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# Indiana's Texting-While-Driving Ban: Why Is It Not Working and How Could It Be Better?

EMMA GORMLEY\*

## INTRODUCTION

The last decade has seen an explosion in the popularity of text messaging, with many Americans citing it as their preferred form of communication.<sup>1</sup> In 2013, Americans sent 153.3 billion text messages every month, up from just 2.1 billion per month in 2003.<sup>2</sup> This popularity is unsurprising considering the benefits of texting when compared with other popular forms of communication. Texts allow individuals to discretely carry on conversations in public, take less time to send than emails or phone calls, and do not require the intended recipient to be available at the time the message is sent, to name just a few of the benefits.<sup>3</sup> Cell phones have become an essential part of the American lifestyle, and, especially for younger generations, it is next to impossible to picture life without them.<sup>4</sup> One need only drive past the hundreds of anxious consumers queuing up outside an Apple store on the night before the launch of the newest iPhone to gain an understanding of how deep the American obsession with cell phones runs.<sup>5</sup>

Increasingly, cell phones are being designed to make them attractive to individuals on the go, with features like navigation, music streaming, and Internet connectivity.<sup>6</sup> As a result, they appeal to drivers for both their convenience and functionality.<sup>7</sup> In their early days, cell phones were even viewed as roadway safety

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\* J.D. candidate, 2016, Indiana University Maurer School of Law. I would like to thank my family and friends for supporting and tolerating me throughout this process. The life of a law student is hard, but knowing a law student is even harder.

<sup>1</sup> A 2011 study by the Pew Research Center found that 31 percent of Americans who used text messaging preferred receiving text messages to receiving voice calls. AARON SMITH, PEW RESEARCH CENTER, AMERICANS AND TEXT MESSAGING 2 (2011), available at <http://www.pewinternet.org/files/old-media/Files/Reports/2011/Americans%20and%20Text%20Messaging.pdf> [perma.cc/5MMW-L3LK]. Among heavy text users, meaning those who exchange more than fifty text messages every day, the number is even higher, with 51 percent preferring text messaging to voice calls. *Id.*

<sup>2</sup> *Annual Wireless Industry Survey*, CTIA – THE WIRELESS ASSOCIATION (June 2015), <http://www.ctia.org/your-wireless-life/how-wireless-works/annual-wireless-industry-survey> [perma.cc/Q9A7-5ZFA].

<sup>3</sup> See Jennifer Hord, *How SMS Works*, HOW STUFF WORKS (Oct. 14, 2005), <http://computer.howstuffworks.com/e-mail-messaging/sms.htm>.

<sup>4</sup> Young adults between the ages of eighteen and twenty-four send an average of 109.5 text messages per day, well above the median fifty text messages per day. See SMITH, *supra* note 1.

<sup>5</sup> See, e.g., Angela Moscaritolo, *Hundreds Line Up for iPhone 6 at Fifth Ave Apple Store*, PCMAG.COM (Sept. 19, 2014), <http://www.pcmag.com/article2/0,2817,2468851,00.asp> [perma.cc/Q57V-T8TF]; Matthews Sturdevant & Brian Dowling, *Hundreds Line Up to Buy Larger iPhone; '6 Plus' Goes Fast*, HARTFORD COURANT (Sept. 19, 2014), <http://www.courant.com/business/hc-apple-iphone-release-friday-lines-0920-20140919-story.html> [perma.cc/WJ66-92MP].

<sup>6</sup> See *Functions of Mobile Phones Today*, TALKMOBILES (2013), <http://www.talkmobiles.org.uk/functions.html> [perma.cc/F89B-2JX8].

<sup>7</sup> See, e.g., Robert W. Hahn & Patrick M. Dudley, *The Disconnect Between Law and Policy Analysis: A Case Study of Drivers and Cell Phones*, 55 ADMIN. L. REV. 127, 130

devices because they gave drivers the ability to immediately call for help after being in, or witnessing, a motor vehicle accident, increasing the likelihood of receiving medical attention during the critical “golden hour.”<sup>8</sup> Today, however, cell phone use while driving has clearly had a negative net effect on roadway safety, accounting for an estimated 1.5 million crashes each year.<sup>9</sup>

When drivers engage in text messaging in particular, the results can be deadly. Between 2001 and 2007, texting while driving caused more than 16,000 highway deaths.<sup>10</sup> In 2012 alone, the National Safety Council estimated that texting while driving was responsible for between 281,000 and 786,000 motor vehicle crashes.<sup>11</sup> Despite clear evidence of the risk, drivers continue to engage in texting while driving, and other distracting behaviors involving cell phones, in part because of a cognitive split: Drivers see the use of phones while driving as dangerous when done by other drivers, but believe themselves capable of safely engaging in the exact same behavior.<sup>12</sup> Also, many professionals feel a pressure to be constantly productive and available to their employers, causing them to turn to their phones even while on the road.<sup>13</sup>

In an attempt to respond to the serious danger of texting while driving, well-intentioned state legislatures across the country have enacted almost uniformly

(2003) (discussing the convenience of cell phones for users); Robert W. Hahn, Paul C. Tetlock & Jason K. Burnett, *Should You Be Allowed To Use Your Cellular Phone While Driving?*, 23 REG. 46, 46 (1999), available at <http://www.cato.org/pubs/regulation/regv23n3/hahn.pdf> [perma.cc/V4UV-4KH5] (“Cellular phones in cars provide important conveniences, including the ability to check on children, get help in an emergency, and coordinate schedules.”).

<sup>8</sup> Richard Fowles, Peter D. Loeb, & Wm. A. Clarke, *The Cell Phone Effect on Motor Vehicle Traffic Fatality Rates: A Bayesian and Classical Econometric Evaluation*, TRANSP. RES. PART E: LOGISTICS & TRANSP. REV. 1140, 1141, 1145 (2010), available at [http://andromeda.rutgers.edu/~ploeb/papers/TRE\\_46\\_2010.pdf](http://andromeda.rutgers.edu/~ploeb/papers/TRE_46_2010.pdf) [perma.cc/P85E-HJMV].

<sup>9</sup> This number combines the most conservative estimates of crashes caused by handheld, hands-free, and text message usage of cell phones. See National Safety Council, Annual Estimate of Cell Phone Crashes 2013 (2015), available at <http://www.nsc.org/DistractedDrivingDocuments/Attributable-Risk-Estimate.pdf> [perma.cc/S56L-96VM] [hereinafter Estimate of Cell Phone Crashes].

<sup>10</sup> Fernando A. Wilson & Jim P. Stimpson, *Trends in Fatalities from Distracted Driving in the United States, 1999 to 2008*, 100 AM. J. PUB. HEALTH 2213, 2215–16 (2010).

<sup>11</sup> ESTIMATE OF CELL PHONE CRASHES, *supra* note 9, at 4. The broad range is attributed to some uncertainty surrounding the relative risk of text messaging while driving, with studies indicating a range of between 8 and 23 times increased risk. *Id.*

<sup>12</sup> A survey of 1,506 people conducted by Nationwide Mutual Insurance found that 81 percent of cell phone owners admitted to talking on their phones while driving, and 45 percent reported they had been hit or nearly hit by other drivers who were talking on their phones. Despite this, 98 percent of those surveyed still believed that they were safe drivers, indicating a dangerous trend towards overconfidence. Matt Richtel, *Drivers and Legislators Dismiss Cellphone Risks*, N.Y. TIMES (July 18, 2009), available at [http://www.nytimes.com/2009/07/19/technology/19distracted.html?\\_r=0](http://www.nytimes.com/2009/07/19/technology/19distracted.html?_r=0) [perma.cc/YQ4G-2B5J] [hereinafter *Legislators Dismiss*].

<sup>13</sup> See Matt Richtel, *At 60 M.P.H., Office Work Is High Risk*, N.Y. TIMES (Sept. 30, 2009), available at <http://www.nytimes.com/2009/10/01/technology/01distracted.html> [perma.cc/EC74-4CJ6]. There is some indication, however, that company-implemented bans on cell phone usage while driving will not negatively affect productivity. *Id.* (discussing a ban on talking on the phone while driving implemented by AMEC, an international engineering and project management company, which 95 percent of employees said did not affect their productivity).

under-inclusive laws that do little to deter drivers from engaging in risky, distracting behavior. These laws leave police floundering to find ways to enforce them.<sup>14</sup> For many drivers, the perceived benefits of texting or otherwise using a cell phone while driving are high, while the risks seem low. Indiana's texting while driving ban for all drivers, first put in place in 2011, has gone largely unused by police in the years since its passing, with fewer than 400 tickets written as of mid-2014.<sup>15</sup> State police attribute the low numbers mainly to the difficulty they have had in enforcing the law.<sup>16</sup> As it stands today, Indiana's texting while driving statute contains gaping loopholes, which leave drivers free to engage in risky behaviors with little fear of legal repercussions.

This Note will identify and examine obstacles standing in the way of more effective enforcement of Indiana's texting while driving ban and make recommendations on how to achieve greater success. Part I will take a closer look at what makes texting while driving so dangerous, situating it within the larger context of distracted driving. Part II will then focus on Indiana's legislative response in particular, breaking down the texting-while-driving laws and discussing impediments to widespread and consistent enforcement. Part III explores alternative strategies for combating those impediments to enforcement, drawing from the approaches of other areas of law and extralegal alternatives, and finally recommending a strategy for incorporating both statutory and nonlegal adjustments that will best allow Indiana law enforcement to police and deter texting while driving.

## I. THE RISKS OF DISTRACTED DRIVING GENERALLY, AND TEXTING IN PARTICULAR

### *A. What Is Distracted Driving And How Does Texting Fit In?*

Texting while driving falls within the larger framework of distracted driving, which includes talking on a cell phone or to passengers, eating or drinking, applying makeup, reading maps or using a navigation system, and adjusting the radio.<sup>17</sup> Distracted driving is caused by "any activity that could divert a person's attention away from the primary task of driving."<sup>18</sup> In combination, the various

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<sup>14</sup> To date, forty-six states, including Indiana, have banned text messaging for all drivers. U.S. Dep't of Transp., *State Laws*, DISTRACTION.GOV (2014), <http://www.distraction.gov/stats-research-laws/state-laws.html>. A 2013 study by the Cohen Children's Medical Center found, however, that texting while driving is now the leading cause of death for teen drivers, surpassing drinking while driving. *Texting and Driving: Leading Cause of Death Among Teens, Study Finds*, AM. COUNCIL ON SCI. AND HEALTH (May 9, 2013), <http://acsh.org/2013/05/texting-and-driving-leading-cause-of-death-among-teens-study-finds/> [perma.cc/G5N3-5ZRQ] [hereinafter *Leading Cause of Death*].

<sup>15</sup> *Indiana Issues Few Tickets in 1st 3 Years of Texting Law*, INS. J. (June 30, 2014), <http://www.insurancejournal.com/news/midwest/2014/06/30/333316.htm> [perma.cc/76K7-T939]. The number of tickets is particularly low considering that in 2010 Indiana State Police attributed more than 1,000 car wrecks, four of which included fatalities, to cell phone use. *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> U.S. Dep't of Transp., *What is Distracted Driving?*, DISTRACTION.GOV (2014), <http://www.distraction.gov/stats-research-laws/facts-and-statistics.html> [perma.cc/CVE8-QHSK].

<sup>18</sup> *Id.*

forms of distracted driving kill more than nine people every day and injure more than 1,153.<sup>19</sup> It is estimated that every year cell phone use, including hands-free, handheld, and text messaging, accounts for around 1.5 million accidents.<sup>20</sup> It is important to keep in mind this broader context when considering state laws designed to address the isolated behavior of texting while driving.

There are three main types of distraction that can occur: visual, manual, and cognitive.<sup>21</sup> There is a common misconception that hands-free devices are perfectly safe because they do not require the driver to manually manipulate a phone, when in reality multiple studies have found that it is the conversation itself that provides the main distraction.<sup>22</sup> In a study conducted by Carnegie Mellon University, researchers used fMRI scans to show that participants driving in a simulator decreased brain activity by 37 percent in their parietal lobe, an area of the brain linked with navigation and special processing, when they were asked to listen to and comment on spoken sentences.<sup>23</sup> While holding a conversation on the phone, a driver is essentially seeing without processing, a phenomenon researchers call “inattention blindness.”<sup>24</sup> It has been estimated that using a cell phone can cause a driver to “look at but fail to see” up to 50 percent of the information in their roadway environment, including critical safety indicators like red lights and stop

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<sup>19</sup> Ctrs. for Disease Control and Prevention, *Distracted Driving*, CTRS. FOR DISEASE CONTROL AND PREVENTION (Aug. 13, 2015), [http://www.cdc.gov/motorvehiclesafety/distracted\\_driving/](http://www.cdc.gov/motorvehiclesafety/distracted_driving/) [perma.cc/D467-LZX8] (citing facts and statistics reported by the National Highway Traffic Safety Administration).

<sup>20</sup> See NAT'L SAFETY COUNCIL, *supra* note 9. There are significant challenges to making accurate determinations about the number of crashes involving cell phone use for a number of reasons. Police often rely on self-reporting from drivers involved in accidents, many of which are not very forthcoming. Additionally, cell phone use may not be a violation in the jurisdiction of the crash, giving police a reduced incentive to investigate. Finally, cell phone records and data can be difficult to obtain and connect with the accident. See NAT'L SAFETY COUNCIL, *CRASHES INVOLVING CELL PHONES: CHALLENGES OF COLLECTING AND REPORTING RELIABLE CRASH DATA* (2013), available at <http://www.nsc.org/DistractedDrivingDocuments/NSC-Under-Reporting-White-Paper.pdf> [perma.cc/6M8A-C7YF] [hereinafter *CRASHES INVOLVING CELL PHONES*].

<sup>21</sup> Ctrs. for Disease Control, *supra* note 19. Visual distraction arises any time a driver looks at something other than the roadway, including checking on the kids in the back seat or looking at the in-board navigation system. *3 Types of Distracted Driving*, ESURANCE (2015), <https://www.esurance.com/safety/3-types-of-distracted-driving> [perma.cc/6JLH-MNXX]. Manual distraction, also sometimes referred to as biomechanical distraction, involves the driver taking one or both hands off of the steering wheel. *Id.* Finally, cognitive distraction, also known as mental distraction, refers to situations when a driver's mental focus is not on the task of driving, whether because they are talking to someone else, thinking about a different topic, or just zoning out to the radio. *Id.*

<sup>22</sup> See Matthew C. Kalin, Note, *The 411 on Cellular Phone Use: An Analysis of the Legislative Attempts to Regulate Cellular Phone Use by Drivers*, 39 SUFFOLK U. L. REV. 233, 253–55 (2005). See also *Legislators Dismiss*, *supra* note 12.

<sup>23</sup> NAT'L SAFETY COUNCIL, *UNDERSTANDING THE DISTRACTED BRAIN: WHY DRIVING WHILE USING HANDS-FREE CELL PHONES IS RISKY BEHAVIOR* 8 (2012), available at <http://www.nsc.org/DistractedDrivingDocuments/Cognitive-Distracton-White-Paper.pdf> [perma.cc/QY76-3S7K]. Researchers also found impairment of the occipital lobe, which is associated with visual processing. They suspect that even these numbers undervalue the level of distraction drivers face. *Id.*

<sup>24</sup> *Id.* at 9.

signs.<sup>25</sup> These studies suggest that the belief that hands-free cell phone conversations reduce the vast majority of the danger inherent in cell phone use while driving is really just a false sense of security.<sup>26</sup>

It may seem plausible based on the studies regarding hands-free cell phone conversations to assume that conversations with passengers in the vehicle would be equally as distracting for drivers, but in reality they are less so for two key reasons. First, passengers in the vehicle are better able than phone conversationalists to read the level of danger faced by the driver at a particular point in time, adapting their conversation to hazardous situations like heavy traffic or inclement weather to allow the driver to concentrate more on driving.<sup>27</sup> Second, there is a sense of urgency and a social pressure to respond with greater immediacy to incoming calls or texts that is not present in the same way with in-person conversations.<sup>28</sup> In response to this pressure, drivers may be more likely to disregard the danger that accompanies responding in order to avoid appearing rude.

Among the various forms of distracted driving, texting stands out as particularly dangerous because it combines all three types of distraction, requiring the driver to take his eyes off of the road, remove at least one hand from the steering wheel, and take his mind off of the task of driving.<sup>29</sup> But how distracting is it really? A study by the Virginia Tech Transportation Institute found that text messaging while driving increased the risk of crash or near-crash events more than twenty-three times as compared to nondistracted driving.<sup>30</sup> Other tasks involving phones, such as reaching for, dialing, or talking on a cell phone, increased the risk by between one and 6.7 times in similar vehicles, well below the risk created by texting.<sup>31</sup> All three forms of cell phone communication, hands free, handheld, and text messaging, carry their own varying degrees of risk, and legislatures have drawn the line for the acceptable level of risk at different points in drafting legislation, some choosing to ban only the most dangerous of the three (text messaging) while others have opted for more restrictive bans.<sup>32</sup>

The average amount of time a driver's eyes are not focused on the road while sending a text message is five seconds, so if they are driving at fifty-five miles per hour, the vehicle could travel the length of a football field all while the driver is

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<sup>25</sup> *Id.* (citations omitted).

<sup>26</sup> Gilbert Cruz & Kristi Oloffson, *Distracted Driving: Should Talking, Texting Be Banned?*, TIME (Aug. 24, 2009), available at <http://www.time.com/time/magazine/article/0,9171,1916291-1,00.html> [perma.cc/754B-E2XY].

<sup>27</sup> See Melina A. Kunar, Randall Carter, Michael Cohen, & Todd S. Horowitz, *Telephone Conversation Impairs Sustained Visual Attention Via a Central Bottleneck*, 15 PSYCHONOMIC BULL. & REV. 1135, 1139 (2008).

<sup>28</sup> See Marcel Adam Just, Timothy A. Keller, & Jacquelyn Cynkar, *A Decrease in Brain Activation Associated with Driving When Listening to Someone Speak*, 1205 BRAIN RES. 70, 77 (2008).

<sup>29</sup> Ctrs. for Disease Control, *supra* note 19.

<sup>30</sup> *New Data from Virginia Tech Transportation Institute Provides Insight into Cell Phone Use and Driving Distraction*, VA. TECH NEWS (2009), <http://www.vtnews.vt.edu/articles/2009/07/2009-571.html> [perma.cc/64T8-SVYG].

<sup>31</sup> *Id.*

<sup>32</sup> Adam M. Gershowitz, *Texting While Driving Meets the Fourth Amendment: Deterring Both Texting and Warrantless Cell Phone Searches*, 54 ARIZ. L. REV. 577, 585–87 (2012).

essentially “blind.”<sup>33</sup>

Even more alarming is the number of drivers who admit to texting while driving.<sup>34</sup> The Centers for Disease Control and Prevention surveyed a group of American drivers between the ages of eighteen and sixty-four, and 31 percent admitted to having read or sent an email or text message while operating a vehicle at least one time within the previous thirty days.<sup>35</sup>

For teenage drivers between the ages of fifteen and nineteen, texting while driving is even more commonplace, with 25 percent indicating they sent at least one text message every time they drove and 20 percent admitting they frequently engage in protracted, multi-message conversations via text.<sup>36</sup> Despite this prevalence, teenage drivers still recognize the danger inherent in texting while driving. In a survey of 1,200 teenage drivers conducted by cell phone service provider AT&T, they found that 97 percent believed that texting while driving was at least somewhat dangerous.<sup>37</sup>

Teenagers are right to be concerned about the risks of texting while driving, particularly considering they are the group most likely to drive without a seatbelt, especially if other teenagers are present in the vehicle.<sup>38</sup> A recent study by the Cohen Children’s Medical Center alarmingly found that texting while driving is now the leading cause of death for teen drivers, surpassing drinking while driving.<sup>39</sup> One possible explanation for teenagers’ disregard for these concerns is their almost universal expectation of rapid responses to text messages.<sup>40</sup> This particularized problem has made graduated driver-licensing programs, which more dramatically restrict the driving privileges of teenage drivers, attractive as a possible solution for directly addressing their unique position.<sup>41</sup>

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<sup>33</sup> U.S. DEP’T OF TRANSP., DRIVER DISTRACTION IN COMMERCIAL VEHICLE OPERATIONS 143 (2009), available at <http://www.distraction.gov/downloads/pdfs/driver-distraction-commercial-vehicle-operations.pdf> [perma.cc/H5Z7-6HJ2].

<sup>34</sup> NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS 1 (2013).

<sup>35</sup> Ctrs. for Disease Control, *supra* note 19.

<sup>36</sup> U.S. Dep’t of Transp., *supra* note 17.

<sup>37</sup> AT&T, AT&T TEEN DRIVER SURVEY EXECUTIVE SUMMARY 1 (2012), available at [https://www.att.com/Common/about\\_us/txtng\\_driving/att\\_teen\\_survey\\_executive.pdf](https://www.att.com/Common/about_us/txtng_driving/att_teen_survey_executive.pdf) [perma.cc/B5HJ-N9ZV]. Of that 97 percent, 75 percent believed that texting while driving was very dangerous. *Id.* Interestingly, when asked about texting while stopped at a red light, only 70 percent found the behavior to be at least somewhat dangerous, with 5 percent indicating they believed the behavior was not dangerous at all. *Id.*

<sup>38</sup> See, e.g., Anne T. McCartt & Veronika Shabanova Northrup, *Factors Related to Seat Belt Use Among Fatally Injured Teenage Drivers*, 35 J. SAFETY RES. 29, 29 (2004).

<sup>39</sup> *Leading Cause of Death*, *supra* note 14.

<sup>40</sup> The same AT&T survey found that a staggering 89 percent of teenage drivers surveyed expected to respond to or receive a response to a text message within five minutes of receiving or sending the message, with 48 percent of that group expecting the response to come right away. AT&T TEEN DRIVER SURVEY, *supra* note 37, at 3.

<sup>41</sup> See Anne T. McCartt, Eric R. Teoh, Michele Fields, Keli A. Braitman, & Laurie A. Hellinga, *Graduated Licensing Laws and Fatal Crashes of Teenage Drivers: A National Study*, 11 TRAFFIC INJ. PREVENTION 240, 240, 246 (2010) (finding that states that implemented graduated driver licensing programs prohibiting teenage drivers from carrying teenage passengers had 21 percent fewer fatal crashes than states without restrictions on teenage passengers).

*B. Texting While Driving Compared with Other Driving Impairments*

The gold standard for impaired driving, at least in the minds of many Americans, is drunk driving, but texting while driving has been found to be six times more dangerous than drunk driving.<sup>42</sup> Additional studies by Car and Driver Magazine<sup>43</sup> and the Transport Research Laboratory in London<sup>44</sup> both found that sending a text while driving significantly impaired driver reaction times when compared with other dangerous behaviors like drunk driving, driving while under the influence of marijuana, and reading emails. Despite the research indicating that texting while driving is just as dangerous as drunk driving, if not more so, nearly all states with bans on texting while driving treat it more like a minor traffic infraction than a serious offense, imposing minimal fines and no threat of jail time.<sup>45</sup>

Even those states that incorporate the possibility of harsher punishments for texting while driving usually require serious harm to others before they will impose those stricter penalties.<sup>46</sup> By comparison, drunk driving is treated as an inherently dangerous activity and punished accordingly, regardless of whether any actual harm resulted from the behavior in that particular instance.<sup>47</sup> It is the dangerous risk of engaging in drunk driving that forms the basis for the punishment, not the results of a particular instance of behavior.<sup>48</sup> Since implementing more severe sentences and increasing the certainty of punishment for drunk driving, the country as a whole has seen a significant decline in injuries and fatalities attributable to drunk driving.<sup>49</sup>

But drunk driving has not always been regarded as the serious offense it is today. Traditionally, drunk driving, like texting while driving today, was treated as a relatively minor traffic offense.<sup>50</sup> It was not until a reform movement in the early 1980s, spearheaded by Mothers Against Drunk Driving (MADD), that perceptions

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<sup>42</sup> Kiernan Hopkins, *Is Texting While Driving More Dangerous Than Drunk Driving?*, DISTRACTED DRIVER ACCIDENTS, <http://distracteddriveraccidents.com/texting-driving-dangerous-drunk-driving/> [perma.cc/2D7Z-W3GK] (discussing a study conducted by the National Highway Traffic Safety Administration).

<sup>43</sup> *Id.* Car and Driver Magazine's experiment used red lights installed in cars to indicate to drivers when they should brake. *Id.* Sober drivers required an average of 0.54 seconds to begin braking. *Id.* Drivers who were legally drunk, meaning they had a blood alcohol concentration (BAC) of 0.08, needed an additional four feet to react to the light, and those reading an email needed an additional thirty-six. *Id.* Drivers who were sending a text message, however, required an average of seventy additional feet, nearly double the delay of the other impairments tested. *Id.*

<sup>44</sup> *Id.* The Transport Research Laboratory's experiment found that the reaction times of drivers who were texting were 35 percent worse than drivers who had no distractions. *Id.* They also found that texting drivers were more likely to weave in and out of lanes and just drive worse in general than other impaired drivers. *Id.*

<sup>45</sup> Gershowitz, *supra* note 32, at 588–89. The majority of states with bans impose fines of \$100 or less, and some limit fines to around \$25 or \$30. *Id.* at 588. Only Utah and Alaska include possible jail time, of up to ninety days and one year respectively. *Id.* at 589.

<sup>46</sup> *Id.* at 591.

<sup>47</sup> *Id.* at 605.

<sup>48</sup> *Id.*

<sup>49</sup> See Linda C. Fentiman, *A New Form of WMD? Driving With Mobile Device and Other Weapons of Mass Destruction*, 81 UMKC L. REV. 133, 164 (2012).

<sup>50</sup> *Id.* at 163.



about drunk driving began to change.<sup>51</sup> It was reframed as a serious “moral transgression” committed by “killer drunks,” rather than just a minor transgression of an occasional over-indulger.<sup>52</sup> Today, jail sentences are authorized for first-time offenders in nearly every state, with nearly twenty states authorizing jail time of up to six months and twelve more states authorizing up to a year.<sup>53</sup> This evolution of the treatment of drunk driving and the success that has been achieved in reducing accidents inspires hope that the issue of texting while driving could be addressed with similar success.

Despite the numerous similarities, texting while driving, and drunk driving, are different in significant ways. When an individual is drunk driving, his impairment is ongoing, continuing up through the time he is stopped by police.<sup>54</sup> This has two implications. First, some may feel that, because texting while driving is only a temporary impairment that lasts as long as the driver is engaged in that behavior, harsh legislation and total bans on cell phone use are unnecessary because the driver has a greater degree of control over the situation and can make judgment calls about when they can “safely” text while driving.<sup>55</sup> For example, in a survey of teenage drivers, 60 percent admitted to texting while stopped at a red light, as compared with only 43 percent who admitted to texting while in motion, indicating there is a relatively common belief that there are less dangerous times to text while operating a motor vehicle.<sup>56</sup>

The second implication deals with enforcement. When a drunk driver is pulled over, their intoxication does not cease to exist, so it can be presumed that intoxication at the time of the stop means intoxication while driving. The impairment of a driver who has been texting is not so ongoing or readily identifiable. Often police must rely on drivers to disclose that they were texting while driving in order to issue a citation.<sup>57</sup> Even if cellphone data is obtained, it can be difficult to prove that the texting occurred while the driver was operating the vehicle because the vehicle can be turned off and on and the texting can be sporadic.<sup>58</sup> Despite these differences, drunk-driving legislation can provide some insights into improving texting-while-driving laws, and Part III of this Note will draw from the arena of drunk-driving legislation for suggestions on how to revise Indiana’s current texting-while-driving statute to increase enforcement and deterrence.<sup>59</sup>

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<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Adam M. Gershowitz, *12 Unnecessary Men: The Case for Eliminating Jury Trials in Drunk Driving Cases*, 2011 U. ILL. L. REV. 961, 967–68 (2011).

<sup>54</sup> See *The ABCs of BAC*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., <http://www.nhtsa.gov/links/sid/ABCsBACWeb/page2.htm> [perma.cc/S92V-JUNE].

<sup>55</sup> See WORLD HEALTH ORG., MOBILE PHONE USE: A GROWING PROBLEM OF DRIVER DISTRACTION 7 (2011) (explaining that distracted driving involves the temporary division of a driver’s attention between the primary task of driving and some other unrelated task or tasks).

<sup>56</sup> AT&T TEEN DRIVER SURVEY, *supra* note 37, at 2.

<sup>57</sup> See CRASHES INVOLVING CELL PHONES, *supra* note 20, at 3.

<sup>58</sup> *Id.*

<sup>59</sup> See *infra* Part III.

*C. Federalism and Practicality Dictate That States Must Create a Legal Solution*

The crash data and reports of widespread texting while driving make it clear that this is a problem on a national scale,<sup>60</sup> which begs the question why the federal government has not stepped in with a comprehensive regulatory scheme of its own. In 2009, the Obama administration made clear its position on texting while driving when it issued an executive order banning federal employees from texting while driving.<sup>61</sup> But why limit it only to federal employees? The main reason is that texting while driving is traditionally viewed as a states' rights issue, and many members of Congress believe an attempt by the federal government to regulate in that arena would infringe those rights.<sup>62</sup>

Despite this opposition, the federal government has taken some additional steps to at least bring increased awareness to the issue.<sup>63</sup> The Department of Transportation followed up President Obama's executive order with its own ban on texting for motor vehicle operators driving in interstate commerce.<sup>64</sup> Former Transportation Secretary Ray LaHood organized two federal summits on the subject of distracted driving during his four years in office.<sup>65</sup> LaHood's replacement as Transportation Secretary, Anthony Foxx, has picked up where LaHood left off, making clear his intention to continue fighting to "combat the deadly epidemic of distracted driving."<sup>66</sup> Other national traffic safety groups have also joined the fight,<sup>67</sup> placing a particular emphasis on the dangers facing teenage drivers.<sup>68</sup>

Even the Department of Labor, through the Occupational Safety and Health Administration (OSHA), has gotten involved in the movement to end distracted

<sup>60</sup> See *supra* Part I.A & I.B.

<sup>61</sup> See Exec. Order No. 13,513, 3 C.F.R. 246 (2010).

<sup>62</sup> See Fentiman, *supra* note 49, at 134.

<sup>63</sup> See *id.* at 148–52.

<sup>64</sup> Limiting the Use of Wireless Communication Devices, 75 Fed. Reg. 59,118 (Sept. 27, 2010) (codified at 49 C.F.R. pts. 383–84, 390–92). The possible penalties for violation of this law are harsher than the vast majority of state laws, with the potential for license suspension up to 120 days. *Id.* at 59,134–36.

<sup>65</sup> See Press Release, U.S. Dep't. of Transp., Transportation Secretary Ray LaHood Announces Second National Distracted Driving Summit (July 27, 2010), available at <http://www.nhtsa.gov/PR/DOT-175-10> [perma.cc/4G7K-3T3G].

<sup>66</sup> U.S. Dep't of Transp., *A Message from Secretary Foxx*, DISTRACTION.GOV, <http://www.distraction.gov/about-us/message-from-foxx.html> [perma.cc/UP22-DKN4].

<sup>67</sup> The National Safety Council is a particularly strong advocate against texting while driving, focusing particularly on what the private sector and businesses can do to encourage employees to not text while driving. See Press Release, Nat'l Safety Council, National Safety Council President Joins Transportation Secretary LaHood to Address Distracted Driving (July 7, 2010), available at <http://www.prnewswire.com/news-releases/national-safety-council-president-joins-transportation-secretary-lahood-to-address-distracted-driving-97966019.html> [perma.cc/YW4G-3TQ8].

<sup>68</sup> See, e.g., U.S. Dep't. of Transp., *Public Awareness Campaigns*, DISTRACTION.GOV, <http://www.distraction.gov/dot-activities/awareness.html> [perma.cc/6263-J4FU]. See also *Safe Texting Campaign*, SAFE TEXTING CAMPAIGN, <http://safetextingcampaign.com/> [perma.cc/V2HY-C5AH]; Nat'l Highway Traffic Safety Admin. & Ad Council, *About the Campaign*, STOP THE TEXTS. STOP THE WRECKS., <http://www.stoptextsstopwrecks.org/#campaign> [perma.cc/9RZ9-MEZH].

driving, choosing to focus first on texting while driving.<sup>69</sup> OSHA has explicitly stated that “employers who require their employees to text while driving—or who organize work so that doing so is a practical necessity” violate the Occupational Safety and Health Act of 1970’s requirement that “employers must provide a workplace free of serious recognized hazards.”<sup>70</sup>

There is one possible alternative to statewide bans on texting while driving in the form of local ordinances, though they are only applicable in a handful of states and present seemingly more problematic obstacles to effective implementation than do statewide bans.<sup>71</sup> A significant number of states have already taken away this option by formally preempting local ordinances regarding cell phone legislation on the roadways.<sup>72</sup> The bigger practical concern, however, is the difficulty that varying ordinances present to drivers who are just passing through.<sup>73</sup> It is impractical and unfair to expect travelers to research the myriad of local ordinances of every tiny town they may pass through on their journeys.<sup>74</sup>

For all of these reasons, between the various levels of government—federal, state, and local—state government appears to be the best equipped for implementing legislation that will satisfy the demands of federalism while also achieving the most widespread success. Because the behavior being regulated involves travel, often over city lines, uniformity within a broader area than just local cities and towns is essential.<sup>75</sup> Drivers need to know what is expected of them in order to be able to comply with the law, and statewide legislation on cell phone use makes that much more feasible.<sup>76</sup>

The remainder of this Note will examine the legislative efforts of one state, Indiana, to deal with the problem of texting while driving. Part II will begin by breaking down the parameters of Indiana’s texting-while-driving ban, looking particularly at what behavior is prohibited, when police can enforce the law, and what punishments are authorized. This Note will then look at the law’s underutilization and explore possible explanations for its relative ineffectiveness. In Part III, the Note will discuss possible alternative schemes and suggest combining those possible solutions with Indiana’s current law to create a more comprehensive

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<sup>69</sup> OSHA, *OSHA’s Distracted Driving Initiative*, U.S. DEP’T OF LABOR, <https://www.osha.gov/distracted-driving/initiative.html> [perma.cc/AD3L-KJMC].

<sup>70</sup> *Id.*

<sup>71</sup> See Christi Schofield, Note, *Texas, Are We There Yet? A Roadmap for Implementing and Enforcing a Future Texting-While-Driving Ban*, 15 TEX. TECH. ADMIN. L.J. 399, 403-06 (2014); Thomas E. Sherzan, Note, “Talk 2 U L8R”—*Why Cell Phones and Driving Have “G2G”: An Analysis of the Dangers of Cell Phone Use While Driving*, 59 DRAKE L. REV. 217, 238-39 (2010).

<sup>72</sup> See, e.g., KY. REV. STAT. ANN. § 65.873 (LexisNexis 2004); MISS. CODE ANN. § 63-3-212 (West 2009); OKLA. STAT. ANN. tit. 47, § 15-102.1(A) (West 2007); UTAH CODE ANN. § 41-6a-208(2)(b) (LexisNexis Supp. 2010); VA. CODE ANN. § 46.2-334.01(F) (2010).

<sup>73</sup> Schofield, *supra* note 71, at 406.

<sup>74</sup> ANDREI LUBOMUDROV, TEXAS CITIES MOVE TO BAN TEXTING WHILE DRIVING, HOUSE RES. ORG. 6 (Feb. 22, 2012), available at <http://www.hro.house.state.tx.us/pdf/focus/texting82-8.pdf> [perma.cc/VZE5-YTMS].

<sup>75</sup> Shannon L. Noder, Note, *Talking and Texting While Driving: A Look at Regulating Cell Phone Use Behind the Wheel*, 44 VAL. U. L. REV. 237, 272-73 (2009) (discussing the two main factors in differentiating the appropriateness of local versus state legislation: whether uniformity is needed and whether nonlocals would be affected by local regulations).

<sup>76</sup> *Id.* at 273.

and workable legislative scheme.

## II. AN INTRODUCTION TO INDIANA'S CURRENT TEXTING-WHILE-DRIVING BAN AND AN EXPLORATION OF ITS EFFECTIVENESS

### A. Indiana's Texting-While-Driving Ban

First effective in July of 2011, the portion of Indiana's texting-while-driving ban outlining the prohibited behavior reads as follows:

- (a) A person may not use a telecommunications device to:
- (1) type a text message or an electronic mail message;
  - (2) transmit a text message or an electronic mail message; or
  - (3) read a text message or an electronic mail message; while operating a moving motor vehicle unless the device is used in conjunction with hands free or voice operated technology, or unless the device is used to call 911 to report a bona fide emergency.<sup>77</sup>

A text message is defined as “a communication in the form of electronic text sent from a telecommunications device.”<sup>78</sup> The statute clearly prohibits every stage of text messaging, typing, transmitting (or sending), and reading, with any one of those actions being enough to violate the law.<sup>79</sup> Indiana is the thirty-second state to ban texting while driving.<sup>80</sup> The statute also clearly allows use of hands-free technology and provides an exception for emergency situations.<sup>81</sup> The emergency exception seems to be a sensible way to preserve the benefits that first accompanied the introduction of cell phones, such as faster access to medical care.<sup>82</sup>

Conspicuously absent, however, is any limit on other dangerous cell phone uses like surfing the web or navigating using GPS.<sup>83</sup> There is an exception for individuals with a probationary operator's license (which in the case of cell phone use means those under the age of 21). This exception became effective in July of 2015 and says that the probationary license holder “may not operate a motor vehicle while using a telecommunications device until the individual becomes twenty-one (21) years of age unless the telecommunications device is being used to make a 911 emergency call.”<sup>84</sup>

This more restrictive law banning all cell phone use by probationary drivers is an example of a graduated driver-licensing program, which attempts to deal with

<sup>77</sup> IND. CODE § 9-21-8-59 (2014).

<sup>78</sup> IND. CODE § 9-21-8-0.5 (2014).

<sup>79</sup> § 9-21-8-59.

<sup>80</sup> *Indiana: Cell Phone Laws, Legislation*, HANDS FREE INFO (Jan. 8, 2015), <http://handsfreeinfo.com/indiana-cell-phone-laws-legislation/> [perma.cc/J7PS-R2EG].

<sup>81</sup> § 9-21-8-59.

<sup>82</sup> Fowles, et al., *supra* note 8.

<sup>83</sup> *Id.*

<sup>84</sup> IND. CODE § 9-24-11-3.3 (2015).

the acute problem of teenagers who text while driving.<sup>85</sup> Studies have found that stronger graduated driver-licensing laws have a measurably positive effect in reducing the number of accidents by teenage drivers.<sup>86</sup> The broad inclusiveness of the law also accounts for other cell phone uses that teenagers are more likely to engage in, such as checking in on Facebook or scanning through their music selection.

Both Indiana laws banning texting for all drivers and other cell phone use by those under the age of 21 are primary laws, meaning law enforcement officers may cite drivers for a texting violation regardless of whether the driver first committed another offense.<sup>87</sup> Seat belt laws provide a great example of how primary laws tend to be more effective, as compared with secondary laws that only allow law enforcement to issue a citation for that offense if they stop the driver for a different offense.<sup>88</sup> In states where seat belt laws are primary enforcement laws, observed compliance is higher and fatality rates are lower.<sup>89</sup> Primary enforcement laws banning texting while driving support the position that, like drunk driving, it is the act of engaging in risky behavior that is the basis of punishment. Secondary enforcement laws, on the other hand, would seem to send the message that it is possible to text while driving and be perfectly safe because law enforcement cannot pull a driver over until their distraction manifests itself in some outward way, which may not always happen.

The penalty for violating Indiana's texting-while-driving law is a fine of up to \$500.<sup>90</sup> When compared with penalties in other states, Indiana's fine is actually relatively steep.<sup>91</sup> The majority of states with bans in place punish violations with less than a \$100 fine, with some imposing fines that more closely resemble parking tickets in the \$20 range.<sup>92</sup> It must also be remembered, however, that Indiana's \$500 fine is not mandatory, so judges are free to impose much more lenient penalties.<sup>93</sup> With such low potential costs, it is no wonder that drivers across the country continue to believe the benefits of texting while driving outweigh the costs.

In the first three and a half years following the implementation of the texting-while-driving ban, the Indiana State Police enforced the law shockingly little, issuing fewer than four hundred tickets.<sup>94</sup> Indianapolis, the largest city in the state with a population of around 843,000,<sup>95</sup> saw only five tickets written in the eleven-

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<sup>85</sup> Fentiman, *supra* note 49, at 152–53.

<sup>86</sup> See REBECCA E. TREMPER, INS. INST. FOR HIGHWAY SAFETY, GRADUATED LICENSING LAWS AND INSURANCE COLLISION CLAIM FREQUENCIES OF TEENAGE DRIVERS 1, 6 (2009), available at <http://www.iihs.org/frontend/iihs/documents/masterfiledocs.ashx?id=2022> [perma.cc/BP9J-L6Z7].

<sup>87</sup> See Fentiman, *supra* note 49, at 169.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> IND. CODE ANN. §§ 9-24-10-8, 34-28-5-4(c) (West 2012).

<sup>91</sup> See Gershowitz, *supra* note 32, at 588–89.

<sup>92</sup> *Id.*

<sup>93</sup> See IND. CODE ANN. §§ 9-24-10-8, 34-28-5-4(c) (West 2012).

<sup>94</sup> *Indiana State Police Express Frustration with Ban on Texting While Driving*, WDRB.COM (July 1, 2014), <http://www.wdrb.com/story/25904773/indiana-state-police-express-frustration-with-ban-on-texting-while-driving> [perma.cc/4UXX-N6JC].

<sup>95</sup> *Indiana's Four Largest Cities See Population Surges*, INDIANAPOLIS BUS. J. (May 22, 2014), <http://www.ibj.com/articles/47794-indiana-s-four-largest-cities-see-population-surges> [perma.cc/9KYQ-LT8Y].

month period following implementation of the law.<sup>96</sup> In 2012, the year after the law became effective, the overall number of accidents caused by distracted driving actually increased.<sup>97</sup> This lack of success does not come as much of a surprise to many Indiana residents, who predicted at the time of the law's passage that police would face serious obstacles in enforcement.<sup>98</sup> But why exactly has the law not "worked?"

### *B. Identifying the Reasons for Lack of Successful Enforcement*

The lack of enforcement in the years since the law's passage is concerning. Not only are individuals who are breaking the law likely not being punished, but the lack of enforcement sends the wrong message to the public that Indiana does not treat texting while driving as a serious offense and drivers have little to lose by continuing to text while on the road. Deterrence is all about perception, meaning "potential offenders cannot be deterred without first perceiving that their violations of the law carry a significant risk of apprehension and conviction."<sup>99</sup> Certainty of punishment is essential to deterring behavior,<sup>100</sup> and to date Indiana law enforcement has been unsuccessful in demonstrating to drivers that punishment will be certain.

So what has made Indiana's texting-while-driving law so hard to enforce? If you ask Indiana law enforcement, the number one complaint is the under-inclusive nature of the law.<sup>101</sup> The law bans only typing, sending, and reading text messages, but leaves unrestricted all other cell phone functions, which makes it nearly impossible for police to determine whether the driver is engaging in the prohibited activity or just using their phone for a myriad other acceptable uses.<sup>102</sup> This narrowness is also frustrating in that those other cell phone uses that are unregulated are also dangerous.<sup>103</sup> It feels almost as though the legislature enacted the texting ban in response to the significant national attention the topic had gotten, but ignored numerous other dangers presented by various forms of cell phone use while driving, hamstringing police efforts to enforce the ban in the process.

Adding to police frustration with the law are the limits on searches that can be conducted on phones following traffic stops to gather evidence that the driver was texting while operating the vehicle.<sup>104</sup> On July 1, 2014, the texting-while-driving law was amended to make clear that police can do very little to prove their case once they stop a driver for texting.

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<sup>96</sup> *Indiana: Cell Phone Laws, Legislation*, *supra* note 80.

<sup>97</sup> *Id.*

<sup>98</sup> See, e.g., *Enforcement of Indiana Texting Ban Questionable*, THE INDY CHANNEL (June 2, 2011), <http://www.theindychannel.com/news/enforcement-of-indiana-texting-ban-questionable> [perma.cc/PCD2-JUXH].

<sup>99</sup> See Fentiman, *supra* note 49, at 160.

<sup>100</sup> See ANDREW VON HIRSCH, ANTHONY E. BOTTOMS, ELIZABETH BURNEY, & P-O WIKSTROM, CRIMINAL DETERRENCE AND SENTENCE SEVERITY: AN ANALYSIS OF RECENT RESEARCH 5-6, 14 (1999).

<sup>101</sup> See *Indiana Issues Few Tickets*, *supra* note 15.

<sup>102</sup> *Id.*

<sup>103</sup> IND. CODE § 9-21-8-59 (2014).

<sup>104</sup> Zach Myers, *Texting Tickets: Police Unable to Enforce Indiana's Texting and Driving Law*, FOX 59 (May 21, 2014, 9:30 PM), <http://fox59.com/2014/05/21/3-years-later-police-say-indianas-texting-and-driving-law-remains-unenforceable/> [perma.cc/7R5C-2WVK].

The section of the amended law dealing with police searches reads as follows:

- (b) A police officer may not, without the consent of the person:
- (1) confiscate a telecommunications device for the purpose of determining compliance with this section;
  - (2) confiscate a telecommunications device and retain it as evidence pending trial for a violation of this section;
  - or
  - (3) extract or otherwise download information from a telecommunications device for a violation of this section unless:
    - (A) the police officer has probable cause to believe that the telecommunication device has been used in the commission of a crime;
    - (B) the information is extracted or otherwise downloaded under a valid search warrant; or
    - (C) otherwise authorized by law.<sup>105</sup>

Practically speaking, this portion of the law essentially requires police to obtain a confession before they can ticket someone for texting while driving.<sup>106</sup> Unlike drunk driving, it is much easier for a driver who has been texting to hide the evidence from police simply by not admitting to it and refusing to hand over the phone.

### III. LEGISLATIVE AND EXTRALEGAL ALTERNATIVES FOR INCREASING ENFORCEMENT AND DETERRENCE EFFECT OF INDIANA'S BAN

#### *A. Options for Increasing Ease of Enforcement*

As discussed above, the issues of enforcement and deterrence are linked, with certainty of punishment playing a large part in achieving the desired deterrent effect.<sup>107</sup> That being the case, the natural place to start improving Indiana's law is increasing the ease with which police are able to enforce it. One obvious change that would appear to be supported by police would be broadening the law to include a ban on all handheld cell phone use, similar to the ban in place for drivers under the age of 21.<sup>108</sup> In Illinois, where there is a complete ban on any handheld cell phone use, police issued more than 6,700 citations in 2013 alone.<sup>109</sup> By comparison, in the same time period, Indiana State Police issued only 186 citations for texting while driving.<sup>110</sup> Even the complete ban on cell phone use already in place for drivers under the age of 21 in Indiana could be improved upon. For

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<sup>105</sup> *Id.*

<sup>106</sup> See Noelle M. Steele, *Indiana's Texting and Driving Law: Impossible to Enforce?*, IND. ECON. DIG. (Sept. 27, 2014), <http://indianaeconomicdigest.com/Main.asp?SectionID=31&SubSectionID=115&ArticleID=76565> [perma.cc/SEE3-5BQ6].

<sup>107</sup> See *supra* Part II.B.

<sup>108</sup> See Steele, *supra* note 106.

<sup>109</sup> Myers, *supra* note 104.

<sup>110</sup> *Id.*

example, a decal system indicating that the driver is under the age of 21, similar to the system used in New Jersey, could help police identify drivers to whom the law applies, negating the need for police to observe drivers doing anything more than holding a phone.<sup>111</sup>

At least some Indiana representatives also appear to be in favor of a slight shift in the direction of greater restriction, though nowhere near a complete ban on handheld cell phone use. There is currently pending legislation in both the Indiana House of Representatives<sup>112</sup> and the Indiana Senate<sup>113</sup> that would require the use of hands-free technology to place or receive telephone calls while driving a motor vehicle, but those proposals still leave a huge swath of cell phone functions unregulated. While likely a step in the right direction, the fate of the pending legislation is questionable. In 2014, State Senator Jim Merritt indicated he believed any legislation that further restricted cell phone use was likely to be defeated out of respect for “the independence of the Hoosier.”<sup>114</sup> In his experience, Indiana residents tend to be resistant towards strict government restrictions, which is why the limited texting ban that is currently in place was all that was able to pass the legislature in 2011.<sup>115</sup>

Bearing in mind this potential opposition to a harsher restriction, police may need to look elsewhere for ways to increase enforcement. A promising route seems to be technological advancements that help police identify why drivers are using cell phones. A Virginia-based technology company has announced it is working on developing a device similar to a radar gun that would allow police to identify whether text messages are being sent from a car.<sup>116</sup> In New York, Governor Andrew Cuomo implemented a markedly more low-tech solution by modifying undercover police vehicles so that they sit slightly higher than other vehicles on the road, making it easier for police to determine what exactly a driver is doing.<sup>117</sup> A technological solution, such as the texting radar gun mentioned above, might be the most practical option in light of potential legislative opposition to expanding texting-while-driving laws. While new police technology does not address the issue of unregulated dangerous cell phone usage,<sup>118</sup> it at least has the benefit of allowing police to enforce the laws that are already on the books.

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<sup>111</sup> Fentiman, *supra* note 49, at 153.

<sup>112</sup> H.R.B. 1033, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015).

<sup>113</sup> S.B. 204, 119th Gen. Assemb., 1st Reg. Sess. (Ind. 2015).

<sup>114</sup> Myers, *supra* note 104.

<sup>115</sup> *Id.*

<sup>116</sup> Ionut Ungureanu, *A Radar Gun that Catches Driver Texting Is in Development*, AUTOEVOLUTION (Sept. 17, 2014, 8:51 AM), <http://www.autoevolution.com/news/a-radar-gun-that-catches-driver-texting-is-in-development-86650.html> [perma.cc/5MQ5-AYV4]. The radar gun would not be a perfect solution, however, as it does not appear that police would be able to distinguish between signals sent by passengers or by the driver. *Id.* The radar gun would likely have to be limited to use with single-passenger vehicles. *Id.*

<sup>117</sup> Matt Knox & Amy Robach, *NY Launches Specialized Vehicles to Nab Texting Drivers*, ABC NEWS (July 10, 2013), <http://abcnews.go.com/blogs/politics/2013/07/ny-launches-specialized-vehicles-to-nab-texting-drivers/> [perma.cc/2HMB-P798].

<sup>118</sup> See *supra* Part II.A.



*B. Options for Increasing the Deterrent Effect of the Ban*

Increasing the ability of police to enforce the texting-while-driving ban is the first step to improving the law's deterrent effect because it will increase the certainty of punishment, but there are more ways to gain better compliance beyond police enforcement. A promising option would be to treat texting while driving as a more serious offense, along the lines of drunk driving, increasing the severity and variety of possible punishment.<sup>119</sup> As discussed in the previous section, a dramatic change like this would likely be met with significant opposition from the Indiana public,<sup>120</sup> so a grassroots campaign along the lines of the campaign led by Mothers Against Drunk Driving in the 1980s would be required to educate the public and reframe the issue of texting while driving as a more serious offense worthy of an increased punishment.<sup>121</sup> There are currently some Indiana groups making strides in the area of texting while driving, including Indiana Students Against Destructive Decisions,<sup>122</sup> the Indiana Criminal Justice Institute,<sup>123</sup> and even the Indiana State Fair.<sup>124</sup>

A particular feature of nationwide drunk-driving statutes that would be worth incorporating into Indiana's texting-while-driving law is ancillary punishments such as license suspensions and ignition interlock systems.<sup>125</sup> Surveys suggest that these sort of ancillary punishments may be particularly effective for teenage drivers.<sup>126</sup> In Indiana, drunk drivers face a 180-day administrative license suspension following their first offense, with discretionary ignition interlock penalties available.<sup>127</sup> When compared with drunk driving ignition interlock systems, texting-while-driving systems are much more affordable and carry less of a stigma for drivers because the control device is located in the phone where it is not visible to passengers.<sup>128</sup> From a logical standpoint, comparable punishments for drunk driving and texting while driving make sense considering their comparable level of danger.<sup>129</sup> Both impairments have the potential to greatly harm not only the driver of the vehicle,<sup>130</sup> but also others on or near the roadway.<sup>131</sup> As it stands, the

<sup>119</sup> See Fentiman, *supra* note 49, at 162–68.

<sup>120</sup> See *supra* Part I.B.

<sup>121</sup> See Fentiman, *supra* note 49, at 163.

<sup>122</sup> IND. CRIMINAL JUSTICE INST., INDIANA'S ANNUAL TRAFFIC SAFETY REPORT FY 2013 36 (2013).

<sup>123</sup> *Id.* at 37, 44–45.

<sup>124</sup> *Id.* at 45.

<sup>125</sup> See Gershowitz, *supra* note 32, at 590.

<sup>126</sup> Ninety-four percent of teenage drivers surveyed by AT&T reported that license suspensions would be an effective way to get them to comply with a texting-while-driving law. AT&T TEEN DRIVER SURVEY, *supra* note 37, at 5.

<sup>127</sup> Governor's Highway Safety Assoc., *Indiana*, GHSA (Oct. 2015), <http://www.ghsa.org/html/stateinfo/bystate/in.html> [perma.cc/NR8E-LTQ5].

<sup>128</sup> See Gershowitz, *supra* note 32, at 609–11. Devices designed to stop texting while driving can cost as little as \$24 a year, as compared with around \$1000 for similar drunk driving devices. *Id.* at 611.

<sup>129</sup> See *supra* Part I.B.

<sup>130</sup> See, e.g., *Teen Killed in Crash Texting and Driving*, WTHR.COM (May 14, 2014), <http://www.wthr.com/story/16422703/teen-killed-in-crash-texting-and-driving> [perma.cc/G4KM-9HFM] (reporting a crash in which the teenage driver was killed after texting while driving).

Indiana government clearly does not view the danger of texting while driving in the same light as drunk driving. In 2013, the Indiana Highway Safety Plan included a budget of just \$200,000, of which they spent just under \$190,000.<sup>132</sup> By comparison, the budget for alcohol-related programs was over \$2.5 million, of which the State spent just over \$2.3 million.<sup>133</sup> While promising, the evolution of texting-while-driving legislation to the point where it is treated like drunk driving is likely to be difficult and slow.

For more immediate solutions, it is worth looking outside the arena of legislative bans to extralegal options that may prove more practical and effective. One such option is to attempt to get individuals to buy into the movement of not texting while driving, whether through pledges,<sup>134</sup> cell phone apps,<sup>135</sup> or other means.<sup>136</sup> This is another area where teenage drivers in particular are likely to be influenced.<sup>137</sup> Organizations like the Indiana Criminal Justice Institute (ICJI) are among the leaders in Indiana taking strides to increase awareness and interest in the epidemic of texting while driving.<sup>138</sup> In 2013, the ICJI provided interactive education opportunities about texting while driving, including a driving simulator that was used by 1,319 individuals at events like the Indiana State Fair, more than twice the number that used the simulator in 2012.<sup>139</sup>

Publicity has been shown to be an important factor in increasing compliance with new laws.<sup>140</sup> A great opportunity to publicize the law in a way that will ensure widespread dissemination in the critical target group of teenagers is by incorporating the subject into mandatory driver's education classes.<sup>141</sup> Currently, the *Indiana Driver's Manual* devotes a whopping ninety-six words to the use of telecommunication devices while driving,<sup>142</sup> shockingly few for such a serious problem that police have struggled with enforcing.

If people are still unwilling to buy in, additional monetary motivators like increased car insurance rates following texting-while-driving citations may be necessary.<sup>143</sup> A final practical solution that could be relatively easily implemented would be adding or designating pull-offs along highways and major roads where

<sup>131</sup> See, e.g., WANE Staff, *Man Has Apologized to Amish Family for Causing Deadly Crash*, WANE.COM (Feb. 12, 2014), <http://wane.com/2014/02/12/man-apologizes-to-amish-family-for-causing-crash/> [perma.cc/G3GR-LEAJ] (reporting a crash in which several Amish individuals were killed when a texting driver collided with their buggy).

<sup>132</sup> See IND. CRIMINAL JUSTICE INST., *supra* note 122, at 64.

<sup>133</sup> *Id.*

<sup>134</sup> See, e.g., U.S. Dep't of Transp., *Take the Pledge*, DISTRACTION.GOV, <http://www.distraction.gov/take-action/take-the-pledge.html> [perma.cc/76NY-BXST].

<sup>135</sup> See, e.g., Verizon Wireless, *Apps to Block Texting While Driving*, VERIZON, <http://www.verizonwireless.com/mobile-living/apps/apps-to-block-texting-while-driving/> [perma.cc/A2MT-2BT9].

<sup>136</sup> See, e.g., U.S. Dep't of Transp., *Take Action*, DISTRACTION.GOV, <http://www.distraction.gov> [perma.cc/BZ4K-MC2C].

<sup>137</sup> Surveyed teenagers reported that cell phone apps were the third most likely way to deter them from texting while driving, with 89 percent finding them to be at least somewhat effective motivators. AT&T TEEN DRIVER SURVEY, *supra* note 37, at 5.

<sup>138</sup> See IND. CRIMINAL JUSTICE INST., *supra* note 122, at 37, 44–45.

<sup>139</sup> *Id.* at 37.

<sup>140</sup> See Noder, *supra* note 75, at 274.

<sup>141</sup> Fentiman, *supra* note 49, at 153.

<sup>142</sup> IND. BUREAU OF MOTOR VEHICLES, DRIVER'S MANUAL 8, 79 (2015).

<sup>143</sup> See, e.g., Esurance, *Texting and Driving*, ESURANCE, <https://www.esurance.com/safety/texting-and-driving> [perma.cc/7EHX-JBKV].

drivers could stop to read or send a text message before pulling back into traffic.<sup>144</sup> By making it easier for drivers to comply with the ban and allowing them to retain some of the benefits of texting while on the go, it is likely there would be an increase in compliance with the law.

#### CONCLUSION

There can be no doubt that texting while driving is a serious concern that the American public is content to pay lip service to addressing. States like Indiana have taken the admirable step of putting in place legislative bans on the action, but in their haste to respond to public outcry for a solution, the legislature has left gaping holes in the law, which leave drivers undeterred and make it nearly impossible for consistent police enforcement. Luckily, there are several potential changes that can be made, both in the legislative and extralegal arenas, to improve on the existing ban. An ideal improvement would be broadening the law to include all handheld cell phone use for all drivers, but despite the pending legislation, public support is unlikely to manifest. The same can be said for harsher penalties along the lines of drunk-driving statutes, at least in the short term. The most promising immediate solutions for improving Indiana's ban actually come from nonlegal motivating sources that encourage drivers to buy in to abstaining from texting while driving, such as cell phone apps, pledges, and insurance rates. Regardless of the path Indiana chooses going forward, it is important that both the legislature and the public recognize that an effective solution is unlikely to come in a simple, straightforward package.

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<sup>144</sup> Brittany Horn, *Texting While Driving Law for Youths Is Now in Effect*, TIMESUNION.COM (Nov. 1, 2014), <http://www.timesunion.com/local/article/New-texting-while-driving-law-goes-into-effect-5863255.php> [perma.cc/DRW5-DU7F].