

## LOL? Texting While Driving Is No Laughing Matter: Proposing a Coordinated Response to Curb this Dangerous Activity

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Drivers sending and receiving text messages (texting) from behind the wheel have become increasingly pervasive.<sup>1</sup> Correspondingly, there has been a surge in texting-related accidents.<sup>2</sup> In one dramatic

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1. According to the Missouri Code,

to “*send, read, or write a text message or electronic message*” means using a hand-held electronic wireless telecommunications device to manually communicate with any person by using an electronic message. Sending, reading, or writing a text message or electronic message does not include reading, selecting, or entering a phone number or name into a hand-held electronic wireless communications device for the purpose of making a telephone call.

MO. REV. STAT. § 304.820.7 (Supp. 2009). Missouri further defines “electronic message” to mean “a self-contained piece of digital communication that is designed or intended to be transmitted between hand-held electronic wireless communication devices. ‘*Electronic message*’ includes, but is not limited to, electronic mail, a text message, an instant message, or a command or request to access an Internet site.” *Id.* § 304.870.4; *see also* CAL. VEH. CODE § 23123.5(b) (West Supp. 2010) (defining a “text-based communication” similarly); N.Y. VEH. & TRAF. LAW § 1225-d(2)(b) (McKinney Supp. 2010) (defining “using” a portable electronic device while driving as “holding a portable electronic device while viewing, taking or transmitting images, playing games, or composing, sending, reading, viewing, accessing, browsing, transmitting, saving or retrieving e-mail, text messages, or other electronic data”).

According to a 2008 survey of nearly five thousand United States consumers, 28 percent of respondents admitted to texting while driving. Moreover, more than 50 percent of respondents ages sixteen to twenty-nine admitted to texting while driving. VLINGO CORP., CONSUMER TEXT MESSAGING HABITS 1 (2008), *available at* [http://www.vlingo.com/sites/default/files/vlingo\\_survey\\_5\\_22.08.pdf](http://www.vlingo.com/sites/default/files/vlingo_survey_5_22.08.pdf); *see also* Press Release, Nationwide Ins., Almost All Americans Believe They Are Safe Drivers, yet Almost Three-Quarters Guilty of Distracted Driving, Finds Survey from Nationwide Insurance (May 19, 2008), *available at* <http://www.nationwide.com/newsroom/press-release-almost-all-americans-believe-they-are-safe-drivers-2008.jsp> (finding that nearly 40 percent of drivers ages sixteen to thirty admitted to texting while driving).

2. The National Safety Council (NSC) estimates that cell phone use of any sort causes 28 percent of all crashes each year, or approximately 1.6 million crashes annually. Moreover, texting drivers account for at least 200,000 crashes each year. Press Release, Nat’l Safety Council, National Safety Council Estimates that At Least 1.6 Million Crashes are Caused Each Year by Drivers Using Cell Phones and Texting (Jan. 12, 2010) [hereinafter Press Release,

case, phone records revealed that a commuter train operator in California was texting within seconds of a crash that killed twenty-five people and injured another 135.<sup>3</sup>

One byproduct of tragedies like the 2008 California crash is increased media and legislative attention to the dangers of texting while driving.<sup>4</sup> The problem is most serious on an individual level: for every mass-transit texting tragedy, there are thousands of car accidents among the general driving population.<sup>5</sup>

In Parts I.A and B, this Note examines the prevalence of texting while driving among various segments of the population, including teenage drivers. The Note also reviews current leading studies on the dangers of texting while driving.<sup>6</sup> While some studies suggest that texting, e-mailing, web browsing, and similar cell phone use behind the wheel may be just as dangerous as talking on a cell phone while driving or engaging in other forms of driver distraction,<sup>7</sup> this Note focuses on the unique dangers presented by texting while driving.

In Part I.C, this Note summarizes various legislative responses to texting while driving. Current prohibitions on drivers' use of cell phones may be classified into three categories: laws prohibiting any use of a cell phone while driving (an "all cell phone" ban), handheld only laws, and text messaging laws.<sup>8</sup> As this Note further explains,

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NSC], available at <http://www.nsc.org/Pages/NSCEstimates16millioncrashescausedbydriversusingcellphonesandtexting.aspx>.

3. Cell phone records reveal that Robert Martin Sanchez, the commuter train's engineer, received a text message at 4:21:03 p.m. and sent one at 4:22:01 p.m. Syantani Chatterjee, *Train Engineer Was Texting Just Before California Crash*, REUTERS, Oct. 2, 2008, <http://www.reuters.com/article/idUSN0152835520081002>. The accident occurred at 4:22:23 p.m., according to the train's onboard recorders. *Id.* Further, Sanchez received seven text messages and sent five between 3:00 p.m. and the accident. *Id.* Since a common platform did not record all timings, the precise correlation between the events remains unclear. *Id.* The crash was the worst train accident since 1993. *Id.*

4. See *infra* Part I.A. Revealing the priority the federal government places on ending distracted driving, United States Transportation Secretary Ray LaHood held the first Distracted Driving Summit in Washington, D.C., in October 2009. A second national summit was held in September 2010. Secretary LaHood has also taped a national PSA and launched a new government website to provide the public with a comprehensive resource about how to end distracted driving. See DISTRACTION.GOV, <http://www.distracted.gov/> (last visited Aug. 23, 2011).

5. See *supra* notes 1–2 and accompanying text.

6. See *infra* Part I.A–B.

7. See *infra* Part I.A–B.

8. See discussion *infra* Part I.C.

even within those categories, some states have enacted modified prohibitions, such as limiting only certain segments of drivers from utilizing their cell phones for certain purposes, like the State of Missouri does with teenage drivers and texting.<sup>9</sup> As no state bans all cell phone use by all drivers, state legislatures at least implicitly condone the use of a cell phone while driving for some purpose.<sup>10</sup>

Part II of this Note evaluates the efficacy of the current legislation governing cell phone use in motor vehicles. In Part II.A, this Note dispels misconceptions regarding the perceived dangers of simply talking on a cell phone while driving. It also explains why handheld bans may actually pose greater risks to motorists than the absence of such bans.<sup>11</sup> As Part I establishes, texting while driving does pose a grave danger to all motorists, so legislation is necessary. However, this Note discusses in Part II.B the serious enforcement problems behind legislation prohibiting only the practice of texting while driving. While some of the enforcement problems of policing texting while driving could be achieved through handheld bans or an outright prohibition on all cell phone use while driving,<sup>12</sup> this Note will explain why such general prohibitions are overbroad in achieving the desired goal of ending texting while driving.<sup>13</sup>

Moreover, as argued in Parts II and III, curbing texting while driving will not be achieved by legislation alone, regardless of the strength of that legislation. As Part III concludes, the federal government, state governments, law enforcement agencies, cell phone manufacturers, wireless carriers, insurance carriers, corporations, other industry and public interest groups, and, most importantly, individual drivers must collectively engage in a comprehensive effort to raise awareness of this problem. As this Note argues, each must do their part to effectuate a multi-dimensional campaign to prohibit, educate, enforce, and reinforce the dangers of texting while driving.<sup>14</sup>

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9. *See infra* Part I.C.

10. *See infra* Part I.C.

11. *See infra* Part II.A.

12. *See* discussion *infra* Part I.C.

13. *See infra* Part II.B.

14. *See infra* Part III.

## I. HISTORY: ONE TRILLION TEXT MESSAGES AND COUNTING, AND THE LEGISLATION TO CURB TEXTING BEHIND THE WHEEL

### A. *Operating a Car and a Cell Phone Takes Multitasking Too Far*

The number of cell phone subscribers is increasing, with approximately 302.9 million wireless subscriptions as of December 2010, an increase of nearly 100 million in four years.<sup>15</sup> This increase is particularly noticeable among younger demographics, as approximately 75 percent of American teens age twelve and older have cell phones and 66 percent of these teens use their phones to receive text messages.<sup>16</sup>

It is unsurprising, then, that as cell phones have become ubiquitous in the United States, there has been a corresponding increase in texting.<sup>17</sup> While cell phone users sent 9.8 billion text messages in December 2005, they sent 187.7 billion in December 2010.<sup>18</sup> In total, cell phone users sent and received 2.052 *trillion* text

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15. As of December 2005, there were approximately 207.9 million wireless subscribers for a wireless penetration of 69 percent of U.S. households; as of December 2010, wireless penetration, reached 96 percent. CTIA—The Wireless Ass'n, *U.S. Wireless Quick Facts: Year-End Figures*, CTIA.ORG, <http://www.ctia.org/advocacy/research/index.cfm/AID/10323> (last visited Aug. 23, 2011) [hereinafter CTIA, *Wireless Quick Facts*].

16. Older teens are more likely than younger teens to have cell phones and use text messaging. Eighty-two percent of teens ages 16–17 have a cell phone and 76 percent of those teens are texters. Furthermore, one in three (34 percent) texting teens ages 16–17 say they have texted while driving. PEW INTERNET & AM. LIFE PROJECT & PEW RES. CTR., *TEENS AND DISTRACTED DRIVING: TEXTING, TALKING, AND OTHER USES OF THE CELL PHONE BEHIND THE WHEEL 2* (2009), available at [http://pewinternet.org/~media/Files/Reports/2009/PIP\\_Teens\\_and\\_Distracted\\_Driving.pdf](http://pewinternet.org/~media/Files/Reports/2009/PIP_Teens_and_Distracted_Driving.pdf) [hereinafter PEW REPORT]; see also Alina Tugend, *New Worries About Children With Cellphones*, N.Y. TIMES, Aug. 15, 2009, at B7.

17. The number of text messages sent and received was 2.052 trillion. Press Release, CTIA—The Wireless Ass'n, CTIA—The Wireless Association Announces Semi-Annual Survey Results (Mar. 22, 2011), available at <http://www.ctia.org/media/press/body.dfm/prid/2062>. This is an increase of 31 percent from the previous year, when 1.563 trillion SMS were sent and received. *Id.* Emily Tedford, 13, of St. Charles, Missouri, sends nearly 20,000 texts each month and has done so since her parents gave her a cell phone. Aisha Sultan, *Can Texting by Teens Reach a Danger Level? Phone Users Cite Comfort, but Psychologist Warns of Lag in Verbal Skills*, ST. LOUIS POST-DISPATCH, Jan. 25, 2010, at A1. That figure averages to nearly 600 text messages each day. Moreover, in one monthly billing cycle, Emily sent 19,657 texts and spent just 102 minutes talking on the phone. *Id.* While Emily's texting activity is far above average, among teenagers who say they text, the average number of text messages they send and receive in one month is about 3500, according to a Kaiser Family Foundation report on children and media use. *Id.*

18. CTIA, *Wireless Quick Facts*, *supra* note 15.

messages in the year 2010.<sup>19</sup> If only from observing fellow drivers in traffic or at a stoplight, it is clear that at least some of those 2.052 trillion text messages sent last year were sent while the senders were behind the wheel. In fact, “[t]he federal government estimates that at any given time about 11 percent of drivers, or about two million people, are talking on a cell phone” while driving.<sup>20</sup>

Of course, driver distractions existed long before the advent of the text message. Drivers change radio stations, converse with passengers, discipline children, apply mascara, fidget with the GPS, and eat while driving.<sup>21</sup> These may be seemingly innocuous activities, yet a report from the National Highway Traffic Safety Administration revealed that 20 percent of all car crash fatalities in 2009 involved some form of driver distraction.<sup>22</sup> In that year alone, 5474 people died and another 448,000 were injured in crashes in which the police report listed at least one form of driver distraction involved.<sup>23</sup> Drivers under twenty years of age are the most distracted drivers, with 16

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19. *Id.*

20. Matt Richtel, *Driven to Distraction: Driver Texting Now an Issue in the Back Seat*, N.Y. TIMES, Sept. 8, 2009, <http://www.nytimes.com/2009/09/09/technology/09distracted.html?fta=y>.

21. NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS, RESEARCH NOTE: DISTRACTED DRIVING (2010) [hereinafter TRAFFIC SAFETY FACTS], available at <http://www.distraction.gov/research/PDF-Files/Distracted-Driving-2009.pdf>. Driver distraction occurs when a driver

is delayed in the recognition of information needed to safely accomplish the driving task because some event, activity, object, or person within or outside the vehicle compelled or tended to induce the driver’s shifting attention away from the driving task. The presence of a triggering event distinguishes a distracted driver from one who is simply inattentive or “lost in thought.”

JANE C. STUTTS ET AL., AAA FOUND. FOR TRAFFIC SAFETY, THE ROLE OF DRIVER DISTRACTION IN TRAFFIC CRASHES 6 (2001), available at <http://www.aaafoundation.org/pdf/distraction.pdf>.

22. TRAFFIC SAFETY FACTS, *supra* note 21, at 3. Crash reports indicate that distracted driving was involved in 11 percent of automobile related fatalities in 2005; thus, there was a 9 percent increase in four years in the number of car crash fatalities due to distracted drivers. *Id.* More generally, a 2006 study conducted by the National Highway Traffic Safety Administration (NHTSA) and the Virginia Tech Transportation Institute (VTTI) found that “[n]early 80 percent of crashes and 65 percent of near-crashes involved some form of driver inattention within three seconds of the [crash].” Joshua Rhett Miller, *Texting While Driving Remains ‘Serious Issue,’ Officials Say*, FOXNEWS.COM (May 11, 2009), <http://www.foxnews.com/story/0,2933,519856,00.html>.

23. TRAFFIC SAFETY FACTS, *supra* note 21, at 1.

percent of all under-twenty drivers in fatal crashes reported to have been distracted while driving.<sup>24</sup> These numbers are significant, but they likely understate the true magnitude of the problem, as law enforcement often has difficulty identifying a distraction and its role in a crash.<sup>25</sup>

Study results are mixed with regard to the potential dangers of simply talking on a cell phone while driving. Some studies indicate that drivers who talk on their cell phone face a crash risk four times greater than those who do not.<sup>26</sup> Another study suggests that dialing a cell phone raises the risk of a crash nearly threefold, but the danger of simply having a conversation drops to nearly undistracted levels once the driver places the call.<sup>27</sup> In contrast to looking down to tap out a text message, listening or talking on a cell phone at least allows a driver to maintain her eyes on the road.<sup>28</sup>

Studies consistently reveal that the risk of an accident significantly increases when the cell phone user is texting while driving.<sup>29</sup> In 2009, *Car and Driver* magazine documented the dangers

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24. *Id.*

25. *Id.* at 6.

26. *Id.*; News Release, Ins. Inst. for Highway Safety, 1st Evidence of Effects of Cell Phone Use on Injury Crashes: Crash Risk is Four Times Higher When Driver Is Using a Hand-Held Cell Phone (July 12, 2005), available at [http://www.iihs.org/news/2005/iihs\\_news\\_071205.pdf](http://www.iihs.org/news/2005/iihs_news_071205.pdf) (citing a two-year study done by Anne McCartt, the Vice President of Research at the Insurance Institute for Highway Safety, which found that cell phone use caused “a fourfold increase in injury crash risk . . . consistent across groups of drivers”).

27. See Press Release, Va. Tech Transp. Inst., New Data from VTTI Provides Insight into Cell Phone Use and Driving Distraction (July 27, 2009) [hereinafter Press Release, VTTI], available at [http://www.vtti.vt.edu/PDF/7-22-09-VTTI-Press\\_Release\\_Cell\\_phones\\_and\\_Driver\\_Distraction.pdf](http://www.vtti.vt.edu/PDF/7-22-09-VTTI-Press_Release_Cell_phones_and_Driver_Distraction.pdf). The Virginia Tech study found the risk of crash or a near crash event for a driver dialing a cell phone is 2.8 times higher than that of a non-distracted driver; however, when the driver is talking or listening on a cell phone while driving, the risk of crash drops to 1.3 times greater than that of a non-distracted driver. *Id.*

28. According to Troy Green, national spokesman for the fifty million member strong American Automobile Association (AAA), “[f]or every two seconds a driver’s eyes are off the road, a motorist is twice as likely to be involved in a crash.” Miller, *supra* note 22.

29. See, e.g., Press Release, U.S. Dep’t of Transp., U.S. Transportation Secretary Ray LaHood Announces Federal Ban on Texting for Commercial Truck Drivers (Jan. 26, 2010) [hereinafter Press Release, USDOT], available at <http://www.dot.gov/affairs/2010/dot1410.htm> (explaining that texting drivers are twenty times more likely to get in an accident than non-distracted drivers); see also Phil LeBeau, *Texting and Driving Worse Than Drinking and Driving*, CNBC.COM (June 25, 2009, 11:54 AM), [http://www.cnbc.com/id/31545004/Texting\\_And\\_Driving\\_Worse\\_Than\\_Drinking\\_and\\_Driving](http://www.cnbc.com/id/31545004/Texting_And_Driving_Worse_Than_Drinking_and_Driving) (summarizing the results of the *Car and*

of texting while driving.<sup>30</sup> *Car and Driver* staffers rigged a Honda Pilot with a red light that, when illuminated, alerted the driver to brake, thereby testing the driver's reaction time under four different conditions: when unimpaired; when over the legal driving limit with a blood alcohol content (BAC) of 0.08; when reading a text message aloud; and when sending a text message.<sup>31</sup> Driving at seventy miles per hour, it took the driver just half of a second to hit the brake when unimpaired; when legally drunk, the driver took an additional four feet to come to a complete stop; when reading a text message, thirty-six feet; and, when sending a text message, seventy feet.<sup>32</sup> Although the *Car and Driver* study is admittedly unscientific, it accurately simulated real-world driving situations.<sup>33</sup>

In July 2009, the Virginia Tech Transportation Institute (VTTI) released another study indicating that texting poses the highest risk of all cell phone related tasks while driving.<sup>34</sup> Similarly, research from the Federal Motor Carrier Safety Administration showed that text messaging also results in drivers keeping their eyes off of the road for the longest duration: 4.6 seconds over a six second interval, compared to 2.6 seconds for the distraction of adjusting the radio.<sup>35</sup> At fifty-five miles per hour, the former distraction equates to

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*Driver Magazine* study on texting while driving, which show delayed reaction while texting and driving).

30. Michael Austin, *Texting While Driving: How Dangerous Is It?*, CAR AND DRIVER, June 2009, [http://www.caranddriver.com/features/09q2/texting\\_while\\_driving\\_how\\_dangerous\\_is\\_it\\_-feature](http://www.caranddriver.com/features/09q2/texting_while_driving_how_dangerous_is_it_-feature); LeBeau, *supra* note 29.

31. Austin, *supra* note 30.

32. *Id.*

33. The test only considered the reactions of two drivers. *Id.*

34. Press Release, VTTI, *supra* note 27. The VTTI study compiled data on drivers who drove a combined six million miles under electronic observation. *Id.* These "large-scale, naturalistic driving studies," which interfere as little as possible with the subjects or phenomena, used "sophisticated cameras and instrumentation in participants' personal vehicles." *Id.* The study utilized eye glance analyses to assess drivers' focus in performing cell phone related tasks. *Id.* The tasks that drew the driver's eyes away from the road for the longest period of time were those with the highest risk. *Id.* For heavy vehicles and trucks, texting while driving increased the risk of crash or a near crash event 23.2 times. *Id.*

35. Terri Hallquist, U.S. Dep't of Transp., Presentation at the Federal Motor Carrier Safety Administration, Analysis, Research and Technology Forum 2010: Driver Distraction in Commercial Vehicle Operations (Jan. 12, 2010), available at [http://www.fmcsa.dot.gov/facts-research/presentations/annual-forum-2010/Hallquist\\_DriverDistractionCVO508.pdf](http://www.fmcsa.dot.gov/facts-research/presentations/annual-forum-2010/Hallquist_DriverDistractionCVO508.pdf).

traveling nearly the length of a football field without *once* looking at the road.<sup>36</sup>

### *B. Teenagers as Drivers and Texters*

The average texting American teenager now sends and receives more than three thousand text messages each month.<sup>37</sup> While adult drivers may encounter little danger once they dial a phone number, the same is not true for less experienced teenage drivers.<sup>38</sup> As the VTTI study noted, “teens tend to engage in cell phone tasks much more frequently, and in much more risky situations, than adults. Thus . . . teens are four times more likely to get into a related crash or near crash event than their adult counterparts.”<sup>39</sup> With so many teens equipped with cell phones, there is great reason to be alarmed. In 2009, one in three texting teens reported having texted while driving.<sup>40</sup> Put differently, 26 percent of all American teens ages 16–17, the driving population, have texted from behind the wheel.<sup>41</sup>

### *C. Prohibitions and Enforcement Regulating Cell Phone Use While Driving*

In 2009, forty-three states considered more than 270 distracted driving bills.<sup>42</sup> Yet no state bans all cell phone use for all drivers.<sup>43</sup>

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36. Press Release, USDOT, *supra* note 29.

37. Sultan, *supra* note 17, at A1.

38. Press Release, VTTI, *supra* note 27 (“[T]eens are four times more likely to get into a [cell phone task] related crash or near crash event than their adult counterparts.”). In June 2007, Bailey Goodman, a seventeen-year-old cheerleader, sent and received text messages moments before her SUV slammed into a truck, killing her and four other recent high school graduates. See Miller, *supra* note 22; Keach Hagey, *Five Young Women Killed in Fiery Car Crash*, CBS NEWS (June 28, 2007), <http://www.cbsnews.com/stories/2007/06/27/nationa/main2988033.shtml>.

39. Press Release, VTTI, *supra* note 27. Similarly, a 2008 Nationwide Insurance survey found that drivers between the ages of sixteen and thirty are the most frequent senders of text messages. See Sarah N. Lynch, *Text-Messaging Behind the Wheel*, TIME, June 25, 2008, <http://www.time.com/time/nation/article/0,8599,1817856,00.html>.

40. PEW REPORT, *supra* note 16, at 2.

41. *Id.*

42. See Ray LaHood, U.S. Transp. Sec’y, Remarks at the Second National Distracted Driving Summit (Sept. 21, 2010), available at <http://www.distraction.gov/files/for-media/2010.09.22-sec-lahood-remarks-2010summit.pdf>; see also Vernon Betkey, Chairman, Governors Highway Safety Ass’n, Presentation at the U.S. Department of Transportation



Furthermore, statutes governing cell phone use while driving vary greatly by jurisdiction.<sup>44</sup> Many prohibit cell phone use by only certain segments of the driving population, particularly teenage or novice drivers and school bus drivers.<sup>45</sup> For example, as of August 2011, thirty states and the District of Columbia ban all cell phone use by novice or teenage drivers.<sup>46</sup> Nineteen states and the District of Columbia prohibit school bus drivers from all cell phone use when passengers are present.<sup>47</sup>

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Distracted Driving Summit: Legislation, Regulation and Enforcement (Oct. 1, 2009), *available at* [http://www.ghsa.org/html/issues/pdf/summit\\_forweb.pdf](http://www.ghsa.org/html/issues/pdf/summit_forweb.pdf).

43. *See Cell Phone and Texting Laws*, GOVERNORS HIGHWAY SAFETY ASS'N (Aug. 2010), [http://www.ghsa.org/html/stateinfo/laws/cellphone\\_laws.html](http://www.ghsa.org/html/stateinfo/laws/cellphone_laws.html) (organizing cell phone bans by driver classification, prohibition, and mode of enforcement); *see also* GOVERNORS HIGHWAY SAFETY ASS'N, CURBING DISTRACTED DRIVING: 2010 SURVEY OF STATE SAFETY PROGRAMS (2010), *available at* [http://statehighwaysafety.org/html/publications/survey/pdf/2010\\_distraction.pdf](http://statehighwaysafety.org/html/publications/survey/pdf/2010_distraction.pdf). The GHSA's 2010 State Survey details the various approaches states are implementing to combat distracted driving. *See id.* All fifty states, plus the District of Columbia, Guam and American Samoa are included in the report. *Id.*

44. *See Cell Phone and Texting Laws*, *supra* note 43.

45. *See id.*

46. The following states ban novice drivers from all cell phone use while operating a motor vehicle: Alabama (total ban for drivers age sixteen and seventeen where the latter have had intermediate licenses for less than six months); Arkansas (total ban for drivers under eighteen; drivers age eighteen to twenty must use a hands-free system); California (total ban for drivers under eighteen); Colorado (total ban for drivers under eighteen); Connecticut (total ban for drivers with learners' permits and those under eighteen); Delaware (total ban for drivers with learners' permits or with intermediate licenses); the District of Columbia (total ban for drivers with learners' permits); Georgia (total ban for drivers under eighteen); Illinois (total ban for drivers under nineteen); Indiana (total ban for drivers under eighteen); Iowa (total ban for drivers with restricted or intermediate licenses); Kansas (total ban for drivers with learners' or intermediate licenses); Kentucky (total ban for drivers under eighteen); Louisiana (total ban for first year of licensure and drivers under eighteen); Maine (total ban for drivers under eighteen); Maryland (total ban for drivers under eighteen with learners' permits or provisional licenses); Massachusetts (total ban for drivers under eighteen); Minnesota (total ban for drivers under eighteen with learners' permits or provisional licenses); Nebraska (total ban for drivers under eighteen with learners' permits or provisional licenses); New Jersey (total ban for drivers with a permit or provisional licenses); New Mexico (total ban for drivers with a learners' permits or provisional licenses); North Carolina (total ban for drivers under eighteen); North Dakota (total ban for drivers under eighteen, effective Jan. 1, 2012); Oregon (total ban for drivers under eighteen); Rhode Island (total ban for drivers under eighteen); Tennessee (total ban for drivers with learners' permits or intermediate licenses); Texas (total ban for drivers within their first twelve months of driving); Vermont (total ban for drivers under eighteen); Virginia (total ban for drivers under eighteen); Washington (total ban for drivers with their learners' permits or intermediate stage licenses); and West Virginia (total ban for drivers with their learners' permits or intermediate stage licenses). *See id.*

47. The following states ban all types of cell phone use (handheld and hands-free) by school bus drivers: Arizona, Arkansas, California, Connecticut, Delaware, the District of

In most states, if a driver is texting and causes a crash injuring or killing someone, the penalty may be as light as a fine.<sup>48</sup> That is, the state may treat the crash like most other “accidents.” Thus, in the majority of jurisdictions, if a prosecutor wants to hold a texting driver who causes serious bodily harm or a fatality criminally liable, she must prove some sort of mens rea on the part of the driver, such as the driver knew of the risks of texting while driving before sending the text message.<sup>49</sup> In other states, however, the law may provide more serious sanctions for a texting driver who injures or kills someone.<sup>50</sup> Utah has adopted the latter approach, with the state no longer classifying a multitasking motorist’s crash as an “accident” when such a crash results in a fatality.<sup>51</sup> In contrast to most states, the law in Utah presumes a texting driver understands the risk her actions pose,<sup>52</sup> and Utah considers the texting driver’s actions criminally negligent.<sup>53</sup> Criminally negligent vehicular homicide is classified as a

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Columbia, Georgia, Illinois, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, New Jersey, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas (total ban when passengers under eighteen are present), and Virginia. *Id.*

48. Matt Richtel, *Not Driving Drunk, but Texting? Utah Law Sees Little Difference*, N.Y. TIMES, Aug. 29, 2009, at A1. A violation of the California law prohibiting texting while driving is, for example, considered an infraction. CAL. VEH. CODE § 23123.5 (West Supp. 2010). The fine for the first infraction is a mere twenty dollars. *Id.*

49. Richtel, *supra* note 48, at A1. Furthermore, there may be evidentiary roadblocks: “If an officer or prosecutor wants to confiscate a phone or phone records to determine whether a driver was texting at the time of the crash, such efforts can be thwarted by search-and-seizure and privacy defenses.” *Id.*

50. *Id.* Literature frequently analogizes between texting and drunk drivers because studies suggest that talking on a cell phone while driving is at least as risky as driving with a blood alcohol content (BAC) of 0.08, the standard for legal intoxication. *Id.*

51. *Id.* Utah’s law defines “careless driving” as committing a moving violation (other than speeding) while being distracted by any activity not related to the singular task of driving. UTAH CODE ANN. § 41-6a-1715(1)(b) (LexisNexis Supp. 2010) (classifying an accident caused by texting while driving not resulting in death as either a Class C or Class B misdemeanor); *id.* § 53-3-218(5) (“Upon a conviction for a violation of the prohibition on using a handheld wireless communication device for text messaging or electronic mail communication while operating a moving motor vehicle under Section 41-6a-1716, a judge may order a suspension of the convicted person’s license for a period of three months.”); *id.* § 53-3-220 (describing offenses requiring mandatory revocation, denial, suspension or disqualification of a license, as triggered by § 76-5-207.5, among other violations of Title 41, Chapter 6a, Traffic Code or Title 53, Public Safety Code); *id.* § 76-5-207.5 (homicide involving texting while driving is criminally negligent vehicular homicide).

52. See Richtel, *supra* note 48, at A1.

53. According to the Utah Code, “[c]riminal homicide is automobile homicide, a second degree felony, if the person operates a moving motor vehicle in a criminally negligent manner

second degree felony in Utah<sup>54</sup> and carries a potential sentence of up to fifteen years.<sup>55</sup> Only Alaska has a tougher law—up to four years in prison if a texting motorist injures someone and up to twenty years if someone is killed.<sup>56</sup>

### 1. Handheld Cell Phone Bans

Eight states, the District of Columbia, and the Virgin Islands prohibit all drivers from using a handheld cell phone while driving.<sup>57</sup> Thus, drivers may talk on their cell phone but must utilize a hands-free headset, a speakerphone feature, or the equivalent.<sup>58</sup> With the exception of Maryland, these laws have primary enforcement support.<sup>59</sup> As such, an officer may stop a driver for using a handheld cell phone while driving regardless of any other moving violation.<sup>60</sup> Some states have municipal, rather than statewide, laws prohibiting drivers from talking on a handheld cell phone.<sup>61</sup> However, some

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... while using a handheld wireless communication device for text messaging or electronic mail communication in violation of Section 41-6a-1716. § 76-5-207.5(3)(b).

54. § 76-5-207.5(3)(b).

55. UTAH CODE ANN. § 76-3-203(2) (LexisNexis 2008) (providing that a second degree felony conviction imposes an imprisonment term “of not less than one year nor more than [fifteen] years”).

56. See ALASKA STAT. ANN. § 28.35.161 (West Supp. 2010).

57. These states and territories are: California, Connecticut, Delaware, the District of Columbia, Maryland, New Jersey, New York, Oregon, the Virgin Islands, and Washington. See *Cell Phone and Texting Laws*, *supra* note 43. Effective January 1, 2012, Nevada will ban handheld cellular phone use for all drivers. *Id.* Arkansas bans handheld cell phone use among drivers age eighteen to twenty. *Id.* Although Hawaii does not have a state law banning the use of handheld cell phones, all of the state’s counties have enacted distracted driving ordinances. *Id.* Illinois bans drivers from using their cell phones while in a school zone or a highway construction zone. *Id.* Louisiana bans handheld cell phone use among drivers with learners’ permits or intermediate licenses, regardless of age. *Id.* New Mexico bans handheld cell phone use in in-state vehicles. *Id.* Oklahoma bans handheld cell phone use among drivers with learners’ permits or intermediate licenses. *Id.*

58. See *id.*

59. See *id.*

60. See, e.g., CAL. VEH. CODE § 23124(e) (West Supp. 2010) (providing that law enforcement officers may stop a vehicle for a violation of Section 23123, the provision governing using a cell phone while driving).

61. For example, the State of Hawaii does not have a state law banning the use of handheld cell phones; however, all of the state’s counties have enacted distracted driving ordinances. Thus in practical effect, a driver may not text and drive in Hawaii. See *Cell Phone and Texting Laws*, *supra* note 43. In addition, four localities in the State of Ohio have enacted municipal laws dealing with cell phone use and driving. *Ohio Driving Laws and Cell-Phone*

states, such as Florida, Kentucky, Louisiana, Mississippi, Nevada, and Oklahoma, have preemption laws that prohibit localities from enacting their own cell phone driving bans.<sup>62</sup>

## 2. Text Messaging Bans

Thirty-four states, plus Guam and the District of Columbia, now prohibit all drivers from texting while driving.<sup>63</sup> Eleven of these laws were enacted in the first half of 2010.<sup>64</sup> An additional seven states prohibit text messaging for novice drivers only.<sup>65</sup> In addition to banning text messaging among young drivers, Mississippi, Oklahoma, and Texas also prohibit school bus drivers from texting while driving.<sup>66</sup>

## 3. Primary versus Secondary Enforcement

Forty-one states, plus Guam and the District of Columbia, have some primary enforcement support of a cell phone ban.<sup>67</sup> Seven states

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*Legislation*, DRIVINGLAWS.ORG (Mar. 24, 2010), <http://www.drivinglaws.org/ohio.php>. Brooklyn, North Olmstead, the City of Cleveland, and Walton Hills, Ohio all have ordinances that make talking on a cell phone while driving illegal conduct. *Id.* The Brooklyn law stipulates that a driver cannot use a cell phone unless the driver maintains both hands on the steering wheel. BROOKLYN, OHIO, TRAFFIC CODE § 331.45 (1999), available at <http://www.conwaygreene.com/Brooklyn/lpext.dll?f=templates&fn=main-h.htm&2.0>.

62. See *Cell Phone and Texting Laws*, *supra* note 43.

63. The states and territories that ban text messaging for all drivers are: Alaska, Arkansas, California, Colorado, Connecticut, Delaware, the District of Columbia, Georgia, Guam, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada (effective Jan. 1, 2012); New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oregon, Rhode Island, Tennessee, Utah, Vermont, Virginia, Washington, Wisconsin, and Wyoming. *Id.*

64. *Id.*

65. The following states prohibit text messaging for novice drivers only: Alabama (drivers age sixteen and seventeen where the latter have had an intermediate license for less than six months); Mississippi (drivers with learners' permits or provisional licenses); Missouri (drivers who are age twenty-one and younger); New Mexico (drivers with learners' permits or provisional licenses); Oklahoma (drivers with learners' permits or intermediate licenses); Texas (drivers during their first twelve months of driving); and West Virginia (drivers with learner or intermediate stage licenses). *Id.*

66. *Id.* Texas prohibits school bus drivers from texting while driving only when passengers under eighteen are present. *Id.*

67. *Id.* With the noted caveats and exceptions, the following states have primary enforcement of cell phone driving laws: Alabama; Alaska; Arizona; Arkansas (primary enforcement for texting, for cell phone use by bus drivers, and for handheld use by drivers age

have a secondary enforcement mechanism behind at least some of their statutes governing drivers' use of cell phones.<sup>68</sup> In secondary enforcement states, a driver can be pulled over only for a traffic violation with primary enforcement support, such as speeding, and then also ticketed for illegal cell phone use.<sup>69</sup>

## II. EVALUATING THE EFFICACY OF LEGISLATION

### A. *Understanding Motorists and Misconceptions*

In comparison to dialing, talking, listening, or reaching for an electronic device, texting while driving poses the greatest risk of accident.<sup>70</sup> In addition, texting while driving can be more dangerous than driving while intoxicated.<sup>71</sup> Although general public opinion

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eighteen to twenty; secondary enforcement supporting the cell phone ban for novice drivers); California (primary enforcement for texting, for cell phone use by bus drivers, and for handheld use by drivers age eighteen to twenty; secondary enforcement supporting the cell phone ban for novice drivers); Colorado; Connecticut; Delaware; the District of Columbia; Georgia; Guam; Illinois; Indiana; Iowa (primary enforcement supporting the cell phone ban for drivers with restricted or intermediate licenses; secondary enforcement supporting the text messaging ban for all drivers); Kansas; Kentucky; Louisiana; Maine; Maryland (primary enforcement supporting only texting while driving ban; secondary enforcement supporting the handheld and cell phone bans); Massachusetts; Michigan; Minnesota; Mississippi; Missouri; Nevada; New Hampshire; New Jersey; New Mexico; New York; North Carolina; North Dakota; Oklahoma; Oregon; Rhode Island; Tennessee; Texas; Utah; Vermont; Virginia (primary enforcement supporting all cell phone ban; secondary enforcement supporting texting while driving ban); Washington; West Virginia; Wisconsin; and Wyoming. *Id.*

68. *Id.* With the noted caveats and exceptions, the following states have secondary enforcement of cell phone driving laws: Arkansas (secondary enforcement supporting cell phone bans for novice drivers); California (secondary enforcement supporting cell phone use ban by novice drivers); Iowa (secondary enforcement supporting texting while driving ban); Maryland (secondary enforcement supporting handheld cell phone ban and secondary enforcement supporting all cell phone use by drivers under eighteen years old with a learners permit or provisional license); Nebraska; and Virginia (secondary enforcement supporting all cell phone ban for novice drivers and text messaging ban for all drivers). *Id.*

69. See CAL. VEH. CODE § 23124(d) (West Supp. 2010).

70. See Press Release, VTTI, *supra* note 27. The National Safety Council announced in January 2010 that drivers using cell phones cause 28 percent of all annual traffic crashes, or at least 1.6 million crashes each year. Press Release, NSC, *supra* note 2. Drivers using cell phones cause approximately 1.4 million crashes annually and texting drivers cause a minimum of 200,000 additional crashes each year. *Id.* According to Janet Froetscher, President and CEO of NSC, "We know that cell phone use is a very risky distraction and texting is [an] even higher risk. We now know that cell phone use causes many more crashes than texting. The main reason is that millions more drivers use cell phones than text." *Id.*

71. Austin, *supra* note 30.

supports legislation banning texting while driving,<sup>72</sup> there seems to be less societal outrage over texting while driving than drunk driving. One plausible explanation is that simply too many people have become accustomed to checking email or sending text messages while driving.<sup>73</sup> In fact, a 2008 Nationwide Insurance poll of 1500 motorists found that 48 percent of people who multitasked behind the wheel did so because they felt an “urgent need” to address a work or school issue.<sup>74</sup> Further, 33 percent of respondents said they used their cell phone while driving because they felt “pressure to stay connected socially.”<sup>75</sup> User motivations are important because any workable solution to the epidemic of texting while driving must address and respond to these motivations.

Perhaps drivers feel that they can support legislation banning texting while driving and yet still text themselves because, when it comes to texting while driving, they minimize the dangers of their own actions. Although research shows that many drivers are aware that their multitasking behavior is dangerous, they believe that other multitasking drivers pose the real risk on the road.<sup>76</sup>

User motivations aside, there is no consensus that a driver using a hands-free cell phone is any safer than a driver using a handheld one.<sup>77</sup> Actions that require a driver to take her eyes off the road, such

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72. NAT'L SAFETY COUNCIL, PUBLIC OPINION FACT SHEET: PUBLIC CALLS TO REDUCE DISTRACTION (2010), available at [http://www.nsc.org/news\\_resources/Resource/Documents/Public%20Opinion%20Fact%20Sheet.pdf](http://www.nsc.org/news_resources/Resource/Documents/Public%20Opinion%20Fact%20Sheet.pdf).

73. According to a 2008 survey of 6500 workplace professionals, “87 percent [of professionals] take their personal digital assistant (PDA) to the bedroom; 84 percent check email just before going to bed and as soon as they wake up; 85 percent check their PDA in the middle of the night; 80 percent check email before morning coffee; 35 percent say if forced to choose, they'd pick their PDA over their spouse; [and] 85 percent feel compelled to be connected to work” at all times because of modern technology. Nicholas Bettinger, *Time 4 U 2 Detach*, 72 TEX. B.J. 252 (2009).

74. Richtel, *supra* note 20, at A1.

75. *Id.* Further, the Nationwide Insurance poll found that both men and women were avid multitaskers: about 85 percent of female drivers said they multitasked, compared with 78 percent of male drivers. *Id.*

76. *See id.*

77. *See, e.g.,* Robert W. Hahn & Patrick M. Dudley, *The Disconnect Between Law and Policy Analysis: A Case Study of Drivers and Cell Phones*, 55 ADMIN. L. REV. 127, 151–67 (2003) (reviewing experimental and epidemiological evidence to argue that hands-free phones offer few safety advantages); Joseph B. White, *Eyes on the Road: When Cellphone Bans Don't Curb Crashes*, WALL ST. J., Feb. 3, 2010, at D2 (noting that a study recently released by the Highway Loss Data Institute and the Insurance Institute for Highway Safety found no reduction

as dialing and answering a call, are the source of risk under either a hands-free or manual operation.<sup>78</sup> This is because the majority of hands-free devices in today's market still require the owner to use her hands to set up and attach the device, to dial a call, or to answer an incoming call.<sup>79</sup> When a cell phone requires the driver to use her hands, her hands are not properly on the steering wheel, and she is mentally distracted from the primary task of driving.

In fact, some researchers suggest that using a hands-free device provides a driver with a "false sense of security," which poses a greater risk to motorists than if there were no handheld ban in the first instance.<sup>80</sup> Furthermore, a completely voice activated hands-free unit may not resolve driver distraction because the complexity of some voice activated phones can at times render them even more distracting than handheld phones.<sup>81</sup> Risk will be optimally minimized when hands-free technology evolves so that a driver does not have to take her eyes off of the road or her hands off of the wheel.<sup>82</sup> The technology will be reliable and foolproof.

### *B. Legislation Alone is Insufficient*

Concerns frequently raised in evaluating proposed texting while driving legislation echo concerns frequently raised in evaluating the efficacy of most legislation—whether the proposed law will serve its stated purpose, whether it is over- or under-inclusive, and whether it is truly necessary.<sup>83</sup>

Laws, in isolation, could prove insufficient. Not only do many drivers believe that others are the problem, there are serious

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in accident claims in state that have banned the use of handheld cell phones behind the wheel); Press Release, VTTI, *supra* note 27.

78. See, e.g., Press Release, VTTI, *supra* note 27.

79. Hahn & Dudley, *supra* note 77, at 157–58 (citing Susan Stellin, *BASICS; Hands-Free Calling: Options for the Road*, N.Y. TIMES, July 26, 2001, at G9).

80. *Id.* at 157.

81. See Stellin, *supra* note 79, at G9 (describing personal experience with hands-free cell phone technology).

82. See Press Release, VTTI, *supra* note 27.

83. See Andrew F. Amendola, Note, *Can You Hear Me Now?: The Myths Surrounding Cell Phone Use While Driving and Connecticut's Failed Attempt at a Remedy*, 41 CONN. L. REV. 339, 341 (2008).

enforcement issues undermining texting while driving laws.<sup>84</sup> Because most drivers text with the phone in their laps, or at least below eye level, the prohibited conduct is difficult for law enforcement officers to detect.<sup>85</sup> For policing purposes, a driver could be texting just as likely as she could be dialing or looking up a number. In many states, one, but not the other, type of conduct is illegal.<sup>86</sup>

The relatively low number of tickets issued to texting drivers supports the argument that texting bans, in isolation, are near impossible to enforce.<sup>87</sup> For example, California banned text messaging for all drivers in January 2009, but issued just one thousand tickets to motorists for texting while driving in the first year of implementation.<sup>88</sup> As of the early twenty-first century, California had twenty-two million licensed drivers.<sup>89</sup>

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84. Lynch, *supra* note 39. For example, a June 2008 study by the Insurance Institute for Highway Safety found that North Carolina's cell phone ban for drivers under eighteen did not deter them from talking or texting. *See id.* "In fact, cell phone use actually increased slightly after the law took effect on December 1, 2006, from 11% to 11.8% about five months later." *Id.* "Only 100 cell-phone violations were issued in North Carolina to teen drivers in 2007 . . ." *Id.* In Missouri, from August 2009, when the law went into effect prohibiting drivers under twenty-one from texting, to January 2010, Missouri Highway Patrol officers issued just thirteen tickets for the offense statewide. Juana Summers, *Texting-Driving Bans: Little Effect*, ST. LOUIS POST-DISPATCH, Jan. 24, 2010, at B1. From these thirteen tickets, only eight convictions resulted. *Id.* According to Missouri Highway Patrol Lt. John Hotz, "[T]he law is difficult to enforce due to the age limit. It's hard for troopers to tell from a distance how old a driver might be." *Id.*

85. *See* Loretta Park, *Enforcement Challenge: Utah's No-Texting Law Difficult to Prove*, STANDARD-EXAMINER (Odgen, Utah), Sept. 5, 2009, <http://www.standard.net/topics/news/2009/09/05/enforcement-challenge-utahs-no-texting-law-difficult-prove> (reporting on the difficulties of enforcing Utah's anti-texting laws).

86. *Id.*

87. *See, e.g., id.*; Lynch, *supra* note 39; Summers, *supra* note 84, at B1; Dan Whitcomb, *U.S. Teens Ignore Laws Against Texting While Driving*, REUTERS, Dec. 11, 2009, <http://www.reuters.com/article/idUSTRE5BA0F920091211>.

88. The California Highway Patrol ticketed nearly 163,000 drivers talking on handheld cell phones since mid-2008, but has only issued 1400 texting citations between January and December 2009. Whitcomb, *supra* note 87. These figures do not include tickets issued at the local level; however, the California Highway Patrol is the largest statewide law enforcement agency in the United States with more than 6750 uniformed employees. C.H. WILISZOWSKI ET AL., U.S. DEP'T OF TRANSP., A TREND ANALYSIS OF TRAFFIC LAW ENFORCEMENT IN THE U.S. (2001), available at [http://www.nhtsa.dot.gov/PEOPLE/injury/research/TrendAnalysis/2\\_chip.htm](http://www.nhtsa.dot.gov/PEOPLE/injury/research/TrendAnalysis/2_chip.htm) (data as of 1999).

89. According to 2003 Highway Statistics from the U.S. Department of Transportation, in California there were 22,657,288 licensed drivers. *Licensed Drivers Total Number by State*,



In California, like many states, texting while driving is an infraction.<sup>90</sup> As such, it does not merit a point on the driver's Department of Motor Vehicles record, and the fine for the first offense is twenty dollars.<sup>91</sup> Not surprisingly, lax penalties equate to low deterrence.<sup>92</sup> In what may be a harbinger of changing attitudes, the United States Department of Transportation announced in early 2010 new federal guidelines that subject commercial truck and bus drivers who engage in text messaging while driving to penalties of up to \$2,750.<sup>93</sup>

Even in states employing more than nominal deterrent mechanisms for drivers who text, a secondary enforcement scheme is equivalent to no enforcement. When a law permits secondary enforcement, law enforcement officers are powerless to ticket a driver they see texting in the absence of some other offense that confers primary enforcement.<sup>94</sup> *De minimis* repercussions and impotent enforcement schemes effectively undermine efforts to police this dangerous conduct.

There is little case law on the legality of legislation prohibiting cell phone use while driving, suggesting it is entirely within the government's power to enact such legislation in furtherance of the general welfare. Moreover, courts that have entertained challenges to cell phone legislation have largely upheld the laws.<sup>95</sup> In August 2009,

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STATEMASTER, [http://www.statemaster.com/graph/trn\\_lic\\_dri\\_tot\\_num-transportation-licensed-drivers-total-number](http://www.statemaster.com/graph/trn_lic_dri_tot_num-transportation-licensed-drivers-total-number) (last visited Oct. 9, 2010).

90. CAL. VEH. CODE § 23123 (West Supp. 2010).

91. CAL. VEH. CODE § 12810.3 (West 2010) (“[A] violation point shall not be given for a conviction of a violation of . . . subdivision (a) of Section 23123.5,” which prohibits texting while driving.). Furthermore, “[a] violation of this section is an infraction punishable by a base fine of twenty dollars (\$20) for a first offense and fifty dollars (\$50) for each subsequent offense.” § 23123.5(d).

92. See *supra* notes 86–87 and accompanying text.

93. 49 C.F.R. § 390.17.

94. See, e.g., CAL. VEH. CODE § 23124(d) (West Supp. 2010).

95. See, e.g., *Schor v. City of Chicago*, 576 F.3d 775 (7th Cir. 2009). Motorists ticketed by the city for using a cell phone without a hands-free device, individually and on behalf of all others similarly situated, brought suit against Chicago's mayor, police officers, and the city. *Id.* at 778. Plaintiffs argued that Chicago Municipal Ordinance 9-40-260 unduly burdened their fundamental right to travel by subjecting them to seizures and fines without adequate notice. *Id.* at 780. The Seventh Circuit affirmed that police officers had probable cause to initiate traffic stops upon observing motorists driving while using a wireless telephone without a hands-free device and further rejected plaintiffs' void for vagueness challenge. *Id.* at 780–81.

the Seventh Circuit held in *Schor v. City of Chicago* that a Chicago ordinance barring drivers from talking on a cell phone without a hands-free device was constitutional.<sup>96</sup> State legislation has since preempted the local ordinance.<sup>97</sup>

Legislation alone will not deter motorists from texting while driving, but legislation is necessary even if insufficient.<sup>98</sup> Concerns regarding texting while driving legislation are analogous to concerns previously raised in the context of seat belt legislation.<sup>99</sup> While politicians and safety coalitions initially debated the efficacy of mandatory seat belt laws, the true value of those laws lay in the awareness they generated about safety benefits, which then set societal guidelines for seat belt behavior.<sup>100</sup> Comparing the efficacy of Illinois's texting law to seat belt laws, Dave Druker, spokesman for Illinois Secretary of State Jesse White, said that while the texting law might not result in more tickets being issued, it increases awareness of the dangers of the prohibited activity.<sup>101</sup>

The success of any anti-texting campaign must be outcome-oriented. That is, if drivers were to refrain from texting while driving, then in theory there would be no citations to issue and it would seem that the problem were resolved. Yet, because texting while driving is difficult to police, few issued citations do not equate to a dearth of texting motorists.<sup>102</sup> Thus, until there are no more texting-related collisions, anti-texting campaigns must continue.

### III. A BIG-PICTURE SOLUTION

The federal government, state legislatures, cell phone manufacturers and industry groups, public interest groups, and cell

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96. *Id.*

97. See 625 ILL. COMP. STAT. ANN. 5/12-610.2(b) (West Supp. 2009) ("A person may not operate a motor vehicle on a roadway while using an electronic communication device to compose, send, or read an electronic message.")

98. See Betkey, *supra* note 42.

99. See Ashley Halsey III, *Cellphone Use, Texting in 28 Percent of Crashes; Traffic Study Results Inspire Group to Fight Distracted Driving*, WASH. POST, Jan. 13, 2010, at A06.

100. See Matt Richtel, *Senators Seek a Ban on Texting and Driving*, N.Y. TIMES, July 30, 2009, at B4.

101. Summers, *supra* note 84, at B1.

102. See *supra* notes 88–89, 92 and accompanying text.

phone owners must work together to discourage texting motorists. Laws alone are insufficient, and prohibitions on all cell phone use while driving are unnecessarily broad, for the use of a cell phone while driving can, of course, be beneficial at times—like to report a drunk driver on the roadways.<sup>103</sup> Therefore, legislators, industry members, and cell phone users must together consider all of the following suggestions to truly eliminate texting while driving. To pick and choose among solutions will not end this dangerous practice. Without collective action and integrated responses, drivers will keep texting, and texting-related injuries and deaths will continue.

#### A. *The Federal Government as a Traffic Cop*

The federal government should assume a coordinating role. Specifically, Congress and the appropriate regulatory agencies, such as the United States Department of Transportation and the Federal Motor Carrier Safety Administration, should assist in efforts between the States, manufacturers and telecommunication providers, advocacy groups, and consumers.

Congress should, moreover, utilize its Commerce Clause power to essentially force the States to legislate in the area of texting while driving.<sup>104</sup> In 2009, legislation was introduced to do this very thing.

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103. *See infra* Part II.B.

104. *See* U.S. CONST. art. I, § 8, cl. 3.

[T]here are constitutionally permissible methods, short of outright coercion, by which Congress may urge the states to cooperate and to adopt legislative programs and uniform regulatory schemes consistent with federal interests. These methods include attaching conditions to the receipt of federal funds and, where Congress has authority to regulate private activity under the Commerce Clause, offering states the choice of regulating that activity according to federal standards or having state laws preempted by federal regulation as part of a program of “cooperative federalism.”

16A AM. JUR. 2D *Constitutional Law* § 228 (2009) (citing *New York v. United States*, 505 U.S. 144 (1992)). In *South Dakota v. Dole*, the State of South Dakota challenged the constitutionality of a federal statute conditioning states’ receipt of a portion of federal highway funds upon adoption of a federally set minimum drinking age of twenty-one. 483 U.S. 203 (1987). Because Article 1, Section 8, Clause 1 of the United States Constitution authorizes Congress to exercise its spending power pursuant to the general welfare, the United States Supreme Court asserted that if Congress invokes its spending power to condition the States’ receipt of federal funds, it must do so unambiguously, thereby enabling the states to exercise their choice knowingly. *Id.* at 206–08. As support for the success of a uniform minimum

The Senate bill, entitled the Avoiding Life-Endangering and Reckless Texting by Drivers Act of 2009 (ALERT Drivers Act), required states to adopt federally set minimum penalties for texting while driving, or forfeit 25 percent of their federal highway financing.<sup>105</sup> Under the bill, States would have two years to comply and could recover lost funds once they passed the minimum federally-mandated standards.<sup>106</sup> A companion bill was introduced in the House of Representatives.<sup>107</sup>

Congress considered a similar bill in 2001 but the legislation did not pass, and the now two-year delay in the ALERT Drivers Act suggests this bill, like its predecessor, may die in committee.<sup>108</sup> While it is unclear what will ultimately happen with the ALERT Drivers Act or its progeny, providing a financial incentive or disincentive to the states is a demonstrated effective way for Congress to realize its dual interest in federal safety and uniformity.<sup>109</sup>

Although *Schor v. City of Chicago* rejected an Equal Protection challenge to the city ordinance prohibiting drivers' handheld cell phone use<sup>110</sup> and case law is sparse,<sup>111</sup> there is merit to the argument

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drinking age of twenty-one, the National Highway and Transportation Safety Authority estimates that the 21 Minimum Drinking Age Law prevented nearly 25,000 teenage traffic deaths since enacted. *21 Minimum Drinking Age*, GOVERNORS HIGHWAY SAFETY ASS'N, <http://www.ghsa.org/html/issues/why21.html> (last visited Oct. 9, 2010). Furthermore, the percentage of teenage drivers killed in traffic crashes with a blood alcohol content (BAC) above the legal limit (0.08) has dropped from 56 percent in 1982 to 23 percent in 2005. *Id.*

105. S. 1536, 111th Cong. (2009). Section (2)(16) of the ALERT Drivers Act states that Congress finds that "a Federal law to address the problem of texting while driving is necessary to ensure minimum standards of protection across the United States, in the same manner as the national minimum drinking age provides a uniform standard of protection." *Id.*

106. *Id.* § 3(b).

107. H.R. 3535, 111th Cong. (2009).

108. H.R. 1837, 107th Cong. (2001). The Call Responsibly and Stay Healthy Act of 2001 required states to regulate the use of handheld cell phones by drivers or incur a ten percent cut in federal highway funds. *Id.* Under this proposed bill, states were to have until 2005 to enact such legislation and could allow hands-free devices if the state determined they were safe. *Id.* In May 2001, the proposed bill was referred to the House's Subcommittee on Highways and Transit where it died. *Id.* The ALERT Drivers Act was introduced on July 29, 2009, and has been referred to the Committee on Environment and Public Works, although it has not been reported by Committee. S. 1536: *ALERT Drivers Act*, GOVTRACK.US, <http://www.govtrack.us/congress/bill?bill=s111-1536> (last visited Aug. 23, 2011).

109. *See supra* note 106.

110. 576 F.3d 775 (7th Cir. 2009).

111. *See, e.g.,* Price v. New York City Bd. of Educ., 855 N.Y.S.2d 530 (N.Y. App. Div. 2008). Beyond this case, the law is devoid of serious constitutional challenges to cell phone

that piecemeal legislation is problematic for drivers' compliance. As texting-while-driving laws are literally all over the map, drivers who travel to areas with inadequate postings about various prohibitions on cell phone use may have insufficient notice of prohibited conduct.<sup>112</sup> A uniform body of law regarding texting while driving will increase compliance because it ensures that drivers, wherever they may be, are on notice of the law.

Strategic partnerships would also assist in providing notice of prohibited conduct, and the government should align itself with public interest groups that educate the public about the dangers of texting while driving. In January 2010, the Department of Transportation and the National Safety Council established FocusDriven, the first national nonprofit devoted to raising awareness about the dangers of distracted driving.<sup>113</sup> The federal government should continue such ventures, as well as take a number of other reinforcing steps. For example, the United States Department of Transportation should continue to follow through on its commitment to aid states in evaluating the merits and flaws in their distracted driving legislation.<sup>114</sup>

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laws. *See id.* The Supreme Court Appellate Division of New York rejected a challenge by parents, guardians and an advocacy group to a New York City Board of Education ban prohibiting possession of cell phones in public schools. *Id.* at 543. The court found this was a nonjusticiable controversy and that the decision of the school board's Chancellor to ban possession of cellular telephones in public schools was rationally related to a legitimate goal of government. *Id.* at 537.

112. *See supra* Part I.C.

113. Press Release, Nat'l Safety Council, U.S. Transportation Secretary Ray LaHood and the National Safety Council Announce FocusDriven (Jan. 12, 2010) [hereinafter Press Release, FocusDriven], available at <http://www.nsc.org/Pages/USTransportationSecretaryRayLaHoodandNSCAnnounceFocusDriven.aspx>. According to National Safety Council President Janet Froetscher, "FocusDriven is an important organization that puts faces and names to the tragedies caused by cell phone use while driving. . . . The members of FocusDriven have powerful stories to tell about their loved ones." *Id.* (quoting Froetscher). FocusDriven is modeled after MADD, which "changed society's attitudes towards drinking and driving with the use of advocates who have experienced the terrible consequences firsthand." *Id.*

114. In 2010, the United States Department of Transportation undertook pilot projects in Connecticut and New York "to test the effects of enforcing those states' driving-while-phoning bans with the same intensity as seat-belt laws or drunk-driving laws." White, *supra* note 77. The pilot projects in Hartford, Connecticut and New York were, by every measure, successful in decreasing the incidents of texting while driving. LINDA COSGROVE, NEIL CHAUDHARY & SCOTT ROBERTS, HIGH VISIBILITY ENFORCEMENT DEMONSTRATION PROGRAMS IN CONNECTICUT AND NEW YORK REDUCE HAND-HELD PHONE USE (2010), available at <http://www.distraction.gov/research/PDF-Files/High-Visibility-Enforcement-Demo.pdf>.

Still, the federal government must contribute more than financial resources to the epidemic of texting while driving. The government must continue to lead by example and develop model policies. On October 1, 2009, President Obama took a significant step in doing just that by signing Executive Order 13,513, which prohibits federal employees from text messaging or emailing when driving on official business or using government-supplied electronic equipment while driving.<sup>115</sup> In addition, in October 2010, the United States Department of Transportation partnered with the Network of Employers for Traffic Safety (NETS), an alliance of major corporations, such as the Coca-Cola Company and Johnson & Johnson, to hold an annual Drive Safely Work Week.<sup>116</sup> To implement Drive Safely Work Week, employers may download free materials that highlight the dangers of distracted driving and share these educational tools with their employees.<sup>117</sup> As U.S. Secretary of Transportation Ray LaHood has astutely remarked, “Employers have the potential to reach up to one-half of the nation’s population,” and with four million civilian employees, the federal government should demonstrate leadership in reducing the dangers of texting while driving.<sup>118</sup>

### *B. The States, United*

For their part, state legislatures should respond to any federal government mandate and ban text messaging for all drivers. For maximum efficacy, bans must be uniform across the states so that all drivers, interstate or otherwise, can understand and rely upon legislative policies. Furthermore, state legislatures should increase the noncompliance penalties associated with texting while driving.<sup>119</sup> Given the potential risks of the practice, suspension of a driver’s license for three months or a \$500 fine is rationally related to the

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115. Exec. Order No. 13,513, 74 Fed. Reg. 51,225 (Oct. 6, 2009). The anti-texting policy extends to federal contractors to promote economy and efficiency in federal procurement. *Id.*

116. LaHood, *supra* note 42; see also *Drive Safely Work Week*, NETS, <http://trafficsafety.org/drivesafelyworkweek/index.php> (last visited Aug. 23, 2011).

117. *Drive Safely Work Week*, *supra* note 116.

118. LaHood, *supra* note 42.

119. See *supra* note 92–93 and accompanying text.

state's interest in curbing texting while driving.<sup>120</sup> With the looming threat of costly sanctions, driver compliance would increase, which would then reduce the need for enforcement.

### C. Public Involvement

Public interest groups are integral to raising awareness, petitioning legislators, and funding safety campaigns regarding texting while driving. According to the Governors Highway Safety Association (GHSA) Chairman Vernon F. Betkey, Jr., the GHSA advocates a broad strategy to deter distracted driving.<sup>121</sup> Betkey has said, “[n]ew laws should not be an ending point, but rather a beginning. Effective enforcement strategies need to be developed and shared. We must also educate the public about how to best minimize and manage distractions behind the wheel.”<sup>122</sup> While other advocacy groups lobby for anti-texting legislation, the mission of FocusDriven is to bring together family members of distracted driving victims and increase awareness of this issue, much like Mothers Against Drunk Driving (MADD) did in the 1980s with drunk driving.<sup>123</sup> Raising awareness of texting while driving is fundamental to eliminating the practice.<sup>124</sup>

Legislatures should encourage, and advocacy groups should lobby, cell phone manufacturers and wireless carriers to develop technological solutions that automatically switch off the texting feature when a user is at the wheel. For example, the wireless service

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120. Heightened penalties, while a novelty in the United States, are commonplace in other countries. *Countries That Ban Cell Phones While Driving*, CELLULAR-NEWS, [http://www.cellular-news.com/car\\_bans/](http://www.cellular-news.com/car_bans/) (last updated June 6, 2009). In the Netherlands, for example, violations of the Dutch cell phone ban can result in fines as high as 2000 Euros, or even imprisonment for multiple offenses. *Id.* Ireland imposes a \$380 fine and up to three months in jail for a third offense. *Id.*

121. Press Release, Governors Highway Safety Ass'n, Distracted Driving Summit Offers Chance to Address Issue Comprehensively (Sept. 28, 2009), available at [http://www.ghsa.org/html/media/pressreleases/2009/200909\\_summit.html](http://www.ghsa.org/html/media/pressreleases/2009/200909_summit.html). The GHSA encourages all states “to ban texting behind the wheel for all drivers.” Press Release, Governors Highway Safety Ass'n, Governors Highway Safety Association Endorses Texting While Driving Ban for All Drivers (Aug. 31, 2009), available at [http://www.ghsa.org/html/media/pressreleases/2009/200908\\_txt.html](http://www.ghsa.org/html/media/pressreleases/2009/200908_txt.html).

122. *Id.*

123. Press Release, FocusDriven, *supra* note 113. FocusDriven hopes to eventually expand its mission to include education and research of new technologies. *Id.*

124. *See id.*; *see also infra* note 142.

provider AT&T has its Smart Limits option which allows the user to establish the times of day that the phone can be used for web-browsing, texting, and outbound calls.<sup>125</sup> Thus, if a parent knows her child drives to and from school between the hours of seven and eight in the morning and three and four in the afternoon, the parent may turn off the texting and emailing features during those times.<sup>126</sup> Even more sophisticated than the Smart Limits option is PhoneGuard's Drive Safe software.<sup>127</sup> This mobile application disables the texting, emailing, and keyboard functions of a cell phone while in a vehicle moving faster than ten miles per hour. The application utilizes GPS to track speeds and coordinates to turn off the aforementioned functionalities of the phone. Unfortunately, the downloadable Drive Safe application is currently only available for Android phones and Apple's iPhone, and it would turn off not only the driver's texting features, but all other passengers' features as well, assuming they also have the Drive Safe software.<sup>128</sup> In addition, Drive Safe is an elective feature and, in the context of texting while driving, where texting drivers assume other drivers pose the real safety risk, this technology may not actually prevent life-threatening collisions. That is, drivers may not download the software simply because they believe, however erroneously, that they are capable of texting while behind the wheel.

Until cell phone manufacturers and wireless providers develop fool- and tamper-proof technologies that thwart texting drivers, they should continue to educate their customers on the dangers of texting while driving. Verizon Wireless, the nation's largest wireless service provider, is leading the way with its "Don't Text and Drive" advertising campaign, which launched in October 2009.<sup>129</sup> The campaign features billboard, radio, and television advertisements that appeal to drivers' emotions.<sup>130</sup> The campaign pitch is that every

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125. See Tugend, *supra* note 16, at B7.

126. *See id.*

127. PHONEGUARD, <http://www.phoneguard.com/default.aspx> (last visited Aug. 23, 2011).

128. *Id.*

129. Press Release, Verizon Wireless, Verizon Wireless Launches "Don't Text And Drive" Ad Campaign (Oct. 23, 2009), available at <http://news.vzw.com/news/2009/10/pr2009-10-23.html>.

130. *Id.*



driver has someone in her life who “would really like to see you get home safely.”<sup>131</sup> Allstate, the insurance carrier, also has a nationwide campaign, “X the TXT,” featuring the Jonas Brothers and *American Idol* winner Jordin Sparks. While the source of the message is less important than the message itself, responsible corporations will be part of the solution to curbing texting while driving. For example, automobile insurers could also provide incentives to drivers who pledge not to text and drive or who have a history clear of texting and driving related incidents.

However, it is not enough that officers enforce laws banning texting while driving or that the public be educated about the proven dangers of texting while driving. According to Chuck Hurley, Executive Director of MADD, “[e]ducation alone is a proven failure. Education and enforcement are a success.”<sup>132</sup> In a familiar theme, Hurley cites the seat belt campaigns as an example for anti-texting advocacy groups: “[T]he ‘Buckle Up for Safety’ campaign was well received, but only 13 percent of drivers complied.”<sup>133</sup> In contrast, Anne McCartt credits the success of the national seat belt enforcement campaign, “Click It or Ticket,” to publicity of the enforcement of seat belt laws.<sup>134</sup> There must be greater publicity of enforcement of texting laws specifically so that the driving public is aware laws will be enforced and that they will be held accountable.<sup>135</sup>

The public and private sectors should collaborate in advertising laws and the dangers of texting while driving, particularly to the most vulnerable group—teenage drivers. However, many youth risk prevention specialists question the effectiveness of videos using shock value to change teenage behavior.<sup>136</sup> Thus, a more successful

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131. *Id.*

132. Halsey, *supra* note 99, at A06 (quoting Hurley).

133. *Id.*

134. Lynch, *supra* note 39. The “Click It or Ticket” seat-belt campaign “contributed to a record 84% level of seat-belt use.” White, *supra* note 79, at D2.

135. *See* Lynch, *supra* note 39.

136. Larry Magid, *Shocking Stats, Video on Texting While Driving*, CNET.COM (Aug. 29, 2009, 6:00AM), [http://news.cnet.com/8301-19518\\_3-10320712-238.html](http://news.cnet.com/8301-19518_3-10320712-238.html). According to Russell Sabella, a professor at Florida Gulf Coast University, “While there is some research that shows that some students can be sensitized to potential consequences from [shock] videos . . . there is also evidence that students get emotionally aroused in the short term but desensitiz[ed] in the long term.” *Id.* (quoting Sabella). If a shock video is going to be used, Professor Sabella said, it

approach might be to involve teenagers directly in creating an educational campaign targeting teenagers.<sup>137</sup> For example, any public service announcement should include positive messages by teenagers for teenagers, encouraging them to look out for themselves and the people they care about by not texting while driving. Furthermore, according to Patti Agatston of the Prevention/Intervention Center, it is “helpful for youth to receive consistent and repeated messages from a variety of sources, including their peers and parents or guardians.”<sup>138</sup>

The private sector, particularly employers and parents, is the cornerstone of any workable solution. In the absence of legislation governing texting while driving, employers should ban employees from emailing and texting while driving for business purposes.<sup>139</sup> For their part, parents should utilize the Smart Limits option or download the Drive Safe anti-texting while driving software application, or an analogous feature, to limit the text messaging abilities of their teenage drivers.<sup>140</sup> Parents should also make clear to their children that they will not tolerate texting while driving. Finally, parents should set a good example by not texting behind the wheel. To both set an example and facilitate a dialogue between parents and children on texting while driving, Allstate offers the Allstate Family Texting Pledge on its website.<sup>141</sup> A family may print and sign the pledge, thereby promising one another not to text and drive. This symbolic

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“has [to] be of a comprehensive effort which includes kids, parents, teachers, legislators, and authorities.” *Id.* (quoting Sabella).

137. In a deliberate effort to market their program to teenage drivers, PhoneGuard, the developer of Drive Safe, selected current heartthrob and pop sensation Justin Bieber, 17, as spokesperson for the mobile application. Press Release, Options Media Grp. Holdings, Inc., Justin Bieber and PhoneGuard, Inc. Join “Remember Alex Brown Foundation to Launch a Campaign to Encourage Responsible Texting” (July 11, 2011), *available at* <http://www.marketwire.com/press-release/justin-bieber-phoneguard-inc-join-remember-alex-brown-foundation-launch-campaign-encourage-otcqb-opmg-1536589.htm>.

138. *Id.* (quoting Agatston).

139. Private businesses could use the government’s ban on employee texting while driving as an example. *See supra* notes 115–18, 125 and accompanying text.

140. *See* Tugend, *supra* note 16, at B7.

141. *Join Allstate’s Teen Driver Pledge: Teens and Families Pledging Not to Text & Drive*, ALLSTATE, <http://www.allstate.com/auto-insurance/teen-text-pledge.aspx> (last visited Aug. 23, 2011).

act may help to reinforce the importance of refraining from texting while driving to the entire family.

#### IV. CONCLUSION

According to Barbara Harsha, Executive Director of the GHSA, “[d]istracted driving did not become a problem overnight, and it will not be solved overnight.”<sup>142</sup> Moreover, “[t]here is . . . not likely to be a one-size-fits-all solution.”<sup>143</sup> Clearly, though, consciousness-raising, in addition to uniformity and dedicated enforcement, is key to eliminating texting while driving. In a letter to the Editor of the *New York Times*, one reader suggested that cell phones should be sold with a warning attached stating that their use on the road can be lethal, similar to the mandatory warning labels affixed to cigarette packages.<sup>144</sup> Such a suggestion initially sounds a bit far-flung, but it is actually indicative of a growing public sentiment.<sup>145</sup> Current public support for laws banning texting is between 80 and 97 percent,<sup>146</sup> which again highlights the contradiction between the words and actions of American drivers. Most drivers agree that texting while driving should be illegal and yet, based on the data, a sizeable percentage of those people still send and receive text messages while driving.

Despite a continuing debate as to the potential dangers of driving and talking on a cell phone, the dangers of texting while driving are perfectly clear. If you text and drive, someone might die. Laws and education of the laws and of the dangers of texting while driving are everyone’s responsibility. The efforts to end texting while driving should not cease until drivers take their hands and eyes off their phones and direct their attention back onto the roadways.

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142. Barbara Harsha, *States Need Assistance, Not Sanctions to Address Driver Distractions*, POLITICO (Aug. 29, 2009), [http://www.politico.com/arena/perm/Barbara\\_Harsha\\_4FFA7892-7B5A-46BD-BBB2-FF6E753136A8F.html](http://www.politico.com/arena/perm/Barbara_Harsha_4FFA7892-7B5A-46BD-BBB2-FF6E753136A8F.html).

143. *Id.*

144. Marilyn Zacks, *Letter to the Editor*, N.Y. TIMES, Sept. 5, 2009, at A18.

145. NAT’L SAFETY COUNCIL, *supra* note 72. Moreover, the public understands the risks of texting while driving. *Id.* According to a 2009 AAA Foundation for Traffic Safety survey, 95 percent of respondents rated texting while driving as completely or somewhat unacceptable and 87 percent said texting or emailing while driving is a very serious threat to safety. *Id.*

146. *Id.*