

# Distracted Walking

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## ABSTRACT

Throughout the United States and across the world, cities are enacting bans on “distracted walking.” These bans target cell phone users who cross the street while using a telephone. Doing so in certain cities may result in a fine, community service, or even jail. Drawing inspiration from municipalities, lawmakers in several states have proposed similar statewide legislation. Pushback against these measures is rare—as many people have either directly, or indirectly, experienced the slow and oblivious behavior of “smartphone zombies.”

This Article surveys these laws and demonstrates that the science is, at best, mixed on whether device usage results in distraction significant enough to put pedestrians at risk. Studies of pedestrian deaths and injuries suggest that pedestrian distraction plays a minimal role in pedestrian injuries. And those who are most at risk of serious death or injury—elderly pedestrians—are barely mentioned in debates over distracted walking bans. This Article argues that these distracted walking prohibitions are not only poor traffic policy, but also exemplify a trend of blaming pedestrians for deaths and injuries caused by drivers. What’s more, by criminalizing common behavior, these bans create a further opportunity for selective enforcement by the police. Those most likely to suffer the penalties from distracted walking prohibitions are racial minorities and others living in areas deemed “high crime.” Distracted walking bans therefore contribute to selective enforcement of criminal law and burden the most disadvantaged members of society with additional fines and penalties.

Distracted walking bans have never been addressed in academic legal scholarship. They are barely examined or criticized when they are proposed—instead attracting widespread media attention for their quirkiness. But odd little crimes like these can have significant negative impacts on people’s lives, fail to help those who they are meant to aid, and

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implicate wider systemic injustices in the legal system. It is therefore worthwhile to examine these overlooked laws more closely, consider less burdensome and more effective alternatives, and realize that perhaps many other similar, neglected infractions are deserving of similar critique and attention.

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#### I. INTRODUCTION

It’s a near-universal experience: you are walking down a sidewalk, answering the latest email, liking the latest post, or responding to your friend’s text, when you stumble over an uneven patch of pavement. Or perhaps you find yourself standing at an intersection for minutes on end—unaware that the “Walk” sign has switched on and off multiple times. You may even collide with a fellow pedestrian who, more likely than not, is also buried in a phone.

If this has happened to you, welcome to the ranks of “smartphone zombies.” It’s a common phenomenon: news reports across the world document the prevalence of slow, oblivious people on their phones,<sup>1</sup> and

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1. See “Third Eye” Invented to Stop “Smartphone Zombies” From Bumping Into Things, SKY NEWS (June 5, 2021), <https://bit.ly/3oXrPvh>; Douglas Broom, “Zombie Traffic Lights” Are Saving the Lives of Smartphone Users – Here’s How, WORLD ECON. F. (Nov. 1, 2021), <https://bit.ly/3h7x5YF>; Mark Sharp, *Beware the Smartphone Zombies*

it has even merited its own Wikipedia page.<sup>2</sup> Most people have been smartphone zombies on at least one occasion, or at the very least have friends or family members who tend to fit this description. We have likely encountered these people on walks or drives—dodging them on sidewalks or braking sharply to avoid colliding with them after they’ve inadvertently wandered into traffic. Are you reading this Article on your phone right now? Quick, look up!

What is to be done in this smartphone zombie apocalypse? Should we wait for society to further acclimate to the relatively recent technology of smartphones to the point where people are accustomed to using both their bodies and telephones simultaneously? Should we strive to call out oblivious smartphone users and create a new faux pas to battle smartphone zombification on the field of etiquette? Or should we, instead, criminalize this activity and bring to bear the apparatus of law enforcement, its disruptive proceedings, and its crippling financial penalties on these dastardly phone users?

To those readers who think that the third option is disproportionate and rather ridiculous, congratulations on your measured reaction. Unfortunately, quite a few people in power do not share this restraint and have decided that an appropriate means of addressing the phenomenon of distracted pedestrians on phones is to criminalize the behavior. Multiple municipalities, both in the United States and abroad, have instituted “distracted walking” ordinances prohibiting various forms of phone use while crossing the street. Legislators across the country have proposed bills to make this practice illegal on a statewide level. Penalties for violating these measures tend to be fines, although at least one municipality’s ordinance calls for potential imprisonment for repeat offenders.<sup>3</sup>

This Article surveys these recent “distracted walking” laws and the disturbing phenomenon of legislators calling for similar restrictions in different jurisdictions. While distracted driving and jaywalking laws tend to get more attention, discussions of distracted walking laws tend to be minimal. In legal academic literature, the discussion is nonexistent.

Perhaps distracted walking laws aren’t discussed because they’re of trivial importance. After all, violations of these laws tend to result in little more than a fine, and the conduct prohibited by the laws is banal—not

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*Blindly Wandering Around Hong Kong*, S. CHINA MORNING POST (Mar. 2, 2015), <https://bit.ly/3H4qZmw>.

2. *Smartphone Zombie*, WIKIPEDIA (Feb. 15, 2022, 21:06), <https://bit.ly/3BCy1Ov>.

3. See Liza Agoot, “*Distracted Walking*” Law Now In Effect in Baguio, PHIL. NEWS AGENCY (Aug. 1, 2019, 3:46 PM), <https://bit.ly/3p4ovhM> (noting Baguio’s ordinance prohibiting and restricting the use of mobile devices while walking and crossing streets and sidewalks—which apparently includes reading any material while walking—calls for a penalty of eleven to thirty days of imprisonment for fourth and subsequent offenses).

splashy and dramatic like homicide, a crime that takes up a disproportionate amount of discussion. Readers may find it silly to spend time reading about such low penalties for everyday conduct. Indeed, if you were reading this Article on your phone, you may have already switched away to check Instagram or to play the Property Brothers' Home Design game.<sup>4</sup>

Not so fast. As it happens, these distracted walking bans are one of all too many entry points into the criminal justice system, and are part of significant, negative practices within that field. To start, crimes that carry seemingly low penalties may still have a disastrous effect on those who are convicted, or even charged, with these offenses. Recent, crucial scholarship by Alexandra Natapoff demonstrates the dramatic impacts that convictions for misdemeanors and infractions may have on people, the systemic abuses with the prosecution of people for these offenses, and the ongoing collateral consequences of misdemeanor and infraction convictions.<sup>5</sup> Moreover, the fact that distracted walking crimes target everyday behavior makes these laws far more relevant to members of the general public—many of whom will manage to make it through life without committing a dramatic crime like homicide or violating Iowa City Municipal Code section 6-5-3.<sup>6</sup> And, as will be discussed in greater detail below, the fact that a law targets everyday behavior makes it more likely that it will be applied selectively against disadvantaged people, including racial minorities and poorer members of society.<sup>7</sup>

This Article delves into the deeper issues of criminal justice and policy considerations that distracted walking laws implicate. It reveals that these laws are factually unsupported and designed to shift blame from drivers to pedestrians—even though pedestrians are far less likely to cause serious harm to others as a result of their distraction. These laws are also likely to perpetuate discretionary enforcement against racial minorities

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4. See *Our First-Ever Mobile Game is Here!*, SCOTT BROS. (June 20, 2019), <https://bit.ly/3H56OEY>.

5. See generally Alexandra Natapoff, *Misdemeanors*, 85 S. CAL. L. REV. 1313 (2012) (describing the “largely informal” system of misdemeanor processing and adjudication, noting that low scrutiny and high volumes of cases encourage convictions that are unsupported by evidence, and arguing that the consequences of this system are significant to those subjected to it); Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055 (2019) (arguing that offenses without jail time subject offenders to many of the same consequences as misdemeanor offenses while stripping their right to counsel); ALEXANDRA NATAPOFF, PUNISHMENT WITHOUT CRIME: HOW OUR MASSIVE MISDEMEANOR SYSTEM TRAPS THE INNOCENT AND MAKES AMERICA MORE UNEQUAL (2018) (detailing how misdemeanor offenses and prosecution subject a vast number of people to criminal penalties and the profound collateral consequences of these penalties).

6. See IOWA CITY, IOWA, MUN. CODE § 6-5-3 (prohibiting “Nuclear Weapons Work” which includes “the development, production, deployment, launching, maintenance or storage of nuclear weapons or components of nuclear weapons”).

7. See *infra* Part IV.

and other disadvantaged members of society. While distracted walking laws may seem like a trivial curiosity in the greater scheme of things, these laws are of critical importance to those who will find themselves on the receiving end of their enforcement.

Beyond this investigation and analysis of distracted walking laws and their implications, this Article serves as the first thorough, scholarly legal treatment of these laws. Distracted walking bans are proposed by states and municipalities on a semi-regular basis and often attract a fair amount of discussion. While many of these bans have their fair share of critics, this criticism is typically relegated to abbreviated points made in op-eds or news interviews rather than thorough legal treatment (although there is the occasional, welcome exception).<sup>8</sup> This Article seeks to aggregate and amplify responses to distracted walking bans, as well as to pose additional critiques.

Beyond systematically evaluating distracted walking bans, this Article aims to inspire readers to pay attention to local news and politics in order to spot similar efforts at overcriminalization. Distracted walking bans illustrate how states and municipalities may opt to criminalize routine behaviors rather than undertake more expensive infrastructure reforms. Readers should remain on the lookout for similar tactics in other contexts. Additionally, this Article emphasizes that significant issues of overcriminalization and abuse of law enforcement discretion are not only present in high profile crimes and incidents. Seemingly mundane infraction offenses may just as easily implicate these issues and, therefore, deserve scrutiny as well.

Section II of this Article surveys distracted walking laws that have been passed or contemplated in the United States and in other countries. While similarities exist between several of these laws, some laws are notably restrictive. Section III begins the critique of distracted walking laws by demonstrating how these laws are poor traffic and pedestrian policy. Distracted walking laws are based on studies and science that are, at best, inconclusive with regard to whether walking while using devices creates risks to safety. And these laws seek to blame and fine pedestrians, when distraction on the part of drivers is far more dangerous, and where the design of many cities and towns tends to place pedestrians at a disadvantage from the outset. Section IV criticizes distracted walking laws as enabling the prosecution of everyday activities, which leads to discretionary prosecution against disadvantaged members of society. The consequences of these laws tend to fly under the radar as minor infractions, but the impacts on those who are ticketed and fined can be profound.

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8. See, e.g., Linda Poon, *The Problem with Outlawing Distracted Walking*, BLOOMBERG CITYLAB (May 17, 2019, 12:51 PM), <https://bloom.bg/3186W8e>.

Section V addresses potential alternatives to distracted walking bans that may be more effective at addressing the significant problem of pedestrian deaths and injuries.

## II. DISTRACTED WALKING LAWS

Several municipalities have passed ordinances that ban walking while using cell phones and other devices in various contexts. This Part summarizes ordinances that have been passed, both in the United States and abroad. It then addresses several instances where similar restrictions have been proposed, but not adopted, at the state level.

### A. Rexburg, Idaho's Ban on Crossing Streets While Texting

The earliest documented ban on distracted walking is an ordinance passed in Rexburg, Idaho in 2011.<sup>9</sup> The ordinance states:

It shall be unlawful for any person to use a hand-held wireless telephone, cellular telephone, or any other wireless device for texting purposes while operating a motor vehicle within the City of Rexburg. No pedestrian shall use a hand-held telephone, cellular telephone, or any other wireless device for texting while crossing a public right-of-way in the City of Rexburg. Offenses shall be punishable by a fifty (\$50) dollar fine on the first offense and a one-hundred and fifty (\$150) dollar fine on each subsequent offense.<sup>10</sup>

The ordinance does not apply when the devices are being used for emergency purposes or to emergency services professionals who are using devices while operating an authorized emergency vehicle in the course and scope of their duties.<sup>11</sup> It also does not apply to people who are texting while driving on private property.<sup>12</sup>

This ordinance notably targets the use of cell phones and wireless devices by both pedestrians and drivers, calling for the same penalty against each type of offender. Why such an equal penalty is warranted for drivers and pedestrians is unclear, as distracted drivers are far more likely to cause serious injury or death to others than pedestrians.

An aspect of the law that is mirrored in subsequently-enacted ordinances and proposals is that it only bans the use of devices “while crossing a public right-of-way” in the City of Rexburg.<sup>13</sup> Under Idaho law, a “public right-of-way” is similar to a public highway, with the primary

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9. See Sara Lenz, *BYU-Idaho Town Outlaws Texting, Crossing Street; Study Reveals Dangers*, DESERET NEWS (Sept. 21, 2011, 11:42 AM), <https://bit.ly/3LQ3KQE>.

10. REXBURG, IDAHO, MUN. CODE § 10.02.140.

11. *See id.*

12. *See id.*

13. *Id.*

difference being that a public right-of-way need not be maintained by the government.<sup>14</sup> The Rexburg ordinance therefore only applies to pedestrians when they are texting on wireless devices while crossing the street.

The ordinance also only applies to using devices for “texting”—a behavior that the ordinance neglects to define. The lack of a definition or further elaboration on this phrase may lead to some confusion. The ordinance would likely apply to a pedestrian who is sending a text message to another person while crossing the street. But what about a pedestrian who is writing in a note or document on a phone? What if a pedestrian is sending an email? What about someone who is underlining or typing comments in a cutting-edge piece of legal scholarship on distracted walking while he or she is crossing the street? Are these instances of “texting”? The ordinance does not seem to apply to a situation where a pedestrian is scrolling over a digital map to find a particular location, but does it apply if that pedestrian is typing in the name of that location to narrow down a portion of the map to search?

Perhaps the rule of lenity will exclude these alternate situations where pedestrians are not sending text messages to other people, but the language of the ordinance is still deceptively ambiguous considering the scope of activities one may carry out on a smartphone.<sup>15</sup> The drafters of the ordinance likely did not contemplate the scope of potential confusion, as smartphones had only been around for several years when the ordinance was introduced.<sup>16</sup> These textual confusions are not so much an issue for distracted drivers; Idaho state law includes a broader ban on the use of cell phones and similar devices while driving.<sup>17</sup> But they remain an issue for those using cell phones and crossing the street in Rexburg, Idaho.

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14. See IDAHO CODE § 40-202(4) (2013); see also CHRISTOPHER H. MEYER, ROAD LAW HANDBOOK: ROAD CREATION AND ABANDONMENT LAW IN IDAHO 5 (Givens Pursley LLP eds., Aug. 24, 2021).

15. See *Statutory Construction*, CORNELL L. SCH. LEGAL INFO. INST., <https://bit.ly/35bFCYb> (last visited Feb. 20, 2022) (describing the rule of lenity as “in construing an ambiguous criminal statute, a court should resolve the ambiguity in favor of the defendant”).

16. See David Pierce & Lauren Goode, *The WIRED Guide to the iPhone*, WIRED (Dec. 7, 2018, 8:00 AM), <https://bit.ly/314Vj1G> (noting that the iPhone was first announced on January 9, 2007, and that it was not released until six months after the announcement). While precursors to the iPhone had launched in the 1990s, these did not achieve the same widespread use as iPhones. See Steven Tweedie, *The World’s First Smartphone, Simon, Was Created 15 Years Before the iPhone*, BUS. INSIDER (June 14, 2015, 8:00 AM), <https://bit.ly/33DOTru> (describing a device released by IBM in 1992 but noting that IBM managed to sell only 50,000 of them).

17. See IDAHO CODE § 49-1401A (2021).

*B. Honolulu's Ban on Looking at Devices While Crossing the Street*

In 2017, the City of Honolulu, Hawaii enacted an ordinance that banned the use of cell phones and other devices while crossing streets.<sup>18</sup> Specifically, the ordinance bans pedestrians from crossing streets or highways “while viewing a mobile electronic device.”<sup>19</sup> Mobile electronic devices include “any handheld or other portable electronic equipment capable of providing wireless and/or data communication between two or more persons or of providing amusement” and include cell phones, laptops, and videogames.<sup>20</sup> “Viewing” the device means “looking in the direction of the screen of a mobile electronic device.”<sup>21</sup>

City officials made statements around the time of the ordinance’s passage that suggest they wanted to prevent pedestrian deaths and injuries. For example, Honolulu’s mayor noted that Honolulu had a high rate of pedestrian collisions, particularly with senior citizens.<sup>22</sup> No evidence indicates, however, that any member of the media asked the mayor whether senior citizens tended to be more frequent users of smartphones and electronic devices.

Later discussions of the ordinance suggest a bit more of a nuanced history to the ordinance’s development. City Councilman Brendan Elfante noted in 2019 that “the distracted walking law was the brainchild of a group of Wapahu students who were concerned that their peers were spending too much time looking at their phones when they should have been looking for traffic.”<sup>23</sup> Unless these students happened to be classmates with numerous senior citizens taking classes late in their lives, the law did not appear to be initially motivated by the desire to help the class of citizens Honolulu’s mayor deemed most vulnerable to pedestrian injuries. Councilman Elfante went on to note that “the main thrust of the law wasn’t to crack down on pedestrians, but to remind everybody of the importance of traffic safety.”<sup>24</sup> Despite this sentiment, the ordinance only calls for a ban on crossing streets while looking at devices; it does not include any budgetary allocations for awareness programs, employ a penalty scheme that first requires a warning before any fines, or take other

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18. See Miles Parks, *It’s Now Illegal to Text While Crossing the Street in Honolulu*, NPR (July 29, 2017, 8:54 AM), <https://n.pr/3H7c5vT>.

19. HONOLULU, HAW., REV. ORDINANCES, ch. 15, art. XXXVII, § 15-24.23(a) (2017).

20. *Id.*

21. *Id.*

22. See Eric M. Johnson, *Honolulu Targets “Smartphone Zombies” With Crosswalk Ban*, REUTERS, (July 28, 2017, 4:50 PM), <https://reut.rs/3LKgsR9>.

23. Tamara Goebbert, *Two Years Later: How the “Distracted Walking” Law is Holding Up in Honolulu*, KA LEO (Nov. 22, 2019), <https://bit.ly/3sXw4YG>.

24. *Id.*



measures suggesting that its purpose is to raise awareness rather than to punish offenders.<sup>25</sup>

Pedestrian fatalities “soared” in 2018 and continued to rise in 2019.<sup>26</sup> As of November 2019, 232 people were cited under Honolulu’s ordinance.<sup>27</sup> Despite creating a new mechanism to stop and fine citizens, the ordinance appears to have had no effect on pedestrian deaths and injuries.

*C. Montclair, California’s Broad Ban on Device Usage While Crossing Streets*

In late 2017, the City of Montclair, California passed an ordinance banning the use of cell phones and other electronic devices while crossing the street.<sup>28</sup> The ordinance originated from City Manager Edward Starr, who believed that youths were distracted by cell phones.<sup>29</sup> Inspired by Honolulu’s ordinance, “Starr’s staff drafted a law that was approved by the City Council” in December 2017.<sup>30</sup> While the ordinance went into effect thirty days after its passage, there was an approximately seven-month period during which law enforcement officers only gave warnings to first-time offenders.<sup>31</sup>

Starr noted that several accidents in Montclair in which pedestrians were injured “involved the use of a cellphone.”<sup>32</sup> Starr appeared to have received this information from police (with no officials named) and did not specify whether these instances involved pedestrians’ use of cell phones or drivers’ use of cell phones.<sup>33</sup> In reporting on the ban, the Los Angeles Times did not specify the ages of any of the pedestrian victims in these accidents. Whether these accidents involved youths struck by vehicles remains unclear.<sup>34</sup>

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25. See HONOLULU, HAW., REV. ORDINANCES, ch. 15, art. XXXVII, § 15-24.23 (2017).

26. See *id.*

27. See Goebbert, *supra* note 23.

28. See Alene Tchekmedyan, *In This Pomona Valley City, It’s Now Illegal to Cross the Street While on the Phone*, L.A. TIMES (Feb. 25, 2018, 6:00 AM), <https://lat.ms/3p3YOq>; Montclair, Cal., Ordinance No. 17-971 (Dec. 4, 2017), <https://bit.ly/3oYyCof>.

29. See Tchekmedyan, *supra* note 28.

30. *Id.*

31. See *id.* (noting that “[f]or now, first-time offenders will get a warning” and that “[a]uthorities will start giving out tickets in August”); Montclair, Cal., Ordinance No. 17-971 (Dec. 4, 2017), <https://bit.ly/3oYyCof> (stating that the ordinance goes into effect 30 days after its signing).

32. Tchekmedyan, *supra* note 28.

33. See *id.*

34. See *id.*

Beyond this, the Los Angeles Times noted that one student sustained injuries from being hit by a car after stepping into a marked crosswalk.<sup>35</sup> The Times reported that unnamed “[c]ity officials” had claimed that she had headphones on, but her attorney (representing her in a lawsuit against the City of Montclair) noted that this was disputed and claimed that the law had been passed “to taint the jury in his upcoming trial.”<sup>36</sup> The Los Angeles Times did not specify why a phone was to blame for a student being hit by a car in a marked crosswalk.<sup>37</sup> The Times closed its article with an anecdote sourced from unnamed “city officials” regarding a student “on her phone” who was sideswiped “after she walked into the path of an oncoming car.”<sup>38</sup> The Times provided no details on whether that student was also on a marked crosswalk or how she was using her phone.<sup>39</sup>

The operative portion of the municipal code provision that Montclair enacted states: “No pedestrian shall cross a street or highway while engaged in a phone call, viewing a mobile electronic device, or with both ears covered or obstructed by personal audio equipment.”<sup>40</sup> A few exceptions exist. Pedestrians who are making an emergency call to 911 have an affirmative defense; emergency responders on their official duties are exempt from the law, and people whose disabilities require them to use mobile electronic devices or audio equipment to cross a street or highway are exempt.<sup>41</sup> Violating the law results in an infraction conviction with a penalty of 100 dollars for the first violation, 200 dollars for the second offense within a year, and 500 dollars for any further offenses within a year.<sup>42</sup>

The 2017 ordinance also includes several definitions that govern the new restriction which are set forth elsewhere in the municipal code.<sup>43</sup> Here are the pertinent definitions:

**Mobile Electronic Device** means any handheld, head- or body-mounted, or portable electronic equipment capable of providing wireless and/or data communication between two or more persons or a device for providing amusement, including but not limited to a cellular phone, smart phone, text messaging device, paging device, personal digital assistant, laptop computer, video game, video/audio

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35. *See id.*

36. *Id.*

37. *See id.*

38. *Id.*

39. *See id.*

40. MONTCLAIR, CAL., CODE OF ORDINANCES § 8.28.020(A) (2018).

41. *See id.* § 8.28.020(B)–(D) (2018).

42. *See id.* § 8.28.020(E) (2018) (providing that violating the law is an infraction to be punished under MONTCLAIR, CAL., CODE OF ORDINANCES § 1.12.010 (2019)); *id.* § 1.12.010(B)(2) (2019) (setting forth the penalties for infractions).

43. *See* Montclair, Cal., Ordinance No. 17-971 (Dec. 4, 2017), <https://bit.ly/3sVqE0l>.

player, digital photographic device, or any other similar electronic device.

...

**Pedestrian** means a person who is afoot or who is using any of the following: (1) a means of conveyance propelled by human power other than a bicycle; or (2) an electric personal assistive mobility device.

**Personal Audio Equipment** means any device placed in, on or around a person's ears capable of providing an audible sound, including but not limited to headphones or ear buds.

...

**Viewing** means looking in the direction of the screen of a mobile electronic device.<sup>44</sup>

Montclair's ban on device use while crossing the street is far broader than the bans enacted by Rexburg and Honolulu. Rexburg's ban is limited only to pedestrians who are texting.<sup>45</sup> Honolulu's ban is broader than Rexburg's, but at least requires pedestrians to be looking at the screen of a device while crossing the street (although the ban does not require that the device be activated).<sup>46</sup> Montclair goes further and prohibits pedestrians not only from looking at their devices, but from wearing headphones or earphones (wireless or otherwise) while crossing the street—whether or not the pedestrian is listening to music or audio from those devices.<sup>47</sup> The ordinance also bans talking on the phone while crossing the street, and because it does not describe what “engaged in a phone call” means, it is unclear whether a person may simply lower their phone and cross the street before resuming the call, or whether they have to hang up entirely.<sup>48</sup>

Montclair also embarked on a public awareness campaign by placing stencils at crosswalks in the eyeline of people on cell phones that display “decals depicting a no-cellphone symbol below the words: ‘Don't be distracted.’”<sup>49</sup> Apparently, several of these decals have been stolen, which Starr described, laughing, as “a[n] early protest by young people.”<sup>50</sup>

#### *D. Baguio City's Ban on Device Usage by Pedestrians*

For the first international example of a restriction on device use by pedestrians, this Article turns to Baguio City in the Philippines. In March

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44. MONTCLAIR, CAL., CODE OF ORDINANCES § 8.02.010 (1999).

45. See REXBURG, IDAHO, MUN. CODE § 10.02.140 (2011).

46. See HONOLULU, HAW., REV. ORDINANCES § 15-24.23(a), (e) (2017).

47. See MONTCLAIR CODE §§ 8.02.010, 8.28.020(A) (2018).

48. See *id.* § 8.28.020(A) (2018).

49. Tchekmedyian, *supra* note 28.

50. *Id.*

2019, the City Council of Baguio City considered an ordinance written by the “Councilor Scout Official For a Day” that “prohibits and regulates the use of mobile devices and other distractive devices while walking and crossing the streets and sidewalks to ensure public safety.”<sup>51</sup> Unlike earlier discussions of United States municipalities’ bans on distracted walking, summary and discussion of Baguio City’s ban is derived from secondhand sources, as the only mechanism to access a systematic reporting of Baguio’s ordinances is under development (and has been since 2019).<sup>52</sup>

Before getting into the substance of the ban, a bit more on the author of the ban—the Councilor Scout Official For a Day. Baguio City has a program through which the city government allows boy scouts and girl scouts “to sit as officials for a day after a screening process.”<sup>53</sup> Eriko Coscolueda was the scout councilor for this particular day and was the author of the proposal, which ultimately passed.<sup>54</sup> Coscolueda did not provide much in the way of support for the ban, asserting that distracted walking was a “relatively new” phenomenon that caused “numerous road accidents.”<sup>55</sup>

The ordinance prohibits people from:

[T]exting or reading text messages while crossing a pedestrian lane or street; reading any material while crossing a pedestrian lane or a street; texting or reading while traversing a sidewalk which causes delays in the mobility of other pedestrians; and using a mobile device while crossing a pedestrian lane or the street wherein the line of sight is directed or focused to such devices.<sup>56</sup>

The ordinance permits city officials to enforce the ban using CCTV cameras to show proof of violation of the ordinance.<sup>57</sup>

51. Liza Agoot, *Council Hears Proposed “Anti-Distracted Walking” Measure*, PHIL. NEWS AGENCY (Mar. 26, 2019, 3:16 PM), <https://bit.ly/3I4asQX>.

52. The home page of the website for Baguio City includes a link to a “Legislative Management System.” See CITY GOV’T BAGUIO, <https://bit.ly/3I4asQX> (last visited Jan. 2, 2022). Attempting to access that web page leads to a message that the system is “currently being developed.” See *Site and System Being Developed*, CITY GOV’T BAGUIO, <https://bit.ly/3oXNGmc> (last visited Jan. 2, 2022). I ran into the same difficulties in my initial research into this Ordinance in 2019, which reduces my optimism that this part of the website will ever be operable. See Michael L. Smith, *City of Baguio to Again Consider Distracted Walking Ordinance*, MICHAEL SMITH’S L. BLOG (Mar. 27, 2019, 6:45 PM), <https://bit.ly/3s32im6>. As no media outlets have reprinted the text of the ordinance, this Article relies on their characterizations of it. *Id.*

53. Agoot, *supra* note 51.

54. See Liza Agoot, “Distracted Walking” Law Now in Effect in Baguio, PHIL. NEWS AGENCY (Aug. 1, 2019, 3:46 PM), <https://bit.ly/3BBnYZU>.

55. *Id.*

56. Dexter A. See, *Regulating Use of Mobile Devices While Crossing City’s Streets Okayed*, HERALD EXPRESS (July 8, 2019), <https://bit.ly/3JDrq7>.

57. See *id.*

The penalties for violating Baguio City's distracted walking ban are the most severe of any ban surveyed in this Article. Those who violate the ban are initially warned, and then face a series of increasing fines for further offenses.<sup>58</sup> Second-time violators face a fine of P1,000 "or community service"; third-time violators face a fine of P2,000 or community service, or 1–10 days in jail, and those who have violated the ban four or more times face a fine of "P2,500 and community service or imprisonment of 11-30 days."<sup>59</sup> Fees collected from the fines are to be devoted to the "city's special education fund."<sup>60</sup>

Unlike the ordinances surveyed thus far, Baguio City's ban applies not only to pedestrians who are crossing the street, but also to pedestrians on the sidewalk, to the extent that their texting or reading "causes delays in the mobility of other pedestrians."<sup>61</sup> Additionally, this is the only ban on distracted walking surveyed by this Article that provides for potential jail time for those who are repeatedly convicted.

#### E. Yamato Japan's Ban on "Smartphone Walking"

In early 2020, researchers for the city of Yamato watched approximately 6,000 people at two train stations and concluded that approximately twelve percent of them were looking at smartphones while walking.<sup>62</sup> Several months later, the Yamato City Council approved an ordinance banning walking while looking at smartphones.<sup>63</sup>

The ordinance prohibits people from walking in public places using smartphones, cell phones, tablets, and similar devices.<sup>64</sup> The ordinance states that if people want to use their devices, they should stop walking and do so in an area where they do not obstruct other pedestrians.<sup>65</sup> The

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58. *See id.*

59. *Id.* Philippine pesos are equivalent to about two US cents as of April 11, 2022, so a 1,000 fine is a little less than \$20.00, 2,000 pesos is approximately \$39.12, and 2,500 is about \$48.89). *See 1 PHP to USD – Convert Philippine Pesos to US Dollars*, XE CURRENCY CONVERTER, <https://bit.ly/3x1ujNZ> (last visited Apr. 3, 2022).

60. *See, supra* note 56.

61. *Id.*

62. *See* Casey Baseel, *Japanese Politicians Want to Make Walking While Looking at Your Smartphone Illegal*, SORA NEWS 24 (June 1, 2020), <https://bit.ly/3s78Pwn>; *Yamato Becomes Japan's First City to "Ban" Use of Phones While Walking*, JAPAN TIMES (June 25, 2020), <https://bit.ly/3s6EGx5> [hereinafter *Yamato Becomes*].

63. *See Yamato Becomes, supra* note 61.

64. *See Daiwashi aruki sumaho no bōshi ni kansuru jōrei o ko* [Yamato City Ordinance on Prevention of Walking with Smartphones], Ordinance No. 17 of 2020, Art. 5 (Japan), <https://bit.ly/3u8KS7q>.

65. *See id.* at Art. 5; *see also Yamato Becomes, supra* note 62.

ordinance does not provide for any penalties for its violation and states that rules will be developed regarding the enforcement of the ordinance.<sup>66</sup>

The City has not promulgated further rules providing for penalties. The BBC's reporting confirms that this is part of the City's strategy, noting that authorities "are hoping for more of an organic change in behaviour."<sup>67</sup> The strategy is not to alter behavior through the threat of punishment, but to instead bring this behavior in line with "the Japanese concept of *meiwaku*, which can be translated as 'being a nuisance to others.'"<sup>68</sup> Bringing the notion of *meiwaku* to bear on walking while using a smartphone is not just about altruism, as social groups tend to penalize nuisance behavior through penalties such as ostracism.<sup>69</sup>

The BBC draws a parallel between Yamato's ordinance and the fact that people and businesses generally followed the Japanese government's stay-at-home and business closure orders, even though the government imposed no penalties for failure to comply.<sup>70</sup> This effort fits in with other Japanese efforts to sway public sentiment against using phones and devices while walking, including East Japan Railways' campaign of printing messages inside of toilet stalls and on toilet paper urging people to stop using smartphones while walking.<sup>71</sup>

On one level, Yamato's ordinance is broader than other ordinances discussed above in that it applies to all smartphone use while walking in public places. People do not need to be crossing streets or even on sidewalks to violate the law—if they are looking at their phones while walking in any public place, they are in violation of the ordinance. Unlike all ordinances discussed above, though, Yamato's ordinance does not provide for any financial or other penalties for violating the rule. Instead, it hopes to be one component in a general campaign of swaying public opinion against using phones and devices while walking. In essence, the government is using law to shift the rules of etiquette in a particular direction.

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66. See *Daiwashi aruki sumaho no bōshi ni kansuru jōrei o ko* [Yamato City Ordinance on Prevention of Walking with Smartphones], Ordinance No. 17 of 2020, Art. 8 (Japan), <https://bit.ly/3u8KS7q>.

67. Lucy Dayman, *Can a Ban on "Smartphone-Walking" Work if No Penalties Are Attached? Officials in Japan's Yamato City Are Optimistic*, BBC: WORKLIFE (Aug. 18, 2020), <https://bbc.in/359dJQl>.

68. *Id.*

69. *See id.*

70. *See id.*

71. See Casey Baseel, *A Message from Japanese Train Station Toilet Paper: Don't Stare at Your Smartphone While Walking*, SORA NEWS 24 (Nov. 5, 2015), <https://bit.ly/3sUnbPP>.

### F. *Other Proposals to Ban Distracted Walking*

So far, this Article has surveyed municipal distracted walking ordinances. But discussions of distracted walking occur at the state level as well. To date, none of these laws have been passed.

New York is one such state that has proposed distracted walking bans. In 2019, a lawmaker introduced a bill in the New York State Assembly and in the New York Senate to prohibit pedestrians from using electronic devices while crossing streets.<sup>72</sup> The bill would have banned pedestrians from crossing roadways “while using any portable electronic device.”<sup>73</sup> Unlike some of the ordinances surveyed so far, the bill took a more serious stab at defining “using,” as:

[H]olding a portable electronic device while viewing, taking or transmitting images, playing games, or, for the purpose of present or future communication: performing a command or request to access a world wide web page, composing, sending, reading, viewing, accessing, browsing, transmitting, saving or retrieving e-mail, text messages, instant messages, or other electronic data.<sup>74</sup>

Violations would have been punishable by fines between twenty-five dollars for first offenses, and fifty dollars for subsequent offenses within eighteen months.<sup>75</sup>

John Liu, the Senator who introduced the bill, claimed that he had heard from constituents ““that there ought to be a law”” and that parents had told him that they ““don’t want their kids texting while they’re walking much less while they’re crossing the street.””<sup>76</sup> When asked if jaywalking laws were supposed to prohibit this behavior, Liu claimed that people were jaywalking less although he admitted that he had no proof of this.<sup>77</sup> Ultimately, Liu claimed that the bill was ““just about common sense.””<sup>78</sup>

Critics attacked the bill, however, arguing that it could lead to “subjective and discretionary policing” and that it placed blame on victims of traffic accidents rather than motorists who were more likely to be responsible.<sup>79</sup> Critics also noted that pedestrian deaths had doubled in Honolulu in the year following its enactment of a similar ban—rising from

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72. See Augusta Anthony, *New York Might Make It Illegal to Text While Walking*, CNN (May 22, 2019, 3:59 PM), <https://cnn.it/35df60o>.

73. See S.B. S5746-A, 2019–2020 Reg. Sess. (N.Y. 2019); see also Assemb. B. A1516-A, 2019–20 Reg. Sess. (N.Y. 2019).

74. *Id.*

75. See *id.*

76. Christopher Robbins, *NY Lawmakers Want to Make Texting While Crossing the Street Illegal*, GOTHAMIST (May 15, 2019), <https://bit.ly/3p8TIk1>.

77. See *id.*

78. *Id.*

79. See Poon, *supra* note 8.

thirteen to twenty-six.<sup>80</sup> What's more, after the legislation was introduced, the results of a New York City study of "fatal crash reports from 2014 to 2017" were released, which included a finding that devices were involved in only two instances.<sup>81</sup> Liu claimed that he would take the study into account, but Felix Ortiz, who introduced the Assembly version of the bill, seemed unmoved, asserting that "[j]ust one accident caused by pedestrian texting is one too many."<sup>82</sup> The bill did not go anywhere; it was referred to the Senate Transportation Committee in January 2020 and has been there ever since.<sup>83</sup>

The State of Connecticut also considered a distracted walking ban in 2019.<sup>84</sup> The bill would have prohibited pedestrians from crossing highways while viewing "a mobile electronic device," which included phones, pagers, video games, and other devices.<sup>85</sup> As with other restrictions, the law would have exempted emergency personnel performing their official duties.<sup>86</sup> Violators would be warned on their first offense, and fined twenty dollars for subsequent offenses.<sup>87</sup> The law would have further required that drivers exercise due care to avoid collisions with pedestrians and should give "reasonable warning by sounding a horn or other lawful noise emitting device to avoid a collision," with a fine of 500 dollars for drivers who did not comply.<sup>88</sup>

The bill never ended up passing; the last action on record is on April 8, 2019, where the Senate Committee on Transportation voted favorably on the bill and passed it through to the Senate.<sup>89</sup> While this bill ended up failing, another bill has been passed in Connecticut more recently with an eye to pedestrian safety, including terms providing for increased penalties for distracted drivers and requiring drivers to stop for pedestrians who step up to the curb and signal that they want to cross the street.<sup>90</sup>

In 2016, New Jersey Assemblywoman Pamela Lampitt introduced a bill to prohibit pedestrians from using "wireless telephone or electronic communication device[s]" unless the phone was a hands-free wireless

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80. *See id.*

81. See Michael Gold, *Yes, Texting While Walking is Relatively Safe. (But Still Annoying.)*, N.Y. TIMES (Sept. 6, 2019), <https://nyti.ms/3Ia1OQZ>.

82. *Id.*

83. See S.B. S5746-A, 2019–2020 Reg. Sess. (N.Y. 2019), <https://bit.ly/3va1T3y>.

84. See Russell Blair, *Connecticut's "Distracted Walking" Law Would Make it a Fineable Offense to Cross the Street While Looking at Your Phone*, HARTFORD COURANT (Mar. 20, 2019, 2:33 PM), <https://bit.ly/35bJZIT>.

85. See S.B. 825, 2019 Gen. Assemb. (Conn. 2019).

86. *See id.*

87. *See id.*

88. *See id.*

89. *See id.*

90. See Kent Pierce, *New Law Creates Fines for Distracted Driving, Designed to Make Streets Safer for Pedestrians and Bikers*, WTNH (Aug. 16, 2021, 12:22 PM), <https://bit.ly/3vge66u>.



phone or the communication device was hands-free.<sup>91</sup> The definition of a “hands-free” device was a bit convoluted, but it permitted the use of a phone or device as long as headphones or a Bluetooth device was employed.<sup>92</sup> Still, the bill would have prohibited not only texting, but also using a phone to speak if the user was required to hold the phone while doing so.<sup>93</sup> Exceptions to the bill included instances where a pedestrian feared for his or her life or reported an emergency to authorities.<sup>94</sup> Violations of the law would have resulted in a fifty-dollar fine for each offense.<sup>95</sup>

Some reporting on the bill was confused, as multiple news outlets reported that violations of the ban could result in fifty-dollar fines or fifteen days of imprisonment.<sup>96</sup> Yet, the penalty provision in the bill’s text does not include any mention of potential imprisonment.<sup>97</sup> This may be a reporting mistake by the Associated Press, as the earliest stories about the bill appear to be based on the reporting of the Associated Press.<sup>98</sup> The other reports all follow within the next several days and use almost identical language comparing the fine/imprisonment penalty as the same as jaywalking.<sup>99</sup>

Lampitt was surprised by the flurry of media attention that her bill drew, acknowledging that the story had gone viral.<sup>100</sup> Still, she acknowledged that the bill was unlikely to pass, but she thought it was a good public service announcement, stating that she was happy if people would think twice about crossing the road while using a phone.<sup>101</sup>

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91. Assemb. B. A3503, 217th Legis. Assemb., 2016–2017 Sess. (N.J. 2016) [*hereinafter* Bill A3503].

92. *See id.*

93. *See id.*

94. *See id.*

95. *See id.*

96. *See* Bruce Shipkowski, *N.J. Lawmaker Wants Fines for Distracted Walking*, WASH. POST (Mar. 26, 2016), <https://wapo.st/33P8btX> (“Violators would face fines of up to \$50, 15 days imprisonment or both, which is the same penalty as jaywalking.”); Melanie Burney, *New Jersey Bill Would Ban Texting While Walking*, HERALD TIMES (Mar. 27, 2016, 12:00 AM), <https://bit.ly/3IinfiU>.

97. *See* Bill A3503, *supra* note 91.

98. *See* *Walking While Texting Could Mean Jail Time Under New Jersey Proposal*, GUARDIAN (Mar. 26, 2016, 12:35), <https://bit.ly/3BQ8am5>; Shipkowski, *supra* note 96 (including an “Associated Press” note at the bottom of the article).

99. *See* Ephrat Livni, *NJ Legislators Consider Punishment for Distracted Walking*, FINDLAW (Mar. 29, 2016, 12:09 PM), <https://bit.ly/3HmghYG> (“The same penalty applies to jaywalking.”); Joe Mullin, *State Lawmaker Seeks to Ban Texting While Walking*, ARS TECHNICA (Mar. 28, 2016, 4:44 PM), <https://bit.ly/3JQlj1k> (“Lampitt’s bill allows fines of up to \$50 or imprisonment of up to 15 days (the same penalties that the state imposes for jaywalkers).”).

100. *See* Matt Friedman, *Christie Plans Homeless Voucher Program—Peter Harvey Gets Newark Oversight Role—Distracted Walking Bill Goes Viral*, POLITICO (Mar. 31, 2016), <https://politi.co/36ekZvb>.

101. *See id.*

Lampitt's prediction about the bill was correct. While it was introduced and referred to the Assembly Law and Public Safety Committee, it appears to have died there.<sup>102</sup>

### III. DISTRACTED WALKING LAWS ARE POOR TRAFFIC POLICY

Each year, thousands of pedestrians in the United States are killed in traffic collisions.<sup>103</sup> In 2019, 6,301 pedestrians were killed in traffic collisions—a slight decrease from 2018, but a forty-six percent increase from 2010.<sup>104</sup> As discussed in detail in the preceding Part, distracted walking laws are frequently portrayed as a means of addressing this problem. The thinking goes that by penalizing distracted walking, pedestrians will be less likely to be distracted while crossing the street and therefore less likely to become victims of traffic collisions. This Part addresses why this logic is unsupported by any clear facts or science and why, as a matter of traffic policy, distracted walking bans ultimately make very little sense.

#### A. *The Mixed and Limited Science on Distracted Walking*

This subsection addresses studies on distracted walking, starting with studies by academic writers evaluating distracted walking behaviors in laboratory and natural observation scenarios, and moving to analyses by researchers and government entities of real-world accident reports and trends in pedestrian injuries. At best, findings on whether distracted walking has a meaningful impact on pedestrian behavior are mixed, with most entities and researchers agreeing that more research is needed—particularly more research of actual pedestrian behavior rather than simulations.

Occasionally, lawmakers purport to review the research on walking, distraction, and safety before proposing ordinances or laws to ban distracted walking. News reports on the Rexburg, Idaho ban appear to cite research published in 2012 in *Accident Analysis and Prevention*.<sup>105</sup> This

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102. See Bill A3503, *supra* note 91 (including April 4, 2016 as the only operative date for the bill, noting that it was introduced and referred to the Assembly Law and Public Safety Committee).

103. See GOVERNORS HIGHWAY SAFETY ASS'N, PEDESTRIAN TRAFFIC FATALITIES BY STATE: 2020 PRELIMINARY DATA 5 (2021).

104. See *id.*

105. See Sara Lenz, *BYU-Idaho Town Outlaws Texting, Crossing Street; Study Reveals Dangers*, DESERET NEWS (Sept. 21, 2011, 11:42 AM), <https://bit.ly/3McwjJg> (referencing an untitled “new study out by the University of Alabama” that purportedly “says texting while walking can be a hazard, too.” No link to the study is provided, and no authors or methodology are listed). Following up on Lenz’s vague reference, it appears that this research is being performed by David Schwebel, and notes that some of his findings were published in *Accident Analysis and Prevention*—linking to the article that I cite here.

study concluded that distraction from devices “has a small but meaningful impact on college students’ pedestrian safety” (as the research subjects were all college students).<sup>106</sup> Whether the distractions witnessed in the setting of an “interactive, semi-immersive virtual pedestrian street” translate into increases in pedestrian accidents in the real world remains unclear.<sup>107</sup> And concluding that increases in pedestrian injuries and deaths are due to distractions for pedestrians is a difficult conclusion to reach, as the same technological distractions that pedestrians experience may just as easily be experienced by those behind the wheel. Moreover, for what it is worth, the lead author of this study urged against banning distracted walking.<sup>108</sup>

Other research, however, suggests that gut feelings that distracted walking leads to more collisions may lack factual support. A 2015 study, for instance, found that study participants who were required to walk while texting and while performing cognitive tasks changed their gait patterns and adopted more hesitant gaits, including decreased speed and smaller steps.<sup>109</sup> While these participants’ gaits changed, they were not significantly more likely to deviate from a straight path or collide with obstacles.<sup>110</sup>

A meta-analysis published in 2020 sought to synthesize the results of multiple studies on distracted walking behaviors and resulting impacts on attention and potential collisions.<sup>111</sup> Studies contained in the analysis included those that involved participants or observed individuals using phones (either by texting, talking, or through hands-free devices) and individuals using earbuds or headphones to listen to music.<sup>112</sup> Those studies measured the time taken to start walking at a crosswalk, the number of missed safe crossing opportunities, crossing duration, whether pedestrians looked left and right, and collisions and close calls.<sup>113</sup>

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See Jim Bakken, *Unplug From Mobile Devices to Cross the Street Safely*, UAB NEWS (Aug. 17, 2011), <https://bit.ly/3toGzF0>.

106. David C. Schwebel, Despina Savrinos, Katherine W. Byngton, Tiffany Davis, Elizabeth E. O’Neal, Desiree De Jong, *Distraction and Pedestrian Safety: How Talking on the Phone, Texting, and Listening to Music Impact Crossing the Street*, 45 ACCIDENT ANALYSIS & PREVENTION 266, 266 (2012).

107. See *id.* at 266, 270.

108. See Lenz, *supra* note 105.

109. See Sammy License, Robynne Smith, Miranda P. McGuigan, & Conrad P. Earnest, *Gait Pattern Alterations During Walking, Texting and Walking and Texting During Cognitively Distractive Tasks While Negotiating Common Pedestrian Obstacles*, PLOS ONE, July 29, 2015, at 8.

110. See *id.*

111. See Sarah M. Simmons, Jeff K. Caird, Alicia Ta, Franci Sterzer, & Brent E. Hagel, *Plight of the Distracted Pedestrian: A Research Synthesis and Meta-Analysis of Mobile Phone Use on Crossing Behaviour*, 26 INJ. PREV. 170, 171 (2020).

112. See *id.* at 171.

113. See *id.*

The meta-analysis concluded that talking on cell phones resulted in small increases in time taken to start crossing streets, while “browsing” on cell phones resulted in moderate increases.<sup>114</sup> Listening to music did not significantly impact the time taken to start crossing a street.<sup>115</sup> Talking on cell phones resulted in a slight increase in missed safe opportunities to cross streets, but texting and listening to music did not have a statistically significant impact.<sup>116</sup> Texting, speaking on cell phones, and listening to music did not have significant impacts on the time taken to cross streets.<sup>117</sup> Texting or browsing on cell phones “significantly reduced participants’ looks to the left and right before and/or during crossing” streets, but talking on phones and listening to music did not have a significant impact.<sup>118</sup> The study’s authors noted that measurements of looking to the left and right tended to rely on the visible turning of heads, and often failed to measure whether participants or people observed looked left and right with their eyes alone.<sup>119</sup> Finally, the analysis concluded that talking on cell phones “was associated with a small increase in rates of hits and close calls” while texting and browsing resulted in a moderate increase.<sup>120</sup> Talking on phones and listening to music did not have a statistically significant impact on hits or near-collisions.<sup>121</sup> The authors noted that hits and close calls were measured in virtual environments, and that the validity of such environments needed to be confirmed in real world scenarios—although there were certainly ethical concerns with “putting pedestrians into potential collision events.”<sup>122</sup>

These studies, and the meta-analysis of various studies, suggest that the science is, at best, mixed as to whether distracted walking leads to an increased risk of injury or collisions. This tends to conflict with the instinct of those who propose and support distracted walking bans. Proponents of such bans tend to assume that pedestrian phone use leads to heightened risks of injuries, likely as a result of their own experiences or of the experiences of those who they know.

As noted earlier, New York was one state that considered a distracted walking ban in 2019. Not long after the legislation was proposed, the New York State Department of Transportation released a report on distracted walking that undermined legislators’ assertions that distracted walking

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114. *See id.* at 172.

115. *See id.*

116. *See id.*

117. *See id.* at 172–73.

118. *Id.* at 173.

119. *See id.*

120. *See id.*

121. *See* Simmons et al., *supra* note 111, at 173.

122. *Id.* at 174.

was the scourge they had made it out to be.<sup>123</sup> New York’s study supports the conclusion that distracted walking does not lead to increased pedestrian deaths and injuries.<sup>124</sup> The New York Department of Transportation analyzed pedestrian fatalities that “involved” “pedestrian use of portable electronic devices” and found that these instances were a vanishingly small minority of all pedestrian fatalities—ranging from 0.1 to 0.2 percent.<sup>125</sup>

In a 2020 article, Kelcie Ralph and Ian Girardeau surveyed various studies on distracted walking and studies of how many accidents and pedestrian injuries involved distraction as a result of distracted devices.<sup>126</sup> Ralph and Girardeau noted that key datasets for traffic and pedestrian injuries did not consistently measure distraction, and that “crash analysis reports are often incomplete and inaccurate.”<sup>127</sup> With the data available, though, Ralph and Girardeau estimated a lower bound estimate for distracted pedestrian deaths of 0.2 percent of fatal accidents, and a high bound estimate of 21.5 percent of fatal or serious injury cases.<sup>128</sup>

There were issues with both of these boundaries—the lower limit involved incomplete data, as “just eleven states reported any distracted walking deaths,” and the upper limit was based only on New York City data from a 2010 report which likely involved other potential distractions or jaywalking incidents and was based on incidents where distraction was a factor—not necessarily the cause of the accident.<sup>129</sup> Additionally, that report only specified that “pedestrian error/confusion” was a contributing factor to the fatal or serious injury—it did not specify that pedestrians were distracted as a result of using phones or other devices.<sup>130</sup> Ralph and Girardeau concluded that distracted walking was “likely a factor in a relatively small share of crashes, likely five to 10%.”<sup>131</sup>

Despite the relatively small percentage of accidents involving distracted walking, a survey of various people at transportation conferences indicated that one-third of respondents thought that distracted walking was a “large problem” and was “responsible for nearly 40% of

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123. See Gold, *supra* note 81.

124. N.Y.C. DEP’T OF TRANSP., DISTRACTION SHOULDN’T BE DEADLY (Aug. 30, 2019), <https://on.nyc.gov/3h4MgCc>.

125. See *id.* at 2.

126. See Kelcie Ralph & Ian Girardeau, *Distracted by “Distracted Pedestrians?”*, 5 TRANSP. RSCH. INTERDISC. PERSPECTIVES 100118, May 2020, at 3.

127. *Id.*

128. See *id.*

129. See *id.* Although it should be noted that the lower bound of 0.2 is consistent with the New York City Department of Transportation’s 2019 findings. See *Distracted Shouldn’t Be Deadly*, *supra* note 124, at 2.

130. See N.Y.C. DEP’T OF TRANSP., THE NEW YORK CITY PEDESTRIAN SAFETY STUDY & ACTION PLAN: TECHNICAL SUPPLEMENT 26 (2010), <https://on.nyc.gov/34XhAAi>.

131. Ralph, *supra* note 126, at 3.

pedestrian deaths.”<sup>132</sup> Approximately fifty percent of those surveyed thought that distracted walking was a “small problem” and responsible for approximately fifteen percent of pedestrian deaths.<sup>133</sup> Still, only a small percentage of respondents believed that a ban on distracted was an appropriate solution, although those respondents who thought that distracted walking was a serious problem were significantly more likely to support such a ban.<sup>134</sup> Ralph and Girardeau also noted that drivers were far more likely to conclude that distracted walking was a large problem— noting that forty percent of drivers concluded that distracted walking was a large problem compared with twenty-five percent of non-drivers.<sup>135</sup> Drivers were also more likely to conclude that distracted walking was a problem compared with non-drivers.<sup>136</sup> Ralph and Girardeau concluded that surveys and other polling that focused on these types of respondents would likely result in skewed perspectives of risk and appropriate solutions.<sup>137</sup> They also concluded that “a misplaced focus on distracted walking will hamper our efforts to save lives and improve safety for all users.”<sup>138</sup>

Other studies by governments and municipalities are consistent with the conclusion that the impacts of distracted walking on pedestrian safety are low—or at the very least, unclear. While the National Highway Traffic Safety Administration (NHTSA) claims that “[d]istracted walking among pedestrians . . . is a major contributor to pedestrian safety risk and often leads to a serious injury[,]” it notes that “the exact number of distraction-related pedestrian injuries is difficult to estimate.”<sup>139</sup> NHTSA provides an estimate that 1,500 people in 2012 “were estimated to be treated in emergency rooms as a result of distraction due to walking while engaged in cell phone conversations,” but does not specify whether those injuries resulted from traffic collisions.<sup>140</sup> This is a small fraction of reported pedestrian injuries resulting from distractions—which NHTSA estimated to be 431,000 in 2014.<sup>141</sup> After a review of the literature, the only finding that NHTSA truly emphasized was the lack of research performed on the impact of cell phone use on pedestrian behaviors—particularly the behaviors of pedestrians observed in real-world settings.<sup>142</sup>

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132. *Id.* at 8.

133. *See id.* at 9.

134. *See id.* at 8.

135. *See id.* at 7.

136. *See id.*

137. *See id.* at 9.

138. *Id.*

139. R.A. SCOPATZ & Y. ZHOU, EFFECT OF ELECTRONIC DEVICE USE ON PEDESTRIAN SAFETY: A LITERATURE REVIEW 1 (2016).

140. *Id.*

141. *See id.*

142. *See id.* at 50–51.

All of this demonstrates that the science on distracted walking—including whether distraction increases pedestrian risk and whether distracted walking results in a substantial portion of traffic injuries—is, at best, mixed. Despite this, concerns over the dangers of distracted walking tend to be disproportionate. The NHTSA and New York studies suggest that concerns about risks of distracted walking are exaggerated, given how little this phenomenon contributes to actual injury and death rates. And the Nasar and Troyer study illustrates these exaggerated concerns—revealing that the perceived risk that distracted walking poses tends to be far greater than the actual risk of injury or death. All of this reveals a perilous landscape for legislation, as legislators seek to solve a problem that either does not exist, or that is not nearly as significant as they perceive.

*B. Distracted Walking Bans Are Not Effective at Reducing Risks to Pedestrians*

With the mixed results of distracted walking studies and real-world indications that distracted walking does not play a substantial role in pedestrian deaths and injuries in mind, this subsection addresses why distracted walking laws are unlikely to effectively address risks to pedestrians.

One of the most apparent problems with distracted walking bans is that, while law may address pedestrians or drivers, these laws focus on pedestrians.<sup>143</sup> Yet, only one of these categories of individuals is in control of several-ton, highly mobile metal objects that may cause death or significant injury should they collide with the other category of individual. This “power imbalance” between pedestrians and drivers makes legal regimes or campaigns that endeavor to have pedestrians and drivers take equal responsibility seem unusual or misguided.<sup>144</sup> Rules that punish both pedestrians and drivers for being distracted tend to equate the activities of these two actors, even though drivers, by far, pose the most risk.<sup>145</sup> All of this is part of a larger trend of society tending to blame road users who are

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143. See Jack L. Nasar & Derek Troyer, *Pedestrian Injuries Due to Mobile Phone Use in Public Places*, 57 ACCIDENT ANALYSIS & PREVENTION 91, 91 (2013) (noting that the increase of cell-phone related injuries for pedestrians “paralleled the increase in injuries for drivers”).

144. See ANGIE SCHMITT, RIGHT OF WAY: RACE, CLASS, AND THE SILENT EPIDEMIC OF PEDESTRIAN DEATHS IN AMERICA 51 (Island Press eds., 2020).

145. See Robert A. Scopatz & Yuying Zhou, *Effect of Electronic Device Use on Pedestrian Safety: A Literature Review*, REPOSITORY & OPEN SCI. ACCESS PORTAL, Apr. 1, 2016, at 1, <https://bit.ly/3h9wTbn> (noting that in 2014, 3,179 people were killed and approximately 431,000 were injured in “distraction-affected crashes”).

most vulnerable, like bicyclists and pedestrians, for their own deaths—even when their deaths are due to vehicle collisions.<sup>146</sup>

Additionally, not only do distracted walking bans target pedestrians rather than drivers, but these bans largely ignore those subsets of pedestrians who are most vulnerable to being killed or injured in traffic collisions. Critics of ordinances banning distracted walking note that these ordinances fail to protect elderly pedestrians who are particularly vulnerable.<sup>147</sup> Distracted walking prohibitions tend to target younger people who are more likely to be texting and walking, even though elderly pedestrians are more at risk.<sup>148</sup> This is of particular concern in Honolulu, where more than forty-two percent of pedestrians killed in traffic accidents between 2005 and 2014 were over the age of sixty-five.<sup>149</sup> As a result, distracted walking bans are most likely to affect those pedestrians who are at less risk of death or injury from vehicles and make little to no difference for those that face the highest risk.

Moreover, not only do pedestrians pose the least risk to drivers and other pedestrians, but they also bear the most risk when walking near or across streets. As noted above, thousands of pedestrians are killed every year in traffic collisions—and many more are injured. If this risk of death or serious injury is not enough to deter pedestrians from using phones or listening to music while crossing the street, it is unreasonable to expect that a law penalizing that behavior will do so. To the extent that distracted walking laws are likely to make any difference, the difference comes from the educational side effects that these laws have when they are subjected to widespread reporting.<sup>150</sup>

Another aspect of pedestrian risk that lawmakers appear to have ignored is that pedestrians' risk of injury when crossing the street increases at night, when they are less visible to drivers.<sup>151</sup> Approximately seventy-five percent of pedestrian fatalities occur at night.<sup>152</sup> Pedestrians may be more visible to drivers, however, if they are looking at phones, as they will

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146. See Gregory H. Shill, *Should Law Subsidize Driving?*, 95 N.Y.U. L. REV. 498, 532–33 (2020).

147. See Laura Bliss, *The Problem with Honolulu's New Ban on Texting in Crosswalks*, BLOOMBERG CITYLAB (July 31, 2017, 6:22 PM), <https://bloom.bg/3H7URhK>; SCHMITT, *supra* note 144, at 40–41.

148. See *id.*; see also Nasar & Troyer, *supra* note 143, at 94 (noting that pedestrian injuries related to mobile phone use were higher for young people).

149. See Laura Bliss, *supra* note 147.

150. Advocates of these measures all but admit that this is the case. See Friedman, *supra* note 100 (quoting a sponsor of a distracted walking ban acknowledging that her bill is unlikely to pass, but that it at least serves as a good public service announcement to pedestrians).

151. See SCHMITT, *supra* note 144, at 12.

152. See *id.*



be holding a glowing object that drivers are likely to see.<sup>153</sup> While no data or research exists measuring the impact of pedestrian phone use on driver visibility (and while researching this would likely be difficult or unethical—at least outside of simulations), this fact at least complicates assumptions that phone use while walking has solely negative effects on pedestrian safety.

These arguments that distracted walking bans are ineffective are backed up by real world data. As noted above, Honolulu's ban on distracted walking appears to have had no impact on pedestrian safety, with pedestrian deaths increasing in the wake of the ordinance's passage.<sup>154</sup> An increase in pedestrian deaths following the passage of a distracted walking ban suggests that the ban does not achieve its primary goal of protecting pedestrians from death and injury when crossing the street. This is also the most pertinent data on distracted walking bans, as it concerns pedestrian safety in one of the few municipalities that has enacted such a ban.

#### IV. DISTRACTED WALKING LAWS ENCOURAGE SELECTIVE PROSECUTION AND ABUSE OF DISCRETION

Distracted walking bans aren't just bad traffic policy, but they also increase the power of the government to criminalize everyday behavior, which increases risks of abuses of discretion in enforcing the law. Where laws criminalize common behavior that white people and Black and Hispanic people engage in at similar rates, Black and Hispanic people bear a disproportionate brunt of prosecution for these ostensibly neutral laws.<sup>155</sup>

Real world enforcement patterns bear out these concerns. In New York City, for example, a study of summons issued for biking on the sidewalk between 2008 and 2011 revealed that “the NYPD issued tickets primarily in minority neighborhoods” and that “of the 15 neighborhoods that had the greatest number of summonses, 12 consisted mainly of black and Latino residents.”<sup>156</sup> Moreover, all but one of the neighborhoods with the lowest number of summonses issued for biking on the sidewalks had

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153. *See id.* at 13.

154. *See* Tamara Goebbert, *supra* note 23.

155. *See* WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 4–7 (2011); Tracey Maclin, *Race and the Fourth Amendment*, 51 *VAND. L. REV.* 331, 344–46 (1998).

156. Poon, *supra* note 8 (citing Harry Levine, Director, & Loren Siegel, Director, Marijuana Arrest Research Project, Presentation at CUNY School of Law: Summons: The Next Stop and Frisk 9–10 (April 24, 2014), <https://bit.ly/3p3iMsC> (describing the disparity in issuances of summonses by neighborhoods and further noting that all fifteen of the neighborhoods in which disorderly conduct summonses were issued were majority Black and/or Latino)).

residents with majority populations of white and races other than Black and Latino.<sup>157</sup>

Studies of ticketing practices in Jacksonville, Florida provide further support for the concern that police tend to ticket pedestrians of color at higher rates.<sup>158</sup> ProPublica and the Florida Times-Union examined five years'-worth of pedestrian tickets from 2012 to 2016 in Jacksonville and found that Black pedestrians were "nearly three times as likely as whites to be ticketed for a pedestrian violation."<sup>159</sup> While Black people make up 29 percent of Jacksonville's population, they received "55 percent of all pedestrian tickets" from 2012 to 2017.<sup>160</sup> Moreover, enforcement efforts tended to prioritize targeting majority-Black areas of the city instead of targeting areas with higher traffic fatalities:

Just one of the top six census tracts in Jacksonville for pedestrian deaths was among the top six for tickets. Indeed, one of the deadliest tracts — six deaths — saw just 10 tickets in five years. The neighborhood with the most tickets had just two deaths.

And while 25 percent of all deadly crashes occurred in majority-black census tracts, 40 percent of pedestrian tickets were given there. Six of the top 10 ticketed census tracts are majority black.<sup>161</sup>

Ironically, if laws and ordinances banning distracted walking are enforced disproportionately against racial minorities, these restrictions will end up burdening communities that are most in need of measures to protect them from traffic injuries. Black, Hispanic, and multiracial communities tend to have higher pedestrian mortality rates following accidents, while Black and multiracial communities tend to have higher hospital admission rates for pedestrians.<sup>162</sup> And Black neighborhoods in particular have suffered extensively from historic highway construction, underdevelopment, and a lack of sufficient pedestrian infrastructure.<sup>163</sup>

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157. *See id.*

158. *See* Tophers Sanders, Kate Rabinowitz, & Benjamin Conarck, *Walking While Black*, PROPUBLICA (Nov. 16, 2017), <https://bit.ly/3v7uNBm>.

159. *Id.*

160. *Id.*

161. *Id.*

162. *See* Cara Hamann, Corinne Peek-Asa, & Brandon Butcher, *Racial Disparities in Pedestrian-Related Injury Hospitalizations in the United States*, BMC PUBLIC HEALTH, Sept. 25, 2020, at 4; *see also* SCHMITT, *supra* note 144, at 34 ("Statistically, black men are about twice as likely to be killed while walking (or wheeling) as white men and four times as likely to be killed than the general population. The same is true for Hispanic men.").

163. *See generally* Deborah N. Archer, *Transportation Policy and the Underdevelopment of Black Communities*, 106 IOWA L. REV. 2125 (2021) (describing how Black communities tend to shoulder the most burden, and enjoy the fewest benefits, of infrastructure development).

Distracted walking bans that tend to target these communities will only make the situation worse by adding an additional basis for fines to the mix.

Defenders of distracted walking ordinances and legislation may argue that most of these laws tend to provide for minor fines as punishment. But minimizing the issue through such a claim is misguided. First, it may not always be the case that distracted walking is punished with minor fines. Baguio City's ordinance demonstrates that at least some municipalities are willing to impose penalties of imprisonment on repeat violators of distracted walking bans.<sup>164</sup> No barriers prevent states or municipalities from following a similar path in banning distracted walking. And Montclair, California's ordinance calls for fines of up to 500 dollars for repeat offenders—an amount that almost anyone would consider substantial.<sup>165</sup> Second, and more crucially, fines that may seem to be mere inconveniences to some may have crippling effects on those who are unable to pay. A seemingly low fine may have a profound impact on a person who has to choose between paying a fine and paying for food.<sup>166</sup> Moreover, for people in those circumstances who choose food, failure to pay fines may lead to a series of consequences that result in significant collateral consequences and further criminal penalties.

By way of example, consider a person who is fined fifty dollars for violating a distracted walking ban. This person is in dire financial straits and, rather than spend the last of the money in her bank account to pay the fine, she chooses to eat or pay her electricity bill instead. However, as a result of this failure to pay, her driver's license is then suspended—a common consequence in many states for those who fail to pay fines.<sup>167</sup> As a result, this person cannot drive to work, and her financial condition continues to deteriorate. Or, say she does try to drive to work, at which point she is driving on a suspended license—a crime that will likely be punished far more severely than the initial distracted walking offense.

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164. See *supra* Section II.D.

165. See MONTCLAIR, CAL., CODE OF ORDINANCES § 8.28.020(E) (2018) (providing that violating the law is an infraction to be punished under MONTCLAIR, CAL., CODE OF ORDINANCES § 1.12.010 (2019)); MONTCLAIR, CAL., CODE OF ORDINANCES § 1.12.010(B)(2) (2019) (setting forth the penalties for infractions).

166. See Torie Atkinson, Note, *A Fine Scheme: How Municipal Fines Become Crushing Debt in the Shadow of New Debtors' Prisons*, 51 HARV. C.R.-C.L. L. REV. 189, 191 (2016) (detailing how municipalities use fines to support their budgets and how these schemes lead to aggressive enforcement of minor offenses against those who cannot afford to pay, resulting in “a never-ending cycle of debt and incarceration”).

167. See *Free To Drive*, FREE TO DRIVE, <https://bit.ly/3paxIoV> (last visited Feb. 22, 2022) (noting that, as of the beginning of 2022, at least 23 states continue to suspend people's licenses for failure to pay fines or fees); see also Caroline Greer, *States Should Not Suspend Driver's Licenses When People Can't Pay Fines and Fees*, REASON FOUNDATION (July 22, 2021), <https://bit.ly/3hdUR5w> (noting that 34 states have laws in place that may result in the suspension or revocation of driver's licenses due to failures to pay fines, fees, or other debts resulting from criminal proceedings).

Indeed, in California, repeat offenses for driving with a suspended license carry mandatory jail time.<sup>168</sup>

Beyond this, distracted walking bans provide police with an additional basis for conducting pretextual stops. In *Whren v. United States*, the United States Supreme Court held that a police officer may lawfully stop a motorist if they spot a violation of a traffic law even if the officer's actual intent is to use the stop as a pretext for conducting a search of the motorist and his or her vehicle for evidence of a separate crime.<sup>169</sup> Commentators have criticized *Whren*, arguing that people of color tend to bear the burden of these pretextual stops—which are largely a matter of police discretion.<sup>170</sup> An empirical study of traffic stops in a jurisdiction that adopted then later rejected *Whren* confirms these concerns—finding that “granting police discretion in traffic stops may lead to more traffic stops of drivers of color, with some likely escalating to more serious encounters.”<sup>171</sup>

Laws banning distracted walking create yet another opportunity for officers to stop people as a pretext for conducting a further search or investigation. Should an officer spot a pedestrian crossing a street while looking at or using a device in a jurisdiction that has banned distracted walking, that officer may approach and stop the pedestrian to issue a citation. Officers seeking to uncover evidence of further criminal activity will likely focus on pedestrians who they think are more likely to be criminals. One common way of making such a determination is to target pedestrians in what officers deem to be “high crime areas” (read: areas with populations that tend to be low-income and with high percentages of residents of color).<sup>172</sup> As a result, distracted walking bans will likely be enforced more heavily against pedestrians of color. The result will be an increased rate of fines and financial burdens on minority communities, and higher rates of prosecution arising from any other crimes that are uncovered as a result of pretextual stops.<sup>173</sup>

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168. See, e.g., CAL. VEH. CODE § 14601.1(a)–(b) (1959) (prohibiting driving with a suspended license and calling for a minimum fine of \$300 for a first offense, and a minimum penalty of a \$500 fine and five days in jail for a second offense within five years. Maximum penalties range up to fines of \$1,000 and six months in jail (or \$2,000 and one year in jail for a subsequent offense within five years)).

169. See *Whren v. United States*, 517 U.S. 806, 812–13 (1996).

170. See Maclin, *supra* note 155, at 344–66.

171. Stephen Rushin, *An Empirical Assessment of Pretextual Stops and Racial Profiling*, 73 STAN. L. REV. 637, 697 (2021).

172. See Ben Grunwald & Jeffrey A. Fagan, *The End of Intuition-Based High-Crime Areas*, 107 CAL. L. REV. 345, 351–52 (2019) (noting that officers' assessments of high crime areas tend to vary and that labels of an area as “high crime” can be predicted by the race of the suspect who is stopped); Andrew Guthrie Ferguson, *Crime Mapping and the Fourth Amendment: Redrawing “High-Crime Areas,”* 63 HASTINGS L.J. 179, 217 (2011).

173. This latter effect may be rare, as prior instances of systemic pretextual stops of thousands of people have led to a miniscule number of arrests. See Ferguson, *supra* note

Even where laws deal in infractions, one must not forget that these are criminal laws and that their enforcement will only be a burden on those subject to their scope. This is often overlooked in the context of pedestrians—where laws that result in fines and other punishments against pedestrians are portrayed as helping them. As noted above, many of the distracted walking ordinances that have been passed or proposed are presented as means of protecting or helping pedestrians.<sup>174</sup> Subjecting pedestrians to discretionary imposition of fines for everyday conduct hardly seems to be beneficial.

This phenomenon is reflected in the context of California’s treatment of jaywalking. In 2021, California’s governor vetoed a bill that would have allowed people to “cross the street outside of crosswalks when cars were not present without facing the possibility of a pricey jaywalking ticket.”<sup>175</sup> Proponents of the bill argued that jaywalking laws were enforced in a discriminatory manner and resulted in burdensome fines to those targeted.<sup>176</sup> Governor Gavin Newsom’s veto message paid lip service to this concern but claimed that the law would “unintentionally reduce pedestrian safety and potentially increase fatalities or serious injuries *caused by pedestrians* that enter our roadways at inappropriate locations.”<sup>177</sup> Newsom’s veto message—explicitly stating that pedestrians are the cause of their traffic injuries rather than the vehicles that run them down—is a concise and illuminating example of policymakers’ tendency to place pedestrians on equal or lesser ground than motorists when it comes to their safety. Distracted walking bans further perpetuate this trend.

## V. ALTERNATIVES TO DISTRACTED WALKING BANS

While distracted walking bans raise far more problems than they solve, the dangers pedestrians face are real and need to be addressed. Criminalizing and punishing those who walk and use devices is an unwise policy, but some of the laws discussed in this Article contain provisions or ideas that may be worth adopting. And even some of the bans that have failed to pass contain lessons that may be applied in future efforts to protect pedestrians.

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172, at 215 (noting that of 52,000 stop and frisks conducted in a “high-crime area” from 2006 to 2010, only one percent of those stopped were arrested).

174. See *supra* Part IV.

175. Melody Gutierrez, *Newsom Vetoes Jaywalking Bill Aimed at Easing Fines, Targeted Enforcement*, L.A. TIMES (Oct. 8, 2021, 7:58 PM), <https://lat.ms/3BP2vg0>.

176. See *id.*

177. Veto Message re Assembly Bill 1238 from Gavin Newsom, Governor of Cal., to Members of the Cal. State Assembly (Oct. 8, 2021) (emphasis added), <https://bit.ly/3IkAzTR>.

One alternative to distracted walking bans is educational efforts to inform pedestrians of the risks of distracted walking. This may include installing signs or other devices warning pedestrians to remain alert at crosswalks. Indeed, measures like these have been enacted along with distracted walking bans.<sup>178</sup> Other educational efforts may include campaigns in which law enforcement officials simply warn pedestrians of the dangers of distracted walking without ticketing them. At least one city has enacted a similar policy—albeit on a temporary basis—to curb increased instances of distracted driving.<sup>179</sup>

While policies to educate or alert pedestrians to the danger of distracted walking may be worth considering, pairing them with distracted walking bans may undo some of their benefits. As noted above, the City of Montclair, California passed an ordinance that provided for a public education campaign—including stencils to alert pedestrians to stay alert, and signs at crosswalks alerting pedestrians not to be distracted.<sup>180</sup> But Montclair also passed a ban on distracted walking, which called for fines to any pedestrians crossing the street while using or listening to phones or other devices.<sup>181</sup> As it happens, signs alerting pedestrians to stay alert started to disappear—which the ban’s author chalked up to protest against the ban on distracted walking.<sup>182</sup> Had Montclair simply taken measures to educate and alert pedestrians, there would have been no ban to protest, and the signs alerting pedestrians of potential danger may have stayed up.

Yamato, Japan’s ban on “smartphone walking” is also instructive to municipalities that are concerned about distracted walking. While Yamato passed an ordinance banning the use of cell phones and other devices while walking in a public place, the ordinance does not contain any penalty provisions.<sup>183</sup> Instead, the ordinance seeks to shift public opinion against distracted walking by using lawmaking authority to label behavior that is considered to be rude and unpleasant.<sup>184</sup> Those who may contend that bans on behavior without penalty provisions are toothless or ineffective would do well to consider Yamato’s approach. Still, this approach may not be without its drawbacks in American jurisdictions, as illegal behavior may

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178. See Tchekmedyan, *supra* note 28.

179. See Anoushka Dalmia, “Eyes Up, Phones Down” Initiative Relaunched in Worcester to Target Cellphone Use While Driving, TELEGRAM & GAZETTE (Aug. 17, 2021, 6:06 PM), <https://bit.ly/3tbrfvd>.

180. Tchekmedyan, *supra* note 28.

181. See *id.*

182. See *id.*

183. See *Daiwashi aruki sumaho no bōshi ni kansuru jōrei o ko* [Yamato City Ordinance on Prevention of Walking with Smartphones], Ordinance No. 17 of 2020, Art. 8 (Japan), <https://bit.ly/3u8KS7q>.

184. See Dayman, *supra* note 67.

still be enough to prompt the attention of law enforcement and lead to a pretextual stop that could escalate or result in an arrest for a separate crime.

In addition to these potential alternatives, laws may put more onus on drivers to counter the dangers of distracted walking. Recall the 2019 proposed law in Connecticut to ban distracted walking.<sup>185</sup> In addition to containing the typical provisions that have already been critiqued at length, the bill did have a unique aspect: it included a requirement that drivers honk or make some other “lawful noise” to avoid colliding with pedestrians—providing for a 500 dollar fine if drivers failed to do so.<sup>186</sup> A law like this makes drivers responsible for alerting potentially distracted pedestrians that they are approaching, and a honk from an approaching vehicle is likely to jolt a pedestrian out of even the most engrossing text chain (or law review article). Additionally, laws or ordinances requiring drivers to alert pedestrians recognize that drivers are the parties who cause the most danger while bearing the least risk, and shape requirements and punishments accordingly.

Alternatives to distracted walking bans may also include government funding, research, and infrastructure projects to improve safety where pedestrian deaths and injuries are more frequent. Research suggests that particularly dangerous stretches of roads share common characteristics, such as “multilane roadways, high speed limits, high traffic volumes, adjacent commercial land uses, and nearby lower-income neighborhoods.”<sup>187</sup> These common characteristics suggest that governments can engage in a systemic approach to identify roadways with similar characteristics and to focus efforts on mitigating risks to pedestrians through means like “engineering, education, and automated enforcement” strategies as well as improved pedestrian crossings and lower speed limits.<sup>188</sup> Adding additional lighting, controlled crosswalks, and pedestrian underpasses or overpasses may also make communities safer and more walkable for those without vehicles. Additionally, sidewalks could be expanded, and policies doing so at the cost of spaces where cars may park could cut down on and slow traffic in targeted areas.<sup>189</sup> All of these measures will both reduce the danger that vehicles pose by slowing them down and incentivizing them to drive more safely, as well as improve the environment in which pedestrians operate—as even

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185. See S. 825, 2019 Leg., Jan. Sess. (Conn. 2019), <https://bit.ly/3Inmh4U>.

186. See *id.*

187. Robert J. Schneider, Rebecca L. Sanders, Frank R. Proulx, & Hamideh Moayyed, *United States Fatal Pedestrian Crash Hot Spot Locations and Characteristics*, 14 J. TRANSP. & LAND USE 1, 19 (2021); see also SCHMITT, *supra* note 144, at 17–31.

188. See *id.*

189. See Vanessa Casado Perez, *Reclaiming the Streets*, 106 IOWA L. REV. 2185, 2205 (2021).

attentive pedestrians may face significant risks when trying to cross many-laned, high-speed roadways.

## VI. CONCLUSION

Distracted walking bans may fly under the radar for most people, but they implicate several core issues at the heart of modern scholarship and debates over criminal law. Likely as a result of anecdotal experiences and exaggerated risk perceptions, these bans have proliferated in America and around the world. With anecdotes of pratfalls suffered by smartphone zombies and the annoyances of those who must dodge them, media coverage of these laws tends toward whimsy and also tends to focus on the misguided earnestness of these bans' sponsors and proponents as to the bans' effectiveness at protecting vulnerable pedestrians.

But as this Article demonstrates, these bans are poor policy and overlook true dangers and vulnerabilities that pedestrians suffer. Thousands of pedestrians are killed in traffic collisions every year—an ongoing tragedy that Americans in particular have learned to simply tolerate.<sup>190</sup> Distracted walking bans purport to confront this problem but place the onus onto pedestrians to protect themselves from drivers whose vehicles pose the greatest risk to others on or near roadways. Not only that, but studies suggest that the impact of device distraction on pedestrian safety is, at worst, mixed, with real-world accident report analysis and pedestrian safety metrics following distracted walking bans suggesting that distracted walking (and bans targeting the practice) have little to no impact on overall pedestrian safety. Despite there being no basis for these policies, they are put in place anyway, giving law enforcement officials even more opportunities to engage in biased enforcement of bans targeting everyday behavior. All of this further perpetuates discriminatory law enforcement and amplifies the burdens of the criminal justice system on disadvantaged members of society.

This Article reveals these multilevel failings of distracted walking bans. One can only hope that commentators and lawmakers will take these shortcomings to heart and that debates over similar bans at the state and local level focus on the failings of these bans rather than simply their quirkiness. Many policy options exist to increase pedestrian safety, and lawmakers should prioritize alternate solutions rather than turning to blunt, imprecise, and ineffective tactics of overcriminalization.

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190. See SCHMITT, *supra* note 144, at xi–xii (flagging political rhetoric attempting to minimize the number of deaths resulting from COVID-19 by comparing these numbers to traffic deaths in the United States).