

DRIVING WHILE ‘INTEXTICATED’: TEXTING, DRIVING, AND PUNISHMENT

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In recent years, there have been a number of high profile accidents attributable to “texting while driving.”¹ In Colorado, a man who was engaged in text messaging died in a crash mid-sentence.² In Missouri, the driver of a truck sent and received eleven text messages in the final eleven minutes before he caused a fatal crash.³ In England, a truck driver was alleged to have caused a fatal accident because he was engrossed in sending text messages.⁴ A

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1. See generally A. Starkey De Soto, *Intextication: Txtng Whl Drvng. Does the Punishment Fit the Crime?*, 32 U. HAW. L. REV. 359 (2010) (describing several examples of high profile texting-related deaths, such as the deaths of five cheerleaders who died right after graduation). In 2007, the Governor of New Jersey was in an accident because his driver was distracted by e-mails. *Id.* at 371. The governor then banned texting while driving. *Id.*

2. Jessica Rodriguez, *Fatal Text Message Photo Released After Young Man Dies in Crash While Sending Text Message*, CHRISTIAN POST (Apr. 11, 2013, 12:34 PM), <http://www2.christianpost.com/news/fatal-text-message-photo-released-after-young-man-dies-in-crash-while-sending-text-message-video-93746/>. “A fatal text message, belonging to a young man who died in a car crash, has been released by the victim’s parents and authorities to act as a warning to other drivers who are tempted to text while driving. The fatal text message is that of 22 year old Alexander Heit, a student from the University of Northern Colorado. The text message was on his cell phone and was cut off mid-sentence—the moment he crashed his car. Police have said that before Heit could finish his message, which he was typing while driving, he drifted into the wrong lane and into oncoming traffic. Authorities describe that Heit realized he had come out of his lane and jerked his steering wheel back but it was too late, and his vehicle went flying off the road and rolled over.” *Id.*

3. Joan Lowy, *Driver Sent or Got 11 Texts in 11 Min Before Crash*, YAHOO! NEWS (Dec. 13, 2011, 11:30 AM), <http://news.yahoo.com/driver-sent-got-11-texts-11-min-crash-151619850.html>. “A 19-year-old pickup truck driver involved in a deadly highway pileup in Missouri last year sent or received 11 texts in the 11 minutes immediately before the accident The driver sent six texts and received five texts, with the last text just before his pickup traveling at 55 mph crashed into the back of a tractor truck, beginning a chain collision. The pickup was rear-ended by a school bus, which in turn was rammed by a second school bus.” *Id.*

4. See Lucy Sherriff, *Fatal Lorry Crash Text Message Trial*, THE REGISTER (Feb. 13, 2001), http://www.theregister.co.uk/2001/02/13/fatal_lorry_crash_text_message/ (“A man was killed as a truck wobbled off the road because the driver was too busy composing a text message to pay attention to his driving”).

nineteen-year-old woman who was texting while driving killed a father driving his motorcycle within the law.⁵

In an effort to curtail texting, and protect the public against the dangers of texting drivers, forty-four states have enacted laws making it illegal to text message while driving (Washington, D.C., Puerto Rico, Guam, and the Virgin Islands have also passed similar laws).⁶ Thirty-eight of those states have primary enforcement, meaning police officers can issue tickets for the offense even though they do not charge the driver with another offense.⁷ Three states specifically prohibit school bus drivers from texting.⁸ Fourteen states ban all hand-held cell phone use while driving.⁹

The difficulty is that, unlike laws prohibiting drunk driving, anti-texting laws do not go far enough.¹⁰ Under most of these laws, the penalties for texting while driving are relatively low.¹¹ For example, although a Maine law prohibits drivers from text messaging, instant messaging, and sending emails on portable electronic devices (it does permit drivers to use global positioning devices and navigation systems), the penalty for a first-time offender is a fine of only \$250.¹² Repeat offenders can be subjected to somewhat enhanced penalties such as license suspension for up to thirty, sixty, or ninety days.¹³ Although a Missouri law prohibits any driver twenty-one and under, or drivers of commercial vehicles, from using wireless communication devices to send, read, or write text or electronic messages,¹⁴ a violation is treated only as an infraction—the equivalent of a moving violation.¹⁵ Rhode Island's text messaging ban prohibits a person from using a wireless handset "to compose, read, or send text messages while driving a motor vehicle on any public street

5. Derek Valcourt, *Woman, 20, Accused of Texting While Driving Faces up to 10 Years for Fatal Crash*, CBS BALTIMORE (Oct. 8, 2013, 6:48 PM), <http://www.baltimore.cbslocal.com/2013/10/08/woman-20-accused-of-texting-while-driving-faces-up-to-10-years-for-fatal-crash/>. This was the first time anyone had been prosecuted for manslaughter as a result of texting while driving. *Id.* The evidence of texting included cell phone records and an eyewitness. *Id.*

6. *Distracted Driving Laws*, GOVERNOR'S HIGHWAY SAFETY ASS'N, (Oct. 2014), http://www.ghsa.org/html/stateinfo/laws/cellphone_laws.html.

7. *Id.*

8. *See id.*

9. *Id.*

10. *See De Soto, supra* note 1, at 381–89.

11. *See id.* at 381–82 (explaining that in most states violations amount to nothing more than a minor traffic infraction). There are exceptions. Alexis M. Farris, *LOL? Texting While Driving Is No Laughing Matter: Proposing a Coordinated Response to Curb This Dangerous Activity*, 36 WASH. U. J.L. & POL'Y 233, 242 (2011). While some penalties may be as light as a fine, others are more harsh—for example, Utah's criminally negligent vehicular homicide penalty. *Id.*

12. *See* ME. REV. STAT. ANN. tit. 29-A, § 2119(1)(C) (2013).

13. *See id.* § 2119(3)(B). The penalties are thirty days of license suspension for two violations within three years, sixty days for three violations within three years, and ninety days for at least four violations within three years. *Id.*

14. *See* MO. ANN. STAT. § 304.820(1), (3) (West 2014). Text messaging while operating a motor vehicle is prohibited, with some exceptions. *Id.*

15. *Id.* § 304.820(10). The statute has several exceptions, including GPS technology, and also does not apply if the vehicle is lawfully parked or stopped. *Id.* § 304.820(12)(1), (3).

or public highway.”¹⁶ The first three violations of this law subject the offender to a fine of up to \$250, a suspended license, or both.¹⁷ Yet, the penalties for these and similar offenses often belie their dangerousness.¹⁸

In this short article, we argue that texting while driving presents a special danger to society for which preventive solutions are needed. Although a variety of societal responses might be possible, and some other (softer) approaches should generally be preferred (e.g., education), since this is a symposium on homicide, it is appropriate to note that there will be situations when a prosecutor might justifiably (and probably should) bring murder or manslaughter charges against a driver whose texting causes a fatal accident.¹⁹ This article outlines the problems associated with texting, explains the legal basis on which homicide charges might be brought, and suggests some less drastic alternatives for dealing with the problem.

I. TEXTING AND DRIVING

Driving while texting is an inherently dangerous activity. Indeed, the mere act of driving a motor vehicle is, in and of itself, a dangerous activity. Cars and trucks can weigh thousands of pounds and are capable of causing both death and serious bodily injury. When text messaging is added to the mix, the danger to society increases dramatically. When an individual's attention is focused on text messaging, it is difficult or impossible to give sufficient attention to where their vehicle is going, or to the risks to others. As a result, there is an increased risk that the driver will slam his vehicle into another vehicle or a pedestrian.

Despite the inherent risks associated with driving while texting, evidence suggests that many people actually do text and drive every day.²⁰ Indeed, at any given moment during a given day, hundreds of thousands of Americans use cell phones or electronic devices while driving.²¹ Many drivers routinely send text messages, e-mail, or are otherwise distracted.²² In a study by the Center for Disease Control, 31% of U.S. drivers aged eighteen to sixty-four reported that they “had read or sent text or e-mail messages while driving at least once” within the thirty day period before they were surveyed.²³ As might be expected,

16. See R.I. GEN. LAWS ANN. § 31-22-30 (West 2014).

17. See *id.* § 31-22-30(e).

18. See TENN. CODE ANN. § 55-8-199 (West 2014) (showing that Tennessee also expressly prohibits sending or reading text messages while operating a motor vehicle). In Tennessee, the provision applies only to vehicles in motion at the time the message is sent or read. See *id.* § 55-8-199(a)(2)(c). Violation of the law is a Class C misdemeanor, subject to a fine not to exceed \$50. *Id.* § 55-8-199 (a)(2)(d).

19. See, e.g., Valcourt, *supra* note 5.

20. See *Distracted Driving 2011*, NHSTA.GOV, 2 (Apr. 2013), <http://www-nrd.nhtsa.dot.gov/Pubs/811737.pdf>.

21. *Driver Electronic Device Use in 2011*, NHSTA.GOV (Apr. 2013), <http://www-nrd.nhtsa.dot.gov/Pubs/811719.pdf>.

22. *Distracted Driving 2011*, *supra* note 20.

23. Centers for Disease Control and Prevention, *Mobile Device Use While Driving—United States and*

this rate is proportionately higher for younger drivers than for older drivers.²⁴ For example, nearly half of all high school students in the United States, aged sixteen years or older, reported that they had engaged in texting or e-mailing while driving.²⁵ At least 25% of teens reply to a text message they receive while driving *each time* they drive.²⁶ In addition, 20% of teens—and 10% of their parents—report having extended multi-message text conversations while they drive.²⁷

Distracted drivers cause approximately 10% of fatal vehicle crashes in the United States.²⁸ Indeed, texting is a hazard even for those who simply walk. One study found that texting “significantly distorted” a person’s attention while walking and “tie[d] up the brain’s relatively limited working attentional resources.”²⁹ For drivers, the complications multiply exponentially.³⁰ Three hundred eighty-five people were killed in 2011 in crashes in which at least one of the drivers was using a cell phone,³¹ and texting is an even more dangerous distraction.³²

II. MULTITASKING AND THE DIGITAL CULTURE

Texting is linked to another significant feature of the digital culture: multitasking—a factor that significantly increases the dangerousness of texting.³³ Multitasking means engaging in several tasks at the same time, leading people to divide their attention among tasks.³⁴ Multitasking is a salient part of the omnipresent, 24/7 stimulation of the digital-device world.³⁵ As a result, people are often distracted and perform tasks with diminished competency.³⁶

Seven European Countries, 2011, 62 MORBIDITY & MORTALITY WKLY. RPT. 177, 177 (2013), available at <http://www.cdc.gov/mmwr/pdf/wk/mm6210.pdf>.

24. *Id.* at 180.

25. *Distracted Driving*, CDC.GOV, http://www.cdc.gov/motorvehiclesafety/distracted_driving/ (last updated Oct. 10, 2014).

26. Nat’l Highway Traffic Safety Admin., *Key Facts and Statistics*, DISTRACTION.GOV [hereinafter *Key Facts and Statistics*], <http://www.distraction.gov/content/get-the-facts/facts-and-statistics.html> (last visited Oct. 22, 2014).

27. *Id.*

28. *See id.* (referring to drivers under the age of twenty).

29. Gretchen Reynolds, *The Art of Texting While Walking*, N.Y. TIMES: WELL (Feb. 20, 2014, 12:01 AM), <http://well.blogs.nytimes.com/2014/02/20/the-difficult-balancing-act-of-texting-while-walking/>.

30. *See, e.g.*, Thomas E. Sherzan, Note, “Talk 2 U L8r”—*Why Cell Phones and Driving Have “G2G”*: *An Analysis of the Dangers of Cell Phone Use While Driving*, 59 DRAKE L. REV. 217, 224–25 (2010).

31. *Distracted Driving 2011*, *supra* note 20.

32. *Key Facts and Statistics*, *supra* note 26; *see also* Sherzan, *supra* note 30, at 223.

33. *See generally* DARIO D. SALVUCCI & NIELS A. TAATGEN, *THE MULTITASKING MIND* (2010) (explaining the cognition theory of multitasking).

34. *See* Jon Hamilton, *Think You’re Multitasking? Think Again*, NPR (Oct. 2, 2008, 1:47 PM) <http://www.npr.org/templates/story/story.php?storyId=95256794>.

35. *See generally* Thomas Buser & Noemi Peter, *Multitasking*, 15 EXP. ECON. 641 (2012) (explaining how multitasking affects performance).

36. *See id.*

The digital world tends to encourage multitasking.³⁷ That world is populated by a variety of advancing technologies. In addition, that world is characterized by total interconnectivity, with communication and relationships based on technology such as texting, Instagram, Snapchat, Facebook, and other social media, rather than on face-to-face interaction.³⁸ People who are “born digital” are accustomed to using computers, cable television, Facetime, Skype, and a wide variety of apps to occupy their free time.³⁹

Social media interfaces, such as Facebook and Twitter, have changed the contours of friends, family, and relationships between people.⁴⁰ Communities just as often revolve around the Internet and social media as they do physical neighborhoods or actual (non-virtual) friends.⁴¹

With the opportunity for entertainment and mental distraction only an app away, the digital generation is more accustomed to multitasking than its predecessors.⁴² Significantly, however, studies have shown that multitasking often leads to distraction, making difficult tasks people are otherwise capable of performing.⁴³

III. THE UNIQUENESS OF TEXTING

Of course, texting is not the only distraction that drivers face. Roadways are littered with billboards of exceedingly large roadway and commercial establishment signs. Drivers can also be distracted by turning on and off radios or changing stations, as well as by navigation systems or DVD players that are now built into cars.

While other distractions can readily divert a driver’s attention, texting is one of the most powerful distractions for several reasons. Manipulating a device to text another person requires sustained attention as the driver attempts to spell words, create sentences, and send messages. During this process, the driver must view a small screen for sustained periods of time, any second of which a traffic issue can arise, requiring split-second judgment by the driver. One study showed that a texting driver’s eyes were diverted from the roadway for an average of 4.6 seconds of a 6 second interval while sending a

37. See generally Robert H. Logie et al., *Multitasking: Multiple, Domain-Specific Cognitive Functions in a Virtual Environment*, 39 *MEMORY & COGNITION* 1561 (2011) (explaining multitasking in the everyday world).

38. See *Dr. Bonnie on Technology and Texting Causing Mental Illness, Narcissism, and Obsessive-Compulsive Disorder*, PRWEB (May 20, 2012), [hereinafter *Dr. Bonnie on Technology*] http://www.prweb.com/releases/2012/5/prweb_9524837.htm.

39. See *id.* (speaking to the effect technology has on everyday life).

40. See *id.*

41. See *id.*

42. See generally Hilde A. M. Voorveld & Margot van der Goot, *Age Differences in Media Multitasking: A Diary Study*, 57 *J. BROADCAST & ELECTRONIC MEDIA* 392–93 (2013) (explaining media multitasking).

43. *Id.*

text message.⁴⁴ Composing sentences and paragraphs also requires one's attention. Even if a person is looking straight ahead, the person's attention and focus are on the messages and communication rather than on anticipating traffic and road issues. Of course, distraction is also present with "hands-free" devices, and indeed is associated with the mere use of a cell phone.⁴⁵ But, text messaging is different. Even if a person is merely receiving a text message, it is often preceded by a sound, indicating receipt. The sound conditions recipients to immediately glance at their cell phones and try to determine what was sent and by whom.⁴⁶ Moreover, since text messaging can pull a driver's focus away from the road for several consecutive seconds, the mere act of text messaging can raise a driver's risk of being involved in an accident by twenty-three times.⁴⁷ It is no wonder that texting has been described by one expert as being "in its own universe of risk."⁴⁸

Texting comes with an additional layer of dangerousness because of the psychological distortion it creates for some texters.⁴⁹ In today's culture, some people are so addicted to their devices, specifically their cell phones, that text messaging has been referred to as a "national obsession"⁵⁰ and has spawned a new set of disorders called "iDisorders."⁵¹ These disorders are facilitated by a cultural shift toward device dependency.⁵² According to one expert, the "ability to have information at our fingertips, and to share information about ourselves via sites like Facebook and Twitter, can easily play into problems many people already struggled with prior to the technology revolution."⁵³

Texting tendencies are more pronounced among the younger generations, which have grown up with constant connectedness through Wi-Fi and various types of connectivity devices. Some people text when they wake, at meals, in the gym, in class, and even when sitting next to their significant other. This obsession is not just an idiom of speech, and might even extend to psychological syndrome and true addiction, within the same general category of addictions.⁵⁴

44. Sherzan, *supra* note 30, at 224.

45. *See id.* at 226–31 (discussing the dangers of hands-free devices).

46. *See id.* at 223–26 (explaining the dangers of text messaging).

47. *See id.* at 224.

48. *Id.* at 225 (quoting Matt Richtel, *In Study, Texting Lifts Crash Risk by Large Margin*, N.Y. TIMES, July 28, 2009, at A1, available at <http://www.nytimes.com/2009/07/28/technology/28texting.html>) (statement by Professor Rick Hanowski, who oversaw the study).

49. *See id.* at 223.

50. *Id.*

51. Dr. Bonnie on Technology, *supra* note 38.

52. *Id.*

53. *Id.* This statement, by Dr. Bonnie Eaker Weil, alludes to ways that the use of technology can exacerbate health problems including insomnia (using technology to defer sleep) and narcissism (using technology to self-indulge). *Id.* One study has shown that 70% of people have phantom vibrations, believing their phone is vibrating with a message when it is not. *Id.*

54. David Moore & Bill Manville, *Text Messaging May Be the Newest Form of Addiction*, NY DAILY NEWS (June 19, 2008, 8:42 PM), <http://www.nydailynews.com/life-style/health/text-messaging-newest-form-addiction-article-1.296170>.

A study of people's texting behavior while driving illustrates the unhealthy status of this ubiquitous activity, even in situations when no immediate harmful consequences result.⁵⁵ Professors from the Walton College of Business surveyed more than 900 people in 2011 about their texting and driving habits.⁵⁶ The professors concluded that people exhibited mild obsessive-compulsive behaviors concerning texting.⁵⁷ The researchers distinguished these obsessive-compulsive behaviors from addiction, though, because most of the compulsiveness was responsive, such as responding to alerts and incoming texts, as compared to compulsions to initiate behaviors, which generally occur with addictions.⁵⁸ Still, the fact that texting rises to the level of a disorder indicates the need for a strong legal response to the unhealthiness of such conduct.⁵⁹

IV. THE JUSTIFICATIONS FOR PUNISHMENT

Texting as a recognized addiction affects the criminal law analysis in several ways.⁶⁰ When taken to an extreme, texting falls below minimum standards of acceptable behavior and can be a problem that spills over into many areas of a person's life.⁶¹ The fact that it can be addicting indicates texting also might be the kind of compulsion that requires prohibition in certain contexts, if only to illuminate the dangers for those who might be in self-denial, again paralleling drinking and driving frameworks of thought.

In many texting-while-driving cases in which death results, a prosecutor might bring particularly serious charges (e.g., murder and manslaughter) against a texting driver whose conduct caused the death.⁶² The profound dangers associated with texting while driving a heavy vehicle, sometimes at high rates of speed, suggest that texting while driving should be subject to the same level of moral turpitude as drinking and driving. As multitasking and texting continue to proliferate and become more ingrained in the social culture—like alcohol was decades ago—it may become necessary to cabin this behavior through criminal-law sanctions if other alternatives fail (and we propose that society first try alternative measures).

55. See William Bowden, *UA Researchers Concerned About Students' Excessive Cell Phone Use*, RAZORBACK REP. (Nov. 4, 2013), http://razorbackreporter.uark.edu/2013/11/ua_cell-phone_students/.

56. *Id.*

57. *Id.*

58. *Id.*

59. Bryan Burrough, *When You Text Till You Drop*, N.Y. TIMES, May 12, 2012, <http://www.nytimes.com/2012/05/13/business/in-idisorder-a-look-at-mobile-device-addiction-review.html>.

60. See generally LARRY D. ROSEN ET AL., *IDISORDER: UNDERSTANDING OUR OBSESSION WITH TECHNOLOGY AND OVERCOMING ITS HOLD ON US* (2012) (addressing the addictive qualities texting may have).

61. See *supra* Part I.

62. See *supra* note 19 and accompanying text.

Of course, the criminal law differs from tort law because it is enforced through the medium of punishment.⁶³ Within the criminal law literature, there has always been considerable debate regarding the justifications for imposing punishment on criminal defendants.⁶⁴ “Retribution” is sometimes cited as a justification for punishment,⁶⁵ one that is generally supported by the public (e.g., as reflected in such statements as “an eye for an eye” or “defendant has paid his ‘debt’ to society”),⁶⁶ but some question the ethics and permissibility of seeking retribution against criminal defendants.⁶⁷ “Restraint” is an often-cited justification for imposing punishment, one that justifies locking up particularly dangerous or violent criminals.⁶⁸ Some criminal defendants, however, are unlikely to repeat their crimes and are not in need of restraint.⁶⁹ “Rehabilitation” is a lofty and worthwhile objective of the criminal justice process, but it is not clear that the present penal system places sufficient emphasis on rehabilitation, or even that certain criminal defendants are rehabilitable.⁷⁰ “Deterrence” is a frequently cited justification for imposing criminal punishment, but it is not clear that certain types of crimes are deterrable.⁷¹ Some question whether “general deterrence” is justifiable when a court imposes a longer sentence on a criminal defendant to accomplish the general societal good of deterring others from committing similar crimes.⁷² Other justifications include economic efficiency⁷³ and social and moral condemnation.⁷⁴ Both commentators and courts struggle to explain and reconcile these justifications,⁷⁵ especially in the context of particular cases.⁷⁶

Theories of punishment do not apply in a vacuum, but instead apply in societal contexts.⁷⁷ Deterrence depends on the circumstances and questions of

63. See generally RUSSELL L. WEAVER, JOHN M. BURKOFF & CATHERINE HANCOCK, *CRIMINAL LAW: A CONTEMPORARY APPROACH* (2011) [hereinafter *A CONTEMPORARY APPROACH*] (outlining the many purposes of criminal law).

64. See *id.* at 1–24.

65. DEIRDRE GOLASH, *THE CASE AGAINST PUNISHMENT: RETRIBUTION, CRIME PREVENTION, AND THE LAW* (2005); see *A CONTEMPORARY APPROACH*, *supra* note 63, at 15.

66. See *A CONTEMPORARY APPROACH*, *supra* note 63, at 15.

67. See *id.*

68. See *id.* at 17.

69. See *id.*

70. See *id.* at 16. See generally Robert R. Ross et al., *Reasoning and Rehabilitation*, 32 *INT’L J. OFFENDER THERAPY & COMP. CRIMINOLOGY* 29, 29–35 (1988) (discussing programs designed to rehabilitate high-risk adult probationers).

71. Kevin M. Carlsmith et al., *Why Do We Punish?: Deterrence and Just Deserts as Motives for Punishment*, 83 *J. PERSONALITY & SOC. PSYCHOL.* 284, 285 (2002); see also *A CONTEMPORARY APPROACH*, *supra* note 63, at 22–23.

72. See *A CONTEMPORARY APPROACH*, *supra* note 63, at 9–10.

73. See *id.* at 17–18.

74. See *id.* at 14–15.

75. See *id.* at 1–24.

76. See *United States v. Bergman*, 416 F. Supp. 496, 499 (S.D.N.Y. 1976); *Regina v. Dudley & Stephens*, 14 Q.B.D. 273 (1884).

77. See *A CONTEMPORARY APPROACH*, *supra* note 63, at 7–8.

causality—will a sentence deter other future offenders?⁷⁸ This is especially true for the digital culture phenomenon of texting and one of its salient links: multitasking.⁷⁹ Thus, the imposition of penalties for texting must be evaluated within the context of the digital world.

In the case of texting while driving, a variety of punishments might be possible. When an individual does nothing more than text and causes no death or serious bodily injury, the prosecution may be limited to remedies available under the statute that prohibits texting while driving.⁸⁰ On the other hand, when the texter causes death, much more draconian sanctions might be warranted in some situations. For example, it might be possible to charge the texter with murder or manslaughter.⁸¹ Murder charges are possible even if the texter did not intend or have the purpose to cause the death of another, because the social utility of texting while driving is usually quite low.⁸² Indeed, if there is an urgent situation, the texter can pull over and complete the text message while stopped.⁸³ Further, the potential risk to others can be quite high and severe, including death or serious bodily injury.⁸⁴

In our criminal justice system, though, we allot considerable discretion to prosecutors.⁸⁵ In considering the possible punishments the justice systems should impose, a prosecutor should recognize that texting presents a special problem for the criminal law.⁸⁶ For one thing, texting is an obsessive–compulsive behavior.⁸⁷ We have all seen students walking across campus while texting, oblivious to everything else around them. Some pedestrians have even been “run over” by other pedestrians who are so absorbed in texting that they fail to watch where they are going.⁸⁸ The obsessive–compulsive aspect of the behavior is hardly limited to students. We also have seen faculty in committee meetings (or for that matter, in faculty meetings) who find themselves compulsively checking their inbox and responding to e-mails and texts.

Consequently, the culture of texting is important to assessing the range of possible punishments. The compulsive nature of texting is thoroughly ingrained in the culture, especially among young people. Parents of teenage children are well aware that teenagers can become obsessively absorbed in

78. See Carlsmith et al., *supra* note 71, at 285–86.

79. See *id.* at 285; see also Sherzan, *supra* note 30, at 259.

80. See Carlsmith et al., *supra* note 71, at 285. Some jurisdictions would have no other penalty for texting in vehicles, treating it as a lawful distraction much like manipulating a radio, navigation system, or radar detector. See De Soto, *supra* note 1, at 374 n.109.

81. See A CONTEMPORARY APPROACH, *supra* note 63, at 272–439.

82. See text accompanying notes 78–80.

83. See A CONTEMPORARY APPROACH, *supra* note 63, at 403–08.

84. See *id.*

85. See RUSSELL L. WEAVER, JOHN M. BURKOFF, CATHERINE HANCOCK, JANET C. HOFFEL, STEPHEN SINGER & STEVEN I. FRIEDLAND, CRIMINAL PROCEDURE: CASES, PROBLEMS AND EXERCISES 831–61 (5th ed. 2013).

86. See Sherzan, *supra* note 30, at 253–55.

87. See generally Moore, *supra* note 54 (discussing texting as a psychological disorder).

88. See Reynolds, *supra* note 29.

checking text messages; parents are often forced to take drastic action to limit smart phone use, such as limiting the amount of time per day when text messaging is permissible or banning texting at certain times.⁸⁹ In addition, parents might prohibit children from sending text messages during family events or when the family is out to dinner.⁹⁰ Of course, cultural acceptance of texting is hardly limited to young people. For example, at restaurants, it is not unusual to observe entire families who are engrossed in texting and hardly communicating with each other except through their smart phones.

There is an additional element to the problem: because of the development of handheld devices (e.g., smart phones), it is quite easy for individuals to text while driving. Even though individuals may be aware of the potential risks, they sometimes continue texting while driving because of the ease and accessibility. Interestingly, even law students and lawyers schooled in the criminal law have admitted that they sometimes text while driving.

Under these circumstances, how do the justifications for punishment apply when an individual causes death or serious bodily injury while texting and driving? Frequently, such individuals will not need to be “restrained.” The pain and guilt that results from causing another’s death will likely be sufficient to keep the perpetrator from texting and driving in the future.⁹¹ The individual may need rehabilitation, but only to find solace for the psychological pain that results from killing or seriously injuring another human being. If one accepts retribution as a valid basis for punishment, an argument can be made for taking retribution against the perpetrator in some instances.⁹² Deterrence, in the sense of specific deterrence against the perpetrator, may not be necessary because the texter learned a difficult lesson.⁹³ As with restraint, any human being with a conscience is likely to feel great psychological pain after killing or injuring someone else while texting.

Perhaps the most significant justification for imposing serious criminal penalties on texters who cause death or serious bodily injury is general deterrence. Even though one can debate the propriety of punishing the perpetrator simply as an example to others, general deterrence may generate substantial societal benefits. How else does society overcome the obsessive–compulsive aspect of texting, especially given that this behavior is pervasive throughout culture, especially youth culture? Serious sanctions, such as murder or manslaughter charges, clearly convey this message. The sanctions imposed for drinking and driving also conveys this message. Moreover, even though young people may generally be somewhat oblivious to governmental processes, including criminal justice processes, they are more likely to take notice when their peers receive serious criminal sanctions for texting while driving when

89. See generally Moore, *supra* note 54 (discussing the issues of texting for teenagers).

90. See Dr. Bonnie on Technology, *supra* note 38, at 218–19.

91. See A CONTEMPORARY APPROACH, *supra* note 63, at 403–39.

92. See *supra* text accompanying note 65.

93. See A CONTEMPORARY APPROACH, *supra* note 63, at 22–23.

death results. Such sanctions are likely to be publicized in contexts where they are listening. In addition, schools and educators are likely to take note and engage in additional education.

V. CONCLUSION

Given the compulsive nature of texting, its pervasiveness in the digital culture, and its link to multitasking, society simply must take action to limit and control texting while driving. One would hope that society could control the problem with non-criminal sanctions. For example, many schools are conducting educational campaigns designed to alert students to the hazards of texting while driving.⁹⁴ Moreover, there are other possible solutions. For example, individuals who suffer serious injury or the loss of a loved one might file civil lawsuits against the texter who caused the death and might also bring products liability litigation against cell phone manufacturers. If they choose to do so, manufacturers could create cell phones that would not work in a moving vehicle.⁹⁵ As a result, courts could consider their failure to do so a "design defect." In addition, there are smart phone applications that parents can install on their children's phones that prevent texting while driving.⁹⁶

Nevertheless, in egregious situations, legislators and prosecutors need to consider the possibility of imposing more severe punishments on those who cause death or serious bodily injury while texting and driving. One way courts can impose more severe punishment is by increasing the size of the criminal penalties under existing laws that prohibit texting while driving. If those laws prove insufficient, it might be appropriate to impose enhanced sanctions on texting drivers.⁹⁷ For example, someone who is engaged in a large amount of texting while piloting a vehicle at high speeds on an interstate highway and causes death or serious bodily injury should probably be subjected to serious sanctions, including a murder charge. Moreover, given the ubiquitousness of social media, severe sanctions are likely to be widely publicized, and may lead to public education campaigns which (hopefully) will alter behavior.⁹⁸

94. See Danny Valentine, *Schools Play Key Role in Telling About Texting-While-Driving Ban*, TAMPA BAY TIMES (Sept. 29, 2013 7:33 PM), <http://www.tampabay.com/news/education/k12/schools-play-key-role-in-telling-about-texting-while-driving-ban/2144546>.

95. Of course, it might be desirable to allow cell phone calls from moving vehicles in emergency situations. For example, as a questioner mentioned at symposium, what if someone is being followed by a person who is threatening or harassing him and who may need to dial 911? It might be appropriate to allow the cell phone call in that situation.

96. See Kate Freeman, *5 Apps to Prevent Your Teen from Texting While Driving*, MASHABLE (Dec. 8, 2012), <http://mashable.com/2012/12/08/apps-texting-while-driving/>; see also Michael L. Rich, *Limits on the Perfect Preventive State*, 46 CONN. L. REV. 883, 891 & n.45 (2014).

97. See Carlsmith et al., *supra* note 71, at 286.

98. See *id.*