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COMMENTS

ARE “EVAN’S LAW” AND THE TEXTALYZER IMMEDIATE SOLUTIONS TO TODAY’S RAPID CHANGES IN TECHNOLOGY OR ENCROACHMENTS ON DRIVERS’ PRIVACY RIGHTS?

AGGIE BAUMERT*

I. INTRODUCTION

Distracted driving contributes to more than 1 million crashes in North America annually and results in serious bodily injuries, deaths, and an economic impact estimated by some experts at nearly \$40 billion per year.¹ Every day approximately 9 people are killed and more than 1,000 injured in crashes that involve a distracted driver.² Driving while using a cellphone can pose a dangerous cognitive distraction and degrade driver performance.³ The use of a cellphone while driving increases your chance of getting into a crash by 400%.⁴ Texting while

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1. ILL. ST. POLICE, <https://www.isp.state.il.us/traffic/distractdrive.cfm> (last visited May 31, 2017).

2. CTRS. FOR DISEASE CONTROL AND PREVENTION, *Distracted Driving/Motor Vehicle Safety*, https://www.cdc.gov/motorvehiclesafety/distracted_driving/index.html (last visited, Oct 29, 2017).

3. ILL. ST. POLICE, *supra* note 1.

4. *Id.*

driving makes you 23 times more likely to crash.⁵

In 2011, Evan Lieberman was killed in a car crash as a result of distracted driving.⁶ The driver of the car, in which Evan was a passenger, drifted over the yellow line and collided head on with an oncoming car.⁷ Evan was wearing a seatbelt in the back seat and still suffered substantial internal injuries and died a month after the accident.⁸ The driver told the police that “he dozed off while driving.”⁹ Although the crash killed Evan and injured two other passengers, the State police never charged or cited the driver for using a hand-held cellphone.¹⁰ The driver’s phone had been left for weeks in the wrecked car at a tow yard.¹¹ The State police could not check the driver’s phone at the scene of the accident to find out if he was telling the truth because the police lacked probable cause to obtain a warrant.¹² Frustrated with the lack of progress in the criminal investigation, Evan’s father, Ben Lieberman, filed a civil lawsuit in which he subpoenaed the driver’s phone records.¹³ Six months after the accident, Evan’s father learned that the driver was texting while driving.¹⁴ The phone record eventually proved that the driver was texting immediately before the crash.¹⁵ As a result of this accident, Evan’s father advocated passage of “Evan’s Law” in New York State, which would allow the police to use a device called a textalyzer at the scene of the accident.¹⁶ The “textalyzer” device would permit “law enforcement to scan a driver’s cellphone after an accident to see if it was in use during or before the collision.”¹⁷ Supporters for the textalyz-

5. *Id.*

6. David Schaper, ‘Textalyzer’ Aims To Curb Distracted Driving, But What About Privacy?, NAT’L PUB. RAD., Apr. 27, 2017, <http://www.npr.org/sections/alltechconsidered/2017/04/27/525729013/textalyzer-aims-to-curb-distracted-driving-but-what-about-privacy>.

7. Joel Rose, *New York Wants To Know: Have You Been Texting And Driving?*, NAT’L PUB. RAD., Apr. 27, 2016, <http://www.npr.org/sections/alltechconsidered/2016/04/27/474980140/new-york-wants-to-know-have-you-been-texting-and-driving>.

8. Schaper, *supra* note 6.

9. *Id.*

10. Terence Corcoran, *N.Y. family who lost son fights distracted driving*, USA TODAY, May 29, 2013, <https://www.usatoday.com/story/news/nation/2013/05/29/ny-father-fights-distracted-driving/2370837/>.

11. Schaper, *supra* note 6.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. O’CONNOR’S ANNOTS, *NY Bill Would Allow Police to Search Cellphone After Crash to Check for Distracted Driving*, Dec. 5, 2016, <https://www.oconnors.com/blog/2016/12/05/ny-bill-would-allow-police-to-search-cell-phone-after-crash-to-check-for-distracted-driving/>.

17. N. Y. C. L. UNION, *New York Civil Liberties Union Comments on the “Textalyzer” for the Governor’s Traffic Safety Committee*,

er compare it to a “breathalyzer for texting,” and advocate to obtain the information without a warrant, like a breathalyzer.¹⁸

The goal of “Evan’s Law” is to increase enforcement of existing laws that prohibit the use of cellphone or other personal electronic devices while driving, through the creation of field tests by police officers at the scene of the accident.¹⁹ The bill would approve electronic scanning devices, which are reliable and accurate for the purpose of conducting the field testing.²⁰ Further, “Evan’s Law” would permit police to conduct warrantless inspections of drivers’ cellphones or other personal electronic devices at the scene of the accident.²¹ Specifically, “Evan’s Law” would allow the police to conduct a field test on the driver’s cellphone or other personal electronic device at a crash site to determine whether a distracted driver caused the accident by using the cellphone or electronic device just before a crash.²²

In the pre-digital age, before cell and smartphones, a search of a driver was limited by physical realities and constituted only a narrow intrusion on privacy.²³ Today, “Evan’s Law” and similar laws, as well as the availability of devices such as a textalyzer, create concerns regarding drivers’ privacy rights. Some advocates argue that the field testing authorized by “Evan’s Law” directly infringes a fundamental privacy interest for drivers in New York State.²⁴ Notably, certain privacy advocates, for example the New York Civil Liberties Union, argue that law enforcement officers should be required to obtain a warrant to access drivers’ cellphones.²⁵ In support of their claim, they cite to the Supreme Court decision, *Riley v. California*, where the Court has recognized drivers’ privacy interest.²⁶ Further, the position of the opponents of the bill is that drivers should have the right to continue to have a

https://www.nyclu.org/sites/default/files/field_documents/nyclu_textalyzer_comments_final.pdf (last visited March 2, 2018).

18. *Id.*

19. S.B. 2306, N.Y.S. 2017-2018 Sess., <https://www.nysenate.gov/legislation/bills/2017/S2306> (last visited June 6, 2017).

20. *Id.*

21. O’CONNOR’S ANNOTS., *supra* note 16.

22. *Id.*

23. *Riley v. California*, 134 S.Ct. 2473, 2489 (2014).

24. Mem. from the NYCLU, Elec. Frontier Found., TechNet, The St. Privacy and Sec. Coalition on *An Act in relation to the field testing of mobile telephones and portable electronic devices (S.2306/A.3955)*, <https://www.nyclu.org/en/press-releases/telecom-industry-and-privacy-rights-groups-oppose-police-textalyzer-phone-search-bill> (last visited Apr. 25, 2017).

25. Jason Tashea, *Checking Texting N. Y. Considers ‘Textalyzer’ Bill That Allows Police to Learn Whether Drivers in Crashes Were Texting Behind the Wheel*, 102 A.B.A. J. 18, 19; S.B. 2306, 240th Sess. (N.Y. 2017).

26. *An Act in relation to the field testing of mobile telephones and portable electronic devices*, *supra* note 24.

privacy interest in their cellphones or other portable devices to remain free from warrantless searches by law enforcement.²⁷

This article will focus on distracted driving caused by cellphones and smartphones and other portable electronic devices that have web-browsing and text-sending capabilities. It will address the following issues: 1) the current application and changes in Illinois law and police practice that cause a decrease in enforcement of distracted driving laws; 2) the New York State Senate Bill S2306, or “Evan’s Law” proposal, as the only solution to decrease distracted driving; 3) current laws and regulations that do not fully address problems associated with distracted driving; 4) the U.S. Supreme Court decision that prohibits cellphone searches because it implicates privacy issues and Fourth Amendment concerns and thus leads to increased use of cellphones by drivers; and 5) recommendations to enact “Evan’s Law” to permit the use of a textalyzer without abuse of a driver’s cellphone privacy rights being violated.

II. BACKGROUND

1. DISTRACTED DRIVING AND ITS ASSOCIATION WITH CELLPHONE USE

A driver who engages in distracted driving behavior places himself, other drivers, passengers, and pedestrians in danger and potentially risks their lives.²⁸ A distracted driver is one who fails to focus 100% on the act of driving.²⁹ According to the National Highway Traffic Safety Administration (“NHTSA”), distracted driving includes not only cellphone use such as texting, but also other conduct including eating, talking to passengers, and adjusting the radio and/or climate controls.³⁰

Distracted drivers constitute a grave public hazard when using a cellphone or changing control settings inside their vehicle.³¹ Using hands-free technology such as a headset or voice active controls while driving a vehicle is also considered a distraction and can have dangerous and devastating effects.³² A study conducted by the 2015 Washington Traffic Safety Commission found that one in ten drivers were distracted in some way while on the road, and that 70% of those observed

27. *Id.*

28. Nat’l Highway Traffic Safety Admin., U.S. Dep’t of Transp., *Distracted Driving 2015*, <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/812381> (last visited June 7, 2017).

29. ILL. ST. POLICE, *supra* note 1; *An Act in relation to the field testing of mobile telephones and portable electronic devices*, *supra* note 24.

30. Nat’l Highway Traffic Safety Admin., *supra* note 28.

31. OFF. OF THE ILL. SEC’Y OF ST., ILLINOIS RULES ON THE ROAD 2017 (June 2017), https://www.cyberdriveillinois.com/publications/pdf_publications/dsd_a112.pdf.

32. *Id.*

were using their phone.³³ The National Highway Traffic Safety Administration (“NHTSA”) reported that in cases where distractions were caused by dialing or texting, the risk of a crash tripled.³⁴ According to a State Farm insurance company survey, nearly 30% of drivers surveyed in 2015 admitted to using the Internet while driving, compared to just 13% in 2009.³⁵ The survey found that the percentage of young drivers, “aged 18-29, who read social media websites while driving doubled from 21% in 2009 to 41% in 2014.”³⁶ Similarly, the proportion of this population who actually post to social media while driving increased from 20% in 2009 to 30% in 2014.³⁷ The same survey found the percentage of young adults aged 18-29 who texted while driving was 58% in 2014, down from 71% in 2009, because the use of social media as a form of communication may eventually supersede text messaging.³⁸ Thus, it seems that social media use while driving is increasing among adolescents and young adults and may be as dangerous as text messaging or talking on the phone.³⁹

In 2015, crashes caused by distraction constituted 14% of all police-reported motor vehicle traffic crashes.⁴⁰ Individuals between 15 to 19 years old (9%) comprised the largest group of distracted drivers.⁴¹ The NHTSA statistics reported 35,092 fatal crashes in 2015.⁴² In that year alone, distracted driving alone claimed 3,477 lives and an estimated 391,000 injuries among drivers and passengers.⁴³ Distracted driving also killed pedestrians, bicyclists, and bystanders.⁴⁴ The registered spike in collisions and fatal crashes is closely related to distracted driving as-

33. Bart Jansen, *New distracted driving law in Washington makes it illegal to hold phone while driving*, USA TODAY, July 4, 2017, <https://www.usatoday.com/story/news/nation-now/2017/07/24/new-distracted-driving-law-washington-makes-illegal-hold-phone-while-driving/504821001/>.

34. *Id.*

35. *Id.*

36. ST. FARM®, *Distracted Driving Includes Growing Mobile Web Use*, <http://teendriving.statefarm.com/road-to-safety/risky-driving/distracted-driving> (last visited Oct. 29, 2017); ST. FARM®, *Smartphones While Driving: We Know It's Risky. So Why Do We Do It?*, (Mar. 30, 2017), <https://newsroom.statefarm.com/8th-state-farm-distracted-driving-survey/#Zlmb7UhRGtcTsf6C>.99.

37. M. Kit Delgado, Kathryn J. Wanner, and Catherine McDonald, *Adolescent Cell-phone Use While Driving: An Overview of the Literature and Promising Future Directions for Prevention*, NAT'L CTR. FOR BIOTECHNOLOGY INFO., U.S. NAT'L. LIAB. OF MED., (Sep. 29, 2016), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5041591/>; *Smartphones While Driving: We Know It's Risky. So Why Do We Do It?*, *supra* note 36.

38. *Id.*

39. *Id.*

40. Nat'l Highway Traffic Safety Admin., *supra* note 28.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

sociated with cellphone useage.⁴⁵

Besides using a cellphone to access social media, the most deadly form of distraction is text messaging. Since the year 2000, the use of equipment with text messaging capabilities has increased from 12 million messages annually to over 16 billion messages in 2006.⁴⁶ But in 2014 the numbers are even higher, as an estimated 169.3 billion text messages were sent worldwide, in comparison to 110 billion in 2009.⁴⁷ In the United States, in December 2009, the 286 million U.S. phone subscribers sent 152.7 billion text messages per month, for an average of 534 messages per subscriber per month.⁴⁸ Further, in May 2010, 72% of adult cellphone users sent and received text messages.⁴⁹ Texting, e-mailing, web browsing, and similar cellphone use while driving may be as dangerous as talking on a cellphone or engaging in other forms of driver distractions.⁵⁰ Any activity a driver engages in while driving has the potential to distract him from the primary task of driving.⁵¹ A comparison can be drawn with cellphone use to passenger conversations while driving show each to be equally risky, while others show cellphone use to be more risky.⁵² However, an important distinction between the two is the fact that a passenger can monitor the driving situation along with the driver and pause for, or alert the driver to, potential danger.⁵³ In recent years, cellphone use, specifically, text messaging, has dramatically increased in occurrence and popularity across the world.⁵⁴

The most common types of distractions that affect drivers' abilities to operate vehicles safely and avoid crashes fall into three categories: visual, manual, and cognitive distractions.⁵⁵ First, visual distractions arise when a driver's eyes are diverted to complete or pay attention to

45. *Id.*

46. OFF. OF THE ILL. SEC'Y OF ST., ILLINOIS RULES ON THE ROAD 2017, *supra* note 31.

47. Delgado, *supra* note 37.

48. *Id.*

49. Kristen Purcell, Roger Entner, Nichole Henderson, *The Rise of Apps Culture 35% of U.S. adults have cellphones with apps, but only 24% of adults actually use them*, DEW RES. CTR., PEW RES. CTR.'S INTERNET & AM. LIFE PROJECT (Sep. 15, 2015), http://www.pewinternet.org/files/old-media/Files/Reports/2010/PIP_Nielsen%20Apps%20Report.pdf.

50. Alexis M. Farris, Note, *LOL? Texting While Driving Is No Laughing Matter: Proposing a Coordinated Response to Curb this Dangerous Activity*, 36 Wash. U. J.L. & Pol'y 233, 234 (2011).

51. ILL. ST. POLICE, *supra* note 1.

52. *Id.*

53. *Id.*

54. Delgado, *supra* note 37.

55. DMV.org, *Three Types of Driving Distractions*, <https://www.decidetodrive.org/distracted-driving-dangerous/eating-driving/> (last visited Oct. 29, 2017).

another task.⁵⁶ Examples of such visual distractions include: looking for items on the floor of the car, checking and adjusting the GPS, changing the radio station, adjusting the temperature controls, and applying makeup.⁵⁷ Second, manual distractions arise when the driver takes one or both hands off of the wheel of a vehicle.⁵⁸ Examples of such manual distractions include: eating and drinking, smoking, and searching through a purse or wallet while in the car.⁵⁹ Third, cognitive distractions arise when a driver focuses away from the task of driving a vehicle.⁶⁰ Examples of such cognitive distractions include: talking to another passenger, thinking about something that is upsetting, road rage, daydreaming, and being under the influence of drugs and/or alcohol.⁶¹

In the United States, texting while driving falls under all three categories of distracted driving.⁶² It takes more attention away from a driver than distractions that fall under only one category.⁶³ First, a visual distraction takes place when a driver looks at a phone.⁶⁴ Second, a manual distraction takes place when a driver uses fingers to type messages rather than keeping his hands on the wheel.⁶⁵ Third, a cognitive distraction takes place when a driver concentrates on reading or responding to a conversation rather than focusing on general traffic conditions.⁶⁶ Thus, cellphone use while driving should be restricted because of increased danger of crashes or even death.

2. IS A CELLPHONE JUST A PHONE OR A CAUSE OF DEATH IN AUTO ACCIDENTS?

“Fully eight in ten adults today (82%) are cellphone users, and about one-quarter of adults (23%) now live in a household that has a cellphone but no landline phone.”⁶⁷ A cellphone is no longer just a phone but if used while driving can be a cause of death in auto accidents. Also, the use of cellphones for purposes of calling, text messaging, or browsing the Internet has increased immensely.⁶⁸ In 2016 there

56. Decidetodrive.org, *Eating While Driving*, <https://www.decidetodrive.org/distracted-driving-dangerous/eating-driving/>, (last visited Oct. 29, 2017).

57. DMV.org, *supra* note 55.

58. Decidetodrive.org, *supra* note 56; DMV.org, *supra* note 55.

59. DMV.org, *supra* note 55.

60. Decidetodrive.org, *supra* note 56.

61. DMV.org, *supra* note 55.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. Purcell, *supra* note 49.

68. Delgado, *supra* note 37.

were 262 million smartphones in active use in comparison to 2009 when there were only 50 million.⁶⁹ According to CTIA-The Wireless Association's Industry Survey, the use of smartphones has increased 15% every year since 2009.⁷⁰

A cellphone differs in both "a quantitative and a qualitative sense" from any other object found on a driver's person, such as personal items carried by a driver.⁷¹ Before a smartphone, drivers would not usually carry sensitive personal information everywhere they went. Since then, phones used by drivers have been adapted to the technological changes in society. Today, many cellphones contain sensitive information previously found in the home of a driver, such as credit card information and e-mail.⁷² The phone also contains a broad array of private information that might not be found in the driver's home.⁷³ Many cellphones have mobile applications software, or "apps," that provide the user with a range of tools for managing detailed information about all aspects of a person's life.⁷⁴

The term "cellphone" is deceptive because the assumption is that it can be used only as a telephone, when in fact, the majority of cellphones are minicomputers with the capacity to be used as telephones.⁷⁵ Today's cellphones can be any of the following at the same time: "cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers."⁷⁶ Because of cellphones' storage and memory capacities, these devices differ immensely from the traditional telephones or "old-fashioned flip" phones.⁷⁷

Drivers find cellphones more interesting and helpful in everyday life because they couple that capacity with the ability to store many different types of information.⁷⁸ Even the most simple cellphones purchased for less than "\$20 might hold photographs, picture messages, text messages, Internet browsing history, a calendar, a thousand-entry phone book, and so on."⁷⁹ Thus, because of the astonishing number of ways in which cellphones can be used, if used inappropriately, these devices can be distracting and their use can substantially contribute to

69. Ctia.org, <https://www.ctia.org/docs/default-source/default-document-library/annual-year-end-2016-top-line-survey-results-final.pdf?sfvrsn=2> (last visited Oct. 29, 2017).

70. *Id.*

71. *Riley* at 2488, 2489.

72. *Id.* at 2491.

73. *Id.*

74. *Id.* at 2490.

75. *Id.* at 2489.

76. *Id.*

77. *Riley* at 2478, 2489.

78. *Id.* at 2489.

79. *Id.*

devastating injuries or even death in auto accidents.

3. SUMMARY AND IMPACT OF THE NEW YORK DEPARTMENT OF MOTOR VEHICLE HEARING

In 2013, at the hearing regarding Evan's death before the New York Department of Motor Vehicles, an administrative law judge found the driver at-fault for using his cellphone while driving; however, the judge did not cite his cellphone use as a factor contributing to the crash itself.⁸⁰ The driver did not testify during the hearing.⁸¹ The lawyer for Evan's estate introduced as evidence the driver's phone records and statements that the driver made in a civil suit stemming from the crash.⁸² In addition, Evan's lawyer submitted the driver's Facebook message that the driver had sent the day after the accident to Evan and to the two other passengers.⁸³ That message read as follows: "... i am soooooo sorry ... i was exhausted and you were all sleeping too ... I was bobbing my head and taking those 1 second naps before forcing myself to stay alert."⁸⁴ Evan's attorney stated that the browser on the driver's phone, which can be used to access Facebook and other social media, was on from the early morning of that day up to the time of the crash.⁸⁵ Further, the attorney stated that the driver's phone records illustrated "a consistent usage of a cellphone device texting in and out for the period that [the driver] was operating the vehicle up until when the accident happened."⁸⁶

On the one hand, the driver's attorney opposed the introduction of the phone records into evidence stating that the police filed no charges and that "[l]aw enforcement concluded there was no evidence connecting the cause to texting or talking on the phone prior to the crash."⁸⁷ Nevertheless, the administrative judge allowed the admission of the records and cited them in her ruling, and consequently suspended the driver's license for a year.⁸⁸

4. LIEBERMAN'S PROPOSAL OF "EVAN'S LAW" AND USE OF A TEXTALYZER AS A SOLUTION TO ADDRESS DISTRACTED DRIVING

Considering the above statistics and the cause of Evan's death, the

80. Corcoran, *supra* note 10.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. Corcoran, *supra* note 10.

87. *Id.*

88. *Id.*

NHTSA and law enforcement need a technological solution to address the distracted driving problem.⁸⁹ One of these solutions might be the textalyzer or “Evan’s Law” as currently proposed by lawmakers in New York State.⁹⁰ The bill and the technological device were inspired by Ben Lieberman’s story; Lieberman lost his son in a car accident caused by a driver who was texting while driving.⁹¹ “Evan’s Law” will allow devices like a textalyzer to be used by law enforcement to determine if a driver used a cellphone before a crash. At this point, however, the textalyzer and “Evan’s Law” are only being considered in New York, but if successfully enacted, other states might follow New York State’s lead.⁹²

i. The “Evan’s Law” Proposal would Aid Law Enforcement in Decreasing, if not Eradicating, Distracted Driving Caused by Use of a Cellphone.

“Evan’s Law” would create a more efficient way through field testing for law enforcement at the scene of an accident in determining whether a driver was using a cellphone while driving before an accident. This would ultimately decrease or perhaps eliminate distracted driving caused by use of a cellphone or other personal electronic devices while driving.⁹³ As a result of Evan’s death, his father, Ben Lieberman, co-founded Distracted Operators Risk Casualties, a nonprofit advocacy group that supports the bill in the New York Assembly.⁹⁴ A co-founder of the bill is Deborah Becker, whose son was the front-seat passenger in the head-on collision that caused Evan’s death.⁹⁵ To address the concerns and the danger associated with distracted driving, New York State legislators proposed the New York State Senate Bill S2306 (“S2306”), called “Evan’s Law.”⁹⁶ “Evan’s Law” is currently in the second stage out of the total of four stages of the legislative process.⁹⁷

“Evan’s Law” “[p]rovides for the field testing for use of mobile telephones and portable electronic devices while driving after an accident or collision.”⁹⁸ The goal of “Evan’s Law” is to increase enforcement of existing laws that prohibit the use of cellphones or other personal elec-

89. Anna Gotfryd and Jacob Vannette, *Texting While Driving in a New Age of Automobile Advancements Legal Implications to be Determined*, TIMELY TECH, (June 19, 2016), <http://illinoisjltip.com/timelytech/texting-while-driving-in-a-new-age-of-automobile-advancements-legal-implications-to-be-determined/>.

90. *Id.*

91. Schaper, *supra* note 6.

92. S.B. 2306, N.Y.S. 2017-2018 Sess., *supra* note 19.

93. *Id.*

94. Tashea, *supra* note 25.

95. *Id.*

96. S.B. 2306, 240th Sess. (N.Y. 2017).

97. *Id.*

98. *Id.*

tronic devices while driving through field tests by police officers at the scene of the accident.⁹⁹ “Evan’s Law” is “[a]n act to amend the vehicle and traffic law ..., in relation to the field testing of mobile telephones and portable electronic devices after a motor vehicle accident or collision involving damage to real or personal property, personal injury or death.”¹⁰⁰

The bill amends section 215 of the vehicle and traffic law, regarding rules and regulations of the Department of Motor Vehicles, by including two new subdivisions, (d) and (e).¹⁰¹ In subdivision (d) the commissioner, jointly with the commissioner of criminal justice services, is required to promulgate rules and regulations to assess the reliability and accuracy of the electronic scanning devices used during field testing of mobile telephones and portable electronic devices.¹⁰² This section gives the commissioner, jointly with the commissioner of criminal justice services, power to approve electronic scanning devices, which are reliable and accurate for the purpose of conducting the field testing.¹⁰³

In subdivision (e), the bill proposes that the commissioner must provide a public education campaign, which would include pamphlets, relating to field testing for use of mobile telephones and portable electronic devices, and the implied consent for testing of any person operating a motor vehicle in that state.¹⁰⁴ “Evan’s Law” would increase enforcement of existing laws that prohibit the use of cellphones through field tests at the scene of the accident and would give power to approve electronic scanning devices.¹⁰⁵ Thus, the legislation through field tests would aid law enforcement at the scene of the accident in determining whether a driver was using a cellphone before a crash and ultimately decrease or perhaps eliminate the use of cellphone or other personal electronic devices while driving.¹⁰⁶

ii. Textalyzer is an Effective Way to Determine if a Driver was Using a Cellphone before an Accident.

Currently, almost all of the states in the United States have made “texting while driving” illegal.¹⁰⁷ Utah, Illinois, and New Jersey have

99. *Id.*

100. *Id.*

101. *Id.*

102. S.B. 2306, 240th Sess. (N.Y. 2017).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. GHSA, DISTRACTED DRIVING LAWS BY ST., http://www.ghsa.org/sites/default/files/201705/DistractedDrivingLawChart_May17_2.pdf.

imposed large fines on texting drivers.¹⁰⁸ Despite the ban and the large fines, enforcement of these laws can be problematic for police officers.¹⁰⁹ Even with these state bans and large fines, law enforcement still struggle to determine whether a driver used a cellphone before a crash.¹¹⁰ As a result, Ben Lieberman, Evan's father, has been working with Cellebrite, a company that has developed an electronic device, called a textalyzer, that is modeled after the breathalyzer.¹¹¹

The textalyzer can determine whether a driver was using a cellphone illegally on the road just before an accident, just like the breathalyzer determines whether a driver had been drinking before an accident.¹¹² To make this determination, a law enforcement officer would attach a cord to connect the textalyzer to the cellphone and in about 90 seconds would receive a report of the driver's last activities.¹¹³ The textalyzer would display a summary of what applications, screen taps, and swipes had been opened and used on the phone right before the crash without downloading the cellphone's content.¹¹⁴ For example, the textalyzer will show that a driver "opened WhatsApp at 2:45," that there were several Facebook activities, and the driver "received an incoming call at 2:59 and sent an SMS at 3 o'clock."¹¹⁵ The textalyzer will download information about what apps had just been used.¹¹⁶ Further, the textalyzer would not analyze any sensitive information from the phone such as personal communications.¹¹⁷ Cellebrite plans to tailor the device specifically to each state's jurisdictional requirements.¹¹⁸ Thus, Evan's father and the New York lawmakers believe that the textalyzer will address the problem with distracted driving by aiding the police in conducting field testing on cellphones at crash sites.¹¹⁹

5. CURRENT DISTRACTED DRIVING LAWS AND REGULATIONS IN THE UNITED STATES.

i. Implementation and Enforcement of State Laws and Regulations as a

108. Schaper, *supra* note 6.

109. *Id.*

110. S.B. 2306, N.Y.S. 2017-2018 Sess., *supra* note 19.

111. Schaper, *supra* note 6.

112. *New Stop*, INVESTIGATIVE STOPS LAW BULL., 16 No. 6 Quinlan, Investigative Stops Law Bull. NL 3 (2017).

113. *Id.*

114. *Id.*

115. Jeff Rossen, Lindsey Bomnin, *Rossen Reports: How the 'textalyzer' can tell if you were texting while driving*, TODAY, Jun. 21, 2017, <https://www.today.com/money/rossen-reports-how-textalyzer-can-tell-if-you-were-texting-t112973>.

116. *Id.*

117. Rose, *supra* note 7.

118. *New Stop*, *supra* note 112.

119. Rose, *supra* note 7.

Result of Distracted Driving.

Most states recognize distracted driving as a threat to public safety and, as a response, have enacted laws such as the “Hand-held Cellphone Ban,” the “All Cellphone Ban” (applicable to school bus drivers and novice drivers), and the “Text Messaging Ban” (applicable to all drivers, school bus drivers, and novice drivers).¹²⁰ In addition, some states have passed modified prohibitions, which apply only to selected drivers and limit them to utilizing their cellphones for certain purposes.¹²¹

Some states also classify “texting while driving” as either a secondary or primary offense.¹²² This distinction is important because a secondary offense does not allow the police to conduct an arrest and a subsequent search, including the search of a cellphone.¹²³ In contrast, when “texting and driving” is classified as a primary offense, commonly categorized in a few states, law enforcement officers have no authority to conduct a full-custody arrest for traffic offenses, effectively precluding a search incident to arrest and the search of a cellphone.¹²⁴ These “primary enforcement laws” mean “an officer may cite a driver for using a hand-held cellphone without any other traffic offense taking place.”¹²⁵ The “Text Messaging Ban” is in effect in 47 states, as well as D.C., Puerto Rico, Guam, and the U.S. Virgin Islands for all drivers.¹²⁶ All of these states have primary enforcement except Florida, Nebraska, Ohio, and South Dakota.¹²⁷ In those four states, the use is a secondary offense.¹²⁸ Arizona, Missouri, Montana, and Texas do not ban all categories of drivers from texting.¹²⁹ Missouri prohibits text messaging by novice or teen drivers.¹³⁰ Montana is the only state that does not have a “Hand-held Cellphone Ban,” “All Cellphone Ban,” or “Text Messaging Ban” prohibition.¹³¹

120. GHSA, DISTRACTED DRIVING LAWS BY ST., *supra* note 107.

121. Farris, *supra* note 50.

122. GHSA, DISTRACTED DRIVING LAWS BY ST., *supra* note 107.

123. Adam M. Gershowitz, *Texting while Driving Meets the Fourth Amendment: Detering Both Texting and Warrantless Cellphone Searches*, 54 *Ariz. L. Rev.* 577, 597 (2012); GHSA, DISTRACTED DRIVING LAWS BY ST., *supra* note 107.

124. Gershowitz, *supra* note 123.

125. GHSA, DISTRACTED DRIVING, <http://www.ghsa.org/state-laws/issues/Distracted-Driving>, (last visited May 30, 2017).

126. *Id.*

127. GHSA, DISTRACTED DRIVING LAWS BY ST., *supra* note 107.

128. *Id.*

129. *Id.*

130. Richard Stim, *Cell Phone and Texting Laws Texting and hands free laws, penalties and fines - many states are enacting these laws to enhance safety and save lives*, NOLO, <http://www.drivinglaws.org/missouri.php>.

131. GHSA, DISTRACTED DRIVING LAWS BY ST., *supra* note 107.

The “Hand-held Cellphone Use Ban” applies to all drivers and prohibits drivers from using their cellphones while driving. This type of ban is enforced in 14 states, in addition to D.C., Puerto Rico, Guam, and the U.S. Virgin Islands.¹³² Hand-held operation of a cellphone while driving has been shown to have a three to four fold increased risk of a near crash or crash, and an eye glance duration greater than two seconds increases crash risk.¹³³ There is an implied notion that through the hand-held ban, hands-free talking is safer than driving while holding the cellphone to carry on a conversation.¹³⁴ But the use of a “hands-free” device most commonly involves some sort of hands-on activity.¹³⁵ This means that one hand is off the steering wheel “whether it is to manually set up and attach the device, to dial the phone in order to make a call, or press a button to answer an incoming call.”¹³⁶

The “All Cellphone Use Ban” means prohibiting any use of a cellphone while driving.¹³⁷ Although no state has enacted “All Cellphone Use Ban” to all categories of people, the ban applied to certain drivers. For instance, in 38 states and D.C. the ban applies to novice drivers or teen drivers.¹³⁸ Additionally, 21 states prohibit all cellphone use by school bus drivers.¹³⁹ Currently, no state prohibits all cellphone use for all drivers.¹⁴⁰

Often, local authorities pass their own distracted driving bans - most include the use of cellphones while driving.¹⁴¹ However, several states, including Florida, Kentucky, Louisiana, Mississippi, Nevada, Pennsylvania, and Oklahoma, have prohibited localities from enacting their own laws regarding cellphone use.¹⁴²

The above listed laws differ from the “Evan’s Law” because they do not provide for field testing for use of mobile telephone and portable electronic devices while driving after an accident or collision.¹⁴³ In addition, “Evan’s Law”, if passed, would amend the vehicle, traffic, and the enforcement laws in relation to field testing of mobile telephones and portable electronic devices after a motor vehicle accident.¹⁴⁴ Also,

132. GHSA, DISTRACTED DRIVING, *supra* note 125.

133. Delgado, *supra* note 37

134. Annie Barret Wallin, Note, *Cellphones Pose a Distraction to Drivers but Legislative Ban Is Not the Answer*, 98 Ky. L.J. 177, 187 (2009).

135. *Id.*

136. *Id.*

137. *Id.*

138. GHSA, DISTRACTED DRIVING, *supra* note 125.

139. *Id.*

140. GHSA, DISTRACTED DRIVING LAWS BY ST., *supra* note 107.

141. *Id.*

142. *Id.*

143. S.B. 2306, 240th Sess. (N.Y. 2017).

144. *Id.*

“Evan’s Law” would approve electronic scanning devices, which are reliable and accurate for the purpose of conducting field testing.¹⁴⁵ Finally, the goal of the “Evan’s Law” is to increase enforcement of existing laws that prohibit the use of cellphone or other personal electronic devices while driving through the creation of field tests by police officers at the scene of the accident.¹⁴⁶ The field testing recommended by “Evan’s Law” would provide printed reports that would constitute evidence that the driver was using a cellphone just before an accident.¹⁴⁷ The current state laws enacted by each state rely only on the police officer’s statement.¹⁴⁸ Thus, the field test report would constitute a more reliable form of evidence presented in court than police officers testimony to prove that the driver was using a cellphone or other electronic device just before a crash.

ii. U.S. Supreme Court Decisions Related to Cellphone Searches.

Current U.S. Supreme Court decisions slowly address Fourth Amendment considerations in view of rapid technological changes in today’s society. The Court has been responding to these technological advancements at a moderate pace. For example, in *Riley v. California*, the Court looked at the applicability of the search incident to arrest doctrine to a modern smartphone and flip phone.¹⁴⁹ The “flip phone,” which is no longer commonly used, generally has a smaller range of features than a smartphone.¹⁵⁰ In *Riley*, the Court held that an enforcement officer must obtain a warrant before searching the digital contents of cellphones seized from people who are placed under arrest.¹⁵¹ The Court, citing to the Fourth Amendment, reasoned that a law enforcement officer could not search a cellphone without a warrant, even after an arrest, unless exigent circumstances existed.¹⁵² The Fourth Amendment, enacted to prohibit the government from conducting unreasonable searches and seizures, states that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”¹⁵³ Further, the Court stated that the search inci-

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. *Riley* at 2484.

150. *Id.* at 2481.

151. *Id.* at 2497.

152. *Id.* at 2494.

153. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173 (2016).

dent to arrest exception does not apply to cellphones, but recognized “the exigencies of the situation” exception that may justify a warrantless search of a particular phone that would pass Fourth Amendment scrutiny.¹⁵⁴

The search incident to arrest doctrine and its application has been analyzed in many cases before *Riley*, including *Arizona v. Gant*.¹⁵⁵ In *Gant*, the Court held a police officer may search a car in the case of lawful arrest, only if the officer reasonably believes that the person arrested might have access to the vehicle at the time of the search or the vehicle contains evidence of the offense that prompted the arrest.¹⁵⁶ In the absence of these circumstances, a “warrantless search” is unreasonable and is subject to a few, narrow exceptions.¹⁵⁷ For instance, when safety or evidentiary concerns demand it, then the officer is authorized to search a car without a warrant.¹⁵⁸ Further, an officer is authorized to search the vehicle when the officer has a reasonable suspicion that a person, whether or not the arrestee, might cause danger and might want to re-enter the vehicle to obtain a weapon.¹⁵⁹ Lastly, an officer is authorized to search any area of a vehicle when the officer has probable cause to think that the vehicle possesses evidence of criminal activity.¹⁶⁰ There might also be other circumstances that would justify a search, such as officer safety or evidentiary interests.¹⁶¹

Ultimately in *Riley*, the Court determined that *Gant* relied on “circumstances unique to the vehicle context” and endorsed a search solely for the purpose of gathering evidence.¹⁶² These were unique circumstances applicable at “a reduced expectation of privacy” when it comes to motor vehicles.¹⁶³ Thus, the *Gant* analysis could be extended to apply to cellphone searches because “Evan’s Law” applies solely to the search of a cellphone which was used by the driver of an auto involved in a crash.¹⁶⁴

iii. A Drop in Enforcement of Distracted Driving Laws in Illinois Caused by Current Changes in Police Practice.

In 2014, Illinois enacted a statute that prohibits the use of hand-

154. *Riley* at 2494.

155. *Arizona v. Gant*, 556 U.S. 332, 351 (2009).

156. *Id.*

157. *Id.*

158. *Id.* at 346.

159. *Id.* at 346-47.

160. *Id.* at 346.

161. *Id.* at 347.

162. *Riley* at 2484.

163. *Id.* at 2488.

164. *Id.* at 2492.

held cellphones, texting or using other electronic communications while operating a motor vehicle.¹⁶⁵ The statute does not permit cellphone use, or use of other electronic devices for the purpose of composing, texting, emailing, browsing the Internet, or conducting other similar activities while operating a vehicle.¹⁶⁶ Illinois law also prohibits the use of headsets while driving.¹⁶⁷ Headsets are defined as “any device, other than a hearing aid, that allows a person to hear or receive electronic communications.”¹⁶⁸ But the use of a single-sided headset or earpiece with a wireless/cellphone device is permitted while driving.¹⁶⁹ Thus, using hands-free technology, for example a headset or voice activated controls, is considered a distraction while driving and can be devastating to drivers, passengers, or pedestrians in case of accidents.¹⁷⁰

The Illinois statute, however, does permit hands-free devices or Bluetooth technology for drivers age 19 and older.¹⁷¹ That said, Illinois using a cellphone while holding the device and utilizing the speaker phone is not considered hands-free and is a violation of its state law.¹⁷²

In cases where a driver believes that he must make a phone call, even with hands-free technology, the Illinois statute recommends that the driver pull to the side of the road before making the call.¹⁷³ In addition, the Illinois statute creates ten exceptions where drivers can use a cellphone that is not hands-free.¹⁷⁴ Some of the exceptions where a driver can use a cellphone include: to report an emergency situation, when a vehicle is parked on the shoulder of a road, and in a vehicle stopped due to normal traffic being obstructed, and in a vehicle that is in neutral or park position.¹⁷⁵

The violation of this statute is “an offense against traffic regulations governing the movement of vehicles.”¹⁷⁶ An enforcement officer can fine a person who violates this law with a maximum of “\$75 for a

165. OFF. OF THE ILL. SEC'Y OF ST., ILLINOIS RULES ON THE ROAD 2017, *supra* note 31.

166. HandsFreeInfo.com, *Illinois: Cellphone & texting laws, legislation*, <http://handsfreeinfo.com/illinois-cell-phone-laws-legislation/> (last visited May 31, 2017).

167. OFF. OF THE ILL. SEC'Y OF ST., ILLINOIS RULES ON THE ROAD 2017, *supra* note 31.

168. *Id.*

169. *Id.*

170. *Id.*

171. HandsFreeInfo.com, *supra* note 166.

172. OFF. OF THE ILL. SEC'Y OF ST., ILLINOIS RULES ON THE ROAD 2017, *supra* note 31.

173. *Id.*

174. H. B. No. 761, 100th Gen. Assem., Reg. Sess. (Ill. 2017).

175. *Id.*

176. § 1:3.Summary of new traffic and DUI laws in 2010, 25 Ill. Prac., Ill. DUI Law and Practice Guide § 1:3 (2017).

first offense, and \$100, \$125, and \$150 for subsequent offenses.¹⁷⁷ Also, the City of Chicago enacted an ordinance to penalize texting while driving, under which fines can range from \$90 to \$500.¹⁷⁸ In addition, drivers of vehicles that cause an accident as a result of distracted driving may face criminal penalties and incarceration.¹⁷⁹

Although each state has some laws that address distracted driving, the enforcement of traffic laws has dropped nationally and locally.¹⁸⁰ In 2016, the number of tickets decreased to 186 from 25,884, in 2015; in 2015 the number of tickets had decreased from 45,594 in 2014.¹⁸¹ As of April 16, 2017, there were only 24 tickets issued.¹⁸² For instance, in Il-

177. H. B. No. 761, 100th Gen. Assem., Reg. Sess. (Ill. 2017).

178. Mary Wisniewski, *Chicago police citations for distracted driving plummet over 3 years*, CHI. TRIB., May 8, 2017, <http://www.chicagotribune.com/news/local/breaking/ct-distracted-driving-chicago-police-getting-around-0508-20170507-column.html>.

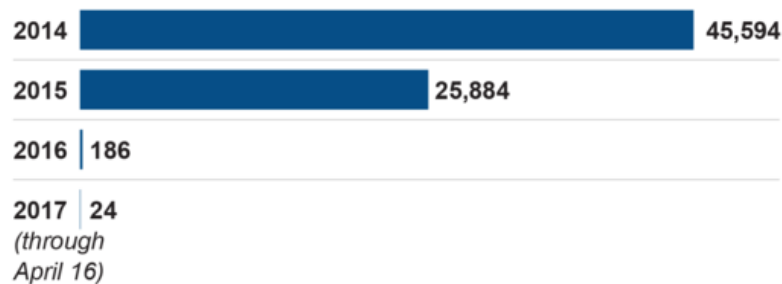
179.

http://www.cyberdriveillinois.com/departments/drivers/traffic_safety/distracted.html

180. Mary Wisniewski, *supra* note 178.

181. *Id.*

Tickets issued to Chicago drivers for using mobile devices *By year*



Sources: Chicago Police Department

@ChiTribGraphics

182. *Id.*

linois, the Illinois State Police noticed a drop in enforcement of the state distracted driving law.¹⁸³ Also, over the past three years, the number of municipal tickets issued by Chicago police to drivers using their mobile devices has fallen dramatically.¹⁸⁴

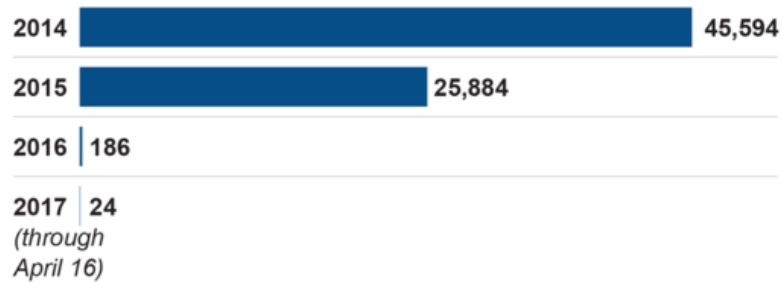
One of the explanations for the downward trend in enforcement is the 2015 amendment to the Chicago police cellphone citation policy.¹⁸⁵ The policy conforms to the changes in state law that mandated that cellphone violations be subject to the same process as other traffic violations.¹⁸⁶ As a result of this change, violators are sent to traffic court and, in order for the ticket to be enforced, the citing officer is required to be present in court.¹⁸⁷ Before this change, the citing officer's presence was not required and the municipal citation could be upheld before an administrative law judge.¹⁸⁸ Therefore, law enforcement officers are in need of rapid assistance with new enforcement technological solutions.

III. ANALYSIS

Although there are laws and regulations that govern cellphone use while driving, privacy concerns still remain to be addressed that will favor enactment of "Evan's Law" and the use of a "textalyzer."

1. "EVAN'S LAW" WOULD AID LAW ENFORCEMENT IN DETERMINING THE

Tickets issued to Chicago drivers for using mobile devices *By year*



Sources: Chicago Police Department

@ChiTribGraphics

183. Mary Wisniewski, *supra* note 178.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

DRIVER'S CELLPHONE USAGE PRIOR TO OR AT THE TIME OF A COLLISION
AND WOULD ALLOW ENFORCEMENT OF DISTRACTED DRIVING LAWS AFTER
AN ACCIDENT WHILE PROTECTING THE DRIVER'S ESSENTIAL PRIVACY
RIGHTS.

To justify the passage of "Evan's Law," lawmakers argue that the use of mobile telephone and personal electronic devices increase the occurrence of distracted driving.¹⁸⁹ Because many drivers engage in this distracted behavior, the lives of other drivers and passengers traveling on New York state roadways are in danger.¹⁹⁰ Despite public information campaigns and laws that prohibit the use of mobile telephones while driving, as well as the "text stops" signs along all major New York highways, the reports show that 67% of drivers admit to the use of their cellphones while driving even when they know that they pose a danger to themselves and others on the road.¹⁹¹ In 2001, the New York legislature enacted a law prohibiting the use of cellphones while driving, and in 2009 updated the legislation to include all portable electronic devices.¹⁹² In addition, the New York executive branch started a public campaign against cellphone use while driving, and established "text stops" along all major New York highways.¹⁹³ However, legislators supporting "Evan's Law" point out that in one year alone, a 10-year trend of declining collisions and casualties was reversed, as crashes are up 14%, and fatalities increased 8%, suggesting that the problem not only still exists but also has worsened.¹⁹⁴

Furthermore, lawmakers recognize that law enforcement has difficulties enforcing these public safety laws, especially after an accident when it is impossible to discern whether the operator of a motor vehicle was using his or her cellphone immediately prior to or at the time of the collision.¹⁹⁵ Supporters of "Evan's Law" advocate technology that would aid law enforcement and that would allow law enforcement to immediately determine cellphone usage without an inquiry into content.¹⁹⁶ Lawmakers advocate that this advanced technology would allow enforcement of distracted driving laws after an accident while still protecting essential privacy rights.¹⁹⁷ Finally, lawmakers also point out that while it is the technology that is causing the serious danger to the public, technology also has the capacity to aid law enforcement in tack-

189. S.B. 2306, 240th Sess. (N.Y. 2017).

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. S.B. 2306, 240th Sess. (N.Y. 2017).

196. *Id.*

197. *Id.*

ling, if not eradicating, distracted driving.¹⁹⁸

i. Current Laws Make it Difficult for Law Enforcement to Prove that a Driver was Engaged in Distracted Driving by Using a Cellphone.

Were it not for Evan's father's determination to file a civil lawsuit to subpoena the driver's cellphone records, the actual cause of Evan's death would not have been discovered.¹⁹⁹ The investigations by police and prosecutors showed no cellphone use.²⁰⁰ Further, the criminal investigators did not seek phone records, and the State of New York has no laws that prohibit drowsy driving.²⁰¹ Drowsy driving often occurs when a driver has not rested or slept enough, but it can also happen due to untreated sleep disorders, medications, or drinking alcohol.²⁰² Here, however, drowsy driving was not the cause.²⁰³ If not for Evan's father, it would never be known that the driver had actually been texting before the crash.²⁰⁴

In many states, even though police officers are to some extent enforcing the distracted driving laws, it remains difficult to determine when the use of prohibited devices is a contributing factor to a crash.²⁰⁵ Indeed, without a witness present, proving that a driver was using a cellphone while driving is virtually impossible.²⁰⁶ Therefore, without a witness present there is almost no way of telling whether a distracted driving was a contributing factor to the crash.

ii. Subpoenaing Drivers' Cellphone Records is an Inefficient and Impractical Method to Effectively Decrease Distracted Driving.

Today, the principle method for finding out if a driver was using a cellphone while driving and whether distracted driving contributed to an accident is to subpoena the driver's cellphone records.²⁰⁷ For a law enforcement officer to obtain the driver's phone records, the subpoena must be issued a cellphone company.²⁰⁸ This process takes from two days to a month and is not considered a part of law enforcement protocol.²⁰⁹ The current subpoena process is not practical because there is in-

198. *Id.*

199. Corcoran, *supra* note 10.

200. *Id.*

201. *Id.*

202. <https://www.cdc.gov/features/dsdrowsydriving/index.html>

203. Schaper, *supra* note 6.

204. *Id.*

205. Corcoran, *supra* note 10.

206. *Id.*

207. *Id.*

208. Tashea, *supra* note 25.

209. *Id.*

sufficient time for enforcement officers to obtain each driver's phone records from every car crash.²¹⁰ Thus, the subpoena process practicality causes problems for law enforcement departments, as they do not have sufficient manpower to follow up on these inquirers.²¹¹

Even when cellphone records are obtained by subpoena, the records do not identify such distractions as the driver's interactions with e-mail, social media, or Web browsing.²¹² Thus, cellphone records obtained by subpoena do not provide the entire picture of what the driver was doing before the crash and do not accurately determine whether distracted driving was the principle cause of the crash.²¹³ Therefore, subpoenaing the driver's cellphone records is an inefficient and impractical method for law enforcement to effectively lower or even substantially eliminate distracted driving in the United States.

iii. Differing Types of Laws Restricting Cellphone Use Precludes Law Enforcement from Accurately Determining Whether the Driver's Behavior was Illegal Cellphone Use.

Certain state laws require law enforcement officers to distinguish whether the driver's use of a cellphone is illegal.²¹⁴ In Indiana, for example, the law prohibits only "Text Messaging"²¹⁵ In addition, there is no "Hand-held Ban" and "All Cellphone Ban" that would apply to people under the age of 21, thus the officers are faced with a difficult task of distinguishing texting from other uses.²¹⁶ Law enforcement officers must make this determination from a distance by glancing into a moving car and observing the driver using a cellphone.²¹⁷ Because law enforcement officers make this decision while the car is in motion, they may observe a driver only appearing to be using a cellphone.²¹⁸ Thus, even a driver's lawful cellphone use may cause officers to be suspicious, create unnecessary presumptions about the driver, and ultimately result in a wrongful traffic stop.²¹⁹

Even in states where a "Hand-held Ban" or "Text Messaging Ban" are enforced, it is still difficult for enforcement officers to prove that a driver was engaged in distracted driving before a police traffic stop or

210. *Id.*

211. *Id.*

212. Schaper, *supra* note 6.

213. *Id.*

214. *United States v. Paniagua-Garcia*, 813 F.3d 1013, 1014 (7th Cir. 2016).

215. GHSA, DISTRACTED DRIVING LAWS BY ST., *supra* note 107.

216. *Id.*

217. *Paniagua-Garcia*, 813 F.3d at 1014.

218. *Id.*

219. *Id.* at 1015.

an accident.²²⁰ One Indiana case demonstrates this difficulty. In *U.S. v. Paniagua-Garcia*, a police officer observed a driver, who “appeared to be texting” on his cellphone while driving.²²¹ The driver denied that he was texting while driving; further explaining that he was just searching for music.²²² A search of the driver’s cellphone proved that the phone was not used to send a text message at the time when the officer saw him.²²³ The court determined that the officer did not see the driver texting before the traffic stop.²²⁴ Further, the court indicated that the officer had only seen that the driver was holding a cellphone in his right hand while his head was bent toward the phone.²²⁵ The court stated that the government failed to establish that the officer had probable cause or a reasonable suspicion that the driver was violating the no-texting law while driving at the time of the traffic stop.²²⁶ Thus, the court concluded that the driver’s behavior was consistent with any one of lawful cellphone uses under Indiana state law.²²⁷

As illustrated in *Paniagua-Garcia*, law enforcement officers have struggled to distinguishing from a distance whether a driver using a cellphone in compliance with a given state’s law.²²⁸ By enacting “Evan’s Law” and allowing a textalyzer, law and technology would aid law enforcement officers in determining whether a driver was using cellphone illegally.²²⁹ The bill would permit a textalyzer to be used by the police only in the investigation after the accident, but it is difficult to predict whether the use of a textalyzer should be extended to regular traffic stops.²³⁰

iv. Justice Alito’s concurrence in *Riley v. California* Supports Enactment of “Evan’s Law.”

To justify “Evan’s Law,” supporters of the bill cite drivers’ increased use of technology while driving and the negative impact that technology has on roads today.²³¹ Legislators find support for “Evan’s Law” in Jus-

220. Mary Wisniewski, *supra* note 178.

221. *Paniagua-Garcia*, 813 F.3d at 1014.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Paniagua-Garcia*, 813 F.3d at 1014, 1015.

228. *Id.* at 1015.

229. *New Stop*, *supra* note 112.

230. Alice Gainer, *Evan’s Law Would Allow Cops To Use ‘Textalyzers’ To Probe Distracted Driving Allegations*, CBS NEW YORK, Apr. 7, 2016, <http://newyork.cbslocal.com/2016/04/07/evans-law-textalyzer/>.

231. S.B. 2306, 240th Sess. (N.Y. 2017).

tice Alito's concurrence in *Riley v. California*.²³² In *Riley*, the Court considered two cases, consolidated for appeal, that dealt with similar issues pertaining to a warrantless cellphone search incident to a lawful arrest.²³³ In the first case, the police stopped David Riley for expired registration tags.²³⁴ During the stop, the officers learned that his license had been suspended.²³⁵ As a result, Riley's car was searched and seized, and he was arrested for possession of concealed and loaded firearms found in his vehicle.²³⁶ The officers seized Riley's cellphone from his pants pocket.²³⁷ After the officers examined information on the phone, they noticed that some words in the text messages and the contact list were related to gang members.²³⁸ Because of these findings, Riley was charged in connection with a shooting and attempted murder.²³⁹ As a defense, Riley claimed that the searches of his phone violated "the Fourth Amendment because they were performed without a warrant and there was no justification by exigent circumstances."²⁴⁰

In the second case, Brima Wurie was arrested after the police claimed that they observed him participate in a drug sale from a car.²⁴¹ On the "flip phone" external screen, which police seized from Wurie, they noticed that the phone was receiving multiple calls from a source identified as "my house."²⁴² The officers opened the phone and accessed its call log from which they traced the number to Wurie's apartment.²⁴³ After securing a search warrant to enter the apartment, they found drugs, cocaine, and firearms.²⁴⁴ Subsequently, Wurie was charged with drug and firearm offenses.²⁴⁵

In *Riley*, the Court held that the warrantless search exception following an arrest exists for the purpose of protecting officer safety and preserving evidence, neither of which is at issue in the search of digital data.²⁴⁶ "The digital data cannot be used as a weapon to harm an arresting officer," and police officers have the ability to preserve evidence while awaiting a warrant by "disconnecting the phone from the network" and placing the phone in a "Faraday bag", which will help "iso-

232. *Id.*
 233. *Riley* at 2482.
 234. *Id.* at 2480.
 235. *Id.*
 236. *Id.*
 237. *Id.*
 238. *Id.* at 2477.
 239. *Riley* at 2481.
 240. *Id.*; Tashea, *supra* note 25.
 241. *Riley*, 134 S.Ct. at 2481.
 242. *Id.* at 2477.
 243. *Id.* at 2481.
 244. *Id.*
 245. *Id.* at 2482.
 246. *Id.* at 2478, 2483, 2494.

lates the phone from radio waves”²⁴⁷ The “Faraday bag” is a sandwich bag “made of aluminum foil: cheap, lightweight, and easy to use.”²⁴⁸

Furthermore, the Court stated that information contained in and on a cellphone is not immune from the search, but instead a warrant is required to conduct a search of a cellphone, even if it was seized incident to arrest.²⁴⁹ In its reasoning the Court categorized cellphones as minicomputers that contain massive amounts of private information, which are very different from the traditional items that can be seized from an arrestee’s person, for example a wallet.²⁵⁰

In addition, the Court held that information accessible from the phone but stored using “cloud computing” is not even “on the arrestee’s person.”²⁵¹ The Court defined cloud computing as “the capacity of Internet connected devices to display data stored on remote servers rather than on the device itself.”²⁵² Thus, the cellphone user may not be aware that a particular information is stored on the device or in the cloud.²⁵³ However, the Court held that some warrantless searches of cellphones might be permitted in an emergency when the law enforcement’s interest is so compelling that a search would be reasonable.²⁵⁴ Further, the Court recognized “the exigencies of the situation” exception, where a search without a warrant is reasonable under the Fourth Amendment because the officer’s needs are “so compelling.”²⁵⁵ Exigencies include “the need to prevent the imminent destruction of evidence in individual cases, to pursue a fleeing suspect, and to assist persons who are seriously injured or are threatened with imminent injury.”²⁵⁶ The Court also emphasized that the search incident to arrest exception differs from the exigent circumstances exception, which requires a court to look at each particular case and see whether an emergency justified a warrantless search in that case.²⁵⁷

The *Riley* decision is relevant to “Evan’s Law” and the textalyzer because both will be used if an officer’s needs are “so compelling” to investigate whether the cause of an accident was the use of a cellphone. The Court in *Riley* was concerned with addressing two issues, the harm to officers and destruction of evidence. The Court determined that both

247. *Riley* at 2478, 2487.

248. *Id.* at 2487.

249. *Id.* at 2479.

250. *Id.* at 2496.

251. *Id.* at 2491.

252. *Id.*

253. *Riley* at 2491.

254. *Id.* at 2494.

255. *Id.*

256. *Id.*

257. *Id.*

are present in all custodial arrests.²⁵⁸ However, The Court determined that there are no comparable risks when searching digital data.²⁵⁹ The Supreme Court was concerned with a search of data contained in the memory of a modern cellphone.²⁶⁰ In considering “Evan’s Law,” the scanning device is only trying to determine whether a cellphone’s applications were active immediately before a crash.²⁶¹ A law enforcement officer would not have access to any content, such as text conversations or pictures.²⁶² The goal of “Evan’s Law” is to aid police in the investigation after a crash and to act as a deterrent from using cellphone while driving.²⁶³ The bill will designate members of the government to promulgate rules and regulations to assess the reliability and accuracy of the electronic scanning devices used during field testing of mobile telephones and portable electronic devices.²⁶⁴ The members of the government will have the power to approve electronic scanning devices, which are reliable and accurate for the purpose of conducting the field testing.²⁶⁵

In contrast to *Riley*, where the Court said that the information accessible from the phone is most likely stored using “cloud computing,” the proponents of “Evan’s Law” assure that the information law enforcement needs will be accessible with a field test “on the arrestee’s person.”²⁶⁶ The proponents of the textalyzer state that the device would be able to determine whether a driver was using a cellphone illegally shortly before an accident.²⁶⁷ To make this determination, an law enforcement officer would attach a cord to connect the textalyzer to the cellphone and in approximately 90 seconds would receive a report of the driver’s last activities.²⁶⁸ The textalyzer would display a summary of what applications had been opened and used, screen taps, and swipes occurred on the phone right before the crash without downloading the cellphone’s content.²⁶⁹ Further, the textalyzer would not analyze any sensitive information from the phone such as personal communications.²⁷⁰ To make the use of the textalyzer legal, the company will tailor the device specifically to each state’s jurisdictional requirements, thus

258. *Id.* at 2477.

259. *Riley* at 2477.

260. *Id.* at 2497.

261. Birchfield, 136 S. Ct. at 2176.

262. Gainer, *supra* note 230.

263. *Id.*

264. S.B. 2306, 240th Sess. (N.Y. 2017).

265. *Id.*

266. *Riley* at 2473.

267. *New Stop*, *supra* note 112.

268. *Id.*

269. *Id.*

270. Rose, *supra* note 7.

providing Congress or state legislatures with the power to assess the legitimate needs of law enforcement and the privacy interests of cell-phone owners.²⁷¹

As the Court in *Riley* wrote that “[a]bsent more precise guidance from the founding era, the Court generally determines whether to exempt a given type of search from the warrant requirement ‘by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.’”²⁷² Justice Alito’s concurrence in *Riley* indicates that precise guidance from the New York legislature and technical information from the makers of the textalyzer could be sufficient to justify the passage of “Evan’s Law” without violating the Fourth Amendment.²⁷³

In *Riley*, Justice Alito concurred in a part of the judgment, doubting that the warrantless search exception following an arrest exists for the sole or primary purposes of protecting officer safety and preserving evidence.²⁷⁴ As far as the privacy interests at stake, however, he agreed that the majority’s conclusion was the best solution.²⁷⁵ Furthermore, Justice Alito stated that legislators are better positioned than the U.S. Supreme Court to respond to changes that have taken place or will take place in the future as a result of technological advances.²⁷⁶ Thus, he suggests that the legislature enact laws that draw reasonable distinctions regarding when and what information within a phone can be reasonably searched following an arrest.²⁷⁷

Justice Alito agreed with the holding in *Riley* that the interest in protecting officers’ safety and preventing the destruction of evidence did not justify dispensing with a warrant requirement for searches of cell-phone data.²⁷⁸ However, he indicated a willingness to reconsider the Court’s holding in *Riley* when “either Congress or state legislatures, after assessing the legitimate needs of law enforcement and the privacy interests of cellphone owners, enact legislation that draws reasonable distinctions based on categories of information or perhaps other variables.”²⁷⁹ Thus, Justice Alito’s concurrence is even more relevant today because of current data indicating that every day approximately nine people are killed daily and more than 1,000 injured in crashes that in-

271. *Riley* at 2497; *New Stop*, *supra* note 112.

272. *Riley* at 2478.

273. *Id.*

274. *Id.* at 2496.

275. *Id.* at 2498.

276. *Id.* at 2497-98.

277. *Id.* at 2497.

278. *Riley* at 2495.

279. *Id.* at 2497.

volve a distracted driver.²⁸⁰

Therefore, Congress or state legislatures should assess the legitimate needs of law enforcement and the privacy interests of cellphone owners in considering whether to enact legislation, such as “Evan’s Law.” Texting, e-mailing, web browsing, talking, and similar cellphone useage behind the wheel create an imminent danger both to the officers’ safety and the public on the road.²⁸¹ The Court’s majority opinion recognized “the exigencies of the situation” exception, where a search without a warrant is reasonable under the Fourth Amendment because the officer’s needs are “so compelling.”²⁸² Hence, like in *Riley*, an officer at the scene of the accident should be allowed to conduct field testing, dispensing with a warrant requirement for searches of cellphone data, when the officer believes the accident was caused by cellphone use.

v. Analogy to Implied Consent Statutes and Drivers’ Refusal to Comply under these Statutes Support “Evan’s Law” and Use of the Textalyzer to Combat the Problem of Distracted Driving.

Advocates of “Evan’s Law” and use of the textalyzer find support in the “implied consent theory” currently used to combat the problems with drunk driving.²⁸³ To address the problems of drunk driving, states nationwide have enacted implied consent statutes.²⁸⁴ These statutes “specifically require that a person who is arrested for driving while under the influence of alcohol submit to a chemical test of his blood, breath or urine to determine the alcohol content of the blood.”²⁸⁵ A person who applies for a driver’s license impliedly consents to take the breathalyzer test imposed on anyone driving in the respective state.²⁸⁶ Implied consent to a breathalyzer test is one of the conditions to obtain a driver’s license.²⁸⁷ These statutes are used by all states to combat drunk driving.²⁸⁸ Under these implied consent statutes, refusal to take the breathalyzer test results in the revocation or suspension of the privilege to drive.²⁸⁹ The period of revocation or suspension differs from state to state usually ranging from three months to a year.²⁹⁰

280. CTRS. FOR DISEASE CONTROL AND PREVENTION, *supra* note 2.

281. Wallin, *supra* note 134.

282. *Riley* at 2494.

283. M. Elizabeth Fuller, *IMPLIED CONSENT STATUTES: WHAT IS REFUSAL?*, 9 Am. J. Trial Advoc. 423, 424 (1986).

284. *Id.*

285. *Id.* at 424-25.

286. O’CONNOR’S ANNOTS., *supra* note 16.

287. Tashea, *supra* note 25.

288. *Id.*

289. Fuller, *supra* at 424-25; O’CONNOR’S ANNOTS., *supra* note 16.

290. Fuller, *supra* at 424-25.

“Evan’s Law,” proposes that a driver’s license is a privilege granted by the state. In order for a driver to maintain the privilege, the driver is required to comply with established conditions set forth in the law.²⁹¹ The lawmakers propose that under the bill, like drivers who refuse to take a breathalyzer test, drivers who refuse to allow the police to use the textalyzer on their cellphones at the scene of an accident can also have their driver’s licenses suspended or revoked.²⁹² To support its reasoning, the legislature used studies that have indicated that texting while driving impairs a driver to the same level as a .08 blood alcohol level.²⁹³ Thus, the New York legislature claims that it is in the state’s interest of the State of New York to penalize the impairment caused by texting while driving.²⁹⁴ It is also in New York’s interest to enact “Evan’s Law” to encourage public safety and avoid the loss of human lives.²⁹⁵ Finally, the legislature asserts that the public safety reasons supporting the use of the textalyzer justify and balance out any privacy concerns related to such use.²⁹⁶

2. PRIVACY CONCERNS

In the pre-digital age, a search of a person was constrained by “physical realities” and caused “only a narrow intrusion on privacy.”²⁹⁷ Modern cellphones create privacy concerns far beyond those implicated by the search of “a cigarette pack, a wallet, or a purse.”²⁹⁸ Thus, a search of contents of an “arrestee’s pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom.”²⁹⁹ The question of whether field testing authorized by “Evan’s Law” directly implicates a fundamental privacy interest for drivers in New York State or other states, requires proof that the field testing technology is not capable of scanning or collecting content. Therefore, a slight infringement upon the privacy of drivers caused by enactment of “Evan’s Law” and use of the textalyzer is warranted.

i. The Danger Imposed by Distracted Driving to the Vast Number of Persons Using Roads Outweighs the Rights of a Driver whose Privacy is

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291. S.B. 2306, 240th Sess. (N.Y. 2017).
292. O’CONNOR’S ANNOTS., *supra* note 16.
293. S.B. 2306, 240th Sess. (N.Y. 2017).
294. *Id.*
295. *Id.*
296. Tashea, *supra* note 25.
297. *Riley* at 2496*.
298. *Id.* at 2488-89.
299. *Id.* at 2489.

Slightly Infringed by Use of the Textalyzer.

The danger imposed by distracted driving to the vast number of persons using roads outweighs the rights of a driver whose privacy is slightly infringed by use of the textalyzer.³⁰⁰ The textalyzer could help enforcement officers determine whether a driver involved in an auto accident was using a cellphone before the crash.³⁰¹ According to *Cellebrite*, the textalyzer would only indicate whether the cellphone was in use immediately before the accident and would not access or retrieve any of the phone's sensitive content.³⁰² Nevertheless, the notion of plugging some type of device into a cellphone to display the log of cellphone use creates various privacy concerns.³⁰³

One of the concerns with the passing of "Evan's Law" is that this legislation would permit police officers to use a device such as the textalyzer to obtain data from the driver's cellphone.³⁰⁴ The textalyzer would allow police to analyze the driver's cellphone without a warrant after a car crash to see if prohibited use of the cellphone had occurred.³⁰⁵ Because law enforcement would not be required to obtain a warrant to search the driver's cellphone after the crash, there is a concern that such a law would expand the police power to obtain sensitive personal information in violation of the Fourth Amendment protection against search and seizure.³⁰⁶ Thus, allowing the police to use the textalyzer would provide a way for the enforcement officer to avoid the warrant requirement, which currently protects cellphones from search and seizure.³⁰⁷

Although the U.S. Supreme Court recognized that a motorist's privacy interest in his vehicle is less substantial than in his home, that interest still deserves constitutional protection.³⁰⁸ Notwithstanding the constitutional attack upon implied consent statutes in many states,

300. Fuller, *supra* at 427.

301. O'CONNOR'S ANNOTS., *supra* note 16.

302. *Id.*

303. *Id.*

304. Tashea, *supra* note 25.

305. *Id.*

306. *An Act in relation to the field testing of mobile telephones and portable electronic devices*, *supra* note 24.

307. O'CONNOR'S ANNOTS., *supra* note 16; *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972), "The warrant traditionally has represented an independent assurance that a search and arrest will not proceed without probable cause to believe that a crime has been committed and that the person or place named in the warrant is involved in the crime. Thus, an issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search. This Court long has insisted that inferences of probable cause be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

308. *Gant* at 345.

there is a strong preference from the courts in those states to uphold the statutes.³⁰⁹ Courts usually offer two reasons to sustain the validity of implied consent laws.³¹⁰ The first theory treats driving on highways of a state as a privilege rather than a right, permitting a state to condition that privilege on adherence to state law.³¹¹ The second theory states that implied consent statutes are a reasonable regulation of driving on state highways under the state's police power.³¹² Additionally, for the second theory to be applied, due process must be met.³¹³ Therefore, courts defend this theory on the basis that "the interests of society outweigh the rights of the individual and the dangers imposed by the drinking driver to the vast number of persons using the highways are such that they warrant a slight infringement upon the liberty of individuals."³¹⁴ Therefore, because of the legitimate public safety concerns "Evan's Law" seeks to address, the bill should be enacted even if "[p]rivacy comes at a cost."³¹⁵

ii. "Evan's Law" Attempts to Balance Public Safety Concerns and Privacy Interests Concerns.

According to Evan's father, "Evan's Law" attempts to balance public safety and privacy interests concerns.³¹⁶ "Evan's Law" provides that no electronic device administering the scan of a cellphone or portable electronic device will compromise "the content or origin of any communication or game conducted, or image or electronic data viewed."³¹⁷ In *Riley v. California*, the Court affirmed the Fourth Amendment protection for a cellphone and required police to obtain a warrant when searching a cellphone during a stop, unless exigent circumstances existed.³¹⁸ Justice Alito, concurring, stated that the rule used in the predigital era should not be automatically applied to the search of a cellphone.³¹⁹ In the digital era, the cellphone capacity to store information is much greater than a person could ever have had on his person in hard-copy form.³²⁰ Thus, the use of cellphones in today's society calls for a new consideration of law enforcement and privacy interests in a bal-

309. Fuller, *supra* at 425

310. *Id.* at 427.

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Riley* at 2493.

316. Tashea, *supra* note 25.

317. *Id.*

318. *Id.*

319. *Riley* at 2496.

320. *Id.*

ancing test.³²¹

In *Riley*, Justice Alito pointed out that the Court favored protection of privacy interests with respect to all cellphones and all information found in them.³²² This approach taken by the Court creates inconsistency regarding privacy interest concerns.³²³ According to Justice Alito, the Court's holding favors information in digital form over information in hard-copy form.³²⁴

Justice Alito offered an example of two arrested suspects to illustrate the difference between information in digital form and hard-copy form.³²⁵ One individual "has in his pocket a monthly bill for his land-line phone, and the bill lists an incriminating call to a long-distance number."³²⁶ In addition, he also has in his wallet his photos, and one of these snapshots is incriminating.³²⁷ On the other hand, the second suspect has in his pocket a cellphone with the same incriminating information.³²⁸ The call-log displays a call to the same incriminating phone number as the bill in the first example.³²⁹ In addition, the cellphone contains a number of photos, and one of these photos is incriminating.³³⁰ Thus, in the first scenario under the established law before *Riley*'s holding, the law enforcement officer may seize and examine the phone bill and the snapshots in the wallet without obtaining a warrant.³³¹ But in the second scenario, under the Court's holding in *Riley*, the information stored in the cellphone is protected.³³² The reason for this distinction is that modern cellphones involve privacy concerns far beyond those "implicated by the search of a cigarette pack, a wallet, or a purse."³³³ The storage capacity of cellphones has several interconnected consequences for privacy.³³⁴ For example, first, "a cellphone collects in one place many distinct types of information that reveal much more in combination than any isolated record. Second, the phone's capacity allows even just one type of information to convey far more than previously possible. Third, data on the phone can date back for years."³³⁵ Further, the Court states that "an element of pervasiveness characterizes cellphones but

321. *Id.* at 2496-97.

322. *Id.* at 2497.

323. *Id.*

324. *Id.* at 2496.

325. *Riley* at 2497.

326. *Id.*

327. *Id.* at 2496-97.

328. *Id.* at 2497.

329. *Id.*

330. *Id.*

331. *Riley* at 2497.

332. *Id.*

333. *Id.* at 2488-89.

334. *Id.* at 2478.

335. *Id.* at 2478-79.

not physical records.”³³⁶ In the near past, officers might have sporadically stumbled across a highly personal information such as “a diary,” but today more than “90% of American adults who own cellphones” save “on their person a digital record of nearly every aspect of their lives.”³³⁷

Unlike *Riley*, where the police stop in one instance involved expired registration tags, the bill refers to “accident or collision involving damage to real or personal property, personal injury or death.”³³⁸ “Evan’s Law” only has to do with the use of a cellphone before a crash, where in *Riley* the Court does not talk about use.³³⁹ Instead *Riley* discusses, seizing and searching a phone’s content at the stop and in custody.³⁴⁰ This distinction is very important to define privacy boundaries between content and use of a cellphone or portable electronic device.³⁴¹ Thus, the focus should be on whether metadata information deserves the same protections as does the content of communications.³⁴²

Today, the content of an individual’s communication is no longer the only information that is available.³⁴³ The individual also sends data about the communication that allows the communication to effectively reach its intended recipient.³⁴⁴ This is commonly called “communications metadata - data about data.”³⁴⁵ The traditional definition of metadata would even include the times at which the message was made and sent.³⁴⁶ “Metadata paints a picture about an individual’s patterns of behavior, viewpoints, interactions and associations, revealing even more about that person than the content of their emails or phone calls might.”³⁴⁷ Cellphones are continuously producing this information.³⁴⁸

“There’s no explicit content in metadata, but metadata can be used to infer features of someone’s life.”³⁴⁹ Cellphones’ metadata can lead to sensitive assumptions about the users of the devices.³⁵⁰ For instance, MetaPhone, an Android application for crowdsourcing phone metadata,

336. *Id.* at 2479.

337. *Riley* at 2479.

338. *Id.* at 2480; S.B. 2306, N.Y.S. 2017-2018 Sess., *supra* note 19.

339. Tashea, *supra* note 25.

340. *Riley* at 2480-81.

341. Tashea, *supra* note 25.

342. *Id.*

343. Privacy Int’l, <https://www.privacyinternational.org/node/53>, (last visited June 9, 2017).

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.*

349. Tashea, *supra* note 25.

350. *Id.*

provides personalized results about the phone user.³⁵¹ The results confirmed that phone activity easily reveals private relationships, is deeply interconnected, and can be identified.³⁵² The study results show that telephone metadata is sensitive, particularly when combined with a broad array of readily available information.³⁵³ The use of metadata can be troubling, especially when people do not care about it.³⁵⁴ This could be particularly problematic, when the proposed “Evan’s Law,” does not provide data retention or data use standards.³⁵⁵

The textalyzer’s technology is still in development state, thus it is still unknown how much information the device could retain.³⁵⁶ Cellphones are equipped with a variety of mobile applications software or “apps” that allow the user to gather and sort detailed information about all facets of a person’s life.³⁵⁷ Today, there are cellphone applications for almost anything that people wish to do in their personal life.³⁵⁸ It is estimated that the average smartphone user has installed 33 apps, which can describe and reveal information about the user’s life.³⁵⁹

In Justice Alito’s words, “[m]any cellphones now in use are capable of storing and accessing a quantity of information, some highly personal, that no person would ever have had on his person in hard-copy form.”³⁶⁰ A cellphone’s capacity to store information related to a person’s life that would otherwise not be easily discoverable has several interrelated consequences for privacy.³⁶¹ Justice Alito’s pointed out that a cellphone may collect in one place many distinct types of information that describe much more in combination than any single record.³⁶² A cellphone can convey far more than previously possible.³⁶³ The whole of an individual’s private life can be reconstructed through many photographs with private information, unlike a photograph kept in a wallet.³⁶⁴ The data on the phone can date back to the purchase of the phone, or even earlier.³⁶⁵ For example, a person might carry a reminder to call Mr. Jones, but the person would not keep in his pocket a record

351. Jonathan Mayer, Patrick Mutchler, *Spy on Your Metadata*, <http://cyberlaw.stanford.edu/blog/2013/12/spy-your-metadata> (last visited May 31, 2017).

352. *Id.*

353. Tashea, *supra* note 25.

354. *Id.*

355. *Id.*

356. *Id.*

357. *Riley* at 2490.

358. *Id.*

359. *Id.*

360. *Id.* at 2496.

361. *Id.* at 2478-79, 2489.

362. *Id.* at 2489 (2014).

363. *Riley* at 2489.

364. *Id.*

365. *Id.*

of all his communications with Mr. Jones for the past several months.³⁶⁶

If “Evan’s Law” becomes effective, the New York Department of Transportation and other agencies would be in charge of setting standards and creating rules and regulations to implement the bill.³⁶⁷ This approach could be troubling because such agencies could influence and adjust the standards of obtaining information from cellphone users. Indeed, this bill could allow agencies, along with law enforcement, to obtain information from drivers domiciled in the State of New York. Because today’s cellphones hold for many Americans “the privacies of life,” issues related to such devices deserve special attention.³⁶⁸ Unlike any other personal belongings that store our most personal information, cellphones and other personal computers must be protected as intended by the Founding Fathers.³⁶⁹ Accordingly, “Evan’s Law” allowing the field testing of a cellphone with devices such as the textalyzer must provide and analyze data retention or data use standards.³⁷⁰ Although the textalyzer’s technology is still in the development stage, the company should provide data to the legislatures about how much information the device could retain.³⁷¹ Thus, analyzing the data would be crucial to determine whether law enforcement should be required to obtain a warrant to conduct field testing of a driver’s cellphone.³⁷²

IV. RECOMMENDATION

“Evan’s Law” addresses the legitimate public safety concern that “[p]rivacy comes at a cost” and addresses how to protect society from a greater harm caused by distracted driving.³⁷³ Because “Evan’s Law” provides that no electronic device administering the scan of a cellphone or a portable electronic device can access the content or origin of any communication or electronic data viewed, the passing of the bill is likely to overcome these privacy concerns.³⁷⁴ As guaranteed by the bill, a cellphone or a portable electronic device would only be searched for the purpose of field-testing.³⁷⁵ Such test would be performed by a law enforcement officer at the accident site, during which the officer would attach a cord to connect the textalyzer to the cellphone and in a few se-

366. *Id.*

367. Tashea, *supra* note 25.

368. *Riley* at 2494-95.

369. *Id.* at 2495.

370. Tashea, *supra* note 25).

371. *Id.*

372. *Riley* at 2495.

373. *Id.* at 2493.

374. S.B. 2306, 240th Sess. (N.Y. 2017).

375. *Id.*

conds would receive a report of the driver's last activities.³⁷⁶ The report would contain a summary of what applications, screen taps, and swipes were open and used on the phone prior to the crash.³⁷⁷ This report would be created without downloading the cellphone's content.³⁷⁸ As stated by the company that is developing the textalyzer, the device would not analyze any sensitive information such as personal communications from the phone.³⁷⁹ Thus, the textalyzer, without accessing any of the private information or data stored on the phone, could serve as a tool for law enforcement to determine if a cellphone was used just before an accident and thus, would ultimately reduce accidents caused by distracted driving.

According to the New York Civil Liberties Union ("NYCLU"), an organization that is vocally opposed to "Evan's Law," the bill lacks supporting evidence that this police procedure will prevent distracted driving or car accidents caused by distracted driving.³⁸⁰ The organization instead proposes creating a law that would include constitutionally protected privacy rights and would not change the behavior of the driver.³⁸¹ Further, the NYCLU states that "Evan's Law" would authorize police to obtain sensitive personal information in violation of the constitutional protections against search and seizure.³⁸² Thus, the legislature would directly encroach on a fundamental privacy interest for drivers in New York State.³⁸³

The NYCLU argues that until it is established that "the field testing technology is not capable of scanning or collecting content, drivers will continue to have a privacy interest in their cellphones ... to remain free from warrantless searches by law enforcement."³⁸⁴ This privacy interest is already granted by the United States Supreme Court to drivers in *Riley v. California*.³⁸⁵ The Court held in *Riley* that the Fourth Amendment requires that law enforcement acquire a warrant prior to engaging in a field test on a driver's cellphone at the site of a collision or accident.³⁸⁶ Thus, the NYCLU suggests, that legislatures would "be better advised to incentivize the use of tech applications that prevent distracted driving, and to develop voluntary driver education programs

376. *New Stop*, *supra* note 112.

377. *Id.*

378. *Id.*

379. *Rose*, *supra* note 7.

380. *An Act in relation to the field testing of mobile telephones and portable electronic devices*, *supra* note 24.

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.*

385. *Id.*

386. *Id.*

that cause drivers to avoid dangerous driving practices involving electronic devices.”³⁸⁷

Such initiatives have already been introduced in major cities. For instance, in 2016, the City of Chicago established Vision Zero Chicago to renew its commitment to saving lives and preventing serious injuries.³⁸⁸ Also, the Chicago Police are currently working with other city agencies on a plan to increase awareness enforcement and to eliminate distracted driving.³⁸⁹ This data-driven, multi-agency approach is designed to improve traffic safety for all road users, whether in vehicles, on a bike, or on foot.³⁹⁰ The implementation of this program is predicted to reduce the number of roadway crashes with the goal of eliminating traffic fatalities and serious injuries in Chicago by 2026.³⁹¹ Further, in support of National Distracted Driving Awareness Month, the Illinois Association of Chiefs of Police (“ILACP”) asked the Governor of the State of Illinois to declare an Illinois Distracted Driving Awareness Week in an effort to bring attention to the dangers and consequences associated with distracted driving.³⁹²

Another example of initiatives on a local level, is the Children’s Hospital of Philadelphia White Paper.³⁹³ The purpose of the Children’s Hospital of Philadelphia White Paper is the “Evaluation of EndDD.org’s Student Awareness Initiative: Effectiveness of a Program to Prevent Teen Distracted Driving” with assistance of volunteers speakers throughout the country.³⁹⁴ For example, these volunteers include: safety professionals, teachers, trial lawyers, college students, driver’s education instructors, law enforcement, physicians, nurses, occupational and physical therapists, injury prevention coordinators, and other health care professionals, who have reached thousands of teens and adults with distracted driving presentations.³⁹⁵ As of January 2016, more than 275,000 teens and 15,000 adults have seen the EndDD.org

387. *An Act in relation to the field testing of mobile telephones and portable electronic devices*, *supra* note 24.

388. Mike Claffey and Susan Hofer, *Mayor Emanuel Launches Vision Zero Chicago Initiative To Eliminate Traffic Fatalities And Serious Injuries Across The City*, https://www.cityofchicago.org/city/en/depts/cdot/provdrs/traffic_signals_andstreetlights/news/2016/september/mayor-emanuel-launches-vision-zero-chicago-initiative-to-elimina.html (last visited June 6, 2017).

389. Mary Wisniewski, *supra* note 178.

390. Claffey, *supra* note 388.

391. *Id.*

392. NEWS SERV., *First Ever Illinois Distracted Driving Awareness Week*, (April, 24, 2017), <https://dekalbcountyonline.com/2017/04/first-ever-illinois-distracted-driving-awareness-week/>.

393. Joel Feldman, EndDD (May 5, 2014), <http://enddd.org/distracted-driving-research/childrens-hospital-of-philadelphiachop-report/>.

394. *Id.*

395. *Id.*

presentation in 45 states and Canada.³⁹⁶ The program has been expanding and presentations are being given to middle school and college students, adults and businesses.³⁹⁷

For example, The Chicago Bar Association Young Lawyers Section (“YLS”) recently undertook an initiative called the “End Distracted Driving” program.³⁹⁸ The YLS attorneys and law students work together with local high schools and hold “End Districted Driving” presentations to high school students both in small classrooms and in large gatherings.³⁹⁹ The presentations have been empirically tested and shown to influence attitudes and behavior among teenagers.⁴⁰⁰ “[S]ignificant changes were made from pre to post presentation with respect to teen-parent communication about distracted driving, including increasing teens’ intention to speak with parents about stopping parent cellphone use - texting and talking - while driving; an increase in teens’ belief in the importance of having those conversations with parents; and an increased frequency of having actual conversations with parents about stopping cellphone use while driving.”⁴⁰¹ There was also a significant reduction in parents’ texting while driving as observed by their teens.⁴⁰² According to EndDD.org, the pre to post presentation with respect to teen-parent communication about distracted driving made positive changes.⁴⁰³ There have been significant changes including increasing teens’ communication with their parents about stopping parent cellphone use, texting and talking, while driving.⁴⁰⁴ As a result, there was a meaningful reduction in parents’ texting while driving as observed by their teens.⁴⁰⁵ But even as a result of these programs, statistically significant changes with respect to teen to teen communications and reports of teens’ use of cellphones while driving were not significantly reduced.⁴⁰⁶

In addition, there is also Do Not Disturb driving mode added by Apple in iOS 11, called “Do Not Disturb While Driving” that might help remove the temptation to use a cellphone while driving a vehicle.⁴⁰⁷ The

396. Chicago Bar Ass’n, http://www.chicagobar.org/AM/Template.cfm?Section=End_Distracted_Driving (last visited June 6, 2017).

397. *Id.*

398. *Id.*

399. *Id.*

400. *Id.*

401. Feldman, *supra* note 393.

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.*

407. Mikah Sargent, *How to use Do Not Disturb While Driving in iOS 11*, iMORE, Sep. 23, 2017, <https://www.imore.com/do-not-disturb-while-driving-ios-11-can-change->

main purpose of the feature is to decrease distracted driving.⁴⁰⁸ Do Not Disturb has been expanded with a new “Do Not Disturb While Driving” feature that mutes all incoming notifications on an iPhone when it is connected to a car’s Bluetooth or WiFi.⁴⁰⁹ The new feature “Do Not Disturb While Driving” in iOS 11 operating software hides incoming notifications while a person is driving a vehicle.⁴¹⁰ The feature senses when you might be driving and prevents notifications to be sent to the driver.⁴¹¹

Do Not Disturb While Driving is an extension of Apple’s Do Not Disturb feature, which reduces announcements on demand or during a preferred schedule.⁴¹² In addition to limiting or muting notifications, Do Not Disturb While Driving can also respond to people who contact the driver while he is driving to inform them about the current task of being on the road and being unavailable.⁴¹³ If, however, a contacting person must contact the driver, the person can use the word “Urgent” and iOS will show the announcement on the iPhone device.⁴¹⁴ To unlock the device there is an extra step to tap a button that says “I’m Not Driving.”⁴¹⁵

The feature is created for passengers who have Do Not Disturb While Driving turned on and set to activate automatically or when connected to the car’s Bluetooth.⁴¹⁶ Using the feature for the first time, the iPhone iOS 11 senses that you might be driving, and shows a description of the Do Not Disturb While Driving feature after you stop.⁴¹⁷ However, this feature is available only in certain countries, including the United States.⁴¹⁸ “Tap Turn On While Driving,” and it will turn on automatically when your iPhone connects to your car via Bluetooth or when your iPhone senses driving motion.⁴¹⁹ The owner of the cellphone has an option to change the method the iPhone uses to determine whether a person is driving, or turn the feature on manually.⁴²⁰ Another problem with the feature is when the driver’s car is not connected to

your-habits-if-you-let-it; MacRumors.com, <https://www.macrumors.com/roundup/ios-11/> (last visited Oct. 29, 2017).

408. MacRumors.com, <https://www.macrumors.com/roundup/ios-11/> (last visited Oct. 29, 2017).

409. *Id.*

410. Sargent, *supra* note 407.

411. Apple, <https://support.apple.com/en-us/HT208090> (last visited Oct. 29, 2017).

412. Sargent, *supra* note 407.

413. *Id.*

414. *Id.*

415. *Id.*

416. *Id.*

417. *Id.*

418. Apple, *supra* note 411.

419. *Id.*

420. *Id.*

Bluetooth but the car supports CarPlay, the Do Not Disturb While Driving is not automatically activated.⁴²¹

The feature is also questionable because it allows the driver to select which contacts a driver wants to Do Not Disturb While Driving to reply.⁴²² The feature allows a driver to select contacts from a list of “No One,” “Recent,” “Favorites,” and “All Contacts,” to be sent a notification; thus it is unclear whether an unselected group will be notified or allowed to deliver a message to the driver.⁴²³ Under pressure from drivers, the feature might create an “exceptions” list to include specific applications and contacts to automatically allow notifications through without interruption.⁴²⁴ As an example from a reader of an article, “[t]hen we would be able to specify apps like Waze as an exception app and contacts like Mom as an exception contact, both of whose notifications would be automatically allowed through without hinderance.”⁴²⁵ Thus, the Do Not Disturb While Driving feature could defeat its main purpose and would not decrease or eliminate distracted driving.

In addition, drivers might be afraid to enable the Do Not Disturb While Driving feature because they might think that Apple Maps, or third-party mapping maps, Siri control, and music and podcasts are also disabled.⁴²⁶ The application allows one to unlock the phone, but drivers feel that it is burdensome and is an additional step.⁴²⁷ For example, one reader has stated that “[n]ot only do I have to lie and say I’m not driving, I then have to re-enable DND! All just to check Waze or change my music after my phone locks.”⁴²⁸ Thus, there is also a question whether the Do Not Disturb While Driving feature by forcing the driver to lie is unethical, especially, when other programs implemented by the EndDD.org value integrity through its educational platforms at schools and in fostering bonding relationships between a child and its parent in regard to distracted driving.

Even if the device is successful, another concern with the Do Not Disturb While Driving feature is the absence of an iPhone among drivers. Drivers who do not use iPhone or do not know how to operate an iPhone to enable the device properly will be prevented from using this feature, and their phones will not send a notification to their contacts. Enabling the Do Not Disturb While Driving feature on an iPhone re-

421. *Id.*

422. Sargent, *supra* note 407.

423. *Id.*

424. *Id.*

425. *Id.*

426. *Id.*

427. *Id.*

428. Sargent, *supra* note 407.

quires manual set up and knowledge of the settings.⁴²⁹ There are five steps to activate Do Not Disturb While Driving and to adjust those settings and customize your Auto-Reply contacts message on iOS 11.⁴³⁰ For drivers who are not familiar with their iPhone functions, to follow those five steps might be cumbersome and they ultimately will opt-out from doing so.⁴³¹ Thus, the Apple feature, Do Not Disturb driving mode, with the updated version, might be only one contributing factor to lower distracted driving but will not eliminate it entirely and will not aid enforcement officers in determining if the driver was using a cellphone before an accident. “Evan’s Law” will allow police to use a textalyzer to help enforcement officers determine whether a driver involved in an auto accident was using a cellphone before the crash.⁴³² The purpose of use of the textalyzer is different from the purpose of the Do Not Disturb While Driving feature. The textalyzer is to be used after the crash by law enforcement.⁴³³

Although these initiatives are beneficial to society and might reduce texting while driving in the long term, they do not address the immediate problems with distracted driving that face law enforcement officers. They do not help the police officer to determine whether the driver was texting and using a cellphone just before the accident and whether the use of the cellphone was the main cause of the accident.⁴³⁴ The textalyzer would allow responding officers to determine whether a cellphone was in use when a traffic accident happened simply by connecting the device into the driver’s cellphone.⁴³⁵ By plugging the device to the cellphone, the device will only show whether the cellphone was in use.⁴³⁶ The Textalyzer would not access the phone’s content, but privacy advocates argue it will give the police a way to avoid the warrant requirement that would normally protect cellphones from search and seizure.⁴³⁷

The NYCLU admits that distracted driving is a serious concern, but argues that is why laws exist that permit police to access phones and phone records when there is a need.⁴³⁸ The organization also argues

429. *Id.*

430. *Id.*

431. *Id.*

432. O’CONNOR’S ANNOTS., *supra* note 16.

433. *Id.*

434. S.B. 2306, 240th Sess. (N.Y. 2017).

435. O’CONNOR’S ANNOTS., *supra* note 16.

436. *Id.*

437. Tashea, *supra* note 25.

438. N. Y. C. L. UNION, *TELECOM INDUSTRY AND PRIVACY RIGHTS GROUPS OPPOSE POLICE “TEXTALYZER” PHONE SEARCH BILL*, Apr. 25, 2017, <https://www.nyclu.org/en/press-releases/telecom-industry-and-privacy-rights-groups-oppose-police-textalyzer-phone-search-bill>.

“Evan’s Law” goes a step further to give police power to take and search drivers’ phones, with the most personal and private information, “at every fender bender.”⁴³⁹ Furthermore, the NYCLU states that there is no certainty that the textalyzers can even detect distracted driving.⁴⁴⁰ Yet, of one thing the NYCLU is certain, imposing this proposed law would violate people’s privacy and could potentially impute driver’s guilt for innocent activities.⁴⁴¹

On the other hand, the current subpoena process used by the enforcement officers is not practical because there is insufficient time to legally track down each driver’s phone record from each car crash.⁴⁴² Consequently, the alternate burdens imposed by a subpoena or other current state laws are insufficient to protect those safety concerns when balanced against privacy interests.⁴⁴³ Thus, a device such as a textalyzer could have an immediate positive effect on drivers and the safety of society at large. With the textalyzer, a police officer could put direct pressure on drivers for whom texting while driving is more than just personally risky, but the driver becomes a danger to everyone on the road.⁴⁴⁴ Also, the use of the textalyzer could create a traffic safety culture around the country and ultimately reduce traffic fatalities and injuries resulting from distracted driving.⁴⁴⁵ Thus, the safety imposed through “Evans Law” outweighs privacy implications that an individual may face.

V. CONCLUSION

In summary, distracted driving, and the lack of appropriate regulations to prevent the risks it creates, is one instance where the law has not adapted as rapidly as required to address the needs of the changing society driven by fast paced changing technology. Not so long ago, legislators and courts were not concerned with smart cellphones and their capability of processing vast amounts of data. Further, the courts were not burdened with the potential limitations to the driver’s privacy rights stemming from attempts to regulate such devices because such technology did not exist. As a result, current laws and regulations do not fully address law enforcement problems associated with distracted driving.⁴⁴⁶ Law enforcement officers nationwide are in need of “Evan’s Law” and devices such as the textalyzer to react to the challenges of

439. *Id.*

440. *Id.*

441. *Id.*

442. Tashea, *supra* note 25.

443. *Id.*

444. ACME NEWS SERV., *supra* note 392.

445. *Id.*

446. S.B. 2306, 240th Sess. (N.Y. 2017).

modern technology.⁴⁴⁷ The United States Supreme Court decision in *Riley v. California* could not address “Evan’s Law” challenges because of the rapidity of technological changes.⁴⁴⁸ It only illustrates the privacy implications when conducting a search in a persons’ phone.⁴⁴⁹

The changes in Illinois law, as well as other states, have decreased enforcement of distracted driving laws and have resulted in an increased number of automobile accidents deaths.⁴⁵⁰ Therefore, if “Evan’s Law” is enacted in New York and other states follow, the textalyzer may be a solution to immediate problems with distracted driving without invading the drivers’ cellphone privacy rights.

447. *Id.*

448. *Riley*, 134 S.Ct. at 2473.

449. *Id.* at 2497.

450. Mary Wisniewski, *supra* note 178.

