

## Statutory Standards and Negligence in Accident Cases

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# Statutory Standards and Negligence in Accident Cases

*Fleming James, Jr.\**

This is no new subject, yet most of the very able treatment it has received has been written so as greatly to emphasize the fault aspect and the admonitory function of tort law. In view of modern trends, I believe that the objective of compensating accident victims deserves greater emphasis, and that its detailed implications for the fabric of tort law deserve more careful analysis than they have received. Though our system is replete with the language and logic of negligence as a species of fault, we may well be working towards what Professor Ehrenzweig has aptly called "Negligence without fault,"<sup>1</sup> which itself may be only a way station on the road to a full-fledged scheme for the compensation of accident victims. This article tries to examine the implications of both sets of objectives for the judicial treatment of statutory standards of conduct in accident cases.

There is here also another departure from former treatments, which is of an entirely different kind. Perhaps too little attention has been paid to statutes which expressly create civil liability for breach of their commands, and to a close analysis of how they have created judicial habits of thought and of the way those habits have been transplanted, not always appropriately, to the treatment of statutes which lack any such express provision. This article will attempt a point by point comparison of the two situations.

## WHERE CIVIL REMEDY IS EXPRESSLY PROVIDED

Within broad limits (presently to be noticed), the legislature may of course prescribe standards of conduct and provide for the recovery of civil damages by persons injured through breach of such standards.<sup>2</sup> Where an action is brought under

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1. See Ehrenzweig, Assurance Oblige—A Comparative Study, 15 *Law & Contemp. Prob.* 445, 447 (1950).

2. Of course, the legislature may also directly impose liability for injuries

such a legislative enactment any one or more of the following questions may arise, determination of practically all of which call for the court alone without intervention of the jury.

The validity of the enactment may be challenged. If it is a federal statute, the challenge would have to be on the ground that it contravened the Federal Constitution. It is impossible here even to suggest all the manifold inquiries that might be raised under this head. Perhaps those most common in accident cases would be that the subject matter of the statute did not pertain to one of the powers vested in the federal government (such as the war power or that to regulate interstate and foreign commerce), or that the statute imposed such inappropriate and unreasonable burdens as to violate the due process clause of the Fifth Amendment.<sup>3</sup> If the enactment is a state statute it may still be challenged as directly contravening the Federal Constitution.<sup>4</sup> In addition, it may be held invalid because it invades a sphere properly preempted by federal legislation, or contravenes a valid federal statute or regulation.<sup>5</sup> Moreover a state statute

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caused by a certain kind of activity without prescribing any standard, unless the fiction be indulged that a statute of this kind imposes the duty so to conduct the activity that no one is injured thereby. But such a fiction is not helpful. A statute of the kind described in this footnote may more profitably be regarded as imposing liability without fault (or requiring the actor to engage in that activity at his peril). See analysis in Harper, *A Treatise on the Law of Torts* (1933) c. 10; Werner, J., in *Ives v. South Buffalo R.R.*, 201 N.Y. 271, 94 N.E. 431, 34 L.R.A. (N.S.) 162 (1911). Statutes imposing liability for fire set by railroad engines may be of this type. See *Grissell v. Housatonic R.R.*, 54 Conn. 447, 9 Atl. 137 (1886), as may statutes imposing liability on employers for accidental injuries to employees. Cf. *Jackson v. Southern Kraft Corp.*, 183 So. 135 (La. App. 1938); La. R.S. (1950) 23:1031. See *Prager v. W. H. Chapman & Sons Co.*, 122 W. Va. 428, 9 S.E. 2d 880, 129 A.L.R. 1114 (1940). The text at this point does not refer to this type of statute, but rather to legislative enactments which require the taking of specific precautions, or which forbid the conducting of an operation in some specific way.

3. Apparently there is no Supreme Court case striking down a federal statute of this kind in the field. The problems would be similar to those presented by the cases in the next note. For a case invalidating standards of conduct in a different field altogether, see *United States v. Cohen Grocery Co.*, 255 U.S. 81 (1921).

4. *Seaboard Air Line Ry. v. Bladewell*, 244 U.S. 310 (1917) (Georgia statute requiring railroads to check speed of trains at grade crossings held unconstitutional as direct burden on interstate commerce); *Parks v. Libby-Owens-Ford Glass Co.*, 360 Ill. 130, 195 N.E. 616 (1935) (Section of Occupational Diseases Act requiring employer to adopt "reasonable and approved devices, means or methods" to prevent such disease held so vague as to violate due process clauses of federal and state constitutions. The applicable due process clause of the Federal Constitution is here to be found in the Fourteenth Amendment.).

5. These instances too, of course, involve conflict with the Federal Constitution. They are listed separately because it is a conflict which, for the most part, legislation (federal) can remove without constitutional change. An example is *Napier v. Atlantic C.L.R. Co.*, 272 U.S. 605 (1926) (state acts requiring cab curtains and automatic firebox doors held invalid in view of

may be invalidated for conflict with the state constitution.<sup>5a</sup> If the enactment is a municipal ordinance it is subject to any challenge that may be levelled at a state statute. In addition, it will be invalid if it conflicts with a valid state statute including, of course, those public or private acts which constitute the municipal charter, and govern the municipal power to pass ordinances. If the standard is prescribed not by the legislative enactment itself, but by administrative regulation promulgated by reason of a statute, it is vulnerable to any successful challenge to the parent statute. In addition, the regulation will fall if its own terms are *ultra vires* the statute (exceed the authority conferred by the statute under which it was purportedly passed) or are in collision with the provisions of a governing constitution.<sup>6</sup> If the enactment (or regulation) is invalid,<sup>7</sup> it will not support an action for its breach.<sup>8</sup> If the enactment (or regulation) survives any challenge made to its validity it is no defense to an action under it that it is widely disobeyed, or seldom enforced, or ill-adapted to promote the end it seeks.<sup>9</sup>

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Federal Boiler Inspection Act, though they would otherwise be valid exercises of police power and only an incidental burden on interstate commerce). See *Kelly v. Washington*, 302 U.S. 1, 9 (1937).

5a. Paulsen, *The Persistence of Substantive Due Process*, 34 Minn. L. Rev. 91 (1950).

6. *Robert A. Johnson Co. v. Industrial Commission*, 242 Wis. 299, 7 N.W. 2d 854 (1934). See cases cited in Morris, *Role of Administrative Safety Measures in Negligence Actions*, 29 Texas L. Rev. 143, 152 (1949).

7. The invalidity need not, of course, spring from unreasonableness or other substantial defect. It may result from some procedural failure as in the manner of its passage, approval, or publication. See, e.g., *Clinkscales v. Carver*, 22 Cal. 2d 72, 136 P. 2d 777 (1943) (defects in publication of resolution by board of supervisors establishing boulevard stop signs); *State v. McCook*, 109 Conn. 621, 147 Atl. 126 (1929) (acts signed by governor more than three days after final adjournment of legislature held unconstitutional).

8. Morris, *Role of Administrative Safety Regulations in Negligence Actions*, 29 Texas L. Rev. 143, 152 (1949).

9. See *Nashville C. & St. L. Ry. v. White*, 278 U.S. 456 (1929) (requirement by ordinance of flagman at crossing not avoided by showing it is obsolete and that railroad has taken more modern precautions); *Conrad v. Springfield Consolidated Ry.*, 240 Ill. 12, 88 N.E. 180 (1909) (excluding evidence of the general discontinuance by industry of guard wires required by ordinance for protecting high voltage lines); *Riser v. Smith*, 136 Minn. 417, 162 N.W. 520 (1917) (excluding evidence of a police department regulation allowing violation of the speed limit set by ordinance); *Stultz v. Thomas*, 182 N.C. 470, 109 S.E. 361 (1921) (custom among construction men as to guarding of excavations cannot prevail against the positive requirements of an ordinance); *Murphy v. Way*, 107 Conn. 633, 141 Atl. 858 (1928) (the "somewhat prevalent existence" of the practice of multiple traffic lanes on wide and congested streets cannot justify departure from statute).

These cases do not involve legislation containing an express provision for civil recovery. The reasoning in them would, however, apply even more strongly to an action to enforce such an express provision, than it would to an action for negligence in which the legislation is collaterally invoked to set the standard.

The applicability of the civil remedy provisions of the statute may be challenged.<sup>10</sup> It may be conceded that defendant's conduct violated the standard prescribed by the statute, yet claimed that the resulting injury was not to one of the class of persons or things which the statute was designed to protect, or was not produced by an evil which the statute was aimed at. Such a challenge invokes familiar and long-standing principles of statutory construction. Some statutes are narrowly specific in defining the class of persons or interests sought to be benefitted. Recovery may for instance be expressly limited to employees (with respect to personal injuries)<sup>11</sup> or to "damages done by [railroad] agents or engines or cars to any domestic animals" on the right of way.<sup>12</sup> But broader language may also be limited by construction in the light of what the court finds to be the legislative purpose (which may be suggested by other language of the statute or other relevant statutes, by its history, by its title, or the like). Thus it has been held that a statute requiring warning signals to be given for grade crossings and providing that the owner of the "railroad shall be liable to any person injured for all damages sustained"<sup>13</sup> by reason of a neglect to give them was not intended for the protection of employees, but only of highway travelers and possibly passengers and non-

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10. For brevity the word statute will be used (in the rest of this article) to include also ordinances and administrative regulations except where the context indicates otherwise. In the present instance, for example, the civil remedy provision would rarely if ever be found in a regulation but in the parent statute (the regulation merely prescribing the specific standard of conduct). The question whether it is within the power of an administrative body to provide for remedies, (in addition to prescribing standards) is a much mooted one which can scarcely be gone into here.

11. See, e.g., *Gibson v. Kansas C.P.E. Co.*, 85 Kan. 346, 116 Pac. 502 (1911), where such a statute was narrowly construed to exclude recovery by a father for loss of services of his minor son who was an employee within the terms of the statute. Cf. *Bagesse v. Thistlewaite Lumber Co., Inc.*, 125 So. 322 (La. App. 1929); La. R.S. (1950) 23:1031. But see *Osborne v. Salvation Army*, 107 F. 2d 929 (2d Cir., 1939), where plaintiff was allowed to recover damages for injuries caused by defendant's breach of labor statute in not supplying safety devices to one washing windows from the outside, although within the technical meaning of the statute he was not an employee. Cf. *Alexander v. Latimer*, 5 La. App. 41 (1926); La. R.S. (1950) 23:1044.

12. N.Y. Consol. Laws (1917), Railroad Law, § 52, which was construed in *Di Caprio v. New York Cent. R.R.*, 231 N.Y. 94, 131 N.E. 746 (1921) to exclude injuries to children wandering onto an unfenced right of way. Cf. similar holdings in *Bischof v. Illinois So. Ry.*, 232 Ill. 446, 83 N.E. 948 (1908); *B. & O. S.W. Ry. v. Bradford*, 20 Ind. App. 348, 49 N.E. 388 (1898) (under similar statutory provisions). Cf. *Henderson v. Lancaster*, 2 La. App. 680 (1925); La. R.S. (1950) 45:504. On the other hand, this same narrowly circumscribed language has been extended by construction to include employees and passengers. *Terr. H. & I. Ry. v. Williams*, 172 Ill. 379, 50 N.E. 116 (1898); *Atchison, T. & S.F.R.R. v. Reesman*, 60 Fed. 370 (8th Cir., 1894).

13. W. Va. Stat. (1873) c. 88, § 31. Cf. La. R.S. (1950) 45:561.

trespassing strangers.<sup>14</sup> Similarly the effect of broad provisions may be cut down because the harm (though it happened to one of the protected class) was not brought about through the mischief which the statute was designed to prevent, as where cattle wander over a railroad right of way (which is unfenced, in violation of statute) and are injured by some danger not connected with the vicissitudes of railroad operation, but one which the required fence would have kept them from reaching.<sup>15</sup> In

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14. *Randall v. Baltimore & O.R.R.*, 109 U.S. 478 (1883). See also *L.S. & M.S.R.R. v. Liidtko*, 69 Ohio 384, 69 N.E. 653 (1904) (Ohio statute requiring fences sufficient to turn stock held not to require railroad to fence against persons despite fact that statute expressly imposed liability for all damages to "person or property in any manner by reason of the want or insufficiency of any such fence."). This case neatly illustrates the point that the extent of the class to be protected by a statute may often be determined by a consideration to the mischief sought to be prevented. Here the court uses such reasoning restrictively. From the fact that the statute requires fences "sufficient to turn stock" it concludes that the statute was aimed at preventing the dangers to be anticipated from stock being on the right of way (e.g., collision with and injury to stock, derailment of trains, etc.). The recovery provision was correlatively narrowed (despite its broad literal sweep) to the classes of interests peculiarly jeopardized by this danger. Cf. *Nolan v. New York & N.H.R.R.*, 53 Conn. 461, 4 Atl. 106 (1886) (similar limitation stated as a general rule without express reference to either broad statutory provision in effect when case decided, or narrower one applicable at time of accident. See Conn. Gen. Stats. (1875) §§ 35, 39, p. 325; Pub. Acts (1881) c. 66, § 3).

The same reasoning may, of course, be used to *extend* by construction the narrow literal terms of a statute, as in *Terre H. & I. Ry. v. Williams*, 172 Ill. 379, 50 N.E. 116 (1898), where an employee engineer was given the benefit of a similar statute in spite of language providing expressly only for recovery for damage to stock. See also *Donnegan v. Erhardt*, 119 N.Y. 463, 23 N.E. 1051 (1890) (brakeman on train allowed to recover for injury where train was derailed by horse wandering on track through fence, although statute specifically imposed liability only for injuries to animals). Cf. *Atchison, T. & S.F.R.R. v. Reesman*, 60 Fed. 370 (8th Cir., 1894) (railway employee recovered for injury caused by railroad's failure to erect sufficient fences on ground statute designed to protect persons on train as well as cattle owners); *Dickson v. Omaha & S.L.R.R.*, 124 Mo. 140, 27 S.W. 476, 25 L.R.A. 320 (1894) (railroad held liable for death of engineer caused by collision of train with bull which strayed on track through defective fence. The reasoning of the court was that the fences were considered necessary to ensure a safe roadbed for the benefit of the train's passengers and employees).

See also *Fairport P. & E.R.R. v. Meredith*, 292 U.S. 589, 596 (1934) ("It may fairly be said that the nature of the duty imposed by a statute and the benefits resulting from its performance usually determine what persons are entitled to its protection."). Here the notion was used to extend liability under the Federal Safety Appliance Act to highway travelers, though benefit to railroad employees was conceded to be the principal statutory purpose. No civil recovery provisions were involved, but the reasoning of the court seems applicable to this section as well as to the next one.

15. *Ingalsbe v. St. Louis-San Francisco R.R.*, 295 Mo. 177, 243 S.W. 323, 24 A.L.R. 1051 (1922) (cow eating herself to death); *Nelson v. Chicago, M. & St. P. Ry.*, 30 Minn. 74, 14 N.W. 360 (1882) (mule breaking leg in hole on right of way).

It is fairly common to reach such a result by reasoning artificially that the breach of statute is not the "proximate" or "legal" cause of the injury. This reasoning has been discredited. See *Green, Are There Dependable Rules of Causation*, 77 U. of Pa. L. Rev. 601, 618 (1929); *Prosser, a Handbook of the*

this matter of statutory construction there is often, needless to say, a good deal of room for the judicial process—for taking either a broad or a strict view of the legislative purpose (either as to the class to be protected, or the dangers to be avoided). On the whole the tendency of the courts has been distinctly towards taking a broad liberal view of the statutory purpose<sup>16</sup> and thus to extend the areas of liability.<sup>17</sup> Once it has been determined, however, that a given injury falls outside the scope of a statute, any action viewed as one founded upon civil recovery provisions of the statute must necessarily fail,<sup>18</sup> though it by no means necessarily follows that the action cannot be sustained on some other basis (for example, common law negligence)<sup>19</sup> or even, perhaps, that the statutory standard must be regarded as entirely irrelevant.<sup>20</sup>

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Law of Torts 267 (1941). It has not however fallen entirely out of fashion with courts.

16. This trend toward liberality represents no recent departure. See Note, 9 L.R.A. (N.S.) 338 (1906). Recent cases are *Ross v. Hartman*, 139 F. 2d 14, 158 A.L.R. 1370 (App. D.C. 1943), cert. denied 321 U.S. 790 (1943) (ordinance requiring motorists to lock ignitions construed as intended to protect public from unauthorized drivers); *Ostergard v. Frisch*, 333 Ill. App. 359, 77 N.E. 2d 537 (1948), noted in 10 LOUISIANA LAW REVIEW 554 (1950) (holding defendant liable for injuries under an ordinance of the City of Chicago similar to that in the *Hartman* case); *Huckleberry v. Missouri Pac. R.R.*, 324 Mo. 1025, 26 S.W. 2d 980 (1930) (where boy burned by gasoline spilled on right of way and not rendered harmless in accordance with I.C.C. regulations, the court said that the class of persons meant to be protected included all who *conceivably* might be endangered by the breach of statute); *De Haen v. Rockwood Sprinkler Co.*, 258 N.Y. 350, 179 N.E. 764 (1932) (statute requiring guards for elevator shaft openings held designed to protect men below from falling objects as well as to keep men from falling into shaft). Recent restrictive cases are *Galbraith v. Levan*, 323 Mass. 255, 81 N.E. 2d 560 (1948) (refusing to hold defendant liable under an ordinance similar to that in *Ross v. Hartman*, supra); *Butler v. McCalep*, 54 A. 2d 644 (D.C. 1947) (construing order of Public Utilities Commission of Washington, D.C., concerning the number of passengers to be carried in taxicabs as not being for the benefit of plaintiff passenger); *Routh v. Quinn*, 20 Cal. 2d 488, 127 P. 2d 1, 149 A.L.R. 215 (1942) (tax assessor's breach of statutory duty to compute correctly realty tax held to be for benefit of securing public revenue only and not for protection of buyers at tax sale). Cf. La. R.S. (1950) 47:1903, 1958.

17. It should be noted that express civil recovery provisions operate uniformly in favor of accident victims (plaintiffs) and extend liability. If the statutes that contain them also restrict liability by enlarging the scope of contributory negligence, that is due to the principles dealt with in the next section.

18. Prosser, op. cit. supra note 15, at 266; Harper, op. cit. supra note 2, at § 78.

19. Prosser, op. cit. supra note 15, at 275.

20. *Hansen v. Kemmish*, 201 Iowa 1008, 208 N.W. 277 (1926) (although statute requiring owners to fence male pigs was primarily to prevent misbreeding, the court held that failure to fence adequately presented a prima facie case of negligence toward motorist injured by striking pig). Cf. La. R.S. (1950) 3:2002. *U.P. Ry. v. McDonald*, 152 U.S. 262 (1894) (statute which required burning slack pile to be fenced was designed to protect cattle, but its breach afforded "evidence of negligence" where injury was to a child). See *Denton v. Missouri, K. & T. Ry.*, 90 Kan. 51, 55, 133 Pac. 558, 559 (1913)

The existence of any breach of statute may be challenged. This of course includes the case where the defendant denies doing the alleged acts which constitute the breach and this would typically present an issue for the jury. But it may also involve questions of statutory construction. Thus an Illinois statute requiring flanges on drums used to wind cable in order to raise and lower miners was held not to apply to a drum being used for similar purposes where the mine was still under construction, though practically completed.<sup>21</sup> One of the claims most commonly made under this head is that a statutory command, apparently unqualified, is to be read as requiring only reasonable care to take the specified precaution, so that a non-negligent failure to meet the statutory standard is not a breach of the statute at all.<sup>22</sup> Although it may once have been doubted, the legislative power to impose duties not qualified in this manner seems clear.<sup>23</sup> The question is simply one of the meaning of legislation, and

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("The violation of a law may be evidence of negligence even in a situation where it could not actually constitute negligence.")

21. *Moore v. Dering Coal Co.*, 242 Ill. 84, 89 N.E. 674 (1909). This was an action brought under express provision for civil recovery for alleged wilful failure to provide the flanges required by the act. See Ill. Rev. Stat. (Hurd 1903) c. 93, § 33.

22. See, e.g., *Iudica v. De Nezzo*, 115 Conn. 233, 161 Atl. 81 (1932) (requirement that landlord provide light in hallways of tenements construed as requiring only reasonable care to keep lights burning). *Romansky v. Cestaro*, 109 Conn. 654, 145 Atl. 156 (1929) (similar construction of statute requiring sufficient brakes for automobiles). Cf. La. R.S. (1950) 32:284. These statutes did not expressly provide civil recovery but the problem of construing the statute itself is the same under either type of legislation. Cf. *Nashville & C.R.R. v. Peacock*, 25 Ala. 229 (1854) (statute making railroad liable for stock killed by cars or locomotives construed as allowing defense of due care); *Chicago & N.W. Ry. v. Barrie*, 55 Ill. 226 (1870) (where railroad has once erected fences, it "was not bound to do impossible things, nor . . . required to keep a constant patrol, night and day" to maintain them). Cf. *Duke v. Missouri Pac. R.R.*, 142 So. 333 (La. App. 1932), La. R.S. (1950) 45:503, 504 (under statute expressly allowing defendant to show non-negligence as a defense).

23. *O'Donnell v. Elgin J. & E. Ry.*, 338 U.S. 384 (1949); *Carter v. Atlanta & St. A.B.R.R.*, 338 U.S. 430 (1949); *St. Louis & I.M. & S.R.R. v. Taylor*, 210 U.S. 281 (1907) (Safety Appliance Act held to impose absolute duty on interstate carriers with reasonable care no defense. "It is enacted that no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard. There is no escape from the meaning of these words." *Moody, J.*, id. at 295). See *C.B. & Q. Ry. v. United States*, 220 U.S. 599 (1911), where Justice Harlan in following the *Taylor* case, supra, said, "the power of the legislature to declare an offense and to exclude the elements of knowledge and due diligence . . . cannot, we think, be questioned." Id. at 599.

The child labor statutes have generally been construed to impose an absolute duty. See *Blanton v. Kelhoka Coal Co.*, 192 Ky. 220, 232 S.W. 614 (1921). But cf. *Alexander v. Standard Oil Co.*, 140 La. 54, 72 So. 806 (1916), La. R.S. (1950) 23:161-168.

For an expression of the older attitude doubting the legislative power to impose absolute standards and exclude the defense of reasonable care to fulfill them, see *Ives v. South Buffalo Ry.*, 201 N.Y. 271, 298, 94 N.E. 431, 441 (1911).



the solution will often lie in the seriousness with which the legislature probably regarded any deviation from the standard it prescribed.<sup>24</sup> If the court construes the command as an absolute one, then evidence of reasonable efforts to comply is irrelevant, and can present no issue for the jury.<sup>25</sup> If the requirement is read as one to use due care to comply with the standard, then such evidence is relevant on the issue of whether the statute has been breached, and does present a jury question.<sup>26</sup> Even in such

24. The extent to which the court itself approves of the fault principle will also no doubt influence its decision. See *Romansky v. Cestaro*, 109 Conn. 654, 658, 659, 145 Atl. 156, 157, 158 (1929); *Morris*, *Criminal Statutes and Negligence*, 49 Col. L. Rev. 21, 29 (1949). Moreover, narrower considerations may be thought dispositive of the question of construction. See, e.g., *Gallagher v. New York & N.E.R.R.*, 57 Conn. 442, 18 Atl. 786 (1888) (where court construed statute requiring railroad to fence both sides of right of way unless exempted by the commission so as not to require railroad to fence the side of its right of way paralleling the tracks of another railroad, on the ground that this would be an absurd requirement, despite the absolute language of the statute). Cf. *La. R.S.* (1950) 45:503. But cf. *Marengo v. Great N. Ry.*, 84 Minn. 397, 87 N.W. 1117 (1901).

25. *St. Joseph & G.I. Ry. v. Moore*, 243 U.S. 311, 314 (1917) ("The exercise of care, even the greatest, in supplying these appliances will not excuse defects in them—the duty and liability are absolute." Action under Federal Safety Appliance Act into which courts have imported by construction a civil recovery provision.). Cf. *Ohio & M.V.R.R. v. Brown*, 23 Ill. 94 (1859) (where railroad has omitted to build statutory fences it is liable under statute "without references to the amount of . . . care exercised"). *Toledo P. & W. Ry. v. Pence*, 68 Ill. 524 (1873) (Semble. Instruction requiring plaintiff to show negligence for recovery held properly refused); *Chicago & E.P.R.R. v. Goette*, 133 Ill. 21 (1890) (failure to remove combustibles from right of way in violation of statute providing civil recovery is negligence per se). See *Cary v. St. Louis K.C. & N. Ry.*, 60 Mo. 209, 213 (1875) (where railroad omits to construct statutory fences "No question of negligence could arise."). But cf. *Sanders v. Illinois Cent. R.R.*, 127 La. 917, 54 So. 147 (1911), *La. R.S.* (1950) 45:503. *Evers v. Davis*, 86 N.J.L. 196, 90 Atl. 677 (1914), neatly illustrates this. The trial court treated the action as one directly upon the statute and excluded evidence of reasonable efforts to comply with it. The Court of Errors and Appeals apparently assumed this ruling would have been correct, on the trial court's premise, but held that the evidence should have been received since the statute did not provide for civil recovery and could come into the case only through the reasoning suggested by *Thayer*, *Public Wrong and Private Action*, 27 *Harv. L. Rev.* 317 (1913).

"Some statutes, such as traffic laws, are enacted, not to prevent acts that the community may regard as inherently undesirable, but to prescribe uniform and certain rules of conduct in the interest of safety. Such rules are authoritative declarations as to how persons shall act, and must be observed. . . . In such a field, when the Legislature has spoken, the standard of care required is no longer what the reasonable prudent man would do under the circumstances, but what the Legislature has commanded." *Traynor, J.*, dissenting in *Satterlee v. Orange Glen School Dist.*, 29 Cal. 2d 581, 596, 597, 177 P. 2d 279, 287, 288 (1947). See *Bush v. Harvey Transfer Co.*, 146 Ohio St. 657, 67 N.E. 2d 857 (1946) (reversing defendant's verdict because judge charged jury that defendant's conduct in violating statute was to be considered in the light of the emergency confronting him); *Bushnell v. Telluride Power Co.*, 145 F. 2d 950 (10th Cir., 1944) (court refused to listen to defendant's showing of reasonable precautions where damage was caused by fire kindled without written permission).

26. *Illinois Cent. R.R. v. Swearingen*, 33 Ill. 289 (1864). Analytically

a case the court may hold that defendant has the burden of proving reasonable efforts, once non-compliance with the standard is shown.<sup>27</sup>

Liability under the type of statute here considered may also be challenged for want of any causal connection between the violative conduct and the injury.

#### WHERE CIVIL REMEDY IS NOT EXPRESSLY PROVIDED

By far most of the ever growing number of regulatory statutes that are drawn into accident litigation prescribe a standard of conduct and provide a penalty for its breach (usually fine or imprisonment), but contain no express provision for civil damages. In such a case a court might, of course, "find" such a provision "implied" by "construing" the statute in the light of the "legislative intent." And very occasionally there is some substantial indication that the members of the legislature actually and consciously meant that a breach of statute should afford a civil recovery (though they omitted to say so) as where Congress, in enacting the Safety Appliance Act, provided that employees injured by a violation of its requirements should "not be deemed to have assumed the risk thereby occasioned."<sup>28</sup> It was once fairly common, however, for courts to find a provision for tort liability implied in a criminal statute whenever that was construed as requiring or prohibiting conduct for the protection of individuals and a breach of it "result[ed] in damage to one of the class for whose especial benefit the statute was enacted."<sup>29</sup>

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considered, the action is still one for breach of statute, not one for common law negligence.

27. This seems to be the unexpressed assumption in the Illinois cases holding that if a railroad has built proper fences, it will be liable only for negligence in maintenance and repair. *Illinois Cent. R.R. v. Dickenson*, 27 Ill. 55 (1861); *Illinois Cent. R.R. v. Swearingen*, 33 Ill. 289 (1864); *Chicago & N.W.R.R. v. Barrie*, 55 Ill. 226 (1870). Cf. *Diamond v. Northern Pacific R.R.*, 6 Mont. 580, 13 Pac. 367 (1887) (under statute expressly calling for such a result).

It should be noted that as used in this paragraph the phrase "noncompliance with the standard" is not necessarily equivalent to the phrase "breach of statute."

28. Since the only relevance of the doctrine of assumed risk would be as a defense to an action by an employee for personal injuries, it requires no fiction to say that Congress was thinking of just such remedy for breach of this safety statute. See *Texas & Pac. Ry. v. Rigsby*, 241 U.S. 33, 40 (1916) (allowing recovery in a civil suit).

29. "A Disregard of the Command of the statute is a wrongful act, and where it results in damage to one of the class for whose special benefit the statute was enacted, the right to recover the damages from the party in default is implied." Pitney, J., in *Tex. & Pac. Ry. v. Rigsby*, 241 U.S. 33, 39 (1915).

See Holt, C. J., *Anon.* 6 Mod. 27 (1703): "So, in every case, where a

But in most cases it is carrying construction pretty far<sup>30</sup> to read provisions for civil liability into a statute which actually omits them while expressly providing for criminal punishment, especially when it is such an easy and familiar thing to insert civil recovery provisions where they are wanted. Professor Thayer pointed this out incisively in his classic article on the subject<sup>31</sup> and modern cases in this country make little use of the discredited reasoning.<sup>32</sup> As we shall see, however, its implications (which would logically regard the action as one upon the statute and involve the analysis set forth in the preceding section) have had considerable influence on the techniques currently used.

There is another point of view which has very occasionally found favor among American courts. The violator of penal statutes is after all a "criminal." He might therefore be treated as something of an outlaw who is liable for all the direct results of his misdeeds and disentitled to seek redress through the courts for any injury to which his criminal conduct contributed. Thus a defendant has been held liable without regard to negligence for injury to another person hit by a blow aimed at a horse he was maltreating contrary to statute.<sup>33</sup> A similar result has been reached by one court where defendant was violating a statute which forbade hunting on Sunday.<sup>34</sup> And Massachusetts treats

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statute enacts, or prohibits a thing for the advantage of any person, that person shall have remedy to recover the advantage given him, or to have satisfaction for the injury done him contrary to law by the same statute."

30. Lowndes calls it "embarking upon a perilous speculation." Lowndes, *Civil Liability by Criminal Legislation*, 16 Minn. L. Rev. 361, 363 (1931).

31. Thayer, *supra* note 25, at 320: "This sort of speculation as to unexpressed legislative intent is a dangerous business permissible only within narrow limits; and the tendency to overindulge it is responsible for much of the confusion in the law. Proper regard for the legislature includes the duty both to give full effect to its expressed purposes, and also to go no further. The legislature could, if it chose, have provided in terms that any one injured by a breach of the statute should have a remedy by civil action. Such a provision is familiar in criminal statutes. Its omission in this instance must therefore be treated as the deliberate choice of the legislature, and the court has no right to disregard it." Thayer goes on to say that failure to give a private action does not mean private rights are unaffected. "The legislature must be assumed to know the law, and if upon common-law principles such a statute would affect private rights, it must have been passed in anticipation of that result." "The true attitude of the courts," says Thayer, "is to ascertain the legislature's expressed intent, to refrain from conjecture as to its unexpressed intent, and then to consider the resulting situation in the light of the common law."

32. Restatement, Torts, § 286(c) (1934). But it is still fashionable in England to pursue the will o' the wisp of a non-existent legislative intention. See *Phillips v. Britannia Hygienic Laundry*, 2 K.B. 832 (1932).

33. *Osborne v. Van Dyke*, 113 Iowa 557, 85 N.W. 784 (1901), a case which seemed to Thayer "hard to support." Thayer, *supra* note 25, at 338, n. 62. Cf. *La. R.S.* (1950) 14:102.

34. *White v. Levarn*, 93 Vt. 218, 108 Atl. 564 (1918).

an unregistered motor vehicle as a trespasser on the highway.<sup>35</sup> What little currency this notion enjoys today, however, is largely confined to cases where a law-breaking *plaintiff* is denied access to the courts, a fact which makes it run sharply counter to the objective of compensating accident victims.<sup>36</sup> The doctrine appears to be a barbarous relic of the worst there was in puritanism. Its application could be justified at all only as a stringent means of imposing additional sanctions to enforce a very important provision of the criminal law,<sup>37</sup> and it is questionable indeed whether it is wise for the courts to assume the responsibility of imposing such a sanction when the legislature has not seen fit to do so. It should be noted in passing that the limitations of the "statutory purpose" notion (described in the last section) have no logical relevance to the doctrine described in the present paragraph.

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35. *Koonovsky v. Quelette*, 226 Mass. 474, 116 N.E. 243 (1917) (defendant driving unregistered car on the highway liable for all injury the direct result of that act even if not contemplatable as a probable result). Cf. La. R.S. (1950) 47:501.

36. *Patrican v. Garvey*, 287 Mass. 62, 90 N.E. 9 (1934) (eleven year old plaintiff denied recovery where he rode bicycle over middle line of road in violation of statute) (Cf. La. R.S. (1950) 32:231.); *Johnson v. Boston & M.R.R.*, 83 N.H. 350, 143 Atl. 516 (1928) (plaintiff nonsuited where injuries in collision at railroad crossing with defendant's train because he had no driver's license). Contrast *Rapee v. Beacon Hotel Corp.*, 293 N.Y. 196, 56 N.E. 2d 548 (1944) (court refused to bar suit by plaintiff against hotel for damages merely because he had violated law by registering at hotel with woman not his wife). See Davis, *The Plaintiff's Illegal Act as Defense in Actions of Tort*, 18 Harv. L. Rev. 505 (1905).

A variation of this rule is that which deprives a plaintiff who is violating an ordinance or statute of the benefit of last clear chance. See *Price v. Gabel*, 162 Wash. 275, 298 Pac. 444 (1931) (photographer breaking city ordinance by taking pictures from the middle of street is a wrongdoer every moment he is so engaged; hence a defendant who injures him there can never be the last wrongdoer); *Masters v. Man Lehmden*, 36 Ohio App. 414, 173 N.E. 303 (1930) (where plaintiff is violating ordinance, he may recover only where defendant is wilfully and wantonly negligent). See contra *Arnold v. Owens*, 78 F. 2d 495 (4th Cir., 1935).

37. Thayer half-heartedly suggested a curious pragmatic defense of the application of the doctrine in Massachusetts to plaintiffs only and not to defendants. Plaintiffs, he said, need only to have a statute regarded as evidence of negligence, for juries will generally find in their favor. "But when the plaintiff's conduct is in question the *harshness* of contributory negligence as a defense and the relative situation of the parties often makes the jury grasp at any opportunity to exonerate the plaintiff of negligence even though he broke the law. *Justice* to the defendant thus requires that the lines be exactly drawn, protection which in the converse case the plaintiff does not need—forces the court to examine the principles more closely." A Draconian kind of "justice" that requires discrimination *against* accident victims to assure full force to the "harshness" of an outworn defense. In a slightly different connection the same author provides what should be a conclusive answer to the suggestion. "The reinforcement brought to this stringent defense by the suggested discrimination against the plaintiff would come oddly at a time when the defense itself is crumbling at many points under attacks both legislative and judicial." Thayer, *supra* note 25, at 41-42.

It has sometimes been suggested that criminal statutes be disregarded altogether in considering the rights and liabilities of parties to civil litigations, but as a general proposition this has commanded virtually no judicial support.<sup>38</sup> The almost universal American and English attitude is that where legislation prescribes a standard of conduct for the purpose of protecting life, limb, or property from a certain type of risk, and harm to the interest sought to be protected comes about through breach of the standard from the risk sought to be obviated, then the statutory prescription of the standard will at least be considered in determining civil rights and liabilities. The authorities divide, however, on the effect to be given the statute. There are two main lines of decisions. Probably a majority of American courts have adopted the rule that the unexcused violation of such a statutory standard is negligence per se, that is, negligence as a matter of law (to be ruled by the court).<sup>39</sup> In a substantial number of jurisdictions such a violation is held to be evidence of negligence to be weighed by the jury.<sup>40</sup>

The most widely accepted rationalization of the negligence per se rule is that given by Thayer.<sup>41</sup> The civil action (according to this) cannot be regarded as one upon the statute for the statute gives no civil remedy. Any recovery for breach of statute must be worked out on common law principles of negligence. This involves the standard of reasonably prudent conduct which is usually for the jury to decide upon. But it would be against the very nature of the reasonably prudent and law-abiding citizen to set his judgment up against that of the duly constituted law-making body of the community. When the community has thus officially determined that certain risks are foreseeable and are reasonably to be avoided by taking a prescribed precaution, no reasonable man would thereafter omit the precaution, so there

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38. *Louisville & N.R.R. v. Dalton*, 102 Ky. 290, 43 S.W. 431 (1897) ("Negligence cannot be fastened on the carrier by some local police regulation." The court here held that a city ordinance requiring trains to be operated at 6 m.p.h. within city limits was inadmissible to prove negligence of the defendant in causing a fire. The court was apparently influenced by the unreasonableness of the permissible speed).

39. *Harper*, op. cit. supra note 2, at § 78; *Lowndes*, *Civil Liability by Criminal Legislation*, 16 Minn. 361, 376 (1932); *Morris*, *Criminal Statutes and Tort Liability*, 46 Harv. L. Rev. 453, 455 (1932).

40. *Hanlon v. Southern Boston R.R.*, 129 Mass. 310 (1879) (a leading case); *Harsha v. Bowles*, 314 Mass. 738, 51 N.E. 2d 454 (1943); *Gill v. Whiteside-Hemby Drug Co.*, 197 Ark. 425, 122 S.W. 2d 597 (1939); *Fomple v. Archer Ballroom Co.*, 150 Neb. 681, 35 N.W. 2d 680 (1949); *Landry v. Hubert*, 101 Vt. 111, 141 Atl. 593 (1928). See *Morris*, op. cit. supra note 39, at 456; *Note*, 32 Col. L. Rev. 712 (1932).

41. *Thayer*, supra note 25, at 322.

is no room for jury judgment in the matter. This promotes the predictable certainty of standard so much favored by Holmes, as against the "featureless generality of the jury verdict" in each case.<sup>42</sup> And the latter alternative (so runs the argument) has the additional disadvantage here of letting the jury determine when men may disobey the law, a fact which "cannot fail to bring about a disregard of the standards by those whose conduct is regulated."<sup>43</sup> Moreover the negligence per se rule sometimes tends to expand liability in desirable ways (along lines charted out by the legislature in ways which they as practical law-makers have found feasible). It could also plausibly be urged that the negligence per se rule is needed to equalize the administration of negligence and contributory negligence and to counteract the jury's well-known partiality to plaintiffs.<sup>44</sup> Another consideration that has been urged is the importance of exact and uniform observance of such regulations as traffic laws, so that each traveler may rely on mutual observance, and order will reign on the highways.<sup>45</sup>

The arguments against the negligence per se rule are these. The standard of care is generally set by the jury. In a statute the legislature could have set the standard to be applied in civil cases, but by hypothesis here it omitted to do so expressly. This omission must be deemed deliberate. The law-makers may well have been content with a broad unqualified requirement in a criminal statute because they well knew that enforcement officials would use their discretion to make exceptions in cases where literal compliance made no sense or worked a hardship. Moreover, most of the statutes with which we are concerned

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42. Holmes, *The Common Law* 111 (1881).

43. Traynor, J., dissenting in *Satterlee v. Orange Glen School Dist.*, 29 Cal. 2d 581, 177 P. 2d 279, 290 (1947): "They are doing nothing less than informing . . . [the jury] that it may properly stamp with approval, as reasonable conduct, the action of one who has assumed to place his own foresight above that of the legislature in respect of the very danger it was legislating to prevent." See Thayer, *supra* note 25, at 322; *Riegent v. Thackery*, 212 Pa. 86, 61 Atl. 614 (1905), cited with disapproval in Thayer, *supra* note 25, at 322, n. 13, where the court upheld an instruction to the jury that "if they should find that a reasonably prudent person, under the circumstances, would not have erected a shed over the pavement or given warning of the danger from the erection of the building to those on the pavement, the defendant was not negligent, notwithstanding the ordinance."

44. Whether this is a desirable thing to do depends, of course, on one's fundamental attitude towards the relative importance of refining the fault principle (here the defense of contributory fault), on the one hand, and of promoting compensation for accident victims, on the other.

45. This was a consideration in the decision in *Clinkscales v. Carver*, 22 Cal. 2d 72, 136 P. 2d 777 (1943), holding defendant liable as a matter of law for going through an invalidly posted stop sign.

here provide relatively small penalties. In civil actions on the other hand large damages are often at stake; and the injured party can scarcely be expected to jeopardize his claim by forgiving non-compliance in exceptional cases, as a public prosecutor would. Exceptions might have been worked out and specified if such consequences had been intended.<sup>46</sup> Even where such a statute is wise and well drawn, therefore, it is rash indeed to assume that it was meant as a literal guide to conduct in all situations or, even if it was, that the legislature thought *exact* compliance was any more important than the fine it imposed would indicate. Moreover there is no blinking the fact that many statutes on the books today are ill conceived, or hastily drawn, or obsolete.<sup>47</sup> In view of all this it is unrealistic and mechanical to say that reasonable men would blindly obey all the regulatory statutes under all circumstances, and to deprive the jury of its usual and historic function in negligence cases on the basis of any such notion. Further, while a rule based on such a notion might promote certainty, it does so in harsh, undesirable ways. It would sometimes impose liability without fault on a defendant, as where a truck's tail light has gone out just before the accident without the driver's knowledge and in spite of all reasonable precautions. In like manner it would sometimes bar a plaintiff from recovery when he has not been negligent in any real sense, a result which would offend both the fault principle and the objective of compensating accident victims. Further, if the rule is applied even-handedly to plaintiffs and defendants, it will in practice restrict liability and hinder recovery of compensation in more cases than it will extend liability. As we have seen, fixed standards generally tend to do this because they take from the jury the defense of contributory negligence (which does not fare well with juries) as well as the claim of defendant's negligence (which juries are likely to find anyhow).<sup>48</sup> To the con-

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46. Another reason why a legislature might lay down a rigid rule where only a small fine is at stake is to save the administrative burden and expense of having to sift a host of excuses in court when many of them will foreseeably be flimsy. It would not at all follow that the legislature would adopt the same rather high-handed attitude where the litigants had a great deal more at stake.

47. Examples chosen with an eye to amusement (rather than fair sampling) appear monthly in *The American Magazine*: Dick Hyman, "It's the Law."

48. The author has elsewhere argued for a "double standard" for negligence and contributory negligence. James and Dickenson, *Accident Proneness and Accident Law*, 63 *Harv. L. Rev.* 769, 782 et seq. (1950).

A logical corollary to this argument would be the adoption of a negligence *per se* rule for defendants and an evidence of negligence rule for plaintiffs. Very much the same result may be achieved in practice, however, by either

tention that the negligence per se rule is needed to promote and fulfill justifiable reliance by others on uniform obedience of statutes (by the actor), the possible answer is threefold: (1) It is a legislative function to determine the importance of a legislative command and to prescribe sanctions suitable to that importance. Here the legislature has not imposed automatic liability (or disability) in a civil action as a sanction, and the court is encroaching on legislative territory when it adds such a sanction for the purpose of securing law enforcement; (2) To the extent that the contention is concerned with evaluating the other person's conduct, it is beside the present point; (3) To the extent the contention means the actor should realize that others will be likely to rely on his observance of statute it is valid within limits, but it only points to a factor which should be given weight in determining whether negligence exists rather than to one which should fix negligence by a rule of thumb for all cases. Neither in fact nor in law do others have the right under all circumstances to rely on the actor's obedience to statute.<sup>49</sup> And where those others should reasonably expect the actor to break the law, his most prudent course may sometimes be to conform to their reasonable expectations. Few things are more likely to throw a monkey-wrench into a traffic situation, for instance, than blind obedience to a statute that is uniformly disregarded.<sup>50</sup>

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adopting an evidence of negligence rule across the board, or by broadly expanding the jury's sphere in determining whether there has been a justifiable excuse for violation (under the negligence per se rule).

49. See *Satterlee v. Orange Glen School Dist.*, 29 Cal. 2d 581, 177 P. 2d 279, 289 (1947) ("an operator who reached the intersection first after he had properly approached it may be at fault if he proceeds blindly in disregard of danger that is obvious"); *Standard Oil Co. v. McDaniel*, 52 App. D.C. 19, 280 Fed. 993 (1922) (person driving on highway has no right to persist in his right of way when he realizes another person is not going to conform to rules of road).

50. In Connecticut, for instance, there has for years been a statute requiring motorists to go to the right of the imaginary center of an intersection in making a left turn. When there is no policeman, and no traffic stanchion, etc., it is the uniform practice of drivers here to turn to the left of the imaginary center. In many situations a driver would cause the utmost confusion if he obeyed the statute literally. Yet see such cases as *Andrew v. White Time Bus Co.*, 115 Conn. 464, 161 Atl. 792 (1932); *Fallon v. Collier*, 133 Conn. 370, 51 Atl. 2d 599 (1947). Cf. La. R.S. (1950) 32:235.

Evidence of customary disobedience of statute may be admissible to negative the right of others to rely on its observance. See, e.g., *Langner v. Caviness*, 238 Iowa 274, 28 N.W. 2d 421 (1947) (custom of empty truck yielding right of way to loaded truck on narrow roadway relevant to precautions to be taken by plaintiff although defendant could not invoke it to nullify statutory duty to yield half the travelled way); *Payne v. Chicago & A.R. Co.*, 129 Mo. 405, 31 S.W. 885 (1895) ("A presumption that everyone will obey the law rests on the fact that dutiful citizens do obey it. The presumption is at once rebutted when it appears that the law is habitually violated."). See Note, 172 A.L.R. 1141 (1948).



And even where the right to rely on statutory observance exists it may be only one factor in a complex situation that is outweighed by other factors.

If the arguments against the negligence per se rule are accepted the question arises whether the enactment should be excluded from consideration altogether. It is suggested that it is entitled to consideration because it represents the collective opinion or judgment of the community in the matter—"it is virtually a custom or usage having orthodox status,"<sup>51</sup> and should be received in evidence (or judicially noticed) on much the same basis.<sup>52</sup> At any rate, as we have noted, virtually all courts seem to agree that the enactment should be considered unless it is irrelevant in the sense that its subject matter has nothing to do with the case.

There is some merit in the objections to both the negligence per se and the "evidence of negligence" rules. The negligence per se rule is certainly capable of rigidly Draconian administration. But the alternative rule, at the other extreme, may be administered so that juries are empowered to dispense with reasonable statutory requirements in every case no matter how flimsy the excuse.<sup>53</sup> Neither rule, however, must necessarily receive an extreme application and each is capable of being administered so as to avoid the most serious objections levelled against it. It remains to consider and analyze the limitations and qualifications put on the rules in practice. And because the thinking in this field clearly bears the imprint of the time when such actions were more commonly thought of as warranted by an implied civil recovery provision, it will be convenient to treat the problems in an order parallel to that in the first part of this article. The following, then, are the possible avenues of escape from the rigidity of the negligence per se rule.

The invalidity of an enactment will usually mean that it should have no effect under any theory in setting the proper

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51. Wigmore, *Evidence* (3 ed. 1940) § 461(6).

52. The reasoning would seem if anything to proceed from the weaker to the stronger case. Wigmore, however, suggests that whenever the enactment does not operate in law to fix the standard of negligence per se, it would be "unwise" to give it any "secondary status . . . as evidence of negligence." Wigmore, *Evidence*, § 461(6). The passage may well have reference to situations where the enactment is rejected because the case at bar is not thought to fall within the statutory purpose (as to which, see p. 112, *infra*). If not, the reasoning is hard to follow.

53. Perhaps this is a weakness only in the eyes of those who would preserve the fault system.

standard of conduct.<sup>54</sup> And where invalidity springs from the statute's unreasonableness or its contraventions of some overriding constitutional or other public policy, then it should neither govern nor have weight in setting the standard. But invalidity may result from a technical defect in the enacting procedure and while this would defeat an action on the express or implied terms of the statute, it would not necessarily preclude consideration by the court or jury of both the standard itself and the fact that it represents the legislative judgment.<sup>55</sup>

Thus in a carefully reasoned opinion the California court has ruled it was negligent to go through a stop sign though it was posted under an ordinance invalid for faulty publication, since "the legislative standard may nevertheless apply if it is an appropriate measure for the defendant's conduct."<sup>56</sup> This means

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54. This does not mean that it would have no bearing on it at all. If a party's conduct included compliance or attempts to comply with the standard, he might well be entitled to have that fact considered in any judgment of the conduct. And the existence of the statute might in some situations have a bearing on what might reasonably be expected of others though it is not at all clear that one is entitled to rely on another's observance of an invalid enactment. What is meant by the text is simply this: in determining whether it is reasonable to require a given precaution, the fact that the legislature has invalidly purported to require it will not govern and may not be considered.

55. It is possible to argue that to allow consideration of an invalid statute would be to run afoul of the opinion evidence and the hearsay objections. But such objections are no stronger here than they would be in the case of evidence of custom and customary conduct, where, under the weight of authority such evidence would be admissible. See Wigmore, *op. cit.* supra note 52, at § 461. It is interesting to note that Wigmore, despite his advocacy of the admissibility of custom as evidence of the standard of due care, flatly, and without reasoning, would exclude statutes and ordinances in every instance in which they were not conclusive evidence of the standard—i.e., negligence *per se*.

56. *Clinkscales v. Carver*, 22 Cal. 2d 72, 136 P. 2d 777 (1943). A majority of the court held it negligent as a matter of law "for otherwise a stop sign would become a trap to innocent persons who rely upon it." Apparently this was not an application of the negligence *per se* rule but a decision that in this particular case no reasonable man would condone a deviation from the standard. See *Satterlee v. Orange Glen School Dist.*, 29 Cal. 2d 581, 177 P. 2d 279 (1949); *Combs v. Los Angeles Ry. Corp.*, 29 Cal. 2d 606, 177 P. 2d 293 (1949). And indeed there would seem to be a conceptual difficulty in the way of applying the negligence *per se* rule to such a case since it cannot be said that the party set his own judgment up against the community standard as crystallized in law, for some step has been omitted which was needed to consummate that crystallization. Perhaps the metaphysical nature of this difficulty exposes the unreality of Thayer's justification for the negligence *per se* rule. We have found no case dealing with this particular difficulty.

Probably the conclusion of the California court would not everywhere be accepted. Mechanical habits of thought (prompted perhaps by the too facile analogy to actions upon a statute) are often so strong in this field, that some courts would probably automatically exclude consideration of an enactment which is invalid for *any* reason. See, e.g., *Rodenkirch v. Mennick*, 168 S.W. 2d 977 (Mo. App. 1943) (charge to jury on negligence in going through stop sign reversed because no statute requiring stopping at stop

that the court will preliminarily examine the appropriateness of the standard under the circumstances presented and permit consideration of it if it is sufficiently appropriate.

The statutory purpose doctrine has generally been applied to limit the operation of the negligence per se rule. We have seen how an action upon a statute will lie only where the injury is of a class which the legislature meant to guard against. It has been questioned whether this limitation has any place under the relatively newer negligence analysis of the effect of statutory violations, but it is now generally recognized that the specific obligations which a jury may impose under the reasonable man standards are themselves owed only to those likely to be harmed by their breach and with respect only to injuries from a source which the fulfillment of the obligation is likely to prevent. So there seems to be no reason why a similar limitation should not be imposed upon a legislative determination of what due care requires. It is logical too that the court in adopting the legislative judgment as to the standard should also adopt the legislature's judgment as to the limits of the need that brought it forth.<sup>57</sup> The leading case is *Gorris v. Scott*.<sup>58</sup> In that case defendant violated a statute requiring carriers by water to provide separate pens for stock. During a storm plaintiff's sheep were washed overboard. It was clear that the pens required by statute would have prevented the loss of the sheep, but the defendant was not held liable, because, as Kelly, C.B., pointed out ". . . as is recited in the preamble, the act is directed against the possibility of sheep or cattle being exposed to disease on their way to this country. . . . But the damage complained of here is something totally apart from the object of the act of Parliament." In accordance with this notion statutes have often been excluded from consideration because their purpose was thought not to be

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signs); *Moore v. Dering Coal Co.*, 242 Ill. 84, 89 N.E. 674 (1909) (statute inapplicable to mine under construction inadmissible). But see *West Texas Coaches v. Madi*, 26 S.W. 2d 199 (Tex. Comm. App. 1930) (though penal statute invalid for vagueness and uncertainty, admissible on civil liability); *Ponca City v. Reed*, 115 Okla. 166, 242 Pac. 164 (1925) (fact that ordinance provided unlawful penalty does not make it incompetent on issue of negligence).

57. In a sense, perhaps, it is only with reference to the risks perceived by the lawmakers that the actor has set his judgment up against theirs in omitting a statutory requirement.

58. [1874] L.R. 9, Ex. 125; 37 Vict. 125; *Shulman and James, Cases and Materials on the Law of Torts* 303 (1942). In this case the statute required carriers of animals to furnish separate pens and footholds during transit. The court denied plaintiff damages for the loss of animals washed away during storm on the ground that the statute was designed as a sanitary measure only.

to promote safety, or not to protect individual interests (but only the public at large as such), or to protect only a limited class (to which the interest injured did not belong), or to avoid a risk different from the one that produced the harm. Thus a child labor statute has been found to have the intent only of preventing interference with education and not the promotion of safety.<sup>59</sup> And a New York blackout statute was construed to be for the protection of the public at large and not that of an air raid warden injured in an attempt to extinguish a light showing violation.<sup>60</sup> And the Missouri courts have construed the Boiler Inspection Act as having as its purpose only the prevention of accidental injuries and not the contraction of silicosis.<sup>61</sup> There is only scant authority for the rejection of the statutory purpose limitation, but there is a marked tendency for courts to view the legislative purpose broadly (at least where the extension of liability is involved), particularly in defining the class to be protected.<sup>62</sup> This is generally held to include all who might foreseeably be harmed by the proscribed conduct. At one time it was doubted whether the statutory purpose limitation should be applied to the issue of contributory negligence at all,<sup>63</sup> but both common sense and authority have resolved the doubt. Plaintiff's breach of statute will not constitute negligence unless the protection of his own safety against the risk encountered was within the statutory purpose.<sup>64</sup>

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59. *Pecou v. J. B. Luke & Sons*, 204 La. 881, 16 So. 2d 466 (1943). See also *Flores v. Steeg Ptg. & Pub. Co.*, 142 La. 1068, 78 So. 119 (1918); *Bogesse v. Thistlewaite Lbr. Co.*, 12 La. App. 453, 125 So. 322 (1929); La. R.S. (1950) 23:161 et seq. Most courts have construed child labor laws as having accident prevention as one of their purposes. See cases collected in Prosser, op. cit. supra note 15, at 274, n. 72.

60. *Klein v. Herlim Realty Corp.*, 54 N.Y.S. 2d 144 (Sup. Ct. 1945). See also *Routh v. Quinn*, 20 Cal. 2d 488, 127 P. 2d 1 (1942) (tax assessor's breach of statutory duty to correctly compute tax held for purpose of securing public revenue only and not the protection of buyers at tax delinquency sales). Cf. *Pourciau v. Angelloz*, 134 La. 1006, 64 So. 888 (1913).

61. *Urie v. Thompson*, 357 Mo. 738, 210 S.W. 2d 98 (1948). See also *Brown Hotel v. Levitt*, 306 Ky. 804, 209 S.W. 2d 70 (1948) (statute requiring hand-rails on hotel staircases held not to be intended to protect guest from injuries sustained when another person fell down steps and knocked her down).

62. Note, 9 L.R.A. (N.S.) 338 (1906). See *Huckleberry v. Missouri Pac. R.R.*, 324 Mo. 1025, 26 S.W. 2d 980 (1930) (I.C.C. regulation as to covering petroleum spilled on right of way meant to protect all persons who might conceivably be endangered by the breach of statute). See cases cited supra note 16.

63. *Thayer*, supra note 25, at 341; *Green*, Judge and Jury 219-222 (1930).

64. *Harper*, op. cit. supra note 2, at § 136; Prosser, op. cit. supra note 15, at 277. It has sometimes been held, however, that in such a case, the statute may be considered along with other circumstances as evidence of negligence. See *Dohm v. R. N. Cardozo & Bros.*, 165 Minn. 193, 206 N.W. 377 (1925). It should also be noted that the outlaw theory would completely bar plaintiff on the mere fact of statutory violation. See note 36, supra.

Even if the statutory purpose doctrine limits the negligence per se rule, it does not necessarily follow that it should always preclude consideration of a statute which was not meant to govern the precise situation before the court. If the legislature, for instance, when it was concerned with the protection of employees, deemed that safety gates were a suitable protection against the hazards of open elevator shafts, why is not this fact some (though not controlling) evidence of the suitable means for protecting others also who may be exposed to such hazards? A number of courts have answered similar questions affirmatively<sup>65</sup> at least where there is, apart from the statute, a duty to use due care towards those others.<sup>66</sup> This should be the result wherever the situation envisaged by the legislature and that in the case at bar are analogous enough, so that the ordinary canons of relevancy are met. Otherwise the enactment has little logical claim to consideration except under what may be called the "outlaw theory" described above.

The question whether there has been a breach of statute at all will often be dispositive under the negligence per se rule as it

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It has occasionally been reasoned that the statute must have had defendant's protection in view. See *Town of Remington v. Hesler*, 111 Ind. App. 404, 41 N.E. 2d 657 (1942) (statute prohibiting driving on wrong side of street did not have benefit of municipality in mind); *Chattanooga Ry. & Light Co. v. Betts*, 139 Tenn. 332, 202 S.W. 70 (1918) (statute making it unlawful for stock to run at large not enacted for the protection of the railroad company, hence plaintiff not contributorily negligent); *Watts v. Montgomery Traction Co.*, 175 Ala. 102, 57 So. 471 (1912) (statute requiring drivers to keep to the right of the middle of the street not for the benefit of street railway company). But so far as orthodox reasoning goes, this misses the distinction generally taken between negligence and contributory negligence. The latter is the breach of a duty prescribed for the actor's own safety; the former is the breach of a duty prescribed for the safety of others. However that may be, the distortion of reasoning here tends to impose still a further limitation on the defense of contributory negligence and so may be regarded as benign by those who favor fostering the compensation aspect of tort law by cutting down this defense. Cf. La. R.S. (1950) 32:231; 3:2531.

65. In a negligence per se jurisdiction this would mean that the statute fixed the standard when the statutory purpose limitation is met, that it is only evidence of the standard when that limitation is not met but the enactment is deemed relevant enough to be considered. See *Hanson v. Kemmish*, 201 Iowa 1008, 208 N.W. 277 (1926); *Dohm v. Cardozo*, 165 Minn. 193, 206 N.W. 377 (1925). Where the evidence of negligence rule prevails the enactment would not be binding in either case, but presumably the jury should be told to consider the fact that the harm was (or was not) the very kind which the statute was meant to avoid. Some courts reject the reasoning set forth in the text and mechanically exclude enactments from all consideration unless the statutory purpose test is met. See, e.g., *Guse v. Martin*, 96 N.J.L. 262, 114 Atl. 316 (1921) (where statutory safeguards for elevators was construed for the protection of employees only, the statute was inadmissible in an action by anyone else). Cf. La. R.S. (1950) 40:1680, 1681.

66. Morris raises the interesting question whether such a statute should not be held to extend the scope of those to whom a duty is owed. See Morris, *supra* note 39, at 471 et seq.

is where there is a civil remedy expressly provided by the statute. But there are two problems deserving special mention here. First, because of the harshness of the negligence per se rule, statutes are often distorted by construction in civil cases so as to allow exceptions which their language does not suggest and which would hamper their effectiveness as criminal statutes. Many enactments, to be sure, lay down the standard in general terms of reasonable care so that their application calls for exercise of the jury's function. But the process of construction just described has often engrafted exceptions on clearly stated specific standards. Thus an unequivocal prohibition against walking to the right of a motor highway has been construed as not applicable to a situation where nearly all the highway traffic was also on that side.<sup>67</sup> The evidence of negligence rule does not exert the same pressures towards distorted construction since the jury is at liberty to give the needed flexibility in applying the standard even where it has been violated.<sup>68</sup> The second problem which is peculiar here could not arise where a civil action is expressly provided by the statute. If there has been no breach because the statute does not cover the precise situation before the court, may it not, nevertheless, be some evidence of the proper standard in a sufficiently analogous situation? This is very close to the similar question put in the last paragraph about situations falling slightly outside of the statutory purpose<sup>69</sup> and should receive a similar answer. Thus should not safety rules made to govern private power companies deserve consideration in evaluating the conduct of municipally owned power systems?<sup>70</sup> And may not

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67. *Tedla v. Elman*, 280 N.Y. 124, 19 N.E. 2d 987 (1939).

In *Romansky v. Cestaro*, 109 Conn. 654, 145 Atl. 156 (1929), a statute requiring automobiles to have brakes "of sufficient power to lock the wheels" was construed (over a vigorous dissent) as requiring only reasonable care to keep the car so equipped. But the legislature did not like this strained construction of its language, and immediately adopted the minority view. *Madison v. Morovitz*, 122 Conn. 208, 188 Atl. 665 (1936). Later, the court (also over a vigorous dissent) held that the new statute did not apply to a case where the inability to stop resulted from a broken axle rather than a failure of the braking mechanism itself. Cf. *La. R.S.* (1950) 32:284.

See *Morris*, *Criminal Statutes and Negligence*, 49 *Col. L. Rev.* 21, 29 et seq. (1949).

68. And if the concept of justifiable violation is liberally applied under the negligence per se rule, that too will obviate the need for strained construction. But it has occasionally been thought that the technique of implying exception is the only one logically available under the negligence per se rule. Apparently this is the case in New York and Connecticut. See *infra* note 74.

69. The difference is that here there has been no technical breach of statute at all, while in the statutory purpose cases there has been a breach but the harm was not within the limitations of that doctrine.

70. *Polk v. Los Angeles*, 26 Cal. 2d 519, 150 P. 2d 520 (1945) (railroad

precautions required of motorists having the right of way as they approach highway intersections be some guide to proper behavior in approaching the intersection with a private road?<sup>71</sup>

Thus far we have been considering limitations and exceptions to the prevailing American rules which are fairly parallel to those presented by actions directly upon a statute which expressly provides a civil remedy. The remaining questions to be dealt with (except for that of proximate cause) pertain peculiarly to analyses which give civil redress for breach of a criminal statute on a theory of negligence (that is, the negligence per se, and evidence of negligence rules).

Thayer would not have applied the negligence per se reasoning to statutes which require an affirmative act, on the theory that the law of torts on the whole does not require a man to engage in conduct which will prevent harm to others, but seeks only to require a man to take reasonable precautions (including, to be sure, affirmative ones) in performing conduct which he has voluntarily engaged in. On this basis Thayer explained the American rule that statutes requiring abutting owners to clear sidewalks of snow and ice (on pain of a fine or civil penalty to the municipality) do not create a right of action in favor of the highway traveler against the abutting owner.<sup>72</sup> Thayer's distinction, however, has received little if any support and the sidewalk cases can perhaps more satisfactorily be explained on the ground that their result imposed the loss on the best risk-distributor in the picture (the municipality—the rule grew up in the days before liability insurance was devised) and the courts perhaps intuitively and at any rate very soundly took a view<sup>73</sup> of the

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commission's rules requiring frequent inspection of wire insulation by private power companies held admissible in suit against municipal power company not subject to the commission's rules). Cf. La. R.S. (1950) 56:1490.

71. But not, of course, where the private road was not noticeable and had nothing to do with the accident. *White v. Kennedy*, 17 La. App. 315, 135 So. 694 (1931), La. R.S. (1950) 32:233.

72. Thayer, *supra* note 25, at 329. Cf. La. R.S. (1950) 33:815.

73. That is that the statute created duties to the general public (municipality) only, and was not for the protection of individuals. In terms of statutory construction, regarded as a disembodied art, this may be a "narrow" view. In terms of the function which the statute may play in the whole scheme of highway repair and maintenance and the administration of losses from highway defects, it may well be a "broad" or "liberal" view.

Morris, however, quite accurately points out that the prevailing American view is open to the objection that it does not put as much pressure on owners to clean their sidewalks as would a rule which put civil liability on them for failure to do so. (Morris, *supra* note 39, at 468.) This clearly is an argument addressed to the function of the rule. I disagree with it because I feel it too greatly emphasizes the admonitory function of the law of torts over its loss distribution function.

statutory purpose which would prevent this good risk-distributor from throwing the loss back again to the individual property owners.

Perhaps the most important question is the extent to which justification or excuse for a violation may be taken into account (and so may go to the jury) under the negligence per se rule. As we have seen it has no place whatever in an action directly upon a statute (save as it may induce the court to find an implied exception to the statutory command, hence no breach of the statute). A very few states come to the same conclusion under the negligence per se rule on the ground that it is not for the jury to dispense with strict compliance where the legislature has not.<sup>74</sup> In most jurisdictions, however, the negligence per se rule is administered so as to permit consideration of some factors of excuse. Courts which take a narrow view of this exception confine such factors to those showing that compliance was impossible,<sup>75</sup> that the noncompliance was caused by circumstances over which the actor had no control,<sup>76</sup> or that the actor broke

74. These states apparently allow factors of excuse to be considered only where they are regarded as bringing the case within some implied exceptions. *McDowell v. Federal Tea Company*, 129 Conn. 455, 23 Atl. 2d 512 (1942); *Andrews v. White Line Bus Corp.*, 115 Conn. 464, 161 Atl. 799 (1932) (impossibility of compliance no excuse). The Connecticut rule was not always so rigid. See *James, Chief Justice Maltbie and the Law of Negligence*, 24 Conn. B.J. 61, 66, n. 25 (1950).

In *Tedla v. Ellman*, 280 N.Y. 124, 19 N.E. 2d 987 (1939), the jury was allowed to determine whether it was negligent for a pedestrian to walk on the wrong side of a divided highway at a time when virtually all traffic was using the other lane. The court reasoned that since the legislative enactment was merely an adoption of the common law rule of the highways, the legislature could not have intended to wipe out the limitations and exceptions which judicial decisions had attached to the common law duty. Cf. *La. R.S.* (1950) 32:237(D).

75. *Bush v. Harvey Transfer Co.*, 146 Ohio St. 657, 67 N.E. 2d 851 (1946) ("A legal excuse, precluding liability for injuries resulting from the failure to comply with the statutory requirements respecting the operation of a motor vehicle on the public highway must be something that would make it impossible to comply with the statute.").

*Slogetown v. Charleston Transit Co.*, 127 W. Va. 286, 32 S.E. 2d 276 (1944) ("impossibility excuses; customary non-compliance does not").

76. Probably this would everywhere avoid the effect of the negligence per se rule on one theory or another. Even Connecticut comes to this conclusion on the ground that there is then an absence of that voluntary act which is needed to constitute a breach of the criminal law. *Giancarlo v. Karakowski*, 124 Conn. 223, 198 Atl. 752 (1930) (defendant drove on to wrong side of road when steering apparatus incapacitated by collision for which he was not to blame); *Herman v. Sladofsky*, 301 Mass. 534, 17 N.E. 2d 879 (1938) (skidding does not establish negligence as a matter of law in not giving defendant half travelled right of way); *Johnson v. Prideaux*, 176 Wis. 375, 187 N.W. 207 (1922) (driver unconsciously swerved to left while enveloped in cloud of dust); *Martin v. Nelson*, 82 Cal. App. 2d 733, 187 P. 2d 78 (1947) (defendant swerved over center line after collision with another car).



the criminal law in a sudden emergency not of his making.<sup>77</sup> Other courts go beyond this and allow the actor's conduct to go to the jury whenever he puts in evidence that he used due care to comply with the statute.<sup>78</sup> Other excuses stand at the outer limit of the "emerging doctrine of justifiable violation." These include the reasonableness of the statutory standard (both generally, and as applied to the facts of the particular case); the reasonableness of alternative precautions; the prevalence of official non-enforcement; the facts of customary breach, subsequent repeal, and the like.<sup>79</sup> The tendency of judicial decisions under

77. See *Kisling v. Thierman*, 214 Iowa 911, 243 N.W. 552 (1932), stating these three as the excuses for violation of statute which will defeat operation of the negligence per se rule. See also *Morris*, supra note 67, at 32. Cf. *La. R.S.* (1950) 32:231.

Cases illustrating the emergency excuse are *Burle v. Stephens*, 113 Wash. 182, 193 Pac. 684 (1920) (where driver crossed to left hand side of street to avoid hitting child, instruction approved that turning to left side of street in an emergency does not constitute negligence even though in violation of ordinance); *Chase v. Tingdale Bros.*, 127 Minn. 401, 149 N.W. 654 (1914) (swerving to avoid car suddenly entering street from private road); *Jolly v. Clemens*, 28 Cal. App. 2d 55, 82 P. 2d 51 (1938) (swerving to avoid collision).

78. See, e.g., *Taber v. Smith*, 26 S.W. 2d 722 (Tex. Civ. App. 1930) (truck driver with lights burned out attempted to proceed to garage four hundred feet away slowly and keep as close to the side of the road as he could. The court reversed a judgment for plaintiff who ran into the rear of the truck, on the ground that due care was taken although this was a technical violation of the statute requiring lights). Where a motorist's tail light has gone out while he was on the highway without his knowledge, most courts have excused the statutory violation. See *Bissel v. Seattle Vancouver Motor Freight*, 25 Wash. 2d 68, 168 P. 2d 390 (1946); *Brotherton v. Day & Night Fuel Co.*, 192 Wash. 362, 73 P. 2d 788 (1937); *Berkovitz v. American Gravel Co.*, 191 Cal. 195, 215 Pac. 675 (1923). See also *Rath v. Bankston*, 101 Cal. App. 274, 281 Pac. 1081 (1929) (defendant allowed to show that despite reasonable careful inspection, gasoline supply exhausted and car stalled on highway). Of course, this is the rule universally applied under the evidence of negligence rule. See *Harsha v. Bowles*, 314 Mass. 738, 51 N.E. 2d 454 (1943). Cf. *Penton v. Fisher*, 155 So. 35 (La. App. 1934); *La. R.S.* (1950) 32:290-315.

Some courts will excuse a reasonable mistake as to the law. See *Evers v. Davis*, 86 N.J.L. 196, 90 Atl. 677 (1914) (reasonable belief that building not tenement within meaning of statute requiring fire escapes). Of course, this comes close to conflicting with that favorite fiction in the law that every man is presumed to know it.

On the other hand, some courts have taken a strict view of violations of statute, even of technical ones. See *Kisling v. Thierman*, 214 Iowa 911, 243 N.W. 552 (1932) (motorist operating without tail light negligent as a matter of law though he had no knowledge of violation); *Keller v. Breneman*, 153 Wash. 208, 279 Pac. 588 (1929) (plaintiff negligent per se for stopping on highway when truck stalled because gas supply ran out); *Stehle v. Jaeger Automatic Mach. Co.*, 225 Pa. 348, 74 Atl. 215 (1909) (defendant liable for injuries to child employed in breach of statute despite factory inspector's advice that act did not apply).

79. See *Evison v. Chicago St. P.M. & O. Ry.*, 45 Minn. 370, 48 N.W. 6 (1891) (four miles per hour speed limit held unreasonable for that part of city); *Malloy v. New York Real Estate Assoc.*, 156 N. Y. 205, 50 N.E. 853 (1898) (chain instead of gate on elevator a reasonable substitute); *Dugan v. Fry*, 34 F. 2d 723 (3rd Cir., 1929) (custom of using lefthand lane to turn

the negligence per se rule has certainly been to exclude consideration of these factors on the ground that another course would involve judicial encroachment on the sphere of the legislature.<sup>80</sup> If the action were a criminal prosecution, or a civil action upon a statute expressly providing for civil recovery this reasoning would be cogent. Where the legislature has provided no civil recovery, however, the court is entering upon judicial law making in any event by adopting standards of the criminal law in civil litigation. It is mechanical and doctrinaire, therefore, for courts to do this without exercising their own judgment as to whether the transplanted standard is appropriate to the new purpose. And the question of appropriateness involves factors of the very type listed above, a great many of which will call into play also the functions of the jury to resolve arguable questions of "reasonableness" and the like.<sup>81</sup>

If the negligence per se rule is tempered by the doctrine of justifiable violation (just described), it means that violation of a statutory standard is negligence per se in a civil case only in the absence of evidence tending to establish some excuse which the

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at intersection in violation of statute admissible). Cf. *Dobrowolski v. Henderson*, 15 La. App. 79, 130 So. 237 (1930); La. R.S. (1950) 23:278.

In *Stevens v. Luther*, 105 Neb. 184, 180 N.W. 87 (1920), the court, in deciding that violation of speed limit statute was not negligent per se, considered the fact that the statute had been subsequently repealed.

Note that some of the factors mentioned in the text would eliminate the element of justifiable reliance by the other party.

80. In *Bushnell v. Telluride Power Co.*, 145 Fed. 950 (10th Cir., 1944), where defendant kindled a fire without written permit, a directed verdict for plaintiff was upheld although defendants sought to show that they took all reasonable precautions and had even obtained the fire warden's oral permission. See *Nashville C. & St. L.R.R. v. White*, 278 U.S. 456 (1929) (Justice Holmes held that the railroad could not avoid a finding of negligence as a matter of law for failure to have a flagman at a railroad crossing by showing that electric signalling devices were reasonable substitutes); *Stogdon v. Charleston Transit Co.*, 127 W. Va. 286, 32 S.E. 2d 276 (1944) (impossibility excuses, customary non-compliance cannot); *Casey v. Boyer*, 270 Pa. 492, 113 Atl. 364 (1921) (evidence of custom to drive to left of center at point of accident rejected); *Allen v. Mack*, 345 Pa. 407, 28 A. 2d 783 (1942) (holding error to admit similar evidence to excuse plaintiff's non-compliance); *Cleveland C.C. & I. Ry. v. Harrington*, 131 Ind. 426, 30 N.E. 37 (1892) (excluding evidence that 4 m.p.h. ordinance unreasonable).

81. Within, of course, the limits usually set by the court. Professor Morris has championed a position very much like this, but he would limit the functions of the jury along lines which project the views of the late Mr. Justice Holmes. Thus he would confine the role of the jury to a "very small number of cases" where the judge "doubts the suitability of the legislature's criminal standard for the decision of the tort case before him. . . ." Morris, *supra* note 39, at 461. See also Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 Col. L. Rev. 21 (1949). But if the decision is ultimately to be judicial rather than legislative, there seems to be no inherent reason why the court should exclude the jury from participating in the setting of the standard here any more than it does in other cases (e.g., where custom, usage, expert opinion, or the like is involved).

court will recognize. If there is such evidence the reasonableness of the actors' conduct is for the jury in the light of all the circumstances including the statute, and the justifiable reliance that others may usually place on its observance. Now the evidence of negligence rule can be so administered that every case is sent to the jury, but it is more often ruled that breach of the statute is *prima facie* evidence of negligence so that a verdict of negligence will be directed on such a showing in the absence of some evidence tending to show factors of explanation, excuse or justification.<sup>82</sup> It will readily be seen therefore that the two rules are capable of being so administered that their results approach each other in practice. This is dramatically brought out by contrasting the three opinions in each of two recent California cases wherein a majority of the court adopts substantially the middle view reflected in the text.<sup>83</sup> There seems to be a perceptible trend in the decisions in a number of states towards just such an expansion of the "justifiable violation" doctrine under the negligence *per se* rule.

Another limitation sometimes imposed on the negligence *per se* rule is to confine its operation to statutes and to regard breach of ordinances or administrative regulations as evidence of negligence only.<sup>84</sup>

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82. *Martin v. Nelson*, 82 Cal. App. 2d 733, 187 P. 2d 78 (1947); *Jolly v. Clemens*, 28 Cal. App. 2d 55, 67, 82 P. 2d 51, 58 (1938) ("violation of such statute or ordinance is presumptive evidence of negligence, which if not excused by other evidence, including all the surrounding circumstances, should be deemed conclusive"). In Minnesota, the *unexplained* and *unexcused* breach of a traffic law is negligence as a matter of law, *Wojtowicz v. Belden*, 211 Minn. 461, 1 N.W. 2d 409 (1942), but presumably in the event explanation was forthcoming the jury would make the determination; *Cantwell v. Cromins*, 347 Mo. 836, 149 S.W. 2d 343 (1941) (charge that defendant negligent *per se* for driving on left side of road approved in absence of evidence to justify violation). See *Taylor v. Texas & N.O.R.R.*, 22 So. 2d 771 (La. App. 1945) (violation of statute requiring the doing of a certain thing or prohibiting the doing of another may be *prima facie* evidence of negligence, but it is not negligence *per se*). Cf. *Sexton v. Stiles*, 15 La. App. 148, 130 So. 821 (1930); *Viator v. Talbot*, 18 La. App. 124, 137 So. 84 (1931).

83. *Satterlee v. Orange Glen School Dist.*, 29 Cal. 2d 581, 177 P. 2d 279 (1947); *Combs v. Los Angeles Ry. Corp.*, 29 Cal. 2d 606, 177 P. 2d 293 (1947).

The formula for implying an exception to the statute under the decision in *Tedla v. Ellman*, 280 N.Y. 124, 19 N.E. 2d 987 (1939), may well tend to produce the same results.

84. *Carlson v. Meusberger*, 200 Iowa 65, 204 N.W. 432 (1925) ("law of the road" as set out in ordinance only evidence of negligence); *Temple v. Walker*, 127 Ark. 279, 192 S.W. 200, 201 (1917) ("It is not within any of the general or special powers conferred upon municipal corporations in this state to create a right of action between third persons nor to enlarge the common law or statutory liability of citizens among themselves."); *Knupfle v. Knickerbocker Ice Co.*, 84 N.Y. 488 (1881) (violation of city ordinance leaving horse untied in city street not negligence *per se*). See discussion in *Martin v. Herzog*, 228 N.Y. 164, 126 N.E. 814 (1920). See *Morris*, *The Role of Administrative Safety Measures in Negligence Actions*, 28 Tex. L. Rev. 144 (1949).

In a majority of jurisdictions that have passed on the point the negligence per se rule is not applied against a violator who is a minor (all of the cases found deal with minor plaintiffs).<sup>85</sup>

The concept of proximate cause has been used to limit the negligence per se rule.<sup>86</sup> Of course if the conduct which violated the enactment was not a cause in fact of the injury, then it should be irrelevant under any rule (save possibly the "outlaw" theory).<sup>87</sup> And the same thing is true if the cause in fact connection is too attenuated or is beset by intervening causes in such a way as to insulate the violator from liability under generally accepted principles. Beyond that, the notion of proximate cause has no legitimate application here. Nevertheless it has sometimes been used as a confused and indiscriminating phrase to cover an escape from the rigors of the negligence per se rule which could more usefully be thought out in terms of one of the limitations already described in this section.<sup>88</sup>

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85. *Michalsky v. Gaertner*, 53 Ohio App. 341, 5 N.E. 2d 181 (1937) (9 year old boy not negligent as a matter of law for stepping into street without looking both ways); *Fightmaster v. Mode*, 31 Ohio App. 273, 167 N.E. 407 (1928) (13 year old boy not negligent per se for violating statute similar to that in *Gaertner* case); *Van Saxe v. Barnett*, 125 Wash. 639, 217 Pac. 62 (1923) (an ordinance is inapplicable to a child incapable of contributory negligence). Cf. *Bridwell v. Butler*, 18 La. App. 675, 139 So. 51 (1932) (negligence of another, though a breach of statute, will not be imputed to minor under six). In Connecticut by statute, the negligence of a plaintiff or defendant under the age of sixteen in violating a statutory duty shall be for the jury. Conn. Rev. Stat. (1949) § 7948. See, however, *D'Ambrosio v. Philadelphia*, 354 Pa. 403 (1946) (plaintiff held negligent as a matter of law for riding on tailboard of truck in violation of ordinance); *Wright v. Salzberger & Son*, 63 Cal. App. 450, 218 Pac. 785 (1923) (boy coasting on hill in violation of statute would be negligent as a matter of law). Massachusetts has held that violation of a statute by an eleven year old boy, under the outlaw theory, bars him from a suit for injuries, even though jury had specifically found that his conduct did not amount to contributory negligence. *Patrican v. Garvey*, 287 Mass. 62, 190 N.E. 9 (1934). See Notes, 95 U. of Pa. L. Rev. 93 (1946), 15 Tex. L. Rev. 522 (1938), 36 Mich. L. Rev. 328 (1937).

86. Green, op. cit. supra note 63, at 212 et seq.

87. See, e.g., *Berry v. Sugar Notch*, 191 Pa. 345, 43 Atl. 240 (1899) (plaintiff motorman, while exceeding the speed limit, was injured by a falling tree. Recovery was allowed despite the argument that the unlawful speed placed plaintiff in a position of danger under the tree at the time it fell.). Cf. *Sparks v. Hanagriff*, 15 La. App. 553, 131 So. 302 (1930); *Masaracchia v. Inter-City Exp. Lines, Inc.*, 162 So. 221 (La. App. 1935), La. R.S. (1950) 32:290-32:315. See, however, *Hobbs v. B. & M.R.R.*, 88 N.H. 112, 184 Atl. 355 (1936), where plaintiff was injured at a railroad crossing while violating the statutory speed limit. The court, in denying plaintiff recovery, said that if he had complied with the statute, the engine would have been on the crossing while he was still fifty feet away. It was reasoning such as this which the court in the *Sugar Notch* case branded as "sophistical." It is also generally held that failure to comply with licensing statutes will not render the actor liable in the absence of negligence. See *Brown v. Shyne*, 242 N.Y. 176, 151 N.E. 197, 44 A.L.R. 1407 (1926) (chiropractor practicing without license).

88. *Falk v. Finkelman*, 268 Mass. 89, 168 N.E. 89 (1929) (illegal parking held not cause of injury to pedestrian from fire truck colliding with parked

As we saw at the beginning of this article the majority of American jurisdictions have adopted (at least in form) the negligence per se rule. Probably this number increased somewhat during the early part of this century, a growth that received impetus from Thayer's article on the subject. This bade fair to fulfill in one field Holmes' prophecy and desire that fixed standards of negligence be promoted.<sup>89</sup> But the tide has swung the other way. The fixing of standards in this manner does not satisfy those who would refine the fault principle, for it too often imposes liability on a defendant or disability on a plaintiff who has violated a statute under circumstances where he was free from fault or negligence in any but the most fictional sense. And it does not satisfy those who are imbued with the importance of compensating accident victims and distributing accident losses, because its rigidity is not needed to expand liability but is effective largely to bolster a crumbling and partly discredited defense that stands as a barrier to liability.<sup>90</sup> This newer trend

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car); *Morton Ref'g Co. v. Duffy*, 94 Okla. 16, 220 Pac. 846 (1923) (failure to license car not proximate cause of accident); *Platz v. City of Cohoes*, 89 N.Y. 219 (1882) (plaintiff riding on Sunday in violation of statute injured by pile of dirt left on city streets. The court found no causal relation between the violation of law and the injury.).

There are occasional instances, however, where the court was trying to escape from the strict rule in a hardship case which could more appropriately be taken care of by the notion of excusable violation, or by a rejection of the strict rule altogether for the more flexible evidence of negligence rule. See, e.g., *Hinton v. Southern Ry.*, 172 N.C. 587, 90 S.E. 756 (1916), where plaintiff, exceeding a seven mile per hour speed limit was injured when defendant negligently let railroad crossing gates down in front of her car. The court, arguing lack of proximate cause, allowed plaintiff to recover. Here, it will be noted, the injury resulting was of the very type the legislature had in mind. Green, in commenting on this case, said (Contributory Negligence and Proximate Cause, 6 N.C.L. Rev. 3, 16 [1927]): "So far as logic is concerned this was a simple case of negligence and contributory negligence and plaintiff should have had no recovery. But the rule plaintiff violated is a hard and fast rule, allowing no flexibility. Seven miles per hour is a very low rate of speed even at intersections. If determined by the common law standard plaintiff was doubtless not negligent. . . . Legislative attempts at making exact standards of conduct are perhaps desirable, but that does not mean that inexorable logic will be or must be followed in all such cases. About the only utility of the fantastic doctrines of proximate cause is that they can be used as a smoke screen in these cases. After a while perhaps when courts come to see that logic is not the life of the law they will do openly what they now do timidly and covertly. There are other ways around which are more sensible."

89. Holmes, *The Common Law* 111, 121-124 (1938 ed.); *Lorenzo v. Wirth*, 170 Mass. 596, 49 N.E. 1010 (1898). Holmes' philosophy reached its high point of acceptance in *Baltimore & Ohio R.R. v. Goodman*, 275 U.S. 66 (1927), a position from which the Supreme Court has subsequently receded.

90. Of course, these objectives would be well served by the frank adoption of a double standard here (i.e., application of the stricter rule to the defendant's negligence, and of the evidence of negligence rule to the defense of contributory negligence). But this result is more likely to be reached by the adoption of devices for elasticity which will allow the jury to apply

has not been marked by a widespread express rejection of the negligence per se rule in states which formerly adhered to it, although this has been the result in two important jurisdictions.<sup>91</sup> For the most part it has been accomplished by the increasing acceptance of one or another of the avenues of escape treated in this section. The effectiveness of these devices may perhaps be suggested by the paucity of recent cases in which a plaintiff has actually been barred of recovery because of statutory violation.

So far we have been discussing the effect in a tort action of breach of a criminal statute. A related problem is the effect of conformity to such a statute. At one time there was considerable authority that the finding of such conformity more or less automatically precluded a conclusion of negligence.<sup>92</sup> As a rule of thumb this notion has been pretty generally abandoned in favor of allowing the jury to weigh the fact of such conformity in determining the issue of negligence.<sup>93</sup> This is another instance of the trend away from fixed standards of negligence and of enlarging the jury's scope in this field. Of course, under general principles, conformity to the legislative standard (like conformity to custom) may so clearly constitute due care under the circumstances of any given case that the court will decide it does as a matter of law,<sup>94</sup>

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a double standard in practice under announced rules that satisfy that yearning for formal symmetry which has so often marked the judicial process and produced (especially in periods of transition) such curious fictions.

91. California and Minnesota. See note 83, supra, for the California cases.

In Minnesota, a statute has reversed the negligence per se rule so far as statutory rules of the road are concerned, making violation of traffic laws "prima facie evidence of negligence only." Minn. Laws (1937) c. 464, § 141; Minn. Laws (1939) c. 430, § 30. Cf. *Bourgeois v. Longman*, 199 So. 142 (La. App. 1940).

92. See Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 Col. L. Rev. 21, cases cited n. 73 (1949).

93. *Pratt, Read & Co. v. New York, N.H. & H.R.R.*, 102 Conn. 735, 130 Atl. 102 (1925) (fact defendant had erected warning devices required by statute not conclusive on due care); *Kientz v. Charles Denning, Inc.*, 17 So. 2d 506 (La. App. 1944) (defendant, crossing intersection with favorable light still held negligent for failing to look); *Hommel v. Southwestern Greyhound Lines*, 195 S.W. 2d 803 (Tex. Civ. App. 1946) (fact defendant not required by law to place flares by parked bus not conclusive on due care).

94. Professor Morris, in a latter day advocacy of Holmes' philosophy, takes the view that conformity to statute *under optimum conditions* constitutes due care as a matter of law. Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 Col. L. Rev. 21 (1949). If this is anything more than an attempt at describing broadly the type of situation in which courts will so rule (in proceeding on a case to case basis) under the limitations universally imposed on the jury's sphere, it would seem to be a rear guard battle in the retreat of rigidity. If the view is tendered simply as the kind of broad description suggested in the last sentence, it may be criticized as not taking account of enough factors. All of those which Professor Morris himself would have considered in determining the appropriateness of the

but it seems neither safe nor desirable to attempt the formulation of any more crystallized rule.

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statutory standard when its breach is in issue should also be considered in evaluating conduct that conforms to that standard. Thus if the standard is unreasonable, or the less satisfactory of reasonable alternatives, or one that is customarily breached, an observance of it even under the very conditions contemplated by the legislature ought not necessarily to preclude a finding of negligence.