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# No Second Chances: Leandra's Law and Mandatory Alcohol Ignition Interlocks for First-Time Drunk Driving Offenders

Joseph Marutollo\*

## Introduction

On October 11, 2009, a drunk driving accident on the Henry Hudson Parkway in New York City tragically took the life of eleven-year-old Leandra Rosado.<sup>1</sup> Thirty-eight days later, Governor David Paterson signed “groundbreaking” legislation, known as Leandra’s Law, to combat drunk driving in New York State.<sup>2</sup> Although media reports<sup>3</sup> following the enactment of Leandra’s Law focused on the legislation’s creation of a new class E felony for defendants convicted of driving while under the influence of alcohol or drugs (DWI) with a child passenger in the vehicle,<sup>4</sup> a different feature of the legislation may ultimately have a greater effect on drunk driving in New York: the requirement that *all* convicted DWI offenders—including first-time offenders—install alcohol ignition interlocks in their vehicles.<sup>5</sup>

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\* Pace University School of Law, Class of 2010. I would like to express my gratitude to my family for their unyielding support during law school and throughout my life.

1. Simon Akam & Colin Moynihan, *Bronx Woman Is Charged in Crash that Killed Girl, 11*, N.Y. TIMES, Oct. 11, 2009, at A18.

2. Press Release, New York State, Governor Paterson Signs Groundbreaking DWI Legislation into Law (Nov. 18, 2009), available at [http://www.state.ny.us/governor/press/press\\_1118091.html](http://www.state.ny.us/governor/press/press_1118091.html).

3. See, e.g., Cheryl Robinson, *New York Toughens Drunk Driving Law*, CNN, Nov. 19, 2009, <http://www.cnn.com/2009/CRIME/11/19/new.york.dwi.law/index.html>; *‘Leandra’s Law’ Signed By Gov. Paterson; Tougher State Law Makes Driving Drunk With A Child In The Vehicle A Felony; Named After Leandra Rosado*, WCBSTV, Nov. 19, 2009, <http://wcbstv.com/politics/leandras.law.dwi.2.1320705.html>.

4. N.Y. VEH. & TRAF. LAW § 1193(1)(c) (McKinney 2009).

5. N.Y. EXEC. LAW § 259-c(15-a); N.Y. VEH. & TRAF. LAW § 1193(1)(b)(ii).

This Comment will examine whether it was prudent for New York to mandate alcohol ignition interlocks for all convicted DWI offenders. This Comment begins with an examination of the recent history of alcohol ignition interlocks in New York State. This Comment will then focus on three major critiques of alcohol ignition interlocks: first, whether first-time offenders should be treated the same way as serious alcohol abusers; second, whether mandating alcohol ignition interlocks for first-time offenders is an efficient way to curb drunk driving; and third, whether mandatory alcohol ignition interlock laws violate the separation of powers doctrine through Pennsylvania case law. Finally, this Comment will explore the future of alcohol ignition interlocks.

Ultimately, this Comment will conclude that Leandra's Law will help reduce the scourge of drunk driving and save lives.

## I. The Recent History of Alcohol Ignition Interlocks in New York

### A. *Defining Alcohol Ignition Interlocks*

Mothers Against Drunk Driving (MADD) defines an alcohol ignition interlock as “a small, sophisticated device – about the size of a cell phone – which is installed into the starting circuit of a vehicle.”<sup>6</sup> The driver must blow “approximately 1.5 liters of air” into the alcohol ignition interlock in order for the vehicle to start.<sup>7</sup> The alcohol ignition interlock is typically “located on the vehicle’s dashboard.”<sup>8</sup> If the driver’s “breath alcohol content is over a preset limit, the [alcohol ignition interlock] will not allow the car to start.”<sup>9</sup> If the driver’s breath alcohol content is not over the preset limit,

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6. Mothers Against Drunk Driving, Ignition Interlocks, <http://www.madd.org/Drunk-Driving/Drunk-Driving/Campaign-to-Eliminate-Drunk-Driving/Ignition-Interlocks.aspx> (last visited Jan. 3, 2010).

7. Ignition Interlock Device.Org., How the Ignition Interlock Device Works, <http://www.ignitioninterlockdevice.org/ignitioninterlockdevice.html> (last visited Mar. 2, 2010).

8. *Id.*

9. *Id.*

“the vehicle will start normally.”<sup>10</sup>

Alcohol ignition interlocks usually require “running retests,” which require a driver to provide breath tests at regular intervals,” in an effort to prevent “drivers from asking a sober friend to start the car.”<sup>11</sup> According to MADD, “[i]f a driver fails a running retest, the vehicle’s horn will honk and/or the lights will flash to alert law enforcement.”<sup>12</sup> For safety purposes, however, the vehicle will not turn off automatically.<sup>13</sup>

Currently, alcohol ignition interlocks are required by National Highway Traffic Safety Administration standards to prevent a car from starting ninety percent of the time if the driver’s Blood Alcohol Content (BAC) is .01% points greater than the preset limit (.02% points in extreme conditions).<sup>14</sup>

### B. *Alcohol Ignition Interlocks in New York*

Before New York passed Leandra’s Law, alcohol ignition interlocks were mandated only for those convicted of Aggravated Driving While Intoxicated (which requires a 0.18 BAC and over) and who also had been given probation as a condition of their sentence.<sup>15</sup> In 2008, a year where alcohol-impaired driving contributed to 341 deaths in New York State,<sup>16</sup> the New York State Senate passed a bill, spearheaded by Long Island State Senator Charles Fuschillo, to create a Mandatory Ignition Interlock and Probation Pilot Program for all those who were convicted of drunk driving.<sup>17</sup> The bill ultimately did not reach a vote in the New York State Assembly.

In 2009, however, numerous high-profile drunk driving

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10. Mothers Against Drunk Driving, *supra* note 6.

11. *Id.*

12. *Id.*

13. *Id.*

14. Model Specifications for Breath Alcohol Ignition Interlock Devices (BAIIDs), 57 Fed. Reg. 11,772 (Apr. 7, 1992).

15. New York State Senate, S27B: Creates the Mandatory Ignition Interlock Program (Apr. 28, 2008), available at <http://open.nysenate.gov/open-leg/api/html/bill/S27B>.

16. National Highway Traffic Safety Administration, Fatalities and Fatality Rates in Alcohol-Impaired-Driving Crashes by State 2007-2008, Dec. 2009, at 3, <http://www-nrd.nhtsa.dot.gov/Pubs/811250.pdf>.

17. See New York State Senate, *supra* note 15.

deaths pushed the New York State Legislature into action. In February 2009, a Suffolk County police officer was killed by a drunk driver who had been given a conditional driver's license after a January 2009 arrest on drunken driving charges.<sup>18</sup> In July 2009, a Long Island woman with a BAC more than double the legal limit drove the wrong way on Westchester County's Taconic State Parkway.<sup>19</sup> She killed her two-year-old daughter, three young nieces, and three men in an oncoming vehicle.<sup>20</sup> Finally, in October 2009, eleven-year-old Leandra Rosado was killed in the aforementioned drunk driving accident.<sup>21</sup> The State Legislature reacted fairly rapidly to these tragedies, and Governor Paterson signed Leandra's Law on November 18, 2009.<sup>22</sup>

## II. Critiques of Mandatory Alcohol Ignition Interlocks for First-Time Offenders

In examining whether New York acted appropriately in passing Leandra's Law, it is helpful to explore critiques of mandating alcohol ignition interlocks for first-time offenders. These critiques generally fall into three major categories: first, whether first-time offenders should be treated the same way as serious alcohol abusers; second, whether alcohol ignition interlock laws are effective; and third, whether alcohol ignition interlock laws are constitutional. Each critique will be analyzed below.

### A. *Should First-Time Offenders be Treated the Same Way as Serious Alcohol Abusers?*

Critics argue that requiring all drunk drivers to install alcohol ignition interlocks is an insufficient "one-size-fits-all" solution.<sup>23</sup> The American Beverage Institute (ABI), a

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18. Jonathan Starkey, *Bill for Device to Avoid Drunken Driving Gains Momentum*, NEWSDAY, May 7, 2009.

19. See Editorial, *Cracking Down on Drunken Driving*, N.Y. TIMES, Nov. 23, 2009, at A26.

20. *Id.*

21. Akam & Moynihan, *supra* note 1.

22. Press Release, New York State, *supra* note 2.

23. Sarah Longwell, *MADD's Ignition Interlock Proposal Goes Too Far*,

restaurant industry trade group that frequently opposes MADD, argues that the use of alcohol ignition interlocks “won’t help solve the drunk driving problem” because it does not address “the root cause of today’s drunk driving problem—hard core alcohol abusers.”<sup>24</sup> ABI managing director Sarah Longwell said that while ABI supports alcohol ignition interlock laws “targeting repeat offenders and those arrested with high blood-alcohol levels,” mandatory alcohol ignition interlock laws for all drunk driving offenders do not “allow judges to distinguish between those who have a few drinks and go just over the 0.08 blood-alcohol legal limit and those who go way over.”<sup>25</sup> ABI calls supporters of mandatory alcohol ignition interlocks, “modern-day prohibitionists.”<sup>26</sup> One DWI defense attorney contends that there “is no therapeutic reason why an individual who is shown to have no problem with alcohol, no prior record and a low breath-test reading’ — either below or just above the 0.08 legal limit — ‘should have to have the alcohol ignition interlock, other than it helps the alcohol ignition interlock providers.”<sup>27</sup>

The one-size-fits-all criticism, however, is rather faulty. At the outset, it is naïve to think that most first-time DWI offenders have never previously driven drunk. In fact, research shows quite the opposite. Research suggests “that first-time offenders arrested for drunken driving have driven drunk more than 87 times before their first arrest.”<sup>28</sup> Dr. William J. Rauch, a researcher for the Center for Studies on Alcohol Substance Abuse, refers to such behavior as “learning’ to drink and drive.”<sup>29</sup> Statistics indicate that the BACs of first-time

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BALT. SUN, Nov. 4, 2009, available at [http://articles.baltimoresun.com/2009-11-04/news/0911030043\\_1\\_interlocks-speed-limit-offenders](http://articles.baltimoresun.com/2009-11-04/news/0911030043_1_interlocks-speed-limit-offenders).

24. Paul Carpenter, *Breathalyzer Interlocks (sob) Will Put a Crimp in Booze Sales*, MORNING CALL, Oct. 17, 2008, at B1.

25. Michael Tarm, *New Ignition Lock Laws Aim to Foil Drunk Drivers*, HUFFINGTON POST, Jan. 2, 2008, [http://www.huffingtonpost.com/2009/01/03/new-ignition-lock-laws-ai\\_0\\_n\\_154946.html](http://www.huffingtonpost.com/2009/01/03/new-ignition-lock-laws-ai_0_n_154946.html).

26. Carpenter, *supra* note 24.

27. Sara Jean Green, *Tough DUI Laws Take Effect*, SEATTLE TIMES, June 10, 2004, at B1, available at [http://www.nlada.org/DMS/Documents/1086883680.71/2001952693\\_duilaws10e.html](http://www.nlada.org/DMS/Documents/1086883680.71/2001952693_duilaws10e.html).

28. Terry Galanoy, *First-Time Driving Offenders Don’t Get off Easy*, CNN, Nov. 5, 2008, <http://www.cnn.com/2008/LIVING/wayoflife/11/05/aa.first.time.fines/> (emphasis added).

29. See Janet Dewey-Kollen & Angela Downes, *Shattering*

offenders at the “time of [their] arrest are almost as high as the rates of repeat offenders.”<sup>30</sup> Additionally, a three-year Massachusetts study evaluated 1,252 first-time offenders and found that “over [eighty] percent were assessed as problem drinkers or alcoholics.”<sup>31</sup> Therefore, alcohol ignition interlocks do not unfairly target first-time drunk driving offenders, since many of these drivers are likely to have alcohol abuse problems.

Moreover, the criminal justice theory behind alcohol ignition interlocks provides further support for its mandated use for first-time DWI offenders. By treating first-time DWI offenders the same as repeat offenders, Leandra’s Law tells New Yorkers that there is zero tolerance for drunk driving. Critics contend that such a policy will lead to “a country in which you’re no longer able to have a glass of wine, drink a beer at a ball game or enjoy a champagne toast at a wedding, [because of] a de facto zero tolerance policy imposed on people by their cars.”<sup>32</sup> This criticism, however, lacks merit. Supporters of alcohol ignition interlocks for all DWI offenders do not advocate zero tolerance for drinking alcohol in public. The goal of Leandra’s Law is not prohibition of alcohol. Rather, Leandra’s Law prohibits drinking alcohol *and then driving*.

This concept of zero tolerance originated in the “broken windows” theory of crime, developed by social scientist James Q. Wilson and criminologist George Kelling in 1982.<sup>33</sup> Wilson and Kelling explained that people were far “likelier to vandalize a building with one broken window than a building with none, since a broken window sends the message that no one cares, encouraging vandals to act on their destructive impulses.”<sup>34</sup> Wilson and Kelling then applied their theory to

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*Misconceptions About First-Time Drunk Driving Offenders*, PROSECUTOR: J. NAT’L DISTRICT ATT’YS ASS’N, Jan. 2008, at 14, available at 42-MAR PROSC 14 (WestLaw).

30. *Id.*

31. *Id.* at 15.

32. Tarm, *supra* note 25.

33. See generally James Q. Wilson & George Kelling, *Broken Windows*, THE ATLANTIC, Mar. 1982, available at <http://www.theatlantic.com/ideastour/archive/windows.mhtml> (examining inner-city crime and elucidating a new approach to the law enforcement of petty offenses).

34. Charles Upton Sahn, *Broken Windows Turns 25*, CITY J., Spring 2007, available at [http://www.city-journal.org/html/17\\_2\\_sndgs07.html](http://www.city-journal.org/html/17_2_sndgs07.html).

quality-of-life crimes, whereby “if a community tolerates quality-of-life offenses, it signals to all potential lawbreakers that it does not care what happens to them and more serious crime will soon result.”<sup>35</sup> New York City used the “broken windows” theory to police quality-of-life crimes and dramatically reduced all major crime rates to record lows.<sup>36</sup>

Leandra’s Law applies the “broken windows” theory to drunk driving. Before the law was passed, convicted drunk drivers were allowed to operate vehicles without alcohol ignition interlocks. This freedom to drive drunk essentially sent a message to New Yorkers that “no one cares”<sup>37</sup> about drunk drivers’ dangerous behavior. This disrespect for the law and society effectively encourages intoxicated drivers to act on their impulses, as drunk drivers will continue their destructive behavior and lives will continue to be lost. But by now mandating alcohol ignition interlocks for all DWI offenders, Leandra’s Law sends a message that drunk driving in New York will no longer be tolerated. Despite critics’ allegations that the law is merely zero tolerance for the drinking of alcohol, Leandra’s Law truly aims for zero deaths caused by drunk drivers.

#### B. *Examining the Effectiveness of Alcohol Ignition Interlocks*

At its essence, the success of alcohol ignition interlocks is found in the device itself. In contrast to mass media campaigns that aim to educate drivers about the perils of drunk driving, the alcohol ignition interlock does not rely on the decision-making ability of the drunk driver. Instead, the alcohol ignition interlock intervenes to preclude the driver from even starting the vehicle if his blood alcohol content is higher than a preset limit.<sup>38</sup>

Critics may argue that, in practice, alcohol ignition

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35. *Id.*

36. See, e.g., CHRISTOPHER DICKEY, SECURING THE CITY: INSIDE AMERICA’S BEST COUNTERTERRORISM FORCE – THE NYPD 12-19 (2009); William J. Bratton, Editorial, *New York’s Police Should Not Retreat*, N.Y. TIMES, Aug. 19, 1997, at A27 (crediting the broken windows theory with falling crime rates in New York City).

37. Wilson & Kelling, *supra* note 33.

38. Mothers Against Drunk Driving, *supra* note 6.



interlock laws are simply not effective. The evidence, however, shows otherwise. The National Highway Traffic Safety Administration found that “alcohol ignition interlocks have shown effectiveness in reducing DWI arrest rates while installed on offender vehicles.”<sup>39</sup> One study reports that, “[i]n the aggregate, evidence spanning nearly ten years by [eight] or more research groups in the United States and Canada point toward 40-95% reductions in recidivism while the interlock programs are in effect relative to DWI rates of matched groups of offenders who are simply suspended and should not be driving at all.”<sup>40</sup> In turn, another study indicates “that a high number of interlock users re-offend once the device is removed from their vehicles.”<sup>41</sup>

A few states have examined the recidivism rates among offenders required to use alcohol ignition interlocks versus those offenders who are not punished with alcohol ignition interlocks. In Arkansas, alcohol ignition interlock subjects “were less than half as likely to have a subsequent DWI conviction within three years.”<sup>42</sup> Additionally, in Maryland, researchers “found statistically significant reductions in recidivism by multiple offenders who installed interlock devices in [their] vehicles.”<sup>43</sup> An Ohio study found even more impressive results: “recidivism rates were three times higher for offenders who received a license suspension compared with offenders placed in an interlock group.”<sup>44</sup> “After [thirty]

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39. RICHARD P. COMPTON & JAMES HEDLUND, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., REDUCING IMPAIRED-DRIVING RECIDIVISM USING ADVANCED VEHICLE-BASED ALCOHOL DETECTION SYSTEMS vii, Report No. DOT HS 810 876, (Dec. 12, 2007), *available at* <http://www.nhtsa.gov/staticfiles/DOT/NHTSA/Traffic%20Injury%20Control/Articles/Associated%20Files/810876.pdf>.

40. DR. PAUL R. MARQUES ET AL., INT’L COUNCIL ON ALCOHOL, DRUGS & TRAFFIC SAFETY, ALCOHOL IGNITION INTERLOCK DEVICES I: POSITION PAPER, at 10 (2001), <http://www.icadts.org/reports/AlcoholInterlockReport.pdf>.

41. JAMES E. FREEMAN & POPPY LIOSSIS, CTR. FOR ACCIDENT RESEARCH & ROAD SAFETY, IMPACT OF ALCOHOL IGNITION INTERLOCKS ON A GROUP OF RECIDIVIST DRINK DRIVERS 61 (2002), <http://www.rsconference.com/pdf/RS020107.PDF?check=1>.

42. Andrew Fulkerson, *The Ignition Interlock System: An Evidentiary Tool Becomes a Sentencing Element*, AM. J. DRUG & ALCOHOL ABUSE, Winter 2003, at 21, *available at* [http://aja.ncsc.dni.us/courtrv/cr39\\_4/CR39-4Fulkerson.pdf](http://aja.ncsc.dni.us/courtrv/cr39_4/CR39-4Fulkerson.pdf).

43. *Id.*

44. *Id.*

months, only 1.5% of the Ohio interlock subjects were rearrested, compared to 16.1% of the non-interlock group.”<sup>45</sup> These studies give credence to New York’s decision to mandate alcohol ignition interlocks.

Yet, perhaps the strongest evidence in support of New York’s decision to enact Leandra’s Law appears in New Mexico. In June 2005, New Mexico became the first state in the nation to mandate that drivers, after a first drunk driving conviction, install an alcohol ignition interlock on their vehicles.<sup>46</sup> New Mexico previously required interlocks only for a second or subsequent conviction, or for a first aggravated drunk driving conviction.<sup>47</sup> Under its new law:

Upon a conviction pursuant to this section, an offender shall be required to obtain an ignition interlock license and have an ignition interlock device installed and operating on all motor vehicles driven by the offender, pursuant to rules adopted by the bureau. Unless determined by the sentencing court to be indigent, the offender shall pay all costs associated with having an ignition interlock device installed on the appropriate motor vehicles. The offender shall operate only those vehicles equipped with ignition interlock devices for: (1) a period of one year, for a first offender; (2) a period of two years, for a second conviction pursuant to this section; (3) a period of three years, for a third conviction pursuant to this section; or (4) the remainder of the offender’s life, for a fourth or subsequent conviction pursuant to this section.<sup>48</sup>

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45. *Id.*

46. Christy Gutowski, *New State DUI Law’s Success Rate Remains a Source of Debate*, CHI. DAILY HERALD, Feb. 8, 2009, available at <http://www.dailyherald.com/story/?id=270390&src=1>.

47. Kate Nash, *Many Drivers Dodge N.M.’s Interlock Law: Less Than Half of Ignition Devices Required Get Installed, Says Researcher*, ALBUQUERQUE TRIBUNE, Nov. 21, 2006, available at <http://www.abqtrib.com/news/2006/nov/21/many-drivers-dodge-nms-interlock-law/>.

48. N.M. STAT. ANN. § 66-8-102(N) (LexisNexis 2005).

The results of the New Mexico law were extraordinary. According to Governor Bill Richardson, research indicated that in 2006, “ignition interlocks prevented some 63,000 alcohol-involved driving events.”<sup>49</sup> According to MADD, New Mexico experienced a twenty-five percent drop in alcohol-related fatalities the first year it enacted the same law.<sup>50</sup> In 2008, a study of New Mexico’s alcohol ignition interlock program by the Pacific Institute of Research and Evaluation found a reduction in drunk driving recidivism of over 60%.<sup>51</sup> “Statistics show a [nineteen percent] drop in [drunk driving] fatalities there from 2004 to 2007.”<sup>52</sup> Similar developments in New York would be truly extraordinary.

Critics, however, still allege that New Mexico’s law was not effective. They contend that “the last six months of 2005, when the law was in effect were statistically unchanged from the last six months of 2004: 115 deaths in the last half of 2004 and 116 in the last half of 2005.”<sup>53</sup> Critics further argue that courts did not actually mandate alcohol ignition interlocks on all DWI offenders. For instance, in 2006, 11,789 offenders were convicted of drunk driving but only 5,038 interlocks were installed.<sup>54</sup> This deficiency did not seem to improve by 2008, as the following example illustrates. Gerald Cavalier, an Albuquerque man with a lengthy history of drunk driving arrests, was charged with driving while intoxicated.<sup>55</sup> As a condition of his earlier guilty plea to drunk driving charges, “Cavalier was supposed to have an alcohol-sensing ignition interlock device installed on his vehicle.”<sup>56</sup> Unfortunately, no such device was found on the vehicle when Cavalier was stopped for drunk driving.<sup>57</sup> While no lives were lost, the

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49. Press Release, Mothers Against Drunk Driving, New Data Shows Disturbing Number of Repeat Drunk Drivers on America’s Roadways (Nov. 25, 2008), <http://www.madd.org/Media-Center/Media-Center/Press-Releases/PressView.aspx?press=168>.

50. Rob Olmstead, *Get a DUI, Take a Deep Breath*, CHI. DAILY HERALD, Jan. 1, 2009, at 9.

51. Tarm, *supra* note 25.

52. Gutowski, *supra* note 46.

53. Olmstead, *supra* note 50.

54. Nash, *supra* note 47.

55. Jeff Proctor, *DWI Suspect Has 3 Arrests, 3 Convictions; Cops: Man Stopped with Minors in Car*, ALBUQUERQUE J., Nov. 6, 2008, at 2.

56. *Id.*

57. *Id.*

Cavalier example is certainly unsettling.

Although mandating alcohol ignition interlocks for all offenders clearly has not been perfected, New Mexico's law still seems rather successful. According to Rachel O'Connor, New Mexico's DWI coordinator, discrepancies between mandated alcohol ignition interlocks and the number actually installed indicate that some offenders are simply driving on a revoked license while others lie to the judge about whether they own a vehicle.<sup>58</sup> Inefficient court bureaucracy, rather than innovative technology, seems to be the problem. Despite critics' claims, the number of alcohol ignition interlocks installed in New Mexico remains significantly more per capita than in any other state.<sup>59</sup>

Justice Louis Brandeis wrote that, "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."<sup>60</sup> As a trailblazer in the use of alcohol ignition interlocks, New Mexico served as an important laboratory that New York is currently emulating. While the New Mexico alcohol ignition interlock law's practical shortcomings still need to be corrected, the law deserves acclaim for its proactive approach in the fight against drunk driving.

*C. Separation of Powers Issues in Pennsylvania's Alcohol Ignition Interlock Law.*

Since mandating alcohol ignition interlocks for first-time drunk driving offenders is a fairly new legal phenomenon, the courts have been relatively silent about any possible constitutional violations associated with such laws. Yet, with more states adopting legislation that punishes all drunk driving offenders with alcohol ignition interlocks, it is likely that courts—particularly in the litigious culture of New York State—will soon be determining the constitutionality of their use. Thus, it is helpful to examine how courts have viewed

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58. Nash, *supra* note 47.

59. Gutowski, *supra* note 46.

60. *New State Ice Co. v. Liebman*, 285 U.S. 262 (1932) (Brandeis, J., dissenting).

mandating alcohol ignition interlocks for *repeat* drunk driving offenders. Pennsylvania's Ignition Interlock law (hereinafter "Act 63")<sup>61</sup> serves as a fascinating case study in this area, particularly in regard to whether mandating alcohol ignition interlocks violates the separation of powers doctrine.

The pertinent parts of Act 63 are as follows:

**(a) First offense.** In addition to any other requirements imposed by the court, where a person has been convicted for a first offense under 75 Pa.C.S. § 3731 (relating to driving under influence of alcohol or controlled substance), the court may order the installation of an approved ignition interlock system on each motor vehicle owned by the person to be effective upon the restoration of operating privileges by the department. A record shall be submitted to the department when the court has ordered the installation of an approved interlock ignition device. Before the department may restore such person's operating privilege, the department must receive a certification from the court that the ignition interlock system has been installed.

**(b) Second or subsequent offense.** In addition to any other requirements imposed by the court, where a person has been convicted of a second or subsequent violation of 75 Pa.C.S. § 3731, the court shall order the installation of an approved ignition interlock device on each motor vehicle owned by the person to be effective upon the restoration of operating privileges by the department. A record shall be submitted to the department when the court has ordered the installation of an approved interlock ignition device. Before the department may restore such person's operating privilege, the department must receive a certification from the court that the ignition interlock system has been

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61. 42 PA. CONS. STAT. ANN. § 7002 (West 2004).

installed.<sup>62</sup>

In *Commonwealth v. Mockaitis*, the defendant entered a guilty plea to Driving Under the Influence (DUI), his second DUI offense.<sup>63</sup> The trial court sentenced the defendant to imprisonment and, pursuant to Act 63, ordered an alcohol ignition interlock to be installed on each motor vehicle owned by the defendant prior to restoration of the defendant's operating privileges by the Pennsylvania Department of Transportation (hereinafter "the Department").<sup>64</sup> The defendant "moved to modify his sentence, arguing that Act 63 was facially unconstitutional" because it violated the separation of powers doctrine.<sup>65</sup> The Pennsylvania Supreme Court agreed and found Act 63 unconstitutional.<sup>66</sup>

The Pennsylvania Supreme Court reasoned that:

delegation to the judiciary of the executive functions necessary to effectuate issuance of an alcohol ignition interlock restricted license - *i.e.*, ordering installation of the interlock system(s) as a condition to applying to the Department for a restricted license, verifying compliance, and apprising the Department of the court's determinations - impermissibly violates the separation of powers doctrine.<sup>67</sup>

The court reasoned that the Pennsylvania General Assembly, in passing this legislation, cannot "constitutionally impose upon the judicial branch powers and obligations exclusively reserved to the legislative or executive branch; nor can it in essence deputize judicial employees to perform duties more properly reserved to another of the co-equal branches of government."<sup>68</sup> Act 63's mandatory language "essentially forces court employees to serve the function of the Department

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62. *Id.* § 7002(a) & (b).

63. 834 A.2d 488, 491 (Pa. 2003).

64. *Id.* at 491-92.

65. *Id.* at 492.

66. *Id.* at 499.

67. *Id.*

68. *Id.* at 500.

of Transportation in discharging its executive responsibility of regulating whether and when repeat DUI offenders are entitled to conditional restoration of their operating privileges.”<sup>69</sup> By mandating that the trial court “serve the function of the Department, and thereby impose unfunded executive responsibilities upon the judicial branch of government,” the court held that Act 63 was “fatally flawed.”<sup>70</sup>

*Mockaitis* raises a number of issues that must be addressed if mandatory alcohol ignition interlocks for first-time offenders are to be constitutionally upheld. Therefore, it is advantageous to look at another Pennsylvania case that, although later overturned by the same Pennsylvania Court that upheld *Mockaitis*, took a different approach to the separation of powers issue. In *Turner v. Commonwealth, Department of Transportation, Bureau of Licensing*,<sup>71</sup> the Commonwealth Court of Pennsylvania found that Act 63 did not violate the separation of powers doctrine because the trial court’s action of certifying an offender’s compliance with a mandatory alcohol ignition interlock “is connected with the functions of the trial court.”<sup>72</sup>

In *Turner*, the court reasoned that the alcohol ignition interlock law was “not the only instance where the trial court is required by the General Assembly to report a defendant’s compliance with a condition of restoration of his operating” a vehicle privilege.<sup>73</sup> For example, court-ordered intervention or treatment has been found to be constitutional when a license suspension remains in effect until the Department of Transportation is notified by the court that “the defendant has successfully completed treatment.”<sup>74</sup> In such cases, judges are

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69. *Id.* at 501.

70. *Id.*

71. 805 A.2d 671 (Pa. Commw. Ct. 2002), *rev’d by order*, 922 A.2d 878 (Pa. 2007) (per curiam).

72. *Id.* at 675.

73. *Id.*

74. *Id.* at 676; *see also* 75 PA. CONS. STAT. ANN. § 1548(f)(2) (West 2004):

**Court-ordered intervention or treatment.** . . . A record shall be submitted to the department as to whether the court did or did not order a defendant to attend a program of supervised individual or group counseling treatment or supervised inpatient or outpatient treatment. If the court orders treatment, a report shall be forwarded to the

appropriately applying the laws to the cases before them—and are not burdening the separation of powers doctrine.

If New York courts are confronted with this separation of powers issue in the future, *Turner* appears to present the more appropriate analysis. It is not necessarily accurate to contend that mandating alcohol ignition interlocks is an executive, rather than judicial, function. If the Legislature passes a bill that provides a new way to fight drunk driving, and the Governor signs such a bill into law, the judiciary is not infringing upon the rights of the other branches of government if it merely applies the law as written. Legislatures can “identify certain sentencing factors and determine the weight those factors [are] to be given in selecting an appropriate sentence.”<sup>75</sup> The United States Supreme Court has “never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range.”<sup>76</sup> Mandating alcohol ignition interlocks is no more onerous on the separation of powers doctrine than when legislatures pass laws mandating court ordered drug treatment<sup>77</sup> or treatment for adult sexual offenders.<sup>78</sup>

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department as to whether the defendant successfully completed the program. If a defendant fails to successfully complete a program of treatment as ordered by the court, the suspension shall remain in effect until the department is notified by the court that the defendant has successfully completed treatment and the defendant is otherwise eligible for restoration of his operating privilege. In order to implement the recordkeeping requirements of this section, the department and the court shall work together to exchange pertinent information about a defendant's case, including attendance and completion of treatment or failure to complete treatment.

75. *United States v. Grier*, 475 F.3d 556, 611-12 (3d Cir. 2007) (finding “that the Constitution is not offended by the historical manner in which judges have gone about fact finding that inform the appropriate exercise of judicial discretion at sentencing”).

76. *United States v. Booker*, 543 U.S. 220, 233 (2005) (finding that “when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant”).

77. *Clark v. State*, 705 A.2d 1164 (Md. 1998) (finding that the Maryland legislature can enact a drug treatment statute).

78. *Leamer v. New Jersey*, No. 95-5105, 2007 U.S. Dist. LEXIS 53288 (D.N.J. July 24, 2007) (examining the New Jersey Legislature’s Sex Offender Act, which aimed to provide treatment to those whose sexual criminal conduct demonstrated a pattern of repetitive-compulsive behavior).



Moreover, the judiciary has taken on a more expansive, albeit constitutional, role in establishing community problem-solving courts in recent years. For example, drug courts have gained widespread acclaim for their success in reducing recidivism among drug offenders. Instead of relying on executive or legislative action, drug courts seek to reduce drug recidivism by incorporating therapeutic drug treatment and serious sanctions for negative behavior.<sup>79</sup> Judith S. Kaye, the esteemed former-Chief Judge of the New York Court of Appeals said, “[n]o longer remote umpires of legal disputes, Drug Treatment Court judges play an active role in the treatment process: monitoring compliance, rewarding progress, and sanctioning infractions.”<sup>80</sup> Drug court judges have an unprecedented responsibility in the courtroom, as they personally engage drug offenders and make emotional displays “a central feature of the courtroom drama, a development that not only markedly effects the nature of courtroom theater but portends to redefine the standards by which judicial programs are evaluated.”<sup>81</sup>

Similar to the expanded judicial power of drug courts, mandating alcohol ignition interlocks is a common-sense approach that employs the courts to reduce drunk driving. Leandra’s Law, therefore, does not appear to violate the separation of powers doctrine and should be held constitutional in future challenges in New York.

### III. The Future of Alcohol Ignition Interlocks

New York’s roadways, of course, do not operate in a vacuum. Repeat drunk drivers from states that do not mandate alcohol ignition interlocks will inevitably operate their vehicles in New York. New York will also, undoubtedly, confront drunk drivers who have no criminal DWI history on

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79. See generally Faye S. Taxman & Jeffrey Bouffard, *Treatment Inside the Drug Treatment Court: The Who, What, Where, and How of Treatment Services*, 37 *SUBSTANCE USE & MISUSE* 1665 (2002).

80. JAMES L. NOLAN, *REINVENTING JUSTICE: THE AMERICAN DRUG COURT MOVEMENT* 90 (2001) (quoting former-Chief Judge Judith S. Kaye).

81. *Id.* at 155. See also Hon. Peggy Fulton Hora, Hon. William G. Schma & John T.A. Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System’s Response to Drug Abuse and Crime in America*, 74 *NOTRE DAME L. REV.* 439 (1999).

their records. Consequently, advocates have suggested the universal use of alcohol ignition interlocks. Yet, if the Federal Government mandated alcohol ignition interlocks on all vehicles, regardless of the driver's propensity to drink and drive, civil liberties groups would likely protest and drivers, perhaps quite understandably, would object to being forced to install alcohol ignition interlocks in their vehicles.<sup>82</sup> In a short piece discussing this subject in an almost-prescient 1998 article in the Manhattan Institute's *City Journal*, Harris Silver proposed a fascinating alternative that seems to assuage both civil liberties groups and drivers.<sup>83</sup> According to Silver, the typical car owner would install an alcohol ignition interlock in his vehicle if there would be a significant decrease in insurance premiums.<sup>84</sup> By agreeing to equip one's car with an interlock device, insurance premiums would indeed decrease, as the individual removes himself from the risk pool that, by some estimates, "wreaks a staggering \$100 billion in damage annually."<sup>85</sup> As Silver points out, "[w]ith fewer traffic deaths, society as a whole benefits, while prudent drivers get a substantial break—all without coercion."<sup>86</sup> If multiple states adopt insurance premium breaks to persuade citizens that putting alcohol ignition interlocks in their vehicles is safe *and* saves money, the use of alcohol ignition interlocks would grow even more widespread. As MADD's Chief Executive Officer Chuck Hurley commented, the universal use of alcohol ignition interlocks would "make drunk driving the public health equivalent of polio."<sup>87</sup>

At the same time, if all fifty states adopt laws requiring alcohol ignition interlocks for all DWI offenders, "the number of interlocks in the country could grow to 750,000."<sup>88</sup> With the

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82. Harris Silver, *How to Stop Drunk Driving*, CITY J., 1998, at 11, available at [http://www.city-journal.org/html/8\\_2\\_sndgs10.html](http://www.city-journal.org/html/8_2_sndgs10.html).

83. *See id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. Aubrey Fox, *The Fight Against Drunk Driving*, GOTHAM GAZETTE, (Nov. 2007), <http://www.gothamgazette.com/article/crime/20071119/4/2349> (quoting Chuck Hurley).

88. Ken Bensinger, *Keeping the Drunk Driver Off the Road; Lawmakers Ponder Requiring Alcohol Detection Devices for Convicted Offenders*, L.A. TIMES, May 24, 2008, at C1.

increased use of alcohol ignition interlocks, abusers have found new ways to try to defeat the device and avoid alcohol detection. For instance, in Wisconsin, a six-time drunk driver used a balloon attached to the interlock and an air compressor plugged into the cigarette lighter to start his car and proceeded to drive drunk.<sup>89</sup> If the use of alcohol ignition interlocks becomes more widespread, the technology associated with it must become easier to test but harder to manipulate.

Fortunately, it appears as though future technology may alleviate some of the practical problems alcohol ignition interlocks currently face. MADD's Hurley said that the prospects for rapid technological change are great, "pointing to a recent agreement between the United States Department of Transportation and major car manufacturers to devote \$10 million to researching ignition interlocks."<sup>90</sup> One innovative company, Smart Start, Inc., has introduced a Photo Identification Ignition Interlock device, which "ties photographs of the interlock user to an [alcohol] ignition interlock device. The device identifies who is actually taking the breath test, on each and every test, or attempted test."<sup>91</sup> The device saves the information on a microchip to prevent any form of cheating.<sup>92</sup>

While the technology needs to be further developed and its costs analyzed, alcohol ignition interlocks certainly appear to be the future of fighting drunk driving. Leandra's Law may only be the beginning of New York's serious battle against drunk driving.

#### IV. Conclusion

"There would be no alcohol-impaired driving, and no crashes, injuries, or fatalities involving alcohol, if it were impossible for a person with a positive BAC to start or operate a vehicle."<sup>93</sup> Leandra's Law is a critical piece of legislation that

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89. *Ignition Device Tampered, Police Say*. MILWAUKEE J. SENTINEL, Oct. 12, 2008, at W2.

90. Fox, *supra* note 87.

91. *Saving Lives Starts with Who Drives . . . ; Smart Start Launches a Photo-ID Ignition Interlock Device*, BUS. WIRE, Oct. 31, 2008.

92. Bensinger, *supra* note 88.

93. COMPTON & HEDLUND, *supra* note 39, at vii.

will help make drunk driving impossible—and save lives. In the dangerous world of drunk driving, there are no second chances. Innocent lives can be lost instantly when a drunk driver operates a motor vehicle. New York should be commended for acting promptly and decisively in passing legislation mandating alcohol ignition interlocks for all drunk driving offenders.