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## HOW TO DETER PEDESTRIAN DEATHS: A UTILITARIAN PERSPECTIVE ON CARELESS DRIVING

*John Clennan\**

### I. INTRODUCTION

For the last twenty years, politicians, developers, business leaders, academics, and environmentalists have formed coalitions to encourage transit-oriented development.<sup>1</sup> Proponents of transit-oriented development argue that jurisdictions need to enact land-use reform to mitigate the damage of suburban sprawl.<sup>2</sup>

On Long Island, transit-oriented development is big business. With the goals of reducing pollution and car dependency, jurisdictions grant smart growth developers tax breaks worth millions.<sup>3</sup> In most

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<sup>1</sup> See 2020 *Board of Directors*, VISION LONG ISLAND, <http://visionlongisland.org/board-members/> (Last visited May 12, 2020) (Vision Long Island is a smart growth advocacy organization comprised of business and community leaders.)

<sup>2</sup> Edward J. Sullivan & Jessica Yeh, *Smart Growth: State Strategies in Managing Sprawl*, 45 URB. LAW. 349, 351 (2013).

<sup>3</sup> Jurisdictions compete amongst each other by offering developers massive tax breaks. See Rachel O'Brien, *Tritec Granted \$28.6 Million Tax Break For Lindenhurst Residences*, NEWSDAY (Dec. 12, 2018 4:30 PM), <https://www.newsday.com/long-island/suffolk/tritec-lindenhurst-residences-tax-break-1.24484049>; see also Denise M. Bonilla, *Residents Decry Tax Breaks Approved For Wyandanch Building*, NEWSDAY (Mar. 2, 2020 5:05 PM), <https://www.newsday.com/long-island/suffolk/babylon-wyandanch-rising-tax-breaks-1.42373714>; see also Rachel O'Brien, *Tax Deal Would Make Way For 12 Apartments, Family Dollar Store In Copiague*, NEWSDAY (Jan. 7, 2019 4:05 PM), <https://www.newsday.com/long-island/suffolk/darius-masonry-copiague-tax-deal-1.25658821> (“A planned mixed-use building in the heart of downtown Copiague may get an almost 50 percent tax abatement. . .”).

cases, the new development rejuvenates a historic downtown.<sup>4</sup> Once abandoned and blighted downtowns can turn into hip nightlife spots.<sup>5</sup>

However, in the suburbs, transit-oriented development does not necessarily reduce car dependency.<sup>6</sup> In New York, the “Patchogue revival” is “recognized as a model for transit-oriented development and a success story for smart growth on Long Island.”<sup>7</sup> However, without parking, the Patchogue transit-oriented development miracle would not have been possible.<sup>8</sup> While improved downtowns lead to people walking between bars and restaurants, transit-oriented development does not necessarily lead to using mass transit. Instead, as evident by the need for more parking, new development, even under the guise of transit-oriented development—does not necessarily reduce car dependency.<sup>9</sup> To this end, Politicians have bemoaned that lack of parking is merely a “growing pain” of transit-oriented development.<sup>10</sup>

The Village of Patchogue, “Long Island’s model for transit-oriented development,”<sup>11</sup> placed a moratorium on new businesses until the Village can establish more parking.<sup>12</sup> However, instead of evaluating road safety, politicians are focusing on expanding

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<sup>4</sup> See Michael Dobie, *Dobie: Patchogue Comes Back to Life, With Lessons for All of Us*, NEWSDAY (Jun. 27, 2014 2:35 PM), <https://www.newsday.com/opinion/columnists/michael-dobie/patchogue-comes-back-to-life-with-lessons-for-all-of-us-michael-dobie-1.8592159>.

<sup>5</sup> *Id.*

<sup>6</sup> See Dena Belzer & Gerald Autler, *Countering Sprawl with Transit-Oriented Development*, ISSUES IN SCIENCE AND TECHNOLOGY, Vol. 19, No. 1, at 51-58 (Fall 2002).

<sup>7</sup> LONG ISLAND REGIONAL PLANNING COUNCIL, VILLAGE OF PATCHOGUE REVITALIZATION, ECONOMIC IMPACT ANALYSIS, 5 (Dec. 19, 2018), <https://lirpc.org/wp-content/uploads/2018/12/Long-Island-RPC-Village-of-Patchogue-Impact-Study-12.19.18.pdf>.

<sup>8</sup> “[T]he installation of four municipal public parking lots on the corners of the Village were important, allowing the growing number of visitors to the downtown easier access to its businesses and events.” *Id.* at 44.

<sup>9</sup> Nicole Fuentes, *Patchogue Village Looks to Ban New Bars/Restaurants Until More Parking Acquired*, LONG ISLAND ADVANCE (Jan. 13, 2020 6:30 PM), <http://www.longislandadvance.net/stories/patchogue-village-looks-to-ban-new-barsrestaurants-until-more-parking-acquired,85078>.

<sup>10</sup> The Nassau County executive awarded grants to villages and towns so that they can “address growing pains of recent TOD development - from parking concerns, to traffic issues, to improvements to pedestrian safety.” *Curran Expands Efforts to Advance Transit Oriented Development Projects*, NASSAU COUNTY, NEW YORK (Sep. 17, 2019), <https://www.nassaucountyny.gov/CivicAlerts.aspx?AID=7546>.

<sup>11</sup> See LONG ISLAND REGIONAL PLANNING COUNCIL, *supra* note 7.

<sup>12</sup> “Our restaurants have been a key foundation to our downtown renaissance, but that comes with a cost to the Village in the form of parking and public safety.” Fuentes, *supra* note 13.

parking.<sup>13</sup> Even more ironically, on Long Island, at the of the dawn of transit-oriented development, Suffolk and Nassau County slashed funding to mass transit and reduced service.<sup>14</sup> In 2016, Suffolk County made deep cuts to mass transportation.<sup>15</sup>

Despite advocating for transit-oriented development, politicians have mostly paid lip service to public transportation.<sup>16</sup> In 2018, the Suffolk County Executive drove to his “car free day” celebration.<sup>17</sup> Nonetheless, at the celebration, which the County Executive hosted near a train station, he promised to make improvements to the county bus system.<sup>18</sup> As various taxing jurisdictions grant generous benefits to transit-oriented development, the county agreed to move bus stops out of downtowns and away from train stations.<sup>19</sup> Spending money to encourage development around transportation hubs while slashing mass transportation could make

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<sup>13</sup> “We need to come up with another 600 or 700 spaces.” Carl MacGowan, *Patchogue Hires Consultant to Aid in Finding Downtown Parking*, NEWSDAY (Mar. 30, 2020 2:07 PM), <https://www.newsday.com/long-island/suffolk/patchogue-downtown-parking-1.43457975>; see also Lon Cohen, *Patchogue's Parking Garage Plans Getting \$625K Boost from Suffolk County*, GREATER LONG ISLAND (Oct. 16, 2019), <https://patchogue.greaterlongisland.com/2019/10/16/patchogues-parking-garage-plans-getting-625k-boost-from-suffolk-county/>.

<sup>14</sup> See Alfonso A. Castillo, *Suffolk County Will Cut 9 Bus Routes in October, Officials Say*, NEWSDAY (Aug. 4, 2016 11:44 PM), <https://www.newsday.com/long-island/suffolk/suffolk-county-may-cut-9-bus-routes-in-october-officials-say-1.12132709>; see also Alfonso A. Castillo, *Groups Oppose MTA's Plan to Yank Funding for LI Bus*, NEWSDAY (Jul. 23, 2010 10:00 PM), <https://www.newsday.com/long-island/nassau/groups-oppose-mta-s-plan-to-yank-funding-for-li-bus-1.2134966>.

<sup>15</sup> Suffolk County eliminated nine bus routes that connected 400 people to downtowns, train stations, town halls, colleges, hospitals, medical centers, and a retirement home for veterans. Castillo, *supra* note 18; see also S71 Shirley to Stony Brook Railroad, SUFFOLK COUNTY TRANSIT (Apr. 1, 2015) archived at <https://studylib.net/doc/8749864/map-s71---suffolk-county-transit>.

<sup>16</sup> On Long Island, Republican and Democrat politicians have run on platforms that encourage smart transit-oriented development. Dan O'Regan, *Bellone, Mangano Focus on Transportation, Transit-Oriented Development*, LONG ISLAND BUSINESS NEWS (Mar. 19, 2014), <https://libn.com/2014/03/19/bellone-mangano-focus-on-transportation-transit-oriented-development/>.

<sup>17</sup> “Bellone, who said he did not abandon his vehicle but went ‘car-light’ on Friday by not using his car as much as he normally would. . . .” Denise M. Bonilla, *On Car Free Day, Bellone Unveils Smartphone App for Bus Riders, Details Bike-Share Program*, NEWSDAY (Sep. 21, 2018 7:49 PM), <https://www.newsday.com/long-island/suffolk/suffolk-bike-share-1.21194187>.

<sup>18</sup> *Id.*

<sup>19</sup> Riverhead Town has successfully lobbied Suffolk County to move its bus stops away from a train station. The move is to facilitate leasing the former station building to a private coffee shop. Denise Civiletti, *Supe: Hampton Coffee Co. To Open at Riverhead Train Station*, RIVERHEADLOCAL (Jun. 26, 2019 12:19 PM), <https://riverheadlocal.com/2019/06/26/hampton-coffee-to-open-at-riverhead-train-station/>.

good fodder for a political comedian. However, stakeholders are encouraging people to walk as pedestrian death tolls are rising.<sup>20</sup> In particular, pedestrian deaths on Long Island are some of the highest in the United States.<sup>21</sup> Smart Growth America placed three out of the four congressional districts on Long Island on its list for the deadliest congressional districts for pedestrian traffic.<sup>22</sup>

To combat pedestrian deaths, local governments mostly focus on making improvements to education, enforcement, and infrastructure—when funds are available.<sup>23</sup> However, enforcement is controversial, and some jurisdictions merely focus on citing pedestrians.<sup>24</sup> In Florida, the Duval County Sheriff's Office prides itself on its pedestrian traffic enforcement.<sup>25</sup> Between 2012 to 2016, the Duval County Sheriff's Office utilized twenty-eight separate statutes to issue 2,200 tickets to pedestrians.<sup>26</sup> Likewise, in Georgia, a jury convicted a mother—who did not even own a vehicle—of homicide by vehicle.<sup>27</sup> The mother was “jaywalking” across a five-

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<sup>20</sup> In 2018 pedestrian deaths reached a twenty-seven-year high and continued to increase. *Fatality Facts 2018: Pedestrians*, INSURANCE INSTITUTE FOR HIGHWAY SAFETY, <https://www.iihs.org/topics/fatality-statistics/detail/pedestrians#fn1ref1> (last visited May 13, 2020); Colin Beresford, *Pedestrian Deaths in 2019 Were Highest in 30 Years, Report Says*, CAR AND DRIVER (Feb. 27, 2020), <https://www.caranddriver.com/news/a31136893/pedestrian-deaths-increase-2019/>.

<sup>21</sup> *Most Deadly U.S. House Districts: Dangerous by Design*, SMART GROWTH AMERICA (Jul. 2019), <https://smartgrowthamerica.org/app/uploads/2019/07/DBD-2019-Congressional-Districts.pdf>.

<sup>22</sup> *Id.*

<sup>23</sup> Education includes so-called “See and be Seen” programs. In “See and be Seen programs,” police issue warning cards to pedestrians and place educational postings at bus stops. Municipalities improve road safety by reconstructing crosswalks, reducing traffic speeds, and building sidewalks. Under targeted enforcement, police officers carry out “blitzes” where they ticket drivers and pedestrians. See Richard Retting, *Pedestrian Traffic Fatalities by State*, GOVERNORS HIGHWAY SAFETY ASSOCIATION, Feb. 2020, at 39-40, <https://www.ghsa.org/sites/default/files/2020-02/GHSA-Pedestrian-Spotlight-FINAL-rev2.pdf>.

<sup>24</sup> See Tophers Sanders et al., *Walking While Black*, PROPUBLICA & FLORIDA TIMES UNION (Nov. 16, 2017), <https://features.propublica.org/walking-while-black/jacksonville-pedestrian-violations-racial-profiling/>.

<sup>25</sup> The Duval County Sheriff's Office claims that pedestrian tickets are a useful tool to stop suspicious people. Furthermore, issuing pedestrian tickets will deter people from illegally crossing the street and reduce traffic accidents. See *id.*

<sup>26</sup> *Id.*

<sup>27</sup> GA. CODE ANN. § 40-6-393(c) (2020):

Any person who causes the death of another person, without an intention to do so, by violating any provision of this title . . . commits the offense of homicide by vehicle in the second degree when such violation is the cause

lane road with her children when a habitually intoxicated driver struck her family.<sup>28</sup>

In the Georgia case, the mother was trying to cross the road to reach her apartment building from a bus stop.<sup>29</sup> The nearest crosswalk involved walking over one-and-a-half miles.<sup>30</sup> Therefore, the mother “jaywalked” across the road with her children.<sup>31</sup> The driver of the van claimed the family “jumped out in front of [him].”<sup>32</sup> The driver also claimed that he “thought that he had only hit a basket and a post on the side of the road.”<sup>33</sup> The driver did not stop.<sup>34</sup> Regardless, investigators claimed the accident occurred because the mother “led” her son “into the roadway under unsafe conditions.”<sup>35</sup> The case caused a media frenzy; nonetheless, nearly ten years after the accident, there is still not a crosswalk from the bus stop to the apartment building.<sup>36</sup>

However, the climate is changing, and some jurisdictions are prosecuting drivers who unintentionally cause pedestrian fatalities.<sup>37</sup> In 2012, New Jersey amended its vehicular homicide statute to include death caused by a distracted driver using a cellphone.<sup>38</sup> In 2017 the New Jersey statute came to national prominence when Monmouth

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of said death and, upon conviction thereof, shall be punished as provided in Code Section 17-10-3.

*Id.*

<sup>28</sup> A jury convicted the mother of second-degree vehicular homicide. The court granted the mother a new trial. Before the new trial, the State allowed the mother to plea to the “jaywalking” charge and dropped the homicide charge. See *Nelson v. State*, 31 S.E.2d 770 (Ga. 2012); see also Marcus K. Garner, *Homicide Charge Dropped Against Jaywalking Cobb Mom*, ATLANTA JOURNAL CONSTITUTION (June 13, 2013), <https://www.ajc.com/news/crime--law/homicide-charge-dropped-against-jaywalking-cobb-mom/0Nane3VdTqDe5NvUSLIn2H/>.

<sup>29</sup> David Goldberg, *Protect, Don't Prosecute, Pedestrians*, THE WASHINGTON POST (Aug. 4, 2011), [https://www.washingtonpost.com/opinions/protect-dont-prosecute-pedestrians/2011/07/28/gIQAny45uI\\_story.html](https://www.washingtonpost.com/opinions/protect-dont-prosecute-pedestrians/2011/07/28/gIQAny45uI_story.html).

<sup>30</sup> *Id.*

<sup>31</sup> *Nelson v. State*, 731 S.E.2d 770, 773 (Ga. 2012).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 774.

<sup>36</sup> *Austell Rd + Austell Circle Bus Stop ID: 920247*, GOOGLE MAPS, <https://www.google.com/maps> (then search for Austell Rd + Austell Circle) (last visited May 13, 2020).

<sup>37</sup> See Nate Schweber & Tracey Tully, *She Texted About Dinner While Driving. Then A Pedestrian Was Dead*, N.Y. TIMES (Nov. 22, 2019), <https://www.nytimes.com/2019/11/22/nyregion/texting-driving-vehicular-homicide-nj.html>.

<sup>38</sup> N.J. STAT. ANN. § 2C:11-5 (2012) (“Proof that the defendant was operating a hand-held wireless telephone while driving a motor vehicle in violation of section 1 of P.L.2003, c. 310 (C.39:4-97.3) may give rise to an inference that the defendant was driving recklessly.”)

County prosecutors secured an indictment against a driver who caused the death of a pedestrian.<sup>39</sup> The driver declined to take a plea that would have resulted in a sentence of three-to-five years.<sup>40</sup> Instead, the driver went to trial, and a jury of her peers came back with a conviction.<sup>41</sup> The driver is currently awaiting sentencing.<sup>42</sup>

As the suburbs increase density to encourage growth, pedestrian safety must become paramount. Therefore, the purpose of this note is to analyze potential criminal penalties under current New York Law for motor vehicle accidents that result in pedestrian deaths. Furthermore, this note will make recommendations as to how the New York State Legislature can reform existing laws to penalize drivers who carelessly cause the death of a pedestrian. To that end, criminal penalties for careless driving are significant because penalties can deter other careless drivers.

In this note, Part II will explain the theory behind using criminal punishment to deter subsequent criminal conduct. Part III will discuss the evolution of current New York criminal statutes as applied to careless driving that causes death. Part IV will compare how New Jersey and Georgia penalize careless driving that results in the loss of life. Finally, Part V will explain why New York needs to reform or enact new statutes to deter careless driving.

## II. DETERRENCE

Proponents of utilitarian punishment believe that punishment must result in the reduction of future crime.<sup>43</sup> Under utilitarian punishment, a judge must consider the deterrent value in imposing punishment.<sup>44</sup> There are two considerations to deterrence: individual and general.<sup>45</sup> Preventing recidivism is the primary focus behind an individual or specific deterrence.<sup>46</sup> This note focuses on general deterrence as a method to improve road safety.

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<sup>39</sup> See Schweber, *supra* note 37.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Meg Oliver, *New Jersey Woman Faces 10 Years in Prison for Deadly Texting While Driving Case*, CBS NEWS (November 26, 2019, 6:39 PM), <https://www.cbsnews.com/news/new-jersey-woman-faces-10-years-in-prison-for-deadly-texting-while-driving-case-2019-11-26/>.

<sup>43</sup> JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 14 (7TH ED. 2015).

<sup>44</sup> *People v. McConnell*, 402 N.E.2d 133, 135 (1980).

<sup>45</sup> DRESSLER, *supra* note 43.

<sup>46</sup> *Id.* at 16.

Under the theory of general deterrence, a judge imposes a reasonable sentence that deters subsequent people from committing similar criminal conduct.<sup>47</sup> Utilitarians premise general deterrence on the theory that potential offenders will see the impact of the punishment that society extends to individual conduct and, therefore, will avoid participating in similar conduct.<sup>48</sup> Some utilitarianists think that punishment absent a deterrence value is fundamentally unfair.<sup>49</sup>

In part, New York enacted its Penal Law to:

[P]roscribe unjustifiably and inexcusably causes or threatens substantial harm to individual or public interests;. . . [t]o provide for an appropriate public response to particular offenses, including consideration of the consequences of the offense for the victim, including the victim's family, and the community; and [t]o insure the public safety by preventing the commission of offenses through the *deterrent influence of the sentences authorized*. . . .<sup>50</sup>

Thus, in enacting the Penal Law, the Legislature recognized general deterrence is a crucial aspect of sentencing in New York.<sup>51</sup>

In *People v. Suitte*,<sup>52</sup> the Second Department noted that “deterrence is [a] primary and essential postulate of almost all criminal law systems.”<sup>53</sup> Moreover, at sentencing, “the judge may look beyond the offender to the presumed effect of the sentence on others.”<sup>54</sup>

However, there are several reasons why general deterrence is controversial. First, in a high publicity case, the accused can face

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<sup>47</sup> Daniel M. Farrell, *Using Wrongdoers Rightly: Tadros on the Justification of General Deterrence*, 9 CRIM. L. & PHIL. 1 (2015).

<sup>48</sup> Major Owen Basham, *General Deterrence Arguments (an Excursion Ticket, Good for This Day and Trip Only)*, THE ARMY LAWYER (April 1979), at 5 (Major Basham's article is a critique on military law as applied to general deterrence. However, Major Basham includes a good analysis of the philosophy behind general deterrence.).

<sup>49</sup> *Gabriel v. Brame*, 28 So. 2d 581, 582–83 (Miss. 1947):

“Two propositions are fundamental, as we think, the first of which is that punishment for crime has its basis solely in its effect as a deterrent as against future offenses—that punishment for the sake of punishment, or for vengeance alone, has no place in the processes of human tribunals. And as a deterrent, a present offender is as much within the object as others in general.”

*Id.*

<sup>50</sup> N.Y. PENAL LAW § 1.05(1), (5), (6) (McKinney 2019) (emphasis added).

<sup>51</sup> N.Y. PENAL LAW § 1.05.

<sup>52</sup> 455 N.Y.S.2d 675 (App. Div. 2d Dep't 1982).

<sup>53</sup> *Id.* at 680

<sup>54</sup> *Id.* (citing *United States v. Foss*, 501 F.2d 522 (1st Cir. 1974)).



unusually harsh punishments for the sake of the deterrent value.<sup>55</sup> Second, opponents of utilitarianism argue that it is fundamentally unfair to publicly humiliate the accused for the sake of deterring future crime.<sup>56</sup> In essence, opponents of general deterrence contend that society is immorally using the accused by making an example out of her.<sup>57</sup> Finally, opponents of general deterrence claim it is a logical fallacy to assume people act rationally.<sup>58</sup> Opponents further argue that certain crimes may be immune to general deterrence.<sup>59</sup> Specifically, people who suffer from compulsive behavior (such as substance abuse) or commit crimes of passion do not rationally decide to commit a crime or participate in reckless behavior.

The opponents' arguments are not without merit. First, under the utilitarian view, the punishment in a high-profile case should shock the public conscience.<sup>60</sup> Therefore, if a case has, for some reason, attracted great publicity, a severe sentence could be expected to have a significant deterrent effect.<sup>61</sup> For punishment to have a general deterrence effect, community awareness and media attention are necessary.<sup>62</sup> If the public is not aware, then the rational person cannot take notice and alter her behavior.<sup>63</sup> Second, proponents of general deterrence argue that it is not immoral, nor is society using the

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<sup>55</sup> Opponents further argue that a harsh sentence in the name of general deterrence does not enhance deterrence. See Mirko Bagaric & Peter Isham, *A Rational Approach to the Role of Publicity and Condemnation in the Sentencing of Offenders*, 46 FLA. ST. U. L. REV. 239, 275 (2019).

<sup>56</sup> See *id.*

<sup>57</sup> See Daniel M. Farrell, *Using Wrongdoers Rightly: Tadros on the Justification of General Deterrence*, 9 CRIM. L. & PHIL. 1 (2015).

<sup>58</sup> Under the rational approach an actor makes a cost benefit analysis before engaging in reckless or intentional conduct that can lead to punishment. See William L. Barnes, Jr., *Revenge on Utilitarianism: Renouncing A Comprehensive Economic Theory of Crime and Punishment*, 74 IND. L.J. 627, 640 (1999).

<sup>59</sup> See Johannes Andenaes, *Deterrence and Specific Offenses*, 38 CHI. U. L. REV. 3 (1971).

<sup>60</sup> "If the sentencing judge wishes to attach weight to the general preventive effect of a particular sentence, he should consider the publicity which the decision will receive and the possible reactions of those people who will hear or read about the decision." Johannes Andenaes, *The Morality of Deterrence*, 37 CHI. U. L. REV. 649, 656 (1970).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*:

If, on the other hand, the publicity is minimal and the sentence probably will be known only to the defendant himself and the officials involved with the case, the judge could let the offender off with a light sentence without sacrificing any general preventive effects.

*Id.*

accused.<sup>64</sup> Instead, some criminal law theorists argue that the accused owes a duty to the victim to prevent future wrongdoing.<sup>65</sup> Finally, the opponents are correct; utilitarianism will not prevent crimes of passion or compulsive behavior. However, unintentional death due to careless driving is not necessarily a result of compulsive behavior or a crime of passion.

### III. EXISTING NEW YORK STATUTES

Currently, New York does not have a vehicular homicide statute that is as broad as the Georgia<sup>66</sup> or New Jersey<sup>67</sup> statutes.<sup>68</sup> The New York vehicular homicide statute is limited to cases that concern intoxication, transporting hazardous materials, and driving a snowmobile or all-terrain vehicle while intoxicated.<sup>69</sup> Absent

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<sup>64</sup> See Farrell, *supra* note 57.

<sup>65</sup> “The accused owes a duty to the victim of future protection.” See VICTOR TADROS, *THE ENDS OF HARM: THE MORAL FOUNDATIONS OF CRIMINAL LAW* 276 (Sep. 15, 2011).

<sup>66</sup> GA. CODE ANN. § 40-6-393(c) (2020).

<sup>67</sup> N.J. STAT. ANN. § 2C:11-5 (2020).

<sup>68</sup> Cf. N.Y. PENAL LAW § 125.12 (McKinney 2019), with N.J. STAT. ANN. § 2C:11-5 (West 2020), and GA. CODE ANN. § 40-6-393(c) (2020).

<sup>69</sup> N.Y. PENAL LAW § 125.12 (McKinney 2019):

A person is guilty of vehicular manslaughter in the second degree when he or she causes the death of another person, and either: (1) operates a motor vehicle . . . or operates a vessel or public vessel . . . and as a result of such intoxication or impairment by the use of a drug, or by the combined influence of drugs or of alcohol and any drug or drugs, operates such motor vehicle, vessel or public vessel in a manner that causes the death of such other person, or (2) operates a motor vehicle with a gross vehicle weight rating of more than eighteen thousand pounds which contains flammable gas, radioactive materials or explosives . . . and such flammable gas, radioactive materials or explosives is the cause of such death, and as a result of such impairment by the use of alcohol, operates such motor vehicle in a manner that causes the death of such other person, or (3) operates a snowmobile . . . or operates an all terrain vehicle . . . and as a result of such intoxication or impairment by the use of a drug, or by the combined influence of drugs or of alcohol and any drug or drugs, operates such snowmobile or all terrain vehicle in a manner that causes the death of such other person. If it is established that the person operating such motor vehicle, vessel, public vessel, snowmobile or all terrain vehicle caused such death while unlawfully intoxicated or impaired by the use of alcohol or a drug, then there shall be a rebuttable presumption that, as a result of such intoxication or impairment by the use of alcohol or a drug, or by the combined influence of drugs or of alcohol and any drug or drugs, such person operated the motor vehicle, vessel, public vessel, snowmobile or all terrain vehicle in a manner that caused such death, as required by this section.

*Id.*

intoxication and depending on circumstances, prosecutors can currently charge a careless driver who kills a pedestrian, with reckless driving,<sup>70</sup> reckless endangerment,<sup>71</sup> criminally negligent homicide,<sup>72</sup> and second-degree manslaughter.<sup>73</sup> Reckless driving falls under the Vehicle and Traffic Code; whereas, Reckless Endangerment, Criminally Negligent Homicide, and Manslaughter fall under the Penal Law.<sup>74</sup>

However, the issue with recklessness and criminal negligence is that both levels of culpability require more than merely breaking the Vehicle and Traffic Code—even if it results in death. As this note demonstrates below, to prove criminal negligence or reckless culpability, prosecutors need what has colloquially become known as the “rule of two.”<sup>75</sup>

The “rule of two” is the theory that prosecutors can only secure a conviction for the death of a pedestrian if the driver violated two or more traffic provisions.<sup>76</sup> Instead, prosecutors must show some “moral blameworthiness.”<sup>77</sup> Mere traffic violations, even when it results in tragic consequences, are not “moral blameworthy conduct.”<sup>78</sup>

### A. Recklessness

In New York, there are two statutes that the prosecution can use against a driver who recklessly causes the death of a pedestrian.<sup>79</sup> The first statute is reckless driving.<sup>80</sup> The second statute is reckless

<sup>70</sup> N.Y. VEH. & TRAF. LAW § 1212 (McKinney 2019).

<sup>71</sup> N.Y. PENAL LAW § 120.20 - 120.25 (McKinney 2019) (first- and second-degree Reckless Endangerment are not Homicide statutes).

<sup>72</sup> N.Y. PENAL LAW § 125.10 (McKinney 2019).

<sup>73</sup> N.Y. PENAL LAW § 125.15 (McKinney 2019).

<sup>74</sup> *C.f.* N.Y. Veh. & Traf. Law § 1212 (McKinney 2019); *with* N.Y. PENAL LAW § 125.15 (McKinney 2019); *and* N.Y. PENAL LAW § 120.20 (McKinney 2019).

<sup>75</sup> Brad Aaron, *Is There Really a “Rule of Two”?*, STREETS BLOG NYC (Feb. 22, 2012), <https://nyc.streetsblog.org/2012/02/22/is-there-really-a-rule-of-two/>.

<sup>76</sup> “Vehicular-crime cases in New York are usually based on a driver’s committing at least two traffic infractions, which prosecutors informally call ‘the rule of two.’ Speeding alone is frequently insufficient to establish criminality.” J. David Goodman, *Prosecutors Face Test Proving Serious Crime in a Fatal Crash*, N.Y. TIMES (Mar. 12, 2013), <https://www.nytimes.com/2013/03/13/nyregion/serious-charges-in-fatal-crashes-pose-challenge-for-prosecutors.html?pagewanted=all>.

<sup>77</sup> *See* People v. Cabrera, 887 N.E.2d 1132 (N.Y. 2008).

<sup>78</sup> *See id.*

<sup>79</sup> *Infra* notes 80, 81.

<sup>80</sup> N.Y. VEH. & TRAF. LAW § 1212 (McKinney 2019).

endangerment.<sup>81</sup> Under both statutes, the actor must commit reckless culpable conduct. In New York, a person acts with reckless culpable conduct when she:

[I]s aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.<sup>82</sup>

The elements of reckless endangerment overlap with reckless driving. However, under reckless driving, the accused must “unreasonably interfere[] with the free and proper usage of a public highway or unreasonably endanger[] users of the public highway.”<sup>83</sup>

### 1. *Reckless Driving*

In New York State a person recklessly drives when she uses “any motor vehicle, motorcycle or any other vehicle propelled by any power other than muscular power or any appliance or accessory thereof in a manner which unreasonably interferes with the free and proper use of the public highway, or unreasonably endangers users of the public highway.”<sup>84</sup> Furthermore, a person drives recklessly when she unreasonably shows a disregard for the consequences of her driving.<sup>85</sup>

The driver must show a reckless disregard for the consequences of her driving, which interferes with the use of a public roadway.<sup>86</sup> Breaking other rules of the road, such as speeding, is not enough to warrant a reckless driving conviction.<sup>87</sup> Furthermore, an accident—without something more—can not lead to an inference that a driver drove recklessly.<sup>88</sup> Likewise, mere negligence is not reckless

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<sup>81</sup> N.Y. PENAL LAW § 120.20 – 120.25 (McKinney 2019).

<sup>82</sup> N.Y. PENAL LAW § 15.05(3) (McKinney 2019).

<sup>83</sup> The People’s failure to prove reckless endangerment does not necessarily foreclose a conviction of reckless driving. The People could prove reckless driving because an element of reckless driving is interfering with use of a public highway. *People v. Sanchez*, 34 N.Y.S.3d 565, 569 (N.Y. Crim. Ct. 2016).

<sup>84</sup> N.Y. VEH. & TRAF. LAW § 1212 (McKinney 2019).

<sup>85</sup> *People v. Grogan*, 183 N.E. 273, 275 (N.Y. 1932); *People v. Armlin*, 160 N.E.2d 478, 479 (N.Y. 1959).

<sup>86</sup> *Grogan*, 183 N.E. at 277; *People v. Sanchez*, 34 N.Y.S.3d 565, 569 (N.Y. Crim. Ct. 2016).

<sup>87</sup> *Sanchez*, 34 N.Y.S.3d at 568-69.

<sup>88</sup> The occurrence of an accident does not automatically lead the inference that the Accused drove recklessly. *People v. Blakeslee*, 15 N.Y.S.3d 638, 644 (Tompkins Cty. Ct. 2019).

driving.<sup>89</sup> The reckless driving statute focuses on the accused's conduct.<sup>90</sup> For a guilty conviction, the accused must display "wilful or wanton disregard of the rights of others."<sup>91</sup>

In *People v. Smith*,<sup>92</sup> the court found that the accused did not commit criminal conduct because she was not "intoxicated or impaired . . . [and] did not speed or disobey traffic signals."<sup>93</sup> Instead, the defendant looked away to make a turn and did not look back to check for a pedestrian.<sup>94</sup> For the People to win a proper conviction for reckless driving, the People must prove a multitude of factors. The court needs to analyze all of the accused's actions leading up to the accident.<sup>95</sup> In *People v. Goldblatt*,<sup>96</sup> the court found that the jury could use the facts that the accused was speeding, disregarding traffic signs, intoxicated, and swerving to infer that he drove recklessly.<sup>97</sup>

Reckless driving is more than one action that results in death. Instead, a court must look at all of the driver's conduct. Thus, multiple instances of negligent conduct can lead to the inference that the driver drove recklessly.

## 2. *Reckless Endangerment*

In New York, a person is guilty of second-degree reckless endangerment "when he recklessly engages in conduct which creates a substantial risk of serious physical injury to another person."<sup>98</sup> First-degree reckless endangerment requires "depraved indifference to

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<sup>89</sup> Civil negligence is not the same as criminal negligence. Even in a reckless driving charge the People must prove more than mere negligence. The People must show the accused had culpability. Merely driving through a stop sign does not create culpable negligence. *People v. Garo*, 144 N.Y.S.2d 107, 109 (Broome Cty. Ct. 1955).

<sup>90</sup> *In re Vincent H.*, 775 N.Y.S.2d 457, 461 (N.Y. Fam. Ct. 2004), *aff'd*, 790 N.Y.S.2d 890 (App. Div. 2d Dep't 2005) (the case was in family court because the accused was a juvenile).

<sup>91</sup> *People v. Smith*, 90 N.Y.S.3d 800, 803 (App. Div. 1st Dep't 2018) (the unwise decision of the Accused that resulted in the Accused fatally striking a pedestrian did not rise to the level of criminal conduct. "Defendant was not intoxicated or impaired; she did not speed or disobey traffic signals; she checked her rear view and driver's side mirrors before executing the turn; and attempted, albeit unsuccessfully, to stop the vehicle in the seconds after the collision and avoid striking the pedestrian.").

<sup>92</sup> *See generally* 90 N.Y.S.3d 800 (App. Div. 1st Dep't 2018).

<sup>93</sup> *Id.* at 803.

<sup>94</sup> *Id.*

<sup>95</sup> *See People v. Goldblatt*, 950 N.Y.S.2d 210, 212-15 (App. Div. 3d Dep't 2012).

<sup>96</sup> 950 N.Y.S.2d 210 (App. Div. 3d Dep't 2012).

<sup>97</sup> *Id.* at 213.

<sup>98</sup> N.Y. PENAL LAW § 120.20 (McKinney 2019).

human life.”<sup>99</sup> Depraved indifference involves “an utter disregard for the value of human life.”<sup>100</sup> Voluntary intoxication is not a defense of reckless conduct.<sup>101</sup>

Reckless endangerment requires that the accused act with a “heightened sense of awareness of a substantial and unjustifiable risk. . . .”<sup>102</sup> Next, the People must prove that a reasonable person could foresee that the accused’s conduct would result in the harm or risk of the harm alleged.<sup>103</sup> Second, the accused’s conduct must cause the risk of physical harm.<sup>104</sup> When combined, a multitude of actions can rise to the culpable level of recklessness that constitutes reckless endangerment.<sup>105</sup> Speeding alone may not constitute reckless conduct.<sup>106</sup> However, speeding combined with driving the wrong way, and ignoring traffic signals can constitute reckless conduct.<sup>107</sup>

In *People v. King*,<sup>108</sup> a police officer, while driving down a road, allegedly opened his vehicle door. The vehicle door knocked into a cyclist and the cyclist’s passenger.<sup>109</sup> The vehicle door “propelled” the bicycle, cyclist, and the cyclist’s passenger into a nearby pedestrian.<sup>110</sup> Then, the police officer closed the vehicle door and allegedly sped off.<sup>111</sup> The officer did not come forward; however, he purportedly admitted to his partner that he opened the vehicle door because the cyclist cursed at him.<sup>112</sup> On appeal, the court upheld the verdict of reckless endangerment because a jury could infer reckless conduct because he told his partner that he hit the cyclist, and he did not stop to render aid.<sup>113</sup> However, currently, with the “rule of two,”

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<sup>99</sup> N.Y. PENAL LAW § 120.25 (McKinney 2019).

<sup>100</sup> *People v. Wilson*, 109 N.E.3d 542 (N.Y. 2018) (quoting *People v. Feingold*, 852 N.E.2d 1163, 1173 (N.Y. 2006)).

<sup>101</sup> *Id.*

<sup>102</sup> *People v. Reagan*, 683 N.Y.S.2d 543, 545 (App. Div. 2d 1998).

<sup>103</sup> *People v. Roth*, 604 N.E.2d 92, 93 (N.Y. 1992) (“For purposes of criminal liability, it was not enough to show that, given the variety of dangerous conditions existing at the site, an explosion was foreseeable; instead the People were required to show that it was foreseeable that the explosion would occur in the manner that it did.”).

<sup>104</sup> *People v. Beam*, 866 N.Y.S.2d 564, 567 (N.Y. Crim. Ct. 2008).

<sup>105</sup> See *People v. Sanchez*, 34 N.Y.S.3d 565 (N.Y. Crim. Ct. 2016).

<sup>106</sup> *Id.* at 558-69.

<sup>107</sup> *Id.*

<sup>108</sup> 529 N.Y.S.2d 172 (App. Div. 2d Dep’t 1988).

<sup>109</sup> *Id.* at 173

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 173-74.

it is unlikely that a driver who “doors” a pedestrian would face any charges, let alone reckless endangerment.<sup>114</sup>

First-degree reckless endangerment is outside the scope of this note. Nevertheless, to sustain a conviction of first-degree reckless endangerment, the People need to prove something more than a careless operation that results in loss of life.<sup>115</sup> Generally, evidence that the accused participated in other crimes, such as driving while intoxicated,<sup>116</sup> fleeing from the police,<sup>117</sup> or participating in a fight<sup>118</sup> can demonstrate a “depraved indifference to human life.”<sup>119</sup>

### B. Negligent Homicide

Conduct, an act or omission<sup>120</sup> that causes the death of another person, is homicide.<sup>121</sup> Criminal negligence is a level of criminal culpability where a person:

[F]ails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.<sup>122</sup>

In New York, criminally negligent homicide<sup>123</sup> and second-degree manslaughter<sup>124</sup> require the culpability of criminal negligence. Nevertheless, not every act of carelessness constitutes criminal

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<sup>114</sup> In 2012, an unlicensed driver caused the death of pedestrian when he alleged struck a cyclist with the door of his vehicle. The force of the door caused the cyclist into the path of a bus. Brad Aaron, *Is There Really a “Rule of Two”?* STREETS BLOG NYC (Feb. 22, 2012), <https://nyc.streetsblog.org/2012/02/22/is-there-really-a-rule-of-two/>.

<sup>115</sup> N.Y. PENAL LAW § 120.25 (McKinney 2019).

<sup>116</sup> *See* People v. Davis, 576 N.Y.S.2d 947 (App. Div. 3d Dep’t 1991) (During a blizzard, the accused drove a snowmobile on a public highway while under the influence of marijuana, and cocaine. The accused struck someone and left the person in the road. Leaving the victim in the road helpless supported the accused’s conviction).

<sup>117</sup> *See* People v. Kenney, 733 N.Y.S.2d 124 (App. Div. 2d Dep’t 2001).

<sup>118</sup> *See* People v. Saunders, 613 N.Y.S.2d 386 (App. Div. 1st Dep’t 1994).

<sup>119</sup> *Id.*

<sup>120</sup> N.Y. PENAL LAW § 15.00(4) (McKinney 2019).

<sup>121</sup> N.Y. PENAL LAW § 125.00 (McKinney 2019).

<sup>122</sup> N.Y. PENAL LAW § 15.05(4) (McKinney 2019).

<sup>123</sup> N.Y. PENAL LAW § 125.10 (McKinney 2019).

<sup>124</sup> N.Y. PENAL LAW § 125.15 (McKinney 2019)

negligence.<sup>125</sup> Criminal negligence requires a higher level of culpability than mere civil negligence.<sup>126</sup>

The Accused must have a severe level of blameworthiness for the conduct that resulted in the death of a victim.<sup>127</sup> A string of unfortunate events may not rise to the level of criminal negligence.<sup>128</sup> Nevertheless, the accused's state of mind is the difference between criminally negligent homicide and second-degree manslaughter.<sup>129</sup> State of mind is determined:

[E]ntirely on the circumstances of the particular conduct. Whether in those circumstances the act or acts causing death involved a substantial and unjustifiable risk, and whether the failure to perceive it was such as to constitute a gross deviation from the standard of care which a reasonable man would have observed under the same circumstances. . . .<sup>130</sup>

Therefore, under criminally negligent homicide, the accused is not aware of the risk.<sup>131</sup> Instead, under criminally negligent homicide, the accused "failed to perceive the risk in a situation where [he] has a legal duty of awareness."<sup>132</sup> Whereas in second-degree manslaughter, the accused appreciated the risk of harm but continued acting, and that action resulted in death.<sup>133</sup>

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<sup>125</sup> *People v. Boutin*, 555 N.E.2d 253, 254 (N.Y. 1990).

<sup>126</sup> *Id.*

<sup>127</sup> It is not enough that the elements of criminal negligence are met. Underlying conduct that caused death is required as well. *Id.* at 255.

<sup>128</sup> *See id.*

<sup>129</sup> "The essential distinction between the crimes of manslaughter, second degree, and criminally negligent homicide is the mental state of the defendant at the time the crime was committed." *People v. Stanfield*, 330 N.E.2d 75, 77 (N.Y. 1975), *overruled on other grounds by* *People v. Glover*, 439 N.E.2d 376 (N.Y. 1982).

<sup>130</sup> *People v. Haney*, 284 N.E.2d 564, 568 (N.Y. 1972).

<sup>131</sup> *See* *People v. Haney*, 284 N.E.2d 564 (N.Y. 1972).

<sup>132</sup> *Id.* at 567:

The present law [criminally negligent homicide] lacks the moral implication of murder or manslaughter in the first or second degree, each of which involves awareness of the harm which will (or in some degree probably will) result from the offender's conduct. Criminally negligent homicide, in essence, involves the failure to perceive the risk in a situation where the offender has a legal duty of awareness. It, thus, serves to provide an offense applicable to conduct which is obviously socially undesirable. (citations omitted).

*Id.*

<sup>133</sup> *Id.*



### 1. *Criminally Negligent Homicide*

In New York, “[a] person is guilty of criminally negligent homicide when, with criminal negligence, he causes the death of another person.”<sup>134</sup> First, criminally negligent homicide does not include every action of carelessness that results in someone’s death.<sup>135</sup> Second, the elements require that the significance of the accused’s wrongdoing violates the community’s sense of right and wrong.<sup>136</sup> Furthermore, under criminally negligent homicide, the accused does not have to have a conscious awareness of her acts.<sup>137</sup> Therefore, criminally negligent homicide requires a lower level of culpability than reckless driving.<sup>138</sup>

To sustain a conviction of criminally negligent homicide, the People must prove that the accused’s actions are the direct result of the victim’s death.<sup>139</sup> It is not enough that the accused set off a chain of events that resulted in the victim’s death.<sup>140</sup> In *People v. Ballenger*,<sup>141</sup> the accused, a passenger in the vehicle, grabbed the vehicle’s steering wheel and caused it to hit a guard rail.<sup>142</sup> Thirty minutes after the accused allegedly caused the first accident, several other vehicle accidents occurred.<sup>143</sup> Queued traffic due to lane closures caused by the accused’s accident was the direct cause of the subsequent accidents.<sup>144</sup> The court held that the accused could foresee that his actions could cause lane closures; however, probable accidents caused by possible lane closures were not criminal negligence.<sup>145</sup>

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<sup>134</sup> N.Y. PENAL LAW § 125.10 (McKinney 2019).

<sup>135</sup> *People v. Beiter*, 432 N.Y.S.2d 947, 949 (App. Div. 4th Dep’t 1980).

<sup>136</sup> “[T]he elements of the crime ‘preclude the proper condemnation of inadvertent risk creation unless’ the significance of the circumstances of fact would be apparent to one who shares the community’s general sense of right and wrong.” *Id.*

<sup>137</sup> *See Myers v. State*, 667 N.Y.S.2d 1010, 1013 (N.Y. Ct. Cl. 1997).

<sup>138</sup> It is interesting that reckless driving has a higher burden than some homicide statutes, because reckless driving is in the Vehicle and Traffic Code, whereas the homicide statutes are in the Penal Law. *People v. Boice*, 455 N.Y.S.2d 859, 860 (App. Div. 3d Dep’t 1982).

<sup>139</sup> *See People v. Ballenger*, 968 N.Y.S.2d 610 (App. Div. 3d Dep’t 2013).

<sup>140</sup> *See generally id.*

<sup>141</sup> 968 N.Y.S.2d 610 (App. Div. 3d Dep’t 2013).

<sup>142</sup> *Id.* at 611-12.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 612.

In *People v. McDermott*,<sup>146</sup> the accused pulled a home-made trailer behind his vehicle.<sup>147</sup> The accused did not license, nor register his trailer.<sup>148</sup> At one point, the accused pulled into the median of an interstate highway because he thought there was something wrong with the trailer.<sup>149</sup> By pulling into the median, he disregarded highway signage that forbids parking or making U-turns in the median—pulling into the median of the interstate set off a chain of events that caused a multicar accident that resulted in the death of another driver.<sup>150</sup> The court held that the accused did not commit criminal negligence by merely ignoring a road sign.<sup>151</sup> However, when tallied, the accused’s actions—ignoring the sign, stopping in the median, pulling an unlicensed trailer, the road conditions caused by heavy rain—proved the accused had the culpability of criminal negligence.<sup>152</sup>

*People v. Haney*<sup>153</sup> is one of the earliest examples of criminally negligent homicide as applied to careless driving. In *Haney*, a driver was speeding, ignored a stoplight, and ran over a pedestrian.<sup>154</sup> The pedestrian had just exited from a bus and had the right of way.<sup>155</sup> The driver struck the pedestrian in the crosswalk.<sup>156</sup> The force of the accident flung the pedestrian over 100 feet away from the accident site.<sup>157</sup> After hitting the pedestrian, the vehicle continued to go forward until it crashed into a telephone pole.<sup>158</sup> When a police officer placed the accused under arrest, the accused kept repeating that he “didn’t mean to hit her.”<sup>159</sup> The court held that hitting a pedestrian who has the right of way in a crosswalk may not arise to criminal negligence.<sup>160</sup> Nevertheless, hitting the pedestrian in the crosswalk, combined with excessive speed, clear vision, and ignoring a stoplight,

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<sup>146</sup> 790 N.Y.S.2d 678 (App. Div. 3d Dep’t 2005).

<sup>147</sup> Brief for the Respondent at 3, *People v. McDermott*, 790 N.Y.S.2d 678 (App. Div. 3d Dep’t 2005) (No. 2004-00393), 2004 WL 3560170, at 3.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *McDermott*, 790 N.Y.S.2d 678 (App. Div. 3d Dep’t 2005).

<sup>152</sup> *Id.*; Brief for the Respondent at 3, *People v. McDermott*, 790 N.Y.S.2d 678 (App. Div. 3d Dep’t 2005) (No. 2004-00393), 2004 WL 3560170, at 3.

<sup>153</sup> N.E.2d 564 (N.Y. 1972).

<sup>154</sup> *Id.* at 565

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

could lead a jury to the reasonable inference that the accused acted with criminal negligence.<sup>161</sup>

However, in a 2008 decision, the Court of Appeals may have created the “rule of two” when it took the teeth out of criminal negligence as it relates to careless driving.<sup>162</sup> In *People v. Cabrera*,<sup>163</sup> the court retreated from the standards set in *Haney*.<sup>164</sup> In *Cabrera*, the accused drove his friends to a lake to go swimming.<sup>165</sup> The accused violated the terms of his junior license by having more than two underage people in his vehicle.<sup>166</sup> Moreover, the accused did not wear his seatbelt, did not require his passengers to wear their seatbelts, and was driving thirty miles per hour over the speed limit.<sup>167</sup> The accused took a corner too fast, and the “vehicle went off the left-hand side of the road, it slid down a 25–to–30–foot embankment.”<sup>168</sup>

The crash killed two people in the accused’s vehicle.<sup>169</sup> The court held that the accused’s carelessness in speeding was not enough to uphold a verdict of criminally negligent homicide.<sup>170</sup> Instead, the People needed to show that the driver committed an affirmative action that “transform[s] ‘speeding’ into ‘dangerous speeding,’ conduct by which the defendant exhibits the kind of ‘serious[ly] blameworth[y]’ carelessness whose ‘seriousness would be apparent to anyone who shares the community’s general sense of right and wrong.’”<sup>171</sup>

Here, the majority distinguished *Cabrera* from *Haney* because the accused in *Haney* caused the death of another person when he ran a red-light signal while speeding.<sup>172</sup> In comparison, the accused, in *Cabrera*, was merely speeding.<sup>173</sup> Therefore, in *Cabrera*, the majority held that “a young and inexperienced but sober driver, [who] entered a tricky downhill curve, . . . at a [high] rate of speed” did not commit seriously blameworthy conduct when his careless driving caused the death of three people.<sup>174</sup>

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<sup>161</sup> *Id.* at 569.

<sup>162</sup> *See* *People v. Cabrera*, 887 N.E.2d 1132 (N.Y. 2008).

<sup>163</sup> 887 N.E.2d 1132 (N.Y. 2008).

<sup>164</sup> *Cf. Cabrera*, 887 N.E.2d 1132 (N.Y. 2008), *with Haney*, N.E.2d 564 (N.Y. 1972).

<sup>165</sup> *Cabrera*, 887 N.E. 2d at 1133.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 1134.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 1136.

<sup>171</sup> *Id.* (quoting *Boutin*, 555 N.E.2d 253).

<sup>172</sup> *Id.* at 1136-37.

<sup>173</sup> *Id.* at 1138.

<sup>174</sup> *Id.*

Nevertheless, the dissenting judges noted that a jury could draw the inference of criminal negligence.<sup>175</sup> The dissenting judges compared the accused's actions in *Cabrera* with the actions of the accused in *Haney*.<sup>176</sup> First, the dissenters cited excessive speed.<sup>177</sup> Next, the dissenters noted that the accused broke the conditions of his junior driver's license by having too many people in the vehicle.<sup>178</sup> Finally, the dissenters pointed out that the accused further broke the conditions of his junior license by not requiring all of the passengers in the vehicle to wear a seatbelt. Therefore, like the *Haney* court, the dissenters found that these actions together could lead the jury to infer criminal negligence.<sup>179</sup>

In 2015, the Third Department upheld a conviction of criminally negligent homicide against a driver who killed a person who was standing on her front yard.<sup>180</sup> In *People v. Olsen*,<sup>181</sup> a driver lost control of her vehicle, on a country road, and went careening across a front lawn, striking a bystander. Using the rule of two (without mentioning it), the court upheld the conviction because, at the trial, witnesses testified that the accused was using a cellphone, weaving in and out of traffic, and passing vehicles.<sup>182</sup> *Olsen* distinguishes *Cabrera*, because in *Olsen* the accused participated in overt conduct—using the cellphone, and illegally passing vehicles—while speeding.<sup>183</sup> In comparison, in *Cabrera*, the driver merely sped.<sup>184</sup>

Nevertheless, in 2018, the Second Department dismissed, albeit weak charges, of criminally negligent homicide against a

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<sup>175</sup> *Id.* at 84 (Graffeo, J., dissenting).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 82 (Graffeo, J., dissenting).

<sup>178</sup> *Id.* (Graffeo, J., dissenting).

<sup>179</sup> *Id.* at 83 (Graffeo, J., dissenting).

<sup>180</sup> *People v. Olsen*, 1 N.Y.S.3d 555 (App. Div. 3d Dep't 2015).

<sup>181</sup> 1 N.Y.S.3d 555 (App. Div. 3d Dep't 2015).

<sup>182</sup> *Id.* at 558:

[W]e reject defendant's claim that her conduct was not sufficiently blameworthy to support the criminally negligent homicide conviction and conclude that her actions evinced "the kind of "seriously blameworthy" carelessness whose "seriousness would be apparent to anyone who shares the community's general sense of right and wrong. . . . [The] defendant engaged in unsafe passing and drove in an erratic manner while looking at her cell phone, which ultimately caused her to lose control of her vehicle and fatally strike an innocent bystander. . . .

*Id.*

<sup>183</sup> *Id.*

<sup>184</sup> *See Cabrera*, 887 N.E.2d 1132 (N.Y. 2008).

limousine driver.<sup>185</sup> In *People v. Pino*,<sup>186</sup> a limousine driver miscalculated a turn.<sup>187</sup> A pickup truck, driven by an intoxicated man, broadsided the limousine, which caused the death of four passengers.<sup>188</sup> The court held that the People, “did not establish ‘the kind of seriously condemnatory behavior that the Legislature envisioned when it defined ‘criminal negligence,’ even though the consequences here were fatal.’”<sup>189</sup> Here, the actions of the limousine driver were negligent and tragic by not criminally negligent.

Again, in 2020, the Second Department upheld the “rule of two,” when it invalidated a 2016 conviction against a man who caused a three-vehicle accident on an upstate parkway.<sup>190</sup> The court held that the People failed to “establish beyond a reasonable doubt, that the defendant ‘fail[ed] to perceive a substantial and unjustifiable risk’ which caused the death” of another person.<sup>191</sup>

At issue in *People v. Deriva*,<sup>192</sup> was whether the accused had enough space to pass another vehicle. Here, similar to the other cases, speed was a factor; however, quoting *Cabrera*, the court held that the People failed to prove conduct other than carelessness.<sup>193</sup> In *Deriva*, the accused miscalculated a lane change while speeding.<sup>194</sup> The court held that a mere miscalculation does not “transform speeding into dangerous speeding.”<sup>195</sup> *Deriva* distinguishes *Olsen* because, in *Olsen*, the accused committed other affirmative acts such as using the cellphone and weaving in and out of traffic.<sup>196</sup>

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<sup>185</sup> *People v. Pino*, 78 N.Y.S.3d 408 (App. Div. 2d Dep’t 2018), *leave to appeal denied*, 111 N.E.3d 1121 (N.Y. 2018).

<sup>186</sup> 78 N.Y.S.3d 408 (App. Div. 2d Dep’t 2018), *leave to appeal denied*, 111 N.E.3d 1121 (N.Y. 2018).

<sup>187</sup> *Id.* at 410.

<sup>188</sup> Brief for the Respondent at 1, *People v. Pino*, 78 N.Y.S.3d 408 (App. Div. 2d Dep’t 2018) (No. 2017-01048.) 2017 WL 10716689, at 1.

<sup>189</sup> *Pino*, 78 N.Y.S.3d at 411 (quoting *People v. Cabrera*, 887 N.E.2d 1132 (N.Y. 2008)) (citations omitted).

<sup>190</sup> *People v. Derival*, 181 A.D.3d 918 (App. Div. 2d Dep’t 2020).

<sup>191</sup> *Id.*

<sup>192</sup> 181 A.D.3d 918 (App. Div. 2d Dep’t 2020).

<sup>193</sup> “In cases concerning charges of criminally negligent homicide arising out of automobile accidents involving excess rates of speed, ‘it takes some additional affirmative act by the defendant to transform speeding into dangerous speeding.’” *Id.* (quoting *People v. Cabrera*, 887 N.E.2d 1132 (N.Y. 2008)) (citations omitted).

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *See Olsen*, 1 N.Y.S.3d 555 (App. Div. 3d Dep’t 2015).

## 2. *Second-Degree Manslaughter*

A person is guilty of second-degree manslaughter when “[h]e recklessly causes the death of another person.”<sup>197</sup> First, second-degree manslaughter requires causation.<sup>198</sup> The accused’s criminal negligence must cause the victim’s death. Second, the accused must perceive the risk and consciously disregard it.<sup>199</sup> Therefore, in second-degree manslaughter, knowledge of the risk is critical.<sup>200</sup>

In *People v. Taylor*,<sup>201</sup> the accused failed to stop at a flashing red traffic signal. The accused struck a vehicle, and as a result of the accident, the driver of the other vehicle died.<sup>202</sup> The People presented evidence that the accused drank several beers that night.<sup>203</sup> Furthermore, at trial, a witness testified that he told the accused “that if he did not slow down, he would kill somebody.”<sup>204</sup> However, on appeal, the Third Department found too much time elapsed between the statements about the accused’s driving and the accident.<sup>205</sup> Therefore, even when considering the totality of the accused’s conduct—drinking, speeding, running traffic lights, and ignoring comments to slow down—it did not rise to the level of criminal negligence.<sup>206</sup>

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<sup>197</sup> N.Y. PENAL LAW § 125.15(1) (McKinney 2019).

<sup>198</sup> See *People v. Raymond*, 867 N.Y.S.2d 643 (App. Div. 4th Dep’t 2008).

<sup>199</sup> “The crime of manslaughter in the second degree requires the People to establish that defendant recklessly caused the death of another by creating and consciously disregarding a substantial and unjustifiable risk of death.” *People v. Hart*, 698 N.Y.S.2d 357, 360 (App. Div. 3d Dep’t 1999).

<sup>200</sup> *People v. Kern*, 545 N.Y.S.2d 4, 18 (App. Div. 2d Dep’t 1989), *aff’d*, 554 N.E.2d 1235 (N.Y. 1990):

[I]f the defendant is aware of the risk of death and consciously disregards it and the risk is of such a nature that disregard thereof is a gross deviation of the standard of conduct that a reasonable person would have observed under those circumstances, he is guilty of reckless manslaughter in the second degree if death results.

*Id.*

<sup>201</sup> 297 N.Y.S.2d 192 (App. Div. 3d Dep’t 1969).

<sup>202</sup> *Id.* at 193.

<sup>203</sup> *Id.* at 193-94.

<sup>204</sup> *Id.* at 194.

<sup>205</sup> The witness told the accused that his driving would “kill someone” three hours before the accident. *Id.*

<sup>206</sup> “To convict of manslaughter, second degree, under the circumstances, it would be necessary to hold that the act of passing a red blinking traffic light without stopping was a conscious disregard of a risk.” *Id.*

However, general familiarity with an area may lead to the inference that a person consciously disregarded a known risk.<sup>207</sup> In *People v. Heinsohn*,<sup>208</sup> the accused operated an unregistered vehicle at a high rate of speed on a busy city road. To get around heavy traffic, the accused allegedly maneuvered his vehicle into the median so that he could overtake a work truck.<sup>209</sup> The maneuver caused the accused to strike two people on a pedestrian refuge island.<sup>210</sup>

At trial, the accused took the stand.<sup>211</sup> During cross-examination, the accused testified that he had a general familiarity with the area.<sup>212</sup> The court held that “[t]he jury was properly permitted to conclude that when the defendant, knowing that there was a safety island ahead, pulled out from behind the van, leaving the traffic lanes and crossing the dividing line, he consciously disregarded the substantial risk that pedestrians would be standing on the island.”<sup>213</sup> Therefore, a jury can make the inference that the accused had criminal negligence because he had a *general familiarity* with the area and drove at an excessive speed in an unregistered vehicle.<sup>214</sup>

Generally, second-degree manslaughter can survive the “rule of two” because, unlike criminally negligent homicide, the driver has an *awareness* of the risk. In *People v. Asaro*,<sup>215</sup> the accused drove double the posted speed limit on a windy country road.<sup>216</sup> At one point, the accused stopped his vehicle in the middle of the road to “rev its engine.”<sup>217</sup> Right after stopping, the accused rapidly accelerated and crossed a double yellow line, which caused the accused to crash head-on into another vehicle.<sup>218</sup> The impact of the crash caused the death of

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<sup>207</sup> See *People v. Heinsohn*, 459 N.Y.S.2d 329 (App. Div. 2d Dep’t 1983), *aff’d*, 462 N.E.2d 145 (N.Y. 1984); see also *People v. Kern*, 554 N.E.2d 1235 (N.Y. 1990) (an intervening cause does not necessarily negate the accused’s criminally negligent conduct.).

<sup>208</sup> 459 N.Y.S.2d 329 (App. Div. 2d Dep’t 1983).

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*; A pedestrian refuge island is an elevated surface on a roadway. The refuge island gives pedestrians a place to wait as they cross a wide road. Refuge islands are often found on large roadways where a pedestrian cannot cross the road in one traffic light interval. See *Pedestrian Refuge*, FEDERAL HIGHWAY ADMINISTRATION (June 2018), [https://safety.fhwa.dot.gov/ped\\_bike/step/docs/techSheet\\_PedRefugeIsland2018.pdf](https://safety.fhwa.dot.gov/ped_bike/step/docs/techSheet_PedRefugeIsland2018.pdf).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.* at 330.

<sup>213</sup> *Id.* at 331.

<sup>214</sup> *People v. Heinsohn*, 462 N.E.2d 145-46 (N.Y. 1984).

<sup>215</sup> 998 N.E.2d 810 (N.Y. 2013).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

the other driver.<sup>219</sup> At the trial, a witness testified that the accused had an awareness of the dangerous curve on the road because the witness warned him.<sup>220</sup> Therefore, the Court of Appeals held that the accused “consciously disregard[ed] the risk he created” when he “used a public road as his personal drag strip to showcase the capabilities of his modified sports car.”<sup>221</sup>

#### IV. OTHER JURISDICTIONS

As mentioned above, other jurisdictions have tailored their statutes to quantify specific types of negligent conduct as vehicular manslaughter. Georgia casts a wide net; nearly any traffic infraction can lead to a conviction of homicide by vehicle.<sup>222</sup> In contrast, New Jersey periodically updates its vehicular homicide statute to include new problematic conduct.<sup>223</sup>

##### 1. Georgia’s Catch-All Model

Homicide by vehicle, in Georgia, is when a person violates the Motor Vehicle and Traffic Law, and that violation causes the death of another.<sup>224</sup> Homicide by vehicle in the first degree is when the accused allegedly causes the death of another while fleeing from the police,<sup>225</sup> passing a stopped school bus,<sup>226</sup> recklessly driving,<sup>227</sup> driving under the influence,<sup>228</sup> or leaves the scene of an accident.<sup>229</sup> First-degree homicide by vehicle is a felony that can result in a sentence of three-

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<sup>219</sup> *Id.*

<sup>220</sup> *Id.* at 814 (quoting *People v. Heinsohn*, 462 N.E.2d 145 (N.Y. 1984):

“Later, just before the collision, Ligenzowski pleaded with defendant to slow down because they were ‘about to make the turn.’ Taken together, ‘there was sufficient proof for the jury to find that defendant was aware of and consciously disregarded a substantial and unjustifiable risk that his actions would cause the death of another.’” (citations omitted).

*Id.*

<sup>221</sup> *Id.*

<sup>222</sup> *See generally* GA. CODE ANN. § 40-6-393(c) (2020).

<sup>223</sup> *Cf.* N.J. Stat. Ann. § 2C:11-5 (West 2020), *with* N.J. Stat. Ann. § 2C:11-5 (West 2012), *and* N.J. Stat. Ann. § 2C:11-5 (West 2003).

<sup>224</sup> GA. CODE ANN. § 40-6-393 (2020).

<sup>225</sup> GA. CODE ANN. § 40-6-395 (2020).

<sup>226</sup> GA. CODE ANN. § 40-6-163 (2020).

<sup>227</sup> GA. CODE ANN. § 40-6-390 (2020).

<sup>228</sup> GA. CODE ANN. § 40-6-391 (2020).

<sup>229</sup> GA. CODE ANN. § 40-6-393 (2020).



to-fifteen years.<sup>230</sup> Any other offense of the Vehicle and Traffic code that causes the death of another person is second-degree homicide by vehicle.<sup>231</sup> Second-degree homicide by vehicle is a misdemeanor that carries a one-year maximum sentence.<sup>232</sup>

Homicide by vehicle is a strict liability offense.<sup>233</sup> Furthermore, the State does not need to prove specific intent to commit the underlining Motor Vehicle and Traffic Law infraction.<sup>234</sup> However, the State must prove that the accused's conduct is the "legal and proximate" cause of the victim's death.<sup>235</sup> Therefore, if the accused broke a traffic law and was the proximate cause of the victim's death, then she is guilty of homicide by vehicle.

## 2. *New Jersey's Selective Approach*

New Jersey's reckless vehicular homicide statute is similar to Sections 125.12, 125.13, and 125.14 of New York's Penal Law. However, in New York, the Legislature limited its vehicular homicide statutes to accidents that concern alcohol consumption or the transportation of hazardous materials.<sup>236</sup> By contrast, New Jersey did not limit its reckless vehicular homicide statute to driving under the influence.<sup>237</sup> Nonetheless, in New Jersey, some statutes address homicide caused by driving a vehicle while intoxicated as a strict liability offense.<sup>238</sup>

Unlike New York's statutes, New Jersey's vehicular homicide statute allow a jury to draw inferences about the accused's conduct. In New Jersey, proof that the accused did any of the proscribed types of

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<sup>230</sup> *Id.*

<sup>231</sup> GA. CODE ANN. § 40-6-393 (c) (2020).

<sup>232</sup> GA. CODE ANN. § 17-10-3 (2020).

<sup>233</sup> *State v. Ogilvie*, 734 S.E.2d 50, 53 (Ga. 2012).

<sup>234</sup> *Ogilvie*, 734 S.E.2d at 53:

"A charge on accident is appropriate for this crime only when there is evidence that the defendant did not voluntarily drive into the crosswalk instead of stopping for a pedestrian who was located in the statutorily protected area. At trial, *Ogilvie* did not dispute that she voluntarily drove into the crosswalk and struck the child there. . . ."

*Id.*

<sup>235</sup> *McGrath v. State*, 627 S.E.2d 866, 869 (Ga. Ct. App. 2006).

<sup>236</sup> *Cf.* N.J. STAT. ANN. § 2C:11-5 (West 2020), *with* N.Y. Penal Law § 125.12 - 125.14 (McKinney 2019).

<sup>237</sup> *See* N.J. STAT. ANN. § 2C:11-5 (West 2020).

<sup>238</sup> *See* N.J. STAT. ANN. § 2C:11-5.3 (West 2020) (However, that statute is outside the purposes of this note as this note concerns careless driving other than driving while intoxicated.).

conduct “may give rise to an inference that the [the accused] was driving recklessly.”<sup>239</sup> New Jersey made law lists such conduct as using a cell phone, falling asleep while driving, driving without proper sleep, or failure to maintain a lane a second-degree crime when such conduct causes the death of another person.<sup>240</sup> A person found guilty of second-degree reckless vehicular homicide can face a five-to-ten year sentence.<sup>241</sup>

However, if a person causes the death of another while driving on school grounds, illegally driving through a school crossing, or driving through an undesignated school crossing with the knowledge that juveniles are present, that is a first-degree crime under the New Jersey’s reckless vehicular homicide statute.<sup>242</sup> A person found guilty of first-degree vehicular homicide can face a ten-to-twenty year sentence.<sup>243</sup>

## V. ANALYSIS

Stakeholders need to take action to correct dangerous road conditions. It is crucial now because higher density development is supposed to encourage people to walk to nearby businesses and transportation stops.<sup>244</sup> However, at the same time—as evident by the need for parking—higher density development does not necessarily reduce car dependency.<sup>245</sup> Therefore, people who walk must still contend with dangerous road conditional caused by careless drivers. Moreover, the current methodology which focusses on educating drivers and pedestrians about road safety is not enough.<sup>246</sup>

### A. Regression

In the early twentieth century, a felony conviction carried severe consequences; accordingly, judges were hesitant “to attach the grave consequences of a felony conviction to results by mere inadvertence or carelessness.”<sup>247</sup> Prior to the revised Penal Law, New

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<sup>239</sup> N.J. STAT. ANN. § 2C:11-5 (West 2020).

<sup>240</sup> *Id.*

<sup>241</sup> *See* N.J. STAT. ANN. § 2C:43-6 (West 2020).

<sup>242</sup> N.J. STAT. ANN. § 2C:11-5 (West 2020).

<sup>243</sup> *See* N.J. STAT. ANN. § 2C:43-6 (West 2020).

<sup>244</sup> Sullivan, *supra* note 2.

<sup>245</sup> LONG ISLAND REGIONAL PLANNING COUNCIL *supra* note 7.

<sup>246</sup> Retting, *supra* note 23

<sup>247</sup> CLACK & MARSHALL, A TREATISE ON THE LAW OF CRIMES § 10.13 (7th ed. 1967).

York Courts defined criminal negligence as “a disregard of the consequences which may ensue from the act, and indifference to the rights of others.”<sup>248</sup> Therefore, to combat death caused by careless conduct, legislatures enacted lesser statutes.<sup>249</sup>

In New York, under the old Penal Law, the Legislature created a vehicular homicide statute that criminalized reckless or negligent conduct while operating a vehicle that resulted in another person’s death.<sup>250</sup> However, the vehicular homicide statute did not include the “failure to perceive” a risk associated with careless conduct.<sup>251</sup> Therefore, New York’s early vehicular homicide statute did not have teeth because it still required that the accused consciously participate in careless conduct, which resulted in death.<sup>252</sup>

In the 1960s,<sup>253</sup> New York revised its Penal Code—it eliminated vehicular homicide—and enacted statutes that comprised reckless driving, reckless endangerment, vehicular manslaughter, criminally negligent homicide, and second-degree manslaughter,<sup>254</sup> because of the courts’ reluctance to convict an accused of involuntary manslaughter for causing death through careless driving.<sup>255</sup> Under the revised Penal Law, the Legislature enacted criminally negligent homicide to address “a wide spectrum of fatal conduct of both omission and commission.”<sup>256</sup> Therefore, criminally negligent homicide replaced New York’s old vehicular homicide statute and carried a lesser burden of proof.<sup>257</sup>

However, since the enactment of New York’s revised Penal Law, the courts have chipped away at the effectiveness of using

<sup>248</sup> See *People v. Angelo*, 159 N.E. 394, 396 (N.Y. 1927); see also Robert P. Fine & Gary M. Cohen, *Is Criminal Negligence a Defensible Basis for Penal Liability?*, 16 BUFF. L. REV. 749, 753 (1967).

<sup>249</sup> See CLARK, *supra* note 247.

<sup>250</sup> See N.Y. PENAL LAW § 1053-a (repealed 1967) (“A person who operates or drives any vehicle of any kind in a reckless or culpably negligent manner, whereby a human being is killed, is guilty of criminal negligence in the operation of a motor vehicle resulting in death.”).

<sup>251</sup> See Fine, *supra* note 248.

<sup>252</sup> See CLARK, *supra* note 247.

<sup>253</sup> The New York State Legislature ratified the Penal Law in 1965. The Penal Law came into effect on September 1, 1967. See SIXTH INTERN REPORT OF THE STATE OF NEW YORK, TEMPORARY COMMISSION ON REVISION OF THE PENAL LAW AND CRIMINAL CODE (February 1, 1967) *archived at*

<https://pdfs.semanticscholar.org/d7df/7812c0b0cc91fe85ff84d7042b1efal1e64b8.pdf>.

<sup>254</sup> CLARK, *supra* note 247.

<sup>255</sup> *Id.*

<sup>256</sup> Hechtman, *Practice Commentary*, MCKINNEY’S CONS LAWS OF NY, Book 39, Penal Law § 125.10 (1975).

<sup>257</sup> *Id.*

criminal statutes to penalize careless drivers. The decision in *Cabrera* reflects as much, and the *Cabrera* decision may be what caused the so-called “rule of two.” Trial courts are using *Cabrera* as a means to dismiss homicide charges against careless drivers.<sup>258</sup> *Cabrera* had an immediate chilling effect on using the criminally negligent homicide statute to deter careless driving.

On September 5, 2008, three months after *Cabrera*, a Suffolk County judge, dismissed charges of criminally negligent homicide against a driver who caused the death of three people as a result of speeding.<sup>259</sup> The accused was driving over eighty-seven miles-per-hour in a fifty-five miles-per-hour zone.<sup>260</sup> The driver “dramatically” pressed the brakes, which caused the vehicle to spin into oncoming traffic.<sup>261</sup> A minivan traveling in the opposite direction—under the posted speed limit—broad-sided the accused’s vehicle.<sup>262</sup> The force of the accident caused the death of two teenagers in the accused’s vehicle and the death of the minivan driver’s son.<sup>263</sup>

The county court judge held that while teenage death caused by inexperience driving is tragic, it did not rise to the level of criminal negligence.<sup>264</sup> Citing *Cabrera*, which the county court judge noted, the facts were eerily similar.<sup>265</sup> The judge held that criminal negligence required risk creation.<sup>266</sup> The judge reasoned that merely speeding, even excess of thirty miles per hour, on a busy suburban road, during rush hour, is not “blameworthy conduct,” which rises to the level of risk creation that the Court of Appeals set in *Cabrera*.<sup>267</sup> Thus, the court acknowledged the “rule of two,” without explicitly mentioning it.

Nevertheless, the accused “allegedly drove ‘in a manner which unreasonably interferes with the free and proper use of the public highway, or unreasonably endangers users of the public highway,’” therefore, the county court judge did not dismiss the reckless driving charge.<sup>268</sup> Consequently, for causing the death of three people, the

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<sup>258</sup> See *People v. Badke*, 865 N.Y.S.2d 488 (Suffolk Cty. Ct. 2008).

<sup>259</sup> *People v. Badke*, 865 N.Y.S.2d 488, 494 (Suffolk Cty. Ct. 2008).

<sup>260</sup> *Id.* at 490-91.

<sup>261</sup> *Id.* at 494.

<sup>262</sup> *Id.* at 490-91.

<sup>263</sup> *Id.* at 490.

<sup>264</sup> *Id.* at 494.

<sup>265</sup> *Id.* at 492.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.* at 494.

<sup>268</sup> *Id.*

driver pled guilty and received a thirty-day sentence and a revoked driver's license.<sup>269</sup>

As noted above, despite transit-oriented development and programs to improve road safety—pedestrian deaths are on the rise. When the Court of Appeals decided *Cabrera*, it set the standards back eighty years to a time where the courts did not want to find a careless driver guilty of a felony.<sup>270</sup> For example, in the 1934 case of *People v. Grieco*,<sup>271</sup> the Court of Appeals did not want to convict a driver who caused the death of a person by driving intoxicated, of first-degree manslaughter, which was a felony. The court wrote that “[t]he degree of the crime cannot be fixed ‘by analyzing the constituent acts which, in combination, make up the transaction, and viewing them distributively. It is determined by the quality and purpose of the transaction as a whole.’”<sup>272</sup> Furthermore, the court held that it is improper to take a misdemeanor Vehicle and Traffic Law violation that is a crime against society and use it to prove a crime against a person.<sup>273</sup> However, today prosecutor in *Grieco* could have used New York's alcohol-related vehicular homicide statutes.

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<sup>269</sup> *Smithtown Teen Gets 30 Days for Crash That Killed 3*, NEWS12 LONG ISLAND (Dec. 04, 2008 12:37 PM), <http://longisland.news12.com/story/34765843/smithtown-teen-gets-30-days-for-crash-that-killed-3>.

<sup>270</sup> See generally *People v. Grieco*, 193 N.E. 634, 635 (N.Y. 1934):

“The Vehicle and Traffic Law makes many offenses misdemeanors. If this conviction should be sustained, every driver of an automobile, who, while committing one of the offenses defined as a misdemeanor in that act, accidentally causes the death of a person, will be guilty of the crime of manslaughter in the first degree no matter how thoughtless or unintentional the act.”

*Id.*

<sup>271</sup> 193 N.E. 634, 635 (N.Y. 1934).

<sup>272</sup> *Id.* at 635.

<sup>273</sup> *Id.*:

“A moment before the collision the defendant's conduct constituted a crime, a misdemeanor against society, against law and order, and against the people of the state. The commission of the misdemeanor in which he was engaged was not one affecting the person or property of deceased or of another. He had not seen the deceased and did not know that she was present. The fact that his automobile struck her could not instantly change his conduct so as to make it an act affecting the person of the deceased and thereby make him liable for the crime of manslaughter in the first degree.”

*Id.*

## B. Public Perception

It is also important to note that in 2009 when the court decided *Cabrera*, accident fatalities, more specifically pedestrian fatalities, were the lowest ever recorded in the nation's history.<sup>274</sup> Ten years since *Cabrera*, pedestrian deaths are as high as they were in the 1970s.<sup>275</sup> To that end, the public perception of pedestrian-involved vehicle accidents can use an attitude check. Public perception is important because, under a theory of general deterrence, the public must take note of the unlawful conduct, and the punishment must shock the public into avoiding similar conduct.<sup>276</sup>

Generally, commentators on social media and news websites voice anger and frustration towards dead pedestrians and get annoyed that a driver's day may get delayed.<sup>277</sup> Some posters question why pedestrians use roads, "[t]his is sad. B[ut] why walk at night in [the] rain. . . ."<sup>278</sup> Blaming walkers even extends to parking lots—where one-out-of-four pedestrian deaths occur.<sup>279</sup> In a post about a pedestrian who got struck and killed in a parking lot, one commenter wrote, "[s]o sad but people fail to pay attention to cars in parking lots all the [ ] time!"<sup>280</sup>

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<sup>274</sup> Retting, *supra* note 23, at 12.

<sup>275</sup> *Id.*

<sup>276</sup> Basham, *supra* note 48.

<sup>277</sup> See "There is something wrong with these people. Nobody ever taught them how to walk on the street?" Donald Grasso, *Stringer News*, FACEBOOK (Mar. 17, 2020, 7:38 PM) (commenting on a post about a pedestrian struck by a vehicle); see also "I don't know if it [is] ignorance, [ ]arrogance, [ ]or just plain stupidity. [ ]They walk and ride bicycles straight into the path of a vehicle and expect them to stop on a dime. [ ]And they're usually all but invisible because they wear dark colors. [ ]Meanwhile the driver not only has their vehicle damaged and their day delayed, [ ]they have to live with the fact they killed someone even if it was unintentional. [ ]The roads are getting worse and worse because people don't use common sense." Thomas F. Cullen Jr., *Stringer News*, FACEBOOK (Mar. 17, 2020, 8:36 PM) (responding to Donald Grasso); see also "A law should be [e]nacted for [people] walking at night [t]hat they should carry a flashlight or wear neon gear so that they could be seen easily. So many stories I read where [people] are struck and killed walking in the dark." Terry Ciulla, *Patch.com Homeless Man in Wheelchair Fatally Struck by Car: PD*, FACEBOOK (Feb. 11, 2020 7:21 PM) (commenting on the death of 62-year-old man in a wheelchair who was struck by a vehicle while crossing a road).

<sup>278</sup> Matthew Savage, *Stringer News*, FACEBOOK (Dec. 24, 2017 12:07 AM)

[https://www.facebook.com/pg/StringerNewsService/posts/?ref=page\\_internal](https://www.facebook.com/pg/StringerNewsService/posts/?ref=page_internal).

<sup>279</sup> Accardo, *infra* note 284; Chris Giarratana, *How Safe Are Pedestrians in Local Parking Lots*, SAFETY RESOURCE CENTER (Apr. 17, 2018),

<https://www.trafficsafetystore.com/blog/tips-for-enhancing-parking-lot-pedestrian-safety>.

<sup>280</sup> Anthony Accardo, *Stringer News*, FACEBOOK (May 21, 2019)

Socioeconomic status can create a public perception of the victim.<sup>281</sup> Socioeconomic status is apparent in enforcement, improvements, and prosecution. Generally, pedestrians are dying at a faster rate in more disadvantaged neighborhoods.<sup>282</sup> In some jurisdictions, accidents that involve a pedestrian fatality are not “even judged worth a traffic ticket.”<sup>283</sup> Commonly, suburban people view commuting through the use of walking and mass transportation as tools for the poor.<sup>284</sup> Therefore, prosecutors treat accidents that result in the death of a pedestrian differently.

### C. General Deterrence and Public Perception

In some circumstances, prosecutors will bring a case because of community pressure.<sup>285</sup> Whereas, in other circumstances, similar cases might not even get the attention of the press, let alone a prosecutor.<sup>286</sup> The two examples below, while anecdotal, demonstrate the inequalities of prosecution. The first case concerns a youth from an affluent neighborhood who died as a result of car-surfing.<sup>287</sup> The second case concerns a middle-aged woman who was hit by a vehicle and dragged some distance down the road in a lower-middle-income

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<sup>281</sup> Maciag, *infra* note 286.

<sup>282</sup> Mike Maciag, *Pedestrians Dying at Disproportionate Rates in America's Poorer Neighborhoods*, GOVERNING (Aug. 2014), <https://www.governing.com/topics/public-justice-safety/gov-pedestrian-deaths-analysis.html>:

“Select areas, typically downtowns and business districts, are often targeted for improvements, it’s the less visible lower-income neighborhoods where pedestrians are dying at the highest rates. It’s not just an inner-city problem -- at least, not for long. As more low-income residents are priced out of downtowns, and as poverty continues to rise in less pedestrian-friendly suburban communities, higher pedestrian death tolls could follow.”

*Id.*

<sup>283</sup> Eric Roper, *In Crashes That Kill Pedestrians, The Majority of Drivers Don't Face Charges*, STAR TRIBUNE (May 22, 2016 10:41 AM), <https://www.startribune.com/in-crashes-that-kill-pedestrians-the-majority-of-drivers-don-t-face-charges/380345481/?refresh=true>.

<sup>284</sup> “Nowadays, many local politicians don’t see transit as a vital transportation function — instead, they think of it as a government aid program to help poor people who lack cars.” Joseph Stromberg, *The Real Reason American Public Transportation Is Such A Disaster*, VOX (Aug. 10, 2015, 5:49 PM), <https://www.vox.com/2015/8/10/9118199/public-transportation-subway-buses>.

<sup>285</sup> See Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 NOTRE DAME L. REV. 321 (2002).

<sup>286</sup> See *Id.*

<sup>287</sup> See *QuickFacts Cold Spring Harbor CDP, New York*, UNITED STATES CENSUS BUREAU (Jul. 1, 2019), <https://www.census.gov/quickfacts/coldspringharborcdpnewyork>.

area.<sup>288</sup> Both incidents happened in the same jurisdiction within months of each other.

### 1. *Car-surfing Incident*

On September 23, 2018, three youths solicited an Uber driver into letting them surf on the roof of the driver's vehicle.<sup>289</sup> That night, the youths were using Uber to hop between different parties in Cold Spring Harbor, an affluent suburban neighborhood.<sup>290</sup> During the last trip home, the youths offered the driver \$70 to allow them to car-surf.<sup>291</sup> At first, the driver refused, after pressuring the driver, the youths persuaded him to let them car-surf in exchange for \$40.<sup>292</sup>

Two of the youths surfed on the Uber driver's vehicle, as the other youth filmed it to post on social media.<sup>293</sup> One youth fell off the vehicle and suffered a head injury.<sup>294</sup> However, the victim did not seek medical treatment and died in his sleep as a result of the head injury.<sup>295</sup> Under a theory of general deterrence, the People prosecuted the Uber driver. According to the District Attorney:

We have a culture right now where the mindset is, "How can we outdo each other?" particularly among young people on social media, and we often see the tragic consequences of that. . . . A lot of young people think they are invincible, and that's something we need to keep drilling in their heads — that this could happen to anyone when you engage in this kind of conduct.<sup>296</sup>

Therefore, here, the People sought to deter other youths from car-surfing, not necessarily dissuade other Uber drivers from allowing customers to surf on their vehicles, but to use the publicity from prosecuting the Uber driver to discourage car-surfing among youths.

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<sup>288</sup> *QuickFacts Deer Park CDP, New York*, UNITED STATES CENSUS BUREAU (Jul. 1, 2019), <https://www.census.gov/quickfacts/fact/table/deerparkedpnewyork/PST045219>.

<sup>289</sup> Robert Brodsky, *Parents Forgive Uber Driver Responsible for Son's 'Car Surfing' Death*, NEWSDAY (Feb. 14, 2020 6:06 PM), <https://www.newsday.com/long-island/suffolk/car-surfing-uber-driver-sentencing-1.41829885>.

<sup>290</sup> *Id.*

<sup>291</sup> Michael O'Keefe, *Uber Driver Charged with Manslaughter in Death of Car Surfer, Suffolk Officials Say*, NEWSDAY (Nov. 5, 2018 10:59 PM), <https://www.newsday.com/long-island/crime/uber-car-surfing-manslaughter-1.22940332>.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

<sup>296</sup> *Id.*



Ultimately, the Uber driver pled guilty to second-degree manslaughter and received a sentence of ten-months' time-served and five years of probation.<sup>297</sup> Here, the People had a strong case for second-degree manslaughter because the driver initially refused the request. Refusing the request to allow the youths to car-surf could demonstrate a conscious awareness of the risk.

## 2. *Vehicle Dragging Incident*

In contrast, in the same jurisdiction and during the same year, prosecutors only charged a delivery driver who hit and dragged a pedestrian to her death with leaving the scene of an accident.<sup>298</sup> The delivery driver was leaving his drop off at an auto parts store when he hit two pedestrians.<sup>299</sup> The collision knocked the first pedestrian to the ground.<sup>300</sup> However, the collision caused the delivery truck to suck the second pedestrian into the wheel well.<sup>301</sup> The delivery driver continued on his way, ignoring the screams of the pedestrian and bystanders.<sup>302</sup> The delivery driver dragged the second pedestrian a half-mile down the road “zigzagged and fishtailed” across the road “before [the pedestrian’s] body became dislodged. . . .”<sup>303</sup>

Witnesses claimed the driver got out of the delivery truck, looked at the dead pedestrian, and drove away.<sup>304</sup> The police caught the delivery driver at his next stop, and he allegedly told detectives that he “didn’t think she was alive,” and stated that he “panicked, and [needed] to get to [his] next job.”<sup>305</sup> Days after the accident, members of the community said there were still “reddish-colored skid marks” down the road.<sup>306</sup>

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<sup>297</sup> *Brodsky, supra* note 293.

<sup>298</sup> Andrew Smith, *Sini: Autozone Delivery Driver May Face Increased Charges in Death of Pedestrian*, NEWSDAY (August 7, 2019 6:39 PM), <https://www.newsday.com/long-island/crime/autozone-fatal-van-death-1.34748834>.

<sup>299</sup> *Id.*

<sup>300</sup> *Id.*

<sup>301</sup> *Id.*

<sup>302</sup> *Id.*

<sup>303</sup> *Id.*

<sup>304</sup> *Id.*

<sup>305</sup> *Id.* (quotes are statements made by the District Attorney to the press on the day of the arraignment).

<sup>306</sup> *Donnell Hicks Indicted for Fatal Hit-And-Run; Funeral Held for East Quogue Woman*, THE SOUTHAMPTON PRESS (Aug. 2, 2019), <https://www.27east.com/southampton-press/donnell-hicks-indicted-for-fatal-hit-and-run-funeral-held-for-east-quogue-woman-1503938/>.

The People charged the delivery driver with leaving the scene of an accident without reporting when there is an injury.<sup>307</sup> The delivery driver pled guilty to leaving the scene of an accident, and he is currently awaiting sentencing.<sup>308</sup>

Under current law, in the vehicle dragging incident, prosecutors cannot sustain a conviction that requires either criminal negligence or recklessness. First, criminal negligence does not apply because the driver's blameworthy conduct is the failure to see the pedestrians. As stated in *Pino* and *Deriva*, miscalculation when driving is not morally blameworthy conduct.

#### D. Time to get rid of the "Rule of Two"

In *Cabrera*, the Court of Appeals gutted any severe consequences of careless driving that causes death or severe harm. Under current law, a prosecutor cannot convict a careless driver, let alone a driver who causes death to others by excessively speeding. Currently, the driver needs to commit an overt act beyond a minor traffic offense, which then turns the driver's negligent conduct into something more significant than a mere traffic infraction. Nevertheless, New York has a few possibilities to make the consequences of killing a pedestrian severe.

First, New York can enact a catch-all statute like Georgia's homicide by vehicle statute. Under Georgia's statute, anyone who causes the death of a person as a result of breaking a traffic law can face a homicide conviction.<sup>309</sup> However, there are downsides to

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<sup>307</sup> Complaint, *People v. Hicks*, 01296-2019 (Suffolk Cty. Ct. 2019); N.Y. VEH. & TRAF. LAW § 600 (McKinney 2019):

"Any person operating a motor vehicle who, knowing or having cause to know that personal injury has been caused to another person, due to an incident involving the motor vehicle operated by such person shall, before leaving the place where the said personal injury occurred, stop, exhibit his or her license and insurance identification card for such vehicle, when such card is required pursuant to articles six and eight of this chapter, and give his or her name, residence, including street and street number, insurance carrier and insurance identification information including but not limited to the number and effective dates of said individual's insurance policy and license number, to the injured party, if practical, and also to a police officer, or in the event that no police officer is in the vicinity of the place of said injury, then, he or she shall report said incident as soon as physically able to the nearest police station or judicial officer."

*Id.*

<sup>308</sup> *Appearances*, *People v. Hicks*, 01296-2019 (Suffolk Cty. Ct. 2019).

<sup>309</sup> *See* GA. CODE ANN. § 40-6-393 (2020).

Georgia's statute. First, some people in Georgia find the State's catch-all statute too lenient.<sup>310</sup> Without aggravating factors, most deaths caused by a driver's traffic infractions fall under second-degree homicide by vehicle.<sup>311</sup> The maximum penalty under second-degree homicide by vehicle is one year.<sup>312</sup>

Georgia's first-degree homicide by vehicle statute does carry a fifteen-year maximum sentence.<sup>313</sup> However, the driver must violate specific sections of Georgia's Motor Vehicle and Traffic Law.<sup>314</sup> For instance, if a driver leaves the scene of a fatal accident, the State can charge her with first-degree homicide by vehicle.<sup>315</sup> Therefore, if New York had a statute similar to Georgia's homicide by vehicle statute, the driver in the vehicle dragging incident could have faced a three-to-fifteen-year sentence.

People who advocate for reforming the Georgia statute would like to see the list of proscribed conduct under first-degree homicide by vehicle expanded.<sup>316</sup> Their argument may have merit; however, the Georgia statute is a good one because it recognizes that a person who causes the death of another—with a vehicle—caused a homicide. The same cannot be said in New York, where the courts think the death of a person caused by a driver is a tragedy—not culpable criminal conduct.<sup>317</sup> However, in Georgia, if a driver sets off a chain of events that causes a “tragedy,” the driver is branded as someone who committed a homicide. That could have a general deterrence effect on future careless drivers.

Second, New York can amend its vehicular homicide statutes to include more conduct. Currently, New York limits charges of vehicular homicide to accidents that involve intoxication or hazardous materials.<sup>318</sup> However, states like New Jersey regularly update its vehicular homicide statutes to include new problematic conduct that

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<sup>310</sup> See Tim Chitwood, *How Can Homicide By Vehicle Be A Misdemeanor?*, LEDGER-ENQUIRER (Mar. 2, 2017 6:15 PM), ledger-enquirer.com/news/local/article136029928.html.

<sup>311</sup> See GA. CODE ANN. § 40-6-393 (2020).

<sup>312</sup> See GA. CODE ANN. § 17-10-3 (2020).

<sup>313</sup> GA. CODE ANN. § 40-6-393 (a), (b), (d) (2020).

<sup>314</sup> *Id.*

<sup>315</sup> *Id.*

<sup>316</sup> Chitwood, *supra* note 314.

<sup>317</sup> “[T]he Court must look to the conduct of the defendant which caused the accident in determining the legal sufficiency of the evidence as to criminal negligence, not the results, no matter how tragic those results.” *Badke*, 865 N.Y.S.2d at 494-95.

<sup>318</sup> See N.Y. PENAL LAW § 125.12 - 125.14 (McKinney 2019).

includes drowsy driving, falling asleep, using a handheld device, failure to maintain a lane while driving.<sup>319</sup>

The limitations of the New Jersey Statute is that it enumerates specific conduct.<sup>320</sup> However, the value in the New Jersey statute is that it allows a jury to draw an inference that the accused acted with criminal negligence if she committed any of the enumerated conduct.<sup>321</sup> Another downside to the New Jersey statute is that it limits conduct where the jury can draw an automatic inference. However, the enumerated conduct does not foreclose a vehicular homicide conviction. If the accused's actions fall outside of the conduct that the Legislature proscribes, a prosecutor can still secure a vehicular homicide conviction if she can prove that operator drove recklessly.<sup>322</sup>

## VI. CONCLUSION

If the Legislature is serious about transit-oriented development and curtailing car dependency, it must enact new statutes that recognize the seriousness of careless driving. Currently, in the United States, New York ranks at the top of people who walk and use public transportation to commute to work.<sup>323</sup> Therefore, it is shocking that New York lacks hard consequences for negligent conduct that results in the death of a pedestrian.

Therefore, to deter future careless driving, the Legislature should make the consequences for the negligent death of a pedestrian more severe. Encouraging high-density development that attracts people to walk without having severe consequences for negligent conduct that causes the death of a pedestrian is unconscionable.

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<sup>319</sup> N.J. STAT. ANN. § 2C:11-5 (West 2020).

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> “A driver need not be intoxicated or under the influence of drugs to drive recklessly; a finding of recklessness can be premised upon excessive speed, among other factors.” *State v. Buckley*, 78 A.3d 958, 966 (N.J. 2013).

<sup>323</sup> “Less than 3 percent (2.7 percent) of Americans walk to work. But more than 5 percent of workers do in New York City (5.9 percent).” “Five percent of U.S. commuters use transit to get to work. New York City, with its extensive subway and rail system, is the big outlier here—more than 30 percent of workers get to their jobs by transit in greater New York City.” Richard Florida, *The Great Divide in How Americans Commute to Work*, CITY LAB (Jan. 22, 2019), <https://www.citylab.com/transportation/2019/01/commuting-to-work-data-car-public-transit-bike/580507/>.