

The 411 on Cellular Phone Use: An Analysis of the Legislative Attempts to Regulate Cellular Phone Use by Drivers

“During the next few years, states and researchers will begin to accumulate more information about the implications of mobile phones and other devices on traffic safety. In the interim, as the quantity of phones and other wireless communications devices available on the road continues to grow, greater constituent concerns, local ordinances, and judicial activity will increasingly challenge lawmakers to address driver distraction as a traffic safety concern.”¹

I. INTRODUCTION

On the night of February 1, 2002, a southbound Ford Windstar Minivan collided head-on and killed twenty-year-old Dawn Richardson, when her northbound Ford Explorer veered across the Beltway outside Washington D.C., and collided head on with a southbound Ford Windstar Minivan.² Richardson was following her boyfriend and traveling nearly twenty miles-per-hour over the speed limit in a sport utility vehicle known for being top-heavy and particularly unwieldy in precarious situations.³ The gusting winter wind off of the Atlantic coast caught Richardson, a driver with less than fifty miles of driving experience, at a vulnerable moment because she was not only speeding but also talking on her cellular phone.⁴ The unbridled Explorer careened through two guard rails, took flight, and collided head-on with the four passenger mini-van, killing everyone in both cars.⁵

Cellular phones, originally intended for use by business people and emergency situations, permeate popular American culture and have become a staple in our lives.⁶ Occupations now demand more from their full-time

1. Matt Sundeen, *National Conference of State Legislatures, Cell Phones and Highway Safety: 2003 State Legislative Update*, at 19 (Dec. 2003).

2. See John Valenti, *Young Drivers More at Risk with Phone*, NEWSDAY, Oct. 19, 2003, at A43 (relating story of fatal crash caused by cellular phone use while driving); see also Sidney Becker, *Don't Talk and Drive: Humor Off-Color, But on the Mark*, S. FLA. SUN-SENTINEL, Jan. 6, 2003, at 21A (detailing story involving cellular phone use and traffic safety); *Child Dies after SUV Hits Tractor-Trailer*, HOUSTON CHRONICLE, May 26, 2004, at 22 (describing car accident caused by cellular phone use); Hector Gutierrez, *Cell Phone May Have Led to Fatal Collision*, ROCKY MTN. NEWS, Feb. 7, 2004, at 12A (citing fatal crash where cellular phone involved).

3. See Valenti, *supra* note 2, at A43 (recounting story of Dawn Richardson's crash).

4. See Valenti, *supra* note 2, at A43 (noting use of cellular phone while driving).

5. See Valenti, *supra* note 2, at A43 (depicting fatal collision).

6. See Jordan Michael, *Liability for Accidents from Use and Abuse of Cell Phones: When Are*

employees, requiring increased availability outside the office.⁷ It is becoming clear that the purpose of cellular phones has changed from a device reserved for special situations to an item of necessity for people of all ages, in all makes of life.⁸

Despite their broad utility, cellular phone use by drivers is not greeted with enthusiasm by legislators and law enforcement personnel.⁹ Due to an increase in the general public's fear for their safety and a general disdain for cellular phone use while driving, over the last four years legislatures in every state have proposed bills designed to reduce or eliminate a driver's ability to talk and drive at the same time, thereby hopefully making drivers more responsible and alert.¹⁰ Despite the proponents' best efforts, however, most legislation rarely reaches the governor's desk, and if it does, the bills are severely weaker than the original design.¹¹ To date, only New York, New Jersey, and Washington

Employers and Cell Phone Manufacturers Liable?, 79 N.D. L. REV. 299, 299 (2003) (characterizing cellular phone use as both personal and business related); see also Karen S. Lissy et al., *Cellular Phone Use While Driving: Risks and Benefits*, HARVARD SCHOOL OF PUBLIC HEALTH, July 2000, at 8 (praising growth of cellular industry and versatility of cellular phone).

7. See Michael, *supra* note 6, at 299 (suggesting increase in corporate cellular phone reimbursement reflects increase in business cellular phone use). Cellular phone use is widespread in cars, where eighty-five percent of cellular phone users place calls while driving, and seventy percent of all calls are made from a car. *Id.*; Donna Glassbrenner, Ph.D., *Traffic Safety Facts – Research Note*, at 1 (noting increase in hand-held cellular phone use by drivers). In 2002, five percent of drivers between the ages of sixteen and twenty-four used cellular phones while driving, and by 2004, eight percent of drivers in the same age group used cellular phones while driving. Glassbrenner, *supra*, at 1.

8. See Edward Thai, *A World Gone Wired; Though Useful, Cells Can Annoy*, S. FLA. SUN-SENTINEL, Mar. 21, 2003, at 18 (noting practicality of cellular phones for busy teenagers); see also Lissy et al., *supra* note 6, at 11 (tracing evolution of ownership of cellular phone); Michael, *supra* note 6, at 299 (reporting overwhelming growth in cellular phone industry since 1992). The cellular phone industry reported a twelve fold increase in users from 1992 to 2002, and a thirty percent increase from 2001 to 2003. Michael, *supra* note 6, at 299.

9. See Alicia Taylor, *Smart Drivers Don't Talk on the Phone*, BG NEWS, May 24, 2004 (discussing state-wide bans of cellular phone use while driving) available at http://www.bgnews.com/vnews/display.v/ART/2004/05/24/40b3e1dbcb32c?in_archive=1; see also Sundeen, *supra* note 1, at 4 (noting every state has examined legislation concerning cellular phone use while driving proposed in forty states); Gary Richards, *Senators Missed Call on Cell Phone Vote: Defeated Bill Requiring Hands-Free Devices for Drivers Would be Step Toward Safer Roads*, SAN JOSE MERCURY NEWS, July 9, 2003, at B1 (admonishing amendment of proposed California bill requiring hands-free devices).

10. See Sundeen, *supra* note 1, at 4-13 (detailing 2003 proposed legislation and existing laws in those states); see also Melissa A. Savage et al., *State Traffic Safety Legislative Summary 2001* at 1 (noting, in 2001 alone, 43 states examined 140 bills regarding cellular phone use while driving); R.J. Lehmann, *Studies Suggest Safety Promise of Cellular Phone Bans May Ring Hollow*, BEST'S INS. NEWS, July 21, 2004 (citing New Jersey poll revealing eighty-five percent of voters favor banning talking while driving); David Nakamura & Robin Shulman, *Put Down Phone, D.C. Tells Drivers; Council Votes to Limit Motorists to Hands-Free Devices by July*, WASH. POST, Jan. 7, 2004, at A1 [hereinafter Nakamura] (reiterating D.C. Council members hope of safer cellular phone use); Press Release, New Jersey Office of the Governor, Governor Signs Law Banning Hand-Held Cell Phones While Driving (Jan. 20, 2004), available at http://www.nj.gov/cgi-bin/governor/njnewsline/view_article.pl?id=1712 (last visited Feb. 28, 2005) [hereinafter Governor] (reconciling importance of cellular phones with danger from using while driving).

11. See Dan Ring, *Calling All Cars: Bill Targets Driving, Dialing*, REPUBLICAN, June 17, 2003, at News A1 (outlining Massachusetts' attempt to create state-wide ban on cellular phone use while driving); see also

D.C. have territory-wide bans on hand-held cellular phone use, and these jurisdictions still allow the use of hands-free devices, only prohibiting placing the phone up to one's ear.¹² While it seems that these three statutes might inspire other states to enact similar statutes, many states have actually backed off the issue, trimmed down proposed legislation, and prevented cities and towns from passing their own municipal laws.¹³

This Note examines the cellular phone's role in automobile accidents, discussing how current state and federal legislation addresses the growing problem, and how that legislation is both misguided and ineffective. Part II.A examines the dichotomy of the numerous benefits of cellular technology, as compared with its accident causing abilities.¹⁴ Next, Part II.B examines the emerging case law shaping the liability of cellular phone corporations in automobile accidents involving a cellular phone.¹⁵ Later, Part II.C explains and scrutinizes the litany of proposed, and often failed legislation.¹⁶ This section illustrates the types of statutes surviving the enactment process, describes the types of problems legislatures face in enacting legislation governing cellular phone use while driving, and reveals the federal government's limited role in such legislation.¹⁷ Parts II.D-E examine the three territorial bans on hand-held cellular phone use, New York, New Jersey, and Washington D.C., focusing on the hand-held and hands-free distinction, a similarity amongst the existing territorial bans.¹⁸ Part II.F then looks at the mental occupation of the driver, the major problem with driving and using a cellular phone.¹⁹ Finally, Part III analyzes the current legislation, and suggests more effective alternatives.²⁰

Jim Collar, OSHKOSH NW., Feb. 23, 2003, at C1 (outlining Wisconsin's attempt to ban driving while talking state-wide); Jack Komperda, *Proposal Would Encourage Drivers to Avoid Cell Phones*, CHI. DAILY HERALD, Dec. 27, 2003, at News 3 (outlining Illinois' attempt to regulate driving and cellular phone use).

12. D.C. CODE § 50-1731.01-.10 (2004) (stating D.C.'s distracted driving laws); N.J. STAT. ANN. § 39:4-97.3 (West 2004) (prohibiting cellular phone use while driving); 3A N.J. PLEADING & PRAC. FORMS § 29:44 (2004); N.Y. VEH. & TRAF. LAW § 1225-c (McKinney 2001) (defining cellular phone use while driving ban); see also Diane Cadrain, *States Cracking Down on Driving and Phoning*, HR MAG., Apr. 1, 2004, at 30 (comparing New York, New Jersey, and Washington D.C. laws); Charisse Jones, *New Jersey and D.C. Are Telling Drivers to Hang Up; Anti-Cellphone Laws Take Effect Thursday*, USA TODAY, June 29, 2004, at A3 (explaining New Jersey law).

13. See Richards, *supra* note 9, at B1 (criticizing amendment to proposed California statute); see also Sundeen, *supra* note 1, at app. A (outlining proposed 2003 legislation). Appendix A shows that in 2003 alone, Delaware, Kentucky, Louisiana, Mississippi, Nevada, Oklahoma, Ohio, Oregon, and Washington all proposed laws that would prevent local jurisdictions from making their own laws concerning cellular phone use. *Id.* at app. A. As of November 2003 Florida, Kentucky, Louisiana, Mississippi, Nevada, Oklahoma, and Oregon had passed state government preemption laws. *Id.* at app. B.

14. See *infra* Part II.A (discussing benefits and dangers resulting from America's dependence on cellular phones).

15. See *infra* Part II.B (describing cellular phone litigation).

16. See *infra* Part II.C (examining unsuccessfully proffered legislation).

17. See *infra* Part II.C (revealing legislative issues serving as impediments to proposed legislation).

18. See *infra* Parts II.D-E (inspecting current legislation regulating cellular phone use by driver).

19. See *infra* Part II.F (citing scientific evidence directing attention towards mental occupation).

20. See *infra* Part III (offering different solutions to protecting public from dangers of drivers using

II. HISTORY

A. *Benefits Breed Accidents*

Juxtaposed against the widely documented benefits of cellular technology, is the startling truth that fatalities due to cellular phone use while driving more than doubled from 2001 to 2003, increasing from an estimated 1,000 to over 2,600, according to Harvard University's Center for Risk Analysis.²¹ Scientists at the University of Utah determined that cellular phone use while driving caused, or contributed to, between 2,000-3,000 deaths in 2003.²² Using a cellular phone while driving has sometimes been grouped into the broader category of distracted driving, which includes activities like shaving, eating, listening to the radio, and even talking with a passenger.²³ The cellular phone industry in the United States has exploded in recent years, and as a result, more users are becoming drivers, the effect of which will inevitably be an increase in the number of deaths attributed to cellular phone use while driving.²⁴

cellular phones).

21. See Karen Mahabir, *Wake-up Call for Distracted Drivers?/Death Toll in Accidents Involving Drivers Using Phones Doubles*, HOUS. CHRON., Jan. 1, 2003, at 14 (blaming drivers using cellular phones for increase in automotive fatalities); 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) [hereinafter Hahn] (estimating ten to ten-thousand deaths per year caused by cellular phone use in cars). The studies also estimated that six-hundred thousand collisions occur each year because of cellular phone use in vehicles. Hahn, *supra*, at 130; Stefanie Matteson & George Olivar, *Hands-Free Phones the Law, But Some Say Dangers Exist*, COURIER-NEWS, July 1, 2004, at A6 [hereinafter Matteson] (reporting statistical findings); Fran Wood, *Shut Up and Drive*, STAR-LEDGER, Sept. 26, 2004, at 3 (citing another Harvard Center for Risk Analysis study). This Harvard study concluded that the range of deaths attributable to cellular phone use while driving is between eight hundred and eight thousand, and one-hundred thousand to one million injuries. Wood, *supra*, at 3.

22. See Matteson, *supra* note 21, at A6 (acknowledging dangerous link between cellular phone use and driving).

23. See Sundeen, *supra* note 1, at 1 (including use of cellular phones while driving in cases of distracted driving). The National Highway Traffic Safety Administration (NHTSA) estimates that distracted driving is the cause of twenty-to-thirty percent of all motor vehicle accidents. *Id.*; see also Lana Mobydeen, *Reach Out and Touch Someone: Cellular Phones Health, Safety and Reasonable Regulation*, 16 J.L. & HEALTH 373, 374 (2001-02) (referencing statistics given by NHTSA); David L. Strayer & William A. Johnston, *Driven to Distraction: Dual-Task Studies of Simulated Driving and Conversing on a Cellular Telephone*, 12 PSYCHOL. SCI. 462, 462-66 (2001) [hereinafter Strayer] (concluding cellular phone conversation distracting to drivers); Debbie Howlett, *Americans Driving to Distraction; As Multitasking on Road Rises, Cellphones only Part of Problem*, USA TODAY, Mar. 5, 2004, at A3 (reporting NHTSA statistics); Albert R. Karr, *Cellphones in Cars, Not So Bad?: Many Driving Activities Are Higher on the List of Dangers, AAA Finds*, WALL ST. J., Aug. 7, 2003, at D4 (listing other common distracting activities); Insurance Corporation of British Columbia, *The Impact of Auditory Tasks (as in Hand-Free Cell Phone Use) On Driving Task Performance*, (June 2001), available at http://www.icbc.com/Library/research_papers/Cell_phones/Cellphones_Impact2.pdf (last visited Feb. 15, 2005) [hereinafter ICBC] (concluding conversations using hands-free device downgrades driving ability).

24. See Hahn, *supra* note 21, at 143-44 (citing University of North Carolina study indicating correlation between accidents and cellular phone industry growth). Researchers at the University of North Carolina took information gathered by the state's highway patrol, and estimated the frequency of cellular phone use and

Reports and statistics admonishing the use of cellular phones while driving seem to have little or no actual effect on drivers.²⁵ Motorists continue to drive and talk despite warnings of a significant risk of harm to themselves and others.²⁶ Moreover, there is a tendency among the driving public to always lay fault on the other driver, in that most people involved believe that the other driver was inattentive and at fault.²⁷ Scientists and scholars have theorized that this is caused by the lack of a nexus between when the accident occurs and the actual use of the cellular phone.²⁸

According to a study conducted by the University of Utah, the increase in danger to a driver using a cellular phone comes not from a loss of dexterity, but rather the driver's inability to do two or more complicated things simultaneously.²⁹ The New England Journal of Medicine (NEJM) found that

crashes by using the short descriptions in the accident reports. *Id.* The study demonstrated that the number of crashes rose gradually through most of the 1990's, when suddenly, in 1998, 1999, and 2000, the number doubled each year. *Id.* Furthermore, researchers identified a parallel between the increase in crashes resulting from cellular phone use and the growth of the cellular phone industry. *Id.*; Nick Shields, *State Officials Warn of 'Safety Crisis'*, MILWAUKEE J. SENTINEL, July 19, 2003, at 1B (reporting increase in deaths on U.S. highways). Between 2001 and 2002, the number of deaths on U.S. highways increased by one-and-a-half percent to 42,815 people, the highest level in twelve years. Shields, *supra*, at 1B.

25. See Jesse A. Cripps, Jr., *Dialing While Driving: The Battle Over Cell Phone Use on America's Roadways*, 37 GONZ. L. REV. 89, 91 (2001/2002) (reporting prevalent use of cellular phone while driving). Eighty-five percent of Americans admit to using their cellular phone while driving. *Id.*; see also Mohamed Abdel-Aty, *Investigating the Relationship Between Cellular Phone Use and Traffic Safety*, ITE J., Oct. 1, 2003, at 38 (investigating cellular phone use while driving). A January 2001 NHTSA report found that fifty-four percent of drivers have cellular phones in their cars or have carried one as they drove. See Abdel-Aty, *supra*, at 38. The report also found that nearly eighty percent of all drivers leave their cellular phone on while driving, and seventy-three percent of drivers admitted to talking while driving. *Id.*; Howlett, *supra* note 23, at A3 (citing recent poll showing many drivers engage in risky behavior while driving). Ninety-one percent of the people polled said they had engaged in some sort of distracting behavior while driving, such as using a cellular phone, eating, or reading. Howlett, *supra* note 23, at A3.

26. See Matteson, *supra* note 21, at A6 (documenting high level of cellular phone use on U.S. roads). At any given moment, there are at least five-hundred thousand drivers using their cellular phones. *Id.*

27. See Matteson, *supra* note 21, at A6 (reporting drivers' opinions). A University of Utah study revealed that while drivers recognize the danger of using a cellular phone while driving, most feel that it is other drivers who are inattentive, and never themselves. *Id.*

28. See Michael, *supra* note 6, at 300 (referring to problem as one of distraction and not occupancy of hands). The threat of an accident is still four times greater during the fifteen minutes immediately after the phone call has ended. *Id.* Michael also mentions a University of Florida study that reported that driving while talking increases the chances of getting into an accident by between thirty-four percent and three hundred percent. *Id.* at 300.

29. See Richards, *supra* note 9, at B1 (referring to University of Utah study). Drivers suffer from "inattention blindness" when using a cellular phone, where the use of the cellular phone overtakes the mind to the point where the driver isn't even focused on the road ahead. *Id.* The University of Utah study concluded that the conversation had more of an effect on the ability of the motorist to operate than the simple act of holding the phone. *Id.*; see also Sundeen, *supra* note 1, at 3 (citing University of Utah study). The study showed that a cellular phone conversation produced "distraction levels" far exceeding the distraction arising from many other activities including listening to audio books or the radio. Sundeen, *supra* note 1, at 3; see also Jane E. Allen, *When Drivers' Brains Get a Busy Signal*, L.A. TIMES, Feb. 3, 2003, at F1 (noting competition between visual and auditory signals for drivers); Mahabir, *supra* note 21, at 14 (referring to University of Utah study).

talking on a cellular phone while driving impairs the driver's ability to focus on the road to such a degree that it is the functional equivalent of driving drunk.³⁰ The NEJM also reported a 1997 University of Toronto study, which analyzed the cellular phone bills of 699 drivers, and revealed that the risk of being in an accident was four times greater when the driver was using a cellular phone.³¹ Thirteen years ago, the National Public Services Research Institute concluded that cellular phone use driving leads to significant increases in response times to highway traffic situations.³² Two years later, the University of Michigan concluded that "reading a map or changing a cassette" were the only activities more dangerous than talking on a cellular phone.³³

The rise in cellular phone use by drivers has caused a swell in accidents, resulting in more lawsuits and damages payouts.³⁴ In fact, the National Highway Traffic Safety Administration (NHTSA) reports 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 damages according to one researcher.³⁵ The rapidly increasing cost of cellular phone related accidents and the inability of the public to objectively assess their driving presents a major problem, demanding the entry of a governing body to enact new laws or use its existing powers in a more effective manner.³⁶

B. Case Law

1. Foreseeable Negligence to Cellular Phone Manufacturers

Cellular phone manufacturers face two types of civil claims when a cellular phone is involved in an automobile accident: (1) claims regarding the manufacturing of the cellular phone, and (2) negligence suits relating to the actual accident.³⁷ Courts are generally not amenable to negligence suits

30. See Cripps, *supra* note 25, at 94 (referring to New England Journal of Medicine (NEJM) report).

31. See Wood, *supra* note 21, at 3 (noting NEJM study reporting University of Toronto data); see also Hahn, *supra* note 21, at 140-41 (citing NEJM study); Savage et al., *supra* note 10, at 10 (mentioning NEJM report). Another 2001 Canadian report indicates a nearly forty percent increase in the risk of automobile accidents for cellular phone users. Savage et al., *supra* note 10, at 11; Sundeen *supra* note 1, at 3 (referring to NEJM report).

32. See Wood, *supra* note 21, at 3 (describing findings of reaction time study).

33. See Wood, *supra* note 21, at 3 (outlining findings of University of Michigan study).

34. See Sundeen, *supra* note 1, at 1 (calling attention to damage and liability statistics).

35. See Sundeen, *supra* note 1, at 1 (citing reports from National Conference of State Legislatures, 2002). Dr. John Lee, in addition to his monetary damages finding, estimates that driver inattention could cause up to ten-thousand deaths per year. *Id.*

36. See *supra* note 35 and accompanying text (describing financial implications of cellular related accidents); see also Matteson, *supra* note 21, at A6 (noting unwillingness of drivers to blame themselves).

37. See Michael, *supra* note 6, at 307-08 (discussing strict product liability). Tort law provides for three types of defects: manufacturing defect; design defect; and inadequate warnings. *Id.* (citing RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2(c) (1997)). Courts look to consumers' expectations to decide if a

asserting that cellular phone manufacturers owe a duty of care to collision victims merely because the driver was using a cellular phone when the accident occurred.³⁸ In *Williams v. Cingular Wireless*,³⁹ the plaintiff, Terry Williams, argued that not only did the defendant driver owe her a duty of care, but that Cingular did as well.⁴⁰ The Indiana Court of Appeals analyzed three factors deciding whether to impose a duty of care to cellular phone manufacturers: (1) the relationship between the plaintiff and the manufacturer; (2) whether the harm was reasonably foreseeable; and (3) court-imposed public policy.⁴¹ The court found that no relationship existed between Williams and Cingular that would warrant imposing a duty of care on the part of the manufacturer.⁴² Additionally, the court found that an automobile accident was not reasonably foreseeable when Cingular sold the cellular phone to the defendant.⁴³ The court ruled that state statutes limiting the use of cellular phones while driving are simply not enough to make an accident foreseeable from the sale of the phone, because statutes make little or no mention of cellular phone

product is unreasonably unsafe. *Id.* at 309. Courts also weigh the benefits against the risks of a product to decide if a product is unreasonably dangerous. *Id.* Cellular phones have been viewed as “unavoidably unsafe” in some circumstances and carry strict liability for being unreasonably dangerous, but manufacturers are relieved of that liability by properly providing warnings to the general public. *Id.*; see also Cripps, *supra* note 25, at 110 (discussing risk-utility balancing test). There is even more protection from defective product suits applying this test because courts tend to allow a comparative negligence defense from the manufacturers considering all of the known risks of driving and using a cellular phone. Cripps, *supra* note 25, at 110. Plaintiffs face a tough battle in these lawsuits given the ultimate utility of a cellular phone and proper warnings from the manufacturers. Cripps, *supra* note 25, at 110.

38. See *Ind. Court Lays Blame on Driver, Not Cell Phone, For Accident*, ANDREWS TELECOMM. INDUSTRY LITIG. REP., June 15, 2004, at 9 [hereinafter Andrews] (referring to Indiana case law); see also *Williams v. Cingular Wireless*, 809 N.E.2d 473, 476-78 (Ind. Ct. App. 2004) (holding no liability between manufacturer and accident victim where driver using cellular phone).

39. 809 N.E.2d 473 (Ind. Ct. App. 2004).

40. *Id.* at 476 (outlining plaintiff’s argument). The Court of Appeals of Indiana began its analysis with a review of the elements of negligence: duty owed to the plaintiff, a breach of that duty signaled by the conduct of the defendant falling below the applicable standard of care, and a recoverable injury proximately caused by that breach. *Id.* The court viewed the duty element as a threshold because “[a]bsent a duty, there can be no breach and, therefore, no recovery in negligence.” *Id.* (citing *Rawls v. Marsh Supermarket, Inc.*, 802 N.E.2d 457, 459 (Ind. Ct. App. 2004); see also Andrews, *supra* note 38, at 9 (reviewing plaintiff’s argument).

41. *Williams*, 809 N.E.2d at 476 (outlining various forms of duty element).

42. *Id.* at 477 (finding no duty creating relationship). Cingular did not hold a duty to the world, but instead only to those with which it had a relationship. *Id.* at 476-77. The court held Williams had no contractual relationship with Cingular, the accident did not involve any employee or property of Cingular, and the cellular phone itself was functioning properly at the time of the accident, precluding the conclusion that any type of relationship existed. *Id.* at 477. Moreover, the relationship between the defendant driver and Cingular did not include the plaintiff, and therefore did not create a duty. *Id.*

43. See *id.* at 478 (rejecting foreseeability argument). The court distinguished between the foreseeability that creates a duty, and the foreseeability that shows causation. *Id.* at 477. (citing *Goldsberry v. Grubbs*, 672 N.E.2d 475 (Ind. Ct. App. 1996)). The foreseeability test used when determining proximate cause is much broader, and explained by looking at the events preceding the alleged tort and deciding if the events were the “natural and probable consequence.” *Id.* (citing *Goldsberry v. Grubbs*, 672 N.E.2d 475 (Ind. Ct. App. 1996)). The foreseeability which creates a duty is a much narrower inquiry, and is a question of law for the court, in contrast to proximate cause, which is a question of fact. *Id.* (citing *Goldsberry v. Grubbs*, 672 N.E.2d 475 (Ind. Ct. App. 1996)).

manufacturers.⁴⁴ The court reasoned that “[a] cellular phone does not cause a driver to wreck a car. Rather, it is the driver’s inattention while using the phone that may cause an accident.”⁴⁵ Finally, the court determined that sound public policy warranted limiting liability for manufacturers of items used while driving, and placed the duty of care squarely on the negligent driver.⁴⁶ In doing so, the court indicated that the benefits of cellular phones outweigh their potential to cause accidents and harm.⁴⁷

2. Constitutional Challenges

Soon after the enactment of New York’s “Cellular Phone Law,”⁴⁸ drivers challenged the constitutionality of the law.⁴⁹ Subject to certain exemptions, the law makes hand-held cellular phone use while driving a primary offense, meaning an officer can pull over a car upon seeing the driver using a hand-held cellular phone.⁵⁰ In *People v. Neville*,⁵¹ the village justice analyzed the new constitutionality of the “Cellular Phone Law” by determining whether the law was too broad or vague; whether it overreached and infringed on drivers’ right to privacy; and whether the law violated due process.⁵² The *Neville* court determined that the law banning hand-held cellular phone use while driving passed all possible constitutional tests.⁵³

44. *Williams v. Cingular Wireless*, 809 N.E.2d 473, 477-78 (Ind. Ct. App. 2004) (refuting statutory law as creating foreseeable duty). The court found it would be a “leap in logic” to impose a foreseeable duty on Cingular through the sale of the phone. *Id.* at 478.

45. *See id.* at 478 (noting “[d]rivers frequently use cellular phones without causing accidents”).

46. *Id.* at 478-79 (distinguishing responsibilities of driver and manufacturers of items used in cars). It does not make sense to impose liability on the manufacturer of an item that is otherwise safe just because it can be used while driving. *Id.* at 478. The court drew parallels between Cingular selling phones to negligent drivers and the sale of otherwise safe cars to negligent drivers. *Id.*

47. *See Williams v. Cingular Wireless*, 809 N.E.2d 473, 479 (Ind. Ct. App. 2004) (listing positives of cellular technology). Cellular phones are used for personal and business needs, and encourage drivers to report emergencies, weather conditions, or other driving threats. *Id.* The court held that it would not be sound public policy to put a higher burden on cellular phone manufacturers, because it would effectively force the companies to stop selling cellular phones because of their possible use by drivers. *Id.* The state legislature is more aptly suited to shift the levels of duty of care, according to the Court, and they have already decided to put the responsibility for negligence on the driver. *Id.*

48. N.Y. VEH. & TRAF. LAW § 1225-c (McKinney 2001).

49. *See id.* (raising constitutional issues through new law restricting cellular phone use while driving); *People v. Neville*, 737 N.Y.S.2d 251, 254 (N.Y. Just. Ct. 2002) (adjudicating constitutional aspects of new law in New York); *see also* Tom Perrotta, *Village Justice Affirms State’s Law Limiting Cell Phone Use*, N.Y. L.J., Jan. 15, 2002, at 1 col. 4 (reporting decision of court). Just ten days after the law went into effect, Victoria Neville received a traffic ticket while driving and using her hand-held cellular phone. Perrotta, *supra*, at 1 col. 4. The court found that the law was not overly broad or vague, did not violate a person’s right to privacy, and did not violate equal protection and due process rights. Perrotta, *supra*, at 1 col. 4.

50. N.Y. VEH. & TRAF. LAW § 1225-c (McKinney 2001) (illegalizing use of cellular phone while driving); *see infra* notes 111-113 and accompanying text (describing exceptions to law and enforcement procedure).

51. *People v. Neville*, 737 N.Y.S.2d 251 (N.Y. Just. Ct. 2002)

52. *See id.* at 254 (outlining constitutional test statute must withstand).

53. *See id.* at 256 (holding New York law constitutional). The State of New York enacted the law

When analyzing whether a law is overly broad or vague, a court must determine if a reasonable person of ordinary intelligence would be able to discern what exactly the law seeks to ban.⁵⁴ The *Neville* court determined that the language of the statute was explicit.⁵⁵ The court also praised the law for its concern for public welfare, by incorporating a trial period for drivers and law enforcement personnel, where the officers could issue only verbal warnings.⁵⁶

The *Neville* court analyzed the “Cellular Phone Law” starting with the premise that laws are not permitted to expand the state’s rights so as to exceed their authority, and infringe upon individual rights by unnecessary invasions of privacy.⁵⁷ The court reviewed New York’s “Seat Belt Law” for guidance, as it too was the first of its kind in the nation, and also passed similar constitutional examination.⁵⁸ The court in *Neville* determined that the “Cellular Phone Law” “satisfies the state’s interest in protecting the health, safety, and welfare of its citizens.”⁵⁹ The court found that requiring a hands-free device for cellular phone use while driving was a relatively small burden, which paralleled the requirement of seat belts, helmets, and prohibiting smoking in public buildings.⁶⁰

The specific exemptions in the law required the *Neville* court to examine the law for any equal protection violations, requiring that the specific exemptions bore a reasonable relation to the statute’s desired purpose.⁶¹ Under New York

prohibiting the use of hand-held cellular phones while driving on June 28, 2001, and it became effective on December 1, 2001. *Id.* at 254.

54. *Id.* at 254 (stating standard for constitutionality test).

55. *Neville*, 737 N.Y.S.2d at 254 (examining language of statute). The court quoted sections of the then new law, presenting clear and concise language. *Id.* The court stated the law in part, “no person shall operate a motor vehicle upon a public highway using a mobile telephone. . .while such vehicle is in motion.” *Id.* (quoting N.Y. VEH. & TRAF. LAW § 1225-c (McKinney 2001)). The court also pointed out the careful distinction between prohibiting hand-held use versus allowing hands-free use. *Id.*; see also *People v. Moore*, 765 N.Y.S.2d 218, 219-220 (N.Y. Just. Ct. 2003) (examining language of statute). The court determined that the term “public highway” did not include private parking lots of private shopping centers. *Moore*, 765 N.Y.S.2d at 220.

56. See *Neville*, 737 N.Y.S.2d at 254 (determining law understandable and accommodating to public).

57. *Id.* (stating constitutional standard when examining law for vagueness and broadness).

58. See N.Y. VEH. & TRAF. LAW § 1229-c (McKinney 2001) (mandating use of seat belts); *People v. Neville*, 737 N.Y.S.2d 251, 254 (N.Y. Just. Ct. 2002) (comparing previously enacted legislation). The court also referenced requiring helmets for motorcyclists and banning smoking in public buildings as similarly not invading privacy. *Id.* at 255.

59. *Id.* (holding law does not unconstitutionally infringe on people’s rights). The court held that “the police powers of the government concern the delicate balancing act between the regulating authority of the state and the rights of the individuals whose freedoms as a result may be somewhat curtailed.” *Id.* at 255 (citing *Kass v. Kass*, 696 N.E.2d 174 (N.Y. 1998) The court drew similarities between the legislature’s intent in enacting the “Cellular Phone Law” and when they enacted the “Seat Belt Law.” *Id.* Like the “Seat Belt Law,” the court reasoned, the “Cellular Phone Law” is designed to protect not only the public, but the drivers from themselves. *Id.*

60. *Id.* (comparing earlier constitutional statutes). The statute also provides for the fine to be waived if a proof of purchase of a hands-free device is produced. N.Y. VEH. & TRAF. LAW § 1225-c (McKinney 2001).

61. *Neville*, 737 N.Y.S.2d at 255 (outlining equal protection analysis). The court did not subject the statute to strict scrutiny because the exemptions were “not based on race, sex, age, or national origins.” *Id.* at

law, the use of a hand-held cellular phone while driving is excused if used to place an emergency call to a hospital, ambulance, health clinic, the police or fire department.⁶² The *Neville* court reasoned that the exemptions for emergency personnel and ordinary persons in emergency situations bear a reasonable relationship to creating safety and well being.⁶³

3. *The Effects of Respondeat Superior*

As the cellular phone became a staple in the business world, the doctrine of respondeat superior was also forced to expand.⁶⁴ Law firms and corporations are now frequently sued for their employees' alleged negligent use of cellular phones while driving.⁶⁵ Because auto insurance and employer "deep pockets" seemingly insulate individuals from conceivably massive settlements, employee drivers are rarely impacted by the financial burdens that often accompany car accidents.⁶⁶ This leaves employers with the difficult task of controlling their employees' conduct, and has also caused a sense of apathy among drivers.⁶⁷ Standard auto insurance does not cover reckless acts.⁶⁸ In a

256.

62. See N.Y. VEH. & TRAF. LAW § 1225-(c)(3)(a) (McKinney 2001) (listing all possible cellular phone use exemptions). Persons who operate authorized emergency vehicles, such as police officers, fire fighters, and ambulance operators are also exempt from the ban. N.Y. VEH. AND TRAF. LAW § 1225-(c)(3)(b) (McKinney 2001); see also *People v. Neville*, 737 N.Y.S.2d 251, 255 (N.Y. Just. Ct. 2002) (outlining argument for constitutional violation).

63. *Neville*, 737 N.Y.S.2d at 256 (justifying exemptions because of close relationship to statute's overall purpose). The court noted that even in emergency situations the calls are likely short in duration and would not cause the same property or physical damage that "long, distracting phone calls cause." *Id.*

64. See Michael, *supra* note 6, at 299-300, 304 (characterizing cellular phones as important to business world). Respondeat superior extends an employer's liability to the tortious acts of an employee, so long as the employee is acting within the scope of employment. *Id.* at 304. Respondeat superior, then, becomes an issue when an employee is using a cellular phone to conduct business while driving and an accident occurs. *Id.* Even if the cellular phone use is not during business hours, the employer might still be held liable if the employee was on a business calls because of the benefit provided to the employer. *Id.* at 304-05; see also Hahn, *supra* note 21, at 138 (describing increase in lawsuits for accidents caused by cellular phone use). Between 1990 and 1999 there were thirty-four tort cases involving cellular phones. Hahn, *supra* note 21, at 138; see also *Cell Phone Suits Targeting Law Firm*, N.J. LAW.: WKLY. NEWSPAPER, Jan. 6, 2003, at 2 col. 5 [hereinafter *New Jersey Lawyer*] (citing cases where law firms and companies were sued for cellular phone accidents). In 2001, for example, the parents of a hit and run victim sued the Virginia law firm where driver worked and sought a thirty million dollar settlement. *New Jersey Lawyer*, *supra* note 64, at 2 col. 5.

65. See *New Jersey Lawyer*, *supra* note 64, at 2 col. 5. (discussing past lawsuits involving law firms and other companies). Smith Barney paid out a \$500,000 settlement, the State of Hawaii paid \$1.5 million, and an Arkansas lumber wholesale company paid out a \$16.2 million settlement to individuals and families of those injured in accidents caused by employees using their cellular phones while driving. *Id.*; see also Sundeen, *supra* note 1, at 18 (describing other past settlements).

66. See Dusty Horwitt, *Driving While Distracted: How Should Legislators Regulate Cell Phone Use Behind the Wheel?*, 28 J. LEGIS. 185, 198-99 (2002) (revealing automobile insurance effects on cellular phone lawsuits).

67. See Michael, *supra* note 6, at 301-02 (describing financial impact on corporations); see also Horwitt, *supra* note 66, at 197 (evidencing individual apathy because of business' deep pockets). While it is becoming clear that employers are taking possible lawsuits into account when budgeting, individuals still hold on to the idea that "that will never happen to [them]." Horwitt, *supra*, at 197. A 1999 poll of cellular phone users

typical situation, the plaintiff sues for both recklessness and negligence, and the defendant employer, seeks to settle the negligence claim and drop the recklessness claim.⁶⁹ Normally, the defendant is willing to settle rather than risk an uncertain outcome at trial.⁷⁰ The result is that the insurance company covers the negligence claim, and the individual defendant is relieved of massive settlement payments.⁷¹

Many corporations have enacted strict policies in an attempt to control and curtail their employees' cellular phone use while driving.⁷² Johnson & Johnson, for example, banned its nearly ten-thousand person sales and services staff from using hand-held or hands-free cellular devices while driving.⁷³ Companies such as Southwest Gas and Praxair have either heavily restricted cellular phone use while driving or banned its use altogether.⁷⁴ Other companies have halted reimbursement programs for employees' business-related cellular phone charges.⁷⁵ Corporations are increasingly forced to defend themselves by implementing similar internal policies, thereby hopefully warding off the "deep pockets" impetus behind the litany of lawsuits.⁷⁶

conducted by the Insurance Research Council revealed that eighty-four percent of people believed that using a cellular phone while driving was dangerous, but at the same time, sixty-one percent said they do did so, and thirty percent said they frequently use their cellular phones while driving. Horwitt, *supra*, at 197.

68. See Horwitt, *supra* note 66, at 198-99 (describing common situation regarding insurance settlements).

69. See Horwitt, *supra* note 66, at 198-99 (depicting situation faced by defendants).

70. See Horwitt, *supra* note 66, at 198-99 (describing strategy of plaintiff faced with settlement possibility).

71. See Horwitt, *supra* note 66, at 198-99 (showing disconnect between allegedly negligent driver and lawsuit consequences).

72. See Horwitt, *supra* note 66, at 197-98 (comparing individuals and businesses with respect to cellular phone use deterrence). Tort law appears to have a greater deterrence impact on business users than individuals. *Id.*; see also Hahn, *supra* note 21, at 138 (revealing more employer cellular phone policies). The Society for Human Resource Management, which represents many employers, has also begun to recommend that companies prohibit cellular phone use by their drivers and employees while driving. Hahn, *supra*, at 138; Cripps, *supra* note 25, at 110-11 (revealing employers being pursued by victims of cellular phone related accidents). Some employers now provide defensive driving courses, including lessons on driving with a cellular phone. Cripps, *supra*, at 110-11; Michael, *supra* note 6, at 301-02 (discussing employers' cellular phone use by employees). Du Pont and the New York City Taxi and Limousine Commission as well as Johnson & Johnson have prohibit employees' cellular phone use while driving. Michael, *supra*, at 301-02.

73. See Horwitt, *supra* note 66, at 198 (describing "Safe Fleet" program at Johnson & Johnson).

74. See Hahn, *supra* note 21, at 138 (describing Southwest Gas Corporation's cellular phone use while driving ban); see Michael, *supra* note 6, at 301-02 (describing Praxair's ban on employees' use of cellular phones while driving).

75. See Michael, *supra* note 6, at 302 (noting alternative ways to discourage cellular phone use by drivers).

76. See Michael, *supra* note 6, at 302 (describing large variety of lawsuits against companies); see also Cripps, *supra* note 25, at 110 (characterizing employers as "under attack").

C. Past Government Legislation—Local, State, and Federal

1. Local Action

In 1999, two instances of distracted driving prompted one Ohio town to enact a ban on cellular phone use while driving.⁷⁷ A driver using a cellular phone nearly ran down a Brooklyn, Ohio police officer's friend, and on a separate occasion the Brooklyn police chief witnessed a driver on his cellular phone run a red light, causing an accident.⁷⁸ Brooklyn became the first municipality in the United States to enact a ban on cellular phone use while driving, and by its action hoped to spark knowledge and awareness in other states and towns.⁷⁹ Drivers entering the town of Brooklyn, Ohio are now greeted with the sign, "Park 2 Talk: It's the Law."⁸⁰

In November 1999, the mother of a two-year-old girl killed by a driver using his cellular phone commenced a campaign called Advocates for Cell Phone Safety.⁸¹ Hilltown, Pennsylvania, where the accident occurred, passed an ordinance similar to Brooklyn's within two months.⁸²

Many cities and towns emulated Hilltown and Brooklyn, enacting their own prohibitions on hand-held cellular use while driving.⁸³ Even Fort Campbell

77. See Hahn, *supra* note 21, at 172 (providing two examples of dangerous cellular phone use in one Ohio town).

78. See Hahn, *supra* note 21, at 172 (describing history of cellular phone ban in Brooklyn, Ohio).

79. See Cripps, *supra* note 25, at 102-03 (citing enactment of Brooklyn's law). Under the ban on cellular phone use while driving in Brooklyn, Ohio, a first-time offender receives a three-dollar, but a second offense can be fined up to one hundred dollars. *Id.* at 102. If driver is involved in an accident while using a cellular phone, fine a up to one hundred dollars can be imposed, regardless of whether the driver has had any previous citations. *Id.*; see also Hahn, *supra* note 21, at 172 (mentioning origin of Brooklyn, Ohio law). One particular officer, Rick Hovan, issued over 285 tickets in the first thirteen months of the ban. Hahn, *supra*, at 172.

80. See Mobydeen, *supra* note 23, at 384 (quoting posted signs in Brooklyn, Ohio).

81. See Hahn, *supra* note 21, at 172 (detailing story of death of two-year-old Morgan Lee Pena). Since the accident, the girl's mother, Patti Pena, has appeared on national television, lobbied legislators, and had a statement read on National Public Radio's "Car Talk." Hahn, *supra*, at 172-73.

82. See Hahn, *supra* note 21, at 172 (describing significant efforts by mother of deceased two-year-old to prevent similar tragedies). The town council of Lebanon, Pennsylvania passed a law banning cellular phone use while driving shortly thereafter. Hahn, *supra*, at 172-73.

83. See Sundeen, *supra* note 1, at 15-16 (listing cities and towns with restrictions on cellular phone use while driving). The list includes: Miami-Dade County, Fla., Pembroke Pines, Fla., Westin, Fla., Brookline, MA., Bloomfield, N.J., Carteret, N.J., Hazlet, N.J., Irvington, N.J., Marlboro, N.J., Nutley, N.J., Paramus, N.J., Santa Fe, N.M., Nassau County, N.Y., Suffolk County, N.Y., Westchester County, N.Y., Brooklyn, Ohio, North Olmstead, Ohio, Walton Hills, Ohio, Conshohocken, Pa., Hilltown Township, Pa., Lebanon, Pa., Lower Chichester, Pa., West Conshohocken, Pa., York, Pa., and Sandy, Ut. *Id.*; see also Savage et al., *supra* note 10, at 40 (referring to local governments efforts to ban cellular phone use while driving); Cripps, *supra* note 25, at 102 (citing local government efforts to curb cellular phone use while driving). As of 2002, over 300 municipalities were considering legislation restricting cellular phone use by drivers. Cripps, *supra*, at 102; Kevin C. Dilworth, *Town Enacts Cell Ban on Road – Irvington Joins Trend, with Some Skeptical*, STARLEDGER, Feb. 9, 2003, at 27 (listing more New Jersey towns that passed ban on cellular phone use while driving). As of February 9, 2003, New Jersey towns Irvington, Bloomfield, Carteret, Hazlet, Nutley, and Marlboro had all passed hand-held cellular phone bans. Dilworth, *supra*, at 27; *States Applying Brakes on Dialing & Driving Limits*, WIRELESS DATA NEWS, Apr. 9, 2003 (listing states dialing and driving laws).

military base in Kentucky banned hand-held cellular phone use while driving.⁸⁴ Suffolk County, New York, in 2000, prior to the state wide ban, passed a “Cellular Phone Law,” the first of its kind.⁸⁵ Local lobbyists, like Patti Pena, the mother of the Hilltown two-year-old, hoped that inconsistent legislation at the municipal level would encourage state legislatures to take action for the anti-cellular phone movement.⁸⁶

2. Preemption of Local Law

Many states responded, but instead of supporting local laws, states actually undermined municipalities, stripping their power to regulate cellular phone use while driving.⁸⁷ Because state legislatures are concerned with uniformity within their borders, they only allow municipalities to enact laws consistent with state statutes.⁸⁸ To this end, state legislatures must review local actions and decide whether municipalities’ traffic laws actually conflict with the state laws.⁸⁹ For example, in Pennsylvania, at the time of the enactment of the Hilltown ordinance, cellular phones were not mentioned in state-level laws or regulations, and therefore conflicted with existing state law.⁹⁰ Many other state legislatures, notably Kentucky, Oklahoma, and Oregon, have also favored uniformity over safety for drivers and their communities.⁹¹ In many states, the

84. See James Malone, *Fort Campbell Limits Cell-Phone Use in Cars*, COURIER-J., Sep. 13, 2004, available at <http://www.courier-journal.com/localnews/2004/09/13ky/A1-cellularphone0913-6372.html> (last visited January 6, 2005) (describing Fort Campbell, Kentucky’s ban on cellular phone use in cars). The ban took effect on September 22, 2004, and restricts soldiers and their family members from using cellular phones while driving. *Id.*

85. See Cripps, *supra* note 25, at 103 (describing Suffolk County ban). This was a significant event because Suffolk County, New York is larger than fifteen states. *Id.*

86. See Cripps, *supra* note 25, at 103 (reflecting goals of lobbyists in favor of banning cellular phone use while driving). *But see* Savage et al., *supra* note 10, at 40 (referring to municipalities with cellular phone use legislation, noting five stopped enforcing law by end of 2001); Sundeen, *supra* note 1, at 16 (explaining how many states took action in response to emerging local laws). Between state attorney general’s opinions, the court system, and state-wide preemption, many of the laws passed by towns are not enforced. Sundeen, *supra*, at 16

87. See Cripps, *supra* note 25, at 103-04 (illustrating states’ ability to undermine local laws through preemption).

88. See Cripps, *supra* note 25, at 103-04 (noting local governments can create traffic laws not in conflict with already existing state laws).

89. See Cripps, *supra* note 25, at 103-04 (explaining dilemma posed by state preemption of local laws).

90. Cripps, *supra* note 25, at 104 (outlining Pennsylvania court’s decision to strike down local ordinance). The Pennsylvania state court ruled that although the state had not enacted anything on the subject, the town’s ordinance conflicted with state driving regulations because the cellular phone law was stricter than existing state laws. *Id.* Critics argue that the cellular phone laws are about basic “public safety” and not within the clear statewide jurisdiction of “traffic safety.” *Id.* The state responded that the critics are arguing over semantics and that the regulation of roads is clearly a state government exercise. *Id.*; see also Sundeen, *supra* note 1, at 16 (discussing examples of state law pre-empting local law in the area of cellular phone use while driving). The Legislature stepped in and banned use in several local communities. Sundeen, *supra*, at 16.

91. See OKLA. STAT. ANN. tit. 47, § 15-102.1 (West 2004) (codifying preemption); Malone, *supra* note 84 (listing other states where state preemption exists). The state governments in Kentucky, Oklahoma, and Oregon have all denied towns the ability to pass their own ordinances regarding cell phone use while driving.

struggle over preemption still exists as those state legislatures continue to argue over whether towns may regulate themselves or whether the state should enact a statewide policy.⁹²

3. State Action

The hope that local action would inspire state legislatures to provide statewide uniformity for cellular phone use while driving laws has yet to prove true.⁹³ Many experts cite the lack of a strong unified force opposing the influential cellular phone industry as the main hindrance to state action.⁹⁴ While state congressional representatives have proposed and sponsored a myriad of legislation, very few bills have actually passed.⁹⁵ Every state, however, has proposed legislation over the last four years, indicating a clear trend of states imposing limitations on phone use while driving.⁹⁶

While most states have not enacted statutes banning hand-held cellular use while driving like those in New York, New Jersey, and Washington D.C., some states have enacted laws that limit one's ability to drive and talk.⁹⁷ The

Malone, *supra*; see also Cripps, *supra* note 25, at 104 (discussing Pennsylvania's battle between state and towns over regulation of cellular phone use). State governments, in many states, have determined that it is unreasonable to change one's driving habits when passing from town to town. See Cripps, *supra*, at 103.

92. See Sundeen, *supra* note 1, at apps. A, B (listing pending and existing legislation on use of cellular phones while driving). By the end of 2003, Delaware, Florida, Kentucky, Louisiana, Mississippi, Nevada, Ohio, Oklahoma, and Oregon, Washington had all considered or passed preemption laws. *Id.*; see also Lissy et al., *supra* note 6, at app. C (addressing 2000 legislation regarding use of cellular telephones while driving). Between 1995 and 2000, legislators from thirty states proposed more than one hundred bills regarding restrictions on cellular phone use. Lissy et al., *supra*, at 59. As of 2000, over three hundred cities and towns had considered banning cellular phone use by drivers. *Id.*

93. See Cripps, *supra* note 25, at 103 (describing localities taking action as impetus for state governments).

94. See Cripps, *supra* note 25, at 105 (describing need for stronger lobbying power against use of cellular phones while driving). Proposals in over thirty-seven states never survived the legislative process mainly because there is no strong force against cellular phone use. *Id.*

95. See Richards, *supra* note 9, at B1 (describing defeated bill in California limiting cellular phone use by requiring hands-free device in cars). One state senator allegedly succumbed to the cellular phone companies demands by adding banning other activities, such as eating and applying makeup, thereby making the bill far less desirable and practical. *Id.*; see also Hahn, *supra* note 21, at 134 (noting 46 states proposed 146 bills in 2001). Some states have proposed that a person is presumed to be at fault if they were using a cellular phone when an accident occurred is presumed to be at fault. See Cripps, *supra* note 25, at 106-07; see also Collar, *supra* note 11, at C1 (outlining failed Wisconsin bill, requiring hands-free equipment for talking while driving); Komperda, *supra* note 11, at 3 (outlining failed Illinois bill allowing police to ticket drivers for using cell phones while driving). The Illinois legislature considered adding specific language to prevent first-year drivers from using cellular phones while driving at all, the bill itself only allowed ticketing for using a cellular phone while committing a traffic violation. See Komperda, *supra*, at 3; see also Ring, *supra* note 11, at A1 (outlining failed Massachusetts bill making use of hand-held cellular phone primary offense).

96. See Sundeen, *supra* note 1, at app. A (listing each state's 2003 distracted driving legislation). Forty-two states proposed 116 bills in 2003. *Id.* at 4; see also Savage et al., *supra* note 10, at 10 (citing twenty-seven states in 2000 and fifteen in 1999 proposed legislation).

97. See Lissy et al., *supra* note 6, at app. C (compiling state-by-state review of legislation enacted as of July 2000); see also Savage et al., *supra* note 10, at app. F (listing existing restrictions on cellular phone use as of 2001); Sundeen, *supra* note 1, at 4-13 (listing all proposed, defeated, and enacted 2003 legislation relating to

Connecticut Legislature, in fact, recently enacted House Bill 6722, which, beginning on January 1, 2006, prohibits hand-held cellular phone use by drivers in almost the same fashion as New York, New Jersey, and Washington D.C.⁹⁸ Arizona, Arkansas, Illinois, Massachusetts, Rhode Island, and Tennessee all prohibit bus drivers from using cellular phones except in emergency situations.⁹⁹ Maine and New Jersey prohibit younger and less experienced drivers from using cellular phones.¹⁰⁰ Some legislative bans also target video screens viewable to the driver.¹⁰¹

4. Federal Action

In 2000, when Congress conducted hearings to review potential legislation, the House of Representatives subsequently introduced the Driver Distraction Prevention Act of 2000.¹⁰² However, the overall lack of response from the federal government has sparked a heated debate in Congress.¹⁰³ One of the first attempts to achieve federal uniformity was a bill authored by Senator Jon Corzione (D-N.J.) and sponsored by Representative Gary Ackerman (D-N.Y.) in 2001, but the bill failed to pass the Senate Committee on Environment and Public Works.¹⁰⁴ After failing ratification, Senator Corzione tried again in

cellular phone use by drivers); Mark Smith, *Regulating Cell Phone Use While Driving*, 2002 U.C.L.A. J.L. & TECH. 21 (2002) (discussing current and proposed legislation of cellular phone use while in car).

98. See cga.ct.gov, An Act Concerning the Use of Hand-Held Mobile Telephones and Hand-Held Mobile Electronic Devices by Operators of Motor Vehicles, <http://www.cga.ct.gov/2005/fc/2005HB-06722-R000290-FC.htm> (last visited Oct. 20, 2005) (presenting new Connecticut law prohibiting use of cellular phones by drivers). The Connecticut law carves out similar exceptions to New York, New Jersey, and Washington D.C. *Id.* The use of a hands-free device, operating a cellular phone in emergency situations, and the use of a cellular phone by law enforcement or emergency personnel are all permitted uses in Connecticut. *Id.* The law punishes first offenders with a seventy-five dollar fine, with two-hundred fifty dollars being the largest possible fine upon a third and subsequent offense. *Id.*; GHSA.org, Cell Phone Restrictions - State and Local Jurisdictions, http://www.ghsa.org/html/stateinfo/laws/cellphone_laws.html (last visited Oct. 18, 2005) (detailing current legislation regulating cellular phone use by drivers); housegop.state.ct.us, Representative Frey: Legislature Approves Cellular Phone Laws, <http://housegop.state.ct.us/pressrel/Frey/2005/press111t.htm> (last visited Oct. 18, 2005) (stating Connecticut law now awaits approval into law by Governor M. Jodi Rell).

99. See Sundeen, *supra* note 1, at app. B (cataloguing existing state laws concerning cellular phone use by bus drivers).

100. See Sundeen, *supra* note 1, at app. B (listing existing state age restrictions on cellular phone use while driving).

101. See Sundeen, *supra* note 1, at app. B (listing existing state laws concerning other technology banned from use by drivers). California and Louisiana have also banned video display screens viewable by the driver. *Id.*

102. See Cripps, *supra* note 25, at 107 (discussing federal government attempts to investigate effects of driver distraction on highway safety).

103. See Savage et al., *supra* note 10, at 12 (discussing proposed legislation); Sundeen, *supra* note 1, at 14 (discussing lack of federal government response to flurry of state legislative activity).

104. See Savage et al., *supra* note 10, at 12 (describing legislation requiring states to prohibit hand-held cellular phone use or lose federal transportation funding). The "Call Responsibly and Stay Healthy Act of 2001" and the "Mobile Telephone Safety Act of 2001" directed the Secretary of Transportation to withhold federal funding from those states that did not prohibit cellular phone use. See Mobydeen, *supra* note 23, at 380; see also Hahn, *supra* note 21, at 134-37 (referring to 2001 proposed legislation).

2003 after Senate Bill 179 passed the Senate, but Corzione's bill remains in the committee's hands and is not expected to move.¹⁰⁵

New national agencies seek to bring public attention to the issue and investigate if a problem really exists.¹⁰⁶ While the NHTSA leads the way in research, other agencies have significantly augmented their efforts.¹⁰⁷ Surprisingly, the NHTSA has decided to eschew the federal regulation movement, citing a lack of authority.¹⁰⁸ Dr. Jeffrey Runge, the 2001 appointed head of the NHTSA, explains that the NHTSA has no jurisdiction to regulate cell phone use by drivers because the cellular phone is not part of a car.¹⁰⁹ With the proposed legislation at a standstill, and federal agencies lacking the power to institute change, it does not seem likely that the federal government will regulate drivers' cellular phone use anytime soon.¹¹⁰

D. The Existing State Laws

I. New York

In November 2001, New York Vehicle and Traffic Law § 1225-c went into effect, stating in relevant part, a primary offense: “[e]xcept 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.”¹¹¹ The law also provides for a first time penalty not exceeding

105. See Sundeen, *supra* note 1, at 14 (discussing bill proposing five percent reduction in federal funds for first-year violation). Following the first-year, states there risk losing an additional ten percent of federal transportation funds for each year of subsequent violations. *Id.*

106. See Sundeen, *supra* note 1, at 15 (highlighting rise of NTSB). Sundeen's report also mentions increasing contributions of the NHTSA, the National Governors' Highway Safety Administration (NGHSA), and the Model Minimum Uniform Crash Criteria publication. *Id.*; see also Mobydeen, *supra* note 23, at 381-82 (mentioning impact of FCC and FDA).

107. See Savage et al., *supra* note 10, at 12 (discussing NHTSA's studies of driver behavior showing impact of certain "dangerous" activities while driving). As far back as 1997, the NHTSA was studying the impact of wireless technology in cars; the administration has become a public forum and awareness group. *Id.*; see also Sundeen, *supra* note 1, at 15 (discussing federal agency attempts to improve data collection). The NGHSA published its new edition of the Model Minimum Uniform Crash Criteria in June 2003, intended to assist in measuring the effects of driver distraction on crashes. See Sundeen, *supra*, at 15.

108. See Sundeen, *supra* note 1, at 15 (noting NHTSA's lack of jurisdiction to regulate because cellular phones are not part of cars).

109. See Savage et al., *supra* note 10, at 12 (indicating Runge not prepared for federal regulation upon his appointment in August 2001).

110. See Cripps, *supra* note 25, at 107 (citing traditional role of states as primary force to enact and enforce traffic safety); see also Savage et al., *supra* note 10, at 12 (noting lack of federal action to date regarding cellular phone use while driving); Sundeen, *supra* note 1, at 14 (referring to lack of federal legislation of cellular use while driving).

111. See N.Y. VEH. & TRAF. LAW § 1225-c (McKinney 2001) (punishing use of cellular phone while driving); Jones, *supra* note 12 (noting start date of hand-held cellular phone ban); see also Sundeen, *supra* note 1, at 12-13 (citing statute); Hahn, *supra* note 21, at 132 (referring to cellular phone law passed in New York in summer 2001); Mobydeen, *supra* note 23, at 384 (noting New York as first state with state wide ban on hand-held cellular phones).

one-hundred dollars.¹¹² There are three exceptions to the ban on cellular phone use: an emergency situation; use by law enforcement personnel; and operation of the cellular phone through a hands-free device.¹¹³ Since its inception, the law has survived constant constitutional attacks from petitioners.¹¹⁴

Enforcement of the New York law has, at times, been effective and consistent, however, some think that the allure has worn off, and law enforcement personnel as well as drivers are ignoring the law.¹¹⁵ The law seems to also be struggling to convince the insurance business to become a spokesperson for an increase in safety.¹¹⁶ Robert Hartwig, the senior vice president and chief economist of the Insurance Information Institute, notes that insurance activity in New York is similar to other states without analogous laws, and therefore, the law has not created a feeling of safety or a corresponding insurance discount.¹¹⁷ Hartwig cites two surveys conducted by the Insurance Institute for Highway Safety in four upstate New York communities that reveal cellular phone usage rates have not declined since the law's enactment.¹¹⁸

2. New Jersey

New Jersey followed New York in enacting its version of a ban on cellular phone use while driving, which became effective July 1, 2004.¹¹⁹ The New Jersey law carves out unique exceptions to the state-wide hand-held ban, allowing cellular phone use while driving when the driver "fear[s] for his life or safety, or believes that a criminal act may be perpetrated against [him]. . . [or] to

112. N.Y. VEH. & TRAF. LAW § 1225-c (McKinney 2001) (limiting first-time penalty).

113. N.Y. VEH. & TRAF. LAW § 1225-c (McKinney 2001) (detailing permissible use of cellular phone while driving); *see also* Perrotta, *supra* note 49, at 1 (mentioning hands-free carveout in law); Cripps, *supra* note 25, at 106 (mentioning hands-free aspect of law). The New York law, however, does not address dialing and driving. Cripps, *supra* note 25, at 106.

114. *See People v. Neville*, 737 N.Y.S.2d 251, 255-56 (N.Y. Just. Ct. 2002) (attacking law based on vagueness and equal protection grounds); *see also* Perrotta, *supra* note 49, at 1 (referencing *Neville* case).

115. *See* Lehmann, *supra* note 10 (quoting Robert Hartwig, of the Insurance Information Institute, stating law not relevant to insurers). Although the official study does not come out until December 2005, Hartwig suspects that the accident rates are the same as they were before the law was enacted. *Id.*; *see also* Jones, *supra* note 12 at A3 (stating 270,000 tickets issued in law's first three and a half years).

116. *See* Lehmann, *supra* note 10 (citing lack of reaction from insurance business).

117. *See* Lehmann, *supra* note 10 (describing law as irrelevant to insurers).

118. *See* Lehmann, *supra* note 10 (referencing surveys). The use of cellular phones by drivers decreased by fifty percent immediately after the law's inception, but a survey in March 2003 reports that the use of cellular phones by drivers is currently the same as it was before the state wide ban. *Id.*

119. N.J. STAT. ANN. § 39:4-97.3 (West 2004) (prohibiting cellular phone use while driving); *see also* Governor, *supra* note 10 (quoting Governor of New Jersey after signing bill). The legislation was prompted by a poll illustrating New Jersey voters overwhelmingly favor a ban on hand-held cellular phone use. Governor, *supra*; *see also* Matteson, *supra* note 21, at A6 (recounting first day of new law); Lehman, *supra* note 10 (investigating new law); *see also* Jones, *supra* note 12, at A3 (noting first day of law); Cadrain, *supra* note 12, at 30 (noting New Jersey as second state to enact ban on cellular phone use while driving).

report a fire, a traffic accident” and in other emergency situations.¹²⁰ Violating the law costs drivers between one-hundred and two-hundred and fifty dollars.¹²¹ To receive a fine, however, the driver must be pulled over for some other offense, and be caught using their cellular phone while committing the other offense.¹²² Unlike New York, driving and talking is not enough to be reprimanded; the New Jersey law’s secondary offense provision distinguishes it from the New York law.¹²³

While eighty-five percent of the voters favored the law, the drastic number of violations reveal either that New Jersey drivers do not care about paying fines, or that the traditional problem of always blaming someone else persists.¹²⁴ During the first two months of the law’s enactment, 2,037 tickets issued, and 692 people were convicted of breaking the law.¹²⁵ Even with the numerous violations and fines assessed, drivers continue to use their cellular phones.¹²⁶ Fellow drivers, many of whom have not noticed a reduction in cellular phone use, complain about the new law.¹²⁷ Critics often cite that a secondary offense is not enough to deter talking drivers.¹²⁸ Critics complain that the law needs to be more direct, and should not contain so many loopholes.¹²⁹ Fran Wood, a journalist for the *Star-Ledger* in New Jersey, does not hide her disdain, “. . .it’s astonishing to me that the head of a federal board [Ellen Engleman Connors, head of the National Transportation Safety Board, NTSB] entrusted with studying and devising measures to keep us safe would discourage laws that could curtail a practice that clearly makes our roads less safe.”¹³⁰

120. N.J. STAT. ANN. § 39:4-97.3 (West 2004) (allowing cellular phone use by drivers in special circumstances); see also Governor, *supra* note 10 (reporting Governor’s speech upon signing bill into law, noting statewide uniformity).

121. N.J. STAT. ANN. § 39:4-97.3 (West 2004) (outlining penalty for violation of New Jersey law); see also Governor, *supra* note 10 (quoting statute); see also Lehman, *supra* note 10 (discussing law); Cadrain, *supra* note 12, at 30 (breaking down penalty under law).

122. See Cadrain, *supra* note 12, at 30 (noting secondary offense aspect). The police may only issue a ticket when stopping a driver for some other offense, and they were using the cellular phone. *Id.*; see also Governor, *supra* note 10 (commenting on secondary offense aspect); Wood, *supra* note 21, at 3 (outlining secondary offense facet).

123. N.J. STAT. ANN. § 39:4-97.3 (West 2004) (distinguishing New Jersey’s law from that of New York’s). See Wood, *supra* note 21, at 3 (referring to secondary offense aspect); see also Matteson, *supra* note 21, at A6 (describing parameters of law). No motor vehicle or automobile insurance eligibility points are assessed for a violation of this law. Matteson, *supra*, at A6.

124. See Lehman, *supra* note 10 (citing poll of voters who favored ban); see also Wood, *supra* note 21, at 3 (revealing statistics concerning assessed fines).

125. See Wood, *supra* note 21, at 3 (highlighting early effects of law).

126. See Wood, *supra* note 21, at 3 (noting drivers’ ignorance of law).

127. See Wood, *supra* note 21, at 3 (questioning effectiveness of statute).

128. See Wood, *supra* note 21, at 3 (describing inefficacy of statute).

129. See Wood, *supra* note 21, at 3 (criticizing statute for vagueness).

130. Wood, *supra* note 21, at 3 (admonishing laws designed by state and federal governments); see also Nakamura, *supra* note 10, at A1 (citing D.C. Council vote). The D.C. Council passed the law on January 6, 2004, and Mayor Anthony Williams planned on signing it into law with Congress’ approval. Nakamura, *supra*,

3. Washington, D.C.

On the same day that the New Jersey cellular phone law became effective, the “Distracted Driving Safety Act of 2004” became law in Washington D.C.¹³¹ The D.C. law is far more extensive than the New York or New Jersey laws, including sections about education, police reporting, and prohibitions on cell phone use by bus drivers and persons with learners’ permits.¹³² The statute contains the typical exceptions for emergency calls and for law enforcement personnel.¹³³ The law fines a driver one hundred dollars for each offense, but allows the first-time offender to waive the fine by purchasing a hands-free device and returning the receipt with the citation.¹³⁴

While all but one of the D.C. lawmakers viewed the legislation as a victory for driver safety, critics condemn the law as providing a false sense of security.¹³⁵ Jonathan Adkins, a spokesman for the Governor’s Highway Safety Association (GHSA), fears that the law makes people think that it is safe to use a cellular phone, if accompanied with a hands-free device.¹³⁶ Adkins’ group feels that a total ban of cellular phone use in cars - including hands-free devices - is the only way to increase safety.¹³⁷ Washington D.C. Council Chairman Linda W. Cropp (D) responded to Adkins’ argument by stating, “[t]his law is not trying to keep people from using their cell phones. We’re just saying that when you use your cell, think of public safety.”¹³⁸ It thus appears as if the impetus behind the D.C. law is not to stop cellular phone conversations, like in

at A1.

131. 2004 D.C. STAT. 15-124 (prohibiting use of cellular phones while driving); Jones, *supra* note 12, at A3 (noting start date for D.C. law same as New Jersey law); Lehman, *supra* note 10 (referring to July start date for New Jersey law); Nakamura, *supra* note 10, at A1 (describing how D.C. law passed twelve to one). Jim Graham was the only council member who opposed the ban on cellular phone use while driving, he reasoned that the police should be spending more time on “more serious crimes” like robbery and murder. Nakamura, *supra*, at A1; *see also* Cadrain, *supra* note 12, at 30 (mentioning Mayor Anthony Williams and Congress approved ban).

132. 2004 D.C. STAT. 15-124 (providing a multitude of alternative prohibitions). Section five of the law prohibiting cellular use by bus drivers and drivers with learners’ permits, prohibits the use of hands-free devices. *Id.* Section seven requires police to report use of a cellular phone in an accident. *Id.* Section eight encourages education by making distracted driving and mobile telephone usage a viable subject for questions on the driver’s license exam. *Id.*

133. 2004 D.C. STAT. 15-124 (exempting emergencies, initiating or terminating phone call, turning phone on or off, and law enforcement).

134. 2004 D.C. STAT. 15-124 (noting ability of offender to remove fine). Section six reads: “. . . the fine shall be suspended for a first time violator who, subsequent to the violation but prior to the imposition of a fine, provides proof of acquisition of a hands-free accessory of the type required by this act.” *Id.*; *see also* Jones, *supra* note 12, at A3 (explaining waiver provision).

135. *See* Nakamura, *supra* note 10, at A1 (citing dissent amongst pundits). The proponents of the bill see it as forcing drivers to think about using cellular phones carefully, but the opponents see the bill as misguided and deceiving. *Id.*

136. *See* Nakamura, *supra* note 10, at A01 (downplaying effectiveness of law on creating safety).

137. *See* Nakamura, *supra* note 10, at A1 (suggesting hands-free devices not effective enough in decreasing accidents).

138. *See* Nakamura, *supra* note 10, at A1 (quoting D.C. Council Chair).

New York or New Jersey, but rather to make people more aware of public safety by discouraging the activity.¹³⁹ Still, despite certain critics' commentary that the New York and New Jersey laws are more powerful, a majority of the population in Washington D.C. agree with their Council.¹⁴⁰

E. Hand-Held Versus Hands-Free

Studies are beginning to show that there is no difference between drivers who use hand-held phones and those who use hands-free devices, or that cellular phones are even as big of a driving distraction as some claim.¹⁴¹ Many researchers, for example, say the occupation of a driver's thoughts, the real problem behind a driver's distraction, occurs regardless of the type of cellular phone a driver uses, resulting in no discernable distinctions between the two.¹⁴² "[t]he cognitive distraction caused by cell phone use is a problem that cannot be eliminated by hands-free requirements."¹⁴³ In fact, research shows that dialing is the only activity proven to be safer when using hands-free technology.¹⁴⁴ Unfortunately, this study assumes that "most hand-held phones are manually dialed and most hands-free phones are voice activated," an assumption not supported by data.¹⁴⁵ In 1997, two Canadian scientists, Redelmeier and Tibshirani, detected no statistical advantage of hands-free over hand-held designs, thereby concluding that the problem lay in the driver's minds and not hands.¹⁴⁶ In 1999, Hahn and Tetlock went further in concluding that a ban on hand-held cellular phone use, but not hands-free devices, would

139. See Nakamura, *supra* note 10, at A1 (referring to law as "deterrent").

140. See Nakamura, *supra* note 10, at A1 (noting lack of complaints voiced to Council members). Councilwoman Carol Schwarz, a primary creator of the law, noted that six months after the law took effect she had not received a single complaint, because people "realize its day has come." *Id.*

141. See Matteson, *supra* note 21, at A6 (suggesting cellular phone conversation is distracting regardless of type of cellular phone); see also Hahn, *supra* note 21, at 151-67 (reviewing studies researching effects of cellular phone use while driving); Abdel-Aty, *supra* note 25, at 38 (exhibiting no discernable difference between hand-held and hands-free devices); Sundeen, *supra* note 1, at 3 (discussing study which ranked cell phone use eighth on list of distractions causing automobile crashes); Horwitt, *supra* note 66, at 201 (finding no differences between types of phones); Lissy et al., *supra* note 6, at 1, 15, 18, 30-1, 58 (citing multiple studies on distracted driving and hands-free device effectiveness).

142. See Lissy et al., *supra* note 6, at 1, 15 (downplaying effectiveness of hands-free device). The driver still uses mental energy while talking whether or not they hold the phone to their ear. *Id.*

143. See Sundeen, *supra* note 1, at 17 (explaining distraction cannot be eliminated by hands-free devices). Studies published in Sweden and the NEJM determined that hands-free device legislation does not solve the mental distraction problem. *Id.*

144. See Lissy et al., *supra* note 6, at 18 (noting insufficient data concerning safety advantage of hands-free devices). While most studies tend to focus on one model, a study conducted by Serafin et al. presented at the 37th Annual Meeting of the Human Factors and Ergonomics Society specifically compared the hands-free device to a hand-held phone. *Id.*; see also Sundeen, *supra* note 1, at 17 (noting advantages of hands-free phone device); Hahn, *supra* note 21, at 151-55 (citing many studies reaching similar conclusion).

145. See Hahn, *supra* note 21, at 155 (reviewing effect of hands-free phone dialing).

146. See Lissy et al., *supra* note 6, at 30-31 (explaining results of Canadian study). The study looked at the cellular phone activity of almost seven hundred drivers in relation to getting into car accidents. *Id.* at 30; see also Horwitt, *supra* note 66, at 201 (citing Redelmeier and Tibshirani study).

actually have higher costs than benefits.¹⁴⁷

Crash data also shows that the hands-free device does not prevent accidents because the real distraction was the conversation.¹⁴⁸ Using two databases of crash information from police reports, independent investigators, and medical records the NHTSA, the studies found that the only unifying characteristic of the drivers involved in accidents was that they were talking on the phone, not dialing.¹⁴⁹ Crash data from North Carolina supports the premise that engaging in conversation, not dialing, causes the problem.¹⁵⁰ The NHTSA relied on this data in finding that a mere ten percent of accidents involved dialing, while the overwhelming majority instead involved conversation in some form.¹⁵¹

F. Scientific Proof: Occupation of the Mind

Many studies indicate that the types of conversations drivers have while on their cellular phones is the real distraction.¹⁵² The Strayer study involved forty drivers who attempted to follow a pace car while speaking on a cellular phone using a hands-free device.¹⁵³ The study showed that the subjects had slower brake times, more collisions with the pace car, and increased distance behind the pace car.¹⁵⁴ The study not only concluded that conversation harmfully affected driving performance, but that driving performance worsened as the difficulty of driving increased.¹⁵⁵

Another study, conducted by the Insurance Corporation of British Columbia, put drivers on an open road course to test their acceleration/deceleration and reaction time.¹⁵⁶ The study required the drivers to react to a stoplight, maneuver around pop-up targets, and perform a left turn.¹⁵⁷ Like the Strayer

147. See Lissy et al., *supra* note 6, at 58 (noting lack of practicality in cell phone prohibition). The study tried to assess the benefits and costs of cellular phone bans actual monetary units, finding that a total prohibition on cellular phone use had costs that outweighed its benefits. *Id.*

148. See Hahn, *supra* note 21, at 162-63 (highlighting NHTSA conclusion).

149. See Hahn, *supra* note 21, at 163 (reporting engaging in conversation as most frequent factor in automobile accidents).

150. See Hahn, *supra* note 21, at 163 (examining causal factor of conversation while driving). The database in North Carolina was not as extensive as the other national databases, but rather it was an electronic version of handwritten accounts of accidents. *Id.*

151. See Hahn, *supra* note 21, at 163 (reporting findings of NHTSA).

152. See Hahn, *supra* note 21, at 159 (referencing scientific data on driver distraction). One study was conducted by David L. Strayer and William A. Johnston. Strayer, *supra* note 23. Another study was done by the Insurance Corporation of British Columbia. ICBC, *supra* note 23; see also Matteson, *supra* note 21, at A6 (mentioning study).

153. See Hahn, *supra* note 21, at 158 (describing Strayer study). The study's authors of the study noted that they intentionally limited the amount of distractions outside the car. *Id.* There was no dialing performed by the test subjects during this test. *Id.* at 158-59; Matteson, *supra* note 21, at A6 (citing Strayer study).

154. See Hahn, *supra* note 21, at 159 (revealing results of study).

155. See Hahn, *supra* note 21, at 159 (discussing opinion of study's); Matteson, *supra* note 21, at A6 (observing no difference between hand-held and hands-free devices).

156. See Hahn, *supra* note 21, at 159 (citing study criteria).

157. See Hahn, *supra* note 21, at 159 (delineating study requirements).

study, the subjects used a hands-free device and were asked yes or no questions while driving.¹⁵⁸ This study is lauded for several reasons, including the use of real cars as opposed to a simulator and for the use of a hands-free device, allowing the researchers to isolate the effects of conversation on the drivers.¹⁵⁹ Study subjects altered their driving significantly, evidenced by their tentative approach to stop lights, and diminished ability to move the car laterally or turn.¹⁶⁰

Many other studies indicate that it is conversation, not the occupation of physical faculties, that impairs driving.¹⁶¹ Drivers talking on their cellular phones only remember half as many physical objects outside the car as those who are not on a cellular phone.¹⁶² Most of the studies showed that more important or complex conversations further diminished the drivers' driving ability.¹⁶³

The driving simulation experiments conducted at the University of Central Florida were arguably the most extensive studies involving both hand-held and hands-free devices.¹⁶⁴ The test subjected drivers to three different situations: before the phone call, during the phone call, and after the phone call.¹⁶⁵ The test included observation of typical driving errors, including lane deviations, whether the car left the road, crossed the median, sped, crashed, or failed to stop.¹⁶⁶ The most frequent errors the drivers committed were lane deviations and crossing the median.¹⁶⁷ The test found no significant statistical differences in the results between hand-held users and hands-free users except with respect to speeding.¹⁶⁸ The study concluded that the problem was driver distraction, and that there was no difference between hand-held and hands-free.¹⁶⁹ In fact, one of the study's major findings was that the third phase of the test, after the

158. See Hahn, *supra* note 21, at 159 (highlighting absence of physical distractions).

159. See Hahn, *supra* note 21, at 159 (revealing latent effects of conversation on drivers' abilities).

160. See Hahn, *supra* note 21, at 159 (noting impairment of drivers due to responding to questions while driving).

161. See Matteson, *supra* note 21, A6 (reporting findings of other studies). These other studies tested drivers' ability to drive depending on the importance of the conversation and their ability to remember objects they saw while driving. *Id.*

162. See Matteson, *supra* note 21, A6 (reporting findings of other studies). The test required subjects to remember objects outside of the car including billboards and road signs. *Id.* The study also found that the drivers had no recognition of their driving being impaired. *Id.*

163. See Matteson, *supra* note 21, at A6 (discussing results of other studies).

164. See Abdel-Aty, *supra* note 25, at 38 (reporting results of the ITE study).

165. See Abdel-Aty, *supra* note 25, at 38 (outlining driver distraction test). The test also provided for different traffic densities on a scale of 0 to 100 with 20 being low traffic density and 80 being high traffic density. *Id.* The test drivers went through each of the three stages of driving twice, once while talking with a hands-free device, and once with a hand-held device. *Id.*

166. See Abdel-Aty, *supra* note 25, at 38 (describing test criteria).

167. See Abdel-Aty, *supra* note 25, at 38 (highlighting results).

168. See Abdel-Aty, *supra* note 25, at 38 (noting only difference disobeying speed limit).

169. See Abdel-Aty, *supra* note 25, at 38 (commenting on hand-held and hands-free distinction). The average number of driving errors for hand-held users was six, and the average number of errors for hands-free users was six-and-a-half. *Id.*

phone call, was the most problematic for some of the drivers, further substantiating the hypothesis that occupation of the mind, not the hands, poses the greatest risk for drivers.¹⁷⁰

III. ANALYSIS

A. State Governments Are Missing the Point

Whether statutes label cellular telephone use while driving as primary or secondary offenses, they all make the same mistake of distinguishing between hand-held and hands-free use.¹⁷¹ When the New York Legislature enacted the “Cellular Phone Law” it did not have the benefit of the many studies conducted since its enactment, showing that while hands-free devices do allow for the use of all physical faculties, there still is the occupation of the driver’s mind.¹⁷² “The actual problem is one of attention. Even with the hands-free device, the performance is impeded because the driver’s attention is divided between driving and the phone conversation.”¹⁷³ State governments have all ignored this available research showing that hands-free devices are just as dangerous while driving as using a hand-held cellular telephone.¹⁷⁴ The “Cellular Phone Law” was revolutionary when it was enacted, but has since not been updated to reflect this new research.¹⁷⁵

As Jonathan Adkins, spokesman for the GHSA, argued, state governments have given drivers a false sense of security by suggesting that somehow drivers are safer when they have two hands on the wheel and an earpiece in their ears.¹⁷⁶ This false perception will actually encourage and allow drivers to legally remain on their phones longer, while creating a greater risk to others on the road.¹⁷⁷ Washington, D.C. puts great emphasis on the hands-free device, allowing drivers to be completely absolved of a cell phone related driving

170. See Abdel-Aty, *supra* note 25, at 38 (discussing findings).

171. See *supra* Parts II.D. (describing cellular use restriction laws in New York, New Jersey, and Washington, D.C.).

172. See *supra* Parts II.E, II.F and accompanying text (noting recent studies showing that hands-free use is not safer than hand-held use).

173. See Matteson, *supra* note 21, at A6 (quoting William A. Johnston, cognitive psychologist at University of Utah).

174. See *supra* Part II.F and accompanying text (presenting two important studies proving hand-held and hands-free are equally dangerous).

175. See *supra* Parts II.E, II.F and accompanying text (highlighting many emerging studies showing no distinction between hands-free and hand-held).

176. See *supra* notes 135-140 and accompanying text (noting major problem with thinking hands-free device creates safety).

177. See Jones, *supra* note 12, at A3 (revealing false sense of security involved with hands-free cellular phone use). Mantill Williams, a spokesman for AAA, said that the real problem lies in the conversation and not the actual phone. *Id.*; see also Nakamura, *supra* note 10, at A1 (noting similar stance of GHSA). The organization is worried that drivers will think the activity is safe as long as a hands-free device is used. Nakamura, *supra*, at A1.

violation with the proof of purchase of a hands-free device.¹⁷⁸ This emphasis creates the public perception that using a cellular telephone while driving is safe as long as the driver's hands are free.¹⁷⁹ Additionally, by drawing so much attention to hand-held cellular phone use, legislatures are ignoring the emerging data showing that there is little difference between drivers using their cellular phones with or without their hands.¹⁸⁰ The D.C. legislature stated that the law is not designed to prevent cellular phone use, but rather to force people to think about safety.¹⁸¹ The law, unfortunately, has the opposite effect.¹⁸² Once the earpiece goes in, drivers have no reason to think about safety because they have been told that they are safe as long as their hands are free.¹⁸³

The New Jersey Legislature has hypothesized that existing laws already deal with the hands-free problem.¹⁸⁴ While some regulation on cellular phone use while driving is necessary, every state has existing reckless driving laws that, if strictly enforced, would be effective where the cellular phone laws are not.¹⁸⁵ As the New Jersey law is a secondary offense, it requires the officer to find some other driving violation before ticketing a driver for cellular phone use.¹⁸⁶ This shifts the emphasis back to driving ability, as opposed to cellular phone use, which comports with the original purpose of the law: to create safer roads.¹⁸⁷ Using a cellular phone itself does not cause accidents; the true culprit is the reckless and distracted driving that often results from the cellular phone use.¹⁸⁸ New Jersey's experience shows that it would be more effective to strictly enforce the reckless driving laws already in force, and impose additional fines on drivers who use cellular phones.¹⁸⁹

178. See *supra* note 134 and accompanying text (citing D.C. law's forgiveness for violating drivers that purchase hands-free device).

179. See *supra* notes 135-136 and accompanying text (describing danger of heavy promotion of hands-free devices).

180. See Matteson, *supra* note 21, at A6 (citing studies conducted by University of Utah scientists showing no difference between two).

181. See *supra* notes 138-140 and accompanying text (noting purported emphasis on driver safety rather than specifically on cellular phones).

182. See *supra* notes 126-128 and accompanying text (highlighting adverse effect of allowing drivers to use cellular phone with hands-free device); see also *supra* notes 135-136 and accompanying text (repeating dangerousness of allowing hands-free use).

183. See *supra* notes 135-140 and accompanying text (repeating argument of critics of Washington, D.C. law).

184. See *infra* notes 205-210 and accompanying text (presenting alternative to restrictive cellular phone laws).

185. See *infra* notes 205-210 and accompanying text (suggesting larger role for existing laws).

186. See *supra* note 122-123 and accompanying text (highlighting important aspects of New Jersey statute).

187. See *supra* note 130 and accompanying text (citing safety as main idea behind cellular phone laws is safety).

188. See *infra* note 209-210 and accompanying text (discussing irrelevancy of driver activity as cause of reckless driving).

189. See *infra* Part III.B.2 and accompanying text (suggesting enforcement of existing reckless driving laws would be most effective).

B. Other Alternatives to the Distracted Driver Problem

1. Education

A commonly proposed alternative to legislation and fines is driver education: showing how driving with a phone is unsafe, or teaching drivers who are going to use their phones how to do so safely.¹⁹⁰ The cellular telephone industry is very active in creating and funding programs addressing cellular phone safety, including programs highlighting the dangers of driving and talking.¹⁹¹ The Cellular Telecommunications & Internet Association (CTIA) started a program in 1995 called “The Seven Days of Safety” or “National Wireless Safety Week.”¹⁹² In 2001, the CTIA spent millions of dollars on radio and public service announcements to remind drivers of the dangers of driving while using a cellular phone, and that such action is prohibited in some states.¹⁹³ While these programs represent a great effort by the cellular phone industry, the job of educating drivers on the dangers of use should not be left to cellular phone companies, most obviously because of the inherent conflict of interest.¹⁹⁴

In the late 1990’s, AAA and similar groups became integral players in advocating for an improved drivers’ education program.¹⁹⁵ These agencies seek to solve the problem that only six states drivers’ manuals have sections describing dangerous driver distractions.¹⁹⁶ The Harvard Center for Risk Analysis agrees with this proposition stating, the “NHTSA. . .with support from the U.S. Congress and state legislatures, should develop a comprehensive educational effort aimed at drivers to promote the responsible use of cellular

190. See Mobydeen, *supra* note 23 at, 391-92 (discussing importance of driver education on alerting public of dangers of cellular phone use); see also Cripps, *supra* note 25, at 115-16 (suggesting methods of educating drivers on dangers of distracted driving).

191. See Mobydeen, *supra* note 23, at 391-92 (noting industry promotes safe use to increase sales and prevent legislation).

192. See Mobydeen, *supra* note 23, at 391 (discussing efforts of cellular phone industry).

193. See Mobydeen, *supra* note 23, at 392 (discussing further efforts of cellular phone industry to increase driver safety).

194. See Mobydeen, *supra* note 23, at 392 (warning of industry desire to prevent “unwelcome legislation”). While the cellular phone industry efforts have been helpful, it should not be lost that the cellular phone industry uses the week as an advertising tool. *Id.*

195. See Karr, *supra* note 23, at D4 (noting nationwide advertisement campaign by AAA). As of Summer 2003, AAA had created a nationwide advertisement by changing an existing ad of the Auto Club of Southern California. *Id.*

196. See Karr, *supra* note 23, at D4 (describing deficiency in driver’s education manuals nationwide). As of the summer 2003 only six states’ manuals contained sections describing driver distractions. *Id.*; see also Sundeen, *supra* note 1, at 18 (noting lack of warning within driver’s education manuals). Twenty states’ driver education manuals merely warn drivers of cellular phone use while driving, whereas thirty-two states caution drivers to be mindful of their emotions while driving, and less than ten states warn of eating, reading, or drinking while driving. Sundeen, *supra*, at 18.

telephones while driving.”¹⁹⁷

Rather than solely enacting legislation to protect drivers, state and federal governments should also shoulder the burden of driver distraction education.¹⁹⁸ The legislatures should combine efforts with agencies like AAA and incorporate driver distraction courses into the drivers’ education programs that most young drivers complete before receiving their licenses.¹⁹⁹ Additionally, legislatures should encourage increased efforts from the cellular phone industry and use the industry’s existing framework to distribute information.²⁰⁰ The government should create public service announcements as well as and radio and billboard advertisements.²⁰¹ These public service announcements should instruct drivers on how to behave in tense situations, that any cellular phone conversation while driving should be kept short, and that cellular phones should only be used for safety purposes only while driving.²⁰² Most importantly, lawmakers must dispel the myth of a safety distinction between using a hand-held or hands-free cellular phone.²⁰³ Legislatures should not be distracted by emotional lobbyists and cannot forget that consumer awareness is the most powerful tool available in the effort to encourage safer driving.²⁰⁴

2. Existing Reckless Driving Laws

Legislation governing cellular phone use was not many state and local governments’ first exposure to citizens’ driving behaviors.²⁰⁵ Ohio and New York penalize drivers for “wanton disregard of . . . safety,” and driving in a way that “unreasonably endangers” others on the road.²⁰⁶ Critics of the New York,

197. See Sundeen, *supra* note 1, at 17 (quoting from July 2000 report).

198. See Cripps, *supra* note 25, at 115 (urging lawmakers to take more action).

199. See Cripps, *supra* note 25, at 115 (discussing necessity of incorporating discussion of cellular phone safety into driver’s education).

200. See Cripps, *supra* note 25, at 115 (mentioning possibility of legislatures joining forces with cellular phone industry).

201. See Cripps, *supra* note 25, at 115 (suggesting areas where lawmakers could take action). Lawmakers need to do an adequate job of explaining the severity of the issues to both new and existing drivers. *Id.*; see also Howlett, *supra* note 23, at A3 (providing examples of current billboards). In California and Arizona, insurance companies such as 21st Century Insurance are a step ahead of the local government by designing and posting their own billboards promoting driver safety. Howlett, *supra*, at A3 (citing safety initiatives from private sector).

202. See Cripps, *supra* note 25, at 116 (proposing topics for government education).

203. See Cripps, *supra* note 25, at 116 (highlighting critical area for government to focus on while educating drivers).

204. See Cripps, *supra* note 25, at 117 (warning lawmakers of “emotional appeals” based on “inconclusive evidence”); see also Mobydeen, *supra* note 23, at 397 (highlighting importance of informed consumers).

205. See Cripps, *supra* note 25, at 117 (noting states’ inattentive driving laws already in place); see also Mobydeen, *supra* note 23, at 397 (citing examples of existing state reckless driving laws). Ohio’s law reads in part: “[n]o person shall operate a vehicle. . . on any public or private property. . . in willful or wanton disregard of the safety of persons or property.” Mobydeen, *supra*, at 397. New York defines reckless driving as driving “in a manner which unreasonably interferes with the free and proper use of the public highway, or unreasonably endangers users of the public highway.” Mobydeen, *supra*, at 397.

206. See *supra* note 205 an accompanying text (citing existing reckless driving laws).

New Jersey, and Washington D.C. cellular phone laws are agitated over the government's efforts to regulate another private activity, and also believe that the new laws may create new problems in their effort to make roads safer.²⁰⁷ While regulating cellular phone use by drivers is a clear step towards creating safer roads, it may also amount to governmental waste because, as was the case in New Jersey, many state and local governments already have appropriate laws in place.²⁰⁸ Existing reckless driving laws are much easier to enforce because whether someone was using a phone or brushing his hair, this person's driving is dangerous.²⁰⁹ Stricter enforcement of current reckless driving laws would refocus state legislatures and the general driving public on the real issue of making roads safer.²¹⁰

3. Cost-Effectiveness of Cellular Phone Use Ban

Observers have suggested that the enforcement of cellular phone legislation is not cost-effective, and that society is better off without such bans.²¹¹ The July 2000 Harvard Center for Risk Analysis report compared two experiments in order to create a number which represented the cost-effectiveness of bans such as the ones in place in New York, New Jersey, and Washington D.C.²¹² The Harvard Center report first examined the 1999 Hahn and Tetlock study, which defined the cost of a cellular phone ban as the "lost welfare" for consumers if their cellular phones were taken away.²¹³ The study quantified that "lost welfare" as represented by what people are willing to pay for the use of their cellular phone.²¹⁴ The study then subtracts the direct costs related to accidents caused by cellular phones (medical bills, property damage, etc.), which was approximately three thousand dollars per collision in 1999, from the total "lost welfare".²¹⁵ The authors estimated the value consumers would

207. See Cripps, *supra* note 25, at 117 (speculating on adverse effects of cellular phone legislation). Cripps suggests that the frantic attempt to set up the hands-free system or the illegal use of a hands-held device could be dangerous side effects to the new laws. *Id.*; see also Mobydeen, *supra* note 23, at 397 (advising readers to be wary of over-regulation of cellular phone use).

208. See Cripps, *supra* note 25, at 117-18 (noting encompassing nature of existing state laws).

209. See Cripps, *supra* note 25, at 118 (describing reckless driving as easier to identify than illegal cellular phone use).

210. See Cripps, *supra* note 25, at 118 (predicting results of "effective enforcement of inattentive driving laws").

211. See Lissy et al., *supra* note 6, at 54-58 (discussing cost-effectiveness of cellular phone use legislation).

212. See Lissy et al., *supra* note 6, at 54-58 (evaluating monetary cost of ban as compared with value of health benefits).

213. See Lissy et al., *supra* note 6, at 54 (describing "lost welfare" element of cost-effectiveness figure).

214. See Lissy et al., *supra* note 6, at 54 (stating Americans willing to pay twenty-five billion dollars for use of cellular phones). The Hahn and Tetlock study characterized the amount people are willing to pay for their cell phones as the benefit derived from that cellular phone. *Id.* Therefore, a ban on cellular phone use would "cost" that amount in "lost welfare."

215. See Lissy et al., *supra* note 6, at 54 (defining cost of accidents caused by cellular phones). The total value of direct costs per year equal two billion dollars. *Id.* The study used this number as saved cost or the

require in compensation for the calls that they could not make because of the legislative restrictions.²¹⁶ When Hahn and Tetlock compared the two numbers, “lost welfare” and direct costs saved, they found that the benefits derived from the use of cellular phones far exceeded the societal costs caused by cellular phone related accidents.²¹⁷

The Harvard Center report also examined a study conducted by professors Redelmeier and Weinstein designed to measure the health benefits of the legislation in Quality Adjusted Life Years (QALYs).²¹⁸ This study concluded that collisions each year represent a loss of thirty-three thousand QALYs.²¹⁹ The Harvard Center report used the quotient of total costs of a cellular phone ban according to the Hahn and Tetlock study, twenty-three billion dollars, and the total QALYs saved through the imposition of a cellular phone ban according to professors Redelmeier and Weinstein, thirty-three thousand, to appraise each QALY at seven-hundred thousand dollars.²²⁰ It is unclear, however, how reliable this comparison is because it is difficult to predict values for QALYs, and hard to estimate the value of a simple collision as compared to a fatal collision.²²¹

The Harvard Center’s compilation of these two important studies also includes estimates for other legislative restrictions on drivers, such as seat belts and speed limits, and has estimated the respective QALY costs.²²² The societal cost of a speed limit that creates similar inconveniences to drivers as the cellular legislation is much lower than the cellular legislation, as are seat belts, daytime running lights, and airbags.²²³ State and local governments need to take a long look at whether cellular legislation is the proper choice when there are cheaper, less intrusive alternatives available.²²⁴ The question thus becomes,

benefit of a ban on cellular phone use, because with a ban, these costs do not exist. *Id.*

216. See Lissy et al., *supra* note 6, at 55 (explaining cost of legislation). The Hahn and Tetlock study reasoned that calls made while driving are particularly valuable, because these calls are often made by busy people whose time is very valuable. *Id.*

217. See Lissy et al., *supra* note 6, at 54 (comparing costs and benefits of bans). The study concluded that the loss from the lack of cellular phone use exceeded the benefit of preventing cellular phone use by twenty-three billion dollars. *Id.* The confidence interval used in this study creates a range of possible societal costs of a ban from thirteen billion to seventy-two billion dollars. *Id.*

218. See Lissy et al., *supra* note 6, at 54 (introducing second empirical study). The professors defined the effectiveness of a ban on the use cellular phones as the number of QALYs saved by preventing injury and property damage commonly associated with collisions as a result of cellular phone use. *Id.*

219. See Lissy et al., *supra* note 6, at 55 (quantifying loss of QALYs per year due to accidents caused by cellular phones).

220. See Lissy et al., *supra* note 6, at 55 (comparing data). The Hahn and Tetlock study concluded that the banning legislation was approximately a net twenty three billion dollar cost. *Id.* at 54. Dividing that number by the yearly saved amount of QALYs, the cost of each QALY becomes seven-hundred thousand dollars. *Id.* at 55.

221. See Lissy et al., *supra* note 6, at 56 (discussing problems with studies). The statistical uncertainty is still great when it comes to evaluating these numbers. *Id.*

222. See Lissy et al., *supra* note 6, at 57 (explaining chart with costs per QALY saved).

223. See Lissy et al., *supra* note 6, at 57 (noting QALY cost of speed limits).

224. See Lissy et al., *supra* note 6, at 57 (questioning cellular legislation when other less costly choices

at what point is a piece of legislation too costly in terms of QALYs?²²⁵ While these studies have valuation problems, they still provide a framework which legislatures should consider when drafting laws that further restrict the general public's freedom.²²⁶

IV. CONCLUSION

As with most behavior-restricting legislation, governments struggle to balance public safety with the public's autonomy. Through our own inventions, we have created a need for legislation to ensure safety. Laws mandating the use of seat belts and other now standard items on cars were once challenged for their intrusiveness. Over time, society has accepted these behavioral restrictions because the benefits are clear. Cellular phone legislation is a much different entity. A lack of clarity pervades the issue of whether drivers view the use of a cellular phone as a life-threatening event. While there are many nuances with the current cellular phone legislation, it is clear that cellular phone use while driving creates a dangerous driving environment and requires some sort of legislation.

The battle over the coming years will likely focus on restrictions versus prohibitions of extraneous activities while driving. Cellular legislation's critics note there are a myriad of activities in a car that are far more distracting—such as eating and shaving—yet do not receive the same public attention as cellular phones. Proponents contend that as a matter of practicality, governments have an interest in and the ability to control cellular phone use but cannot prohibit eating while driving because it is simply too intrusive.

The current legislation has placed undue importance on the hand-held and hands-free distinction. Many empirical studies and psychological evaluations to date indicate that there is little or no difference between a driver who uses a hands-free device and one who is holding the phone to his or her ear. Scientists have concluded that the cause of collisions involving drivers using cellular phones is not a matter of physical impairment, but a question of the occupation of one's mind. The broader characterization of "distracted driving" is more appropriate because it emphasizes that the distraction of drivers' sensory perceptions causes the accidents rather than the fact that the driver does not have two hands on the wheel. New York, followed by New Jersey and Washington D.C. (and recently Connecticut), have all missed the ultimate point. These states' laws only prohibit hand-held use. Even with these laws in place, the amount of cellular phone related accidents has increased, and while

exist).

225. See Lissy et al., *supra* note 6, at 57 (revealing struggle between costs to society and making roads safer).

226. See Lissy et al., *supra* note 6, at 58 (applying pressure to legislators to consider data before passing laws).

part of this increase can be attributed to the increase of cellular phone ownership, much can also be attributed to ineffective legislation.

Society and legislatures must decide the appropriate scope of cellular phone legislation. Arguably the safest option would be to institute a total ban on all cellular phone use, whether hands-free or hand-held. The public, however, may not want a complete prohibition and a prohibition is not guaranteed to work. Similar to the way that people currently skirt around traffic laws, drivers would likely continue to use cell phones despite the ban. Moreover, it is more likely that drivers would take on the risk of using their cellular phone, because the alternative of no use could be very costly in terms of a lifestyle change. Creating a more informed public through education as well as the strict enforcement of well-established reckless driving laws might be the only ways to curb the sharp increase in property damage and personal injuries that legislatures now attribute to cellular phone use. As cellular technology continues to become more complex and readily available, the challenge will be for legislatures to create a safe driving environment by enacting laws that, unlike laws creating a hands-free and hand-held distinction, are reinforced by statistics and empirical studies proving their worth to the driving public.

Matthew C. Kalin