cated probability that "reliable, probative and substantial" in the APA may properly be equated with the "substantial evidence test."[45] These problems might well have received definitive treatment in the *Universal Camera* case.

A RATIONALE OF NEGLIGENCE PER SE

When the plaintiff in a civil action bases his right to recover on the fact that the defendant has violated a criminal statute, the court must determine the effect, if any, such statute is to have upon civil liability.[1] The great majority of criminal statutes make no mention of a possible civil action, thus the courts are not compelled to consider them at all.[2] However, in a large percentage of the forty-eight state jurisdictions criminal violations are often labelled negligence *per se* and made to serve as the basis for civil liability.[3] While the results of this procedure, on the whole, have been satisfactory, there are several aberrations, and the procedure itself has not been satisfactorily explained.

There have been attempts to explain why the courts recognize a relationship between a violation of the criminal law and the law of negligence. Professor Thayer has contended that the principles of negligence *require* that civil liability follow a criminal violation.[4] Professor Lowndes, in answer to Thayer, denies the existence of any intrinsic relation between criminal conduct and negligence, asserting that when the courts recognize such they are but

---

lar statement was made in the Senate Committee Report, SEN. DOC. No. 248, 79th Cong., 2d Sess. 208 (1946).

While the Senate and House proceedings are more equivocal, there are several statements which lend support to this position and nothing which specifically controverts it. For example, the comment was made in the Senate Proceedings: "We are saying that there must be probative evidence of a substantive nature, and that even though the committee or bureau may take hearsay evidence in its hearings, it must have some probative evidence to sustain its findings." SEN. DOC. No. 248, 79th Cong., 2d Sess. 365 (1946); *Speech of Representative Walter*, 92 CONG. REC. 5653 (May 24, 1946).

45. See note 36 *supra* and accompanying text.

1. In accord with the great majority of cases, and with the literature on the subject, this note makes no distinction between statutes and municipal ordinances. But see Note, 14 VA. L. REV. 591 (1928).

2. *Cf.* KY. REV. STAT. § 446.070 (1948): "A person injured by the violation of any statute may recover from the offender such damage as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation." For the effect of this provision, see Kepner, *Violation of a Municipal Ordinance as Negligence Per Se in Kentucky*, 37 KY. L.J. 358 (1949).

3. RESTATEMENT, TORTS § 286 (1934). The cases are too numerous for citation. See, *e.g.*, Hayes Freight Lines v. Wilson, 226 Ind. 1, 77 N.E.2d 580 (1947).

4. "It is an unjust reproach to our old friend the ordinary prudent man to suppose that he would do such a thing in the teeth of the ordinance. It would mean changing his nature, and giving over the very traits which brought him into existence." Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 326 (1914). This analysis should be compared with the language of Oates v. Union Ry., 27 R.I. 499, 63 Atl. 675 (1906): "None of the rules of the road are so imperative that it is always negligence to disobey them. . . . [I]t may often be the highest care for a driver to turn to his left when the rule of the road prescribes the right"; and that of Walker v. Lee, 115 S.C. 495, 106 S.E. 682 (1921): ". . . a person is bound to technically violate either [statute or ordinance], if by so doing he can avoid inflicting injury to person or property."

giving vent to their own predilections.[5] The two views are irreconcilable, yet neither is acceptable. The essence of negligence is that only that conduct which is culpable—below the standard prescribed by law and without justification—and which causes a forseeable kind of injury to a forseeable class of persons should lead to civil liability.[6] From this it is reasonable to infer that the principles of negligence do not require the relationship—not every criminal act will be negligence; nor do they reject the relationship—some criminal acts may be negligence.[7]

But while the courts speak in terms of negligence in the statutory violation case, it is possible that they are applying other concepts of liability. Thayer indicates as much; he asserts that a violation of a criminal statute is negligence in itself, and the plaintiff, in order to recover, need only prove that fact and that he was injured thereby.[8] Lowndes, while not challenging the correctness of Thayer's analysis of the cases, charges that this is liability without fault.[9] Again neither authority is helpful. It is true that when the statutory violation problem first arose, the concept of strict liability offered

---

5. "It seems obvious that if the court really applies the common law principles of negligence to the violation of the statute, as Thayer felt that it should, there is no tenable basis for holding that the violation of the statute constitutes negligence. . . . If a court [so] holds . . . it is simply taking the roundabout route to the conclusion that the violation of a statute creates a civil liability. This is, perhaps, less arrogant than reaching the same result by construction, but it is also a shade less honest. . . . It may well be questioned whether the violation of a criminal statute has any legitimate bearing upon the question of negligence." Lowndes, *Civil Liability Created by Criminal Legislation,* 16 MINN. L. REV. 361, 368-369 (1932). Thus, Lowndes' explanation of the relationship between a criminal violation and negligence is that the courts *desire* that such relationship exist; but he does not explain *why* courts are so inclined.

6. PROSSER, TORTS § 30 (1941). *Cf.* dissent of Andrews, J., in Palsgraf v. Long Island Ry., 248 N.Y. 339, 347, 162 N.E. 99, 101 (1928), in which the author rejects the element of foreseeability as a test of negligence.

7. See Morris, *The Relation of Criminal Statutes to Tort Liability,* 46 HARV. L. REV. 453 (1933). The author of this article, after reaching substantially the same conclusion as above, seemed bewildered and concluded: ". . . the limits of liability . . . should not be left to the hunch of the individual judge, to be handled as best he can on a semi-subconscious basis, but should be principled. And for this, there must be reliance upon judges skilled in the application and reformation of general principles." *Id.* at 477.

8. Thayer, *supra* note 4, at 328: "A new statutory 'nuisance' has thus been created in every sense in which that word has legal significance; and the proposition that he who violates the statute or ordinance does so at his peril is only an application of the principle that an action lies in favor of one who has suffered a private injury from a public nuisance."

9. Lowndes, *supra* note 5, at 376: "As soon as a court says that anything is negligence *per se,* the question of negligence is eliminated." Morris, *supra* note 7, at 463, makes an identical criticism of Thayer's analysis: "But if the doctrine of negligence *per se,* as traditionally stated, is applied without discrimination, defendants who violate the criminal law must be held to be negligent even though they are not at fault."

a solution.[10] Yet a comparison of the statutory violation and common law negligence cases reveals that in the former the courts have not attempted to impose liability without fault, but liability consistent with the fundamental principles of negligence. Thus, in common law negligence cases the defendant is liable only to those persons[11] and for those consequences he could foresee;[12] in statutory cases, only to those persons the statute was designed to protect[13] and for those injuries the statute was designed to prevent.[14] Again, in common law cases it must appear that the defendant's conduct was the proximate cause of the plaintiff's injury;[15] in statutory cases precisely the same rule obtains.[16] And the common law defenses of assumption of risk and contributory negligence were carried over and applied to the statutory case.[17]

A useful inquiry might be directed as to why the courts chose to approach the statutory violation problem through negligence rather than strict liability or just plain statutory liability, *sui generis*. As to the latter, it is probable that since some criminal statutes provided expressly for a civil action following their violation and others did not, the courts felt that to impose liability in the absence of such a provision would be a flagrant disregard of the legislative

10. "Negligence was scarcely recognized as a separate tort before the earlier part of the nineteenth century." PROSSER, TORTS § 28 (1941). Civil liability resulting from the violation of a criminal statute can be traced back considerably further. See, *e.g.*, Rowning v. Goodchild, 2 Black. W. 907 (1772) (action on the case lies against a deputy postmaster for non-delivery of letters, contrary to statute). Not until 1850, with Brown v. Kendall, 6 Cush. 292, 60 Mass. 292 (1850), was it firmly established that there could, in general, be no liability in tort in the absence of some wrongful intent or negligence. ". . . [A]s to injuries to person or property which followed as the more direct and immediate consequences of a voluntary act . . . the early common law imposed a very strict responsibility." PROSSER, TORTS § 29 (1941).

11. Palsgraf v. Long Island Ry., 248 N.Y. 339, 162 N.E. 99 (1928); RESTATEMENT, TORTS § 281, comment b: *"Risk to class of which plaintiff is member.* If the actor's conduct creates a recognizable risk of harm only to a particular class of persons, the fact that it causes harm to a person of a different class, to whom the actor could not reasonably have anticipated injury, does not render the actor liable to the persons so injured."

12. If the defendant could not reasonably foresee any injury as the result of his act, or if his conduct was reasonable in the light of what he could anticipate, there is no negligence and no liability. Gaupin v. Murphy, 295 Pa. 214, 145 Atl. 213 (1928); Sears v. Texas & N.O. Ry., 247 S.W. 602 (Tex. Civ. App. 1923); Nunan v. Bennett, 184 Ky. 591, 212 S.W. 570 (1919); Stephens v. Mutual Lumber Co., 103 Wash. 1, 173 Pac. 1031 (1918).

13. A factory act, for example, requiring that dangerous machinery, or elevators, shall be guarded, may obviously be intended only for the benefit of employees, offering no protection to others who enter the building. See Gibson v. Leonard, 143 Ill. 182, 32 N.E. 182 (1892); Hamilton v. Minneapolis Desk Mfg. Co., 78 Minn. 3, 80 N.W. 693 (1899); Kelley v. Henry Muhs Co., 71 N.J.L. 358, 59 Atl. 23 (1904); *accord*: Indiana Coal Co. v. Neal, 166 Ind. 458, 77 N.E. 850 (1905).

14. Gorris v. Scott, L.R. 9 Exch. 125 (1874). See Morris, *supra* note 7, at 473.

15. PROSSER, TORTS § 46 (1941).

16. Hayes Freight Lines v. Wilson, 226 Ind. 1, 77 N.E.2d 580 (1947); Jinks v. Currie, 324 Pa. 532, 188 Atl. 356 (1936); Bentson v. Brown, 186 Wis. 629, 203 N.W. 380 (1925).

17. Cleveland, etc., Ry. v. Tauer, 176 Ind. 621, 96 N.E. 758 (1911); Baltimore & O. Ry. v. Conoyer, 149 Ind. 524, 49 N.E. 452 (1897); White v. Cochrane, 189 Minn. 300, 249 N.W. 328 (1933); RESTATEMENT, TORTS § 286 (1934).

prerogative.[18] The selection of negligence over strict liability could have been a product of the times. During the nineteenth century, when the statutory violation problem was in its formative stages, liability without fault had come into disfavor;[19] it was no longer felt socially desirable to hold a person responsible for *all* of the injurious consequences of his act.[20] Negligence, with its principles of foreseeability and proximate cause, offered the only convenient means of determining the point at which the defendant's liability should end.[21]

Much of the confusion as to just what the courts are doing in the statutory violation cases can be attributed to their use of the phrase "negligence *per se*." It does not mean *liability per se*. It means merely that the court has decided that the defendant's act of violating this statute which injured this plaintiff was negligence, in the common law sense of the term, and that it is neither necessary nor proper for the jury to determine the question. The contention has been made by Lowndes that this procedure of withholding the question of negligence from the jury in the statutory violation case transforms the cause of action from one founded on negligence to one founded on the statute itself.[22] To support this charge Lowndes asserts that the determination of negligence is the inalienable function of the jury and that a court has no right to interfere with the determination in any way.[23] However, Lowndes fails to object to

18. See, *e.g.*, Evers v. Davis, 86 N.J.L. 196, 202, 90 Atl. 677, 679 (1914): "The reason why no civil action can be based upon the statute is because no such action or right of action is given by the statute. The language of the statute is entirely free from ambiguity; it seeks to eliminate a source of danger by the imposition of a penalty. The legislature could if such were its intention have provided also that anyone injured by a breach of the statute should have a remedy by civil action. It has not seen fit to do so and the court has no right to supply such omission. . . ." See also Note, *Negligence Per Se—Statutory Interpretation*, 26 TEX. L. REV. 681 (1948).

19. *Compare* Weaver v. Ward, 80 Eng. Rep. 284 (1616), *with* Brown v. Kendall, 6 Cush. 292, 60 Mass. 292 (1850).

20. See discussion in PROSSER, TORTS § 56 *et seq.* (1941). Isaacs, *Fault and Liability*, 31 HARV. L. REV. 954, 966 (1918), has contended that the law has moved in cycles, alternating periods of strict liability with liability based on fault.

21. With strict liability, the only connecting factor necessary to the imposition of liability is that of causation. In a philosophical sense, the causes of an event go back to the creation of the world, and the consequences of an act go forward to eternity. But the fact that certain conduct may bear a causal relation to an injury is felt to be an insufficient reason for shifting a loss from one party to another. The sound policy of tort law is that losses should lie where they fall, unless a special reason can be shown for interference. The principles of negligence were devised in an attempt to determine the existence of a reason to shift a loss. See Feezer, *Capacity to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases*, 78 U. PA. L. REV. 805 (1930), 79 U. PA. L. REV. 742 (1931).

22. Lowndes, *supra* note 5, at 369.

23. "True, the doctrine of the reasonably prudent man is a legal doctrine, but the qualities of this superb individual are not determined by legal rules, but by the social judgment of the jurors. It is beside the point to argue what a reasonably prudent man would or would not do. The actions of the reasonably prudent man cannot predetermine the judgment of the jury. The judgment of the jury predetermines the actions of the reasonably prudent man. The formulation of the social standard of conduct for unintentional injuries is for the jury, not for the court, and consequently it would appear to follow that the jury must determine whether the violation of a criminal statute is or is not

a procedure followed in common law negligence cases which also results in withholding the question of negligence from the jury.[24] Criticism of one must go to the other.

Holmes has pointed out that "the tendency of law must always be to narrow the field of uncertainty."[25] Thus, where the jury system as a whole has identified certain conduct as basically deserving of civil liability, there is little doubt that the courts are justified in withholding that area of negligence which has thus become crystallized from the scrutiny of an *individual* jury which may "oscillate to and fro."[26] Negligence *per se* procedure can be similarly defended if the criminal statute embodies a standard of care which will also identify conduct deserving of civil liability according to negligence concepts.[27]

The assumption that the law of negligence is administered by the jury system is fallacious—the function has always been that of the courts.[28] However, the courts are free to enlist the aid of juries in determining that conduct deserving of civil liability. Holmes explains why it is often necessary for courts to do this:

> When the case arises in which the standard of conduct, pure and simple, is submitted to the jury, the explanation is plain. It is that the court, not entertaining any clear views of public policy applicable to the matter, derives the rule to be applied from daily experience, as it has been agreed that the great body of tort law has been derived. But the court further feels that it is not itself possessed of sufficient practical experience to lay down the rule intelligently. It conceives that twelve men taken from the practical part of the community can aid its judgment.[29]

Legislatures are also representative of society, and thus seem as capable as juries of furnishing the assistance which is needed.[30] Courts would be justi-

---

negligence. When the court makes the decision it does not overstep its power, but it does overstep the decent amenities of judicial conduct." *Id.* at 365.

24. See Note, *Functions of Judge and Jury in Negligence Cases,* 58 YALE L.J. 667 (1949); see also 48 MICH. L. REV. 131 (1949).

25. HOLMES, THE COMMON LAW 127 (1881).

26. ". . . [S]upposing a state of facts often repeated in practice, is it to be imagined that the court is to go on leaving the standard to the jury forever? Is it not manifest, on the contrary, that if the jury is, on the whole, as fair a tribunal as it is represented to be, the lesson which can be got from that source will be learned?" *Id.* at 123.

27. "From the time of Alfred to the present day, statutes have busied themselves with defining the precautions to be taken in certain familiar cases." *Id.* at 112.

28. "Hence the question of the Year Books is not a loose or general inquiry of the jury whether they think the alleged trespasser was negligent on such facts as they may find, but a well defined issue of law, to be determined by the court, whether certain acts set forth upon the record are a ground of liability." *Id.* at 102.

". . . When standards of conduct are left to the jury, it is a temporary surrender of a judicial function which may be resumed at any moment in any case when the court feels competent to do so." *Id.* at 126. See note 24 *supra.*

29. *Id.* at 123.

30. See Morris, *supra* note 7, at 474.

fied in utilizing the knowledge and experience of legislative bodies, as well as juries, whenever possible.[31]

All criminal statutes embody a standard of conduct—that activity which society condemns is prohibited. And the criminal statute is the ultimate of crystallization;[32] thus it would seem to serve the same function as the crystallized rule of negligence obtained from the jury system. But the fact that a statute crystallizes punishable conduct is not enough. If liability is to be predicated upon the failure to avoid a foreseeable risk, then the statute must also be conducive to a proper determination of that fact. A Blue Law, for example, is devoid of all negligence tests; the type of injury to be avoided and the persons to be protected cannot possibly be determined.[33] When the court in a negligence case is confronted with conduct which does not comply with Blue Law standards, it has no alternative but to disregard the statute and rely on its own judgment or seek the aid of a jury. However, the great majority of criminal statutes do embody standards susceptible of application in terms of foreseeable risk, harm and plaintiff. The courts are not usurping powers peculiar to the jury system when they adopt those standards for negligence cases.[34]

Negligence *per se* procedure, properly understood, should cause little difficulty. It must be kept constantly in mind that it is negligence that is being administered and not liability without fault or a type of statutory liability. "The rule to be applied is that derived from daily experience."[35] However, negligence *per se* misunderstood and thus misapplied leads to confusion and harsh results. The Blue Law example serves as a warning of one difficulty which may be encountered. Those statutes which prohibit certain types of activity inevitably, with passage of time, become trivial or obsolete—dictates of the mores of another day. Unlike the Blue Law, however, the obsolete

31. *Cf.* Lowndes, *supra* note 5, at 367: ". . . the determination of the standard of conduct to be applied in negligence cases is an inalienable function of the jury unless taken from it by the legislature."

32. Note also that criminal standards of conduct must be sufficiently definite and intelligible to survive the attack of due process of law. Lanzetta v. New Jersey, 306 U.S. 451 (1939); Herndon v. Lowry, 301 U.S. 242 (1937); Connally v. General Construction Co., 269 U.S. 385 (1926); *Ex parte* Webb, 225 U.S. 663 (1912); United States v. Reese, 92 U.S. 385 (1876); Smith v. State, 186 Ind. 252, 115 N.E. 943 (1917); Railway Commission of Indiana v. Grand Trunk West. Ry., 179 Ind. 225, 100 N.E. 852 (1913).

33. In a number of jurisdictions it is technically a crime to engage in certain activity on Sunday—such as driving an automobile or conducting a business transaction. Applications of proximate cause and foreseeability tests to injuries occurring in connection with a violation of a Sunday law result in a complete nullity. See Morris, *supra* note 7, at 473 n. 40.

34. Oddly enough, none of the authorities have recognized this seemingly obvious and logical explanation of negligence *per se*. Addison, Bigelow, Bohlen, Chapin, Cooley, Green, Harper, Lowndes, Morris, Pollock, Prosser, Salmond, Thayer, all fail to adequately explain the relationship between the criminal statute and tort liability, which is the very heart of the problem. Most have concerned themselves with the desirability or undesirability, the advantages or disadvantages of the various rules *after* the courts have determined that there is *some* relationship.

35. HOLMES, *op. cit. supra* note 25, at 127.

provision does point to the risk to be avoided, harm to be prevented, and persons to be protected. It is defective now only in that it no longer represents community opinion—it has ceased to be a test of negligence.

Only a court which misconceives negligence *per se* procedure would use the standard of a statute with which to measure the defendant's conduct without first determining whether that standard was obsolete. However, many courts, seeking a beguiling symmetry, have been guilty of assuming that *all* statutes are of equal utility in measuring conduct. Thus, the motorist who drives seven miles an hour in the face of a six mile an hour speed limit has been held negligent for speeding.[36] A proper procedure here would not differ substantially from that followed when the court discovers that a settled jury rule has suddenly become outdated. In the common law negligence case the question is given once again to the jury for the formulation of a new standard.[37] Since the court cannot compel the legislature to modernize its enactments, recourse must be to the only other advisory body available.

Negligence *per se* procedure must also remain flexible so as to allow for emergency situations and superior precautions. A sound principle of negligence is that the conduct of one reacting to an emergency cannot be held to the same standard as the conduct of one who has had an opportunity to reflect.[38] The conduct of the motorist who cuts into the left lane to avoid striking a child, for example, is not to be measured by the "rule of the road" if he was in fact faced with an emergency.[39] The standard of conduct embodied in the criminal statute is not the result of "typical reactions to emergencies," but the result of normal human activity. Neither the legislatures nor juries are capable of furnishing the courts with a crystallized standard of conduct for the emergency case. Tort law refuses to be so confined.[40] Thus, if negligence *per se* is to remain consistent with negligence concepts, the standard of the statute must be ignored the moment it is determined that the defendant was confronted with an emergency,[41] just as the crystallized jury standard is ignored

36. See Conrad v. Springfield Consolidated Ry., 240 Ill. 12, 88 N.E. 180 (1909); Carter v. Caldwell, 183 Ind. 434, 109 N.E. 355 (1915); Riser v. Smith, 136 Minn. 417, 162 N.W. 520 (1917).

37. See HOLMES, *op. cit. supra* note 25, at 123.

38. Barnhardt v. American Glycerin Co., 113 Kan. 136, 213 Pac. 663 (1923); Louisville & N. Ry. v. Wright, 193 Ky. 59, 235 S.W. 1 (1921); Austin v. Eastern Massachusetts St. Ry., 269 Mass. 420, 169 N.E. 484 (1929); Donahue v. Kelly, 181 Pa. 93, 37 Atl. 186 (1897); RESTATEMENT, TORTS § 296 (1934).

39. R&L Transfer Co. v. State, 160 Md. 222, 153 Atl. 87 (1931); Chase v. Tingdale Bros., 127 Minn. 401, 149 N.W. 654 (1914); *accord*: Conder v. Griffith, 61 Ind. App. 218, 111 N.E. 86 (1915).

40. See PROSSER, TORTS § 242 (1941).

41. Morris, *supra* note 7, at 458, in contending that application of negligence *per se* procedure inevitably results in liability without fault overlooks a helpful analogy between criminal and tort law. It is not every departure from the criminal standard of conduct that results in a criminal conviction—the seven well known elements pervading the entire field of criminal law must also be present. Since the criminal courts in applying the

when the emergency element is found present in the common law negligence case.[42]

Also, one who betters the standard of conduct of a statute has technically violated the statute; but has he been negligent? Courts have held as much. When a statute provided for a bell on an engine to be rung while approaching crossings, a railroad was held to be negligent for not ringing the bell although it had improved the situation with a stationary signal at the crossing itself.[43] Proper insight into negligence *per se* procedure reveals that the statutory standard is a minimum standard to be applied only when the conduct in question has fallen below it.[44] If the defendant has recognized the risk and undertaken precautions superior to those of the statute, it is highly illogical as well as unjust to say that he was negligent because he violated the statute.[45] In some instances it will be obvious to the court that the defendant's precautions were in fact superior; thus it should be held that the "violation" of the statute is of no significance. In other cases the court will need the aid of the jury to determine whether the defendant's conduct was equal or superior to that standard embodied in the statute. In either event, the standard of the statute is retained, but departure from it leads to civil liability only when the defendant has in fact been negligent.

The assumption that all statutes embody an applicable standard of conduct, or that once a standard is utilized it must be applied in every case, has led a number of courts to rule that a statutory violation is but prima facie

---

statute limit its application by well recognized criminal concepts, it is only proper that a civil court, in applying the criminal standard to a negligence case, should also limit its application by well recognized tort concepts.

42. Several jurisdictions consistently refuse to allow any defense, emergency or otherwise, in civil actions based upon the violation of certain statutes. In Massachusetts, for example, the person who operates an automobile without a driver's license is held responsible for any accident in which he becomes involved, without regard to the reasonableness of his conduct or the fact that he may have been confronted with an emergency. See, *e.g.*, Bourne v. Whitman, 209 Mass. 155, 95 N.E. 404 (1911). Similar treatment is accorded child labor statutes in other states. See, *e.g.*, Northwest Door Co. v. Lewis Investment Co., 92 Ore. 186, 180 Pac. 495 (1919). The policy underlying these decisions is evidently considered so overpowering that a defense based on blameworthiness cannot be allowed. It is not here contended that this reaction is erroneous. However, the courts should not impose liability in these cases on the ground that the defendant was negligent. This is liability without fault, pure and simple, and should be labelled as such. Much muddied thinking on negligence *per se* could be cleared up if courts would specify *why* they are holding defendant liable in a civil action. See Morris, *supra* note 7, at 471-72.

43. Kavanagh v. New York, O. & W. Ry., 196 App. Div. 384, 187 N.Y.S. 859 (1921).

44. Grand Trunk Ry. v. Ives, 144 U.S. 408 (1892); Prichard v. Collins, 228 Ky. 635, 15 S.W.2d 497 (1930); Licha v. Northern Pac. Ry., 201 Minn. 427, 276 N.W. 813 (1937); Knott v. Pepper, 74 Mont. 236, 239 Pac. 1037 (1925).

45. Since his "superior precaution" did not prevent the accident, it is not argued that the defendant should escape liability; but his liability, if any, should not be based on the violation of the minimum standard imposed by the statute. Although the result may be the same, there is much to be said in favor of utilizing the proper method to reach a given end.

evidence of negligence.[46] Under this procedure the defendant is given the opportunity to justify his departure from the statute, the jury deciding his success or failure in this respect. But while the desire to relieve non-negligent defendants from liability is commendable,[47] it does not justify abandonment, without discrimination, of negligence *per se* procedure. With the prima facie rule, it is impossible to tell whether the jury found the defendant free from negligence because he did not violate the statute, because he justified his violation, or because the standard of the statute was felt an inappropriate measure of the conduct involved. Thus, by allowing the jury to always "second guess" the legislature, an effective technique in "social engineering" is lost.[48]

---

46. Colorado Midland Ry. v. Roggins, 30 Colo. 499, 71 Pac. 632 (1902); Augusta, etc., Ry. v. McElmurry, 24 Ga. 75 (1858); St. Louis, J. & C. Ry. v. Terhune, 50 Ill. 15 (1869); Rowley v. Cedar Rapids, 203 Iowa 1245, 212 N.W. 158 (1927); Fowler Packing Co. v. Enzenperger, 77 Kan. 406, 94 Pac. 995 (1908); Davis v. Whiting & Son Co., 201 Mass. 91, 87 N.E. 199 (1909); Mattes v. Great Northern Ry., 95 Minn. 386, 104 N.W. 234 (1905); McRickard v. Flint, 114 N.Y. 222, 21 N.E. 153 (1889); Riley v. Salt Lake Rapid Transit Co., 10 Utah 428, 37 Pac. 681 (1894); La Cahnce v. Meyers, 98 Vt. 498, 129 Atl. 172 (1925); Tarr v. Keller Lumber & Constr. Co., 106 W. Va. 99, 144 S.E. 881 (1928). Some courts hold that a violation of *certain* statutes is prima facie evidence of negligence, while the violation of others is negligence *per se*. Indiana, for example, has long held that driving on the left side of a road, in violation of a statute, is but prima facie evidence of negligence. Gamble v. Lewis, 227 Ind. 455, 85 N.E.2d 629 (1949); Jones v. Cary, 219 Ind. 268, 37 N.E.2d 944 (1941); Lorber v. Peoples Motor Coach Co., 89 Ind. App. 139, 164 N.E. 859 (1928); Conder v. Griffith, 61 Ind. App. 218, 111 N.E. 86 (1915).

47. This desire evidently prompted the Indiana Supreme Court in the recent case of Northern Indiana Transit, Inc. v. Burk, 89 N.E.2d 905 (Ind. 1950), to adopt the prima facie rule in cases involving IND. ANN. STAT. § 47-2123 (Burns Repl. 1940) which provides that vehicles "shall be stopped or parked with the right hand wheels of such vehicle parallel and within twelve (12) inches of the right hand curb." The language of Emmert, J., is typical: "When the breach of a statutory duty is held to be negligence *per se*, or negligence as a matter of law, the court holds that the legislature has created an absolute duty, which cannot be escaped by attempting to prove that the breach was in fact done in the exercise of due care," but "under the rule that the violation of such a duty is prima facie evidence of negligence, the operator may be excused from compliance to this section, but the duty of coming forward with the evidence to show such excuse is upon him."

48. "If the whole evidence in the case was that a party, in full command of his senses and intellect, stood on a railway track, looking at an approaching engine until it ran him down, no judge should leave it to the jury to say whether the conduct was prudent. If the whole evidence was that he attempted to cross a level track, which was visible for half a mile each way, and on which no engine was in sight, no court would allow a jury to find negligence. Between these two extremes are cases which would go to the jury." HOLMES *op. cit. supra* note 25, at 129.