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PRODUCTS LIABILITY: DEAN WADE AND THE CONSTITUTIONALITY OF SECTION 402A

Reed Dickerson*

I. THE ISSUE

In his contribution to the products liability symposium in honor of Professor Dix Noel's several years ago, Dean John Wade made an important contribution to the burgeoning law of products liability by addressing himself to an important issue that most authorities, judicial or academic, have ignored or swept under the rug as academic trivia: whether the Restatement (Second) of Torts, section 402A is compatible with statutory sales law. For them, the issue, if it ever existed in any significant sense, is a fading vignette of legal history; section 402A "has now swept the field."4

Wade, on the other hand, performed a valuable service to American constitutional law by recognizing in print (1) that the judicial adoption of section 402A has been valid only if and to the extent that the area it occupies was not inconsistently occupied or preempted by the Uniform Sales Act or its more widely adopted successor, the Uniform Commercial Code, (2) that the possibility of a significant inconsistency between section 402A and the Code raises a constitutional issue of legislative supremacy that even chronic judicial disregard cannot erase, and (3) that

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the courts have a professional, indeed constitutional, responsibility to interpret the Code to determine whether, and if so to what extent, it occupies or preempts the field of products liability. After noting that the courts have avoided discussion of this issue even though they apply section 402A, Wade concludes that it is now time "to face up to the problem." He then proceeds to do so. But how successfully?

Having been too heavily committed to other projects to participate in the Noel symposium or even to follow through with a delayed entry, I hope I may be allowed to stir the embers one more time. There are lessons here that may be valuable even apart from any meager hope of salvaging rationality in the field of products liability.

My disaffection with section 402A, which goes back to the 1961 American Law Institute debates and which is shared by others, has been documented often. My general complaint is that section 402A has been either unnecessary, if it did not undercut the Uniform Sales Act or the Code, or unconstitutional, if it did. In either case, the motivation for section 402A was to make sure that a broad area of products liability was free of any unpleasant tentacles of statutory sales law. As a result of the section's success, the Code has become almost irrelevant in this area and, within a few years, it may cease even to be mentioned.

5. Id. at 125.
6. Id.
7. See 38 ALI PROCEEDINGS 76-79 (1961).
10. See RESTATEMENT (SECOND) OF TORTS § 402A, Comment m (1965).
But even a judicial and academic fait accompli is no warrant for abandoning the matter. No statute of limitations runs on unconstitutionality, and American law is worth protecting against the danger that section 402A (and more recently section 402B) will inspire similar conceptual misadventures in analogous situations such as those involved in defective housing. Metastasis is a continuing risk and probably a greater danger than the original disease.

For latecomers, here are some specifics. The Uniform Sales Act and its successor, the Uniform Commercial Code, were enacted with language that raised serious questions as to whether a consumer could recover from a seller for injuries caused by a defective product in cases in which there was a lack of privity, a seller’s disclaimer, or a lack of timely notice by the consumer. To assure consumer relief free of such statutory limitations, the American Law Institute included in the Restatement (Second) of Torts the well-known section 402A, which, being wrapped in the

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11. In the recently promulgated Uniform Land Transactions Act, a strong effort was made by its authors to include a section, inspired by section 402A and the cases adopting it, that would have in effect invited the courts to derogate from the very warranty provisions relating to consequential damages that the authors of the Act had so painstakingly worked out. Attacked as a “suicide” provision, the proposed section was, fortunately, stricken. It read as follows:

Nothing in this Act determines or affects the liability or non-liability in tort of a seller to any person, including the buyer, arising apart from this Act for injury to the person, death, property damage, or other loss caused by a condition of the real estate [section 2-314].


12. RESTATEMENT (SECOND) OF TORTS § 402A (1965) states:
Special Liability of Seller of Product for Physical Harm to User or Consumer.

(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.
clothes of pure tort, hardly looked like a possible threat to the Code. Even so, the section has been occasionally attacked as an unseemly, even unconstitutional, intrusion upon the Code. But until Wade, the academic and judicial response had been largely one of benign neglect.

The crucial constitutional assumption is that the principle of legislative supremacy, which inheres in the separation of powers found in every state constitution, means that once the legislature has constitutionally spoken, the courts are bound to respect the objectively ascertained meaning of that utterance, including its implications. Briefly, a court may not repeal or amend a statute. That the power to make law is not the exclusive province of the legislature, or that the separation of powers is complicated, does not dilute the basic principle, which Wade's defense of section 402A concedes.

Accordingly, the basic issues are these: Do the warranty, disclaimer, or notice provisions of the Code, objectively interpreted, carry a negative implication? If so, what is it and does section 402A intrude upon it? Even if there is no such implication, does section 402A clash directly with any of those provisions?

In defense of section 402A, Wade develops several main points. First, he delineates the common law differences between tort and contract. Second, he disposes of the possibility that the Code may have preempted the field of products liability based on negligence. Third, he argues that the Code, being concerned with sales contracts, is unscarred by a judicial thrust aimed only at torts. Alternatively, he advances a more novel justification that treats section 402A as creating a form of negligence per se, which, being "negligence," is beyond the reach of the Code.

II. Possibilities of Conflict

Before discussing the specifics of Wade's approach, let us examine the possibilities of conflict between section 402A and the Code. If the Code preempted anything by negative implication,

what was its probable sweep? Possibility number one is that the Uniform Commercial Code preempted the field of products liability (other than liability based on culpability) but only with respect to the legal relations between the immediate parties to the sale in question. For courts willing to rely on comment 3\textsuperscript{15} to section 2-318, any uncertainty here has been dispelled regarding vertical privity\textsuperscript{16} and perhaps horizontal privity\textsuperscript{17} (except possibly with respect to employees of the retail buyer).\textsuperscript{18}

Possibility number two is that the Code preempted the field of products liability (other than liability based on culpability), including the rights of third parties, so far as they rest on warranty based on promise, but not so far as they rest on warranty based on representation.

Possibility number three is that the Code preempted the field of products liability (other than liability based on culpability), including the rights of third parties so far as they rest on warranty.

Possibility number four is that the Code preempted the field of products liability (other than liability based on culpability), including the rights of third parties, whether or not they rest on warranty. This preemption would include all forms of strict liability, including breach of warranty, liability under section 402A, and some instances of negligence per se.

Stating the issue as one of "preemption," however, does not exhaust the possibilities of conflict. Even if the Code preempted nothing, there would still be the question whether in the circum-

\begin{itemize}
  \item \textsuperscript{15} The first alternative expressly includes as beneficiaries within its provisions the family, household and guests of the purchaser. Beyond this, the section in this form is neutral and is not intended to enlarge or restrict the developing case law on whether the seller's warranties, given to his buyer who resells, extend to other persons in the distributive chain.
  \item \textsuperscript{16} U.C.C. § 2-318 Alternative A, Comment 3 (1972 version).
  \item \textsuperscript{17} Vertical privity is the relationship between two persons (e.g., a consumer and the manufacturer) in the distribution chain.
  \item \textsuperscript{18} Horizontal privity is the relationship between a consumer not in the distribution chain (e.g., a member of the retail buyer's family) and the retailer.
  \item \textsuperscript{18} In jurisdictions adopting Alternative A, beneficiaries under U.C.C. § 2-318 do not include the retail buyer's employees, only his family, household, and guests.
\end{itemize}
stances the judicial activity under section 402A derogated from any substantive right, privilege, or obligation that the Code was designed to secure. If, for example, the Code allowed the seller to disclaim in a situation not involving unconscionability, could the court ignore the disclaimer by clothing the transaction in nonstatutory terms? It hardly seems likely, since there is a strong presumption that a legislature intends to condition the coverage and operation of its statutes on substantive considerations rather than on mere names or form, or a system of jurisprudential pigeonholing. To assume otherwise is to assume that legislatures are indifferent to easy evasion.

III. WADE'S PRELIMINARY OBSERVATIONS: CONTRACT V. TORT, AND NEGLIGENCE

Before undertaking what few judges have tried,19 Wade

19. Almost no judge has tried to defend the approach of section 402A against the possibility of legislative preemption. Justice Traynor did not do so in Greenman v. Yuba Power Products, Inc., 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), the purported spawning ground of "strict [products] liability in tort." See Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 MINN. L. REV. 791, 803 (1966). It is clear that this distinguished judge believed that the Uniform Sales Act did not invade the field of third-party rights, either affirmatively or by negative implication. Accordingly, he felt free to call for a constructive filling of that area by the courts. But he produced not one word of exegesis to support his tacit assumption that the Act had left the area wholly free for judicial development, an assumption that deference to the legislative branch made it desirable to explicate. The social desirability of the result, however great, was not enough to fill the legal gap.

Judge Holman's half-hearted effort in Markle v. Mulholland's, Inc., 265 Ore. 259, 272-73, 509 P.2d 529, 535 (1973), hardly did the job with these three defenses: (1) "[T]he legislature would not have intended to pre-empt the field and thus to prevent the development of case law for the additional protection of consumers . . . ." However, he offers no evidence of a legislative intent to permit unlimited judicial innovations for consumer protection, even though the Code's notice and disclaimer provisions suggest otherwise. (2) The Code, he says, does not specifically adopt preemption. But what about preemption through negative implication, which is neither specific nor express? (3) Because every state that has adopted section 402A has also adopted the Code, "[o]bviously, none of these courts thought the UCC pre-empted the field." Although the statement is obviously true, there is no hard evidence that more than a very few have ever given the matter serious attention.

Before Wade, the only academic to defend section 402A against protectors of the Code was apparently Professor Littlefield. See Littlefield, Some Thoughts
makes several preliminary observations. He attempts to distinguish contract from tort in terms of the interests that they protect:

Contract (sales) law protects the expectation interests of the parties. It seeks to give them the benefit of their bargain . . . . In sales of personal property, contract law is concerned with the quality of the product, and it sets forth quality standards (merchantability and fitness for a particular purpose).

. . . .

Tort (negligence) law, on the other hand, involves an obligation imposed by law, not by contract . . . . It does not depend upon (require) a contractual arrangement . . . . It does not purport to give the plaintiff the benefit of his bargain, but instead undertakes to put him back in the position he was in before his injury—to "make him whole." In sales of personal property, tort law is concerned with the safety of the product. It uses safety standards—for example, "unreasonably dangerous," "not duly safe."

One difficulty is that in the context of products liability Wade's differentiation is misleading: The differences are highly exaggerated. The problem arises because, as he points out, "the two theories sometimes overlap." Unfortunately, the word "sometimes" blurs the fact that almost all products liability as we now know it lies in the area of overlap. Indeed, if we exclude the negligence aspects of products liability, which create no problem in the present context, the significant aspects that remain lie wholly within the common area. Within it, the courts have done a skillful job of producing similar results, whichever theory has been applied. To this extent, all or almost all the differences


20. Wade, supra note 3, at 127.

21. Id. at 128.


[All] the strict liability rule does to implied warranty law is abolish the notice requirement, restrict the effectiveness of disclaimers to situations where it can be reasonably said that the consumer has freely assumed the risk, and abolish the privity requirement, where ordinary
that Wade suggests disappear.

For example, in products liability cases "benefit of bargain" is usually not at stake, leaving consequential damages (a tort-flavored aspect of contract law) at the forefront. Despite some marginal theoretical differences respecting foreseeability, the courts have handled the consequential damages aspect of contract law as if it were purely one of tort.\(^3\) In any case, the interests to be protected are identical—those of person or personal property as threatened by civil wrong.

For the most part, Wade seems to agree. On the other hand, he is on slippery ground when he says that, if the action is for breach of a contractual obligation, recovery for consequential damages "comes almost as an afterthought."\(^4\) However true this may be of contract actions generally, it has almost nothing to support it in the area of products liability as commonly understood; consequential damage is what products liability is all about. The fact that such damage is unusual elsewhere in actions founded on breach of an obligation arising out of, or engrafted on, contract does not take it out of "contract" or "sales" law.

The critical question is not whether smacking of tort makes the matter smack any less of contract; it is whether smacking of tort removes the matter from the scope of the relevant sales statute. Nobody seems to have publicly observed that neither the extinct Uniform Sales Act nor the current Uniform Commercial Code suggests that its applicability turns on whether the arrangement or event involved is classified as "contract" or "tort." Instead, the Code's section 1-201(11) expressly forecloses the issue by defining "contract" as encompassing "the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law."\(^5\) This is certainly

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\(23\). See generally R. DICKERSON, PRODUCTS LIABILITY AND THE FOOD CONSUMER § 5.2 (1951).

\(24\). Wade, supra note 3, at 128.

\(25\). U.C.C. § 1-201(11) (1972 version). This section should be read in conjunction with section 1-103, which Wade says is of "comparatively little help" because "the fields of law specifically referred to have to do primarily with

See also Dickerson, Products Liability: How Good Does a Product Have to Be?, 42 IND. L.J. 301, 304-05 (1967).
broad enough to include the tort aspects of the transaction.

Wade next asks whether the Code preempted the negligence aspects of products liability. Because no one has ever seriously urged that it did, his contemplating the possibility seems close to creating a straw man. Certainly, there is nothing surprising about the Code's preempts some areas of sales law without preempts all, whether or not they are also areas of tort law. Answering Wade's question is not the problem. The main problems are (1) whether by negative implication the Code preempted any part of the field of products liability and, if so, whether that part is also claimed by section 402A, and (2) whether that section is otherwise inconsistent with the Code.

IV. Wade's Reconciliation Number One: Two Breeds of Cat

After concluding his general ponderings, Wade confronts the "real problem," which is "not the constitutionality of the negligence action . . . but the constitutionality of section 402A and its judicial following." Protesting that his discussion of negligence was no attempt to create a straw man, he draws a line between "sales" law, which is statutory, and "negligence" ("tort") law, which is common law. "The question is, on which side of the line does strict liability fall?"

This strikes me as an odd way to pose the significant question. The difference between sales law and negligence law is not a useful basis of classification because the two categories do not exhaust anything, and they do not exclude each other. If Wade intends to suggest instead a useful distinction between "sales" law and "tort" law (which from his later discussion appears to be the case), I cannot imagine any gain from making such a division, even if it could be successfully made. Although the Uniform Commercial Code may be steeped in sales law and section 402A in tort, nothing in that statement excludes the converse. In products

principles affecting the contract itself—its validity and enforceability." Wade, supra note 3, at 130. But, read with section 1-201(11), it fortifies the impression that the sweep of the Code, as indicated by the latter section, is very wide: "the total legal obligation which results from the parties' agreement . . . ." U.C.C. § 1-201(11) (1972 version). This does not necessarily preempt negligence.

27. Id. at 136.
28. Id.
liability cases, breach of warranty that results in injury has long been viewed as tort,\(^29\) and section 402A is no less sales law than section 2-314 of the Code.\(^30\) There is thus an area of overlap, and within it the distinction between section 402A and the Code with respect to “sales” law and “tort” law is simply meaningless.

Wade says that “strict liability involves not just a change in language but a change in meaning or theory.”\(^31\) Whatever this means specifically, it means generally that the differences he talks about are substantive rather than merely formal. Strict liability as a tort, he says, provides “a better . . . theory”\(^32\) to explain the decisions of the courts than breach of warranty as a tort. Here, he appears to be comparing strict liability with something else, but the something else is itself a kind of strict liability. The resulting distinction, therefore, turns out to be between strict liability in tort without the “warranty” label and strict liability in tort with the “warranty” label.

He shifts distinctions once more. This time he apparently contrasts strict-liability-as-expressed-in-section-402A with strict-liability-as-expressed-in-sales-law.\(^33\) Because section 402A, too, is

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30. Uniform Commercial Code section 2-314(1) provides:

Unless excluded or modified (Section 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premises or elsewhere is a sale.

Here, as in section 402A of the Restatement, liability is expressly tied to sale.

31. Wade, supra note 3, at 137.

32. Id.

33. Id. The consumer law-commercial law distinction that has recently surfaced in some of the cases has been supported, although not by Wade, on the assumption that the Code itself, according to section 1-102 and the Code’s very name, is concerned only with “commercial” transactions. See, e.g., Heavner v. Uniroyal, Inc., 63 N.J. 130, 152-55, 306 A.2d 412, 424-26 (1973).

But this approach carries the day only if “commercial” is limited to deals between merchants, thus excluding deals between merchants and consumers. The answer is found in the Code’s own working provisions (e.g., §§ 2-314, -315). Although they deal with sales between merchants, they deal also with sales at retail. An attempt to exclude consumer transactions from the Code cannot be
"sales law," Wade presumably means strict tort liability as embodied in section 402A as distinguished from strict tort liability as embodied in the Code's warranty law.

To support the allegedly substantive distinction, he contends that the measure of quality in section 402A (freedom from any unreasonably dangerous defect) differs materially from that in the Code (merchantable quality), whereas the exact opposite is true. The cases show that, despite the differences in wording and despite the fact that section 402A speaks in terms of noncompliance while the Code speaks in terms of compliance, the courts are applying a uniform standard of defectiveness. The one respect in which the two approaches sometimes differ lies in section 402A's requirement that the defective product be "unreasonably dangerous," which has made a significant difference only occasionally and which has recently been repudiated by several courts.

The upshot is that, whereas the differences in form may be enormous, the differences in substance, if any, have been minuscule or nonexistent. What we are talking about here are not differences in general but differences within the area of products liability not involving culpability.

The questionable aspects of Wade's analysis here are (1) the apparent assumption that the tort-contract, tort-sales, tort-warranty, 402A-Code, 402A-warranty, and common law-statute distinctions are marked by the same boundary line, and (2) the assumption that these distinctions, each of which may be significant in analyzing social policy, are relevant to determining the outer reaches of the Code. The error lies in trying to interpret the Code within the area of products liability, not by explicating the Code, but by evaluating its social impact in terms of a cluster of preconceived, incongruent, and even inconsistent distinctions that are treated as interchangeable (which they are not) and mu-

squared with its terms. Although the Heavner court limits its attempt to take from the Code consumer protection against injuries to person or property, it concedes that even to accomplish a limited removal involves assuming that the Code did not mean what it explicitly said.

34. See note 23 supra.

Wade says that "[t]ort law provides the right milieu." But what does the milieu of tort law offer that is withheld by the milieu of contract, especially when those categories so extensively overlap in the area under consideration? That some aspects of current statutory sales law are inadequately articulated to satisfy modern notions of consumer protection is hardly warrant for banishing, as some courts have purported to do, the whole machinery of "sales" law from the field of consumer protection. As for the judicial leeway to balance interests that is said to inhere in the tort approach, the opportunity to balance is no greater within the concept of legal defect as it appears in section 402A than it is under that concept as it inheres in the broader Code notion of lack of "merchantability."

I suggest that forcing complicated statutory concepts into a false, awkward, and, worse, irrelevant "dichotomy" between contract and tort is a poor way of meeting the courts' general obligation to defer to legislative supremacy in the area of constitutionally valid policymaking. Even Wade has residual misgivings: "With some courts... this analysis may not completely eliminate all doubt as to whether the UCC has preempted section 402A." On the basis of the analysis offered so far, I certainly

36. Much of the resulting confusion flows also from the fact that almost all recent conceptualizing in this area presumes the inevitability of a two-valued logic that says that all law is divided into "contract" and "tort." Such thinking is not so wrong as it is unhelpful. Modern jurisprudence has arrived at a point where at least a three-fold breakdown, while not "truer," would be preferable. Would it not be more useful to distinguish (1) breaches of voluntary undertakings, (2) deviations from standards of prudence, and (3) breaches of requirements that are to be met regardless of voluntary undertaking or lack of conventional prudence? But, although more refined and more likely to be mutually exclusive, even these categories would not necessarily be differentiated on bases marking the outer reaches of the Code.

37. Wade, supra note 3, at 137.

38. Although the widely quoted comment, in Ketterer v. Armour & Co., 200 F. 322, 323 (S.D.N.Y. 1912), that protection of the consumer's person and property against defective goods ought not to depend on "the intricacies of the law of sales" is commonly read as a wholesale rejection of "sales law" for this purpose, I think the more plausible interpretation is to read it as a less drastic rejection of the uncongenial complexities of the then current statutory sales law. Such complexities can be singled out and dealt with, if necessary, by amending the applicable sales statute.

To bolster his claim of constitutionality, Wade offers this additional insight: With the extension of the doctrine of res ipsa loquitur and the natural prejudices of juries, the prevailing theory of negligence has closely approached, in practical effect, results attainable in strict liability.\(^\text{40}\) (Any experienced trial lawyer will tell you that, except for legal argumentation and formal instructions, he tries a case of negligent manufacture the same way that he tries a case of strict liability; even the evidence is the same.) Wade would seem to conclude that strict liability has become negligence and thus lies beyond the reach of the Code. But it does not follow that, because most or all negligence law has become de facto strict liability, strict liability is now "negligence" law.

How can we extract a rule of law solely from a factual tendency? De facto is not automatically de jure, else this useful distinction would disappear. (We move here in the domain of law, not almost-law.) Ironically, Wade's argument undermines rather than supports his case. If the negligence in a purported "negligence" action is fictional in the sense that there is no significant effort to draw reasonable inferences of imprudence, the action should be treated for what it is, an action in strict liability. If this places it within the Code's area of preemption, the action should be handled under the Code. It simply will not do to argue that, because the Code steers around authentic negligence, it also steers around pretended negligence. That would place form above substance.

V. Wade's Reconciliation Number Two: Negligence Per Se

Wade's alternative attempt to reconcile section 402A with the Uniform Commercial Code relates to negligence per se, which is normally negligence arising from breach of a criminal statute. The gist of this approach is that, because the Code bypasses negligence, it bypasses a kind of "negligence" that when examined depends in no way on culpability and therefore constitutes strict liability.\(^\text{41}\)

Negligence per se normally involves breaching a statute that

\(^{40}\) Id.

\(^{41}\) Id.
sets a standard of performance." The courts in most states say that failure to comply with such a statute is ipso facto "negligence" regardless of culpability in the civil sense. However, if the statute requires mens rea, as most criminal statutes do, there is still criminal, if not civil, culpability. Here, negligence per se retains some flavor of "negligence" in the broad culpability sense. Moreover, the courts of some other states treat breach of statute, including breach of a statute not requiring mens rea, only as evidence of culpability. Here too we have negligence, not strict liability.

It is only when we have a standard-setting statute, not requiring mens rea in a state that views noncompliance as "negligence" without further evidence of culpability, that we have the full equivalent of strict liability comparable to that imposed by section 402A or section 2-314 of the Code. Because such statutes are the rare exception, one wonders how Wade can multiply such meager materials into a fund of loaves and fishes sufficient to feed the legal needs of consumers everywhere. If accepted, Wade's argument proves that this kind of "negligence" is in fact strict liability and therefore not negligence. And, if it is not negligence, what basis is there for saying that the Code bypasses it?

If there is to be civil liability arising out of breach of statute, it must ordinarily be generated by the court. This is so even when the legislature has furnished the standard that the court adopts. As always, the central question is: What does the statute mean? On this basis, I accept his assumption that statutes that expressly impose only criminal sanctions do not ordinarily impose civil liability even by implication.

If a court can on its own initiative supplement a statutory standard of criminality not requiring mens rea by imposing civil consequences, it can achieve a similar result, says Wade, even when such a statute does not exist. This it does by creating its

43. See Comment, supra note 42, at 1393.
44. See id. at 1394.
45. Wade, supra note 3, at 139. See also Comment, supra note 42, at 1413.
46. Wade, supra note 3, at 139-40.
own specific rule of conduct not involving culpability and then substituting it for the general standard of due care. Specifically,

[s]uppose . . . that the courts were to lay down, “once and for all,” a rule that it is negligence for a person who is engaged in the business of selling a product to sell it on the market when it is in an unreasonably dangerous condition. This would be a part of the law of negligence and would in no way be impaired by the provisions of the UCC, and yet it would amount to strict liability . . . .

[C]ases following 402A . . . are applying the principle of negligence per se, with the court substituting for the usual standard of negligence a specific rule of conduct . . . .

Let us examine the logic here. The Code bypasses negligence, because the Code deals only with strict liability, whereas negligence involves culpability. Negligence per se, which is in some instances a kind of strict liability, is nonetheless “negligence.” Therefore the Code, in bypassing negligence, bypasses negligence per se even in those instances in which it constitutes strict liability. Section 402A likewise escapes the clutches of the Code, because it too is only a form of negligence per se and therefore negligence. Greenman v. Yuba Power Products, Inc. is similarly rationalized.

Wade finds precedent for this approach in Dippel v. Sciano. Although the plaintiff had pleaded breach of implied warranty under section 15 of the Uniform Sales Act, the Wisconsin Supreme Court, eager to apply its new doctrine of comparative negligence, treated the claim initially as a breach of section 402A. The court then rationalized the strict liability that it imposed as “negligence per se,” even though no violation of a criminal statute was involved. By this approach the court purported to bypass both the Uniform Sales Act and section 402A by relying on section 402A to get around the Act and then by extending “negligence per se” to get around section 402A.

47. Id.
48. Id. at 142.
49. Id. at 140.
50. See note 19 supra.
51. Wade, supra note 3, at 141.
52. 37 Wis. 2d 443, 155 N.W.2d 55 (1967).
But does even this rationale support Wade’s position? In Dippel, the doctrine of negligence per se was extended only to provide cover for derogating from Restatement doctrine, which the Wisconsin court had no constitutional duty to honor. The Uniform Commercial Code was not eroded because it was not yet in force and because, being a vertical privity case, the situation fit neatly into the niche marked by comment 3 to section 2-318. Whether the Uniform Sales Act was eroded depends on whether we reject the rationale of the tiny group of cases, such as Chapman v. Brown, that had seriously investigated and dismissed the possibility of legislative preemption. In any event, the Wisconsin court did not offer its negligence per se approach to reconcile its action with anything other than section 402A; compatibility with the Uniform Sales Act it simply took for granted. Thus, the main constitutional gap was not convincingly plugged.

Wade’s fallacy lies at the point where he, like the Wisconsin court, assumes that negligence per se, which is often negligence in fact and sometimes negligence only in law, is always “negligence.” Can a court, by judicial fiat, effectively decree that what is in effect strict liability is “negligence” without butchering accepted usage? As long as the gist of negligence is culpability in fact, there is no way, except in some Orwellian sense, that strict liability, which does not involve culpability, can be negligence.

Wade has apparently fallen into the verbal trap unintentionally laid by Ehrenzweig, whose recognition of “negligence without fault” as a risk distribution device amounting to strict liability might suggest that he classifies such liability as “negligence.” On the other hand, Ehrenzweig is careful to enclose the word “negligence” in quotation marks when using it to denote strict liability masquerading as negligence, thus making clear that in his judgment usage still identifies negligence with culpability.

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53. This states that section 2-318, Alternative A, extending warranties to specified third parties, “is neutral and is not intended to enlarge or restrict the developing case law on whether the seller’s warranties, given to his buyer who resells, extend to other persons in the distributive chain.” U.C.C. § 2-318, Comment 3. See also U.C.C. § 2-313, Comment 2 (1972 version).
55. A. EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951).
56. For traditional negligence, Ehrenzweig prefers the term “negligent causation.” Id. at 36. See also James, Statutory Standards and Negligence in Accident Cases, 11 La. L. Rev. 95 (1950).
In any event, "negligence without fault" and "negligence per se" are not necessarily kinds of negligence in the normal culpability sense any more than root beer is necessarily a kind of beer. How then can Wade assume otherwise? The distinction between fault and strict accountability still needs preserving, and confining the simple term "negligence" to fault is a good way of doing it.

One apparently plausible answer to this with respect to negligence per se is that some types of conduct are so bad that they constitute imprudence in all situations. Although the incidence of this type of situation may be uncertain, there is no questioning the possibility. In such cases, a statutory or other prohibition merely coincides with an institutional finding of fact. When this is so, we have negligence in the classical sense of actual culpability, which is no less actual because it is coextensive with a rule of law. Here, negligence per se is "negligence" in the full civil sense. But does this happen often enough to support an across-the-board products liability rationale? The hard fact is that much of negligence per se is merely evidence of civil culpability, the great bulk of it rests on criminal culpability, and only a small percentage of it constitutes strict liability of the kind imposed by the Restatement and the Code. The distinction between the culpable and the nonculpable is too useful to be brushed aside by an assertion that strict liability can be classed as "negligence."

This latter point is not refuted by the fact that, as currently applied by many courts (even under section 402A), "strict liability" is being relaxed in the case of unforeseeable side effects to the point where it is contingent on what is arguably a mild form of culpability. Even in this limited area, what we call "negligence" and "strict liability" are still separated by important degrees of culpability. Wade's argument holds up only if the courts can by fiat eliminate a distinction that, wherever it is most logical to draw it, is vital to marking the outer boundaries of a finite code. And this brings us back once more to the crucial question: What does the Code mean?

57. "[I]t is unrealistic and mechanical to say that reasonable men would blindly obey all the regulatory statutes under all circumstances, and to deprive the jury of its usual and historic function in negligence cases . . . ." James, supra note 56, at 108.

58. See Dickerson, supra note 9, at 456. See also Dickerson, supra note 22, at 322-28.
Outside the limited area just discussed, what basis is there for imputing negligence-in-fact to every person who happens to sell a defective product? Wade may believe that merely selling an "unreasonably dangerous" product, however accidentally, warrants stigmatizing the seller along with his product, his "negligence" having consisted of opting to be in that kind of business. Under current tests of legal defectiveness, however, unreasonable danger in a product, as viewed from the standpoint of the consumer, does not necessarily include any factor from which unreasonableness can be imputed to the seller. Responsibility is not ipso facto culpability. If this is not sufficiently clear in the case of the manufacturer, it should be in the case of the retailer.

The theme implied in Wade's defense of section 402A's constitutionality is that form controls substance. What's in a name? If we call something "negligence per se" it is automatically excluded from a statute that bypasses "negligence" (even when the negligence per se amounts to strict liability), but if we call it "breach of warranty" it is automatically included! But if "warranty," as alleged fiction, is abhorrent to strict tort liability, is not "negligence," as fiction, equally so? If name juggling is all that it takes to thwart a socially uncongenial statute, the constitutional principle of legislative supremacy is in a bad way.

So far this analysis has assumed that "negligence," undorned with the words "per se" is confined to culpability. But suppose, for the purposes of argument, that the normal meaning of "negligence" is the same as it is normally understood. Then, what's in a name if Wade's latest approach cuts him off from enjoying the fruits of classifying the strict liability aspect of negligence per se as "negligence." If it is under "fault," he will have to convert the doctrine of negligence per se to a doctrine of fault per se, and then explain to the reader how the two concepts differ. But even if he accomplishes this, he will still have to face up to the fact that the elements that constitute "fault" under section 402A exist to the same precise extent in bodily injury cases resulting from breaches of the Code's warranty of merchantability, a fact that he affirms in this later article. Id. at 227. Finally, he must answer the question: How can the Code fail to apply to something that is substantively indistinguishable from what it unquestionably covers?

59. Compare this statement: "Putting out a defective and dangerous product . . . involves a measure of fault . . . even though there is no negligence." Wade, A Uniform Comparative Fault Act—What Should it Provide?, 10 U. Mich. J.L. Ref. 220, 226 (1977). Here Wade relies on a concept of no-negligence fault, whereas in his earlier article he seems to rely on a concept of no-fault negligence. Under which shell will we find the pea? If it is under "negligence," Wade's latest approach cuts him off from enjoying the fruits of classifying the strict liability aspect of negligence per se as "negligence." If it is under "fault," he will have to convert the doctrine of negligence per se to a doctrine of fault per se, and then explain to the reader how the two concepts differ. But even if he accomplishes this, he will still have to face up to the fact that the elements that constitute "fault" under section 402A exist to the same precise extent in bodily injury cases resulting from breaches of the Code's warranty of merchantability, a fact that he affirms in this later article. Id. at 227. Finally, he must answer the question: How can the Code fail to apply to something that is substantively indistinguishable from what it unquestionably covers?
of "negligence" also includes the kind of strict liability that is involved in some instances in "negligence per se." If so, it would seem prudent to review our earlier conclusion that the Code steers around "negligence" to determine whether we should have concluded that it steers around only culpability. If we should then decide that the Code bypasses all types of "negligence," including all types of negligence per se, it would seem equally prudent to ponder how far a court may appropriately go in extending the concept of "negligence per se." Although concepts are capable of judicial growth, what happens when a judicially created concept grows to the point where it envelops a concept already locked into a statute? Does the legislature lose control of it? This is now happening with section 402A. That the courts control the interpretative process does not absolve them from the constitutional obligation to respect legislative supremacy. Although this does not shut off judicial growth, it involves respecting the general legislative connotations existing at the time of enactment.

If Wade's approach is sound, may we not take the last logical step? Courts imposing strict tort liability in warranty on the basis of the statutory quality standard of merchantability laid down in the Code are, by the standard urged, applying "negligence per se." Because negligence per se is "negligence" and the Code bypasses negligence, the Code bypasses strict liability for breach of the warranty of merchantability. Consequently, the Code does not occupy even the field that it expressly covers. Here, indeed, is a jurisprudential landmark!

Although Wade would hardly allow himself to be led into such a reductio ad absurdum, notice how far he is willing to go: A court may borrow a safety rule from a statute, label noncompliance with it "negligence per se," and apply the new rule to situa-

60. Or would he? If applying section 402A is applying negligence per se, and if borrowing the Uniform Sales Act's quality standards in Greenman v. Yuba Power Products, Inc., 59 Cal.2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963), to impose strict liability in a situation presumed not to be covered by that act was negligence per se, why would not applying the Uniform Commercial Code's quality standards in a strict liability suit in a retail situation obviously covered by it likewise be negligence per se?

On the other hand, the fact that the Code obviously applies to what it expressly deals with makes certain that, if Wade has appropriately characterized such strict liability as "negligence per se," he has effectively demonstrated that, far from bypassing negligence per se, the Code embraces and controls it.
tions covered by the statute. But the result of applying it is at least potentially at variance with the rule that the statute applies to the identical situation, with the result that the latter becomes a practical nullity. This is precisely what the court in Dippel did to section 402A."

Although a scholar of Wade's intellectual integrity could hardly be charged with premeditated word juggling, I suggest that, under strict academic accountability, he may have committed the logical misdemeanor that Ogden and Richards have called "utraquistic subterfuge."" This is using in the same context the same word, "negligence," in two different senses—the one excluding strict liability, the other including it—a verbal crime that has wreaked untold intellectual havoc.

I am reminded of Belvedere, one of M.C. Escher's "impossible" buildings, in which the first floor is functionally related to the connecting structure if the structure is viewed as having a particular aspect, whereas the second floor is functionally related to the same structure only if the structure is viewed as not having that aspect. In Wade's analysis, the connecting structure is "negligence per se," which is functionally related to negligence only when it is based on culpability and functionally related to strict liability only when it is not.

Is this a sound way to build otherwise desirable new law?

VI. Summary

Dean Wade's constitutional apology for section 402A of the Restatement (Second) of Torts rests, inter alia, on the following assumptions:

(1) Tort and contract are mutually exclusive.
(2) Whether an action is framed in tort or in contract is relevant to determining whether the Uniform Commercial Code applies.
(3) The measure of legal defectiveness under section 402A differs materially from that under the Code.
(4) Negligence per se is always negligence and is therefore bypassed by the Code.

Because these assumptions appear to be false, I conclude that Wade has not established the constitutionality of section 402A.

61. See note 52 supra.