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## What Does Law Have to Do With It? The Jury's Role in Cases Alleging Violations of Law, Custom and Standards

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# WHAT DOES LAW HAVE TO DO WITH IT? THE JURY'S ROLE IN CASES ALLEGING VIOLATIONS OF LAW, CUSTOM, AND STANDARDS

Barbara Kritchevsky\*

## INTRODUCTION

Rules telling people how to act come from many sources. Statutory law governs a wide range of conduct—driving an automobile, operating a business, building a home. Non-governmental standards reach just as far. Individuals run their businesses in accordance with the law, but also by observing professional standards and industry customs. A hotel owner might look to state or local law to determine how to fence the hotel pool or whether to have a lifeguard on duty.<sup>1</sup> The owner might also decide what to do by looking to industry customs or non-governmental safety guidelines, such as those a private body has issued.<sup>2</sup> A failure to comply with any type of safety standard can result in tragedy—a child might drown in a hotel's unfenced or unguarded pool. And, in any case, the child's parents are likely to argue that the hotel was negligent in failing to follow the governing standards.

But different rules of tort law control the cases and judge and jury play different roles depending on the source of the standard. The hotel operator who violated a state or local law by operating

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1. *See generally* Haft v. Lone Palm Hotel, 478 P.2d 465 (Cal. 1970) (discussing state statute and administrative regulations that required a lifeguard or warning signs at certain swimming pools).

2. *See generally* AM. NAT'L STANDARDS INST. ET AL., NO. ANSI/APSP/ICC-1 2014, STANDARD FOR PUBLIC SWIMMING POOLS (2014) (setting standards for public swimming pools); ASS'N OF POOL & SPA PROFESSIONALS, [www.apsp.org](http://www.apsp.org) [http://perma.cc/X29N-9PQ7] (offering services such as safety guidance and certification).

an unfenced pool would generally be negligent per se.<sup>3</sup> The judge would instruct the jury that the statute set the relevant duty of care, and the jury would determine only whether the hotel violated the statute and if the violation caused the child's death.<sup>4</sup> The hotel that violated industry custom or private guidelines would not be per se negligent. The jury would at most consider the custom or safety guidelines, along with other evidence, to determine whether the hotel's actions were reasonable.<sup>5</sup> The plaintiff would still have to prove all aspects of negligence, including that the defendant breached the relevant standard of care.

Courts treat the situations differently because the hotel in the first example violated the law; a legislative body<sup>6</sup> determined that

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3. An "actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect." RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 (AM. LAW INST. 2010). Not all jurisdictions recognize the doctrine of negligence per se, but it is the law in the "strong majority" of jurisdictions. *Id.* § 14 reporters' note at 163.

4. See *infra* note 181 & text accompanying note 182 (discussing jury instructions in negligence-per-se cases); *Wendland v. Ridgefield Constr. Servs. Inc.*, 439 A.2d 954, 956 (Conn. 1981); David P. Leonard, *The Application of Criminal Legislation to Negligence Cases: A Reexamination*, 23 SANTA CLARA L. REV. 427, 448-50 (1983) (explaining jury's limited role in negligence-per-se cases).

5. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 13 cmt. e (AM. LAW INST. 2010); see *infra* text accompanying notes 255-56 (discussing jury instructions on noncompliance with custom). Custom includes standards that private organizations promulgate and government agencies' recommendations. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 13 cmt. e. For a general discussion of the rule of custom in negligence cases, see DAN B. DOBBS, *THE LAW OF TORTS* §§ 163-164 (2000).

6. Courts generally equate all sources of law in applying the doctrine of negligence per se. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 cmt. a (AM. LAW INST. 2010); see also DOBBS, *supra* note 5, § 134, at 316 (noting that "the negligence per se rule may apply to any statutory instrument, including ordinances and administrative regulations" (footnotes omitted)); RICHARD A. EPSTEIN, *TORTS* § 6.4, at 147 (1999) ("Statutes also include the welter of administrative regulations and ordinances issued by federal, state, and local governments on matters of health and safety."); *infra* text accompanying notes 162-64. Courts also find that private standards that a legislative body has ratified give rise to negligence-per-se liability. See *infra* Part II.D.

As Epstein's statement suggests, most courts conclude that state and federal laws and regulations have the same negligence-per-se effect. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 cmt. a; see Barbara Kritchevsky, *Tort Law is State Law: Why Courts Should Distinguish State and Federal Law in Negligence-Per-Se Litigation*, 60 AM. U. L. REV. 71, 84 (2010). That does not mean that the conclusion is correct. Violations of federal law should not have negligence-per-se effect under state tort law because that allows federal standards to alter a state's common law and leads to the covert federalization of state tort law. *Id.* at 123-29. By the same token, there are compelling

safety required that the pool be fenced or a lifeguard be on duty. There was no such legislative judgment in the second case, so the defendant is not negligent per se.<sup>7</sup> Neither the case law nor commentary offers a clear explanation of why the law treats the situations differently, however. Why should a legislative body's determination that safety requires certain precautions bind a jury, but not an industry's custom or the directives of a private standard-setting organization? Why should experts' safety judgments carry less weight than those of a generalist law-making body?

The rationale for the difference is not self-evident. The current law of negligence per se stems from cases that found individuals who violated industry customs per se negligent.<sup>8</sup> Negligence per se evolved to apply only to individuals who violated legal standards, but the cases and commentary give no clear explanation for the change.<sup>9</sup> Moreover, the distinction between law and custom is only partial. The law treats compliance with law and custom the same when a defendant claims that compliance with accepted standards shows due care.<sup>10</sup> Law and custom also receive the same treatment in related areas of the law. Constitutional tort doctrine recognizes that custom can have the force of law, and that custom may be a more potent regulator of conduct than the law on the books.<sup>11</sup> Nonetheless, there appears to be no

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reasons to treat ordinances, regulations, and statutes differently in negligence-per-se litigation. *Id.* at 89-91.

7. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 13 cmt. e (stating that the violation of a private rule or standard does not implicate the Restatement provisions on negligence per se "because it is issued by a private body"); *Id.* § 13 cmt. c (treating standards in the same manner as custom); *Griglione v. Martin*, 525 N.W.2d 810, 812 (Iowa 1994).

8. See *infra* Part I.A.

9. See *infra* Part I.B.

10. In both cases, compliance is relevant to the exercise of due care, but not determinative. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §§ 13(a), 14 (AM. LAW INST. 2010) (stating that compliance is only relevant to the jury's determination, it is not determinative); see *infra* text accompanying note 243.

11. See *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 168 (1970) (explaining that custom can have "the force of law"); *Nashville, Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362, 369 (1940) ("Deeply embedded traditional ways of carrying out state policy . . . are often tougher and truer law than the dead words of the written text."). See generally Myriam E. Gilles, *Breaking the Code of Silence: Rediscovering "Custom" in Section 1983 Municipal Liability*, 80 B.U. L. REV. 17 (2000). The Third Restatement recognized that "[c]ustom plays a powerful role" in other areas of the law, as it can be the source of legal obligations in international law and an implied term in contracts under contract law. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 13 cmt. a (AM. LAW INST. 2010).

analysis as to why a defendant who does not take customary safety precautions may argue that his actions were reasonable, while one who breaks the law may not.<sup>12</sup>

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12. Early commentary actively debated the justifications for imposing tort liability on individuals who violated criminal standards. See generally Charles L.B. Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361 (1932); William P. Malburn, *The Violation of Laws Limiting Speed as Negligence*, 45 AM. L. REV. 214 (1911); Clarence Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1933) [hereinafter Morris, *The Relation of Criminal Statutes*]; Ezra Ripley Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317 (1914). There was otherwise very little academic discussion of negligence per se in the years preceding the 1965 enactment of the Second Restatement. See Leonard, *supra* note 4, at 427 (noting in 1983 that there was little theoretical analysis of the issue after the early 1950s). Professors Fleming James and Clarence Morris wrote major articles developing this area in the years between the publication of the First and Second Restatements. See generally Fleming James, Jr., *Statutory Standards and Negligence in Accident Cases*, 11 LA. L. REV. 95, 104-05 (1950); Clarence Morris, *The Role of Administrative Safety Measures in Negligence Actions*, 28 TEX. L. REV. 143 (1950) [hereinafter Morris, *The Role of Administrative Safety Measures*]; Clarence Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21 (1949) [hereinafter Morris, *The Role of Criminal Statutes*].

There continued to be relatively little scholarly discussion of negligence per se in the years between the Second and Third Restatements. There were, however, some notable contributions to the literature. See generally Caroline Forell, *Statutory Torts, Statutory Duty Actions, and Negligence Per Se: What's the Difference?*, 77 OR. L. REV. 497 (1998); H. Miles Foy, III, *Some Reflections on Legislation, Adjudication, and Implied Private Actions in the State and Federal Courts*, 71 CORNELL L. REV. 501 (1986); Leonard, *supra* note 4; Harvey S. Perlman, *Thoughts on the Role of Legislation in Tort Cases*, 36 WILLAMETTE L. REV. 813 (2000); David E. Seidelson, *The Appropriate Judicial Response to Evidence of the Violation of a Criminal Statute in a Negligence Action*, 30 DUQ. L. REV. 1 (1991); Paul Sherman, *Use of Federal Statutes in State Negligence Per Se Actions*, 13 WHITTIER L. REV. 831 (1992); Paul Yowell, *Judicial Discretion in Adopting Legislative Standards: Texas's Solution to the Problem of Negligence Per Se?*, 49 BAYLOR L. REV. 109 (1997). Most of the articles that discussed negligence per se at length, however, focused on the application of the doctrine in specific substantive areas. See, e.g., Kenneth S. Abraham, *The Relation Between Civil Liability and Environmental Regulation: An Analytical Overview*, 41 WASHBURN L.J. 379 (2002); James M. Beck & John A. Valentine, *Challenging the Viability of FDCA-Based Causes of Action in the Tort Context: The Orthopedic Bone Screw Experience*, 55 FOOD & DRUG L.J. 389 (2000); Sheila G. Bush, *Can You Get There From Here?: Noncompliance with Environmental Regulations As Negligence Per Se in Tort Cases*, 25 IDAHO L. REV. 469 (1989); Andrew E. Costa, *Negligence Per Se Theories in Pharmaceutical & Medical Device Litigation*, 57 ME. L. REV. 51 (2005).

Perhaps due to the publication of the Third Restatement, there has been a renewed interest in the last decade. For recent commentary, see Robert F. Blomquist, *The Trouble with Negligence Per Se*, 61 S.C. L. REV. 221 (2009); Mark A. Geistfeld, *Tort Law in the Age of Statutes*, 99 IOWA L. REV. 957 (2014); Kritchevsky, *supra* note 6; Barbara Kritchevsky, *Whose Idea Was It? Why Violations of State Laws Enacted Pursuant to Federal Mandates Should Not Be Negligence Per Se*, 2009 WIS. L. REV. 693; Aaron D. Twerski, *Negligence Per Se and Res Ipsa Loquitur: Kissing Cousins*, 44 WAKE FOREST L. REV. 997 (2009), and other articles published in Issue One of Wake Forest's Symposium, *Third Restatement of Torts*, 44 WAKE FOREST L. REV. 877 (2009).

The unquestioning acceptance of the fact that violations of law and custom are different prevents courts from considering what the law of custom can teach about the proper reach of the doctrine of negligence per se. Reasons for not giving violations of custom negligence-per-se effect also apply to violations of law. Statutes, like non-legal standards, may reflect outdated thinking or be ill-suited to specific situations. The different treatment of violations of law and custom should also direct attention to the reasons underlying negligence per se. The different treatment of law and non-legal standards does not logically follow, for example, if negligence per se aims to substitute expert judgment on how to undertake a risky activity for a jury's uneducated assessment.<sup>13</sup> It makes sense to treat violations of law differently from violations of private safety guidelines only if the legislative judgment is key, if the legislature intended its rules to alter the law of torts.<sup>14</sup>

This history of negligence per se also highlights another problem with the doctrine. The current law of negligence per se developed against changing perceptions of the jury's role in negligence litigation. The early cases treated violations of law, custom, and court-made rules as negligence per se because courts found that juries could not properly approve of conduct that violated any of those standards.<sup>15</sup> Courts are now much more reluctant to take the negligence question from the jury.<sup>16</sup> Courts recognize that individual cases present unique issues. Those differences counsel against the imposition of a set standard of conduct, and support allowing the jury to assess the reasonableness of any individual's conduct.<sup>17</sup> Courts have not, however, considered how this recognition applies to negligence-per-se cases.

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13. See Morris, *The Role of Administrative Safety Measures*, *supra* note 12, at 147 (invoking this rationale to support instructing jurors that violations of administrative safety rules is negligence as a matter of law).

14. One rationale for negligence per se has been the assumption that legislatures intended to impose such liability. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 220-21 (W. Page Keeton ed., 5th ed. 1984).

15. See *infra* Part I.B.

16. See *infra* text accompanying notes 142-48 (discussing the Third Restatement position).

17. See *infra* text accompanying notes 105-14 (explaining the move away from treating violations of judge-made rules of conduct as negligence per se).

The doctrine of negligence per se has become more potent as tort law generally allows juries increased discretion. The doctrine's reach has broadened and become more rigid even as it operates against a backdrop of increased flexibility in tort adjudication. This Article argues that the doctrine of negligence per se should narrow in reach and become more flexible in operation better to accord with the jury's current role in tort litigation. A better course of action would be to return to history and to again equate violations of law and custom as the law has developed—by treating violations of law as evidence of negligence, not negligence in itself.

This Article discusses tort law's evolving treatment of violations of law and non-legal standards and explains how the history shows the need to restrict the reach of negligence per se. Part I of the Article discusses the origins of the negligence-per-se doctrine in non-statutory cases and explains how it evolved to apply only to violations of positive law. Part II addresses the current law of negligence per se and courts' current treatment of violations of law, custom, and non-legal standards. Part III explains how courts hinge the negligence-per-se question on the legal status of the standards the defendant violated while failing to apply this rule in a logical fashion or explain why the legal status of the standard should be determinative. Part IV explains how the reasons that courts do not give violations of custom negligence-per-se effect also apply to violations of law and inform the doctrine of negligence per se. Courts that are unwilling to abolish the doctrine should apply it more flexibly, in a way that better accords with the modern role of the jury.

Negligence per se does not simply ease a plaintiff's burden of proving negligence. It alters the contours of a negligence claim and changes the roles of judge and jury.<sup>18</sup> A court should not take this step unless it can confidently say that the legislature that enacted a legal standard intended it to carry that result, something it cannot do in the presence of legislative silence.<sup>19</sup> Juries should

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18. See *infra* text accompanying notes 453-60. See Leonard, *supra* note 4, at 429 (saying that negligence per se “amounts to an abandonment of judicial function in negligence cases” and “requires an abandonment of the traditional sphere of jury power in these so fact-oriented cases”).

19. See *infra* Part III.C. Congress, on the other hand, cannot alter the state common-law of negligence, so federal legislation should not have negligence-per-se effect. See Kritchevsky, *supra* note 6, at 118-19.

decide negligence claims absent legislative mandates to the contrary.

## I. NEGLIGENCE PER SE AND CUSTOM: THE COMMON ORIGIN

Negligence per se did not start with cases involving statutory violations. The doctrine originated in cases involving violations of custom and quickly came to apply to violations of statutes and judicially-imposed standards of conduct.<sup>20</sup> The early cases did not distinguish violations of law and custom. They used the term “negligence per se” to condemn conduct that a court determined was so imprudent that no reasonable jury would accept it.<sup>21</sup> Different sources could establish which conduct merited this condemnation.<sup>22</sup> Custom, common law, and statutes could all set standards of conduct that established a legal duty to prevent harm.

### A. The Common Origins

The first negligence per se case<sup>23</sup> used the term to refer to a violation of custom; there was no statutory violation. The case, the Pennsylvania Supreme Court’s decision in *Simpson v. Hand*,<sup>24</sup> found that the defendant acted negligently by anchoring a ship at night in a heavily-navigated waterway without the customary warning lights.<sup>25</sup> The court explained that it was “a custom of the river” to display lights on very dark nights.<sup>26</sup> Even though “there is no positive law to enforce it,” the failure to comply with the

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20. There is no clear history of the early days of the doctrine. See DOBBS, *supra* note 5, § 135, at 319 (stating that “[t]he history of the negligence per se rule seems not to have been written”). For a detailed study that provides extensive commentary on the cases that were key to the development of negligence per se, see Blomquist, *supra* note 12.

21. See Pa. R.R. Co. v. Beale, 73 Pa. 504, 509-10 (1873).

22. “The question of negligence is one for the court where the jury could not, as rational beings, decide it otherwise than as the court does; or where there is a breach of a statute or city ordinance.” H.I. D’Arcy, *In What Sense is Negligence a Mixed Question of Fact and Law?*, 2 CENT. L.J. 810, 813 (1875).

23. *Simpson v. Hand*, 6 Whart. 311 (Pa. 1841), discussed in Blomquist, *supra* note 12, at 225-26 (2009). *Simpson* is the only case that Westlaw lists as using the term “negligence per se” before 1850.

24. 6 Whart. 311 (Pa. 1841).

25. *Id.* at 324-25.

26. *Id.* at 324.



custom courted disaster because an approaching vessel would expect others to conform to the custom.<sup>27</sup> The court said that it could not consider the omission of a precaution “so imperiously demanded by prudence” as anything other than “negligence per se.”<sup>28</sup>

Cases in the same time period began also to look at statutory violations as evidence of negligence. The first case that found a defendant negligent for violating a statute, *Ernst v. Hudson River Railroad Co.*,<sup>29</sup> considered both customary and statutory obligations.<sup>30</sup> The suit was a wrongful death action to recover for the death of a person who was hit by a train.<sup>31</sup> The plaintiff argued that the train operator failed to give sufficient warning of the train’s approach.<sup>32</sup> The court held that the defendants misled the deceased by failing to show a flag at the crossing “in accordance with the uniform custom” and by illegally approaching the highway without sounding a bell.<sup>33</sup> Although the court did not use the term “negligence per se,” it explained that the railroad’s conduct was “in open defiance” of a statute enacted to protect travelers, and said that the law did not favor those who violated its mandates.<sup>34</sup> The duty was “plain and absolute.”<sup>35</sup> Other early cases emphasized that a person who violated a statutory obligation was per se negligent. An 1876 Alabama Supreme Court decision that found a statutory violation to be negligence per se stated it was an

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27. *Id.* The court explained that the presence of a custom generated an expectation regarding how others would act, and this expectation would not be present absent the custom. *Id.*

28. *Id.* Two other early cases discussed negligence per se in terms of whether the defendant had violated a custom. See *Innis v. Steamer Senator*, 1 Cal. 459, 459-60 (1851) (relying on *Simpson* in a ship collision case); *Sparks v. Steamer Saladin*, 6 La. Ann. 764, 764-65 (1851) (distinguishing *Simpson* because there was no failure to conform to custom); see also Blomquist, *supra* note 12, at 226-27.

29. 35 N.Y. 9 (1866).

30. See Blomquist, *supra* note 12, at 228 (discussing *Ernst* as the first such case). Blomquist notes that two earlier cases considered statutory violations but did not impose liability. *Id.* (discussing *Langlois v. Buffalo & Rochester R.R. Co.*, 19 Barb. 364 (N.Y. Gen. Term 1854), and *Morse v. Rutland & Burlington R.R. Co.*, 27 Vt. 49 (1854)).

31. *Ernst*, 35 N.Y. at 25.

32. *Id.* at 26.

33. *Id.* at 28.

34. *Id.* at 28-29.

35. *Id.* at 35. Blomquist notes a previous New York case that rejected the idea that violation of a statute would have tort law effect. Blomquist, *supra* note 12, at 229 n.44 (discussing *Brown v. Buffalo & State Line R.R. Co.*, 22 N.Y. 191 (1860), and *DOBBS*, *supra* note 5, §132, at 319 n.2).

“axiomatic truth, that every person, while violating an express statute, is a wrongdoer, and, as such, is *ex necessitate*, negligent in the eye of the law.”<sup>36</sup>

Other cases of the era explained that a person who violated a clear legal duty that courts established through common law development was *per se* negligent. Cases used the term to refer to conduct that the court thought was clearly dangerous, such as sticking an arm out of a moving vehicle.<sup>37</sup> An 1873 Pennsylvania case declared: “There never was a more important principle settled than . . . the fact of the failure to stop immediately before crossing a railroad track, is not merely evidence of negligence for the jury, but negligence *per se*, and a question for the court.”<sup>38</sup> Courts applied various common-law rules of negligence, such as the rules requiring an individual to stop, look, and listen at a railway crossing and mandating that a driver be able to stop within the range of the car’s headlights, to take the question of whether an individual acted reasonably out of the jury’s hands.<sup>39</sup>

The early negligence-*per-se* cases were one component of a struggle to determine how to allocate power properly between judge and jury in tort litigation, and to define the extent to which the negligence question was one of law for the court or fact for the jury. One early treatise explained that the question of whether a party performed or omitted an act was a question of fact, but that the question of whether the performance or omission was a

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36. *Grey’s Ex’r v. Mobile Trade Co.*, 55 Ala. 387, 403 (1876). This language is not original to *Grey’s Executor v. Mobile Trade Co.* Numerous cases, apparently beginning with *Jetter v. New York & Harlem R.R. Co.*, 2 Abb. Dec. 458, 464 (N.Y. 1865), use the identical language without identifying a source. See, e.g., *La Fayette v. Bass*, 252 P. 1101, 1104 (Okla. 1926); *Correll v. Burlington, Cedar Rapids & Minn. R.R. Co.*, 38 Iowa 120, 124 (1874); *Siemers v. Eisen*, 54 Cal. 418, 421 (1880).

37. *Pittsburg & Connellsville R.R. Co. v. McClurg*, 56 Pa. 294, 300 (1867) (finding that it was “negligence in se” for a traveler to put an arm out of a car window and the court could declare the act “negligence in law”); see also *Brooks v. Inhabitants of Somerville*, 106 Mass. 271, 275 (1871) (listing cases—such as ones involving leaving a train after it has started or crossing a train by going between two cars in motion—in which a judge would properly instruct the jury that the party was not exercising reasonable care); Blomquist, *supra* note 12, at 229 n.45 (discussing additional cases).

38. *Pa. R.R. Co. v. Beale*, 73 Pa. 504, 509-10 (1873) (finding that the failure to stop at a crossing was contributory negligence).

39. See DOBBS, *supra* note 5, § 132, at 309-10; see also *Beale*, 73 Pa. at 509-10 (stating that a failure to stop at a railroad crossing was negligence *per se*). See also cases discussed in Blomquist, *supra* note 12, at 227-44.

breach of a legal duty was “a pure question of law.”<sup>40</sup> This view was not embraced universally. Some opinions questioned whether it was appropriate for courts to declare conduct *per se* negligent. A New York case, for example, questioned the applicability of negligence *per se* in the absence of a statutory duty.<sup>41</sup> The court questioned whether courts could properly impose a duty to fence railroad tracks from cattle “and hold its non-performance to be negligence, *per se*, disregarding all other circumstances” absent a statute imposing an absolute duty to erect such fencing.<sup>42</sup> The court did “not feel at liberty” to take that step.<sup>43</sup> Although there is no further reasoning, the court’s statement does suggest a recognition that courts and legislatures play different roles in defining law. The negligence question would go to the jury if the standard of conduct were variable but not if the law fixed the standard.<sup>44</sup> The unsettled question was the extent to which it was proper for courts to set standards with the force of law.<sup>45</sup>

Cases at the turn of the century continued to use the term “negligence *per se*” to refer to violations of common law standards, customs, and statutes. In 1899, the Minnesota Supreme Court stated that a breach of a legal duty was negligence, and that

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40. 1 THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE § 52 (5th ed. 1898); *see also* D’Arcy, *supra* note 22, at 810. D’Arcy, writing in 1875, noted confusion surrounding the jury’s role in negligence cases because of uncertainty as to whether the term “negligence” referred to an act or the characterization of the act. *Id.* at 810-12.

41. *See* *Langlois v. Buffalo & Rochester R.R. Co.*, 19 Barb. 364, 370 (N.Y. Gen. Term 1854), *overruled by* *Donnegan v. Erhardt*, 119 N.Y. 468 (1890).

42. *Langlois*, 19 Barb. at 364.

43. *Id.* at 370.; *See also* *Ohio & Miss. R.R. Co. v. Shanefelt*, 47 Ill. 497, 499-501 (1868) (rejecting argument that it was negligence *per se* to allow dry weeds and grass to accumulate near a railroad right of way, noting that no statute required removal of the growth and no court had declared such a legal duty).

44. *See* *N. Pa. R.R. Co. v. Heileman*, 49 Pa. 60, 63-64 (1865) (stating this principle and giving examples of situations in which courts fixed the standard).

45. *See generally* Martin A. Kotler, *Social Norms and Judicial Rulemaking: Commitment to Political Process and the Basis of Tort Law*, 49 U. KAN. L. REV. 65, 70-75 (2000) (discussing the legitimacy of judicial rulemaking); Leonard, *supra* note 4, at 431-33 (discussing courts’ development of standards of conduct and reasons for backing away from the practice).

it was “immaterial” whether common law or a state statute established the duty.<sup>46</sup> A series of North Carolina Supreme Court decisions around that time held that railroads that did not use automatic train couplers were per se negligent even though there were no laws mandating their use.<sup>47</sup> The courts relied on the fact that the use of automatic couplers had become customary, explaining that it was negligence not to use approved safety appliances that were in general use.<sup>48</sup> Other cases used the term negligence per se to refer to statutory violations.<sup>49</sup> Failure to obey a statutory mandate requiring a train to stop at a crossing, for example, was negligence per se.<sup>50</sup>

Many courts of the time used statutory standards as the basis for tort liability by considering legislative action an indication that conduct was clearly wrong. As one early treatise reasoned, many early safety statutes were “simply the legislative enactments of what had already become a universal and established custom of our country.”<sup>51</sup> An early court explained that when the legislature acted in response to conduct so universally wrong that it attracted legislative attention, the commission of the forbidden act “is for civil purposes correctly called negligence per se.”<sup>52</sup>

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46. Osborne v. McMasters, 41 N.W. 543, 543-44 (Minn. 1889); see generally Blomquist, *supra* note 12, at 230-31 nn.54-55 (discussing cases).

47. See Troxler v. S. Ry. Co., 32 S.E. 550, 550-52 (N.C. 1899); Greenlee v. S. Ry. Co., 30 S.E. 115, 115-16 (N.C. 1898); Witsell v. W. Asheville & Sulphur Springs Ry. Co., 27 S.E. 125, 126-27 (N.C. 1897); Mason v. Richmond & Danville R.R. Co., 16 S.E. 698, 702-03 (N.C. 1892). Indeed, a railroad’s failure to have the devices was negligence per se even though the railroad was under no legislative compulsion to use them. *Greenlee*, 30 S.E. at 115 (explaining that the fact that Interstate Commerce Commission rules requiring automatic couplers did not go into effect until 1900 only meant that railroads were not subject to administrative penalties); see also *Troxler*, 32 S.E. at 550-51 (discussing development of the law).

48. *Witsell*, 27 S.E. at 126. It was negligence per se for an employer not to use “safer appliances [that] have been invented, tested, and have come into general use.” *Troxler*, 32 S.E. at 550.

49. See *S. Ry. Co. v. Bryan*, 28 So. 445, 449 (Ala. 1899); Blomquist, *supra* note 12, at 233-35 (discussing *Bryan*).

50. *Richmond & Danville R.R. Co. v. Freeman*, 11 So. 800, 803 (Ala. 1892).

51. BYRON K. ELLIOTT & WILLIAM F. ELLIOTT, A TREATISE ON THE LAW OF ROADS AND STREETS § 828 (2d ed. 1900).

52. *Platt v. S. Photo Material Co.*, 60 S.E. 1068, 1070 (Ga. Ct. App. 1908). The United States Supreme Court offered the same explanation in a case finding New York’s worker’s compensation law constitutional. See *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 198 (1917).

The early cases did not articulate any consistent rationale for the developing law of negligence per se,<sup>53</sup> but courts' explanations for their decisions often rested on rationales that were only applicable to statutory violations. Some cases viewed negligence per se in a punitive light, suggesting that tort liability was an appropriate penalty for violating the law.<sup>54</sup> The Alabama Supreme Court's 1876 statement calling it an "axiomatic truth" that every person who violated a statute was "a wrongdoer, and, as such, is, *ex necessitate*, negligent in the eye of the law" illustrates this logic.<sup>55</sup> Other cases focused on the need for courts to defer to legislative judgment.<sup>56</sup> The Ohio Supreme Court explained in 1914 that juries cannot say that something that is not the law is the law, "so they should not be permitted to say that which is the law is not the law."<sup>57</sup> Other courts relied on the idea that the existence of a right guaranteed a remedy—*ubi jus ibi remedium*.<sup>58</sup>

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53. See Blomquist, *supra* note 12, at 230.

54. Professor Fleming James called this the "outlaw" theory of negligence per se and said it was a "barbarous relic of the worst there was in puritanism." James, *supra* note 12, at 104-05; see 3 FOWLER V. HARPER ET AL., THE LAW OF TORTS § 17.6, at 616-18 (2d ed. 1986) (making the same argument); see also, e.g., White v. Levarn, 108 A. 564, 565 (Vt. 1918) (finding individual who voluntarily committed the unlawful act of hunting on Sunday liable for injuries to fellow hunter whom he shot); Koonovsky v. Quelette, 116 N.E. 243, 244 (Mass. 1917) (holding individual driving an unregistered car was an outlaw liable for all injury directly resulting from that act); Osborne v. Van Dyke, 85 N.W. 784, 785-86 (Iowa 1901) (finding individual who violated a statute prohibiting cruelty to animals liable to a person he injured with a blow meant for his horse); Nashville, Chattanooga & Saint Louis Ry. Co. v. Heggie, 12 S.E. 363, 364 (Ga. 1890) (finding shipper who failed to comply with a law regulating the shipment of animals in interstate transit liable for animals' lost value even though statute was anti-cruelty legislation).

55. Grey's Ex'r v. Mobile Trade Co., 55 Ala. 387, 403 (1876) (emphasis in original); see *supra* note 36 and accompanying text (discussing this phrase). Other cases took a similar approach, treating someone who violated a statute as a wrongdoer who was not entitled to the protection of the laws. Balt. & Ohio R.R. Co. v. State, 29 Md. 252, 261 (1868); see also Koonovsky, 116 N.E. at 244 (considering an unregistered vehicle a trespasser on the highway and the driver an "outlaw" liable for injury he caused); Van Norden v. Robinson, 45 Hun, 567, 570 (N.Y. Sup. Ct. 1887) (calling violation of a statute a nuisance).

56. See *infra* notes 70-71 & accompanying text (explaining that this was a point emphasized by early treatises).

57. Variety Iron & Steel Works Co. v. Poak, 106 N.E. 24, 27 (Ohio 1914) (citation omitted).

58. Treatises of the era supported that position. The most explicit statement was in Francis Wharton's 1871 treatise. He explained that a violation of a statutory requirement that a person act or refrain from acting to benefit another was negligence even if the statute provided no specific remedy. "In such cases applies the maxim, *Ubi jus ibi remedium*." FRANCIS WHARTON, A TREATISE ON THE LAW OF NEGLIGENCE, § 443 (2d ed. 1878); see also THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 790 (2d ed. 1888) (stating that when a statute imposes

They believed the doctrine was necessary to give full effect to legislative dictates, preventing statutory mandates from becoming a dead letter. An 1899 Sixth Circuit case explained this idea in holding that a railroad's failure to comply with state railway-safety legislation was negligence per se.<sup>59</sup> The legislature passed the act to secure a right, the court explained, and confining the remedy to criminal proceedings "would make the law not much more than a dead letter."<sup>60</sup>

The turn-of-the-century cases, then, set forth disparate rationales to justify adopting statutory standards in tort cases. They did not, however, discuss whether those rationales were unique to statutes. And they did not discuss whether the existence of a statutory standard should change the normal role of a jury in deciding a tort case.

### B. The Emerging Focus on Law

Early cases began to explain negligence per se in terms that applied specifically to statutory violations. It was certainly true, though, as the Georgia Court of Appeals noted in 1908, that in the early 1900s the term "negligence per se" had not acquired "that precise and definite meaning so essential to the prevention of ambiguity."<sup>61</sup> It is unclear how the term acquired its current, limited

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a duty to benefit individuals and a breach of the duty injures an individual, the common law "will supply a remedy, if the statute gives none").

59. *Narramore v. Cleveland, Cincinnati, Chi. & Saint Louis Ry. Co.*, 96 F. 298, 300 (6th Cir. 1899).

60. *Id.* at 300-01. The court explained that the fact the legislature provided for criminal penalties as one means of furthering its goal of protecting railroad employees from injury did not preclude the use of other, "more efficacious, means" of securing compliance. *Id.* at 300. The court stated "it follows" that a person who suffered an injury due to the railroad's breach of duty had a cause of action if the statute did not explicitly preclude other remedies. *Id.*

This reasoning essentially made negligence per se a way to imply a damages remedy under a statute. The Supreme Court used that approach in *Texas & Pac. Ry. Co. v. Rigsby*, 241 U.S. 33 (1916), a case recognizing that a railroad employee could sue the employer to recover for injuries attributable to the railroad's violation of federal safety laws. *See generally id.* The Court explained that the disregard of the statute was a "wrongful act," and the common law gave the person for whose benefit the statute was enacted a right to recover from the wrongdoer. *Id.* at 39. "This is but an application of the maxim, *Ubi jus ibi remedium.*" *Id.* at 39-40 (citing 3 WILLIAM BLACKSTONE, COMMENTARIES \*51, \*123). The Court further explained that the statute's provision stating the injured employee could not be deemed to have assumed the risk made "[t]he inference of a private right of action . . . irresistible." *Id.* at 40.

61. *Platt v. S. Photo Material Co.*, 60 S.E. 1068, 1070 (Ga. Ct. App. 1908).

meaning. Although the early cases and treatises helped explain why courts adopted legislative standards as the tort standard of care, they did not reject the notion that the concept also applied in other contexts or explain why the courts began to consider *only* statutory violations as negligence per se.<sup>62</sup>

Early treatises and commentary may be responsible for the shift in emphasis and courts' decisions limiting negligence per se to statutory violations.<sup>63</sup> The turn-of-the-century treatises did not have sections devoted to the concept of negligence per se. They contained sections discussing how a defendant's violation of a statute was relevant to tort liability, and a number of treatises used the term negligence per se in the headings of these sections.<sup>64</sup> This organization would logically lead courts and researchers to equate negligence per se with statutory violations.<sup>65</sup> Perhaps following this organization, the treatises used the term "negligence per se" in discussing only the tort consequences of statutory violations. This, in turn, may have influenced courts to consistently use the term "negligence per se" to refer to statutory violations

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62. Some courts had certainly questioned whether violations of non-statutory standards should ever impose negligence-per-se liability. *See supra* text accompanying notes 41-47. My research, though, has not uncovered any case or commentary that discusses why, to the extent that non-statutory violations were once negligence per se, that should cease to be the case.

63. Courts and commentators discussing other areas of the law have recognized that early treatises were very influential and, indeed, were sometimes responsible for changing the substantive law. *See Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 837 n.3 (Wis. 1983) (discussing commentary on how an 1877 treatise, which stated that the rule of employment at will was inflexible, influenced the law even though the cases it cited did not support that proposition); Leonard J. Stern & Daniel F. Grosh, *A Visit with Queen Caroline: Her Trial and Its Rule*, 6 CAP. U. L. REV. 165, 201-02 (1976) (discussing how an 1842 treatise that cited only British cases influenced the leading American treatise and established the rule in American law).

64. *See* FOWLER VINCENT HARPER, A TREATISE ON THE LAW OF TORTS § 78 (1933) (section entitled "Negligence per se—Violation of statutory duties"); 1 SEYMOUR D. THOMPSON, COMMENTARIES ON THE LAW OF NEGLIGENCE IN ALL RELATIONS § 10 (1901) (section entitled "Negligence Per Se, or Statutory Negligence"); ARCHIBALD ROBINSON WATSON, A TREATISE ON THE LAW OF DAMAGES FOR PERSONAL INJURIES § 252 (1901) (section entitled "Violation of Statute or Ordinance as Constituting Negligence—Negligence Per Se"); *see also* COOLEY, *supra* note 58, § 311 (discussing negligence per se in sections entitled "Statutory Duties—Liability for Neglect" and "Other Neglects of Statutory Duty"); 1 SHEARMAN & REDFIELD, *supra* note 40, § 13 (discussing negligence per se in a section entitled "Violation of duty imposed by statute or ordinance").

65. The early law review articles were similar. They discussed negligence per se in articles that debated the justification for attaching civil consequences to violations of criminal legislation. *See infra* text accompanying notes 73-80. These articles also influenced the developing law. *See infra* notes 72-73.

even though they had previously recognized the doctrine using different terminology.<sup>66</sup>

The turn-of-the-century treatises explained that statutory violations were negligence per se. An 1897 treatise said that a person who violated a statute was a “wrong-doer” and ordinarily negligent per se.<sup>67</sup> Seymour Thomson’s 1901 negligence treatise stated that the rule of negligence per se was the only view “reconcilable with reason”<sup>68</sup> and argued that courts that failed to adopt the doctrine allowed juries to set aside legislative acts.<sup>69</sup> The treatises were very influential. Numerous early cases relied on the treatises in discussing negligence per se and their view of the doctrine became the accepted law.<sup>70</sup>

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66. Compare *Atlanta & W. Point R.R. v. Wyly*, 65 Ga. 120, 122 (1880) (calling violation of statute “negligence”), and *Dodge v. Burlington, Cedar Rapids & Minn. R.R. Co.*, 34 Iowa 276, 279 (1872) (same) with *Cent. R.R. & Banking Co. v. Smith*, 3 S.E. 397, 397 (Ga. 1887) (calling violation of ordinance “negligence per se”); *Tobey v. Burlington, Cedar Rapids & N. Ry. Co.*, 62 N.W. 761, 764-65 (Iowa 1895) (same). Courts in that era also used other terminology in opinions finding individuals liable for failing to follow a statute. See *Brockway v. Am. Express Co.*, 47 N.E. 87, 87 (Mass. 1897) (saying that violation would be “gross negligence”); *Burns v. Chi., Milwaukee & St. Paul Ry. Co.*, 80 N.W. 927, 929 (Wis. 1899) (calling statutory violation “actionable negligence”).

67. 3 BYRON K. ELLIOTT & WILLIAM F. ELLIOTT, *A TREATISE ON THE LAW OF RAILROADS* § 1155 (1897); see also 1 SHEARMAN & REDFIELD, *supra* note 40, § 13 (“The violation of any statutory or valid municipal regulation, established for the benefit of private persons, is of itself sufficient to prove such a breach of duty as will sustain a private action for negligence, brought by a person belonging to the protected class . . .”).

68. 1 THOMPSON, *supra* note 64, § 10.

69. *Id.* § 11. Thompson said courts that called a statutory violation only evidence of negligence granted juries the “[d]ispensing [p]ower,” the power English kings had to set aside legislative acts and “sinks acts of the legislature below the grade of by-laws of corporations.” *Id.* Thompson did note, however, that offenses against the public did not give rise to negligence-per-se liability, and that negligence-per-se liability required the statute that the defendant violated be one the legislature intended to prevent injuries like those the plaintiff suffered. *Id.* § 12.

A few early treatises discussed how custom was relevant in determining due care, but they did not use the term “negligence per se” when referring to violations of custom. See ELLIOTT & ELLIOTT, *supra* note 51, § 828 (explaining that the customs of travel could be considered the law of the road); WILLIAM B. HALE, *HANDBOOK ON THE LAW OF TORTS* § 231 (1896) (noting that custom and usage could almost amount to positive law); JOHN D. LAWSON, *THE LAW OF USAGES AND CUSTOMS* §§ 168-171 (1881) (discussing cases in various contexts in which evidence of custom was relevant to a determination of negligence).

70. See, e.g., *Platte & Denver Canal & Milling Co. v. Dowell*, 30 P. 68, 72 (Colo. 1892) (citing Wharton treatise for proposition that violation of a statute is negligence per se); *Leathers v. Blackwell’s Durham Tobacco Co.*, 57 S.E. 11, 15-16 (N.C. 1907) (quoting Thompson and Shearman & Redfield treatises for proposition that violation of an ordinance is negligence per se); *Schell v. Du Bois*, 113 N.E. 664, 667 (Ohio 1916) (quoting Thompson treatise in determining that violation of a municipal ordinance is negligence per se); *Wise v.*



Law review commentary built on the treatises, actively debating whether it was proper to make a legislature's judgment about what conduct merited criminal sanctions the standard of care in tort cases. These articles used the term negligence per se to describe the doctrine the authors were debating, implicitly equating negligence per se with liability for statutory violations.<sup>71</sup> These works, especially Ezra Ripley Thayer's article *Public Wrong and Private Action*, were influential and logically helped to cement the notion that the doctrine applied to statutory violations.<sup>72</sup>

Thayer's article was a response to a 1911 article by William Malburn condemning the negligence-per-se doctrine and arguing that a person who violated a law should only suffer the statutory penalty.<sup>73</sup> Professor Thayer responded with a defense of the doctrine, arguing that a jury could not properly find that a person had

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Morgan, 48 S.W. 971, 972 (Tenn. 1898) (citing Thompson treatise for proposition that violation of a statutory duty is negligence per se).

71. The articles recognized that not all courts followed that rule; some found that violation of a statute was only evidence of negligence. See, e.g., Malburn, *supra* note 12, at 214; Thayer, *supra* note 12, at 317.

72. Courts have cited Thayer from the 1920s to the present day, as do numerous articles. See, e.g., Steinwedel v. Hilbert, 131 A. 44, 45 (Md. 1925); Cerda v. RJL Entm't, Inc., 443 S.W.3d 221, 227-28 228 n.4 (Tex. App. 2013); Yowell, *supra* note 12, at 112.

73. See Malburn, *supra* note 12, at 217. He argued that if a violation of a law could be the basis of a finding of negligence, an action for negligence could be brought on the statute. *Id.* at 218. This would create a right of action by implication, "an effect that is universally condemned." *Id.* Malburn strongly criticized Thompson's negligence treatise, *supra* note 64, saying that it "includes almost every fallacy by which courts have been misled." Malburn, *supra* note 12, at 216; see *supra* notes 68-69 (discussing Thompson). Other commentators also criticized the doctrine. Lowndes argued that a court should not assume that a legislature intended an enactment to impose civil liability when it did not so provide. Lowndes, *supra* note 12, at 364. Other early commentators argued that a person who violated a statute was not necessarily culpable. See Morris, *The Relation of Criminal Statutes*, *supra* note 12, at 458 (explaining that individuals can violate criminal statutes without being "guilty of fault in any sense of the word"). Morris objected that negligence per se removed the jury's ability to decide how the defendant should have acted and reduced it to performing the "historical" "function" of determining what happened. *Id.* at 455.

These are not the only arguments against the doctrine. An article published after the First Restatement explained that the doctrine disregards the discretion inherent in the decision whether to enforce criminal statutes, ignores the fact that many statutes "are ill conceived, or hastily drawn, or obsolete," can lead to liability without fault or prevent a person who has not been meaningfully negligent from recovering, and exposes a person to substantial damages when the statute imposes only a small penalty. James, *supra* note 12, at 108. See also *infra* Part III.B (discussing these criticisms).

acted reasonably if the person disregarded the legislature's judgment regarding appropriate conduct.<sup>74</sup> Although a legislature could expressly provide for civil liability, Thayer argued that the legislature must be presumed to know that a penal statute would affect private rights and intend that result.<sup>75</sup>

Thayer articulated two primary justifications for negligence per se. One was the idea that a reasonable person obeys the law.<sup>76</sup> The other was the need for courts to show proper respect for another branch of government.<sup>77</sup> The legislature acts to set safety standards and condemn dangerous activities in view of changing conditions.<sup>78</sup> A jury could not properly determine that a defendant reasonably substituted his own judgment for the legislature's on how to act, especially when the conduct that caused harm proved the legislature's judgment was correct.<sup>79</sup>

The early law construed the idea of the legislature broadly<sup>80</sup> but tied negligence-per-se liability to the legislative body's intent. Only statutory violations that caused the harm the legislature

74. Thayer, *supra* note 12, at 322-23.

75. *Id.* at 320.

76. *Id.* at 323-24.

77. *Id.* at 324 (“[A]pproval of the wrongdoer’s conduct by the court is not consistent with proper respect for another branch of the government.”).

78. *See id.* at 326-28.

79. Thayer, *supra* note 12, at 323. Lowndes responded that Thayer erroneously assumed that the legislature decided how a prudent person would act. Lowndes, *supra* note 12, at 368. He said that a court should not find a person negligent for failing to comply with an absolute rule of law instead of a standard that a jury found appropriate in the particular case. *Id.* at 376.

80. The early treatises generally equated state statutes and municipal ordinances in applying negligence per se. The Shearman & Redfield 1898 treatise, for example, captioned its discussion of negligence per se “Violation of duty imposed by statute or ordinance,” equating violations of statutes and “valid municipal regulation[s].” 1 SHEARMAN & REDFIELD, *supra* note 40, § 13. This treatise cited cases such as the 1893 decision in *Mueller v. Milwaukee St. Ry. Co.*, 56 N.W. 914 (Wis. 1893), which said that proof that a car obstructed the street in violation of a city penal ordinance was proof of negligence. *Id.* at 915. In some cases, however, the ordinances at issue provided that violators would be liable for harm caused by that violation. *See Toledo, Peoria and Warsaw Ry. Co. v. Deacon*, 63 Ill. 91, 94 (1872) (discussing ordinance regulating the speed of trains).

Thayer and Malburn also debated the question of which lawmaking bodies qualified as legislative, specifically whether violations of municipal ordinances properly imposed negligence-per-se liability. Malburn criticized the courts’ failure to distinguish statutes and ordinances, arguing that state legislatures could not delegate their power to make laws regarding negligence to municipalities. Malburn, *supra* note 12, at 219-20. Thayer, however, argued that violations of ordinances and statutes should receive the same treatment because, in both cases, the state had spoken through a legislative body that had the authority to regulate the matter. Thayer, *supra* note 12, at 324.

aimed to prevent led to negligence-per-se liability.<sup>81</sup> The most influential case establishing this limit was a British case, *Gorris v. Scott*, which found that a violation of a law requiring that animals shipped at sea be confined in separate pens did not impose negligence-per-se liability when the animals were swept overboard in a storm.<sup>82</sup> There was no liability because the purpose of the statute was to protect against disease, not the hazards of the seas.<sup>83</sup>

The same rule applied in the United States. In *Boronkay v. Robinson & Carpenter*, for instance, the New York Court of Appeals found that the defendant, who violated a statute that required drivers to park vehicles with their right sides to the curb, was not per se negligent even though the violation led to a child's death.<sup>84</sup> The court found the statutory violation irrelevant to the question of liability.<sup>85</sup> The purpose of the statute was to aid the safe passage of vehicles and individuals using the road; the injury was not connected to the violation.<sup>86</sup>

The logical effect of these cases was to reject the theory that individuals who violated statutes were outlaws, refusing to embrace the full implications of a doctrine that would hold any individual who violated a statute per se liable in tort.<sup>87</sup> These cases allowed some individuals whose statutory violations caused harm

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81. See Lowndes, *supra* note 12, at 373 (discussing *Gorris v. Scott* (1874) 9 LR Exch. 125 (Eng.), and *Boronkay v. Robinson & Carpenter*, 160 N.E. 400 (N.Y. 1928)); see also 1 SHEARMAN & REDFIELD, *supra* note 40, § 13, at 11-13.

82. *Gorris*, 9 LR Exch. at 128-30.

83. *Id.* at 129-30.

84. *Boronkay*, 160 N.E. at 400-01 (explaining that a hook hanging down the left side of the truck hit and killed a child when the truck started).

85. *Id.* at 400 (ruling that the trial court erroneously instructed the jury that it could find the defendant negligent if it found a violation of the traffic law).

86. The court explained that disregard of a statute is a breach of duty to those for whose protection the statute's safeguards existed but that there was no breach of duty toward individuals who were not in the "zone of apprehended danger" even in cases "where a statutory command is not obeyed." *Id.* at 400-01.

87. See cases cited *supra* note 54. A case like *White v. Levarn*, 108 A. 564 (Vt. 1918), would come out differently if the court rejected the outlaw theory. That case found a person who violated a law prohibiting hunting on Sundays negligent per se and liable to a fellow hunter whom he accidentally shot. *Id.* It is safe to assume that the legislature did not enact the law out of fear that there were special risks inherent in hunting on any particular day of the week and that the harm the actor caused was not the harm the legislature aimed to prevent. Similarly, a statute prohibiting animal cruelty is concerned with preventing harm to animals, not with preventing incidental injury to bystanders. See *Osborne v. Van Dyke*, 85 N.W. 784, 785-86 (Iowa 1901) (imposing liability who accidentally struck another person with a blow meant for his horse).

to escape negligence-per-se liability, undermining the notion that the rationale for the doctrine was to penalize wrongdoers. The reason the legislature acted would be irrelevant if negligence per se was a penalty for wrongdoing; the individual would have still violated the statute, no matter what its purpose. Legislative intent was key. The courts, however, assumed that legislative bodies intended negligence per se.

## II. DIFFERENT PATHS: VIOLATIONS OF LAW AND CUSTOM IN THE MODERN ERA

The law of negligence per se had evolved considerably by the 1930s. Cases and secondary authority had limited the doctrine to acts that violated enacted law, although there was no explicit explanation of the reasons for the restriction. There was also no clear reasoning that supported the use of the doctrine at all. The effect of the cases, though, was to reject the idea that negligence per se served to penalize wrongdoers and to focus instead on honoring legislative intent. The law had developed an expansive view of negligence per se that took tort cases out of the jury's hands when a statutory violation was in play without any clear explanation of why, or whether, it was proper to do so.

### A. Negligence Per Se from the First Restatement to the Present

The First Restatement of Torts codified the law as it had evolved, limiting negligence per se to violations of enacted law. It followed the lead of the commentary and treatises by providing that a person who violated a legal standard was negligent.<sup>88</sup> The Restatement did not use the term “negligence per se” or explain the justification for the doctrine or its reach,<sup>89</sup> but codified the doctrine in its then-current form.

The First Restatement adopted the doctrine of negligence per se as it had evolved. The Restatement provided that an individual who violated “a legislative enactment” faced liability if four criteria were met: (a) “the intent of the enactment” was to protect the

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88. RESTATEMENT (FIRST) OF TORTS § 286 (AM. LAW INST. 1934).

89. Neither the provisions discussing the legal consequences of statutory violations nor the commentary use the term “negligence per se.” *Id.*

other's individual interests; (b) "the interest invaded" was one which the enactment was "intended to protect"; (c) the violation resulted from the hazard against which the enactment aimed to protect; and (d) the violation was "a legal cause of the invasion."<sup>90</sup> The Restatement followed the accepted law by tying the doctrine to legislative intent, although the commentary did not explain the provision in those terms. The doctrine applied if the violation injured the individual interests of a person whom the legislature aimed to protect against the harm the legislature aimed to prevent.<sup>91</sup> The Restatement also broadly interpreted the idea of legislative action by equating municipalities with state legislatures.<sup>92</sup>

The Restatement did not discuss the negligence-per-se doctrine's origins in cases dealing with custom and common law rules, but it treated negligence per se as a component of the broader question of how to determine the standard of reasonable conduct. The Restatement took an expansive view of the trial judge's role in determining what was reasonable. It said that either a "legislative enactment or a judicial decision" could determine the "standard of conduct of a reasonable man."<sup>93</sup> The trial judge or jury would look at the facts of a case and determine what was reasonable in the absence of a legislative enactment or judicial decision.<sup>94</sup>

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90. *Id.* The provision also required that the injured person not act in a way that precluded him from bringing a claim. *Id.* A related provision stated that a violation of "a legislative enactment" would not create civil liability if the provision were designed to protect municipal interests or to secure rights to which a person was entitled only as a member of the public. RESTATEMENT (FIRST) OF TORTS § 288 (AM. LAW INST. 1934).

91. RESTATEMENT (FIRST) OF TORTS § 286. *See also id.* cmts. e-h. The Restatement relied on *Gorris* to support this limitation. *Id.* cmt. h, illus. 4.

92. The provision on negligence per se referred to violations of a "legislative enactment," RESTATEMENT (FIRST) OF TORTS § 286, but the comments referred to a "statute or ordinance." *Id.* cmts. b & c. The illustrations and commentary accompanying the provision explaining when violations of legislative enactments would not impose liability also dealt with both statutes and municipal ordinances. RESTATEMENT (FIRST) OF TORTS § 288 illus. & cmts. on cls. (a)-(c). The illustrations and comments also equated state and federal law. *See id.* illus. 4 (referring to act of Congress requiring that railroads equip cars with automatic couplers); RESTATEMENT (FIRST) OF TORTS § 285 cmt. B (AM. LAW INST. 1934) (saying that the enactment of a commission or municipality with power to create a standard of conduct has the same force as a statute a state or Congress enacted).

93. RESTATEMENT (FIRST) OF TORTS § 285.

94. *Id.*

The Restatement commentary explained that legislative enactments could conclusively establish the standard of conduct.<sup>95</sup> A legislative decision to prohibit an act in order to protect the interests of others defined the standard of conduct of a reasonable person.<sup>96</sup> Appellate decisions could also establish that conduct was negligent and take the issue out of the jury's hands.<sup>97</sup> Custom could also give rise to a standard of conduct. "Occasionally a situation occurs so often that a series of appellate decisions deals with so much of the customary conduct of both parties as to afford a fairly exhaustive definition of the conduct of reasonable men in such situations."<sup>98</sup>

The First Restatement took a narrow view overall of the jury's role in negligence cases. A trial judge could determine that a jury could not reasonably find the defendant negligent and withdraw a case from the jury absent a legislative enactment or appellate decision.<sup>99</sup> The jury would define reasonable conduct if no legislative enactment established a "standard of obligatory conduct" and "there is no ruling of an appellate court upon substantially identical situations and the trial court has not withdrawn the case from the jury . . . ."<sup>100</sup>

The First Restatement's support for judicially-imposed rules of conduct was out of step with the developing case law, however, as judicial decisions had begun to argue against judicial imposition of rules of conduct.<sup>101</sup> A famous example is Justice Cardozo's opinion in *Pokora v. Wabash Railway Company*,<sup>102</sup> which determined that a driver who did not leave his truck and

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95. *Id.* cmt. b. The Restatement, however, only discussed the significance of a person's failure to comply with a legislative enactment; it did not discuss the significance of compliance with a statutory standard. See RESTATEMENT (SECOND) OF TORTS § 288C (AM. LAW INST. 1966).

96. See RESTATEMENT (FIRST) OF TORTS § 285 cmt. h (referring to section 286).

97. *Id.* cmt. d.

98. *Id.* The Restatement did not, however, have a section on custom.

99. *Id.* § 285 cmt. e.

100. *Id.* cmt. f.

101. As Professor James wrote in 1949, "the tendency has been away from fixed standards and towards enlarging the sphere of the jury." Fleming James, *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667, 678 (1949); see also Kotler, *supra* note 45, at 73-74 (discussing shift in judicial decision making from making rules to articulating standards); Leonard, *supra* note 4, at 454-56 (discussing problems with attempting to apply fixed standards in tort cases).

102. 292 U.S. 98 (1934).

survey a railroad crossing before proceeding was not contributorily negligent as a matter of law.<sup>103</sup> The opinion noted a division of authority on the issue<sup>104</sup> and rejected Justice Holmes's earlier opinion that those precautions were a legal requirement.<sup>105</sup> Justice Holmes had stated that a driver who did not take such measures was contributorily negligent as a matter of law.<sup>106</sup> He explained that, although "the question of due care very generally is left to the jury," a clear standard of conduct "should be laid down once for all by the Courts."<sup>107</sup> Justice Cardozo responded that there was a "need for caution in framing standards of behavior that amount to rules of law."<sup>108</sup> The variety of circumstances in any given situation meant that standards suitable for the average case might not apply in a specific situation.<sup>109</sup> The question of negligence was for the jury.<sup>110</sup>

Cases such as *Pokora* reflected a broader role for juries in negligence cases than did the First Restatement, but the *Restatement (Second) of Torts* ("Second Restatement") did not address that change.<sup>111</sup> Rather, provisions on negligence per se in the Second Restatement, like the First Restatement, followed a general provision on how courts could determine the standard of conduct.<sup>112</sup> The Restatement provision gave four options for determining "[t]he standard of conduct of a reasonable man."<sup>113</sup> A legislative enactment or administrative regulation could explicitly

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103. See *id.* at 101. The driver was hit by a train. *Id.* at 100.

104. *Id.* at 103 (citing cases from Pennsylvania that imposed a duty to stop and cases from New York, Arkansas, Illinois, and Connecticut which said the question was for the jury).

105. *Baltimore & Ohio R.R. Co. v. Goodman*, 275 U.S. 66, 70 (1927); see also *Pokora*, 292 U.S. at 106 (limiting the opinion).

106. *Goodman*, 275 U.S. at 70.

107. *Id.*

108. *Pokora*, 292 U.S. at 105.

109. *Id.* at 105-06.

110. *Id.* at 106; see generally KEETON, *supra* note 14, § 35, at 217-18 (discussing the cases and noting that absolute rules of conduct "broke[] down in face of the necessity" of looking at the circumstances of individual situations); Kotler, *supra* note 45, at 73-74 (discussing the cases).

111. The Third Restatement, however, addressed these cases in discussing the jury's role in negligence cases. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 8 reporters' note cmt. c (AM. LAW INST. 2010); see *infra* text accompanying note 144.

112. RESTATEMENT (SECOND) OF TORTS § 285 (AM. LAW INST. 1965).

113. *Id.*

set the standard, the court could adopt the standard “from a legislative enactment or an administrative regulation which does not so provide,” judicial decisions could set the standard, or the trial judge or jury could determine a standard in light of the facts of a case “if there is no such enactment, regulation, or decision.”<sup>114</sup>

Although the structure and phrasing of this provision differed somewhat from its counterpart in the First Restatement,<sup>115</sup> the Second Restatement’s commentary was virtually identical to that of the First. For example, the Second Restatement contained the same general comment that a jury determines reasonableness in the absence of a legislative enactment and the appellate court ruled on the situation and the trial court did not withdraw the case from the jury.<sup>116</sup> It also addressed the relevance of custom in identical language, stating that appellate decisions can deal with “so much of the customary conduct of both parties as to afford a fairly exhaustive definition of the conduct of reasonable men in such situations.”<sup>117</sup>

The Second Restatement’s substantive provisions on negligence per se also closely mirrored those in the First Restatement, and limited the doctrine in much the same way.<sup>118</sup> The Second Restatement provided that a court could adopt statutory requirements as the reasonable person’s standard of conduct when the legislature intended to serve four purposes.<sup>119</sup> The legislature must have intended to protect: (a) “a class of persons which includes the one whose interest is invaded,” and (b) “the particular

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114. *Id.*

115. Compare *id.* with RESTATEMENT (FIRST) OF TORTS § 285 (AM. LAW INST. 1934); see *supra* text accompanying notes 90-95. The First Restatement contained one provision referring to legislative enactments or judicial decisions and one addressing the role of the trial judge or jury. The Second had more divisions. One section referred to legislative standards or administrative regulations which expressly set a standard, one to legislation or regulations which did not expressly set a standard, the third to judicial decisions, and the fourth to the trial judge or jury. The Second Restatement also added sections outlining the roles of judge and jury in negligence cases. See RESTATEMENT (SECOND) OF TORTS §§ 328B, 328C (AM. LAW INST. 1965). The court was to determine if the defendant owed a legal duty, § 328B(b), the standard of conduct the legal duty required, § 328B(c), and “whether the defendant . . . conformed to that standard, in any cases in which the jury may not reasonably come to a different conclusion,” § 328B(d).

116. RESTATEMENT (SECOND) OF TORTS § 285 cmt. g (AM. LAW INST. 1965).

117. *Id.* cmt. e.

118. See RESTATEMENT (SECOND) OF TORTS § 286 (AM. LAW INST. 1965). The title of the provision is “When Standard of Conduct Defined by Legislation or Regulation Will Be Adopted,” and the provision does not use the term negligence per se. See *id.*

119. *Id.*



interest which is invaded,” against (c) “the kind of harm which has resulted,” and (d) “the particular hazard from which the harm results.”<sup>120</sup> An additional provision made it clear that a violation of such a standard was negligence per se. “The unexcused violation of a legislative enactment or an administrative regulation which is adopted by the court as defining the standard of conduct of a reasonable man, is negligence in itself.”<sup>121</sup> The commentary explained that the provision meant “that the violation becomes conclusive on the issue of the actor’s departure from the standard of conduct required of a reasonable man, and so, without more, is negligence.”<sup>122</sup>

The Second Restatement expanded the body of law imposing negligence-per-se liability by including violations of administrative regulations.<sup>123</sup> Treatises began to address liability for violations of rules and regulations as those sources of law became increasingly important.<sup>124</sup> Clarence Morris, one of the leading

120. *Id.*

121. RESTATEMENT (SECOND) OF TORTS § 288B (AM. LAW INST. 1965). The comment to this section used the term negligence per se. “Usually it is said that such a violation is negligence ‘per se,’ or in itself.” *Id.* cmt. a.

122. *Id.* cmt. b.

123. RESTATEMENT (SECOND) OF TORTS § 286 (stating that a court could adopt the standards of a legislative enactment or administrative regulation as the standard of reasonableness). The Second Restatement continued to address the significance of a violation of federal law only in passing. Commentary on the effect of a violation of an administrative regulation referred to the likelihood that a violation of an Interstate Commerce Commission regulation would be negligence per se. RESTATEMENT (SECOND) OF TORTS § 288B cmt. d. The comment stated that courts consider the “character and importance” of the administrative body issuing a regulation as a relevant factor in determining whether a violation of a regulation was negligence per se, making it more likely that a court would accord negligence-per-se significance to a violation of an Interstate Commerce Commission regulation than to one of a city fire commission. *Id.* Each case the reporter’s notes cited as authority for the proposition that violation of a regulation could be negligence per se referred to violations of state agency regulations, however. RESTATEMENT (SECOND) OF TORTS § 288 reporter’s notes (AM. LAW INST. 1966). In the one case that involved a federal regulation, the defendant was liable for violating a federal regulation which the state agency required it to follow. *See Rinehart v. Woodford Flying Serv., Inc.*, 9 S.E.2d 521, 522-23 (W. Va. 1940). As in the First Restatement, the Second Restatement’s comment on when a case would not go to a jury referred to a standard set by an act of Congress. RESTATEMENT (SECOND) OF TORTS § 285 cmt. b (AM. LAW INST. 1965); *see also supra* note 95.

124. For example, the 1941 revised edition of the *Shearman & Redfield* negligence treatise contained a section entitled “Rules and regulations,” and noted that violation of administrative regulations was “some evidence” of negligence. 1 THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE § 18, at 40 (Clarence S. Zipp ed., rev. ed. 1941) (citing predominately cases from New York, a state that has never equated statutes and administrative regulations for negligence-per-se purposes). On the increasing importance of regulations, see 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR.,

scholars in the area,<sup>125</sup> argued that regulations generally “are deserving of respect as criteria of fault.”<sup>126</sup> He explained that administrators are presumably experts who regulate in areas in which legislators cannot act adequately.<sup>127</sup> The legislature’s deference to agencies and agencies’ expertise led Morris to conclude that administrative safety measures, like legislative dictates, are generally “deserving of respect as criteria of fault.”<sup>128</sup>

Professor Morris’s reference to expertise suggested a new rationale in support of negligence per se. The idea that a court should defer to a body with expertise in a complex area complemented legislative comity as the basis for finding violations of regulations negligence per se. Some influential negligence-per-se cases relied on this idea in considering legislative enactments. The Texas case of *Rudes v. Gottschalk*,<sup>129</sup> a case on which the Second Restatement’s Reporter’s Notes relied,<sup>130</sup> explained that courts adopt legislative standards because a legislative body is generally better suited than a court to establish standards “by reason of its organization and investigating processes.”<sup>131</sup>

The Second Restatement also addressed two matters that the First Restatement did not. First, it discussed when a violation of law would be excused, noting that “[a]n excused violation of a

ADMINISTRATIVE LAW TREATISE §§ 1.3-1.5 (3d ed. 1994); Morris, *The Relation of Criminal Statutes*, *supra* note 12, at 453.

125. See *supra* note 12 (citing Morris’s other negligence per se articles); Leonard, *supra* note 4, at 427 (citing Morris as a leading scholar).

126. Morris, *The Role of Administrative Safety Measures*, *supra* note 12, at 144.

127. See *id.* Professor Morris relied on a similar idea to justify treating violations of criminal statutes as negligence per se. Morris, *The Role of Criminal Statutes*, *supra* note 12, at 47 (explaining that legislatures have better opportunities to arrive at informed judgments than do judges and jurors because of their ability to gather facts, hold hearings, and debate the issues).

128. Morris, *The Role of Administrative Safety Measures*, *supra* note 12, at 144. Such respect was due absent “any special reason for suspecting the soundness or impartiality of administrative safety measures.” *Id.*

129. 324 S.W.2d 201, 205 (Tex. 1959).

130. RESTATEMENT (SECOND) OF TORTS § 286 reporter’s notes (AM. LAW INST. 1966).

131. *Rudes*, 324 S.W.2d at 204. See also Teresa Moran Schwartz, *The Role of Federal Safety Regulations in Products Liability Actions*, 41 VAND. L. REV. 1121, 1137 n.61 (1988) (stating that *Rudes* supports the argument that expertise justifies negligence per se). The Reporters relied on *Rudes* to support the idea that courts were under no obligation to find that statutory requirements governed in a negligence action unless the legislature so stated, however. See RESTATEMENT (SECOND) OF TORTS § 286 reporters’ notes (AM. LAW INST. 1966).

legislative enactment . . . is not negligence.”<sup>132</sup> It provided a list of situations that would excuse violations, such as cases when the defendant labored under an incapacity or when the defendant acted in an emergency.<sup>133</sup> The comment stated that the list of excuses was not exclusive.<sup>134</sup>

The Second Restatement also addressed compliance with legislation. It stated that compliance with a statute or administrative regulation did “not prevent a finding of negligence where a reasonable man would take additional precautions.”<sup>135</sup> The comment explained that legislative standards were normally minimum standards of conduct designed with reference to ordinary conditions; the existence of those standards did not preclude a finding that a reasonable person would sometimes take additional precautions.<sup>136</sup> A jury or “court as a matter of law” could accept the legislative standard absent special circumstances, but those standards did not preclude a finding that a reasonable person would sometimes take additional precautions.<sup>137</sup>

The Third Restatement addresses negligence per se against a backdrop that recognizes a broader role for the jury than did the previous Restatements.<sup>138</sup> The Third Restatement provides that

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132. See RESTATEMENT (SECOND) OF TORTS § 288A (AM. LAW INST. 1965). The reporter’s notes explained that this section was added to the First Restatement, which mentioned the matter briefly in a comment. RESTATEMENT (SECOND) OF TORTS § 288A reporters’ notes (AM. LAW INST. 1966). That comment, which addressed the interpretation of statutes, said that violation of a statute would not create civil liability unless done under circumstances that would make the violation criminally punishable. RESTATEMENT (FIRST) OF TORTS § 286 cmt. c (AM. LAW INST. 1934).

133. See RESTATEMENT (SECOND) OF TORTS § 288A. Other excuses were the failure to know of the occasion for compliance, inability to comply using due care, and that compliance would involve a greater risk of harm than noncompliance. *Id.*

134. See *id.* cmt. a.

135. See RESTATEMENT (SECOND) OF TORTS § 288C (AM. LAW INST. 1965).

136. *Id.* cmt. a.

137. *Id.* The decision in *Josephson v. Meyers*, 429 A.2d 877 (Conn. 1980), discusses this idea. The court relied on the Second Restatement in explaining that compliance with statutory standards does not preclude a finding of negligence, but “where the facts are similar to those contemplated by the statute and no special or unusual circumstances or dangers are present, a defendant satisfies his duty of care by complying with the statute.” *Id.* at 880-81. In practice, this principle allows courts to find that compliance with a statute precludes a finding of negligence as a matter of law. See *Leisy v. N. Pac. Ry. Co.*, 40 N.W.2d 626, 630 (Minn. 1950) (finding that compliance with a statute mandates a conclusion that defendant was not negligent as a matter of law when no special circumstances were present).

138. The commentary, however, states that the Restatement does not intend a major change, saying that it “largely agrees with and draws on” sections 328A-328B of the Second Restatement. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND

the jury's role is to determine the facts and whether a party exercised due care when reasonable minds could differ.<sup>139</sup> The Third Restatement, unlike its predecessors, contains no provision indicating that judicial decisions can state the standard of care.<sup>140</sup> The commentary explains that courts had increasingly refused to take the question of what is appropriate conduct away from the jury.<sup>141</sup> What appears to be a recurring issue may, upon closer inspection, reveal many variables meriting individual determination.<sup>142</sup> The commentary explains that, "[t]ort law has thus accepted an ethics of particularism" that doubts that general rules can produce determinate results, and "which requires that actual moral judgments be based on the circumstances of each individual situation."<sup>143</sup> Tort law's need for individualized decisions "highlights the primary role necessarily fulfilled by the jury."<sup>144</sup>

The Third Restatement's focus on the idea of particularism seems in tension with the doctrine of negligence per se, which rejects the notion that a jury can decide whether an individual who violated a legislative provision was negligent. The Third Restatement firmly embraces the doctrine of negligence per se, however, and rejects the idea of particularism where legal provisions are involved. Not only does it fully adopt the principles of negligence

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EMOTIONAL HARM § 8 reporters' note cmt. a (AM. LAW INST. 2010); *see supra* text accompanying notes 115-20 (discussing the Second Restatement).

139. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 8 cmt. c, reporters' note cmt. c.

140. *See supra* text accompanying note 97 (discussing First Restatement); *see supra* text accompanying note 117 (discussing Second Restatement).

141. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 8 cmt. c. The comment notes that there can be advantages in taking recurring questions away from the jury: reducing litigation costs in later cases, avoiding different outcomes in similar cases, and giving individuals guidance on what conduct will avoid liability. *Id.* American courts, however, have generally decided that the advantages of allowing courts to decide these issues do not justify taking cases from a jury. *Id.* The reporters' note to this comment discusses the dispute between Justices Holmes and Cardozo in applying this principle to railway crossing cases. *Id.* reporters' note cmt. c; *see supra* text accompanying notes 103-11 (discussing the cases).

142. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 8 cmt. c.

143. *Id.*

144. *Id.*

per se, but it broadens the class of violations that can impose negligence-per-se liability and narrows the category of excuses for violating the law.<sup>145</sup>

The Third Restatement articulates the same basic principle of negligence per se as did the Second Restatement, but simplifies the formulation of the doctrine.<sup>146</sup> The provision simply states: “An actor is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor’s conduct causes, and if the accident victim is within the class of persons the statute is designed to protect.”<sup>147</sup> This doctrine of negligence per se is the rule in the “strong majority” of jurisdictions.<sup>148</sup>

The commentary accompanying the Third Restatement goes further than previous Restatements in justifying the doctrine.<sup>149</sup> Chief among the reasons it gives for negligence per se is deference to legislative judgment. First, it would be “awkward,” as a matter of “institutional comity,” for a court to find that conduct a legislature prohibited was reasonable.<sup>150</sup> Second, although juries generally serve as the community’s voice in determining whether conduct was negligent, “the judgment of the legislature, as the authoritative representative of the community,” should prevail over a jury’s view when the legislature has decided what conduct

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145. See *infra* text accompanying notes 162-63 (expanding scope of violations) & 166-71 (excuses). The Restatement notes that the significance of negligence per se has expanded over the years. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 cmt. d (AM. LAW INST. 2010); *infra* text accompanying notes 164-65.

146. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14. It also explicitly uses the term “negligence per se” in describing the doctrine, unlike the previous restatements. The heading to the section is “Statutory Violations as Negligence Per Se.” *Id.*

147. *Id.*

148. *Id.* reporters’ note cmt. c. The comment cites cases from four states that hold that a statutory violation “creates a rebuttable presumption of negligence, or prima facie proof of negligence.” *Id.* The Reporters explain that this view is very similar to the Restatement approach, which allows a showing of excuse to rebut a presumption that the actor was negligent per se. *Id.* (citing *id.* § 15). Approximately a dozen states provide that a statutory violation “is only some evidence of negligence.” *Id.*

149. *Id.* cmt. c. The comment defends the doctrine, stating: “[C]ourts, exercising their common-law authority to develop tort doctrine, not only should regard the actor’s statutory violation as evidence admissible against the actor, but should treat that violation as actually determining the actor’s negligence.” *Id.*

150. *Id.*

is appropriate.<sup>151</sup> Third, it can be problematic to apply a negligence standard to “problems of recurring conduct” because the uncertainty of a jury verdict can lead to inequality and high litigation costs.<sup>152</sup> Statutes generally address recurring conduct, so negligence per se “replaces decision making by juries in categories of cases where the operation of the latter may be least satisfactory.”<sup>153</sup> The Restatement does not, however, discuss how to square this view with the move toward particularism when statutory violations are not present.

The Third Restatement emphasizes that limitations on the reach of the doctrine remain in force. “Negligence per se applies only when the accident that injures the plaintiff is the type of accident that the statute seeks to avert.”<sup>154</sup> The doctrine does not apply when the statute “is not a safety statute at all.”<sup>155</sup> Similarly, the doctrine applies only if the plaintiff is in the class of persons the legislature sought to protect.<sup>156</sup> The limits on the doctrine reveal that it serves to substitute the legislature’s judgment on what conduct is safe in a particular situation for a jury’s.<sup>157</sup>

Despite the focus on legislative deference, the Third Restatement treats the concept of legislation broadly. Violations of administrative regulations are generally negligence per se.<sup>158</sup> The

151. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14.

152. *Id.* The commentary, however, does not refer back to the comments to section eight of the Restatement, dealing with the jury’s role, which had argued that similar concerns did not justify allowing judge-made rules to take cases out of the jury’s hands. *See supra* text accompanying notes 142-48. The Restatement thus ignores the tension between the sections.

153. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 cmt. c. The comment also notes that negligence per se has long been established as the default as to how courts assess statutory violations, meaning it could be assumed that legislatures intended that result. *Id.*

154. *Id.* cmt. f.

155. *Id.* The comment states that the legislation does not have to aim only to promote safety. It is enough that avoiding the type of accident at issue is one of the statute’s objectives. *Id.*

156. *Id.* cmt. g. The comment notes that this analysis generally adds little to the legislative purpose analysis. *Id.*

157. In other words, the doctrine does not exist to penalize outlaws for their misconduct. *See* 3 HARPER ET AL., *supra* note 54, § 17.6, at 617-18 (stating that the notion that a person who violates a statute should be held liable for any injury has “little currency”); *supra* text accompanying notes 48-50.

158. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 cmt. a. Indeed, “[m]ost states that accept negligence per se apply it to violations of administrative regulations.” *Id.* reporters’ note cmt. a.

commentary notes that although negligence per se usually applies to state legislative enactments, it “equally applies to regulations adopted by state administrative bodies, ordinances adopted by local councils, and federal statutes as well as regulations promulgated by federal agencies.”<sup>159</sup> The expanded sources of law that can lead to negligence-per-se liability, and the scope of statutory and regulatory controls on everyday life, make the doctrine far-reaching.<sup>160</sup> The Restatement notes that the significance of negligence per se “has expanded in recent decades.”<sup>161</sup>

The Third Restatement also expanded the reach of negligence per se by narrowing the excuses for violating the law. Like the Second Restatement, the Third contains a section on excused violations.<sup>162</sup> The provision recognizes essentially the same excuses as the Second—incapacity, reasonable attempts at compliance, inability to know of the statute’s applicability, and the danger of compliance.<sup>163</sup> The commentary, however, takes a much stricter view to interpreting permissible excuses. The commentary does not begin with a general statement that the list is not exclusive, as did the Second Restatement.<sup>164</sup> Instead, the background comment says it is “essential” to “elaborate the relevant categories of excuses.”<sup>165</sup> The commentary also explains what circumstances do not count as excuses. These explicit exceptions

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159. *Id.* cmt. a. This is the first Restatement explicitly to equate state and federal law for the purposes of negligence-per-se analysis.

160. *See id.* cmt. d.

161. *Id.*

162. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 15 (AM. LAW INST. 2010). Excused violations of a statute are not negligence per se. *Id.* The comment to this section explains that recognizing excuses prevents application of the negligence-per-se doctrine in many cases in which public officials would decide not to prosecute a technical violation of the law. *Id.* cmt. a.

163. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 15.

164. The last comment addresses additional excuses. It states that there may be additional excuses worthy of recognition “[a]lthough the absence of cases reduces the likelihood of this.” *Id.* cmt. g. For discussion of the Second Restatement’s provision on excused violations, see *supra* text accompanying notes 132-37.

165. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 15 cmt. a (AM. LAW. INST. 2010).

are a sincere or reasonable belief that the statute is unwise, ignorance of the law, and custom.<sup>166</sup> “[N]or is it an excuse if there is a custom to depart from the statutory requirement.”<sup>167</sup>

The Third Restatement also addresses statutory compliance. It follows the Second Restatement in providing that compliance with a statute, although evidence of non-negligent conduct, does not preclude a finding of negligence.<sup>168</sup> The commentary, to some extent, echoes the policies that underlie the law of negligence per se, and casts the justification for the rule in terms of legislative deference. A finding that a motorist is negligent if he travels the speed limit in adverse conditions is consistent with legislative judgment because a speed limit logically sets minimum safety standards and looks to general circumstances.<sup>169</sup> A court can, however, direct a finding that a person who complies with a statute is not negligent when there are no unusual circumstances present.<sup>170</sup> The provision that a person is not negligent in failing to take precautions that violate a statute rests on respect for the rule of law.<sup>171</sup>

Other explanations for the compliance rule, however, look more to the law of custom. The commentary explicitly links the rule regarding compliance with statutes with the Restatement's provision on custom, which says that compliance with custom is evidence of non-negligent conduct, but not determinative.<sup>172</sup> Similar concerns underlie both. The rule concerning custom rests on the concern that self-interest may lead individuals to take inadequate safety precautions.<sup>173</sup> The rule regarding compliance

166. *Id.*

167. *Id.* For criticism of the Third Restatement's approach to excused violations, and an argument that judges should have a broader role in determining when the doctrine applies, see Twerski, *supra* note 12, at 1000-03; *infra* text accompanying notes 415-16 & 433-37.

168. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 16 (AM. LAW. INST. 2010). It also provides that an individual does not need to adopt precautions that would violate a statute, *id.*, and recognizes that a statute may provide that compliance is a defense to liability. *Id.* cmt. a. The reference to statutes also includes ordinances and administrative regulations. *Id.* For discussion of the comparable Second Restatement provision, see *supra* text accompanying notes 135-37.

169. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 16 cmt. e.

170. *Id.* cmt. f.

171. *Id.* cmt. g.

172. *Id.* cmt. b (citing the Restatement provision on compliance with custom, section 13).

173. *Id.*



with statutes similarly evidences a concern that the lawmaking process can “be insufficiently attentive to the interests of potential victims.”<sup>174</sup>

The Third Restatement, then, reflects a somewhat ambivalent view of positive law. On the one hand, any positive law prohibiting an action renders a person per se negligent, even when the custom is to violate that law. At the same time, the Restatement recognizes that general rules may not adequately account for specific cases and that legislative safety judgments may not adequately take all relevant interests into account. Despite these concerns, the Restatement’s view of negligence per se dictates that the violation of statutory standards takes the negligence decision out of a jury’s hands, no matter how ill-suited the statute to govern the particular situation.<sup>175</sup>

The application of negligence per se is powerful. Standard negligence-per-se jury instructions do not allow a jury to exercise judgment—they tell the jury that a defendant who violated a statute is liable.<sup>176</sup> New York’s standard jury instruction states bluntly: “If you find that defendant violated the statute, and if that violation was a substantial factor in bringing about the injury . . . , then defendant is liable.”<sup>177</sup> Negligence per se is a stark exception to the general rule that juries decide whether a person has acted reasonably.<sup>178</sup>

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174. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 16 cmt. b. The reporters’ note to comment b relies on Schwartz, *supra* note 131, to support this view. Schwartz argues that the regulatory process is inadequate to provide maximum safety standards because regulated industries heavily influence the regulatory process and regulation moves too slowly to keep standards up to date. *Id.* at 1146-60.

175. Although violations can be excused, the Third Restatement limits permissible excuses and those excuses are narrow and do not include a judgment that the statute is outdated or ill-suited to govern the situation. *See supra* text accompanying notes 162-67.

176. *See, e.g.*, 1 OHIO JURY INSTRUCTIONS § CV 401.01 (2018) (“A person may be required by law to do something or not to do something. Failure to do what is required by law is negligence, as is doing something the law prohibits.”); PA. SUGGESTED STANDARD CIV. JURY INSTRUCTIONS § 13.100 (4th ed. 2013) (“If you find that [name of defendant] violated this law, you must find that [name of defendant] was negligent.”).

177. N.Y. PATTERN JURY INSTRUCTIONS—CIV. § 2:25 (2017).

178. For a helpful discussion of this idea, see generally Twerski, *supra* note 12. Professor Twerski argues that “the law of negligence abhors generalizations” and is “fact sensitive.” *Id.* at 1005. The law nonetheless embraces generalizations in the areas of negligence per se and *res ipsa loquitur*, despite the tension with the general approach. He argues that the Third Restatement would be more effective and principled if it focused more on when to abandon generalizations and promoted a more fact-sensitive inquiry into the actor’s conduct. *Id.* at 997; *see also* Leonard, *supra* note 4, at 429 (arguing against the doctrine of negligence

## B. Custom in the Modern Era

The doctrine of negligence per se had its roots in cases that enforced customs as rules of law and required a finding that a person who violated a custom was negligent.<sup>179</sup> These cases rested on the idea that a reasonable person would follow known safety precautions; it was unreasonable to neglect to take safety measures that were common and that, because they were common, were evidently feasible.<sup>180</sup> The idea of reliance also played a role. Individuals expected others to act in customary ways and relied on the assumption that they would do so. It was unreasonable for a person who dealt with others to deviate from customary modes of conduct because the expectation that others would take customary precautions dictated the precautions an individual took on his own behalf.<sup>181</sup> These rationales for a judicial determination of negligence began to fall to the side as cases and commentary began to root negligence per se in enacted law and explain the doctrine in terms that applied uniquely to statutes.<sup>182</sup> The question of what legal consequences attended a failure to comply with customs never enacted into positive law faded into the background.

The early tort treatises used the term negligence per se to describe cases dealing with statutory violations.<sup>183</sup> Few discussed the legal consequences of a failure to conform to custom at any length, if at all.<sup>184</sup> An early treatise on *The Law of Usages and*

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per se in part because it abandons the “judicial function . . . [and] traditional sphere of jury power” in negligence cases, effectively relinquishing the power of doctrinal development to the legislature).

179. See *supra* Part I.A.

180. The cases holding that the failure to use automatic train couplers was negligence per se illustrate this logic. See *supra* text accompanying notes 47-49.

181. *Simpson v. Hand*, 6 Whart. 311, 323-24 (Pa. 1841), the first negligence per se case, used this logic. See *supra* text accompanying notes 24-28.

182. See *supra* text accompanying notes 55-62. Custom, in modern usage, includes standards issued by private organizations and government agency recommendations. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 13 cmt. e (AM. LAW INST. 2010). Early cases tended not to discuss private standards, largely because rules of evidence precluded their introduction. See *infra* Part II.C.

183. See *supra* text accompanying notes 61-71.

184. See Kenneth S. Abraham, *Custom, Noncustomary Practice, and Negligence*, 109 COLUM. L. REV. 1784, 1795 (2009) (stating that custom only “became a fixture in the case-books and treatises” after the publication of the Second Restatement).

*Customs*<sup>185</sup> devoted only some fifteen pages to discussing the relation of custom to negligence, essentially recounting cases that dealt with the topic but making few editorial observations.<sup>186</sup> The only in-depth discussion of the topic was in one of the earliest treatises, William Hale's 1896 *Handbook on the Law of Torts*.<sup>187</sup> Hale explained that the law looked to custom and usage in determining what was negligence.<sup>188</sup> Custom and usage could "amount to almost positive law (as the law of the road, in the absence of statute)," to general business usage, or to the parties' general practice.<sup>189</sup> Hale noted that custom and usual care were not the same thing. A person who exercised customary care did not necessarily exercise due diligence.<sup>190</sup> A failure to comply with custom was different. A person had to exercise care with reference to a usage or custom "which custom or usage may affect the probability of harm ensuing from a given course of conduct."<sup>191</sup> Due care, for instance, required following "the custom or law of the road."<sup>192</sup>

The later treatises, in the early part of the 1900s, devoted even less attention to deviation from custom and focused on the relevance of conformity with custom. The supplement to Thompson's negligence treatise noted in 1914 that a custom would not justify a negligent act, but could "sometimes be considered by the

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185. LAWSON, *supra* note 69.

186. *See id.* §§ 168-177.

187. *See* HALE, *supra* note 69, § 231, at 454-67.

188. *Id.* at 464.

189. *Id.*

190. *Id.* at 465. Hale later noted that evidence showing the plaintiff acted in accordance with custom was not conclusive of an absence of negligence because the general usage could be negligent. *Id.* at 487. Custom was, however, admissible to show ordinary care. *Id.*

191. *Id.* at 465.

192. HALE, *supra* note 69, § 231, at 465. Hale did not use the term negligence per se, but he did note that it was "prima facie evidence of negligence" to leave a horse unhitched and unattended. *Id.*

Byron and William Elliott discussed nonconformity with custom in passing in their *Treatise on The Law of Roads and Streets*. ELLIOTT & ELLIOTT, *supra* note 51, § 828. They referred to the "custom or system of rules regulating travel upon highways." *Id.* There were statutes prescribing the law of the road in some states which were generally "simply the legislative enactments of what had already become a universal and established custom of our country." *Id.* The commentators noted that courts would take judicial notice of some customs in the absence of statutes on the topic. *Id.* § 830. There was a presumption that a person who violated the law of the road was negligent. *Id.* § 832.

jury on the issue of negligence.”<sup>193</sup> In 1933, Harper noted that it was error to instruct a jury that a person who followed custom was not negligent.<sup>194</sup> Even if a custom was reasonable in the abstract, those actions might not be reasonable in a particular case.<sup>195</sup>

The early custom cases generally dealt with compliance with custom; defendants argued that they acted reasonably because they followed customary precautions.<sup>196</sup> The courts were split on the significance of compliance.<sup>197</sup> Some cases treated compliance with custom as conclusive evidence of due care. This rule, the “safe harbor rule,” found that business custom was the “unbending test of negligence.”<sup>198</sup> The rival view was that compliance with custom was immaterial, and that evidence of custom was not even admissible.<sup>199</sup> Neither competing view has current validity.<sup>200</sup> The now-dominant custom rule, reflected in the famous case of *The T.J. Hooper*,<sup>201</sup> is in many ways a middle ground. It says that compliance with custom is relevant, but not determinative.<sup>202</sup> As Judge Learned Hand explained, “in most cases reasonable prudence is in fact common prudence; but strictly it is

193. EDWARD F. WHITE, A SUPPLEMENT TO THE COMMENTARIES ON THE LAW OF NEGLIGENCE OF SEYMOUR D. THOMPSON, LL.D §§ 30, 31 (1914).

194. HARPER, *supra* note 64, § 70, at 160.

195. *Id.*

196. See Abraham, *supra* note 184, at 1792.

197. *Id.*; see also Richard A. Epstein, *The Path to The T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1 (1992) (exploring the law of custom).

198. Abraham, *supra* note 184, at 1792; see also *Titus v. Bradford, Bordell & Kinzua R.R. Co.*, 20 A. 517, 518 (Pa. 1890); Henry R. Miller, Jr., *The So-Called Unbending Test of Negligence*, 3 VA. L. REV. 537, 537, 540-41 (1916) (arguing that the standard is unsound and criticizing the lack of flexibility and failure to consider individual facts and circumstances).

199. *Burke v. S. Boulder Canon Ditch Co.*, 203 P. 1098, 1099-1100 (Colo. 1922) (holding that it was error to introduce evidence regarding the custom of constructing and operating ditches because the question is not what others have done, but what they ought to do).

200. See Abraham, *supra* note 184, at 1793 (explaining that the modern treatment of custom originated from the rejection of the rules that competed with it); Fleming James, Jr. & David K. Sigerson, *Particularizing Standards of Conduct in Negligence Trials*, 5 VAND. L. REV. 697, 710 (1952) (calling both views wrong on principle and largely abandoned).

201. 60 F.2d 737, 740 (2d Cir. 1932).

202. *Id.* A number of well-known cases stated the same proposition. See, e.g., *Tex. & Pac. Ry. Co. v. Behymer*, 189 U.S. 468, 470 (1903) (“What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.”); see also Abraham, *supra* note 184, at 1792-94 (discussing development of the current rule).

never its measure; a whole calling may have unduly lagged in the adoption of new and available devices.”<sup>203</sup> Industry could not “set its own tests, however persuasive be its usages.”<sup>204</sup> The determination of what prudence required ultimately rested with the courts.<sup>205</sup>

The early custom cases focused on the relevance of compliance with custom, not on whether a defendant failed to exercise due care by omitting customary precautions. As Professor Abraham explains, one might have expected those courts that treated compliance with custom as the test of negligence to find that a departure from custom was negligence as a matter of law.<sup>206</sup> They did not, however. The Supreme Court of Pennsylvania stated that custom was the “unbending test” of negligence only “to disprove negligence, not to prove it.”<sup>207</sup> Other courts followed suit.<sup>208</sup> It does not appear, however, that courts that found custom as irrelevant to disproving negligence also found it to be irrelevant in determining what conduct was considered negligent.<sup>209</sup>

The First Restatement of Torts did not address the topic of custom, perhaps because the rules regarding both compliance and departure from custom had just become accepted at the time it was published.<sup>210</sup> Things changed when two major scholarly works, published after the First Restatement, focused on the topic and substantially influenced the law in this area. The first was

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203. *T.J. Hooper*, 60 F.2d at 740.

204. *Id.*

205. *Id.*; see generally KEETON ET AL., *supra* note 14, at 194 (discussing the development of the law of custom and saying that the view that custom was determinative proved “arbitrary” and “impossible to justify” because customs can be unreasonable in some situations and because some customs were the product of carelessness).

206. See Abraham, *supra* note 184, at 1794.

207. *Cunningham v. Fort Pitt Bridge Works*, 47 A. 846, 846 (Pa. 1901); see Clarence Morris, *Custom and Negligence*, 42 COLUM. L. REV. 1147, 1152 (1942) (discussing *Cunningham*). The *Cunningham* court’s approach is especially surprising because the Supreme Court of Pennsylvania decided the first negligence per se case, *Simpson v. Hand*, finding that deviation from custom was negligence per se. See *supra* text accompanying 23-28. The brief opinion in *Cunningham* does not cite *Simpson*.

208. See *Cent. Granaries Co. v. Ault*, 107 N.W. 1015, 1016 (Neb. 1906) (using the same language as *Cunningham*); Abraham, *supra* note 184, at 1794.

209. See Abraham, *supra* note 184, at 1794.

210. *Id.* at 1795. The Second Restatement’s provision on custom notes that “this Section has been added to the first Restatement.” RESTATEMENT (SECOND) OF TORTS § 295A reporter’s notes (AM. LAW INST. 1965).

Clarence Morris's groundbreaking 1947 article, *Custom and Negligence*.<sup>211</sup> Morris addressed both compliance with custom and departure from custom in detail. He explained that evidence of conformity with custom was relevant for three reasons: (1) it showed that a finding of negligence would have implications for others' conduct, (2) it focused attention on whether other measures were practical, and (3) it was relevant to the question of whether the defendant could have learned of other safeguards.<sup>212</sup> The value of the evidence was limited, however, and the evidence was not conclusive.<sup>213</sup> Conformity with custom did not establish due care because an industry could continue to engage in an unsafe practice.<sup>214</sup>

Morris argued that evidence of departure from custom was more meaningful than that of conformity. "Conformity evidence only raises questions, but sub-conformity evidence tends to answer questions."<sup>215</sup> Emphasizing the need to distinguish sub-conformity from mere non-conformity,<sup>216</sup> Morris explained that evidence that the defendant used more dangerous methods than those customary in the craft was relevant in three ways: (1) it tended to show that liability would not force widespread change, (2) it suggested that safer methods than defendant's were feasible, and (3) it tended to show that the defendant carelessly failed to learn of safeguards or consciously failed to take precautions that others considered essential.<sup>217</sup>

Morris nonetheless argued that proof the defendant used less than customary care did not necessarily prove negligence. The deviation could be insubstantial and reasonable, or the defendant's conduct could have been only slightly more dangerous than the custom.<sup>218</sup> In many other cases, however, "the defendant is proved guilty of heedless, substantial sub-conformity to a usage

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211. Morris, *supra* note 207.

212. *Id.* at 1147-49.

213. *Id.* at 1149.

214. *Id.* at 1151.

215. *Id.* at 1161.

216. Morris, *supra* note 207, at 1152. A person could act in a non-conforming manner because he was ahead of his time or simply wanted to assert his individuality. *Id.*

217. *Id.* at 1151.

218. *Id.* at 1161-62.

calling for reasonable, necessary safeguards.”<sup>219</sup> Morris expressed surprise that there were virtually no such cases in which a court directed verdicts for plaintiffs.<sup>220</sup> Drawing an analogy to negligence per se,<sup>221</sup> Morris suggested there was “no reason why courts should relinquish their power to prevent unreasonable verdicts” in such cases by finding that sub-conformity could never be conclusive proof of negligence.<sup>222</sup>

Five years later, Fleming James and David Sigerson addressed similar concerns in their article focusing on the roles of judge and juries in establishing standards of conduct in negligence trials.<sup>223</sup> The article explained that a court impliedly determined the proper standard of conduct under the circumstances whenever it took the negligence issue from the jury.<sup>224</sup> It did the same thing when it adopted the standard in a criminal statute in negligence per se cases, when it prescribed a standard based on custom, or when it articulated a rule to follow in recurring cases.<sup>225</sup> The authors noted that courts generally refused to adopt mechanical rules limiting the jury’s role when asked to articulate standards.<sup>226</sup> Applying this background to the specific question of custom, the authors explained that “the great weight of modern American authority” found that evidence of a custom to take or to omit a precaution was admissible on the question of what conduct was proper, but was not conclusive.<sup>227</sup> The authors explained that

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219. *Id.* at 1162.

220. *Id.* (“I have not found one such case in which the court directed a verdict for the plaintiff!”). Morris noted that it was possible there were directed verdicts that were not appealed, but thought that plaintiffs did not request directed verdicts. *Id.* at 1162-63. “Perhaps they confuse sub-conformity with conformity, and knowing that the latter is seldom conclusive, assume that the former cannot be.” *Id.* at 1163.

221. Morris, *supra* note 207, at 1163 n.43 (citing to his article on negligence per se *The Relation of Criminal Statutes to Tort Liability*).

222. *Id.* at 1162-63.

223. James & Sigerson, *supra* note 200, at 697.

224. *Id.* at 704. A court made this judgment when it held that a reasonable jury could not find for or against negligence. *Id.*

225. *See id.* The article discussed judicially-created rules such as the requirement that drivers stop, look, and listen at railroad crossings and how the courts moved away from enforcing mechanical rules that limited the jury’s sphere. *See id.* at 705-09; *see also supra* text accompanying notes 101-10 (discussing these cases and the change in judicial approach).

226. James & Sigerson, *supra* note 200, at 708.

227. *Id.* at 710.

evidence of custom had probative force because it represented the experience and conduct of many individuals.<sup>228</sup>

The Second Restatement of Torts relied on Morris's and James' and Sigerson's articles in addressing custom.<sup>229</sup> The Restatement provision was brief, stating: "In determining whether conduct is negligent, the customs of the community, or others under like circumstances, are factors to be taken into account, but are not controlling where a reasonable man would not follow them."<sup>230</sup>

The comments to the section do not go into detail and do not focus on differences between cases of compliance and noncompliance with custom. The comments explained that customs were relevant when they were so well-known that a party must be charged with knowing of the custom or with negligence in not knowing.<sup>231</sup> Evidence of custom was relevant because customs cast light on the community's judgment of the risks of a situation and what precautions were necessary to meet those risks.<sup>232</sup> Custom also spoke to the feasibility of precautions, the difficulty of changing accepted methods of acting, the actor's opportunity to

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228. *Id.* at 712. The question of whether the jury determined the propriety of the defendant's conduct or a judge set the standard was significant, Fleming and Sigerson explained, because the allocation of responsibility affected the likelihood that the defendant would be found liable. *See id.* at 697. They stated that rules expanding the jury's role expanded liability, while rules that fixed specific standards of conduct tended to narrow the jury's role and restrict liability. *Id.* They cited two law review articles to support this conclusion: James, *supra* note 101, and Richard M. Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROBS. 476 (1936).

It appears doubtful that this assumption is uniformly accurate, however. Although it does appear logical that an instruction that a jury defer to custom as a measure of proper conduct would limit liability because a jury would not be able to look to other possible measures of care, the opposite seems true in cases of departure from custom. A determination that customary precautions set a minimum standard would allow a judge to direct a verdict for the defendant or, at a minimum, to instruct the jury that the defendant did not exercise due care. *See* RESTATEMENT (SECOND) OF TORTS § 295A cmt. b (AM. LAW INST. 1965) (explaining that the inferences from a defendant's failure to comply with custom may justify a directed verdict of negligence); Morris, *supra* note 207, at 1162-63 (so suggesting). The move to comparative negligence also appears to affect the validity of the general premise. One reason fixed rules restricted liability was because they made it easier to establish contributory negligence. *See* James, *supra* note 101, at 689. On comparative fault, see generally Daniel L. Rubinfeld, *The Efficiency of Comparative Negligence*, 16 J. LEGAL STUD. 375 (1987).

229. *See* RESTATEMENT (SECOND) OF TORTS § 295A reporter's notes.

230. *Id.* § 295A.

231. *Id.* cmt. a.

232. *Id.* cmt. b.



learn how to respond to a situation, and the expectations of others.<sup>233</sup> These factors justified an inference that an actor was reasonable in complying with community standards and unreasonable in not complying.<sup>234</sup> Compliance with custom was not conclusive on the negligence question, however, because customs that are generally reasonable may not be reasonable in light of the facts of a particular case.<sup>235</sup> The commentary also noted the differences among customs. “Some of them are the result of careful thought and decision, while others arise from the kind of inadvertence, neglect, or deliberate disregard of a known risk which is associated with negligence.”<sup>236</sup> It followed that there would be some situations when a reasonable person would not conform to a custom and others where a person could act reasonably when departing from custom.<sup>237</sup>

The Third Restatement recognized the same role for custom as did the Second, but it refined the analysis by addressing compliance with and departure from custom separately. Compliance with custom was evidence that the actor was not negligent, but not conclusive on the matter.<sup>238</sup> Departures from custom had the same relevance. “An actor’s departure from the custom of the community, or of others in like circumstances, in a way that increases risk is evidence of the actor’s negligence but does not require a finding of negligence.”<sup>239</sup> The reporters’ note explained that this view was widely accepted—“there is no minority rule.”<sup>240</sup>

The commentary to the Third Restatement went into considerably more detail than the previous commentary, and specifically

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233. *Id.*

234. RESTATEMENT (SECOND) OF TORTS § 295A cmt b.

235. *Id.* cmt. c. The statement that evidence of noncompliance is not conclusive on the question of negligence seems in tension with the statement in comment b that the inferences from a case of noncompliance can justify directing a verdict on negligence. *See id.* cmt. b. The statements are reconcilable, however, because the statement on directing a verdict was limited to particular instances in which nothing in the situation led to a contrary conclusion. *Id.*

236. *Id.* cmt. c.

237. *Id.* The comment also noted that there would be no incentive to make progress if prudence only required customary conduct. *Id.*

238. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 13 (AM. LAW INST. 2010).

239. *Id.*

240. *Id.* reporters’ note. The note also stated that the provision was in line with the Second Restatement’s view. *Id.*

addressed the rationale for the rule regarding departure from custom.<sup>241</sup> Although compliance with custom could raise questions about alternatives available to the actor,<sup>242</sup> departure from custom tended “to answer relevant questions concerning the availability and feasibility of . . . precautions.”<sup>243</sup> “While proof of deviation from custom is only evidence of negligence, this evidence often has significant weight.”<sup>244</sup> A party who had departed from custom could justify his actions by questioning the intelligence of the custom, by showing that his actions did not directly implicate the reasons for the customary precautions, or by showing that he addressed the risks in other ways.<sup>245</sup> Proof of departure from custom was also relevant only if the departure increased the risks.<sup>246</sup>

The modern position on custom, reflected in the Restatements, functions much as a rule of evidence; it allows juries to hear evidence of custom, and give it such weight as the jury believes it deserves.<sup>247</sup> The jury does not have to take the custom

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241. The commentary began by explaining that custom played a powerful role in many branches of law other than torts, such as contract law and international law. *Id.* cmt. a. The commentary noted that Morris’s article on Custom and Negligence, *supra* note 207, remained the leading article on the topic, and stated that Abraham’s article, *supra* note 184, was “[a]n excellent modern treatment” of the topic. It also cited Epstein’s article *The Path to the T.J. Hooper*, *supra* note 197, and Steven Hetcher, *Creating Safe Social Norms in a Dangerous World*, 73 S. CAL. L. REV. 1 (1999), as “provocative contemporary” works. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 13 reporters’ note.

242. The commentary to section 13(a) explained that compliance with custom could bear on whether further precautions were available, whether the precautions were feasible, and whether the actor should have known of them. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 13 cmt. b. Custom was also relevant because ordinary care had bearing on what was reasonable care. *Id.* Additionally, a jury should know of custom because it warned that the verdict could have widespread implications. *Id.* Proof of compliance was not conclusive, however, because a whole industry could have lagged behind in adopting safety measures, particularly in cases in which the potential victims and defendants did not have contractual or other consensual relationships. *Id.*

243. *Id.* cmt. c.

244. *Id.* Despite this statement, the commentary did not address whether a judge could rely on proof of departure from custom to justify directing a verdict. This is somewhat surprising because the reporters’ note explained that compliance with custom, standing alone, could not justify a directed verdict on behalf of the actor, although it could play a significant role in the decision to direct a verdict. *Id.* reporters’ note.

245. *Id.* cmt. c.

246. *Id.* The commentary also noted that some customs, such as driving on the right, can induce general reliance by everyone engaging in an activity, and establish the standard by which all persons engaging in the activity are bound. *Id.* cmt. d.

247. See Abraham, *supra* note 184, at 1788-91. Abraham details the different steps by which a jury learns of custom evidence during a trial, as well as the treatment of custom in closing argument and jury instructions. *Id.* at 1789-90. Moreover, he notes that evidence

into account.<sup>248</sup> “The jury may wholly disregard custom evidence without violating the custom rule.”<sup>249</sup> This is dramatically different from the jury’s role in modern negligence-per-se cases, where the jury is told that failure to follow the law is negligence.<sup>250</sup>

### C. Safety Codes and Other Standards without the Force of Law

Customs and practices are often unwritten. An industry might, however, issue safety standards that codify its customs and recognized practices. A government agency might also issue safety recommendations. Private standards and public recommendations could reflect industry custom, and adherence to these standards could be so widespread as to convert the provisions to actual customs.<sup>251</sup> It would seem logical that courts would treat private standards and recommendations that lacked the force of law in the same manner as customs. The law did not readily take that course, however. Evidentiary rules long limited evidence of private standards,<sup>252</sup> and the Restatements did not address private standards until the commentary to the Third Restatement’s provision on custom.<sup>253</sup>

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establishing a practice is customary generally comes in through expert testimony. *Id.* at 1789.

248. *Id.* at 1791.

249. *Id.*; *see, e.g.*, 1 OHIO JURY INSTRUCTIONS § CV 401.03 (2018) (stating that “[y]ou may consider the degree to which such (methods) . . . have been customarily used” and that, if there is an accepted custom, “you may consider this along with all other facts and circumstances”); N.Y. PATTERN JURY INSTRUCTIONS—CIV. § 2:16 (2017) (stating that a custom “may be considered some evidence of what constitutes reasonable conduct”). *But see* CAL. CIV. JURY INSTRUCTIONS § 3.16 (2017) (saying that evidence that a person conformed or did not conform to custom “ought to be considered, but is not necessarily controlling”).

250. *See* 1 OHIO JURY INSTRUCTIONS § CV 401.01 (2018) (“A person may be required by law to do something or not to do something. Failure to do what is required by law is negligence, as is doing something the law prohibits.”); *see also supra* text accompanying notes 179-81.

251. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 13 reporters’ note (explaining that private standards often take the form of documents called codes, such as the American National Standards Institute’s National Electric Safety Code).

252. *See infra* Part II.C.

253. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 13 reporters’ note.

The Third Restatement treated noncompliance with private standards and governmental recommendations in the same manner as custom, explaining that some cases included proof that an actor complied with or deviated from “a standard issued by a private organization or a recommendation issued by a government agency.”<sup>254</sup> The comments stated, without elaboration, that the rules regarding negligence per se did not apply to the former cases because the standards were “issued by a private body,” and that the latter cases did not implicate negligence per se because the doctrine did not apply to a “mere recommendation.”<sup>255</sup> Standards or recommendations could nonetheless bear on the issue of negligence, such as when a party argued that compliance with private standards defeated negligence.<sup>256</sup> If the evidence showed that the standard or recommendation was the equivalent of a custom, the commentary concluded, the standard should be treated like custom.<sup>257</sup>

The Third Restatement was the first Restatement to discuss noncompliance with safety codes and private standards.<sup>258</sup> That is not because private safety codes are recent innovations. They are not. The National Electrical Code was first published in 1897<sup>259</sup> and the American National Standards Institute was

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254. *Id.* cmt. e.

255. *Id.* (referring to *id.* §§ 14-16).

256. *Id.*

257. *Id.* (“Insofar as . . . the standard or . . . recommendation is shown to be the equivalent of custom, evidence concerning the standard or recommendation should be treated in accordance with this Section”). The reporters’ note cited a number of cases considering whether private standards were the equivalent of custom. *Id.* reporters’ note. The commentary also noted that the jurisdiction’s rules of evidence would govern the admissibility of the standard. *Id.* cmt. e. The reporters’ note further cited cases concerning the relation of the hearsay doctrine to private standards. *Id.* reporters’ note.

The commentary also addressed cases in which a defendant departed from its own standards, such as those in a corporation’s safety manual. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 13 cmt. f. It noted that it could be unfair to admit such evidence because a defendant could have adopted greater safety precautions than necessary, but that the evidence could be relevant if the plaintiff had relied on defendant’s standards in choosing to do business. *Id.* In light of these concerns, “the best position is the flexible position that the admissibility of evidence as to the actor’s departure from its own standard depends on all the circumstances of the individual case.” *Id.* The reporters’ note stated that the cases reach divided results on the issue. *Id.* reporters’ note.

258. *Id.* § 13 cmt. e.

259. BRIAN J. MCPARTLAND & JOSEPH F. MCPARTLAND, MCGRAW-HILL’S NATIONAL ELECTRICAL CODE HANDBOOK xvii (25th ed. 2005).

founded in 1918.<sup>260</sup> The lack of judicial attention to private standards instead seems to have been a factor of both restrictive rules of evidence and the absence of a developed body of tort law in which standards were important.<sup>261</sup> A 1965 law review article stated that “[f]ew attorneys have any familiarity with safety standards.”<sup>262</sup> The development of products liability law, and tort law’s emerging focus on safety, required attention to safety codes.<sup>263</sup> The law on the admissibility and use of safety standards, at bottom, reflects a changing view of the jury’s role in tort litigation.

Private safety standards were not irrelevant in the first half of the 1900s, and quite a few cases addressed them.<sup>264</sup> Many cases in the 1930s, for instance, arose from electrical accidents.<sup>265</sup> Some defendants in these cases argued that their compliance with electrical safety standards showed that they were not negligent. The Louisiana Court of Appeals accepted this argument in *Boudreaux v. Louisiana Power & Light Co.*,<sup>266</sup> observing that the defendant’s power lines were constructed in accordance with United States Bureau of Standards requirements and there was, “therefore, no proof of any negligence.”<sup>267</sup> Plaintiffs in other cases used

260. *About ANSI*, AM. NAT’L STANDARDS INST., [http://www.ansi.org/about\\_ansi/overview/overview.aspx?menuid=1](http://www.ansi.org/about_ansi/overview/overview.aspx?menuid=1) [<https://perma.cc/YT6E-RHM3>].

261. The Third Restatement suggests that the lack of focus on private standards was largely because evidentiary rules precluded reliance on such evidence. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 13 cmt. e. The first article to discuss safety codes emphasized the novelty of products liability litigation in explaining why attorneys were generally unfamiliar with the use of standards. Harry M. Philo, *Use of Safety Standards, Codes and Practices in Tort Litigation*, 41 NOTRE DAME L. REV. 1, 1 (1965).

262. Philo, *supra* note 261, at 1.

263. *Id.*

264. For early cases finding non-governmental standards admissible, see *Ala. Power Co. v. McIntosh*, 122 So. 677, 680 (Ala. 1929) (finding that the National Electric Code (“NESC”) was admissible to show negligence of using prohibited fixtures); *Leas v. Cont’l Fruit Express*, 99 S.W. 859, 863 (Tex. Civ. App. 1907) (finding rules of Master Car Builders’ Association admissible to show proper construction of train car); *See generally* Annotation, *Admissibility in Evidence of Safety Codes Issued By Governmental Department or Commission, or Promulgated By Voluntary Associations*, 122 A.L.R. 644 (1939).

265. *See* cases discussed *infra* at text accompanying notes 266-83; Annotation, *supra* note 264.

266. 135 So. 90, 91 (La. Ct. App. 1931).

267. *Id.* The court did not elaborate on the nature of the Bureau of Standards’ requirements. A later Fifth Circuit opinion explains that the Bureau of Standards is a division of the Department of Commerce that has authority to issue the standards for information, but that the Bureau could not regulate wiring, and the standards had no compulsive force. *Miss.*

the standards on the offensive, arguing that defendants' departures from safety standards showed negligence. A Louisiana court was receptive to this view in *Layne v. Louisiana Power & Light Co.*<sup>268</sup> The court found that the defendant violated the National Electric Safety Code (NESC) by stringing uninsulated wires close to a metal roof, ruling that there could be "no doubt" about its negligence.<sup>269</sup> The Fifth Circuit, however, refused to allow evidence that a defendant violated the NESC in its influential decision in *Mississippi Power & Light Co. v. Whitescarver*.<sup>270</sup> The court explained that the code had no legal force—the United States Bureau of Standards authorized its publication as "[i]nformation . . . of value to the public."<sup>271</sup> The standards were thus inadmissible because they simply represented the opinion of the compilers.<sup>272</sup>

The *Whitescarver* opinion illustrates the early, leading approach: holding evidence of non-legal standards inadmissible.<sup>273</sup> That view was not, however, universal. In *City of Dothan v. Hardy*,<sup>274</sup> the early, leading case allowing a plaintiff to rely on a defendant's departure from private standards, a roofer was electrocuted after he brushed against electric wires strung close to the top of the building where he was working.<sup>275</sup> Plaintiffs argued that the city, which installed the wires, violated the clearance provisions in the NESC.<sup>276</sup> The court acknowledged that the Code had no legal force.<sup>277</sup> It stated, "We concur in the view that such rules are not regulations having the force of law, whose violation is negligence per se."<sup>278</sup> The court further stated that the fact the

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Power & Light Co. v. Whitescarver, 68 F.2d 928, 930 (5th Cir. 1934); see also *infra* text accompanying notes 270-73.

268. 161 So. 29, 32 (La. Ct. App. 1935).

269. *Id.* at 30-32. There is no indication in the opinion that the defendant challenged admissibility of the Code. See *id.*

270. 68 F.2d at 930-31; see *infra* text accompanying notes 273-83 (explaining that most courts took this approach).

271. *Whitescarver*, 68 F.2d at 930.

272. *Id.* at 930-31. The court compared the code to a scientific book, explaining that scientific books could not be admitted into evidence in any state other than Alabama. *Id.* at 930-31; see *infra* text accompanying notes 284-91 (discussing evidentiary issues).

273. *Whitescarver*, 68 F.2d at 930-31.

274. 188 So. 2d 264, 265-66 (Ala. 1939).

275. *Id.* at 265-66.

276. *Id.* at 265.

277. *Id.*

278. *Id.* (discussing *Whitescarver*).

Code lacked the force of law did not preclude its admission as expert opinion published under government auspices to aid the public safety.<sup>279</sup> Fearing that a decision to exclude the code as evidence of improper installation would necessarily exclude its admission as evidence of proper installation, the court ruled that it would be improper for one agency of government to deny that another government agency's instructions lacked probative force.<sup>280</sup>

The dispute between the *Whitescarver* and *City of Dothan* courts was not really about tort law but about the rules of evidence, specifically about the admissibility of scientific treatises and similar works. The almost-universal rule of the time, as the *Whitescarver* court explained, was that scientific treatises were inadmissible because they were the mere opinions of the authors about a changing field, not delivered under oath or subject to cross-examination.<sup>281</sup> Safety codes similarly dealt "with a controversial and developing science in which opinions may vary and experience work great changes."<sup>282</sup> The *City of Dothan* court agreed with the analogy between safety codes and scientific treatises, but found that the arguments for admitting the conclusions of an expert body outweighed those for excluding them.<sup>283</sup> *Dothan* was in the minority, and the accepted rule late into the

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279. See *City of Dothan*, 188 So. at 265-66. The court also relied on *Layne*, discussed *supra* at text accompanying notes 268-69, and *Ala. Power Co. v. McIntosh*, 122 So. 677 (Ala. 1929). The *McIntosh* court allowed evidence that the home electric receptacle that caught fire was forbidden by the National Electric Code, "the standard . . . used by all competent wiremen" and "the interior wireman's Bible." *McIntosh*, 122 So. at 680. The code reflected the judgment of those experienced in the business and was "evidence that the use of fixtures forbidden by it is negligence." *Id.*

280. *City of Dothan*, 188 So. at 267.

281. *Miss. Power & Light Co. v. Whitescarver*, 68 F.2d 928, 930-31 (5th Cir. 1934). The court explained that the leading case for rejecting scientific books as primary evidence was *Ashworth v. Kittridge*, 66 Mass. 193 (1853). *Whitescarver*, 68 F.2d at 930-31. The rule against admissibility applied in Mississippi "and generally elsewhere except in Alabama." *Id.* at 931. The *Ashworth* court had rejected the admission of medical books for the reasons the *Whitescarver* court gave, and also because medical terminology would not be accessible to jurors. *Ashworth*, 66 Mass. at 195.

282. *Whitescarver*, 68 F.2d at 930.

283. *City of Dothan*, 188 So. at 266-67. The court explained that the code was the product of a government bureau set up to acquire information from a wide variety of sources and make official findings regarding appropriate standards. *Id.* at 267. "That this agency invites scrutiny and criticism rather strengthens than weakens its findings." *Id.*

1950s was that safety codes lacking the force of law could not be admitted into evidence.<sup>284</sup>

Essentially, the basis for the rule of inadmissibility was that safety standards were unreliable, changeable opinion.<sup>285</sup> Also underlying this rule was a distrust of the jury's ability—a fear that it would not understand scientific terminology.<sup>286</sup> The effect of the rule was to limit the jury's role by keeping material out of the jury's hands.<sup>287</sup> The contrary view that took root in the 1960s reflected a sense that the jury should have access to information that would help it reach an informed decision. Standards could aid the finder of fact in deciding what precautions were feasible ones that should have been known to the defendant<sup>288</sup> and in determining<sup>289</sup> and applying<sup>290</sup> the standard of care. Courts became increasingly receptive to evidence regarding safety codes, and similar documents that lacked the force of law as evidentiary barriers against admitting treatises and similar works began to fall. Two factors contributed to the shift. One was a recognition that safety codes, unlike treatises, represented more than the opinion

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284. See *Sloan v. Carolina Power & Light Co.*, 102 S.E.2d 822, 827 (N.C. 1958). The *Sloan* court found that the National Electric Safety Code was not admissible because the state legislature had not approved it or given it the force of law. *Id.* The court cited secondary sources, American Jurisprudence, and an American Law Reports Annotation as support for the conclusion that safety codes and similar documents that lacked the force of law were inadmissible. *Id.* at 826. It distinguished the court's earlier decision in *Lutz Industries v. Dixie Home Stores*, 88 S.E.2d 333 (N.C. 1955), which took judicial notice of provisions of the electric code that the legislature had given the force of law. *Sloan*, 102 S.E.2d at 827.

The A.L.R. Annotation cited by the *Sloan* court explained the analogy between safety codes and scientific treatises, and said that both were generally inadmissible outside of Alabama. Annotation, *supra* note 264, at 644-46.

285. See *Whitescarver*, 68 F.2d at 930-31, *discussed supra* at text accompanying notes 270-73.

286. *Ashworth*, 66 Mass. at 195, *discussed supra* note 281.

287. The information could come before the jury indirectly, however. The court in *Hercules Powder Co. v. DiSabatino*, 188 A.2d 529 (Del. 1963), said that the trial court properly allowed the defendant to cross-examine expert witnesses on the basis of the National Electrical Safety Code. *Id.* at 533. The court said that it had no doubt that safety codes were not admissible as independent evidence to prove the truth of the standards, but were permissible to examine and cross-examine experts on the grounds of their opinions. *Id.*

288. *Merchs. Nat'l Bank of Aurora v. Elgin, Joliet & E. Ry. Co.*, 273 N.E.2d 809, 813 (Ill. 1971).

289. *Ruffiner v. Material Serv. Corp.*, 506 N.E.2d 581, 584 (Ill. 1987).

290. *Frazier v. Cont'l Oil Co.*, 568 F.2d 378, 382 (5th Cir. 1978).



of the authors. The other, reflecting this recognition, was modernization of the rules of evidence.<sup>291</sup>

The New Jersey Supreme Court opinion in *McComish v. DeSoi*<sup>292</sup> explained the first point. It found that it was proper to admit safety manuals in a negligence case arising out of an industrial accident.<sup>293</sup> The court explained that the manuals were not offered as treatises but “as safety codes, as objective standards of safe construction, generally recognized and accepted as such in the type of construction industry involved.”<sup>294</sup> The manual was not simply one person’s opinion, but “a consensus of opinion carrying the approval of a significant segment of an industry.”<sup>295</sup> The code was not substantive law, but it did illustrate safety practices that generally prevailed in an industry.<sup>296</sup>

Not only were safety codes different from treatises, but the rules regarding admission of treatises had been relaxed. The Uniform Rules of Evidence allowed admission of “[a] published treatise, periodical or pamphlet on a subject of history, science or art to prove the truth of the matter stated therein” if the court took judicial notice or an expert testified that it was reliable authority.<sup>297</sup> The comment to the Rule said that, at the time, very few courts admitted treatises into evidence, and that caused extensive

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291. See Philo, *supra* note 261, at 7-10; see also 1 BARRY A. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 3:68 (2d ed. 2017) (noting that the prior view was that standards were inadmissible because they were considered hearsay, they did not deal with an exact science, and they lacked the force of law).

292. 200 A.2d 116, 120-21 (N.J. 1964).

293. *Id.* at 123.

294. *Id.* at 120.

295. *Id.* 120-21.

296. *Id.* at 121. The Washington Supreme Court, sitting en banc, made similar points in a careful decision allowing a ladder manufacturer to introduce evidence of compliance with American Standards Association standards regarding the manufacture of portable metal ladders. *Nordstrom v. White Metal Rolling & Stamping Corp.*, 453 P.2d 619, 621-23 (Wash. 1969) (en banc). The court found that the trustworthiness of such standards, and the necessity of their use dictated allowing the evidence notwithstanding the hearsay rule. *Id.* at 623. The standards’ trustworthiness were, according to the court, beyond doubt. *Id.* They were published after thorough research by a special committee that was established for the purpose and reflected a broad membership, a subcommittee of which specialized in metal ladders. *Id.* The fact that scientific evidence developed over time did not support its exclusion or scientific evidence “would never be admissible.” *Id.* at 623-24. “Conceding therefore that the code is an expression of opinions of a group of experts, those opinions are relevant on the question of whether the defendant manufacturer properly designed and manufactured the article in question . . .” *Id.* at 625. If these standards were not the latest and best opinion on the subject, plaintiff could have proved that fact. *Id.*

297. UNIF. R. EVID. 63(31) (1953).

debate over whether counsel could impeach experts by referring to treatises.<sup>298</sup> The new rule would eliminate that confusion.<sup>299</sup> The Federal Rules of Evidence now authorize admission of statements in learned treatises under an exception to the hearsay rule.<sup>300</sup>

The first scholarship discussing the use of safety codes in tort litigation appeared as courts relaxed the evidentiary barriers to their admissibility. The 1965 guide *Use of Safety Standards, Codes and Practices in Tort Litigation* presented the topic as a “[n]ew [s]ubject” with which few attorneys had familiarity.<sup>301</sup> It outlined out how attorneys could find applicable codes and use them in preparing to file suit, in discovery, and at trial.<sup>302</sup> It said that safety codes were admissible if properly presented, and that the New Jersey Supreme Court decision in *McComish* was “or soon will be” the law.<sup>303</sup> Noting that safety standards and codes were a safety engineer’s basic tools, the article found it “ridiculous” to allow the engineer to testify based on what was in the codes but not to admit the codes themselves.<sup>304</sup>

A law review comment published several years later called the assertion that safety codes were admissible premature.<sup>305</sup> It did note a “trend toward greater liberality” in admitting codes,

298. *Id.*

299. *Id.*

300. FED. R. EVID. 803(18); *see generally* 2 CLIFFORD S. FISHMAN, JONES ON EVIDENCE: CIVIL AND CRIMINAL § 9.11 (7th ed. 1994) (discussing approaches to admitting safety standards).

The evidentiary problems do not arise with statutes and other legal material because the judge has the authority to investigate the law and take notice of it. Some authority speaks of a judge’s power to take judicial notice of law. *See* Philo, *supra* note 261, at 8; *see also* EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 1-12 (new ed. 1963). The Federal Rules of Evidence explain that the judge has the inherent authority to recognize law aside from rules on judicial notice. FED. R. EVID. 201(c) advisory committee’s note to 1972 proposed rule.

301. Philo, *supra* note 261, at 1. This article and a law review comment, James L. Foutch, Comment, *Admissibility of Safety Codes, Rules and Standards in Negligence Cases*, 37 TENN. L. REV. 581 (1970), appear to be the first scholarship on the issue other than discussion in evidence treatises and general references like American Law Reports annotations. I have found no previous articles, and neither article cites any other earlier works. For a discussion of Foutch’s comment, *see infra* text accompanying notes 305-06.

302. Philo, *supra* note 261, at 1-12.

303. *Id.* at 7 (discussing Uniform Rules of Evidence). The article noted, though, that “[l]ower courts . . . often stumbled and refused to admit a standard or code because of the hearsay rule.” *Id.*

304. *Id.* at 8.

305. Foutch, *supra* note 301, at 593.

and concluded that attorneys “would do well to introduce safety codes and standards for admission when they are relevant to the issue of negligence.”<sup>306</sup> In 1974, The American Law Reports annotators discussed the issue, and stated that, “the modern trend towards greater admissibility of these codes and standards has apparently been great enough to make it unwise to attempt to identify any majority rule or minority rule.”<sup>307</sup> Commentators now say that safety standards are “generally admissible.”<sup>308</sup>

Safety codes reflect accepted industry practices, and some courts held that codes were admissible because they were, essentially, evidence of custom. Codes were admissible not as substantive scientific truth but as “a recognition and codification of customs and practices.”<sup>309</sup> This view treated safety codes as permissible evidence of community standards and custom.<sup>310</sup> The court in *Wheeler v. Jones*,<sup>311</sup> for example, allowed evidence of safety standards to show that the “standards of the community” dictated against using unmarked, ordinary glass in sliding doors leading to a children’s pool area.<sup>312</sup> Courts recognize that safety standards, like evidence of custom, can educate the jury on what is feasible, and what the defendant knew or should have known.<sup>313</sup>

The legal consideration of private standards and custom began to merge as the evidentiary barriers to admitting standards fell. A number of cases admitted standards specifically to show custom. Perhaps the most influential case of this kind is the Fifth Circuit decision in *Muncie Aviation Corp. v. Party Doll Fleet*,

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306. *Id.*

307. Daniel E. Feld, Annotation, *Admissibility in Evidence, on Issue of Negligence, of Codes or Standards of Safety Issued or Sponsored by Governmental Body or By Voluntary Association*, 58 A.L.R.3d 148, § 2[a] (1974 & 2017 Supp.). This Annotation superseded the annotation of the same name at 78 A.L.R.2d 778 (1961).

308. 1 LINDAHL, *supra* note 291, § 3:68; *see* *Elledge v. Richland/Lexington Sch. Dist. Five*, 573 S.E.2d 789, 795 (S.C. 2002) (stating that the “general rule” was that standards were admissible to help establish the standard of care in a negligence case); 2 FISHMAN, *supra* note 300, § 9:11, at 89 (saying the “prevailing view” is in favor of admitting safety codes and standards).

309. Foutch, *supra* note 301, at 582.

310. *Id.*

311. 431 P.2d 985 (Utah 1967).

312. *Id.* at 987. The court found that the standards showed there were widespread dangers involved. *Id.* The case discussed the admissibility of Federal Housing Administration standards but the court did not explain what those standards were or which body promulgated them. *See id.*

313. *Merchs. Nat’l Bank of Aurora v. Elgin, Joliet & E. Ry. Co.*, 273 N.E.2d 809, 813 (Ill. 1971).

*Inc.*<sup>314</sup> In that case, the court allowed the plaintiff to introduce Federal Aviation Administration (FAA) circulars, which governed landing procedures at uncontrolled airports, to show the standard of care pilots customarily followed in making such landings.<sup>315</sup> The court explained that compliance or noncompliance with custom was not conclusive on the issue of negligence, but was a factor the finder of fact could consider.<sup>316</sup> Both plaintiff and defendant pilots testified that they were familiar with FAA advisory material and that pilots customarily followed the circulars, making them relevant evidence of pilots' customary practices.<sup>317</sup> The standards helped to both show that defendant's pilot fell below the standard of care, and to rebut the claim that plaintiff's pilot was contributorily negligent.<sup>318</sup>

Other courts followed the lead of the Fifth Circuit in *Muncie Aviation Corp.* The Tenth Circuit cited *Muncie* when deciding whether the NESC was relevant to determining if the defendant was negligent if the industry custom was to abide by the code.<sup>319</sup> The Oregon Supreme Court similarly found it proper to consider the American National Standards Institute standards as evidence of the industry custom.<sup>320</sup> The Third Restatement drew on these cases in discussing safety codes in the section on custom, noting that compliance or noncompliance with such a standard was relevant to the issue of negligence.<sup>321</sup>

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314. 519 F.2d 1178 (5th Cir. 1975).

315. *Id.* at 1180. The circulars did not have the force of law. *Id.*

316. *Id.* at 1180-81.

317. *Id.* at 1181. The court also carefully discussed the argument of whether the admission of the circulars violated the rule against hearsay. *Id.* at 1181-84. The court said that considerations of practical necessity and trustworthiness rendered them admissible. *Id.* at 1182. It noted that its decision was "in accord with the modern trend of cases" and that courts had become "increasingly appreciative" of the value of safety codes to assist the trier of fact. *Id.* at 1183.

318. *Id.* at 1181. The court found that the circulars were also relevant to showing noncompliance with an FAA regulation having the force of law. *Id.*

319. *Ruhs v. Pac. Power & Light*, 671 F.2d 1268, 1273 (10th Cir. 1982).

320. *Hansen v. Abrasive Eng'g & Mfg., Inc.*, 856 P.2d 625, 628 (Or. 1993) (en banc). For other cases discussing safety codes as relevant to custom, see *Sawyer v. Dreis & Krump Mfg. Co.*, 493 N.E.2d 920, 925 (N.Y. 1986); *Miner v. Long Island Lighting Co.*, 353 N.E.2d 805, 810 (N.Y. 1976); *Crystal Tire Co. v. Home Serv. Oil Co.*, 525 S.W.2d 317, 323-24 (Mo. 1975) (en banc); *Briere v. Lathrop Co.*, 258 N.E.2d 597, 604 (Ohio 1970).

321. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 13 cmt. e (AM. LAW INST. 2010).

Jury instructions on compliance with safety standards sometimes equate those standards with custom. See 4 MINN. PRACTICE: JURY INSTRUCTION GUIDES—CIV. § 25.47

Safety standards, then, are generally now admissible as a codification of industry customs and practices. They are not conclusive evidence of negligence, and a violation of a standard is not negligence per se because only violations of law have that consequence.<sup>322</sup> Numerous cases that admit safety codes into evidence emphasize the standards are not conclusive on the subject of negligence<sup>323</sup> and that their violation is not negligence per se.<sup>324</sup> The cases are short on reasoning, however. A rare case that did attempt an explanation, *Jorgensen v. Horton*,<sup>325</sup> suggested that the difference lay in the fact that negligence per se was based on a fear of allowing a jury to override legislative judgment.<sup>326</sup> “We cannot apply the same reasoning to private safety codes which have not been given the force of law.”<sup>327</sup>

#### D. Law is What Matters: Government Adoption of Private Standards

Conduct that violates private standards is not negligence per se because the standards, like the customs they often codify, do not have legal effect.<sup>328</sup> Standards that lack the force of law, even those that—like the NESC—are issued under the auspices of government body, do not have negligence-per-se effect, and historically were not even admissible evidence.<sup>329</sup> Courts treated codes

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(6th ed. 2017) (“Evidence of standards or custom is not conclusive. It is just one piece of evidence.”). Other instructions treat standards separately from custom, but have the same imports. See PA. SUGGESTED STANDARD CIV. JURY INSTRUCTIONS § 13.110 (2014) (“If you find that [name of defendant] violated the [regulation or standard] . . . this [violation] is evidence you must consider, along with all other evidence, in deciding whether [name of defendant] was negligent.”).

322. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 (AM. LAW INST. 2010).

323. See, e.g., *Sawyer*, 493 N.E.2d at 925; *Barmeyer v. Mont. Power Co.*, 657 P.2d 594, 602-03 (Mont. 1983).

324. See, e.g., *Crane & Crane, Inc. v. C & D Elec., Inc.*, 683 P.2d 1103, 1109 (Wash. Ct. App. 1984); *Planters Elec. Membership Corp. v. Burke*, 105 S.E.2d 787, 793 (Ga. Ct. App. 1958); see generally *Feld*, Annotation, *supra* note 307, §2[b].

325. 206 N.W.2d 100 (Iowa 1973).

326. *Id.* at 102-03.

327. *Id.* at 103. For further discussion of the court’s reasoning, see *infra* text accompanying notes 373-77.

328. See *supra* text accompanying notes 322-27.

329. See *supra* text accompanying notes 269-83.

issued by private bodies the same as those from government authorities lacking the force of law.<sup>330</sup> Commentary criticized this approach, arguing that courts should consider the codes issued by government agencies in light of the agencies' familiarity "with all segments of the community under consideration."<sup>331</sup> That approach did not gain currency. A code's legal force, or lack thereof, determined not only whether violation of the code would be negligence per se, but frequently whether the code would be admissible at all.

With a code's legal force the key question, courts often had to determine whether a code had legal force. It was not always easy to determine whether a legislative body incorporated a code, giving it the force of law. The North Carolina Supreme Court's decision in *Lutz Industries v. Dixie Home Stores*<sup>332</sup> is a good example. The plaintiff sued to recover the value of real and personal property lost in a fire allegedly caused by wiring and fixtures that violated the NESC.<sup>333</sup> The defendant argued that the Code was inadmissible, relying on cases that followed the general rule against admitting safety codes lacking the force of law.<sup>334</sup> The court ruled that those cases were inapplicable because the North Carolina Building Code had incorporated the electric code, giving it legal force.<sup>335</sup> "It is well settled law in this jurisdiction, that when a statute imposes upon a person a specific duty for the protection of others, that a violation of such statute is negligence per

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330. Compare *In re Air Crash Disaster at John F. Kennedy Int'l Airport on June 24, 1975*, 635 F.2d 67, 77 (2d Cir. 1980) (allowing evidence of FAA advisory materials), and *Fluor Corp. v. Black*, 338 F.2d 830, 832 (9th Cir. 1964) (allowing evidence of the United States Corps of Engineers' Safety Manual and Arizona Industrial Commission rules), with *Johnson v. District of Columbia*, 728 A.2d 70, 75-76 (D.C. 1999) (finding Consumer Products Safety Commission notices admissible only if they stated the standard of care), and *Dominick v. Brockton-Taunton Gas Co.*, 255 N.E.2d 370, 371 (Mass. 1970) (finding testimony regarding Federal Housing Agency bulletin properly excluded because it was not in effect when gas line was installed and there was no duty to remove old fixtures). See generally Feld, Annotation, *supra* note 307, §§ 5-6 (discussing cases).

331. Foutch, *supra* note 301, at 584. The Comment stated the court that refused to reject the evidence on hearsay grounds generally offered "the succinct statement that since the rule has not been legislatively passed upon, it cannot be deemed evidence of negligence." *Id.* (citation omitted).

332. 88 S.E.2d 333, 339 (N.C. 1955).

333. *Id.* at 336.

334. *Id.* at 340 (relying on the early A.L.R. annotation on the topic and cases such as *Whitescarver*); see *supra* text accompanying notes 271 & 277-79 (discussing the annotation and *Whitescarver*).

335. *Lutz Indus.*, 88 S.E.2d at 339.

se.”<sup>336</sup> The court followed *Lutz* in *Jenkins v. Leftwich Electric Co.*,<sup>337</sup> holding that the defendant’s violations of the National Electrical Code, which North Carolina law gave the force of law, were negligence per se.<sup>338</sup>

The matter is more complicated than it may appear. The *Lutz* court reached its conclusion only after a painstaking analysis of the North Carolina building code and its incorporation of the National Electrical Code.<sup>339</sup> The court explained that the North Carolina General Assembly enacted a Building Code in 1933 which created the North Carolina Building Code Council and authorized it to draft a state building code.<sup>340</sup> The Council promulgated the state Building Code in 1936.<sup>341</sup> This Code required that electrical systems be installed in accordance with the National Electrical Code approved by the American Standards Association.<sup>342</sup> In 1941, the state legislature revisited the law, “restricting and defining the authority of the Building Code Council.”<sup>343</sup> This 1941 law “ratified and adopted” the 1936 Building Code.<sup>344</sup> This history led the court to conclude that, “[t]he 1941 Act ratified and adopted the North Carolina Building Code published in 1936 by clear and specific reference.”<sup>345</sup> The fact that the Code, which incorporated the National Electrical Code, had the force of law meant that the violation was negligence per se.<sup>346</sup>

Having found adoption by reference, the court then turned to the validity of that incorporation. The court said that “reference

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336. *Id.* The court ultimately remanded with orders that the Superior Court require the plaintiff to amend the complaint to specifically plead the parts of the National Electrical Code on which it relied. *Id.* at 343.

337. 119 S.E.2d 767 (N.C. 1961).

338. *Id.* at 775. The court discussed the history of the legislature’s adoption of the state building code and the standards it incorporated, concluding that the National Electrical Code “had the force and effect of law” on the day of the fire at issue. *Id.* at 774 (citing *Lutz Indus.*, 88 S.E.2d 333).

339. *Lutz Indus.*, 88 S.E.2d at 337-39.

340. *Id.* at 337.

341. *Id.*

342. *Id.*

343. *Id.* at 338.

344. *Lutz Indus.*, 88 S.E.2d at 339. This law provided that the Building Code Council could enact less stringent requirements with the Insurance Commissioner’s approval. *Id.* at 338. In 1945, the North Carolina Insurance Department reissued the 1936 Code. *Id.*

345. *Id.* at 339.

346. *Id.*

statutes” are “approved method[s] of legislation to avoid . . . repetition.”<sup>347</sup> This situation was somewhat different from a typical incorporation by reference because the legislation incorporated non-statutory material.<sup>348</sup> The court approved of the law nonetheless, quoting a law review article which stated there was no reason to doubt the validity of the enactment.<sup>349</sup> The court concluded that “[t]he General Assembly can prescribe standards of conduct which have the force and effect of law.”<sup>350</sup> The legislature here specifically set the standard of care for electrical systems and required that they comply with the National Electrical Code.<sup>351</sup> The court found that the National Electrical Code reference in the 1936 Building Code had the force of law by virtue of the 1941 Act, and was admissible as evidence.<sup>352</sup>

Other courts have also looked to whether a private organization’s standards had attained the force of law through incorporation, conducting similarly detailed analyses of the law-making process and scope of incorporation in order to determine a standard’s legal effect. The Alaska Supreme Court, for example, found that a trial court erred in not instructing the jury that a failure to manufacture a tank in accordance with the American Society of Mechanical Engineers’ standards was negligence per se.<sup>353</sup> The

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347. *Id.*

348. *Id.*

349. *Lutz Indus.*, 88 S.E.2d at 339 (citing *A Survey of Statutory Changes in North Carolina in 1941*, 19 N.C. L. REV. 435, 458 (1941) [hereinafter *Statutory Changes*]). The article said it was “[v]ery likely” that the original building code legislation that delegated power to the Building Code Council attempted an improper delegation of legislative power. *Statutory Changes, supra*, at 457. However, the 1941 law put the Code “on a better foundation.” *Id.* at 458. Nonetheless, the article suggested that arguments remained that the delegation of legislative power went too far. *Id.* at 458-59.

350. *Lutz Indus.*, 88 S.E.2d at 339.

351. *Id.*

352. *Id.* at 340. The court distinguished a Kansas case that found that a Kansas law incorporating the National Electrical Code was void for uncertainty and an unconstitutional delegation of legislative power to a private group. *Id.* (citing *State v. Crawford*, 177 P. 360, 361 (Kan. 1919)). The *Lutz* court found the situation in North Carolina was different because the 1941 law explicitly ratified and adopted the National Electrical Code referred to the 1936 Building Code. *Id.* It further noted the presumption that legislation is constitutional and said that the constitutionality of the 1941 Act was not challenged in this case. *Id.* at 340-41.

353. *Harned v. Dura Corp.*, 665 P.2d 5, 11-12 (Alaska 1983).



court found that state law had incorporated the standards by reference when the tank was manufactured,<sup>354</sup> noting that it had previously found that violations of the Uniform Building Code, which the Alaska Administrative Code incorporated, were negligence per se.<sup>355</sup>

The Texas Supreme Court, on the other hand, found that the Corps of Engineers Safety Manual did not have the force of law.<sup>356</sup> The court of appeals considered the manual a safety statute because Armed Services Procurement regulations adopted it by reference.<sup>357</sup> The court rejected that argument, explaining that the manual did not have statutory status.<sup>358</sup> It said that, although it was clear that one statute could incorporate another by reference, the courts had not held that adoption by reference could confer statutory status on a rule which did not previously have the force of law.<sup>359</sup> It also noted that the regulations were not adopted in accordance with the Administrative Procedure Act or published in the Federal Register.<sup>360</sup> Thus, there was no statutory violation.<sup>361</sup>

The courts agree that a clear line determines whether the violation of a safety standard is negligence per se: whether the standard has legal force. It does not matter which body originally

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354. The court reviewed the process of incorporation in some detail in a long footnote. It explained that the Alaska territorial legislature approved the American Society of Mechanical Engineers (ASME) Code in 1949 and the Board of Boiler Rules adopted it in the Alaska Code in 1955. *Id.* at 10 n.17. The Department of Labor ratified the ASME Code after statehood pursuant to statutory authority authorizing it to adopt the existing codification of ASME standards. *Id.* (quoting ALASKA STAT. § 18.60.180 (1955)).

355. *Id.* at 11-13. The court relied on *Northern Lights Motel, Inc. v. Sweaney*, 561 P.2d 1176 (Alaska 1977), which found that a violation of the Uniform Building Code was negligence per se because it was validly incorporated by reference into Alaska law. *Harned*, 665 P.2d at 11 n.18. The court explained that it had previously adopted the law of negligence per se as found in the Second Restatement and determined that the doctrine applied to violations of the Department of Labor's safety regulations. *Id.* at 12-13.

356. *B-R Dredging Co. v. Rodriguez*, 564 S.W.2d 693, 696 (Tex. 1978). This was not precisely a negligence-per-se case. The plaintiff argued that a boat was "unseaworth[y] per se" because it violated the manual. *Id.* at 694.

357. *Id.* at 696.

358. *Id.* at 695-96.

359. *Id.* at 696.

360. *Id.*

361. *B-R Dredging Co.*, 564 S.W.2d at 696-97; *see also* *Herbst v. Miller*, 830 P.2d 1268, 1270-71 (Mont. 1992) (holding that the state legislature did not adopt the Uniform Building Code by reference so violation of the State Building Code was not negligence per se, but the Town of Belgrade adopted the Uniform Building Code by reference in a town ordinance, and a violation of that ordinance, incorporating the Code, was negligence per se).

drafted the standard or how it came to have the force of law. The final determination of whether a violation is negligence per se rests ultimately not on tort law, but on administrative law or the vagaries of the state legislative process. The consequences of this inquiry can be tremendous: it can mean the difference between the jury having the power to decide a negligence case without even having a safety code admitted in evidence and being instructed that a violation of a safety code is negligence per se.

The North Carolina Supreme Court's decision in *Sloan v. Carolina Power & Light Co.*<sup>362</sup> illustrates this point. The case was filed on behalf of the estate of a telephone lineman who was electrocuted after a telephone line contacted a power line that allegedly violated the clearance requirements of the NESC, issued by the United States Department of Commerce.<sup>363</sup> The question was whether the lower court properly refused to admit the NESC into evidence,<sup>364</sup> and the court concluded that the refusal was proper. It discussed the general rule against admission of safety codes into evidence<sup>365</sup> and its prior discussion in *Lutz Industries v. Dixie Home Stores*,<sup>366</sup> which found that the state legislature had given parts of the National Electrical Code the force of law and that its violation was negligence per se.<sup>367</sup> Here, however, nothing indicated that the General Assembly had approved the NESC, and there was nothing that would give it the force of law.<sup>368</sup> It was, accordingly, proper to exclude the NESC from evidence.<sup>369</sup>

The force of law is what matters. It is perhaps surprising, then, that the cases barely touch on why force of law matters. Courts generally just state the rule that only violations of law are

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362. 102 S.E.2d 822 (N.C. 1958).

363. *Id.* at 826-28.

364. *Id.* at 826.

365. *Id.* (discussing *Whitescarver*); see *supra* text accompanying notes 264-308 (discussing the law on admissibility of safety codes into evidence).

366. 88 S.E.2d 333, 339-41 (N.C. 1955) (discussed *supra* text accompanying notes 332-52).

367. *Id.* at 339; see also *Sloan*, 102 S.E.2d at 826-27.

368. *Sloan*, 102 S.E.2d at 827.

369. *Id.* The effect of the determination is now not quite as stark in most jurisdictions because most courts now find safety codes admissible. See *supra* text accompanying note 309. The force of law still has a great significance in terms of the jury instructions, however. See *supra* text accompanying notes 176-77 (discussing negligence-per-se jury instructions) & note 322 (discussing instructions for violation of standards).

negligence per se.<sup>370</sup> Many cases simply note in passing that violations of safety codes and similar standards are not negligence per se.<sup>371</sup> A typical example is the Supreme Court of Montana's statement in *Harwood v. Glacier Electric Cooperative, Inc.*<sup>372</sup> that the violation of a non-statutory standard could be used as evidence of negligence but "it is insufficient grounds on which to find the defendant negligent per se."<sup>373</sup>

Only a few cases discuss the issue more fully. The Iowa Supreme Court discussed the question in *Jorgensen v. Horton*,<sup>374</sup> a case in which the plaintiff argued on appeal that the trial court erred by not instructing the jury that a failure to follow the Associated General Contractors of America's safety code was negligence per se.<sup>375</sup> The court explained that it had previously limited the doctrine of negligence per se to violations of statutes and ordinances which establish the standard of care.<sup>376</sup> Negligence per se rested on the rationale that it would be improper for a jury to approve conduct that the legislature had said was unreasonable.<sup>377</sup> "We cannot apply the same reasoning to private safety codes which have not been given the force of law."<sup>378</sup> The same court later held that only bodies with legislative authority can establish

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370. See, e.g., *Rimbert v. Eli Lilly & Co.*, 577 F. Supp. 2d 1174, 1204 (D.N.M. 2008).

371. See, e.g., *Flechsig v. United States*, 991 F.2d 300, 304 (6th Cir. 1993); *LaVine v. Clear Creek Skiing Corp.*, 557 F.2d 730, 733 (10th Cir. 1977); *City of Dothan v. Hardy*, 188 So. 264, 265 (Ala. 1939); *Kent Vill. Assocs. Joint Venture v. Smith*, 657 A.2d 330, 337 (Md. Ct. Spec. App. 1995); *Elledge v. Richland/Lexington Sch. Dist. Five*, 534 S.E.2d 289, 290-91 (S.C. Ct. App. 2000); see also *Hansen v. Abrasive Eng'g & Mfg., Inc.*, 856 P.2d 625, 628 (Or. 1993) (noting that violation of an industry custom does not constitute negligence per se).

372. 949 P.2d 651, 656 (Mont. 1997).

373. *Id.* at 656.

374. 206 N.W.2d 100 (Iowa 1973).

375. *Id.* at 102.

376. *Id.*

377. *Id.* at 103 (quoting Thayer, *supra* note 12, at 322).

378. *Id.* The Superior Court of Delaware discussed the issue in similar terms in *Fanean v. Rite Aid Corp. of Del.*, 984 A.2d 812, 824 (Del. Super. Ct. 2009), finding that a violation of the American Pharmaceutical Association's standards could not serve as the basis of a negligence per se claim. "The basic concept of negligence per se is to ease the requirements of proving negligence if a party inflicts harm that the General Assembly attempted to alleviate by legislative enactment. That power does not exist in private organizations." *Id.* The Pharmaceutical Association was a private organization so its rules could not be the basis of negligence-per-se liability. *Id.* at 823-24.

rules that bind all individuals.<sup>379</sup> It explained that “rules of conduct that establish absolute standards of care, the violation of which is negligence per se, must be ordained by a state legislative body or an administrative agency regulating on a statewide basis under authority of the legislature.”<sup>380</sup>

To the extent the cases explain the basis of the law, then, they rest on a desire to honor a legislative judgment. The technical force of law an enactment has, even force that comes about by virtue of a long-ago legislative decision to incorporate a private code, determines if the jury can assess the reasonableness of the conduct at issue or is told that a violation of the standard is negligence. Courts do not consider the real question, which is whether a legislative decision to incorporate a private code is really a decision to have that code set the standard of care and alter the jury’s role in civil tort litigation.

### III. THE LESSONS OF HISTORY: THE PROBLEMS WITH NEGLIGENCE PER SE

#### A. The Current Law and the Role of the Jury

Negligence per se hinges on whether a standard has the force of law. It does not matter how the standard attained the force of law—legislative enactment, municipal lawmaking, administrative regulation, or legislative or administrative adoption of a private standard—the force of law is what matters. The positive law is determinative even if the custom is to violate it.<sup>381</sup> Custom does not impose negligence-per-se liability no matter how universally followed the custom, nor does a private standard no matter how accepted or authoritative.<sup>382</sup> The force of law governs.

The determination that a law has negligence per se impact is significant because that determination changes the jury’s role. The jury does not decide whether the defendant acted as a reason-

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379. *Griglione v. Martin*, 525 N.W.2d 810, 812 (Iowa 1994) (finding that violation of police operating procedures and private safety codes is not negligence per se).

380. *Id.*

381. *See supra* text accompanying notes 170-71 (discussing Restatement position).

382. *See supra* Part II.B (discussing custom) & Part II.C (discussing private standards).

able person would have acted but, rather, plays the historical function of determining if the defendant violated a statute.<sup>383</sup> If a child died in a hotel swimming pool left unfenced in violation of a state statute, the judge in most states would tell the jury there is negligence. The judge would instruct the jury: “If you find that [name of defendant] violated this law, you must find that [name of defendant] was negligent” as a matter of law.<sup>384</sup> The instruction would be very different if the defendant violated hoteliers’ customs or a safety standard lacking legal force. The jury would then have a much different, more meaningful, and more difficult job. The judge would instruct it that, if the jury found that the defendant violated a custom of which it should have known, “you may consider this along with all other facts and circumstances in this case when deciding whether the defendant(s) (was) (were) negligent.”<sup>385</sup> The instruction would be similar if a safety standard were in effect. The judge would tell the jury: “[i]f you find that [name of defendant] violated the [regulation or standard], then [name of defendant]’s violation of this [regulation or standard] is evidence you must consider, along with all other evidence, in deciding whether [name of defendant] was negligent.”<sup>386</sup> The jury would consider all the relevant evidence in either case to determine the defendant’s negligence.

The jury’s limited role in negligence *per se* cases stands against a backdrop of an increasingly broad jury role in most tort litigation. Judges a century ago kept cases from the jury by finding defendants who violated common-law standards of conduct *per se* negligent.<sup>387</sup> Actions that violated custom and statute were also negligence *per se*.<sup>388</sup> Courts are now reluctant to announce firm rules of conduct. The doctrine of negligence *per se* stands against the backdrop of “an ethics of particularism” that rejects the notion that general rules can produce fair results in all cases

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383. Morris, *The Relation of Criminal Statutes*, *supra* note 12, at 455.

384. See PA. SUGGESTED STANDARD CIV. JURY INSTRUCTIONS § 13.100 (2013); *supra* notes 176-77 & accompanying text (discussing negligence-*per-se* jury instructions and giving examples of other instructions).

385. See 1 OHIO JURY INSTRUCTIONS § CV 401.03 (2018); *supra* text accompanying notes 249-50 (discussing jury instructions on custom and giving examples).

386. See PA. SUGGESTED STANDARD CIV. JURY INSTRUCTIONS § 13.110 (2014) (referring specifically to violation of ANSI standards); *supra* note 321 (discussing jury instructions on safety standards).

387. See *supra* Part I.A.

388. See *supra* Part I.A.

and that decides cases “based on the circumstances of each individual situation.”<sup>389</sup> The individual situation is irrelevant in one situation, however—when a law is at stake. The jury must then find the defendant negligent.

Negligence per se is an even more potent doctrine than it used to be. Not only does law play an enhanced role in most individuals’ daily lives,<sup>390</sup> and not only do violations of an expanded body of law impose negligence-per-se liability,<sup>391</sup> but those are the only cases in which a jury is routinely prohibited from assessing the reasonableness of the parties’ conduct.

### B. The Problems with the Current Law

This state of affairs would perhaps be justified, and could at least be explained, if the legal enactments that impose negligence-per-se liability reflected a conscious legislative determination that a violation of the legal standard should alter tort law or if the doctrine were the result of a carefully-reasoned evolution of the common law. But neither is the case. Even if one can fairly assume that a state legislature enacts standards with the understanding that a violation will alter the scope of tort liability,<sup>392</sup> the same cannot logically be said when a state court imposes negligence-per-se liability because a party violated a federal statute,<sup>393</sup> municipal ordinance, or administrative rule,<sup>394</sup> or because a state legislature or administrative agency ratified a code that incorporated by reference safety standards that would otherwise have no legal force.<sup>395</sup> The current state of affairs also does not reflect a rea-

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389. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 8 cmt. c (AM. LAW INST. 2010); *see supra* text accompanying notes 142-48 (discussing changing role of the jury).

390. *See supra* text accompanying notes 160-61.

391. *See supra* text accompanying notes 162-63.

392. This was one of Professor Thayer’s arguments in support of the doctrine back in 1914, and an argument reiterated by the Third Restatement of Torts. *See supra* text accompanying note 75 (discussing Thayer) & 156 (discussing the Restatement). *See also* KEETON ET AL., *supra* note 14, § 36, at 220-21 (making this point).

393. *See also* Kritchevsky, *supra* note 6, at 128-30, in which I explain at length why courts should not give violations of federal laws negligence-per-se effect.

394. *See supra* text accompanying note 159 (discussing Third Restatement).

395. *See supra* Part II.D.

soned evolution. There is essentially no explanation for why negligence per se became limited to violations of law,<sup>396</sup> and the current cases largely reiterate the limitation with no attention to why the rules are what they are.<sup>397</sup> Legislative decisions on matters remote from tort law determine the scope of negligence law with no consideration of why, or whether, the legislative decision should have that impact.

The unquestioning acceptance of negligence per se, without careful focus on the validity of the doctrine, has prevented courts from recognizing that the concerns that led courts to stop giving violations of custom and common law rules negligence-per-se effect also apply to statutory violations. Just as a custom may be out of date or unsuited to a particular situation,<sup>398</sup> so may a statute. As Professor Fleming James noted over a half century ago, “many statutes on the books today are ill conceived, or hastily drawn, or obsolete.”<sup>399</sup> He said that it was unrealistic to say that reasonable individuals “would blindly obey all the regulatory statutes under all circumstances” and wrong to deprive the jury of its usual role whenever a statutory violation was at issue.<sup>400</sup> The ethic of particularism recognizing that general rules may be ill-suited to specific situations can also be the case when a statute or regulation is

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396. See *supra* Part II.B.

397. See, e.g., *Sibert-Dean v. Wash. Metro. Area Transit Auth.*, 721 F.3d 699, 703, 705-06 (D.C. Cir. 2013) (citation omitted) (upholding negligence-per-se jury instruction for violation of statute requiring that driver “give full time and attention” to driving); *Schlimmer v. Poverty Hunt Club*, 597 S.E.2d 43, 45-46 (Va. 2004) (finding that failure to give negligence-per-se instruction for alleged violation of statute prohibiting reckless handling of a firearm was error and that error was not harmless).

398. See *supra* text accompanying notes 235-46 (discussing this reason for not giving violations of custom negligence-per-se effect).

399. James, *supra* note 12, at 108. Criminal laws are unlikely to be repealed once they have been enacted, so laws remain on the books when they serve no purpose. Richard E. Myers II, *Responding to the Time-Based Failures of the Criminal Law Through a Criminal Sunset Amendment*, 49 B.C. L. REV. 1327, 1329 (2008); see generally DICK HYMAN, *THE TRENTON PICKLE ORDINANCE AND OTHER BONEHEAD LEGISLATION* (1976) (cataloguing outdated and irrational legislation).

400. James, *supra* note 12, at 108.

at stake.<sup>401</sup> Safety statutes often enact customs into law,<sup>402</sup> and there is no reason to believe the statute becomes unfailingly applicable simply because the legislation has codified the standard. For example, a traffic statute may codify a standard method that drivers use to indicate to other drivers their intent to pass or turn. That does not mean that there are no other equally safe methods of signaling that drivers may readily adopt and on which they may rely.<sup>403</sup>

It is also unrealistic to assume that legislatures endorse all standards that they enact into law. That is certainly the case when states act in response to federal mandates. States strongly disagreeing with the idea that the minimum drinking age should be twenty-one nonetheless enacted the requirement because of the financial consequences.<sup>404</sup> The same was true when the federal government required that states reduce the drunk-driving threshold and lower the speed limit to fifty-five.<sup>405</sup> It is safe to assume that state legislatures have also enacted laws to appease special interest groups and not because they agreed with the policy.<sup>406</sup>

401. The prosecutorial discretion inherent in the decision whether to enforce criminal statutes accounts for these situations in criminal cases but there is no similar outlet in tort law. *Id.* The Third Restatement argues that the provision that excused statutory violations are not negligence per se prevents application of the doctrine in many cases in which public officials would choose not to prosecute. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 15 cmt. a (AM. LAW INST. 2010). The narrow categories of available excuses, however, do not cover many cases in which a person might reasonably violate the law. *See infra* text accompanying notes 415-16 & 436-37 (making the argument).

402. *See supra* text accompanying notes 53-54 & note 196-97 (making this point).

403. *See infra* text accompanying notes 428-38 (discussing this point and giving examples).

404. As a spokesman for Wisconsin's governor stated when the state raised the drinking age to twenty-one, "[i]t's hard to lose a battle like this when you so disagree with the merits, but we had no real choice." Howard Witt & Robert Enstad, *Wisconsin Jumps on Wagon: Officials Reluctantly Support Shift to 21 Drinking Age*, CHI. TRIB. (Apr. 10, 1986), [http://articles.chicagotribune.com/1986-04-10/news/86012\\_60391\\_1\\_drinking-age-legal-drinking-wisconsin](http://articles.chicagotribune.com/1986-04-10/news/86012_60391_1_drinking-age-legal-drinking-wisconsin) [<https://perma.cc/S3XH-T23X>]; *see also* Kritchevsky, *supra* note 12, at 707-09 (discussing state disagreement with federal mandates).

405. *See* Kritchevsky, *supra* note 12, at 707-09.

406. *See id.* at 705-09 (explaining how states treat violations of federal mandates with which they disagree as negligence per se); *see also* James C. Fell & Robert B. Voas, *Mothers Against Drunk Driving (MADD): The First 25 Years*, 7 TRAFFIC INJURY PREVENTION, 195, 197-98 (2006), [https://www.academia.edu/16040445/Mothers\\_Against\\_Drunk\\_Driving\\_MADD\\_The\\_First\\_25\\_Years](https://www.academia.edu/16040445/Mothers_Against_Drunk_Driving_MADD_The_First_25_Years) [<https://perma.cc/E7QZ-5U22>] (discussing well-publicized incidents of deaths attributable to impaired drivers leading to the establishment of MADD, which successfully crusaded for stricter impaired driver laws).



Statutes that apply statewide necessarily generalize. A legislature may adopt a policy that is especially suited to some areas of the state, such as densely-populated cities, even though the standard is logically inapplicable to rural areas. A state may adopt a law prohibiting drivers from using their cell phones out of a fear that phone use will cause accidents in city driving, but the law may not carve out exceptions for rural areas.<sup>407</sup> A violation of the law would nonetheless be negligence per se statewide. A state may also act quickly to enact a law in response to a pressing problem or external persuasion without considering how broadly it should apply or whether it should include exceptions.<sup>408</sup> But all violations of these statutes would be negligence per se without consideration of whether giving the statutory standard that effect would further state legislative policy.

The availability of exceptions to negligence per se does little to ameliorate the rigidity of the doctrine. The law has always recognized some justifications for violating statutes. The Second Restatement codified this notion, providing a list of situations that would excuse violations.<sup>409</sup> The provision referred to cases involving defendants who labored under an incapacity, acted in an emergency, or failed to know of the occasion for compliance or were unable to comply, and to situations in which compliance was more risky than noncompliance.<sup>410</sup> The provision explicitly stated that the list was not exclusive.<sup>411</sup> The Third Restatement lists essentially the same excuses as the Second Restatement—incapacity, reasonable attempts to comply, inability to know of the statute's applicability, and the danger of compliance.<sup>412</sup> The

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407. New York and California have state-wide bans on using cell phones while driving, for instance. See CAL. VEH. CODE § 23123 (West 2018); N.Y. VEH. & TRAF. LAW § 1225-c (McKinney 2018). There are certainly rural areas in both states where phone use would not pose a special risk. See generally KAREN S. LISSY ET AL., HARV. CTR. FOR RISK ANALYSIS, CELLULAR PHONE USE WHILE DRIVING: RISKS AND BENEFITS (2000), [http://www.nsc.org/Distracted\\_Driving\\_Documents/Cellular-Phone-Use-While-Driving-Risk-and-Benefits.pdf](http://www.nsc.org/Distracted_Driving_Documents/Cellular-Phone-Use-While-Driving-Risk-and-Benefits.pdf) [<https://perma.cc/7CPH-92WU>] (discussing risks and benefits of cell phone use while driving).

408. See sources cited *supra* notes 404-06.

409. RESTATEMENT (SECOND) OF TORTS § 288A (AM. LAW INST. 1965); *supra* text accompanying notes 132-34.

410. RESTATEMENT (SECOND) OF TORTS § 288A.

411. *Id.* cmt. a.

412. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 15 (AM. LAW INST. 2010); *supra* text accompanying notes 162-70 (discussing Third Restatement approach).

Third Restatement, however, aims to restrict the availability of additional excuses. It does not say that the list is non-exclusive and emphasizes the importance of elaborating the categories of excuse.<sup>413</sup> It then provides that it is not an excuse that the defendant believes the statute is unwise, does not know of the law, or that violation of the law is customary.<sup>414</sup> “[N]or is it an excuse if there is a custom to depart from the statutory requirement.”<sup>415</sup>

The Third Restatement’s rigid approach to excuses undermines the possibility that the doctrine of excused justifications will serve to mitigate the harshness of negligence per se in cases where there are sound reasons to violate a statute. The provision, for instance, seemingly would not recognize an excuse if a person speeds to rush an injured friend to the hospital.<sup>416</sup> And the Restatement certainly does not recognize an exception when a reasonable person might violate a statute that is outdated or ill-suited to a situation.<sup>417</sup>

The rigidity of the Restatement position on negligence per se does not necessarily promote safety; it may instead reward unsafe conduct. A state or municipality, for example, may make it illegal to talk on a phone while driving, but fail to enact a law prohibiting sending text messages.<sup>418</sup> Texting, however, is more dangerous than simply talking on the phone.<sup>419</sup> A person aware of the prohibition against phone calls who nonetheless has an immediate need to relay a message would not be making a safer choice by sending a text. If the person sending a text caused an

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413. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 15 cmt. a.

414. *Id.*

415. *Id.*

416. *See* Twerski, *supra* note 12, at 1002 (explaining that the exception for conduct when compliance poses a greater danger of physical harm to the actor or others than non-compliance appears to apply only to road-related emergencies, such a driver swerving into another lane to avoid a child who has darted into the street).

417. A person who used a cell phone while driving in a state with a ban would be per se negligent even if the person were answering an emergency call or talking in a rural area that was not the focus of the ban. *See* Kritchevsky, *supra* note 12, at 694-95. States similarly find that violations of statutes that the legislatures enacted in response to federal mandate to be negligence per se. *See id.* at 707-09.

418. *See, e.g., Arizona Highway Safety Laws*, GOVERNORS HIGHWAY SAFETY ASS’N (Jan. 2015), <http://www.ghsa.org/html/stateinfo/bystate/az.html> [<https://perma.cc/53EU-24VJ>].

419. *See* Sheila G. Klauer et al., *Distracted Driving and Risk of Road Crashes among Novice and Experienced Drivers*, 370 N. ENG. J. MED. 54, 57-58 (2014).

accident, he would be able to argue to the jury that he was not negligent, or that he was only slightly negligent, because of the need to send the message. The same driver who made a phone call and caused an accident would not.<sup>420</sup>

The law's refusal to recognize that customary conduct is relevant to justify a statutory violation can also hinder safety. Minimum speed limit laws recognize that a person who does not travel the prevailing speed poses a danger to others.<sup>421</sup> An argument against the fifty-five mile-per-hour speed limit was that it hindered safety on roads where drivers customarily disregarded the limit and drove sixty-five or seventy.<sup>422</sup> Indeed, custom is relevant in negligence litigation in part because individuals rely on others to follow the customary course of conduct and it is dangerous to act in a way that others do not anticipate.<sup>423</sup> That would not change just because the custom involves disregarding a law.

Commentators have long recognized that compliance with custom can be safer than compliance with a statute that others customarily ignore. Professor Fleming James gave an example in an early article on the topic. He discussed a traffic law that requires drivers making a left turn to go to the right of the imaginary center of an intersection.<sup>424</sup> The custom was to disobey the law and turn to the left of the imaginary center.<sup>425</sup> That is the conduct other drivers expected.<sup>426</sup> It is not hard to envision that a driver

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420. The narrow exceptions to negligence per se would not cover this situation because the driver is not avoiding physical harm by sending the message; an urgent need to communicate would not suffice. See *infra* note 422 and accompanying text. And although it would probably often be possible for the driver to stop driving to send the message, that may not always be the case. Moreover, stopping could cause added danger (such as if the person is driving on a narrow, dark road at night), and it might take too much time to find a safe place to stop.

421. See Victor Muchuruza & Renatus N. Mussa, *Speeds on Rural Interstate Highways Relative to Posting the 40 MPH Minimum Speed Limit*, BUREAU TRANSP. STAT., [https://www.rita.dot.gov/bts/sites/rita.dot.gov/bts/files/publications/journal\\_of\\_transportation\\_and\\_statistics/volume\\_07\\_number\\_23/html/paper\\_06/index.html](https://www.rita.dot.gov/bts/sites/rita.dot.gov/bts/files/publications/journal_of_transportation_and_statistics/volume_07_number_23/html/paper_06/index.html) [<https://perma.cc/KZB8-2WA4>].

422. Eric Peters, *Highways Are Safe at Any Speed*, WALL STREET J., Nov. 24, 1998, at A22; see generally *Monreal v. Tobin*, 72 Cal. Rptr. 2d 168 (Ct. App. 1998) (rejecting factfinder's determination that driver who drove the posted speed limit of fifty-five was contributorily negligent by driving in the middle lane of the freeway when surrounding traffic was traveling considerably faster).

423. See *supra* text accompanying note 179-80.

424. James, *supra* note 12, at 109 n.50.

425. *Id.*

426. *Id.*

who followed the letter of the law would cause an accident. James explains that few things are more likely to disrupt traffic “than blind obedience to a statute that is uniformly disregarded.”<sup>427</sup>

Courts have also recognized that a person’s compliance with custom may show that the actor exercised due care even when the conduct violates a statute. The Minnesota Supreme Court reached this conclusion in *Howard v. Marchildon*,<sup>428</sup> a case in which a driver used the customary signal to indicate a left turn instead of giving the statutorily-mandated signal.<sup>429</sup> The court affirmed the decision that the plaintiff, who used the customary signal, was not contributorily negligent.<sup>430</sup>

Key to the court’s decision was that Minnesota law made a violation of the statute prima facie evidence of negligence, not negligence per se.<sup>431</sup> The court explained that the factfinder could not justify considering evidence of custom on a theory that “common consent” could substitute standards of conduct for those the legislature has prescribed.<sup>432</sup> Custom could nonetheless be considered when a violation was only prima facie evidence of negligence. This was because a legislature’s determination that a statutory violation was only prima facie evidence of negligence showed that the legislature contemplated that the jury could consider other factors in determining negligence.<sup>433</sup> The custom was relevant to the determination of whether the act was negligent. Courts do not reach the same conclusion when a statutory violation is negligence per se, however, because the rigid doctrine of negligence per se makes the evidence irrelevant. “Obviously, where violation of a statute is negligence per se, evidence of a

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427. *Id.* at 109.

428. 37 N.W.2d 833, 838 (Minn. 1949).

429. *Id.* at 835 (explaining that state law required that drivers whose cars did not have turn signals to signal a left turn by extending the left arm out of the window during a turn but that it was customary for drivers to signal turns during winter by opening the driver-side door).

430. *Id.* at 838.

431. *Id.* at 837.

432. *Id.*

433. *Howard*, 37 N.W.2d at 837.

custom sanctioning violations of the statute would be irrelevant on the question of the existence of negligence.”<sup>434</sup>

The point here is not that custom should trump positive law, or even that a jury should always be able to consider a custom of violating a statute. A person who runs over a child while speeding in a school zone should not be able to justify the conduct simply by saying that it was customary to exceed the speed limit.<sup>435</sup> Rather, the cases show that some customs can be safer than, or as safe as, statutory mandates, and the doctrine of negligence per se should not absolutely bar the jury from even considering the custom. The customary means of signaling before turns that the court considered in *Howard* would not cease to be a custom on which other drivers relied, and thus potentially a reasonable way to act, if state law made a violation of the law negligence per se instead of prima facie evidence of negligence. The legal difference would not change the expectations of the average driver.

The fact that it is often customary to violate the law points to the undue rigidity of a doctrine of negligence per se that only allows for minimal excuses and does not even allow for judicial discretion in whether to send a case to the jury on negligence-per-se grounds. A court in such a case should at least be able to consider whether to instruct the jury that it could consider the custom in determining negligence.<sup>436</sup> The existence of prosecutorial discretion and administrative policies not to enforce certain laws shows that the executive branch recognizes that the positive law

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434. *Am. Smelting & Refining Co. v. Wusich*, 375 P.2d 364, 369 (Ariz. 1962) (en banc). The *Wusich* court explained, citing *Howard*, that evidence of custom was not admissible to justify conduct that violates a statute unless the statutory violation is only considered prima facie evidence of negligence. *Id.* at 368-69.

435. The Oregon Supreme Court’s decision in *Elliott v. Callan*, 466 P.2d 600 (Or. 1970) (en banc), is such a case. A driver who was speeding in a school zone hit and killed a child. *Id.* at 601. The driver sought to admit evidence that drivers customarily sped in the area. *Id.* The court said that testimony that speeding was customary should not have been admitted. *Id.* The court explained that the evidence would not suggest that the driver was driving safely, and that accepting the testimony would not show that his speed was reasonable. *Id.* The court also explained that allowing the evidence would allow drivers to repeal a law by customarily disregarding it. *Id.* at 601-02. “Certainly the legislature did not intend the statute to be so evaded.” *Id.* at 602.

436. See Twerski, *supra* note 12, at 998-1003 (criticizing the rigidity of the Third Restatement’s sections on negligence per se and arguing that the section on excuses should be more open-ended and that trial judges should have discretion on whether to allow the jury to determine the standard of care).

should not be enforced literally.<sup>437</sup> The judicial branch should have the same discretion.<sup>438</sup>

Some laws on the books have no support in modern society and would not currently command a legislative majority; prosecutors do not enforce these laws because prevailing norms would not support enforcement.<sup>439</sup> To the extent such laws serve a purpose, it is as a vehicle for police harassment.<sup>440</sup> Professor Cass R. Sunstein argues that citizens engage in legitimate rule revision when they violate rules that lack support in popular convictions.<sup>441</sup> “The same argument would apply to all situations in which rules or applications of otherwise valid criminal statutes have entirely fallen out of popular favor. In disregarding palpably outdated rules or palpably outdated applications of modern rules, citizens are participating in a healthy and continuous process of democratic deliberation.”<sup>442</sup>

The sort of politically-charged laws that Professor Sunstein discusses are unlikely to give rise to negligence-per-se liability because they do not purport to regulate safety. But other politically-unpopular and widely-disregarded laws do.<sup>443</sup> A theory of negligence per se that does not allow a court to consider the custom of disregarding the law allows the law to function arbitrarily,

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437. Prosecutorial discretion is a way the criminal justice system responds to over-criminalization and the existence of outdated laws. Peter Krug, *Prosecutorial Discretion and Its Limits*, 50 AM. J. COMP. L. 643, 643-56 (2002); Myers, *supra* note 399, at 1339-53. Similarly, it is established law that administrative agencies have broad discretion to set enforcement priorities and goals. See *Heckler v. Chaney*, 470 U.S. 821, 831-33 (1985); Kenneth Culp Davis, *Discretionary Justice*, 23 J. LEGAL EDUC. 56, 56-62 (1970).

438. The Restatement position is that the provision that excused violations of a statute are not negligence per se serves the same purpose as the existence of prosecutorial discretion. See *supra* text accompanying note 166. Excuses cannot serve this purpose when courts have no discretion in which excuses to recognize, the Third Restatement's position. See *supra* text accompanying notes 167-69. A decision-maker needs to be able to make choices to exercise discretion.

439. Cass R. Sunstein, *Problems with Rules*, 83 CALIF. L. REV. 953, 1011 (1995) (discussing *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Bowers v. Hardwick*, 478 U.S. 186 (1986)); see also Justin Driver, *Constitutional Outliers*, 81 U. CHI. L. REV. 929, 931-33 (2014) (discussing theory that the Supreme Court invalidates laws that are outliers, enforced in only a few states).

440. Sunstein, *supra* note 439, at 1011 (discussing *Bowers*).

441. *Id.*

442. *Id.* at 1011-12.

443. See *supra* notes 404-05 (discussing minimum drinking age laws); see generally Kritchevsky, *supra* note 12 at 705-15.

resulting in disproportionate penalties on the handful of many violators who have the misfortune of getting into an accident even though no more blameworthy than the others.<sup>444</sup>

This is not a new criticism of negligence per se. Commentators have argued since the days of the First Restatement that some statutes “are ill conceived, or hastily drawn, or obsolete,” and that negligence per se can lead to liability without fault and expose a person to substantial damages for minor deviations from accepted conduct.<sup>445</sup> Just as widely-disregarded and rarely-enforced laws can be the vehicle for police harassment, widely-disregarded and rarely-enforced laws can be the vehicle for what is essentially financial harassment or extortion through the doctrine of negligence per se. Courts should have the power not to instruct juries on negligence per se when those laws are at stake.<sup>446</sup>

### C. How Negligence Per Se Can Reflect the Importance of Law

The idea that laws are better suited to setting standards of conduct than custom or private standards does not support the doctrine of negligence per se. Laws can be obsolete, ill-suited to the situation, and based on hasty or unfounded assumptions. Following a law is not always the safest course of action, even when the law purports to regulate safety. The fact that a law is in place does not justify using it to set the standard of care anymore than would the fact that a custom or private safety standard applies.<sup>447</sup>

The fact that a law is in play does not justify applying the doctrine of negligence per se. And the doctrine absolutely should not apply unless a law is at stake. Negligence per se changes the role of the jury and the parties’ rights and duties. The Connecticut Supreme Court explained this idea well in *Wendland v. Ridgefield Construction Services, Inc.*,<sup>448</sup> holding that federal Occupational

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444. James, *supra* note 12, at 108.

445. *Id.* (noting also that negligence per se could expose an actor to substantial liability even when the statute only imposes a minor penalty for violations).

446. See Twerski, *supra* note 12, at 998-1003.

447. One justification for negligence per se rests on a desire to defer to expert judgment on what conduct is safe. See *supra* text accompanying notes 127-31 (discussing this rationale). That view would support granting safety standards negligence-per-se effect much more readily than statutes. See *supra* note 293-96 (discussing expertise involved in setting safety standard).

448. 439 A.2d 954 (Conn. 1981).

Safety and Health Act regulations could not justify instructing the jury on negligence per se.<sup>449</sup> The court explained that “[a] negligence per se instruction transforms the character of the [jury’s] inquiry.”<sup>450</sup> This in turn affects the applicable standard of care, a key factor in determining liability.<sup>451</sup> Negligence per se thus affects common law rights and duties.<sup>452</sup> Negligence per se changes the jury from a deliberative body that determines what care is due in a situation to a body that performs the “historical” task of determining what happened.<sup>453</sup>

Only statutes should give rise to negligence-per-se liability because only legislative bodies can change tort law. A private group’s standards or customary conduct cannot alter the common law. Some cases discuss why only legislative action can give rise to negligence-per-se liability, but their analysis stops short. Those cases focus on the deference due legislative judgment and argue that a jury should not be able to change the standard of care that the legislature has established.<sup>454</sup> The cases do not go on to discuss how deferring to the legislative judgment affects the underlying tort analysis and the role of the jury.

A focus on how the decision to defer to the legislative judgment alters the jury’s role suggests a need to alter the doctrine of negligence per se. The doctrine should apply only when the legislature intended that consequence—when the legislature intended that its action alter the jury’s traditional role. Courts frequently analyze legislative intent in negligence-per-se cases in determining whether the injury was of the sort the legislature intended to prevent, or if the injured person was in the class the legislature intended the law to protect.<sup>455</sup> But the courts generally do not take the further step of determining whether the legislature specifically intended that violation of the law be negligence per

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449. *Id.* at 956-58.

450. *Id.* at 956 (explaining that the jury in a negligence-per-se case does not decide if the defendant acted as an ordinary prudent person but merely decides whether the defendant violated the relevant statute or regulation).

451. *Id.*

452. *Id.* at 956-57.

453. Morris, *The Relation of Criminal Statutes*, *supra* note 12, at 455.

454. See *Jorgensen v. Horton*, 206 N.W.2d 100, 102 (Iowa 1973), and *supra* text accompanying notes 373-79.

455. These limits on when a statutory violation will be negligence per se have been in effect throughout the development of the doctrine. See *supra* text accompanying notes 84-90.



se.<sup>456</sup> They simply apply the doctrine, implicitly assuming that the legislature so intended.<sup>457</sup> The idea, from the earliest days of the doctrine, has been that the legislature knows of the doctrine of negligence per se and so intends that it apply to violations of standards it sets.<sup>458</sup> Even if this assumption were once true, it is hard to envision that any legislature intends that statutes that delegate broad power to agencies or that incorporate private standards will change tort law.<sup>459</sup>

A focus on legislative intent suggests various ways courts could limit negligence per se. These approaches reflect two different focal points. One approach would focus on the law itself; courts could only apply negligence per se if there is an indication that the legislature intended the doctrine to apply. The other approach would focus on the courts and give a court more leeway in deciding when to give the jury a negligence-per-se instruction by allowing the court to determine probable legislative intent in the situation.

Courts could try more closely to match the scope of negligence per se to situations in which the legislature likely intended the doctrine to apply by limiting the doctrine to violations of state law. This approach would assume that a state legislature adopting safety law to benefit a class of persons intends that law to set a standard of care that applies in tort litigation.<sup>460</sup> It would not, however, apply the doctrine when a municipality or agency set the standard, when a federal law was at issue, or when the statute incorporated a private standard. This approach would have the benefit of ensuring that only state legislative action altered the contours of state tort law. It would not, however, avoid the difficult problems of inquiring into legislative intent that courts would still have to face in determining whether the legislature intended

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456. Thayer, *supra* note 12, at 320

457. *See id.*

458. This idea reaches back to Thayer, *id.* at 322-23, and continues in the Third Restatement. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 cmt. c (AM. LAW INST. 2010); *see supra* note 392 and accompanying text.

459. It is often far from clear whether the legislature even intended to incorporate a private standard into law. *See supra* Part II.D.

460. This approach would follow the Third Restatement's suggestion that legislatures intended safety statutes to set a standard of care only when the legislature set the standard itself. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 cmt. c.

to benefit a certain class or if the injury were of the sort the legislature aimed to prevent. But this approach would still rest on a far-reaching assumption that the legislature actually intended the safety standard to set the tort standard of care. Furthermore, this approach would not mitigate the rigidity of negligence per se in situations in which the legislature had acted. An individual could still be found per se negligent for breaching an outdated or ill-considered law.

Many of the same problems would attend an approach that took the focus on legislative intent further and placed the onus on the state legislature explicitly to state whether it intended a violation of a law to have negligence-per-se effect. Courts would likely face difficult questions of deciphering intent: did a statute that explicitly referred to the “standard of care” show an intent for the statute to apply in tort actions, was a textual statement of intent required, did the legislature have to use the words “negligence per se”? Moreover, although this approach would provide certainty when the legislature explicitly endorsed or precluded negligence per se,<sup>461</sup> courts would still be left to decipher intent when the statutory language was ambiguous. This approach also would not eliminate the problem of holding someone per se liable under an outdated or hastily-drafted statute. The legislature could react to political pressure by quickly enacting a statute and providing that violations are negligence per se and the statute would likely stay on the books long after, no matter how ill-considered the provisions.

Another way of ensuring the reach of negligence per se better reflects legislative intent is to put more discretion in the hands of trial judges to determine when the doctrine should apply by asking if the legislature logically would intend it to apply in that case. One way to do this would be to increase judicial discretion by broadening the range of cases in which courts find statutory violations excused. The idea would be that broadening permissible excuses would make application of negligence per se more

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461. States have explicitly provided that violation of certain statutes is not negligence per se. *See, e.g.*, KY. REV. STAT. ANN. § 189.125(5) (West 2017) (providing that failure to wear a seat belt is not negligence per se); S.C. CODE ANN. § 56-5-6540(C) (2017) (stating that failure to wear a seat belt is not negligence per se).

closely mirror likely decisions to enforce the law.<sup>462</sup> This approach would explicitly grant courts the discretion not to instruct on negligence per se when the actor had a strong justification for not following the law or when the law was rarely enforced or widely ignored. Professor Twerski recommends this approach, suggesting that the comments to the Third Restatement's provision on excused violations of law state that the exceptions in the provision "are illustrative of the kinds of situations in which courts have refused to apply the statutory standard in civil tort litigation. They are not meant to exhaust the possibilities."<sup>463</sup> This approach reflects the reality that negligence is fact-sensitive and that statutes written in general terms cannot reflect the myriad of situations where an actor will have valid reasons for not meeting a standard.<sup>464</sup> This approach does, though, add uncertainty to the reach of the doctrine, perhaps a reason the drafters of the Third Restatement found it "essential" to enumerate excuses.<sup>465</sup>

A broader approach would reach beyond the idea of enlarging the exceptions to negligence per se and grant courts discretion to determine when a violation of a statute should impose negligence-per-se liability. Courts could explicitly recognize that a statute is outdated, or rarely enforced, or otherwise ill-suited as a standard of care. This view would partially reflect a power that courts already have; courts now judge whether a statutory violation should be negligence per se by looking at the class of persons the legislature aimed to protect and the goal the legislature aimed to accomplish.<sup>466</sup> Certainly, courts can broaden or narrow the

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462. The recognition of exceptions, that not all statutory violations will be negligence per se, aims to make application of the doctrine reflect cases in which executive officials would actually enforce the law. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 15 cmt. a (AM. LAW INST. 2010) (providing that the provision that excused statutory violations are not negligence per se prevents application of the doctrine in many cases in which public officials would choose not to prosecute). The rigidity with which the Restatement defines permissible excuses prevents the provision from adequately serving this goal, however. See *supra* text accompanying notes 415-16 & 435-36.

463. Twerski, *supra* note 12, at 1002-03 (suggesting revision to Section 15, comment a of the Third Restatement); see *supra* text accompanying notes 162-67 (discussing Section 15 of the Third Restatement).

464. Twerski, *supra* note 12, at 1003.

465. See *supra* text accompanying notes 162-67 (discussing Third Restatement's approach to excused violations).

466. See *Rosenau v. City of Estherville*, 199 N.W.2d 125, 128 (Iowa 1972) ("In those situations we have said each case is to be decided in light of the purpose and intent of the

reach of negligence per se by interpreting purpose or class of intended beneficiaries either broadly or narrowly.<sup>467</sup> Courts could similarly engage in a general inquiry into whether the legislature intended the legislation to set the tort standard of care.

This approach would resemble the approach the Third Restatement recommends that courts use to decide whether a statute requiring an actor to act to protect another imposes an affirmative duty to act.<sup>468</sup> The Restatement's comments explain that some statutes expressly provide a private right of action for failure to perform a statutory duty, whereas others preclude one.<sup>469</sup> In the interstices, "courts may consider the legislative purpose and the values reflected in the statute to decide that the purpose and values justify adopting a duty that the common law had not previously recognized."<sup>470</sup> This same general approach could apply to determine whether a statutory standard of care should govern in a tort suit.<sup>471</sup> The court could consider evidence that the legislature intended the standard to apply in civil actions and whether the statute reflects the predominant community sentiment of appropriate conduct.<sup>472</sup>

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pertinent statute or ordinance."); *supra* text accompanying notes 154-57 (discussing role of legislative intent under the Third Restatement).

467. Courts' varying answers to questions such as whether violation of licensing statutes is negligence per se illustrates this point. *See generally* KEETON ET AL., *supra* note 14, § 36, at 222-27 (discussing cases on applicability of negligence per se).

468. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 38 (AM. LAW INST. 2012) ("When a statute requires an actor to act for the protection of another, the court may rely on the statute to decide that an affirmative duty exists and to determine the scope of the duty.").

469. *Id.* cmt. c.

470. *Id.*

471. This would not necessarily be a big step. The recognition of a duty to act is not the same as negligence per se, which presupposes a duty to act and adopts the statutory standard of care in acting. *Id.* cmt. d. Courts often confuse the two inquires, however, and apply negligence per se to violations of statutes that impose duties. *Id.* § 38 reporters' note; *see generally* Forell, *supra* note 12 (discussing issue).

472. *See* Whetzel v. Jess Fisher Mgmt. Co., 282 F.2d 943, 946 (D.C. Cir. 1960) (explaining that penal statutes protecting individuals impose a duty of care "based on contemporary community values and ethics" and that the law of torts will be out of step with community standards if it ignores such duties). Under this approach, for example, a court could find that popular and legislative resistance to imposing a minimum drinking age of twenty-one meant that a person who violated the law by selling beer to a twenty year-old was not negligent per se. *See* Kritchevsky, *supra* note 12, at 707-09 (discussing states' resistance to the federally-mandated drinking age).

An approach to negligence per se that explicitly considers the current validity of a penal standard, in terms of whether it accurately reflects community sentiment, would enable tort law better to reflect contemporary values and mitigate the rigidities and inequities that negligence per se can create.<sup>473</sup> This approach would build on the courts' current role in inquiring into a legislature's purpose and whether an excuse applies "in an effort to return to the jury responsibility for determining whether reasonable care was exercised in the circumstances."<sup>474</sup> Vesting courts with the power to determine that a statute does not reflect community sentiment certainly is at odds with the idea that the doctrine reflects an obligation to defer to legislative judgment, but it better accords with the "ethics of particularism" that underlies modern tort law than does rigid application of negligence per se.<sup>475</sup>

All of these approaches keep the basic doctrine of negligence per se; they accept the current doctrine that the legislature may define the standard of care but aim to restrict its reach either by limiting the contexts in which it applies or by giving trial judges some measure of discretion in determining whether to apply it in any given case. The history of the doctrine suggests a different approach, however. Negligence per se initially applied to violations of custom and judge-made rules as well as statutory violations.<sup>476</sup> Increased respect for the role of the jury and a recognition that absolute rules were ill-suited to tort cases led courts to reject per se rules when custom and common-law rules were in play. The reasons courts did so suggest that courts should do the same in the case of statutory violations.

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473. See *Whetzel*, 282 F.2d at 946-47 (discussing Holmes's view that the vitality of the common law depends on its ability to reflect contemporary community values and commentators' criticisms of negligence per se).

474. *Id.* at 947.

475. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 8 cmt. c (AM. LAW INST. 2010) (discussing the "ethics of particularism"); *supra* text accompanying notes 143-47.

476. See *supra* Part I.A.

#### IV. THE BETTER RESOLUTION: A RETURN TO HISTORY

Justice Frankfurter said that the doctrine of assumption of the risk was an “excellent illustration of the extent to which uncritical use of words bedevils the law.”<sup>477</sup> The point applies equally well to negligence per se. “A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, indiscriminately used to express different and sometimes contradictory ideas.”<sup>478</sup> The term negligence per se began as one of various formulations courts used to explain why the question of whether the defendant acted reasonably would not go to the jury.<sup>479</sup> The term first applied to violations of custom, and then developed to apply to violations of statutes and judge-made standards of conduct.<sup>480</sup> Cases and treatise authors came to use the term to apply only to statutory violations, and that meaning stuck.<sup>481</sup>

The term negligence per se has remained for a century to refer to the doctrine that adopts a legislatively-established standard of care as the standard for negligence actions and that thus takes the question of whether the defendant acted reasonably from the jury.<sup>482</sup> The jury simply determines whether the defendant violated the statutory standard; if so, the jury is told that the defendant was negligent.<sup>483</sup> This doctrine has remained in force, and indeed expanded in scope and importance, despite the changed jury role in cases alleging violation of custom or accepted safety precautions and in negligence litigation generally.

Cases and commentary in the modern era explain in detail why a jury should determine whether a person exercised due care even when the conduct violated a custom or judge-made rule. Judge-made rules should not be absolute standards of conduct because, given the variety of circumstances that could be present in any general fact scenario, the standard suitable for the average

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477. *Tiller v. Atl. Coast Line R.R. Co.*, 318 U.S. 54, 68 (1943) (Frankfurter, J., concurring).

478. *Id.*

479. *See supra* Part I.A.

480. *Id.*

481. *See supra* Part I.B.

482. *See* Twerski, *supra* note 12, at 998.

483. *See supra* text accompanying note 176-77 (quoting jury instructions).

case might not be appropriate in a specific situation.<sup>484</sup> Cases should go to a jury for a determination of whether the defendant acted reasonably.<sup>485</sup> Customs should not serve as set rules of law because noncompliance with custom does not necessarily mean that the conduct was less safe.<sup>486</sup> Even if the conduct were less safe, the deviation from custom could have been insubstantial, the deviation could have been reasonable, or the conduct could have been only slightly less safe than the custom.<sup>487</sup> Customs that are generally reasonable may not be reasonable in light of the facts of a particular case and, although some customs may be the product of careful decision, others arise from inadvertence or neglect.<sup>488</sup> These concerns led courts to treat noncompliance with custom as evidence of negligence, not negligence per se.<sup>489</sup> Custom is just one piece of evidence for the jury in determining negligence.<sup>490</sup>

The entrenched law of negligence per se has led courts to fail to see that statutes can have the same problems as do judge-made standards, custom, and private standards.<sup>491</sup> Statutes that are suited for general situations may not be applicable to particular situations. Noncompliance with a statute may not be less safe than compliance. Noncompliance with a statute may be insubstantial or only slightly less safe than compliance. Statutes may be the result of hasty and ill-informed decision-making. A recognition of these facts should lead courts to turn to history and reject the rigid doctrine of negligence per se. A violation of a statute is certainly relevant to the question of negligence and is certainly something the jury should be able to consider. But the jury should also be able to consider the facts of the situation and make the decision of whether, ultimately, the defendant acted reasonably.

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484. See *Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 105-06 (1934); *supra* text accompanying notes 102-10 (discussing *Pokora*).

485. See *Pokora*, 292 U.S. at 106 (finding that a defendant was not per se contributorily negligent for failing to exit his car at a railroad crossing and remanding for further proceedings).

486. *Morris*, *supra* note 207, at 1152.

487. *Id.* at 1161-62; see *supra* text accompanying notes 215-34 (discussing *Morris* and other early commentary on the role of custom).

488. RESTATEMENT (SECOND) OF TORTS § 295A cmt. c (AM. LAW INST. 1965).

489. *Id.*; RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 13 (AM. LAW INST. 2010); see *supra* Part II.B.

490. See *supra* note 249 (quoting jury instructions). The law treats violations of standards that lack the force of law in the same way as it treats customs. *Supra* text accompanying notes 254-63.

491. For elaboration on the points in this paragraph, see *supra* Part III.B.

This approach would make only slight inroads into the doctrine of legislative comity—the core of the current doctrine of negligence per se.<sup>492</sup> Negligence per se now applies in numerous cases in which any notion of legislative intent to set a standard is remote at best: in cases involving municipal ordinances, administrative regulations, private standards that the legislature gave legal force, and federal laws and regulations.<sup>493</sup> Even when a state statute has set a standard, it is unlikely that the legislature consciously intended that it have negligence-per-se effect. To the extent that negligence per se rests on an assumption that the legislature intends its standard to apply in tort, it is fair to call the notion “pure fiction, concocted for the purpose.”<sup>494</sup> Legislative silence means either that the legislature did not consider civil suits at all or neglected to provide for them.<sup>495</sup> Legislative comity is more of a concern when a jury decision is directly at odds with a legislative judgment—when a jury specifically finds that conduct that the legislature considered to be unsafe and that caused harm to another nonetheless manifested as due care.<sup>496</sup> But even in those cases a jury award does not necessarily honor legislative intent. The violation of the statute could be excused through prosecutorial discretion, and that doctrine’s recognition that it is unrealistic to assume that any general standard unwaveringly governs every case. Even absent a recognition that statutes do not universally apply, the fairness to the defendant in a particular case and respect for the jury justify the slight incursion on a legislature’s presumptive intent. A legislature that intends a standard to govern in tort could always enact a statute to that effect.

Negligence per se is the remnant of a time when juries played a lesser role in tort litigation than they do now. Courts routinely took cases from the jury when the judge believed the jury could only reach one decision on negligence—whether the defendant violated a custom, a statute, or a judge-made rule. The defendant in all of those cases was negligent per se. The jury’s role has increased over time and courts have been increasingly reluctant

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492. See *supra* text accompanying notes 149-57.

493. See *supra* text accompanying notes 149-63.

494. KEETON ET AL., *supra* note 14, § 36, at 221.

495. *Id.*

496. See Thayer, *supra* note 12, at 323 (giving this possibility as a reason for adopting negligence per se).



to assume that general rules apply to particular cases.<sup>497</sup> This ethic of particularism has led courts to refrain from enforcing common-law rules of negligence and to allow juries to determine if a defendant who violated a custom is negligent.<sup>498</sup> Negligence per se has remained in cases of statutory violations without any clear explanation as to why that should be so. At the same time, the doctrine reaches an increasing number of cases. The doctrine has an increased potency due to both its reach and because it, alone, takes cases from the jury. Courts should consider the history of negligence per se and recognize that the reasons that led courts to allow juries to consider cases of custom, and to stop enforcing judge-made rules of conduct, also dictate stepping back from rigid adherence to negligence per se. Juries should consider evidence of statutory violations in determining negligence but should not be instructed to find defendants negligent.<sup>499</sup>

### CONCLUSION

Courts say only violations of law are negligence per se because the conduct contravenes a legislative determination of the proper standard of care. Legislative action is what differentiates law from custom and the judge-made standards cases that also originally gave rise to negligence-per-se liability. Violations of custom and common law stopped giving rise to a finding that the actor was per se negligent for various reasons: the recognition that general rules do not fit all cases, the fear that a custom does not reflect the safest conduct, the fear that the standard could be out-of-date, poorly thought out, or logically inapplicable. All of these reasons reflect the ethic of particularism that supports deciding tort cases on their facts. They also recognize a role for the jury in

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497. See *supra* notes 141-47 and accompanying text.

498. See *supra* text accompanying notes 141-45.

499. This is the law in some states. The Third Restatement explains that approximately a dozen states treat statutory violations as evidence of negligence. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 14 reporters' note (AM. LAW INST. 2010). A few states conclude that statutory violations create a rebuttable presumption of negligence, or prima facie proof of negligence. *Id.* (saying that this position is congruent with the Restatement position). So it is possible, then, to consider this approach as a modification of negligence per se or a variation of the doctrine. A clearer approach is to look to history, however. The history of negligence per se and its origins support adopting a position that explicitly rejects the current doctrine of negligence per se and equates violations of statutes, customs, and private standards.

tort litigation: the jury, as the voice of the community, determines how a reasonable member of the community would act.

The cases offer no explanation of why the same development has not occurred with legal standards. But the idea of adherence to legal standards has never been absolute, in criminal or tort law. The long-ago abandonment of the outlaw approach to negligence per se establishes that negligence per se is not a punishment for violating the law.<sup>500</sup> Instead, the doctrine aims to defer to a legislative determination of proper conduct.<sup>501</sup> But the idea that legislative judgment deserves deference is not absolute. The law has long recognized the idea of prosecutorial discretion and recognized that some laws are outdated and unenforced. Courts have similarly recognized exceptions to negligence per se. The exceptions are narrow, however, and do not recognize that statutes, like custom and private rules of conduct, may be outdated or unsuited to a particular situation.<sup>502</sup> The exceptions do not recognize the need for some measure of discretion in determining whether a statutory standard should govern civil litigation. They do not embrace the ethic of particularism, the recognition that cases differ and that the jury's job is determining when a general rule applies to a particular case.

Courts should recognize that the ethic of particularism is as applicable to violations of positive law as it is to cases dealing with violations of custom, common law, or private standards. Courts should allow juries to consider the statutory violations, but only to consider the violation as evidence of negligence. Courts should, in other words, take the next step that the history of the law of negligence per se suggests. The law has developed to treat violations of custom and common-law standards as only evidence of negligence, not determinative of the question. The same should be true of violations of law.

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500. *See supra* text accompanying notes 87-92.

501. *See supra* text accompanying notes 87-88.

502. *See supra* Part III.B.