

## DRIVEN TO DISTRACTED DRIVING IN FLORIDA

Becky N. Saka\*

### I. INTRODUCTION

Your beloved cellphone may be your best friend, but it is also your worst nightmare.<sup>1</sup> Your cellphone demands your attention no matter where you are or what you are doing.<sup>2</sup> Even when your cellphone does not demand your attention by vibrating or ringing, you probably still feel the need to check it.<sup>3</sup> You check it in the bathroom.<sup>4</sup> You check it in bed.<sup>5</sup> You just checked it right now while reading this sentence.<sup>6</sup> Unfortunately, you probably also check your cellphone while you drive, and you are not the only one.<sup>7</sup>

Whenever you receive a text message on your cellphone, your brain releases dopamine, a neurochemical that causes feelings of pleasure and

---

\* Juris Doctor Candidate May 2018, St. Thomas University School of Law, ST. THOMAS LAW REVIEW, Executive Editor; B.A. English, University of Florida, 2015.1. *See* Dana Dovey, *Cell Phones Make For Sleepy, Screen-Addicted, Socially Awkward Students – Their Grades Don’t Stand A Chance*, MEDICAL DAILY (Aug. 29, 2014), <http://www.medicaldaily.com/cell-phones-make-sleepy-screen-addicted-socially-awkward-students-their-grades-dont-stand-300562> (describing the negative effects cellphones have on students).

2. *See* Melissa Dahl, *Your Phone Is Distracting You Even When You’re Not Using It*, THE CUT (Dec. 8, 2014), <https://www.thecut.com/2014/12/mere-presence-of-your-phone-is-distracting.html>. “The mere presence of [one’s] phone is enough to distract [one’s] attention away from complicated tasks.” *Id.*

3. *See* Elizabeth Cohen, *Do you obsessively check your smartphone?*, CNN (July 28, 2011), <http://www.cnn.com/2011/HEALTH/07/28/ep.smartphone.obsessed.cohen/>; *see also* Leon Neyfakh, *Why you can’t stop checking your phone*, BOSTON GLOBE (Oct. 6, 2013), <https://www.bostonglobe.com/ideas/2013/10/06/why-you-can-stop-checking-yourphone/trBJzyBGDAr1YIEH5JQDcM/story.html> (discussing why people cannot stop checking their phones nowadays).

4. Markham Heid, *You Asked: Am I Addicted to My Phone?*, TIME (Feb. 24, 2016), <http://time.com/4234366/phone-smartphone-addiction/> (discussing the implications of obsessive cellphone use).

5. *See id.*

6. *See id.*

7. *See* Neyfakh, *supra* note 3; *see also* Justin Worland, *Why People Text And Drive Even When They Know It’s Dangerous*, TIME (Nov. 6, 2014), <http://time.com/3561413/texting-driving-dangerous/>. A study found that 98% of those who text and drive frequently say the practice is dangerous; yet, nearly 75% say that they do it anyway. Worland, *supra*.

excitement.<sup>8</sup> Studies indicate that our brains are conditioned to seek these feelings of pleasure and excitement, which leads many of us to check for messages compulsively.<sup>9</sup> Hence, using a cellphone may be more a habit than a decision.<sup>10</sup> It is clear these “checking habits” occur while we drive as well, despite knowing that it is dangerous to text and drive.<sup>11</sup>

Modern society is obsessed with the cellphone and all of its capabilities.<sup>12</sup> As cellphones today are equipped with Internet access, digital cameras, portable music players, navigation systems, games, and social media applications, the cellphone has transformed into the smartphone.<sup>13</sup> However, as smart as our phones have become, it seems our smartphones are making us become distracted drivers.<sup>14</sup> Unfortunately,

---

8. David Greenfield, *The Digital Drug: What Makes You Text and Drive Despite Known Dangers*, HUFFINGTON POST (last updated Jan. 5, 2015), [http://www.huffingtonpost.com/dr-david-greenfield/the-digital-drug-what-mak\\_b\\_6108236.html](http://www.huffingtonpost.com/dr-david-greenfield/the-digital-drug-what-mak_b_6108236.html); see also Aaron Mamiit, *Blame it on dopamine: Here's why people text and drive despite knowing risks involved*, TECH TIMES (Nov. 8, 2014), <http://www.techtimes.com/articles/19689/20141108/blame-it-on-dopamine-heres-why-people-text-and-drive-despite-being-aware-of-risks-involved.htm> (explaining how texting while driving can be attributed to the release of dopamine in the brain).

9. See Greenfield, *supra* note 8; see also Mamiit, *supra* note 8 (explaining how checking phones compulsively can be attributed to the brain's release of dopamine).

10. See Neyfakh, *supra* note 3. A habit is an action people make without initially thinking about what they are doing or why. See *id.* Cellphones have effectively programmed individuals with new habits that include a powerful urge to pull their cellphones out when they are not supposed to, such as while driving a car. *Id.* This powerful urge—to check our e-mail, to glance at Facebook, to see who just messaged us—can be hard to resist. *Id.*

11. See Cohen, *supra* note 3; Robin Westen, *Why Checking Your Smart Phone Can Become Compulsive*, READER'S DIGEST, <http://www.rd.com/health/wellness/why-checking-your-smart-phone-can-become-compulsive/> (last visited Apr. 2, 2018). A study found that smartphone users have developed what they call “checking habits.” Cohen, *supra*. The checks typically lasted less than thirty seconds and were often done within ten minutes of each other. *Id.* Most people with these “checking habits” compulsively check their cellphone an average of thirty-four times a day and often do not even notice they are doing it. Westen, *supra*.

12. See *Mobile Phones and Society — How Being Constantly Connected Impacts Our Lives*, SOUTH UNIVERSITY (May 10, 2013), <https://www.southuniversity.edu/whoweare/newsroom/blog/mobile-phones-and-society-how-being-constantly-connected-impacts-our-lives-137313> (“Mobile phones have become a staple of our society, with everyone from elementary school children to senior citizens owning at least one.”); see also Neil Roberts, *Mobile phones changed society, not just communication*, THE GUARDIAN (Dec. 31, 2009, 7:05 PM), <https://www.theguardian.com/business/2010/jan/01/mobile-phones-changed-society>.

13. See Vangie Beal, *The Difference Between a Cell Phone, Smartphone and PDA*, WEBOPEDIA (May 2, 2008), [http://www.webopedia.com/DidYouKnow/Hardware\\_Software/smartphone\\_cellphone\\_pda.asp](http://www.webopedia.com/DidYouKnow/Hardware_Software/smartphone_cellphone_pda.asp) (discussing the differences between cellphones and smartphones).

14. See Robert Rosenberger, *Yes, Smartphone Use Is Probably Behind the Spike in Driving Deaths. So Why Isn't More Being Done to Curb It?*, SLATE (Dec. 28, 2017), [http://www.slate.com/articles/technology/future\\_tense/2017/12/yes\\_smartphone\\_use\\_is\\_probably\\_behind\\_the\\_spike\\_in\\_vehicle\\_related\\_deaths.html](http://www.slate.com/articles/technology/future_tense/2017/12/yes_smartphone_use_is_probably_behind_the_spike_in_vehicle_related_deaths.html); see also Robert Roy Britt, *Cell Phones Make Drivers as Bad as Drunks*, LIVE SCIENCE (June 29, 2006), <http://www.livescience.com/872-cell-phones-drivers-bad-drunks.html> (claiming that cellphones are affecting drivers in negative ways).

distracted driving is nothing new in Florida.<sup>15</sup> In fact, Florida is known for having the worst drivers.<sup>16</sup> Given Florida's current toothless texting while driving law, it is no wonder Florida drivers are especially driven to distracted driving.<sup>17</sup>

This Comment examines the roadblocks that are stopping Florida from having an effective enforcement of Florida's texting while driving ban.<sup>18</sup> Part II discusses the meaning and dangers of distracted driving.<sup>19</sup> This part also focuses on Florida's legislative response to texting while driving by examining the current cellphone legislation in Florida.<sup>20</sup> Part III specifically addresses why Florida's statute falls short from deterring Florida drivers from distracted driving.<sup>21</sup> In addition, this part addresses why Florida has been resistant to proposed legislation to change Florida's current law.<sup>22</sup> Finally, Part IV proposes amendments to Florida's law that will best allow Florida to deter drivers from distracted driving.<sup>23</sup>

---

15. See Capitol News Service, *Distracted driving caused 45,000+ crashes in Florida last year*, WFLA (last updated Apr. 20, 2016, 4:41 AM), <http://wfla.com/2016/04/19/distracted-driving-claiming-almost-one-life-a-day-in-florida/>; see also *Despite Florida texting law, distracted driving crashes keep going up*, BRADENTON HERALD (last updated May 21, 2016, 2:52 PM), <http://www.bradenton.com/news/state/florida/article78801337.html> [hereinafter, BRADENTON HERALD]. In 2015, distracted drivers in Florida caused more than 45,000 crashes. Capitol News Service, *supra*. Almost three years after Florida banned texting while driving, car crashes due to distracted driving continue to increase at a steady pace. BRADENTON HERALD, *supra*.

16. Ed Leefeldt, *Which state has the worst drivers in the U.S.?*, CBS (Aug. 8, 2016, 5:00 AM), <http://www.cbsnews.com/news/which-state-has-the-worst-drivers-in-the-us/>; Mahita Gajanan, *The Worst Drivers in the U.S. Are in Florida and Mississippi*, TIME (Aug. 8, 2016), <http://time.com/4442983/florida-mississippi-among-states-with-worst-drivers-study/>. Floridians look up "speeding tickets" and "traffic tickets" on Google more than any other state. Leefeldt, *supra*. Florida also has "the second lowest number of insured drivers in the nation." *Id.* To judge which state had the worst drivers, a study collected data on "DUI per thousand drivers, deaths per thousand drivers, Google trends on driving tickets and the percentage of people who have auto insurance." Gajanan, *supra*. Based on this study, Florida was ranked number one as the state with the worst drivers. *Id.*

17. See BRADENTON HERALD, *supra* note 15; Capitol News Service, *supra* note 15 (providing statistics proving that Florida's drivers are not deterred by Florida's current texting while driving law).

18. See *infra* Part III.

19. See *infra* Part II.

20. See *infra* Part II.

21. See *infra* Part III.

22. See *infra* Part III.

23. See *infra* Part IV.

## II. BACKGROUND

### A. DISTRACTED DRIVING: STREAMING OFF-COURSE

Distracted driving involves taking one's eyes off the road, taking one's hands off the wheel, or taking one's mind off the driving process.<sup>24</sup> Texting comprises all three: drivers must take at least one hand off the wheel and their eyes off the road to read or send a text message, while also directing their thoughts to the text and away from the road.<sup>25</sup> Although distracted driving also involves eating and drinking, talking to passengers, grooming, using a navigation device, and adjusting audio players, texting while driving is considered the most dangerous distraction as it requires visual, manual, and cognitive attention from a driver.<sup>26</sup> Although the statistics of car accidents, deaths, and injuries relating to distracted driving are overwhelming, what is more overwhelming is how the numbers do not seem to register into people's distracted minds.<sup>27</sup> The numbers do not come to life until they hit you in the face like an oncoming vehicle.<sup>28</sup> State Legislators have taken notice of this growing epidemic of distracted driving, and most are taking action.<sup>29</sup> The Florida Legislature, in particular,

---

24. *Distracted Driving*, CENTERS FOR DISEASE CONTROL AND PREVENTION, [https://www.cdc.gov/motorvehiclesafety/distracted\\_driving/](https://www.cdc.gov/motorvehiclesafety/distracted_driving/) (last updated June 9, 2017) (defining distracted driving).

25. *See id.*

26. *See Distracted Driving*, U.S. DEP'T. OF TRANSP., <https://www.nhtsa.gov/risky-driving/distracted-driving> (last visited Apr. 7, 2018) (explaining what distracted driving is and how texting is the most alarming form of distracted driving).

27. *See* Erin Schumaker, *10 Statistics That Capture The Dangers of Texting and Driving*, HUFFINGTON POST (last updated Dec. 6, 2017), [https://www.huffingtonpost.com/2015/06/08/dangers-of-texting-and-driving-statistics\\_n\\_7537710.html](https://www.huffingtonpost.com/2015/06/08/dangers-of-texting-and-driving-statistics_n_7537710.html); *see also* Worland, *supra* note 7 (discussing how people text and drive despite knowing that it is dangerous). Nine Americans are killed every day from car accidents that involve distracted driving, including the use of a cellphone. Schumaker, *supra*. Using a cellphone while driving increases the risk of a crash by four times. *Id.*

28. *See* Kiernan Hopkins, *25 Shocking Distracted Driving Statistics*, DISTRACTED DRIVER ACCIDENTS (Jan. 23, 2015), <http://distracteddriveraccidents.com/25-shocking-distracted-driving-statistics/>; *see also* *Distracted Driving: The vital statistics*, CNN (last updated Sept. 2, 2016, 2:02 PM), <http://www.cnn.com/2016/09/02/health/gallery/distracted-driving-statistics/>. "Texting and driving is [six] times more likely to get [one] in an accident than drunk driving." Hopkins, *supra*. "[I]t is actually safer for someone to get wasted and get behind the wheel than to text and [drive]." *Id.* Reading a text message is equivalent to driving the length of a football field at 55mph with one's eyes off the road. CNN, *supra*.

29. *See Cellular Phone Use and Texting While Driving Laws*, NAT'L CONFERENCE OF STATE LEGISLATURE (June 23, 2017), <http://www.ncsl.org/research/transportation/cellular-phone-use-and-texting-while-driving-laws.aspx>; *see also* *Distracted Driving*, GOVERNOR'S HIGHWAY SAFETY ASSOC., [http://www.ghsa.org/html/stateinfo/laws/cellphone\\_laws.html](http://www.ghsa.org/html/stateinfo/laws/cellphone_laws.html) (last visited Apr. 7, 2018) (presenting the texting while driving laws in place across the nation).

finally decided to take *some* action.<sup>30</sup> “Dozens of bills to regulate cellphone use while driving have been introduced in Florida since 2002.”<sup>31</sup> It was not until 2013 that a texting ban finally gained approval, and it was a long and bumpy ride for the bill.<sup>32</sup>

## B. THE BUMPY LEGISLATIVE RIDE

Before a bill becomes a law, a bill must survive the long and bumpy road of legislation.<sup>33</sup> Florida’s texting while driving bill (“SB 52”), filed November 19, 2012, managed to survive Florida’s 2013 legislative session.<sup>34</sup> Senator Nancy Detert, the sponsor of the bill, had been trying to pass a bill banning texting while driving for five legislative sessions.<sup>35</sup> After passing through numerous committees and undergoing three readings, the bill was voted on and passed in the Senate.<sup>36</sup> The Florida Senate was nearly unanimous when it passed the bill and sent it to the

---

30. See Sonja Isger, *Texting while driving illegal in Florida starting Tuesday*, PALM BEACH POST (last updated Sept. 30, 2013, 10:18 PM), <http://www.palmbeachpost.com/news/news/state-regional-govt-politics/texting-while-driving-illegal-starting-today/nbB54/>; *Florida Lawmakers Pass Texting-While-Driving Ban*, NBC MIAMI (last updated May 3, 2013, 9:06 AM), <http://www.nbcmiami.com/news/local/Florida-Lawmakers-Pass-Texting-While-Driving-Ban-205859031.html> (reporting that Florida has made texting while driving illegal).

31. Isger, *supra* note 30; see Bill Cotterell, *Florida lawmakers pass texting-while-driving ban*, TAMPA BAY TIMES (last updated May 3, 2013, 7:52 AM), <http://www.tbo.com/Fla-lawmakers-pass-texting-while-driving-ban-b82486841z2> (noting difficulty legislators have faced passing texting while driving laws in Florida).

32. See Isger, *supra* note 30; Cotterell, *supra* note 31 (reporting that Florida made texting while driving illegal in 2013).

33. See *How an Idea Becomes a Law*, FLA. SENATE, <https://www.flsenate.gov/About/HowAnIdeaBecomesALaw> (last visited Apr. 7, 2018); *Bill originating in the Senate*, FLA. SENATE, <https://www.flsenate.gov/PublishedContent/ADMINISTRATIVEPUBLICATIONS/idea-to-law.pdf> (last visited Apr. 7, 2018). First, a Legislator decides an idea should become a law. *Id.* When a bill is filed, it is referred to one or more committees related to the bill’s subject. See *How an Idea Becomes a Law, supra*. Through the committee process, the bill is discussed and debated as to whether a bill should pass, fail, or be amended. *Id.* If a bill passes in one house with a majority vote, it is sent to the other house for review. *Id.* Both chambers must pass each bill before it becomes law. See *How an Idea Becomes a Law, supra*. If both the House and Senate approve the same bill, it goes to the Governor. See *Bill originating in the Senate, supra*. If a bill does not make it all the way through this process before the end of the legislative session, the bill dies and must start the process all over again. See *How an Idea Becomes a Law, supra*.

34. See S.B. 52, 115th Reg. Sess. (Fla. 2013).

35. See Cotterell, *supra* note 31; see also James L. Rosica, *Fla. lawmakers pass texting-while-driving ban*, DAYTONA BEACH NEWS-JOURNAL (May 2, 2013), <http://www.news-journalonline.com/news/20130502/fla-lawmakers-pass-texting-while-driving-ban/2> (noting Detert’s struggle to pass a texting while driving law in Florida).

36. See S.B. 52; see also Rosica, *supra* note 35 (discussing the difficulty with which the bill ultimately passed).

House for approval.<sup>37</sup> On its second reading in the House, an evidentiary amendment was adopted forbidding search of phone records except in crashes involving death or injury.<sup>38</sup> After the Senate approved the amendment, Governor Scott signed the bill into law.<sup>39</sup> “I think it will be enforced,” Governor Scott said after signing the bill.<sup>40</sup> Despite Governor Scott’s belief that Florida’s texting while driving law will be enforced, statistics have proved otherwise.<sup>41</sup> In actuality, the law is so difficult to enforce that it is rarely used.<sup>42</sup> Unfortunately, the difficulty in enforcing Florida’s law is only one of its many issues.<sup>43</sup>

---

37. See *Fla. governor gets texting bill*, HANDS FREE INFO (May 2, 2013), <http://handsfreeinfo.com/florida-texting-law/>; Rosica, *supra* note 35; Cotterell, *supra* note 31. Republican Senator Joe Negron was the only no vote. See Rosica, *supra*. Negron viewed the law as problematic because “a driver might be glancing at a screen to check an address, and police would have a hard time proving a text message or phone number was being entered at the precise moment a traffic stop occurred.” Cotterell, *supra*. “We already have a law – it’s called reckless driving,” Negron adds. *Id.*

38. See Cotterell, *supra* note 31. Representative Jose Oliva added the evidentiary amendment. *Id.* Detert did not originally approve of the amendment because she feared drivers would simply deny texting in court and get off for lack of evidence; however, she accepted the change to avoid seeing her bill die. *Id.* Detert says only the prosecution would be forbidden to present electronic records in cases not involving death or injury. *Id.* Hence, an innocent driver could bring phone records to court to prove that he or she was not texting during the traffic violation. *Id.*

39. See Arianna Prothero & Rick Stone, *Florida’s New Texting While Driving Ban Takes Effect Oct. 1*, WLRN (Sept. 30, 2013), <http://wlrn.org/post/floridas-new-texting-while-driving-ban-takes-effect-oct-1>.

40. John Woodrow Cox, *Florida’s texting while driving ban turns up few citations*, TAMPA BAY TIMES (July 6, 2014), <http://www.tampabay.com/news/publicsafety/floridas-texting-while-driving-ban-turns-up-few-citations/2187402>; see also Rochelle Koff & Gina Cherelus, *Rick Scott signs texting-while-driving ban, but does it have teeth?*, MIAMI HERALD (last updated June 10, 2013, 6:09 PM), <http://www.miamiherald.com/news/politics-government/article1951926.html>. Governor Scott further adds, “Just the fact that it’ll be illegal to text and drive, I think that’s going to stop our teenagers, stop citizens from texting and driving.” Koff & Cherelus, *supra*.

41. See Cox, *supra* note 40; see also BRANDENTON HERALD, *supra* note 15. Statewide, law enforcement officials issued fewer than 1,800 citations through the law’s first year. Cox, *supra*. “Far more obscure infractions [were] cited at much higher rates, according to 2013 data: failure to dim lights (3,056), improper parking (11,872), and improper backing (21,376).” *Id.* Statistics show that car crashes caused by distracted driving in Florida have increased even after Florida’s texting while driving ban. See BRANDENTON HERALD, *supra*. The year-to-year breakdown reveals the following amount of crashes each year because of distracted driving in Florida: 33,511 crashes in 2012; 39,036 crashes in 2013; 42,221 crashes in 2014; and 45,740 crashes in 2015. *Id.* Although these numbers reflect all kinds of distractions (i.e., talking on the phone, personal grooming, and texting), the numbers do indicate that the current Florida law is not effectively deterring drivers from distracted driving. See *id.*

42. See Cox, *supra* note 40. Those with the task of enforcing the texting while driving law have found it especially frustrating because despite constantly seeing drivers using their cellphones every day, the law currently gives them little authority to act. *Id.*

43. See *infra* Part III.

### III. DISCUSSION

#### A. NARROW LAW WITH NARROW EFFECTS

State laws regulating cell phone use vary significantly, from bans on text messaging or hand-held cellphone use for all drivers, to complete cell phone bans for teenagers or bus drivers.<sup>44</sup> Florida's law solely bans text messaging for all drivers.<sup>45</sup> Fla. Stat. § 316.305, known as the "Florida Ban on Texting While Driving Law[.]" became effective October 1, 2013:

A person may not operate a motor vehicle while *manually typing or entering multiple* letters, numbers, symbols, or other characters into a wireless communication device or while sending or reading data in such a device *for purposes of non-voice interpersonal communication*, including, but not limited to, communication methods known as texting, emailing, and instant messaging.<sup>46</sup>

This means that "a driver cannot send, type, or read messages while driving."<sup>47</sup> Drivers are only prohibited from pressing multiple buttons on their phones specifically "for purposes of non-voice interpersonal communications."<sup>48</sup> Limiting the prohibition to purposes involving only "non-voice interpersonal communication" allows drivers to use their phones for many other purposes that do not involve communicating with another person, such as checking their calendar, surfing the Internet,

---

44. See Thomas E. Sherzan, "Talk 2 U L&R" – Why Cell Phones and Driving Have "G2G": An Analysis of the Dangers of Cell Phone Use While Driving, 59 *DRAKE L. REV.* 217, 239–242 (2010); *Distracted driving*, INS. INST. FOR HIGHWAY SAFETY, <http://www.iihs.org/iihs/topics/laws/cellphonelaws/maphandheldcellbans> (last visited Apr. 7, 2018). "Talking on a hand-held cellphone while driving is banned in 15 states and the District of Columbia." INS. INST. FOR HIGHWAY SAFETY, *supra*. "The use of cellphones by novice drivers is restricted in 38 states and the District of Columbia." *Id.* "Text messaging is banned for all drivers in 47 states and the District of Columbia." *Id.* Also, "novice drivers are banned from texting in one state (Missouri)." *Id.*

45. See FLA. STAT. § 316.305 (2017).

46. § 316.305(3)(a) (emphasis added). The statute defines "wireless communications device" as "any handheld device used or capable of being used in a handheld manner, that is designed or intended to receive or transmit text or character-based messages, access or store data, or connect to the Internet or any communications service . . . that allows text communications." *Id.*

47. Valerie Johnston, *Cell Phones and Texting: Distracted Driving Laws in Florida*, *YOUR MECHANIC* (Jan. 19, 2016), <https://www.yourmechanic.com/article/cell-phones-and-texting-distracted-driving-laws-in-florida>; see also Spencer Aronfeld, *Florida Finally Bans Texting and Driving*, *HUFFINGTON POST* (last updated Oct. 19, 2013), [http://www.huffingtonpost.com/spencer-aronfeld/florida-texting-and-driving\\_b\\_3779675.html](http://www.huffingtonpost.com/spencer-aronfeld/florida-texting-and-driving_b_3779675.html) (explaining what the new texting law in Florida means).

48. § 316.305(3)(a); Cox, *supra* note 40 (discussing the limiting language of Florida's law).

scrolling through contacts, playing games, and taking pictures.<sup>49</sup> Although these activities are just as dangerous and distracting as reading or sending a text message, the current wording of Florida's statute does not expressly prohibit these activities.<sup>50</sup>

Some states have cellphone-related prohibitions that are not limited to texting.<sup>51</sup> For example, Delaware's statute declares: "No person shall have drive a motor vehicle . . . while using an electronic communication device while such motor vehicle is in motion."<sup>52</sup> Another example is West Virginia's statute, which states: "[A] person may not drive or operate a motor vehicle on a public street or highway while: (1) texting; or (2) using a cell phone or other communications device, unless the use is accomplished by hands-free equipment."<sup>53</sup> Both Delaware and West Virginia clarify that the word "using" means "holding in a person's hand or hands an electronic communication device while: (a) viewing or transmitting images or data; (b) playing games; (c) composing, sending, reading, viewing, assessing, browsing, transmitting, saving, or retrieving e-mail, text messages or other electronic data; or (d) engaging in a call."<sup>54</sup> Another instance is New York's statute, which states that "no person shall operate a motor vehicle while using any portable electronic device while such vehicle is in motion."<sup>55</sup> New York's definition of "using" is even more specific than Delaware and West Virginia's definition, stating that "using" shall mean:

[H]olding a portable electronic device while viewing, taking or transmitting images, playing games, or, *for the purpose of present or future communication: performing a command or request to access a world wide web page*, composing, sending, reading, viewing,

---

49. See Cox, *supra* note 40; Matthew Dolman, *Florida's Texting and Driving Ban: What's Actually Prohibited?*, DOLMAN LAW GROUP (Nov. 20, 2013), <https://www.dolmanlaw.com/floridas-texting-driving-ban-whats-prohibited/>; see also Christopher Muscato, *Interpersonal Communication: Definition, Characteristics & Types*, STUDY.COM, <http://study.com/academy/lesson/interpersonal-communication-definition-characteristics-types.html> (last visited Apr. 7, 2018) (defining interpersonal communication). "Interpersonal communication . . . means the exchange of information between two or more people." Muscato, *supra*. As long as one is communicating with another person, one is involved in interpersonal communication. *Id.*

50. See Jeffrey Meldon, *What Exactly Does Florida's Texting While Driving Law Mean?*, MELDON LAW, <http://www.meldonlaw.com/faqs/what-exactly-does-floridas-texting-while-driving-law-mean/> (last visited Apr. 7, 2018) (explaining how although certain uses are not prohibited, they can still be just as dangerous as texting while driving); § 316.305(3)(a).

51. See *Distracted Driving*, *supra* note 29 (describing the different types of cellphone-related prohibitions).

52. DEL. CODE ANN. tit. 21, § 4176C(a) (2018).

53. W. VA. CODE § 17C-14-15 (2017).

54. § 4176C(b)(6); § 17C-14-15(b)(8).

55. N.Y. VEH. & TRAF. LAW § 1225-d (1) (McKinney 2014).



accessing, browsing, transmitting, saving or retrieving e-mail, text messages, instant messages, or other electronic data.<sup>56</sup>

The wording of the prohibitions listed above essentially covers all of the distracting and dangerous activities that Florida's statute currently allows.<sup>57</sup> It is clear that the intent of Florida's Legislature was to limit the prohibition to texting while driving: "It is the intent of the Legislature to[] . . . [p]revent crashes related to the *act of text messaging* while driving a motor vehicle."<sup>58</sup> However, the Florida Legislature should consider expanding the scope of its statute to prohibit the use of cellphones without hands-free technology; this would better achieve the purpose it lists first: to "[i]mprove roadway safety for all vehicle operators, vehicle passengers, bicyclists, pedestrians, and other road users."<sup>59</sup> "[S]tates with bans prohibiting the use of cellphones without hands-free technology altogether on all drivers [have seen] significant reductions in fatalities among [adults]."<sup>60</sup> Thus, hand-held bans are more effective than texting while driving bans.<sup>61</sup>

#### B. THE BEST DEFENSE IS A GOOD (PRIMARY) OFFENSE

State laws also differ in whether the law is primarily or secondarily enforced.<sup>62</sup> The purpose of Florida's texting while driving law is to:

(a) Improve roadway safety for all vehicle operators, vehicle passengers, bicyclists, pedestrians, and other road users. (b) Prevent crashes related to texting messaging while driving a motor vehicle. (c) Reduce injuries, death, property damage, health care costs, health insurance rates, and automobile insurance rates related motor vehicle crashes. (d) Authorize law enforcement officers to stop motor vehicles and issue citations as a *secondary* offense to persons who are texting while driving.<sup>63</sup>

---

56. See § 1225-d (2)(b).

57. See § 4176C(b)(6).

58. See FLA. STAT. § 316.305(2)(b) (2017) (emphasis added).

59. See § 316.305(2)(a).

60. Mark Huffman, *Do texting-while-driving bans work?*, CONSUMER AFFAIRS (July 29, 2014), <https://www.consumeraffairs.com/news/do-texting-while-driving-bans-work-072914.html> (describing the effect of different cellphone related prohibitions on drivers).

61. See *id.*

62. Sherzan, *supra* note 44, at 237; see *Distracted Driving*, *supra* note 44 (displaying the current standing of cellphone and texting laws in the United States).

63. § 316.305(2) (emphasis added); see also § 316.305(5). The last subsection of this statute expressly states that "[e]nforcement of this section by state or local law enforcement agencies must be accomplished only as a secondary action when an operator of a motor vehicle has been detained" for another suspected traffic violation. § 316.305(5).

The statute makes texting while driving a secondary offense, meaning an officer can only stop a driver for texting while driving if the officer has witnessed some other violation.<sup>64</sup> Florida's texting law is considered one of the weakest in the United States.<sup>65</sup> Florida is one of only five states where texting while driving is not a primary offense.<sup>66</sup> A primary offense would allow police officers to pull a driver over for texting while driving only.<sup>67</sup>

Laws that make it a primary offense to text and drive better protect drivers.<sup>68</sup> A study in the *American Economic Journal* reports that "texting [while driving] laws only reduce fatalities under certain conditions[,] . . . and that without strong enforcement, behavior relapses within just a few months."<sup>69</sup> This study reveals that states with secondary enforcement of the texting while driving law do not show any significant improvement in traffic accidents.<sup>70</sup> Thus, making texting while driving a secondary offense is about as good as not banning texting while driving at all.<sup>71</sup> States with primary enforcement, on the other hand, "reduce the type of accidents

---

64. Aronfeld, *supra* note 47; *Texting While Driving Banned in Florida*, PLAN HILLSBOROUGH, <http://www.planhillsborough.org/texting-while-driving-banned-in-florida/> (last visited Apr. 7, 2018) (explaining Florida's new texting while driving ban and discusses the effect of this new legislation).

65. See *Editorial: Make texting while driving a primary offense*, TAMPA BAY TIMES (May 27, 2016), <http://www.tampabay.com/opinion/editorials/editorial-make-texting-while-driving-a-primary-offense/2279321> (claiming Florida's law needs to be stricter); Irving Slosberg, *How Florida's Ban on Texting While Driving Lost It's Tread*, CRAIG GOLDENFARB, P.A. (May 6, 2015), <http://www.800goldlaw.com/Blog-and-Articles/2015/May/How-Floridas-Ban-on-Texting-While-Driving-Lost-I.aspx>.

66. See *Editorial: Make texting while driving a primary offense*, *supra* note 65. "At least the [other states] with secondary bans—Iowa, Nebraska, Ohio, and South Dakota—also ban handheld phone use of any kind among new drivers." *Id.* "Florida [does not] do that, either." *Id.*

67. *Id.*

68. *Id.*; see also Eric Jaffe, *Do Texting Bans Really Prevent Fatal Accidents?*, CITYLAB (Mar. 27, 2013), <http://www.citylab.com/commute/2013/03/do-texting-bans-really-prevent-fatal-accidents/5104/> (referencing a study that found that primary enforcement is more effective than secondary enforcement).

69. *Editorial: Make texting while driving a primary offense*, *supra* note 65; see also Jaffe, *supra* note 68. "Economists . . . of the University of Wisconsin-Milwaukee recently examined . . . [the effect of texting bans], conducting the first nationwide study of texting laws and fatalities." Jaffe, *supra*. The study "focused on one type of accident most likely to be caused by distracted driving: single vehicle, single-occupancy crashes." *Id.* The researchers figured that if texting bans "do work, then single-vehicle accident figures would be the ones most subject to change." *Id.*

70. See Jaffe, *supra* note 68. The researches divided the texting bans by quality: states with "strong" bans versus states with "weak" bans. *Id.* States with "strong" bans are states that universally outlawed texting and made it a primary offense, while states with "weak" bans only make texting illegal for certain members of the population or make texting a secondary offense. *Id.*

71. See *Editorial: Make texting while driving a primary offense*, *supra* note 65 ("[B]ans enforced as secondary offenses . . . have at best no effect on accidents.").

likely to be caused by distracted driving, but this public safety improvement diminishes quickly in the face of poor enforcement.”<sup>72</sup>

Additionally, laws that make texting while driving a primary offense are easier to enforce than those that make it a secondary offense.<sup>73</sup> Officers and deputies from numerous counties in Florida have expressed extreme difficulties in issuing citations.<sup>74</sup> In fact, statistics prove that few citations have been issued ever since the texting while driving ban went into effect.<sup>75</sup> Also, experiments prove that Florida drivers easily get away with texting while driving as cameras have caught hundreds of drivers texting while

---

72. Jaffe, *supra* note 68. “[S]tates with ‘strong bans’ experienced an 8 percent reduction in fatal single-occupancy, single-vehicle accidents following a texting ban.” *Id.* “[E]ven states that make texting a ‘primary’ offense must maintain heightened enforcement to sustain the benefits of the law.” *Id.* “[T]he easiest way to facilitate strong enforcement is to ban handheld mobile use in general.” *Id.*

73. See, e.g., *9 Investigates: Is Florida’s texting and driving law a failure?*, WFTV 9 (Jan. 29, 2015, 5:02 PM), <http://www.wftv.com/news/local/9-investigates-texting-law-fail/69677209> (noting police officers had an easier time enforcing wearing a seatbelt when it was increased to a primary offense); Michael Turnbull, *Few cited under texting while driving law*, SUN SENTINEL (Jan. 8, 2014), [http://articles.sun-sentinel.com/2014-01-08/news/fl-texting-while-driving-broward-20140108\\_1\\_texting-primary-offense-secondary-offense](http://articles.sun-sentinel.com/2014-01-08/news/fl-texting-while-driving-broward-20140108_1_texting-primary-offense-secondary-offense) (noting that when wearing a seatbelt became a primary offense the number of citations increased). “Florida’s seat belt law went from a secondary to a primary offense after two decades and troopers . . . [claim] that [it] made it far easier to enforce.” See *9 Investigates, supra*. “Traffic records show police issued 135 times as many seat belt tickets than texting tickets [in 2014].” *Id.* “There were 279,200 seat belt violations issued, compared with 2,061 citations for texting” in Florida. *Id.* “Officials say during the 23 years that Florida’s seat belt law was a secondary offense, the numbers of citations were equally low.” Turnbull, *supra*. When the seat belt law became a primary offense, tickets went up. *Id.*

74. See, e.g., Cox, *supra* note 40; Keith Morelli, *Texting-while-driving ban lacks teeth critics say*, TAMPA BAY TIMES (last updated Jan. 12, 2014, 8:11 AM), <http://www.tbo.com/news/florida/texting-while-driving-ban-lacks-teeth-critics-say-20140112/>. Police officers continue to claim that “the law gives them little authority to act.” See Cox, *supra*. “It’s almost unenforceable,” said a police officer in St. Petersburg. *Id.* “In the first three months after the law went into effect on Oct. 1, only 17 texting citations have been issued in Hillsborough County, which has a population of almost 1.3 million.” See Morelli, *supra*. The same officer, Curtis Bascom, gave seven of the seventeen tickets issued out. See *id.* The drivers Bascom pulled over and cited were only a fraction of those he spotted texting while driving. *Id.* Bascom sees dozens of people texting while driving, but he cannot prove it or pull them over because they have not committed another violation. *Id.* “Most of those cited by Bascom were stopped for seatbelt violations[.]” *Id.*

75. See Scott Johnson, *Lawmaker makes new push to tighten law on texting while driving*, NEWS4JAX (last updated July 27, 2017, 7:41 PM), <https://www.news4jax.com/news/florida/lawmaker-seeks-tougher-law-on-texting-while-driving>. According to Florida Highway Patrol, the total number of citations issued for texting while driving in 2017 were 38 citations in Duval County; 8 citations in Alachua County; 5 citations in St. Johns County; 3 citations in Flagler County, and 1 citation in Nassau County. See *id.*

driving on major roads and highways.<sup>76</sup> It is clear that law enforcement cannot do anything to enforce the current texting while driving ban unless the Florida Legislature makes texting while driving a primary offense.<sup>77</sup>

### C. FLORIDA'S RESISTANCE TO CHANGE

Unfortunately, history shows that Florida is particularly resistant to change when it comes to the law.<sup>78</sup> The sponsors of the texting while driving bill said making it a secondary offense was the only way to win support in a Legislature that was reluctant to take up the bill in the first place.<sup>79</sup> The Legislative members in opposition to harsher texting while driving laws fear excessive governmental control and an invasion of

---

76. See *Video Highlights South Florida's Distracted Driving Dilemma*, CBS MIAMI (Apr. 16, 2016, 5:19 PM), <http://miami.cbslocal.com/2016/04/16/video-highlights-south-floridas-distracted-driver-dilemma/>; see also Sean Lavin, *Caught on camera: Central Florida drivers texting*, NEWS 6 (last updated May 17, 2016, 6:50 AM), <http://www.clickorlando.com/news/investigators/caught-on-camera-central-florida-drivers-texting-while-driving>. A news station examined the streets of Central Florida and caught driver after driver using their phones while driving. See Lavin, *supra*. The news station "conducted an experiment on I-95 in South Florida that caught 185 distracted drivers in just 20 minutes." *Id.* "[C]ameras captured 150 drivers on the phone, 17 texting, 12 eating, and 6 others distracted in some other form . . . like applying makeup, reaching to the back seat, staring at the mirror, etc." *Video Highlights South Florida's Distracted Driving Dilemma, supra*.

77. See *Editorial: Make texting while driving a primary offense, supra* note 65; Morelli, *supra* note 74 (explaining how secondary enforcement is turning up few citations and how primary enforcement would make the law more effective at deterring drivers from texting while driving).

78. See *Fla. governor gets texting bill, supra* note 37; Lloyd Dunkelberger, *Texting While Driving Now Illegal Activity in Florida*, THE LEDGER (Sept. 30, 2013), <http://www.theledger.com/article/20130930/news/130939920?tc=ar> (noting the texting-while-driving statute faced similar resistance). Representative Doug Holder said that "weak enforcement made the legislation more palatable to resistant lawmakers." See *Fla. governor gets texting bill, supra*. The original sponsors of the current texting while driving bill were members of the Republican majority and still faced considerable resistance when proposing the current law. See Dunkelberger, *supra*.

79. Dunkelberger, *supra* note 78; see also Lloyd Dunkelberger, *Detert Hopes for Generational Shift with Text-Driving Bill*, HERALD TRIBUNE (Mar. 6, 2013), <http://politics.heraldtribune.com/2013/03/06/detert-hopes-for-generational-shift-with-text-driving-bill/> (presenting legislative intent and response to the passing of the new texting bill).

privacy.<sup>80</sup> Some Democratic Legislators have blamed the watered-down legislation on some of their Republican colleagues.<sup>81</sup>

Additionally, history shows that Florida is not only resistant to change but also extremely slow to change.<sup>82</sup> Florida's seatbelt law is a prime example; it was enacted in 1986 as a secondary offense, but it was not until 2009 that a bill finally gave police authority to stop and ticket drivers for not wearing a seatbelt.<sup>83</sup> "Supporters of a stricter texting [while driving] law argue that it is illogical for seatbelt use to be so much more scrutinized, because unlike drivers who use phones, drivers who do not buckle up place no one but themselves at a higher risk of injury or death."<sup>84</sup> Despite this logical reasoning, the Florida Legislature has refused to make any changes to the toothless law.<sup>85</sup> Legislation to change the language of the current texting while driving law in Florida was proposed for the 2016 legislative session.<sup>86</sup> One new bill would have made texting while driving a primary

---

80. See Cox, *supra* note 40; see also Prothero & Stone, *supra* note 39 (describing the reasoning behind the resistance of certain legislative members to increasing penalties for texting while driving).

81. See Cox, *supra* note 40; see also Prothero & Stone, *supra* note 39. For example, Senator Maria Sachs, a Democrat from Delray Beach, blames her conservative Republic colleagues for the law's ineffectiveness. See Cox, *supra*. She says: "There is a group of conservatives, and I have to say they're in the other party, who do not want government regulation to infringe upon people's liberties." *Id.* "My argument to that is if you step inside a car, your liberties are going to be controlled for public safety[.]" she adds. *Id.* Another example is Irving Slosberg, a Democratic Representative from Boca Raton, who said Florida's current texting while driving law was "guttled by powerful lawmakers from three camps: people who dislike police, people who proudly text and drive[.] and people with a libertarian political orientation." Prothero & Stone, *supra*. Slosberg adds: "[I]t's politics and unfortunately there's no lobbyist for public safety." *Id.*

82. See Isgar, *supra* note 30 (describing the slow process of the seatbelt law becoming a primary offense); see also Cotterell, *supra* note 31 (noting the sponsor of the bill tried to pass similar bills for five legislative sessions).

83. See Isgar, *supra* note 30; see also Cotterell, *supra* note 31. This change to a primary offense "came five years after a halfway measure enacted primary enforcement for teenage drivers." See Isgar, *supra* note 30.

84. Cox, *supra* note 40 (noting the criticisms of people who believe the texting while driving law should be just as scrutinized as the seatbelt law).

85. See *Despite Florida's texting law, distracted driving crashes keep going up*, *supra* note 15 (noting the Legislature's recent refusal to take up any bills to change Florida's current texting law).

86. Kristen M. Clark, *Florida lawmakers urge consideration of enhanced penalties for texting-while-driving*, MIAMI HERALD (Dec. 1, 2015, 2:04 PM), <http://miamiherald.typepad.com/nakedpolitics/2015/12/lawmakers-urge-consideration-of-enhanced-penalties-for-texting-while-driving.html>; Nicholas Primrose, *Tougher Texting & Driving Bills Introduced in Florida Legislature*, THE LEGAL EXAMINER (Jan. 19, 2016, 12:49 PM), <http://orlando.legalexaminer.com/uncategorized/tougher-texting-driving-bills-introduced-in-florida-legislature/>. A bill was introduced to double the amount of the traffic citation if someone is found texting while in a school zone. Primrose, *supra*. Another bill was introduced to make texting while driving in a school zone a primary offense. *Id.*

offense.<sup>87</sup> Unfortunately, any bills attempting to make Florida's current texting while driving law stricter died in committee.<sup>88</sup>

Some Florida Legislators believe the texting while driving law will evolve in the same way the seatbelt law did, which took 23 years.<sup>89</sup> It has been five years since Florida's toothless law came into effect.<sup>90</sup> Should Florida really wait another two decades, like they did with the seatbelt law, to get on board with the rest of the nation and make the law a primary offense?<sup>91</sup> Why does Florida need baby steps while the majority of states in the United States have evolved in a much faster timeframe?<sup>92</sup>

Surprisingly, Senator Detert, the sponsor of the texting while driving bill, is not in favor of making the law into a primary offense.<sup>93</sup> She said: "Every single year people file the same bill to put in more restrictions or up the penalties[.]"<sup>94</sup> She believes that the difference between a secondary or primary offense might be lost on the demographic targeted by her bill.<sup>95</sup> She wanted her bill to allow parents to tell their children not to text and

---

87. See Primrose, *supra* note 86; Clark, *supra* note 86 (discussing some attempt by Florida's Legislature to change the current texting while driving law).

88. See *Despite Florida's texting law, distracted driving crashes keep going up*, *supra* note 15 (noting the Legislature's recent refusal to take up any bills to change Florida's current texting while driving law).

89. Cox, *supra* note 40 (comparing the texting while driving law to the seatbelt law); see also Isger, *supra* note 30 (noting that lawmakers currently feel that Florida is moving in the right direction).

90. See FLA. STAT. § 316.305 (2018).

91. See Isger, *supra* note 30; see also Cox, *supra* note 40 (noting how not wearing a seatbelt only become a primary offense in 2009).

92. See Turnbell, *supra* note 73; Morelli, *supra* note 74. "It's a new law," said Sgt. Mark Wysocky, of the highway patrol." Turnbell, *supra*. "The law is a start to make people aware that it's illegal to text and drive." *Id.* Senator Sachs "voted for the first bill that is now law." Morelli, *supra*. She says: "It was a step in the right direction." *Id.* She admits "it is difficult for law enforcement officers to catch people, and [that] the law as it is now really is unenforceable." *Id.* That is why she has proposed bills in the Senate that would make the texting ban a primary offense. See *id.*

93. Christopher Brantley, *New bill proposes texting while driving become a primary offense*, MYSUNCOAST (Feb. 8, 2015), [http://www.mysuncoast.com/news/new-bill-proposes-texting-while-driving-become-a-primary-offense/article\\_7c120862-b002-11e4-a176-9b717fc1832c.html](http://www.mysuncoast.com/news/new-bill-proposes-texting-while-driving-become-a-primary-offense/article_7c120862-b002-11e4-a176-9b717fc1832c.html); Dave Hilsheimer, *Don't oppose bill upgrading texting while driving law to primary offense*, BRADENTON HERALD (last updated Mar. 30, 2015, 3:12 PM), <http://www.bradenton.com/opinion/letters-to-the-editor/article34794261.html> (noting Detert's opposition to make texting while driving a primary offense).

94. Brantley, *supra* note 93 (describing Detert's reaction to Legislators trying to change law to a primary offense).

95. See Dunkelberger, *supra* note 78 (noting the bill is targeted at teenagers); *Poll: Floridians support texting while driving ban; bills await next legislative step*, TAMPA BAY TIMES (Mar. 28, 2013), <http://www.tampabay.com/blogs/the-buzz-florida-politics/poll-floridians-support-texting-while-driving-ban-bills-await-next/2111858> (describing Detert's reasoning that a primary offense is probably lost on the demographic targeted by her bill).

drive, and she doubts children are going to pull out the Florida statute and say, “Oh, but it is only a secondary offense!”<sup>96</sup>

Just like the seatbelt law changed people’s behavior when getting into a car, some Florida Legislators believe the texting while driving ban will do the same.<sup>97</sup> Democratic Senator Sachs says, “Seatbelt use is part of the driving culture. Almost everyone straps a seatbelt on when they get into a car.”<sup>98</sup> She adds, “We want to create the same type of habit with texting.”<sup>99</sup> Likewise, Senator Detert claims the idea of her bill was to change the behavior of Florida drivers, and she believes that she has changed the behavior of people who were texting and driving.<sup>100</sup> However, it is abundantly clear based on statistics and experience that texting is a habit that cannot be easily broken.<sup>101</sup> It is also apparent that texting while driving can be a habit of every age group.<sup>102</sup> The only way to change behavior is to have tougher laws with tougher penalties.<sup>103</sup> Unfortunately, the penalties

---

96. *Poll: Floridians support texting while driving ban; bills await next legislative step*, *supra* note 95 (noting Detert’s avid defense of the current texting while driving law); *see also* Dunkelberger, *supra* note 78.

97. *See* Morelli, *supra* note 74 (describing how some Legislators hope the seatbelt law’s effect on people’s behavior will be the same for the current texting while driving law).

98. *Id.*

99. *See id.*

100. *See* Brantley, *supra* note 93; *see also* Cotterell, *supra* note 31. Detert and Holder, the sponsors of the bill, said their main intention was not to punish drivers, but to educate young drivers about the distraction of texting. *See* Cotterell, *supra*.

101. *See supra* note 3 and accompanying text.

102. *See Florida: Cell phone laws, legislation*, HANDS FREE INFO (May 28, 2016), <http://handsfreeinfo.com/florida-cell-phones-texting-laws-hands-free-info/>; *see also Study: Adults more likely to text, use phones while driving than teens*, CBS NEWS (Dec. 12, 2013, 3:14 PM), <http://www.cbsnews.com/news/study-adults-more-likely-to-text-use-phones-while-driving-than-teens/>. The Department of Highway Safety and Motor Vehicles reported that “[a]lmost 20,000 drivers under age 30 were involved in distracted driving crashes statewide in 2015[.]” *See* HANDS FREE INFO, *supra*. “The age group with the largest number of distracted driving crashes was 20-24 year-olds (17.8 percent), followed by 25-29 year-olds (14.3 percent), and then 15-19 year olds (11.6 percent).” *Id.* New research shows that more adults use their phones while driving than teens. *See* CBS NEWS, *supra*. The report, done by the AAA Foundation for Traffic Safety, showed that “82 percent of adults ages 25-29 reported using their phones while driving, with 43 percent [admitting] to using it fairly often or regularly while behind the wheel.” *Id.* In addition, “72 percent of those between 40-59 said they also use their phone while driving, [which ties] with the percentage of those between 19-24 that admitted to doing so.” *Id.*

103. *See Editorial: Make texting while driving a primary offense*, *supra* note 65; *How Effective Are New Distracted Driving Laws?*, TRAFFIC SCHOOL ONLINE, <https://trafficschoolonline.com/blog/how-effective-are-new-distracted-driving-laws> (last visited Apr. 7, 2018). Tougher laws can be a deterrent and help curb behavior. *See Editorial: Make texting while driving a primary offense*, *supra*. A study released by the AAA Automobile Club of Southern California recommends strong penalties for violations of current laws, including assessing points to violators’ driving records, a step that has been shown to increase driver compliance with other traffic laws. TRAFFIC SCHOOL ONLINE, *supra*.

for the current texting while driving ban “will hardly put a dent in anyone’s wallet[,]” let alone deter drivers from texting while driving.<sup>104</sup>

#### D. MINIMAL FINES EQUALS MINIMAL DETERRENCE

Deterrence is based on one’s perception: “potential offenders cannot be deterred without first perceiving that their violations of the law carry a significant risk of apprehension and conviction.”<sup>105</sup> “Unless potential offenders are aware that the sanction for a particular crime has increased or that law enforcement efforts have expanded,” such behavior will likely not be affected.<sup>106</sup>

[Cellphone] bans or restrictions can affect behavior only if people believe that it is more likely that they will be apprehended (increased certainty of punishment), or that they will suffer a more severe consequence if they are apprehended (increased severity of punishment), such as an increased fine, driver’s license points or suspension, or possibly heftier insurance premiums.<sup>107</sup>

Since a serious accident is an infrequent event from the point of view of a driver, the consequences of apprehension (confrontation with a police officer, possible license suspension, increased insurance rates) are much more visible and immediate than the relatively remote possibility of an accident.<sup>108</sup> Therefore, the stricter the penalty, the more motivated drivers will be to abide by the law.<sup>109</sup>

The penalties for texting while driving across the nation vary significantly: ranging all the way from a \$20 fine to a \$10,000 fine and a

---

104. See Aronfeld, *supra* note 47; Steven A. Bagen, *The Reality of Florida’s Texting and Driving Law*, BAGEN LAW (Feb. 7, 2014, 12:30 PM), <http://info.bagenlaw.com/blog/the-reality-of-floridas-texting-and-driving-law> (noting how a higher fine would encourage drivers to put their phones down).

105. Linda C. Fentiman, *A New Form of WMD? Driving With Mobile and Other Weapons of Mass Destruction*, 81 UMKC L. REV. 133, 160 (2012); see also Shawn Bushway & Peter Reuter, *Economists’ Contribution to the Study of Crime and the Criminal Justice System*, 37 CRIME & JUST. 389, 405 (2008). One theory of deterrence is that there are three key factors to the “deterrent impact of a particular criminal sanction: the certainty, severity, and celerity (swiftness) of punishment.” Fentiman, *supra*.

106. Fentiman, *supra* note 105.

107. *Id.* at 174.

108. See Roger C. Cramton, *Driver Behavior and Legal Sanctions: A Study of Deterrence*, 67 MICH. L. REV. 421, 431-32 (1969) (discussing deterrence principles in relation to driving behavior).

109. See *supra* notes 105–108 and accompanying text.



year in prison.<sup>110</sup> Florida's penalty for texting while driving is one of the lowest in the nation.<sup>111</sup> The current penalty for a first-time offense is a \$30 fine and is considered a non-moving violation.<sup>112</sup> Although the act of texting while driving is comparable to the act of drinking while driving, the penalty for texting while driving in Florida is comparable to receiving a parking ticket.<sup>113</sup> In addition, the minimum fine for texting while driving in Florida is less than the minimum fine for littering.<sup>114</sup> "[I]f the penalty for throwing a banana peel out [one's] window far exceeds literally taking [one's] eyes off the road[,]" then the penalty will not deter drivers from texting while driving.<sup>115</sup> Thus, the Florida Legislature should enact penalties that reflect texting while driving is taken just as seriously as drinking while driving because the consequences of either could involve death or injuries (as opposed to the consequences of a parking violation or littering).<sup>116</sup>

#### E. EXCEPTIONS SWALLOW THE TOOTHLESS STATUTE

According to Florida's texting while driving law, "a motor vehicle that is stationary is not being operated and is not subject to the prohibition" of Florida's law.<sup>117</sup> This means the law does not apply at stoplights.<sup>118</sup>

---

110. Tasneem Raja & Benjy Hansen-Bundy, *How Much Does Your State Fine For Texting and Driving?*, MOTHER JONES (Oct. 25, 2013, 10:00 AM), <http://www.motherjones.com/media/2013/10/numbers-texting-and-driving/>; Dave Johnson, *The penalty for texting and driving in your state*, CBS (Nov. 6, 2013), <http://www.cbsnews.com/news/the-penalty-for-texting-and-driving-in-your-state/> (comparing the penalties for texting while driving in every state).

111. See Raja & Hansen-Bundy, *supra* note 110; Johnson, *supra* note 110 (comparing the penalties for texting while driving in every state).

112. See Aronfeld, *supra* note 47; Johnston, *supra* note 47; Ellsworth Buck, *Florida Texting While Driving Ban*, THE FLA. INS. BLOG (Feb. 10, 2014), <https://blog.greatflorida.com/2014/florida-texting-driving-ban/>. Subsequent offenses within five years of the first offense would result in a \$60 fine and be considered a moving violation. See Buck, *supra*. Subsequent offenses would also assess points to the driver's license and the amount of points depends on the nature of the infraction: texting in a school zone assesses two points; passing a stopped school bus assesses four points; and causing an accident assesses six points. *Id.*

113. See Ben Spencer, *Texting while driving 'slows reaction times more than drink or drugs'*, DAILY MAIL (last updated June 8, 2014, 7:28 PM), [www.dailymail.co.uk/news/article-2652015/Texting-driving-slows-reaction-times-drink-drugs.html](http://www.dailymail.co.uk/news/article-2652015/Texting-driving-slows-reaction-times-drink-drugs.html).

114. See DeCastroVerde Law Group, *Texting & Driving vs. Littering: Which Fines are Higher?*, DLG TEAM (Aug. 14, 2016), <http://www.dlgteam.com/texting-driving-vs-littering-fines-higher/>.

115. *Id.*

116. See Christopher G. Burns, *\$30 Fine in Florida for Texting While Driving*, FLA. CYCLING LAW BLOG (Jun. 2, 2016), <http://floridacyclinglaw.com/blog/archives/30-florida-texting-fine-while-driving/>; see also DeCastroVerde Law Group, *supra* note 114 (comparing the penalties for texting while driving to littering).

117. FLA. STAT. § 316.305(3)(a) (2017).

This also means one can text in traffic jams.<sup>119</sup> Many states have a “stationary” exception; however, these states clarify their exception to make sure the public safety is preserved.<sup>120</sup> Numerous states expressly declare that their cellphone laws also apply to drivers who are temporarily stationary because of traffic.<sup>121</sup> For example, West Virginia defines “driving” or “operating a motor vehicle” as “operating a motor vehicle, with the motor running, *including while temporarily stationary because of traffic*, a traffic control device, or other momentary delays,” while also clarifying that the law does not apply to drivers who have “moved the vehicle to the side of, or off a highway and halted in a location where the vehicle can safely remain stationary.”<sup>122</sup> Another example is Wisconsin’s statute, which states: “drive” means the “exercise of physical control over the speed and direction of a motor vehicle *while it is in motion or is temporarily stationary because of traffic*, a traffic control device, or other momentary delay.”<sup>123</sup> Some states limit their stationary exception to traffic on a highway, while others apply their stationary exception to any “road,” “street,” or “public way intended for travel.”<sup>124</sup> Other states make it clear

---

118. Cox, *supra* note 40; see *FL Texting While Driving Ban Signed Into Law*, PANTER, PANTER & SAMPEDRO, PA, <https://www.hg.org/article.asp?id=30620> (last visited Apr. 7, 2018) (discussing the loopholes of Florida’s texting while driving law).

119. Prothero & Stone, *supra* note 39.

120. See, e.g., COLO. REV. STAT. § 42-4-239(1)(b) (2017); OHIO REV. CODE ANN. § 4511.204(B)(3) (West 2017). Colorado’s statute states “operating a motor vehicle” does not mean “maintaining the instruments of control *while the motor vehicle is at rest in a shoulder lane or lawfully parked.*” § 42-4-239(1)(b) (emphasis added). The law in Ohio does not apply to a “person using a handheld electronic wireless communications device in that manner whose motor vehicle is in a stationary position *and who is outside the lane of travel.*” § 4511.204(B)(3) (emphasis added).

121. See ME. STAT. tit. 29-a, § 2119(1)(D) (2018); N.Y. VEH. & TRAF. LAW § 1225-d(1) (McKinney 2017). Maine’s statute declares: “operate” means “driving a motor vehicle on a public way with the motor running, including while temporarily stationary because of traffic, a traffic light or a stop sign or otherwise stationary.” § 2119(1)(D). New York’s statute states “no person shall operate a commercial motor vehicle while using any portable electronic device on a public highway *including while temporarily stationary because of traffic*, a traffic control device, or other momentary delays.” § 1225-d(1) (emphasis added).

122. W. VA. CODE § 17C-14-15(b)(2) (2017) (emphasis added).

123. WIS. STAT. § 346.89(4)(b)(1)(b) (2017) (emphasis added).

124. See, e.g., WASH. REV. CODE § 46.61.672(5)(a) (2017); ALA. CODE § 32-5A-350(e)(2) (2017); MASS. GEN. LAWS ANN. ch. 90, § 13B(a) (West 2017). Washington’s statute says “driving” does not include “when the driver has moved the vehicle to the side of, or off, a *highway* and has stopped in a location where the vehicle can remain safely stationary.” § 46.61.672(5)(a) (emphasis added). Alabama clarifies that the law does not apply to “an individual using a wireless communication device while the motor vehicle is parked on the shoulder of the *highway, road, or street.*” § 32-5A-350(e)(2) (emphasis added). Massachusetts’s law states: “[A]n operator shall not be considered to be operating a motor vehicle if the vehicle is stationary and not located in a part of the *public way intended for travel.*” § 13B(a) (emphasis added).

that the cellphone-related prohibition does not apply to when a vehicle is “stopped in a location where it can safely remain stationary.”<sup>125</sup> In contrast, the vague wording of Florida’s “stationary” exception does not preserve roadway safety because drivers who stop for a moment during traffic should still be aware of their surroundings, and allowing drivers to look down at their phones while being stopped momentarily will certainly prevent that.<sup>126</sup> In fact, studies show that texting while stopped at a stoplight and in traffic is not safe, even when a driver looks at the road and not at his or her phone when he or she begins to move.<sup>127</sup> “Being momentarily stopped does not mean [a driver is] not operating [his or her] vehicle, . . . as [t]he task of driving always requires [a driver’s] full attention.”<sup>128</sup> Thus, the Florida Legislature should follow the overwhelming majority of states who add clarity to their stationary exception by making sure that drivers cannot text while temporarily

---

125. See, e.g., CONN. GEN. STAT. § 14-296aa(a)(9) (2017); 31 R.I. GEN. LAWS § 31-22-30(a)(1) (2017). Connecticut’s law states that “operating a motor vehicle” does not include “being parked on the side or shoulder of any highway *where such vehicle is safely able to remain stationary.*” § 14-296aa(a)(9) (emphasis added). Rhode Island’s statute says “[d]riving” means

operating a motor vehicle on a public road, including operation while temporarily stationary because of traffic, a traffic light or stop sign, or otherwise, but does not include operating a motor vehicle when the vehicle has pulled over the side of, or off, an active roadway and has *stopped in a location where it can safely remain stationary.*

§ 31-22-30(a)(1) (emphasis added).

126. See Scott Goldman, *Is it illegal to text message while stopped at a red light?*, QUORA (Aug. 25, 2013), <https://www.quora.com/Is-it-illegal-to-text-message-while-stopped-at-a-red-light>; Joel Feldman, *Think texting when stopped in traffic is safe? Think again – it takes up to 27 seconds after texting for our brains to fully engage in the driving task*, END DISTRACTED DRIVING (Oct. 23, 2015), <http://www.enddd.org/distracted-driving-updates/think-texting-when-stopped-in-traffic-is-safe-think-again-it-takes-up-to-27-seconds-after-texting-for-our-brains-to-fully-engage-in-the-driving-task/>. A study conducted at the University of Utah found that texting when stopped in traffic is not safe as our brains take almost another 30 seconds to fully engage in a driving task after texting while being stopped. See Feldman, *supra*.

127. Feldman, *supra* note 126. “Even sending a short text message can cause almost another 30 seconds of impaired attention.” *Id.*

128. Jon Hilkevitch & Lauren Zumbach, *Drivers Texting at Stoplights Accident Waiting to Happen*, CHAIN LINK (Nov. 15, 2013, 10:46 AM), <http://www.thechainlink.org/forum/topics/trib-drivers-texting-at-stoplights-accident-waiting-to-happen> (discussing the implications of texting while momentarily stopped).

stopped and only allow drivers to text in a location where the vehicle can remain safely stationary.<sup>129</sup>

Additionally, according to Florida's statute, the law does not apply to a motor vehicle operator who is "[u]sing a device or system for navigational purposes."<sup>130</sup> Some states also have a GPS exception; however, these states add limitations to preserve the safety of other drivers.<sup>131</sup> One limitation imposed by states is only applying this exception to a navigation device that is "affixed" to the vehicle, which ensures that drivers will not hold their cellphones in their hands or lap while looking at directions.<sup>132</sup> For example, Michigan's law excludes drivers who use a "global positioning or navigation system that is 'affixed' to the motor vehicle."<sup>133</sup> While Florida does not restrict windshield mounting of GPS devices, it is important for drivers to mount or set their GPS devices in a place where they can see the device while still focusing on the road.<sup>134</sup>

Another limitation imposed is requiring drivers to program their GPS before driving, which ensures that drivers are not distracted while trying to input GPS coordinates.<sup>135</sup> For example, Alabama's law does not apply to "[a]n individual using a wireless communication device as a global positioning or navigation system to receive driving directions, which has been *pre-programmed with the desired coordinates*."<sup>136</sup> Alabama further clarifies that "[t]he programming of coordinates while operating the vehicle

---

129. See MINN. STAT. § 169.475(2)(a) (2017); MO. REV. STAT. § 304.820(12)(1) (2017). Minnesota is another state that clarifies its stationary exception, stating: "No person may operate a motor vehicle while using a wireless communications device to compose, read, or send an electronic message, *when the vehicle is in motion or a part of traffic*." § 169.475(2)(a) (emphasis added). Missouri clarifies that its provision shall not apply to the "operator of a vehicle that is *lawfully parked or stopped*." § 304.820(12)(1) (emphasis added).

130. FLA. STAT. § 316.305(3)(b) (2017).

131. See, e.g., OKLA. STAT. tit. 47, § 11-901d(F)(3)(b) (2017); NEV. REV. STAT. § 484B.165(3) (2017). Oklahoma's statute states the "electronic communication device" does not include "a voice-operated global positioning or navigation system that is affixed to a motor vehicle." § 11-901d(F)(3)(b). Nevada's law states: "The provisions of this section do not prohibit the use of a voice-operated global positioning or navigation system that is affixed to the vehicle." § 484B.165(3).

132. See, e.g., § 11-901d(F)(3)(b); § 484B.165(3) (adding a limitation to the GPS use exception by requiring a GPS device to be mounted in the vehicle).

133. MICH. COMP. LAWS ANN. § 257.602b(1) (2018).

134. James Fasig, *Driving while using GPS legal in Florida, but may cause distraction*, FASIG & BROOKS (Aug. 21, 2014), <http://www.tallahasseepersonalinjury.com/driving-while-using-gps-legal-in-florida-but-may-cause-distraction/> (discussing the implications of Florida's GPS exception).

135. See ALA. CODE § 32-5A-350(e)(3) (2017); see also Fasig, *supra* note 134 (noting how inputting GPS coordinates while driving is still distracting).

136. § 32-5A-350(e)(3) (emphasis added).

remains a violation of” Alabama’s law.<sup>137</sup> Requiring drivers to program their GPS devices before leaving home or to pull over to the side of the road to enter the destination coordinates helps guarantee drivers will keep their eyes on the road.<sup>138</sup> Therefore, Florida Legislators should add limitations to the GPS exception by requiring the GPS device to be “affixed” to the vehicle, while also requiring drivers to pre-program their devices before driving.<sup>139</sup> These limitations will close a loophole in Florida’s law in which drivers can claim that they were looking at directions (rather than reading a text message) or entering GPS coordinates (rather than writing a text message).<sup>140</sup>

#### IV. SOLUTION

##### A. PROPOSED AMENDMENTS TO FLORIDA’S STATUTE

(3)(a) A person may not operate a motor vehicle while using a wireless communication device while such vehicle is in motion, including while temporarily stationary because of traffic, a traffic control device, or other momentary delays, unless the use is accomplished by hands-free equipment.<sup>141</sup> For purposes of this paragraph, “using” means holding in a person’s hand or hands an electronic communication device while: (a) viewing or transmitting images or data; (b) playing games; or (c) composing, sending, reading, viewing, assessing, browsing, transmitting, saving, or retrieving e-mail, text messages, or other electronic data.<sup>142</sup> For the purposes of this paragraph, a motor vehicle that is stationary on the side of the road or halted in a location where the vehicle can remain safely stationary is not subject to the prohibition in this statute.<sup>143</sup>

---

137. *Id.*

138. See Fasig, *supra* note 134 (noting the importance of pre-programming GPS coordinates before driving).

139. Fasig, *supra* note 134; see also Bryan Mims, *Proposal would outlaw holding cellphone while driving in NC*, WRAL (Mar. 25, 2015), <http://www.wral.com/proposal-would-outlaw-holding-cellphone-while-driving-in-nc/14539587/> (noting how the GPS exception in North Carolina creates a loophole in its texting law).

140. See Steve Urbon, *Bill would ban hand-held cellphone, GPS use while driving in Massachusetts*, SOUTH COAST TODAY (Jan. 14, 2016), <http://www.southcoasttoday.com/article/20160114/NEWS/160119642> (discussing the loophole in Massachusetts’ law relating to the GPS exception).

141. See ME. STAT. tit. 29, § 2119(1)(D) (2018); N.Y. VEH. & TRAF. LAW § 1225-d(1) (McKinney 2017) (placing a ban on hand-held cellphone use while also temporarily stationary).

142. See DEL. CODE ANN. tit. 21, § 4176C(b)(6) (2017); W. VA. CODE § 17C-14-15(b)(8) (2017) (defining “using” with a broader scope).

143. See CONN. GEN. STAT. § 14-296aa(a)(9) (2017); 31 R.I. GEN. LAWS § 31-22-30(a)(1) (2017) (clarifying the stationary exception).

(3)(b) Paragraph (a) does not apply to:

4. An individual operating a voice-operated global positioning or navigation system that is affixed to the vehicle and that allows the user to send or receive messages without diverting visual attention from the road or engaging in the use of either hand.<sup>144</sup> The programming of coordinates while operating a vehicle remains a violation of this section.<sup>145</sup>

(4)(a) Any person who violates paragraph (3)(a) commits a noncriminal traffic infraction, punishable as a moving violation with a minimum fine of \$250.<sup>146</sup> Each subsequent violation shall be punishable by a fine of not more than \$500.<sup>147</sup>

(5) Enforcement of this section by state or local law enforcement agencies may treat a violation of this section as the primary or sole reason for issuing a citation to a driver.<sup>148</sup>

#### B. COMMENTARY TO PROPOSED AMENDMENTS

These proposed amendments, if adopted, would help cure some of the many problems with Florida's current statute.<sup>149</sup> First, the proposed amendment to expand the scope of Florida's law to a hand-held cellphone prohibition better achieves roadway safety, especially since hand-held bans seem to be more effective than texting while driving bans.<sup>150</sup> Second, the proposed amendment to make hand-held cellphone use a primary offense will make enforcement of the law easier.<sup>151</sup> An officer who sees a person using a cellphone in their hands while driving will be able to issue a citation.<sup>152</sup> This alone will create a larger deterrence in drivers to not use their cellphones while driving.<sup>153</sup> This will also help reduce accidents significantly, especially in comparison to states with secondary enforcement of texting while driving laws.<sup>154</sup> Third, the proposed amendment to increase the fine for hand-held cellphone use while driving

---

144. See OKLA. STAT. tit. 47, § 11-901d(F)(3) (2017); NEV. REV. STAT. § 484B.165(1)(b), (3) (2017) (limiting the GPS exception to those mounted on the vehicle).

145. See ALA. CODE § 32-5A-350(e)(3) (2017) (limiting the GPS exception to drivers who pre-program their devices).

146. See 29-A M.R.S.A. § 2119(3) (2013).

147. See *id.*

148. See § 32-5A-350(d).

149. See *supra* Part III.

150. See *supra* Part III, Section A.

151. See *supra* Part III, Section B.

152. See *supra* Part III, Section B.

153. See *supra* Part III, Section B.

154. See *supra* Part III, Section B.

to a reasonable but effective amount will likely encourage drivers to comply with the law.<sup>155</sup> This will ensure that drivers will take cellphone use while driving as seriously as drinking while driving.<sup>156</sup> Fourth, the proposed amendment to clarify the stationary exception will ensure that drivers will not text while momentarily stopped at traffic lights or in a traffic jam.<sup>157</sup> Finally, the proposed amendment to limit the GPS exception by requiring drivers to mount their GPS devices and also pre-program their destination coordinates will close a loophole in Florida's law that allows drivers to claim they were using their GPS, rather than texting while driving.<sup>158</sup>

## V. CONCLUSION

Florida's current texting while driving ban is a narrow law that is ineffective.<sup>159</sup> With a secondary ban, minimal fines, and exceptions that create loopholes and defeat the purpose of the law, the Florida Legislature needs to get on board with the rest of the nation and pass a law that will actually deter Florida drivers from distracted driving.<sup>160</sup> A law with the proposed amendments above would be met with resistance because it prohibits activities that most drivers habitually engage in while driving in Florida.<sup>161</sup> Although placing more restrictions on cellphone use while driving may be the unpopular choice, it is the necessary choice.<sup>162</sup> It is better to temporarily part with your phone while driving than to permanently part with your life.<sup>163</sup>

---

155. See *supra* Part III, Section D.

156. See *supra* Part III, Section D.

157. See *supra* Part III, Section E.

158. See *supra* Part III, Section E.

159. See *supra* Part III.

160. See *supra* Part III.

161. See *supra* Part IV.

162. See Shannon L. Noder, Note, *Talking and Texting While Driving: A Look at Regulating Cell Phone Use Behind the Wheel*, 44 VAL. U.L. REV. 237, 281 (2009) (discussing how cellphone bans are unpopular and come with much resistance but are necessary to prevent fatal accidents).

163. See Cohen, *supra* note 3; see also Sebastian Murdock, *Our Addiction To Cell Phones Is Costing Lives. Here's How We Can Stop It*, HUFFINGTON POST (Jun. 9, 2015), [http://www.huffingtonpost.com/2015/06/09/cell-phone-addiction-driving\\_n\\_7543464.html](http://www.huffingtonpost.com/2015/06/09/cell-phone-addiction-driving_n_7543464.html) (noting how texting while driving can become a matter of life and death).