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Law and Economics, Consequentialism and Legal Pragmatism: The Influence of Oliver Holmes Jr.

Abstract: This paper aims to present the similarities and differences between Posner's defense of Law and Economics (LAE) and Holmes' pragmatism. The investigation is centered in the arguments of economic consequences of judicial decisions. Law and Economics tend to emphasize these arguments as a determinant characterization of legal pragmatism. These arguments involve some dilemmas: Is it possible to eliminate a rule, or reinterpret it according to the effect of its application in practical life? May these economic consequences serve as argument for a replacement of traditional interpretation? To what extent can we rule out the law with arguments of consequence? Despite the influence, LAE has some important differences with respect Holmes' legal pragmatism. Posner's LAE involves the economic principle of wealth maximization and its relations with utilitarianism and economic liberalism. Consequentialism in Holmes, by contrast, is based on a teleological interpretation of existing rules. It is important that the judge does not decide based on a specific economic theory. Also, legal pragmatism does not advocate abandoning the tenets of positivism that form the basis for the rule of law. Holmes defends a judicial restraint. Accordingly, the argument of consequence must have previous limits in precedents and statutes. However, both legal pragmatism and LAE are connected by the idea that the adaptation of the law to a reasonable end can not be absent from the canons of interpretation and adjudication.

I. Introduction

Legal pragmatism is presented by Richard Posner as a corollary of an economic vision of law, so, this paper aims to present the similarities and differences between Posner's defense of law and economics and Holmes' legal realism. The investigation is centered in the arguments of economic consequences of judicial decisions, which is the basis of a pragmatist view of law, according to Posner. This paper is going to examine the alleged proximity between law and economics and Holmes' legal pragmatism, showing also the differences between one and another.

The economic approach of Posner defends both a descriptive and a normative thesis. According to the first one, the judges who forged the Common Law build the law in accordance with the wealth maximization premise. The normative thesis would say that this is the best way to decide a legal case.

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The normative thesis indicates the path of what would be called a "judicial activism", where the consequences of decision are more important than any previous premises (statutes or precedents). This paper is concerned specifically with the normative thesis applied to the judicial adjudication.

Herbert Hart defines American theory of law as absolutely centered on judicial adjudication. Holmes' legal pragmatism is an evident example. The central concern of Holmes' pragmatism is about what the courts do and how they do. How do the judges really decide and reason their decisions in particular cases?[1]

In his paper, *The path of the law*, Holmes defines law as a whole of prophecies about what would judges do in each concrete case.[2] The expression, "legal realism" applied to Holmes indicates this vision according to what law must be understood in reality, not in abstract concepts. In other words, the judicial decisions are the reality of law and this reality is not on abstract texts, but in the history of judicial decision. This explains the similar expression in appointing Holmes and Cardozo as legal realists or legal pragmatists.

In this paper, I will not question the difference between the terms "legal realism" and "legal pragmatism". The attention to psychological themes, a claim for functional attitude and a political approach is normally connected to legal realism, rather than legal pragmatism. Also some theorists, like Frederic Kellogg and Richard Posner, call Holmes a "legal pragmatist" instead of "legal realist". For the purposes of this paper, the important thing is to compare Posner's and Holmes' approaches to judicial adjudication.[3]

The most important difference between Posner and Holmes is what follows. In spite of the pragmatic foundations of Posner's theory of judicial adjudication, we can not justify a judicial activism based in economic arguments in Oliver Holmes' legal pragmatism. On the contrary, his theory about prediction in law is more concerned about a judicial restraint.

Consequentialism in Holmes is based on a teleological interpretation of existing rules. It is important that the judge does not decide based on a specific economic theory. Also, legal pragmatism does not advocate abandoning the tenets of positivism that form the basis for the rule of law.

Holmes argues in favor of the Common Law method and defends an eclectic vision of law and its fonts, but legal pragmatism is closer to the idea of a judicial restraint. Some

[1] Herbet L. A. Hart. *Essays in jurisprudence and philosophy*, 1983, 123.
[2] Oliver Wendell Holmes. The path of the law, *Collected legal papers*, 2010, 173.
[3] Roscoe Pound. The call for a realist jurisprudence. In: FISHER III, William W.; HORWITZ, Morton J.; REED, Thomas A. (Orgs.) *American legal realism*. New York: Oxford University Press. 1993, p. 66. See also Frederic R. Lellogg, *Oliver Wendell Holmes, Jr., Legal Theory, and judicial restraint*, 2007.

characteristics of legal pragmatism are actually compatible with the proposals of legal positivism, notably with what Americans call *Analytical jurisprudence*.

So, this approach to Holmes tends to draft an objective view of law and legal adjudication, keeping aside the idea, normally attributed to legal realism, that law is just the result of subjective creation of judges or of arguments of public policy.

II. The normative economic approach: discretion and creativity in judicial adjudication

The central issue that is going to be discussed here is: should be possible to withdraw a statute or precedent in favor of a decision based on arguments about economic consequences? The rejection of a legal rule should be interpreted as a violation of rule of law?

Richard Posner argues that legal pragmatism claims for an adjudication based on analyzing economic consequences of judicial decision. The basic assumption of law and economics theory is that the individual is a rational maximizer of its own satisfactions. As this includes both criminals and parties to a contract, the principle of wealth maximization has evident application in law. In its descriptive approach, positive economic analysis of law defends that "common law adjudication brings the economic system closer to the results that would be produced by effective competition".[4]

But the interest of this paper is the normative part of economic analysis of law. In essence, law and economics theory, in its normative approach, advocates a judicial activism. What does it mean? Judges should, in deciding hard cases, analyze the economic consequences of their decision, choosing the best public policy, that one which favors wealth maximization. Posner wrote that efficiency "is an adequate concept of justice that can plausibly be imputed to judges, at least in common law adjudication".[5]

As we note, this activism is justified only in hard cases, when the judges are more accurately seen as policy maker than as a conventional jurist or lawyer. Sometimes, judges are as free from previous rules as a traditional politician.[6]

Seeing himself as a pragmatist, Posner tends to affirm the compatibility of his defense of wealth maximization with pragmatic postulates. Pragmatism is an empiricist view of law, so, it should be easy to accept the interdisciplinary interference of economics. The economists investigates facts to anticipate possible consequences of judicial decisions, which is central to a pragmatic analysis.[7]

[4] Richard Posner. *The economics of justice*. 1983, p. 5; Richard Posner. *Problemas de Filosofia do Direito*, 2007, 473-474.
[5] Richard Posner. *The economics of justice*. 1983, 6.
[6] Richard Posner. *Problemas de Filosofia do Direito*, 2007, 175.
[7] Richard Posner. *Direito, pragmatismo e democracia*, 2010, 60.

He concedes that there are possible questionable ethical consequences in the application of wealth maximization principle, mainly when individual guaranties are in opposite side of collective increase of wealth. An important critique to normative theory of wealth maximization is that some political values, like liberty, are extraneous to the idea of wealth maximization. Liberty has a value in itself. Regardless the calculus, we choose to live in a free society.

The examples used by Dworkin to criticize wealth maximization are dealing exactly with this initial distribution of rights. Dworkin discerns that economic analyzes of law, in its normative approach, may legitimate slavery, if it increases the amount of happiness in society. In his example, Agatha is a brilliant writer, but prefers to work in a less remunerative activity. If Agatha were a slave, the owner of her labor would compel her to write, increasing the wealth of society. This demonstrates that wealth maximization is not a good parameter of justice.[8]

Posner's response is his compromise with freedom and its immediate consequences in wealth maximization. So, Posner defends that "if Agatha were free she almost certainly could – not would – write more detective stories than she would write if she were a slave".[9]

If this is correct, she would buy her freedom back because her labor as a slave would worth much less than it would if she were free. This leads to the argument that, independently of initial assignment of rights, the result would be the same. To minimize the costs of transactions, it is better to make her free.

This is, however, a weak argument for a moralist. Therefore, when advocates economic freedom and wealth maximization, Posner does not use a moralist argumentation. He rejects both libertarianism and egalitarianism. In a pragmatic point of view, it is the experience and history that demonstrate the efficiency and triumph of wealth maximization in democratic societies.[10]

Hart also highlights the utilitarian influence on economic analysis of law.[11] But the utilitarian approach is partially rejected by Posner:

> The ethics of wealth maximization can be viewed as a blend of these rival philosophical traditions. Wealth is positively correlated, although imperfectly so, with utility, but the pursuit of

[8] Ronald Dworkin. *O império do direito*, 2000, 378.
[9] Richard Posner. *The economics of justice*. 1983, 110.
[10] Richard Posner. *Problemas de Filosofia do Direito*, 2007, 516.
[11] Herbet L. A. Hart. *Essays in jurisprudence and philosophy.* 1983, 143.

> wealth, based as it is on the model of the voluntary market transaction, involves greater respect for individual choice than in classical utilitarianism.[12]

So, wealth maximization should be considered a guide. An instrument to support the judge in his analysis of policy. But not merely a guide. Common Law facilitates the exchanges and, accordingly, wealth maximization is also a social value which serves as reference to criticize inefficient law decisions in an economic point of view. In pragmatic view, judges provide a public service. The service of legitimate solution of conflicts. But they provide this service not only by applying the legislative rules, but by creating the Common Law.[13]

In creating Common Law, judges should make a choice between two or more public policies. His choice is oriented by the results of researching and evaluation of consequences of alternative options. The consequences involve not only the specific case, but also the rule of law and the society as a role. But the strictly juridic material is only used to help establishing an initial orientation, providing specific data and as source of limitations of the possible policies to be chosen. These serve, nevertheless, for a previous control of judges choices.[14]

It is possible to say, in this context, that judges are more prepared than legislators to face this challenge. Judges are not exposed to the lobbies that pressure legislators and politicians. In this aspect, judicial independence makes legislators more limited than judges. Actually, we can not say which one is more constrict. To accept judicial freedom is to accept that judges are public policies formulators, specially when facing a hard case. The most important thing about pragmatic adjudication is efficiency. To suppress any creative function of the judge is to sacrifice efficiency. This version of Posner's pragmatism will be mitigated in his later writings.[15]

Posner calls the legalistic argument against judicial activism a “pedigree argument”. This argument is based on the legitimacy of state in producing law. Since Hobbes, this is the essence of legal positivism. Posner seems to understand that basing legitimacy of judicial decision in a previous text, like positivism does, or, somehow, also Dworkin does, would be an appealing to an specific political theory. The judges are compelled to decide based on previous political decisions only in a specific political theory: liberalism. Pedigree approach maintains that judicial decisions must be observed because they are reasoned in political

[12] Richard Posner. *The economics of justice*. 1983, 66.
[13] Richard Posner. *Problemas de Filosofia do Direito*, 2007, 477.
[14] Richard Posner. *Problemas de Filosofia do Direito*, 2007, 178.
[15] Richard Posner. *Direito, pragmatismo e democracia*. 2010, 223; Richard Posner. *Problemas de Filosofia do Direito*, 2007, 177.

decisions of the past. Posner claims for a different approach. Judicial decisions must be observed because they are just. If a statute or a precedent is unjust, a judicial decision reasoned in these unjust statements would not be considered a just decision.[16]

The question is what follows: how can we achieve the virtues of rule of law without appealing to the pedigree approach? This is the challenge for a contemporary pragmatist theory of law.

Posner's legal pragmatism should be understood as a concern about the future in legal adjudication. Contemporary citizens should not be governed only by decisions made in the past. Judges must not forget public opinion about the future in their decisions. It demonstrates a clear preference for judicial activism, including in American constitutionalism, when the Supreme Court must decide about constitutionality of statutes.

Pedigree approach has a tendency to separate morals from law in an absolute way. According to positivism, moral conceptions must not interfere in judicial decisions, unless they are part of the previous texts considered law. But even the pedigree approach must admit some spaces of freedom in legal adjudication. This open area enables the application of moral principles by judges. As we can see in Harts response to Dworkin in his postscript in *The concept of law*, this open area is also an "open texture" of legal norms.[17]

In Dworkin, however, this "open texture" is something to criticize in positivism. Moral principles are part of law and cannot be excluded by pedigree approach. This is part of his critics about what he calls "the model of rules". Dworkin advocates that positivism is overly arbitrary because of this "open texture".[18]

The problem is that, in law and in economy, hard cases do not exist on the abstract level of norms, but on the application level. It means that agreement with economic or juridic principles do not guarantee any specific result of the decision process. Normally, disagreement is in how the concrete case should be viewed by the law. Concrete cases sometimes involve unforeseen situations.[19]

Posner thinks that any position that eliminates judicial creativity is dependent of an unnecessary idolatry toward the authors of constitutions and statutes. It does not mean that judges are better than legislators, but that statutes and constitutions, alone, are not able to resolve concrete cases. There is always some space for discretionary decision in law. It is not clear how to deduce correct public policies from as general proposition like constitutional

[16] Richard Posner. *Problemas de Filosofia do Direito*, 2007, 181-183.
[17] Herbert Hart. *O conceito de direito*, 2001, 137.
[18] Ronald Dworkin. *Taking Rights Seriously*, 2001, 17.
[19] Richard Posner. *Problemas de Filosofia do Direito*, 2007, 188.

principles. Constitutional texts are often representing different political views and this is the reality of Brazilian constitution.[20]

Pure positivism leaves no place for debating development of law by judges. That is the specific part of legal positivism that pragmatism does not embrace. In pragmatism, the state is not the exclusive source of all law and legal rationality.[21] Posner thinks that the environment of American law does not embrace legalistic view of interpretation and judicial restraint:

> Has we more professional, more disciplined legislative bodies, a constitutional convention in continuous session, a federal commission to revise statutes, a counterpart to the Sentencing Commission for every area of federal law, then the judges could take a backseat as foreign do. But none of these conditions for judicial passivity in interpretation is satisfied.[22]

Therefore, in a clear pragmatist attitude, Posner defends formalism only in a forward-looking assessment of the consequences. If the environment was different, legalistic view of interpretation could be used in a pragmatic way.

Actually, pedigree approach has only a rhetorical function. A rhetoric of certitude. It enables social stability. Legalism gives judicial adjudication an apparent intellectual rigor. Also, legalism provides a backward looking in judicial adjudication that reflects the state of knowledge from the time of promulgation of the statute, precedent or constitution.[23]

III. Consequentialism and pragmatism in Oliver Holmes Jr.

Holmes' pragmatism is also a rejection of legal positivism. Therefore, it is a theory of law which defends a socially rooted inquire with important parallels with Peirce's philosophy. It is an application even more conservative than that of Dewey or, more recently, of Rorty. [24]

Consequentialism is connected to the pragmatic tradition in philosophy. With Charles Sanders Peirce, pragmatism is described as a philosophy of action. The effects of a given object are defined by its practical consequences in reality. As the effects depend on the context of action, pragmatism is also an antiessentialism.

> It appears, then, that the rule for attaining the third grade of clearness of apprehension is as follows: consider what effects, which might conceivably have practical bearings, we conceive the

[20] Richard Posner. *Problemas de Filosofia do Direito*, 2007, 189.
[21] Frederic R. Lellogg, *Oliver Wendell Holmes, Jr., Legal Theory, and judicial restraint,* 2007, 102.
[22] Richard Posner. *How judges think*, 2008, 199.
[23] Richard Posner. *How judges think*, 2008, 176-177-252.
[24] Frederic R. Lellogg, *Oliver Wendell Holmes, Jr., Legal Theory, and judicial restraint,* 2007, 40.

> object of our conception to have. Then, our conception of these effects is the whole of our conception of the object.[25]

So, it is not possible to determine all effects of any object immediately or in the future, because the conception of the effects is limited by the context of investigation, historically conceived.[26]

Essences and concepts make sense only if they have practical effects in the world. Intrinsic characteristics are only characteristics that refers themselves to practical effects that the object will generate in the environment. Peirce's pragmatism is an empiricism, critical to Descartes' thought. For Peirce, the idea is not generated by pure thought, but by facts and empiric observation. There is a clear relation between pragmatism and a historical and experimentalist view connected to scientific method. Pragmatism defends the need to submit our intellectual beliefs to experience test, considering all practical consequences that could happen.[27]

Belief is, actually, a form of creating a habit. A rule for action. Belief is linked to action. In this way, different beliefs distinguish themselves by the different habits they provoke. Then, as pragmatism is a philosophy of action, it is based on the idea of practical consequences of concepts.[28]

Holmes' conception about consequences can be immediately connected to an epistemological posture. We should not describe rights and duties independently of the practical consequences of their breach. This is strictly related to Holmes' theory of prediction. In *The path of the law*, Holmes defines law as a whole of prophecies about what would judges do in each concrete case along history. This means an evident appeal to consequentialism. The law is limited to the predictions about practical consequences of human action. "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law".[29]

[25] Charles Sanders Peirce. How to Make our Ideas Clear. *Selected Writings,* 1980, 124.
[26] Charles Sanders Peirce. How to Make our Ideas Clear. *Selected Writings,* 1980, 124.
[27] George Browne Rego. *O Pragmatismo de Charles Sanders Peirce: conceitos e distinções.* **In:** *Anuário dos cursos de pós-graduação em Direito,* 2003, 238-241.
[28] Charles Sanders Peirce. How to Make our Ideas Clear. *Selected Writings,* 1980, 121.
[29] Oliver Wendell Holmes Jr. The path of the law. *Collected legal papers,* 2010, 173.

In Holmes' words:

> These are what properly have been called the oracles of the law. Far the most important and pretty nearly the whole meaning of every new effort of legal thought is to make these prophecies more precise, and to generalize them into a thoroughly connected system.[30]

History plays an important part in studying law, because judges and also law students, they must reconstruct history of law as a coherence exigency. Each new legal decision is a form of continuity. That is why Holmes affirms: "The rational study of law is still to a large extent the study of history".[31]

Nevertheless, pragmatism must spend his time in studying the ends of the law. It is the aspect of pragmatism that points to the future. Therefore, Holmes emphasizes the importance of economic consequences. In his own words, "As a step toward that ideal it seems to me that every lawyer ought to seek an understanding of economics".[32] And, "The man of the future is the man of statistics and the master of economics"[33]

When criticizing legal positivism, Holmes affirms: "You may assume, with Hobbes and Bentham and Austin, that all law emanates from the sovereign, even when the first human beings to enunciate it are the judges".[34] Legal positivism enables the fallacy that the only force in development of the law is logic. In the beginning of *The common law*, Holmes says that "the life of the law has not been logic, it has been experience".[35]

Here, Holmes explains the limits of a positivist approach of law and adjudication, criticizing the syllogistic method:

> The official theory is that each new decision follows syllogistically from existing precedents. (…) precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten. The result of following them must often be failure and confusion from the merely logical point of view. [36]

[30] Oliver Wendell Holmes Jr. The path of the law. *Collected legal papers*, 2010, 168.
[31] Oliver Wendell Holmes Jr. The path of the law. *Collected legal papers*, 2010, 186.
[32] Oliver Wendell Holmes Jr. The path of the law. *Collected legal papers*, 2010, 195.
[33] Oliver Wendell Holmes Jr. The path of the law. *Collected legal papers*, 2010, 187.
[34] Oliver Wendell Holmes Jr. The path of the law. *Collected legal papers*, 2010, 180.
[35] Oliver Wendell Holmes Jr. *The common law*. 1881, 1.
[36] Oliver Wendell Holmes Jr. *The common law*. 1881, 35.

Every judicial adjudication is the result of views of public policy, not only deduction of general premises. Actually, it also involves the "unconscious result of instinctive preferences and inarticulate convictions" but nevertheless "traceable to views of public policy".[37]

Holmes advocates that pragmatism must first follow the existing body of dogma, then to discover from history the reason why it is what it is, and finally, to consider the ends of the law and how to accomplish them. The pragmatic man should seek the social consequences of law. The hole of the judges involves "their duty of weighing considerations of social advantage".[38]

Judges have a creative role, but they have to seek some security in the previous texts produced by the politicians and by other judges in Common Law. Thus, it is always important that judges do not forget their relations with the past. Decisions of the past must conform with the present decisions in favor of a historical coherency. It is the need to reconstruct law as continuity.

That is why pragmatism does not exclude the validity of some postulates of legal positivism for the maintenance of democracy. Judicial activism must be limited by decisions of the past (statutes and precedents). This leads to a long-term consequence of social advantage, like democracy and the rule of law. It is a form of judicial restraint which will be observed by Posner.

IV. The importance of previous authority in pragmatic adjudication: pragmatism is not an irrationalism

The point of major agreement between Posner and Holmes is viewed when the former criticize the authors of critical legal studies. CLS states that law and legal reasoning are simply a way to hide or to cover the real political motivation of judicial decisions. Posner says that an exaggeration in the interest for subjectivity indicates a neglect of the importance of easy cases and an excessive attention to indeterminate cases in law.[39]

When defending that law is not merely what legislators say, Holmes is immediately identified with an irrational legal realist, and sometimes he is put in the same side as critical legal studies, as a predecessor. Posner, in his later works, just like Holmes, tries to stay away from this subjective posture. His economic approach in judicial adjudication is in the half way between extreme formalism and absolute irrationality and subjectivity.

[37] Oliver Wendell Holmes Jr. *The common law*. 1881, 36.
[38] Oliver Wendell Holmes Jr. The path of the law. *Collected legal papers*, 2010, 184, 198.
[39] Richard Posner. *Problemas de Filosofia do Direito*, 2007, 206.

In spite of consequentialism, judge must not put aside precedents, legislative authorities, Constitution and the facts of lawsuit. Thus, Posner's later version of pragmatism is quite different from his normative theory of law and economics.

According to Posner, judges are limited by various circumstances which include the facts of lawsuit, *stare decisis* and other previous limitations. So, the later Posner changes his emphasis, and states that there is a difference between legislators and judges when we talk about previous limitation. While legislators are limited by lobby, judges have some limits legislators do not have. Logic, coherence of speech, publicity of arguments and reasons for decision are also limitations of all judicial adjudication, even on hard cases. As we can see, Posner's pragmatism is wider than his normative economic approach. [40]

Posner says that pragmatism is a better description of judicial behavior because judges are more likely to recognize themselves as pragmatist then as an economist. So, it's clear that economic analysis of law is just one of the various methods of legal pragmatism.[41]

Hard cases are not the field for irrationality. There is not only one result, but it is possible to point to possible and reasonable results. Pragmatism is not able to fill all the open areas of law, but it is possible to deal with it. Adjudication may not be objective, but it should be reasonable.

Essence of pragmatism is the emphasis on consequences, but it is not a mere consequentialism. Institutional consequences are also important and the decisions of the past play an important role in pragmatic adjudication. Pragmatism also balances the systemic consequences, and the danger of uncertainty is an important consequence of despising a rule. "Definite criteria of pragmatic adjudication is rationality".[42]

Legal pragmatism in Posner's view has the advantage of recognizing the importance of backward looking for coherence and stabilization of social relations, but also it can deal with unforeseen cases and changed circumstances without needing to wait for amendment of statutes or constitution.

Holmes' idea that law is what the courts decide is constantly misinterpreted. Some theorists affirm legal realism decreases the importance of some postulates of democracy which form the basis of legal positivism, like legality. João Maurício Adeodato says, for instance, realism decreases the importance of legislator activity and engenders exacerbation of judicial activity.[43]

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[40] Richard Posner. *Problemas de Filosofia do Direito*, 2007, 175.
[41] Richard Posner. *How judges think*, 2008, 246.
[42] Richard Posner. *Direito, pragmatismo e democracia*, 2010, 47.
[43] João Maurício Adeodato. Adeus à separação de poderes? Chegando à tese do realismo jurídico. In: FEITOSA, Enoque. [et al.] *O direito como atividade judicial.* Recife: Ed. Dos Organizadores, 2009, 142.

Holmes, however, does not abandon the importance of Statute Law. In fact, what Holmes intended was an eclectic theory of law and he never defended complete abandonment of legislation. Adeodato's affirmation should be interpreted in this context. Holmes' "realism" is pragmatic, and says that law is not only created by legislation.

> Taken as a whole, his effort was aimed toward encompassing statute law, and was framed with the comprehensive positivist theory of John Austin in mind. It was an extended criticism of austinian positivism, and an effort to present a unified theory of all law, accounting for the judicial role in interpreting and applying all forms of law, precedent, statute, and constitution.[44]

Even Posner considers that the previous texts of law (statutes and precedents) have their importance in judicial adjudication. Actually, they are the first things to be reached. Only after having analyzed the history of the case and examined the precedents and statutes, may the judge use a general concept to point the decision to the future. But only after this backward looking, this general concept should be wealth maximization.[45]

Benjamin Cardozo, as well, expresses his concern about codification of law. However, codification is not bad in itself. But it is incompatible to the complexity of law and life. Absolute codification is just an ideal which can not be accomplished.[46]

Pragmatism is not entirely unconnected to the emergence of rule of law, which made the Common Law tradition lose importance for Statute Law. Common Law had to adapt itself to constitutionalism. Holmes said once "When we analyze legal interpretation of statutes, the inquire is not about what the legislature means, but what the statute means.[47]

Creativeness of judges is not as wide as judicial activism would like. Judges create law, but not to the point of disruption with legislation and precedents. The legal adjudication is a complex process, with influence of previous rules and principles, but not just this. It involves the adaptation of these previous texts to the unforeseen facts and social needs. Consequentialism, thus, is not an authorization for the judge to act like a politician.

Judicial restraint in Holmes is not based, thus, in observing previous text like legalism or positivism. "Beneath it lay Holmes' observation that the courtroom operates through 'successive approximation,' guided by precedent but adapting prior rules to conform to

[44] Frederic R. Lellogg, *Oliver Wendell Holmes, Jr., Legal Theory, and judicial restraint,* 2007, 57.
[45] Richard Posner. *Problemas de Filosofia do Direito*, 2007, 176 e 177.
[46] Benjamin Cardozo. *A natureza do processo judicial*. 2004, 106.
[47] Oliver Wendell Holmes Jr. Theory of legal interpretation. *Collected legal papers,* 2010, 207.

unanticipated circumstances."[48] What control judges in a pragmatic sense is a notion of law as collective production. History plays an essential role.

Frederic Kellogg says that:

> The notion of restraint is thus not located strictly within the legal or political domain, as a condition of the proper operation of a putative system of governance. Nor is law seen as separate and autonomous, as in the dominant school of theory still prevailing in England and America. Instead, judicial restraint is seen as a limiting condition of collective inquiry into the conditions of social ordering, of which law and governance is a contributing, but not the only, factor, its extent and operation to be determined according to the overall success of the project of an ordered society.[49]

Pragmatic view of law is combined with a historical consensus and will forge the content of law. But the consistency of law is also its changing over time.

However much we may codify the law into a series of seemingly self-sufficient propositions, those propositions will be but a phase in a continuous growth. To understand their scope fully, to know how they will be dealt with by judges trained in the past which the law embodies, we must ourselves know something of that past. The history of what the law has been is necessary to the knowledge of what the law is.[50]

In studying law and in legal adjudications, history is determinant. It explains the various policy grounds of precedents and statutes in the time they were produced. It is possible for the judge do examine if the policy which justified law of the past is still valid to justify law of the present and of the future.

V. Separation between law and morals in Holmes' theory

Holmes is, in another important aspect, away from judicial activism found in some early writings of Richard Posner. There is a skepticism about principles which involves not an absolute, but an important separation between law and morals in Holmes' thought. "For his skepticism about principles Holmes was posthumously criticized as an amoral authoritarian positivist, obscuring his true position".[51]

Obviously, Holmes is not an "amoral positivist", but his view about principles puts him in the same side of judicial restraint theories rather than judicial activism.

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[48] Frederic R. Lellogg, *Oliver Wendell Holmes, Jr., Legal Theory, and judicial restraint,* 2007, 39.
[49] Frederic R. Lellogg, *Oliver Wendell Holmes, Jr., Legal Theory, and judicial restraint,* 2007. 110-111.
[50] Oliver Wendell Holmes Jr. *The common law*. 1881, 37.
[51] Frederic R. Lellogg, *Oliver Wendell Holmes, Jr., Legal Theory, and judicial restraint,* 2007. 59.

The distinction between morals and law is related do his theory of bad man.

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences witch such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.[52]

We have already seen the theory of prediction, according to which "a legal duty so called is nothing but a prediction that if a man does or omits certain things he will be made to suffer in this or that way".[53] This means that the "sanctions of conscience" have no interest in law because they do not cause any practical consequence.

This is Holmes' view of morals, considered only in its subjective sense. Even the moral concepts present in law must be interpreted in the pragmatic point of view. The bad man does not care about the abstractions, principles, axioms or deductions in law. He cares only to know about the real courts decisions.

This is a form of skepticism about general propositions. It is linked to the fact that pragmatism believes general propositions are not able, alone, to resolve concrete cases. The history and facts of the case are the elements to inform judges, not some general principle. In his dissent in Lochner case Holmes wrote: "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise".[54]

Principles are also general propositions and they cannot reason a hard case decision because they involve unforeseen cases and special social circumstances. The use of arguments based on general propositions of moral kind hides the true reason of decision. It is in this sense that Holmes defends that law can only be apprehended in concrete reality.

As we have already said, hard cases do not exist on the abstract level of norms, but on the application level. So, agreement with principles does not guarantee any specific decision. Legal reasoning needs more that mere appealing to principle.

This advice is specially destined to the activism of USA Supreme Court when judging labor cases. The fear of the word "socialism" led many to ignore demands for social

[52] Oliver Wendell Holmes Jr. The path of the law. *Collected legal papers*, 2010, 171.
[53] Oliver Wendell Holmes Jr. The path of the law. *Collected legal papers*, 2010, 168 e 173.
[54] Oliver Wendell Holmes Jr. Lochner v. New York. 198 U.S. 45 (1905). In: FISHER III, William W.; HORWITZ, Morton J.; REED, Thomas A. (Orgs.) *American legal realism*. New York: Oxford University Press. 1993, 26.

legislation. Holmes defends a judicial restraint in these economic themes, as to provide a social experimentation before judging its constitutionality.

A clear example is Lochner v. New York:

> Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relations of the citizen to the State or of *laissez faire*.[55]

This interpretation of judicial adjudication puts the contemporary followers of Holmes in the opposite side of Posner's defense of an economic approach. But Holmes emphasizes the danger of subjectivity, with which Posner would certainly agree. Policy is a more objective way of legal reasoning than moral principles or specific economic theories. That is the place Posner wants for "wealth maximization": an objective guide.

The rejection of principle is not an absolute incompatibility with wealth maximization principle, but a different focus in analyzing social consequences:

> Holmes rejected judicial appeal to "principle" as a dereliction of the judicial role. This was to step entirely away from the delicate process of building or rebuilding transgenerational consensus. Such was the import of his constant critique of moral language, notable in "The Path of the Law".[56]

So, Posner's economic analysis of law is not opposed to Holmes concerns about moral subjectivity. But his emphasis is different. Although it must be said that, about economic approach, Holmes was specifically concerned. A form of moral skepticism, Holmes' pragmatic view of judicial adjudication avoids introducing ideology into legal argumentation. Holmes resisted in accepting introducing economic liberalism theories as a competent reason for deciding constitutional cases.[57]

It is important to have "a cautionary approach to judicial policy where no clear path has yet been publicly sanctioned".[58] When there is no consensus about what policy is lawful, especially in judging constitutionality of statutes, judges should wait.

Posner is also careful to recognize pragmatism as merely an economic approach:

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[55] Oliver Wendell Holmes Jr. Lochner v. New York. 198 U.S. 45 (1905). In**:** FISHER III, William W.; HORWITZ, Morton J.; REED, Thomas A. (Orgs.) *American legal realism*. New York: Oxford University Press. 1993, 26.
[56] Frederic R. Kellogg. *Oliver Wendell Holmes, Jr., Legal Theory, and judicial restraint*. 2007, 45.
[57] Frederic R. Lellogg, *Oliver Wendell Holmes, Jr., Legal Theory, and judicial restraint,* 2007. 106.
[58] Frederic R. Lellogg, *Oliver Wendell Holmes, Jr., Legal Theory, and judicial restraint,* 2007. 45.

> As a normative theory, economic analysis of law is controversial. A judge's choice to use it to generate outcomes in the open area is an ideological choice except when there is broad agreement that economics should guide then decision; consensus represses ideological conflict.[59]

So, except when the path is already drawn, the judge may not impose his ideology. Holmes' legal realism (or pragmatism) is a clear limitation to the use of normative postulates of economic analysis of law. In his essay *Law and the court*, Holmes defends that judge must not impose his sympathy for a moral doctrine:

> As law embodies beliefs that have triumphed in the battle of ideas and then have translated themselves into action while there still is doubt, while opposite convictions still keep a battle front against each other, the time for law has not come; the notion destined to prevail or not yet entitled to the field. It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his fellow men to be wrong.[60]

That is why judges should not read his conscious or unconscious sympathy for a moral, political or economic doctrine. It does not mean that moral values are not part of law. It means that judges should not import their own "subjective values under the abstract language of rights".[61]

IV. Conclusion

1. Economic analysis of law has a normative approach which argues for a judicial activism based on economic consequences of law. According to that, judges should analyze the economic consequences of their decision choosing the public policy which favors wealth maximization. So, wealth maximization should be considered a guide for legal adjudication.

2. Posner believes in judicial creativity and criticizes legal positivism as an unnecessary idolatry toward the authors of constitutions and statutes. It does not mean that judges are better than legislators, but that statutes and constitutions, alone, are not able to resolve concrete cases.

[59] Richard Posner. *How judges think***.** 2008, 237.
[60] Oliver Wendell Holmes Jr. Law and the court. *Collected legal papers*, 2010, 295.
[61] Frederic R. Lellogg, *Oliver Wendell Holmes, Jr., Legal Theory, and judicial restraint,* 2007. 59.

3. Holmes has a similar view. He argues in favor of a Common Law method and an eclectic vision of law. Holmes argues that legal positivism enables the fallacy that the only force in development of the law is logic and explains the limits of a positivist approach of law and adjudication, criticizing the syllogistic method.

4. But Holmes' legal realism is closer to the idea of a judicial restraint. Some characteristics of legal pragmatism are actually compatible with the proposals of legal positivism, notably the defense of rationality. Hard cases are not the field for irrationality. Pragmatism can not fill all the open areas of law, but it can deal with it. So, adjudication may not be objective, but is should be reasonable.

5. That is why in spite of its emphasis on consequences, Holmes legal realism is not a mere consequentialism. Decisions of the past play an important role in pragmatic adjudication because institutional and systemic consequences are also important. Danger of law uncertainty is an important consequence to be considered in despising a rule.

6. In his approximation of judicial restraint, Holmes advocates that general propositions can not reason a hard case decision because hard cases involve unforeseen situation and special social circumstances. The use of arguments based on general propositions of moral kind hides true reason of decision. Thus, Holmes defends law can only be apprehended in concrete reality.

7. Posner also considers that statutes and precedents are important in judicial adjudication. Only after having analyzed the history of the case and examined the precedents and statutes, may the judge use wealth maximization as a general concept to point the decision to the best public policy.

8. But Holmes' legal realism (or pragmatism) is a clear limitation to the use of normative postulates of economic analysis of law, because judges must not impose his sympathy for a moral, politic or economic doctrine. Pragmatism is wider than a merely economic approach.

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