

Dialing While Driving: The Battle over Cell Phone Use on America's Roadways

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“[K]eep your eyes on the road [and] your hands upon the wheel.”¹

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1. Jason Leff, *Boston U.: Massachusetts Legislators and Drivers Battle over Cell Phone Use*, U-WIRE, Mar. 1, 2000, available at 2000 WL 15360755 (quoting THE DOORS, ROADHOUSE BLUES (Elektra/Asylum Records 1970)).

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I. INTRODUCTION

Americans need only draw on personal experience to know that cell phones threaten the safety of every driver, passenger, and pedestrian on our roadways. We have all seen the commuter juggling act played out on a daily basis, like some sixty mile-per-hour circus act gone mad. Drivers juggle their cell phone, the steering wheel, and the clutch as they simultaneously tend to their breakfast, their hair, their makeup, and the daily news. Drive-time has become talk-time. Attention to snacks, in-car entertainment, and personal hygiene has become more important than attention to the road. This inattention is enough to drive any safety-minded driver down the road of contempt for every single cell phone toting motorist in America.

However, many other highway travelers have lost much more than their patience in the newly emerging cell phone revolution.² In 1999, the driver of a sport utility vehicle blindly missed a stop sign and barreled through an intersection while attempting to discuss lunch plans on his cell phone.³ The 45 mile per hour mistake cost the life of two-year old Morgan Lee Pena, whose mother was driving her home from a play date with her cousin.⁴ The driver “received two traffic tickets and a \$50 fine.”⁵

2. See, e.g., Lisa Haarlander, *Disconnecting Drivers Cars, Phones a Bad Mix*, BUFF. NEWS, Dec. 19, 2000, at A1, available at 2000 WL 5703358 (describing “[t]he horror stories” that have fueled the legislative crusade against dialing while driving).

3. Gerry Kobe, *Death by Distraction*, AUTOMOTIVE INDUSTRIES, May 1, 2000, at 30, available at 2000 WL 14918329.

4. *Id.*

5. *Id.* In suburban Georgia, a teenage driver ran off the road and onto a lawn, hitting a nearby mother and her two-year old son who were walking with their dog. Charles W. Holmes, *Lawmakers Begin to Weigh Dangers of Drivers with Cell Phones*, J. REC. (Okla. City), Apr. 24, 2000, available at 2000 WL 14294848. As a result of the wreck, the mother slipped into a coma and, upon awakening, learned that the accident had claimed the life of her son. *Id.* The driver had been using a cell phone at the time of the accident. *Id.*

In North Carolina, a road crew supervisor was struck and killed by an oncoming car while working roadside. *Drivers Unlikely to Hang Up Cell Phones Despite Danger*, GREENSBORO NEWS & REC., Nov. 12, 1999, at B4, available at 1999 WL 26307856. The driver was talking on her cell phone at the time of the accident. *Id.*

In New York, a family pulled their car to the side of the road to let their 10-year-old son use the bathroom. Haarlander, *supra* note 2. Moments later, the boy looked on in horror as a driver using a cell phone plowed into his family’s parked car, killing both of his parents and breaking his sister’s back. *Id.*

In Florida, a 21-year old driver ran onto a roadside construction site, hitting a deputy’s car. Thomas B. Pfankuch, *Cell Phone Rules Not Imminent: Legislative Action Expected*

Although cellular telephones have been around for 18 years, reduced prices have made them more readily accessible among the masses.⁶ As of July 2000, over 100 million citizens nationwide used cell phones⁷ and every two seconds an American signs up for cellular service.⁸ Furthermore, as many as 85% of Americans admit that they use their cell phones while on the road.⁹ As a result, drivers distracted by cell phones cause an estimated 800 accidents per day¹⁰ and as advanced technology for our cars becomes more readily available, the problem of driver distraction will only become worse.¹¹

Despite the increased public perceptions surrounding the dangers of cell phones, the country is currently split as to whether cell phone use should be banned in cars.¹² Rhode Island State Representative Peter Kilmartin says that over the past nine years no issue has been such a hotbed of contention in the

Eventually, FLA. TIMES-UNION, Dec. 24, 1999, at B1, available at 1999 WL 29076150. The car then caught fire and the deputy burned to death inside. *Id.* Again, the driver had been talking on her cell phone at the time of the collision. *Id.*

In Pennsylvania, a medical technician responded to reports of a car accident in which he found his own family trapped inside the wreckage of the victim's car. Lisa Kozleski, *Crash Injured Girl, 5* Driver Using Hand-Held Cell Phone Was Distracted, Ran Light, Seriously Injuring Tot, Police Say*, ALLENTOWN MORNING CALL, Mar. 9, 2000, at B01, available at 2000 WL 8186989. The culprit was yet another driver preoccupied by her cell phone. *Id.*

6. Laura Meade Kirk, *Bill Would Limit Cell Phone Use By Drivers*, PROVIDENCE J., June 9, 1999, at F02, available at 1999 WL 18835939.

7. *Harvard Research Backs up NHTSA on Dialing and Driving*, CT WIRELESS, Aug. 7, 2000, available at 2000 WL 6392278 (referring to a Harvard University agency report) [hereinafter *Harvard Research*].

8. Holmes, *supra* note 5.

9. See Kirk, *supra* note 6.

10. See Rosemary Roberts, Editorial, *A No-Hands Approach to Cell Phones May Save Lives*, GREENSBORO NEWS & REC., Aug. 11, 2000, at A14, available at 2000 WL 5243895 (citing the Network of Employers for Traffic Safety).

11. Benny Evangelista, *Caution Technology on Board: Critics Fear New Tech Gadgets Could Drive Motorists to Distraction*, S.F. CHRON., Jan. 14, 2001, at B5, available at 2001 WL 3392235 (citing experts who declare that the biggest threat to driver safety is technology of today which is becoming the standard car equipment of tomorrow); see also Los Angeles CBS News, *Survey: Majority of Drivers Are Distracted by Everything from Cellphones to Contact Lenses* (Jan. 18, 2000) [hereinafter *Survey*] (reporting that long commutes are largely responsible for the increase in distracted driving), at <http://www.channel2000.com/news/stories/news-20000119-015825.html> (last visited Sept. 5, 2001).

12. *State Bills Take Renewed Aim at Cellular Phone Use in Cars*, COMMS. DAILY, Mar. 1, 1999, available at 1999 WL 7578846 [hereinafter *Renewed Aim*]; see also *Making a Tough Call on Cell Phone Use*, WASH. POST, Jan. 18, 2001, at T1, available at 2001 WL 2537501 (listing five full opinion letters of differing points of view as written by American motorists on the issue of dialing while driving); *Last Week We Asked: Cell Phones out of Hand? Give Us an Earful*, ARIZ. REPUBLIC, Jan. 6, 2001, at B6, available at 2001 WL 8505090 (summarizing seventy-five letters to the editor in response to how legislators should deal with cell phones on the road).

Rhode Island General Assembly as the proposed ban on cell phones in cars.¹³ Like most hot beds of activism in America, the case against cell phone users has spread to the almighty bumper sticker decrying, “Hang up and drive—cell phone abuse kills” and “Drive Now, Talk Later.”¹⁴ Nevertheless, many cell phone users are not yet willing to give up their rights to dial and drive without a fight.¹⁵

In light of the increasing practice of dialing while driving, both state and local governments should be expected to consider whether this behavior needs to be more thoroughly regulated or even completely prohibited.¹⁶ Accordingly, this Comment will focus on the public policy arguments and proposed solutions which currently surround the nationwide controversy over dialing while driving.¹⁷ Specifically, Part II of this Comment will explain the current empirical evidence on cell phone use and driver distraction.¹⁸ Part III will explore the current proposals which local, state, and federal lawmakers have thus far considered.¹⁹ Part IV will discuss alternative solutions to the problem of distracted driving.²⁰ Part V will examine similar problems that may accompany future technology as it moves out of the realm of novelty and becomes a part of our everyday lives.²¹ Finally, Part VI will lay forth a three-part recommendation on this controversial issue based on the aforementioned policy considerations.²²

13. See Kirk, *supra* note 6.

14. See Holmes, *supra* note 5; see also Leff, *supra* note 1 (noting that anti-dialing and driving bumper stickers are so popular that a radio station’s year supply of the product disappeared in only two weeks).

15. See, e.g., Mark Simon, *Many Habits Put People on Road to Danger*, S.F. CHRON., Sept. 22, 2000, at 1, available at 2000 WL 6492058 (parodying the number of factors which affect driver distraction and satirically proposing a ban on the use of coffee, makeup, radios, smoking, dogs and children in the car; noting that such a law “would create a major hardship for almost every building contractor . . . most of whom use their trucks as offices and their dashboards as desks”).

Some advocates have even asserted that a ban on cell phone use among motorists would be an imposition on First Amendment free speech. Editorial, *Cell Phone Legislation*, N.J. LAW.: WKLY. NEWSPAPER, Sept. 20, 1999, at 6.

16. See *Renewed Aim*, *supra* note 12.

17. See *infra* text accompanying notes 23-223.

18. See *infra* text accompanying notes 23-72.

19. See *infra* text accompanying notes 73-152.

20. See *infra* text accompanying notes 153-79.

21. See *infra* text accompanying notes 180-97.

22. See *infra* text accompanying notes 198-223.

II. THE EMPIRICAL CASE AGAINST DIALING AND DRIVING

Although we are only now entering the technology revolution, the battle over driver distraction is nothing new.²³ In the first half of the twentieth century, highway safety advocates were concerned when car manufacturers introduced car radios.²⁴ Opponents of the car radio feared that in-car music might lull drivers to sleep.²⁵ Shortly after they were introduced, lawmakers proposed legislation that would ban car radios altogether.²⁶ However, subsequent studies found that car radios actually provided more safety to drivers insofar as music kept drivers awake and alert while on the road.²⁷ Manufacturers developed push button radios to eliminate many of the distracting dexterity problems involved with changing radio stations while driving.²⁸ Needless to say, car radios, tapes, and compact discs are now an integral part of the American commute.²⁹

Cell phones carry with them many of the same concerns that accompanied the introduction of car radios.³⁰ According to a Gallup Poll taken in the Spring of 2000, 67% of Americans believe that state governments should take action to ban cell phones completely on America's roadways.³¹ Scientific evidence indicates that America's fear of dialing while driving may be well founded.³² According to the American Automobile Association ("AAA"), 8.3% of drivers involved in serious crashes are distracted by something either inside or outside of the vehicle at the time of the accident.³³ In 1997, cell phones contributed to

23. See Roy Bragg, *Cell Phones: Boon or Bane?: Some Folks See Hazards in the Ubiquitous, Annoying, Handy Gadgets*, SAN ANTONIO EXPRESS-NEWS, Aug. 13, 2000, at 01J, available at 2000 WL 27328576.

24. *Id.*

25. See Lindsay Brooke, *An 80-Year-Old Distraction*, in Kobe, *supra* note 3, at 35.

26. See *id.* (noting that 1930's lawmakers in Massachusetts and St. Louis were the first to propose bans on car radios).

27. *Id.*

28. *Id.*

29. The 45 r.p.m. record craze in the 1950's also found its way into cars. *Id.* However, because the records skipped, car-installed record players never sold well; thus, they were never much of a hazard. See *id.*

Highway safety advocates were also worried when windshield wipers were first introduced. See Bragg, *supra* note 23. Critics suggested that the swaying motion of the wipers would mesmerize drivers. *Id.*

30. See Brooke, *supra* note 25, at 35.

31. Poll Analyses, *New Jersey Town Bans Cell Phones While Driving*, GALLUP ORG., July 14, 2000, at <http://www.gallup.com/poll/releases/pr000714b.asp> (last visited Jan. 24, 2002) [hereinafter *Gallup Poll Releases*].

32. See, e.g., Roberts, *supra* note 10 (discussing the results of a study from the National Highway Traffic Safety Board which indicate that cell phones pose a viable threat to motorists).

33. JANE C. STUTTS ET AL., AAA FOUNDATION FOR TRAFFIC SAFETY, THE ROLE OF

fifty-seven fatal automobile accidents.³⁴ At present date, over 4,000 accidents per day are caused by driver distraction.³⁵ The Network of Employers for Traffic Safety ranks driver distraction fourth behind drunkenness, aggression, and speeding as the leading causes of accidents.³⁶ The New England Journal of Medicine (“NEJM”) received worldwide attention when it reported that using a cell phone while driving is functionally equivalent to driving drunk.³⁷ Moreover, the NEJM study indicated that cell phone use increases the risk of an accident fourfold.³⁸

Drivers who use cell phones are mostly affected in their ability to react to constantly changing driving conditions.³⁹ As a result, rear-end collisions are by far the most common accident caused by cell phones,⁴⁰ accounting for over 76%

DRIVER DISTRACTION IN TRAFFIC CRASHES (May 2001), <http://www.aaafoundation.org/projects/index.cfm?button=distractio> (last visited Jan. 24, 2002).

34. Mike Wendling, *Don't Dial, Drive in Cleveland Suburb*, ARIZ. REPUBLIC, Sept. 2, 1999, at A20, available at 1999 WL 4196740.

35. See Roberts, *supra* note 10 (citing the Network of Employers for Traffic Safety).

36. Network of Employers for Traffic Safety, *Leading Employers Join to Combat Distracted Driving* (June 27, 2000), at <http://www.trafficsafety.org/newsroom/06272000.cfm> (last visited Jan. 24, 2002).

37. Donald A. Redelmeier & Robert J. Tibshirani, *Association Between Cellular – Telephone Calls and Motor Vehicle Collisions*, 336 NEW ENG. J. MED. 453, 456 (1997) (reporting that using a cell phone while driving is equivalent to driving with a blood alcohol level near the legal limit).

However, even though dialing while driving may be functionally equivalent to driving while drunk, cell phones are responsible for far fewer deaths than alcohol-related fatalities. *Harvard Research*, *supra* note 7. Specifically, only 6.4 fatalities per million drivers are currently linked to cellular usage compared to 30.9 fatalities per million drivers linked to driver intoxication. *Id.* (referring to a Harvard University agency report). Furthermore, 49.3 fatalities per million drivers are a result of no safety belts, 14.5 fatalities per million drivers are linked to choosing small cars over larger ones, and 1.5 fatalities per million drivers are the result of driving sixty miles per hour on a non-interstate road. *Id.*

As for non-driver fatalities, cell phones are responsible for 1.5 deaths per million drivers and alcohol related accidents are responsible for 17.6 fatalities per million drivers. *Id.*

In addition, unlike other collisions, cell phone related accidents are less likely to be fatal as “a significant percentage of cellular phone calls are made from vehicles during rush hour, when traffic conditions reduce the risk that an accident will cause death.” *Id.* Moreover, cell phone users may pose less of a threat because, unlike drunk drivers, astute cell phone users can choose periods of their drive in which minor distractions will have little effect on their ability to maintain control of their vehicle.

38. Redelmeier & Tibshirani, *supra* note 37, at 456. The NEJM Study was based on a survey of 699 auto accidents. *Id.* at 454-55.

39. E. Patrick McGuire, *Driven to Distraction: The Role of Distraction in Accident Causation*, PRODUCT LIABILITY L. & STRATEGY, July 2000, at 4 (citing JAMES MCKNIGHT & A. SCOTT MCKNIGHT, AAA FOUND. FOR TRAFFIC SAFETY, THE EFFECT OF CELLULAR PHONE USE UPON DRIVER ATTENTION (1991), <http://www.aaafoundation.org/resources/index.cfm?button=cellphone>).

40. *Id.* (citing NATIONAL POLICE AGENCY OF JAPAN, CAR-PHONE RELATED TRAFFIC

of all cell phone related accidents.⁴¹ The average delay in driver reaction time caused by cell phone use is between .3 and .85 seconds.⁴² And while a half-second delay may seem inconsequential, it is significant enough to cost a driver traveling at sixty miles per hour, ninety feet of stopping distance.⁴³

In response to claims that dialing while driving is unsafe, many cell phone users have bought hands-free kits, which allow drivers to keep both hands on the wheel while using their cell phones.⁴⁴ Ironically, NEJM reports that hands-free phones are simply not effective in reducing the risk of accidents among those who dial and drive.⁴⁵ Thus, the problem is not one of visual distraction or problems with manual dexterity, but one of cognitive distraction.⁴⁶ Research shows that the cognitive distraction of talking on a phone is even more dangerous than dialing or reaching for a phone while driving.⁴⁷ Driving is a complicated mental task which involves looking, listening, scanning the mirrors, modulating speed, anticipating conditions, controlling steering and braking, and calculating a way out.⁴⁸ As such, a telephone call made while driving may even interfere with these mentally complex tasks well after the call has ended as the driver continues to mull over the conversational issues in her head.⁴⁹

ACCIDENTS DURING FIRST HALF OF 1998 (1998)); *see also* NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., PRELIMINARY STUDIES IN HAPTIC DISPLAYS FOR REAR-END COLLISION AVOIDANCE SYSTEM AND ADAPTIVE CRUISE CONTROL SYSTEM APPLICATIONS (Sept. 2000), *available at* http://www-nrd.nhtsa.dot.gov/vrtc/ca/HapticReport_final.pdf [hereinafter REAR-END COLLISION RESEARCH]. Rear end crashes account for "approximately 23 percent of all police-reported . . . crashes in the United States," the vast majority of these being associated with driver inattention. *Id.* *But see* McGuire, *supra* note 39 (providing that cell phones can also cause drivers to lose lateral tracking ability and the ability to prevent steering wheel deviation).

41. *See* ALASDAIR CAIN & MARK BURRIS, CENTER FOR URBAN TRANSPORTATION RESEARCH, INVESTIGATION OF THE USE OF MOBILE PHONES WHILE DRIVING § 4.5 (Apr. 1999), http://www.cutr.eng.usf.edu/its/mobile_phone_text.htm (last visited Jan. 10, 2002) (citing a study by the Japanese National Police Agency's Traffic Planning Department).

42. *Id.* § 3.2.2; *see also* McGuire, *supra* note 39 (reporting that another study about using a cell phone while driving causes a delay of .6 seconds in a driver's reaction time).

43. McGuire, *supra* note 39.

44. *CellPort Selects Lucent Technologies' New Hands-Free Cellular Phone Chip Targeting Automobiles and Telematics Markets*, CAMBRIDGE TELECOM REP., Jan. 10, 2000, *available at* 2000 WL 7983909 (reporting that in 1999, 45% of cell phone subscribers had either purchased or planned to purchase a hands-free kit).

45. Heather Alston, *A Risky Call: Employer Limitation of Employee Cell Phone Use*, GA. EMP. L. LETTER, Jan. 2000, at 6.

46. Kobe, *supra* note 3, at 30 (noting that cognitive distraction may explain how a driver talking on a cell phone can be looking straight ahead but still fail to register that the car ahead has stopped).

47. Pfankuch, *supra* note 5.

48. *What the Cops See*, in Kobe, *supra* note 3, at 35, 36.

49. McGuire, *supra* note 39.

Despite the general delay in reaction time caused by dialing while driving, a number of other factors may affect a driver's ability to effectively manage the road while using a cell phone.⁵⁰ First, the risk of an accident is greatly reduced if the driver does not take incoming calls, which often by their very nature catch the driver by surprise.⁵¹ Also, the dangers of using a cell phone while driving increases significantly among drivers who engage in particularly complex and intense conversations.⁵² Research indicates that the ability to handle distractions while using a cell phone is increased by hands-on experience,⁵³ on the other hand, too much experience may cause drivers to be careless with their in-car cell phone use.⁵⁴ Despite these findings, scientists have yet to pinpoint and accurately measure many of the numerous driver-related variables that could significantly contribute to the increased risk of using a cell phone while driving.⁵⁵

Because a driver's ability to effectively use a cell phone while driving is the product of so many driver-related variables, some proponents are unwilling to take action against cell phone users without more complete cell phone related crash data.⁵⁶ The hope is that more accurate data on cell phone related collisions will result in more effective remedies in the battle against driver distraction.⁵⁷

50. See, e.g., *id.*

51. See, e.g., Kobe, *supra* note 3, at 33.

52. See MCKNIGHT & MCKNIGHT, *supra* note 39.

53. *Id.*

Lack of experience in using cell phones may explain why age also plays a factor in determining risk of cell phone users behind the wheel. See McGuire, *supra* note 39. Accordingly, test subjects over fifty-five years old are at greater risk for an accident when using a cell phone while driving. *Id.*

Moreover, the dangers inherent in the different types of distractions vary with age. STUTTS ET AL., *supra* note 33. For example, radio-related distractions are more prominent among drivers under twenty years old, the distraction of other occupants (such as young children) is more common among twenty to twenty-nine year olds, and distractions outside of the car are most prominent among drivers over the age of sixty-five. *Id.* Notably, "[v]ariations by driver sex [are] less pronounced, although males [are] slightly more likely than females to be categorized as distracted at the time of [a] crash." *Id.*

54. See MCKNIGHT & MCKNIGHT, *supra* note 39.

55. CAIN & BURRIS, *supra* note 41, § 3.4.1.

56. See Vicki Hyman, *Despite Wrecks, Motorists' Cellular Calls Legal Across U.S.*, THE NEWS & OBSERVER (Raleigh), Nov. 11, 1999, at B1, available at 1999 WL 2777115.

One legislator in Utah even called for a task force to investigate the larger problem of inattentive driving. Kristen Beckman, *Bid to Ban Driving and Dialing Dropped*, RCR RADIO COMM. REP., Feb. 22, 1999, at 3, available at 1999 WL 7790291.

Others believe, however, that public opinion should determine whether cell phone use in cars should be banned. See Hyman, *supra* (reporting that the Charlotte chapter of the AAA said they would poll their members before deciding on whether they would support legislation that would curtail the use of cell phones while driving).

57. See Beckman, *supra* note 56, at 3.

However, only five states currently require any form of cell phone crash data on police accident reports.⁵⁸ Even so, perfect cell phone-related accident data may be difficult, if not impossible, to come by.⁵⁹ The National Highway Transportation Safety Administration (“NHTSA”) maintains that there may never be good real-world accident scene statistics when it comes to cell phone users insofar as few drivers using cell phones at the time of an accident are likely to risk the liability which might accompany the admission of such use.⁶⁰ Nonetheless, NHTSA has undertaken studies to demonstrate the effects of (and possible solutions for) driver distraction during rear-end collisions.⁶¹

In focusing on what we do know of cell phone related injuries on our roadways, we must not ignore the larger problem of general driver distraction.⁶² Recent studies show that dialing while driving consistently ranks fifth among leading driver distractions.⁶³ Research shows that the majority of accidents caused by driver distraction are a result of a distraction occurring *outside* of the car.⁶⁴ Other surveys report that there are more drivers distracted by writing notes in the car or by picking something up from the floor than drivers distracted by cell phone use.⁶⁵ Even car radios are estimated to cause 150,000 crashes per year, although such widespread use and social acceptance of these devices belays any ban or restriction.⁶⁶

58. Paul K. Heutzen, *The Trouble with Telematics: The Uneasy Marriage of Wireless Technology and Automobiles*, 69 U. MO.-KAN. CITY L. REV. 845 [hereinafter *Trouble with Telematics*] (reporting that Minnesota, Montana, Oklahoma, Florida, and Pennsylvania all collect cell phone related crash data).

59. See Jeanne Wright, *Your Wheels Calls for Ban on Cell Phone Use in Cars Debated*, L.A. TIMES, Sept. 27, 2000, at G1, available at 2000 WL 25900860.

60. Tom Abate, *Cell Phones Probed for Double Trouble: Driving Hazard, Cancer Link Feared*, S.F. CHRON., Oct. 23, 2000, at C6, available at 2000 WL 6494859.

61. See REAR-END COLLISION RESEARCH, *supra* note 40, at vii-viii.

62. See *infra* text accompanying notes 63-66.

63. Kristina Stefanova, *Gadgets Seen as Highway-Safety Threat*, WASH. TIMES, July 19, 2000, at B7, available at 2000 WL 4160550.

64. STUTTS ET AL., *supra* note 33. The AAA study revealed that 29% of distracted drivers involved in accidents were distracted by distractions outside of the car, including people, objects, and events. *Id.* Of other drivers involved in accidents, 10.9% were distracted by other occupants; 2.8% were distracted by adjusting the vehicle or climate controls; 1.7% were distracted by eating and/or drinking; and only 1.5% were distracted by using or dialing a cell phone. *Id.*

65. *Survey*, *supra* note 11.

66. See Kobe, *supra* note 3, at 32 (referring to a National Highway and Transportation Safety Administration Study); see also STUTTS ET AL., *supra* note 33.

Significantly, one report indicates that the effect of complex and intense cell phone conversations is similar to that of tuning a radio while driving. MCKNIGHT & MCKNIGHT, *supra* note 39. Casual cell phone conversations, however, were described as “less of a problem.” *Id.*

Despite the threat of driver distraction, 90% of Americans still rate safety and security as the number one reason for owning a cell phone.⁶⁷ In addition, more than 80% of all cell phone owners still use their handsets while driving.⁶⁸ Also, more than 25% of all cell-phone users talk on the phone on more than half of their trips.⁶⁹ As such, cell phone users seem to enjoy the convenience of dialing and driving.⁷⁰ And with the number of Americans who own cell phones rising at an annual rate of 40%, the problem of driver distraction will likely grow worse.⁷¹

Not surprisingly, drivers are not the only ones supporting the idea of dialing and driving. The cell phone industry, in particular, has fiercely opposed any attempts to restrict cell phone use on the road.⁷² Whether cell phone manufacturers are ultimately successful, however, remains to be seen.

III. LEGISLATIVE SOLUTIONS

A. *Three Schools of Thought*

While studies show that cell phones do, in fact, pose a viable threat to our roadways, there is substantial disagreement as to how lawmakers should intervene.⁷³ Today, three theories exist on how to address the problem of dialing while driving.⁷⁴ The first theory calls for an absolute ban on cell phone use by vehicle drivers.⁷⁵ The second theory would ban only hand-held cellular devices,

67. Viveca Bhat, *U. Maryland: Journal Warns of Cellular Phone Use While Driving*, U-WIRE, Apr. 1, 1999, available at 1999 WL 15034037.

68. *Harvard Research*, *supra* note 7 (referring to a Harvard University agency report).

69. McGuire, *supra* note 39; see also Kobe, *supra* note 3, at 35 (reporting that between 50-70% of all cellular minutes are used in cars).

70. The convenience of cell phones in cars measured in terms of consumer economic benefit seems to suggest why cell phone users are so accustomed to using their cell phones while on the go. "Economic studies suggest that the monetary value of using a cellular phone while driving exceeds the costs, even when those costs include safety risks expressed in dollar units'" *Harvard Research*, *supra* note 7 (quoting The Harvard University agency's report, *Cellular Phones and Driving: Weighing the Risks and Benefits*). "Compared to several other ways of improving traffic safety, restrictions on the use of cellular phones while driving appear to be inefficient. That is, they cost more than other safety measures to produce similar safety outcomes." *Id.*

71. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., AN INVESTIGATION OF THE SAFETY IMPLICATIONS OF WIRELESS COMMUNICATIONS IN VEHICLES (1997) [hereinafter WIRELESS COMMUNICATIONS IN VEHICLES], available at <http://www.nhtsa.dot.gov/people/injury/research/wireless> (last visited Jan. 24, 2002).

72. Kirk, *supra* note 6.

73. See *infra* text accompanying notes 74-102.

74. See *infra* text accompanying notes 78-102.

75. See *infra* text accompanying notes 78-83.

allowing drivers to place calls from their cars using hands-free adaptors.⁷⁶ Adherents to the final theory believe that cell phone use while driving is a matter of common sense and that the dangers of driver inattention can be addressed through the enforcement of current laws.⁷⁷

1. Ban motorists from using any cell phone
while driving

Advocates of the first theory believe that the dangers of cell phone use on the road would be best addressed by a complete ban on dialing while driving, as is presently the case in some foreign countries.⁷⁸ While these proponents recognize the presence of other distractions on American roadways, they argue that cell phones are much more distracting than other forms of in-car distraction because they require the psychological and emotional involvement of the driver.⁷⁹ Moreover, they argue that driver education will do little good to address the dangers of dialing while driving because Americans are far too engrossed in their conversations to rely on common sense when using their phones.⁸⁰

In addition, this school of thought emphasizes that hands-free sets do little to address the real dangers of dialing while driving.⁸¹ Specifically, these advocates point to studies which show that “the main factor in most motor vehicle collisions is a driver’s limitations in attention, rather than dexterity.”⁸² They conclude conversations on hands-free sets do little or nothing to bolster

76. See *infra* text accompanying notes 84-92.

77. See *infra* text accompanying notes 93-102.

78. See Steven Komarow, *Germany Targets Dialing and Driving*, USA TODAY, Sept. 12, 2000, at 26A, available at 2000 WL 5789363 (reporting that Portugal, among other countries, currently enforces a complete ban on the use of cell phones while driving). But see *Doctors Ask B.C. to Ban Car Phones*, SEATTLE TIMES, June 20, 1999, at B6, available at 1999 WL 6278653 (reporting that Canada is also struggling with the issue of dialing while driving).

On the other hand, some proponents have suggested that using a cell phone while driving should only be a secondary offense, meaning that motorists could only be cited for the offense if stopped for some collateral traffic violation. See CAIN & BURRIS, *supra* note 41, § 7.2.1.

79. Kirk, *supra* note 6 (noting that while Big Macs and makeup may cause in-car distractions, they do not require the driver to deal cognitively with another person).

80. Kobe, *supra* note 3, at 35; see also Ann Landers, *Americans’ New Hang-up: Cell Phone Rudeness “There is Absolutely No Excuse for Using a Cell Phone in the Bathroom,”* J. REC., Aug. 7, 2000, available at 2000 WL 14297425 (questioning the common sense of cell phone users, noting that 39% of cellular users say they would answer the phone in the bathroom).

81. See Kobe, *supra* note 3, at 32.

82. *Id.*

the drivers' cognitive ability to react to constantly changing road conditions.⁸³

2. Advocates for a "hands-free" America

Despite studies which show that hands-free sets do little to reduce the risk of accident associated with dialing while driving, many countries will only allow drivers to use a cell phone if they are using such hands-free equipment.⁸⁴ Proponents of hands-free cell phone use in cars argue that current American driving laws are both inadequate and difficult to enforce.⁸⁵ However, police officials are quick to note that any driving restrictions specifically targeted at cell phones might be "overkill" in the battle against distracted drivers.⁸⁶ Accordingly, in light of the difficulty of enforcing current laws, there are legitimate concerns about the capacity of law enforcement to enforce yet another traffic law targeted at a specific class of drivers.⁸⁷

Although store-front retailers stand to benefit from hands-free traffic laws by selling an increased number of hands-free headsets,⁸⁸ cell phone manufacturers are concerned that such laws will affect overall cell phone sales.⁸⁹ Specifically, cell phone manufacturers argue that lawmakers should avoid any law which discourages cell phone sales "because phones are invaluable to stranded motorists and can help speed rescue efforts for accident victims."⁹⁰ In fact, studies by NEJM and NHTSA show that cell phones are effective in reducing response time to auto accidents, and thus are responsible

83. See Wright, *supra* note 59 (stating that when drivers are engrossed in telephone conversations, they become oblivious to what is going on around them).

84. See Komarow, *supra* note 78 (reporting that such laws exist in Austria, Denmark, Greece, Hungary, Italy, Poland, Romania, Switzerland, Slovenia, Spain, and Turkey); see also CAIN & BURRIS, *supra* note 41, § 7.3.1 (reporting that under the Spanish headset law, violators face fines up to \$800); WIRELESS COMMUNICATIONS IN VEHICLES, *supra* note 71, at app. A (citing Switzerland's Public Penalty Regulations, Victoria's Road Safety Regulations, New South Wales' Motor Traffic Regulations, Israel's Transportation Regulations, and Italy's Code of the Road, all of which prohibit drivers from using hand-held telephones while driving).

85. See Kirk, *supra* note 6 (reporting that police have issued few citations under current distracted driving laws unless the driver has been involved in an accident).

86. Pfankuch, *supra* note 5.

87. See *id.*

88. Jeffrey Kosseff, *Effort to Ban Cell Phone Use in Cars Pleases Some Store Owners*, PORTLAND OREGONIAN, Aug. 7, 2000, at B01, available at 2000 WL 5422778.

89. See *id.* (reporting that cell phone sales in a Pennsylvania city decreased 30% the year after local headset laws were enacted).

90. See Hyman, *supra* note 56. "Every day more than 118,000 emergency calls are made from a wireless phone." Wright, *supra* note 59.

Moreover, cell phones are particularly useful in the battle against drunk drivers, allowing motorists to report possible offenders to the police from their cars. Kirk, *supra* note 6.

for saving lives.⁹¹ The Center for Urban Transportation Research reports that 40% of drivers in 1993 used their cell phone at some time to call for help for another vehicle.⁹²

3. Enforce existing careless driving laws

Despite the apparent dangers involved with dialing and driving, many cell phone users believe that cell phone use is a matter of common sense, no more dangerous than other driving distractions.⁹³ They argue that cell phones should not be specifically targeted in the battle against distracted driving.⁹⁴ Moreover, they argue that states already have the tools to effectively regulate the larger problem of inattentive driving.⁹⁵ These proponents are correct insofar as all fifty states currently have laws prohibiting reckless driving; however, only half have laws which prohibit inattentive driving.⁹⁶

In Cleveland, Ohio, for example, the law prohibits drivers from operating a motor vehicle without giving “full time and attention to [its] operation.”⁹⁷ Other laws forbid drivers from operating a vehicle without giving full-time attention to the vehicle itself⁹⁸ or without maintaining reasonable control of the vehicle.⁹⁹ These laws have already proven effective in penalizing erratic cell

91. NAT'L CONFERENCE OF STATE LEGISLATURES, CELL PHONES AND DRIVING (1999), <http://www.ncsl.org/programs/esnr/celphone.htm> (last visited Jan. 24, 2002).

92. CAIN & BURRIS, *supra* note 41, § 2.4 tbl. 8 (citing to a Motorola Cellular Impact Survey). The Motorola Cellular Impact Survey also indicated that 39% of cell phone owners in 1993 used their phone to summon help for their own disabled vehicle, and 28% percent of cell phone owners in 1993 called for help for another's medical emergency. *Id.*

93. Kirk, *supra* note 6; *see also Cell Phone Legislation, supra* note 15.

94. Komarow, *supra* note 78.

95. Kirk, *supra* note 6 (“There are already laws on the books in all 50 states that address the problem of distracted drivers . . . whether you are talking on the phone, applying makeup, eating a Big Mac or turning around to talk to children in the back seat, those laws should be enforced' . . .”).

96. Stefanova, *supra* note 63.

97. *City of Cleveland v. Isaacs*, 632 N.E.2d 928, 929 (Ohio Ct. App. 1993).

98. *See id.* at 930.

99. *See OHIO REV. CODE ANN. § 4511.202* (Anderson 1999) (“No person shall operate a motor vehicle . . . or streetcar on any street, highway, or property open to the public for vehicular traffic without being in reasonable control of the vehicle . . .”); *see also IDAHO CODE § 49-1401(3)* (Michie 2000) (“Inattentive driving shall be considered a lesser offense than reckless driving and shall be applicable . . . where the conduct of the operator has been inattentive, careless or imprudent . . . rather than heedless or wanton, or in those cases where the danger to persons or property by the motor vehicle operator's conduct is slight.”); *N.M. STAT. ANN. § 66-8-114(B)* (Michie 1998) (“Any person who operates a vehicle in a careless, inattentive or imprudent manner, without due regard for the width, grade, curves, corners, traffic, weather and road conditions and all other attendant circumstances is guilty of a misdemeanor.”).

phone-toting drivers.¹⁰⁰ For example, in Delaware, a citation for inattentive driving may cost first time offenders \$25 to \$115 and repeat offenders \$50 to \$230.¹⁰¹ Moreover, repeat offenders may be sentenced to between ten and thirty days imprisonment.¹⁰²

B. *Legislative Efforts to Regulate Roadway Cell Phone Use*

1. Local restrictions on dialing while driving

The greatest effort to restrict dialing while driving has come from local lawmakers in response to local cell phone related tragedies.¹⁰³ Currently, 300 municipalities are considering legislation that would restrict the use of cell phones on the roadways.¹⁰⁴

Brooklyn, Ohio became the first local municipality in the United States to ban cell phone use behind the wheel,¹⁰⁵ prompted by the tragic death of two-year old Morgan Lee Pena.¹⁰⁶ Under the citywide ban, first time offenders are fined only three dollars if they are caught using a cell phone while driving,¹⁰⁷ but may be fined as much as \$100 for a second offense¹⁰⁸ or if they are involved

100. See *Isaacs*, 632 N.E.2d at 931 (upholding a fine of an erratic driver who was seen crossing center and curb lines of traffic while using a cell phone).

101. DEL. CODE ANN. tit. 21, § 4176(b)-(c) (1995) ("Whoever operates a vehicle and who fails to give full time and attention to the operation of the vehicle, or whoever fails to maintain a proper lookout while operating the vehicle, shall be guilty of inattentive driving.").

102. *Id.*

103. *Localities Wrestling with Bans on Cellphones*, COMM. DAILY, Oct. 23, 2000, available at 2000 WL 4696460; see also NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 91 ("As more constituents report near misses with drivers using car phones . . . legislators may feel growing pressure to specifically restrict cellular phone use in automobiles.").

104. Holmes, *supra* note 5.

105. Donna Dudick, *Cell Phone Safety Under Legal Scrutiny: Conviction Issued Under Ordinance Restricting Cell-Phone Use*, LEGAL INTELLIGENCER, Apr. 19, 2000, at S3. The town of 11,000 boasts signs at its city limits which read, "Park 2 Talk. It's the Law." Holmes, *supra* note 5.

Brooklyn, Ohio was also the first local municipality to pass mandatory seat belt laws in 1966. Dan Meyer, *Judge Overrules Town on Cell-Phone Driving Ban*, RCR RADIO COMM. REP., July 17, 2000, at 1, available at 2000 WL 9541762.

106. Dudick, *supra* note 105, at S3; see also *supra* text accompanying notes 3-5 (concerning the death of two-year old Morgan Lee Pena).

107. See Meyer, *supra* note 105.

108. *Cell Phone-Driving Ban*, in J. REC. (Okla. City), Sept. 3, 1999, available at 1999 WL 9848586.

in an accident while using a cell phone.¹⁰⁹ To date, local police have issued 300 citations under the ban, maintaining that their efforts in enforcing the law are valuable in raising public awareness of the dangers of dialing and driving.¹¹⁰

Few local governments have succeeded in enacting similar cell phone bans of their own.¹¹¹ A lack of state level action has increased the motivation of local officials to act.¹¹² In 2000, the battle against dialing and driving took a giant leap forward when Suffolk County, New York became the first county to ban dialing and driving—a county larger than fifteen states.¹¹³ Accordingly, local officials hope that the increase in inconsistent legislation at the local level will compel state lawmakers to act promptly.¹¹⁴

2. The problem of preemption

Local governments who are working to curb dialing and driving face the particular problem of preemption. Most traffic laws within each state are uniform so that motorists within that state are not changing their driving habits as they pass from town to town.¹¹⁵ However as Ohio illustrates, localized traffic laws are permitted so long as they are not in conflict with the state's general

109. *Id.*

110. *See* Holmes, *supra* note 5.

As part of the city's public awareness campaign, police also give offenders pamphlets detailing the death of Morgan Lee Pena. Dudick, *supra* note 105. As such, the law costs the city more in paperwork than they collect in fines. Meyer, *supra* note 105.

111. *See, e.g.,* Wright, *supra* note 59 (reporting that Santa Monica, CA debated such an ordinance, but decided against it). *But see* Meyer, *supra* note 105 (noting that Marlboro Township, NJ, and Hilltown Township, PA, have also tried to ban cell phone use on their local roadways).

112. *Localities Wrestling with Bans on Cellphones*, *supra* note 103.

113. Robert Gearty, *Suffolk Pols Pull Plug on Car Cellphones*, N.Y. DAILY NEWS, Oct. 27, 2000, at 8, available at 2000 WL 26559912.

In addition, the New York City Taxi and Limousine Commission acted in 1999 to ban New York taxi drivers from using a wireless phones while driving in an effort to protect cab passengers. *See* Hyman, *supra* note 56.

Massachusetts has proposed a similar bill that would exclusively prohibit school bus drivers from using cell phones while driving. Leff, *supra* note 1.

114. *Localities Wrestling with Bans on Cellphones*, *supra* note 103. Arguably, this local pressure is beginning to work insofar as New York recently became the first and only state to enact a statewide ban on cell phone use while driving. *See infra* text accompanying notes 136-38. For the most recent activity on cell phone legislation in all fifty states, see the NHTSA State Legislative Tracking Database at <http://www.nhtsa.dot.gov/ncs> (last visited Jan. 24, 2002). To track, choose the appropriate state or in the issue field, choose "cell phone issue."

115. *See The Early Show: Congressional Committee Opens Hearings on Cell Phone Use While Driving* (CBS television broadcast, July 18, 2000) transcript available at 2000 WL 6654611.

laws.¹¹⁶ This raises the question of whether local cell phone bans conflict with statewide traffic laws.

Hilltown Township, Pennsylvania, fought and lost the battle of preemption.¹¹⁷ The city passed a law which allowed drivers to use hands-free sets or speaker phone devices, but did not allow motorists to use traditional cell phone handsets while driving.¹¹⁸ Offenders of the traffic ordinance faced a \$75 fine.¹¹⁹ However, like most local governments, Hilltown's power to enact local laws pertaining to vehicles flows exclusively from the permission of the state.¹²⁰ And while the state traffic laws are indeed silent on the matter of dialing and driving, a state judge ruled that Hilltown's local ordinance conflicted with the state traffic laws because it imposed a more stringent level of vehicle control on motorists.¹²¹ As such, the judge issued a three sentence order¹²² declaring that the local law was preempted by the portions of state motor code which addressed careless driving.¹²³

Critics of this judge's decision argue that because cell phone use is not specifically addressed by state traffic laws, there can be no conflict between the state and local laws.¹²⁴ Some local legislators also argue that while local traffic regulations are preempted by similar state traffic laws, the local ban on cell phones is meant to promote public safety and not traffic safety.¹²⁵ As such, these legislators argue that local governments are given more discretion in deciding local safety issues.¹²⁶ However, these cell phone laws by their very nature place direct restrictions on what can occur within the cabin of a car and impose more restrictive standards of care on drivers within city limits. Critics point out that if the state were to accept this purely semantic argument, then a driver's blood alcohol content could also be regulated locally as a matter of

116. *City of Cleveland v. Isaacs*, 632 N.E.2d 928, 930 (Ohio Ct. App. 1993).

117. *See Meyer, supra* note 105.

118. *See Dudick, supra* note 105.

Hilltown's local ordinance read, "[N]o person shall operate a motor vehicle on any street . . . while engaging in any conduct defined as the use of a mobile telephone unless the operator maintains both hands on the applicable steering devices." *Id.* (quoting HILLTOWN, PA., ORDINANCE 99-14).

119. *Id.*

120. PA. CONS. STAT. ANN. tit. 75, § 6101 (West 1996) ("[N]o local authority shall enact or enforce any ordinance on a matter . . . unless expressly authorized [by the state].").

121. *See Meyer, supra* note 105.

122. *Ban on Cell Phones While Driving Tossed*, PA. L. WKLY., July 17, 2000, at 11.

123. Laurie Mason, *Judge Strikes Down Cell-Phone Driving Ban*, LEGAL INTELLIGENCER, July 19, 2000, at S5.

124. Sandy Lovell, *To Beat Suits, Cell-Phone Ban is Billed as Safety, Not Traffic Effort*, N.J. L.J., July 24, 2000, at 7.

125. *Id.*

126. *See id.*

public safety even if it were in conflict with existing state traffic laws.¹²⁷ Although it seems unlikely that any judge would accept the city's public safety argument, the debate continues while other cities prepare to fight their own preemption battles.¹²⁸

3. State legislative efforts

In light of problems with preemption, many local governments are turning to state lawmakers to effectively address the dangers of dialing while driving.¹²⁹ Statewide regulation of cell phone use would solve the problem of uniformity and consistency in the state's traffic laws which might otherwise exist under a patchwork of local cell phone legislation.¹³⁰ Since 1995, legislators in over thirty-seven states have introduced cell phone related laws but only one state has succeeded in passing such legislation,¹³¹ largely because there is no single, strong organized lobby opposing cell phone use.¹³² Some observers even speculate that legislative efforts have been slow because lawmakers themselves have grown particularly fond of their own cell phones.¹³³

Nevertheless, in 2000, twenty-seven states considered legislation to regulate roadway cell phone use—twelve more than only a year before.¹³⁴ And while no

127. *Id.*

128. *Ban on Cell Phones While Driving Tossed*, *supra* note 122 (reporting that two Pennsylvania municipalities have local laws similar to the one overturned in Hilltown township and that Marlboro Township). Additionally, New Jersey expresses concern that their local law may not survive a battle of preemption. Lovell, *supra* note 124.

129. See Lisa Haarlander, *Road Ban Urged for Cell Phones*, BUFF. NEWS, Sept. 7, 2000, at B5, available at 2000 WL 5692464.

130. Bruce Meyerson, *Verizon Backs Car Cell Restrictions*, AP ONLINE, Sept. 26, 2000, available at 2000 WL 27211715.

131. Haarlander, *supra* note 129 (referring to data from the National Conference of State Legislatures); *Hands-Free Calling Now New York Law Safety: Gov. George Pataki Signs Bill Forbidding Hand-Held Cell Phone Use While Driving in the State*, L.A. TIMES, June 29, 2001, at A25, available at 2001 WL 2499538 [hereinafter *New York Law Safety*]; see also NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 91 (detailing recent proposed legislation in fifteen states).

132. Holmes, *supra* note 5.

133. *Prospects Murky for Ban on Cell Phone Use in Cars*, N.J. LAW.: THE WKLY. NEWSPAPER, Aug. 21, 2000, at 2.

134. *Localities Wrestling with Bans on Cellphones*, *supra* note 103.

Proposed legislation in California, for example, would prevent drivers from operating a motor vehicle while operating a cell phone if such use would require the driver to hold the phone in her hand. WIRELESS COMMUNICATIONS IN VEHICLES, *supra* note 71, at app. A (citing S. 1131, Reg. Sess. (Cal. 1997)). However, it is unclear whether such legislation would prohibit the use of headsets which require manual dialing to initiate a call, as opposed to voice activated phones.

state has completely banned the practice of dialing while driving,¹³⁵ New York recently became the first and only state to ban the use of “hand-held” cell phones while driving.¹³⁶ However, other states are not far behind; in fact, new state laws demonstrate that lawmakers are well aware of the danger that cell phones present.¹³⁷

As of December 1, 2001, New Yorkers will no longer be able to use “hand-held” phones while driving.¹³⁸ Under the new statewide law, New Yorkers will have to purchase hands-free devices such as headsets or speakerphones if they wish to use their cell phones while driving.¹³⁹ However, the New York law will allow cell phone use if the driver is in danger or phoning 911.¹⁴⁰ This law does not address the issue of cell phone users *dialing* while driving insofar as the law still allows drivers to dial their cell phones while behind the wheel.¹⁴¹

Other states have proposed less conventional solutions to the problem of dialing while driving.¹⁴² Nebraska, for instance, has proposed a law which creates a rebuttable presumption that drivers who are on cell phones at the time

135. Beckman, *supra* note 56.

136. *New York Law Safety*, *supra* note 131.

137. California state law “requires rental car companies to include written operating instructions for safe use of cellular phone equipment installed in their vehicles.” Beckman, *supra* note 56. Massachusetts state law requires that cell phones “not interfere with vehicle operations” and requires drivers to “keep one hand on the steering wheel at all times.” *Id.* Oklahoma and Minnesota laws require state police to include information regarding cell phone use on accident reports. *Id.*

138. *New York Law Safety*, *supra* note 131.

139. *Id.* Drivers caught violating the new law will be fined \$100 for a first time violation, \$200 for a second violation and \$500 for every violation thereafter. *New York Bans Use of Hand-Held Cell Phones While Driving*, SAN ANTONIO EXPRESS-NEWS, June 29, 2001, at 03A, available at 2001 WL 22458963. However, through February 28, 2002, the fines for first-time offenders will be waived if the driver purchases a hands-free device and presents a receipt in court. *New York State Bans Cell Phones While Driving*, WIRELESS NEWS, June 26, 2001, available at 2001 WL 20311144.

140. Beckman, *supra* note 56.

Both Texas and California are among the states which have considered following New York’s lead—like New York, both states are considering legislation that would allow drivers to use only “hands-free” cell phones while on the road. *Renewed Aim*, *supra* note 12; Hugo Martin, *Behind the Wheel: A Plan to Take Phones Out of Drivers’ Hands*, L.A. TIMES, July 10, 2001, at B2, available at 2001 WL 2502002.

141. *New York Law Safety*, *supra* note 131.

142. Illinois, for instance, has suggested that cell phone laws should be phased in over a three year period. Fran Spielman, *Natarus Weakens Cell Phone Crackdown*, CHI. SUN-TIMES, Oct. 22, 2000, at 26, available at 2000 WL 6700780. The three year phase in of cell phone related traffic regulation is patterned after a 1988 Illinois seat belt law. *Id.* The three year period is designed to give manufacturers time to make cheaper and safer alternatives and police time to compile more accurate crash statistics. *Id.*

of an accident are at fault.¹⁴³ Georgia has proposed even broader legislation which would require drivers to use “due care” when using both radios and cell phones.¹⁴⁴ Despite the increasing number of state-initiated legislative proposals in the area of driver distraction, states have remained apprehensive, and the driving safety industry is hoping for federal guidance so that there might be some uniformity among states.¹⁴⁵

4. The federal government responds

The federal government has been particularly slow to act in addressing driver distraction because the enactment and enforcement of traffic safety laws are traditionally reserved for the states.¹⁴⁶ However, on July 18, 2000, Congress opened hearings to discuss possible legislative solutions.¹⁴⁷ In addition, the House of Representatives recently introduced the Driver Distraction Prevention Act of 2000—a million dollar study designed to explore the impact of driver distractions on highway safety.¹⁴⁸

Federal regulatory agencies are also getting involved in the battle against driving while dialing.¹⁴⁹ The NHTSA recently issued its first warning, recommending that motorists refrain from using cell phones and reading e-mail while driving.¹⁵⁰ A NHTSA spokesperson commented that the agency is still conducting studies and federal action is still in the future.¹⁵¹ In the meantime, frustrated opponents of dialing and driving wonder “[h]ow many more people have to die before this activity is curtailed by lawmakers?”¹⁵² Do we really need studies to tell us that dialing while driving kills?

143. Robynn Tysver, *Bill Would Put Legal Burden on Phone Users*, OMAHA WORLD-HERALD, Feb. 17, 2000, at 17, available at 2000 WL 4354677. Nebraska’s law would be similar to a prior German law which presumed that any driver who is found to be using cell phone during an accident is guilty of gross negligence. Komarow, *supra* note 78. As such, a German driver is personally responsible for any damages as a result of the accident, and the driver’s insurance company is excused from any liability. *Id.*

However, Germany has since proposed a law that would require a driver to use hands free devices while talking on the phone. *Id.*

144. See Beckman, *supra* note 56.

145. *Localities Wrestling with Bans on Cellphones*, *supra* note 103.

146. NAT’L CONFERENCE OF STATE LEGISLATURES, *supra* note 91.

147. *The Early Show*, *supra* note 115 (reporting that both safety analysts and industry groups were called to testify before Congress).

148. H.R. 3848, 106th Cong. (2000).

149. See Haarlander, *supra* note 129.

150. *Id.*

151. Abate, *supra* note 60.

152. *Limiting Cell Phone Drivers: State Can Take Safety Lesson from Bucks Municipality*, SUNDAY PATRIOT NEWS, Jan. 2, 2000, at B16.

IV. ALTERNATIVE SOLUTIONS

A. *Nationalized Driver's Education*

1. Teaching old dogs new tricks

The cell phone industry believes that the solution to driving while distracted is education and not legislation.¹⁵³ As a result, cell phone manufacturers have increased their safety efforts in recent years,¹⁵⁴ proclaiming a new industry-wide slogan: "Safety – your most important call."¹⁵⁵ In the process, cell phone manufacturers have placed over 271,000 educational safety displays in retail stores across the nation and have established a nationwide toll-free education number.¹⁵⁶ In addition, cell phone manufacturers have increased safety-minded billboard advertising,¹⁵⁷ presumably to reach motorists when they are behind the wheel. Furthermore, some manufacturers have begun to mail their customers safety tips on a routine basis,¹⁵⁸ while others now make new cell phone customers sign a safe-driving pledge.¹⁵⁹ The cell phone industry hopes to avoid formal regulation of cell phones and that a safety-educated driving public will regulate itself.¹⁶⁰

2. A new generation of "Driver's Ed"

Drivers under twenty years of age are the most likely to be involved in

153. See Hyman, *supra* note 56. But see Wright, *supra* note 59 (reporting that Verizon Communications, a leading cell phone manufacturer, broke ranks with the industry and now supports legislation that would ban the use of motorists using hand-held cell phones).

154. Kirk, *supra* note 6.

155. *Id.*

156. *Letters to the Contrary*, HERALD ROCK HILL (Rock Hill S.C.), Jan. 6, 2001, at 4A, available at 2001 WL 5210987 (noting that cell phone related public service announcements have reached more than 200 million television viewers and 88 million radio listeners).

157. Stefanova, *supra* note 63.

158. Kirk, *supra* note 6; see also *Letters to the Contrary*, *supra* note 156 (claiming that the cell phone industry has sent more than sixty-five million bill stuffers to its customers).

159. Kirk, *supra* note 6.

160. Mike Langberg, *Lawmakers Address Driving While Talking on Cell Phones*, SAN JOSE MERCURY NEWS, Apr. 12, 2001, available at 2001 WL 18878659. The cell phone industry recommends, for example, using hands-free sets and ceasing conversations while in heavy traffic or dangerous driving conditions. Kirk, *supra* note 6. The industry also recommends dialing manually only when stopped and refraining from stressful and emotional conversations when driving. *Id.* They also believe that drivers can reduce the risks of accidents by using built in safety features, such as speed dial and redial. *Id.*

distraction-related crashes.¹⁶¹ Moreover, younger cell phone users continue to make up a large portion of cell phone users.¹⁶² As a result, some of America's educational institutions are now teaching cell phone safety as part of their driver's education programs.¹⁶³ These programs are designed to familiarize new drivers with cell phone uses and features, while teaching them to avoid answering calls during intense driving situations.¹⁶⁴ The schools are also teaching students to pull over or hang up if the phone conversation becomes emotional.¹⁶⁵ However, most state and local lawmakers have yet to successfully integrate driver distraction education into formal driver's education programs, and, as a result, have failed to reach new drivers when they are first developing their lifetime driving habits.

B. *Civil Liability for Both Cell Phone Companies and Employers*

A lack of cell phone safety legislation may prompt victims of cell phone-related accidents to seek civil remedies through the courts. Since NHTSA has issued its official warning about the dangers of cell phone use and driving, cell phone manufacturers have been informed that these products pose a safety threat.¹⁶⁶ And while speaker phone sets not attached to phones can cost as much as \$300,¹⁶⁷ cheaper technology is now available allowing hands-free use of cell phones,¹⁶⁸ such as voice activated phones.¹⁶⁹ Currently, hands-free technology has become quite affordable; it now can cost less than \$15.¹⁷⁰

In light of NHTSA's warning, cell phone manufacturers may soon face strict product liability for cell phone design defects.¹⁷¹ A design defect exists if

161. STUTTS ET AL., *supra* note 33. In addition, drivers between the ages of fifteen to twenty are four times more likely to be in a fatal crash than drivers ages twenty-five to sixty-four. Wayne Washington, *The New Driver's Ed: Buckle Up, Don't Speed, Get Off the Phone*, ST. PETERSBURG TIMES, Nov. 17, 1999, at 1B, available at 1999 WL 27328916.

162. See CAIN & BURRIS, *supra* note 41, § 2.2, tbl.2.

163. Jody Benjamin, *Hang Up and Drive*, SUNDAY GAZETTE-MAIL, Apr. 6, 1997, at P5E, available at 1997 WL 7094650; see also Pfankuch, *supra* note 5 (describing the start of Florida's "Cellular Safe Talk" program).

164. Pfankuch, *supra* note 5.

165. *Id.*

166. Stefanova, *supra* note 63.

167. *Verizon Alone on Slippery Slope of Backing Hands-Free Rules*, CT WIRELESS, Sept. 26, 2000, available at 2000 WL 6392472.

168. Kosseff, *supra* note 88 (referencing a hands-free cell phone that plugs into a car cigarette lighter).

169. McGuire, *supra* note 39.

170. Abate, *supra* note 60.

171. In light of the recent safety campaign of cell phone manufacturers, a products

a foreseeable injury is caused by an unreasonably dangerous product.¹⁷² And while safer cell phone designs may be feasible, most courts will apply a risk-utility balancing test which considers the usefulness of the cell phones in relation to their overall risk.¹⁷³ Consumer expectations of safety are also a factor in assessing risk, and many states will allow a defense of comparative negligence in light of the known dangers of multitasking while driving.¹⁷⁴ As a result, victims of cell phone related injuries face a tough battle if they are to convince a court that cell phones are unreasonably dangerous as designed. While it is highly foreseeable that cell phones will be used in cars,¹⁷⁵ a court would be unlikely to find current cell phone designs unreasonable given the undeniable utility and versatility of the cell phone and the low fatality rates in cell phone related accidents as reflected by current crash data. However, as technology changes, it is always possible that a failure to integrate certain safety-related technology may be unreasonable in light of what we may know from future studies and reports on cell phone related collisions.

Even employers are under attack for their role in cell phone related accidents.¹⁷⁶ As a consequence, some employers have recently offered their employees defensive driving courses, which includes driver cell phone training.¹⁷⁷ However, if an employee is acting within the scope of his employment, an “employer cannot insulate himself from liability [for the

liability action for failure to warn would likely be unsuccessful. In addition, most jurisdictions do not require manufacturers to warn consumers of obvious dangers. JOHN W. WADE ET AL., PROSSER, WADE & SCHWARTZ'S CASES & MATERIALS ON TORTS 760 (9th ed. 1994). Otherwise, one might expect drive thru restaurants to provide similar warnings to those who might drive and eat.

172. *Id.* at 728-29.

173. *See id.* at 740-41.

174. *See id.* at 740-41, 780.

175. Foreseeability that cell phones will be used in cars is especially likely given the availability of rechargers and power adaptors designed specifically for motorists.

176. *See, e.g., Cell Phone Accident Costs Company 500,000*, MANAGING RISK, June 1999 (detailing a suit in which an employer was forced to settle out of court for \$500,000 when an employee stockbroker hit a cyclist while on a business related call—the employer was alleged to have no policy or training on the use of cell phones by employees); *see also* Alston, *supra* note 45 (reporting that employers can incur liability for accidents which result from business or personal calls of their employees); Stephanie Armour, *Firms Crack Down: Don't Dial and Drive*, USA TODAY, Sept. 26, 2000, at 01A, available at 2000 WL 5790661 (noting that employees are more likely to die from traffic related accidents than any other hazard of work); Dudick, *supra* note 105 (reporting that the family of Morgan Lee Pena has filed suit against the driver's employer, claiming that the driver was acting within the scope of his employment by talking on his cell phone at the time of the accident).

177. Armour, *supra* note 176.

Some employers send their employees safety bulletins or provide their employees with hands-free sets. *Id.*

negligence of his agent] by imposing safety rules or by instructing his employees to proceed carefully—no matter how specific and detailed his orders may be.”¹⁷⁸ Consequently, some employers completely forbid their employees to use cell phones while driving.¹⁷⁹

V. THE FUTURE OF DISTRACTED DRIVING

For the automobile, the future is ripe with endless technological possibilities. Telematics, the now popular integration of computer and automotive technology, has created a craze among car manufacturers and has taken concerns over distracted driving to an entirely new level.¹⁸⁰ Today, computers in some cars allow drivers to surf the Internet, and other cars will actually read a driver’s e-mail or stock quotes aloud.¹⁸¹ Current telematic computers are even capable of making hotel and restaurant reservations for the driver.¹⁸² Within the next three years, the number of Americans accessing the Internet via their driver’s seat is expected to increase by over 700%.¹⁸³

178. WADE ET AL., *supra* note 171, at 644. Ironically, 78% of drivers on cell phones are talking to their family and friends, and not coworkers. *Who’s Driving While Using a Cell Phone and What They’re Gabbing About Might Just Surprise You . . .*, PROGRESSIVE NEWS RELEASE, Mar. 19, 2001, available at http://progressive.com/newsroom/cell_phones.asp (last visited Jan. 24, 2002).

179. Brenda Rios, *Lawsuit Could Lead Companies to Limit Workers’ Cell-Phone Use While Driving*, DETROIT FREE PRESS, Sept. 11, 2001, available at 2001 WL 27174780.

As a condition of receipt of the cell phones during working hours, some employers could also require their employees sign an acknowledgment requiring that cell phones not be used while driving. Alston, *supra* note 45.

180. Telematics is the now popular integration of computer and automotive technology. See Amanda Greene, *Auto Extras: New Car Gadgets Keep You Safe, Comfortable*, MORNING STAR (Wilmington, N.C.), Oct. 9, 2000, at 5B, available at 2000 WL 27833662.

181. John Yaukey, *Car of Future Doubles as House and Office: Connected Cars Cruise Toward Safety, Comfort*, DETROIT NEWS, Oct. 9, 2000, at 01, available at 2000 WL 3494359.

Some drivers have even equipped their cars with DVD players and Nintendos to entertain their children on road trips. Greene, *supra* note 180. Specifically, Pioneer Electronics Corp., has developed a seven inch theater system for sport utility vehicles which mounts to the dashboard and folds away when not being used. Benny Evangelista, *Caution . . . Technology on Board: Critics Fear New Tech Gadgets Could Drive Motorists to Distraction*, S.F. CHRON., Jan. 14, 2001, at B5, available at 2001 WL 3392235.

182. See Greene, *supra* note 180.

183. See Yaukey, *supra* note 181 (noting that the number of drivers accessing the internet from their cars is expected to rise from 7.4 million to 61.5 million by 2003); see also Kobe, *supra* note 3, at 32 (announcing that Cadillac will be the first car company to offer factory installed e-mail and internet in their 2001 model cars); Stefanova, *supra* note 63 (reporting that 7% of drivers currently have access to e-mail and 3% currently have fax capacity in their cars).

Expanding sales in mobile electronics directly reflects this.¹⁸⁴ Drivers of the future will even be able to upload family photos to their vehicle's digital dashboard.¹⁸⁵

Currently, factory installed navigation services are priced at \$2000-\$5000 but are quickly decreasing in price.¹⁸⁶ As such, NHTSA is worried that as telematics become more readily available, the current problem of driver distraction will only grow worse.¹⁸⁷ Some states have anticipated the dangers of telematics and have enacted appropriate legislation to deal with some potential hazards.¹⁸⁸ Consequently, telematics may soon subject car manufacturers to additional tort liability for defective product design.¹⁸⁹

In response to concerns over the safety of telematics, the automotive industry is developing "foolproof safeguards" which will only allow drivers to use e-mail and navigation systems when the car is stopped.¹⁹⁰ Other products are being designed so as to minimize hands-off-wheel time and to increase simplicity and ease of use.¹⁹¹ Furthermore, car companies are rushing to introduce voice activation technology for use with navigation and Internet systems to eliminate the need for reading while driving.¹⁹² Coupled with adequate warnings, these safeguards should effectively reduce the chance of defective design liability by reducing the risk of injury associated with these products.

Like cell phones, telematics are expected to increase highway safety in unexpected ways.¹⁹³ In-car navigation systems will keep drivers apprised of

184. See Evangelista, *supra* note 181 (reporting that the sales of mobile electronics was expected to exceed \$9 billion in the year 2000).

185. See Greene, *supra* note 180.

186. *Id.*

187. Kobe, *supra* note 3, at 33-34.

Currently, NHTSA research indicates that navigational systems which require hand input are ill-advised while driving but that "voice recognition technology is a viable alternative." NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., DRIVER DISTRACTION WITH WIRELESS COMMUNICATIONS AND ROUTE GUIDANCE SYSTEMS § 2.4, at 32 (July 2000).

188. See, e.g., WIS. STAT. § 346.89(2) (West 1999) ("No person shall drive any motor vehicle equipped with any device for visually receiving a television broadcast when such device is . . . visible to the operator while driving the motor vehicle."); see also Stefanova, *supra* note 63.

189. Kobe, *supra* note 3, at 33 ("If I had a client that was injured by someone because he was checking his e-mail, then I'd have a great case against the industry for selling a defective product. In essence, they built in a device that is guaranteed to distract the driver.").

190. *Id.*

191. *Id.* at 35-36; see also Greene, *supra* note 180 (reporting that Mercedes has placed controls on the steering wheel for ease of use with in-car telephone and navigation equipment).

192. Meyerson, *supra* note 130.

193. See Kobe, *supra* note 3, at 36.

upcoming exits so that the driver can avoid last minute swerving on freeways.¹⁹⁴ These systems will also warn drivers of dangerous road conditions including slippery roads and traffic delays from accidents.¹⁹⁵ In-car computer systems will even allow the manufacturer to track the car if stolen¹⁹⁶ and provide information about stranded drivers via satellite.¹⁹⁷ The practical utility of these new automotive products should make it very difficult for plaintiffs to successfully argue the existence of a design defect so long as manufacturers continue to develop safety precautions to counteract potential design defects. However, a more important question is whether local, state, or federal lawmakers will nevertheless feel compelled to regulate this industry in the name of public safety.

VI. RECOMMENDATIONS

The battle over cell phone use on America's roadways can be summarized as a balance between public safety and protection versus driver efficiency and autonomy. Simply put, lawmakers must ask how many lives they are willing to give up in exchange for the continued use of cell phones on our roadways.¹⁹⁸ The problem is that lawmakers may never have completely accurate studies which will reveal the true cost of dialing while driving.¹⁹⁹

Nevertheless, public pressure continues to mount in the crusade to ban cell phones from America's roadways.²⁰⁰ Yet, while more than half of Americans believe that cell phones are dangerous,²⁰¹ 70% believe that it is also dangerous to talk to fellow passengers while driving.²⁰² Does this mean that we should

194. *Id.*

195. *Id.*

196. Greene, *supra* note 180.

197. *Id.* (noting also that in-car computers can also direct lost drivers out of unsafe areas).

Other features of telematics include a help button which, when pushed by a driver, directs police and firefighting officials to an accident and reports any existing medical conditions the driver may have. *Id.*

An even more ambitious safety feature of telematics is a work load manager which, based on the driver's vital information, computes current roadway dangers and decides whether the driver can afford to take a phone call at any given moment. Kobe, *supra* note 3, at 37-38. If the computer concludes that the driver is unable to handle an incoming call at any given moment, the call is forwarded into voicemail and delivered to the driver during more favorable driving conditions. *Id.* at 38.

198. *See id.*

199. *See id.*

200. Gallup Poll Releases, *supra* note 31.

201. *Id.*

202. Bragg, *supra* note 23.

punish those who talk to their passengers while driving? What about those who eat or listen to emotionally-charged talk radio stations while driving? After all, the AAA considers both food and radios more dangerous than cell phones²⁰³ and some research indicates that simple and casual cell phone conversations are less distracting than tuning a radio while driving.²⁰⁴ And what should we do about the most dangerous distractions on the highway—the distractions *outside* of the car?²⁰⁵

Moreover, the information age has made cell phones less of a luxury and more of a necessity. Cell phones have become the epitome of efficiency, relied on by doctors and babysitters alike. In addition, we cannot afford to ignore the role that cell phones play in the battle against drunk driving or in the speedy and accurate reporting of accidents, which saves lives.²⁰⁶ Nor should we ignore the safety and utility of telematics and in-car navigation systems.²⁰⁷ One can only imagine an America where lawmakers had completely dismissed the utility of the automobile itself in light of its inherent danger; after all, the human body was not designed to travel at freeway speeds. Instead, with the aid of government research, car manufacturers forged ahead and developed safety features to make vehicles as safe as possible, including seatbelts and air bags. In the process, automobiles grew even more efficient and are today almost indispensable. Likewise, lawmakers should avoid ensuring the safety of all motorists at the complete expense of the cell phone's current and potential efficiency. Thus, while manufacturers must continue to make both cell phones and telematics as safe as possible, lawmakers should not rush to abandon them altogether.

Still, as long as there is public support for the regulation of cell phones in vehicles fueled by misconceptions and anecdotal evidence, lawmakers will feel the temptation to appease their constituents.²⁰⁸ In an effort to balance the competing interests of public safety and driver autonomy, some legislators will propose a move toward hands-free technology.²⁰⁹ However, hands-free legislation, like that adopted by New York, ignores the problem of cognitive impairment and would only give the public a false sense of security by fueling common misconceptions. Other lawmakers will seek a quick-fix and call for a sweeping ban on *all* cell phones at the expense of the efficiency cell phones

203. See Stefanova, *supra* note 63.

204. MCKNIGHT & MCKNIGHT, *supra* note 39.

205. STUTTS ET AL., *supra* note 33.

206. See *supra* notes 90-92 and accompanying text.

207. See *supra* notes 193-97 and accompanying text.

208. See NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 91.

209. See *supra* text accompanying notes 84-92.

provide.²¹⁰ Yet, a complete ban on cell phones would ignore the larger problem of distracted driving and would punish hundreds of millions of *safety conscious* cell phone users. And finally, some constituents will take matters into their own hands, seeking individualized justice in extraordinary cases by waging civil legal battles against those cell phone users with deep pockets.²¹¹ As society continues to grow more dependent on cell phones and other information-based technology, these constituents face the increasingly difficult burden of proving that the ever-growing utility of such technology is plainly outweighed by a clear and unacceptable risk. And while some constituents may indeed prove successful in civil litigation, individual legal battles will do little to directly address the problem of driver distraction at the national, state, or even local level. So what *should* we do?

A. *Educate the Motoring Public*

First, lawmakers must join the efforts of the cell phone industry to educate the American driving public as to the dangers of *all* types of driver distractions. Specifically, we must encourage drivers not to engage in *any* activity which will significantly affect their ability to maintain reasonable control of their vehicle. Motorists must learn that a driver's concentration is a very delicate commodity that may be upset by anything from eating to reaching into a glove box. Otherwise, we will pass habits of carelessness to the next generation of drivers—a generation who learns by watching the prudence of their predecessors. When motorists begin to recognize the significance of even the most minor of distractions, they will begin to truly understand the importance of their role as a safety conscious driver.

A large part of educating drivers about the significance of distractions involves explaining the potential hazards of cell phones to both new and existing drivers. With the aid of the cell phone industry, state and local lawmakers should launch public service announcements via radio and billboard advertisements to reach existing drivers when they are most receptive—when they are driving.²¹² In addition, lawmakers should incorporate cell phone safety training into state-funded driver's education programs so as to educate new drivers when they are first developing their lifetime driving habits.²¹³ Finally, lawmakers must educate local police as to the significant dangers of distracted

210. See *supra* text accompanying notes 78-83.

211. See *supra* text accompanying notes 166-79.

212. See *Letters to the Contrary*, *supra* note 156 (describing the willingness of the cell phone industry to participate in cell phone safety education efforts).

213. Perhaps the additional costs of educating both future and existing motorists could be paid for by supplemental taxes on cellular air time usage or on new cell phone purchases.

driving so that officers can effectively recognize the symptoms of driver distraction and will act willingly to enforce existing laws.

Based on the research that is currently available, public service announcements should advise drivers who use cell phones not to do so in tense traffic situations or during times of high stress. Cell phone users should be encouraged to consciously and purposefully allow for more stopping room while driving to compensate for reduced reaction time. Cell phone users should also be taught to avoid answering incoming calls unless they are stopped or unless driving conditions at the time are unquestionably safe. In addition, drivers must be taught to keep all cell phone conversations both brief and simple. And finally, states should work to dispel false perceptions of cell phone safety, including the popular notion that hands-free sets reduce the risk of cell phone related accidents and the belief that cell phones are inherently more dangerous than any other distraction.

However, education efforts cannot simply single out cell phones from the list of current roadway distractions and ignore the larger problem of distracted driving in general; doing so would send the wrong message to drivers. After all, if even a half-second delay while driving can prove deadly, the specific source of the delay is immaterial. Accordingly, rather than villainize cell phone users, lawmakers must target all distractions with their education efforts, including radios, food, makeup, newspapers, books on tape, and even noisy children. Moreover, these educational efforts will allow motorists to recognize potential distractions of the future as they become available, including navigation systems, in-car e-mail, driver-mounted video screens, and even technology we have yet to imagine. When motorists learn the significance of even the most minor of distractions, they are more likely to tailor their own driving habits to create safer road conditions rather than point their guilty fingers at a particular class of drivers.²¹⁴

B. *Fund and Develop Reliable Research*

Second, lawmakers must continue to fund efforts to study driver distraction. Today, there is simply too much conflicting data on the effects of dialing and driving on driver attention.²¹⁵ Only five states have data collection programs in place to measure cell phone related crash information through police accident reports.²¹⁶ Moreover, lawmakers do not know the potential

214. See *Letters to the Contrary*, *supra* note 156. Thus, education may be more effective in the regulation of cell phones. See *id.*

215. CAIN & BURRIS, *supra* note 41 (reporting that the results of varying cell phone related studies show an increased crash risk of anywhere between 34% to 300%).

216. See *Trouble with Telematics*, *supra* note 58.

consequences of levying cell phone restrictions on American motorists. For instance, cell phone legislation may create even more dangerous driving conditions by forcing determined cell phone users to crouch dangerously low in their cars to conceal illegal cell phone use at the expense of keeping their eyes on the road.²¹⁷ Even worse, hands-free laws may cause drivers to frantically attempt to affix their hands-free headsets while driving in an effort to answer unexpected incoming calls.²¹⁸ Banning cell phones may also significantly effect accident reporting and response times, and in turn, cost lives that might otherwise be saved.²¹⁹ In light of these potential hazards, lawmakers must thoroughly explore the effects of potential cell phone legislation before they succumb to the pressure of emotional appeals which spring from solely anecdotal or inconclusive evidence.

States can make great progress in the war against distracted driving, but only when they know all of the facts. Lawmakers must act to include cell phone related crash data on local accident reports and must specifically fund laboratory research on driver distraction. Such information will allow cell phone manufacturers to make both future and existing products safer²²⁰ and will allow experts to more accurately pinpoint and address the most influential factors which contribute to driver distraction. Moreover, such information can be used to dispel false perceptions about cell phone usage in the important effort to educate motorists on the dangers of distracted driving.

C. Strictly Enforce Existing Laws

Finally, states must use current inattentive driving laws to fine any driver who is not in reasonable control of their vehicle, regardless of how the driver is distracted. In addition, those states without specific inattentive driving laws should act quickly to enact such legislation. Such laws should be written to give judges the discretion to ensure justice in extraordinary cases.²²¹

217. See Kathleen O'Brien, *Cell Phone Ban Would Send Mixed Signals*, STAR-LEDGER (Newark, N.J.), Jan. 18, 2001, at 065, available at 2001 WL 9806336.

In addition, a ban on cell phones may cause well-meaning cell phone users to swerve recklessly through traffic lanes to reach the roadside shoulder in an attempt to lawfully answer an incoming call before their phone sends it to voicemail. *Id.*

218. *Id.*

219. See *supra* notes 90-92 and accompanying text.

220. See Evangelista, *supra* note 181. Ford Motor Company, for instance is spending \$10 million to build a automobile simulator, designed to study the effects of driver distractions caused by navigation devices and cell phones. *Id.*

221. Inattentive driving laws that do not allow for potential incarceration or stiff fines in extraordinary situations are likely to do little for Americans' sense of justice when they hear of cellular horror stories.

Because inattentive driving laws target *all* types of driver distraction, they are less burdensome on local law enforcement officials because they do not force police officers to identify and cite a particular class of drivers. Rather, inattentive driving laws allow police to single out only those drivers who pose a viable threat without unfairly punishing safety-conscious cell phone users.²²² Moreover, inattentive driving laws will prove effective in battling the distractions of the future, eliminating the need to legislate against every single piece of automobile technology that proves potentially hazardous. Thus, through the effective enforcement of inattentive driving laws, lawmakers can avoid villanizing cell phone users and instead send the message that no type of driver distraction, either now or in the future, will be tolerated.

VII. CONCLUSION

As long as local tragedies continue to affect our communities, local officials will inevitably face public pressure to write cell phone laws of their own. However, communities that take matters into their own hands will likely face an uphill battle against preemption. Consequently, local lawmakers should focus on fighting the battle of driver distraction and inattention by promoting efforts to educate the driving public, including new drivers. Likewise, state lawmakers should not simply react to mounting public pressure to regulate cell phone use. Rather, states should follow the lead of the federal government by encouraging the cell phone industry to develop safer products, by funding research on driver distraction, and by increasing efforts to educate drivers about the dangers of distracted driving. States must also implement their own data collection programs by requiring cell phone related crash data on local police accident reports.

In the battle against driver distraction, cell phones are simply the tip of the iceberg. Forcing drivers to pay careful attention to their surroundings requires that we punish *any* driver who cannot maintain reasonable control of her vehicle. This includes drivers who lose control of their car because of eating, reading, listening to music, talking to passengers, or even tending to children. It also includes drivers distracted by billboards, e-mail, faxes, stock quotes, and navigational equipment.

Long before there were cell phones, there were bad drivers. Thus, when it comes to poor driving we must be careful not to blame or punish technology and instead blame and punish those behind the wheel. Otherwise we may find ourselves on a slippery slope, banning all new technology that finds its way inside of our cars and depriving ourselves of the safety and utility that

222. *Survey, supra* note 11 (reporting driver confessions of changing clothes and putting in contacts while driving).

technology provides. Like cell phones, both navigation systems and telematics stand to change the way we look at driver safety for both the good and the bad. And when we witness the bad, and our frustrations begin to rise, we must first remind ourselves of the good, and then use our own phones to report the very recklessness we have witnessed.²²³

223. Currently, forty-two states have established special hotlines for cellular phone users to report impaired, aggressive, or unsafe driving. See Nat'l Highway Traffic Safety Admin., *Phone Numbers for Reporting Impaired, Aggressive, or Unsafe Driving* (cataloging a national list of special phone numbers for cellular phone users), at <http://www.nhtsa.dot.gov/people/outreach/safesobr/16qp/phone.html> (last visited Jan. 12, 2002).

