

# MICHIGAN’S TEXTING BAN: ONE STEP FORWARD, TOO MANY STEPS BACK

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## I. INTRODUCTION

In his opening remarks at the 2010 National Distracted Driving Summit, United States Transportation Secretary Ray LaHood stated plainly that “distracted driving is an epidemic. It’s an epidemic because everyone has a cell phone—and everyone thinks they can use it while driving. They can’t.”<sup>1</sup> Thirty-one states and the District of Columbia agree and have passed legislation banning texting for all drivers, while an additional nine states have passed texting bans only for novice drivers or school bus drivers.<sup>2</sup> According to an October 2009 New York Times/CBS News poll, 97% of the people surveyed supported making texting while driving illegal.<sup>3</sup> Michigan joined what is now a majority of states in banning texting for all drivers on July 1, 2010.<sup>4</sup>

Michigan’s statute prohibits drivers from reading, typing, or sending text messages while their cars are moving on a public road but provides exceptions for some emergency situations.<sup>5</sup> The question of how beneficial the texting law is for Michigan has yet to be answered, and only time will truly tell what effect the law has had on Michigan’s roadways. However, data collected from other jurisdictions with similar bans indicate that enforcing Michigan’s anti-texting statute will, at best, have no effect<sup>6</sup> and, at worst, cause Michigan’s roads to become more dangerous.<sup>7</sup> In its haste to make the roads safer, Michigan’s Legislature may have inadvertently created more problems than it is solving.

The texting ban has given rise to a number of issues that the current law fails to adequately address. First, the statute fails to provide explicit

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1. Ray LaHood, Sec’y, U.S. Dep’t of Transp., Opening Address at the 2010 Distracted Driving Summit (Sept. 21, 2010), *available at* <http://www.distracted.gov/files/dot/2010.09.22-distracted-driving-summit-press-kit.pdf>.

2. *Cellphone and Texting Laws*, HIGHWAY LOSS DATA INST. (May 2011), <http://www.iihs.org/laws/CellPhoneLaws.aspx> [hereinafter HIGHWAY LOSS DATA INST., *Cellphone Laws*].

3. Marjorie Connelly, *Many in U.S. Want Texting at the Wheel to Be Illegal*, N.Y. TIMES (Nov. 1, 2009), <http://www.nytimes.com/2009/11/02/technology/02textinside.html?ref=newyorktimes-poll-watch>.

4. *See* MICH. COMP. LAWS § 257.602b (2011).

5. *Id.*

6. *See* Press Release, Highway Loss Data Inst., Laws Banning Cellphone Use While Driving Fail to Reduce Crashes, New Ins. Data Indicate (Jan. 29, 2010), *available at* [http://www.iihs.org/news/2010/hldi\\_news\\_012910.pdf](http://www.iihs.org/news/2010/hldi_news_012910.pdf) [hereinafter Highway Loss Data Inst., *New Ins. Data Indicate*].

7. *See* Press Release, Highway Loss Data Inst., Texting Bans Don’t Reduce Crashes; Effects Are Slight Crash Increases (Sept. 28, 2010), *available at* [http://www.iihs.org/news/2010/hldi\\_news\\_092810.pdf](http://www.iihs.org/news/2010/hldi_news_092810.pdf) [hereinafter Highway Loss Data Inst., *Slight Crash Increases*].

protections for citizens from having their cellphones illegally seized and searched by police for evidence of a statutory violation.<sup>8</sup> Second, opponents have asked why the texting ban was even necessary when other traffic laws already allow police to pull over and ticket distracted drivers.<sup>9</sup> Moreover, if the Legislature determined that texting while driving was such a serious issue that it required legislation to ban the behavior, then why did it make the penalty for such behavior so light?<sup>10</sup> Finally, new research by the Highway Loss Data Institute (HLDI) suggests that current texting bans in several states are actually making the roads more dangerous rather than reducing the number of crashes.<sup>11</sup> The question becomes, How can these issues be properly addressed without creating more problems?

Section II of this Comment presents the prevalence of text messaging in the United States, the dangers associated with distracted driving, the steps taken by the Michigan Legislature leading up to the enactment of the texting ban, the federal government's response to distracted driving, and the varying views in the debate over the effectiveness of existing texting bans. Section III analyzes the problems the texting ban has created, including how Michigan and other states are enforcing the texting bans, the potential for Fourth Amendment violations inherent in Michigan's statute, and the research on the effectiveness of texting bans in various states, and the research data's conflicting results. Section IV highlights suggested solutions that would not be practical or effective and proposes a multi-pronged solution for Michigan to meet its goals of eliminating distracted driving and making roads safer.

## II. BACKGROUND

With the creation of the cellular telephone came the beginning of traffic crashes caused by cellphone use. *Distraction.gov*, the "Official U.S. Government Website for Distracted Driving," maintained by the National Highway Traffic Safety Administration (NHTSA), compiles distracted-driving research from many sources and publishes it on its website.<sup>12</sup> The

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8. Compare § 257.602b, with CONN. GEN. STAT. ANN. § 14-296aa (West 2006).

9. See The Mitch Albom Show, *State Senator Wayne Kuipers on Why He Opposes the Proposed Ban on Texting in Cars*, NEWS/TALK WJR 760AM (Jan. 26, 2010), <http://wjr.com/article.asp?id=1676151>.

10. See The Frank Beckmann Show, *Frank Discusses the Texting-While-Driving Ban with Rep. Lee Gonzales*, NEWS/TALK WJR 760AM (Apr. 21, 2010), <http://wjr.com/article.asp?id=1778823>.

11. See Highway Loss Data Inst., *Slight Crash Increases*, *supra* note 7.

12. See Nat'l Highway Traffic Safety Admin., *Research*, DISTRACTION.GOV, <http://www.distraction.gov/research/> (last visited Mar. 4, 2011) [hereinafter Nat'l

website states that “[w]hile all distractions can endanger drivers’ safety, texting is the most alarming because it involves all three types of distraction.”<sup>13</sup> Distraction.gov reported that 5,474 people were killed in traffic crashes as a result of distracted driving in 2009, (18% of all traffic-crash fatalities in that year), 995 of which were attributed to cellphone use.<sup>14</sup> The National Safety Council went one step further to attribute an estimated “28% of all traffic crashes—or at least 1.6 million crashes each year—[to] drivers using cell phones and texting.”<sup>15</sup>

### A. The Growth in Cellphone Usage in Relation to Traffic-Crash Data

#### 1. A Wireless Nation

The rise in cellphone- and texting-related accidents could not have been possible without the success of the wireless industry. The wireless industry has experienced market-saturating growth over the past decade. The Cellular Telecommunications and Internet Association, an international wireless association, estimates that the number of wireless subscribers in the United States increased from over 97 million in June 2000 to nearly 293 million in June 2010.<sup>16</sup> More dramatic still, the number of SMS<sup>17</sup> messages transmitted in the United States has increased

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Highway Traffic Safety Admin., *Research*]; see also Nat’l Highway Traffic Safety Admin., *Statistics and Facts About Distracted Driving*, DISTRACTION.GOV, <http://www.distraction.gov/stats-and-facts/> (last visited Mar. 4, 2011) [hereinafter Nat’l Highway Traffic Safety Admin., *Statistics and Facts*].

13. There are “three main types of distraction: Visual—taking your eyes off the road[;] Manual—taking your hands off the wheel[; and] Cognitive—taking your mind off what you’re doing.” Nat’l Highway Traffic Safety Admin., *Statistics and Facts*, *supra* note 12.

14. U.S. DEP’T OF TRANSP., NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., REP. NO. DOT HS 811 379, *DISTRACTED DRIVING 2009*, at 2 (2010), available at <http://www.distraction.gov/research/pdf-files/distracted-driving-2009.pdf>.

15. *National Safety Council Estimates that at Least 1.6 Million Crashes Each Year Involve Drivers Using Cell Phone and Texting*, NAT’L SAFETY COUNCIL (Jan. 12, 2010), <http://www.nsc.org/pages/nscestimates16millioncrashescausedbydriversusingcellphonesandtexting.aspx> (“NSC estimates that 1.4 million crashes each year involve drivers using cell phones and a minimum of 200,000 additional crashes each year involve drivers who are texting.”).

16. *Semi-Annual Wireless Industry Survey: Estimated Subscriber Connections*, CELLULAR TELECOMM. AND INTERNET ASS’N (2010), available at [http://files.ctia.org/pdf/CTIA\\_Survey\\_Midyear\\_2010\\_Graphics.pdf](http://files.ctia.org/pdf/CTIA_Survey_Midyear_2010_Graphics.pdf).

17. *Wireless Glossary of Terms Q–S*, CELLULAR TELECOMM. AND INTERNET ASS’N, <http://www.ctia.org/advocacy/research/index.cfm/AID/10406> (last visited

exponentially: as of December 2010, an estimated 187.7 billion text messages are sent each month.<sup>18</sup>

## 2. Michigan Roads See Fewer Tragedies

Though the cellular industry has seen great leaps in the use of its technology, the number of reported traffic crashes in Michigan has slowly and steadily decreased since 2000,<sup>19</sup> despite a slight increase in licensed drivers and an assumption that crashes would go up with the increased cellphone use.<sup>20</sup> Likewise, the number of deaths,<sup>21</sup> injuries,<sup>22</sup> and fatal crashes has also decreased.<sup>23</sup> A percentage of the decrease in traffic crashes and related casualties in Michigan is likely attributable to increased seatbelt and drunk-driving enforcement during this period.<sup>24</sup>

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Oct. 12, 2011) (“Short Messaging Service [or SMS] enables users to send and receive short text messages (usually about 140-160 characters) on wireless handsets. Usually referred to as ‘text messaging’ or ‘texting.’”).

18. See *U.S. Wireless Quick Facts*, CELLULAR TELECOMM. AND INTERNET ASS'N, <http://www.ctia.org/advocacy/research/index.cfm/aid/10323> (last visited Mar. 4, 2011) (estimating that 14.4 million text messages were sent monthly in the United States as of December 2000, 9.8 billion text messages were sent every month as of December 2005, and 187.7 billion text messages were sent every month as of December 2010 (annualized at nearly 2.1 trillion in 2010)).

19. See MICH. OFFICE OF HIGHWAY SAFETY PLANNING, 2009 MICHIGAN TRAFFIC CRASH FACTS 9, available at [http://www.michigantrafficcrashfacts.org/doc/2009/2009MTCF\\_vol1.pdf](http://www.michigantrafficcrashfacts.org/doc/2009/2009MTCF_vol1.pdf) (reporting 424,852 crashes in 2000 compared with 290,978 crashes in 2009, a 31.5% decrease).

20. *Id.* at 12 (reporting 7.04 million drivers in 2000 compared with 7.07 million drivers in 2009, “an increase of 0.4 percent”).

21. *Id.* at 10 (reporting 1,382 deaths in 2000 compared with 871 deaths in 2009, a 37.0% decrease).

22. *Id.* (reporting 121,826 injuries in 2000 compared with 70,931 injuries in 2009, a 41.8% decrease).

23. *Id.* (reporting 1,237 fatal crashes in 2000 compared with 806 fatal crashes in 2009, a 34.8% decrease).

24. See Press Release, Mich. State Police, Statewide Drunk Driving Crackdown Kicks Off July 4 Holiday; Special One-Night Enforcement Effort on I-94 Involves Seven States (July 1, 2010), available at [http://www.michigan.gov/msp/0,1607,7-123-1586\\_1710-239851--,00.html](http://www.michigan.gov/msp/0,1607,7-123-1586_1710-239851--,00.html); Press Release, Mich. Office of Highway Safety Planning, Mich. Seat Belt Use Highest in the Nation (Mar. 5, 2009), available at [http://www.michigan.gov/documents/msp/0086\\_269487\\_7.pdf](http://www.michigan.gov/documents/msp/0086_269487_7.pdf) (attributing the 97.2% seatbelt-usage rate in 2008 to the law that made the seatbelt-use requirement a primary-enforcement law and the creation of seatbelt-enforcement zones where police target drivers not wearing seatbelts); Press Release, Mich. State Police, Expanded Enforcement, New Advertisements Kick Off Statewide Click It or Ticket

Michigan also tracks and records whether law-enforcement officers investigating traffic crashes believe that drivers involved in a crash were using their cellphones, though the reports recognize that “[w]hile some conditions may be evident, others (such as distraction) will only be known if the driver admits to the condition, thus leading to possible underreporting.”<sup>25</sup> The Michigan Office of Highway Safety Planning started collecting driver-condition data in January 2000, but because of processing errors, the data was not reported until 2001.<sup>26</sup> The table below reflects the reported number of drivers using a cellphone at the time of the traffic crash between 2001 and 2009:

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Enforcement Effort (May 15, 2006), *available at* [http://www.michigan.gov/msp/0,1607,7-123-1586\\_1710-143247--,00.html](http://www.michigan.gov/msp/0,1607,7-123-1586_1710-143247--,00.html).

25. MICH. OFFICE OF HIGHWAY SAFETY PLANNING, 2009 CRASH FACTS, *supra* note 19, at 130; *see also* T.A. DINGUS ET AL., U.S. DEP’T OF TRANSP., NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., REP. NO. DOT HS 810 593, THE 100-CAR NATURALISTIC DRIVING STUDY, PHASE II—RESULTS OF THE 100-CAR FIELD EXPERIMENT 347–48 (2006), *available at* <http://www.nhtsa.gov/DOT/NHTSA/NRD/Multimedia/PDFs/Crash%20Avoidance/Driver%20Distraction/100CarMain.pdf> (“Naturalistic methods have the potential to fill a void in our existing driving safety research. Specifically, it provides much more detailed and accurate information regarding near-crash, pre-crash, and crash events than is currently available, even after a detailed crash investigation. Police reports and crash investigations rely on eyewitness accounts. Such data have been shown to be limited in accuracy. For example, drivers often do not remember specific details that occur very rapidly as a crash or near-crash scenario unfolds. This is exacerbated by cases in which the drivers or passengers have been dazed in a crash event, or are trying to hide the details of what occurred due to reasons of embarrassment or fear of prosecution.”).

26. MICH. OFFICE OF HIGHWAY SAFETY PLANNING, 2000 MICHIGAN TRAFFIC CRASH FACTS 5, *available at* [http://www.michigantrafficcrashfacts.org/doc/2000/2000MTCF\\_vol1.pdf](http://www.michigantrafficcrashfacts.org/doc/2000/2000MTCF_vol1.pdf) (stating that data on drivers’ conditions would be recorded and explaining the error causing the delay in reporting driver-condition data); MICH. OFFICE OF HIGHWAY SAFETY PLANNING, 2001 MICHIGAN TRAFFIC CRASH FACTS 165, *available at* [http://www.michigantrafficcrashfacts.org/doc/2001/2001MTCF\\_vol1.pdf](http://www.michigantrafficcrashfacts.org/doc/2001/2001MTCF_vol1.pdf).

Table 1: Possible Conditions of Driver—Using Cellular Phone, 2001–2009, Michigan

Year	2001	2002	2003	2004	2005	2006	2007	2008	2009
Number of Drivers	822 <sup>27</sup>	870 <sup>28</sup>	879 <sup>29</sup>	1021 <sup>30</sup>	1022 <sup>31</sup>	951 <sup>32</sup>	872 <sup>33</sup>	908 <sup>34</sup>	856 <sup>35</sup>

The figures represented in Table 1 demonstrate only a marginal long-term increase in the number of drivers that may have used their cellphones before a crash. Though it is probable that these figures, individually, are inaccurate and greater than reported, the fact that the figures have remained relatively static over a nine-year period may be an accurate indication of a larger trend: the number of crashes in Michigan where a driver was using his or her cellphone does not correlate with the dramatic growth of cellular subscriptions and text messages sent during the same nine-year period.

### 3. Studies Report on the Danger of Texting While Driving

Recent research suggests that texting and cellphone use by drivers is on the rise. The NHTSA estimated that in 2008 there were “812,000 vehicles

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27. MICH. OFFICE OF HIGHWAY SAFETY PLANNING, 2001 CRASH FACTS, *supra* note 26, at 165.

28. MICH. OFFICE OF HIGHWAY SAFETY PLANNING, 2002 MICHIGAN TRAFFIC CRASH FACTS at 165, *available* at [http://www.michigantrafficcrashfacts.org/doc/2002/2002MTCF\\_vol1.pdf](http://www.michigantrafficcrashfacts.org/doc/2002/2002MTCF_vol1.pdf).

29. MICH. OFFICE OF HIGHWAY SAFETY PLANNING, 2003 MICHIGAN TRAFFIC CRASH FACTS at 165, *available* at [http://www.michigantrafficcrashfacts.org/doc/2003/2003MTCF\\_vol1.pdf](http://www.michigantrafficcrashfacts.org/doc/2003/2003MTCF_vol1.pdf).

30. MICH. OFFICE OF HIGHWAY SAFETY PLANNING, 2004 MICHIGAN TRAFFIC CRASH FACTS at 165, *available* at [http://www.michigantrafficcrashfacts.org/doc/2004/2004MTCF\\_vol1.pdf](http://www.michigantrafficcrashfacts.org/doc/2004/2004MTCF_vol1.pdf).

31. MICH. OFFICE OF HIGHWAY SAFETY PLANNING, 2005 MICHIGAN TRAFFIC CRASH FACTS at 165, *available* at [http://www.michigantrafficcrashfacts.org/doc/2005/2005MTCF\\_vol1.pdf](http://www.michigantrafficcrashfacts.org/doc/2005/2005MTCF_vol1.pdf).

32. MICH. OFFICE OF HIGHWAY SAFETY PLANNING, 2006 MICHIGAN TRAFFIC CRASH FACTS at 163, *available* at [http://www.michigantrafficcrashfacts.org/doc/2006/2006MTCF\\_vol1.pdf](http://www.michigantrafficcrashfacts.org/doc/2006/2006MTCF_vol1.pdf).

33. MICH. OFFICE OF HIGHWAY SAFETY PLANNING, 2007 MICHIGAN TRAFFIC CRASH FACTS at 129, *available* at [http://www.michigantrafficcrashfacts.org/doc/2007/2007MTCF\\_vol1.pdf](http://www.michigantrafficcrashfacts.org/doc/2007/2007MTCF_vol1.pdf).

34. MICH. OFFICE OF HIGHWAY SAFETY PLANNING, 2008 MICHIGAN TRAFFIC CRASH FACTS at 130, *available* at [http://www.michigantrafficcrashfacts.org/doc/2008/2008MTCF\\_vol1.pdf](http://www.michigantrafficcrashfacts.org/doc/2008/2008MTCF_vol1.pdf).

35. MICH. OFFICE OF HIGHWAY SAFETY PLANNING, 2009 CRASH FACTS, *supra* note 19, at 130.

being driven by someone using a hand-held cell phone at any given moment during daylight hours.”<sup>36</sup> A 2009 Pew Research Center survey also revealed that “82% of teens ages 16–17 have a cell phone and 76% text. Overall, 34% of teen texters ages 16–17 say they have texted while driving. That translates into 26% of all American teens ages 16–17.”<sup>37</sup> But how do these statistics translate into actual risk?

Many studies have been performed to calculate the risk of texting while driving, but the July 27, 2009 report from the Virginia Tech Transportation Institute (VTTI) has found itself at the center of the texting-while-driving debate and has provided ammunition for proponents of texting bans.<sup>38</sup> The results of the oft-cited study indicate that texting while driving increases the risk of a crash<sup>39</sup> or near-crash<sup>40</sup> event up to twenty-three times that of driving without distractions.<sup>41</sup>

A simulated study from Australia has also yielded interesting data on the effects of texting while driving on new, young drivers.<sup>42</sup> Four findings, in particular, demonstrate the increased risk in texting while driving:

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36. Nat'l Highway Traffic Safety Admin., *Statistics and Facts*, *supra* note 12.

37. Mary Madden & Amanda Lenhart, *Teens and Distracted Driving*, PEW RESEARCH CENTER, 4 (Nov. 16, 2009), [http://pewinternet.org/~media/Files/Reports/2009/PIP\\_Teens\\_and\\_Distracted\\_Driving.pdf](http://pewinternet.org/~media/Files/Reports/2009/PIP_Teens_and_Distracted_Driving.pdf).

38. *See* Press Release, Va. Tech Transp. Inst., New Data from VTTI Provides Insight into Cell Phone Use and Driving Distraction (July 27, 2009), *available at* [http://www.vtti.vt.edu/PDF/7-22-09-VTTI-Press\\_Release\\_Cell\\_phones\\_and\\_Driver\\_Distraction.pdf](http://www.vtti.vt.edu/PDF/7-22-09-VTTI-Press_Release_Cell_phones_and_Driver_Distraction.pdf) (noting that the VTTI study, while conducted by VTTI, was commissioned and sponsored by the NHTSA).

39. DINGUS ET AL., *supra* note 25, at xviii. *Crash* is defined as “[a]ny contact with an object, either moving or fixed, at any speed in which kinetic energy is measurably transferred or dissipated. Includes other vehicles, roadside barriers, objects on or off of the roadway, pedestrians, cyclists, or animals.” *Id.*

40. *Id.* at xx. *Near-crash* is defined as “[a]ny circumstance that requires a rapid, evasive maneuver by the subject vehicle, or any other vehicle, pedestrian, cyclist, or animal to avoid a crash. A rapid, evasive maneuver is defined as a steering, braking, accelerating, or any combination of control inputs that approaches the limits of the vehicle capabilities.” *Id.*

41. Va. Tech Transp. Inst., *supra* note 38 (noting that driving while texting is up to 23.2 times riskier for heavy vehicles/trucks); *see also* Frank A. Drews et al., *Text Messaging During Simulated Driving*, 51 HUM. FACTORS: J. HUM. FACTORS & ERGONOMICS SOC'Y 762 (2009). A simulated study performed by the University of Utah revealed that crash rates for *car* drivers increased six-fold when texting compared to undistracted driving. *Id.*

42. SIMON HOSKING ET AL., MONASH UNIV. ACCIDENT RESEARCH CENTRE, THE EFFECTS OF TEXT MESSAGING ON YOUNG NOVICE DRIVER PERFORMANCE (2006), *available at* <http://www.distraction.gov/research/PDF-Files/Effects-of-Text-Messaging.pdf>.

The amount of time that drivers spent with their eyes off the road increased by up to 400% when retrieving and sending text messages.

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The variability in lateral lane position increased by up to 70% when sending texts during the traffic light, pedestrian, and car following events.

Drivers made 28% more lane excursions when retrieving and sending text messages.

[And t]he number of incorrect lane changes increased by 140% when retrieving and sending text messages. The majority of the incorrect lane changes were due to drivers not seeing the signs when distracted by text messaging.<sup>43</sup>

Another source, the NHTSA's National Occupant Protection Use Survey (NOPUS), claims to provide "the best tracking of the extent to which people in the United States use cell phone and other electronic devices while driving."<sup>44</sup> According to the survey, 0.6% of all drivers in 2009 were observed text messaging or otherwise visibly manipulating their cellphones while behind the wheel, compared to 1.0% in 2008;<sup>45</sup> this decline comes after steady increases in the preceding years, 2005–2008, in age groups 16–24 and 25–69.<sup>46</sup> The report does not speculate as to the possible causes of the increase and subsequent decrease in the number of drivers texting.

In an effort to further quantify the danger of texting while driving, *Car and Driver* magazine performed an experiment to compare the reaction times of drunk drivers to those who texted while driving.<sup>47</sup> The experiment was designed to test two drivers' reaction times while driving 35 mph and

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43. *Id.* at xii (comparing all results to controlled results when drivers were not text messaging).

44. TIMOTHY M. PICKRELL & TONY JIANQIANG YE, U.S. DEP'T OF TRANSP., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., REP. NO. DOT HS 811 372, DRIVER ELECTRONIC DEVICE USE IN 2009, at 2 (2010), available at <http://www.distraction.gov/research/PDF-Files/Driver-Electronic-Device-Use-2009.pdf>.

45. *Id.*

46. *Id.*

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

70 mph when they were either texting or under the influence of alcohol.<sup>48</sup> After determining the drivers' reaction times at each speed without any distraction or alcohol, the drivers drove on a closed course while reading, typing, and sending text messages.<sup>49</sup> Next, the two drivers each drank until they reached a blood-alcohol level of 0.08% and then drove through the same closed course without any other distractions.<sup>50</sup> "The results," as the article reporting the experiment points out, "though not surprising, were eye-opening."<sup>51</sup> Tables 2 and 3 displays the average reaction times for each driver at both speeds:

Table 2: *Car and Driver* Average Reaction Times for Two Distracted Drivers at 35 mph<sup>52</sup>

	Average Reaction Time (sec)		Average Extra Distance Traveled (ft)	
	<i>Brown</i>	<i>Alterman</i>	<i>Brown</i>	<i>Alterman</i>
<b>Baseline</b>	0.45	0.57	-	-
<b>Reading</b>	0.57	1.44	6	45
<b>Texting</b>	0.52	1.36	4	41
<b>Impaired</b>	0.46	0.64	1	7

Table 3: *Car and Driver* Average Extra Distance Traveled for Two Distracted Drivers at 70 mph<sup>53</sup>

	Average Reaction Time (sec)		Average Extra Distance Traveled (ft)	
	<i>Brown</i>	<i>Alterman</i>	<i>Brown</i>	<i>Alterman</i>
<b>Baseline</b>	0.39	0.56	-	-
<b>Reading</b>	0.50	0.91	11	36
<b>Texting</b>	0.48	1.24	9	70
<b>Impaired</b>	0.50	0.60	11	4

These averages, while indicators of potentially dangerous, even fatal, real-life consequences, are not nearly as shocking as the worst results of the two drivers:

48. *Id.* The two drivers were *Car and Driver* Editor-in-Chief Eddie Alterman, 37, and Intern Jordan Brown, 22. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

Table 4: *Car and Driver* Experiment: Worst Results for Extra Distance Traveled<sup>54</sup>

	Greatest Extra Distance Traveled (ft) at 35 mph		Greatest Extra Distance Traveled (ft) at 70 mph	
	<i>Brown</i>	<i>Alterman</i>	<i>Brown</i>	<i>Alterman</i>
<b>Baseline</b>	-	-	-	-
<b>Reading</b>	21	188	30	129
<b>Texting</b>	16	90	31	319
<b>Impaired</b>	7	7	15	17

The results of the comparison support proponents' claims that texting while driving is quite dangerous. The results show that, overall—compared to drunk driving—typing and reading text messages while driving are measurably more risky than driving while impaired. However, *Car and Driver* reminded readers, “[D]on’t take the intoxicated results to be acceptable just because they’re an improvement over the texting numbers. They only look better because the texting results are so horrendously bad.”<sup>55</sup>

Probably the most demonstrative evidence to result from the experiment was the amount of time that each driver had their eyes off the road, the distance they traveled in that time, and other non-measurable aspects.<sup>56</sup> For example, the younger driver, Brown, “went more than four seconds before looking up while reading a text message at 35 mph and over three and a half seconds while texting at 70 mph.”<sup>57</sup> Additionally, Alterman’s “two-hands-on-the-phone technique resulted in some serious lane drifting. . . . [And Brown] had to be told *twice* which lane to drive in.”<sup>58</sup> Considering this test was performed on “a straight road without any traffic, road signals, or pedestrians” and with the drivers’ full knowledge of the test and the need to stop when prompted, the results are more

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54. *Id.*

55. *Id.*

56. *See id.*

57. *Id.*; *see also* Press Release, U.S. Dep’t of Transp., Fed. Motor Carrier Safety Admin., U.S. Transp. Secretary Ray LaHood Proposes Rule to Ban Texting for Truck & Bus Drivers (Mar. 31, 2010), *available at* <http://www.fmcsa.dot.gov/about/news/news-releases/2010/Ban-Texting-for-Truck-and-Bus-Drivers.aspx> (“[Federal Motor Carrier Safety Administration] research shows that drivers who send and receive text messages take their eyes off the road for an average of 4.6 seconds out of every 6 seconds while texting. At 55 miles per hour, this means that the driver is traveling the length of a football field, including the end zones, without looking at the road.”).

58. Austin, *supra* note 47.

alarming.<sup>59</sup> The danger involved in performing these same tasks on roads shared by other drivers is obvious.

The results of the several studies on the effect of texting while driving on a driver's abilities and performance lead to one simple conclusion: texting while driving is dangerous. However, simply labeling an activity as dangerous is not likely to effectively deter unwanted behavior. Rather, state and federal governments have taken affirmative administrative and legislative action to raise awareness of the dangers of texting while driving and deter drivers from engaging in this dangerous behavior.<sup>60</sup>

### *B. Michigan's Legislative Action*

The Michigan Legislature recently took action to address the problem of texting while driving. On February 24, 2009, Representative Lee Gonzales introduced House Bill 4394 to add section 602b to the Michigan Vehicle Code to ban texting while driving in Michigan.<sup>61</sup> On February 19,

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59. *Id.*

60. *See* U.S. DEP'T OF TRANSP., FACT SHEET: DOT EFFORTS TO COMBAT DISTRACTED DRIVING (July 7, 2010), *available at* <http://www.distraction.gov/files/dot/07-07-10-DD-Fact-Sheetmk.pdf> [hereinafter U.S. DEP'T OF TRANSP., FACT SHEET].

61. JOURNAL OF THE H.R., H.R. 95-13, 2009 Reg. Sess., at 193 (Mich. 2009); H.B. 4394, 95th Leg., 2009 Reg. Sess. (Mich. 2009). The Bill originally read as follows:

(1) A person shall not read, write, or send a text message on a wireless 2-way communication device that is located in the person's hand or in the person's lap, including a wireless telephone used in cellular telephone service or personal communication service, while operating a motor vehicle that is moving on a highway or street in this state. As used in this subsection, a wireless 2-way communication device does not include a global positioning or navigation system that is affixed to the motor vehicle.

(2) Subsection (1) does not apply to an individual who is using a device described in subsection (1) to do any of the following:

(a) Report a traffic accident, medical emergency, or serious road hazard.

(b) Report a situation in which the person believes his or her personal safety is in jeopardy.

(c) Report or avert the perpetration or potential perpetration of a criminal act against the individual or another person.

2009, Representative Gino Polidori introduced House Bill 4370, a bill that would make a violation of section 602b result in no points on a driver's record, which became *tie-barred*<sup>62</sup> to House Bill 4394.<sup>63</sup> While the Bill was in the House Committee on Transportation, the Committee heard testimony from various interested parties who provided facts and recommendations on House Bill 4394.<sup>64</sup> After spending nearly eight months in committee, House Bill 4394 was finally recommended to the House for passage on October 22, 2009.<sup>65</sup> The House passed the Bill.<sup>66</sup>

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(d) Carry out official duties as a police officer, law enforcement official, member of a paid or volunteer fire department, or operator of an emergency vehicle.

(3) Enforcement of this section by state or local law enforcement agencies shall be accomplished only as a secondary action when the operator of a motor vehicle has been detained for a suspected violation of another section of this act.

(4) An individual who violates this section is responsible for a civil infraction.

(5) If a local unit of government adopts an ordinance substantially similar to this section, the ordinance shall include the secondary enforcement provision in subsection (3).

*Id.*

62. *Glossary of Legislative Terms*, MICH. LEGISLATURE, [http://www.legislature.mi.gov/\(S\(4qmalg454tu44h554vj3im45\)\)/mileg.aspx?page=Glossary](http://www.legislature.mi.gov/(S(4qmalg454tu44h554vj3im45))/mileg.aspx?page=Glossary) (last visited Oct. 12, 2011). *Tie-bar* is defined as “[a] device to condition the effectiveness of legislation on the enactment or passage of other specified legislation.” *Id.*

63. H.B. 4370, 95th Leg., 2009 Reg. Sess. (Mich. 2009) (amending the vehicle code so that no points are assessed on a driver's record for violations of the proposed amendments).

64. See COMM. ON TRANSP., 95TH LEG., MINUTES OF THE COMM. ON TRANSP., APR. 23, 2009 (Mich. 2009). Testimony was heard from Louis Tijerna, Ford Motor Company; Mac Jashney, Legislation Committee for the Michigan Association for Pupil Transportation; Jim C. Walker, JCW Consulting; and John Lindenmayer, The League of Michigan Bicyclists. *Id.* No testimony was given in opposition of the Bill. See *id.*

65. JOURNAL OF THE H.R., H.R. 95-92, 2009 Reg. Sess., at 2155 (Mich. 2009).

66. JOURNAL OF THE H.R., H.R. 95-105, 2009 Reg. Sess., at 2405 (Mich. 2009) (passing ninety-four to thirteen).

However, not all of the House was in agreement.<sup>67</sup> Foreshadowing a future amendment to the Bill,<sup>68</sup> on the House floor, Representative Douglas Geiss argued that

texting while driving should be a primary offense in the State of Michigan, rather than the secondary offense as contained in HB 4394. . . . Common sense says that you should not text while driving. We, as legislators, need to send a clear message to those who do not have common sense. This bill, unfortunately, is not a strong enough message, or legislation.<sup>69</sup>

Alternatively, Representative David Agema argued that the Bill should not have passed, no matter the language:

The problem with this bill is you don't know if someone is answering a call, dialing a number etc. yet if an officer thought you were texting, you could be ticketed. If someone causes an accident because of a careless act—ticket him. What will happen here is that people will put their phones lower in the car causing more distraction and cause more accidents. You lose you[r] freedoms one law at a time.<sup>70</sup>

Despite the protest, the Bill advanced to the Michigan Senate on December 8, 2009.<sup>71</sup>

House Bill 4394 spent considerably less time in the Michigan Senate than it did in the House. On December 9, 2009, the Senate read the Bill and referred it to the Senate Committee on Transportation for analysis and debate.<sup>72</sup> On February 24, 2010, the Senate Committee on Transportation recommended the Bill for passage with immediate effect and sent it to the Senate.<sup>73</sup> House Bill 4394 was also tie-barred with another bill, Senate Bill 468, sponsored by Senator Roger Kahn, which would determine the penalties assessed for violating the texting ban and “specify that a texting

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67. *See id.*

68. *See* JOURNAL OF THE S., S. 95-28, 2010 Reg. Sess., at 512 (Mich. 2010) (striking out all of a subsection in the original House Bill 4370, which made the law a secondary-enforcement violation).

69. JOURNAL OF THE H.R., H.R. 95-105, 2009 Reg. Sess., at 2406 (Mich. 2009).

70. *Id.*

71. JOURNAL OF THE S., S. 95-102, 2009 Reg. Sess., at 2359 (2009).

72. *Id.* at 2370.

73. JOURNAL OF THE S., S. 95-15, 2010 Reg. Sess., at 241 (Mich. 2010) (reporting that the Committee on Transportation recommended passage).

violation would not be entered on the master driving record.<sup>74</sup> On March 25, 2010, the Senate voted on House Bill 4394 and the amendment to make texting a primary-enforcement violation; it passed by a vote of 28:10.<sup>75</sup> The same day, the Bill was returned to the House for approval of the revisions and amendments.<sup>76</sup>

On April 20, 2010, the House approved the Senate's changes and passed the Bill in its final form in a 74:33 vote.<sup>77</sup> While only thirteen representatives voted against the Bill in the first House vote, the second time around, thirty-three did not want to see the Bill passed in its revised form.<sup>78</sup> Representative Geiss, who voiced opposition in the first vote because he wanted the violation to be a primary-enforcement offense, supported the revised Bill.<sup>79</sup> At least two representatives wanted the violation to be a secondary-enforcement offense: Representatives Ken Horn and Tom McMillin both introduced amendments on April 20, 2010, to make texting while driving a secondary offense, but both amendments failed to pass.<sup>80</sup> Representative McMillin also introduced an amendment to create an additional exception to the general ban that would allow drivers to "enter, send, or transmit not more than 10 characters"; this amendment also failed.<sup>81</sup> Representative Justin Amash introduced an amendment to prohibit "[a] law enforcement agency [from] obtain[ing] telephone, cellular telephone, e-mail, text communication, or other electronic communication records, messages, or any data associated with a violation or alleged violation of this section for use as evidence in a prosecution under this section"; this amendment failed as well.<sup>82</sup> Even though the Bill was finally passed, Representative Agema again voiced his dissent:

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74. HOUSE FISCAL AGENCY, 95TH LEG., LEGISLATIVE ANALYSIS: A SUMMARY OF SENATE BILL 468 AS REPORTED FROM HOUSE COMMITTEE AND HOUSE BILLS 4370 & 4394 AS PASSED BY THE SENATE (Mich. 2010).

75. JOURNAL OF THE S., S. 95-28, 2010 Reg. Sess., at 512 (Mich. 2010).

76. JOURNAL OF THE H.R., H.R. 95-31, 2010 Reg. Sess., at 471 (Mich. 2010).

77. JOURNAL OF THE H.R., H.R. 95-35, 2010 Reg. Sess., at 535 (Mich. 2010).

78. There were thirteen nays in the first House vote. JOURNAL OF THE H.R., H.R. 95-105, 2009 Reg. Sess., at 2405 (Mich. 2009). There were thirty-three nays in the House vote on the Senate-revised Bill. JOURNAL OF THE H.R., H.R. 95-35, 2010 Reg. Sess., at 535 (Mich. 2010).

79. JOURNAL OF THE H.R., H.R. 95-105, 2009 Reg. Sess., at 2406 (Mich. 2009) (reporting Representative Geiss's dissent); JOURNAL OF THE H.R., H.R. 95-35, 2010 Reg. Sess., at 535 (Mich. 2010) (reporting Representative Geiss's support).

80. JOURNAL OF THE H.R., H.R. 95-35, 2010 Reg. Sess., at 535 (Mich. 2010).

81. *Id.*

82. *Id.*

This bill is not sufficient to eliminate accidents. You can still surf the web etc. This gives police an excuse to pull you over if you're looking down in your car for probable cause. It should not be a primary offense and it's impossible to enforce according to some police I have talked to. You're not even allowed to read a text message in this bill yet you can do all manner of other things with your phone. It's inconsistent.<sup>83</sup>

The Bill was presented to Governor Jennifer Granholm on April 29, 2010.<sup>84</sup> Granholm signed the Bill into law the next day in the Detroit Renaissance Center as part of a broadcast of *The Oprah Winfrey Show*.<sup>85</sup> After fourteen months of analysis and debate by the Michigan Legislature, Michigan's statute banning texting while driving reads as follows:

(1) Except as otherwise provided in this section, a person shall not read, manually type, or send a text message on a wireless 2-way communication device that is located in the person's hand or in the person's lap, including a wireless telephone used in cellular telephone service or personal communication service, while operating a motor vehicle that is moving on a highway or street in this state. As used in this subsection, a wireless 2-way communication device does not include a global positioning or navigation system that is affixed to the motor vehicle.

(2) Subsection (1) does not apply to an individual who is using a device described in subsection (1) to do any of the following:

(a) Report a traffic accident, medical emergency, or serious road hazard.

(b) Report a situation in which the person believes his or her personal safety is in jeopardy.

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83. *Id.* at 536.

84. JOURNAL OF THE H.R., H.R. 95-40, 2010 Reg. Sess., at 627 (Mich. 2010).

85. *Granholm Signs Texting-Driving Ban on 'Oprah,'* WNEM.COM (Apr. 30, 2010, 6:49 PM), <http://www.wnem.com/news/23316027/detail.html>; *see also The Oprah Winfrey Show* (CBS television broadcast Apr. 30, 2010), *available at* <http://www.wnem.com/video/23319372/index.html>.

(c) Report or avert the perpetration or potential perpetration of a criminal act against the individual or another person.

(d) Carry out official duties as a police officer, law enforcement official, member of a paid or volunteer fire department, or operator of an emergency vehicle.

(3) An individual who violates this section is responsible for a civil infraction and shall be ordered to pay a civil fine as follows:

(a) For a first violation, \$100.00.

(b) For a second or subsequent violation, \$200.00.

(4) This section supersedes all local ordinances regulating the use of a communications device while operating a motor vehicle in motion on a highway or street, except that a unit of local government may adopt an ordinance or enforce an existing ordinance substantially corresponding to this section.<sup>86</sup>

### *C. The Federal Response to Distracted Driving*

Just as states have started to address the texting-while-driving issue, the federal government has recently taken a close look at distracted driving. The executive branch, in particular, has taken several steps to discourage distracted-driving behavior at both the state and federal levels. Secretary LaHood has made it his personal mission to reduce distracted driving and eliminate cellphone use while driving.<sup>87</sup> The Department of Transportation has taken affirmative steps to lobby against distracted driving, texting, and cellphone use, in particular.<sup>88</sup> It has also issued regulations that prohibit texting by commercial truck drivers and bus drivers.<sup>89</sup> Additionally,

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86. MICH. COMP. LAWS § 257.602b (2011).

87. Victor Mendez, Fed. Highway Admin., American Public Transportation Association “Transportation Tuesday” Series (Dec. 8, 2009), *available at* <http://www.fhwa.dot.gov/pressroom/re091208.htm>.

88. *See* U.S. DEP’T OF TRANSP., FACT SHEET, *supra* note 60.

89. *See* Press Release, U.S. Dep’t of Transp., Sec’y Ray LaHood Announces Fed. Ban on Texting for Commercial Truck Drivers (Jan. 26, 2010), *available at* <http://www.dot.gov/affairs/2010/dot1410.htm>.

President Barack Obama signed an executive order banning texting while driving by federal employees and contractors in the course of their employment, effective December 30, 2009.<sup>90</sup> The Department of Transportation also launched *Distraction.gov*, a website dedicated to informing people about the risks of distracted driving and encouraging states and the United States Congress to support bans on distracted driving and, in particular, cellphone usage.<sup>91</sup>

Congress has also taken notice of the issue and sent a number of bills to committee: some to reward states for taking action to curb distracted driving and others to punish states for not doing enough. Senate Bill 1938, the Distracted Driving Prevention Act of 2010, introduced on October 27, 2009, provides a yearly grant to individual states if they enact statutes in compliance with the federal law's requirements for banning texting or cellphone use while driving.<sup>92</sup> Senate Bill 1536, the Avoiding Life-Endangering and Reckless Texting by Drivers Act of 2009 (ALERT Drivers Act), introduced on July 29, 2009, would allow Congress to withhold up to 25% of a state's highway funding if the state fails to comply with the federal law's requirements.<sup>93</sup>

#### *D. The Debate Continues*

For the most part, the American public supports government action to prevent and reduce texting-while-driving casualties. With all of the data available, it is hard to dispute that distracted driving is a serious issue that affects everyone on the road, including drivers, passengers, bicyclists, and pedestrians, and that texting is one of the most dangerous manifestations of distracted driving. Indeed, as recent as November 2009, as many as 97% of Americans supported banning texting while driving.<sup>94</sup> Michigan State Representative Gonzales, sponsor of Michigan's texting law, stated that supporters of the ban claim that "[d]riving while texting is a clear and present danger."<sup>95</sup> Supporters of the ban have taken the position that, at the very least, the texting ban is a starting point—a tool that is part of a larger

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90. Exec. Order No. 13513, 74 Fed. Reg. 51225 (Oct. 1, 2009), available at <http://edocket.access.gpo.gov/2009/pdf/e9-24203.pdf>; see also Press Release, Presidential Exec. Order on Distracted Driving Effective Today (Dec. 30, 2009), available at <http://www.dot.gov/affairs/2009/dot20209.htm>.

91. See Presidential Exec. Order on Distracted Driving Effective Today, *supra* note 90; see also DISTRACTION.GOV, <http://www.distraction.gov> (last visited Oct. 12, 2010).

92. S. 1938, 111th Cong. (2009).

93. S. 1536, 111th Cong. (2009).

94. Connelly, *supra* note 3.

95. The Frank Beckmann Show, *supra* note 10.

strategy to inform and educate drivers that texting while driving is dangerous and should be avoided.<sup>96</sup>

Alternatively, most opponents of the current texting ban do not dispute the inherent danger in texting while driving. Rather, opponents argue that the current language of the Michigan ban fails to protect citizens from Fourth Amendment violations by not expressly providing that police shall not search a person's phone upon suspicion of texting while driving.<sup>97</sup> Michigan lawyers and other professionals that owe duties of confidentiality share the same Fourth Amendment fears; lawyers, in particular, are also concerned that in the course of having their phones searched, privileged and confidential client information may be intercepted by the police, thereby breaching their ethical duties.<sup>98</sup>

Opponents also argue that distracted-driving behaviors such as texting can be punished by laws that already exist. State Senator Wayne Kuipers explained his opposition to Michigan's texting law by stating, "I believe there's already penalties that can be assessed against drivers who drive distracted. . . . I didn't feel like it was appropriate to single out one aspect of distracted driving, and penalize that higher than any of the other basis of distracted driving."<sup>99</sup> Some have opposed the law because they believe that texting is but one of many distracting behaviors that increase the risk of a crash, and texting and wireless technologies, in general, should not be singled out by legislation—the Legislature should prohibit all distracting behavior or none of it.<sup>100</sup> Finally, probably the strongest argument that opponents put forth indicates that similar texting bans enacted in other

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96. *Id.*

97. See JOURNAL OF THE H.R., H.R. 95-105, 2009 Reg. Sess., at 2406 (Mich. 2009) (noting Representative Agema's explanation of why he voted against the original House Bill 4394); JOURNAL OF THE H.R., H.R. 95-35, 2010 Reg. Sess., at 535 (Mich. 2010) (noting Representative Amash's proposed amendment to prohibit police from searching phones and data associated with them to gather evidence to prosecute the alleged violator).

98. PTBarone, *Texting Law May Allow Phone Email and Text Searches*, WINBACKYOURLIFE.ORG (June 29, 2010), <http://winbackyourlife.org/texting-law-may-allow-phone-email-and-text-searches/>.

99. The Mitch Albom Show, *supra* note 9.

100. See Lauren French, *DOT Criticizes Firm Lobbying Against Cell Phone Bans*, MCCLATCHY NEWSPAPERS (July 7, 2010), <http://www.mcclatchydc.com/2010/07/07/97159/dot-criticizes-firm-lobbying-against.html> ("We absolutely and wholeheartedly agree with Secretary LaHood. Distracted driving is wrong, unsafe and unacceptable . . . . But when you're looking at distracted driving, you shouldn't just look to target specific industries or technology.") (quoting Jason Oxman of the Consumer Electronics Association); The Mitch Albom Show, *supra* note 9; see also The Frank Beckmann Show, *supra* note 10.

states are having the opposite effect intended: crashes are increasing.<sup>101</sup> The supporters of the texting ban are not without their retort, however.

Representative Gonzales, as the sponsor of Michigan's ban, has been a loud voice supporting the measure.<sup>102</sup> In response to the argument that other laws already address distracted driving and a texting ban is unnecessary, Gonzales stated that the texting ban "gives an extra tool for a police officer or state trooper to pull somebody over as a primary offense and discuss with them their erratic driving."<sup>103</sup> As Gonzales explains, the texting law allows police to pull a driver over if they suspect a texting violation; whereas before, police would have had to follow and observe drivers until they committed another traffic offense before police could pull drivers over to discuss their distracted behavior.<sup>104</sup> To address the Fourth Amendment issue, Gonzales stated that "[t]here's not going to be a confiscation of a hand-held device [by police]. . . . [T]hat would be a taking . . . under the Constitution."<sup>105</sup>

### III. BALANCING THE BENEFITS OF THE TEXTING BAN: ARE THE PROBLEMS WORTH THE MERE POSSIBILITY OF SAFER ROADS?

Michigan's texting ban is still too new to determine its actual effectiveness in making roads safer, and only time and a comprehensive, comparative long-term study will truly reveal how successful the legislation has been. However, without taking further steps to address the problem of texting while driving, data collected from other jurisdictions with similar bans indicate that enforcement of Michigan's anti-texting statute will, at best, have no effect, and at worst, will cause roads to become more dangerous.<sup>106</sup> While many organizations advocate that banning cellphone use altogether is the only effective means to make our roads safer, the

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101. See Highway Loss Data Inst., *Texting Laws and Collision Claim Frequencies*, HIGHWAY LOSS DATA INST. BULLETIN, Sept. 2010, available at [http://www.iihs.org/research/topics/pdf/HLDI\\_Bulletin\\_27\\_11.pdf](http://www.iihs.org/research/topics/pdf/HLDI_Bulletin_27_11.pdf) [hereinafter HIGHWAY LOSS DATA INST., *Texting Collision Claim Frequencies*]. Compare Michigan's ban, MICH. COMP. LAWS § 257.602b (2011), with California's ban, CAL. VEH. CODE § 23123.5 (West Supp. 2011); Louisiana's ban, LA. REV. STAT. ANN. § 32:300.5 (Supp. 2011); Minnesota's ban, MINN. STAT. ANN. § 169.475 (West Supp. 2011); and Washington's ban, WASH. REV. CODE ANN. §46.61.668 (West Supp. 2011).

102. See The Frank Beckmann Show, *supra* note 10.

103. *Id.*

104. Representative Gonzales Shares His Opinions on Texting While Driving, THE MICHIGAN TALK NETWORK (Mar. 26, 2010) (on file with author).

105. The Frank Beckmann Show, *supra* note 10.

106. See Highway Loss Data Inst., *Slight Crash Increases*, *supra* note 7.

problem of ensuring that drivers adhere to the ban persists.<sup>107</sup> The trouble with getting drivers to obey the anti-texting law is likened to the trouble states had with getting drivers to obey seatbelt and drunk-driving laws.<sup>108</sup> But how should a driver be punished for a violation that is so difficult to prove? Moreover, how should Michigan address the Fourth Amendment violations that will inevitably result from enforcement under the current language of the law?

### *A. Texting Bans Result in More Dangerous Roads*

In September 2010, the HLDI released the results of a study measuring the effectiveness of texting bans in reducing traffic-crash rates in four states.<sup>109</sup> The results were less than encouraging for proponents of such bans. The study compared the frequency of insurance claims for collisions before and after texting bans became effective in the studied states to adjacent control states that either had no texting ban or “had no substantial change in ban status during the months before and after the ban became effective in the states studied.”<sup>110</sup>

The HLDI acknowledged that the study was not without its weaknesses and admitted that the increase in crashes may be attributable to other causes.<sup>111</sup> First, the study points out, “Collision claims are not a perfect indicator of all crashes for which distraction is a factor.”<sup>112</sup> Second, the study concedes that because the study was naturalistic, there may have been other uncontrollable factors that could have skewed the results.<sup>113</sup> And finally, “[I]t is possible that crashes involving texting have decreased as a result of the bans but there has been an unexpected increase in crashes due to other causes. That, however, seems unlikely and, in any case, would imply that texting bans are responsible for those increases in other

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107. See Press Release, Teen Drivers Often Ignore Bans on Using Cellphones and Texting, Ins. Inst. for Highway Safety (June 9, 2008), available at [http://www.iihs.org/news/2008/iihs\\_news\\_060908.pdf](http://www.iihs.org/news/2008/iihs_news_060908.pdf); see, e.g., *Why Cell-Free Driving*, FOCUSDRIVEN.ORG, [http://www.focusdriven.org/why\\_cell\\_free.aspx](http://www.focusdriven.org/why_cell_free.aspx) (last visited Nov. 15, 2010).

108. See Ashley Halsey III, *Laws Are Not Detering Drivers from Texting, Report Finds*, WASH. POST (Sept. 29, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/28/AR2010092805833.html>.

109. Highway Loss Data Inst., *Slight Crash Increases*, *supra* note 7.

110. Highway Loss Data Inst., *Texting Collision Claim Frequencies*, *supra* note 101.

111. *Id.*

112. *Id.*

113. *Id.*

crashes.”<sup>114</sup> Dismissing the weaknesses as irrelevant to the larger picture, the HLDI reaffirmed the legitimacy of its study by asserting that “there is strength in the similarity of findings.”<sup>115</sup>

The study found that following the implementation of the texting bans, collision-claim frequencies increased in all four states.<sup>116</sup> To illustrate, “In California, Louisiana and Minnesota, the bans are associated with small but statistically significant increases in collision claims (7.6%, 6.7%, and 8.9%, respectively) . . . . In Washington, the ban was also associated with an increase in crashes (0.8%), but it was not statistically significant.”<sup>117</sup> There is indeed something to be said about the similarity of the study’s findings. Even though, as the study concedes, there were variables that the researchers could not control, the results seem to indicate that the texting ban was the cause, at least in part, of the increase in collision claims.<sup>118</sup> The report explains it best:

The results of this study seem clear. In none of the four states where texting bans could be studied was there a reduction in crashes. It’s important to remember that the public safety issue in distracted driving is the crashes resulting from cellphone conversations and texting, not the use of these devices, per se. If the goal of texting and cellphone bans is the reduction of crash risk, then the bans have so far been ineffective. Bans on handheld cellphone use by drivers have had no effect on crashes, as measured by collision claim frequencies, and texting bans may actually have increased crashes.<sup>119</sup>

The researchers hypothesized that a cause of the increase in crashes could be a result of drivers going to greater lengths to hide their distracted behavior<sup>120</sup>—what some have termed *discreet texting*<sup>121</sup> is a logical culprit.

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114. *Id.*

115. *Id.* (“In four states, texting bans failed to produce a detectable reduction in crash risk, despite the geographic dispersion of these states and their controls. It is unlikely that uncontrolled covariates are confounding all the results. This is similar to the previous study, showing that hand-held cellphone bans have not affected crash risk in four different states. Two of the previously studied jurisdictions, Connecticut and the District of Columbia, had all driver texting bans come into effect at the same time as the studied hand-held bans. The findings of this study coupled with the previous analysis would suggest that simultaneously banning texting and cellphones for all drivers does not reduce collision claim frequencies.”).

116. *Id.*

117. *Id.*

118. *See id.*

119. *Id.* (citation omitted).

120. *See id.*

The HLDI cited two simulated studies that support this theory: “In one study, more than 3 times as many drivers experienced a simulated collision while using a head-down display (traditional dashboard display) compared with a head-up (display part of the windshield). Another simulator study found longer reaction times among commercial drivers using head-down versus head-up displays.”<sup>122</sup> If the risks similarly increased with drivers holding their phones below the car’s windows more often, instead of up on the steering wheel where their eyes are directed nearer to the road, it would help to explain the increase in crashes attributable to texting while driving.

In the accompanying press release, HLDI and IIHS President Adrian Lund further explained the report’s hypothesis.<sup>123</sup> Lund cited survey results showing that 45% of 18–24 year olds in states that have texting bans were still texting, compared with 48% in states with no ban.<sup>124</sup> In fact, “Many respondents who knew it was illegal to text said they didn’t think police were strongly enforcing the bans.”<sup>125</sup> Lund suggested,

If drivers were disregarding the bans, then the crash patterns should have remained steady. So clearly drivers did respond to the bans somehow, and what they might have been doing was moving their phones down and out of sight when they texted, in recognition that what they were doing was illegal. This could exacerbate the risk of texting by taking drivers’ eyes further from the road and for a longer time.<sup>126</sup>

Secretary LaHood quickly criticized the HLDI study, however, calling it “completely misleading.”<sup>127</sup> A press release issued by the United States Department of Transportation stated that the IIHS and the HLDI have been “working to discredit national anti-distracting efforts over the last year

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121. See *Texting Bans May Increase Car Crash Rate, Study Finds*, AOLNEWS, (Sept. 28, 2010, 10:30 AM), <http://www.aolnews.com/2010/09/28/u-turn-texting-bans-may-increase-car-crash-rate-study-finds/>.

122. Highway Loss Data Inst., *Texting Collision Claim Frequencies*, *supra* note 101 (citations omitted).

123. See Highway Loss Data Inst., *Slight Crash Increases*, *supra* note 7.

124. *Id.* at 4.

125. *Id.*

126. *Id.*; see also Madden & Lenhart, *supra* note 37, at 6. When one teenager was asked about texting while in cars and his method of hiding his behavior from the police, he stated, “I think it’s fine . . . And I wear sunglasses so the cops don’t see [my eyes looking down].” *Id.* (alterations in original).

127. Press Release, U.S. Dep’t of Transp., U.S. Transp. Sec’y Ray LaHood Responds to Misleading Distracted Driving Study (Sept. 28, 2010), *available at* <http://www.dot.gov/affairs/2010/dot18110.html>.

[(2009–2010)].”<sup>128</sup> The press release claimed that the “HLDI–IIHS report fail[ed] to reconcile with previous research supported by HLDI–IIHS showing that drivers are four times as likely to crash if using a handheld device while driving.”<sup>129</sup> Secretary LaHood explained that the study’s largest weakness is “that they have created a cause and effect that simply doesn’t exist.”<sup>130</sup> Presumably, he is referring to the fact that the study associates the increase in the number of insurance claims—rather than the number of actual crashes—with the implementation of the texting bans in the studied states.

Secretary LaHood’s attack, however, merely comes across as an attempt to discredit any research that does not support his personal crusade as well as a shot back at IIHS for criticizing the Department of Transportation for focusing too much on distracted driving and not on more statistically dangerous issues.<sup>131</sup> This becomes more obvious when viewing the “Official U.S. Government Website for Distracted Driving,” [Distraction.gov](http://Distraction.gov), which still cites IIHS studies on its *Research and Statistics and Facts* webpages.<sup>132</sup> Neither HLDI nor IIHS has advocated that distracted-driving efforts should be curtailed; rather, the organizations have strongly advocated against distracted driving.<sup>133</sup> Following Secretary LaHood’s reasoning, it can be said that LaHood, the Department of Transportation, and the NHTSA have been similarly misleading by failing

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128. *Id.*

129. *Id.* (referring to an IIHS study released in 2005); see Press Release, 1st Evidence of Effects of Cell Phone Use on Injury Crashes: Crash Risk Is Four Times Higher When Driver Is Using a Hand-Held Cell Phone, Ins. Inst. for Highway Safety (July 12, 2005), available at [http://www.iihs.org/news/2005/iihs\\_news\\_071205.pdf](http://www.iihs.org/news/2005/iihs_news_071205.pdf).

130. Ray LaHood, *Make No Mistake; DOT and Its Safety Partners Will Continue Fighting Against Distracted Driving*, FASTLANE: THE OFFICIAL BLOG OF THE U.S. SEC’Y TRANSP. (Sept. 28, 2010, 8:43 AM), <http://fastlane.dot.gov/2010/09/index.html> [hereinafter LaHood, *Make No Mistake*].

131. See Zach Bowman, *Catfight! IIHS Criticizes NHTSA for Losing Focus on Driver Safety*, AUTOBLOG.COM (Aug. 28, 2010, 9:33 AM), <http://www.autoblog.com/2010/08/28/catfight-iihs-criticizes-nhtsa-for-losing-focus-on-driver-safet/>.

132. See Nat’l Highway Traffic Safety Admin., *Research*, *supra* note 12; Nat’l Highway Traffic Safety Admin., *Statistics and Facts*, *supra* note 12.

133. See, e.g., Anne T. McCartt, Statement Before the Joint Hearing of the Subcommittee on Commerce, Trade, and Consumer Protection and the Subcommittee on Communications, Technology, and the Internet of the U.S. House of Representatives: Driven to Distraction: Technological Devices and Vehicle Safety, INS. INST. FOR HIGHWAY SAFETY (Nov. 4, 2009), [http://www.iihs.org/laws/testimony/pdf/testimony\\_11-04-2009.pdf](http://www.iihs.org/laws/testimony/pdf/testimony_11-04-2009.pdf).

to update the statistics on its website (Distraction.gov) to include more recent crash data that reflects a decrease in the number of texters behind the wheel<sup>134</sup> or by falling back to talking points that cite distracted-driving casualties, in general, when attacking the IIHS study.<sup>135</sup> The only “reputable research,” according to Secretary LaHood, on the effectiveness of the texting bans comes from an NHTSA study of cellphone usage in targeted, high-visibility enforcement zones.<sup>136</sup> Although Secretary LaHood may not want to acknowledge the results of the IIHS’s texting-ban-effectiveness study, the results of the IIHS and NHTSA studies are not irreconcilable.

NHTSA’s study, released in the same month as the IIHS study,<sup>137</sup> “summarizes results from the first two of four waves of enforcement and media for distracted driving high visibility enforcement campaigns in [Hartford, Connecticut, and Syracuse, New York].”<sup>138</sup> Each wave of the *Phone in One Hand, Ticket in the Other* campaign involved television, radio, and online advertisements; scheduled press events covered by local and national media; and scheduled, targeted law-enforcement zones to enforce the hands-free and texting laws and serve as an on-the-road presence to deter drivers from prohibited behavior.<sup>139</sup> However, the results released in September 2010 do not necessarily paint a picture of effectiveness.<sup>140</sup>

Halfway through the campaign, the NHTSA study shows that awareness of the campaign and the illegality of texting and hand-held

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134. Compare Nat’l Highway Traffic Safety Admin., *Statistics and Facts*, *supra* note 12 (citing data from 2007 and 2008 NOPUS studies), with PICKRELL & JIANQIANG YE, *supra* note 44, at 2 (reporting 2009 NOPUS data that shows an overall decrease in drivers visibly manipulating their cellphones and increases in only two categories: black drivers and drivers in southern states).

135. See Halsey, *supra* note 108 (“Distracted-driving-related crashes killed nearly 5,500 people in 2009 and injured almost half a million more. Lives are at stake, and all the reputable research we have says that tough laws, good enforcement and increased public awareness will help put a stop to the deadly epidemic of distracted driving on our roads.”).

136. See *id.*; LINDA COSGROVE ET AL., U.S. DEP’T OF TRANSP., NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., REP. NO. DOT HS 811 376, HIGH VISIBILITY ENFORCEMENT DEMONSTRATION PROGRAMS IN CONNECTICUT AND NEW YORK REDUCE HAND-HELD PHONE USE (2010), available at <http://www.distraction.gov/research/PDF-Files/High-Visibility-Enforcement-Demo.pdf>.

137. Compare Highway Loss Data Inst., Slight Crash Increases, *supra* note 7, with COSGROVE ET AL., *supra* note 136.

138. COSGROVE ET AL., *supra* note 136, at 1.

139. *Id.* at 2–3.

140. See generally *id.* at 4–8.

cellphone use is up, and for this purpose the campaign has been effective.<sup>141</sup> By this performance metric, the NHTSA's campaign has been a success.<sup>142</sup> As of the September 2010 report, the enforcement effort netted a combined total of 9,402 citations for drivers using a hand-held cellphone or texting—only 584 of which were attributable to drivers caught texting or emailing.<sup>143</sup> Notably, the number of citations issued between the first and second waves of the enforcement effort did decrease overall, most significantly for the number of citations issued for texting in Hartford (279 in the first wave and 21 in the second wave); however, the number of texting citations did increase from the first to the second wave in Syracuse (115 and 169, respectively).<sup>144</sup> Possibly the most important data—the percentage of drivers observed texting on the roads—indicate that the campaign has had an effect on people texting while driving.<sup>145</sup> “The percentage of people observed manipulating their phones” in each community before and after each wave is expressed in Figure 1 below:

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141. *See id.* at 6–7.

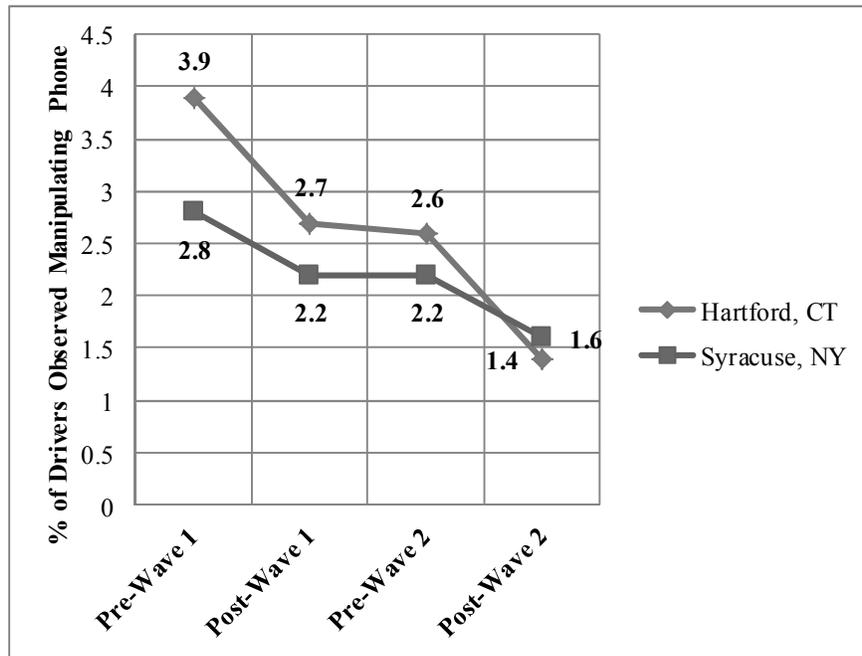
142. *See id.* at 7 (“Changing driver behavior presents a challenge, but high visibility enforcement campaigns are a proven countermeasure in a variety of traffic safety areas. The intent of a high visibility enforcement campaign is not to issue tickets. Rather, the intent is to deter drivers from engaging in that particular behavior in the first place. In other words, if drivers violate a particular law, there should be a high certainty that they will receive a ticket. While issuing one citation to a motorist may persuade that person to avoid that offense in the future (known as specific deterrence), highly visible enforcement seeks to have 100 or 1,000 other drivers know about that one citation so they choose to avoid that behavior (general deterrence).”).

143. *Id.* at 3.

144. *Id.*

145. *See id.* at 5.

Figure 1: Percentage of Drivers Observed Manipulating Their Cellphones in Hartford and Syracuse Before and After Waves One and Two of the NHTSA Enforcement Campaign<sup>146</sup>



The data from the NHTSA study are promising. They indicate that the texting bans may be effective when combined with aggressive media and enforcement campaigns.<sup>147</sup> The NHTSA study and the IIHS multi-state study, while reaching different results, can be reconciled.<sup>148</sup>

However, the NHTSA's campaign, a federally funded program modeled after other high-visibility-enforcement campaigns like *Click It or Ticket*, has only been implemented in the two studied communities and nowhere else.<sup>149</sup> While police in these communities are getting a substantial monetary boost to fund the enforcement effort, other communities in other states must go without federal funds.<sup>150</sup> Secretary LaHood's rash

146. *Id.*

147. *See id.*

148. *See id.*; Highway Loss Data Inst., Slight Crash Increases, *supra* note 7.

149. COSGROVE ET AL., *supra* note 136, at 1.

150. *See id.*; *see also Phone in One Hand, Ticket in the Other* (FOX News broadcast Oct. 12, 2010), available at <http://video.foxnews.com/v/4370626/phone-in-one-hand-ticket-in-the-other/> (claiming that \$400,000 in federal money has been dedicated to the campaign).

denouncement of the IIHS study fails to take into account the fact that the studied states (California, Louisiana, Minnesota, and Washington) did not receive the same funds as the communities in the NHTSA's study. If these states received federal funds proportional to those received by Hartford and Syracuse, it is probable that these states would not see the same increases in crash claims.

### B. Enforcement Problems

Perhaps the real problem is not drivers that are unaware of the new statute or that texting while driving is dangerous, but drivers that simply do not believe that police *will* enforce the law. Or, as some have suggested, drivers may not believe that the law *can* be enforced. Two days before the law went into effect, Sheriff Mark Hackel of Macomb County, Michigan's third-most-populated county, said that not knowing whether drivers are texting or dialing a number is *the* problem police will face when attempting to enforce the new law.<sup>151</sup>

#### 1. Enforceability

Today, cellphones have multiple functions, making it extremely difficult for a police officer to determine what function the driver was using at the time the officer observed the driver using the phone.<sup>152</sup> What results when a driver receives a text (but does not read it) while using another legal function of the phone, and the driver still gets a ticket because the driver's phone records were obtained and show that a text was received at the time of the traffic stop? Drivers should not be penalized for merely receiving a text message, nor should it be necessary for police to become glorified driving instructors simply to enforce the law as Representative Gonzales has suggested.<sup>153</sup>

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151. The Paul W. Smith Show, *Sheriff Mark Hackel Clarifies the Texting Ban with Paul W. Smith*, NEWS/TALK WJR 760AM (June 29, 2010), <http://www.wjr.net/article.asp?id=1857709>.

152. See Kristin Longley, *Michigan Bill to Ban Texting While Driving Raises Questions on Cell Phone, Internet Use*, MLIVE.COM (Apr. 22, 2010), [http://www.mlive.com/news/flint/index.ssf/2010/04/michigan\\_bill\\_to\\_ban\\_texting\\_w.html](http://www.mlive.com/news/flint/index.ssf/2010/04/michigan_bill_to_ban_texting_w.html) [hereinafter Longley, *Raises Questions*]; Jonathan Oosting, *Texting—or Just Dialing—While Driving? Enforcement Issues Loom As Michigan Ban Nears*, MLIVE.COM (June 29, 2010), [http://www.mlive.com/news/detroit/index.ssf/2010/06/texting\\_--\\_or\\_just\\_dialing\\_--.html](http://www.mlive.com/news/detroit/index.ssf/2010/06/texting_--_or_just_dialing_--.html).

153. See The Frank Beckmann Show, *supra* note 10. Gonzales stated that the law “gives an extra tool for [police] to pull somebody over . . . and discuss with them their erratic driving.” *Id.*

While Michigan's texting law gives police another tool to penalize driver behavior, it does more to tie their hands and prevent them from keeping the roads safe. Because Michigan's distracted-driving law focuses solely on texting, rather than all of the functions of a cellphone or, more broadly, all forms of distracted driving, police are left with the difficult problem of proving that the driver was, in fact, texting.<sup>154</sup> Whereas if the Legislature had not been so selective in targeting texting while driving and simply prohibited distracted driving generally, police would be able to ticket drivers for texting or any number of other potentially dangerous distractions.<sup>155</sup> Now, if a driver challenges a texting ticket, it pits the officer against the driver and forces a judge to determine whose story is more believable, unless the driver's phone records are subpoenaed—which is neither likely nor worthwhile for a \$100 civil infraction.<sup>156</sup>

This dilemma is reflected in the number of tickets reported to have been issued since the texting ban became effective. The Michigan State Police started tracking the number of tickets issued under the new ban shortly after the ban went into effect.<sup>157</sup> Although no official data has been released, reports from news outlets around the state indicate that very few tickets have been issued.<sup>158</sup> The number of tickets issued is likely to remain small because the ban is so difficult to enforce.<sup>159</sup>

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154. See The Paul W. Smith Show, *supra* note 151.

155. See *id.*

156. *Id.*; see MICH. CT. R. 2.302(A)(3) (prohibiting discovery in civil-infraction actions); see also Juliana Keeping, *Michigan's Texting Ban Takes Effect Today: Will it Reduce Crashes?*, ANNARBOR.COM (July 1, 2010), <http://www.annarbor.com/news/michigans-texting-ban-takes-effect-today-will-it-reduce-crashes/> (“Law enforcement agencies can’t subpoena cell phone records if the ticket is challenged in court, unless a separate criminal element like drunken driving was involved in the stop.”).

157. Jennifer Guerra, *Michigan Police Issue Few Tickets Under New Texting Law*, MICHIGAN RADIO (July 8, 2010), <http://www.publicbroadcasting.net/michigan/news.newsmain/article/0/0/1672947/Michigan.News/Michigan.Police.Issue.Few.Tickets.Under.New.Texting.Law>.

158. See, e.g., *id.* (noting that only two tickets were issued in southern Michigan after the first week of enforcement); Christa Graban, *Police Write Few Texting Tickets in 1st Week*, WZZM13.COM (July 17, 2010, 4:28 PM), <http://www.wzzm13.com/news/story.aspx?storyid=124178&catid=235> (noting that eleven tickets were issued by Metro Detroit’s ten largest communities); Jeff Patrus, *Local Law Enforcement Officials Report No Texting-Related Incidents*, OGEMAW COUNTY HERALD (Oct. 15, 2010), <http://www.ogemawherald.com/detail/86999.html>.

159. See, e.g., Graban, *supra* note 158. According to Warren Police Commissioner William Dwyer, “This is very difficult to enforce . . . . I don’t see a massive amount of tickets being written now, or down the road.” *Id.*

## 2. The Risk of Fourth Amendment Violations

In addition to evidentiary issues, a driver's Fourth Amendment rights are also at stake when enforcing the new ban. When an officer stops a driver for texting while driving and the driver refuses to admit to committing the violation—What is the officer to do? Those unaware of their rights may believe that the officer has the authority to seize and search their cellphone whether or not the driver gives consent. It would be relatively easy for a law-enforcement officer to confiscate and search the cellphone for the evidence needed to cite the driver for texting. However, those aware of their constitutional rights know that the Fourth Amendment protects the people from unreasonable searches and seizures.<sup>160</sup> As Sheriff Hackel points out,

I can ask a person, but I can't take their phone away from them if they won't let me see to prove it. I can't take somebody's phone from them to look at [the phone's records] to take the documentation. Obviously, I have got to have probable cause to look at their phone. . . . [This law] is going to be challenged.<sup>161</sup>

The risk of law enforcement illegally seizing and searching a driver's cellphone is not a new issue. And because commentary on this issue has been thorough, it will not be discussed at length here.<sup>162</sup> However, it should be noted that amendments to the Michigan ban were proposed to address the concern that a law-enforcement officer might eventually cross the line

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160. See U.S. CONST. amend. IV.

161. The Paul W. Smith Show, *supra* note 151.

162. See C. Rheney Williams, *The Trouble With Texting: The Future of Searches Under the Automotive Exception After Arizona v. Gant*, 4 CHARLESTON L. REV. 919, 922 (2010) (exploring the difficulties of applying *Arizona v. Gant*, 129 S. Ct. 1710 (2009), to cellphones and the constitutionality of "a phone search under the automobile exception to verify suspected violations of the distracted driving laws"); Justin M. Wolcott, *Are Smartphones Like Footlockers or Crumpled Up Cigarette Packages? Applying the Search Incident to Arrest Doctrine to Smartphones in South Carolina Courts*, 61 S.C. L. REV. 843 (2010) (discussing the constitutionality of searching smartphones as containers incident to a lawful arrest, the reasonableness of an expectation of privacy in cellphones and other devices, and briefly, the use of smartphones by lawyers and the potential liability that follows a search of the smartphone by law enforcement); *cf.* Jeffery R. Beck, *Arizona v. Gant: Heightening A Person's Expectation of Privacy in a Motor Vehicle Following Searches Incident to Arrest*, 55 S.D. L. REV. 299 (2010) (examining expectations of privacy in automobiles and the Fourth Amendment and its warrant exceptions through the lens of *Arizona v. Gant*).

and search a driver's phone without consent, a warrant, or exigent circumstances.<sup>163</sup>

The fact that the Michigan Legislature voted against such protections makes the Legislature's intentions curious.<sup>164</sup> Perhaps the Legislature was

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163. JOURNAL OF THE H.R., H.R. 95-35, 2010 Reg. Sess., at 535 (Mich. 2010); *see also* U.S. CONST. amend. IV ("The right of the people to be secure . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the . . . things to be seized."); MICH. CONST. art. I, § 11 ("The person . . . and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation."); *Arizona v. Gant*, 129 S. Ct. 1710, 1723-24 (2009) (holding that a police officer's ability to search a vehicle incident to a lawful arrest is limited to [(1)] when "the arrestee is within reaching distance of the passenger compartment at the time of the search or [(2)] it is reasonable to believe the vehicle contains evidence of the offense of arrest"); *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001) (permitting arrest for *misdemeanor* traffic violations, e.g., violating state seatbelt law); *People v. Borchard-Ruhland*, 597 N.W.2d 1, 10 (Mich. 1999) ("Searches and seizures conducted without a warrant are unreasonable per se, subject to several specifically established and well-delineated exceptions. One established exception to the general warrant and probable cause requirements is a search conducted pursuant to consent."); *People v. Brzezinski*, 622 N.W.2d 528, 531 (Mich. Ct. App. 2000) ("Generally, a search conducted without a warrant is unreasonable unless there exists both probable cause and exigent circumstances establishing an exception to the warrant requirement. Probable cause to search exists when facts and circumstances warrant a reasonably prudent person to believe that a crime has been committed and that the evidence sought will be found in a stated place. Whether probable cause exists depends on the information known to the officers at the time of the search. Among the recognized exceptions to the warrant requirement are exigent circumstance, searches incident to a lawful arrest, stop and frisk, consent, and plain view. Each of these exceptions, while not requiring a warrant, still requires reasonableness and probable cause."). *But see* MICH. COMP. LAWS § 257.602b (2011) (texting while driving is a civil infraction); MICH. COMP. LAWS § 257.907 (2011); MICH. COMP. LAWS § 764.15 (2011) (listing Michigan's arrestable offenses, including felonies, misdemeanors, and ordinance violations (but not civil infractions)); *Miller v. Sanilac Cnty.*, 606 F.3d 240, 248 (6th Cir. 2010) ("Under Michigan law, arrestable offenses include felonies, misdemeanors, and ordinance violations, but not civil infractions."); *Adams v. Metiva*, 31 F.3d 375, 383 (6th Cir. 1994) (citing testimony that "one cannot be arrested for a civil infraction" in Michigan); *People v. Chapman*, 387 N.W.2d 835, 839 n.11 (Mich. 1986) ("It should be noted that the vast majority of minor traffic offenses are civil infractions, in Michigan, for which an arrest may not be made.").

164. *See* JOURNAL OF THE H.R., H.R. 95-35, 2010 Reg. Sess., at 535 (Mich. 2010).

not concerned about the risk of a Fourth Amendment violation.<sup>165</sup> Perhaps the Legislature simply relied on the Constitutions of Michigan and the United States to provide that express protection.<sup>166</sup> Or maybe, the Legislature was concerned that amending the Bill to include such a protection would encourage texting drivers to simply deny any such behavior, knowing that the police would not be able to search their cellphones.<sup>167</sup>

Unfortunately, Representative Gonzales's radio-interview assurance that cellphones will not be confiscated and searched does not guarantee that it will not happen.<sup>168</sup> Gonzales cannot patrol the streets everyday ensuring that police do not simply grab a person's phone. Despite the best intentions and training, a law-enforcement officer somewhere will inevitably seize a phone without consent, a warrant, or exigent circumstances; search it for evidence of a texting-ban violation; and violate a person's Fourth Amendment rights in the process.<sup>169</sup> Fortunately, with the low number of tickets being issued, the risk of a Fourth Amendment violation is small, but it may not remain so if the law is not changed.<sup>170</sup>

### 3. Penalties

The Michigan Legislature has been criticized for not making the penalties severe enough to actually deter drivers from texting.<sup>171</sup> When questioned about why the law did not impose more severe penalties, Representative Gonzales replied, "Don't sacrifice the good for the perfect."<sup>172</sup> Unfortunately, Gonzales prematurely judged the new law to be "good" before it has had a chance to prove its worth. If texting truly increases the risk of a traffic crash by more than twenty-three times,<sup>173</sup> is shown to be more dangerous than drunk driving,<sup>174</sup> and is so important for

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165. See The Frank Beckmann Show, *supra* note 10.

166. See U.S. CONST. amend. IV; MICH. CONST. art. I, § 11.

167. See U.S. CONST. amend. IV; The Frank Beckmann Show, *supra* note 10.

168. The Frank Beckmann Show, *supra* note 10.

169. See The Paul W. Smith Show, *supra* note 151.

170. See *supra* note 158–59 and accompanying text.

171. See, e.g., Matt Harding, Op-ed., *Michigan's Texting While Driving Law Doesn't Quite Get It Right*, DIGITAL J. (June 26, 2010), <http://www.digitaljournal.com/article/293888> ("Reason one why the new texting law doesn't get it right: most texters will not stop doing it. The law needs to have a stiffer penalty.").

172. The Frank Beckmann Show, *supra* note 10.

173. See Va. Tech Transp. Inst., *supra* note 38.

174. Austin, *supra* note 47.

highway safety, then why are the penalties so marginal?<sup>175</sup> Gonzales answered, “We don’t want to escalate the cost of insurance for our drivers.”<sup>176</sup> With the new HLDI study providing strong evidence to suggest that the texting bans are likely detrimental to highway safety, insurance rates are not likely to remain at their current levels or decrease.<sup>177</sup> Instead, Representative Gonzales’s justification for not adding points to the violation will have the opposite effect.

Perhaps one of the problems with getting people to comply with the new statute really is that the penalties are too light. What effect would a \$500 fine have? \$5,000 and jail time? Making the penalty the same as a drunk-driving violation?<sup>178</sup> Would drivers then be so willing to risk the consequences of texting while driving?

Before the texting ban, police could not pull drivers over and ticket them for using their cellphones. Now, police are able to make the prescribed traffic stop.<sup>179</sup> However, because the violation is so difficult to prove, police departments have seen very few tickets issued.<sup>180</sup> Police are left with few legal options once they actually pull over suspected texters: they may simply give the drivers a warning and send them on their way,<sup>181</sup> they may issue a citation,<sup>182</sup> they may ask the drivers for consent to search their phone for evidence of the violation or proof of innocence,<sup>183</sup> or if the drivers do not admit guilt, refuse to consent to a search, or claim to have used another function of the phone, police may offer to issue a ticket for careless driving or reckless driving.<sup>184</sup> The choice between a careless-

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175. The Frank Beckmann Show, *supra* note 10.

176. *Id.*

177. See Highway Loss Data Inst., Slight Crash Increases, *supra* note 7.

178. See MICH. COMP. LAWS § 257.625(4)–(5), (7), (9), (11)–(14) (2011) (listing the penalties for violations of Michigan’s drunk-driving laws).

179. See MICH. COMP. LAWS § 257.602b (2011).

180. See *supra* notes 157–58 and accompanying text.

181. See The Frank Beckmann Show, *supra* note 10.

182. See § 257.602b.

183. See *People v. Borchard–Ruhland*, 597 N.W.2d 1, 10 (Mich. 1999).

184. See Longley, *Raises Questions*, *supra* note 152 (“[Drivers are] welcome to say they were doing something besides text messaging—the alternative is a much more substantial violation under the careless-driving law. . . . It’s definitely careless to be reading your Facebook page while driving.”); see also MICH. COMP. LAWS § 257.626b (2011) (noting that Michigan’s careless-driving statute is a civil infraction with a penalty of three points on driver’s record); MICH. COMP. LAWS § 257.907 (2011) (explaining that fines for civil infractions must be determined by a judge or district-court magistrate, and they are not to exceed \$100 and costs); MICH. COMP. LAWS § 257.626 (2011) (noting that Michigan’s reckless-driving statute is a misdemeanor that also carries a penalty of six points on driver’s record).

driving ticket and a texting citation would be a simple one for most drivers not wanting to make things worse for themselves. It would also amount to little more than extortion and a slippery slope for police and drivers alike. For this and the other reasons discussed above, Michigan's law must be changed.

#### IV. SOLUTIONS

It is clear that legislation alone cannot change driving behavior. Making the roads safer and decreasing distracted driving will require a multi-faceted approach. Education and awareness of the law and the dangers it is trying to protect citizens from is a start. As Secretary LaHood has said: “[G]ood laws don’t mean anything without tough enforcement.”<sup>185</sup> Michigan must be careful not to let poorly crafted legislation make its roads more dangerous.<sup>186</sup> If Michigan wants to use legislation as a tool for change, it must ensure that the tool is sufficient for the task. Moreover, if Michigan is serious about reducing distracted driving and increasing highway safety, then it must focus on all forms of distracted driving—not target a single technology, discriminately.

##### A. *What Will Not Work*

Many solutions have been offered to solve the texting-while-driving problem, but not all of them would be practical or effective. Impractical or ineffective solutions range from poorly designed texting laws, like Michigan's,<sup>187</sup> to installing devices that effectively jam all wireless communications within a vehicle.<sup>188</sup> No solution will be perfect, but there are a few solutions that can be discounted from the onset.

First, Michigan's texting law is a poorly designed and flawed enforcement tool that, when compared side-by-side to similar bans,<sup>189</sup>

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and “imprisonment for not more than 93 days or a fine of not more than \$500.00, or both”).

185. LaHood, *Make No Mistake*, *supra* note 130.

186. *See supra* Part III.A.

187. *See* § 257.602b.

188. *See, e.g.*, TXTSTOPPER, <http://www.txtstopper.com/cms/home> (last visited Nov. 30, 2010).

189. *Compare* § 257.602b, with CAL. VEH. CODE ANN. § 23123.5 (West Supp. 2011), GA. CODE ANN. § 40-6-241.1 (2011), KAN. STAT. ANN. § 8-15,111 (2011), LA. REV. STAT. ANN. § 32:300.5 (2011), WASH. REV. CODE §46.61.668 (2011), and Nat'l Highway Traffic Safety Admin., *Sample Law To Prohibit Texting While Driving*, DISTRACTION.GOV (Feb. 2010), <http://www.distraction.gov/files/dot/texting-law-021910.pdf> [hereinafter Nat'l Highway Traffic Safety Admin., *Sample Law*].

appears to be little more than the state's attempt to placate the masses' cries for *something* to be done and to get a head start on compliance with proposed federal legislation.<sup>190</sup> The evidence available on the effectiveness of the existing texting bans does not indicate that the benefits outweigh the potential costs.<sup>191</sup> Balancing the marginal benefits seen in the NHTSA study<sup>192</sup> against the increase in crashes<sup>193</sup> and undeniable enforcement problems,<sup>194</sup> the verdict on the current texting law is simple: it is no good. If the NHTSA study, at its end, produces definitive results that the texting laws are effective at reducing crashes, then the legislation may be labeled an effective solution. However, in the meantime, Michigan is not receiving the same support as Hartford and Syracuse, and the HLDI study indicates that a dangerous law should not be left on the books.

Similarly, federal legislation, such as Senate Bill 1536, that effectively punishes states for not adopting its model texting ban will lead to the same result as before.<sup>195</sup> States that fear a drop in federal highway funding<sup>196</sup> will pass bad laws—laws that are unenforceable will cause texters to become more discreet and will increase the number of crashes on the states' roads.<sup>197</sup>

Another solution that has been proposed and implemented, in part, in other states, is a ban on the use of cellphones while driving.<sup>198</sup> Currently, no state has a complete ban on using a cellphone while driving, but eight states and the District of Columbia currently ban all drivers from using *hand-held* cellphones.<sup>199</sup> These hand-held bans, however, are similarly ineffective.<sup>200</sup>

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190. See Distracted Driving Prevention Act of 2009, S. 1938, 111th Cong. (2009) (granting money for compliance); Avoiding Life-Endangering and Reckless Texting by Drivers Act of 2009, S. 1536, 111th Cong. (2009) (withholding federal highway funds for noncompliance); Nat'l Highway Traffic Safety Admin., *Sample Law*, *supra* note 189.

191. See *supra* Part III.

192. See COSGROVE ET AL., *supra* note 136, at 1.

193. Highway Loss Data Inst., Slight Crash Increases, *supra* note 7.

194. See *supra* Part III.B.

195. S. 1536.

196. See *id.*

197. See *supra* Part III.

198. See, e.g., CONN. GEN. STAT. § 14-296aa (2011).

199. HIGHWAY LOSS DATA INST., *Cellphone and Texting Laws*, *supra* note 2.

200. See Highway Loss Data Inst., *Hand-Held Cellphone Laws and Collision Claim Frequencies*, HIGHWAY LOSS DATA INST. BULLETIN, Dec. 2010, available at [http://www.iihs.org/research/topics/pdf/HLDI\\_Cellphone\\_Bulletin\\_Dec09.pdf](http://www.iihs.org/research/topics/pdf/HLDI_Cellphone_Bulletin_Dec09.pdf) (“Data presented in this bulletin indicate that, during a time of large growth in the purchase of cellphones and in the use of these phones, collision claim rates either were flat or already decreasing before enactment of the laws. Claim frequencies for

If states go a step further and ban all cellphone use while driving, then police will face enforcement problems very similar to texting. With the advent of Bluetooth technology, drivers can communicate through their cellphones without even taking the phone from their pocket—making laws banning cellphones pointless if police cannot see violators to catch them.<sup>201</sup>

Some have suggested installing devices in cars that block all wireless communications so drivers are not tempted to use their phones at all.<sup>202</sup> Despite jamming devices being illegal for private use in the United States, this solution is not very viable to begin with.<sup>203</sup> However, a few companies have patented technology that would allow one of these devices, for example, to block all incoming and outgoing wireless communications (text or voice) if the vehicle is turned on and moving faster than 10 mph.<sup>204</sup> The Guardian Angel Vehicle Platform even claims the ability to target only wireless communications from the driver and not disable passengers' phones.<sup>205</sup>

The jamming alternative, while currently illegal without a change in federal law, remains a dangerous alternative. Assuming such devices are truly able to block only drivers' communications and do not malfunction, a driver would also be prohibited from making emergency calls or necessary calls to a family member or friend, unless the driver stops the vehicle or has

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control states without laws also were declining and generally continued to trend in the same way as claim frequencies for the study states after the laws. There is no evidence that bans on hand-held cellphone use by drivers has affected these trends in collision claims.”).

201. See *Handsfree Calling*, BLUETOOTH.COM, <http://www.bluetooth.com/Pages/Handsfree-Calling.aspx> (last visited Oct. 12, 2011); *Mobile Phone Accessories*, MOTOROLA USA, <http://www.motorola.com/Consumers/US-EN/Consumer-Product-and-Services/Mobile+Phone+Accessories> (last visited Oct. 12, 2011) (indicating that wireless headsets, in-car speakerphones, and other accessories would allow drivers to discreetly talk on their phones); *Hands-Free Texting Application Developed*, SCIENCE DAILY (Feb. 17, 2010), <http://www.sciencedaily.com/releases/2010/02/100216142332.htm> (reporting an application that allows hands-free texting while driving).

202. See, e.g., Eric Bland, *Gov't Evaluating Cell Phone Blocking Tech in Cars*, MSNBC.COM (Nov. 29, 2010, 1:23 PM), [http://www.msnbc.msn.com/id/40418794/ns/technology\\_and\\_science-wireless/](http://www.msnbc.msn.com/id/40418794/ns/technology_and_science-wireless/) (“There’s a lot of technology out there now that can disable phones and we’re looking at that.”).

203. See 47 U.S.C. §§ 301, 302a, 333 (2011).

204. *Guardian Angel Vehicle Platform: The Solution to a Growing Problem*, TRINITY NOBLE, [http://www.trinitynoble.com/ga\\_vp.html](http://www.trinitynoble.com/ga_vp.html) (last visited Oct. 12, 2011).

205. See *id.*

Bluetooth capabilities.<sup>206</sup> Other devices are not as discriminating as the Guardian Angel Vehicle Platform.<sup>207</sup> The TxTStopper, for example, blocks *all* wireless communications, including passengers'.<sup>208</sup> This raises the issue of safety again—What happens when a driver (or passenger) must call the police to report that his or her life is in danger from someone following and trying to attack them? They could drive to a police station (if one is nearby, that is). If not, must they stop the vehicle and further endanger their lives to make the call? What happens when a traffic crash occurs that pins occupants in the vehicle and the device does not disengage? Should a parent in this situation be forced to do nothing while their child bleeds to death in the backseat? These examples alone are reason enough to continue the prohibition of such jamming devices and prevent the federal government from requiring their installation in all vehicles.

### *B. Possible Solutions for Michigan*

If Michigan is serious about stopping the “epidemic” of texting while driving, then further practical and effective steps must be taken to discourage drivers from this dangerous behavior while at the same time keeping the roads safe and preserving constitutional rights.<sup>209</sup> As the Chairman of the Governors Highway Safety Association, Vernon F. Betkey, Jr., states, “We need to develop a traffic safety culture that does not condone driving while distracted much like we have done with drunk driving.”<sup>210</sup> As a civil infraction with a minimal fine, Michigan’s texting ban will not have the deterrent effect of a misdemeanor or felony.<sup>211</sup> To make the ban an effective deterrent, it may require criminalizing the offense.<sup>212</sup>

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206. *See id.*

207. *See generally id.*; TXTSTOPPER, *supra* note 188.

208. *See FAQs*, TXTSTOPPER, <http://www.txtstopper.com/faq.html> (last visited May 14, 2011).

209. *See* LaHood, Opening Address, *supra* note 1.

210. Elizabeth Vernet, GOVERNORS HIGHWAY SAFETY ASS’N, CURBING DISTRACTED DRIVING: 2010 SURVEY OF STATE SAFETY PROGRAMS 5 (2010), *available at* [http://www.ghsa.org/html/publications/survey/pdf/2010\\_distraction.pdf](http://www.ghsa.org/html/publications/survey/pdf/2010_distraction.pdf).

211. *See* James M. Pike, *Civil Infractions for Minor Traffic Offenses: Michigan’s New Motor Vehicle Code*, 26 WAYNE L. REV. 1543, 1547 (1980) (“The objectives of the criminal law have been described as some combination of retribution, deterrence, condemnation, incapacitation, and rehabilitation. The civil law, however, seeks primarily to regulate and compensate.”).

212. *See id.*; *see also* Henry M. Hart, Jr., *Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958).

The current statute needs to be repealed or, at the very least, amended to address the major problems the statutory language creates. The penalties for distracted-driving behavior must be more severe. If texting while driving is indeed more dangerous than drunk driving, then why are the penalties not at least as severe, if not more severe, as those for drunk driving?<sup>213</sup> Moreover, if the statute survives and is amended, it must address all forms of distracted driving instead of solely targeting texting.

### 1. Distracted Driving: More than Just Text Messaging

Before any workable solutions to distracted driving can be implemented, the problem must be properly identified and defined. Distracted driving is more than just text messaging or even cellphone use. *Distraction.gov* has clearly defined distracted driving and identified it as a dangerous activity, but the bulk of the criticism of distracted driving has been targeted squarely at cellphone use.<sup>214</sup> Not only does this overshadow many of the other forms of distracted driving, but it also may lead some to believe that these other forms of distracted driving are not so dangerous, reasoning that these other distractions existed long before cellphones and have not yet been prohibited. Familiar examples of distracted driving include putting on makeup, shaving, reading a book or newspaper, and eating and drinking, while some more outrageous examples include changing clothes, working on a laptop, or even reading a patient's x-rays.<sup>215</sup> Such a narrow view of distracted driving is counterproductive and dangerous.

Efforts have been made to expand the focus of distracted-driving campaigns, but they have been quickly criticized by Secretary LaHood and labeled as attempts to “organize activities against safe driving.”<sup>216</sup> However, there is a real need for the target of these distracted-driving campaigns to focus on all forms of the behavior because they are all potentially dangerous. Any discussion in the future about the dangers of distracted driving should not be limited to just texting while driving or using hand-held cellphones. Instead, drivers should be educated through driver's training programs, refresher courses, public-service

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213. See Austin, *supra* note 47.

214. See Nat'l Highway Traffic Safety Admin., *Statistics and Facts*, *supra* note 12.

215. *Driving While Distracted Becomes Growing Safety Concern*, CAR BUYER'S NOTEBOOK (July 24, 2007), [http://www.carbuyersnotebook.com/archives/2007/07/driving\\_while\\_distracted.htm](http://www.carbuyersnotebook.com/archives/2007/07/driving_while_distracted.htm).

216. *Distracted Driving Laws: Texting Ban Pits Electronics Group Against Government*, LIBERAL ECON. DISCUSSION F. (Nov. 2, 2010), <http://www.liberal-economics.com/uncategorized/distracted-driving-laws-texting-ban-pits-electronics-group-against-government/>.

announcements, and ad campaigns that distracted driving, in whatever form, is not safe.

## 2. Education, First and Foremost

The solution that Michigan needs cannot be limited to a legislative ban and a few billboards.<sup>217</sup> Michigan already has a system in place to teach new drivers about the dangers of distracted driving in its several forms,<sup>218</sup> but a more comprehensive plan should be put in place to ensure that drivers stay current on distracted-driving dangers, the traffic laws, and their driving skills.

To make the roads safer, Michigan drivers should be required to submit to regular driving tests, including behind-the-wheel exams. If the state would like to educate drivers about the dangers of texting, then what better way than to have drivers navigate a closed driving course while trying to text on their phones or perform other distracting tasks? If drivers are forced to experience the difficulty of texting while driving in a controlled situation, then they are more likely to avoid this dangerous behavior when they are on the open road. In addition, with more frequent testing, drivers will be held accountable for their driving habits and updated on the current laws and rules of the road. If drivers are unable to pass the regular driving tests, then their licenses should be forfeited until they can pass. The success of a law is dependent upon not only its enforcement, but also upon citizens being aware of the law and its purpose.

## 3. Legislative Solutions

Though there are no data on the effectiveness of Michigan's texting ban, there is evidence in other states with similar bans that shows that there is a negative effect on highway safety following the implementation of such bans.<sup>219</sup> Michigan has seen steady decreases across the board for traffic crashes, injuries, and deaths<sup>220</sup> and only a marginal increase in the number of accidents attributable to cellphone use,<sup>221</sup> despite explosive growth in

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217. Kristin Longley, *Billboards Warn Michigan Drivers to 'Txt Bck L8r' as New Texting Ban Takes Effect*, MLIVE.COM (June 22, 2010), [http://www.mlive.com/news/flint/index.ssf/2010/06/new\\_billboards\\_warn\\_michigan\\_d.html](http://www.mlive.com/news/flint/index.ssf/2010/06/new_billboards_warn_michigan_d.html).

218. *See, e.g.*, MICH. DEP'T OF STATE, DRIVER EDUCATION CURRICULUM GUIDE (2010), available at [http://www.michigan.gov/documents/sos/DES\\_-\\_201\\_Driver\\_Education\\_Curriculum\\_Guide\\_215706\\_7.pdf](http://www.michigan.gov/documents/sos/DES_-_201_Driver_Education_Curriculum_Guide_215706_7.pdf).

219. *See supra* Part III.A.

220. *See supra* notes 19–23 and accompanying text.

221. *See supra* Table 1.

cellphone usage.<sup>222</sup> It is likely that these trends would have continued without the implementation of Michigan's texting ban. Understandably, Michigan wants to make its roads as safe as possible, but allowing the texting ban to remain as it is poses a risk more certain than the potential reward.<sup>223</sup>

Michigan's texting ban must be repealed. To prevent an increased number of accidents, as seen in the states studied by the IIHS and HLDI, Michigan cannot allow its texting ban to remain in place any longer.<sup>224</sup> In its place, Michigan may add a law that will offer the benefits sought in the texting ban but fewer of the problems.

The new law should not be so narrow in scope that only a single form of distracted driving is prohibited. As Michigan State Senator Wayne Kuipers has suggested, "There's any number of things that distract people when they're driving. If we're going to be purists about this, we should punish all of those activities because they're all responsible for traffic accidents."<sup>225</sup> Sheriff Mark Hackel suggests a less exclusive offense—distracted driving—"So an officer can say, 'A person was taking their shirt off while they were driving a car [or] a person was reading the newspaper.' . . . [Then,] an officer can make the determination that there's many things that distract a person's driving that can cause an accident."<sup>226</sup>

In 2009, Maine's distracted-driving ban became effective and allowed police to cite drivers for more than simply using their phones.<sup>227</sup> Maine's distracted-driving statute reads as follows:

1. Definitions. As used in this section, unless the context otherwise indicates, the following terms have the following meanings.

A. "Operation of a motor vehicle while distracted" means the operation of a motor vehicle by a person who, while operating the vehicle, is engaged in an activity:

(1) That is not necessary to the operation of the vehicle; and

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222. See *supra* Part II.A.1.

223. See *supra* Part III.A.

224. See Highway Loss Data Inst., Slight Crash Increases, *supra* note 7.

225. The Mitch Albom Show, *supra* note 9.

226. The Paul W. Smith Show, *supra* note 151.

227. ME. REV. STAT. tit. 29-A, § 2118 (2011).

(2) That actually impairs, or would reasonably be expected to impair, the ability of the person to safely operate the vehicle.

2. Failure to maintain control of a motor vehicle. A person commits the traffic infraction of failure to maintain control of a motor vehicle if the person:

A. Commits either a traffic infraction under this Title or commits the crime of driving to endanger under section 2413 and, at the time the traffic infraction or crime occurred, the person was engaged in the operation of a motor vehicle while distracted; or

B. Is determined to have been the operator of a motor vehicle that was involved in a reportable accident as defined in section 2251, subsection 1 that resulted in property damage and, at the time the reportable accident occurred, the person was engaged in the operation of a motor vehicle while distracted.

A person may be issued a citation or summons for any other traffic infraction or crime that was committed by the person in relation to the person's commission of the traffic infraction of failure to maintain control of a motor vehicle.<sup>228</sup>

This statute, if implemented in Michigan, could resolve many of the problems arising with the current texting ban. This new law would prohibit any activity that distracts drivers' attention and would have the potential to impair their ability to perform their primary task: driving. With appropriate penalties, this rule would actually deter drivers from texting rather than encouraging them to simply be more discreet.

#### 4. Appropriate Penalties

If the Michigan Legislature is serious about creating a law to prevent distracted driving, it must attach serious penalties to the infraction. A \$100 fine for the first offense and a \$200 fine for the second are hardly effective deterrents for a dangerous behavior like texting while driving.<sup>229</sup> Penalties

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228. *Id.*; see also ME. REV. STAT. tit. 29-A, § 2413 (2011); ME. REV. STAT. tit. 29-A, § 2251(1) (2011).

229. MICH. COMP. LAWS § 257.602b (2011).

for speeding in Michigan are more severe, and drivers are not deterred from speeding.<sup>230</sup> To act as an effective deterrent, the punishment for distracted driving should not be a civil infraction.<sup>231</sup> Assigning an appropriate penalty for a dangerous behavior would help legitimize the law and show Michigan citizens that distracted driving is a behavior that will be punished and not tolerated.

Violation of the law cannot remain a simple civil infraction. As a first offense, a civil infraction may be appropriate as a warning to drivers, but penalties must significantly escalate from there. Subsequent offenses should be treated as reckless-driving violations, subjecting drivers to a misdemeanor charge with possible jail time, higher fines, and more points on their licenses.<sup>232</sup> After the third offense, their drivers licenses would be subject to review and suspension by the Secretary of State.<sup>233</sup> Fines should also increase with subsequent offenses: drivers that continually get caught driving while distracted create more risk on the highways and should have to carry the financial burden of their behavior. Revenue from these increased fines should go, in part, to fund driver's education classes that violators should be required to attend: drivers that continually violate the law should be reminded of what the law is and their responsibility to follow it. The remainder of fine revenue should be directed to cover the cost of retesting drivers for license renewal and advertising the dangers of distracted driving. If drivers face punishments that will affect their lives in significant ways, they will be more apt to make significant changes in their behavior to avoid punishment.

## 5. Enforcement

Under the new law,<sup>234</sup> enforcement would not be the significant issue that Michigan police face today.<sup>235</sup> The new law would allow police more discretion in determining what behaviors are distracting and reduce the risk of a Fourth Amendment violation because there would be no need for

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230. See §§ 257.320a, 257.627(14), 257.907(2) (2011).

231. See Pike, *supra* note 211 and accompanying text.

232. Michigan's reckless-driving statute makes reckless driving a misdemeanor with a penalty of six points on a driver's record and "imprisonment for not more than 93 days or a fine of not more than \$500.00, or both." MICH. COMP. LAWS § 257.626 (2011); see § 257.320a (2011).

233. See MICH. COMP. LAWS § 257.320 (2011) (allowing the Secretary of State to review the driver's record and make a determination as to their ability to operate a motor vehicle on the state's highways upon receipt of twelve or more points on the driver's record within a two-year period); § 257.320a (2011).

234. See *supra* Part IV.B.3.

235. See *supra* Part III.B.

police to seize a driver's phone to prove that a driver was texting. When police see a driver focused on an object in their lap or generally not paying attention to the road, they would have the authority to pull the driver over and ticket them. There would be no need to prove that the driver was texting or using a hand-held device; they could simply ticket them for being distracted.

## V. CONCLUSION

So has the Michigan Legislature created more problems than it is solving? Was it rash to put a law into play without examining the effects?<sup>236</sup> The answer to both of these questions is *yes*. The data produced by the various institutes and organizations have provided interesting results that are arguably conclusive: texting while driving is dangerous, but the texting bans alone are not helping make the roads safer. Texting has been singled out instead of attempting to address the wide range of distracting activities that a driver may engage in while on the road. The American people, by and large, want texting while driving banned, but attempts to actually ban the behavior through legislation have not seen the success that was envisioned.

The Michigan Legislature must consider the issues its law has created and take appropriate steps to reduce the risk of more dangerous roads, enforcement problems, and Fourth Amendment violations. The solutions proposed in this Comment will produce multiple beneficial effects, while at the same time reducing or eliminating the problems that are associated with Michigan's current texting law. The current texting ban should be repealed and replaced with a law that mirrors Maine's distracted-driving law.<sup>237</sup> This would broaden the scope of distracted driving to include activities besides texting. The new law would more effectively deter drivers from texting by increasing penalties such as the amount of the fines paid, the points incurred on the driver's license, and the classification of the violation itself—from a mere civil infraction to a civil infraction that becomes criminal with subsequent offenses. And when police are given the discretion to determine when a driver's behavior and in-car activities have become dangerous, the new law would give police the authority to hold drivers accountable for their risky behavior without the evidentiary problems that exist now.

A law such as the one proposed above would be met with resistance because it would prohibit activities that most drivers have become

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236. See NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., *Sample Law*, *supra* note 189, at 34 ("Texting laws are relatively new and have not been thoroughly evaluated.").

237. See ME. REV. STAT. tit. 29-A, § 2118 (2011).

accustomed to performing whenever they drive. And perhaps legislation is not the best way to approach the problem of distracted driving, so it will need to be examined more closely before a decision is made. Moreover, if a decision to change the law, one way or another, is made, it must be based on concrete facts not wild conjecture and best estimates with large margins for error. Either way, distracted driving is a problem that needs further attention and cannot simply be ignored. Most importantly, it is time that drivers take personal responsibility for their safety and use a little of their *own* common sense.

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