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A Road to Injustice Paved With Good Intentions: Maggie's Misguided Crackdown on Drowsy Driving

JOSHUA D. LEVINE*

INTRODUCTION

There is no doubt that sleep-deprived drivers present a considerable danger to those traveling America's roads, each year taking a heavy toll on passengers, hapless bystanders, and fellow drivers.¹ The National Highway Traffic Safety Administration reports that annually 100,000 auto crashes are caused by driver fatigue, injuring 71,000 people and killing 1,550 more.² Fatigue-related crashes also represent at least $12.5 billion in property loss and diminished productivity.³ These consequences are the result of a society that regularly ignores the risks of driving without adequate rest. Studies show that seventeen percent of Americans (or almost thirty-two million drivers) have fallen asleep while driving, and one percent (or almost two million drivers) admit that their drowsy driving or dozing off has resulted in an accident.⁴ Yet, until recently, policymakers and prosecutors have largely overlooked the problem.

This began to change in the summer of 2003 when the New Jersey legislature made national headlines by passing Maggie's Law, a first-of-its-kind law that permits unprecedented criminal penalties for drowsy drivers who are involved in deadly automobile accidents.⁵ Maggie's Law

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2. Gallagher, supra note 1.


has had an influence on legislatures far beyond New Jersey's borders. Ten other states have decided to consider similar legislation, and even the U.S. Congress has considered a bill entitled "Maggie's Law."

Policymakers, however, should use caution before quickly following New Jersey's lead. While the goals of Maggie's Law are laudable, its specific provisions and omissions are causes for concern. The Law's twenty-four-hour no-sleep rule for determining when a driver is subject to an inference of recklessness is an arbitrary standard, and is, as a result, significantly over- and under-inclusive. Enforcement of the Law could prove difficult because drivers can easily mislead authorities about the amount and time periods during which they last slept. There are also questions about whether the Law will indeed change a form of driver behavior that often seems unavoidable. Finally, the Law's vague wording creates a great deal of uncertainty.

Part I of this Note introduces Maggie's Law and the reasons underlying its support. This Part will detail the history of Maggie's Law and the ongoing movement to introduce drowsy driving laws throughout the United States. Part I also sets forth the major provisions of Maggie's Law, as well as the amendments to the final version of the bill.

Part II analyzes the likely effect of Maggie's Law in New Jersey. Although drowsy driving is a major safety concern that policymakers have failed to adequately address, the way in which Maggie's Law is drafted will significantly reduce its effectiveness. In particular, Part II highlights the Law's most critical flaws, including problems concerning under- and over-inclusiveness, enforcement, focus, and ambiguity.

Even if Maggie's Law is not the right solution, action must be taken to address the danger created by drowsy drivers. Part III suggests alternative language to the current version of the New Jersey law. This section explains why a totality of the circumstances approach, rather than the twenty-four-hour limit in Maggie's Law, is the best way to structure criminal sanctions against drowsy drivers. Finally, Part III suggests that

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6. See infra note 7.
10. See infra Part II.B.3.
12. See infra Part II.B.5.
the extra-judicial means of curtailing drowsy driving embodied in congressional legislation is essential to reduce drowsy driving accidents.

I. THE PURPOSE AND SUBSTANCE OF MAGGIE’S LAW

A. THE CATALYST

In July 1997, Maggie McDonnell, a twenty-year-old college student, was killed when Michael Coleman swerved across three lanes and hit her car head on. Coleman told New Jersey Police that he had not slept for thirty hours before the accident. He was charged with vehicular homicide and reckless driving. Coleman was tried twice because the first jury deadlocked. At the second trial, Coleman’s lawyer argued that his client could not be prosecuted for fatigued driving because there was no law forbidding a driver from falling asleep at the wheel. Consequently, the judge refused to allow the jurors to consider the issue of sleep deprivation. Coleman was acquitted of vehicular homicide and fined only $200 for reckless driving.

Maggie’s mother, Carole McDonnell, was outraged. Carole had fought a two-year bout of depression, rarely left her house, and quit her job as a hospital secretary after her daughter’s death. In time, however, Carole transformed her grief into a determination to change New Jersey’s vehicular homicide law. She petitioned her local legislators to take action to close “what she considered to be a terrible legal loophole.” Consistent with the trend of using marquee cases to push forward changes in criminal law, the name Maggie McDonnell became the rallying cry behind a new movement to punish drowsy drivers.

In August 2003, New Jersey Governor James McGreevey signed a law
bearing Maggie’s name and declared that “[i]n the memory of Maggie McDonnell, we are closing the legal loophole that allowed sleep-deprived drivers to take a life and get away with it.”

Hence, Maggie’s Law was born almost entirely because of one woman’s crusade to punish the type of sleep deprived drivers that had taken her daughter’s life.

B. The Substance of S-1644

Maggie’s Law was first introduced in February 2001. After being stalled in the New Jersey Senate Judiciary Committee, the bill was reintroduced in June 2002, passed both houses of the state legislature, and was signed into law by Gov. McGreevey on August 5, 2003.

Maggie’s Law is actually an amendment to New Jersey’s vehicular homicide statute, N.J.S.A. 2C:11-5. The current version of the statute now reads:

Criminal homicide constitutes vehicular homicide when it is caused by driving a vehicle or vessel recklessly. Proof that the defendant fell asleep while driving or was driving after having been without sleep for a period in excess of 24 consecutive hours may give rise to an inference that the defendant was driving recklessly. Proof that the defendant was driving while intoxicated... or was operating a vessel under the influence of alcohol or drugs... shall give rise to an inference that the defendant was driving recklessly. Nothing in this section shall be construed to in any way limit the conduct or conditions that may be found to constitute driving a vehicle or vessel recklessly.

The New Jersey legislature made significant changes to the language of Maggie’s law before approving the final version. As originally drafted, the bill stated that falling asleep while driving or driving without having slept for over twenty-four consecutive hours “shall” give rise to an inference that the defendant was driving recklessly. In addition, the original version included an exception if the driver’s drowsiness was “justified by [a] salutary public purpose.”

26. Id.
27. Levine, supra note 17, at iG. After signing Maggie’s Law, Governor McGreevey commented that the day Maggie died “was not just a sad day for Carole and her family but a sad day for New Jersey and America.” He stated, “[w]e are all indebted to Maggie and her mother.” Id.
32. See id.
33. 2002 Bill Tracking N.J. S.B. 1644; see also Gallagher, supra note 1. Another section deleted from the final version of Maggie’s law states that “[f]or the purposes of this section, driving a vehicle or vessel while knowingly fatigued shall constitute recklessness. ‘Fatigued’ as used in this section means having been without sleep for a period in excess of 24 consecutive hours.” 2002 Bill Tracking supra.
34. 2002 Bill Tracking N.J. S.B. 1644.
Maggie’s Law only applies to fatal accidents.\textsuperscript{35} Violation of the current vehicular homicide statute is a second-degree crime that can result in a maximum ten-year prison sentence and $100,000 fine.\textsuperscript{36} New Jersey Attorney General Peter Harvey, in describing Maggie’s Law, stated that “the law does not specifically target average drivers who tire from long hours at work or boredom behind the wheel.”\textsuperscript{37} Rather, he believes it will simply allow prosecutors to charge drivers in cases where extreme sleeplessness played a key factor in a fatal accident.\textsuperscript{38}

II. THE EFFECT OF MAGGIE’S LAW ON REDUCING DROWSY DRIVING

A. A WORTHY GOAL

America is a country in need of a good night’s sleep. Joyce Walsleben, director of the sleep disorder center at the New York University Medical Center describes sleep deprivation in America as “huge.”\textsuperscript{39} Walsleben explains that “[a]t a minimum, 30% of the public or more is chronically sleep-deprived. Just about any survey will show that . . . We are burning the candle at both ends. We don’t realize we are really paying the toll.”\textsuperscript{40} This sleep deprivation, tolerated by a high percentage of the American population, is directly tied to the tens of thousands of people who are killed or injured in drowsy driving accidents each year.\textsuperscript{41}

Unsurprisingly, sleep deprivation has a significant impact on an individual’s vision and coordination, facilities essential to safe driving.\textsuperscript{42} What is striking is the extent of this impact. Studies have shown that people who have been awake for twenty-four hours are as impaired as someone with a blood-alcohol level of .10%, which is considered legally drunk in all fifty states.\textsuperscript{43} These studies, coupled with the substantial impact of drowsy driving accidents, have led to calls from across the nation, and even abroad, for laws to address this problem more adequately.\textsuperscript{44} Darrel Drobnich, a senior director of government affairs at

\textsuperscript{35} See Levine, supra note 17, at 1G; Gallagher, supra note 1.
\textsuperscript{36} Gallagher, supra note 1.
\textsuperscript{37} Levine, supra note 17, at 1G.
\textsuperscript{38} Id.
\textsuperscript{39} Goldman, supra note 14, at A9.
\textsuperscript{40} Id.
\textsuperscript{41} Jerome & Calandra, supra note 1, at 115; Goldman, supra note 14, at A9.
\textsuperscript{42} Goldman, supra note 14, at A9.
\textsuperscript{43} Press Release, Maggie’s Law Underscores Importance, supra note 7; Mitchell Interview, supra note 23 (noting also that “[r]esearchers have . . . found fatigue to be as damaging to a driver’s ability as alcohol.”); see also Levine, supra note 17, at 1G (quoting New Jersey Attorney General Peter Harvey as stating that “[a] driver who is asleep at the wheel is more dangerous than a person who is intoxicated”).
\textsuperscript{44} Supra notes 5–6 and accompanying text; Dozy Driver Law, THE CHRISTCHURCH PRESS, Oct. 18, 2003 (noting that “[f]ollowing recent law changes in Britain, where exhaustion behind the wheel is now
the National Sleep Foundation, contends that the criminal law should treat drowsy drivers in a manner similar to those impaired by alcohol and drugs.45 Drobnich considers Maggie’s Law to be “a very important step forward” because it “is the first law that specifically deals with the issue of drowsy driving and makes it a prosecutable offense.”46 Yet the mere fact that Maggie’s Law seeks to address an important problem is not sufficient in and of itself, to justify this novel legislation.

B. VEERING OFF COURSE

1. Under-Inclusiveness

Advocates of Maggie’s Law hope that the law will present a meaningful instrument for law enforcement officials to use to prevent drowsy driving. The likelihood of reaching this goal, however, is diminished because the Law is significantly under-inclusive. First, Maggie’s Law only applies to fatal accidents.47 This limitation means that the Law does nothing to punish the vast majority of drowsy drivers involved in very serious, but not deadly, accidents.48 Extrapolating from the data provided by the National Highway Traffic Safety Administration, a maximum of 1.55% of auto crashes and 2.14% of accidents resulting in physical harm will be covered under Maggie’s Law.49 These small percentages mean that Maggie’s Law will not affect the vast majority of drivers who cause accidents while fatigued and/or fall asleep at the wheel.

Another source of Maggie’s Law’s under-inclusiveness is its time element: only when a driver has been without sleep for more than twenty-four hours “may” a jury infer that he or she was driving recklessly.50 Although the New Jersey vehicular homicide statute will also apply where there is “[p]roof that the defendant fell asleep while treated with the same seriousness as driving drunk, [New Jersey’s] law now makes motoring while tired a serious offence, and not a mitigating factor as it tends to be in New Zealand”).

45. Goldman, supra note 14, at A9 (explaining that “[w]e are looking for local juries to take sleep deprivation into account like [they do] drugs and alcohol”).
46. Id.
47. See supra note 29 and accompanying text.
48. See Jerome & Calandra, supra note 1 and accompanying text (noting that of the 100,000 auto crashes each year resulting from driver fatigue there were 1,550 fatalities).
49. These percentages are based on the National Highway Traffic Safety Administration study that reported that 100,000 auto crashes each year are caused by driver fatigue, resulting in 71,000 injuries and 1,550 deaths. Id. The first percentage derived from these numbers (that 1.55% of all auto accidents resulting from driver fatigue will be covered under Maggie’s Law) is based on the number of deaths in relation to the total number of accidents (1,550 ÷ 100,000). The second percentage (that 2.14% of all auto accidents resulting in physical harm will be covered under Maggie’s Law) is based on the number of deaths in relation to the sum of the deaths and injuries (1,550 ÷ (1,550 + 71,000)). Note that these percentages are actually over-estimates because some of the accidents likely resulted in multiple deaths/injuries and the number of dead or injured people also includes the fatigued drivers themselves.
50. See supra note 31 and accompanying text.
driving" regardless of when the driver last slept, proving that a driver actually fell asleep is often a difficult task. As a result, allowing the jury to infer that the driver's fatigue caused an accident is a very important instrument for prosecutors. The clause that allows for an inference of recklessness, however, is only explicitly implicated after a driver has been awake for twenty-four consecutive hours. This is true regardless of the presence of other factors that may logically inform a jury's decision as to whether a driver is sufficiently fatigued to be found in violation of the statute. Recognizing this problem, commentator Frank Cerabino quipped:

If being drowsy means being awake for 24 continuous hours, there won't be many drivers cited under the New Jersey law. But if it were truly a crime to cause a crash by driving while drowsy—something not defined merely by hours of sleeplessness—then the highway... would be full of potential criminals.

Reckless driving laws in other states avoid this potential underinclusiveness by not explicitly linking an inference of recklessness to the number of consecutive hours a defendant has gone without sleep. In Commonwealth of Pennsylvania v. Smoker, a man who had been awake for fourteen consecutive hours crossed into the wrong lane and killed the driver of an oncoming car. The driver admitted on cross-examination that he had only had seven hours of sleep in the forty hours leading up to the accident. The court found that there was sufficient evidence for a jury to infer that the driver had been reckless and therefore, affirmed his conviction for involuntary manslaughter.

Under Maggie's Law, however, a jury presumably could not have inferred that the defendant in Smoker had been reckless if there was not sufficient proof that he actually fell asleep. This is because although the driver was extremely sleep deprived, the man never went for more than twenty-four consecutive hours without sleep. The language in Maggie's Law that driving without sleep for a period "in excess of 24 consecutive hours may give rise" to an inference of recklessness suggests that a driver with any sleep in the twenty-four hours leading up to a deadly accident

51. Id.
53. See supra note 33.
56. Id. at 360.
57. Id. at 361-62.
58. Id. at 359-60.
cannot be subject to an inference of recklessness.\textsuperscript{59} This is true notwithstanding the Law's language that nothing in it shall be "construed to in any way limit the conduct" that constitutes reckless driving.\textsuperscript{60} If it could be inferred that a driver who was drowsy, but did not fit into either of the two categories in Maggie's Law,\textsuperscript{61} were reckless, it would render the twenty-four-hour provision meaningless. The Law's twenty-four-hour limit as to when recklessness may be established, however, naturally implies that only after that threshold has been breached can an inference of recklessness arise.

This realization has considerable consequences regarding how effective Maggie's Law will be as a means to combat drowsy driving because in the vast majority of criminal cases involving sleep deprivation, the driver did not go without sleep for twenty-four consecutive hours\textsuperscript{62}. Rather, these cases typically involve individuals who have had some, albeit inadequate, amounts of sleep within this time period.\textsuperscript{63} This is not unexpected, considering the fact that a driver's fatigue impairment level becomes equivalent to a .08% blood alcohol level—which is typically considered legally drunk—before enduring twenty-four sleepless hours.\textsuperscript{64} By the time a driver has gone without sleep for twenty-four consecutive hours, the individual's fatigue level is equivalent to a blood-alcohol level of .10%, which is well above most legal limits.\textsuperscript{65}

\begin{itemize}
  \item \textsuperscript{60} Id.
  \item \textsuperscript{61} Id. (stating that a jury may infer recklessness only if there is proof that a driver actually fell asleep or went without sleep for a period exceeding twenty-four hours).
  \item \textsuperscript{62} Note that as a matter of formal logic, saying that an action may occur after a certain condition does not exclude that same action from occurring before that condition is met. However, as a matter of statutory interpretation, for a court to give the twenty-four hour provision in Maggie's Law meaning, the only reasonable conclusion is that persons that have not gone without sleep for twenty-four hours (and are not subject to proof that they actually fell asleep) are not affected by the Law.
  \item \textsuperscript{63} See, e.g., Manser v. Eder, 248 N.W.2d 563, 564 (Mich. 1973) (affirming conviction with only evidence that defendant worked from 9:00 a.m. until 9:00 p.m. and then caused an accident at 1:00 a.m.); In re Lewis, 94 A.2d 328, 331–32 (N.J. 1953) (affirming a juvenile conviction for willful and wanton disregard of the safety of others where a seventeen-year-old boy had slept for three hours shortly before causing an accident); State v. Mundy, 90 S.E.2d 312, 314–15 (N.C. 1955) (holding that there was sufficient evidence to take the case to the jury on an involuntary manslaughter charge when an off-duty police officer had gone 16 1/2 hours without sleep); Commonwealth v. Smoker, 203 A.2d 358, 359–60 (Pa. Super. Ct. 1964) (defendant awake for fourteen hours without sleep); Grindstaff v. State, 377 S.W.2d 921, 923, 927 (Tenn. 1964) (affirming conviction where defendant admitted that he had slept very little during the preceding night); Conrad v. Commonwealth., 521 S.E.2d 321, 324 (Va. Ct. 1999) (defendant awake for twenty-two hours without sleep); Parchia v. Parchia, 150 N.W.2d 205, 208 (Wis. 1964) (defendant had been "awakened" several times from noise near motel and then was involved in an accident approximately five hours after departing). But see, e.g., Johnson v. State, 4 So. 2d 671, 672 (Fla. 1941) (affirming a manslaughter conviction against a driver who had gone thirty hours without sleep).
  \item \textsuperscript{64} See supra note 63.
  \item \textsuperscript{65} Press Release, National Sleep Foundation, supra note 5.
  \item \textsuperscript{66} Id.
2. **Over-Inclusiveness**

Maggie’s Law is also remarkably over-inclusive with respect to emergency services personnel, medical professionals, and other employees who are occasionally compelled to stay awake for over twenty-four hours at a time.\(^6\) The bulk of this problem stems from the New Jersey Legislature’s decision to delete the “salutary public purpose” exception from the final text of Maggie’s Law.\(^8\) Although somewhat ambiguous, this exception would have allowed employees engaged in valuable public services to avoid having an inference of recklessness applied against them. New Jersey’s decision not to include this exception in the final version of Maggie’s Law might well lead to exceedingly harsh consequences. For instance, medical professionals and other emergency services personnel who are often required to remain on-duty for twenty-four-hour shifts during emergency situations\(^6\) may be subject to the same inference of recklessness, and severe penalties, as any other driver.\(^7\) The Law also raises the specter of increased civil liability for public service organizations that employ these individuals.\(^7\)

The argument that Maggie’s Law should not carve out any special exception for emergency personnel is not without merit. Strict penalties for businesses and emergency operations could provide a strong incentive for these organizations to educate their employees better and take steps to eliminate job restraints that encourage imprudent driving habits.\(^7\) Nevertheless, of the twenty-four million Americans who work extended hour jobs outside the hours of 7 a.m. to 7 p.m., there is a significant segment that will periodically be forced into situations where they do not receive adequate sleep.\(^7\) It would be imprudent to suggest that a firefighter that has been up all night protecting lives and homes should be subject to the same inference of recklessness as a person that is up partying until dawn and then decides to drive home. The legal system should deter both individuals from driving while fatigued. But if the fireman, who has violated the law for the purpose of public safety, made the mistake of driving while deeply fatigued, that individual would be

\(^6\) See Press Release, Maggie’s Law Underscores Importance, *supra* note 7 (discussing the effect of Maggie’s Law on emergency personnel, medical professionals, and other employees who are “confronted daily with the challenge of drowsy driving”).

\(^8\) 2002 Bill Tracking N.J. S.B. 1644.


\(^7\) See 2002 Bill Tracking N.J. S.B. 1644 (omitting any exception for an employee engaged in a salutary public purpose).

\(^7\) See Press Release, Maggie’s Law Underscores Importance, *supra* note 7. It is also noteworthy that the Department of Transportation already identifies fatigue as the number one safety problem in transportation operations, costing the industry in excess of $12 billion a year. *Id.*

\(^7\) *Id.* (quoting Dr. Martin Moore-Ede, Chairman and CEO of Circadian Technologies, Inc., who feels that employers need to “[educate] employees on the danger of drowsy driving and controlling long work hours, and [develop] policies that minimize the potential new legal liability”).

\(^7\) *Id.*
distinctly less culpable than the "party-animal" who assumes an unnecessary risk only for personal benefit.

In response, advocates of Maggie's Law might point to its flexible language and argue that the reasons for a driver's fatigue will become relevant when deciding whether or not to apply an inference of recklessness. Such arguments, however, amount to mere speculation that a judge will treat individuals engaged in salutary public services in a different manner than other defendants. Indeed, the fact that the New Jersey legislature explicitly considered a salutary services exception and rejected it could be interpreted as evidence of the legislature's intent not to allow for such an exception.

3. Enforcement

Maggie's Law is modeled after laws that prohibit driving under the influence of drugs or alcohol. It is no coincidence that the language adopted by Maggie's Law is located immediately before the section on driving while intoxicated in the New Jersey vehicular homicide statute, or that state officials emphasized the similar effects of fatigue and alcohol on driving ability. Drowsy driving, however, is different than driving while intoxicated because there is no chemical test available to measure drowsiness. In fact, automobile accidents can generate enough adrenaline to eliminate all signs of fatigue.

The lack of an objective test to detect fatigue will create an overwhelming motive for drivers to mislead investigators. The incentive to say, "Wait a minute, I think I took a little nap last night" would be irresistible given the severe penalties available under Maggie's Law. This same incentive to mislead will also cripple enforcement efforts against drivers who actually fell asleep within twenty-four hours of last sleeping. Maggie's Law only allows these drivers to be prosecuted upon "[p]roof that the motorist actually "fell asleep while driving."

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74. See N.J. Stat. Ann. § 2C:11-58 (West Supp. 2004) (explaining falling asleep or driving drowsy "may" give rise to an inference of recklessness and that "[n]othing in this section shall be construed to in any way limit the conduct or conditions that may be found to constitute driving a vehicle or vessel recklessly").

75. See 2002 Bill Tracking N.J. S.B. 1644 (showing that a salutary public purpose exception was deleted from the final version of Maggie's Law).

76. Note that this could also be interpreted to mean that the New Jersey legislature found a salutary public services exception to be unnecessary. However, if this is the case, it is important to say so explicitly in the legislation.


78. See Levine, supra note 17.

79. See Mitchell Interview, supra note 23 (quoting AAA spokesperson, Justin McNaull noting that drowsy driving is "not like drunk driving where you have a chemical test and you can say what someone's blood alcohol level was").


81. Cerabino, supra note 54, at 3.

Robert Gaydosh, a spokesman for the New Jersey Division of Highway Traffic Safety explains, "People aren't willing to admit they fell asleep at the wheel, and will say they swerved to avoid a deer, a dog or a patch of ice if [they] go off the road." Advocates of Maggie's Law say that proof that a defendant fell asleep can be established through circumstantial evidence such as work records, the driver's age, sleep patterns, and a lack of skid marks at the scene of the accident. Without an actual admission by the driver, however, this evidence alone will seldom be sufficient to prove beyond a reasonable doubt that a defendant actually fell asleep.

4. Misguided Focus

The primary focus of Maggie's Law is to deter drowsy driving through exceptionally tough criminal penalties. Carole McDonnell explains that in the "[b]est case scenario . . . [i]t scares the heck out of people so they won't drive tired and kill someone." It is not clear, however, that changing well-established driver behavior is possible simply by providing a criminal deterrent. The deterrent effect will only be successful if potential drowsy drivers know about Maggie's Law and the Law provides the type of disincentive that is likely to influence their behavior. There is reason to doubt that Maggie's Law will fulfill these criteria. First, Maggie's Law has no provision to increase driver education about the dangers of getting behind the wheel when fatigued. Second, the group most disposed to drive while fatigued, is also the least likely to be deterred by criminal penalties. The reason is that young individuals are significantly more likely to be involved in fatigue related accidents. Despite representing only a small portion of the overall driving population, drivers twenty-five-years-old and younger cause fifty-five percent of all accidents related to fatigue. Researchers believe that this is because college age drivers and younger are the most likely to stay up late, sleep too little, and drive late at night. These practices, deeply ingrained in the lifestyle of many young Americans, are difficult to change merely by passing criminal sanctions. This is especially true when the criminal sanctions are passed without any corresponding program to help educate young people about the danger of drowsy driving and without effective alternatives available to those who feel compelled to

84. Jerome & Calandra, supra note 1, at 115.
85. Note that because Maggie's Law involves criminal penalties, the standard of proof will be beyond a reasonable doubt, a much higher standard that would suffice to prove negligent drowsiness under a civil liability standard.
86. Mitchell Interview, supra note 23.
89. Stimpson, supra note 87.
90. Id.
91. Id.
drive while seriously fatigued.

5. **Ambiguity**

One of the main purposes of Maggie's Law was to remedy the ambiguity within New Jersey's vehicular homicide law so that judges, like the one in Maggie McDonnell’s case, could no longer prevent a jury from considering evidence of drowsy driving. Although the New Jersey legislature clarified that drowsy driving could be considered, and even lead to an inference of recklessness, New Jersey law remains ambiguous even after the enactment of Maggie's Law. Indeed, proof that a defendant fell asleep or drove without having slept for the past twenty-four hours “may,” but not necessarily will, give rise to an inference of recklessness. Contrary to the term “shall,” the term used in the original version of Maggie’s Law and in the intoxication clause of the vehicular homicide statute, “may” is an ambiguous term that would seem to allow for a significant amount of discretion on the part of the judge and jury. This ambiguity might make the current New Jersey law almost indistinguishable from the law before the legislature enacted Maggie’s Law.

Maggie McDonnell’s case was not the first drowsy driving case considered by New Jersey courts. In 1953, the New Jersey Supreme Court considered the case of seventeen-year-old Leon Lewis. Lewis had driven to New York City after working at his summer job in a Catskill Mountain resort some 100 miles away. He slept from two until five-o'clock in the morning and then began the return trip to Catskill Mountain with four other boys. Shortly after beginning, Lewis' car jumped a curb at a bus stop and crushed a woman to death against a telephone pole. Lewis at first denied that he had fallen asleep at the wheel, but then stated that he had no memory whatsoever as to what had happened. He was convicted under R.S. 2:138-9, careless driving in willful and wonton disregard of the rights or safety of others. The New

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92. See Gallagher, *supra* note 1 (noting that the judge would not allow evidence of drowsy driving in the trial for Maggie McDonnell's death because the judge did not believe that drowsy driving could be considered).
94. *Id.*
98. *Id.*
99. *Id.* at 331.
100. *Id.*
101. *Id.* at 329-30.
102. *Id.* at 331.
103. *Id.*
Jersey Supreme Court affirmed his conviction. The court described the requirements of R.S. 2:138-9 by stating that its intent element is supplied by “entering into the intentional act which produces harm... so that conduct which otherwise would be merely negligent becomes, by reason of reckless disregard for of the safety of others, a willful or wanton wrong.” The court noted that even though the evidence that Lewis actually fell asleep was circumstantial, “[c]ircumstantial evidence of course suffices, indeed often [it] is ‘more certain, satisfying and persuasive than direct evidence.”

Although R.S. 2:138-9 constituted a misdemeanor under New Jersey law, the mens rea of recklessness set forth in R.S. 2:138-9 mirrors the mens rea element of the state’s vehicular homicide statute. Accordingly, even before Maggie’s Law was enacted, one could credibly argue that a lack of sleep could be considered when determining whether a defendant has violated New Jersey’s vehicular homicide statute. In other words, circumstantial evidence of drowsiness “may” have been used to infer recklessness before Maggie’s Law was enacted. As a result, the two criteria set forth in Maggie’s Law for when an inference of recklessness may arise might limit, rather than expand, state courts’ ability to punish drowsy drivers.

III. DEVELOPING MORE EFFECTIVE METHODS FOR COMBATING DROWSY DRIVING

A. GREATER FLEXIBILITY

Although Maggie’s Law is unique because of its explicit focus on drowsy driving, states have prosecuted fatigued motorists who cause accidents for many years. Darrel Drobnich, National Sleep Foundation senior director of government affairs, explains that “many states have prosecuted fatigued motorists who cause crashes by charging them with such violations as reckless driving, leaving the scene of an accident, failure to maintain control of a vehicle, or manslaughter.” The basis for criminal liability in these cases was not the driver’s behavior while asleep;
rather, it was the person's decision to drive while sleepy under particular circumstances.\textsuperscript{111} The source of the driver's drowsiness and other aggravating conduct often has played an important role in evaluating culpability in these cases.\textsuperscript{112}

Factors beyond the twenty-four-hour time-limit in Maggie's Law should play a central role in determining whether a driver was reckless on a particular occasion. For instance, the effect of alcohol or drugs in contributing to a driver's fatigue is a significant aspect of many drowsy driving accidents.\textsuperscript{113} Likewise, it is often useful to determine whether a driver was accustomed to, and better able to cope with, sleep deprivation.\textsuperscript{114} Whether a driver has been put on notice of the dangers of drowsy driving due to previous similar accidents is also probative of a defendant's blameworthiness.\textsuperscript{115}

Despite the Law's broad language,\textsuperscript{116} it is likely that a court could not consider these other factors under Maggie's Law.\textsuperscript{117} But even if other factors can be considered, the twenty-four-hour time-limit provision is given extraordinary weight in determining guilt because it is the only explicit factor that can lead to an inference of recklessness outside of actual proof that the defendant fell asleep.\textsuperscript{118} This emphasis is unjustified considering the loose correlation between the twenty-four-hour time-limit and the danger posed by a fatigued motorist.\textsuperscript{119}

A more effective approach to combating drowsy driving would take the amount of time a driver has gone without sleep into account, but not

\begin{footnotes}
\textsuperscript{111} 63 A.L.R. 2d 983 \S 3a.
\textsuperscript{112} See, e.g., Armstrong v. State, 289 P. 1115, 1117 (Okla. 1936) (holding that a man could be found guilty of second degree manslaughter for permitting a girl unfamiliar with driving to operate his vehicle while he slept); see also infra notes 113–14.
\textsuperscript{113} See, e.g., People v. Robinson, 235 N.W. 236, 237 (Mich. 1931) (affirming convictions for manslaughter and negligent homicide respectively where alcohol was also involved in accidents resulting from defendants falling asleep at the wheel); Commonwealth v. Page, 65 Pa. D. & C. 424, 430 (Philadelphia County 1949); see also State v. Simmons, 580 P.2d 564 (Or. 1978); Grindstaff v. State, 377 S.W.2d 921, 923, 927, 934–35 (Tenn. 1964) (holding that the defendant's decision to take pills to settle "his nervous stomach" and then drive was sufficient for a jury to find him guilty of involuntary manslaughter).
\textsuperscript{115} See People v. Shaffer, 364 N.E.2d 109 (Ill. App. Ct. 1977) (holding that evidence was sufficient to sustain a conviction for reckless homicide where a driver fell asleep at the wheel after having been put on notice by 75 prior accidents of falling asleep at the wheel).
\textsuperscript{116} See N.J. Stat. Ann. \S 2C:11-5a (West Supp. 2004) (stating that "[n]othing in this section shall be construed to in any way limit the conduct or conditions that may be found to constitute driving a vehicle or vessel recklessly").
\textsuperscript{117} See supra Part II.B.5.
\textsuperscript{119} See supra Part II.B.1–2.
\end{footnotes}
create an arbitrary twenty-four-hour limit for establishing a presumption of recklessness. Rather, sleep deprivation, not merely in a twenty-four-hour period, but for the days leading up to the accident, should be one of many factors that can be used to establish recklessness. Such a rule would be significantly more effective because the vast majority of drowsy driving accidents do not involve sleep deprivation for twenty-four consecutive hours. Thus, in Commonwealth v. Stankovik, where a defendant slept for six hours in the morning before falling asleep at the wheel later that night, a court would give substantial weight to the fact that the defendant had not slept at all the night preceding the accident. This result would not only be more effective, but also more fair; a driver who sleeps for one hour in a twenty-hour period is at least as "reckless" as a driver who sleeps for twelve hours and then goes without sleep for twenty-four consecutive hours.

Under a totality of the circumstances approach, sleep deprivation should still be explicitly listed as one of several factors that a jury can consider when determining guilt. This would alleviate a problem like the one in the case of Maggie McDonnell, where the judge refused to allow the jury to consider the issue of sleep deprivation. A totality of the circumstances approach would also allow the jury to consider other equally important factors such as: (1) the reasons for the defendant's sleep deprivation, including whether it was due to a salutary public purpose; (2) the aggravating role, if any, of drugs and alcohol (even if the amounts were not sufficient alone to produce unlawful impairment); (3) the presence of a sleep disorder; and (4) traditional indicators that fatigue was a contributing factor to an accident such as work records, history of drowsy driving accidents, sleep patterns, and the absence of skid marks. The list of possible factors should not be exhaustive in order for the law to adapt and be applied effectively in a variety of contexts.

The use of a totality of the circumstances approach for establishing recklessness raises concerns that the standard of guilt will be too vague to be effective. Maggie's Law itself, however, does not resolve this ambiguity because it merely states that fulfillment of either of its two

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120. See supra note 62.
123. See supra Part II.B.2.
124. See supra note 112.
125. Maggie's Law: National Drowsy Driving Act of 2003, H.R. 968, 108th Cong. § 2(4)B, D (2003), available at http://www.theorator.com/bills108/hr968.html (noting that "40,000,000 Americans suffer from sleep disorders" and that these disorders when "left untreated" can increase crash risk three to seven times.)
126. Jerome & Calandra, supra note 1, at 115.
triggering criteria “may” lead to an inference of recklessness. Moreover, a totality of the circumstances approach has been used by many states in the past to establish criminal guilt, demonstrating that states have the potential to develop manageable standards to prosecute drowsy drivers using a multi-factor test.

A totality of the circumstances approach would, therefore, provide two distinct benefits over current New Jersey law. First, the fatigue factor could be weighted outside the rigid and arbitrary confines of Maggie’s Law’s twenty-four-hour time limit. Second, a jury could examine a wide array of factors that indicate recklessness. These distinctions would translate into increased flexibility and fairness, while preserving an explicit pronouncement that driver fatigue is an important factor to consider when determining whether the state should impose criminal sanctions.

B. A Broader Focus

Criminal sanctions alone will not remedy the nation’s drowsy driving problems. Although deterrence from criminal penalties should play a part in fighting drowsy driving, such sanctions are unlikely to play a decisive role. Drivers already have a large deterrent to driving while seriously fatigued: the risk that they themselves will be killed in an accident. The fact that many of these drivers get behind the wheel despite being sleep-deprived is more a function of their lack of awareness of the problem than their belief that they will not be harmed criminally or physically. As Judie Stone, president of Advocates for Highway and Auto Safety, notes, “It is always difficult to change people’s behavior just by passing a law. You have to educate people.” Advocates for Maggie’s Law hope that the Law’s passage will spur educational initiatives, but the Law itself is limited to criminal penalties.

In contrast, a federal version of “Maggie’s Law” introduced by New Jersey Representative Rob Andrews in 2003 would not criminalize accidents caused by driver fatigue, but rather would provide incentives for states to develop traffic safety programs to decrease fatigue-related collisions. The proposed law would shift the focus from reactive

129. See Stimpson, supra note 87.
130. See Goldman, supra note 14, at 9 (quoting Darrel Drobnich, senior director of government affairs at the National Sleep Foundation as saying that he “hope[s] [Maggie’s Law] will spur educational initiatives”).
132. Drowsy Driving Now Illegal in New Jersey, supra note 7.
criminal penalties to proactive education and prevention initiatives. Specifically, it would provide state highway offices and other experienced drowsy driving safety organizations with grants to provide for drowsy driving awareness programs and supporting educational materials. These resources would be used to instruct not only the public, but also "traffic safety professionals, police officers, fire and emergency medical personnel, and other educators in all aspects of drowsy driving prevention." Rep. Andrews' proposal would also encourage the "installation and expansion of continuous shoulder rumble strips during highway resurfacing and new construction programs for interstate highways." These rumble strips have proven very effective in preventing drowsy driving accidents. For instance, New York State reported that accidents at thirteen sites on the New York Thruway were cut by eighty-four percent after continuous shoulder rumble strips were installed.

Finally, the proposed federal law would encourage the adoption of "formal codes on motor vehicle accident report forms to report fatigue-related or fall-asleep crashes." This would help provide much-needed data on the causes and frequency of fatigue-related motor vehicle crashes.

The proposed federal law and similar state measures should play a critical role in combating the primary source of drowsy driving accidents: a lack of awareness. In addition, by encouraging procedures like the installation of more shoulder rumble strips, the proposal would improve safety even in cases where motorists insist on driving while fatigued. The measures in this federal proposal do not replace effective criminal sanctions. They do, however, act as an essential complement to criminal sanctions that would allow states to adopt a broad-based strategy toward fighting driver fatigue.

In addition to adopting preventative programs similar to those in Rep. Andrews' proposed law, state legislatures should also expand the types of criminal sanctions to which Maggie's Law applies. In particular, it is imperative that drowsy driving legislation apply even in cases where

134. Id. § 412(b).
135. Id. § 412(b)(4).
136. See id. § 412(b)(9)(A).
137. Id.
138. Id. § 412(b)(5).
139. Id. § 2(5) (noting that "[a]n insufficient amount of statistical data and documentation concerning fatigue-related vehicle crashes is available... [because] federal statistics significantly under-report the problem of driver fatigue...").
140. See Stimpson, supra note 87.
no one is killed. Maggie's Law only amends New Jersey's vehicular homicide statute and provides no guidance to courts regarding serious but not deadly accidents. This ought to be remedied so that driver fatigue is explicitly noted as a factor to be considered at all levels of criminal sanctions for driver conduct. If criminal sanctions are appropriate in a deadly accident resulting from driver fatigue, they are also appropriate where the victim is paralyzed, brain-damaged, or suffers some other serious injury. A wide array of criminal sanctions that take driver fatigue into consideration would have an improved deterrent effect, as well as provide greater uniformity and fairness.

CONCLUSION

The movement started by Carole McDonnell to prevent drowsy driving should not end with the current version of Maggie's Law. Although its explicit recognition of driver fatigue as a factor in vehicular homicide cases represents a significant step forward, Maggie's Law's specific provisions raise serious doubts that courts will be able to enforce it in a fair and effective manner. Maggie's Law, although well-intentioned, was drafted in such a way that its impact will be quite minimal.

Adopting a totality of the circumstances approach over the twenty-four-hour time limit model currently used within Maggie's Law would add flexibility and fairness to the Law. It would also allow courts to crack down on fatigued drivers that cause accidents even though they have received some, albeit minimal, sleep in the preceding twenty-four hours.

In addition, efforts must be made to broaden the focus of the effort to reduce drowsy driving. This can be accomplished in large part through initiatives like those in the proposed federal version of "Maggie's Law." The proactive education and prevention measures in this bill are an essential complement to criminal sanctions. Moreover, expanding the range of driving laws that explicitly consider driver fatigue as a factor in evaluating guilt would greatly expand the law’s real-world impact.

Unfortunately, Maggie's Law, as currently drafted, is more symbol than substance, more indicative of an effort to display good intentions than produce hard results. The past and future victims of driver fatigue deserve more. National and state policymakers considering their own version of "Maggie’s Law" have a unique opportunity to produce laws

141. See notes 48-49 and accompanying text.
142. See generally N.J. STAT. ANN. § 2C:11-5a (West Supp. 2004); supra Part II.B.1.
143. See, e.g., supra note 49 and accompanying text.
144. See supra Part II.B.1.
145. Id.
that will live up to Carole McDonnell's aspirations. With thoughtful revision of New Jersey's law, such legislation might be just down the road.