Near Impossible to Enforce at Best, Unconstitutional at Worst: Maryland's Text-Messaging Ban on Drivers Has GTG

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NEAR IMPOSSIBLE TO ENFORCE AT BEST, UNCONSTITUTIONAL AT WORST: MARYLAND’S TEXT-Messaging BAN ON DRIVERS HAS GTG.

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I. INTRODUCTION

You read in your local newspaper that your state of residence has recently passed law prohibiting citizens from “writ[ing] or send[ing] a text message while operating a motor vehicle.” As explained infra, while a reasonable citizen is likely to proceed with such knowledge of a texting ban in one of at least three ways, each option exposes such a statute’s flaws.

Scenario 1: You decide that text-messaging is too important to your social life to refrain from sending messages while driving, so you ignore the new ban. However, while engaged in an intense text-messaging back-and-forth while driving on Interstate 95, a police officer pulls aside your vehicle and observes you writing and sending a text message. He pulls your vehicle over, and gives you a ticket for $500. However, you hire a savvy defense attorney who does not

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† J.D., 2010, University of Baltimore School of Law. Law Clerk to the Honorable Glenn T. Harrell Jr., on the Court of Appeals of Maryland; 2010-11. The views expressed in this article in no way reflect the views of the Honorable Glenn T. Harrell Jr., or the Court of Appeals of Maryland. I thank Levi Zaslow, Esq. for his time proof reading and providing research assistance.
2 See Julie Scharper, Road Hazard, BALT. SUN, Sept. 27, 2009, at 1A.
4 See infra notes 29-32 and accompanying text (discussing the prevalence of talking and text-messaging while driving).
5 See Cell Phone Use While Driving, http://www.nationwide.com/ newsroom/dwd-surveys.jsp (last visited Feb. 24, 2010) (“[O]nly 41 percent of respondents said their behavior would change if cell phone usage were restricted by law.”).
6 See infra Part III.C.2 (discussing the distinction between primary and secondary offenses).
7 See Md. Code Ann., Transp. § 27-101(b) (“[A]ny person convicted of a misdemeanor for the violation of any of the provisions of the Maryland Vehicle Law is subject to a fine of not more than $500.”).
believe that the State can prove beyond a reasonable doubt\(^8\) that you were writing or sending a text message while operating a motor vehicle. During cross-examination of the officer, the follow colloquy ensues:

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

[OFFICER] That is correct.

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

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

[DEFENSE COUNSEL] You weren’t able to physically view the screen of the cell phone, were you officer?

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

[DEFENSE COUNSEL] If that is the case, then you cannot be sure that my client was not, in fact, posting something to his Facebook\(^9\) wall, correct?

[OFFICER] Well, I guess he could have been.

[DEFENSE COUNSEL] And you cannot be sure that he was not posting a message on Twitter,\(^{10}\) can you?

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\(^8\) See, e.g., State v. Rusk, 289 Md. 230, 240, 424 A.2d 720, 725 (1981) (“[D]ue process requirements mandate that a criminal conviction not be obtained if the evidence does not reasonably support a finding of guilt beyond a reasonable doubt.”).


\(^{10}\) Twitter is a “free social networking and micro-blogging service that lets users send messages called ‘tweets.’ Tweets are messages that can contain up to 100 characters. Once posted, tweets are sent to the people (known as followers) who subscribe to a particular person’s messages.” Susan W. Brenner, *Internet Law in the Courts*, 13 No. 6 J. INTERNET L. 16, 16 (2009).
[OFFICER] No, I guess I cannot say that for sure.

Because the officer was the only prosecution witness, your attorney moves for, and the judge grants, a motion for judgment of acquittal, explaining the term “text message” as used in the statute does not encompass sending messages through social-media sites such as Facebook or Twitter. As such, it cannot be proven beyond a reasonable doubt that you were—as the statute requires—sending a “text message” while operating a motor vehicle. Despite writing and sending a text message, you are found not guilty.

Scenario 2: After learning that the new law prohibits writing or sending text messages while driving, you decide to abide by the law. That is, you understand that the term “text message” is colloquially used to mean a short message sent from one cell phone to another, or an SMS message. As such, you do not believe that posting messages on Facebook or Twitter constitutes sending “text messages,” so you continue sending such messages while driving. However, while posting an article to your Facebook wall while driving on Interstate 95, a police officer pulls aside your car, observes you engaged in such activity, and pulls your car over. The police officer gives you a ticket for $500, explaining that you have violated the State’s new text-messaging ban. However, this time, the savvy defense attorney is unable to help you; the judge

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11 See Md. R. 4-324(a) (“A defendant may move for judgment of acquittal on one or more counts, or on one or more degrees of an offense which by law is divided into degrees, at the close of the evidence offered by the State and, in a jury trial, at the close of all the evidence.”).
12 See infra note 14. While the statute defines “text messaging device” to essentially mean a cellular telephone, it, nor the statute’s legislative history give any guidance as to what constitutes a “text message.” See Md. Code Ann., Transp. § 21-1124.1 (West Supp. 2009); infra Part IV.B.
13 A “text message” is the act of “sending of short messages over a cellular phone network, typically by means of a short message service (SMS).” Steven Goode, The Admissibility of Electronic Evidence, 29 Rev. Litig. 1, 16 n.66 (2009). Such SMS messages are “transmitted to the recipient immediately, or they may be stored and forwarded later if a recipient’s phone was off when the message was initiated.” Id.
14 See Editorial, TXT U L8R TIME 2 DRIVE, BALTIMORE SUN, Sept. 29, 2009, at 12A (“It’s not even absolutely certain that the law would apply to posting updates on Facebook or Twitter - or even sending an e-mail on your BlackBerry.”).
explains that you were sending a “message” that was comprised of “text,” and, as such, you are guilty of violating the statute. Scenarios 1 and 2 illustrate the first major flaw with such a statute: without defining what constitutes a “text message,” prosecution and enforcement of the text-messaging ban will be impossible at worst and inconsistent at best. Because the statute does not put Maryland residents on fair notice as to what activity is criminal, and because it gives law enforcement officers, prosecutors, judges no meaningful standard to apply in enforcing and prosecuting the statute, there is a strong argument to be made that the statute is potentially even “void for vagueness.”

Scenario 3: Similar to Scenario 2, after learning that your state of residence has banned the writing or sending of text messages while driving, you decide to abide by the ban. However, you reason that since posting on Facebook and Twitter involves the sending of “messages” comprised of “text,” you may no longer engage in the use of such social-networking sites in addition to text messaging (hereinafter “texting”). Such a reading of the statute – an entirely reasonable one at that – presents a classic example of a “chilling effect” on protected expression. That is, assuming the statute was only intended to prohibit the use of SMS-like text messages, the vagueness of the statute, in not defining “text message,” may have the collateral effect of making you more reluctant to engage in non-proscribed forms of communications such

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15 Black’s Law Dictionary defines “message” as “[a] written or oral communication, often sent through a messenger or other agent, or electronically . . . .” BLACK’S LAW DICTIONARY 1080 (9th ed. 2009).
16 See Lawmakers Want to Keep Drivers’ Eyes on Road, SPRINGFIELD NEWS-LEADER, Feb. 17, 2009, at LOCAL (“Enforcement of a cell phone or text messaging ban [is] more difficult than pulling someone over for applying mascara while driving.”).
17 See infra Part IV.B.
19 See infra Part IV.B.2.ii.
as Facebook or Twitter. While legislatures ostensibly have the power to restrict the right to send text messages out of concern of driver-safety, the chilling effect that this ambiguous statute has on non-proscribed forms of expression raises First Amendment issues. Thus, Scenario 3 raises the second major flaw in such legislation: a potentially unconstitutional curtailment of constitutionally protected speech.

The above exercise is not merely academic; to date, at least twenty-one states have enacted legislation limiting or forbidding some use of texting while driving. In fact, the issue has been described as “the hottest safety issue in the states right now by far . . . .” Generally, this article will deal with Maryland’s ban, which prohibits citizens from “writ[ing] or send[ing] a text message while operating a motor vehicle.” Specifically, this article will first discuss the effects that cell-phone use and text-messaging have on driver behavior - precisely the ills that the Maryland legislature was seeking to remedy in passing the recent legislation. Second, this article will detail all attempts, both successful and unsuccessful, the Maryland legislature has taken to combat distracted driving, including an overview of legislative bills and their legislative history. Third, this article will argue that Maryland’s 2009 ban – the Delegate John Arnick Electronic Communications Traffic Safety Act – is at best difficult or impossible to

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20 See Smith v. California, 361 U.S. 147, 151 (1959) (describing the “chilling effect” as “the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it.”).
23 MD. CODE ANN., TRANS. § 21-1124.1 (West Supp. 2009); see infra note 163 and accompanying text (discussing 2010 legislation outlawing motorists from reading text messages).
enforce and at worse unconstitutional. And finally, this article will detail recent legislation introduced in the Maryland legislature that would rectify many of the issues discussed in this article.

II. THE EFFECTS OF TEXT MESSAGING ON DRIVER BEHAVIOR

In the past twenty-five years, over one-million people have died as a result of motor-vehicle crashes, including 37,261 in 2008 alone.\textsuperscript{24} In fact, motor-vehicle crashes are the number one killer of teens aged fifteen-to-twenty years of age.\textsuperscript{25} A factor contributing to many motor-vehicle crashes is driver inattention.\textsuperscript{26} As such, it is no surprise that, for over fifty years, researchers have sought to determine a link between motor-vehicle crashes and various distracting behaviors;\textsuperscript{27} in fact, it has been estimated that more than 20\% of all automobile crashes in 2009 involved distracted driving.\textsuperscript{28} With over 3.3 billion mobile phone subscriptions in the world, it should further come of no surprise that cellular telephones are one such distraction. Over time, the “purpose of cellular phones has changed from a device reserved for special situations to an item of necessity for people of all ages, in all makes of life.”\textsuperscript{29} In fact, in 2007 — a time when cell-phone use was much less prevalent than it is today — the National Highway Traffic Safety Administration estimated that, at any given time, as much as eleven

\textsuperscript{24} AAA FOUNDATION FOR TRAFFIC SAFETY, 2009 TRAFFIC SAFETY CULTURE INDEX \textsuperscript{1} (2009), available at http://www.aaafoundation.org/pdf/ 2009TSCIndexFS.pdf.
\textsuperscript{26} See D.L. HENDRICKS, ET AL., THE RELATIVE FREQUENCY OF UNSAFE DRIVING ACTS IN SERIOUS TRAFFIC CRASHES \textsuperscript{2} (2001) (noting that driver inattention was a factor in 22.7\% of crashes examined).
\textsuperscript{27} See, e.g., I.D. Brown \& E.C. Poulton, Measuring the Spare “Mental Capacity” of Car Drivers By a Subsidiary Task, ERGONOMICS Vol. 4, at 35 (1961); S.L. Chisolm et al., The Effects of Practice with MP3 Players on Driving Performance, 40 ACCIDENT ANALYSIS \& PREVENTION 704 (2007); see generally Jacobson \& Gostin, supra note 21, at 1419-20 (2010) (detailing the risks of distracted driving, distracted driving laws and regulation, automakers’ design changes, and policies to reduce distracted driving).
\textsuperscript{28} Jacobson \& Gostin, supra note 21, at 1419.
\textsuperscript{29} Noder, Shannon L. Noder, Talking and Texting While Driving: A Look at Regulating Cell Phone Use Behind the Wheel, 44 VAL. U. L. REV. 237, 240 n.19 (2009).
percent of drivers on the road were using their cellular phones. As such, for almost twenty years, researchers have been conducting a plethora of scientific studies linking cell-phone use and motor-vehicle crashes, and it was ultimately this body of research that led to the aforementioned legislation.

Specifically, researchers have long found that cell-phone use while driving greatly impairs drivers’ reaction time and increases their crash risk. In fact, statistical analyses have revealed that using a cell phone while driving may quadruple the risk of crashing. More specifically, one study found that the act of dialing a cell phone increased the likelihood of a crash nearly three-fold, while merely talking on a cell phone increased the risk by about 30%. However, while much research has been done, “there is a significant gap in the research literature, namely the effects of text messaging on driving.”

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30 Annie Barret Wallin, Cell Phones Pose a Distraction to Drivers But Legislative Ban is Not the Answer, 98 KY. L.J. 177, 178 (2009); see Matthew C. Kalin, The 411 on Cellular Phone Use: An Analysis of the Legislative Attempts to Regulate Cellular Phone Use by Drivers, 39 SUFFOLK U. L. REV. 233, 234 (2005) (noting that, in 2004, the figure was approximately eight percent).
31 The first study that this author is aware of investigating effects of cellular telephone use on driving performance was conducted in 1991. See K.A. Brookhuis, et al., The Effects of Mobile Telephoning on Driving Performance, 23 ACCIDENT ANALYSIS & PREVENTION 309 (1991).
32 See Noder, supra note 29, at 242-43 (2009)(explaining why statistics purporting to show the incidence of vehicle crashes attributable to cell-phone use may be inaccurately low).
34 Donald A. Redelmeier & Robert J. Tibshirani, Association Between Cellular-Telephone Calls and Motor Vehicle Collisions, 336 NEW ENG. J. MED. 453 (1997); see Wallin, supra note 30, at 184-86 (outlining proponents’ arguments in favor of handheld cell-phone bans).
The use of texting as a form of communication is growing exponentially. In the calendar year 2008, nearly 600 billion text messages were sent, a number almost four times the amount sent in 2006. Demographically, texting is most prevalent in younger people, with 66% of those ages 18-24 reporting texting while driving, compared to only 16% of cell-phone owners overall. Thus, because of the prevalence of texting while driving, researchers have examined the relationship between such texting and motor-vehicle crashes.

A. Early Research

The research on the effects of texting while driving is emerging. However, most research to date has either “focused on verbal communication at best, or at worst conflated text messaging with verbal communication under vague labels such as mobile phone use.” One 2004 study did find – albeit in a sample of only ten drivers – that receiving a text message increased response times to a peripheral detection task but reduced driver speed. Furthermore, a 2006 study in which young drivers in a simulator were asked to send and receive text messages found that participants spent about 40% of the time looking away from the road, that participants were less consistent in maintaining position in their lane, and that

39 Id.
40 Zogby Poll: 83% Say Texting While Driving Should Be Illegal, http://www.zogby.com/News/ReadNews.cfm?ID=1323 (last visited Mar. 10, 2010). Another study found that 45% of people responding to a Facebook poll admitted to texting while driving. Text Messaging & Driver Behaviour, supra note 37, at 3.
41 See Noder, supra note 29, at 262 (detailing the case of a train accident that killed over twenty-five people, caused in part by an operator who was texting at the time of the crash).
42 Text Messaging & Driver Behaviour, supra note 37, at 3 (emphasis added).
participants frequently failed to see simulated signs instructing them to change lanes. However, until the 2008 Transport Research Laboratory study – discussed fully infra – no study differentiated between sending and receiving text messages, nor did any research “describe any performance differences resulting from experience of texting . . . .”

Aside from the research detailing and proving the inherent dangers involved with texting while driving, the public at large is well aware of such dangers. For instance, an AAA Foundation poll found that over 94% of drivers considers it unacceptable to send text messages or e-mail while driving, with almost 87% of respondents considering such activity a “very serious threat to their personal safety.” Further, numerous surveys show that over 80% of drivers favor legislation outlawing texting while driving.

B. September 2008 Total Research Laboratory Study

In this author’s opinion, to date, the largest and most comprehensive study looking at the effects of texting on driver behavior was published in September 2008 by the Transport Research Laboratory (TRL) for its client, the Royal Automobile Club Foundation. The purpose of the TRL study “was to assess the impact of text messaging on driver performance, and the attitudes and beliefs that surrounded the activity in the 17-25 age category.” The study consisted of seventeen participants who completed the study using a driving simulator, with

45 Text Messaging & Driving Behaviour, supra note 37, at 4.
48 See Text Messaging & Driver Behaviour, supra note 37.
49 Id. at viii. Choosing the demographic of 17-25 makes sense, as it is this age group that tends to text the most. See supra note 40 and accompanying text.
each participant completing both a distraction-free drive and a drive in which they were told to
either read a received message, compose and send a message, and ignore an incoming
message. Researchers hypothesized that “when writing/reading text messages, drivers would
display increased reaction times, poorer care following ability, poorer lateral lane control . . . [,]
reduced speech . . . [and] that reductions in drivers’ performance will be greater when writing
a text message than when reading a text message.”51

The results of the study overwhelmingly confirmed the researchers’ hypotheses. Primarily, the study confirmed that “[r]eaction times to (task-unrelated) trigger stimuli tended
to be higher when reading or writing a text message.”52 Furthermore, the study discovered a
disparity in impairment between composing and reading text messages; namely, that “[w]riting
text messages created a significantly greater impairment than reading text messages.”53 Finally,
the researchers observed that drivers, while texting, “were less able to maintain a constant
distance behind a lead vehicle and showed increased variability in lateral lane position when
following that vehicle.”54

The results of the TRL study are not merely academic; as the researchers point out,
“[t]he failure to detect hazards, increased response times to hazards, and exposure time to that
risk have clear implications for safety.”55 In fact, at normal highway speeds, it may take the

50 Id.
51 Id.
52 Id. For detailed reaction-time findings and charts, see id. at 16-17.
53 Id. This distinction is logical, considering that, as opposed to merely reading a text message, one composing a text
message “must consider the text to be written and interact with the phone to compose the text message.” Id. at ix.
54 Id. at ix.
55 Id. at viii.
driver as much as a mile to complete the composition and sending of a text message. The difference in reaction time between sending and not sending a text message could increase the distance required to stop a vehicle by approximately three car lengths, a distance that “could easily make the difference between causing and avoiding an accident or between a fatal and non-fatal collision.” Finally, the poor control over lateral position and reaction times that TRL researchers found “would increase the likelihood of collision dramatically.” Therefore, it is clear that the ills that the Maryland legislature sought to rectify in passing the Delegate John Arnick Electronic Communications Traffic Safety Act were serious ones; dangers the researchers determined were “greater than that caused by alcohol consumption to the legit limit for driving [and the use of] cannabis . . . .”

III. MARYLAND’S LEGISLATIVE ATTEMPTS TO OUTLAW TEXTING

While the issue of banning cell-phone use while driving “has . . . taken off over the last 10 years” – the first piece of legislation seeking to outlaw cell-phone use for Maryland drivers was first introduced in 1999 - the first legislative attempt to ban text-messaging while driving was introduced in the Maryland Legislature in 2008.

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56 Id. It took participants in the TRL study an average of sixty-three seconds to compose and send a text message while driving. Id. at 28. See Jacobson & Gostin, supra note 21, at 1419 (“[W]hen texting, drivers take their eyes off the road for 4.6 of 6 seconds.”).
57 Id.
58 Id. at ix.
59 Id. See Play It Safe, supra note 38 (“Texting while driving is more dangerous than driving under the influence of drugs or alcohol.”). The TRL study concluded that, whereas reaction times for users of alcohol and marijuana were delayed by 12 and 21 percent respectively, the reaction times of those texting were delayed by 35 percent. TEXT MESSAGING & DRIVING BEHAVIOUR, supra note 37, at 1.
60 Nicole Fuller, Limits Eyed on Cell Use in Cars: Lawmakers Again Try to Bar Hand-Held Phone Use, Texting While Driving in MD, BALT. SUN, Jan, 22, 2008, at 1A.
61 Delegate John S. Arnick of Dundalk, for whom the current legislation is named, introduced the 1999 legislation. Id.
A. Legislation On the Books

While the first legislative attempt to expressly outlaw text-messaging while driving was introduced in 2008, such legislation arguably “seeks to prohibit [acts] already criminal under Vehicle and Traffic Law § 21-901.1.”62 Section 21-901.1 of the Transportation Article provides that “[a] person is guilty of negligent driving if he drives a motor vehicle in a careless or imprudent manner that endangers any property or the life or person of any individual.”63 Arguably, one who employs one or both of his hands and takes his eyes off of the road for the better part of a minute – as the TRL study found64 – to send a text message, is driving in a “careless” and “imprudent” manner that could potentially endanger other motorists. As such, it has been argued that new cell-phone use and texting bans are superfluous and that law enforcement agencies should use the tools already in place.65

B. 2008 Legislation

House Bill 380 of the 2008 Regular Session66 sought to add § 21-1124.1 to the Transportation Article, and provided that “[a] person may not use a text messaging device to write, send, or read a text message while operating a motor vehicle.”67 This legislation was

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64 See supra note 56.
65 Cell Phone Bill Back on Table, Salisbury Daily Times, Feb. 23, 2008, available on Westlaw at 2008 WLNR 27479481 (“Instead of specifically addressing cell phone use while driving, motorists should use common sense and police should enforce negligent driving laws.”); Wallin, supra note 30, at 196 (advocating for the use of current reckless driving statutes instead of enacting specific text-message legislation), 200 (quoting a State Trooper saying that “[w]hen I was a trooper I would pull motorists over for reckless driving and find out they were putting on makeup or reading a road map . . . . I didn’t need a special law to charge them; we already outlaw reckless driving.”).
66 The bill file is available at http://mlis.state.md.us/2008rs/billfile/HB0380.htm (last visited Mar. 17, 2010).
67 House Bill 380 of the 2008 Regular Session, available at http://mlis.state.md.us/2008rs/bills/hb/hb0380f.pdf. The text of this bill is now identical to that found in § 21-1124.1, after the 2010 amendment adding “reading” to the list of prohibited activities. See infra note 163 and accompanying text.
originally part of a larger Senate Bill\textsuperscript{68} that barely passed in the Senate before being referred to
the House of Delegates Environmental Matters Committee.\textsuperscript{69}

Numerous organizations, through letters to the committee, voiced support for the
legislation, including MedChi, the Maryland Department of Transportation, and the American
Academy of Pediatrics.\textsuperscript{70} The only party to oppose the legislation was the State of Maryland
Office of the Public Defender, who opined that sufficient laws already existed to deal with the
ills of text-messaging on the roads; if the legislature was to pass the bill, “it [would] need to
create a new law for the driver who shaves on the way to work or who puts on make-up or who
eats a Big Mac or looks at a map or other navigation device . . . while driving.”\textsuperscript{71} Further, the
Office of the Public Defender argued that allowing law enforcement officers to pull drivers over
for such acts “expands the police powers and provides even more of a pretextual reason to stop
a moving vehicle than allowed under the Maryland Bill of Rights.”\textsuperscript{72}

However, despite overwhelming support from outside parties, House Bill 380 ultimately
received an unfavorable report from the Environmental Matters Committee, with the bill never

\textsuperscript{68} This Senate Bill would have also banned all hand-held cell phone use while driving. See Nicole Fuller, \textit{Limits Eyed on Cell Use in Cars: Lawmakers Again Try to Bar Hand-Held Phone Use, Texting While Driving in MD}, BALT. SUN, Jan. 22, 2008, at 1A; supra note 164 and accompanying text (detailing the 2010 legislation banning motorists’ use of handheld cell phones).

\textsuperscript{69} The Senate Judicial Proceedings Committee approved the bill 6 to 5, and the full Senate approved the bill 26 to 21. Laura Smitherman & Nick Madigan, \textit{Phone Ban Moving Ahead: Bill to Prohibit Hand-Held Cells for Md. Motorists Going to Full Senate}, BALT. SUN, Mar. 8, 2008, at 1A; Legislative Digest, BALT. SUN, Mar. 21, 2008, at 7B.

\textsuperscript{70} The bill file, including all of these referenced letters, is on file with this author.

\textsuperscript{71} State of Maryland Office of the Public Defender, Position on Proposed Legislation – HB 380, Feb. 12, 2008(on file with author); see Editorial, \textit{Celling Ourselves Short}, DIAMONDBACK, Mar. 25, 2010, available at http://www.diamondbackonline.com/opinion/staff-editorial-celling-ourselves-short-1.1281738 (“After all, statistics show drivers are distracted by conversations with passengers – should we ban them too? What about radios? Should drivers not be allowed to drink a cup of coffee in the morning either?”); Kalin, \textit{supra} note 30, at 261 (“[C]ritics note there are a myriad of activities in a car that are far more distracting—such as eating and shaving—yet do not receive the same public attention as cellular phones.”); Wallin, \textit{supra} note 30, at 188 (noting that “those who single out and legislate this action ignore the various other types of distracted driving that occur on the roads and highways every day.”); Jacobson & Gostin, \textit{supra} note 21, at 1420 (“[T]here are additional likely sources of driver distraction, such as eating, drinking, smoking, reading, and grooming, that extant law does not directly target.”).

\textsuperscript{72} \textit{Id.} See infra Part III.C.2 (discussing the distinction between primary and secondary offenses).
even receiving a vote. One State Senator spoke out against the legislation, arguing that “[i]t’s legislating common sense . . . . People should be responsible adults and know how to behavior and act reasonably. Next we’re going to be telling people what radio station they can listen to and how loud they can listen to it.” One Delegate called the bill “a dropped phone call,” arguing that “cell phone use is just one of a number of driver distractions, and that the bill doesn’t really deal with the larger problem,” citing a paucity of evidence that bans in other states have reduced traffic accidents. In fact, another Delegate even suggested that such legislation would create more havoc on the roads, considering motorists would then swerve off of the road to answer phone calls.

C. 2009 Legislation

After success in one of the chambers in 2008, Maryland legislators renewed their attempts to pass legislation outlawing text-messaging while driving in 2009. Ultimately, the legislature was successful in passing this legislation, which is currently codified in § 21-1124.1 of the Transportation Article.

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74 Wallin, supra note 30, at 192.
75 See Timothy B. Wheeler, Cell Phone Bill Meets Static: House Panel Split on Move to Limit Drivers’ Cell Use, BALT. SUN, Mar. 26, 2008, at 4B; Wallin, supra note 30, at 190-191 (discussing the unanswered questions about the effectiveness of legislation banning cell-phone use while driving). In fact, a 2009 study conducted by the Insurance Institute for Highway Safety concluded that laws banning cell-phone use for drivers have failed to reduce the incidence of traffic accidents. Results of Study on Cellphone Use Surprise Researchers, http://wheels.blogs.nytimes.com/2010/01/29/study-finds-that-reduced-phone-use-does-not-cut-crashes/ (last visited Mar. 27, 2010); see Jacobson & Gostin, supra note 21, at 1419 (“[N]o significant reductions in traffic crashes [were found] in states that enacted handheld cellular phone bans relative to states that had not.”).
76 Wheeler, supra note 75, at 4B.
1. The bills

The Senate and the House of Delegates introduced Senate Bill 98 and House Bill 72, respectively.\textsuperscript{77} House Bill 72 – mimicking the legislation as it passed in 2009 – provides that “a person may not use a text messaging device to write or send a text message while operating a motor vehicle in motion or in the travel portion of the roadway.”\textsuperscript{78} Under this language, the law does not prohibit one from reading text messages while driving,\textsuperscript{79} nor does the law differentiate between one driving on the highway and one stopped at a red light. The law does not apply to one who is using a global positioning system (GPS) or a text-messaging device to contact a 9-1-1 system.\textsuperscript{80}

Similar to the 2008 legislation, both the Senate and House bills received overwhelming support from outside parties. For instance, the bills received support from: the Maryland Department of Transportation, MedChi, the American Academy of Pediatrics, the Maryland PTA, the State of Maryland Sheriff’s Association, the Maryland Chiefs of Police Association, and the Maryland Automobile Insurance Fund.\textsuperscript{81} The only parties in opposition to the bills were the State of Maryland Office of the Public Defender – who presented the same arguments as in 2008\textsuperscript{82} - and the American Civil Liberties Union (ACLU), who, due to concerns of racial

\textsuperscript{77} The bills are substantially similar, but the Senate Bill lacked the statutory exceptions found in (c) of the House Bill. The bill files are available online at http://mlis.state.md.us/2009RS/billfile/sb0098.htm, and http://mlis.state.md.us/2009RS/billfile/hb0072.htm, respectively.

\textsuperscript{78} 2009 Md. Laws 1140, MD. CODE ANN., TRANS. § 21-1124.1(b) (West Supp. 2010).

\textsuperscript{79} See infra note 163 and accompanying text (discussing 2010 legislation outlawing motorists from reading text messages).

\textsuperscript{80} 2009 Md. Laws 1140, MD. CODE ANN., TRANS. § 21-1124.1(c) (West Supp. 2010). Definitions for “text messaging device” and “9-1-1 system” are found at 2009 Md. Laws 1140, MD. CODE ANN., TRANS. § 21-1124.1(a)(2) – (3) (West Supp. 2010).

\textsuperscript{81} All of these documents are on file with this author.

\textsuperscript{82} See supra notes 71-72 and accompanying text.
profiling on Maryland’s roadways, sought an amendment clarifying that the law could not alone justify police detention of a suspect.83

Ultimately, the bills passed in the House of Delegates by a 133-2 margin, and in the Senate by a margin of 43-4.84 Governor Martin O’Malley signed off on the legislation on May 7, 2009, and the legislation went into effect on October 1, 2009.85 The law, as currently codified, reads:

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

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

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

(b) Subject to subsection (c) of this section, a person may not use a text messaging device to write or send a text message while operating a motor vehicle in motion or in the travel portion of the roadway.

(c) This section does not apply to the use of:

(1) A global positioning system; or

(2) A text messaging device to contact a 9-1-1 system.86

2. Primary vs. secondary offenses

Text-messaging bans for motorists can take the form of

“either primary or secondary enforcement offenses. If the ban is a primary enforcement offense, the officer may ticket a driver . . . without any other traffic offense occurring. If the law only makes the ban a secondary enforcement

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83 Testimony from the American Civil Liberties Union for the House Environmental Matters Committee, Feb. 3, 2009 (on file with author). See infra Part III.C.2 (discussing the distinction between primary and secondary offenses).
84 Julie Bykowicz, Ban on Texting Passes House: Senate Also Voted to Bar Messaging While Voting, BALT. SUN, Apr. 2, 2009, at 1A.
85 Laura Smitherman, O’Malley Signs Contested Bills: Death Penalty, Driver License, Texting Curb Becomes Law, BALT. SUN, May 8, 2009, at 3A.
offense, the officer can only ticket the driver if he commits some other infraction while breaking the cell phone law.\textsuperscript{87}

The ACLU, in a letter to the Environmental Matters Committee, noted that the policy behind the distinction between primary and secondary traffic offenses is to “protect drivers from pretextual stops.”\textsuperscript{88} Thus, it urged the legislature to make the ban a secondary offense to “ensure that the General Assembly does not unwittingly increase the risks of racial profiling in traffic stops when addressing the serious problem of distracted driving.”\textsuperscript{89} Echoing this sentiment, a contingent of legislators introduced an amendment to the Senate bill that would have made the ban a secondary offense; however, the amendment failed by a margin of 31-16,\textsuperscript{90} and, as such, the current texting ban is a primary offense.\textsuperscript{91} That is, police may pull over drivers based solely on suspicion of texting.\textsuperscript{92}

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

In the almost-five month period between October 1, 2009 - the date the legislation went into effect - and the end of February 2010, state law enforcement officers had issued only sixty\textsuperscript{93}

\textsuperscript{87} Wallin, supra note 30, at 180.
\textsuperscript{88} Testimony from the American Civil Liberties Union for the House Environmental Matters Committee, Feb. 3, 2009 (on file with author).
\textsuperscript{89} Id.
\textsuperscript{90} Laura Smitherman, Texting-Ban Bill Advances in State Senate, BALT. SUN, Mar. 14, 2009, at 2A.
\textsuperscript{91} This is in line with other states, as approximately “90% of states that ban texting while driving permit primary enforcement.” Jacobson & Gostin, supra note 21, at 1420.
\textsuperscript{93} See James Erwinger, Law Banning Texting May Be Hard to Enforce, CLEVELAND PLAIN DEALER, Apr. 15, 2009, at A1 (stating that, in the first three months of California’s text-messaging ban on drivers, only 326 tickets had been issued for the infraction in the entire state); Juana Summers, Texting-Driving Bans: Little Effect, ST. LOUIS POST DISPATCH, Jan. 24, 2010, at B1 (noting that, in the first five months of Missouri’s texting ban, law enforcement officers had issued merely thirteen citations); Mark Waller, Legislation Would Make Drivers Put Down the Phone, Only Hands-Free Phones Allowed Behind the Wheel Under New Bill, NEW ORLEANS TIMES PICAYUNE, Apr. 26, 2009, at 1 (explaining that in the first several months of Louisiana’s texting ban, State Police had issued “only about 10 tickets under the law.”).
citations to motorists for texting while driving. In this author’s opinion, this is due to the flaws inherent in the legislation: (1) the problems in enforcing the texting ban, and (2) the vagueness of the behavior that the legislation prohibits.

A. Enforcement Problems

The 2009 legislation prohibits drivers from either “writing” or “sending” a text message. Assuming, arguendo, it is clear what constitutes a “text message,” absent a confession or confiscation of the cell phone in question, it is difficult for prosecutors to prove beyond a reasonable doubt that drivers are “writing” or “sending” text messages on the

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94 Julie Bykowicz, Ban on Texting Could Tighten, General Assembly 2010 Session, BALT. SUN, Feb. 19, 2010, at 1A. In this author’s opinion, the limited number of citations to date is especially surprising, considering Maryland’s ban is a primary offense for which police officers may pull a car over in the absence of another traffic infraction. See supra Part III.C.2 (discussing the distinction between primary and secondary offenses). Further, a study of adults from New York, New Jersey, and Connecticut revealed that close to ninety-percent of drivers ignore cell-phone bans in their respective states. Wallin, supra note 30, at 191.

95 It should here be noted that the difficulties law enforcement officers encounter in enforcing penal laws do not render the statutes unconstitutional. See Ruark v. Int’l Union of Operating Engineers, Local Union No. 37, 157 Md. 576, 584, 146 A.2d 797, 800 (1958) (“[T]he necessity for a fact to be proved does not make the fact so in issue indefinite or uncertain.”); United States v. Williams, 553 U.S. 285, 286 (2008) (“What renders a statute vague is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of precisely what that fact is.”).

96 See infra note 163 and accompanying text (detailing the Maryland legislature’s efforts to add reading text messages to the list of prohibited activities); Julie Bykowicz, Ban on Texting Could Tighten, General Assembly 2010 Session, BALT. SUN, Feb. 19, 2010, at 1A.

97 But see infra Part IV.B.2. (arguing that it is by no means clear what constitutes a “text message”).

98 Absent consent or any other warrant exception, law enforcement officers may not confiscate motorists’ cell phones in order to search their text-messaging history without a search warrant. See Julie Scharper, Road Hazard, BALT. SUN, Sept. 27, 2009, at 1A (“If a law enforcement officer demands to see my phone, must I comply? No, you have the right to hand over your phone, unless the officer has a search warrant.”); Matthew E. Orso, Cellular Phones, Warrantless Searches, and the New Frontier of Fourth Amendment Jurisprudence, 50 SANTA CLARA L. REV. 183, 191 (2010) (“[C]ourts have regularly held that a person has a reasonable expectation of privacy in the contents of his cellular phone.”); Bryan Andrew Stillwagon, Bringing an End to Warrantless Cell Phone Searches, 42 GA. L. REV. 1165, 1188 n.145 (2008) (noting a case where a prosecutor’s office did not bring charges against an individual for possession of a stolen handgun because police searched his phone, finding a picture of the gun in a text message, without a search warrant); see generally Katharine M. O’Connor, :O OMG They Search My TXTS: Unraveling the Search and Seizure of Text Messages, 2010 U. ILL. L. REV. 685 (2010).
roadways, to the exclusion of all other non-proscribed behaviors. Thus, enforcement of Maryland’s text-messaging ban on motorists is near impossible to enforce at best.99

1. Writing

While there is undoubtedly a learning curve with respect to the ease and efficiency with which one sends a text message,100 writing and sending a text message is certainly less arduous than taking out a pad and paper and physically composing a written message. As such, it is not easily recognizable to a passing law enforcement officer that an individual composing a text message is engaged in the behavior.101 Furthermore, composing a text message may be done with either one hand or two hands. In this author’s experience, composing a text message with one hand more closely resembles scrolling through one’s contact list than drafting a text message (at least to a passing law enforcement officer), and such behavior is likely to go undetected. Further, due to the difficulty sending a one-handed text message, any detection of one-handed texting would require the law enforcement officer to observe the motorist engaged in the act for a substantial amount of time - compared to two-handed text messaging - before having the requisite probable cause that the motorist is, in fact, sending a text message.

99 See Noder, supra note 29, at 266 (“Furthermore, the difficulty of enforcing specific types of cell phone and text messaging legislation . . . contributes to the ineffectiveness of current legislation.”); Julie Bykowicz, Lawmakers Want to Tighten Ban on Texting While Driving, BALT. SUN., Feb. 19, 2010, at 1A (“But some lawmakers complained last year that the measure would be unenforceable . . . .”).

100 TEXT MESSAGING & DRIVER BEHAVIOUR, supra note 37, at 4 (“[T]he degree of experience/skill with texting can vary considerably between individuals.”).

101 See Robert Salonga, Drivers With Cell Phones are Back to Old Ways, CONTRA COSTA TIMES., Nov. 15, 2009, at 18A (“The tally also includes three citations for sending text messages while driving, which was prohibited at the beginning of the year but is . . . difficult for police to detect.”); supra note 93 and accompanying text (detailing the relative infrequency of issuance of citations for text messaging while driving).
Detection of texting on the roads is more likely when the motorist is engaged in two-handed texting.\footnote{A New Hampshire bill makes it illegal to “use two hands operating a telecommunications device while driving.” Kevin Landrigan, *Texting, Driving Bill OK’d*, TELEGRAPH, Jul. 17, 2009, available on Westlaw at 2009 WLNR 13683012; see N.H. REV. STAT. ANN. § 265:105-a (Supp. 2009).} Two-handed texting is possible with standard phones, but the advent of “flip-phones,”\footnote{Flip phones look like regular cell-phones “until you open the lid and expose the thumb keyboard . . . .” Lawrence M. Friedman, *Many Happy Returns*, 16-Jan. CBA RECORD 42, 42 (2002).} Blackberrys, and iPhones have made this phenomenon much more prevalent. That is, these phones provide users with a regular QWERTY keyboard; this layout, being the “standard layout for keyboards,”\footnote{Bryan Druzin, *Buying Commercial Law: Choice of Law, Choice of Forum, and Network Externalities*, 18 Tul. J. INT’L & COMP. L. 131, 146 (2009).} is clearly more conducive to writing with two hands than with one. Thus, for instance, if a police officer pulls aside a motorist holding a cell phone, Blackberry,\footnote{A Blackberry is a “and-held device that connects wirelessly to the Internet, providing e-mail, phone, and other communications capabilities.” Robert Sprague, *Orwell Was An Optimist: The Evolution of Privacy in the United States and Its De-evolution for American Employees*, 42 J. MARSHALL L. REV. 83, 85 n.11 (2008).} or iPhone\footnote{See Apple – iPhone, http://www.apple.com/iphone/ (last visited Apr. 1, 2010).} above the steering-wheel and typing with both thumbs, he or she is more likely to be armed with the requisite probable cause to pull the motorist over and cite him or her for “writing” a text message.

However, having the probable cause to pull a motorist over and cite him or her for texting is a far cry from the prosecution being able to prove beyond a reasonable doubt that the motorist was engaged in texting.\footnote{See State v. Ofori, 170 Md. App. 211, 224, 906 A.2d 1089, 1096 (2006) (“He has confused probable cause with proof beyond a reasonable doubt.”); State v. Bagley, 844 So.2d 688, 690 (Fla. Dist. Ct. App. 2003) (“Probable cause is not the same standard as beyond a reasonable doubt . . . .”).} That is, the Maryland legislature, in passing this ban, fails to realize that cellular phones are currently used for a plethora of activities aside from making telephone calls and sending text messages. While, perhaps at their inception, cell phones were
used merely for making telephone calls, they “have become combination phone, pager, e-mail server, internet service provider, and planner.”

Furthermore, the iPhone boasts hundreds of thousands of “apps,” and most modern cell phones allow users to play and compete in various games; surely, the use of a cell phone for such uses does not fall under the umbrella of “writing” a text message. Thus, the hill that prosecutors must climb to prove that those cited for “writing” a text message while driving were actually engaged in that behavior – to the exclusion of all of the aforementioned, non-proscribed acts – is a steep one.

2. Sending

In prohibiting drivers from sending a text message, the legislature was clearly outlawing an act separate and distinct from writing the text message, as statutes are “construe[d] . . . as a whole so that no word, clause, sentence, or phrase is rendered surplusage, superfluous . . . or nugatory.” Whatever difficulties prosecutors have in proving that a motorist engaged in writing a text message, they are likely to have even more trouble proving that a motorist was sending a text message.

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108 Ross Chaffin, The Growth of Cost-Shifting in Response to the Rising Cost and Importance of Computerized Data in Litigation, 59 OKLA. L. REV. 115, 123 (2006); see Benjamin V. Madison, III, The Elephant in Law School Classrooms: Overuse of the Socratic Method as an Obstacle to Teaching Modern Law Students, 85 U. DET. MERCY L. REV. 293, 296 (2008) (“Cellular phones are part of their lives – not just to answer calls whenever they may be on the planet, but to take photos, send e-mails, and even to search the Internet.”).

109 One newspaper reported that “[i]n Maryland, questions have been raised about whether it would be illegal to use an Iphone while driving because it has a touch screen.” Jason Nevel, Illinois Legislators Looking to Curb Cell Phone Use in Cars, PANTAGRAPH, Feb. 7, 2009, at A1. However, in this author’s opinion, there is no language in the current statutory scheme that prohibits the mere “use” of an iPhone without proof that the user was engaged in writing, sending, or reading a text message.

110 An “app” is an “abbreviation of ‘application,’ which is something you put on your iPhone to enable you to do various things with your phone.” 57-Feb. FEDERAL LAWYER 70, 70 (2010).

111 See Julie Scharper, Road Hazard, BALT. SUN, Sept. 27, 2009, at 1A (“The law does not ban playing games or using applications.”); See Editorial, TXT U L8R, TIME 2 DRIVE, BALT. SUN, Sept. 29, 2009 (“Using applications on your iPhone? Perfectly legal.”).

The final act of “sending” a text message, once completely composed, is nothing at all more than simply pressing one button on a cell phone.\textsuperscript{113} Thus, the act of “sending” a text message takes no more than a split-second. In order to pull someone over for “sending” a text message, then, the law enforcement officer must have probable cause that what is on the cell-phone screen is a text message and catch the driver at the exact split-second that he or she is “sending” the message. But, again, merely having the probable cause to pull a car over and being able to prove beyond a reasonable doubt that one was sending a text message are two very different things.\textsuperscript{114} That is, while the act of “writing” a text message can easily be explained away as engaging in any number of non-proscribed activities with the cell phone, the “sending” of a text message is even easier to explain away; the single key-stroke that comprises the “sending” of a text message looks identical to pressing any button on a cell phone. Thus, the defendant could argue that he was scrolling through his contacts, dialing a telephone number, accessing his calendar, or engaging any other activity with his cell phone involving at least a single key-stroke. The plethora of such activities that the defendant could have been engaging in instead of “sending” a text message should be enough to put reasonable doubt into the mind of the fact-finder sufficient to render a verdict of not-guilty.

B. \textit{Vagueness}

Even if the prosecution can prove that a motorist was “writing” or “sending” \textit{something} with his or her cell phone, to sustain a conviction for violating § 21-1124.1 of the Transportation Article, they must be able to prove that motorist was sending a “text message” within the

\textsuperscript{113} See Mary Beth Marklein, \textit{College Catch Cellphone Wave}, USA TODAY, Oct. 29, 2003, at 5D (“With a press of a button, he soon could be sending a text message to the cellphones of every student on campus.”).

\textsuperscript{114} See \textit{supra} note 107 and accompanying text.
meaning of the statute. Because the legislature did not define what constitutes a “text message,” and because it is otherwise unclear what constitutes a “text message,” § 21-1124.1 is vague at best, and unconstitutionally vague at worst.

1. Vagueness doctrine in Maryland

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

A void-for-vagueness analysis is comprised of two criteria; the first of such criteria is the “fair notice principle.” The rationale underlying this principle is the notion that “since vague laws may trap the innocent by not providing fair warning, no one should be subject to criminal responsibility for conduct which he could not reasonably understand to be prohibited.” Next, the second criteria in a vagueness analysis is “the failure to provide legally fixed standards and adequate guidelines for police, judicial officers, triers of fact and others


116 McGowan, 220 Md. at 125, 151 A.2d at 160.


119 Id. (citing Bowers, 238 Md. 120-21, 389 A.2d at 341).
whose obligation it is to enforce, apply and administer the penal laws.”\textsuperscript{120} And finally, and pertinent to this issue, is the notion that “whenever a criminal statute may, because of imprecise draftsmanship, impact upon free speech rights, the void-for-vagueness doctrine ‘demands a greater degree of specificity than in other contexts.’”\textsuperscript{121}

2. Vagueness doctrine and § 21-1124.1

Intuitively, the best advice as to what constitutes a “text message” should come from the statutory scheme prohibiting motorists from sending them. However, § 21-1124.1 does not define “text message”; it does, on the other hand, define “text messaging device” as a “a hand held device used to send a text message or an electronic message via a short message service, wireless telephone service, or electronic communication network.”\textsuperscript{122} Thus, while it would make sense to reason that the definition of a “text message” should be implicit in the definition of “text messaging device,” unfortunately, the legislature did everyone a disservice failing to heed a lesson school-children are taught at a young age: do not use the word you are trying to define in that word’s definition. But, what is clear is that, including the term “text message” in the definition of “text messaging device” \textit{in addition} to “an electronic message via a short message service [(SMS)]”, the legislature intended the term “text messaging device” to encompass something more than a device used to send SMS messages,\textsuperscript{123} which “allow[] a user to send a message consisting of a maximum of 160 characters from a cell phone or computer to another

\textsuperscript{120} \textit{Levitt}, 48 Md. App. at 7, 426 A.2d at 387.
\textsuperscript{121} \textit{Bowers}, 283 Md. at 123, 389 A.2d at 346 (quoting Smith v. Goguen, 415 U.S. 566, 573 (1974)); \textit{see infra} Part IV.C (discussing the statute’s potential chilling effect on First Amendment speech).
\textsuperscript{122} MD. CODE ANN., TRANSP. § 21-1124.1 (West Supp. 2009).
\textsuperscript{123} \textit{See} Goode, \textit{supra} note 13, at 16 n.66 (explaining that text messages are “typically,” but not exclusively, sent via SMS).
cell phone.” However, the statute does not outlaw use of a text messaging device, it outlaws the use of a text messaging device to write or send a “text message.” Thus, there is no legislative guidance as to what constitutes a “text message.”

i. A “message” comprised of “text”

As Maryland courts have repeatedly stated, “[a] dictionary is a starting point in the work of statutory construction . . . .” The Merriam-Webster Online Dictionary defines “text” as “the original words and form of a written or printed work.” Thus, seemingly any letters produced by pressing the keys of a cell phone constitute “text.” The Merriam-Webster Online Dictionary defines “message” as “a communication in writing, speech, or by signals.” Put together, then, the use of a cell phone to communicate in any way would meet the dictionary definition of “text message.”

According to this definition, the use of a cell phone to post a message on Facebook or tweet on Twitter would constitute the writing of a “text message.” Further, it would also encompass the sending of an e-mail or a standard SMS message. In fact, it could be argued that any use of a cell phone to access the internet could constitute sending a “text message,” as “internet” is defined as a form of “electronic communications network,” and thus, one is “communicating” using “text” whenever he or she accesses the internet with a cell phone.

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ii. Common understanding

While strict dictionary definitions are a “useful starting point,”129 such definitions “are not dispositive as to the meaning of statutory terms,”130 and are “not necessarily the end” of a statutory-construction analysis.131 Another bedrock rule of statutory construction is that statutory language is interpreted to conform to its plain meaning; that is, they are interpreted according to the “ordinary and commonly understood meaning of the words of the statute.”132

However, the commonly understood meaning of “text message” does not nearly encompass the plethora of activities included under a combination of dictionary definitions of “text” and “message.”133 In common parlance, the term “text message” is not meant to include using a cell phone to post on Facebook, tweet on Twitter, or even to send e-mails.134 Rather, in this author’s experience, the term is used amongst cell-phone users most commonly refer to the sending of a message from one cell phone to another. The term is not used to refer to posting on Facebook or tweeting; notably, the verbs “posting” and “tweeting” are used in reference to these activities, whereas the words “text” or “texting” are used in reference to sending messages from one cell phone to another. Such a limited understanding of the term “text message” is

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131 See supra note 125 and cases cited therein.
133 See supra Part IV.B.2.i.
134 A state legislator, regarding a 2010 bill that would prohibit motorists from merely reading text messages, noted that “[w]ith features like mapping, social media, e-mail and Web browsing, there are too many temptations for drivers when their phones are in front of them.” Julie Bykowicz, Ban on Texting Could Tighten, General Assembly 2010 Session, BALTIMORE SUN, Feb. 19, 2010, at 10A. Arguably, it can be inferred that this legislator does not believe that the aforementioned activities are prohibited under the 2009 version of the bill.
actually in line with the Merriam-Webster Online Dictionary entry for “text messaging,” which is defined there as “the sending of short text messages electronically from one cell phone to another.”\textsuperscript{135} Thus, according to this definition, certainly none of the aforementioned activities would constitute a “text message,” as none of them involve the sending of a message from one cell phone to another; they entail the sending of a message from a cell phone to an internet server.

After all of this, what do we know? The only thing that this author can say with any degree of confidence is that the term “text message” certainly encompasses SMS messages.\textsuperscript{136} Aside from this limiting understanding, we have an expansive view of the term stemming from dictionary definitions of “text” and “message” that is at odds with the common understanding and usage of the term. While the legislature is free to word penal statutes “by a general term without definition,” it may only do so “if the term has a settled common-law meaning and a commonly understood meaning which does not leave a person of ordinary intelligence in doubt as to its purport . . . .”\textsuperscript{137} Of course, there is no common-law definition of “text message”; and the previous exercise reveals that the definition is a far cry from “not leav[ing] a person of ordinary intelligence in doubt as to its purport.\textsuperscript{138}

The lack of understanding that comes from the aforementioned analysis can only lead to the conclusion that the citizens of Maryland are not on “fair notice” of what activity is criminal under § 21-1124.1.\textsuperscript{139} To survive a vagueness challenge, citizens must be “perfectly capable,\textsuperscript{136} See supra note 14.  
\textsuperscript{138} Magaha, 182 Md. App. at 129, 32 A.2d at 481.  
\textsuperscript{139} See supra notes 118-19 and accompanying text.
without having to guess, of understanding th[e statute]’s meaning and application.”

Because the statute’s bare “text messaging” standard leaves Maryland citizens, at best, guessing as to what conduct is prohibited, it is possible Maryland courts would hold it to be unconstitutionally vague. Further, this murkiness fails to provide a fixed standard for both police officers in charge of enforcing the texting ban, and judges and juries charged with determining guilt beyond a reasonable doubt.

3. Vagueness and other jurisdictions’ cell-phone bans / would-be bans

The argument that a law restricting motorists’ use of cell phones is unconstitutional is not without precedent; in fact, such bans “have been the subject of constitutional challenges since their inception . . . .” For instance, legislative efforts in Michigan “have failed because of fears that such a law might implicate privacy rights and personal freedoms,” and numerous United States Congressmen expressed concern that such laws would implicate First Amendment freedom of speech rights.

Further, in People v. Neville, a New York court – the Justice Court of Nassau County – dealt with a defendant charged with the “use of a mobile telephone (cell phone) while operating a motor vehicle . . . .” This was in violation of a New York State statute that provides, in pertinent part, that “no person shall operate a motor vehicle upon a public highway while using a mobile telephone to engage in a call while such vehicle is in motion.” Before the Justice

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141 See supra note 120 and accompanying text.
142 Wallin, supra note 30, at 186.
143 Noder, supra note 29, at 248 n.54.
145 Id. at 253.
146 N.Y. VEH & TRAF. LAW § 1225-c(2)(a) (McKinney 2001). See infra note 164 and accompanying text (noting the Maryland legislature’s efforts in 2010 to pass a similar bill).
Court, the defendant argued, *inter alia*, that the law was vague or overbroad, in violation of both the New York State and United States Constitutions.\(^{147}\) After enunciating a vagueness standard similar to that of Maryland,\(^{148}\) the Justice Court explained that the statute “distinguishes between the prohibited ‘mobile telephones’ and the permitted ‘hands free mobile telephone’ where the operator of the motor vehicle can maintain ‘both hands’ on the applicable steering device.”\(^{149}\) Then, after noting that during the first month of the statute’s applicability police action was limited to a verbal warning,\(^{150}\) the court summarily concluded that the “language is clear and indisputable to the ordinary citizen” and “[a]ccordingly, the statute is not void for vagueness or overly broad.”\(^{151}\)

Of course, § 21-1124.1 of the Transportation Article, as it stands today, is distinguishable from the statute with which the *Neville* court dealt. While one may take issue with a statute outlawing hand-held phones for purposes of making a call,\(^{152}\) citizens of New York are on fair notice that if they use their cell phones without a hands-free device while driving, they are acting in violation of § 1225-c of New York’s Vehicle and Traffic law. That is, nothing in the New York statute is vague, overbroad, or ambiguous. However, as detailed above, the behavior that Maryland’s § 21-1124.1 prohibits is unclear. Does it apply to e-mail? Blackberry Messenger? Cell-phone-based GPS? Neither the citizens of Maryland, the law enforcement agencies

\(^{147}\) *Neville*, 737 N.Y.S.2d at 253.

\(^{148}\) See *id.* at 254 (“The first question of consideration is if the law is so vague or overly broad to the point where a reasonable person of ordinary intelligence would be unable to ascertain what conduct is prohibited.”).

\(^{149}\) *Id.*

\(^{150}\) This was done, in the court’s view, “[a]s an added concern for public knowledge and understanding of the law.” *Id.*

\(^{151}\) See also Schor v. Daley, 563 F. Supp. 2d 893, 904-05 (N.D. Ill. 2008) (holding that a Chicago city ordinance providing that “no person shall drive a motor vehicle while using a mobile . . . telephone” was not void for vagueness).

responsible for enforcing the statute, nor the judges and juries charged with determining guilt have any guidance; as such, applying the New York court’s holding in Neville to the Maryland statute would be misplaced.

C. Chilling Effect

Inextricably intertwined with the vagueness doctrine is the “chilling effect” that impermissibly vague statutes exert on non-proscribed behaviors.\(^\text{153}\) Because of this chilling effect “which vagueness can exert on First Amendment liberties . . . [,] whenever a criminal statute may, because of imprecise draftsmanship, impact upon free speech rights, the void-for-vagueness doctrine ‘demands a greater degree of specificity than in other contexts.’”\(^\text{154}\) The potential for a chilling effect on non-proscribed activity is substantial with regard to § 21-1124.1, as the statute’s vagueness as to what constitutes a “text message” may cause motorists to abstain from certain First Amendment behaviors not prohibited under it.

First, it should be undisputed that engaging in the types of behaviors that may, potentially, constitute sending a “text message” when done on a cellular phone – SMS texting, e-mailing, messaging on Blackberry Messenger, posting on Facebook or Twitter, etc. – constitute “speech” subject to protection by both the Maryland Declaration of Rights\(^\text{155}\) and the First

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\(^{153}\) See, e.g., Cole v. Richardson, 405 U.S. 676, 689 n.3 (1972) (noting that a statute is void for vagueness “because the common meaning of its words is so imprecise . . . as to place a ‘chilling effect’ upon constitutionally protected expression”) (emphasis added); Walker v. City of Birmingham, 388 U.S. 307, 345 (1967) (noting the Supreme Court’s “overriding duty to insulate all individuals from the ‘chilling effect’ upon the First Amendment freedoms generated by vagueness . . . .”).


\(^{155}\) The Maryland Declaration of rights provides, in pertinent part, “that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects . . . .” Md. Const., Declaration of Rights, Art. 40. See Runnels v. Newell, 179 Md. App. 168, 944 A.2d 1183 (2008) (noting that the rights available under the Maryland Declaration of Rights are the same as those provided by the First Amendment).
Amendment to the United States Constitution.\textsuperscript{156} Maryland courts have long held that “[it] is the substance rather than the form of communication to which First Amendment protection attaches . . . .”\textsuperscript{157} Thus, whether the protected expression is in the form of a human being voicing his or her opinions on a street corner, or in the form of a posting to a Facebook wall or Twitter account sent on a cell phone, such expression is entitled to protection. However, one note is in order. This author fully recognizes that the freedom of speech is not an unlimited and unqualified right; statutes challenged on First Amendment grounds will be upheld “if it furthers important or substantial government interest[s].”\textsuperscript{158} While this is true – and certainly, the Maryland legislature was seeking to further an important and substantial government interest in passing this legislation – it is the responsibility of the legislature to enact a well-drafted statute proscribing such behavior; it is not a court’s responsibility to construe a poorly-drafted statute broadly simply because the legislature had good intentions and a worthwhile purpose.

After understanding the inherent vagueness of § 21-1124.1,\textsuperscript{159} grasping the mechanics of the “chilling effect,” as it relates to the texting statute, is relatively simple.\textsuperscript{160} Let’s assume that the texting statute prohibits the sending of SMS messages and similar phone-to-phone messages.\textsuperscript{161} However, the average citizen, upon reading § 21-1124.1 and seeing that the writing or sending of “text messages” is prohibited and realizing that the statute gives no guidance as to

\textsuperscript{156} The First Amendment to the United States Constitution, applicable to the states via the Fourteenth Amendment to the United States Constitution, provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech . . . .” U.S. CONST. amend. I.
\textsuperscript{159} See supra Part IV.B.
\textsuperscript{160} See supra Part I, Scenario III.
\textsuperscript{161} It is this author’s opinion that a fair construction of the statute would be to prohibit only SMS messages and other phone-to-phone messaging services, such as those sent via Blackberry Messenger.
what constitutes a “text message,” could reasonably conclude that writing or sending any “messages” comprise of “text” is outlawed. As such, such a citizen would likely refrain from what are potentially permissible activities, including e-mailing, posting a message to a Facebook wall or a Twitter account. This result, while perhaps making Maryland’s roadways safer, is actually the result of the “chilling effect” on otherwise-protected speech that this poorly-drafted and vague statute causes. Thus, in addition to not providing citizens of Maryland with fair notice of what § 21-1124.1 prohibits, the statute is also fatal in potentially causing citizens to refrain from otherwise non-proscribed speech.

V. REASON FOR HOPE: NEW LEGISLATION

During the 2010 legislative session, in addition to prohibiting motorists from reading text messages, and passing legislation outlawing motorists’ use of hand-held cell phones, the

162 See supra notes 118-19 and accompanying text.
163 See Bill Info – 2010 Regular Session - HB 192, http://mlis.state.md.us/2010rs/billfile/HB0192.htm (last visited Apr. 9, 2010). The text of the bill is available at http://mlis.state.md.us/2010rs/billfile/HB0192.htm. Section 21-1124.1 of the Transportation Article will be amended to read: “[A] person may not use a text messaging device to write, send, or read a text message . . . .” See Around the Region, BALT. SUN, Mar. 12, 2010, at 4A. The TRL study concluded that, while the act of sending a text message was significantly more dangerous than reading one, drivers reading text messages remain impaired. See supra note 53 and accompanying text.
164 See Michael Dresser, Driver Phone Ban is Passed, General Assembly 2010 Session, BALT. SUN, Apr. 10, 2010, at 1A; Liam Farrell, Assembly: Shut Up and Drive: Ban on Using Hand-Held Phones While Driving Would Take Effect Oct. 1, THE CAPITAL, Apr. 10, 2010, available on Westlaw at 2010 WLNR 7460975. The bill, Senate Bill 321 of the 2010 Regular Session, provides, in pertinent part, that “[a] driver of a motor vehicle that is in motion may not use the driver’s hands to use a handheld telephone other than to initiate or terminate a wireless telephone call or to turn on or off the handheld telephone.” Text of Senate Bill 321, 2010 Regular Session, http://mlis.state.md.us/2010rs/bills/sb/sb0321t.pdf (last visited Apr. 9, 2010). However, the measure is merely a secondary offense, and first-time offenders are subject to a fine of only $40. See § 21-1142.2(e); (f)(1)(i) of the bill. Finally, it should be noted that this piece of legislation has no effect on the texting ban found in § 21-1142.1, as the new legislation specifically states that “[t]his section does not apply to . . . use of a handheld telephone as a text messaging device.” § 21-1142.2(b)(3) of the bill. Finally, while under this legislation the use of a hands-free device remains legal, many commentators have argued that the use of hands-free devices is no safer than talking on a handheld phone. See Jacobson & Gostin, supra note 21, at 1419 (“A meta-analysis of 125 studies . . . showed no differences in risk between hands-free and handheld phones.”); Noder, supra note 29, at 268 (“This false sense of security comes from the fact that the only aspect of hands-free devices proven to be safer is the act of dialing.”); Wallin, supra note 30, at 186-87 (detailing the argument that hands-free phones are no safer than handheld phones); Kalin, supra note 30, at 252-53 (detailing the hands-free versus handheld argument). For a satirical view of this new legislation, see Marta Mossburg, Driven to Distraction: What Will They Ban Next?, BALT. SUN, Apr. 13, 2010, at 15A.
Maryland legislature introduced a bill – House Bill 385 - that would remedy many of the aforementioned ills of the current texting ban. The text of the proposed bill, House Bill 385 of the 2010 Regular Session, provides, in pertinent part:

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

Unfortunately for the citizens of Maryland, this bill did not even as much receive a vote by the House Environmental Matters Committee, let alone become law.

House Bill 385, proposed to repeal and reenact § 21-1124.1 in its current form, would be a far more useful and effective text-messaging prohibition over the current legislation, both from an enforcement and a constitutional perspective. Regarding enforcement, the problem with the legislation as it stands currently is the inherent difficulties law enforcement personnel and prosecutors have in proving that one was engaged in the narrow class of acts that constitutes “text messaging,” to the exclusion of all other non-proscribed acts. However, under the proposed House Bill 385, the class of the proscribed behavior has widened considerably, with only a few narrow circumstances in which a motorist may operate a wireless communication device. Thus, in order to secure a conviction under proposed House Bill 385, police officers and prosecutors are armed with many more weapons in their repertoire. In fact,

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165 See supra Part IV.
166 See supra Part IV. A.
169 See supra Part IV. A.
this expanded list of acts in which motorists may no longer engage is in line with the legislative intent behind § 21-1124.1: driver inattention.\textsuperscript{170}

Further, and more importantly, passing a bill similar to House Bill 385 would help cure the vagueness analyzed above. To begin, and as mentioned above, the term “text message” has a very specific and limited colloquial meaning: an SMS text message.\textsuperscript{171} Of course, this limited commonly-understood meaning would be utilized and analyzed by a reviewing court in determining what constitutes a “text message” under the current legislation. But, by prohibiting motorists from “typ[ing], send[ing], or read[ing] an electronic message, including a text message,”\textsuperscript{172} the legislature would be clarifying the acts that are prohibited – not only “text messages” as they are commonly understood, but also any form of “electronic message,” a term that has no limited colloquial meaning like that of “text message.” Thus, the citizens of Maryland would be on fair notice that they are susceptible of being found guilty of this section by sending any sort of electronic message – nothing vague or ambiguous about it.

Furthermore, by explicitly enumerating which behaviors are prohibited and those which are allowed, Maryland residents are in a better position to understand which behaviors, should they choose to engage in them, would lead to a misdemeanor citation. Thus, compared to a statute outlawing merely writing or sending “text messages,” under proposed House Bill 385, Maryland citizens are on “fair notice” as to what conduct is criminal;\textsuperscript{173} and law enforcement

\textsuperscript{171} See supra Part IV.B.2.ii.
\textsuperscript{172} Subsection (b)(1) of proposed House Bill 385 (emphasis added).
\textsuperscript{173} See supra notes 118-19 and accompanying text.
officers, prosecutors, and judges, have a workable, straightforward standard to apply in enforcing and prosecuting the statute.\textsuperscript{174}

Essentially, House Bill 385 would serve as an analog to the statute the Justice Court of Nassau County dealt with in \textit{People v. Neville}.\textsuperscript{175} That is, the statute in \textit{Neville} was a catch-all statute prohibiting motorists from “using a mobile telephone to engage in a call while such vehicle is in motion”;\textsuperscript{176} similarly, House Bill 385, with a provision outlawing motorists from “engag[ing] in any other use of a wireless communication device not explicitly authorized”\textsuperscript{177} and merely a few exceptions, likewise creates a catch-all statute. Thus, just as the New York court determined that its statute was not vague or overbroad,\textsuperscript{178} Maryland courts would likely determine that its analog, proposed House Bill 385, similarly is not vague or overbroad.

VI. CONCLUSION

While cell phones have become integrated into the lives of people worldwide, “drivers mistakenly assume they can be used safely while operating a motor vehicle.”\textsuperscript{179} The reality is that distracted drivers pose a serious hazard for drivers, passengers, and pedestrians alike. The ideal proposal to ameliorate distracted driving is likely one involves “concerted action at every level of government,” and that combines legislation, education, and possibly even manufacturer design changes.\textsuperscript{180} However, it is ultimately up to “[s]ociety and legislatures . . . [to] decide the

\textsuperscript{174} See supra note 120 and accompanying text.
\textsuperscript{175} 737 N.Y.S.2d 251 (N.Y. Just. Ct. 2002).
\textsuperscript{176} N.Y. VEH. & TRAF. LAW § 1225-c(2)(a) (McKinney 2001).
\textsuperscript{177} Subsection(b)(8) of the proposed legislation, available at http://mlis.state.md.us/2010rs/bills/hb/hb0385f.pdf.
\textsuperscript{178} Neville, 737 N.Y.S.2d at 254.
\textsuperscript{179} Jacobson & Gostin, supra note 21, at 1419.
\textsuperscript{180} Id. at 1419-20.
appropiate scope of cellular legislation.” Certainly, bans on texting while driving is no exception.\textsuperscript{181}

However, in passing Transportation Article § 21-1124.1, the Maryland legislature was derelict with its onus to combat distracted driving vis-à-vis texting. While, undoubtedly, courts are at liberty to analyze and construe ambiguous statutes – in fact, “[i]t is one of the principal functions which courts were created to perform”\textsuperscript{182} – at a certain point, a standard is so unworkable as to be declared void for vagueness. Ostensibly, in passing this bill, legislators wanted to show their constituents that they were doing their part to make Maryland’s roads safer.\textsuperscript{183} However, this statute engenders nothing more than a false sense of security, and may even hinder future efforts to legislate against texting. The statute is near impossible to enforce.\textsuperscript{184} The statute’s bare invocation of the term “text message” to define prohibited conduct deprives the citizens of Maryland fair notice as to what conduct is prohibited and is an unworkable standard for law enforcement officers, prosecutors, and judges alike.\textsuperscript{185} To cure these ills, Maryland legislators should enact 2009 House Bill 385 - which unequivocally informs citizens, law enforcement officers, prosecutors, and judges exactly what conduct is prohibited – at its first opportunity. Only then will Maryland’s citizens stop LOLing\textsuperscript{186} with their thumbs, and tell their friends that they GTG\textsuperscript{187} when getting behind the wheel of a car.

\textsuperscript{181} Kalin, supra note 30, at 262. But see Wallin, supra note 30, at 177 (arguing that a “legislative ban is not the answer”).
\textsuperscript{183} See Michael Dresser, Cell Phone Curb Begins, BALT. SUN, May 22, 2009, at 1A (quoting Governor Martin O’Malley as saying, “This legislative session, we passed tough new laws to improve safety on our roadways by cracking down on . . . texting.”).
\textsuperscript{184} See supra Part IV.A.
\textsuperscript{185} See supra Part IV.B.
\textsuperscript{187} See supra note 1.