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### The Missing Normative Dimension in Brian Leiter's "Reconstructed" Legal Realism

Edmund Ursin

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# The Missing Normative Dimension in Brian Leiter’s “Reconstructed” Legal Realism

EDMUND URSIN\*

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\* Professor of Law, University of San Diego School of Law. Thanks to Roy Brooks, Kevin Cole, Brian Leiter, and Richard Posner for helpful comments on an earlier draft of this Article. The Article also benefitted from research assistance from Rachael Davidson, Justin Manganiello, Catherine Hampton, Kristen Johnson, Alexis Kokkinos, Krystal Norris, and Sara Rasmussen.

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## I. INTRODUCTION

Legal Realism has undergone a revitalization in academia. In a series of articles over the past decade and a half,<sup>1</sup> and in a 2007 book,<sup>2</sup> Brian Leiter has offered a “philosophical reconstruction” of Legal Realism.<sup>3</sup> That this reconstruction is *necessary* is itself remarkable in that Legal Realism has been a dominant force in judicial decisionmaking for at least the past half century, as seen, for example, in the landmark tort decisions of the California Supreme Court,<sup>4</sup> the most influential state supreme court in the nation.<sup>5</sup> Among legal philosophers, however, a misunderstood Legal Realism has been an object of scorn, thought by many to be best

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1. See, e.g., Brian Leiter, *American 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*, 35 NOÛS 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, *Positivism, Formalism, and Realism*, 99 COLUM. L. REV. 1138 (1999) [hereinafter Leiter, *Positivism*] (reviewing ANTHONY SEBOK, LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE (1998)); Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267 (1997) [hereinafter Leiter, *Rethinking Legal Realism*].

2. BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY (2007).

3. Leiter, *Rethinking Legal Realism*, *supra* note 1, at 275.

4. See, e.g., *Rowland v. Christian*, 443 P.2d 561, 567–68 (Cal. 1968) (abolishing traditional landowner rules); *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900–01 (Cal. 1963) (adopting strict products liability). See generally Edmund Ursin, *How Great Judges Think: Judges Richard Posner, Henry Friendly, and Roger Traynor on Judicial Lawmaking*, 57 BUFF. L. REV. 1267 (2009).

5. Measured by decisions that have been “followed,” as that term is employed by Shepard’s Citations Service, “over the course of several decades, the California Supreme Court has been the most followed state high court, and that trend continues.” Jake Dear & Edward W. Jessen, “*Followed Rates*” and the *Leading State Cases, 1940–2005*, 41 U.C. DAVIS L. REV. 683, 710 (2007). Six of the seven *most* followed decisions are tort decisions rendered since 1960. See *id.* at 708–09.

forgotten.<sup>6</sup> So, in a sense, Leiter is offering academics, and especially legal philosophers, the opportunity to learn something about American law as it exists in the real world, as opposed to the colloquia of academia.

Examining this reconstructed Legal Realism through the lens of the tort scholarship of Leon Green and Karl Llewellyn, two giants in American law, this Article adds an important (normative) dimension, which is missing in Leiter's otherwise illuminating analysis.<sup>7</sup>

In articulating what he sees as the descriptive and normative aspects of Legal Realism, Leiter draws most of his examples from the field of commercial law, which was the main focus of Llewellyn's scholarship.<sup>8</sup> He writes that most Legal Realists made a descriptive claim about judicial decisions or, more specifically, decisions of appellate courts. Stated in its most succinct form, this descriptive claim was that judicial decisions fall into discernable patterns, correlated with the underlying factual scenarios of disputes, or "situation types," as opposed to formal legal rules.<sup>9</sup> As we will see, the tort scholarship of both Green and Llewellyn confirms this thesis.

On the normative front, Leiter writes that most Legal Realists, including Llewellyn, were "quietists." 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."<sup>10</sup> "A more subtle version of quietism," linked to Llewellyn and Holmes, would have Legal Realists "call[] for judges to do explicitly (and perhaps more successfully, as a

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6. Leiter, *Rethinking Legal Realism*, *supra* note 1, at 270.

7. This Article primarily focuses on three seminal works: KARL N. LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* (1930); Leon Green, *The Duty Problem in Negligence Cases: II*, 29 COLUM. L. REV. 255 (1929) [hereinafter Green, *The Duty Problem: II*]; Karl N. Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699 (1936). For a more elaborate discussion of Green's and Llewellyn's scholarship, see VIRGINIA E. NOLAN & EDMUND URSIN, *UNDERSTANDING ENTERPRISE LIABILITY: RETHINKING TORT REFORM FOR THE TWENTY-FIRST CENTURY* 30–37, 71–87 (1995), and Virginia E. Nolan & Edmund Ursin, *Dean Leon Green and Enterprise (No-Fault) Liability: Origins, Strategies, and Prospects*, 47 WAYNE L. REV. 91 (2001).

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).

8. See generally LLEWELLYN, *supra* note 7.

9. Leiter, *Positivism*, *supra* note 1, at 1148.

10. Leiter, *Legal Realism*, *supra* note 1, at 277.

consequence) what they do unconsciously anyway,” or at least “largely do anyway.”<sup>11</sup> Leiter writes 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.”<sup>12</sup>

A focus on the *tort* scholarship of Green and Llewellyn, however, reveals an ambitious normative agenda, making them, in Leiter’s terms, “nonquietists” who believed that “judges should simply adopt, openly, a legislative role, acknowledging that . . . courts . . . make judgments on matters of social and economic policy.”<sup>13</sup> 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.<sup>14</sup> This Article thus confirms and extends the Legal Realism that Leiter has presented.

That Green was a nonquietist (or, better, a reformist<sup>15</sup>) should be no surprise. In fact, he is identified by Leiter as the “leading *tort* reform scholar in America in the twentieth century.”<sup>16</sup> Green’s proposed reforms consisted of normative advice to courts and legislatures. Indeed, Green laid out the policy framework, identified today as the theory of enterprise liability, that the California Supreme Court, beginning in the 1960s, would write into law as it adopted expansive liability rules and eliminated or limited defenses and no-duty rules that protected even negligent defendants from liability.<sup>17</sup> Similarly, the policy-driven doctrine of strict products liability, a key component of the enterprise

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11. Leiter, *American Legal Realism*, *supra* note 1, at 58–59.

12. Leiter, *Classical Realism*, *supra* note 1, at 258.

13. Leiter, *American Legal Realism*, *supra* note 1, at 58–59.

14. See Leiter, *Classical Realism*, *supra* note 1, at 258.

15. The term “reformist” better captures the substantive orientation of Green’s and Llewellyn’s scholarship. See Edmund Ursin, *Judicial Creativity and Tort Law*, 49 GEO. WASH. L. REV. 229, 231 (1981). Better yet is Judge Posner’s more general term “legal pragmatist.” A legal pragmatist believes that “judges in our system are legislators as well as adjudicators” and that policy judgments are at the core of judicial lawmaking. RICHARD A. POSNER, HOW JUDGES THINK 80, 118 (2008); see Ursin, *supra* note 4. Legal pragmatists, based on their policy views, might think that judges are deciding cases in the manner they think are correct and thus reach a quietist conclusion that it makes no sense to give normative advice. This would explain how Leiter might describe Holmes, a legal pragmatist, as a quietist. See Leiter, *American Legal Realism*, *supra* note 1, at 58–59.

16. LEITER, *supra* note 2, at 107–08.

17. See, e.g., *Rowland v. Christian*, 443 P.2d 561, 567–68 (Cal. 1968) (abolishing traditional landowner rules). See generally NOLAN & URSIN, *supra* note 7. In a similar vein, Roy Brooks writes that “the imprint of legal realism can certainly be seen beyond the 1920s and 1930s in landmark Supreme Court cases like *Shelley v. Kraemer* (1948) and *Brown v. Board of Education* (1954).” ROY L. BROOKS, STRUCTURES OF JUDICIAL DECISION MAKING FROM LEGAL FORMALISM TO CRITICAL THEORY 89 (2d ed. 2005).

liability theory, can be traced to Llewellyn's famous 1930 casebook on the law of sales.<sup>18</sup> Thus, it turns out that Llewellyn, described by Leiter as a quietist in the field of commercial law, was a nonquietist when it came to tort (products liability) law. And Llewellyn, like Green, was a prophetic nonquietist.

This Article proceeds as follows. Following this introduction, Part I briefly sketches Leiter's reconstructed Legal Realism. Parts II and III then examine seminal works by Green and Llewellyn that have shaped modern tort law. This examination reveals that each scholar believed that judicial decisions fall into discernable patterns correlated with underlying factual scenarios, thus confirming Leiter's descriptive claim. On the other hand, both Green and Llewellyn believed that courts should adopt a legislative role, making judgments on matters of social and economic policy. This nonquietist, reformist role would eventually lead to courts' reshaping tort law in accord with Green's and Llewellyn's views. Part IV, the postscript, sketches the adoption by courts of the normative (enterprise liability) agenda put forward by these giants of American law and Legal Realism. In a forthcoming article I will seek to clarify further the normative dimension of Legal Realism.<sup>19</sup> I will suggest that it is a mistake to divide Legal Realists into quietist and nonquietist camps. This is because these terms refer to two distinct phenomena. Nonquietism is a view of the lawmaking role: judges are legislators—they make law, and policy plays a role in their lawmaking. Quietism reflects a conclusion: it makes no sense to give normative advice. In the present Article, I have continued to use these terms as Leiter uses them so as not to confuse the analysis and because in the context of this Article they prove adequate.

## II. BRIAN LEITER'S "RECONSTRUCTED" LEGAL REALISM

Legal Realism has long been an object of scorn among legal philosophers. Scholars, such as Ronald Dworkin, see Legal Realism as a phenomenon of the 1920s and 1930s and claim that Realists believed that judges actually decide cases according to their own political or moral tastes and then choose an appropriate legal rule as a rationalization.<sup>20</sup> In

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18. LLEWELLYN, *supra* note 7, at 341–42.

19. See Edmund Ursin, *Clarifying the Normative Dimension of Legal Realism: The Example of Holmes's The Path of the Law*, 49 SAN DIEGO L. REV. (forthcoming 2012).

20. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 3 (1977).

this, the “Received View,” judges exercise unfettered discretion, and predicting how courts will decide cases is impossible.<sup>21</sup> This version of Legal Realism was, according to Leiter, rendered a “philosophical joke” by H.L.A. Hart in the early 1960s,<sup>22</sup> thought by many to be “best forgotten.”<sup>23</sup>

Leiter argues that the Legal Realism that legal philosophers would dismiss is an inadequate, indeed misleading, description of the views of the Legal Realists. Leiter thus has attempted a “philosophical reconstruction” of Legal Realism in order to restore it to philosophical respectability.<sup>24</sup> Leiter’s reconstructed Legal Realism is linked to two contemporary philosophical movements: naturalism and pragmatism. “According to . . . [n]aturalism, a satisfactory theory of adjudication must be continuous with empirical inquiry in the natural and social sciences.”<sup>25</sup> This approach is “skeptical about intuition-driven methods of philosophy and conceptual analysis [and] . . . think[s] that the facts matter for philosophy.”<sup>26</sup> The commitment to pragmatism means that “a satisfactory theory of adjudication for lawyers must enable lawyers to predict what courts will do.”<sup>27</sup> These two concepts are linked in Leiter’s philosophical reconstruction of Legal Realism, which he calls a naturalized jurisprudence. “To predict reliably and effectively what courts will do,” Leiter writes, “one should know what causes courts to decide as they do. The causes of judicial decision, in turn, are only available to the sort of empirical inquiry modeled on the natural and social sciences that the Realists advocate.”<sup>28</sup> Thus, “[a] naturalistic theory of adjudication . . . must produce a pragmatically valuable theory for lawyers, *i.e.*, one that will enable them to predict what courts will do.”<sup>29</sup>

In Leiter’s reconstructed Legal Realism, Realists are seen to have offered a claim about judicial decisionmaking that was an alternative to the legal formalist view that in deciding cases, “judges respond primarily—indeed, perhaps exclusively—to the rational demands of the applicable rules of law and modes of legal reasoning.”<sup>30</sup> The core claim of the Realists was that “[i]n deciding cases, judges react primarily to the underlying facts of the case, rather than to applicable legal rules and

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21. Leiter, *Rethinking Legal Realism*, *supra* note 1, at 280.

22. *Id.* at 270.

23. *Id.*

24. *Id.* at 275.

25. *Id.* at 285.

26. Brian Leiter, *Moral Psychology*, in 2 *THE COGNITIVE SCIENCE OF MORALITY: INTUITION AND DIVERSITY* 333, 333 (Walter Sinnott-Armstrong ed., 2008).

27. Leiter, *Rethinking Legal Realism*, *supra* note 1, at 285–86.

28. *Id.* at 286.

29. *Id.*

30. *Id.* at 277–78.

reasons.”<sup>31</sup> All Realists, according to Leiter, held this view.<sup>32</sup> Beyond this, however, there were fundamental disagreements.<sup>33</sup>

#### A. *The Descriptive Theory*

Leiter’s reconstruction places Realists in two camps, or wings. A minority of Realists, like Jerome Frank, “thought that idiosyncrasies of the judge’s personality determined the decision.”<sup>34</sup> Leiter labels this the “Idiosyncrasy Wing” and notes that this wing’s version of Legal Realism would make it impossible to predict how courts will decide cases.<sup>35</sup> This is the source of the received view.<sup>36</sup>

According to Leiter, most Realists belonged to the “Sociological Wing.”<sup>37</sup> These Realists believed that judicial decisions fall into “discernible patterns (making prediction possible), though the patterns are not those one would expect from examining the existing legal rules.”<sup>38</sup> Instead, “decisions fall into patterns correlated with the underlying factual scenarios of the disputes at issue.”<sup>39</sup> The judicial response to the “situation type” determines the outcome of the cases.<sup>40</sup> Judges then “rationalize [these outcomes] after-the-fact with appropriate legal rules and reasons.”<sup>41</sup> In private law especially, Leiter writes, “what courts really do is enforce prevailing, uncodified norms as they would apply to the underlying factual situation,” or situation type.<sup>42</sup>

In commercial law, for example, where “[Legal] Realists tend to draw their best examples,” Realists argued that judges “either . . . enforce the norms of the prevailing commercial culture [or] . . . try to reach the decision that is socio-economically best under the circumstances.”<sup>43</sup>

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31. Leiter, *Positivism*, *supra* note 1, at 1148.

32. *See id.*

33. *See id.*

34. *Id.*

35. *Id.*

36. *See* Leiter, *Rethinking Legal Realism*, *supra* note 1, at 268–69, 279.

37. *See* Leiter, *Positivism*, *supra* note 1, at 1148.

38. *Id.*

39. Thus, for Leon Green there was “no law of torts, *per se*, but rather numerous laws of torts specific to differing situation-types” such as “‘surgical operations,’ ‘keeping of animals,’ ‘traffic and transportation,’ etc.” *Id.* at 1148–49.

40. *Id.* at 1148.

41. Leiter, *Rethinking Legal Realism*, *supra* note 1, at 285.

42. Leiter, *Positivism*, *supra* note 1, at 1149.

43. Leiter, *Rethinking Legal Realism*, *supra* note 1, at 281.



Leiter gives the example of Karl Llewellyn’s analysis of a series of New York cases in which courts appeared to have harshly “applied the rule that a buyer who rejects the seller’s shipment by formally stating his objections thereby waives all other objections.”<sup>44</sup> However, “a careful study of the facts of these cases revealed that . . . what had really happened was that the market had fallen, and the buyer was looking to escape the contract.”<sup>45</sup> The waiver rule was being used by courts “‘sensitive to commerce or to decency’ . . . to frustrate the buyer’s attempt to escape the contract.”<sup>46</sup> In fact, “the commercial norm—buyers ought to honor their commitments even under changed market conditions—[was being] enforced by the courts.”<sup>47</sup> Lawyers sensitive to the insights of Legal Realism could recognize that “these ‘background facts, those of mercantile practice, those of the situation-type’ . . . determine the course of decision.”<sup>48</sup> This would enable them to make “predictive generalizations about the patterns of decision[s].”<sup>49</sup>

Judges act in this manner and thus render predictably uniform decisions, Realists suggested, because of their “sociological” profile.<sup>50</sup> Leiter notes that Karl Llewellyn wrote that judges “respond to traditions . . . . Tradition grips them, shapes them, limits them, guides them.”<sup>51</sup> Leiter writes that the Realists held that “judicial decisions are causally determined by the relevant psycho-social facts about judges, and at the same time judicial decisions fall into predictable patterns because these psycho-social facts about judges—their professionalization experiences, their backgrounds, etc.—are not idiosyncratic, but characteristic of significant portions of the judiciary.”<sup>52</sup>

The sociological wing’s Legal Realism thus differs from the received view in that first, the “choice of decision [is] sufficiently fettered that prediction is possible,” and second, “these fetters upon choice [do] not consist in idiosyncratic facts about individual judges, but rather [are] of sufficient generality or commonality to be both accessible and to permit

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44. *Id.* at 282.

45. *Id.*

46. *Id.* (footnote omitted) (quoting KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 124 (1960)).

47. *Id.*

48. *Id.* (quoting LLEWELLYN, *supra* note 46, at 126).

49. *Id.* at 281.

50. *Id.* at 283.

51. *Id.* at 284 (quoting LLEWELLYN, *supra* note 46, at 53); *see also* Leiter, *Legal Realism*, *supra* note 1, at 272.

52. Leiter, *Rethinking Legal Realism*, *supra* note 1, at 284; *see* Leiter, *Legal Realism*, *supra* note 1, at 272.

formulating general scientific laws of the kind that make prediction possible.”<sup>53</sup>

### *B. The Normative Theory*

The sociological wing also advanced a *normative* theory of adjudication. Some of these Realists thought that judges “should simply adopt, openly, a legislative role, acknowledging that, because law is indeterminate, courts must necessarily make judgments on matters of social and economic policy.”<sup>54</sup> Leiter writes that this nonquietist view was held by a minority of Realists.<sup>55</sup>

Most Realists were quietists. Recall the core claim of the Realists, that “judges respond primarily to the stimulus of the facts.”<sup>56</sup> Consistent with this claim, the quietist camp believed that “since the core claim reports some irremediable fact about judging, it makes no sense to give normative advice.”<sup>57</sup> Leiter considers Llewellyn’s work to be the most important example of normative quietism. Llewellyn’s normative advice to judges in commercial disputes was to “tell judges . . . to do what . . . they will do anyway, that is, enforce the norms of commercial culture, of the prevailing mercantile practice.”<sup>58</sup> Leiter sees this as “a contingent, but still obstinate, fact about adjudication in the common-law system.”<sup>59</sup> He notes, however, that some Legal Realists called for “judges to do explicitly (and perhaps more carefully) what they do unconsciously anyway.”<sup>60</sup> He also detects a further *nonquietist* normative element, or perhaps a small nonquietist element in a generally quietist view:

[T]o the extent, however small, that judges are *not* fact-responsive and fairness-driven in their decisions (to the extent, for example, that they are sometimes formalistic or Langdellian in their mode of decision), then to that extent they *ought* to decide as the core claim says most of them ordinarily do.<sup>61</sup>

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53. Leiter, *Rethinking Legal Realism*, *supra* note 1, at 280–81.

54. Leiter, *American Legal Realism*, *supra* note 1, at 58.

55. See Leiter, *Legal Realism*, *supra* note 1, at 276.

56. *Id.*

57. *Id.* at 277.

58. *Id.*

59. *Id.* at 278.

60. *Id.* at 277.

61. *Id.* at 278.

### III. LEON GREEN'S LEGAL REALISM

In the field of torts, legal scholars best know Green today for his theories of causation and duty,<sup>62</sup> his emphasis on the functions of judge and jury,<sup>63</sup> his focus on “relational interest,”<sup>64</sup> and his iconoclastic torts casebook, which was first published in 1931.<sup>65</sup> These scholars largely overlook the fact that Green provided the intellectual foundation for what became known by its proponents as the theory of enterprise liability.<sup>66</sup> In fact, Green first developed the central ideas of that theory, which embraced no-fault compensation plans as an alternative to tort (negligence) law and proposed that courts themselves might play an important role in reforming tort law to reflect contemporary values.

When Green came on the scene, the dominant view among judges and scholars was that “the general notion upon which liability . . . is founded is fault or blameworthiness.”<sup>67</sup> In contrast, in his seminal two-part article *The Duty Problem in Negligence Cases*, published in 1928 and 1929, Green launched the modern theory of enterprise liability with a scathing critique of traditional tort theory and an ambitious agenda for substantive tort reform.<sup>68</sup>

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62. See LEON GREEN, *RATIONALE OF PROXIMATE CAUSE* (1927).

63. See LEON GREEN, *JUDGE AND JURY* (1930).

64. See generally Leon Green, *Relational Interests*, 30 ILL. L. REV. 1 (1935).

65. See LEON GREEN, *THE JUDICIAL PROCESS IN TORT CASES* (1931); see also LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960*, at 87 (1986) (describing it as the “quintessential functional casebook to be produced by a realist”).

66. See KALMAN, *supra* note 65, at 301–14 (failing to provide an index entry for enterprise liability); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 465–70, 472–74 (1985) (failing to acknowledge the seminal role Green played in the “invention of enterprise liability”); Allen E. Smith, *Some Realism About a Grand Legal Realist: Leon Green*, 56 TEX. L. REV. 479, 499–501 (1978) (highlighting Green’s “[three] accomplishments of which he is proudest” without mentioning his contribution to the theory of enterprise liability: (1) the attractive nuisance doctrine, (2) “the judicial erosion of the proximate cause doctrine,” and (3) “the development of the concept of the relational interest of human beings as a proper subject of protection by courts”). Many overlooked Green’s contributions because of a general misunderstanding of enterprise liability and, specifically, the equation of enterprise liability with strict products liability, accompanied by traditional damage awards. See generally Priest, *supra*. This view overlooks the compensation plan component of the enterprise liability theory and the fact that enterprise liability proponents urged that the expansion to strict tort liability be accompanied by limitations on damages. See NOLAN & URSIN, *supra* note 7, at 106.

67. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 72 (A.B.A. 2009) (1881); see Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401, 402–03 (1959); see also Warren A. Seavey, *Mr. Justice Cardozo and the Law of Torts*, 52 HARV. L. REV. 372, 374–75 (1939); 39 COLUM. L. REV. 20, 22–23 (1939); 48 YALE L.J. 390, 392–93 (1939) [hereinafter citing to HARV. L. REV.].

68. See Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928) [hereinafter Green, *The Duty Problem*], reprinted in GREEN, *supra* note 63,

*A. Traditional Tort Theory and Legal Formalism*

A classic statement of traditional tort theory is found in Oliver Wendell Holmes's 1881 book, *The Common Law*. For Holmes and subsequent traditional theorists, it was clear that "the general notion upon which liability . . . is founded is fault or blameworthiness."<sup>69</sup> Thus, in 1959 Robert Keeton wrote that "[f]or more than a century, at least, fault has been the principal theme of tort law."<sup>70</sup>

These theorists saw tort law as a means to achieve justice, involving the shifting of losses from one individual to another according to principles of fairness. In this view, the compensation of an accident victim, by itself, was not a sufficient reason for imposing liability: "[T]he mere fact that one member of society is compensated when the court shifts the loss is not such a reason, since the gain is offset by the loss shifted to another member of society."<sup>71</sup> A plaintiff was thus required to provide a justification for shifting his or her loss to the defendant, and proof of defendant fault was seen as "the one generally acceptable reason for such loss shifting."<sup>72</sup>

The jurisprudential counterpart to traditional theory was 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."<sup>73</sup> The normative view was that "judges ought to be primarily rule- and legal-reason-responsive."<sup>74</sup> If a normative theory of adjudication addresses the question of what the lawmaking role of courts is, then the formalist answer was that courts do not make law and policy has no role in judicial decisionmaking.

Warren Seavey, the leading tort scholar at Harvard Law School from the 1930s to the 1950s and the Reporter for the *Restatement of Torts*, was a traditional tort theorist and a formalist. Seavey's article *Mr. Justice Cardozo and the Law of Torts*, published in 1939 simultaneously in the *Harvard Law Review*, the *Columbia Law Review*, and the *Yale*

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at 38; Green, *The Duty Problem: II*, *supra* note 7, at 255. See generally NOLAN & URSIN, *supra* note 7.

69. HOLMES, *supra* note 67, at 72.

70. Keeton, *supra* note 67, at 402.

71. *Id.* at 401.

72. *Id.* at 402.

73. Leiter, *Rethinking Legal Realism*, *supra* note 1, at 277–78.

74. *Id.* at 278 n.54.

*Law Journal* as part of a tribute to Justice Cardozo,<sup>75</sup> reflects Seavey's view of the judicial process and arguably misstates Cardozo's.<sup>76</sup> Seavey writes that Cardozo was "not primarily a reforming judge. He did not remake the law of torts. On the contrary, by and large, he accepted the common law as he found it, merely choosing between precedents where choice was possible, and choosing the best."<sup>77</sup> Cardozo's "power lay in his ability to see the plan and pattern underlying the law and to make clear the paths which had been obscured by the undergrowth of illogical reasoning."<sup>78</sup> Cardozo could be praised because "he did not first decide from some internal and unexplainable sense of justice that one of the parties was entitled to the decision and then find or invent a formula to fit the facts."<sup>79</sup> Nor did Cardozo "allow his private opinions of policy to sway him from the lines into which the law had been moulded."<sup>80</sup> He, specifically, "did not become the protector of the injured merely because the defendant had ample funds to meet a judgment or had an ability to spread the loss."<sup>81</sup> Such considerations, for Seavey, were not only substantively undesirable but also inappropriate even for judicial consideration. He wrote in this vein that Cardozo's "scales were those of legal justice, not sentimental justice."<sup>82</sup> In that vein, Seavey continued, Cardozo "used principles deduced from the cases and weighed competing interests as had the judges who had gone before him."<sup>83</sup> Seavey's view that a more expansive role would simply be nonjudicial<sup>84</sup> reflects the importance that he attached to restricting the judicial lawmaking function. Cardozo could not be accused of the heresy of "destroying [his court] as a court of law."<sup>85</sup>

Despite its beguiling rhetoric of fault, however, tort law in fact consisted of a broad-ranging system of doctrines immunizing even negligent defendants from tort liability.<sup>86</sup> The privity requirement,

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75. *See supra* note 67.

76. Ursin, *supra* note 15, at 282.

77. Seavey, *supra* note 67, at 372.

78. *Id.*

79. *Id.* at 373.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *See id.*

85. *Id.*

86. *See, e.g.,* Balt. & Ohio R.R. v. Goodman, 275 U.S. 66 (1927) (Holmes, J.); Glynn v. Cent. R.R. of N.J., 56 N.E. 698 (Mass. 1900) (Holmes, J.); Lamson v. Am. Ax & Tool Co., 58 N.E. 585 (Mass. 1900) (Holmes, J.); McCarvel v. Sawyer, 54 N.E. 259 (Mass. 1899) (Holmes, J.). *See generally* Virginia E. Nolan & Edmund Ursin, *Strict Tort Liability of Landlords: Becker v. IRM Corp. in Context*, 23 SAN DIEGO L. REV. 125, 142 n.116 (1986) (questioning the reinterpretation of nineteenth-century tort history offered

which insulated negligent manufacturers from tort liability for defective products, is illustrative. Other conspicuous examples are the traditional landowner rules, the doctrines of charitable, governmental, and intrafamily immunity, and the defenses of assumption of the risk and contributory fault. Although traditional theorists ignored or downplayed these doctrines,<sup>87</sup> maintaining that “community notions of individual blameworthiness”<sup>88</sup> are at the core of tort law, Legal Realist tort scholars such as Leon Green were appalled by the “harshness” of these doctrines and their “monstrous results, both in legal theory and protection afforded particular persons.”<sup>89</sup>

### *B. Leon Green’s Normative (Enterprise Liability) Framework*

#### *1. Leon Green’s Duty (Policy) Factors*

Green vehemently rejected the staples of traditional tort theory, declaring that “[c]urrent legal theory . . . is wholly inadequate.”<sup>90</sup> Scornful of “talk about a ‘tort of negligence,’” Green wrote that “[t]his can only be intended in a catchword sense.”<sup>91</sup> Far from being an immutable principle rooted in morality, negligence law in fact was an accommodation to the emerging industrialization of the nineteenth century and was unsuited to the conditions and values of twentieth-century America.<sup>92</sup> In practice, negligence law countenanced ruthless defenses<sup>93</sup> and no-duty rules noted for their harshness.<sup>94</sup> Such doctrines granted classes of defendants a preferential position against which “[e]ven the strong morality of the negligence theory has made slow progress.”<sup>95</sup> Particularly offensive to Green was the immunity from liability that was given to negligent industrial landowners in cases involving innocent child trespassers maimed on their premises. Here the regime of traditional landowner rules “had its

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by Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 *YALE L.J.* 1717 (1981)).

87. See, e.g., HOLMES, *supra* note 67, at 63–103; Seavey, *supra* note 67, at 375–404.

88. Keeton, *supra* note 67, at 443.

89. Green, *The Duty Problem: II*, *supra* note 7, at 271–72 n.56, 274.

90. *Id.* at 276.

91. *Id.* at 279.

92. See *id.* at 255, 270.

93. *Id.* at 264–66.

94. *Id.* at 274.

95. *Id.* at 271.

bloodiest toll.”<sup>96</sup> “The cases themselves reflect . . . monstrous results, both in legal theory and [in the] protection afforded particular persons . . . .”<sup>97</sup>

In Green’s view, the cornerstone of traditional tort theory, the “idea of ‘fault,’ . . . had become bankrupt.”<sup>98</sup> As to the reverence given to “principles” by traditional theorists, Green wrote that “‘principles’ are nothing more than the generalizations (assumptions) drawn from the factors which determined the initial judgment.”<sup>99</sup> It followed that “these factors having changed, the initial judgment should no longer stand. ‘Principles’ should therefore be expected to vary as do the factors which support them.”<sup>100</sup> Unfortunately, in Green’s view, “as a matter of fact they lag far behind.”<sup>101</sup> Thus, legal principles and the tort theorists who insisted upon them were, for Green, impediments to needed legal change.

In place of traditional analysis, Green offered his own scheme for determining both common law duties and whether compensation plans should displace tort law in particular categories of accidents (or situation types). In determining common law duties or whether compensation plans should be adopted in particular situation types (or fact patterns), Green urged a focus on five factors<sup>102</sup>: (1) the administrative factor—the practical workability of a rule;<sup>103</sup> (2) the moral factor—or considerations of fault;<sup>104</sup> (3) the economic factor—including the impact on economic activity;<sup>105</sup> (4) the prophylactic factor—concerned with the prevention of future harm;<sup>106</sup> and (5) the justice factor<sup>107</sup>—seen as “synonymous [with] the capacity to bear the loss.”<sup>108</sup> This last factor, which envisioned an inquiry into loss spreading capacity as an aspect of tort theory, was truly revolutionary and was recognized as such at the time by traditional theorists. Francis Bohlen, for example, wrote that the “so-called ‘Justice’ factor . . . has no place in a restatement of the existing law of the United States and not that of Utopia. This factor has never consciously or . . . unconsciously influenced the decision of any court.”<sup>109</sup>

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96. *Id.* at 272.

97. *Id.* at 272 n.56.

98. *Id.* at 270.

99. *Id.* at 280.

100. *Id.*

101. *Id.*

102. *Id.* at 255–57.

103. *Id.* at 255; Green, *The Duty Problem*, *supra* note 68, at 1035.

104. Green, *The Duty Problem: II*, *supra* note 7, at 255.

105. *Id.* at 255, 274.

106. *Id.* at 255–57.

107. *Id.* at 255.

108. Calvert Magruder, Book Review, 45 HARV. L. REV. 412, 415 (1931) (reviewing GREEN, *supra* note 63).

109. Francis H. Bohlen, Book Review, 80 U. PA. L. REV. 781, 794 (1932) (reviewing GREEN, *supra* note 63).

## 2. *Workers' Compensation Plans as a Normative "Pattern"*

Unlike traditional tort theorists who viewed workers' compensation plans as irrelevant to tort,<sup>110</sup> the law of employee accidents was the cornerstone of Green's analysis, providing "a pattern by which to indicate other developments either mature or now under way."<sup>111</sup> The enactment of workers' compensation plans signaled that "a new order of things was at hand" and marked a recognition that "risks of physical hurts could be distributed as well as could wages and other costs."<sup>112</sup> In Green's hands, this recognition became the policy of "plac[ing] the loss where it will be felt the least and can best be borne."<sup>113</sup> He argued that accidental injury was not a product of moral shortcoming but the "inevitable" byproduct of industrial society.<sup>114</sup> Moreover, the "costs of affording . . . protection can be cared for as part of the costs of the enterprise, and more than all, . . . the risk when it results in hurt . . . can best be borne and absorbed" by the enterprise.<sup>115</sup> This insistence that the capacity to bear and distribute a loss was a legitimate consideration in tort law injected a vital new element into tort analysis, legitimizing the loss spreading policy that would become central to what became known as the theory of enterprise liability.

Leon Green, Karl Llewellyn (when he wrote of tort law), and the Legal Realist/enterprise liability scholars who followed them articulated an ambitious nonquietist (or, better, a reformist) normative program addressed to both legislatures and courts. Under the umbrella of what is now known as the theory of enterprise liability, these scholars urged that legislatures adopt no-fault compensation plans modeled after workers' compensation plans and that courts rewrite tort law to reflect the values of twentieth-century America by adopting expansive liability rules and limiting or eliminating restrictive defenses and no-duty rules that protected even negligent defendants from liability.<sup>116</sup> For these scholars, the choice between the legislative and common law routes was "a pragmatic one, contingent on broader political and jurisprudential forces."<sup>117</sup> It was this scholarship that spawned the three most striking developments in the

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110. *E.g.*, Warren A. Seavey, *Principles of Torts*, 56 HARV. L. REV. 72, 86 (1942).

111. Green, *The Duty Problem: II*, *supra* note 7, at 270.

112. *Id.*

113. *Id.* at 256.

114. *Id.* at 278.

115. *Id.* at 273.

116. *See* NOLAN & URSIN, *supra* note 7, at 7–11.

117. *Id.* at 11.



tort law of the past half century: the adoption by courts of the doctrine of strict products liability, the judicial rewriting of negligence law to eliminate or limit many no-duty rules and defenses, and the movement for legislative enactment of no-fault auto compensation plans.<sup>118</sup>

*C. Leon Green's Legislative Agenda: Compensation Plan Proposals Tailored to Situation Types*

Far from content with critique and theory, Green suggested both legislative and common law strategies to achieve the goals of enterprise liability. The clearest articulation of Green's normative view can be seen in his discussion of his legislative compensation plan strategy. Bearing in mind that the same policy (duty) factors are relevant to both the legislative and the common law agenda, it is instructive to see the far-reaching implications of these factors by examining briefly Green's legislative strategy.

For Green, the workers' compensation "pattern"<sup>119</sup> suggested that "the question now has come to be, not whether the negligence process should be recognized as controlling [in specific classes of cases], but whether [classes of cases] should not be controlled . . . by even a more rational process for imposing responsibility."<sup>120</sup> This more rational process was legislatively enacted compensation plans based on the workers' compensation model; and Green proposed compensation plans for general traffic cases,<sup>121</sup> for railway crossing accidents,<sup>122</sup> and for children injured while trespassing on the premises of industrial landowners.<sup>123</sup> Green intended these proposals to be suggestive, not exhaustive. He wrote that the "possibilities are many" and that he had merely chosen "familiar subject matters" to illustrate the "pattern [of] developments either mature or now under way."<sup>124</sup> In these classes of cases "and others not discussed . . . nothing is left to be done which cannot be better performed by some less ponderous agency than an orthodox court."<sup>125</sup>

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118. See *id.* at 7–8. Llewellyn's major work was his drafting of Article 2 of the Uniform Commercial Code, "the sales article of the most successful codification in American Law." Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 466 (1987).

119. Green, *The Duty Problem: II*, *supra* note 7, at 270.

120. *Id.* at 271.

121. *Id.* at 277–79.

122. *Id.* at 275–76.

123. *Id.* at 272–74.

124. *Id.* at 270.

125. *Id.* at 279.

Green recognized the enormous social problem posed by automobile accidents, which “furnish by far the largest number of cases of the current day.”<sup>126</sup> For Green, the Legal Realist, a heartening fact of the law in action, as opposed to the law on the books, was that “insurance companies are constantly absorbing the overwhelming amount of these losses without suit, and . . . jury verdicts are little short of unanimity for the injured party.”<sup>127</sup> Nevertheless, the fundamental problem remained: “Too many people . . . continue to be hurt and subjected to serious risk without adequate protection” because of the fault requirement, which, to Green, was a difficult and needless obstacle to victim compensation.<sup>128</sup> He asked, “What court or group of laymen can so weigh faults as to pass with any precision upon the conduct of two swiftly moving automobiles . . . ? And what difference does it make if they could?”<sup>129</sup>

Concluding that “legal theory [in automobile cases] is . . . most out of joint,”<sup>130</sup> in 1929 Green proposed that automobile accidents should be governed by a compensation system analogous to the workers’ compensation plans, arguing that his duty (policy) factors supported this proposal.<sup>131</sup> In his view, automobile accidents were inevitable, and the “same economy is involved in compensating the hurt individual . . . as is involved in the employer-employee cases. Insurance is the best available protection we have against the inevitable. . . . hurts and injuries of a motorized society.”<sup>132</sup> Moreover, “[t]he motorist has chosen to make the streets unsafe. . . . [and] gets the advantages”; thus, “[m]orality, economy, and justice . . . all require the person who creates hazards on a large scale to avail himself of the protection insurance gives in behalf of his victims.”<sup>133</sup> Green’s conclusion was that this litigation should be taken from courts and given to “some less ponderous agency.”<sup>134</sup>

Green also proposed a compensation plan to govern railroad crossing cases, and he argued that cases of child trespassers injured on industrial

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126. *Id.* at 277.

127. *Id.*

128. *Id.* at 278.

129. *Id.*

130. *Id.* at 277.

131. *See id.* at 278–81.

132. *Id.* at 278.

133. *Id.*

134. *Id.* at 278–79.

property should also “be placed upon some basis of insurance similar to the workmen’s compensation device.”<sup>135</sup>

#### *D. Judicial Decisionmaking in Industrial Premises Cases*

##### *1. Leon Green’s Descriptive Theory*

Green wrote that under basic tort doctrine a landowner “owes a trespasser no duty other than not to intentionally harm him.”<sup>136</sup> In other words, landowners were immune from liability to trespassers for what, in the absence of a no-duty rule, would be negligence. Moreover, Green wrote, “No group of ideas has been harder set in the pronouncements of courts.”<sup>137</sup> Yet despite this doctrinal hurdle to victim recovery for negligent behavior, courts were able to afford relief in the situation type of persons injured while trespassing on industrial premises.

Breaking from traditional analysis, Green rejected the “assumption (stated in the decisions as a principle) . . . that all landowners are to be subjected to the same responsibility.”<sup>138</sup> In his view, special problems arose out of a particular situation type—cases involving the “industrial land owners.”<sup>139</sup> Unlike the “medieval [or even contemporary] domestic establishment with its yards and meadows . . . an entirely different sort of enterprise [existed in] a railway yard, a steam mill, a factory, a power system, a supply depot, an explosive storehouse, an abandoned plant, or many other such premises.”<sup>140</sup> In cases involving trespassers injured on these industrial premises, courts were able to impose liability for negligence through “a process of ‘peaceful penetration’ . . . [although] negligence [could not] yet wear its own garb.”<sup>141</sup>

Within the industrial landowner cases, Green also believed that a particular situation type could be singled out. This was the case of injuries to young children, where “[t]he trespasser rule has had its bloodiest toll.”<sup>142</sup> In these cases the “landowner’s responsibility was denied [at] first because the intruder himself was a wrongdoer and there was no duty owed him.”<sup>143</sup> Nevertheless, courts later allowed recovery. And they rationalized their results after the fact with appropriate rules and reasons. A majority of courts met the “wrongdoer” argument by

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135. *Id.* at 273–74.

136. *Id.* at 271.

137. *Id.*

138. *Id.* at 274.

139. *Id.* at 272.

140. *Id.* at 273.

141. *Id.* at 271.

142. *Id.* at 272.

143. *Id.*

conceding “this ground but met it with a like moral argument.”<sup>144</sup> These courts “said that the landowner who places dangerous and attractive machinery on his land thereby tempts young children, and his temptations amount to invitations and having invited them into his traps, he himself is a wrongdoer and hence responsible.”<sup>145</sup> This was a “good result” reached by a method “judges thought . . . necessary under their accepted theory.”<sup>146</sup> Indeed, this “was no small theological feat.”<sup>147</sup>

“A somewhat similar development ha[d] taken place with reference to adults—those who walk on railway tracks or go upon the premises of industrial plants.”<sup>148</sup> They may choose to walk along dry railroad beds “rather than the muddy streets of the outlying districts of large communities.”<sup>149</sup> Or they may choose “to satisfy their curiosities by entering and observing the operations of industrial plants.”<sup>150</sup> Although their activities are not “particularly sinful . . . they are trespassers, or tolerated intruders at best.”<sup>151</sup> Nevertheless, courts imposed liability for negligence, although their “judgments [were] years in advance of their language.”<sup>152</sup> For example, many courts insisted that “railway[s] . . . keep a lookout for such persons, that other landowners must warn or protect them from hidden dangers, and must refrain from negligent action while such persons are present.”<sup>153</sup> The “creative power of the courts to raise an intruder from the category of a trespasser to that of an invitee” provided “‘bootleg’ protection.”<sup>154</sup> The “power of judges to work such miracles,” Green wrote, “has always been beyond the understanding of those who would insist upon the sanctity of principles.”<sup>155</sup> Judges were able to “bend both principles[] and judgment . . . long before the judges [overcame] their own habits of talking about such matters in the refined categories of ‘fault.’”<sup>156</sup>

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144. *Id.*

145. *Id.* at 272–73 (footnote omitted) (citing *Keffe v. Milwaukee & St. Paul Ry. Co.* (1875)).

146. *Id.* at 273.

147. *Id.*

148. *Id.* at 274.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 275.

153. *Id.* at 274.

154. *Id.*

155. *Id.*

156. *Id.* at 275.

Green's description of judicial decisionmaking in the trespasser cases thus confirms much of Leiter's claim about the sociological wing of the Legal Realists. In conformity with that claim, Green found that judicial decisions favorable to plaintiffs fell into discernable patterns, though not those one would predict from basic tort doctrine,<sup>157</sup> that is, the rule that a landowner owes a trespasser no duty other than not to intentionally harm him. Instead, as Leiter puts it, "[J]udicial decisions fall into (sociologically) determined patterns, in which . . . judges reach results based on a (generally shared) response to the underlying facts of the case which . . . they then rationalize after-the-fact with appropriate legal rules and reasons."<sup>158</sup> These were the rules that allowed a negligence cause of action for young children injured by dangerous and attractive machinery on industrial property (which evolved into the child trespasser rule) and rules that in cases of adult trespassers on industrial property required railways to keep a lookout for such persons and other industrial landowners to warn or protect them from hidden dangers and refrain from negligent action while such persons were present.

In these industrial trespasser cases, judicial decisions rationalizing plaintiff recovery after the fact with legal rules were responding, in Leiter's terms, to uncodified norms. These norms, however, were not those of the commercial culture. In Green's view, the uncodified norms that courts enforced in these cases were those that he articulated in his policy (duty) factors. Green wrote that the ability of industrial enterprises, such as railroads and factories, "to reduce the risks of hurt even as to those who insist upon subjecting themselves to such risks, is sufficient to warrant judgment for plaintiffs in many of these cases."<sup>159</sup> Moreover, "the costs of affording such protection can be cared for as part of the costs of the enterprise."<sup>160</sup> And "more than all, . . . the risk when it results . . . can best be borne and absorbed by this type of landowner."<sup>161</sup> Summarizing the application of his duty factors to child trespasser cases, Green wrote that "[e]very consideration of economics, of ethics, of prevention, and of justice would all place a severe duty upon the landowner in such cases."<sup>162</sup> It was in response to the uncodified social norms represented by these policy factors that courts allowed tort causes of action for persons

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157. See Leiter, *Positivism*, *supra* note 1, at 1148. It should be noted, however, that Green might nevertheless agree with Judge Posner's statement that many judicial decisions, though not the most important ones in terms of the development of legal doctrine or the impact on society, are responsive to legal rules. POSNER, *supra* note 15, at 8. This would be especially true of decisions *unfavorable* to plaintiffs.

158. Leiter, *Rethinking Legal Realism*, *supra* note 1, at 285.

159. Green, *The Duty Problem: II*, *supra* note 7, at 274.

160. *Id.* at 273.

161. *Id.*

162. *Id.*

injured while trespassing on industrial premises. These results were then rationalized after the fact with legal rules and reasons. Courts had found, for example, that “temptations amount to invitations”<sup>163</sup> and that industrial landowners had a duty to “warn or protect [intruders] from hidden dangers.”<sup>164</sup> This “‘bootleg’ protection”<sup>165</sup> reached a “good result”<sup>166</sup> by a method “judges thought . . . necessary under their accepted theory.”<sup>167</sup>

## 2. *A Note on Prediction*

Leiter writes that a naturalistic theory of adjudication “must enable lawyers to predict what courts will do.”<sup>168</sup> That is a pretty tall order, given that a primary focus of the Legal Realists was on appellate cases,<sup>169</sup> which by definition are those that present the most difficult issues. As Green pointed out, “[T]he process in negligence cases, of all the patterns of the judicial process, is least fixed and most flexible.”<sup>170</sup> As a result, “[n]o aggregate of scholars or judges or practitioners can anticipate its judgment with assurance in a single complex case.”<sup>171</sup> Moreover, even courts that responded to situation types too often clung to outmoded doctrines, leading to either “the confusion or the bad habits resulting from carrying along these phrases which misrepresent everything that is being done.”<sup>172</sup> So the predictive power of Green’s Legal Realism should not be overstated with respect to individual cases.

But Leiter has offered an alternative version of the predictive power of Legal Realist insights: the Realist perspective should allow lawyers to make “predictive generalizations about *patterns of decision[s]*.”<sup>173</sup> And this, indeed, is what Green was offering in his analysis of the industrial premises cases. Adapting what Leiter characterizes as the “‘central tenet’ of the Realist Movement” to the tort context, we see Green’s demonstration that “judges’ decisions arise not merely from the rules they state in their

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163. *Id.*

164. *Id.* at 274.

165. *Id.*

166. *Id.* at 273.

167. *Id.*

168. Leiter, *Rethinking Legal Realism*, *supra* note 1, at 286.

169. *Id.* at 273.

170. Green, *The Duty Problem: II*, *supra* note 7, at 281.

171. *Id.*

172. *Id.* at 275.

173. Leiter, *Rethinking Legal Realism*, *supra* note 1, at 281 (emphasis added).

opinions, but at least as much from unstated reasons<sup>174</sup>—from the situation type and underlying policy considerations.

Moreover, in assessing the predictive power of the Realist perspective, we can ask, “Compared to what?” The alternative to Legal Realism, it will be recalled, was legal formalism, the view that “judges respond primarily—indeed, perhaps exclusively—to the rational demands of the applicable rules of law and modes of legal reasoning.”<sup>175</sup> The “‘bootleg’ protection”<sup>176</sup> that courts were affording in industrial premises cases would mystify the formalist. As Green wrote, the “power of judges to work such miracles has always been beyond the understanding” of those who started with the “assumption (stated in the decisions as a principle) . . . that all landowners are to be subjected to the same responsibility” and who “would insist upon the sanctity of principles.”<sup>177</sup>

So prediction would not be perfect for the Legal Realist. But the predictive power of Legal Realism would be better than that of formalism. And prediction would be improved for the Realist who understood a Realist-related insight that the lawyer needs to know the *type of court* that is deciding the case. One needs to recognize that there are “court types” as well as “situation types,” and one also needs to understand the ideological makeup of the court and its willingness to adapt to the “new order of things”<sup>178</sup> by abandoning or adapting traditional formalistic doctrine. Previous decisions of the court, as lawyers know, are a guide to prediction by a lawyer who knows the importance of both situation type and court type.

### 3. *Leon Green’s Normative (Reformist) Theory of Judicial Decisionmaking*

The main thrust of Green’s writing was normative. As he noted, the accommodations made for child trespassers on industrial property were made by a majority of courts, and many courts had also made accommodations for adults. Green’s approval of the “good result” reached by affording such “bootleg protection” can be seen as implicit normative advice that lagging courts should move in this direction. In Leiter’s terms:

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174. *Id.* at 275–76 n.40 (quoting James J. White, *The Influence of American Legal Realism on Article 2 of the Uniform Commercial Code*, in *PRESCRIPTIVE FORMALITY AND NORMATIVE RATIONALITY IN MODERN LEGAL SYSTEMS* 401, 401 (Werner Krawietz et al. eds., 1994)) (internal quotation marks omitted).

175. *Id.* at 277–78.

176. Green, *The Duty Problem: II*, *supra* note 7, at 274.

177. *Id.*

178. *Id.* at 270.

[T]o the extent, however small, that judges are *not* fact-responsive and fairness-driven in their decisions (to the extent, for example, that they are sometimes formalistic or Langdellian in their mode of decision), then to that extent they *ought* to decide as the core claim says most of them ordinarily do.<sup>179</sup>

If this had been the extent of Green’s normative advice, he might be seen as adding a small nonquietist element to an otherwise quietist jurisprudence. But Green believed that courts should follow what most courts were doing because of his policy factors—and he had bigger fish to fry.

Green, for example, went beyond proposing that lagging courts respond to his policy factors by joining the majority of courts in extending bootleg protection to adult trespassers. Noting that the judgments of courts “are years in advance of their language,” Green wrote that “[t]he judicial process does not require either the confusion or the bad habits resulting from carrying along these phrases which misrepresent everything that is being done.”<sup>180</sup> In his view the “normal negligence formula of ‘reasonable care under all the circumstances’ was designed for just these cases in which judgment must have the widest range and in which uniformity, except in process, is impossible.”<sup>181</sup> Green thus urged that courts, based on his policy factors, do what no court had done or would do for decades: hold that landowners owe a full duty of care to adult (and presumably child) trespassers—and presumably licensees—on industrial property. Four decades later, the California Supreme Court would write policy factors derived from Green into law in its landmark decision in *Rowland v. Christian*, which abolished the traditional landowner rules.<sup>182</sup>

#### *E. Beyond Negligence Law: Endorsing and Extending Rylands-Style Strict Liability Rules*

Green’s normative agenda, moreover, extended beyond reforms within the negligence system. Contrary to traditional theorists who viewed the strict liability rule of *Rylands v. Fletcher*<sup>183</sup> as “misguided,”<sup>184</sup> Green suggested that courts might adopt strict liability rules, which could simplify litigation and assure compensation. Green wrote that “it is not

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179. Leiter, *Legal Realism*, *supra* note 1, at 278.

180. Green, *The Duty Problem: II*, *supra* note 7, at 275.

181. *Id.*

182. See *infra* notes 279–81 and accompanying text.

183. *Rylands v. Fletcher*, (1868) 3 L.R.E. & I. App. 330 (H.L.).

184. Green, *The Duty Problem: II*, *supra* note 7, at 282.



always necessary that courts await legislation to relieve them of the glut of cases which their own process has brought upon them.”<sup>185</sup> Judges, for example, “were not helpless in reducing to a simple basis the responsibility of the keeper of wild animals for the hurts done by them.”<sup>186</sup> Similarly, the “extreme use of power in *Rylands v. Fletcher* was not as misguided as sometimes thought.”<sup>187</sup> Indeed, Green approved of a 1928 California Supreme Court decision, *Green v. General Petroleum Corp.*,<sup>188</sup> that applied strict liability to a defendant whose oil well had blown out while being drilled with due care. The California court “properly ignored the commitment it had made doctrinally [rejecting *Rylands* in previous cases] and decided the case on a broader basis.”<sup>189</sup> Although Green did not pursue the matter, the application of strict liability to oil wells would inevitably suggest broader applications of strict liability.<sup>190</sup>

The far-reaching implications of Green’s policy-based approach to tort doctrine can be seen in a two-part article published in 1929 and 1930 by Lester Feezer and “prepared under the direction of Dean Leon Green.”<sup>191</sup> Elaborating on Green’s position that courts and legislatures could legitimately decide to “place the loss where it will be felt the least and can best be borne,”<sup>192</sup> Feezer wrote:

[A] guiding principle as to who can best bear loss . . . would seem to be that it is the party who can absorb it with the least injury to himself and in such a way as will produce a minimum of consequential problems of social adjustment for himself or his dependents.<sup>193</sup>

Furthermore, he argued that placing a loss on a defendant was the beginning, not the end, of the analysis. “The defendant upon whom is placed the burden of a money loss in a tort action may distribute the loss by insurance or by adding it to the cost of carrying on his business; in either case it is distributed ultimately upon society.”<sup>194</sup> From this perspective Feezer regarded workers’ compensation as the “great outstanding step in the process of shifting loss arising from personal

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185. *Id.*

186. *Id.*

187. *Id.*

188. *Green v. Gen. Petrol. Corp.*, 270 P. 952, 955 (Cal. 1928).

189. Green, *The Duty Problem: II*, *supra* note 7, at 282 n.71.

190. *See, e.g., Luthringer v. Moore*, 190 P.2d 1, 8 (Cal. 1948) (discussing strict liability in regard to fumigation).

191. L.W. Feezer, *Capacity To Bear the Loss as a Factor in the Decision of Certain Types of Tort Cases* (pts. 1 & 2), 78 U. PA. L. REV. 805, 805 (1930), 79 U. PA. L. REV. 742, 742 n.1 (1931).

192. Green, *The Duty Problem: II*, *supra* note 7, at 256.

193. Feezer, *supra* note 191, pt. 1, at 809.

194. *Id.* at 809–10.

injury,”<sup>195</sup> and he followed Green’s lead with a proposal for an automobile compensation plan.

More provocative was Feezer’s proposal that *courts* adopt a strict liability rule in a specific class of products cases. Feezer’s strict liability proposal was tailored to the specific product to which Green had pointed as the single most important source of injuries of the time—the automobile.<sup>196</sup> Feezer did not focus on *manufacturer* liability, and the law of implied warranty was not a source of his proposed strict products liability rules. Instead, he built on *Rylands v. Fletcher*.

Noting that “[e]vidences of a tendency to shift and distribute the loss are appearing from time to time in diverse forms” and that this “tendency may take the form of a greater development of liability without fault,” Feezer suggested that courts might apply strict liability rules to vehicle operators by building on *Rylands v. Fletcher*.<sup>197</sup>

The courts may find it just as easy to place a legal responsibility upon the man who brings a dangerous force upon the highway, in the form of an automobile weighing thousands of pounds and capable of going eighty miles per hour, to keep it under control at his peril, as to fix this degree of responsibility upon the man who brings upon his land a substance which, if it escapes from his control, turns into a dangerous force.<sup>198</sup>

This proposal was, of course, an extension of Green’s 1929 endorsement of strict liability rules that built on *Rylands v. Fletcher*.<sup>199</sup> If courts had accepted Feezer’s view, the stage would have been set for the judicial creation of a sweeping enterprise liability. Beyond automobiles loomed other enterprises and activities wherein the application of strict liability would serve the policies of the enterprise liability theory.

#### IV. KARL LLEWELLYN’S TORT (PRODUCTS LIABILITY) LEGAL REALISM

Although Green had recognized that courts might expand the reach of *Rylands*-style strict liability rules, his focus on “tort” law meant that he neglected an existing body of strict liability rules. These were the strict liability rules that courts were employing in products cases under the law of sales, specifically the warranty doctrines that permitted courts to

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195. *Id.* at 814.

196. *See id.* at 812–14.

197. *Id.* at 813.

198. *Id.*

199. Green, *The Duty Problem: II*, *supra* note 7, at 282–83.

impose strict liability in cases of injury caused by food products.<sup>200</sup> It was out of these warranty decisions that the modern law of strict products liability grew and an aggressive common law strategy developed.<sup>201</sup> The seminal scholar was Karl Llewellyn, who addressed the issue of products liability in his 1930 casebook on the law of sales and in a 1936 article.<sup>202</sup>

Llewellyn was to the law of contract and sales what Green was to tort, a visionary prophet who, beginning in the 1920s, used the insights of Legal Realism<sup>203</sup> to debunk the methodology and policies of traditional theorists.<sup>204</sup> In Llewellyn's view, the 1906 Uniform Sales Act was out of date, "failing to relate meaningfully to the demands and complexities of modern commercial relations."<sup>205</sup> Llewellyn also believed the 1906 Act "embodied an obsolete *form* of law—consisting of rules derived from a few broad abstractions, removed from practical experience, and expected to answer all questions."<sup>206</sup> Llewellyn's critique of sales law, in short, paralleled Green's critique of tort law. And in 1930, shortly after Green published his *Duty Problem* articles, "Llewellyn published his first major work criticizing [Williston's Uniform Sales Act] as ill-suited to sales transactions."<sup>207</sup> That work, Llewellyn's famous casebook on sales,<sup>208</sup> began his lifelong venture into the modernization of sales law, which ultimately reached fruition in the 1960s with Article 2 of the Uniform Commercial Code, "the sales article of the most successful codification in American law."<sup>209</sup> Less well known is that Llewellyn's casebook made a contribution of fundamental importance to the substance and strategy of enterprise liability.<sup>210</sup>

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200. For an early account of the application by courts of strict liability in food cases, see Rollin M. Perkins, *Unwholesome Food as a Source of Liability* (pts. 1 & 2), 5 IOWA L. BULL. 6, 86 (1919–1920).

201. For an excellent account of Llewellyn's contribution to the enterprise liability theory, on which I draw, see John B. Clutterbuck, Note, *Karl Llewellyn and the Intellectual Foundations of Enterprise Liability Theory*, 97 YALE L.J. 1131, 1136 (1988).

202. See LLEWELLYN, *supra* note 7, at 341–42; Llewellyn, *supra* note 7, at 704 n.14; see also K.N. Llewellyn, *The Effect of Legal Institutions upon Economics*, 15 AM. ECON. REV. 665, 680–81 (1925) (providing early presentation of related views). For a detailed account of Llewellyn's contribution to the development of strict products liability, see Clutterbuck, *supra* note 201. See also Ursin, *supra* note 15, at 288 n.382.

203. See KALMAN, *supra* note 65; WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973).

204. For an excellent discussion of Llewellyn's sales scholarship, on which I draw, see Wiseman, *supra* note 118, at 472–73.

205. *Id.* at 472.

206. *Id.* at 473.

207. *Id.* at 475.

208. LLEWELLYN, *supra* note 7.

209. Wiseman, *supra* note 118, at 466.

210. See Clutterbuck, *supra* note 201; see also Ursin, *supra* note 15, at 288 n.382.

*A. Karl Llewellyn's Descriptive Theory: Strict Products Liability*

Examining the situation type of product injuries, Llewellyn found that judicial decisions had fallen into patterns, but not the patterns one would predict from orthodox legal doctrines.<sup>211</sup> In tort law, cases that formerly would have resulted in summary judgment for a product manufacturer or seller no longer were being so decided. Llewellyn wrote that this change could not be understood if one focused on tort law “in *theory*: ‘one responds for fault.’”<sup>212</sup> Rather, attention had to be paid to the “actual decisions,” which had shown “the tendency to constantly raise the degree of care required, and to constantly decrease the extent of proof required to get to the jury—leaving the jury to do the rest.”<sup>213</sup> This was “tort [law] in action: given *res ipsa loquitur*, what do juries do?”<sup>214</sup>

The new element in Llewellyn’s analysis was a second line of cases that had escaped the focus of tort scholars. These were the warranty decisions that, in the case of food products, had resulted in consumer recovery on a strict liability theory.<sup>215</sup> In this situation type, warranty law was “being stretched . . . to fit . . . a need . . . which the historical limitations of the warranty concept [such as the privity limitation] make it inadequate to cover.”<sup>216</sup> But when a “court proclaims a ‘warranty’ and *therefore* a recovery,” Llewellyn suggested that it is not “a case of ‘warranty’ as we know it in mercantile sales law [but rather] a technical excuse for shifting a risk which seems to call for shifting.”<sup>217</sup>

Courts in products liability cases were deciding cases in a manner favorable to plaintiffs and rationalizing these results with available legal materials.<sup>218</sup> As Llewellyn explained, “How could case-law grow, without technical defects? You cannot both really follow, and get results, at once. Since you have to *seem* to follow, and also have to get results, almost every advance is at the price of fudging your logic.”<sup>219</sup>

Courts in these cases were responding to uncodified norms, but these norms were not those of the commercial culture.<sup>220</sup> And Llewellyn’s

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211. See Leiter, *Positivism*, *supra* note 1, at 1147–48.

212. Llewellyn, *supra* note 7, at 704 n.14.

213. LLEWELLYN, *supra* note 7, at 342.

214. Llewellyn, *supra* note 7, at 704 n.14.

215. LLEWELLYN, *supra* note 7, at 342.

216. *Id.* at 343.

217. *Id.*

218. See *id.* at 342.

219. Llewellyn, *supra* note 7, at 705 n.14.

220. See LLEWELLYN, *supra* note 7, at 342.

discussion of these norms reveals his normative theory of adjudication.<sup>221</sup> Llewellyn, in the context of products cases, in fact held normative and substantive views that mirrored the views of Leon Green, and he was no quietist.

## B. Karl Llewellyn's Normative Theory

### 1. Policies

The “tendencies toward . . . which [these cases were] driving” was indicated by what Llewellyn called the “ideal picture.”<sup>222</sup> “If judges were legislators, and felt free of precedent, . . . if the courts were given to viewing social policy as a whole, rather than the particular case before them, . . . the goal of the development would in its main outlines have been clear.”<sup>223</sup> The “needed protection,” Llewellyn wrote, “is twofold: to shift the immediate incidence of the hazard of life in an industrial society away from the individual over to a group which can distribute the loss; and to place the loss where the most pressure will be exerted to keep down future losses.”<sup>224</sup> These twin policies of creating incentives for safety and distributing accident losses mirror two of Green’s duty/policy factors: the “prophylactic factor” concerned with prevention of future harm and the “justice factor”—which was seen as “synonymous [with] the capacity to bear the loss.”<sup>225</sup> (And they would become the policy justification Justice Traynor would offer for his proposal for strict products liability in his 1944 concurrence in *Escola v. Coca Cola Bottling Co.*<sup>226</sup>) Llewellyn wrote that “it is desired to [provide this twofold protection] in the quickest, least expensive . . . way.”<sup>227</sup>

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221. See Wiseman, *supra* note 118, at 472.

222. LLEWELLYN, *supra* note 7, at 342.

223. *Id.* at 341.

224. *Id.* In 1920 Rollin M. Perkins, in supporting application of strict liability in food cases, had seen such liability as “stimulating such great care that the injury will be avoided.” Perkins, *supra* note 200, pt. 2, at 110. And in 1924 Edwin W. Patterson suggested that the warranty doctrine applied in food cases should be analyzed in terms of risk bearing. Edwin W. Patterson, *The Apportionment of Business Risks Through Legal Devices*, 24 COLUM. L. REV. 335, 357–59 (1924). Patterson was concerned that the “theory of contracts” posed privity barriers to recovery from manufacturers by injured consumers. *Id.* at 358. “[O]nly by some violent pounding and twisting can the [warranty] concept be made to yield the result called for by considerations of economic and social policy.” *Id.* Thus, Patterson asked, “Would it not simplify matters to state the rules as one of . . . risk-bearing?” *Id.*

225. Magruder, *supra* note 108, at 415.

226. 150 P.2d 436, 440–41 (Cal. 1944) (Traynor, J., concurring).

227. LLEWELLYN, *supra* note 7, at 341.

## 2. Karl Llewellyn's Normative Advice to Legislatures

In the context of this “ideal picture,”<sup>228</sup> Llewellyn offered normative advice based on his twofold policies. Strict liability should be imposed on manufacturers who are “equipped to spread, and indeed to reduce, risks.”<sup>229</sup> “The first group liable, to any consumer, should be the manufacturer. . . . The consumer, barring his own fault in use, should have no negligence to prove; that the article was not up to its normal character should be enough.”<sup>230</sup> Under this approach, “the first point of loss infliction would be [the manufacturer,] a party best able to prevent a similar loss.”<sup>231</sup> But “the loss would lie ultimately where it belongs, on the consumers of the article concerned *en masse*, in competition with other articles each carrying its own true costs in human life and effort.”<sup>232</sup>

This was the “ideal picture,” and Llewellyn wrote that it was “time for legislation,”<sup>233</sup> presumably to enact this broad rule of strict products liability. Llewellyn did not elaborate on this terse suggestion in his 1930 casebook, but he took steps to see it implemented a few years later.

By the 1930s, it had become apparent that the Uniform Sales Act was unsuited to a modern industrial society. Llewellyn called the Uniform Sales Act a “rebuilt machine,”<sup>234</sup> and in “the 1930s . . . lawyers, scholars, and merchants reached a consensus . . . that the Uniform Sales Act of 1906 was obsolete.”<sup>235</sup> As a consequence, Llewellyn and others began to contemplate the possibility of replacing the “rebuilt machine” of the Uniform Sales Act with a new creation, which would eventually become the Uniform Commercial Code.<sup>236</sup>

Llewellyn contemplated that the law of products liability would be part of the new Code and that this would give him the opportunity, as part of a comprehensive reform of the law of sales, to incorporate a strict liability provision that would serve the goals of accident prevention and loss spreading. How much this idea deviated from the prevailing norms of the commercial culture was soon made crystal clear. In 1940 and 1941,

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228. *Id.* at 342.

229. Llewellyn, *supra* note 7, at 704 n.14.

230. LLEWELLYN, *supra* note 7, at 341.

231. *Id.* at 342.

232. *Id.*

233. *Id.*

234. *Id.*

235. Wiseman, *supra* note 118, at 472.

236. *See id.* at 507.

Llewellyn proposed, as part of his new law of sales, a manufacturer's implied warranty of freedom from dangerous defects. This warranty would impose an "absolute liability . . . on manufacturers for injury 'in person or property' incurred by anyone 'in the ordinary course of use or consumption . . . by reason of defect' in the goods."<sup>237</sup>

Llewellyn's proposed sales law was considered in the National Conference of Commissioners on Uniform State Laws beginning in 1940.<sup>238</sup> Merchants' representatives voiced such strong opposition at the 1941 conference that Llewellyn dropped the warranty provision entirely. Asked about the deletion at the 1943 meeting, "Llewellyn replied that 'every time we tried to draw' the rule, it 'scare[d] everybody that saw it pea green.'"<sup>239</sup> In this initial skirmish between the norms of commercial culture and the enterprise policies of loss spreading and accident prevention, the commercial culture prevailed.

### 3. *Karl Llewellyn's Normative Theory of Judicial Decisionmaking in Products Liability Cases*

Recall that Leiter considers Llewellyn's commercial law scholarship an example of normative quietism. Llewellyn's normative advice to judges in commercial disputes was to "tell judges that they ought to do what it is they [would] do anyway, that is, enforce the norms of commercial culture, of the prevailing mercantile practice."<sup>240</sup> Leiter detects a further nonquietist element: "[T]o the extent, however small, that judges are *not* fact-responsive and fairness-driven . . . then to that extent they *ought* to decide as the core claim says most of them ordinarily do."<sup>241</sup> In contrast, nonquietists such as Felix Cohen believed courts should examine real-world facts about a particular situation type, assess "economic, sociological, political, or ethical questions," and then "formulate [a] rule."<sup>242</sup>

In the field of products liability, not all courts were imposing strict liability in food cases. Thus, Llewellyn can be seen as offering implicit normative advice to courts that were "hampered in their vision";<sup>243</sup> they should join the trend of the warranty line of decisions that, by "fudging [their] logic,"<sup>244</sup> had allowed recovery in food cases and that "wax[ed]

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237. *Id.*

238. *See id.* at 490.

239. *Id.* at 523–24 n.255 (alteration in original).

240. Leiter, *Legal Realism*, *supra* note 1, at 277.

241. *Id.* at 278.

242. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 810 (1935).

243. LLEWELLYN, *supra* note 7, at 342.

244. Llewellyn, *supra* note 7, at 705 n.14.

great by way of glass in beverages or bread, and poisonous meat.”<sup>245</sup> One might characterize this as a small element of nonquietism. But that would be a mistake. Llewellyn believed that courts should join this trend because a strict liability rule would serve the goals of distributing losses and exerting pressure to keep down future losses—because of reasons of social policy that clashed with the prevailing norms of commercial culture. Moreover, Llewellyn did not see this development as “confined to [the food cases], its center. It spreads to cover other hazards to consumers.”<sup>246</sup> And Llewellyn’s “ideal picture” of a broad strict liability doctrine indicated “a set of tendencies toward . . . which [the cases were] driving.”<sup>247</sup>

The nonquietist implications of Llewellyn’s analysis can be seen in a 1938 article by Lester Feezer.<sup>248</sup> As previously discussed, Feezer’s provocative 1931 discussion of products liability had not focused on manufacturer or dealer liability nor had Feezer suggested or mentioned the law of warranty as a source of strict liability rules.<sup>249</sup> In an article published seven years later, however, Feezer’s thinking once again had been transformed, this time by Llewellyn. Feezer incorporated in quotation form two pages of material from Llewellyn’s 1930 casebook, writing that “Professor Llewellyn has outlined the situation.”<sup>250</sup> Following Llewellyn’s lead, Feezer wrote that the food cases “furnish[ed] a convenient stepping stone for the inclusion of other manufactured articles in the same category.”<sup>251</sup> Building on this case law, Feezer “suggest[ed] the possibility that makers of all sorts of products [would] be held responsible . . . without showing negligence.”<sup>252</sup> Such a rule would fulfill the policy of placing the burden “where it can be best distributed.”<sup>253</sup> In the years that followed, other enterprise liability scholars and, importantly, Justice Traynor would also take their cue from Llewellyn in suggesting judicial adoption of strict liability rules to cope with the problem of injuries caused by defective products.

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245. LLEWELLYN, *supra* note 7, at 342.

246. *Id.*

247. *Id.*

248. See Lester W. Feezer, *Manufacturer’s Liability for Injuries Caused by His Products: Defective Automobiles*, 37 MICH. L. REV. 1 (1938).

249. See Feezer, *supra* note 191, pt. 1.

250. Feezer, *supra* note 248, at 5–6.

251. *Id.* at 10–11.

252. *Id.* at 26.

253. *Id.* at 24.



V. POSTSCRIPT: LEGAL REALIST (ENTERPRISE LIABILITY)  
SUCCESES IN COURTS

A. *Strict Products Liability*

Llewellyn's (and Feezer's) proposal for strict products liability was picked up by Prosser in his 1941 treatise and then, importantly, by Justice Traynor in his 1944 concurring opinion in *Escola v. Coca Cola Bottling Co.*<sup>254</sup> In that opinion, Traynor urged that persons injured by defective products should not have to prove negligence; a strict liability rule should govern.<sup>255</sup> In sharp contrast to Seavey-like formalists, Traynor's stance was that the policy of loss distribution and the fact of insurance were not simply legitimate but of central importance in judicial lawmaking. Traynor wrote that the "cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured."<sup>256</sup> This misfortune, however, is "a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."<sup>257</sup> Traynor also emphasized that strict liability should be imposed in order to create incentives for safety, writing that "public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot."<sup>258</sup>

The *Escola* concurrence used the insights and techniques of the Realists: it looked behind the formality of legal rules, inquired how rules "really work," and examined both the historical bases of existing legal rules and the real world in which these rules must operate. Justice Traynor wrote that traditional products liability rules were the outgrowth of a different era: "[H]andicrafts have been replaced by mass production with its great markets and transportation facilities, [and] the close relationship between the producer and consumer of a product has been altered."<sup>259</sup> Consequently, the "manufacturer's obligation to the consumer must keep pace with the changing relationship between them."<sup>260</sup>

Moreover, Justice Traynor emphasized that when one moved beyond a mere acceptance of the verbal formulas of legal doctrines, it became

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254. See 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

255. *Id.*

256. *Id.* at 441.

257. *Id.*

258. See *id.* at 440–41.

259. *Id.* at 443.

260. *Id.*

apparent that strict liability was not far from the law as it existed even in 1944. In cases of injuries caused by defective food products, courts had granted plaintiffs using warranty law a strict liability recovery against manufacturers of defective food products. Those courts had “resorted to various fictions to rationalize the extension of the manufacturer’s warranty to the consumer.”<sup>261</sup> Recognizing the desirability of the results reached through these fictions, Traynor was ready to discard the fictions and openly embrace a rule of strict manufacturing liability.<sup>262</sup> Justice Traynor’s analysis of negligence law was similar. He recognized that courts had “held the manufacturer[s] liable on a mere fiction of negligence.”<sup>263</sup> He also recognized that courts left to juries the decision “whether the inference of [negligence had] been dispelled, regardless of the evidence against . . . negligence.”<sup>264</sup> In doing so, the reality was that “the negligence rule approaches the rule of strict liability.”<sup>265</sup> Justice Traynor concluded that “[i]f public policy demands that a manufacturer of goods be responsible for their quality regardless of negligence there is no reason not to fix that responsibility openly.”<sup>266</sup>

Justice Traynor’s *Escola* proposal for judicial adoption of strict products liability was “heresy to formalists of the 1940s and 1950s.”<sup>267</sup> And it, “as well as its controversial loss spreading policy, violated 1950s legal process norms of ‘neutrality’ and ‘reasoned elaboration.’”<sup>268</sup> Both the strict liability doctrine and its underlying policies, however, were written into California law beginning in the 1960s with *Greenman v. Yuba Power Products, Inc.*<sup>269</sup> Based on these policies, the California Supreme Court, with little hesitation, extended strict liability beyond manufacturers to include retailers,<sup>270</sup> wholesalers,<sup>271</sup> and lessors.<sup>272</sup> These rulings, which quickly were followed by courts across the nation,

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261. *Id.* at 442.

262. *Id.* at 442–43.

263. *Id.* at 442.

264. *Id.* at 441.

265. *Id.*

266. *Id.*

267. Ursin, *supra* note 4, at 1336.

268. *Id.*

269. *See* 377 P.2d 897, 900–01 (Cal. 1963).

270. *See* *Vandermark v. Ford Motor Co.*, 391 P.2d 168, 171–72 (Cal. 1964).

271. *See* *Canifax v. Hercules Powder Co.*, 46 Cal. Rptr. 552, 557 (Ct. App. 1965).

272. *See* *Price v. Shell Oil Co.*, 466 P.2d 722, 723, 726–27 (Cal. 1970).

represented, according to Prosser, “the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts.”<sup>273</sup>

### B. Negligence Law and Duty

The Legal Realists’ normative agenda met with similar success within negligence law. Leon Green, it will be recalled, had proposed that policy, or “duty,” factors should replace traditional analysis to determine liability and duty rules.<sup>274</sup> One of these, the “justice factor,”<sup>275</sup> or “the capacity to bear the loss,”<sup>276</sup> was said at the time by critics to have “no place in a restatement of the existing law of the United States and not that of Utopia.”<sup>277</sup> This factor was said to have “never consciously or . . . unconsciously influenced the decision of any court.”<sup>278</sup> In 1968, the California Supreme Court, in its landmark decision in *Rowland v. Christian*, wrote policy factors that can be traced to Green into California tort law as it discarded the traditional landowner rules in favor of a general duty of due care.<sup>279</sup> In deciding whether to retain, discard, or modify traditional no-duty rules in the future, the court would consider

the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the *availability, cost, and prevalence of insurance for the risk involved*.<sup>280</sup>

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273. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 97, at 654 (4th ed. 1971).

274. Green, *The Duty Problem: II*, *supra* note 7, at 255–57.

275. *Id.* at 255–56.

276. See Magruder, *supra* note 108, at 415.

277. Bohlen, *supra* note 109, at 794.

278. See *id.*

279. 443 P.2d 561, 567 (Cal. 1968). *Rowland* adopted and augmented factors first articulated by the court in *Biakanja v. Irving*, 320 P.2d 16, 19 (Cal. 1957). *Biakanja*, in turn, drew on and augmented factors found in Prosser’s hornbook, see PROSSER, *supra* note 273, § 36, at 168, 172 (2d ed. 1955), and the Harper and James treatise, see FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 18.6, at 1052 (1956). Prosser’s factors were an adaptation of the duty factors Green had articulated in his *Duty Problem* articles.

280. 443 P.2d at 564 (emphasis added). *Rowland*’s considerations for determining duty reflect Green’s duty factors. Green, *The Duty Problem: II*, *supra* note 7, at 255–57; see *supra* notes 102–08 and accompanying text. *Rowland*’s moral blame factor, of course, directly reflects Green’s moral factor, but the foreseeability of harm to the plaintiff and the closeness of connection between the defendant’s conduct and injury suffered may also be seen to reflect this factor. *Rowland*’s policy of preventing future harm is linked to Green’s prophylactic factor, and *Rowland*’s focus on the availability, cost, and prevalence

The “fundamental principle,” the court wrote, is that liability generally should be imposed “for an injury occasioned to another by [a] want of ordinary care or skill.”<sup>281</sup>

Just as in the case of its landmark strict products liability rulings, so too the California Supreme Court’s approach to duty has proved influential with the nation’s courts, as illustrated by the *Restatement (Third) of Torts*.<sup>282</sup> Like California, the *Third Restatement* adopts a default rule that defendants owe a duty of reasonable care to avoid physical injury.<sup>283</sup> Also, like California, the determination that a no-duty rule should be adopted is a determination of policy or, in the words of the *Restatement*, “[a] principle or policy which warrants denying or limiting liability.”<sup>284</sup> Although the *Restatement* declines to delineate factors to assist in this policy determination, a substantial number of states have followed *Rowland* in this regard, and half the nation’s courts have followed *Rowland* in establishing a unitary standard of care in premises cases, at least with respect to invitees and licensees.<sup>285</sup>

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of insurance reflects Green’s justice factor, which encompasses “plac[ing] the loss where it will be felt the least and can best be borne.” Green, *The Duty Problem: II, supra* note 7, at 256. Likewise, *Rowland*’s consideration of the burden on the defendant and the consequences to the community is linked to Green’s economic factor and his consideration of the impact on economic activity.

*Rowland*’s duty factors would provide the framework for California decisions expanding the concept of duty in later years, and with a more conservative court in the past quarter century, they also provided the framework for cutting back liability. Compare *Isaacs v. Huntington Mem’l Hosp.*, 695 P.2d 653, 658–59 (Cal. 1985) (emphasizing foreseeability and expanding landowner duty to protect against crime by third parties), with *Ann M. v. Pac. Plaza Shopping Ctr.*, 863 P.2d 207, 214–15 (Cal. 1993) (limiting *Isaacs*).

281. *Rowland*, 443 P.2d at 563.

282. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 7 (2005).

283. *Id.*

284. *Id.*

285. See W. Jonathon Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 676 n.27 (2008) (citing RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 51 reporters’ note to cmt. a (Council Draft No. 7, 2007)).

