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Texting While Driving Meets the Fourth Amendment: Deterring Both Texting and Warrantless Cell Phone Searches

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TEXTING WHILE DRIVING MEETS THE FOURTH AMENDMENT: DETERRING BOTH TEXTING AND WARRANTLESS CELL PHONE SEARCHES

Adam M. Gershowitz*

Recent laws criminalizing texting while driving are under-inclusive, ambiguous, and impose light punishments that are unlikely to deter. At the same time, the laws empower police to conduct warrantless searches of drivers' cell phones. Texting while driving is dangerous and should be punished with stiff fines, possible jail time, license suspensions, and interlock devices that prevent use of phones while driving. However, more severe punishment will not eliminate police authority to conduct warrantless cell phone searches. This Article therefore proposes that legislatures allow drivers to immediately confess to texting while driving in exchange for avoiding a search of their phones. Trading a confession for a search will encourage guilty pleas while reducing invasive, warrantless cell phone searches that are currently authorized under the Fourth Amendment.

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INTRODUCTION

Texting while driving causes thousands of deaths every year,¹ and studies have shown it to be more dangerous than drunk driving.² In response, legislatures in dozens of states have recently imposed restrictions on cell phone use while driving.³ While the explosion of legislative activity is commendable, most of the statutes are badly flawed. In their haste to stop texting while driving, some legislatures have failed to prohibit other dangerous cell phone use, such as e-

1. See Fernando A. Wilson & Jim P. Stimpson, *Trends in Fatalities from Distracted Driving in the United States, 1999 to 2008*, 100 AM. J. PUB. HEALTH 2213, 2215–16 (2010) (estimating that texting while driving resulted in more than 16,000 highway deaths between 2001 and 2007).

2. See *infra* notes 31–34 and accompanying text.

3. See *infra* notes 44–52 and accompanying text.

mailing or using Facebook while driving.⁴ Other states have set fines so low—for instance, \$20 in Virginia and California⁵—that texting while driving more closely resembles a parking ticket than a comparably dangerous activity such as drunk driving.⁶

At the same time that states treat texting while driving as a trivial offense, the existence of these laws gives tremendous power to police officers to conduct invasive and warrantless searches of drivers' cell phones. Under the search incident to arrest doctrine, police are entitled to search everything on a person, following a lawful arrest, even if the arrest is only for a low-level traffic offense.⁷ Over the last few years, dozens of courts have held that cell phones are just like any other container found on a person and can therefore be searched incident to arrest without a warrant.⁸ Accordingly, drivers who have their cell phones on their person can be arrested for any offense—including texting while driving—and have the full contents of the phone searched incident to arrest. In fact, even if the cell phone is in the vehicle, rather than on the driver's person, police have authority to search it incident to arrest.⁹

Even beyond the search incident to arrest doctrine, officers have power under the Fourth Amendment's automobile exception to conduct warrantless

4. See, e.g., MD. CODE ANN., TRANSP. § 21-1124.1 (2012); see also Alan Lazerow, *Near Impossible to Enforce at Best, Unconstitutional at Worst: The Consequences of Maryland's Text Messaging Ban on Drivers*, 17 RICH. J.L. & TECH. 1, 1–6, 29–32 (2010) (“Assuming, *arguendo*, it is clear what constitutes a text message, 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.” (footnote omitted)).

5. E.g., CAL. VEH. CODE § 23123(b) (2012) (“A violation of this section is an infraction punishable by a base fine of twenty dollars (\$20) for a first offense . . .”); VA. CODE ANN. § 46.2-1078.1(D) (2012) (“A violation of any provision of this section shall constitute a traffic infraction punishable, for a first offense, by a fine of \$20 . . .”).

6. For a review of the penalties for first-offense drunk driving, see Adam M. Gershowitz, *12 Unnecessary Men: The Case for Eliminating Jury Trials in Drunk Driving Cases*, 2011 U. ILL. L. REV. 961, 967–69.

7. See *United States v. Robinson*, 414 U.S. 218, 224–27, 235–36 (1973).

8. See Adam M. Gershowitz, *Password Protected? Can a Password Save Your Cell Phone From a Search Incident to Arrest?*, 96 IOWA L. REV. 1125, 1137 n.66 (2011) (cataloging dozens of cases).

9. Pursuant to the Supreme Court's decision in *Arizona v. Gant*, police are permitted to search a vehicle incident to a lawful arrest when it is reasonable to believe evidence of the crime of arrest could be found in the vehicle. 556 U.S. 332, 335 (2009). This new rule seemingly forbids searches of the vehicle after arrests for low-level traffic infractions (think of running a stop sign or failing to signal) because there would be no evidence of the traffic infraction anywhere inside the vehicle. Yet, if a driver is arrested for texting while driving and his phone is sitting on the front seat of the car, it is reasonable to believe there is evidence of texting in the phone. And if texting-while-driving statutes are drafted broadly (as they should be) to prohibit e-mailing, Internet browsing, and other applications while driving, police would be permitted to search through almost the entire phone without a warrant.

searches of phones when texting while driving is suspected.¹⁰ If police have probable cause, they can open any container in an automobile without a warrant.¹¹ Because courts consider cell phones to be electronic containers,¹² police can conduct warrantless searches of cell phones found in vehicles.¹³ Under the automobile exception, police officers do not even need to arrest the driver to search her phone. In states that have forbidden a wide array of cell phone uses while driving—for example, texting, e-mailing, Internet browsing, and other functions—police seemingly have authority to search through the entire contents of the phone, even if the crime is only a low-level misdemeanor.¹⁴

As matters now stand, the cost-benefit analysis behind criminalizing texting-while-driving statutes is misguided.¹⁵ Many texting-while-driving statutes are under-inclusive and impose penalties that are too lenient to deter dangerous cell phone use. On the other hand, texting-while-driving statutes have opened the door to police roaming through reams of private cell phone data to gather evidence about misdemeanor traffic offenses. To put it differently, most texting-while-driving statutes authorize a million-dollar search for evidence of a twenty-dollar crime.

Because texting while driving is dangerous behavior that merits comprehensive prohibition and stiff penalties, I do not suggest abandoning criminal penalties for cell phone use while driving. Rather, legislatures should more comprehensively criminalize and more severely punish texting while driving. At the same time, statutes should be designed to drastically reduce police officers' authority to conduct warrantless (and possibly pretextual) searches of cell phones in the name of proving texting while driving allegations.

To deter dangerous cell phone use, legislatures should treat texting while driving similar to drunk driving. This means, first of all, increasing fines and

10. Numerous courts have upheld searches of cell phones under the automobile exception in other contexts. *See infra* note 141.

11. *See California v. Acevedo*, 500 U.S. 565, 579 (1991).

12. *See, e.g., United States v. Finley*, 477 F.3d 250, 259–60 (5th Cir. 2007); *United States v. Wurie*, 612 F. Supp. 2d 104, 109–10 (Mass. Dist. Ct. 2009) (“I see no principled basis for distinguishing a warrantless search of a cell phone from the search of other types of personal containers found on a defendant’s person . . .”); *see also Adam M. Gershowitz, The iPhone Meets the Fourth Amendment*, 56 UCLA L. REV. 27, 39–40 (2008).

13. *See infra* Part III.B.

14. *See Donald A. Dripps, The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules*, 74 MISS. L.J. 341, 392–93 (2004) (describing how the Supreme Court has created an “Iron Triangle” of bright-line rules that gives the police “general search power over anyone traveling by automobile” even for trivial violations).

15. Because it is easy to see when other drivers are texting and it is natural to form personal conclusions, the cost-benefit calculus is often not carefully considered. For an early criticism of cell phone laws in this regard, *see Robert W. Hahn & Patrick M. Dudley, The Disconnect Between Law and Policy Analysis: A Case Study of Drivers and Cell Phones*, 55 ADMIN. L. REV. 127, 168–78 (2003).

authorizing jail time for the most serious violators.¹⁶ Second, individuals convicted of texting while driving should forfeit their driver's licenses for a period of time, just like convicted drunk drivers.¹⁷ Third, just as some convicted drunk drivers are required to install ignition interlocks that prevent them from starting their vehicles with alcohol on their breath,¹⁸ texting while driving offenders should be required to install one of the many inexpensive products that prevent cell phones from operating while a vehicle is in motion.¹⁹ These tougher drunk-driving style punishments all make sense in light of the danger posed by texting while driving.

However, tougher punishments alone are not sufficient. Social scientists have long found that the severity of punishment is less important than certainty of punishment in deterring undesirable behavior.²⁰ And tougher punishments do not address the problem of police officers having authority to search enormous amounts of sensitive cell phone data for a misdemeanor traffic offense. Accordingly, legislatures should set up a framework in which drivers would have an incentive to plead guilty more often and more quickly while simultaneously restricting police officers' ability to search cell phones. To do that, legislatures should encourage drivers to provide a confession to the texting while driving charge in exchange for avoiding a search of the cell phone. Officers would first be required to give suspects the option to sign a standard written confession acknowledging that they were texting while driving. Drivers would be informed that signing the confession would eliminate the officers' right to search the cell phone. If, however, the suspect refused to sign the confession, the officer would be free, if she thought it necessary, to search the cell phone for evidence of texting while driving.

16. With the exception of New Hampshire and Pennsylvania, every state in the nation authorizes jail time—ranging from a few days to more than two years incarceration—for first-time drunk driving offenders. See Gershowitz, *supra* note 6, at 967–68.

17. See, e.g., Chuck Stanfield, *Drivers' License Consequences of a DWI Arrest*, 43 HOUS. LAW., Nov./Dec. 2005, at 18, 18 (2005) (discussing Texas's suspension period of 90 days to one year).

18. See Gregory T. Neugebauer, *Alcohol Ignition Interlocks: Magic Bullet or Poison Pill*, 2 U. PITT. J. TECH. L. & POL'Y 2, 2 (2002) (noting, almost a decade ago, how 40 states utilized interlock devices for repeat drunk drivers).

19. For example, one product on the market is "Textecution," an application that can be installed for a one-time fee of \$29.99, which disables the text message function once the phone is traveling at more than 10 miles per hour. See *How Does It Work?*, TEXTECUTION, http://www.textecution.com/how_does_it_work.php (last visited July 29, 2012). For additional, less-expensive products, see *infra* notes 196–98 and accompanying text.

20. See, e.g., ANDREW VON HIRSCH ET AL., *CRIMINAL DETERRENCE AND SENTENCE SEVERITY: AN ANALYSIS OF RECENT RESEARCH* 47 (1999) (reviewing the literature and concluding that "there are consistent and significant negative correlations between likelihood of conviction and crime rates"); Robert Apel & Daniel S. Nagin, *General Deterrence: A Review of Recent Evidence*, in OXFORD HANDBOOK OF CRIME AND CRIMINAL JUSTICE 179, 180 (Michael Tonry ed., 2011) ("There is substantial evidence from a diverse literature that increases in the certainty of punishment substantially deters criminal behavior."); Gershowitz, *supra* note 6, at 989–93 (reviewing additional literature).

Exchanging a confession for a search of the cell phone serves two purposes. First, it will encourage texting while driving defendants to plead guilty (and to do so faster than they otherwise would) because it will be very difficult to challenge a written confession at trial. Increasing the certainty and speed of guilty pleas should improve the deterrent effect of texting-while-driving laws. Second, encouraging confessions in lieu of cell phone searches will prevent officers from conducting unnecessary, invasive, and warrantless cell phone searches that could expose private data unrelated to the texting-while-driving allegation. In short, legislatures can better deter dangerous activity while simultaneously reducing warrantless searches of very private information.

Part I of this Article briefly reviews the danger posed by texting while driving to demonstrate the need to criminalize and seriously punish it. Part II then analyzes the texting-while-driving statutes enacted in recent years and exposes the flaws in many of these statutes—namely, that they are under-inclusive and impose punishments that are too lenient. Part III then explores the broad authority police have to conduct warrantless cell phone searches under the automobile and search incident to arrest exceptions. Finally, Part IV lays out a framework for enhancing the certainty, celerity, and severity of texting-while-driving punishments, while simultaneously reducing the number of warrantless cell phone searches. Part IV also explains the novelty of exchanging confessions for cell phone searches and responds to objections that the framework would amount to unconstitutional coercion.

I. THE DANGERS OF CELL PHONE USE, AND TEXTING IN PARTICULAR, ARE CONSIDERABLE

A 2003 study by the Harvard Center for Risk Analysis attributed 2,600 deaths and more than 330,000 other injuries per year to cell phone use while driving.²¹ Those numbers have risen dramatically as cell phones have become more ubiquitous. By 2005, the California Highway Patrol logged data showing that cell phones were the top distraction leading to traffic accidents.²² A few years later, more than a million accidents nationwide per year could be attributed to cell phones.²³ Based on an analysis of traffic fatality data and texting records, researchers at the University of North Texas recently concluded that texting while driving was responsible for more than 16,000 deaths between 2001 and 2007.²⁴ And in 2010, the National Safety Council released a study estimating that 1.6

21. For the study from which the numbers were extrapolated, see Joshua T. Cohen & John D. Graham, *A Revised Economic Analysis of Restrictions on the Use of Cell Phones While Driving*, 23 RISK ANALYSIS 5, 13 (2003); Ashley Halsey III, *What Does it Take to Get Texting off Roads? Consequences Are Only Way, Some Say*, WASH. POST, Oct. 5, 2009, at B01.

22. Marc Benjamin, *Drivers Keep Talking in Face of Cell Phone Law*, FRESNO BEE, Oct. 6, 2008, at A1.

23. Shannon L. Noder, *Talking and Texting While Driving: A Look at Regulating Cell Phone Use Behind the Wheel*, 44 VAL. U. L. REV. 237, 272 (2009).

24. See Wilson & Stimpson, *supra* note 1, at 2215–16.

million crashes per year were due to cell phone use while driving, with texting while driving accounting for 200,000 of those crashes.²⁵

The connection between cell phone use and traffic accidents is not surprising. Researchers have found that talking on a cell phone creates a “cognitive tunnel vision” in which drivers fail to recognize what is happening around them.²⁶ A 2001 study of simulated driving found that college students who were deeply involved in cell phone conversations missed traffic signals at twice the rate of those not using phones.²⁷ Research published in *The New England Journal of Medicine* found a four-times greater risk of an accident when the driver was using a cell phone.²⁸

Notably, a number of studies have concluded that hands-free cell phones are not significantly safer than hand-held phones because the conversation itself is a major distracter.²⁹ Researchers at Carnegie Mellon University used MRI brain scans to demonstrate that simply listening to a cell phone conversation while driving results in a drastic decrease in brain activity focused on driving.³⁰ Based on this research, it was not surprising that scholars at the University of Utah concluded that talking on a cell phone is as dangerous as driving drunk.³¹

Texting while driving is even more dangerous than ordinary cell phone use because it utilizes cognitive functioning while also requiring the driver to remove her eyes from the road to see the phone. A car traveling at 65 miles per

25. Press Release, National Safety Council, National Safety Council Estimates That at Least 1.6 Million Crashes Each Year Involve Drivers Using Cell Phones and Texting (Jan. 12, 2010), available at <http://www.nsc.org/pages/nscestimates16millioncrashescausedbydriversusingcellphonesandtexting.aspx>.

26. Ana M. Alaya, *Cell Phone Law Having Trouble Getting Traction—Drivers Ignore It, While Factions Debate Its Contribution to Safety*, STAR-LEDGER (Newark), Jan. 2, 2005, at 15 (quoting University of Utah psychology professor David Strayer); see also Marcel Adam Just et al., *Interdependence of Nonoverlapping Cortical Systems in Dual Cognitive Tasks*, 14 NEUROIMAGE 417, 420–21 (2001) (finding that listening to someone speak uses some of the resources that people otherwise use for visual analysis).

27. David L. Strayer & William A. Johnston, *Driven to Distraction: Dual-Task Studies of Simulated Driving and Conversing on a Cellular Telephone*, 12 PSYCHOL. SCI. 462, 463–64 (2001).

28. Donald A. Redelmeier & Robert J. Tibshirani, *Association Between Cellular-Telephone Calls and Motor Vehicle Collisions*, 336 NEW ENG. J. MED. 453, 456 (1997).

29. See Hahn & Dudley, *supra* note 15, at 156–62 (reviewing early literature).

30. Annie Barret Wallin, Note, *Cell Phones Pose a Distraction to Drivers but Legislative Ban Is Not the Answer*, 98 KY. L.J. 177, 184–85 (2009).

31. See David L. Strayer et al., *A Comparison of the Cell Phone Driver and the Drunk Driver*, 48 J. HUM. FACTORS & ERGONOMICS SOC'Y 381, 388–90 (2006). Professor Strayer and his colleagues used a driving simulator to compare the dangers posed by cell phone use and drunk driving. *Id.* at 383–85. They found that talking on a cell phone slowed braking reactions and led to more accidents than not using a phone. *Id.* at 386, 388. Intoxicated drivers were more dangerous for a different reason: they drove more aggressively and followed other vehicles at a closer distance. *Id.* at 387–88. The authors concluded that “the impairments associated with using a cell phone while driving can be as profound as those associated with driving with a blood alcohol level at 0.08%.” *Id.* at 390.

hour covers 95.3 feet in just one second.³² Studies estimate that texting causes drivers to look away from the road at least 14 times every 30 seconds to see their phones.³³ A 2009 analysis by *Car and Driver* magazine found that texting while driving at 70 miles per hour increased stopping distance by 319 feet for one participant and resulted in a slower response time than being intoxicated for another participant.³⁴ It is therefore not surprising that texting while driving increases the risk of accidents, including a 10% increase in drivers inadvertently leaving their lanes.³⁵

In the largest study to date, the Virginia Tech Transportation Institute found even more alarming data based on videotape of millions of miles of actual driving by truck drivers.³⁶ The study found that talking on a cell phone while driving marginally increased the risk of crashing but that texting while driving was 23.2 times more dangerous than non-distracted driving.³⁷ The study determined that drivers who were texting had their eyes off the road for an alarming 4.6 out of every 6 seconds.³⁸

Polling shows that two-thirds of people under the age of 30 use cell phones while driving and more than one-third admit to texting while driving.³⁹ And those numbers appear to be on the rise.⁴⁰ This increase, especially when

32. Dusty Horwitt, Note, *Driving While Distracted: How Should Legislators Regulate Cell Phone Use Behind the Wheel?*, 28 J. LEGIS. 185, 191 (2002).

33. Robert L. Sachs, Jr., *TXT MSGS and Other Driving Distractions*, 44 TRIAL, Feb. 2008, at 20, 22. Another study found that drivers spend up to 400% more time looking off the road when text messaging while driving. SIMON HOSKING ET AL., MONASH UNIVERSITY ACCIDENT RESEARCH CENTRE, *THE EFFECTS OF TEXT MESSAGING ON YOUNG NOVICE DRIVER PERFORMANCE 1*, 22 (Feb. 2006), available at <http://www.distraction.gov/research/PDF-Files/Effects-of-Text-Messaging.pdf>.

34. Michael Austin, *Texting While Driving: How Dangerous Is It?*, CAR & DRIVER (June 2009), <http://www.caranddriver.com/features/texting-while-driving-how-dangerous-is-it>.

35. See Noder, *supra* note 23, at 247 & n.45 (discussing Clemson University study). In a study of novice drivers, lane excursions due to text messages rose to 28%. See HOSKING ET AL., *supra* note 33, at 21.

36. *New Data from VTTI Provides Insight into Cell Phone Use and Driving Distraction*, VA. TECH. TRANSP. INST. (July 27, 2009), http://opi.mt.gov/pdf/DriverEd/RR/09VTTI_CellPhonesDistraction.pdf.

37. *Id.*

38. *Id.*

39. See *A Problem of Focus*, CONSUMER REP. (Apr. 2011), <http://www.consumerreports.org/cro/magazine-archive/2011/april/cars/distracted-driving/distracted-driving-awareness/index.htm> (finding one-third admit to texting while driving); Insurance Information Institute, *Cellphones and Driving*, INS. INFO. INST. (July 2012), <http://www.iii.org/media/hottopics/insurance/cellphones/> (referencing surveys by State Farm Insurance Company and Public Attitude Monitor finding that between 18% and 32% of drivers admit to texting while driving); Sachs, *supra* note 33, at 22 (reporting that AAA found that 46% of teenagers admitted to texting while driving).

40. See *Study Shows Texting While Driving on the Rise*, MOBILE TECH. NEWS (Apr. 28, 2010), www.mobiletechnews.com/info/2010/04/28/115540.html (noting that

coupled with the dangers of texting while driving, appears to be a good reason for legislatures to ban the practice.⁴¹

II. LEGISLATIVE RESPONSES: RECOGNITION OF THE PROBLEM, BUT INADEQUATE COVERAGE AND PUNISHMENT

In the aftermath of high-profile accidents and studies documenting the danger of cell phone use while driving, legislatures have responded with a vengeance. Over the last decade, every state has considered legislation banning or significantly restricting cell phone use while driving.⁴² A handful of states have banned all hand-held cell phone use (but permitted hands-free use), another group of states has restricted teenagers from using phones altogether while driving, and an increasing number of states and municipalities have banned the specific practice of texting while driving.⁴³ Although legislatures should be applauded for their initiative, in many instances their statutes are woefully inadequate. Part II.A below details how many states have failed to restrict other dangerous activity such as e-mailing or Internet browsing while driving. Part II.B demonstrates that the fines imposed to punish texting while driving are extremely light in many states.

A. Legislative Action to Date Is Inadequate to Cover the Range of Dangerous Cell Phone Use

States have responded to the dangerous combination of driving and cell phone use in a variety of ways. The most aggressive approach—adopted by eight states and the District of Columbia—has been to ban all hand-held phone use while driving.⁴⁴ In these states, drivers are still free to talk on cell phones but only if they use a hands-free Bluetooth device. The virtue of this approach is that it is a

texting while driving appears to be on the rise 15 months after California banned the practice).

41. Of course, the fact that cell phones can be linked to traffic accidents and fatalities does not in and of itself support a full or partial ban on their use. Under a cost-benefit analysis, the lost value from prohibiting cell phone use may not outweigh the deaths, injuries, and property damage that could be averted. Indeed, some early assessments argued that a ban would result in a net cost to society of \$20 billion annually. Hahn & Dudley, *supra* note 15, at 149; Robert W. Hahn et al., *Should You Be Allowed to Use Your Cellular Phone While Driving?*, 23 REGULATION 46, 49–50 (2000). Newer research is necessary now that the injuries, deaths, and property damage attributable to cell phone use has risen dramatically.

42. For a general summary of the legislation, see *Cell Phone and Texting Laws*, GOVERNORS HIGHWAY SAFETY ASS'N, http://www.ghsa.org/html/stateinfo/laws/cellphone_laws.html (last visited Aug. 15, 2012).

43. *Id.*

44. Those states are California, Connecticut, Delaware, Maryland, New Jersey, New York, Oregon, Washington, as well as the District of Columbia. See CAL. VEH. CODE § 23123(a) (2012); CONN. GEN. STAT. ANN. § 42-4-296aa (2012); DEL. CODE ANN. tit. 21, § 4176C (2012); D.C. CODE § 50-1731.04(a) (2012); MD. CODE ANN., TRANSP. § 21-1124.1 (2012), amended by 2012 Md. Laws Ch. 251 S.B. No. 529 (effective Oct. 1, 2012); N.J. STAT. ANN. §39:4-97.3 (2012); N.Y. VEH. & TRAF. LAW § 1225-c (2012); OR. REV. STAT. ANN. § 811.507 (2012); WASH. REV. CODE ANN. § 46.61.667 (2012).

straightforward and easily enforceable bright-line rule. Either the driver was using a hands-free device or she was not. And because drivers are not permitted to use their hands, texting while driving is clearly prohibited under these statutes.⁴⁵

More than two-dozen states have adopted more nuanced restrictions on cell phone use while driving.⁴⁶ In these states, some cell phone use is permissible (such as talking on or dialing a phone), while other use (such as texting) is forbidden. Unfortunately, efforts at nuance often create ambiguities and loopholes that legislatures likely did not intend.

In attempting to draft nuanced statutes, a number of states have forbidden any “text-based communication” while a vehicle is in motion.⁴⁷ Other states have forbidden drivers from writing, sending, or reading a “written communication,”⁴⁸ “written message,”⁴⁹ “electronic message,”⁵⁰ “electronic communication[],”⁵¹ or “interactive communication”⁵² while the vehicle is moving.

The difficulty with these statutes is that they do not provide clear definitions for what a “text-based communication” or similar term includes. Some states have failed to define the terms “electronic message” or “written message.”⁵³ Other states have defined “written communication” or “text-based communication” as including but “not limited to a text message, an instant message, electronic mail, and Internet web sites.”⁵⁴ This definition is both unduly narrow and unhelpfully vague. Can a driver use the map function of an iPhone to read the directions to his destination while he is driving? Would the answer be “yes” if he only viewed the map (because it is a picture) but “no” if he read “Turn

45. Although these states have adopted a bright-line rule that is more easily enforceable, its effectiveness is debatable. Some studies indicate that hands-free phone usage is just as dangerous as hand-held phones. *See supra* notes 29–31 and accompanying text.

46. For an overview of the existing statutes, see GOVERNORS HIGHWAY SAFETY ASS’N, *supra* note 42.

47. CAL. VEH. CODE § 23123.5, amended by 2012 Cal. Legis. Serv. Ch. 92 (A.B. 1536) (effective Jan. 1, 2013); GA. CODE ANN. § 40-6-241.2 (2012); KY. REV. STAT. ANN. § 189.292 (2012); LA. REV. STAT. ANN. § 32:300.5 (2012); OKLA. STAT. ANN. tit. 47, § 11-901c (2012); WYO. STAT. ANN. § 31-5-237 (2012).

48. KAN. STAT. ANN. § 8-15,111 (2012); NEB. REV. STAT. § 60-6,179.01 (2012).

49. TENN. CODE ANN. § 55-8-199 (2012).

50. MASS. GEN. LAWS ANN. ch. 90, § 13B (2012); MINN. STAT. ANN. § 169.475 (2012).

51. ME. REV. STAT. ANN. tit. 29-A, § 2119 (2012), amended by 2012 Me. Legis. Serv. Ch. 654 (S.P. 684) (L.D. 1912) (effective Jan 1, 2013).

52. ARK. CODE ANN. § 27-51-1504 (2012).

53. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 90, § 13B; TENN. CODE ANN. § 55-8-199.

54. NEB. REV. STAT. ANN. § 60-6,179.01; *see also, e.g.*, GA. CODE ANN. § 40-6-241.2 (2012) (defining text-based communication as “including but not limited to a text message, instant message, e-mail, or Internet data”); R.I. GEN. LAWS ANN. § 31-22-30 (2012) (defining text message as “including but not limited to, text messages, instant messages, electronic messages or e-mails, in order to communicate with any person or device”).

Right on Main Street” (because that is written in text)? Is looking at Facebook permissible if the driver uses a phone application to do so rather than looking at an “Internet website?” Is playing an interactive trivia game through the phone permissible, or does that somehow fall within the category of “instant message?” These questions and countless others are not answered by the vague statutory language and definitions in most states that have criminalized texting while driving.

Other states have drafted statutes that are more specific but are troublingly under-inclusive. For example, in Michigan and New Hampshire, the legislatures have only forbidden texting while driving.⁵⁵ In Iowa, it is unlawful to send, read, or write a text message while driving, but a text message includes only “an instant message and electronic mail.”⁵⁶ Wisconsin forbids only “composing or sending an electronic text message or an electronic mail message” but not actually reading the messages.⁵⁷ Virginia prohibits drivers only from manually entering letters or text in a hand-held device, as well as “read[ing] any email or text message,” but it is seemingly permissible to surf the Internet or look at photographs or videos.⁵⁸ Millions of drivers in these states are free to use their phones for a range of dangerous activities, such as Internet surfing, checking Facebook, banking online, or even playing Scrabble without running afoul of many texting-while-driving statutes. Legislatures surely did not intend for such large loopholes to exist.⁵⁹

In sum, legislatures have made an admirable start in attempting to criminalize cell phone use while driving, but most statutes are vague and woefully

55. See MICH. COMP. LAWS ANN. § 257.602b (2012); N.H. REV. STAT. ANN. § 265:105-a (2012) (explaining that there is no texting while driving violation when a person “reads, selects, or enters a number or name in a wireless communications device for the purpose of making a phone call”). The New Hampshire law, which only forbids writing text messages, also forbids “us[ing] 2 hands to type on or operate an electronic or telecommunication device.” *Id.*

56. See IOWA CODE ANN. § 321.276 (2012). Similarly, Utah forbids only “text messaging or electronic mail communication” while driving. UTAH CODE ANN. § 41-6a-1716 (2012). In Maryland, the prohibition includes only a “text message or electronic message.” MD. CODE ANN. TRANSP. § 21-1124.1 (West 2012), *amended by* 2012 Md. Laws Ch. 251 (S.B. 529) (effective Oct. 1, 2012).

57. WIS. STAT. ANN. § 346.89 (2012).

58. VA. CODE ANN. § 46.2-1078.1 (2012). Likewise, North Carolina forbids “manually entering multiple letters or text in the device” as well as reading “any electronic mail or text message” but not other behavior. N.C. GEN. STAT. ANN. § 20-137.4A (2012).

59. For example, although Washington’s statute only prohibits using an electronic wireless communication device to send, read, or write a text message, the statute goes to the trouble of specifying that a person is not violating the law if “she reads, selects, or enters a phone number or name in a wireless communications device for the purpose of making a phone call.” WASH. REV. CODE ANN. § 46.61.668 (2012). This language is completely unnecessary as reading, selecting, or entering a phone number clearly does not fall under the list of proscribed conduct, and its inclusion likely indicates that the legislature did not realize how little behavior it had actually prohibited in forbidding texting while driving.

under-inclusive. With each passing year, smart phones become capable of a host of new applications that are not prohibited by many existing statutes. Recently enacted statutes would have been effective for first- and second-generation cell phones, which were used in the mid-2000s and were only capable of making phone calls and short text messages; however, these statutes are inadequate for today's phones, many of which come with full Internet capability and endless applications.

B. Punishments Are Far Too Lenient

In addition to being vague and under-inclusive, most texting-while-driving statutes impose surprisingly light penalties. As described below, most states treat texting while driving as a traffic infraction, which is typically the lowest level offense in a state's criminal code. No jail time is authorized, fines are very low, and ancillary punishments (such as loss of drivers' licenses or mandatory defensive driving classes) are almost nonexistent.

Most of the states that have criminalized texting while driving have set a fine of \$100 or less for first offenders.⁶⁰ A handful of states have imposed even lower fines that more closely resemble a parking ticket. Kentucky authorizes a maximum fine of \$25,⁶¹ while Iowa limits offenses to a \$30 penalty.⁶² In California and Virginia, the fine for texting while driving is only \$20.⁶³ A few states authorize more serious fines of \$125 to \$750, but those amounts are usually not mandatory and judges are free to impose a lesser sum.⁶⁴

60. See COLO. REV. STAT. ANN. § 42-4-239 (2012) (\$50 fine); DEL. CODE ANN. tit. 21, § 4176C (2012) (\$50 fine); D.C. CODE §§ 50-1731.04, 1731.06 (2012) (\$100 fine); KAN. STAT. ANN. §§ 8-15,111, 8-2118 (2012) (\$60 fine); ME. REV. STAT. ANN. tit. 29-A, § 2119 (2012) (not less than \$100 fine); MASS. GEN. LAWS ANN. ch. 90, § 13B (2012) (\$100 fine); MICH. COMP. LAWS ANN. § 257.602b (2012) (\$100 fine); N.H. REV. STAT. ANN. § 265:105-a (2012) (\$100 fine); N.J. STAT. ANN. § 39:4-97.3 (2012) (\$100 fine); N.Y. VEH. & TRAF. LAW § 1225-c (2012) (up to \$100 fine); N.C. GEN. STAT. ANN. § 20-137.4A (\$100 fine); R.I. GEN. LAWS ANN. § 31-22-30 (2012) (\$85 fine); TENN. CODE ANN. § 55-8-199 (2012) (up to \$50 fine); VT. STAT. ANN. tit. 23, § 1099 (2012) (\$100 fine); WYO. STAT. ANN. § 31-5-237 (2012) (up to \$75 fine).

61. See KY. REV. STAT. ANN. §§ 189.292, 182.990 (2012).

62. See IOWA CODE ANN. §§ 321.276, 805.8A (2012).

63. CAL. VEH. CODE § 23123.5 (2012), *amended by* 2012 Cal. Legis. Serv. Ch. 92 (A.B. 1536) (effective Jan. 1, 2013); VA. CODE ANN. § 46.2-1078.1.

64. See CONN. GEN. STAT. ANN. § 14-296aa (2012) (\$125 fine), *amended by* 2012 Conn. Legis. Serv. P.A. 12-67 (S.B. 61) (effective Oct. 1, 2012); GA. CODE ANN. § 40-6-241.2(d) (2012) (\$150 fine); IND. CODE ANN. §§ 9-24-10-8, 34-28-5-4(c) (2012) (up to \$500 fine); LA. REV. STAT. ANN. § 32:300.5(c)(1) (2012) (up to \$175 fine); MD. CODE ANN. TRANSP. §§ 21-1124.1, 27-101 (2012) (up to \$500); MINN. STAT. ANN. §§ 169.475, 169.89 (2012) (up to \$300 fine); MO. ANN. STAT. §§ 304.820, 560.016 (2012) (up to \$200 fine and points on driver's license, but only for drivers twenty-one and under); OKLA. STAT. ANN. tit. 47, § 11-901c (2012) (\$500 fine); OR. REV. STAT. §§ 811.507, 153.018 (2012) (up to \$250); UTAH CODE ANN. §§ 41-6a-1716, 76-3-301 (2012) (up to \$750 fine); WASH. REV. CODE ANN. §§ 46.61.668, 46.63.110 (up to \$250 fine); WIS. STAT. ANN. §§ 346.89(3)(a), 346.95(2) (2012) (fine of between \$20 and \$400).

These small fines are typically the only punishment for texting while driving. In almost every state where it is illegal to use a cell phone while driving, offenders face no possibility of jail time. There are two surprising exceptions, however. In Utah, texting while driving is a Class C misdemeanor that carries a possible jail sentence of 90 days.⁶⁵ And in Alaska, the crime of viewing a screen device while driving (which includes televisions and other computer monitors in addition to cell phones) is a Class A misdemeanor that carries the possibility of a \$10,000 fine and up to a year in jail.⁶⁶ Yet, even these states almost never impose any actual incarceration.⁶⁷

The relatively lax punishments for texting while driving are reminiscent of the light penalties for drunk driving decades ago.⁶⁸ With the rise of Mothers Against Drunk Driving (“MADD”) and its lobbying campaign in the 1980s, the federal government and states got tougher on drunk driving by authorizing jail time, imposing stiffer fines, and lengthening license suspensions.⁶⁹ Today, almost every state in the nation authorizes jail time for first-time drunk driving offenders.⁷⁰ Almost 20 states authorize up to six months in jail, and another dozen states authorize up to a year or more incarceration for first offenders.⁷¹ And while many first-time offenders are never actually sentenced to any jail time,⁷² they almost always pay significant fines following conviction. Most states authorize fines of around \$1,000 (and sometimes drastically more) for first-time drunk drivers,⁷³ and anecdotal evidence indicates that offenders actually pay significant sums. For example, in Houston, Texas, the typical fine imposed on a first-time

65. See UTAH CODE ANN. § 41-6a-1716(4)(c) (2012) (making it a Class C misdemeanor); *id.* § 76-3-301(1)(e) (imposing a fine of up to \$750 for Class C misdemeanor); *id.* § 76-3-204 (imposing an imprisonment sentence of up to 90 days for Class C misdemeanor).

66. ALASKA STAT. §§ 28.35.161(a)(1), 12.55.035(b)(5), 12.55.135(a) (2012).

67. See Chris Freiberg, *Alaska Texting While Driving Charge Nets Probation*, FAIRBANKS DAILY NEWS-MINER (Oct. 28, 2010), http://www.newsminer.com/view/full_story/10074022/article-Alaska-texting-while-driving-charge-nets-probation (noting that defendant, who was texting while driving, received probation after almost hitting a police officer).

68. See Andrew E. Taslitz, *A Feminist Fourth Amendment?: Consent, Care, Privacy, and Social Meaning in Ferguson v. City of Charleston*, 9 DUKE J. GENDER L. & POL'Y 1, 67–68 (2002) (explaining that drunk driving prohibitions were “sumptuary offenses” like “blue laws” and that “[s]ignificant penalties for violating sumptuary laws were long inconsistent with popular attitudes”).

69. See JAMES B. JACOBS, *DRUNK DRIVING: AN AMERICAN DILEMMA* XVII (1989).

70. See Gershowitz, *supra* note 6, at 967–68.

71. For an overview of the punishments authorized in the different states, see *id.*

72. See *id.* at 968.

73. See, e.g., ALA. CODE § 32-5A-191(e) (2012) (\$600 to \$2,100); CAL. VEH. CODE § 23536(a) (2012) (\$390 to \$1,000); GA. CODE ANN. § 40-6-391(c)(1)(A) (2012) (\$300 to \$1,000); HAW. REV. STAT. § 291E-61(b)(1)(C)(3) (2012) (\$150 to \$1,000); MASS. GEN. LAWS ch. 90, § 24(1)(a)(1) (2012) (\$500 to \$5,000); MISS. CODE ANN. § 63-11-30(2)(a) (2012) (\$250 to \$1,000).

offender is \$500 to \$1,000.⁷⁴ In Detroit, fines are even tougher, sometimes approaching \$2,000.⁷⁵

Drunk drivers also face ancillary penalties that texting while driving defendants do not. Following drunk driving convictions, most defendants have their licenses suspended, usually for a period of months.⁷⁶ Most states have not even authorized license suspensions for texting while driving, much less imposed them.⁷⁷

Additionally, a considerable number of repeat drunk drivers (and even a small number of first offenders) are required to install alcohol ignition interlocks in their vehicles following conviction.⁷⁸ Although there are similar (and far less expensive) products on the market that can be installed in vehicles or cell phones to stop texting while driving,⁷⁹ states do not require any such installations following texting convictions.

In sum, there is a dramatic difference in the way that states treat the equally dangerous activities of drunk driving and texting while driving. Drunk drivers face stiff fines, possible jail time, license suspensions, ignition interlock devices, as well as the ramifications for employment and university admissions that come with a criminal conviction.⁸⁰ Not surprisingly, affluent defendants are willing to hire expensive lawyers to fight drunk-driving charges.⁸¹ And while the price of a good criminal defense is not a formal punishment authorized by the state, this expensive process is a de facto punishment.⁸²

74. Interview with Laura Killinger, Assistant District Attorney, Harris County District Attorney's Office, in Hous., Tex. (July 22, 2011).

75. See John Wisely & L.L. Braiser, *Arrest Location Could Determine the Outcome for a Drunken-Driving Penalty*, DETROIT FREE PRESS (July 24, 2011), http://www.robentlarin.com/Free_Press_-_Arrest_location_could_determine_the_outcome_for_a_drunken-driving_penalty.pdf (reporting fines of almost \$2,000 in some Detroit area courthouses); L.L. Braiser, *Lawyer, Fines, Fees in a Drunken-Driving Case Could Be \$10,000*, DETROIT FREE PRESS (July 24, 2011), <http://www.freep.com/article/20110724/NEWS03/110030003/Lawyer-fines-fees-drunken-driving-case-could-10-000> (explaining that in addition to a typical fine of \$500, drunk drivers pay thousands of dollars to hire an attorney, post bond, get their vehicles out of impound, as well as court costs and driver responsibility fees).

76. See Noder, *supra* note 23, at 269; see also *infra* notes 173–77 and accompanying text.

77. See *infra* notes 179–83 and accompanying text.

78. See *infra* notes 188–93 and accompanying text.

79. See *infra* notes 194–98 and accompanying text.

80. On the ancillary effects of conviction, see John S. Dzienkowski, *Character and Fitness Inquiries in Law School Admissions*, 45 S. TEX. L. REV. 921, 923 (2004) (explaining that a majority of law schools ask applicants character and fitness questions, including questions about criminal offenses).

81. See Gershowitz, *supra* note 6, at 978–79.

82. See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* 201 (Russell Sage Found. 1992) (1979).

By contrast, texting while driving is perceived and treated as an innocuous event. Only two states even authorize jail time, and those states likely do not incarcerate anyone unless significant injuries result from the texting while driving.⁸³ Fines are extremely light in most jurisdictions, and offenders do not risk loss of their license or the costs and stigma of installing a device to prevent future texting while driving violations. There are also no collateral consequences for employment or school admissions. Offenders simply pay their ticket the same way they would for running a stop sign. And while grassroots groups opposed to texting while driving are starting to raise awareness of the problem and lobby for legislation,⁸⁴ their political power is insignificant in contrast to MADD and other anti-drunk-driving groups. All told, efforts to combat texting while driving do not equate to the movement to stop drunk driving.

Tougher responses to texting while driving are likely in the future. But for the time being, many legislatures have outlawed the practice haphazardly and without adequate punishment. As explained in Part III below, laws prohibiting texting while driving give police a green light to conduct invasive cell phone searches.

III. POLICE AUTHORITY TO SEARCH CELL PHONES FOR EVIDENCE OF TEXTING WHILE DRIVING

The mere existence of laws criminalizing texting while driving gives police broad authority to search drivers' cell phones without a warrant. Even though most texting-while-driving statutes carry only a small fine, those statutes authorize warrantless searches under the Fourth Amendment's search incident to arrest doctrine and automobile exception. Without having to procure a warrant, police can search text messages, Internet browsing history, Facebook accounts, and a wide variety of other data on the phone.

A. *The Search Incident to Arrest Doctrine*

For decades, police officers have had wide authority to conduct warrantless searches following the arrest of an individual. Although the Supreme Court has recently scaled back this doctrine considerably in the automobile context, the search incident to arrest doctrine continues to give police enormous power to search cell phones. As discussed below, many states have texting-while-driving statutes that either intentionally or inadvertently give police power to search cell phones incident to arrest, even if the crime is only punishable by a small fine.

1. *The Basic Doctrine*

Under the so-called search incident to arrest doctrine, police are permitted to search the arrestee and the area within his immediate grabbing space

83. See *supra* notes 65–67 and accompanying text.

84. See *infra* notes 158–59 and accompanying text.

contemporaneously with arrest.⁸⁵ The rationale for this rule is to prevent the destruction of evidence and to protect officers from the arrestee using a hidden weapon against them.⁸⁶ To make matters simple for officers on the street and to reduce litigation in court, the Supreme Court has primarily treated the search incident to arrest doctrine as a bright-line rule.⁸⁷ Anything on an arrestee can be opened incident to arrest, even if there is no prospect that the arrestee could destroy it or grab a weapon from it.⁸⁸ Thus, in the landmark case of *United States v. Robinson*, the Supreme Court upheld the search of a cigarette pack in a jacket pocket after an individual had been arrested for driving with a revoked license.⁸⁹ Police had authority to search the cigarette pack even though no evidence of driving with a revoked license would be found there and even though there was no realistic prospect of a weapon being contained inside.

Police officers' broad authority under the search incident to arrest doctrine has also extended to the passenger compartment (but not the trunk) of vehicles. More than three decades ago, in *New York v. Belton*, the Supreme Court embraced the fiction that the passenger compartment of a vehicle was always within an arrestee's immediate grabbing space.⁹⁰ And because the Court held that police could conduct a search incident to arrest following any arrest no matter how trivial the crime, the *Belton* decision gave police enormous power to search vehicles incident to arrest and open any containers found in the passenger compartment.⁹¹ Thus, in *Belton*, the Court upheld the search of a jacket in the backseat after the officer arrested the occupants for speeding.⁹²

The *Belton* doctrine gave police such wide authority to conduct warrantless searches that critics, including Justice Scalia, began to call for its revision.⁹³ The Supreme Court responded to that criticism in 2009 with *Arizona v. Gant*; the Court scaled back police authority to search vehicles incident to arrest when there was no reason to believe evidence relating to the arrest would be found in the vehicle.⁹⁴ In *Gant*, the police arrested the defendant for driving with a suspended license, handcuffed him, and placed him in the back of a police car.⁹⁵ Thereafter, police searched Gant's vehicle and found a jacket in the backseat that

85. See *Chimel v. California*, 395 U.S. 752, 762–63 (1969).

86. *Id.* at 763.

87. See Gershowitz, *supra* note 12, at 30–31, 33–35.

88. See Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381, 394–96 (2001).

89. 414 U.S. 218, 220–24, 236 (1973).

90. 453 U.S. 454, 459–60 (1981).

91. See Logan, *supra* note 88, at 396.

92. See *Belton*, 453 U.S. at 455–56, 462.

93. See *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in the judgment) (“I would therefore limit *Belton* searches to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.”); James J. Tomkovicz, *Divining and Designing the Future of the Search Incident to Arrest Doctrine: Avoiding Instability, Irrationality, and Infidelity*, 2007 U. ILL. L. REV. 1417, 1420.

94. 556 U.S. 332, 343–47 (2009).

95. *Id.* at 335.

contained cocaine.⁹⁶ Although the search would have been upheld under *Belton*, the Court in *Gant* narrowed *Belton*'s reach by holding that police can only search a vehicle incident to arrest if “the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search” or “when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.”⁹⁷ The *Gant* decision eliminated police authority to search vehicles after arrests for most traffic infractions because police are trained to secure arrestees before searching⁹⁸ and because there is no reason to believe evidence of a traffic infraction could be found in the vehicle.⁹⁹

In light of the *Gant* decision, the Supreme Court has now embraced two different rules for warrantless searches incident to arrest. If police are searching the body of an arrestee or his immediate grabbing space based on *Robinson*, they are free to open any container on the person, even if there is no connection between the arrest and the evidence that might be found in the container. If, however, police wish to search the passenger compartment of a vehicle incident to arrest under *Gant*, they can only do so if the arrestee is unsecured or if it is reasonable to believe evidence related to the arrest could be found in the vehicle. In many instances, the rule for automobiles will give police less authority to search. Nevertheless, as described below, when states have criminalized texting while driving and made it an arrestable offense, police will have power under either *Robinson* or *Gant* to search the driver's cell phone.

2. Can Police Search Cell Phones Incident to Arrest for Texting While Driving Evidence?

With the basic parameters of search incident to arrest law laid out in Part III.A.1 above, the next question is whether police can search cell phones incident to arrest for evidence of texting while driving. In many states, the answer is yes. Courts generally, although not universally, authorize police to search cell phones incident to arrest.¹⁰⁰ And despite imposing light penalties for texting while driving, many states have made it an arrestable offense, thus allowing police to utilize the search incident to arrest doctrine.

96. *Id.* at 336.

97. *Id.* at 343.

98. See Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, 2002 WIS. L. REV. 657, 665–66 (surveying law enforcement agencies and finding that “in general, police officers are taught to handcuff an arrestee (preferably behind his back) before searching the area around him”).

99. See Barbara E. Armacost, *Arizona v. Gant: Does It Matter?* 2009 SUP. CT. REV. 275, 304–08 (discussing the reach of *Gant* in changing search incident to arrest doctrine). Some observers question the practical scope of the Court's decision because there are relatively few arrests solely for traffic violations. For an argument that *Gant* does not eliminate much police authority to search, see generally Seth W. Stoughton, Note, *Modern Police Practices: Arizona v. Gant's Illusory Restriction of Vehicle Searches Incident to Arrest*, 97 VA. L. REV. 1727 (2011).

100. See *infra* notes 104–08.

Over the last decade, dozens of courts have grappled with whether it is permissible for police to search cell phones incident to arrest.¹⁰¹ When police arrest suspected drug dealers (and likely when they arrest some other individuals as well), they handcuff the arrestee and remove his cell phone from his pocket. Because drug transactions are often conducted by text messages,¹⁰² police search the arrestee's text messages for evidence.¹⁰³ The arrestee then moves to suppress the text messages on the grounds that the Supreme Court has never authorized the search of a cell phone incident to arrest.

Dozens of courts have rejected arrestees' motions to suppress evidence found on their cell phones. These courts have reasoned that the search incident to arrest doctrine allows police to open all containers on an arrestee and that cell phones are containers.¹⁰⁴ These courts take the position that until the Supreme Court decides otherwise, cell phones are no different from pockets, wallets, or cigarette packages that have long been fully searchable, even if the cell phones hold vastly more private data.¹⁰⁵ This rationale has been embraced by five federal circuit courts,¹⁰⁶ the California Supreme Court,¹⁰⁷ and dozens of other federal and state courts.¹⁰⁸

101. See Gershowitz, *supra* note 8, at 1135–42.

102. For instance, a buyer might text a dealer, “I need a 50” to request a specific quantity of drugs. See, e.g., *United States v. Finley*, 477 F.3d 250, 254 n.2 (5th Cir. 2007).

103. See, e.g., *United States v. Wall*, No. 08-60016-CR, 2008 WL 5381412, at *4 (S.D. Fla. Dec. 22, 2008) (noting that although the court rejected the warrantless search of a cell phone, a drug enforcement agent testified during a suppression hearing that “it is his practice to search cell phones for text messages primarily because DEA’s policy allows for it and because it is common to find text messages that further the investigation”).

104. See, e.g., *Finley*, 477 F.3d at 259–60.

105. See, e.g., *People v. Diaz*, 244 P.3d 501, 511 (Ca. 2011) (“[U]nder the United States Supreme Court’s binding precedent, the warrantless search of defendant’s cell phone was valid. If, as the dissent asserts, the wisdom of the high court’s decisions must be newly evaluated in light of modern technology, then that reevaluation must be undertaken by the high court itself.” (internal citations and quotations omitted)).

106. See *United States v. Pineda-Areola*, No. 09-1105, 2010 WL 1490369, at *663 (7th Cir. Apr. 6, 2010); *United States v. Fuentes*, 368 F. App’x 95, 99 (11th Cir. 2010); *United States v. Murphy*, 552 F.3d 405, 410–12 (4th Cir. 2009); *Silvan W. v. Briggs*, 309 F. App’x 216, 225 (10th Cir. 2009); *United States v. Young*, 278 F. App’x 242, 246 (4th Cir. 2008); *Finley*, 477 F.3d at 259–60.

107. See *Diaz*, 244 P.3d at 509–11.

108. See Gershowitz, *supra* note 8, at 1135–44 (summarizing case law through mid-2010). More recently, see *United States v. Curtis*, 635 F.3d 704, 711–14 (5th Cir. 2011), *cert. denied*, 131 S.Ct. 191; *United States v. Rodriguez*, No. C-11-344, 2011 WL 3924958, at *4–5 (S.D. Tex. Sept. 6, 2011); *United States v. Gomez*, 807 F. Supp. 2d 1134, 1140–50 (S.D. Fla. 2011); *United States v. Hill*, No. CR 10-00261 JSW, 2011 WL 90130, at *4–8 (N.D. Cal. Jan. 10, 2011); *United States v. Grooms*, No. 2:10-CR-87, 2011 WL 381036, at *1–2 (E.D. Tenn. Jan. 3, 2011); *United States v. Rodriguez-Gomez*, 2010 WL 5524891, at *2–3 (N.D. Ga. Nov. 15, 2010); *United States v. Faller*, 681 F. Supp. 2d 1028, 1045–46 (E.D. Mo. 2010); *United States v. Hodges*, No. 09-40077-04-RDR, 2010 WL 2553780, at *5–8 (D. Kan. June 23, 2010); *Gracie v. State*, No. CR-10-0596, 2011 Ala. Crim. App. LEXIS 123, at *5–16 (Dec. 16, 2011); *People v. Notolli*, 199 Cal. App. 4th 531,

A few courts have refused to uphold the search incident to arrest of cell phones.¹⁰⁹ The rationales supporting these decisions break down into three categories: (1) cell phones contain so much personal information that they are categorically different than other containers and cannot be searched incident to arrest;¹¹⁰ (2) the search of the phone occurred too long after arrest to be contemporaneous as is required by the search incident to arrest doctrine;¹¹¹ and (3) based on the Court's recent decision in *Gant*, cell phones should only be searched incident to arrest when the officer is searching for evidence related to the crime of arrest.¹¹² These cases are a distinct minority however.¹¹³ Although the Supreme

559 (6th Dist. Sept. 26, 2011); *Fawdry v. State*, 70 So. 3d 626, 628–30 (Fla. Cir. Ct. 2011); *Smallwood v. State*, 61 So. 3d 448, 453–62 (Fla. Cir. Ct. 2011); *Hawkins v. State*, 704 S.E.2d 886, 889–92 (Ga. App. 2010); *State v. Nix*, 237 P.3d 842, 846–53 (Or. Ct. App. 2010).

109. See *United States v. McGhee*, No. 8:09CR31, 2009 WL 2424104, at *3–4 (D. Neb. July 21, 2009) (relying on *Arizona v. Gant* and concluding that search incident to arrest of cell phone was unjustified because no evidence related to the crime of arrest—which occurred in early 2008—could be found in the phone when the arrest occurred in 2009); *United States v. Quintana*, 594 F. Supp. 2d 1291, 1299–1301 (M.D. Fla. 2009) (rejecting search incident to arrest of cell phone photos because defendant was arrested for driving with a suspended license and no information of that crime could be found on a cell phone); *United States v. Wall*, No. 08-60016-CR, 2008 WL 5381412, at *3–4 (S.D. Fla. Dec. 22, 2008) (finding that search was not contemporaneous and was not justified by exigent circumstances or inventory exception); *United States v. Park*, No. CR 05-375 SI, 2007 WL 1521573, at *5–12 (N.D. Cal. May 23, 2007) (rejecting search incident to arrest conducted at station because cell phones are possessions within arrestees' immediate control and cannot be searched at the station); *United States v. LaSalle*, No. 07-00032 SOM, 2007 WL 1390820, at *6–8 (D. Haw. May 9, 2007) (finding that search was not contemporaneous); *Commonwealth v. Diaz*, No. ESCR 2009-0000, 2009 WL 2963693, at *6–9 (Mass. Super. Ct. Sept. 3, 2009) (rejecting search incident to arrest of cell phone because it occurred more than 20 minutes after arrest and was therefore not contemporaneous); *State v. Novicky*, No. A07-0170, 2008 WL 1747805, at *4–5 (Minn. Ct. App. Apr. 15, 2008) (rejecting argument that search of cell phone held in evidence since initial arrest could fall under search incident to arrest exception when search was conducted on the day of trial); *State v. Smith*, 920 N.E.2d 949, 954–55 (Ohio 2009) (holding that cell phones are not containers that can be searched incident to arrest). Two other courts have suggested, although not held, that searches of cell phones incident to arrest should be impermissible without deciding the issue. See *United States v. James*, No. 1:06CR134 CDP, 2008 WL 1925032, at *9, *10 n.4 (E.D. Mo. Apr. 29, 2008) (noting in dicta, and without analysis, that even though search of cell phone was proper under a warrant, the district judge disagreed with the magistrate's conclusion that the search was also justified under the search incident to arrest doctrine); *United States v. Carroll*, 537 F. Supp. 2d 1290, 1299 (N.D. Ga. 2008) (expressing skepticism of search incident to arrest of a BlackBerry when a suspect surrendered at the police station, but ordering further briefing before deciding the issue).

110. For the most prominent decision, see *Smith*, 920 N.E.2d at 954.

111. See *Park*, 2007 WL 1521573, at *5–12.

112. See *McGhee*, 2009 WL 2424104, at *3–4 (relying on *Arizona v. Gant* and concluding that search incident to arrest of cell phone was unjustified because no evidence related to the crime of arrest—which occurred in early 2008—could be found in the phone when the arrest occurred in 2009); *Quintana*, 594 F. Supp. 2d at 1291, 1299–1301 (rejecting

Court has not weighed in on the issue of searching cell phones incident to arrest,¹¹⁴ the trend is strongly toward upholding such searches, with well over two-thirds of courts reaching that conclusion.¹¹⁵

Because most courts have issued blanket decisions upholding warrantless searches of cell phones found on an arrestee's person, there is no reason to think these courts would rule any differently when the arrest was for texting while driving rather than a drug offense. The crime for which a person has been arrested—whether it is drug dealing, arson, or texting while driving—is irrelevant to the question of whether police can search a cell phone found on an arrestee's person.¹¹⁶ The search incident to arrest doctrine is a bright-line rule that allows police to open all containers on an arrestee, even if there is no reason to believe either that a weapon could be stored in it or that evidence related to the arrest could be found there. As long as courts treat cell phones like any other container, and most courts do,¹¹⁷ then cell phones on an arrestee can be searched following a texting while driving arrest.

The law becomes slightly more complicated when the container to be searched is located in the passenger compartment of a vehicle, rather than on the person of the arrestee. As noted, the Supreme Court's decision in *Gant* limited searches of the passenger compartment of vehicles to instances where the arrestee is unsecured or the officer has reason to believe evidence related to the crime of arrest could be found in the vehicle.¹¹⁸ Under the latter rule, courts can often reject searches incident to arrest in traffic cases—for instance, speeding, running a stop

search incident to arrest of cell phone photos because defendant was arrested for driving with a suspended license and no information of that crime could be found on a cell phone); see also *United States v. McCray*, No. CR408-231, 2009 WL 29607, at *4, n.4 (S.D. Ga. Jan. 5, 2009) (upholding limited search of cell phone following arrest for statutory rape but noting that “this case, therefore, does not present the question of whether a cell phone (a kind of computer capable of storing vast amounts of data) may be subjected to a comprehensive search incident to a defendant's arrest for a simple traffic violation”).

113. Compare *supra* notes 109–12 (cataloging less than a dozen cases rejecting the search incident to arrest of cell phones), with *supra* notes 104–08 (identifying approximately twice as many cases upholding such searches).

114. The Court did request further briefing in the Ohio Supreme Court case. See Docket Files, U.S. SUP. CT., <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/09-1377.htm> (last visited July 14, 2012). Ultimately, the Court declined to grant certiorari. *Ohio v. Smith*, 131 S. Ct. 102 (2010).

115. See *supra* notes 104–12.

116. See Gershowitz, *supra* note 12, at 34. For a compelling argument that courts should reverse course and consider crime severity in determining the reasonableness of searches, particularly in cases of evolving technology, see generally Jeffrey Bellin, *Crime-Severity Distinctions and the Fourth Amendment: Reassessing Reasonableness in a Changing World*, 97 IOWA L. REV. 1 (2011).

117. See *supra* notes 104–08 and accompanying text.

118. See *supra* notes 93–99 and accompanying text.

sign, or reckless driving—because no evidence of those crimes could possibly be found in the vehicle.¹¹⁹

However, when the arrest is for texting while driving, *Gant* provides no roadblock to searching a cell phone found in the passenger compartment of the vehicle. Following an arrest for texting while driving, officers could expect to find evidence in the phone of incomplete texts that the driver had been typing or time-stamped messages that the driver had recently sent while driving. Indeed, it is hard to think of a case where an officer would not expect to find evidence of texting on the phone following an arrest for that crime. Thus, unlike most traffic offenses, it would be reasonable for the officer to believe there would be evidence of texting while driving in the vehicle. As such, if the phone is located in the passenger compartment of the vehicle, police should be able to search it incident to arrest.

The only real obstacle to police utilizing the search incident to arrest doctrine when they pull over a driver for texting while driving is that the police must actually conduct an arrest. The Supreme Court has made clear that police cannot issue a traffic ticket and “search incident to citation.”¹²⁰ Thus, texting while driving must be an arrestable offense and police officers must actually arrest the driver to conduct the search incident to arrest.

Some states have classified texting while driving as a secondary offense for which police cannot conduct an arrest and a subsequent search.¹²¹ In a few states, texting while driving is a primary offense, but police lack authority to conduct a full-custody arrest for traffic offenses, thus precluding a search incident to arrest.¹²² In these states, a search incident to arrest would seemingly be off limits, but even those protections are illusory.

The Supreme Court has recently held that violating state statutes governing which offenses are arrestable does not constitute a Fourth Amendment violation that can result in the exclusion of evidence. In *Virginia v. Moore*, officers stopped Moore for driving on a suspended license.¹²³ Even though Virginia law did not allow officers to arrest for that offense, the officers arrested Moore anyway, and they discovered cocaine when they performed a search incident to arrest.¹²⁴

119. See, e.g., *United States v. Holland*, No. H-09-512, 2011 U.S. Dist. LEXIS 5261, at *36 (S.D. Tex. Jan. 20, 2011) (rejecting search incident to arrest of vehicle following arrest for failure to signal).

120. See *Knowles v. Iowa*, 525 U.S. 113, 118–19 (1998).

121. See, e.g., IOWA CODE ANN. § 321.276(5)(a) (2012) (“A peace officer shall not stop or detain a person solely for a suspected violation of this section. This section is enforceable by a peace officer only as a secondary action when the driver of a motor vehicle has been stopped or detained for a suspected violation of another [violation].”); MD. CODE ANN., TRANSP. § 21-1124.2(e) (2012) (same); NEB. REV. STAT. § 60-6,179.01(4) (2012) (same); VA. CODE ANN. § 46.2-1078.1(C) (2012) (same).

122. See Janet Koven Levit, *Pretextual Traffic Stops: United States v. Whren and the Death of Terry v. Ohio*, 28 LOY. U. CHI. L.J. 145, 152 nn.63–64 (1996) (surveying the law on arrestable offenses and noting that officers have “unfettered discretion [to arrest for traffic offenses] in twenty-six states and subject to minimal constraints in sixteen states”).

123. 553 U.S. 164, 166–67 (2008).

124. *Id.*

Although acknowledging that the arrest and search were unlawful, the Virginia trial court refused to suppress the cocaine because Virginia law does not require the suppression of illegally seized evidence.¹²⁵ The Supreme Court of the United States affirmed the decision on the grounds that a violation of Virginia state law does not constitute a Fourth Amendment violation requiring suppression of evidence.¹²⁶ The cocaine was admissible because there was nothing unconstitutional about arresting Moore for the low-level offense of driving with a revoked license and searching incident to that arrest.¹²⁷

Other states have adopted the same approach as Virginia and refused to suppress evidence that was procured in violation of a state statutory guarantee. For instance, when local police officers violated a New Jersey statute by making a warrantless arrest of a defendant outside of their territorial jurisdiction, the court refused to suppress the resulting evidence because the New Jersey exclusionary rule applies only to constitutional violations, not statutory violations.¹²⁸ Maryland, Ohio, and other jurisdictions have taken the same approach.¹²⁹ Thus, even when legislatures do not make texting while driving an arrestable offense, evidence found during a search of the driver's cell phone incident to arrest will not necessarily be suppressed because the police action amounts to only a statutory violation, not a constitutional prohibition.

In sum, in most states that criminalize either all hand-held cell phone use or just texting while driving, police will have authority to search the phone incident to arrest. Whether the phone is found on the person of the arrestee or somewhere inside the passenger compartment of the car is significant only in defining the scope of the search. If officers find the phone on the driver's person, then they may conduct a complete search of the entire contents of the phone. This means police can search not only text messages, but also e-mails, voicemails, photos, Internet browsing history, calendar entries, and everything else found on the phone. If officers find the phone in the passenger compartment of the vehicle, then under *Gant*, they will be limited to searching for evidence related to the crime of arrest. In a state that only criminalizes texting while driving, this will limit the search to the phone's text messages. But for states with broader statutes that criminalize the use of texting, e-mail, Internet browsing, and other applications, police will have authority to search a considerable amount of applications and data

125. *Id.* at 167–68.

126. *See id.* at 171–73.

127. *See id.* at 177–78.

128. *See State v. Gadsden*, 697 A.2d 187, 194 (N.J. Super. Ct. App. Div. 1997).

129. *See id.* at 193 (noting that “[t]he trend of many states is to follow Pennsylvania and hold that where a police officer violates a criminal-procedure statute, such as exceeding territorial jurisdiction, evidence gathered as a result is not automatically subject to suppression” and citing cases from a dozen different jurisdictions); *see also Howell v. State*, 483 A.2d 780, 781 (Md. Ct. Spec. App. 1984) (refusing to exclude evidence or violations of “sub-constitutional” rules); *City of Kettering v. Hollen*, 416 N.E.2d 598, 600 (Ohio 1980) (“It is clear . . . that the exclusionary rule will not ordinarily be applied to evidence which is the product of police conduct violative of state law but not violative of constitutional rights.”).

on the phone. Put simply, in most situations, the search incident to arrest doctrine gives police authority to rummage through most of the data on an arrestee's cell phone.

B. Police Can Also Search Phones for Evidence of Texting While Driving Under the Automobile Exception

Although the search incident to arrest exception has received the bulk of academic attention with respect to cell phone searches, police have wide authority to conduct warrantless searches under the automobile exception as well. For states that have not made texting while driving an arrestable offense, or in cases where police do not want to take the time to effectuate a custodial arrest, the automobile exception provides an easy way for police to conduct a warrantless search for evidence of texting while driving. The fact that texting while driving is a low-level traffic offense will not limit police authority to search.

Almost since the introduction of the automobile, the Supreme Court has recognized the authority of police to conduct warrantless searches of vehicles.¹³⁰ The rationale is twofold. First, automobiles are mobile and warrantless searches are necessary to locate evidence before the driver leaves the scene and hides or destroys the evidence.¹³¹ Second, because automobiles are utilized on public roads, they carry a significantly lower expectation of privacy than homes and are thus entitled to less constitutional protection.¹³²

Unlike the search incident to arrest doctrine, which is automatic following a lawful arrest, the automobile exception is premised on the police having probable cause.¹³³ The automobile exception eliminates only the police officer's obligation to procure a warrant, not the requirement that she have sufficient suspicion of criminal activity. Additionally, police can only search the locations in the vehicle where they have probable cause to believe the evidence is located. As a result, police do not have blanket authority to search entire vehicles, even if they have probable cause to be looking for evidence. Police officers who suspect a vehicle has a stolen flat-screen television cannot search the glove compartment because the television could not fit there. But officers with probable cause to believe drugs are in the car can likely search the entire vehicle because drugs can fit anywhere.¹³⁴

Importantly, for purposes of texting-while-driving laws, the Court has also allowed warrantless searches when police have probable cause only for a particular container in a vehicle. Thus, if police have probable cause to believe a

130. See *Carroll v. United States*, 267 U.S. 132, 153–62 (1925).

131. See *id.* at 153.

132. See *California v. Carney*, 471 U.S. 386, 390–95 (1985).

133. See 1 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE § 13.01(D) (4th ed. 2006).

134. This presumes that the officers are not aware of information that the drugs would only be located in a particular part of the vehicle. For instance, if probable cause is based exclusively on an informant's tip, and the informant stated that the drugs were in the trunk of the vehicle, police would lack probable cause to search the glove compartment. See *id.*

bag contains drugs, and they see the bag being placed into a vehicle, the officers may stop the vehicle and conduct a warrantless search of the bag itself.¹³⁵ The fact that the probable cause is for the bag, rather than the vehicle itself, is irrelevant.

When prosecutors and defense attorneys disagree about whether the automobile exception is applicable, there are typically two key issues in dispute. First, did the officer have enough suspicion to amount to probable cause? If the answer to that question is yes, then the second question becomes: Where in the automobile and the containers inside of it does the officer have grounds to search? In cases involving texting while driving, the answer to the first question will almost always be “yes” and the answer to the second question will be “it depends on the statute.”

The question of whether the officer has probable cause to search the phone for evidence of texting while driving is quite easy. When an officer stops a driver for texting, it is almost always because the officer saw the driver texting. This personal observation is surely sufficient to create probable cause.¹³⁶ Moreover, even if it turns out that the officer was wrong—for instance the driver appeared to be texting, but he was actually just looking down at printed directions or picking up a piece of food—that does not eliminate probable cause retroactively.¹³⁷ Indeed, if the officer thinks she saw the driver texting and the driver adamantly denies it, the officer would still have probable cause (assuming she had a good view of the driver) because suspects regularly lie to law enforcement to avoid criminal liability.¹³⁸ Because probable cause is a relatively low standard in this context, the officer’s belief that she saw texting while driving would, by itself, satisfy the standard. Moreover, if there is probable cause that the driver was texting while driving, then there is probable cause to believe there will be incompletely drafted or recently sent text messages on the phone itself. Put simply, the case for probable cause to believe the phone contains evidence of texting while driving is ironclad.

135. See *California v. Acevedo*, 500 U.S. 565, 573–81 (1991). Before *Acevedo*, the Court took the opposite position. For an overview of the prior caselaw, see WAYNE R. LAFAVE ET AL., *PRINCIPLES OF CRIMINAL PROCEDURE: INVESTIGATION* § 2.7(c) (2d ed. 2009).

136. See David A. Harris, *The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection*, 66 *LAW & CONTEMP. PROBS.* 71, 91 (2003) (“According to the U.S. Supreme Court, observation of any traffic offense by a police officer constitutes full and sufficient probable cause for the officer to stop and detain the driver long enough to perform the actions necessary to issue a citation.”).

137. See, e.g., *United States v. Gonzalez*, 969 F.2d 999, 1006 (11th Cir. 1992) (“A policeman’s mistaken belief of fact can properly contribute to a probable cause determination and can count just as much as a correct belief as long as the mistaken belief was reasonable in the light of all the circumstances.”).

138. See Stephanos Bibas, *The Right to Remain Silent Helps Only the Guilty*, 88 *IOWA L. REV.* 421, 426–27 (2003) (“Roughly 46% of questioned suspects deny guilt, almost four times as many as remain silent. Unless the police are formally interrogating huge numbers of innocent suspects, one must conclude that guilty suspects prefer lies to silence.”).

The rest of the analysis follows easily. Courts, almost universally, have construed cell phones to be containers that can hold evidence.¹³⁹ And because the cell phone was in the automobile at the time of the traffic stop, it is a container that can be searched without a warrant under the automobile exception.¹⁴⁰ At present, there are already a few cases, primarily involving drug activity, that have adopted this strain of logic and upheld cell phone searches under the automobile exception.¹⁴¹

Although there are no reported decisions of courts upholding such searches for texting while driving prosecutions, it is likely that prosecutors have already relied on this reasoning. At present, the stakes are so low—\$20 fines in some places¹⁴²—that most defendants probably just pay the fine without pushing

139. The container question has typically arisen in the search incident to arrest context, but the issue would apply in exactly the same way under the automobile exception. For authority concluding that cell phones are containers, see *supra* notes 104–08 and accompanying text. For a prominent decision rejecting the container rationale, see *State v. Smith*, 920 N.E.2d 949, 952–55 (Ohio 2009).

140. See *Acevedo*, 500 U.S. at 565 (“Police, in a search extending only to a container within an automobile, may search the container without a warrant where they have probable cause to believe that it holds contraband or evidence.”).

141. See *United States v. Cole*, No. 1:09-CR-0412-ODE-RGV, 2010 WL 3210963, at *18 (N.D. Ga. Aug. 11, 2010) (“[T]he seizure of multiple cell phones, in combination with the seizure of suspected marijuana, firearms, and a large sum of cash discovered in a shoe box, would together warrant a ‘man of reasonable caution’ to believe that the contacts and recent calls located on Defendant’s personal cell phone might contain some additional evidence of illegal drug distribution activity.”); *United States v. Garcia-Aleman*, No. 1:10-CR-29, 2010 WL 2635071, at *12 (E.D. Tex. June 9, 2010) (finding probable cause based on drug dog alert to a car where the driver had previously been arrested with a hidden compartment containing cocaine and because “cell phones have been held by other circuits to constitute tools of the drug trade”); *United States v. Monson-Perez*, No. 4:09CR623 HEA, 2010 WL 889833, at *6–8 (E.D. Mo. Mar. 8, 2010) (concluding there was probable cause to search a cell phone and allowing a warrantless search under the automobile exception); *United States v. Rocha*, No. 06-40057-01-RDR, 2008 WL 4498950, at *6 (D. Kan. Oct. 2, 2008) (finding probable cause to search cell phone for drug activity and relying on automobile exception); *United States v. James*, No. 1:06CR134 CDP, 2008 WL 1925032, at *4, *7. (E.D. Mo. Apr. 29, 2008) (upholding search of cell phone’s call log based on automobile exception); *United States v. Fierros-Alvarez*, 547 F. Supp. 2d 1206, 1211–14 (D. Kan. Apr. 23, 2008) (upholding search of cell phone located in vehicle under the automobile exception because inventory of vehicle turned up drugs and there was probable cause to believe the cell phone had facilitated drug transactions); *People v. Chho*, No. H034693, 2010 WL 1952659, at *5–6 (Cal. App. 6 Dist. May 17, 2010) (upholding search of text messages on repeatedly ringing cell phone under automobile exception); *State v. Boyd*, 992 A.2d 1071, 1089–90 (Conn. 2010) (upholding search of cell phone under automobile exception); *State v. Novicky*, No. A07-0170, 2008 WL 1747805, at *4, 6–7 (Minn. App. Apr. 15, 2008) (upholding search of cell phone seized from an automobile when search was conducted on the day of trial). *But cf.* *United States v. Davis*, 787 F. Supp. 2d 1165, 1171 (D. Or. 2011) (recognizing that “[c]ell phones may be searched for call records and other data pursuant to the automobile exception” but rejecting the argument in this case).

142. See *supra* note 63 and accompanying text.

for an appellate decision on the issue. But as the punishments for texting while driving get tougher, courts will likely be forced to consider the issue, and it seems clear that warrantless searches for evidence of texting while driving should be found permissible under the automobile exception.

The hard question is therefore not whether there is probable cause to search the phone, but instead *where* in the phone the officer can search. Are officers limited to searching text messages, or can they go further and look through e-mails, Facebook, Internet browsing history, pictures, and various other items? Here, the answer is trickier and depends on the scope of the statute.

As detailed in Part II above, a few states have banned the use of all hand-held cell phones while driving. Under these statutes, an officer who observes a driver using the phone seemingly has free reign to search any function on the phone for evidence that it was in use while the vehicle was moving. This includes text messages, e-mails, Internet browsing history, Facebook accounts, and a host of other applications. If police come across evidence of other criminal activity in the course of their search—for instance, text messages about drug transactions or pictures of child pornography—they are free to seize that evidence.¹⁴³

Other states have authorized some hand-held cell phone use but forbidden a large and ambiguous number of functions. For instance, Georgia forbids drivers from writing, sending, or reading text messages, instant messages, email, or Internet data.¹⁴⁴ Police searching under the automobile exception for a violation of that statute can therefore look through a phone's text messages, e-mail accounts, and Web browser because any indication that those functions were in use while the vehicle was moving would be evidence of a criminal violation. By contrast, police cannot search the phone's photo library, voicemail messages, or calendar entries because the statute does not prohibit a driver from using those functions while the vehicle is moving and thus no evidence of a criminal violation could be found there. For other applications, police authority to search is not clear because Georgia has not provided a definition of what constitutes an "instant message" or "Internet data."¹⁴⁵

A few states have (perhaps unintentionally) defined their texting-while-driving statutes narrowly. For instance, Michigan only forbids text messaging, but not other functions such as e-mail or Internet browsing.¹⁴⁶ In these states, law enforcement officers, acting under the automobile exception, can only search text messages.

143. Police are permitted to seize any item in plain view that is immediately incriminating. *See Horton v. California*, 496 U.S. 128, 128–29 (1990); *Arizona v. Hicks*, 480 U.S. 321, 326–29 (1987).

144. GA. CODE ANN. § 40-6-241.2(b) (2012).

145. *See id.*

146. *See MICH. COMP. LAWS ANN.* § 257.602b (2012); *see also supra* notes 55–59 and accompanying text for additional states falling into or close to this category.

Finally, there are three states that have statutorily forbidden police from searching or seizing phones as part of a texting while driving investigation.¹⁴⁷ For instance, Indiana's statute specifies that "[a] police officer may not confiscate a telecommunications device for the purpose of determining compliance with [the texting-while-driving statute]."¹⁴⁸ Although there is no legislative history indicating why these provisions were included in the texting-while-driving statutes, the likely explanation is that legislators wanted to protect the privacy of offenders and prevent fishing expeditions by law enforcement.¹⁴⁹

If true, these privacy concerns are admirable, but the solution is misguided. Texting while driving is a dangerous offense. Completely eliminating law enforcement's ability to collect evidence that someone committed the crime is therefore not productive. Legislatures do not handicap police in drunk driving investigations by preventing them from searching cars for beer cans or conducting field sobriety tests simply because they might also discover other embarrassing information. To be sure, there are obvious cost-benefit questions that must be addressed in allowing cell phone searches to prove texting while driving allegations. However, as described in Part IV.D below, there is a better way to balance those cost-benefit considerations that encourages convictions for texting while driving, while preventing many unnecessary cell phone searches.

IV. A COMPREHENSIVE LEGISLATIVE SOLUTION TO TEXTING WHILE DRIVING THAT MINIMIZES WARRANTLESS CELL PHONE SEARCHES

Although many states have admirably criminalized texting while driving, their efforts are insufficient. As described in Part II.B above, drivers in almost every state can text while driving without worrying about jail time, loss of their licenses, or large monetary fines. Yet, despite the seemingly inconsequential punishments imposed for texting while driving, police retain broad authority to rummage through reams of data on the phones of drivers stopped for texting while driving. This disconnect makes little sense. Legislatures should therefore take straightforward steps to enhance the punishment and deterrence of texting while driving, while simultaneously scaling back police authority to conduct unnecessary cell phone searches.

147. CONN. GEN. STAT. ANN. § 14-296aa(b)(3) (2012) ("The provisions of this subsection shall not be construed as authorizing the seizure or forfeiture of a hand-held mobile telephone or a mobile electronic device, unless otherwise provided by law."); IND. CODE § 9-21-8-59(b) (2012) ("A police officer may not confiscate a telecommunications device for the purpose of determining compliance with this section or confiscate a telecommunications device and retain it as evidence pending trial for a violation of this section."); N.Y. VEH. & TRAF. LAW § 1225-c(2)(c) (2012) ("The provisions of this section shall not be construed as authorizing the seizure or forfeiture of a mobile telephone, unless otherwise provided by law.").

148. IND. CODE ANN. § 9-21-8-59(b).

149. See Jon Seidel, *Texting Ban Clears Indiana House Panel*, POST-TRIB., Jan. 20, 2011, (News-Metro), at 6 (noting that the Indiana bill prohibits "police from confiscating a phone in a nod to privacy concerns").

A. Legislatures Should Increase Punishments for Texting While Driving

The case for tougher punishments for texting while driving is easily made by looking to the comparable crime of drunk driving. Although texting while driving and drunk driving are comparably dangerous activities (with texting possibly being more dangerous),¹⁵⁰ drunk driving is punished far more severely. A look at the history and current approach to drunk driving helps to put the issue in perspective.

For decades, the United States treated drunk driving like any other traffic offense.¹⁵¹ The public did not see drunk driving as a serious criminal offense, therefore, legislatures punished it extremely lightly.¹⁵² Over time, however, public attitudes changed. MADD and similar organizations began lobbying legislatures for tougher penalties in the early 1980s.¹⁵³ And legislatures eventually increased penalties for drunk driving because of public pressure. Today most state statutes authorize the possibility of jail time for first-time offenders.¹⁵⁴

The prohibition on texting while driving is at the same place drunk driving was in the late 1970s and early 1980s. While technically illegal, texting while driving is not stigmatic because public opinion does not harshly condemn it. At present, texting while driving is treated more like overtime parking, which is illegal but not repugnant, than drunk driving, which is both illegal and stigmatic.

Public perceptions about texting while driving will likely change though. Each year, thousands of new accidents and many deaths are attributed to texting while driving.¹⁵⁵ Some of those cases will become media sensations. For instance, the public was briefly outraged in 2008 after it was discovered that the engineer who caused a train crash killing 25 people in California had sent a text message just seconds before colliding with a freight train.¹⁵⁶ As texting while driving continues to cause mass casualty events—the deaths of high-profile figures, or the deaths of attractive young people¹⁵⁷—public attitudes may slowly begin to change.¹⁵⁸

150. See *supra* notes 31–34 and accompanying text.

151. See Gershowitz, *supra* note 6, at 966–67.

152. See *supra* note 68.

153. See GERALD D. ROBIN, *WAGING THE BATTLE AGAINST DRUNK DRIVING: ISSUES COUNTERMEASURES, AND EFFECTIVENESS* 8–14 (1991).

154. See Gershowitz, *supra* note 6, at 967–68. Authorized punishments nevertheless remain relatively light, with most states authorizing up to six months incarceration and, practically speaking, very few courts imposing actual jail time for first offenses. See *id.* at 968–69; see also Wisely & Braiser, *supra* note 75 (explaining that actual jail time for first-offense drunk drivers in the Detroit area is rare, but one court does regularly impose it).

155. See *supra* notes 24–25.

156. See Steve Hymon & Molly Hennessy-Fiske, *No Drugs, Alcohol Found in Body of Engineer*, L.A. TIMES, Dec. 4, 2008, at B3.

157. See Charles Bassett, *Couple Promotes Texting While Driving Safety Device After Losing Daughter in Crash*, NEWSON6.COM (Apr. 22, 2010, 11:42 AM), <http://www.newson6.com/global/story.asp?s=12357878> (“A Texas couple who lost their

Grass roots organizations are beginning to pop up and lobby against texting while driving in a way similar to MADD's attack on drunk driving.¹⁵⁹ It is quite possible that public attitudes toward texting while driving will eventually resemble the current perception of drunk driving. The question is whether it will take decades for the perceptions and punishment levels to change or whether the transformation will be faster. If legislatures wish to be ahead of the curve, they should move toward punishment levels that more closely approximate the penalties for driving while intoxicated.¹⁶⁰

As described in Part II.B above, many states currently treat first-offense drunk driving as a jailable offense punishable by up to six months of incarceration.¹⁶¹ Some states authorize lighter sentences such as a month or less in jail, while defendants in other states face penalties of a year or more.¹⁶² By and large, however, states take a fairly consistent approach to drunk driving by classifying it as more serious than a traffic ticket but less serious than a felony. Moreover, states authorize jail time and stiff fines for drunk drivers who never caused an accident.¹⁶³ This tells us that legislatures have chosen to punish drunk driving not simply when it causes harm, but more widely in order to deter the dangerous behavior.

If the basis for punishing drunk driving is that it is dangerous behavior, then the obvious question is why other similarly dangerous behavior behind the wheel is not punished in a similar fashion. As discussed in Part II, studies suggest that texting while driving may be as dangerous or possibly even more risky than

daughter in an accident is in Oklahoma City promoting a new device to help prevent teens from texting while driving.”)

158. See Matt Richtel, *Utah Gets Tough with Texting Drivers*, N.Y. TIMES (Aug. 28, 2009), <http://www.nytimes.com/2009/08/29/technology/29distracted.html?pagewanted=all> (explaining that Utah authorized tough punishments, including incarceration, for texting while driving after two scientists were killed by a college student who crossed into the other side of the road because he was texting).

159. For example, a Florida organization called Text Free Driving Organization describes itself as “a group of concerned citizens who want to make our highways, roadways and neighborhood streets as safe as possible.” See *Purpose*, TEXT FREE DRIVING ORG., <http://www.textfreedriving.org/index.html> (last visited July 4, 2012).

160. See A. Starkey De Soto, *Intoxication: Txtng Whl Drvng. Does the Punishment Fit the Crime?*, 32 U. HAW. L. REV. 359, 381–90 (2010) (noting, as this Article does, that because the dangers of texting while driving are similar to the dangers of driving while intoxicated, legislatures should craft similar penalties).

161. See Gershowitz, *supra* note 6, at 967–68.

162. See *id.*

163. Some states draw no distinction between drunk drivers who are arrested before causing any harm and drunk drivers who cause property damage or modest injuries. These states do, however, punish intoxicated manslaughter cases (where death results) and intoxication assault cases (where serious bodily injury results) more severely. Compare TEX. PENAL CODE ANN. § 49.04 (2012) (ordinary drunk driving is a Class B misdemeanor), with TEX. PENAL CODE ANN. § 49.08 (intoxication manslaughter is a second-degree felony), and TEX. PENAL CODE ANN. § 49.07 (intoxication assault is a third-degree felony).

driving while intoxicated.¹⁶⁴ If legislatures are seeking to punish people for risky behavior and to deter it in the future, it stands to reason that the comparably dangerous activity of texting while driving should be punished similarly to the crime of drunk driving. Accordingly, states should authorize jail time for texting while driving. At present, 48 states authorize jail time for drivers who are convicted of ordinary drunk driving for the first time,¹⁶⁵ but only two states—Alaska and Utah—do the same for those convicted of texting while driving for the first time.¹⁶⁶

In addition to authorizing jail time, legislatures must also increase the fines for texting while driving. As noted above in Part II.B, most texting-while-driving statutes impose very light fines of \$100 or less.¹⁶⁷ In some states, the fine for texting while driving is actually less than the most minor traffic offenses. For instance, in Kentucky, the first-time fine for texting while driving is only \$25, compared with a \$30 fine for speeding at 45 miles per hour in a 30-miles-per-hour zone.¹⁶⁸ In Virginia, exceeding the speed limit in some geographic areas results in a \$200 fine, compared with a \$25 fine for the first texting-while-driving offense.¹⁶⁹

Even in states that authorize tougher fines for texting while driving, those amounts are not mandatory and prosecutors and judges likely assess lower amounts.¹⁷⁰ By contrast, first-time drunk drivers around the country face thousands of dollars in fines, and prosecutors and judges regularly demand payments of \$500 to \$1,000 or more following conviction.¹⁷¹

Legislatures seeking to send a message about texting while driving and enhance deterrence should authorize jail time and increase the fines for texting while driving to bring them in line with the punishments for drunk driving.¹⁷²

164. See *supra* notes 31–34 and accompanying text.

165. New Hampshire and Pennsylvania are the two exceptions. See N.H. REV. STAT. ANN. § 265-A:18 (2012); 75 PA. CONS. STAT. § 3804(a)(1), (c)(1) (2012) (although authorizing 72 hours incarceration if offender refused to take breathalyzer test).

166. See *supra* notes 65–66 and accompanying text.

167. See *supra* note 60 and accompanying text.

168. See KY. REV. STAT. ANN. §§ 189.394, 189.990(30)(b) (2012).

169. VA. CODE ANN. §§ 46.2-878.2, -1078.1(D) (2012).

170. See *supra* note 64 and accompanying text.

171. See *supra* notes 73–75 and accompanying text.

172. Deterrence is a notoriously difficult concept to measure. Nevertheless, early indications are that tougher punishments and more rigorous enforcement, coupled with a strong public relations campaign, can reduce texting while driving. See Ashley Halsey III, *Fines Lower Drivers' Use of Cellphones*, WASH. POST (July 10, 2011), http://www.washingtonpost.com/local/fines-lower-drivers-use-of-cellphones/2011/07/08/gIQAMvX67H_story.html (finding considerable decrease in hand-held cell phone use and texting based on federal pilot program in Syracuse, New York).

B. Legislatures Should Revoke the Licenses of Drivers Convicted of Texting While Driving

Another way in which legislatures should toughen the punishment for texting while driving offenders is by imposing driver's license suspensions comparable to those in drunk driving cases.

States regularly suspend the driver's licenses of drunk drivers, even those convicted of a first offense.¹⁷³ Typically, license suspensions are mandatory¹⁷⁴ and last anywhere from a few months to a year.¹⁷⁵ There are ways for judges to soften the blow, such as allowing offenders to drive to work,¹⁷⁶ or for other hardships such as medical problems.¹⁷⁷ The key point, however, is that across the country it is an accepted practice for judges to suspend the driver's license of convicted drunk drivers. Indeed, drivers may still lose their licenses if they refuse to submit to a breathalyzer test before criminal charges are ever filed, and even if defendants are eventually acquitted.¹⁷⁸

At present, states typically do not suspend driver's licenses for texting while driving offenses unless the driver is a serial offender or has committed other violations. For instance, in June 2011, Nevada enacted a ban on texting while

173. See Ins. Inst. for Highway Safety & Highway Loss Data Inst., *DUI/DWI Laws*, HIGHWAY SAFETY RES. & COMM. (July 2012), <http://www.iihs.org/laws/dui.aspx> ("License suspension or revocation traditionally follows conviction for alcohol-impaired driving.").

174. See, e.g., CAL. VEH. CODE § 13352(a) (2012) ("The department shall immediately suspend or revoke the privilege of a person to operate a motor vehicle upon the receipt of an abstract of the record of a court showing that the person has been convicted of a violation of [certain drunk driving offenses].").

175. See, e.g., CAL. VEH. CODE § 13352(a)(1) (specifying six-month suspension); MD. CODE ANN., TRANSP., § 16-205.1 (2012) (forty-five days for first-offenders); NEB. REV. STAT. § 60-6,197.03 (2012) (six-month suspension which can be shortened if judge allows the installation of an interlock device instead); TENN. CODE ANN. § 55-10-403(a)(1)(A)(i) (2012) (one-year suspension for first offenders).

176. See, e.g., CAL. VEH. CODE § 13352.5(a)(4)(c) (authorizing restricted driver's licenses to drive to and from employment).

177. See, e.g., KY. REV. STAT. ANN. § 189A.410 (2012) (allowing hardship reductions for medical and other reasons); LA. REV. STAT. ANN. § 32:415.1 (2012) (allowing hardship reductions for medical and family reasons); MISS. CODE ANN. § 63-11-30 (2012) (allowing hardship reductions for first offenders).

178. See Jennifer E. Dayok, Comment, *Administrative Driver's License Suspension: A Remedial Tool That Is Not in Jeopardy*, 45 AM. U. L. REV. 1151, 1154 n.9 (1996) (listing roughly 40 states that have adopted this rule). For a more recent compilation, see *Administrative License Revocation*, MADD, <http://www.madd.org/laws/administrative-license-revocation.html> (last visited August 16, 2012) (listing 42 states and the District of Columbia that revoke licenses when drivers refuse to take chemical tests). The Insurance Institute for Highway Safety and the Highway Loss Data Institute have gathered the suspension time period for every state that administratively suspends licenses. Ins. Inst. for Highway Safety & Highway Loss Data Inst., *supra* note 173. Three months appears to be the most common suspension period, although some states go as high as a year while a few states do not impose administrative suspensions. *Id.*

driving and provided for license suspension only after a third conviction.¹⁷⁹ When Massachusetts enacted its ban on texting while driving in 2010, it did not classify it as a moving violation, thus eliminating the possibility of insurance surcharges.¹⁸⁰ Even Utah, which seemingly has the toughest texting-while-driving laws in the nation, and is one of the few places to even authorize license suspensions,¹⁸¹ is more lenient on texting suspensions than drunk driving suspensions. Judges in Utah are statutorily required to suspend the licenses of convicted drunk drivers,¹⁸² but they have discretion whether to suspend the licenses of those convicted of texting while driving.¹⁸³

In the drunk driving context, scholars have observed that license suspension may be the most feared penalty because it amounts to a considerable liberty restriction.¹⁸⁴ Given that more than one-third of teenagers in the U.S. text while driving, and that these young drivers undoubtedly value the newfound freedom of driving on their own,¹⁸⁵ imposing the threat of license suspensions may be beneficial to general deterrence.¹⁸⁶ Moreover, assuming texting-while-driving offenders comply,¹⁸⁷ license suspensions should have an incapacitation effect by

179. See *Nevada Bans Texting While Driving*, METRO MAG. (June 20, 2011), <http://www.metro-magazine.com/News/Story/2011/06/Nevada-bans-texting-while-driving.aspx>.

180. See Michael Levenson, *New State Law Spells It Out: No Texting While Driving*, BOS. GLOBE (July 3, 2010), http://www.boston.com/news/local/massachusetts/articles/2010/07/03/new_state_law_spells_it_out_no_texting_behind_wheel/.

181. See Richtel, *supra* note 158 (discussing how “Utah is much tougher” than the rest of the nation in punishing texting while driving); UTAH CODE ANN. § 41-6a-1715 (2012) (providing that a judge may order the revocation of a convicted person’s license if the violation caused or resulted in another’s death).

182. See UTAH CODE ANN. § 41-6a-509(1)(a) (2012) (providing that the driver’s license division shall “suspend for a period of 120 days the operator’s license of a person convicted for the first [DUI offense]”).

183. See *id.* § 53-3-218(5) (“Upon a conviction for a violation of the prohibition on using a handheld wireless communication device for text messaging or electronic mail communication while operating a moving motor vehicle under Section 41-6a-1716, a judge may order a suspension of the convicted person’s license for a period of three months.”).

184. See H. Laurence Ross, *Can Mandatory Jail Laws Deter Drunk Driving? The Arizona Case*, 81 J. CRIM. L. & CRIMINOLOGY 156, 164 (1990) (reporting that according to defense attorneys who were surveyed, “the punishment most threatening to their clients was not jail, but license suspension”); H. Laurence Ross, *Law, Science, and Accidents: The British Road Safety Act of 1967*, 2 J. LEGAL STUD. 1, 68 (1973) (same).

185. See Steven Cole Smith, *Report: Teen Drivers Text, Call on Road*, SEATTLE TIMES, Nov. 17, 2009, at A26.

186. Unlike fines, which can be paid by parents, license suspensions can only be served by teenage drivers themselves.

187. The problem with license suspensions is that it is difficult to monitor compliance, leading offenders to ignore the suspension and continue driving. See David J. DeYoung et al., *Estimating the Exposure and Fatal Crash Rates of Suspended/Revoked and Unlicensed Drivers in California*, 29 ACCIDENT ANALYSIS & PREVENTION 17, 22 (1997) (noting that most suspended or revoked drivers continue to drive anyway and finding that 8.8% of the drivers on the road in California during a sampled period had suspended or revoked licenses).

removing dangerous drivers from the road, at least while the suspension is in effect.

C. Legislatures Should Require Convicted Offenders to Install Devices in Their Vehicles That Disable Cell Phones from Texting While the Vehicle Is in Motion

Yet another way that drunk driving is punished more harshly than texting while driving is that some drunk drivers are required to install alcohol ignition interlocks on their vehicles. Although similar devices exist to stop texting while driving, no state statutorily authorizes them and the Author is unaware of a judge ever mandating installation following a texting-while-driving conviction. As explained below, interlocks are an effective way to deal with both drunk driving and texting-while-driving offenders.

Most states require at least some convicted drunk drivers to install ignition interlock devices that prevent the offender's vehicle from starting when his breath alcohol exceeds a certain level.¹⁸⁸ For many years, ignition interlocks were not used with great frequency and were typically reserved for offenders caught with very high blood-alcohol levels or who had numerous prior drunk-driving convictions.¹⁸⁹ Recently, however, a few states have begun to make much greater use of interlock devices and have mandated them after a defendant's first drunk-driving offense.¹⁹⁰ For instance, in 2010, New York began requiring anyone sentenced for a drunk-driving offense to pay for the installation of an interlock device for six months in any vehicle she operates.¹⁹¹ Although the alcohol industry disputes the effectiveness of interlocks,¹⁹² preliminary research indicates that they substantially reduce recidivism by convicted drunk drivers.¹⁹³

188. See Janet Dewey-Kollen & Angela Downes, *Shattering Misconceptions About First-Time Drunk Driving Offenders*, 42 PROSECUTOR 14, 16 (2008) (explaining that 45 states and the District of Columbia authorize interlock devices in some circumstances).

189. For example, in Wisconsin, interlock devices are required for offenders convicted of second or subsequent drunk driving charges, first-offenders with a blood alcohol level of .15 or higher, or offenders who improperly refused to take the breathalyzer test. See WIS. STAT. § 343.301(1g)(b) (2012).

190. See Dewey-Kollen & Downes, *supra* note 188, at 16 (noting that, as of 2008, Arizona, Illinois, Louisiana, and New Mexico required ignition interlocks by all first-time DWI offenders); Joseph Marutollo, Comment, *No Second Chances: Leandra's Law and Mandatory Alcohol Ignition Interlocks for First-Time Drunk Driving Offenders*, 30 PACE L. REV. 1090, 1092–95, 1098 (2010) (discussing the enactment of mandatory interlock laws for first offenders in New York in 2009 and New Mexico in 2005).

191. See Barry Kamins, *New Criminal Justice Legislation*, 82 N.Y. ST. B.J. 30, 31 (2010).

192. See Marutollo, *supra* note 190, at 1093–94.

193. See *id.* at 1099 (discussing recidivism research in New Mexico); Dewey-Kollen & Downes, *supra* note 188, at 16 (discussing studies finding “a 77 percent decrease in recidivism among interlocked first offenders in West Virginia” and even higher reductions in Canada).

Because of the increased problem of texting while driving, the marketplace has responded with a number of products similar to ignition interlocks. These devices stop texting or other cell phone use while a vehicle is in motion. For instance, the cleverly named Textecution product installs an application on the phone that disables the texting function when the cell phone is traveling at more than ten miles per hour.¹⁹⁴ The total cost is a one-time fee of \$29.99.¹⁹⁵ Another product, tXtBlocker, enables cell phone owners to log into an account and control what times and locations the phone can receive text messages and phone calls.¹⁹⁶ The total cost is \$6.99 per month.¹⁹⁷ In March 2011, Sprint announced that it would begin offering a \$2-per-month service to its customers that locks the cell phone screen and blocks text messages while the vehicle is in motion.¹⁹⁸

The natural objection to such devices—just like the objection to alcohol ignition interlocks—is that individuals will find a way to circumvent them.¹⁹⁹ In a world of evolving technology, this objection certainly has some merit, but the marketplace has already taken steps to limit the problem. For instance, if a tech-savvy teenager figures out how to remove Textecution from the phone, the parent who purchased the application will be notified by e-mail that it has been uninstalled.²⁰⁰

At present, parents seeking to protect their children and corporations seeking to avoid liability for accidents caused by their agents are the primary customers using devices to stop texting while driving.²⁰¹ The average adult—who

194. *Frequently Asked Questions*, TEXTECUTION, <http://www.textecution.com/faqs.php> (last visited July 4, 2012).

195. *Id.*

196. *See* TXTBLOCKER, <http://www.txtblocker.com/default.aspx> (last visited July 4, 2012).

197. *See Pricing*, TXTBLOCKER, <http://www.txtblocker.com/pricing.aspx> (last visited July 4, 2012).

198. *See* Jennifer Valentino-DeVries, *Phone Carriers Tout Tool to Stop Texting and Driving*, WALL ST. J. BLOG (Mar. 24, 2011, 3:59 PM), <http://blogs.wsj.com/digits/2011/03/24/phone-carriers-tout-tool-to-stop-texting-and-driving/>.

199. Critics complain that drunk driving offenders can have someone else blow into the ignition interlock or find some other clever way to defeat the device. *See* Marutollo, *supra* note 190, at 1107 (recounting how a recidivist drunk driver used a balloon, an air compressor, and a cigarette lighter to overcome the interlock).

200. *Frequently Asked Questions*, TEXTECUTION, *supra* note 194.

201. The product marketing is clearly directed to parents and employers. *See, e.g., About*, TXTBLOCKER, <http://www.txtblocker.com/about.aspx> (last visited July 30, 2012) (“With tXtBlocker, you can ensure safe driving for your whole family Many job related accidents are now attributed to mobile phone distractions. If you have invested in phones for your company and employ drivers in your business, have employees that travel frequently for work, or drive to and from the office every day, you can provide a safer workplace by using tXtBlocker.”); E-mail from Joe Lemire, employee of Textecution, to Brian Wittpenn, research assistant for Author (July 28, 2011, 7:18 AM) (on file with author) (“[T]he majority of [our customers] are parents placing [the application] on a teen[?]s phone. . . . Several clients had fleets of trucks and wanted to keep their drivers safe.”).

almost certainly believes he is a good driver, even if he is not²⁰²—will not pay to limit his own ability to utilize his cell phone while driving. However, there is no reason why states cannot require offenders convicted of texting while driving to use such devices, just as most states require drivers convicted of driving drunk to use alcohol ignition interlock devices.²⁰³

The hardships of requiring convicted offenders to install the text-blocking device are far less than for alcohol ignition interlock devices. First, devices to stop texting while driving are far cheaper and thus less financially burdensome on poorer offenders. While an alcohol ignition interlock costs about \$70 per month plus the cost of installation and removal (a total of at least \$500 for a six-month period),²⁰⁴ devices to stop texting while driving may cost as little as \$24 per year²⁰⁵ and future technology may soon reduce that cost to almost nothing. Second, unlike alcohol interlocks, text-blocking devices are not stigmatic to the offender because they are hidden inside the vehicle or are non-tangible applications on the phone themselves.

If states are willing to require alcohol ignition interlocks that are embarrassing and cost offenders more than \$500 for a six-month period to reduce the dangers of recidivist drunk driving, then there is good reason to implement far cheaper, invisible devices that reduce the equally dangerous activity of texting while driving. This approach would seem to be a palatable first step in dealing with the texting-while-driving problem. To date, such legislation has only been proposed in Rhode Island,²⁰⁶ where it was shelved for further study after a single committee hearing.²⁰⁷ States seeking to deter texting while driving and to incapacitate offenders should specifically authorize, and perhaps require, the installation of interlock devices to prevent texting while driving.

202. Nowhere is the Lake Wobegon effect, where everyone believes they are above average, more present than in people's perceptions of their own driving. *See, e.g.*, Mark S. Horswill et al., *Drivers' Ratings of Different Components of Their Own Driving Skill: A Greater Illusion of Superiority for Skills That Relate to Accident Involvement*, 34 J. APPLIED SOC. PSYCHOL. 177, 177–78 (2004).

203. Indeed, Secretary of Transportation Ray LaHood has asked automakers to design devices that would disable Twitter and Facebook while vehicles are moving. Angela Greiling Keane, *Don't Tweet and Drive: Feds Ask Automakers to Disable Devices in Moving Cars*, DENVER POST (Feb. 17, 2012, 1:00 AM), http://www.denverpost.com/business/ci_19984202.

204. *See, e.g.*, *What to Expect*, LIFESAFER, <http://www.lifesafes.com/what-to-expect> (last visited August 16, 2012).

205. *See* Valentino-DeVries, *supra* note 198 and accompanying text.

206. *See* David Klepper, *R.I. Lawmaker: Device Can Stop Texting While Driving*, ASSOC. PRESS (Apr. 5, 2011, 8:17 AM), <http://www.businessweek.com/ap/financialnews/D9MDGGJG0.htm>.

207. E-mail from Representative Charlene Lima, Rhode Island House of Representatives, to Adam Gershowitz, Author (June 9, 2011, 12:37 PM) (on file with author).

D. Exchanging Confessions for Searches

As I advocated in Parts IV.A–C, legislatures should impose tougher fines, jail time, license suspension, and interlock devices on texting while driving offenders to enhance general deterrence and incapacitation. Yet, these approaches focus exclusively on what happens after a defendant is convicted, rather than enhancing the odds of convicting those who commit the crime of texting while driving. Also, imposing tougher punishments on convicted offenders does not reduce police authority to rummage through reams of private cell phone data in the name of investigating allegations of texting while driving. Legislatures can achieve these seemingly inconsistent goals, increasing the chances of conviction and reducing the instances of warrantless cell phone searches, by adopting a statutory scheme in which drivers are given the option to avoid a cell phone search in exchange for a written confession that they were texting while driving. As outlined below, this approach would make it faster and easier to convict offenders because it is hard for defendants to contest their guilt in the face of a written confession. At the same time, exchanging a confession for a search would statutorily eliminate an officer's authority to search, thus providing greater protection against warrantless cell phone searches than that provided by the U.S. Constitution. As explained below, exchanging a confession for a search does not amount to unconstitutional coercion and is sound public policy.

Legislatures should codify the exact steps that law enforcement officers must take when exchanging a confession for a search. Statutes should specify that police may only search a driver's cell phone if the driver has been given a clear opportunity to confess and has declined to do so. The statute should specify the exact language that the officer must convey to the driver and it should provide an opportunity for the driver to sign a clear confession or denial. A simple formulation would be as follows:

Confessing in Lieu of a Search

1. Each driver stopped for texting while driving shall be orally advised of the following rights and choices and shall be presented with a copy of this form.
 - A. You have been stopped by a police officer for unlawfully texting while driving.
 - B. If you choose to confess to texting while driving, the officer will not be allowed to search your cell phone. By confessing, you will be issued a ticket and will be allowed to leave immediately after the paperwork is completed.
 - C. You have a constitutional right not to confess to the texting-while-driving allegation. You are free to deny the allegation and to refuse to confess.
 - D. If you refuse to sign this confession, then the officer will be permitted by law to search your cell phone for evidence that you were texting while driving.
2. I acknowledge that I have read and understood paragraphs 1A through 1D above. [Signed_____]

3. Driver shall sign either Option A or Option B below:
 - A. I hereby confess to the allegation that I was texting while driving. [Signed _____]
 - or
 - B. I hereby deny the allegation that I was texting while driving. [Signed _____]

There are multiple benefits to a statutory scheme that provides for a clear and simple confession while forbidding a search of the phone. First, and most obviously, for individuals who wish to protect the privacy of their cell phones, this scheme gives them protection well in excess of what the Fourth Amendment affords. Although the search incident to arrest doctrine and the automobile exception to the Fourth Amendment would authorize police to search the driver's cell phone, the legislature would be giving drivers the option to prevent that search. The statute thus amounts to a windfall for some defendants who were clearly guilty of texting while driving and have something to hide in their phones. Had officers been allowed to search the phone, they might have discovered text messages revealing that the driver is a drug dealer,²⁰⁸ e-mails showing that the driver is engaged in theft from his employer, photos of him posing with an illegal firearm,²⁰⁹ or simply embarrassing (but not illegal) naked pictures of his girlfriend. A statutory scheme that exchanges a confession for a search allows the driver to prevent law enforcement from ever seeing any of this incriminating and embarrassing information.

Second, and related, the statute gives the driver valuable information about his rights and provides the opportunity to make an informed choice. Drivers will know, up front, that they have the right to refuse to confess. They will also know, up front, that police have the authority to search the phone without a warrant. This level of knowledge is atypical in the criminal justice system. For instance, under longstanding Supreme Court precedent, police need not inform suspects about their right to refuse consent.²¹⁰ The decision whether to confess to texting while driving is thus far more informed than the decision whether to consent to a search. Additionally, the statutory scheme is considerably simpler—and thus more helpful—than the supposedly informed choices defendants make after receiving *Miranda* warnings.²¹¹ Drivers would have a binary choice to either

208. Cell phone searches regularly turn up this type of evidence. *See supra* notes 102–03 and accompanying text.

209. *See* John Grant Emeigh, *Facebook, Texting Help Police Investigations*, MONT. STANDARD (July 24, 2011, 8:26 AM), http://mtstandard.com/news/local/facebook-texting-help-police-investigations/article_32e95608-b601-11e0-a5be-001cc4c002e0.html (explaining how prosecutors found a photo of a defendant flashing a gang sign and holding two dozen \$100 bills on Facebook).

210. *Schneckloth v. Bustamonte*, 412 U.S. 218, 231–33 (1973).

211. *See* George C. Thomas III & Richard A. Leo, *The Effects of Miranda v. Arizona: "Embedded" in Our National Culture?*, 29 CRIME & JUST. 203, 245–53 (2002) (explaining the ways in which the *Miranda* rule actually harms defendants and helps police).

confess to the simple offense of texting while driving or to refuse to confess. There would be no ambiguity about whether they were entitled to a lawyer, what they would have to do to invoke their choice, or whether it would be in their best interest to confess.²¹² Under a statute exchanging a confession for a search, the choice will be simple and understandable for most defendants.

A third, and completely different benefit of this statutory approach is that a signed confession will make it very difficult for drivers to later argue that they are not guilty. To be sure, defendants will contend that they signed the confession because they were scared or because they thought they had no choice, but such arguments will be unpersuasive. The plain language of the document lays out the driver's two options and provides a clear space for the driver to either confess or refuse to confess. Thus, in most cases where the driver has signed a written confession, she will know that she has little chance of prevailing at trial.²¹³ Accordingly, defendants will likely plead guilty more often and at an earlier stage of the process than they otherwise might. This, in turn, will increase the certainty and speed of conviction for the crime of texting while driving—two key factors in achieving deterrence.²¹⁴

Fourth, defendants who refuse to sign the confession will be in no worse position than if the statute had never been enacted. Under existing Fourth Amendment jurisprudence, almost all courts would permit officers to search the cell phone for evidence of texting while driving. A statute that exchanges a confession for a search does not confer any additional authority on law enforcement to conduct a warrantless cell phone search. Quite obviously, legislatures lack the power to convey more search and seizure authority than the Fourth Amendment permits. As such, if a defendant chooses to assert his rights and refuses to confess, he will be in exactly the same position as if the statute had never been enacted. The officer may choose to search the phone under the search incident to arrest doctrine or automobile exception, or she may choose not to.

212. All of these confusing problems arise under *Miranda*. See JOSHUA DRESSLER & GEORGE C. THOMAS, III, *CRIMINAL PROCEDURE: PRINCIPLES, POLICIES, AND PERSPECTIVES* 669–73, 678–95 (4th ed. 2010).

213. See Richard A. Leo et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-First Century*, 2006 WIS. L. REV. 479, 519 (“A suspect’s confession sets in motion a seemingly irrefutable presumption of guilt among justice officials, the media, the public, and lay jurors. The system is stacked against the individual who confesses, treating that suspect more harshly at every stage of the investigative and trial process.” (footnotes omitted)).

214. A vast literature demonstrates that the certainty of punishment is the most important factor in maximizing deterrence. See *supra* note 20 (collecting sources). Some studies have also found the speed of punishment to be a relevant factor in deterrence. See, e.g., H. Laurence Ross, *Administrative License Revocation in New Mexico: An Evaluation*, 9 LAW & POL’Y 5, 5–6, 14 (1987) (studying new law that immediately suspended the licenses of drivers who failed or refused alcohol tests and finding that immediate suspensions—in other words, the variable for swiftness of punishment—appeared to reduce highway fatalities).

Of course, there are objections—some weak and some plausible—that can be raised to this statutory scheme. The first objection is that such an approach may encourage police to conduct warrantless cell phone searches that they might not otherwise have done. Critics would surely argue that failure to confess might give the officer a hunch—whether merited or not—that the driver is hiding something more serious and thus encourage officers to search phones they would otherwise have ignored. The objection about refusal to confess leading to additional cell phone searches has some merit, but it is ultimately not sufficient to undermine the framework.²¹⁵

Even though I have advocated that texting while driving should be treated as a more serious offense carrying jail time and stiff fines, most law enforcement officers, like the general public, likely do not view it as a very serious offense. Given that police deal with murders, robberies, burglaries, drug smuggling and other serious offenses, most officers likely will not be interested in prolonging texting while driving detentions without good reason. And while refusal to confess might be slightly suspicious, the officer (as an average person with her own phone and privacy concerns) likely understands that the driver has a lot of private data on the phone that he simply may want to keep private. As such, an officer who was not inclined to search a cell phone before the driver refused to confess is probably not going to change his mind simply because of the refusal. Refusal to consent will surely lead to some cell phone searches that otherwise would not have occurred, but the number will likely be fairly small.

A second, and related objection, is that a driver's refusal to confess might be interpreted by police officers as "contempt of cop."²¹⁶ Officers might become aggravated with the driver and retaliate against him by searching the cell phone when they otherwise would not have done so. While there is likely some truth to this objection as well, it must be rejected because otherwise any restriction on police power could be defeated. Simply because police may dislike individuals exercising their statutory rights is not a legitimate reason to prevent the creation of such rights.²¹⁷

215. See Margaret Raymond, *The Right to Refuse and the Obligation to Comply: Challenging the Gamesmanship Model of Criminal Procedure*, 54 BUFF. L. REV. 1483, 1487–89 (2007) (explaining that the consequences of refusing consent should be "extremely limited" but that police "plainly view a failure to comply as suspicious, and treat resistance to an attempt to initiate a consensual encounter as sufficient to create reasonable suspicion").

216. See Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1451 n.50 (2009) (explaining that "contempt of cop" is a way in which officers "punish or exact retribution on disrespectful or non-submissive individuals").

217. The Supreme Court did assert a perverse version of this argument, however, in *Illinois v. Gates*. 462 U.S. 213 (1983). Justice Rehnquist argued in passing for a low probable cause standard because making it onerous to get a warrant would result in police simply conducting warrantless searches. See *id.* at 236 ("If the affidavits submitted by police officers are subjected to the type of scrutiny some courts have deemed appropriate, police might well resort to warrantless searches . . ."). The contempt of cop argument is thus not without precedent, even if it is unpersuasive.

A third objection is that asking a driver to confess to texting while driving in order to avoid an invasive and potentially embarrassing search of her cell phone is unduly coercive and thus unconstitutional under the Fifth Amendment. In essence, the argument is that an exchange creates so much pressure on the driver to sign the confession that it renders it involuntary and thus unconstitutional. On an instinctual level, there appears to be some merit to this argument. Drivers who might have a viable defense to the texting-while-driving charge might nevertheless sign the confession because they fear handing their phone over to the police. Drivers who want to protect their privacy or just have the traffic stop end quickly might feel as though they have no choice but to sign the confession. Whatever the instinctual allure of this argument, however, as a legal matter, it is quite weak.²¹⁸

To render a confession involuntary in violation of the Fifth Amendment, police must overbear the will of the suspect.²¹⁹ This occurs when law enforcement uses force, threat of force, or, in rare cases, an extreme form of psychological trickery.²²⁰ Quite obviously, the first and second scenarios are extremely unlikely in the vast majority of cases, leaving the inquiry to ride on whether the police are engaged in extreme trickery. The answer to this question must surely be no. Simply making a suspect uncomfortable or delaying her ability to leave the scene does not come close to qualifying as coercion.

Involuntariness is judged under a totality of the circumstances test and there are no specific factors pointing toward coercion in a scheme that exchanges a confession for a search.²²¹ Police who follow the statutory script will have been honest and straightforward with the suspect about his options. They will have advised him in plain language of his right to refuse to confess, a crucial factor in determining that the confession was voluntary.²²² In short, while a suspect might not enjoy being put in a situation that forces him to choose between confession and a possible search of her phone, there is nothing unconstitutionally coercive about that choice. By the statute's very language, the suspect has a choice and is thus not coerced.

The key reason why the coercion argument fails is that the officer almost certainly has Fourth Amendment authority under the search incident to arrest

218. The Supreme Court has rejected far more compelling instances where defendants might have felt trapped and helpless. *See, e.g.*, *Florida v. Bostick*, 501 U.S. 429, 437–40 (1991) (declining to find a seizure when officers worked the busses and asked for consent to search passengers' bags in a confined area).

219. *See Arizona v. Fulminante*, 499 U.S. 279, 287–88 (1991).

220. For a study about thousands of confession cases explaining the parameters of the voluntariness rule, see Paul Marcus, *It's Not Just About Miranda: Determining the Voluntariness of Confessions in Criminal Prosecutions*, 40 VAL. U. L. REV. 601 (2006).

221. *See id.* at 638 n.210.

222. Courts explicitly and implicitly find that police compliance with the *Miranda* warnings is a reason to conclude a confession has been voluntary. *See id.* at 637 (“Many cases can be found throughout the nation—both federal and state—in which confessions are held to be voluntary, with courts relying strongly on the fact that the suspects were given *Miranda* warnings and appeared to understand their constitutional rights.”).

doctrine and the automobile exception to conduct the search.²²³ In other words, the officer is not gathering evidence through deception that he was not legally entitled to acquire.

The choice between a confession and a search is very different from the choice faced by the defendant in *Bumper v. North Carolina*, the famous Supreme Court case where police lied about having a search warrant to gain consent to search a house.²²⁴ In *Bumper*, Justice Stewart uttered the much quoted statement that “[w]here there is coercion there cannot be consent.”²²⁵ The Court simply meant that police may not lie about the existence of a warrant when they do not have one. If police have the ability to get a warrant, then threatening to get one if the suspect does not consent is a perfectly constitutional police tactic.²²⁶ As the First Circuit has explained “[c]ourts have held, with a regularity bordering on the monotonous, that [threatening to get a warrant if the suspect refuses consent], made in a case in which the facts were sufficient to support the issuance of a search warrant, does not constitute coercion.”²²⁷ Similarly, the Ninth Circuit has explained that an officer telling a suspect that he will get a warrant if consent is withheld can only possibly be coercive if the statement is made in a threatening manner, and even that argument is significantly diminished if probable cause to procure a warrant in fact exists.²²⁸

Courts have applied the same logic in other contexts as well. For instance, in a case where officers procured consent to search by threatening to bring in a drug-sniffing dog (which they had reasonable suspicion to do under the circumstances), the Ninth Circuit rejected the defendant’s argument that consent was invalid.²²⁹

Although the cases described above all involve consent, the key issue is whether consent was voluntarily given. And the voluntariness issue in consent cases is indistinguishable from the voluntariness question that arises in the Fifth Amendment confession context. Accordingly, it appears well settled that police can “threaten” to search a cell phone if the driver refuses to confess to texting while driving.

223. See 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 74 (4th ed. 2004) (explaining that when a police threat “accurately informs the individual of his precise legal situation” then it “does not involve any deceit or trickery” and does not amount to a Fourth Amendment violation).

224. 391 U.S. 543, 546–47 (1968).

225. *Id.* at 550.

226. See Rebecca Strauss, Note, *We Can Do This the Easy Way or the Hard Way: The Use of Deceit to Induce Consent Searches*, 100 MICH. L. REV. 868, 870–71 (2002) (noting the state of the law but arguing for a different rule); see also LAFAVE, *supra* note 223, at 74 & n.110 (collecting cases).

227. *United States v. Lee*, 317 F.3d 26, 33 (1st Cir. 2003).

228. *United States v. Rodriguez*, 464 F.3d 1072, 1078 (9th Cir. 2006).

229. *United States v. Todhunter*, 297 F.3d 886, 891 (9th Cir. 2002).

Despite the clear constitutionality of a rule that exchanges a confession for a search, legislatures have not embraced it.²³⁰ Indeed, legislatures almost never adopt rules that enable suspects to avoid an uncomfortable police tactic by submitting to a different tactic.²³¹ Rather, legislative approaches to criminal procedure are usually at two diametrically opposite extremes. Legislators either give police blanket authority to utilize certain techniques or they take a police tactic off the table entirely. For example, legislatures give police blanket authority to deceive suspects during interrogations, rather than permitting it in some types of cases but not others.²³² On the opposite side of the coin, many legislatures have completely banned the (debatably effective) practice of racial profiling, rather than allowing it in particular kinds of cases.²³³ In other words, legislatures tend to think one-dimensionally and say, “yes, police can do that,” or “no, police cannot do that,” rather than adopting rules that say “police can use a tactic in these situations but not those.”

The lack of such legislative nuance in criminal investigation rules is not surprising. As Bill Stuntz has explained, police interests are typically aligned with legislators’ interests, making legislators inclined to give the police the tools they want.²³⁴ In rare circumstances however, legislatures truncate police authority either out of sincere belief,²³⁵ self-interest,²³⁶ or to score political points.²³⁷ For these

230. Perhaps because of their absence from legislation, scholars rarely advocate such alternative choices. For one prominent exception, see William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2189–90 (2002) (advocating, among other proposals, that *Miranda* rules be relaxed in certain cases in exchange for law enforcement videotaping interrogations). As Professor Stuntz recognized, most of his suggested changes to police authority would require the Supreme Court to alter its rules, thus making them less likely to occur. *Id.* at 2191–92.

231. Although on a bigger picture level, legislative and constitutional choices do redirect police activity. For instance, as Jacqueline Ross has explained, limits imposed on police questioning have resulted in increased police deception and undercover tactics. See Jacqueline E. Ross, *Tradeoffs in Undercover Investigations: A Comparative Perspective*, 69 U. CHI. L. REV. 1501, 1508–09 (2002). In Europe, legislatures do circumscribe certain police techniques, such as reserving undercover policing for certain categories of crime. See *id.* at 1521. There are very few comparable examples in the American criminal justice system.

232. See Miriam S. Gohara, *A Lie for a Lie: False Confessions and the Case for Reconsidering the Legality of Deceptive Interrogation Techniques*, 33 FORDHAM URB. L.J. 791, 834–40 (2006) (advocating that legislatures change the status quo and ban deceptive police tactics).

233. See Samuel R. Gross & Debra Livingston, *Racial Profiling Under Attack*, 102 COLUM. L. REV. 1413, 1413 & nn.1–4 (2002).

234. See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 534 (2001) (explaining in the criminal law context that “[a]dvancing police and prosecutors’ goals usually means advancing legislators’ goals as well”).

235. For example, many politicians came to the conclusion, at least before September 11, 2001, that racial profiling was wrong even if it was arguably helpful to law enforcement. See Gross & Livingston, *supra* note 233, at 1430 & n.66.

236. See Craig S. Lerner, *Legislators as the “American Criminal Class”: Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599, 601–05,

reasons, and because it is simply easier to ban a practice than to draft legislation authorizing it in particularized circumstances, legislators occasionally reject certain law enforcement tools, yet rarely draft rules that limit law enforcement in some situations but not others.

That is not to say that my proposal to exchange a confession for a search is completely without analogy. There are somewhat similar exchange rules in other spheres of the criminal justice system that give suspects choices that in turn restrict the government's power. For instance, when a driver is pulled over for drunk driving, the officer will give him a choice to either take a breathalyzer test on the one hand or to administratively lose his license²³⁸ and possibly have the jury hear of his refusal on the other hand.²³⁹ Another example is the statutorily authorized fast-track plea-bargaining process in which Congress has given defendants an initial choice. Defendants can agree to plead guilty prior to indictment and to waive certain discovery, and in exchange, they receive a charge bargain or a more lenient sentence.²⁴⁰ The government gives up its ability to get a tougher sentence in exchange for a swifter outcome.

Giving the defendant the option of exchanging a confession for a search goes even further than the breath test and fast-track plea-bargaining examples. Exchanging a confession for a search cuts off a perfectly constitutional police tactic to further competing goals of the criminal justice system: swift conviction and individual privacy.

CONCLUSION

Although legislatures have moved quickly over the last few years to criminalize texting while driving, they have not appreciated the scope or severity of the problem, nor have they considered the possibility of police searching cell

660, 662 (arguing that many pro-defendant rules result from legislatures being placed in the crosshairs of the criminal justice system).

237. Legislatures in some libertarian states—Texas is a good example—have refused to support sobriety checkpoints in large part because they are unpopular. See Adam M. Gershowitz, *Is Texas Tough on Crime, but Soft on Criminal Procedure?*, 49 AM. CRIM. L. REV. 31 (forthcoming Winter 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1805208 (describing how the Texas Court of Criminal Appeals has required legislative authorization for sobriety checkpoints and how the Texas legislature has refused to do so).

238. See Dayok, *supra* note 178, at 1153 nn.9–10 (cataloging states that have adopted this rule).

239. See James P. Geraghty, *The Reality of Homicide and DUI Charges: Knowing When to Settle and When to Defend*, in DEFENDING DUI VEHICULAR HOMICIDE CASES 41, 43 (2009) (“[I]n many states the prosecutor can tell the jury your client refused a Breathalyzer test.”).

240. For a description of the practice and its problems, see Jane L. McClellan & Jon M. Sands, *Federal Sentencing Guidelines and the Policy Paradox of Early Disposition Programs: A Primer on “Fast-Track” Sentences*, 38 ARIZ. ST. L.J. 517, 517–19, 527, 533–34 (2006); see also *United States v. Ruiz*, 536 U.S. 622, 629–33 (2002) (approving the practice in the discovery context).

phones. In their haste to act, many legislatures have adopted statutes that are either hopelessly vague or under-inclusive and fail to cover dangerous cell phone activity, such as viewing Facebook, or using applications, such as Urban Spoon or Words With Friends. In setting punishments, legislatures have also failed to analogize texting while driving to the comparable behavior of drunk driving. Fines for texting while driving are far too lenient and, unlike drunk driving cases, most defendants face no risk of jail time, license suspension, or interlock devices. At the same time that legislatures have enacted toothless statutes, they have unwittingly encouraged warrantless cell phone searches under the Fourth Amendment's search incident to arrest doctrine and automobile exception. In many states, officers who suspect drivers of texting while driving can search the full contents of their cell phones without a warrant and, in some cases, without even having probable cause.

Legislatures can get tough on texting while driving without also permitting warrantless cell phone searches. In addition to enacting tougher penalties for texting while driving and mandating interlock devices, legislatures should also adopt a strategy that is almost unheard of in the criminal procedure field. Rather than a binary choice of allowing or completely disallowing a law-enforcement tactic, legislatures should adopt a more nuanced approach that makes police authority dependent on the choice of the suspect. Legislatures should give the suspect the option to confess to the texting allegation and extinguish the officer's ability to conduct a warrantless search of the phone. Exchanging a confession for a search will improve deterrence (because it is hard for drivers to dispute their own confessions) while reducing warrantless cell phone searches. This nuanced solution enhances the certainty of conviction while recognizing a greater expectation of privacy in cell phones than the Fourth Amendment provides.