

University of Chicago Law School

## Chicago Unbound

---

Journal Articles

Faculty Scholarship

---

1999

### Doing without Speed Limits

Cass R. Sunstein

Robert E. King

Follow this and additional works at: [https://chicagounbound.uchicago.edu/journal\\_articles](https://chicagounbound.uchicago.edu/journal_articles)



Part of the [Law Commons](#)

---

#### Recommended Citation

Cass R. Sunstein & Robert E. King, "Doing without Speed Limits," 79 Boston University Law Review 155 (1999).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

---

# ESSAY

## DOING WITHOUT SPEED LIMITS

ROBERT E. KING\* AND CASS R. SUNSTEIN\*\*

INTRODUCTION .....	155
I. MONTANA AND THE BASIC RULE .....	157
A. <i>Some Relevant Facts</i> .....	157
B. <i>The Fall and Rise of the Basic Rule</i> .....	158
II. DRIVING HABITS .....	162
A. <i>What Montanans Did and Did Not Do</i> .....	162
B. <i>Tourists and Speed Magnets</i> .....	164
C. <i>A Note on Coordination</i> .....	167
D. <i>Early Results</i> .....	167
III. TRADEOFFS .....	171
A. <i>Safety</i> .....	171
B. <i>Fuel Efficiency</i> .....	171
C. <i>Air Pollution</i> .....	172
D. <i>Tourism</i> .....	173
E. <i>Reputation</i> .....	174
F. <i>A Note on Benefits</i> .....	175
IV. LAW ENFORCEMENT .....	178
A. <i>In General</i> .....	178
B. <i>Administering Standards</i> .....	181
C. <i>Rule of Law Values</i> .....	184
V. RECENT LEGISLATIVE ACTIONS AND POLITICAL POLARIZATION ...	185
VI. VOID FOR VAGUENESS? .....	188
CONCLUSION .....	190

### INTRODUCTION

In late 1995, Montana became the first and only state to eliminate a numerical daytime speed limit on its interstate highways. Instead, the state adopted a “Basic Rule” of “reasonable and prudent” daytime driving. The law produced a heated debate about its consequences, the relationship between norms and law, and the choice between rules and standards in statutes

---

\* J.D., *Cum Laude*, University of Chicago Law School, 1998.

\*\* Karl N. Llewellyn Distinguished Service Professor, University of Chicago Law School.

affecting primary conduct. Montana's endeavor to regulate drivers' conduct without a numerical speed limit offers an intriguing opportunity to explore the role of social norms in regulating behavior, the importance and feasibility of cooperation, and the possibility of controlling behavior through relatively open-ended law.

In this essay, we investigate the consequences of Montana's daytime driving rules. We examine the law itself, its effects on driving behavior and law enforcement, and recent attempts to overturn the law. Specifically, we evaluate the law's impact on the motoring public and Montana as a whole. We also consider the Basic Rule's effect on legal standards: Does the law's subjective nature promote arbitrary and ineffective enforcement? We explore the effect of the law on so-called "rule of law" values of both drivers and police officers. In late 1998, the Montana Supreme Court invalidated the Basic Rule on due process grounds, and the ultimate fate of the "reasonable and prudent" rule remains unclear. In Part VI, we offer a brief discussion of that issue.

Our basic findings are as follows:

1. In the short term, the change in the speed limit had few consequences for the driving behavior of Montana citizens, in terms of overall speed and safety. Most citizens appeared to coordinate their behavior around a certain area of appropriate speed, both during the period of an official 55 mile-per-hour (mph) limit and after the return of the Basic Rule. This point suggests the possibility that driving habits may outstrip the law. Indeed, we suspect that much of driving behavior is governed by informal norms. Those norms govern speed as well as many other topics, and have a far greater degree of flexibility and specificity than any law. Of course these norms operate against a backdrop set by speed limits in other states and past limits in Montana. It is hard to know how fast Montanans would drive without this backdrop.

2. The change in the speed limit had the significant consequence of encouraging very fast and somewhat reckless driving by tourists. Many of these drivers appeared to be attracted to Montana by virtue of its Basic Rule. This point also has an important implication; a state that allows very fast driving (because of a high speed limit in the form of a rule or standard) may find itself becoming a "speed magnet," which may produce unanticipated dangers.

3. Partly as a result of (2), aggregate mortality and morbidity rates on the interstate highways of Montana increased after the switch to the Basic Rule. Both statistics, however, generally remained within historical fluctuating ranges, and a sharp upward spike in 1997 does not offer any unambiguous lesson.

4. Even taking (2) and (3) into account, the aggregate motor vehicle accident rate did not increase enormously in Montana, perhaps because the Basic Rule encouraged drivers to use the interstate highways, which are relatively safe. This point suggests a final important implication; one of the conse-

quences of decreasing safety on interstate highways may be to increase overall safety, if the decrease is a result of a change in policy that shifts drivers away from relatively more perilous rural roads and makes interstate driving more attractive.

5. The Basic Rule has created serious problems for law enforcement. Its vague nature subjects the Basic Rule to many different interpretations by both drivers and law enforcement officials. The results have included increased roadside confrontations between officers and motorists, and also a judicial and administrative backlog in adjudicating possible violations.

6. There is some evidence that motorists are becoming accustomed to the law. For example, traffic citations for Basic Rule violations, initially soaring in the law's first year, declined as drivers apparently adapted to the flexible standards. Similarly, after a sharp spike in fatalities in 1997, Montana's roadways became safer in 1998, the law's third year of operation.

In the end, we do not mean to say that the Basic Rule is a good or a bad idea. The most important and interesting elements of this story lie in the details rather than the "bottom line."

## I. MONTANA AND THE BASIC RULE

### A. *Some Relevant Facts*

To understand the Basic Rule, it is necessary to emphasize that Montana is a large and thinly populated area. With 147,047 square miles of territory, it stands as the fourth largest state.<sup>1</sup> Montana's population, however, totals approximately 870,000, making it the third most sparsely populated state<sup>2</sup> with an average of just six people per square mile.<sup>3</sup> Billings, with its 87,000 residents, is the state's largest city.<sup>4</sup> Yet Billings does not face the suburban sprawl of other metropolitan areas; the first traffic light outside of the city is 145 miles away in Miles City, population 8,400.<sup>5</sup>

Traveling Montana's vast expanse via its interstate highways can be relatively hazardous. The state has 88,000 miles of highway.<sup>6</sup> There is no separate state police force and only 212 Highway Patrol officers monitor the

---

<sup>1</sup> See George Bennett, *Montana Sees Old Ways Slipping Away*, PALM BEACH POST, Apr. 14, 1996, at 1A.

<sup>2</sup> See *id.* (noting that only Alaska and Wyoming have fewer people per square mile).

<sup>3</sup> See Mark Mueller, *Montana's Wild Frontier Beckons Actors, Writers and Reactionaries*, BOSTON HERALD, Apr. 7, 1996, at 6.

<sup>4</sup> See *In Big Sky State, Sky's the Speed Limit Again*, ST. PETERSBURG TIMES (Fla.), Dec. 9, 1995, at 1A.

<sup>5</sup> See *id.*

<sup>6</sup> See Tim Cornwell, *Bomber from the Backwoods?*, INDEPENDENT (London), Apr. 7, 1996, at 10.

roads.<sup>7</sup> As of 1995, Montana's rate of 2.3 fatalities per 100 million vehicle miles was considerably above the national average of 1.8 deaths per 100 million vehicle miles.<sup>8</sup> Moreover, the deadliest stretch of road in the country and two of the nation's three most perilous highway areas are located in Montana, with fatality rates of 6.206 and 4.031 per 100 million miles, respectively.<sup>9</sup> In sum, Montana's wide open spaces afford ample distance and danger for the motoring public.

### B. *The Fall and Rise of the Basic Rule*

Before the enactment of federally mandated speed limits, Montana governed its highways under its Basic Rule.<sup>10</sup> This law, passed in 1955,<sup>11</sup> accorded motorists substantial freedom in conducting themselves on the road, requiring drivers to operate their vehicles in a

careful and prudent manner and at a rate of speed no greater than is reasonable and proper under the conditions existing at the point of operation, taking into account the amount and character of traffic, condition of brakes, weight of vehicle, grade and width of highway, condition of surface, and freedom of obstruction to the view ahead.<sup>12</sup>

Citizens of Montana regarded the Basic Rule as practical and a necessary way of life, viewing fast driving in the words of one inhabitant, as a "God-given right."<sup>13</sup>

Congress altered the situation in 1974. In the wake of the 1973 Arab oil embargo, the federal government enacted the Federal Aid Highways Amendments of 1974 and imposed a "National Maximum Speed Limit" of 55 mph.<sup>14</sup> Initially urged as a conservation effort, the law rapidly gained

---

<sup>7</sup> See Brad Knickerbocker, *Yes, America There Is a Speed Limit in the 'Montanabahn,'* CHRISTIAN SCI. MONITOR, July 10, 1996, at 3. The 212 figure represents the maximum authorized number of Highway Patrol officers; however, Montana Highway Patrol Major Bert Obert noted that the Highway Patrol does not operate at this full contingent and usually fields slightly more than 200 officers. For example, in 1998 there were 206 Highway Patrol officers. See Telephone Interview with Bert Obert, Major, Montana Highway Patrol (Aug. 18, 1998).

<sup>8</sup> See *In Big Sky State*, *supra* note 4, at 1A.

<sup>9</sup> See Steven D. Kaye et al., *Hello 75, So Long 55*, U.S. NEWS & WORLD REP., Dec. 18, 1995, at 71 (designating I-90 and I-15 as the perilous roads).

<sup>10</sup> See MONT. CODE ANN. § 61-8-303 (1973).

<sup>11</sup> See Jessica Kowal, *Sky's the Limit on Montana Highways*, TIMES UNION (Albany, N.Y.), Dec. 12, 1995, at A16; see also William J. Cook, *Why Did We Have to Slow Down in the First Place?*, U.S. NEWS & WORLD REP., Dec. 18, 1995, at 74.

<sup>12</sup> MONT. CODE ANN. § 61-8-303.

<sup>13</sup> Tom Kenworthy, *New Life in the Fast Lane: Wide-Open Throttles in Wide Open Spaces*, WASH. POST, Dec. 9, 1995, at A3.

<sup>14</sup> See Tyce Palmaffy, *Don't Brake for Big Government*, J. OF AMER. CITIZENSHIP POL. REV., Sept.-Oct. 1996, at 11; see also Cook, *supra* note 11, at 74.

support as a safety measure, reducing highway fatalities.<sup>15</sup> The federal government enforced the mandate by restricting highway funds for those states that refused to establish the new limit.<sup>16</sup> As a result, every state acquiesced and 55 mph emerged as the national speed limit.<sup>17</sup>

Its libertarian populace<sup>18</sup> not content to bow to Washington's edict, Montana passed a "[f]uel conservation speed limit" to achieve nominal compliance with the federal government's ultimatum.<sup>19</sup> The law, explicitly designed to "insure conservation of a resource,"<sup>20</sup> established violations of the speed limit as misdemeanors not reported against a driver's insurance record.<sup>21</sup> Infractions cost the driver \$5, payable directly to the Highway Patrol officer issuing the ticket.<sup>22</sup> Simultaneously, Montana's legislature enacted another law stating that its fuel conservation speed limit would remain effective "only as long as the establishment of those speed limits by the state is required by federal law as a condition to the state's continuing eligibility to receive [federal highway] funds . . . ."<sup>23</sup>

Montana's motorists virtually ignored the newly imposed speed limits; driving behavior was largely a function of norms, not of law.<sup>24</sup> Partly be-

---

<sup>15</sup> See Palmaffy, *supra* note 14, at 11 (noting that the law remained in effect long after the fuel crisis ended because of presumed safety benefits).

<sup>16</sup> See *id.*

<sup>17</sup> See *id.*

<sup>18</sup> See Tamara Jones, *Montana's Rocky Reputation: First the Freeman. Now Maybe the Unabomber. What Gives?*, WASH. POST, Apr. 5, 1996, at F1 ("'As soon as they learn to drive a car or handle a rifle, Montanans learn self-sufficiency,' writes Norma Tirrell in her historical guidebook, 'Montana.' 'Neighbors are to be trusted,' she says, 'but it is this ability to take care of one's self that defines the Montana spirit.'"); see also Graham Brink, *Free to Govern Oneself*, ST. PETERSBURG TIMES (Fla.), Dec. 21, 1997, at 4D (quoting one Montanan's view of governmental regulation: "'Speed laws chip away at the already eroding footholds we call liberty.'").

<sup>19</sup> MONT. CODE ANN. § 61-8-304 (1998). It is important to note that Montana's Basic Rule continued to remain in effect even during the period when the fuel conservation speed limit applied. For example, if a driver was stopped for driving 120 mph on a road on which the 55 mph fuel conservation speed limit applied, he would be issued a Basic Rule citation instead of a citation under the fuel conservation speed limit because his actions were not "reasonable and prudent." Telephone Interview with Bert Obert, Major, Montana Highway Patrol (Nov. 12, 1998).

<sup>20</sup> MONT. CODE ANN. § 61-8-304.

<sup>21</sup> See Peyton Whitely, *With a Roar, Montana Drops Day Speed Limit*, SEATTLE TIMES, Dec. 10, 1995, at A1.

<sup>22</sup> See *id.* (noting "some Montanans simply kept a stash of \$5 bills over the visor, ready to pay and go").

<sup>23</sup> MONT. CODE ANN. § 61-8-305 (1996).

<sup>24</sup> See Richard Simon, *When the Rules of the Road Are a Big Blur*, L.A. TIMES, July 6, 1996, at A1 (arguing "the bottom line is that 'it's social norms that drive behavior, not speed limits'").

cause they were accustomed to driving under the Basic Rule and partly because of the weak sanctions for speeding, the state's citizens continued their basic driving patterns in the decades following 1974. As one newspaper described the situation, "Montana drivers are known for flouting the law, and the state for winking at such behavior."<sup>25</sup> Studies reported that a majority of motorists disobeyed Montana's speed limit on both interstates and two-lane highways.<sup>26</sup> Critics derided the national speed limit as "irrelevant," "practically meaningless," and "a joke."<sup>27</sup> Moreover, some disobeyed the speed limit on principle, as a protest against federal intrusion.<sup>28</sup> Thus, the very existence of the law created at least a degree of faster driving.<sup>29</sup> Folklore emerged regarding the laxity of enforcement.<sup>30</sup> The state traffic highway spokesman recognized the dilemma, acknowledging, "'You cannot choose the speed limit for people, . . . [t]he truth is that it can't be enforced unless people agree with it.'"<sup>31</sup>

The lax compliance took a toll on law enforcement. Despite writing approximately 66,000 \$5 tickets per year, the Highway Patrol described the law as "'a nondeterrent to speeding.'"<sup>32</sup> The law also had a corrosive effect

<sup>25</sup> Kenworthy, *supra* note 13, at A3.

<sup>26</sup> See *Some in Montana Regret Easing of Speed Limits*, CHATTANOOGA FREE PRESS, Dec. 10, 1995 ("[H]alf of all drivers exceeded the 65 mph limit on Montana's interstates. Two-thirds ignored the 55 mph signs on two lane highways."). One resident summarized the widespread violations, noting, "[n]obody drove the speed limit anyway." Jim Robbins, *With Speed Limits Untied by U.S., Montana Reverts to the Fast Lane*, N.Y. TIMES, Dec. 9, 1995, at 6.

<sup>27</sup> Kowal, *supra* note 11, at A16.

<sup>28</sup> See *id.*

<sup>29</sup> The social meaning of fast driving became, in the aftermath of the federal speed limit law, a kind of rebellion against federal intrusion, and in some quarters the result was to spur faster driving. See, e.g., Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 951 (1995) (discussing the role of social meaning in human behavior).

<sup>30</sup> For example, Representative Pat Williams, Montana's only Congressman, recounted an anecdote where a driver paid a patrolman in cash and the motorist began to close his window to drive away. The officer stopped the individual and said "'Hold on, old timer, hold onto that ticket. It's good for the rest of the day.'" Kenworthy, *supra* note 13, at A3. In another Montana driving tradition, a driver and each of his passengers would place "\$5 on the dashboard, and if the driver made it from Billings to Helena without getting stopped, he won the kitty." *In Big Sky State*, *supra* note 4, at 1A. "'The joke goes that if you g[ot] pulled over, you'd just give the officer a \$20 bill, . . . then tell the next three guys you already paid.'" *Id.*

<sup>31</sup> Ben Spiess, *Change in Speed Limit Draws Mixed Reviews*, MONTGOMERY ADVERTISER, Nov. 18, 1996, at 1A.

<sup>32</sup> Kenworthy, *supra* note 13, at A3 (quoting Col. Craig Reap, head of the Montana Highway Patrol). Admittedly, the Highway Patrol could have punished offenses such as reckless driving, usually defined as traveling at more than 85 mph, more harshly and with

on the public's perception of law enforcement. The head of the Highway Patrol noted that motorists' disregard for speed limits "caused disrespect for us [the Highway Patrol] in particular because we were burdened with enforcing the law."<sup>33</sup> Furthermore, the law demoralized the officers themselves. One patrolman lamented, "You wondered how much good you were doing out there."<sup>34</sup>

Montana received its reprieve from federal regulation of its interstate highways with the enactment of the National Highway System Designation Act (the "NHSDA") in 1995.<sup>35</sup> Spurred by the Republicans' desire to limit the role of the national government, Congress enacted the NHSDA by the overwhelming margin of 419 to 7 in the House and on a voice vote in the Senate, thus repealing the federal speed limit.<sup>36</sup> President Clinton "reluctantly" signed the legislation on November 28, 1995.<sup>37</sup>

The NHSDA endured a storm of alarmist and often unfounded protests, many based on predictions about adverse effects on safety.<sup>38</sup> President Clinton admonished states to "exercise this authority responsibly,"<sup>39</sup> while Transportation Secretary Federico Peña sent letters to governors, "imploring them, for safety reasons, to consider not raising speed limits."<sup>40</sup> Insurance companies warned of premium increases to pay for the impending roadway

---

higher fines. The Highway Patrol, however, rarely invoked such penalties, writing fewer than 3,000 reckless driving tickets per year before the Basic Rule. *See id.*

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

<sup>34</sup> *Id.*; see also Steve Lopez, *America's Fast Lane*, TIME, Oct. 13, 1997, at 44 (describing motorists' disregard for the prior law as "insulting" to law enforcement).

<sup>35</sup> National Hwy. System Designation Act of 1995, Pub. L. No. 104-59, 23 U.S.C.A. § 161 (Nov. 28, 1995).

<sup>36</sup> See Palmaffy, *supra* note 14, at 11.

<sup>37</sup> *Id.* This essay, however, is a study of Montana's particular experience, and does not purport to be a general treatment of the consequences of raising speed limits. Part of the reason that we avoid firm conclusions about the effects of the change in Montana is the small samples in terms of both years and fatalities.

<sup>38</sup> See Kaye et al., *supra* note 9, at 71 (predicting "that the end of the . . . federal mandate is no less than a death sentence for thousands more motorists whose lives will be lost in speed-related crashes").

<sup>39</sup> Statement on Signing the National Highway System Designation Act of 1995, 31 WEEKLY COMP. PRES. DOC. 2064 (Dec. 4, 1995); see also Brian Blomquist & Valerie Richardson, *55 to Remain the Law for D.C.-Area Drivers, But in Montana, Big Sky's the Limit*, WASH. TIMES, Dec. 8, 1995, at A1 (noting that the President did not support the bill); Warren P. Strobel, *'Double-Nickel' Comes to End of the Road, Clinton Grudgingly Signs Bill Killing 22-Year-Old Top Speed*, WASH. TIMES, Nov. 29, 1995, at A4 (noting that if President Clinton had vetoed the bill, Congress probably would have overridden his veto).

<sup>40</sup> Kaye et al., *supra* note 9, at 71-72.



carnage.<sup>41</sup> Ralph Nader labeled the repeal “homicidal legislation.”<sup>42</sup> Montana law enforcement echoed the national fears, predicting a potential 50% increase in fatalities with “phenomenal wrecks . . . cars that roll 8, 9, and 10 times.”<sup>43</sup> One trooper ominously warned, “[m]y phone is going to ring more often in the middle of the night.”<sup>44</sup>

Proponents of the NHSDA mounted their own public relations effort. They argued that the law would simply legalize existing behavior by drivers, and bring the law more in accordance with informal norms already producing sufficiently safe driving.<sup>45</sup> Supporters downplayed the safety fears, noting improvements in drunk-driving laws, seat belts, air bags, and anti-lock brakes.<sup>46</sup>

On December 9, 1995, Montana reverted to its Basic Rule of reasonable and prudent conduct to govern its roadways.<sup>47</sup>

## II. DRIVING HABITS

### A. *What Montanans Did and Did Not Do*

What was the consequence of this change? In the short term, the effects were minimal. Throughout 1996 drivers did not significantly alter their conduct under their new-found roadway freedom.<sup>48</sup> Although the percentage of

---

<sup>41</sup> See *id.* at 72; Palmaffy, *supra* note 14, at 11 (discussing insurance companies' beliefs that increased speed will lead to more fatalities).

<sup>42</sup> Strobel, *supra* note 39, at A4; see also Carol J. Castaneda, *Speed-Limit Law Reaches End of Road Friday*, USA TODAY, Dec. 4, 1995, at 3A (indicating that Nader called Clinton and Congress “political cowards” for signing the bill because of other favorable provisions); *Speed Doesn't Kill; Road Deaths Stable Despite Higher Limits*, COLUMBUS DISPATCH (Ohio), Sept. 25, 1997, at 10A (quoting Ralph Nader as predicting that “[h]istory will never forgive Congress for this assault on the sanctity of human life”).

<sup>43</sup> Robbins, *supra* note 26, at 6. Such wild fatality forecasts later proved grossly exaggerated. See *infra* Part II.D.

<sup>44</sup> *Id.*

<sup>45</sup> See Kaye et al., *supra* note 9, at 71 (commenting that the federal speed limit “turned good drivers into scofflaws”); Castaneda, *supra* note 42, at 3A (noting that “[p]eople already are driving 65 or 70 mph in . . . 55-mph posted zones”).

<sup>46</sup> See Kaye et al., *supra* note 9, at 73 (finding that cultural factors and safer cars have lowered injury and fatality rates).

<sup>47</sup> See Kenworthy, *supra* note 13, at A3. The new law, however, provides stiff penalties. Unlike the conservation speed limit, under the Basic Rule fines can range from \$70 to \$500 and count against a driver's insurance record. See MONT. CODE ANN. § 61-8-303 (1996).

<sup>48</sup> See *Speed Doesn't Kill; Road Deaths Stable Despite Higher Limits*, *supra* note 42, at 10A (“Changing the law didn't change how fast people were driving; it decriminalized their behavior. If people were already driving between 65 and 75 mph, changing the signs along the road would have little effect on the death toll.”).

motorists traveling above 80 mph increased from 2% to 5%,<sup>49</sup> total average speeds increased negligibly, from 72 to 74 mph during the law's first few months.<sup>50</sup> In fact, speed played no part in the first twelve traffic fatalities.<sup>51</sup> Lynn Conn, a Helena resident, seemed to typify Montanans' attitude toward the Basic Rule: "I'm a 65 mph driver, and I imagine I'll just stay there."<sup>52</sup> The Director of the state's Highway Traffic Safety Division said, "[a] lot of press outside the state did not assume Montanans had a modicum of common sense . . . . I still give the average Montanan a lot of credit for pretty much driving in a reasonable and prudent manner. The world is not going to hell."<sup>53</sup> Anecdotal evidence indicates that Montanans' driving behavior remains relatively constant in terms of speed, although speed limit proponents warn that motorists, now more accustomed to the increased roadway speeds, may be driving less carefully.<sup>54</sup>

Three factors may explain the constancy of drivers' behavior. First, it may take a significant period of time for a change in the speed limit to produce changes in driving behavior. Second, as Montanans like to insist, the state's motorists appear to possess good judgment and honed ability in traversing its highways.<sup>55</sup> This accounts for the striking 72 mph speeds before the repeal of the law and the nominal initial increase thereafter. Republican Governor Marc Racicot contended that, "[w]e tend to respect each other, instead of aiming for one another. I have great faith that Montanans will be concerned with safety and security."<sup>56</sup> One state resident maintained that Montanans are "used to driving long distances, and they know which roads are safe at which speed."<sup>57</sup>

The third and perhaps the most compelling explanation of drivers' constant speeds may be Montana's often treacherous road conditions. These conditions, more than formal law, may dictate much driving behavior. Interstate drivers in Montana face a litany of perils: brutal weather, icy pavement,

---

<sup>49</sup> See James Brooke, *Life Without Speed Limits: No Rush to the Fast Lane*, N.Y. TIMES, Dec. 31, 1995, at 16.

<sup>50</sup> See *id.* These figures, however, may underestimate actual speeds because many roadway sensors "embedded in the highway max out at 85 miles per hour. . . . 'They don't differentiate . . . [between] 86 or 105.'" Knickerbocker, *supra* note 7, at 3.

<sup>51</sup> See *Montana Mayhem? Maybe Not*, TELEGRAPH HERALD (Dubuque, Iowa), Jan. 7, 1996, at A7.

<sup>52</sup> *No Moting Mayhem in Montana Yet*, CHATTANOOGA TIMES, Jan. 15, 1996, at A5.

<sup>53</sup> Bill Hall, Editorial, *Montana Is Driving Fast and Driving off Its Tourists*, LEWISTON MORNING TRIB. (Maine), Jan. 10, 1996, at 10A.

<sup>54</sup> See Telephone Interview with Bert Obert, Major, Montana Highway Patrol (Apr. 10, 1998).

<sup>55</sup> See Hall, *supra* note 53, at 10A.

<sup>56</sup> Kowal, *supra* note 11, at A16.

<sup>57</sup> Valerie Richardson, *Montana Drivers Face Judgment Call; Reason, Prudence Only Speed Limits*, WASH. TIMES, Dec. 1, 1996, at A1.

roads not designed for high-speed travel, animal crossings, and sharp curves.<sup>58</sup> Epitomizing both Montanan drivers' judgment and the often challenging road conditions, one resident stated, "[i]f you don't drive in a reasonable and prudent manner, you end up in the ditch."<sup>59</sup> A visiting reporter said that in Montana, "[t]he real limits are set by the land."<sup>60</sup> Thus it appears that driving behavior in Montana is largely a function of local knowledge; it is partly for this reason that the change in law was far less important to behavior than it was feared to be. Before the abandonment of the national speed limit, citizens of Montana were violating it regularly, and when the abandonment occurred, those citizens continued to do what they were doing.

### B. *Tourists and Speed Magnets*

Tourists are the central exception to motorists' constant driving behavior. The repeal of the national speed limit turned Montana into a national speed magnet.

Montana receives an estimated seven million visitors annually.<sup>61</sup> Many of these outsiders came to be known, or more appropriately, derided, as "speed tourists."<sup>62</sup> Such visitors, spurred by their desire to drive fast, descended on the "Montanabahn."<sup>63</sup> Their exploits became legendary. A Porsche driver boasted that he traveled from Missoula to Billings, a distance of 350 miles, in less than three hours;<sup>64</sup> a Minnesota car club wanted to race "700 Corvettes . . . across the state at 150 miles an hour;"<sup>65</sup> a writer for *Forbes* hit a

---

<sup>58</sup> See Mike Henderson, *Montana Reconsiders Daytime 'Autobahn,'* CHRISTIAN SCI. MONITOR, Sept. 3, 1997, at 3 ("Severe weather conditions [] often leave packed snow and ice, and even in dry weather, roads are ravaged by the effects of constantly changing conditions."); *Perspectives*, NEWSWEEK, Dec. 11, 1995, at 27 ("[O]ur roads aren't designed for speeds much past 100 mph . . ."); Richard Simon, *When the Rules of the Road Are a Big Blur*, L.A. TIMES, July 6, 1996, at A1 ("Hitting a deer at 75 mph can badly damage a car or risk death for both motorist and animal."); Whitely, *supra* note 20, at A1 ("At such speeds [95 mph], interstate highways suddenly develop real curves, and signs that say bridges may be icy become very pertinent.").

<sup>59</sup> Otto Hallgren, Editorial, *Big Sky, Big Flap, Big Deal*, S.F. CHRON., Dec. 18, 1995, at A23.

<sup>60</sup> Richard Manning, *Your Assignment: Drive Like a Bat Outta Hell and Back; A Quick Trip Across Montana in the Age of No (Speed) Limits*, L.A. TIMES, Jan. 21, 1996, (Magazine), at 16.

<sup>61</sup> See Melanie Brennan, *A Lesson for Montana: How Speed Can Kill*, SEATTLE TIMES, June 23, 1997, at A5.

<sup>62</sup> *Montana Wants Brake on Vague Speed Rules for Daytime Drivers*, COMMERCIAL APPEAL (Memphis), Dec. 8, 1996, at C6.

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

<sup>64</sup> See Quentin Letts, *Easy Riders Rush West to High-Speed Montana*, TIMES (London), Dec. 28, 1995, at 9.

<sup>65</sup> Brooke, *supra* note 49, at 16.

top speed of 116 mph in a Miata;<sup>66</sup> fifteen test engineers drove a convoy of Mercedes through the state “at speeds in excess of 95 mph;”<sup>67</sup> a French tiremaker “wanted to run tests at 140 mph;”<sup>68</sup> and lastly, a reporter for *Popular Mechanics* drove a high-test minivan, aptly named “The Montana,” across the state at 113 mph to review the vehicle.<sup>69</sup>

The resulting behavior outraged state officials: “I think [the planned Basic Rule violations] show a real lack of respect, not only for the law in Montana, but for the rights and safety of Montana drivers and tourists . . . . Even if these were professional drivers, not everyone else on the road was.”<sup>70</sup> Highway Patrol officials were equally livid. One officer questioned a motorist who was stopped for driving 107 mph over a bridge deck, asking, “What would happen to you in your home state?”<sup>71</sup> When the man responded that at home he would have been charged with reckless driving, the officer questioned, “Well, what makes you think it’s all right to do that in this state?”<sup>72</sup>

The influx of tourists altered both average speeds and highway fatalities. But before analyzing these statistics, it is important to note their limitations. Most importantly, the Highway Patrol’s statistics lack appropriate detail in determining the full impact of Basic Rule driving patterns. For example, the statistics do not reveal how many of the out-of-staters’ accidents occurred at times when the Basic Rule was not the governing law and a numerical speed limit was in effect.<sup>73</sup> Nor do the reports specify what percentage of the out-of-state drivers’ accidents involved factors other than speed, including alcohol or failure to wear seat belts, both significant contributors to highway fatalities. Lastly, fatality statistics tend to fluctuate considerably each year, even under conditions when the posted speed limit remained constant, again undercutting the impact of such annual comparisons.<sup>74</sup>

<sup>66</sup> See R. Lee Sullivan, *The American Autobahn*, FORBES, July 15, 1996, at 37.

<sup>67</sup> *Western Empire*, DENV. POST, July 28, 1996, at B2.

<sup>68</sup> Susan Gallagher, *Yes, Virginia, There Is a Speed Limit in Montana, Even if It’s Not Exact*, ROCKY MTN. NEWS, Aug. 18, 1996, at 38A.

<sup>69</sup> Scott Oldham, *Montana Run: Cruising Montana at High Speed in a 1997 Pontiac Trans Sport Montana Minivan*, POPULAR MECH., Oct. 1996, at 46.

<sup>70</sup> Gallagher, *supra* note 68, at 38A.

<sup>71</sup> Simon, *supra* note 58, at 1.

<sup>72</sup> *Id.*

<sup>73</sup> Such non-Basic Rule times and zones include: at night, in a construction zone, within city or town limits, accidents involving trucks, or on a highway with a posted speed limit due to road conditions. See MONT. CODE ANN. § 61-8-303.

<sup>74</sup> See Patrick Bedard, *Speed Kills? Not as Much as the Feds Claim*, USA TODAY, Sept. 24, 1996, at 15A (explaining factors that influence the reliability of accident fatality statistics). The numbers are already fluctuating again, this time returning to the tourists’ favor: Through August 18th of 1998, Montana experienced a 32% decrease from the year-ago period in out-of-state vehicles’ involvement in overall roadway deaths. See Montana Highway Patrol Fatality Crash Information (Jan. 1 through Aug. 18, 1997 & 1998) (noting

Within the context of the preceding paragraph's disclaimer, noticeable driving patterns, especially those involving out-of-state motorists, began to emerge.<sup>75</sup> Although the average speed increased only 2 miles per hour during the Basic Rule's first few months,<sup>76</sup> by the close of the law's first year, average speeds climbed to 78 mph on the interstate,<sup>77</sup> in significant part (it appears) because of tourists.<sup>78</sup> Moreover, a Highway Patrol study indicated that "60 percent of the cars traveling more than 85 mph were from out of state. The figure was 75 percent for those traveling more than 95 mph."<sup>79</sup> Another investigation documented that out-of-staters, particularly Canadians, drive at higher speeds than residents on Montana's roads.<sup>80</sup>

The Montana Highway Patrol's roadway safety statistics tend to support the perception of tourists as the more dangerous drivers. From 1996 to 1997, the number of out-of-state vehicles involved in fatal accidents increased by 38%,<sup>81</sup> and the number of roadway deaths involving out-of-state vehicles increased by 69% during the same one-year span.<sup>82</sup> These numbers should, of course, be put in perspective. For example, non-Montanans were involved in only 23% of fatal accidents in 1996<sup>83</sup> and only 26% in 1997<sup>84</sup>—

---

that out-of-state vehicles were involved in 52 deaths between January 1, 1997 and August 18, 1997, but just 35 between January 1, 1998 and August 18, 1998).

<sup>75</sup> State officials blame misinformation, misunderstanding and the misconception that motorists may drive as fast as they want for the tourists' elevated speeds and reckless behavior. See Henderson, *supra* note 58, at 3.

<sup>76</sup> See Knickerbocker, *supra* note 7, at 3 (noting that the average auto speed increased only from 72 mph to 74 mph).

<sup>77</sup> Richardson, *supra* note 57, at A1 (explaining that between December 8, 1995 and December 1, 1996 the average speed increased from 72 mph to 78 mph). Note, however, that available data does not indicate exactly how much of the increase came from out-of-state drivers.

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

<sup>79</sup> *Montana Wants Brake*, *supra* note 62, at C6.

<sup>80</sup> See Dick Kreck, *105 Degrees West Longitude*, DENV. POST, Sept. 29, 1996, at 4 ("Those Canadians can really cook. Of all the drivers whizzing through the Big Sky state, Albertans average 76.8 mph; out-of-state drivers, 74.9 and Montanans, 72.9.").

<sup>81</sup> See Montana Highway Patrol Fatality Crash Information (Jan. 1 through Dec. 31, 1996 & 1997) (indicating that out-of-state vehicles were involved in 42 fatal crashes in 1996 and 58 fatal crashes in 1998).

<sup>82</sup> See *id.* (indicating that out-of-state vehicles were involved in 48 deaths in 1996 and 81 deaths in 1997).

<sup>83</sup> See *id.* (indicating that out-of-state vehicles accounted for 42 of 177 total fatal crashes in 1996).

<sup>84</sup> See *id.* (indicating that out-of-state vehicles accounted for 58 of 223 total fatal crashes in 1997); see also Henderson, *supra* note 58, at 3 (noting that as of August 10, 1997, "just 25 out-of-state cars were involved in the 122 fatal high-speed accidents"); Katy Witkowski & Bob Edwards, *Deaths Up on Montana Roads* (National Public Radio, Morning Edition,

hardly an overwhelming proportion of roadway crashes. Similarly, non-Montanans were involved in only 24% of roadway deaths in 1996 and 30% in 1997.<sup>85</sup> These statistics suggest a simple conclusion. Most fatal accidents do not include out-of-staters, but the Basic Rule attracted unsafe drivers from out of state, and this helped produce an increase in fatalities including non-residents.

### C. *A Note on Coordination*

The varying driving habits of Montanans and out-of-staters indicate a general coordination problem under the law; each motorist may interpret the Basic Rule differently, thereby causing significant divergences in traffic flow. Such speed disparities can be perilous, potentially increasing the “risk of crashes and other hazardous traffic situations, such as unsafe lane changes and following too closely.”<sup>86</sup> A Highway Patrol study estimated that the number of people traveling with the general traffic flow decreased to a record low of 41%.<sup>87</sup> This is important because accidents may be a function of flow rather than mere speed. Hence a numerical speed limit has an advantage to the extent that it provides a number around which drivers may coordinate their behavior. The significant increase in fatalities in 1997 may have resulted partly from this lack of coordination.

### D. *Early Results*

Despite the slightly elevated speeds and potential traffic flow disparities, the statistics tallying the Basic Rule’s effects, measured in terms of fatal accidents and total roadway deaths, remain inconclusive. During the first year under the Basic Rule, both fatal accidents and total roadway deaths declined by 4.8% and 7.9%, respectively.<sup>88</sup> Fatal accidents on interstate highways,

---

Sept. 15, 1997) (citing a later study that indicated that, as of September 15, 1997, “only one-third of this year’s fatal accidents involved out of state vehicles”).

<sup>85</sup> See Montana Highway Patrol Fatality Crash Information (Jan. 1 through Dec. 31, 1996 & 1997) (indicating that out-of-state vehicles were involved in 48 of 198 total deaths in 1996 and 81 of 265 total deaths in 1997).

<sup>86</sup> Montana Highway Patrol Handout (Revised, Feb. 13, 1997) to Montana Legislature for January 30, 1997 Montana Senate Highways Committee Hearing on SB 64; see also Mark Roberts & Bob Edwards, *Montana Speed Limits* (National Public Radio, Morning Edition, Dec. 16, 1996) (quoting the Chief of Montana’s Highway Patrol as stating, “We have a lot of trucks, of course, which are restricted to 65 on the interstate and 60 on the two-lanes during the day. And then, we have a lot of farm equipment and RVs and those kind of vehicles that are mixing out there with the faster cars. And those kind of things sure set up the potential for a disaster.”).

<sup>87</sup> See Montana Highway Patrol Legislative Handout, *supra* note 86.

<sup>88</sup> See Montana Highway Patrol Fatality Crash Information (Jan. 1 through Dec. 31, 1996 & 1997) (indicating that fatal accidents decreased from 186 in 1995 to 177 in 1996 and total roadway deaths decreased from 215 in 1995 to 198 in 1996).

the roads where the Basic Rule most commonly applies, did increase from 33 in 1995 to 37 in 1996, although the latter was below the 39 lethal crashes recorded in 1994.<sup>89</sup>

Statistics from this first year appeared to suggest that proponents of the Basic Rule were correct on some disputed questions. In particular, supporters contended that increased speeds on highways lured motorists away from dangerous country roads and onto better-designed, more expedient highways.<sup>90</sup> Consequently, although interstate deaths increased, the Basic Rule promoted safety by decreasing total deaths on all roads.<sup>91</sup> The first year under the Basic Rule seemed to fulfill the promise of efficient, self-regulating, and most surprisingly, safer, travel on Montana's roads.

In the following year the safety tide turned dramatically. During 1997, fatal accidents increased by 26% and total roadway deaths soared by 34%.<sup>92</sup> Speed proved particularly lethal. Measuring those crashes where speed was a factor, fatal accidents increased 39%<sup>93</sup> and total deaths rose by 47%.<sup>94</sup>

Yet the pattern reversed, though not as markedly, in 1998. As of August 18, 1998, comparing the year-ago period, fatal accidents increased a meager .77%<sup>95</sup> and total roadway deaths actually declined by 6.2%.<sup>96</sup> Even the presumably virulent element of speed proved less troublesome in 1998. Again comparing year-ago periods, fatal crashes in which speed was a factor decreased by 12%<sup>97</sup> and total roadway deaths involving speed as a factor decreased by 19%.<sup>98</sup>

---

<sup>89</sup> See Montana Highway Patrol 1997 Annual Report, Accidents by Trafficway Statistics (Fatal Crashes), 1993-1997.

<sup>90</sup> See Palmaffy, *supra* note 14, at 11.

<sup>91</sup> See *id.*

<sup>92</sup> See Montana Highway Patrol Fatality Crash Information (Jan. 1 through Dec. 31, 1996 & 1997) (noting fatal accidents increased from 177 to 223 and total roadway deaths increased from 198 to 265); see also Montana Highway Patrol 1997 Annual Report, Annual Traffic Rates. Note that some Highway Patrol Statistics indicate 49 fatal accidents in 1997. See, e.g., Montana Highway Patrol 1997 Annual Report, Where Crashes Occurred.

<sup>93</sup> See Montana Highway Patrol Fatality Crash Information (Jan. 1 through Dec. 31, 1996 & 1997) (indicating 90 fatal accidents where speed was a factor in 1996 and 125 in 1997).

<sup>94</sup> See *id.* (indicating 101 total deaths where speed was a factor in 1996 and 148 in 1997).

<sup>95</sup> See Montana Highway Patrol Fatality Crash Information (Jan. 1 through Aug. 18, 1997 & 1998) (indicating 130 fatal crashes during the relevant period in 1997 and 131 in 1998).

<sup>96</sup> See *id.* (indicating 161 deaths during the relevant period in 1997 and 151 in 1998).

<sup>97</sup> See *id.* (indicating 74 fatal crashes in which speed was a factor in the relevant period in 1997 and 65 in 1998).

<sup>98</sup> See *id.* (indicating 93 total deaths in which speed was a factor in the relevant period in 1997 and 75 in 1998).

This data is even less conclusive than the vacillating numbers indicate. For example, when comparing 1996 to 1997, excepting those accidents where a numerical speed limit was in effect (i.e., non-Basic Rule times or zones), the increases in fatal accidents and total roadway deaths amounted to 15%<sup>99</sup> and 28%,<sup>100</sup> respectively—higher numbers from the previous year, but not as devastating as the original figures. Deleting those accidents where alcohol was a factor further ameliorates the situation. Calculating fatal accidents and total deaths without those incidents where alcohol was a factor, the numbers rise a modest 13%<sup>101</sup> and 19%,<sup>102</sup> respectively. Even the specter of unbridled Basic Rule speed, seemingly a leading factor in roadway deaths, may be less important than it seems in light of the complexity in tracing causation. The Highway Patrol suggested, “[i]t’s really difficult to pin down one factor and say this is the primary cause . . . [or] factor that resulted in this crash and perhaps this death.”<sup>103</sup> In short, driving safety under the Basic Rule fluctuates, producing relatively less hazardous motoring in 1996 and year-to-date 1998, while exacerbating roadway fatalities in 1997. Equally important, the Basic Rule stands as only one factor in roadway safety analysis; conditions such as alcohol and unsafe driving during times or in zones with numerical speed limits also were significant elements in this multifaceted problem. Of course it is possible that some of these conditions are connected with the Basic Rule. Dangerous driving while drunk may be aggravated in the absence of a numerical speed limit, and reckless driving in zones without such limits may have a “spillover” effect on zones with numerical limits.

---

<sup>99</sup> See Montana Highway Patrol Fatality Crash Information (Jan. 1 through Dec. 31, 1996 & 1997) (indicating 93 fatal crashes in which a speed limit was not in effect in 1996 and 107 in 1997).

<sup>100</sup> See *id.* (indicating 107 total deaths in which a speed limit was not in effect in 1996 and 137 in 1998).

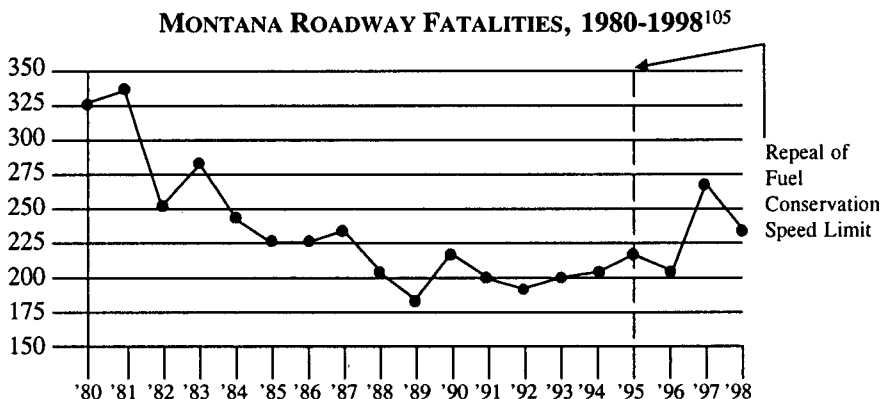
<sup>101</sup> See *id.* (indicating 111 fatal crashes in which alcohol was not a factor in 1996 and 125 in 1998).

<sup>102</sup> See *id.* (indicating 126 total deaths in which alcohol was not in factor in 1996 and 155 in 1998).

<sup>103</sup> Witkowski & Edwards, *supra* note 84.



There is also reason to question the meaning of the fatality figures themselves, because such data varies enormously from year to year. For example, from 1987 to 1988 Montana roadway deaths decreased by 15%, while increasing by 17% from 1989 to 1990.<sup>104</sup> Consider the following chart:



Measured in historical context, the 34% increase in roadway fatalities in 1997 appears to be a statistical anomaly within this fluctuating range, while the aggregate of almost three years under the Basic Rule is not greatly out of line with historic patterns of overall roadway death variations.<sup>106</sup> Some state lawmakers have so urged, with one asserting, “[a]s far as I can see, the statistics aren’t there to warrant [a numerical speed limit]. . . . One year’s worth of statistics are not enough to make a determination.”<sup>107</sup> The Director of Montana’s Highway Traffic Safety Division captured the essence of the fatality-rate debate, noting, “[i]f you’re looking for a compelling reason to have a maximum speed limit, you won’t find it in the data.”<sup>108</sup>

In conclusion, the Basic Rule has done little to alter Montanans’ driving behavior. Tourists, however, relish the lack of numerical limits, potentially contributing to divergent traffic flows and increased overall speeds. Overall, the nascent fatality figures, representing a decrease in deaths in 1996, a substantial increase in 1997, and a subsequent decline in 1998 year-to-date com-

<sup>104</sup> See Montana Highway Patrol 1997 Annual Report, Fatalities by County 1935 to Present (Yearly Totals).

<sup>105</sup> See *id.* (1980-1997 figures); Telephone Interview with Montana Highway Patrol Accident Records Department (Jan. 8, 1999) (1998 figures).

<sup>106</sup> For example, even accounting for 1997’s spike of 265 roadway fatalities, that number is still below the fatality figures for 1980, 1981 and 1983.

<sup>107</sup> *Montana Wants Brake*, *supra* note 62, at C6.

<sup>108</sup> Richardson, *supra* note 57, at A1.

parisons, suggest a possible increase in unsafe driving, but offer an inconclusive verdict on Basic Rule safety.

### III. TRADEOFFS

The Basic Rule carries with it both advantages and disadvantages. Although we cannot undertake a full cost-benefit analysis here, we can cast light on some of the important variables. Part of the analysis involves a form of "risk-risk tradeoffs,"<sup>109</sup> which occur when the regulation of one risk affects another risk. Just as regulation of one source of environmental danger (such as nuclear power plants) may increase the danger from another source (such as coal-fired power plants), so too for speed limits. Increasing or decreasing speed limits may increase some risks while decreasing others. For example, a higher speed limit on an interstate highway may increase deaths on the interstates while reducing the use of, and deaths on, less traveled, more dangerous roads. Hence, an increased speed limit may save aggregate lives. This section seeks to identify and analyze some of the most important tradeoffs.

#### A. Safety

The most heralded detriment of Montana's Basic Rule is the law's impact on roadway safety. As noted in Part II.B above, while the numbers are less than conclusive, it seems fair to characterize Montana's roads as somewhat more dangerous under the Basic Rule. Increased speeds, reckless tourists and traffic flow disparities appear particularly hazardous under the new law. Admittedly, the evidence is ambiguous, for it is possible to claim that many of the accidents and deaths occur at times or in zones not governed under the Basic Rule, that such numbers tend to fluctuate from year to year, and that increased seatbelt usage and decreased use of alcohol could have dramatically increased safety. These claims undercut the most alarmist reading of the data. More evidence is necessary for a final judgment; currently, it appears that the Basic Law has decreased safety by a modest but non-trivial amount. On the whole, safety, while the most significant concern, cannot yet be shown to be more than a slight detriment overall.

#### B. Fuel Efficiency

Decreased fuel efficiency represents another adverse consequence of the Basic Rule. As vehicle speed increases, fuel efficiency decreases, thereby causing motorists to spend more on gasoline and consume more than necessary of a non-replenishing natural resource. The *Popular Mechanics* re-

---

<sup>109</sup> See W. Kip Viscusi, *Risk-Risk Analysis*, in *THE MORTALITY COSTS OF REGULATORY EXPENDITURES: A SPECIAL ISSUE OF THE JOURNAL OF RISK AND UNCERTAINTY* 5 (W. Kip Viscusi ed., 1994) (suggesting risk-risk analysis as a replacement for cost-benefit analysis).

porter who test drove the Montana minivan throughout the state provides a colorful discussion of the decrease in fuel efficiency at high speeds, writing, “[b]ack at 113 mph, the trip computer on the Trans Sport [Montana minivan] says we’re averaging 6 miles per gallon. Right there, we discover the first drawback of traveling—even legally—at such high speeds. At this rate, the Trans Sport’s 24-gal. tank will be dusty by Tarkio, about 125 miles down the road.”<sup>110</sup> Conversely, a commercial truck driver noted the economic advantage of lower speeds, stating that on his trip through Montana from Vancouver, British Columbia, to Hartford, Connecticut, “[i]t’s about a thousand bucks in my pocket to drive slower.”<sup>111</sup>

Reasonable questions, however, can be raised about the fuel efficiency argument. Obviously, fuel efficiency alone is not the criterion upon which to establish speed limits; if it were, the law would limit vehicles to their most efficient and unrealistically low speeds of 35 to 40 mph.<sup>112</sup> It is also possible to increase fuel efficiency while maintaining a relatively high speed limit through, for example, higher miles per gallon or using light rather than heavy trucks.<sup>113</sup> Even accounting for such rebuttals, however, decreased fuel efficiency looms as another Basic Rule disadvantage.

### C. Air Pollution

Increased air pollution is another adverse effect of the Basic Rule. Preliminary data from the Environmental Protection Agency (EPA) suggests that “rural states such as Montana, which have sharply raised their speed limits [although the increase in actual speed itself is slight], face a higher increase

<sup>110</sup> Oldham, *supra* note 69, at 46. The reporter also admitted that at the vehicle’s top speed of 113 mph, the air conditioner ceased functioning, “turning the vehicle into the fastest greenhouse on the face of the Earth.” *Id.*; see also Whitely, *supra* note 21, at A1 (“Speed doesn’t come without cost. Even dropping to 85 mph on the 293-mile drive from Ritzville, Wash. to Missoula [MT], the Explorer got 24.01 miles a gallon. For the 194-mile high-speed trip from Missoula to Butte and then north into Helena, it got 10.43 miles a gallon.”).

<sup>111</sup> Simon, *supra* note 58, at 1.

<sup>112</sup> See Quentin Hardy, *Pedal to the Metal Time Out West*, CHI. TRIB., Dec. 10, 1995, at 5.

<sup>113</sup> A reporter for the *Los Angeles Times* colorfully illustrates the point that vehicles’ lower fuel economy, rather than increased speeds, is the real culprit in the decreased fuel efficiency debate.

All of the gasoline saved with a lower speed limit has been more than consumed by a curious development. Our fleet mileage—the collective mpgs of the nation’s drivers—has dropped dramatically recently because of the popularity of light trucks . . . . Accountants from Santa Monica and programmers from San Jose commute in Land Rovers and Explorers on palm-lined freeways that have never seen snow. Their rigs average 20 miles per gallon, all so drivers can adopt the image of a Montana rancher. Should I slow so that some all-hat-no-horse guy in a muscle truck can cast a longer shadow in the parking lot of a line-dance bar?

Manning, *supra* note 60, at 16.

in ozone-forming Nox [oxides of nitrogen] emissions.”<sup>114</sup> The EPA survey estimated that Montana faced a 12.74% increase in ozone forming emissions.<sup>115</sup> On the other hand, Montana already meets the national primary and secondary standards for ozone, and hence the increase in air pollution from automobiles does not appear to create serious risks of any kind. An official from the Montana Department of Environmental Quality, Jim Carlin, found a negligible impact on the environment of motorists’ higher speeds.<sup>116</sup> While Mr. Carlin noted elevated levels of carbon monoxide around Billings and Missoula were probably attributable to increased speeds, he characterized the practical effect of such speed-related increases in air pollution as “hardly even quantifiable; they [the higher levels of emissions] wouldn’t be a good reason to debate the speed limit law.”<sup>117</sup> This appears to be a plausible view, though the increased pollution certainly counts as an adverse effect.

#### D. *Tourism*

The fact that Montana operates as a “speed magnet” is not *only* a negative; perhaps the Basic Rule actually helps generate more tourism, thereby creating various positive welfare effects. This is certainly a reasonable judgment. Nevertheless, there is a debate about whether the “reasonable and prudent” standard might decrease tourism, another potential drawback.<sup>118</sup> Initially, as with many other aspects of the new law, Basic Rule opponents made alarmist predictions, forecasting a steep drop in tourism,<sup>119</sup> Montana’s second largest industry.<sup>120</sup> But these predictions were based on anecdotes, not evidence. For example, the Highway Patrol reported that “one out-of-state woman had called to say she was canceling her vacation for safety reasons.”<sup>121</sup> A Maine newspaper, after observing only one month under the Basic Rule, exhorted:

A lot of people from other states will avoid driving through Montana now that they know some of the barriers are down against extravagant speeds on those highways. . . . Montana is right to be worried about

---

<sup>114</sup> *Higher Speeds Mean Higher Pollution*, GANNETT NEWS SERV., Oct. 27, 1996.

<sup>115</sup> *See id.* (showing that this is a larger increase than in any other state).

<sup>116</sup> Telephone Interview with Jim Carlin, Air Quality Specialist, Montana Department of Environmental Quality (Aug. 20, 1998) (attributing the slight impact on the environment to the small increase in actual speed).

<sup>117</sup> *Id.*

<sup>118</sup> *See Hall, supra* note 53, at 10A. Although after documenting non-Montanans’ relatively more dangerous driving habits, one wonders if a decrease in tourism, despite the economic detriment, actually might constitute a net advantage under the Basic Rule.

<sup>119</sup> *See id.*

<sup>120</sup> *See Kathleen McLaughlin, Travel Agents Figure Headlines Won’t Hurt*, BILLINGS GAZETTE, Apr. 22, 1996, at B1.

<sup>121</sup> Robbins, *supra* note 26, at 6.

how people will view a state with its speeders unleashed. That gorgeous state suddenly looks like a place to visit some other year.”<sup>122</sup>

In analyzing a potential decrease in tourism, the *Billings Gazette* polled travel agents in New York, Washington, D.C., Philadelphia and New Jersey to query whether vacationers intended to cancel planned trips to Montana.<sup>123</sup> None reported any cancellations.<sup>124</sup> Christopher Reynolds, a *Los Angeles Times* travel writer, concurred that the spate of publicity would not deter tourists.<sup>125</sup> The general manager of one of Missoula’s newest hotels asserted, “I think the speed limit [the Basic Rule] will bring people into Montana.”<sup>126</sup> An official from Travel Montana, the state’s tourism agency, confirmed that “there is no indication that the law has either helped or hindered tourism.”<sup>127</sup> In the end, speed limits seem to have no significant effect on Montana’s robust tourism industry. Any decrease from frightened motorists has probably been matched by those seeking a state without numerical speed limits.

#### E. Reputation

A final concern to Montana under the Basic Rule, the detriment to the state’s reputation, is less tangible. Montana has endured national ridicule and derision from the public since instituting the Basic Rule. Comedians poked fun at Montana and its free-wheeling spirit.<sup>128</sup> Others have been less charitable. National Public Radio’s “Car Talk” program labeled Montanans

---

<sup>122</sup> Hall, *supra* note 53, at 10A.

<sup>123</sup> See McLaughlin, *supra* note 120, at B1 (investigating whether Montana’s recent publicity regarding the Basic Rule, the Freeman, and the Unabomber is hurting state tourism).

<sup>124</sup> See *id.*

<sup>125</sup> See *id.*

<sup>126</sup> Sarah Harrington, *The Inn Crowd: Missoula’s Five New Hotels Open Their Doors to Visitors*, MISSOULIAN, June 30, 1996, at P1.

<sup>127</sup> Telephone Interview with Thurston Elfstrom, Information Services Coordinator, Travel Montana (Apr. 13, 1998); see also Telephone Interview with Bert Obert, Major, Montana Highway Patrol, *supra* note 54 (acknowledging that the Basic Rule probably did not discourage visitors, but noting that the Highway Patrol receives numerous telephone calls from tourists who do not understand the Basic Rule).

<sup>128</sup> See Gary Dunford, *Love’s Labor Isn’t Lost*, TORONTO SUN, Jan. 4, 1996, at 6 (“What do you call a car going 55 mph in Montana? Parked. What color is Montana’s state flag? Checkered. And what do you call a speed bump in Montana? A pedestrian.”); Cameron Morfit, *The Lighter Side of 1995: Year Had Its Share of Weird Stories*, FALLS POST REG. (Idaho), Jan. 1, 1996, at A1 (“December: Montana takes down speed limit signs, adopts ‘reasonable and proper’ limit to driving. Becomes ‘Official State of NASCAR.’”); Simon, *supra* note 58, at 1 (“‘You know, coming to Montana’s kind of different. You’re expected to drive 100 mph and look at the landscape.’”); *Speed Delivery*, TIRE BUS., Jan. 22, 1996, at 23 (“[I]n Montana, at least, ‘Domino’s Pizza now guarantees delivery in three minutes or less.’”).

“a bunch of morons.”<sup>129</sup> Syndicated columnist Tony Kornheiser was equally condescending in his description of Montanans, quipping, “[h]ave you seen the kind of people who live in Montana? Montanans make West Virginians look like it’s opening night at Lincoln Center. This is the end of Montana as a state and the beginning of Montana as a test track.”<sup>130</sup> A Highway Patrol officer lamented that the Basic Rule “[m]ade us the joke of the nation.”<sup>131</sup>

Montanans viewed outsiders’ criticism as an attack on their state’s values and vehemently defended their libertarian ways. Governor Racicot’s Communication Director bristled, “[t]he tone of much of the coverage has been patronizing at best. . . . And I understand it. Urban Americans can be uncomfortable if they don’t have someone else telling them what to do.”<sup>132</sup> One resident replying to Kornheiser’s arrogant missive did not mince words:

The whole thing shakes down to a simple truth about how we do things here. Our legislature made a law reflecting reality instead of prescribing it. We’re doing just fine with that, thank you, we’re used to being responsible for ourselves. If you can’t come to terms with that, don’t drive here.<sup>133</sup>

Despite these impassioned rebuttals, Montana’s image emerged a bit battered from the national press pounding. On the whole, however, since tourism remains unaffected and Montanans themselves shrug off outsiders’ opinions, the eccentric reputation may prove a source of pride for the state’s independent residents.

#### F. *A Note on Benefits*

The benefits under the Basic Rule, although more difficult to quantify than the detriments, appear substantial. Increased efficiency represents the most important advantage under the new law. The state’s vast distances, isolated commercial centers and dearth of traffic<sup>134</sup> argue for the value of higher

---

<sup>129</sup> Hallgren, *supra* note 59, at A23.

<sup>130</sup> Tony Kornheiser, *There’s No Safety in These High-Speed Numbers*, ROCKY MTN. NEWS, Dec. 10, 1995, at 122A.

<sup>131</sup> Letts, *supra* note 64, at 9; *see also* Witkowski & Edwards, *supra* note 84 (“Ever since December of 1995 when Montana suspended its daytime speed limit for highway drivers, it’s been the butt of national jokes.”).

<sup>132</sup> Dennis McCann, *Fast Friends, Montana Drivers, High Speed Go Together*, MILWAUKEE J. SENTINEL, Dec. 16, 1995, at 1; *see also* Larry Slonaker, *Kook Image Worries Montanans*, TIMES-PICAYUNE (New Orleans), Apr. 14, 1996, at A17 (quoting Governor Racicot’s Communications Director, Andrew Malcolm, as saying, “[r]easonable-and-prudent is a viable system in Montana . . . because residents have learned to police themselves. ‘It may be difficult for (outsiders) to understand, but it works here.’”).

<sup>133</sup> Hallgren, *supra* note 59, at A23.

<sup>134</sup> Lack of traffic is a recurring theme among Basic Rule supporters. Even the Spokesman of the Montana Department of Transportation, Dennis Unsworth, admits, “[Y]ou can drive for several hours and not see another car. It can be pretty lonely.”

speeds.<sup>135</sup> There may well be significant productivity gains from time saved. Highway Patrol Sergeant Robert Koch highlighted the economic importance of saving time on the roadways, noting, “[w]e have a lot of people making a living driving, . . . and they are appreciative of the fact they can drive 70 or even 80 miles per hour on the interstate.”<sup>136</sup> Residents also favor the increased speeds to facilitate weekly errands or enhance social life.<sup>137</sup> The increased speeds can result in substantial time savings. “A car going 65 mph takes more than 10 hours to cross Montana. Go 80 mph, and you shave off two hours.”<sup>138</sup> Overall, a *U.S. News & World Report* article aptly summarized the productivity argument, stating, “[f]uel efficiency has doubled since 1974, and saving a few bucks on a long trip by doing 65 vs. 75 is hardly compelling. But many drivers will find savings of an hour or two in travel time quite appealing.”<sup>139</sup> It would be highly desirable to quantify the various savings from these efforts, though we have not been able to do so here.

Interestingly, Basic Rule supporters also claim increased safety as an advantage under the Basic Rule. Proponents contend that prior to the law, the majority of motorists did not obey the posted speed limits.<sup>140</sup> Consequently, advocates argue, drivers who adhered to the mandated levels were actually dangerous, disrupting the traffic flow by traveling significantly slower than most other vehicles on the road.<sup>141</sup> Furthermore, proponents claim that the

---

Ken Hoffman, *In Big Sky Country, No Speed's the Limit, but Try 85*, HOUSTON CHRON., Dec. 10, 1995, at 7.

<sup>135</sup> Montana Representative Sonny Hanson, a leading Basic Rule advocate, summarizes the arguments: “The reason we have to have a variable-type speed limit is because of the size of the state. And so, we really need a daytime speed limit that reflects the distances that we as individuals have to make our living by traveling.” Roberts & Edwards, *supra* note 86; see also Susan Gallagher, *Montana Speeders Get Reality Check*, TELEGRAPH HERALD (Dubuque, Iowa), Aug. 28, 1996, at 4 (“With a few exceptions, Montana highways are not crowded, [Representative Hanson] said, and he believes people should be able to cover the state’s vast distances quickly, if they can do it safely.”).

<sup>136</sup> McCann, *supra* note 132, at 1.

<sup>137</sup> See Manning, *supra* note 60, at 16 (“People here routinely run a hundred miles to shop for groceries or for a beer and conversation on a Saturday night.”); *In Big Sky State*, *supra* note 4, at 1A (citing Rosebud County Clerk Geraldine Custer, who drives “the 100 miles to Billings twice a month or so to go shopping,” as a Basic Rule beneficiary; Ms. Custer now makes the trip in “just over an hour.”).

<sup>138</sup> *In Big Sky State*, *supra* note 4, at 1A.

<sup>139</sup> Kaye et al., *supra* note 9, at 72.

<sup>140</sup> See *Some in Montana Regret Easing of Speed Limits*, *supra* note 26 (citing a state highway study showing that “half of all drivers exceeded the 65 mph limit on Montana’s interstates. Two-thirds ignored the 55 mph signs on two-land highways.”).

<sup>141</sup> See Hardy, *supra* note 112, at 5 (“[S]peed proponents say the 55-m.p.h. law also means that people obeying speed-limit laws become a highway danger, causing unexpected slowdowns in the flow of traffic. ‘When I drive a government vehicle, I have to obey the speed limit,’ says [traffic operations engineer James] Poston. . . . ‘But when I do, I feel

prior law extended driving times over long, tiring distances, decreasing roadway safety.<sup>142</sup> One Montanan emphasized the weariness and peril of such protracted travel: “The big killer out here is falling asleep on a straightaway. . . . If you drive slower, you just spend more time on the road getting fatigued.”<sup>143</sup> All in all, proponents’ safety arguments, contradicting speed limit advocates’ safety claims, require empirical evaluation. We have not found much direct evidence in their favor.

Montanans’ deep sense of pride and satisfaction with the Basic Rule represents an intangible, yet not trivial, benefit. The Basic Rule epitomizes Montanans’ self-reliant attitudes.<sup>144</sup> One reporter’s comments summarized the citizenry’s gratification as follows: “[T]he core issue has to do with sustaining the cult of Western independence. No one—certainly not some pudgy-fingered, Hyundai-driving carpooler at the Department of Transportation in the District of Columbia—tells the independent man how fast he can drive.”<sup>145</sup> The Basic Rule generates a heartening chorus among Montanans.<sup>146</sup> One individual exclaimed, “I think no speed limit is the most

---

like I’m a hazard, since accidents often come from speed differentials.”); Manning, *supra* note 60, at 16 (quoting its reporter who drove at the prior posted speed limits, “I am the most dangerous driver on the road.”).

<sup>142</sup> See Hardy, *supra* note 112, at 5.

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

<sup>144</sup> See Hallgren, *supra* note 59, at A23 (reporting on a resident’s view of “the law’s assumption that we will be responsible for our own driving”); Letts, *supra* note 64, at 9 (“The lack of limit matches Montana’s libertarian instincts. Since the days of the 19th century outlaws ‘Rattlesnake Jack’ and ‘Liver Eating Johnson’ . . . the state has had its share of wild folk.”); Richardson, *supra* note 57, at A1 (“Montanans seem to think they can handle it [driving under the Basic Rule]—unlike in Washington [D.C.], they don’t need a lot of signs telling them when they can stand here or park there.”); Simon, *supra* note 58, at 1 (“Our people, [Montanans] they have a philosophy, . . . [t]hey like the freedom to be prudent.”).

<sup>145</sup> John Taylor, *The Big Sky’s the Limit; Speed Limits in Montana*, *ESQUIRE*, Mar. 1996, at 114; see also Brink, *supra* note 18, at 4D (personifying the state’s determination and support for the Basic Rule, one Montanan averred, “Free people . . . govern themselves.”). Speed limit proponents respond to this mantra, noting that “Freedom without responsibility doesn’t work.” Telephone Interview with Bert Obert, Major, Montana Highway Patrol, *supra* note 54.

<sup>146</sup> See *In Big Sky State*, *supra* note 4, at 1A (“It’s a blast going fast.”); Letts, *supra* note 64, at 9 (“Teenage drivers whooped at the dismantling of the roadside speed signs.”). Montanans’ glee over the demise of numerical limits on one occasion transcended words: shortly after the former law’s repeal, an unknown celebrant “impaled a 55 mph speed limit sign” in front of the state capitol. *Across the USA: News from Every State*, *USA TODAY*, Dec. 13, 1995, at 10A. A cottage industry of “No Limits” gear sporting a 65 mph speed limit sign circled and slashed also reflects the state’s elation with the Basic Rule. See Jan Falsted, *No Limits to Making a Buck*, *BILLINGS GAZETTE*, Oct. 16, 1996, at A1.



fabulous thing that ever hit the United States.”<sup>147</sup> A reporter described the state’s euphoria, noting that “Montana has discovered the modern equivalent of the ‘yee-hi!,’ dust-stirring stagecoach gallop, and it is fun.”<sup>148</sup> Eliciting a wellspring of public support, the Basic Rule fosters an incalculable, but perhaps important, advantage; the law represents an extension of Montana’s distinctive culture, embodying and affirming residents’ independent values.

#### IV. LAW ENFORCEMENT

##### A. *In General*

For law enforcement officials, the Basic Rule is both a blessing and a burden. The highway patrol is writing considerably more speeding tickets.<sup>149</sup> In 1995, the Highway Patrol issued 4,197 citations.<sup>150</sup> That number soared to 6,825 in 1996, but declined to 5,262 in 1997 as people became accustomed to the law.<sup>151</sup> Since fines under the conservation speed limit cost

---

<sup>147</sup> Gary Gerhardt, *Wyo. Zooms into Fast Lane*, ROCKY MTN. NEWS, Dec. 9, 1995, at 6A.

<sup>148</sup> Letts, *supra* note 64, at 9.

<sup>149</sup> Ironically, one of the Highway Patrol’s initial arguments against the Basic Rule was a predicted decrease in speeding infractions. *See id.* at 9. Law enforcement contended that such traffic stops enabled officers to detain suspicious drivers, often resulting in the motorists’ arrests for other, more serious crimes. *See id.* (“Mr. Wakefield [a Montana Highway Patrol officer] added that speed offenses used to allow the police to pull over shifty-looking motorists. He once apprehended a gang of armed robbers that way.”). The argument implied that under the Basic Rule, officers would have fewer opportunities to stop motorists for speeding, thereby depriving police of the opportunities to discover and arrest dangerous offenders. *See id.* Despite the dubious constitutionality of such a tactic, the predictions now seem inapposite; the Highway Patrol actually issues more citations, perhaps increasing the chance encounters. *See* Ann Treneman, *Speed Is in the Eye of the Cop*, INDEPENDENT, Sept. 27, 1996, at 17.

<sup>150</sup> *See* Montana Highway Patrol 1997 Annual Report, Highway Patrol Activity, Citations Issued, Speed—Basic Rule, 1993-1997. *See supra* note 19 for an explanation of the pre-1996 statistics.

<sup>151</sup> *See* Montana Highway Patrol 1997 Annual Report, Highway Patrol Activity, Citations Issued, Speed—Basic Rule, 1993-1997, *supra* note 150; *see also Across the USA: News from Every State*, *supra* note 146, at 9A (“In December [of 1995], which saw the start of no daytime speed limit on Montana highways, 588 tickets were written for drivers exceeding a speed reasonable and prudent. . . . 300 speeding tickets were issued in December ’94.”); Gallagher, *supra* note 68, at 38A (“From January through June [of 1996], the Highway Patrol issued 3,094 warnings and 3,622 tickets for violations of the ‘reasonable and prudent’ standard. During the same period in 1995, the figures were 487 warnings and 1,823 citations.”); *High-Speed Image Worries Montana*, TELEGRAPH HERALD (Dubuque, Iowa), Jun. 1, 1996, at A11 (“[T]he Highway Patrol issued 530 basic rule tickets in April [1996], about 200 more than in the same month last

drivers \$5<sup>152</sup> and Basic Rule infractions range from \$70 to \$500,<sup>153</sup> the result was a windfall for the state treasury. State revenues increased by an estimated \$545,000 during the law's first year.<sup>154</sup>

Another benefit to law enforcement under the Basic Rule is the wellspring of public support for "reasonable and prudent" driving. For example, the Montana office of the American Legion reinstated its custom of commemorating fatal crash scenes with miniature steel crosses, a practice which it had not undertaken in 40 years.<sup>155</sup> In addition to the American Legion's efforts, Montana embarked upon a major advertising campaign to inform motorists about the Basic Rule and encourage safe driving.<sup>156</sup> Described as a "public information blitz,"<sup>157</sup> the \$20,000 campaign<sup>158</sup> intones, "Whoa, Dude, there is a Speed Limit in Montana."<sup>159</sup> The state uses a variety of mass media in targeting its message primarily to non-Montanans.<sup>160</sup>

Despite the increased revenues and enhanced civic support, law enforcement faces significant burdens in administering the Basic Rule. First, officers have encountered more roadside confrontations with motorists.<sup>161</sup> The law's subjective nature results in a growing number of "official-violator relationships," where drivers argue with officers over appropriate speeds.<sup>162</sup>

year."); Treneman, *supra* note 149, at 17 (noting that through September of 1996 the number of speeding tickets approximately doubled).

<sup>152</sup> See MONT. CODE ANN. § 61-8-718 (1996).

<sup>153</sup> See MONT. CODE ANN. § 61-8-303.

<sup>154</sup> Charles S. Johnson, *Speed Is Freedom—or Hazard*, INDEPENDENT REC. (Helena, Mont.), Jan. 31, 1997, at 2A.

<sup>155</sup> See Brooke, *supra* note 49, at 16. A reporter recounted observing the crosses and their poignant effects:

Occasionally, you will find a single cross here and there, some with small patches of flowers planted beneath them. More often, though, you will find two or three welded together. The most I saw in one spot on a recent trip through Montana was five. Several times. They weren't limited to the wide-open spaces or the interstates. You will find them on the approaches to small towns and larger cities, in the mountains and on the prairies, on curves and straight roads and places where there is nothing for miles and miles but miles and miles. It goes without saying, the crosses are a sobering experience, one that reminds you that speed limits are not a bad idea.

Fred Lowery, *Crosses Present Deadly Reminder on Killer Ways*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Dec. 9, 1995, at 5B.

<sup>156</sup> See Gallagher, *supra* note 68, at 38A; Knickerbocker, *supra* note 7, at 3.

<sup>157</sup> Knickerbocker, *supra* note 7, at 3.

<sup>158</sup> Gallagher, *supra* note 68, at 38A.

<sup>159</sup> "Whoa, Dude, There Is a Speed Limit in Montana" Bumper Sticker.

<sup>160</sup> See Gallagher, *supra* note 68, at 38A (describing the campaign's use of billboards, posters, fliers, bumper stickers, and television ads).

<sup>161</sup> See Rocky Barker, *Montana Speed Limit Reasonable and Prudent; Cops Aren't*, FALLS POST REG. (Idaho), Mar. 24, 1996, at B1.

<sup>162</sup> Treneman, *supra* note 149, at 17 ("Now every traffic stop is a hassle."); Barker, *supra* note 161, at B1. A numerical limit could avoid such strife by clarifying the law for

Second, the Basic Rule's mutable standards encourage motorists to challenge citations in court, resulting in more numerous and protracted trials.<sup>163</sup> Consequently, law enforcement and Montana's legal system must endure a deluge of Basic Rule cases. The Highway Patrol described the increasing workload:

More offenders are taking basic rule violations to court. Thus officers must prepare for the case and appear in court for these challenges. Because of the law's subjectivity, trials involving basic rule violations tend to take more time. Case preparation and court appearance time have increased by 614 hours over the previous year [1995].<sup>164</sup>

Montana's Attorney General, Joseph Mazurek, derided the increase in court time and costs, emphasizing the detriment to public safety by decreasing officers' time patrolling the highways.<sup>165</sup> Third, the increase in accidents under the Basic Rule resulted in a further drain on officials' time. Comparing 1995 to 1996, officers spent an additional 4,000 hours in 1996 investigating crash sites, a 9.6% increase from 1995.<sup>166</sup> Fourth, local courts appear doubly affected, as they deal with both the rising case load as well as recording the Basic Rule infractions.<sup>167</sup> Finally, uncertainty about the meaning of the rule means that drivers do not know, in advance, when they will be violating the law, and hence there is a risk of lack of fair notice—a point we take up below.

In the end, law enforcement faces a dilemma. On the one hand, the increased revenues, the American Legion's efforts, and the state's advertising campaign facilitate the Highway Patrol's efforts to ensure roadway safety.

---

both officers and motorists. See Oldham, *supra* note 69, at 46 (referring to statements by Montana Highway Patrol Major Bert Obert).

<sup>163</sup> See Montana Highway Patrol Legislative Handout, *supra* note 86; see also Roberts & Edwards, *supra* note 86 (quoting Montana Attorney General Joseph Mazurek stating, "[t]he time in court defending basic-rule citations because of the subjective nature of those violations is going up dramatically").

<sup>164</sup> Montana Highway Patrol Legislative Handout, *supra* note 86. Strangely, another Highway Patrolman complained that the Basic Rule "makes our officers work harder—they have to have their evidence and argument together when they go to court." Richardson, *supra* note 57, at A1. One wonders why this is a problem for officers or why it would constitute a change under the Basic Rule. On a more serious note, Colonel Craig Reap, the head of Montana's Highway Patrol, commented on the expense of such court time, noting that one case cost a small county \$700, a substantial sum for a rural, underpopulated area. See Telephone Interview with Craig Reap, Colonel, Montana Highway Patrol (Mar. 21, 1997).

<sup>165</sup> Roberts & Edwards, *supra* note 86 (quoting Montana Attorney General Joseph Mazurek, stating, "You're taking officers off the streets and putting them in the courtroom.").

<sup>166</sup> See Montana Highway Patrol Legislative Handout, *supra* note 86.

<sup>167</sup> Henderson, *supra* note 58, at 3 ("[C]ourt clerks say they can't handle the paperwork from all the citations for basic-rule violations.").

In opposition, roadside confrontations, court time, legal costs, crash investigations and an overburdened judicial system make enforcement more difficult. Despite the augmented revenues and moral support, it appears that the demands of apprehending, investigating and prosecuting Basic Rule violations significantly burdens Montana's thinly-staffed Highway Patrol.<sup>168</sup>

### B. *Administering Standards*

The most difficult challenge under the Basic Rule is establishing workable criteria for arrest and prosecution. The essential problem is that there is no quantitative basis for deciding whether a motorist has violated the law. Variouslly described as "confusing,"<sup>169</sup> "nebulous,"<sup>170</sup> "squishy,"<sup>171</sup> "vaguely defined,"<sup>172</sup> "arbitrary and inconsistent,"<sup>173</sup> and "an enforcement nightmare,"<sup>174</sup> administering the Basic Rule is an onerous task because it is so unclear. Law enforcement officials and motorists find the law too subjective, hindering both drivers' ability to comply with the Basic Rule and the Highway Patrol's ability to deter violators.<sup>175</sup> A reporter analogized the dilemma to asking every law enforcement official "to decide how many drinks each driver may have, based on body weight and type, before becoming too drunk to drive."<sup>176</sup> A survey of what speed would constitute a Basic Rule violation revealed the considerable disparity in estimates on the subject.<sup>177</sup>

---

<sup>168</sup> However, law enforcement's economic and temporal strains appear less a function of the Basic Rule and more a result of the state's budgetary allocation. See *supra* Part IV.A. From the Basic Rule's expanding revenue figures, it seems plausible that the fines could ameliorate the law's increased costs as well as provide for the hiring of new Highway Patrol officers, judges or court personnel to meet law enforcement's needs.

<sup>169</sup> Treneman, *supra* note 149, at 17.

<sup>170</sup> Laura Bly, *The Big Sky Isn't the Limit*, USA TODAY, Jun. 7, 1996, at 3E.

<sup>171</sup> McCann, *supra* note 132, at 1.

<sup>172</sup> Whitely, *supra* note 21, at A1.

<sup>173</sup> Telephone Interview with Craig Reap, Colonel, Montana Highway Patrol, *supra* note 164.

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

<sup>175</sup> See Barker, *supra* note 161, at B1. Additionally, while the primary "standards" controversy involves the speed constituting a Basic Rule violation, there is uncertainty relating to the hours of the day in which the law is in effect. See Oldham, *supra* note 69, at 46 (articulating the imprecise guidelines the Highway Patrol follows, stating, "Officially, one-half hour after sunset is night. But the rule of thumb, according to [Highway Patrol Major Bert] Obert, is that if you can read your analog wristwatch without the help of artificial light, or without putting it up to your face, it's technically still daytime.").

<sup>176</sup> Jim Fisher, *Montana Should Avoid Idaho's Speed Limit Roulette*, LEWISTON MORNING TRIB. (Maine), Sept. 10, 1997, at 10A (concluding that "The answers from different officers would of course be all over the map, just as different officers' definitions of reasonable and prudent no doubt are.").

<sup>177</sup> A reporter for *Popular Mechanics* summarized the divergence of views on complying with the law: "How fast is reasonable and prudent? Ask 20 people and you'll get 20

Opinions ranged from “‘they’ll ticket you if you go past 85,’”<sup>178</sup> to “[b]reak 90, and you better start looking over your shoulder,’”<sup>179</sup> to a Highway Patrolman’s assertion that “‘in my opinion, 90 is an unsafe speed for pretty much any conditions.’”<sup>180</sup>

Speeds of more than 100 mph are particularly vexing for law enforcement. Many officers state the refrain that “[a]nything in triple digits is probably a ticket,”<sup>181</sup> defining 100 mph as “the real Montana speed limit.”<sup>182</sup> But others are not as certain that the 100 mph threshold triggers a violation. When queried whether a motorist legally could drive more than 100 mph, Major Steve Barry, Deputy Chief of Montana’s Highway Patrol, admitted, “‘I can’t really answer that.’”<sup>183</sup> Another officer acknowledged that he would be disinclined to stop a professional driver on a desolate highway at speeds in excess of 100 mph.<sup>184</sup>

Montana’s judiciary also is reluctant to assign a fixed numerical speed limit. Some judges impose a de facto 85 mph limit, asserting, “[b]ring that speed into my court and that person is guilty.”<sup>185</sup> Other judges disagree, contending “there’s no speed that would necessarily result in a conviction. . . . ‘Ninety-five on the interstate between here [Helena] and Billings might be perfectly OK.’”<sup>186</sup> This disparity in judicial attitudes has caused many officers to complain that “dangerous” drivers are often “let off by judges.”<sup>187</sup>

---

different answers.” Oldham, *supra* note 69, at 48 (commenting “there’s more gray in this law than in all the hair in Florida”).

<sup>178</sup> Richardson, *supra* note 57, at A1.

<sup>179</sup> Oldham, *supra* note 69, at 50.

<sup>180</sup> John Hiscock, *Catch-22 on Montana’s ‘Open Roads,’* DAILY TELEGRAPH, Apr. 27, 1996, at 11.

<sup>181</sup> Robbins, *supra* note 26, at 6; *see also* Barker, *supra* note 161, at B1 (noting that “officers routinely stop drivers traveling over 100 mph”).

<sup>182</sup> Dave Barry, *Pretend Speed Limit Is Abolished*, STUART NEWS/PORT ST. LUCIE NEWS (Stuart, Fla.), Mar. 13, 1996, at C1 (quoting Steve Barry, Deputy Chief of Montana’s Highway Patrol).

<sup>183</sup> Simon, *supra* note 58, at A1; *see also* Barry, *supra* note 182, at C1 (quoting Major Barry admitting that there is “‘no theoretical upper speed limit’”).

<sup>184</sup> Oldham, *supra* note 69, at 50 (“If I observe Mario Andretti going 113 mph in a new Ferrari on a flat stretch of interstate, I probably wouldn’t pull him over.”).

<sup>185</sup> Tom Vines, *Safe at What Speed*, CAR & TRAVEL, Jan.-Feb. 1997, at 4a (describing the difficulties of Basic Rule jurisdictional disparities, noting, “Other judges are setting unofficial speed limits, which is causing lots of confusion not only to law enforcement officers, but to the public as well—especially when another judge across the county line has different criteria. There may even be differing interpretations among judges in the same county.”).

<sup>186</sup> Whitely, *supra* note 21, at A1.

<sup>187</sup> Sullivan, *supra* note 66, at 37.

Frustrated by the lack of established limits, some Highway Patrol officers and state officials resorted to employing non-numerical guidelines to encourage Basic Rule compliance. One Highway Patrolman exhorted, “‘Don’t drive so fast you can’t enjoy the scenery!’”<sup>188</sup> Other officers emphasized conformity with prevailing traffic patterns, warning, “‘People who are passing everything—that’s the type of person we’re going to be focusing on.’”<sup>189</sup> Finally, some law enforcement officials appealed to drivers’ caution, imploring individuals to travel “at a speed that would be comfortable with a carload of your children.”<sup>190</sup>

The dearth of consistent standards resulted in arbitrary and ineffective enforcement. The discretion of scores of officers, prosecutors and judges combined with the numerous Basic Rule conditions concerning weather, roads, and vehicle maintenance fosters inconsistency.<sup>191</sup> Additionally, the Highway Patrol asserts that the Basic Rule’s subjective nature hinders enforcement by creating longer vehicle stops and increased court appearances.<sup>192</sup> Consequently, law officers spend less time on the road,<sup>193</sup> and the roadside stops become more confrontational, detracting from overall safety and enforcement efficiency.<sup>194</sup>

A recent Park County case involving a motorist traveling at 101 mph illustrates the debate over establishing workable standards.<sup>195</sup> A district court jury acquitted the driver of any Basic Rule violations.<sup>196</sup> The decision incensed law enforcement officials.<sup>197</sup> Highway Patrol Chief Craig Reap stated “[i]f someone hits your car at 101 mph, wouldn’t you be outraged to hear there’s no violation?”<sup>198</sup> The Attorney General was equally indignant, proclaiming “if being caught driving 101 mph isn’t violating the basic rule, . . . [I don’t] know what [is].”<sup>199</sup> The defendant’s attorney countered that the driver’s background as a mechanic, the car’s exemplary maintenance, and

---

<sup>188</sup> *Id.*

<sup>189</sup> *High-Speed Image Worries Montana*, *supra* note 151, at A11.

<sup>190</sup> Barker, *supra* note 161, at B1.

<sup>191</sup> Michael Taylor, *State’s Speed Up, Deaths Down*, S.F. CHRON., Dec. 20, 1996, at A1 (“There are 196 officers out there, and 56 county attorneys and about 80 justices of the peace, and everyone has their own opinion of this law. The conditions are too broad—how steep was the hill, how curvy was the curve. It’s impossible to have a consistent enforcement program.”).

<sup>192</sup> See Montana Highway Patrol Legislative Handout, *supra* note 86 (noting that officers spend time explaining the basic rule to offenders and preparing cases for court).

<sup>193</sup> See Roberts & Edwards, *supra* note 86.

<sup>194</sup> See Barker, *supra* note 161, at B1.

<sup>195</sup> See Johnson, *supra* note 154, at 2A.

<sup>196</sup> See *id.*

<sup>197</sup> See *id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

the deserted road's flat surface made travel at 101 mph perfectly reasonable and prudent.<sup>200</sup> The attorney dismissed claims that the law was confusing, emphasizing the jury's sound judgment in considering the totality of the driving environment.<sup>201</sup>

The Basic Rule has had a detrimental effect on the consistency and potentially the overall effectiveness of Montana's law enforcement. Admittedly, the Basic Rule affords ample and possibly excessive discretion. However, the cause of the "standards" problem emanates not only from the law's vagueness, but also from patrolmen' and judges' variable interpretations of the Basic Rule's expressed "reasonable and prudent" standards. Those officers and judges who establish their own, perhaps idiosyncratic, numerical limits and uniformly stop or convict defendants under fixed guidelines might be thought to endanger both the spirit and the letter of the Basic Rule, in turn creating an uncertain patchwork of rule-free and rule-bound law enforcement. A more uniform enforcement process might have reduced this problem. Consequently, the Basic Rule's enforcement problems stem partly from the vagaries of individual assessments and multiple conditions. These points lead naturally to the question of whether the Basic Rule compromises values associated with the rule of law.

### C. Rule of Law Values

Drivers face numerous opportunities to either comply with or disobey the rule of law. As discussed previously, Montanans routinely ignored prior speed limits, causing disrespect for the law and demoralizing the officers charged with enforcing the state's statutes.<sup>202</sup> Furthermore, some officers speculated that violation of speed limit laws lead to infractions of other vehicular offenses and a general deterioration of rule of law values.<sup>203</sup> Speed

---

<sup>200</sup> *Id.* The Highway Patrol disagreed with the defense attorney's argument that the driver's background as a mechanic ameliorated the Basic Rule violation: "[O]ther drivers cannot possibly be expected to factor another driver's occupation into their decision making." Montana Highway Patrol Legislative Handout, *supra* note 86.

<sup>201</sup> See Johnson, *supra* note 154, at 2A.

<sup>202</sup> See *supra* Part I.B.

<sup>203</sup> "People develop a habit of not obeying the law' when the speed limit is lower than most people are driving. . . . 'That bleeds over to stop signs, crosswalks, things that get people hurt.'" Hardy, *supra* note 112, at 5 (quoting Major Steve Barry, Deputy Chief of the Montana Highway Patrol). Not all commentators ascribe to Major Barry's theory. See Steve Thompson, *Changing Driving Habits in a New York Minute*, AUTOWEEK, Jan. 8, 1996, at 10 (expressing skepticism that "ignoring unrealistic speed limits equals scofflaws equals running red lights. . . . Better cars and higher speeds don't necessarily make people blow red lights. Driving behavior, like all human behavior, is much more complicated than that.").

limit opponents heralded the return of the Basic Rule, averring that the new law would cease turning "law-abiding citizens into scofflaws."<sup>204</sup>

Rule of law values also suffer under the Basic Rule. Anecdotal evidence suggests that the Basic Rule also gives rise to additional traffic violations, although the infractions differ from those arising under prior speed limits.<sup>205</sup> For example, officers report that drivers frequently do not decelerate when leaving the interstates and entering commercial centers.<sup>206</sup> Law enforcement officials from neighboring states also report externalities. In Idaho, a state policeman assigned to patrol the Montana-Idaho border regularly stops drivers exceeding 90 mph.<sup>207</sup> The Idaho officer notes that many motorists are unaware of Idaho's laws or are simply inattentive to their vehicle's speed, despite three signs denoting the change in state speed limits.<sup>208</sup>

As with most effects of the Basic Rule, the law's effects on motorists' rule of law values appears inconclusive. While evidence suggests that traffic violations that are not related to speed have decreased, other speed-related violations are on the rise.<sup>209</sup> Likewise, the theory that motorists are no longer being turned into "scofflaws" is countered by the significant increase in citations issued under the Basic Rule<sup>210</sup> and by the externalities reported in border states.<sup>211</sup>

#### V. RECENT LEGISLATIVE ACTIONS AND POLITICAL POLARIZATION

One year after Montana reinstated the Basic Rule on its highways, the state's Republican Governor, Marc Racicot, Democrat Attorney General, Joseph Mazurek, and the Highway Patrol led a campaign to reestablish numerical speed limits.<sup>212</sup> Citing the rising number of accidents and interstate

<sup>204</sup> Hardy, *supra* note 112, at 5; *see also* Hallgren, *supra* note 59, at A23 ("Our legislature made a law reflecting reality instead of prescribing it.").

<sup>205</sup> *See* Roberts & Edwards, *supra* note 86 (reporting that drivers grow used to faster speeds and do not realize when they are violating a numerical speed limit).

<sup>206</sup> *See id.* ("[C]ity police, [Montana Highway Patrol Colonel Craig] Reap says, report drivers who grow used to faster speeds on the highways and don't slow down to posted limits inside towns. 'When they stop the people and question them about it, the people argue that they did slow down, that they can't believe that they were going 60 in a 45 and those kinds of things.'").

<sup>207</sup> *See* Gene Fadness, *A Year Later: Most Motorists Stick to 75 mph*, FALLS POST REG. (Idaho), Apr. 28, 1997, at A1.

<sup>208</sup> *See id.* (noting that some motorists "will tell you exactly how fast they were going, but they say they were being 'reasonable and prudent'").

<sup>209</sup> *See* Roberts & Edwards, *supra* note 86.

<sup>210</sup> *See* Treneman, *supra* note 149, at 17.

<sup>211</sup> *See* Fadness, *supra* note 207, at A1.

<sup>212</sup> *See* Montana Wants Brake, *supra* note 62, at C6; *see also* Kowal, *supra* note 11, at A16. The effort marked a change for Governor Racicot who previously supported the Basic Rule as "enhanc[ing] the way of life" for Montanans. *Id.*



fatalities, the speed limits coalition proposed a daytime speed limit of 75 mph with a fine of \$25 for driving 10 mph over the posted limit and no points against the individual's insurance record.<sup>213</sup> Motorists driving more than 10 mph over the speed limit would incur additional fines and have the infraction posted to their insurance record.<sup>214</sup>

State Senator Bill Crippen presented the coalition's proposal in a bill introduced in January 1997.<sup>215</sup> The legislation faced an uphill battle from the outset. Proposed in a "legislature [that] has a long history of turning down proposals to increase speeding penalties,"<sup>216</sup> the bill encountered significant opposition and was defeated on a procedural vote of 35 to 15.<sup>217</sup> Although Senator Crippen managed to revive the legislation on a 26 to 24 committee vote to debate the issue before the full Senate,<sup>218</sup> the bill's prospects seemed bleak.

Opposing lawmakers asserted that the public did not support altering the Basic Rule. Polls showed that 56% of Montanans and 58% of legislators opposed numerical limits.<sup>219</sup> As one conservative legislator explained, "[p]eople in Montana don't feel it's necessary. . . . We drive in a prudent manner. I went door to door during the election, and a good percentage didn't think government had any business interfering in how fast people want to drive."<sup>220</sup> Other speed limit detractors echoed the dearth of public support, noting that "a number of state groups representing county attorneys, lower court judges and sheriff and police officers didn't testify at the hearing because they declined to take a position on SB 64."<sup>221</sup> Senator Arnie Mohl summarized the opposition position best, declaring "[t]he public don't [sic] want a speed limit. Let's leave it lay."<sup>222</sup> Opponents ultimately prevailed, voting down the bill 41 to 8.<sup>223</sup>

In September of 1997, several state legislators renewed calls for numerical speed limits. Since the Montana legislature meets every other year and had concluded its 1997 session, several legislators petitioned the Secretary of

<sup>213</sup> See *Montana Wants Brake*, *supra* note 62, at C6 (the coalition also proposed a 65 mph speed limit for most two lane roads).

<sup>214</sup> See *id.*

<sup>215</sup> See S.B. 64, 55th Reg. Sess. (Mont. 1997).

<sup>216</sup> Tom Kenworthy, *As Freeway Deaths Rise, Montana Ponders a Speed Limit*, WASH. POST, Feb. 3, 1997, at A15.

<sup>217</sup> *Montana*, STATE NEWS BRIEFS, Feb. 13, 1997.

<sup>218</sup> See *id.* The Committee voted to allow debate on a modified version of Senator Crippen's bill with the daytime speed limit raised to 80 mph. *Id.*

<sup>219</sup> *Montana Wants Brake*, *supra* note 62, at C6 (noting "many Montanan's are proud of the fact that Montana is the only state without limits").

<sup>220</sup> *Id.*

<sup>221</sup> Johnson, *supra* note 154, at 2A.

<sup>222</sup> *Other People's Houses*, COLUMBIAN, Feb. 16, 1997, at 10.

<sup>223</sup> See *Montana Rejects Auto Speed Limits*, L.A. TIMES, Feb. 16, 1997, at 31.

State's office for a special session to pass speed limit legislation.<sup>224</sup> The tenth legislator's request on September 4, 1997 triggered a mail canvass of lawmakers; proponents needed a majority of 76 votes to convene the legislature.<sup>225</sup> Speed limit proponents again cited mounting highway fatalities as justification for numerical limits.<sup>226</sup> An impassioned legislator decried, "[o]ur friends and neighbors are dying out there."<sup>227</sup>

Opponents rejected the link between the Basic Rule and fatalities. One lawmaker observed that "many of the deaths have involved alcohol or the failure to use seat belts, and that many have occurred at night, when a speed limit is in effect."<sup>228</sup> Given the legislature's historic dislike of speed limits, S.B. 64's resounding defeat, and the overall lack of public support, it appeared unlikely lawmakers would vote to convene the legislature.<sup>229</sup> These predictions came true as speed limit proponents lost their bid to reconvene the legislature by a lopsided vote of 110 to 38.<sup>230</sup>

The political polarization the speed limit issue engenders is the most interesting aspect of recent legislative actions. Although polls show that Montanans are roughly evenly split on the speed limits question, significant differences of opinion exist by geographic region, gender and age. For example, residents of Montana's more rural eastern and central regions favor the Basic Rule to shorten the time required to travel the long distances between the areas' isolated communities.<sup>231</sup> City residents tend to favor numerical limits.<sup>232</sup>

<sup>224</sup> See *Taking a Brake on Speed Law/Montana's Death Toll Rises on No-Limit Roads*, NEWSDAY (New York, N.Y.), Sept. 8, 1997, at A21 (explaining that some Montanans call for a numerical speed limit as a "matter of life and death").

<sup>225</sup> See *id.*; see also *Western Empire*, DENV. POST, Oct. 12, 1997, at B-2.

<sup>226</sup> See *Taking a Brake on Speed Law*, *supra* note 224, at A21 (indicating that between January and September 1997, 177 people died in traffic accidents—42 more than had died during the same period in 1996).

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> News stories and polling data confirmed the dim outlook for convening a special session to impose speed limits. See *Quote, Unquote*, STATE CAPITOLS REPORT, Oct. 31, 1997 ("'Absolutely not, no way!' [said] Montana House Minority Leader Vicki Cocchiarella, when asked if a special session should be held to reinstate speed limits for the state's highways."); Witkowski & Edwards, *supra* note 84 ("[T]he call for a special session is not expected to succeed . . ."); *Across the USA: News from Every State*, *supra* note 146, at 12A ("A Great Falls Tribune poll finds 64% of Montanans want speed limits on highways, but 50% say the Legislature shouldn't convene in special session to establish them. Forty-three percent say a special session is necessary.").

<sup>230</sup> See *Western Empire*, *supra* note 225. The defeat may be attributed to the cost of invoking a special legislative session and the unwillingness of some legislators to repeal the law after such a relatively short test period. See Telephone Interview with Bert Obert, Major, Montana Highway Patrol, *supra* note 54.

<sup>231</sup> See Witkowski & Edwards, *supra* note 84 ("A speed limit faces stiff opposition from conservative eastern Montana lawmakers. They come from the wide open plains,

Gender and age are even more indicative of individuals' preferences in the speed limits debate. When residents were asked whether they "would favor or oppose having the Legislature enact a specific, daytime speed limit," respondents split almost evenly on the question, with 48% in favor and 45% opposed.<sup>233</sup> However, women favored the limits by a substantial 68% to 28% margin, while men opposed the limits 62% to 30%.<sup>234</sup> Questioned on the specific proposal from Governor Racicot and Attorney General Mazurek, women favored the legislation by an even wider 69% to 25% margin.<sup>235</sup> Men still opposed the limits plan, although by the smaller margin of 50% to 43%.<sup>236</sup> Age appears to reinforce gender speed limit preferences. In similar surveys, men between the ages of 18 and 30 were the strongest Basic Rule advocates, while women over 63 were the leading supporters of numerical limits.<sup>237</sup>

The recent legislative actions exemplify Montana's factionalized opinion on the speed limits issue. Yet despite the clamor over increased highway fatalities and the role of excess speed in such accidents, until Montanans develop a consensus bridging geography, gender, and age, a legislative alteration of the Basic Rule seems unlikely.

#### VI. VOID FOR VAGUENESS?

In late 1998, a sharply divided Montana Supreme Court invalidated the daytime speed limit as unconstitutionally vague.<sup>238</sup> The case involved a defendant who had been doing a steady 85 miles per hour.<sup>239</sup> In a brief opinion, the Court concluded that the Basic Rule did not give the defendant "reasonable notice of the speed at which his conduct would violate the law."<sup>240</sup> Neither the arresting officer nor the Attorney General was able to specify a speed that would have been reasonable for the defendant.<sup>241</sup> The

---

where you might not pass another car for miles."); Brooke, *supra* note 49, at 16 ("Driving speeds tend to be higher in the plains of eastern Montana, where long stretches of straight, flat road connect farflung communities."); *Daytime Speed Limit Not Supported*, STATE NEWS BRIEFS, Dec. 19, 1996 ("Lawmakers say they do not believe polls showing an equal split on the issue of posted daytime speed limits. Three legislators from central Montana say they've found little or no support for the proposal.").

<sup>232</sup> See *Daytime Speed Limit Not Supported*, *supra* note 231.

<sup>233</sup> See Charles S. Johnson, *What We Prefer*, STANDARD (Lee, Mont.), Jan. 5, 1997, at A1.

<sup>234</sup> See *id.*

<sup>235</sup> See *id.*

<sup>236</sup> See *id.*

<sup>237</sup> See Brooke, *supra* note 49, at 16.

<sup>238</sup> See *State v. Stanko*, No. 97-486, 1998 WL 892127 (Mont. Dec. 23, 1998).

<sup>239</sup> See *id.* at \*1.

<sup>240</sup> *Id.* at \*4.

<sup>241</sup> See *id.* at \*5.

Court emphasized that the law enforcement machinery of the state had not attempted to limit the discretion of police officers through guidelines, and that it had relied instead on individual, case-by-case judgments.<sup>242</sup> Thus “the average motorist in Montana would have no idea of the speed at which he or she could operate his or her motor vehicle . . . . Furthermore, the basic rule not only permits, but requires the kind of arbitrary and discriminatory enforcement that the due process clause in general, and the void-for-vagueness doctrine in particular, are designed to prevent,” largely because it delegates “basic public policy” to police officers, judges, and juries.<sup>243</sup> A dissenting opinion by Justice Regnier emphasized that the defendant had been “[o]perating a vehicle at 85 miles per hour on a two-lane highway with frost heaves, steep hills, and curves, where farm vehicles may unexpectedly appear.”<sup>244</sup> Thus Justice Regnier’s suggestion appeared to be that the defendant in the case could not reasonably claim to have lacked notice that he was violating the law.<sup>245</sup>

The purpose of this paper is principally empirical, and thus we do not venture a detailed discussion of the Court’s ruling under the due process clause. But what we have said here offers some lessons about the need for empirically-informed constitutional law. It is difficult for a court to venture a judgment about vagueness without knowing how a law operates in practice. A law that seems vague may be far less so when taken in the context of public and private practices. Note, for example, that on the day after it invalidated the Basic Rule, the Montana Supreme Court upheld the prohibition on “reckless driving,” notwithstanding the apparently unclear definition of “reckless driving” as operating “any vehicle in willful or wanton disregard for the safety of persons or property.”<sup>246</sup> The constitutional question is what legal terms are taken to mean, by public and private actors, and a seemingly open-ended term may be proved far less open-ended by practice.

The evidence that we have discussed does provide considerable support for the Court’s ruling. As we have seen, diverse law enforcement officials interpret the basic law in diverse ways, and motorists cannot always know, with precision and in advance, how much speed is excessive. The strongest opinion for invalidation might have been empirical, emphasizing the unmistakable record of uncertainty and arbitrariness.

We think, however, that it was probably premature for the Court to invalidate the law. There is some evidence of an increasing degree of clarity about the circumstances in which drivers will be found to violate the law. At the very least, there seems to have been an emerging judgment about what

---

<sup>242</sup> *See id.* at \*7.

<sup>243</sup> *Id.* at \*6.

<sup>244</sup> *Id.* at \*9 (Regnier, J., dissenting).

<sup>245</sup> *Id.*

<sup>246</sup> *State v. Stanko*, No. 98-106, 1998 WL 896273, at \*7-\*8 (Mont. Dec. 24, 1998).

kinds of driving behavior would count as unreasonable and imprudent. Motorists, and grudgingly, law enforcement, were adjusting to the law.

Probably the best outcome would have been for the Court to reserve judgment on the ultimate issue with a holding that the defendant in the case was certainly on notice that he was not driving prudently. If the Court had reserved judgment on the due process issue, by showing that the particular defendant could not claim a lack of notice, it might have encouraged chief law enforcement authorities to provide greater guidance to the driving public, perhaps through illustrative examples of speeds that would be considered reasonable and speeds that would be considered unreasonable in diverse circumstances.

It remains to be seen how Montana will respond to the ruling of its Supreme Court. A revised version of the Basic Rule might attempt to provide greater clarity through some kind of standard ceiling, or it might, in the spirit of the Basic Rule, use guidelines and exemplars. It might even require the adoption of guidelines and exemplars by law enforcement officials; the Court was obviously troubled by the failure of law enforcement to provide greater clarity for the driving public. On the basis of the evidence discussed here, we believe that it is legitimate to ask for greater guidance for rule of law purposes. But in a case in which the largest issues might best have been left undecided, the Court may well have invalidated the Basic Rule prematurely, at least in the absence of a more detailed factual report.

#### CONCLUSION

Montana's Basic Rule appears to be a simple proposition: During daytime hours on the state's highways and interstates, motorists must drive in a "reasonable and prudent" manner. Yet the Rule's impact on America's fourth largest state, its roadways, its courtrooms, and its residents, has proven to be anything but simple.

Enacted in accordance with Montana's libertarian principles, the Basic Rule drew national attention but caused no substantial difference in Montanans' driving habits in the short term. Although the average speed increased by a non-trivial amount from 72 mph to 78 mph, most Montanans continued driving at approximately the same speed. While remaining within historical fluctuation ranges, the state's total fatalities decreased during 1996, soared in 1997, and declined again in 1998; it remains unclear if this variation is attributable to the change in law or to some other factor or set of factors. The underlying lesson appears to be that driving habits are only partly a function of law. Probably the most discernible effect of the Rule is that Montana has become a "speed magnet," attracting tourists who view Montana's interstates as race tracks. It is also clear that the Basic Rule created several complex tradeoffs. Highway safety, fuel efficiency, air quality, and Montana's reputation suffered under the Basic Rule. Probable economic efficiency, increased social ties, shorter driving times, and personal satisfaction stand as benefits.

Enforcement is perhaps the biggest problem with the Basic Rule. Although ticket revenues have increased, roadside confrontations, accident investigations and court appearances also have increased, depleting the already scant resources of the Highway Patrol and judiciary. Furthermore, the subjective standard has proven an onerous task to administer. Arbitrary and inconsistent enforcement by the police, prosecutors, and judges impedes citizens' compliance and the law's effectiveness. Legislative attempts to reinstate a numerical speed limit have failed amidst geographic, age and gender factionalization. However, in late 1998, a sharply divided Montana Supreme Court invalidated the daytime speed limit as unconstitutionally vague, a move we have criticized in light of the insufficient factual record of the case.

A more consistent application of the law might have reduced some of these problems and may have prevented, or at least forestalled, the recent Montana Supreme Court's action. Recent evidence of declining roadway fatalities and Basic Rule citations may indicate that drivers were adapting to the flexible standard. Furthermore, as Montanans, tourists, the Highway Patrol, prosecutors and judges became more accustomed to "reasonable and prudent" travel, a consensus might have emerged, reducing the difficulty of establishing workable standards for law enforcement and the judiciary.

An overall evaluation of the law and its consequences would require more time and data. Even at this early date the transition from the 55 mph limit to the Basic Rule offers some significant lessons. It highlights the important role that social norms play in generating driving behavior. It reveals how a state may become a speed magnet or a speed repellent. It also illustrates the need to assess a number of effects in order to evaluate a change in transportation policy. Finally, the study demonstrates the palpable adverse effects of a vague, highly subjective standard on law enforcement. These lessons do not permit any simple or straightforward verdict on the Basic Rule. But they do bear on a number of recurrent debates in private and public law, most notably the choice between rules and standards, and the relationship between law and social norms.

*BOSTON UNIVERSITY LAW REVIEW*

The *Boston University Law Review*  
is pleased to announce  
the election of its Editorial Board  
for the 1999-2000 academic year:

*Editor-in-Chief*

GILBERT L. HENRY

*Managing Editor*

PATRICIA R. STEMBRIDGE

*Administrative Editor*

RONALD J. BAUMGARTEN

*Article Editors*

ELIZABETH K. CHEN  
JENNIFER W. CORINIS  
JEREMY N. KUDON  
CHRISTINE M. O'MALLEY

*Topic and Book Review Editor*

CHRISTINE M. FITZGERALD

*Executive Editors*

KELLY N. HONOHAN  
JULIA A. MILLER  
JULIANNA M. THOMAS

*Note Editors*

JEREMY L. BARTELL  
JOSHUA J. LOZNER  
CHRISTOPHER C. MILLER  
DAVID T. SCHUR  
JEFFREY S. SIEGEL



*BOSTON UNIVERSITY LAW REVIEW*