

LEGISLATING UNDER THE INFLUENCE: ARE FEDERAL HIGHWAY INCENTIVES ENOUGH TO INDUCE STATE LEGISLATURES TO PASS A 0.08 BLOOD ALCOHOL CONCENTRATION STANDARD?

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TABLE OF CONTENTS

I.	INTRODUCTION.....	415
II.	BACKGROUND ON THE PERTINENT LEGISLATIVE HISTORY	417
III.	SPENDING POWER ANALYSIS	423
IV.	NEW JERSEY'S LEGISLATIVE ALTERNATIVES	427
	A. The Debate in New Jersey.....	432
	B. Economic Impact.....	433
V.	APPROACH TAKEN BY OTHER STATES	435
VI.	CONCLUSION.....	437

I. Introduction

In response to growing concerns about drunk driving, the federal government passed 23 U.S.C. § 163 to encourage states to lower the legal blood alcohol concentration (“BAC”) level from 0.10 to 0.08.¹

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¹ 23 U.S.C.A. § 163(a) (West Supp. 2003). The statute provides: Safety incentives to prevent operation of motor vehicles by intoxicated persons; (a) General authority. The Secretary shall make a grant, in accordance with this section, to any State that has enacted and is enforcing a law that provides that any person with a blood alcohol concentration of 0.08 percent or greater while operating a motor vehicle in the State shall be deemed to have committed a per se offense of driving while intoxicated (or an equivalent per se offense).

The law, passed under the spending power, allows the government to withhold 2 percent from federal highway funds, starting in 2004, if states do not comply with the federal mandate.² Each subsequent year, until 2007, an additional 2 percent will be withheld from states that are not in compliance.³ Therefore, any state that does not pass legislation to lower the BAC to 0.08 will have 8 percent of their state's federal funding withheld in 2007, and each subsequent fiscal year thereafter.⁴ Currently, all but four states have acquiesced and put this requirement into law.⁵ As of the 2004 federal deadline, New Jersey, Colorado, Delaware, Minnesota, and West Virginia continued to resist passing the law despite having lost 2 percent of their federal highway aid for 2004.⁶

New Jersey is one of five states that missed the 2004 deadline for adoption of the federal blood alcohol content regulations, despite monetary sanctions.⁷ Consequently, New Jersey lost \$7.2 million dollars in federal transportation aid for 2004.⁸ The penalty for failing to

Id.

² 23 U.S.C.A. § 163(b) (West Supp. 2003).

(b) Grants. For each fiscal year, funds authorized to carry out this section shall be apportioned to each State that has enacted and is enforcing a law meeting the requirements of subsection (a) in an amount determined by multiplying—

(1) the amount authorized to carry out this section for the fiscal year; by

(2) the ratio that the amount of funds apportioned to each such State under section 402 for such fiscal year bears to the total amount of funds apportioned to all such States under section 402 for such fiscal year.

Id.

³ 23 U.S.C.A. § 163 History; Ancillary Laws And Directives (West Supp. 2003).

⁴ *Id.*

⁵ Ben Scott, *State Set to Lose \$4.9 Million in Federal Funding Deadline to Lower Blood-Alcohol Limit is Today*, DENV. POST, Oct. 1, 2003, at B4. Pennsylvania was also a hold-out on passing the 0.08 law, but finally made the changes to the current law on September 30, 2003, just in time to receive the full federal highway grant. Bill Toland and Mike Buscko, *PA. DUI Limit Falling to 0.08 Just in Time to Meet U.S. Deadline*, PITTSBURGH POST-GAZETTE, Sept. 30, 2003, at A1. The new penalty system will not take effect until February 1, 2004. *Id.*

⁶ Tony Kennedy, *Pawlenty wants 0.08 to become the law; The state's blood-alcohol standard for drivers is tied to federal highway funds*, STAR TRIBUNE (Minn), Oct. 31, 2003, at 1A. The Governor of Minnesota, Tim Pawlenty, has promised to aggressively push for a legal threshold of 0.08 percent blood-alcohol concentration. *Id.* Governor Pawlenty stated that this is a "key initiative" of his administration and will attempt to prevent the state from losing \$57 million dollars in federal road construction money this year. *Id.* Just last year Pawlenty signed a law allowing bars to extend their closing time until 2 a.m. *Id.*

⁷ Jeremy Pearce, *Briefings: Transportation; Loss of Highway Funds*, N.Y. TIMES, Oct. 5, 2003, at NJ 6.

⁸ Larry Higgs, *Lawmakers May Target Legal Limit for Drinks*, HOME NEWS TRIBUNE (N.J.), Nov. 10, 2003, available at

adopt the new BAC standard will increase to \$14 million in 2005, \$21.5 million in 2006, and \$28.7 million in 2007.⁹ The withheld federal aid is placed in escrow for the state, and a prorated amount can be recovered if the required measures are eventually adopted.¹⁰

This note explores the legislative responses that New Jersey has considered in response to the federal government's passage of the BAC legislation, and will make recommendations as to the viability of each of these measures. It also examines the advantages and disadvantages of a variety of approaches used by other states in dealing with this issue. The note appraises the legal validity of passing the federal measure, including whether the 0.08 BAC law is a valid exercise of the federal spending power, and whether the inducement involved is so great that it reaches the level of compulsion. Finally, this note will comment on the political process and its ultimate effect on the BAC legislation in New Jersey.

II. Background on the Pertinent Legislative History

By enacting 23 U.S.C. § 163, the federal government decided to withhold federal highway funds from any State that does not enforce a law providing, "any person with a blood alcohol concentration of 0.08 percent or greater while operating a motor vehicle in the State shall be deemed to have committed a per se offense of driving while intoxicated."¹¹ In order to insure state compliance, the federal government may withhold a percentage of the states' highway funding.¹² Beginning in 2004, the federal government will withhold 2 percent of the state's highway funding beginning in 2004.¹³ The percentage withheld increases by 2 percent for each successive year until 2007,

<http://www.injersey.com/thnt/story/0,212,852335,00.html>.

⁹ Tom Baldwin, *Senate Panel OKs Lower DUI Threshold*, HOME NEWS TRIBUNE (N.J.), Jan. 11, 2004, available at <http://www.thnt.com/thnt/story/0,21282,884390,00.html>.

¹⁰ Larry Higgs, *Extra Drink May Cost New Jersey 7 Million*, HOME NEWS TRIBUNE (N.J.), Nov. 10, 2003, available at <http://www.injersey.com/thnt/story/0,212,852334,00.html>. This article explains that the funds are recoverable upon implementation of the standard. *Id.* Tom Baldwin, *Lower Drunk Driving Standard Sent to Governor*, GANNETT STATE BUREAU, Jan. 13, 2004, available at <http://www.injersey.com/gsbr/story/0,21421,886687,00.html>. Loretta Weinberg, the bill's primary sponsor, explains that the amount withheld is recoverable, but this amount is prorated for the time that has elapsed without the 0.08 percent standard. *Id.*

¹¹ 23 U.S.C.A. § 163(a) (West Supp. 2003).

¹² 23 U.S.C.A. § 163 History; Ancillary Laws And Directives (West Supp. 2003).

¹³ *Id.*

when it reaches 8 percent of the total budget.¹⁴

If the state initially chooses not to enact the law, it can recover the funds lost in previous years by enacting the law by October 1, 2006, at which time all funds are prorated and restored retroactively.¹⁵ However, if the state does not enact the law by that date, any amount withheld is permanently lost.¹⁶ In addition, the federal government will continue to withhold 8 percent from state highway funding in subsequent fiscal years after 2008, which will not be recoverable.¹⁷

The main purpose behind the federal law is to combat the drunk driving problem in America and ultimately save lives.¹⁸ Senator Lautenberg (D-NJ), co-sponsor of the bill, remarked that by changing to the 0.08 standard, “[w]e can prevent many injuries and deaths that result from drunk driving by making 0.08 the national alcohol limit.”¹⁹ During the debate on the bill, Senator Reed (D-RI) referred to drunk driving as, “a scourge on the highways of the United States of America.”²⁰ According to a Mothers Against Drunk Driving (“MADD”) survey, 53 percent of Americans considered drunk drivers to be the nation’s number one highway safety problem, and 68.8 percent of Americans are in favor of lowering the legal blood alcohol limit to 0.08.²¹ The United States Department of Transportation estimates that drunk driving causes approximately 18,000 deaths and a half-million injuries nationwide each year.²²

In order to illustrate the dangerous effects alcohol has on drivers, several studies were presented on the Senate floor during the debate.

¹⁴ *Id.*

¹⁵ Scott, *supra* note 5; Baldwin, *supra* note 10.

¹⁶ John Sanko, *Lowering DUI Limit A \$20M Question; Legislators Take First Step to Toughen Law*, ROCKY MOUNTAIN NEWS, Oct. 16, 2003, at A34.

¹⁷ Brad Heath, *Bad Drivers Get Bad News; State Lawmakers OK Plan to Make Motorists with Seven Points Pay an Annual Fee*, DETROIT NEWS, July 17, 2003, at D1. Michigan passed MCLS § 257.625 in order to implement the 0.08 BAC standard. *Id.*

¹⁸ 144 CONG. REC. S1298 (daily ed. Mar. 4, 1998) (statement of Sen. Lautenberg and Sen. DeWine).

¹⁹ 144 CONG. REC. S1298 (daily ed. Mar. 4, 1998) (statement of Sen. Lautenberg). Senator Lautenberg was attempting to bring the United States’ drinking limit standards in line with other westernized countries such as Canada, Ireland, Great Britain, Italy, Austria, and Germany. 144 CONG. REC. S1225 (daily ed. Mar. 3, 1998) (statement of Sen. Lautenberg).

²⁰ 144 CONG. REC. S1298 (daily ed. Mar. 4, 1998) (statement of Sen. Reed).

²¹ 144 CONG. REC. S1298 (daily ed. Mar. 4, 1998) (statement of Sen. Feinstein).

²² Jon Craig, *Drivers Face Lower DUI Level*, COLOMBUS DISPATCH (Ohio), June 29, 2003, at D-01.

The National Institute on Alcohol and Alcohol Abuse at the National Institute of Health (“NIH”) provided the Senate with detailed findings on how alcohol affects the function of the body.²³ The report explained how the brain’s control of eye movement is seriously impaired by alcohol.²⁴ For example, when a person is driving, the eye must focus on objects and then monitor them as they, and the vehicle, move.²⁵ Additionally, steering is a complex task that requires significant eye-to-hand coordination.²⁶ The studies showed that significant impairment of steering ability may begin at a BAC as low as 0.04.²⁷ Moreover, alcohol-impaired drivers require more time to read street signs and respond to traffic signals than unimpaired drivers.²⁸

In 1997, the National Highway and Transportation Safety Administration (“NHTSA”) indicated that practically all drivers, regardless of skill, are significantly impaired at the 0.08 BAC level.²⁹ At the 0.08 level, basic driving skills such as braking, steering, and speed control, as well as judgment, reaction time, and focused attention are adversely affected.³⁰ Furthermore, according to a study conducted by MADD, drivers are 11 times more likely to get in a car accident if they drive with a BAC of 0.08 percent than an alcohol free driver.³¹ The MADD study also concluded that a driver with a BAC of 0.10 percent is 29 times more likely to have a car accident than a completely unimpaired driver.³²

During the congressional hearings on passage of the 0.08 BAC law, several Senators cited statistics illustrating the severity of the drunk driving problem in America today, opining as to how the legislation in question would impact this problem.³³ Senator Durbin (D-IL) stated that

²³ 144 CONG. REC. S1298 (daily ed. Mar. 4, 1998) (statement of Sen. Wellstone).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ 144 CONG. REC. S1298 (daily ed. Mar. 4, 1998) (statement of Sen. Chaffe). The report conducted by the NHTSA was entitled, “Setting Limits, Saving Lives: The Case for 0.08 BAC Laws.” *Id.*

³⁰ *Id.*

³¹ 144 CONG. REC. S1298 (daily ed. Mar. 4, 1998) (statement of Sen. Wellstone).

³² *Id.*

³³ 144 CONG. REC. S1298 (daily ed. Mar. 4, 1998) (statements of Sen. Lautenberg, DeWine, Wellstone, Reed, Feinstein, and Chaffe).

every 30 minutes an American is killed by a drunk driver.³⁴ The National Public Services Research Institute reported that every year accidents involving drivers with BACs of 0.08 to 0.09 kill 660 people and injure 28,000.³⁵ Similarly, a preliminary evaluation of the legislation done by the NHTSA projects that the 0.08 BAC level would reduce alcohol related fatalities by five to eight percent.³⁶

Before the passage of the federal law, 15 states had already adopted the 0.08 BAC standard.³⁷ A study by Boston University concluded that the 15 states that adopted the 0.08 standard experienced a 16 percent decline in fatal accidents where the driver's BAC was 0.08 or greater.³⁸ The congressional findings indicated that on a national level, lowering the BAC would save approximately 500 to 600 lives each year.³⁹

However, there is some conflicting evidence regarding the efficacy of a lower standard.⁴⁰ Some reports have suggested that the 0.08 limit will not affect the behavior of repeat DUI offenders, whose blood alcohol level is often greater than 0.15.⁴¹ This group is the most dangerous and deadly of all offenders. According to the American Beverage Licensees, a trade group comprised of bar owners and liquor store managers, repeat offenders are the least likely to be influenced by the new law.⁴² Moreover, a study by the University of North Carolina, performed after North Carolina reduced its drunk driving limit, found that the state did not show a significantly greater decrease in accidents than states that had retained the higher BAC level of 0.10.⁴³ According to the doctors who conducted the study, the new law did not seem to

³⁴ 144 CONG. REC. S1298 (daily ed. Mar. 4, 1998) (statement of Sen. Durbin).

³⁵ 144 CONG. REC. S1298 (daily ed. Mar. 4, 1998) (statement of Sen. Wellstone).

³⁶ 144 CONG. REC. S1298 (daily ed. Mar. 4, 1998) (statement of Sen. Durbin).

³⁷ 144 CONG. REC. S1298 (daily ed. Mar. 4, 1998) (statement of Sen. Reed).

³⁸ *Id.*

³⁹ 144 CONG. REC. S1298 (daily ed. Mar. 4, 1998) (statement of Sen. Durbin).

⁴⁰ Bill Toland & Mike Buscko, *PA. DUI Limit Falling to 0.08 Just in Time to Meet U.S. Deadline*, PITTSBURGH POST-GAZETTE, Sept. 30, 2003, at A1. The author explains that evidence on the impact of lower DUI limits point in "both ways". *Id.* Studies done by the Pacific Institute and Evaluation and Boston University suggest that 0.08 laws would result in a drop in alcohol related fatalities. *Id.* However, a study conducted by the University of North Carolina seems to suggest that the 0.08 law would have no effect on alcohol-related fatalities. *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

have, “any clear effect on alcohol-related crashes.”⁴⁴ A study in California also showed that the lower limit did not reduce the number of DUI accidents or arrests.⁴⁵ Accidents declined only after implementing a second set of laws that made it easier for authorities to confiscate driver's licenses.⁴⁶

In direct contrast to the above statistics, a study conducted by Rainbow Technologies reviewed the statistics in eleven states with 0.08 BAC laws and found a significant decline in alcohol related fatalities in seven of the eleven states.⁴⁷ In five of the seven states, the reduction was attributed solely to the 0.08 standard.⁴⁸ In two of the seven states, the reduction was associated with a combination of the 0.08 standard and administration license revocation (“ALR”) laws enacted within six months of each other.⁴⁹ In four states, the 0.08 standard did not have any effect on the number of alcohol-related fatalities.⁵⁰ An additional study, conducted by the Pacific Institutes for Research and Evaluation, reviewed forty states with a 0.08 BAC regulation and found that the law reduced the involvement of intoxicated drivers in fatal crashes by approximately 8 percent.⁵¹

Along with these conflicting statistics, passage of 23 U.S.C. § 163 received vigorous opposition in Congress on a variety of other grounds.⁵² The first argument made against the passage of the law was

⁴⁴ *Id.* The authors of the North Carolina study found that the law did not show “a significantly greater decrease [in accident numbers] in North Carolina than in the states that retained a higher BAC . . . [it] did not have any clear effect on alcohol-related crashes.” *Id.*

⁴⁵ *Id.*

⁴⁶ Toland & Busco, *supra* note 40, at A1. California introduced a second set of DUI laws that allowed courts to confiscate offender's driver's license after a violation. *Id.*

⁴⁷ .08 *Let's Not Wait*, <http://www.enddwi.com/Issues/Issues.htm> (last visited Mar. 23, 2005). The mission of End DWI and their website is “to provide support to victims and families affected by impaired driving through a myriad of services and to create public awareness about the devastating effects and the need to end driving while intoxicated.” *Id.* The states that experienced a significant reduction in alcohol related fatalities were Vermont, Kansas, North Carolina, Florida, New Mexico, California, and Virginia. *Id.*

⁴⁸ *Id.* The states in which the reduction in fatalities was attributed solely to the 0.08 standard were Vermont, Kansas, North Carolina, Florida, and New Mexico. *Id.*

⁴⁹ *Id.* The states in which the reduction in alcohol-related fatalities was attributed to the combination of the 0.08 standard and the administration license revocation (ALR) laws were California and Virginia. *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* The study found that both administrative license revocation laws and 0.08 illegal per se BAC laws were effective in reducing alcohol-related crashes. *Id.*

⁵² 144 CONG. REC. S1298 (daily ed. Mar. 4, 1998) (statements of Sen. Thomas, Sen. Nickles, and Sen. Craig).

that it violated the political process. Proponents of this theory argued that the federal government should not attach conditions to state grants because, in actuality, the money had come from the states in the first place.⁵³ Alternatively, instead of penalizing those states that do not adopt the standard, Congress should encourage the adoption of the 0.08 standard by offering the states incentives to do so.⁵⁴

Second, opponents of the bill argued that the passage of the bill was an encroachment on states' rights.⁵⁵ Many expressed resistance, not against the substance of the bill, but against the federal government's imposition of the bill upon the states.⁵⁶ Senator Nickles opposed passage of the bill by the federal government, but would have supported it if it had been a bill proposed by his state legislature.⁵⁷ In his opinion, lowering the BAC level to 0.08 was a decision that should be left for each individual state,⁵⁸ and the proposed legislation was "trampling on state's rights."⁵⁹ Senator Nickles believed that by passing the 0.08 law, Congress was reinforcing the idea that if there is a problem a federal solution must be supplied instead of giving states the flexibility to find effective solutions.⁶⁰ Proponents of the bill countered this argument by claiming that the heart of this amendment is not about states' rights, but about saving lives.⁶¹

Senator Craig (R-ID) agreed with the position that the 0.08 BAC

⁵³ 144 CONG. REC. S1298 (daily ed. Mar. 4, 1998) (statement of Sen. Thomas).

⁵⁴ *Id.*

⁵⁵ 144 CONG. REC. S1298 (daily ed. Mar. 4, 1998) (statement of Sen. Nickles).

⁵⁶ *Id.*

⁵⁷ *Id.* Senator Nickles believed that it was the domain of the state government to pass laws regarding the legal limit for intoxication. *Id.* Senator Nickles was not against the substance of the bill, but was against it being forced upon state legislatures by the federal government. *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ 144 CONG. REC. S1298 (daily ed. March 4, 1998) (statement of Sen. DeWine). In his remarks, Sen. DeWine pointed out that Ronald Reagan, the great protector of state's rights, was in favor of a similar concept when he approved a bill that established a national drinking age of 21. *Id.* When Ronald Reagan signed the uniform drinking age bill into law, he was quoted as saying:

[t]his problem is much more than just a State problem. It's a national tragedy. There are some special cases in which overwhelming need can be dealt with by prudent and limited Federal influence. In a case like this I have no misgivings about a judicious use of Federal inducements to save precious lives.

Id.

law was a states' rights issue, despite the fact that his own state, Idaho, had already passed a similar provision adopting the 0.08 standard.⁶² Senator Craig commented that, "[t]he federal government should leave this decision to the states, where it constitutionally belongs in the first place."⁶³ As an alternative, Senator Craig favored a strong resolution by the Senate denouncing drunk driving.⁶⁴ Senator Craig also pointed out the irony of the Senate's actions. While the action taken by the Senate aimed at protecting the public, it was attempting to accomplish this goal by taking away transportation money, which is "critical to public safety."⁶⁵

III. Spending Power Analysis

States that have not yet adopted the 0.08 standard have the option to challenge the constitutionality of the federal law as an abuse of the spending power.⁶⁶ The effects of the retroactive provision could place overwhelming pressure on state legislatures to enact the BAC standard. The retroactive provision allows all non-compliant states to recover money withheld if they pass the 0.08 standard by October 1, 2006. For instance, New Jersey will lose \$7.2 million in federal highway aid next year alone because it failed to comply with the October 1, 2003 deadline.⁶⁷ In 2006, New Jersey will be forced to choose between either reducing its 0.10 limit to 0.08 or turn down a total of \$71.2 million in federal aid withheld from 2004 through 2008.⁶⁸ As a result of the retroactive provision, the aggregate effect of four years of withheld highway funds could reach the point of compulsion on the part of the federal government and may, therefore, be outside the confines of the Spending Power.⁶⁹ Realistically, state legislatures may not be able to

⁶² 144 CONG. REC. S1298 (daily ed. March 4, 1998) (statement of Sen. Craig).

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ U.S. CONST. art. I, § 8, cl. 1. "The Congress shall have Power To lay and collect Taxes, Duties, Imports and Excises, to pay the Debts and provide for the Common Defense and general Welfare of the United States." *Id.*

⁶⁷ Jeremy Pearce, *Loss of Highway Funds*, N.Y. TIMES, Oct. 5, 2003, at 14NJ.

⁶⁸ Baldwin, *supra* note 10. New Jersey lost \$7 million for 2004 and would lose \$14 million in 2005, \$21.5 million in 2006, and \$28.7 million in 2007 for a total of \$71.2 million. *Id.*

⁶⁹ *South Dakota v. Dole*, 483 U.S. 203 (1987). The Court recognized that in some situations the activity may be outside the broad range of the spending power when the financial inducement offered by Congress is so coercive that it passes the point at which

turn down such a staggering amount of money for their highways.

The United States Constitution gives Congress the power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense, and the general welfare, of the United States.⁷⁰ In *United States v. Butler*, the court interpreted the spending power broadly, holding that Congress has broad power to tax and spend for the general welfare, so long as it does not violate other constitutional provisions.⁷¹ Thus, Congress is not limited to the legislative powers granted by Article 1 of the Constitution.⁷² Objectives that may not be accomplished through the enumerated powers may be accomplished through the spending power.⁷³

In *South Dakota v. Dole*, the court upheld a federal law that withheld 5 percent of federal highway funds from states that had a minimum drinking age below the age of 21.⁷⁴ Congress lacked the authority to establish a national drinking age directly, but was able to accomplish the same objective by evoking the use of the spending power.⁷⁵ In a majority opinion, written by Chief Justice Rehnquist, the Court enumerated four general limitations on the spending power.⁷⁶ First, the language of the Constitution limits the spending power, because it must be used in pursuance of the "general welfare."⁷⁷ In analyzing this standard, courts generally defer to the judgment of Congress.⁷⁸ Second, use of the spending power requires that if Congress wishes to place a condition upon receipt of funds, it must do so unambiguously, allowing the states to make informed decisions.⁷⁹ Third, conditions on federal grants may be unconstitutional if they are

pressure turns into compulsion. *Id.* at 211.

⁷⁰ U.S. CONST. art. I, § 8, cl. 1.

⁷¹ *United States v. Butler*, 297 U.S. 1, 65 (1936). The Court expressly adopted Alexander Hamilton's view of the Spending Power. *Id.* Hamilton believed that Congress could tax and spend for the general welfare, as long as it did not violate other constitutional provisions. *Id.* The clause provides a power to Congress that is distinct from the other enumerated powers of the Constitution, limited only on the grounds that it must be exercised for the general welfare of the United States. *Id.*

⁷² *Id.* at 66.

⁷³ *Dole*, 483 U.S. at 207.

⁷⁴ *Id.* at 205.

⁷⁵ *Id.* at 207.

⁷⁶ *Id.* at 207-09.

⁷⁷ *Id.* at 207.

⁷⁸ *Id.*

⁷⁹ *Dole*, 483 U.S. at 207.

unrelated to “the federal interest in a particular national project or programs.” However, the condition is met if it is not unrelated to some “federal interest.”⁸⁰ Fourth, the condition must not violate any other Constitutional prohibition.⁸¹

In *Dole*, the majority noted that South Dakota did not contest the third requirement and quickly dismissed this requirement after a brief analysis.⁸² However, Justice O’Connor’s dissent addressed this prong and opined that the condition imposed was not reasonably related to the federal interest in the particular program.⁸³ Justice O’Connor reasoned that a minimum drinking age of 21 was not sufficiently related to highway construction to justify conditioning funds for that purpose.⁸⁴ According to the dissent, the program was both under-inclusive and over-inclusive.⁸⁵ Furthermore, there should have been a tighter fit between the condition and the spending program.⁸⁶ Justice O’Connor also stated that if a condition is attached to the federal grant, it should only dictate how the money is spent and should not seek to regulate.⁸⁷ In her opinion, allowing such a rule would lead to the following consequence:

If the spending power is to be limited only by Congress’ notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives “power to the Congress to tear down the barriers, to invade the states’ jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.” This, of course, as *Butler* held, was not the Framers’ plan and it is not the meaning of the Spending Clause.⁸⁸

Justice O’Connor’s concerns in *Dole* are present in the instant matter concerning a uniform blood alcohol concentration level for drunk driving. The law appears to be both over-inclusive and under-inclusive

⁸⁰ *Id.* at 207-08 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978)).

⁸¹ *Id.* at 208.

⁸² *Id.*

⁸³ *Id.* at 213 (O’Connor, J., dissenting).

⁸⁴ *Id.* at 214 (O’Connor, J., dissenting).

⁸⁵ *Dole*, 483 U.S. at 214-15 (O’Connor, J., dissenting). Justice O’Connor felt the law was over-inclusive because it stops teenagers from drinking even when they are not going to drive on interstate highways and it is under-inclusive because teenagers only comprise a small percentage of the drunk driving problem. *Id.*

⁸⁶ *Dole*, 483 U.S. at 214-15 (O’Connor, J., dissenting).

⁸⁷ *Id.* at 216 (O’Connor, J., dissenting).

⁸⁸ *Id.* at 217 (O’Connor, J., dissenting) (quoting *Butler*, 297 U.S. at 78).

for similar reasons.⁸⁹ It is over-inclusive because the law is applied to any person drinking and driving not just those people who drive on an interstate highway for which the federal money is to be used; and it is under-inclusive because drivers with a blood alcohol concentration between 0.08 and 0.10 are only a small percentage of the drunk driving problem.⁹⁰ Much like the statute implemented in *Dole*, the new law also serves as a regulation that does not simply condition how the money should be spent. Thus, it is possible that a similar argument to the one made in *Dole* could be implemented to strike down the current law. However, because a majority of the Court was not persuaded in *Dole*, its success is unlikely.

In his majority opinion, however, Chief Justice Rehnquist recognized that in some situations “the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’”⁹¹ The Court also held that it would not look at the measure’s success in achieving its congressional objective when deciding if the measure is coercive.⁹² Ultimately, the court found that withholding a “relatively mild encouragement” of 5 percent of the federal highway funds did not meet the standard of coercion.⁹³ However, the Court did not suggest a percentage that would have surpassed this point.⁹⁴

At first glance, the federal government’s attempt to induce the states to adopt a 0.08 blood alcohol level seems rather benign. In 2004, the Secretary of the Treasury will only withhold 2 percent from the federal-aid for highways.⁹⁵ The percentage withheld doubles to 4 percent in 2005.⁹⁶ It is not until 2006 that the amount withheld will exceed the percentage that the *Dole* Court found mild.⁹⁷ In 2007, and thereafter, the percentage withheld reaches 8 percent.⁹⁸ However, keep

⁸⁹ *Id.* at 214-15 (O’Conner, J., dissenting).

⁹⁰ Higgs, *supra* note 10. Steve Carellas, the National Motorist Association state coordinator claims that the median blood-alcohol level of drunk drivers who cause accidents is 0.17. *Id.*

⁹¹ *Dole*, 483 U.S. at 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937)).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ 23 U.S.C.A § 163 (West Supp. 2003).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

in mind, the retroactive provision allows states that have not enacted the law in previous years to recover a prorated amount of their money from the previous four years if they enact the required law by October 1, 2006.⁹⁹ Nevertheless, the amount of funding involved puts tremendous pressure on the state legislature. The aggregate effect of the retroactive provision forces states to make the impossible decision of turning down a large amount of the money withheld over four years or explore other revenue generating alternatives, such as raising taxes.

The Supreme Court has not yet used the compulsion theory to strike down a funding condition.¹⁰⁰ The Court's reluctance to invoke this doctrine seems to stem from the fact that it is extremely difficult to draw a line between inducement and compulsion.¹⁰¹ Currently, there is no content or workable framework for this doctrine. The question arises of how to give such a standard content. Given the Court's historical reluctance to invoke this limitation, it is likely that the sort of inducement involved would have to be enormous. Here, it seems that even though the inducement involved is considerable, it does not reach that level of compulsion because it is not significantly greater than that found in *Dole*.

IV. New Jersey's Legislative Alternatives

New Jersey has considered several bills to avoid losing its share of federal highway funding.¹⁰² The bills pertaining to the legal drunk driving limit, however, were not acted upon during the regular session in 2003.¹⁰³ According to Assemblyman Peter Barnes Jr., Chairman of the Law and Public Safety Committee and a co-sponsor of the current Assembly Bill, other more pressing issues, such as the state budget and auto insurance, took precedence that year.¹⁰⁴

One of the first options considered by the New Jersey Legislature

⁹⁹ *Id.*

¹⁰⁰ See Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 102 (2001).

¹⁰¹ *Id.*

¹⁰² Assemb. 682, 210th Sess. (N.J. 2002); Assemb. 695, 210th Sess. (N.J. 2002); Assemb. 973, 210th Sess. (N.J. 2002); Assemb. 832, 210th Sess. (N.J. 2002). Loretta Weinberg (D-Paramus) has been trying to get a measure passed in this area for almost ten years. Baldwin, *supra* note 10. Several bills have been introduced that have varied from the original attempt at simply lowering the BAC level to 0.08. *Id.*

¹⁰³ Higgs, *supra* note 8.

¹⁰⁴ *Id.*

was to mimic the federal law and simply reduce the blood alcohol level at which a person is considered to be guilty of a drunk driving offense from 0.10 percent to 0.08 percent, without making any other alterations to the drunk driving laws.¹⁰⁵ Although Assemblywoman Loretta Weinberg and Assemblyman Matt Ahearn introduced this bill on January 8, 2002, and referred it to the Assembly Law and Public Safety Committee, it was not initially acted upon by the Committee.¹⁰⁶

During the lame duck session, the bill came out of the Assembly Committee with several amendments. The Assembly gave the amended bill a second reading.¹⁰⁷ The bill had gained three new co-sponsors, adding Assemblymen Russo, Johnson, and Diegnan.¹⁰⁸ After the additional amendments were added, the bill passed the Assembly by a margin of 58-to-10, with nine abstentions.¹⁰⁹ The measure then went to the Senate Law, Public Safety and Veterans' Affairs Committee for approval, where the Committee voted 5-to-1 to send the measure to the full Senate.¹¹⁰ The bill went to the Senate for a vote on Monday, January 12, 2003.¹¹¹ At that time, many believed that New Jersey could be, "within days of lowering its drunk driving threshold, a step that should bring needed federal money into the state."¹¹² Observers felt that the bill had considerable support in the Senate.¹¹³ However, it still faced opposition from the restaurant and hospitality industry.¹¹⁴ After much of

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* This bill was initially co-sponsored by Assemblywomen Previte and Greenstein and Assemblymen Barnes and Guear. *Id.* Assemblywoman Loretta Weinberg, one of the primary sponsors of the bill, is the Assembly Majority Conference Leader. Tom Baldwin, *Assembly OKs 0.08 Drunk Driving Limit*, GANNETT STATE BUREAU, Dec. 16, 2003, available at <http://www.injersey.com/gsbr/story/0,21421,870481,00.html>.

¹⁰⁷ Assemb. 682, 210th Sess. (N.J. 2002), available at <http://www.njleg.state.nj.us/bills/BillView.asp>. On December 11, 2003, the bill was reported out of the Assembly Committee with amendments and given a second reading. *Id.*

¹⁰⁸ Assemb. 682, 210th Sess. (N.J. 2002), available at <http://www.njleg.state.nj.us/bills/BillView.asp>. The initial bill had four co-sponsors, while the amended bill had a total of seven co-sponsors. *Id.*

¹⁰⁹ Assemb. 682, 210th Sess. (N.J. 2002), <http://www.njleg.state.nj.us/bills/BillView.asp>.

¹¹⁰ Baldwin, *supra* note 9.

¹¹¹ *Id.*

¹¹² *Id.* "New Jersey yesterday moved to within days of lowering its drunken-driving threshold, a step that should bring needed federal money into the state but that also sparked debate between the hospitality industry and victims of road carnage." *Id.*

¹¹³ David Kocieniewski, *Legislators Focus on Lesser Issues After Failing to Increase Gas Tax*, N.Y. TIMES, Dec. 12, 2003, at B5.

¹¹⁴ Baldwin, *supra* note 106. It is believed that the debate in the Senate will mirror the

the same debate that occurred in the Assembly, the state Senate voted 37-1 to reduce the blood-alcohol level.¹¹⁵

After the bill passed through the Senate, the bill went back to the Assembly to give them the opportunity to concur with the changes made by the Senate.¹¹⁶ The State Assembly voted 61-8 with four abstentions to approve the lower threshold.¹¹⁷ From this point, the bill was sent to the desk of Governor James E. McGreevey for approval.¹¹⁸ Governor McGreevey, a strong supporter of the bill, quickly signed it into law.¹¹⁹ Had the Senate vote and Assembly concurrence not been completed before the legislative session ended on January 13, 2003, the bill would have had to be reintroduced and the process would have had to start over again.¹²⁰ The Assembly Law and Public Safety Committee provided several important changes before the bill passed.¹²¹ At the request of Assemblywoman Weinberg, the primary sponsor of the bill, the name of the law was changed to Florence's Law, in honor of the late Florence Nass, whose son was killed by a drunk driver.¹²² In addition, Assemblywoman Weinberg remarked that, "[a] reduction in the blood-alcohol content levels used to identify drunk drivers will save lives."¹²³ Thus, the committee amended the bill to impose penalties for a first drunk driving offense based on the level of intoxication of the offender.¹²⁴

Pursuant to the amendments, an offender whose BAC is less than 0.10 percent, but 0.08 or higher, would be fined not less than \$250 or more than \$400, with a three-month license suspension.¹²⁵ If the BAC is

debate in the Assembly, where lawmakers were primarily concerned with the loss of jobs in the hospitality industry. *Id.*

¹¹⁵ Baldwin, *supra* note 10.

¹¹⁶ Assemb. 682, 210th Sess. (N.J. 2002).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See Baldwin, *supra* note 10.

¹²² *Id.* Florence Nass was the founder of End DWI and the person who originally requested that the bill be introduced. Assembly Law And Public Safety Committee, Statement to Assembly No. 682. available at http://www.njleg.state.nj.us/2002/Bills/A1000/682_S1.HTM.

¹²³ See Kocieniewski, *supra* note 113.

¹²⁴ Assemb. 682, 210th Sess. (N.J. 2002).

¹²⁵ Assembly Law And Public Safety Committee, Statement to Assembly, No 682. available at http://www.njleg.state.nj.us/2002/Bills/A1000/682_S1.HTM.

0.10 percent or higher, but less than 0.16 percent, the fine is also between \$250 and \$400, but the license suspension would be between six months and one year.¹²⁶ If the offender's BAC is 0.16 percent or higher, the fine would be \$400 to \$600, and the license suspension would be for nine months to one year.¹²⁷ The Assembly also decided to impose harsher penalties on repeat drunk drivers. For example, three DUI offenses requires an automatic 90 days in jail.¹²⁸

Prior to enactment of this legislation, Assembly Bill 973, a similar bill, proposed lowering the legal BAC to 0.08 from 0.10.¹²⁹ However, Assembly Bill 973 lessened the penalty for a first time offender with a BAC that was more than 0.08 percent, but less than 0.10 percent.¹³⁰ According to this bill, an offender within this range would only be subject to a driver's license suspension for a period of thirty days to one year.¹³¹ A first-time offender whose BAC is 0.10 percent or more would continue to be subject to the original penalty, a driver's license suspension of six months to one year.¹³² The other penalties for a first offense would remain the same.¹³³ This bill strikes a compromise between those in favor and those against the federal standard by raising the BAC standard to 0.08 percent, while lessening the penalties for those who would not have been prosecuted under the earlier law but would be prosecuted under the proposed law.¹³⁴ This bill was also submitted to the Assembly Law and Public Safety Committee, but it was not acted upon.¹³⁵

Another approach that New Jersey legislators have considered was to keep the 0.10 percent standard intact for first time offenders, but lower the BAC level for repeat offenders.¹³⁶ Two bills introduced in the New Jersey Assembly have taken this approach.¹³⁷

¹²⁶ Assemb. 682, 210th Sess. (N.J. 2002).

¹²⁷ Assembly Law And Public Safety Committee, Statement to Assembly, No 682. available at http://www.njleg.state.nj.us/2002/Bills/A1000/682_S1.HTM.

¹²⁸ See Baldwin, *supra* note 10.

¹²⁹ Assemb. 973, 210th Sess. (N.J. 2002).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ Assemb. 973, 210th Sess. (N.J. 2002).

¹³⁶ Assemb. 832, 210th Sess. (N.J. 2002); Assemb. 695, 210th Sess. (N.J. 2002).

¹³⁷ *Id.*

Assembly Bill 695 criminalizes a second or subsequent drunk driving offense if a person's BAC is 0.08 percent or higher.¹³⁸ The comments that accompany this bill explain that motorists with a history of drunk driving are most likely to drive under the influence of alcohol and drugs.¹³⁹ By establishing a more stringent 0.08 percent BAC for repeat offenders, the state will send a strong message to chronic offenders.¹⁴⁰ The comments also note that moderate users will not be affected.¹⁴¹

Another proposal, Assembly Bill 832, leaves the 0.10 percent level in place for first-time offenders, but sets the legal limit on the second and subsequent driving offenses at 0.05 percent or higher.¹⁴² This bill was modeled after a Maine statute.¹⁴³ A study conducted in Maine after the passage of the law showed that the proportion of fatal crashes involving drivers with prior drunk driving convictions declined 25 percent following its enactment. However, the proportion of fatal crashes increased in neighboring states during the same year.¹⁴⁴

While these proposals may help curb the drunk driving problem in New Jersey, it is unlikely that New Jersey will recover lost federal highway funding because the proposals do not comply with the terms of the federal statute.¹⁴⁵ The federal statute requires that states enforce a law in which, "any person with a blood alcohol concentration of 0.08 percent or greater while operating a motor vehicle in the State shall be deemed to have committed a per se offense of driving while intoxicated."¹⁴⁶ The statute will not be satisfied by imposing a 0.08 standard or lower on repeat offenders only, it is required that all

¹³⁸ Assemb. 695, 210th Sess. (N.J. 2002).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Assemb. 832, 210th Sess. (N.J. 2002).

¹⁴³ *Id.* This bill would leave the 0.10 blood alcohol concentration standard intact for first time offenders, but would lower the standard to 0.05 for second time or subsequent drunk driving offenders. *Id.*

¹⁴⁴ *Id.* The study was conducted in 1998 and the comparison showed that other New England states had an increase in their proportion of fatal crashes involving drunk drivers, while Maine experienced a 25 percent decline. *Id.*

¹⁴⁵ Assemb. 832, 210th Sess. (N.J. 2002) and Assemb. 695, 210th Sess. (N.J. 2002). These bills only enforce a 0.08 standard or lower for repeat offenders and not "any person" that 23 U.S.C. § 163 requires. *Id.*

¹⁴⁶ 23 U.S.C.A. § 163 (West Supp. 2003).

offenders be subject to a 0.08 standard.¹⁴⁷ While the proposed bills may be a helpful tool in dealing with the problem of drunk driving, they are not adequate to satisfy the federal requirements for recovering the withheld highway funding.

A. *The Debate in New Jersey*

There has been a great deal of opposition in New Jersey to passing the 0.08 BAC law.¹⁴⁸ Those who oppose the bill claim that the federal government is blackmailing the states into accepting the standard, thereby circumventing any open discussion of the issue.¹⁴⁹ Opponents also argue that the federal legislation does not really deal with the most serious dangers involved with drunk driving.¹⁵⁰ Deborah Dowdell, vice president of the New Jersey Restaurant Association, calls the legislation "a cosmetic solution to a serious problem."¹⁵¹ The most serious danger comes from "repeat offenders and people driving at a higher BAC level."¹⁵² Dowdell claims that the 0.08 law targets responsible social drinkers and not the people who are actually the cause of the problem.¹⁵³ In fact, New Jersey has an outstanding track record with regard to drunk driving accidents and is the fifth safest state in the nation even with the 0.10 standard.¹⁵⁴

According to Steve Carrellas, state coordinator of the National Motorist Association, it is not the drivers with a blood-alcohol level between 0.08 and 0.10 that cause accidents, considering the median blood-alcohol level of drunk drivers who cause accidents is 0.17 percent.¹⁵⁵ Consequently, Carrellas believes that the lower standard will not result in a decreased number of alcohol-related fatalities.¹⁵⁶

¹⁴⁷ *Id.*

¹⁴⁸ See Higgs, *supra* note 10. There was a great deal of opposition in the state coming from restaurant and tavern owners. *Id.* Specifically, members of the New Jersey Restaurant Association and National Motorist Association spoke out in opposition to the bill. *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* The opponents to the bill claim that the most dangerous drunk drivers are repeat offenders and those individuals with extremely high BAC's. *Id.* The median blood alcohol of drunk drivers who cause accidents 0.17 percent. *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See Higgs, *supra* note 10.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

Moreover, according to the National Highway Traffic Safety Administration, about 80 percent of alcohol-related fatal crashes in the United States involve drivers with a BAC of 0.10 percent or higher.¹⁵⁷

Proponents of the lower threshold respond to these allegations by claiming that the law has had its intended impact on drunk driving, and arrests of social drinkers has not come to pass.¹⁵⁸ The President of the New Jersey Traffic Safety Association, Anthony Parenti, claims that the states that have enacted the law have been getting a few more arrests than before, but not as many as the predictions had anticipated.¹⁵⁹ Reports from other states seem to indicate that the 0.08 percent standard has made the roads safer.¹⁶⁰

B. *Economic Impact*

Members of the restaurant and tavern industry fear that lowering the alcohol limit from 0.10 to 0.08 will target social drinkers and patrons who have had one or two drinks with dinner.¹⁶¹ The revenue from that one extra drink is what bar and restaurant owners fear they will lose if patrons are forced to cut back on consumption due to a more stringent DUI standard.¹⁶² The NHTSA has concluded that a 170-pound male will reach the 0.08 limit after drinking four beers in an hour on an empty stomach.¹⁶³ A 135-pound woman will reach that same level after consuming three drinks in an hour on an empty stomach.¹⁶⁴ The impact of the new law becomes more evident as the weight of the individual decreases — a 120-pound woman reaches the new standard by her second drink.¹⁶⁵ Since it takes the human body an hour to burn off one

¹⁵⁷ Dennis Chaptman, *Assembly Approves Lower Alcohol Limit; But first-time Drunken-Driving Offenders could get a break on Fine, Have Record Cleared*, MILWAUKEE J. SENTINEL, May 30, 2003, at 1A.

¹⁵⁸ See Higgs, *supra* note 10.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* Anthony Parenti, president of the New Jersey Traffic Safety Officers Association, claims that "what we're hearing from other states is that it has made it safer." *Id.*

¹⁶¹ Giovanna Fabiano and Larry Higgs, *Bargoers' Sobriety Put to the Test*, HOME NEWS TRIBUNE (N.J.), Nov. 10, 2003, available at <http://www.injersey.com/thnt/story/0,21282,852347,00.html>.

¹⁶² See Higgs, *supra* note 10.

¹⁶³ See Scott, *supra* note 5. One drink is defined as 12 ounces of beer, 5 ounces of wine, or 1 ½ oz. shot of 80-proof liquor. *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Fabiano & Higgs, *supra* note 161. See *supra* note 157. The United States

ounce of alcohol, bar and restaurant owners claim that the new standard will cause a drop in alcohol consumption if it is put in place.¹⁶⁶

Restaurant industry advocates warn that if patrons cut back by one drink, New Jersey will lose \$9 million in sales tax this year.¹⁶⁷ Thus, this year, the state stands to lose more in sales tax revenue than it will in federal highway funds.¹⁶⁸ However, this utilitarian argument will not hold water where, in 2005, the percentage of withheld federal aid rises to 4 percent.¹⁶⁹ By then, the amount withheld by the federal government translates into a loss of \$14.4 million to the state.¹⁷⁰ Thus, the \$9 million in lost sales tax is dwarfed when the amount withheld by the federal government increases to 6 percent in 2006, and then 8 percent in 2007.¹⁷¹

Furthermore, New Jersey lawmakers from both parties fear that passing the 0.08 percent BAC law could cost the state jobs in the hospitality industry.¹⁷² Democratic Assemblyman Joseph Cryan remarked that, “[w]hat we’re doing tonight is voting against jobs. . . . I have no intention of voting for this job-killing bill.”¹⁷³ Similarly, Republican Assemblyman John Rooney commented that “[w]e in New Jersey are taking away the right to work.”¹⁷⁴

A recent study has called into question the validity of claims that the 0.08 percent BAC level would have any effect on alcohol consumption or the economy.¹⁷⁵ A study conducted by the Distilled

Department of Health and Human Services predicts that a 120-pound woman will reach the 0.08 standard by her second drink. *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ See Higgs, *supra* note 10. New Jersey Restaurant Association’s vice president Deborah Dowdell claims that, “[i]f restaurants sold one less bottle of wine a day, the state would lose \$9 million in sales tax revenue.” *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ 23 U.S.C.A. § 163(a). The amount withheld in 2005 increases to 4 percent from 2 percent in 2004. *Id.* New Jersey lost \$7.2 million in 2004, when the amount withheld was 2 percent, so this amount will double in 2005 when 4 percent of the budget is withheld. *Id.* In 2006, the amount withheld rises to 6 percent and then 8 percent in 2007. See Higgs, *supra* note 10.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² See Baldwin, *supra* note 10.

¹⁷³ See Baldwin, *supra* note 10.

¹⁷⁴ *Id.* There is some sentiment among Legislators that those who are convicted of a DUI and have their license suspended, should at least be allowed to drive to work. *Id.* Assemblyman Joseph Azzolina (R-Monmouth) states that he would be in support of allowing offenders to continue to drive to work. *Id.*

¹⁷⁵ See *supra* note 47 and accompanying text.

Spirits Council of the United States concluded that there was almost no affect on alcohol consumption in four states that had adopted the 0.08 standard.¹⁷⁶ Moreover, there did not appear to be any evidence that per capita alcohol consumption was affected.¹⁷⁷ According to an official publication of Guinness UDV, some of the most profitable markets in the United States, such as California, Florida, Texas, and Illinois, have a 0.08 percent BAC standard, and it has not made them any less attractive or their retailers any less successful.¹⁷⁸

V. *Approach Taken By Other States*

Because New Jersey already has a strong track record against drunk driving, opponents to the 0.08 percent standard argue New Jersey does not need to pass the standard.¹⁷⁹ With a 0.10 BAC, New Jersey is already the fifth safest state in the nation.¹⁸⁰ Moreover, New Jersey already has a unique approach to drunk driving.¹⁸¹ New Jersey is one of only three states that classify drunk driving as a civil offense without mandatory jail time.¹⁸² The other forty-seven states classify a first conviction as a criminal offense.¹⁸³

Many states have followed New Jersey's past approach to the drunk driving problem.¹⁸⁴ In addition to adding the 0.08 standard, Michigan has recently patterned its other driving laws after the system that was launched in New Jersey over 20 years ago.¹⁸⁵ The Michigan plan will charge a \$100 yearly fee to drivers who accumulate seven or

¹⁷⁶ *Id.* The states that had recently adopted the 0.08 standard and were involved in the study were Utah, Oregon, Maine, and California. *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See Higgs, *supra* note 10. Deborah Dowdell, vice president of the New Jersey Restaurant Association, felt that since New Jersey was already the fifth safest state in the United States, the law would target social drinkers who are not the cause of the real problem. *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Peter Maller & Lawrence Sussman, *Law Would Clear 1st Drunken Driving Offenses After 10 Years; Bill Touted as Incentive to Stay Sober, Criticized as Soft on Offenders*, MILWAUKEE J. SENTINEL, Jan. 16, 2004, at 1A.

¹⁸² *Id.* Massachusetts and Wisconsin are the only other states that consider a first-time drunk driving conviction a civil offense without mandatory jail time. *Id.*

¹⁸³ *Id.* According to the National Conference of State Legislatures, the other 47 states treat a first-time drunk driving offense as a criminal offense with mandatory jail time. *Id.*

¹⁸⁴ See Chaptman, *supra* note 157. Wisconsin and Texas have changed their drunk driving laws to mirror New Jersey's laws. *Id.*

¹⁸⁵ See Heath, *supra* note 17, at D1.

more points on their license within a two-year period.¹⁸⁶ Drivers with more points will be charged \$50 per point.¹⁸⁷ Convictions for more serious crimes, including reckless driving or drunk driving, could result in fees between \$500 and \$1,000.¹⁸⁸ Drivers who do not pay within sixty days will have their license suspended.¹⁸⁹ Michigan will net between \$65 and \$75 million from passage of these laws.¹⁹⁰ Texas has also approved a similar measure, hoping that increased penalties will help lower their drunk driving fatality rate, which is among the highest in the country.¹⁹¹

Indeed, the higher monetary penalty system was not really intended to make the roads safer in New Jersey, even though that may have been a by-product.¹⁹² Quite simply, the system was intended to generate revenue for the state.¹⁹³ David Weinstein, a spokesman for New Jersey's Motor Vehicle Commission, claims that the program, "wasn't designed with the idea of making bad drivers good or getting bad drivers off the road, although that is a by-product in some instances."¹⁹⁴ There have not been any studies substantiating the notion that higher monetary penalties have any effect on lowering the incidences of drunk driving fatalities.¹⁹⁵

In contrast to the laws in Michigan and New Jersey, Wisconsin has approached this issue by lowering its legal limit to 0.08 percent, but lessening the penalties on first-time offenders.¹⁹⁶ The new law gives first-time offenders a break on the cash penalties they are forced to pay.¹⁹⁷ The proposed law would also allow first-time drunk drivers to have their records expunged after ten years without incurring another

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ Heath, *supra* note 17, at D1.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ See *supra* note 181. Wisconsin passed WIS. STAT. § 346.63 in order to implement the new 0.08 standard. WIS. STAT. § 346.63 (West 2004).

¹⁹⁷ WIS. STAT. § 346.63. The bill will keep fines for drivers whose BAC is between 0.08 and 0.099 at \$150 to \$300. *Id.* It would eliminate the \$355 surcharge for these offenders and alcohol assessments with counselors that can cost from \$125 to \$175. *Id.* Offenders with a BAC of 0.10 or higher would still incur these additional costs. *Id.*

conviction.¹⁹⁸ The National Highway Traffic Safety administration has stated that these less-severe penalties would still qualify Wisconsin to receive the federal highway money that would otherwise be withheld.¹⁹⁹

VI. Conclusion

The federal 0.08 percent BAC standard may have long lasting effects on the drunk driving problem because it could force state legislatures to rethink their entire policy on drunk driving, not just the minimum intoxication levels. The real impact of this bill may not be the 500 lives that may or may not be saved by the 0.08 percent standard, but the countless number of lives that could be saved by forcing legislatures to revamp their antiquated policies on drunk driving. Legislatures have already begun to punish the most dangerous drunk drivers, the repeat offenders and severely intoxicated drunk drivers, more harshly than offenders who pose a less serious threat to safety on the roads. For example, New Jersey had hardly changed its laws in this area in the last twenty years.²⁰⁰ New Jersey's new law finally makes formal distinctions between drunk drivers at different levels of intoxication, giving harsher punishments to those who are more intoxicated.²⁰¹ It also targets repeat offenders by imposing harsher penalties on those who have had three DUI offenses in the past.²⁰²

Most opponents of the 0.08 percent standard claim that the real problem is not drivers with a 0.08 percent BAC, rather it is those who are way above the 0.10 percent standard, and drivers who are repeat offenders. The federal 0.08 percent standard, and the millions of dollars contingent upon adopting it, may or may not save lives, but it is forcing legislators to deal with some issues that normally may have been lost in the shuffle; pushed aside and replaced by "more pressing issues."²⁰³ Ironically, the opponents of the 0.08 percent standard have really focused the attention towards some of the more prevalent dangers associated with drunk driving.²⁰⁴ Their criticism of the tougher standard ultimately led to the addition of its most important and strictest

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ See Heath, *supra* note 17, at D1.

²⁰¹ See *supra* note 125 and accompanying text.

²⁰² See *supra* note 125 and accompanying text.

²⁰³ See *supra* note 104 and accompanying text.

²⁰⁴ See Higgs, *supra* note 10 and accompanying text.

provisions. The measures taken against heavily intoxicated drivers and drivers with a long history of DUI offenses, issues inadvertently raised by the 0.08 percent standard, could have a drastic impact on the number of alcohol related deaths.²⁰⁵

Perhaps New Jersey will again serve as a model for other states in dealing with individuals who drive drunk. The recently passed law imposes penalties based on both the level of intoxication of the offender, and the level of threat such offenders pose to other drivers. Moreover, the new statute imposes an automatic jail term for repeat offenders. These additions to what started out simply as a decrease in the state BAC standard could strike at the heart of the problem, the most dangerous of offenders, making our streets safer than ever before.

²⁰⁵ See Heath, *supra* note 17. According to the NHTSA, about 80 percent of alcohol related fatal crashes in the United States involve drivers with blood-alcohol content of 0.10 percent or higher. *Id.*