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The Trouble with Negligence Per Se

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THE TROUBLE WITH NEGLIGENCE PER SE

ROBERT F. BLOMQUIST*

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I. INTRODUCTION

Statutes in twenty-first century America are exuberantly bounteous.¹ Statutes, in the broad sense of the term, “include not only the products of state legislatures and Congress, but also ordinances, administrative regulations, and even constitutions.”² Synoptically speaking, viewed in their relation to tort law, statutes fall into two basic categories.³ One category comprises statutes that “expressly or implicitly address tort law, perhaps by creating a duty or defense or some particular rule of conduct.”⁴ The other category consists of those statutes that do not expressly or by implication “address tort law at all but instead make rules to be enforced under the criminal law or by administrative regulation.”⁵ In sum, insofar as judges of tort cases are concerned, the term *prescriptive statutes* usefully describes the first category of statutes.⁶ The term *nonprescriptive*

1. See, e.g., WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 26 (3d ed. 2001) (“More than 200,000 bills are introduced in the 50 state legislatures each biennium, and more than 10,000 in each Congress.”); WILLIAM D. POPKIN, MATERIALS ON LEGISLATION: POLITICAL LANGUAGE AND THE POLITICAL PROCESS 1 (3d ed. 2001) (“Legislation is all around us. . . . Statutes have infiltrated into traditional common law areas and created whole bodies of law to deal with the modern welfare state and to regulate activities of modern business.”).

2. DAN B. DOBBS, THE LAW OF TORTS § 133, at 311 (2000).

3. *Id.*

4. *Id.*

5. *Id.*

6. Cf. *id.* § 134, at 315 (referring to statutes that do not address tort law as *nonprescriptive statutes*). Professor Dobbs has identified six classes of prescriptive statutes in tort law: (1) “[s]tatutes imposing a duty but not otherwise altering the incidents of a tort claim”; (2) “[s]tatutes creating a new claim, duty, or defense”; (3) “[s]tatutes limiting a claim or creating defenses”; (4) “[s]tatutes disclaiming tort law effects”; (5) “[i]mplied disclaimer of tort effects”; and (6) “[p]reemptive statutes.” *Id.* § 133, at 311–14 (emphasis omitted). An example of a “[s]tatute imposing a duty but not otherwise altering the incidents of a tort claim” would be a rule that requires a landowner at certain swimming pools to post a lifeguard. *Id.* at 311–12. This rule sets forth a specific duty that did “not exist at common law but does not otherwise change the rules for negligence, causation, defenses, and procedures.” *Id.* at 311. “Statutes creating a new claim, duty, or defense” can be created “[b]y express terms or by implication” and go further than merely creating a specific duty or cause of action not existing at common law and also formulate “a set of rules about conduct or about adjudication.” *Id.* at 312. An example of this type of statute is the Employers’ Liability Act, 45 U.S.C. §§ 51–60 (2006), which “creates a federal claim on behalf of railroad workers injured on the job” and “abolishes the defenses of contributory negligence and assumed risk.” DOBBS, *supra* note 2, § 133, at 312 (citing 45 U.S.C. § 51). “Statutes limiting a claim or creating defenses” include automobile guest statutes, “‘Good Samaritan’ statutes, [which] relieve medical doctors and sometimes others of the ordinary care standard when they give treatment in various emergency situations, and recreational use statutes[, which] relieve landowners of ordinary care standards towards recreational users of the land.” *Id.* n.6. Examples of “[s]tatutes disclaiming tort law effects” include statutory provisions like the federal Occupational Safety and Health Act (OSHA). *Id.* at 313 (citing 29 U.S.C. §§ 651–678). OSHA states that the statute should not be “construed to supersede or in any manner affect any workmen’s compensation law or to enlarge or diminish or affect in any other manner the common law.” 29 U.S.C. § 653(b)(4). The category

statutes sensibly describes the second category of statutes because “[a]lthough such statutes prescribe no tort-law effects at all, courts are usually free nonetheless to adopt the standards or rules of conduct from such statutes and to apply them to tort cases.”⁷

This Article bypasses prescriptive statutes of tort law and focuses exclusively on nonprescriptive statutes. My thesis is as follows: The mainstream jurisprudential approach of finding or rejecting automatic proof of “negligence on the part of the violator [of a nonprescriptive statute], subject to a limited range of excuses or to none at all”⁸ is unsystematic, vague, muddled, and wrongheaded. Instead of using touchstones of legislative intent—whether the legislature intended to protect against the type of risk or harm that actually occurred and whether the legislature intended to protect the class of persons (including the plaintiff)—subject to considering various categories of excused and unexcused statutory violations, courts should engage in unabashed *judicial policy* analysis. The judicial policy analysis should consist of the *pragmatics* of recognizing violation of a nonprescriptive statute as a shortcut for the proof of the common law standard of reasonable care under the circumstances, with a baseline bias *against* using the nonprescriptive violation to alter the rules of the tort of negligence.

The remainder of this Article is divided into three parts that flesh out the trouble with the negligence per se doctrine and its analysis in American courts.⁹ First, in Part II, this Article explores the shaky and confusing intellectual foundations of the negligence per se doctrine during the mid-nineteenth century up to 1920—the eve of Judge Cardozo’s landmark opinion for the New York Court of Appeals in *Martin v. Herzog*.¹⁰ Second, in Part III, this Article analyzes *Martin v. Herzog* and judicial opinions decided in its wake, with a focus on recent cases decided since 2000 to show the state of modern confusion about the meaning of nonprescriptive statutory standards in tort. Finally, in Part IV, this

“[i]mplied disclaimer of tort effects” includes statutes that can be construed as “implicitly excluding any tort-law effects” because they “provide[] one remedy, such as a criminal sanction or an administrative remedy, but say[] nothing about tort remedies” and are a radical departure from common law torts. DOBBS, *supra* note 2, § 133, at 313. An example is a statute that requires a person to report suspected child abuse. *Id.* at 313–14 (citing *Freehauf v. Sch. Bd. of Seminole County*, 623 So. 2d 761, 764 (Fla. Dist. Ct. App. 1993), *appeal dismissed*, 629 So. 2d 132 (Fla. 1993); *Cechman v. Travis*, 414 S.E.2d 282, 284 (Ga. Ct. App. 1991)). “Preemptive statutes” are a “special case of statutes” whereby a “federal statute . . . set[s] rules of conduct and create[s] a federal remedy, administrative or otherwise, and at the same time preempt[s] or exclude[s] ordinary state tort law,” such as federal warning requirements for tobacco manufacturers. *Id.* at 314.

7. DOBBS, *supra* note 2, § 134, at 315.

8. *Id.* § 135, at 319.

9. While some courts use the term *prima facie* evidence of negligence instead of *negligence per se*, the difference is insignificant. *See id.* § 134, at 316 (“Although it is possible that a rule described in terms of *prima facie* or presumptive negligence is a slight variant on the *per se* rule, the differences, if any, are minor indeed.”).

10. 126 N.E. 814 (N.Y. 1920).

Article attempts to clear away the cobwebs of negligence per se methodology in nonprescriptive statutory standard cases. In this key part, I argue that the theory of law in such cases should shift from the inappropriate and confusing basis of legislative intent to the proper and illuminating basis of judicial policy analysis.¹¹

11. It is surprising that only a few legal scholars in a smattering of articles have touched on the efficacy of the negligence per se doctrine. *See, e.g.*, Andrew E. Costa, *Negligence Per Se Theories in Pharmaceutical & Medical Device Litigation*, 57 ME. L. REV. 51, 89–90 (2005) (discussing the problems involved in applying negligence per se to medical device litigation); Margaret Fordham, *Breach of Statutory Duty—A Diminishing Tort*, 1996 SING. J. LEGAL STUD. 362, 363, 373–74 (considering the tendency of courts to increasingly deny claims for breach of statutory duty); Caroline Forell, *Statutory Torts, Statutory Duty Actions, and Negligence Per Se: What's the Difference?*, 77 OR. L. REV. 497, 497–500 (1998) (discussing how statutes relate to tort cases in Oregon); Thomas C. Galligan, Jr., *A Primer on the Patterns of Negligence*, 53 LA. L. REV. 1509, 1518–19 (1993) (discussing the different methods courts use in analyzing negligence per se); Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 569, 631–32 (2001) (exploring the idea of negligence per se in a welfare context); David Howarth, *Muddying the Waters: Tort Law and the Environment from an English Perspective*, 41 WASHBURN L.J. 469, 491 (2002) (noting that English courts do not recognize the doctrine of negligence per se); Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 THEORETICAL INQUIRIES L. 333, 378–80 (2002) (considering negligence per se within the “harm-within-the-risk” analysis); Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 742–45 (2006) (discussing the use of statutory standards to inform public trust principles); John E. Noyes, *Implied Rights of Action and the Use and Misuse of Precedent*, 56 U. CIN. L. REV. 145, 165–69 (1987) (discussing implied rights of action); Paul Sherman, *Use of Federal Statutes in State Negligence Per Se Actions*, 13 WHITTIER L. REV. 831, 877–908 (1992) (describing the increase in federal statutes and the effect of that increase on negligence per se actions); Mike Steenson, *The Impact of “Exceptional” Statutes on Civil Litigation in Minnesota*, 26 WM. MITCHELL L. REV. 865, 866–79 (2000) (discussing “exceptional” statutes in Minnesota and their impact on negligence per se); Paul Yowell, *Judicial Discretion in Adopting Legislative Standards: Texas's Solution to the Problem of Negligence Per Se?*, 49 BAYLOR L. REV. 109 *passim* (1997) (discussing the history of negligence per se and its overlooked issues); Nancy G. Itnyre, Comment, *Civil Liability for Violations of Criminal Statutes*, 75 U. DET. MERCY L. REV. 681, 714–716 (1998) (discussing the imposition of civil liability for the violation of a criminal statute); Anthony E. White, Comment, *The Recognition of a Negligence Cause of Action for Victims of Identity Theft: Someone Stole my Identity, Now Who is Going to Pay for it?*, 88 MARQ. L. REV. 847, 865–66 (2005) (proposing negligence per se actions as a possible recourse for identity theft victims). Older articles examining the negligence per se doctrine are sparse. *See, e.g.*, Fleming James, Jr., *Statutory Standards and Negligence in Accident Cases*, 11 LA. L. REV. 95 *passim* (1950–1951) (discussing negligence per se in the context of accidents); Charles L.B. Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361, 361 (1932) (analyzing the issues arising from the determination that criminal statutes “entail certain civil consequences as well”); Clarence Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 *passim* (1933) (arguing that not every violation of a criminal statute should constitute negligence per se); Clarence Morris, *The Role of Criminal Statutes in Negligence Actions*, 49 COLUM. L. REV. 21, 27–34 (1949) (explaining how a finding of a violation of a criminal statute is conclusively a breach of duty). No scholar to date has exhaustively examined, on an in-depth basis, the origins and legal theory of negligence per se.

II. THE WEAK FOUNDATIONS OF AMERICAN NEGLIGENCE PER SE DOCTRINE

A. *The Problem with Nonprescriptive Statutes and Tort Law*

Many statutes, ordinances, and administrative regulations, which can be generically referred to as statutes, “prescribe no tort law effects at all.”¹² For example, “[a] highway speed limit statute usually prescribes a criminal penalty, but as to tort liability it prescribes nothing.”¹³ Thomas Cooley, in his late nineteenth century treatise on tort law, identified the following problem with nonprescriptive statutes: “Where the statute imposes a new duty, where none existed before, and gives a specific remedy for its violation, the presumption is that this remedy was meant to be exclusive, and the party complaining of a breach is confined to it.”¹⁴

However, as Professor Dan Dobbs has pointed out, “courts [have come to] say that violation of such a statute automatically proves negligence on the part of the violator, subject only to a limited range of excuses or to none at all.”¹⁵ How did the American judiciary arrive at this counterintuitive rule? What follows in this part of the Article is an attempt to sketch an intellectual history of negligence per se that draws chiefly upon published judicial opinions but also considers scholarly input.

B. *Early Judicial Opinions, 1841–1879*

The first American judicial reference to the phrase “negligence per se” appeared in *Simpson v. Hand*,¹⁶ an 1841 opinion of the Supreme Court of Pennsylvania. This case involved two ships on the Delaware River; the owners of an anchored schooner, the *Thorn*, sought damages against the owners of the brig, the *William Henry*, stemming from a nighttime collision.¹⁷ In commenting on the conflicting trial testimony on the issue of whether or not the *Thorn* had a signal lantern to warn the approaching vessel, the *William Henry*, Chief Justice Gibson included the following colorful dictum in his opinion:

Indeed, the hoisting of a light is a precaution so imperiously demanded by prudence, that I know not how the omission of it could be qualified by circumstances, any more than could the leaving of a crate of china in

12. DOBBS, *supra* note 2, § 135, at 318.

13. *Id.*

14. THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 783 (2d ed. 1888).

15. DOBBS, *supra* note 2, § 135, at 318–19.

16. 6 Whart. 311, 323 (Pa. 1841).

17. *Id.* at 311.

the track of a railroad car; or how it could be considered otherwise than as negligence *per se*.¹⁸

So negligence *per se* parlance began with a maritime case that did not mention a statute but rather a nautical custom that demanded, in the court's view, the anchored vessel to have a warning light as a matter of law.¹⁹ Failure to abide by the custom meant that the *Thorn*'s "people were obnoxious to such a charge of negligence as would bar the action."²⁰

The next judicial reference to negligence *per se* parlance occurred ten years later, in 1851, in another nighttime ship collision case off the coast of the new state of California.²¹ The Supreme Court of California, in *Innis v. Steamer Senator*,²² parroted the exact dicta from *Simpson*—the seminal Pennsylvania case.²³ Interestingly enough, also in 1851, the Supreme Court of Louisiana distinguished the facts in its case, *Sparks v. Steamer Saladin*,²⁴ which involved a collision between a steamboat on the Mississippi River with a moored flatboat on a foggy night, from the facts in *Simpson*.²⁵ Plaintiff, a flatboat owner, sued the steamboat for negligence.²⁶ On appeal, counsel for the defendants cited the negligence *per se* dicta from *Simpson*.²⁷ According to Justice Slidell of the Supreme Court of Louisiana, however, the "context and the facts"²⁸ involving the Mississippi River collision were different from the context of the Pennsylvania maritime collision:

The present case is a very different one. Here was a flatboat tied to the bank at a place appropriated to that sort of craft, at a considerable distance from the landing appropriated to steamboats; there was no want of conformity to custom, whereby a false confidence could be given to an approaching vessel; nor does there appear to have been any reason for the owner of the flatboat to expect that a steamboat would come to that part of the bank of the river.²⁹

So the first three published judicial decisions that used negligence *per se* parlance were common law maritime vessel collision cases that considered the

18. *Id.* at 323.

19. *Id.* at 323–24.

20. *Id.* at 324.

21. *Innis v. Steamer Senator*, 1 Cal. 459, 459–60 (1851).

22. 1 Cal. 459 (1851).

23. *Id.* at 460–61 (quoting *Simpson*, 6 Whart. at 323–24).

24. 6 La. Ann. 764 (1851).

25. *Id.* at 764–65 (citing *Simpson*, 6 Whart. at 323).

26. *Id.* at 764.

27. *Id.* (citing *Simpson*, 6 Whart. at 323).

28. *Id.* at 765.

29. *Id.*

context and custom of moored vessels deploying warning lights at night. While the Pennsylvania and the California cases involved clear-cut local customs for a moored vessel to use warning lights—triggering judicial conclusions that, as a matter of law, failure to have lights constituted negligent conduct—the Louisiana case involved different facts and circumstances such that the court was unwilling to conclude that a failure to have warning lights on the stationary vessel at night was negligence as a matter of law.³⁰ But none of these early negligence per se cases involved statutes.³¹

The first judicial considerations of the effect of statutory enactments regarding the duty of due care were a pair of railroad cases decided in 1854: a New York trial court opinion, *Langlois v. Buffalo & Rochester Rail Road Co.*,³² and a Supreme Court of Vermont opinion, *Morse v. Rutland & Burlington Railroad Co.*³³

In *Langlois*, a New York trial court noted the existence of a state statute that obligated railroads “to erect and maintain fences” on the sides of their tracks; if a railroad failed to erect these fences, the statute created liability ““for all damages”” caused by the train ““to cattle, horses or animals thereon.””³⁴ The case at bar involved a railroad employee who died from injuries sustained when a train engine and attached coal tender were overturned by straying cattle.³⁵ Justice T.R. Strong concluded that the statute did not impose a duty on the railroad to prevent human death or injury.³⁶ He phrased the question, to which he answered in the negative, in the following manner:

It is undoubtedly true that fences along our lines or rail roads, protecting the tracks from cattle on adjoining lands, are an important measure of security, both to the agents and servants of rail road corporations, and to the public; but in the absence of a legislative provision making their erection an absolute duty to the public, can the

30. Compare *Innis v. Steamer Senator*, 1 Cal. 459, 459–60 (1851) (“[T]he Court should have instructed the jury that want of a light and a watch, in the position of the *Rhode Island*, was such negligence on her part, as to prevent a recovery.”), and *Simpson*, 6 Whart. at 323–24 (“[T]he hoisting of a light is a precaution so imperiously demanded by prudence, that I know not how the omission of it could be qualified by circumstances . . . or how it could be considered otherwise than as negligence *per se*.”), with *Sparks*, 6 La. Ann. at 765 (holding that the case was “a very different one” from *Simpson* and refusing to find negligence per se).

31. See *Innis*, 1 Cal. 459; *Sparks*, 6 La. Ann. 764; *Simpson*, 6 Whart. 311.

32. 19 Barb. 364 (N.Y. Gen. Term 1854).

33. 27 Vt. 49 (1854).

34. 19 Barb. at 369 (quoting 1850 N.Y. Laws 233).

35. *Id.* at 365–66.

36. See *id.* at 369.

courts properly impose it as a duty, and hold its non-performance, *per se*, negligence, disregarding all other circumstances?³⁷

While the trial court judge in *Langlois* did not directly say so, it appears that the motivation for his decision not to create negligence *per se* liability for wrongful death was the lack of a proper fit between the claimed injury with the class of persons protected by the New York statute—animal owners—and and the type of injury contemplated by the statute—damage or death of animals.³⁸

The Supreme Court of Vermont's opinion in *Morse* involved an analysis of a Vermont railroad fencing statute.³⁹ The court construed the statute narrowly such that there was no duty to the plaintiff (whose cattle initially strayed from the owner's land onto a neighbor's lot that adjoined the railroad tracks and then ultimately strayed onto the tracks) because a duty was owed only to the landowner whose land abutted the railroad.⁴⁰ The court also concluded that the speed of the locomotive was not negligence *per se* and that the common law standard of ordinary reasonable care under the circumstances was warranted.⁴¹

In 1866, the Court of Appeals of New York applied a negligence *per se* analysis in *Ernst v. Hudson River Railroad Co.*,⁴² making it the first case in which an American appellate court found a defendant negligent for violating a statute. In reversing a nonsuit for a wrongful death action involving a teamster driving a two-horse sleigh across train tracks, the court had the occasion to expound on the significance of the railroad's failure to sound its whistle and ring its bell in violation of a New York statute.⁴³ Judge Porter held:

This was an act in open defiance of a public statute, enacted for the protection of the traveler. It was a flagrant breach of duty to the passengers, whose safety it jeopardized, to the stockholders, whose property it imperiled, and to the testator, whose life it exposed. Its direct tendency was to put him off his guard, to disarm his vigilance, and to produce a false sense of security. . . . It is not the policy of the law to favor those who deliberately violate its mandates, nor is it the duty of the courts to invent excuses for wrong-doers, or to palliate the guilt of reckless homicide. Our statutes for the protection of life are to be obeyed; and when they are broken and defied, responsibility is not to be

37. *Id.* at 370.

38. *See id.* at 369–70.

39. *Morse v. Rutland & Burlington R.R. Co.*, 27 Vt. 49, 52 (1854) (citing Vt. Comp. Stat. ch. 26, § 41 (1849)).

40. *Id.* at 53–54 (citing *Jackson v. Rutland & Burlington R.R. Co.*, 25 Vt. 150, 161 (1853)).

41. *Id.* at 54.

42. 35 N.Y. 9 (1866).

43. *Id.* at 22, 28–29.

invaded by imputing blame, without proof, to him who suffers death, for the sake of shielding those who inflict it.⁴⁴

The court's opinion in *Ernst* is fraught with emotional condemnation of the locomotive crew who failed to follow the whistle and bell statute.⁴⁵

Two years later, in the 1869 case *St. Louis, Jacksonville & Chicago Railroad Co. v. Terhune*,⁴⁶ the Supreme Court of Illinois utilized negligence per se concepts to uphold a railroad's liability in another whistle and bell statutory violation case—this time, for the destruction of two cows by a locomotive.⁴⁷

An 1875 federal trial court opinion, *Adams v. West Roxbury*,⁴⁸ involved a workplace personal injury action by an employee of a street repair crew who was seriously injured by explosives that went off accidentally.⁴⁹ The court seemed to hint at what became in later years strict liability for abnormally dangerous activities⁵⁰ when it asked in passing if “[t]he use of exploders in blasting, not being . . . negligence per se, and the town having procured exploders . . . [which] were generally deemed to be a good safe article . . . , what higher degree of care could be required of the master?”⁵¹ The court went on, however, to reject a strict

44. *Id.* at 28–29. Curiously, in *Ernst*, the Court of Appeals of New York made no reference to its decision just six years prior in *Brown v. Buffalo & State Line Railroad Co.*, 22 N.Y. 191 (1860). That case, as described by Professor Dobbs, “reject[ed] the idea that a criminal statute would have tort law effect.” DOBBS, *supra* note 2, § 135, at 319 n.2 (citing *Brown*, 22 N.Y. 191). Perhaps the fact that the plaintiff in *Ernst* was the widow of a hapless teamster affected the court's view of the tort law effect of the violation by the railroad of a quasi-criminal statute.

45. *See Ernst*, 35 N.Y. at 28–29. The Court of Appeals of New York utilized negligence per se parlance in another 1866 train accident case, *Willis v. Long Island Railroad Co.*, 34 N.Y. 670, 675–76 (1866). However, like the maritime cases discussed above, *see supra* notes 16–31 and accompanying text, the negligence per se language was not used to describe the breach of a statutory standard but rather to refer to conduct that was claimed to be clearly uncaredful. *Willis*, 34 N.Y. at 675–76. Other courts used similar negligence per se language in early railroad cases. *See, e.g., Ohio & Miss. R.R. Co. v. Shanefelt*, 47 Ill. 497, 500 (1868) (“In that case, as in this, it was contended, that it was negligence *per se* to permit dry weeds and grass to accumulate on the right of way of a railway company; that its presence there created a legal presumption of negligence.”); *Pittsburg & Connellsville R.R. Co. v. McClurg*, 56 Pa. 294, 300 (1867) (“In conclusion, we have simply to reassert, that where a traveller puts his elbow or an arm out of a car window, voluntarily, without any qualifying circumstances impelling him to it, it must be regarded as negligence *in se*; and when that is the state of the evidence it is the duty of the court to declare the act negligence in law.”). For similar, nonstatutory use of negligence per se language in an early case involving an owner of a mule killed by the bad repair of a canal towpath, *see Pennsylvania Canal Co. v. Bentley*, 66 Pa. 30, 33 (1870).

46. 50 Ill. 151 (1869).

47. *Id.* at 153–54.

48. 1 F. Cas. 152 (C.C.D. Mass. 1875) (No. 67).

49. *Id.* at 152–53.

50. For an explanation of strict liability for abnormally dangerous activities, *see* RESTATEMENT (SECOND) OF TORTS §§ 519–520 (1976).

51. *Adams*, 1 F. Cas. at 154.

liability theory, shifting back to ordinary negligence principles in the following excerpt:

If a master should procure a box of percussion caps from a well known respectable manufacturer, which were by the community at large, generally considered safe and free from danger, would it be expected of him that he should use up a large portion of the contents of the box in testing them before he put them in the hands of his servants for use? Could he not well rely on the standing and reputation of the maker of the article for his putting on the market a safe and proper cap, and if on careful inspection they were apparently all right, and no defect could be discoverable, should he be deemed guilty of negligence, if under such circumstances he procured and used them in his business?⁵²

C. The Run Up to Cardozo's Opinion in Martin v. Herzog, 1880–1920

During the forty-one year period of 1880 through 1920, there was an explosion of judicial references to the phrase “negligence per se,” with 3,419 state and federal opinions containing this language.⁵³ The cases are a gallimaufry of holdings and dicta. Some cases do not address statutes or ordinances on civil liability at all but rather utilize “negligence per se” to consider whether conduct of litigants could be construed as lacking due care as a matter of law.⁵⁴ Other

52. *Id.* at 155.

53. Based on a Westlaw search of the phrase “negligence per se” in the “all cases” database with a query of dates between 1879 and 1921 (search conducted on Oct. 31, 2009).

54. *See, e.g.,* Mammoth Vein Coal Co. v. Johnson, 127 S.W. 971, 971 (Ark. 1910) (citing Johnson v. Mammoth Vein Coal Co., 114 S.W. 722, 729 (Ark. 1908)) (deciding that it is not negligent as a matter of law for a coal miner to continue working in a dangerous part of the mine); Meeks v. S. Pac. R.R. Co., 56 Cal. 513, 517 (1880) (citing Meeks v. S. Pac. R.R. Co., 52 Cal. 602, 604–05 (1878)) (hearing an appeal of a plaintiff who fell asleep on train tracks); Girtman Bros. v. Eaton, 59 So. 397, 399 (Fla. 1912) (“It is not negligence per se for an iron rod in a wagon to protrude from the wagon as it passes along a street.”); Pittsburgh, C., C. & St. L. Ry. Co. v. Simons, 79 N.E. 911, 915 (Ind. 1907) (holding that it is not negligent as a matter of law for a railroad to leave its switches unblocked); Middleton v. City of Cedar Falls, 153 N.W. 1040, 1046 (Iowa 1915) (“It is not negligence per se for a person to pass over a street or sidewalk in the nighttime.”); Wolf v. Des Moines Elevator Co., 98 N.W. 301, 302 (Iowa 1904) (explaining that it is not negligent as a matter of law to establish a “factory, shop, or other industrial plant” near a public thoroughfare); Atchison, T. & S. F. R. Co. v. Morgan, 22 P. 995, 1000 (Kan. 1890) (“The plaintiff is not precluded from recovery because on approaching the railroad crossing he did not stop.”); Kelly v. S. Minn. R. Co., 9 N.W. 588, 590 (Minn. 1881), *overruled on other grounds by* Morse v. Minneapolis & St. L. Ry. Co., 16 N.W. 358, 359 (Minn. 1883) (“In the present case a court would have no right to hold that it was negligence *per se* to attempt to drive over this [railroad] crossing with knowledge of the fact of the removal of [a] plank. That was eminently a proper question for . . . the jury”); Smith v. Mo. Pac. Ry. Co., 20 S.W. 896, 898 (Mo. 1892) (stating that it is not negligent as a matter of law for a railroad to have three freight trains converge on a single station at the same time); Hendricks v. W. Union Tel. Co., 35 S.E. 543, 546 (N.C. 1900) (indicating that it is not negligence per se for a

cases decided during this time frame use negligence per se terminology to describe what has come to be called a *rule of law*—a judicial determination that specified conduct automatically breaches a standard of reasonable care.⁵⁵ Still other cases lacking statutory referents utilize “negligence per se” as a rhetorical trope.⁵⁶

Numerous judicial opinions during the 1880–1920 period refer, in a perfunctory and mechanical way, to the proposition that the violation of a statute or municipal ordinance is or is not negligence per se or mere evidence of negligence in a civil action seeking compensatory damages.⁵⁷

Only a handful of judicial opinions during this approximately four decade time frame attempted to explain the rationale for grafting a nonprescriptive statutory standard onto a civil action for the tort of negligence. Surprisingly, the rather obscure Supreme Court of the Territory of New Mexico, in the 1897 case of *Cerrillos Coal Railroad Co. v. Deserant*,⁵⁸ provided what may be viewed as the first quasi-scholarly American judicial opinion to explore the emerging doctrine of negligence per se. *Cerrillos* was a wrongful death action by the

telephone company to fail to promptly notify the sender that a message could not be delivered); *Palmer v. Willamette Valley S. Ry. Co.*, 171 P. 1169, 1172 (Or. 1918) (noting a split of authority on whether it is negligent as a matter of law for a passenger to board a moving train); *Gulf, C. & S. F. Ry. Co. v. Cusenberry*, 26 S.W. 43, 46 (Tex. 1894) (“It is not negligence per se for a railroad company to permit grass and weeds, or other combustible matter, to accumulate upon its right of way.” (citing *Gram v. N. Pac. R. Co.*, 46 N.W. 972, 975 (N.D. 1890))).

55. See, e.g., *Gothard v. Ala. Great S. R.R. Co.*, 67 Ala. 114, 116–17 (1880) (stating the duty of a wagon driver to look and listen for approaching trains before crossing tracks); *Plummer v. E. R.R. Co.*, 73 Me. 591, 593 (1882) (quoting *Grows v. Me. Cent. R.R. Co.*, 67 Me. 100, 104 (1877)) (stating the duty to look for approaching trains).

56. See, e.g., *Jordan v. McNeil*, 25 Kan. 459, 461 (1881) (“Is it, as an abstract question of law, negligence per se for a client to rely upon the professional integrity of a Kansas lawyer?”).

57. See, e.g., *Cent. R.R. & Banking Co. of Ga. v. Golden*, 21 S.E. 68, 69 (Ga. 1894) (considering railroad’s failure to signal warnings to persons not near a crossing); *Lake Shore & M. S. Ry. Co. v. Barnes*, 76 N.E. 629, 630–31 (Ind. 1906) (finding that the running of a train over a country highway crossing at fifty miles per hour is not negligence per se); *Chesapeake Beach Ry. Co. v. Donahue*, 68 A. 507, 509 (Md. 1908) (holding that trespassing deliberately on railroad tracks constitutes negligence per se); *Bahel v. Manning*, 70 N.W. 327, 330 (Mich. 1897) (holding that violating a gun safety statute is negligence per se); *Bowman v. Chi. & Alton R.R. Co.*, 85 Mo. 533, 538 (1885) (citing *Kelley v. Hannibal & St. Joseph R.R. Co.*, 75 Mo. 138, 142 (1881); *Karle v. Kansas City, St. Joseph & Council Bluffs R.R. Co.*, 55 Mo. 476, 483 (1874)) (analyzing the violation of a train speeding ordinance); *Morrison v. Lee*, 133 N.W. 548, 550 (N.D. 1911) (stating that the violation of a statute constituting negligence per se did “not abrogate the defense of contributory negligence” without a legislative intent to do so); *Crowl v. W. Coast Steel Co.*, 186 P. 866, 870 (Wash. 1920) (explaining that violation of a pedestrian crossing ordinance is negligence per se); *O’Brien v. Wash. Water Power Co.*, 129 P. 391, 394 (Wash. 1913) (citing *Wilson v. Puget Sound Elec. Ry. Co.*, 101 P. 50, 54 (Wash. 1909); *Engelker v. Seattle Elec. Co.*, 96 P. 1039, 1039–40 (Wash. 1908)) (operating a street car at a rate of speed in excess of that permitted by ordinance is negligence per se).

58. 49 P. 807 (N.M. 1897), *overruled on other grounds by* *Stang v. Hertz Corp.*, 467 P.2d 14, 18 (N.M. 1970).

survivors of a coal miner who died (along with twenty-two other miners) from an explosion in a room of the mine.⁵⁹ Justice Collier described the 1891 Act of Congress that was at issue in the case:

The act . . . provides that managers or owners of coal mines shall provide adequate ventilation of not less than so many cubic feet of air per minute for so many men, and . . . force same through the mine . . . to dilute and render harmless noxious and poisonous gases, and to keep all working places clear of standing gas.⁶⁰

Initially, the territorial court noted that “[i]t has been laid down in a recent work of high authority that a breach of a statutory duty is negligence per se.”⁶¹ But then the *Cerrillos* opinion observed: “Such, however, does not seem to be the view of the United States [S]upreme [C]ourt.”⁶² In support of this proposition, the territorial court cited four previous Supreme Court railroad opinions as authority for making “[b]reaches of statute or ordinance” mere evidence of negligence.⁶³ Applying the mere evidence of negligence standard that it derived

59. *Id.* at 807.

60. *Id.* at 812. The federal statute at bar was simply cited as an “act of congress passed March 3, 1891.” *Id.* The statute referred to by the court is probably Act of Mar. 3, 1891, ch. 564, 26 Stat. 1104.

61. *Cerrillos*, 49 P. at 812 (citing 3 BYRON K. ELLIOT & WILLIAM F. ELLIOT, A TREATISE ON THE LAW OF EVIDENCE § 1155 (1897)).

62. *Id.*

63. *Id.* (citing *Union Pac. Ry. Co. v. McDonald*, 152 U.S. 262, 282–83 (1894); *Grand Trunk Ry. Co. v. Ives*, 144 U.S. 408, 418 (1892); *Hayes v. Mich. Cent. R.R. Co.*, 111 U.S. 228, 239–40 (1884); *Randall v. Balt. & Ohio R.R. Co.*, 109 U.S. 478, 485 (1883)). Interestingly, the first opinion by the Supreme Court of the United States to use negligence per se parlance explicitly was *Grand Trunk Railway Co. v. Ives*. See 144 U.S. at 418. *Ives* involved a wrongful death action by survivors of a Michigan farmer who was struck by a train while crossing a railroad track in his horse-drawn buggy. *Id.* at 409–11. *Ives* was brought in a Michigan state court and removed to federal court on the basis of diversity of citizenship. *Id.* at 409. A Detroit city ordinance set a train speed limit of six miles per hour. *Id.* at 411. The Supreme Court began its analysis of the applicability of the ordinance by discussing the “reasonable and prudent” standard of care in a negligence suit. *Id.* at 417. The Court went on to observe: “Indeed, it has been held in many cases that the running of railroad trains within the limits of a city at a rate of speed greater than is allowed by an ordinance of such city is negligence, *per se*.” *Id.* at 418 (citing *Schlereth v. Mo. Pac. Ry. Co.*, 96 Mo. 509, 515 (1888); *Va. Mid. R.R. Co. v. White*, 84 Va. 498, 502 (1888)). Without further explanation, however, the Court concluded: “But, perhaps, the better and more generally accepted rule is that such an act . . . is always to be considered by the jury as at least a circumstance from which negligence may be inferred in determining whether the company was or was not guilty of negligence.” *Id.* (citing five different state cases to support its conclusion). The *Ives* Court did not provide any comparison to the question of violation of a state statute; however, later in its opinion, the Court construed a statute delegating authority to a railroad commissioner in deciding whether a flagman should be posted at a railroad crossing. *Id.* at 421–22. In the situation where the commissioner had decided not to require a flagman at the crossing at bar, the Court construed the statute as giving rise to the following construction: “[A] railroad company, under certain

from previous Supreme Court precedent, the *Cerrillos* court reasoned, in rather opaque language, as follows:

Where the means to be adopted for securing requisite ventilation were not prescribed [in the 1891 Act], but congress contented itself with general directions, it should be held that reasonable effort is to be exerted to attain and maintain this result. If this result were neither attained nor maintained, it would then be the jury's province to say whether, under all the circumstances, this failure was or not due to negligence by the defendant.⁶⁴

While the *Cerrillos* opinion questioned the negligence per se doctrine utilized by other courts and a treatise writer, the basis of the skepticism was sketchy, unexamined dicta from United States Supreme Court precedent. But, at least the *Cerrillos* court made a persuasive—albeit somewhat turgid—logical argument that a statute that set forth a *general* standard—as opposed to a *specific* standard—should do no more than assist the jury to assess the context of care that ultimately should govern the case. The general standard, according to this line of reasoning, should not sidetrack the trier of fact in making its own independent judgment based on all of the evidence adduced at trial in determining whether the defendant's conduct fell below a standard of reasonable care under the circumstances.

In *Southern Railway Co. v. Bryan*,⁶⁵ the Supreme Court of Alabama, in a thoughtful—but flawed—1899 opinion authored for the court by Justice Haralson, offered a searching and analytical account of the negligence per se doctrine.⁶⁶ *Bryan* was a wrongful death action brought by a deceased railroad engineer's wife; the engineer died in a nighttime collision with another train that was not sufficiently lit.⁶⁷ An Alabama penal statute (first enacted in 1867 and amended twice) established a twofold duty on railroad officers operating trains within the state.⁶⁸ As paraphrased by Justice Haralson, these legislative prescriptions required that a train come to a full stop within 100 feet of a place of crossing of two tracks and that a stopped train “not proceed until [the engineer and conductor] know the way to be clear,” with a criminal fine, imprisonment,

circumstances, will not be held free from negligence, even though it may have complied literally with the terms of a statute prescribing certain signals to be given, and other precautions . . .” *Id.* at 420–21. According to the Court, the rationale for this rule of construction is that “other measures,” not specified in the statute, may be dictated by “public safety and common prudence” under the circumstances of the case. *Id.* at 421 (citing *Chi., Burlington & Quincy R.R. Co. v. Perkins*, 125 Ill. 127, 131 (1888)).

64. *Cerrillos*, 49 P. at 812.

65. 28 So. 445 (Ala. 1899).

66. *Id.* at 449.

67. *Id.* at 445–46.

68. *Id.* at 447 (citing 1898 Ala. Laws 44).

or “hard labor for the county” as possible penalties for violation.⁶⁹ The issue on appeal was whether the trial court properly considered negligence per se where there was evidence that the decedent engineer failed to take appropriate precautions before crossing the track intersection.⁷⁰ As explained by the court, “[e]ach train may reasonably indulge the presumption, that the other will comply with the mandates of the statute, but this presumption will not protect either from liability for want of care in proceeding, when it becomes apparent, or reasonably so, that the other train is negligent and disobedient.”⁷¹ The heart of the Alabama opinion focused on interpreting the meaning of the state statute’s command that train officials, stopped at a track crossroads, “must not proceed until they know the way to be clear.”⁷² In a detailed consideration of this legal problem, Justice Haralson opined for the court:

Can the knowledge required to be had by the engineer and conductor, that the way is clear, mean less, than that they shall take such steps as are necessary to inform and make themselves certain, and not be doubtful of the fact? If one upon whom such a duty is imposed, takes the necessary steps to thus make himself aware of the situation at or about the crossing, and uses all diligence necessary to that end, and there is an absence of another train, so far as the diligent exercise of his senses will discover, with which he may collide, this would be knowledge on his part, such as the law requires. But, to acquire such knowledge, he must exhaust all necessary means to make himself certain; or, in other words, he must exercise not simply ordinary, but the highest degree of diligence to ascertain that the way is clear. This knowledge may not imply, however, that the way will certainly remain clear against all after-occurring, extraordinary, unanticipated and unascertainable happenings.⁷³

At this juncture in the opinion, the Supreme Court of Alabama tried to discern the elusive intent of the state legislature in passing a penal statute that did not explicitly provide that the penal standard of care should be transposed to a civil tort action predicated on negligence:

This statute is not merely declaratory of the common law. Without it, the duty of an engineer would require him to use reasonable, or ordinary care to avoid collision,—to stop if necessary, and not proceed

69. *Id.* at 447–48.

70. *Id.* at 448.

71. *Id.* at 447.

72. *Id.* at 448.

73. *Id.* at 448–49.

until, by reasonable diligence, he ascertains that he may do so safely. If nothing more than ordinary care is required under the statute, it would seem, it may as well, for the ends proposed, have not been adopted. The legislature evidently did not deem such degree of care sufficient in such an emergency, where the danger to life and property is so great; and the statutes were passed, manifestly, to impose a higher degree of diligence than was theretofore required,—extraordinary care on the part of those running trains to prevent collisions such as that with which we deal. The officers upon whom the duties imposed by the statute are devolved, cannot neglect their discharge, without committing a penal offense, and rendering their company liable for consequent injuries.⁷⁴

While the court's analysis regarding legislative intent was a respectable attempt to unpack the meaning of the specific penal command, the reasoning was deficient in several respects. First, the opinion did not grapple with the question of whether the common law duty of reasonable care, applicable to tort actions for compensatory damages, should be displaced by a criminal standard of extraordinary care. Second, the court failed to explain how the assumed legislatively-positing duty of extraordinary care could ever be successfully met by a person like the decedent engineer, who could not perceive the other train (operating without lights) in the darkness of night. Third, without saying so, the opinion turns on its head the usual lenity the law of torts accords to individuals behaving under emergency conditions to a virtual strict liability standard of care. Fourth, the court contradicted itself by, on the one hand, quoting a learned treatise by Elliott that “ordinarily the omission of the statutory duty is negligence *per se*, and that where the omission is established, such negligence arises as a matter of law,”⁷⁵ and then, on the other hand, going on to conclude that “by the very terms of the statute,” the engineer was “forbidden absolutely to cross the tracks, until [he] knew the way to be clear for [his train] to pass in safety,” when he could never know with certitude under the circumstances that it was all clear.⁷⁶ Finally, the opinion made the erroneous conclusion that the court's hands were tied: “If we preserve the integrity of the statute, we see no escape from the conclusion we reach.”⁷⁷ To the contrary, because the statute was a nonprescriptive penal statute (theoretically applicable only in a criminal prosecution), the Alabama court had judicial discretion to find the statute inapplicable to a wrongful death action sounding in negligence.

74. *Id.* at 449.

75. *Id.* (emphasis added) (quoting ELLIOTT & ELLIOTT, *supra* note 61, § 1155, at 1745).

76. *Id.* at 449–50.

77. *Id.* at 450.

The Supreme Court of South Dakota, in the 1905 case of *Borneman v. Chicago, St. Paul, Minneapolis & Omaha Railway Company*,⁷⁸ issued a commendable summary of differing judicial interpretations of ordinances or statutes in American courts.⁷⁹ *Borneman* involved an action in negligence against a railroad for the plaintiff's loss of a horse that was killed at a railroad crossing.⁸⁰ The plaintiff alleged that the railroad violated a city ordinance setting forth a speed limit and a requirement that a "bell . . . be rung continually on all engines while running within the city limits."⁸¹ The court stated the following:

Many cases lay down the rule that the violation of a statute or ordinance constitutes negligence per se, or conclusive evidence of negligence. The rule of other cases seems to be that the violation of a statute or municipal ordinance is prima facie evidence of negligence. In still other cases the courts have been content with the announcement that evidence of the fact that the defendant's act constituted the violation of a state or municipal law is proper for the consideration of the jury in determining whether the defendant was in fact negligent.⁸²

While the *Borneman* court's paraphrase of what the justices discerned to be three extant judicial approaches to the construction of nonprescriptive statutory violations in negligence cases was pithy and lucid, the court—following in the footsteps of previous judicial pronouncements on the subject—failed to articulate any rationale for choosing from among the three approaches other than the authority of precedent.⁸³ Indeed, like earlier opinions, the jurists did not address the essential legal question of why a penal statutory enactment that did not address civil actions in tort should be used at all in a common law negligence cause of action.

The Supreme Court of Utah, in the 1907 case *Smith v. Mine & Smelter Supply Co.*,⁸⁴ went beyond summaries of past cases and took a serious stab at probing the rationale behind the use of nonprescriptive statutes and ordinances in negligence cases. Mrs. Smith sued for damages to her home and destruction of personal property caused by the negligence of a mining company.⁸⁵ The mining company had violated a Salt Lake City ordinance prescribing how explosives should be stored in magazines and vaults, and prohibiting the storage of "any

78. 104 N.W. 208 (S.D. 1905).

79. *Id.* at 211 (citing Archibald R. Watson, *Negligence*, in 21 THE AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW 478–79 (David S. Garland & Lucius P. McGehee eds., 2d ed. 1902)).

80. *Id.* at 209.

81. *Id.* at 211.

82. *Id.* (citing Watson, *supra* note 79, at 478–79).

83. *See id.*

84. 88 P. 683 (Utah 1907).

85. *Id.* at 683.

explosive substance having an explosive power greater than that of ordinary gunpowder.”⁸⁶ Initially, the court contended that “whether a violation of a [statute] or ordinance constitutes negligence per se depends in a large measure upon the nature of the law or ordinance.”⁸⁷ Thus, as noted by the court, “[w]hen a standard of duty or care is fixed by law or ordinance, and such law or ordinance has reference to the safety of life, limb, or property, then, as a matter of necessity, a violation of such law or ordinance constitutes negligence.”⁸⁸ Reasoning that it would make no sense to allow people who violated a safety standard contained in a statute or ordinance to argue that they conformed to the common law negligence standard of ordinary care and prudence, the *Smith* court opined:

In any case the standard is usually defined as that degree of care that men of ordinary care and prudence usually exercise. But, when the standard is fixed by law or ordinance, how can one be heard to say that he exercised care in exceeding, or in refraining to comply with, the standard fixed? There is, in such cases, no comparison to be made. Care and prudence alone cannot excuse. Exceeding or disregarding the standard of care imposed must be held to be negligence, if it is anything. If it is held not to be such per se, it simply amounts to this: That it is for the jury to say whether, in violating a law or ordinance fixing a standard of care to be observed the law was carefully or negligently violated. The violation, thus in and of itself, would mean nothing, and one would be permitted to violate the law with impunity, provided the jury find it to have been carefully done.⁸⁹

The court’s rationale, however, was deficient. It would certainly matter for purposes of criminal liability and penal policy whether or not a defendant violated the explosives ordinance. However, it might not make sense to hold a defendant negligent per se for all losses occasioned by an explosion stemming from the violation of the ordinance. The court acknowledged as much by limiting liability for a statutory or ordinance violation to proximately caused injuries and providing for defenses for an act of God or an unavoidable accident.⁹⁰ Moreover, the court’s reasoning is further deficient because it did not explain why the explosives ordinance was designed for the “safety of life, limb, or property.”⁹¹ Was this an inference by the court based on the subject matter of the ordinance? Or, was it a conclusion about the intent of the Salt Lake City

86. *Id.*

87. *Id.* at 686.

88. *Id.*

89. *Id.*

90. *See id.* at 686–87.

91. *Id.* at 687.

Council in promulgating the explosives ordinance? The court leaves it to us to guess the answer.

The 1906 opinion of *Schutt v. Adair*⁹² by the Supreme Court of Minnesota offered little more than a conclusory holding on whether negligence per se existed for violation of a statutory standard. In *Schutt*, a man fell down an open elevator shaft when he was on defendant's premises for the purpose of transacting business.⁹³ The court explained that a state statute provided that "elevator shafts like those involved in this case [are] to be guarded and protected," but the court was "not prepared to admit that the statute" was applicable to the case at bar.⁹⁴ On the contrary, without any explanation to support its conclusion, the court held that the elevator statute "was enacted for the protection of employ  s in warehouses, factories, and manufacturing establishments, and it is doubtful whether, properly construed, it has any application to others."⁹⁵ Yet, the court went on to assume the elevator statute's potential applicability to nonemployees like the plaintiff.⁹⁶ Notwithstanding the statute's potential applicability, the court concluded that "statutes imposing such duties are not [to be] construed as to abrogate the ordinary [all or nothing] rules of contributory negligence, unless so worded as to leave no doubt that the Legislature intended to exclude the defense."⁹⁷ Therefore, according to the court, the trial judge properly instructed the jury, and the jury reached a justifiable verdict denying plaintiff's suit for negligence.⁹⁸

The Supreme Court of Indiana, in the 1909 case of *Inland Steel Co. v. Yedinak*,⁹⁹ upheld a jury verdict in favor of a young boy who was seriously injured when a railroad car ran over his leg while he was working the graveyard shift at a steel mill.¹⁰⁰ A state statute prohibited "the employment of a child under 14 years of age in any manufacturing establishment within [the] state."¹⁰¹ The supreme court construed the child employment prohibition statute as "designed to protect children against the hardships and perils resulting from overexertion"; as a "legislative interdiction [that] in effect declares that children within the prohibited age are not possessed of that judgment, discretion, and care requisite and necessary for their own safety while engaged in a hazardous avocation"; and as making the steel company "chargeable with knowledge of the legal disabilities of children to engage in its service, and [required to] ascertain at

92. 108 N.W. 811 (Minn. 1906), *overruled by* *Suess v. Arrowhead Steel Prods. Co.*, 230 N.W. 125, 126–27 (Minn. 1930).

93. *Id.* at 811.

94. *Id.* at 812 (citing MINN. STAT. § 24.2250 (1894)).

95. *Id.*

96. *See id.*

97. *Id.*

98. *Id.*

99. 87 N.E. 229 (Ind. 1909).

100. *Id.* at 231–32, 236.

101. *Id.* at 232 (citing IND. CODE ANN. § 8022 (1908)).

its peril that a boy employed in the operations of its factory, which has been classified by the Legislature as dangerous, is of the required age.”¹⁰² The court characterized violation of the state statute as constituting “negligence per se”;¹⁰³ however, the court really construed such violations of the statute as giving rise to absolute civil liability for the boy’s personal injuries suffered on the job, having precluded the steel company from utilizing the defenses of contributory negligence and assumption of risk.¹⁰⁴ The court’s statutory analysis fell short, though, by failing to answer why a nonprescriptive penal statute should displace the common law standard of ordinary care in a civil action for negligence and failing to explain why it construed the legislation as giving rise to absolute liability.

The 1910 case of *Peterson v. Standard Oil Co.*¹⁰⁵ involved a wrongful death action by the administrator of a domestic maid who died when she tried to light a fire of kerosene-soaked wood kindling.¹⁰⁶ The Supreme Court of Oregon unanimously affirmed a trial court judgment based on negligence of the kerosene manufacturer who had mislabeled a drum of “Water White Kerosene,” indicating the substance “would not burn under 120 degrees Fahrenheit open-fire test.”¹⁰⁷ A state statute made it a misdemeanor to fail to label properly containers of petroleum distillates.¹⁰⁸ The opinion for the supreme court started off with a curious discussion of the concept of judicial notice and its applicability to the “dangerous qualities” of distillates like kerosene.¹⁰⁹ Concluding that it was proper to take judicial notice of the explosive qualities of kerosene, the supreme court attempted to bolster this conclusion by citing the Oregon petroleum labeling statute—a violation of which the court interpreted as “constitut[ing]

102. *Id.* at 233.

103. *Id.*

104. *Id.* Still, the court conceded that “[a] causal connection between the unlawful employment and the injury . . . must be shown.” *Id.*

105. 106 P. 337 (Or. 1910), *overruled by* *Nw. Door Co. v. Lewis Inv. Co.*, 180 P. 495, 504 (Or. 1919).

106. *Id.* at 338.

107. *Id.* at 337–38.

108. *Id.* at 340 (quoting 1903 Or. Laws 103). The state act provided as follows:

Benzole, benzene, gasoline, naphtha, and distillates, must be sold under their true names and grades, respectively, and such names and grades must be impressed, or otherwise plainly marked, upon the barrel, can, or vessel in which the same is sold, offered, or exposed for sale, respectively, or upon a label conspicuously and securely fastened thereto; and every barrel, can, or vessel of kerosene or coal oil that is offered or exposed for sale, shall be in like manner plainly marked or labeled with the word kerosene or coal oil, and with the degree, Fahrenheit, of fire test below which the same will not burn. Any person, firm, or corporation violating any of the provisions of this section shall be fined the sum of not less than one hundred dollars (\$100) nor more than five hundred (\$500), or be imprisoned in the county jail not exceeding six months.

1903 Or. Laws 103.

109. *Peterson*, 106 P. at 339–40.

negligence per se” in a civil tort action.¹¹⁰ The supreme court cited a treatise on negligence law as well as appellate opinions from other states in support of its negligence per se holding.¹¹¹ The Supreme Court of Oregon in *Peterson* quoted extensively from the treatise, *Commentaries on the Law of Negligence* by Seymour Thompson, as follows:

This seems to introduce in this place a consideration of the antithesis of the proposition contained in the preceding paragraph—the case where the Legislature of the state, or the council of a municipal corporation, having in view the promotion of the safety of the public . . . commands or forbids the doing of a particular act. Here the general conception of the courts, and the only one that is reconcilable with reason, is that the failure to do the act commanded, or the doing of the act prohibited, is negligence as mere matter of law, otherwise called negligence per se; and this, irrespective of all questions of the exercise of prudence, diligence, care, or skill; so that if it is the proximate cause of hurt or damage to another, and if that other is without contributory fault, the case is decided in his favor, and all that remains to be done is to assess his damages.¹¹²

The *Peterson* opinion followed up the treatise quotation with a quotation from the Supreme Court of Minnesota in a case involving a druggist who sold poison without the label mandated by state statute:

Negligence is the breach of legal duty. It is immaterial whether the duty is one imposed by the rule of the common law requiring the exercise of ordinary care not to injure another, or is imposed by a statute designed for the protection of others. In either case the failure to perform the duty constitutes negligence, and renders the party liable for injuries resulting from it. The only difference is that in the one case the measure of legal duty is to be determined upon common-law principles, while in the other the statute fixes it, so

110. *Id.* at 340.

111. *Id.* (citing *Siemers v. Eisen*, 54 Cal. 418, 420–21 (1880); *Brower v. Locke*, 67 N.E. 1015, 1017 (Ind. App. 1903); *Diamond Block Coal Co. v. Cuthbertson*, 67 N.E. 558, 559 (Ind. App. 1903), *aff'd*, 73 N.E. 818 (Ind. 1905); *Tobey v. Burlington, C. R. & N. Ry. Co.*, 62 N.W. 761, 764 (Iowa 1895); *Osborne v. McMasters*, 41 N.W. 543, 543–44 (Minn. 1889); 1 SEYMOUR D. THOMPSON, COMMENTARIES ON THE LAW OF NEGLIGENCE IN ALL RELATIONS §§ 10–11, at 12–13 (1901)).

112. *Id.* (quoting THOMPSON, *supra* note 111, § 10, at 12) (internal quotation marks omitted).

that the violation of the statute constitutes conclusive evidence of negligence, or, in other words, negligence per se.¹¹³

At this juncture in its *Peterson* opinion, the Oregon court focused on the legal effect of violation of “a mere city ordinance” in a civil tort suit because “[i]n such cases a different question presents itself, namely, whether, under the powers granted in a particular charter to prevent and regulate certain kinds of business, the city ordinance will have the effect to give a person injured a remedy” not available “by a general statute upon the . . . subject.”¹¹⁴ According to the court, violation of a city ordinance would be “mere evidence of negligence”;¹¹⁵ the court traced this conclusion back to an Oregon precedent that construed a violation by a railroad of a city speed ordinance as a breach of contract that “could give [no] right of action to a third party” in a tort suit.¹¹⁶ Then, the *Peterson* court returned to the Thompson treatise for a final flourish:

It is to be regretted that two or three authoritative courts have fallen into the aberration of holding that the violation of a statute, or municipal ordinance, enacted for the public safety, does not establish negligence per se, but is merely . . . ‘evidence of negligence’—that is to say, competent but not conclusive evidence, to be submitted to the jury on the question of negligence or no negligence. It seems to have escaped the attention of the judges who have laid down this rule, that it has the effect of clothing common juries with the dispensing power—the power to set aside acts of the Legislature—a power exercised by the early kings of England, though its exercise was odious to our ancestors, so much so that the exercise of it disappeared with the Tudors.¹¹⁷

The reasoning of *Peterson*, however, upon closer examination, is too clever by half. First, the Oregon court assumed, without discussion, that the statutory misdemeanor criminal standard constituted an absolute liability criminal offense; yet, it is more probable that given constitutional norms of due process, a mens rea intent to violate the standard would be required in any criminal prosecution.¹¹⁸ Second, the court failed to discuss why the state legislature’s

113. *Id.* (quoting *Osborne*, 41 N.W. at 543–44) (internal quotation marks omitted).

114. *Id.* at 341.

115. *Id.*

116. *Id.* (citing *Beck v. Portland & V. Ry. Co.*, 34 P. 753, 755 (Or. 1893), *overruled by* *Morgan v. Bross*, 129 P. 118, 120 (Or. 1913)).

117. *Id.* (quoting THOMPSON, *supra* note 111, § 11, at 12–13) (internal quotation marks omitted).

118. *See* *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 515 (E.D.N.Y. 1993) (finding that there is continuing constitutional importance to the mens rea principle and that this principle must be given constitutional effect based on the Due Process Clause); *Finger v. State*, 27 P.3d 66, 86 (Nev. 2001) (“[A]n individual who lacks the mental capacity to form the requisite intent or *mens*

criminal law enactment was mandated in a civil suit sounding in negligence involving potentially high compensatory damages. Third, the *Peterson* court incorrectly assumed that the common law standard of negligence was equivalent with a criminal statutory standard. Indeed, negligence involves circumstantial assessment of ordinary prudent care in individual, highly particularized contexts whereas the criminal statute is more absolutist in tone (but, nevertheless, softened in its potential impact on hapless violators by virtue of the tradition of prosecutorial discretion to forego a criminal indictment in extenuating and relatively minor cases). Fourth, the court's attempt to distinguish the tort law effect of statutory violations, on the one hand, and violations of city ordinances, on the other hand, is weak. Finally, the court makes the inapposite analogy of the ancient practice of kingly dispensing power to acts of the legislature with the traditional power of a common law jury in a civil action for negligence to consider the applicability of a nonprescriptive criminal statute to a tort suit for damages.¹¹⁹

One final example of a judicial attempt to articulate and apply negligence per se principles during the 1880–1920 time frame is the 1913 United States Supreme Court opinion in *St. Louis, Iron Mountain & Southern Railway Co. v. McWhirter*.¹²⁰ This case was a wrongful death action by the widow and administratrix of a railroad flagman who was killed while working on a freight train.¹²¹ The plaintiff alleged negligence on the railroad's part because of its violation of a federal statute which made it unlawful for interstate railroads to require their employees to remain on the job longer than sixteen consecutive hours.¹²² In reviewing a state court judgment on a jury verdict for the plaintiff against the railroad, which a state appellate court affirmed, Chief Justice White, writing for the Court, reversed the lower court's holding that the railroad's violation of the quasi-criminal federal statute on consecutive work hours was negligence per se that justified a verdict for the plaintiff.¹²³ The Chief Justice opined for the Court:

[T]here would seem to be little doubt that [the state appellate court opinion] was intended to hold that the effect of the violation of the Hours of Service Act was to create an unconditional liability for all accidents happening during the period beyond the statutory time irrespective of proof showing a connection between the accident and the

rea of a criminal offense cannot be convicted of that offense without violating the due process provisions of the United States and Nevada Constitutions.”).

119. *Peterson*, 106 P. at 341.

120. 229 U.S. 265 (1913).

121. *Id.* at 266.

122. *Id.* at 266–67 (citing Act of Mar. 4, 1907, ch. 2939, § 2, 34 Stat. 1415, 1416 (repealed 1994)).

123. *Id.* at 279–80, 283.

working over time. In other words, the ruling was that by operation of law the carrier is an insurer of the safety of all his employés while working beyond the statutory time.¹²⁴

The Supreme Court in *McWhirter* disagreed with the construction of the federal railroad consecutive work hours statute given by the court below because the text of the statute gave no “support for the conclusion that it was the purpose of Congress in adopting it to subject carriers to the extreme liability of insurers” in a common law tort action for civil damages.¹²⁵ The Court went on to reason:

We say this because although the act carefully provides punishment for a violation of its provisions, nowhere does it intimate that there was a purpose to subject the carrier who allowed its employés to work beyond the statutory time to liability for all accidents happening during such period without reference to whether the accident was attributable to the act of working over time. And we think that where no such liability is expressed in the statute it cannot be supplied by implication. It requires no reasoning to demonstrate that the general rule is that where negligence is charged, to justify a recovery it must be shown that the alleged negligence was the proximate cause of the damage.¹²⁶

The Supreme Court’s opinion in *McWhirter* is refreshing in that it looks to the text of the relevant statute for any indication that Congress prescribed tort law remedies for litigants in civil cases who could establish that a defendant violated the statute. The Court made the important distinction—conceptually ignored by most courts that addressed the negligence per se doctrine during this early period of the doctrine’s development—that while the statute carefully prescribed quasi-criminal penalties for its breach, no language in the statute prescribed negligence as a matter of law where proof was adduced from a statutory violation. Still, the Court’s reasoning was arguably too narrow in finding the statutory predicate to require proof of proximate causation connecting the tort injury and the law’s violation. A broader reason for rejecting a negligence per se construction of a nonprescriptive federal statute would have been that the apparent purpose of Congress in passing the quasi-criminal statute was to authorize the government to seek appropriate quasi-criminal penalties against interstate railroads that kept their employees working more than sixteen straight hours, not to change the common law of negligence in civil actions by private litigants.

124. *Id.* at 279.

125. *Id.* at 280.

126. *Id.*

III. *MARTIN V. HERZOG* AND LATER NEGLIGENCE PER SE JUDICIAL FLUBSA. *Benjamin Cardozo, Martin v. Herzog, and the Nature of the Judicial Process*

Benjamin Nathan Cardozo's "judicial opinions, first as a justice of the New York Court of Appeals (1916–1932) and then as an associate justice of the United States Supreme Court (1932–1938), especially in the law of torts, still find a place in the casebooks, often as living law" or "as classical expositions of the law of his day and model exemplars of the jurist's art."¹²⁷ Indeed, "[w]hat distinguishes Cardozo from all but a handful of American judges of the past century were his extra-judicial writings on the law."¹²⁸ It is a fair comment that "[p]erhaps no other judge save Learned Hand has distilled so much judicial experience into his writings as did Cardozo."¹²⁹ Cardozo was chiefly concerned in these writings with the *judicial process*.¹³⁰

While some observers have noted the eclectic nature of Cardozo's judicial style, the most controversial insight is that he was, at heart, and as revealed in his judicial opinions, a Platonist.¹³¹ As fathomed in a 1939 law review article on Cardozo's legal philosophy, Edwin W. Patterson discerned that Cardozo sought "law as a generalization."¹³² Patterson "correctly understood that Cardozo sought Platonic 'essences,' overarching realities that exist as universals and possess an independent existence beyond our perception of them, that ideas are real, not

127. Thomas G. Barnes, *Introduction* to BENJAMIN N. CARDOZO, *CARDOZO ON THE LAW* 3, 4 (1982).

128. *Id.* at 5.

129. *Id.* Cardozo's extra-judicial writings "are disquisitions of a mature and experienced judge, and they are devoted both to understanding what a judge *does* and what he *ought to do*." *Id.* Compare those views with the modern case of United States Court of Appeals Judge Richard A. Posner who has, in both quantity and quality, reflected on the role of American judges in his judicial and extra-judicial writings. See Robert F. Blomquist, *Introduction* to THE QUOTABLE JUDGE POSNER: SELECTIONS FROM TWENTY-FIVE YEARS OF JUDICIAL OPINIONS OF RICHARD A. POSNER (Robert F. Blomquist ed., forthcoming 2010) (manuscript on file with author); RICHARD A. POSNER, *HOW JUDGES THINK* (2008).

130. See, e.g., BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 9–10 (1921), reprinted in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO: THE CHOICE OF TYCHO BRAHE* 107, 108–09 (Margaret E. Hall ed., 1947) (introducing Cardozo's discussion of the judicial process). For general background on Cardozo's judicial career, see GEORGE S. HELLMAN, *BENJAMIN N. CARDOZO: AMERICAN JUDGE* (1940); IRVING LEHMAN, *THE INFLUENCE OF JUDGE CARDOZO ON THE COMMON LAW* (1942); JOSEPH P. POLLARD, *MR. JUSTICE CARDOZO: A LIBERAL MIND IN ACTION* (Greenwood Press 1970) (1935); RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* (1990) [hereinafter POSNER]; *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO*, *supra*; Edwin W. Patterson, *Cardozo's Philosophy of Law*, 88 U. PA. L. REV. 71 (1939).

131. See Barnes, *supra* note 127, at 7.

132. Patterson, *supra* note 130, at 78–81.

merely symbolic contrivances” and that “Cardozo really did search for universals” in his jurisprudence.¹³³

Despite his universalist tendencies and Platonist approach to deciding cases as an appellate judge, Cardozo’s famous book about judging reveals a less essentialist judicial philosophy. The public reaction to Cardozo’s first book-length opus, *The Nature of the Judicial Process*,¹³⁴ published in 1921—the same year that it was delivered as a series of lectures at Yale—“was extraordinary.”¹³⁵ Thus, “[a]t one extreme [the book] had about it something of titillation: a serving [state] justice of one of the most highly reputed supreme benches in the country [the Court of Appeals of New York] was revealing all about how seven grave

133. Barnes, *supra* note 127, at 7. *But see* Stanley C. Brubaker, *The Moral Element in Cardozo's Jurisprudence*, 1 CARDOZO L. REV. 229 (1979) (arguing that Cardozo was a Platonist in the sense that the law should function to perfect society at large and individual citizens). I do not mean to label Cardozo in a pejorative sense with a Platonist label; I acknowledge that some more recent scholars offer a different picture of Cardozo. *See, e.g.*, John C.P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419, 1461–73 (1999) (arguing that Justice Cardozo employed a pragmatic form of conceptualism in his decision making); John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733, 1812–24 (1998) (articulating Justice Cardozo’s belief that one could deploy the concept of duty in negligence law in a manner that was progressive and pragmatic without being an instrumentalist). Yet, other commentators have criticized Cardozo in ways that roughly relate to the abstraction and essentialism of a Platonistic approach to the law. Judge Richard A. Posner surveys a few of these criticisms in his book. *See* POSNER, *supra* note 130, at 11–18. According to Judge Posner, “Warren Seavey . . . used to deride Cardozo’s aphoristic style.” *Id.* at 11. Grant Gilmore “terms Cardozo ‘mysterious . . . almost mystical.’” *Id.* at 12 (quoting GRANT GILMORE, *THE AGES OF AMERICAN LAW* 74 (1977)). Alfred Konefsky discerned an “elliptical, convoluted, and incomprehensible method” in Cardozo’s opinion writing. *Id.* at 15 (citing Alfred S. Konefsky, *How to Read, or at Least Not Misread, Cardozo in the Allegheny College Case*, 36 BUFF. L. REV. 645, 645 (1987)). John Noonan “accuses Cardozo of deficiency in empathy, of suppressing critical facts, and of blindness to . . . human issues.” *Id.* at 16 (citing JOHN T. NOONAN, JR., *PERSONS AND MASKS OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS* 144 (1976)). G. Edward White argued that Cardozo’s judicial opinions “‘were at times close to being disingenuous’”; that his “‘interpretation of his office . . . juxtaposed a private craving for certainty and predictability against a public acceptance of the complexities of modern life’”; and that “[h]is method in writing opinions was ‘to lay bare the competing elements in a case and then to make it appear as if their clash had been resolved by someone other than himself.’” *Id.* at 18 (quoting G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 208, 212 (3d ed. 2007)). Although Judge Posner himself has some good things to say about Cardozo’s judicial method, he criticizes Cardozo for being, in certain opinions, a “rhetorician . . . rather than [a] pragmatic policy analyst,” and he argues that while “Cardozo is committed to a pragmatic approach . . . he frequently is unable to make [it] operational so that its application can be predicted.” *Id.* at 53; *cf.* BRIAN H. BIX, *A DICTIONARY OF LEGAL THEORY* 29 (2004) (stating that while Cardozo often wrote “thoughtful and well-crafted opinions” and argued in his nonjudicial writings for “the judicial role as a creative part of a process for making law serve social needs,” nevertheless, “[i]ronically, many of Cardozo’s opinions, including some of his better-known decisions, read more like the work of a formalist than that of a legal realist, though this may only reflect Cardozo’s beliefs about how decisions should be presented”).

134. CARDOZO, *supra* note 130, at 107.

135. Barnes, *supra* note 127, at 9.

jurists handle the law.”¹³⁶ And, “[a]t the other extreme, there was a sense of triumph that a judge was finally coming clean and demonstrating that what judges did was . . . to *make law*”¹³⁷ instead of merely applying existing rules to the facts of a case.

The Nature of the Judicial Process famously was the first judicial explanation “to demonstrate in a systemic treatment how the judge was a legislator” in sometimes making law.¹³⁸ Yet, Cardozo’s book articulated limitations on judicial lawmaking as well. First, judges should not legislate, he argued, when “the law is so clear that judges have no discretion.”¹³⁹ Moreover, according to Cardozo’s parlance, to determine whether a gap in the law exists, judges should first attempt to find apt analogies, appropriate historical teachings, and community traditions.¹⁴⁰ “If one (or more) of these methods when applied to the case indicates that there is a ‘gap’ requiring judicial legislation, then ‘sociology’ will be the approach taken to fill it.”¹⁴¹ For Cardozo, this “method of sociology” to fill gaps in the law by judicial legislation should entail “justice, morals and social welfare, the *mores* of the day” as guideposts.¹⁴²

Despite Cardozo’s ambition to rationalize and essentialize the process of judging, a close reading of *The Nature of the Judicial Process* shows that judicial thinking entails open-textured and largely subjective considerations. Consider the following passages in his book. First, Cardozo acknowledges:

All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in [William] James’ phrase of “the total push and pressure of the cosmos,” which, when reasons are nicely balanced, must determine where choice shall fall.¹⁴³

Second, Cardozo admits that his judicial quest really boils down to “introspective searchings of the spirit”:

In this mental background every problem finds its setting. We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own. To that test they are all brought—a

136. *Id.*

137. *Id.* at 10.

138. *Id.*

139. CARDOZO, *supra* note 130, at 160.

140. *Id.* at 116–117.

141. Barnes, *supra* note 127, at 12.

142. CARDOZO, *supra* note 130, at 117.

143. *Id.* at 109–10.

form of pleading or an act of parliament, the wrongs of paupers or the rights of princes, a village ordinance or a nation's charter.¹⁴⁴

Third, Cardozo points out the deceptive certainty of judicial reliance on statutes as sources of law in adjudication. As the following excerpt demonstrates, the meaning of a statute is fraught with multiple questions of interpretation that are hard to answer when judging:

Our first inquiry should . . . be: Where does the judge find the law which he embodies in his judgment? There are times when the source is obvious. The rule that fits the case may be supplied by the constitution or by statute. If that is so, the judge looks no farther. The correspondence ascertained, his duty is to obey. The constitution overrides a statute, but a statute, if consistent with the constitution, overrides the law of judges. In this sense, judge-made law is secondary and subordinate to the law that is made by legislators. It is true that codes and statutes do not render the judge superfluous, nor his work perfunctory and mechanical. There are gaps to be filled. There are doubts and ambiguities to be cleared. There are hardships and wrongs to be mitigated if not avoided. Interpretation is often spoken of as if it were nothing but the search and the discovery of a meaning which, however obscure and latent, had none the less a real and ascertainable pre-existence in the legislator's mind. The process is, indeed, that at times, but it is often something more. The ascertainment of intention may be the least of a judge's troubles in ascribing meaning to a statute. "The fact is," says Gray . . . "that the difficulties of so-called interpretation arise when the Legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present."¹⁴⁵

Fourth, speaking of the flux in the law, Cardozo opined: "For every tendency, one seems to see a counter-tendency; for every rule its antimony.

144. *Id.* at 110. This view is comparable to a later observation by Cardozo in his book, noting that after a judge exhausts "logic," "analogies," and "philosophies," "[h]istory or custom or social utility or some compelling sentiment of justice or sometimes perhaps a semi-intuitive apprehension of the pervading spirit of our law, must come to the rescue of the anxious judge, and tell him where to go." *Id.* at 122 (emphasis added).

145. *Id.* at 110–11 (quoting JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 173 (Macmillan Co. 1921) (1909)).

Nothing is stable. Nothing absolute. All is fluid and changeable. There is an endless ‘becoming.’ We are back with Heraclitus.”¹⁴⁶

Fifth, Cardozo realized that symmetry and uniformity in a judge’s interpretation of law “may be bought at too high a price.”¹⁴⁷ He explained this concern as follows:

Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare. These may enjoin upon the judge the duty of drawing the line at another angle, of staking the path along new courses, of marking a new point of departure from which others who come after him will set out upon their journey.¹⁴⁸

And yet, “[i]f you ask [Cardozo] how he is to know when one interest outweighs another,” he responds with utter subjectivity: “I can only answer that [a judge] must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself.”¹⁴⁹ Moreover, a judge, according to Cardozo, “legislates only between gaps. He fills the open spaces in the law. How far he may go without traveling beyond the walls of the interstices cannot be staked out for him upon a chart.”¹⁵⁰ Rather, a judge “must learn it for himself as he gains the sense of fitness and proportion that comes with years of habitude in the practice of an art.”¹⁵¹ So, “[e]ven within the gaps” of the evolving law in a particular field, “*restrictions not easy to define, but felt, however impalpable they may be . . . hedge and circumscribe [a judge’s] action.*”¹⁵² Therefore, “[t]he law which is the resulting product” of this judicial search is, in Cardozo’s words, “not found, but made. The process, being legislative, demands the legislator’s wisdom.”¹⁵³ Perhaps a useful coda in Cardozo’s discussion of the judge as a cabined legislator is his admiring quotation of the first article of the Swiss Civil Code of 1907:

The statute . . . governs all matters within the letter or the spirit of any of its mandates. In default of an applicable statute, the judge is to

146. *Id.* at 115–16.

147. *Id.* at 154.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* (emphasis added).

153. *Id.* at 155. Cardozo hedges this broad, subjective view of a judge’s law-finding by claiming that “[o]bscurity of statute or of precedent or of customs or of morals” are “occasional and relatively rare” and should not “blind [judges’] eyes to the innumerable instances where there is neither obscurity nor collision nor opportunity for diverse judgment.” *Id.* at 159–60.

pronounce judgment according to the customary law, and in default of a custom according to the rules which he would establish if he were to assume the part of a legislator. He is to draw his inspiration, however, from the solutions consecrated by the doctrine of the learned and the jurisprudence of the courts¹⁵⁴

Benjamin Cardozo was a judge on New York's top appellate court for a mere seven years when he published *The Nature of the Judicial Process* in 1921.¹⁵⁵ Just the year before, in 1920, Cardozo authored the majority opinion for the Court of Appeals of New York in *Martin v. Herzog*.¹⁵⁶ Nowhere in his book, however, does he mention the *Martin* opinion.¹⁵⁷ Yet, there was a profound disconnect between Cardozo's easygoing subjectivity articulated in his book and his rigid tendencies in *Martin*, where he famously asserted the universal bromide that "unexcused omission of the statutory signals is more than some evidence of negligence. It is negligence in itself."¹⁵⁸ Cardozo acknowledged the rigidity of the negligence per se approach¹⁵⁹ and went on to recognize "relaxation" of the doctrine "where the one who complains of the omission is not a member of the class for whose protection the safeguard is designed"¹⁶⁰ and "where the safeguard is prescribed by local ordinance, and not by statute."¹⁶¹ But Cardozo would brook no flexibility in the case at bar, which involved a collision between an automobile and a buggy where the buggy failed to travel with lights at night in violation of a state highway statute.¹⁶² Cardozo reasoned:

Lights are intended for the guidance and protection of other travelers on the highway. By the very terms of the hypothesis, to omit, willfully or heedlessly, the safeguards prescribed by law for the benefit of another . . . is to fall short of the standard of diligence to which those who live in organized society are under a duty to conform.¹⁶³

In Cardozo's view, the court should not have allowed the jurors to determine under all the facts and circumstances leading up to the roadway accident whether

154. *Id.* at 164 (quoting Schweizerisches Zivilgesetzbuch [ZGB] [Civil Code] Dec. 10, 1907, art. 1 (Switz.), translated in THE SWISS CIVIL CODE OF DECEMBER 10, 1907 (Robert P. Shick trans., Boston Book Company 1915)) (internal quotation marks omitted). Cardozo's translation appears to be unique but does not differ in substance from the Shick translation.

155. See ANDREW L. KAUFMAN, CARDOZO 129, 199 (1998).

156. 126 N.E. 814 (N.Y. 1920).

157. See CARDOZO, *supra* note 130.

158. *Martin*, 126 N.E. at 815.

159. See *id.*

160. *Id.*

161. *Id.*

162. See *id.* at 814–16.

163. *Id.* at 815 (internal citations omitted).

the buggy driver was at fault in failing to having lights on his buggy.¹⁶⁴ He reasoned as follows:

In the case at hand, we have an instance of the admitted violation of a statute intended for the protection of travelers on the highway Yet the jurors were instructed in effect that they were at liberty in their discretion to treat the omission of lights either as innocent or as culpable. They were allowed to “consider the default as lightly or gravely” as they would They might as well have been told that they could use a like discretion in holding a master at fault for the omission of a safety appliance prescribed by positive law for the protection of a workman. Jurors have no dispensing power, by which they may relax the duty that one traveler on the highway owes under the statute to another. It is error to tell them that they have. The omission of these lights was a wrong, and, being wholly unexcused, was also a negligent wrong. No license should have been conceded to the triers of the facts to find it anything else.¹⁶⁵

In closing his opinion in *Martin*, Cardozo noted that “causal connection between the negligence and the injury” is required in negligence cases, but that given “evidence of a collision occurring more than an hour after sundown between a car and an unseen buggy, proceeding without lights, is evidence from which a causal connection may be inferred between the collision and the lack of signals.”¹⁶⁶

For a number of reasons, Cardozo’s negligence per se reasoning in *Martin v. Herzog* was deficient and against his theoretical musings on the judicial process in his eponymous book. In the first place there was no “gap” in the law for the Court of Appeals of New York to fill. A common law jury was doing its traditional function of applying the appropriate standard of care to the contextual facts in the case. The court should have allowed the jury to weigh the fact that the buggy driver was driving without lights (in violation of a quasi-criminal traffic statute that made no reference to its binding applicability in a civil suit for damages) with the fact of the automobile driver’s lack of care “in swerving from the center of the road”¹⁶⁷ into the lane of the oncoming buggy, which happened also to violate a general state quasi-criminal highway safety statute.¹⁶⁸ Cardozo’s opinion, however, aggressively usurped the jury’s sifting and balancing of the evidence adduced at trial and improperly denigrated the automobile driver’s

164. *See id.*

165. *Id.* (internal citations omitted).

166. *Id.* at 816.

167. *Id.*

168. *Id.* at 814 (citing N.Y. HIGH. LAW §§ 286(3), 332 (McKinney 1917)).

violation of the statutory command to stay right of the road center. It was illogical, in this regard, for Cardozo to contend that the automobile driver “may have been negligent in swerving from the center of the road; but he did not run into the buggy purposely, nor was he driving while intoxicated, nor was he going at such a reckless speed that warning would of necessity have been futile.”¹⁶⁹ The aforementioned contingencies were immaterial to the automobile driver’s lack of due care in failing to stay in his own lane—purposely running into the buggy would have been an intentional tort; not purposely running into the oncoming buggy was of no legal consequence in a tort suit sounding in negligence; not being intoxicated was no excuse for forgiving swerving into the lane of oncoming traffic; and not speeding was no excuse for going into the other lane.¹⁷⁰

In the second place, Cardozo’s opinion in *Martin* abrogated, in the name of negligence per se, the jury’s implicit finding that the buggy driver’s violation of the general highway statute prescribing a running light was not the proximate cause of the automobile colliding with the buggy.¹⁷¹ Judge Hogan cogently explained in his dissent:

I cannot concur that we may infer that the absence of a light on the front of the [buggy] was not only the cause, but the proximate cause, of the accident. Upon the evidence adduced upon the trial and the credence attached to the same [by the jury], the fact has been determined that the accident would have been avoided, had the defendant been upon his side of the road, or attentive to where he was driving along a public highway, or had he been driving slowly, used his sense of sight, and observed plaintiff and her intestate as he approached them; they being visible at the time The jury found that the accident happened as claimed by the plaintiff and her witnesses, and we cannot surmise or infer that the accident would not have happened, had a light been located on the [buggy].¹⁷²

In the third place, Cardozo’s opinion in *Martin* fails to explicitly interpret the general highway statute requiring running lights on vehicles; instead, he simply assumes by wooden and unpragmatic reasoning that violation of *any* statute “is more than some evidence of negligence,” but “*is* negligence in

169. *Id.* at 816.

170. As the dissenting opinion of Judge Hogan pointed out, moreover, the majority opinion in *Martin* discounted and overlooked evidence that the automobile driver who swerved into the buggy’s lane was speeding, that the evening of the accident was not dark, and that the road was lit up by moonlight, electric lights along the highway, and by the defendant’s automobile. *Id.* at 817–18 (Hogan, J., dissenting).

171. *See id.* at 816 (majority opinion).

172. *Id.* at 820 (Hogan, J., dissenting).

itself.”¹⁷³ “Substituting form and phrases for substance,” in the dissent’s turn of phrase,¹⁷⁴ undermines Cardozo’s quest, as stated in *The Nature of the Judicial Process*, for serious and thoughtful statutory construction and interpretation by judges.¹⁷⁵

Fourth, Cardozo’s negligence per se analysis in *Martin* flies in the face of his call in *The Nature of the Judicial Process* for judicial balancing of “uniformity,” “symmetry,” and “certainty” in law with “the social interest served by equity and fairness or other elements of social welfare.”¹⁷⁶

B. 1921–2000

During the eighty-year period that followed Cardozo’s opinion in *Martin v. Herzog*, state and federal court opinions mentioned negligence per se principles in over 10,000 opinions.¹⁷⁷ Many of these judicial opinions mechanically intoned black letter law on the nature and relevance of nonprescriptive statutory provisions in civil actions for negligence. My aim in discussing these opinions is to select a few prominent examples of the problematic corpus of negligence per se analysis while pointing out the rare opinions that rise above the muddle.

In the 1925 case of *Day v. Pauly*,¹⁷⁸ the Supreme Court of Wisconsin applied negligence per se principles to hold an injured motorist contributorily negligent for violating a statute by “cut[ting] a corner” at an intersection.¹⁷⁹ As a result, under the prevailing all-or-nothing liability regime then in place, the court denied the plaintiff recovery for injuries despite the negligence by the defendant motorist.¹⁸⁰

In the 1939 case of *Fairchild v. Dean*,¹⁸¹ the Supreme Court of Washington rigidly interpreted a criminal statute, which penalized motorists for passing

173. *Id.* at 815 (majority opinion).

174. *Id.* at 820 (Hogan, J., dissenting). *But cf.* WHITE, *supra* note 133, at 234–35 (noting that Judge Learned Hand’s theory of statutory interpretation focused on a judge “determining the primary purposes of a statute” but “required judges to maintain the delicate balance between creativity and restraint that he associated with wisdom in the judiciary”). Cardozo’s approach in *Martin* was more akin to the statutory interpretation philosophy of California Supreme Court Justice Roger Traynor involving a “symbiotic relationship” between legislatures and courts. *See id.* at 255.

175. *See supra* note 145 and accompanying text.

176. CARDOZO, *supra* note 130, at 154.

177. Based on a Westlaw search in the “all cases” database with a query “negligence per se” between February 20, 1920 and February 20, 2000 (search conducted on Nov. 2, 2009).

178. 202 N.W. 363 (Wis. 1925).

179. *Id.* at 364–65.

180. *See id.* at 365–66.

181. 86 P.2d 271 (Wash. 1939). *But see* *Tedla v. Ellman*, 19 N.E.2d 987 (N.Y. 1939) (illustrating judicial interpretation to avoid a finding of an unexcused statutory violation). In *Tedla*, the plaintiff was walking with his back to oncoming traffic in violation of a statute mandating pedestrians to walk facing oncoming traffic. *Id.* at 988 (citing N.Y. VEH. & TRAF. LAW § 85(6) (Baldwin 1938)). The court rejected the defendant’s contention that the plaintiff should be barred

without a clear view of more than 200 yards, to reverse the trial court's finding that the defendant motorist was not at fault.¹⁸² The motorist had passed a truck on a strange highway on a foggy morning and collided with a car that could not be seen coming around a curve.¹⁸³

In the 1948 case of *Garbacz v. Grand Trunk Western Railway Co.*,¹⁸⁴ the Supreme Court of Michigan mechanically utilized negligence per se to foreclose a tractor-trailer driver from having a jury resolve his negligence claim against a railroad.¹⁸⁵ The case involved a nighttime railroad crossing accident, which the driver claimed was caused by "the blinker warning signals at the crossing . . . not working" and "no bells or whistles sound[ing]," lulling him to believe that he could safely cross the tracks at a reduced rate of speed.¹⁸⁶ The case appeared to involve substantial negligence by the railroad in maintaining deficient crossing signals and the train engineer's failure to sound a whistle or bell.¹⁸⁷ However, the court deemed the truck driver's objectively reasonable decision to slow down, rather than stop, at the crossing to be negligence per se in light of a state statute requiring heavy trucks to "'com[e] to a full stop within 50 feet but not less than 10 feet from . . . railroad tracks'"¹⁸⁸ and the violation of his state carrier certificate, which also required the driver to come to a complete stop at railroad crossings.¹⁸⁹ Finding negligence per se in the driver's violations of the statutes, the Supreme Court of Michigan upheld the lower court's directed verdict for the railroad because of the contributory negligence rule then in effect.¹⁹⁰

In 1949, the United States Supreme Court missed an opportunity to clarify negligence per se principles in Federal Employment Liability Act cases involving railroad workers in *O'Donnell v. Elgin, Joliet & Eastern Railway Co.*¹⁹¹ Justice Jackson's majority opinion, however, candidly unearthed numerous doctrinal deficiencies concerning negligence per se.¹⁹² First, Jackson observed that an overarching problem could be "traceable to the diversity of judicial opinion concerning the consequences attributed in negligence actions to the violation of a statute."¹⁹³ Second, he noted that "[b]reach of certain statutes

from recovery because he was contributorily negligent per se. *Id.* at 991. The court reached its conclusion, in part, by concluding that it would have been more dangerous for the plaintiff to have complied with the statute than to violate it and that the statute at issue was a mere "rule of the road." *Id.* at 991.

182. *Fairchild*, 86 P.2d at 272–73.

183. *Id.* at 271–72.

184. 34 N.W.2d 531 (Mich. 1948).

185. *Id.* at 533.

186. *Id.* at 532.

187. *See id.*

188. *Id.* (quoting Act No. 191, 1941 Mich. Pub. Acts 287).

189. *Id.* at 532–33.

190. *Id.* at 533 (citing *Benaway v. Pere Marquette Ry. Co.*, 295 N.W. 536, 538 (Mich. 1941)).

191. 338 U.S. 384 (1949).

192. *See id.* at 389–93.

193. *Id.* at 389.

in various jurisdictions will be regarded as some evidence of negligence, to be weighed by the jury along with the facts.”¹⁹⁴ Third, Jackson asserted that “[a]t other times or places, or under other statutes, a violation may be ‘prima facie’ or ‘presumptive’ evidence of negligence which [the opposing party] must meet or overcome.”¹⁹⁵ Fourth, confusion was exacerbated because “[c]ourts sometimes talk of [statutory violations] in terms of *res ipsa loquitur* or treat violations as negligence *per se*.”¹⁹⁶ Fifth, as Jackson went on to point out, “[i]t is not uncommon that within the same jurisdiction the rule is different as to different statutes.”¹⁹⁷ Sixth, Jackson neatly summarized the chaotic state of American negligence *per se* principles by contending that “usually, unless the statute sets up a special cause of action for its breach, *a violation becomes an ingredient, of greater or lesser weight, in determining the ultimate question of negligence.*”¹⁹⁸ Yet, in spite of Justice Jackson’s yeoman job in identifying the aforementioned inconsistencies in negligence *per se* doctrine, the Court’s holding in the case¹⁹⁹ instantiated a seventh doctrinal deficiency of negligence *per se* law. That is, in some cases (incompletely theorized as “absolute” liability) the violation of a statute “is not excused by any showing of care however assiduous.”²⁰⁰ This principle is confusingly akin to negligence *per se* without excuses.

The diverging opinions of the Supreme Court of Illinois in the 1954 case, *Ney v. Yellow Cab Co.*,²⁰¹ illustrate the vague and indeterminate nature of the classic two-part inquiry used by judges to decide the propriety of adopting a quasi-criminal statute as the standard of care in a negligence case. Under this inquiry, “[t]he judge must examine the statute in order to determine . . . whether the statute was designed to protect against the type of harm suffered by the plaintiff, and whether the class of persons designed to be protected by the statute includes the plaintiff.”²⁰² As noted by one recent treatise on torts, “[t]his [two-step] determination is wholly for the judge to make and often is no easy task, investing the judge with *great discretion.*”²⁰³ Indeed, in *Ney*, a state statute

194. *Id.* at 390 (citing *Union Pac. Ry. Co. v. McDonald*, 152 U.S. 262, 283 (1894); *Hayes v. Mich. Cent. R. Co.*, 111 U.S. 228, 240 (1884)).

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* (emphasis added).

199. “[T]o equip a car with a coupler which broke . . . was a violation of the [Safety Appliance] Act, which rendered defendant liable . . . , and . . . neither evidence of negligence nor of diligence of care was to be considered on the question of . . . liability.” *Id.* at 394.

200. *Id.* at 390–91 (quoting *Brady v. Terminal R.R. Ass’n*, 303 U.S. 10, 15 (1938)).

201. 117 N.E.2d 74 (Ill. 1954).

202. JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS § 6.02, at 95 (2d ed. 2000) [hereinafter UNDERSTANDING TORTS SECOND EDITION] (citing RESTATEMENT (SECOND) OF TORTS § 286 (1965)).

203. *Id.* (emphasis added). Justice Traynor once noted that “[t]he decision as to what the civil standard should be still rests with the court, and the standard formulated by a legislative body in a

rendered unlawful leaving one's keys in the ignition of an unattended vehicle.²⁰⁴ The *Ney* majority found that the statute provided a negligence per se standard when a plaintiff's automobile was hit by a taxi after it had been stolen by a third party.²⁰⁵ Contrary to the statute, the taxi had been left unattended with the motor running and the key in the ignition.²⁰⁶ The *Ney* majority looked to assorted provisions of the Illinois statute to conclude that the state legislature, through the key-removal command, intended to protect the public from harm to their property and person.²⁰⁷ According to the opinion for the court, there was no indication that the legislature had intended to make a legal distinction between harm triggered by a criminal act, like stealing a car, and other forms of harm.²⁰⁸ The dissent in *Ney* interpreted the key-in-the-ignition statute in a way that was diametrically opposed to the majority's interpretation, concluding that there was no direct indication that the legislature had contemplated harm caused by a car thief in contradistinction to injury occasioned by negligent or inadvertent operation of the vehicle.²⁰⁹ Therefore, the dissent argued it was inappropriate for the judiciary to infer that the statute was intended to prevent the accident which took place.²¹⁰

Wenninger v. United States,²¹¹ a 1964 wrongful death case involving the violation by air traffic controllers of a federal administrative rule, provides another prominent example of the exercise of improvident judicial discretion in interpreting the ambiguous purpose of a nonprescriptive statutory or administrative rule. The plaintiff's decedent was flying his private airplane when turbulence, caused by a military aircraft operating in a zone where military planes were prohibited, caused him to crash.²¹² The federal district court held that an air traffic control regulation that barred military aircraft from flying in a civilian area did not result in negligence per se because the apparent purpose of the regulation was not to protect civilian flyers but only to increase the efficiency of Air Force flights.²¹³ However, the purpose of a federal air traffic control system that seeks to separate relatively high-powered and freewheeling military aircraft from less powerful and mobile private aircraft would seem to be the protection of both civilian and military air travelers.

police regulation or criminal statute becomes the standard to determine civil liability only because the court accepts it." *Clinkscales v. Carver*, 136 P.2d 777, 778 (Cal. 1943).

204. 117 N.E.2d at 76.

205. *Id.* at 76, 78.

206. *Id.* at 76.

207. *Id.* at 77–78.

208. *Id.*

209. *Id.* at 81 (Hershey, J., dissenting).

210. *Id.*

211. 234 F. Supp. 499 (D. Del. 1964), *aff'd*, 352 F.2d 523 (3d Cir. 1965) (per curiam).

212. *Id.* at 508.

213. *Id.* at 511.

In *Hanrahan v. McClatchy*,²¹⁴ a federal trial court appears to have confused the distinction between the purposes of the negligence per se doctrine—to protect a class of people and to prevent a particular type of injury—and the proximate cause nexus requirement between a statutory violation and a plaintiff’s injury.²¹⁵ The plaintiff, “a passenger in an automobile which failed to yield the right of way at a stop intersection,” sought tort damages against the driver of the other automobile involved in the collision, which was in the wrong lane on a two-way street.²¹⁶ The plaintiff argued that because the driver of the other car had violated a provision of the Pennsylvania Vehicle Code, the court should hold that driver to be negligent per se.²¹⁷ The court rejected the plaintiff’s negligence per se argument.²¹⁸ According to the reasoning of the court, the purpose and interests that the Pennsylvania legislature intended to protect by requiring motor vehicles to stay on the right side of a two-way street were not applicable to an intersection accident.²¹⁹ Moreover, according to the court, the violation of the right lane statute by the other motorist was not the immediate cause of the intersection accident.²²⁰ Accordingly, the jury was required to weigh the intent of the statute and proceed upon the evidence to be presented at trial to make a determination of negligence.²²¹

Decisions like *Hanrahan* make a jury’s job more difficult than it already is in a common law negligence suit. It might be proper for a jury to consider the statutory violation as evidence of negligence, which is weighed in the balance of both drivers’ ostensible violations of motor vehicle rules—one prohibiting driving on the wrong side of the road, the other prohibiting running stop signs—but it is manifestly not the province of a jury to weigh the intent of a statute.²²² We should nevertheless be sympathetic with the court in trying valiantly to sort out the ambiguous muddle of negligence per se principles in hard cases.²²³

214. 384 F. Supp. 16 (E.D. Pa. 1974), *aff’d*, 506 F.2d 1051 (3d Cir. 1974).

215. *See id.* at 18–21.

216. *Id.* at 17.

217. *Id.* at 17–18.

218. *Id.* at 21.

219. *Id.* at 19.

220. *Id.* at 21.

221. *See id.*

222. JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS § 6.02, at 85 (3d ed. 2007) [hereinafter UNDERSTANDING TORTS THIRD EDITION] (noting that a decision about the intent of a statute “is wholly for the judge to make”).

223. But compare *Hanrahan* to the simpler case of *Ward v. McDan Dav Leasing Corp.*, 340 F. Supp. 86 (W.D. Pa. 1972), *aff’d*, 485 F.2d 683 (3d Cir. 1973), where the negligence per se analysis was indubitably correct. In that wrongful death action, a steel shipper and manufacturer violated a state statute by allowing a piece of steel to fall off a truck onto a public highway. *Id.* at 89, 96. The presence of the steel beam caused an accident that resulted in the decedent’s death. *Id.* at 88. The court gave judgment to the plaintiff, reasoning that the statute was designed to protect other users of the highway from accidents occasioned by dislodged foreign objects in the road. *Id.* at 96.

The conflict between judicial opinions in the 1980 Louisiana case, *McCloud v. Parish of Jefferson*,²²⁴ is emblematic of a further source of negligence per se doctrinal confusion—the public duty exception.²²⁵ The plaintiffs in *McCloud* sued a parish “for damages to themselves and their property” resulting from the local government’s failure to maintain an effective drainage system as mandated by a Louisiana statute.²²⁶ The appellate court majority reversed the trial court’s dismissal of the suit and remanded the case for further trial court proceedings.²²⁷ The dissent argued that the lower court’s decision should have been affirmed because the plaintiffs had not alleged that the parish had breached a duty that it owed to them.²²⁸ The dissent contended that legislative enactments involved in the case at bar, which created departments of government and granted them essential powers, are not intended “to protect the interests of any [one] individual except as they secure to all members of the community the enjoyment of rights and privileges to which they are entitled only as members of the public.”²²⁹ Accordingly, as pressed by the dissent, governmental “[n]eglect in the performance of such [public statutory] requirements [should not] create[] . . . civil liability to individuals.”²³⁰

The dissent in *McCloud* was motivated by analogous tort policy considerations in nonstatutory common law negligence actions against government predicated on a theory of failure to protect a private citizen.²³¹ And yet, if the Louisiana legislature commanded the Parish of Jefferson to maintain properly a public drainage system, it would appear that the dissent in *McCloud* unduly minimized the plausible implicit legislative intent to protect parish residents from flooding caused by a deficient public drainage system.

The 1990 California case of *Selger v. Steven Brothers, Inc.*²³² involved another confusing nuance of negligence per se—statutory or ordinance requirements of nearby property owners to maintain a sidewalk in a condition that will not endanger pedestrians.²³³ *Selger* involved a city ordinance that

224. 383 So. 2d 477 (La. Ct. App. 1980).

225. See RESTATEMENT (SECOND) OF TORTS § 288 (1965) (“The court will not adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively . . . to impose upon the actor the performance of a service which the state or any subdivision of it undertakes to give the public.”).

226. *McCloud*, 383 So. 2d at 478.

227. *Id.* at 479.

228. *Id.* at 484 (Chehardy, J., dissenting).

229. *Id.* (quoting *Steitz v. City of Beacon*, 64 N.E.2d 704, 706 (N.Y. 1945)) (internal quotation marks omitted).

230. *Id.* (quoting *Steitz*, 64 N.E.2d at 706) (internal quotation marks omitted).

231. See, e.g., *Riss v. City of New York*, 240 N.E.2d 860, 860–61 (N.Y. 1968) (holding that with regard to police and fire protection, the government owes a duty to the public at large, not to any particular individual, and therefore, the city was not liable in common law negligence for failing to protect a young woman from a jilted suitor who ultimately carried out his threats).

232. 272 Cal. Rptr. 544 (Ct. App. 1990).

233. *Id.* at 545–46.

provided that “[n]o person shall fail, refuse or neglect to keep the sidewalk in front of his house, place of business or premises in a clean and wholesome condition.”²³⁴ The plaintiff slipped on dog excrement on the sidewalk outside of a nursery and hardware store.²³⁵ She had previously undergone a hip implant, and as a result of her fall, she required extensive additional surgery.²³⁶ The trial judge instructed that the defendant store should be found negligent per se if the jury found that the defendant violated the ordinance.²³⁷ Accordingly, the trial court entered judgment on a jury verdict of over \$400,000 for the plaintiff.²³⁸ On appeal, the California intermediate appellate court reversed, holding that the ordinance violation did not give rise to negligence per se:

[B]ecause the municipality has the primary responsibility for maintaining the public sidewalks, statutes and ordinances which require the abutting landowner to maintain the sidewalk in a condition that will not endanger pedestrians have . . . been interpreted *not* to create a standard of care toward pedestrians but only a liability of the owner to the municipality.²³⁹

The *Selger* appellate court rendered a fair and appropriate decision. But a better rationale would have been one premised on fair proportionality—between the defendant’s conduct and the plaintiff’s injuries—coupled with traditionally posited lower status of a municipal ordinance violation as compared to a violation of a state statute.²⁴⁰ The trial court in *Selger* deserves sympathetic understanding, however, because a mechanical application of the two-part purpose, which protects a class of persons from a particular type of harm, appears, at first blush, to justify an instruction of negligence per se for violating the ordinance.

A 1999 Alaska case, *Cable v. Shefchik*,²⁴¹ demonstrates recurrent judicial confusion about negligence per se. A worker, who “severely injured his right hand when it was caught in the rotating . . . blade of a concrete pump,” sued the pump owner for negligence.²⁴² The trial court entered judgment on a jury verdict for the defendant, finding that the defendant’s negligence “was not the legal cause of” the plaintiff’s injuries.²⁴³ The Supreme Court of Alaska, however,

234. *Id.* at 546 (quoting L.A., CAL., MUNICIPAL CODE § 41.46 (1964)).

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at 547.

240. *See* VINCENT R. JOHNSON, MASTERING TORTS 98 (3d ed. 2005).

241. 985 P.2d 474 (Alaska 1999).

242. *Id.* at 475.

243. *Id.*

reversed and remanded the action, holding that the trial court judge had abused his discretion when he declined to instruct the jury on negligence per se.²⁴⁴ As reasoned by the supreme court, the Alaska General Safety Code provisions for industrial machinery “were not ‘so obscure, oblique, or irrational’ that, as a matter of law, they could not provide an adequate standard of care.”²⁴⁵ The court ordered that “[t]he negligence per se instruction at the new trial should include” language that the machine owner would be “negligent only if he committed an *unexcused* violation of” the Alaska General Safety Code.²⁴⁶ One wonders, however, how a jury would be able to fathom better clarity from the safety code provisions than the trial court judge.

The 2000 Wisconsin case, *Totsky v. Riteway Bus Service, Inc.*,²⁴⁷ illustrates judicial disarray over “excused violations” of statutes used as negligence per se standards. A motorist, whose car was struck by a school bus that skidded on ice through a stop sign, sued the bus driver, among others, claiming negligence per se for violating the stop sign statute.²⁴⁸ After the jury found neither motorist negligent, the trial court granted a directed verdict for the plaintiff because of the bus driver’s negligence per se in violating the stop-sign statute and the lack of application of the emergency doctrine.²⁴⁹ The intermediate appellate court reversed, and the Supreme Court of Wisconsin affirmed the appellate court’s decision.²⁵⁰ According to the majority opinion of the state supreme court, the emergency doctrine applied to excuse the bus driver’s violation of the stop-sign statute.²⁵¹ The dissent, however, argued that the plain language of the stop-sign statute did not permit application of the emergency doctrine.²⁵² Indeed, it seems to warp the concept of an excused emergency to allow a motorist to avoid civil liability for violating a statute simply because the road at the intersection was icy.

A 2000 Washington case, *Templeton v. Daffern (Estate of Templeton)*,²⁵³ showcases unclear negligence per se reasoning by the appellate court. The estate of a minor sued the social hosts of a party for negligence.²⁵⁴ The minor was involved in a fatal car crash after the party, at which he had consumed alcohol obtained elsewhere.²⁵⁵ The intermediate appellate court affirmed the trial court’s

244. *Id.* at 479.

245. *Id.* at 478 (quoting *Osborne v. Russell*, 669 P.2d 550, 554 (Alaska 1983)).

246. *Id.* at 479.

247. 607 N.W.2d 637 (Wis. 2000).

248. *Id.* at 640–41.

249. *Id.* at 642.

250. *Id.* at 642, 652.

251. *Id.* at 649.

252. *Id.* at 657 (Bradley, J., dissenting) (citing RESTATEMENT (SECOND) OF TORTS § 288A (1965)).

253. 990 P.2d 968 (Wash. Ct. App. 2000).

254. *Id.* at 970.

255. *Id.*

granting of the social hosts' motion for summary judgment.²⁵⁶ In spite of the defendants' breach of a state statutory duty not to allow a minor to consume alcohol on their premises, the court reasoned that a common law duty in Washington did not exist to prevent a minor from consuming alcohol furnished by someone other than the social hosts.²⁵⁷ Obviously, the appellate court was concerned about the limited duty that most courts have adopted for social host liability for hosts who serve guests alcohol on their premises.²⁵⁸ Yet, the fundamental rationale of negligence per se is that if a specific statutory standard of care exists, it should be judicially substituted for the general common law negligence standard.²⁵⁹

C. 2001–2006

We now turn to recent negligence per se cases adjudicated from 2001 to 2006. The commentary that follows discusses several judicial opinions. Alas, many American courts continue to struggle with negligence per se principles and to entangle the resolution of nonprescriptive statutory problems with confusing and unsatisfactory analysis.

1. 2001

The Supreme Court of Nebraska, in *Claypool v. Hibberd*,²⁶⁰ affirmed a trial court's grant of summary judgment for the defendants, Furnas County, Nebraska, and two sheriff's deputies.²⁶¹ A mother sued the defendants for the wrongful death of her son, whom the defendants had arrested and released the night before he committed suicide, alleging that the county officials' failure to notify the son's parents violated the parental notification provision of a state temporary-custody statute.²⁶² As a result, the mother did not know that her son, who was in a depressed, post-arrest state of mind, was alone in her house.²⁶³ The supreme court held that the state statute did not create a duty for the defendants to notify the parents of their son's arrest.²⁶⁴ A more convincing rationale, however, would have focused on a lack of proximate causation.

256. *Id.* at 975–76.

257. *Id.* at 973–75.

258. See JOHNSON, *supra* note 240, at 188.

259. UNDERSTANDING TORTS THIRD EDITION, *supra* note 222, § 6.01, at 84.

260. 626 N.W.2d 539 (Neb. 2001).

261. *Id.* at 541–42, 549.

262. *Id.* at 541–44.

263. See *id.* at 542–43.

264. *Id.* at 546.

The Supreme Court of Nevada issued divergent opinions in *Vega v. Eastern Courtyard Associates*.²⁶⁵ After a patron of a medical facility suffered personal injuries when she slipped and fell on a ramp leading to the main entrance of a building, she sued the facility for negligence.²⁶⁶ The trial court entered judgment on a jury verdict for the defendant after refusing to issue jury instructions that the fact that the ramp's slope exceeded the county's Uniform Building Code (UBC) was negligence per se.²⁶⁷ A majority of the supreme court reversed and remanded the action, holding that a violation of a building code provision adopted by county ordinance constituted negligence per se if the plaintiff belonged to the class of persons the ordinance was intended to protect and the injury was the sort the ordinance was intended to protect against.²⁶⁸ The dissent, however, asserted that the trial court had properly instructed the jury that it could consider the UPC violation as evidence of negligence.²⁶⁹

The disagreement by the dissent, of course, focused on the view that "accord[s] negligence per se . . . treatment to violations of legislative enactments passed by a prestigious body, such as a state legislature, but treat[s] violations of laws or regulations emanating from lower tribunals, such as a city council or administrative agency [or county], as simply evidence of negligence."²⁷⁰ This aspect of negligence per se jurisprudence, however, makes little sense when one considers that city councils, counties, and administrative agencies enjoy mixtures of prestigious, constitutionally-specified, and statutorily-delegated governmental powers to promulgate various important safety standards.²⁷¹

2. 2002

In *Dalmer v. State*,²⁷² the Supreme Court of Vermont affirmed the trial court's grant of a judgment as a matter of law for a state social services center and a state employee.²⁷³ In *Dalmer*, the parents of a runaway son claimed that the state defendants, by violating the state Juvenile Proceedings Act, were negligent per se in taking and retaining custody of the boy.²⁷⁴ The supreme court interpreted the state statute as providing no civil remedy for violation of the statute in this case.²⁷⁵ The judicial result was affected by the public duty

265. 24 P.3d 219 (Nev. 2001).

266. *Id.* at 220.

267. *Id.* at 220–21.

268. *Id.* at 222.

269. *Id.* at 223 (Maupin, J., dissenting).

270. JOHNSON, *supra* note 240, at 98 (emphasis omitted).

271. See 2 AM. JUR. 2D *Administrative Law* § 50 (2004); 56 AM. JUR. 2D *Municipal Corporations, Counties, and Other Political Subdivisions* § 404 (2000).

272. 811 A.2d 1214 (Vt. 2002).

273. *Id.* at 1217, 1227.

274. *Id.* at 1219.

275. *Id.* at 1222 (citing RESTATEMENT (SECOND) OF TORTS § 286(d) (1965)).

doctrine, which makes courts hesitant to hold governmental litigants negligent per se when administering statutes for the benefit of the public at large.²⁷⁶

The Supreme Court of Ohio, in *Wallace v. Ohio Department of Commerce*,²⁷⁷ rebuffed the state fire marshal's public duty defense in a case brought by persons injured in a fireworks store and the estates of persons killed in the store.²⁷⁸ The plaintiffs alleged that the state official was negligent per se in failing to perform an adequate fire safety inspection of the store as required by state statutes.²⁷⁹ The court held that the State could not raise the public duty doctrine as a bar to liability for negligence in actions brought in the court of claims.²⁸⁰ A dissent argued that, without the protection of the public duty rule, government actors would be vulnerable to liability under statutes that charge agencies of the state with public or general protective duties.²⁸¹

3. 2003

The Tennessee intermediate appellate court, in *Rains v. Bend of the River*,²⁸² reversed the trial court's denial of a motion to dismiss brought by a defendant who sold ammunition to an underage buyer.²⁸³ The decedent's parents sued the seller in a wrongful death action, asserting that the seller was negligent per se in selling ammunition to an eighteen-year-old buyer who used the ammunition to commit suicide.²⁸⁴ The appellate court reasoned that, despite the seller's violation of the statute, the boy's suicide was "an independent, intervening cause that insulate[d the seller] from [the] . . . negligence per se claim" as a matter of law.²⁸⁵ Given the troublesome teenage suicide rate, it seems that the legislature would have contemplated such suicides by firearms and would have intended to protect minors—as well as the general citizenry—from the rash use of firearms.²⁸⁶

276. See *id.* at 1224–25.

277. 773 N.E.2d 1018 (Ohio 2002).

278. *Id.* at 1021, 1032.

279. See *id.* at 1021.

280. *Id.* at 1032.

281. *Id.* at 1041–43 (Resnick, J., dissenting).

282. 124 S.W.3d 580 (Tenn. Ct. App. 2003).

283. *Id.* at 584–85.

284. *Id.* at 586.

285. *Id.* at 596.

286. The *New York Times Almanac* summarizes the pertinent national suicide statistics for young people as follows:

Each year, approximately 30,000 Americans kill themselves—about one person every 20 minutes. . . .

Suicide is the eleventh-leading cause of death of all Americans but the third-leading cause for young people age 10-24. Depression, drug abuse, and a history of impulsive, aggressive, or antisocial behavior appear to be associated with suicide in young people. . . .

The Washington intermediate appellate court, in *Skeie v. Mercer Trucking Co., Inc.*,²⁸⁷ reversed the trial court's granting of summary judgment in favor of a trucking company that was sued by the passenger of a car that "crashed head-on into [the trucking company's] tractor-trailer."²⁸⁸ The car passenger was seriously injured when "the trailer's load of cement blocks [came loose and] fell onto him."²⁸⁹ The appellate court reasoned that the trucking company's statutory failure to properly secure the load pursuant to a state statute constituted evidence of negligence because the statute, as interpreted by the court, was intended to "protect[] all who travel on public roads against injury from improperly secured loads that fall from vehicles[, and the car passenger] was a member of the class of people who travel[led] on public roads."²⁹⁰ Other courts would have found the trucking company's violation of the state safety statute to be negligence per se.²⁹¹ On remand, the trial court judge in such a case would likely face the vexing problem of instructing the jury on comparative negligence between the trucking company's statutory failure to properly secure the load; the trucker's negligence in causing the head-on collision; and the car driver's negligence in causing the head-on collision.

In a confusing application of negligence per se principles, the Illinois intermediate appellate court, in *Putman v. Village of Bensenville*,²⁹² affirmed in part the trial court's grant of a summary judgment to a municipality in a negligence suit brought by a pedestrian who was rendered a quadriplegic in a fall on a village sidewalk ramp.²⁹³ The appellate court turgidly reasoned that even if the relevant provisions of the Illinois Accessibility Code established a negligence per se standard of care for the village in judging whether the ramp was safe, any defect in the ramp was "*de minimis*."²⁹⁴ While a *de minimis* noncompliance with a state safety statute arguably fits into the *Restatement's* "further excuses worthy of recognition" verbiage,²⁹⁵ the court failed to explain adequately the basis and application of its *de minimis* noncompliance rationale.

....

The majority of Americans [in all age groups] who commit suicide shoot themselves (55 percent in 1999).

THE N.Y. TIMES, THE NEW YORK TIMES 2007 ALMANAC 385 (John W. Wright ed., 2007).

287. 61 P.3d 1207 (Wash. Ct. App. 2003).

288. *Id.* at 1208.

289. *Id.*

290. *Id.* at 1209.

291. *See, e.g., Fortner v. Tecchio Trucking, Inc.*, 597 F. Supp. 2d 755, 757–58 (E.D. Tenn. 2009) (granting partial summary judgment to an injured accident victim on a negligence per se claim where the defendant trucking company violated regulations requiring that trucks be loaded securely).

292. 786 N.E.2d 203 (Ill. App. Ct. 2003).

293. *Id.* at 204–05.

294. *Id.* at 208.

295. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (BASIC PRINCIPLES) § 15 (Tentative Draft No. 1, 2001).

In a perplexing decision by the Supreme Court of Indiana in *Cook v. Whitsell-Sherman*,²⁹⁶ the court interpreted a dog bite state statute as a strict liability enactment, noting that its reading was “similar but not identical to the” trial court’s view that the state’s violation constituted negligence per se.²⁹⁷ The Indiana intermediate court had offered yet a third take on the meaning of the dog bite statute: the statute did not render the owner liable for negligence per se and ordinary rules of common law negligence applied.²⁹⁸ The *Cook* case is illustrative of the wide-ranging and misguided discretion that judges enjoy in divining the intent of the legislature’s promulgation of a criminal enactment that is nonprescriptive in its applicability to a tort action.²⁹⁹

In *Brooks v. Lewin Realty III, Inc.*,³⁰⁰ the Court of Appeals of Maryland liberally interpreted a Baltimore city housing code as creating negligence per se liability for a city landlord in an action by a tenant who sued in negligence based on the landlord’s violation of lead-based paint prohibitions.³⁰¹ The tenant’s child had been diagnosed with an elevated blood lead level, and evidence existed that the child had consumed paint flakes and chips at the rented apartment.³⁰² The litigation created a panoply of different judicial reactions to the local housing code: the trial court entered judgment on a jury verdict awarding the plaintiff damages; the intermediate appellate court reversed and remanded for a new trial;³⁰³ and a dissent in the court of appeals argued that “absent notice, actual or constructive, the landlord ha[d] no duty” to remove lead paint prohibited by the city housing code.³⁰⁴

In the Alaska case of *Getchell v. Lodge*,³⁰⁵ the driver of a car braked to avoid a moose and skidded on ice into oncoming traffic, violating traffic regulations that required vehicles to stay on the right.³⁰⁶ The plaintiff brought a negligence action to recover for personal injuries caused by the skidding defendant.³⁰⁷ At trial, the court entered judgment on a jury verdict for the defendant and denied plaintiff’s motions for judgment notwithstanding the verdict or a new trial predicated on a negligence per se argument.³⁰⁸ The Supreme Court of Alaska affirmed, holding that reasonable jurors could have concluded that the defendant was excused from complying with the pertinent traffic regulations because the

296. 796 N.E.2d 271 (Ind. 2003).

297. *Id.* at 276.

298. *Id.* at 274.

299. See UNDERSTANDING TORTS THIRD EDITION, *supra* note 222, § 6.02, at 84–86.

300. 835 A.2d 616 (Md. 2003).

301. *Id.* at 618, 627.

302. *Id.* at 617.

303. *Id.* at 618.

304. *Id.* at 632 (Raker, J., dissenting).

305. 65 P.3d 50 (Alaska 2003).

306. *Id.* at 52–53.

307. *Id.* at 52.

308. *Id.* at 52–53.

presence of a moose in the road created an emergency.³⁰⁹ While the result appears to make pragmatic sense, it would seem that Alaska drivers should foresee the possibility of moose intruding on their highways. A fairer allocation of the loss would have been a recovery for the innocent plaintiff's injuries, based on the clear-cut violation of the traffic regulations, reduced by a certain amount for the ostensible emergency scenario. Arguably, the presence of a negligence per se situation confused the jury and led them to make an either/or decision on liability.

In *Murphy v. State*,³¹⁰ ambiguities in the Washington State Health Care Disclosure Act led to a divergence of interpretation between the trial court judge and the Washington intermediate appellate court.³¹¹ *Murphy* involved a county sheriff and his family who "sued the State for damages . . . caused by the . . . [s]tate [p]harmacy [b]oard's negligent disclosure of [the sheriff's] prescription records."³¹² The pharmacy board disclosed the records to a prosecuting attorney who used the records in an unsuccessful criminal case against the plaintiff for obtaining prescription drugs by deceit.³¹³ The trial court entered judgment on the jury verdict for the plaintiffs, holding that the state pharmacy board had a statutory duty to prevent disclosure of private health information.³¹⁴ The intermediate appellate court, however, reversed in part and remanded, holding that the trial court had erred in construing the Health Care Disclosure Act as creating negligence per se liability.³¹⁵ Conceding that the legislature had intended to "protect patient information from disclosure to the public," the intermediate appellate court noted that the legislature also intended "to allow law enforcement access [to] enforc[e] prescription drug laws."³¹⁶

4. 2004

The vagaries of a state criminal vegetation maintenance statute figured into judicial confusion in the federal diversity case, *Shanklin v. Norfolk Southern Railway Co.*³¹⁷ The widow of a car driver who was killed by a train while crossing railroad tracks sued the railroad in a wrongful death action, alleging negligence due to inadequate warning devices and deficient removal of vegetation around the crossing area.³¹⁸ The federal district court, after an initial

309. *Id.* at 55.

310. 62 P.3d 533 (Wash. Ct. App. 2003).

311. *See id.* at 536–37.

312. *Id.* at 535.

313. *Id.* at 535–36.

314. *Id.* at 536–37, 542.

315. *Id.* at 542.

316. *Id.*

317. 369 F.3d 978 (6th Cir. 2004), *rev'd*, 529 U.S. 344 (2000).

318. *Id.* at 982.

remand, entered judgment on a jury verdict for the widow based on negligence per se, finding that the railroad violated the state vegetation statute.³¹⁹ The United States Court of Appeals for the Sixth Circuit affirmed, holding that the jury's consideration of Tennessee's vegetation and passenger safety statute did not constitute reversible error.³²⁰ The appellate court's concurring opinion argued that the state statute was relevant as evidence of negligence by the railroad toward other classes of persons not specifically delineated in the statute.³²¹

In a questionably narrow construction of a federal statute, a federal district judge in *Wallace v. United States*³²² narrowed the plaintiffs' legal claims involving exposure of the occupants of a home, purchased from the federal government, to lead-based paint.³²³ The homebuyer brought suit against the federal government, a local housing authority, and a realtor, asserting negligence, breach of contract, violations of state law, and negligence per se for violations of the federal Residential Lead-Based Paint Hazard Reduction Act of 1992 (RLPHRA).³²⁴ All of the charges were predicated on the failure to warn the homebuyer of lead-based paint in the house, which he purchased and subsequently leased to his children and their mother.³²⁵ Granting a partial judgment on the plaintiffs' negligence per se claim with respect to the realtor, the court found that while the realtor owed a duty to the homebuyer to disclose the possible presence of lead paint, the realtor did not owe that same duty to the children or their mother because, as mere tenants of the property, they fell outside of the protective orbit of the RLPHRA.³²⁶

The Washington dram shop case, *Barrett v. Lucky Seven Saloon, Inc.*,³²⁷ created a multiplicity of confusing judicial constructions of the criminal provisions in the Alcoholic Beverages Control Act. An intoxicated driver, who had been overserved alcohol by the defendant tavern, caused the accident.³²⁸ The trial court entered judgment on a jury verdict for the tavern, and the Washington intermediate appellate court affirmed.³²⁹ The Supreme Court of Washington, however, reversed and remanded, holding that the trial court should have instructed the jury on the statutory "“apparently under the influence”" standard.³³⁰ This standard derived from the state criminal provisions of the

319. *Id.* at 982–83.

320. *Id.* at 992, 994.

321. *Id.* at 994–95 (Rogers, J., concurring).

322. 335 F. Supp. 2d 252 (D.R.I. 2004).

323. *Id.* at 254–55.

324. *Id.*

325. *Id.* at 255.

326. *Id.* at 263–66.

327. 96 P.3d 386 (Wash. 2004).

328. *Id.* at 387.

329. *Id.* at 389.

330. *Id.* at 393.

Alcoholic Beverages Control Act and was “the minimum standard of conduct for commercial hosts whose alleged overservice cause[d] a drunk driving accident [that] injur[ed] a third party.”³³¹ While one dissent contended that the law did not obligate the court to apply the negligence per se statutory standard, which would modify an already preexisting duty of alcohol providers,³³² the other dissent countered that the statutory standard should be applied but that the plaintiff motorist failed to establish reversible error or prejudice from the trial court’s improper jury instructions.³³³

In the perplexing New Mexico case, *Spencer v. University of New Mexico Hospital*,³³⁴ the New Mexico intermediate appellate court wrestled with the negligence law effect to be given to a problematic state statute that was repealed.³³⁵ The estate of a patient, who received a fatal injection of heroin by an in-home caregiver, sued the caregiver’s employer for negligent hiring and retention, alleging that the hospital failed to conduct a criminal background check required by the state Caregivers Criminal History Screening Act.³³⁶ After affirming the trial court’s grant of summary judgment for the defendant, the New Mexico intermediate appellate court held that the statute, under the limited circumstances of the case at bar, would not form the basis of a duty to conduct the prehire background check on the errant caregiver.³³⁷ The court made this determination despite the fact that the statute was in force when the caregiver was hired.³³⁸ It predicated its rationale on the questionable subsequent legislative intent of a later state legislature,³³⁹ which had decided to repeal the old statute.³⁴⁰

A Supreme Court of Connecticut case, *Ward v. Greene*,³⁴¹ created splintered appellate opinions with differing interpretations of a state statute requiring reports of child abuse. The mother, individually and as administratrix of her deceased child’s estate, sued a private child-placement provider for negligence per se in failing to notify a state agency of its suspicions that a daycare employee, who allegedly shook the child to death, had previously abused several foster children.³⁴² The trial court granted the defendant summary judgment based

331. *Id.*

332. *Id.* at 400 (Sanders, J., dissenting).

333. *Id.* at 405 (Madsen, J., dissenting).

334. 91 P.3d 73 (N.M. Ct. App. 2004), *rev’d sub nom.* *Spencer v. Health Force, Inc.*, 107 P.3d 504 (N.M. 2005).

335. *Id.* at 76–77.

336. *Id.* at 75–76.

337. *Id.* at 75, 77.

338. *Id.* at 77.

339. Subsequent legislative history—coming after a statute is passed by a legislature—“is highly disfavored for both rule of law and policy reasons.” WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 316 (2d ed. 2006).

340. *See Spencer*, 91 P.3d at 77–78.

341. 839 A.2d 1259 (Conn. 2004).

342. *Id.* at 1262, 1265–66.

on the inapplicability of the state reporting statute.³⁴³ The Supreme Court of Connecticut affirmed, reasoning that the defendant's duty to report suspected child abuse under the statute was not mandated for the protection of the deceased child, who was not within the class of persons to whom the defendant owed a duty.³⁴⁴ A dissent, however, argued that the defendant's failure to report allegations of abuse violated the statutory duty to all children in the care of the suspected abuser.³⁴⁵

5. 2005

A Supreme Court of Wyoming case, *Landsiedel v. Buffalo Properties, LLC*,³⁴⁶ illustrates the chaotic effect of building codes that are subject to discretionary local adoption. The plaintiff, who was injured when he put his arm through a plate glass window as he was leaving a bar, sued the bar owner, alleging that it negligently failed to maintain its premises in a reasonably safe condition.³⁴⁷ The trial court entered a judgment on the jury verdict for the bar owner.³⁴⁸ The Supreme Court of Wyoming affirmed, holding that evidence supported the verdict and that the trial court had not erred in refusing to instruct the jury on the negligence per se effect of building codes because there was conflicting evidence on the issue of whether the building codes, had been adopted locally.³⁴⁹

The Arizona intermediate appellate court, in *Martin v. Schroeder*,³⁵⁰ affirmed the trial court's ruling in favor of parents—the defendants—who had given their adult son a gun.³⁵¹ The appellate court's discussion can best be understood as an equitable limit on the admittedly applicable negligence per se standard imposed by a federal statute. Nine months after the parents gave a gun to their adult son, the son accidentally shot his friend in the head while they were smoking marijuana together.³⁵² The victim sued the shooter's parents for negligent entrustment and negligence per se for violation of the Federal Gun Control Act.³⁵³ Affirming the trial court's grant of a summary judgment for the parents, the Arizona intermediate appellate court agreed that while the federal statute supported a claim of negligence per se—because its purpose was to protect a class of persons who could be harmed by an unlawful drug user or

343. *Id.* at 1264.

344. *Id.* at 1272–73.

345. *Id.* at 1273–74 (Katz, J., dissenting).

346. 112 P.3d 610 (Wyo. 2005).

347. *Id.* at 612.

348. *Id.*

349. *Id.* at 617–18.

350. 105 P.3d 577 (Ariz. Ct. App. 2005).

351. *Id.* at 578.

352. *Id.* at 579.

353. *See id.* at 579, 582 (citing 18 U.S.C. § 922(d) (2006)).

addict with a gun—the victim’s negligence per se claim failed, nevertheless, because the plaintiff did not prove that, when the parents gave the son a gun, “they knew or had reason to believe he was addicted to marijuana within the meaning of the Act.”³⁵⁴ A more convincing rationale for the result, however, would be a lack of factual causation or proximate causation connecting the parents’ inadvertent violation of the statute and the victim’s gunshot damages.

The Idaho case of *O’Guin v. Bingham County*³⁵⁵ involved the reversal by the Supreme Court of Idaho of the trial court’s grant of summary judgment for a defendant county that owned a landfill where trespassing children were killed.³⁵⁶ The Supreme Court of Idaho vacated the grant of summary judgment and remanded for trial the parents’ wrongful death action based on the county’s negligence per se in violating landfill operating regulations.³⁵⁷ The supreme court held that the regulations violation constituted negligence per se and that the common law willful-or-wanton standard of care for premises liability to trespassers was inapposite.³⁵⁸

In a Wyoming negligence per se case, *Burnett v. Imerys Marble, Inc.*,³⁵⁹ the Supreme Court of Wyoming rendered a doctrinally defensible analysis of the inapplicability of the Mine Safety and Health Administration (MSHA) regulations in establishing the standard of care for personal injuries.³⁶⁰ In that case, a trucking company employee fell off his truck as he was placing tarps over a marble load he had picked up at a mine.³⁶¹ The supreme court reasoned that because the statute’s purpose was to protect miners working in mines, a commercial truck driver like the plaintiff, who occasionally transported products produced in the mine, was not exposed to the types of mining hazards contemplated in the legislation and, therefore, was not protected by the MSHA or its regulations.³⁶² However, a more pragmatic use of the mining statute and its regulations might have been for the court to apply them to the injured trucker given the special dangers posed by anyone who performs work for a mine.³⁶³

354. *Id.* at 582–84.

355. 122 P.3d 308 (Idaho 2005).

356. *Id.* at 310.

357. *Id.* at 314–15.

358. *Id.* at 314.

359. 116 P.3d 460 (Wyo. 2005).

360. *See id.* at 462–64.

361. *Id.* at 461.

362. *Id.* at 463–64.

363. *See* U.S. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, CAREER GUIDE TO INDUSTRIES: MINING, <http://data.bls.gov/cgi-bin/print.pl/oco/cg/cgs004.htm> (last visited Nov. 5, 2009) (discussing the dangerous work environments of various mines, quarries, and well sites for miners, loading-machine operators, and truck drivers working therein); *see also* Mike Waterhouse, *Coal Truck Driver Killed at WV Mine*, WSAZ, Aug. 23, 2008, <http://www.wsaz.com/news/headlines/27313294.html> (reporting the death of a truck driver from an accident on his “second day working at a mine”).

6. 2006

A multiple tractor-trailer accident involving violations of safety regulations pertaining to commercial vehicle wheels created discomfiture for a Texas trial court in *Omega Contracting, Inc. v. Torres*.³⁶⁴ The trial court entered judgment on a jury verdict awarding damages to a driver injured in the wreck.³⁶⁵ The court provided a negligence per se jury instruction predicated on a commercial vehicle safety regulation violated when two wheels separated from a trucking rig.³⁶⁶ The Texas intermediate appellate court reversed in part and remanded for a new trial on the cross-claims.³⁶⁷ It based its holding on the improper strict liability standard articulated by the trial court's negligence per se jury instructions.³⁶⁸ The problem could have been avoided, according to the appellate court, by the trial court's submission of an "excuse instruction . . . permit[ting] the jury to consider whether [the defendant trucking firm] knew or should have known" of safety problems with the wheels.³⁶⁹

In *White v. Sabatino*,³⁷⁰ a federal district court judge in Hawaii faced an unusual admiralty-based argument of a cruise ship owner in a suit by the administrator of the estate of a motorist who was killed in an automobile accident with an intoxicated driver who had attended a "snorkeling cruise."³⁷¹ The plaintiff claimed that the cruise ship owner's practice of serving "unlimited . . . liquor for a fixed price during a set period of time" violated a county's liquor ordinance.³⁷² The cruise ship owner unsuccessfully sought a limitation of liability based on the vessel's value.³⁷³ The court, in turn, granted partial summary judgment for the plaintiff, ruling that the plaintiff could proceed without limitation.³⁷⁴ The trial court concluded that the county liquor ordinance established a negligence per se standard for the cruise ship owner and that there was a reasonably close causal relation between the breach of the county ordinance and the accident because the decedent was the type of victim the ordinance was intended to protect from the type of accident the ordinance was intended to prevent.³⁷⁵ All in all, this approach to the negligence per se made sense. The court was justified in ignoring the hypertechnical admiralty damages limitation argument of the cruise ship owner. Furthermore, the court exhibited

364. 191 S.W.3d 828 (Tex. App. 2006).

365. *Id.* at 835.

366. *Id.* at 834, 838–39 (citing 49 C.F.R. §§ 393.205, 396.3, 396.13 (2005)).

367. *Id.* at 852.

368. *Id.* at 841.

369. *Id.* at 842.

370. 415 F. Supp. 2d 1163 (D. Haw. 2006).

371. *Id.* at 1167–68.

372. *Id.* at 1181.

373. *Id.* at 1181, 1186.

374. *Id.* at 1186.

375. *Id.* at 1182–84.

sense in accepting the county liquor control ordinance as a practical, specific standard of care, notwithstanding the view by some other courts that a county's legislative enactment should be viewed as less prestigious than a state or federal statute.³⁷⁶

Another practical and sensible judicial negligence per se decision was the Arizona intermediate appellate court's reversal, in *Gipson v. Kasey*,³⁷⁷ of a trial court's grant of summary judgment for the defendant.³⁷⁸ *Gipson* was a wrongful death action by a surviving parent of a drug-overdose victim against the victim's co-worker.³⁷⁹ The surviving parent alleged that the coworker negligently caused the victim's death by furnishing prescription pills to the victim's girlfriend, who subsequently gave the pills to the victim.³⁸⁰ In reversing the trial court's summary judgment for the defendant, the appellate court discerned a statute-based duty of reasonable care owed by the defendant to the victim.³⁸¹ The court looked to the strong public policy behind several state and federal statutes that outlawed distributing prescription drugs to those who had not been prescribed the medications.³⁸² The opinion refreshingly departed from the traditional negligence per se mechanistic tests, which seek to discern vague and often nonexistent "legislative intent" to create a tort duty standard from a criminal or regulatory enactment.³⁸³ Instead, it wisely focused on more realistic and coherent public policy considerations.³⁸⁴

In a mechanistic and stilted negligence per se ruling, the North Carolina intermediate appellate court, in *Hall v. Toreros, II, Inc.*,³⁸⁵ shunned policy analysis in favor of a concentration on the "intent" of the regulatory provision.³⁸⁶ In *Hall*, victims of an automobile collision caused by an intoxicated driver brought a negligence suit against a restaurant that had served alcoholic beverages to a customer who later drove away from the restaurant.³⁸⁷ The trial court granted the restaurant's motion for judgment notwithstanding the verdict after

376. See, e.g., *Schumer v. Caplin*, 150 N.E. 139, 140 (N.Y. 1925) ("The violation of a statute under certain circumstances may of itself establish negligence. Not so, however, with a rule or ordinance.").

377. 129 P.3d 957 (Ariz. Ct. App. 2006), *vacated in part* by 150 P.3d 228 (Ariz. 2007).

378. *Id.* at 959.

379. *Id.* at 960.

380. *Id.* at 959–60.

381. *Id.* at 962–63.

382. *Id.*

383. See *Fortier v. Flambeau Plastics Co.*, 476 N.W.2d 593, 601 (Wis. Ct. App. 1991) ("[T]he touchstone . . . is the presence of an expression of legislative intent specifically to create such a right, and the form and language of the rule are the primary indicators of such an expression." (alteration in original) (quoting *Kranzush v. Badger State Mut. Cas. Co.*, 307 N.W.2d 256, 268 (Wis. 1981))).

384. *Gipson*, 129 P.3d at 963.

385. 626 S.E.2d 861 (N.C. Ct. App. 2006).

386. See *id.* at 869.

387. *Id.* at 863.

the jury returned a verdict for the plaintiffs.³⁸⁸ In affirming, the North Carolina intermediate appellate court held that the trial court was correct in rejecting the plaintiffs' argument that a state Alcoholic Beverage Control Commission regulation imposed a legal duty on the restaurant to prevent the driver from consuming alcohol on its premises after it knew that he was intoxicated.³⁸⁹ The appellate court went on to note that the statutory scheme, under which the administrative regulation was promulgated, did not contain any express language regarding consumption of alcohol by intoxicated persons.³⁹⁰

IV. FROM READING LEGISLATIVE TEA LEAVES OF INTENT TO ASTUTE JUDICIAL POLICY ANALYSIS

Negligence per se analysis—judicial efforts to interpret the nonprescriptive commands of an authoritative legislative body or administrative agency in an effort to determine whether a tort jury should have its common law role of applying a broad standard of reasonable care under the circumstances trumped by a more specific standard of care—suffers from both *general* form and function problems and *specific* form and function problems.

The discussion that follows first considers the general form and function problems of judicial negligence per se analysis. Then it reviews a host of specific form and function issues of judicial negligence per se analysis.³⁹¹

A. *An Overview of Negligence Per Se Form and Function Problems*

Negligence per se analysis in American judicial opinions emerged from the first mention of the phrase “negligence per se” in an 1841 judicial opinion,³⁹² to twenty-first century cases applying methodologies of legislative intent and purpose.³⁹³ In terms of legal theory, this negligence per se analysis is a general type of functional legal form involving a methodological type and an interpretive subtype, with implications for institutional, preceptual, and enforcement or implementive types of legal form.³⁹⁴ Part IV.B first delineates and amplifies these general form and function terms, which were previously articulated by Professor Robert S. Summers. It describes American judicial negligence per se analysis in terms of Summer’s form and function typology. Part IV.C and Part

388. *Id.* at 864.

389. *Id.* at 867–70.

390. *Id.* at 869.

391. I am particularly indebted to the excellent theoretical book, ROBERT S. SUMMERS, FORM AND FUNCTION IN A LEGAL SYSTEM (2006).

392. *See supra* notes 16–20 and accompanying text.

393. *See supra* Part III.C.

394. *See infra* Part IV.B.

IV.D then analyze general and specific legal form and function problems of the negligence per se doctrine.

B. An Introduction to Legal Form and Function Theory

Summers explained that “[t]he overall forms of functional legal units” in a modern legal system “stand as tributes to the organizational inventiveness of developed Western societies. The realization of humanistic values, including justice, order, liberty, democracy, rationality, the rule of law, and more, has been heavily dependent on this inventiveness.”³⁹⁵ Yet, somewhat surprisingly, legal forms—“purposive systematic arrangements” of a legal system—“have seldom in the course of Western legal theory been explicitly conceived as objects of frontal and systematic theoretical inquiry,” and consequently, this disorderly theoretical tendency has impeded the full “understanding of the nature of functional legal units or as contributing to the efficacy of such units as means to ends.”³⁹⁶

Summers noted that “purported ‘law’ may be so deficient in form as to be profoundly dysfunctional, and thus be at best a highly degenerate specimen of law, and, if deficient enough, not law at all, even though officially ‘laid down.’”³⁹⁷ He explained that “[r]eason should permeate and shape the purposive design of overall form, its constituent features, and the complementary material or other components of each functional legal unit” of a legal system.³⁹⁸ “Without duly designed forms, even the potentially most proficient of such components could avail us relatively little.”³⁹⁹

Summers set forth five general types of “overall forms of functional legal units.”⁴⁰⁰ First, “a functional legal unit may be *institutional* in nature.”⁴⁰¹ Institutional types include legislatures, courts, administrative bodies, and corporate and other private entities.⁴⁰² Second, “a functional legal unit may be . . . *preceptual*.”⁴⁰³ Preceptual types include rules, principles, maxims, and general orders.⁴⁰⁴ Third, “a functional legal unit may be . . . *methodological*.”⁴⁰⁵

395. SUMMERS, *supra* note 391, at 7.

396. *Id.*

397. *Id.* at 34. “For example, the expressional feature of the overall form of an enacted statutory rule otherwise in due form may be such that what the rule means is quite unclear to all of its addressees! [In Professor Summers’s] view, such a ‘rule’ would fail to qualify as law at all.” *Id.*

398. *Id.* at 35.

399. *Id.*

400. *Id.* at 54.

401. *Id.* at 37 (emphasis added).

402. *Id.* at 54.

403. *Id.* at 37 (emphasis added).

404. *Id.* at 54.

405. *Id.* at 37 (emphasis added).

Methodological types include interpretation, drafting, and fact-finding.⁴⁰⁶ Fourth, “a functional legal unit may be . . . *enforcive*.”⁴⁰⁷ Enforcive legal units include sanctions, remedies, and others.⁴⁰⁸ Finally, “a functional legal unit may be . . . a *nonpreceptual* species of law.”⁴⁰⁹ Nonpreceptual types include contracts, property interests, and wills.⁴¹⁰ However, the schematic by Summers is not exhaustive.⁴¹¹

Summers went on to explain that “[t]he . . . forms of functional legal units within Western legal systems vary in their approximations to what may be ideal. Yet these forms define and organize the [legal] units to serve purposes.”⁴¹² Indeed, he noted that “[w]hen the purposes to be served are valuable, and these forms and their complementary material . . . are sufficiently well-designed, then some value will ordinarily be realized when the units are duly put to use.”⁴¹³

Finally, with regard to the interpretive subtype of the methodological type of overall forms of functional legal units—what may be viewed as the key functional legal unit in negligence per se analysis—“[t]he purposes of the overall form . . . of a methodology for interpreting statutes include objective, reasoned, faithful, consistent, predictable, efficient, and purpose-fulfilling interpretation.”⁴¹⁴ Moreover, “[i]t is also a systematic means to the realization of more ultimate purposes such as democracy, legitimacy, and the rule of law.”⁴¹⁵ Judges and lawyers must understand “[t]he primary criterion of interpretive faithfulness” in fashioning arguments for statutory interpretation.⁴¹⁶ Professor Summers has identified at least five candidates as the primary criterion of statutory faithfulness:

- (1) [T]he interpretation that conforms most closely to the relevant standard ordinary, or relevant standard technical, or relevant special, meaning of the language adopted in the statute, in light of immediate purposes of the statute evident from text and context (*language-oriented*), or
- (2) the interpretation that best accords with reliable evidence of the applicational intentions of individual legislators, or of major committees

406. *Id.* at 54.

407. *Id.* at 38 (emphasis added).

408. *Id.* at 54.

409. *Id.* at 37 (emphasis added).

410. *Id.* at 54.

411. *Id.* For example, the jury would be another illustrative institutional type of functional legal unit.

412. *Id.* at 38.

413. *Id.*

414. *Id.* at 242.

415. *Id.*

416. *Id.* at 255.

of legislators, or of sponsoring legislators speaking on the floor of the legislature, etc. (*intent-oriented*), or

(3) the interpretation that best implements the ultimate general purpose or purposes justifiably attributable to the legislature in adopting the statute, (*ultimate purpose-oriented*), or

(4) the interpretation that best implements a policy judges themselves wish to implement, believe the legislature may have espoused, and believe to be achievable in the circumstances, (*policy-oriented*), or

(5) some other criterion.⁴¹⁷

C. General Form and Function Problems of the Negligence Per Se Doctrine

There are six overarching general form and function problems with traditional negligence per se analysis.

First, as a major, functional legal unit involving an interpretational methodology for judges to decide whether a nonprescriptive statutory or administrative standard should constitute, as a matter of law, a specific standard of conduct in a tort action (typically of negligence), the methodology, while inventive and motivated by the democratic “rule of law” values to apply criminal and administrative standards of care implicitly sanctioned by a legislative body or agency, is seriously flawed by what may be termed a *fundamental origin problem*. As demonstrated in the initial portions of this Article, nineteenth century American judges started to utilize negligence per se parlance as a shorthand way of describing certain types of conduct as negligent as a matter of law.⁴¹⁸ This approach was closely related to so-called rule of law assessments made by judges in an “attempt to create specific rules of conduct that they . . . declare to be the rule the reasonable person will always follow.”⁴¹⁹ This disorderly genesis confused negligence per se analysis as it later developed—that is, when courts began creating tort actions from nonprescriptive legislative

417. *Id.* (emphasis added). Eskridge, Frickey, and Garrett espouse a “pragmatic theory” of statutory interpretation, which consists of a “web of beliefs” that views “human decisionmaking” as “polycentric, spiral, and inductive, not unidimensional, linear, and deductive,” and assert that under this approach, “the most concrete considerations,” like “statutory text” and “specific legislative intent,” outweigh more abstract ones, like “imaginative reconstruction,” “legislative purpose,” “evolution of [the] statute,” and “current values.” ESKRIDGE, FRICKEY & GARRETT, *supra* note 339, at 249–50. Their model suggests an interactive process of statutory interpretation that considers these factors, “considering the strengths of various considerations, rethinking each in light of the others, and weighing them against one another” in the process of interpretation. *Id.* at 250.

418. See *supra* notes 16–31 and accompanying text.

419. DOBBS, *supra* note 2, § 132, at 309.

criminal or administrative rules.⁴²⁰ This has left dangling, so to speak, vital issues of means and ends instead of fashioning a theoretically sound purposive, systematic arrangement in tort law.

Second, negligence per se analysis as an interpretational methodology was not duly and purposively designed, and therefore, it suffers an *unreasoned haphazardness problem*. Indeed, negligence per se analysis “grew up without careful explicit consideration” of ends and means and “[c]ommentators dreamed up [various] fanciful explanations for the” methodology and rule of liability for breaching a nonprescriptive legislative or administrative standard.⁴²¹ “One argument was that the legislature intended to provide for tort liability but forgot to do so. Another was that reasonable people always obey statutes.”⁴²²

Third, negligence per se analysis, similar to the methodology of judge-made rules of law in negligence cases, is often rigid and overinclusive, forbidding or limiting the jury’s “assessment of the evidence to determine whether [a civil litigant] was negligent in the particular circumstances” suggested by the evidence.⁴²³ While specific excuses have been incorporated into negligence per se jurisprudence by various iterations of the American Law Institute’s *Restatement of Torts*,⁴²⁴ the analytical gestalt of negligence per se is, nevertheless, characterized by a *nonflexibility problem*.

Fourth, negligence per se analysis suffers from an *institutional legitimacy problem*. Courts employing negligence per se principles do not generally claim that the pertinent legislature or administrative agency intended to imply a tort cause of action.⁴²⁵ Yet courts, concomitantly, are not candid in describing what they are doing as judicial creation of tort law standards that restrict the baseline freedom and flexibility of a jury to consider the question of reasonableness.

420. See *supra* notes 32–126 and accompanying text. A chronic unsystematic American approach to ordering and interpreting statutes exacerbates the disorderly genesis of negligence per se analysis. See James R. Maxeiner, *Legal Indeterminacy Made in America: U.S. Legal Methods and the Rule of Law*, 41 VAL. U. L. REV. 517, 545 (2006) (noting that three factors coalesce to create indeterminate American statutory law: “lack of system in ordering and interpreting statutes; assimilation of statutes to common law resulting in the undermining [of] the reliability of statutes as authoritative rules; and encouragement of lawyers to develop novel legal theories”).

421. DOBBS, *supra* note 2, § 135, at 319.

422. *Id.*

423. *Id.* § 132, at 310 (discussing rigidity and overinclusiveness of judge-made rules of law in negligence cases like “stop, look, and listen” railroad crossing cases).

424. See, e.g., RESTATEMENT (SECOND) OF TORTS § 288A (1965) (enumerating excuses for various situations in which violating a statute is otherwise reasonable); RESTATEMENT OF TORTS § 286 cmt. c (1934) (discussing situations like emergencies where “the circumstances justify an apparent disobedience to the letter of the enactment”).

425. See, e.g., *White v. Sabatino*, 415 F. Supp. 2d 1163, 1182–84 (D. Haw. 2006) (relying on its own conclusion that the victim was the type of victim the ordinance was intended to protect and that the accident was the type of accident the ordinance was intended to prevent).

Fifth, the effect of a negligence per se ruling in a case creates confusion and complexity for a trial court and a jury resulting in a *dysfunctional preceptual problem*.

Finally, negligence per se can lead to disproportionate liability for litigants who breach nonprescriptive criminal-based statutory or administrative rules.⁴²⁶ This is best described as a *dysfunctional enforcement or implementive problem*.

FIGURE 1
Summary of General Form and
Function Problems with Negligence Per Se

<i>Problem</i>	<i>Nature of Problem</i>
1. Fundamental Origin	<ul style="list-style-type: none"> • The historical basis of the doctrine is hard to trace.
2. Unreasoned Haphazardness	<ul style="list-style-type: none"> • The judiciary did not duly and purposively design the doctrine. • There is a lack of an adequate means and ends analysis. • The judicial explanations for the doctrine are dubious.
3. Nonflexibility	<ul style="list-style-type: none"> • The doctrine's rigid and overinclusive approach is similar to "rule of law" negligence. • The doctrine restricts the jury's full, contextualized assessment of all the evidence bearing on facts of negligent conduct.

426. UNDERSTANDING TORTS THIRD EDITION, *supra* note 222, § 6.07, at 90.

4. Institutional Legitimacy	<ul style="list-style-type: none"> • There is a lack of judicial candor regarding judicial creation of tort law standards while restricting jury's role. • Some courts errantly claim that they are bound by legislative intent in the face of a textually nonprescriptive criminal or administrative enactment that says nothing about tort law.
5. Dysfunctional Preceptual	<ul style="list-style-type: none"> • There is excessive confusion among trial courts, judges, and juries in understanding and applying the doctrine in concrete cases.
6. Dysfunctional Enforcement or Implementive	<ul style="list-style-type: none"> • Disproportionate liability exists for tort damages.

D. Specific Form and Function Problems of the Negligence Per Se Doctrine

On a more detailed level, there are numerous specific form and function problems with the negligence per se doctrine.

First, “[t]hough well-settled [for over a century], there is certainly room to question the propriety of placing so much weight on laws that were enacted without any indication of an intent to affect negligence law.”⁴²⁷ Moreover, statutory text provides absolutely no language-oriented criterion for concrete, “objective, reasoned, faithful, consistent, predictable, efficient, and purpose-fulfilling [judicial] interpretation”⁴²⁸ of nonprescriptive statutes and administrative regulations. By virtue of the negligence per se doctrine, relatively abstract considerations of legislative purpose—ungrounded, by definition, in either concrete statutory text or concrete specific legislative intent—are ritualistically invoked by judges in a highly manipulable process that leads to divergent and unpredictable results.

Second, an important specific “criticism arises from the widely divergent impact the violation of a criminal statute has in a criminal prosecution from that in a tort case.”⁴²⁹ One commentator described the problem as follows:

427. *Id.*

428. SUMMERS, *supra* note 391, at 242.

429. UNDERSTANDING TORTS SECOND EDITION, *supra* note 202, § 6.07, at 100.

Violation of most of the criminal statutes used in negligence per se cases leads to the imposition of a modest fine in the criminal context. Because of the slight penalty and the enormous administrative burden required by considering all possible defenses, these offenses are often strict liability in nature, thus disposing of the State's requirement to show a bad intent. In the negligence per se context, however, the impact of violation can be enormous as the defendant is liable for all the harm proximately caused by the statutory violation. Further, this result can be achieved without providing the sort of safeguards (such as an elevated burden of proof) provided in criminal cases.⁴³⁰

Third, given that most American jurisdictions have come to allow judicial consideration of "broad excuses" for statutory and administrative violations of a nonprescriptive enacted standard in the context of tort cases,⁴³¹ it is highly questionable why courts allow precious judicial resources to be consumed in a remarkably inefficient process of considering potential nonprescriptive standards and far ranging, unlimited excuses.⁴³²

Fourth, the very conceptual foundation of the rationale for the negligence per se doctrine—"the doctrine's ability to provide greater certainty than the usual reasonable person standard"—is undermined by the broad and far ranging excuses that may be considered as reasons for why a tort litigant violated a particular nonprescriptive standard.⁴³³

Fifth, "the negligence per se doctrine greatly constricts the jury's traditional role of determining breach [of a duty of care] and often invests the trial judge with broad discretion. To the extent that judge-made [rule of law] standards of care have been rejected," it is anomalous for judges to have "wide discretion to impose legislative standards" under negligence per se principles.⁴³⁴

Sixth, the doctrine of negligence per se constitutes an inappropriate, and arguably radical, "encroachment upon the . . . legislature" and duly constituted

430. *Id.* at 100–01 (emphasis omitted).

431. UNDERSTANDING TORTS THIRD EDITION, *supra* note 222, § 6.07, at 90 n.18.

432. Perhaps a key motivation for the attraction of negligence per se analysis is the elusive desire of judges to control their busy dockets and to simplify the resolution of disputes. In this regard, see LEON GREEN, JUDGE AND JURY 148–52 (1930). Green viewed the then-nascent negligence per se doctrine in American tort cases as a simplifying judicial device akin to the way that courts had attempted to simplify judicial resolution of cases involving damages from wild animals, abnormally dangerous activities, slander per se rules, and libel per se rules. *Id.* at 148–50. Yet, Green recognized the efficacy problem of negligence per se escape hatches (like contributory negligence and proximate causation) that made negligence per se analysis inefficient and time consuming. *Id.* at 150.

433. UNDERSTANDING TORTS THIRD EDITION, *supra* note 222, § 6.07, at 90 n.18.

434. *Id.* at 90 (emphasis omitted); *cf.* GREEN, *supra* note 432, at 166 ("Nothing is more obvious from a reading of the cases than that courts desire to pass the negligence issue to the jury as free from any commitments as possible and yet subjecting the jury to as much control as possible.").

administrative agencies that have been delegated power to administratively govern social problems.⁴³⁵ “If the legislature elects to do so, it surely may impose civil liability” expressly by statutory enactment.⁴³⁶ “When it does not elect to do so,” it is hubristic and intrusive for a court to “presume” a legislative purpose based on abstract and undisciplined “readings” of generalized “legislative intent” to apply a nonprescriptive standard to a tort action.⁴³⁷

FIGURE 2
Summary of Specific Form and
Function Problems with Negligence Per Se

<i>Problem</i>	<i>Nature of Problem</i>
1. Highly Manipulable	<ul style="list-style-type: none"> Courts can pick and choose assorted vague and unpersuasive indicia of legislative intent notwithstanding nonprescriptive text and nonexistent legislative history.
2. Import of Criminal Law Standards Without Criminal Law Protections for Defendants	<ul style="list-style-type: none"> Tort defendants are held accountable for proximately caused civil damages without plaintiffs bearing heightened burden of proof requirements when using a quasi-criminal or administrative enactment.
3. Uncabined Excuses	<ul style="list-style-type: none"> The doctrine creates confusion and inefficiencies for trial courts and juries with high administrative costs.
4. Self-Defeating	<ul style="list-style-type: none"> The potentially numerous and hard to apply excuses undermine the so-called greater certainty of the doctrine.
5. Excessive Judicial Discretion	<ul style="list-style-type: none"> The doctrine displaces the jury’s traditional role in

435. UNDERSTANDING TORTS THIRD EDITION, *supra* note 222, § 6.07, at 90.

436. *Id.*

437. *Id.*

	assessing fault in tort cases with judicial officiousness.
6. Judicial Encroachment on Legislature	<ul style="list-style-type: none"> It is hubristic and intrusive for the judiciary to presume a legislative purpose based on abstract and undisciplined readings of legislative intent regarding a nonprescriptive enactment.

E. Toward a Systematic Negligence Per Se Approach Involving Astute Judicial Policy Analysis

A magical, one-size-fits-all approach will not resolve the trouble with negligence per se. However, American courts could improve the judicial decision “for determining when to adopt and when to reject a nonprescriptive statute”⁴³⁸ or administrative regulation by following a few basic principles.

First and foremost, courts of last resort should candidly urge legislatures and administrative agencies to set forth, in the enacted text of a police regulation, whether the enactment should be used in tort actions and whether the enacted standard (if expressly applicable to tort) is subject to any excuses for compliance and the specific substance of those excuses. In this regard, legislatures and administrative bodies (and their counsel) should strive to upgrade the craft of drafting statutes and regulations so that uniform and consistent language is routinely inserted into new police enactments on the prescriptiveness or nonapplicability of the enactment in tort actions. A *text-based* approach to modifying (or not modifying) the baseline common law standard of the reasonably prudent person under the circumstances would obviate many of the deficiencies of *intent-based* negligence per se analysis. As pointed out by Wilson Huhn, “areas of common law are shrinking relative to text-bound law. As society becomes more complex, legislatures have enacted detailed statutes and comprehensive codes to bring uniformity and consistency to areas formerly governed by decisional law.”⁴³⁹ And yet, we cannot expect a better and more systematic legislative process to solve the negligence per se conundrum in every, or perhaps in most, situations. “Rather, the legislative process is an often-chaotic process of lobbying by interest groups and of assessments by legislators of the public interest and of their own, sometimes less public-regarding needs (such as

438. DOBBS, *supra* note 2, § 135, at 321. I attempt to address the challenge set forth by Professor Dobbs to advance “systematic principles” in this vexing area. *See id.*

439. WILSON HUHN, *THE FIVE TYPES OF LEGAL ARGUMENT* 18 (2002).

reelection).⁴⁴⁰ An extreme view of the disorderliness of the legislative process is that it consists of “merely the operation of politics conducted in an environment virtually bereft of principled behavior.”⁴⁴¹ But, legislators are capable of taking their lawmaking functions seriously⁴⁴² and crafting the words that they enact into textual public commands in a careful manner.⁴⁴³

Second, in the absence of a clear-cut prescriptive legislative or administrative rule establishing a specific standard of care in a tort suit, courts should prefer the *tradition-based*⁴⁴⁴ and *precedent-based*⁴⁴⁵ ordinary prudent person under the circumstances standard as discerned and applied by a common law jury (with the possibility that a violation of a nonprescriptive enactment could be considered by the jury as evidence of negligence). The venerable reasonably prudent person standard has stood the test of time for nearly two centuries of the Anglo-American experience.⁴⁴⁶ Moreover, courts of last resort

440. ESKRIDGE, FRICKEY & GARRETT, *supra* note 339, at 3.

441. *Id.*

442. See generally Robert F. Blomquist, *The Good American Legislator: Some Legal Process Perspectives and Possibilities*, 38 AKRON L. REV. 895, 897–927 (2005) (outlining theoretical attributes of a good American legislator).

443. See generally Jeremy Waldron, *Legislation, Authority, and Voting*, 84 GEO. L.J. 2185, 2204–06 (1996) (emphasizing the difficulty of legislative decision making to justify the respect that the legislature deserves); Jeremy Waldron, *The Dignity of Legislation*, 54 MD. L. REV. 633, 653–54 (1995) (arguing that careful attention to statutory text by legislators should be required by the very nature of a legislative body as “a large gathering of disparate individuals who purport to act collectively in the name of the whole community, but who can never be sure exactly what it is that they have settled on, as a collective body, except by reference to a given form of words in front of them”).

444. “Tradition . . . exerts a silent influence on legal reasoning. Our traditions establish ‘baselines,’ which are background assumptions that favor the status quo and place the burden of proof on any person who seeks to change the existing order.” HUHN, *supra* note 439, at 49.

445. “The principle of *stare decisis* (which literally means ‘to stand by things decided’) is what lends strength to precedent. *Stare decisis* encourages courts to follow their own prior decisions, and it requires lower courts to follow decisions of higher courts in the same jurisdiction.” *Id.* at 42 (quoting BLACK’S LAW DICTIONARY 1414 (7th ed. 1999)).

446. See generally DOBBS, *supra* note 2, §§ 117–118, at 277–81 (describing the objective reasonable person standard). The objective reasonable person standard goes back at least to *Vaughan v. Menlove*, (1837) 132 Eng. Rep. 490, 492 (C.P.). This proposal for using the objective reasonable prudent standard as a baseline in the face of nonprescriptive statutory and administrative police commands would not affect other areas of negligence law where “[t]he default standard of reasonable care yields to the law’s lesser standard for children, for instance, and in medical malpractice cases the standard yields to the standard implicitly undertaken by the physician and based upon the custom of the medical community” or, by way of another traditional example, where courts “may require of landowners very little care toward [adult] trespassers.” DOBBS, *supra* note 2, § 117, at 277; see also *Bauman v. Crawford*, 704 P.2d 1181, 1187–89 (Wash. 1985) (Brachtenbach, J., concurring) (urging the reexamination of “the entire theory of negligence per se arising from the alleged violation of a statute, an ordinance or an administrative regulation”). In *Bauman*, the concurrence pointed out several practical problems with the doctrine of negligence per se and urged, in the State of Washington, “prospectively limit[ing] the doctrine to an evidence of negligence standard” because, among other problems, the negligence per se doctrine “removes the

could provide proper separation of powers incentives to legislatures and administrative agencies in their respective jurisdictions by announcing a clear statement rule of interpretation that legislative bodies, including local bodies and administrative agencies, under the jurisdiction of the court of last resort, may create specific negligence per se standards of care in tort cases only by making their intention unmistakably clear in the textual language of the standard, ordinance, or administrative regulation.⁴⁴⁷

Third, courts of last resort should reserve the judicial power to borrow selectively and rarely nonprescriptive statutory and administrative standards to modify the default objective reasonable person standard in civil tort suits. However, the basis for this borrowing should not be *intent-based*⁴⁴⁸ arguments, which are usually inefficacious in negligence per se jurisprudence, but on astute *policy analysis*.⁴⁴⁹ Furthermore, judicial policy-based borrowing in this regard should be extraordinarily rigorous and based on well briefed policy analyses by counsel. Unless compelling legislative facts brought to a court's attention or subject to judicial notice provide a strong factual prediction that borrowing a nonprescriptive legislative or administrative standard will, on balance, substantially improve the use of the objective ordinary prudent person standard, courts of last resort should refuse to borrow the nonprescriptive standards.

determination of negligence from the fact-finding function of the jury, or the [trial] court sitting as a fact finder." *Bauman*, 704 P.2d at 1187–89 (Brachtenbach, J., concurring).

447. Clear statement rules of statutory interpretation have been employed by the Supreme Court of the United States for the purpose of protecting federalism issues under the U.S. Constitution. *See* ESKRIDGE, FRICKEY & GARRETT, *supra* note 339, at 367–75. By analogy, a clear statement rule for a legislative or administrative creation of a specific tort standard of care would protect institutional prerogatives of the judiciary and the jury to adjudicate tort suits using the traditional negligence standard absent a clear indication from the legislature or executive branches of government, within their constitutional powers, to alter those traditional prerogatives. *See* UNDERSTANDING TORTS THIRD EDITION, *supra* note 222, § 6.07, at 90.

448. Intent-based arguments in law are based on numerous materials that are often vague and abstract. Statutory and administrative intent is often divined by textual hints, previous versions of the text, specific sequences of events leading up to an enactment, reports of legislative committees, other government reports, and other miscellaneous commentaries. *See* HUHNS, *supra* note 439, at 31–43.

449. Professor Huhn explains:

There is a fundamental difference between policy arguments and the other four types of legal argument. The distinctive feature of policy arguments is that they are consequentialist in nature. The other four types of argument are appeals to authority, but the core of a policy argument is that a certain interpretation of the law will bring about a certain state of affairs, and this state of affairs is either acceptable or unacceptable in the eyes of the law. Deriving rules of law from text, intent, precedent and tradition is inherently conventional; such rules represent specific choices that our lawgivers have already made. Deriving rules from policy arguments, on the other hand, is inherently open-ended; the specific choice has not yet been made. Text, intent, precedent and tradition look principally to the past for guidance; policy arguments look to the future for confirmation.

Id. at 51.

Possible judicial policy considerations in making this determination might include the following: (1) “the limits to implementation, administration, and control”⁴⁵⁰ that counsel in favor of modest and restrained judicial experimentation in tinkering with the basic negligence standard, which would allow the jury to consider nonprescriptive statutory and regulatory violations and justifications for those violations; (2) the likely consequences⁴⁵¹ of borrowing a nonprescriptive statutory or administrative standard to the proper functioning of a civil tort system involving lay juries and busy generalist trial court judges; (3) the prospects of the legislature’s seasonably amending a nonprescriptive statute to encompass a prescriptive tort standard in future cases after judicial highlighting of the nonprescriptive police standard in the course of an appellate opinion and communicating the matter to legislative officials;⁴⁵² (4) “benchmarking” the prevalence of specific safety standards in particular areas of tort law—for example, industrial electrical wiring and grounding, operation of heavy trucks, and commercial building construction;⁴⁵³ (5) the judicial opinions of trial court judges and intermediate appellate court judges on the advisability of a baseline reasonable person standard versus more specific standards of care in certain kinds of tort suits where those specific standards are ensconced in nonprescriptive policy or regulatory enactments;⁴⁵⁴ and (6) economic analyses such as cost-benefit review, which is “the most straightforward attempt to

450. Robert E. Goodin et al., *The Public and Its Policies*, in THE OXFORD HANDBOOK OF PUBLIC POLICY 3, 4 (Michael Moran et al. eds., 2006) [hereinafter PUBLIC POLICY] (citing CHRISTOPHER C. HOOD, THE LIMITS OF ADMINISTRATION (1976); JEFFREY L. PRESSMAN & AARON WILDAVSKY, IMPLEMENTATION (1973); HERMAN R. VAN GUNSTEREN, THE QUEST FOR CONTROL (1976)).

451. See generally *id.* at 6 (“Policy studies embody a bias toward acts, outputs, and outcomes—a concern with consequences—that contrasts with the formal-institutional orientation of much of the rest of political studies.”).

452. Cf. *id.* at 11–12 (discussing “networked governance” and asserting that “[b]road cooperation from a great many effectively independent actors is required in order for any of them to accomplish their goals”).

453. Cf. *id.* at 19 (“In the first instance, there is merely a process of collecting information on policy performance . . . on some systematic, comparable basis. But once that has been done, the performance of better-performing states will almost automatically come to serve as a ‘benchmark’ for the others to aspire to—voluntarily initially, but with increasing amounts of informal and formal pressure as time goes by.” (citing TONY ATKINSON ET AL., SOCIAL INDICATORS: THE EU AND SOCIAL INCLUSION (2002); Claus Offe, *The European Model of “Social” Capitalism: Can It Survive European Integration?*, 11 J. POL. PHIL. 437 (2003))).

454. Cf. Richard Freeman, *Learning in Public Policy*, in PUBLIC POLICY, *supra* note 450, at 367–88 (discussing the improvement of public policy decision making overtime through the process of thinking about and resolving public policy problems); Goodin et al., *supra* note 450, at 19 (“Policy, like all human action, is undertaken partly in ignorance; and to a large extent is a matter of ‘learning-by-doing.’” (citing Kenneth J. Arrow, *The Economic Implications of Learning by Doing*, 29 REV. ECON. STUD. 155, 155 (1962); Richard K. Betts, *Analysis, War, and Decision: Why Intelligence Failures Are Inevitable*, 31 WORLD POL. 61, 61–62 (1978))).

measure the economic efficiency of policy alternatives”⁴⁵⁵ and which would entail continuing with the general tort default standard of reasonable care under the circumstances or borrowing more specific nonprescriptive statutory and administrative standards for specific kinds of tort cases.

V. CONCLUSION

Negligence per se analysis is built on weak foundations. In the early nineteenth century, courts started to use “negligence per se” parlance to talk about conduct that was, or should be, negligent as a matter of law. As the nineteenth century ripened and ultimately transitioned to the twentieth century, courts and commentators parroted various unexamined assumptions for why a nonprescriptive policy or regulatory standard should or should not be utilized in a tort action. Judge Benjamin Cardozo of the Court Appeals for New York in a famous 1920 opinion, proclaimed, with Platonic certitude, that the unexcused violation of a nonprescriptive statutory enactment was negligence per se,⁴⁵⁶ an essentialist judicial approach that contradicted an influential treatise that he published in 1921 about the theory of judging. American courts have expended considerable time and effort—along with the time and effort of countless lawyers and jurors—in trying to conceptualize, analyze, understand, and apply cumbersome and unwieldy negligence per se doctrine. In large measure, the negligence per se doctrine has created a cottage judicial industry of reading legislative tea leaves. This is a misconceived enterprise to discern legislative intent to allow, or disallow, a nonprescriptive statutory standard that fails to specify in the text of the enactment that it governs tort suits to be used in place of, or along with, the traditional ordinary prudent person standard of care under the circumstances.

Negligence per se doctrine suffers from assorted general form and function problems which consist of a fundamental origin problem, an unreasoned haphazardness problem, a nonflexibility problem, an institutional legitimacy problem, a dysfunctional preceptual problem, and a dysfunctional enforcement or implementive problem. Moreover, numerous specific form and function problems hobble the negligence per se doctrine. One such problem is the prevalence of broad and far ranging excuses that serve to vitiate the purpose of the doctrine and lead to inefficient uses of judicial and legal resources. Another is the unfair impact that can occur in utilizing nonprescriptive, quasi-criminal violations that require a violator to pay exorbitant tort damages for all harm proximately caused by the statutory violation.

It is high time for courts of last resort to move away from the problematic intent-based approach of the negligence per se doctrine and to an astute judicial

455. Kevin B. Smith, *Economic Techniques*, in PUBLIC POLICY, *supra* note 450, at 742.

456. Martin v. Herzog, 126 N.E. 814, 815 (N.Y. 1920).

policy analysis approach for harmonizing nonprescriptive legislative and administrative standards with the common law negligence standard. Courts should follow three overarching principles in moving toward a systematic negligence per se approach involving astute policy analysis—not questionable intent-based nostrums. First, courts of last resort should candidly insert guidance language in their tort opinions urging legislative bodies and administrative agencies within the pertinent jurisdiction to set forth whether or not an enactment should be used in tort actions and what, if any, excuses should be cognizable. Second, in the absence of a clear-cut prescriptive or administrative rule establishing a specific standard of care in a tort suit, courts should prefer the tradition-based and precedent-based ordinary prudent person under the circumstances standard as discerned and applied by a common law jury. As part of this principle, courts of last resort should announce a clear rule of interpretation that would provide for a baseline traditional negligence standard unless the relevant legislative or administrative body made it unmistakably clear that it was enacting a more specific prescriptive standard. Third, courts of last resort should reserve the judicial power to selectively and rarely borrow nonprescriptive statutory and administrative standards to modify the default objective reasonable person standard based on astute policy analysis of the likely consequences, costs, and benefits of doing so in select cases.