# WHY NEGLIGENCE PER SE SHOULD BE ABANDONED

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## I.
## INTRODUCTION

One who negligently causes injury to the person or property of another is subject to liability in tort. Negligence cases arise in a wide variety of factual contexts, and the legal standards governing these cases are, in most instances, extremely general and open-ended. A defendant's liability in a negligence case is typically determined by reference to the standard of ordinary care—the requirement that the defendant conduct himself as would a reasonably prudent person under the same or similar circumstances. This extremely flexible, open-ended standard typically requires the fact-finder to assess the defendant's conduct on a case-by-case basis, taking into account a wide range of factors relevant to the determination of the prudence of the defendant's conduct under the particular circumstances.

However, the negligence per se doctrine supplants this open-textured, case-by-case analysis of the reasonableness of the defendant's behavior under the circumstances, compelling the conclusion that an actor was negligent solely on the basis of that actor's violation of a statute or ordinance. As statutory commands have proliferated, their intersection with tort liability has increased. Courts are forced to grapple with an increasingly voluminous and complex body of law designed to delineate the contours of negligence per se doctrine.[1]

In this Article, I argue that the doctrine of negligence per se should be abandoned. It rests on shaky theoretical foundations, and it does not reflect modern understandings of the nature of statutory interpretation and the limits of legislation. In practice it is either highly over-inclusive or (more often) superfluous in its effects. As negligence per se jurisprudence has developed, it has created difficult and unnecessary problems of implementation, miring courts and litigants in an increasingly complex, muddled, and ultimately useless doctrinal morass. An approach simply permitting the fact-finder to assess the defendant's violation of statute as one factor in determining negligence would lead to better outcomes in cases and more efficient use of court resources. The remainder of this Article consists of three parts. Part II describes the nature and historical development of legal principles that govern the role of legislative standards in negligence cases, including the negligence per se doctrine. Part III discusses the disadvantages of negligence per se. It addresses the traditional criticisms of the doctrine's excessive rigidity as well as the substantial costs occasioned by the large, complex, and unpredictable case law necessary to determine

1. *See infra* notes 157–235 and accompanying text.

the applicability of the doctrine. Part III also highlights important developments of negligence per se, which have occurred since the emergence of the doctrine and reinforced the criticisms of that doctrine. Finally, Part IV assesses the arguments offered by the drafters of the Third Restatement of Torts in favor of negligence per se, explains why those arguments are not convincing, and explains why treating statutory violation as some evidence of negligence would be a better approach.

## II.
## THE COMMON LAW NEGLIGENCE INQUIRY AND THE ROLE OF LEGISLATIVE STANDARDS IN DETERMINING NEGLIGENCE

### *A. The Common Law Negligence Inquiry: Reasonable Precautions and Ordinary Prudence Under the Circumstances*

At its core, negligence involves the creation of unreasonable risks of harm to others. The negligence cause of action requires the plaintiff to establish, by a preponderance of the evidence, that:

(1) the defendant owed the plaintiff a duty of care;
(2) the defendant breached that duty of care;
(3) the plaintiff suffered some injury constituting a legally recognized harm;
(4) the defendant's negligent behavior was a factual cause of plaintiff's injury;
(5) the defendant's negligent behavior was a proximate or legal cause of plaintiff's injury.[2]

Subject to certain exceptions and limitations, a defendant owes to others a duty of ordinary care, defined as the care that would have been exercised by a reasonable and prudent person under the same or similar circumstances faced by the defendant, in order to minimize or eliminate the potential risk of foreseeable harm to others.[3] In determining whether the defendant breached that duty of ordinary care, the fact-finder must assess the defendant's behavior in light of the precautions that a hypothetical reasonable and prudent person would have undertaken in the defendant's situation.[4] That is a highly fact-specific inquiry, which can take into account a wide variety of factors including the foreseeability of harm associated with the defendant's con-

2. DAN B. DOBBS, THE LAW OF TORTS 269 (2000).

3. *See id.* at 277.

4. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 173–74 (5th ed. 1984) (describing the reasonable person standard).

duct;[5] the range of reasonable alternative precautions that might have been undertaken to reduce the risk of harm to the plaintiff,[6] as well as the costs and benefits of these alternative precautions;[7] the customary safety practices of others in similar situations;[8] and a host of other factors potentially relevant to the reasonableness of the defendant's behavior too numerous to mention here.

The key characteristic of the negligence inquiry is its flexibility.[9] Tort law traditionally has been a common law system guided by judicially crafted legal principles,[10] using flexible standards rather than rigid rules to determine a defendant's liability for negligence.[11] The

5. *See* DOBBS, *supra* note 2, at 334–36 (explaining that conduct is typically not negligent unless the harm would have been foreseeable to a reasonable person, and noting that foreseeability is normally a question for the jury).

6. *See id.* at 369 (explaining that, to establish breach of duty, a plaintiff typically must show particular ways in which the defendant's conduct could have been made safer).

7. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (articulating the famous risk-utility formula for determining negligence); *see also* Mark F. Grady, *Untaken Precautions*, 18 J. LEGAL STUD. 139, 143 (1989) (explaining that juries often determine negligence by evaluating the costs and benefits of precautions that the plaintiff claims defendant should have taken).

8. *See* Kenneth S. Abraham, *Custom, Noncustomary Practice, and Negligence*, 109 COLUM. L. REV. 1784, 1786 (2009) (explaining that evidence of an actor's compliance or non-compliance with customary safety practices may be used by a fact-finder in determining negligence).

9. *See* David P. Leonard, *The Application of Criminal Legislation to Negligence Cases: A Reexamination*, 23 SANTA CLARA L. REV. 427, 453 (1983) (observing that "[t]he beauty of the negligence standard is its flexibility").

10. *See* DOBBS, *supra* note 2, at 1 (explaining that tort law is predominantly common law, the content of which is typically determined by judges, rather than legislatures).

11. *See* David A. Logan, *Juries, Judges, and the Politics of Tort Reform*, 85 U. CIN. L. REV. 903, 932 (2015) (noting that "our tort system has traditionally been characterized by the use of standards rather than rules"). The distinction between rules and standards is well known, and has been explored extensively in the legal literature. *See, e.g.*, Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992); Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953 (1995). As a general matter, rules are more specific than are standards. *See* James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 CAL. L. REV. 115, 130 (2012). Rules ascribe "definitive consequences to the satisfaction of precise and determinate criteria." Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644, 652 (2014). Rules aim to restrict the discretion of decision makers, leading to greater determinacy of outcome at the cost of potential over- or under-inclusiveness relative to the purposes of the rule. *See* Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58–59 (1992). Standards, in contrast, permit decision makers to apply directly relevant background principles or policies, giving those decision makers greater discretion to do justice in individual cases, at the expense of greater uncertainty and variation in outcomes. *See id.* Professor Coenen notes that the principle "[m]ust be at least five feet tall to ride" is a rule. The principle is clear, with little room for interpretation. *See* Coenen, *supra*, at 652. In contrast the

standard of reasonable care under the circumstances used to determine breach of duty in negligence cases is a nearly ideal example of a legal standard.[12] The jury determines the reasonableness of the defendant's conduct in the context of the specific circumstances in which it took place,[13] inviting the jury to engage in a wide-ranging, contextual assessment of the defendant's behavior.[14] One scholar has characterized the negligence determination as "an act of discretionary norm creation by a finder of fact."[15] Legislative modification of negligence standards, including efforts to define through rules what constitutes negligent behavior, thus represents a significant deviation from the traditional approach to questions of negligence.

### *B. The Role of Legislative Standards in Determining Negligence: Private Rights of Action, Statutory Modification of Tort Rules, and Negligence Per Se*

Legislative and regulatory bodies have become increasingly prolific throughout the last century.[16] Statutory provisions[17] are thus playing an increasingly important role in determining the existence and scope of liability in civil cases.[18] Yet "doctrinal confusion plagues the

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principle "[m]ust be mature enough to ride" is a standard, as it leaves detailed application of the concept of maturity to the judgment of the final decision maker. *See id.*

12. *See* Kenneth S. Abraham, *The Trouble with Negligence*, 54 VAND. L. REV. 1187, 1192 (2001) (characterizing negligence as "the paradigm example of a general standard"); Logan, *supra* note 11, at 931–32 (characterizing the standard of reasonable care under the circumstances as a "classic example" of a standard in action).

13. *See* Logan, *supra* note 11, at 933 (noting the "almost infinite contexts in which torts principles are applied").

14. *See* Thomas C. Galligan, Jr., *The Tragedy in Torts*, 5 CORNELL J.L. & PUB. POL'Y 139, 148–49 (1996) (observing that the fact-finder's decision in a negligence case is focused on "the particularities of the incident at issue" and "may be based not so much on the cold logic of the law as on the factfinder's feeling for the warm reality of the particular case"); Leonard, *supra* note 9, at 453 (noting that under the standard of ordinary care "the jury is given wide latitude in determining whether the duty of care has been satisfied in that case").

15. Abraham, *supra* note 12, at 1191.

16. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 1 (1982) (describing the change "from a legal system dominated by the common law, divined by courts, to one in which statutes, enacted by legislatures, have become the primary source of law"); GRANT GILMORE, THE AGES OF AMERICAN LAW 95 (1977) (noting the twentieth century's "orgy of statute making"); *see also* Robert F. Blomquist, *The Trouble with Negligence Per Se*, 61 S.C. L. REV. 221, 222 (2009) (observing that "[s]tatutes in twenty-first century America are exuberantly bounteous").

17. Here, I use the term "statutory provisions" as a general term, encompassing not only statutes enacted by Congress or state legislatures but also ordinances enacted by local governments, and even administrative regulations adopted by regulatory agencies. *See* DOBBS, *supra* note 2, at 311.

18. *See* Caroline Forell, *The Statutory Duty Action in Tort: A Statutory/Common Law Hybrid*, 23 IND. L. REV. 781, 783 (1990) (noting the large number of statutory

efforts of lawyers, judges, and law professors to elucidate consistent rules and analyses affecting the private liability of persons who breach statutory commands."[19] Negligence per se doctrine is a major part of that confusion. Understanding negligence per se requires differentiating among three types of statutory provisions that can influence tort liability: 1) those that directly govern civil liability, either expressly or impliedly; 2) those that modify existing common law rules governing tort liability; and 3) those that are not directed toward civil liability, but that courts may use in determining the scope of tort liability. The first type of provision is a statutory private right of action. The second type may be termed a tort law modification statute, while the third is the type most commonly involved in a court's analysis of negligence per se.

*1. Statutory Private Rights of Action*

A legislature possesses the authority, subject only to relevant constitutional limitations, to promulgate legally enforceable rules of conduct and create remedies for victims of violations of such rules.[20] Courts are bound to respect and apply those private rights of action, which are not tort law, but create tort-like duties, and offer tort-like remedies to persons injured by violations of the rules embodied in those statutes. The standard of conduct articulated by the legislature and the civil damages that it authorizes are creatures of statutes. Courts may face issues of statutory interpretation in applying the statutes, but the legislative policy judgments are supreme.

Many of these statutes expressly create private rights of action. For example, Title VII prohibits certain types of discrimination in employment practices and expressly provides various remedies, including civil damages, for individuals harmed by violations of the duties imposed by that provision.[21] Similarly, the Federal Employers Liability

duty cases occasioned by increasing prevalence of statutes and explosion of tort litigation).

19. Henry H. Drummonds, *The Dance of Statutes and the Common Law: Employment, Alcohol, and Other Torts*, 36 WILLAMETTE L. REV. 939, 939 (2000). Others have noted this confusion as well. *See, e.g.*, Forell, *supra* note 18, at 783 (observing that, in addressing the significance of statutory commands in influencing civil liability for damages, "state courts consistently fail to ask, much less answer, the right questions"); Mark A. Geistfeld, *Tort Law in the Age of Statutes*, 99 IOWA L. REV. 957, 960 (2014) (bemoaning the lack of "systematic analysis of the relation between the common law of torts and statutory law").

20. *See* Fleming James, Jr., *Statutory Standards and Negligence in Accident Cases,* 11 LA. L. REV. 95, 95 (1950).

21. 42 U.S.C. § 2000e (2012).

Act (FELA) created a federal damages claim on behalf of railroad workers injured on the job.[22]

Other times, the legislature does not expressly create a private right of action, but courts nevertheless recognize that one is implied in the statutory scheme. For example, courts interpreted Title IX of the Education Amendments of 1972 to create a private right of action in federal courts for a person discriminated against in violation of its provisions, even though no express right of action exists in the statute.[23] Similarly, section 10b-5 of the Securities Act of 1934 has been interpreted to create a private right of action for persons defrauded in violation of its provisions.[24] Whether a statute creates an implied private right of action is typically a question of legislative intent.[25]

Private rights of action (express or implied) are creatures of legislative prerogative—the existence and parameters of any civil action are determined by the legislative enactment. Such actions need not have been recognized by common law.[26] The legislature creates the defendant's duty and the plaintiff's corresponding right, and defines the remedy.

### 2. *Statutory Tort Law Modification Rules*

Statutes can also influence tort law directly by modifying existing common law rules. While tort law traditionally is common law, legislatures retain the power to change the rules.[27] Some statutes do so by abrogating common law rules that limit tort liability. One of the earliest examples is statutory abolition of the common law rule barring tort claims for wrongful death. New York enacted such a statute in 1847,[28]

22. 45 U.S.C. § 51 (2012).

23. *See* Cannon v. Univ. of Chi., 441 U.S. 677 (1979).

24. *See* Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975).

25. *See* Geistfeld, *supra* note 19, at 975 (explaining that courts' analyses of such statutory liability issues turns on "whether the legislature intended to create a private cause of action"); *see also* H. Miles Foy, III, *Some Reflections on Legislation, Adjudication, and Implied Private Rights of Action in the State and Federal Courts*, 71 CORNELL L. REV. 501, 570 (1986) (noting that private rights of action "may still be created by affirmative legislative intentions" expressed outside the text of the statute, as in "legislative histories or in the structure of a given statutory scheme").

26. *See* Caroline Forell, *Statutory Torts, Statutory Duty Actions, and Negligence Per Se: What's the Difference?*, 77 OR. L. REV. 497, 520 (1998) (explaining that, for a legislatively created cause of action, it is irrelevant whether a common law duty exists).

27. *See* Geistfeld, *supra* note 19, at 962 (observing that a "legislature can obligate courts to modify or even eliminate common-law tort rules").

28. *See* F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 468 (2006) (noting New York's statutory modification of common law wrongful death prohibition).

and all states have adopted some form of statutory modification of the common law prohibition on such claims.[29] Another example is a Vermont "bad Samaritan" statute that expanded the scope of potential tort liability by modifying existing common law limits on duties arising from nonfeasance.[30] In other situations, legislatures can expand the scope of tort liability by eliminating or limiting applicable common law defenses.[31]

Conversely, legislatures can restrict common law tort liability by enacting statutes barring or limiting particular types of actions. For example, statutes in various jurisdictions shield the manufacturers of handguns from claims for damages.[32] Similar laws have been enacted to ban obesity-related lawsuits against fast-food sellers.[33] Legislatures can also modify the otherwise applicable duty of care in tort cases. A good example is automobile guest statutes, which were widely adopted in the mid-twentieth century but are now mostly repealed.[34] These statutes relieved host-drivers of liability to passengers for injuries arising from ordinary negligence, requiring plaintiffs to establish at least gross negligence in order to recover.[35]

The common thread is that the legislative influence on the common law tort rules arises from a deliberate use of legislative authority to directly modify those rules. Like statutory private rights of action, the effects on private civil liability are a direct product of legislative

29. *See* Steven H. Steinglass, *Wrongful Death Actions and Section 1983*, 60 IND. L.J. 559, 564–65 (1985) (observing that all states have modified the common law rules by adoption of some form of wrongful death and survival statutes, though these modifications vary considerably in detail).

30. *See* VT. STAT. ANN. tit. 12, § 519 (2016). Under the common law, a person owes no duty to affirmatively act to prevent harm to another. *See* DOBBS, *supra* note 2, at 853 (noting that "[u]nless the defendant has assumed a duty to act, or stands in a special relationship to the plaintiff, defendants are not liable in tort for a pure failure to act for the plaintiff's benefit"). The Vermont statute overrode that rule by providing that a person who knows that another is exposed to danger has an obligation to "give reasonable assistance to the exposed person, unless that assistance is being provided by others." tit. 12, § 519.

31. *See, e.g.*, N.Y. C.P.L.R. 1411 (McKinney 2016) (abolishing assumption of risk as a complete defense in negligence cases as part of adoption of a comparative fault scheme).

32. *See, e.g.*, Elizabeth T. Crouse, *Arming the Gun Industry: A Critique of Proposed Legislation Shielding the Gun Industry from Liability*, 88 MINN. L. REV. 1346, 1357–59 (2004) (noting that thirty states have enacted laws limiting gun manufacturers' tort liability).

33. *See, e.g.*, Cara L. Wilking & Richard A. Daynard, *Beyond Cheeseburgers: The Impact of Commonsense Consumption Acts on Future Obesity-Related Lawsuits*, 68 FOOD & DRUG L.J. 229, 230 (2013) (listing state "commonsense consumption" laws barring obesity-related tort claims).

34. *See* DOBBS, *supra* note 2, at 312.

35. *See id.*

will. The same is not the case with respect to statutes giving rise to negligence per se.

### *3. Statutory Rules and Negligence Per Se*

Many statutes prescribe a standard of conduct and impose a penalty for violation of that conduct, without specifying whether the statute has any tort law consequences.[36] Such nonprescriptive statutes present the situations in which negligence per se potentially arises.[37] A court invoking the negligence per se doctrine borrows the specific standard of conduct delineated in the statute, substituting that presumably more specific standard for the general, open-ended obligation on the part of the defendant to behave as a reasonable and prudent person under the circumstances.[38] The fact-finder then determines whether the defendant violated the statute and, if so, concludes that the defendant has therefore breached the applicable duty of care.[39] In other words, operating within the common law negligence framework,[40] negligence per se substitutes the statutory standard for the standard of ordinary care, and replaces evaluation of breach of ordinary care with determination of violation of the statute.

*Osborne v. McMasters*[41] is an early and classic example. In *Osborne*, the plaintiff brought a wrongful death action against the defendant, a proprietor of a drug store, claiming that the decedent ingested poison sold by the defendant. The plaintiff claimed that the defendant's failure to affix a poison label to the bottle containing the poison caused the death of the decedent and alleged that the failure violated a

36. Commentators sometimes term these "nonprescriptive statutes." *See id.* at 319–20 (using that term to describe statutes which prescribe no tort law effects); Blomquist, *supra* note 16, at 222–23 (also using that term for the same purpose).

37. *See* RESTATEMENT (THIRD) OF TORTS § 14 cmt. c (AM. LAW INST. 2010) (explaining that negligence per se "presupposes a statute that declares conduct unlawful but that is silent as to civil liability and that cannot be readily interpreted as impliedly creating a private right of action").

38. *See, e.g.*, Barbara Kritchevsky, *Tort Law is State Law: Why Courts Should Distinguish State and Federal Law in Negligence-Per-Se Litigation*, 60 AM. U. L. REV. 71, 129–30 (2010) ("A determination that an individual violated a statute shows that the individual breached a duty of care, taking the question of reasonableness from the jury and substituting the legislative judgment regarding acceptable conduct.").

39. *See, e.g.*, Jeff Todd, *The Poetics and Ethics of Negligence*, 50 CAL. W. L. REV. 75, 93 (2014) (explaining that, under the operation of negligence per se, "rather than using the reasonably prudent person in the same or similar circumstances as the standard of conduct for duty, and failure to conform to the standard for breach, violation of the statute is negligence per se—negligence as a matter of law").

40. *See id.* (observing that the cause of action in a negligence per se case "still proceeds as common law negligence").

41. Osborne v. McMasters, 41 N.W. 543 (Minn. 1889).

criminal statute.[42] In affirming judgment for the plaintiff, the Supreme Court of Minnesota wrote:

> Negligence is the breach of legal duty. It is immaterial whether the duty is one imposed by the rule of common law requiring the exercise of ordinary care not to injure another, or is imposed by a statute designed for the protection of others. The only difference is that in one case the measure of legal duty is to be determined upon common-law principles, while in the other the statute fixes it, so that the violation of the statute constitutes conclusive evidence of negligence, or, in other words, negligence per se.[43]

The key notion is that the defendant's violation of the statute is not mere evidence of breach of the standard of due care, but conclusively establishes that breach.[44] The plaintiff still must establish the other elements of the negligence claim,[45] and could have her recovery barred or reduced depending upon the applicability of available defenses.[46]

Thus, negligence per se, unlike statutory private rights of action or tort law modification rules, is a doctrine of judicial operation rather than a product of direct legislative regulation of civil liability standards.[47] Because the statutes used by courts under the negligence per se doctrine are nonprescriptive, it follows that courts' borrowing of the legislatively-articulated standard of conduct is permissive and not mandatory.[48] For this type of statute to have negligence per se effect, there must have been a pre-existing common law duty.[49] In the ab-

42. *See id.* at 543.

43. *See id.* at 543–44.

44. RESTATEMENT (THIRD) OF TORTS § 14 cmt. c (AM. LAW INST. 2010) (explaining that under the doctrine of negligence per se "courts, exercising their common-law authority to develop tort doctrine, not only should regard the actor's statutory violation as evidence admissible against the actor, but should treat that violation as actually determining the actor's negligence").

45. *See, e.g.*, Andrew E. Costa, *Negligence Per Se Theories in Pharmaceutical and Medical Device Litigation*, 57 ME. L. REV. 51, 56 (2005) (observing that negligence per se "does not relieve the claimant of having to prove the other elements of its negligence claim," such as causation).

46. *See, e.g.*, Gwendolyn McKee, *Injury Without Relief: The Increasing Reluctance of Courts to Allow Negligence Per Se Claims Based on Violations of FDA Regulations*, 83 UMKC L. REV. 161, 182–85 (2014) (noting that various affirmative defenses, such as contributory negligence and assumption of risk, operate to potentially reduce or eliminate plaintiff's recovery in negligence per se cases).

47. *See* Geistfeld, *supra* note 19, at 975 (explaining that "the issue of whether a statute gives individuals a right to compensatory damages for breach of the statutory duty has nothing to do with the doctrine of negligence per se, but instead is determined by a different doctrine that asks whether the legislature intended to create a private cause of action").

48. *See infra* notes 180–90 and accompanying text.

49. *See infra* notes 220–35 and accompanying text.

sence of a common law duty, there is no obligation, enforceable in negligence law, to exercise reasonable care.

### C. Historical Origins and Explanations for Negligence Per Se

The doctrine of negligence per se is well over a century old[50] and is a long-standing feature of American tort jurisprudence.[51] Yet the precise nature and justifications for the doctrine were not well established in its early years.[52] Early courts did not clearly differentiate statutes that created private rights of action from what is recognized today as negligence per se. Other courts employed the term to be synonymous with negligence as a matter of law,[53] or even as an all-purpose pejorative label for clearly negligent behavior.[54] Given nineteenth century courts' confusion about the meaning of the term, it is not surprising that the justifications for negligence per se were not carefully developed or defended.

Both courts and academic commentators struggled to harmonize the common law negligence tradition with a newly emergent and increasingly muscular regulatory state. Providing an early and influential articulation and defense of the negligence per se doctrine, Professor Ezra Ripley Thayer argued that negligence per se was justified by the need for fact-finders in individual cases to defer to the collective will of the legislature in setting the standards of conduct. He argued that rejecting the doctrine of negligence per se:

> puts the court in an unsuitable attitude toward the legislature. . . . Whether it be a statute or an ordinance, none the less the state has spoken through a legislative body having authority to deal with the

50. One scholar traces the concept of negligence per se to an 1841 opinion of the Supreme Court of Pennsylvania. *See* Blomquist, *supra* note 16, at 225. *But see* DOBBS, *supra* note 2, at 319 n.2 (citing Brown v. Buffalo & State Line R.R., 22 N.Y. 191 (1860)) (stating that as late as 1860, New York's highest court rejected the idea that a criminal statute could have any tort law effect).

51. *See, e.g.*, Barbara Kritchevsky, *Whose Idea Was It? Why Violations of State Laws Enacted Pursuant to Federal Mandates Should Not Be Negligence Per Se*, 2009 WIS. L. REV. 693, 697 (characterizing negligence per se as having been viewed "well-settled" doctrine in 1889).

52. *See* Blomquist, *supra* note 16, at 231 (contending that "[o]nly a handful of judicial opinions during this approximately four-decade time frame [from 1880 to 1920] attempted to explain the rationale for grafting a nonprescriptive statutory standard onto a civil action for the tort of negligence").

53. *See id.* at 230 (observing that some early cases used the term "to consider whether conduct of litigants could be construed as lacking due care as a matter of law").

54. *See* McKee, *supra* note 46, at 176 (observing that the concept was often "used to demonstrate the belief on the part of the judge or judges that the behavior in question was undeniably negligent").

> situation a standard of conduct has been fixed in order to prevent a public evil; and the liberty of the individual has been curtailed for the protection of others.[55]

Thayer also argued that a reasonably prudent person should, by definition, follow the standards of conduct embodied in legislative commands and that a jury assessing whether a person satisfied the standard of ordinary care similarly should be constrained by the applicable legislative pronouncement.[56]

Thayer's view was not without its critics. Professor Charles Lowndes, for example, argued that a blanket legislative rule did not necessarily dictate how a prudent person would act in a particular situation, and that the jury should be free to determine negligence with respect to each particular case.[57] Professor Clarence Morris contended similarly that violation of a criminal statute was not necessarily indicative of negligence in a particular case.[58] Nevertheless, the negligence per se doctrine was accepted in the Restatement of Torts (First Restatement), which provided that violation of a legislative enactment made the actor liable if the statute was designed, at least in part, as a safety measure for the benefit of individuals.[59]

Subsequent versions of the Restatement of Torts have retained the basic concept of negligence per se, though the precise dimensions of the doctrine have been refined. The Second Restatement provides that the standard of conduct of a reasonable person may be "adopted by the court from a legislative enactment or an administrative regulation"[60] if the purpose of the statute or regulation is, at least in part, to protect the class of persons of which plaintiff is a member (the "class of persons" limitation) and to prevent the type of harm suffered by the

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55. Ezra R. Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 324 (1914).

56. *See id.* at 321–28.

57. *See, e.g.*, Charles L. B. Lowndes, *Civil Liability Created by Criminal Legislation*, 16 MINN. L. REV. 361, 368 (1932).

58. *See, e.g.*, Clarence Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453, 458 (1932).

59. The First Restatement provided that a "violation of a legislative enactment" made the actor liable for negligence if four criteria were met: (1) "the intent of the enactment was 'exclusively or in part to protect the interest of the other as an individual'"; (2) "the interest invaded" was one that the enactment was "intended to prevent"; (3) the invasion of the plaintiff's interest was one the enactment "intended to protect"; and (4) the violation was "a legal cause of the invasion" of the plaintiff's interest. *See* RESTATEMENT (FIRST) OF TORTS § 286 (AM. LAW INST. 1934). As Kritchevsky notes, the First Restatement ties negligence per se closely to the legislative intent in the enactment of the statute. *See* Kritchevsky, *supra* note 38, at 81.

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

plaintiff (the "class of risks" limitation).[61] The Second Restatement emphasized that the court's decision to borrow the statutory requirement as the standard of care was discretionary.[62] It also recognized the possibility that the defendant's violation of the statute might be excused.[63] The Third Restatement reflects the same basic requirements as the Second Restatement in a somewhat streamlined form.[64] The Third Restatement also articulates, more specifically and comprehensively than did prior Restatements, the rationales for the negligence per se rule.[65]

In short, a court applying the doctrine of negligence per se substitutes the standard of conduct contained in the statute for the general standard of ordinary care, streamlining the fact-finder's breach deter-

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61. *See id.* § 286. That provision reads as follows:

The court may 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 or in part

> a) to protect a class of persons which includes the one whose interest is invaded, and
>
> b) to protect the particular interest which is invaded, and
>
> c) to protect that interest against the kind of harm which has resulted, and
>
> d) to protect that interest against the particular hazard from which the harm results

62. *See id*. at cmt. d (explaining that the "decision to adopt the standard [contained in the statute or administrative regulation] is purely a judicial one," as the court employing negligence per se analysis "is acting to further the general purpose which it finds in the legislation, and not because it is in any way required to do so").

63. *See id*. at § 288A. That section provides:

> (1) An excused violation of a legislative enactment or an administrative regulation is not negligence.
>
> (2) Unless the enactment or regulation is construed not to permit such excuse, its violation is excused when
>
> > a) the violation is reasonable because of the actor's incapacity;
> >
> > b) he neither knows nor should know of the occasion for compliance;
> >
> > c) he is unable after reasonable diligence or care to comply;
> >
> > d) he is confronted by an emergency not due to his own misconduct;
> >
> > e) compliance would involve a greater risk of harm to the actor or to others.

64. *See* RESTATEMENT (THIRD) OF TORTS § 14 (AM. LAW INST. 2010). That provisions states that an actor "is negligent if, without excuse, the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect." Section 15 specifies the situations in which statutory violation may be excused. *See id.* § 15

65. *See* Kritchevsky, *supra* note 51, at 704 (noting that the Third Restatement "goes much further than did previous Restatements in justifying" negligence per se). In a subsequent section, I will address each of the rationales set out in the Third Restatement, and explain why they are inadequate to justify the continued adherence to that doctrine. *See infra* notes 236–68, and accompanying text.

mination.[66] Rather than inquiring broadly whether the defendant's conduct entailed risks that a reasonable and prudent person would not have created under the circumstances, the fact-finder simply determines whether the defendant violated the statute. The statute establishes the standard of care, and its unexcused violation constitutes breach of that standard.

The majority view is that negligence per se conclusively establishes breach of duty in a negligence case.[67] However, approximately a dozen jurisdictions treat statutory violation as merely some evidence of breach,[68] similar to the approach taken with respect to failure to adhere to customary safety precautions.[69] A handful of jurisdictions treat statutory violation as prima facie proof of negligence, or as creating a rebuttable presumption of negligence.[70] Given the possibility that the statutory violation may be excused under its negligence per se provisions, the Third Restatement treats the rebuttable presumption view as functionally equivalent to negligence per se.[71]

It should be noted that negligence per se plays a similar role in connection with evaluation of the plaintiff's contributory negligence.[72] The basic contributory negligence inquiry is, essentially, a mirror image of the negligence analysis, focusing on the plaintiff's failure to exercise the care of the reasonable and prudent person in her own self-protection. A statutory safety violation by the plaintiff can be used by the defendant to establish conclusively that the plaintiff failed to exercise due care in her own self-protection (the equivalent of breach of duty in the contributory negligence context). Once the plaintiff has been shown to be contributorily negligent, her potential recovery

66. *See* Kritchevsky, *supra* note 38, at 84 (noting that the negligence per se serves to substitute the legislature's judgment of reasonable conduct for that of the jury).

67. *See* RESTATEMENT (THIRD) OF TORTS § 14 cmt. c (AM. LAW INST. 2010) (stating that this approach is the "strong majority rule"). This characterization of the effect of unexcused statutory violation reflects the language used by Justice Cardozo in his landmark opinion in *Martin v. Herzog*, 126 N.E. 814 (N.Y. 1920) ("We think the unexcused omission of the statutory signals is more than some evidence of negligence. It is negligence in itself.").

68. *See* RESTATEMENT (THIRD) OF TORTS § 14 cmt. c.

69. *See* Abraham, *supra* note 8, at 1786 (explaining that evidence of an actor's departure from custom is admissible to show negligence, but is not conclusive).

70. *See* RESTATEMENT (THIRD) OF TORTS § 14 cmt. c.

71. *See id.* (characterizing this approach as "close to or congruent with this Restatement's position"); *see also* DOBBS, *supra* note 2, at 316 (stating that a presumptive or prima facie negligence rule is, at most, "a slight variant on the per se rule," with "the differences, if any, [being] minor indeed").

72. *See* DOBBS, *supra* note 2, at 316 (stating that statutory violation "equally proves the plaintiff's contributory negligence in appropriate cases").

against a negligent defendant is barred or reduced.[73] Many judicial opinions addressing negligence per se discuss the role of this doctrine in evaluating the plaintiff's contributory negligence.[74]

## III.
## Problems with Negligence Per Se

Despite its long pedigree, there are a number of conceptual and doctrinal problems with negligence per se. This section examines some of the most important ones.

### *A. Mismatch Between Legislative and Adjudicative Functions*

A major problem with negligence per se is that it involves the use of a criminal statute or administrative regulation not designed to address tort liability in determining the existence and scope of negligence-based tort liability. Critics of negligence per se have long noted that key features of legislative and administrative processes render the products of those processes ill suited for negligence analysis.

#### *1. The Prospective and General Nature of Legislation, and the Problems of Over-inclusiveness, Disproportionality, and Obsolescence*

A central characteristic of the traditional negligence standard is its flexibility. The standard of ordinary care invites the fact-finder to evaluate the reasonableness of the defendant's behavior under all of the circumstances, permitting the fact-finder to do justice in individual cases.[75] Efforts to fix through rigid rules what reasonable care entails are fraught with difficulty because of the infinite variety of factual settings in negligence cases. Professor Leonard cites, for example, the cautionary tale of Justice Holmes' efforts in *Baltimore & Ohio R.R. v. Goodman*[76] to set out a fixed rule for the standard of conduct drivers should undertake when approaching railroad crossings. *Goodman* held that reasonable care necessarily required a driver to get out of his car

73. At common law, contributory negligence was a complete defense to a plaintiff's negligence suit. *See id*. at 494. With few exceptions, modern American jurisdictions have abandoned the common law rule, replacing it with some version of comparative fault apportionment, under which plaintiff's contributory negligence proportionally reduces, but does not necessarily eliminate, plaintiff's damages recovery against a negligent defendant. *See id*. at 503–04.

74. *See, e.g.*, Martin v. Herzog, 126 N.E. 814 (N.Y. 1920) (finding plaintiff's "unexcused omission of statutory signals" to be contributory negligence).

75. *See supra* notes 4–15 and accompanying text (discussing the flexibility inherent in the standard of reasonable care).

76. Balt. & Ohio R.R. Co. v. Goodman, 275 U.S. 66, 69–70 (1927).

and look to see if a train is approaching. Just seven years later, the U.S. Supreme Court effectively repudiated the *Goodman* rule,[77] with Justice Cardozo famously observing the "need for caution in framing standards of behavior that amount to rules of law."[78] According to Professor Leonard, the problem was not with Holmes's particular rule, but with the effort to capture in a rule a principle as elusive and fact-specific as that of reasonable care.[79] As Leonard explains:

> Judge and jury are thus the essential element in each case, and are of greater importance than rules and formulas, Their interrelated workings, with each serving a circumscribed yet highly situational function, assures not only that justice is done between the parties, but that other factors, including important social policies, are served in each individual case. No fixed rules can have this effect, and attempts to interject such standardized calculations into negligence law, no matter whether they are born of the efforts of judges or of the legislature, are doomed to failure.[80]

Negligence per se, in its purest form, creates precisely this type of problem.[81] When an actor's negligence is determined solely by violation of a statute, the traditional flexibility to evaluate the entire range of circumstances is sacrificed, because the legislature's approach in defining standards of conduct is necessarily general and prospective. The classic case of *Tedla v. Ellman*[82] is illustrative. In *Tedla*, the plaintiff was a pedestrian struck by a passing automobile operated in an apparently negligent fashion by the defendant Ellman. Ellman appealed the jury verdict for Tedla, claiming that Tedla was contributorily negligent as a matter of law, having violated a state traffic law requiring pedestrians to "keep to the left of the center line . . . so as to permit all vehicles passing them in either direction to pass on their right."[83] Tedla acknowledged violation of the statutory rule, but introduced evidence indicating that the exceptionally heavy Sunday night traffic on that evening made statutorily-approved walking on the west-

77. *See* Pokora v. Wabash Ry. Co., 292 U.S. 98, 101–02 (1934).

78. *Id.* at 105.

79. *See* Leonard, *supra* note 9, at 455.

80. *Id.* at 456–57.

81. *See id.* at 457 (stating that a "crucial flaw in the negligence per se formula is that it requires just such an injection of fixed standards into the adjudication of negligence cases"). *See also* Dobbs, s*upra* note 2, at 309–10 (observing the problems associated with a rule of law specifying particular conduct as necessarily negligent); Blomquist, *supra* note 16, at 276 (noting the "nonflexibility problem" of negligence per se).

82. Tedla v. Ellman, 19 N.E.2d 987 (N.Y. 1939).

83. *Id.* at 988.

bound side of the road unusually hazardous, compared to the comparative safety of walking on the lightly-traveled eastbound side.[84]

Should the legislative provision conclusively establish the unreasonableness of the plaintiff's decision to walk with the light traffic, rather than against the heavy traffic? Generally speaking, negligence per se doctrine would say yes.[85] And it is fair to conclude that the legislature, looking at the matter prospectively, would have viewed adherence to the statutory requirement as enhancing safety. But the legislature's view is necessarily a generalized response to an overall problem, and by its nature cannot account for particular situations in which safety might be enhanced by conduct that would violate the statute. Rigid application of negligence per se principles would strip the reasonableness inquiry of the situational nuances typically needed to do justice in individual cases. Professor Geistfeld explains:

> Statutes and safety regulations ordinarily provide general rules, not solutions for specific cases. While reasonable in the ordinary case, a statutorily prescribed standard of safe conduct is not necessarily reasonable in the extraordinary circumstances of an individual tort case. Sometimes it can be safer to violate a statute than to comply

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84. *See id.* at 989. Of course, the occurrence of the accident suggests that this assessment may, in perfect hindsight, have been mistaken. Nevertheless, evaluating the reasonableness of the plaintiff's behavior on an *ex ante* basis, the jury apparently agreed in finding the defendant liable.

85. Note, however, that the New York Court of Appeals held otherwise in *Tedla*. The court explained:

> We may assume reasonably that the Legislature directed pedestrians to keep to the left of the center of the road because that would cause them to face traffic approaching in that lane and would enable them to care for their own safety better than if the traffic approached them from the rear. We cannot assume reasonably that the Legislature intended that a statute enacted for the preservation of life and limb of pedestrians must be observed when observance would subject them to more imminent danger.

*Id.* at 991.

*Tedla* could be viewed as a case in which the court interpreted the statute to contain an implied limitation on its scope. *See, e.g.*, Clayton P. Gillette, *Rules and Reversibility*, 72 NOTRE DAME L. REV. 1415, 1416, 1416 n.4 (1997) (characterizing the *Tedla* court as reading into the statute an exception not explicitly included in it). This idea is broadly akin to the notion of the defense of necessity in criminal cases. *See, e.g.*, Stephen S. Schwartz, *Is There a Common Law Necessity Defense in Federal Criminal Law?*, 75 U. CHI. L. REV. 1259, 1260–63 (2008) (explaining that the necessity defense allows courts to flexibly recognize implied exceptions or limitations to criminal statutes in order to avoid unjust results). Alternatively, *Tedla* could be viewed as recognizing an excuse for a statutory violation where adherence to the statute would subject the actor to a greater risk of harm. *See* RESTATEMENT (SECOND) OF TORTS § 288A(2) cmt. e (AM. LAW INST. 1965) (using a scenario similar to *Tedla* to illustrate such an excuse).

> with it. In these cases, the legislative safety decision is not relevant to the particular safety decision implicated by the tort claim . . . .[86]

A second, related problem in applying criminal prohibitions to negligence analysis is that of potentially disproportionate effects. Many of the types of statutory or administrative rules applied in negligence per se cases involve provisions like speed limits, or other traffic regulations, which typically provide for relatively minor penalties.[87] In negligence actions, however, minor infractions can have potentially massive effects on damages recovery.[88] In effect, this generates "penalties" for violation of the statute that could far exceed those that the legislature contemplated.

Finally, the relative permanence of statutory prohibitions creates a risk that parties in civil litigation may rely on violations of obsolete or outmoded statutes to establish liability. As Professor Leonard emphasized, while the common law process permits constant updating of the law,[89] legislation designed to address a particular problem can become outdated over time, and the realities of the legislative process can make such legislation nearly impossible to repeal, even if it no longer comports with changing technology or social norms.[90] Examples abound. Professor William Stuntz, commenting on the sheer scope of behavior criminalized in various jurisdictions, as well as the oddity of some of the prohibitions, noted:

> Florida criminalizes selling untested sparklers, or altering tested ones; it also bans the exhibition of deformed animals. . . . California criminalizes knowingly allowing the carcass of a dead animal "to be put, or remain, within 100 feet of any street, alley public highway, or road . . . ." It also criminalizes the sale of alcohol "to any common drunkard" and cheating at cards. Ohio criminalizes homosexual propositions and "ethnic intimidation." Texas criminalizes overworking animals, causing two dogs to fight, and violations of rules concerning college athletes. Massachusetts crim-

86. Geistfeld, *supra* note 19, at 989 (citations omitted).

87. *See* James, *supra* note 20, at 107–08.

88. These effects can operate in either direction. A defendant's traffic violation might generate expansive liability that the legislature would not have contemplated. Alternatively, a violation might be the plaintiff's, potentially reducing or even eliminating recovery of damages for injuries inflicted by the defendant's wrongdoing. Again, just because a traffic law imposes a small fine for, say, speeding, it does not follow that the legislature intended such violation to cost an injured plaintiff tens or hundreds of thousands of dollars in potential damages. *See id.* at 108 (observing that negligence per se in practice tends to harm plaintiffs more often than defendants, effectively restricting, rather than expanding, tort liability).

89. *See* Leonard, *supra* note 9, at 459.

90. *See id.* at 461. *See also* James, *supra* note 20, at 108 (observing that "many statutes on the books today are ill conceived, or hastily drawn, or obsolete").

> inally punishes frightening pigeons away from beds which have been made for the purposes of taking them in nets.[91]

When nonprescriptive statutes are confined to their designated realms, the problems of inflexibility, disproportionality, and immutability can be mitigated by the exercise of police and prosecutorial or administrative discretion. But these critical safeguards are absent in negligence per se doctrine, where self-interested litigants have a financial incentive to push the envelope in using statutory or administrative commands to establish the negligence of the opposing party.[92]

### 2. *The Role of Discretion*

In drafting a criminal law, legislators have every incentive to draft criminal prohibitions extremely broadly to ensure that they are not under-inclusive and to rely on the discretion of enforcement agencies and prosecutors to ensure that such laws are not over-enforced.[93] As a result, discretion is essential to the effective operation of the criminal justice system. As one commentator observed:

> Discretion pervades the American criminal justice system. Although prosecutorial discretion is largely unreviewable and unchecked and, therefore, subject to abuse, it is essential to the efficient operation of the criminal justice system. Full enforcement of the law would not only be impractical, but also unwise. Prosecutors are expected to make decisions regarding which cases *will* be prosecuted out of the many which *could* be prosecuted.[94]

Such discretion is not limited to prosecutorial charging decisions. Administrative agencies[95] and law enforcement officials[96] perform simi-

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91. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 515–16 (2001) (internal citations omitted).

92. *See* McKee, *supra* note 46, at 178 (noting substantial tactical benefits of negligence per se for the party successfully asserting it).

93. *See* Donald A. Dripps, *Criminal Procedure, Footnote Four, and the Theory of Public Choice; Or, Why Don't Legislatures Give a Damn About the Rights of the Accused?*, 44 SYRACUSE. L. REV. 1079, 1090 (1993) ("Executive discretion . . . operates as an important shock-absorber that protects legislatures from hostile reaction to law enforcement operations."); Stuntz, *supra* note 91, at 547–49 (explaining that legislative incentives push in the direction of broadly drafted criminal statutes, relying on prosecutorial discretion to winnow their coverage in practice).

94. Roger A. Fairfax, Jr., *Prosecutorial Nullification*, 52 B.C. L. REV. 1243, 1243–44 (2011) (internal citations omitted).

95. *See* KENNETH C. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 21–23 (1969) (explaining the role of administrative agencies' discretion in choosing cases to adjudicate).

96. *See* Erik Luna, *Transparent Policing*, 85 IOWA L. REV. 1107, 1132–33 (2000) (observing that police are vested with "broad latitude" both "as a matter of history and of practical necessity" in their application of penal codes to potential offenders).

lar filtering functions, exercising discretion to winnow the vast array of potential enforcement actions to a manageable number and to ensure that broad prohibitions are not inappropriately applied.

The centrality and pervasiveness of this discretion negates the key assumption underlying negligence per se—namely, that the legislature had deemed the subject's behavior as dangerous or unreasonable by enacting a piece of legislation prohibiting it. A particular statute, as written, may not reflect the legislature's view[97] of the appropriateness of the subject's behavior in specific contexts. The statutory command could better be viewed as a set of practices to be adhered to generally, with enforcement officials, prosecutors, and adjudicators acting as crucial safety valves to limit enforcement to appropriate cases.[98]

In determining whether an actor has failed to exercise reasonable care under the circumstances, juries using the traditional negligence approach perform a similar discretionary function. But negligence per se, in its traditional form,[99] eliminates this critical safety valve, highlighting the mismatch between the legislative standard and the use of that standard to specify reasonable care. That mismatch is the basis for the traditional criticisms of negligence per se.

### *B. Changed Circumstances: Major Developments Since the Emergence of Negligence Per Se*

The traditional critique of negligence per se presented in the previous section is reinforced by three important developments that have taken place since the early days of negligence per se: (1) the massive increase in statutory and administrative laws and regulations, (2) the rising prominence of modern textualist approaches to statutory interpretation, and (3) the rise of the legislative tort reform movement. The

97. If it can be said that a multi-member body can have "a view." *See infra* notes 114–21 and accompanying text (discussing conceptual and practical problems in determining legislative intent).

98. *See* James, *supra* note 20, at 107 (observing that "law-makers may well have been content with a broad unqualified requirement in a criminal statute because they well knew that enforcement officials would use their discretion to make exceptions in cases where literal compliance made no sense or worked a hardship").

99. The rigidity of early negligence per se cases is mitigated somewhat by the modern recognition of judicial discretion to reject negligence per se effect of particular statutes for policy reasons, *see infra* notes 180–90 and accompanying text, as well as by the recognition of excuses for statutory violation. *See infra* notes 214–19 and accompanying text. This additional flexibility, however, is not without its own problems. *See infra* notes 243–44 and accompanying text (discussing the ways in which the rationales for negligence per se are undermined by the judicial discretion to reject negligence per se effects and by the availability of excuses).

interplay of these developments amplifies the problems of negligence per se.

### *1. The Massive Increase in Statutory Law*

When negligence per se emerged, common law courts were the arbiters of most legal rights, obligations, and remedies.[100] While legislatures possessed the ultimate authority to determine the contours of the law, statutes were a relative rarity.[101] On the few occasions when the legislature did prohibit or regulate behavior, it is unsurprising that courts felt that they should pay attention.

This world of rare legislation is long gone. The past century has seen "an orgy of statute making."[102] Congress alone has created twelve times the statutory law during the last fifty years that it did in the previous one hundred and fifty years.[103] Similar trends exist at the state level.[104] Moreover, there has been, if anything, an even greater explosion of lawmaking by administrative agencies,[105] not to mention local and regional governments. As a result, "legislatures are the primary source of law, and the statute books grow exponentially."[106]

This exponential growth in positive law alters the calculus for negligence per se.[107] Rather than rare intrusions into assessment of negligence under common law standards, the legislation explosion creates myriad opportunities for litigants to allege statutory violations to show negligence, magnifying the problems outlined in the previous section. Moreover, the cacophony of positive law increases the odds

100. *See* CALABRESI, *supra* note 16, at 4 (observing that nineteenth century legal requirements were largely determined by common law courts); Daniel A. Farber & Philip P. Frickey, *In the Shadow of the Legislature: The Common Law in the Age of the New Public Law*, 89 MICH. L. REV. 875, 875 (1991) (noting that "a century ago, statutes were considered intrusions into the pristine order of the common law").

101. *See* CALABRESI, *supra* note 16, at 4–5 (stating that legislative authority "was exercised sparingly, by modern standards," and that "[s]tatutes were rare enough so that, even when they became middle-aged and no longer desirable, they would not greatly inconvenience the polity") (citation omitted). Indeed, legislatures were originally viewed not as sources of desirable laws, but as institutions designed to prevent the enactment of bad ones by courts. *See* Andrew J. Wistrich, *The Evolving Temporality of Lawmaking*, 44 CONN. L. REV. 737, 780 (2012).

102. GILMORE, *supra* note 16, at 95.

103. Wistrich, *supra* note 101, at 780.

104. *Id.*

105. *See* Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 96 (2003) (characterizing the explosion of administrative bureaucracy as an "epochal transformation" of American law and government).

106. Farber & Frickey, *supra* note 100, at 875.

107. *See* RESTATEMENT (THIRD) OF TORTS §14 cmt. d (AM. LAW INST. 2010) (acknowledging that the significance of negligence per se "has expanded in recent decades, as the number of statutory and regulatory controls has substantially increased").

of misapplication of negligence per se principles, as well as the costs to litigants and judges of administering the doctrine.[108]

### 2. *The Rise and Implications of Modern Textualist Approaches to Statutory Interpretation*

A core component of the negligence per se analysis is the inquiry into the class of persons and class of risks that the statute is designed to address, which requires a potentially broad-ranging assessment of the legislative purpose(s) underlying the statute.[109] The focus on legislative purpose, which would have seemed quite natural to courts of the early twentieth century, is questionable in light of modern textualist critiques of strong purposivist approaches to statutory interpretation.

#### *a. Purposivist and Textualist Approaches to Statutory Interpretation*

Under the purposivist approach, a court undertaking the task of statutory interpretation should, to the best of its ability, construe the statute in a way consistent with the legislature's purposes in enacting it.[110] Purposivists believe that a statute should be presumed to be the work of reasonable people pursuing intelligible goals, and that any interpretation of the statute should be conducted accordingly.[111] Purposivists are comfortable with reliance on interpretive aids extrinsic to the text, such as legislative history, to effectuate the legislature's purpose,[112] and are willing to adopt an interpretation that furthers evi-

108. *See infra* notes 157–235 and accompanying text (discussing extensive doctrinal analysis that goes into negligence per se applicability, and its accompanying costs).

109. *See infra* notes 159–84 and accompanying text (describing operation of the statutory purpose doctrine).

110. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1374 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (explaining that in interpreting a statute, a court should first determine "what purpose ought to be attributed to the statute" and then "[i]nterpret the words of the statute . . . so as to carry out the purpose as best it can"); *see, e.g.*, Archibald Cox, *Judge Learned Hand and the Interpretation of Statutes*, 60 HARV. L. REV. 370, 370 (1947) (noting that "some such purpose lies behind all intelligible legislation"); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 538–39 (1947) (explaining that all legislation is designed to address some problem and therefore has some intelligible aim).

111. *See* HART & SACKS, *supra* note 110, at 1125 (stating that a "statute ought always to be presumed to be the work of reasonable men pursuing reasonable purposes reasonably").

112. *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1764 (2010).

dent statutory purposes, even if that interpretation conflicts with the text.[113]

Textualists, in contrast, contend that a court's goal is not to discern the legislature's understanding of the statutory text or the interpretation of the statute that best accomplishes the purposes of the legislature, but rather to determine the objective meaning of the statutory text.[114] The primacy of the enacted text is defended on various grounds, but one key to the textualist rejection of purposivism is its institutional view of legislative action that is grounded in legal realist analysis influenced by the public choice theory.[115]

The core of the critique of purposivism arises from the fact that the legislature is a multi-member body and therefore has no uniform "intent" or "purpose."[116] When the majority of a legislature votes to adopt a particular bill, that majority is comprised of members who may have completely varied purposes, or even completely divergent understandings of the meaning of the adopted bill.[117] Thus, courts at-

113. *See id.* For examples of purpose overriding text, *see infra* notes 123–32 and accompanying text.

Some scholars conclude that there is a related approach to statutory interpretation, intentionalism, which focuses on legislative intent (as opposed to purpose) as the "ultimate determinant of the law." Jonathan R. Siegel, *The Inexorable Radicalization of Textualism*, 158 U. PA. L. REV. 117, 123–24 (2009) (describing intentionalist approaches to interpretation and contrasting this approach with purposivism); *see also* John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 419–23 (2005) (discussing intentionalism). Like purposivism, intentionalism does not ignore statutory text, but acknowledges that a literal interpretation of the statute's text can sometimes lead to results inconsistent with the intentions of the law's drafters. *See* Siegel, *supra*, at 123. In such a scenario, intentions, not text, should determine interpretation of the law. *See id.* As Siegel acknowledges, purposivism and intentionalism are sufficiently closely related that some commentators treat them as effectively synonymous. *See id.* at 125 n.39 (noting that Jonathan T. Molot "uses the term 'purposivism' to cover both purposivism and intentionalism"); *see also* Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 3 n.2 (2006) (explaining that he uses the term purposivism "as shorthand to refer to textualism's nonadherents" and does not "distinguish among different versions of 'purposivism' ").

114. *See* Gluck, *supra* note 112, at 1762–63 (noting textualist rejection of statutory purpose as a determinant of statutory meaning); Siegel, *supra* note 113, at 123 (explaining that textualists view the text as having legal force regardless of what its individual legislative adopters understood or intended the text to mean).

115. *See* Manning, *supra* note 113, at 431–32 (highlighting the role of public choice theory in textualists' view of legislative process).

116. *See, e.g.*, Frank H. Easterbrook, *Text, History, and Structure in Statutory Interpretation*, 17 HARV. J.L. & PUB. POL'Y 61, 68 (1994) (observing that the concept of intent "is elusive for a natural person, fictive for a collective body"); *see also* Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent as Oxymoron*, 12 INT'L REV. L. & ECON. 239, 244 (1992).

117. *See* Easterbrook, *supra* note 116, at 68 ("Intent is empty. Peer inside the heads of legislators and you find a hodgepodge."); John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2410–13 (2003) (explaining that the compromise

tempting to discern the legislature's purpose (distinct from the text) are on a fool's errand.

Moreover, public choice theory suggests that the legislative process often involves compromise, sometimes of an unprincipled sort, further undermining the case for some discernible intent or purpose to guide judicial interpretation of the statute.[118] Judicial selection of underlying purposes thus may permit judges to elevate their own policy preferences over the enacted text, as well as the policy preferences of one faction of the legislature over that of another.[119] Finally, textualists argue that the realities of the legislative process are sufficiently opaque, complex, and path-dependent that judges can never hope to discern what the legislature in fact intended.[120] As a result, the textualist view is that the objective meaning of the words in the statute present the only reliable measure of statutory meaning.[121]

*b. Purposivism and Negligence Per Se*

At the time negligence per se became widely accepted, purposivist approaches to statutory interpretation were dominant.[122] The U.S. Supreme Court's 1892 decision in *Holy Trinity Church v.*

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inherent in legislative decision-making undermines the search for a single coherent rationale for legislative action); Siegel, *supra* note 113, at 125 (noting that the "legislative majority that voted for a statute may be made up of legislators serving different purposes").

118. *See, e.g.*, Easterbrook, *supra* note 116, at 68 (explaining that compromise is at the core of legislation, and that compromise undermines the search for coherent legislative purposes); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 334–35 (noting that public choice theory and the impacts of interest groups undercut the view that the legislative process produces statutes reflecting a meaningful legislative purpose or intent); Siegel, *supra* note 113, at 132 ("Interest-group politics and the give and take of the legislative process produce compromises, including potentially unprincipled compromises, and even statutes that pursue no reasonable purpose but simply transfer wealth to powerful groups.").

119. *See* Molot, *supra* note 113, at 28.

120. *See* John F. Manning, *What Divides Textualists From Purposivists?*, 106 COLUM. L. REV. 70, 74–75 (2006) (explaining that such techniques as the sequence of presentation of alternatives, logrolling, and strategic voting influence outcomes of the legislative process in ways inconsistent with the assumptions of purposivist statutory interpretation).

121. *See id.* at 75.

122. *See* John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 113 (noting that, for most of the twentieth century, the United States Supreme Court adhered to the traditional purposivist framework for statutory interpretation); Molot, *supra* note 113, at 30 (claiming that "[f]rom the late nineteenth century through the Warren Court era and beyond, purposivist judges had purported to base their decisions on *Congress's* statutory purposes").

*United States*[123] is illustrative. In *Holy Trinity*, the Court interpreted a federal statute, which forbade anyone from contracting with an alien to perform "labor or service of any kind,"[124] to be inapplicable to the church's actions in that case, despite concluding that its behavior fell within the literal language of the statute.[125] Invoking the "familiar rule" that "a thing may be within the letter of a statute, yet not within the statute, because not within its spirit or within the intention of its makers,"[126] the Court, relying on committee reports accompanying the bill, among other things, concluded that the primary purpose of the statute was to prevent "the influx of . . . cheap unskilled labor."[127] Consequently, it concluded that a literal interpretation of the statute would extend its scope beyond legislative design, and that a more faithful adherence to Congress's purpose required a narrower interpretation.[128]

This purposivist approach continued throughout the New Deal era and beyond. In *United States v. American Trucking Association*,[129] the Court wrote:

> When [plain] meaning has led to absurd or futile results . . . this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results, but merely an unreasonable one "plainly at variance with the policy of the legislation as a whole" this Court has followed that purpose, rather than the literal words. When aid to construction to the meaning of words, as used in the statute, is available, there certainly can be no "rule of law" which forbids its use, however clear the words appear to be on "superficial examination."[130]

According to Professor Manning, *American Trucking* "helped usher in a period of increasing judicial reliance on legislative history, and the unapologetic use of such material to ascertain whether the statutory text adequately captured the legislative purpose."[131] During this hey-

123. Holy Trinity v. United States, 143 U.S. 457 (1892).

124. Alien Contract Labor Act of 1885, 23 Stat. 332, *repealed by* Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952).

125. *See Holy Trinity*, 143 U.S. at 458 (acknowledging that it "must be conceded that the act of the corporation is within the letter of this section"). The Holy Trinity Church contracted with the Rev. E. Walpole Warren, an Englishman, to serve as minister of its congregation.

126. *See id.* at 458.

127. *Id.* at 464.

128. *See id.* at 465.

129. United States v. Am. Trucking Ass'n, 310 U.S. 534 (1940).

130. *Id.* at 543–44 (quoting Ozawa v. United States, 260 U.S. 178, 194 (1922)).

131. *See* Manning, *supra* note 122, at 123.

day of purposivism, numerous judicial decisions relied on legislative intent or purpose, even when in tension with the statutory text.[132] Against this backdrop, it is unsurprising that courts in negligence per se cases were confident that they could, and should, determine the purpose(s) of the statutes before them in assessing whether the statutes were suitable for negligence per se treatment.

*c. The Dominance of Modern Textualism and Its Challenge to Negligence Per Se*

The 1980s saw the rise of a new textualist approach to statutory interpretation, an approach expressly in contrast with purposivism.[133] Textualist critiques have significantly impacted interpretive practices. In particular, recognition of the way in which the realities of the legislative process challenge traditional emphasis on legislative intent or purpose has significantly influenced courts, both federal[134] and state.[135] Though there is still much debate at the margins, textualism is now the dominant approach.[136] Molot explains:

> Indeed, the broad appeal of textualism's underlying premises has led judges who do not consider themselves adherents to heed textualism's warnings about the pitfalls of strong purposivism and to alter their approach to statutory interpretation. Empirical studies by prominent scholars and judges and anecdotal evidence from scholars who follow statutory interpretation decisions confirm that textualism has had a measurable impact on judges and Justices who do not include themselves among textualism's adherents.[137]

The strong purposivism that reigned prior to the rise of modern textualist critiques has been undermined significantly.[138]

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132. *See* Molot, *supra* note 113, at 30 n.125 (collecting cases).

133. *See* Manning, *supra* note 120, at 73 (noting that the close of the twentieth century brought the "new textualist" critiques of purposivist orthodoxy).

134. *See* Manning, *supra* note 117, at 2419 (explaining that the United States Supreme Court, for example, "now seems to accept that the uncertainties of the legislative process make it safer simply to respect the language that Congress selects, at least when that language is clear in context").

135. *See* Gluck, *supra* note 112, at 1758 (observing that textualism is "the *controlling* interpretive approach—the consensus methodology chosen by the courts' " in the study of state court interpretive practices).

136. *See* Jonathan R. Siegel, *Textualism and Contextualism in Administrative Law*, 78 B.U. L. REV. 1023, 1057 (1998) (stating that "[i]n a significant sense, we are all textualists now").

137. *See* Molot, *supra* note 113, at 32. *See also* Siegel, *supra* note 113, at 119 (characterizing Molot's view as suggesting that the wars over methods of statutory interpretation are over because the textualists have won).

138. *See* Molot, *supra* note 113, at 35 (noting that "the purposivism that prevailed in prior decades has largely disappeared and textualist rhetoric has made its way into mainstream judicial opinions").

The ascendance of textualism poses a challenge to negligence per se, which uses the violation of a statutory provision, which is not expressly designed for negligence liability, to establish breach of duty. First, if the statute neither creates a private right of action nor modifies existing tort liability rules, it is not clear why courts should view the statute as controlling the legal standards governing liability.[139] The legislature could have expressed its intention that the statutory provision alters tort liability, and textualists should seriously consider the significance of the omission of such expression, where it occurs.[140] Moreover, the class of persons and class of risks inquiries, central to negligence per se analysis, are exactly the kind of purpose inquiries that Molot claims the new textualism has defeated.[141]

Curiously, the American Law Institute (ALI) drafters of the Third Restatement briefly acknowledged the potential challenges to negligence per se posed by the new textualism, noting the difficulty of judicial determination of statutory purpose.[142] However, they quickly dropped the issue without further analysis, merely observing that "the theoretical debates that have marked the general project of legislative interpretation in recent years have not broken out in these negligence per se cases."[143]

### *3. Tort Reform and the Distinction Between Legislative Ends and Means*

The notion that the legislature's purpose in enacting a statutory prohibition can and should be furthered by treating the statute's violation as negligence per se is based, implicitly, on the assumption that civil tort liability, though not necessarily contemplated by the legislature, is at least broadly consistent with legislative goals. Many early negligence per se cases were partly based on the ancient principle that

139. *See* Jeffrey A. Pojanowski, *Statutes in Common Law Courts*, 91 TEX. L. REV. 479, 530 (2013) (characterizing negligence per se doctrine as "puzzling through federal textualist eyes").

140. *See, e.g.*, Drummonds, *supra* note 19, at 964 ("When the legislature omits any reference to a tort-like remedy, the inference clearly arises that, without more, no tort-like remedy was intended.").

141. *See infra* notes 157–84 for a discussion of the difficulties courts have encountered in assessing legislative purpose in undertaking the class of persons and class of risks inquiries.

142. RESTATEMENT (THIRD) OF TORTS § 14 cmt. f (AM. LAW INST. 2010) (reporter's notes) (citing Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, 77 MINN. L. REV. 241 (1992)).

143. *Id.*

each statutory wrong must have a remedy.[144] However, the modern tort reform movement represents a decisive break from the linkage between right and remedy, reinforcing the necessity for caution in extending the effects of nonprescriptive statutes beyond the words the legislature enacted to reach negligence actions.

The "tort reform" movement began in the 1970s, when concerns about large increases in medical malpractice insurance premiums spurred efforts to reduce tort liability for medical care providers.[145] The movement broadened in focus and became more institutionalized throughout the 1980s and 1990s,[146] continuing to shape legislative policy well into the new millennium.[147] Legislatively enacted restrictions on tort damages recoveries, especially at the state level, have been a key feature of tort reform.[148]

State legislatures have imposed numerous restrictions on tort liability since the 1970s. Many jurisdictions abandoned the collateral source rule, which had permitted plaintiffs to recover compensatory damages in tort actions despite having received some portion of out-of-pocket expenses from a different source, such as insurance, unemployment compensation, or a government program like Medicaid.[149] Similarly, there has been widespread legislative modification of the doctrine of joint and several liability, which had permitted a plaintiff injured by the wrongdoing of two or more tortfeasors to recover full compensation from any defendant,[150] and thereby had permitted the plaintiff full recovery even if one or more defendants was determined to be judgment-proof.[151]

144. *See* Kritchevsky, *supra* note 38, at 94–97 (identifying cases using the perceived need for a civil remedy to support negligence per se); Foy, *supra* note 25, at 546–47 (noting emergence of negligence per se from older principle that every statutory wrong required a civil remedy). This right/remedy link was particularly a factor in older implied private right of action cases. However, courts have not been particularly meticulous in distinguishing implied private rights of action from negligence per se. *See generally* Forell, *supra* note 18.

145. *See* Hubbard, *supra* note 28, at 469–70 (describing origins of the tort reform movement).

146. *See id.* at 470–71 (describing broadening of claimed "crises" of tort liability and long-term institutionalized efforts for reform).

147. *See, e.g.*, Julie Davies, *Reforming the Tort Reform Agenda*, 25 WASH. U. J.L. & POL'Y 119, 151–55 (2007) (describing roles of major interest groups in contemporary tort reform efforts).

148. *See* Hubbard, *supra* note 28, at 483 (observing that tort reform has been much more successful at the state level than at the federal level).

149. *See id.* at 485.

150. *See* Logan, *supra* note 11, at 914 (observing the phenomenon of legislative changes to joint and several liability).

151. *See id.*

Imposition of statutory caps on noneconomic damages (i.e., pain and suffering) is one of the most common legislative tort reforms.[152] Even more than restrictions on joint and several liability or abolition of the collateral source rule, these damage caps reflect legislative policies to restrict the use of monetary damages to enforce defendants' obligations and plaintiffs' rights in tort litigation. Such caps potentially reflect legislative judgments that extrinsic policy concerns outweigh the social interest in ensuring full compensation to injured plaintiffs.[153] Legislative efforts to limit the size and availability of punitive damages are another important feature of modern tort reform and reflect similar policy concerns.[154]

The various legislative enactments capping or otherwise restricting damages in tort actions reinforce a core problem with negligence per se—the failure to respect or recognize the distinction between legislative goals and the means to accomplish them.[155] Critics of negligence per se long have observed that it is rational for a legislative or administrative body to create or recognize a legal obligation on the one hand, but to conclude on the other hand that a judicially enforceable private damages remedy is not appropriate.[156] The damages limits arising from tort reform demonstrate and reinforce this distinction between ends and means.

In short, even if negligence per se were a sensible treatment of nonprescriptive statutes at the time it emerged, circumstances have changed. The explosion of statutory enactments has dramatically broadened the scope of the doctrine, increasing its footprint in negligence cases, and consequently its associated costs. The modern, textualist appreciation for the limits of courts' abilities to define legislative purpose, and the increased attention of legislatures to the costs of civil

152. *See* Robert L. Rabin, *The Pervasive Role of Uncertainty in Tort Law: Rights and Remedies*, 60 DEPAUL L. REV. 431, 447 (2011) (characterizing caps on pain and suffering awards as "widespread" and noting that nearly thirty states have adopted such limitations); *see also* Logan, *supra* note 11, at 911 (claiming that "[t]he most frequent tactic of tort reformers has been to place limits on the historical ability of juries to award a full measure of compensatory damages," and passing "legislation that caps the amount a plaintiff may recover as compensation regardless of the seriousness of the harm suffered").

153. Critics of such damages caps contend that they are arbitrary and disproportionately affect the most seriously injured plaintiffs. *See* Davies, *supra* note 147, at 140.

154. *See* Logan, *supra* note 11, at 912–13.

155. *See* Pojanowski, *supra* note 139, at 529 (noting this distinction in the context of judicial creation of implied private rights of action).

156. *See* Lowndes, *supra* note 57, at 364 (stating that a legislative intention to protect a particular class of persons does not necessarily entail the desire to achieve that protection through the imposition of civil liability, where the only sanction provided is a criminal one).

tort liability, reinforce concerns about the operation of negligence per se in the twenty-first century.

### C. *Complexity, Confusion, and Inefficiency in Judicial Assessment of Negligence Per Se Doctrine*

Aside from the criticisms of negligence per se doctrine analyzed in the previous sections, negligence per se is troublesome because it has spawned a vast, conflicting, and complex case law dedicated to determining when it should be applied. According to Professor Blomquist, there have been more than ten thousand cases addressing negligence per se in state and federal courts between 1920 (the year *Martin v. Herzog* was decided) and 2000.[157] The rate of cases addressing negligence per se seems to be accelerating; employing the search methodology used by Professor Blomquist, it appears that more than eight thousand additional cases have been decided since 2000.[158] Litigants and judges expend a lot of time and effort to discern and shape the parameters of negligence per se doctrine.

Why is there such a large body of negligence per se case law? In part, it is because, as a threshold matter, the court must decide whether the doctrine is applicable to a given case. For negligence per se to apply, the plaintiff must be within the class of persons the statute is designed to protect, and her injury within the class of risks the statute is designed to prevent. Because nonprescriptive statutes rarely offer clear guidance, courts are required to make difficult and sometimes controversial judgments about the legislative purposes underlying them. In addition, because courts retain the discretion to decide whether to borrow the standard of conduct embodied in the statute, courts have to make tricky policy determinations to assess whether to do so. Finally, even if all the other triggering requirements for negligence per se are satisfied, the statutory violation is not negligence per se if it is excused.[159] Each of these decisions creates the opportunity for confusion and error in the application of negligence per se doctrine.

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157. *See* Blomquist, *supra* note 16, at 252.

158. This is based on a Westlaw search in the "all cases" database, using the query "negligence per se" and a date restriction, limiting cases to those issued after February 20, 2000. *See* Blomquist, *supra* note 16, at 252 n.177 (describing his search methodology). Of course, this search methodology likely is over-inclusive, as some cases mentioning the concept of negligence per se do so in passing, rather than as part of an in-depth analysis or application of that doctrine. Nevertheless, that's a lot of cases.

159. *See infra* notes 214-219 for discussion of the role of excuse in negligence per se cases.

*1. Class of Risks and Class of Persons*

A statutory violation is not negligence per se unless the statute protects against the type of risk suffered by the plaintiff and the plaintiff is within the class of persons protected by the statute.[160] The class of risks limitation is traceable to[161] and demonstrated by the classic nineteenth-century English case *Gorris v. Scott.*[162] In *Gorris*, the defendant ship owner violated a statute requiring that animals shipped at sea be confined in separate pens. During the voyage, the plaintiff's livestock were washed overboard during a storm, a result the plaintiff alleged could have been averted had the animals been in their statutorily-required pens. The court rejected liability on a negligence per se theory because the purpose of the statute was to prevent the spread of disease among the animals, not to prevent the distinct risk of losing the animals overboard.[163]

This class-of-risks inquiry is difficult to apply. Nonprescriptive statutes, by definition, do not pertain to tort liability. It is therefore difficult to determine the class of persons and class of risks the statute covers. Courts have to make inferences by discerning the underlying purposes of the statute, which is an extremely difficult task.[164] If one seriously considers the new textualists' critique, the quest is hopelessly misconceived.[165] Unsurprisingly, courts applying negligence per se principles routinely struggle to determine whether the pur-

160. *See* RESTATEMENT (THIRD) OF TORTS § 14 (AM. LAW INST. 2010) (providing that an actor is negligent if "the actor violates a statute that is designed to protect against the type of accident the actor's conduct causes, and if the accident victim is within the class of persons the statute is designed to protect"). The Third Restatement characterizes this as the statutory purpose doctrine. *See id.* at cmt. f.

161. The First Restatement relied on the facts of *Gorris* in its commentary illustrating the application of its class of risks requirement. *See* RESTATEMENT (FIRST) OF TORTS § 286 cmt. h, illus. 4 (AM. LAW INST. 1934). Some early commentators even referred to the class of risks rule as the *Gorris* rule. *See, e.g.*, Morris, *supra* note 58, at 476–77. *See also* Geistfeld, *supra* note 19, at 968–69 (describing how the statutory purpose limitations of *Gorris* frame modern negligence per se doctrine).

162. Gorris v. Scott, [1874] 9 L.R. Exch. 125, 125 (Eng.).

163. *See id.* at 128 (Kelly, C.B.) (concluding that torts liability on the basis of the statutory violation is precluded "when the damage is of such a nature as was not contemplated at all by the statute").

164. *See* Blomquist, *supra* note 16, at 278 (explaining that in negligence per se cases, "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 manipulatable process that leads to divergent and unpredictable results"). Interestingly, the Third Restatement acknowledges the difficulty of this inquiry. *See* RESTATEMENT (THIRD) OF TORTS § 14 cmt. f.

165. *See supra* notes 109–21 and accompanying text (discussing textualists' critique of judicial analysis of legislative purpose).

pose(s) of the statute encompass the risks resulting in the plaintiff's injury. *O'Guin v. Bingham County* is an excellent example.[166]

In *O'Guin*, the plaintiffs were a pair of minor children killed while playing in the Bingham County landfill when a section of the pit wall collapsed and crushed them. The landfill was located relatively near a schoolyard, accessible through a privately owned field abutting the landfill.[167] The family sued, alleging, *inter alia*, that the landfill operator's failure to have adequate fencing or other means to prohibit unauthorized access to the site violated certain state statutes and state and federal administrative provisions,[168] and was therefore negligence per se.[169]

Reversing the trial court's summary judgment for the defendant, a divided Idaho Supreme Court concluded that the plaintiffs' injuries were within the class of risks that the statutes and regulations sought to prevent.[170] As the four dissenting justices observed, this conclusion seemed questionable in light of the fact that the defendant's liability was based upon environmental provisions, which appear to have been designed to prevent illegal dumping and salvaging, and thus to reduce health hazards from pollution and disease rather than physical injury from accidents.[171] In this view, the majority's class of risks analysis is

166. O'Guin v. Bingham County, 122 P.3d 308 (Idaho 2005).

167. *See id.* at 310.

168. An Idaho statutory provision granted to the State's Board of Environmental Quality the authority to adopt solid waste management rules and standards, and declared it unlawful for landfill operators to violate those rules. *See* IDAHO CODE § 39-7402(1) (2011). The relevant administrative standards provided, among other things, that the landfill site "shall be fenced or otherwise blocked to access when an attendant is not on duty," and that "[u]nauthorized vehicles and persons shall be prohibited access to the site." IDAHO ADMIN. CODE r. 58.01.06.005.02 (2016).

The *O'Guin* court also noted that Idaho statutory provisions require that landfill operators control access to the landfill "as provided in 40 CFR 258.25." IDAHO CODE § 39-7412(6) (2011). That federal regulatory provision in turn stated that "[o]wners or operators of all municipal solid waste landfill units must control public access and prevent unauthorized vehicular traffic and illegal dumping of wastes by using artificial barriers, natural barriers, or both, as appropriate to protect human health and the environment." 40 C.F.R. § 258.25 (2016).

For the court's discussion of these provisions, and their impact on its negligence per se analysis, see *O'Guin*, 122 P.3d at 312–14.

169. *See O'Guin*, 122 P.3d at 310 (noting the O'Guins' argument that violation of administrative regulations was sufficient to establish negligence).

170. *See id.* at 312–13 (concluding that the underlying purposes of the regulations included protection of human health and safety, thereby encompassing the risks encountered by the plaintiffs).

171. *See id.* at 316 (Schroeder, C.J., dissenting) (explaining that the evident purpose of the statute and regulations was to ensure the protection of human health by protecting the environment against illegal dumping of wastes).

simply wrong, and the summary judgment should have been affirmed.[172]

If *O'Guin* seems like a case in which the court reached a questionably broad interpretation of the statute at issue, *Wenninger v. United States*[173] may be an example of the opposite problem.[174] In *Wenninger*, the plaintiff was killed when his small plane crashed as the result of a turbulence caused by military aircraft operating in a prohibited zone. The court held that the defendants' violation of the air traffic control regulation barring military aircraft from flying in a civilian area was not negligence per se because the purpose of the regulation was to protect military rather than civilian flyers.[175]

*Ney v. Yellow Cab Co.*[176] also illustrates courts' problems with identifying whether the plaintiff's injury is within the class of risks contemplated by the statute. In *Ney*, the plaintiff was injured after a third party stole a taxi, which the driver had left unattended with the motor running and the key in the ignition. A state statute made it unlawful to leave one's keys in the ignition of an unattended vehicle.[177] A majority of the Illinois Supreme Court gave the statute negligence per se effect, characterizing the statute's purpose broadly as protection of the public from harm to their property or person, and rejecting the defendant's argument that the statute was not designed to protect against injuries stemming from a criminal act such as the theft of a taxi.[178] The dissent reached the opposite conclusion, narrowly characterizing the purpose of the statute as preventing inadvertent operation of a vehicle.[179]

*O'Guin*, *Wenninger*, and *Ney* are mere examples to give the reader some sense of the struggles of courts undertaking the statutory purpose inquiry. There are hundreds of similar cases, in which courts attempt to discern the drafters' purpose from a nonprescriptive statute.

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172. Of course, even where negligence per se is not available to establish breach of duty, the plaintiffs still are free to pursue a negligence claim under the traditional approach. It may well have been that the defendants failed to exercise reasonable care by using inadequate security measures to prevent access to the landfill.

173. Wenniger v. United States, 234 F. Supp. 499 (D. Del. 1964), *aff'd sub nom.*, Wenniger v. United States, 352 F.2d 523 (3d Cir. 1965).

174. One commentator criticized the case as an example of "improvident judicial discretion in interpreting the ambiguous purpose of a nonprescriptive statutory or administrative rule." Blomquist, *supra* note 16, at 255.

175. *Wenniger*, 234 F. Supp. at 511.

176. Ney v. Yellow Cab Co., 117 N.E. 74 (Ill. 1954).

177. *See id.* at 76.

178. *See id.* at 77–78.

179. *See id.* at 81 (Hershey, J., dissenting).

The results are divergent and unpredictable; and the effort is costly for judges and litigants.

Negligence per se doctrine also requires that the plaintiff be in the class of persons the statute is designed to protect. This class-of-persons inquiry can also be difficult for courts, because nonprescriptive statutes typically do not identify specifically the protected class. Many times, courts in negligence per se cases simply treat the statute as if the general public is the relevant class of persons.[180] However, other times, courts will give the statute a narrower scope, based on the view that it was designed to protect a specific class of individuals.[181] For example, administrative provisions related to occupational health and safety might be interpreted to protect only employees on the job site, and might be deemed not to have negligence per se effect for visitors.[182] Another example is *Klein v. Herlim Realty Corp.*,[183] in which a World War II era blackout statute was interpreted to be for the protection of the general public, excluding from its scope the plaintiff air raid warden who was injured in an attempt to extinguish a light showing in violation of that provision.

In any event, because the statutes are not written with tort liability principles in mind, it is difficult to know what the legislature might have intended as the protected class, making this inquiry, like the type-of-risks inquiry, artificial and arbitrary.[184] These inquiries contribute to a large and unwieldy body of negligence per se case law.

### *2. Policy-Based Rejection of the Statute*

Although some negligence per se cases (especially older cases) treat the statute as creating a binding rule that the court is obliged to

180. *See* DOBBS, *supra* note 2, at 326.

181. *See, e.g.*, Anderson v. Turton Dev., Inc., 483 S.E. 597, 600 (Ga. Ct. App. 1997) (rejecting plaintiff's claim that a handicap ramp design inconsistent with requirements of the Georgia Handicap Act was negligence per se, on the ground that plaintiff was not handicapped or elderly).

182. *See, e.g.*, Carman v. Dunaway Timber Co., 949 S.W.2d 569, 570 (Ky. 1997) (holding that violation of a workplace safety provision was not negligence per se because plaintiff was not defendant's employee); Claborn v. Plains Cotton Coop. Ass'n, 211 P.3d 915, 919 (Okla. Civ. App. 2009) (holding that violations of U.S. Occupational Safety and Health Administration regulations are not negligence per se as to non-employees).

183. Klein v. Herlim Realty Corp., 54 N.Y.S.2d 144 (Sup. Ct. 1945).

184. *See* DOBBS, *supra* note 2, at 326 ("More fundamentally, the nonprescriptive statutes under discussion make no provision at all for tort liability or tort standards, so it seems impossible to determine from the statute itself the appropriate class of harms or persons to be covered.").

accept for tort liability purposes,[185] the modern view acknowledges that courts retain the discretion to decide whether to borrow the legislatively prescribed standard of conduct to specify what reasonable care entails.[186] As the California Supreme Court noted in a leading case:

> The significance of the statute in a civil suit for negligence lies in its formulation of a standard of conduct that the court adopts in the determination of such liability. The decision as to what the civil standard should be still rests with the court, and the standard formulated by a legislative body in a police regulation or criminal statute becomes the standard to determine civil liability only because the court accepts it.[187]

The Second Restatement similarly leaves the decision to borrow the standard of conduct in the statute to judges' discretion.[188] Its commentary reinforces the role of judicial discretion, stating that a court "is under no compulsion to accept [a statute] as defining any standard for purposes of a tort action."[189] Rather, a "decision to adopt the standard is purely a judicial one, for the court to make. When the court does adopt the legislative standard, it is acting to further the general purpose which it finds in the legislation, and not because it is in any way required to do so."[190]

The discretion to borrow a statute's requirements to specify what ordinary care entails can create difficult questions about whether particular statutes are suitable for doing so. For example, many courts[191]

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185. *See, e.g.*, Martin v. Herzog, 126 N.E. 814, 815 (N.Y. 1920) (emphasizing that unexcused statutory safety violations conclusively establish negligence).

186. *See, e.g.*, Ferrell v. Baxter, 484 P.2d 250, 260 (Alaska 1971); Mansfield v. Circle K Corp., 877 P.2d 1130, 1132 (Okla. 1994); Marquay v. Eno, 662 A.2d 272, 278 (N.H. 1995); Stachniewicz v. Mar-Cam Corp., 488 P.2d 436, 438 (Or. 1971); Rains v. Bend of the River, 124 S.W.2d 580, 589 (Tenn. Ct. App. 2003).

187. Clinkscales v. Carver, 136 P.2d 777, 778 (Cal. 1943).

188. *See* RESTATEMENT (SECOND) OF TORTS § 286 (AM. LAW INST. 1965) (emphasis added) (stating that the court *may* adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation); *see also* Leonard, *supra* note 9, at 450 n.98 (characterizing section 286 as permissive in nature, allowing a court to refuse to apply a statute which otherwise meets the requirements of negligence per se). The Third Restatement appears to reject this discretionary authority, noting that courts should treat a statutory violation by an actor "as actually determining the actor's negligence," and characterizing any unexcused violation of an applicable statute as negligence per se. *See* RESTATEMENT (THIRD) OF TORTS § 14 cmt. c (AM. LAW INST. 2010); *see also* Aaron D. Twerski, *Negligence Per Se and Res Ipsa Loquitur: Kissing Cousins*, 44 WAKE FOREST L. REV. 997, 1000 (2009) (criticizing section 14 of the Third Restatement for apparently eliminating judges' authority to decline, on policy grounds, to use the statutory standard of care).

189. RESTATEMENT (SECOND) OF TORTS § 286 cmt. d.

190. *Id.*

191. *See, e.g.*, Brown v. Shyne, 151 N.E. 197, 198 (N.Y. 1926) (holding that a defendant who engaged in medical practice without a license was not negligent per se);

and commentators[192] reject licensing statutes as a basis for negligence per se, based on the view that such provisions neither prohibit nor require specific actions and therefore fail to specify what reasonable conduct entails.[193] However, others apparently give such licensing provisions per se effect.[194]

Problems also arise with respect to municipal ordinances and state or local administrative regulations. Some courts refuse to recognize local ordinances as a basis for negligence per se,[195] though many courts view them as sufficiently authoritative for negligence per se purposes.[196] *Vega v. Eastern Courtyard Associates*[197] is a good example of the potential confusion over this type of issue. In *Vega*, a patron of a medical facility was injured when she fell on a ramp outside the building. She sued, contending that the ramp's excessive slope was unsafe. The trial court rejected her efforts to instruct the jury on the principles of negligence per se based on the claim that the ramp's slope exceeded that permitted by the county's building code.[198] A majority of the Nevada Supreme Court reversed, holding that the county ordinance could be used to establish the defendant's standard of conduct.[199] This drew a dissent, which argued that the county code had no negligence per se effect.[200]

Similarly, there is some disagreement about whether administrative regulations qualify for negligence per se treatment. Many courts

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Dance v. Town of Southampton, 467 N.Y.S.2d 203, 207 (App. Div. 1983) (noting that "[a]lmost universally, licensing statutes are not regarded as creating a duty to individual highway travelers or pedestrians"); *see also* KEETON ET AL., *supra* note 4, at 223–24 (stating that courts generally find licensing statutes unsuitable for negligence per se treatment).

192. *See, e.g.*, Charles O. Gregory, *Breach of Criminal Licensing Statutes in Civil Litigation*, 36 CORNELL L. REV. 622, 632 (1951); Morris, *supra* note 58, at 458.

193. *See, e.g.*, Leonard, *supra* note 9, at 439–41.

194. *See, e.g.*, Duty v. E. Coast Tender Serv., Inc., 660 F.2d 933, 939 (4th Cir. 1981) (giving negligence per se effect to operation of a vessel without a licensed operator in violation of a Coast Guard regulation); Turri v. Bozek, 261 N.W.2d 264, 265 (Mich. Ct. App. 1977) (treating plaintiff's operation of a motorcycle without a proper license as contributory negligence per se); Mundy v. Pirie-Slaughter Motor Co., 206 S.W.2d 587, 590 (Tex. 1947) (characterizing the act of allowing another to drive without a license as negligence per se).

195. *See, e.g.*, Elliot v. City of New York, 747 N.E.2d 760, 763 (N.Y. 2001) (concluding that violation of a city ordinance was not negligence per se); Griglione v. Martin, 525 N.W.2d 810, 812 (Iowa 1994).

196. *See* RESTATEMENT (THIRD) OF TORTS § 14 cmt. a (AM. LAW INST. 2010) (giving examples of cases in which states applied negligence per se to violations of city ordinances).

197. Vega v. E. Courtyard Assoc., 24 P.3d 219 (Nev. 2001).

198. *See id.* at 220–21.

199. *See id.* at 222.

200. *See id.* at 223 (Maupin, J., dissenting).

treat administrative regulations as sufficiently authoritative statements of legislative or quasi-legislative policy for their violation to qualify as negligence per se.[201] The Third Restatement embraces this view.[202] A number of courts, however, reject negligence per se treatment of administrative regulations. These courts often argue that such regulations cannot specify the standard of care because administrative agencies lack the legal authority possessed by legislative bodies to alter common law legal principles.[203] Relatedly, some emphasize the lack of direct democratic accountability of administrative agencies as a rationale for rejecting agency rules as specifying the standard of care.[204]

Federal statutes and administrative regulations also pose tricky questions. A number of courts have given negligence per se effect to a variety of federal statutory provisions and administrative agency regulations.[205] Professor Barbara Kritchevsky has argued that this practice represents a grave misapplication of negligence per se principles.[206] In her view, because tort law is state law, the policy judgments embodied in federal statutes and regulations do not necessarily reflect the substantive policy views of democratically accountable state legislators and regulators, and they therefore fail to fulfill the core purposes of negligence per se. If negligence per se rests on deference to legislative policy judgments, a federal statute or regulation fails to reflect the correct institution's views.[207]

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201. *See* RESTATEMENT (THIRD) OF TORTS § 14 cmt. a (noting that most states that accept negligence per se apply it to administrative regulations).

202. *See id.* (explaining that negligence per se "most frequently applies to statutes adopted by state legislatures, but equally applies to regulations adopted by administrative bodies").

203. *See, e.g.*, Zimmerman v. Moore, 441 N.E.2d 690, 696 (Ind. Ct. App. 1982) (noting that, because the legislature cannot delegate its lawmaking power to administrative agencies, those agencies' regulations have no negligence per se effect); Major v. Waverly & Ogden, Inc., 165 N.E.2d 181, 184 (N.Y. 1960) (explaining that legislative authority was not delegated to a subordinate administrative rule-making body); Chambers v. St. Mary's Sch., 697 N.E.2d 198, 202 (Ohio 1998) (stating that only the legislature has the power to adopt a rule altering the proof requirement in litigation).

204. *See, e.g.*, Jackson v. Harsco Corp., 364 So. 2d 808, 810 (Fla. Dist. Ct. App. 1978) (Barkdull, J., concurring) (observing that courts "should not, by judicial fiat, raise an administrative rule to equal dignity with a penal statute or ordinance").

205. *See, e.g.*, Coker v. Wal-Mart Stores, Inc., 642 So. 2d 774, 776 (Fla. Dist. Ct. App. 1994) (treating violation of a federal statute prohibiting selling ammunition to minors as negligence per se). Professor Kritchevsky cited to numerous examples. *See* Kritchevsky, *supra* note 38, at 104–16.

206. *See* Kritchevsky, *supra* note 38, at 116–29.

207. *See id.* at 124. Professor Kritchevsky explained that courts should resist adopting federal statutory or administrative rules for three reasons:

> First, finding violations of federal statutes to be negligence per se is inconsistent with the institutional comity justification for the doctrine. Second, state and federal judgment regarding which conduct is appropriate

Finally, courts are free to reject the statutory standard if embrace of the standard would conflict with other considerations of justice or social policy. For example, in *Rudes v. Gottschalk*,[208] the Texas Supreme Court rejected application of negligence per se principles to assess the contributory negligence of an eight-year-old plaintiff who violated a crosswalk ordinance.[209] Observing that "the power of adopting or rejecting standards rests with the civil courts,"[210] the *Rudes* court concluded that it "may accept or reject the criminal statute or use such parts thereof that may be deemed appropriate for [its] purposes."[211] Exercising this authority, the *Rudes* court declined to adopt the standard of care from the crosswalk statute, finding it in conflict with important policies embodied in the child standard of care.[212]

This authority to decline adoption of the statutory standard is an additional source of litigation and uncertainty in application of negligence per se. A court's discretion to reject a statute's negligence per se effect on policy grounds is a potential issue in a broad range of cases. Moreover, the standards for exercising such discretion are not well defined, making this issue's effects on a given case unpredictable.[213]

### *3. Excuses*

Even if all the requirements for negligence per se are satisfied, the actor's violation of the statute is not negligence per se if that violation is excused.[214] According to the Second Restatement, a statutory violation may be excused when:

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> may differ. Courts should only apply negligence per se when conduct violates a standard that the state legislature has approved. Third, Congress does not have the power to control state tort law.

*Id.* (citations omitted).

208. Rudes v. Gottschalk, 324 S.W.2d 201 (Tex. 1959).

209. *See id.* at 205.

210. *Id.*

211. *Id.*

212. *See id.* at 205–06. As the *Rudes* court noted, the negligence of a child is traditionally evaluated under the so-called child standard of care. *See id.* at 204 (noting the "well-settled" rule that a minor's negligence is judged by the standard of a child, rather than by the standard of an adult); *see also* DOBBS, *supra* note 2, at 293 (stating that the typical standard for minors requires them to act with the care of a minor his own age, intelligence, and experience). The *Rudes* court's view is apparently widely shared. Dobbs notes that a minor's violation of a statute is usually not considered negligence per se. *See id.*

213. *See* DOBBS, *supra* note 2, at 321 (observing that "courts and commentators have not advanced any systematic principles for determining when to adopt and when to reject a nonprescriptive statute").

214. *See* RESTATEMENT (SECOND) OF TORTS § 288A(1) (AM. LAW INST. 1965) (providing that "[a]n excused violation of a legislative enactment or an administrative

> a) the violation is reasonable because of the actor's incapacity;
> b) he neither knows nor should know of the occasion for compliance;
> c) he is unable after reasonable diligence or care to comply;
> d) he is confronted by an emergency not due to his own misconduct;
> e) compliance would involve a greater risk of harm to the actor or to others.[215]

This list of excuses is not exclusive.[216] While the availability of this broad and non-exclusive list of excuses adds valuable flexibility to the otherwise rigid law of negligence per se,[217] it also adds to the number of legal determinations to be made in cases in which negligence per se is invoked. The list of excuses is sufficiently broad that one or more can be raised in a wide array of cases. Moreover, since the listed excuses do not purport to be exclusive, litigants are free to advance their own excuses, which can, in practice, duplicate the general breach inquiry.[218] However, the judge must assess the legal viability of the excuse before offering it to the jury.[219]

### *D. Negligence Per Se and Common Law Duty Problems*

Courts purporting to discern the purpose of the statute sometimes appear to be mistaking an implied private right of action inquiry for the common law-based negligence per se inquiry, potentially creating confusion in determining the existence and scope of a legal duty in negligence law.[220] *O'Guin v. Bingham County*[221] is a good example.

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regulation is not negligence"); RESTATEMENT (THIRD) OF TORTS § 14 (AM. LAW INST. 2010) (providing that a statutory violation is negligence per se only if it occurs "without excuse").

215. RESTATEMENT (SECOND) OF TORTS § 288A(2). The Third Restatement provides a similar list of excused violations, with only slight variations in language. *See* RESTATEMENT (THIRD) OF TORTS § 15.

216. *See* RESTATEMENT (SECOND) OF TORTS § 288A cmt. a.

217. *See, e.g.*, Leonard, *supra* note 9, at 467.

218. *See, e.g.*, Alarid v. Vanier, 327 P.2d 897, 900 (Cal. 1958) (concluding that the subject's statutory violation was excused when he did what a person of ordinary prudence in similar circumstances would have done); Waugh v. Traxler, 412 S.E.2d 756, 760 (W. Va. 1991) (offering a similar conclusion); *see also* Leonard, *supra* note 9, at 477 (discussing excuses that are based on the claim that statutory compliance would not be reasonable under the circumstances).

219. See RESTATEMENT (SECOND) OF TORTS § 288A cmt. j (providing that "[i]t is for the court to determine in the first instance whether the excuse is one which the law will recognize").

220. *See supra* notes 20–49 and accompanying text (discussing differences among statutory private rights of action, statutory tort modification rules, and negligence per se).

In *O'Guin*, the trial judge granted the defendant's motion for summary judgment, based in part on the view that the defendant owed no duty of ordinary care to the plaintiffs because the plaintiffs were trespassers,[222] and that the plaintiffs were therefore required to plead and prove a willful and wanton violation of the statutory requirements.[223] The Idaho Supreme Court reversed, claiming that the statutory obligation established a duty on the part of the defendant that "replaced the common law duty of landowners to trespassers,"[224] and that there was, consequently, "no need for the district court to look to the common law duty owed to trespassers."[225]

The Idaho Supreme Court's analysis of the duty question is flatly wrong, and represents a fundamental misunderstanding of the nature of negligence per se. As noted earlier, negligence per se merely involves the borrowing of a standard of conduct from a statute that specifies what the exercise of ordinary care would necessarily entail.[226] This adoption occurs within the confines of a common law action for negligence, and presupposes the existence of a duty of ordinary care. If, for whatever reason, the duty of ordinary care is not applicable in the case, then negligence per se is, by definition, also inapplicable.

Of course, the legislature has the power to create by statute, expressly or impliedly, a private right of action.[227] The legislature also has the power to alter, by statutory decree, the content of common law doctrine, including the rules regarding the nature and scope of duties owed in negligence cases.[228] Both of these approaches, however, require interpretation of the statute in order to determine its effects. Neither involves the language or doctrinal requirements of negligence

221. O'Guin v. Bingham County, 122 P.3d 308 (Idaho 2005). I really do not mean to pick on the Idaho Supreme Court, but *O'Guin* presents an excellent example of the duty problems courts sometimes encounter in negligence per se cases, as well as the statutory purpose doctrine problems discussed earlier.

222. This is consistent with the traditional land entrant status classifications of the common law, which typically provided that, with respect to dangerous conditions on the land, the owner or occupier of that land owed trespassers merely the duty to refrain from willful or wanton infliction of injury. The landowner owed no duty to exercise reasonable care to detect dangerous conditions on their land, and thereby to prevent injury to trespassers. *See* DOBBS, *supra* note 2, at 592 (noting common law rule that landowner owes no duty of reasonable care to trespassers).

223. *O'Guin*, 122 P.3d at 314.

224. *Id.*

225. *Id.* at 313.

226. *See supra* notes 180–84 and accompanying text (discussing judicial discretion in statutory borrowing of nonprescriptive statutes for negligence per se).

227. *See supra* notes 16–26 and accompanying text (discussing statutory private rights of action).

228. *See supra* notes 27–35 and accompanying text (discussing statutory tort modification rules).

per se. The *O'Guin* court did not suggest that the provisions at issue created an implied private right of action, nor did it characterize the statute as a modification of the common law trespasser rules.[229] Rather, the court seems simply to have been confused about the interaction of statutory standards of conduct and common law duty rules.

*Barrett v. Lucky Seven Saloon, Inc.*[230] is another example. In that case, which involved an intoxicated driver who had been over-served by the defendant tavern, Washington courts experienced considerable difficulty in determining the negligence per se effects of a state criminal provision of the Alcoholic Beverages Control Act. The trial court had entered summary judgment for the defendant, and the intermediate appellate court affirmed.[231] The Supreme Court of Washington reversed and remanded, characterizing the criminal provision as setting the appropriate standard of conduct for commercial hosts like the defendant.[232] A dissent pointed out that the law did not obligate the court to apply the statutory standard under negligence per se analysis, as it represented a modification of pre-existing common law duty.[233]

Unfortunately, these are not isolated cases. While many courts get this analysis right,[234] it is not uncommon for courts to be less than meticulous in differentiating among negligence per se, implied private rights of action, and tort law modification statutes.[235] This is yet another cost associated with current negligence per se doctrine.

## IV.
## THE BENEFITS OF NEGLIGENCE PER SE DO NOT EXCEED ITS COSTS: WHY THE EVIDENCE OF NEGLIGENCE RULE IS A BETTER APPROACH

### *A. The ALI's Rationales for Negligence Per Se Are Unpersuasive*

The Third Restatement articulates four rationales for adherence to the traditional treatment of negligence per se: institutional comity, legislative supremacy, uniformity-related process considerations, and

229. Such treatment is inconsistent not only with the court's negligence per se terminology, but also with its invocation of the class of persons/class of risks limitations. *See O'Guin*, 122 P.3d at 311–13; RESTATEMENT (SECOND) OF TORTS § 286 (AM. LAW INST. 1965). Moreover, it would hardly have been possible for the provisions to work if there were a substantive change in Idaho negligence law, given that the relevant provisions were federal environmental regulations.

230. Barrett v. Lucky Seven Saloon, Inc., 96 P.3d 386 (Wash. 2004).

231. *See id.* at 389.

232. *See id.* at 393 (explaining that the plaintiff should have been permitted to tell the jury that the defendant had a statutory duty to refrain from selling liquor to an intoxicated person).

233. *See id.* at 400 (Sanders, J., dissenting).

234. *See* Forell, *supra* note 18 (collecting cases).

235. *See id.* (collecting cases).

stare decisis. Upon closer examination, none of these rationales are persuasive. Let's examine each in turn.

### *1. Institutional Comity*

Institutional comity is the first rationale for negligence per se offered by the American Law Institute in the Third Restatement.[236] The ALI claims that it is disrespectful for courts to treat acts declared illegal by the legislature as reasonable for civil liability purposes.[237] This rationale, which goes back at least as far as Thayer's classic article,[238] is the central justification for the doctrine of negligence per se.[239] It is appealing on its face, but ultimately unpersuasive.

#### *a. Institutional Comity Does Not Require Deference to Non-Existent Legislative Purpose*

Negligence per se involves the judicial act of borrowing a standard of conduct embodied in a legislative enactment that does not purport to address tort liability.[240] A legislative declaration that a particular act is unlawful is not identical to a declaration that the act is unreasonable in all circumstances, much less that said act should result in civil tort liability of negligence. As noted in Part IIIA, the legislature's declaration that a particular act is unlawful takes place in the context of substantial discretion in enforcement of such a prohibition.[241] The legislature could well assume that such discretion could be used to avoid enforcement that would be unfair or disproportionate under the circumstances. Even if violation of the statute would *often* be unreasonable, or even would *usually* be unreasonable, one cannot attribute to the legislature the view that it would *always* be unreasonable. The legislature did not address (and presumably did not contemplate) the statute's application to civil negligence liability. Therefore,

236. RESTATEMENT (THIRD) OF TORTS § 14 cmt. c (AM. LAW INST. 2010) ("[E]ven when the legislature has not chosen to attach a liability provision to the prohibition it has imposed, as a matter of institutional comity it would be awkward for a court in a tort case to commend as reasonable that behavior that the legislature has already condemned as unlawful.").

237. *See* Harvey S. Perlman, *Thoughts on the Role of Legislation in Tort Cases*, 36 WILLAMETTE L. REV. 813, 821 (2000).

238. *See supra* note 55 and accompanying text.

239. *See* Todd, *supra* note 39, at 94 (characterizing institutional comity as a primary contemporary justification for negligence per se).

240. *See supra* note 36 and accompanying text (discussing nonprescriptive statutes).

241. *See supra* notes 93–99 and accompanying text (discussing role of enforcement discretion).

it hardly seems disrespectful to the legislature for a court to recognize that distinction and limit the effects of the statute accordingly.[242]

In addition, the notion that institutional comity compels courts to treat statutory violations as conclusively establishing negligence is difficult to defend in light of important developments since Thayer's time. First, major aspects of legislative tort reform suggest that courts should be cautious in "helping" legislatures enforce statutory prohibitions by recognizing civil liability effects. Legislatively imposed limits on tort damages, characteristic of much of late twentieth-century tort reform, suggest the existence of concerns about excessive tort liability.[243] Even if a legislature chooses to declare certain behavior unlawful, it does not follow that the legislature would want to enforce that declaration through civil damages remedies.[244] Courts should respect the distinction between legislative ends and the means used to achieve them.[245]

Finally, the emergence of a greater emphasis on textualism in statutory interpretation reinforces the need for caution in interpretive legislative prohibitions to establish the standard of care in negligence cases.[246] The legislature could have created a private right of action, or modified existing rules regarding the existence or scope of tort liability. But it didn't. Furthering the statute's general purpose by giving the statute negligence per se effects may be less respectful to the legislature than seriously acknowledging the limits of nonprescriptive statutory language.[247]

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242. *See* Paul Yowell, *Judicial Discretion in Adopting Legislative Standards: Texas's Solution to the Problem of Negligence Per Se?*, 49 BAYLOR L. REV. 109, 113 (1997) (observing that tort standards of reasonableness differ from criteria legislatures use in deciding to prohibit conduct, so that "a court's refusal to hold that violating a statute is negligent per se is not an offense to the legislature, and it may be more in keeping with legislative intent").

243. *See supra* notes 145–56 and accompanying text (discussing tort reform's impact on negligence per se).

244. *See* Leonard, *supra* note 9, at 466 (claiming that "[c]onduct which a legislature might consider culpable enough to make subject to criminal penalty is not necessarily conduct which either a court or the legislature would wish to make compensable"). Professor Leonard made this observation before the heyday of tort reform. Legislative limits on tort damages recoveries strongly reinforce this view.

245. *See* Pojanowski, *supra* note 139, at 529–30 (discussing this distinction between ends and means in the context of implied private rights of action).

246. *See supra* notes 133–43, and accompanying text (discussing implications of increasingly textualist approaches to interpretation for negligence per se).

247. *See* Blomquist, *supra* note 16, at 280 (arguing that it is "hubristic and intrusive" for courts to impose civil liability on the basis of a statute that does not expressly address such liability).

*b. Existing Negligence Per Se Exceptions and Limitations Already Undermine Institutional Comity*

Even if one views institutional comity to require courts to respect legislative judgments by embracing negligence per se, the discretionary limitations on the scope of that doctrine undermine the Third Restatement's institutional comity argument. As explained in Part IIIC, the prevailing view is that courts retain the discretion to reject a statute's use to establish negligence on the basis of ill-defined policy grounds.[248] This authority to choose which statutes are worthy of negligence per se treatment seems more intrusive and disrespectful of legislative authority than a blanket treatment of nonprescriptive statutes as some evidence of negligence.

Similarly, the availability of a broad range of potential excuses for statutory violation, recognized by both the Second and Third Restatements, seems inconsistent with the institutional comity rationale. Permitting the jury to excuse the statutory violation precisely allows the jury to "commend as reasonable that behavior that the legislature has already condemned as unlawful."[249] The court does so in an ad hoc, case-by-case fashion, rather than through a forthright recognition of the limits of the statute's reach. If treating statutory violation as some evidence of negligence is disrespectful to the legislature, it is hard to understand why the recognition of excuses is not similarly so.

*2. Legislative Supremacy*

The second rationale is legislative supremacy. The argument is that the role of the jury in a negligence case is to provide an assessment from a body representing the community. But where the legislature has already deemed the behavior illegal, that legislative judgment represents a democratic consensus that the subject behavior is unacceptable that should not be overridden by the views of a particular jury.[250] Here, the ALI appears to borrow from Justice Cardozo's opinion in *Martin v. Herzog*, which characterizes jury authority to treat the actor's statutory violation as non-negligent as a repudiation of the legislature's judgment.[251] This rationale is also problematic for some of the same reasons as the institutional comity rationale.

248. *See supra* notes 185–90 and accompanying text.
249. RESTATEMENT (THIRD) OF TORTS § 14 cmt. c (AM. LAW INST. 2010).
250. *Id.* ("Yet when the legislature has addressed the issue of what conduct is appropriate, the judgment of the legislature, as the authorized representative of the community, takes precedence over the views of any one jury.").
251. *See* Martin v. Herzog, 126 N.E. 814, 815 (N.Y. 1920). Cardozo stated:

First, the legislature did not necessarily make any judgment about the appropriateness of the defendant's behavior under the particular circumstances of the case. The general and prospective nature of criminal enactments means that they can easily be over-inclusive. The legislature can nevertheless act, knowing that the discretion of enforcement officials is a safety valve to prevent over-enforcement of the provision.[252] Such safety valves are lacking in negligence per se cases.

Second, because the underlying criminal statute is not designed to address questions of civil liability, respecting the *limits* of the statute better reflects the democratic principles cited by the Third Restatement. If the legislature wanted to displace the fact-finder's role by fixing in place particular behavior to establish the standard of care in negligence cases, it could have done so. The fact that it chose not to do so suggests that reliance on the traditional role of the jury to determine the reasonableness of the litigants' behavior does not invade the province of the legislature. Finally, the residual, ad hoc authority of the jury to dispense justice by recognizing an excuse for a statutory violation undercuts the strength of the legislative supremacy rationale.

### *3. Process Considerations: Inequality, Litigation Cost, and Inadequate Guidance*

The third rationale for negligence per se offered by the ALI relates to various process considerations in negligence determinations. The ALI explains as follows:

> Third, it must be recognized that the negligence standard encounters difficulty in dealing with problems of recurring conduct. When each jury makes up its own mind as to the negligence of that conduct, *there are serious disadvantages in terms of inequality, high litigation costs, and failing to provide clear guidance to persons engaged in primary activity* . . . . In general, statutes address conduct that conspicuously recurs in a way that brings it to the attention of the legislature. *Negligence per se hence replaces decisionmaking by juries in categories of cases where the operation of the latter may be least satisfactory.*[253]

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> 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 they have. The omission of these lights was 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.

*Id.*

252. *See supra* notes 93–99 and accompanying text.

253. RESTATEMENT (THIRD) OF TORTS § 14 cmt. c (emphasis added).

This rationale for negligence per se boils down to a preference for rules over standards in determining breach of duty in negligence cases. As noted earlier, this goes very much against the grain of traditional negligence analysis, in which the context of the specific circumstances is key to assessing the reasonableness of the subject's behavior.[254] In addition, it is not clear that use of negligence per se advances any of the stated interests.

First, it is odd to characterize as "inequality" the unremarkable notion that different fact-finders in different cases might reach inconsistent results about the nature of a subject's behavior in different circumstances. The context-specific nature of the reasonable care inquiry makes such variations appropriate; and efforts to inject a false uniformity in this process are likely to do more harm than good.[255] Moreover, the variations in doctrinal requirements for negligence per se significantly undermine the claim that it advances uniformity or equality in negligence cases. As explained in Part IIIC, it is quite difficult to determine ahead of time whether any particular statute will have negligence per se effect, given the vagaries of the doctrine. There are uncertainties about whether the plaintiff is within the contemplated class of persons and class of risks, whether the statute is suitable for borrowing as a matter of policy, and whether statutory violation may be excused.[256] Uniform application of the doctrine is nearly impossible in light of these issues.[257]

Second, the ALI does not explain how negligence per se could reduce litigation costs, nor is it clear how it would do so. As noted previously, the doctrinal apparatus of negligence per se is complex, with multiple determinations needed to decide whether negligence per se applies in any given case.[258] The threshold requirements have spawned a large negligence per se jurisprudence, itself resulting in significant costs of both judicial and litigant resources.[259] If the argument is that litigation is streamlined by narrowing the jury's focus to statutory violation, the benefit is substantially offset by the presence of

254. *See supra* notes 9–14 and accompanying text.

255. *See supra* notes 75–92 and accompanying text (discussing traditional criticisms of negligence per se which focus on its inflexibility).

256. *See supra* notes 157–219 and accompanying text.

257. *See, e.g.*, Blomquist, *supra* note 16, at 278–79 (noting the "highly manipulable process" of statutory purpose evaluation, leading to "divergent and unpredictable results," as well as the effect of "broad and far ranging excuses" that eliminate the ability of negligence per se to provide greater certainty than the reasonable person standard).

258. *See supra* notes 157–219 and accompanying text.

259. *See id.*

excuses, which give the jury a substantial role even where negligence per se applies. Moreover, negligence per se is often analyzed in addition to, rather than as a substitute for, ordinary care.[260] Rather than completely supplanting the traditional ordinary care analysis, negligence per se often adds an additional layer of doctrinal inquiry on top of it.

Finally, why would abolition of negligence per se undermine "clear guidance to persons engaged in primary activity"? The underlying statutory standard of conduct is in place whether a court gives it negligence per se effect or not, and the same defendant could be subject to criminal or administrative penalties for violating it regardless of the same standard's potential use in other areas of law. Further, if the possibility of a criminal or administrative sanction tied to the underlying provision is not enough to deter the actor's conduct, what additional marginal deterrence effect could negligence per se achieve? Potential litigants are unlikely to be aware of the doctrine. Even if they were aware of it, its effects would be likely viewed as minor, and so unpredictable as to be irrelevant in shaping the actor's conduct.[261]

In short, while it may be true that legislative safety statutes arise from a legislative response to activity that is sufficiently recurrent (or at least conspicuous) to trigger legislative attention, it does not follow that traditional jury determinations of tort liability in the face of a statutory violation pose any of the problems that the ALI drafters highlight in their commentary.

### *4. Stare Decisis and Legislative Reliance Interests*

The fourth, and final, rationale for negligence per se advanced by the ALI relates to considerations of stare decisis and legislative reliance on negligence per se. The ALI explains:

> Furthermore, negligence per se has been settled doctrine in American tort law for many decades. Once settled, the doctrine functions

260. *See* DAN B. DOBBS, PAUL T. HAYDEN, & ELLEN M. BUBLICK, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 136 (7th ed. 2013) (noting that the standard of ordinary care serves as a default where the statute is deemed not to have negligence per se effect). The ALI acknowledged this in its commentary. *See* RESTATEMENT (THIRD) OF TORTS § 14 cmt. f (AM. LAW INST. 2010) (noting that even if an actor's conduct "is not negligent per se because the accident injuring the plaintiff is not the type of accident the statute seeks to avert, it remains acceptable to argue that the actor's conduct is negligent under the general provisions of § 3"). However, the drafters do not appear to recognize its implications for the viability of the stated rationales for negligence per se.

261. This is not to say that the prospect of civil liability generally has no deterrent effect. But attributing marginal deterrent effects specifically to the possibility that statutory violation might be treated as negligence per se is a stretch.

> as a default rule in terms of how the judiciary will assess the significance of a statute. The legislature, in enacting a safety statute, can be aware that a party's violation of the statute will result in negligence per se. Aware of this, the legislature can be deemed to accept this result unless it includes in the statute a specific provision making the statutory violation irrelevant in a common law action for damages.[262]

While it is true that negligence per se has been a feature of negligence jurisprudence for a long time, the ALI's legislative reliance claim is dubious. First, it is premised on an unrealistic view of the legislative process. There is little reason to believe that legislative or administrative bodies actually act in reliance on negligence per se doctrine. Second, any potential for such reliance is seriously undermined by the various exceptions to and limitations of the applicability of negligence per se. Finally, the default rule of negligence per se is an odd one in light of modern approaches to statutory interpretation and tort liability.

Do legislative and administrative bodies really assume the applicability of negligence per se, and therefore impliedly approve it? There is good reason to be skeptical. In theory, this is an empirical question. It would be possible to survey some sample of state legislators, members of administrative agencies, city council members, and staff working with the various bodies to assess awareness of and potential reliance on negligence per se rules.[263] Unfortunately, such research is considerably beyond the scope of this piece.[264] Still, based on current understanding of the legislative process, such reliance appears extremely unlikely. If the public choice theory critiques of purposivism noted in Part IIIB are credited,[265] the odds that legislators are contemplating the role of negligence per se when considering criminal legislation are vanishingly remote.

Moreover, any supposed reliance on potential negligence per se effects would be thwarted by the unpredictable and discretionary gatekeeping judgments of courts and the availability of excuses. The malleability of the class of persons and class of risks analyses, the possibility of judicial rejection of the statute's negligence per se ef-

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262. RESTATEMENT (THIRD) OF TORTS § 14 cmt. c.

263. Some scholars have done similar research into congressional staffers' awareness and understanding of canons of statutory and administrative interpretation, as well as views about the uses of legislative history. *See* Abbe R. Gluck & Lisa S. Bressman, *Statutory Interpretation from the Inside – An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901, 905–06 (2013) (describing methodology of the research project, which involved interviews with 137 congressional counsels with legislative drafting responsibilities).

264. This would make an excellent research project for some enterprising scholar(s).

265. *See supra* notes 118–21 and accompanying text.

fects on policy grounds, and the possibility of available excuses combine to render problematic the predictions about the effects of a statute on civil tort liability.[266]

Finally, using negligence per se as the default rule is difficult to justify in light of modern textualist approaches to statutory interpretation and the rise of tort reform.[267] Legislators can make rules regarding tort liability when they choose to. Should not the natural default be to treat statutory silence about liability effects as an indication that no such effects are authorized? If the Third Restatement drafters are correct that legislatures presume negligence per se effects for nonprescriptive statutes (an unlikely assumption), then abandonment of the current negligence per se doctrine should encourage legislatures to more clearly consider and specify such effects in future enactments.[268] Greater specificity by state legislatures would be a desirable outcome because it would encourage efficient use of court and litigant resources by reducing the amount of issues before the court.

### *B. What the ALI's Model Penal Code Can Teach Us About How to Approach Negligence Per Se*

The previous sections of this Article have suggested that the ALI, in retaining negligence per se in its Third Restatement, adheres to a doctrine that involves a costly and complex doctrinal apparatus to determine its applicability, at significant cost to litigants and the judicial system, for benefits that seem less than compelling. In contrast, the ALI's Model Penal Code, particularly in its treatment of the problems of proximate cause, demonstrates a better way. Abandonment of the common law's excessively and uselessly complex proximate cause doctrine, in favor of a simple, flexible standard to be applied by the jury, is an excellent model for dealing with the problems of negligence per se.

Questions of causation arise whenever a crime has, as an element, the requirement that the defendant's conduct generate a particular result. So, for example, homicide crimes such as murder require that the defendant's conduct causes the victim's death.[269] In criminal law, as in tort law, causation is divided into two parts: factual cause

266. *See supra* notes 157–219 and accompanying text.

267. *See supra* notes 109–56 and accompanying text.

268. *See* Blomquist, *supra* note 16, at 281 (advocating that "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").

269. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 182 (6th ed. 2012).

and proximate cause.[270] Factual cause is typically analyzed through a but-for test.[271] But factual cause is a necessary but not sufficient condition for the imposition of criminal liability. The prosecution must also show that the defendant's conduct was a proximate cause of the victim's death.[272]

Courts operating in the common law tradition typically have used a complex, confusing and potentially contradictory array of doctrinal tests to analyze proximate cause.[273] One commentator, Professor Joshua Dressler, has identified at least six different "factors" that courts operating in the common law tradition use in determining whether the offender's conduct is a proximate cause of a required result.[274] They are: 1) whether the conduct is a *de minimis* contributor to the result; 2) whether the intervening cause was foreseeable; 3) whether the resulting harm was intended by the defendant; 4) whether the victim had reached a position of apparent safety prior to suffering the harm; 5) whether the result was the product of a "free, deliberate and informed" human intervention; and 6) whether the intervening party's conduct was an omission, rather than an affirmative act.[275] The second of these factors alone is subject to a "sophisticated"[276] analysis, which differentiates between coincidental (or independent) intervening causes, which relieve the defendant of criminal liability if they are not foreseeable, and responsive (or dependent) intervening causes, which do not relieve the original wrongdoer of criminal liability unless the response was not only unforeseeable but also abnormal.[277] Moreover, there are additional doctrinal standards that sometimes come into play, such as the medical aggravation doctrine, which can influence proximate cause determinations where the intervening act consists of medical malpractice or other misconduct in treatment of injuries inflicted upon the victim by the defendant.[278]

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270. *See id.* at 184.
271. *See id.* at 185.
272. *See id.* at 188–89.
273. *See id.*
274. *See id.* at 190–96.
275. *See id.*
276. *See id.* at 191. Another treatise writer characterizes the doctrine as "difficult." *See* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW 481 (2d ed. 2003) (explaining that many of the decided cases on proximate cause "rest upon difficult distinctions between intervening concurrent, natural, human, and other classifications of causes").
277. *See* DRESSLER, *supra* note 269, at 191–93.
278. This doctrine, arguably traceable to *Bush v. Commonwealth*, 78 Ky. 268 (1880), usually provides that medical aggravation of the victim's injuries is not a superseding cause if it consists of conduct that is merely negligent, but that the defendant is not a proximate cause of injuries that result from grossly negligent or intentional mistreatment.

In short, proximate cause doctrine is a complicated mess. While judges and lawyers "bandy about conclusory terms like 'superseding intervening cause,' 'direct cause,' and 'remote cause,'"[279] the underlying doctrine is difficult to apply, and the inquiry "collapses, either explicitly or implicitly, into a normative one about whether it seems just to hold the actor morally responsible for the result under the circumstances."[280] This is why the ALI, in drafting the Model Penal Code, jettisoned the entire doctrinal structure of common-law-influenced proximate cause principles, substituting a simple, flexible standard that encourages the fact-finder to make a moral judgment about the defendant's criminal responsibility.[281] Section 2.03 of the Model Penal Code provides that the causal relationship between conduct and result is satisfied where the conduct "is an antecedent but for which the result in question would not have occurred,"[282] and "the actual result involves the same kind of injury of harm as that designed or contemplated and *is not too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or the gravity of his offense.*"[283]

In comments accompanying these provisions, the ALI drafters explained their rationales for this alternative approach to the vexing questions of proximate cause.

> This section is concerned with offenses in which causing a particular result is a material element (e.g., homicide). . . . These problems are currently dealt with as issues of "proximate causation" and pre-

279. DRESSLER, *supra* note 269, at 189.

280. Janice Nadler & Mary-Hunter McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORNELL L. REV. 255, 299 (2012).

281. *See* MARKUS D. DUBBER, CRIMINAL LAW: MODEL PENAL CODE 138 (2002) (observing that "Code drafters threw up their hands and placed the issue [of proximate cause] squarely in the jury's lap"); DRESSLER, *supra* note 269, at 196 (stating that in the Model Penal Code "the 'varying and sometimes inconsistent' proximate causation factors developed by the common law are replaced with a single standard, which expressly invites the jury to reach a commonsense, or just, result").

282. Model Penal Code § 2.03(1)(a) (AM. LAW INST. 2015).

283. Model Penal Code § 2.03(2)(b) (emphasis added). The word "just" was placed in brackets by the ALI as a possible addition for legislatures to consider in assessing possible adoption of the provision, because ALI drafters were in disagreement about the desirability of submitting to the jury explicit questions of undefined, broad moral concepts like justice. *See* Model Penal Code § 2.03 cmt., 261 n.16. Section 2.03(2)(b) applies to crimes requiring that the defendant purposely or knowingly cause a particular result. The ALI drafters used parallel language in section 2.03(3)(b), which deals with instances where recklessly or negligently causing a particular result is required. *See* Model Penal Code § 2.03(3)(b) (emphasis added) (requiring that the actual result involve "the same kind of injury or harm as the probable result and *is not too remote or accidental to have a [just] bearing on the actor's liability or the gravity of his offense*").

> sent enormous difficulty (especially in homicide) because of the obscurity of that concept. Rather than seeking to systematize the varying and sometimes inconsistent rules in the numerous areas in which the problem has arisen, the section undertakes a fresh approach to the central issues . . . treating the difficult situations, in which actual result differs from the expected result, as problems of culpability.[284]

Having noted the difficulty of the proximate cause inquiry under traditional legal standards, and identified the offender's culpability as the central issue of the inquiry, the ALI drafters then explained the nature of the standard in section 2.03 and why they adopted it:

> Subsection (2)(b) . . . makes no attempt to catalogue the possibilities intervening or concurrent causes, natural or human; unexpected physical conditions; distinctions between mortal and nonmortal wounds; and so on. It deals only with the ultimate criterion by which the significance of such factors ought to the judged whether the actual result is too remote or accidental in its occurrence to have a [just] bearing on the actor's liability or the gravity of his offense . . . . In general, the infinite variety of contexts in which the issue can arise precludes an advance catalogue of premises that can be used mechanically to deduce a solution. The issue should be put to the jury in terms of a general principle that articulates the ultimate basis of judgment.[285]

In short, the ALI concluded that it was appropriate to replace a large, complex, and uncertain body of substantive doctrinal law with a simple, broad, flexible standard, to be applied by the fact-finder to the specific facts of the particular case. This approach has been characterized as sensible by major commentators.[286]

The lessons for negligence per se doctrine are readily apparent. Like proximate cause in criminal cases, negligence per se has spawned a large, complex body of law governing its application to particular cases.[287] As in the proximate cause inquiry, this doctrinal apparatus complicates what is, at root, a relatively simple inquiry that contains a value judgment at its core. In negligence cases, that inquiry is whether the actor's conduct, under the circumstances, has created an unreason-

284. Model Penal Code § 2.03 cmt., at 255–56.

285. *Id.* at 261–62.

286. *See, e.g.*, H.L.A. Hart & Tony Honore, Causation in the Law 394 (2d ed. 1985) (calling § 2.03 the "most lucid, comprehensive and successful attempt to simplify problems of proximate cause in the criminal law"); LaFave, *supra* note 276, at 481 (observing that "the Model Penal Code appropriately deals with [proximate cause problems] by putting the issue squarely to the jury's sense of justice").

287. *See supra* notes 157–219 and accompanying text (noting the array of doctrinal issues that courts must resolve in applying negligence per se principles).

able risk of harm to others. Abandonment of negligence per se would eliminate the need for courts to determine whether the plaintiff is within the class of persons and whether the injury is within the class of risks that the statute is designed to address; and if so, whether there are countervailing policy reasons that the court should decline to adopt the statute as the standard of care; and, if so, whether there is a valid excuse for violation of the statute. Permitting the fact-finder to simply use the statutory violation as a factor to consider in assessing of the reasonableness of the actor's conduct would drastically simplify the law.

### *C. The Evidence of Negligence Approach Should Be Adopted*

At this point, only a dozen or so jurisdictions embrace the rule that a statutory violation is merely evidence of negligence, making it a distinctly minority rule. However, it has significant advantages over the existing negligence per se doctrine. As Dobbs explains:

> The evidence of negligence rule is flexible and easy to administer. It does not generate litigation over excuses or over questions about what risks and harms were covered by the statute. The per se rule is often justified in part on the ground that it creates more certainty, but it is far from clear that it creates as much certainty as it creates litigation and litigation strategy. If it does create more certainty, it creates it at the price of risking strict liability. So the evidence of negligence rule is a fair contender for support.[288]

Treating statutory violation as simply one factor for the jury to use in assessing negligence would not only preserve the traditional flexibility possessed by juries, but also would avoid much of the vast, complex doctrine governing the legal applicability of negligence per se. It would do so in a way that is truly respectful of the proper relationship among legislatures, judges, and juries. In today's world, if legislatures or administrative agencies desire to create civil liabilities, or alter existing tort principles, they are perfectly capable of saying so.

The evidence of negligence rule still leaves a significant role for nonprescriptive statutes in shaping negligence determinations. As in the case of customer safety precaution violations, juries are likely to view proof that the actor's purported negligence consisted of violation of a statute or a regulation as persuasive evidence that the actor failed to exercise reasonable care. Reasonable people generally will follow the law in most circumstances. Negligence cases would continue to reflect this principle under the evidence of negligence standard.

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288. DOBBS, *supra* note 2, at 317.

## CONCLUSION

Negligence per se involves the use of nonprescriptive statutory or administrative provisions to determine the existence and scope of tort liability in negligence cases—something those provisions were not designed to do. As a result, negligence per se sows unnecessary confusion in the law. To the extent that the doctrine made sense in an era where judicially generated common law was predominant, it has outlived its usefulness. Adopting an evidence of negligence approach provides a practical way to simplify the legal doctrine at very little cost.