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THE APPLICATION OF CRIMINAL LEGISLATION TO NEGLIGENCE CASES: A REEXAMINATION

David P. Leonard*

I. INTRODUCTION

In the first half of this century, tort theorists became aware that the application of criminal legislation to negligence cases presented the potential for institutional conflict between the legislature and the courts, and that an improper application of legislation could impede the development and refinement of negligence theory itself. This awareness spawned a flurry of scholarship aimed at constructing a theoretical framework for the application of criminal legislation to negligence cases, and many leading scholars participated in the debate.¹ Given the acceleration in legislative activity during that period,² scholarly inquiry was clearly warranted.

Since the early 1950's, however, there has been little theoretical analysis of the ways in which criminal legislation may be incorporated into negligence cases.³ But the problems

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² "The last fifty to eighty years have seen a fundamental change in American law. In this time, we have gone from a legal system dominated by the common law, divined by courts, to one in which statutes, enacted by legislatures, have become the primary source of law." G. CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982). See also Traynor, Statutes Revolving in Common Law Orbits, 17 CATH. U.L. REV. 401, 401-02 (1968).

³ Most articles written since the 1950's have focused more on how particular jurisdictions have applied the various formulas than on the theoretical underpinnings of the formulas themselves. Of the many articles taking this general approach, see
which gave rise to this attention many years ago have not disappeared. Indeed, the tension between court and legislature is at least as great today as it was in the first part of the century, as legislative activity has continued unabated, and persisted in its move into areas traditionally developed by the courts. The judiciary has always jealously guarded its spheres of influence, fearing that incursions from the legislature would result in an overall loss of power. Negligence actions, hundreds of thousands of which are filed annually in the state and federal courts, present an especially striking area of potential


In this article, the term "criminal legislation" will be used in a broad sense, encompassing legislation at various governmental levels (federal, state, and local) as well as administrative regulations, which often have the same force as if they were specifically enacted by legislatures. On the subject of the application of administrative regulations to negligence cases, see Note, Statutory Negligence — O.S.H.A. Standard Violation is Negligence Per Se, 27 DRAKE L. REV. 178 (1977-78).

4. Traynor, supra note 2, at 401-02.

5. The Uniform Commercial Code, which has been widely adopted, is one example of legislative action in areas traditionally developed by courts. Another is the movement toward adoption of evidence codes, exemplified by the Federal Rules of Evidence and the California Evidence Code. In the negligence area, which will be the focus of this article, there has not been extensive legislation. However, as will be shown, the wide variety and scope of criminal statutes has a major impact on negligence cases brought to redress harm caused by their violation.

6. Referring to the tendency of courts to try to protect their power, Justice Harlan Stone once wrote that statutes are often treated as "an alien intruder in the house of the common law . . . ." Stone, The Common Law in the United States, 50 HARV. L. REV. 4, 15 (1936). Even as early as 1908, Dean Roscoe Pound noted that: "[n]ot the least notable characteristics of American law today are the excessive output of legislation in all our jurisdictions and the indifference, if not contempt, with which that output is regarded by courts and lawyers." Pound, Common Law and Legislation, 21 HARV. L. REV. 383 (1908). The methods by which courts have attempted to protect themselves from legislative incursions, including the use of various doctrines of "legislative interpretation," will be discussed. See infra notes 35-43 and accompanying text.

7. Direct statistical evidence of the number of negligence cases being filed
conflict between judiciary and legislature. One would imagine that serious conflict would arise because negligence doctrine is almost entirely a product of judicial development, and the courts are increasingly faced with the issue of whether and how to take note of this growing body of legislative standards.

It is curious, therefore, that while courts have generally labored so hard to guard their traditional independence in many areas of law, a large majority of them have accepted a doctrine which effectively relinquishes to the legislature their power of doctrinal development for those negligence cases in which a criminal statute is directed toward the allegedly negligent conduct. This doctrine, usually called "negligence per se," amounts to an abandonment of judicial function in negligence cases. The doctrine of negligence per se also requires an abandonment of the traditional sphere of jury power in these so fact-oriented cases. Little is truly left for the jury in negligence actions when the instructions make clear that there is a specific standard of conduct, and all the jury is asked to decide is whether the actor did what the statute prohibited, or failed to take action the statute required. Missing is the jury's responsibility, under the guidance of the court, to take account of all the circumstances of the case in deciding whether

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across the nation is difficult to obtain. However, the National Center for State Courts in Williamsburg, Virginia, estimates that in 1976, 12,500,000 civil actions were filed in state trial courts, of which perhaps 600,000 to 700,000 fall into the category of "torts." Telephone interview with Mary Elsner, National Center for State Courts (Sept. 23, 1982).

Of private cases pending in the United States District Courts for a twelve-month period ending December 31, 1981, the combined categories of "Marine Personal Injury," "Motor Vehicle Personal Injury," and "Other Personal Injury," add up to 33,904 cases, representing the largest class of pending cases. FEDERAL JUDICIAL WORKLOAD STATISTICS, A-12-13 (For Twelve-Month Period Ending December 31, 1981).

8. Despite this general antipathy toward legislation, the courts have promoted the policy of legislation beyond the fondest hopes of the legislators on occasion. One major example of this is the tendency of courts to impose tort liability for breach of criminal statutes, where on any fair reading of the statute one cannot avoid the conclusion that no language to this effect was included.

Linden, Criminal Nonfeasance, supra note 3, at 35.

9. Negligence per se (or "in itself") is a doctrine which accepts certain criminal legislation as conclusive on the issue of the duty owed by one party to another in a negligence action. For a more complete exposition of how the doctrine operates, see infra notes 89-99 and accompanying text.

10. "Probably there is no class of cases which demands so much jury participation as those we label 'negligence.'" L. GREEN, JUDGE AND JURY 386 (1930).
due care was exercised by the charged party.\textsuperscript{11}

The doctrine of negligence per se also assumes too much about the ability of legislatures to create rules of conduct which can be fairly and effectively applied in negligence actions. The very nature of a legislature's prospective rule-making function, especially when considered in connection with its approach to problem-solving, renders most statutes too narrow to permit the flexibility which courts require in negligence cases.\textsuperscript{12} Courts must reason in a different manner when deciding individual cases, and the introduction of specific standards, in situations in which the legislature has not even considered civil liability, clouds this process and can result in unjust adjudication.

This article will examine the use of statutory authority in negligence actions, and argue that the imposition of the negligence per se standard is inappropriate. Properly defined and administered, a standard under which the violation of a statute creates a rebuttable presumption of negligence better achieves the goals of courts while giving due deference to legislative power. The problem of excusing violations of statutes will be specially examined, and the thesis advanced that by adopting a presumption standard, courts will not have to deal with the difficult procedural problems raised by excuses, and indeed, will not have to speak of "excuses" at all.

\section*{II. Background: The Adoption of Legislative Standards in Negligence Cases}

Even before negligence emerged as the primary basis of tort liability,\textsuperscript{13} courts were trying to come to terms with the existence of statutes which might make the conduct which is alleged to be negligent subject to criminal penalty.\textsuperscript{14} This was

\textsuperscript{11} Of course, there may still be questions of causation and damages for jury determination. However, once the statute has been adopted as setting the standard of care, there is no longer any place for the common law process of evaluating the reasonableness of the actor's conduct under all the circumstances. Gregory, \textit{supra} note 1, at 627.

\textsuperscript{12} See \textit{infra} notes 151-60 and accompanying text.

\textsuperscript{13} See \textit{infra} notes 100-04 and accompanying text.

\textsuperscript{14} One of the earliest English cases which grappled with this problem was Couch v. Steel, 118 Eng. Rep. 1193 (1854). An American case of somewhat later vintage dealing with the problem was Osborne v. McMasters, 40 Minn. 103, 41 N.W. 543 (1889). For a more complete historical analysis of judicial reaction to efforts to impose legislative standards on common law tort cases, see Linden, \textit{Criminal Nonfea-}
not a particularly urgent problem in an era when criminal legislation aimed at conduct beyond the basic common law crimes was not common. Free to act largely in isolation, courts spent decades refining the negligence cause of action on their own. In dealing with the "duty" element of the negligence action, courts attempted to discern general categories of cases in which it could be said as a matter of law either that no duty was owed or some duty was owed. Further, if a duty was owed at all, courts devoted much energy to the issue of whether that duty could be specifically defined to the jury, or whether, instead, the jury should be instructed to consider the conduct of the parties according to the more general standard of due care under all the circumstances.

Because negligence cases can arise out of an infinite variety of fact patterns, courts have typically rejected attempts

\[\text{sance, supra note 3, at 34-38.}\]

15. Included here are myriad regulations and statutes ranging from traffic laws to safety regulations aimed at industry, all of which are largely products of this century.

16. See supra note 2.

17. The task of defining whether any duty is owed under the circumstances of the case is one for the court. Green, The Duty Problem in Negligence Cases (I), 28 COLUM. L. REV. 1014, 1022 (1928), reprinted in L. Green, THE LITIGATION PROCESS IN TORT LAW: NO PLACE TO STOP IN THE DEVELOPMENT OF TORT LAW 153, 161 (2d ed. 1977). The duty element can perhaps be viewed as the most crucial in the negligence action, since it incorporates matters of policy as well as considerations of justice between the parties. See infra notes 114-17 and accompanying text.

18. Included among the specific rules which courts developed were Holmes' famous "stop, look, and listen" rule regarding railroad crossing cases, declared in Baltimore & Ohio R.R. v. Goodman, 275 U.S. 66, 70 (1927). See infra notes 118-23 and accompanying text.

19. This was the more common solution adopted by courts. Of course, juries are not actually permitted to consider all circumstances, since courts have declared that some circumstances about the actor or the conduct are not relevant to the objective standard which negligence cases use. See, e.g., Daniels v. Evans, 107 N.H. 407, 224 A.2d 63 (1966) (concerning when age may be considered in determining whether due care was used); Breunig v. American Family Insurance Company, 45 Wis. 2d 536, 173 N.W.2d 619 (1970) (insanity or mental illness).

20. That the kind of conduct about which negligence cases are concerned is almost limitless in its variety was made clear by Green:

It would be as futile to attempt to state for the judge the limits of the law's protection in advance of the particular conduct, as it would be to state for the jury the sort of conduct they should condemn. Conduct is infinite in its variety. The most a legal science can do with the classes of cases here involved is to employ broad formulas for judge and jury and rely on their respective judgment-passing capacity to dispose of the cases satisfactorily as they arise.

Green, supra note 17, at 163.
to carve out rules which, like statutes, state a party's duty in terms of precise conduct. Indeed, despite the urgings of such scholars as Holmes to create specific rules of conduct whenever possible, many of the attempts to state precise, static rules have met with criticism and, eventually, rejection. There is more than just inertia operating in favor of the general standard of reasonable care under the circumstances; more than likely, courts have responded to the need for flexibility in negligence cases and shied away from rules which could not survive over time.

The generality of the standard used in most negligence cases also assures that far more cases will reach the jury than would be true if courts were operating with more specifically defined standards of conduct. It is much easier to survive an opponent's motion for summary judgment or for directed verdict if the court is not required to apply a standard which will automatically preclude a finding in your favor under even your version of the facts. Properly instructed, therefore, juries are given broad power to determine the nature of the parties' conduct and to reach a conclusion on the breach of duty (negligence) aspect of the case. Though this large degree of jury freedom can sometimes result in inconsistent verdicts, the overall historical judgment clearly indicates a willingness to accept a modicum of inconsistency to preserve the counter-

21. If, now, the ordinary liabilities in tort arise from failure to comply with fixed and uniform standards of external conduct, which every man is presumed and required to know, it is obvious that it ought to be possible, sooner or later, to formulate these standards at least to some extent, and that to do so must at least be the business of the court. It is equally clear that the featureless generality, that the defendant was bound to use such care as a prudent man would do under the circumstances, ought to be continually giving place to the specific one, that he was bound to use this or that precaution under these or those circumstances.


22. This was to occur with regard to the "stop, look, and listen" rule that Holmes himself would later promulgate. See infra notes 118-23 and accompanying text.

23. As already indicated, jury participation is of major value in negligence cases. See supra note 10.

24. Where the standard applied is the general reasonable person standard, it has been suggested that when it instructs the jury, "[t]he court . . . simply tells the jury that there is a reasonably prudent man, and it is left to the jurors to say what he would do." Lowndes, supra note 1, at 368. Of course, sometimes there is a need to be more explicit about the circumstances which the jurors are permitted to take into account in reaching their decision on this issue. See supra note 19.
vailing value of jury freedom. It is only those more general policy-oriented duty limitations, such as the basic rule that a person has no duty to take action when he has not caused the perilous situation, which have survived at all, and many of these rules have as well come undone in recent years. In most cases, juries are still instructed that they are to determine whether a party has breached a duty of care owed to another party according to their examination of all the circumstances of the case and their perceptions about what a reasonable person would have done in the circumstances.

It might be asserted that by defining the standard of care generally and leaving its precise application to the jury, trial judges are relinquishing a power to control negligence actions, and this may be true to some degree. But the power is still there, and in appropriate cases judges will exercise it, whether such exercise be in the form of directing a verdict or more narrowly defining the extent of duty owed under the circumstances. And even though many recent changes in the concept of duty have looked toward an expansion of that concept, the fact that such changes have occurred at all bespeaks the power of courts to exercise control over the adjudicative process in negligence cases.

The negligence system has never operated in complete isolation, however, and almost from the time negligence became the accepted basis of tort liability, legislative action has been found to have some relevance to negligence cases. For example, in an action for personal injuries brought by a policeman who entered a building to investigate an unguarded back door and fell into an open elevator shaft, it was impossible to completely ignore a statute which made it a crime to

25. A current example of the elimination of no-duty rules is the erosion of the rule that a landowner or land occupier owes no duty of care toward a trespasser on the land. The judicial trend toward rejection of this rule began with Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). Though many jurisdictions have reaffirmed the traditional rule, others have followed the lead of the California courts. See, e.g., Mile High Fence Co. v. Radovich, 175 Colo. 537, 489 P.2d 308 (1971); Pickard v. City and County of Honolulu, 51 Hawaii 134, 452 P.2d 445 (1969). Even the common law rule that one is not under a duty to come to the aid of another person he has harmed, as long as the original harm was not caused by the actor's negligence, has been seriously eroded. See Summers v. Dominguez, 29 Cal. App. 2d 308, 84 P.2d 237 (1938); RESTATEMENT (SECOND) OF TORTS § 322 comment d (1965).

26. See supra notes 17-19 and accompanying text.

27. See supra note 25 and accompanying text.
leave an elevator shaft unguarded. In that 1883 case, even though a common law rule had apparently provided that there was no duty toward a licensee who entered the defendant's premises, the court still felt a need to give some effect to the statute which made it a crime to leave elevator shafts unguarded. If a court finds itself compelled to give effect to a criminal statutory standard in a situation in which a specific common law rule would have provided for the opposite result, then a fortiori courts will feel compelled to adopt criminal statutes when the common law would have provided a general duty of care under the circumstances, and thus would at least possibly have reached the same result called for by the statute.

Something in the nature of legislative action moves courts to give it effect even when it does not specifically address itself to the negligence case which the court must decide. It is a well-engrained (though not necessarily self-evident) principle that legislatures are the supreme lawmakers in our system, and perhaps this has provided courts and commentators with the impetus to accord great deference to legislation. For example, in discussing Osborne v. McMasters, where a druggist arguably violated a criminal law by selling a poisonous drug which he had failed to label, Charles Gregory noted that the common law evaluative process which would normally take place in the negligence action has no place at all once the legislature has spoken by making the failure to label poisons a criminal offense. He then noted that were the normal evaluative process to occur, it would be possible for a jury to reach the conclusion that conduct which the legislature had made criminal was not negligent. He went on to say that such a situation is an absurd paradox, where the conduct in question has already been officially declared sub-standard and criminal by the highest legal agency in the state.

30. When a court adopts a criminal statute for use in a negligence case, and that statute establishes a duty of care where a prior common law rule would specifically have negated such a duty, the institutional and theoretical problems are particularly interesting. See infra note 92.
31. Gregory, supra note 1, at 627. G. Calabresi, supra note 2, at 5; Thayer, supra note 1, at 342-43.
32. 40 Minn. 103, 41 N.W. 543 (1889).
Under such circumstances there is not only no need to resort to the common-law evaluating process but there is a compelling reason for not doing so — that is, that the court or the jury might set another standard in conflict with that already set by the legislature. This picture of a common jury competing successfully with the legislature in establishing the prevailing norm of approved conduct is, of course, too ridiculous to be tolerated.\(^{33}\)

Why need this be so? The paradox might not be in the possibility of a jury determining that it was not negligent under certain circumstances to fail to label poisons, but in the willingness of courts following Gregory's reasoning to abandon to the legislature their common law power of guidance and control over the adjudication of negligence cases.\(^{34}\)

Though there has been general acceptance of the view espoused by Gregory, courts have always exhibited much ambivalence about the degree to which they will allow legislation to govern their decisionmaking. The many-faceted doctrines of statutory interpretation, for example, have long served the desires of courts to limit application of legislation which they do not wish to govern particular cases.\(^{35}\) The courts have even developed the maxim that statutes in derogation of the common law will be strictly construed,\(^{36}\) which gives them the

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33. Gregory, \textit{supra} note 1, at 627.

34. If the common law system of gradual evolution of duty rules were to be followed, there would be nothing to stop a court from eventually declaring that as a matter of law, there is indeed a duty to label poisons, and that in a case in which the defendant admits to having failed to label a poison, a directed verdict on the breach of duty issue may follow. Indeed, it might well be the legislature's determination that failure to label poison is a crime which provides the impetus for a judicial change in negligence law. The point here is not that there is anything wrong with a court following the judgment of the legislature as to important matters of social policy; it is the \textit{compelled} nature of such a decision to which exception is taken. Moreover, as will be developed later, once a court has adopted the negligence per se formula, consistency with the theory underlying that formula leads to evidentiary effects which unduly bind the hands of judges and jurors alike and can lead to unfair results.

35. \textit{See} Landis, \textit{Statutes and the Sources of Law}, in \textit{Harvard Legal Essays} 213 (1934); Linden, \textit{Criminal Nonfeasance,} \textit{supra} note 3, at 25. It has also been said that "[t]he traditional judicial weapon in dealing with statutes has always been interpretation of what the written law means." G. \textit{Calabresi,} \textit{supra} note 2, at 21. And even more directly, John Chipman Gray once quoted Bishop Headley as saying that "[w]hoever hath an \textit{absolute authority to interpret} any written or spoken laws, it is \textit{he} who is truly the \textit{Law-giver} to all intents and purposes, and not the person who first wrote or spoke them." J.C. \textit{Gray, Nature and Sources of the Law} 172 (2d ed. 1931) (emphasis in original).

36. \textit{See} Raney v. Gunn, 221 Ark. 10, 253 S.W.2d 559 (1952). There, an individ-
same power to mold even clear legislation to their needs. Such a maxim hardly comports with the general concept that legislative action is superior.\textsuperscript{37} The ability of courts to interpret statutes in a range from narrow confinement to their precise language to broad application beyond the language used by the legislature, also exemplifies the power which accompanies the right to construe legislation.\textsuperscript{38}

The interpretative contortions of courts have sometimes led to legislative construction that can only be called incredible,\textsuperscript{39} though this is often done in order to reach results which seem fair under the circumstances. For example, in \textit{Bird v. Gabris},\textsuperscript{40} the plaintiff stopped his car on a road one night usual fenced off a public road which ran over his property. After this, members of the public ceased using the road. The individual was held to have acquired title to the road based on common law doctrine, despite the existence of a statute which the court admitted was intended to prevent “acquisition of title to a public thoroughfare by adverse occupancy.” \textit{Id.} at 11, 253 S.W.2d at 560. The court made use of the maxim that statutes in derogation of the common law must be strictly construed. See also 2A J. SUTHERLAND, \textit{STATUTES AND STATUTORY CONSTRUCTION}, §§ 58.01-58.03 (C.D. Sands 4th ed. 1973).

37. That is, if legislation is to be treated as the statement of a superior power, it should not matter whether the statute reverses a common law no-duty rule or merely replaces the generalized reasonable care test. In either case, if the legislature is seen as having the final power of lawmaking, the result should logically be the same.

38. Keeton, \textit{Statutes, Gaps, and Values in Tort Law}, 44 \textit{J. AIR L. AND COM.} 1, 7-8 (1978). For an interesting case raising the issue of narrow versus broad construction, and pointing out the important impact on the legislature’s purpose and policy which a particular interpretation can have, see \textit{Bird v. Plunkett}, 139 Conn. 491, 95 A.2d 71 (1953). There, a state statute prohibited any person convicted of murder from taking under the will of a victim. The person seeking to enforce the will of the deceased had been charged with murder but convicted only of manslaughter. The court construed the language narrowly, and permitted the individual to enforce the will. This result may or may not have been in accord with the policy behind the adoption of the statute. See also F. Dickerson, \textit{THE INTERPRETATION AND APPLICATION OF STATUTES} 199-200 (1975).

39. See G. CALABRESI, \textit{supra} note 2, at 6 and 33-34. See also \textit{Haft v. Lone Palm Hotel}, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970). In \textit{Haft} a man and his son were found drowned in a motel swimming pool. A state statute (\textit{CAL. HEALTH & SAFETY CODE} § 24101.4 (Wést 1967)) provided that for swimming pools of the type involved “lifeguard service shall be provided or signs shall be erected clearly indicating that such service is not provided.” The motel operators provided neither a lifeguard nor a sign. The California Supreme Court construed the statute to create a “primary obligation,” which was the maintenance of “lifeguard service,” and refused to allow the defendant to be held to answer only for those damages which would have been caused by the failure to maintain a sign. \textit{Haft}, 3 Cal. 3d at 767, 478 P.2d at 471, 91 Cal. Rptr. at 751. This reading of the statute was hardly compelled by its wording, and appears to represent the court’s own view of the policy behind the statute. There is little reference to legislative material which might support this conclusion.

when he noticed that there were telephone lines stretching across the intersection. He got out of the car to look, carrying a flashlight. When he saw the defendant's car approaching the scene, plaintiff tried to slow it down by waving the flashlight. Despite plaintiff's warning attempt, defendant did not see the wires crossing the intersection, and his car struck them, causing them to snap and strike the plaintiff. There was testimony that when he was waving the flashlight, plaintiff was standing on the traveled portion of the road, in violation of a Michigan statute\textsuperscript{41} providing that "pedestrians" should use sidewalks or, when not provided or when it is impracticable, should walk on the left side of the highway facing traffic passing nearest. Even though a second statute\textsuperscript{42} specifically defined "pedestrian" as "any person afoot," the court construed the language as not including the plaintiff. In reaching this interpretation, the court noted that if the statute were to be read literally, it would include "a traffic control officer, emergency personnel, persons alighting from their vehicles for the purpose of walking to a sidewalk, persons crossing the highway, . . ." and others to whom it was obviously not intended to apply.\textsuperscript{43} While it certainly seems reasonable to construe the statute as not prohibiting the plaintiff's conduct, it is not at all clear that the legislature would have wished to encourage the plaintiff to place himself in this kind of peril by getting out of his car and walking on the roadway. On the other hand, since the plaintiff's motives were admirable, it would seem unduly harsh to penalize him by refusing to permit him to recover for injuries suffered in his endeavor. Thus, while the result may not perhaps accord with the legislative will, it might nevertheless be a fair one.

Despite this ambivalence about legislation, courts have uniformly concluded that when certain conditions are met, criminal legislation must be accorded a place in the negligence action. The rationale for this conclusion has not been consistently explicated.\textsuperscript{44} Some years ago, courts would justify the imposition of civil liability for violation of criminal statutes by declaring that they were merely enforcing the legislature's de-

\textsuperscript{43} 53 Mich. App. at 167-68, 218 N.W.2d at 873.
\textsuperscript{44} For an excellent historical review of this problem, see Linden, Criminal Nonfeasance, supra note 3, at 35-44.
sire to impose such liability. This, however, is a dubious conclusion given that the statutes with which we are dealing make no declaration about civil liability, but concern themselves only with criminal sanctions. It is most commonly the case that there is neither a positive nor a negative legislative intent regarding civil liability. More recently, courts and commentators have theorized that the motivation for use of criminal standards in negligence actions is to apply indirect pressure for conformance with the criminal statute or, as Prosser stated, to further the underlying purpose of the statute. This rationale is far more sensible, particularly since it grants the court the power to adopt the criminal standard, rather than holding that the court is adopting the standard because the legislature has so mandated. As will be argued below, any defensible theory for utilizing criminal legislation in negligence cases requires that the power to decide the standard of care remain with the court.

The interesting thing is that faced with a spectrum of choices of the effect to be given such legislation, courts have largely adopted the negligence per se theory, a doctrine which grants the greatest power to the legislature, and thus most severely circumscribes the courts' own traditional rule-making authority. That doctrine provides that if the statute applies at all, it is conclusive on the duty issue, and its breach will establish negligence without resort to the common law evaluative process. As legislatures become more active in their law-making pursuits, the issue of the propriety of this doctrine becomes more acutely joined. If we really live in the "age of statutes," a reexamination of a doctrine largely expounded before the effects of the explosion of statute-making were fully appreciated is certainly in order.

45. Id. See also 2 F. HARPER & F. JAMES, THE LAW OF TORTS 995 (1965).
47. Linden, Lighting Legislation, supra note 3, at 122-23.
49. See infra notes 105-29 and accompanying text.
50. Gregory, supra note 1, at 631; Thayer, supra note 1, at 322.
51. G. CALABRESI, supra note 2. The title of his first chapter is "Choking on Statutes." Grant Gilmore said that legislatures have been involved in an "orgy of statute making." G. GILMORE, THE AGES OF AMERICAN LAW 95 (1977).
First, however, we must examine the method by which courts (whether they adopt the negligence per se standard or some other theory) determine whether the criminal statute will bear at all on the negligence action. This process has been well documented. The first and most basic question a court faces is whether the criminal statute sets a standard of care which can replace or supplement the safety standard which the common law would have imposed (if any). Most commonly, this threshold question has been broken down into several components, with courts inquiring whether the statute was designed to prevent the type of harm which occurred in this case; and whether the statute was intended to protect from that harm a class of persons which includes the harmed party. However it is stated, the basic question is whether the statute sets a standard of conduct which can take the place of or supplement the common law standard which would otherwise be applied to the case.

This issue is one for the judge to decide, not only because it is considered in part a matter of statutory construction and thus a “question of law,” but also because it is really a question of relevance. That is, unless the statute explicitly or implicitly sets a standard of care, it neither informs the court of the nature of the duty owed nor defines the conduct which will satisfy that duty. In such a case, evidence of the existence or violation of the statute is of no relevance to the questions of duty and breach, the only issues in the negligence case on which it can have any bearing. The court’s resolution of this

52. See, e.g., Gregory, supra note 1; James, supra note 1; Morris, supra note 1.
53. “It is only when a criminal statute provides a standard of conduct — a way of doing what the defendant did or failed to do in any particular case in question — that a court should permit its breach to be considered as a basis of civil liability at all.” Gregory, supra note 1, at 625. See also Morris, supra note 1, at 42.
54. Gregory stated that the court should be “satisfied that the statute is a safety measure designed to prevent the hazard which occurred and to protect the interest affected from the damage sustained . . . .” Gregory, supra note 1, at 629. See also James, supra note 1, at 112.
55. Sometimes, the task of determining the legislative intent can be a very flexible one, bringing into play all the interpretative machinations which have already been discussed. See supra notes 35-43 and accompanying text.
56. See Fed. R. Evid. 401, which defines “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” When a legislature passes a statute which does not implicitly prescribe conduct which constitutes due care under specified circumstances, evidence of its violation can have no proper purpose in a negligence case. Such evidence can only serve
issue can thus make an important difference in the case, since a decision that the statute does not set a standard of care should be accompanied by a decision that the jury cannot hear any evidence of the existence of the statute, and thus cannot be affected by knowing that the conduct in question is subject to criminal penalty.

This point is best illustrated by licensing statutes. Typically, they cannot be held to set a standard of care because they neither proscribe nor require the taking of specific action. Rather than dealing with particular conduct, licensing statutes normally provide only that a certain enterprise (usually broadly defined as a general activity such as the practice of a profession or the driving of a vehicle) cannot be undertaken without first obtaining a license. Since, for example, it

the probably prejudicial purpose of informing the jury that the party has done something proscribed by criminal law, and thus encourage the jury to find the party negligent because he is "bad." This purpose would be proscribed by Fed. R. Evid. 403, which excludes evidence, inter alia, if "its probative value is substantially outweighed by the danger of unfair prejudice . . . ."

57. See Fed. R. Evid. 402, which provides that "[e]vidence which is not relevant is not admissible."

58. Leaving the jury uninformed about the violation of a criminal statute in some cases could have a major impact on the jury's view of the negligence question. Certainly, knowing that a criminal statute proscribes some aspect of the party's actions would affect the minds of most jurors, though the weight which would be given to such a violation would vary greatly depending on the statute involved. In Brown v. Shyne, 242 N.Y. 176, 151 N.E. 197 (1926), for example, defendant, an unlicensed chiropractor, medically treated the plaintiff, and plaintiff claimed that she suffered harm as a result. Because the statute which defendant violated did not prescribe a standard of care, but only required that persons offering medical treatment be licensed, the court properly found the defendant's violation of the statute to be irrelevant. However, it is easy to see how a jury, if informed of the statute and its violation, might be extremely swayed against the defendant. After all, as a logical (if not a legal) matter, had defendant not practiced medicine without a license, the harm would not have occurred. In such a case, the prejudicial impact of evidence of the statute or its violation could be substantial.

In other kinds of cases, however, the impact of not being informed about the statutory violation might be much smaller. For example, in a normal traffic accident case, jurors might well be aware that the party's conduct, as described by witnesses, is in violation of a traffic law, even if for some reason this fact is not made explicit. Though such knowledge should not be used by jurors, it is doubtful that they would completely ignore it. However, if the traffic violation were one which many persons — the jurors included — commonly commit, then it may not be given much weight in any event.

59. Referring to Brown v. Shyne, Gregory stated:

The real reason that the licensing statute in question cannot operate in any way as the basis of civil liability is that it establishes no standard of conduct — it does not stipulate that any particular human act, let alone anything which the defendant happened to do in practicing on the per-
is not held to be the judgment of the legislature that it is inherently dangerous to practice medicine or drive a car without a license, breach of the licensing statute can have no bearing on the negligence issue. In sum, then, statutes which neither forbid nor require the taking of specific action cannot properly be held to set a standard of care, and evidence of their violation, or even their existence, should not be put before the jury.

As already indicated, unless the harm which occurred in the case was the type of harm which the statute was designed to prevent, the legislation will not be held to have any bearing on the case. This principle was firmly established at common law in Gorris v. Scott. And as in any negligence case, the

son of the plaintiff, must be done in any prescribed fashion.

Gregory, supra note 1, at 631-32.

Whether a statute meets the test of establishing a standard of care is not always such an easy decision to make and depends in part on the way the test is viewed. If, for example, the test is viewed broadly as simply an inquiry into whether the statute was passed for a safety purpose, then even such statutes as that involved in Brown v. Shyne, 242 N.Y. 176, 151 N.E. 197 (1926) could conceivably meet the test. After all, there can be little doubt that the legislature was at least partly concerned with protecting the public from the unsafe practice of medicine when it passed the statute. However, if the test is viewed more narrowly as one inquiring into whether the safety statute requires or proscribes particular conduct deemed unsafe in itself, then the licensing statute in Brown v. Shyne does not pass the test. It is not in itself unsafe to practice medicine without a license, for the possibility that a particular person is unqualified to practice medicine might be only one reason why he or she does not possess a license.

A recent Michigan decision illustrates the confusion concerning the relevance of licensing statutes in negligence actions. In Turri v. Bozek, 79 Mich. App. 212, 261 N.W.2d 264 (1977), the court, citing no legislative history as authority, construed a motorcycle driver licensing statute as "intended to protect against accidents involving motorcycles driven by persons who have not been legally recognized as competent in their operations." 79 Mich. App. at 215, 261 N.W.2d at 266. The court noted that plaintiff (the unlicensed motorcycle driver) was a member of the class which the statute sought to protect, and that his failure to obtain a license would bear on the issue of contributory negligence. If Brown v. Shyne was correctly conceptualized, Turri v. Bozek is wrongly decided.

9 L.R.-Ex. 125 (1874). There, a number of sheep which the defendant shipowner had contracted to carry for the plaintiff were washed overboard during the shipping. A statute required that sheep and cattle being shipped to ports in Great Britain be penned on the ship in a certain manner, including the use of foot-holds. Plaintiff sued on a theory of negligence, attempting to use the statute, which defendant had violated, as the source of the duty owed. The Court of Exchequer, however, rejected this contention, holding that the statute, which was entitled the Contagious Diseases (Animals) Act, was passed "merely for sanitary purposes." Since it was not a statute designed to prevent the type of harm which occurred (drowning), the plaintiff could not use its breach to form the basis of the action.

It should be noted that the clarity with which the act in Gorris set forth its
breach of the statute must also be a cause of the harm before the plaintiff can succeed, even assuming that the statute is held to set a standard of care.62

Once a court determines that a criminal statute sets a standard of care which makes it relevant to the negligence action, the court must decide what effect the statutory standard has on the standard of care which would otherwise be applicable to that case, and must instruct the jury accordingly.63 On this question, there is a continuum of possibilities, and this can best be understood by examining the procedural effect which each would have on the action. For purposes of this analysis, we will assume that the defendant is the party whose alleged negligence is based upon a violation of a criminal statute, and that the statute has been found to set a standard of care.

At one end of the spectrum, the statutory violation can be viewed as "mere evidence" of negligence.64 Unless the judge decides otherwise,65 the common law duty remains unchanged,

intent made the court's job of interpretation unusually easy. In many other cases, the purpose of the enactment will be sufficiently shrouded to leave enormous room for judicial interpretation.

62. Gregory, supra note 1, at 629-30. This, too, can sometimes be a difficult determination to make, though it does render certain results easier to understand. Returning to Brown v. Shyne, 242 N.Y. 176, 151 N.E. 197 (1926), it can be seen that even assuming the statute passes the relevance test by being held to set a standard of care, it is not true that the violation of the statute brought about the harm to the plaintiff. Certainly, had the defendant not practiced medicine at all, the plaintiff would not have been harmed by him, but it was the particular manner in which he treated the plaintiff that brought about the harm, not the fact of his being unlicensed. As the New York court said in Brown:

[T]he license to practice medicine confers no additional skill upon the practitioner; nor does it confer immunity from physical injury upon a patient if the practitioner fails to exercise care. Here, injury may have been caused by lack of skill or care; it would not have been obviated if the defendant had possessed a license yet failed to exercise the skill and care required of one practicing medicine.

242 N.Y. at 180, 151 N.E. at 198.

63. James, supra note 1, at 106; Morris, supra note 1, at 27; Thayer, supra note 1, at 317.

64. Lowndes, supra note 1, at 369; Morris, supra note 1, at 34-35; Thayer, supra note 1, at 322.

65. There is still room under this standard for the judge to determine that as a matter of policy, the statutory standard should replace the standard which would have applied in the absence of the legislation. Surely if the judge has the responsibility to define the nature of the duties owed under the circumstances of the case, the judge should be free to decide that the statutory standard is more sensible, and to instruct the jury in accordance with this view of the applicable duty of care. But if the judge so decides, he will have done so as a matter of choice. This element of
and the judge will instruct the jury that the violation of the statute is but one factor which may be considered in determining whether the defendant was negligent. Proof that the statute was violated will have no special procedural effect on the action, and indeed may not in some cases even suffice to meet the plaintiff's burden of producing evidence of negligence. Therefore, defendant will have no formal obligation to come forward with evidence of due care, and it may even be possible, should defendant produce evidence of due care, that such evidence will be sufficiently strong to require that the judge direct a verdict in her favor on the negligence issue. The effect of proof of the violation of the statute, therefore, is merely to create an inference of negligence which may or may not be sufficiently strong to defeat defendant's motion

discretion differentiates the evidence of negligence approach from negligence per se, in which the underlying theory compels the court to adopt the statutory standard. See infra notes 89-99 and accompanying text.

66. A party who bears the burden of persuasion on an issue typically bears the burden of being the first to produce evidence on that question. 9 J. WIGMORE, WIGMORE ON EVIDENCE § 2487 (3d ed. 1940). In a negligence action, the burden of production will fall on the plaintiff since it is the plaintiff who must persuade the jury of the defendant's negligence. See infra note 109 and accompanying text. Satisfying the burden of production amounts to satisfying the court that the party has produced "a quantity of evidence fit to be considered by the jury, and to form a reasonable basis for the verdict." 9 J. WIGMORE, WIGMORE ON EVIDENCE § 2487. It is thus a threshold question which must be answered in the affirmative before the jury will even be permitted to consider the evidence produced by the party bearing the burden of production. As viewed by the "mere evidence" standard, proof of the statutory violation will be but some evidence of negligence, and the judge in each case will have to determine whether this evidence is sufficient to satisfy plaintiff's burden of production.

Just what quantum of evidence is required to satisfy a burden of production has been defined in a number of ways. It is generally held that a "scintilla" of evidence will not suffice, though a great deal more is probably not required. The more direct evidence on the issue offered by the party, the more likely the burden will be met. However, circumstantial evidence alone (and the statutory violation is but circumstantial evidence) can suffice. See generally F. JAMES, CIVIL PROCEDURE § 7.11 (1965).

67. Though defendant has no formal obligation to come forward with evidence of due care, it would usually be folly not to produce whatever evidence he has to support a conclusion that he exercised due care. Thus, since the statutory violation at least constitutes some evidence of negligence, it is assumed that defendant will normally come forward with contrary evidence. The point, however, is that under the "mere evidence" standard, there is no procedural device which requires this result under penalty of a directed verdict against the defendant.

68. CAL. EVID. CODE § 600(b) (West 1966) defines "inference" as "a deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action." (emphasis added). The permissive nature of an inference demonstrates its minor procedural effect on the action. See also F. JAMES, CIVIL PROCEDURE § 7.9 (1965).
for directed verdict at the close of plaintiff’s case.

Jurisdictions adhering to this “mere evidence” of negligence standard are apparently in a small minority.69 And though the approach is attractive in its retention of judicial power to define the duty of care, as well as jury power to view all circumstances before determining breach of the duty, it may suffer from the problem of granting too little deference to a legislative determination about the nature of certain conduct.70

A second possible effect of proving that defendant has violated an applicable criminal statute is to hold that such evidence satisfies plaintiff’s burden of producing evidence of negligence. This has sometimes been referred to as making out a “prima facie” showing of negligence.71 In this sense of the term “prima facie,” plaintiff will only have assured that he will defeat a motion for directed verdict made at the close of his case. However, the burden of production will not shift to defendant once the statutory violation has been proven,72 and though adducing no evidence of due care carries risks for defendant, those risks will normally reside in a jury determination that she was negligent rather than in a directed verdict for plaintiff at the close of defendant’s case.73 Importantly,

69. See W. Prosser, supra note 48, § 36, at 201 n.27. Lowndes also asserted that this standard described the appropriate effect of criminal statutes in negligence cases, if indeed such statutes ought to be considered at all. Lowndes, supra note 1, at 369.

Even though few jurisdictions hold that violation of a state statute will only constitute evidence of negligence, there appears to be a larger number of jurisdictions which hold violations of municipal ordinances and enactments of other local bodies to be only some evidence of negligence. Courts sometimes support this view by stating that local bodies do not have the same fact-gathering abilities as do state legislatures, or that strict adherence to local standards may lead to loss of uniformity in the common law because of small differences in the location of the action. More likely, courts simply do not trust the judgments of inferior legislative bodies. See Linden, Criminal Nonfeasance, supra note 3, at 56-57.

70. See infra notes 221-23 and accompanying text.

71. Wigmore indicates that “prima facie” can have at least a couple of meanings. 9 J. Wigmore, supra note 66, § 2494, at 293-96. As used here, the term “prima facie showing” of negligence means only that by proving defendant’s statutory violation, plaintiff will have satisfied his burden of production on the negligence issue.

“Prima facie” is also used in connection with presumptions, though to avoid confusion, that term will not be employed here.

72. Wigmore stresses that used in this way, the production of “prima facie” evidence will not serve to shift any burden to the other party. Id.

73. Once again, however, defendant would be foolish not to produce some evidence of due care. And indeed, there may be some cases in which plaintiff’s evidence
adoption of this standard, as with the "mere evidence" standard, retains judicial power to determine the existence and extent of the duty of care owed. The statutory standard does not replace that of the common law.

It is difficult to determine whether any jurisdictions have adopted this standard. The Michigan Supreme Court has declared that the violation of a criminal statute will create a "prima facie case," but it has not defined the precise procedural effect which this should have on the action. Intermediate appellate courts have been grappling with that question ever since. The Illinois courts have been similarly vague about their meaning when they declare the violation of a criminal statute to constitute "prima facie" evidence of negligence. In any event, if the true effect of this standard is not to shift any burden once the statutory violation has been

of negligence, which includes the statutory violation, may be so strong as to justify a directed verdict in plaintiff's favor should defendant not come forward with some evidence of due care.

74. Zeni v. Anderson, 397 Mich. 117, 243 N.W.2d 270 (1976). At one point in the opinion, the court speaks of the creation of an "inference" of negligence: "[T]he real Michigan rule as to the effect of violation of a penal statute in a negligence action is that such violation creates only a prima facie case from which the jury may draw an inference of negligence." Id. at 128-29, 243 N.W.2d at 276 (emphasis added). One paragraph later, the court states: "In a growing number of states, the rule concerning the proper role of a penal statute in a civil action for damages is that violation of the statute . . . establishes only a prima facie case of negligence, a presumption which may be rebutted . . . ." Id. at 129, 243 N.W.2d at 276 (emphasis added).

75. In Baumann v. Potts, 82 Mich. App. 225, 228-32, 266 N.W.2d 766, 768-70 (1978), an appellate court assumed that proof of a statutory violation created a presumption of negligence. Though the court seems to have assumed that this shifted the burden of production, it rejected the contention that the presumption could only be overcome by "positive, unequivocal, strong, and credible" or "clear, positive, and credible" evidence. The court also held that the burden of persuasion does not shift to the violator once the violation has been proven. Id. at 223, 266 N.W.2d at 771. Later, another appellate panel decided Hack v. Foster, 89 Mich. App. 254, 280 N.W.2d 503 (1979). That court also held that proof of the statutory violation created a presumption of negligence and said that even when the violator offers rebuttal evidence on the negligence issue, the presumption remains in force as a "permissive inference." If the jury finds that the force of the presumption is only equally opposed by the rebuttal evidence, the presumption is "mandatory" and requires a finding of negligence. This seems to indicate that the burden of persuasion is shifted to the violator. Id. at 258, 280 N.W.2d at 505.

Whatever these holdings truly mean, it seems clear that the supreme court's intent in Zeni was later viewed as including the creation of a presumption once the statutory violation has been proven. See supra note 74.

proven, it is not likely to have any greater procedural effect than the "mere evidence" standard, and will therefore suffer from the same theoretical deficiencies.\textsuperscript{77}

Another view of the effect which proof of the violation should have is that such evidence creates a \textit{presumption} of negligence, rebuttable by evidence that despite the violation, defendant exercised due care.\textsuperscript{78} There is no question that a presumption has a greater procedural effect than a mere inference of negligence, but there are different theories about the \textit{extent} of the procedural effect of presumptions. It would be beyond the scope of this article to attempt to fully explain these differing views.\textsuperscript{79} We can assume that there are theoretical merits to either approach, and examine the effects which the adoption of either would have on the problem to which this article is addressed. The first theory, which has come to be identified with Thayer and Wigmore and has been dubbed the "bursting bubble" theory of presumptions,\textsuperscript{80} would hold in this situation that proof of the violation satisfies plaintiff's burden of going forward with evidence of negligence, and shifts to defendant the burden of producing evidence of due care. The burden of persuasion on the negligence issue remains with plaintiff. Crucial to this view is that once defendant has come forward with evidence of due care, the presumption disappears entirely from the case,\textsuperscript{81} and should not be mentioned in the jury instructions. The practical effect of this standard is that proof of the violation of the statute will assure plaintiff that he will defeat defendant's motion for directed verdict at the close of plaintiff's own case, and unless

\textsuperscript{77} See \textit{infra} notes 221-23 and accompanying text.

\textsuperscript{78} As already indicated, the term "prima facie" is sometimes used in connection with presumptions. See \textit{supra} note 71.

\textsuperscript{79} For further elucidation of this issue, see \textit{9 J. Wigmore, supra} note 66, §§ 2490-2493; \textit{J. Thayer, Preliminary Treatise on Evidence}, ch. 8 (1898); \textit{E. Morgan, Basic Problems of Evidence}, ch. 3 (1963); \textit{C. McCormick, McCormick on Evidence} § 345 (E. Cleary 2d ed. 1972).

\textsuperscript{80} See \textit{9 J. Wigmore, supra} note 66, § 2491; \textit{J. Thayer, supra} note 79, ch. 8.

\textsuperscript{81} This is the majority view of the effect on a presumption of evidence offered to rebut the presumed fact. Wigmore stated that presumptions are "like bats of the law flitting in the twilight, but disappearing in the sunshine of actual facts." \textit{9 J. Wigmore, supra} note 66, § 2491 (quoting Lamm, J. in Mackowik v. Kansas City, St. J. & C.B.R.R., 196 Mo. 550, 571, 84 S.W. 256, 262 (1906)). See also Bohlen, \textit{The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof}, 68 U. Pa. L. Rev. 307, 314 (1920) ("Like Maeterlinck's male bee, [presumptions] having functioned they disappear."). The "bursting bubble" approach appears to have been adopted in \textit{Fed. R. Evid.} 301.
defendant comes forward with evidence sufficient to satisfy her burden of production, plaintiff should be able to successfully bring a motion for directed verdict on the negligence issue at the close of defendant’s case.88

The second presumption theory, which has been closely associated with Morgan and McCormick, would hold in this situation that once the statutory violation has been proven, a presumption of negligence will arise and the burden of persuasion will shift to defendant to prove due care.88 Because the presumption has the procedural effect of shifting the burden of persuasion rather than just that of producing evidence, and because this theory views presumptions as having important public policy purposes, defendant’s presentation of evidence of due care will not dissolve the presumption. Rather, it remains a part of the case and may even be a part of the jury instructions, though this is not a necessary consequence of the approach.89 This view of the effect of a statutory violation has been adopted in California.89

The two presumption approaches have an important

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82. See supra note 66. That this may not be too difficult a burden for defendant to satisfy will be discussed later. See also infra notes 229-33 and accompanying text.

83. This presumption standard may have been adopted in Michigan, though the courts have not yet fully clarified the issue. See supra notes 74-75 and accompanying text.

84. E. Morgan, Some Problems of Proof 74-81 (1956); C. McCormick, supra note 79, § 345.

85. E. Morgan, supra note 84, 74-81; C. McCormick, supra note 79, § 345. Of course, if the burden of persuasion shifts to the defendant, the burden of production will shift along with it.

86. C. McCormick, supra note 79, § 345. The California Evidence Code recognizes that some presumptions are intended “to implement some public policy other than to facilitate the determination of the particular action . . . .” (Cal. Evid. Code § 605 (West 1966)), and declares that with regard to those presumptions, the burden of persuasion will shift upon proof of the basic fact (in our case, the statutory violation). Evidence Code section 669 declares the presumption of negligence which arises upon proof of a statutory violation to be such a presumption, and therefore the burden of persuasion will shift to the violator to demonstrate due care. Cal. Evid. Code § 669 (West Supp. 1983).

87. The California courts do not mention the presumption itself in instructions. See infra note 209 and accompanying text.

88. See supra note 86. Cal. Evid. Code § 669 (West 1967) was enacted in conformity with the state supreme court decision in Alarid v. Vanier, 50 Cal. 2d 617, 327 P.2d 897 (1958). Defendant can meet the burden of persuasion on the negligence issue by demonstrating that he “did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law . . . .” Cal. Evid. Code § 669(b)(1) (West 1967). For a detailed analysis of this rule, see Holdych, supra note 3.
quality in common with the "mere evidence" and "prima facie evidence" standards. Their common element is the maintenance of judicial power to determine the existence of a duty in the negligence case, and to decide whether that duty should be more carefully circumscribed than by the general "reasonable care under all the circumstances" formula. Moreover, because breach of the duty will normally be determined according to a full review of the precise circumstances of the case, the jury retains its traditional power to decide exactly what constituted due care in that situation. However, there is a vital functional difference between the presumption approaches and either of the two previous theories. While the presumption approaches place at least some onus on the violator to come forward with evidence of the exercise of due care, the "mere evidence" and "prima facie evidence" standards will seldom so adversely affect the violator. Where those standards are employed, proof of the statutory violation will have little procedural effect on the action, and this essentially means that the legislative determination about the quality of particular conduct will not, as a matter of law at least, be subject to much deference.

The final approach which may be adopted is the theory to which this article is primarily addressed: negligence per se. According to this theory, proof of the statutory violation, absent limited excuses, will conclusively establish that the defendant was negligent.88 The element of the negligence per se approach which makes it entirely different from any of the theories which have thus far been described is that the duty of care which would have governed the case at common law (if indeed the common law would have prescribed any duty at all) is completely supplanted by the standard of care implicit in the criminal statute adopted by the legislature. The theory underlying negligence per se holds that this result is mandated by virtue of the legislature's position as supreme lawmaker.89 While courts and commentators have been careful to point out that the action does not thereby become one on the statute, remaining instead a common law negligence case

88. See Gregory, supra note 1, at 626-27; Thayer, supra note 1, at 325-26. Proof of the violation, of course, only establishes the duty and breach elements of the action. Plaintiff must still show causation and damages as in any other negligence case.
89. Thayer, supra note 1, at 321-23. See also supra notes 31-33 and accompanying text.
in which the standard of care derives from the legislature, it should be clear that both judge and jury abrogate extensive power to the legislature under the negligence per se approach. The judge may not engage in the usual weighing process in determining whether and to what extent a duty is owed. The jury's only inquiry on the question of breach of the duty is whether the statute was violated.

The negligence per se theory thus operates much like a "conclusive presumption," which is a rule of substantive law rather than a procedural device intended to apportion the burdens of production and persuasion. The factual accuracy of the thing presumed ("negligence") is not of concern. Indeed, it is immaterial. Proof of defendant's statutory violation may not technically shift to defendant the burden of persuasion on the negligence issue, but it actually accomplishes a great deal more. Defendant's only hope on the duty and breach questions is to demonstrate that the statute does not establish a standard of care, that she did not violate it, or that her violation should be excused. However, strict adherence to the theory underlying negligence per se should require that excuses be very limited, and because the statutes involved in

91. Thayer, supra note 1, at 322. See James, supra note 1, at 106, who characterizes this position as follows:

The most widely accepted rationalization of the negligence per se rule is that given by Thayer. The civil action (according to this) cannot be regarded as one upon the statute for the statute gives no civil remedy. Any recovery for breach of statute must be worked out on common law principles of negligence.

See also Osborne v. McMasters, 40 Minn. 103, 104-05, 41 N.W. 543, 544 (1889).

92. Adoption of the statutory standard can have an extreme effect upon the common law of negligence, particularly if the statute replaces a specific no-duty rule with a duty to take particular action. Perhaps this is what moved Thayer to suggest that when a criminal statute imposes an obligation of affirmative action where the common law would not have required action, civil liability could not result. Thayer, supra note 1, at 329. Fleming has taken the same position. J. FLEMING, THE LAW OF TORTS 130 (3d ed. 1965). But if the theory of negligence per se is based on deference to the legislature as the final arbiter of rules of conduct when it chooses to legislate, there is no reason why a court should not be just as bound to follow the legislature in these cases as in all others. See supra text accompanying note 33.

93. 9 J. WIGMORE, supra note 66, § 2492, at 307-08.

94. Wigmore states:

Wherever from one fact another is said to be conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule is really providing that, where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case . . . .

Id.
these cases are typically strict liability offenses, the range of available excuses will be extremely narrow. This means that evidence of circumstances which go beyond the issue of permissible excuses and actual violation of the statutory standard is actually irrelevant, and should not be admitted by the court. The jury should therefore not even be permitted to hear much of the evidence of the circumstances surrounding the violation of the statute, evidence which is permitted, and often indeed required, under the other theories.

The negligence per se theory has been adopted in most American jurisdictions. While those who adhere to the theory assert that their approach does not work a dramatic transformation of the negligence action, an examination of the implications of the theory demonstrates that its true effect is to drastically alter the nature of the action and to introduce rigid, unproductive elements into the adjudication of negligence cases. The next section of the article will explore this question in detail.

III. RATIONALE FOR REJECTION OF THE NEGLIGENCE PER SE THEORY

A. The Rise of Negligence Doctrine; The Need for a Flexible Standard

The shift to a negligence standard in the middle of the nineteenth century represented both a departure from

95. See infra note 170 and accompanying text.
96. See infra notes 164-220 and accompanying text.
97. See supra notes 56-57 and accompanying text.
98. See W. Prosser, supra note 48, § 36, at 200 (stating that “the great majority of the courts hold that an unexcused violation is conclusive on the issue of negligence . . . .”); James, supra note 1, at 106. Restatement (Second) of Torts § 286 (1965) has also adopted the negligence per se approach for situations in which a statute is found to set a standard of care. That section states that the court “may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation . . . .” (emphasis added). Because of the permissive nature of this provision, it would appear that the court has the power to refuse to apply even a statute which meets the test of setting a standard of care. The comment following the section seems to support this interpretation.
99. See supra notes 91-92 and accompanying text.
100. “The new principle, basing liability for unintentionally caused harm on proof of fault or negligence, became generally accepted around the middle of the 1800’s.” Gregory, Trespass to Negligence to Absolute Liability, 37 Va. L. Rev. 359, 370 (1951).
archaic distinctions between forms of action and a normative shift in the manner of judging the character of an actor's conduct.\textsuperscript{101} Whereas in those cases which had previously fallen under the “trespass” rubric, plaintiff had needed only to demonstrate that defendant acted to directly cause him harm (regardless of the reasonableness of the action),\textsuperscript{102} a singular kind of judgment was now to be applied to all unintentionally-caused harm.\textsuperscript{103} Thenceforth, plaintiff could not recover unless he could demonstrate that defendant owed him some duty of care, and that under all the circumstances of the case, defendant did not act toward plaintiff as the “reasonable person” would have acted.\textsuperscript{104} This new standard was well-suited to the service of social goals of the late nineteenth century, a time when industrial development was viewed as of paramount importance. No doubt judges shared this goal, and sought to encourage industrialization.\textsuperscript{105} They could see that new machinery, dangerous

\textsuperscript{101} For general discussions of the emergence of negligence as the primary basis of tort liability, see id.; Wigmore, \textit{Responsibility for Tortious Acts: Its History}, 7 Harv. L. Rev. 315, 441, 453 (1894).

\textsuperscript{102} For a classic debate about the distinction between “immediate” and “consequential” harms, see Scott v. Shepard, 2 Black. W. 892, 96 Eng. Rep. 525 (1773).

\textsuperscript{103} Recently, however, there has been some criticism of the notion that absolute liability was the rule in actions brought under the writ of trespass, while actions brought under the “case” writ were decided on a negligence theory. See, e.g., M. Horwitz, \textit{The Transformation of American Law}, 1780 to 1860 at 89-91 (1977).

\textsuperscript{104} The case most often cited as having speeded this trend was Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850), in which, for all intents and purposes, the Massachusetts high court removed the distinction in pleading between those cases in which harm had occurred “directly” and those in which it had come about in an “indirect” manner. Whether the case would formerly have been required to be pled in trespass or in trespass on the case, the plaintiff would have to demonstrate negligence on defendant’s part before he could recover.

\textsuperscript{105} The importance of this goal is perhaps nowhere made more explicit than in the following passage from the New York Court of Appeals decision in Losee v. Buchanan, 51 N.Y. 476, 484-85 (1873). In rejecting plaintiff’s argument for the imposition of strict liability in blasting cases, based on the English decision in Rylands v. Fletcher, L.R.-E. & I. App. 330 (1868), the court said:

\begin{quote}
We must have factories, dams, canals and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of all our civilization. If I have any of these upon my lands, and they are not a nuisance and are not so managed as to become such, I am not responsible for any damage they accidentally and unavoidably do my neighbor. He receives his compensation for such damage by the general good, in which he shares, and the right which he has to place the same things upon his lands.
\end{quote}

Of course, there were also counter-trends occurring at the same time, in which liability was expanded over what it would have been prior to the emergence of negligence
in its operation, was needed for the task, and that an inevitable consequence of rapid industrialization was physical harm to innocent persons. Judges believed that industries were delicate entrepreneurial enterprises, and that liability rules which imposed responsibility in too many cases could impede or even stop national progress toward full development. Thus, rules which would give rise to more limited liability had to be found, and the negligence standard was embraced.\(^\text{106}\)

Though the desire to limit liability can perhaps best be illustrated in cases of railroad accidents,\(^\text{107}\) the policy of encouraging action and enterprise applied to all activity, and Chief Justice Shaw of the Supreme Judicial Court of Massachusetts may well have had this policy in mind when he declared in Brown v. Kendall\(^\text{108}\) that for all unintentional harms, there could be no liability in the absence of negligence, and that plaintiff bore the burden of proof on the negligence issue.\(^\text{109}\)

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\(^{106}\) The negligence standard, of course, provides greater protection to defendants than one which does not require proof of "fault" in order for a harmed party to recover. Moreover, given that plaintiff would bear the burden of proving defendant's negligence, the barriers to recovery can be even greater. See infra note 109 and accompanying text.

\(^{107}\) See, e.g., Hauser v. Chicago, R.I. & P. Ry., 205 Iowa 940, 219 N.W. 60 (1928). There, a woman was "frightfully injured" when she apparently fainted in the bathroom of a train and was burned by exposed steam pipes running along the floor around three sides of the room. Reversing a jury verdict in favor of the plaintiff, the court stated:

> It is quite apparent from the construction of this compartment that the part thereof under the water cooler and wash basin was not intended for the use of passengers. There was nothing below these basins of interest to the passenger or put there for his use or accommodation, or for any purpose directly affecting him. The company, in construction of this compartment, was required, under a high degree of care, to construct it with reference to the purposes of its intended use and with reference to prudent and careful use thereof by its passengers.

\(^{108}\) Id. at 944-45, 219 N.W. at 62. Even if it was true, as the court stated, that the possibility of a person fainting in the bathroom and falling against the pipes was small, it is extremely unlikely that an appellate court today would reverse a jury verdict in the plaintiff's favor, particularly given the small cost to the railroad of covering the steam pipes. See also Ryan v. New York Central R.R., 35 N.Y. 210 (1866) (stating a minority rule imposing strict limits on recovery from railroad companies for fires caused by engines).

\(^{109}\) Id. at 297. Chief Justice Shaw did not make his reasoning clear on this issue, and indeed treated the problem as though the law had never distinguished between recovery in cases of direct harm and those of indirect harm. Id. See Gregory, supra note 100, at 366.
The beauty of the negligence standard is its flexibility. As social needs change, the standard can accommodate itself to new goals. In an era when courts felt the need to assure (or at least not impede) industrial development, they could hold that an enterprise had only a duty to adhere to the general custom and practice of that industry in taking safety precautions and otherwise conducting its business.\footnote{110} By the 1930's, however, social goals had shifted, and courts were no longer willing to protect enterprise at such a high cost in personal injury. Thus, the old rule gave way to a flexible standard in which industry custom would be but one factor in determining the care owed in a given case.\footnote{111}

The flexibility of the negligence standard actually serves important functions for both judge and jury.\footnote{112} First, it permits the judge to control the question of whether any duty is owed in a given case.\footnote{113} Second, because of the basic generality and circumstantial orientation of the formula "reasonable care under all the circumstances," the jury is given wide latitude in determining whether the duty of care has been satisfied in that case. Each aspect of this flexibility merits further elaboration.

First, the standard grants the trial judge great flexibility in determining whether a duty of care is owed in the case before him. This decision can often be a complex one. Leon Green identified five factors which a judge should always consider: (1) an administrative factor (the workability of the

\footnote{110} Titus v. Bradford, B. & K. R.R., 136 Pa. 618, 20 A. 517 (1890). There, the court called industry custom the "unbending test of negligence . . . ." Id. at 626, 20 A. at 518.

\footnote{111} The T.J. Hooper, 60 F.2d 737 (2d Cir. 1932).

\footnote{112} The judicial process in negligence cases is not greatly dissimilar from the judicial process in other cases. But negligence cases have afforded the process its greatest flexibility. It is extensive in these cases because of the machinery required in making use of a jury, and more so because negligence cases concern more largely the infinite variety of workaday contacts involved in the operation and development of the machine of industry and commerce. The judicial process in negligence cases is the experimental machinery of government-by-judges through which a restless and changing industrial society is furnished protection against its self-inflicted physical hurts.


\footnote{113} Responsibility to make such a determination clearly resides with the judge. See supra note 17.
rule); (2) an ethical or moral factor (the society's perspectives on the nature of the parties' conduct); (3) an economic factor; (4) a prophylactic or preventive factor; and (5) a justice factor (inquiring which party has the greater capacity to bear the loss). Learned Hand spoke mainly of economic considerations (the probability of the harm coming about, the gravity of that harm, and the burden of taking adequate precautions to prevent the harm from occurring), though he later stated that his formula probably assumed too much about the ability to quantify certain matters. Others have offered different explanations for when a duty arises in negligence cases. No matter how the factors are identified, however, it is clear that only if the judge has the power to determine the duty question in each case can the factors receive appropriate treatment. And by definition, any methodology which prevents the judge from exercising this responsibility will lead, at best, to a generalized weighing of factors that will often be unfair in its application to individual cases.

The fact that the process of determining duty does not succeed in the context of abstract situations has proven true through historical experience. Most attempts at developing concrete, specific definitions of duty applicable to "classes" of "recurring" cases have failed, even though such attempts were encouraged by such influential figures as Holmes. Indeed, Holmes himself was to fall victim to the trap of believing that "fixed and uniform standards of external conduct" could be

114. Green, supra note 17; Green, supra note 112.
115. In United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947), Hand spoke of a duty arising if the burden of taking adequate precautions to prevent the harm from occurring was less than the product of the probability of the particular harm coming about multiplied times the gravity of that harm. The degree to which this formula is economic in orientation is discussed in Posner, A Theory of Negligence, 1 J. LEGAL STUDIES 29, 32-33 (1972).
117. George Fletcher suggests that the results of negligence cases can also be explained according to a "paradigm of reciprocity," which would impose the burden of the loss on a party whose conduct has subjected the other party to an unusual and non-reciprocal degree of risk. Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537 (1972). Despite his claim that this paradigm better explains the results of tort cases than the "paradigm of reasonableness," it is nevertheless true that whatever theory is employed to explain negligence cases, part of the determination of a case requires an evaluation of the nature of the risks involved in the parties' conduct.
118. See supra note 21 and accompanying text.
119. Id.
developed to settle the duty question for classes of cases. In 1927, he wrote the now familiar Supreme Court opinion *Baltimore & Ohio R.R. v. Goodman.* It is hard to imagine a class of cases more uniform and recurring than those involving railroad crossings, and it must have seemed to Holmes a relatively easy matter to create a clear standard which would dictate the precise precautions all drivers should take when approaching such crossings. Yet that standard could not survive, because railroad crossing accidents, like all other generalized fact patterns, actually occur in an infinite variety of ways. It is no more possible to speak of a “recurring” kind of crossing accident than it is to speak of a recurring slip-and-fall fact pattern. Just seven years later, the Court “limited” the *Goodman* rule in *Pokora v. Wabash Ry.* Justice Cardozo’s opinion in that case recognized the fallacy of Holmes’ view, and warned of the “need for caution in framing standards of behavior that amount to rules of law.”

It is important to see that it was not just the particular rule which Holmes promulgated in *Goodman* which did not work, but the idea itself that “fixed and uniform standards of external conduct” can truly be developed to govern the infinite variations which can arise in even the most similar-appearing of negligence cases. Much flexibility is needed in each case for the court to determine whether, under the precise circumstances, a duty of care is owed, and whether it is appropriate to frame that duty more specifically than with the general reasonableness formula.

In at least one way, the old rule about industry custom also illustrates the poverty of fixed standards. While that rule served an important social goal, its application was bound to be improper in at least some individual cases. Faced with such a rule, however, trial courts were prevented from taking

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120. 275 U.S. 66 (1927).
121. The standard in essence provided that a driver approaching a railroad crossing should get out of his car and look to see if a train is approaching. However, it is interesting to note that even this rule was not stated with total inflexibility. Holmes provided that the driver should get out of his car if he “cannot be sure otherwise whether a train is dangerously near . . .,” and that “he will not often be required to do more than to stop and look.” *Id.* at 70.
123. *Id.* at 105.
124. *See supra* note 110 and accompanying text.
125. *Id.*
into consideration factors other than industry custom in framing the duty question. And as with Holmes' Goodman rule, the old custom rule also eventually collapsed.

Time and again, then, courts have returned to a generalized statement of the duty of care, not substantially different from the 1837 formulation requiring "in all cases a regard to caution such as a man of ordinary prudence would observe."126

The second area of flexibility afforded by the negligence standard is the degree of freedom it grants to jurors to weigh all circumstances in deciding whether reasonable care was in fact exercised in the particular case. In a railroad crossing case, the jurors can determine whether the circumstances truly warranted exiting the car and walking up to the tracks, or whether some lesser precaution would be sufficient.127 But the more specific the standard about which the judge instructs the jury, the less room there will be to make this determination.

Judge and jury are thus the essential element in each case, and are of "greater importance than rules and formulas."128 Their interrelated workings, with each serving a circumscribed yet highly situational function, assures not only that justice is done between the parties, but that other factors, including important social policies, are served in each

126. Vaughan v. Menlove, 3 Bing. (N.C.) 468, 475, 132 Eng. Rep. 490, 493 (C.P. 1837). Irvin Rutter has suggested that all legal rules are in fact general in nature, and cannot operate unless this is so:

All rules of law are generalizations . . . . [R]ules do not describe the unique facts of a particular case, but a whole class of cases. As Oliphant puts it, the rule must extend to at least one case other than that before the court . . . . Unless it is so generalized, it cannot function as a rule. The facts of a particular case are unique and unrepeatable, and a description limited to that case will never find another case that it fits. Rutter, Designing and Teaching the First Year Law Curriculum, 37 U. Cin. L. Rev. 9, 85 (1968).

127. In Pokora, 292 U.S. at 105, Cardozo listed some of the many facts which would need to be considered in determining whether one should get out of the car and look down the tracks, even if the roadbed is level and straight:

Where was Pokora to leave his truck after getting out to reconnoitre? If he was to leave it on the switch, there was the possibility that the box cars would be shunted down upon him before he could regain his seat . . . . If he was to leave his vehicle near the curb, there was even stronger reason to believe that the space to be covered in going back and forth would make his observations worthless.

128. L. Green, supra note 112, at 210.
case. No fixed rules can have this effect, and attempts to inject such standardized calculations into negligence law, no matter whether they are born of the efforts of judges or of the legislature, are doomed to failure. A crucial flaw in the negligence per se formula is that it requires just such an injection of fixed standards into the adjudication of negligence cases.

There are other aspects of the judicial process, as well as of the operation of legislatures, which help to explain the particular problem of injecting legislatively-derived standards into negligence cases. That will be the subject of the next section of the article.

B. Judicial Process Contrasted with Legislative Process: Why Legislation Cannot Be Applied Per Se to Negligence Cases

To this point, the article has focused primarily on the process by which the common law works. More understanding of the process of adjudicating cases, and how it contrasts with the operation of legislatures and the nature of statutory rules, is required in order to understand the weaknesses of the negligence per se theory. This section will demonstrate that negligence per se requires accepting into the common law process a set of standards too narrow and unreliable to work effectively in the adjudication of negligence cases.

The common law process operates through the application of a constantly evolving general principle to a set of facts. In each negligence case, judge and jury thus begin with two things. The first is a set of facts, which it is the responsibility of the jurors to determine. The second is a general legal principle (that defendant owed plaintiff a duty of due care under the circumstances). The judge has the responsibility to determine the suitability of that principle to the case, and to instruct the jury about the test to which it must subject the

129. To illustrate the need for flexibility in the negligence standard, Green draws the example of the development of master-servant rules. As strict limitations on the liability of the master, these rules could not meet the desires and needs of society, and they changed in part through a process of jury decisions representing an unwillingness to adhere to the established limitations. While Green felt that the better way to bring about the change would have been for judges themselves to meet their responsibility to change rules which no longer made sense, he nevertheless would claim that it is the nature of the adjudicatory process in negligence cases — making extensive use of both judge and jury — which eventually brought about the fall of rules which did not meet the society's needs. Id. at 198-99.
facts. As has already been shown, both judge and jury must engage in a complex weighing process in order to determine, respectively, the scope of any duty owed, and whether that duty was breached. Most often, the judge's weighing process will result in the conclusion that the duty of care should be expressed generally, and the jury will be instructed accordingly. But until a given factual situation is decided by a court in this manner, there cannot be said to be any "rule" which characterizes the parties' conduct as negligent or not. Harlan Stone may have had this in mind when he declared almost fifty years ago:

With the common law, unlike its civil law and its Roman law precursor, the formulation of general principles has not preceded decision. Its origin is the law of the practitioner rather than the philosopher. Decision has drawn its inspiration and its strength from the very facts which frame the issue for decision. General rules, underlying principles, and finally legal doctrine, have successively emerged only as the precedents, accumulated through the centuries, have been seen to follow a pattern...

Stone's point is not that common law adjudication operates without a set of principles which can be applied to the cases. Rather, the point is that the interplay between fact and principle is so close that the principle really has no meaning outside the factual context. Thus, there is no "rule" in isolation from a particular set of facts. "Law" evolves through an incremental process, and it is only over time that the general principle takes on meaning as patterns emerge from the decided cases. There will, of course, be aberrant decisions, and these will either be woven into the fabric of the law (giving the principle new meaning) or swallowed up amid a large number of contrary, though factually similar, decisions.

This never-ceasing process operates without the direct influence of political factors, and with no significant public re-

130. See supra notes 112-29 and accompanying text.
132. The analogy to biological evolution is intended, though its application is far from perfect and it is not meant to apply in an all-encompassing sense. This is not an explanation of how societal change occurs; it is a recognition that in the development of common law doctrine, aberrant application of a general principle typically will not survive.
course. It is the reasoning process alone which should justify decisions reached in particular cases, and not any physical or political power base which the parties or the court might bring to bear.\textsuperscript{133} Therefore, in any particular case the court, especially on appeal, must justify its decision not in terms of whether it accords with the views of a majority of people in the society, or even with the pressures exerted by powerful forces representing the interests of the parties, but only in terms of whether the decision is a proper application of legal principle to the facts.\textsuperscript{134}

The common law process also permits constant updating of the law.\textsuperscript{135} When it either appears that society no longer benefits from a particular principle, or that a specific rule no longer accords with a more generally accepted principle, there is flexibility within which to order change in the system. Though such change does not appear incremental when it suddenly occurs in an individual case, the process is not really sudden. A look at jury verdicts or results in reported decisions will more often reveal that over a fairly lengthy period, courts have not strictly abided by the supposed rule, and have moved in another direction to the extent the rule could toler-

\textsuperscript{133} Traynor, \textit{supra} note 2, at 402, citing Breitel, \textit{The Lawmakers}, 65 COLUM. L. REV. 749, 772 (1965).

\textsuperscript{134} This does not mean that the wishes or goals of society do not play a part in the determination of either the duty owed in negligence cases or whether the standard of care has been violated. It has already been explained that the very nature of the common law process allows for and thrives on the consideration of such factors. \textit{See supra} notes 112-29 and accompanying text. What is meant here is that the adjudicatory process operates without the \textit{direct} influence of political factors, including the need for majority support of its members in order for them to continue in their roles as judges and jurors. Moreover, there is no public recourse (aside from removal of a judge, which is exceedingly rare) for decisions which do not comport with majority support, aside from appeal to the legislature to impose different rules on the courts. Rather than operating with the direct majoritarian pressures of a legislature, courts function through this evolutionary process, permitting them to gradually bring about change in law where the need for change is perceived.

\textsuperscript{135} "The incremental nature of common law adjudication meant that no single judge could ultimately change the law, and a series of judges could only do so over time and in response to changed events or to changed attitudes in the people." G. CALABRESI, \textit{supra} note 2, at 4.

With social change comes the imperative demand that law satisfy the needs which change has created, and so the problem . . . of jurisprudence in the modern world is the reconciliation of the demands, paradoxical and to some extent conflicting, that law shall at once have continuity with the past and adaptability to the present and the future.

ate. Only when it is not possible to go any further without explicitly rejecting the rule do courts abandon it once and for all. An example is the judicial rejection of contributory negligence in some jurisdictions. While it may appear that the contributory negligence doctrine is officially swept away by a single opinion, that is hardly true in practice, because even under a strict rule of contributory negligence, both judges and juries typically administer that rule as though comparative negligence were the standard. Interestingly, when it rejected the contributory negligence rule in favor of pure comparative negligence, the California court changed not only a prior common law rule, but also a statute which had codified that rule. The court reasoned that since the contributory negligence rule was originally a creation of the common law, it could also be abrogated by the common law process.

The common law process of incremental development of legal doctrine through application of evolving, general principles contrasts with the function and operation of the legislature. The complexity of the political process makes a precise formulation of the legislative method extremely difficult. Nevertheless, it is possible to identify certain attributes of legislative operation which demonstrate why the pronouncements which emerge cannot be accepted wholesale into the common law system of adjudicating disputes.

136. See supra note 129.
137. See, e.g., Li v. Yellow Cab Co. of California, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).
138. This was observed as long ago as 1933, when Ulman stated: “For many years juries have been deciding cases as though there was no such rule of law.” J. Ulman, A Judge Takes the Stand (1933). See also Keeton, Creative Continuity in the Law of Torts, 75 Harv. L. Rev. 463, 508 (1962) (“The change to comparative negligence would in its nature produce little stress on the principle of continuity in view of the existing unlegitimated practice of juries in applying a rough rule of this type.”); Weinstein, Routine Bifurcation of Jury Negligence Trials: An Example of the Questionable Use of Rule Making Power, 14 Vand. L. Rev. 831, 833 (1961).
140. Li v. Yellow Cab Co., 13 Cal. 3d 804, 813-23, 532 P.2d 1226, 1232-39, 119 Cal. Rptr. 858, 864-71 (1975). Traynor argued that the courts have the responsibility for the upkeep of the common law, even if it means rejecting a judicially created rule which has been codified by the legislature. Traynor, supra note 2, at 414-15, referring to People v. Pierce, 61 Cal. 2d 879, 395 P.2d 893, 40 Cal. Rptr. 845 (1964), in which such action was taken by the court.
141. Characterizing the legislative process is a difficult task, and it is probably true that no one system pervades that process. The discussion in the text is merely an attempt to identify certain fairly discernable aspects of that process, not an attempt to fully categorize it.
It has already been pointed out that the legitimate judicial rationale for looking to criminal statutes in negligence cases is a desire to help promote the policy underlying that legislation.\textsuperscript{142} However, there can often be serious doubt about the policy of statutes which emerge from the legislative process.\textsuperscript{143} This problem stems from the political nature of that system, which requires legislators to be responsive to shifting majorities or coalitions of minorities.\textsuperscript{144} The result is often instability in policy-making and periodic reversal of direction. Even the briefest look at the number of roadblocks to passage of a piece of legislation suggests that the chance of a legislative proposal surviving intact, either in form or in purpose, is slim at best.\textsuperscript{145} Moreover, legislation designed to relieve a particular problem often becomes outdated over time. Political realities, however, often make such legislation impossible to repeal, even when a majority of the legislators would no longer support the legislation were it now being proposed for the first time.\textsuperscript{146}

Therefore it may be true that even if there existed a fairly coherent legislative purpose at the time a statute was

\textsuperscript{142} See supra notes 47-48 and accompanying text.

\textsuperscript{143} Referring to the roadblock to passage posed by the committee structure in legislatures, Traynor said:

For all the vaunted responsiveness of legislatures to the will of the people, it is no secret that legislative committees, particularly those dominated by the elder statesmen of a seniority system, tend to dilute the reliability of statutes as an expression of public policy. Hence it is [no] small wonder that statutes are often bad and indifferent as well as good.

Traynor, supra note 2, at 424-25 (footnotes omitted).

\textsuperscript{144} "As finally enacted by a multi-membered and often two-bodied legislature, [a law] may represent an amalgam of perceptions and of compromises influenced by the views of affected special interests, and therefore, it is sometimes not internally consistent." Tate, The Judge's Function and Methodology in Statutory Interpretation, 7 S.U.L. Rev. 147, 148 (1981). See also G. Calabresi, supra note 2, at 3, 185 n.9.

\textsuperscript{145} The number of roadblocks to the final passage of legislation range from various forms of committees (standing committees, sub-committees, conference committees, etc.) to floor battles, and executive vetoes. See supra note 143. See generally Dahl, On Removing Certain Impediments to Democracy in the United States, 92 Pol. Sci. Q. 1 (1977).

\textsuperscript{146} Gilmore wrote that "[o]ne of the facts of legislative life, at least in this country in this century, is that getting a statute enacted in the first place is much easier than getting the statute revised so that it will make sense in the light of changed conditions." G. Gilmore, The Ages of American Law 95 (1977). See also G. Calabresi, supra note 2, at 8 (concerning the fact that the Connecticut birth control law finally held unconstitutional in Griswold v. Connecticut, 381 U.S. 479 (1965) would not have been possible to pass by that time, but was also politically impossible to repeal).
adopted, that purpose may no longer exist at a future date when the statutory standard is hauled before a court in a negligence case. In such a situation, a court wishing to enforce the legislative will is operating in a legal vacuum, even granted its highly developed skill of statutory interpretation.\footnote{147} And if the legislative policy is so often incoherent or simply nonexistent as a unitary truth, then any judicial doctrine which requires blind adherence to a statutory standard of conduct should be immediately suspect. Negligence per se is just such a doctrine, since it requires that once a court finds that a statute establishes a standard of care,\footnote{148} the court must adopt that statute in place of the common law duty of care which would otherwise have been applicable to the case.\footnote{149}

Further, suppose that a court adhering to the negligence per se doctrine is somehow able to determine what the current legislative policy would be were the statute to come before the legislature today,\footnote{150} and to alter the meaning of the rule accordingly. If the court engages in this rather risky pursuit, its changing application of the statute will substantially sacrifice the values of predictability, consistency, and gradual evolution of negligence doctrine. Stare decisis, so much a part of the operation of the common law, will be subsumed in the court’s attempts to adhere to a shifting legislative will. Moreover, one inflexible standard will be substituted by another, albeit updated, one. The court’s pursuit of elusive legislative policy will thus be of little benefit, and will indeed sacrifice much more than will be gained.

The nature of the “rule” which emerges from the legislative process provides another reason why per se acceptance into the common law system will not succeed. By their nature, statutes are narrow, concrete standards of conduct. (Indeed, criminal statutes must be narrowly drawn in order to survive constitutional attack).\footnote{151} Because of this narrow quality, the

\footnote{147} The subterfuge often involved in the statutory interpretation process has already been discussed. See supra notes 35-43 and accompanying text.

\footnote{148} See supra notes 52-62 and accompanying text.

\footnote{149} See supra notes 89-92 and accompanying text.

\footnote{150} Absent some act such as recent amendment of the statute, it is hard to imagine how a court would be able to determine the current intent of the legislature. Conceivably, this could be done by looking at recent legislative action in similar or analogous areas of law, but this would be an uncertain and risky enterprise.

\footnote{151} See, e.g., Papachristou v. Jacksonville, 405 U.S. 156 (1972), in which the United States Supreme Court declared certain vagrancy ordinances “void for vague-
same problems emerge in application as are involved when a court attempts to prescribe a duty in terms of "fixed and uniform standards of external conduct." The standard simply cannot be applied without sometimes reaching results which are not fair under the circumstances.

An illustration will make this point more clear. Suppose that a legislator has become aware of the number of pedestrian deaths resulting from collisions between automobiles and pedestrians who walk in the direction of rather than facing traffic. Based on an observation of this phenomenon, the legislator might propose a law which makes it illegal for a pedestrian to walk in the same direction as the traffic on that side of the street. The legislator's view of this problem is necessarily a prospective one. Unlike a court, which will have a specific case before it involving a set of unique facts, the legislator will have before him either a generalized view of a kind of problem, or his own conception of a very narrow fact situation. In either case, however, the legislator's task, quite distinct from that of a court, is to attempt to cover a certain category of conduct with a written rule, typically framed in narrow terms. It may not (and because of its prospective nature often cannot) account for particular situations in which pedestrian safety might be better served by walking with the traffic. Indeed, the legislator might not even have considered this possibility. In a criminal prosecution brought against a pedestrian who violated the statute, the entirety of the conduct, and perhaps state of mind, will probably play a role in determining guilt. However, if a court accepts the criminal statute in a negligence action as establishing a per se

ness" and thus violative of the due process clause. The Court declared that a statute will be declared void for vagueness if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute,... [and] it encourages arbitrary and erratic arrests and convictions." 405 U.S. at 162 (quoting United States v. Harriss, 347 U.S. 612, 617 (1954)).

152. See supra notes 118-26 and accompanying text.


154. This was the problem raised in Zeni and Tedla.

155. Morris, supra note 1, at 29.

156. This will not be true, however, if the crime involved is a strict liability offense. See infra notes 170-71 and accompanying text.
standard of conduct, a party may be found negligent in a situation not even envisioned by the legislature.\textsuperscript{157}

Legislative standards also have an immutable character which makes their fit into the common law system especially difficult, probably even more so than the kinds of fixed standards which Holmes urged judges to adopt. Particularly in the appellate context where such rules are likely to be made, judges must support their positions with written opinions explaining their rationale. The "rule," even if a supposedly fixed standard, thus stands in the midst of at least some explanation which has been agreed upon by all signatories to the opinion. In subsequent cases where a particular decision may be relevant, the litigants therefore have a great deal more to go on than the "fixed" standard. Indeed, the language of the opinion will often leave room to argue that the fixed standard was not intended to be applied to the case now before the court.\textsuperscript{158} The limits of the rule are probed in this manner, and the rule takes on a gradually evolving meaning. "Fixed and uniform standards," in the judicial context, are therefore illusory even if judges claim to promulgate them.

The same cannot generally be said for legislation. Be-

\textsuperscript{157} Sometimes legislators will not know how particular legislation will fit into the fabric of the law, and will say so explicitly. An interesting example is provided by \textit{A Bill to Eliminate Discrimination in Public Accommodations Affecting Interstate Commerce, 1963: Hearings on S. 1732 Before the Senate Committee on Commerce 88th Cong., 1st Sess. (1963)}. During those hearings, which concerned a portion of the 1964 Civil Rights Act pertaining to discrimination in places of public accommodation (Pub. L. 88-352, 78 Stat. 241, now renumbered 42 U.S.C. §§ 2000a-2000a-6), a question came up about whether the legislation could be authorized under the commerce clause of the Constitution. In a very revealing statement about his view of the legislative process and its relation to the function of courts, Senator Magnuson, Chairman of the Committee, said:

\begin{quote}
I think we ought to get this in perspective.

Congress doesn't determine what is under the interstate commerce clause. The Constitution and court decisions determine that . . . . We are talking about how far you want to go or what you want to do in a particular field with a bill . . . . Whether a business is in interstate commerce or not is a question of the interpretation of the Constitution and of the courts' rules in these matters.
\end{quote}

\textit{Id.} at 71. Later, both Assistant Attorney General Marshall and James J. Kilpatrick, a journalist, took a different position, arguing, in the words of Mr. Marshall, "[i]t would be a disservice to pass a bill that was later thrown out by the Supreme Court." \textit{Id.} at 252.

\textsuperscript{158} Even in \textit{Baltimore and Ohio R.R. v. Goodman}, 275 U.S. 66 (1927), for example, Holmes left room to argue that it would not be necessary in some cases to get out of the car and look down the tracks. \textit{See supra} note 121.
cause legislatures do not usually feel constrained to provide a unitary rationale for their product, the result of legislative effort is often far more fixed and immutable than judicially-developed standards. Although courts must interpret statutes as cases arise under them, the direct, brief form in which statutes are drawn simply does not permit much flexibility. In addition, statutes are not usually subject to incremental change. They remain in force until the political climate alters sufficiently to amend or discard them. When the change does occur, it comes in hurried leaps rather than measured steps, and this differs significantly from common law change.¹⁵⁸

In sum, there are serious problems in meshing statutory standards with the common law system in negligence cases. Rather than having before it a still evolving concept of "due care," a court is faced with bald language declaring particular conduct to be a crime. That statute cannot be changed by the court; it can either be adopted wholesale into the adjudicatory process, it can be rejected as irrelevant, or it can be seen as relevant on the question of the acceptability of certain conduct, but not without room for judicial judgment. If a court chooses the first course, and adopts the legislative standard per se, the court has frozen the common law at that point, leaving no room for further change until the legislature acts to change its rule. Perhaps the problem would not be so serious if the negligence per se doctrine could tolerate broad excuses, but as will be shown,¹⁶¹ this is not the case.

Two final points need to be made here. First, one wonders whether legislatures would object to courts' refusal to accept criminal legislation as the absolute standard of conduct for those negligence cases. Had the question of civil liability come to the attention of the legislature, it could have made matters clear by explicitly creating or refusing to create a civil remedy.¹⁶¹ But even apart from this, legislators are always aware

¹⁵⁸ "[A] difference between the legislative rule and the judicially-evolved precept is that the latter, having resulted from judicial 'interpretation' rather than from legislative command, may without theoretical difficulty be modified or overruled in the light of a changed social milieu or an unforeseen factual aberration." Tate, The Judge's Function and Methodology in Statutory Interpretation, 7 S.U.L. Rev. 147, 150 (1981). Tate sees this as permitting "greater judicial freedom in modifying judge-made law . . ." Id.

¹⁶⁰ See infra notes 164-220 and accompanying text.

¹⁶¹ If the legislature takes this action, then the court has no choice but to enforce the statute, unless some basis can be found either for holding it inapplicable
that the rules they enact will have to be interpreted by courts and applied to situations they have not envisioned, even in those cases to which the legislation directly applies. It should therefore be neither a shock nor an insult to the legislature that courts do not adopt statutory standards wholesale in cases to which the legislation does not explicitly apply.

A final and related point is that we should never lose sight of the difference between the goals which legislatures have in mind when enacting criminal legislation, and those which courts seek to serve in deciding negligence cases. Conduct which a legislature might consider culpable enough to make subject to criminal penalty is not necessarily conduct which either a court or the legislature would wish to make compensable. Wholly different considerations go into the determination of whether society needs to be protected through the use of criminal sanctions for certain conduct, and whether that same conduct should be made subject to a civil action brought by the harmed party.¹⁶²

In sum, neither the legislative process nor the underlying purposes for which legislation is enacted demand that courts adopt the negligence per se approach in civil cases. The adoption of negligence per se in fact impedes the common law process of doctrinal development and unproductively freezes the characterization of conduct as reasonable or unreasonable. Nevertheless, criminal legislation must be synchronized with the common law,¹⁶³ and the article will now turn to another area in which the negligence per se formula creates problems in achieving such synchrony.

C. The Problem of Excuses Under the Negligence Per Se Theory

The preceding section addressed the reasons why the

¹⁶². This becomes particularly important when one considers that the civil liability arising out of negligence cases in which a criminal statute forms the basis of the duty of care might be far greater than the criminal sanction for such conduct. The process which gives rise to the criminal statute should therefore be carefully considered before that standard is adopted wholesale and “potentially ruinous civil liability” imposed on one who has committed a minor criminal infraction. Morris, supra note 1, at 23. See also James, supra note 1, at 107-08.

¹⁶³. Overstating the point, Traynor wrote: “The hydraheaded problem is how to synchronize the unguided missiles launched by legislatures with a going system of common law.” Traynor, supra note 2, at 402.
static rules derived through the legislative process, if adopted wholesale, do not provide courts with the flexibility to achieve the gradual development of law which the proper administration of negligence cases requires. The discussion focused both on the method by which statutes are adopted and on the nature of statutory rules, and contrasted those elements with the common law process of incremental change and the generality of the standards most often found useful in negligence cases. Fixed standards, it was argued, freeze the development of negligence law and eliminate the fluidity of the system. Given that flexibility in negligence law helps further important public policy and best serves the infinite variety of negligence cases, any theory which accepts statutory standards as conclusive on the standard of care in negligence cases is seriously flawed.

This section of the article will analyze the extent to which the theory underlying negligence per se can tolerate the introduction of excuses which cushion the harsh effects of the doctrine. The analysis will reveal that in order to adhere to the policies underlying negligence per se, only the most limited excuses can rationally be justified. However, a theory which permits so few excuses leads to unfair and unduly harsh results in many cases.

Even the most ardent proponents of the negligence per se doctrine would allow excuses which would be permissible in a criminal prosecution based on the statute. If the doctrine rests on a foundation of deference to the legislative will, to hold otherwise would run contrary to the entire basis of the theory by creating civil liability for conduct which would not be found criminal. Therefore, if a criminal statute has been construed to permit the broad excuse that under all the circumstances, it was proper to engage in the proscribed conduct, negligence per se theory should permit the same exc-

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164. See, e.g., Gregory, supra note 1, at 632.
165. An example of a statute which has been construed to permit a broad excuse in a criminal prosecution is Cal. Veh. Code § 21650 (West 1971), which requires that drivers use the right half of the roadway except under specified circumstances. Though its language does not imply such an excuse, the statute has been construed to permit a consideration of all the circumstances before a person will be found guilty for its violation. Zohner v. Sierra Nevada Life & Casualty Co., 114 Cal. App. 85, 299 P. 749 (1931). If all circumstances will be considered before one will be found criminally responsible, the same should be true in a negligence action in which a party has allegedly violated the statute, and the decisions bear this out. See Uhl v. Fertig, 56
cuse in the negligence action. The theory has no difficulty recognizing the excuse since it would be equally cognizable in a criminal prosecution based on the statute.

The theory also should not have any difficulty limiting liability when the statute invoked in the case requires intent in order for a criminal prosecution to succeed. Suppose a criminal statute prohibits persons from knowingly operating unfenced construction sites. In the negligence case, the court must first determine whether the statute sets a standard of care. This will require asking what conduct the statute was intended to prohibit. In this case, the answer would have to be that the proscribed conduct was the knowing failure to fence the construction site. The intent portion of the statute would thus become a part of the standard of care applicable to the negligence case, and if the criminal prosecution would not succeed because of lack of intent, neither would the negligence action. This is therefore another instance in which negligence per se theory could limit liability in accordance with the limitations on defendant's criminal responsibility.

Can the negligence per se doctrine tolerate excuses beyond those which would be cognizable in a criminal prosecution based on the statute? As already indicated, the purpose of the negligence per se doctrine is to defer to and help promote the legislature's policy judgment when it has implicitly established a standard of care by providing criminal penalties for certain conduct. If that is the case, then a court's

Cal. App. 718, 206 P. 467 (1922) (defendant swerved left across the center line to avoid plaintiff's car); and Lowe v. City of San Diego, 8 Cal. App. 2d 440, 47 P.2d 1083 (1935) (defendant crossed the center line to avoid hitting a child who had suddenly come into his path).

166. See supra notes 52-62 and accompanying text.

167. It is conceivable that a court might construe the statute only as intended to protect the public from the evil of unfenced construction sites. This more general interpretation of the statute would have to be suspect, however, because the legislature in truth will not have determined that all persons who have unfenced construction sites are criminally responsible, but only those who knowingly fail to put up fences. Were the court to construe the intent in this broader manner, it would be providing for civil liability far more often than the statute creates criminal responsibility. If the basis of negligence per se is deference to the will of the legislature, such a result is clearly not called for.

168. This example is not technically one of excuse in either the criminal prosecution or the civil action. In the former, intent is an element of the prosecution's prima facie case, and in the latter, intent will be plaintiff's burden to prove, since it relates to the duty and breach elements of the prima facie case.

169. See supra notes 47-48 and accompanying text.
recognition of any excuses which would not be cognizable in
criminal prosecutions based on the statute should necessarily
be suspect because if such excuses are recognized, the court
will be failing to hold civilly liable some persons who have en-
gaged in the precise conduct addressed by the legislature. But
excuses in negligence cases should not be limited to those
which would be permitted in the criminal prosecution. To so
limit excuses would arguably alter the entire nature of the
negligence action, since many of the criminal statutes involved
in these cases do not contain any "sciente" or "mens rea"
requirement. If no "fault" is required, with the only ques-
tion being whether the party did the proscribed act and was a
substantial factor in bringing about the harm, then the so-
called negligence case begins to look more like a strict liability
action.

For example, driving under the influence of alcohol is
often punished without regard to the intent of the defen-
dant. If an individual is prosecuted for driving under the

170. Thayer, supra note 1, at 335; Note, Nonfault Liability for Vehicle Equip-
ment Failures, 23 STAN. L. REV. 1112, 1127 (1971). See also Holdych, supra note 3, at
916.

171. It is interesting that the negligence per se doctrine has sometimes been
confused with strict liability. See Note, supra note 170. However, even given a strict
interpretation, the doctrine does not create liability without fault. Courts applying
the negligence per se doctrine may adopt a criminal standard under some notion that
they are compelled to do so out of deference to the legislature, but only do so after
deciding that the statute creates a standard of care the breach of which can be con-
sidered negligence. As Thayer asserted, such cases are still negligence cases. Thayer,
supra note 1, at 321-22. Presumably, defenses available in negligence cases could still
be asserted, and other doctrines applicable to negligence but not to strict liability
theory would similarly apply.

Nevertheless, the less fault that is required before one will be held liable, the
more these cases begin to look like strict liability cases, and perhaps this is what the
Michigan Supreme Court had in mind when it stated:

[T]he judge-made rule of negligence per se has still proved to be too
inflexible and mechanical to satisfy thoughtful commentators and
judges. It is forcefully argued that no matter how a court may attempt
to confine the negligence per se doctrine, if defendant is liable despite
the exercise of due care and the availability of a reasonable excuse, this
is really strict liability, and not negligence.


172. See, e.g., CAL. VEH. CODE § 23152 (West 1971 & Supp. 1982), replacing §
23102, which was similar in content. In People v. Keith, 184 Cal. App. 2d Supp. 884, 7
Cal. Rptr. 613 (1960), the older code section was construed as imposing liability with-
out regard to the innocence of the defendant in becoming intoxicated. See also Peo-
ple v. Baxter, 165 Cal. App. 2d 648, 332 P.2d 334 (1958), which spells out the ele-
ments of the offense solely in terms of acts, with no mention of scienter.
influence, he cannot excuse himself by claiming that a sudden emergency required him to drive. That excuse would not succeed because a legislative determination that this offense requires no mens rea is a determination that to do the proscribed act poses such a serious public danger that it will not be permitted without criminal penalty, even where it might otherwise be "reasonable" to engage in the conduct.\textsuperscript{173} Suppose, however, that following a two-car collision, the injured driver brings a negligence action against the driver of the other car. Suppose further that as a matter of common law negligence, defendant was exercising due care in deciding to drive since his child had suddenly become seriously ill and there were no reasonable alternative means of obtaining medical assistance than to drive him to the hospital. However, plaintiff alleges that defendant was negligent because he was driving under the influence of alcohol, in violation of the statute. If defendant claims that he was only on the road because of the sudden emergency, should plaintiff be permitted to recover substantial damages by raising defendant's statutory violation? To be consistent with the legislative determination concerning public safety, and to grant the degree of deference to the legislative standard which negligence per se requires, it would seem improper to allow the defendant to claim the excuse, since that excuse could not be used in a criminal prose-

\textsuperscript{173} See United States v. Woods, 450 F. Supp. 1335, 1349 (D.Md. 1978), and United States v. Barner, 195 F. Supp. 103, 108 (D.D.C. 1961), both of which declare the act of driving under the influence to be so inherently dangerous as to be "malum in se."

It is possible that in a criminal prosecution based on the statute, defendant could raise the defense of necessity. See generally W. LAFAYE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 50 (1972). One of the criteria for satisfying the defense is that under the circumstances, the harm which would result from complying with the statute is greater than that which results from noncompliance. Id. Determination of that issue requires a balancing of harms which is normally up to judge and jury in the criminal action. However, if the legislature has already weighed those factors and incorporated them, explicitly or implicitly, into the statute, then the availability of the defense will depend on the legislative judgment. On this basis, it is unclear whether necessity could be a defense to a strict liability crime, since it may be that with such offenses, the legislature has implicitly determined that the harm from noncompliance will always be greater than that from compliance.

In any event, if the necessity defense is available in the criminal prosecution, it should be similarly available in the negligence action. And if this is true, cases which have held that the statutory violator cannot be excused where he claims that his conduct was safer than that required by the statute are wrongly decided. See infra notes 192-94 and accompanying text.
But at the same time, something seems wrong with that result. Although some deference must be shown to the legislature’s policy of deterring driving while intoxicated, this is not the only policy which a court might wish to consider in determining liability in a negligence case. For example, a court might wish not only to discourage intoxicated persons from driving, but also to encourage attempts to render needed assistance to sick persons. Yet, if negligence per se requires that statutory standards be followed to the extent that only those excuses be recognized which would be available in criminal actions, then the court deciding the negligence case would have to rule defendant’s evidence about the sick relative inadmissible. Moreover, if defendant admits to being intoxicated, the court will also be forced to direct a verdict for the plaintiff on the issue of breach of the duty, making recovery a near certainty.

The same untenable result would be mandated in a case in which it is the plaintiff who has violated the criminal statute. Suppose that a driver who knows her car’s tail-lights are not working nevertheless undertakes to drive her child to the hospital in an emergency. If the statute imposes criminal responsibility without fault for driving a car without functioning tail-lights, then negligence per se would require the refusal to admit evidence of the excuse in a negligence action filed following an accident in which the plaintiff is injured by a negligent defendant. In a jurisdiction which adheres to the all-or-nothing contributory negligence rule, the court might even feel compelled to take the case from the jury and direct a verdict for defendant.

Fortunately, even jurisdictions which otherwise adhere to the doctrine of negligence per se have not interpreted it so strictly as to refuse to permit an excuse in cases in which the party is faced with a sudden emergency not of his own mak-

174. If as in the hypothetical, the driver were the parent of the sick child, the law might even impose a duty to seek immediate assistance for the child.
175. The evidence would be inadmissible because it would not be relevant to the action once the excuse which the conduct addressed was deemed inapplicable. See supra notes 56-57 and accompanying text.
176. The directed verdict might be called for because the violation itself is established and plaintiff will have offered no evidence to support a cognizable excuse. The violation will therefore be negligence.
ing, even where the violator would be found criminally responsible. Exactly why these jurisdictions have backed away from what would arguably be the result mandated by the negligence per se doctrine is a matter for speculation. Perhaps these courts realize that a refusal to recognize some excuses in cases such as those we have just discussed would so alter the negligence action as to render it in many ways the equivalent of a strict liability case. Nevertheless, if a criminal statute imposes responsibility without fault, courts deciding negligence cases based on the statute are departing from the basis of the theory when they permit excuses which would not be available in criminal prosecutions.

177. Morris, supra note 1, at 32-33. However, in 1950 James wrote that some states still required that the court be able to find an implied exception to the statute in order to permit excuses to be recognized. James, supra note 1, at 117 n.74 (citing McDowell v. Federal Tea Company, 129 Conn. 455, 23 A.2d 512 (1942), and Andrew v. White Line Bus Corp., 115 Conn. 464, 161 A. 792 (1932)). RESTATEMENT (SECOND) OF TORTS § 288A(2)(d)(1965) would permit the emergency excuse. See Statutory Violation, supra note 3, at 557, noting recognition of the excuse.

It is not absolutely clear that the hypotheticals posed raise the traditional "sudden emergency" kind of case. The broad contours of that excuse are not clear. In Tedla v. Ellman, 280 N.Y. 124, 19 N.E.2d 987 (1939), plaintiff and her brother were walking on the right side of a highway in violation of a statute which required pedestrians to walk on the left side, facing oncoming traffic. They were struck by defendant's vehicle. Facing the argument that plaintiff and her brother were contributorily negligent per se, plaintiff argued that a custom which pre-dated the statute permitted walking on the right when traffic coming from behind was much lighter than oncoming traffic. A later New York case asserted that these facts involved an emergency situation, a questionable construction. See Nielson v. City of New York, 38 A.D.2d 592, 328 N.Y.S.2d 698 (1971).

More commonly, emergency cases involve situations such as that posed by the Illustration to Clause (2)(d) of RESTATEMENT (SECOND) OF TORTS § 288A comment h, illustration 5 (1965). In that Illustration, a driver violates a criminal statute by crossing the center line of a highway, but only when a child suddenly darts out from the sidewalk into the driver's path. For a similar fact pattern, see Lowe v. City of San Diego, 8 Cal. App. 2d 440, 47 P.2d 1083 (1935). However, in another case a park officer crossed the center line of a road to avoid pedestrians because he was in a hurry to reach another part of the park to break up a fight. The court held that the facts did not raise the "sudden emergency" excuse. Poplawski v. Huron Clinton Metropolitan Auth., 78 Mich. App. 644, 653, 260 N.W.2d 890, 895 (1977). Although that case (and the hypotheticals posed in the text) do not fit the classic "sudden emergency" fact pattern, they are at least somewhat similar, since in all the cases, the violator was acting in what he considered an emergency situation. The difference is that the emergency was not on the road itself.

178. Morris, supra note 1, at 32. See supra note 170 and accompanying text.

179. In one South Carolina decision, the court went so far as to say that a party is bound to violate a statute in an emergency situation if to do so will avoid inflicting injury. Walker v. Lee, 115 S.C. 495, 106 S.E. 682 (1921). Plaintiff collided with defendant when he stayed on his side of the center line of the highway, in compliance with
The emergency excuse is compelling in a negligence case because it carries with it an element of involuntariness or non-fault on the part of the violator. Negligence per se jurisdictions have adopted other excuses which contain that same element. Persons have been excused when they are able to demonstrate that compliance with the statute would have been impossible, when noncompliance was caused by circumstances over which the violator had no control, or when the violator neither knew nor should have known of the occasion for compliance. In each of these cases, the actor is excused because he or she cannot be held at fault for violating the statute. It is easy to see how even courts adhering to negligence per se would find it difficult to hold these parties responsible. But that result would be mandated by the theory if the statutes would not permit the excuses in criminal prosecutions.

Negligence per se theory has even greater difficulty accommodating excuses beyond the kinds already discussed, and could lead to other unjust results if strictly followed. A good example is provided by the facts of Zeni v. Anderson. On a winter morning in the upper Michigan peninsula, the plaintiff, a nurse, was walking to work. A state statute required that when sidewalks are provided, it is unlawful to walk on the main traveled portion of the highway. It also provided that when there are no sidewalks, a pedestrian must, when practicable, walk on the left side of the highway, facing traffic.

a statute. The court, however, was unwilling to say that he was free of contributory negligence for complying with the statute. He should have avoided the collision by swerving to the left. See Note, Negligence Per Se in South Carolina: The Effect Given in Civil Actions for the Violation of Criminal Statutes, 11 S.C.L. Q. 207, 211-12 (1959).

180. See Statutory Violation, supra note 3, at 557; James, supra note 1, at 117; Restatement (Second) of Torts § 288A (1965) takes the same position.

181. James, supra note 1, at 117. This excuse may overlap with the "sudden emergency" excuse. See supra note 177.

182. Statutory Violation, supra note 3, at 557-58; Statutory Excuse, supra note 3, at 109-10. Restatement (Second) of Torts § 288A(2)(b)(1965) would also allow the excuse.

183. As already noted, not all such statutes impose criminal responsibility without fault, and where they do not, there are no theoretical difficulties in a negligence per se jurisdiction recognizing such excuses. See supra notes 166-68 and accompanying text.


Because the sidewalk was snow-covered, and because compliance with the statute would have required her to walk across the street twice to get to her job, plaintiff chose instead to walk on the right side of the highway, along a “well-used pedestrian snowpath, with her back to oncoming traffic.” While walking, plaintiff was struck by the right-hand (passenger) side of a car driven by defendant, and was seriously injured. Testimony at trial was also offered to prove that it was common for nurses to reach the hospital by way of this footpath on the roadway, and that it was actually safer to walk there than on the sidewalk. The jury apparently found that the plaintiff had violated the statute, but it still ultimately gave a verdict for plaintiff on grounds of last clear chance.

The Michigan Supreme Court took up the issue of violations of criminal statutes in negligence cases, holding that the violation creates a “prima facie” showing of negligence, but that the violator could rebut the prima facie case by demonstrating an excuse which the jury found to be proper under the circumstances. It is important to characterize the excuse which plaintiff was asserting in this case, and to differentiate it from the involuntary or non-fault types of excuses we have been considering. Here, there is no question about the voluntariness of the act which constituted the statutory viola-

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187. Testimony in fact indicated that plaintiff had previously slipped when attempting to walk on the sidewalk, and that another person had required hospitalization after also falling on the sidewalk. Id.
188. The trial judge’s instructions provided that the jury should decide whether the sidewalks were “provided” according to the statute, and then whether it was practicable for the plaintiff to walk on the left side of the highway, facing oncoming traffic. Id. at 124-25, 243 N.W.2d at 273-74.
189. The court seems confused here as to the meaning of “prima facie case.” See supra notes 74-75 and accompanying text.
190. 397 Mich. at 128-29, 243 N.W.2d at 276. When the court says that it is up to the jury to decide what is an “adequate excuse,” this has a very different meaning than it would if the jurisdiction adopted a negligence per se approach to the cases. Here, the court seems only to mean that the jury will be permitted to hear all the circumstances of the case and decide whether the facts raised by the plaintiff to explain the statutory violation adequately overcome the effect which the violation has (probably in creating a presumption of negligence on her part). Were this a negligence per se jurisdiction, it would not be proper to say that the jury should determine what is an “adequate excuse” since to give this power to the jury too severely restricts the judge’s power to rule that as a matter of law, certain types of excuses are cognizable and other types are not. As will be shown infra, the approach taken in Zeni permits far more facts to be heard and considered by the jury than would be permitted under a negligence per se rule.
tion. The facts make it plain that the plaintiff chose to walk on the roadway rather than on the sidewalk, and that she chose to walk on the right side, rather than the left side. Therefore, the violation of the statute cannot be called involuntary.\footnote{191} On the other hand, the plaintiff's violation was at least partly the result of a consensus that it was less dangerous to walk where she did than on the snow-covered sidewalk, though the convenience of not having to cross the street twice was also a consideration in her action. Taking all of these factors into account, one way the excuse can be characterized is that plaintiff intentionally violated the statute because it was safer to do so than to comply, and that it was customary to do so under these conditions.

Can the negligence per se theory tolerate an excuse based on an intentional violation? This presents serious problems, since to recognize such an excuse would be to say that the trier of fact could sanction individual judgments about whether or not to abide by the statute.\footnote{192} If the legislature intended to build this kind of flexibility into the standard, it could presumably have done so. The negligence per se theory should hold that the most logical course would be to amend or repeal the statute if it does not properly account for situations in which it would be safer to take action such as that taken by the plaintiff.\footnote{193} If the theory underlying negligence per se re-

\footnote{191} The assumption here is that plaintiff's conduct in walking on the right-hand side of the traveled portion of the roadway was an act in which she voluntarily engaged. The "choice" element is much more dominant than in the emergency cases, for example, where the nature of the situation is such that the actor's conduct can almost be called instinctive rather than voluntary. Here, plaintiff decided to walk where she did for a number of reasons.

\footnote{192} This is precisely what Thayer thought to form the theoretical foundation for negligence per se:

\begin{quote}
When eminent courts... state that the breach of the ordinance is not "negligence per se," but only "evidence of negligence," and leave the question of negligence as a fact to the jury, they are doing nothing less than informing that body that it may properly stamp with approval, as reasonable conduct, the action of one who has assumed to place his own foresight above that of the legislature in respect of the very danger which it was legislating to prevent.
\end{quote}

Thayer, \textit{supra} note 1, at 322 (footnotes omitted).

\footnote{193} See Conrad \textit{v.} Consolidated Ry., 240 Ill. 12, 88 N.E. 180 (1909), criticized in Unreasonable Standards, \textit{supra} note 3, at 289 ("attitude of the court implies obedience to the ordinance until resulting deaths inspire its repeal is more desirable than encroachment by courts on the field of legislative action."). Amendment or repeal, however, might be very difficult to accomplish, and many persons could be harmed before the legislature finally acts to change the rule. \textit{See supra} notes 143-46 and ac-
quires that a legislative judgment about the safety of certain action be adhered to and supported, then there is no room for excusing persons who have sought to substitute their own judgment for that of the legislature. To allow individuals to do so would be the equivalent of a finding that the legislative standard at times requires unreasonable conduct. Such a determination is completely foreign to negligence per se theory since it once again injects the common law balancing process into the case, something which the adoption of the legislative judgment is supposed to dispose entirely.\(^{194}\)

The excuse asserted in Zeni may also be characterized as a claim that compliance with the statute would thwart the legislative purpose. This characterization of the excuse might be more defensible under the negligence per se theory because it is essentially a claim that the statutory purpose was the more general one of preventing pedestrians from being injured by automobiles, and that there is actually no violation of the statute when its purpose would be thwarted by strict adherence to the terms appearing on its face. While this approach may be attractive in some ways, it suffers from a serious problem of statutory interpretation, since a strained construction of the statute has to be made before it can be held not to require the very conduct which its terms unequivocally require. A good illustration of the unsoundness of this approach

companying text.

194. Whether jurisdictions adopting the negligence per se formula can recognize an excuse to the effect that the statute imposes an unreasonable standard of conduct has been the subject of much disagreement. The problem can actually work two ways. The Zeni facts may support an excuse to the effect that compliance with the statute sometimes requires unreasonably unsafe conduct. At other times, courts wrestle with the question of whether the statutory standard requires conduct which is too cautious. In Stafford v. Chippewa Valley Elec. Ry., 110 Wis. 331, 85 N.W. 1036 (1901), for example, a court examined a statute which required trains to continuously ring a bell within the municipal limits. The court found the statute unreasonable as a safety measure. A continuously ringing bell on a city street would soon cease to be a true warning device. See Unreasonable Standards, supra note 3, at 290-91.

Gregory, supra note 1, at 627, would not allow the common law evaluating process to take place once a statute has been found to set a standard of care, since to do so might result in a decision that the conduct "was not sub-standard or negligent." See supra text accompanying note 33. Morris, on the other hand, claimed that to refuse to admit evidence as to the unreasonableness of the criminal standard is wrong, since wholesale adoption of such a standard might create novel civil liability, something which courts should be careful about doing. Morris, supra note 1, at 40-41.

At base, negligence per se ceases to be negligence per se if the common law evaluating process is injected and can result in a finding that the statutory standard is either not strict enough or too strict for a particular negligence case.
Criminal Legislation

is presented by Schumacher v. City of Caldwell.\textsuperscript{196} There, an ordinance made it unlawful to permit animals to run at large in a specified area. The plaintiff's cow was electrocuted by a high voltage line managed by defendant, and defendant argued that plaintiff's violation of the ordinance constituted contributory negligence per se. However, the court found that the cow had broken away from a reasonably stout restraint, and that such a restraint was what the statute had the purpose of requiring. It thus refused to find plaintiff in violation of the ordinance. But to interpret the statute so as not to require what on its face it clearly does require is a suspect interpretation and not a sound means of avoiding the harsh effects of the negligence per se doctrine.

The allowance of excuse on the ground that compliance would thwart the legislative purpose requires a dubiously broad reading of the purpose of the legislation, and given the statute in Zeni, there is serious doubt as to whether such a broad and general construction of the statute's purpose is justifiable. It would require reading its purpose as merely to protect the safety of pedestrians, rather than to protect their safety by requiring that they walk on sidewalks or on a certain side of the street.\textsuperscript{196}

The negligence per se doctrine, then, cannot theoretically accommodate excuses which arise from intentional violations of the statutory standard, even when those excuses are based on the assertion that compliance would not be reasonable under the circumstances.\textsuperscript{197} Yet the Zeni court is quite right that the excuse raised there is worthy of consideration by the jury, and our basic concept of negligence cases is jarred by a doctrine which requires that the jury not even be permitted to hear the facts which would support the excuse.\textsuperscript{198}

Negligence per se also cannot accommodate an excuse

\textsuperscript{195} 146 Tex. 265, 206 S.W.2d 243 (1947), cited in Morris, supra note 1, at 30 n.35.

\textsuperscript{196} Concerning the problems of statutory interpretation, see supra notes 35-43 and accompanying text.

\textsuperscript{197} Another excuse falling into this category would be a violator's claim that his conduct was as safe or safer than that required by the statute, and so was an adequate substitute. See Holdych, supra note 3, at 11; Unreasonable Standards, supra note 3, at 289 (citing Nashville, Chattanooga & St. Louis Ry. v. White, 278 U.S. 456 (1929) (rejecting this excuse)).

\textsuperscript{198} See supra notes 56-57 and accompanying text.
based on official non-enforcement of the statute. Once the legislature has spoken in enacting a law, it should be no excuse that the executive chooses not to enforce it. It is still the law. An interesting example of the harshness of this result is *Day v. Pauly.* There, the plaintiff made a left turn following markings on the highway which permitted turns to the left of center of an intersection. The markings, however, were set up in a manner which permitted turns in violation of a criminal statute. Despite the fact that the plaintiff merely followed markings which had been made by a governmental authority, the court found him contributorily negligent as a matter of law, stating that "travelers are not warranted or justified in proceeding according to the direction of highway officials . . . where such directions are contrary to the express provision of the law. . . ." In this case, then, the court found that there was no room for a jury determination of whether the circumstances warranted a finding of contributory negligence; the plaintiff who followed what appeared to be lawful directions of the government was negligent as a matter of law.

In the absence of a statute, evidence supporting each of the kinds of excuses we have been considering would be relevant to a determination of the nature of the party's conduct. Yet negligence per se theory would usually seem to require the judge to rule that evidence supporting the purported excuse be excluded in these cases. If negligence doctrine developed through the application of general principles to


200. 186 Wis. 189, 202 N.W. 383 (1925), cited in Morris, supra note 1, at 29.

201. 186 Wis. at 194, 202 N.W. at 365.

202. Though the negligence per se doctrine would mandate results such as those reached in *Day v. Pauly*, some courts have used dubious means of avoiding such results. In Johnson v. Garand, 18 Ariz. App. 191, 501 P.2d 32 (1972), for example, defendant violated pavement markings which required a left turn at a certain point. Rather than turn, defendant proceeded straight for a short distance. Though the court found him negligent as a matter of law in the subsequent collision with plaintiff's car, defendant was allowed to prove that as many as 95 percent of the drivers did what he did at that intersection. The court admitted this evidence on the issue of plaintiff's contributory negligence. The jury found for defendant on the ground that plaintiff was contributorily negligent, and this result was affirmed on appeal. The result, however, is totally contrary to the underlying basis of the negligence per se doctrine.

203. See supra notes 56-57 and accompanying text.
widely varying circumstances, then the willing acceptance of legislative determinations of specific standards in place of this well-developed formula, and the exclusion of evidence which is a necessary concomitant of such a choice, substantially changes the character of the negligence action. Negligence law has always permitted the trier of fact great flexibility in determining the nature of conduct under all the circumstances. The introduction of criminal legislation should not be permitted to so change the character of the action.

That courts and even legislatures perceive the need to permit juries great flexibility in negligence cases, even when statutes are involved, is well illustrated by California's handling of violations of automobile speed laws. California has not adopted the negligence per se standard, opting instead for the establishment of a rebuttable presumption of negligence when a safety statute has been violated. This standard, however, also grants legislation substantial deference, and even requires a shift of the burden of persuasion to the violator to demonstrate that he was not negligent. While most violations of California safety legislation are so treated, speed limit violations are exempted from this procedural effect. Pattern jury instructions make this clear by providing that juries be instructed that

[t]he . . . speed limit . . . where the accident occurred . . . is . . . to be considered by you, together with all the other evidence in determining whether or not the (defendant) was negligent, but proof that a vehicle was traveling at a speed greater or less than **** miles per hour does not, in and of itself, prove that the driver of that vehicle was or was not negligent.

This is a curious rule, particularly when it is compared with the pattern instruction used when other safety statutes

204. See supra notes 130-40 and accompanying text.
206. Id.
207. Cal. Veh. Code § 40831 (West 1971) provides:
In any civil action proof of speed in excess of any prima facie limit declared in Section 22352 at a particular time and place does not establish negligence as a matter of law but in all such actions it shall be necessary to establish as a fact that the operation of a vehicle at the excess speed constituted negligence.
are involved. Why would the legislature enact a provision specifically providing that violation of a posted speed limit does not establish negligence as a matter of law, when in all other situations it is the policy of the legislature, following the lead of the courts, that statutory violations shall create a presumption of negligence shifting to the violator the burden of persuasion on that issue? One can only speculate about this question, but it is possible that the legislature recognized that even where a speed limit violation can truly be labeled a cause of the accident, juries should be free to determine the negligence issue in light of all the circumstances of the case. Courts have lent further support to the more liberal rule in speed violation cases by providing that it is error to refuse to instruct the jury that speed limit violations are merely evidence of negligence.

Thus, even in a jurisdiction which has not adopted the negligence per se standard, there is discomfort about some applications of a doctrine which would give such substantial effect to the statutory standard and so greatly impact the resolution of the negligence case. If some discomfort exists in a jurisdiction which has embraced a standard less rigid than negligence per se, then there should be even greater concern where the negligence per se doctrine has been adopted. And indeed, when one considers the results which would be mandated by negligence per se in speed limit violation cases, it


If you find that a party to this action violated . . . the (statute) . . . just read to you (and that such violation was a proximate cause of injury to another or to himself), you will find that such violation was negligence (unless such party proves by a preponderance of the evidence that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law).

This instruction is based on Cal. Evid. Code § 669 (West 1967).


213. The standard developed in Alarid v. Vanier, 60 Cal. 2d 617, 327 P.2d 897 (1958), and subsequently codified in Cal. Evid. Code § 669 (West 1967), recognizes a broad excuse whenever the violator can prove that he did what might reasonably be expected of a person of ordinary prudence, in similar circumstances, who desired to comply with the law. This broad excuse obviously goes far beyond the excuses which can be tolerated by strict adherence to the negligence per se doctrine.
becomes clear that juries will have their hands tied in any case in which it can be shown that the speed limit violation was a substantial factor in bringing about the harm. This possibility likely offended the California legislature's sense of justice, and not unreasonably so. Nevertheless, strict adherence to negligence per se theory would mandate a finding of negligence in such cases.

Other statutory violations are similarly inappropriate as conclusive on the negligence issue. If violation of the speed limit should only be some evidence of negligence, why not also include violations of traffic laws regarding signaling of turns, or prohibiting U-turns in business or residential districts? Each of these traffic laws is safety-oriented. Yet there is something about each of them which makes us feel that juries should not be tied into holding an actor negligent merely for violating them and having contributed to the damages sustained. It is hard to define precisely how these statutes give rise to such a reaction, but perhaps we are reacting to our own knowledge about the frequency with which such laws are violated, or the seeming unfairness of saddling defendants with huge liability for violating admittedly safety-oriented, but often minor, provisions. The same reaction would be justified when the adoption of negligence per se would require a court to refuse recovery to a plaintiff who has violated one of these statutes. The California solution for most statutes may not go as far as it could in granting juries their traditional power in determining breach of the standard

214. The same result has apparently been reached in Texas. See Statutory Excuse, supra note 3, at 113. The author suggests that a plaintiff cannot rely on the violation of a speed law to establish negligence, but that negligence will be measured as it would be at common law — determining whether the conduct was unreasonable.

215. Gregory took this position:

[S]uppose . . . [a motorist] violates . . . a statute specifying 45 miles per hour as the maximum speed on a certain stretch of highway. No matter how skillfully he has otherwise handled his car, he has fallen short of official statutory rules of conduct and to that extent is automatically negligent. If he becomes involved in harm arising out of risks which these statutes were designed to prevent, then he is either liable or is denied recovery, whatever the case may be.

Gregory, supra note 1, at 635.

216. See, e.g., CAL. VEH. CODE § 22107 (West 1971).

217. See, e.g., CAL. VEH. CODE § 22102 (West 1971) (U-turns in business districts); CAL. VEH. CODE § 22103 (West 1971) (U-turns in residential districts).

218. See supra note 162 and accompanying text.
of care.  Nevertheless, that approach at least recognizes both that there are situations in which the statutory violation can be no more than some evidence of negligence, and that in all other cases, an actor will be excused if he can demonstrate that he acted as would a reasonable person who desired to comply with the law.

In sum, the negligence standard thrives on the consideration of the circumstances of individual cases, but the theory underlying negligence per se does not permit consideration of those circumstances. Yet even courts adopting negligence per se have typically found ways to permit consideration of many of the circumstances which the theory cannot tolerate. A better solution would be for courts to abandon the theory and turn to one which both accords with the traditional roles of judge and jury in deciding negligence cases, and gives due deference to the legislature. That standard would be either of those which treats violations of criminal statutes as creating a rebuttable presumption of negligence. Even the briefest look at how the presumption approaches would handle these cases, including claims of "excuse," will demonstrate their fitness.

IV. AN ALTERNATIVE: THE REBUTTABLE PRESUMPTION APPROACHES

Either standard which would hold that proof of a statutory violation creates a rebuttable presumption of negligence would solve the theoretical and institutional problems from which the negligence per se standard suffers. Both presumption approaches would require taking account of the will of the legislature while at the same time permitting the trier of fact to make a determination based on all of the circumstances of the case. Moreover, the court would retain its power to determine whether a duty is owed, and if so, whether it can be defined more sharply than with the broad "reasonable person" standard. However, the balance which must be struck between competing interests is a delicate one, and the advantages and disadvantages of the two alternative versions of this standard must be outlined.

First, however, the flaws of the "mere evidence" of negli-

219. See infra notes 235-37 and accompanying text.
220. See supra note 88.
gence\textsuperscript{221} and "prima facie evidence" standards\textsuperscript{222} must be pointed out. According to the "mere evidence" approach, evidence of the statutory violation is only relevant to the negligence issue, creating at best an inference of negligence, which is of little procedural importance. The "prima facie evidence" standard does little more, assuring the non-violator only that he has met his burden of production on the negligence issue. Proof of the violation places no formal burden on the violator. Neither standard, therefore, requires the jury to give special weight to the statutory violation, and thus the jury is free to refuse to give any more weight to the violation than to any other facts bearing on the negligence issue. Because they grant no special deference to the authority of the legislature to regulate conduct through lawmaking, these standards present the opposite theoretical flaw to that presented by the negligence per se approach. While this article has mainly focused on the disadvantages of granting too much deference to the legislative standard, it has hardly been suggested that an implied legislative judgment about conduct which constitutes due care should be granted so little credence. Just as many advocates of legislative nullification would still insist that most legislation be accorded a "retentionist bias,"\textsuperscript{223} it is suggested that due deference to the legislative function requires that some onus be placed on the violator. The issue of how great an onus will now be examined.

As already indicated, there are two primary approaches to the effect of the presumption of negligence created upon proof of the statutory violation. One, the "bursting bubble" approach, views the presumption as merely shifting the burden of production on that issue, and holds that the presumption completely disappears when evidence of due care is produced.\textsuperscript{224} The other approach views the presumption as intended to effectuate important public policy, and requires a shifting of the burden of persuasion on the negligence issue. Moreover, this second approach holds that even in the light of evidence of due care, the presumption remains a part of the case.\textsuperscript{225}

\textsuperscript{221} See supra notes 64-70 and accompanying text.
\textsuperscript{222} See supra notes 71-77 and accompanying text.
\textsuperscript{223} See G. Calabresi, supra note 2, at 163-66.
\textsuperscript{224} See supra notes 80-83 and accompanying text.
\textsuperscript{225} See supra notes 84-88 and accompanying text.
The choice of which view to adopt can have an important impact on the outcome of the negligence action. This can best be demonstrated with an example. Suppose that a statute prohibits drivers from crossing the center line of a highway. Following an accident in which the plaintiff was injured when the car he was driving was struck by the defendant's car, plaintiff alleges that defendant should be found negligent for having crossed over the center line, causing the accident. Assuming that defendant does not contest the violation itself, the presumption of negligence will now operate. If the "bursting bubble" approach is adopted, defendant's burden will be to go forward with some evidence of due care; if she does not do so, a directed verdict in favor of the plaintiff on the negligence issue is almost assured. However, how difficult is it likely to be for defendant to come forward with some evidence of due care to satisfy this burden? In our example, this might not be at all difficult. Defendant might testify that she swerved to avoid hitting a child or an animal which had suddenly ventured onto the street. She might testify that the car's steering, which she had exercised care in maintaining, suddenly malfunctioned, causing her to lose control. Satisfaction of the burden of producing evidence is not too difficult in general, and in negligence actions, wherein some evidence of care can usually be found, allegedly negligent parties should be able to reach the jury in most cases. It may even

226. This possibility is posed by the Illustration to Clause (2)(d) of Restatement (Second) of Torts § 288A (1965). See supra note 177.

227. If the violation is contested, the jury will normally be asked to consider that question and reach a conclusion.

228. C. McCormick, supra note 79, § 345, at 820.

229. This is reminiscent of the excuse asserted by the defendant in Alarid v. Vanier, 50 Cal. 2d 617, 327 P.2d 897 (1958), which involved the failure of brakes. Defendant asserted that he had had his brakes checked on a number of occasions, and had no reason to know that they might malfunction.

230. See supra note 66.

231. There seems to be an inherent difference between the kind of presumptions normally referred to in the cases and the particular presumption with which we are here concerned. A typical example of the former is the presumption that a letter properly addressed and mailed is presumed to have been received in the ordinary course of the mail. See Cal. Evid. Code § 641 (West 1967). In this situation, both the basic fact (mailing) and the presumed fact (receipt in the ordinary course of the mail) are fairly concrete matters. The party against whom the presumption operates will typically have either no evidence to rebut the presumption, or he will have substantial evidence (probably to the effect that he checked the mail daily for a certain period of time and never saw the letter).
be that in presenting his own version of the facts, the plaintiff will reveal sufficient evidence of defendant’s care to dissolve the presumption of negligence. Meeting the burden of going forward, therefore, should be easy in a large number of negligence cases. Because the presumption will no longer operate at this point, the fact of the statutory violation will become but one factor for the jury to weigh in determining whether under all the circumstances, the defendant exercised due care.

Suppose, however, that in our example the court adopts the approach which shifts to the defendant the burden of persuasion on the negligence issue once the statutory violation has been proven. While it may not be difficult for defendant to avoid a directed verdict by producing some evidence of due care, the shift of the burden of persuasion will present a far more substantial obstacle to avoiding liability. Plaintiffs will therefore prevail in more cases than under the first theory.

Which of these theories best strides between the excessive weight which the negligence per se standard grants to legislation and the contempt for legislative power which the “mere evidence” and “prima facie evidence” standards exemplify? As the previous discussion should illustrate, the primary problem with the approach which shifts only the burden of pro-

The presumption of negligence, however, appears to be qualitatively different. While the basic fact (the statutory violation) can be reasonably concrete, especially if the offense consists of a simple act such as crossing the center line of a highway, the same cannot be said of the presumed fact (that the violator was negligent). The presumed fact is by its nature a legal conclusion dependent upon the particular circumstances of the case. It is not a concrete thing, and indeed that is a major part of the problem to which this entire article is addressed. Because the violator will almost always be able to present some evidence from which an inference of due care can be drawn, the presumption will likely be far more fragile than the usual kind of presumption exemplified by the letter example. Perhaps this argues for a greater procedural effect to be accorded to this particular presumption.

232. In the example of the driver who crossed the center line of the highway, the plaintiff, merely in telling his version of the facts, might divulge the fact of the child running into the road. Although plaintiff’s lawyer might foresee this possibility and seek to prevent the fact from being revealed on direct examination of the plaintiff, the information could easily be brought out on cross-examination. In such a case, the defendant could arguably be found to have met her burden of going forward with evidence without offering any case at all aside from possibly cross-examining the plaintiff.

233. This does not mean that jurors will not often grant great weight to the fact of a statutory violation. See supra note 58.

duction is that too often, that burden will be easily satisfied and the presumption will disappear. The jury will not be instructed about the presumption, evidence of the statutory violation will simply be submitted along with all the other evidence, and the weighing process will proceed as it would in any negligence action. If the flaw in the "mere evidence" and "prima facie evidence" standards is that the jury is not required to grant the statutory violation any special place in its determination of the negligence issue, then this approach to presumptions will have the same effect in those cases in which the violator can come forward with some evidence of due care. This may not be a fatal flaw, however. The violator will still have been required to come forward with some evidence of due care, which is more than is theoretically required under the two lesser standards.

The approach which requires a shift of the burden of persuasion once the violation has been demonstrated does not suffer from this problem since the onus placed on the statutory violator will be much greater, and the jury will be instructed in a manner which makes this clear.235 A problem with the standard, however, is that it raises the possibility that jurors will feel compelled to give too much weight to the statutory violation. Though such an effect is not a necessary consequence of knowing that the burden of persuasion regarding due care falls on the violator, it is unclear that juries would understand the importance of reaching a verdict which takes into account all the circumstances. This could undermine the general negligence formula and lead to the same lack of flexible standards from which the negligence per se approach suffers. In addition, shifting the burden of proof on an essential element of the negligence action works a transformation in this class of negligence cases which courts have not found necessary in other areas of negligence law. The fact that it is the legislature which has determined the nature of the duty, rather than the common law process, may not in itself justify a move away from the long-standing view that it is the party alleging negligence who must prove it.236 While a shift in the burden of persuasion is said to be required because the

235. For the California version of this instruction, see supra note 209.
236. This became firmly established in Brown v. Kendall, 60 Mass. (6 Cush.) 292 (1850).
presumption serves the important public policy of assuring that persons abide by statutory rules of conduct, the same strong policy exists with regard to judicially-developed standards of conduct. Yet the courts have been unwilling to shift the burden of persuasion in those cases, even when the evidence of negligence seems substantial.

Potential flaws can therefore be found in both “presumption” approaches. Nevertheless, either approach solves the serious problems posed by the negligence per se standard. Neither amounts to a complete abrogation of the court’s power to set the standard of care for negligence cases. The court, for example, could still determine that the imposition of a duty under the particular circumstances of the case would not be appropriate. This is particularly important where the statutory standard would impose a duty of care which would be completely absent (not merely more generally stated) at common law. As Morris declared, when courts are faced with a defendant who, absent the criminal statute, would clearly not have been civilly liable, “expanded civil duties may be—but are not necessarily—appropriate.”

The jury, too, will retain its traditional role of weighing all the circumstances and reaching a decision as to whether the duty of care was adequately discharged. Under either view of presumptions, most negligence cases involving statutes should reach the jury, as do negligence cases which do not involve statutes.

The administration of “excuses” will also become a simple matter, since the crucial issue will no longer be whether a

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237. The doctrine of res ipsa loquitur poses an interesting illustration. That doctrine establishes a set of criteria by which to measure the strength of purely circumstantial evidence of negligence. The criteria generally require a showing that this is the kind of accident which does not normally occur in the absence of negligence, and that the instrumentality of the accident was in the exclusive control of the defendant. See W. Prosser, supra note 48, § 39. If these criteria can be met, the burden of going forward with evidence is shifted to the defendant because, among other reasons, it is felt that the circumstantial evidence of negligence is so strong that the defendant should be made to come forward with at least some evidence of due care. However, only this burden is shifted; the burden of persuasion remains with the party alleging negligence.

Of course, in certain cases the courts do shift the burden of persuasion on other issues, such as causation. See, e.g., Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948). Even in these cases, however, the burden of persuasion on the negligence issue remains with the party alleging the other party’s negligence.

238. See supra note 92 and accompanying text.

239. Morris, supra note 1, at 26.
violation can be excused lest a directed verdict on the negligence issue follow, but merely whether other circumstances in the case warrant a finding that despite the violation of the statute, there was no negligence. There will be no need to derive a theory which categorizes excuses into those which imply "involuntary" violations\(^{240}\) and those involving "intentional" violations.\(^{241}\) The court will therefore be able to avoid having to make difficult decisions about whether the jury should be permitted to hear any evidence of certain excusing conditions. The party who has violated the statute will simply offer evidence of the circumstances surrounding the violation, all of which (except for those which the common law traditionally refuses to consider)\(^{242}\) will be relevant to the negligence issue. The result will be that the proper administration of "excuses" will no longer be a roadblock to the jury's ability to render a decision based on all circumstances.

V. Conclusion

Some commentators have suggested that there may be little difference between a test which declares that safety legislation should be conclusive on the negligence issue, and one which says that the violation of such a statute should create a rebuttable presumption of negligence.\(^ {243}\) This article has demonstrated that there is indeed a great theoretical difference between the negligence per se and rebuttable presumption approaches, particularly insofar as they represent divergent philosophies about the degree to which legislatively-derived standards, fixed and uniform as they are, can be effectively incorporated into negligence cases. Moreover, it should also be clear that the choice between negligence per se and rebuttable presumption will significantly affect the degree to which the jury will retain its traditional role as a weigher of all the circumstances, both tangible and intangible, in negligence cases.

The most significant result of the adoption and proper administration of either of the presumption approaches will

\(^{240}\) See supra notes 172-83 and accompanying text.

\(^{241}\) See supra notes 184-204 and accompanying text.

\(^{242}\) See supra note 19.

\(^{243}\) Morris, supra note 1, at 34-35 (referring to a fairly strict interpretation of an evidence of negligence standard); W. Prosser, supra note 48, § 36, at 201 (referring to the California standard).
be that a sound system of adjudication of negligence cases will not be rendered susceptible to the jarring changes which an increasingly active legislature often imposes. If the imposition of legislation into negligence cases is in truth wholly a matter of court control, and does not amount to abrogation of standard-setting power to the legislature, then judicial discretion should be used to accommodate the legislative will, while at the same time maintaining the delicate balance of functions which negligence cases require and on which they thrive. The dynamic process of the common law demands no less.

244. See supra note 91 and accompanying text.