homicide, and proof of the discovery of new facts establishing the innocence of the convicted person.

Convictions of the innocent spring from the same factors as other defects in criminal law administration—public impatience at the escape of so many apparently guilty persons, and a "crime wave" producing police and prosecution overzealousness; the desire for vengeance, which leads to mistaken identification by witnesses and prejudiced juries; the difficulty of drawing conclusions from circumstantial evidence; the lack of public defenders and competent defense counsel; the third degree; lack of power in appellate courts to review discretionary rulings and most findings of fact; and statutory limitations on the traditional common law powers of the trial judge, as in prohibiting the expression of opinion on the weight of the evidence. Most of these practices which result in the conviction of the innocent can only be changed through an enlightened public opinion and legislative action. Although erroneous convictions acts, such as the federal statute, do not reach the causes of erroneous convictions, they nevertheless should be enacted in every state in order that society may, as far as possible, repair the wrong it has inflicted upon the convicted innocent.

CONTRIBUTORY NEGLIGENCE AS DEFENSE TO STATUTORY TORT

The plaintiff's deceased made a retail purchase from the defendant grocer of kerosene distributed by the defendant oil company. In order to hasten the ignition of green firewood in a cold stove, he poured some kerosene directly from the can into the firebox. An explosion followed and the plaintiff's husband died from burns and injuries received. It was determined that the fuel sold actually was an explosive mixture of kerosene and gasoline[1] made possible by the defendant's routine practice of indiscriminately using the tanks of its delivery truck for hauling both gasoline and kerosene. Since this practice violated state law,[2] the plaintiff pleaded a statutory tort in her action for death damages. The defendants pleaded the deceased's contributory negligence in pouring kerosene into the stove. The trial court approved this defense, dismissed the action

[1] Flashpoint is that temperature at which a combustible fluid vaporizes and may be ignited. Expert testimony revealed that the mixture flashed at 68 degrees Fahrenheit whereas kerosene normally ignites at 145 to 160 degrees Fahrenheit. By law, Minnesota fixes the lowest permissible flashpoint of kerosene mixtures at 120 degrees Fahrenheit. Minn. Stat. (1945) § 296.01, subd. 3.

[2] Minn. Stat. (1945) § 296.22, section headed "safety requirements," subd. 3, headed "use of pump lines": "Gasoline and other products having a flash point of less than 100 degrees Fahrenheit when tested with the Tagliabue closed-cup tester shall not be pumped through the same pumps or marketing lines as are used for other petroleum products except by special permission of the commissioner." The briefs indicate that other subdivisions of the same section were violated, including requirements that gasoline filling lines be painted red and that identifying tags be placed on spigots that headed low flash point fuel conduits. However these are not within the scope of the theory of this note, nor are they mentioned in the decision. § 296.25 provides that violations of the safety requirements are misdemeanors. No penalty is stipulated.

against the defendant grocer, and directed a verdict for the defendant oil company. On appeal, the Supreme Court of Minnesota ordered a new trial, holding that the question of whether the act of the deceased constituted an act of negligence was an issue of fact to be decided by a jury. The court asserted, however, that contributory negligence would be a good defense to a statutory tort in this case since the statute in question was intended for the protection of the public at large rather than for a specific consumer, and, further, because the plaintiff's deceased was not in an exceptional class entitled to claim absolute liability on the part of the wrongdoer. *Dart v. Pure Oil Co.*[3]

Statutory standards of conduct impose absolute liability only insofar as an express or implied legislative intent to do so is manifest. Judicial administration of that intent is accomplished by articulating the public policy at issue and, thereafter, including or excluding the case from categories which bring the plaintiff within the protection of the statute and which are immune from the defense of contributory negligence. In the instant case the controlling rôle played by the judicial interpretation of implied intent is strikingly illustrated.

Even in the absence of clear legislative intent, statutes traditionally are classified as intended either for the benefit of a special group or for the public at large. In cases arising under statutes of the first type, a civil action can be founded upon mere violation of the statute, so long as the injured party can be demonstrated to fall within the class meant to be protected. In cases arising under the second type, no civil action based upon mere violation of the statute will lie, for the injury is either one which the statute was not intended to prevent,[4] or where the statute was intended to prevent such an injury, it is felt that the statute is directed exclusively toward the upkeep of public property, or is solely concerned with the maintenance of public security and safety.[5]

The category of statutes designed to maintain the public safety, however, has frequently been subject to modification. Where it has been thought expedient to exact a more rigorous standard of conduct, the courts have construed these statutes as applicable to a class including all those likely to be injured by the violation. In these situations the courts have upheld actions on behalf of the party injured by obliterating all distinctions between the class to be protected and the public at large. This tendency has appeared in cases arising out of traffic regulations,[6] pure food laws,[7] and the use of dangerous ingredients in manu-

[3] 27 N.W. 2d 555 (Minn., 1947). The importance of the case is enhanced by the fact that it was very nearly elevated to the status of a cause célèbre. It was twice argued before the court; amicus curiae briefs were requested of a personal injury lawyer, a railway counsel, and an authority on the law of torts, and several other briefs amici curiae were accepted from interested parties. Prosser, Contributory Negligence as Defense to Violation of a Statute, 32 Minn. L. Rev. 105 (1948), presents a detailed discussion of the case.

[4] Prosser, Torts 266–69 (1941).

[5] Rest., Torts § 288 (1934).

[6] Bott v. Pratt, 33 Minn. 323, 23 N.W. 237 (1885) (ordinance requiring horses to be tied to hitching posts while standing in streets).

[7] Hollis v. Armour & Co., 190 S.C. 170, 2 S.E. 2d 681 (1939) (poisonous sausages in oil); Meshbesher v. Challellene Oil Co., 107 Minn. 104, 119 N.W. 428 (1909) (adulterated cooking oil).

facturing processes.[8] It is noteworthy that an earlier Minnesota safety statute applying to liquid fuels was so interpreted; a consumer was permitted to recover when injury resulted because gasoline delivered in the wrong type of container was mistaken for kerosene.[9]

Likewise, even in the absence of a specifically demonstrable legislative intent, courts may decide that the purpose of various statutes is not to be frustrated by a plea of contributory negligence. The relation between contributory negligence and statutory torts as conceived by the Minnesota Supreme Court and applied in the *Dart* case may be stated as follows: statutes are legislative expressions of standards of conduct which establish as negligent per se acts or omissions that might not otherwise be so condemned;[10] violations are acts of ordinary negligence in that the degree of culpability is no greater than it is for conduct below the common law standard;[11] hence, traditional defenses are available to the tortfeasor.[12] The only category of statutory torts denying the contributory negligence defense recognized by the Minnesota court is comprised of laws passed to protect those in a position of economic inferiority or personal helplessness, as typified by statutes prescribing standards of conduct for the protection of children, employees, and intoxicated persons.[13]

But the court's discussion in the present case gives an unwarranted impression that the judge-made exception involving persons in an inferior or helpless position is the only one that varies an otherwise uniform rule that contributory negligence is a defense to statutory torts. There are other exceptions, however, which suggest that they are created whenever the circumstances or policies involved are sufficiently compelling. Thus, it has been held that railroads are under an absolute duty to fence their rights of way and to operate locomotives

[8] "The duty imposed is for the safety and welfare of members of the community and as a general rule . . . . where an act is enjoined or forbidden under a statutory penalty, and the failure to do the act enjoined or the doing of the act forbidden has contributed to the injury, the party thus in default is liable to the party injured, notwithstanding he may be also subject to a penalty." Gatley v. Taylor, 211 Mass. 60, 64, 97 N.E. 619, 622 (1912) (sale of stove polish containing naphtha); Harper, Torts 192 (1938).

[9] "The statute was enacted to protect persons in her situation against the very danger to which the injury is attributable." Farrell v. G. O. Miller Co., 147 Minn. 52, 56, 179 N.W. 566, 568 (1920).

[10] Rest., Torts §§ 285, 286 (1934); Prosser, Torts 264 (1941); Harper, Torts 188 (1938).

[11] Rest., Torts §§ 245, 286 (1934); Prosser, Torts 274 (1941); Harper, Torts 220 (1938); Prosser, Contributory Negligence as Defense to Violation of a Statute, 32 Minn. L. Rev. 105, 110–13 (1948).

[12] Cases offered in support of this statement involved laws affecting railroads in the operation of trains and the maintenance of crossings. Cited also was a case involving a statute requiring an elevator shaft to be guarded and another requiring a county auditor to post a tax sale notice. Among the cases quoted on the point were Osborne v. McMasters, 40 Minn. 103, 41 N.W. 543 (1889) and Schaar v. Conforth, 128 Minn. 460, 151 N.W. 275 (1915).

[13] The court cites Dusha v. Virginia and Rainy Lake Co., 145 Minn. 171, 176 N.W. 482 (1920) (child labor); Suess v. Arrowhead Steel Products Co., 180 Minn. 21, 230 N.W. 125 (1930) (safety devices); Mayes v. Byers, 214 Minn. 54, 7 N.W. 2d 403 (1943) (liquor law).

without throwing sparks and coals.[14] And when statutory violations create an absolute nuisance, a contributory negligence plea will not be heard.[15] Nor is such a defense available to an abortionist pleading the injured party's consent to the operation.[16]

The situation in the present case offers strong reasons for imposing absolute liability upon fuel distributors who persist in using illegal loading and delivery methods. It is true that pouring kerosene on flames or live coals has been condemned as negligence in law,[17] while other cases have held that when an explosive mixture believed to be kerosene has been poured on a going fire or on unkindled wood the issue of contributory negligence is to be submitted to a jury.[18]

[14] To admit the defense would restrict the adjacent property owner in the free enjoyment of his land by making his normal routine negligent in terms of the neglect of the company. Leroy Fiber Co. v. Chicago, M. & St. P. Ry., 232 U.S. 340 (1914) (sparks). "Indeed, if contributory negligence would constitute a defense, the purpose of the statute might be in great measure, if not wholly, defeated, for the mere neglect of the railway company to observe the directions of the statute would render it unsafe for the owner of beasts to suffer them to be at large or even on his own grounds in the vicinity of the road, so that if he did what, but for the neglect of the company, it would be entirely safe and proper for him to do, the very neglect of the company would constitute its protection, since that neglect alone rendered the conduct of the plaintiff negligent." Cooley, J., in Pere Marquette Ry. v. Lull, 28 Mich. 510, 515 (1874) (fencing statute). Contra: Moser v. St. Paul and Duluth Ry. Co., 42 Minn. 480, 44 N.W. 530 (1890); L. R. Martin Lumber Co. v. G. N. Ry. Co., 123 Minn. 423, 144 N.W. 145 (1913).

[15] An absolute nuisance is measured neither by intent nor negligence but by the character of the act as contrary to an ordinance or statute or as persistent conduct which inevitably interferes with a public right and inures to the detriment of the community or some one of its members. Since the condition is being condemned, a plaintiff's conduct need only be something better than a reckless disregard for personal safety, a standard of conduct that is obviously less stringent than that marking the bounds of contributory negligence. Cardozo, J. in MacFarlane v. City of Niagara Falls, 247 N.Y. 340, 343, 160 N.E. 391, 392 (1928) stated: "The duty to desist is absolute whenever conduct, if persisted in, brings injury to another..... He is not to do the thing at all whether he is negligent or careful." The same reasoning appears in cases founded in common law nuisance liability. Bowman v. Humphrey, 132 Iowa 234, 109 N.W. 714 (1906); Rutter v. Foy, 46 Iowa 132 (1877) (concurrent fouling of a stream by plaintiff and defendant). It was said in the Bowman case, "If defendant created a nuisance upon plaintiff's premises by fouling the waters of the stream, the fact that the plaintiff had also by his .... separate acts cast foul material into the same stream .... would not defeat his right to recovery." In Albee v. Chappaqua Shoe Co., 62 Hun (N.Y.) 233, 16 N.Y. Supp. 687 (1891) where a horse was frightened when a poorly located factory whistle was blown, it was said, "The action rests upon the wrong done and not upon the negligent manner in which it was done."

[16] The reason generally advanced is that the injured party may not consent to an unlawful act, but it is also likely that civil liability is imposed to create an added deterrent to an illegal practice and to provide a remedy for injuries resulting from careless technique for which implied or actual consent is never given. Hancock v. Hullett, 203 Ala. 272, 52 So. 522 (1919); Miller v. Bayer, 94 Wis. 123, 68 N.W. 869 (1896). Contra, on the theory of volenti non fit injuria: Nash v. Mayer, 54 Idaho 283, 31 P. 2d 273 (1934); Martin v. Morris, 163 Tenn. 186, 42 S.W. 2d 207 (1932).

[17] Barton v. Phillips Petroleum Co., 231 Mo. App. 585, 107 S.W. 2d 167 (1937); Riggs v. Standard Oil Co., 130 Fed. 199 (C.C.A. 8th, 1904).

[18] Douglas v. Daniel Bros. Coal Co., 135 Ohio St. 641, 22 N.E. 2d 195 (1939); Pure Oil Co. v. Taylor, 264 Fed. 829 (C.C.A. 8th, 1920); Farrell v. G. O. Miller, 147 Minn. 52, 56, 179 N.W. 566, 568 (1920).

But even some of these latter cases concede that there is a non-negligent way to use kerosene in wood stoves.[19] And a strong current of decision goes further by flatly stating that the practice is not negligent in law and is not negligent in fact when the method used in the instant case is employed.[20] Two arguments are generally adduced in support of this position. One is founded on the custom and usage of the community and points to the widespread prevalence of the practice, and the knowledge of that practice by producers and retailers.[21] The other is predicated on the view that use of kerosene in this fashion is innocuous, and becomes dangerous only when an explosive mixture is involved.[22]

But the singularly dangerous consequences of the loading and delivery practice outlawed by the Minnesota statute flow from the fact that the explosive mixture of fuels likely to result gives no hint of its power to transform carefully used and normally safe stoves, lanterns, and burners into agencies of personal injury and property destruction. It must be remembered, too, that fuels are most extensively used for heating and lighting purposes in rural areas where fire protection is minimal, and where wood is the predominant building material. Negligence, if any, in terms of the use of kerosene is of little moment when no care but that of a chemist might save even the prudent man from the hidden danger in the fluid.

[19] Paragon Refining Co. v. Higbea, 22 Ohio App. 440, 153 N.E. 860 (1925); Kentucky Independent Oil Co. v. Schnitzler, 208 Ky. 507, 271 S.W. 570 (1925).

[20] Frazier v. Aylers, 20 So. 2d 754 (La. App., 1945); Fairbanks Morse Company v. Gimbel, 142 Tenn. 633, 222 S.W. 5 (1920); Peterson v. Standard Oil Co., 55 Ore. 511, 106 Pac. 337 (1910); Waters-Pierce Oil Co. v. Deselmes, 18 Okla. 107, 89 Pac. 212 (1907); Ellis v. Republic Oil Co., 133 Iowa 11, 110 N.W. 20 (1906).

[21] "Ordinary coal oil has been in use so long and the use of it so universal for purposes other than illumination, that all persons of ordinary intelligence have knowledge of the general purposes for which it is used, and to make it safe for such use the legislature has prescribed a test which must be complied with in placing the same upon the market for use in this territory, and it is not within the province of a dealer, after an injury has been inflicted by the use of the oil, to say that he is not liable for damages arising by reason of such injury occasioned by its use within the general custom and experience of the people in the usage thereof, and which custom is a matter of general knowledge." Waters-Pierce Oil Co. v. Deselmes, 18 Okla. 107, 126, 89 Pac. 212, 218 (1907).

[22] "However we do not think that it is indispensable to a correct determination of the case to decide whether, if the liquid had been pure kerosene, Frazier acted with or without due care before putting it into the stove. The case really pivots upon the fact that the mixture contained sufficient gasoline content to render its explosive and inflammable potentialities much greater than kerosene. The immediate cause of the injury .... was .... the explosion of the contents of the can. If the liquid had been pure kerosene the flames from the explosion would not have reached to the can in Frazier's hands. Gasoline is highly volatile. It is shown that the can was about two thirds full and capped. Vapor was pent therein. When the can was opened naturally the vapor began to escape. It was continuous from the stove to the can. This would not have occurred had kerosene been used." Frazier v. Aylers, 20 So. 2d 754, 761 (La. App., 1945). A similar analysis was made but not given the same effect in Douglas v. Daniel Bros. Coal Co., 135 Ohio Stat. 641, 22 N.E. 2d 195 (1939). Briefs in the instant case reveal a dispute over the nature of this type of explosion and it may be because the principles of combustion are not well known that the courts prefer to construe it as a debatable matter of causation in fact and leave it to a jury. Contra, with a different analysis: Riggs v. Standard Oil Co., 130 Fed. 197 (C.C.A. 8th, 1904).

Other aspects of the defendant's acts in the instant case, although glossed over by the court, might have been operative to deprive him of the defense of contributory negligence. The court stated:

There is no evidence of an intentional or wilful mixture of gasoline with kerosene as distinguished from mere negligence on the part of the company in [not] using reasonable care to avoid the possibility of such a mixture. It does not appear from the record that the company intentionally and wilfully sold to the grocery a mixture of kerosene and gasoline contrary to the statute.[23]

It may be conceded that the actual act of mixing was no more than ordinary negligence. But elsewhere in the *Dart* case it is stated that "it was common practice to alternately carry kerosene and gasoline in the same compartment on the same day or at different times."[24] This suggests that the defendant, whose business requires expert knowledge of the characteristics and means of handling dangerous substances, deliberately chose to flout the statute[25] because it was convenient. The defendant's is a skill upon which the public relies; none would characterize as unjustifiable a presumption that this skill ought to include an ability to foresee the likely consequences of a dangerous practice. This combination of expert knowledge and the element of deliberate intent inferred from the repeated and routine violation of the statute might serve to characterize the defendant's acts as wilful, wanton, or reckless[26] conduct, for which the defense of contributory negligence has long been held not to be available.[27]

The highly individualistic attitude of the common law as expressed in the doctrine of contributory negligence has come to appear increasingly anachronis-

[23] Dart v. Pure Oil Co., 27 N.W. 2d 555, 561 (Minn., 1947).

[24] Ibid., at 557.

[25] Minn. Stat. (1945) § 296.22.

[26] Case law is by no means in accord as to the distinctions between these terms. But they roughly agree that wilful conduct involves a deliberate intent to inflict harm, while wanton conduct involves either a malicious or reckless disregard of the safety of others. Donnelly v. So. Pac. Ry., 18 Cal. 2d 465, 118 P. 2d 465 (1941); Foster v. Hymon, 197 N.C. 189, 148 S.E. 36 (1929); Conchin v. El Paso & S.W. Ry., 13 Ariz. 259, 108 Pac. 260 (1910). A typical distinction is as follows: "To constitute wilful injury, there must be design, purpose and intent to do wrong and inflict the injury; while to constitute wanton negligence, the party doing the act or failing to act must be conscious of his conduct, and, though having no intent to injure, must be conscious, from surrounding circumstances and existing conditions, that his conduct will naturally and probably result in injury." Universal Concrete Pipe Co. v. Bassett, 130 Ohio St. 567, 575, 200 N.E. 843, 847 (1936).

[27] Rest., Torts §§ 282, 482, 500 (1924). This orthodox theory is noted despite the Minnesota rule as to wilful and wanton conduct which comes into being through "a reckless disregard of the safety of the person or property of another by failing, *after discovering the peril*, to exercise ordinary care to prevent the impending injury." (Italics added.) Anderson v. Mpls. & St. P. Ry., 103 Minn. 224, 228, 229, 114 N.W. 1123, 1125 (1908); Demarey v. G. N. Ry. Co., 121 Minn. 516, 141 N.W. 804 (1913); Westerburg v. Motor Truck Ice Service, 158 Minn. 202, 197 N.W. 98 (1924). The Anderson dissent makes plain the implications of this doctrine. Prosser, Torts 263 (1941). Regardless of this unique local nomenclature, the underlying concept outlined in the Restatement is indispensable to administration of the law of torts, as the Minnesota court acknowledged when it defined criminal negligence in the operation of an automobile. State v. Bolsinger, 221 Minn. 154, 21 N.W. 2d 480 (1946).

tic.[28] The doctrine has had the effect of cutting down the burden of litigation otherwise falling upon certain favored industries, but as the justification for such subsidization grows less apparent, it is becoming generally recognized that a technique of relief must be made available to plaintiffs who, though tainted with a degree of negligence, are unquestionably entitled to some award. Since opposition to doctrines of comparative negligence or loss apportionment continues to prevail, there is an acute need for finding clear cut exceptions to the contributory negligence rule which will not do violence to the established theory of tort defenses. Such an exception might well be found in the instant case, where even the prudent user is almost certain to incur injury as a result of a hidden danger, and where the acts inducing this dangerous condition have been repeated as part of an established routine. A decision recognizing such an exception would probably be safe both from judicial legislation and from the likelihood of its becoming an embarrassing or unworkable precedent.[29]

[28] Prosser, Torts 403, 410 (1941).

[29] In Contributory Negligence as Defense to Violation of a Statute, 32 Minn. L. Rev. 105 (1948), Professor Prosser disagrees with the two reasons advanced herein for creation of an exception to the contributory negligence rule. To the contention that explosive mixtures are a hidden danger he replies that the maturity of ordinary members of the community who use kerosene should suffice for protection. Ibid., at 123. In rebuttal to the argument that the defendant's failure to meet statutory requirements in handling potentially explosive mixtures was an intentional one, he asserts that such failures are "not intended to injure anyone, or to invade anyone's rights, and the defendant is proceeding under an optimistic hope that nothing unpleasant will happen." Ibid., at 112.