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## How Hands-On Will Regulation of Hands-Free Be - An Analysis of SB 1613 and the Effectiveness of Its Proposed Regulation

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# How Hands-On Will Regulation of Hands-Free Be? An Analysis of SB 1613 and the Effectiveness of Its Proposed Regulation

by  
JESSICA CROZE\*

I. Introduction.....	463
II. Background.....	465
A. Cellular Accident Statistics.....	465
B. Foreign Cellular Legislation.....	467
C. Domestic Cellular Legislation.....	468
III. Analysis.....	470
A. California’s Proposed Legislation.....	470
B. Cellular Phone’s Association with Distraction.....	471
C. Enforcement and Regulation Concerns.....	472
1. Mandatory Seat Belt and Drunk Driving Similarities.....	473
2. Economic and Constitutionality Concerns.....	474
IV. Proposal.....	475
A. Strict Enforcement of Existing Laws.....	475
B. Harsher Consequences for Violation.....	476
C. Increase Education and Awareness.....	477
V. Conclusion.....	477

## I. Introduction

We’ve all been there before, juggling our phone in one hand, while simultaneously flipping on our right blinker, turning down the radio, and down shifting into second gear as we make that one-handed turn. In the back of our minds we all have the tiny remnant of Drivers Ed. and the beloved 10-and-2 position that it repeatedly branded into our minds.<sup>1</sup> What you might not know is that “America’s educational institutions are now

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\* University of California, Hastings College of the Law, J.D. Candidate, 2009; Hastings Communications and Entertainment Law Journal.

1. Drivers Education, <http://driversed.com/> (last visited on March 19, 2008).

teaching cell phone safety as part their driver's education programs."<sup>2</sup> "These programs are designed to familiarize new drivers with cell phone uses and features while teaching them to avoid answering their calls during intense driving situations."<sup>3</sup> How come most of us then still choose to forfeit one hand in spite of the dangers, for the sake of simply chatting on the phone? Regardless of your answer—or your ability to multitask—new legislation concerning cell phone use and driving is going to affect us all.

Beginning on July 1, 2008, all persons driving are now required to use a hands-free device when making a call on their cell phone.<sup>4</sup> Although this rule does not apply in certain emergency situations, in all other incidences when the car you are driving is in motion it is now illegal to use your hands to hold your cell phone.<sup>5</sup> What you may not know is that similar laws already affect drivers in a variety of other states.<sup>6</sup> Massachusetts, New York, New Jersey, and Washington D.C. are just a few of the states that have existing laws in place that require all drivers to put down the phone and pick up a hands-free device instead.<sup>7</sup> In order to prepare for the consequences of this new law, it will be extremely valuable to understand how "hands-free laws" are regulated in other states. Comparing California's new regulations to these existing laws and recognizing the history behind its inaction are crucial. An analysis of these previous attempts to regulate cell phone use while driving will ease the adoption of this new legislation in California.

Since California's legislation, Senate Bill 1613 ("SB 1613"), regarding the ban on hand-held cellular devices while driving, was enacted the resulting public effect may have failed to fulfill the intention of the law. Part II of this paper will discuss the factors leading to the necessity for such legislation, as well as examination of similar legislation passed previously in other states. Part III will focus on California's new law and its projected affect state-wide. Part IV will cover a dynamic proposal in order to overcome the weaknesses of the proposed legislation and enhance the overall effectiveness of achieving the law's purpose.

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2. Jesse A. Cripps, Jr., *Dialing While Driving*, 37 GONZ. L. REV. 89, 108 (2001).

3. *Id.* at 109.

4. 2005 Legis. Bill His. CA S.B. 1613

5. *Id.*

6. Matthew C. Kalin, *The 411 on Cellular Phone Use*, 39 SUFFOLK U.L. REV. 233, 234-35 (2005).

7. *Id.* at 235.

## II. Background

Cellular phones were originally enacted for use during emergency situations and business communications.<sup>8</sup> Over the years cellular phones have evolved into a staple in everyone's day-to-day life. Despite the overwhelming role cellular phones play in society, use of cellular phones while driving has long been an issue.<sup>9</sup> Due to an increase in the general public's fear for their safety and a general disapproval of cellular use while driving, the California legislature has taken continual steps to address this issue.<sup>10</sup>

### A. Cellular Accident Statistics

Cellular phone use while driving increased by twenty percent from 2004 to 2005.<sup>11</sup> Presumably, since then cellular phone use has only increased. "A study prepared by the National Highway Traffic Safety Administration and the Virginia Tech Transportation Institute concluded that distracted driving is the leading cause of motor vehicle accidents in the United States."<sup>12</sup> "Eighty percent of drivers involved in accidents were engaged in some sort of inattentive behavior within three seconds prior to the collision."<sup>13</sup> Cell phone usage while driving is a significant distraction.<sup>14</sup>

Cell phone distraction while driving is two-fold.<sup>15</sup> First, cell phones impair a driver's ability to manually operate both a motor vehicle and a cellular phone simultaneously.<sup>16</sup> Second, cell phone usage causes a cognitive impairment.<sup>17</sup> "Studies have shown that these two distractions can have significant effects on a driver's performance."<sup>18</sup> The Harvard study also portrayed that approximately six percent of all traffic accidents in the United States are the result of a driver distraction due to cellular

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8. Jordan B. Michael, *Liability for Accidents from Use and Abuse of Cell Phones: When Are Employers and Cell Phone Manufacturers Liable?*, 79 N. DAK. L. REV. 299 (2003).

9. *Id.* at 300.

10. Erin Barmby, *Review of Selected 2007 California Legislation*, 38 MCGEORGE L.REV. 342 (2007).

11. Marsha Harrison, Issue Brief - Recent Studies on Cell Phone Usage Look Promising, NAMIC, October 2006, <http://www.namic.org/insbriefs/061005CellPhone.pdf> (last visited 6 Apr. 2009).

12. Barmby, *supra*, note 11 at 343.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 343.

18. *Id.*

phone usage.<sup>19</sup> Another study conducted in 2001 found that cell phone use while driving was the eighth highest driver distraction.<sup>20</sup>

The Response Insurance National Driving Habit Surveys (“RINDH”) revealed similar findings.<sup>21</sup> “Aggressive driving and drunk driving are now taking second and third place to the fear that the other driver is simply not paying sufficient attention to the road.”<sup>22</sup> This concern may stem from the fact that many believe that drivers emphasize “a higher priority on making better use of their time rather than getting to their destination safely.”<sup>23</sup> The survey conducted by RINDH explains “as cars becomes the extension of the home and office . . . drivers are increasingly engaging in activities that take their hands, and more importantly their focus of attention, off the road.”<sup>24</sup> Interestingly, these findings coincide with the theory that cellular phones are increasingly becoming a crux of everyday life; more than simply a tool for business and the emergency situations in from which cellular phones originally sprouted.<sup>25</sup>

According to data compiled by the California Highway Patrol in 2004, 818 automobile accidents in California were associated with hand-held cellular phone usage, yet only thirty accidents were attributed to hands-free usage.<sup>26</sup> A 2005 study by the United States Department of Transportation showed that accidents could be reduced through the use of hands-free equipment.<sup>27</sup> The study showed that drivers steered better, had more consistent speed, and reacted faster while using a hands-free device rather than a normal hand-held cellular phone.<sup>28</sup> However, another study completed in 2004 found no difference between hands-free usage and hand-held cellular usage, suggesting that the conversation itself is a more significant distraction.<sup>29</sup>

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19. Assembly Committee on Transportation, Committee Analysis of SB 1613, at 2-3 (June 20, 2006).

20. Every Driver is Distracted Some of the Time, Study Shows, <http://www.aaafoundation.org/multimedia/index.cfm?button=distractII>, (last visited April 6, 2009).

21. Mory Katz, *National Driving Habits Survey*, 14580 Magazine Online, <http://magazine.14850.com/0107/driven.html> (last visited on March 17, 2008).

22. *Id.*

23. *Id.*

24. *Id.*

25. Michael, *supra* note 8.

26. Assembly Committee on Transportation, Committee Analysis of SB 1613, at 4 (June 20, 2006).

27. *Id.* at 3.

28. *Id.*

29. William J. Horrey & Christopher D. Wickens, *The Impact of Cell Phone Conversations on Driving: A Meta-Analytic Approach*, University of Illinois, Institute of Aviation – Aviation Human Factors Division 196, 203. (2004).

## B. Foreign Cellular Legislation

Foreign legislation regarding cellular phone use was first discussed in the early 1980s, and by 1989 at least nine countries had amended their vehicle codes to include some sort of ban on hand-held cellular devices.<sup>30</sup> The first country to introduce legislation and begin regulating the use of hand-held cellular phones while driving was Australia in 1988.<sup>31</sup> Norway, Austria, Singapore, Taiwan, and Japan followed in May of 2002, implementing bans on hand-held cellular phones while driving.<sup>32</sup> Additionally, around the same time Belgium, Canada, Germany, and the Netherlands were either in the process of passing legislation or were conducting their own studies and investigations regarding the effect of hand-held devices while driving.<sup>33</sup> Great Britain followed suit by making cellular phone usage by drivers a criminal offence as of December 1, 2003.<sup>34</sup> The regulations “simply make it an offence to hold a phone while driving and cover all activities associated with making or receiving a call, including dialing.”<sup>35</sup>

Out of all foreign legislation, Japan’s laws carry by far the heaviest penalties for violating the hand-held bans. The punishments include the possibility of up to three months imprisonment or a fine of 50,000 yen (approximately US\$480).<sup>36</sup> As a result of the strict penalties Japan’s cell phone related accidents fell sixty-one percent after only six months of the ban’s enactment.<sup>37</sup>

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30. Michael J. Goodman et al., *An Investigation of the Safety Implications of Wireless Communications in Vehicles*, National Highway Traffic Safety Administration (Report No. DOT HS 808-635 at Report Summary (Nov. 1997), at <http://www.nhtsa.dot.gov/people/injury/research/wireless>. (last visited March 18, 2008). Chapter 1 § 1.4. (The countries listed were: Australia, Spain, Israel, Portugal, Italy, Brazil, Chile, Switzerland, and Great Britain).

31. *Id.*

32. Paul K. Henken, *The Trouble With Telematics: The Uneasy Marriage of Wireless Technology and Automobiles*, 69 UMKC L. REV. 845, 860 (2001).

33. *Id.* at 860-61.

34. Cell Phones are Banned for British Drivers—It’s the Law!, Drive and Stay Alive, [http://www.driveandstayalive.com/info%20section/news/individual%20news%20articles/x\\_0310\\_27\\_hand-held-cellphones-outlawed-in-Britain.htm](http://www.driveandstayalive.com/info%20section/news/individual%20news%20articles/x_0310_27_hand-held-cellphones-outlawed-in-Britain.htm) (last visited on April 6, 2009).

35. *Id.*

36. Japan’s Cell Phone Legislation, Drivers.com, <http://www.drivers.com/article/273/>(last visited on March 18, 2008).

37. See Norman Martin, *Cell Phone Related Traffic Accidents Fall in Japan*, Auto Central.com, <http://www.autocentral.com/article/mvc/cell-phone-related-traffic-accidents-fall-in-0001> (last visited March 18, 2008). (The number of accidents dropped from 1,473 in the six months preceding the ban to 580 in the six months after the ban was enacted).

### C. Domestic Cellular Legislation

“In 2001, New York [was] the first state in America to pass legislation banning the use of hand-held cellular phones while driving.”<sup>38</sup> “Immediately after the ban of hand-held cellular phones, cell phone usage in vehicles decreased.”<sup>39</sup> However, a year later cell phone usage had gone back up to similar levels as before the ban.<sup>40</sup> Unfortunately enforcement efforts of the new ban were less than significant and hand-held cell phone violations accounted for only two percent of the total traffic violations for the year.<sup>41</sup>

In part, this may be due to the hands-free technology available at that time. Hands-free devices available in New York in 2001 were significantly less efficient and possibly made it even more distracting to use a cellular phone while driving.<sup>42</sup> The legislation ignores numerous effects of cell phone usage that significantly impair an individual’s driving ability, notwithstanding the use of a hands-free device, such as straining to hear the caller on the other side of the phone while concentrating on the road, still having to look down to dial numbers, and answering a call by fumbling with the hands-free gadget instead of simply flipping open your phone.<sup>43</sup> On the other hand, drivers may have been willing to risk violating the new law due to the fact that in New York the first offense only constitutes a warning, while the second may result in a \$100 fine.<sup>44</sup> However, the actual regulation of either of these consequences is left an open question.

In July of 2004, New Jersey followed New York in enacting its own version of the ban on cellular use while driving.<sup>45</sup> The New Jersey law includes an exception allowing the use a hand-held cellular phone when the driver “fears for his life or safety, or believes a criminal act may be perpetrated against him . . . or to report . . . a fire, traffic accident” or other emergency situation.<sup>46</sup> Violating New Jersey’s law will cost \$100.<sup>47</sup> To receive a fine, however, the driver must be pulled over for some other

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38. Barmby, *supra*, note 11 at 344.

39. *Id.*

40. A.T. McCarrt & L.L. Geary, *Longer Term Effects of New York State’s Law on Drivers’ Hand-held Cell Phone Use*, INJURY PREVENTION at 11, (2004), <http://injuryprevention.bmj.com/cgi/reprint/10/1/11>.

41. *Id.* at 14.

42. Susan Stellin, *Hands-free Calling: Options for the Road*, NEW YORK TIMES, July 26, 2001, at 9.

43. *Id.*

44. *Id.*

45. N.J. Stat. Ann. 39:4-97.3 (West 2004) (prohibiting cellular phone use while driving).

46. N.J. Stat. Ann. 39:4-97.3 (West 2004) (allowing cellular phone use by drivers in special circumstances).

47. N.J. Stat. Ann. 39:4-97.3 (West 2004) (outlining penalty for violation of New Jersey law).

offense, and be caught using their cellular phone while committing the other offense.<sup>48</sup> Unlike New York, and as is evident in Washington D.C. as well (see below), simply talking on your phone while driving is not enough to be reprimanded.<sup>49</sup>

Although eighty-five percent of New Jersey voters were in favor of the law, there still remains a staggering amount of violations.<sup>50</sup> “During the first two months of the law’s enactment, 2,037 tickets [were] issued and 692 people were convicted of breaking the new law.”<sup>51</sup> Even with the large amount of violations issued, drivers continued to use their hand-held cellular phones.<sup>52</sup> Critics often place the blame for these high levels of violations on the regulatory techniques of the secondary offense—i.e., having to be *first* pulled over for a different offense, *then* facing possible charges of cell phone use while driving. Many claim that it contains too many loopholes and the law itself should be more direct.<sup>53</sup> For these reasons, the ban on cellular phone use while driving seems to be ineffective.

Similarly in Washington D.C., there is also a ban in effect that is largely ignored by the majority of drivers.<sup>54</sup> Washington D.C.’s law is far more extensive than either of New York or New Jersey’s laws since it further bans use of cellular phones (even accompanied by hands-free devices) by bus drivers and persons with learners permits.<sup>55</sup> D.C.’s law also places a ban on other electronics such as Blackberrys, Game Boys, and even calculators.<sup>56</sup> The law fines a driver \$100 for each offence, but allows the first-time offender to waive the fine by purchasing a hands-free device and returning a receipt with the citation.<sup>57</sup> It seems evident from the

48. Diane Cadrain, *States Cracking Down on Driving and Phoning*, HR MAG., April 1, 2004, at 30 (comparing New York, New Jersey and Washington D.C. laws).

49. N.J. Stat. Ann. 39:4-97.3 (West 2004) (distinguishing New Jersey’s law from that of New York’s).

50. R.J. Lehmann, *Studies Suggest Safety Promise of Cellular Phones Bans May Ring Hollow*, BEST’S INS. NEWS, July 21, 2004, at 51 (citing New Jersey’s poll revealing eighty-five percent of voters favor banning talking while driving).

51. Kalin, *supra* note 6, at 250.

52. *Id.*

53. *Id.*

54. Assembly Committee on Transportation, Committee Analysis of SB 1613, at 6 (June 20, 2006).

55. Distracted Driving Safety Act of 2004, D.C. Stat. 15-124 (2004) (providing a multitude of alternative prohibitions). Section five of the law prohibiting cellular use by bus drivers and drivers with learning permits and prohibits the use of hands-free devices.

56. Charisse Jones, *New Jersey and D.C. are Telling Drivers to Hang Up*, USA TODAY, June 29, 2004, available at: [http://www.usatoday.com/news/nation/2004-06-28-cellphone-laws\\_x.htm](http://www.usatoday.com/news/nation/2004-06-28-cellphone-laws_x.htm).

57. Distracted Driving Safety Act of 2004, D.C. Stat. 15-124 (2004) (noting ability of offender to remove fine.) Section six reads: “. . . the fine shall be suspended for a first time

frequent ignorance of these bans in other states, that there is a common public misperception that hands-free devices do not solve the underlying problems caused by cell phone use while driving.<sup>58</sup>

### III. Analysis

In California, although the hand-held cell phone ban did not go into effect until 2008, prior existing law already generally addressed inattentive drivers.<sup>59</sup> California Vehicle Code section 23103 arguably could include distracted drivers since it makes it a crime to drive a vehicle with “willful or wanton disregard” for the safety of other motorists.<sup>60</sup> SB 1613 was originally introduced in an effort to specifically target and prevent the distraction associated with hand-held phones and driving.<sup>61</sup> Although the bill has little to no effect on the conversational distraction, its main goal is to improve reaction time by allowing a motorist to keep both hands on the steering wheel.<sup>62</sup>

#### A. California’s Proposed Legislation

California’s SB 1613 makes it illegal to operate a hand-held cellular phone while driving.<sup>63</sup> Drivers can still use wireless telephones in a hands-free manner, so long as the phone is designed to be used that way.<sup>64</sup> The fine for a violation of this new law will be “twenty dollars for the first offense and fifty dollars for each subsequent offense.”<sup>65</sup> However, these fines will not lead to a violation point on the driver’s record.<sup>66</sup>

There are also many exceptions. Most importantly, the law does not apply in emergency situations, nor does it apply to emergency personal—e.g., firefighters, police, and paramedics—while operating a vehicle in the scope of their employment.<sup>67</sup> Finally the law is not applicable to a person operating a school bus or to persons on private property.<sup>68</sup>

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violator who, subsequent to the violation but prior to the imposition of a fine, provides proof of acquisition of a hands-free accessory of the type required by this act.”

58. Barmby, *supra* note 11, at 344.

59. Cal. Veh. Code § 23103 (West 2000 & Supp. 2006).

60. *Id.*

61. Senate Transportation and Housing Committee, Committee Analysis of SB 1613, at 2 (Feb. 24, 2006).

62. *Id.*

63. Cal. Veh. Code § 23123(a) (West Supp. 2009) (enacted by SB 1613 or Chapter 290).

64. Cal. Veh. Code § 23123(a) (West Supp. 2009) (enacted by SB 1613 or Chapter 290).

65. Cal. Veh. Code § 23123(b).

66. Cal. Veh. Code § 12810.3 (West Supp. 2009) (enacted by Cal. SB 1613 or Chapter 290).

67. Cal. Veh. Code § 23123(c)-(d).

68. Cal. Veh. Code § 23123(f)-(g).

The problem then becomes whether SB 1613 will actually have a substantial impact on the accidents caused by cell phone use while driving. “Reports and statistics admonishing the use of cellular phones while driving seem to have little or no actual effect on the drivers. Motorists continue to drive and talk despite warnings of significant risk of harm to themselves and others.”<sup>69</sup> “Scientists and scholars have theorized that this is caused by the lack of a nexus between when the accident occurs and the actual use of the cellular phone.”<sup>70</sup> Although, it is conceivable that once a legally recognized risk is in place in the form of an actual law, motorists might take more caution. Anticipation of the law’s affect on California drivers will likely be predicted by examination of past research experiments and similar enacted laws in other states.

### B. Cellular Phone’s Association with Distraction

David Strayer, a psychologist at the University of Utah, points out that “[l]ooking and seeing aren’t one and the same. . . . Just because your eyes are directed at something doesn’t mean you’re processing it. Seeing means paying attention.”<sup>71</sup> When an individual is “not attending to driving [they are] more of a hazard.”<sup>72</sup> Strayer and his colleagues found that motorists talking on phones “were more likely to react sluggishly to traffic signals” and other obstacles.<sup>73</sup> They concluded that the conversation—not the act of keeping both hands on the wheel—is what diverts a driver’s attention from the road.<sup>74</sup> But why then are conversations with people within the car not banned? Or on the flip side, why are other activities requiring one hand off the wheel (such as eating, changing the radio, putting on makeup) unregulated?

This question has also been pondered by researchers Donald A. Redelmeier and Robert J. Tibshirani in an epidemiologic method study conducted for the *New England Journal of Medicine*.<sup>75</sup> Redelmeier and Tibshirani examined 699 drivers who used cell phones and were involved in accidents.<sup>76</sup> Both Redelmeier and Tibshirani persuasively argued that while eating, shaving, or applying makeup may take a brief moment, drivers can choose when to perform these activities; preferably when traffic

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69. Kalin, *supra* note 6, at 237.

70. *Id.*

71. Jane E. Allen, *When Drivers’ Brains get a Busy Signal*, LOS ANGELES TIMES, February 3, 2003 at F1.

72. *Id.*

73. *Id.*

74. *Id.*

75. Donald A. Redelmeier & Robert J. Tibshirani, *Association Between Cellular-Telephone Calls and Motor Vehicle Collisions*, 336 NEW ENG. J. MED. 453, 453-54 (1997).

76. *Id.* at 454-55.

conditions are not hazardous.<sup>77</sup> In contrast, a cell phone conversation can begin at any time and last for much more than a brief moment. In the time span of a cellular phone conversation traffic conditions have the potential to change drastically.<sup>78</sup>

The researchers also theorized that the conversation can change severely as well.<sup>79</sup> What a driver thinks may be a quick call home, or to the office, may turn into a much more lengthy discussion than anticipated.<sup>80</sup> Additionally cellular phone activity distinguishes itself since it combines visual, auditory, biomechanical, and cognitive distractions.<sup>81</sup>

### C. Enforcement and Regulation Concerns

Conceding that the ban on hand-held cellular phones is targeting the correct distraction associated with cellular phones and driving, the next issue to overcome is that of obtaining a successful impact through effective regulation. As discussed earlier, other states including New York, New Jersey, and Washington D.C. have all had their assortment of regulation concerns.<sup>82</sup> Simply, the one problem seems to be that catching someone on their cellular phone while driving is not as easy, nor as clear, as catching someone running a right light or speeding.<sup>83</sup> Police regulation will depend solely on eye-witness observations of those violating the law by simultaneously talking on the phone and driving.<sup>84</sup>

Another concern is that while talking on the phone might be easy to recognize, law enforcement could have a problem distinguishing between push to talk, dialing, text messaging,<sup>85</sup> and hand-held cellular phone conversations.<sup>86</sup> SB 1613 is not intended to excuse other distracting driving behaviors, but it is meant to target hand-held cellular phone use, since there is a clear visual difference between holding a phone to one's ear and not doing so.<sup>87</sup> The hands-free solution is easier to administer since the

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77. *Id.* at 455.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. N.J. Stat. Ann. § 39: 4-97.3 (West 2004) (prohibiting cellular phone use while driving; see Barmby, *supra*, note 11, at 344; see also Assembly Committee on Transportation, Committee Analysis of SB 1613, at 5 (June 20, 2006).

83. Barmby, *supra* note 11, at 344.

84. *Id.* at 352.

85. California State Bill 28 which went into effect January 1, 2009, "specifically bans the use of an electronic wireless communications device to write, send, or read a text-based communication while driving a motor vehicle." Drivers who violate the law will face a "base fine of \$20 for a first offense and \$50 for each subsequent offense. 2009 Legis. B. His. CA SB 28.

86. *Id.*

87. *Id.*

technology is widely available in contrast to other activities (such as adjusting the radio or attending to passengers) that are harder to curtail.<sup>88</sup> Still the dilemma remains on how efficiently, clearly, and successfully the ban can be enforced, since it relies mainly on visual observation of a certain slight mannerism.

1. *Mandatory Seat Belt and Drunk Driving Similarities*

This line of thinking regarding the difficulty of regulation has come up previously when enactment of seat belt laws and drinking and driving laws were taking place.<sup>89</sup> When the first proposals were introduced requiring all motorists to wear seat belts and/or not to drink alcoholic beverages, they too were met with skepticism.<sup>90</sup> For example, police officers peering into car windows to determine whether a driver is drinking a soda or a beer will be similar to regulation of a police officer peering into a window to determine if a driver is using a hands-free device.<sup>91</sup> Similarly, trying to spot drivers or passengers who are not wearing their seat belts presents the same issues as spotting cell phone use while driving.<sup>92</sup>

“Often in cases such as these, the officer must combine his observations of in car activity with his observations of other driving behaviors.”<sup>93</sup> If a police officer sees a car driving erratically and pulls the driver over, the driver may be cited for inattentive driving (in California the law is known as “willful or wanton disregard” for other motorists on the road) and for hand-held cell phone use as well.<sup>94</sup> “If an accident occurs, the investigating officers will attempt to determine not only if alcohol was involved but also if a cell phone . . . was in use at the time of the accident.”<sup>95</sup> It seems the law is based on “the deterrent effect on risky behaviors, and not the ready enforcement, that is the essence of restrictions on hand-held cell phones” while driving.<sup>96</sup> Another strategy that may be used is Selective Traffic Enforcement Programs (“STEPS”). These programs use “a blitz of enforcement for a short time to raise the public’s

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88. *Id.*

89. Hentzen, *supra* note 32, at 867.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. Cal. Veh. Code § 23103 (West 2000 & Supp. 2006).

95. Hentzen, *supra* note 32, at 867.

96. *Id.*

awareness of the law.”<sup>97</sup> The threat of enforcement, not the actual enforcement itself, will encourage compliance.<sup>98</sup>

## 2. *Economic and Constitutionality Concerns*

Numerous other concerns have been raised in accordance with enforcement of the ban on hand-held cellular phones. Currently many feel “that police departments simply do not have the resources to enforce cell phone restrictions,” such as enough manpower to attentively observe cell phone use while driving or the proper equipment.<sup>99</sup> Additionally, others feel that the fact they will be forced to purchase an extra device so they can use their phone while driving is economically impairing.<sup>100</sup> Hands-free devices can range from as little at \$30 increasing up to \$200, depending on the model.<sup>101</sup> Furthermore, some older model cellular phones are not equipped with the technology to be used with a hands-free device.<sup>102</sup> This fact would require those owning older model cellular phones to discard them and purchase new ones that contain the necessary hardware and software.

Finally, issues have been raised regarding the actual constitutionality of the legislation. New York heard a case where the defendant was charged with violating the statutes ten days after it went into effect.<sup>103</sup> The court on its own motion addressed the constitutionality of the statute and found no violation.<sup>104</sup> The court reasoned, “the legislative intent [behind the law] sets forth the need to protect its citizens from the numerous motor vehicle accidents and serious physical injuries that result from the use of hand-held cell phones.”<sup>105</sup> The court also reasoned that the burden of the law was no greater than using seat-belts, motorcycle helmets, or prohibiting cigarette smoking in public buildings.<sup>106</sup> Thus it seems the overall response to the legislation is to put safety first, even if it means government implemented regulation.

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97. *Id.*

98. An Educator’s Standpoint on Distractions, Drivers.com, <http://www.drivers.com/cgi-bin/go.cgi?type=ART&id=000000350&static=1.com> (last visited on March 13, 2008).

99. Henkzen, *supra* note 32, at 867.

100. *Id.*

101. See Blueant, Cellular Accessories, <http://www.cellularaccessory.com/blueant.html> (last visited on March 18, 2008).

102. Examples includes Nokia model 6102 (no Blue Tooth technology) vs. the Nokia 6102i (equipped with Blue Tooth technology).

103. *People v. Neville*, 737 N.Y.S.2d 251, 253 (Just. Ct., Nassau County, Jan. 4, 2002).

104. *Id.* at 256.

105. *Id.* at 255.

106. *Neville*, 2002 N.Y. Misc. LEXIS at \*9.

## IV. Proposal

It is apparent that regulation of the hand-held ban will be a hurdle to overcome but one that cannot be deemed impossible. Following examples of regulation of similar laws, such as mandatory seat belts and the ban on drinking alcoholic beverages while driving, regulation of hand-held phones may be able to be achieved.<sup>107</sup> Past experience has shown that even a high level of public awareness of the risks of certain behavior is not sufficient by itself to alter a driver's behavior.<sup>108</sup> The system involving "Driving Under the Influence" and mandatory seat belt laws, when properly enforced provides more of the necessary motivation for drivers to obey.<sup>109</sup> A similar result can be expected with efforts to alter driver behavior through not only public awareness of the risk of cellular phone use while driving, but with the enactment of the law itself.<sup>110</sup> The underlying truth is that Americans love to talk on their phones regardless of where they are or the accompanying risk.

A recent study conducted by the Insurance Research Council found that forty-seven percent of Americans do not believe that safety campaigns regarding cell phone use and driving are effective by themselves.<sup>111</sup> This only goes to prove that even though Americans are aware of the risks associated with driving hand-held cellular phones, they are still willing to do it. As seen with seat-belt requirements and drunk driving, legislation is needed for American's behavior to change. Unfortunately, the actual reality is the legislation might not even be enough as currently observed through the still high percentages of drunk-driving accidents and injuries resulting from accidents where a seat belt was not worn.<sup>112</sup>

### A. Strict Enforcement of Existing Laws

Another solution to the problems revolving around cellular phone use and driving is to more strictly enforce the existing laws in the state that deal with reckless and negligent driving. California's legislation existing involving "wanton and reckless disregard for other motorists" grants the police the power to cite motorists for any sort of distractions that contribute

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107. Hentzen, *supra* note 32, at 865.

108. *Id.*

109. *Id.*

110. *Id.*

111. Americans Believe Cellular Phones Distract Drivers, Yet They Use Them Anyway, AAA Foundation for Traffic Safety, <http://www.ircweb.org/news/2001-01-11-2.htm> (last visited on March 18, 2008).

112. Alcohol Alert: Drunk Driving Statistics, <http://www.alcoholalert.com/drun-driving-statistics.html> (last visited on March 18, 2008). There were 16,885 alcohol-related fatalities in 2005 – 39 percent of the total traffic fatalities for the year.

to hazardous and unsafe driving.<sup>113</sup> Although the ban on hand-held cellular phones is most definitely a step in the right direction, it will not be enough. Along with strictly enforcing these bans, current laws regarding negligent driving need to be strictly enforced as well.

Along with more strictly enforcing the existing negligent driving laws, these laws could be amended to include provisions regarding use of hand-held cellular phones while driving.<sup>114</sup> If the negligent driving laws included a “*per se*” provision described as use of a hand-held cellular phone while driving then the law would be more efficient.<sup>115</sup> Increased effectiveness of the negligence law with the amendment would be reflected in the ability to easier spot distracted drivers based on both surveying their driving state *and* observation of whether they were holding a cellular phone. Of course, the same emergency and law enforcement exceptions would apply.<sup>116</sup>

### B. Harsher Consequences for Violation

In addition to strict enforcement of the laws, the penalties for violation of the laws should be increased. Following Japan’s lead, punishment for violation could include larger fines and perhaps even jail time.<sup>117</sup> Currently, the California legislation imposes a fine of \$20, which may prove insufficient to actually stop people from using their cellular phones while driving.<sup>118</sup> California’s penalties are lower than fines imposed by other states for similar violations.<sup>119</sup> As we have seen even states such as New York, with higher penalties still have problems with drivers ignoring the law.<sup>120</sup> With such low penalties “drivers may ignore the law and take their chances.”<sup>121</sup> Just as not every red light runner gets pulled over and ticketed, not every cell phone user will either.<sup>122</sup> Harsher penalties will deter drivers who feel that the cost of losing business outweighs the fines imposed from violating the law.

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113. Cal. Veh. Code § 23103 (West 2000 & Supp. 2006).

114. Hentzen, *supra* note 32, at 864.

115. *Id.*

116. *See* Cal. Veh. Code § 23123(a) (enacted by SB bill 1613 or Chapter 290) (allows hand-held cellular phones to be used while driving in emergency situations and by law enforcement officials).

117. *Japan’s Cell Phone Legislation*, Drivers.com, <http://drivers.com/cgi-bin/go/cgi?type=ART&id=00000273> (last visited on March 18, 2008).

118. *See* Senate Transportation and Housing Committee, Committee Analysis of SB 1613, at 3 (Feb. 24, 2006) (showing that the fines in New York are much higher than in California for similar violations).

119. *Id.*

120. McCarrt, *supra* note 40, at 11.

121. Barmby, *supra* note 11, at 351.

122. *Id.*

### C. Increase Education and Awareness

Furthermore, education is a key factor in making consumers aware of the dangers of using a cellular phone while driving. Shell Oil already has radio commercials directing drivers to head to the nearest Shell station to obtain a pamphlet entitled "Deadly Distractions."<sup>123</sup> The pamphlet features facts and statistics about the damages of driving distracted, including the use of hand-held cellular phones.<sup>124</sup> Additionally, since 1995 the Cellular Telecommunications and Internet Association ("CTIA") has sponsored a National Safety Wireless Week which seeks to raise awareness about the safety benefits derived from owning a cellular phone.<sup>125</sup> CTIA also has launched a multimillion-dollar program that includes radio campaigns and public service announcements.<sup>126</sup> Some of the advertisements remind drivers of the state laws prohibiting cell phone use while driving, while others discuss the safety concerns.<sup>127</sup> In the future it will be vital that the media and the cell phone industry continue to work together in educating the public. Awareness of the dangers associated with cell phone use and driving is an important step towards reducing the amount of associated accidents.

## V. Conclusion

It is obvious that cellular phones and other wireless devices have become as common and as valuable as communication itself in today's society. The union of cellular phones and cars provides apprehension at best and fatality at worst. Unfortunately, a divorce doesn't seem forthcoming, at least in the near future, so the only option is to take steps to reduce the risks associated with this uneasy pair. Regardless of awareness of the numerous hazards associated with driving and the use of hand-held phones, the majority of Americans continue to participate in the fateful task everyday. In July of 2008 California joined the emerging trend already reflected in New York, New Jersey, and Washington D.C., as well as across the globe, to try and take a step towards limiting driver distractions associated with cellular phone usage.<sup>128</sup>

Although the laws regarding inattentive driving are already in place, the new ban on hand-held phones seeks to further diminish traffic accidents

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123. Lana Mobydeen, *Reach Out and Touch Someone: Cellular Phones Health, Safety and Reasonable Regulation*, 16 J.L. & HEALTH 373, 391 (2002).

124. *Id.*

125. *Id.* at 391-92.

126. *Id.* at 392.

127. *Id.*

128. Cal. Veh. Code § 23123(a) (enacted by SB bill 1613 or Chapter 290).

connected with distraction by implementing a specific ban.<sup>129</sup> Regulation will be difficult and even if the ban is enforced to the full extent, it might not be enough.<sup>130</sup> The new legislation will hopefully strike a reasonable balance between limiting risk and promoting the promise of safer driving through the ever-developing technological era.<sup>131</sup>

Research is clear that the cognitive distractions—such as the conversation itself flowing from the use of cellular phones—are the real underlying problem rather than the use of one hand while driving.<sup>132</sup> If these studies prove to be correct, the ban on hand-held phones may chip away at the number of accidents, but it will not successfully eliminate them. With continual education, possibly harsher penalties and learning from similar past regulation issues, the law will hopefully at least be a step in the right direction. Inevitably Americans will become more aware of the risks and—one day—set down the phone in order to save a life.

Hopefully sooner rather than later.

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129. Senate Transportation and Housing Committee, Committee Analysis of SB 1613, at 3 (Feb. 24, 2006).

130. Barmby, *supra* note 11, at 350.

131. *Id.*

132. Redelmeier, *supra* note 78, at 454; *see* Horrey, *supra* note 29, at 203, *see also* Jordan B. Michael, *Automobile Accidents Associated with Cell Phone Use*, 11 RICH. J.L. & TECH. 5, at 30 (2005).