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A Comparison of Drinking and Driving Law in Norway and North Dakota: More Than a Difference in Penalties

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A COMPARISON OF DRINKING AND DRIVING LAW IN NORWAY AND NORTH DAKOTA: MORE THAN A DIFFERENCE IN PENALTIES

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The problem of drinking drivers is of concern in both Norway and the United States. Norway is world famous for the originality and strictness of its law and practice regulating the problem and is the birthplace of the "Scandinavian model."[1] Professor Johannes Andenæs described the main features of the Scandinavian model as a tripartite system involving 1) "per se" legislation that prohibits driving with more than a specified amount of alcohol in the blood (blood alcohol concentration or "BAC"); 2) strict enforcement by police, primarily through breath and blood alcohol tests and random roadside checks; and 3) stiff sanctions. This Article undertakes to compare this system with the American approach to the same problem.

One difficulty with comparing Norwegian and American law and practice is the American federal system, which has traditionally relegated primary responsibility for traffic regulation to the individual states.[2] In recent years, pressure from the United States federal government has reduced the diversity of state laws affecting drunk driving, but the differences among them are still significant,[3] comparable perhaps to

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This article has grown out of experience teaching in and administering the University of North Dakota Summer School in Norway. The summer school is part of the exchange program conducted since 1982 between the University of North Dakota and the University of Oslo, Norway. In addition, the author teaches comparative law seminars at the University of North Dakota in which Norwegian and North American law students work together on comparative law projects. Since this long period of time includes many valuable contributions from many people in both Norway and the United States, the list of individual contributions would unduly lengthen this footnote. I hope that the colleagues, research assistants, and students who contributed to my learning will accept this collective thanks and forgive both the absence of their individual names and the publication of evidence that I either didn't understand or didn't agree with all they tried to teach.

1. Johannes Andenæs, *The Scandinavian Experience*, *in* SOCIAL CONTROL OF THE DRINKING DRIVER 43 (Michael D. Laurence et al. eds., 1988) [hereinafter SOCIAL CONTROL].

2. Michael D. Laurence, *The Legal Context in the United States*, *in* SOCIAL CONTROL, *supra* note 1, at 136-37.

3. Laurence provides subsections entitled "The Growing Federal Presence," "Diffusion and Uniformity in State Level Policies," and "The Future of Decentralized Policy-Making," and he explains the diversity among the states and the increased participation of the federal government. Laurence, *supra* note 2, at 142-52. Laurence describes succinctly the combination of "encouragement" of states to comply with federal standards, in the form of threats to withhold federal highway funds, and financial "carrots," consisting of federal funding of state programs, used to create the increased federal influence on state traffic law and policy. Laurence, *supra* note 2, at 147-49.

those between Norway and its Nordic neighbors. Therefore, this Article will use the law of North Dakota, where the author lives and works, as a representative system. This should allow for a sufficiently detailed and comprehensive, yet readable, comparative picture of driving under the influence law and practice.

Although there are a variety of types of "drunk driving" in both Norway and North Dakota, the North Dakota custom of abbreviating the offenses generally as "DUI," standing for driving under the influence of alcohol,[4] will be used throughout the remaining discussion, except where more discriminating terminology is appropriate.[5] Furthermore, although both Norway and North Dakota prohibit driving under the influence of other drugs or substances,[6] the vast majority of reported cases involve alcohol, and this discussion will therefore be limited to an analysis of alcohol cases to avoid complications posed by other substances.

It is reasonable to characterize North Dakota's DUI laws as modern and progressive, measured by American standards.[7] Although it would

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4. There is little uniformity among the various states regarding alcohol related terminology. *See* Editor's Introduction, *in* SOCIAL CONTROL, *supra* note 1, at xvii. "Drunk driving is grammatically awkward, but is a convenient shorthand term" and is "standard parlance in the popular press." Editor's Introduction, *supra*, at xvii. "The American acronyms DUI (driving under the influence) and DWI (driving while intoxicated) have a precise legal and technical meaning within a given state in the absence of common federal standards." Editor's Introduction, *supra*, at xvii.

5. North Dakota has four levels of driving under the influence offenses. *See* N.D. CENT. CODE § 39-08-01(1) (1997 & Supp. 1999). Section 39-08-01(1), the DUI statute, provides, in pertinent part:

> A person may not drive or be in actual physical control of any vehicle upon a highway or upon public or private areas to which the public has a right of access for vehicular use in this state if any of the following apply:
> I. That person has an alcohol concentration of at least ten one-hundredths of one percent by weight at the time of a chemical test within two hours after the driving or being in actual physical control of a vehicle.
> II. That person is under the influence of intoxicating liquor.
> III. That person is under the influence of any drug or substance or combination of drugs or substances to a degree which renders that person incapable of safely driving.
> IV. That person is under the combined influence of alcohol and any other drugs or substances to a degree which renders that person incapable of safely driving.

Id.

6. N.D. CENT. CODE § 39-08-01(1)(c) & (d); Vegtrafikkloven [*The Road Traffic Act*] § 22. Norwegian legal writers would refer to the appropriate section, which prohibits driving when "påvirket av alkohol (iikke edru) eller annet berusende eller bedøvende middel" or "affected by alcohol (not sober) or other intoxicating or stupefacient substance," as § 22, 1. ledd. Section 22 consists, in Norwegian, of two paragraphs, with no numerical or other subdividing. "1. ledd" refers to the first paragraph. Further citations in this article to Norwegian statutes with unnumbered or lettered paragraphs or subsections will either refer only to the section itself, or will appear as follows, using § 22 as an example: § 22.1 to refer to § 22's first paragraph; § 22.2 to refer to § 22's second paragraph, and so on. English speaking readers who are fortunate enough someday to discuss legal topics with Norwegian lawyers should be forewarned that "§," to which we in the United States refer as "section," is in Norwegian referred to as "paragraph" or, in Norwegian, "paragraf," with obvious potential for confusion. All translations from Norwegian to English in this article are by the author unless otherwise noted.

7. However, Mothers against Drunk Driving (MADD) recently gave North Dakota a D+ when compared to other states on the organization's annual report card on drunk driving enforcement and

be pleasant to credit North Dakota's relatively advanced status to the well-recognized and strong influence of its Norwegian settlers, other factors, such as the previously mentioned pressure from the federal government, likely have been more directly responsible. It may well be, however, that North Dakota's strong Norwegian connections contribute to more ready acceptance of frequent public and political calls for increased penalties. Many North Dakotans may know something about Norway's previous long-standing practice of minimum, unsuspended twenty-one-day jail sentences for first offense drinking and driving, or, if they do not know the details, they may at least know that Norway's punishment for DUI is severe. Newspapers and politicians are the primary educators in this respect, and it is also fair to assume that if ordinary North Dakotans know anything about the law of Norway—the ancestral home of many—the fact that Norway has strict punishment provisions is likely all they know. However, an investigation of Norwegian law and practice has disclosed a surprising variety of significant differences in addition to sentencing law and practice. In this time of change in Norway and continued concern in North Dakota, it might prove interesting, and perhaps useful, to point out the main differences discovered. My goal is not to evaluate critically and recommend particular aspects as superior or suitable candidates for "transplantation,"[8] but rather simply to describe some significant differences.[9]

I. NATURE OF THE CRIME

A. "PROMILLE" AND "PER SE" OFFENSES; UNDER THE INFLUENCE

In 1936, Norway became the first country to redefine the crime of "drunk driving" from driving under the influence of alcohol to driving with a prohibited amount of alcohol in the blood (blood alcohol concen-

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education. *See* GRAND FORKS HERALD, Nov. 24, 1999. In 1994, North Dakota received a D from MADD; however, then-chair of the Governor's Committee on DUI and Traffic Safety and now district judge James Vukelic declared that "North Dakota is generally ahead of the game in terms of working with new ideas . . . . We've adopted most of the programs that have worked successfully in other states." GRAND FORKS HERALD, Jan. 1, 1994, at 6B. Vukelic also stated that "[t]he MADD survey serves a valuable service. It prods us to do better, but the very, very bottom line in DUI and traffic safety is the number of lives lost on our highways due to drivers who are impaired . . . . If you look at that measure, then North Dakota really has something to brag about." *Id.* A member of the Minot, North Dakota Mayor's Committee on Traffic Safety, said that while North Dakota deserved better than a D grade on MADD's survey, a lot of work needed to be done for an A. *Id.* "It is an on-going educational process, and we just have to change our information and tactics . . . . We are open to anything that looks like it works anywhere else." *Id.*

8. For the classic discussion of "legal transplants" in comparative law, see A. WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (1974). A masterful discussion of French criminal procedure and, to a lesser extent, criminal law, in the context of possible "transplantation" or "borrowings" in United States law is found in a 1990 law review article by Richard S. Frase. *See generally* Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do it, How Can We Find Out, and Why Should We Care?* 78 CALIF. L. REV. 539 (1990).

9. For more regarding the modest purpose of this article, see discussion *infra* Part V.

tration, or "BAC").[10] In Norway, the offense is labeled both popularly and in the legal literature as "promillekjøring," short for "driving with an alcohol concentration in the blood of over 0.5 per thousand."[11]

North Dakota, like Norway, has adopted a per se prohibition, but North Dakota's adoption in 1983 was relatively recent.[12] Not only is North Dakota's per se prohibition a newcomer in comparison to Norway's per se law, it is also significantly weaker, for it allows twice as much blood alcohol before the driver reaches the per se limit of .10%.[13] Both Norway and North Dakota are considering reduction in the per se BAC. The North Dakota Legislature, at its 1999 session, was again presented with a proposition to lower the per se level from .10% to .08%. Most states currently use .10%, but a minority of them, which the North Dakota legislature is repeatedly asked to join, use reduced per se levels. Citing the alternative, under the influence charge, available under North Dakota's DUI law, representatives again defeated the measure in a 68-29 vote.[14]

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10. JOHS ANDENÆS & ANDERS BRATHOLM, SPESIELL STRAFFERETT [*SPECIAL CRIMINAL LAW*] 325 (3d ed. 1996).

11. The Norwegian statute goes on to include "or an amount of alcohol in the body which can lead to that level of alcohol." Vegtrafikkloven [*The Road Traffic Act*] § 22.1.

12. N.D. CENT. CODE § 39-08-01(1) (1997 & Supp. 1999); *see also* BRUCE D. QUICK, I ONLY HAD TWO BEERS, at ii, 6 (1992) (describing adoption of the per se law in 1983 and subsequent amendments to the law).

13. N.D. CENT. CODE § 39-08-01(1)(a) (1997 & Supp. 1999). In their "Note on Terminology," the editors of *Social Control*, *supra* note 1, at xvii, xviii, observe that:

> Although the current differences of opinion about general terminology cannot be easily resolved [referring to their description of different terms used to describe the general subject and problems with each term: drunken driving, drunk driving, drinking-driving behavior, DUI (driving under the influence), DWI (driving while intoxicated), alcohol-impaired driving], the situation is quite different in the narrow, technical domain pertaining to *blood alcohol concentration* (called *BAC* in the United States). Despite the apparent international diversity of measures for BAC, all can be "translated" into equivalent scientific scales. Thus, if an American driver is recorded as having .08 percent BAC, this means the blood sample showed .08 *grams* of alcohol per 100 milliliters of blood. However, the scale in Canada and the United Kingdom is based upon *milligrams* of alcohol in 100 milliliters of blood. In still another variation of decimal displacement, the Scandinavian countries favor a scale based on 100 milligrams per 100 *liters* of blood so that a value of 80 milligrams per 100 liters would be reported as .8 per mille.

Editor's Introduction, *in* SOCIAL CONTROL, *supra* note 1, at xvii, xviii. Alan C. Donelson further explains:

> Concentrations of alcohol in body fluids and breath can be expressed in various units of measurement. In this paper, two conventional BAC unites have been used: (1) milligram percent (mg%), which specifies milligrams of alcohol per 100 milliliters of blood or other fluid; and (2) percent weight-volume (% w/v), which specifies milligrams of alcohol per .1 milliliter of body fluid. These units correspond as follows: 50 mg% = .05% (w/v), 100 mg% = .10%, 150mg% = .15% (w/v), etc.

ALAN C. DONALDSON, SOCIAL CONTROL 385 (Michael D. Laurence et al eds., 1988).

Therefore, under the Scandinavian measurement system, .05% would be indicated as .5 per mille. Throughout this article, unless otherwise indicated, the Scandinavian measurements will be converted to the United States weight/volume measurement.

14. Dale Wetzel, *House Defeats Proposal to Lower DUI Blood-Alcohol Level*, BISMARCK TRIBUNE,

In Norway, the government is proposing to lower the per se limit for DUI from .05% to .02% and punish the lowest levels, .02% to .05%, with fines.[15] The proposal is not without serious opposition, but the mantra "drinking and driving don't belong together" appears likely to carry the proposition despite doubts regarding its cost-benefit ratio.

Another difference between the "per se" definitions is that in Norway, the statute prohibits driving with a quantity of alcohol in the body that leads to a BAC above .05%.[16] Because of the absorption curve of alcohol in the body, it is possible that a driver may have less than .05% measurable in the blood at the time of driving, but more than .05% later, such as at the time of the BAC test. In North Dakota, the law allows a per se conviction if the driver has greater than a .10% BAC and the test is taken any time within two hours of driving.[17]

Despite adoption of per se regulations, both Norway and North Dakota retain the original, now alternative, offense of "driving while under the influence."[18] In North Dakota, a person can be convicted of that offense, and can be penalized the same as for the per se violation, with evidence of a blood alcohol content of less than .10%, although this seldom happens in practice.[19] A person may similarly be convicted and

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Jan. 21, 1999. *See infra* notes 18-19 and accompanying text.

15. ODIN Samferdselsdepartementet (SD) (visited Apr. 6, 2000) <http://odin.dep.no/html/nofovalt/offpub/repub/99-00/otprp/26/index.htm> (describing in a government publication the proposal and responses from concerned interest groups in Norway to whom it was circulated for comment). *See also generally* SVEIN SLETTAN & TORIL MARIE ØIE, FORBRYTELSE OG STRAFF [*CRIME & PUNISHMENT*] 497 (1997).

16. Vegtrafikkloven [*The Road Traffic Act*] § 22.1. When Norway originally adopted the "promille" limit, the alcohol concentration in the blood while driving was determinative. That created proof problems in cases where drivers drank shortly before driving and claimed that the BAC at the time of testing was not representative of the lower amount that could have reached the blood at the time of driving. In 1959, the law was amended to avoid this evidentiary problem by specifying that it is the quantity of alcohol in the body (not only the blood) at the time of driving that is decisive because it leads to a later prohibited BAC. *See* MAGNUS MATNINGSDAL, PROMILLEKJØRING OG ETTERFØLGENDE ALKOHOLNYTELSE [*DRUNK DRIVING AND SUBSEQUENT USE OF ALCOHOL*] 18 (1981); Ragnar Hauge, *Drinking and Driving in Scandinavia, Norway*, 6 SCANDINAVIAN STUDIES IN CRIMINOLOGY 19, 24 (1978).

17. N.D. CENT. CODE § 39-08-01(1)(a) (1997 & Supp. 1999).

18. N.D. CENT. CODE § 39-08-01(1)(b) (1997 & Supp. 1999); Vegtrafikkloven [*The Road Traffic Act*] § 22.1. The Norwegian prohibition makes it clear that the per se offense is in effect a presumption of alcohol influence. Vegtrafikkloven [*The Road Traffic Act*] § 22.1. It reads:

> No one may drive or attempt to drive a motor vehicle when influenced by alcohol. One having a greater alcohol concentration in the blood than 0.5 per thousand or an alcohol concentration in the body which can lead to that quantity of alcohol in the blood, or a greater alcohol concentration in the breath than 0.25 milligrams per liter of air, is considered in all cases as affected by alcohol (not sober) with respect to the provisions of this statute. Mistake with respect to the size of the alcohol concentration does not provide a defense.

Id.

19. N.D. CENT. CODE § 39-20-07(2) (1999); State v. Engebretson, 326 N.W.2d 212 (N.D. 1982). Section 39-20-07 of the North Dakota Century Code prescribes the presumptions and evidentiary weight of chemical tests. *See* N.D. CENT. CODE § 39-20-07 (1999). The statute provides: "A person having, at that time, an alcohol concentration of not more than five one-hundredths of one percent by weight is presumed not to be under the influence of intoxicating liquor." N.D. CENT. CODE § 39-20-07(1) (1999). The statute further provides that more than five one-hundredths of one percent alcohol

penalized in Norway for a blood alcohol concentration of .05% or lower or, in the absence of any "scientific" evidence or measurement, upon extremely good evidence of intoxication at the time of driving, such as testimony from the police officer about the defendant's driving and condition.[20]

B. COMPLICITY

Norwegian criminal law has no general complicity provisions.[21] However, some criminal prohibitions specifically include complicity, thereby broadening the scope of the offense to include those who assist a person violating its explicit prohibition. Norway's DUI provision does not include a complicity provision as such; therefore, only actual drivers are covered, and one who loans a car to a drunk driver or convinces a drunk to drive him or her home can't be punished for DUI as an accomplice.[22]

In North Dakota, the practice seems similar, since the author is not aware of any attempts to prosecute for aiding and abetting a DUI. This is somewhat surprising in light of the political and social pushes to "get tough" on drinking and driving. In light of the general provision governing complicity in North Dakota's criminal code, however, it would appear that proof, for example, that a drinking companion, aware of the driver's obvious intoxication, urged the driver to drive the companion's car, would satisfy both the conduct and culpability requirements for complicity.[23]

C. ATTEMPTS TO DRIVE

In Norway, as in North Dakota, drunk driving is typically a misdemeanor.[24] According to the Norwegian criminal code, attempted

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concentration by weight is relevant evidence, but such evidence does not receive the prima facie effect in determining if the person was under the influence. N.D. CENT. CODE § 39-20-07(2). Finally, a person having an alcohol concentration of at least ten one-hundredths of one percent, or two one-hundredths of one percent if the person is under 21, when subjected to a chemical test within two hours of driving, "is under the influence of intoxicating liquor at the time of driving or being in physical control of the vehicle." N.D. CENT. CODE § 39-20-07(3) (1999).

20. *See* State v. Skipton, 339 N.W.2d 87, 88-89 (N.D. 1983) (holding a chemical test is not required to support a conviction for DUI when other evidence is sufficient to establish the elements of the offense); *see also* Vegtrafikkloven [*The Road Traffic Act*] § 22.1; Magnus Matningsdal, *Alkoholpåvirkning av Motorvognfører* [*Influence of Alcohol on Motor Vehicle Drivers*], *in* VEGTRAFIKKLOVEN OG TRAFIKKREGLENE MED KOMMENTARER [*THE ROAD TRAFFIC ACT AND THE TRAFFIC RULES WITH COMMENTARY*] 281 (3d ed. 1998).

21. SLETTAN & ØIE, *supra* note 15, at 123.

22. SLETTAN & ØIE, *supra* note 15, at 491.

23. Section 12.1-03-01(1)(b) of the North Dakota Century Code provides that a person may be convicted for another's conduct commanded, induced, procured, or aided with intent that an offense be committed. *See* N.D. CENT. CODE § 12.1-03-01(1)(b) (1999).

24. Vegtrafikkloven [*The Road Traffic Act*] § 31.1; *see also* N.D. CENT. CODE § 39-08-01(2) (1999). A first or second offense within five years is a class B misdemeanor. *See* N.D. CENT. CODE § 39-08-01(2). A third offense within five years, or a fourth offense within seven years, is a class A

misdemeanors are not punishable unless the statute creating the offense specifically prohibits attempt.[25] The Norwegian DUI statute does so by including anyone who "drives or attempts to drive."[26] North Dakota has no similar "attempt" language in its traffic code, although attempt is prohibited by the criminal code and is not limited to serious offenses.[27] The North Dakota traffic law does prohibit being "in actual physical control" ("APC") of a motor vehicle while under the influence.[28] North Dakota's APC provision is thus analogous to Norway's attempt provision, but it is probably more inclusive because it is applied to punish drivers who might drive, irrespective of any evidence of an actual attempt to drive.[29] Perhaps because of that inclusiveness, the author has never read or heard of a prosecution in North Dakota for "attempted" DUI.[30]

The difference between North Dakota's APC provision and Norway's attempt provision is best illustrated by considering a person who turns on the car engine to get warm but has no intention of driving. The North Dakotan is guilty of APC,[31] whereas the Norwegian would not be guilty of an attempt because of the absence of intent to drive. The "attempt" prohibited in the Norwegian statute is punished with the same severity as actual driving, contrary to the ordinarily less severe punishment for other attempts provided in the Norwegian criminal code.[32] The punishment provided for North Dakota's APC provision is substantially the same as for DUI; the main distinction is that mandatory jail sentences for repeat offenses may be suspended or replaced by appropriate

misdemeanor. *Id.* A fifth or subsequent offense within seven years is a class C felony. *Id*

25. ANDENÆS & BRATHOLM, *supra* note 10, at 329-30 (explaining Straffeloven [*The Criminal Code*] § 49).

26. Vegtrafikkloven [*The Road Traffic Act*] § 22.1 (emphasis added).

27. N.D. CENT. CODE § 12.1-06-02 (1999).

28. N.D. CENT. CODE § 39-08-01(1) (1997 & Supp. 1999).

29. *See, e.g.*, Buck v. North Dakota Highway Comm'r, 425 N.W.2d 370 (N.D. 1988). *Buck* describes the purpose of the APC statute as prevention. *Id.* at 372. Despite the fact that Buck argued he was merely trying to "sleep it off," the court stated an intoxicated person behind the steering wheel of a vehicle is a threat because "he might set out on an inebriated journey at any moment." *Id.* at 373 (citing Martin v. Commissioner of Pub. Safety, 358 N.W.2d 734, 737 (Minn. Ct. App. 1984)). The court further stated, "The real purpose of the statute is to deter individuals who have been drinking intoxicating liquor from getting into their vehicles, except as passengers." *Id.* (citing State v. Ghylin, 250 N.W.2d 252, 255 (N.D. 1977)). The court continued, "An intoxicated individual who gets into his vehicle to sleep poses a threat of immediate operation of the vehicle at any time while still intoxicated." *Id.* at 373. Thus, in North Dakota, judicial interpretation of the APC offense weighs the danger of the sleeper's possible waking and driving as heavier than the presumed incentive to "sleep it off" rather than drive.

30. It is certainly conceivable, however, that someone stopped before getting into a car could be charged with attempted DUI. North Dakota thus has extremely broad deterrent coverage, especially in light of the fact that both APC and attempted DUI are "strict liability" crimes in North Dakota. *See* State v. Novotny, 562 N.W.2d 95 (N.D. 1997).

31. *See, e.g.*, City of Valley City v. Berg, 394 N.W.2d 690 (N.D. 1986).

32. SLETTAN & OIE, *supra* note 15, at 491-92 (suggesting that an attempt may nevertheless be treated as a sentencing factor, presumably in mitigation).

community service.[33] That distinction may play a role in the plea bargaining process described under Part III. B below.

D. SUBSEQUENT USE OF ALCOHOL [ETTERFØLGENDE ALKOHOLNYTELSE] AND OBSTRUCTION OF JUSTICE

Norway prohibits drinking any quantity of alcohol within six hours after driving by anyone who has good reason to believe there will be a police investigation.[34] This prohibition is unique, even among other strict Nordic countries.[35] The Norwegian prohibition is intended to prevent a drinking driver who is found after driving from escaping punishment by claiming that the drinking took place after the driving.[36] The punishment for subsequent use of alcohol is potentially the same as for DUI, although in practice it is easier to get a suspended jail sentence or fine.[37] In North Dakota, the problem of drinking after driving is handled as a matter of evidence and credibility. If the fact finder is convinced that the defendant drank only after driving, no conviction results.[38]

A defendant believed to have drunk both before (or during) and after driving may presumably not be convicted under the per se law, even if the statute might literally apply. In *City of Bismarck v. Preston,* the defendant claimed that he drank alcohol during the time that elapsed between his driving and his return to the scene of a traffic accident.[39] The trial court refused to use a subsequent alcohol test as "conclusive evidence" of the per se offense.[40] However, the court considered the test result as circumstantial evidence of the older, now alternative, driving

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33. N.D. CENT. CODE § 39-08-01(4)(e)(1) (1997 & Supp. 1999). North Dakota courts have struggled to distinguish the offenses of DUI and APC. In *State v. Huber,* the court characterized APC as a different offense from DUI due to the difference in penalties. State v. Huber, 555 N.W.2d 791, 795 (N.D. 1996). The *Huber* court discussed the legislative history of the APC and DUI provisions and concluded that under prior law APC was not a lesser-included offense because prior to 1983 the penalties for DUI and APC were the same. *Id.* Subsequent to the 1983 legislative amendments that allow suspension of sentence for only APC, the court stated that the penalties were now different, making APC a lesser-included offense of DUI. *Id.* at 796.

34. Vegtrafikkloven [*The Road Traffic Act*] § 22.2.

35. SLETTAN & OIE, *supra* note 15, at 488; *see also* ANDENÆS & BRATHOLM, *supra* note 10, at 349.

36. SLETTAN & OIE, *supra* note 15, at 489.

37. ANDENÆS & BRATHOLM, *supra* note 10, at 348.

38. *See, e.g.,* State v. Kaloustain, 212 N.W.2d 843 (N.D. 1973) (concluding that where the defendant was found at least one and one-half hours after a one-car accident and was intoxicated when found, the lack of evidence of intoxication at time of driving meant the evidence was insufficient to support conviction).

39. City of Bismarck v. Preston, 374 N.W.2d 602, 603 (N.D. 1985). The defendant attempted to show that the intervening time period was "substantial," but the court rejected this, observing that after he was seen driving erratically and backing into a car at about 8:00 p.m., he left the scene before returning and being arrested 11 minutes later. *Id.*

40. *Id.*

under the influence offense.[41] The court's emphasis on the fair administration of the test and the "minimal" amount of time between the accident and the BAC test suggest that test evidence will not, under all circumstances, be admissible in under the influence cases.[42] Prosecutors will, in cases of doubt, charge the alternative, under the influence offense instead of the per se offense.[43]

In theory, it might also be possible to charge a defendant who manages to drink between driving and apprehension with obstruction of justice or destruction or alteration of evidence offenses, but I have never seen or heard of that being done. The problems of proof, especially with respect to the defendant's intention, would present great difficulties for the prosecution.[44]

E. DUI IN ANOTHER STATE OR COUNTRY

Another significant difference between North Dakotan and Norwegian DUI law is the possibility of being convicted for DUI for an offense committed in another jurisdiction. A Norwegian may be convicted in

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41. *Id.* Although the court found the evidence relevant, it suggested consumption of alcohol in the intervening time between driving and the chemical test would likely be inapplicable in a per se offense prosecution by stating "because of the lower court's limited use of the evidence . . . the evidence cannot be considered prejudicial." *Id.*

42. *Id.* at 604. In *Preston*, the defendant was charged under Bismarck municipal ordinance 35-148(a)(2), which at the time was identical to section 39-08-01(1)(b) of the North Dakota Century Code. *Id.* at 603.

43. Due to the defendant's intervening time argument in *Preston*, the lower court refused to employ a chemical test as "conclusive evidence" of a per se violation; however, the lower court found the chemical test to be appropriate "circumstantial evidence" of a violation of the alternative "under the influence" offense. *Id.* Section 39-08-01(1)(a) of the North Dakota Century Code indicates that, for the per se presumption to be used, a chemical test must be conducted within two hours of driving. N.D. CENT. CODE § 39-08-01(1)(a) (1997 & Supp. 1999). On the other hand, section 39-08-01(1)(b)-(d) of the North Dakota Century Code allows for prosecution irrespective of the time of the test. N.D. CENT. CODE § 39-08-01(1)(b)-(d) (1997 & Supp. 1999).

44. Section 12.1-08-01 of the North Dakota Century Code, entitled "Physical Obstruction of a Government Function," is likely inapplicable as subsection 2 of the provision explicitly states the statute does not apply to the conduct of a person obstructing arrest of himself. N.D. CENT. CODE § 12.1-08-01 (1999). Second, section 12.1-08-02 of the North Dakota Century Code, entitled "Preventing Arrest or Discharge of Other Duties," requires the offender to create a substantial risk of bodily injury to a public servant or anyone but himself before the statute is applicable. N.D. CENT. CODE § 12.1-08-02 (1999). Third, section 12.1-08-03 of the North Dakota Century Code, entitled "Hindering Law Enforcement," requires an actor to harbor, conceal, or provide a means to avoid apprehension, concealment of a document or thing, warning another of impending discovery, or providing false information to law enforcement for the offense to be applicable. N.D. CENT. CODE § 12.1-08-03 (1999). Finally, section 12.1-09-03 of the North Dakota Century Code, entitled "Tampering with Physical Evidence," requires an actor to alter, destroy, mutilate, conceal, or remove a document or thing in order for the offense to be applicable. N.D. CENT. CODE § 12.1-09-03 (1999). None of these provisions seems clearly to apply to an offender who consumes alcohol after driving in an effort to alter the effects of chemical testing, and, since North Dakota follows the rule of strict construction of criminal statutes, they are likely inapplicable to such situations. *See* State v. Plentychief, 464 N.W.2d 373, 375 (N.D. 1990).

Norway for DUI committed in another country.[45] A North Dakotan may only be convicted in North Dakota courts for a DUI committed within North Dakota.[46] However, a compact, analogous to a treaty, between the majority of states allows North Dakota officials to sanction administratively a person with a North Dakota driver's license for offenses reported from another compact member state.[47] Thus, North Dakotans can be sanctioned administratively for DUIs committed in other states, though not criminally.

II. APPREHENSION AND LAW ENFORCEMENT

A. RANDOM STOPS AND ROADBLOCKS

In both Norway and North Dakota, police may stop a driver to investigate driving conduct that leads them to a reasonable suspicion that the driver may be under the influence of alcohol.[48] Moreover, stops made for other reasons, for example speeding, may frequently lead to suspicion of drinking and further investigation of possible DUI.[49] Norway, however, makes regular use of roadblocks or random stops, which are not based upon any suspicion of the individual stopped.[50]

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45. Straffeloven [*The Criminal Code*] § 12; Vegtrafikkloven [*The Road Traffic Act*] § 22.1. The liability for conduct outside of Norway only applies to citizens and residents of Norway, and it requires also that the driving be criminalized in the other country as well. ANDENÆS & BRATHOLM, *supra* note 10, at 349. The subsequent use of alcohol prohibition, described *infra*, because it is unique to Norway, is not punishable when committed outside of Norway. ANDENÆS & BRATHOLM, *supra* note 10, at 349.

46. N.D. CENT. CODE § 29-03-01.1 (1997) (identifying when persons are liable to be prosecuted in North Dakota). The statute explicitly indicates the offenses for which one may be prosecuted in North Dakota when the offense conduct did not occur there. *Id.* DUI is not one of the enumerated offenses. *Id.*

47. N.D. CENT. CODE § 39-19-01 (1999) (giving the Director of the Department of Transportation the power to execute agreements involving reciprocity between North Dakota and any other state on matters relating to drivers' licensing, financial responsibility, and traffic law enforcement). For a further discussion of administrative sanctions see, *infra*, section IV.F.

48. *See, e.g.*, State v. Burris, 545 N.W.2d 192, 194 (N.D. 1996) (holding that a vehicle that twice crossed the fog line was subject to being stopped); Moran v. North Dakota Dep't of Transp., 543 N.W.2d 767, 770 (N.D. 1996) (holding that a vehicle crossing the centerline and "jerking and weaving" within its own lane offered sufficient justification to stop the motorist); State v. Hawley, 540 N.W.2d 390 (N.D. 1995) (holding suspicion of a parking violation warranted investigation); State v. Ova, 539 N.W.2d 857 (N.D. 1995) (holding suspicion of potential violation of exhibition or careless driving statutes justified stopping a motorist); State v. Placek, 386 N.W.2d 36, 37 (N.D. 1986) (holding reasonable suspicion to stop a motorist exists when a vehicle's taillights appear inoperable); State v. Dorendorf, 359 N.W.2d 115, 117 (N.D. 1984) (holding a car weaving within its own lane of traffic is a sufficient reason to stop for investigation); State v. Kolb, 239 N.W.2d 815, 819 (N.D. 1976) (holding changes in speed and weaving within a lane are sufficient justifications for a stop); *see also* Thomas M. Lockney, *Justice Beryl Levine: Taking Her Title Seriously in North Dakota Criminal Cases*, 72 N.D. L. REV. 967, 979 (1996) (criticizing the North Dakota reasonable suspicion traffic stop doctrine and the *Ova* case).

49. *See generally* State v. Mertz, 362 N.W.2d 410 (N.D. 1985).

50. Vegtrafikkloven [*The Road Traffic Act*] § 10.

In the United States, the Fourth Amendment to the Constitution forbids "unreasonable searches and seizures" and generally requires probable cause or reasonable suspicion to justify a stop, which is considered a seizure, even though temporary. In *Michigan Department of State Police v. Sitz*,[51] the United States Supreme Court determined that roadblocks are reasonable under the Fourth Amendment, at least when conducted as in *Sitz*.[52] Subsequently, some state supreme courts have found roadblocks to be impermissible on state constitutional grounds.[53] Results of constitutional challenges in state courts have been mixed, with some courts approving the police conduct, some conditioning approval upon compliance with specific guidelines, and others holding roadblocks to be unconstitutional.[54] Prior to *Sitz*, the North Dakota Supreme Court had not ruled on the permissibility of sobriety checkpoints.[55]

In the aftermath of *Sitz*, the North Dakota Supreme Court was faced with a similar case in *City of Bismarck v. Uhden*.[56] In *Uhden*, the city of Bismarck established a sobriety checkpoint, at which police stopped Uhden.[57] The court affirmed Uhden's subsequent conviction, holding the checkpoint violated neither the Fourth Amendment nor the North Dakota Constitution.[58] The court held the checkpoint in question valid in light of the city's interest in controlling drunk driving, carefully tailored guidelines, operational briefings, lack of discretion by the officers in determining which vehicles would be stopped, and use of safety precautions.[59]

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51. 496 U.S. 444 (1990).

52. Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990).

53. *See generally* Sitz v. Michigan Dep't of State Police, 506 N.W.2d 209 (Mich. 1993). Interestingly, the Michigan Supreme Court, on remand from the United States Supreme Court, determined that sobriety checkpoints were unconstitutional on state constitutional grounds. *Id.* Similarly, North Dakota's neighboring state, Minnesota, does not permit sobriety checkpoints under the Minnesota constitution. *See* Ascher v. Commissioner of Pub. Safety, 519 N.W.2d 183 (Minn. 1994).

54. MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURE 93 (1998) (counting "nearly" 40 states as following *Sitz* and a "substantial minority (about 10)" as requiring individualized suspicion). For a thorough discussion of sobriety checkpoints under the Fourth Amendment and a critique of *Sitz*, see 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 10.8(d) (1996).

55. In one interesting related case, however, the North Dakota Supreme Court refused to approve a stop by a state highway patrol officer as a routine "safety check" stop when the government produced testimony by the officer that he had followed standard procedures but failed to introduce any evidence of what the standard procedures consisted. *See* State v. Goehring, 374 N.W.2d 882 (N.D. 1985).

56. 513 N.W.2d 373 (N.D. 1994).

57. City of Bismarck v. Uhden, 513 N.W.2d 373, 374 (N.D. 1994).

58. *Id.* at 378.

59. *Id.* at 378-79. I have previously suggested the *Uhden* opinion is mere dictum, because the court rejected defendant's reliance on a state statute he claimed did not authorize a reasonable suspicion stop, when in fact the stop in *Uhden* was made on no suspicion whatsoever. *See* Lockney, *supra* note 48, at 975-79.

The impact and effectiveness of combating impaired drivers through the use of sobriety checkpoints is contentious and debatable in the United States generally and North Dakota specifically. Those advocating checkpoint operations concede that, because of the brevity of the contact, not all impaired drivers who are stopped are arrested. However, others suggest a deterrent effect which, although difficult to measure, seems plausible because the public has a heightened awareness when sobriety checkpoints are used. The arguments for and against checkpoints are aired in the *Sitz* opinions and in extensive legal commentary in the United States.[60] The main point here is that despite *Sitz* and *Uhden*, the controversy continues, and anecdotal evidence suggests that sobriety checkpoints are not yet common in North Dakota. In Norway, contrarily, they are both common and uncontroversial.

B. BREATH AND BLOOD ALCOHOL TESTS

In both Norway and North Dakota, a portable breath-testing device is, or may be, used by the police in the field to determine whether the defendant shall be further processed as a suspected drunk driver.[61] In Norway, a positive reading on the breath "alkotest" leads to a clinical examination, blood test by medical personnel, or a more sophisticated police administered breath test.[62] In North Dakota, similar field breath testing devices including the A.L.E.R.T., SD2, and Alco-Sensor may be used for an arrest determination.[63]

However, police proficiency levels and availability of these devices may be limited by the fact that, unlike Norway, North Dakota has three levels of police jurisdiction, with some overlap in authority. The state Highway Patrol is limited primarily to traffic enforcement on highways; county sheriffs are responsible for general law enforcement throughout counties but typically outside the cities and towns; and municipal police are responsible for enforcement in cities and towns.[64] It may be surprising for Norwegians to learn that a town with a population as small as

60. *See generally* LAFAVE, *supra* note 54.

61. N.D. CENT. CODE § 39-20-14 (1999); Vegtrafikkloven [*The Road Traffic Act*] § 22a.1.

62. Vegtrafikkloven [*The Road Traffic Act*] § 22a; ANDENÆS & BRATHOLM, *supra* note 10, at 350.

63. N.D. CENT. CODE § 39-20-14 (allowing the use of a screening test only for determining whether a further test shall be given).

64. Jurisdiction for municipal police agencies is within the municipality and one-and-one-half miles outside the city limits. N.D. CENT. CODE § 40-20-05(1) (1999). Sheriffs and deputies have jurisdiction within their respective counties, including cities and towns within the county, and up to one-and-one-half miles into adjacent counties. N.D. CENT. CODE § 39-01-01 (1999). State patrol officers have jurisdiction on all highways and on all state-owned property. N.D. CENT. CODE § 39-03-03(11)-(12) (1999). Interestingly, the statutory definition of highways includes roadways within cities and towns; thus, highway patrol officers have jurisdiction on virtually all roadways within the state. N.D. CENT. CODE § 39-01-01(24) (1999).

1,500 may have its own police department consisting of one or two police officers.[65]

In contrast, Norway has uniform training and centralized control of its police. The police are under administrative hierarchy of the Ministry of Justice; indeed, it is officially the "Royal Norwegian Ministry of Justice and the Police." Also of interest and relevant to many points of this comparison, every police department is headed by a police chief required to be a law school graduate. Each department has subordinate officers who are also lawyers and who direct investigations and handle lower level prosecution functions.[66]

North Dakota law authorizes trained and certified police officers to administer screening tests if the driver has committed a moving traffic violation or was involved in an accident and the officer has formulated an opinion that the driver's body contains alcohol.[67] The screening devices are used only in the officer's ascertainment of probable cause to arrest for DUI and a determination to administer chemical testing following arrest.[68] Refusal to submit to an on-site screening test will result in the revocation of driving privileges for up to three years unless the driver "cures" the refusal by submission to subsequent testing for the same offense.[69]

In Norway, after a driver is determined likely to be under the influence in the field, evidence for subsequent prosecution is obtained either by a physician's clinical examination, a blood test, or a more sophisticated breath test. The breath test is administered by the police; despite the convenience of the breath test for both the police and the suspect (assuming a favorable result), its use is fairly recent in Norway. Opposition to breath testing was lead by the head of the State Forensic Toxicology Institute, who disputed the reliability of breath testing for

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65. Notwithstanding these jurisdictional differences, often an officer with broader jurisdictional authority can "vest" the officer possessing less jurisdictional enforcement authority with the authority to stop and arrest potential violators. For example, in *State v. Graven*, a highway patrolman vested a Casselton, North Dakota police officer with authority to stop a suspected drunk driver after the officer radioed the patrolman with his observations. State v. Graven, 530 N.W.2d 328 (N.D. 1995). Likewise, in *Mead v. North Dakota Department of Transportation*, a sheriff's deputy directed a city police officer to stop and subsequently arrest a DUI offender outside the city police officer's jurisdiction. Mead v. North Dakota Dep't of Transp., 581 N.W.2d 145 (N.D. Ct. App. 145 1998).

66. *See Johs. Andenæs, Criminal Law, Criminology, and Criminal Procedure in Knoph's Overview of Norwegian Law (Thomas Lockney trans.) (10th ed. 1993), 2 J. INT'L L. & PRACTICE 431, 458 (1993).*

67. N.D. CENT. CODE § 39-20-14 (1999). Three devices are currently approved for use by the state toxicologist. *See id.* These devices are the A.L.E.R.T., the Alco-sensor, and the SD2. Each device is portable, but only the SD2 gives a "quantifiable" reading. The SD2 lists an approximation of the driver's alcohol content, whereas the A.L.E.R.T. and Alco-sensor only indicate a pass, warn, or fail. These two devices are calibrated to register a fail at .11% alcohol concentration.

68. *Id.*

69. *Id.*

evidentiary purposes. Blood samples are taken by doctors, officially authorized nurses, or medical technologists and sent for analysis to the State Forensic Toxicology Institute.[70]

In North Dakota, a state statute allows the arresting police officer to determine whether the defendant will be taken to a medical facility for a blood, urine, or saliva test, or to a police station where a breath test will be taken on an "Intoxilyzer."[71] The Intoxilyzer is a device approved by the state toxicologist for infrared spectrographic analysis of the alcohol content in the subject's breath.[72] The machine is largely computer driven, and thus police officers with no scientific training themselves are taught and authorized by the toxicologist to run tests on drivers.[73] The Intoxilyzer converts the measurement of breath alcohol to blood alcohol on the basis of a formula thought by the state toxicologist and some, but by no means all, other experts to be a fair approximation of the ratio between breath and blood alcohol content.[74]

Finally, in Norway, the blood sample can be taken by force, and, if the suspect refuses to co-operate, driving privileges are revoked for at least two years.[75] In North Dakota, the defendant may generally refuse

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70. Vegtrafikkloven [*The Road Traffic Act*] § 22a; ANDENÆS & BRATHOLM, *supra* note 10, at 350 (suggesting that the "new type" of test was approved by the Justice Department in 1996 and as of that date the "very advanced and costly" test apparatus was available in few police stations); *see also* R.N. Torgersen, *in* VEGTRAFIKKLOVEN OG TRAFIKKREGLENE MED KOMMENTARER [*THE ROAD TRAFFIC ACT AND THE TRAFFIC RULES WITH COMMENTARY*] (R.N. Torgersen & Bjørn Engstrøm eds., 3d ed. 1998) (describing the new apparatus as the "Intoxilyzer 5000 N" developed in the United States and adapted for Norwegian use).

71. N.D. CENT. CODE § 39-20-01 (1999).

72. *Id.* Officers administering chemical Intoxilyzer tests are trained and certified by the State Toxicologist and must administer the test in accordance with the approved method of the State Toxicologist's office. The approved method provides that a subject will provide two breath samples; the lower of the two tests, if the test is valid, becomes the reported alcohol content. *See generally* N.D. CENT. CODE § 39-20-07 (1999) (providing statutory authority for the State Toxicologist and detailing chemical test interpretation).

73. The State Toxicologist's office conducts a 40-hour training session to certify operators in the use of the Intoxilyzer. Additionally, officers must periodically re-certify in the use of the instrument. *See generally* N.D. CENT. CODE § 39-20-07(6) (1999) (providing statutory authority for training and certification of chemical test operators).

74. *See* BRUCE D. QUICK, I ONLY HAD 2 BEERS: A NORTH DAKOTA PROSECUTOR'S MANUAL FOR DUI CASES 45-55 (1992) (discussing the operation of the Intoxilyzer 5000). Significant controversy exists regarding the use of instruments such as the Intoxilyzer, particularly the conversion ratio commonly referred to as "Henry's Law." A detailed annotation discusses Henry's Law at length, as well as individual state interpretation of chemical testing. *See* David Polin, Annotation, *Challenges to Use of Breath Tests for Drunk Drivers Based on Claim That Partition or Conversion Ration Between Measured Breath Alcohol and Actual Blood Alcohol is Inaccurate*, 90 A.L.R.4th 155 (1991); *see also* State v. McCarty, 434 N.W.2d 67, 68 (S.D. 1988) (indicating a standard ratio of 2100:1 was used, while actual ratios may vary from 1142:1 to 3478:1).

75. Vegtrafikkloven [*The Road Traffic Act*] § 33.

both a blood or breath test, but the refusal leads to revocation of driving privileges for up to three years.[76]

III. LAWYERS, JUDGES, AND THE LEGAL PROCESS

A. TRIALS AND THE CRIMINAL PROCESS

It is my impression that the processing of a DUI case in Norway is generally fairly cut and dried and is therefore a relatively simple affair.[77] I have not yet discovered any detail about how the actual prosecution of a Norwegian DUI compares with other misdemeanors, but I recall a "dommerfullmektig" (deputy judge) friend telling me that he had "lots of drunk driving cases" in his court. When I asked him if I could watch a trial, he replied, "Oh, we never have trials. There's nothing to try." Most cases are determined by a single judge sitting as a magistrate ("court of summary jurisdiction") and accepting a defendant's plea of guilty.[78]

In North Dakota, DUI is typically a misdemeanor.[79] All misdemeanor defendants are entitled to demand a jury trial with six jurors, which DUI defendants often do.[80] Although a great majority of cases are disposed of by pleas of guilty, it is likely that more DUI cases go to trial than any other category of misdemeanor.[81] At trial, defendants vigorously urge relatively strict and formal rules of evidence in an attempt to have various types of evidence excluded from consideration by the jury or ignored by the judge if a jury trial is waived.

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76. N.D. CENT. CODE § 39-20-04(1) (1997). The period of revocation may be increased up to three years depending on the number of previous suspensions or revocations within the preceding five years. *See* N.D. CENT. CODE § 39-20-04(1)(c) (1997). The driver also may not be able to refuse a blood test if involved in a motor vehicle accident causing death or serious bodily injury. *See* N.D. CENT. CODE § 39-20-01.1 (1997). The statute provides that a driver involved in such an accident may be compelled to submit to an alcohol test by a police officer with probable cause to believe the driver is in violation of the DUI provisions. *Id.*

77. It is beyond the scope of this article to describe the difference between the so-called continental or "inquisitorial" trial system and the "adversarial" system used in the United States. For a useful and entertaining comparison of the "European" approach and that of the United States in the context of the trial of O.J. Simpson, see Myron Moskowitz, *The O.J. Inquisition: A United States Encounter With Continental Criminal Justice*, 28 VAND. J. TRANSNAT'L L. 1121 (1995). In general, Norway seems to be somewhere between the continental system and the adversarial system. *See generally* ANDENÆS, *supra* note 66.

78. Straffeprossessloven [*Code of Criminal Procedure*] § 248. Magnus Matningsdal, *Nyere Reaksjonspraksis m.v. ved Promillekjøring og Etterfølgende Alkoholnytelse [Recent Sanction Practice Regarding Drunk Driving and Subsequent Use of Alcohol]*, 1993 LOV OG RETT [*LAW AND JUSTICE*] 151, 179.

79. N.D. CENT. CODE § 39-08-01(2) (1999).

80. N.D. CENT. CODE § 29-17-12 (1997).

81. *See* QUICK, *supra* note 74, at ii ("[L]ikely no other crime in modern times, misdemeanor or felony, . . . is so frequently contested").

One of the most commonly used strategies to exclude evidence is the constitutional exclusionary rule, created by the United States Supreme Court, which declares that any evidence obtained in violation of the Federal Constitution cannot be used against the defendant at trial.[82] Thus, items found or seized in violation of the Fourth Amendment's requirement of reasonableness, which generally requires "probable cause" for the search and seizure, as well as judicial approval manifest in a warrant, or a good excuse for not having a warrant, and confessions obtained in violation of the Fifth Amendment privilege against self-incrimination or the Sixth Amendment right to counsel, are inadmissible in evidence.[83] If the excluded evidence is crucial, the prosecution may move to dismiss or the defendant may be acquitted. As the famous Benjamin Cardozo said critically of the exclusionary sanction, prior to his service on the United States Supreme Court: "The criminal goes free because the constable blundered."[84]

For example, if the stop of the car is made without a violation or the requisite suspicion, the stop is deemed illegal or unconstitutional. All evidence obtained or flowing from such a stop would then be inadmissible in court as a result of the metaphorically phrased "fruit of the poisonous tree" doctrine.[85] Thus, evidence obtained after the illegal stop, such as observation of speech or physical movements, as well as BAC testing, is inadmissible at trial. Efforts to exclude illegally obtained evidence are handled before trial at so-called "suppression hearings." Critics call them "mini-trials," and in fact DUI cases often provide examples of lengthy suppression hearings followed, when the defense is unsuccessful, by guilty pleas.[86] Norwegian trials are much less formalistic affairs, at least concerning rules of evidence. The general rule seems to be one of common sense evaluation of credibility.[87] In contrast, North Dakota and

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82. Weeks v. United States, 232 U.S. 383, 391-92, 398 (1914) (establishing the exclusionary rule for violation of constitutional rights by federal officers). The exclusionary sanction was extended to state law enforcement officers through the Due Process Clause of the 14th Amendment in a landmark constitutional case, *Mapp v. Ohio*, 367 U.S. 643 (1961).

83. For a useful discussion of the exclusionary rule specifically as it applies to search and seizure questions with references also to Fifth and Sixth Amendment applications, see CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE, at ch. 2 (3d ed. 1993).

84. People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).

85. *See* WHITEBREAD & SLOBOGIN, *supra* note 83, at § 2.04 (providing a discussion of the background and application of the doctrine).

86. Many DUI-related cases reach the North Dakota Supreme Court through a process referred to as a conditional guilty plea under Rule 11 of the North Dakota Rules of Criminal Procedure. N.D. R. Crim. P. 11(a)(2) (1999). The rule states that if the court and prosecuting attorney consents, "a defendant may enter a conditional plea of guilty reserving in writing the right, on appeal from the judgment, to review the adverse determination of any specified pretrial motion. A defendant who prevails on appeal must be allowed to withdraw the plea." *Id.*

87. SLETTAN & ØIE, *supra* note 15, at 525. Stetten and Øie describe, as a main principle of Norwegian criminal procedure, "The principle of free admission of evidence." SLETTAN & ØIE, *supra*

the United States federal courts have lengthy, complex, and wonderfully disputable codes of evidence rules.[88] A major course of law school deals entirely with the rules of evidence, often followed by another course in trial advocacy which consists in large part of learning how to apply—some might say manipulate—the rules of evidence to advantage at trial.

B. PLEA BARGAINING

In both Norway and North Dakota, a defendant may plead guilty and avoid a trial. However, in North Dakota, as is common throughout United States jurisdictions, the guilty plea is often induced by, or rewarded with, a concession, generally a reduction in the sentence, a reduction in the severity of the crime charged, or a dismissal of one or more of multiple charges against the accused.[89] For many years, despite its widespread use, many people considered this practice of plea bargaining to be constitutionally suspect.[90] However, the United States Supreme Court in 1970 suggested that a concession-induced plea is not invalid under the United States Constitution.[91] The now-approved practice has continued to thrive, despite continual criticism from many quarters and occasional efforts in some jurisdictions to abolish it.[92] The specific

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note 15, at 525. "It is a principle not specified in statute, that as a main principle the parties may introduce all relevant evidence." SLETTAN & ØIE, *supra* note 15, at 525. *But see* JOHS. ANDENÆS, NORSK STRAFFEPROSESS [NORWEGIAN CRIMINAL PROCEDURE] 241-47 (1994). Andenæs suggests that illegally obtaned evidence may be excluded by judges at their discretion. His discussion does not explicitly distinguish between constitutional violations and other illegality. Factors a judge may consider in exercising exclusionary discretion include the reliability or quality of the evidence, the interests protected by the law violated, and the seriousness of both the illegality and the alleged crime being tried. Indisputably probative real evidence, like a murder weapon, is discussed as clearly admissible, in direct contrast to Untied States practice which is noted as such by Andenæs. ANDENÆS, *supra*, at 243-44. But Andenæs's discussion of less clear cases, such as illegal blood testing (presumably referring to the extraction of the blood from the suspect) and confessions obtained by illegal methods, hints that Norwegian results may not always differ as much as the simple "Norway has no exclusionary rule" statement suggests.

88. For a recent critical and comparative view of our trial system, see WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH (1999). Particularly insightful and enjoyable is his first chapter, "Soccer, Football, and Trial Systems," where he compares soccer and American football as a prelude to comparing European and United States trial systems. *Id.* at 23. I will leave it to my readers, as an incentive to read his wonderful book, to guess the referent for his description of "worship of proceduralism, the attempt to rationalize every aspect of decisionmaking, the distrust of spontaneous action, the heavy preference for tight control over the participants, and, above all, the daunting complexity of the rules such a system requires." *Id.* at 23-24. Pizzi also briefly describes the Norwegian trial system. *Id.* at 101-04. For a vigorous review essay claiming that Pizzi's critique of the United States system is overstated and misleading, see Richard S. Frase's Review Essay, "The Search for the Whole Truth about American and European Criminal Justice," 3 BUFF. CRIM. L. REV. (2000) (forthcoming in Issue 2).

89. *See generally* YALE KAMISAR ET AL., *Coerced, Induced and Negotiated Guilty Pleas; Professional Responsibility: Some Views of Negotiated Pleas Modern Criminal Procedure*, *in* MODERN CRIMINAL PROCEDURE 1301-13 (1994).

90. Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564 (1997).

91. *See generally* Brady v. United States, 397 U.S. 742 (1970) (approving a plea induced to avoid the death penalty by comparison with the practice of plea bargaining).

92. MILLER ET AL., CRIMINAL JUSTICE ADMINISTRATION 942-50 (4th ed. 1991).

incentives offered to the defendant are determined for the most part by the prosecutor who, within the broad range of prosecutorial discretion, must negotiate a sufficient reduction to induce the defendant's sacrifice of his right to trial.[93] However, the reduction should not be so great as to offend the integrity of the office, arouse excessive public outrage or, in light of the final authority vested in the court to approve or disapprove of the "deal," offend the judge's sense of justice.[94]

Plea bargaining either to reduced charges such as reckless driving or in exchange for mild penalties has been a common feature of drunk driving law in the United States, including North Dakota. Pressure from groups such as MADD and legislative minimum punishment provisions have reduced the amount of plea bargaining in DUI cases, but they are far from eliminating it.

In Norway, the official or standard position is that plea bargaining does not exist. However, modern developments in Norway's "war on drugs" and complicated economic crime prosecutions cast some doubt about correspondence between the official position and the "law on the streets" or in practice.[95] A famous case many years ago against a wealthy shipping line owner involving numerous counts of serious economic crime ended with a guilty plea to one minor offense with minimum penalty.[96] Nonetheless, it is doubtful that anything like North Dakota plea bargaining takes place in Norway, except perhaps as an occasional aberration.

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93. *Id.* at 946.

94. The judge can accept, reject, or defer his or her decision pending a presentence investigation once a plea agreement has been placed before the court. *See* N.D. R. CRIM. P. 11(d)(2) (1999). *But see* United States v. Ammidown, 497 F.2d 615 (D.C. Cir. 1973) (holding, under the specific facts of the case, that the trial court should have accepted a plea agreement based on a prosecutor's recommendation for the agreement which would protect a later criminal action by the government). In *State v. Thompson*, the North Dakota Supreme Court refused to allow a defendant to withdraw his guilty plea when the judge imposed a sentence more severe than the non-binding plea agreement entered into by the prosecution and defense. State v. Thompson, 504 N.W.2d 315 (N.D. 1993); *see also* State v. Halton, 535 N.W.2d 734 (N.D. 1995) (holding a defendant could not withdraw a guilty plea when a judge sentenced the defendant to a substantially longer sentence than the prosecutor's recommendation); Lockney, *supra* note 48, at 1007-10 (discussing the court's refusal to honor a prosecutor's recommendation).

95. Norway might do well to heed the developments described in Joachim Herrmann, *Bargaining Justice—A Bargain For German Criminal Justice?*, 53 U. PITT. L. REV. 755 (1992), which begins: "The administration of criminal justice in Germany has undergone dramatic changes in recent years. Bargaining over charges and sentences and settling cases have become common practice, even though they previously were considered repugnant to the principles and tradition of German criminal justice." Although the history and context may differ significantly, a similar process may well be under way in Norway.

96. In light of that case, the continued assurance by Norwegian experts that plea bargaining is foreign to Norway seems to me analogous to the widespread antipathy expressed by most North Dakotans to "socialism," notwithstanding the state-owned bank and mill constituting the state's two largest industries.

C. DEFENSE ATTORNEYS

1. *Right to an Attorney*

In both Norway and North Dakota, a defendant has the right to be represented by an attorney. The critical issue, however, is what triggers the right of an accused to have the assistance of a defense lawyer at state expense. In Norway, a criminal defendant has the right to a state-paid defense attorney in most cases, but not for a DUI case unless special circumstances exist.[97] If the description of DUI cases as being "cut and dried" in Norway is accurate, it would then naturally follow that such "special circumstances" are infrequently found.

In North Dakota, the issue is more complicated. The Sixth Amendment to the Constitution, made applicable to the states by the Fourteenth Amendment's Due Process Clause, provides that an indigent accused has the right to counsel at state expense in any case where a jail sentence is actually imposed.[98] Great conceptual and practical difficulties arise in trying to administer this rule for the common sense reason that the trial court must determine whether to appoint counsel before the trial and sentencing processes; in other words, it must guess whether there will be a jail sentence before it knows anything about the case. As a practical matter, many North Dakota judges, at the initial appearance of the defendant, ask the prosecution whether it intends to reserve the possibility of recommending a jail sentence. If so, counsel is appointed. If not, the defendant gets good and bad news from the court: the good news is, "I will not send you to jail"; the bad news is, "You have to defend yourself or hire your own defense attorney."

If that is not complicated, or perhaps even absurd, enough, North Dakota has additional complications for DUI cases. Repeat offenses carry statutory mandatory jail sentences.[99] The North Dakota Supreme Court has held that the North Dakota state constitution's guarantee of the right to counsel does not permit a defendant to be sentenced to jail as a repeat offender without proof that the defendant either had, or voluntary waived the offer of, counsel in the previous case(s).[100] As a result, some judges are now appointing counsel in all cases, even first offenses,

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97. Straffeprosessloven [*The Criminal Procedure Act*] §§ 96 & 100.

98. *See* Argersinger v. Hamlin, 407 U.S. 25, 37 (1972) (holding there is a right to counsel for indigent defendants in misdemeanor cases involving a jail term); *see also* Scott v. Illinois, 440 U.S. 367, 373-74 (1979) (holding there is no right to counsel when the defendant does not get an actual jail sentence for violating a statute that provides imprisonment as a possibility).

99. N.D. CENT. CODE § 39-08-01(4) (1999).

100. State v. Orr, 375 N.W.2d 171, 174-80 (N.D. 1985).

in order to preserve the right to jail the defendant for subsequent offenses.[101]

2. *Role of the Defense Attorney*

A "chicken and egg" problem—"which comes first, the chicken or the egg?"—is presented in considering the role of Norwegian and North Dakota DUI defense lawyers. Lawyers in the United States are required by codes of ethical conduct to provide "zealous" advocacy for the defendant.[102] This tone of the zeal was evident at a national seminar for DUI defense lawyers, attended by the author just prior to first traveling to Norway to study its DUI law.[103] At least one lawyer from forty-seven states was in attendance, including three from North Dakota. Two full days were devoted to methods and tactics of defending DUI cases and focused on ways to avoid the perceived excesses of the "get-tough-on-drunk-driving" movement as manifest in legislative efforts to pass tougher statutes and police and prosecution efforts to enforce more vigorously the legislation.[104]

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101. The reason some judges do not follow that practice may be a realistic appraisal of economic considerations, in light of the fact that the municipalities and counties must bear the expense of court appointed attorneys. I myself have experienced situations as a municipal judge in which a city prosecutor dismissed the charge rather than subject the city budget to the expense of an appointed defense attorney. An unclear factor in all of this is the arguably theoretical nature of the issue, despite its practical consequences, in light of the careful or clever judge's ability to sentence the offender to jail in a repeat case under the general misdemeanor sentencing discretion (0-30 days in jail) irrespective of the "mandatory" legislative penalty for the repeat offense. *See generally* NORTH DAKOTA MUNICIPAL COURT BENCHBOOK at III-23 to -24 (1997) (discussing right to counsel, the *Orr* decision, and waiver of right to counsel).

102. *See* MODEL RULES OF PROFESSIONAL CONDUCT Preamble ¶ 2 (1997); *see also* N.D. R. PROF. CONDUCT Preamble, Rule 1.3 cmt. (1997).

103. Third National Seminar: Getting Tough on DWI: The Defense, Sponsored by The Minnesota Society for Criminal Justice & The Washington Foundation for Criminal Justice, Orlando, Florida (Mar. 4-5, 1988).

104. The "war" has scarcely diminished in intensity since 1988. For example, the January/February 2000 issue of "The Champion," the journal of the National Association of Criminal Defense Lawyers, continues a longstanding column devoted to defense of DUI and entitled "The .10% Solution." The January/February column, by Christian Samuelson and Gary Trichter, both practicing defense lawyers, is entitled "DWI Defense Witness Preparation: How to Compete with the Testimony of Experienced Police Witnesses." It begins:

> In the era of MADD Mothers and .08 legislation, DWI prosecutions have become both political and competitive. They are "political" in the sense that politicians and judges alike use anti-DWI sentiment as a banner to garner votes. They are "competitive" in the sense that many police officers and other state witnesses testify only to win and not to do justice. DWI trials are also competitive from a prosecution standpoint because of the need to avoid the political embarrassment that a "not guilty" verdict can bring. Here, it is important to note that in most every jurisdiction around the country, no other crime is litigated as often as DWI and moreover, no other prosecution ends in a not guilty verdict more than that of DWI.
>
> Accordingly, in this political and competitive context, it must be remembered that DWI is an opinion crime. Generally speaking, the jury is forced to rely on the opinions of the arresting officers in arriving at its verdict. In most cases these opinions will be sufficient

It is likely that such a seminar would be unthinkable in Norway. Hence the chicken and egg problem: Is the advocacy of the Norwegian defense bar subdued because the statutes, rules of evidence, permissible trial tactics, and public and judicial attitudes preclude a vigorous defense? Or, are the tools of a vigorous defense lacking because the defense lawyers share the general moralistic attitude of Norwegian society reflected in the discrimination against DUI defendants, notably the lack of a general right to appointed counsel?[105]

North Dakota lawyers seek to suppress evidence by claiming it was illegally obtained, vigorously plea bargain, and, if a plea bargain is not negotiated, often take cases to juries. Occasionally enough to justify their efforts, they convince juries that the police officer made a mistake, or the scientific evidence is untrustworthy, or perhaps that a merciful acquittal is justified on the subtly argued (because technically impermissible) adage that "there but for the grace of God go I."[106]

3. *Jury Trials*

A simple but misleading comparison would simply state that in North Dakota DUI defendants are entitled to a jury trial; in Norway they are not. However, such a statement is misleading if one considers the purpose of a jury to be public participation in judicial decisions.

In Norway, a defendant who does not plead guilty is first tried in the Herredsrett (township court) or Byrett (city court), both of which consist of one professional (law-trained) and two lay judges.[107] After conviction, it is theoretically possible to get a new trial in the Lagmannsrett (Court of Appeal) with a court consisting generally of three professional and four lay judges.[108]

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evidence to persuade the jury to convict your client because the officers who testify against your client have been well-schooled and battle educated on the stand.

Christian Samuelson & Gary Trichter, *DWI Defense Witness Preparation: How to Compete with the Testimony of Experienced Police Witnesses*, THE CHAMPION, January/February 2000. For a flavor of the opposing side, visit the web site of Mothers Against Drunk Driving at <http://www.madd.org/>.

105. Straffeprosessloven [*The Criminal Procedure Act*] §§ 96 & 100.

106. *See* LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 281 (1993) (describing traditional ambivalence about the seriousness of drunk driving as reflected in a classic jury study by Harry Kalven, Jr. and Hans Zeisel, entitled *The American Jury* , at 293-97 (1966)). Friedman describes the movement to change that attitude spearheaded by the founding of Remove Intoxicated Drivers (RID) in 1979 and Mothers Against Drunk Driving (MADD) in 1980, which he claims recriminalized drunk driving, with questionable deterrent results, causing him to conclude that "the campaign against drunk driving tends to make more of a mark on paper than it does in terms of real deterrence, or even in terms of severity of punishment." *Id.* at 281-82.

107. SLETTAN & OIE, *supra* note 15, at 530.

108. The bases for appeals, the composition of the court hearing the appeal, and the procedural rules for determining the processing and filtering of appeals have become especially complex after recent revisions in Norway effective 1995. Since it is rare that a DUI case is appealed on issues of guilt or innocence, those complexities are beyond the scope of this article. *See generally* ADMINISTRATION OF JUSTICE IN NORWAY (3d ed. 1998).

In North Dakota, every DUI defendant has the same right to a jury trial (six member jury) as any other misdemeanor defendant.[109] So-called administrative or non-criminal (civil) traffic offenses are handled with a different procedure,[110] but serious traffic offenses, such as DUI, reckless driving, and driving without a suspended or revoked license, are all retained as misdemeanors subject to all the normal misdemeanor procedures, including a jury trial.[111]

4. *Appeals*[112]

A significant feature of the Norwegian system, discussed below in Part IV. E, is appellate review of sentences. In North Dakota, and the United States generally, the prosecution has a very limited right to appeal, based on tradition and a long and very complicated history of judicial development of the federal constitutional prohibition against being put twice in jeopardy for the same offense.[113] Norway has no similar prohibitions, and it is probable that the majority of appeals in DUI cases are taken and won by prosecutors. If that impression is correct, it is interesting to contemplate the ability, if any, of an unrepresented defendant to appeal, the chances of success if an appeal is legally and practically possible, and the effects on the "common law" of DUI in Norway if the answer to either question is little or none.

IV. SANCTIONS: CRIMINAL PENALTIES AND OTHERWISE

A. JAIL AND FINE

The most famous aspect of Norwegian DUI law was until recently the mandatory unsuspended twenty-one days minimum jail sentence.[114]

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109. *See* N.D. CENT. CODE § 29-17-12 (1991). The North Dakota right to a jury trial is broader than the federal right, which generally requires imprisonment of over six months. *See* Baldwin v. New York, 399 U.S. 66 (1970).

110. N.D. CENT. CODE § 39-06.1-02 (1991) (setting forth procedures for disposition of non-criminal traffic offenses).

111. N.D. CENT. CODE § 39-06.1-05 (1997) (excluding DUI, reckless driving, driving without a license, and other serious offenses from procedures for non-criminal offenses).

112. The general structure and nature of appeals from DUI convictions in North Dakota and Norway is reasonably similar. A complete discussion would require a detailed description of the two court systems and appellate procedures. That discussion is avoided in this article for the sake of brevity. *See generally*, ADMINISTRATION OF JUSTICE IN NORWAY, *supra* note 108.

113. For an analysis of the history and development of double jeopardy, see J. SIGLAR, DOUBLE JEOPARDY: THE DEVELOPMENT OF A LEGAL AND SOCIAL POLICY (1969).

114. Andenæs, *in* SOCIAL CONTROL, *supra* note 1, at 48-49. Even the "mandatory" three week unsuspended sentence, however, was not imposed in about 15% of the cases; the exceptional suspended sentences were handed out to very young or old defendants, or defendants for whom the prison time would have had serious psychological consequences.

This feature, initiated in the 1920s, was not changed by parliament until 1988.[115] The severity of the minimum twenty-one day unsuspended jail sentence was amplified by comparison with the normal wide discretion afforded to Norwegian courts for other crimes and the wide use of suspended sentences for other first offenders. The length, however, must be put in the context of the fact that for many years, in fact until 1985, the minimum length of incarceration for any crime in Norway was twenty-one days, a feature that I personally never saw mentioned in United States articles touting the severity of Norwegian DUI sentencing. On the other hand, it is also indicative of the Norwegian attitude toward DUI, as reflected by acts of Parliament, that when the general minimum sentence of twenty-one days was lowered to fourteen, the change affected all crimes except DUI, a situation that lasted from 1985 until the sweeping revision of DUI punishment in 1988.[116]

The situation after 1988 is more complex. Perhaps the clearest and simplest exposition of the current situation is contained in a basic criminal law treatise written for Norwegian law students which explains as follows:[117]

> **Punishment Range**
>
> The punishment for drunk driving is fines or imprisonment up to one year. According to legislative history, restraint should be exercised in imposing community service for drunk driving.
>
> **The Act Gives More Precise Directions for the Imposition of Punishment**
>
> In 1988 we received rules which lack counterparts in Norwegian criminal law: Rules were established in the act regarding imposition of punishment in drunk driving cases. Additional directions were provided in the preparatory works.
>
> The act operates with three grades of seriousness: BAC between .05% and .10%; between .10% and .15%; and over .15%. There is moreover a special provision for imposition of punishment for repeat drunk driving, which applies irrespective of the degree of BAC.
>
> The punishment increases as the level of BAC rises. Fines and imprisonment should normally be imposed in all cases.

115. Vegtrafikkloven [*The Road Traffic Act*] § 31.3.

116. ANDENÆS & BRATHOLM, *supra* note 10, at 337 (describing this situation as "scarcely reasonable").

117. SLETTAN & ØIE, *supra* note 15, at 494-96. The translation quoted in the text omits the section numbers, parenthetical citations of authorities, and footnotes contained in the Norwegian treatise.

The difference is whether the imprisonment should be suspended or unsuspended and how long it lasts.

The Three Levels of Influence

With a BAC from .051% to .10% the punishment as a rule is a fine and suspended or prison sentence. According to the preparatory works, the imprisonment should normally be from fourteen to twenty-one days.

With BAC between .10% .to .15%, the punishment should usually be a fine suspended *or* unsuspended prison. According to the Supreme Court practice the line between suspended and unsuspended prison is in the vicinity between .115% and .13% when there is nothing remarkable about the driving. Suspended sentences should normally be 21 to 30 days, while unsuspended sentences should be from 14 to 30 days.

For BAC over .15% the normal punishment is fine and unsuspended prison. The term of imprisonment should usually be from 21 to 36 days.

The division according to levels of influence is not absolute, see "as a rule" language in the introduction to the statutory provision. The punishment can deviate from the normal where the situation is more, or less, serious than usual. With drunk driving on a moped on a private road without any other traffic, the prison sentence may be suspended, even though the BAC is high. The same can result when the drunk driver has psychological problems or other special personal circumstances exist. One who drives under the influence and at high speed past a grade school at school time may, on the other hand, receive an unsuspended jail sentence despite a low BAC. It may also be appropriate to impose only a fine or only imprisonment. * * *

The court has a rather wide range of discretion. The Act to be sure specifies what should be emphasized: the level of alcohol influence and the danger the driving has occasioned. But those are factors, which the court would in any event have considered. Weight may also be placed on other sentencing factors.

Repeat Drunk Driving

Repeat drunk driving should be punished with fine and unsuspended imprisonment, irrespective of how low the illegal BAC is. The statutory provision has no reservation of exceptional cases, as with the first offense provision. Nevertheless, it

has happened that suspended sentences are imposed with repeat drunk driving. The preparatory works state that the length of the prison term should be "increased considerably" with repeat offenses.

Imposition of the Fine

The preparatory works also provide guidelines for imposition of fines. The Criminal Law Commission, which prepared the amendment, suggested that the fine should normally correspond to a month's pay *with* a deduction for taxes. But in the view of the Department of Justice and Parliament, a more appropriate amount was a month and a half's pay *without* a deduction for taxes. And the fine should—whatever the offender's income—only in exceptional cases be under 10,000 kroner [approximately $1,300].

* * *

Practice in a series of court cases has imposed a fine considerably lower than 10,000 kroner because of the convicted person's economic situation or ability to pay.

The Supreme Court has opined that the fine in drunk driving cases should, as a point of departure, not be affected by the size of the BAC or by the dangerousness of the driving. Such circumstances are relevant only to the choice between suspended and unsuspended sentences of imprisonment and to the length of the prison sentence.

In North Dakota, there is no mandatory jail sentence for the first offense.[118] The defendant may be sentenced from one to thirty days in jail, and fined up to $1000, or may receive a combination of jail sentence and fine.[119] A jail sentence and a fine may be suspended, but only in certain instances.[120] The sentencing options for the first time DUI are for the most part consistent with all other class B misdemeanors,[121] except for the minimum $250 fine,[122] which differs from the usual range of $0 - $1000.[123]

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118. N.D. CENT. CODE § 39-08-01(4)(a) (1999).

119. N.D. CENT. CODE § 39-08-01(2) (1999); *see also* N.D. CENT. CODE § 12.1-32-01 (1997).

120. N.D. CENT. CODE § 39-08-01(4)(e) (1999). The statute allows suspension for a conviction of actual physical control or if the defendant is under 18 years of age (unless previously convicted of DUI in the preceding five years). *Id.*

121. N.D. CENT. CODE § 12.1-32-01 (1997).

122. N.D. CENT. CODE § 39-08-01(4)(a) (1999).

123. Additionally, offenders convicted of DUI must, as a part of their sentence, obtain an addiction evaluation from an approved addiction treatment center. N.D. CENT. CODE § 39-08-01(4)(a) (1999).

Another important comparison is the nature of the prison or jail to which the convicted driver is sent. In Norway, most men serve their DUI sentences in minimum-security institutions under conditions that even by Norway's relatively progressive penal standards, internationally speaking, are considered light compared to those for other prisoners.[124] The conditions for women DUI convicts are not so easy because their smaller number has apparently precluded creation of special prison conditions for female DUI convicts.

In North Dakota, prisoners are generally sent either to the county or regional jail, or to one of two minimum-security facilities, the Missouri River Correctional Center or the James River Correctional Center, both run by, but physically separate from, North Dakota's single penitentiary. Although prisoners do not describe either the jails or the minimum-security facilities as easy, the minimum-security facilities are likely considered preferable to the penitentiary.

Both Norway and North Dakota provide increased punishment for repeat offenders. In Norway, as explained above in the excerpt from the Norwegian criminal law treatise, one may get unsuspended jail time for a second offense even if the BAC was just over the limit (.05%).[125] In North Dakota, minimum, mandatory unsuspended jail sentences, *e.g.*, four days for the second offense, are imposed only on repeat offenders.[126] One interesting aspect of the difference is that North Dakota's legislation is an obvious effort to curb the perceived leniency of courts; Norway's pre-1988 practice of unsuspended prison sentences was imposed by the Supreme Court itself, without overt legislative coercion.[127]

Repeat offenders in North Dakota face additional sanctions, such as the mandatory minimum four day's imprisonment (or ten days community service), a minimum fine of $500, and an alcohol evaluation for a second offense within five years.[128] A third offense within five years results in a minimum sixty days imprisonment, a fine of one thousand

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124. H. LAURENCE ROSS, CONFRONTING DRUNK DRIVING 67 (1992) (pointing out that most DUI jail terms in the U.S. are served in austere county jails, whereas the "much longer" sentences in Norway are served in institutions that "more closely resembled those of a budget motel in this country"). There has been a problem in Norway with long waits for service of DUI sentences because of the large number of convicted drivers, relative to convictions for other crimes, and available prison space. I have heard conflicting reports about whether this problem has been resolved.

125. Vegtrafikkloven [*The Road Traffic Act*] § 31.3.

126. N.D. CENT. CODE § 39-08-01(4)(b) (Supp. 1999) (requiring imposition of either four days imprisonment or 10 days community service).

127. The Norwegian Supreme Court began the practice of unsuspended sentences based on preparatory works for the 1936 per se legislation suggesting that jail sentences for drunk driving should be unsuspended, actual jail sentences. RAGNAR HAUGE & JENS J. GAUSLUND, STRAFFUTMÅLINGEN I PROMILLESAKER [*IMPOSITION OF PUNISHMENT IN DRUNK DRIVING CASES*] 12 (1992).

128. N.D. CENT. CODE § 39-08-01(4)(b) (Supp. 1999).

dollars, and an alcohol evaluation.[129] A fourth or subsequent offense within seven years results in a minimum 180 days imprisonment and a fine of $1,000.[130]

B. PUBLICITY

In Norway, little or no publicity is traditionally given to criminal convictions, including DUI cases, except in newsworthy cases such as when a public official is a defendant. For example, a police chief was mentioned by name as a defendant in a Norwegian DUI case. I have been told that other famous defendants have been named by the media, *e.g.*, well-known sports or entertainment figures. A somewhat broader interpretation of newsworthiness seems to apply for some serious or spectacular crimes like murder, embezzlement, or fraud involving large sums of money or public trust. This limitation is a result of media practice, and the difference is striking. However, there is nothing in Norway to compare to the daily newspaper publication of lists of convictions or court reports in some North Dakota newspapers. The author discovered this difference when asking some Norwegian law student friends about how neighbors and acquaintances might react to a Norwegian's three-week disappearance because of a DUI conviction. The author was informed that often the friends and relatives are unaware of such a conviction. Often the convict tells his friends he is on vacation, and reportedly one Norwegian entrepreneur offers a service whereby postcards are taken to Greece or the Canary Islands in order to obtain

129. N.D. CENT. CODE § 39-08-01(4)(c) (Supp. 1999).
130. N.D. CENT. CODE § 39-08-01(4)(d) (Supp. 1999).

appropriate postmarks before being mailed back to the convict's friends in Norway.[131]

C. CONFISCATION OF LICENSE PLATES OR MOTOR VEHICLE

In Norway, the Road Traffic Act authorizes the police to forbid the use of a vehicle by a convicted drunk driver, and other dangerous traffic offenders, for up to one year and, if necessary, to confiscate the license plates, registration card, or even the vehicle itself for the designated period.[132] These provisions are used often. Less frequent is forfeiture of the vehicle, which may be ordered by the court under the general forfeiture provision in the Criminal Code, which provides, "Instead of confiscating the object the court may impose measures to prevent the object being used for the commission of new offenses."[133] In North Dakota, confiscation of license plates is permitted by statute,[134] and forfeiture and sale of a motor vehicle is permitted by court order at the

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131. An article in Motor, the monthly magazine of the Norwegian Automobile Association, describes Ilseng, nicknamed "Costa del Ilseng," a prison work colony near Hamar for persons convicted of drunk driving under a headline reading "Mother-in-law believes I'm Down South." Rune Korsvoll, *At Ilseng for Drunk Driving: Mother-in-Law Believes I'm Down South*, MOTOR, May 1988, at 8-9. Describing the relaxed conditions as vacation-like, a prisoner claims the food is better than he is used to at home. *Id.* When asked whether the conditions are sufficiently frightful to deter future drunk driving, the prisoner replies that conditions are not at all frightful; the worst part, he claims, is to calm a nervous mother and mother-in-law, or to find a believable explanation for being away for three weeks. *Id.* In response to a question about whether it is still usual to make up an excuse, the prisoner responds that it sounds that way among the fellows at Ilseng. *Id.* He claims that a three-week vacation in the south is the usual explanation, but that going to a seminar was becoming increasingly common as an excuse. *Id.* The prisoner supports the claim that it is still embarrassing to admit one is serving time for drunk driving by telling the story of a prisoner who saw a familiar looking older man in the food line; it turned out to be his father, whom he believed to be at a seminar, while the father thought the son was on vacation in the south. *Id.* at 10.

For readers unfamiliar with Norwegian vacation and travel habits, it should be pointed out that an astonishing number of Norwegians take vacations each year to "the South" including places like the Canary Islands, Spain, Greece, or Bulgaria, most using inexpensive charter flights and travel packages that make it cheaper to vacation far to the south than at home in comparatively expensive Norway. In addition, it should be pointed out that most Norwegians conveniently (for persons sentenced for drunk driving) get four weeks of yearly paid vacation time. ARNE SELBYG, NORWAY TODAY 25 (1986).

132. Vegtrafikkloven [*The Road Traffic Act*] § 36.

133. Vegtrafikkloven [*The Road Traffic Act*] § 35. Andenæs & Bratholm describe the "great reluctance" of courts to forfeit vehicles because of the wide disparity in values of vehicles. Moreover, the forfeiture is only possible if the convicted driver owns the vehicle. *See* ANDENÆS & BRATHOLM, *supra* note 10, at 343. The 1988 amendments' preparatory works suggested a possible increase in the use of forfeiture, while also observing that forbidding use and taking the license plates by the police under the Road Traffic Act § 36 can accomplish much of the same preventive effects. Further, although the police confiscation is limited to one year, it may be used not only against the offender's vehicle but also one regularly used with the owner's consent. ANDENÆS & BRATHOLM, *supra* note 10, at 343.

134. N.D. CENT. CODE § 39-08-01(3) (Supp. 1999).

time of sentencing.[135] These options are seldom used, however, probably because of hardships caused to family members needing to use the vehicle.[136]

D. EVALUATION AND TREATMENT OF ALCOHOL PROBLEMS

Both Norway and North Dakota envision treatment as an alternative to traditional punitive measures.[137] In Norway, a convicted driver may be given a suspended sentence conditioned upon participation in a treatment program,[138] and a prisoner may be transferred to a treatment institution. Both options are used rarely.[139]

In North Dakota, a court may sentence a defendant directly to a treatment program in lieu of jail.[140] Moreover, the DUI legislation requires that every driver convicted of DUI be evaluated at a state approved alcohol evaluation center.[141] The driver must pay a fee to the institution for the evaluation. The evaluation is reported to the State Department of Transportation; before the convicted driver's privilege to drive will be reinstated in North Dakota and other compact member states, the Department of Transportation must receive a report of satisfactory compliance with any treatment recommendation contained in the evaluation report.[142]

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135. N.D. CENT. CODE § 39-08-01.3 (Supp. 1999).

136. Ignition interlock devices may also be ordered pursuant to N.D. CENT. CODE § 39-08-01.3 (1999). A colleague has previously suggested vehicle confiscation and sale of motor vehicles operated by drunken drivers. Larry Kraft, *The Drive to Stop the Drunk from Driving: Suggested Civil Approaches*, 59 N.D. L. REV. 391 (1983). New York City has recently taken a very aggressive and controversial approach under its administrative code, promising to seize and forfeit cars of arrested drunk drivers. For a report of the announcement of the program, see Sean Gardiner, *Drink and Walk/Safir [New York Police Commissioner]: Cars to Be Locked Up in DWI Arrests*, NEWSDAY, Jan. 22, 1997, at A7, *available in* 1999 WL 8153627. A defense attorney defending a client against the new policy paints a very critical picture, claiming many defects including lack of notice, seizure without prior judicial hearings, selective prosecution, and violation of the excessive fines clause of the Eighth Amendment. Steven L. Kessler, *The City's New DWI Forfeiture Laws Fail the Constitutional Challenge*, N.Y.L.J., July 8, 1999, at 1. For another defense lawyer's critical review of New York and other "big cities across America" adoption of "draconian local ordinances," see David B. Smith, *Cities Fight 'Quality of Life' Offenses with Forfeiture Blunderbuss*, THE CHAMPION, Mar. 2000, at 28. Minnesota allows vehicle forfeiture after multiple offenses. *See* MINN. STAT. § 169.1217 (1998).

137. N.D. CENT. CODE §§ 12.1-32-021(1)(g) (1997), 39-08-01(4)(a) (1999).

138. Vegtrafikloven [*The Road Traffic Act*] § 31 (specifying the range of punishment for those convicted of drunk driving); Straffeloven [*The Criminal Code*] § 53 (allowing, as a condition of a suspended sentence, the imposition of in-patient treatment); *see* SLETTAN & ØIE, *supra* note 15, at 496 (explaining how the two provisions interact).

139. Special drunk driving treatment programs imposed as conditions of suspended sentences were first instituted on a trial basis in 1995 in only five countries. SLETTAN & ØIE, *supra* note 15, at 496.

140. N.D. CENT. CODE § 39-08-01(4)(g) (Supp. 1999).

141. N.D. CENT. CODE § 39-08-01(4) (Supp. 1999).

142. N.D. CENT. CODE § 39-06.1-10(3.1)(a) (Supp. 1999).

Because of the requirement of treatment in North Dakota before driver's license privileges are reinstated, it appears evaluation and treatment of the drunk driver are deemed more important in North Dakota than in Norway. Important questions regarding the efficacy and fairness of a system of coerced treatment are of continuing concern in both Norway and North Dakota.

E. APPELLATE REVIEW OF SENTENCING

The main exception to the description of DUI in Norway as "cut and dried"[143] is probably the issue of sentencing. Norway has a system whereby appellate courts may review the length and nature of criminal sentences. This has lead to an extensive "common law" (judge made) of sentencing in Norway, and it includes DUI sentences. A survey of Norwegian Supreme Court decisions in all DUI cases from 1975 through 1987 uses 211 of its 306 pages, more than two thirds, to summarize sentencing decisions.[144]

In contrast, North Dakota, as is true generally in the United States,[145] allows appellate review of sentences only if the sentence is "illegal."[146] In theory, an illegal sentence is one that is either outside the range set by the legislature, so severe as to constitute "cruel and unusual punishment" in violation of the Eighth Amendment to the United States Constitution or a state constitution's analog,[147] or invidiously discriminatory. In practice, especially in the context of DUI, this means no significant appellate review of sentences.

North Dakota's severe limitation of appellate review of sentencing judges' discretion is quite difficult to understand and impossible to explain to Norwegian colleagues, especially in light of our society's purported commitment to a "rule of law." As a part-time judge who sentences convicted drunk drivers in North Dakota, I find my virtually unreviewable power to sentence a drunk driver to, as a general rule, from

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143. *See supra* text at section III.A.

144. PER OTTO BORGEN & ANNA HØGSET, HØYESTERETTS AVGJØRELSER I PROMILLESAKER 1975-1987 [*SUPREME COURT'S DECISIONS IN DUI CASES 1975-1987*] (1988).

145. *See generally* WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL 559 (1968). The movement toward sentencing guidelines in federal courts and some states is changing this situation and indeed might be seen as moving criminal appeals in the United States closer to those in Norway. But there is no strong movement toward sentencing guidelines in North Dakota state prosecutions.

146. WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 1099 (2d ed. 1992). Although the tradition of limited review of sentencing has been rejected in "a substantial number of states," *id.* at 1100, North Dakota is not one of them.

147. U.S. CONST. amend. VIII. Article I, section 11 of the North Dakota Constitution is North Dakota's counterpart to the Eighth Amendment of the United States Constitution.

zero to thirty days in jail, and to impose a fine varying from nothing to $1,000, to be astonishing.[148]

F. LOSS OF DRIVING PRIVILEGES

1. *At Arrest*

In Norway, if a driver is arrested and subjected to a blood test, his or her driver's license may be confiscated by the police until the case is finished.[149] However, the police are not entitled to keep the license for more than three weeks without court approval.[150] In practice, the defendant normally gets the license back if the blood test is negative (.05% or less). The decision is quicker when the police themselves determine the BAC with a breath test.[151] Remarkably, the accused has a right to compensation for costs resulting from confiscation of the driver's license if the case is dismissed or ends in acquittal.[152]

In North Dakota, if a driver refuses chemical testing or is found to have a BAC of .10% or more, he or she receives a temporary twenty-five day driving certificate.[153] Within ten days, the driver must request a hearing before an administrative hearing officer from the Department of Transportation.[154] If the driver does not request such a hearing, or is found at the hearing to have been over the .10% limit, driving privileges are suspended for ninety-one days.[155] The period of suspension would be longer than ninety-one days if the suspension is for a subsequent offense within a specified time period.[156]

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148. It is possible for a driver convicted in North Dakota municipal court to appeal to the district court for a trial anew. N.D. CENT. CODE § 40-18-19. If the driver is convicted again, the district judge then has the same wide sentencing discretion as the judge at the first trial and the limitations on review described in the text apply to the second sentence.

149. Vegtrafikkloven [*The Road Traffic Act*] § 33.

150. *Id.*

151. ANDENÆS & BRATHOLM, *supra* note 10, at 353.

152. ANDENÆS & BRATHOLM, *supra* note 10, at 353 (citing Straffeprossessloven [Code of Criminal Procedure] § 438, which provides for criminal prosecutions generally that acquittal or waiver of prosecution entitle the defendant to compensation awarded by the court for necessary expenses, including travel, incurred in the defense "unless he himself willfully incurred suspicion").

153. N.D. CENT. CODE § 39-20-03.1(1) (1999). The procedure differs for blood tests because the results of a blood test are not known for up to several weeks following a DUI arrest. In that case, a driver retains his or her license until the blood test results are returned to the arresting officer. Once the blood test results are obtained, the arresting officer then serves the 25 day driving certificate.

154. N.D. CENT. CODE § 39-20-05(1) (1997).

155. N.D. CENT. CODE § 39-20-04.1 (Supp. 1999).

156. *Id.*

2. *Revocation of Driving Privileges Upon Conviction*

In both Norway and North Dakota, a person convicted of DUI loses driving privileges. In Norway, the loss is for a minimum of one year,[157] but in practice, the period is often set longer, for example two years, even for a first offense.[158] If a driver refuses to cooperate with a blood alcohol test, the license is revoked for a minimum of two years. For repeat offenders, the license is by statute to be taken "for alltid," or forever.[159] In practice, however, "forever" normally means five years.[160]

The revocation in Norway is administered by the police, not by the courts, and thus is an administrative procedure not considered "punishment." As Andenæs and Bratholm , two of Norway's foremost criminal law experts observe, however:

> Realistically seen, revocation is close to punishment because it has the same primary purposes: general and individual prevention. One affected by revocation normally experiences it as punishment, often a more severe punishment than an unsuspended jail sentence. Professional drivers are affected especially hard since revocation leads to loss of one's job, in any event for the period of revocation.[161]

Official proposals have suggested that the courts should administer revocation, but they have been opposed by the Ministry of Justice, which takes the position that the existing, police-administered system is less costly and consistent with the rule of law because of the right to appeal revocations to the ministry. Andenæs and Bratholm also note that an argument against the administrative scheme that has become increasingly weighty is based on inconsistency with Article 6 of the European Convention on Human Rights.[162]

In North Dakota, the revocation process is also handled as an administrative and thus civil, or non-criminal, matter, administered by the Department of Transportation.[163] Revocation resulting from a DUI is at least ninety-one days for a first offense, but it may be longer if the driver

157. Vegtrafikkloven [*The Road Traffic Act*] § 33.
158. ANDENÆS & BRATHOLM, *supra* note 10, at 351.
159. Vegtrafikkloven [*The Road Traffic Act*] § 33.
160. ANDENÆS & BRATHOLM, *supra* note 10, at 351.
161. ANDENÆS & BRATHOLM, *supra* note 10, at 252.
162. ANDENÆS & BRATHOLM, *supra* note 10, at 252.
163. *See* Asbridge v. North Dakota State Highway Comm'r, 291 N.W.2d 739, 750 (N.D. 1980).

has accumulated points from "moving traffic violations" resulting in the assessment of legislatively assigned points.[164]

G. EFFECTS ON AUTOMOBILE INSURANCE[165]

Both Norway and North Dakota require a minimum level of insurance coverage for motor vehicles.[166] Driving a vehicle without the required coverage is a criminal offense, although in Norway the punishment is limited to a fine, while in North Dakota the offense is a misdemeanor with a minimum fine of $150 that may not be suspended and a potential jail sentence of up to thirty days.[167] In Norway, damages caused by a drunk driver are covered by the applicable insurance policy, but the insurance company has the right to reimbursement.[168] However, the insurance company is not responsible for damages suffered to the drunk drivers own person or property.[169] In North Dakota, damages are covered, but the insured's coverage is usually canceled. If not canceled, or upon a resumption of coverage, the driver's insurance premium rate will be increased dramatically.[170]

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164. N.D. CENT. CODE § 39-06.1-10(7) (1999). The suspension period is 91 days if the defendant has no previous DUI conviction within the past five years, 365 days for once violating the DUI statute within the preceding five years, and two years for two or more DUI convictions in the preceding five years. *Id.* Claims that administrative revocation constitutes double jeopardy have been rejected by the North Dakota Supreme Court, which rejects the notion that the revocation is punishment by switching the label from "punitive" to "remedial." *See* State v. Zimmerman, 539 N.W.2d 49 (N.D. 1995) (rejecting a federal constitutional claim); *see also* State v. Jacobson, 545 N.W.2d 152 (N.D. 1996) (rejecting a state constitutional claim).

165. For a general discussion of the insurance and other civil law consequences of drunk driving in the United States, see James B. Jacobs, *The Impact of Insurance and Civil Law Sanctions on Drunk Driving, in* SOCIAL CONTROL, *supra* note 1, at 227.

166. N.D. CENT. CODE § 39-08-20 (1999); Bilansvarslova [*The Automobile Responsibility Act*] §15.

167. N.D. CENT. CODE § 39-08-20 (1999); Bilansvarslova [*The Automobile Responsibility Act*] § 20.

168. Bilansvarslova [*The Automobile Responsibility Act*] § 12.1; R.N. TORGERSEN & BJORN ENGSTRØM, RETT B AK RATTET [*LAW BEHIND THE WHEEL*] 47 (1984). Torgersen and Engstrøm indicate that, in practice, insurance companies who pay for damages caused by drunk drivers seek compensation from most drunk drivers with sufficient assets. TORGERSEN & ENGSTRØM, *supra*, at 47. They also warn passengers that although they may not be punished or lose their driver's license for riding with a drunk driver, they do risk losing compensation from the vehicle's insurer for damages suffered during the trip. TORGERSEN & ENGSTRØM, *supra*, at 47. "We have examples where passengers became 100% disabled for life, but were refused compensation because they let themselves be transported in a car even though they were aware that the driver was influenced." TORGERSEN & ENGSTRØM, *supra*, at 47.

169. TORGERSEN & ENGSTRØM, *supra* note 168, at 47.

170. *See generally* James B. Jacobs, *The Impact of Insurance and Civil Law Sanctions on Drunk Driving, in* SOCIAL CONTROL, *supra* note 1, at 226.

V. CONCLUSION

Although this article is entitled a "comparison," it is not necessarily a comparative law project, in the reform-oriented sense of most recent comparative law scholarship in the United States. Its origins and purpose are much more modest. The University of North Dakota began an exchange program in Norway in 1982 and I was invited to attend the first University of North Dakota-University of Oslo Summer School in Norway that year. As a criminal law and procedure teacher, part-time municipal judge, and occasional defense lawyer or prosecutor, the only part of Norwegian law I had heard about was the mandatory jail sentence for first time drunk drivers. It seemed intuitively likely that such a sentence, like a song title without the actual music, would be part of a broader system of law and procedure, which itself would be intricately connected with a context in Norwegian, Scandinavian, and European culture.

I was curious about the system and the broader context, although, like most United States lawyers, I had never studied comparative law as such (in a course). And yet, United States legal education seems inherently comparative. Our casebooks are intended to be "national," and all law students quickly become accustomed to reading and studying cases and statutes from virtually any jurisdiction, although they are for the most part domestic. This is a much different experience from that of Norwegian law students and, I believe, most European law students. I never recall any of my teachers, or colleagues after law school, talking about the "comparative method" in United States legal education. But I expected the drunk driving law in Norway to be more exotic due to the language and cultural differences. In essence, then, this article is serendipitous. I was asked to go to Norway, and DUI was the only aspect of Norwegian law I had heard about.

One wonders why curiosity must always give way to reform or critique. After several trips to Norway, I realized that it would take a long time just to acquire minimal understanding of two new languages: Norwegian and the language of law in Norway. Lawyers who doubt that learning law is in many respects learning a new language should think back to their extensive use of a legal dictionary, especially in the first year of law school, and to the number of times they read or heard it said that the goal was to learn to "think like a lawyer," so as to communicate like a lawyer.

This article, then, reflects the author's attempt to try to understand and compare how the law deals with drivers who drink in Norway and

North Dakota. Understanding in some beginning way how the two approaches compare is reward enough. I find the comparison inherently interesting (a non-academic could just admit up front that it is fun). Indeed, after reading many comparative/reform articles, I wonder why it seems reasonable to learn another language and compare it in many ways with one's own, without feeling compelled to analyze which features of one are appropriate for "borrowing" by the other to improve it in some way, but not when the language is law.

Nevertheless, one cannot begin to compare DUI in Norway and the United States (using North Dakota as an example) without being struck by the obvious borrowing that has already taken place. North Dakota after almost fifty years has adopted the per se approach to DUI begun in Norway. Norway has, long after North Dakota and most of the United States, begun to use breath testing and is provisionally experimenting with alcohol treatment programs as an alternative to incarceration.

This comparison, then, might be seen as a partial confirmation of Richard Frase's premise that transplants are more likely to be attempted and to succeed in areas of law where the comparative differences are small, not large.[171] In that light, the emphasis of much comparative criminal law on procedure rather than substantive seems odd. An American lawyer who merely skims through the Norwegian Criminal Code will, at least in the post-Model Penal Code world, feel much more comfortable or "at home" than after a similar quick trip through the Norwegian Code of Criminal Procedure.

In this initial attempt to understand the differences and broad context of DUI law, I am reluctant to suggest improvements for either Norway or North Dakota based on borrowing from the other.[172] But

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171. *See* Frase, *supra* note 8, at 553. Professor Frase recommends that comparative studies examine individual foreign systems individually rather than in "families" and broadly rather than focusing on a narrow subject of reform. *See* Frase, *supra* note 8, at 553. I have attempted to do so here. Second, all possible sources should be examined, including formal rules and structures, impressionistic descriptions of practice, and quantitative data. *See* Frase, *supra* note 8, at 553. I have made some effort to do so, but I confess that I have avoided examination of quantitative data due to an irrational aversion to numbers. Third, he directs examination of the researcher's own system in both theory and practice to determine the actual differences from the other system. *See* Frase, *supra* note 8, at 553. "Finally, research and reform efforts should concentrate on the smaller differences between foreign and domestic systems that are revealed by the above approach, since it is the smaller differences that are most likely to suggest feasible 'borrowings' from abroad." *See* Frase, *supra* note 8, at 553.

172. Moreover, I avoid entirely the debate over the effectiveness of legal changes in addressing the "problem" of drunk driving. Those interested in the broader discussion may usefully consult H. LAURENCE ROSS, CONFRONTING DRUNK DRIVING 76 (1992). Ross, a leading contributor to the cottage industry debating policies for fighting drunk driving, devotes only one chapter to "Law and Criminal Justice." He concludes:

> Effective deterrent programs may also require resources at the limit of political acceptability. It is insufficient merely to up the ante for being caught, if the chances of

using Professor Frase's insight, I will suggest, for an example, that consideration of the Norwegian-attempt and North Dakota-APC approaches to the drinker who is not yet driving would be more productive than, for example, North Dakota's complicated approach to evidence rules, including the exclusionary rule and Norway's simpler approach. One need not travel to Norway to learn that the complexities of our evidence and procedural rules have exceeded the bounds of both logic and good sense.[173] Perhaps it is of some use in reform efforts to claim that a "better" (or, in this case, "simpler") approach works elsewhere. But a likely response to those favoring the status quo (and perhaps appropriate in light of the Frase-proposition) is "that's fine for them, but it wouldn't work in our system." The purpose here is to explore the differences in the two systems that might lead to this response.

Major differences may be the most interesting, but if Frase is correct, they are the least likely candidates for successful borrowing.[174] Before differences can be characterized as large or small, they must be understood and described. Hence this article. Perhaps future work can expand on this effort, and then proceed to evaluate likely candidates for borrowing. If this comparison is useful to such projects, so much the better. For now, Norway's strict punishment of DUI should at least be better understood as more nuanced than merely long, mandatory jail sentences, and as part of a system with remarkable differences from North Dakota's.

> apprehension are negligible. Even well conceived and well implemented legal threats may leave some populations relatively unaffected, and these resistant populations are likely to be the most dangerous ones. Deterrence thus cannot be the whole of drunk driving policy. It should be conceived as one element in an arsenal of countermeasures, along with other measures based on valid understanding of the social causes of the problem.

Id.

173. *See* PIZZI, *supra* note 88.

174. This article for the most part avoids taking a position on the purposes of the provisions it compares and evaluating whether "borrowing" a corresponding provision from the other country might better further a particular purpose. Its fundamental goal is to be descriptive, to begin an internationally comparative picture of how DUI provisions in two jurisdictions interact and compare. I hope that this comparison is interesting to others, but I admit that further research would provide a more detailed picture of relevant differences and similarities; e.g. the training and licensing of drivers, driving conditions and safety provisions, availability of public transportation, alcohol use (or abuse) in general, and legal issues involving alcohol (such as regulation of alcohol, the drinking age, limits on sale, civil liability issues, defenses of intoxication in criminal law, and the like). Comparison of law, like translation, is always imperfect and incomplete. JAMES BOYD WHITE, JUSTICE AS TRANSLATION 247-56 (1990).