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Valparaiso University

TALKING AND TEXTING WHILE DRIVING: A LOOK AT REGULATING CELL PHONE USE BEHIND THE WHEEL

I. INTRODUCTION

Imagine traveling on a roadway behind a vehicle swerving back and forth over the lines or driving at very inconsistent speeds. You wonder what could possibly be causing the driver to drive so erratically. Is the driver drunk? Is the driver preoccupied with eating his or her lunch? Is the driver busy attending to children in the backseat? As you pull alongside the driver, you realize this is not the case. Instead, you notice that the driver has a cellular telephone (hereinafter "cell phone") up to his or her ear and is busy chatting away, or even worse, you notice that the driver is busy looking down typing a text message on his or her cell phone. As you pass the driver, who is more focused on his or her cell phone conversation than on driving, you are disgusted. However, if you are like eighty-five percent of Americans, you answer your cell phone or make a phone call just moments later, thereby engaging in the same dangerous practice that just annoyed you.[1]

Unfortunately, these dangerous practices of talking on a cell phone or text messaging while driving have become common and carry deadly consequences.[2] For example, a mother was driving her two-year-old

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[1] *See* Jordan Michael, *Liability for Accidents From Use and Abuse of Cell Phones: When are Employers and Cell Phone Manufactures Liable?*, 79 N.D. L. REV. 299, 299 (2003) [hereinafter Michael, *Liability for Accidents*] (indicating that approximately eighty-five percent of Americans who own cell phones use them while they are driving).

[2] *See, e.g.*, Erin Barmby, Statutory Review, *Chapter 290: California's Message to Hang Up and Pay Attention*, 38 MCGEORGE L. REV. 342, 342 (2007) (relating the story of a mother who was carrying her child while walking in front of the drive-thru at a fast food restaurant when a driver, talking on his cell phone, hit and killed her); Kyle Martin, *Push for "Allie's Law*," HERNANDO TODAY, Dec. 3, 2008, *available at* 2008 WLNR 23215668 (indicating that two teenage girls were killed when their vehicles collided after one of the drivers had sent a text message just two minutes prior to the accident); Austin L. Miller, *Driver in Fatal School Bus Crash Was on Cell Phone, Report Says*, OCALA STAR-BANNER, Sept. 25, 2008, at BN9 (indicating that a driver, who had been talking on his cell phone just prior to the accident, rear-ended a school bus and killed a thirteen-year-old passenger); Milton J. Valencia, *Texting Driver Sentenced in 2007 Death: Man Gets 2 1/2 Years for Killing Teenager*, BOSTON GLOBE, Nov. 13, 2008, at 2 (indicating that a thirteen-year-old boy riding his bicycle was killed by a driver text messaging on his cell phone); Jeff Wiehe, *Sending a Deadly Message: Bill Drafted to Ban Texting While Driving*, FT. WAYNE J. GAZETTE, Dec. 14, 2008, at 1C (discussing the death of an eighteen-year-old who was killed after he lost control of his car while text messaging); Scott Wong, *Texting-While-Driving Ban Meets Resistance: State Lawmaker Says Such Laws Unneeded*, ARIZ. REPUBLIC, Feb. 28, 2008, *available at* http://www.azcentral.com/specials/special12/articles/0228text0228.html (indicating that an eighteen-year-old, who was text messaging, caused an accident in which she and another motorist were killed).

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daughter, Morgan Lee Pena, home from a play-date when a driver, distracted by a cell phone conversation, missed a stop sign and crashed into her car, killing Morgan.[3] In another deadly accident, five teenage girls, who had graduated from high school just five days earlier, were killed when the teen driver, whose cell phone records showed several phone calls and text messages sent from her phone minutes before the accident, lost control of the vehicle and collided head-on with a tractor trailer.[4] Despite these highly publicized accidents and common knowledge that driving while talking on a cell phone or text messaging is dangerous, people continue to do it.[5] As a result, in order to protect American motorists, each state legislature needs to adopt a complete ban against cell phone use while driving that includes harsh penalties for those who violate the prohibition.[6]

Part II of this Note focuses on the expanding role cell phones play in Americans' lives, how this has negatively affected the safety of motorists, and the opposing viewpoints on cell phone legislation.[7] Part III analyzes why current legislative approaches have been ineffective in reducing the number of individuals who use their cell phones while driving and examines two successful traffic regulations that can be used as models for creating successful legislation prohibiting talking on a cell phone or text messaging while driving.[8] Finally, Part IV proposes a model statute that will eliminate several of the problems with the current cell phone and text messaging legislation, and advocates for the adoption of similar legislation by each state in order to create a uniform approach to regulating these dangerous activities and successfully reduce the number of drivers distracted by their cell phones.[9]

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[3] *See* Jesse A. Cripps, Jr., Comment, *Dialing While Driving: The Battle Over Cell Phone Use on America's Roadways*, 37 GONZ. L. REV. 89, 90 (2001/2002) (discussing the unfortunate accident that killed two-year-old Morgan Lee Pena).

[4] Matt Sundeen, *Driving While Distracted: Inexperienced Teen Drivers Too Often Take Fatal Risks*, ST. LEGISLATURES, May 2008, at 20, 20 [hereinafter Sundeen, *Inexperienced Teen Drivers*].

[5] *See infra* Part II.A (discussing the popularity of talking on a cell phone and text messaging while driving).

[6] *See infra* Part IV (proposing a model statute that will deter Americans from using a cell phone while driving).

[7] *See infra* Parts II.A–B (discussing the growing popularity of cell phones, the impact cell phones have on automobile accidents, and the dangers associated with using a cell phone while driving).

[8] *See infra* Parts III.A–B (discussing several flaws with current cell phone legislation, exploring the success of seat belt and drunk driving laws, and explaining how using these two laws as a model to create cell phone legislation can protect American motorists).

[9] *See infra* Part IV (proposing and discussing a model statute that completely prohibits the use of cell phones by drivers and contains significant penalties for drivers who ignore the prohibition).

II. BACKGROUND

As the cell phone industry continues to grow and cell phones become more advanced, so too do the problems associated with using them while driving a motor vehicle. Part II discusses the growth of the cell phone industry and the dangers resulting from this development, as well as the legislative attempts to regulate the use of cell phones while driving.[10] More specifically, Part II.A examines the rapid growth of the cell phone industry, the role cell phones now play in individuals' lives, and the impact cell phones have on automobile accidents.[11] Next, Part II.B examines the dangers of driving while using a cell phone.[12] Finally, Part II.C considers the opposition to legislation and the legislative action taken in this area, including both state and local efforts.[13]

A. Cell Phones and Our Society

Technology plays a large role in Americans' lives, as is clear by the number of individuals who now own cell phones.[14] Each year the cell phone industry grows larger, with its estimated total customers in the United States reaching over 270 million as of December 2008.[15] Not only has the number of Americans using cell phones significantly increased in recent years, but the number of cell phone users utilizing the text message feature on their phones increased by approximately 160 percent

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[10] *See infra* Parts II.A–C (exploring the growing popularity of cell phones and text messaging and how this technology has caused several state and local legislatures to pass laws restricting drivers from using cell phones while driving).

[11] *See infra* Part II.A (discussing how cell phones have evolved into personal necessities, how the increasing use of cell phones while driving has led to more distracted drivers, and how this increases the number of traffic accidents).

[12] *See infra* Part II.B (explaining the negative impact using a cell phone while driving has on a driver's ability to operate his or her vehicle in a safe manner, which causes danger not only for him or herself, but also for all other motorists).

[13] *See infra* Part II.C (discussing the varying legislative approaches taken by state and local governments in prohibiting drivers from talking on their cell phone or text messaging while driving, which include hands-free legislation and restricting these dangerous activities only for young adults).

[14] *See infra* note 15 (discussing the number of Americans owning cell phones).

[15] Cellular Telecommunications & Internet Indus. Ass'n, 2008 CTIA's Semi-Annual Wireless Industry Survey (April 1, 2009), http://files.ctia.org/pdf/CTIA_Survey_Year-End_2008_Graphics.pdf (reporting the number of American cell phone subscribers to be 270,333,881 as of December 2008); Opinion, *Driving While Distracted*: *Florida Should Consider Restricting Drivers' Use of Cell Phones*, SARASOTA HERALD-TRIB., July 9, 2008, at A10 (indicating that over 250 million Americans now own cell phones). *See also* Sundeen, *Inexperienced Teen Drivers*, *supra* note 4, at 20–21 ("[W]ireless communications devices are found in 81 percent of households and more than 255 million people now subscribe to wireless services in the United States.").

from June 2007 to June 2008.[16] Although cell phones were traditionally used for business purposes, over the years they have developed into what seems to be a personal necessity, and have become a staple of American life.[17] As a result of our culture's dependence on cell phones and the desire for individuals to always be accessible, many Americans now use their cell phones while driving.[18] The National Highway Traffic Safety Administration ("NHTSA") reported that the number of drivers using hand-held cell phones at any given moment rose from five percent in 2006 to six percent in 2007.[19]

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[16] Daniel B. Wood, *L.A. Metrolink Crash Puts Focus on Dangers of Texting*, CHRISTIAN SCI. MONITOR, Sept. 17, 2008, at 25. *See also* Adam Foxman, *Texting Grows As a Safety Concern: Rules Difficult to Enforce,* VENTURA COUNTY STAR, Sept. 20, 2008, *available at* 2008 WLNR 17896078 (indicating the number of text messages sent in 2007 was 362 billion).

[17] Matthew C. Kalin, Note, *The 411 on Cellular Phone Use: An Analysis of the Legislative Attempts to Regulate Cellular Phone Use By Drivers*, 39 SUFFOLK U. L. REV. 233, 234 (2005). *See also* 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, 130 (2003) (indicating the importance of the convenience cell phones provide to their users); Tim Martin, *Michigan Again Debates Cell Phone Use by Motorists*, TRANSP. TOPICS, June 2, 2008, at 12 (stating that even legislators that support passing restrictions on cell phone use understand that cell phones have become part of our driving culture for both social and business reasons).

[18] *See* Michael, *Liability for Accidents*, *supra* note 1, at 299 (reporting that fifty-four percent of drivers have access to cell phones while in their car). *See also* Ins. Info. Inst., Cellphones and Driving (Oct. 2009), http://www.iii.org/media/hottopics/insurance/cellphones/ ("Increased reliance on cellphones has led to a rise in the number of people who use the devices while driving."). Studies have found that approximately eighty-five percent of cell phone owners use them while they are driving and roughly "seventy percent of all cell phone calls are made from vehicles." Michael, *Liability for Accidents*, *supra* note 1, at 299. Another study found that cell phone users use approximately sixty percent of their minutes while driving. Jordan B. Michael, *Automobile Accidents Associated With Cell Phone Use: Can Cell Phone Service Providers and Manufacturers Be Held Liable Under a Theory of Negligence?*, RICH. J.L. & TECH., Winter 2005, at 1, 5 [hereinafter Michael, *Automobile Accidents*]. This "affirm[s] the notion that cell phone use in automobiles is a deliberate attempt by drivers to create value with underutilized time in automobiles." *Id.* In addition, a survey conducted by Nationwide Mutual Insurance Company reported that seventy-three percent of drivers admitted to talking on their cell phone while driving. Ins. Info. Inst., *supra*. A 2008 survey reported in the AAA Traffic Safety Culture Index reported that fifty-three percent of drivers admitted to talking on their cell phone while they were driving within the past thirty days prior to the survey. Patrick Gannon, *AAA Unleashes Graphic Campaign Against Dialing, Driving*, WILMINGTON STAR-NEWS, Sept. 11, 2008, *available at* 2008 WLNR 17243249. *See also* Gary Emerling, *Police Catch More Motorists With Phone in Hand,* WASH. TIMES, Aug. 21, 2008, at A1 (reporting that the number of drivers caught using their cell phones while driving in the District of Columbia increased each year from 2005 to 2007); *Conn. Drivers Ignore Cell Phone Ban*, INS. J., Oct. 2, 2007, http://www.insurancejournal.com/news/east/2007/10/02/83937.htm (reporting that the number of drivers in Connecticut in 2007 caught using their cell phone while driving was excepted to be three times the amount in 2006).

[19] NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS: DRIVER ELECTRONIC DEVICE USE IN 2007 1 (2008). The NHTSA also reported that, "The 2007 rate translates into

This increase in cell phone use while driving is partly a consequence of commuters attempting to make the most of their travel time.[20] Also, the increase is attributable to employers wanting their employees to be accessible even when they are not in the office.[21] In addition to the business purposes for using cell phones while driving, Americans also highly value the convenience their cell phones afford them while they are in their vehicles.[22] Despite the benefits provided by cell phones, the use of a cell phone while driving is dangerous because it distracts the driver, which causes accidents.[23]

1,005,000 vehicles on the road at any given daylight moment being driven by someone using a hand-held phone." *Id.* In addition, the NHTSA estimated that approximately eleven percent of vehicles were being operated by a driver using some form of a cellular device. *Id.*

[20] Michael, *Automobile Accidents*, *supra* note 18, at 3. "American motorists in particular spend substantial amounts of their day in automobiles, vans, trucks, and buses. It is not surprising that people will attempt to optimize their time in the vehicles by doing other things." *Id.*

[21] Kalin, *supra* note 17, at 233–34. *See also* Hahn & Dudley, *supra* note 17, at 130 (indicating that cell phones allow businesses the ability to communicate in real-time with their employees, which was not available to them two decades ago); Michael, *Liability for Accidents*, *supra* note 1, at 299 ("Many people make cell phone calls for business purposes in their automobiles while driving."); Dan Whitcomb, *California to Drivers: Drop the Cell Phone, Dude*, REUTERS, June 27, 2008, http://www.reuters.com/articlePrint?articleId=USN2638029720080627 ("[M]any Californians are forced to use their cars as offices while stuck on the freeway.").

[22] Hahn & Dudley, *supra* note 17, at 130. *See also* Robert W. Hahn, Paul C. Tetlock & Jason K. Burnett, *Regulating Cellular Phone Use: Too Little Benefit for Too Much Cost, Should You Be Allowed To Use Your Cellular Phone While Driving?*, 23 REG. 46, 46 (1999), *available at* http://www.cato.org/pubs/regulation/regv23n3/hahn.pdf ("Cellular phones in cars provide important conveniences, including the ability to check on children, get help in an emergency, and coordinate schedules."). Cell phones provide several benefits including allowing drivers to "save considerable amounts of time and money combining travel with communications." Jay M. Zitter, Annotation, *Civil Liability Arising from Use of Cell Phone While Driving*, 36 A.L.R. 6th 443 (2008). Another reason cell phones in cars are beneficial is the fact that they can be used to promote programs such as the Amber Alert system. MATT SUNDEEN, NAT'L CONFERENCE OF STATE LEGISLATURES, 2006 STATE LEGISLATIVE UPDATE: CELL PHONES AND HIGHWAY SAFETY 2 (2007) [hereinafter SUNDEEN, LEGISLATIVE UPDATE]. Some benefits cell phone users indicate as reasons for using their cell phone in their vehicle include "security and peace of mind for instant communication, increased productivity, privacy and quicker crime and accident reporting." *Study: Car Call Value Equals Crash Cost*, USA TODAY, Dec. 2, 2002, http://www.usatoday.com/news/nation/2002-12-02-cell-phones_x.htm. Additional benefits include reducing the number and duration of trips and greater productivity. Press Release, Harvard Sch. of Pub. Health, Study Finds That Restricting Cell Phones While Driving May Be Premature, That Benefits May Be More Compelling Than the Risks (July 24, 2000), *available at* http://www.hsph.harvard.edu/news/press-releases/archives/2000-releases/press07242000.html.

[23] *See infra* notes 25–26 and accompanying text (discussing the correlation between distracted driving and automobile accidents in the United States).

Automobile accidents are a major cause of death in the United States.[24] Driver inattention, which includes the use of cell phones, is the leading cause of traffic accidents.[25] Studies estimate that the distractions caused by cell phone use while driving result in roughly 2600 fatalities and 330,000 injuries each year in the United States.[26] Although alarming, these statistics may be inaccurately low for several reasons.[27]

First, it is hard to determine the extent of cell phone involvement in automobile accidents because it is difficult to detect cell phone use due to its discreet nature.[28] Second, individuals involved in accidents while

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[24] *See* Robin Olson, Cell Phone Bans for Drivers: Wise Legislation?, May 2003, http://www.irmi.com/Expert/Articles/2003/Olson05.aspx (indicating that traffic accidents cause many deaths, and are the most common cause of death of children and young adults). *See also* SUNDEEN, LEGISLATIVE UPDATE, *supra* note 22, at 1 (indicating the NHTSA reported that "in 2005, 43,443 people died and approximately 2.7 million people were injured in an estimated 6.16 million police-reported motor vehicle crashes").

[25] SUNDEEN, LEGISLATIVE UPDATE, *supra* note 22, at 1. The most common activity distracting drivers is the use of a cell phone. Sundeen, *Inexperienced Teen Drivers*, *supra* note 4, at 20. A 2006 study reported that approximately "80 percent of crashes and 65 percent of near crashes involve[d] some form of driver inattention." SUNDEEN, LEGISLATIVE UPDATE, *supra* note 22, at 1. Not only do cell phones distract drivers and cause accidents, they also cause a lot of damage in the United States. *Id.* "[D]river inattention causes as many as 4.9 million crashes, 34,000 fatalities and 2.1 million injuries each year [in the United States] and as much as $184 billion in economic damage." *Id.* Another study by NHTSA indicated that "cellular phone use while driving represents between twenty and thirty percent of all motor vehicle accidents, approximately 1.2 million accidents in 2003, causing over forty billion dollars in damage." Kalin, *supra* note 17, at 238. *See also* Marc Benjamin, *Drivers Keep Talking In Face of Cell Phone Law: Officers Issue Thousands of Tickets Since July 1, But the Problem of Distracted Motorists Persists,* FRESNO BEE, Oct. 6, 2008, at A1 (reporting that the number one distraction leading to the most accidents in California between the years 2005 and 2007 were cell phones). In fact, nearly 1300 accidents were attributed to drivers using cell phones in 2007. *Id.*

[26] Robert Roy Britt, Drivers on Cell Phones Kill Thousands, Snarl Traffic (Feb. 1, 2005), http://www.livescience.com/technology/050201_cell_danger.html. *See also Study: Car Call Value Equals Crash Cost*, *supra* note 22 (indicating that cell phones play a role in approximately six percent of traffic accidents annually). The number of deaths reported as a result of accidents involving a driver using a cell phone has more than doubled from approximately 1000 in 2001 to 2600 in 2003. Kalin, *supra* note 17, at 236. Studies have estimated that cell phones caused roughly 2000 to 3000 deaths in 2003 alone. *Id. See also* Karen Neely et al., *Put Your Calls on Hold While Driving*, MONDAQ, Apr. 4, 2008, *available at* 2008 WLNR 6506147 (indicating that over 1.5 million drivers using a cell phone were involved in car accidents).

[27] *See infra* notes 28–30 and accompanying text (discussing the difficulties in accurately determining when a cell phone is involved in an automobile accident).

[28] SUNDEEN, LEGISLATIVE UPDATE, *supra* note 22, at 3. It is difficult to detect cell phone use in accidents because they do not leave any physical indicators at the scene of an accident and in collecting crash data, the officers must rely on self-reporting, which jeopardizes the accuracy of the data. *Id. See also* Olson, *supra* note 24 (indicating that because cell phones are small and hard to see it makes detection for reporting purposes difficult). Dave France, a firefighter and paramedic, as well as a councilman stated:

using their cell phones are unlikely to report such behavior for fear that it may increase their civil liability.[29] In addition, these statistics are inaccurate because many states only recently began collecting data related to cell phones and automobile accidents.[30] Despite these flaws, the data collected by individual states indicates that the use of cell phones distracts drivers, thereby significantly contributing to accidents.[31]

> It's scary the number of crashes I've investigated in which a cell phone was involved . . . . Some of them, the diver said they were on the cell phone, and others, you saw an open cell phone lying on the floor of the car. And then there's the times when our emergency vehicle was driving to a rescue scene and there were people in cars blocking our way because they didn't hear the siren because they were on a cell phone.

Bill Lilley, *Driving While on Phone is Attacked: More Green City Council Discussion Expected on Resident's Suggestion to Outlaw Cell Use if Car is Moving*, AKRON BEACON J., June 9, 2008, at B1.

[29] Cripps, *supra* note 3, at 97; Olson, *supra* note 24. There have been several cases where a driver's use of his or her cell phone played a role in his or her civil liability. *See, e.g.*, Prego v. Falcioni, No. CV020280472S, 2006 WL 463189 (Conn. Super. Ct. Feb. 8, 2006) (finding plaintiff ten percent responsible for an accident for failure to maintain a proper lookout because she had been using her cell phone seconds prior to the accident); Hiscott v. Peters, 754 N.E.2d 839 (Ill. App. Ct. 2001) (finding evidence of the driver's use of his cell phone should have been given to the jury so it could determine the weight and value of the evidence); McCormick v. Allstate Ins. Co., 870 So. 2d 547 (La. Ct. App. 2004) (allegations that the driver was talking on his cell phone at the time of the accident played a role in the court finding him solely responsible for the accident); Perkins v. Allstate Indem. Ins. Co., 821 So. 2d 647 (La. Ct. App. 2002) (finding equal fault between parties due to plaintiff talking on her cell phone at the time of the accident); Wilkerson v. Kan. City S. Ry., 772 So. 2d 268 (La. Ct. App. 2000) (finding a driver's inattention due to being on her cell phone was solely responsible for the accident).

[30] *See* SUNDEEN, LEGISLATIVE UPDATE, *supra* note 22, at 3 ("As of February 2007, only 16 states—California, Florida, Kansas, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, New York, Oklahoma, Pennsylvania, Tennessee, Texas, Utah and Wisconsin—had published data on the number of crashes that cited phones or CB radios as a causal factor."). In addition, many of these states have only published statistics for one year and in other states, only one law enforcement agency collected the data, so it is difficult to get an accurate picture of the statistics involving cell phones and accidents. *Id.*

[31] *See generally* 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 ("[T]wo studies confirm that the distractions associated with phone use contribute significantly to crashes."). *See also* Chris Brennan, *City Would Restrict Cell-Phone Use by Drivers*, PHILA. DAILY NEWS, Aug. 19, 2008, at 9 (indicating Pennsylvania records showed that 1241 car accidents were attributed to the use of a cell phone while driving in 2006); Omer Gillham, *Cell-Phone-Related Crashes Soaring, Highway Data Shows*, TULSA WORLD, Jan. 9, 2007, at A1 (indicating Oklahoma reported that the number of cell phone related accidents has grown from just eighty-eight accidents in 2000 to seven hundred seventy-five in 2005); Robert Roy Britt, Are Cell Phones Really so Dangerous? (Feb. 2, 2005), http://www.livescience.com/technology/050201_cell_danger.html (discussing California statistics from 2001, which indicated that despite the estimates being

B. The Dangers of Cell Phones and Driving

When driving a vehicle, a distraction—no matter how brief—can cause serious problems.[32] There are four kinds of driving distractions: visual, biomechanical, auditory, and cognitive.[33] Interestingly, talking on a cell phone while driving is the only activity where all four types of distractions are present.[34]

A number of activities associated with a cell phone can distract a driver, including talking, dialing, hanging up a call, reaching for the phone, or picking up a dropped phone.[35] One study showed that talking on a cell phone caused drivers to have tunnel vision, which made them unable to describe the situation around them.[36] This is because

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low because of a lack of formal procedures, cell phones were deemed to be responsible for 4699 reported accidents, which killed thirty-one people and injured 2786); Whitcomb, *supra* note 21 (discussing the data of the California Highway Patrol, which shows that cell phone use is the cause of most distracted driving). However, the data analysts for the Oklahoma Highway Safety Office admit that the figures are probably much higher than reported because "[g]etting an accurate count on cell-phone accidents can be difficult because cells are easily hidden and some won't admit to using a cell phone." Gillham, *supra*.

[32] *See* Dusty Horwitt, Note, *Driving While Distracted: How Should Legislators Regulate Cell Phone Use Behind the Wheel?*, 28 J. LEGIS. 185, 191 (2002). Horwitt explained:

> At 35 miles per hour, for example, a car travels 51.3 feet per second. At 65 miles per hour, it covers 95.3 feet per second. Thus, the driver who takes his eyes off the road for just one second to answer a phone is essentially blind for close to 100 feet of roadway.

Id.

[33] Fran Bents, Nat'l Highway Traffic Safety Admin., Driving With Cell Phones: What Have Highway Safety Researchers Learned, http://www.nhtsa.dot.gov/staticfiles/DOT/NHTSA/NRD/Multimedia/PDFs/Crash%20Avoidance/Driver%20Distraction/BentsF_doc.pdf, at 4 (last visited Oct. 13, 2009).

[34] Horwitt, *supra* note 32, at 202. This is because cell phones cause individuals to look away from the road. *See* Bents, *supra* note 33. Also, the manipulation of controls on the phone and the ringing of the telephone can both distract the driver. *Id.*

[35] *See* Michael, *Liability for Accidents*, *supra* note 1, at 300 (indicating that one of the problems with using a cell phone while driving is that it may cause the driver to take his or her eyes off of the road); Horwitt, *supra* note 32, at 190 (indicating that all of these activities can distract a driver because they cause the driver to take his or her eyes off of the road). *See also* Ins. Inst. for Highway Safety, *Phoning While Driving Increases Year by Year, Even as Evidence of the Risk Accumulates*, STATUS REP., Jan. 28, 2006, at 4 [hereinafter *Risk Accumulates*] ("[D]rivers were more likely to take their hands off the steering wheel or their eyes off the road when they were dialing a phone or answering it."); Press Release, N.J. Motor Vehicle Comm'n, MVC and Partners Urge Motorists to "Put the Phone Down" (Feb. 28, 2008), *available at* http://www.state.nj.us/mvc/PressReleases/archives/2008/022808.htm ("A driver's attention should be focused solely on driving, period, [and a]ny conversation on a cell phone, whether it's hand-held or hands-free, is distracting and can instantly take a driver's mind and eyes off the road, creating a potentially deadly situation.").

[36] *See* Horwitt, *supra* note 32, at 192 (describing a study in which simulators were used and drivers, when suddenly stopped and asked questions, were unable to describe the

individuals are unable to engage in multiple complex tasks simultaneously.[37] The cognitive distraction caused by the cell phone conversation is the most dangerous aspect of using a cell phone while driving, mainly because it greatly impairs an individual's reaction time.[38] Studies have found that the effect a cell phone has on a person's reaction time is similar to that of a person who drives under the influence of alcohol.[39] As the rate of cell phone use and the duration of phone calls continue to increase, drivers talking on cell phones will be impaired for longer periods of time, thereby increasing the risk of accidents even further.[40]

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traffic around them despite the fact they were able to do so when they were not talking on their phone). *See also* Kalin, *supra* note 17, at 254 (discussing a study that found drivers engaging in cell phone conversations were much less aware of their surroundings in that they could only identify half as many objects outside of the vehicle as opposed to those drivers not having cell phone conversations).

[37] Kalin, *supra* note 17, at 237. *See also* Olson, *supra* note 24 (indicating that people have trouble multitasking in general). The problem arises because driving is a complicated task in itself that requires the driver to engage continuously in several activities such as monitoring his or her speed, checking his or her mirrors, and steering the vehicle. Cripps, *supra* note 3, at 95.

[38] *See* Olson, *supra* note 24 (discussing a study by Carnegie Mellon University that found "humans cannot converse on cell phones without distracting the brain from the task of driving"). This is because "the fundamental implication is that engaging in a demanding conversation could jeopardize judgment and reaction time if an atypical or unusual driving situation arose." *Id.* Another study concluded that cell phone users' reaction times were significantly lowered. Britt, *supra* note 26. "If you put a 20-year-old driver behind the wheel with a cell phone, their reaction times are the same as a 70-year-old driver who is not using a cell phone." *Id.* *See also* Michael Dresser, *Driving While Using a Cell Phone Found to Quadruple Crash Risk*, BALT. SUN, Dec. 5, 2008, at 18A (indicating that studies have shown the use of a cell phone while driving delays an individual's ability to react to situations by .23 seconds).

[39] *See* Michael, *Liability for Accidents*, *supra* note 1, at 300–01 ("Scientific research has found that a driver's reaction time is slowed by an average of [thirty percent] while talking on a cell phone, similar to that of a drunk driver."). *See also* SUNDEEN, LEGISLATIVE UPDATE, *supra* note 22, at 5 (discussing the results of a study conducted by the University of Utah that found drivers talking on cell phones experienced double the amount of rear-end collisions); Wong, *supra* note 2 (discussing the above study's findings that drivers who were talking on their cell phones "drove slower, had a slower reaction time when braking, were slower to resume normal speed after braking and were more likely to crash"). A New England Journal of Medicine study also found that using a cell phone while driving is similar to driving drunk because it significantly impairs the driver's ability to focus his or her attention on the road. Kalin, *supra* note 17, at 237–38. Another study indicated that the risk associated with using a cellular telephone while driving constituted a four-fold increase, which is similar to that of driving while intoxicated. Horwitt, *supra* note 32, at 195.

[40] Horwitt, *supra* note 32, at 195. Frances Bents, Vice President of Dynamic Science, Inc., analyzed an article by the New England Journal of Medicine that reported that there is a four-fold increase in risk associated with driving while using a cellular telephone, which is comparable to the risk associated with driving with a blood alcohol level at the legal limit.

Because of the troubles with data collection relating to accidents involving cell phones, the actual danger of using a cell phone while driving has varied among studies.[41] Although evidence shows that driving while using a cell phone is extremely dangerous, some studies have found it less dangerous than many other activities.[42] However, the Virginia Tech Transportation Institute and the NHTSA conducted a one-hundred-car naturalistic study, which found that wireless devices, particularly cell phones, were the largest cause of inattention and contributed to the most instances of accidents or near-accidents.[43] Other

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Id. The article, after receiving some criticism, later attempted to clarify its finding by expressing that "[t]he cumulative risks associated with alcohol intoxication are much greater than those associated with using a cellular telephone." *Id.* The authors of the article pointed to the fact that a cell phone conversation lasts for only a few minutes as opposed to alcohol which can stay in a person's blood stream for hours. *Id.* at 196. Bents suggested that the way the data was collected and analyzed may have skewed the results, and proposed that if drivers talking on the phone for a half hour continuously were studied, researchers would find that the risk factor is actually higher than driving while intoxicated at the legal limit. *Id.*

[41] *See infra* notes 42–44 and accompanying text (discussing several studies regarding cell phone use while driving and the different conclusions reached by them).

[42] *See* ANDREA L. GLAZE & JAMES M. ELLIS, CTR. FOR PUB. POLICY VA. COMMONWEALTH UNIV., PILOT STUDY OF DISTRACTED DRIVERS 14 (2003) (discussing the 2002 pilot study conducted by Virginia Commonwealth University that found cell phones accounted for only approximately four percent of distractions). Another study ranked a number of things ahead of cell phones as far as causing accidents, including rubbernecking, fatigue, passenger distractions, and adjusting the radio. WebMD.com, *Rubbernecking Distracts More than Phones: Cell Phones Rank Sixth on List of Causes of Accidents* (Mar. 7, 2003), http://women.webmd.com/news/20030307/rubbernecking-distracts-more-than-phones. Also, a study by Virginia Tech Transportation Institute found that reaching for a fallen object increases the risk of crashing by nine times as opposed to only a 1.3 increase in risk caused by cell phones. Eric Saiontz, Maryland Hand-Held Cell Phone Ban Blocked by Law Makers (Apr. 4, 2008), http://www.youhavealawyer.com/blog/2008/04/04/maryland-cell-phone-ban/.

[43] VICKI L. NEALE ET AL., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., AN OVERVIEW OF THE 100-CAR NATURALISTIC STUDY AND FINDINGS 9 (2005), *available at* http://www.nhtsa.dot.gov/staticfiles/DOT/NHTSA/NRD/Multimedia/PDFs/Crash%20Avoidance/Driver%20Distraction/100Car_ESV05summary.pdf. This study equipped one hundred cars with sensors and video cameras to monitor the driving of 241 drivers. *Id.* at 1–2. Participants in the study consisted of people from all age groups ranging from eighteen-year-olds to drivers over the age of fifty-five. *Id.* at 4. The study consisted of over approximately two million miles driven over a twelve to thirteen month collection period. *Id.* at 1. Findings showed that inattentive drivers caused approximately eighty percent of crashes and sixty-five percent of near crashes. *Id.* at 7. Of these incidents, the majority of them occurred while the driver was engaged in a cell phone conversation. *Id.* at 8. *See also* SUNDEEN, LEGISLATIVE UPDATE, *supra* note 22, at 5; Joe Benton, *Cell Phone No. 1 Driver Distraction* (Apr. 20, 2006), http://www.consumeraffairs.com/news04/2006/04/cell_phones_distraction.html; Hand Held Cell Phone Ban While Driving, http://www.fourwinds10.com/siterun_data/media/telephone_cell_phone_radio/news.php?q=1201893038 (last visited Oct. 19, 2009); Saiontz, *supra* note 42 (discussing the findings of the Virginia Tech study).

studies have concluded that using a cell phone while driving quadruples the risk of an accident.[44] Similarly, studies have also demonstrated that the likelihood of danger is increased when individuals use the text message function of their cell phone while they are driving.[45] These studies indicating the potential dangers of cell phone use while driving have prompted a large amount of legislation.

C. Approaches to Legislation

The studies conducted about the dangers of driving while using a cell phone have created many concerns throughout the country.[46] In response, there has been a debate over whether the government should regulate cell phone use while driving, and if so, whether it should be the responsibility of local or state governments to impose restrictions. This Part first discusses the opposition to legislation.[47] Next, this Part examines state legislation of cell phone use while driving,[48] followed by

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[44] ROBERT D. FOSS ET AL., INS. INST. FOR HIGHWAY SAFETY, SHORT-TERM EFFECTS OF A TEENAGE DRIVER CELL PHONE RESTRICTION 1 (2008). The New Institute, by examining phone use habits of the driver, concluded that driving while using a cell phone increased an individual's chance of getting into a serious accident, one serious enough to cause physical injury, by four times. 1st Evidence, *supra* note 31. *See also* Hahn & Dudley, *supra* note 17, at 140–41 (indicating that this risk is also significant for other drivers, passengers, and pedestrians); Michael, *Liability for Accidents*, *supra* note 1, at 300 (reporting that the New England Journal of Medicine reported this four-fold risk increase still remains even if a call ends as much as fifteen minutes before the accident); Dresser, *supra* note 38 (indicating a recent study found that using a cell phone while driving, whether hands-free or hand-held, quadruples the chances of getting into an accident). A study conducted by the Harvard Center of Risk Analysis concluded that while a driver using a cell phone has a thirteen in one million chance of dying in an accident, other drivers and pedestrians are also at risk of being killed by a driver using a cell phone at a rate of four in one million. *Study: Car Call Value Equals Crash Cost*, *supra* note 22.

[45] *See* Wood, *supra* note 16 (indicating text messaging can be more dangerous than talking on a cell phone because drivers who text have to constantly look at the keypad while typing their message, thereby removing their eyes from the road-way). *See also* Robert L. Sachs, Jr., *TXT MSGS and Other Driving Distractions*, 44 TRIAL 20, 22 (2008) ("Text-messaging requires a greater level of concentration than other activities in the car. An average driver trying to text-message takes his or her eyes off the road at least 14 times every 30 seconds to look at the screen or use the keypad. That's a recipe for disaster."). Additionally, when someone sends a text message while driving, they increase their chance of getting into an accident by six times. *Id.* at 22. A 2007 study by Clemson University reported that drivers leave their lanes approximately ten percent more frequently when they are texting. Wood, *supra.*

[46] *See supra* notes 42–44 (discussing several studies examining the effect cell phones have on the driving performance of drivers).

[47] *See infra* Part II.C.1 (discussing different reasons legislators are opposed to passing legislation restricting the use of cell phones while driving).

[48] *See infra* Part II.C.2.a (examining current state legislation restricting drivers' ability to talk on hand-held cell phones while driving).

cell phone restrictions directed solely at minors.[49] Then, this Part discusses local municipalities' attempts to regulate cell phone use while driving.[50] Finally, this Part examines the current text message legislation.[51]

1. Opposition to Legislation

Despite the studies indicating the dangers of driving and talking on a cell phone or text messaging, a number of states have not yet regulated these activities.[52] One reason for the reluctance of legislatures to pass this type of legislation is the fear that it will be perceived as "nanny government."[53] Others are hesitant to pass legislation restricting cell phone use in vehicles due to possible constitutional challenges.[54] An

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[49] *See infra* Part II.C.2.b (exploring current legislation that prohibits only minors from talking on a cell phone while driving).

[50] *See infra* Part II.C.2.c (discussing action taken by municipalities to prohibit drivers from using cell phones while driving).

[51] *See infra* Part II.C.3 (exploring current legislation prohibiting drivers from text messaging while driving).

[52] *See* Ins. Inst. for Highway Safety, *Cellphone Laws* (Oct. 2009), http://www.iihs.org/laws/cellphonelaws.aspx (detailing cell phone legislation in all fifty states). As of October 2009, fourteen states have not limited the ability of drivers to talk on a cell phone or text message while driving. *Id.* These states include: Alabama, Florida, Hawaii, Idaho, Iowa, Montana, Nevada, North Dakota, Oklahoma, South Carolina, South Dakota, Vermont, Wisconsin, and Wyoming. *Id.* Also, four states—Arizona, Georgia, Kentucky, and Massachusetts—only prohibit schools bus drivers from talking on a cell phone while driving. *Id.* An additional four states—Massachusetts, Michigan, Ohio, and New Mexico—provide municipalities with the option to restrict drivers from talking on a cell phone. *Id.*

[53] *See* Tom Barnes, *Bill Would Ban Cell Phone Use By Drivers*, PITTSBURGH POST-GAZETTE, Sept. 12, 2007, at A1 ("Some critics of such bills complain the Legislature is going overboard with 'nanny government', unnecessarily restricting people in their cars."). *See also* Michael Fickes, *Educating Distracted Drivers: The Wireless Industry Mounts Education to Make Drivers Aware of Distractions*, WIRELESS WAVE, Summer 2006, at 34, 36 (indicating that there are a number of other things one can do while driving that are distracting, but yet remain unaffected by legislation). James R. Sayer stated, "No one would legislate that you can't eat, drink, or talk in the car. But they will legislate that you can't use a cell phone in the car. But there are lots of other things in the car that have negative consequences in terms of driving." *Id. See also* Martin, *Michigan Again Debates*, *supra* note 17 ("Some lawmakers think talking on cell phones isn't any more distracting than operating car radios and CD players, applying makeup, reading a map or eating while behind the wheel.").

[54] *See* Martin, *Michigan Again Debates*, *supra* note 17 (indicating legislative efforts in Michigan have failed because of fears that such a law might implicate privacy rights and personal freedoms). *See also* Theodore Kim, *Bill Calls for Drivers to Hang Up*, INDIANAPOLIS STAR, Jan. 26, 2005, *available at* 2005 WLNR 1095601 (suggesting that such legislation would likely be viewed as an attempt to limit civil liberties); Olson, *supra* note 24 (discussing the United States House of Representative hearings regarding this issue in 2001 in which several congressmen expressed concerns with this type of law implicating First Amendment freedom of speech rights). *But see* People v. Neville, 190 Misc. 2d 432, 437

additional argument made by those who oppose the legislation is that the cost of restricting cell phone use while driving does not outweigh the benefits.[55]

Furthermore, many individuals argue that talking on a cell phone is not any different from talking to a passenger while driving; however, very important distinctions exist between the two scenarios, mainly the nature of the conversations.[56] In addition, some lawmakers have not supported bills restricting cell phone use while driving because of the belief that doing so would impede the development of other beneficial

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(N.Y. Just. Ct. 2002) (finding New York's statute prohibiting hand-held cell phone use was constitutional).

[55] *See* Hahn & Dudley, *supra* note 17, at 146–51 (discussing three different studies that attempted to determine if the costs associated with prohibiting cell phones while driving outweighed the benefits). Each of the three studies found a cell phone prohibition would not be a cost-effective way of saving lives. *Id.* at 146. However, there are a number of factors that raise questions as to the reliability of these studies. *Id.* at 149–50. One of the most important factors is that these studies are likely dated. *Id.* at 150. With the increase in the number of cell phone users each year, both the costs and benefits of such legislation have changed, and therefore, this may not be the most reliable argument. *Id. See also* Hahn, Tetlock & Burnett, *supra* note 22, at 46 (outlining one of the important cost/benefit studies that was conducted in 1999 which determined that that a cell phone ban was not worth it); Harvard Sch. of Pub. Health, *supra* note 22; *Study: Car Call Value Equals Crash Cost*, *supra* note 22 (discussing a study conducted by the Harvard Center for Risk Analysis which estimated the costs of accidents caused by cell phone use was forty-three billion dollars, which is roughly equal to the value of cell phones to their users). Furthermore, it is argued that, "Unlike other traffic safety issues—such as drunk driving or seat belts, where few compelling reasons exist to allow a driver to operate a vehicle drunk or without a seatbelt—there are reasons to allow phones in the car." SUNDEEN, LEGISLATIVE UPDATE, *supra* note 22, at 2. Some people urge that the reasons cell phones should not be regulated is because they can be very valuable to their owners because they help drivers make the most out of their time, allow drivers to stay in contact with their families, and also provide assistance in an emergency. *Id. See also* Kim, *supra* note 54 (reporting that Indiana legislators are skeptical of restricting cell phone use because of their useful purpose).

[56] *See* Bents, *supra* note 33 (indicating there are two main distinctions between cell phone conversations and conversations with passengers). One difference between these two types of conversations is that a passenger is aware of the driving situation, and can easily pause the conversation when needed as opposed to those who are on the opposite end of the cell phone conversation. *Id.* The second main difference is that cell phones carry a sense of immediacy, where individuals feel the need to answer their cell phone whether it is a good time to do so or not. *Id. See also* Courtney Perkes & Jennifer Muir, *Calls Distract Drivers More Than Passengers, Study Finds*, ORANGE COUNTY REG., Dec. 5, 2008, *available at* 2008 WLNR 23449661 (discussing a study that found drivers talking on a cell phone missed their freeway exits half of the time whereas an individual talking with a passenger hardly ever missed their exit). The study concluded that the difference was the conversational styles between the two conversations because passengers saw the same road conditions as the driver and were able to adjust the conversation accordingly. *Id.* Also, the study found that drivers talking to a passenger tended to speak less frequently in complex situations. *Id.*

technological advances.[57] A final theory opposing legislation in this area is that it is unnecessary because the number of injuries and deaths on the roadways are declining; however, this decline could be attributed to a number of other factors including the success of seatbelt and drunk driving laws.[58] Despite these concerns, legislation regarding cell phone use while driving has in fact passed in some states and municipalities.[59]

2. Hands-Free Legislation

Every state has considered legislation relating to cell phone use in automobiles because of the visibility of these devices on the roadways and the cognitive effect a phone conversation has on an individual.[60] In

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[57] *See* Kristin Dizon, *Calls are Growing for Cell Phone Laws in Cars: State Senator Undaunted by Delays*, SEATTLE POST-INTELLIGENCER REP., Nov. 17, 2004, *available at* http://seattlepi.nwsource.com/local/199984_celllaws17.asp (indicating that the advancements of devices such as embedded voice-activated phones and in-dash navigational systems could be affected if cell phones were prohibited while driving).

[58] *See* Fickes, *supra* note 53, at 1 ("From 1994 to 2004, the number of U.S. licensed drivers and miles driven went up, with huge increases in the number of wireless subscribers and the time they spent on their devices. At the same time, the number of vehicle crashes dropped about 5%."). *See also* Olson, *supra* note 24 ("In short, automobile accident deaths and injuries continue to drop. This decrease may be due, in part, to improved seat belt usage, tougher driving under the influence (DUI) of alcohol or drugs laws, and automobile safety features."). For information regarding seat belt and drunk driving laws see NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., 2007 TRAFFIC SAFETY ANNUAL ASSESSMENT- ALCOHOL-IMPAIRED DRIVING FATALITIES (2008) [hereinafter ALCOHOL-IMPAIRED DRIVING FATALITIES]; NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., SEAT BELT USE IN 2008—OVERALL RESULTS 1 (2008) [hereinafter SEAT BELT USE IN 2008]; Press Release, Ad Council, Ad Council & U.S. Dep't of Transp. Expand Focus of Drunk Driving Campaign to Buzzed Driving Risks (Dec. 28, 2005), *available at* http://www.stopimpaireddriving.org/planners/Buzzed_Planner/pdfs/Buzz_Release.pdf; U.S. Dep't of Transp., DUI Fatalities Down Nationwide and in 32 States, Says U.S. Secretary of Transportation Mary Peters (Aug. 28, 2008), *available at* http://www.dot.gov/affairs/dot12508.htm [hereinafter U.S. Dep't of Transp. DUI]; U.S. Dep't of Transp., Seat Belt Use Hits Record Level in 2008 (Sept. 17, 2008), *available at* http://www.dot.gov/affairs/nhtsa0608.htm [hereinafter U.S. Dep't of Transp., Seat Belt]; DrivingLaws.org, Drunk Driving Laws, Fines, & Penalties in the U.S., http://dui.drivinglaws.org/ (last visited Aug., 3, 2009); Ins. Inst. for Highway Safety, DUI/DWI Laws, Aug. 2009, http://www.iihs.org/laws/dui.aspx. (listing the drunk driving laws in each of the fifty states); Ins. Inst. for Highway Safety, Safety Belt Use Laws, Aug. 2009, http://www.iihs.org/laws/SafetyBeltUse.aspx [hereinafter Safety Belt Use Laws]. For an analysis of how drunk driving and seat belt laws can be used as a model to create successful cell phone and text message legislation see *infra*, Part III.B.

[59] *See infra* Parts II.C.2.a–II.C.2.c (discussing current legislation prohibiting the use of cell phones while driving).

[60] SUNDEEN, LEGISLATIVE UPDATE, *supra* note 22, at 2. Matt Sundeen, researcher for the National Conference of State Legislatures, indicated that it is easy for other drivers to spot when a driver is engaged in a cell phone conversation because conversations often last for long periods of time. *Id.* Sundeen also suggested that legislatures have targeted cell phone use as opposed to other distractions because cell phones cause a unique cognitive

2006 alone, thirty-eight states considered possible cell phone legislation.[61] Despite state legislative efforts to introduce these bills, similar bills in the federal government have failed due to lack of support.[62] The NHTSA, a federal agency, has refused to take action, claiming that the agency lacks the proper authority to do so.[63] Although the federal government of the United States has not passed legislation, many foreign countries have laws regulating the use of cell phones on their roadways.[64] Despite the popularity of these laws in foreign countries, currently only seven states and the District of Columbia prohibit driving while using a hand-held cell phone.[65]

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distraction that is not involved with other distractions. *Id.* He goes on to say that this causes drivers to become engrossed in the conversation and often times make gestures, which distracts them from the task of driving, and also makes it easier for other drivers to notice. *Id.*

[61] *Id.*

[62] *See* Kalin, *supra* note 17, at 247–48 (discussing proposed cell phone regulations that failed in both the House of Representatives and the Senate). In 2000, the Driver Distraction Prevention Act of 2000 was introduced by the House or Representatives, but failed to pass. *Id.* at 247. A similar bill introduced by Senator Jon Corzione in 2001 failed to pass Committee and a subsequent attempt by him also failed. *Id.* at 248.

[63] *Id.* The NHTSA explained that while it has the ability to regulate aspects of automobiles, it does not have the authority to regulate cell phone use in cars because the phone is not part of the vehicle. *Id.* A report published by the National Conference of State Legislatures expressed this by indicating:

> Federal law clearly governs equipment embedded in motor vehicles. Driver behavior, however, is a state issue. States, rather than the federal government, should decide whether to regulate the use of wireless telephones and other communications, information and entertainment technology in motor vehicles.

WILLIAM T. POUND, NAT'L CONFERENCE OF STATE LEGISLATORS, ALONG FOR THE RIDE REDUCING DRIVER DISTRACTIONS: FINAL REPORT OF THE DRIVER FOCUS AND TECHNOLOGY FORUM, 7 (2002), *available at* http://www.ncsl.org/documents/transportation/driver distract02.pdf.

[64] *See* Cellular-News, List of Countries that Ban Cellphone Use While Driving, Sept. 25, 2008, http://www.cellular-news.com/car_bans/ (indicating that forty-nine countries currently regulate the use of cell phones on their roads). Some countries with complete bans include Australia, France, Germany, Greece, Ireland, Japan, the Netherlands, Russia, and the United Kingdom. *Id.* The penalties vary from monetary fines to imprisonment. *Id.* As of December 1, 2003, it is a criminal offense to use a hand-held phone while driving in Britain. Michael, *Automobile Accidents*, *supra* note 18, at 6. The regulations "simply make it an offence to hold a phone whilst driving and cover all activities associated with making or receiving a call, including dialing." *Id.* Japan also prohibits the use of all cell phones while driving on its roadways and the penalty ranges from 5000 to 7000 yen with a fine of up to 50,000 yen if it is not paid, as well as one point on the diver's license. *Law Banning Drivers From Using Mobile Phones Takes Effect*, MAINICHI DAILY NEWS (Japan), Nov. 1, 2004, *available at* 2004 WLNR 4518605.

[65] *See Cellphone Laws*, *supra* note 52 (indicating that Utah banned all cell phone use while driving under its careless driving statute and that Oregon recently became the seventh state to prohibit all drivers from using a hand-held cell phone while driving);

a. State Legislation

In 2001, New York became the first state to regulate hand-held cell phone use while driving.[66] Although New York prohibits hand-held cell phones, it still allows drivers to engage in cell phone conversations as long as they use a hands-free device.[67] New York's law also includes a provision that permits drivers to use their cell phones to call proper authorities in emergency situations.[68] States enacting similar laws have used New York's law as a model for their legislation and typically

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DrivingLaws.org, Hands Free, Text Messaging, and Cell Phone Driving Laws, http://www.drivinglaws.org/indexhf.php (last visited Aug. 5, 2009) (indicating California, Connecticut, New York, New Jersey, Washington, and the District of Columbia ban drivers from using hand-held cell phones while driving). *See also Cellphone Laws*, *supra* note 52 (reporting that Oregon's legislation that prohibits all drivers from using a cell phone becomes effective on January 1, 2009).

[66] Alicia Chang, *Drivers Soon Ignored New York Cell Phone Ban, Study Shows*, MILWAUKEE J. SENTINEL, Feb. 8, 2004, at 8. *See also* Scott Gutierrez, *Do Driver Cell-Phone Bans Work? Mixed Results Cited by Other States; Senate-Passed Bill Faces Uphill Fight*, SEATTLE POST INTELLIGENCER, Mar. 10, 2007, at A1 (indicating New York passed legislation restricting the ability to use a cell phone while driving in attempt to prevent dangerous distractions to drivers). *See also* N.Y. VEH. & TRAF. LAW §§ 1225-c(2)–(4) (McKinney Supp. 2009) stating:

> 2. (a) Except as otherwise provided in this section, no person shall operate a motor vehicle upon a public highway while using a mobile telephone to engage in a call while such vehicle is in motion.
> (b) An operator of a motor vehicle who holds a mobile telephone to, or in the immediate proximity of his or her ear while such vehicle is in motion is presumed to be engaging in a call within the meaning of this section. The presumption established by this subdivision is rebuttable by evidence tending to show that the operator was not engaged in a call.
> (c) The provisions of this section shall not be construed as authorizing the seizure or forfeiture of a mobile telephone, unless otherwise provided by law.
> 3. Subdivision two of this section shall not apply to (a) the use of a mobile telephone for the sole purpose of communicating with any of the following regarding an emergency situation: an emergency response operator; a hospital, physician's office or health clinic; an ambulance company or corps; a fire department, district or company; or a police department, (b) any of the following persons while in the performance of their official duties: a police officer or peace officer; a member of a fire department, district or company; or the operator of an authorized emergency vehicle as defined in section one hundred one of this chapter, or (c) the use of a hands-free mobile telephone.
> 4. A violation of subdivision two of this section shall be a traffic infraction and shall be punishable by a fine of not more than one hundred dollars.

Id.

[67] N.Y. VEH. & TRAF. LAW § 1225-c(3)(c).

[68] *Id.* § 1225-c(3)(a).

include the same exception for emergencies.[69] In 2004, New Jersey and the District of Columbia enacted legislation that prohibited hand-held cell phone use while driving.[70] New Jersey's law originally provided

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[69] *See, e.g.*, N.J. STAT. ANN. § 39:4-97.3(b) (West Supp. 2008). The emergency clause of this statute states:

> The operator of a motor vehicle may use a hand-held wireless telephone while driving with one hand on the steering wheel only if:
>
> (1) The operator has reason to fear for his life or safety, or believes that a criminal act may be perpetrated against himself or another person; or
>
> (2) The operator is using the telephone to report to appropriate authorities a fire, a traffic accident, a serious road hazard or medical or hazardous materials emergency, or to report the operator of another motor vehicle who is driving in a reckless, careless or otherwise unsafe manner or who appears to be driving under the influence of alcohol or drugs. A hand-held wireless telephone user's telephone records or the testimony or written statements from appropriate authorities receiving such calls shall be deemed sufficient evidence of the existence of all lawful calls made under this paragraph.

N.J. STAT. ANN. § 39:4-97.3(b).

[70] *See id*. § 39:4-97.3 stating:

> a. The use of a wireless telephone or electronic communication device by an operator of a moving motor vehicle on a public road or highway shall be unlawful except when the telephone is a hands-free wireless telephone or the electronic communication device is used hands-free, provided that its placement does not interfere with the operation of federally required safety equipment and the operator exercises a high degree of caution in the operation of the motor vehicle. For the purposes of this section, an "electronic communication device" shall not include an amateur radio.
>
> b. The operator of a motor vehicle may use a hand-held wireless telephone while driving with one hand on the steering wheel only if:
>
> (1) The operator has reason to fear for his life or safety, or believes that a criminal act may be perpetrated against himself or another person; or
>
> (2) The operator is using the telephone to report to appropriate authorities a fire, a traffic accident, a serious road hazard or medical or hazardous materials emergency, or to report the operator of another motor vehicle who is driving in a reckless, careless or otherwise unsafe manner or who appears to be driving under the influence of alcohol or drugs. A hand-held wireless telephone user's telephone records or the testimony or written statements from appropriate authorities receiving such calls shall be deemed sufficient evidence of the existence of all lawful calls made under this paragraph.
>
> As used in this act, "hands-free wireless telephone" means a mobile telephone that has an internal feature or function, or that is equipped with an attachment or addition, whether or not permanently part of such mobile telephone, by which a user engages in a conversation without the use of either hand; provided, however, this definition shall not preclude the use of either hand to activate, deactivate, or initiate a function of the telephone.

that driving while using a hand-held cell phone was a secondary offense, which meant a person would be punished for such activity only if he or she was initially pulled over for a different offense.[71] This changed in 2007 when Senate Bill No. 1099 made driving while using a hand-held cell phone a primary offense, thereby allowing an officer to stop a vehicle without any additional reason if the officer believes the driver is using a hand-held cell phone.[72] In 2005, Connecticut became the next state to prohibit hand-held cell phone use, closely modeling its legislation after New York's statute.[73] Soon thereafter, Washington and California enacted laws that took effect in 2008.[74] Like New Jersey's

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> "Use" of a wireless telephone or electronic communication device shall include, but not be limited to, talking or listening to another person on the telephone, text messaging, or sending an electronic message via the wireless telephone or electronic communication device.
>
> . . . .
>
> d. A person who violates this section shall be fined $100.
>
> e. No motor vehicle points or automobile insurance eligibility points pursuant to section 26 of P.L.1990, c. 8 (C.17:33B-14) shall be assessed for this offense.

Id. The District of Columbia's code prohibiting the use of hand-held cell phones while driving states:

> (a) No person shall use a mobile telephone or other electronic device while operating a moving motor vehicle in the District of Columbia unless the telephone or device is equipped with a hands-free accessory.
>
> (b) The provisions of this section shall not apply to the following:
>
> (1) Emergency use of a mobile telephone, including calls to 911 or 311, a hospital, an ambulance service provider, a fire department, a law enforcement agency, or a first-aid squad;
>
> (2) Use of a mobile telephone by law enforcement and emergency personnel or by a driver of an authorized emergency vehicle, acting within the scope of official duties; or
>
> (3) Initiating or terminating a telephone call, or turning the telephone on or off.

D.C. CODE § 50-1731.04 (Supp. 2008).

[71] N.J. STAT. ANN. § 39:4-97.3(b)(2), *amended by* Pub. L. 2007, c. 198.

[72] S. 1099, 2007 Reg. Sess. (N.J. 2007). In an effort to promote this new bill and make the public aware of the change in the law, the New Jersey Motor Vehicle Commission initiated a public awareness campaign called "Put the Phone Down." N.J. Motor Vehicle Comm'n, *supra* note 35. This campaign consisted of posting posters around the state, movie screen advertisements, and reminder messages on digital highway signs. *Id.*

[73] CONN. GEN. STAT. § 14-296aa (2006).

[74] CAL. VEH. CODE § 23123 (West Supp. 2009); WASH. REV. CODE § 46.61.667 (Supp. 2009). *See also* JED KOLKO, PUB. POLICY INST. OF CAL., WHAT TO EXPECT FROM CALIFORNIA'S NEW HANDS-FREE LAW 3 (May 2008), *available at* http://www.ppic.org/content/pubs/op/OP_508JKOP.pdf (discussing California's cell phone law and indicating that "[t]he purpose

original law, Washington's is only a secondary offense.[75] Taking a different approach, Utah bans the use of a hand-held cell phone under its careless driving law, a law that also prohibits other behaviors such as reaching for an item in a vehicle or attending to personal hygiene.[76]

Although these states successfully passed legislation addressing cell phone use, other states have found it difficult to pass legislation restricting cell phone use while driving.[77] In fact, Carrie Webster, House Judiciary Chairwoman of West Virginia, stated that "trying to pass that kind of legislation is like hitting a political brick wall."[78] Successfully passed bills have noted that although cell phones do provide some benefits, the risks associated with them create the need to regulate their use while driving.[79]

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of hands-free laws is to reduce the distraction of using mobile phones and ultimately reduce traffic collisions, injuries, and fatalities.").

[75] WASH. REV. CODE § 46.61.667(6).

[76] *See* UTAH CODE ANN. § 41-6a-1715 (Supp. 2008) stating:

> (1) A person operating a motor vehicle is guilty of careless driving if the person:
>
> (a) commits two or more moving traffic violations under this chapter in a series of acts within a single continuous period of driving; or
>
> (b) commits a moving traffic violation under this chapter other than a moving traffic violation under Part 6, Speed Restrictions, while being distracted by one or more activities taking place within the vehicle that are not related to the operation of a motor vehicle, including:
>
> (i) using a wireless telephone or other electronic device unless the person is using hands-free talking and listening features while operating the motor vehicle;
>
> (ii) searching for an item in the vehicle; or
>
> (iii) attending to personal hygiene or grooming.

Id.

[77] *See, e.g.*, Dresser, *supra* note 38 (indicating Maryland rejected several bills that proposed to prohibit all drivers from using hand-held cell phones while driving); Martin, *Push for "Allie's Law," supra* note 2 (indicating nine bills restricting cell phone use were proposed in Florida's 2008 session, but none made it out of committee); Valencia, *supra* note 2 (indicating a bill to ban the use of hand-held cell phones passed the Massachusetts House but failed to pass the Senate).

[78] Justin D. Anderson, *Manchin Calls for Cell Phone Ban: Governor Says it is Time for Laws on Use of Devices While Driving*, CHARLESTON GAZETTE & DAILY MAIL, Sept. 18, 2008, at 1A. Often times these legislative measures die in committees, and many believe this is partially because of "the political clout of 76 million cell phone users." Michael, *Automobile Accidents*, *supra* note 18, at 7. In addition, it is speculated that many of these bills are rejected because "just about every politician owns and uses a cell phone." *Id.* Ironically, a politician called a radio station during a program advocating the prohibitions of cell phones on the road, and while he was defending cell phones and arguing that they were safe and did not need to be regulated, he got into a collision. Dizon, *supra* note 57.

[79] *See*, *e.g.*, S. 5037, 60th Leg., 2007 Reg. Sess. (Wash. 2007). Washington's legislation states:

b. Restrictions on Minors

Although some states have banned hand-held use by all drivers, others prohibit only minors or novice drivers from using a cell phone while driving because of the generally held notion that teenagers are not good drivers due to their inexperience.[80] There have been several highly publicized accidents where a minor talking on his or her cell phone, or sending a text message, played a large role in the accident.[81] In fact, automobile accidents are the leading cause of death among thirteen- to nineteen-year-old young adults.[82] In response to these accidents and statistics, twenty-one states and the District of Columbia passed legislation prohibiting minors from engaging in cell phone conversations while driving.[83] Most states have implemented these restrictions as part

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> While wireless devices have assisted with quick reporting of road emergencies, their use has also contributed to accidents and other mishaps on Washington state roadways. When motorists hold a wireless communications device in one hand and drive with the other, their chances of becoming involved in a traffic mishap increase. It is the legislature's intent to phase out the use of hand-held wireless communications devices by motorists while operating a vehicle.

Id.

[80] *See* Sundeen, *Inexperienced Teen Drivers*, *supra* note 4, at 20 (indicating that teenagers typically do not make good drivers because they are more easily distracted and are less able to react to dangerous traffic conditions due to their inexperience). Oklahoma representative, Danny Morgan, attempted to pass legislation that would restrict the ability of minors to use their cell phones while driving because of the distraction it creates. Sean Murphy, *Ban on Drivers' Cell Phones to Be Considered*, TULSA WORLD, Aug. 6, 2008, at A13, *available at* 2008 WLNR 14751424. He stated, "Anything that takes the driver's attention away from that responsibility of manipulating the controls of an automobile is a concern . . . . If you take the cell phone out of their hand, that's one less distraction they have to worry about." *Id.*

[81] *See* Sundeen, *Inexperienced Teen Drivers*, *supra* note 4, at 20 (relating the story of five recent high school graduates who were killed in New York in June of 2007). The driver, whose cell phone records indicated several text messages and phone calls were made just prior to the accident, lost control of the vehicle and collided with a tractor-trailer. *Id.*

[82] *Id.* In addition, "The crash rate per mile driven for 16- to 19-year-olds is four times higher than the rate for older drivers." *Id. See also* Ken Thomas, *Study Shows Teens Ignoring Cell Phone Bans*, ST. PAUL PIONEER PRESS, June 9, 2008, at A3 ("[T]teenagers are involved in three times as many fatal crashes as all other drivers.").

[83] Governor's Highway Safety Ass'n, Cell Phone Driving Laws (Aug. 2009), http://www.ghsa.org/html/stateinfo/laws/cellphone_laws.html. These states include: Arkansas, California, Colorado, Connecticut, Delaware, Illinois, Indiana, Kansas, Louisiana, Maine, Maryland, Minnesota, Nebraska, New Jersey, North Carolina, Oregon, Rhode Island, Tennessee, Texas, Virginia, and West Virginia. *Id.* Rather than passing legislation banning cell phone use among teenagers, Michigan has taken a different approach. In Michigan, if a teenager has a probationary license and is involved in an accident or receives a ticket in which their cell phone played a role, they lose the privilege to use a cell phone while driving. *Id. See also* Mary Lazich, Do Cell-Phone Bans Really Work? (July 3, 2008), http://www.legis.wi.gov/senate/sen28/news/Press/2008/col2008-

of their graduated licensing system,[84] while others have made it a blanket prohibition.[85] Although many of these states have instituted these as primary laws, some have simply made them secondary laws.[86]

c. Local Legislation

While some states regulate hand-held cell phone use, others have decided against statewide legislation, and as a result, some municipalities have taken action by passing local ordinances to limit cell phone use on their roadways.[87] Brooklyn, Ohio was the first municipality to pass this type of legislation, and it did so before any state passed legislation restricting cell phone use.[88] Since Brooklyn enacted its

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026.asp ("Concern over the high risk of crashes among teen drivers has prompted legislation to restrict cellphone use.").

[84] *See* Ins. Inst. for Highway Safety, Licensing Systems for Young Drivers, http://www.iihs.org/laws/graduatedLicenseIntro.aspx (last visited Aug. 27, 2009). Due to the risks associated with young drivers, states have created graduated licensing programs. *Id.* These programs are "designed to delay full licensure while allowing beginners to obtain their initial experience under lower risk conditions." *Id.* Most of these programs have three stages, whereby drivers gain additional privileges at each stage. *Id.* These stages are: "a minimum supervised learner's period, an intermediate license (once the driving test is passed) that limits unsupervised driving in high-risk situations, and a full-privilege driver's license available after completion of the first two stages." *Id.*

[85] *See e.g.*, OR. REV. STAT. §§ 811.507(1)(a)–(c) (2007) (indicating that Oregon's restriction that became effective on January 1, 2008, applies to drivers under the age of eighteen who have a provisional driver's license, student permit, or instructional permit). *Id. See also* Press Release, Ore. Dep't of Transp., New Law Prohibits Use of Cell Phones by Teen Drivers (Dec. 10, 2007), *available at* http://www.oregon.gov/OSP/NEWSRL/news/12_20_2007_teen_cell_ban.shtml (discussing the Oregon statute). Louisiana, however, has taken the approach of prohibiting all drivers seventeen and under from using cell phones while driving. Banning Cell Phone Use by Young Drivers OK'd by Louisiana Legislature, The Daily Beam, http://dailybeam.blogspot.com/2008/06/banning-cell-phone-use-by-young-drivers.html (June 25, 2008, 8:21 EST). Connecticut has also made its restriction on the basis of age by prohibiting drivers under the age of eighteen from using a hand-held telephone, even if it is equipped with a hands-free accessory, unless he or she is using it for an emergency purpose. CONN. GEN. STAT. § 14-296aa(d) (2006).

[86] Governor's Highway Safety Ass'n, *supra* note 83. Arkansas, Louisiana, Maryland, Nebraska, Virginia, and Washington have all made their laws secondary where as California, Colorado, Connecticut, Delaware, the District of Columbia, Illinois, Indiana, Kansas, Maine, Minnesota, New Jersey, North Carolina, Oregon, Rhode Island, Tennessee, Texas, and West Virginia's laws are primary. *Id.*

[87] *See infra* notes 88–89 and accompanying text (discussing municipalities that have passed legislation prohibiting the use of hand-held cell phones while driving within their borders).

[88] Kalin, *supra* note 17, at 244. There were two unfortunate incidents that led to Brooklyn passing its ordinance. *Id.* The first was when a friend of a police officer was almost hit by a driver using a cell phone, and the second was when the police chief witnessed an accident caused by a driver distracted by his cell phone. *Id.* Brooklyn, Ohio was not only the first

law, at least twenty-six other cities from ten different states have passed similar legislation.[89] However, many of these cities are not enforcing their laws, and the judiciary struck down two of the legislating cities' ordinances.[90] Although these two cities' laws did not survive challenges, Chicago's cell phone law, which has been in place for four years, recently withstood a federal court challenge.[91] Other cities have also attempted to pass legislation but were ultimately unsuccessful.[92] Although local officials typically make these decisions, one city, Bowling Green, Ohio, has taken a different approach by allowing the public to vote on whether to prohibit drivers from talking on a cell phone while driving within the city's borders.[93]

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town to prohibit hand-held cell phone use, but was also the first town to require drivers to use seat belts. Hahn & Dudley, *supra* note 17, at 136.

[89] SUNDEEN, LEGISLATIVE UPDATE, *supra* note 22, at 9. These cities include: Miami-Dade County, Pembroke Pines, and Westin, Florida; Chicago, Illinois; Brookline, Massachusetts; Shelby Township and Detroit, Michigan; Bloomfield, Irvington, Marlboro, Nutley, Carteret, Hazlet, and Paramus, New Jersey; Sante Fe, New Mexico; Nassau County, Suffolk County, and Westchester County, New York; North Olmstead and Walton Hills, Ohio; Conshohocken, Hilltown Township, Lebanon, Lower Chichester, West Conshohocken, and York Pennsylvania; and Sandy, Utah. *Id.*

[90] See *id.* (indicating that although these local municipalities have legislation in place regulating the use of cell phones while driving, many of them are not being enforced). In addition, Sundeen stated: "A Pennsylvania appellate court struck down the ordinance in Hilltown Township, and the state attorney general issued an opinion against the provision in Brookline, Mass." *Id.* The Hilltown Township ordinance was struck down because the judge determined it was an issue that should be regulated uniformly across the state. Dan Meyer, *Judge Overrules Town on Cell-Phone Driving Ban*, RCR RADIO COMM. REP., July 17, 2000; Jeff Shields, *Bill Would Ban Use of Handheld Phones by Drivers*, PHILA. INQUIRER, Sept. 18, 2008, at B1.

[91] *See* Shields, *supra* note 90 (indicating the court upheld the law because it determined the law was aimed at protecting the public, and was therefore, not unconstitutional).

[92] *See* Margaret Gillerman, *Officials Defer to State on Cell Phone Ban*, ST. LOUIS POST-DISPATCH, Aug. 21, 2008, *available at* 2008 WLNR 15753461 (indicating St. Louis attempted to pass local legislation to prohibit drivers from using cell phones while driving within its borders, but was unsuccessful). The city was originally pushing for a local law because the state had not taken action to restrict drivers from using hand-held cell phones. *Id.* One proponent of such legislation recognized the obstacles in passing this type of legislation stating: "With a number of cell phone companies giving campaign contributions through straw parties and directly this isn't about to hit the Missouri Legislature anytime soon for a vote." *Id.* He also urged that this was "a chance to take a lead stance on the issue." *Id.*

[93] *See* Jennifer Feehan, *Bowling Green Voters to Say if Drivers May Use Cell Phones*, BLADE (Toledo), Sept. 16, 2008, *available at* 2008 WLNR 17578175 (reporting that the city council agreed to put this issue on the ballot in May 2009). Only one councilman opposed allowing the citizens to vote on this potential law because he felt doing so would put the community at odds with each other, and also because he did not believe legislation on this issue should be passed by local government. *Id.*

Subsequent to the passing of these local laws, two states passed legislation to preempt the laws and make them unenforceable.[94] In addition, the state laws prohibiting cell phone use in New Jersey and New York now supersede the local ordinances.[95] Although local laws may pressure state governments to pass statewide legislation, seven states have passed legislation preventing local legislatures from restricting the use of cell phones by drivers.[96]

These local preemption laws reiterate the historic struggle for power between local and state governments.[97] While roughly ninety thousand local governments exist across the United States, local governments, unlike state governments, lack inherent law-making authority.[98] Specifically, local governments only have powers that the states have delegated to them.[99] Despite lacking inherent law-making authority, local governments still play a large role in the success of a state's government because they are responsible for providing essential services

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[94] *See* SUNDEEN, LEGISLATIVE UPDATE, *supra* note 22, at 9 (indicating the two states that preempted local laws were Florida and Utah). Utah's code reads: "A local highway authority may not . . . prohibit or restrict the use of a cellular phone by the operator or passenger of a motor vehicle." UTAH CODE ANN. § 41-6a-208(2)(b) (Supp. 2008). While Utah passed statewide legislation prohibiting drivers from using a hand-held cell phone while driving, Florida has failed to do so. *See* Hands Free, Text Messaging, and Cell Phone Driving Laws, *supra* note 65 (indicating California, Connecticut, New York, New Jersey, Utah, and Washington are the only states that ban drivers from using hand-held cell phones while driving); *Cellphone Laws*, *supra* note 52 (reporting that Oregon recently passed legislation prohibiting all drivers from talking on a cell phone while driving that will become effective on January 1, 2010).

[95] SUNDEEN, LEGISLATIVE UPDATE, *supra* note 22, at 9.

[96] *See id*. ("In states where local communities have passed restrictions, the legislature may feel pressure to address the issue to avoid a piecemeal approach where the boundaries of the law may not always be clear to motorists."); *Cellphone Laws*, *supra* note 52 (reporting that in addition to Florida and Utah, Kentucky, Louisiana, Mississippi, Nevada, and Oklahoma passed legislation specifically preempting local governments from passing legislation to prohibit drivers from talking on a cell phone while driving). Part of the reason Nevada passed its legislation was based on testimony of industry representatives who stated: "[A] patch-work system of local regulation, which could change several different times on a single street or highway, would be confusing, burdensome and unfair to drivers." S. 10, 2003 Leg., 72d Sess. (Nev. 2003).

[97] *See* U.S. Oil, Inc. v. City of Fond Du Lac, 544 N.W.2d 589, 591 (Wis. Ct. App. 1996) ("In an area solely or paramountly of statewide concern, the legislature may either delegate to local units of government a limited authority or responsibility to further proper public interests, or may preempt the field by expressly banning local legislative action as to such matter of statewide concern." (quoting State *ex rel.* Michalek v. LeGrand, 253 N.W.2d 505, 508 (Wis. 1977))).

[98] RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 4, 7 (6th ed. 2004).

[99] Richard Briffault, *Our Localism: Part I – The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 7 (1990).

to their communities.[100] There are two types of local governments: general purpose and special purpose.[101] The traditional form of local governments, counties, cities, and townships, are general purpose and are responsible for many different things.[102] Special purpose governments, which are the most common form of local governments, are responsible for very limited areas of local governance.[103]

Despite the number of local governments, some scholars are opposed to them because they believe that both the leadership and quality of the individuals operating local governments is inadequate.[104] In addition, there is concern that because of financial disparity among local governments near each other, one government may be successful at reaching its local goals, while another may not.[105] There is also concern that participation in local governments will cause problems within a community and make it more difficult to address regional problems.[106]

Courts consider two important factors to determine whether a state or local government would be better suited to regulate a particular activity.[107] The first of these factors is the need for uniformity across the state.[108] Uniformity is essential for laws that regulate transient

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[100] *See* BRIFFAULT & REYNOLDS, s*upra* note 98, at 7 ("The states may be formally responsible for the provision of most domestic public services, but local governments play the key role in actually delivering such basic services as education, policing, fire prevention, street and road maintenance, mass transit, and sewage and solid waste removal."). *See also* City of Canon City v. Merris, 323 P.2d 614, 620 (Colo. 1958) ("A municipality is an agency of the state; to it the state delegates certain powers and duties.").

[101] BRIFFAULT & REYNOLDS, *supra* note 98, at 11.

[102] *Id.* General purpose governments have broad responsibilities over areas such as "public safety, public health, land use, streets, highways, and transportation." *Id.*

[103] *Id.* The most common form of special purpose local governments are school districts. *Id.* In addition, other special district governments are responsible for a wide array of things such as fire protection, sewerage, highways, parks and recreation, or water supply. *Id.*

[104] *See id.* at 23 (discussing James Madison's opinion that "the upper level of government is likely to enjoy better leadership" and John Stuart Mill's opinion that "[t]he greatest imperfection of popular local institutions, and the chief cause of the failure which so often attends them, is the low caliber of the men by whom they are almost always carried on").

[105] *See id.* at 40 (discussing the impact of finances on local governments).

[106] *See* BRIFFAULT & REYNOLDS, *supra* note 98, at 41 ("Local participation may drive communities apart, intensify the sense of interlocal difference and reduce the possibilities of fashioning regional solutions to regional problems.").

[107] Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d 776, 787 (Ohio 2006) (indicating that two factors indicate a certain activity is of statewide concern). These two factors are: "(1) A need for uniform regulation exists and (2) any local regulation of the matter would have extraterritorial effects." *Id.*

[108] *See id.* (indicating an issue of statewide concern is one that "has become of such general interest that it is necessary to make it subject to statewide control so as to require uniform statewide regulation" (quoting State *ex rel.* McElroy v. City of Akron, 181 N.E.2d 26, 30 (Ohio 1962))).

individuals.[109] The second factor is the impact the decision of a local government has on individuals outside of a locality's boundary lines.[110] If an individual outside of the locality would be required to inquire about the ordinance before entering the locality's borders, the activity would likely be better regulated at the state level.[111] Using these factors as guidelines, courts have found that state rather than local governments should regulate a number of activities.[112]

3. Text Messaging Bans

Both state and local governments have also passed legislation restricting drivers' ability to text message while driving.[113] Talking on a cell phone while driving is dangerous, but sending and receiving text messages while operating a motor vehicle is even more dangerous.[114]

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[109] *See* Robins v. County of Los Angeles, 248 Cal. App. 2d 1, 9 (1966) ("Certain areas of human behavior command statewide uniformity, especially the regulation of statewide commercial activities and the conduct of transient individuals, so that mobility may not be burdened unreasonably.").

[110] *See Am. Fin. Servs.*, 858 N.E.2d at 787 ("[M]unicipal regulations which have significant extraterritorial effects are matters of statewide concern" (quoting State *ex rel.* Evans v. Moore, 431 N.E.2d 311 (Ohio 1982))). *See also* BRIFFAULT & REYNOLDS, *supra* note 98, at 40 ("Local borders enclose only small fractions of interdependent urbanized areas. As a result, local decisions regularly impose externalities on people outside the local polity who are not entitled to participate in the local decision-making process . . . .").

[111] *See Robins*, 248 Cal. App. 2d at 10 (discussing when an activity should be regulated by the state as opposed to local government). The court stated:

> [I]t should be considered whether the nature of the subject matter of the local ordinance is such that those affected might reasonably be expected to inquire about existing ordinances in planning their activities. As a general rule it may be said that ordinances affecting the local use of static property might reasonably prevail, while ordinances purporting to proscribe social behavior of individuals should normally be held invalid if state statutes cover the areas of principal concern with reasonable adequacy.

Id.

[112] *See generally, e.g.*, Walgreen Co. v. Charnes, 819 P.2d 1039, 1046–47 (Colo. 1991) (determining the appellate process governing locally imposed sales and use taxes is of statewide concern); City of Colorado Springs v. Indus. Comm'n, 749 P.2d 412, 416–17 (Colo. 1988) (finding employment benefits to be a statewide concern); Century Elec. Serv. & Repair, Inc. v. Stone, 564 P.2d 953, 955 (Colo. 1977) (finding licensure of electricians is a statewide concern); Kelly v. City of Fort Collins, 431 P.2d 785, 787 (Colo. 1967) (holding regulation of liquor is a statewide concern); City of Canon City v. Merris, 323 P.2d 614, 621 (Colo. 1958) (finding driving under the influence is a statewide concern); U.S. Oil, Inc. v. City of Fond Du Lac, 544 N.W. 2d 589, 593 (Wisc. Ct. App. 1996) (holding the distribution of tobacco is a statewide concern).

[113] *See infra* notes 119, 123 and accompanying text (identifying the states and localities that restrict drivers' ability to text message).

[114] *See supra* note 45 (discussing the danger of text messaging while operating a vehicle). One recent study, conducted by the Transportation Research Laboratory in England, found

This danger recently became apparent in a highly publicized train accident that took place on September 12, 2008, in Los Angeles that killed at least twenty-five people and injured approximately 135 others.[115] The operator of a passenger train sent several text messages from his cell phone while on duty, the last of which he sent just twenty-two seconds prior to the deadly crash.[116] West Virginia Governor Joe Manchin believes this tragic incident may increase public awareness about the dangers of driving while texting and lead to more legislation in this area.[117]

While this tragedy will likely increase awareness about the dangers of text messaging while driving, some states have already passed legislation restricting this activity.[118] Currently eighteen states and the District of Columbia prohibit all drivers from text messaging.[119] Rather

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texting while driving to be more dangerous than being under the influence of alcohol or drugs while driving. Foxman, *supra* note 16.

[115] Jennifer Steinhauer & Michael Cieply, *Rail Line Says Train Ran Signal; Death Toll at 25*, N.Y. TIMES, Sept. 14, 2008, at A1.

[116] *See* Press Release, Nat'l Transp. Safety Bd., Update: NTSB's Investigation of the Metrolink, Union Pacific Accident in California (Oct. 1, 2008), *available at* http://www.ntsb.gov/pressrel/2008/081001.html (reporting that the train engineer received seven and sent five text messages, the last of which was just twenty-two seconds prior to the collision, in the hour and twenty minutes he was on duty).

[117] Anderson, *supra* note 78. Governor Manchin stated, "Texting, cell phones, all this, . . . I think it's come to the point now that we see how distractive they are. Whether (investigators' suspicion about Sanchez) is accurate or not, if it comes out to be accurate, we see how deadly it is, too." *Id.* He also said, "I don't think anybody that's out there driving right now hasn't had a close call because they were looking down—myself included—looking down trying to dial a number, someone texting or someone trying to read a text. And I think you're going to see more movement on legislation." *Id.*

[118] *See infra* note 119 (listing the states that prohibit drivers from text messaging).

[119] *Cellphone Laws*, *supra* note 52. The eighteen states restricting drivers' ability to send text messages while driving include: Alaska, Arkansas, California, Colorado (effective 12/1/09), Connecticut, Illinois (effective 1/1/10), Louisiana, Maryland, Minnesota, New Hampshire (effective 1/1/10), New Jersey, New York, North Carolina (effective 12/1/09), Oregon (effective 1/1/10), Tennessee, Utah, Virginia, and Washington. *Id.* One of the most recent cell phone prohibitions is California's, which was signed by the governor on September 24, 2008, and took effect on January 1, 2009. S. 28, 2008 Reg. Sess. (Cal. 2008). California's legislation reads:

> (a) A person shall not drive a motor vehicle while using an electronic wireless communications device to write, send, or read a text-based communication.
>
> (b) As used in this section "write, send, or read a text-based communication" means using an electronic wireless communications device to manually communicate with any person using a text-based communication, including, but not limited to, communications referred to as a text message, instant message, or electronic mail.
>
> (c) For purposes of this section, a person shall not be deemed to be writing, reading, or sending a text-based communication if the person

than enacting total prohibitions against text messaging, other states have restricted only novice drivers' ability to send and receive text messages.[120] Although many states' statutes impose minimal fines for violation of the text message laws,[121] one state, Alaska, made the penalty for driving while text messaging the same as a driving under the influence violation in an effort to convey the seriousness of the offense.[122] In addition, some cities have also taken a proactive approach and passed legislation prohibiting drivers within their borders from engaging in the dangerous practice of text messaging while driving.[123]

The legislative approaches restricting drivers' ability to talk and text message via their cell phones vary between states and municipalities.[124] Keeping this in mind, Part III analyzes the effectiveness of these different approaches and how they can be more successful in reducing the

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> reads, selects, or enters a telephone number or name in an electronic wireless communications device for the purpose of making or receiving a telephone call.
> (d) 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.
> (e) This section does not apply to an emergency services professional using an electronic wireless communications device while operating an authorized emergency vehicle, as defined in Section 165, in the course and scope of his or her duties.

CAL. VEH. CODE § 23123.5 (Supp. 2009). In signing the bill, Governor Schwarzenegger said, "Banning electronic text messaging while driving will keep drivers' hands on the wheel and their eyes on the road, making our roadways a safer place for all Californians." Jill Serjeant, *Car Loving California Bans Texting While Driving*, REUTERS, Sept. 25, 2008, http://www.reuters.com/article/lifestyleMolt/idUSTRE48O8NB20080925.

[120] *See Cellphone Laws*, *supra* note 52 (indicating that there are currently nine states with legislation restricting novice drivers' ability to text while driving.) These are: Delaware, Indiana, Kansas (effective 1/1/10), Maine, Mississippi, Missouri, Nebraska, Texas, and West Virginia. *Id.*

[121] *See, e.g.*, N.J. STAT. ANN. § 39:4-97.3(d) (2008) (indicating that the fine for violating the regulation is not to be more than one hundred dollars).

[122] ALASKA STAT. § 28.35.161 (2008); Megan Holland, *Texting Behind the Wheel Punishable With Jail Time*, ANCHORAGE DAILY NEWS, Sept. 1, 2008, at A1. Alaska's texting ban is a primary offense, which carries the same penalties as a first-time driving under the influence charge. *Id.* As a class A misdemeanor, the penalties for violating the prohibition include a fine up to $5000 and one year in jail. *Id.* However, the offense can become a felony if the individual hurts or kills someone or causes a crash that kills someone. *Id.*

[123] *See, e.g.*, Zach Colman, *Detroit Bans Text Messaging Behind Wheel, Statewide Ban Being Discussed*, (March 12, 2008), http://www.statenews.com/index.php/article/2008/03/detroit_city_council_bans_text_messaging_while_driving (indicating that Detroit passed legislation making texting while driving a secondary offense); Wong, *supra* note 2 (indicating Phoenix passed a text message prohibition in September 2007 after a deadly accident killed two individuals).

[124] *See supra* Part II.C.2 (discussing current state and local legislation that prohibits talking on a hand-held cell phone or text messaging while driving).

dangers associated with driving while talking on a cell phone or text messaging.[125] Part IV then proposes a model statute that will resolve the problems with current legislative efforts to regulate cell phone use while driving.[126]

III. ANALYSIS OF CURRENT CELL PHONE AND TEXT MESSAGING LEGISLATION AND HOW TO MAKE THE LEGISLATION MORE EFFECTIVE

Current legislative attempts addressing the issues of talking on a cell phone and text messaging while driving are steps in the right direction; however, in order to fully protect the public from the dangers associated with these two activities, more legislation, accompanied by increased public awareness, is needed. Part III.A of this Note addresses the flaws of current legislative efforts.[127] Next, Part III.B examines two successful traffic laws that can be used as models to guide the legislation needed to regulate cell phone use and text messaging while driving.[128] Part III.C then addresses why these laws need to be implemented across the country.[129] More specifically, this Part addresses the magnitude of the problem, why state governments are better suited to regulate these activities than local governments, and finally, what needs to be done to increase the effectiveness of these laws.[130]

A. The Ineffectiveness of Current Legislation

Due to drivers not complying with the cell phone prohibitions of many states, these laws have not been as effective as originally hoped.[131] New York, the first state to restrict cell phone use while driving, experienced an initial decline in drivers using cell phones, but just a year after its law became effective, drivers resumed using their hand-held cell

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125 *See infra* Part III (analyzing the effectiveness of current cell phone and text messaging laws).

126 *See infra* Part IV (proposing a model statute that, if adopted, will eliminate several problems associated with the ineffectiveness of current legislation regulating cell phone use and text messaging while driving).

127 *See infra* part III.A (discussing several reasons why the current legislation has not been effective in reducing the number of drivers using their cell phones).

128 *See infra* part III.B (examining current seat belt and drunk driving laws).

129 *See infra* part III.C (discussing the need for uniformity of cell phone and text message laws across the country).

130 *See infra* Parts III.C.1.–III.C.3 (discussing approaches that can increase the effectiveness of cell phone and text messaging laws, including the implementation of tougher legislation by state governments).

131 *See infra* Part III.A (discussing the ineffectiveness of current cell phone and text messaging legislation).

phones.[132] Drivers in the District of Columbia complied longer than those in New York, but as time passed, drivers returned to using their cell phones.[133] Similarly, Connecticut's law has also not affected drivers' cell phone use.[134] Additionally, California, whose law just recently went into effect, has already experienced individuals ignoring the prohibition on hand-held cell phone use while driving.[135] In addition to the ineffectiveness of these blanket prohibitions on drivers' ability to use hand-held cell phones, similar restrictions on teenage drivers have also proven to have little impact on the use of cell phones while driving.[136]

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[132] Chang, *supra* note 66. A study conducted by the Insurance Institute for Highway Safety indicated that shortly after New York's law went into place 1.1% of drivers used their cell phone as compared to 2.3% prior to the law. SUNDEEN, LEGISLATIVE UPDATE, *supra* note 22, at 10. However, just a year after the enactment of the law, the number of drivers using their cell phones was back up to 2.1%. *Id. See also* Gutierrez, *supra* note 66 (indicating that since 2002, the number of accidents involving cell phones as well as the number of citations issued for violation of the cell phone law have gradually increased); Ins. Inst. for Highway Safety, *Hand-held Cell Phone Use Goes Back Up in New York, Despite Year-Long Ban: Once the Publicity Dropped Off, Drivers Resumed Old Dialing Habits*, STATUS REP. Aug. 26, 2003, at 6 [hereinafter *Hand-held*] (reporting that just one year after the cell law was enacted, the amount of cell phone use returned to similar levels as before the enactment of the law); *Risk Accumulates*, *supra* note 35, at 5 (reporting that the initial decline in cell phone use experienced right after the passing of the law was gone within 18 months).

[133] *See Risk Accumulates*, *supra* note 35, at 5 (discussing the impact of the law on hand-held cell phone use by drivers in the District of Columbia). Prior to the enactment of the law, an estimated six percent of drivers were using a hand-held phone. *Id.* Hand-held cell phone use dropped to just three and a half percent three months after the law went into effect, and this level was being maintained a year later. *Id.* However, this compliance has diminished, and now, drivers are being issued more tickets for hand-held cell phone use than they have in any year since the law's enactment in 2004. Emerling, *supra* note 18. In 2008, approximately seventy-five more tickets were being issued per month than in 2007, which indicates that drivers are not complying with the law. *Id.*

[134] *See Conn. Drivers Ignore Cell Phone Ban*, *supra* note 18 (indicating that the number of Connecticut drivers using a hand-held cell phone in 2007 was on pace to triple those of 2006). In just a six-month period, from January 1 to June 30 of 2007, Superior Courts handled more than 16,000 cases of violations of the cell phone law. *Id.* Connecticut Representative Richard Roy demonstrate the ineffectiveness of the law when he stated "[w]e are seeing more and more drivers violating the law." *Id.*

[135] Benjamin, *supra* note 25. Since the enactment of California's cell phone law on July 1, 2008, California Highway Patrol Officers have written more than 20,000 tickets for violation of the law. *Id.* Tom Marshall, the spokesman for the California Highway Patrol stated that drivers "still don't get it." *Id.*

[136] *See* Thomas, *supra* note 82 (discussing a study of North Carolina's restriction on teenage cell phone use while driving, which found teenagers were using their cell phones almost at the same rate as before the law went into effect). The study, which was conducted by observing teenage drivers at school parking lots, compared the use of cell phones by teens in North Carolina with teens in neighboring South Carolina, which does not have a cell phone restriction. FOSS ET AL., *supra* note 44, at 3–5. The study found that approximately 11% of North Carolina teenagers and 13% of South Carolina teenagers used

The ineffectiveness of these laws is attributable to a number of factors. The first is the lack of enforcement.[137] The strong enforcement and large amount of publicity that accompanied these laws upon their enactment led to greater initial compliance; however, as time passed and enforcement dwindled, people reverted to using their cell phones.[138] Additionally, a lack of enforcement was one of the main reasons North Carolina's restriction on minors' use of cell phones while driving was ineffective.[139] Furthermore, the difficulty of enforcing specific types of cell phone and text messaging legislation, such as prohibitions enacted by local governments or those aimed solely at minors, also contributes to the ineffectiveness of current legislation.[140]

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cell phones while driving before the enactment of the cell phone restrictions. *Id.* at 6. After the law was in effect, 11.8% of North Carolina teens and 13.1% of South Carolina teens were spotted using their cell phones while driving. *Id.* This is despite the fact that 64% of teenagers were aware of the law and 74% of them supported it. *Id.* at 1. This indicates that North Carolina's cell phone restriction is not causing teenagers to stop using their cell phone while driving, and in fact, many are simply ignoring the prohibition. Lazich, *supra* note 83.

[137] *See* Benjamin, *supra* note 25 (discussing the enforcement of California's new cell phone prohibition). Police officers have difficulty devoting the time and attention needed to enforce the cell phone law because of their duty to enforce other traffic laws. *Id.* One California police officer stated, "We know it's definitely going on around us, but we can't give it the attention it needs day in and day out." *Id.* Enforcement is also a problem with text messaging laws. *See* Wong, *supra* note 2 (indicating that in the six months since Phoenix's prohibition of text messaging took effect, enforcement of the law was very difficult and one officer reported he was aware of only one citation for violating the law). Additionally, the ineffectiveness of the New York law could be attributed to a lack of targeted enforcement zones similar to those used to catch violators of other traffic regulations such as seat belt and speeding laws. Chang, *supra* note 66.

[138] *See Hand-held*, *supra* note 132, at 6 (discussing the ineffectiveness of the New York cell phone prohibition). Ann McCartt, a senior researcher for the Insurance Institute for Highway Safety, indicated, "The pattern of initial compliance and then a gradual return to previous behaviors is typical when new traffic laws are introduced. Without enforcement that's well publicized and vigorous, drivers tend to revert to their prior behaviors." *Id.*

[139] *See* FOSS ET AL., *supra* note 44, at 9 ("[F]ewer than 100 citations were issued in 2007 for violations of the cell phone restriction, and there was no evidence of a special enforcement campaign."). Interviews conducted with teenage drivers and their parents prior to the enactment of the law indicated the belief that enforcement of this type of law would be very minimal. *Id.* Similar interviews conducted after the enactment of the law indicated that it was not being enforced by the police. *Id.* The study conducted on the effectiveness of the North Carolina restriction on teenager drivers' use of a cell phones indicated that this type of law was also challenging for law enforcement to enforce because of the difficulty in determining the age of a young driver. *Id.*

[140] *See* Lilley, *supra* note 28, (discussing how local laws are hard to enforce and indicating that the laws would need to be statewide in order to be effectively enforced). *See also* FOSS ET AL., *supra* note 44, at 9 (indicating that it is difficult to enforce laws aimed at a specific age group because of the difficulty in determining the precise age of the driver and it is also difficult to enforce prohibitions of hand-free cell phones because it is hard for officers to see

The next factor that may explain why these laws have been unsuccessful is the minimal punishments that accompany a violation of them.[141] For example, a violation of the cell phone laws in New Jersey and the District of Columbia constitutes a nominal one hundred dollar fine.[142] Likewise, the penalty for violating the cell phone restrictions in New York or Connecticut is not greater than one hundred dollars.[143] The state with the most modest penalty is California, which imposes a twenty-dollar penalty for the first violation and a fifty-dollar penalty for any subsequent violation.[144] Additionally, in both the District of Columbia and Connecticut, the court waives the monetary fine if the individual shows he or she has purchased a hands-free device.[145] With these small monetary fines as the only repercussion for violating laws prohibiting the use of cell phones while driving, many people will likely continue the dangerous activity and run the risk of getting caught.[146]

Furthermore, the fact that current cell phone legislation makes a distinction between hand-held and hands-free cell phone use, thereby failing to address the real problem—the conversation—contributes to its ineffectiveness.[147] By allowing individuals to engage in conversations

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the devices); *Risk Accumulates*, *supra* note 35, at 5 (indicating hands-free laws are problematic because of the difficulty in enforcing them).

[141] *See* KOLKO, *supra* note 74, at iii (finding that even with strong enforcement of the new laws, the minimal punishments would likely not deter individuals from using their cell phones behind the wheel). *See also Driving While Distracted*, *supra* note 15 (discussing the findings of the study conducted by the Public Policy Institute of California).

[142] D.C. CODE § 50-1731.04 (2004); N.J. STAT. ANN. § 39:4-97.3(b)(2) (West Supp. 2008).

[143] CONN. GEN. STAT. § 14-296aa(g) (2006); N.Y. VEH & TRAF. LAW § 1225-c(4) (McKinney Supp. 2009).

[144] CAL. VEH. CODE § 23123(b) (West Supp. 2009).

[145] CONN. GEN. STAT. § 14-296aa(g) (2006); D.C. CODE § 50-1731.06(a) (2004).

[146] *See* KOLKO, *supra* note 74, at iii ("[W]ith relatively modest penalties for using hand-held phones . . . even strict enforcement of the law might not discourage drivers from using their mobile phones in distracting ways."); Barmby, *supra* note 2, at 351 (discussing California's cell phone law and indicating that drivers are likely to ignore it because the fine is so minimal); Benjamin, *supra* note 25 (indicating the modest penalties do not intimidate everyone).

[147] Ana M. Alaya, *Cell Phone Law Having Trouble Getting Traction: Drivers Ignore It, While Factions Debate Its Contribution to Safety*, STAR-LEDGER (Newark), Jan. 2, 2005, at 15 (quoting a spokesman for NHTSA as saying: "It's the cognitive distraction of the conversation that is the greater concern than the physical manipulation of the phone itself."). *See also* Andrea Kelly, *Book Tells Us Why We Drive the Way We Do*, ARIZ. DAILY STAR, Sept. 8, 2008 at B1 ("[W]hether you hold the phone or use an earpiece, you put the same amount of attention into talking, not driving."); Bents, *supra* note 33 (discussing how hands-free cell phones fail to eliminate all the dangers associated with making a phone call while driving). *See also* SUNDEEN, LEGISLATIVE UPDATE, *supra* note 22, at 2 (indicating people become engrossed in their cell phone conversations, which presents problems); Hahn & Dudley, *supra* note 17, at 127 (discussing several studies that determined the mental distraction of carrying on a

while driving as long as they use a hands-free device, governments are creating a false sense of security for motorists.[148] This false sense of security comes from the fact that the only aspect of hands-free devices proven to be safer is the act of dialing.[149] Additionally, because hands-free devices often provide poor audio quality and may make it more difficult to answer an incoming call, drivers may feel safer than they should when using such equipment.[150]

Another factor that may influence the effectiveness of these cell phone laws is the lack of notice and advertising of the prohibitions.[151] In New York, initial publicity surrounding the law and the lack of subsequent publicity likely affected the change in compliance from the first few months until years after the law's enactment.[152] In Connecticut, although signs at the border into the state inform drivers of cell phone restrictions, advertisement of the law stops there.[153] Long-term publicity

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conversation caused problems for drivers); *Risk Accumulates*, *supra* note 35, at 4 (discussing the cognitive effects of cell phone conversations on drivers).

[148] *See* Ins. Info. Inst., *supra* note 18 ("A September 2004 study from the [NHTSA] found that drivers using hand-free cellphones had to redial calls 40 percent of the time, compared with 18 percent for drivers using hand-held sets, suggesting that hands-free sets may provide drivers with a false sense of ease."). *See also* Dresser, *supra* note 38 (indicating that despite studies showing the risk of getting into an accident is just as great when using a hands-free cell phone as a hand-held one, two-thirds of individuals still believe they are safer when using a hands-free device).

[149] Kalin, *supra* note 17, at 252. While a study did determine that dialing was the only activity to be safer while driving, this idea of safety may be overstated because the study assumed that most hands-free cell phones were voice activated and did not need to be manually dialed; however, this is not accurate. *Id.* Even if dialing is safer while using a hands-free device, evidence showed that the dialing of the cell phone is responsible for less than ten percent of accidents caused by cell phones. Hahn & Dudley, *supra* note 17, at 163. *See also* Dresser, *supra* note 38 ("The best available evidence suggests that it is no less hazardous for a driver to use a hands-free phone than to use a hand-held phone.").

[150] Hahn & Dudley, *supra* note 17, at 157–58. These downfalls of hands-free devices typically cause more of a distraction than hand-held devices because they require more fumbling with the device, thereby increasing the likelihood that the driver is taking his or her eyes off of the road. *Id.* *See also* Kathleen Michon, Cell Phones and Driving: The Law in Your State, http://www.nolo.com/article.cfm/ObjectID/5EB7D295-E2B1-4247-9F3471A782FCF799/catID/CF015A63-6B69-4EED-A34B6F4035C8BE0E/104/263/ART/ (last visited Aug. 27, 2009) ("Many drivers spend more time fiddling with the earpieces or headphones of their hands-free device than they would dialing a handheld cell phone, and volume problems with hands-free phones have been cited as creating distractions for the driver.").

[151] *See infra* notes 152–54 and accompanying text (discussing the effect the lack of advertising has had on the effectiveness of current cell phone regulations).

[152] *See* Chang, *supra* note 66 ("[T]here was a flurry of advertisements during the implementation of the New York ban, but publicity has since dwindled."). New Yorkers resorting back to using their cell phones while driving has to do with a lack of publicity of the cell phone law. *Id.*

[153] Opinion, *Cellphone Madness: Blatant Violations. State Should Launch "Hands-Free" Campaign*, HARTFORD COURANT, Oct. 3, 2008, at A21. It has been suggested that

of cell phone laws, like that of seatbelt and drunk driving laws, is needed in order for them to succeed because evidence shows that many drivers tend to revert to using their cell phones after the initial buzz of the law subsides.[154]

B. Successful Traffic Regulations That Can Serve as Models

Laws prohibiting drunk driving and those requiring the use of seatbelts are two traffic regulations that have experienced successful compliance.[155] Each state prohibits drunk driving, and all states, except for New Hampshire, have seatbelt laws.[156] The penalties for violating drunk driving laws vary among states, but typically include large monetary fines and the possibility of jail time and/or license suspension.[157] Seatbelt violations, on the other hand, consist of only monetary fines ranging from ten to two hundred dollars.[158]

Despite the difference in penalties for violating these two laws, both have experienced significant compliance.[159] Seatbelt laws, even with the small penalty that accompanies them, have encouraged people to buckle up, leading to an average of eighty-three percent of individuals utilizing their seatbelts.[160] This high compliance rate is associated with the highly publicized law enforcement efforts like the "Click It or Ticket" campaign

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Connecticut needs more advertisement of this law at other areas throughout the state so motorists are constantly reminded that they are not allowed to use a hand-held cell phone while driving. *See Conn. Drivers Ignore Cell Phone Ban*, *supra* note 18 (suggesting signs should be installed on the highways, exit ramps, and rest stops).

154 *See* Chang, *supra* note 66 (indicating that long-term publicized enforcement is essential to the success of a traffic regulation).

155 *See infra* notes 160, 164–65 and accompanying text (examining the success of current drunk driving and seat belt laws).

156 *See* DUI/DWI Laws, *supra* note 58 (listing the drunk driving laws in each of the fifty states); Safety Belt Use Laws, *supra* note 58 (providing a list of the seat belt laws across the country).

157 *See* Drunk Driving Laws, Fines, & Penalties in the U.S., *supra* note 58 (describing the penalties for driving under the influence in all fifty states). In Indiana, for example, a first time drunk driving offender will have to pay three hundred dollars in court costs, may be fined up to five thousand dollars, faces up to one year in jail, and loses his or her license for up to thirty days. *Id.*

158 Safety Belt Use Laws, *supra* note 58.

159 *See infra* notes 160, 164–65 and accompanying text (discussing the success of current seat belt and drunk driving laws).

160 SEAT BELT USE IN 2008, *supra* note 58, at 1. This is a slight increase from the eighty-two percent who buckled up in 2007. *Id.* This one percent increase represents approximately 270 saved lives. *See* U.S. Dep't of Transp., Seat Belt, *supra* note 58 ("More and more Americans are realizing that the mere seconds it takes to buckle up can mean the difference between life and death."). *Id.*

and targeted checkpoints.[161] Additionally, when seatbelt laws are enforced as primary rather than secondary offenses, more individuals follow them.[162]

Like seatbelt laws, drunk driving laws have also been effective in reducing fatalities in the United States.[163] In 2007, fatalities related to drunk driving fell 3.7 percent as compared to those in 2006.[164] In fact, thirty-two states experienced a decline in alcohol-related fatalities.[165] Similar to the seatbelt laws, ad campaigns are routinely used to get the message out about the drunk driving laws and the dangers presented by driving under the influence.[166] The NHTSA has launched national campaigns like "Friends Don't Let Friends Drive Drunk" and "Buzzed Driving is Drunk Driving" in hopes of informing the public that drinking and driving do not mix, which have been successful in reducing alcohol-related fatalities.[167] The success of both the seatbelt and drunk driving laws in reducing the number of accident fatalities demonstrates the possibility that a cell phone prohibition can succeed as well.

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[161] *Id. See also* Chang, *supra* note 66 ("If you look at the experiences with other laws in highway safety like seat belt and drunk driving laws, what seems to make a difference in the long-term is publicized enforcement."); *Cellphone Madness*, *supra* note 153 (discussing the success of Connecticut's "Buckle Up" seat belt campaign). Additionally, targeted seat belt checkpoints, whereby police officers specifically look for seat belt use in certain areas, are helpful in encouraging compliance with the laws. Chang, *supra* note 66.

[162] *See* SEAT BELT USE IN 2008, *supra* note 58, at 1 (indicating that seat belt use in states with primary seat belt offenses is eighty-eight percent compared to only seventy-five percent in states with secondary laws). As of August 2009, thirty-one states and the District of Columbia have primary seat belt laws, while nineteen states' seat belt laws are only secondary offenses. Safety Belt Use Laws, *supra* note 58.

[163] *See infra* notes 164–65 (discussing the success of drunk driving laws).

[164] ALCOHOL-IMPAIRED DRIVING FATALITIES, *supra* note 58, at 1 (2008). In 2006, approximately 13,491 people were killed in accidents involving alcohol; however, in 2007, it is estimated that only 12,998 individuals were killed in such accidents. *Id.*

[165] U.S. Dep't of Transp. DUI, *supra* note 58. The largest decline in alcohol-related fatalities was experienced in California, which had 117 fewer fatalities in 2007 than 2006. *Id.*

[166] *See id.* (indicating that the U.S. Department of Transportation spent thirteen million dollars to promote its "Drunk Driving. Over the Limit. Under Arrest." campaign over the 2008 Labor Day Holiday). The NHTSA has also launched campaigns using a variety of media outlets and information sources including a large web outreach strategy. *Id.*

[167] *See* Ad Council, *supra* note 58 (discussing both of these campaigns). The fatality rates due to drunk driving have dramatically decreased since the "Friends Don't Let Friends Drive Drunk" campaign launched in 1983. *Id.*

C. The Need for Cell Phone and Texting Prohibitions to Protect the Public

Seatbelt and drunk driving laws were enacted to reduce the number of deaths resulting from vehicle accidents.[168] Due to the number of accidents and deaths caused by inattentive driving, of which cell phones have become the number one distraction, the time has come for state legislatures to pass laws to make the roads safer for the public.[169] This Part first discusses why regulation of cell phone use while driving is needed.[170] Next, this Part analyzes why state, as opposed to local, governments would be better suited to regulate these activities.[171] Finally, using the drunk driving and seatbelt laws as models, this Part addresses what needs to be done in order for these laws to have a better chance at being successful in protecting American motorists.[172]

1. Why Regulation is Necessary

As drunk driving has been for years, driving while using a cell phone to either carry on a conversation or text message has become a serious problem in the United States.[173] While accidents relating to the use of alcohol killed nearly thirteen thousand people in 2007, inattentive driving causes approximately thirty-four thousand fatalities annually.[174]

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[168] *See, e.g.*, H.B. 72, 1991 Reg. Sess. (Ala. 1991) ("The legislature finds that it is the policy of the State of Alabama that all precautionary measures be taken to save the lives of the state's citizens from vehicle accidents and thereby, to preserve the most valuable resource of the state.").

[169] *See supra* notes 25–26 (discussing the number of accidents and deaths caused by drivers using cell phones). The State of California recognized this when it passed its legislation stating:

> It is in the best interests of the health and welfare of the citizens of the state to enact one uniform motor vehicle wireless telephone use law that establishes statewide safety guidelines for use of wireless telephones while operating a motor vehicle.

S. 1613, 2005-2006 Reg. Sess. (Cal. 2006).

[170] *See infra* Part III.C.1 (demonstrating that regulation is needed to prevent individuals from using their cell phone while driving because of the staggering number of accidents, injuries, and deaths caused by distracted driving).

[171] *See infra* Part III.C.2. (exploring how local legislation restricting cell phone use while driving would not be successful because the transient nature of Americans requires uniformity).

[172] *See infra* Part III.C.3. (describing the action that needs to take place in order for cell phone legislation to be effective, such as tougher enforcement, harsher penalties, and stronger advertisement).

[173] *See infra* notes 174–75 and accompanying text (describing the amount of harm caused by people driving while using their cell phone).

[174] ALCOHOL-IMPAIRED DRIVING FATALITIES, *supra* note 58, at 1 (discussing drunk driving related accidents); SUNDEEN, LEGISLATIVE UPDATE, *supra* note 22, at 1 (discussing the number of fatalities caused by inattentive drivers).

In addition to the fatalities caused by inattentive driving, it is estimated that using a cell phone while driving causes over one million accidents and billions of dollars in damage each year.[175] As previously discussed, studies have shown that talking on a cell phone or text messaging while driving increases the risk of getting into an accident.[176] Additionally, studies have also compared the dangers of driving while using a cell phone with those of driving under the influence.[177] Because of this information, the public has become very concerned with the use of cell phones on the roadways.[178] Due to the number of cell phone subscribers, the increased use of text messaging, the length of cell phone conversations, and the number of individuals who admit to using their cell phones while driving, implementation of legislation addressing the dangers of using cell phones while driving is essential and overdue.[179]

2. Statewide Prohibition is Needed

Both state and local governments have taken action to restrict cell phone use while driving.[180] However, several of the local laws in this area have been preempted.[181] In addition, several states have passed legislation that prohibits local governments from regulating this activity.[182] This raises the issue of which level of government, state or local, is better suited to regulate cell phone use while driving.

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175 Kalin, *supra* note 17, at 238.

176 *See* Sachs, *supra* note 45, at 22 (indicating that the chance of a driver getting into an accident is six times greater when that driver is text messaging than when he or she is not); 1st Evidence, *supra* note 31 (indicating that drivers who are engaged in a cell phone conversation are four times more likely to get into a serious accident than drivers who are not talking on their cell phones).

177 *See* Horwitt, *supra* note 32, at 195 (discussing studies that have found driving while using a cell phone is just as dangerous as driving under the influence because of the cognitive effect the activity has on the person's brain).

178 *See* Bents, *supra* note 33 ("The National Highway Traffic Safety Administration reports that they receive more complaints and requests for information about cell phone use than any other driving issue.").

179 *See* Horwitt, *supra* note 32, at 196 (discussing the impact longer conversations will have on the dangers of driving while talking on a cell phone); Foxman, *supra* note 16 (indicating the number of text messages sent in 2007 was 362 billion); Ins. Info. Inst., *supra* note 18 (reporting that seventy-three percent of drivers admitted they talked on their cell phones while driving); Cellular Telecommunications & Internet Indus. Ass'n, *supra* note 15 (reporting the number of American cell phone subscribers to be 270,333,881 as of December 2008).

180 *See supra* Parts II.C.2.a–c (discussing state and local legislation restricting cell phone use on the roadways).

181 *See supra* notes 94–96 and accompanying text (discussing state preemption laws).

182 *See supra* note 96 (indicating which states have passed legislation preempting local governments from passing laws restricting cell phone use while driving).

As previously discussed, two factors are considered when determining whether an activity would be better regulated by state or local governments: whether a need for uniformity across the state exists and whether local regulation would affect individuals outside local boundaries.[183] In passing its cell phone law, California specifically addressed the need for uniformity.[184] Additionally, in striking down a local cell phone law in Pennsylvania, the judge cited the need for uniformity in driving laws across the state.[185] In addition, statewide uniformity will promote easier and more consistent enforcement of a cell phone prohibition.[186] Furthermore, statewide legislation would be more appropriate because local legislation restricting cell phone use while driving affects individuals crossing the city's border who may not be aware of the law in that particular municipality.[187] All of these factors, when considered together, support the argument that state governments, as opposed to local governments, should regulate cell phone use and text messaging while driving.

3. What is Needed to Protect the Public?

In order for cell phone and text messaging restrictions to be successful in protecting roadway travelers, a number of things must be present. Using the success of drunk driving and seatbelt laws as guidance, this Part first addresses the need for publicity of these laws.[188] Next, this Part addresses the need for increased enforcement of and harsher punishment for a violation of cell phone and text messaging

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[183] Am. Fin. Servs. Ass'n v. City of Cleveland, 858 N.E.2d 776, 787 (Ohio 2006). *See supra* notes 107–11 and accompanying text (discussing these two factors and how they are utilized in determining whether local or state governments should regulate certain activities).

[184] S. 1613, 2005-2006 Reg. Sess. (Cal. 2006).

[185] Shields, *supra* note 90. As a result of this decision, other local jurisdictions in Pennsylvania have not consistently enforced their cell phone restrictions. *Id.* Pennsylvania state representative Josh Shapiro has been supporting a statewide ban on cell phone use while driving, stating: "I think it is not wise to have individual policies, municipality by municipality—it's better to have one statewide standard." *Id.* St. Louis officials have also expressed the desire to have statewide regulation by stating: "It requires statewide regulation—not half-baked hip-shooting at the municipal level." Gillerman, *supra* note 92.

[186] Lilley, *supra* note 28. There has been concern expressed that if a cell phone law is enacted solely at the local level it will be difficult to enforce, and that in order for it to be consistently enforced, the law would need to be at the state level. *Id.*

[187] *See* Brennan, *supra* note 31 (discussing whether Pennsylvania should push for state legislation and stating: "we need a statewide ban so motorists know what the rules are no matter where they're driving").

[188] *See infra* notes 191–94 and accompanying text (discussing how advertisement is essential to the success of traffic laws).

laws in order to increase compliance with the laws.[189] Finally, this Part concentrates on the need for states to enact complete prohibitions on cell phone use while driving in order to truly protect all drivers and passengers on the roadways.[190]

First, building on the success of the drunk driving and seatbelt laws, long-term publicity surrounding cell phone laws is essential.[191] Public service announcements and other media advertisements have been used for years to educate drivers about the dangers of driving while under the influence or without a seatbelt.[192] The success of these campaigns in gaining compliance with the laws and saving lives demonstrates that similar advertising initiatives are needed to publicize cell phone laws and to educate individuals about the dangers associated with cell phone use and text messaging while driving.[193] While some organizations have recognized the need for using advertisements to educate the public about the dangers associated with these two activities, all states should adopt similar statewide campaigns in order to make the roadways safer across the country.[194]

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[189] *See infra* notes 195–203 and accompanying text (discussing how traffic laws deter people from breaking them when there are harsh penalties associated with a violation and the laws are strictly enforced).

[190] *See infra* notes 204–10 and accompanying text (discussing how only prohibiting drivers from using hand-held cell phones or only prohibiting the use of these devices by minors does not address the true problem associated with using a cell phone while driving).

[191] *See* Chang, *supra* note 66 ("If you look at the experiences with other laws in highway safety like seat belt and drunk driving laws, what seems to make a difference in the long-term is publicized enforcement."). *See also* Ad Council, *supra* note 58 (discussing the impact ad campaigns have had on fatalities due to drunk driving).

[192] *See* Ad Council, *supra* note 58 (describing the evolution of drunk driving public awareness campaigns and the effect they have had on drunk driving).

[193] *See* Cripps, *supra* note 3, at 115 ("[S]tate and local lawmakers should launch public service announcements via radio and billboard advertisements to reach existing drivers when they are most receptive—when they are driving."); Kalin, *supra* note 17, at 258 ("[T]he government should create public service announcements as well as and [sic] radio and billboard advertisements."); *Cellphone Madness, supra* note 153 (suggesting Connecticut needs to launch a similar campaign as it used for its seat belt and highway worker laws in order to market the cell phone law); Wong, *supra* note 2 (indicating that a broad public awareness campaign like the "Click It or Ticket" campaign could be used to prevent accidents).

[194] *See* Gannon, *supra* note 18 (describing a graphic campaign launched by AAA Carolinas demonstrating the dangers of driving while using a cell phone). The catchy slogans used in this campaign were, "You Drive. You Dial. You Die." and "Hang Up and Drive." *Id.* Advertisements with these messages were posted at more than fifty gas stations in five selected counties with the hopes of alerting motorists of the dangers associated with using a cell phone while driving. *Id. See also* N.J. Motor Vehicle Comm'n, *supra* note 35 (discussing New Jersey's recent campaign launched when they changed their law from a secondary to primary offense). New Jersey initiated its "Put the Phone Down"

Second, increased penalties for violations and stronger enforcement of the laws are essential to compel compliance.[195] With the penalty for violating these laws ranging from just twenty to one hundred dollars in most cases, this nominal amount is not sufficient to persuade people to hang up their phones or stop text messaging while driving, which has contributed to the ineffectiveness of the current cell phone laws.[196] Although seatbelt laws have been successful with minimal fines, these laws are aimed at protecting the individual driver, whereas cell phone and text messaging laws are aimed at protecting not only the driver, but other motorists and passengers as well.[197] Therefore, because cell phone use while driving puts the life of not only the driver at risk, but also the lives of other individuals on the roadway, the penalties for violations of cell phone related traffic laws should be similar to those of drunk driving laws.[198]

In addition to tougher penalties, strong, consistent enforcement is necessary because the lack of enforcement has allowed drivers to believe that compliance with cell phone and text messaging laws is not mandatory.[199] Many people believe that it is difficult to enforce cell phone and text messaging laws when they restrict only minors or are only local ordinances; however, this can be resolved by making these laws uniform across a state and across all age groups because it would eliminate the need for law enforcement to determine an individual's age

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public awareness campaign to ensure individuals were aware of the change in the law and the consequences of violating the law, with the ultimate goal of making the state's roads safer. *Id.* The mediums New Jersey chose for its campaign consisted of posters at rest stops, movie screen advertisements, tollbooth signs, messages on digital highway signs, and the Motor Vehicle Commission's website. *Id.*

[195] *See supra* note 146 (attributing the ineffectiveness of current cell phone laws to the small monetary fines accompanying a violation of the laws).

[196] *See supra* text accompanying notes 142–45 (describing the penalties for violations of current cell phone and text messaging laws). The only statute that has instituted a strong penalty for a violation is Alaska's text messaging law, which treats texting while driving as a misdemeanor with possible penalties of up to $5000 and one year in jail. Holland, *supra* note 122. *See also supra* note 146 and accompanying text (discussing how the minimal penalties associated with a violation of current cell phone and text messaging legislation do not convince individuals to follow the laws).

[197] *See* Safety Belt Use Laws, *supra* note 58 (listing the penalties for seat belt violations in each state). *See also Cellphone Madness, supra* note 153 ("Seat belts protect a driver, but hand-held cellphone use endangers others.").

[198] *See* Drunk Driving Laws, Fines, & Penalties in the U.S., *supra* note 58 (describing the penalties for driving under the influence in all fifty states).

[199] *See supra* notes 138–39 and accompanying text (discussing how a lack of enforcement has led to decreased compliance with current legislation restricting the use of cell phones while driving).

before citing them.[200] One aspect of enforcing the seatbelt and drunk driving laws has been specific checkpoints aimed at catching violators.[201] While law enforcement officers surely have many other traffic matters to attend to, one option to increase enforcement of cell phone traffic laws is to use checkpoints similar to those used to enforce the seatbelt and drunk driving laws.[202] In addition, if individuals believe the law is actually going to be enforced, they will be less likely to take the risk of getting caught.[203]

Finally, in order to truly protect American motorists from the dangers of cell phone use on the roadway, laws must prohibit the use of all cell phones, regardless of whether they are hand-held or hands-free.[204] The dangers posed by using a cell phone while driving has become evident by the number of accidents caused by cell phone use.[205] In addition, studies have shown that driving while using a cell phone increases the chance of getting into an accident by four times.[206] While some people believe using a hands-free device lessens the danger, evidence shows the opposite.[207] This is because the main problem with talking on a cell phone while driving is the conversation itself.[208] When individuals engage in conversations while driving, it causes them to be

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[200] *See supra* note 140 and accompanying text (indicating that there are three types of current cell phone legislation that are difficult to enforce: local ordinances, restrictions solely on minors, and legislation prohibiting only hand-held cell phones).

[201] *See* Chang, *supra* note 66 (indicating checkpoints are helpful in encouraging compliance with traffic laws).

[202] Benjamin, *supra* note 25 (indicating the lack of enforcement has to do with officers' inability to give these laws the needed attention because of the number of other activities police have to monitor while on the road).

[203] *See* FOSS ET AL., *supra* note 44 (discussing the lack of enforcement of the teenage cell phone restriction in North Carolina, and how this played a role in non-compliance).

[204] *See supra* note 147 (discussing why hands-free cell phones are not safer than hand-held cell phones).

[205] *See supra* note 25 (discussing the number of accidents and the amount of monetary damage caused by inattentive drivers annually); *supra* note 31 (discussing studies conducted by individual states that found cell phones contributed to a significant number of police reported car accidents).

[206] *See supra* note 44 (discussing studies that have found that talking on a cell phone while driving increases the chance of the driver or another driver, passenger, or pedestrian being injured in an automobile accident).

[207] *See* Kalin, *supra* note 17, at 252 (discussing a study that found dialing to be the only aspect that is safer when using a hands-free phone); Bents, *supra* note 33 (discussing how hands-free cell phones fail to eliminate all dangers associated with making a phone call while driving).

[208] *See supra* note 147 (discussing the fact that the major problem with cell phone conversations while driving is the actual conversation and not the manipulation of the cell phone).

less aware of their surroundings, which in turn leads to accidents.[209] In addition, carrying on a conversation takes individuals away from the task at hand—driving—because they often become engrossed in their conversations.[210] Therefore, despite the resistance this complete ban may receive because of the popularity of cell phones, it would likely be the most efficient way to eliminate the growing problem of accidents caused by cell phone use while driving.

IV. CONTRIBUTION

Given the number of individuals who are driving while using their cell phones at any given moment, and the dangers created by such activity, it is clear that legislative action is needed to protect other motorists from these distracted drivers.[211] Although some states and municipalities have passed legislation to restrict the use of hand-held cell phones and text messaging while driving, it has not deterred individuals from partaking in these dangerous activities.[212] As a result, this Note proposes a model statute that addresses several of the problems with the current legislation, and advocates that each state adopt a statute similar to this model statute.

A. *Proposed Model Statute*[213]

(a) Except as otherwise provided in this section, it shall be unlawful for an operator of a motor vehicle on a public road or highway to use a wireless telephone

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[209] *See* Horwitt, *supra* note 32, at 192 (describing a study that used simulators and found that drivers were unable to describe the traffic around them when they were suddenly stopped and asked questions, despite the fact they were able to do so when they were not talking on their phones). *See also* Kalin, *supra* note 17, at 254 (discussing a study that found drivers engaging in cell phone conversations were much less aware of their surroundings and could identify only half as many objects outside of the vehicle in contrast to drivers not having cell phone conversations).

[210] *See* SUNDEEN, LEGISLATIVE UPDATE, *supra* note 22, at 2 (indicating drivers often become engrossed in conversation and make hand gestures, which distracts them from the task of driving and makes it easier for other drivers to notice that the driver is distracted); Olson, *supra* note 24 ("[H]umans cannot converse on cell phones without distracting the brain from the task of driving.").

[211] *See supra* note 19 (indicating the number of drivers distracted by cell phones at any given moment in the United States is 1,005,000); *supra* note 24 (reporting the number of estimated accidents that occur each year because of distracted drivers).

[212] *See supra* Part III.A (analyzing the ineffectiveness of current cell phone legislation).

[213] This proposed model statute is the work of the author incorporating specific language and ideas from the following statutes: ALASKA STAT. § 28.35.161 (2008); N.Y. VEH. & TRAF. LAW §§ 1225-c(2)–(4) (McKinney Supp. 2001); and N.J. STAT. ANN. § 39:4-97.3(b) (West 2008).

or electronic communication device to make or receive a phone call, or write, send, or read a text-based communication.

(b) The provisions of this section shall not apply if:
   (1) The operator has reason to fear for his life or safety, or believes that a criminal act may be perpetrated against himself or another person;
   (2) The operator is using the telephone to report to appropriate authorities a fire, a traffic accident, a serious road hazard, or medical or hazardous materials emergency, or to report the operator of another motor vehicle who is driving in a reckless, careless, or otherwise unsafe manner, or who appears to be driving under the influence of alcohol or drugs;
   (3) The operator is acting while in the performance of his or her official duties as a police officer or peace officer, a member of a fire department, or the operator of an authorized emergency vehicle;

(c) This shall be a primary offense, violation of which is a misdemeanor punishable by a fine of up to five thousand dollars ($5,000) and up to one year in jail.

Commentary

This proposed statute, if adopted, would help cure some of the problems with current legislative attempts to restrict the use of cell phones while driving. First, this statute prohibits the use of all cell phones, regardless if they are hand-held or hands-free. As previously discussed, one of the largest problems with current legislation is the fact that it distinguishes between hand-held and hands-free cell phones.[214] Studies have shown that prohibiting drivers from using hand-held cell phones, but still allowing them to use hands-free cell phones, fails to protect motorists.[215] Therefore, because it is not the type of device that causes the problem, but rather the cell phone conversation itself, it is important not to distinguish between hands-free and hand-held cell phones. As a result, the only way to eliminate the danger presented by

[214] *See supra* notes 147–51 and accompanying text (discussing the problems with distinguishing between hand-held and hands-free cell phone use).

[215] *See supra* note 207 (discussing how hands-free cell phones are not safer than hand-held cell phones).

cell phones on the roadway is to eliminate the conversation, which requires a complete prohibition against using cell phones while driving.

Second, the proposed statute will make enforcement of cell phone prohibitions easier. Law enforcement officers have indicated that enforcing cell phone prohibitions is difficult, especially when the prohibition extends only to minors.[216] By prohibiting all drivers from using cell phones, law enforcement officers will no longer have to attempt to determine a driver's age before pulling him or her over for violating the law. Additionally, because individuals will be completely barred from using a cell phone while driving, it will make it easier for law enforcement officers to spot individuals breaking the law by either talking on a cell phone or text messaging. Furthermore, as a primary offense, officers will be able to enforce the cell phone prohibition without the driver being guilty of any other offense. Therefore, with enforcement of a complete cell phone prohibition being easier for officers, it will likely deter more individuals from driving while talking on their cell phones or text messaging because they would be more fearful of being caught.

Third, the proposed statute's increased penalty for using a cell phone while driving will likely encourage drivers to comply with the law.[217] Current laws prohibiting drivers from talking on cell phones or sending or receiving text messages carry modest penalties, and as a result, have not discouraged drivers from using their cell phones.[218] However, drunk driving laws carry much harsher penalties, which have contributed to their success.[219] Therefore, the hope is that by increasing the penalty for talking on a cell phone or text messaging while driving to reflect the seriousness of the risk it prevents, drivers will be deterred from engaging in such dangerous practices.

Fourth, the adoption of the proposed statute by all states will address another major issue presented by current legislation, the lack of uniformity.[220] Several states prohibit cell phone use and text messaging while driving, whereas others do not.[221] Within some states that do not prohibit these activities, there are some municipalities that do in fact

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[216] *See supra* notes 137, 140 (discussing the difficulty in enforcing cell phone prohibitions).

[217] *See supra* notes 146 (discussing how the ineffectiveness of current cell phone legislation can be attributed to the small monetary penalties).

[218] *See supra* note 196 (discussing the modest penalties of current cell phone and text messaging restrictions).

[219] *See supra* note 157 and accompanying text (discussing penalties that accompany a violation of a drunk driving law).

[220] *See supra* Part III.C.2 (discussing the need for uniformity of cell phone laws within states).

[221] *See supra* Parts II.C.2.a, II.C.2.c (discussing which state and localities restrict drivers' ability to talk on a cell phone or text message while driving).

prohibit talking on a cell phone or text messaging while driving.[222] As a result, motorists traveling within a state will likely be unaware of which localities restrict these activities and could be ticketed without ever knowing they were breaking the law. If each state passed legislation similar to the proposed statute, motorists everywhere would know that they cannot use their cell phones to carry on conversations or text message, no matter where they travel, and would not have to alter their driving habits between cities or states.

Furthermore, if each state prohibited driving while talking on a cell phone or text messaging, national advertising campaigns similar to those used for drunk driving and seatbelt laws could be launched. Much of the success of the seatbelt and drunk driving laws is attributed to the advertisement of these laws and the increased awareness of the dangerous consequences of violating them.[223] Therefore, in order for cell phone prohibition laws to experience success similar to those of the drunk driving and seatbelt laws, advertisement of these laws is essential. National advertisement campaigns can be utilized and will be more effective if each state had a similar prohibition against using a cell phone while driving because the same advertisements could be used across the country. Given that national seatbelt and drunk driving campaigns were successful at increasing the awareness of the laws and dangers of not following them, a similar campaign aimed at driving while talking on a cell phone or text messaging should also experience success.

Adoption of legislation similar to the proposed statute by every state would create a consistent message that driving while talking on a cell phone, whether hand-held or hands-free, or text messaging is dangerous and will not be tolerated. This, along with the ability to enforce the law more easily, the increased penalty for violating the law, and the national advertisement that would be able to take place, will likely encourage more individuals to focus on driving rather than being distracted by their cell phones, and therefore, make the roadways safer for all travelers.

V. CONCLUSION

It is undeniable that drivers traveling at inconsistent speeds or swerving in their lanes because they are preoccupied with text messaging or carrying on a cell phone conversation pose serious dangers

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[222] *See supra* Parts II.C.2.c, II.C.3 (discussing current local legislation prohibiting drivers from either talking on a cell phone or text messaging while driving).

[223] *See supra* note 161 and accompanying text (discussing current ad campaigns used for seat belt laws); *supra* note 167 and accompanying text (discussing current advertisements used to promote drunk driving laws).

not just for themselves, but for other motorists traveling near them. As the number of Americans owning cell phones, utilizing the text message function of their cell phones, and using their cell phones while driving continues to rise, so too do the dangers of driving on the roadways. Therefore, legislators should take action to prohibit individuals from talking on cell phones or text messaging while they are driving.

Because studies find driving while talking on a cell phone is extremely dangerous, regardless of whether it is a hands-free or hand-held cell phone, it is clear that despite the unpopularity of a complete cell phone ban while driving and the resistance it will likely encounter, a complete ban is essential to make our roadways safer. Therefore, if legislators are truly concerned about protecting American motorists, rather than just acting as if they are taking a proactive approach by prohibiting hand-held cell phone use or creating restrictions only for minors, they need to take the less popular approach and completely outlaw talking on all cell phones and text messaging while driving. Not only will this prohibition make the roadways safer and prevent accidents like the one killing Morgan Lee Pena, the two-year-old killed on her way home from a play-date, but also, as you drive alongside someone, you will no longer have to worry that his or her attention is more focused on a cell phone than on the road.

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