

A Use-ful Update: Promoting Safer Roadways Through Stricter Distracted Driving Laws

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I. INTRODUCTION

Over 20,000 Americans died on roadways in the first half of 2021—most of which have occurred during the first half of the year in over a decade.¹ This number represents an increase of over eighteen percent,

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¹ Press Release, Nat’l Highway Traffic Safety Admin., USDOT Releases New Data Showing That Road Fatalities Spiked in First Half of 2021, (Oct. 28, 2021), <https://www.nhtsa.gov/press-releases/usdot-releases-new-data-showing-road-fatalities-spiked-first-half-2021>.

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even while vehicle travel dwindled during the COVID-19 pandemic.² Without addressing the numerous individuals injured by vehicular means, Dr. Steven Cliff, the Deputy Administrator for the National Highway Traffic Safety Administration, claims “‘hundreds of millions of people can’” prevent these fatal crashes by changing their behavior behind the wheel.³ Namely, drivers should “[s]low down, wear seat belts, drive sober, and avoid distractions” while driving.⁴ Such advice is certainly not cutting edge: besides explicit discussions concerning risky driving decisions, high school students newly eligible to operate motor vehicles on public roadways are likewise exposed to the dangers of driving when reading F. Scott Fitzgerald’s 1925 novel *The Great Gatsby*.⁵

A combination of factors causes traffic accidents and their injurious effects.⁶ The complex interaction of vehicles, roadways, the environment, and drivers leads to accidents and collisions.⁷ Human factors, including distracted driving, account for over ninety percent of road accidents.⁸ Although distracted driving may concern eating and using onboard entertainment systems while operating a vehicle, it is most often associated with cellphone use.⁹ In 2017, distracted driving was at least a factor in nine percent of all fatal automobile accidents; this proportion was the same as in previous years, suggesting that the situation has not improved.¹⁰ Of these fatal accidents, fourteen percent

² Laura Bliss, *As Traffic Deaths Spike, U.S. Pledges New Safety Strategy*, BLOOMBERG CITYLAB (Jan. 27, 2022, 12:50 PM EST), <https://www.bloomberg.com/news/articles/2022-01-27/usdot-s-buttigieg-announces-new-traffic-safety-strategy>.

³ Press Release, Nat’l Highway Traffic Safety Admin., USDOT Releases New Data Showing That Road Fatalities Spiked in First Half of 2021, (Oct. 28, 2021), <https://www.nhtsa.gov/press-releases/usdot-releases-new-data-showing-road-fatalities-spiked-first-half-2021>.

⁴ *Id.*

⁵ See *High School Seniors Dramatize the Risk of Drunk Driving*, THE PHOTO NEWS, (Feb. 21, 2012, 2:34 AM EST), <http://www.thephoto-news.com/news/high-school-seniors-dramatize-the-risk-of-drunk-driving-JTPN20070608306089935>; See also F. SCOTT FITZGERALD, *THE GREAT GATSBY* 73–75, 163–64 (Oldcastle Books 2020) (1925).

⁶ Mabrouk Touahmia, *Identification of Risk Factors Influencing Road Traffic Accidents*, 8 ENG’G TECH. & APPLIED SCI. RSCH. 2417, 2417 (2018).

⁷ *Id.*

⁸ Eleonora Papadimitriou et al., *Transport Safety and Human Factors in the Era of Automation: What Can Transport Modes Learn From Each Other?*, 144 ACCIDENT ANALYSIS & PREVENTION 1, 1 (2020).

⁹ Youngbin Lym & Zhenhua Chen, *Influence of Built Environment on the Severity of Vehicle Crashes Caused by Distracted Driving: A Multi-state Comparison*, 150 ACCIDENT ANALYSIS & PREVENTION 1,1 (2021) (citing Michael A. Regan, Charlene Hallett, & Craig P. Gordon, *Driver Distraction and Driver Inattention: Definition, Relationship and Taxonomy*, 43 ACCIDENT ANALYSIS & PREVENTION 1771 (2011)).

¹⁰ *Id.* (citing NHTSA, TRAFFIC SAFETY FACTS: RSCH NOTES 3 (2019), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812700>).

were attributed to the driver “talking on, listening to, or engag[ing] in some other cell phone activity” leading to 434 total deaths nationwide¹¹ and likely greater amounts of injury to person and property. The United States, federally and within states, has attempted to make roads themselves safer through Intersection Safety Implementation Plans.¹² These plans have reduced fatalities and severe injuries.¹³ Even though these infrastructure plans reduced fatalities, they ignore a major cause of motor vehicle accidents: human behavior.

The proportion of accidents caused by human error is lower in other modes of transportation: accidents caused by human error decreases to eighty percent in aviation and sixty percent in maritime accidents.¹⁴ These decreases are likely because of the elimination, or at least a substantial reduction, of the impact of human error by the implementation of automation.¹⁵ Increasing automation on roadways to seek a similar reduction in human error accidents is already underway; the Department of Transportation has released a comprehensive plan, the National Roadway Safety Strategy, which addresses “the national crisis in roadway fatalities and serious injuries” partly by creating agency rules “on automatic emergency braking and pedestrian automatic emergency braking” among other technological means.¹⁶ Even still, current Secretary of Transportation Pete Buttigieg acknowledges “[t]echnology alone will not save us, certainly not on any acceptable timeline.”¹⁷ The Strategy’s optimistic, long-term goal of entirely eliminating roadway fatalities “will take sustained and concerted action from everyone across all sectors and all levels of government.”¹⁸ From this, it becomes apparent that reducing distracted

¹¹ NHTSA, *Distracted Driving in Fatal Crashes, 2017*, TRAFFIC SAFETY FACTS: RSCH. NOTES 1 (2019), <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812700>.

¹² See Youngbin Lym & Zhenhua Chen, *Influence of Built Environment on the Severity of Vehicle Crashes Caused by Distracted Driving: A Multi-state Comparison*, 150 ACCIDENT ANALYSIS & PREVENTION 1, 10 (2021).

¹³ *Id.*

¹⁴ Papadimitriou, *supra* note 8, at 1 (first citing David C. Nagel, *Human Error in Aviation Operations*, in HUMAN FACTORS IN AVIATION 263 (Earl L. Wiener et al., eds., 1988); then citing Kayvan Pazouki et al., *Investigation on the Impact of Human-Automation Interaction in Maritime Operations*, 153 OCEAN ENG’G 297 (2018)).

¹⁵ Papadimitriou, *supra* note 8, at 1.

¹⁶ Press Release, U.S. Dep’t of Transp., U.S. Transp. Sec’y Pete Buttigieg Announces Comprehensive Nat’l Roadway Safety Strategy (Jan. 27, 2022), <https://www.transportation.gov/briefing-room/us-transportation-secretary-pete-buttigieg-announces-comprehensive-national-roadway>.

¹⁷ Bliss, *supra* note 2.

¹⁸ Press Release, U.S. Dep’t of Transp., U.S. Transp. Sec’y Pete Buttigieg Announces Comprehensive Nat’l Roadway Safety Strategy (Jan. 27, 2022),

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driving by implementing enforceable laws and changing driver behavior is a crucial component to making our nation's roads safer.

This Comment argues that roadway accidents in the United States can be reduced through statutory updates of state vehicle and traffic laws prohibiting the use of cellphones while driving. Namely, by providing more direct means of enforcement, broadening the definition of "use," clarifying exceptions, and including a rebuttable presumption, these laws can contribute to overall road safety. Part II of this Comment explores current state traffic laws highlighting differences in their mechanisms of enforcement and statutory definitions. Part III argues that many state laws could benefit from updates to their statutory language by allowing primary enforcement of a violation, expanding "use" to include all cellphone-related activity, expressly enumerating exceptions that defendants could use as an affirmative defense, and permissibly shifting the burden of proof by adding a rebuttable presumption. Although certainly an area of concern, civil liabilities for distracted drivers and those who may cause those distractions are not within this Comment's purview; instead, the focus remains on statutory reform as a means of accident prevention. This Comment concludes that states could benefit from these changes in their laws leading to a reduction in motor vehicle accidents by changing human behavior and enabling law enforcement to prevent human behavior from affecting roadway safety.

II. BACKGROUND/OVERVIEW

A. History

Distracted driving has long been recognized as requiring legislative regulation. In the 1930s, many states considered restrictions, if not outright bans, of radio use in cars.¹⁹ For both the radio and car industry, this was cause for concern: few cars had radios pre-installed, and the Connecticut legislature's proposed 1935 bill would have made the installation of a radio in a car a criminal offense exacting a substantial \$50 fine (\$1,014.41 today when adjusting for inflation).²⁰ For better or worse, no state succeeded in enforcing restrictions on radios in automobiles.²¹ Absent a prohibition, research at the end of the decade

<https://www.transportation.gov/briefing-room/us-transportation-secretary-pete-buttigieg-announces-comprehensive-national-roadway>.

¹⁹ See Matt Novak, *Distracted Drivers are Nothing New*, PACIFIC STANDARD (Feb. 21, 2013), <https://psmag.com/environment/the-1930s-battle-over-car-radios-and-distracted-driving-52823>.

²⁰ *Id.*

²¹ *Id.*

concluded there was no association between the use of car radios and the incidence of automobile accidents.²²

As wireless communication technology improved, states attempted to follow step. In 2001, New York became the first state to prohibit the holding of a cellphone while driving.²³ As cellphones gained greater capability, laws changed to prohibit more than just voice communication.²⁴ Washington State led the nation in banning text messaging communication while driving in 2007.²⁵ As of writing this Comment, Montana remains the only state that does not statutorily prohibit the use of a cellphone while driving in any capacity.²⁶ Missouri, unlike the other forty-eight states which otherwise restrict cellphone use, apply their prohibition only to drivers under the age of twenty-one.²⁷ The reason why laws banning phones while driving have succeeded in state legislatures while their radio-prohibiting predecessors failed decades prior may be explained by the science behind human attention supporting the posture that cellphones are more detrimental than simpler radios.

B. The Science of Attention

Attention, generally, is the ability to “select and enhance specific items ... and to put others in the background.”²⁸ Research has conceptualized attention as processing capacity or “the amount of ‘work’ that a system is capable of performing at a given moment.”²⁹ Drivers are just like everyone else and have an allotted amount of attention they may delegate to any given task; a driver exceeding their capacity through distraction cannot allocate attention to critical events requiring their response.³⁰ Unlike inattention which describes all

²² Edward A. Suchman, *Radio Listening and Automobiles*, 23 AM. PSYCH. ASS'N. 148, 153 (1939).

²³ James C. McKinley Jr., *New York to be First State to Ban Holding Cell Phone While Driving*, N.Y. TIMES, June 26, 2001, at A1; see S. 5400-A, 224th Leg. (N.Y. 2001).

²⁴ Compare N.Y. VEH. & TRAF. LAW § 1225-c (McKinney 2014) (prohibiting calls with a cellphone while driving), with N.Y. VEH. & TRAF. LAW § 1225-d (McKinney 2014) (prohibiting texting and other physical interaction with a cell phone while driving).

²⁵ *Distracted Driving*, GHSA, <https://www.ghsa.org/state-laws/issues/distracted%20driving> (last visited Aug. 4, 2023).

²⁶ See *infra* tbl. 1.

²⁷ See MO. ANN. STAT. § 304.820 (West 2013).

²⁸ Marco Iacoboni, *Attention and Sensorimotor Integration*, in BRAIN MAPPING: THE SYSTEMS 463, 463 (2000).

²⁹ Jason S. McCarley et al., *Spatially Mediated Capacity Limits in Attentive Visual Perception*, 126 ACTA PSYCHOLOGICA 98, 101 (2007).

³⁰ Michelle Chan & Anthony Singhal, *Emotion Matters: Implications for Distracted Driving*, 72 SAFETY SCI. 302, 302 (2014) (citing DRIVER DISTRACTION: THEORY, EFFECTS AND MITIGATION 31–40 (Michael A. Regan et al. eds., 1st ed. 2009)).

occurrences of attention absence, distraction requires a preceding event to cause inattention such as a cellphone notification.³¹ When these preceding events occur and engage the driver in “another task, their attention may not be optimal for safe driving due to reallocation of attention to the” distracting source—their cellphone.³²

Cellphone use while driving can provide three modes of distraction: “manual distraction (hands off the steering wheel), visual distraction (eyes off the road), and cognitive distraction (mind off driving).”³³ Cellphones can create these distractions through phone calls, texts, and apps, leading to motor vehicle accidents.³⁴ Drivers who use the cellphone are two to six times more likely to be involved in a crash compared to their abstaining counterparts.³⁵ As far as mobile app usage is concerned, Pokémon GO, a popular mobile game, was noted as a major contributor to traffic accidents following its 2016 release.³⁶ These distractions and associated collisions while driving result in a lower life expectancy in the United States compared to other countries with a high human development index; traffic crashes are a major contributor to this discrepancy as they are a leading cause of death overall.³⁷

C. Efficacy of Texting and Driving Laws

Bans on cellphone use are effective and reduce driver fatalities.³⁸ Differences in the statutory structure of a ban lead to differences in their effectiveness: so-called “comprehensive bans” which prohibit all cellphone activity are “associated with fewer driver fatalities, but calling-only, texting-only, texting plus,³⁹ and calling and texting bans” are not.⁴⁰ While comprehensive bans are effective in reducing driver

³¹ *Id.*

³² *Id.*

³³ Motao Zhu et al., *Bans on Cellphone Use While Driving and Traffic Fatalities in the United States*, 32 EPIDEMIOLOGY 731, 731 (2021) (citing Jeffery H. Coben & Motao Zhu, *Keeping an Eye on Distracted Driving*, 309 JAMA 877–78 (2013).

³⁴ *Id.*

³⁵ *Id.* (citing Feng Guo et al., *The Effects of Age on Crash Risk Associated with Driver Distraction*, 46 INT'L J. EPIDEMIOLOGY 258 (2017)).

³⁶ Mara Faccio & John J. McConnell, *Death by Pokémon GO: The Economic and Human Cost of Using Apps While Driving*, 87 J. RISK & INS. 815 (2020) (finding the app has potentially caused \$2 billion in damages since its release).

³⁷ Zhu, *supra* note 33, at 731.

³⁸ Zhu, *supra* note 33, at 736.

³⁹ See e.g., COLO. REV. STAT. § 42-4-239 (2009) (“A person shall not use a wireless telephone for the purpose of engaging in text messaging or other similar forms of manual data entry or transmission while operating a motor vehicle.”).

⁴⁰ Zhu, *supra* note 33, at 735.

fatality, they are not associated with a reduction in non-driver fatalities which, aside from vehicle passengers, include non-vehicle road users such as cyclists and pedestrians.⁴¹ As for nonfatal injuries, previous research found that comprehensive bans led to a five percent reduction in emergency department visits; in comparison, texting only bans led to a four percent reduction in the same.⁴² In sum, laws prohibiting the use of cellphones while driving in any capacity are effective, but laws which ban all cellphone use while driving instead of specific actions are better at reducing fatalities and injuries.

These laws achieve their result by reducing the number of drivers who use their devices. Following the introduction of calling-only bans in New York and D.C., there was a forty-one to forty-seven percent reduction in use.⁴³ When Connecticut banned texting and driving, it saw a seventy-six percent reduction in use.⁴⁴ Consequently, prohibitions on handheld use of phones have led to an increase in hands-free cellphone use.⁴⁵ Hands-free use of a cellphone removes the manual and visual distractions typically required and, presumably, permits greater attention allocation to the task of driving instead of toward a distracting device.⁴⁶ Despite this evidence, advancements in cellphone capabilities, and two decades since the first state statute on the subject was enacted, state traffic laws banning cellphone use differ among states.

D. Review of States' Texting and Driving Laws

State and territory laws banning cellphone use while driving share similar components.⁴⁷ Differences generally concern whether

⁴¹ Zhu, *supra* note 33, at 736.

⁴² Zhu, *supra* note 33, at 736 (citing Alva O. Ferdinand et al., *Texting-While-Driving Bans and Motor Vehicle Crash-Related Emergency Department Visits in 16 US States: 2007-2014*, 109 AM. J. PUB. HEALTH 784 (2019)).

⁴³ Zhu, *supra* note 33, at 737 (citing Anne T. McCartt et al., *Long-term Effects of Handheld Cell Phone Laws on Driver Handheld Cell Phone Use*, 11 TRAFFIC INJ. PREVENTION 133 (2010)).

⁴⁴ Zhu, *supra* note 33, at 737 (citing Anne T. McCartt et al., *Long-term Effects of Handheld Cell Phone Laws on Driver Handheld Cell Phone Use*, 11 TRAFFIC INJ. PREVENTION 133 (2010)).

⁴⁵ Zhu, *supra* note 33, at 737 (citing Christopher S. Carpenter & Hai V. Nguyen, *Effects of a Driver Cellphone Ban on Overall Handheld, and Hands-Free Cellphone Use While Driving: New Evidence from Canada*, 24 HEALTH ECON. 1452 (2015)).

⁴⁶ See Zhu, *supra* note 33, at 731. But see Annie Barret Wallin, Note, *Cell Phones Pose a Distraction to Drivers but Legislative Ban is Not the Answer*, 98 KY. L. J. 177, 185-86 (2009) (“[L]egislation does not attempt to stop the distracting conversations. Instead, the laws focus on prohibiting the use of handheld phones, proving exemptions to hands-free phone users. With a hands-free device, the conversation still occurs and the root of the distraction is not addressed.”).

⁴⁷ See *infra* tbl.1.

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enforcement is primary or secondary, how “use” is defined, what uses or circumstances serve as exceptions, and if a rebuttable presumption changes the burden of proof necessary for conviction.⁴⁸ Each is discussed in kind below.

1. Primary Versus Secondary Enforcement Mechanism

When a law enforcement officer views a driver using their cellphone in a prohibited manner while operating a motor vehicle, they may be limited in their ability to enforce the violation—and stop the detrimental behavior—depending on the statute’s enforcement mechanism. Traffic law enforcement can be categorized as either primary or secondary: primary enforcement permits a violation of the law to be charged by itself; secondary enforcement laws only allow an officer to stop and charge a driver when another violation (e.g., speeding or ignoring traffic lights) has also occurred.⁴⁹ Nebraska’s texting prohibiting statute specifies just this: “[e]nforcement of this section . . . shall be accomplished only as a secondary action when a driver of a motor vehicle has been cited or charged with a traffic violation or some other offense.”⁵⁰ Thus, while a driver who runs a stop sign because they were looking at their phone can be charged for both offenses,⁵¹ a Nebraskan officer is left powerless if they only observe a driver texting and cannot prevent a secondary infraction or potential accident. The Metropolitan Police of Washington, D.C., do not have the same restriction and can stop a driver only for using their cellphone.⁵² The ability to pull over a driver, however, is not free from complication as officers may need to determine if a prohibited “use” of a cellphone occurred.

2. Defining “use”

State laws differ in the activity considered “use” in their cellphone prohibiting statutes.⁵³ In states like Utah, only specifically listed

⁴⁸ *Id.*

⁴⁹ Wallin, *supra* note 46, at 180.

⁵⁰ NEB. REV. STAT. ANN. § 60-6,179.01(4) (West 2014).

⁵¹ *Id.*; NEB. REV. STAT. ANN. § 60-682 (West 1993); NEB. REV. STAT. ANN. § 60-6, 119 (West 1993).

⁵² D.C. CODE ANN. § 50-1731.04 (West 2020).

⁵³ *Compare* VA. CODE ANN. § 46.2-818.2(a) (West 2021) (“It is unlawful . . . to hold a handheld personal communications device.”), *with* UTAH CODE ANN. § 41-6a-1716 (2) (West 2021) (“[A] person may not use a handheld wireless communication device . . . to manually: (a) write, send, or read a written communication . . . ; (b) dial a phone number; (c) access the Internet; (d) view or record video; or (e) enter data into a handheld wireless communication device.”).

activities are banned via statute.⁵⁴ The law prohibits interaction with written cellphone communications (e.g., texts or email), dialing a number, retrieving or sending internet data, viewing or recording video, or otherwise inputting data into a cellphone.⁵⁵ Prosecution may be more difficult under these more exacting statutes compared to their more broadly defining counterparts.⁵⁶ Presumably, under Utah's law, a person could use a cellphone to take a "selfie" while driving and not violate the law because such an action is not enumerated: conviction under the statute would require court interpretation that such action was entering "data into a handheld wireless communication device."⁵⁷ Even still, this leaves little argument that using a cellphone's camera as a mirror would be prohibited as no data is created, thus not constituting viewing or recording of a video.⁵⁸

Pennsylvania's prohibition is even more exacting and only prohibits a driver from sending, reading, or writing "a text-based communication while the vehicle is in motion."⁵⁹ While specifying a driver "does not send, read, or write a text-based communication when the" driver interacts with their cellphone to place a phone call, the law would theoretically allow a person to use the application Tinder as it does not require text-based communication.⁶⁰ Ohio's texting and driving statute prohibits the use of a cellphone to "write, send, or read a text-based communication," as well, but only prohibits any use of a cellphone for those under the age of eighteen in a separate statute.⁶¹ This means that an individual driving at 11:59 PM the night prior to their birthday would need to wait one minute until it would no longer be a violation for them to hold their phone while making a phone call;⁶² even if the driver is under the age of eighteen, another traffic violation would need to occur before the cellphone violation could be enforced as

⁵⁴ See UTAH CODE ANN. § 41-6a-1716(2) (West 2021).

⁵⁵ UTAH CODE ANN. § 41-6a-1716(2)(a)-(c) (West 2021).

⁵⁶ See Alan Lazerow, *Near Impossible to Enforce at Best, Unconstitutional at Worst: The Consequences of Maryland's Text Messaging Ban on Drivers*, 17 RICH. J. L. & TECH. 1, 5 (2010).

⁵⁷ UTAH CODE ANN. § 41-6a-1716(2)(e) (West 2021).

⁵⁸ See UTAH CODE ANN. § 41-6a-1716(2)(d) (West 2021).

⁵⁹ 75 PA. STAT. AND CONS. STAT. ANN. § 3316(a) (West 2012).

⁶⁰ See *id.*; see also MIKE ABRAMS, *Sexuality and The Internet*, in SEXUALITY AND ITS DISORDERS: DEVELOPMENT, CASES, AND TREATMENT 381 (2016) (stating that Tinder, a dating app, allows users to "find desirable partners while minimizing communication" as it is mainly based on photographs).

⁶¹ OHIO REV. CODE ANN. § 4511.204(A) (West 2018); OHIO REV. CODE ANN. § 4511.205(A) (West 2018).

⁶² See OHIO REV. CODE ANN. § 4511.205(A) (West 2018).

a secondary offense.⁶³ These laws, which specify which activities are prohibited, are contrasted by so-called comprehensive bans making any interaction with a phone while driving prohibited independent of the reason.⁶⁴ For example, West Virginia prohibits texting or “[u]sing a cell phone [for any reason] . . . unless the use is accomplished by hands-free equipment.”⁶⁵ Law enforcement would therefore be able to stop any driver seen holding a cellphone.⁶⁶ In either a comprehensive ban state or more specified state, exceptions to the statute permit the use of a cellphone in a manner otherwise prohibited by the statute so long as use requirements or certain circumstances are present.

3. Exceptions

Exceptions are generally either for starting or stopping a cellphone function or emergency circumstances, though more recently enacted laws permit use when the vehicle has sufficient automation equipped. Many states allow the holding or touching of a cellphone when it is used to “activate or deactivate a function of the device.”⁶⁷ In New Jersey, the statute provides that an individual may not use a cellphone unless it is used hands-free; in defining hands-free, the statute concludes it “shall not preclude the use of either hand to activate, deactivate, or initiate a function of the” cellphone.⁶⁸ As interpreted by *State v. Malone*, this exception means “a motorist could use one hand to ‘activate, deactivate, or initiate a function of the telephone,’ but once engaged in the conversation, the use of the telephone must be ‘without the use of either hand.’”⁶⁹ Further, *Malone* held that activating or deactivating could

⁶³ *Id.*; See *Distracted Driving Laws by State*, GHSA (Apr. 2021), <https://www.ghsa.org/sites/default/files/2021-04/DistractedDrivingLawChart-April21Edit3.pdf>.

⁶⁴ See Zhu, *supra* note 33, at 731.

⁶⁵ W. VA. CODE ANN. § 17C-14-15(a)(2) (West 2013).

⁶⁶ See *id.*

⁶⁷ See ARIZ. REV. STAT. ANN. § 28-914(B) (2019); N.J. STAT. ANN. § 39.4-97.3(b)(2) (West 2014); WASH. REV. CODE ANN. § 46.61.672(5)(c)(ii) (West 2017); see also CAL. VEH. CODE § 23123.5(c)(1)–(2) (West 2018) (requiring a cellphone to be mounted to the windshield and “used to activate or deactivate a feature or function” to be excepted from prohibition); CONN. GEN. STAT. ANN. § 14-296aa(a)(6) (West 2021) (excluding holding a “telephone to activate, deactivate or initiate a function” of the phone from prohibition of talking on a cell phone); FLA. STAT. ANN. § 316.305(b)(5)–(6) (West 2022); MD. CODE ANN., TRANSP. § 21-1124.2(d)(2) (West 2014) (“A driver of a motor vehicle that is in motion may not use the driver’s hands to use a handheld telephone other than to initiate or terminate a wireless telephone call . . .”). But see N.Y. VEH. & TRAF. LAW § 1225-d(2) (McKinney 2014) (providing no exception as a violation occurs through any (a) holding or (b) use of a phone while driving).

⁶⁸ N.J. STAT. ANN. § 39.4-97.3(a)–(b)(2) (West 2014).

⁶⁹ *State v. Malone*, No. A-6176-09T4, 2011 WL 2582730, *4 (N.J. Super. Ct. App. Div. July 1, 2011) (citing N.J. STAT. ANN. § 39.4-97.3(b)(2) (West 2014)).

include the pressing of more than one button: “the statute does not limit the methods used by a motorist” and convicting on the basis of multiple button presses rather than a single press is an impermissible legal conclusion.⁷⁰ Even with this determination of law, in many cases where defendants appeal their conviction of a violation under the statute by arguing they were activating or deactivating a function, courts have highlighted the “case boils down to a credibility assessment.”⁷¹

Washington State likewise allows the “minimal use of a finger to activate, deactivate, or initiate a function of the device” without violating the law.⁷² Illinois’ statute, however, adopts the exact opposite of *Malone’s* interpretation and allows the use of a cellphone to start or stop a phone call only “by pressing a single button.”⁷³ Maine’s exception is narrower still:

[t]he operator of a motor vehicle may use a hand to activate or deactivate a feature or function of a mobile telephone or handheld electronic device that is in hands-free mode and mounted or affixed to the vehicle in a location that does not interfere with the operator’s view of the road if the feature or function activated requires only a single swipe, tap or push of the operator’s finger.⁷⁴

Meanwhile, while most states are chiefly concerned with the ability for drivers to communicate with others behind the wheel, some see value in more personally pleasurable activities: Texas allows drivers to avoid conviction when they hold their cellphone along with a hands-free device, as a navigation system, or “to activate a function that plays music.”⁷⁵

More states share similarity in excepting cellphone use when contacting emergency personnel or in the event of an emergency.⁷⁶ New

⁷⁰ *Id.* at *6.

⁷¹ *State v. Zielinski*, No. A-3727-18T3, 2020 WL 1527214, *3 (N.J. Super. Ct. App. Div. Mar. 31, 2020); *State v. Mangione*, No. A-4416-14T1, 2016 WL 3981216, *5 (N.J. Super. Ct. App. Div. July 26, 2016); *see also State v. Shaikh*, No. A-4209-17T1, 2020 WL 3529461, *3 (N.J. Super. Ct. App. Div. June 30, 2020); *State v. Gassama*, No. A-0971-18T4, 2019 WL 2419577, *4 (N.J. Super. Ct. App. Div. June 10, 2019).

⁷² WASH. REV. CODE ANN. § 46.61.672(c)(ii) (West 2017).

⁷³ 625 ILL. COMP. STAT. ANN. 5/12-610.2(d)(9) (West 2021).

⁷⁴ ME. REV. STAT. ANN. tit. 29-A, § 2121(2) (West 2020).

⁷⁵ TEX. TRANSP. CODE ANN. § 545.4251(c)(1), (2), (6) (West 2017). There is at least some evidence that music can promote safer driving. *See* Dominic Utton, *Why the Ultimate Driving Playlist Can Help You Focus at the Wheel*, THE TELEGRAPH (Feb. 26, 2016 09:15 AM), <https://www.telegraph.co.uk/cars/road-safety/ultimate-driving-playlist/>.

⁷⁶ *See, e.g.,* MD. CODE ANN., TRANSP. § 21-1124.1(c) (West 2014) (“This section does not apply to the use of . . . (2) A text messaging device to contact a 9-1-1 system.”); UTAH CODE ANN. § 41-6a-1716(3)(c)-(f) (West 2021) (permitting the use of a cellphone in

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York provides exception for communicating with inclusively enumerated emergency persons or organizations such as hospitals or police departments as well as for specific persons acting in their official capacity.⁷⁷ Hawaii similarly allows cellphone use for emergencies; however, unless the driver is an emergency responder, a cellphone can only be used to call 911.⁷⁸ Utah, instead of describing which entities or numbers are permissible to communicate with, allows handheld cellphone use while driving “during a medical emergency, . . . when reporting a safety hazard or requesting assistance relating to a safety hazard, [or] when reporting criminal activity.”⁷⁹ No state has relevant caselaw, which may be attributable to enforcement discretion that permits an officer to determine whether the use of a cellphone was a violation or if an exceptional circumstance permits the use.⁸⁰

In the most recent iteration of cellphone banning laws updated with advancements in technology, Florida and Nevada added exceptions to their otherwise prohibiting statutes when the vehicle has sufficient autonomous capabilities.⁸¹ These laws are exacting in defining which autonomous vehicles the exemption applies to.⁸² Autonomous vehicles are classified into six levels by the Society of Automotive Engineers; the U.S. Department of Transportation has adopted this classification

medical emergencies, reporting hazardous conditions, reporting criminal activity, or when used by law enforcement or emergency personnel).

⁷⁷ N.Y. VEH. & TRAF. LAW § 1225-d(3)(a)–(b) (McKinney 2014).

⁷⁸ HAW. REV. STAT. ANN. § 291C-137(b)–(d) (West 2015).

⁷⁹ UTAH CODE ANN. § 41-6a-1716(3)(c)–(e) (West 2021).

⁸⁰ See Stephen R. McAllister & Peyton H. Robinson, *The Potential Civil Liability of Law Enforcement Officers and Agencies*, 67 J. KAN. BAR ASS'N 14, 20 n. 79 (1998) (stating that law enforcement officers have discretion to enforce law based on circumstance); Officer discretion, however, is not always perfect: in 1980, three officers inexplicably removed a property owner from his home instead of the trespasser he warned would “burn the house down.” *Robertson v. City of Topeka*, 644 P.2d 458, 459–60 (Kan. 1982). Fifteen minutes later, the house was ablaze. *Id.*

⁸¹ FLA. STAT. ANN. § 316.305(3)(b) (West 2019) (“Paragraph (a) [defining a violation for texting and driving] does not apply to a motor vehicle operator who is: . . . (7) Operating an autonomous vehicle . . . with the automated driving system engaged.”); NEV. REV. STAT. ANN. § 484B.165(7) (West 2017) (“For the purposes of this section, a person shall be deemed not to be operating a motor vehicle if the motor vehicle is driven autonomously and the autonomous operation of the motor vehicle is authorized by law.”). These laws still refer to the person within the vehicle as the driver or operator although at full automation the person is not technically controlling the vehicle in a direct capacity.

⁸² See FLA. STAT. ANN. § 316.305(3)(b) (West 2019) (referencing § 316.003(3) which defines an autonomous vehicle as “(a) . . . any vehicle equipped with an automated driving system.”); NEV. REV. STAT. ANN. § 484B.165(7) (West 2017) (eluding to the lawfully authorized operation of an autonomous vehicle).

scheme in full.⁸³ Starting at level zero, which is no automation and includes the large majority of vehicles on the road today, this scale extends to full automation at level five, which requires no human attention; cars of this variety may not “even have steering wheels or acceleration/breaking pedals.”⁸⁴ Between these poles, from level one to four, comes driver assistance (having steering or accelerating assistance such as cruise control), partial automation (having both steering and acceleration control), conditional driving automation (providing environmental detection to make informed decisions without human intervention), and high driving automation (providing intervention and self-driving in limited, low-speed areas), respectively.⁸⁵ Florida’s exemption applies to vehicles whose “hardware and software . . . are collectively capable of performing the entire dynamic driving task,” but does not specify which levels within the U.S. Department of Transportation’s classifications this would apply; Nevada, however, has specifically defined autonomous vehicles as those “designed to function at a level of driving automation of level three, four or five.”⁸⁶

In theory, these exceptions aim to strike a balance between the risks associated with distracted driving (lowered when button-pressing limitations are in place) and promotion of life-saving actions. While studies of efficacy in regard to function activation or emergency contact are not readily available, legislators have likely considered the safety benefits of autonomous vehicles over their level zero counterparts; however, it should be noted that autonomous vehicles are not free from accidents even after removing human control.⁸⁷ In the first quarter of 2021, Tesla reported their vehicles were involved in an accident once every 978,000 miles driven when human controlled.⁸⁸ Tesla vehicles with autopilot engaged were over four times *less* likely to be involved in a collision.⁸⁹ Waymo, Google’s autonomous vehicles operating in California, experienced eighteen minor incidents on the road between

⁸³ *The 6 Levels of Vehicle Autonomy Explained*, SYNOPSIS, <https://www.synopsys.com/automotive/autonomous-driving-levels.html> (last visited Aug. 4, 2023).

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ FLA. STAT. ANN. § 316.003(3) (West 2019); NEV. REV. STAT. ANN. § 482A.030 (West 2017) (defining autonomous vehicles separately and excluding vehicles in level 3 or below); *see* NEV. REV. STAT. ANN. § 482A.036 (West 2017).

⁸⁷ *See Autonomous Vehicle Statistics*, GERBER INJURY LAW (June 25, 2021), <https://www.gerberinjurylaw.com/autonomous-self-driving-vehicle-statistics-2021/>.

⁸⁸ *Id.*

⁸⁹ *Id.* (Reporting a Tesla accident occurred once every 4.19 million miles when autopilot was engaged).

2019 and the first nine months of 2020.⁹⁰ These advancements in safety have not been without significant, headline-grabbing, fatal accidents involving an autonomous vehicle. In 2016, a Tesla driver was killed when the vehicle, operating autonomously, failed to recognize a truck on the roadway.⁹¹ More recently in 2018, one of Uber's autonomous vehicles struck and killed a pedestrian crossing the street at night.⁹² This accident was investigated by the National Transportation Safety Board ("NTSB") who determined the operator, an emergency backup driver with the ability to take control, "was visually distracted through the trip by her personal cell phone;" the NTSB declared human error as the major cause of the accident.⁹³ While not free from accidents, the reduction in accidents, including those from human error, cannot be discounted and excepting operators from cellphone use prohibitions is understandable in promoting safer vehicles.

4. Burden of Proof

Beyond the problem of under-specifying which activities are prohibited or excepted under the law, there exists the alternate issue of proving the violation occurred.⁹⁴ Many state laws require the prosecution to prove prohibited use "beyond a reasonable doubt," unless an officer testifies to seeing the exactly specified prohibited behavior defined in the statute—this becomes an almost impossible exercise.⁹⁵ New Jersey is one such state where the prosecutor "has the burden of proving, beyond a reasonable doubt, that a defendant was" using their cellphone in violation of the law.⁹⁶ Alternatively, some states (including New York, Oregon, and Connecticut) have provided a rebuttable presumption of use instead.⁹⁷

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Diasuke Wakabayashi, *Self-Driving Uber Car Kills Pedestrian in Arizona, Where Robots Roam*, N.Y. TIMES (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/technology/uber-driverless-fatality.html>.

⁹³ See Rory Cellan-Jones, *Uber's Self-driving Operator Charged Over Fatal Crash*, BBC NEWS (Sept. 16, 2020), <https://www.bbc.com/news/technology-54175359>.

⁹⁴ Lazerow, *supra* note 56, at 32.

⁹⁵ Lazerow, *supra* note 56, at 32 ("[A]bsent a confession or the confiscation of the cell phone in question, it is difficult for a prosecutor to prove beyond a reasonable doubt that a driver was writing or sending a text message, as opposed to engaging in non-proscribed behavior.").

⁹⁶ See Letter Brief, *State v. Abraham*, 2017 WL 11421431, *6 (N.J. Super. Ct. App. Div. 2017).

⁹⁷ N.Y. VEH. & TRAF. LAW § 1225-d(4) (McKinney 2014) ("A person who holds a portable electronic device [while driving] . . . is presumed to be using such device[.]"); see also OR. REV. STAT. ANN. § 811.507(2) (West 2018) (providing that if a person "(a) [h]olds a mobile electronic device in the person's hand; or (b) [u]ses a mobile electronic

A “rebuttable presumption is a species of evidence that may be accepted and acted on when there is no other evidence to uphold the contention for which it stands, or one which may be overcome by other evidence.”⁹⁸ Statutes proscribing a rebuttable presumption allow the prosecution to overcome instances where obtaining specific evidence to support a prima facie case would present great hardship.⁹⁹ Within criminal law, a rebuttal presumption is permissive so long as there is “‘a rational basis’ for the presumption such that the presumed fact is ‘more likely than not to flow’ from the proved fact.”¹⁰⁰

In New York and Oregon’s cellphone prohibiting statutes, the holding of a cellphone is used to presume the defendant was using the same.¹⁰¹ Connecticut’s statute provides a presumption of violation when the “operator of a motor vehicle . . . holds a [cellphone] to, or in the immediate proximity of [their] ear while” driving.¹⁰² Thus far, this presumption of use has not been deemed an impermissible shifting of the burden of proof.¹⁰³ The presumption of use also remains rebuttable by the driver who is found to have violated the law.¹⁰⁴ Under these laws, a person holding their cellphone for any reason can be charged with violating the law; however, the charged defendant, such as in *People v. Vogt*,¹⁰⁵ has the opportunity to present evidence against conviction

device for any purpose[]” they have committed a violation unless they are exempted under subsection (3) or can provide an affirmative defense enumerated under subsection (4)); CONN. GEN. STAT. ANN. § 14-296aa (West 2021). Other states, like Hawaii, expressly state what can be claimed as an affirmative defense though do not have presumption of use. See HAW. REV. STAT. ANN. § 291C-137(b) (West 2022).

⁹⁸ Kristina E. Music Biro et al., *Conclusive and Rebuttable Presumptions*, 31A C.J.S. *Evidence* § 201 (2021).

⁹⁹ See *id.*

¹⁰⁰ *Id.* (citing *City of Moline Acres v. Brennan*, 470 S.W.3d 367 (Mo. 2015)).

¹⁰¹ N.Y. VEH. & TRAF. LAW § 1225-d(4) (McKinney 2014) (“A person who holds a [cellphone while driving] . . . is presumed to be using such device[.]”); OR. REV. STAT. ANN. § 811.507(2) (West 2018) (providing that if a person “(a) [h]olds a mobile electronic device in the person’s hand; or (b) [u]ses a mobile electronic device for any purpose[]” they have committed a violation unless they are exempted under subsection (3) or can provide an affirmative defense enumerated under subsection (4)).

¹⁰² CONN. GEN. STAT. ANN. § 14-296aa(b)(2) (West 2021).

¹⁰³ See, e.g., *People v. Vogt*, 135 N.Y.S.3d 751, 754–55 (N.Y. App. Div. 2020) (holding “the court did not impermissibly shift the burden of proof to defendant to prove that she was not using the device within the meaning of the statute[]” when presuming defendant was using her cellphone because the officer testified only that she was holding it).

¹⁰⁴ N.Y. VEH. & TRAF. LAW § 1225-d(4) (McKinney 2014) (“The presumption established by this subdivision is rebuttable by evidence tending to show that the operator was not using the device within the meaning of this section.”).

¹⁰⁵ *People v. Vogt*, 135 N.Y.S.3d 751 (N.Y. App. Div. 2020).

either by showing they were not using their device or the use was a permitted exception.¹⁰⁶

In *Vogt*, the defendant was charged with violating New York’s law prohibiting the use of an electronic device while driving.¹⁰⁷ Deciding on the defendant’s appeal of conviction, the court held the initial charge was permissible: “the [law enforcement officer]’s testimony was legally sufficient to invoke the presumption that defendant was impermissibly operating a motor vehicle while using a portable electronic device[.]”¹⁰⁸ *Vogt* further explained that because the prosecution’s claim was sufficiently supported, “the burden was then on defendant to rebut that presumption by” providing evidence proving the defendant did not use their device in a manner prohibited by the statute.¹⁰⁹ The conviction was affirmed as the lower court found that the officer’s testimony stating he “observed defendant operating a motor vehicle with her right hand while holding a flat black cell phone horizontally in her left hand” was more credible than defendant’s proffered testimony, which completely conflicted with the officer’s.¹¹⁰

While *Vogt* upheld the defendant’s conviction although the officer “could not state what defendant was doing with” her phone,¹¹¹ *People v. Riexinger*¹¹² held defendant was not guilty with similar officer testimony.¹¹³ The officer had seen the defendant holding her cellphone and therefore presumptively “using” it in violation of the statute.¹¹⁴ Defendant, however, testified that she was not talking on her phone and produced records to show “no texting was going on at the time” of the officer’s observation or defendant’s arrest.¹¹⁵ Instead, she claimed only to be looking at the time displayed on her phone.¹¹⁶ Although the statute, being strictly construed, would otherwise support a conviction, and while the court noted the “problems that have developed as a result of drivers [using cellphones] while driving,” the defendant was nonetheless found not guilty because her action was “akin to taking a pocket watch out to view the time” which the statute, by interpretation,

¹⁰⁶ *Id.* at 754; N.Y. VEH. & TRAF. LAW § 1225-d(4) (McKinney 2014).

¹⁰⁷ *Vogt*, 135 N.Y.S.3d at 753 (citing N.Y. VEH. & TRAF. LAW § 1225-d (McKinney 2014)).

¹⁰⁸ *Id.* at 754.

¹⁰⁹ *Id.* (citing N.Y. VEH. & TRAF. LAW § 1225-d(2)(b) (McKinney 2014)).

¹¹⁰ *Id.* at 754–55.

¹¹¹ *Id.* at 754.

¹¹² *People v. Riexinger*, 968 N.Y.S.2d 832 (Town Ct. 2013).

¹¹³ *Id.* at 833–34.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 833.

¹¹⁶ *Id.*

does not prohibit.¹¹⁷ In all, while the rebuttable presumption shifts the burden on the defendant upon any observance of driver-cellphone interaction, the proof required to overcome conviction is not insurmountable by the lay defendant.

In states without such a presumption, the State can fail to provide sufficient evidence from law enforcement testimony alone, independent of how credible an officer is found in courts below.¹¹⁸ In *State v. Malone*, the court overturned a conviction of a driver for using a cellphone while driving.¹¹⁹ The court reasoned that “[t]he State did not prove that such conduct constituted the use of [a] phone for any unlawful purpose . . . by pressing buttons, or pressing icons.”¹²⁰ Because the prosecution failed to specifically evidence how defendant’s button pressing while definitively a use, was one which was prohibited and thus the court could not sustain the conviction.¹²¹

III. ANALYSIS

A. Switching to Primary Enforcement

Texting and driving laws with secondary enforcement mechanisms have substantial attenuation between the intent of the law to prevent traffic accidents from distracted driving and their actual ability to do so. Because these laws allow law enforcement officers to sit and wait for some additional violation to occur before stopping a person from using their cellphone behind the wheel, it is no stretch of the imagination to consider the following hypothetical: positioned at a four-way intersection, an officer observes a vehicle approaching, traveling northbound, at the appropriate and legal speed and otherwise following all rules of the road; but, as the light turns yellow, the officer notices the vehicle provides no indication of slowing down. Further, the officer clearly sees the driver of this vehicle engrossed in their cellphone, which is in their hand. As perpendicular traffic begins to cross the intersection, the officer has two options: (1) allow the vehicle to impermissibly enter

¹¹⁷ *Id.* at 834 (“Surely, the New York State Legislature did not intend to prohibit this kind of action when enacting [the statute].”).

¹¹⁸ See *State v. Malone*, No. A-6176-09T4, 2011 WL 2582730, at *11-12 (N.J. Super. Ct. App. Div. July 1, 2011) (holding because N.J. STAT. ANN. § 39:4-97.3 allows holding a phone to “activate, deactivate, or initiate a function” thereof and finding a driver could be required to press more than one button to do so, the State failed to show such holding and pressing of buttons evidenced at trial was sufficient to show unlawful use of a cellphone in violation of the statute).

¹¹⁹ *Id.* at *1.

¹²⁰ *Id.* at *19-20.

¹²¹ *Id.*

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the intersection against the red light so they may ticket the driver for both violations, or (2) stop the driver, preventing an accident, with little ability to sustain conviction when the driver appears in court.

Although far from the “Trolley Problem,”¹²² this dilemma is not farfetched considering the great deference law enforcement officers are given combined with the potential financial incentive a police department may provide to increase ticketing.¹²³ A 2021 report from the New York Times highlights a nationwide phenomenon in which traffic violations, while purportedly issued to increase road safety, are instead used to generate revenue for municipalities, over 730 of which “rely on fines and fees for at least [ten] percent for their revenue.”¹²⁴ For smaller communities, this accounts for all police force funding.¹²⁵ This “hidden scaffolding of financial incentives” can encourage communities to use their police force in ways unrelated to public safety and, instead, pursue revenue-generating ventures.¹²⁶ “As a result, driving is one of the most common daily routines during which people have been shot, tased, beaten, or arrested after minor offenses.”¹²⁷ While allowing primary enforcement of a texting and driving law does not wholly remedy the issue of officer discretion, when combined with the inability for municipalities to seek revenue from increases in taxes,¹²⁸ it would signal to citizens and enforcers alike that texting while driving is

¹²² “A runaway streetcar is hurtling toward five unsuspecting workers. Do you pull a switch to divert the trolley onto another track, where only one man works alone? Or do you do nothing?” Lauren Cassani Davis, *Would You Pull the Trolley Switch? Does it Matter?*, ATLANTIC (Oct. 9, 2015), <https://www.theatlantic.com/technology/archive/2015/10/trolley-problem-history-psychology-morality-driverless-cars/409732/> (claiming the famous trolley problem originated in 1967 with the “‘grand dame of philosophy’ Philippa Foot . . . while discussing the permissibility of abortion.”).

¹²³ See *Swanson v. Town of Mountain View, Colo.*, 577 F.3d 1196, 1203–04 (10th Cir. 2009) (holding even though an officer acted outside their jurisdictional capacity, albeit geographical in nature, a traffic stop was nonetheless permitted “when no dispute exists that the officer observed traffic violations before effectuating the stop[]” despite the same being a clear violation of Fourth Amendment law); Mike McIntire & Michael H. Keller, *The Demand for Money Behind Many Police Traffic Stops*, N.Y. TIMES (Nov. 2, 2021), <https://www.nytimes.com/2021/10/31/us/police-ticket-quotas-money-funding.html> (detailing various schemes and instances of officer incentivization to over enforce because “[m]any municipalities across the country rely heavily on ticket revenue and court fees to pay for government services . . .”).

¹²⁴ McIntire, *supra* note 123.

¹²⁵ McIntire, *supra* note 123.

¹²⁶ McIntire, *supra* note 123.

¹²⁷ McIntire, *supra* note 123.

¹²⁸ McIntire, *supra* note 123 (noting some towns in the South and Midwest may be “barred by state law from easily raising taxes”).

impermissible while promoting safety by preventing accidents before they have the chance to occur.

Research has likewise noted that enforcement mechanisms, combined with well-written cellphone banning statutes, are effective in saving lives.¹²⁹ A 2021 study found “comprehensive handheld bans allowing primary enforcement were associated with fewer driver fatalities ... [c]omprehensive handheld bans without primary enforcement for all banned activities might be associated with modestly fewer driver fatalities.”¹³⁰ Nebraska and South Dakota texting and driving prohibiting laws are enforceable via a secondary mechanism, while other states with such laws allow the violation to be enforced alone.¹³¹ Researchers suggest ensuring laws have primary rather than secondary enforcement mechanisms to reduce vehicle accidents attributed to texting and driving.¹³² Additionally, researchers found reduced efficacy of bans may be caused by identified loopholes that proscribe specific activities considered “use” instead of defining it broadly.¹³³

B. Broadly Defining Use

Comprehensive bans of cell phones reduce traffic accidents and driver fatalities.¹³⁴ These laws, banning more actions involving cellphones, are more effective than their more specific comparators.¹³⁵ Laws which ban handheld use for telephone conversations, compared to texting bans, were associated with fewer instances of self-reported use.¹³⁶ The specific reason for this difference is yet unknown.¹³⁷ Regardless, the ability to prosecute differs in states with comprehensive bans when “use” does not encompass all activities. The laws of New York and New Jersey provide a comparison of this: while both states have a comprehensive ban, their definition of “use” leads to a difference in overall enforcement. New York defines use as the following:

¹²⁹ See Zhu, *supra* note 33, at 735.

¹³⁰ Zhu, *supra* note 33, at 737.

¹³¹ See *Distracted Driving Laws by State*, GHSA (April 2022), <https://www.ghsa.org/sites/default/files/2022-04/DistractedDrivingLawChart-April22-.pdf>.

¹³² Zhu, *supra* note 33, at 737.

¹³³ Zhu, *supra* note 33, at 737.

¹³⁴ Zhu, *supra* note 33, at 735–36.

¹³⁵ Zhu, *supra* note 33, at 736.

¹³⁶ Toni Marie Rudisill et al., *Association Between Cellphone Use While Driving Legislation and Self-Reported Behaviour Among Adult Drivers in USA: A Cross-Sectional Study*, 9 *BMJ OPEN* 1, 4 (2019).

¹³⁷ *Id.* at 6–7.

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“[u]sing” shall mean holding 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, accessing, browsing, transmitting, saving or retrieving e-mail, text messages, instant messages, or other electronic data.¹³⁸

New Jersey, however, takes a less exacting approach:

“[u]se” of a wireless telephone or electronic communication device shall include, but not be limited to, talking or listening to another person on the telephone, text messaging, or sending an electronic message via the wireless telephone or electronic communication device.¹³⁹

Notwithstanding a sixteen-word differential, New York’s comprehensive ban is, most simply stated, more comprehensive because any conspicuous holding of the device is presumed to be use.¹⁴⁰ Absent this provision in the New Jersey statute, the specific action must be noted before a conviction is possible.¹⁴¹

New Jersey’s *Malone* and New York’s *Vogt* highlight these different definitions. In *Malone*, the court held that “the plain language of the [New Jersey] statute permits motorists to hold the cell phone in one hand” to start a function of the phone.¹⁴² Without facts specifying the activity of the driver, defendant’s conviction could not be sustained.¹⁴³ *State v. Salama*,¹⁴⁴ another New Jersey case, found this exact problem:

[t]he State must prove a violation of the cell phone statute beyond a reasonable doubt. Even if defendant had his cell phone at the time he drove past the officer’s position, there are many perfectly legal explanations for such conduct that are not violative of the cell phone statute. The State has failed to prove its case beyond a reasonable doubt.¹⁴⁵

Vogt, applying New York’s law, would come to the opposite conclusion in either case: “[a]lthough [the officer] could not state what defendant was doing with the phone at the time he observed her holding it, the trooper’s testimony was *legally sufficient*” to find the driver

¹³⁸ N.Y. VEH. & TRAF. LAW § 1225-d(2)(b) (McKinney 2014).

¹³⁹ N.J. STAT. ANN. § 39:4-97.3 (West 2014).

¹⁴⁰ N.Y. VEH. & TRAF. LAW § 1225-d(4) (McKinney 2014).

¹⁴¹ See generally N.J. STAT. ANN. § 39:4-97.3 (West 2014).

¹⁴² *Malone*, 2011 WL 2582730, at *4.

¹⁴³ *Id.* at *7.

¹⁴⁴ No. MA 21-17 (N.J. Super. Law Div. 2021) (on file with author).

¹⁴⁵ *Id.* at 7.

violated the statute.¹⁴⁶ The subtle difference would find the same driver using a cellphone while traversing the George Washington Bridge in the same manner being treated differently depending on which side of the Hudson River an officer observed the action.¹⁴⁷

Although there are slight differences between the neighboring states of New York and New Jersey, Pennsylvania and Utah's "use" definitions are weaker still, requiring particularly acute observed actions for a violation.¹⁴⁸ Just as a prosecutor in New Jersey may struggle to support a conviction where an officer is unable to testify as to the number of buttons pressed by a driver to sufficiently constitute "use," prosecutors in these states are left wholly unable to sustain a conviction where the officer only observed the driver holding their device absent an enumerated "use."¹⁴⁹ Perhaps on the whole and at the current, it matters little as officers can still issue a traffic ticket with little incentive for drivers to contest it.¹⁵⁰ Even still, the effectiveness of a law is not so much in its ultimate ability to convict a person of a driving violation; rather, a law's effectiveness lies within its perceived strictness.¹⁵¹ States which introduced stricter laws saw reductions in cellphone use because drivers likely perceived their actions as illegal.¹⁵² It is no foregone conclusion to state the opposite: drivers without this perceived illegality in their actions will continue to participate in dangerous distracting behavior. Thus, although laws may currently reduce the instances of distracted driving because they are perceived to be strict, this reduction may wane as the population becomes aware of the unique specificity and burden of proof required to sustain a conviction and thin their wallet.

C. Rebuttable Presumption of "Use"

Statutes which broadly define "use" and sustain a conviction upon almost any interaction with a cellphone still identify exceptions; however, they leave it to the courts to determine whether such

¹⁴⁶ *Vogt*, 135 N.Y.S.3d at 754 (emphasis added).

¹⁴⁷ See GOOGLE MAPS, <https://www.google.com/maps/@40.8524803,-73.9542338,15z> (last visited Nov. 13, 2022).

¹⁴⁸ See UTAH CODE ANN. § 41-6a-1716(2) (West 2021); 75 PA. STAT. AND CONS. STAT. ANN. § 3316(a) (West 2012).

¹⁴⁹ See, e.g., UTAH CODE ANN. § 41-6a-1716(2) (West 2021).

¹⁵⁰ Cf. Brandon F. Jones, *7 Interesting Driving Citation Statistics*, RHINO LAWYERS (Mar. 10, 2019), <https://www.rhinolawyers.com/7-interesting-driving-citation-statistics/> (stating that only five percent of those issued speeding tickets ever contest them and the average cost is \$152).

¹⁵¹ See Zhu, *supra* note 33, at 737.

¹⁵² See Zhu, *supra* note 33, at 735-37.

exception was met. “Use,” therefore, is presumed even though the action was technically permissible.¹⁵³ The presumption created under these laws remains rebuttable—the charge can be overcome when defendant proffers evidence showing that the cellphone use was for an excepted, permitted purpose.¹⁵⁴ Because the presumptive fact is not far attenuated from the fact in evidence, and such presumption remains rebuttable by the defendant, statutes which contain a rebuttable presumption of use are likely to survive a challenge claiming it is an impermissible shifting of the burden of proof.¹⁵⁵ Notably, New York’s presumptive statute, as applied to its earlier adopted prohibition of calls while driving, has been upheld against constitutional challenges for vagueness and reasonable relation.¹⁵⁶

States whose statutes do not include this presumption may benefit from its addition both because it (1) lessens the burden of proof necessary for the state to convict, and (2) specifies to defendants which actions are permitted, which they can, in turn, provide evidence of in court and lead to their acquittal when proper.¹⁵⁷ Driver behavior concerning the use of a cellphone and driving is correlated with the strictness by which the law is perceived.¹⁵⁸ When laws ban all activities, it sends a message that cellphones cannot be held while driving for any reason.¹⁵⁹ When a presumption of use is present in a law that comprehensively bans all cellphone activity, a driver can be found in violation of the law for any reason without requiring the prosecution to prove every aspect.¹⁶⁰ Thus, under these presumptive and comprehensive laws, drivers may be more inclined to change their behavior and the proportion of drivers who use their cellphone while driving would subsequently decrease.¹⁶¹

¹⁵³ See, e.g., N.Y. VEH. & TRAF. LAW § 1225-d(4) (McKinney 2014).

¹⁵⁴ See *State v. Bennett*, 402 P.3d 732, 739 (Or. Ct. App. 2017) (reversing conviction as defendant was using her cellphone to coordinate “farming or agricultural operations” which is excepted from prohibition under OR. REV. STAT. ANN. § 811.507(3)(b) (West 2013) as interpreted).

¹⁵⁵ See *Vogt*, 135 N.Y.S.3d at 755.

¹⁵⁶ *People v. Neville*, 737 N.Y.S.2d 251, 254 (Just. Ct. 2002).

¹⁵⁷ See *People v. Vogt*, 135 N.Y.S.3d at 754–55.

¹⁵⁸ See *Zhu*, *supra* note 33, at 735 (citing Toni Marie Rudisill, Adam D. Baus, & Traci Jarrett, *Challenges of Enforcing Cell Phone Use While Driving Laws Among Police: A Qualitative Study*, 25 INJURY PREVENTION 494 (2019)).

¹⁵⁹ See *Zhu*, *supra* note 33, at 735 (citing Toni Marie Rudisill, Adam D. Baus, & Traci Jarrett, *Challenges of Enforcing Cell Phone Use While Driving Laws Among Police: A Qualitative Study*, 25 INJURY PREVENTION 494 (2019)).

¹⁶⁰ See N.Y. VEH. & TRAF. LAW § 1225-d(4) (McKinney 2014).

¹⁶¹ See *Zhu*, *supra* note 33, at 732.

Moreover, without the presumption, and without the ability to gain more information from the device in question, prosecutors are at a disadvantage.¹⁶² The evidence needed for conviction under these statutes remains in the possession of the defendant, not the prosecution.¹⁶³ If, however, the law allowed the defendant to be convicted without specific evidence of “use,” and further enumerated evidence which the defendant is able to present as an affirmative defense against the conviction, the evidence would be presented by the parties in possession thereof; absent this, it is no stretch to imagine warranted searches are necessary to procure evidence necessary for conviction.¹⁶⁴

Commentators have previously reviewed the ability of police to search a cellphone following a texting while driving situation and noted such searches would not generally be considered “incident to arrest,” and thus are prohibited from occurring.¹⁶⁵ This posture differs from state to state and depends on whether the statute is primarily or secondarily enforced in addition to evidentiary standards.¹⁶⁶ “[M]ost states that criminalize either all hand-held cell phone use or just texting while driving [provide authority to police] to search the phone incident to arrest.”¹⁶⁷ A problem, however, remains where prosecutors and defense attorneys must argue whether there was sufficient probable cause and, if so, how far the warrantless search is permitted.¹⁶⁸ Adam Gershowitz, professor of law at William & Mary Law School, expands to say that this second prong of the probable cause requirement depends on the statute.¹⁶⁹ Judicial capital can likely be preserved by allocating a burden on the defendant, not the law enforcement officers or prosecutors, to present the remaining evidence to prove a defense to their alleged use of an electronic communication device while driving.

Even still, although a defendant may try to use evidence to exonerate themselves and provide proof against State testimony, admissibility can be hindered by procedural rules or evidentiary standards where affirmative defenses are absent. This occurred in *State*

¹⁶² See Lazero, *supra* note 56.

¹⁶³ See *People v. Vogt*, 135 N.Y.S.3d 751.103

¹⁶⁴ See generally Adam M. Gershowitz, *Texting While Driving Meets the Fourth Amendment: Deterring Both Texting and Warrantless Cell Phone Searches*, 54 ARIZ. L. REV. 577 (2012).

¹⁶⁵ *Id.* at 598.

¹⁶⁶ See *id.* at 597–98.

¹⁶⁷ *Id.* at 598.

¹⁶⁸ *Id.* at 600.

¹⁶⁹ *Id.*

v. Mangione,¹⁷⁰ where the defendant proffered cell phone records to support the proposition that she was “not on the phone at the time” the officer claimed.¹⁷¹ Although this evidence may have proved the defendant’s innocence, the State objected “to the admission of the records because there was no representative from the phone company present to authenticate them.”¹⁷² The judge sustained the objection, the defendant was found guilty of the violation, and all was upheld on appeal.¹⁷³ To say a rebuttable presumption would have entirely contributed to a different result is not the case; rather, it could be argued a rebuttable presumption would have signaled both to the court and defendant of potential avenues by which a defendant may escape liability. From the perspective of prosecutors, defendants, and the courts, the addition of a rebuttable presumption of cellphone use reduces officer discretion, increases positive findings of violations at trial, and provides ample notice to defendants as to what evidence can be used to alleviate their liability.

D. Enumerating Exceptions

Just as stating “use” as a rebuttable presumption can provide sufficient notice to litigants of avenues toward and away from conviction, specifically enumerating exceptions would provide an even clearer idea to courtroom actors. As mentioned previously, the use of a cellphone for emergency purposes, such as contacting law enforcement or otherwise coordinating time-sensitive communications, should likely continue as an acceptable purpose even without data to support these use cases to mitigate accident severity.¹⁷⁴ Alternatively, allowing autonomous vehicle operators to escape the quasi-criminal liability of a texting and driving law may be worthwhile as technology continues to advance. This exception, however, should advance at a rate parallel to the proven technology, and not solely based on its purported capabilities. The New York Times Presents, a docuseries produced by the paper of record, recently released an episode detailing Tesla’s troubles on the road to fully autonomous vehicles, highlighting how the company’s famous leaders often placed hopes, dreams, and business forward statements ahead of current company limitations.¹⁷⁵ In one

¹⁷⁰ State v. Mangione, No. A-4416-14T1, 2016 WL 3981216 (N.J. Super. Ct. App. Div. 2016).

¹⁷¹ *Id.* at *1.

¹⁷² *Id.*

¹⁷³ *Id.* at *5.

¹⁷⁴ See e.g., *supra* note 76, at 13.

¹⁷⁵ *Id.*

instance, the company posted a video of a car driving itself on all roads when, in reality, it took multiple takes, including a small collision, until they obtained a “perfect run” on camera.¹⁷⁶ While fans, investors, and savvy politicians may be entranced with the purported safety benefits of vehicle autonomy, legislators should detail laws to ensure two things: first, the autonomous vehicle can truthfully operate absent human input to a degree better than their nonautonomous predecessors and, second, such determination occurs in a courtroom and not on the roadway. This latter portion is necessary because while new Tesla vehicles can be autonomous, operators must purchase the software package either outright or on a subscription basis.¹⁷⁷ Absent activation of this portion of the vehicle’s capability, it should not be considered autonomous.¹⁷⁸ There is currently little debate that vehicle autonomy, even though not complete, can increase road safety; however, until a vehicle can navigate any and all roadway environments better than a human, legislation should exact the means of adjudging whether a texting and driving conviction should be avoided by an operator thereof.

IV. CONCLUSION

Texting and driving laws have been adopted with relative success in the states that allow for a broader ability to enforce and interpret the definitions of “use.” By covering all the ways that a cellphone could be distracting and allowing a violation to occur without requiring an additional driving infraction, officers have a greater likelihood of preventing accidents before they happen. Exceptions to “use” should persist; although the efficacy of hands-free devices is controversial, the removal of manual and visual distraction is likely sufficient to buttress continued permissibility. Likewise, exceptional circumstances should persist albeit with greater uniformity based on the reason for communicating rather than specifying who or how this communication should occur. Lastly, statutes should include a rebuttable presumption of use leaving adjudication to the courtroom by a judge rather than on the roadside by a law enforcement officer; instead, the officer is empowered to stop the detrimental behavior before an accident occurs. This provides the defendant ample means by which to argue against conviction based on the merits with evidence they control rather than

¹⁷⁶ *Elon Musk’s Crash Course*, N.Y. TIMES (FX television broadcast May 20, 2022).

¹⁷⁷ *Id.*

¹⁷⁸ See *Model 3: Full Self-Driving Capability*, TESLA, <https://www.tesla.com/model3/design#overview> (last visited Aug. 4, 2023); *Full Self-Driving Capability Subscriptions*, TESLA, <https://www.tesla.com/support/full-self-driving-subscriptions> (last visited Aug. 4, 2023).

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relying on judicial determinations of credibility. As technology improves, our roadways are likely to become safer. Until then, legislators should act to prevent damages, injuries, and fatalities by sending a clear message to citizens that any use of a cellphone while driving is prohibited, allowing law enforcement to prevent accidents before they occur, and providing defendants an appropriate opportunity to contest a conviction on the merits with the evidence that they hold.

Texting and Driving Laws in All 50 States and Select U.S. Territories

State	Statute	Exceptions	
		"Activate or Deactivate"	Emergency Situations
Ala.	Ala. Code § 32-5A-350 (2012)	No	Yes
Alaska	Alaska Stat. Ann. § 28.35.161 (West 2021)	Yes	Yes
Ariz.	Ariz. Rev. Stat. Ann. § 28-914 (2019)	Yes	Yes
Ark.	Ark. Code Ann. § 27-51-1504 (West 2019)	No	Yes
Cal.	Cal. Veh. Code § 23123.5 (West 2018)	Yes	Yes
Colo.	Colo. Rev. Stat. Ann. § 42-4-239 (West 2019)	No	Yes
Conn. ¹⁷⁹	Conn. Gen. Stat. Ann. § 14-296aa (West 2021)	Yes	Yes
Del.	Del. Code Ann. tit. 21 § 4176C (West 2018)	Yes	Yes
D.C.	D.C. Code Ann. § 50-1731.04 (West 2020)	Yes	Yes
Fla.*	Fla. Stat. Ann. § 316.305 (West 2019) ¹⁸⁰	Yes	Yes
Ga.	Ga. Code Ann. § 40-6-241 (West 2018)	No	Yes
Haw.	Haw. Rev. Stat. Ann. § 291c-137 (West 2015)	No	Yes
Idaho	Idaho Code Ann. § 49-1401A (West 2021)	Yes	Yes
Ill.	625 Ill. Comp. Stat. Ann. 5/12-610.2 (West 2021)	Yes (single press*)	Yes

¹⁷⁹ Connecticut has a presumption of use for phone calls when a phone is held "to, or in the immediate proximity of, his or her ear" CONN. GEN. STAT. ANN. § 14-296aa(b)(2) (West 2021)

¹⁸⁰FLA. STAT. ANN. § 316.305(3)(a)(7) (West 2019) ("Operating an autonomous vehicle as defined in s. 316.003(3), with the automated driving system engaged" is excepted.); "*" indicates that exception for autonomous vehicles is recognized.

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Ind.	Ind. Code Ann. § 9-21-8-59 (West 2020) ¹⁸¹	No	Yes
Iowa	Iowa Code Ann. § 321.276 (West 2017)	Yes	No
Kan.	Kan. Stat. Ann. § 8-15,111 (West 2010)	Yes	Yes
Ky.	Ky. Rev. Stat. Ann. § 189.292 (West 2011)	Yes	Yes
La.	La. Stat. Ann. § 32:300.5 (West 2016)	Yes	Yes
Me.	Me. Stat. tit. 29, § 2121 (West 2019)	Yes	Yes
Md.	Md. Code Ann., Transp. § 21-1124.2 (West 2014)	Yes	Yes
Mass.	Mass. Gen. Laws Ann. ch. 90, § 13B (West 2020)	No	Yes
Mich.	Mich. Comp. Laws Ann. § 257.602b (West 2016)	No	Yes
Minn.	Minn. Stat. Ann. § 169.475 (West 2019)	No	Yes
Miss.	Miss. Code Ann. § 63-33-1 (West 2018)	No	No
Mo.	Mo. Ann. Stat. § 304.820 (West 2013) ¹⁸²	No	Yes
Mont.	NULL		
Neb.	Neb. Rev. Stat. Ann. § 60- 6,179.01 (West 2014)	No	Yes
Nev.*	Nev. Rev. Stat Ann. § 484B.165 (West 2017) ¹⁸³	Yes	Yes
N.H.	N.H. Rev. Stat. Ann. § 265:105-a (West 2010)	Yes	No
N.J.	N.J. Stat. Ann. § 39.4-97.3 (West 2014)	Yes	Yes

¹⁸¹Subsection (d) expressly prohibits an officer from “[confiscating] a telecommunications device for the purpose of determining compliance”

¹⁸²Missouri law does not apply to those 21 and older.

¹⁸³NEV. REV. STAT. ANN § 484B.165(7) (“For the purposes of this section, a person shall be deemed not to be operating a motor vehicle if the motor vehicle is driven autonomously and the autonomous operation of the motor vehicle is authorized by law.”).

N.M.	N.M. Stat. Ann. § 66-7-374 (West 2014)	Yes	Yes
N.Y. ¹⁸⁴	N.Y. Veh. & Traf. Law § 1225-d (McKinney 2014)	No	Yes
N.C.	N.C. Gen. Stat. Ann. § 20-137.4A (West 2012)	No	No
N.D.	N.D. Cent. Code Ann. § 39-08-23 (West 2017)	Yes	Yes
Ohio	Ohio Rev. Code Ann. § 4511.204 (West 2018)	Yes	Yes
Okla.	Okla. Stat. tit. 47 § 11-901c (West 2019)	Yes	Yes
Or. ¹⁸⁵	Or. Rev. Stat. Ann. § 811.507 (West 2018)	No	Yes
Pa.	75 Pa. Stat. and Cons. Stat. Ann. § 3316 (West 2012)	Yes	Yes
R.I.	31 R.I. Gen. Laws Ann. § 31-22-30 & 31-22-31 (West 2018)	Yes	Yes
S.C.	S.C. Code Ann. § 56-5-3890 (West 2014)	Yes	Yes
S.D.	S.D. Codified Laws § 32-26-47.1 (West 2020)	Yes	Yes
Tenn.	Tenn. Code. Ann. § 55-8-199 (West 2019)	Yes	Yes
Tex.	Tex. Transp. Code Ann. § 545.4251 (West 2017)	Yes (for music)	Yes
Utah	Utah Code Ann. § 41-6a-1716 (West 2021)	Yes	Yes
Vt.	Vt. Stat Ann. tit. 23 § 1095b (West 2020)	Yes	Yes
Va.	Va. Code Ann. § 46.2-818.2 (West 2021)	No	Yes
Wash.	Wash. Rev. Code Ann. § 46.61.672 (West 2017)	Yes	Yes

¹⁸⁴Full presumption of use if cellphone is held.

¹⁸⁵Oregon notably, (2) of the statute finds violation if a person “(a) Holds a mobile electronic device in the person’s hand; or (b) Uses a mobile electronic device for any purpose.” Further, (4) lists affirmative defenses rather than exceptions.

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W. Va.	W. Va. Code Ann. § 17C-14-15 (West 2013)	Yes	Yes
Wis.	Wis. Stat. Ann. § 346.89 (West 2016)	Yes	Yes
Wyo.	Wyo. Stat. Ann. § 31-5-237 (West 2010)	Yes	Yes