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## Note

### CAN YOU HEAR ME NOW?: THE MYTHS SURROUNDING CELL PHONE USE WHILE DRIVING AND CONNECTICUT'S FAILED ATTEMPT AT A REMEDY

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*The use of cell phones while driving has been demonized by many as a predominant cause of automobile accidents attributed to distracted driving. While there is no doubt that distracted driving is dangerous, and increases the risk of being involved in an automobile accident, this Note contends that cell phone use does not play as prominent a role in distracted driving as is typically portrayed. Many other distractive stimuli pose a more significant threat, and often occur more regularly than cell phone use. Unlike cell phone use, however, these other distractive stimuli have not been characterized as negatively, or singled out by legislative bans.*

*In particular, Connecticut's legislation banning cell phone use while driving is neither a direct nor a particularly effective means of achieving its purported purpose of increasing the safety of Connecticut's roadways. This Note advocates utilizing a graded negligence methodology which directly addresses the root of the problem—the conduct of the driver—by focusing on remedying all distractive driving practices. The graded negligence standard concentrates on the quality of conduct exhibited in the presence of a distractive influence, weighed with the level of negligence displayed in the conduct, combined with several other factors.*

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USE WHILE DRIVING AND CONNECTICUT'S FAILED ATTEMPT AT A  
REMEDY

ANDREW F. AMENDOLA\*

I. INTRODUCTION

The prohibition of cellular phone use while driving instituted in the state of Connecticut has garnered much attention, as has similar legislation in other states. Many question the effectiveness of such legislation: whether it actually serves the purpose it was enacted to accomplish, whether it is over- or under-inclusive, and, generally, whether it is fair and truly necessary. There is little doubt as to the potential for injury caused by driving while distracted. But while distraction may originate from a number of different sources, the only element addressed by Connecticut's legislation is the use of cellular phones. Given the prominence telematics, such as cellular phones, have gained in the daily lives of most people, and the benefits gained from the technology, one has to wonder whether the legislative ban is actually advantageous to the citizens of Connecticut. The fact that the ban addresses merely mobile electronic devices, ignoring other possible distractions—some far more common and carrying equal potential for detrimental results—raises the question of whether cellular phones have been relegated to the role of scapegoat in order to quell a public sentiment of frustration aimed at the increasing social acceptance of inattentive drivers sacrificing safety for convenience.

Since the introduction of cellular phone technology to the public in 1984,<sup>1</sup> cellular<sup>2</sup> phones and other telematics<sup>3</sup> have become a ubiquitous feature not only in American culture, but throughout the world.<sup>4</sup> Cellular

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\* University of Connecticut School of Law, J.D. Candidate 2009. I would like to thank Professor Paul Bader for his comments and guidance, as well as the *Connecticut Law Review* staff for their efforts. I dedicate this Note to my family and friends for their love and support. All errors contained herein are mine and mine alone.

<sup>1</sup> After approximately a decade of research and development, the first cell phones, released in 1984, weighed two pounds and cost almost \$4000. *First Cell Phone a True 'Brick,'* MSNBC.COM, Apr. 11, 2005, <http://www.msnbc.msn.com/id/7432915>.

<sup>2</sup> The terms "cellular" and "cell" will be used interchangeably throughout this Note.

<sup>3</sup> The term telematics, which traditionally referred to the combination of computer and telecommunications elements, has more recently been used to describe the combination of computers and telecommunications elements used to enhance the performance of automobiles. Global Telematics, *The Meaning of Telematics*, <http://www.globaltelematics.com/telematics.htm> (last visited Aug. 27, 2008).

<sup>4</sup> By June of 2008, more than 260 million people subscribed to cell phone service in the United States. Insurance Information Institute, *Cell Phones and Driving* (June 2008), <http://www.iii.org/media/hottopics/insurance/cellphones> [hereinafter "Ins. Info. Inst."]. In 1990 there were only 4.3 million

phones have become ubiquitous in our society, and people have become unfortunately familiar with the spectrum of ring tones available that tend to sound all too frequently at the most inappropriate times. The number of cell phone disciples has grown exponentially since the inception of wireless service; while taking twenty years for the number of wireless subscribers to reach one billion, the number grew to two billion in merely three years.<sup>5</sup>

There can be no doubt as to the many benefits derived from wireless technology: greater facility and expedience with which we are able to communicate with others, the ability to quickly report emergency situations to the proper authorities, the ability to more effectively manage work responsibilities, and the overall increased efficiency in our daily lives.<sup>6</sup> However, this convenience comes at a cost. Many people complain of the habits less conscientious cell phone users adopt over time. Habits ranging from mere annoyances—such as the often inappropriately high speaking volume some cell phone users employ (dubbed the “cell-yell”), the plethora of loud and potentially irritating ring tones, and the general inconsideration displayed by many cell phone users engrossed in their conversation at the expense of others around them—to conduct causing significantly more serious problems, such as injury and death, the latter of which may be caused by distracted drivers using cell phones.<sup>7</sup>

While the safety of Connecticut roads is of paramount concern, Connecticut’s legislation banning cellular phone use while driving is neither a direct nor a particularly effective means of achieving it. This Note advocates a methodology directly addressing the root of the problem—the conduct of the driver—focusing on remedying *all* distractive driving practices through the utilization of a graded negligence standard. This standard concentrates on the quality of conduct exhibited in the presence of a distractive influence, weighed with the level of negligence displayed in the conduct and combined with several other factors. This approach abandons the overly myopic standard currently observed which penalizes the use of all mobile electronic devices (with some exceptions discussed below), presuming negligence even in the absence of any injurious occurrence.

Part II of this Note explains distracted driving and its effects not only

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subscribers. *Id.* Worldwide, wireless subscriptions reached two billion by the end of 2005. Tony Dennis, *Two Billion Mobile Phone Mark Reached*, THE INQUIRER, Sept. 2005, available at <http://www.theinquirer.net/en/inquirer/news/2005/09/18/two-billion-mobile-phone-mark-reached>.

<sup>5</sup> Dennis, *supra* note 4.

<sup>6</sup> See J. Robert Latham, Jr., The Independent Institute, Statement at the California Legislative Panel: Cell Phone Use While Driving (Sept. 21, 2000), available at <http://www.independent.org/issues/article.asp?id=380> (detailing some of the benefits of cellular phones in the context of driving).

<sup>7</sup> See Maureen Milford, *Employers Crack Down on Cell Chats*, THE NEWS JOURNAL, Jan. 3, 2005 at 1A, available at LEXIS, News Library, NEWJNL File (discussing various bad habits related to cell phone use).

on those it directly impacts, but also on the indirectly affected members of the public who are often left to deal with the economic consequences. Part II will also discuss different varieties of distractive stimuli, the various ways they affect the driver, and how the use of cell phones plays into the driver-distraction equation.

Part III of this Note discusses the Connecticut legislation banning the use of mobile electronic devices while driving, comparing particular aspects of the law to similar legislation enacted in other states as well as in some foreign countries. It will also briefly note some of the public opinion expressed regarding the Connecticut ban in the two years since its enactment.

Part IV further examines the issue of driver distraction, including a discussion of other stimuli that more commonly cause driver distraction, often resulting in harmful outcomes. It includes empirical evidence supporting the conclusion that cellular phones have become the scapegoat in the world of driver distraction. In considering alternative stimuli that cause distraction, Part IV notes the lack of legislative regulation to curb such behavior. Part IV then debunks some of the myths that purport to justify the legislative ban on cell phone use while driving and explains that Connecticut's legislation is both over- and under-inclusive. It also closely examines the facial flaws of the legislation as well as the failure of its local enforcement. Finally, Part IV explains that the ambiguity and erroneous preconceived notions in the text of the legislation render it unworkable at best.

Part V examines the current Connecticut cell phone legislation's effectiveness as well as that of similar legislation in other states and countries. It explains that the current legislation punishes not the conduct we seek to deter, but merely one stimulus that may or may not cause such conduct. In punishing only one of many possible causes of distraction, the legislation is not only considerably less effective in its purported purpose, but it also deflects attention from the very conduct the law was drafted to discourage, thus reducing the public's awareness of the importance of the issue. Next, Part V explains why cell phone bans are ineffectual and may have the inadvertent effect of exacerbating the problem of distracted driving. Part V also discusses some of the other remedial measures advocated and proposes a more complete and equitable legislative treatment of inattentive driving. The proposal combines a concept of equal treatment with the integration of more safety features into mobile electronic devices, the utilization of graduated licenses, and the implementation of a graded negligence standard which more effectively weighs the entirety of the circumstances surrounding inattentive driving and fairly apportions liability based on the level of negligence exhibited in the conduct. This is achieved without being conditioned on the particular stimulus that provided the initial distraction.

The purpose of this Note is not to discredit the opinion that using a cellular phone while driving presents a risk of being involved in an accident. There is no doubt that mobile electronic devices pose a threat of distraction for drivers. The contention advanced herein is that the general conception of that threat is often exaggerated and over-emphasized in relation to other distractive stimuli of equal or greater magnitude, and that the legislature should concentrate on more complete remedies for the problem of distracted driving without shortsightedly focusing on but one compositional element.<sup>8</sup>

## II. DISTRACTED DRIVING AND CELL PHONE USE

One of the most serious and contested issues regarding cellular phones is whether one should be allowed to use a cellular phone while driving.<sup>9</sup> It was estimated that in the year 2000, approximately 44% of drivers in the United States had a cellular phone in their car.<sup>10</sup> Moreover, in a recent study of 1200 drivers, it was discovered that 73% used cell phones while driving.<sup>11</sup> Given the amount of time Americans spend in their cars and their desire to accomplish as many tasks as possible without leaving the comfort of their automobiles, Americans naturally began spending significant amounts of time talking on their phones while driving.<sup>12</sup> It was perhaps just as natural for states to respond by outlawing such conduct.

The argument against cellular phone use while driving is rooted in the idea that the distraction caused by the use of cellular phones, which poses a substantial risk for a greater number of automobile accidents, significantly outweighs any benefits the public may derive from their use.<sup>13</sup> Driver distraction has been defined as occurring when a driver:

is delayed in the recognition of information needed to safely accomplish the driving task because some event, activity, object, or person within or outside the vehicle compels or induces the driver's shifting attention away from the driving task. The presence of a triggering event distinguishes a distracted driver from one who is simply inattentive or "lost

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<sup>8</sup> This Note primarily focuses on cell phone use while driving as it applies to spoken conversations and does not consider the effect of text messaging while driving. Text messaging encompasses different levels and types of distraction.

<sup>9</sup> See, e.g., Brian Knowles, *Should Using a Cell Phone While Driving Be Illegal?*, SPEAKOUT.COM, June 15, 2000, [http://speakout.com/activism/issue\\_briefs/1334b-1.html](http://speakout.com/activism/issue_briefs/1334b-1.html) (stating that as cell phone use has increased, so have the number of public safety advocates linking the use of cell phones while driving to fatal automobile accidents).

<sup>10</sup> *Id.*

<sup>11</sup> Ins. Info. Inst., *supra* note 4.

<sup>12</sup> See Lana Mobydeen, Note, *Reach Out And Touch Someone: Cellular Phones Health, Safety and Reasonable Regulation*, 16 J.L. & HEALTH 373, 376–78 (2001–2002) (stating that cell phone use while driving has become as common as eating or putting on makeup).

<sup>13</sup> *Id.* at 374–75, 377, 379, 385.

in thought.”<sup>14</sup>

An April 2006 study found that nearly 80% of automobile accidents (and 65% of near-accidents) involved some form of driver inattention within three seconds of the accident.<sup>15</sup> The delayed reaction time exhibited by drivers using cell phones in another recent study was even greater than the impairment demonstrated by intoxicated drivers.<sup>16</sup> With vehicular collisions being the leading cause of death among Americans between the ages of fifteen and twenty-nine,<sup>17</sup> and cell phone use highest among young drivers,<sup>18</sup> it is of obvious importance that we consider the possible threat cellular phones pose while driving. Cell phone use while driving was found to create a risk of an at-fault crash 1.16 times greater than driving while not using a cell phone.<sup>19</sup>

Reports estimate that there are approximately 4000 traffic accidents each day caused by driver distraction, resulting in between 450 and 1000 fatalities each year.<sup>20</sup> Automobile accidents in general affect a significantly broader population than merely those directly involved; automobile accidents cost the United States economy approximately \$230 billion annually, an amount equal to 2.3% of the U.S. gross domestic product, which translates to \$820 per United States citizen.<sup>21</sup> This figure includes \$33 billion in medical expenses, \$61 billion in lost workplace productivity, and \$59 billion in property damage.<sup>22</sup> While the individuals involved in the accidents pay approximately 26% of the overall costs, it is the public who ultimately pays for the remaining 74% through taxes, higher insurance premiums, and increased health care costs.<sup>23</sup> Some of the more serious injuries caused by automobile accidents, such as those to the brain or spinal cord, cost an average of \$332,457 per injury, amounting to roughly \$1.1 million over the injured person’s lifetime.<sup>24</sup>

Cell phone-related automobile accidents typically fall into two categories: those resulting in the driver striking an object in front of them,

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<sup>14</sup> JANE C. STUTTS ET AL., AAA FOUND. FOR TRAFFIC SAFETY, THE ROLE OF DRIVER DISTRACTION IN TRAFFIC CRASHES 3 (May 2001), available at <http://www.aaafoundation.org/pdf/distraction.pdf>.

<sup>15</sup> Ins. Info. Inst., *supra* note 4.

<sup>16</sup> David L. Strayer et al., *A Comparison of the Cell Phone Driver and the Drunk Driver* 7 (AEI-Brookings Joint Center for Regulatory Studies, working paper No. 04-13, July 2004), available at <http://aei-brookings.org/admin/authorpdfs/redirect-safely.php?fname=../pdffiles/phpUf.pdf>.

<sup>17</sup> Lior Jacob Strahilevitz, “How’s My Driving?” *For Everyone (And Everything?)*, 81 N.Y.U. L. REV. 1699, 1702 (2006).

<sup>18</sup> Ins. Info. Inst., *supra* note 4.

<sup>19</sup> Strahilevitz, *supra* note 17, at 1738.

<sup>20</sup> Paul K. Hentzen, Comment, *The Trouble With Telematics: The Uneasy Marriage of Wireless Technology and Automobiles*, 69 UMKC L. REV. 845, 846 (2001).

<sup>21</sup> Kevin M. McDonald, *Shifting Out of Neutral: A New Approach to Global Road Safety*, 38 VAND. J. TRANSNAT’L L. 743, 751 (May 2005).

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

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

or those resulting from the driver unknowingly deviating from their lane. This second type of accident is notably different from regular automobile accidents, one directly attributable to driver inattention.<sup>25</sup>

Distraction has traditionally been categorized under four classifications: visual, auditory, biomechanical, and cognitive.<sup>26</sup> Visual distraction refers to distraction caused by visual stimuli, which, in the case of a driver, could include street signs, billboards, other cars, or the display screen of a cell phone.<sup>27</sup> Auditory distraction is described as any distraction caused by perception of an unexpected sound, such as a car horn or cell phone ring.<sup>28</sup> Biomechanical distraction refers to a driver's manipulation of objects like radio knobs, heating or air conditioning controls, or the buttons on a cell phone.<sup>29</sup> Cognitive distraction occurs when the driver fails to concentrate on the task of driving, and essentially becomes "disconnect[ed] from her immediate driving environment," such as when a driver becomes completely engrossed in a conversation.<sup>30</sup>

The distraction associated with using a cell phone while driving is two-fold. First, the driver is distracted by the physical manipulation of the device, including opening or closing the phone, dialing or text messaging, which inhibits the driver's ability to control the vehicle. Second, the distraction presented by the driver's involvement in conversation directly impairs the driver's cognitive awareness, reducing her ability to effectively deal with changes in the surrounding environment.<sup>31</sup> The process of using a cell phone can therefore encompass all four categories of distraction.

### III. A LEGISLATIVE REMEDY?

In response to the perceived pandemic of automobile accidents caused by driving while using a cell phone,<sup>32</sup> some states have enacted legislation either restricting or completely banning the use of cell phones while driving.<sup>33</sup> The pioneer jurisdiction in cell-phone-banning legislation was

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<sup>25</sup> Hentzen, *supra* note 20, at 853.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> Erin Barmby, *Review of Selected 2007 California Legislation: Chapter 290: California's Message to Hang Up and Pay Attention*, 38 MCGEORGE L. REV. 342, 343, 346-47 (2007).

<sup>32</sup> Kim Knox Beckius, *Connecticut Cell Phone Law: Don't Get Caught Talking and Driving*, About.com, Oct. 6, 2005, available at <http://hartford.about.com/od/government/a/aactcellphone.htm> (quoting Chief State's Attorney Christopher L. Morano, "the purpose of this law is to promote safety on our highways").

<sup>33</sup> Five states (California, Connecticut, New Jersey, New York, and Washington) and the District of Columbia have completely banned the use of hand-held devices while driving (Utah deals with cell phone use as a distracted driving issue, which encompasses all careless driving offenses). Governors Highway Safety Ass'n, *Cell Phone Driving Laws*, Jan. 2008, available at [http://www.ghsa.org/html/stateinfo/laws/cellphone\\_laws.html](http://www.ghsa.org/html/stateinfo/laws/cellphone_laws.html). Other states have banned use in certain situations. *Id.* Seventeen

Brooklyn, Ohio, which enacted a statute in 1999.<sup>34</sup> Soon after, New York became the first state to legislate a ban on cell phone use while driving.<sup>35</sup>

In Connecticut, legislation enacted in October 2005, prohibits driving while using any “mobile electronic device.” A “mobile electronic device” is defined as:

any hand-held or other portable electronic equipment capable of providing data communication between two or more persons, including a text messaging device, a paging device, a personal digital assistant, a laptop computer, equipment that is capable of playing a video game or a digital video disk, or equipment on which digital photographs are taken or transmitted, or any combination thereof, but does not include any audio equipment or any equipment installed in a motor vehicle for the purpose of providing navigation, emergency assistance to the operator of such motor vehicle or video entertainment to the passengers in the rear seats of such motor vehicle.<sup>36</sup>

Connecticut bans the use of hand-held cellular phones, except in emergency situations, and the “legitimate use by drivers of school buses” (not carrying passengers at the time), buses, taxis, and tow trucks in the performance of job duties.<sup>37</sup> The statute permits the use of hands-free devices, although drivers with a learner’s permit and any drivers under the age of eighteen are prohibited from using *any* cellular phone device while driving (including hands-free systems) except in emergency situations.<sup>38</sup> Connecticut, along with several other states, allows enforcement for hand-held phone use as a primary offense.<sup>39</sup> A primary offense, as opposed to a secondary offense, does not require law enforcement officers to stop motorists for other motor vehicle violations before they can issue a ticket for improper use of a hand-held phone.<sup>40</sup> A violation of the Connecticut

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states and the District of Columbia have enacted special laws regarding cell phone use while driving for novice drivers. *Id.* Sixteen states and the District of Columbia have prohibited school bus drivers from using cell phones while driving with passengers, except in emergency situations. *Id.* Alaska, Minnesota, New Jersey, and Washington have banned text messaging while driving. *Id.*

<sup>34</sup> Ed Garsten, *Ohio Town Cracks Down on Driving Under Influence of Phone*, CNN.COM, Aug. 25, 1999, <http://www.cnn.com/US/9908/25/cellphone.ban>.

<sup>35</sup> Perry Bacon, Jr., *D.C. To Discuss a Cell Phone Ban For Drivers*, WASH. POST, July 8, 2001, at C04, available at LEXIS, News Library, WPOST File.

<sup>36</sup> CONN. GEN. STAT. § 14-296aa(a)(8) (Supp. 2006).

<sup>37</sup> *Id.* § 14-296aa(c)(1)–(2); *Id.* § 14-296aa(b)(4)(A)–(B).

<sup>38</sup> *Id.* § 14-296aa(d); Pub. Act. No. 05-220, § 3(b) (2005).

<sup>39</sup> Matt Sundeen, *Cell Phones and Highway Safety: 2005 State Legislative Update*, Aug. 2005, at 8, available at <http://www.ncsl.org/print/transportation/cellphoneup805.pdf>.

<sup>40</sup> See Press Release, State of New Jersey Motor Vehicle Commission, MVC and Partners Urge Motorists to “Put the Phone Down” (Feb. 28, 2008), available at <http://www.nj.gov/mvc/PressReleases/archives/2008/022808.htm> (explaining that until 2008, New Jersey’s cell phone statute limited enforcement of violations to situations where a motorist was cited for another motor vehicle violation).

statute carries a maximum fine of one-hundred dollars;<sup>41</sup> however, the fine for a first time offender is suspended provided the offender produces proof of the purchase of a hands-free device “subsequent to the violation but prior to the imposition of a fine.”<sup>42</sup> The amount of the Connecticut fine is certainly more than the maximum fine provided for in California’s similar legislation, but comparable to New Jersey’s.<sup>43</sup>

In the two years since the enactment of the Connecticut legislation, reviews regarding its effectiveness have been mixed.<sup>44</sup> Between January 1 and June 30, 2007, more than 16,000 drivers were prosecuted for violating the cell phone ban, of which almost 7000 were found guilty.<sup>45</sup> While many feel the legislation has made progress in the reduction of cell-phone-related accidents, some feel there is still much to be done.<sup>46</sup>

More than fifty other countries have enacted cell phone bans, some, such as Jersey and Japan, as early as the 1990s,<sup>47</sup> however, the contours of the legislation are particular to each country. In the Netherlands for example, violations of the cell phone ban can result in fines as high as €2,000.00, or even imprisonment for multiple offenses.<sup>48</sup> Ireland imposes the punishment of a \$380 fine and up to three months in jail for a third offense.<sup>49</sup>

#### IV. A CLOSER EXAMINATION

Driver distractions are hardly a novel problem plaguing the roadways. In fact, when automobile manufacturers began equipping their cars with radios in the 1930s, Massachusetts proposed legislation prohibiting listening to the radio while driving.<sup>50</sup> Proponents’ concerns for the prohibition included the auditory distraction to the driver, arguing that the

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<sup>41</sup> CONN. GEN. STAT. § 14-296aa(g) (Supp. 2006).

<sup>42</sup> *Id.*

<sup>43</sup> *Countries That Ban Cell Phones While Driving*, CELLULAR-NEWS, July 5, 2008, [http://www.cellular-news.com/car\\_bans/](http://www.cellular-news.com/car_bans/) (noting that California’s legislation provides for a fine of \$20 for a first offense and \$50 for subsequent offenses, while New Jersey imposes a fine of \$100 for any offenses).

<sup>44</sup> *Cell Phone Ban Shows Mixed Results After Two Years*, BOSTON.COM, Sept. 30, 2007, [http://www.boston.com/news/local/connecticut/articles/2007/09/30/cell\\_phone\\_ban\\_shows\\_mixed\\_results\\_after\\_two\\_years](http://www.boston.com/news/local/connecticut/articles/2007/09/30/cell_phone_ban_shows_mixed_results_after_two_years).

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

<sup>46</sup> Issues expressed include concern that many people simply ignore the law, and that the maximum fine should be modified. *Id.*

<sup>47</sup> Jersey, a British Crown dependency, enacted cell phone ban legislation in 1998, followed by Japan in 1999. *Countries That Ban Cell Phones While Driving*, *supra* note 43. As of 2005, twenty-five countries, including Australia, Britain, Germany, and Japan restrict or prohibit hand-held cell phone use while driving. Minnesota Dep’t of Admin./Office of Geographic & Demographic Analysis, *States Look at Bans on Cell Phone Use for Teen Drivers*, <http://www.gda.state.mn.us/resource.html?Id=15996> (last visited Sept. 15, 2008).

<sup>48</sup> *See, e.g., id.* (nothing that the Netherlands imposes fines up to €2,000 or two weeks in jail).

<sup>49</sup> *Countries That Ban Cell Phones While Driving*, *supra* note 43.

<sup>50</sup> Hentzen, *supra* note 20, at 859.

music “could lull a driver to sleep . . . and that radios played in open cars distracted the drivers of other cars.”<sup>51</sup> Moreover, concerns existed regarding biomechanical distraction caused by manipulation of the radio’s controls<sup>52</sup>—arguments similar to some of those posited by proponents of cellular phone bans. The automobile industry countered, arguing that radios were actually beneficial to drivers, helping to keep them awake while driving.<sup>53</sup> The proposed ban was overwhelmingly rejected.<sup>54</sup>

Although car radios are currently the estimated cause of approximately 150,000 automobile accidents per year, it would appear the value society places on the ability to listen to the radio while driving outweighs the potential risk of driver distraction, thus thwarting any potential legislation prohibiting car radios.<sup>55</sup> As cell phones and other telematics become even more omnipresent, and society’s dependence on them continues to increase, it would not be unreasonable to predict an outcome similar to that of the car radio.

There is also evidence that driver distraction is not as rampant a cause of automobile accidents as is typically portrayed by many in the media. In 1999, the National Accident Sampling System’s Crashworthiness Data System analysis indicated that accidents caused by driver distraction only accounted for between 8.3% and 12.9% of accidents reported during the study.<sup>56</sup> In fact, between 1995 and 1999, the study showed that accidents caused by distracted drivers actually declined.<sup>57</sup> Accidents involving *fully attentive* drivers—not distracted drivers—accounted for the highest percentage of accidents studied (48.6%).<sup>58</sup>

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

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

<sup>53</sup> *Id.* at 860.

<sup>54</sup> *Id.*

<sup>55</sup> Jesse A. Cripps, Jr., Comment, *Dialing While Driving: The Battle Over Cell Phone Use on America’s Roadways*, 37 GONZ. L. REV. 89, 97 (2001–02).

<sup>56</sup> STUTTS ET AL., *supra* note 14. Spanning from 1995 to 1999, The National Accident Sampling System’s Crashworthiness Data System study was “an annual probability sample of approximately 5,000 police reported crashes involving at least one passenger vehicle that has been towed from the crash scene.” *Id.* Data were collected by crash investigation teams using information obtained at the scene of the crash, an examination of the vehicles involved, from interviews with the crash victims and other witnesses, as well as from available medical records. *Id.* The study also made note of the “Driver’s Distraction/Inattention to Driving”; drivers’ conduct was categorized as either attentive, looked but did not see, sleepy, attention unknown, driver not present, or distracted (which was then subcategorized under one of more than a dozen specific distractions such as eating or drinking, other occupants, moving object in vehicle, talking on cellular phone, etc.). *Id.* Because 35.9% of the crashes analyzed were recorded as driver’s attention “unknown” or “no driver present,” the actual number of accidents caused by distracted drivers may be between 8.3% and 12.9%. *Id.*

<sup>57</sup> *Id.* at 10 (finding that even if drivers’ attention “unknown” cases were distributed like the known incidents, yearly percentage of crashes involving distracted drivers fell from 13.9% in 1995 to 12.7% in 1999).

<sup>58</sup> *Id.* at 3.

A. *Cell Phone Use is Not as Prominent a Cause of Accidents as Typically Portrayed*

Although cell phone use has garnered a majority of the attention recently as the newfangled cause of driver inattentiveness, the field is ripe with other offenders. In a recent study in Virginia, cell phone use ranked only ninth in a list of most common driver distractions causing accidents, following behind other distractions inside the vehicle (accounting for 26.3% of the accidents studied), driver fatigue (17%), rubbernecking (13.1%), other distractions outside the vehicle (10%), looking at scenery (9.8%), passenger and child distractions (8.7%), adjusting the radio, CD or tape player (6.5%), and eating/drinking (4.2%).<sup>59</sup> Cell phone use accounted for less than 4% of accidents surveyed.<sup>60</sup> The majority of accidents caused by driver distraction actually stem from stimuli occurring *outside* the car.<sup>61</sup>

Another earlier study by the University of North Carolina indicates that in an analysis of accidents involving more than 32,000 vehicles, cell phone use accounted for only 1.5% of the accidents, higher only than the distraction of smoking (which accounted for 0.9%).<sup>62</sup> The above mentioned National Accident Sampling System's Crashworthiness Data System information ranked cell phone use distraction eighth in a list of sources of distraction in accidents studied.<sup>63</sup> The study also specifically addressed the common misconception that cell phone use while driving causes an inordinate number of automobile accidents, stating that:

[g]iven the huge increase in reported ownership and use of cellular phones nationwide . . . one might have expected an increase in the reported number of crashes involving cell phones over the five years covered by the analysis. No such increase was apparent, however. The "raw" number of reported cases involving cell phones was 8 in 1995, 10 in 1996, 8 in 1997, 10 in 1998, and 6 in 1999.<sup>64</sup>

In fact, a 2007 study of the relationship between cell phone usage while driving and accident rates explained that while cell phone ownership has grown sharply since 1990 (average use-per-subscriber has risen from 140

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<sup>59</sup> Andrea L. Glaze & James M. Ellis, *Pilot Study of Distracted Drivers*, Virginia Commonwealth U., Center for Pub. Pol'y, Surv. & Evaluation Res. Laboratory, Jan. 2003 at 1, 14.

<sup>60</sup> *Id.* at 14.

<sup>61</sup> Cripps, *supra* note 55.

<sup>62</sup> Charles E. Wilson, *Distracted Driving Needs More Attention*, BULK TRANSPORTER, June 2001, at 12; *Eyes on the Road, Hands on the Wheel*, Canada Safety Council, <http://www.safety-council.org/info/traffic/distract.html> (last visited Aug. 27, 2008).

<sup>63</sup> STUTTS ET AL., *supra* note 14, at 4.

<sup>64</sup> *Id.* at 34. The number of cell phone subscribers increased from less than forty million in 1995 to more than eighty million in 1999. *Id.* at 35.

to 740 minutes per month since 1993), and that as many as 40% of drivers have used their phones while driving, aggregate crash rates have *decreased* substantially over this period.<sup>65</sup>

In other studies, the action of dialing a cell phone while driving on a closed course only sometimes caused more lane diversion than non-dialing drivers. The act was only sometimes found to be more distracting than tuning a radio; other times tuning a radio caused more visual distraction than cell phone dialing.<sup>66</sup> Regardless of the distracting potential of using a cell phone while driving, “such effects may be minimized if drivers are aware of the hazards, are judicious in their use of the technology, and if ergonomically sound cellular telephone designs are used.”<sup>67</sup>

Currently, reports of crashes caused by cellular phone are inadequate.<sup>68</sup> It is therefore not possible to validly determine the magnitude of the traffic safety problem posed by the use of cellular phones while driving.<sup>69</sup>

### 1. *Other Sources of Distraction*

Eating while driving is a distracting behavior that has been largely overlooked in both the media and legislation. A recent study commissioned by the National Safe Driving Test and Initiative Partners indicated that while 37% of drivers surveyed admitted to using a cell phone while driving, almost 60% admitted to eating while driving.<sup>70</sup> Experts consider eating to be one of the most distracting behaviors a driver can engage in.<sup>71</sup> A recent study by Brunel University in the United Kingdom revealed that test subjects who were asked to navigate an urban route in a driving simulator while managing a bottle of water and some wrapped candies were twice as likely to hit a pedestrian who wandered into the virtual street.<sup>72</sup> However, eating while driving has not been addressed specifically by prohibitive legislation. In fact, such conduct is essentially

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<sup>65</sup> Saurabh Bhargava & Vikram Pathania, *Driving Under the (Cellular) Influence: The Link Between Cell Phone Use and Vehicle Crashes* 1 (AEI-Brookings Joint Center for Reg. Stud., Working Paper No. 07-15, 2007), available at [http://aei-brookings.org/admin/authorpdfs/redirect-safely.php?fname=../pdffiles/WP07-15\\_topost.pdf](http://aei-brookings.org/admin/authorpdfs/redirect-safely.php?fname=../pdffiles/WP07-15_topost.pdf).

<sup>66</sup> Nat'l Highway Traffic Safety Admin., *Driver Distraction with Wireless Telecommunications and Route Guidance Systems* 2 (July 2000), available at [http://www-nrd.nhtsa.dot.gov/pdf/nrd-13/DDRGS\\_final0700\\_1.pdf](http://www-nrd.nhtsa.dot.gov/pdf/nrd-13/DDRGS_final0700_1.pdf). The study found that “on-the-road disruptions by manual dialing to lane or speed maintenance, as compared to manual radio tuning, appear to be small to nonexistent.” *Id.* at 3.

<sup>67</sup> Nat'l Highway Traffic Safety Admin., *An Investigation of the Safety Implications of Wireless Communications in Vehicles*, (Nov. 1997), available at <http://www.nhtsa.dot.gov/people/injury/research/wireless>.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> The Nat'l Safe Driving Test & Initiative Partners, *Drive for Life: The National Safe Driving Test & Initiative National Survey of Drivers* 7 (May 2003), available at [http://www.safedrivingtest.com/press\\_releases/mason\\_dixon\\_survey.pdf](http://www.safedrivingtest.com/press_releases/mason_dixon_survey.pdf).

<sup>71</sup> *The Ten Most Dangerous Foods to Eat While You Are Driving*, INSURE.COM, Oct. 11, 2007, available at <http://www.insure.com/articles/carinsurance/driver-distractions.html>.

<sup>72</sup> *Food For Thought (But Not While You're Driving)*, MOTORING NEWS, Aug. 27, 2006, available at <http://www.carpages.co.uk/news/eating-at-the-wheel-27-08-06.asp>.

encouraged through the ubiquitous fast-fast food drive through windows and food management aids currently included in many automobiles.<sup>73</sup>

Another overlooked, yet serious, cause of distracted driving is fatigue or drowsy driving. As many as 100,000 police-reported crashes each year involve drowsiness or fatigue as a principal cause, injuring at least 76,000 people, and killing at least 1500.<sup>74</sup> The effects of sleep deprivation on driving have been compared to those of intoxication.<sup>75</sup> In 2005, a National Sleep Foundation poll discovered that 60% of adult drivers in the United States—approximately 168 million people—admitted to driving while drowsy.<sup>76</sup> The same poll revealed that more than one-third (37%) of the people surveyed admitted to having fallen asleep while driving.<sup>77</sup> A state-by-state survey conducted in 1998 revealed that only one of the responding states enacted legislation specifically addressing driver fatigue.<sup>78</sup>

These studies unequivocally show there are other, more common forms of driver distraction that pose a much greater risk to driver safety than do cell phones. Empirical evidence shows the notion that cell phone-caused accidents are an out-of-control epidemic in our society is a myth. Based on the information commonly relied on, one columnist remarked it would make more sense to “criminaliz[e] possession of food and drink paraphernalia such as straws, go-cups, and Slim Jim wrappers” than cell phones.<sup>79</sup> In addition, these research results may be inaccurate representations of actual cell phone use causing accidents: “[p]revious statistical work estimates risk of use as a multiple of an individual’s unknown baseline accident rate rather than absolute risk of use . . . . No existing paper uses data and methods that allow for a direct computation of the effect of a cell phone ban on the number of accidents.”<sup>80</sup> Robert W. Hahn and James E. Prieger explained the problem of misrepresentation

<sup>73</sup> See *id.* (pointing out that many automobile manufacturers include cup holders near the driver’s seat, apparently to facilitate consumption of food while driving).

<sup>74</sup> Jane C. STUTTS ET AL., WHY DO PEOPLE HAVE DROWSY DRIVING CRASHES? INPUT FROM DRIVERS WHO JUST DID 8, Nov. 1999, available at <http://www.aaafoundation.org/pdf/sleep.PDF>.

<sup>75</sup> *Id.* at 7 (stating that subjects kept awake for seventeen hours performed as well on a cognitive psychomotor test as a rested person with a blood alcohol concentration (BAC) of 0.05%). After being awake for twenty four continuous hours, the subject’s performance was equivalent to that of a person with a BAC of 0.10%—the level which most U.S. states set as their legal limit). *Id.*

<sup>76</sup> Nat’l Sleep Found., *State of the States Report on Drowsy Driving* 3 (Nov. 2007), available at <http://www.drowsydriving.org/site/c.lqLPIROCKTF/b.2708421/K.BD17/Home.htm> (follow “Resources” hyperlink; then follow “Major Studies and Federal Reports” hyperlink; then follow “National Sleep Foundation 2007, State of the States Reporting Drowsy Driving” hyperlink”).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 21.

<sup>79</sup> Robert P. Libbon, *Dear Data Dog: Do Cellular Phones Really Cause Auto Accidents?*, AM. DEMOGRAPHICS, July 1999, available at [http://findarticles.com/p/articles/mi\\_m4021/is\\_ISSN\\_0163-4089/ai\\_55403024](http://findarticles.com/p/articles/mi_m4021/is_ISSN_0163-4089/ai_55403024).

<sup>80</sup> Robert W. Hahn & James E. Prieger, *The Impact of Driver Cell Phone Use On Accidents* 2 (AEI-Brookings Joint Center for Regulatory Studies, Working Paper No. 04-14) available at <http://aei-brookings.org/admin/authorpdfs/redirect-safely.php?fname=../pdffiles/Hahn-PriegerREPOST1-4-07.pdf>.

occurring in many studies:

[T]he cost-benefit analysis literature has relied on out-of-sample assumptions about average minutes of use while driving and average accident rates to estimate accidents from usage. If individuals who use cell phones have different baseline accident rates than those who do not, however, using average rates to calculate the reduction in accidents from a ban can be inaccurate.<sup>81</sup>

In other words, many studies condemning cell phone use while driving as a significant cause of automobile accidents fail to account for the driver's preexisting proclivity for causing an accident (regardless of the existence of *any* distractive stimulus). Not only can the potential for accidents stem from innate driver carefulness (or lack thereof), but many extraneous factors may influence that quality.<sup>82</sup> It seems far more likely, as Mr. Hahn and Mr. Prieger have pointed out, that safe drivers will typically drive safely, unsafe drivers will typically drive unsafely, and an unsafe driver will generally be more prone to distractive behavior regardless of whether the distraction causing the accident is a cell phone, a tube of lipstick, or a particularly interesting billboard on the side of the highway.<sup>83</sup> Many cellular phone studies also fail to consider the possibility that correlation may not equate to causation, neglecting to account for aggressive driving, bad weather, or heavy traffic.<sup>84</sup> They further neglect to consider the possibility that many drivers involved in accidents will be untruthful about their inattentive driving, especially if they fear liability.<sup>85</sup> The Hahn-Prieger study stated that given their research, "there is no statistically significant predicted effect of a cell phone ban on accidents."<sup>86</sup> Even so, cell phones still remain the scapegoat of the driver distraction world as lawmakers pay more consideration to politics than concern for safety.<sup>87</sup>

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 2, 15, 18 (stating that additional factors, such as weather, miles traveled per trip, and driver's type or innate level of safety exhibited, are typically not accounted for); *see also* Robert W. Hahn & Patrick M. Dudley, *The Disconnect Between Law and Policy Analysis: A Case Study of Drivers and Cell Phones*, 55 ADMIN. L. REV. 127, 181 (2003) (explaining that although the use of hands-free devices may reduce the risk of accidents, drivers may be more willing to use cellular phones while driving and conduct longer conversations, thus potentially creating a net loss in safety).

<sup>83</sup> Hahn & Prieger, *supra* note 80, at 2.

<sup>84</sup> Hahn & Dudley, *supra* note 82, at 142. Additionally, some studies suffer from weaknesses such as the inability to determine the actual cause of many crashes, and problems of equating the characteristics of a small test demographic to the population at large. *Id.* at 142, 144.

<sup>85</sup> *Id.* at 144.

<sup>86</sup> Hahn & Prieger, *supra* note 80, at 29.

<sup>87</sup> *See, e.g.*, Shawn E. Klein, *There Ought to be a Law!*, THE ATLAS SOC'Y & ITS OBJECTIVIST CENTER, June 13, 2001, available at [http://www.objectivistcenter.org/cth--472-There\\_Ought\\_be\\_Law.aspx](http://www.objectivistcenter.org/cth--472-There_Ought_be_Law.aspx) (discussing the fact that while many other distractions pose a greater risk to

### B. *Cell Phone Use vs. Drunk Driving*

A 2006 study conducted by Professor David Strayer revealed that drivers who used a cellular phone while driving were as impaired as those who drove intoxicated.<sup>88</sup> The test involved a group of subjects driving in fifteen minute intervals behind a pace car in a simulator containing normal automobile controls and three screens simulating daytime, light freeway driving conditions. The pace car would randomly brake or slow down (mimicking stop-and-go traffic), and the amount of time required for the subject to brake was recorded, as was the pressure with which the subject applied the brake, the average driving speed, and the amount of time required to resume to normal speed after braking.<sup>89</sup> Professor Strayer found that motorists who used hand-held or hands-free cellular devices drove slightly slower than the control group, were 9% slower to brake when the pace car stopped, displayed 24% more variation in the distance with which they followed behind the pace car (a variation attributed to the driver's attention switching between driving and conversing on the cellular phone), were 19% slower to return to normal speed after applying the brakes and were more likely to be involved in an accident.<sup>90</sup> Three study participants rear-ended the pace car.<sup>91</sup> Of the three, all were using cellular phones.<sup>92</sup> None of the drivers involved in the collisions was intoxicated.<sup>93</sup> By contrast, the intoxicated drivers "exhibited a more aggressive driving style," following closer to the vehicle immediately in front of them and applying more force while braking.<sup>94</sup> From these results Professor Strayer determined that the impairments associated with the use of a cellular phone while driving are as profound as those associated with intoxication.<sup>95</sup>

While Professor Strayer's findings certainly bolstered the popular backlash against cellular phones, there were notable flaws in the study that may have skewed the results. First, the studies were conducted in the mornings, when the subjects were well rested, and in the "up" phase of intoxication.<sup>96</sup> Second, the blood alcohol concentration of each participant was maintained at approximately 0.08%.<sup>97</sup> In reality, most

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driver safety, cell phones have been singled out and prohibited, a choice more related to politics than concern for driver safety).

<sup>88</sup> *Drivers on Cell Phones are as Bad as Drunks: Utah Psychologists Warn Against Cell Phone Use While Driving*, U. of Utah News Center, June 29, 2006, <http://unews.utah.edu/p/?r=062206-1>. [hereinafter U. of Utah News Center].

<sup>89</sup> David L. Strayer et al., *A Comparison of the Cell Phone Driver and the Drunk Driver*, 48 HUMAN FACTORS 381, 383-85 (2006).

<sup>90</sup> U. of Utah News Center, *supra* note 88.

<sup>91</sup> *Id.*

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

<sup>93</sup> *Id.*

<sup>94</sup> Strayer, *supra* note 89, at 387.

<sup>95</sup> *Id.* at 390.

<sup>96</sup> U. of Utah News Center, *supra* note 88.

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

drunk-driving accidents occur between the hours of 6 p.m. to 6 a.m. when fatigue is also a factor. Moreover, most intoxicated drivers involved in automobile accidents exhibit blood alcohol concentrations of roughly twice the amount tested in Strayer's study.<sup>98</sup> The authors of the study concede that these situational differences most likely contributed to the lack of accidents caused by the intoxicated drivers during the experiment.<sup>99</sup> Nevertheless, the authors did not examine the possibility that the unrealistic conditions may have also tainted their findings relative to cellular phone usage while driving.

Professor Strayer's observations regarding subjects using cellular phones while driving compared to intoxicated drivers were wholly different and objectively incongruent. From the data provided, it is impossible to compare whether following too closely to a pace car (exhibited by the intoxicated subjects) or more slowly resuming normal speed after braking (exhibited by the cellular phone-using subjects) is more or less conducive to being involved in a traffic accident. Both could be construed as negative characteristics, but either may or may not result in an accident. The fact no collisions occurred involving intoxicated subjects can be attributed to the fact that the time during which the study was conducted as well as the actual blood alcohol levels tested were significantly dissimilar to real-world analogues. The inequity imposed on the testing conditions, therefore, renders Professor Strayer's results of little real-world value.

### C. *The Hands-Free Fallacy*

The state of Connecticut currently allows the use of cellular phones equipped with a hands-free device.<sup>100</sup> These devices, which have been available since the mid 1990's, feature ear pieces or in-ear speakers and a microphone (with a clip that connects to the user's shirt or jacket) connected by a wire (although wireless models have gained popularity in the past few years) to the host cell phone. The hands-free device allows the user to talk on the cellular phone without the manual inhibition of being forced to hold the device against her ear or lift the phone to answer a call.<sup>101</sup>

Implicit in Connecticut's legislation, as well as in public opinion, is that hands-free devices are safer than hand-held units because the

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> Knox Beckius, *supra* note 32.

<sup>101</sup> Randall Frost, *Look Ma—No Hands! Are Hands-Free Cell Phones Any Less Distracting For Drivers?*, ROAD & TRAVEL MAGAZINE, Jan. 14, 2008, available at <http://www.roadandtravel.com/automotive/safetysecurity/handsfreecellphone.aspx>; Cell Phone and Wireless Service Plan Buying Guide, <http://wirelessguide.org/accessories/hands-free.php> (explaining the components of a hands-free device).

distraction associated with holding the phone unit against the user's ear is eliminated. However, the act of holding a cellular phone to one's ear has not been found to be a cause of interference with operating an automobile, as both hand held and hands-free devices generally fair as well.<sup>102</sup>

The action of dialing a cell phone, because it requires at least one of the driver's hands to be temporarily removed from the steering wheel, is presumed to be resolved by the use of a hands-free device.<sup>103</sup> However, a majority of hands-free devices still require some use of the hands, whether it is to manually set up and attach the device, to dial the phone in order to make a call, or press a button to answer an incoming call.<sup>104</sup> Even voice activated systems (which completely eliminate the need for the user to make any sort of manual action, allowing the driver to keep both hands on the steering wheel at all times) are quite new to the market and contain numerous operating "bugs" that could create a safety issue due to user frustration.<sup>105</sup> University of Kansas psychology professor Paul Atchley noted that hands-free devices are really only safer "under very limited circumstances."<sup>106</sup> Other studies have found hands-free systems to be no safer than hand-held units.<sup>107</sup> In fact, using a hands-free device might provide a driver with a false sense of security that could induce a greater exposure to risk than if a hand-held cellular phone was being used.<sup>108</sup> Some aspects of using hands-free devices lead to greater driver inattention than are posed by hand-held units.<sup>109</sup> Another study has gone as far as stating that even a completely voice activated hands-free unit fails to resolve the problem of driver performance impairment when using a cellular phone.<sup>110</sup> The complexity of some of the voice activated units renders them, at times, even more distracting than hand-held units. One reviewer of a voice activated system found that

[j]ust watching a demo in a parked vehicle, I was overwhelmed by all the digital readouts across the dashboard screen (imagine reading your Palm while driving) and the

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<sup>102</sup> Hahn & Dudley, *supra* note 82, at 157.

<sup>103</sup> *Id.* at 152.

<sup>104</sup> Frost, *supra* note 101.

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

<sup>106</sup> *Id.*

<sup>107</sup> Donald A. Redelmeier & Robert J. Tibshirani, *Association Between Cellular-Telephone Calls and Motor Vehicle Collisions*, 336 NEW ENG. J. MED. 453, 455 (Feb. 13, 1997); Hahn & Prieger, *supra* note 80, at 20.

<sup>108</sup> Hahn & Dudley, *supra* note 82, at 157.

<sup>109</sup> Susan Stellin, *Basics; Hands-Free Calling: Options For the Road*, N.Y. TIMES, July 26, 2001, at G9, available at LEXIS, News Library, NYT File. In reviewing several hands-free devices, issues such as the fact that the user still has to look down and manually operate the host cell phone to dial and answer a phone call, the poor audio quality of some of the devices, and the fact that answering a call using a headset requires more biomechanical action than is needed for a hand-held device, made some hands-free devices more distracting than using a hand-held unit. *Id.*

<sup>110</sup> Hahn & Dudley, *supra* note 82, at 153.

commands that need to be mastered simply to place or answer a call—never mind troubleshooting the system on a crowded highway if something goes wrong.<sup>111</sup>

A possible explanation for the lack of safety advantage in hands-free devices is that motor vehicle collisions result from a driver's limitations with regard to attention rather than dexterity.<sup>112</sup> Typically, drivers who use hands-free devices tend to be more careful drivers in general.<sup>113</sup> If that characteristic is accounted for in the results, the use of hands-free devices produces no significant reduction in accidents due to driver inattention.<sup>114</sup>

#### D. Cell Phone Use vs. In-Car Conversation

Prominent research suggests that the conversation itself is at least as significant a distraction as the biomechanical or visual stimuli associated with cell phone use.<sup>115</sup> Most conversations are typically longer in duration than the act of dialing a phone number or glancing at the cell phone display screen to view the identity of an incoming call. Other research shows that conversation poses the largest danger of driver distraction.<sup>116</sup> In a study comparing the acts of dialing a cell phone, tuning a radio, and conducting a conversation, complex conversation was determined to be the most distracting to drivers:

Complex, intense conversation leads to the greatest increases in likelihood of overlooking significant highway traffic conditions, and the time to respond to them. The distracting effect is similar to that of tuning a radio. The effect of placing calls or engaging in casual conversation is less of a problem, although, calling tends to retard responses.<sup>117</sup>

Therefore, although dialing does appear to pose some risk, the risk posed by the conversation itself is at least as great, and the act of dialing may ultimately be unimportant.<sup>118</sup> Even simple conversation, without the added distraction of a physical mechanism such as a cellular phone, "affects the way a driver's brain processes visual information and presumably hurts driver performance."<sup>119</sup>

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<sup>111</sup> Stellin, *supra* note 109.

<sup>112</sup> Redelmeier & Tibshirani, *supra* note 107, at 456.

<sup>113</sup> Robert W. Hahn & James E. Prieger, *The Impact of Driver Cell Phone Use on Accidents* 27 (Am. Enter. Inst. For Pub. Pol'y Res., Working Paper No. 106, 2004).

<sup>114</sup> *Id.*

<sup>115</sup> Hahn & Dudley, *supra* note 82, at 152–53.

<sup>116</sup> *Id.* at 165.

<sup>117</sup> *Id.* at 154 (internal quotations omitted).

<sup>118</sup> *Id.* at 155.

<sup>119</sup> *Id.* at 161.

If conversation is the greatest danger associated with driver distraction, why not prohibit passengers in cars? In-car conversations occurring with a passenger are generally thought to be safer because they are self-paced, and more naturally allow for lapses when driving conditions require increased driver concentration, while phone conversations tend to be “more purposeful and goal-directed with a faster exchange of information.”<sup>120</sup> It is thought that because a passenger is present throughout the entire trip, a conversation can be conducted in a less urgent (and presumably less distracting) manner.<sup>121</sup> A passenger, present in the vehicle, has an awareness of the exterior surroundings, and is thus more accommodating to the necessary ebb and flow of conversation typical in a driving situation than a non-present participant would be.<sup>122</sup> Since the passenger is present in the automobile, she would potentially be capable of warning the driver of a dangerous situation. However, as is pointed out in a study by the Institute for Road Safety Research, the presence of a passenger also carries the potential for significant driver distraction:

The intensity of distraction naturally changes according to the intensity and content of the conversation, the type of passenger (adult, child) and also the type of driver. For example, for young novice drivers, the presence of their peers is particularly dangerous not just because of the conversation itself, but also because young people are often more prepared to take risks in the presence of their peers.<sup>123</sup>

Each of the reasons posited in the study require numerous assumptions to be true, some of which are impractical. For example, one must assume that a driver automatically succumbs to the conversation pace of the other participant. This fails to consider the possibility that the driver may set the pace of conversation, regardless of whether the other participant is inside or outside the automobile. One must also assume that drivers typically feel more “urgency” in conversing with someone over the phone than with a passenger.<sup>124</sup> The study fails to provide any proof of such an assertion. While a passenger may, in theory, be able to warn the driver of a

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<sup>120</sup> NINA DRAGUTINOVIC & DIVERA TWISK, USE OF MOBILE PHONES WHILE DRIVING—EFFECTS ON ROAD SAFETY, INST. FOR ROAD SAFETY RES., 37 (2005), available at <http://www.swov.nl/rapport/R-2005-12.pdf>.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* In a 2005 study of conversations occurring while driving, those where both participants were present in the automobile experienced a natural suppression while driving on more demanding urban roads. This suppression was absent in conversations occurring over a cell phone with a driver and non-present participant. *Id.* These results show that a conversation involving an in-car passenger is more likely to exhibit the aforementioned lapses to accommodate situations when driving conditions require increased driver concentration.

<sup>123</sup> *Id.*

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

dangerous situation, the study neglects to account for the percentage of passengers that actually remain sufficiently cognizant of exterior situations in the short period of time between a distractive episode and an accident.<sup>125</sup> One must also assume that the passenger involved in the conversation is not as distracted as the driver.<sup>126</sup>

If conversation is a significant source of distraction for a driver, whether the conversation occurs with both participants present in the automobile should be of de minimis effect. Of paramount influence on the level of distraction exhibited by the driver is the complexity and intensity of the conversation.<sup>127</sup>

#### E. *Problems With Connecticut's Legislative Ban*

The Connecticut legislation prohibiting cellular phone use while driving suffers from numerous flaws, including facial ambiguity, general impracticality, and lack of enforcement.

##### 1. *Facial Ambiguity*

One important problem with Connecticut's cellular phone ban lies in the ambiguity of the text which renders it practically unworkable and prevents accurate enforcement. For example, the Connecticut statute defines a "hands-free accessory" as "an attachment, add-on, built-in feature, or addition to a mobile telephone, whether or not permanently installed in a motor vehicle, that, when used, allows the vehicle operator to maintain both hands on the steering wheel."<sup>128</sup> The statute then defines a "hands-free mobile telephone" as:

a hand-held mobile telephone that has an internal feature or function, or that is equipped with an attachment or addition, whether or not permanently part of such hand-held mobile telephone, by which a user engages in a call without the use of either hand, whether or not the use of either hand is necessary to activate, deactivate or initiate a function of such telephone.<sup>129</sup>

The problem with the legislation in this regard is that the hands-free devices the state currently allows drivers to utilize (and the vast majority of the hands-free models currently sold on the market) neither allow the

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<sup>125</sup> See *supra* note 15 and accompanying text. If the passenger is no more cognizant of the exterior driving conditions than the distracted driver—especially considering the relatively short period of time between the distractive episode and the accident—there is no reason to think an in-car passenger conversation would provide any advantage over a conversation occurring over a cell phone.

<sup>126</sup> Ins. Info. Inst., *supra* note 4.

<sup>127</sup> See *supra* note 117 and accompanying text.

<sup>128</sup> CONN. GEN. STAT. § 14-296aa(a)(4) (Supp. 2006).

<sup>129</sup> *Id.* § 14-296aa(a)(5).

driver to maintain both hands on the steering wheel at all times, nor allow for the user to operate the phone without any physical manipulation.<sup>130</sup> The state is not enforcing the statute as written, and the hands-free devices currently condoned by law enforcement do not comply with the legislative text. This disparity in the legislative text and the actual application renders the legislation unfair and unworkable because it imposes an unrealistic demand on drivers and is not applied according to the express requirements of the statute.

Another problem of ambiguity arises when we consider what constitutes “using” a cellular device under the statute. The Connecticut legislation defines the use of a cellular phone as “holding a hand-held mobile telephone to, or in the immediate proximity of, the user’s ear.”<sup>131</sup> The statute then goes on to define “immediate proximity” as “the distance that permits the operator of a hand-held mobile telephone to hear telecommunications transmitted over such hand-held mobile telephone, but does not require physical contact with such operator’s ear.”<sup>132</sup> Of note is the fact that the statute apparently seeks to eliminate the distraction caused by the physical action of holding a cellular phone to one’s ear to converse, but expressly condones the act of “holding a hand-held mobile telephone to activate, deactivate or initiate a function of such telephone.”<sup>133</sup> Therefore, the visual and biomechanical distraction commonly associated with cellular phone use while driving, which legislators considered so grave as to necessitate the absolute requirement of hands-free devices, is almost completely overlooked by the current statute. To illustrate the point, under the current law, a driver glancing down at her cell phone for forty-five seconds to locate a contact’s phone number or review her caller I.D. list would not be in violation of the law. Another driver, however, that utilizes the speaker phone function on her hand-held unit, resting the phone on the seat next to her while conversing, would be violating the statute.

An additional source of ambiguity stems from the statute’s exception for use of a hand-held cellular phone in an emergency situation.<sup>134</sup> This allowance begs the question: what constitutes an emergency? Naturally, situations of unquestionable importance such as reporting an automobile accident to the proper authorities, calling for emergency help, or notifying the authorities of a possible drunk driver must surely qualify as emergency situations. Nevertheless, the statute fails to identify a bright line rule defining when a situation is serious enough to justify diversion from the law. If, instead of reporting a possible drunk driver, the caller were

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<sup>130</sup> Most models, while allowing for hands-free conversation, require the user to manually operate the hand-held device to either answer an incoming call or dial to make a phone call.

<sup>131</sup> CONN. GEN. STAT. § 14-296aa(a)(2) (Supp. 2006).

<sup>132</sup> *Id.* § 14-296aa(a)(7).

<sup>133</sup> *Id.* § 14-296aa(a)(6).

<sup>134</sup> *Id.* § 14-296aa(b)(4)(a).

identifying one driving recklessly, would the caller still be exempted under the emergency caller provision? If so, how reckless would the driver have to be to justify the exemption? If the caller is prosecuted for violating the statute, what is the requisite burden of proof in showing that the unidentified driver was driving in a sufficiently reckless manner to justify use of the hand-held device? The statute's ambiguity as to what constitutes an emergency situation may have a chilling effect on some drivers, dissuading them from using their hand-held devices in a borderline "emergency" situation for fear of being prosecuted under the statute.

## 2. Enforcement

Perhaps the most serious problem with the current legislation is the issue of enforcement. Although Connecticut's cellular phone ban has been in place for almost three years, a recent poll conducted shows that only half of Connecticut drivers surveyed felt that the legislation was "relevant to them personally."<sup>135</sup> In Connecticut, New York, and New Jersey, where bans on hand-held devices are currently enacted, only 45% of drivers surveyed felt the legislation was relevant to them personally and only 14% of drivers who admitted to using a cellular phone while driving reported that they always use a hands-free device while operating a vehicle (even though 72% claimed to own a hands-free device).<sup>136</sup> In other areas of the country, the number of drivers who admitted to using a cellular phone while driving was even higher. In the Southern region of the country, for example, 77% of drivers surveyed admitted to using a cellular phone while driving.<sup>137</sup> In total, 72% of drivers surveyed claimed to use a hand-held device while driving.<sup>138</sup> Even in states with hand-held cell phone bans, almost half of the drivers surveyed admitted to using a hand-held device while driving.<sup>139</sup> Many drivers simply do not feel that the law applies to them.<sup>140</sup> A surprising number of people surveyed had no idea whether their state even had a law regulating cellular phone use while driving.<sup>141</sup>

Connecticut's cell phone ban also experiences efficacy problems because many drivers simply ignore the law.<sup>142</sup> Reinforcing many drivers' feelings of safety from prosecution is the fact that very few offenders are

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<sup>135</sup> *New York Region Drivers Support but Disregard Hands-Free Laws*, GOV'T TECH., Oct. 2, 2007, <http://www.govtech.com/dc/150451> [hereinafter GOV'T TECH].

<sup>136</sup> *Id.*

<sup>137</sup> Harris Interactive, *The Harris Poll #46: Despite Understanding Risks Many U.S. Adults Still Use Cell Phones While Driving*, June 6, 2006, [http://www.harrisinteractive.com/harris\\_poll/index.asp?PID=673](http://www.harrisinteractive.com/harris_poll/index.asp?PID=673).

<sup>138</sup> *Id.*

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

<sup>140</sup> GOV'T TECH., *supra* note 135.

<sup>141</sup> Harris Interactive, *supra* note 137 (finding that 25% of people surveyed were unsure as to whether their state regulated cell phone use while driving).

<sup>142</sup> *Conn. Drivers Ignore Cell Phone Ban*, INS. J., Oct. 2, 2007, available at <http://www.insurancejournal.com/news/east/2007/10/02/83937.htm>.

ever actually prosecuted. During the first six months of 2007, more than 50% of the tickets issued for using a cellular phone while driving were dismissed from court (an increase of 30% from the previous year).<sup>143</sup> In New York, where a cell phone ban has been in effect since November of 2001, drivers who use cellular phones while driving still use hand-held devices 36% of the time. Of those, only 4% claimed to have ever received a ticket for the infraction. Although some legislators have considered the possibility of making the statute stricter,<sup>144</sup> the effort seems moot if the law is ignored by most drivers and not enforced anyway. If a majority of cases charging drivers with violating the law are ultimately dismissed—perpetuating the façade by circulating offenders through the judicial system in an unending exercise in futility—enforcing the statute becomes little more than a waste of time, judicial resources, and tax payer money.

## V. LEGISLATIVE PURPOSE GONE AWRY

### A. *The Status Quo*

The Connecticut legislation is not working.<sup>145</sup> Considering that more than half of the tickets issued for infractions were dismissed,<sup>146</sup> many are growing frustrated with what is commonly interpreted as lagging enforcement of the statute.<sup>147</sup> In an effort to increase compliance, legislators are considering a broad spectrum of possible remedies from decreasing fines to increasing fines, or eliminating the current “free pass” policy for first time offenders (who are able to produce proof of purchase of a hands-free unit).<sup>148</sup> While many in the legislature point the finger at those enforcing the law, law enforcement blames a lack of education and public awareness.<sup>149</sup> The gamut of proposed courses of action point clearly to one conclusion: the government knows neither of a remotely effective means of remedying the problem nor what is the true problem.

In New York, the cell phone ban instituted in 2001 garnered short term results, but within one year the percentage of drivers using hand-held

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<sup>143</sup> *Lawmakers Considering Reforms to Cell Phone Ban Law*, ASSOCIATED PRESS, Oct. 15, 2007, available at <http://www.wtic.com/Lawmakers-Considering-Reforms-to-Cell-Phone-Ban-La/1090860>; see also Tina Detelj, *Despite Law, Many Still Talking While Driving*, WTNH.COM, Oct. 2, 2007, available at <http://www.wtnh.com/Global/story.asp?S=7159245> (noting that enforcement of the cell phone ban in Connecticut has been lax).

<sup>144</sup> *Lawmakers Considering Reforms to Cell Phone Ban Law*, *supra* note 143.

<sup>145</sup> See *supra* Part IV.E.2 (detailing the deficiencies with the Connecticut cell phone legislation).

<sup>146</sup> *Id.*

<sup>147</sup> *Lawmakers Question Effectiveness of Cell Phone Ban in Cars*, WTNH.COM, Oct. 14, 2007, <http://www.wtnh.com/Global/story.asp?S=7211593&nav=3YeX>.

<sup>148</sup> CONN. GEN. STAT. § 14-296aa(g) (Supp. 2006); *Lawmakers Considering Reforms to Cell Phone Ban Law*, *supra* note 143 (detailing the broad spectrum of remedies currently being considered); *Lawmakers Question Effectiveness of Cell Phone Ban in Cars*, *supra* note 147 (also detailing potential legislative remedies).

<sup>149</sup> *Lawmakers Considering Reforms to Cell Phone Ban Law*, *supra* note 143.

cellular phones increased to nearly pre-ban levels.<sup>150</sup> During the same period, Connecticut was able to maintain an average hand-held cell phone use rate of 3.1% even without a cellular phone prohibition—results close to those experienced in New York, yet without the added fiscal expense and time expenditure involved in passing legislation. In New York, studies indicate that enforcement has occurred at a steady rate.<sup>151</sup> However, a drop in the public awareness originally spawned by a flurry of advertisements adversely affected drivers' compliance with the law.<sup>152</sup> In comparison to similar highway safety campaigns, such as enforcement of seat belt and drunk driving laws, publicity proved to be an integral factor in successful enforcement.<sup>153</sup>

In New Jersey, where using a hand-held device while driving constituted a secondary offense until 2008,<sup>154</sup> 43% of drivers still admit to doing so.<sup>155</sup> Of those surveyed, none reported ever receiving a ticket for using a hand-held device while driving.<sup>156</sup>

Washington, D.C. has enjoyed comparative success: its cell phone ban resulted in a 50% decline in use of hand-held cellular phones while driving.<sup>157</sup> However, much of Washington's success has been attributed to an aggressive enforcement of the statute. In Washington, tickets attributed to cell phone violations represent 8% of all the moving violations, while New York's reported cell phone violations accounted for only 4% of moving violations.<sup>158</sup>

Overall, in states that have enacted legislative bans on driving while using hand-held cellular phones, almost half of all drivers surveyed still admit to using hand-held devices while driving.<sup>159</sup> Such results show

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<sup>150</sup> A.T. McCartt & L.L. Geary, *Longer Term Effects of New York State's Law On Drivers' Handheld Cell Phone Use*, 10 *INJ. PREVENTION*, 11–12 (2004). New York's pre-law handheld cell phone use rate of 2.3% declined significantly to 1.1% immediately after the law took effect. Use then rose during the following year to 2.1% in March 2003, a level significantly higher than the short term compliance rate, and nearly equal to the pre-law rate. During the same time periods, the combined rate for the Connecticut communities surveyed was 2.9% before the New York law, 2.9% immediately after the law, and 3.3% in March of 2003. *Id.*

<sup>151</sup> *Id.* at 14.

<sup>152</sup> *Id.* at 13; Alicia Chang, *Study: Drivers Ignore N.Y. Cell Phone Ban: Compliance With Law Drops After Initial Surge of Publicity*, *MSNBC.COM*, Feb. 4, 2004, <http://www.msnbc.msn.com/id/4162174/>.

<sup>153</sup> Chang, *supra* note 152. Ironically, soon after, in an effort to discourage cell phone use while driving, Assemblyman Felix Ortiz (who fought to pass the cell phone ban) announced legislation to release a toll-free hotline for motorists to call if they witness drivers using cell phones. *Id.*

<sup>154</sup> See State of New Jersey Motor Vehicle Commission, *supra* note 40 (explaining that until 2008, New Jersey's cell phone statute limited enforcement of violations to situations where a motorist was cited for another motor vehicle violation).

<sup>155</sup> *GOV'T TECH.*, *supra* note 135.

<sup>156</sup> *Id.*

<sup>157</sup> Chad Lawhorn, *Lawrence Cell Phone Ban Would Be Strictest: Prohibition Would Include Even Hands-Free Devices*, *LAWRENCE JOURNAL-WORLD*, June 1, 2006, available at [http://www2.ljworld.com/news/2006/jun/01/lawrence\\_cell\\_phone\\_ban\\_would\\_be\\_stricest/?city\\_local](http://www2.ljworld.com/news/2006/jun/01/lawrence_cell_phone_ban_would_be_stricest/?city_local).

<sup>158</sup> *Id.*

<sup>159</sup> Harris Interactive, *supra* note 137.

serious fundamental flaws in the current use of legislation to ban such conduct. If the success of legislative bans on cell phone use is completely dependent on large-scale advertising campaigns and extremely aggressive enforcement, it may prove to be more expensive than beneficial. Similar reasoning has influenced much of Canada to decline to adopt similar legislation.<sup>160</sup> Considering cell phone bans “counterproductive, irresponsible and unenforceable,” Canadians found it far more effective to simply enforce reckless driving laws already in force rather than write new, unnecessary ones.<sup>161</sup> In Kentucky, where lawmakers refused to support similar legislation, Representative Sal Santoro explained the unnecessary nature of cell phone bans by stating:

[w]hen I was a trooper I would pull motorists over for reckless driving and find out they were putting on makeup or reading a road map I didn't need a special law to charge them; we already outlaw reckless driving. We don't need to create another law to deal with this.<sup>162</sup>

With only five states currently supporting such statutes, it becomes undeniably evident that cell phone bans aren't the panacea legislators have led us to believe.

Instead, experience shows that lagging enforcement is a growing problem in many of the states that have enacted cell phone bans (combined with the fact that many citizens blatantly ignore the laws anyway). Therefore, people must ask whether it is of any value to legislate the modern-day equivalent of blue laws into an already cluttered and exceedingly complex system.

#### B. *Are Bans Really the Answer?*

Cell phone bans fail to resolve the issue of distractive driving—they merely address one potential cause of distraction while ignoring the numerous other potential sources. They may even serve to exacerbate the problem. Outright bans fail to weigh the advantages cell phones offer drivers. Besides the obvious ability of drivers to use their cell phones to report accidents, drunk drivers, crimes, or traffic congestion, they also allow drivers to be contacted in emergency situations, help relieve stress

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<sup>160</sup> Newfoundland enacted a cell phone ban in 2002, followed by Quebec in April, 2008. However, none of the other provinces have since followed suit. *Countries That Ban Cell Phones While Driving*, *supra* note 43. Two years after the Newfoundland ban took effect, only 280 drivers were cited for violations. Jeff Nagel, *Jury Out On Cell Phone Bans*, RICHMOND REVIEW, May 13, 2006, available at <https://www.yourlibrary.ca/community/richmondreview/archive/RR20060513/morenews.html>.

<sup>161</sup> *Cell Phone Use Skyrockets While Road Fatalities Drop? Where's The Evidence To Ban Car Phones?*, CANADA SAFETY COUNCIL, Feb. 2, 2002, available at <http://www.safety-council.org/news/media/releases/feb6-cell.html>.

<sup>162</sup> Patrick Crowley, *Northern Kentucky Not Hung Up on Cell Phone Ban*, CINCINNATI ENQUIRER, Dec. 27, 2007, at 1A, available at LEXIS, News Library, CINNEN File.

during periods of severe traffic congestion, reduce boredom, and provide a level of convenience that may reduce the urgency a person may feel in getting to their destination. By providing a tardy driver with a means to contact someone at their point of destination, the driver may not consider it necessary to speed or drive recklessly in an attempt to avoid arriving late. Additionally, cell phones may offer the important benefit of helping drowsy drivers stay awake.<sup>163</sup>

Forcing drivers to pull over to use their cell phones while in transit can also create dangerous driving conditions. In an attempt to answer an important phone call, a driver may carelessly cross lanes to pull over, risking a collision with a car in an adjacent lane, or decelerate too quickly, causing a collision with the car immediately following. There is also the potential for accidents caused by rubbernecking as drivers strain to ascertain why a motorist may be pulling over.

Moreover, as discussed *infra*, partial bans that allow the use of hands-free devices while driving may provide drivers with a false sense of security. This may lead them to believe that hands-free devices are safer than hand-held units, influencing them to use their cell phones more frequently and for longer periods.<sup>164</sup>

While the use of cell phones while driving may increase the risk of automobile accidents, that risk is relatively low compared to other distractive stimuli.<sup>165</sup> Mere risk alone does not justify regulation, nor does the existence of risk combined with someone's personal judgment. Such an approach to regulation is overly simplistic considering the broad range of activities that carry with them some risk of harm (and yet do not necessitate legislative regulation).<sup>166</sup>

Using a cost-benefit analysis, scientists have concluded that cell phone bans are not a cost-effective means of saving lives.<sup>167</sup> Even a ban only on hand-held devices would fail a cost-benefit test unless it could reduce accidents by an enormous amount (25% or more).<sup>168</sup> Many other safety precautions and regulations would be of greater value and pose less theoretical cost to the driver than a cell phone ban.<sup>169</sup>

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<sup>163</sup> See Bhargava & Pathania, *supra* note 65, at 42 (noting that the National Highway Traffic Safety Administration reported that approximately 100,000 crashes, and 1500 fatal crashes each year are attributable to driver fatigue or sleepiness). The danger is "particularly pronounced for drivers accustomed to driving long distances or long hours," and it is possible that "cell phone use actually reduces fatigue and leads to safer outcomes" for many drivers. *Id.*

<sup>164</sup> Hahn & Dudley, *supra* note 82, at 166.

<sup>165</sup> See *supra* Part IV.A (explaining that a majority of accidents caused by driver distraction stem from distractions occurring outside the car; cell phone use has a considerably smaller distractive effect than other distractive stimuli studied).

<sup>166</sup> Hahn & Dudley, *supra* note 82, at 144-45.

<sup>167</sup> *Id.* at 146.

<sup>168</sup> *Id.* at 148. Current bans are nowhere near achieving these types of reductions. *Id.*

<sup>169</sup> *Id.* at 149. The study concluded that policies requiring such features as front crash passenger and driver airbags, side door beams, seat-belt policies, and daytime running lights, would actually

Another argument against cell phone bans focuses on the desire to limit governmental interference in the lives of its citizens. The over-regulation argument follows the “slippery slope” archetype, contending that the government has no right to ban every potentially dangerous conduct affecting its citizens. Ultimately, there are times when people simply have to be responsible for their own behavior.<sup>170</sup> If certain distractive driving conduct can be regulated, what will prevent the enactment of legislation prohibiting *any* driving conduct that does not exclusively emphasize maintaining both hands on the steering wheel and eyes permanently fixated solely on the view outside the front windshield?

### C. Case Law

There have been a limited number of cases related to accidents caused by drivers using a cell phone, but the jury decisions were hardly indicative of an overwhelming public opinion either for or against holding drivers specifically responsible for using a cellular phone while driving. Between 1990 and 1999, there were thirty-four tort cases related to cellular phone use while driving.<sup>171</sup> Of those, fourteen resulted in verdicts for the plaintiffs, eleven verdicts for the defendants, six were settled, and three were resolved in some form of alternative dispute resolution.<sup>172</sup>

### D. Other Schools of Thought

#### 1. Total Bans

As of yet, no state has enacted a total ban on the use of cellular phones while driving.<sup>173</sup> In consideration of the problems currently experienced with enforcement of partial bans, it seems highly unlikely total bans would be any more effective, and could actually exacerbate some of the ill effects associated with hand-held bans.<sup>174</sup> A complete ban could also deter cellular phone manufacturers from introducing safer cellular phones or ameliorative accessories. Since any device would be prohibited under the legislation, there would be no incentive for manufacturers to develop the

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reduce costs and be less expensive than a cell phone ban. Fifty-five mile-per-hour speed limits, on the other hand, would be more expensive than a cell phone ban. These costs, considered “inconvenience” costs, are closely analogous to those incurred with cell phone bans—also considered inconvenience costs. Finally, the study notes that many states, despite the risks, have nonetheless raised their speed limits to sixty-five miles-per-hour. *Id.*

<sup>170</sup> Nagel, *supra* note 160.

<sup>171</sup> Terry Carter, *Crash Course For Business: Companies Can Be Liable For Accidents Resulting From Job-Related Cell Phone Use*, 85 A.B.A. J., 40 (Aug. 1999).

<sup>172</sup> *Id.*

<sup>173</sup> Governors Highway Safety Ass’n, *supra* note 33.

<sup>174</sup> See *supra* Part V.B (stating that bans allowing the use of hands-free devices while driving may provide drivers with a false sense of security, leading drivers to believe that hands-free devices are safer than hand-held units, potentially influencing them to use their cell phones more frequently and for longer periods).

new technology.

## 2. Tort Liability for Mobile Service Providers

One liability regime suggested by attorney Jordan Michael in his *North Dakota Law Review* article focuses on placing liability for accidents caused by distracted drivers using cellular phones on the cell phone manufacturers.<sup>175</sup> The theory rests on the concept that either cellular phones could fall under a strict liability regime, or that cell phone manufacturers should be held liable under a negligence theory for “failure to warn cell phone users of the danger of dialing while driving.”<sup>176</sup> Michael primarily considers the negligence theory, relying on the Restatement (Third) of Torts, which advocates a negligence standard for warning and design defects.<sup>177</sup> Quoting section 2(c) of the Restatement (Third), Michael reasons that a product is defective when:

inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.<sup>178</sup>

A cell phone by itself is clearly not inherently dangerous. With the growing publicity surrounding cell phone use while driving, though, it seems imprudent to oppose the inclusion of an express warning label in the packaging of new cell phones since the risk of danger—even if inconclusive, often misleading, and typically hype-propelled—is nonetheless foreseeable to cell phone manufacturers. However, following the chain of logic that results in the provision of express warnings for any product carrying a foreseeable risk of harm would result in over-inclusive regulation. First, manufacturers would be forced to include warning labels on everything from cans of soda to cheeseburgers to tubes of mascara that may be used while driving, to silverware sets that could foreseeably poke an eye out if used improperly. Almost any product manufactured today has some sort of foreseeable risk of danger associated with it. Detrimental ambiguity in the proposal arises in determining what constitutes a “foreseeable risk.” But how foreseeable is sufficiently “foreseeable”? Subjecting product manufacturers to what could be little more than whimsical finger-pointing could have an adverse effect on the

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<sup>175</sup> Jordan Michael, *Liability For Accidents From Use And Abuse of Cell Phones: When Are Employers And Manufacturers Liable?*, 79 N.D. L. REV. 299, 307 (2003).

<sup>176</sup> *Id.* (internal quotation omitted).

<sup>177</sup> *Id.* at 308.

<sup>178</sup> RESTATEMENT (THIRD) OF TORTS § 2(c) (1997).

manufacturer's willingness and ability to make their products safer, and could perhaps force the company to cease manufacturing the product in question.<sup>179</sup>

Second is the issue that since practically every product manufactured today has some foreseeable risk of danger, and if warning labels are required on all such products, such labels would become ineffective. If too many products are labeled as dangerous, the impact of the labels themselves would be diluted to the point of impotence.

Third, we must consider whom to hold liable for negligence. If a driver, legally using a hands-free kit attached to a hand-held unit, is involved in an accident, it must first be determined whether driver distraction was the cause of the accident. Then, it must be determined whether the use of the cellular device sufficiently contributed to that distraction (the driver may have been simultaneously eating or applying make up). Should courts be expected to utilize a comparative negligence formula to divide liability between a cell phone and a secondary distractive source such as a cup of coffee? Subsequently, it must be determined whether to hold the manufacturer of the hand-held cell phone or the hands-free device liable. How is a court to determine which item contributed more significantly to the driver's distraction? Furthermore, perhaps the car manufacturer should share in the liability because by including cigarette lighters in their cars, they failed to adequately warn of the risk they may be condoning, acknowledging that cell phones are commonly charged in such outlets and thus utilized in their cars. Or for that matter, perhaps the company that produces the charging apparatus should also share in the liability for encouraging cell phone use in automobiles. Finally, should the state that legislatively condones the use of hands-free devices bear some liability for promoting the safety of such devices?

The theory of manufacturer liability is underdeveloped and shortsightedly misplaced and could create a parade of horrors requiring copious amounts of legislation merely to clean up the litigious agglomeration created by a rush to divert responsibility from the consumer to the deeper-pocketed manufacturer.

### 3. *Tort Liability for Employers*

Another theory of liability, at least when drivers cause accidents while using cellular phones within the capacity of their employment, relates to the doctrine of respondeat superior, which states that an employer is liable for an employee's wrongful acts committed within the scope of the

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<sup>179</sup> While the phrase "whimsical finger-pointing" seems to discount the gravity of the driver distraction issue associated with cell phone use, given the radically conflicting studies and inconclusive reports, it would be overindulgent to give the determination process described any more weight.

employment.<sup>180</sup> Influenced in part by fears of legal liability, increased insurance premiums, and workman's compensation claims, numerous employers have taken steps to prohibit or limit their employee's use of cell phones while driving.<sup>181</sup> While the concept of employers facing liability for automobile accidents caused by their employees is not new, cell phone use by employees poses many uncertainties to the respondeat superior liability regime.<sup>182</sup> For example, should the employer be held liable only when an employee is driving within the scope of her employment *and* using a cellular phone also within the scope of her employment?<sup>183</sup> What if the employee is acting within the capacity of employment by driving, but the phone call itself is of a personal nature?<sup>184</sup>

Applying the respondeat superior liability regime also poses questions that would need resolution before the theory could prove effective. Many of those issues, however, would be resolved if a more efficient, all-encompassing enforcement regime were in place.

#### 4. *Modify Penalties*

Other schools of thought focus on alteration of the penalties for violating the cell phone ban. Suggestions range from increasing fines (presumably under the impression that a more severe penalty will deter potential offenders),<sup>185</sup> to reducing fines in hopes of encouraging sympathetic police officers to enforce the law as opposed to only issuing warnings.<sup>186</sup> Legislators have also considered revoking the policy of dismissing the cases of first-time offenders who later prove the purchase of a hands-free unit.<sup>187</sup>

As mentioned above, the lack of consensus and seemingly contravening proposals for remedial measures reveals not only that the legislature does not know what will resolve the driver distraction issue, but they may not know the actual problem.<sup>188</sup> The reason cell phones have

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<sup>180</sup> BLACK'S LAW DICTIONARY 1338 (8th ed. 2004).

<sup>181</sup> Hahn & Dudley, *supra* note 82, at 181 (stating that it is unclear, however, whether these policies are actually enforced, or have merely been enacted to provide employers with refuge from legal liability); Michael, *supra* note 175, at 301-02.

<sup>182</sup> Michael, *supra* note 175, at 302-03.

<sup>183</sup> For example, Dyke Industries, an Arkansas-based lumber wholesaler, was sued when one of its salesmen was involved in a car accident while using a cellular phone. The jury awarded the plaintiff \$21 million, however the parties later settled for \$16.2 million. *Id.* at 304.

<sup>184</sup> See, for example, the case of Jane Wagner, an attorney who was involved in an accident while on her cell phone (which resulted in the death of a fifteen year old girl). Parents of the girl filed suit against Wagner and the law firm that employed her. Both Wagner and her employer denied that the phone call Wagner was on at the time of the accident was work-related. *Id.*

<sup>185</sup> See *supra* note 147.

<sup>186</sup> *Lawmakers Considering Reforms to Cell Phone Ban Law*, *supra* note 143.

<sup>187</sup> See *supra* note 147 and accompanying text.

<sup>188</sup> See *supra* Part V.A (explaining that the proposals, some of which are diametrical to each other, evidence a lack of understanding of the issues involved in ameliorating the problem of distracted driving).

become the scapegoat for many may have deep rooted psychological implications not only for the policy makers, but for the public as well. Psychological research has discovered that “risk perception can be influenced by factors other than the actual magnitude of the risk and some of those factors appear to be present in the case of cell phones.”<sup>189</sup> The “availability-bias” is a very significant factor in people’s perception of cell phone use while driving.<sup>190</sup> This bias describes how people typically place excessive emphasis on “available information in framing an issue,” causing them to overestimate the risks they can more easily identify and remember.<sup>191</sup> When the victims of the issue are more identifiable—such as when media coverage is more extensive, as it is currently with the cell phone issue—the effect of the bias is compounded.<sup>192</sup>

Perceived benefits of a specific conduct can also influence risk perception.<sup>193</sup> When the benefits of a particular conduct are small or difficult to perceive, people may tend to overestimate the risk involved.<sup>194</sup> The benefits associated with being able to use a cellular phone while driving are not always easily observed, at least not as easily as the potential negative impact. While many people have no trouble recounting stories of a negligent driver using a cellular phone (whether experienced first-hand or not), or envisioning the scene of a terrible automobile accident, few as readily perceive the benefits of a cell phone, like reduced stress, boredom, and fatigue.<sup>195</sup>

Risks may also be overestimated if they are new or unfamiliar, as cell phone technology arguably is, giving the public the mistaken impression that the problem is greater than it really is.<sup>196</sup> Beyond the risk the media presents of driving while using a cell phone, the public is barraged with fantastic stories of cancer caused by radiation emitted from cell phones or cell phone towers, cell phones causing explosions at gas stations, among other things.<sup>197</sup> The novelty of cellular technology allows the media to prey upon the public’s lack of experience and foster fear based on ignorance. This burgeoning hot bed of conflict subsequently makes for the perfect soap box for many politicians. After the media have stirred up sufficient public disquietude regarding unsubstantiated dangers of cell phone use while driving, politicians have the luxury of swooping in and advocating the metaphorical crucifixion of the industry, to the glowing

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<sup>189</sup> Hahn & Dudley, *supra* note 82, at 170.

<sup>190</sup> *Id.* at 170–71.

<sup>191</sup> *Id.* at 170.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 173.

<sup>194</sup> *Id.*

<sup>195</sup> See *supra* Part V.B (discussing some of the benefits afforded by cellular technology).

<sup>196</sup> Hahn & Dudley, *supra* note 82, at 174.

<sup>197</sup> *Id.*

response of the citizens.

E. *A Possible Solution*

1. *Safer Mobile Electronic Devices*

Mobile technology manufacturers have an obligation to play a significant role in reducing the risk of using cellular devices while driving. While, as noted above, the actual biomechanical and visual distraction risk posed by cellular phones is minimal when compared to other factors,<sup>198</sup> the development of safer products by the mobile technology industry would help minimize the risk even more. One of the most significant reasons not to institute a ban on the use of cellular phones while driving is that it may tend to chill efforts in the mobile phone industry to develop safer products. It is of critical importance that society incentivizes the mobile technology industry to invest in safety; punishing the industry for the conduct of its consumers misses the mark and could result in a retardation of technological progress in the field of safety. A pragmatic approach would take into account both short term, more easily implemented goals, and a long term strategy that would incentivize more dynamic efforts and a cross-incorporation of technology between the mobile communications industry and the automobile industry.

Optimal short term goals could include the development of better functioning, simpler hands-free devices that curb problems associated with excessive biomechanical manipulation required to answer or make calls, and improving the sound quality of such devices.<sup>199</sup> More ergonomically sound cell phone designs would also help minimize distractive potential.<sup>200</sup> The current trend toward miniaturization of mobile units (including smaller display screens, smaller buttons, etc.) makes utilization of the product more difficult, less safe, and places greater demand on the user.<sup>201</sup> A move away from this trend would facilitate use and allow drivers to concentrate more on the task of driving than accurately pressing unnecessarily small buttons. More extensive utilization and industry-wide simplification of completely voice-controlled units would help diminish the biomechanical distraction associated with manually operating cellular devices. While voice activated technology is already available in some mobile units, greater publicity efforts touting the safety benefits and ease of use could have a significant effect on demand. Currently, separate phone-mounting systems can be purchased that allow cell phone users to dock their cell

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<sup>198</sup> Hahn & Dudley, *supra* note 82, at 155.

<sup>199</sup> See Stellin, *supra* note 109, at G9 (discussing many of the shortcomings of the current hands-free devices available on the market).

<sup>200</sup> Nat'l Highway Traffic Safety Admin., *supra* note 67, at 6.2.

<sup>201</sup> *Id.*

phones to the dash board of the vehicle. A system of microphones and speakers in the docking unit automatically converts the hand-held device into a completely hands-free speaker phone (and provides the added benefit of charging the cellular phone battery while docked).<sup>202</sup> More public awareness of such accessories could greatly reduce the risk of distraction posed by mobile electronic devices.

Long-term goals could include a cross-incorporation of technology between the mobile communications industry and automobile manufacturers. In this approach, automobile manufacturers would integrate systems into their vehicles that automatically detect the presence of a cellular device on the person of the driver (the driver would previously have to sync her cell phone device with the in-car system) and enable calls to be made and answered by voice command with the aid of a factory installed microphone and speaker system. Similar systems have already been implemented by some automobile manufacturers in their higher-end model. For example, 2008 Acura<sup>®</sup> TL models come equipped with a hands-free system that combines Bluetooth<sup>®</sup> technology and a factory installed navigation system that allows the driver to answer phone calls, access contact numbers, or even find the nearest Indian restaurant, without having to manually operate the device. All operations are voice activated:

The Bluetooth<sup>®</sup> HandsFreeLink<sup>®</sup> system works with many Bluetooth<sup>®</sup>-enabled cell phones to let you receive and initiate phone calls through the TL audio system without ever taking your hands off the wheel. The Multi-Information Display below the speedometer shows the caller's number, while the center panel display shows reception strength. A one-time pairing process enables the TL to communicate wirelessly with the phone, and up to six different phones can be paired with it at a time. After the initial pairing, a phone can be operated through the vehicle audio system without ever leaving your pocket or purse. The system allows you to import a compatible phone's contact information in a single process, using the Acura Navigation System<sup>®</sup> interface. For each paired phone, up to 1000 names can be entered, with ten available numbers per name.<sup>203</sup>

Embellishing on similar technology, Microsoft<sup>®</sup> recently unveiled Sync, a voice-activated, in-car communication and entertainment system

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<sup>202</sup> Jim Hanks, *Tips For Driving Responsibly While Using Your Cell Phone*, HELLODIRECT.COM, <http://telecom.hellodirect.com/docs/Tutorials/DrivingResponsibly.1.061101.asp> (last visited Aug. 27, 2008).

<sup>203</sup> Acura TL Audio and Communication Features, <http://www.acura.com/> (follow "TL" hyperlink, then follow "Features" hyperlink, then follow "Audio & Communication" hyperlink, then follow "Bluetooth Hands Free Link" hyperlink).

enabling the driver to simultaneously control both a cellular phone and a digital music player.<sup>204</sup> The Sync system enables the driver to make and answer phone calls and select music to listen to by using voice commands.<sup>205</sup> Beginning in 2008, the Sync system will also enable connection to emergency 911 services and even provide a vehicle health report at the driver's command.<sup>206</sup> The system is currently offered, factory installed, by select automobile manufacturers in North America.<sup>207</sup>

Further safety features could include a factory installed system that detects erratic motion (such as lane diversion or sudden swerving), oncoming traffic congestion, or other approaching hazards, and subsequently notifies the driver through an auditory alarm which would refocus the distracted driver's attention.<sup>208</sup>

As an incentive to the mobile communications industry, the government could award short term contracts with automobile manufacturers to the mobile communications company introducing products with the most effective safety features. These contracts would allow the mobile communications manufacturer exclusive rights to supply participating automobile manufacturers with factory installed mobile technology devices for a set term.<sup>209</sup> The automobile manufacturers would either be mandated to exclusively use the mobile units prescribed by the government or could perhaps receive the units at a discounted rate from the mobile communications company, who then would receive a government subsidy for the discount.

## 2. *Graduated Licenses*

Given that drivers under the age of twenty are most likely to be distracted while driving,<sup>210</sup> and that the risk of automobile accidents is higher among drivers between the ages of sixteen and nineteen than among

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<sup>204</sup> About Sync, [http://www.syncmyride.com/default.aspx?UserCulture=en-US#/overlay/overlay\\_what\\_is\\_sync](http://www.syncmyride.com/default.aspx?UserCulture=en-US#/overlay/overlay_what_is_sync).

<sup>205</sup> *Id.*

<sup>206</sup> About Sync, [http://www.syncmyride.com/default.aspx?UserCulture=en-US#/overlay/overlay\\_coming\\_fall\\_2008](http://www.syncmyride.com/default.aspx?UserCulture=en-US#/overlay/overlay_coming_fall_2008).

<sup>207</sup> About Sync, *supra* note 204.

<sup>208</sup> Similar technology is already being implemented through "Intelligent Transportation Systems," such as the Collision Avoidance System, that uses "vehicle-mounted sensors to detect obstructions, such as other vehicles, road debris, or animals, in a vehicle's path and alert the driver." U.S. Dep't of Transp., Intelligent Transp. Sys., <http://www.itsoverview.its.dot.gov/Options.asp?System=CWS&SubSystem=OD&Tech=Obstacle>.

<sup>209</sup> The term should be relatively brief, somewhere between one and three years, so as to encourage continued research and development of safer devices and to ensure that automobiles are equipped with the safest mobile units available at the time. Obviously, many issues that are beyond the scope of this Note would need to be resolved regarding inclusion of foreign manufacturers (of both automobiles and mobile electronic devices), compatibility of all devices, etc. The approach proposed is merely a hypothetical outline of a potentially advantageous course of action.

<sup>210</sup> STUTTS ET AL., *supra* note 14, at 13.

any other age group,<sup>211</sup> a statutory provision specifically addressing inattentive driving among young drivers would clearly be justified.

Connecticut's current legislation states that any person under the age of eighteen who receives a driver's license cannot carry passengers other than a licensed parent or guardian who is twenty-five years of age or older, or a driving instructor, for the first three months after receiving the license.<sup>212</sup> For the next three months, drivers with a driver's license are subject to the same limitations but may also carry an immediate family member as a passenger.<sup>213</sup> Connecticut legislation also prohibits any driver under the age of eighteen from using any kind of cellular phone or mobile electronic device, whether hand-held or hands-free (except in emergency situations).<sup>214</sup>

This statutory provision, similar to the regular cellular phone ban, also fails to remedy the true issue at hand—distracted driving. By only focusing on cellular phone use, the law neglects to consider that, given the natural propensity of drivers in this particular age group to be involved in automobile accidents, it would be far more effective and prudent to proscribe a broader range of distractive conduct. If the legislature is within its power to restrict the number and type of occupant permitted to accompany certain drivers, it should also be within their ability to prohibit and penalize distractive conduct such as applying makeup or eating while driving. Not only does omitting other distractive behavior from the statute ignore more common and significant causes of distracted driving, it could inadvertently promote the mistaken idea that other behaviors, because they are legally acceptable, are safer. The proper course of action would also emphasize comprehensive education programs for teens, highlighting the risks of distractive driving and ways to ameliorate such driving habits.

### 3. *Equal Treatment Using Pre-Existing Legislation and a Graded Negligence Standard*

Utilizing already-existing legislation to combat the issue of distracted driving makes more efficient use of legislative time and resources than drafting new statutes to address minute potential sources. A more effective treatment of distracted driving would involve comprehensive education programs concerning the risks of distractive driving and the utilization of already-existing statutes<sup>215</sup> combined with a graded negligence standard.

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<sup>211</sup> Centers for Disease Control and Prevention, *Teen Drivers: Fact Sheet*, available at, <http://www.cdc.gov/ncipc/factsheets/teenmvh.htm> (last visited Aug. 27, 2008). In fact, drivers between the ages of sixteen and nineteen are four times more likely to be involved in an automobile accident than any other age group. *Id.*

<sup>212</sup> CONN. GEN. STAT. § 14-36g(a)(1) (Supp. 2006).

<sup>213</sup> *Id.* § 14-36g(a)(2).

<sup>214</sup> *Id.* § 14-296aa(b)(1).

<sup>215</sup> A similar approach has long been supported by the wireless industry, which advocates “the enforcement of existing reckless driving laws as the most effective way to address all potential

This resolution could account for the idiosyncratic factors causing distracted driving.

Most states currently have some form of reckless driving legislation (although textual nomenclature may vary from state to state).<sup>216</sup> Connecticut's reckless driving statute prohibits driving faster than eighty-five miles-per-hour or at a rate of speed "as to endanger the life of any person other than the operator of such motor vehicle, or the operation, downgrade, upon any highway, of any motor vehicle with a commercial registration with the clutch or gears disengaged, or the operation knowingly of a motor vehicle with defective mechanism."<sup>217</sup> It also prohibits reckless driving, "having regard to the width, traffic and use of such highway, road, school property or parking area, the intersection of streets and the weather conditions."<sup>218</sup> Reckless driving has been further clarified by Connecticut courts as not lying "in speed alone, but in that and other circumstances which together show a reckless disregard of consequences."<sup>219</sup> However, reckless driving connotes a level of severity that many distracted drivers would fail to meet:

Recklessness is a state of consciousness with reference to the consequences of one's acts. . . . It requires a conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man, and the actor must recognize that his conduct involves a risk substantially greater . . . than that which is necessary to make his conduct negligent . . . . It is more than negligence, more than gross negligence. . . . The state of mind amounting to recklessness may be inferred from conduct. But, in order to infer it, there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them.<sup>220</sup>

Reckless conduct requires that the actor know (or should have known) that the conduct in question "not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that

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distractions drivers face while behind the wheel." *Wireless Industry Responds to Article on Wireless Phone Use While Driving: More Certainty, Less Sensationalism Needed*, U.S. NEWSWIRE, Jan. 11, 2002, available at LEXIS, News Library, UNSWR File.

<sup>216</sup> See FINDLAW.COM, *Reckless Driving*, <http://public.findlaw.com/traffic-ticket-violation-law/traffic-ticket-a-z/reckless-driving-laws.html> (last visited Aug. 27, 2008) (providing a state-by-state list of reckless driving statutes).

<sup>217</sup> CONN. GEN. STAT. § 14-222a (2001).

<sup>218</sup> *Id.*

<sup>219</sup> *State v. Andrews*, 142 A. 840, 841 (Conn. 1928).

<sup>220</sup> *State v. Edwards*, 173 A.2d 746, 747 (Conn. Super. Ct. 1961) (internal quotations omitted).

substantial harm will result to him.<sup>221</sup>

Reckless driving statutes should therefore be limited to more severe distracted driving offenses. The Connecticut legislature has numerous other statutory provisions for more minor moving violations that could serve as a contributing variable in a graded negligence equation, including driving at an unreasonable speed,<sup>222</sup> exceeding the posted speed limit,<sup>223</sup> driving too slowly,<sup>224</sup> deviating from the proper lane,<sup>225</sup> following the preceding vehicle too closely,<sup>226</sup> failing to yield to emergency vehicles,<sup>227</sup> and moving a vehicle without signaling or in a way that interferes with traffic.<sup>228</sup> Connecticut legislation also sets forth “damages for personal injury or property damage resulting from certain traffic violations.”<sup>229</sup> The need for additional legislation prohibiting the use of cellular phones while driving—legislation that neglects to address the actual potentially harmful conduct of distracted driving—in the face of adequate pre-existing legislation is completely lacking.

A more effective approach to combating distracted driving should treat all sources of distraction equally, with less focus on the particular distraction’s impetus.<sup>230</sup> Key to this approach is an understanding that it is not the source of distraction that poses the real danger, but the negligence of the driver. Greater attention should be paid to the level of distraction (which could also be interpreted as the level of disregard for the safety of others) in combination with the impact of the conduct itself. Also of importance is the consideration of the gravity of the actual infraction committed. Therefore, the overall negligence of a driver could be calculated using an equation that accounts for the level of distraction, multiplied by a variable which takes into account more flagrant impetuses of distraction (those that evidence a blatantly wanton disregard for the safety of others, such as multiple simultaneous distractive impetuses), added to a predetermined variable representing the perceived severity of the offense committed, multiplied by the overall impact of the conduct (the severity of the outcome). The resulting “overall negligence level” would then be matched to a guideline chart listing a range of negligence levels as well as accompanying advisory punitive measures which the trier of fact could utilize in their sentencing determination. Therefore, where  $D$  equals

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<sup>221</sup> Brock v. Waldron, 14 A.2d 713, 715 (Conn. 1940).

<sup>222</sup> CONN. GEN. STAT. § 14-218a (2001).

<sup>223</sup> *Id.* § 14-219.

<sup>224</sup> *Id.* § 14-220.

<sup>225</sup> *Id.* § 14-230a.

<sup>226</sup> *Id.* § 14-240.

<sup>227</sup> *Id.* § 14-283.

<sup>228</sup> *Id.* § 14-243.

<sup>229</sup> *Id.* § 14-295.

<sup>230</sup> The flagrancy of distractive impetuses would be taken into account and may be represented as a variable multiplied by the level of distraction in the overall negligence equation proposed below.

the level of distraction,  $F$  equals the flagrancy of the distractive impetus,  $S$  equals the predetermined severity level of the actual offense committed,<sup>231</sup>  $I$  equals the impact of the conduct,<sup>232</sup> and  $N$  equals the overall negligence of the driver's conduct, the graded negligence equation would be represented as:

$$N = [D(F) + S] \times I$$

As an illustration, in the instance of a driver who spills a cup of coffee while driving and briefly deviates from her lane without causing any harm or damage, the level of distraction,  $D$ , would be a relatively small number because the level of disregard for safety exhibited by drinking a cup of coffee while driving is minimal. Moreover, the actual distraction (the spill) was unintentional.<sup>233</sup> The flagrancy of the distractive impetus,  $F$ , is also small, as is the predetermined severity level of the offense,  $S$ , (deviation from appropriate lane). The impact of the conduct,  $I$ , would be *de minimis* since no harm or damage ensued from the conduct (only an infraction of the traffic law). The driver's overall level of negligence in this situation would be small, possibly necessitating only a ticket for the infraction of deviating from her appropriate lane and perhaps a warning for distracted driving.

On the other hand, the equation's results would unfold quite differently in a situation involving a person who is driving while simultaneously talking on a cellular phone, smoking a cigarette, and sifting through papers located on the passenger seat, who then subsequently fails to see cars stopped at a traffic light ahead and collides with one of them causing severe injury to the other driver. Obviously,  $D$  would be quite high because the level of disregard for safety exhibited by a driver trying to perform three simultaneous distractive actions while operating an automobile is significant. Given the number of simultaneous distractions, the flagrancy of the distractive impetus,  $F$ , is also very high, as is the predetermined severity level of the offense,  $S$ , (collision with another automobile and whatever other motor vehicle violations are determined). The impact of the conduct,  $I$ , would be significant since the driver of the other vehicle sustained severe injuries. The driver's level of negligence in this situation would be much higher than in the previous example, necessitating a more severe punitive remedy.

The graded negligence standard demonstrated above creates a more

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<sup>231</sup> Each traffic violation could be statutorily assigned a numerical value representing its severity or level of danger.

<sup>232</sup> Impact of conduct could range from *de minimis* (e.g. briefly deviating from one's proper lane without causing any damage) to extremely grave impacts (e.g. vehicular homicide).

<sup>233</sup> In this instance, and probably in many, determination of the values of some of the variables will be a subjective one, ultimately in the hands of the trier of fact, thus leaving room for an *ad hoc* consideration of the particular circumstances of each case.

accurate and just determination of overall negligence. It contemplates a wider range of data and places less importance on the particular distractive impetus, focusing instead on the level of distraction and outcome of the event in question.

## VI. CONCLUSION

Distracted driving is clearly an issue requiring the attention of policy makers. There are many potential sources of distraction for drivers today, cellular phones and mobile electronic devices being among the list. The abundance of studies on the subject of cellular phone use while driving is matched only by the number of contradicting results. Even studies that do concur vary widely in the specifics of their results, making it impossible to reach any logical conclusion.<sup>234</sup>

The only concurrence that can be derived from the multitudinous research is that using a cellular phone while driving presents a risk of distraction; a risk less than many other socially accepted distractive behaviors, but a risk nonetheless. Regardless of the presence of a risk of distraction, without more, regulation is not justified. Cell phone use while driving has become a scapegoat issue for politicians, a hot-button topic for the media, and a source of frustration and resentment for the public. For some, the only conceivable remedy is to ban the practice. That solution, however, is both over- and under-inclusive, ineffectual, and potentially more detrimental than beneficial. A prohibition on cellular phone use while driving would eradicate the many benefits derived from the convenience and added safety of being able to contact others while in transit.

Connecticut's proposed solution has been a statutorily-imposed partial ban, prohibiting hand-held units while condoning hands-free devices. This approach is also ineffective in solving the issue of distracted driving. Ample research shows that hands-free devices are no safer than hand held units, and may ultimately be less safe if drivers use their cellular phones more frequently or for longer periods due to a mistaken belief that using a hands-free device is completely safe. The answer does not lie in increased government interference and regulation of people's daily activities, but in more efficient utilization of the legislative tools already in effect, with minor modifications to accommodate the issue of distracted driving in modern times.

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<sup>234</sup> In her response to a study released by the Harvard Center for Risk Analysis concerning the use of cell phones while driving, Kimberly Kuo of The Cellular Telecommunications & Internet Association stated that "data is limited and conclusions reached are very uncertain. For example, the [Harvard Center for Risk Analysis] article cites a range of 800 to 8000 estimated fatalities and 100,000 to 1 million estimated injuries. That's akin to saying something could be a mouse or an elephant." *Wireless Industry Responds to Article on Wireless Phone Use While Driving*, *supra* note 215.

There is no single catholicon that will remedy all problems associated with distracted or inattentive driving. Instead, many steps must be taken to eliminate the problem. First, the public must be adequately educated about the dangers of distracted driving. This involves more considerable advertising campaigns and educational programs explaining potential sources of distraction and laying to rest many of the myths associated with cellular phone use. The mobile telecommunications and automobile industries should also contribute to the cause of reducing distracted driving risk through more research and development of safer, more integrated systems. Second, a graded negligence standard should also be implemented to better accommodate the unique contours of the problem. This standard would complement existing legislation and serve an adaptive function, allowing pre-existing statutes to more efficaciously provide civil and criminal remedies for distracted driving offenses. Legislative provisions and graded negligence standards will be useless though if the statutes themselves are not enforced locally. Police will need to make a more concerted effort to ticket offenders and more accurately and diligently determine whether distracted driving played a causal role in automobile accidents they investigate. Third and finally, with consistently contradicting data and media hype demonizing cellular phone use, it is of utmost importance that policy makers, researchers, and the public, maintain an open mind, resist jumping to conclusions, drive more conscientiously, and show more respect for those whom with we share the roads.