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NEAR IMPOSSIBLE TO ENFORCE AT BEST, UNCONSTITUTIONAL AT
WORST: THE CONSEQUENCES OF MARYLAND'S
TEXT MESSAGING BAN ON DRIVERS

By Alan Lazerow*

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I. INTRODUCTION

[1] A local newspaper¹ reports that your state recently passed a law prohibiting citizens from “writ[ing] or send[ing] a text message while operating a motor vehicle.”² Armed with the knowledge of the texting ban, you, being a reasonable citizen, are likely to proceed in one of at least three ways, each of which exposes the statute’s fundamental flaws.

[2] Scenario 1: You decide text messaging is too important to your social life to refrain from sending text messages while driving, so you

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¹ See Julie Scharper, *Road Hazard*, BALT. SUN, Sept. 27, 2009, at 1A, available at http://articles.baltimoresun.com/2009-09-27/news/0909260153_1_sending-text-text-messaging-texting-while-driving.

² Delegate John Arnick Electronic Communications Traffic Safety Act, MD. CODE ANN., TRANSP. § 21-1124.1 (West, Westlaw through 2010 Reg. Sess.).

ignore the new ban and engage in intense text messaging conversations while operating a motor vehicle.³ One day a police officer driving alongside your vehicle observes you writing and sending a text message.⁴ The officer pulls your vehicle over and writes you a \$500 ticket.⁵

[3] But you hire a savvy defense attorney to defend you in this matter, and he does not believe the State can prove beyond a reasonable doubt that you were writing or sending a text message while operating a motor vehicle.⁶ During cross-examination of the officer, the following colloquy ensues:

[DEFENSE COUNSEL] You testified that you stopped my client because he was writing and sending a text message, is that correct?

[OFFICER] That is correct.

[DEFENSE COUNSEL] And you are certain he was writing and sending a text message because you witnessed it occur, is that correct?

³ See *infra* notes 30-32 and accompanying text (discussing the prevalence of talking and text messaging while driving); *Driving While Distracted – Cell Phone Ban*, NATIONWIDE, 12 (Aug. 2009), available at <http://www.nationwide.com/pdf/NW-Cell-Phone-Ban-final-survey-results.pdf> [hereinafter *Driving While Distracted*] (reporting that only forty-one percent of respondents said their behavior would change if cell phone usage were restricted by law).

⁴ See generally *infra* Part III.C.2 (discussing the distinction between primary and secondary offenses).

⁵ See TRANSP. § 27-101(b) (“[A]ny person convicted of a misdemeanor for the violation of any of the provisions of the Maryland Vehicle Law is subject to a fine of not more than \$500.”).

⁶ See, e.g., *State v. Rusk*, 424 A.2d 720, 725 (Md. 1981) (“[D]ue process requirements mandate that a criminal conviction not be obtained if the evidence does not reasonably support a finding of guilt beyond a reasonable doubt.”).

[OFFICER] Yes, I witnessed him write and send a text message.

[DEFENSE COUNSEL] But, you were not able to physically view the screen of the cell phone, were you, Officer?

[OFFICER] No, I could not physically see the screen.

[DEFENSE COUNSEL] Then you cannot be sure that my client was not, in fact, posting something to his Facebook⁷ wall, correct?

[OFFICER] I guess he could have been.

[DEFENSE COUNSEL] And you cannot be sure that he was not posting a message on Twitter,⁸ can you?

[OFFICER] No, I cannot say that for sure.

[4] Your attorney argues that the term text message in the statute does not encompass sending messages through social-media sites such as Facebook or Twitter.⁹ Because the officer is the prosecution's only witness, the State cannot prove beyond a reasonable doubt that you were, as the statute requires, sending a *text message* while operating a motor

⁷ "Facebook is a versatile social networking Web site, allowing users to post messages on their friends' walls, share photos and video files, send email and instant messages." Sajai Singh, *Anti-Social Networking: Learning the Art of Making Enemies in Web 2.0*, 12 J. INTERNET L. 3, 3 (Dec. 2008).

⁸ "Twitter is a free social networking and micro-blogging service that lets users send messages called 'tweets.' Tweets are messages that can contain up to 100 characters. Once posted, tweets are sent to the people (known as followers) who subscribe to a particular person's messages." Susan W. Brenner, *Internet Law in the Courts*, 13 J. INTERNET L. 16, 16 (Dec. 2009).

⁹ See *infra* note 13. While the statute essentially defines "text messaging device" as a cell phone, neither the statute nor its legislative history give any guidance as to what constitutes a "text message." See MD. CODE ANN., TRANSP. § 21-1124.1 (West, Westlaw through 2010 Reg. Sess.).

vehicle.¹⁰ Based on these grounds, your attorney moves for, and is granted, a judgment of acquittal.¹¹

[5] Scenario 2: You decide to abide by the law, but your understanding of the term text message is limited to its colloquial use: a short message sent from one cell phone to another, or an SMS message.¹² As such, you do not believe posting messages on Facebook or Twitter constitutes sending text messages, and you continue posting such messages while driving.¹³ One day, a police officer observes you engaging in this activity and he initiates a traffic stop during which he issues you a \$500 ticket for violating the State's text messaging ban.¹⁴ This time, the savvy defense attorney is unable to help you and the judge explains that because you sent a message¹⁵ comprised of text you are guilty of violating the statute.

[6] Scenario 3: You decide to abide by the ban and you reason that because posting on Facebook and Twitter involves the sending of

¹⁰ MD. CODE ANN., TRANSP. § 21-1124.1 (West, Westlaw through 2010 Reg. Sess.).

¹¹ See MD. R. 4-324(a) (“A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence.”).

¹² “Text messaging is the sending of short messages over a cellular phone network, typically by means of a short message service (SMS).” Steven Goode, *The Admissibility of Electronic Evidence*, 29 REV. LITIG. 1, 16 n.66 (2009). Such SMS messages are “transmitted to the recipient immediately, or they may be stored and forwarded later if a recipient's phone was off when the message was initiated.” *Id.*

¹³ See Editorial, *TXT U L8R; TIME 2 DRIVE*, BALT. SUN, Sept. 29, 2009, at 12A, available at <http://www.saferoads.org/txt-u-l8r-time-2-drive> (last visited July 17, 2010) (“It's not even absolutely certain that the law would apply to posting updates on Facebook or Twitter - or even sending an e-mail on your BlackBerry.”).

¹⁴ See MD. CODE ANN., TRANSP. § 27-101(b) (West, Westlaw through 2010 Reg. Sess.).

¹⁵ Black's Law Dictionary defines “message” as “[a] written or oral communication, often sent through a messenger or other agent, or electronically. . . .” BLACK'S LAW DICTIONARY 1080 (9th ed. 2009).

messages comprised of text, you may no longer post items on social-networking sites while driving.

[7] Scenarios 1 and 2 illustrate the first major flaw associated with statutes that prohibit citizens from text messaging while driving: absent a clear definition of what constitutes a text message, prosecution and enforcement of the text messaging ban will be impossible at worst and inconsistent at best.¹⁶ Because the statute does not put citizens on fair notice as to what activity is criminal, and because it does not provide law enforcement officers, prosecutors, and judges with a meaningful standard to apply in prosecuting and enforcing the law, there is a strong argument that the statute is void for vagueness.¹⁷

[8] Scenario 3 presents a classic example of a chilling effect on protected expression.¹⁸ That is, assuming the legislature intended the statute to prohibit only the use of SMS-like text messages,¹⁹ the statute's failure to define text message might have the collateral effect of making reasonable citizens more reluctant to engage in non-proscribed forms of communications, such as posting on social media websites.²⁰ While legislatures ostensibly have the power to restrict the right to send text messages out of concern for driver-safety, the chilling effect stemming from the statute's ambiguity raises a First Amendment issue: the

¹⁶ See Andrew Thomason, *Lawmakers Want To Keep Drivers' Eyes on Road*, ST. J.-REG., Feb. 17, 2009, at LOCAL, available at <http://www.sj-r.com/news/x426328416/Lawmakers-focus-on-legislation-to-fine-distracted-drivers-more> (“[E]nforcement of a cell phone or text messaging ban [is] much more difficult than pulling someone over for applying mascara while driving.”).

¹⁷ See *infra* Part IV.B.

¹⁸ See generally Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969) (discussing the operation and parameters of the “chilling effect” in constitutional law).

¹⁹ See *infra* Part IV.B.2.ii (discussing the common understanding of the term “text message”).

²⁰ See *Smith v. California*, 361 U.S. 147, 151 (1959) (describing the “chilling effect” as “the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it.”).

potentially unconstitutional curtailment of constitutionally protected speech.²¹

[9] The above exercise is not merely academic. To date, at least twenty-one states have enacted legislation limiting or forbidding the sending of text messages while driving.²² In fact, one commentator dubbed the issue “the hottest safety issue in the states right now”²³

[10] Generally, this Article deals with Maryland’s recently enacted text messaging ban, which prohibits citizens from “writ[ing] or send[ing] a text message while operating a motor vehicle.”²⁴ More specifically, this Article first discusses the effects cell-phone use and text messaging have on driver behavior, with a focus on the ills the Maryland legislature sought to remedy by enacting the statute. Second, this Article details the Maryland legislature’s attempts to combat distracted driving, including an overview of legislative bills and their legislative history. Third, this Article argues that Maryland’s 2009 ban – the Delegate John Arnick Electronic Communications Traffic Safety Act – is at best difficult or impossible to enforce and at worst unconstitutional. Finally, this Article discusses legislation recently introduced in the Maryland legislature that would rectify many of the issues raised regarding the prohibition against text messaging while driving.

²¹ See *id.* at 157.

²² For a state-by-state breakdown of such text-messaging legislation, see *State Cell Phone Use and Texting While Driving Laws*, GOVERNORS HIGHWAY SAFETY ASS’N (July 2010), available at http://www.ghsa.org/html/stateinfo/laws/cellphone_laws.html. On the federal level, in October 2009, President Barack Obama signed an order prohibiting federal employees from texting in state-provided cars. Matt Richtel, *Bills to Curb Distracted Driving Gain Momentum*, N.Y. TIMES, Jan. 1, 2010, at A3, available at <http://www.nytimes.com/2010/01/02/technology/02distracted.html>. While the federal government has largely avoided enacting distracted driving legislation, there are bills under consideration that “could condition the receipt of highway funds on states’ adoption of distracted driving restrictions in bills currently under consideration.” Peter D. Jacobson & Lawrence O. Gostin, *Reducing Distracted Driving, Regulation and Education to Avert Traffic Injuries and Fatalities*, 303 JAMA 1419, 1419 (2010).

²³ Richtel, *supra* note 22.

²⁴ MD. CODE ANN., TRANSP. § 21-1124.1 (West, Westlaw through 2010 Reg. Sess.).

II. THE EFFECTS OF TEXT MESSAGING ON DRIVER BEHAVIOR

[11] In the past twenty-five years, there have been more than one million fatalities as a result of motor vehicle crashes, with 37,261 deaths occurring in 2008 alone.²⁵ In fact, motor vehicle crashes are the number one killer of individuals between fifteen and twenty years of age.²⁶ A major factor contributing to this unsettling number is driver inattention.²⁷ Estimates reveal that over twenty percent of motor vehicle crashes in 2009 involved distracted driving.²⁸ As such, it is no surprise that for over fifty years researchers have sought to determine a link between motor vehicle crashes and various distracting behaviors.²⁹

[12] Technological growth has transformed the cell phone from an item used only in special circumstances into “a personal necessity, [that has] become a staple of American life.”³⁰ And with cell phone subscriptions likely exceeding the 4 billion mark worldwide, it comes as no surprise that cell phone use is one of the leading distractions leading to driver

²⁵ *Safety Culture*, AAA FOUND. (July 27, 2009), available at <http://www.aaafoundation.org/pdf/2009TSCIndexFS.pdf>.

²⁶ *Bus. Wire, Survey Shows Teens’ Risky Driving Habits Include Text Messaging Behind the Wheel*, ALL BUS. (July 10, 2007), available at <http://www.allbusiness.com/services/business-services/4518957-1.html>.

²⁷ See D.L. Hendricks et al., *The Relative Frequency of Unsafe Driving Acts in Serious Traffic Crashes*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., 2 (Jan. 2001), available at <http://www.nhtsa.gov/people/injury/research/UDAshortprt/UDAsummtechrept.pdf> (noting that driver inattention was a factor in 22.7% of crashes examined).

²⁸ Jacobson, *supra* note 22, at 1419.

²⁹ See, e.g., I.D. Brown & E.C. Poulton, *Measuring the Spare “Mental Capacity” of Car Drivers by a Subsidiary Task*, 4 ERGONOMICS 35, 35 (1961). See generally S.L. Chisholm et al., *The Effects of Practice with MP3 Players on Driving Performance*, 40 ACCIDENT ANALYSIS & PREVENTION 704 (2007); Jacobson, *supra* note 22, at 1419-20 (2010) (detailing the risks of distracted driving, distracted driving laws and regulations, automakers’ design changes, and policies to reduce distracted driving).

³⁰ Shannon L. Noder, *Talking and Texting While Driving: A Look at Regulating Cell Phone Use Behind the Wheel*, 44 VAL. U. L. REV. 237, 240 (2009).

inattention.³¹ In 2007, when cell phone use was much less prevalent than it is today, the National Highway Traffic Safety Administration (“NHTSA”) estimated that at any given time six percent of drivers on the road were using their cell phones.³² The NHTSA study and other similar studies linking cell phone use to motor vehicle accidents likely constitute the driving force behind state legislation prohibiting text messaging while operating a motor vehicle.³³

[13] Researchers have found that using a cell phone while driving greatly slows a driver’s reaction time³⁴ and increases a driver’s risk of crashing.³⁵ In fact, statistical analyses have revealed that using a cell

³¹ See *Number of Cell Phone Subscribers To Hit 4 Billion This Year, UN Says*, UNITED NATIONS EDUC., SCI. & CULTURAL ORG. (Sept. 26, 2008), available at http://portal.unesco.org/ci/en/ev.phpURL_ID=27530&URL_DO=DO_TOPIC&URL_SECTION=201.html; *infra* notes 34-41 and accompanying text.

³² *Traffic Safety Facts: Driver Electronic Device Use in 2007*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., at 1, available at www-nrd.nhtsa.dot.gov/Pubs/810963.pdf; see *Overview of the National Highway Traffic Safety Administration’s Driver Distraction Program*, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., at 4, available at http://www.nhtsa.gov/staticfiles/nti/distracted_driving/pdf/811299.pdf; Annie Barret Wallin, *Cell Phones Pose a Distraction to Drivers but Legislative Ban Is Not the Answer*, 98 KY. L.J. 177, 178 (2009) (noting that, in 2004, the figure was approximately eight percent).

³³ See generally Karel A. Brookhuis et al., *The Effects of Mobile Telephoning on Driving Performance*, 23 ACCIDENT ANALYSIS & PREVENTION 309 (1991); Noder, *supra* note 30, at 242-43 (explaining why statistics purporting to show the incidence of motor vehicle crashes attributable to cellular phone use might be inaccurately low).

³⁴ See Jeff K. Caird et al., *A Meta-Analysis of Driving Performance and Crash Risk Associated With the Use of Cellular Telephones While Driving*, 480-81 (2005), available at www.cellphonefreedriving.ca/media/70_Caird_Meta_analysis.pdf; William J. Horrey & Christopher D. Wickens, *Examining the Impact of Cell Phone Conversations on Driving Using Meta-Analytic Techniques*, 48 HUM. FACTORS 196, 202-03 (2006), available at http://mysite.verizon.net/horrey/papers/Horrey_HF2006meta.pdf.

³⁵ Donald A. Redelmeier & Robert J. Tibshirani, *Association Between Cellular-Telephone Calls and Motor Vehicle Collisions*, 336 NEW ENG. J. MED. 453, 456 (1997); see Wallin, *supra* note 32, at 184-86 (outlining arguments in favor of handheld cell phone bans).

phone while driving may quadruple the risk of crashing.³⁶ One study found that the act of dialing a cell phone increased the likelihood of a crash nearly three-fold, while merely talking on a cell phone increase the risk by about thirty percent.³⁷ But despite the volume of research conducted regarding cell phone use while driving, “there is a significant gap in the research literature, namely the effects of text messaging on driving.”³⁸

[14] The use of texting as a form of communication is growing exponentially.³⁹ In 2008, nearly 600 billion text messages were sent, almost four times the amount sent in 2006.⁴⁰ Demographically, texting is most prevalent among younger people, and studies indicate that sixty-six percent of individuals aged eighteen to twenty-four report that they text while driving, whereas only sixteen percent of all cell phone owners reported that they text while driving.⁴¹ Due to the prevalence of texting

³⁶ Suzanne P. McEvoy et al., *Role of Mobile Phones in Motor Vehicle Crashes Resulting in Hospital Attendance: A Case-Crossover Study*, 331 BRIT. MED. J. 428, 430 (2005), available at <http://www.bmj.com/content/331/7514/428.full.pdf+html?sid=6b16406b-aedc-4d7c-ae0f-9bc5d1109898>.

³⁷ See S.G. Klauer et al., *The Impact of Driver Inattention on Near-Crash/Crash Risk: An Analysis Using the 100-Car Naturalistic Driving Study Data*, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., 33 (2006), available at <http://www.nhtsa.dot.gov/DOT/NHTSA/NRD/Multimedia/PDFs/Crash%20Avoidance/Driver%20Distraction/810594.pdf>.

However, researchers found that the increase in crash risk from merely talking on or listening to a handheld device was not statistically significant. *Id.* at 32.

³⁸ Nick Reed & R. Robbins, *The Effect of Text Messaging On Driver Behaviour, A Simulator Study*, RAC FOUND., viii (Sept. 2008), available at http://www.racfoundation.org/assets/rac_foundation/content/downloadables/texting%20whilst%20driving%20-%20tr1%20-%20180908%20-%20report.pdf.

³⁹ See Jennifer Davison, *Play It Safe, Texting While Driving Has GTG!!!*, AM. NAT'L (May 7, 2009), available at <http://www.anpac.com/safety/texting/Play%20it%20Safe%20texting%2003-09.pdf>.

⁴⁰ *Id.*

⁴¹ *Zogby Poll: 83% Say Texting While Driving Should Be Illegal*, ZOGBY (June 5, 2007), available at <http://www.zogby.com/News/ReadNews.cfm?ID=1323> [hereinafter *Zogby Poll*]. In another study, forty-five percent of respondents admitted to texting while driving. Reed, *supra* note 38, at 3.

while driving, researchers have recently begun examining the relationship between such texting and motor vehicle crashes.⁴²

A. Early Research

[15] Despite the recent emergence of studies researching the effects of texting while driving, most research to date has either “focused on *verbal* communication at best, or at worst conflated text messaging with verbal communication under vague labels such as ‘mobile phone use.’”⁴³ A 2004 study found – albeit in a sample of only ten drivers – that receiving a text message while driving increased braking response times.⁴⁴ Additionally, a 2006 study, in which researchers asked young drivers in a simulator to send and receive text messages, found participants spent about forty percent of the time looking away from the road, were less consistent in maintaining position in their lane, and frequently failed to see signs instructing them to change lanes.⁴⁵ However, until the 2008 Transport Research Laboratory study,⁴⁶ no study differentiated between sending and receiving text messages, nor did any research “describe any performance differences resulting from experience of texting.”⁴⁷

[16] Yet, while the public may be unaware of the research evidencing the inherent dangers involved with texting while driving, it is well aware

⁴² See Noder, *supra* note 30, at 262 (detailing the case of a train accident that killed over twenty-five people, caused in part by an operator who was texting at the time of the crash).

⁴³ Reed, *supra* note 38, at 3 (emphasis added).

⁴⁴ Albert Kircher et al., *Mobile Telephone Simulator Study*, NAT’L SAFETY COUNCIL, 113-16 (2004), available at http://www.nsc.org/safety_road/Distracted_Driving/Documents/Mobile%20Telephone%20Simulator%20Study.pdf.

⁴⁵ Simon Hosking et al., *The Effects of Text Messaging on Young Notice Driver Performance*, MONASH U., 20-21 (Feb. 2006), available at <http://www.monash.edu.au/muarc/reports/muarc246.pdf>.

⁴⁶ See *infra* part II.B.

⁴⁷ Reed, *supra* note 38, at 4.

of the risks.⁴⁸ An AAA Foundation poll found that over ninety-four percent of drivers consider it unacceptable to send text messages or e-mails while driving, with almost eighty-seven percent of respondents considering such activity a “very serious threat to their personal safety.”⁴⁹ Further, numerous surveys show that over eighty percent of drivers favor legislation outlawing texting while driving.⁵⁰

B. September 2008 Transport Research Laboratory Study

[17] In this author’s opinion, the largest and most comprehensive study evaluating the effects of texting on driver behavior is the Transport Research Laboratory (“TRL”) study published in September 2008.⁵¹ The TRL study was designed “to assess the impact of text messaging on driver performance, and the attitudes and beliefs that surrounded the activity in the 17-25 age category.”⁵² The study consisted of seventeen participants who completed the study using a driving simulator.⁵³ Each participant completed a distraction-free drive as well as a drive in which researchers instructed them to read a received message, compose and send a message, or ignore an incoming message.⁵⁴ Researchers hypothesized that “when writing/reading text messages, drivers would display increased reaction times, poorer care following ability, poorer lateral lane control, and reduced speed.”⁵⁵ Researchers also predicted that “reductions in drivers’

⁴⁸ *Id.* at 35-36.

⁴⁹ *Safety Culture*, *supra* note 25.

⁵⁰ *Driving While Distracted*, *supra* note 3, at 4; *Zogby Poll*, *supra* note 41.

⁵¹ *See generally* Reed, *supra* note 38.

⁵² *Id.* at viii. Choosing the demographic of seventeen to twenty-five year-olds makes sense, as it is this age group that tends to text the most. *See supra* note 41 and accompanying text.

⁵³ Reed, *supra* note 38, at viii.

⁵⁴ *Id.*

⁵⁵ *Id.*

performance [would] be greater when writing a text message than when reading a text message.”⁵⁶

[18] The study’s results overwhelmingly confirmed the researchers’ hypotheses.⁵⁷ Primarily, the study confirmed that “[r]eaction times to (task-unrelated) trigger stimuli tended to be higher when reading or writing a [text] message.”⁵⁸ Furthermore, the study discovered a disparity in impairment between composing and reading text messages, namely that “[w]riting text messages created a significantly greater impairment than reading text messages.”⁵⁹ Finally, the researchers observed that drivers, while texting, “were less able to maintain a constant distance behind a lead vehicle and showed increased variability in lateral lane position when following that vehicle.”⁶⁰

[19] The results of the TRL study are not merely academic. As the researchers point out, “[t]he failure to detect hazards, increased response times to hazards, and exposure time to that risk have clear implications for safety.”⁶¹ At normal highway speeds, it might take a driver as much as a mile to complete the composition and sending of a text message.⁶² The difference in reaction time between sending and not sending a text message could increase the distance required to stop a vehicle by

⁵⁶ *Id.*

⁵⁷ *Id.* at 16-28.

⁵⁸ Reed, *supra* note 38, at viii. For detailed reaction-time findings and charts, see *id.* at 16-17.

⁵⁹ *Id.* at viii. This distinction is logical, considering that one composing a text message, as opposed to one merely reading a text message, “must consider the text to be written and interact with the phone to compose the message.” *Id.* at ix.

⁶⁰ *Id.* at ix.

⁶¹ *Id.* at viii.

⁶² Reed, *supra* note 38, at viii. It took participants in the TRL study an average of sixty-three seconds to compose and send a text message while driving. *Id.* at 28; see Jacobson, *supra* note 22, at 1419 (“[W]hen texting, drivers take their eyes off the road for 4.6 of 6 seconds.”).

approximately three car lengths, a distance that “could easily make the difference between causing and avoiding an accident or between a fatal and non-fatal collision.”⁶³ Additionally, the poor control over lateral position and reaction times that TRL researchers found “would increase the likelihood of collision dramatically.”⁶⁴ Thus, it is clear the dangers the Maryland legislature sought to rectify in passing the Delegate John Arnick Electronic Communications Traffic Safety Act are serious – dangers the TRL researchers determined were “greater than [those] caused by alcohol consumption to the legal limit for driving [and the use of] cannabis.”⁶⁵

III. MARYLAND’S LEGISLATIVE ATTEMPTS TO OUTLAW TEXTING

[20] While the issue of banning cell phone use while driving has gained attention in the last decade, the first legislative attempt to ban text messaging while driving was introduced in the Maryland Legislature in 2008.⁶⁶

A. Legislation On the Books

[21] Although the first legislative attempt to expressly outlaw text messaging while driving was introduced in 2008, the legislation arguably “seeks to prohibit [acts] already criminal under Vehicle and Traffic Law §

⁶³ Reed, *supra* note 38, at viii.

⁶⁴ *Id.* at ix.

⁶⁵ *Id.*; see Davison, *supra* note 39 (“Texting while driving is more dangerous than driving under the influence of drugs or alcohol.”). The TRL study indicated that, whereas reaction times for users of alcohol and marijuana were delayed by twelve and twenty-one percent, respectively, the reaction times of those texting were delayed by thirty-five percent. See Reed, *supra* note 38, at 46.

⁶⁶ See Nicole Fuller, *Limits Eyed on Cell Use in Cars, Lawmakers Again Try to Bar Hand-Held Phone Use, Texting While Driving in Md.*, BALT. SUN, Jan. 22, 2008, at 1A, available at http://articles.baltimoresun.com/2008-01-22/news/0801220052_1_cell-phone-while-driving-text-messaging. The first piece of legislation seeking to outlaw cellular phone use while driving was introduced in 1999 by Delegate John S. Arnick, the individual for whom the current legislation is named. *Id.*

21-901.1.”⁶⁷ Section 21-901.1 of the Transportation Article provides that “[a] person is guilty of negligent driving if he drives a motor vehicle in a careless or imprudent manner that endangers any property or the life or person of any individual.”⁶⁸ Conceivably, one who employs one or both of his hands and takes his eyes off the road for the better part of a minute – as the TRL study found – to send a text message, is likely driving in a “careless” and “imprudent” manner that potentially endangers other motorists.⁶⁹ As such, it has been reasoned that new prohibitions against using cell phones and text messaging while driving are superfluous, and law enforcement agencies should use the tools already in place.⁷⁰

B. 2008 Legislation

[22] House Bill 380 of the 2008 Regular Session sought to add § 21-1124.1 to the Transportation Article, providing that “[a] person may not use a text messaging device to write, send, or read a text message while operating a motor vehicle.”⁷¹ This legislation was originally part of a larger Senate Bill that barely passed in the Senate before being referred to

⁶⁷ State of Md. Office of the Pub. Defender, Position on Proposed Legislation – HB 380 (Feb. 12, 2008) (on file with author) [hereinafter Position on Proposed Legislation].

⁶⁸ MD. CODE ANN., TRANSP. § 21-901.1 (West, Westlaw through 2010 Reg. Sess.).

⁶⁹ Reed, *supra* note 38, at 44.

⁷⁰ Wallin, *supra* note 32, at 196 (advocating the use of current reckless driving statutes instead of enacting specific text message legislation), 200 (quoting a former state trooper as saying that “[w]hen I was a trooper I would pull motorists over for reckless driving and find out they were putting on makeup or reading a road map . . . I didn’t need a special law to charge them; we already outlaw reckless driving.”); *Cell Phone Bill Back on Table*, SALISBURY DAILY TIMES (Md.), Jan. 23, 2008, available at 2008 WLNR 27479481 (“Instead of specifically addressing cell phone use while driving, motorists should use common sense and police should enforce negligent driving laws.”).

⁷¹ H.B. 380, 2008 Leg., 425th Sess. (Md. 2008). The text of this bill is identical to that found in House Bill 192, which was drafted in an effort to add reading a text message to the list of prohibited activities under § 21-1124.1. H.B. 192, 2010 Leg., 427th Sess. (Md. 2010).

the House of Delegates Environmental Matters Committee (“Committee”).⁷²

[23] Numerous organizations, including MedChi, the Maryland Department of Transportation, and the American Academy of Pediatrics, wrote letters to the Committee voicing their support for the legislation.⁷³ The State of Maryland Office of the Public Defender, which opined that sufficient laws already existed to deal with the dangers associated with text messaging while driving, was the only party to oppose the legislation.⁷⁴ The Office of the Public Defender further asserted that if the legislature passed the bill, “it [would] need to create a new law for the driver who shaves on the way to work or who puts on make-up or who eats a Big Mac or looks at a map or other navigation device. . . while

⁷² The Senate Judicial Proceedings Committee approved the bill six to five, and the full Senate approved the bill twenty-six to twenty-one. *Legislative Digest*, BALT. SUN, Mar. 21, 2008, at 7B; Laura Smitherman & Nick Madigan, *Phone Ban Moving Ahead; Bill to Prohibit Hand-Held Cells for Md. Motorists Going to Full Senate*, BALT. SUN, Mar. 8, 2008, at 1A; *See Bill Info – 2008 Regular Session – HB 380*, <http://mlis.state.md.us/2008rs/billfile/HB0380.htm> (last visited Oct. 27, 2010).

⁷³ Memorandum from Md. Dep’t of Transp. to H. Envtl. Matters Comm. (Feb. 12, 2008) (on file with author); Memorandum from Joseph A. Schwartz, III et al., Am. Acad. of Pediatrics, to Hon. Maggie McIntosh, Chairman, H. Envtl. Matters Comm. et al. (Feb. 12, 2008) (on file with author); Memorandum from Joseph A. Schwartz, III et al., MedChi, to Hon. Maggie McIntosh, Chairman, H. Envtl. Matters Comm. et al. (Feb. 12, 2008) (on file with author).

⁷⁴ Position on Proposed Legislation, *supra* note 67. *See generally* Jacobson, *supra* note 22, at 1420 (“[T]here are additional likely sources of driver distraction, such as eating, drinking, smoking, reading, and grooming, that extant law does not directly target.”); Matthew C. Kalin, *The 411 on Cellular Phone Use: An Analysis of the Legislative Attempts to Regulate Cellular Phone Use by Drivers*, 39 SUFFOLK U. L. REV. 233, 261 (“[C]ritics note there are a myriad of activities in a car that are far more distracting—such as eating and shaving—yet do not receive the same public attention as cellular phones.”); Wallin, *supra* note 32, at 188 (noting that “those who single out and legislate this action ignore the various other types of distracted driving that occur on the roads and highways every day.”); Diamondback Editorial Bd., *Celling Ourselves Short*, DIAMONDBACK (Mar. 25, 2010), available at <http://www.diamondbackonline.com/opinion/staff-editorial-celling-ourselves-short-1.1281738> (“After all, statistics also show drivers are distracted by conversations with passengers – should we ban them too? What about radios? Should drivers not be allowed to drink a cup of coffee in the morning either?”).

driving.”⁷⁵ Still further, the Office of the Public Defender argued that allowing law enforcement officers to pull drivers over for such acts “expands the police powers and provides even more of a pretextual reason to stop a moving vehicle than allowed under the Maryland Bill of Rights.”⁷⁶

[24] Despite overwhelming support from outside parties, House Bill 380 ultimately received an unfavorable report from the Committee and never proceeded to a vote.⁷⁷ One Senator who spoke out against the legislation argued that “[i]t’s legislating common sense People should be responsible adults and know how to behave and act reasonably. Next we’re going to be telling people what radio station they can listen to and how loud they can listen to it.”⁷⁸ Another delegate called the bill “a dropped call,” arguing that “cell phone use is just one of a number of driver distractions, and that the bill doesn’t really deal with the larger problem.”⁷⁹ Going even further, another delegate suggested that such legislation would create more havoc on the roads, as motorists would likely swerve off the road to answer phone calls.⁸⁰ Supporting the legislators’ statements is a paucity of evidence that bans enacted in other states have reduced traffic accidents.⁸¹

⁷⁵ Position on Proposed Legislation, *supra* note 67.

⁷⁶ *Id.*; see *infra* Part III.C.2 (discussing the distinction between primary and secondary offenses).

⁷⁷ See Bill Info – 2008 Regular Session – HB 380, <http://mlis.state.md.us/2008rs/billfile/HB0380.htm> (last visited Oct. 27, 2010).

⁷⁸ Wallin, *supra* note 32, at 191-92 (quoting Rep. John Stahl).

⁷⁹ See Timothy B. Wheeler, *Cell Phone Bill Meets Static House Panel Split on Move to Limit Drivers’ Cell Use*, BALT. SUN, Mar. 26, 2008, at 4B (quoting Anthony J. O’Donnell).

⁸⁰ *Id.* (citing Del. James E. Malone).

⁸¹ See Jacobson, *supra* note 22, at 1419 (“[N]o significant reductions in traffic crashes [were found] in states that enacted handheld cellular phone bans relative to states that had not.”); Wallin, *supra* note 32, at 190-91 (discussing the unanswered questions about the effectiveness of legislation banning cell phone use while driving); Cheryl Jensen, *Results of Study on Cellphone Use Surprise Researchers*, WHEELS (Jan. 29, 2010, 12:01 AM),

C. 2009 Legislation

[25] After achieving success in one of the legislative chambers in 2008, 2009 saw Maryland legislators renew their efforts to pass legislation outlawing text messaging while driving.⁸² Ultimately, the legislature succeeded and legislation banning text messaging while driving was codified in § 21-1124.1 of the Transportation Article.⁸³

1. The 2009 Bills

[26] In 2009 the Senate introduced Senate Bill 98, and the House of Delegates introduced House Bill 72.⁸⁴ House Bill 72 provides that “a person may not use a text messaging device to write or send a text message while operating a motor vehicle in motion or in the travel portion of the roadway.”⁸⁵ Under this language, the law does not prohibit one from reading text messages while driving, and it does not differentiate between one driving on the highway and one stopped at a red light.⁸⁶ Nor

<http://wheels.blogs.nytimes.com/2010/01/29/study-finds-that-reduced-phone-use-does-not-cut-crashes/> (concluding that laws prohibiting cell phone use while driving have failed to reduce the incidence of traffic accidents).

⁸² Laura Smitherman, *Texting-Ban Bill Advances in State Senate, General Assembly 2009*, BALT. SUN, Mar. 14, 2009, at 2A.

⁸³ MD. CODE ANN., TRANSP. § 21-1124.1 (West, Westlaw through 2010 Reg. Sess.).

⁸⁴ See Bill Info – 2009 Regular Session – SB 98, <http://mlis.state.md.us/2009RS/billfile/sb0098.htm> (last visited Oct. 27, 2010); Bill Info – 2009 Regular Session – HB 72, <http://mlis.state.md.us/2009RS/billfile/hb0072.htm> (last visited Oct. 27, 2010). The bills are substantially similar. See S.B. 98, 2009 Leg., 426th Sess. (Md. 2009) available at <http://mlis.state.md.us/2009rs/bills/sb/sb0098e.pdf>; H.B. 72, 2009 Leg., 426th Sess. (Md. 2009) available at <http://mlis.state.md.us/2009rs/bills/hb/hb0072t.pdf>.

⁸⁵ H.B. 72, 2009 Leg., 426th Sess. (Md. 2009) available at <http://mlis.state.md.us/2009rs/bills/hb/hb0072t.pdf>.

⁸⁶ See *id.*

does the law prohibit the use of a global positioning system (“GPS”) or text messaging device to contact 9-1-1.⁸⁷

[27] The 2009 Senate and House bills received overwhelming support from outside parties, including the Maryland Department of Transportation,⁸⁸ MedChi,⁸⁹ the American Academy of Pediatrics,⁹⁰ the Maryland Sheriff’s Association,⁹¹ the Maryland PTA,⁹² the Maryland Chiefs of Police Association,⁹³ and the Maryland Automobile Insurance Fund.⁹⁴ The only parties opposing the bills were the State of Maryland

⁸⁷ See *id.*; MD. CODE ANN., TRANSP. § 21-1124.1(C) (West, Westlaw through 2010 Reg. Sess.).

⁸⁸ See Memorandum from the Md. Dep’t of Transp. to Env’tl. Matters Comm. (Feb. 3, 2009) (on file with author) (supporting House Bill 72); Memorandum from the Md. Dep’t of Transp. to Env’tl. Matters Comm. (Mar. 31, 2009) (on file with author) (supporting Senate Bill 98).

⁸⁹ See Memorandum from Joseph a. Schwartz, III et al., MedChi, to Hon. Maggie McIntosh, Chairman, H. Env’tl. Matters Comm. et al. (Mar. 31, 2009) (on file with author) (supporting Senate Bill 98).

⁹⁰ See Memorandum from Joseph A. Schwartz, III et al., Am. Acad. of Pediatrics, to Hon. Maggie McIntosh, Chairman, H. Env’tl. Matters Comm. et al. (Feb. 3, 2009) (on file with author) (supporting House Bill 72); Memorandum from Joseph A. Schwartz, III et al., Am. Acad. of Pediatrics, to Hon. Maggie McIntosh, Chairman, H. Env’tl. Matters Comm. et al. (Mar. 31, 2009) (on file with author) (supporting Senate Bill 98).

⁹¹ See Memorandum from Michael A. Jackson, Chairman, Md. Sheriffs’ Ass’n Legislative Comm., and Michael F. Canning, Exec. Dir., Md. Sheriffs’ Ass’n Legislative Comm., to Hon. Maggie L. McIntosh, Chairman, Env’tl. Matters Comm., and Members, H. Env’tl. Matters Comm. (Feb. 3, 2009) (on file with author) (supporting House Bill 72).

⁹² See Memorandum from Debbie Ritchie, President, Md. PTA, and Laura Carr, Vice President of Legislation, Md. PTA, to Env’tl. Matters Comm., (Mar. 31, 2009) (on file with author) (supporting Senate Bill 98).

⁹³ See Memorandum from Md. Chiefs of Police Ass’n Legislative Comm. to Env’tl. Matters Comm. (Feb. 3, 2009) (on file with author) (supporting House Bill 72).

⁹⁴ See Memorandum from M. Kent Krabbe, Md. Auto. Ins. Fund, to Hon. Maggie L. McIntosh, Chairman, Env’tl. Matters Comm., et al. (Mar. 5, 2009) (on file with author) (supporting House Bill 72).

Office of the Public Defender, which presented the same arguments as it did in 2008,⁹⁵ and the American Civil Liberties Union (“ACLU”), which, due to concerns of racial profiling on Maryland’s roadways, sought an amendment clarifying that the law was a secondary offense and thus could not of its own accord justify police detention of a suspect.⁹⁶

[28] Ultimately, the proposed legislation passed in the House of Delegates by a 133-2 margin and in the Senate by a 43-4 margin.⁹⁷ Governor Martin O’Malley signed off on the legislation on May 7, 2009, and it went into effect on October 1, 2009.⁹⁸ The law, as currently codified, reads:

(a)(1) In this section the following words have the meanings indicated.

(2) “9-1-1 system” has the meaning stated in § 1-301 of the Public Safety Article.

(3) “Text messaging device” means a hand held device used to send a text message or an electronic message via a short message service, wireless telephone service, or electronic communication network . . .

(b) Subject to subsection (c) of this section, a person may not use a text messaging device to write or send a text

⁹⁵ See State of Md. Office of the Pub. Defender, Position on Proposed Legislation – HB 72 (Feb. 3, 2009) (on file with author) (opposing House Bill 72); State of Md. Office of the Pub. Defender, Position on Proposed Legislation – SB 98 (Mar. 31, 2009) (on file with author) (opposing Senate Bill 98). See generally *supra* note 67 and accompanying text.

⁹⁶ ACLU, Testimony for the House Environmental Matters Committee (Feb. 3, 2009) (on file with author). See generally *infra* Part III.C.2 (discussing the distinction between primary and secondary offenses).

⁹⁷ Julie Bykowitz, *Ban on Texting Passes House, Senate Also Voted to Bar Messaging While Driving*, BALT. SUN, Apr. 2, 2009, at 1A.

⁹⁸ See Laura Smitherman, *O’Malley Signs Contested Bills, Death Penalty, Driver License, Texting Curbs Become Law*, BALT. SUN, May 8, 2009, at 3A.

message while operating a motor vehicle in motion or in the travel portion of the roadway . . .

(c) This section does not apply to the use of: (1) A global positioning system; or (2) A text messaging device to contact a 9-1-1 system.⁹⁹

2. Primary v. Secondary Offenses

[29] Text messaging bans for motorists can take the form of:

[E]ither primary or secondary enforcement offenses. If the ban is a primary enforcement offense, the officer may ticket a driver . . . without any other traffic offense occurring. If the law only makes the ban a secondary enforcement offense, the officer can only ticket the driver if he commits some other infraction while breaking the cell phone law.¹⁰⁰

[30] In its letter to the Committee, the ACLU noted that the policy justification for distinguishing primary and secondary traffic offenses is to “protect drivers from pretextual stops.”¹⁰¹ The ACLU, therefore, urged the legislature to make the text messaging ban a secondary offense to “ensure that the General Assembly does not unwittingly increase the risks of racial profiling in traffic stops when addressing the serious problem of distracted driving.”¹⁰² Echoing this sentiment, a contingent of legislators introduced an amendment to the Senate bill that would have made the ban a secondary offense; however the amendment failed by a margin of 31-16.¹⁰³ As such, the current text messaging ban remains a primary offense,

⁹⁹ MD. CODE ANN., TRANSP. § 21-1124.1 (West, Westlaw through 2010 Reg. Sess.).

¹⁰⁰ Wallin, *supra* note 32, at 180.

¹⁰¹ ACLU, *supra* note 96.

¹⁰² *Id.*

¹⁰³ *See* Smitherman, *supra* note 82.

allowing police to initiate traffic stops solely on suspicion of texting while driving.¹⁰⁴

IV. NEAR IMPOSSIBLE TO ENFORCE AT BEST,
UNCONSTITUTIONAL AT WORST

[31] Between the October 1, 2009 effective date and the end of February 2010, Maryland law enforcement officers issued only sixty citations to motorists for texting while driving.¹⁰⁵ In this author's opinion, this minimal number of citations is due to the flaws inherent in the legislation: (1) the problems in enforcing the texting ban; and (2) the statute's vague identification of the prohibited behaviors.

¹⁰⁴ See *id.* See generally Jacobson, *supra* note 22, at 1420 (stating that approximately "90% of states that ban texting while driving permit primary enforcement."); Tom Precious, *Enforcement Key to Law on Young Motorists, New Restrictions Give Parents More Responsibility*, *Clout*, BUFFALO NEWS, Feb. 22, 2010, at A1 (describing the secondary-offense feature of New York's texting ban as a "sizeable loophole").

¹⁰⁵ Julie Bykowicz, *Ban on Texting Could Tighten, General Assembly 2010 Session*, BALT. SUN, Feb. 19, 2010, at 1A. In this author's opinion, the limited number of citations to date is especially surprising, considering Maryland's ban is a primary offense. See *supra* Part III.C.2 (discussing the distinction between primary and secondary offenses). Furthermore, a study of adults from New York, New Jersey, and Connecticut revealed that eighty-six percent of drivers ignore cell phone bans in their respective states. Wallin, *supra* note 32, at 191. See generally James Ewinger, *Law Banning Texting While Driving May Be Hard to Enforce*, CLEVELAND PLAIN DEALER, Apr. 15, 2009, at A1 (stating that, in the first three months after California banned text messaging while driving, law enforcement officers issued only 326 tickets); Juana Summers, *Texting-Driving Bans: Little Effect, Missouri Has Issued 13 Citations in First Five Months; Illinois Has No Convictions Since Law Went Into Effect*, ST. LOUIS POST-DISPATCH, Jan. 24, 2010, at B1 (noting that, in the first five months after Missouri banned text messaging while driving, law enforcement officers issued only thirteen citations); Mark Waller, *Legislation Would Make Drivers Put Down the Phone, Only Hands-Free Phones Allowed Behind the Wheel Under New Bill*, NEW ORLEANS TIMES PICAYUNE, Apr. 26, 2009, at 1 (explaining that in the first several months after Louisiana banned text messaging while driving, law enforcement officers issued "only about 10 tickets under the law").

A. Enforcement Problems

[32] The 2009 legislation prohibits drivers from either writing or sending a text message.¹⁰⁶ Assuming, *arguendo*, it is clear what constitutes a text message,¹⁰⁷ absent a confession or the confiscation of the cell phone in question, it is difficult for a prosecutor to prove beyond a reasonable doubt that a driver was *writing* or *sending* a text message, as opposed to engaging in non-proscribed behavior.¹⁰⁸ Thus, Maryland's text-messaging ban is, at best, nearly impossible to enforce.¹⁰⁹

¹⁰⁶ MD. CODE ANN., TRANSP. § 21-1124.1; see Julie Bykowicz, *Lawmakers Want to Tighten Ban on Texting While Driving*, BALT. SUN, Feb. 19, 2010, at 1A; *supra* note 71 and accompanying text (detailing the Maryland legislature's efforts to add *reading* text messages to the list of prohibited activities).

¹⁰⁷ *But see infra* Part IV.B.2 (arguing that it is by no means clear what constitutes a "text message").

¹⁰⁸ Absent consent or some other exception to the warrant requirement, law enforcement officers may not confiscate motorists' cell phones and search their text messaging history without obtaining a search warrant. See Matthew E. Orso, *Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence*, 50 SANTA CLARA L. REV. 183, 191 (2010) ("[C]ourts have regularly held that a person has a reasonable expectation of privacy in the contents of his cellular phone."); Bryan Andrew Stillwagon, Note, *Bringing an End to Warrantless Cell Phone Searches*, 42 GA. L. REV. 1165, 1188 n.145 (2008) (noting a case where the Maryland State's attorney's office did not bring charges against an individual for possession of a stolen handgun because police searched his phone, finding a picture of the gun in a text message, without a search warrant); Scharper, *supra* note 1 ("If a law enforcement officer demands to see my phone, must I comply? No, you have the right to refuse to hand over your phone, unless the officer has a search warrant."). See generally Katharine M. O'Connor, Note, *o OMG They Searched My TXTS: Unraveling the Search and Seizure of Text Messages*, 2010 U. ILL. L. REV. 685 (2010).

¹⁰⁹ See Noder, *supra* note 30, at 266 ("Furthermore, the difficulty of enforcing specific types of cell phone and text messaging legislation . . . contributes to the ineffectiveness of current legislation."); Bykowicz, *supra* note 105 ("But some lawmakers complained last year that the measure would be unenforceable . . ."). It is important to note that the difficulties law enforcement officers encounter in enforcing penal laws do not render the statutes unconstitutional. See *United States v. Williams*, 553 U.S. 285, 306 (2008) ("What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is."); *Ruark v. Int'l Union of Operating Eng'rs*,

1. Writing

[33] There is undoubtedly a learning curve with respect to the ease and efficiency with which one sends a text message, but writing and sending a text message is certainly less arduous than taking out a pad of paper to compose a written message.¹¹⁰ As such, a law enforcement officer may not easily recognize that an individual who is composing a text message is in fact engaged in such behavior.¹¹¹

[34] A significant factor in a police officer's determination of whether an individual is writing a text message while driving is the ability to compose and send a text message with either one or two hands.¹¹² The

Local Union No. 37, 146 A.2d 797, 800 (Md. 1929) (“[T]he necessity for a fact to be proved does not make the fact so in issue indefinite or uncertain.”).

¹¹⁰ Reed, *supra* note 38, at 4 (“[T]he degree of experience/skill with texting can vary considerably between individuals.”).

¹¹¹ See Bykowicz, *supra* note 105 and accompanying text (noting that the text messaging law may be difficult to enforce because “it [is] nearly impossible for a passing officer to tell if a driver was reading a message or sending one,” and discussing the relative infrequency with which law enforcement officers issue citations for text messaging while driving); Robert Salonga, *Drivers With Cell Phones Are Back to Old Ways*, CONTRA COSTA TIMES (Cal.), Nov. 15, 2009, at 18A (noting that it is harder for police to detect text messaging than it is for them to detect a violation of a hands-free law).

¹¹² In this author's experience, composing a text message with one hand more closely resembles scrolling through a contact list than drafting a text message. As such, composing a text message with one hand is likely to go undetected. Furthermore, this author's experiences indicate that detection of one-handed texting would require a law enforcement officer to observe a motorist engaged in the act for a substantial amount of time – compared to observing a motorist engaged in two-handed texting – before gaining the requisite probable cause to initiate a traffic stop. Kevin Landrigan, *Texting, Driving Bill OK'd*, TELEGRAPH (Nashua, N.H.), July 17, 2009, available at 2009 WLNR 13683012 (discussing a New Hampshire bill that makes it illegal “to send a text message or to use *two hands* operating a telecommunications device while driving.”) (emphasis added); see also N.H. REV. STAT. ANN. § 265:105-a (West, Westlaw through Ch. 55 of the 2010 Reg. Sess.).

advent of “flip-phones,”¹¹³ Blackberrys,¹¹⁴ and iPhones¹¹⁵ has made two-handed texting much more prevalent than one-handed texting because these phones are equipped with a QWERTY keyboard and are more conducive to writing with two hands than with one.¹¹⁶ Thus, it is likely that a police officer who pulls alongside a motorist holding a cell phone above the steering wheel while typing with both thumbs has the requisite probable cause to pull the motorist over and cite him for “writing” a text message.¹¹⁷

[35] But probable cause to initiate a traffic stop and cite a motorist for text messaging while driving is a far cry from proving beyond a reasonable doubt that the motorist was engaged in the criminal act.¹¹⁸ This

¹¹³ Flip phones look like regular cell phones “until you flip open the lid and expose . . . the thumb keyboard . . .” Lawrence M. Friedman, *Many Happy Returns*, 16 CBA REC. 42, 42 (2002).

¹¹⁴ “A Blackberry is a hand-held device that connects wirelessly to the Internet, providing e-mail, phone, and other communications capabilities.” Robert Sprague, *Orwell Was an Optimist: The Evolution of Privacy in the United States and Its De-evolution for American Employees*, 42 J. MARSHALL L. REV. 83, 85 n.11 (2008).

¹¹⁵ See Apple – iPhone 4, <http://www.apple.com/iphone/features/messages.html> (last visited Oct. 27, 2010). One newspaper has reported that “[i]n Maryland, questions have been raised about whether it would be illegal to use an iPhone while driving because it has a touch screen.” Jason Nevel, *Illinois Legislators Looking to Curb Cell Phone Use in Cars*, PANTAGRAPH (Bloomington, Ill.), Feb. 7, 2009, at A1. However, in this author’s opinion, there is no language in the current statutory scheme prohibiting the mere “use” of an iPhone without proof that the user engaged in writing, sending, or reading a text message.

¹¹⁶ See Bryan Druzin, *Buying Commercial Law: Choice of Law, Choice of Forum, and Network Externalities*, 18 TUL. J. INT’L & COMP. L. 131, 146 (2009) (noting that the QWERTY layout is standard for keyboards).

¹¹⁷ BLACK’S LAW DICTIONARY 1321 (9th ed. 2009) (defining probable cause as “[a] reasonable ground to suspect that a person has committed or is committing a crime . . .”).

¹¹⁸ See *Brinegar v. United States*, 338 U.S. 160, 174-75 (1949); *State v. Catt*, 839 So. 2d 757, (Fla. Dist. Ct. App. 2003) (“Probable cause is not the same standard as beyond a reasonable doubt . . .”); *State v. Cabral*, 859 A.2d 285, 300 (Md. Ct. Spec. App. 2004) (noting that beyond a reasonable doubt is a higher standard than probable cause); see also

flaw stems from the Maryland legislature's failure to address the fact that individuals use cellular phones for a plethora of activities aside from making telephone calls and sending text messages.¹¹⁹ While, perhaps at their inception, cell phones were used merely for making telephone calls, they "have become combination phone, pager, e-mail server, [I]nternet service provider, and planner."¹²⁰

[36] Furthermore, several phones like the iPhone¹²¹ boast hundreds of thousands of apps,¹²² and the majority of modern cell phones allow users to play various games.¹²³ Surely the use of a cell phone for these features does not fall under the umbrella of writing a text message.¹²⁴ Thus, the hill prosecutors must climb to prove that those individuals cited for writing a text message while driving were indeed engaged in the proscribed behavior – to the exclusion of all non-proscribed acts – is steep.

BLACK'S LAW DICTIONARY 1321 (9th ed. 2009) (defining probable cause); BLACK'S LAW DICTIONARY 1380 (9th ed. 2009) (defining reasonable doubt).

¹¹⁹ See Ross Chaffin, Comment, *The Growth of Cost-Shifting in Response to the Rising Cost and Importance of Computerized Data in Litigation*, 59 OKLA. L. REV. 115, 123 n.57 (2006).

¹²⁰ *Id.*; see Benjamin V. Madison, III, *The Elephant in Law School Classrooms: Overuse of the Socratic Method as an Obstacle to Teaching Modern Law Students*, 85 U. DET. MERCY L. REV. 293, 296 (2008) (noting that for members of the "Millennial Generation . . . Cellular phones are part of their lives – not just to answer calls whenever they may be on the planet, but to take photos, send e-mails, and even to search the Internet.").

¹²¹ See *supra* note 115.

¹²² An "app" is "an abbreviation of 'application,' which is something you put on your iPhone . . . to enable you to do various things with your phone." Gertrude Block, *Language for Lawyers*, 57 FED. LAW. 70, 70 (2010).

¹²³ See generally Scharper, *supra* note 1 (noting the ability to play games on a cell phone).

¹²⁴ See *id.* ("The law does not ban playing games or using applications."); Editorial, *supra* note 13 (indicating that under Maryland's text messaging law it is legal to use applications on your iPhone).

2. Sending

[37] The prohibition against sending a text message is an act separate and distinct from writing a text message, as statutes are “construe[d] . . . as a whole so that no word, clause, sentence, or phrase is rendered surplusage, superfluous, meaningless, or nugatory.”¹²⁵ The following analysis of the act of sending a text message demonstrates that whatever difficulties prosecutors have in proving a motorist engaged in *writing* a text message, they are likely to have even more trouble proving a motorist was *sending* a text message.

[38] The act of sending a text message often requires nothing more than the simple task of pressing a single button on the cell phone.¹²⁶ Thus, the act of sending a text message takes only a split-second to perform.¹²⁷ To initiate a traffic stop for sending a text message, then, a law enforcement officer must have probable cause that a text message is on the cell phone screen, and the officer must catch the driver during the split-second when he or she is sending the message.¹²⁸ But, again, having the probable cause to initiate a traffic stop and being able to prove beyond a reasonable doubt a motorist was sending a text message are two very different things.¹²⁹ Because sending a text message often involves a single keystroke, a defendant can argue that he was scrolling through his contacts, dialing a telephone number, accessing his calendar, or engaging in any other activity with his cell phone that involves a single keystroke and effectively establish reasonable doubt in the mind of the fact-finder.¹³⁰

¹²⁵ *Green v. Carr Lowery Glass Co.*, 921 A.2d 235, 241 (Md. 2007).

¹²⁶ See Mary Beth Marklein, *Colleges Catch Cell Phone Wave*, USA TODAY, Oct. 29, 2003, at 5D (“With a press of a button, he soon could be sending a text message to the cell phones of every student on campus.”).

¹²⁷ See *id.*; Goode, *supra* note 12, at 16 n.66.

¹²⁸ See *supra* notes 118, 126-27 and accompanying text.

¹²⁹ See *supra* note 118.

¹³⁰ See *supra* notes 119-24, 126 and accompanying text.

B. Vagueness

[39] Even if the prosecution can prove a motorist was writing or sending *something*, to sustain a conviction under § 21-1124.1 of the Transportation Article, it must still prove the motorist was writing or sending a *text message* within the meaning of the statute.¹³¹ But the legislature did not define text message, and it is otherwise unclear what constitutes a text message.¹³² As such, § 21-1124.1 is vague at best, and unconstitutionally vague at worst.

1. Vagueness Doctrine in Maryland

[40] Maryland courts have long held that “[a] criminal statute must be sufficiently explicit to enable a person of ordinary intelligence to ascertain with a fair degree of precision what it prohibits and what conduct on his part will render him liable to its penalties, or it will affront the constitutional guarantees of due process.”¹³³ A criminal statute is not void for vagueness, however, merely “because juries may differ in their judgments in cases brought under [the same] facts,”¹³⁴ or because “the statute is of questionable applicability in marginal situations”¹³⁵

¹³¹ See Md. Code Ann., Transp. § 21-1124.1 (West, Westlaw through 2010 Reg. Sess.).

¹³² See *id.*

¹³³ *McGowan v. State*, 151 A.2d 156, 160 (Md. 1959); see also *Gonzales v. Carhart*, 550 U.S. 124, 149 (2007) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)) (“[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”); *MacLeod v. Takoma Park*, 263 A.2d 581, 583 (Md. 1970) (“Due process is violated . . . when a statute is so vague that persons of ordinary intelligence must necessarily guess at its meaning and differ as to its application.”); *Greenwald v. State*, 155 A.2d 894, 898 (Md. 1959) (finding a statute “neither vague nor indefinite [nor an] affront [to] the constitutional guarantees of due process . . . because it is explicit enough to enable a person of ordinary intelligence to ascertain with a fair degree of certainty what it prohibits and what conduct on the offender’s part will render him liable to its penalties.”).

¹³⁴ *McGowan v. State*, 151 A.2d at 160.

¹³⁵ *Bowers v. State*, 389 A.2d 341, 346 (Md. 1978).

[41] A void-for-vagueness analysis is comprised of two criteria, the first of which is the fair notice principle, which stems from the notion that “[s]ince ‘vague laws may trap the innocent by not providing fair warning,’ . . . no one should be subject to criminal responsibility for conduct which he could not reasonably understand to be prohibited.”¹³⁶ The second criterion is whether the statute “fail[s] to provide legally fixed standards and adequate guidelines for police, judicial officers, triers of fact and others whose obligation it is to enforce, apply and administer the penal laws.”¹³⁷ Finally, and pertinent to this issue, is the notion that “whenever a criminal statute may, because of imprecise draftsmanship, impact upon free speech rights, the void-for-vagueness doctrine ‘demands a greater degree of specificity than in other contexts.’”¹³⁸

2. The Vagueness Doctrine and § 21-1124.1

[42] Intuitively, the best advice as to what constitutes a “text message” comes from the statutory scheme prohibiting motorists from sending them. However, § 21-1124.1 does not define text message.¹³⁹ Rather, the statute defines “text messaging device,” which it deems “a hand held device used to send a text message or an electronic message via a short message service, wireless telephone service, or electronic communication network.”¹⁴⁰ Thus, while it would make sense to reason that the definition of “text message” should be implicit in the definition of “text messaging device,” the legislature, unfortunately, failed to heed an age-old lesson: do not use a word to define itself. The legislature’s failure in this respect directly contributes to the statute’s inherent vagueness.

¹³⁶ State v. Levitt, 426 A.2d 383, 387 (Md. Ct. Spec. App. 1981) (citing *Bowers*, 389 A.2d at 341).

¹³⁷ *Id.*

¹³⁸ *Bowers*, 389 A.2d at 346 (quoting *Smith v. Goguen*, 415 U.S. 566, 573 (1974)); *see infra* Part IV.C (discussing the statute’s potential chilling effect on First Amendment speech).

¹³⁹ *See* MD. CODE ANN., TRANSP. § 21-1124.1 (West, Westlaw through 2010 Reg. Sess.).

¹⁴⁰ *Id.*

[43] What is clear is that the inclusion of the term “text message,” in addition to the phrase “an electronic message via a short message service [(SMS)],” reveals the legislature’s intent that the term “text messaging device” encompass something greater than a device used to send SMS messages.¹⁴¹ However, the statute does not outlaw the use of a “text messaging device;” rather it outlaws the use of a text messaging device to write or send a text message. Thus, there is no legislative guidance as to what constitutes a “text message.”

i. A “Message” Comprised of “Text”

[44] As Maryland courts have repeatedly stated, “[a] dictionary is a starting point in the work of statutory construction.”¹⁴² The Merriam-Webster Online Dictionary defines “text” as “the original words and form of a written or printed work.”¹⁴³ Thus, seemingly any letters produced by pressing the keys of a cell phone constitute “text.” The Merriam-Webster Online Dictionary defines “message” as “a communication in writing, speech, or by signals.”¹⁴⁴ Put together, then, the use of a cell phone to communicate in any way meets the dictionary definition of a text message. According to this definition, then, the use of a cell phone to post a message on Facebook or a tweet on Twitter, in addition to sending an e-mail or a standard SMS message, constitutes writing a “text message.” In fact, one could argue that any use of a cell phone to access the Internet

¹⁴¹ *Id.*; see Goode, *supra* note 12, at 16 n.66 (explaining that text messages are typically, but not exclusively, sent via SMS). SMS messages “allow[] a user to send a message consisting of a maximum of 160 characters from a cell phone or computer to another cell phone.” Alyssa H. DaCunha, *TXTS R SAFE 4 2DAY: Quon v. Arch Wireless and the Fourth Amendment Applied to Text Messages*, 17 GEO. MASON L. REV. 295, 299 (2009).

¹⁴² Bd. of License Comm’rs v. Toye, 729 A.2d 407, 410 (Md. 1999) (quoting *Morris v. Prince George’s Cnty.*, 573 A.2d 1346, 1350 (Md. 1990)); see also Bd. of License Comm’rs v. Global Exp. Money Orders, Inc., 896 A.2d 432, 437 (Md. Ct. Spec. App. 2006).

¹⁴³ Text, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/text> (last visited Oct. 28, 2010).

¹⁴⁴ Message, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/message> (last visited Oct. 28, 2010).

constitutes sending a text message, as the Internet is a form of “electronic communications network,” and one “communicates” using text whenever he accesses the Internet with a cell phone.¹⁴⁵

ii. Common Understanding

[45] While strict dictionary definitions are a “useful starting point,”¹⁴⁶ such definitions “are not dispositive as to the meaning of statutory terms,”¹⁴⁷ and are “not necessarily the end” of a statutory construction analysis.¹⁴⁸ A bedrock rule of statutory construction is that courts interpret statutory language to conform to its plain meaning; that is, they interpret a statute according to the “ordinary and commonly understood meaning” of its words.¹⁴⁹

[46] The commonly understood meaning of “text message,” however, does not nearly encompass the plethora of activities falling within the aggregated dictionary definitions of “text” and “message.”¹⁵⁰ In common parlance, the term “text message” does not include using a cell phone to

¹⁴⁵ Internet, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/internet> (last visited Oct. 28, 2010) (emphasis added). Such a reading is in line with another rule of statutory construction; namely, that courts define words by looking at how they fit into “the context of the statute in light of the setting, the objectives, and the purpose of the enactment.” *Sabatier v. State Farm Mut. Ins. Co.*, 592 A.2d 1098, 1107 (Md. 1991). That is, in passing the texting legislation, the Maryland legislature sought to deal with the problem of “driver inattention,” and one could argue drivers are most inattentive when using their cell phones to access the Internet. See Fiscal and Policy Note – House Bill 72, available at http://mlis.state.md.us/2009rs/fnotes/bil_0002/hb0072.pdf.

¹⁴⁶ *Stachowski v. Sysco Food Servs. of Balt., Inc.*, 937 A.2d 195, 206 (Md. 2007).

¹⁴⁷ *Id.*

¹⁴⁸ *Bd. of License Comm’rs v. Toye*, 729 A.2d 407, 410 (Md. 1999) (quoting *Morris v. Prince George’s Cnty.*, 573 A.2d 1346, 1350 (Md. 1990)).

¹⁴⁹ *Elder v. Smith*, 987 A.2d 36, 41 (Md. 2010) (quoting *Addison v. Lochearn Nursing Home, LLC*, 983 A.2d 138, 153 (Md. 2009)).

¹⁵⁰ See *supra* Part IV.B.2.i.

post on Facebook, tweet on Twitter, or even send e-mails.¹⁵¹ Rather, in this author's experience, the term most commonly refers to the sending of a message from one cell phone to another. Whereas the verbs "post" and "tweet" refer to Facebook and Twitter posts, respectively, the words "text" or "texting" refer to sending messages from one cell phone to another.¹⁵² Such an understanding of the term is consistent with the Merriam-Webster Online Dictionary, which defines "text messaging" as "the sending of short text messages electronically especially from one cell phone to another."¹⁵³ Thus, according to this definition, none of the aforementioned activities constitute "text messaging" as none of them involve sending a message from one cell phone to another; they entail sending a message from a cell phone to an Internet server.

[47] After all of this, what do we know? The only thing this author can say with any degree of confidence is that the term "text message" encompasses SMS messages.¹⁵⁴ Aside from this limited understanding, we have an expansive view of the term stemming from dictionary definitions of "text" and "message," a view at odds with the common understanding and usage of the term.¹⁵⁵ While the legislature is free to word penal statutes "by a general term without definition," it may only do

¹⁵¹ Regarding a 2010 bill prohibiting motorists from merely reading text messages, a state legislator noted that "[w]ith features like mapping, social media, e-mail and Web browsing, there are too many temptations for drivers when their phones are in front of them . . ." Bykowicz, *supra* note 105. Such a statement permits the inference that the legislator does not believe the 2009 bill prohibits the aforementioned activities.

¹⁵² See Statement of Rights and Responsibilities, FACEBOOK, <http://www.facebook.com/terms.php?ref=pf> (last visited Oct. 29, 2010) ("By 'post' we mean post on Facebook or otherwise make available to us."); The Twitter Glossary, TWITTER, <http://support.twitter.com/groups/31-twitter-basics/topics/104-welcome-to-tittersupport/articles/166337-the-twitter-glossary#t> (last visited Oct. 29, 2010) ("Tweet, Tweeting, Tweeted. The act of posting a message, often called a 'Tweet,' on Twitter.").

¹⁵³ Text Messaging, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/text%20messaging> (last visited Oct. 29, 2010).

¹⁵⁴ See Goode, *supra* note 12, at 16 n.66 (explaining that text messages are typically, but not exclusively, sent via SMS); DaCunha, *supra* note 141.

¹⁵⁵ See *supra* notes 143-45, 150-53 and accompanying text.

so “if the term has a settled common-law meaning and a commonly understood meaning which does not leave a person of ordinary intelligence in doubt as to its purport”¹⁵⁶ However, “text message” does not have a common-law definition, and, as the previous discussion reveals, the likely definition of the term would “leave a person of ordinary intelligence in doubt as to its purport”¹⁵⁷

[48] It is questionable whether Maryland citizens have fair notice of what activity is criminal under § 21-1124.1.¹⁵⁸ The Court of Appeals of Maryland has held that a law survives a vagueness challenge if the citizens are “perfectly capable, without having to guess, of understanding [the statute’s] meaning and application.”¹⁵⁹ Because the statute’s bare text messaging statute leaves Maryland citizens, at best, guessing what conduct is prohibited, Maryland courts may find it unconstitutionally vague. Furthermore, this murkiness fails to provide a fixed standard for police officers charged with enforcing the texting ban and judges and juries charged with determining guilt beyond a reasonable doubt.¹⁶⁰

3. Vagueness and Other Jurisdictions’ Cell Phone Bans

[49] The argument that a law restricting motorists’ use of cell phones is unconstitutional is not without precedent, as such bans “have been the subject of constitutional challenges since their inception”¹⁶¹ For instance, legislative efforts in Michigan failed because of fears that such a law might restrict privacy rights and personal freedoms, and numerous

¹⁵⁶ State v. Magaha, 32 A.2d 477, 481 (Md. 1943).

¹⁵⁷ *Id.*

¹⁵⁸ See *supra* notes 136-38 and accompanying text; see also MD. CODE ANN., TRANSP. § 21-1124.1 (West, Westlaw through 2010 Reg. Sess.) (lacking a definition for text message).

¹⁵⁹ Fogle v. H & G Rest., Inc., 654 A.2d 449, 467 (Md. 1995).

¹⁶⁰ The second factor in a void-for-vagueness analysis. See State v. Levitt, 426 A.2d 383, 387 (Md. Ct. Spec. App. 1981) (citing *Bowers*, 389 A.2d at 341).

¹⁶¹ Wallin, *supra* note 32, at 186.

United States Congressmen expressed concern that laws limiting cell phone use might implicate First Amendment freedom of speech rights.¹⁶²

[50] By way of example, in *People v. Neville*, the New York Justice Court charged a defendant with using a cell phone while operating a motor vehicle.¹⁶³ This was in violation of a New York State statute providing that “no person shall operate a motor vehicle upon a public highway while using a mobile telephone to engage in a call while such vehicle is in motion.”¹⁶⁴ The defendant argued, *inter alia*, that the statute was vague, overbroad, and in violation of the New York State and United States Constitutions.¹⁶⁵ After enunciating a vagueness standard similar to that of Maryland,¹⁶⁶ the court explained that the statute properly distinguished “between the prohibited ‘mobile telephones’ and the permitted ‘hands free mobile telephone’ where the operator of the motor vehicle can maintain ‘both hands’ on the applicable steering device.”¹⁶⁷ After noting that the statute initially limited police action to a verbal warning, the court concluded that the language of the statute was “clear and indisputable to

¹⁶² Noder, *supra* note 30, at 248 & n.54.

¹⁶³ 737 N.Y.S.2d 251, 253 (N.Y. Just. Ct. 2002).

¹⁶⁴ N.Y. VEH. & TRAF. LAW § 1225-c(2)(a) (McKinney, Westlaw through L.2010 (chs. 1-55, 61-110)); *see supra* note 71 and accompanying text (noting the Maryland legislature’s efforts to pass a similar bill in 2010).

¹⁶⁵ *Neville*, 737 N.Y.S.2d at 254.

¹⁶⁶ *See id.* (citing *People v. Shack*, 658 N.E.2d 706, 712 (N.Y. 1995) (“The first question of consideration is if the law is so vague or overly broad to the point where a reasonable person of ordinary intelligence would be unable to ascertain what conduct is prohibited.”)).

¹⁶⁷ *Id.* (quoting N.Y. VEH. & TRAF. LAW § 1225-c(1)(e) (McKinney, Westlaw through L.2010 (chs. 1-55, 61-110))).

the ordinary citizen.”¹⁶⁸ Thus, the statute was held to be neither “void for vagueness nor overly broad.”¹⁶⁹

[51] Of course, § 21-1124.1 of the Transportation Article, as it stands today, is distinguishable from the statute with which the *Neville* court dealt. While some might take issue with a statute outlawing hand-held phones for purposes of making a call,¹⁷⁰ citizens of New York are on fair notice that using a cell phone without a hands-free device while driving is a violation of § 1225-c of New York’s Vehicle and Traffic law because nothing in the New York statute is vague, overbroad, or ambiguous.¹⁷¹ But it is unclear what behavior Maryland’s § 21-1124.1 prohibits. Does it apply to e-mail? Blackberry Messenger? Cell-phone-based GPS? Neither the citizens of Maryland, the law enforcement agencies responsible for enforcing the statute, nor the judges and juries charged with determining guilt have any guidance. As such, application of the New York court’s holding in *Neville* to the Maryland statute would be misplaced.

C. Chilling Effect

[52] The vagueness doctrine is inextricably linked with the chilling effect vague statutes exert on non-proscribed behaviors.¹⁷² As the Court of

¹⁶⁸ *Id.* The court believed that the legislature provided a one-month warning period “[a]s an added concern for public knowledge and understanding of the law” *Id.*

¹⁶⁹ *Id.*; see also *Schor v. Daley*, 563 F. Supp. 2d 893, 904-05 (N.D. Ill. 2008) (holding that an ordinance of the City of Chicago, which prohibited the use of a mobile telephone while operating a motor vehicle, was not void for vagueness).

¹⁷⁰ See generally *Jensen*, *supra* note 81 (describing a study that concluded laws outlawing cell phone use while driving failed to reduce the incidence of traffic accidents).

¹⁷¹ See *Neville*, 737 N.Y.S.2d at 254.

¹⁷² See, e.g., *Cole v. Richardson*, 405 U.S. 676, 689 n.3 (1972) (noting that a statute is void for vagueness where “the common meaning of its words is so imprecise . . . as to place a ‘chilling effect’ upon constitutionally protected expression”); *Walker v. City of Birmingham*, 388 U.S. 307, 345 (1967) (noting the Supreme Court’s “overriding duty to insulate all individuals from the ‘chilling effect’ upon exercise of First Amendment freedoms generated by vagueness . . .”).

Appeals of Maryland noted, “the Supreme Court has stated that whenever a criminal statute may, because of imprecise craftsmanship, impact upon free speech rights, the void-for-vagueness doctrine ‘demands a greater degree of specificity than in other contexts.’”¹⁷³ As such, because the vagueness of Maryland’s statute might cause motorists to abstain from First Amendment behaviors otherwise permissible under § 21.1124.1, the likelihood of the chilling effect is high.

[53] It should be undisputed that the behaviors that potentially constitute sending a text message – SMS texting, e-mailing, messaging on Blackberry Messenger, posting on Facebook or Twitter, etc. – are forms of speech subject to protection by the Maryland Declaration of Rights and the First Amendment to the United States Constitution.¹⁷⁴ This is evidenced by Maryland courts’ long-standing holding that “[i]t is the substance rather than the form of communication to which the First Amendment protection attaches. . . .”¹⁷⁵ Thus, whether the protected expression is an individual voicing his opinion on a street corner, or an individual posting to a Facebook wall or Twitter account via cell phone, the expression is entitled to protection.

[54] It is of note that the freedom of speech is not an unlimited and unqualified right, and courts will uphold a statute challenged on First Amendment grounds “if it furthers an important or substantial government interest.”¹⁷⁶ While this is true – and certainly, the Maryland legislature

¹⁷³ *Bowers*, 389 A.2d at 346 (quoting *Smith*, 415 U.S. at 573).

¹⁷⁴ The Maryland Declaration of Rights provides, “that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects.” MD. CONST., DECL. OF RIGHTS, art. 40; *see also* *Runnels v. Newell*, 944 A.2d 1183, 1208 (Md. Ct. Spec. App. 2008) (noting that the rights available under the Maryland Declaration of Rights are the same as those protected by the First Amendment). The First Amendment to the United States Constitution, applicable to the states via the Fourteenth Amendment to the United States Constitution, provides that “Congress shall make no law . . . abridging the freedom of speech . . .” U.S. CONST. amend. I.

¹⁷⁵ *Luthardt v. State*, 251 A.2d 40, 44 (Md. Ct. Spec. App. 1969).

¹⁷⁶ *United States v. O’Brien*, 391 U.S. 367, 377 (1968); *accord* *State v. Sheldon*, 629 A.2d 753, 758 (Md. 1993).

sought to further an important and substantial government interest with this legislation – it is the legislature’s responsibility to enact a well-drafted statute.¹⁷⁷ Where the legislature fails in that endeavor, the courts must be careful not to construe the statute too broadly simply because of a well-intended and worthwhile legislative purpose.¹⁷⁸

[55] After understanding the inherent vagueness of § 21-1124.1, grasping the mechanics of the chilling effect as it relates to the texting statute is relatively simple.¹⁷⁹ It is this author’s opinion that a fair construction of the statute prohibits the sending of SMS and similar phone-to-phone messages. However, the average citizen, upon reading that the writing or sending of text messages is prohibited, could reasonably conclude that writing or sending any messages comprised of text is prohibited.¹⁸⁰ As such, citizens will likely refrain from permissible activities, including e-mailing and posting on a Facebook wall or Twitter account. This result, while perhaps making Maryland’s roadways safer, is actually the result of the chilling effect on otherwise protected speech stemming from this poorly drafted and vague statute.¹⁸¹ Thus, § 21-1124.1 not only fails to provide citizens with fair notice of what constitutes prohibited conduct, but it threatens to prevent citizens from engaging in otherwise non-proscribed speech.

V. REASON FOR HOPE: NEW LEGISLATION

[56] During the 2010 legislative session, the Maryland legislature introduced House Bill 385, which would have remedied many of the aforementioned ills of the current legislation.¹⁸² This bill would have

¹⁷⁷ See *Taylor v. Nationsbank*, 776 A.2d 645, 654 (Md. 2001).

¹⁷⁸ See *id.*

¹⁷⁹ See *supra* Parts IV.B. and C.

¹⁸⁰ See *supra* Part IV.B.

¹⁸¹ See *supra* Part IV.C.

¹⁸² Smartphone Safety Act, H.B. 385, 2010 Leg., 427th Sess. (Md. 2010), available at <http://mlis.state.md.us/2010rs/bills/hb/hb0385f.pdf>.

provided a more useful and effective text-messaging prohibition, from both an enforcement and constitutional perspective. The text of the proposed bill dictated that:

[A] person, while operating a motor vehicle that is in motion, may not use a wireless communication device to: (1) type, send or read an electronic message, including a text message; (2) search for or read content on the Internet; (3) access or update social networking websites; (4) takes photographs; (5) play video games; (6) download any content; (7) view any video content; or (8) engage in any other use of a wireless communication device not explicitly authorized.¹⁸³

Unfortunately for Maryland citizens, this bill was not even taken to vote by the House Environmental Matters Committee, let alone adopted to amend the law.¹⁸⁴

[57] Regarding enforcement, the main problem with the current legislation is the difficulty law enforcement personnel and prosecutors have proving a motorist engaged in the narrow class of acts constituting writing or sending a text message.¹⁸⁵ However, House Bill 385, proposed to repeal and reenact § 21-1124.1 in its current form, the class of proscribed behavior would be widened considerably, with only a few circumstances in which a motorist may operate a wireless communication device.¹⁸⁶ As such, the bill provides law enforcement officers and prosecutors additional weapons in their repertoire from which they may successfully prosecute motorists who violate the statute.¹⁸⁷ In fact, this

¹⁸³ *Id.*

¹⁸⁴ See H. Envtl. Matters Comm., Voting Record, H.B. 385, 2010 Leg., 427th Sess. (Md. 2010), available at http://mlis.state.md.us/2010rs/votes_comm/hb0385_env.pdf.

¹⁸⁵ See *supra* Part IV.A.

¹⁸⁶ H.B. 385, 2010 Leg., 427th Sess. (Md. 2010).

¹⁸⁷ H.B. 385, 2010 Leg., 427th Sess. (Md. 2010).

expanded list of acts in which motorists may not longer engage is in line with the legislative purpose underlying § 21-1124.1: combating driver inattention.¹⁸⁸

[58] More importantly, passing a bill similar to House Bill 385 would help cure the vagueness plaguing the current legislation. Because the term “text message” has a very specific and limited colloquial meaning under House Bill 385 – an SMS text message – reviewing courts will, of course, utilize this meaning to determine what constitutes a text message.¹⁸⁹ But, by precluding motorists from “typ[ing], send[ing], or read[ing] an *electronic message*, including text messages,” the legislation would clearly identify the parameters of prohibited behavior.¹⁹⁰ This language not only prohibits “text messages” as they are commonly understood, but any form of electronic message. As such, the legislation would provide Maryland citizens with fair notice that they are susceptible to criminal liability if they send any form of electronic message while driving.¹⁹¹ To provide further clarity, the legislation should explicitly enumerate which behaviors are prohibited and which behaviors are allowed. This would put Maryland citizens in the best position to understand which behaviors lead to a misdemeanor citation.¹⁹² Finally, compared to legislation outlawing merely the writing or sending of text messages, the use of the term “electronic message,” as seen in proposed House Bill 385, provides law enforcement officers, prosecutors, and judges, with a workable, straightforward standard to apply in enforcing and prosecuting the law.¹⁹³

¹⁸⁸ See Fiscal and Policy Note – House Bill 72, available at http://mlis.state.md.us/2009rs/fnotes/bil_0002/hb0072.pdf.

¹⁸⁹ Because House Bill 385 sets forth an enumerated list of proscribed behavior, the inference may drawn that the term text message is limited to SMS messages. H.B. 385, 2010 Leg., 427th Sess. (Md. 2010).

¹⁹⁰ H.B. 385, 2010 Leg., 427th Sess. (Md. 2010) (emphasis added).

¹⁹¹ See *supra* note 136 and accompanying text.

¹⁹² See generally *supra* notes 133-36 and accompanying text.

¹⁹³ See generally *supra* notes 137 and accompanying text.

[59] House Bill 385 would likely serve as an analog to the statute reviewed in *People v. Neville*.¹⁹⁴ That is, the statute in *Neville* was a catchall statute prohibiting motorists from “using a mobile telephone to engage in a call while such vehicle is in motion.”¹⁹⁵ Similarly, House Bill 385 prohibits motorists from “engag[ing] in any other use of a wireless communication device not explicitly authorized.”¹⁹⁶ And just as the New York court determined its statute was not vague or overbroad,¹⁹⁷ Maryland courts would likely reach a similar conclusion with respect to proposed House Bill 385.

VI. CONCLUSION

[60] Because cell phones have become an integral component of global culture, “drivers mistakenly assume they can be used safely while operating a motor vehicle.”¹⁹⁸ But the reality is that distracted drivers pose a serious hazard toward other drivers, passengers, and pedestrians alike.¹⁹⁹ The ideal solution to curtail distracted driving is likely one involving “concerted action at every level of government” – action combining legislation, education, and possibly manufacturer design changes.²⁰⁰ However, it is ultimately up to “[s]ociety and legislatures [to] decide the appropriate scope of cell phone legislation.”²⁰¹ Certainly, bans on texting while driving are no exception.²⁰²

¹⁹⁴ See generally 737 N.Y.S.2d 251.

¹⁹⁵ See *id.* at 254 (quoting N.Y. VEH. & TRAF. LAW § 1225-c(2)(a) (McKinney, Westlaw through L.2010 (chs. 1-55, 61-110))).

¹⁹⁶ Smartphone Safety Act, H.B. 385, 2010 Leg., 427th Sess. (Md. 2010), available at <http://mlis.state.md.us/2010rs/bills/hb/hb0385f.pdf>.

¹⁹⁷ *Neville*, 737 N.Y.S.2d at 254.

¹⁹⁸ Jacobson, *supra* note 22, at 1419.

¹⁹⁹ See *id.* (“The National Highway Traffic Safety Administration (NHTSA) reported that 5870 persons died (16% of all fatalities) and an estimated 515,000 individuals were injured in police-reported crashes involving driver distraction in 2009.”).

²⁰⁰ *Id.* at 1419-20.

²⁰¹ Kalin, *supra* note 74, at 262.

[61] In passing Transportation Article § 21-1124.1, the Maryland legislature was derelict with its onus to combat distracted driving vis-à-vis text messaging. While courts are at liberty to analyze and construe ambiguous statutes – “[i]t is one of the principal functions which courts were created to perform”²⁰³ – some statutes are so ambiguous and unworkable that courts should declare them void for vagueness.

[62] Legislators passed § 21-1124.1 to show their constituents they were doing their part to make Maryland’s roads safer.²⁰⁴ But this statute engenders nothing more than a false sense of security, has the potential to hinder future legislative efforts to combat texting while driving and is likely impossible to enforce.²⁰⁵ Its invocation of the term text message to define prohibited conduct deprives Maryland citizens of fair notice as to what conduct is criminal and forces law enforcement officers, prosecutors, and judges to apply an unworkable standard.²⁰⁶ To cure these ills Maryland legislators should enact House Bill 385, which unequivocally informs citizens, law enforcement officers, prosecutors, and judges of the prohibited conduct. Only then will Maryland’s citizens stop TXTing²⁰⁷

²⁰² See *id.* But see Wallin, *supra* note 32, at 177 (arguing in its title that a “Legislative Ban is Not The Answer”).

²⁰³ *Mangum v. Md. State Bd. of Censors*, 328 A.2d 283, 292 (Md. 1974).

²⁰⁴ See Michael Dresser, *Cell Phone Curb Begins*, BALT. SUN, May 22, 2009, at 1A (quoting Governor Martin O’Malley as saying, “This legislative session, we passed tough new laws to improve safety on our roadways by cracking down on drunken driving, speeding and texting.”).

²⁰⁵ See *supra* Part IV.A.

²⁰⁶ See *supra* Part IV.B.

²⁰⁷ TXT stands for “Text.” See Definition of TXT, ONLINE SLANG DICTIONARY, <http://onlineslangdictionary.com/definition+of/txt> (last visited Oct. 29, 2010); Mark Henderson, *A Race to the Wire as Old Hand at Morse Code Beats Txt Msgs*, THE TIMES, (April 16, 2005) available at <http://www.timesonline.co.uk/tol/news/uk/article381748.ece>.

and tell their friends that they GTG²⁰⁸ when getting behind the wheel of a car.

²⁰⁸ See *Texting Teens Get Message*, INDIANAPOLIS STAR, at W1, (Jul. 15, 2010) (“GTG is a texting acronym that stands for ‘got to go.’”).