

Karl Llewellyn and the Intellectual Foundations of Enterprise Liability Theory

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The stunning rise of enterprise liability theory and its swift acceptance and implementation in the 1960's was one of the most dramatic revolutions in the history of Anglo-American law.¹ The traditional pantheon of enterprise liability theorists includes such academic and judicial luminaries as Fleming James, Friedrich Kessler,² William Prosser,³ Benjamin Cardozo, and Roger Traynor.⁴ Yet, while the rich and varied contributions of these judges and legal academics were of doubtless importance, one equally influential individual has too frequently been overlooked: Karl N. Llewellyn. As a prominent figure in the revolution of legal realism and an established expert on warranties and sales, Llewellyn made some early forays into the discussion of quality of goods law that were of lasting value and insight for later enterprise liability theorists. These insights were notable for elevating to importance such key concepts as social insurance and the inadequacy of the warranty regime and for influencing enterprise liability proponents to come. While Llewellyn ceased writing in the area more than twenty years before its triumph, his impact can be seen in the writings of James, Kessler, and Prosser, and in the judicial opinions most significant to the implementation of the enterprise liability regime.

1. See generally Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 464-65 (1985); G. WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 170 (1980). The term "enterprise liability" refers to the modern synthesis of tort and contract law that established a standard of strict liability for defective products.

2. For a combined analysis of James and Kessler's works, see Priest, *supra* note 1. Good examples of these works are F. HARPER & F. JAMES, *THE LAW OF TORTS* (1956); James, *Last Clear Chance: A Transitional Doctrine*, 47 YALE L.J. 704 (1938) [hereinafter *Last Clear Chance*]; James, *Contribution Among Joint Tort Feasors: A Pragmatic Criticism*, 54 HARV. L. REV. 1156 (1941) [hereinafter *Joint Tort Feasors*]; Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943) [hereinafter *Contracts of Adhesion*].

3. Prosser is also discussed, though not at length, in Priest, *supra* note 1, at 505-07. The most cited products liability article ever is Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960) [hereinafter *Assault*].

4. See G. WHITE, *supra* note 1, at 114-38 (Cardozo), 180-210 (Traynor); see also MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) (Cardozo, J.); Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring); Greenman v. Yuba Power Prods., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963) (Traynor, J.).

This Note argues that both these debts and the prescient scholarship underlying them have failed to be fully appreciated.⁵ Section I sketches the traditional history of the modern synthesis of tort and contract law doctrine that produced enterprise liability, and Section II discusses Llewellyn's scholarship in the area. Sections III and IV then trace the influence of Llewellyn on, respectively, the legal academy and the courts.

I. THE DEVELOPMENT OF ENTERPRISE LIABILITY: A MODERN SYNTHESIS OF TORT AND CONTRACT LAW

Much of the history of the development, academic acceptance, and judicial implementation of enterprise liability theory is well established. It begins with the classic English case of *Rylands v. Fletcher* and Judge Cardozo's 1916 opinion in *MacPherson v. Buick*,⁶ and then sees the emergence of theories of liability without fault⁷ and a special standard of care to which sellers of food and drink should be held.⁸ The judicial tools used in these areas included both strict liability in tort and implied warranty of merchantability in contract.⁹ Underlying these sporadic developments was a more widely accepted legal realist conception of law as a tool of public policy¹⁰ that demanded the shifting of burdens away from consumers and onto manufacturers and sellers better able to avoid and spread losses.¹¹

5. G. Edward White's influential intellectual history of tort law mentions Llewellyn only in a passing discussion of legal realism. G. WHITE, *supra* note 1, at 71-75. Professor Priest's history of the invention of enterprise liability at least touches—though without elaboration—on Llewellyn's influence on Kessler, *see infra* Section III-B, and the unsuccessful attempt to incorporate strict liability concepts into the Uniform Commercial Code, *see infra* Sections II-D, IV-A. Priest, *supra* note 1, at 495, 497. Most authorities have completely missed Llewellyn's contribution. *See, e.g.*, J. HENDERSON & A. TWERSKI, PRODUCTS LIABILITY: PROBLEMS AND PROCESS 137-38 (1987) (crediting only Prosser); M. SHAPO, THE LAW OF PRODUCTS LIABILITY ¶ 7.01 (1987) (crediting only Prosser and Traynor); White, *Tort Reform in the Twentieth Century: An Historical Perspective*, 32 VILL. L. REV. 1265 (1987). *But see* Owen, *The Intellectual Development of Modern Products Liability Law: A Comment on Priest's View of the Cathedral's Foundations*, 14 J. LEGAL STUD. 529, 531 (1985) (criticizing Priest for concentrating on James and Kessler and ignoring contributions of Llewellyn and Prosser).

6. *Rylands v. Fletcher*, 1861-73 All E.R. Reprint 1, 3 H.L. 330 (1868) (strict liability for storing water on land); *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916) (striking privity of contract barrier to recovery under warranty); *see* L. FRIEDMAN, A HISTORY OF AMERICAN LAW 485-86, 684-85 (2d ed. 1986) (beginning with *Rylands* and *MacPherson*).

7. *See* Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775 (1982); Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROBS. 467 (1936).

8. R. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 83-89 (1951) (extension to point of strict liability). The first *Restatement of Torts* established a *Rylands*-like strict liability regime for "ultrahazardous" activities. RESTATEMENT OF TORTS §§ 519, 520 (1938) (mostly limited to land usage harms, *e.g.*, water storage and blasting); *see also* M. SHAPO, *supra* note 5, ¶ 7.01[2] (noting both historical developments).

9. Use of the law of contract was much more common in cases involving specific "products." Strict liability in tort was more commonly applied in the case of harm-producing "activities."

10. G. WHITE, *supra* note 1, at 109.

11. F. HARPER, THE LAW OF TORTS 334 (1933); James, *Last Clear Chance*, *supra* note 2, at 704, 716 (1938). *See generally* Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951) (historical survey discussing *Rylands*, *MacPherson*, workman's compensation, food cases,

This growing academic consensus was not, with the notable exception of Justice Traynor's 1944 *Escola* concurrence, paralleled in the courts.¹² Following World War II, the tort and contract lines of products liability theory became more intertwined as Fleming James' torts scholarship on risk distribution and social insurance dovetailed with Friedrich Kessler's "contracts of adhesion" critique of the limitations of contract law.¹³ Then a distinct literature on products liability emerged in the late 1950's and was swept into the dominant enterprise liability school, which asserted the irrelevance of contract and warranty law and the centrality of tort concepts of compensation and social insurance.¹⁴ In 1960 William Prosser published his seminal *Assault upon the Citadel* article merging the lines of contract and tort law into the modern synthesis¹⁵ simultaneously adopted in *Henningsen v. Bloomfield Motors, Inc.*¹⁶ Justice Traynor's opinion for a unanimous court three years later in *Greenman v. Yuba Power Products, Inc.*¹⁷ made the permanent shift establishing as the law of products liability his *Escola* concurrence and strict liability in tort.

Courts and commentators then jumped onto the enterprise liability bandwagon and consolidated the modern synthesis through the 1960's and beyond.¹⁸ At the fore was the American Law Institute, which in 1964 adopted as section 402A of the *Restatement (Second) of Torts* a strict liability standard drafted by Prosser (with advice from James and Traynor).¹⁹

II. LLEWELLYN'S WRITINGS ON ENTERPRISE LIABILITY

All of the themes and strands of legal theory that coalesced into the modern synthesis of enterprise liability were present in the writings of Karl Llewellyn. While he only briefly touched on some concepts, others were analyzed in great detail and stand as classic theoretical statements.

and risk-bearing theory).

12. G. WHITE, *supra* note 1, at 109-10; see *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring).

13. Priest, *supra* note 1, at 483-504. Since the mid-1930's James had been leading the revolution in tort theory focussed on the concept of compensation of injured parties. *Id.* at 465-83. Of substantial importance in this process was the publication in 1956 of his three-volume torts treatise with Fowler Harper. *Id.* at 501 (discussing F. HARPER & F. JAMES, *supra* note 2). Kessler meanwhile took aim at contract law's most central concept—freedom of contract—and set about delegitimizing it. *Id.* at 492 (discussing Kessler, *Contracts of Adhesion*, *supra* note 2).

14. Priest, *supra* note 1, at 464. For an influential early symposium on products liability, see *Strict Liability of Manufacturers: A Symposium*, 24 TENN. L. REV. 923 (1957).

The term enterprise liability was first used in 1951. Gregory, *supra* note 11, at 385 ("if I may suggest a new term"); A. EHRENZWEIG, NEGLIGENCE WITHOUT FAULT: TRENDS TOWARD AN ENTERPRISE LIABILITY FOR INSURABLE LOSS 4 (1951).

15. Prosser, *Assault*, *supra* note 3; see Priest, *supra* note 1, at 506.

16. 32 N.J. 358, 161 A.2d 69 (1960) (drawing on Kessler, James, and Prosser). See Priest, *supra* note 1, at 505-10.

17. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

18. Priest, *supra* note 1, at 511-19; see also Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966); J. HENDERSON & A. TWERSKI, *supra* note 5.

19. See Priest, *supra* note 1, at 511-19.

Indeed, Llewellyn anticipated and brought together much that would two decades later become the consensus academic position and dominant law of products liability.

A. *Legal Realism*

Karl Llewellyn's contributions to the legal realist movement are well-known and much studied.²⁰ While this Note does not seek to replicate such study, inevitably its discussion of Llewellyn's work and its influence will track themes central to and couched in terms of legal realism: the shifting nature of law, the necessity for law to respond to social needs, and the ultimate realization that law is merely the tool of public policy. It will become clear in the course of this Note that such legal realist tenets run throughout Llewellyn's work and are as well important to his influence.

B. *Trumpeting Social Insurance Benefits of Enterprise Liability*

While Fleming James and William Prosser are commonly acknowledged with bringing modern tort law, and particularly products liability, into its enterprise liability era, Karl Llewellyn was writing ten and twenty years before of the possibilities contained in the shifting pro-consumer trends of law, theory, and public policy.

Llewellyn's first extensive discussion of the twin tort goals of deterrence and social insurance so familiar in the modern strict liability regime was in a 1925 article written while a young instructor of law at Yale.²¹ His analysis of how legal bargaining rules affect transactions noted that the developing replacement of caveat emptor concepts with more pro-consumer warranty law was resulting in a "shift" whereby "the seller incurs new risks and the buyer procures some insurance with his commodity."²²

The observations contained in this remarkably early "law and economics" analysis were also incorporated into Llewellyn's classic *Cases and Materials on the Law of Sales*, published in 1930. In an introduction he laid out an ideal vision of the "seller's obligation as to quality," a vision striking in its modernity and destined to catch the attention of many.²³ Llewellyn stated his overarching goal bluntly—"what is wanted is to protect the consumer"—and then refined his approach: "That needed protec-

20. See, e.g., W. TWining, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973).

21. Llewellyn, *The Effect of Legal Institutions upon Economics*, 15 AM. ECON. REV. 665 (1925) [hereinafter *Effect upon Economics*].

22. *Id.* at 680 ("This opens a whole new field of control, with the question: whether placing by law an insurer's obligation on the party not only best able to distribute, but best able to prevent, may not be a potent instrument of reform."). Llewellyn predicted that many areas were ripe for a similar rule of "insurer's liability . . . [where] the loss is shifted in part to the place whence it can usefully be spread." *Id.* at 680 & n.46.

23. K. LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* 341 (1930) [hereinafter *SALES*] (chapter entitled "Seller's Obligation as to Quality: 'Warranty'").

tion is twofold: to shift the immediate incidence of the hazard of life in an industrial society away from the individual over to a group which can distribute the loss; and to place the loss where the most pressure will be exerted to keep down future losses."²⁴ The twin insurance and deterrence goals could not have been more clear. Moreover, Llewellyn was convinced that their achievement could be best accomplished through strict liability of the manufacturer: enterprise liability. The "least expensive, most effective" point on which to place the insurance burden was the manufacturer, and "[t]he consumer, barring his own fault in use, should have no negligence to prove; that the article was not up to its normal character should be enough."²⁵

Llewellyn's summation of this discussion revealed even more clearly the modern nature of both his approach and his conception of the interconnectedness of goals of insurance, risk spreading, cost internalization, substitute of less risky goods, and deterrence:

Under such an ideal system of law the loss would lie ultimately where it belongs, on the consumers of the article concerned *en masse*, in competition with other articles each carrying its own true costs in human life and effort; and the first point of loss infliction would be a party best able to prevent a similar loss.²⁶

Karl Llewellyn had emerged as a leader of the legal realist movement and well-established commercial law professor when in the mid-1930's he published a remarkable pair of articles entitled *On Warranty of Quality, and Society*.²⁷ The wide-ranging, and at times difficult to follow, discussion in these articles reflected Llewellyn's ambitious goal: to discuss not only the current commercial law of the quality of goods, but also the quality of society that very law was shaping.²⁸

Llewellyn asserted that food and drink cases had only been typical of a more general trend of consumer injuries that cried out for judicial attention.²⁹ That attention involved the establishment of greater liability to the

24. *Id.*

25. *Id.*

26. *Id.* at 342. Llewellyn conveyed to his students an overarching view of the goals (insurance and deterrence) and tools (strict liability) of product liability that had thus far eluded the courts. Judges had only the vaguest notions of the goals, and they were by and large using the unwieldy tools of negligence and warranty. Llewellyn saw courts responding "to the need—but not as yet with understanding of its meaning." *Id.*

27. Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699 (1936) [hereinafter *On Warranty I*]; Llewellyn, *On Warranty of Quality, and Society: II*, 37 COLUM. L. REV. 341 (1937) [hereinafter *On Warranty II*].

28. Llewellyn, *On Warranty I*, *supra* note 27, at 714-16. In attempting to put together the "whole" of sales law, Llewellyn discovered that he could only assemble "rags and tatters pieced together upon an untested half-sewn base of particular." *Id.* at 715. Nonetheless, he pushed on, hoping to "grasp" at an understanding of the working of law and of judges: "what their work does for—or to—the rest of us." *Id.* at 716.

29. Llewellyn, *On Warranty II*, *supra* note 27, at 404-06 & n.171 ("[w]hat gets persistently

consumer, placed³⁰ so as to induce prevention and most readily distribute losses that remained.³¹

In a lengthy—and destined to be influential—footnote to the introduction of *On Warranty* he pointed to the strict liability movement (specifically food cases) as the “point from which the whole line of civil protection of the uninformed consumer branches out.”³² Llewellyn’s discussion in this footnote was informed both by his *Sales* casebook and by two lesser known³³ and more tentative pieces he had written while a student.³⁴ In a brief casenote criticizing a food case that did not find seller liability, he had articulated a concern over the use of privity doctrine—which he referred to as “the *policy* of exempting manufacturers from liability”—to mask the real issues in a case and urged thorough discussion of those real issues: manufacturer duty of care and injuries of third parties.³⁵ In a longer comment Llewellyn argued for the extension of protection to all consumers of foodstuffs and not just to commercial buyers, but hedged somewhat, only hinting that imposition of “the liability of an insurer” upon sellers might be the preferred policy.³⁶

litigated is what indicates the existence of a social problem”).

30. This idea was more fully discussed in a student note undoubtedly supervised by Llewellyn and to which he deferred. *Id.* at 404 & n.165. See Note, *The Marketing Structure and Judicial Protection of the Consumer*, 37 COLUM. L. REV. 77, 77 & n.3 (1937) [hereinafter Note, *Marketing Structure*] (citing K. LLEWELLYN, SALES, *supra* note 23, at 341). This Note also cited another Llewellyn-influenced student note for the goals of deterrence and insurance. *Id.* (citing Note, *Manufacturers’ and Vendors’ Liability Without Fault to Persons Other than Their Immediate Vendees*, 33 COLUM. L. REV. 868, 869 (1933) [hereinafter Note, *Manufacturers’ Liability*] (urging policies “seeking to raise the standards of care, shift the risk of loss” and citing K. LLEWELLYN, SALES, *supra* note 23, at 366, 341 & n.5)).

31. Llewellyn further asserted that such goals were in fact being achieved. As an example, he credited strict liability with leading to chain curtains over New York City blast sites to control thrown rock and concluded: “Where the recoverable damage is *material*, and *concentrated*, there is movement; by drafting or by technical improvement—perhaps by differential pressure of insurance.” Llewellyn, *On Warranty II*, *supra* note 27, at 407–08.

32. Llewellyn, *On Warranty I*, *supra* note 27, at 704 n.14.

33. Professor Twining’s seemingly comprehensive bibliography of Llewellyn’s works, while listing several comments and notes bearing Llewellyn’s initials, misses the unsigned ones. W. TWINING, THE KARL LLEWELLYN PAPERS 47–48 (1968).

34. “My own interest dates from (1917–8) 27 YALE L.J. 281, 1068.” Llewellyn, *On Warranty I*, *supra* note 27, at 705 n.14. These two unsigned pieces appear to have been authored by Llewellyn, editor-in-chief of *The Yale Law Journal*’s volume twenty-seven. Yale professor Arthur Corbin wrote that he and Llewellyn had written half of the notes and comments during this war-era volume, Corbin, *A Tribute to Karl Llewellyn*, 71 YALE L.J. 805, 805 (1962), and Llewellyn cited the pieces elsewhere, *see, e.g.*, Llewellyn, *Effect upon Economics*, *supra* note 21, at 667 n.8; *see also* R. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER 26 n.33 (1951) (crediting Llewellyn with authorship of unsigned comment); Llewellyn, *Song of the Law Review*, in JUSTICE AND THE LAW: AN ANTHOLOGY OF AMERICAN LEGAL POETRY AND VERSE 70 (P. Jackson ed. 1960) (“Both courts and scholars listen / When I tell them so and thus; / You’ll find me cited now as ‘Notes,’ / Now as ‘Anonymous.’”).

35. Recent Case Note, *Torts—Negligence of Manufacturer—Restaurant Keeper’s Liability to Guest*, 27 YALE L.J. 281, 282 (1917) (authored by Llewellyn) [hereinafter *Recent Case Note*] (emphasis added).

36. Comment, *Tort and Contract in the Marketing of Food*, 27 YALE L.J. 1068, 1073 & n.21 (1918) (authored by Llewellyn) [hereinafter *Comment*]. Llewellyn only avowed that “[c]ertainly the more liberal view in this matter is . . . preferable.”

C. *From Contract (Through Implied Warranty) to Tort*

Concomitant with the rise of tort concepts of strict liability and social insurance was the emergence of an understanding of the outmoded nature of the contract regime that had for so long dominated legal thinking about harms to consumers.³⁷ Karl Llewellyn's work in this area was both extensive and anticipatory.

While still in law school in 1918, he concluded with regard to the overlapping tort and contract causes of action in food cases that "[t]he idea of liability in tort seems simpler and more apt . . . [because] benefit of this liability in tort extends . . . to cover almost any consumer."³⁸ Moreover, Llewellyn saw that effective implementation of such pro-consumer policy often ran up against the limitations of privity doctrine. Rather than have courts distort privity concepts for the benefit of consumers, Llewellyn advocated a conscious acceptance of broader protection under tort.³⁹

Llewellyn would carry these early conceptions over into later works like *Sales*⁴⁰ where a legal realist conception of the law as ever-growing and ever-shifting often found expression. The introduction to the warranty chapter was a discourse on the evolution of the economic and commercial world from a community based face-to-face marketplace to the wider, industrialized, standardized, and impersonal one; it concluded that the law does and should change along with the economy and society.⁴¹ The never-ending growth and shifting of law in this area often strained legal concepts to their breaking point.⁴² To Llewellyn the "technical excuse for shifting a risk which seems to call for shifting" needed re-evaluation because it had reached the point where the law was "being stretched by

37. Professor Priest develops this interpretation of the course of products liability history. Priest, *supra* note 1.

38. Llewellyn, *Comment, supra* note 36, at 1071 & n.17.

39.

The doctrine of warranty is not sufficient unto the needs it has been called upon to fill. . . .

The advantages of the tort doctrine, then, over that of implied warranty, are that it is no anomaly, but fits into the general law of the subject; [and] that without danger of uncertainty or mistake it protects all those whom the public policy on which it rests is intended to protect

Id. at 1070, 1073. See also Llewellyn, Book Review, 34 *YALE L.J.* 454, 455 (1925) (reviewing S. WILLISTON, *THE LAW GOVERNING SALES* (2d ed. 1924)).

40. As his biographer Twining has noted, at the center of the *Sales* casebook was an "analysis of the growth of the law of sales, and notably of the shift [sic: read shift] from *caveat emptor* to buyer's protection and the conceptual growth of 'warranty' in terms of the interaction of law and social and economic change." W. TWINING, *supra* note 20, at 133.

41. K. LLEWELLYN, *SALES, supra* note 23, at 204. Llewellyn later summed up:

[There is] what one may call the flat view of legal doctrine . . . which assumes that every case, whenever decided, must be fitted with every other, irrespective of time. That conditions have wholly changed, that new insight has been achieved, makes no difference to this view—theoretically. In fact, doctrine 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*.

Id. at 272.

42. *Id.* at 341.

accident or design to fit a definite but only partially understood need . . . which the historical limitations of the warranty concept make it inadequate to cover."⁴³

The examination of legal shifting in *Sales* was elaborated upon at length—especially as regards the historical development—in the *On Warranty* pieces.⁴⁴ Llewellyn devoted his attention to the prevalent dual regime of tort (with its pro-consumer *res ipsa* tools) and contract (with its conflicting warranty tools: a pro-consumer concept of implied warranty and a pro-merchant concept of privity). In evaluating this doctrinal mixing, he continued to conclude that the tort regime was being slighted.⁴⁵

What needs to be insisted upon is that "contract" [i.e. the current warranty regime] is in this a bastard by accounting out of tort, and, like each of its parents, needs dealing with according to its social uses. Accounting drives toward making deals, mean deals, to keep books straight. 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 "contracting," without regard for the tort phase of risk in hand, is over-domination by an illegitimate father.⁴⁶

Llewellyn saw this over-domination of the law by concepts favorable to the manufacturer/seller exhibited most clearly in the "lop-sided character of modern drafting."⁴⁷ The legal regime, in allowing contract to dominate, had in Llewellyn's opinion simply not kept up with the changing times: "[W]ith new conditions Contract loses its presupposition of mercantile equality of bargaining, and effectively twists the normal decency of transactions out of joint."⁴⁸ Tort law, on the other hand, was more sensitive to the crucial issues of deterrence and risk shifting.⁴⁹ These issues could not adequately be addressed while manufacturers and sellers were able, through their domination of the powers of contracting, to bring about an "indecent cutting down of remedy."⁵⁰

43. *Id.* at 343.

44. There Llewellyn argued that the most complete grasp of the current state of law was attained by observing its progression, and combining such with an understanding of the concomitant historical progression of the economy and society. Llewellyn, *On Warranty I*, *supra* note 27, at 713.

45. In a reformulation of his earlier ideas on the effect of increased liability increased costs on sellers, Llewellyn, *Effect upon Economics*, *supra* note 21, at 680, Llewellyn argued that sellers' need to have an accurate "accounting" of all business costs and revenues had too dominant an influence upon the law. Llewellyn, *On Warranty II*, *supra* note 27, at 402.

46. Llewellyn, *On Warranty II*, *supra* note 27, at 402.

47. *Id.* at 403. The *On Warranty* articles criticized such tools as standardized contracts and their major result: "getting the jump" on unaware and unskilled consumers. *Id.* at 393-94.

48. *Id.* at 399. In an earlier article, Llewellyn had touched upon this same theme and concluded that a situation where the bargaining power was held almost exclusively by one party "amounts to the exercise of unofficial government of some by others, via private law." Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 *YALE L.J.* 704, 731 (1931) [hereinafter *What Price Contract?*].

49. Llewellyn, *On Warranty II*, *supra* note 27, at 406-07 ("The damages claimed in these cases are *always more than mercantile*: They are consequential, they are in essence tort-like.").

50. *Id.* at 400-01.

Two years after the detailed *On Warranty* discussion of the failure of the contract regime, Llewellyn renewed his attack on standardized contracts in a book review,⁵¹ drawing attention to the themes of out-moded concepts of bargaining,⁵² the reality of one-sided control of contracting, and the “semi-covert techniques for somewhat balancing” the resulting bargains.⁵³ This latter point would come to attract great attention as a classic legal realist statement: “Covert tools are never reliable tools.”⁵⁴ In pointing out that the difficulties of “contracts of ‘adhesion’”⁵⁵ were universal and ripe for legal realist analysis and critique, Llewellyn provided the final spark for what had previously been an unfortunately unnoticed topic of commentary and criticism.⁵⁶

D. *Enterprise Liability in the UCC*

Karl Llewellyn’s final expression and effort on behalf of enterprise liability was in connection with his role as chief craftsman of the Uniform Commercial Code, for which he proposed a provision that greatly expanded merchant liability under the implied warranty provision.⁵⁷ Section 16-B of the second draft of the Uniform Sales Act,⁵⁸ would have established a rule of strict liability to most product users “in the ordinary course of use or consumption . . . injured . . . by reason of the defect.”⁵⁹ In the comment to the section, Llewellyn was very specific about its goal:

It seeks to place direct responsibility upon the link in the chain best able at once to insure or absorb the loss and to prevent its recurrence. It takes as the gravamen of liability *the putting of dangerously defective goods, by sale or delivery, upon the market.*⁶⁰

Moreover, the comment reflected its reporter’s long held view that quality of goods law “is tort-law and market-law rolled into one . . . [and needs] consolidation, and . . . a clear theory for their unification in a national market.”⁶¹ This “clear theory”—though never systematically or even

51. Llewellyn, Book Review, 52 HARV. L. REV. 700 (1939) (reviewing O. PRAUSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLISH AND CONTINENTAL LAW* (1937)).

52. *Id.* at 700 (“contract ceases to be a matter of dicker . . . and becomes . . . a matter of mass production of bargains”).

53. *Id.* at 702.

54. *Id.* at 703.

55. He uses the term only once. *Id.* at 703 n.7.

56. *Id.* at 700 & n.3 (noting “problem . . . has not yet made its way into full familiarity” but citing his own *What Price Contract?* and *On Warranty II*).

57. See generally Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713, 757 (1970); Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465 (1987).

58. *Report and Second Draft: The Revised Uniform Sales Act* (1941) § 16-B, at 122-23, reprinted in 1 UNIFORM COMMERCIAL CODE DRAFTS 269 (E. Kelly ed. 1984).

59. *Id.* § 16-B(1)(a), at 122.

60. *Id.* § 16-B comment, at 124 (italics in original).

61. *Id.* at 125. Llewellyn also noted that this area was currently proceeding “in negligence law

clearly laid out—that Llewellyn was promoting in the Code and elsewhere was enterprise liability.⁶²

III. LLEWELLYN'S INFLUENCE ON THE ACADEMICS

While William Prosser is usually acknowledged as the “father” of modern products liability, careful commentators have also given a great deal of credit to Fleming James and Friedrich Kessler.⁶³ It has yet to be recognized that Karl Llewellyn was playing the roles of both James and Kessler back in the 1930's, reflecting upon the virtues of risk distribution and strict liability and criticizing the shortcomings of contract, though never actually combining these two strands of analysis. While it took Prosser to synthesize and popularize the enterprise liability revolution, Llewellyn's guiding influence similarly can be seen in this scholar's work.

A. *Llewellyn and Fleming James*

Fleming James' influence has been attributed to the “radical single-mindedness” of his scholarly program,⁶⁴ which focussed on the principle of risk distribution that was at the core of the enterprise liability regime that emerged dominant in the 1960's.⁶⁵ James' initial promotion of the risk distribution principle and his concomitant scathing attack on all attributes of the negligence and fault systems rarely touched upon the products liability field.⁶⁶ One commentator has suggested that James may have avoided the products liability area because its cases were governed by sale-of-goods law.⁶⁷ This fact may explain why, when he moved into the area,

(with *res ipsa loquitur* aiding) and warranty law (with third-party beneficiary rules aiding) and in a deliberate fusion of the two.” *Id.*

62. Several commentators have recognized the strict liability nature of Llewellyn's UCC proposals. See Titus, *supra* note 57, at 756-57; Wiseman, *supra* note 57, at 507; Priest, *supra* note 1, at 497.

63. See, e.g., Priest, *supra* note 1.

64. *Id.* at 470.

65. *Id.* James' scholarship was concerned with the compensation of those injured in the course of modern industrial activity and unable to bear the loss themselves. A shifting of these losses to defendants capable of spreading them over the whole of society seemed to James the most direct solution to the problem. See James, *Last Clear Chance*, *supra* note 2; James, *Joint Tort Feasors*, *supra* note 2.

While the risk distribution principle was not entirely new when James began writing in the 1930's, see, e.g., Smith, *Frolic and Detour* (pts. 1 & 2), 23 COLUM. L. REV. 444, 716 (1923), it received its most thorough and convincing exposition from his pen. Priest, *supra* note 1, at 480. On the eve of the enterprise liability revolution, one commentator asserting the widespread acceptance of this theory cited ten representative works, of which three were by James. Ehrenzweig, *Products Liability in the Conflict of Laws—Towards a Theory of Enterprise Liability Under “Foreseeable and Insurable Laws”*: II, 69 YALE L.J. 794, 798-99 & n.22 (1960). Interestingly enough, Ehrenzweig also cited Llewellyn's footnote fourteen from the first *On Warranty* piece. *Id.*

66. James drew most of his examples from industrial or automobile accident law. See, e.g., James, *Last Clear Chance*, *supra* note 2, at 716 (observing that social insurance has “strongest hold . . . [over] employee injuries, but we may well expect to see it engulf the whole field of accident litigation within a generation or so”).

67. Professor Priest asserts that James did not explicitly write in the area until 1955. Priest, *supra* note 1, at 500.

James relied upon Llewellyn for an understanding of and approach to products liability.

In the 1942 first edition of his *Cases and Materials on Torts*, edited with Harry Shulman, James acknowledged that all of the casebook's chapter on what would develop into products liability was modeled after the warranty and quality chapter of Llewellyn's *Sales*.⁶⁸ Throughout the chapter James deferred to *Sales*, the *On Warranty* articles, and a number of the law review notes overseen by Llewellyn.

For instance, the casebook's section on deterrence, risk distribution, and placement of the burden of liability relied on the *On Warranty* discussion of these theories.⁶⁹ This same Llewellyn discussion also formed the basis of the casebook's analysis of the need for an expansion of strict liability rules to all areas that demand "protection of the uninformed consumer."⁷⁰ At one point James nearly formulated his own enterprise liability synthesis, and he nearly did so by relying on Llewellyn. "[B]ecause of the position of the parties and the fact that the warranty is generally drawn by the seller, the limitations of the warranty may be at least construed strictly against the seller . . . [or] may be held void as against public policy."⁷¹

For all of his reliance on Llewellyn's *On Warranty* articles in the torts casebook, it is surprising that James neglected to cite the pieces in either his subsequent *Products Liability* articles⁷² or his influential torts treatise with Fowler Harper.⁷³ Both mid-1950's works were nonetheless replete with insights borrowed from Llewellyn's scholarship and did cite *Sales* and numerous Llewellyn-supervised student notes. In the treatise, James deferred to Llewellyn's *Sales* discussion of the growing trend in the law to protect consumers⁷⁴ and credited Llewellyn with the conclusion that this

68. H. SHULMAN & F. JAMES, *CASES AND MATERIALS ON TORTS* 730 (1942) (citing K. LLEWELLYN, *SALES*, *supra* note 23, ch. 3 and striving for "unified treatment" of law of sales and tort). Professor White's misperceptions not to the contrary, *Sales* was the first example of the grand influence of legal realism on law school education. *But see* G. WHITE, *supra* note 1, at 89, 91 (summarizing alterations in casebooks exemplified by Shulman & James and calling it "first of what has now become a long line of 'Cases and Materials' volumes" and model of "a greater emphasis on the policy dimensions"). Shulman and James' casebook had taken its cues in all of these areas from Llewellyn's effort of a dozen years previous.

69. H. SHULMAN & F. JAMES, *supra* note 68, at 769 n.8 (citing Llewellyn, *On Warranty I*, *supra* note 27, at 704 n.14).

70. *Id.* at 795 & n.14 (citing Llewellyn, *On Warranty I*, *supra* note 27, at 704 n.14; arguing that food cases not "special and separate problem"). In addition, James commended as "a stimulating discussion" one of the Llewellyn-supervised student notes. *Id.* at 770 n.8 (citing Note, *Marketing Structure*, *supra* note 30, at 81 & n.26 and referring to its loss distribution section). *See also* Llewellyn, *On Warranty II*, *supra* note 27, at 404-08.

71. H. SHULMAN & F. JAMES, *supra* note 68, at 801 n.16. James cited the lengthy *On Warranty* discussion of the manipulability of warranties, the imbalance in bargaining that "effectively twists the normal decency of transactions out of joint," and the need to expand tort concepts of spreading losses and restrict the excesses of contract doctrine. Llewellyn, *On Warranty II*, *supra* note 27, at 393-404.

72. James, *Products Liability* (pts. 1 & 2), 34 *TEX. L. REV.* 44, 197 (1955) [hereinafter referred to jointly as James, *Products Liability*].

73. F. HARPER & F. JAMES, *supra* note 2.

74. 2 *id.* at 1535 & n.5 (citing K. LLEWELLYN, *SALES*, *supra* note 23, ch. 3); *see also* James, *Products Liability*, *supra* note 72, at 44 & n.5 (same).

trend "was responsive to . . . a realization that liability would not unduly inhibit the enterprise of manufacturers and that they were well placed both to profit from its lessons and to distribute its burdens."⁷⁵ James also credited Llewellyn with recognizing that the contract law tools of implied warranty theory were limited because they had developed not as a solution for the social problems of accident injuries but in order to control commercial transactions.⁷⁶

The Harper & James chapter on products liability concluded with a classic legal realist essay on movement and shifting in the law that recognized an "accelerating retreat from the[] restrictions" of the negligence regime and an "urge towards strict liability" that demanded a theory "tailored to meet modern needs" that the courts—"on grounds of policy . . . [and] entirely within the tradition of a dynamic common law"—should adopt.⁷⁷ This heavily Llewellyn-esque torts treatise was widely and favorably reviewed, and with this publicity came an acceptance of James' never-faltering advocacy of risk distribution and enterprise liability. Ultimately, numerous courts embraced strict liability concepts as product liability became the dominant issue in tort law, and at the center of it all⁷⁸ stood the Harper & James treatise—and Karl Llewellyn.

B. *Llewellyn and Friedrich Kessler*

Friedrich Kessler's important contribution to the emergence of the enterprise liability regime was embodied in his classic 1943 article *Contracts of Adhesion—Some Thoughts About Freedom of Contract*.⁷⁹ The influence and dominance of this article has been remarkable,⁸⁰ and it still stands as the authoritative analysis of the subject.⁸¹ Nonetheless, it was essentially a systematic restatement of themes long before developed by Karl Llewellyn.

Kessler began by recounting the development of modern contract law, asserting that its main lines had been built around the 19th-century needs of "small enterprisers, individual merchants and independent craftsmen."⁸² The emergence of modern, large-scale manufacturing and

75. 2 F. HARPER & F. JAMES, *supra* note 2, at 1535 & n.5.

76. *Id.* at 1570 & n.3 (citing K. LLEWELLYN, SALES, *supra* note 23, at 340 et seq.). Nonetheless, a liberal expansion of warranty theory was necessitated by the interests of the consumer and by the realization that since warranties were "imposed by law as [a] vehicle[] of social policy, the courts should extend [them] as far as relevant social policy requires." James, *Products Liability*, *supra* note 72, at 194 & n.9 (citing K. LLEWELLYN, SALES, *supra* note 23, at 340-03; Note, *Marketing Structure*, *supra* note 34).

77. 2 F. HARPER & F. JAMES, *supra* note 2, at 1605-06.

78. See Priest, *supra* note 1, at 501, 504 (discussing history and evaluating role of treatise).

79. Kessler, *Contracts of Adhesion*, *supra* note 5.

80. For an extended discussion of Kessler and Henningsen, see Priest, *supra* note 1, at 507-09.

81. Professor Priest attributes this to the article's style: It "presents a moral narrative that contrasts the ancient to the modern, the good to the evil, the redeemable to the unredeemable and that . . . possesses a persuasive power." *Id.* at 492.

82. Kessler, *Contracts of Adhesion*, *supra* note 5, at 640.

marketing had through the course of the 20th century shifted the balance of contractual bargaining, replacing it with impersonal, lop-sided, standardized contracts that wholly subordinated the interests of the weaker consumers⁸³ by means of warranty tools that limited manufacturer and seller responsibility for quality goods and liability for consequential damages.⁸⁴ These observations differed little from those put forth in Llewellyn's *Sales* nearly fifteen years earlier.⁸⁵ Moreover, Kessler's attention to shifting conditions, outmoded concepts, and the need for the legal structure to adjust itself to the current needs of society derived almost entirely from the legal realist critique of commercial—and all other—law developed by Llewellyn.⁸⁶

This critique recognized that courts, in an attempt to respond to shifting conditions and to protect weaker parties, twisted and distorted legal concepts nearly beyond recognition.⁸⁷ The difficulty with this type of judicial decisionmaking found—as Kessler acknowledged—classic expression in Llewellyn's writing⁸⁸ about “covert tools” that were unreliable, unwieldy, and producing confusion and uncertainty in an area that needed a clear public policy favoring consumers.⁸⁹

To be sure, Kessler deserves credit for effectively taking the analysis of “contracts of adhesion” into the limelight that Llewellyn had only hoped for.⁹⁰ The lessons of *Contracts of Adhesion*—essentially posited by Llewellyn but most forcefully taught by Kessler—ultimately “succeeded in convincing the world that contract law was totally irrelevant to the modern industrial problem of product defects.”⁹¹ In combination with the legal scholarship focussing on the tort regime and risk distribution goals, these lessons would propel products liability both into the foreground and into a regime of enterprise liability.

83. *Id.* at 631–33. Compare Llewellyn, *On Warranty II*, *supra* note 27, at 393–404 with *id.*

84. Compare Kessler, *Contracts of Adhesion*, *supra* note 5, at 631–32 with Llewellyn, *On Warranty II*, *supra* note 27, at 401 and Llewellyn, Book Review, *supra* note 51, at 701.

85. See K. LLEWELLYN, *SALES*, *supra* note 23, at 340–42.

86. W. TWINING, *supra* note 20, at 133–34 (discussing *Sales*).

87. Compare Kessler, *Contracts of Adhesion*, *supra* note 5, at 633–38 with Llewellyn, Book Review, *supra* note 51, at 702–03 and Llewellyn, *What Price Contract?*, *supra* note 48, at 744.

88. Llewellyn was cited in Kessler, *Contracts of Adhesion*, *supra* note 5, at 631 n.7, 633 n.15, 637 n.27 (citing Llewellyn, *What Price Contract?*, *supra* note 48; Llewellyn, Book Review, *supra* note 51, at 703 & 704). Llewellyn's writing on the issue went back at least as far as K. LLEWELLYN, *SALES*, *supra* note 23.

89. Compare Kessler, *Contracts of Adhesion*, *supra* note 5, at 633–38 with K. LLEWELLYN, *SALES*, *supra* note 23, at 342.

90. Llewellyn, Book Review, *supra* note 51, at 700 (noting “problem . . . has not yet made its way into full familiarity”).

91. Priest, *supra* note 1, at 492. Professor Priest notes in passing the early development by Llewellyn of many of the ideas contained in *Contracts of Adhesion*. *Id.* at 495.

C. *Llewellyn and William Prosser*

While Professor Priest credits William Prosser with having most clearly articulated the modern synthesis of tort and contract law,⁹² he does so reluctantly because he demonstrates that "Prosser's ideas and proposals were derived from those of James and Kessler . . . [and] never threatened originality."⁹³ Nonetheless Prosser played a major role in the emergence of enterprise liability, effectively bringing together and promoting as a complete, indeed dominant, legal regime the strands of risk distribution, strict liability, and contract of adhesion theories⁹⁴ that in their infancy Karl Llewellyn had juxtaposed, struggled with, and nearly articulated as the modern synthesis.

Llewellyn's influence can be seen throughout Prosser's major works,⁹⁵ despite the fact that *Sales* and *On Warranty* were given very little direct credit.⁹⁶ Interestingly, those few passages of Prosser admittedly influenced by or indebted to Llewellyn would be the ones to receive the most attention from courts implementing the enterprise liability regime.⁹⁷

In a strict liability and warranty section of his 1941 treatise, Prosser asserted that "the growth of a business practice by which reputable sellers stood behind their goods, and a changing social viewpoint toward the seller's responsibility, led to the development of 'implied' warranties of quality, . . . which in effect made the seller an insurer of his goods."⁹⁸ In this discussion, Prosser drew extensively from the *On Warranty* articles he cited as well as from the uncited *Sales*.⁹⁹

92. *Id.* at 505-07.

93. *Id.* at 465. Indeed, Prosser admitted as much, characterizing himself as "a packrat . . . at best a collector; and the most that can be said for him is that he sometimes chooses well." W. PROSSER, *LAW OF TORTS* xi (3d ed. 1964). Even Professor White, who at one point makes grand claims for Prosser's scholarship, see *infra* note 106, admits that other torts theorists—especially James on compensation as the goal of tort law—were "more probing and reflective." G. WHITE, *supra* note 1, at 176 & n.156.

94. G. WHITE, *supra* note 1, at 139-79 (chapter entitled "William Prosser, Consensus Thought . . ."); Priest, *supra* note 1, at 506.

95. See, e.g., W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* (1st ed. 1941) [hereinafter *TORTS 1ST ED.*]; W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* (2d ed. 1955) [hereinafter *TORTS 2D ED.*]; Prosser, *Implied Warranty of Merchantable Quality*, 27 *MINN. L. REV.* 117 (1943) [hereinafter *Implied Warranty*]; Prosser, *Assault*, *supra* note 3.

96. Indeed, in the course of the relevant sections of the works cited *supra* note 95, Prosser cited Llewellyn only six times. At numerous other points, however, he relied upon the law review notes of Llewellyn's students.

97. See *infra* Section IV.

98. W. PROSSER, *TORTS 1ST ED.*, *supra* note 95, at 670 & n.26 (citing Llewellyn, *On Warranty I & II*, *supra* note 27).

99. Although Prosser did not indicate direct reliance on any authority for his seller-as-insurer point, Llewellyn's writings are an obvious source. See Llewellyn, *On Warranty I*, *supra* note 27, at 704 n.14 ("allowing suit against one which can afford to take and spread a risk"); K. LLEWELLYN, *SALES*, *supra* note 23, at 341 ("shift . . . hazard . . . away from the individual over to a group which can distribute the loss"). Llewellyn had, of course, been using "insurer" language in this area since his student days. See Llewellyn, *Comment*, *supra* note 36, at 1073.

Prosser also relied on other sales treatises that bear the mark of Llewellyn's influence. W. PROSSER, *TORTS 1ST ED.*, *supra* note 95, at 671 n.27 (citing, e.g., L. VOLD, *LAW OF SALES* vi (1931) ("Author . . . acknowledges . . . Professor Llewellyn's brilliant and stimulating" casebook.)).

A later warranty discussion likewise tracked Llewellyn's work in the area, noting "an increased feeling that social policy demands that the burden of accidental injuries caused by defective chattels be placed upon the producer, since he is best able to distribute the risk to the general public by means of prices and insurance."¹⁰⁰ Prosser also appeared to profit from a reading of Llewellyn in making the case that "it seems far better to discard troublesome sales doctrine of 'warranty,' and impose strict liability outright in tort as a matter of social policy."¹⁰¹ When the second edition of *Prosser on Torts* was issued in 1955, it contained substantially the same discussion of products liability law as did the initial edition.¹⁰²

It was not until Prosser's classic *Assault upon the Citadel* that the modern synthesis of tort and contract law so significant to the implementation of enterprise liability was presented in complete and convincing form.¹⁰³ While most of Prosser's historical recitation of the rise of strict products liability in tort was built upon citation to cases, the theoretical basis rested in the work of Llewellyn, James, and Kessler.¹⁰⁴

The central theme of Prosser's article was that while the contract and warranty regime was declining, a strict liability tort regime was simultaneously emerging. His advice on this development was straightforward: "If there is to be strict liability in tort, let there be strict liability in tort

100. Compare text accompanying this note with K. LLEWELLYN, SALES, *supra* note 23, at 341-42 and Llewellyn, *On Warranty I*, *supra* note 27, at 704 n.14. Inexplicably, Llewellyn's influence was not mentioned. W. PROSSER, TORTS 1ST ED., *supra* note 95, at 689. Prosser's debt to Llewellyn is nonetheless clear from the reference to a pair of *Columbia Law Review* student notes. *Id.* at 689 nn.43-44 (citing Note, *Manufacturers' Liability*, *supra* note 30; Note, *Marketing Structure*, *supra* note 30).

101. W. PROSSER, TORTS 1ST ED. *supra* note 95, at 692. Compare *id.* with Llewellyn, *On Warranty II*, *supra* note 27, at 406-07. Two years after publication of his treatise, Prosser came out with a piece whose very title evokes Llewellyn's influence. Prosser, *Implied Warranty*, *supra* note 95. In fact, this article was little more than an updated restatement of the corresponding section of Prosser's treatise, and did not represent any theoretical advance over Llewellyn's work. The article contained but two minor citations to Llewellyn. See *id.* at 125 n.42, 155 n.220 (citing K. LLEWELLYN, SALES, *supra* note 23, at 324; Llewellyn, *On Warranty II*, *supra* note 27, at 382).

102. Moreover, the citations to Llewellyn and to his students' notes remain identical. See, e.g., W. PROSSER, TORTS 2D ED., *supra* note 95, at 494 n.84 (citing Llewellyn, *On Warranty I & II*, *supra* note 27, corresponding to W. PROSSER, TORTS 1ST ED., *supra* note 95, at 670 n.26).

The most obvious and significant addition was a citation to Justice Traynor's concurrence in *Escola*. *Id.* at 506 n.1. Unfortunately, Prosser failed to notice the rather more prominent and extensive reliance Traynor placed on Llewellyn's works. See *infra* Section IV-B. Prosser also drew upon, *id.* at 506 n. 99, a recent book that thanked Llewellyn for his help in "develop[ing] the general contours of the work." R. DICKERSON, *supra* note 34, at vii. For a further discussion of Dickerson, see *infra* note 111 and accompanying text.

103. Priest, *supra* note 1, at 505-06. Professor Priest, however, asserts that much of the article's influence stemmed from its systematic overstatement of judicial holdings and its timely publication (simultaneous with *Henningsen*). See *id.* at 506-07, 514-16.

104. Prosser relied upon the first two explicitly. Prosser, *Assault*, *supra* note 3, at 1130 n.182, 1131 n.189 (citing James, *Products Liability*, *supra* note 72); 1138 n.226 (citing K. LLEWELLYN, SALES, *supra* note 23). Kessler received an oblique nod via citation to sections of James' work that draw from *Contracts of Adhesion*. Priest, *supra* note 1, at 506 & n.290 (demonstrating that Prosser drew from Kessler through the work of James). Prosser also relied upon one of Llewellyn's student's notes and the heavily-influenced Dickerson book. Prosser, *Assault*, *supra* note 3, at 1124 n.153, 1133 n.198 (citing Note, *Manufacturers' Liability*, *supra* note 30; R. DICKERSON, *supra* note 34).

declared outright, without an illusory contract mask . . . [and let it be] new and independent . . . imposed by the law . . . as a matter of policy."¹⁰⁵ Llewellyn had, of course, proffered this same advice for the same reasons, only he had been doing so over thirty years.¹⁰⁶

In trumpeting the emergence of enterprise liability, Prosser noted that its legal tool of implied warranty, indeed the entire concept, was "a freak hybrid born of the illicit intercourse of tort and contract."¹⁰⁷ This widely cited and quintessentially colorful passage of Prosser's, however, must take second place to Llewellyn's more extensive metaphor of twenty-one years previous: there not only was warranty "a bastard," but its tort and contract "parents" were engaged in a battle in which it would be wrong for mother-tort to succumb to "over-domination by an illegitimate [contract] father."¹⁰⁸

D. *Other Torts Theorists and the Modern Enterprise Liability Synthesis*

Other scholars important to the development and subsequent implementation of the enterprise liability regime also built much of their theoretical approach on the foundations laid by Karl Llewellyn.¹⁰⁹ Albert Ehrenzweig's influential *Negligence Without Fault* borrowed much from *On Warranty* and took pains to thank Llewellyn in the introduction.¹¹⁰ Reed Dickerson's much-cited work on products liability in the food and drink area, which had influence far beyond its own focus, was filled with citations to Llewellyn.¹¹¹ One of the only enterprise liability scholars to clearly call attention to Karl Llewellyn's contributions was Dix Noel, whose article on the "drift toward strict liability" made liberal and prominent use of *Sales* and *On Warranty*, even going so far as to quote Llewellyn-

105. Prosser, *Assault*, *supra* note 3, at 1134.

106. See, e.g., Llewellyn, *Comment*, *supra* note 36, at 1071 ("liability in tort seems simpler and more apt") (published in 1918); Llewellyn, *Book Review*, *supra* note 39 (advocating tort over sales law) (published in 1925); Llewellyn, *On Warranty II*, *supra* note 27 (same) (published in 1937). Given this, Professor White is surely wrong to assert that while Prosser was not "a creative architect of strict liability theory . . . his bold stroke of stripping strict liability from its 'illusory contract mask' and declaring its status as a tort doctrine ranked as a genuinely creative effort." G. WHITE, *supra* note 1, at 173.

107. Prosser, *Assault*, *supra* note 3, at 1126.

108. Llewellyn, *On Warranty II*, *supra* note 27, at 402.

109. An example earlier than those related in the text is *Comment, Warranties of Kind and Quality Under the Uniform Revised Sales Act*, 57 YALE L.J. 1389 (1948). Llewellyn's *Sales, On Warranty*, and his students' notes compose fully half of the sources informing this piece. For a discussion of the comment's later influence, see *infra* note 131.

110. A. EHRENZWEIG, *supra* note 14, at 1 n.1, 16 & n.48, 28-30 & n.110. James and Prosser (mostly drawing on James) are also heavily relied upon. Other pieces owed a similar debt. Ehrenzweig, *supra* note 65, at 799; Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COLUM. L. REV. 1072, 1088 n.90, 1090 & n.102 (citing Llewellyn, *Book Review*, *supra* note 51).

111. The author acknowledged a "special debt" to Llewellyn for "uncover[ing] merit in ideas and approaches that would certainly have suffocated had they been left to my care alone." R. DICKERSON, *supra* note 34, at vii. See also *id.* at 88 (quoting K. LLEWELLYN, *SALES*, *supra* note 23, at 341, on risk distribution).

lyn's loss distribution ideas and connect them directly to the theory motivating Justice Traynor's *Escola* concurrence.¹¹²

As scholars made their way towards the modern enterprise liability synthesis that Karl Llewellyn nearly gathered together for himself in the 1930's, each was able to—indeed, had to—connect his work back to that of Llewellyn. Without ever being able to draw upon James, Kessler, Prosser, Traynor, or dozens of others, Karl Llewellyn had managed to anticipate so much of the enterprise liability discourse that eventually all later theorists would combine in a synthesis very much orchestrated by the man who had gone before.

IV. LLEWELLYN'S INFLUENCE ON THE IMPLEMENTATION OF ENTERPRISE LIABILITY

While Karl Llewellyn's early work on warranty of quality had an important impact on subsequent scholars, it is more significant from a legal realist perspective that the courts—and through them, society—adopted and advanced his ideas.

A. *Failed Enactment of UCC Strict Liability*

Karl Llewellyn's daring section 16-B of the Uniform Revised Sales Act—essentially a strict liability provision for manufacturers that anticipated section 402A of the *Restatement (Second) of Torts*—drew strong opposition at the 1941 Conference at which it was presented and disappeared before the 1943 draft was published. Llewellyn was quoted as saying that “‘every time we tried to draw’ the rule, it ‘scare[d] everybody that saw it pea green.’”¹¹³ While commentators have since criticized the drafts of the UCC because “[t]hey did not adequately anticipate the enormous blossoming of . . . strict liability,”¹¹⁴ this cannot be leveled against Llewellyn, who even after losing the battle over section 16-B would at every opportunity attempt to liberalize the Code in favor of consumers.¹¹⁵

112. Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963, 1010-11 (1957). Noel noted that “[t]he basic arguments were stated by Professor Llewellyn, in his usual emphatic style, as early as 1930.” *id.* at 1010, referred to Llewellyn as a “strong . . . advocate of strict liability,” *id.* at 1015, quoted K. LLEWELLYN, SALES, *supra* note 23, at 341-42, and asserted that “[t]his viewpoint found limited judicial recognition” in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462-68, 150 P.2d 436, 440-44 (1944) (Traynor, J., concurring). Noel, *supra*, at 1010 (quoting concurrence at length). For further discussion of Llewellyn's influence on Traynor and *Escola*, see *infra* Section IV-B.

113. Wiseman, *supra* note 57, at 523-24 & n.255 (quoting Llewellyn from proceedings transcripts in Llewellyn's papers); see Titus, *supra* note 57, at 757.

114. White, *Evaluating Article 2 of the Uniform Commercial Code*, 75 MICH. L. REV. 1262, 1270 (1977) (drafters “did not foresee the considerable potential for confusion between the Code provisions and such strict tort doctrines”); see P. KEETON, D. OWEN, & J. MONTGOMERY, CASES AND MATERIALS ON PRODUCTS LIABILITY 197-98 (1980) (raising similar critique).

115. See James, *Products Liability*, *supra* note 72, at 194 n.10 (praising liberal third-party beneficiary provisions, but expressing wish that Llewellyn's even more liberal draft had survived).

While his most radical statutory drafts were rarely adopted, Llewellyn's ideas found greater acceptance in the courts.

B. *Justice Traynor, the Escola Concurrence, and Beyond*

Justice Traynor's concurrence in *Escola v. Coca Cola Bottling Co.*¹¹⁶ stated explicitly that a rule of strict products liability was needed since "public policy requires that the buyer be insured at the seller's expense against injury,"¹¹⁷ that such sellers could distribute these risks throughout society,¹¹⁸ and that these advances in the law were warranted by the changing economic and social relationships between the parties.¹¹⁹ Justice Traynor drew heavily on both his schooling in the legal realist¹²⁰ approach to the law and on Karl Llewellyn's warranty and quality writings, at several crucial points citing Llewellyn or heavily influenced portions of Prosser's work. Prosser's derivative work on the warranty of quality, for example, provided support for a public policy argument about insurance and for a discussion of the overlap of tort and contract in promoting quality of goods.¹²¹ Moreover, Traynor cited Prosser's first edition of *Torts* at several points where Llewellyn's influence was clear.¹²²

Llewellyn's influence was not felt merely through Prosser, however. At the center of Traynor's sweeping analysis stood a citation to the lengthy products liability footnote from *On Warranty*¹²³ and a descriptive history of the growth of an industrial and commercial economy and the changing relationship between consumers and manufacturers, with the conclusion that the law must move with the social needs. Many of these ideas Traynor took from Llewellyn's *Sales* casebook, as he acknowledged at the end of the discussion.¹²⁴

116. 24 Cal. 2d 453, 461, 150 P.2d 436, 440 (1944) (Traynor, J., concurring).

117. *Id.* at 464, 150 P.2d at 442.

118. *Id.* at 462, 150 P.2d 441.

119. *Id.* at 467, 150 P.2d at 443 ("[t]he manufacturer's obligation to the consumer must keep pace with the changing relationship between them"). He also exposed certain "fictions" relied upon to advance the law. *See id.* at 465-66, 150 P.2d at 442-43 ("Courts have resorted to various fictions to rationalize the extension of the manufacturer's warranty to the consumer . . . [when] such fictions are not necessary.").

120. Legal historian Lawrence Friedman lists the work of Traynor along with that of Cardozo as classic examples of the legal realist approach to judging. L. FRIEDMAN, *supra* note 6, at 688, and the *Escola* concurrence certainly reflected this approach.

121. 24 Cal. 2d at 464, 466, 150 P.2d at 442, 443 (citing Prosser, *Implied Warranty*, *supra* note 95, at 124, 118). Llewellyn's influence on those portions of Prosser is evident and has previously been explored. *See infra* Section III-C.

122. The discussion of the need to expand strict liability from food cases into all defective consumer goods, while discarding warranty fictions in favor of strict liability, was substantially taken from Prosser, and through him, from Llewellyn. 24 Cal. 2d at 465-66, 150 P.2d at 442-43 (citing W. PROSSER, *TORTS 1ST ED.*, *supra* note 95, at 692, 689 (relying upon several of Llewellyn's students' *Columbia Law Review* notes)).

123. *Id.* at 465, 150 P.2d at 442 (citing Llewellyn, *On Warranty II*, *supra* note 27, at 704 n.14).

124. *Id.* at 467-68, 150 P.2d 443-44 (citing LLEWELLYN, *SALES*, *supra* note 23, at 340 et seq.). A Llewellyn-esque approach can be seen throughout Traynor's judging. *Cf.* Macaulay, *Justice Traynor and the Law of Contracts*, 13 *STAN. L. REV.* 812 (1961).

Justice Traynor's writing continued along the lines of the *Escola* concurrence, and he was instrumental in the ultimate triumph of enterprise liability that came in the 1960's, authoring the decision which officially ushered in the enterprise liability era.¹²⁵ While it was unfortunately brief and did not cite directly to Llewellyn, *Greenman* did refer readers to relevant sections of the Harper & James treatise, Prosser's work, and the *Escola* concurrence.¹²⁶ In these other sources lay Llewellyn's influence.¹²⁷

C. Henningsen and the Fall of Contract

After the revolutionary concurrence of Justice Traynor in *Escola* and before the final adoption of enterprise liability in *Greenman*, a New Jersey case settled the contract strand of the modern enterprise liability synthesis by effectively declaring this doctrine to be irrelevant in the area.¹²⁸ Professor Priest has observed that "[t]he conceptual origins of the New Jersey Supreme Court's opinion in *Henningsen* are hardly concealed": they go directly to James and Kessler.¹²⁹ With regard to the influence of Karl Llewellyn, however, the opinion's conceptual origins are somewhat obscure. There was not a single cite to the scholar who contributed so significantly to precisely the issue defined by the court at the outset of the opinion: "implied warranty of merchantability."¹³⁰ Nonetheless, the approach and language of the opinion and the overt reliance on Prosser, James, and Kessler more than demonstrated the guiding influence of Llewellyn.¹³¹

The *Henningsen* court crafted an enterprise liability synthesis that combined the lessons of James and Kessler in order to bring about the products liability move from contract into tort. It traced the liberalization of the law of sales and the expansion of commercial society, and identified the development of implied warranties and the advance of strict liability

125. *Greenman v. Yuba Power Prods.*, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

126. *Id.* at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701 (citing 2 F. HARPER & F. JAMES, *supra* note 2, § 28.15-28.16, which was drawn from K. LLEWELLYN, SALES, *supra* note 23; Prosser, *Assault*, *supra* note 3, at 1124-34, which was drawn from Llewellyn's ideas of the tort/contract hybrid, his students' notes, and the heavily influenced R. DICKERSON, *supra* note 34).

127. Justice Traynor went on to author numerous other opinions that firmly established the enterprise liability regime. Some, including *Seely v. White Motor Co.*, 63 Cal. 2d 9, 16, 403 P.2d 145, 150, 45 Cal. Rptr. 17, 22 (1965) (citing Llewellyn, *On Warranty I & II*, *supra* note 27), made specific reference to Llewellyn, and all continued to rely upon the work of the others he influenced.

128. See Priest, *supra* note 1, at 507-10. *Henningsen v. Bloomfield Motors*, 32 N.J. 358, 161 A.2d 69 (1960), moved products liability from the contract regime wholly into tort by denying manufacturer defenses of disclaimer or limited liability and effectively extending the implied warranty of merchantability to a point where it was indistinguishable from a strict liability in tort standard. Judge Traynor would rely upon *Henningsen* in *Greenman*. Priest, *supra* note 1, at 510.

129. Priest, *supra* note 1, at 509.

130. 132 N.J. at 365, 161 A.2d at 73.

131. In addition to the influence through these three, Llewellyn's contributions ran throughout a 1948 *Yale Law Journal* Comment, *supra* note 109, cited repeatedly in the case. 32 N.J. at 373, 391, 404, 161 A.2d at 78, 87, 95. This Comment was completely informed by *Sales* and the *On Warranty* articles. See *supra* note 109.

as a "trend and a design . . . toward providing protection for the buyer."¹³² While this analysis clearly relied on the work of Llewellyn, its debt to him was reflected instead through citations to Harper & James and Prosser that refer back to pertinent passages in *Sales* and *On Warranty*. One Harper & James section on the development of warranty relied upon repeatedly in *Henningsen* was, for example, drawn almost totally from a discussion in Llewellyn's *Sales*.¹³³ Similarly, references to Prosser's *Torts* were to citations that owed much to Llewellyn's works.¹³⁴

The court also discussed the desirable benefits of risk distribution and relied quite naturally on Harper & James,¹³⁵ whose discussion in turn came directly from Llewellyn's *Sales*.¹³⁶ A quite lengthy and excerpt-filled discussion of Kessler's *Contracts of Adhesion* and similar work by Ehrenzweig,¹³⁷ and the conclusion that unbalanced pseudo-bargaining was void as against public policy¹³⁸ likewise reflected a heavy reliance on Llewellyn.¹³⁹

Henningsen also contained a brief discussion of the interplay between contract and tort in the area of product quality and quoted Prosser to the effect that "warranty [is] 'a curious hybrid of tort and contract.'"¹⁴⁰ This analysis could just as easily have been attributed to Llewellyn, for the reference to Prosser relied on the *On Warranty* pieces.¹⁴¹

Thus while his name never made an appearance in *Henningsen*, Karl Llewellyn nonetheless had a significant impact on the opinion.

132. 32 N.J. at 373, 161 A.2d at 77.

133. *Id.* at 372, 403, 161 A.2d at 77, 92 (citing 2 F. HARPER & F. JAMES, *supra* note 2, § 28.15). This section of the treatise discussed the growth of warranty as related to the growth of commercial activity and its relation to strict liability. The authors relied heavily on Llewellyn's *Sales*. 2 F. HARPER & F. JAMES, *supra* note 2, at 1570 n.3 (citing K. LLEWELLYN, SALES, *supra* note 23, at 340 et seq.).

134. 32 N.J. at 372, 161 A.2d at 77 (citing W. PROSSER, TORTS 2D ED., *supra* note 95, at 494, 506). The first reference to Prosser contained his only acknowledgment of Llewellyn's extensive warranty of quality work. W. PROSSER, TORTS 2D ED., *supra* note 95, at 494 n.84 (citing Llewellyn, *On Warranty I & II*, *supra* note 27). The second was based primarily on the Llewellyn-influenced work contained in the oft-cited *Columbia Law Review* notes. *Id.* at 506 & n.1 (citing Note, *Manufacturers' Liability*, *supra* note 30; Note, *Marketing Structure*, *supra* note 30).

135. *Id.* at 379, 161 A.2d at 81 ("The interest in consumer protection calls for warranties by the maker . . . to reach all who are likely to be hurt.") (quoting 2 F. HARPER & F. JAMES, *supra* note 2, at 1571-72).

136. It taking this quote from Harper & James, the court omitted a footnote citing to Llewellyn. *Id.*; see 2 F. HARPER & F. JAMES, *supra* note 2, at 1571 n.5 (citing K. LLEWELLYN, SALES, *supra* note 23, at 340-03).

137. 32 N.J. at 385-91, 161 A.2d at 84-87. Kessler, *Contracts of Adhesion*, *supra* note 5, and Ehrenzweig, *supra* note 110, are cited *id.* at 389, 161 A.2d at 86.

138. 32 N.J. at 408, 161 A.2d at 97.

139. See *supra* Sections III-B (Kessler), III-D (Ehrenzweig); see also *Stevens v. Fidelity & Casualty Co.*, 58 Cal. 2d 862, 882-83, 377 P.2d 284, 297, 27 Cal. Rptr. 172, 185 (1962) (following *Henningsen* and quoting Kessler at length, but also citing Llewellyn, Book Review, *supra* note 51).

140. 32 N.J. at 414, 161 A.2d at 100.

141. *Id.* (citing W. PROSSER, TORTS 2D ED., *supra* note 95, § 83). This section of Prosser was greatly informed by and cited to Llewellyn, *On Warranty I & II*, *supra* note 27. W. PROSSER, TORTS 2D ED., *supra* note 95, at 494 & n.84.

V. CONCLUSION

As courts in state after state adopted enterprise liability and section 402A of the *Restatement*, citations to James and Prosser grew exponentially. A similar recognition of the value of Llewellyn's contributions, however, did not emerge. This oversight deserves correction, because Llewellyn's clear influence on the most prominent products liability theorists and his additionally direct impact on the courts demonstrates the remarkable viability of the legal theories and analyses that he generated through the 1920's and 1930's. While enterprise liability theory took an additional thirty years to reach fruition, its intellectual foundations had been well laid by Karl Llewellyn.

In the end, the story of Karl Llewellyn and his early work on the concepts that would emerge full-blown in the writings of Fleming James and Friedrich Kessler and in the modern synthesis described by William Prosser is the story of his precociousness,¹⁴² his near miss in creating the synthesis himself, and his important and enduring influence in an area in which he ceased to contribute after the 1930's.

142. Numerous scholars have seen fit to mention in passing something to the effect that "as early as [date], Karl Llewellyn was writing on [topic]." See, e.g., Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1174, 1227 & n.193 (1983) (noting influence of *What Price Contract?*); Murray, *The Chaos of the "Battle of the Forms": Solutions*, 39 VAND. L. REV. 1307, 1350 & n.163 (1986); Noel, *supra* note 112, at 1010.

