The Intellectual Origins of American Strict Products Liability: A Case Study in American Pragmatic Instrumentalism

by JAMES R. HACKNEY, JR.*

There has been a new generalization which, applied to new particulars, yields results more in harmony with past particulars, and, what is still more important, more consistent with the social welfare. This work of modification is gradual. It goes on inch by inch. Its effects must be measured by decades and even centuries. Thus measured, they are seen to have behind them the power and the pressure of the moving glacier.

—Benjamin Cardozo

The philosopher has not as a rule traced the ramifications of his ideas in economics, politics, the writing of history, jurisprudence . . . ; workers in the latter fields have often taken current ideas ready-made, and omitted to ask for their source in prior philosophic speculation, and to consider the degree in which they are affected—or infected—by that origin.

—John Dewey

The doctrine of strict products liability ("SPL") in America has long been the topic of heated debate. In dispute are the theoretical and policy considerations that underpin SPL. However, there has been no in-depth treatment of the intellectual origins of strict products liability as adopted in America. Of course, such noted legal historians and tort theorists as G. Edward White, Morton Horwitz, and George Priest have addressed the subject and duly identified the contributions of those in the legal academy. White's articulation of the connections between legal-academic influences and doctrinal/case law developments of SPL is unsurpassed. However, White pays little attention to the larger (non-legal) influences that impacted SPL. Horwitz's work comes closest to making the broad

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1. BENJAMIN CARDozo, THE NATURE OF THE JUDICIAL PROCESS 25 (1921) (hereinafter cited as "CARDozo").


3. G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY (1980) (hereinafter cited as "G. WHITE").
connections between legal academics and other intellectual movements established in this article. However, given the broad scope of his project (encompassing the corpus of American law), very little attention is paid to detailing the intellectual connections, specifically how they impacted on the development of SPL. Priest admirably lays out the policy and political maneuvering that immediately led up to the adoption of SPL, particularly in the legal literature. However, policy rationales are largely presented as a fait accompli rather than having evolved and been constructed over a long period of time. Thus, the strengths, shortcomings, motivations, and philosophical bases of the policies are insufficiently explored.

In short, none of the above-mentioned scholars, despite the significant contributions they make to our understanding of SPL, delve sufficiently into its conceptual origins. But is there some deeper theoretical and philosophical bases not yet explored? Is there some deeper meaning behind strict products liability that goes beyond narrow doctrinal analysis and boilerplate policy arguments? Yes, and yes.

It is important that these conceptual origins be explored so that the current debate over SPL, and tort law generally, may be informed by its historical antecedent. In addition, tensions within modern SPL can be better understood in light of some of the tensions and inherent ambiguities in its conceptual origins.

The conceptual origins of American strict products liability can be found in the development of late-nineteenth-century and early-twentieth-century American thought, specifically, pragmatism, institutional economics, and legal realism. Collectively, they will be referred to as "pragmatic instrumentalism."

Pragmatic instrumentalism played a significant role in changing the way tort law is viewed in America. This shift is evidenced in the change in perspective that a typical late-nineteenth-century judge would take in analyzing a products liability case and current-day perspectives. The typi-


6. The term “pragmatism” is the focus of much contemporary intellectual discourse. Throughout this article, I use the term in reference to a specific group of intellectuals (Charles Sanders Peirce, Nicholas St. John Green, Oliver Wendell Holmes, and John Dewey) who have been associated to varying degrees with the school of thought referred to as pragmatism. I am not referring to the contemporary pragmatism of Richard Rorty, Hilary Putnam, Cornel West, and others.

7. In drawing a delineation between pragmatism, legal realism, and institutional economics (which respectively represent the disciplines of philosophy, law, and economics), I do not wish to imply that those who toiled in the various disciplines did not from time to time change "intellectual hats" and directly contribute to other disciplines.

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A typical late-nineteenth-century judge would analyze the case as being between the plaintiff and defendant, and more than likely, would not concern himself with the social and policy implications. A corporate defendant would be viewed as a single entity as would any other defendant (person) before the court. The case would turn in the judge’s mind primarily on issues of causation and fault.

By contrast, today’s judge would be more apt to look at the same case from a social/policy perspective and view the corporation as uniquely situated in certain respects. As a consequence, issues of fault would be of secondary consideration and certain aspects of causation would be downplayed. These ideas constitute the core themes that lie behind SPL doctrine, as encapsulated in Section 402A of the Restatement of Torts, Second.9

This marks a significant transformation in perspective. However, it should be noted that the transformation was never complete. Even with the adoption of Section 402A of the Restatement of Torts, Second in 1965, there were still strands of fault/individualistic thought in American products liability law. Nevertheless, the general change in perspective had significant implications regarding the probable result of the lawsuit involved, with the legal framework being more amenable, at least on its face, to victim compensation. The social significance of the change in perspective is that it opened the door to the possible redistribution of wealth from corporations (or consumers of corporate products) to victims of accidents resulting from corporate products, and impacted product design and development.

This paper analyzes the intellectual movements that contributed to these profound changes. In doing so, I will reference representative figures in the movements who are particularly relevant to the history of strict products liability. Thus, some scholars who made germinal contributions to pragmatism, institutional economics, and legal realism will not be discussed. In addition, there are some strands of thought within particular movements that while general historical significance may not have played a major role in the development of SPL. These may be referenced but may not be central to my analysis. In using the phrase “intellectual move-

9. Section 402A states that

(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if

(a) the seller is engaged in the business of selling such a product, and

(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

ments," I in no way mean to imply that the schools of thought discussed in this paper were homogeneous. In fact, there were varying positions held by many who I describe as belonging to a particular movement. In addition, some figures I discuss would at times hold views that contradicted what they held at other times, or that were internally inconsistent. Nevertheless, there was a core of shared principles among and between the movements that allows for categorization.

I am careful to limit my claims of intellectual genealogy to American strict products liability in general: (1) because the intellectual forces discussed specifically contributed to developing American strict products liability doctrine; and (2) because it is important to understand that those who argued for, or provided the intellectual basis for, American strict products liability would not have necessarily argued for strict liability as the foundation for all tort law. In fact, theirs was an anti-foundation argument (against negligence as the foundation for all of torts). In addition, the temporal scope of this article is limited to the origins of American SPL, culminating in its general adoption in the 1960's.

Finally, I make no claim that other social or political forces did not play a role in shaping the development of American SPL. My project focuses on a particular configuration of ideas, pragmatic instrumentalism, and analyzes their impact on American SPL. Of course in the exposition of this configuration certain historical developments, i.e., the industrial revolution, will be highlighted as they relate to the ideas discussed, but I make no claim to an exhaustive study of everything in the American, or international experience that might have had some influence on SPL development.

Section I puts forth the tenets of pragmatism. The purpose is to demonstrate the influence of pragmatist thought on institutional economists and the legal realists involved in reconceptualizing torts.

Section II discusses the contribution of institutional economics to the intellectual construction of strict products liability. Particularly, the influence institutionalists had on the workers' compensation movement will be explored. An essential aspect of the discussion of institutional economics is the influence of pragmatist thought on institutional economists.

Section III sets forth the legal realists' contribution in formulating the intellectual foundation for strict products liability doctrine. Care is taken to draw the connections between the legal realist, and the pragmatist and institutionalist movements discussed in Sections I and II.

Section IV reviews the philosophical and policy basis of strict products liability as put forth by the legal scholars and judges who ultimately succeeded in promoting its implementation as law in America, crystallizing the insights advanced by their pragmatic instrumentalist predecessors. The connection between certain legal realist ideas and those who presided over the implementation of strict products liability will be explored. In addition, the connections with pragmatists' and institutionalists' thought will be made.

I will conclude with some observations on the implications of the
intellectual history of SPL for contemporary legal thought. In particular, there are implications for contemporary law and economics, and neopragmatism.

I. Pragmatism

The conceptual and intellectual bent that would eventually lead to SPL is found in pragmatism. This intellectual turn has been described as anti-formalism, anti-conceptualism, historicism, and contextualism. All of these terms are signifiers for a shift away from an a priori conception of knowledge.

A. The Metaphysical Club

The origins of pragmatism can be found in the loose configuration of intellectuals commonly referred to as the Metaphysical Club. Members of the club included Charles Peirce, William James, Chauncey Wright, Nicholas St. John Green, and Oliver Wendell Holmes. Of these five figures, two (Peirce and James) could generally be described as philosophers, although Peirce and James had wide-ranging intellectual interests. Green and Holmes were both lawyers by training, while Wright was a mathematician.

The Metaphysical Club members did not produce institutional documents or even detailed accounts of their collective ruminations. However, the intellectual products of those who were members demonstrate some shared beliefs: temporalism, relativism, probabilism/fallibilism, and pluralistic empiricism. These four ideas would go on to play a major role in shaping the intellectual evolution of SPL.

Temporalism refers to the pragmatist notion that forms of thought and the nature of things are products of their environment. Thus, they are the product of evolutionary processes. There is a direct connection between this temporalism and empiricism. Since all knowledge is contingent on the particularity of the social circumstance, including the history that precedes the present condition, any a priori theory is to be shunned.

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12. Wright, Green, Holmes, and Peirce studied in the Harvard Department of “Intellectual and Moral Philosophy” in the 1850’s. JOHN P. MURPHY, PRAGMATISM: FROM PEIRCE TO DAVIDSON 7 (1990).

13. WIENER, supra note 11, at 31.

14. These four ideas are enumerated by Philip Wiener as the philosophical legacy of pragmatism. Id. at 190-209. In addition, Wiener lists secular democratic individualism as part of the pragmatist legacy. While I agree with Wiener’s inclusion of democratic individualism as part of the pragmatist legacy, it was not a central theme in the intellectual history of SPL.

15. Id. at 194-197.
Relativism refers to the relative meaning of expressions and concepts in different contexts. This constitutes a rejection of theological and metaphysical ethics that accept claims of the universality of expressions and concepts, external to context. This relativism was combined with pragmatic ethics, which held that the worth of rules was to be judged by their benefit (under specific but variable conditions) to the greatest number of individuals in the society.

Probabilism and fallibilism reject any mechanistic view of society and instead look at social phenomena as being probable and contingent. Contingent owing to the limitations of sense experience and uncertainty of empirical evidence. Again, as with relativism, this ties in with empiricism because no universalistic “Truth” can supplant the place of revisable empirical inquiry. The basis of this view is that the plurality of life experiences and individuals makes it impossible to formulate universal generalities.

Pluralistic empiricism refers to the piecemeal analysis of complex phenomena. Such piecemeal analysis incorporates disparate areas of knowledge and brings them to bear on the problem at hand. In doing so, metaphysical solutions are avoided. A crucial component of this pluralistic empiricism was the need for verifiability as a test for truth.

The general parameters stated above notwithstanding, there was a good deal of diversity in perspective taken by the individual members of the Metaphysical Club. Therefore, it is best to discuss the members individually, rather than as a group. As to the intellectual history of SPL, Peirce, Green, and Holmes are the central figures to emerge from the Metaphysical Club. I will discuss their thought and then go on to discuss John Dewey (their intellectual heir) and situate him as the central figure in the connection between pragmatism and what was to emerge, over a long intellectual journey, as SPL.

1) Charles Sanders Peirce

Charles Sanders Peirce is widely regarded as the founder of pragmatism. Peirce was born in Cambridge, Massachusetts, in 1839. His father was a distinguished mathematician and professor at Harvard University. Peirce’s training and vocation were primarily that of a scientist, which was integral in fixing his philosophical views.

Peirce, like others in the Metaphysical Club, was deeply influenced by Charles Darwin’s *Origin of Species* and adopted an evolutionary view of knowledge. The primary intellectual off-shoot of this perspective was a disbelief in *a priori* knowledge and a rejection of Cartesian/formalism

16. *Id.* at 198.
17. *Id.* at 198-199.
18. *Id.* at 200.
19. *Id.* at 200-201.
20. The term empiricism has many meanings in philosophy. As used in this article, it refers to the empiricism of Charles Peirce and John Dewey.
thought.\textsuperscript{21}

Peirce’s view of knowledge is set forth in his essay, “Questions Concerning Certain Faculties Claimed for Man.”\textsuperscript{22} In the essay, Peirce argues that we do not have the power to constitute knowledge introspectively, independently of previous knowledge. Knowledge or belief is derived from observing external facts and by inference related to such observance.\textsuperscript{23} This is a call for the type of empiricism\textsuperscript{24} that would be central to pragmatic instrumentalism and play an important role in the arguments for SPL. Peirce framed the method as follows:

\begin{quote}
[\textit{V}alid inference . . . proceeds from its premiss, A, to its conclusion, B, only if, as a matter of fact, such a proposition as B is always or usually true when such proposition as A is true.\textsuperscript{25}}
\end{quote}

Peirce stated that this form of argument “might be called statistical argument.”\textsuperscript{26}

Peirce concluded that it is impossible to make valid universal propositions. However, there could be abstractions derived from “judgments of experience.”\textsuperscript{27} The general features are derived from the details: “the details are, in fact, the whole picture.”\textsuperscript{28} In sum, Peirce’s view of logical analysis can be described as inductive. In general, it would be inductive, as opposed to deductive, logical analysis that would animate pragmatic instrumentalism.

The consequence of Peirce’s view of knowledge was to reject Cartesian philosophy. It is the power of this rejection that makes Peirce such an eminent figure on the American intellectual scene. Peirce identified Cartesian philosophy as having four central tenets: (1) universal doubt; (2) belief that individual consciousness is the ultimate arbiter of truth; (3) argumentation based on “single thread inference” which depends on inconspicuous premises (deductive analysis); and (4) inability to explain many facts.\textsuperscript{29}

\textsuperscript{21} “Cartesian” refers to ideas associated with the 17th Century French philosopher Rene Descartes who is credited with introducing the philosophical concept of certainty in science based on self-evident first principles (\textit{a priori} thought).

\textsuperscript{22} Charles Peirce, \textit{Questions Concerning Certain Faculties Claimed for Man}, in \textsc{Collected Papers of Charles Sanders Peirce} V 135 (1934) (hereinafter cited as “PEIRCE, QUESTIONS CONCERNING”).

\textsuperscript{23} \textit{Id.} at 149.

\textsuperscript{24} Peirce’s empiricism, as well as Dewey’s, marked a decided break from the European empirical tradition, which stressed that experience (empirical observation) stemmed from the domain of sense as opposed to the external world. See John E. Smith, \textit{The Reconciliation of Experience in Peirce, James and Dewey}, in \textsc{America’s Philosophical Vision} 17-35 (1992).

\textsuperscript{25} Charles Peirce, \textit{Some Consequences of Four Incapacities}, in \textsc{Collected Papers of Charles Sanders Peirce} V 156, 159 (1934) (hereinafter cited as “PEIRCE, SOME CONSEQUENCES”).

\textsuperscript{26} \textit{Id.} at 162.

\textsuperscript{27} PEIRCE, supra note 22, at 152.

\textsuperscript{28} PEIRCE, supra note 25, at 183.

\textsuperscript{29} \textit{Id.} at 156.
Peirce attacked these premises one by one. First, there can be no universal doubt (pure objectivity) because we all begin with our individual prejudices. In fact, in fooling oneself into believing such universal doubt is possible, the result is inevitably the recovery of the initial beliefs that one thought had been discarded. Second, in Peirce’s mind, the quest for truth was not an individual endeavor but, rather, a product of the interaction among a community of philosophers. Third, philosophy could only be as successful as the sciences if it proceeded from “tangible premises” capable of scrutiny (inductive analysis). Finally, determining the inexplicable could only be accompanied by reasoning from “signs.”

The rejection of Cartesian thought marked a defining moment in American intellectual history. It would be this rejection that would lead the lawyers associated with the Metaphysical Club (Nicholas St. John Green and Oliver Wendall Holmes) to begin the transformation of American tort law from its formalist underpinnings in an evolutionary process towards SPL. Later pragmatic instrumentalists would take up Peirce’s charge to undertake scientific or statistical methodology in arguing for SPL.

2) Nicholas St. John Green

Nicholas St. John Green’s importance in the historical development of SPL lies not so much in any particular ideas he espoused, but rather in his approach, which reflected his pragmatist roots and was to be mirrored not only by his contemporary, Oliver Wendall Holmes, but by latter day legal realists. Green’s association with Holmes and the genesis of pragmatism are well documented. Both resided in the Boston area, with Green being a lecturer of law at Harvard University and later professor at Boston University.

Green’s affiliation with pragmatism is even more transparent than Holmes.’ In fact, Peirce once labeled Green as “the grandfather of pragmatism” referring to Green’s admonition that belief should be defined as that upon which one is prepared to act. This translated into a view that law should subject concepts and rules to careful logical analyses, and factor in changing social and historical conditions.

The importance of this approach is that it led to an anti-formalist

30. Id. at 156-57.
31. Id. at 157.
32. Id.
33. Id. at 157-158. Peirce’s argument for reasoning from signs and not allowing for any fact to be “absolutely inexplicable” is cursory and tautological in nature, and not susceptible to explanation beyond its restatement.
34. See HORWITZ, supra note 4, at 54 (Green’s importance lies not in his direct influence on legal doctrine but in how his perceptions influenced others).
36. WIENER, supra note 11, at 156.
view of tort law. Particularly, it undercut the proposition, which dominated late-nineteenth-century thinking, that a priori all torts could be placed under the umbrella of negligence. Green put forth this view in his critique of Shearman and Redfield’s *A Treatise on the Law of Negligence*. At the heart of his attack was a critique of any metaphysical account of negligence, particularly the proximate/remote cause distinction, which lies at the core of negligence theory.

In his article entitled *Proximate and Remote Cause*, Green criticizes the adoption and misuse of Lord Bacon’s *Maxims of the Law: In jure non remota causa, sed proxima spectatur* 37 (“In law, look to proximate cause, not remote causes”). Bacon put forth his view on cause not only as a prescription for law but as a way for philosophers to look at philosophical problems. The separation of proximate and remote cause could be traced from Aristotle through the schoolmen to Bacon’s time, 38 with the maxim finally standing for the proposition that causal analysis must deal with the “certain.” 39 However, according to Green, Bacon’s admonition was one of broad application, and his general caution with respect to certainty was misconstrued as a prescription for special application in the courts. 40

Some American courts adopted the view that causal certainty could be determined by the judge, leaving him or her to determine negligence from the facts, rather than sending the case to the jury. 41 Green felt this to be a mistake because the methodology of the schoolmen (assuming causes) and Bacon (enumerating instances and excluding foreign causes) could not be put in practice effectively. 42 Green tells us that “[t]he phrase ‘chain of causation,’ which is a phrase in frequent use when this maxim is under discussion, embodies a dangerous metaphor.” 43 To Green’s mind, an event does not have a *particular* antecedent, but a set of antecedents. 44 Therefore, metaphysical (abstract) discussions of causation can’t do the heavy lifting in tort law. However, that still leaves the question of what judges are to do in determining tort liability:

In actions for negligence, a defendant is held liable for the natural and probable consequences of his misconduct. In this class of actions his misconduct is called the proximate cause of those results which a prudent foresight might have avoided. 45

38. *Id.* at 9.
39. *Id.* See HOrwitz *supra* note 4, at 51-54 (discussing how Green’s theoretical perspective constituted a precursor to an all-out assault on causation by legal realists).
40. N. GREEN, *supra* note 37, at 10.
41. Professor Horwitz attributes the American courts’ adoption of certainty in causation not so much to a misunderstanding of Bacon’s maxim, but as an attempt to undercut any redistributionist consequences of tort. HOrwitz, *supra* note 4, at 51.
42. N. GREEN, *supra* note 37, at 11.
43. *Id.*
44. *Id.*
45. *Id.* at 15-16 (emphasis added).
Thus, the basis for liability is "probable consequences" (probability), not causal certainty. But how is this determined? Green tells us that "[t]here is generally no other way of determining whether events . . . were or might have been anticipated or foreseen, than by an appeal to experience."46

As a doctrinal matter, Green concluded that given the confusion over causation it is difficult to reconcile the tort law cases even where there is no factual conflict. The "same cause and effect which would be considered proximate in one class of actions, the attendant circumstances being unchanged, would be considered remote in others."47 Thus, "use of . . . [Lord Bacon's] maxim is liable to lead to error by withdrawing the attention from the true subject of inquiry."48 The alternative to metaphysical speculation was empirical investigation ("appeal to experience") that underlies practical judgment, recognizing the fallibility of any such endeavor.49

Of course, as with all references to experience in pragmatist thought, the ultimate referent of experience ("probable consequences") would be individual decisionmakers subject to their own values. Thus, it must be recognized that the pragmatists' and their successors in the development of SPL, appeal to experience was not a value neutral appeal: the implications of the experience appealed to by individual pragmatists was shaped by their own value orientation.

Green's pragmatist appeal to experience ("probable consequences") as the guiding concept of tort law, and particularly as it related to causation, is a precursor to the assault on causation by legal realists that would follow as an antecedent to SPL. While these were important contributions, they are dwarfed by the impact of the other lawyer affiliated with the Metaphysical Club, Oliver Wendall Holmes.

3. Oliver Wendall Holmes

Holmes is arguably America's greatest and most influential legal figure. It may seem strange to connect Holmes with strict products liability given that his major contribution to legal thought, The Common Law, is a tract arguing for a negligence standard rather than strict liability. However, Holmes' importance to the development of SPL stems from the anti-formalist bent of The Common Law, the questions the work poses, and the extent to which it is cited by virtually all those who would take up the charge for SPL.

In the Common Law, Holmes attempted to answer the question as to whether the basis of liability for unintentional harm should be fault or strict liability. In answering, Holmes shuns formalistic modes of analysis. He points out the

46. Id. at 16 (emphasis added).
47. Id. at 15.
48. Id. at 16-17.
49. See WIENER, supra note 11, at 161.
failure of all theories which consider the law only from its formal side, whether they attempt to deduce the corpus from a priori postulates, or fall into the humbler error of supposing the science of the law to reside in the elegia juris, or logical cohesion of part with part. The truth is, that the law is always approaching, and never reaching, consistency.  

To realize the significance of Holmes’ anti-formalism, a bit of historical background is necessary. The middle-to-late nineteenth century marked the beginning of the subject we know of as torts. To that point, there was a system of writ pleading. With the demise of the writ system and the development of torts, there was a perceived need among legal academics to construct a conceptual foundation for torts. The foundation came to be negligence and as a by-product, the concept of fault. With the foundation of fault in place, the resolution of all tort law issues via the fault principle became a formal matter. This marked what may be referred to as the formalist turn in tort law.

In contrast with formalism, to Holmes “in substance the growth of the law is legislative,” meaning that policy issues underpin law. This is a very telling statement because the law to which Holmes is referring is the common law and not legislative law. However, Holmes takes this not as a novel or radical reconceptualization of the common law, but as a clarification of what is. Thus, although the public policy rationale behind judicial decisionmaking is “rarely mentioned,” it is the “secret root from which the law draws all the juices of life.” Judges are to make policy decisions by determining “what is expedient for the community concerned.”

Holmes’ public policy justification (measurement of the “expedient”) for negligence as opposed to strict liability is thin and conclusory. This is not to say his justification lacked intellectual force, indeed Holmes echoes some of the dominant themes in American political culture (individualism and belief in the free market). However, Holmes’ argument lacks the empirical support that Holmes himself calls for. Holmes begins by stating the general principle that the “loss from accident must lie where it falls,” which of course begs the question. This stems from Holmes’ belief that “the public generally profits by individual activity.” As a

50. OLIVER WENDELL HOLMES, THE COMMON LAW 36 (emphasis in original) (1881) (hereinafter cited as “HOLMES”).

51. G. WHITE, supra note 3, at 3.

52. Id. at 8.


54. HOLMES, supra note 50, at 35.

55. Id.

56. Id.

57. Id. at 94.

58. Id. at 95.
matter of policy, "[a]s action cannot be avoided, and tends to the public
good, there is obviously no policy in throwing the hazard of what is at
once desirable and inevitable upon the actor." Holmes is fully aware
that other methods of dealing with unintentional harms exist. In particular,
Holmes addresses the possibility of the state bearing the costs of accidents
and acting as an insurer spreading the burden of mishaps among its citi-
zens. However, to Holmes’ mind, this insurance function could more effi-
ciently be accompanied via private enterprise. In addition, “to redistribute
losses simply on the ground that they resulted from the defendant’s act”
would offend the “sense of justice.”

The importance of The Common Law to the intellectual genealogy of
strict products liability is not in its substantive conclusion, particularly
given the paucity of policy/empirical arguments used by Holmes. Its
importance lies in the methodology laid out by Holmes. Holmes, in the
pragmatist tradition, rejects a priori arguments regarding the basis of lia-
ability. In this respect, Holmes reflected the emerging anti-formalism of
the day. Thus, his belief in negligence as the basis of liability is not
derived from an a priori belief in the superiority of negligence over strict
liability. His belief is shaped by his reading of legal history and made
determinate by his ideological biases (put forth as policy arguments). The
rejection of a priori truths and rhetorical nod to public policy (scientific/
empirical inquiry) as a method of determining which rule of liability
should prevail was crucial to the subsequent development of strict prod-
ucts liability.

This anti-formalist perspective reached fruition in Holmes’ later
thought, as illustrated in The Path of the Law. In The Path of the Law,
Holmes tells us, in the oft quoted phrase, that “[f]or the rational study of
the law the black-letter man may be the man of the present, but the man of
the future is the man of statistics and the master of economics.”
Important to the thesis of this article is what school of economics would
take up the mantle of providing the analytical tools to examine the law in
the way Holmes suggested. Holmes’ own brief thoughts on the matter
suggest that the institutionalist methodology, which would be later de-
veloped and is discussed in Section III below, would be consistent with the
task. This is hinted at in Holmes’ statement that “instead of ingenious
research we shall spend our energy on a study of the ends sought to be

59. Id.
60. Id. at 96.
HOLMES: LAW AND THE INNER SELF 152 (1993); MORTON WHITE, SOCIAL
THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM (1949) (hereinafter
cited as “MORTON WHITE”).
62. Oliver Wendell Holmes, The Path of the Law, reprinted in THE MIND AND FAITH
(hereinafter cited as “HOLMES, THE PATH OF LAW”).
attained and the reasons for desiring them.”63 In keeping with Holmes’ anti-conceptualism, this research was not to be “worked out like mathematics from some general axioms of conduct.”64 The latter statement is an implicit rejection of the formalism (deductive methodology) that is at the core of neoclassical economic theory and more akin to the anti-formalism (inductive methodology) championed by the institutionalist school of economics, as will be discussed later.

As to policy, in The Path of Law Holmes hints at a change in view toward strict liability, particularly in his thoughts on employer liability. In questioning why negligence is an element in employer liability, Holmes, in keeping with his anti-formalism, states that “if any one thinks it can be settled deductively . . . he is theoretically wrong.”65 While not explicitly taking a position, Holmes, adopting a temporalist/relativist view, does juxtapose the state of society at the formation of tort law—one of “isolated, ungeneralized wrongs”—to the state of society at the time of The Path of Law—where most torts involve “certain well-known businesses.”66

Holmes posits that the “costs of accidents borne by “railroads, factories, and the like” “sooner or later goes into the price paid by the public.”67 This insight by Holmes marks a significant shift in his perspective on torts. This fundamental change is reflected in Holmes’ admonition to judges that they should recognize the social, as opposed to individual, implications of the decisions they render.68

Thus, in the span of the sixteen years between publication of The Common Law and The Path of Law, Holmes had begun to recognize that the rise of industrial capitalism might profoundly change tort law in America. For Holmes, this meant that the general presumption that was so dominant in The Common Law, that losses should lie where they fell, was now open to question.

Although much thought and social transformation would remain to be done in developing American strict products liability law, Holmes’ contribution was germinal. First, in The Common Law, Holmes dealt a heavy blow to formalist thought in American law. Second, in The Path of Law, Holmes alluded to the way, given different social contexts (temporalism/relativism), that the perspective in The Common Law could lead to radically different legal policies than those he initially proposed. These themes would play a dominant role in developing SPL doctrine. However, it would be up to scholars more immediately connected to the legal realist

63. Id. at 85.
64. Id. at 79.
65. Id. at 81.
66. Id.
67. Id.
68. Id. at 81-82. Of course a belief in “social” welfare does not necessarily lead one to a belief in SPL. In particular, one adopting the neoclassical economics belief in maximization of social welfare may very well come out in favor of a negligence regime. See, generally, RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 147-199 (3rd. ed. 1986).
movement and politically progressive\textsuperscript{69} to develop Holmes’ ideas into further arguments for SPL.

\textbf{B. John Dewey}

1) General Philosophy

If Peirce’s anti-conceptualism cleared the philosophical way for multiple perspectives on the configuration of tort law and admonished intellectuals to take a scientific (inductive) approach to inquiry, John Dewey extended Peirce’s insights and provided the full philosophical design for constructing strict products liability. Without question, Dewey is a towering figure in American thought and was one of our most significant public intellectuals, exerting tremendous influence on a whole generation of scholars. Not surprisingly, his influence was to be felt in the legal academy.

The core of Dewey’s method was to first reject conceptualist foundations in much the same way as Peirce.\textsuperscript{70} However, unlike Peirce, Dewey expanded his insights to the social sphere and went on to construct a method by which to confront social problems. The crux of this method was the importance of experience: not ignoring reality.

Dewey’s method is laid out in Experience and Nature, which has been described as Dewey’s most important book of the 1920’s, and as one of the most important philosophical works of the twentieth century.\textsuperscript{71} Explicating Dewey’s concerns in Experience and Nature is particularly relevant to understanding pragmatism’s influence on legal thought because of the direct influence Dewey had on legal realism. Dewey’s impact on legal scholars affiliated with the legal realist movement is illustrated by Holmes’ admiration for Experience and Nature\textsuperscript{72} and the references to Dewey by legal realists.

\textsuperscript{69} See, e.g., discussion of Harold Laski, \textit{infra} Section III (A) (1).

\textsuperscript{70} Dewey studied mathematical logic with Peirce at Johns Hopkins as a graduate student. ROBERT WESTBROOK, JOHN DEWEY AND AMERICAN DEMOCRACY 20 (1991) (hereinafter cited as “WESTBROOK”).

\textsuperscript{71} \textit{Id.} at 321, 341.

\textsuperscript{72} Holmes remarked to Frederick Pollock that Experience and Nature seemed to him “after several readings to have a feeling of intimacy with the inside of the cosmos that I found unequaled.” 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932 287 (Mark DeWolf Howe ed. 2d ed. 1961). Holmes goes on to say that “me-thought God would have spoken had He been inarticulate but keenly desirous to tell you how it was.” \textit{Id.} In addition, Holmes wrote to Harold Laski that he placed having read Experience and Nature for the third time as one of the greatest things he had experienced on earth and that “[i]f reduced to not more than two pages it would be the profoundest apercu of the universe that I have ever read. . . .” 2 HOLMES-LASKI LETTERS 261 (Mark DeWolf Howe ed., abridged ed. by Alger Hiss, 1963). Parts of Holmes’ attraction to Experience and Nature may be due to the fact that Dewey spoke admiringly of Holmes in the latter pages of the book. See Thomas C. Grey, \textit{Holmes and Legal Pragmatism}, 41 STAN. L. REV. 787, 869 (1989) (suggesting that Holmes may have been motivated by self indulgence in praising Dewey).
Dewey describes the approach taken in the book as "empirical naturalism."\textsuperscript{73} Under this approach, experience (empirical inquiry) is the only method capable of penetrating the secrets of nature. For Dewey, the crux of experience rested in the human experience. Thus, he alternatively describes his view as "naturalistic humanism."\textsuperscript{74} Dewey contrasted his position with the "supra-empirical" approach set forth by those (particularly classical empiricists) who believed that reason or intuition could transcend nature.\textsuperscript{75} Transcend nature in the sense of knowledge acquisition being read directly from observation and not being mediated by the critical process of inquiry.\textsuperscript{76}

Dewey, in the tradition of Peirce, took the sciences as his benchmark for approaching philosophy and noted that in the natural sciences there was a union of experience and nature.\textsuperscript{77} Thus, theory cannot be divorced from subject or empirical reality. Dewey cited as one example of this approach, the work of geologists who collect data from a variety of sources and compare it with other experiences to reach substantive conclusions about past geological events.\textsuperscript{78} Again, the point is that traits (be they physical, philosophical, or social) are found in the subject and not constructed \textit{a priori} from logic. Like Peirce, Dewey attributed the philosophical evasion of experience to the Cartesian school of thought, which "relegated experience to a secondary and almost accidental place. . . ."\textsuperscript{79} The evasion of experience in philosophy had not only metaphysical implications, but, more importantly for our discussion, Dewey connected this evasion with what he considered to be a "striking dissimilarity of results yielded by an empirical method and professed non-empirical methods. . . ."\textsuperscript{80}

According to Dewey, the failure of a non-empirical method is threefold. First, there is no verification to check what it leads to in ordinary experience.\textsuperscript{81} Second, the constitutive elements of experience are not enlarged and enriched in their meaning.\textsuperscript{82} Third, the subject matter becomes "abstract" in the negative sense and is divorced from its contact with "ordinary experience."\textsuperscript{83} This third component is very important in placing Dewey in the genealogy of intellectual thought regarding

\textsuperscript{73} JOHN DEWEY, EXPERIENCE AND NATURE 1a (Dover Pub. 1958) (1925) (hereinafter cited as "DEWEY, EXPERIENCE & NATURE").

\textsuperscript{74} Id.

\textsuperscript{75} Id.

\textsuperscript{76} Id. at 31.

\textsuperscript{77} Id. at 2a.

\textsuperscript{78} Id. at 4a.

\textsuperscript{79} Id. at 3; see also id. at 15 (describing dichotomy of mind and matter as dominant in philosophy and as being derived from Descartes).

\textsuperscript{80} Id. at 3.

\textsuperscript{81} Id. at 6.

\textsuperscript{82} Id.

\textsuperscript{83} Id.
American strict products liability, Dewey stresses that any philosophical inquiry must refer us "back to ordinary life-experiences and their predicaments, render them more significant, more luminous to us, and make our dealings with them more fruitful. . . ."84

Thus, applying Deweyian thought to torts, the torts system must render the relationship between doctrine and its effect on the lives of everyday people more comprehensible and place those experiences at the center of analysis, as contrasted with ideals of justice making up what Dewey referred to as the "original material" of analysis.85 As we will discover, this is precisely the type of approach that would consistently guide the legal scholars and jurists who constructed arguments for strict products liability.

Dewey bemoans the way in which some fail to examine the connection between "instrumentalities" and the "conditions of life and action."86 The result of such misguided analysis is "a picture of a world of things indifferent to human interests because it is wholly apart from experience."87 In other words, "[w]e are about something, and it is well to know what we are about . . . [and] [t]o be intelligent in action and in suffering . . . even when conditions cannot be controlled."88 The something cannot be examined outside of its "special context," and "particular need . . . to effect specifiable consequences."89 "Social reform" was the "something" Dewey was "about."

2. The Philosophy of Social Reform

In the final chapter of Experience and Nature, Dewey grapples with the question that drives the entire work: What is the purpose of philosophy? The answer for Dewey is that philosophy, like all intelligent inquiry, is to serve the purpose of criticism.90 However, the role of philosophy in its relationship to other modes of intellectual inquiry is to act as referee with regard to general discourse: "a criticism of criticisms."91 This seems to be a departure from the groundedness that Dewey sought. For example, one might ask: Under what standards are philosophers to referee discourse?

Dewey implores philosophers and others engaged in intellectual work to focus their criticism in an effort to further "social reform."92

84. Id. at 7.
85. Id. at 10.
86. Id. at 11.
87. Id. at 11.
88. Id. at 22.
89. Id. at 27.
90. Id. at 398.
91. Id. at 398.
92. Id. at 411. For an excellent discussion of the relevance of Dewey to social reform, particularly in contrast to Rorty’s pragmatism, see Larry Hickman, Liberal Irony and Social Reform, in PHILOSOPHY AND THE RECONSTRUCTION OF CULTURE: PRAGMATIC ESSAYS AFTER DEWEY 223 (John Stuhr ed. 1993).
Specifically, criticism "includes a heightened consciousness of deficiencies and corruptions in the scheme and distribution of values that obtains at any period." Of course, this criticism is driven by Dewey's own progressive political ideology of social reform. Thus, in Dewey, we hear the philosophical call to arms that would inform many reform movements of the 1900's, including the SPL movement.

The method of social reform would mirror the method of criticism ("philosophy"). The method "partakes both of scientific and literary discourse." Dewey had a specific definition and purpose for both science and literature (art), while being careful to note that utilizing one without the other was insufficient." Literature, like art, was to directly "comment on nature and life in the interest of a more intense and just appreciation of the meanings present in experience . . . [and] to clarify, liberate and extend the goods which inhere in the naturally generated functions of experience."

Science was to play the role of appraising values by evaluating their "causes and consequences." This of course is a very empirical conception of science, highlighting the need for statistical analysis, and in fact, calls for "a degree of distance and detachment." As directly related to statistical inquiry, Dewey put forth a defense of the inductive method of analysis as opposed to the deductive method, going so far as to assert that the "act of knowing . . . is always inductive." In arguing that scientific criticism had been woefully missing in philosophy, Dewey specifically referred to "economics" as one of the "prerequisite tools" to undertake such analysis. The purpose of the tools, like the purpose of literature, is to work to "conceive a happier nature and experience than flourishes among us."

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93. DEWEY, EXPERIENCE & NATURE, supra note 73, at 412.
94. In making this historical point, I do not mean to suggest that this was the only possible implication of Dewey's framework ("social reform"). The open-textured nature of Dewey's formulation is susceptible to other, more conservative, political interpretations.
95. DEWEY, EXPERIENCE & NATURE, supra note 73, at 407.
96. Id. at 360.
97. Id. at 407.
98. Id. at 408.
99. Id. at 409. Obviously, given Dewey's political call for social reform, this "detachment" was not to be political detachment, but analytical detachment allowing one to clearly survey the social terrain in order to better achieve one's political objective.
100. Id. at 381 (emphasis in original). Dewey's belief in the connection between philosophy and the social sciences, as well as the beliefs that social scientists held regarding the relevance of philosophy, are illustrated by the inclusion of a chapter on the role of philosophy to social science research as part of a collection of essays on the subject. DEWEY, supra note 2. Research in the Social Sciences included essays on sociology, economics, anthropology, statistics, psychology, jurisprudence, history, political science, as well as philosophy. Among its contributors were Roscoe Pound and Charles Beard.
101. DEWEY, EXPERIENCE & NATURE, supra note 73, at 433.
102. Id. at 409.
Again, Dewey focuses his attention on social reform. I will later demonstrate that some of the most important materials arguing for SPL and the policy precursor of SPL, workers’ compensation, were quintessential examples of art (literature) and science (statistics) combined as works arguing for social reform.103

3. Thoughts on Economics

Dewey is crucial to the intellectual genealogy of strict products liability not only because of his position as a pragmatist philosopher, but, perhaps just as significantly, due to his intellectual maturation during a period that marked the development of much intellectual inquiry related to strict products liability.

This period is significant in American history because it marked the industrialization of America.104 The period between 1860 and 1900 saw the American population increase from approximately 31 million to 76 million.105 Investment in manufacturing plants increased from one billion dollars to twelve billion; and, the annual value of manufactured products increased from $1.9 billion to $11 billion.106 As a result of this expansion of the United States industrial base, employment in factories increased from 1.3 million employees to 5.5 million.107 Corresponding to increased employment in the workplace was a high incidence of workplace accidents. For example, in the railroad industry, one in every 26 laborers was injured, and one in every 390 killed annually.108 Moreover, as an indicator of general economic conditions, approximately 10 million Americans out of 76 million lived in poverty.109

The philosophical method espoused by Dewey was not only constructed to contend with the major philosophical questions of the day, but also to provide a compass for grappling with the empirical realities. These were the same empirical realities that would motivate the legal scholars who pressed for a regime of strict products liability and the institutional

103. See discussions of Crystal Eastman’s (Section II (D) (3)) and Emma Constvet’s (Section IV (A) (1)) work infra.

104. Historians generally mark the industrial revolution as coinciding with the Civil War and continuing on through the early 1900’s. See e.g. MANSEL G. BLACKFORD & K. AUSTIN KERR, BUSINESS ENTERPRISE IN AMERICAN HISTORY 151-194 (1986); SAMUEL P. HAYS, THE RESPONSE TO INDUSTRIALISM: 1885-1914 (1957); ALLAN NEVINS & HENRY STEELE COMMAGER, A POCKET HISTORY OF THE UNITED STATES 255-267 (7th ed. 1976, originally published in 1942).

105. CORNEL WEST, THE AMERICAN INVASION OF PHILOSOPHY: A GENEALOGY OF PRAGMATISM 79 (1989) (hereinafter cited as “WEST”). The statistics that follow on the United States economy were cited by Cornell West in his cogent genealogy of American pragmatism as indicative of the social misery that Dewey would witness during his life and that would shape his world view.

106. Id.

107. Id.

108. Id. at 80.

109. Id.
economists whose work would provide the more direct policy underpinnings for strict products liability.

In considering how economic policy should deal with industrial reality, Dewey had views which were closely related to institutionalist thought. These views are illustrated in two of his post-World War I essays, *The New Social Science* and *Elements of Social Reorganization*, in which Dewey urged America to construct a new vision of the economic and social order in light of the lessons of the war.\(^{110}\) Dewey was critical of the assumption put forth by classical economists that the "dynamic order . . . [is] the result of the cumulative intelligence of an indefinitely large number of beings, each devoting his own intelligence to the things to which it is peculiarly adapted. . . ."\(^{111}\) He considered this individualist view to "constitute an essential mythology."\(^{112}\) In reality, he argued "the present order rest[ed] upon habit, intrigue, private deflections . . ., secret business"\(^{113}\) and other non-intelligent forces.

In the face of the new reality, coming out of World War I, the proper methodology for social science was to establish "large working hypotheses concerning the uses to which these forces are to be put."\(^{114}\) This would call for empirical description just as the old social science, but a description not "framed up" by the old mythology. In rejecting the old mythology (unfettered capitalism), however, Dewey, like the institutionalists, eschewed lapsing into what he considered to be the alternative mythology of Marxism. There would be no dictatorship of the proletariat.\(^{115}\) There would be a more intelligent and humane capitalism,\(^{116}\) an intelligent capitalism that emphasized the social and public as opposed to the private.\(^{117}\) This new perspective would shore up the "weak pints in our social fabric."\(^{118}\) An accommodationist perspective regarding capitalism would be a common theme among Dewey's pragmatic institutionalist brethren in the institutional economics school of thought.\(^{119}\) Of


\(^{111}\) DEWEY, NEW SOCIAL SCIENCE, *supra* f.n. 111, at 736.

\(^{112}\) Id.

\(^{113}\) Id. at 737.

\(^{114}\) Id.

\(^{115}\) Id. at 738.

\(^{116}\) Dewey specifically stated that his solution did "not involve absolute state ownership and absolute state control, but rather a kind of conjoined supervision and regulation. . . ."

DEWEY, SOCIAL REORGANIZATION, *supra* note 110, at 758.

\(^{117}\) Id.

\(^{118}\) Id. at 747.

\(^{119}\) See THEDA SKOCPOL, PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES 171 (1992) (hereinafter cited as "SKOCPOL") (institutionalist economists involved in the social insurance movement were concerned with enhancing the "'efficiency' of the capitalist industrial order, which all the authors assumed was here to stay.")
course, starting from Dewey’s proposition, a social perspective, one could arrive at a course of action more progressive or conservative than Dewey’s.

Dewey’s principal concern was employment opportunity. However, in listing the afflictions that contributed to an “inhuman” standard in living, he included “socially unnecessary deaths, illnesses, accidents and incapacitations that come from the bad economic conditions under which so much of modern industry is carried on.”\(^{120}\) In this regard, Dewey was encouraged by the acceleration of the social insurance movements that had already been established before the war, and which would serve as an important precursor to SPL.\(^{121}\)

The philosophical journey from Peirce to Dewey set the stage for SPL. However, the props which the actors (legal implementors) would use were to be supplied by the institutionalist economists.

II. Institutional Economics

Although for the sake of exposition I have segregated the discussion of institutionalism from that of pragmatism, in reality, they both derive from the same intellectual milieu.\(^{122}\) The connection and significance of pragmatism to institutional economics was aptly summed up by John R. Commons, one of the leading institutional economists:

> We [institutionalists] . . . follow most closely the social pragmatism of Dewey; while in our method of investigation we follow the pragmatism of Peirce. One is scientific pragmatism—a method of investigation—the other is the pragmatism of human beings—the subject-matter of the science of economics.\(^{123}\)

The basic tenets of institutional economics are a focus on society as opposed to the individual, emphasis on the large forces (institutions) that underlie a market economy, descriptive (inductive) analysis, and humanistic concern (coupled with generally progressive political beliefs) for

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120. DEWEY, SOCIAL REORGANIZATION, supra note 110, at 749.
121. Id. at 757. See discussion of social insurance infra Section II (D).
122. Clarence Ayres, *The Co-ordinates of Institutionalism*, 41 AM. E. REV. 47 (1951) (arguing that institutionalism did not develop in an intellectual vacuum). For example, one of the leading institutionalists, Clarence Ayres, was trained by pragmatist philosophers at the University of Chicago and was an ardent admirer of John Dewey. William Breit, *Institutional Economics as an Ideological Movement in PHILOSOPHY, HISTORY AND SOCIAL ACTION* 119, 128 (Sidney Hook, William O’Neill & Roger O’Toole eds. 1988). This point is also illustrated by the fact that Dewey, along with institutional economists Wesley Mitchell and Thorstein Veblen, participated in the founding of the New School of Social Research in 1919. WESTBROOK, supra note 70, at 278. In addition, Dewey served along with Veblen as an editor of the *Dial*. Id. at 233.
those at the economic margin of society. Overarching these tenets were pragmatist notions that economic theory should stress context rather than abstraction. 124

Institutionalism was in its ascendency in the 1920’s, so much so that in 1928 the noted economist Paul Homan remarked: “The institutional approach to economic theory’ is becoming a standardized phrase in the United States . . .” 125 For purposes of this article, four intellectuals clearly in the institutionalist camp (Thorstein Veblen, John R. Commons, Wesley Mitchell, and Henry Seager), 126 and one on its periphery (Crystal Eastman), are essential.

A. Thorstein Veblen and the Intellectual Fixation on Corporate Power

Central themes in American strict products liability law are the role of the corporation in society and the use of the corporation as a vehicle for achieving certain tort goals (i.e., loss spreading, compensation, and deterrence). Thorstein Veblen is responsible to a great degree for placing the corporation at the center of critical intellectual dialogue in America. Like Dewey, Veblen reached intellectual maturity witnessing the seemingly unbridled rise of the modern corporation. As Henry Steele Commager has perceptively noted, “[i]t would be extravagant to speak of social revolution in late nineteenth-century America, but almost moderate to speak of an economic revolution.” 127

Witnessing the increasing omnipotence of the corporation, Veblen placed his intellectual imprint on the phenomenon. This was to have a significant effect on American thought, and the development of tort law in America. 128

124. In discussing the extent to which other disciplines influenced economic thought in the 1920’s, Robert Dorfman has stated that “significant cross influence derived from the widespread adoption of the pragmatic approach to social studies.” A ROBERT DORFMAN, THE ECONOMIC MIND IN THE AMERICAN CIVILIZATION: 1918-1933 125 (1959) (hereinafter cited as “DORFMAN”). Commager in The American Mind lists three attributes of the “new economic thought” (institutionalism) in the early twentieth century: (1) “recognition that economics was an inductive and pragmatic science”; (2) “appreciation of the relevance of ethical as well as scientific considerations”; and (3) “acknowledgment of the necessity of state intervention in the economic processes.” COMMAGER, supra note 61, at 235.
125. PAUL T. HOMAN, CONTEMPORARY ECONOMIC THOUGHT 453 (1928).
126. Dorfman has summarized the contributions of Veblen, Mitchell, and Commons as follows:

Thorstein Veblen, by his systematic view of the consequences of business processes upon society, furnished the theoretical stimulus of the developments of the thirties; Wesley C. Mitchell supplied statistical materials. But it was the earlier activity of Commons . . . [that] provided the New Dealers with a considerable number of practical instrumentalities and devices. . . .

DORFMAN, supra note 124, at 398.
127. COMMAGER, supra note 61, at 227.
Veblen is widely regarded as the leading influence on institutional economics. As to Veblen’s general intellectual bent, Morton White appropriately describes him as being part of the revolt against formalism along with Dewey and Holmes. Veblen rejected the abstract/individualistic methodology of classical economics, which represented formalist thought in the field. He was influenced by the German historical school of economic thought, and appreciated that it dealt with the “facts” of social phenomena, rather than abstractions. These are all hallmarks of institutionalism.

Veblen was a harsh critic of the corporation. In Absentee Ownership, Veblen charged the corporation with being principally concerned with finance and credit, as opposed to producing goods. Thus, contrary to the “folklore” of political economy that the corporation acted as a “creative force in productive industry,” the corporation was a tool for finance capitalists in their quest for increased wealth. In his seminal work on the corporation, *The Theory of Business Enterprise*, Veblen states that the result of businessmen’s focus on “pecuniary gain” is that they have no interest in the “bearing [of business operations] upon the welfare of the community.” In fact, the workings of the modern corporation had destructive effects on the community, “making the disturbances of the system large and frequent.”

The change in focus of corporate interest from production to finance did not mean that productivity had been at a standstill. The “continued advance of the industrial arts during the same period has constantly been at work to offset or minimise that advances of prices which the credit operations of corporation finance have constantly been at work to produce.” However, the purpose of corporate financing was not increased output but higher prices and increased returns to capital. In fact, businesses restricted output in order to maintain price levels. Another integral part of corporate strategy was “salesmanship” to consumers, assuring

129. Veblen was an editor and contributor to the *Dial* along with Dewey and took part in founding the New School of Social Research. DORFMAN, supra note 124, at 353.

130. MORTON WHITE, supra note 61 (White also included Charles Beard and James Harvey as leading the revolt against formalism).

131. See generally, Id. at 21-27. However, Veblen believed that the historicists did an inadequate job of providing theory to comport with facts. Id. at 25

132. THORSTEIN VEBLEN, ABSENTEE OWNERSHIP 83 (1923) (hereinafter cited as “VEBLEN”).

133. Id. at 86.

134. Id. at 89.


136. Id. at 29. Veblen did recognize that there were instances in which businessmen would take a more philanthropic perspective. Id. at 42.

137. VEBLEN, supra note 132, at 90.

138. Id. at 95.
markets for products.139

The theme of business versus community/consumer interests ran throughout Veblen’s discussion in The Theory of Business Enterprise. The disjunction of business interest and community interest flowed from changing historical conditions:

In the older days, when handicraft was the rule of the industrial system, the personal contact between the producer and his customer was close and lasting.

Under these circumstances the factor of personal esteem and disesteem had a considerable play in controlling the purveyors of goods and services.140

This revision of perspectives on the corporation given different historical circumstances reflects a temporal view of society, stemming from the pragmatic turn in American thought. According to Veblen, one implication of the changed relationship between consumer and producer was that in earlier times “producers were careful of their reputation for workmanship, even apart from the gains which such a reputation might bring” whereas “[u]nder modern circumstances, where industry is carried on a large scale, the discretionary head of an industrial enterprise is commonly removed from all personal contact with the body of consumers. . . .”141

If we extend the implications of Veblen’s view of the relationship between producers and consumers to the area of product safety, it suggests that producers are less inclined to guard against injury to consumers in an increasingly industrialized society and that, if one’s primary concern is consumer protection, as it was for those who would go on to argue for SPL, the law should play a larger role.

Of course, one rebuttal to calls for consumer protection is that consumers knowingly assume the risk associated with particular products. Veblen, however, did not believe that such informed choice existed in the industrial state. To his mind, the specter of mass advertising undercut arguments regarding consumer choice. The purpose of advertising was not to inform the public but to create a “monopoly of custom and prestige.”142 Thus, according to Veblen, advertising acts to condition consumers to purchase products not by investigating their worth or risk, but on the basis of name recognition. The ideas put forth by Veblen on the consumer/corporation relationship and advertising would prove prominent among those who later argued for SPL.143

Veblen argued that the upshot of the corporate finance system was a “magnificent scale of unemployment, privation, and underfeeding that is now to be seen all over the place, rising here and there to the pitch of famine and pestilence.”144 According to Veblen, the social ills produced

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139. Id. at 99.
140. VELEBEN, BUSINESS ENTERPRISE, supra note 135, at 51-52.
142. Id. at 52-53.
144. Id. at 55.
143. See Judge Traynor’s discussion of the role of advertising in Escola infra Section IV (B) (2).
144. VELEBEN, supra note 132, at 96.
by the necessities of finance capitalism rendered the prospect of unregulated economic activity for the greater social good a suspect proposition.\(^{145}\) Again, Veblen strikes an intellectual chord in harmony with the later justification for SPL: the law must be constructed to mitigate the destructive and inevitable social misery resulting from an industrial economy. While Veblen's critiques were part of the intellectual context (focus on corporations) for SPL doctrines and had direct policy implications, unlike his successors in the institutionalist movement, Veblen was not particularly interested in public policy and thought that science should be concerned with critical insight.\(^{146}\) However, he laid a foundation for the more programmatic institutionalists who would follow.

**B. John R. Commons: Apostle of Social Reform**

John R. Commons was a contemporary of Veblen's and was influenced by Veblen's view of the corporation.\(^{147}\) Unlike Veblen, Commons was attuned to mainstream politics and adept at policy implementation.

In his *Legal Foundations of Capitalism*, Commons focused on what he referred to as "going concerns." Going concerns were associations throughout society in which individuals joined for the purpose of consummating transactions. The two going concerns that most interested Commons were labor and corporations. Commons took the position that there needed to be a structure through which labor and corporations could more efficiently transact their negotiations. The method of choice was collective bargaining. He rejected a more socialistic approach in the face of an American public "so stubbornly individualistic that social responsibility, in so far as it exists effectively, has come about only piecemeal."\(^{148}\)

Commons' belief in collective bargaining did not temper his call for government to provide social insurance to its citizens. The common law, statute law, business rules, etc., constituted the "working rules" of going concerns. Thus, laws were to help structure institutional bargaining. For Commons, the locus of those laws was logically in the employment context due to the importance Commons placed on labor and corporations as institutions, and American suspicions toward socialist ("big government") prescriptions.

The importance of Commons' work to the conception of strict products liability is that he took Veblen's more acerbic observations on the workings of business and translated them into an approach to thinking about institutions, focusing on corporations. More importantly, these

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145. *Id.*


147. Commager notes that the report of the Industrial Commission of 1902, which was the basis of much of Veblen's argument in *Theory of Business Enterprise*, also contributed to the education of Commons. COMMAGER, supra note 61, at 243.

insights were transformed into politically mainstream programs, most notably workers’ compensation (which had a long history in Europe but was yet to play a major part in the American economic system). This reconfigured the public policy landscape. After reviewing the role of statistical research (empiricism) in institutionalist thought, I will return to Commons’ focus on social insurance and its influence on others, culminating in the workers’ compensation movement in America and providing much of the intellectual fodder for the subsequent American SPL movement.

C. Wesley Mitchell and the Rise of Statistics in Social Science

Wesley Mitchell was a pioneer in economic thought and a founder of institutional economics. He began his academic career as an undergraduate student of both Veblen and Dewey at the just-then-formed University of Chicago. Mitchell admired both men greatly and was influenced by Veblen’s critical stance toward classical economics, and Dewey’s view on knowledge in general and scientific knowledge in particular. In addition, he was a friend of John R. Commons. As a mature academic, he joined Dewey, Veblen, and others in founding the New School for Social Research.

Mitchell can best be characterized as a scientist by temperament and conviction, an economist by profession, and a statistician by necessity. Indeed, Mitchell had a profound interest in the role of statistical data in constructing a better society. Setting out his view of the role of empiricism in social progress, Mitchell stated:

Our best hope for the future lies in the extension to social organization of the methods that we already employ in our most progressive fields of effort. In science and in industry . . . we do not wait for catastrophes to force new ways upon us. . . . We rely, and with success, upon quantitative analysis to point the way; and we advance because we are constantly improving and applying such analysis.”

His belief in empiricism, combined with a progressive political commit-

149. Daniel Ernst has astutely noted that with respect to national labor law policy, particularly the workings of the National Labor Research Board, the legal realists were closer to Veblen in outlook, criticizing customary practices as impeding social progress, as opposed to Commons who took a more conservative view towards institutional relationships and the proper scope of government intervention. Daniel Ernst, Common Laborers, Industrial Pluralists, Legal Realists, and the Law of Industrial Disputes, 1915-1943, 11 LAW AND HIST. REV. 59 (1993) (hereinafter cited as “ERNST”).


151. For Mitchell’s review of Commons’ Legal Foundations of Capitalism, see 14 AM. ECON. REV. 240 (June 1924).

152. ROSS, supra note 146, at 404.

ment to social progress and democratic ideals, guided the way in which Mitchell brought the pragmatist creed to bear on public policy issues. Nowhere was this more evident than in his work as Director of Research for the National Bureau of Economic Research, and in his academic writings on business cycles and the workings of the money supply. However, in the intellectual development of SPL, Mitchell's importance lies in his general belief in the need for empiricism in the social sciences. This belief would permeate all fields of study, including the way lawyers and economists concerned with legal issues approached their task.

As part of his academic mission, Mitchell served as President of the American Statistical Association in 1918 and continued to be a member of the Association throughout his academic career. The Association's task was to link together different branches of the study of man under the unifying approach of empiricism.154 Mitchell's desire to spread the gospel of statistical analysis across disciplines is reflected in his work for the National Council for Social Science Research (the "Research Council"), an organization in which he played a major role.155 The Research Council was composed of representatives from the American Economics Association, American Sociological Society, American Statistical Association, and American Political Science Association.156

More specifically related to accident studies, Mitchell played a leading role in Columbia's Social Science Research Council.157 This council provided funding for the Report by the Committee to Study Compensation for Automobile Accidents delivered to the Columbia University Council for Research in the Social Sciences (the "Columbia Report"), which was published in 1932.158 The Columbia Report, which will be discussed in more detail in Section V, was a major source of data for Fleming James and provided an empirical basis for much of the tort law scholarship related to developing SPL.159

D. Social Insurance Movement: AALL, Seager, and Eastman

1. AALL

The early twentieth century social insurance movement in America was centered to a great extent around the American Association for Labor

156. Id.
157. BURNS, supra note 154, at 50.
158. John Schlegel, American Legal Realism and Empirical Social Science: From the Yale Experience, 28 BUFF. L. REV. 459, 533 (1979) (hereinafter cited as "SCHLEGEL").
159. PRIEST, supra note 5, at 479.
Legislation ("AALL"), which was founded in 1906 as an outgrowth of
the American Economics Association. It included among its founding
members Henry Seager, John R. Commons, and Richard Ely—each of
whom was a prominent institutionalist economist. The AALL was devot-
ed to promoting a broad range of social insurance policies, including
workers’ compensation laws, unemployment insurance, and old age
insurance. The social insurance movement was central to the historical
development of American SPL because the theory, policy arguments, and
methodology that played a large role in the movement, particularly with
regard to workers’ compensation, would later be used in the call for
SPL. The AALL stressed the scientific investigation of issues related to
social insurance and reliance on empirical (statistical) evidence. In
doing so, according to Commons, it took an interdisciplinary approach
and utilized the “best results of the work done in medicine, hygiene, eco-
nomics, sociology, and jurisprudence” to argue for its cause. The views
of two figures affiliated with the AALL are key in tracing the evolution of
SPL: Henry Seager and Crystal Eastman.

2. Henry Seager

Henry Seager was one of the preeminent economists of his time, and
in 1922 was elected as president of the American Economics Association.
As an undergraduate, he studied under such reformers as Henry Carter
Adams, Herbert B. Adams, and Richard T. Ely, each of whom had firm
roots in the institutionalist school of thought. Like many prominent
American economists at the time, Seager studied in Germany and was
exposed to the historical school of economics. The bulk of his academic
career as an economist was spent at Columbia University.

Henry Seager was a major figure in the social insurance movement
as evidenced not only by his participation in the founding of the AALL,
but also by his position as president of the association (1911-1912 and
1914-1915) and as a member of the Committee on Social Insurance.

160. See ROY LUBOVE, THE STRUGGLE FOR SOCIAL SECURITY: 1900-1935, 25
(1968) (hereinafter cited as “LUBOVE”) (arguing that social insurance was not a serious
topic of debate in America prior to the founding of the AALL).
161. The AALL grew out of a 1905 organizing meeting of the American Economics
Association. SKOCPOL, supra note 119, at 177.
162. See, e.g., PRIEST, supra note 5, at 465-470 (discussing connection between work-
ners’ compensation movement and strict products liability).
163. See SKOCPOL, supra note 119, at 180.
164. LUBOVE, supra note 160, at 32 (quoting from Commons letter).
165. JURGEN HERBS, THE GERMAN HISTORICAL SCHOOL IN AMERICAN
166. LUBOVE, supra note 160, at 31. Theda Skocpol has labeled Seager as the principal
exemplar of the “AALL’s overall programmatic vision.” SKOCPOL, supra note 119, at 194.
The ideas put forth by Seager in Social Insurance,167 published in 1910, are striking precursors of later justifications for strict products liability. Seager’s work is of particular interest because of all the early social insurance theorists, he was the most focused on applying the ideas of social insurance to the American scene.168 While Seager’s contribution to the intellectual foundations of strict products liability have not been generally noted, his work in Social Insurance was specifically cited by Harold Laski, who was affiliated with the legal realist movement169 and contributed to the SPL movement as will be discussed later.170

Social Insurance was a general manifesto concerning the need for social insurance to guard against the social consequences of accidents, illness, premature death, unemployment, and old age. Of course, of greatest concern in constructing an intellectual genealogy of strict products liability are Seager’s thoughts regarding accidents. However, before moving to that specific discussion, it is useful to sketch Seager’s thoughts regarding social insurance in general.

The social conceptualization that lay at the core of Seager’s view was that the “creed of individualism is no longer adequate” in an industrial society where “clear appreciation of the conditions that make for the common welfare . . . and an aggressive program of governmental control and regulation to maintain [them]” is the order of the day.171 Here, we find two themes of great significance to strict products liability: (1) the emphasis on the social versus the individual; and (2) the belief that the rise of corporations required a radical redefinition of society.

Seager was particularly concerned with the ideology of individualism, and he believed that the ability to adopt social insurance schemes hinged upon changing the “state of the public mind” regarding individualism. Seager argued that this transformation, and the consequent social insurance program, would be vital in guarding against the social dislocation befailing those who were unfortunately beset by social ills. Social dislocation came in the form of economic hardships to families suffering a loss of income and insufficient savings. Workers had very little money to save and the “failure of wage earners to provide . . . against [emergencies was] . . . proof that collective remedies must be found and applied . . .”172

The gravity of the problem was illustrated by Seager in emphasizing that “more than courage is needed to enable a widow left without resources to bring up her children as they would have been brought up had the father

167. HENRY SEAGER, SOCIAL INSURANCE: A PROGRAM FOR SOCIAL REFORM (1910) (hereinafter cited as “SEAGER”).
168. SKOCPOL, supra note 119, at 173 (Seager’s Social Insurance was the “most U.S.-centered of all the early social insurance studies”).
169. See generally, HORWITZ, supra note 4 at 183.
170. See Section III (A) infra.
171. SEAGER, supra note 167, at 5.
172. Id. at 174.
173. Id. at 19.
lived."\textsuperscript{174}

In addition, as Seager stressed this point, the evils were not limited to the individual families. Seager believed that a consequence of family economic desperation would be to add to the pool of unskilled and low paid workers.\textsuperscript{175} This would be due to children and women being forced into the workplace, as well as injured workers (presumably male) being forced out of their trades and into lower skill employment.\textsuperscript{176} This pressure would result in lower wages for all and a lowering of the living standard of all: poverty. According to Seager, such poverty was an "insurmountable obstacle to the realization of the individualist’s millennium" and made the "program of individualism little better than a program of despair."\textsuperscript{177}

Seager was not as critical of corporations as Veblen, but believed that industrialization had had a profound impact on America. Seager summed up his views as follows:

[For other great sections of the country—the sections in which manufacturing and trade have become the dominant interests of the people, in which towns and cities have grown up, and in which the wage earner is the typical American citizen—the simple creed of individualism is no longer adequate. . . . [Due to the] industrial revolution . . . with the introduction and spread of capitalistic methods of production, the individual wage earner has become more and more helpless in his efforts to control the conditions of his employment.\textsuperscript{178}

In sum, Seager’s view of the world is collectivist in nature: with the breakdown of the small-scale agrarian economy it made no sense to think of labor in individual terms and it would be a mistake to view industrial activity as anything but collective activity.

Turning specifically to the issue of industrial accidents, Seager devoted a chapter of Social Insurance to both accident prevention and compensation.\textsuperscript{179} Prevention loomed large for Seager because of what he believed to be the disproportionate number of industrial accidents in America, compared to other industrialized countries.\textsuperscript{180} Seager discussed a variety of statistics and suppositions related to accident rates, acknowledging that the inadequacy of statistical data (due itself to America’s “backwardness in the field of accident prevention”) made it difficult to

\textsuperscript{174} Id. at 15.
\textsuperscript{175} Id. at 16.
\textsuperscript{176} Id.
\textsuperscript{177} Id. at 18-19.
\textsuperscript{178} Id. at 4-5.
\textsuperscript{179} Whether the social insurance movement should focus on compensation or deterrence was a topic of heated debate. See LUBOVE, supra note 160, at 25-44. For an argument highlighting Commons’ role in the social insurance movement, particularly as regards promoting the deterrence rationale, see David A. Moss, Internalizing Industrial Externalities: John R. Commons and the Origins of Market-Based Incentives, 1890-1920, in SOCIALIZING SECURITY: PROGRESSIVE-ERA ECONOMISTS AND THE ORIGINS OF AMERICAN SOCIAL POLICY (forthcoming, Harvard Univ. Press) (hereinafter cited as “MOSS”).
\textsuperscript{180} SEAGER, supra note 167, at 25.
draw any definitive conclusions.\textsuperscript{181}

Seager’s discourse centered around industrial accidents, but his analyses can easily be extended to manufactured products. The prescription for preventing industrial accidents would lie in: (1) reporting industrial accidents to government for purposes of prevention studies; (2) safety and prevention regulation based on prevention studies; and (3) accident indemnity for employees to be financed, by and large, by employers.\textsuperscript{182} Seager believed that the “number of . . . accidents in the United States is inexcusably, criminally large, and that fully half of the accidents that now occur could be avoided.”\textsuperscript{183}

In arguing for industry accountability, Seager criticized the American tendency “not to count the cost of human limbs and human lives” and recommended a “different system, one which will put a price on every arm and leg and life that may be sacrificed on the altar of industry. . . .”\textsuperscript{184} Thus, in Seager, we find the strand of thought emphasizing the importance of cost internalization to deterrence,\textsuperscript{185} a strand that would be woven into the argument for SPL.

In discussing compensation for industrial accidents, Seager attacked the negligence doctrine because of the barriers it posed to compensation. Seager had a very sophisticated understanding of negligence law and submitted it to much of the same critique legal scholars and judges would later articulate in arguing for strict products liability. The motivation for his critique was his belief that a negligence regime bars recovery to many who are injured: “the whole burden of loss and expense which it entails, as well as the pain and suffering which it causes, must be borne by the injured workman and those dependent upon him.”\textsuperscript{186} The basis for this was the principle that “every one should be responsible for his own acts and omissions, and only for his own acts and omissions. . . .”\textsuperscript{187} This principle again reflected the individualistic perspective on society which Seager rejected. Seager admonished that only if society “turn[s] from abstract principles to a consideration of the social consequences of the policy”\textsuperscript{188} will there be a move away from individualism and towards a more adequate compensation program.

In his attempt to move away from “abstract principles,” Seager, like his colleague at Columbia University, Wesley Mitchell, used statistical data to make his theoretical case.\textsuperscript{189} In terms of organization building,
Seager played a role in persuading the American Economics Association to participate in the National Social Science Research Council.\textsuperscript{190}

To substantiate his claim that compensation was inadequate, Seager relied upon reports stating that fewer than one-eighth of reported accidents resulted in insurance companies compensating victims.\textsuperscript{191} Significant to Seager was the fact that more than one-half of the accidents were the result of risk inherent to industry and could not be attributed to the fault of the employer or employee.\textsuperscript{192} In addition, a good many of the remaining accidents were non-compensable due to affirmative defenses.\textsuperscript{193}

On the issue of affirmative defenses, Seager, as did others at the time, saw contributory negligence, assumption of risk, and the fellow-servant role as mechanisms to allow corporations to abdicate their responsibility for industrial accidents,\textsuperscript{194} leaving it to the injured worker and society to handle consequences. In addition, the complex legal procedures and difficult issues of proof attendant to a negligence system meant high administrative costs, and had a negative effect on the employer/employee relationship.\textsuperscript{195}

The solution for Seager? Take industrial accidents out of tort law: “[n]egligence is clearly too narrow a basis on which to rest society’s policy with reference to accidents.”\textsuperscript{196} Given the inevitability of a certain number of accidents, even once prevention measures were taken, a system of compensation not based on fault (workers’ compensation) would be needed to assure what Seager considered to be justice.

While the locus of compensation would be the corporation, Seager argued that corporations had the capacity to insure themselves against this contingent liability and “pass on the cost of insurance to consumers as one of the normal items in the expense of production.”\textsuperscript{197} The theme of justifying corporate strict liability by the corporation’s ability as a mere conduit to pass on the cost of accidents (loss spreading) would prove signifi-

\textsuperscript{190} SOCIAL RESEARCH COUNCIL REPORT, supra note 155, at 174 (discussing Seager’s role as president of the American Economics Association in raising the issue of association with the Research Council, as well as Mitchell’s role on the Council).

\textsuperscript{191} SEAGER, supra note 167, at 58.

\textsuperscript{192} \textit{Id.} at 58-59.

\textsuperscript{193} \textit{Id.} at 59.

\textsuperscript{194} \textit{Id.} at 54.

\textsuperscript{195} \textit{Id.} at 62-63.

\textsuperscript{196} \textit{Id.} at 60.

\textsuperscript{197} \textit{Id.}
cant in the strict products liability movement. This theme is in tension with the more hostile approach towards corporations adopted by Veblen. It could be argued that Seager was simply a more astute economist than Veblen—recognizing that whether the corporation actually absorbs the costs of accidents depends largely on the elasticity (sensitivity) of demand. However, there is a larger theme at issue in the differences in approach/rhetoric. The consumer loss spreading theme is more malleable (susceptible to a reconfiguration more in line with negligence) regarding policy than is the "soak the corporation" theme alluded to be Veblen. Ultimately, on this point, Seager’s view would prevail.

3. Crystal Eastman

While Seager provides a crystallization of the policy and theoretical arguments of the social insurance advocates, it would be Crystal Eastman who would fill the statistical void Seager so pointedly alluded to in Social Insurance. Eastman was the architect of the document, Work-Accidents and the Law, that would propel the workers’ compensation movement.198 In so doing, she provided a methodological model for those who would later push for SPL.

Crystal Eastman epitomized the qualities Dewey listed as exemplars of a society reformer. Her work in collecting statistical data regarding industrial accidents illustrates the role of the scientific method (statistical research) in constructing social reform, and in combination with Eastman’s use of narrative and visual display (in Deweyian terminology, “art”), it made for a powerful synthesis.

Crystal Eastman was trained as both a sociologist (earning her Master’s at Columbia) and a lawyer (obtaining an LL. B. from New York University School of Law). In 1907, after graduating from law school and passing the Bar, Eastman began collecting data on industrial accidents in Pittsburgh (the “Pittsburgh Survey”) with her friend and colleague Paul Kellogg. Kellogg was the managing editor of Charities and the Commons, later to be entitled the Survey, a periodical devoted to social welfare issues.199

The Pittsburgh Survey was an empirical study ("science" in Deweyian parlance) of social conditions in Pittsburgh, including employment, workplace conditions, housing, nutrition, and other indicators of social misery.200 In speaking of the role the Pittsburgh Survey played in the subsequent workmen’s compensation movement in America, Kellogg remarked that “as the first inductive investigation of the causes of work accidents and the incidence of their economic burden, it unquestionably

198. See, SKOCPOL, supra note 119, at 291 ("The most influential study of industrial accidents during the Progressive period was unquestionably CRYSTAL EASTMAN'S WORK-ACCIDENTS AND THE LAW....").


200. Id. at 33-45.
accelerated the moves in both these directions."\textsuperscript{201}

As a journalist, Kellogg did not limit the survey to presenting data, but included individual case studies/narratives throughout the statistical presentation, commissioning both photographs and sketches of the individuals subjected to the social conditions portrayed in the statistical data.\textsuperscript{202} This concern with living conditions may be traced to one account of the inspiration behind the study. The most widely believed version is that \textit{Charities and the Commons} had been contacted by Mrs. Alice B. Montgomery of the Allegheny Juvenile Court who phrased her request as follows:

\begin{quote}
We feel that the people of Allegheny County are not as yet wide awake as to the needs of the poor, and it is almost impossible with our limited corps of workers, to make the systematic investigation and presentation that is needed.\textsuperscript{203}
\end{quote}

The connection of Kellogg and \textit{Charities and the Commons} with those in the institutionalist movement is illustrated by the fact that John R. Commons was a member of the advisory committee to the Pittsburgh Survey\textsuperscript{204} and both Commons and Seager had published articles in \textit{Charities and the Commons}.\textsuperscript{205} In addition, the AALL advertised its policies in the \textit{Survey}.\textsuperscript{206} As to any connection to pragmatism, Clarke Chambers writes that Kellogg's philosophical mentors included Dewey and others in the pragmatist camp and that "[p]ragmatic instrumentalism came as naturally to Kellogg as all others parts of his world view."\textsuperscript{207}

What began as a two-month commitment by Eastman to her work on the \textit{Pittsburgh Survey} was extended into a three-year project culminating with Eastman's classic text, \textit{Work-Accidents and the Law}.\textsuperscript{208} It is not difficult to understand Eastman's commitment to such an extensive empirical project in light of her belief in the power of statistics. Eastman was frank in her political objectives when she stated that: "I believe in statistics just as firmly as I believe in revolutions. And what is more, I believe

\textsuperscript{201} \textit{Id.} at 40 (emphasis added). I stress Kellogg's emphasis on inductive methodology because it highlights how the methodology adopted in the Pittsburgh Survey coincides with the pragmatist view of science (knowledge acquisition) as being inductive.

\textsuperscript{202} \textit{Id.} at 36-37.

\textsuperscript{203} \textit{Id.} at 33.

\textsuperscript{204} \textit{Id.} at 34.

\textsuperscript{205} In 1904 Commons published a paper in \textit{Charities and the Commons} on labor conditions in the Bituminous Mines in rural Illinois. John Commons, \textit{Bituminous Mines, reprinted in TRADE UNIONISM AND LABOR PROBLEMS} 336 (First Series, John Commons ed. 1905). Henry Seager in April of 1907 had published an "Outline of a Program of Social Reform" in \textit{Charities and the Commons}. CHAMBERS, supra note 199, at 31.

\textsuperscript{206} SKOCPOL, supra note 119, at 179.

\textsuperscript{207} CHAMBERS, supra note 199, at 238. The full list of philosophical mentors includes Dewey, James Harvey Robinson, Louis Brandeis, Roscoe Pound, Simon N. Patten and Charles A. Beard. \textit{Id.}

\textsuperscript{208} CRYSTAL EASTMAN, WORK-ACCIDENTS AND THE LAW (1910) (hereinafter cited as "WORK-ACCIDENTS & LAW").
statistics are good stuff to start a revolution with.” Therefore, for Eastman:

Investigation just for the sake of investigation does not appeal to me. Social investigators should know what they are driving at. They should have not only evidence that there is an evil but a rough plan for remedying it in mind before they commence an investigation.

As for the Pittsburgh Survey, Kellogg was concerned with the effect of workplace accidents on the “lives of men, [and] the fair living of families.” The specific goals of the Pittsburgh Survey, which formed the basis of Work Accidents and the Law, were: (1) determine who was responsible for work accidents; and (2) make an assessment as to the distribution of income loss resulting from work accidents.

In regard to the first goal, the belief that workers were responsible for 95% of the accidents had “grown into solid, inert mass of opinion among business and professional men in the community. . . .” However, the statistics demonstrated that for 26.27% of the accidents neither employer nor worker was responsible; for 27.85% either the workman injured or a fellow workman was responsible; for 29.97% either the owner or someone operating under the direction of the owner was responsible; for the remaining 15.91% both the employer and workman were responsible. The purpose of dispelling the myth of wholesale worker negligence was to decouple the fault concept from compensation. Thus, the claim was made that workplace accidents “happen more or less inevitably in the course of industry.” This was important because the then-existing forum for resolving workplace injury disputes was common law courts with their barriers to compensation, particularly the fault principle, that so troubled Seager. Eastman included a case study to make her point:


210. Crystal Eastman, Work-Accidents and Employers’ Liability in WOMEN AND REVOLUTION, supra note 209, at 269 (hereinafter cited as “WORK ACCIDENTS”). This formulation is strikingly similar to that put forth by John Dewey regarding social reform. See quote Section I (B) (1): “[w]e are about something and it is well to know what we are about. . . .”, text accompanying note 88 supra.

211. WORK-ACCIDENTS & LAW, supra note 208, at vii (Kellogg foreword).

212. Id. at vi (Kellogg foreword).

213. Id. at 84-85.

214. Id. at 103-104.

215. This use of statistics to dispel myths that lead to social misery is very much in the Deweyian vein:

Were not objects of belief immediate goods, false beliefs would not be the dangerous things which they are. For it is because objects are good to believe, to admit and assert, that they are cherished so intolerantly and unremittingly.

DEWEY, EXPERIENCE & NATURE, note 73, at 405-406.

216 WORK-ACCIDENTS, supra note 210, at 271.
On December 4, 1906, James Brand, a young structural iron worker, employed by the Fort Pitt Bridge Company, while passing over a scaffold to get to his work on the Walnut Street Bridge, fourteenth ward, Pittsburgh, fell 35 feet to the ground and was killed. Testimony at the coroner’s inquest brought out the fact that a plank broke under him. The two pieces of the plank were picked up where they fell. At the broken end of each, the frost and dirt had worked into the wood several inches, testifying eloquently to an old crack, a crack of at least two weeks’ existence according to the statements of those who looked at the pieces. Brand had nothing to do with the building of the scaffold.\(^{217}\)

Also in common with Seager is Eastman’s emphasis of the second goal of the study: determining who bears the loss of the accident. Eastman began by pointing out that the burden of economic dislocation due to accidents fell not only on the individual workers but in a good number of instances on family as well. Eastman uncovered that 258 of 467 persons killed in work-related accidents were married, many of whom had dependent children.\(^{218}\) Of 235 workers killed for whom compensation statistics could be gathered, 53% received $100 or less in compensation from the employer.\(^{219}\) As for compensation for partial disability, Eastman graphically illustrated the amounts paid out by providing a model indicating the dollar value of various body parts.\(^{220}\) (See Appendix 1 attached.)

Eastman was not satisfied with only uncovering the dollars paid to victims or their families: “We must know what manner and measure of actual hardship this injustice brings to those who suffer it. The public’s concern lies not only with abstract justice but with economic welfare.”\(^{221}\) Eastman felt the best way to relay the suffering was through recounting representative case histories. One such history follows:

Pasquale Cavaliere, an Italian laborer, was killed by an explosion of dynamite left too near the fire by another Italian. His widow got $150. Thirty dollars of it she used on the funeral. Mrs. Cavaliere has five children,—a daughter aged seventeen, and four younger ones, twelve, ten, eight, and one. Soon after the father’s death the oldest daughter married. Mrs. Cavaliere then reduced her rent $3.00 by moving into a three-room house. They live at Bandy Farm in West Liberty. The only work she could find to do was washing and mending for the laborers who live nearby. Of this work she does all she can get to do, but earns only two or three dollars a week. For the rest she and her family depend on the young son-in-law who lives nearby. Mrs. Cavaliere stills hopes that something will be done for her.\(^{222}\)

In addition to case histories, Eastman included pictures of the injured. (For examples of pictures used by Eastman, see Appendix 2 and 3.) To further graphically illustrate the tragedy of work accidents, Eastman placed a “Death Calendar” at the beginning of Work-Accidents and the

\(^{217}\) WORK-ACCIDENTS & LAW, supra note 208, at 3.

\(^{218}\) Id. at 120.

\(^{219}\) Id. at 121.

\(^{220}\) Eastman’s illustration is in the spirit of Seager’s admonition that we “put a price on every arm and leg and life that may be sacrificed on the altar of industry.” SEAGER, supra note 167, at 32.

\(^{221}\) WORK-ACCIDENTS & LAW, supra note 208, at 132.

\(^{222}\) Id. at 137.
Law. (See Appendix 4.)

Eastman’s policy response to the consequences of injury was the same as Seager’s: there was a need for workers’ compensation so that “every industrial enterprise should regularly share the loss resulting to the workmen injured in its accident.” This theme was explicitly stated as one of the three hoped-for accomplishments of the new compensation scheme:

Save almost all of the tremendous waste of money and honesty and good will involved in the present system, by doing away with litigation over questions of negligence in such cases.

Provide an important incentive for the prevention of accidents by making each serious accident a direct, sure and considerable expense to employers.

Shift a share of the economic loss of each accident from the family affected, by way of the employer, to the whole body of consumers, by making accidents a regular cost of industry.

As was the case with Seager, the goals Eastman proposed (administrative cost reduction, deterrence, and compensation/loss spreading) would later be espoused in arguing for SPL. Also in common with Seager, is an emphasis on the corporation as conduit for spreading losses.

The methodology used by Crystal Eastman in *Work-Accidents and the Law* in arriving at her policy prescriptions is particularly crucial to examining the intellectual construction of SPL. Not only the same policy prescription (a shift from the negligence system), but also the same methodology would be used by Emma Corstvet some twenty-three years later in the Columbia Study, a central document in the history of SPL, as is discussed below.

Seager, Commons, and Eastman clearly articulated the policy basis behind strict products liability. While Veblen’s initial anti-corporation admonitions were important in focusing the American intellectual psyche on the role of corporate power, his radical critique would be supplanted by the more moderate/instrumentalist view of the corporation as conduit for spreading losses. With the philosophical underpinning (rejection of formalism and focus on humanistic/progressive social considerations) and policy basis (administrative cost reduction, deterrence, and compensation/loss spreading) well established, it would be up to those legal scholars and judges who were so inclined to raise the flag for SPL.

III. Legal Realism

While the legal realist movement predates the eventual implementation of SPL, it would be difficult to overstate its role in laying SPL’s foundation. G. Edward White has perceptively noted that “the emergence of modern strict liability theory in the Realist years has significantly
affected the course of mid-twentieth century tort law.\textsuperscript{226}

Legal historians generally demarcate the period of Legal Realism as the years between 1910 and 1945, with the 1920’s through 1930’s marking its height.\textsuperscript{227} The essential tenets of legal realism that are seen in institutionalism and pragmatism, as well as play a role in the development of American SPL, are anti-conceptualism, concern for connecting law with social and economic reality, and use of social science as an analytical tool.

Anti-conceptualism owes much to the general rejection of formalism in American thought. In this regard, the intellectual connection between legal realism and Holmes is important.\textsuperscript{228} However, unlike Holmes, the legal realists, in general, were politically progressive and motivated by a desire to ameliorate human suffering associated with an industrialized society. In addition, while Holmes exorted that in legal studies the "man of the future is the man of statistics and the master of economics,"\textsuperscript{229} the legal realists would actually take up this methodological charge in arguing for social reform.\textsuperscript{230} The legal realists’ approach to social reform that would shape SPL in America, while limited (if not by the legal realists themselves) by the narrowness and conservatism of American law and political culture, was very much Deweyian in nature. Thus, science, or the inductive method, as represented in statistics and institutional economics, would be a pillar of tort reform.\textsuperscript{231} In addition, literature (art) would later play a role in projecting the experiences of those who suffered injury onto the minds of Americans.

\textbf{A. Harold Laski}

1) Holmes and Laski

Harold Laski, one of Holmes’ most intimate intellectual soul-mates, carried Holmes’ insights on strict liability, as presented in The Path of Law, a few steps further in explication. The relationship between Holmes and Laski was very much one of mentor/mentee. However, Laski was an independent thinker. Laski’s centrality in the intellectual history of strict liability stems not only from his connection with Holmes but also from his connections with other leading thinkers of the Progressive era, particu-

\begin{itemize}
\item \textsuperscript{226} G. WHITE, \textit{supra} note 3, at 110.
\item \textsuperscript{227} HORWITZ, \textit{supra} note 4, at 169; G. WHITE, \textit{supra} note 3, at 64.
\item \textsuperscript{228} See discussion of Holmes’ rejection of 19th Century formalism \textit{supra} (text accompanying note 62).
\item \textsuperscript{229} HOLMES, \textit{supra} note 61, at 83.
\item \textsuperscript{230} For a discussion of the connection between institutionalists and legal realists in national labor reform, see EMST, \textit{supra} note 149.
\item \textsuperscript{231} See HORWITZ, \textit{supra} note 4, at 200-202 (discussing the Realist assault on deductive reasoning); EDWARD PURCELL, THE CRISIS IN DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE 47-73 (1973) (chapter entitled “Non-Euclidianism: Logic & Metaphor” discussing methodological issues regarding inductive and deductive reasoning).
\end{itemize}
larly institutionalists and legal realists. The breadth of Laski’s intellectual contacts is demonstrated in his joining the faculty of the New School of Social Research in 1919 with Dewey, Mitchell, Veblen, and others. The level of his commitment to a progressive social agenda is evidenced by his influential role in Britain’s Labour Party.

2) Laski’s Views on Strict Liability

Laski addressed the issues of strict liability in *The Basis of Vicarious Liability*. For him, the central question was how to justify the doctrine of vicarious liability: liability of employers for actions taken by their employees. Laski aptly pointed out that there was nothing in American or English legal tradition that on its face rationally justified the doctrine. However, this was exactly the point. The ascension of vicarious liability marked a turning point in the way we viewed society.

Like Henry Seager, Laski argued that it was time to move away from the individualistic/private conceptions that had served as the philosophical basis for negligence, and turn toward a more public and collectivist vision. The philosophical basis behind Laski’s position can justly be labeled pragmatism. Laski tells us that “[w]e cannot run a human world on the principle of formal logic . . . [or] fit the life we live to a priori rules.” We must “attempt to see the individual in his social context.”

Laski was attuned to the pragmatism of his day. Holmes and Laski had an on-going debate about the merits of pragmatism in general, and particularly, about which of the emerging versions of pragmatism was most worthy of attention.

In examining the social context in which accidents arise, Laski had firm ideas about the principles that should guide one’s thinking regarding liability. Laski identified the theoretical underpinnings of vicarious liabili-

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232. Laski had positive things to say about his interactions with Veblen. JOSEPH DORFMAN, THORSTEIN VEBLEN AND HIS AMERICA 450-451 (1934).

233. Thomas Bender, *E.R.A. Seligman and the Vocation of Social Science*, in INTELLECT AND PUBLIC LIFE: ESSAYS ON THE SOCIAL HISTORY OF ACADEMIC INTELLECTUALS IN THE UNITED STATES 49, 74 (1993). There were several other prominent intellectuals on the faculty including Charles Beard, Harvey Robinson, Elsie Clews Parsons, Emily James Putnam, and Graham Wallas. *Id.*


236. *Id.* at 111-112.

237. *Id.* at 113.

238. *Id.* at 112. Laski also makes a direct reference to “social context” later in the article in discussing the need to view the world in “social context” when examining issues of liberty. *Id.* at 130.

239. 1 HOLMES-LASKI LETTERS 394-395 (William DeWolfe Howe ed. 1963) (Holmes agreeing with Laski that Charles Peirce was overrated). See also *id.* at 18 (Holmes discouraging Laski from too loosely associating legal thought with pragmatism).
ty as minimizing social dislocation\textsuperscript{240} and locating the cheapest cost avoider.\textsuperscript{241} The intellectual glue holding these concepts together, and what, at bottom, served as the justifications for vicarious liability, were the notions of loss spreading and the view of the corporation as social agent. In arguing that the doctrine of vicarious liability should be extended to the concept of corporate liability, Laski, echoing the views of Veblen, took the position that the public must be protected from the corporation.\textsuperscript{242} Thus, in Laski, we see the more moderate argument for an extension of corporate liability coupled with a Veblen-like leftist critique of corporate power. Laski’s more leftist orientation is also illustrated by the following quote:

\begin{quote}

[It] becomes increasingly evident that society cannot be governed on the principles of commercial nihilism. To assume that freedom and equality consist in unlimited competition is simply to travesty the facts. We come once more to an age of collective endeavor.\textsuperscript{243}
\end{quote}

The economic thought that influenced Laski was institutionalism. In support of his legal policy prescriptions, he cited institutional and German historical economists. The most prominent of the economists and works cited by Laski for purposes of this genealogy of SPL are Henry Seager’s \textit{Social Insurance} and Crystal Eastman’s \textit{Work-Accidents and the Law}, which were discussed earlier.\textsuperscript{244} Laski’s general views on economics and his antipathy toward neoclassical economics are set forth in a letter to Holmes. In the letter, Laski describes an economist who “defines economics as the alternative choice between scarce means to achieve maximum satisfaction” as demonstrating the “mental limitations of the expert” and justifying why the “public does not take the economists very seriously.”\textsuperscript{245}

Laski’s views on vicarious liability aptly illustrate the reconfiguration of the Holmesian view of law in the works of reform-oriented legal intellectuals. If Laski’s views represent the passing of the torch from Holmes to a later generation, Leon Green can be viewed as a similar bridging figure between Nicholas St. John Green regarding the critique of causation in tort law.

\textbf{B. Leon Green}

Leon Green is one of the leading figures in the legal realist movement and a giant in the field of tort law.\textsuperscript{246} His assault on causation in

\begin{itemize}
\item \textsuperscript{240} LASKI, \textit{supra} note 235, at 112.
\item \textsuperscript{241} Id. at 114.
\item \textsuperscript{242} Id. at 123.
\item \textsuperscript{243} Id. at 134.
\item \textsuperscript{244} Id. at 127, note 134. Laski also cited SEAGER’S \textit{PRINCIPLES OF ECONOMICS}. In addition, Laski made reference to WILLIAM WILLOUGHBY’S \textit{WORKINGMEN’S INSURANCE}, another classic in the social insurance literature. Id.
\item \textsuperscript{245} 2 HOLMES-LASKI LETTERS 451-452 (William DeWolfe Howe ed. 1963).
\item \textsuperscript{246} See G. WHITE, \textit{supra} note 3, at 92-96; HORWITZ, \textit{supra} note 4, at 61.
\end{itemize}
negligence was a significant contribution to tort theory. This critique of causation was strikingly similar to Nicholas St. John Green’s, providing a distinct connection to pragmatist thought. However, where Nicholas Green discussed causation on a philosophical level, Leon Green engaged in doctrinal/case analyses.

The philosophy/approach of Leon Green can be seen in his article, *Are Negligence and Proximate Cause Determinable by the Same Test?—Texas Decisions Analyzed* (“Proximate Cause”). In *Proximate Cause*, Green takes a long line of Texas tort cases and criticizes any mention of proximate cause. To Leon Green’s mind, discussions of proximate cause only confused and masked the true issue: negligent behavior, as measured by the probability (foreseeability) of injury stemming from a particular activity. In making his argument, Leon Green drew the same conclusion as Nicholas Green: It is impossible to reconcile the cases in tort law through proximate causation analysis. Whenever courts used the term “proximate cause,” it stood as a proxy for probability of injury (negligence) and not causal relation.

As did Nicholas Green, Leon Green exhorted that negligence should be determined by the “probable consequence” and that in place of vacuous proximate causation analyses courts should look to “experience” as their guide to determining liability. According to Leon Green, only by analyzing cases in a probabilistic manner and appealing to experience could courts avoid the “niceties of metaphysics which have so long beclouded the point [negligence doctrine].” Thus, just as his forebear, Nicholas Green, Leon Green criticizes attempts to provide a metaphysical underpinning for liability and urges that the determination be based on a “probability test solely.” Of course, as in the case today with SPL, there would still be a “but for” causation test.

Leon Green’s intellectual/doctrinal position was an important precursor to the SPL movement. The critique of causation in negligence paved the way for a conception of torts based on probable consequences and, importantly for SPL development, the acceptance of statistical inference as a policy justification in tort law analysis.

C) Karl Llewellyn

Karl Llewellyn differs from the other central legal figures discussed in this article because his chief contribution was in the area of contract law. However, he recognized the importance of his thought to tort law.

247. 1 TEX. L. REV. 423 (1923) (hereinafter cited as “L. GREEN”).

248. Id. at 429. See N. GREEN, supra note 37, at 15-16 for reference by N. Green regarding “probable consequences.”

249. L. GREEN, supra note 249, at 427, 434. See N. GREEN, supra note 37, at 16 for references by Nicholas Green regarding “experience”.

250. L. GREEN, supra note 247, at 437.

251. Id. at 443.

252. Id. at 439-440.
Genealogically, since the bulk of his scholarship was done some ten to twenty years before Fleming James, Llewellyn can be seen as a bridging figure between the original anti-formalist movement and the actual implementation of SPL.\textsuperscript{254}

As a legal realist, Llewellyn trumpeted themes very similar to those in the pragmatic thought of Holmes and Nicholas Green. He believed in the shifting nature of law, the need for law to change in response to a changing society, and the use of law as a public policy tool. In his text on the law of sales, Llewellyn summed up his ideas on the evolutionary nature of law.

[D]octrine changes to somewhat adjust to new insight. But the justification must be in terms of purely static law—and the older authorities pay the price—twisted out of recognizability. The other approach, taking account of the time dimension and of the fact of development, finds classic expression in MacPherson v. Buick.\textsuperscript{256}

Llewellyn readily recognized the direct, and potentially problematic, relationship, between legal realism and pragmatism:

Legal realism is a name for pragmatic and empirical thinking about the law; its confusions are due to an uncritical acceptance of dogmas of raw empiricism and pragmatism without any considerations of the philosophical issues which these dogmas raise, but certainly do not resolve.\textsuperscript{257}

Llewellyn's contribution to the rise of SPL is principally due to his theories on warranty, and, perhaps more importantly, the theoretical arguments he used to support his views.

\textsuperscript{253} For a discussion of Llewellyn's contribution to SPL, though not emphasizing the influence of pragmatism and institutionalism on Llewellyn's thinking, see Note, Karl Llewellyn and the Intellectual Foundations of Enterprise Liability, 97 YALE L.J. 1131 (1988) (hereinafter cited as "NOTE").

\textsuperscript{254} Llewellyn recognized the intellectual debt he owed to Sumner, Holmes, Veblen, Commons and Pound. Karl Llewellyn, The Effects of Legal Institutions Upon Economics, 15 AM. ECON. REV. 665 (1925) (hereinafter cited as "EFFECTS OF LEGAL INSTITUTIONS"). In a book review, Llewellyn again recognized his intellectual debt to Holmes and Commons in formulating the ideas for his classic article, Realistic Jurisprudence. In addition, John Dewey and others are recognized. Karl Llewellyn, Law and the Modern Mind: A Symposium, 31 COLUM. L. REV. 82, 84, note 1 (1931) (hereinafter cited as "LAW & THE MODERN MIND").

\textsuperscript{255} KARL LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES 272 (1930). The reference to MacPherson is illustrative of the essential role of a temporal view of the transformation of tort law. Cardozo in seeking to undermine the doctrine of privity in tort law states that:

Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel to-day. The principle that danger must be imminently does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.


\textsuperscript{257} LAW AND THE MODERN MIND, supra note 254, at 91.

The warranty foundation for strict products liability was set forth in a two-part article written by Llewellyn entitled On Warranty of Quality, and Society.258 Llewellyn’s On Warranty articles are an explicit appeal to history and a call to contextualize legal doctrine:

It is a sad commentary on our dogmatists that sales cases over a hundred and fifty years and more than fifty jurisdictions have been treated as if they floated free of time, place and person. Whereas it is time, place, person and circumstance which give them meaning.259

Given this general framework, Llewellyn would go on to lay out the history of warranty law dating back to early English common law.

One of the themes that figured prominently in Llewellyn’s analysis was the disparities in bargaining power among contracting parties.260 In examining the bargaining issue, Llewellyn adopted a pragmatic assessment rule:

(1) Bargain to the parties’ taste has been, and is, praise-worthy in our law wherever experience has not shown the contrary. (2) A bargain, however, shows itself not to be a bargain when lop-sidedness begins to scream. . . . (3) The problem is this: that contract is not a natural right, but a legal construct.261

Llewellyn recognized the similarities and important differences between warranty (contract) law and torts.262 In particular, he recognized that the impact of a given law was determined by the social and economic context. While not addressing cases sounding in tort (breaking axles, gasoline sold for kerosene, glass in face cream, and exploding heaters) in detail, Llewellyn did at the end of On Warranty II say that he had intended to discuss the subject but it had been addressed in a student note that Llewellyn supervised.263 However, he did make some general statements. To Llewellyn, the core issue was the “helpless consumer . . . who takes what he gets, because he does not know enough, technically, to test even what is before his eyes.”264 Given this core reality, Llewellyn saw the development of product liability law, whether in tort or warranty, tending towards “absolute liability.”265

As part of his historical and policy analysis, Llewellyn admonishes legal scholars to weigh different legal and policy doctrines (tort, contract, res ipsa loquitur, central regulation, etc.) “against the flux of conditions, needs and theories.”266 In setting forth this methodology, Llewellyn recognized the lag time in correspondence between societal need and legal

258. ON WARRANTY I, supra note 258, at 699, note *.
259. Id. at 710.
260. ON WARRANTY II, supra note 258, at 402-403 (emphasis in original).
261. ON WARRANTY I, supra note 258, at 712 (Llewellyn points out the differential deterrence of contract and tort remedies.)
262. ON WARRANTY II, supra note 258, at 404. The student note was entitled The Marketing Structure and Judicial Protection of the Consumer, 37 COLUM. L. REV. 77 (1937).
263. ON WARRANTY II, supra note 258, at 404 (emphasis in original).
264. Id. at 407.
265. Id. at 407.
266. ON WARRANTY I, supra note 258, at 713.
response, citing Veblen as one whose view on such lags he admired. In addition, in making the point that a temporal view of law, particularly with respect to contract interpretation, must be taken, Llewellyn quoted from Holmes’ *The Path of the Law*.

To Llewellyn, the condition of society, in particular industry, was important and perceptions of that reality would govern legal policy. Judges run the risk of “over-idealizations” regarding business and credit relationships. In reality argued Llewellyn, since coming out of the Civil War, America had been transformed from an agricultural yeoman economy to one that included:

- a combination of power-factory, technical advance, natural resources uncovering, expansion of railroad mileage and unity, the Republican Party, the tariff, and the general incorporation law, [which] set the stage nationally for widening a seller’s mercantile obligation.

Furthermore,

[T]o match against the accident of the person-in-the-place, we see the complex of prevailing ideological patterns, and the frequent net straining of such patterns toward predictable results. The great sweep of underlying technology; the repatterning of business structure and ways, under its impact; the interplay of these with the more remote and more rigidly rationalized ways and ideology of law; the sudden deflection of the semi-predictable resultant by two confused single human beings who happened to acquire leverage by position: there are few more moving exhibits recorded of the ways of man and men in civilization.

Llewellyn’s chief policy argument was the need for social insurance. Social insurance was the justification for the shift in the costs of accidents from consumers to manufacturers of products. In *On Warranty II*, describing the “social uses” of torts and how disclaimers in contract should not be allowed to undercut deterrence and loss spreading goals in torts, Llewellyn remarks:

Tort drives toward making losses rest where they can best be first reduced, and then spread. Total exemption or too great cutting down of remedy by ‘contract-

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267. Id. at 713-714. Llewellyn stated that:

[A] lag of indeterminate length is likely, before the reflection becomes at all a true one, but ... the law’s effect upon the relevant activities of men is fairly direct, and not too difficult to observe, and nowhere easier to get at than in the commercial field. *Id.*

268. *ON WARRANTY II*, supra note 258, at 386, quoting Holmes, *The Path of Law*:

You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of a community or of a class, or because of some opinion as to policy, or in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions. Such matters really are battle grounds, where the means do not exist for determinations that shall be good, for all time, and where the decision can do no more than embody the preference of a given body in a given time and place.


269. *ON WARRANTY I*, supra note 258, at 721. Llewellyn adopted the view that “judges being what judges are, at once human beings and lawyers, we must expect the pressure of case-fact to be met, deflected, or accentuated, according to the judges’ experience of life and the judges’ skill in channeling of one sort or another.” *Id.* at 733.

270. *Id.* at 732.

271. *ON WARRANTY II*, supra note 258, at 362.
Llewellyn discussed the need to "spread a risk" and emphasized the importance of being concerned with the "distribution of risk." This concept of risk (loss) spreading was similar to the ideas put forth by the institutionalists in the social insurance movement. However, Llewellyn suggested that, if it were politically feasible, he would prefer a more egalitarian system of loss spreading. Llewellyn stated that imposition of liability should not be based on hazard created and perhaps some "Great Court can be made to see the imposition of liability (as of taxation) in terms of capacity to pay as constitutional."

In framing his policy arguments, Llewellyn used an institutionalist framework. This can be seen in the reference[s] by Llewellyn in his On Warranty articles to Walton Hamilton, the institutionalist economist and Yale Law School professor who had been influenced by Veblen. Moreover, his affection for the institutionalist school of thought is evident in an article, which appeared in the leading economics journal of the day, laying out his public policy ideas: The Effects of Legal Institutions Upon Economics. In the article, Llewellyn is frank about the need for lawyers to turn to economics in an effort to formulate law. Llewellyn made a crucial connection between the legal realists' anti-formalism project and the policy prescriptions of the institutionalist school:

The jurist is protesting against the dogma of his fathers that law is unchanging, eternal, discoverable always by deduction. Only recently has he come to see it as a thing in flux, and made discovery of non-legal factors which condition is growth and action. Whereas the economist takes that for granted...

Llewellyn went on the say:

When one approaches the law, not with the idea of formulating its rules into a system, but with an eye to discovering how much it does or can effect, and to the principles both of its effect and of its change, economic theory offers in many respects amazing light.

The importance of economics was that it provided the scientific tools with which to consider how best to harness the power of institutions for the
good of society.\textsuperscript{281} The institution that was foremost in Llewellyn’s mind was the corporation. Llewellyn’s views on the corporation and its role vis-a-vis the consumer were similar to Veblen’s, as evident in Llewellyn’s view of the “helpless consumer” in \textit{On Warranty II}.\textsuperscript{282} Llewellyn also shared Veblen’s belief that the focus of the “new business” is finance.\textsuperscript{283} The policy implication of this perspective on the corporation was that “the manufacturing concern, already the engine for shifting losses through industrial accident, may tomorrow be used with like effect on risks of unemployment.”\textsuperscript{284} Llewellyn’s critical stance towards the corporation led him to view it as a possible engine of redistribution from “wealthy” corporations to “poor” consumers.

Llewellyn tied his general conception of society to specific areas of tort law: workers’ compensation, products liability, and strict liability for hazardous activities. He saw all of these movements in law as dealing with the relationship between capital, labor, and the consuming public. At the center of the policies was the “legal tendency to throw risks of industrial civilization in the first instance upon the industry to which they are chargeable as costs.”\textsuperscript{285} While this placed a heavy burden on certain industries, it was warranted from a social perspective as a means of regulating the distributive function of the market place. Llewellyn recognized that this distributive function, as opposed to the market’s productive function, was all too easily ignored, but at the peril of cogent analysis. Again, highlighting Llewellyn’s redistributionist (from rich to poor) leanings, it is significant that in \textit{On Warranty II} Llewellyn remarks (and cites to \textit{Buick v. McPherson}) that, as far as contract provisions containing a pro-business slant: “Now these are often cases in which that precious commodity Justice must be viewed as being as scarce as the scarcer economic goods.”\textsuperscript{286}

\textbf{D) Benjamin Cardozo}

Benjamin Cardozo’s \textit{The Nature of the Judicial Process} (“Judicial Process”)\textsuperscript{287} is a landmark text in the “sociological jurisprudence” school of legal thought, which, given the historical linkage between sociological jurisprudence and legal realism, warrants discussion as a work in the legal

\textsuperscript{281} The belief in economics as an integral method in social reconstruction echoes the view put forth by Dewey. \textit{See supra} Section I (B) (3).

\textsuperscript{282} \textit{ON WARRANTY II, supra} note 258, at 404.

\textsuperscript{283} \textit{Id.} at 371 (emphasis in original). Llewellyn, again like Veblen, was aware of the role marketing could play in economic interactions: “Form-contracts can do, in the legal and marketing phases, almost as outrageous work as the conveyor-belt.” \textit{Id.} at 394 (emphasis added).

\textsuperscript{284} \textit{EFFECTS OF LEGAL INSTITUTIONS, supra} note 254, at 667.

\textsuperscript{285} \textit{Id.} at 680.

\textsuperscript{286} \textit{ON WARRANTY II, supra} note 258, at 401.

\textsuperscript{287} \textit{CARDozo, supra} note 1.
realist vein of thought. Throughout the text of *Judicial Process*, the seeds of pragmatism can be found. However, exploring Cardozo’s thought is important not only for its link to legal realism and pragmatism, but, perhaps more significantly, because Cardozo was the author of one of the foundational cases for SPL, *Buick v. MacPherson*, which will be discussed in Section V.

In *Judicial Process*, Cardozo makes little reference to pragmatist philosophers. However, there are several references to Holmes, and a general admonition that “the juristic philosophy of the common law is at the bottom philosophy of pragmatism.” In subscribing to the philosophy of pragmatism, Cardozo stresses that “truth is relative, not absolute.” This vision of truth is linked to the explicit anti-formalist position Cardozo takes throughout *Judicial Process*.

However, Cardozo rejects the radical anti-formalism that some of his legal realist successors would embrace. In Cardozo’s view, judging consists of four types of analyses: 1) logical progression of rules; 2) historical development; 3) custom; and 4) justice, morals, and social welfare. The inclusion of logical progression as a part of judicial development bespeaks Cardozo’s unwillingness to make a clean break with concepts of judicial formalism. Nevertheless, in the context of changes in society, Cardozo makes it clear that “in our day and generation . . . the greatest of them [forces shaping judicial change] all, [is] the power of social justice which finds its outlet and expression in the method of sociology.”

Cardozo’s focus on judicial decisionmaking in context reflects the evolutionary perspective that would figure so prominently in his judicial opinions—particularly *MacPherson*. In the legal realist vein, Cardozo takes an interdisciplinary approach in thinking about how judges are to construe the law at various points in society’s evolution:

> Courts know today that statutes are to be viewed, not in isolation or in vacuo, as pronouncements of abstract principles for the guidance of an ideal community, but in the setting and the framework of present-day conditions, as revealed by the labors of economists and students of the social sciences in our country and abroad.

288. See WHITE, JURISPRUDENCE & SOCIAL CHANGE, supra note 53 (discussing historical linkage and tensions between sociological jurisprudence and legal realism).

289. See Section IV(B) (1) infra for discussion of *MacPherson*.

290. There is a direct reference to William James in regard to the construction of personal truth as a part of everyone’s make up. CARDozo, supra note 1, at 12.

291. Id., at 102 (citing to Roscoe Pound’s, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908)).

292. Id.

293. Cardozo explicitly identifies and disavows “formalism” at two points in *Judicial PROCESS*. Id. at 66 and 100.

294. Id. at 30-31.

295. Id. at 65-66.

296. Id. at 100, 104-105, 137.

297. Id. at 81.
These views taken by Cardozo would be manifest in *MacPherson*, signifying not only Cardozo’s contribution to SPL development, but also the legal realist contribution.

As the contributions of Holmes, Laski, Llewellyn, and Cardozo illustrate, G. Edward White was correct in recognizing legal realism as a fundamental precursor to SPL. What is more, the intellectual foundation is even broader, encompassing the whole of American pragmatic instrumentalism (pragmatism, institutional economics, and legal realism). With the foundations of pragmatic instrumentalism firmly in place, and having already had a significant influence on tort law (the critique of causation), it would be left to post World War II scholars and judges to call upon the tenets (though not necessarily the individuals who constructed the tenets) of pragmatic instrumentalism in completing the evolution of SPL.

**IV. Implementation**

Professors Priest and White have aptly chronicled the major legal-academic and judicial figures behind the implementation of strict products liability. It is not the purpose of this article to go further in this regard. However, a discussion of the intellectual connection between the implementors and American pragmatic instrumentalism is needed to tease out the thesis of this article and provide a broader vision of the intellectual origins of SPL. I will focus on two scholars who have been identified as principally responsible for engineering the spread of strict products liability. The two scholars are Fleming James and William Prosser. I will end with a discussion of how the pragmatic instrumentalist tradition surfaced in the landmark judicial opinions on SPL.

298. G. WHITE, supra note 3, at 110.

299. White implicitly recognizes this in identifying the roles of institutionalism and pragmatism in the general anti-conceptualist turn in American thought, of which legal realism was a part. Id. at 68. Morton Horwitz also implicitly makes this connection in including institutionalism and pragmatism as part of the legal realist intellectual milieu. HORWITZ, supra note 4, at 182-183.

300. G. WHITE, supra note 3; PRIEST, supra note 5. However, despite the noteworthiness of these attempts, they fail to adequately account for the theoretical underpinnings of SPL. See David Owen, *The Intellectual Development of Modern Product Liability Law: A Comment on Priest’s View of the Cathedral’s Foundations*, XIV J. LEG. STUD. 529 (1985) (hereinafter cited as “OWEN”). Owen has praise for Priest’s critical history of enterprise liability and notes the pressing need for historical context in the present policy debate, citing White’s TORT LAW IN AMERICA as an exemplar of the type of intellectual history that should be pursued. However, Owen recognizes the limited scope of Priest’s endeavor, in placing disproportionate emphasis on Fleming James and Fredrich Kessler, and the need to undertake a fuller inquiry into the intellectual origins of enterprise liability. Id. at 530. For a discussion of Karl Llewellyn’s role in the development of strict products liability, see NOTE supra note 253.

301. While American common law is strewn with cases implicating SPL, there are four commonly recognized landmark cases: *MacPherson v. Buick Motor Co.*, 111 N.E. 1050
A) Legal Academics

1) Fleming James

Fleming James led the intellectual charge for the expansion of strict products liability in torts during his career as a law professor at Yale University beginning in the 1940's. James based the promotion of strict products liability on three pillars: the futility of constructing a unifying theory of torts; a zeal for loss spreading as a guiding concept; and a belief in social science as a method for approaching the myriad of tort law issues. These three themes were deeply rooted in the American pragmatic instrumentalism that preceded James.

As I noted earlier, toward the end of the nineteenth century, there was a shift away from formalism in American thought and legal realism was a movement very much in conformity with the anti-formalist turn. In this light, situating Holmes as a precursor to the legal realist movement is significant in tracing the intellectual tradition from which Fleming James approached tort law. This is demonstrated in James' *Tort Law in Midstream*. In the piece, James references Holmes' *The Common Law and Collected Legal Papers*. But, more important than these references, is the way in which James' critique of tort law coincides with Holmes' and the legal realists' conception of tort law as a disparate set of rules and doctrines, with no *a priori* unifying concept.

James stressed that torts "covers a heterogeneous mass of stuff." This view of torts, which reflects James' view of society at large, is a direct offshoot of the anti-formalist turn in American thought, particularly as presented by the legal realists who preceded James. James puts forth three categories of torts: intentional torts, negligent torts, and torts based on strict liability. Just as Oliver Wendell Holmes, Nicholas Green, Leon Green, and Harold Laski took as part of their project the task of criticizing the move to provide an overarching theory of torts, James criticized the notion that *any one* of the concepts associated with his three categories of torts, particularly fault in negligence, could be used to coherently concep-

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(N.Y. 1916); *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P. 2d 436 (Cal. 1944) (Justice Traynor's concurrence at 440); *Hennington v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960); *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1962). See PRIEST, supra note 5, at 496-518, discussing *MacPherson, Escola, Hennington*, and *Greenman* as landmark cases in SPL law. While there are other significant cases that may just as well be discussed within the pragmatic instrumentalist framework, the purpose of this Section is to establish the links between the framework and a limited set of historically significant cases.

302. See, generally, PRIEST, supra note 5.


304. Professor Priest astutely notes that "James' influence . . . cannot be attributed to the novelty or persuasiveness of his theories." PRIEST, supra note 5, at 470.

305. WHITE, JURISPRUDENCE & SOCIAL CHANGE, supra note 53.

306. JAMES, supra note 303.

307. Id. at 315.
tualize all of tort.\textsuperscript{308} James' purpose was to open up doctrinal space, a project initially undertaken by Holmes, for strict liability to take on a larger role in the torts corpus.

James attacked the individualistic creed. Again, this is a common theme linking James to pragmatic instrumentalism, particularly that of Henry Seager. James' rejection of individualism led him to argue against negligence, which he criticized as being founded on the notion of individual fault or blameworthiness. In fact, in attempting to address his critics, James identifies one group of them as those who "prefer the individualism which they believe underlies the present law of negligence."\textsuperscript{309} James, somewhat rhetorically, admonishes that "notions of individualism that underlay the development of negligence law during the last century do not in fact underlie accident law today, and no philosophy and no amount of wishing will make it so."\textsuperscript{310}

The parallels in perspective between James and Seager are not surprising, given that in the landmark treatise, \textit{The Law of Torts}, which James authored with Fowler Harper,\textsuperscript{311} an entire chapter was devoted to "social insurance."\textsuperscript{312} At the beginning of the chapter, a direct reference is made connecting the torts project James wished to pursue with "workmen's compensation in 1910" and "1930's social insurance legislation."\textsuperscript{313} In the treatise, the importance of social insurance is discussed, along with the litany of ills that concerned the social insurance theorists discussed previously;\textsuperscript{314} "pecuniary loss through such vicissitudes of life as accident, old age, sickness, and unemployment."\textsuperscript{315} This linkage of James with the workers' compensation movement is a major linchpin in the genealogy of SPL.\textsuperscript{316}

James and Harper stressed the contrast between the themes of social insurance in the workers' compensation movement, and the fault princi-

\textsuperscript{308} There were other prominent legal scholars who echoed James' dissatisfaction with conceptualist thinking. For example, Leon Green levied a similar assault on conceptualist abstractions. Green believed that legal doctrine should be dynamic and not static. The basis of his belief, as it applied to tort law, was his humanitarianism. G. WHITE, supra note 3, at 75.

\textsuperscript{309} JAMES, supra note 303, at 338.

\textsuperscript{310} Id. at 339.

\textsuperscript{311} 2 FOWLER HARPER & FLEMING JAMES, THE LAW OF TORTS (1956) (hereinafter cited as "HARPER & JAMES").

\textsuperscript{312} Id. at 759-784.

\textsuperscript{313} Id. at 759. There is a spate of social insurance literature referenced in the chapter. Id. Although many of the references in this subsection are to the Harper & James treatise, James had already set forth his central theoretical claims in prior work. See, e.g., Fleming James, Accident Liability: Some Wartime Developments, 55 YALE L.J. 365 (1946); Contribution Among Joint Tortfeasors: A Pragmatic Criticism, 54 HARV. L. REV. 1156 (1941); Last Clear Chance: A Transitional Doctrine, 47 YALE L.J. 704 (1938).

\textsuperscript{314} See Section II (D) supra.

\textsuperscript{315} HARPER & JAMES, supra note 311, at 759.

\textsuperscript{316} Professor Priest has also recognized the workers' compensation movement as an important antecedent to SPL. PRIEST, supra note 5, at 465-470.
ples, recognizing that a dissolution of the fault concept was as essential to constructing their vision of SPL in torts as it was to the workers’ compensation movement. Fault encompassed the individualistic, laissez faire ideals in American society that James rejected. Its origins lay in an “earlier, mechanical imputation of blame,” a view which pragmatic instrumentalists criticized. James believed this should be rejected because:

Human failures in a machine age cause a large and fairly regular—through probably reducible—toll of life, limb, and property. The most important aspect of these failures is not their moral quality; frequently they involve little or nothing in the way of personal moral shortcoming.

Relying on the same argument—the irrelevance of fault in a modern industrial economy—as did Seager and Eastman in proposing workers’ compensation, James and Harper emphasized that individuals are engaged in activity that causes “certain” and “calculable” loss. To this point, James was enamored with accident studies and their economic implications.

As for the economic theory consistent with James’ and Harper’s vision, it was decidedly the institutionalist sort. This is important to emphasize because by the time SPL was to be implemented, the neoclassical school of economics had clearly beaten back institutionalism. In a later edition of The Law of Torts, it was recognized that the thoughts of Guido Calabresi were somewhat allied with the thoughts put forth in the treatise. Calabresi’s neoclassical economics arguments for strict liability, under certain specified conditions, are described as helping “illuminate the approaches taken in this text, although they employ different emphases and suggest different conclusions.” Calabresi’s use of neoclassical economics is contrasted favorably to Posner’s. However, the point cannot be overemphasized that, regardless of “brand” of neoclassical economics, the “economics” James et al. had in mind (as did their intellectual predecessor, Holmes) was incongruous with the tenets underlying neoclassical economics. Their vision of economic analysis was deeply rooted in institutionalist ideas and praxis, as is evidenced by James’ belief in the inductive (statistical) method.

Regarding statistical studies, James declared that the greatest was the Columbia Study. The Columbia Study was compiled by a group of

317. HARPER & JAMES, supra note 311, at 762.
318. Id. at 762 (emphasis added).
319. Id. at 763, note 7.
320. JAMES, supra note 303, at 328-333.
322. 3 FOWLER HARPER, FLEMING JAMES & OSCAR GRAY, THE LAW OF TORTS 132-133, note 7 (2d ed. 1986) (hereinafter cited as “HARPER, JAMES & GRAY”).
323. Id.
324. See text accompanying notes 63-64.
325. Report by the Committee to Study Compensation for Automobile Accidents to the Columbia University Council for Research in the Social Science (1932) (hereinafter cited as
scholars at both Columbia and Yale in the years 1928-1930. The desirability of such a study had been suggested by William O. Douglas and Leon Green, both members of the Yale faculty at the time. The study had four parts: case studies on the effect of accidents on individuals, records of court congestion, studies on the constitutionality of compensation laws, and insurance studies. In this regard, the report was very much in the pragmatic instrumentalist tradition.

Methodologically, the case studies, which were of the greatest interest to James, are strikingly similar to the Pittsburgh Study conducted by Crystal Eastman as part of the evidence supporting the workers’ compensation movement. The Columbia Study was conducted by Emma Corstvet under the supervision of the Dean of the Yale Law School, Charles Clark. Corstvet was influenced by institutionalism. As an undergraduate, she had studied with Commons at the University of Wisconsin, and she later studied at the London School of Economics.

Corstvet’s outlook is similar to Crystal Eastman’s. This is best illustrated in an article Corstvet wrote based on data from the Columbia Study. The article, entitled “The Uncompensated Accident and Its Consequences,” begins with a short exercise in storytelling. Corstvet tells the story of three families, each with a member disabled or killed in an accident, and the emotional and financial consequences they faced. The stories graphically illustrate the similarities with Eastman:

[I]n Connecticut, Steve Carlson, a laborer, was injured in an accident, his hip smashed. While he was in the hospital and for sometime afterwards, his wife and children managed. They borrowed from relatives, used up small savings, exhausted their credit with the grocer. The rent fell behind. Finally, a year later, the family gave up and was taken in by his parents until such time as ‘maybe his sickness gets better.’ There was no compensation. There was no newspaper report of this unimportant series of events; it is recorded only in statistics which state that about a million people were injured that year by automobiles.

A little later in the year, Pasquale Minotti was killed while crossing a street. A brief notice in the local paper stated that the driver had been found by the coroner to have been drinking and was arrested for homicide but later released. The widow got $500 life insurance, more than half of which she foolishly spent on the funeral. Seven months later she was living on occasional gifts from her former husband’s employer and on gifts of food from neighbors. The landlady had not

“COLUMBIA STUDY”). See discussion of Wesley Mitchell and Columbia Study supra Section II (C).

326. SCHLEGEL, supra note 158, at 532-533.
327. SCHLEGEL, supra note 158, at 521-522.
328. See Section II (B) supra discussion John R. Commons.
329. SCHLEGEL, supra note 158, at 521. Corstvet studied at the London School of Economics (the “LSE”) between the years 1923-24. Id. at 521, note 304. During those years, Harold Laski was a professor of political science at the LSE. KRAMNICK & SHEERMAN, supra note 234, at 246. However, there is no evidence that Corstvet studied under Laski at the LSE.
330. Emma Corstvet, The Uncompensated Accident and Its Consequences, 3 LAW & CONT. PROBS. 466 (1936)
yet had the heart to put her out. There had been no compensation.\textsuperscript{331}

The stories, and additional illustrations woven throughout the article, place the empirical data in human context. It is significant that Corstvet makes the point: "The concern of this article is not with reduction of accidents, itself an important problem. . . . It is with . . . the blunt consequences of lack of money."\textsuperscript{332} Thus, at this point in the intellectual evolution of SPL, compensation, not deterrence, had taken center stage. The concern was for the social dislocation associated with uncompensated accidents, a concern which, as illustrated in previous Sections, had been prominent in the workers' compensation movement. Before moving back to a discussion of James, it should be noted, as a historical and personal anecdote, that upon completing the study, Corstvet would go on to marry Karl Llewellyn.\textsuperscript{333}

The case studies and statistical analyses contained in the Columbia Study intrigued James because they lent support to his belief that the then-existing tort system undercompensated victims and led to social dislocation. According to the Columbia Study, those who suffered injury and who did not have insurance were seldom adequately compensated.\textsuperscript{334} In addition, those suffering permanent disability did not obtain sufficient compensation to cover continued medical expenses, and wage loss.\textsuperscript{335}

Loss spreading was the chief economic phenomenon that James attempted to address. His emphasis on loss spreading was a product of the humanistic values associated with institutionalism. James' view was that "[w]e should not only select but also adjust our tools to the particular job in hand, and that is to be measured in terms of human needs and values and not of legal concepts."\textsuperscript{336}

To this end, as evidenced by his emphasis on the Columbia Study, James was more enamored with the tort system as a tool for compensation than as evidence for deterrence. In \textit{The Law of Torts}, we are told that reducing accidents could be achieved through "pressure of safety regulations with penal and licensing sanctions, and of self-interest in avoiding the host of nonlegal disadvantages that flow from accidents."\textsuperscript{337} However, [W]hen this is all done, human losses remain. It is the principal job of tort law today to deal with these losses. They fall initially on people who as a class can ill afford them, and this fact brings great hardship upon the victims themselves and causes unfortunate repercussions to society as a whole. The best and most efficient way to deal with accident loss, therefore, is to assure accident victims of substantial compensation, and to distribute the losses involved over society as a whole or some very large segment of it. Such as basis for administering losses is

\textsuperscript{331} \textit{Id.} at 466.
\textsuperscript{332} \textit{Id.} at 467.
\textsuperscript{333} SCHLEGEL, supra note 158, at 539.
\textsuperscript{334} COLUMBIA STUDY, supra note 325, at 76-90.
\textsuperscript{335} \textit{Id.} at 92.
\textsuperscript{336} JAMES, supra note 303, at 328 (emphasis added).
\textsuperscript{337} HARPER, JAMES \& GRAY, supra note 322, at 132.
what we have classed social insurance."\textsuperscript{338}

This statement echoes the humanistic concerns that informed James’ views, dwarfing any rhetoric he might have put forth concerning efficiency. It also illustrated how the concept of the corporation as conduit for spreading losses, as opposed to an evil entity to be contained/taxed, was at the core of James’ conception of SPL.

2) \textit{William Prosser}

While James was the most theoretically sophisticated of the tort scholars who implemented SPL, William Prosser was the most instrumental in its ultimate adoption into law. Prosser’s influence was due in large part to his doctrinal contributions.\textsuperscript{339} James emphasized the policy aspects of strict products liability. Prosser, while alluding to the relevance of social engineering and policy aspects (remnants of the institutionalist influence), focused on setting forth a doctrinal approach to strict products liability.

This focus on doctrinal reconfiguration can be seen in Prosser’s contribution to the warranty debate.\textsuperscript{340} In \textit{Implied Warranty}, Prosser set out to examine the development of warranty law in much the same way as Llewellyn had in his \textit{On Warranty} articles, beginning with the history of warranty. At the outset, Prosser recognizes that initially breach of warranty was a claim in tort as a form of misrepresentation and that this doctrinal entanglement had present-day consequences.\textsuperscript{341} In particular, the tort strands in warranty analysis provided a grounds for the argument to extend implied warranty to the ultimate consumer irrespective of privity.\textsuperscript{342}

As to the reasons why implied warranty of quality could be so easily read into the law of contracts, Prosser offered three. First, the seller is assumed to have represented certain facts to the buyer and the failure of the product to meet these supposed expectations constitutes deceit.\textsuperscript{343} Deceit was read into the transaction given the “seller’s supposed superior

\textsuperscript{338} HARPER & JAMES, \textit{supra} note 311, at 762-763 (emphasis added). In a later edition, the sentence referencing the “most efficient way to deal with accident loss” was deleted and in its place the following sentence was added.

\textit{Humanitarian objectives} of society can best be met by finding ways to deal with accident loss that will ordinarily assure accident victims substantial compensation to cover at least their economic loss, and will distribute the losses involved over society as a whole or some very large segment of it.

HARPER, JAMES & GRAY, \textit{supra} note 322, at 132 (emphasis added).

\textsuperscript{339} See G. WHITE, \textit{supra} note 3, at 139-179.

\textsuperscript{340} William Prosser, \textit{The Implied Warranty of Merchantable Quality}, 27 MINN. L. REV. 117 (hereinafter cited as “IMPLIED WARRANTY”).

\textsuperscript{341} \textit{Id.} at 118-119.

\textsuperscript{342} \textit{Id.} at 119.

\textsuperscript{343} \textit{Id.} at 122.
judgment or information about the goods." Prosser characterized this as a tort theory and correctly stated that as applied it represented a "strict liability" rule. Second, the basis of warranty was the actual agreement by the parties irrespective of whether the agreement remained unexpressed in the contract. A holding of liability in this instance is based on the court's creative reading of the contract. Nevertheless, at bottom, it is a contract analysis. Third, a warranty is "imposed by the law," irrespective of what the parties initially desired. The basis for imposition of liability was policy: "[t]he loss due to defective goods is placed upon the seller because he is best able to bear it and distribute it to the public. . . ."

Although he listed all three rationales, Prosser was careful to note that, as far as liability was concerned, which of the three actually deployed made little difference because as a general matter, courts were "tending to an increasing extent to favor the buyer and find the warranty" regardless of the rationale put forth. Thus, Prosser recognized that doctrinal machinations were mere placards for intellectual and policy shifts. Those shifts had been forged in the crucible of pragmatic instrumentalism. However, with Prosser's steady hand at the controls, the ultimate triumph of SPL would occur in the form of Section 402A of the Restatement of Torts, which Prosser was instrumental in having adopted, but only after the courts had done their sorting.

B. Judicial Opinions

1) Buick v. MacPherson: Cardozo's Pragmatic Instrumentalism Applied

To set the stage for the judicial adoption of SPL, it is necessary to take a step back in time and return to Cardozo. The importance of his pragmatic instrumentalist views of law and judging to the construction of SPL is manifest in the significance of MacPherson, which as previously noted, was looked upon by Llewellyn as an exemplary piece of jurisprudence and which undoubtedly had an influence on James and Prosser as well.

The judicial origins of strict products liability in America can be squarely placed in the MacPherson opinion. The case is an exemplar of

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344. Id. at 133.
345. Id. at 122.
346. Id. at 123.
347. Id. at 124.
348. Id.
349. Id. at 125.
350. See PRIEST, supra note 5, at 511-518.
351. See supra text accompanying note 256.
how early twentieth-century thought, particularly aspects of pragmatism, initially permeated judicial thought.

In *MacPherson*, an automobile had been sold from the manufacturer to the dealer and from the dealer to the consumer/plaintiff. While the plaintiff was in the car, it suddenly collapsed and the plaintiff was thrown out and injured. The cause of the injury was a wheel made out of defective wood. The plaintiff brought an action against the manufacturer of the automobile, Buick Motor Co. The court held that a charge of negligence could be sustained against the manufacturer, although the purchase had been made between the consumer and dealer and not between manufacturer and consumer.

The importance of *MacPherson* doctrinally is in its rejection of the privity requirement in negligence cases against manufacturers of products. This necessarily led to an extension of liability. Conceptually, Cardozo had to confront common law notions of cause because they provided the justification for the privity requirement. Breaking from the concept of direct causal link, Cardozo discussed liability in terms of whether the "nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made. . . ." Thus, in Cardozo's view as put forth in *MacPherson*, liability hinges upon the probabilistic nature of injury and not vague notions of causation. This shift in analysis parallels the shift argued for by Nicholas Green and Leon Green in the pragmatic instrumentalist tradition, as initially set forth in Peirce's call for probabilistic inquiry. Remember, both Greens believed liability for negligence should rest upon an appeal to experience and empirical investigation. In *MacPherson*, Cardozo, like Nicholas and Leon Green, was unwilling to give up the concept of causation altogether (maintaining the "but for" causation test), but did reconstitute proximate cause as a probabilistic concept.

The context for this change in perspective was the reconfigured technological landscape. It is significant that *MacPherson* was a case involving an automobile, a symbol of industrial progress and technological advancement. The question for Cardozo was do such changes warrant doctrinal reformulation? His answer was:

Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel to-day. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.

Thus, Cardozo takes an evolutionary view of the law much like the evolutionary view that influenced other pragmatic instrumentalists.

354. *Id.* at 1053 (emphasis added).
355. See discussion of Nicholas St. John Green's thought on causation, *supra* Section I (A) (2).
356. *Id.*
MacPherson’s significance to SPL, as a matter of doctrine, is but a stepping stone—negligence still reigns. However, pragmatic instrumentalism had clearly infiltrated judicial thought on the matter.

2) Traynor’s Escola Concurrence

Justice Traynor’s concurrence in Escola\textsuperscript{358} is widely recognized as germinal in the development of strict products liability. The case involved a waitress who was injured when a bottle of Coca Cola exploded in her hand. The bottle had been delivered to the restaurant by an employee of Coca Cola. Coca Cola had not made the bottle, but was responsible for bottling the beverage.\textsuperscript{359}

Significantly for constructing a genealogy of strict products liability, the first case cited and the case that provides the foundation for Traynor’s concurrence is MacPherson.\textsuperscript{360} Traynor began by citing MacPherson for the doctrinal proposition that “irrespective of privity of contract, the manufacturer is responsible for an injury caused by such an article to any person who comes in lawful contact with it.”\textsuperscript{361} Moreover, Traynor’s discussion of social context, although at a very different period in American history, is similar to the contextual analysis offered by Cardozo:

As handicrafts have been replaced by mass production with its great markets and transportation facilities, the close relationship between the producer and consumer of a product has been altered. . . . The manufacturer’s obligation to the consumer must keep pace with the changing relationship between them. . . .\textsuperscript{362}

Just as Cardozo emphasized the temporal nature of truth (in a fashion similar to the pragmatist view of temporalism and relativism), so did Traynor in advocating for a different doctrine (one historically situated in contemporary society) in the products liability area. Also in the above quote, we can see the same concern, regarding what Traynor believed to be the changed relationship between consumer and producer, that animated much of the critique Veblen made concerning corporate power.\textsuperscript{363}

Traynor, in focusing on the historical change in the method of production, shares Veblen’s and Llewellyn’s skepticism about consumer’s ability to obtain useful information about product safety from the marketplace:

The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trade-

\textsuperscript{358} Escola v. Coca Cola Bottling Co. of Fresno, 150 P. 2d 436, 440 (Cal. 1944).
\textsuperscript{359} Id. at 437-438.
\textsuperscript{360} Id. at 440. Traynor would go on to rely on MacPherson twice more regarding the privity of contract issue. Id. at 442.
\textsuperscript{361} Id. at 440.
\textsuperscript{362} Id. at 443.
\textsuperscript{363} See Veblen discussion supra Section II (A) (contrasting consumer/producer role in “handicraft” society versus “industrial system”); Llewellyn discussion supra Section III (C) (discussing powerlessness of consumer in warranty context).
marks... Consumers no longer approach products warily but accept them on
faith, relying on the reputation of the manufacturer or the trademark.\textsuperscript{364}

Thus, reiterating a temporal view of society, “[t]he manufacturer’s obliga-
tion to the consumer must keep pace with the changing relationship
between them: it cannot be escaped because the marketing of a product
has become so complicated as to require one or more intermediaries.”\textsuperscript{365}
The change in obligation would be a restriction on unbridled corporate
power in the form of SPL. Given this critical stance, one might expect that
Traynor would advocate the most potentially redistributionist (from cor-
poration to consumer) system of liability achievable given common law
constraints.

In arguing for a rule of strict liability, as opposed to res ipsa loquitur
as advocated by the majority, Traynor begins by explicitly stating his
obligations as a judge: “public policy demands that responsibility be fixed
wherever it will most effectively reduce the hazards of life and health
inherent in defective products that reach the market.”\textsuperscript{366} Thus, Traynor,
paralleling Cardozo’s view of the judge as legislator, analyzed the case as
resolving issues of public (social) policy, not individual morality. One
criterion for public policy determination is reducing the injury associated
with defective products. To this end, it was time to do away with analysis
of product liability in negligence. Grounding product liability in strict li-
bility, as opposed to the mere inference of fault associated with res ipsa
loquitur, would provide greater assurance that victims would be compen-
sated and acknowledge the fact that fault was not the core issue in prod-
ucts liability.

Along these lines, in the \textit{Escola} concurrence there is a sense of the
inevitability of at least some human injury due to defective products.
Traynor declares that the risk of accidents is a “constant risk and a general
one.”\textsuperscript{367} Just like accidents in the workplace, product-related accidents
would inevitably occur. The question for Traynor was: Who should bear
the cost of these inevitable accidents?

As with Seager, Eastman, James, and Corstvet, the direct human suf-
ferring associated with the injury and the indirect human suffering related
to social dislocation, loomed large in Traynor’s response to the question.
An accident victim, stressed Traynor, normally would be “unprepared to
meet its consequences.”\textsuperscript{368} Thus: “The cost of an injury and the loss
of time or health may be an overwhelming misfortune to the person
injured...”\textsuperscript{369} This theme of human suffering due to product use would
be a constant in Traynor’s strict products liability opinions.

\textsuperscript{364} \textit{Escola}, \textit{supra} note 358, at 443.
\textsuperscript{365} Id.
\textsuperscript{366} Id. at 440.
\textsuperscript{367} Id. at 441. This is the same view regarding the inevitability of accidents that was
taken by Henry Seager. Section II (D) (2) \textit{supra}.
\textsuperscript{368} Id.
\textsuperscript{369} Id.
What is the solution to the social dilemma of human pain and suffering? "[T]he risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business."370 The two concepts of insurance and loss spreading are pillars in the argument for strict products liability that had evolved under institutional economics. As well, the focus on the corporation, rather than the government as loss spreader, had roots in institutionalism, particularly the workers’ compensation movement. However, while the corporation was seen as the source of the problem, it would merely serve as the point of collection for compensation, realizing that ultimately some of the costs would be passed on to consumers. Again, this highlights the tension between the critical versus the instrumentalist theme in pragmatic instrumentalism.

Traynor readily recognized the academic literature that informed his perspective.371 He relied heavily on Prosser (both his treatise and Implied Warranty article), and on James and Llewellyn (Llewellyn’s On Warranty I article as well as his sales case book) to a lesser extent. Much of this intellectual foundation was constructed and became fully formed in the years following Cardozo’s MacPherson opinion. G. Edward White has recognized that Cardozo did not use loss spreading and loss shifting arguments, and he was not particularly sensitive to the need to provide compensation to the injured. These ideas owed their formulation to a great extent to the intellectual movements earlier discussed and were firmly in place at the time Traynor wrote the Escola concurrence some twenty-eight years after MacPherson. In the words of G. Edward White: “Traynor . . . did not originate any of the ideas. He applied them, however, to a case in which they seemed to make good sense, and then used that case to advance arguments for their general use.”373

3) Henningson v. Bloomfield

Henningson v. Bloomfield Motors, Inc.374, while skipping a few generations, picks up very much where MacPherson left off. The case, as did MacPherson, involved the purchase of an automobile from a dealer. In Henningson, the automobile was acquired by the husband of the accident victim. Mrs. Henningson was taking a routine drive down the highway when she suddenly heard a “loud noise ‘from the bottom, by the hood.’ ”375 The steering wheel spun in her hands and the car veered to the right into a highway sign and brick wall.376 The car was so badly dam-

370. Id.
371. See G. WHITE, supra note 3, at 182-183 (discussing Traynor’s propensity to introduce academic literature into judicial opinions and Traynor’s own academic background, including a Ph.D. in philosophy).
373. Id. at 198.
375. Id. at 75.
376. Id. at 75.
aged that the cause of the accident could not be determined by examining the remains of the wreckage.\textsuperscript{377} It had been purchased some ten days before the accident and only had 468 miles on the speedometer.\textsuperscript{378}

Doctrinally, the case hinged primarily on whether a relatively obscure disclaimer in the sales contract was sufficient to undercut the implied warranty of merchantability that was by 1960 well established under New Jersey law. While implied warranty of merchantability was the doctrinal linchpin, the court's opinion was driven by some core pragmatic instrumentalist concepts and infused throughout with notions of tort.

In the pragmatist vein, the court placed great emphasis on the temporal nature of law, going as far as to use the term "modern" ten times in order to emphasize the evolutionary nature of law, and stressing that law is not "easily defined" or "static."\textsuperscript{379} Initially referring to the development of warranty law as a tool for protecting consumers, the court framed its analysis as follows:

\begin{quote}
[O]ver the years since the almost universal adoption of the act [Uniform Sale of Goods Law], a growing awareness of the tremendous development of modern business methods has prompted the courts to administer that provision with a liberal hand.\textsuperscript{380}
\end{quote}

Thus, the changing time warranted that courts "ameliorate the harsh doctrine of \textit{caveat emptor}, and in some measure to impose a reciprocal obligation on the seller to beware."\textsuperscript{381} In addressing the relevance of changed times to the issue of liability resulting from automobile accidents, the court made direct reference to Justice Cardozo's opinion in \textit{MacPherson} quoting:

\begin{quote}
Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel to-day. The principle that the danger must be imminent does not change, but the things subject to the principle do change.\textsuperscript{382}
\end{quote}

Moreover, taking a temporal view of the years following \textit{MacPherson}:

\begin{quote}
In the 44 years that have intervened since that utterance [(the \textit{MacPherson} opinion)], the average car has been constructed for almost double the speed mentioned. ... The number of automobiles in use has multiplied many times and the hazard to the user and the public has increased proportionately.\textsuperscript{383}
\end{quote}

Here, we see the product from the seeds of pragmatic instrumentalism beginning to appear full bloom with a unanimous court ruling that the new seller obligation would require increased victim compensation because implicit in a "rapidly expanding commercial society was the recognition of the right to recover damages on account of personal

\textsuperscript{377} Id.
\textsuperscript{378} Id.
\textsuperscript{379} Id. at 94.
\textsuperscript{380} Id. at 76 (emphasis added).
\textsuperscript{381} Id. at 77.
\textsuperscript{382} Id. at 85 (quoting from \textit{MacPherson} at 1053). The \textit{Henningson} court also relied heavily on another Cardozo opinion, \textit{Ryan v. Progressive Grocery Stores}, citing it nine times. 175 N.E. 105 (N.Y. Ct. App. 1931). \textit{Ryan} was a case involving an implied warranty.
\textsuperscript{383} \textit{Henningson}, supra, note 374, at 85.
injuries arising from the breach of warranty." The scope of liability under warranty had so expanded by the time Henningson had been decided that the court could flatly state:

The particular importance of this advance resides in the fact that under such circumstances strict liability is imposed upon the maker or seller of the product. Recovery of damages does not depend upon proof of negligence or knowledge of the defect. While the doctrine of privity had not been sufficiently obliterated in the wake of MacPherson to not warrant discussion by the Henningson court, the court's reasoning in dismissing the privity requirement as a bar from recovery is instructive. The court stressed that the doctrine had been undercut because manufacturers no longer dealt with consumers as individuals, but as customers to be snared into "large scale advertising" schemes. The court took the position that the mass marketing had the effect of undercutting the equal bargaining position presumption underlying the privity doctrine. In point of fact, modern business whetted consumer appetite by using "newspapers, magazines, billboards, and the radio to build up the psychology to buy and consume." The emphasis on the powerless consumer in the face of a marketing-oriented economy echoes Veblen, Llewellyn, and Traynor.

Market control exercised by corporations had certain policy implications. The corporation was in control, not only of the quality of the product but the information related to quality as well, and, therefore, the "burden of losses consequent upon use of defective articles is borne by those who are in a position to either control the danger or make an equitable distribution of the losses when they do occur." The academic sources most heavily relied upon by the court were Harper and James' treatise and Prosser's tort law treatise and Implied Warranty article. This blend of sources illustrates the doctrinal web left in the wake of Escola and MacPherson. In Henningson, while the bulk of the court's analysis centered around contract (warranty analysis), the court ultimately had to rely on a concept of "inference" closely related to the tort doctrine of res ipsa loquitur, which had previously served as the basis of liability in the majority's opinion in Escola. The facts in the

384. Id. at 77.
385. Id. (emphasis added).
386. Id.
387. In discussing the relative lack of bargaining power consumers exercised, the court cited to both Fredrick Kessler and Albert Ehrenzweig. Id. at 86. For an in-depth discussion of the importance of Fredrick Kessler to the SPL movement, see PRIEST, supra note 5. The inequality in bargaining was compounded in Henningson because the contract in dispute was a standardized contract and had been a product of the Automobile Manufacturers Association, which included among its members General Motors, Ford, and Chrysler. Henningson, supra note 374, at 87.
388. Henningson, supra note 374, at 82.
389. Id. at 81.
390. Id. at 97.
case "inferred" two elements that would later be adopted in Section 402A of the Restatement of Torts, Second: "the car was defective and that such condition was causally related to the mishap."391 The court readily acknowledged this doctrinal admixture,392 but was not particularly concerned because the ultimate result, whether the analysis had been done in contract or tort, would be an enhanced probability of compensation for the victim.393

Ultimately, all doctrines aside, the court held itself to a standard of doing "social justice:"394 a progressive political agenda. The conflicting interests of buyer and seller must be "evaluated realistically and justly, giving due weight to social policy. . . ."395 Echoing tones of pragmatic instrumentalism, this was to be done by recognizing the "experience"396 that judges had accumulated concerning the effect of particular doctrine, and evaluating the merits of the case at bar "[i]n the context of this warranty. . . ." 397

4) Greenman v. Yuba Power Products, Inc.398

If Escola represented Traynor's hope of strict products liability, Greenman represented the fulfillment of his dream. The case involved an injury resulting from operating a power saw. In operating the saw, the plaintiff was struck by a piece of wood that flew out of the machine.399

There was very little exposition of the policies justifying Traynor's position given that they had been so comprehensively put forth in Escola. There was no need to "recanvass the reasons for imposing strict liability on the manufacturer."400 It was enough for Traynor to cite to James, Prosser, and his concurring opinion in Escola.401

This time writing for a unanimous court, Traynor articulated a strict

391. Id. at 97 (emphasis added). For the relevant excerpt of Section 402A, see note 9 supra.
392. The court noted that "historically actions on warranties were in tort also, sounding in deceit." Id. at 100. In addition, quoting from Prosser, the court stated that warranty constituted "a curious hybrid of tort and contract." Id. (quoting from PROSSER, LAW OF TORTS § 83 (1955)).
393. The court specifically stated that:
Circumstantial evidence sufficient to create a jury question as to the negligence of a manufacturer or dealer would clearly justify the same result where the issue is breach of warranty.
Id. at 99.
394. Id. at 83.
395. Id. at 84.
396. Id.
397. Id. at 93 (emphasis in original).
399. Id. at 898.
400. Id. at 901.
401. Id.
liability standard relying on many of the arguments and sources referenced in Escola. The ultimate purpose was to "insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."402 In addition, Traynor's humanist concern over who bears the cost of accidents is again evidenced by emphasizing that "human beings" are the ones harmed by products.403 However, the tension between humanistic leanings, as evidenced by a critical stance toward corporate power, and the realization, as was manifest in Escola, that ultimately it may be other consumers who would bear the costs of injuries remained unresolved.

Conclusion

With the recent discourse on neopragmatism (the "literary turn")404 and debate over the "old pragmatism,"405 discussing the old pragmatism's influence on the rise of strict products liability seems particularly timely. It allows us to reflect upon what the old pragmatism accomplished or failed to accomplish when its influence made an impact on law. It also should cause us to ponder the possible influence, if any, of neopragmatism on legal doctrine, including SPL.

Turning to another significant theoretical area of legal academia, the law and economics movement, whose proponents have had much to say concerning SPL, the movement seems to be at a crossroads at which an in-depth discussion of institutional economics and its relevance to law, particularly strict products liability, might enrich the debate.406 To date, the law and economics discussion of strict products liability has centered largely around a neoclassical economic analysis, ignoring its institutionalist origins.

The words of David Owen, a leading tort theoretician, regarding SPL ring true:

Once we understand more fully from where the conventional concepts came and what they really said we can begin to critique them more constructively, to extract what strands of intellectual value they may contain, and to discard the rest. Then will come the major task: to identify the social values that products liability law should protect and promote, and finally to construct a new cathedral of

402. Id.
403. Id. at 900.
406. For a discussion on the need to examine institutional economics and its place in legal academia, see Herbert Hovenkamp, The First Great Law & Economics Movement, 42 STAN. L. REV. 993 (1990).
principles and rules on those firm foundations.\textsuperscript{407} The pragmatic instrumentalist foundation of SPL includes a core of epistemological and methodological insights. As American legal intellectuals grope for a response to contemporary social miseries and the fate of products liability law, we would do well to revisit the pragmatic instrumentalist legacy.

\textsuperscript{407} OWEN, supra note 300, at 533.
Valuations Put on Men in Pittsburgh in 1907

Actual amounts paid as compensation by employers to twenty-seven workmen permanently injured in Allegheny County, April, May, June, of that year

For loss of an eye..............$200, $150, $150, $100, $75, $50, $50, $48, 0, 0, 0.
For loss of an arm..............$300, 0, 0.
For loss of two fingers....$100, $100, 0, 0, 0, 0, 0.
For loss of leg..............$225, $175, $150, $100, $55, 0.

(For relative significance of these figures see Chapter VIII.)

Appendix 1: WORK-ACCIDENTS & LAW, supra note 208, at 126.
One Arm and Four Children

Appendix 2: WORK-ACCIDENTS & LAW, supra note 208, at 153.
An Arm Gone at Twenty

This young brakeman when last seen was studying telegraphy in order to stay in the service

The Wounds of Work

When a man's hand is mutilated he keeps it out of sight

Appendix 3: WORK-ACCIDENTS & LAW, supra note 208, at 144.
DEATH CALENDAR IN INDUSTRY
FOR ALLEGHENY COUNTY

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Each red cross stands for a man killed at work, or for one who died as a direct result of an injury received in the course of his work.