . . takes a back seat to the practical task of making

38. See Leon Green, *Unpacking the Court*, NEW REPUBLIC, Feb. 24, 1937, at 67–68; Karl Llewellyn, *A United Front on the Court*, NATION, Mar. 13, 1937, at 288.

39. RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* 57 (2003).

40. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

41. Leiter, *American Legal Realism*, *supra* note 2, at 58 (citing Holmes, *supra* note 40, at 467).

42. Holmes, *supra* note 40, at 467; see Leiter, *American Legal Realism*, *supra* note 2, at 58.

43. Leiter, *American Legal Realism*, *supra* note 2, at 59. In his early writing on Legal Realism, Leiter unequivocally cited Holmes's *The Path of the Law* as an example of quietism. See Leiter, *Legal Realism*, *supra* note 2, at 277. More recently, however, using the same analysis, he characterizes Holmes as a “Proto-Posnerian,” that is, a Realist who adopted a “weaker version of quietism—tell judges that they *ought* to do what they by-and-large do anyway.” Leiter, *American Legal Realism*, *supra* note 2, at 58.

44. *Id.* at 59.

45. *Id.* (quoting Holmes, *supra* note 40, at 467).

46. *Id.* (quoting Holmes, *supra* note 40, at 467).

47. *Id.*

a systematic, empirical study of the real grounds of decision. We need to explain and describe judicial decision-making, rather than tell judges what they 'ought' to do."⁴⁸

However, if Holmes is read in the context of the substantive law he was discussing, a more complex picture emerges.⁴⁹ In *The Path of the Law*, Holmes addressed judicial decisionmaking in both the common law and constitutional law.⁵⁰ With respect to the former, Holmes examined the application of (pre-workers' compensation) tort law to the problem of the soaring accident toll of the industrial age in the context of employees injured in the workplace.⁵¹ He first argued, as he had in *The Common Law*, that behind its form and logic the common law reflects judicial accommodation of "competing legislative grounds."⁵² Accordingly, "the means do not exist for determinations that shall be good for all time, and . . . the decision can do no more than embody the preference of a given body in a given time and place."⁵³ Thus, as social conditions and values change, the judge must reconsider the common law. Indeed, Holmes argued that "[w]e do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind."⁵⁴

Turning specifically to the common law of worker injuries, Holmes noted that judges instruct juries "that an employer is not liable to an employee for an injury received in the course of his employment unless he is negligent."⁵⁵ Despite this instruction, juries "generally find for the plaintiff if the case is allowed to go to them."⁵⁶ Holmes asked why this discrepancy existed. His answer was that the common law was out of touch with popular perceptions of sound policy: "[T]he traditional policy of our law is to confine liability to cases where a prudent man might have foreseen the injury, or at least the danger."⁵⁷ In contrast, "the

48. Leiter, *Classical Realism*, *supra* note 2, at 257.

49. For an earlier discussion of this more complex picture, see Ursin, *supra* note 11, at 1291–94, and Edmund Ursin, *Judicial Creativity and Tort Law*, 49 GEO. WASH. L. REV. 229 (1981).

50. See Holmes, *supra* note 40.

51. *Id.* at 466–67.

52. *Id.* at 466; accord OLIVER WENDELL HOLMES, *THE COMMON LAW* 35 (Little, Brown, & Co. 1881).

53. Holmes, *supra* note 40, at 466.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

inclination of a very large part of the community is to make certain classes of persons insure the safety of those with whom they deal.”⁵⁸

The explanation for this shift in policy preferences lies in the successful industrialization of America during the nineteenth century. In Holmes’s view, traditional tort doctrine originated in preindustrial America—in “the old days of isolated, ungeneralized wrongs, assaults, slanders, and the like, where the damages might be taken to lie where they fell by legal judgment.”⁵⁹ In contrast, the torts of industrialized America “with which our courts are kept busy to-day are mainly the incidents of certain well known businesses. They are injuries to person or property by railroads, factories, and the like.”⁶⁰ With respect to these torts, the liability “is estimated, and sooner or later goes into the price paid by the public. The public really pays the damages.”⁶¹ Accordingly, “the question of liability, if pressed far enough, is really the question how far it is desirable that the public should insure the safety of those whose work it uses.”⁶² Holmes thought that courts could answer this question, and this answer could lead to a rewriting of the traditional tort law of employer liability. Holmes wrote that “even now our theory upon this matter [namely, the imposition of accident costs on employers] is open to reconsideration,

58. *Id.*

59. *Id.* at 467.

60. *Id.*

61. *Id.*

62. *Id.* In *The Common Law*, Holmes had considered the alternatives of strict liability and social insurance. He wrote, “The state might conceivably make itself a mutual insurance company against accidents, and distribute the burden of its citizens’ mishaps among all its members. There might be a pension for paralytics, and state aid for those who suffered in person or estate from tempest or wild beasts.” HOLMES, *supra* note 52, at 116. Alternatively, “it might throw all loss upon the actor irrespective of fault.” *Id.* Holmes rejected these alternatives as unsound:

The state does none of these things, however, and the prevailing view is that its cumbrous and expensive machinery ought not to be set in motion unless some clear benefit is to be derived from disturbing the *status quo*. State interference is an evil, where it cannot be shown to be a good.

Id. In his view, “Universal insurance, if desired, can be better and more cheaply accomplished by private enterprise.” *Id.* He also rejected the proposal to “redistribute losses simply on the ground that they resulted from the defendant’s act.” *Id.*

[Such an] undertaking . . . would not only be open to [the above] objections, but . . . to the still graver one of offending the sense of justice. Unless my act is of a nature to threaten others, unless under the circumstances a prudent man would have foreseen the possibility of harm, it is no more justifiable to make me indemnify my neighbor against the consequences, than to make me do the same thing if I had fallen upon him in a fit, or to compel me to insure him against lightning.

Id. As we have seen, however, popular attitudes changed over the next decades and these considerations of justice were no longer as compelling.

although I am not prepared to say how I should decide if a reconsideration were proposed.”⁶³

Holmes was not urging judges to *adopt* a strict liability rule, but asking them to consider adopting such a rule and to consider the policy question of “how far it is desirable that the public should insure the safety of those whose work it uses.”⁶⁴ He was addressing the *process* of judicial decisionmaking and lawmaking. And his normative advice made him a nonquietist—and a legal pragmatist. He was urging judges to “adopt, openly, a legislative role, acknowledging that . . . courts . . . make judgments on matters of social and economic policy,”⁶⁵ to act in a manner analogous to a “competent legislature.”⁶⁶ If Holmes had himself addressed the substantive issue of what liability rule courts should adopt, he might have reached the quietist conclusion that sound policy dictated that the status quo be retained—and thus there was no need, and it would make no sense, to give normative advice.⁶⁷ As we know, American legislatures, not the courts, would decide that the status quo was unacceptable, as they moved to adopt workers’ compensation plans in coming decades.

Holmes’s recognition of the need for courts to reconsider traditional tort law and policy is linked to the demand in his dissent in *Lochner* that courts not interfere with legislative attempts to cope with modern social and economic conditions and values.⁶⁸ For Holmes, it would not be anomalous to call for judicial restraint in *Lochner* while arguing for the

63. Holmes, *supra* note 40, at 467; see Ursin, *supra* note 49, at 273–74 (discussing Holmes’s recognition of the need for courts to reconsider traditional tort law and policy); see also Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266, 1267 (1997) (recognizing that Holmes was suggesting that the law of torts might need to be wholly rethought).

64. Holmes, *supra* note 40, at 467.

65. Leiter, *American Legal Realism*, *supra* note 2, at 58.

66. Cohen, *supra* note 10, at 810.

67. This apparently was the case in Holmes’s own tort decisions. See, e.g., *Balt. & Ohio R.R. v. Goodman*, 275 U.S. 66, 69–70 (1927) (finding that the driver of a truck struck while crossing a railroad was barred from recovery as a matter of law when the driver did not get out of his vehicle when he could not otherwise be sure a train was not dangerously near); *United Zinc & Chem. Co. v. Britt*, 258 U.S. 268, 275–76 (1921) (holding that a child cannot recover when harmed by a poisonous pool of water when he was not induced to trespass by the pool but discovered it after he had come on the land). Judge Posner has written that “Holmes decided . . . tort cases . . . in accordance with the individualistic, anti-collectivist—one might even say anti-socialist—philosophy that came naturally to him.” Richard A. Posner, *The Meaning of Judicial Self-Restraint*, 59 IND. L.J. 1, 18 (1983).

68. See Ursin, *supra* note 49, at 274.

permissibility of judicial reform of the common law.⁶⁹ Courts and legislatures both have a responsibility to bring the law in tune with the “felt necessities of the time.”⁷⁰ Moreover, as Holmes pointed out in *The Path of the Law*, courts that were unwilling to consider reform of the common law also were likely to succumb to the constitutional intervention characteristic of the *Lochner* era.⁷¹

In *The Path of the Law*, Holmes clearly foresaw the coming dominance of *Lochner*-style jurisprudence, writing that “people who no longer hope to control the legislatures [now] . . . look to the courts as expounders of the Constitutions.”⁷² Moreover, “in some courts new principles have been discovered outside the bodies of those [constitutions], which may be generalized into acceptance of the economic doctrines which prevailed about fifty years ago, and a wholesale prohibition of what a tribunal of lawyers does not think about right.”⁷³ That, of course, is what Holmes would accuse the *Lochner* Court of doing a decade later, when he would write that the Court’s overturning of New York’s maximum hours law for bakers was based “upon an economic theory which a large part of the country does not entertain.”⁷⁴ Holmes felt it necessary to remind the majority that the “Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics.”⁷⁵ In Holmes’s view, deference to legislative judgments in the realm of social and economic policy was called for; his—or the Court’s—agreement or disagreement with a particular economic theory “has nothing to do with the right of a majority to embody their opinions in law.”⁷⁶

Holmes’s *The Path of the Law* criticism of the judges of this era was that they had “failed adequately to recognize their duty of weighing considerations of social advantage.”⁷⁷ In Holmes’s view this “duty is

69. See Posner, *supra* note 67, at 18 (recognizing that, for Holmes, “considerations of judicial self-restraint [usually] were irrelevant . . . when a judge is expounding private judge-made law as distinct from public law”). Holmes did not make a sharp distinction between judicial and legislative lawmaking. For example, in writing about judicial lawmaking, he often spoke of theories of “legislation” or “legislative policy.” See, e.g., HOLMES, *supra* note 52, at 35; Holmes, *supra* note 40, at 466–67; Oliver Wendell Holmes, Jr., Book Review, 14 AM. L. REV. 233, 234 (1880) (reviewing C.C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1879), and SIR WILLIAM R. ANSON, PRINCIPLES OF THE ENGLISH LAW OF CONTRACT (1879)).

70. HOLMES, *supra* note 52, at 1.

71. Holmes, *supra* note 40, at 467–68.

72. *Id.* Holmes noted that a fear of socialism both infected “the comfortable classes of the community” and, he suspected, “influenced judicial action both here and in England,” though not necessarily consciously. *Id.* at 467.

73. *Id.* at 468.

74. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

75. *Id.*

76. *Id.*

77. Holmes, *supra* note 40, at 467.

inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious.”⁷⁸ Holmes’s hope was that if lawyers could be made “habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions.”⁷⁹

Holmes is very much the nonquietist. He is advising courts to “weigh[] considerations of social advantage.”⁸⁰ Or, more precisely, to see that considerations of social advantage are at issue in their constitutional rulings. He is telling judges how they *ought* to decide cases—in this case to adopt a posture of judicial restraint, to “hesitate where now they are confident, and see that really they [are] taking sides upon debatable and often burning questions.”⁸¹ Holmes’s position demonstrates, of course, that nonquietism and activism are not synonymous. In the constitutional arena Holmes is a nonquietist, urging courts to do what they were *not* doing—to adopt a position of judicial restraint in the review of social and economic legislation.

78. *Id.*

79. *Id.* at 468.

80. *Id.* at 467.

81. *Id.* at 468.

