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JUSTICE BERYL LEVINE: TAKING HER TITLE SERIOUSLY IN NORTH DAKOTA CRIMINAL CASES

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The Law Review asked me to comment on Justice Beryl Levine's contribution to the criminal law jurisprudence of North Dakota. I am happy to oblige because I will miss her judicial presence in our state legal community. She made a difference.

Typical for such law review tribute issues is a series of laudatory personal reflections by persons who know the subject of the accolades well. For judges, the usual cast of characters includes judicial colleagues, former law clerks, colleagues from previous professional practice, and professors with fond memories of the retiree as a student. Such casting excludes me.[1] Moreover, my own record of commentary in this very review would not lead anyone to seek me out as a likely source for kind words about the work of the North Dakota Supreme Court.[2] Even worse, my most recent viewpoint was a very critical slicing and dicing of the Court's[3] opinion in *State v. Knudson*[4] written by none other than the honored retiree herself, Justice Levine.[5]

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1. Although her first two years as a student at UND School of Law corresponded to my first two years as a teacher, she managed to avoid taking any courses from me, and then, in her third year, I was away on sabbatical.

2. Thomas M. Lockney, *Probable Cause for Nighttime, No-knock Drug Searches: The Illusion of Judicial Control in North Dakota*, 69 N.D. L. REV. 613 (1993) [hereinafter Lockney, *Probable Cause*]; Thomas M. Lockney, *An Open Letter to the North Dakota Attorney General Concerning Search and Seizure Law and the Exclusionary Rule*, 62 N.D. L. REV. 17 (1986) [hereinafter Lockney, *Open Letter*]; Thomas M. Lockney, *Perspectives on State v. Nagel: The North Dakota Supreme Court's Discordant Medley of Fourth Amendment Doctrines*, 58 N.D. L. REV. 727 (1982) [hereinafter Lockney, *Perspectives*].

3. I have obtained permission from the editors to use my own convention, which is to capitalize "Court" when referring to our own North Dakota Supreme Court in a North Dakota context. This is a mark of my respect for the Court despite what its members might believe should they read the essays cited in footnote 2, supra. Thus, throughout this article, I will use "Court" to signify the North Dakota Supreme Court unless specifically or contextually indicated otherwise. For evidence of increasing law review flexibility, compare this footnote with Lockney, *Probable Cause*, *supra* note 2, at 613, n.1.

4. 499 N.W.2d 872 (N.D.1993). *State v. Knudson* is criticized in Lockney, *Probable Cause*, *supra* note 2.

5. It remains a mystery whether the law review solicited me because they assumed I should make amends to Justice Levine for that critique, because they were blissfully unaware of it, or perhaps just because they knew I have more than passing interest in the course of North Dakota criminal law.

For the record, a convenient way to introduce a shameless plug, I will remind the most probable readers of this essay that from 1980 to 1989, and again each year since 1993, I have presented a yearly continuing legal education (CLE) *Criminal Practice Seminar* for North Dakota lawyers. At

In any event, I submit that my attack on the *Knudson* opinion is the best evidence of some objectivity in this more general retrospective on Justice Levine's contributions. No reader of that viewpoint could possibly believe that I am a mere shill for the merits of Justice Levine's judicial opinions! My previous criticism should lend credibility to my praise upon the occasion of her retirement. But prior criticism and a claim to some objectivity hardly specify criteria for evaluation of an appellate judge. Why are some judges considered great and others merely good, mediocre, or poor? That question has perplexed many great writers, and I am not immodest enough to suggest definitive criteria. Instead, I first catalog some reasons why I will miss Justice Levine's presence on our court, interspersed with description of her work, including some critique and suggestions for her successors, and conclude with some comments on why others should miss her too. All in all I hope to support my evaluation of her as a great appellate judge.

I will miss her because:[6]

SHE HAD A POSITIVE EFFECT ON HER JUDICIAL COLLEAGUES

Although I have lived in North Dakota since 1971, it wasn't until 1980 that I began to follow carefully the criminal law opinions of the North Dakota Supreme Court.[7] Justice Levine's first criminal law opinion, in April of 1985, came after I had been regularly reviewing the Court's work for about five years.[8] My general impression was a Court with a tendency to write opinions either shockingly or laughably result-oriented, depending on your degree of sanguinity. The Court appeared to see its primary function as the expeditious affirmance of criminal convictions presumably to save its intellectual energy for civil cases.[9] Appellate court law-guidance-avoidance-devices such as harmless error and the abuse of discretion standard were routinely used, and when the Court took positions on substantive issues, dissent was rare.

each seminar, I distribute a summary of the prior year's North Dakota Supreme Court opinions of interest to criminal lawyers.

6. As a personal matter, in addition to the professional reasons set forth in the text, I will miss Justice Levine because of her gracious acceptance of criticism. She took the work of the Court and the craft of judging very seriously. I was always pleased, but sometimes surprised, that she never appeared to be at all put off by critical commentary from the academy. She suffered in judicious silence my attempt to skewer the *Knudson* opinion while she remained personally cordial. She continued to attend my annual CLE seminars, voluntarily subjecting herself to three hours of fault finding with her work and that of her colleagues. Justice Levine took my written critique and oral carping with good humor and appropriate seriousness. An academic critic could ask for no more.

7. *See supra* note 5 (describing yearly CLE seminars).

8. State v. Patten, 366 N.W.2d 459 (N.D. 1985).

9. At least I cheerfully assume that energy was expended in other areas because I confess I wasn't following the run of non-criminal cases.

Indeed, I will confess that occasionally I wondered whether the four concurring judges had actually read the opinion they had signed.[10]

With the appointments of Justice Levine, and Justice Meschke in the same year,[11] the quality of the Court's opinions soon improved significantly. Justice Levine played a major role in the progress. Her primary role was to motivate the Court to take criminal cases more seriously, especially those involving constitutional issues. Her majority opinions served as models of judicial craft and her dissents contributed to her colleagues' increased efforts to produce persuasive opinions.

JUSTICE LEVINE BELIEVED IN "TAKING RIGHTS SERIOUSLY"[12]

Her most significant contributions were her opinions, both majority and dissenting, in cases raising Constitutional issues because she took them very seriously.

Search and Seizure

Perhaps her greatest contribution was in the area of search and seizure law and the requirements of the Fourth Amendment which reads:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported be Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[13]

This single sentence amendment to the Constitution has resulted in a remarkable volume of decisions regulating law enforcement searches and seizures from all courts, foremost the United States Supreme Court, but also including our own Court.

In a nutshell, the basic Fourth Amendment framework established by United States Supreme Court opinions requires reasonable searches and seizures. Reasonableness generally requires a degree of certainty that the place being searched or the thing or person being seized are proper subjects. Usually we call that level of proof probable cause, using the language of the Fourth Amendment itself. But for less intrusive Fourth Amendment activity, sometimes a lower standard, reasonable suspicion, is sufficient; and sometimes, as explained below, no specific degree of certainty of criminality as to the particular object of the police

10. *E.g.*, State v. Wetsch, 304 N.W.2d 67 (N.D. 1981).

11. Both took their oath of office on February 8, 1985.

12. The phrase is taken from Ronald Dworkin's book of the same name: TAKING RIGHTS SERIOUSLY (1977).

13. U.S. CONST. amend. IV.

activity is required at all. In addition, there is a preference for warrants; police belief that the object of the seizure or search is a criminal or evidence of a crime should be reviewed by a magistrate who, if in agreement, issues a warrant. Thus, Fourth Amendment police activity should be pursuant to a warrant or fit within a recognized exception to the warrant requirement. These rules are enforced by the Fourth Amendment exclusionary rule. The rules for search and seizure have provided frequent grist for our Court's mill. Justice Levine ground it out with the best of them.

Probable Cause

The United States Supreme Court has struggled mightily for years to define or articulate the bounds of probable cause, the level of certainty required for a garden variety search or seizure. Information from confidential informants is often offered to support probable cause. For years, the United States Supreme Court relied on the so-called *Aguilar-Spinelli* test[14] which required that probable cause be based in such cases upon an adequate showing of the informant's veracity and basis of knowledge. A failure to show the truthfulness of the tipster could be remedied by police corroboration. A failure to show how the truthful informant obtained the information could be cured by sufficient detail to indicate the information was first hand.[15]

Dissatisfaction with perceived rigidity in its own test led the United States Supreme Court to abandon the test in favor of a more flexible "totality of circumstances" approach in 1983 in *Illinois v. Gates*,[16] two years before Justice Levine was appointed to our Court. Because state supreme courts can provide greater protection under their state constitutions, our Court was presented in *State v. Thompson*,[17] soon after *Gates*, with the question of whether the *Aguilar-Spinelli* test should be maintained as a matter of North Dakota interpretation of Article I, Section 8 of the North Dakota Constitution.[18] Without deciding whether the *Gates* totality of circumstances approach had replaced *Aguilar-Spinnelli*'s two

14. The test derives from Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 410 (1969).

15. *See, e.g.*, Draper v. United States, 358 U.S. 307 (1959).

16. 462 U.S. 213 (1983). I employ the word *approach* rather than *test*, because the former test is subsumed into the totality of the circumstances so that veracity and the basis of knowledge of the informant become relevant, but not controlling, circumstances.

17. 369 N.W.2d 363 (N.D. 1985).

18. Article I, § 8 provides, in language very close to that of the Fourth Amendment:

> The rights of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall be issued but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or things to be seized.

prongs, the Court found, just four months after Justice Levine's appointment, that the informant's tip in *Thompson* failed both tests.[19]

Justice Levine, concurring specially, cautioned that the Court's statements about the *Gates* standard were mere dicta rather than a prohibited advisory opinion.[20] She then lobbied in favor of "North Dakota's *Aguilar-Spinelli* guidelines [which] do not appear to have been applied in a 'hypertechnical' or 'unduly rigid' manner."[21] She concluded that to "resort to *Gates* may be akin to summoning the repairman to fix what 'ain't broke.'"[22]

Justice Levine's brief in *Thompson* against *Gates* as "an unwise evisceration of the *Aguilar-Spinelli* probable cause standard which has well served North Dakota in effectuating the safeguards contained in Article I, Section 8, of the North Dakota Constitution"[23] was repeated six years later in her concurring and dissenting opinion in *State v. Ringquist*.[24] She concurred in the result, but dissented from adoption of the *Gates* probable cause approach.[25] Her *Ringquist* opinion provides a thorough scholarly argument in favor of a higher standard for probable cause under North Dakota's Constitution than under the Fourth Amendment.[26]

After five years of dissent, in 1990 she threw in the towel in typical Levine common sense prose:

> I give up. Notwithstanding the position I urged in State v. Ringquist, 433 N.W.2d 207, 217 (N.D. 1988) (Levine, J., concurring and dissenting), namely, that we reject the *Gates* totality-of-the-circumstances test and continue to adhere to the *Aguilar-Spinelli* probable cause standard under our state constitution, henceforth, I will meekly join in the majority rationale which adopts and applies *Gates*. I cannot resist pointing out that, as usual, the results under the *Gates* totality-of-circumstances rule are not noticeably different from our common-sense application of *Aguilar-Spinelli*. I regret that the delicate balance of federalism is askew in North Dakota.[27]

Justice Levine did her best to make sure that, even under *Gates*, probable cause would not be a sure thing for the State in North Dakota. For example, we can look at Justice Levine's opinion for the Court in

19. State v. Thompson, 369 N.W.2d 363 (N.D. 1985).
20. *Thompson*, 369 N.W.2d at 372-73 (Levine, J., concurring specially).
21. *Id.* at 373 (citing Illinois v. Gates, 462 U.S. 213, 273 (1983) (White, J., concurring)).
22. *Id.*
23. *Id.* (footnotes omitted).
24. 433 N.W.2d 207 (N.D. 1988).
25. *State v. Ringquist*, 433 N.W.2d 207, 217-20 (N.D. 1988).
26. *Id.*
27. State v. Dymowski, 458 N.W.2d 490, 501 (N.D. 1992) (Levine, J., concurring).

State v. Lewis.[28] In *Lewis*, a police officer who had experience with narcotics investigations, including personal involvement in about fifteen indoor marijuana growing operations, testified in support of a warrant to search defendants' residence that a federal agent had disclosed that defendant husband had received several items by mail from a growing supply store in Arizona.[29] The items were consistent with indoor growing of marijuana and the officer found out that defendant husband was the only person with his name living in the county.[30] Two officers conducted a visual inspection of defendants' residence using a thermal imaging device which showed unusual heat loss from the second story.[31] Further visual inspection showed that windows above the area of heat loss were covered with Styrofoam insulation and another window was covered with fiberglass insulation, while windows on the other side, showing normal heat loss, were not covered.[32] Inspection of electrical consumption records showed that consumption on the farmstead was "small" (70-700 kilowatt hours per month) from April to September, but "jumped" up to 1700 and averaged about 1600 from that point until the next April when the warrant was obtained.[33]

The agent testified that such consumption was "excessive" for a family of four with a fuel oil furnace, no central air conditioning, and no other outbuildings.[34] He also testified that he had learned from another officer that an untested informant had said that someone in town said that there was an indoor growing operation in the area and that the past weekend they couldn't buy any marijuana but were expecting a harvest.[35] The magistrate asked the officer if he was "convinced that the man is not growing tomatoes" and the officer responded:

> Yes. The fact that the windo[w]s are covered indicates to me a need for privacy and not wanting anybody to see what's going on even though it was on a second story window, and that the two windows were covered on the part of the house where the hot spots were, and the two windows weren't covered on the part of the house where the hot spots weren't. That indicates to me that they're hiding something or attempting to hide something.[36]

28. 527 N.W.2d 658 (N.D. 1995).
29. State v. Lewis, 527 N.W.2d 658, 659-60 (N.D. 1995).
30. *Id.* at 660.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 660-61 (alteration in original).

During the preliminary hearing, the sheriff, who had assisted in the investigation, testified that he told the officer who obtained the warrant that defendant wife was known as "the plant lady" and that he knew she had a lot of plants, and that he told him it was possible "she's growing Boston ferns, tomatoes."[37] That information, from the sheriff, was not presented by the officer to the magistrate.[38]

The North Dakota Supreme Court found that the case was not materially different from *State v. Ennen*,[39] and reversed for lack of probable cause.[40] The equipment purchased was consistent with illegal growing, but was not itself shown to be illegal.[41] Thus the evidence failed to show the required "nexus between the home to be searched and the contraband sought."[42] The information from the anonymous and untested informant both failed to implicate the defendant and moreover lacked the required "information from which one may conclude that the informant is honest and his information reliable, or from which the informant's basis of knowledge can be assessed."[43] The observations also failed to supply the required nexus because weatherproofing for winter is common in North Dakota.[44] The Court refused "to view diligent efforts to reduce heat loss, without more, as circumstantial evidence of an indoor marijuana grow operation."[45]

When disagreeing with a majority opinion finding probable cause, Justice Levine could be scathing in dissent. In *State v. Frohlich*,[46] the Court held that probable cause existed for a search warrant authorizing search of a car and an apartment based upon fruits of theft found in a dumpster outside defendant's apartment; evidence that two young men took a package that looked like a wrapped rifle with scope (reported stolen) from the apartment to the car parked nearby; that the car was registered to defendant's parents; and that defendant lived in the apartment.[47] Justice Levine minced no words in her dissent:

37. *Id.* at 661.

38. *Id.*

39. 496 N.W.2d 46 (N.D. 1993). *Ennen* indicated an equally stringent view of probable cause from the then newest Justice on the Court, Justice Sandstrom.

40. *Lewis*, 527 N.W.2d at 663.

41. *Id.* at 662.

42. *Id.*

43. *Id.* (citing State v. Thompson, 369 N.W.2d 363, 367 (N.D. 1985)).

44. *Id.*

45. *Id.* at 663. By finding a lack of probable cause, the Court was able to avoid the other difficult and interesting issues raised in the case. The defendants also objected to the thermal imaging as a warrantless search, *id.* at 661, and claimed that the information about Mrs. Lewis being the "plant lady" was intentionally or recklessly withheld and mislead the magistrate, *id.* (this would arguably be in violation of Franks v. Delaware, 438 U.S. 154 (1978)). The prosecution argued that even if there is was no probable cause, the Court should recognize a *Leon*-like good faith exception to the exclusionary rule under the North Dakota Constitution. *Lewis*, 527 N.W.2d at 663.

46. 506 N.W.2d 729 (N.D. 1993).

47. State v. Frohlich, 506 N.W.2d 729, 730-31 (N.D. 1993).

> This case is terribly disconcerting. Too many people used or had access to the dumpster and too many people are in comparable positions in our society. Too little evidence, indeed none at all, links the stolen property in the dumpster to the defendant in his apartment, unless probable cause is to be diluted, as it was in this case, in all cases involving young people who "sleep all day" and have friends over in the evening.
>
> . . . The majority's decision puts the sanctity of the home and the protection afforded it by the requirement of probable cause at risk by relying on suspicion, speculation and conjecture to establish probable cause and achieve a desired result.[48]

Reasonable Suspicion

In 1968, the United States Supreme Court determined in *Terry v. Ohio*,[49] that some police activity, investigative stops, now called *Terry*-stops, could be done for reasons that fall short of probable cause, calling the lower quantum of evidence reasonable, or articulable, or objective suspicion.[50] In 1969, one year after *Terry*, the North Dakota Legislative Assembly passed a statute authorizing North Dakota law enforcement officers to make investigatory stops based upon reasonable suspicion for felonies and specified serious misdemeanors.[51] The statute lay dormant for years, apparently ignored by North Dakota police, lawyers, and judges.

In the meantime, our Court blithely permitted investigatory stops on reasonable suspicion for misdemeanors not authorized by section 29-29-21 of the North Dakota Century Code. The Court began in 1969

48. *Id.* at 736.

49. 392 U.S. 1 (1968).

50. Terry v. Ohio, 392 U.S. 1, 27 (1968).

51. Currently codified at N.D. CENT. CODE § 29-29-21 (1991). The statute provides:

> A peace officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed, or is about to commit:
>
> 1. Any felony.
> 2. A misdemeanor relating to the possession of a concealed or dangerous weapon or weapons.
> 3. Burglary or unlawful entry.
> 4. A violation of any provision relating to possession of marijuana or of narcotic, hallucinogenic, depressant, or stimulant drugs.
>
> The peace officer may demand of such person his name, address, and an explanation of his actions. When a peace officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the peace officer finds such a weapon or any other thing, the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person.

Id.

with *Borman v. Tschida*,[52] where, apparently unaware of both *Terry* and of section 29-29-21, it found that reasonable suspicion was sufficient to stop a driver suspected of drunk driving.[53] Subsequently, the Court continued to apply the reasonable suspicion standard many times, never noticing the apparent legislative limit of section 29-29-21.[54]

Incredibly, the statute continued to be ignored until its silver anniversary in 1994, when it was raised by the defendant in *City of Bismarck v. Uhden*,[55] not as a limit on a reasonable suspicion stop, but rather against a sobriety checkpoint, in which cars were stopped based upon no particular suspicion of any particular driver,[56] as approved under the Fourth Amendment in *Michigan Department of State Police v. Sitz*.[57] In *Uhden*, the Court rejected the limitation argument and in essence held that its previous twenty years of approving reasonable suspicion stops for minor offenses not listed in section 29-29-21 had, in effect, superseded the statute because of legislative acquiescence.[58] A less contrived way for the Court to have reached the same result would have been to rule that violation of the statute is not of constitutional magnitude and thus exclusion of evidence as a remedy is unnecessary.[59] Instead of its

52. 171 N.W.2d 757 (N.D. 1969).

53. The Court noted that "to the best of our knowledge, the Supreme Court of the United States has not ruled directly on this question, but a number of state appellate courts have held that an officer may stop a pedestrian or motorist under circumstances short of probable cause for arrest." Borman v. Tschida, 171 N.W.2d 757, 761 (N.D. 1969).

54. *See, e.g.*, City of Bismarck v. Uhden, 513 N.W.2d 373, 376 (N.D. 1994) (citing State v. Nelson, 488 N.W.2d 600, 602 (N.D. 1992) (applying reasonable and articulable suspicion in DUI case); State v. Neis, 469 N.W.2d 568 (N.D. 1991) (applying reasonable and articulable suspicion in DUI case); State v. Dorendorf, 359 N.W.2d 115 (N.D. 1984) (applying less than probable cause in DUI case); State v. Kolb, 239 N.W.2d 815 (N.D. 1976) (applying less than probable cause in DUI case)).

55. 513 N.W.2d 373 (N.D. 1994).

56. City of Bismarck v. Uhden, 513 N.W.2d 373, 375-76 (N.D. 1994). The Court stated Uhden's argument as an assertion

> that section 29-29-21, NDCC, authorizes the stopping of motor vehicles on less than probable cause, only in the limited circumstances listed in that section. He deduces that a stop of an automobile for reasons other than those enumerated in section 29-29-21 is thus illegal. Because police checkpoints necessarily involve stops based on less than probable cause, indeed on no particular cause at all, Uhden argues that they are effectively forbidden under section 29-28-21, NDCC.

Id.

57. 496 U.S. 444, 447 (1990).

58. *Uhden*, 513 N.W.2d at 376. First, the Court observed that it was not clear that the legislature intended to prohibit stops of motor vehicles on less than probable cause except as provided in the statute. *Id.* (citing Davis v. Kansas Dept. of Revenue, 843 P.2d 260, 263 (Kan. 1992)). Next the Court relied on *Blair v. City of Fargo* for the proposition that:

> Where courts of this State have construed statute and such construction is supported by the long acquiescence on the part of the legislative assembly and by the failure of the assembly to amend the law, it will be presumed that such interpretation of the statute is in accordance with legislative intent.

Id. (citing Blair v. City of Fargo, 171 N.W.2d 236 (N.D. 1969)). The Court then concluded, as it had impliedly done for years, "that section 29-29-21, NDCC, is not applicable to investigatory stops of motor vehicles and therefore, does not itself prohibit law enforcement from using checkpoints." *Id.*

59. *See infra* notes 136-47 and accompanying text (discussing the exclusionary rule).

strange acquiescence argument (in reality repeal by desuetude) or a possible avoidance of the exclusionary remedy, a third way the Court could have dodged the statute would have been to find that it merely provides a non-exclusive list of some, but not all, grounds for reasonable suspicion stops.[60]

Nowhere in the *Uhden* opinion is there any recognition of the serious issue of whether the reasonable suspicion standard is appropriate for minor offenses. Professor LaFave in his oft-cited treatise on search and seizure discussing the nature of the suspected offense with relation to the dimensions of a permissible stop states:

> Consistent with the reasonableness requirement of the Fourth Amendment, may the police stop suspects for investigation pursuant to *Terry* no matter how minor or insignificant the offense under investigation? This issue has seldom been confronted head on by the lower courts. Most of the decisions upholding stops for investigations have involved suspected criminal conduct of about the same seriousness as that involved in *Terry*, though on occasion a stop has been given judicial approval even though nothing more than a possible curfew violation or smoking of a marijuana cigarette was involved.[61]

Indeed, Professor LaFave offers a North Dakota case as one of his examples, and explains:

> Although it is sometimes asserted "that traffic violations, even if considered common or minor, constitute prohibited conduct and, therefore, provide officers with requisite suspicion," *State v. Stadsvold*, 456 N.W.2d 295 (N.D. 1990), the point there is not that suspicion of such a minor violation permits a stop, but rather that the *actual commission* of the violation justifies at least a non-custodial arrest, during which a more serious offense may come to light. In *Stadsvold*, for example, the stop was for driving without lights, but it resulted in discovery of the fact that defendant was driving while intoxicated.[62]

Despite the Court's dictum in *Uhden* effectively repealing section 29-29-21 because of its long-standing authorization of reasonable suspicion stops in minor cases, our Court has never analyzed the policies

60. That strained interpretation of the statute, given its language, is hinted at by the Court's citation and parenthetical summary of *Davis*, the Kansas case. *See Uhden*, 513 N.W.2d at 376 (citing *Davis*, 843 P.2d at 263).

61. 4 WAYNE LAFAVE, SEARCH AND SEIZURE §9.2(c), at 28-29 (3d ed. 1996) (footnotes omitted). As to the "often cited" comment, the author has personally seen at least 43 different North Dakota Supreme Court opinions citing Professor LaFave's treatise, but in the interest of saving trees, the string citation is omitted.

62. *Id.* at 29 n.44 (citing State v. Stadsvold, 456 N.W.2d 295 (N.D. 1990)).

favoring them. Moreover, it has never recognized LaFave's point that most such stops, including the one in *Stadsvold*, involve observation of actual commission of an offense for which a defendant is stopped, *i.e.*, probable cause, after which probable cause to arrest for a more serious offense such as DUI may develop.[63] Even as perspicacious a judge as Justice Levine, committed as she was to Fourth Amendment rights and analysis, is limited to the points raised by attorneys. However, it is arguably an important part of the Court's work to create a credible body of law. It began its application of the lower, reasonable suspicion, standard to less serious crimes at a time when the concept of a Fourth Amendment standard below probable cause was a novelty and one can hardly fault subsequent defense lawyers for failing to beat their heads against the Court's precedential wall; and prosecutors were unlikely to question a lower standard which simplified their work while increasing their suppression hearing batting averages. It could, of course, be argued that the distinction between probable cause and reasonable suspicion is too sophisticated or amorphous for the practical judgments required of police officers in the field and judges subsequently reviewing those judgments with sensitivity to officers' situation.

In any event, instead of justifying minor league stops for reasonable suspicion, our Court, with nary a hiccup of concern from Justice Levine, has applied the reasonable suspicion standard to a bewildering variety of trivial offenses, including non-criminal traffic offenses.[64] In *Stadsvold* itself, an opinion in which Justice Levine concurred, the Court could not have been clearer, as it stated: "It is well settled that traffic violations, even if considered common or minor, constitute prohibited conduct and, therefore, provide officers with requisite suspicion for conducting investigatory stops."[65] In support of this "well settled" rule, the Court cited three federal circuit court of appeals cases,[66] and then added a

63. *Id.*

64. Just within the last few years, the Court has authorized reasonable suspicion stops for a myriad of minor offenses. *See* State v. Burris, 545 N.W.2d 192 (N.D. 1996) (involving crossing of a fog line); Zimmerman v. Dept. of Transp. Director, 543 N.W.2d 479, 481-82 (N.D. 1996) (regarding crossing a center line); City of Grand Forks v. Egley, 542 N.W.2d 104 (N.D. 1996) (regarding parking after hours in a city park); State v. Hawley, 540 N.W.2d 390 (1995) (involving parking in violation of state statute); State v. Ova, 539 N.W.2d 857 (N.D. 1995) (involving exhibition driving and/or driving without requisite care, neither a criminal offense); State v. Graven, 530 N.W.2d 328, 330 (N.D. 1995) (involving swerving between the driving lane and the shoulder); City of Wahpeton v. Roles, 524 N.W.2d 598 (1994) (involving loud engine noise or rolling through a stop sign); Wolf v. North Dakota Dep't of Transp., 523 N.W.2d 545, 547 (N.D. 1994) (involving exhibition driving).

65. *Stadsvold*, 456 N.W.2d at 296.

66. *Id.* (citing United States v. Fouche, 776 F.2d 1398 (9th Cir. 1985) (noting that common traffic violations constituted criminal conduct and standing alone provided sufficient suspicion for an investigatory stop); United States v. Thompson, 597 F.2d 187 (9th Cir. 1979) (concluding that officers were justified in conducting an investigatory stop having witnessed violations of traffic laws); United States v. Montgomery, 561 F.2d 875 (D.C. Cir. 1977) (noting that police may make an investigatory stop of a vehicle when code violation is witnessed or suspected)). However, the first two cited cases,

footnote noting the approval of police investigatory stops involving various traffic violations.[67]

This combination of judicial repeal of a statute in *Uhden* and consistent failure in many cases over many years to even discuss the serious issue raised by Professor LaFave should be reconsidered. It is bad policy, silly, and most often, unnecessary.

As to policy, after discussing the failure of the United States Supreme Court to clarify whether *Terry* stops are limited to serious crimes, LaFave, despite lower courts' tendencies to allow such stops for minor crimes or indeed "even when the officers apparently had no idea just what particular crime might have been committed," emphatically states his own opinion: "The *Terry* rule should be expressly limited to investigation of serious offenses."[68] He recognizes that it may be difficult "to articulate offense-category limitations as a matter of Fourth Amendment interpretation,"[69] but that difficulty should be eased in North Dakota where we have legislation, section 29-29-21, indicating a judgment as to which offenses justify a reasonable suspicion stop. Moreover, even if certain misdemeanors are thought to be serious enough to add to the legislative list, a bright line could at least be drawn between criminal offenses and non-criminal, or so-called administrative, traffic offenses which are clearly identified in sections 39-06.1-02, -05 of the North Dakota Century Code.[70]

Whichever line is chosen, Professor LaFave offers three reasons why developing such limitations is important. First, *Terry*'s discount from probable cause to reasonable suspicion is not needed for minor crimes. Second, public confidence in the police is heightened and fear of abuse is diminished if the extraordinary authority of *Terry* is not applied to the diversity of minor crimes thus avoiding stops of a significant number of innocent persons. Third, a limitation to serious offenses would minimize "fishing expeditions for contraband," that is, the police will be less tempted to stop as a pretext or subterfuge for a search.[71]

Fouche and *Thompson*, are similarly subject to LaFave's critique in that in both it was not suspicion of the minor offense which justified the stop but actual commission. In *Montgomery*, the court actually found that the police lacked even reasonable suspicion for their stop. 561 F.2d at 888.

67. *Stadsvold*, 456 N.W.2d at 296 n.1 (citing State v. Goeman, 431 N.W.2d 290 (N.D.1988) (involving stop of car at a green light); State v. VandeHoven, 388 N.W.2d 857 (N.D.1986) (involving vehicle crossing over centerline of highway); State v. Placek, 386 N.W.2d 36 (N.D.1986) (involving use of hand signals instead of turn signals and lack of rear lights on vehicle); State v. Klevgaard, 306 N.W.2d 185 (N.D. 1981) (involving speeding)).

68. LAFAVE, *supra* note 61, at 32.

69. *Id.*

70. *See also* N.D. CENT. CODE § 39-06.1-10(3) which specifies points assessed against the offenders record for two categories of offenses, subsubsection a, "Noncriminal Violations," and subsubsection b, "Criminal Violations."

71. *Id.* at 32-33. Specifically, Professor LaFave argues:

> (1) *Terry* utilizes a balancing approach whereby the need to seize and search is

Ignoring these policy reasons and allowing reasonable suspicion stops for an offense, including non-criminal traffic offenses, is often just plain silly. In most traffic stops, there is nothing to investigate. The officer usually has probable cause, which is why discounting the basis for the stop to reasonable suspicion is unnecessary. As an example of both the silliness and the lack of necessity, consider the decision in *State v Ova*.[72] In *Ova*, a highway patrol officer observed defendant's pickup stopped on a gravel road at about 1:25 a.m. facing away about 25 to 30 feet from a paved road.[73] He observed it while it "began backing rapidly in what [he] would term as exhibition or careless type driving towards the paved road" and "accelerating rapidly" to about 20 miles per hour.[74] The officer saw "an unusual amount of dust" illuminated by defendant's headlights and taillights, engulf the pickup.[75] Since it was dark, the officer couldn't see the defendant's tires spinning, but assumed she was skidding because of the amount of dust.[76] While issuing warnings for failure to drive in a careful and prudent manner,[77]

> balanced against the degree of intrusion which will result. The Court stressed that the officer acted "to protect himself and others from possible danger, and took limited steps to do so." The emphasis, therefore, was upon the need for immediate action, which simply is not present as to minor crimes.
>
> (2) Any extraordinary grant of police authority ought to be circumscribed in such a way that meaningful review is possible and so that the public is not apprehensive about police excesses. The circumstances which might lead an officer to suspect that a person is committing such a crime as loitering, gambling or disorderly conduct "are sufficiently diverse and diffuse that their inclusion might mean a large and hard-to-review expansion of coercive authority." And it must be remembered that under a reasonable suspicion test it is inevitable that a significant number of innocent persons will be stopped. But "if persons come to understand that they are being subjected to inconvenience only in cases where most persons would find such action proper and desirable, the cost of resentment might well be reduced."
>
> (3) Most important, as Judge Friendly emphasized, barring the police from employing stop and frisk for such minor crimes as possession of narcotics will remove the temptation for the police to go on fishing expeditions for contraband. Permitting stops for narcotics offenses presents the most obvious temptation to abuse the frisk as an occasion for searching for contraband. ["]There are, to be sure, a number of means for dealing with the problem of abuse of the frisk (as opposed to the stop) in regard to narcotics. . . . However, . . . it is preferable to deal with this problem by removing narcotics offenses from the scope of the stop and frisk authority altogether.["]

Id. (footnotes omitted).

72. 539 N.W.2d 857 (N.D. 1995).

73. State v. Ova, 539 N.W.2d 857, 858 (N.D. 1995).

74. *Id.*

75. *Id.*

76. *Id.*

77. This offense is created by N.D. CENT. CODE § 39-09-01.1 and is commonly referred to as "care required," the first two words in its title, words not repeated in the body of the statute itself. This offense is to be distinguished from the more serious offense that precedes it in Title 39, section 39-09-01. Section 39-09-01's title is "Basic rule — Penalty for violation." Its body does, after a laundry list of specific examples of ways in which a person may offend by driving "at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing," conclude that anyone so driving "has committed careless driving, and must be assessed a fee of thirty dollars." *Id.* The care required offense specifies no penalty, but in but one of many examples of Title 39's justified reputation for a very out of date, patchwork, confusing

and for failure to change her driver's license address, he commented that she "was spitting up the dust there pretty good," and her responses conveyed the odor of alcohol leading to a DUI charge.[78]

The trial court found a lack of reasonable suspicion for the stop.[79] The North Dakota Supreme Court reversed, holding that the trial court had in effect applied the wrong legal standard, probable cause, instead of the less demanding reasonable suspicion standard.[80] The Supreme Court determined that the trial court had believed the officer's testimony, and that his "observation of rapid acceleration and excessive dust" constituted articulable facts.[81] Coupled with the officer's reasonable inference "based upon the officer's training and experience which may elude lay persons," that the dust was caused by acceleration or spinning tires, the officer reasonably suspected a traffic violation and thus the stop was legal.[82]

The reason that I view the court's analysis as silly is because the officer observed commission of the care required offense and therefore had probable cause which justified stopping and ticketing Ova. The stop, based on a level of evidence that would justify an arrest for a criminal offense then, in LaFave's words regarding *Stadsvold,* "resulted in discovery of the fact that defendant was driving while intoxicated."[83] What further investigation of the driving does the Court contemplate? A confession to exhibition driving? The *Ova* opinion observed that "Ova responded that her brakes kept sticking, but she did not deny or confirm Beedy's observation."[84]

As a small town part-time municipal court judge for twenty years, I find it droll to contemplate a patrol officer, as in *Ova*, following up his comment to Ova that she "was spitting up the dust there pretty good," with an investigatory question, perhaps, "Ms. Ova, based on what I have seen, I can write you a ticket for lack of required care, or [as was done in

mishmash, one must turn to another chapter to discover section 39-06.1-06(5) which indicates that violation of section 39-09-01.1 merits "a fee of not less than ten dollars nor more than thirty dollars."

I occasionally fantasize an experiment in which various descriptions of bad driving would be shown to the proverbial college class of experimental guinea pigs, who would then be given the wording of these two offenses and asked to try to determine which one applied to which driving offenses. My fantasized conclusion is that the experimental subjects would have no more of a clue than I do as a municipal judge; all I can deduce is that some minor bad driving, less dangerous than the criminal offense of reckless driving, a class B misdemeanor prohibited by section 39-08-03, merit a $30 fine, whereas others, merit a fine of somewhere between $10 to $30. Such linguistic legerdemain would, I hope, not be tolerated if serious penalties were involved; but, for these non-criminal offenses, I have no reason to believe the vagueness issue has been seriously raised in our courts. See the discussion of the vagueness doctrine *infra* at notes 231-33.

78. *Ova*, 539 N.W.2d at 858.
79. *Id.*
80. *Id.* at 859.
81. *Id.* at 860.
82. *Id.* (citations omitted).
83. *See* LAFAVE, *supra* note 61, at 29 n.44.
84. *Ova*, 539 N.W.2d at 858.

the case] give you a warning ticket, but I want to investigate exhibition driving, so, were you or were you not driving your vehicle in a manner which disturbed the peace by creating or causing unnecessary engine noise, tire squeal, skid, or slide upon acceleration or braking?"[85] I have never heard of an officer seeking, much less obtaining, a confession to exhibition driving or driving with insufficient care. The reality in *Ova*, a typical case rather than any investigatory fantasy, was described by the Court itself:

> Because of the time of night, the location where he spotted the pickup, and the manner of driving, Beedy [the officer] testified that he thought that there was a possibility of drinking activity in the pickup. Although the possibility was a factor in his decision to stop the pickup, Beedy testified that he stopped the vehicle based upon his observations of rapid acceleration and excessive dust which he testified made him suspect "exhibition/careless driving," emphasizing that "it was just the manner that she was driving; the careless manner that brought my attention to her vehicle." Beedy testified that he checked "erratic driving" as his basis for reasonable suspicion to stop the vehicle based upon his observations.[86]

Justice Levine dissented because she felt the Court gave insufficient deference to the trial court's finding a lack of reasonable suspicion.[87] Unfortunately, her dispute with the majority about the legal standard and factual basis for the trial court's suppression ignores the conceptual difficulty with attempting to apply a reasonable suspicion standard to a situation where the officer had probable cause to stop for a traffic offense.

A true case of suspected drunk driving might be an exception to my claim that the reasonable suspicion standard is generally unjustified and unnecessary for minor crimes. Occasionally, an officer may observe driving that raises a reasonable suspicion of impairment but requires a stop to check out absent probable cause to stop for a violation of a traffic offense. Given the extensive range of traffic offenses for which one may be stopped, it is hard to imagine the situation arising often. But in any event, the issue should be confronted in light of the policy reasons asserted by LaFave and if the balance is struck in favor of allowing reasonable suspicion stops, the remedy then is to amend section 29-29-21 of the North Dakota Century Code to include DUI.

85. *See* N.D. CENT. CODE § 39-08-03.1(2b) (providing in pertinent part that "'Exhibition driving' means driving a vehicle in a manner which disturbs the peace by creating or causing unnecessary engine noise, tire squeal, skid, or slide upon acceleration or braking").

86. *Ova*, 539 N.W.2d at 858.

87. *Id.* at 862 (Levine, J., dissenting).

The Court's advice about section 29-29-21 in *Uhden* is dictum, dictum with which Justice Levine unfortunately explicitly concurred.[88] It is dictum because the facts of the case did not involve a reasonable suspicion stop by the police, but instead, a sobriety check point, which requires no suspicion at all. Our Court should come to its senses soon in light of the pretext cases, where Justice Levine lead the way in North Dakota.

Pretext or Subterfuge

At the time Justice Levine wrote the Court's opinion in *State v. Kunkel*,[89] the United States Supreme Court had never directly held that a valid stop, arrest, or search could be invalidated because it was done as a pretext or subterfuge for some other, illegal, reason. In *Kunkel*, the police wanted to search a van they suspected would contain illegal drugs.[90] Lacking probable cause to obtain a warrant to search the van, they obtained an arrest warrant based on an earlier drug sale for one McGath, who they believed would be in the van.[91] The police stopped the van and arrested McGath; Kunkel, who owned the van, and two passengers were released.[92] The van was impounded and during an inventory search marijuana was discovered.[93] A warrant was obtained to search the van further, more drugs were discovered, Kunkel was arrested, and subsequently even more drugs were found in a warranted search of his residence.[94]

The North Dakota Supreme Court found it unnecessary to decide whether McGath's arrest was pretextual because even if not, the search of the van after impoundment wasn't incident to the arrest.[95] The Court rejected the State's alternative argument, that the search was a proper inventory search, because it "was conducted for the purpose of criminal investigation rather than for the protection of property," and thus was a subterfuge.[96] Justice Levine explained that: "The inventory search was conducted to discover evidence of crime and not to fulfill a caretaking function. . . . But it is the caretaking function which legitimizes an inventory. Absent that justification, an inventory is unreasonable and is

88. City of Bismarck v. Uhden, 513 N.W.2d 373, 382 (N.D. 1994) (Levine, J., concurring) ("I agree with the majority's resolution of the statutory argument.").

89. 455 N.W.2d 208 (N.D. 1990).

90. State v. Kunkel, 455 N.W.2d 208, 209 (N.D. 1990).

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 210.

96. *Id.* at 210-11.

an impermissible warrantless search in contravention of the fourth amendment."[97]

In *State v. Everson*,[98] the Court upheld a checkpoint procedure on Highway 85 for controlled substances.[99] The ostensible registration and equipment checks were admittedly conducted in order to find drugs going to or coming from the annual Sturgis motorcycle rally.[100] Analogizing to the then recently decided case of Michigan *Department of State Police v. Sitz*,[101] the Court found the State's interests in fighting drugs and in safe highways outweighed the interference with individual liberty.[102] Justice Levine disagreed.[103] She argued in dissent that since the police "admitted using the safety inspection in order to achieve their purpose of 'alleviating' the drug problem,"[104] the Court should reach "an analogous result" to *Kunkel*.[105]

Recently, in *United States v. Whren*,[106] the United States Supreme Court unanimously rejected the pretext argument for a traffic stop based upon probable cause.[107] In *Whren*, the Court left open the possibility of pretext arguments for cases not involving probable cause.[108] The *Whren* opinion expressly reserves the possibility of three exceptions to its rejection of the pretext doctrine: stops based on race;[109] situations portending very great harm to the individual, such as deadly force, entry into homes without warrants, and physical penetration of the body;[110] and third, searches or seizures based on less than probable cause, for example, inventory and inspection searches.[111] In *Zimmerman v. Department of Transportation Director*,[112] our Court seems to have anticipated the death of the federal pretext doctrine in *Whren*.[113] But since *Zimmerman*, according to our Court, involved a reasonable suspicion stop, it remains to be seen whether our Court will observe the distinction from *Whren* which was explicitly based on the existence of probable cause.[114]

97. *Id.* at 211.
98. 474 N.W.2d 695 (N.D. 1991).
99. State v. Everson, 474 N.W.2d 695, 703 (N.D. 1991).
100. *Id.* at 696, 703.
101. 496 U.S. 444 (1990).
102. *Everson*, 474 N.W.2d at 703.
103. *Id.* at 704-06 (Levine, J., dissenting).
104. *Id.* at 705.
105. *Id.* at 706.
106. 116 S. Ct. 1769 (1996).
107. United States v. Whren, 116 S. Ct. 1769, 1775 (1996).
108. *Id.*
109. *Id.* at 1774.
110. *Id.* at 1776.
111. *Id.* at 1773.
112. 543 N.W.2d 479 (N.D. 1996).
113. Zimmerman v. Department of Transp. Dir., 543 N.W.2d 479, 482-83 (N.D.1996).
114. If the Court wishes to avoid pretext arguments in the cases for which they are most appropriate, minor traffic stops, it must reconsider its misdemeanor and non-criminal traffic stop line of cases and its promiscuous permissiveness for reasonable suspicion stops for trivial cases contrary to

Despite Justice Levine's unfortunate lapse in her role as the Court's search and seizure law watchdog by virtue of her complicity in the trivialization of reasonable suspicion stops,[115] it is only fair to point out that she was no push-over for arguments that reasonable suspicion existed.[116]

Warrants

In *State v. Erickson*,[117] Justice Levine's opinion for the Court took seriously the requirement of particularity in warrants, not only in the issuance but also in the execution. Police executed a valid warrant based on probable cause to search defendant's duplex.[118] The affiant's failure to mention that defendant lived in a duplex was impliedly found by the trial court not to constitute intentional or reckless falsity and that implicit finding was not clearly erroneous.[119] The warrant described the place to be searched with sufficient particularity by stating the address correctly as defendant's, 503 10th Street West.[120] But because the evidence was found in a basement room under the adjacent duplex, 501 10th Street West, which the officers entered through a closed but unlocked door, the search exceeded the scope authorized by the warrant.[121]

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the legislative rule of section 29-29-21 of the North Dakota Century Code.

115. Justice Levine came close to a pretext approach in a recent traffic stop case, *State v. Glaesman*, 545 N.W.2d 178 (N.D. 1996). In *Glaesman*, a sheriff received a call from the state's attorney, *Id.* at 179, (who coincidentally was representing a deputy sheriff in small claims court against a suit by the defendant, *Id.* at 183 (Meschke, J., concurring and dissenting)), telling him that a pickup being driven by defendant was stuck in the snow in a parking lot, *Id.* at 179. The state's attorney didn't identify himself and said nothing about defendant's physical condition. *Id.* The sheriff investigated, told the driver of a second vehicle who had apparently tried to free the pickup that he would take care of the situation, and then saw defendant sitting in the driver's seat. *Id.* at 180. After the door was opened, the odor of alcohol led to an actual physical control arrest. *Id.* Defendant's subsequent unruly behavior, including pushing the police chief and slapping and threatening to kill the sheriff, lead to a disorderly conduct charge! *Id.*

The district court found a lack of articulable suspicion for the stop, ordered the evidence found thereafter suppressed, and dismissed both charges. *Id.* On appeal, the North Dakota Supreme Court refused to consider the State's "community caretaker" argument because it wasn't argued to the district court, *Id.* at 181, but found that no evidence in the record supported the trial court's finding that the sheriff opened the door of the pickup, *Id.* at 182. Instead, the only testimony, by the sheriff, was that as the sheriff reached to open the door, defendant opened it first. *Id.* Thus, the Court found there was no stop before the sheriff smelled alcohol and reversed. *Id.*

Justice Levine joined with Justice Meschke's concurrence and dissent. *Id.* at 183-84 (Meschke, J., concurring and dissenting). Although the focus of the disagreement in *Glaesman* was support for or deference to the trial judge's determination against the existence of reasonable suspicion, it came close to finding the action was, or could have been, pretextual. *Id.* at 183. It's too bad that they didn't realize that the big problem is that the reasonable suspicion test makes little sense in minor traffic cases, much less in non-criminal cases.

116. *See, e.g.*, State v. Robertsdahl, 512 N.W.2d 427 (N.D. 1994) (concluding that information raising deputy's curiosity regarding defendant's activity was not sufficient to raise a reasonable or articulable suspicion justifying a stop).

117. 496 N.W.2d 555 (N.D. 1993).

118. State v. Erickson, 496 N.W.2d 555, 559 (N.D. 1993).

119. *Id.* at 559-60.

120. *Id.* at 560.

121. *Id.* at 560-61.

Justice Levine showed her Fourth Amendment prescience in *State v. Sakellson*,[122] where her opinion for the Court first held that failure of enforcement officers to announce their authority and purpose while entering an open door to a house constituted a breaking under North Dakota law.[123] Anticipating the holding by the United States Supreme Court 10 years later in *Wilson v. Arkansas*,[124] the Court rejected the state's argument that the violation was merely statutory and thus an exclusionary remedy was excessive.[125] The North Dakota Supreme Court held instead that the rule of announcement is more than merely statutory; it is a constitutional imperative implicit in the Fourth Amendment prohibition of unreasonable searches and seizures, and it is required by Article 1, Section 8 of the North Dakota Constitution.[126]

Five officers were executing a standard (not a "no knock") search warrant when they entered the enclosed porch to defendant's residence.[127] They entered the porch through a closed but unlocked storm door.[128] They crossed the porch to the main door of the residence, which was open.[129] They passed through the open main door without ringing the doorbell to the side of the door, walked through a carpeted vestibule, and climbed the stairway which led to the defendant's second floor flat.[130] At the top of the stairs they proceeded down a short hallway which led to the kitchen and living room doors, both of which were open.[131] Upon reaching the living room door, they looked in and observed defendant wife seated and talking on the telephone, at which point one officer testified that he knocked twice at the entrance of the living room, showed his badge, and announced that he had a search warrant.[132]

The North Dakota Supreme Court upheld the suppression of the evidence by the trial court for failure to comply with the knock and announce requirements of section 29-29-08 of the North Dakota Century Code.[133] The Court rejected the state's arguments that the vestibule and stairway were common areas open to the public, and that entry through the open door substantially complied with the policies underlying section 29-29-08.[134] Because of the need, normally, to know who is

122. 379 N.W.2d 779 (N.D. 1985).
123. N.D. CENT. CODE § 29-29-08 (1991).
124. 115 S. Ct. 1914 (1995).
125. State v. Sakellson, 379 N.W.2d 779, 784 (N.D. 1985).
126. *Id.* at 784-85.
127. *Id.* at 781.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 785.
134. *Id.* at 782.

entering and why, even when the door is open, and because of the need to minimize violence which might be produced by a surprise entry, the Court held that a breaking under the statute includes, ordinarily, any entry made without permission.[135]

The Exclusionary Rule

As far back as 1985, in *State v. Thompson*,[136] Justice Levine argued against adoption of the United States Supreme Court's good faith exception to the Fourth Amendment exclusionary rule created the year before, in *United States v. Leon*.[137] In *State v. Lewis*,[138] ten years after *Thompson*, the Court again declined to decide whether North Dakota has a good-faith exception to the exclusionary rule, claiming that even if adopted, it would require reliance by the officer to be "objectively reasonable" and the "implication of criminal activity in th[e] case [at hand was] simply too weak and tenuous to make it objectively reasonable for the officers to rely on the warrant."[139] Certainly prosecutors and law enforcement officials might question the exceptional vigor of this opinion, and even a criminal procedure teacher like me could easily have written an opinion reaching an opposite result in this case. But Justice Levine's somewhat harsh description of the officer's unreasonableness in believing he had probable cause, even after the issuing magistrate had ratified his belief by issuing the warrant, might signal her agreement with the *Leon* dissenters' concern about the good faith exception to the exclusionary rule as a gloss on the *Illinois v. Gates*[140] totality of circumstances approach to probable cause.[141] The *Leon* dissenters wrote:

> Given such a relaxed standard, it is virtually inconceivable that a reviewing court, when faced with a defendant's motion to suppress, could first find that a warrant was invalid under the new *Gates* standard, but then, at the same time, find that a police officer's reliance on such an invalid warrant was nevertheless "objectively reasonable" under the test announced today. Because the two standards overlap so completely, it is unlikely that a warrant could be found invalid under *Gates* and yet the police reliance upon it could be seen as objectively reasonable; otherwise, we could have to entertain the mind-

135. *Id.*
136. 369 N.W.2d 363 (N.D. 1985).
137. 468 U.S. 897 (1984).
138. 527 N.W.2d 658 (N.D. 1995).
139. State v. Lewis, 527 N.W.2d 658, 663 (N.D. 1995).
140. 462 U.S. 213 (1983).
141. *Compare Lewis*, 527 N.W.2d 658 *with* United States v. Leon, 468 U.S. 897, 958-59 (1984) (Brennan, J., joined by Marshall, J., dissenting).

> boggling concept of objectively reasonable reliance upon an objectively unreasonable warrant.[142]

Professor LaFave adds his endorsement of this view:[143]

> There is some force to this argument. "If, as the *Gates* majority beguiles, probable cause is nothing more than a matter of 'practical, common sense' decision making, then it would seem that a probable cause determination which is erroneous and thus lacking this sagaciousness is undeserving of either the appellation 'good faith' or the sympathetic reception which a 'good faith' qualification would allow." Moreover, to try to pile the *Leon* standard on top of the *Gates* test, whereunder a warrant is to be upheld upon review if there was a "substantial basis" for a "fair probability" (or, "substantial chance") that criminal activity exists or that evidence of crime would be found, would seem a form of incomprehensible double counting. "To say that evidence obtained pursuant to a warrant should be admissible even though the police *lacked* a 'substantial basis' for a 'substantial chance' of criminal activity *as long as they had a reasonable belief* that they had a 'substantial basis' for a 'substantial chance' would be to promulgate an almost mind-boggling standard."

A fitting legacy to Justice Levine is the Court's continued avoidance of a good faith exception to the North Dakota constitutional exclusionary rule now that she is not there to mind the Court's store against such mind-boggling standards.

Justice Levine's opinion in *State v. Sakellson*,[144] also rejected the State's argument that a violation committed in good faith should not trigger the exclusionary remedy.[145] The Court found that "it was no mere technicality that the veteran officers, aware of the availability of no-knock warrants, well briefed on the layout of the premises, and without belief there were exigent circumstances, entered through the open main door without knocking or ringing the doorbell."[146] The officer's conduct was not objectively reasonable.[147]

142. *Leon*, 468 U.S. at 958-59 (Brennan, J., joined by Marshall, J., dissenting).

143. W. LAFAVE, SEARCH AND SEIZURE § 1.3(f) (2d ed. 1987) (quoting, first himself, and then Professor Yale Kamisar, *Gates, "Probable Cause," "Good Faith," and Beyond*, 69 IOWA L. REV. 551, 589 (1984)).

144. 379 N.W.2d 779 (N.D. 1985).

145. State v. Sakellson, 379 N.W.2d 779, 785 (N.D. 1985).

146. *Id.*

147. *Id.*

Fortunately for the law of search and seizure in North Dakota, Justice Levine's judicial conduct usually was. Her reasonableness was not confined to search and seizure law alone.

Freedom of Expression

In *City of Bismarck v. Schoppert*,[148] Justice Levine wrote the opinion of the Court reversing the disorderly conduct conviction of a fellow member of the bar who called a female police officer a "fucking, bitching cop" and responded "fuck you" to a request for identification.[149] The jury's verdict could have been based on the hurt feelings of the officer or an accompanying volunteer police chaplain, which would be a violation of the defendant's First Amendment freedom of speech.[150] Justice Levine's opinion for a unanimous Court is the more impressive for two reluctant concurrences. Then Chief Justice Erickstad agreed that the First Amendment "may" protect the "uncouth, foul-mouthed, and vulgar" conduct which he believed came "perilously close" to violating the statutory duties of attorneys.[151] Current Chief Justice VandeWalle "reluctantly" concurred, despite misgivings.[152]

Justice Levine's willingness to protect expression was less influential because in dissent, but nonetheless eloquent, in *Svedberg v. Stamness*,[153] more popularly referred to as the *Dumbo* case.[154] She wanted the Court to narrow the disorderly conduct statute, which, as this case demonstrated, is clearly capable of expansive application.[155] Justice Levine recognized that freedom of expression includes expression that is hurtful, offensive, and upsetting.[156] For her, the fact that the petitioner

148. 469 N.W.2d 808 (N.D. 1991).

149. City of Bismarck v. Schoppert, 469 N.W.2d 808, 813 (N.D. 1991).

150. *Id.* at 812.

151. *Id.* at 814 (Erickstad, C.J., concurring specially).

152. *Id.* (VandeWalle, J., concurring specially).

153. 525 N.W.2d 678 (N.D. 1994).

154. Svedberg v. Stamness, 525 N.W.2d 678 (N.D. 1994). *Svedberg v. Stamness* is part of a trend I call the *civilization* of criminal law, which is not meant as a complement. Criminal convictions are intended to be difficult, because of the severe inherent stigma and consequences. Because of frustrations with the criminal process, there is an increasing tendency to use civil procedures to accomplish purposes traditionally accomplished by punishment of criminals through retribution, deterrence, incapacitation, and rehabilitation, e.g., civil commitment of the mentally ill (an ever increasing category, especially in light of expanding notions of addiction); revocation of impaired drivers' licenses; and now, the most recent addition to North Dakota's arsenal of label-switching-criminal-law-hurdle-avoidance-techniques, civil injunctions as in *Stamness*. The interesting circularity of this device is that it is enforced by criminal penalties! None of the opinions in *Stamness* recognizes the irony: disorderly conduct merits a class B misdemeanor penalty. *See* N.D. CENT. CODE § 12.1-31-01. However, should one engage in the enjoined conduct, without ever being convicted of the corresponding crime, the offense is a class A misdemeanor, earning a potential jail penalty 12 times longer if the defendant knows of the order! *See* N.D. CENT. CODE § 12.1-31.2-01(8).

155. *Id.* at 686 (Levine, J., dissenting).

156. *Id.*

> was hurt, offended and upset by being called "Dumbo," and by seeing snowmen with big ears, is not the determining, or even relevant, fact. It is how ordinary people would react. And, if the first amendment protects "virulent ethnic and religious epithets," and threats to "break your damn neck . . . [if you go into racist stores]," how can it be possible that it does not protect saying "Dumbo" and making snowmen?[157]

Right to Bail

In *City of Fargo v. Stutlien*,[158] a municipal court's "release from custody" order establishing minimum periods of detention for all DUI arrestees was held to be unlawful because it was not authorized by rule or statute.[159] The Court held that neither North Dakota Rule of Civil Procedure 46 nor section 29-08-02 of the North Dakota Century Code authorized the minimum periods of detention ordered by Fargo's municipal court.[160] Because the order denying release was unauthorized by state law, the Court found it unnecessary to determine defendants' claim that the order also violated their constitutional right to release after posting bail.[161] Since the defendants did not show any specific frustration of their ability to obtain an independent blood alcohol content (BAC) test or actual prejudice to their defense, the trial court's dismissal of the charges was "speculative and premature."[162]

Justice Levine, however, disagreed with the majority's refusal to affirm the dismissals.[163] She opined that in this case, where the procedural "defect is not delay but a wholly illegal deprivation of liberty," the prosecution should be required

> to establish lack of active prejudice by proving that the defendants did not ask for independent tests and appeared to be falling-down drunk so that witnesses to their respective appearance would have been of no assistance to their defense. Then, and only then, should the defendants be obliged to refute such evidence and place the issue of actual prejudice in dispute for

157. *Id.* (citations omitted). She was clearly concerned with potential for the broad construction of the majority to lead to possible legality principle problems in subsequent cases more in tune with the political agenda of the disorderly conduct restraining order statute's promoters. *Id.* at 685-86. It is a shame that she will not be on the Court for subsequent legality principle attacks on this statute which, despite the laudable motives of its supporters, is a clear end run around the strictures of the criminal law, as recognized, but not criticized, by Justice Levine in her dissent. *Id.*

158. 505 N.W.2d 738 (N.D. 1993).

159. City of Fargo v. Stutlien, 505 N.W.2d 738, 743 (N.D. 1993).

160. *Id.* at 741 n.3, 743.

161. *Id.* at 741-42.

162. *Id.* at 746.

163. *Id.* (Levine, J., concurring and dissenting).

> resolution by the judge, with the City bearing the risk of nonpersuasion. Here, the City produced no such evidence. That failure of production should be conclusive.[164]

A year later, in *City of Fargo v. Thompson*,[165] she reaffirmed her belief:

> [A] system of justice that not only condones illegal incarcerations but then, adding raw insult to grievous injury, puts the victims to their proof that their illegal incarceration did them damage, is a system that is "broke" and in need of serious fixing.
>
> . . .
>
> This case heralds an unhappy, and unprecedented, additional burden on unfortunate defendants illegally deprived of their liberty. Not only must they prove actual prejudice while the guilty party remains passive, they must prove it to this court. The majority's de novo review of the facts and inferences turns our customary deferential standard of review of facts on its head. The trial judge is abler than we to weigh the facts. That is his business and we should let him do it. In my view, he made no clear error and so I would affirm.[166]

Proof Beyond a Reasonable Doubt

It's a mystery of some complexity how one squares the burden of proof beyond a reasonable doubt with the deferential standard applied on appeal to challenges to the sufficiency of the evidence. Without entering that quagmire, I will merely mention that reversals for insufficiency of the evidence are extremely rare in North Dakota criminal cases. In *State v. Johnson*,[167] Justice Levine's opinion for the Court explained that intent to deprive the owner is an element of theft in an unauthorized control prosecution under section 12.1-23-02(1) of the North Dakota Century Code.[168] Defendant was found asleep in a stolen pickup truck while its engine ran and its lights and left blinker were on.[169] The pickup had been reported stolen three to four hours earlier.[170] Defendant testified that he had received a ride from the pickup's driver, passed out, and subsequently was awakened by the driver

164. *Id.* at 747.

165. 520 N.W.2d 578 (N.D. 1994).

166. City of Fargo v. Thompson, 520 N.W.2d 578, 585 (N.D. 1994) (Levine, J., concurring and dissenting). Her deference to trial court factfinding is discussed below at notes 284-88 and accompanying text.

167. 425 N.W.2d 903 (N.D. 1988).

168. State v. Johnson, 425 N.W.2d 903, 905 (N.D. 1988).

169. *Id.* at 904.

170. *Id.*

who told him he would be right back.[171] Defendant then fell asleep again, awoke and moved into the driver's seat to turn on the heater, and fell asleep again until awakened by the arresting officer.[172] The Court held that the evidence was insufficient to show defendant's intent to deprive the truck's owner of the truck.[173]

In *City of Bismarck v. Schoppert*,[174] discussed above as a First Amendment free speech case, Levine's opinion also held that the City's evidence was insufficient to show that Schoppert's vulgar and abusive speech tended to cause an immediate breech of the peace.[175]

Double Jeopardy

In the area of double jeopardy law, Justice Levine concurred in the line of opinions, starting with *State v. Zimmerman*, holding that criminal prosecution for DUI following license suspension in an administrative proceeding does not constitute double jeopardy under the federal Constitution.[176] The fact the defendant views the outcome as punishment is not controlling. The administrative suspension "serves the remedial goal of protecting the public from impaired drivers, and the suspension of the license is not greatly disproportionate to the remedial goal."[177] In *State v. Sinner*,[178] the Court had held in 1973 that the administrative suspension was not double jeopardy because it was not a penalty.[179] Driving is a privilege, not a right, and revocation of a privilege is not ordinarily punishment. Later, the Court distinguished *United States v. Halper*[180] and *Department of Revenue of Montana v. Kurth Ranch*,[181] by finding that the suspension is not punishment because it is remedial, that is, designed to protect the public from drunk drivers, not to punish or deter, and whatever punitive or deterrent value the revocation has is "merely incidental."[182] Justice Levine's about-face on the same issue under the North Dakota Constitution is evident in her dissenting opinion in *State v. Jacobson*.[183] Justice Levine's eloquent dissent in

171. *Id.*
172. *Id.*
173. *Id.* at 906.
174. 469 N.W.2d 808 (N.D. 1991).
175. City of Bismarck v. Schoppert, 469 N.W.2d 808, 813 (N.D. 1991).
176. State v. Jacobson, 545 N.W.2d 152, 153 (N.D. 1996); State v. Boehler, 542 N.W.2d 745, 747 (N.D. 1996); City of Dickinson v. Powell, 539 N.W.2d 869, 870 (N.D. 1996); State v. Zimmerman, 539 N.W.2d 49, 56 (N.D. 1995).
177. *Zimmerman*, 539 N.W.2d at 50.
178. 207 N.W.2d 495 (N.D. 1973).
179. State v. Sinner, 207 N.W.2d 495, 501 (N.D. 1973) (citing Thomson v. Thomson, 78 N.W.2d 395, 399 (N.D. 1956)).
180. 490 U.S. 435 (1989).
181. 114 S. Ct. 1937 (1994).
182. *Zimmerman*, 539 N.W.2d at 55.
183. 545 N.W.2d 152 (N.D. 1996). *Jacobson* remarkably produced five opinions. Chief Justice VandeWalle agreed with Justice Levine's

Jacobson together with her opinion in *Orr*,[184] discussed below,[185] constitute a primer on North Dakota state constitutional procedure.

Due Process

In *State v. VanNatta*,[186] the Court held that the trial court's determination that defendant was competent to stand trial was not clearly erroneous because it was in agreement with the testimony of a psychiatrist who examined defendant nearly a year previously.[187] The psychiatrist's opinion of competency was countered by a subsequent examination by a clinical psychologist who concluded that, although defendant understood the nature of the proceedings, he couldn't participate effectively in his defense.[188] Subsequently, a state hospital psychiatrist agreed with the first psychiatrist, while defendant's counsel and a criminal lawyer appointed by the trial court to examine the defendant agreed with the psychologist that defendant was unable to assist in providing an adequate defense.[189] The ratio of three (one clinical psychologist and two defense lawyers) to two (psychiatrists) was not enough to render determination of competency clearly erroneous for the Court.[190]

Justice Levine's dissent took issue with the Court's deference to the trial court under the "clearly erroneous" test.[191] She expressed discomfort with the timing of the psychiatrist's examinations and the disregard of the psychologist's greater familiarity with the defendant.[192] Although neither discomfort alone would have justified her dissent, "their cumulative impact contributes to [her] firm and definite conviction that a mistake has been made about the competency of the defendant."[193] Although the phrase "due process" does not appear in the case, Justice Levine cites *Dusky v. United States*,[194] suggesting "[w]hat is widely-regarded as the constitutionally-required criteria for evaluating defendants' competency."[195] Others have noted a "universal agreement that

well-chronicled dissent to the extent that it demonstrates it is improvident to hold that a North Dakota constitutional provision will always be construed the same as a similar provision in the United States Constitution, or, for that matter, will always be construed differently than a similar provision in the United States Constitution.

Id. at 153. He disagreed, however, with her conclusion that administrative sanctions are punitive for double jeopardy purposes. *Id.* at 154.

184. 375 N.W.2d 171 (N.D. 1985).

185. *See infra* section notes 198-202 (discussing right to counsel).

186. 506 N.W.2d 63 (N.D. 1993).

187. State v. VanNatta, 506 N.W.2d 63, 63 (N.D. 1985).

188. *Id.* at 66-67.

189. *Id.* at 67.

190. *Id.*

191. *Id.* at 71-72 (Levine, J., dissenting).

192. *Id.* at 72.

193. *Id.*

194. 362 U.S. 402 (1960).

195. FRANK W. MILLER, ROBERT O. DAWSON, GEORGE E. DIX, RAYMOND I. PARNAS, CRIMINAL

it is a violation of due process" to try an incompetent defendant.[196] Interestingly, neither the majority nor Justice Levine in dissent seemed to factor in the opinion of the criminal defense lawyer appointed by the trial court to examine the defendant. Arguably an experienced defense lawyer, not connected with the case, should be a highly competent evaluator of a defendant's ability to assist in his defense. Unfortunately, the *VanNatta* opinions offer no guidance to trial courts about the appropriateness or usefulness of such an innovative appointment and examination in the future.

The Right to Counsel

In *State v. Orr*,[197] Justice Levine wrote an opinion interpreting Article I, Section 12, of the North Dakota Constitution as granting a broader right to prevent punishment enhancement based on uncounseled prior convictions than that provided under the federal Constitution.[198] *Orr* is discussed elsewhere in this issue as an opinion identified by its author as significant.[199]

In addition to her significant contributions to the right to counsel as a matter of state constitutional law, Justice Levine authored an opinion, *State v. Skjonsby*,[200] discussing one of the thorniest questions at the intersection of the constitutional right to effective counsel and the ethical obligations of a criminal defense lawyer with a lying client. This opinion was recognized as significant by the Ethics Advisory Committee of the National Association of Criminal Defense Lawyers, in an ethics advisory opinion which

> adopts the dominant view that the lawyer should not act on the belief that a client intends to commit perjury unless the lawyer has "actual knowledge" that the testimony will be false or, at least, knows this to be so beyond a reasonable doubt. Under *Strickland v. Washington*, 466 U.S. 668 (1984), the lawyer's judgment that there is a reasonable doubt should be accepted as falling within the "wide range of reasonable professional

JUSTICE ADMINISTRATION 764 (4th ed. 1991).

196. *Id.*

197. 375 N.W.2d 171 (N.D. 1985).

198. State v. Orr, 375 N.W.2d 171 (N.D. 1985).

199. *See* Ralph J. Erickstad & Michael J. Hagburg, *In Justice Beryl Levine's View: Her Most Significant Opinions*, 72 N.D. L. REV. 915 (1997). *Orr* was followed by *State v. Cummings*, 386 N.W.2d 468 (N.D. 1986), another Levine opinion.

200. 417 N.W.2d 818 (N.D. 1987).

assistance." See, e.g., *State v. Skjonsby*, 417 N.W.2d 818 (No. Dak. 1987).[201]

The Principle of Legality

The legality principle is actually an umbrella term for a number of legal doctrines. Professor Paul Robinson explains:

> In addition to its unique focus upon moral blameworthiness, . . . criminal law is unique in its adherence to what is called the "legality principle." . . . In its original latin dress, it was stated as "nullum crimen sine lege, nulla poena sine lege," meaning roughly: no crime without law, nor punishment without law. In its modern form it means that criminal liability and punishment can be based only upon a prior legislative enactment of a prohibition expressed with adequate precision and clarity. The principle is not a legal rule but rather a concept embodied in a series of legal rules and doctrines. In addition to the nearly universal modern prohibition against judicial creation of new offenses and the strong trend toward abolition of common law offenses (offenses defined in a case rather than in a statute), the legality principle is expressed in the constitutional prohibition against vague statutes, the constitutional prohibition against ex post facto laws, and the rule requiring strict construction of penal statutes.[202]

The legality principle rubric arguably constitutes a basic component of due process or fundamental fairness and demonstrates a commitment on the part of our criminal justice system to fair play. The work of Justice Levine shows her own personal judicial leadership in giving the abstract principles of legality concrete application in North Dakota.

Strict construction

In *State v. Pollack*,[203] the Court determined that a driver who escaped on foot after being removed from his vehicle could be convicted under section 39-10-71 of the North Dakota Century Code for fleeing.[204] The statute provides, in relevant part:

201. Ethics Advisory Committee, *Formal Opinion 92-2*, CHAMPION, Mar. 1993, at 23 (citing and quoting State v. Skjonsby, 417 N.W.2d 818, 828 (N.D. 1987)). I am grateful to Bruce Quick, a practitioner from Fargo, North Dakota, with whom I teach a course in criminal advocacy, for calling this opinion to my attention.

202. PAUL H. ROBINSON, FUNDAMENTALS OF CRIMINAL LAW 117 (2d ed. 1995).

203. 462 N.W.2d 119 (N.D. 1990).

204. State v. Pollack, 462 N.W.2d 119, 121 (N.D. 1990).

> Any driver of a motor vehicle who willfully fails or refuses to bring the vehicle to a stop, or who otherwise flees or attempts to elude, in any manner, a pursuing police vehicle or peace officer, when given a visual or audible signal to bring the vehicle to a stop, is guilty of a class A misdemeanor.[205]

Justice Levine's dissent succinctly stated and applied the doctrine of strict construction.[206] Her opinion, in its economical entirety:

> Criminal statutes are to be strictly construed in favor of the defendant and against the Government. An obvious purpose of Section 39-10-71 N.D.C.C. is to discourage car chases. The statute says that any driver who does not stop his vehicle or who otherwise flees or tries to elude, "in any manner", a peace officer, *when told to bring the vehicle to a stop*, is guilty of a Class A Misdemeanor. Defendant here did bring his vehicle to a stop when told to do so and thus did not violate this statute. When we construe a criminal statute, we should hold the legislature to mean what it says, not what it meant to say but didn't. Indeed, even if another construction were reasonable, the benefit of doubt should insure to the defendant. I would reverse.[207]

In *State v. Pippin*,[208] the defendant pleaded guilty to possession of stolen property found in her house.[209] Her former husband pled guilty to the burglaries during which the property was stolen.[210] Justice Levine's opinion for the Court held that restitution under section 12.1-32-08(a) of the North Dakota Century Code is limited to damages "directly related" to the criminal offense.[211] The Court reversed defendant's restitution order because it ordered restitution for damages without "an immediate and intimate causal connection between the [defendant's] criminal conduct and the damages."[212] She could not be ordered to pay restitution for damages to the burglarized homes or for unrecovered property, but could be ordered to pay for damage to property returned or resulting from its temporary loss.[213]

205. N.D. CENT. CODE § 39-10-71 (1996). The statute has been subsequently amended to provide that third and subsequent offenses are class C felonies. *Id.*

206. *Pollack*, 462 N.W.2d at 122 (Levine, J., dissenting).

207. *Id.* (citations omitted).

208. 496 N.W.2d 50 (1993).

209. State v. Pippin, 496 N.W.2d 50, 53 (1993).

210. *Id.* at 53.

211. *Id.* at 52.

212. *Id.* at 53.

213. *Id.*

In another case, *State v. Monson*,[214] Justice Levine wrote an opinion finding that a gross sexual imposition probationer who attended six of his victim's college basketball games did not violate his probation condition that he "shall have no contact with the victim."[215] Prohibited contact includes "personal contact, as well as telephonic and mail communications."[216] Probation conditions, too, are strictly construed in the defendant's favor.[217] The victim testified that she had no eye contact or communication with the defendant during the games.[218] His presence, even though intended to intimidate, was not enough to constitute contact, as strictly construed.[219]

In yet another case, *State v. Grenz*,[220] Justice Levine dissented from a ruling that a person whose driving privileges were suspended for failure to provide proof of financial responsibility under Chapter 39-16.1, of the North Dakota Century Code, may be convicted for driving under suspension in violation of section 39-06-42(1) despite its language reading: "Except as provided in chapters 39-16 and 39-16.1 . . . any person who drives . . . while that person's license or privilege so to do is suspended or revoked is guilty of a class B misdemeanor."[221] She reminded the court that the "benefit of any doubt in the meaning of a criminal statute should inure to a favorable construction for the defendant, not the State."[222] For good measure, she then chastised the Court for its result orientation:

> I am puzzled by the majority's apparent concern that reversing the conviction would let Grenz go scot-free because of double jeopardy. I am unaware of any precedent that says we construe a statute so as to ensure affirmance of a conviction. I really do not believe that the majority suggests that a construction which reverses a conviction is a ludicrous or absurd result. Whether or not double jeopardy prevents retrial is irrelevant.[223]

It is precisely that lesson that I believe Justice Levine brought to the Court and which her departure may allow the Court to begin to forget. But that, should it happen, will be the occasion for a future review.

214. 518 N.W.2d 171 (N.D. 1994).
215. State v. Monson, 518 N.W.2d 171, 174 (N.D. 1994).
216. *Id.*
217. *Id.* at 173 (citing State v. Droder, 432 N.W.2d 553, 554 (N.D. 1988)).
218. *Id.* at 174.
219. *Id.*
220. 437 N.W.2d 851 (N.D. 1989).
221. State v. Grenz, 437 N.W.2d 851, 852 (N.D. 1989) (Levine, J., dissenting).
222. *Id.* at 855.
223. *Id.*

Prohibition of ex post facto laws no bar to application of ameliorating statutes to defendants

Justice Levine understood that the principle of legality is a shield to protect defendants from the State, and thus should not be applied with strict consistency as a sword against defendants. In *State v. Cummings*,[224] where the DUI penalty had been amended from 15 days to 4 days imprisonment after defendant's offense, and he pleaded guilty after the effective date, Justice Levine's opinion determined that the decreased amended penalty was appropriate.[225] *Cummings* overruled *State v. Kaufman*,[226] and held that the general rule against retroactive application of amended statutes no longer applies to ameliorating amendments to penal statutes.[227] From now on, unless otherwise indicated by the legislature, an ameliorating amendment to a criminal statute will be seen as reflecting a legislative determination that the lesser punishment is appropriate for the offense.[228] Where a conviction is not final prior to the effective date of the amendment, the lower penalty is applicable.[229]

The void for vagueness doctrine

The only opinion by Justice Levine that I could find discussing the void for vagueness doctrine is *State v. Beyer*.[230] Justice Levine's opinion for the Court determined that the language of section 39-21-37 of the North Dakota Century Code requiring effective vehicle mufflers "to prevent excessive or unusual noise" was not unconstitutionally vague.[231] She succinctly summarized the requirements of the doctrine:

> The due process clauses of the state and federal constitutions require definiteness of criminal statues so that the language, when measured by common understanding and practice, gives adequate warning of the conduct proscribed and marks boundaries sufficiently distinct for judges and juries to fairly administer the law. In order to survive a vagueness challenge, a statute must meet two requirements: (1) it must provide adequate warning as to the conduct proscribed, and (2) it must establish minimum guidelines to govern law enforcement.[232]

224. 386 N.W.2d 468 (N.D. 1986).
225. State v. Cummings, 386 N.W.2d 468, 472 (N.D. 1986).
226. 310 N.W.2d 709 (N.D. 1981).
227. *Cummings*, 386 N.W.2d at 471.
228. *Id.* at 472.
229. *Id.*
230. 441 N.W.2d 919 (N.D. 1989).
231. State v. Beyer, 441 N.W.2d 919, 922 (N.D. 1989).
232. *Id.* at 921 (citations omitted).

Unfortunately, her opinion fails to mention that the loud muffler statute is not a criminal statute, but rather a non-criminal or so-called administrative offense. A realistic perspective on the vagueness doctrine would recognize that all legislation, indeed all language, is in some sense or to some degree vague or inexact, and that as a practical matter, the rule against vagueness is really a rule against excessive vagueness. Just as the amount of muffled noise that is excessive or unusual might differ for a Mack Truck engine and a moped, the amount of vagueness tolerable in a statute might differ between one imposing the death penalty and one, like the muffler statute, imposing a fine. Thus, I have no quarrel with the result reached in Justice Levine's opinion in *Beyer*. I do have a quarrel with her failure to observe its non-criminal nature and, as discussed above, her complicity, repeated and emphasized in *Beyer*, with the Court's application of the reasonable suspicion standard to investigative stops for such offenses.

Other rights

Justice Levine, in two cases, provided the basis for a theory as to when violation of a statutory right will result in exclusion of evidence found as a result.[233] *State v. Sakellson*[234] was discussed above in the context of Justice Levine's anticipation of the United State's Supreme Court decision that the statutory knock and announce requirement is in fact an aspect of Fourth Amendment reasonableness.[235] From *Sakellson*, one can infer that violations of statutes, such as the knock and announce requirement of North Dakota Century Code section 29-29-08, which are implicit in the Fourth Amendment or which embody very important legislative policies, require exclusion of evidence obtained as a result of their violation.[236]

In contrast, in *State v. Runck*,[237] leaving an unsigned and undated copy of a search warrant at the scene of the search in violation of Rule 41 of the North Dakota Rules of Criminal Procedure did not evidence deliberate institutional disregard requiring judicial protection of the integrity of the system.[238] Absent prejudice to the defendant or a showing of intentional disregard of the rule or of the Fourth Amend-

233. *See* State v. Runck, 534 N.W.2d 829 (N.D. 1996); State v. Sakellson, 379 N.W.2d 779 (N.D. 1985).

234. 379 N.W.2d 779 (N.D. 1985).

235. *See supra* notes 122-35 and accompanying text.

236. However, one should also be aware of the fact that in *Wilson v. Arkansas*, 115 S. Ct. 1914 (1995), the United States Supreme Court did not rule on the prosecution's independent source and inevitable discovery arguments for not applying the exclusionary remedy to violations of the knock and announce requirement.

237. 534 N.W.2d 829 (N.D. 1996).

238. State v. Runck, 534 N.W.2d 829, 832 (N.D. 1996).

ment, the "ministerial" violation of Rule 41 didn't warrant suppression.[239] Thus, in light of Justice Levine's opinions, we can deduce a test for application of a non-constitutional statutory exclusionary rule: Under *Sakkelson*, statutes which further the policies of the constitution will result in exclusion, whereas under *Runck*, less important violations of judicial rules of procedure and statutes, especially absent a showing of harm to the defendant, will not.

Statutory limits on prosecution appeals

Justice Levine took seriously statutory limits on the state's right to appeal. In *City of Fargo v. Cossette*,[240] her opinion for the Court found no jurisdiction under section 29-28-07 of the North Dakota Century Code for the city to appeal a trial court's exclusion of (1) blood test results because the blood test kit was a device and thus should have been, but wasn't, approved and certified by the State Toxicologist, and (2) a prior conviction because of an *Orr*[241] violation.[242] Neither action by the trial court constituted a suppression of evidence "on the ground that it was illegally obtained" as required under the appeal statute and North Dakota Rule of Criminal Procedure 12(b)(3).[243]

Similarly, but somewhat surprisingly, in *State v. Schindele*,[244] a suppression order was held not appealable by the state under section 29-28-07 of the North Dakota Century Code because the suppressed evidence was not "substantial proof of a fact material in the proceeding."[245] The defendant was taken into custody for detoxification by a police officer investigating a domestic disturbance, and subsequently charged with assault upon his wife.[246] The district court found the detention unlawful under section 5-01-05.1 of the North Dakota Century Code.[247] While rejecting the defendant's motion for dismissal as an inappropriate remedy, the district court suppressed evidence about the defendant's drinking, intoxication, and incarceration, clarified subsequently as barring "any testimony from anyone about Michael's [the defendant's]

239. *Id.*

240. 512 N.W.2d 459 (N.D. 1994).

241. 375 N.W.2d 171 (N.D. 1985).

242. City of Fargo v. Cossette, 512 N.W.2d 459, 460 (N.D. 1994).

243. *Id.* Contrast *State v. Keyes*, 536 N.W.2d 358 (N.D. 1995), where a trial court order excluding two prior convictions from consideration, essentially reducing a DUI charge from a class A to a class B misdemeanor, in effect quashed the class A charge and thus was appealable under section 29-28-07(1) of the North Dakota Century Code.

244. 540 N.W.2d 139 (N.D. 1995).

245. State v. Schindele, 540 N.W.2d 139, 142 (N.D. 1995).

246. *Id.* at 140.

247. *Id.*

twenty-four-hour confinement and any testimony from Harrington [the investigating officer] about Michael's 'state of sobriety.'"[248]

The North Dakota Supreme Court dismissed the state's appeal, finding the suppressed evidence was not "substantial proof of a fact material in the proceeding."[249] Justice Levine's opinion held that this evidence was substantially less probative than, for example, a confession.[250] She rejected the state's claim that the evidence of intoxication is relevant to the dispute between the parties and to the defendant's conduct leading up to the simple assault charge.[251] Despite statements that the prosecutor's statement is to be given "utmost deference," and the definition of substantial proof of a fact material as "evidence that would significantly assist the factfinder's evaluation of a fact relevant to the outcome of the case," the Court held that intoxication is not an element of simple assault and thus is irrelevant to its commission and "unlikely" to be a "fact relevant to the outcome of the case."[252] Moreover, the Court rejected the state's argument on appeal that proving intoxication would make it easier to prove commission of simple assault, because, assuming it to be true arguendo, it nonetheless "could be found by a court to be cumulative and excludable" under North Dakota Rule of Evidence 403.[253] "Cumulative testimony is by definition testimony that would not make a significant contribution to proof of a fact."[254] Thus, the State's conclusion that the evidence of intoxication was substantial proof of a material fact was "without foundation in reason or logic," and thus the suppression order was not appealable.[255]

A trial court's sound discretion is not unlimited

Prior to Justice Levine's tenure on the Court, it seemed nearly impossible for a trial court in a criminal case to abuse its discretion, at least when ruling in favor of the prosecution. Justice Levine wrote a number of opinions indicating that application of the "abuse of discretion" standard did not signal an automatic prosecution victory on appeal.

For example, in *State v. Klem*,[256] the defendant was improperly deprived of his right to a public trial when the trial court granted the State's mid-trial motion to exclude the public without a hearing and

248. *Id.* at 141.
249. *Id.* at 142.
250. *Id.* at 141.
251. *Id.* at 142.
252. *Id.* at 141-42.
253. *Id.* at 142.
254. *Id.*
255. *Id.*
256. 438 N.W.2d 798 (N.D. 1989)

findings.[257] Exclusion of the public absolutely requires that the trial court articulate its reasons on the record and express them in findings that enable a proper appellate review.[258] Moreover, a motion to close must ordinarily be made before trial.[259]

In *State v. Gates*,[260] Justice Levine wrote that waiver of a jury trial is effective only when expressed "in writing or in open court," and cannot be inferred or presumed.[261] The trial court's conclusion that it could find defendant to have impliedly waived a jury trial was a misinterpretation of law and thus an abuse of discretion.[262]

Perhaps the least likely reason for a trial court to be reversed on appeal is a ruling on the admissibility of evidence. However, in one area of evidence law, I believe majority rulings resulted from Justice Levine's earlier dissenting groundwork.[263] In *State v. Bohe*,[264] the Court held that defendant's nine prior burglary convictions were admissible to impeach him and that admission of inadmissible prior misdemeanor theft convictions was harmless error.[265] Justice Levine's dissent noted that:

> In admitting the nine prior burglary convictions, the trial court not only gave no reasons, it gave no hint of an explanation. The majority is simply too gentle when it observes that the trial court was "not as explicit as it could have been [in] identifying and weighing the relevant factors . . . ." Not only was the trial court not explicit, it was downright cryptic.
>
> It is obvious that the only reason for seeking admission of nine prior burglary convictions is to make clear to a jury that a defendant is an unmitigated scoundrel who did it, and did it, and did it before, and obviously did it again. I have little doubt that the evidence achieved its intended purpose. My only question is: Why bother with the presentation of any other evidence? Nine priors should be more than sufficient to nail a defendant.[266]

She pointed out that similar criminal convictions are inherently prejudicial, unfair, and require a compelling reason other than to show defendant's bad character, a reason "that outweighs the obvious

257. State v. Klem, 438 N.W.2d 798, 800 (N.D. 1989).
258. *Id.* at 801.
259. *Id.* at 800.
260. 496 N.W.2d 553 (N.D. 1993).
261. State v. Gates, 496 N.W.2d 553, 554-55 (N.D. 1993) (citing N.D. R. CRIM. P. 23).
262. *Id.* at 555.
263. *See e.g.*, State v. Bohe, 447 N.W.2d 277, 282-83 (N.D. 1989) (Levine, J., dissenting).
264. 447 N.W.2d 277 (N.D. 1989).
265. State v. Bohe, 447 N.W.2d 277, 282 (N.D. 1989).
266. *Id.* at 282-83 (Levine, J., dissenting).

prejudice."[267] Justice Levine referred to Judge Weinstein's suggestion that same crime impeachment be limited to one prior conviction and then only for strong reasons and direct relation to veracity.[268] Since the Court had previously approved admission of two same crime priors, Justice Levine would have drawn the line there, at two.[269] For Justice Levine: "Every defendant, even one with nine prior convictions, enjoys the presumption of innocence. A defendant should not be compelled to choose between taking the stand and having his record of nine prior convictions admitted."[270]

In 1995, her remonstrations bore fruit. In *State v. Eugene*,[271] the Court ruled that North Dakota Rule of Evidence 609(a)(ii) requires that a prior conviction being used to impeach the accused must bear directly on the propensity to testify truthfully.[272] Justice Neumann's careful opinion first determined that possession of an imitation controlled substance does not fit because belief that the substance actually is a controlled substance is no defense, that is, knowledge that the substance is an imitation is not an element.[273] Thus, where, as in *Eugene*, the record provides no information about the underlying circumstances of the conviction, it cannot be determined whether the conduct involved in the prior involved false statement or dishonesty.[274]

Furthermore, admissibility of convictions for possession of an imitation controlled substance with intent to deliver and escape were not properly admitted under Rule 609(a)(i) because the record failed to show "that the trial court meaningfully or appropriately considered the relevant factors in balancing the probative value of Eugene's prior convictions to impeach his testimony against their prejudicial effect on the jury in reaching its verdict."[275] The trial court's statements explained little, and what was explained suggested inappropriate consideration and weighing.[276] It unduly emphasized the similar crime factor, without considering the "heightened danger the jury will use the evidence not only for impeachment purposes, but also substantively."[277]

Thus Justice Levine's approach to prior convictions finally became that of the Court's majority.[278] However, the majority also found that

267. *Id.* at 283.
268. *Id.* (citing 3 WEINSTEIN'S EVIDENCE 609-68 (1989)).
269. *Id.*
270. *Id.*
271. 536 N.W.2d 692 (N.D. 1995).
272. State v. Eugene, 536 N.W.2d 692, 694 (N.D. 1995).
273. *Id.*
274. *Id.* at 694-95.
275. *Id.*
276. *Id.*
277. *Id.* at 695-96.
278. *See id.* at 696 (holding that that trial court failed to provide an explanation adequate for the North Dakota Supreme Court to conclude it appropriately exercised its discretion in admitting the prior

the error was harmless because it was not convinced that the admission of the priors affected the verdict.[279] The harmless error ruling caused Justice Levine to dissent once again.[280] She observed that: "The very reason prior convictions are so carefully segregated and regulated by our Rules of Evidence is that they are intrinsically prejudicial. It is a basic principle of evidence law that the bad character of a defendant cannot be used to prove present guilt."[281] With her characteristic sharpness of intellect and word, she quipped that "we exclude evidence of prior convictions because their prejudice often outweighs any probative value. If that is so, how can their erroneous admission, that is in a situation where their prejudice outweighs their probative value, be harmless, that is, non prejudicial?"[282]

SHE TOOK SERIOUSLY DEFERENCE TO TRIAL COURT FINDINGS

As a very part-time municipal court judge, I miss her in ways that full time trial courts should appreciate even more than I. Although she kept the judges on their toes as to the law, she also took seriously the other side of that coin, namely, deference to fact (or factual aspects of mixed law-fact) finding by trial courts.[283] Such deference to trial courts' orders suppressing confessions as involuntary was evident in *State v. Taillon*,[284] and *State v. Pickar*.[285] Similarly, in *State v. Huether*,[286] the Court affirmed a trial court's order suppressing the results of a search for exceeding the scope of the defendant's consent.[287]

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convictions for impeachment).

279. *Id.*

280. *Id.* (Levine, J., dissenting).

281. *Id.* at 697 (Levine, J., dissenting).

282. *Id.* at 698. In *State v. Murchison*, 541 N.W.2d 435, 438 (N.D. 1995), the Court held that prior convictions for felony terrorizing and felony aggravated assault were erroneously, but harmlessly, admitted under North Dakota Rule of Evidence 609(a) at defendant's trial for selling five joints. As in *Eugene*, the trial court failed to adequately explain on the record how it balanced the factors (probative value and prejudicial effect), but the North Dakota Supreme Court, with Justice Meschke writing the opinion, found the admission of the priors here even less harmful than the harmless error in *Eugene*. *Murchison*, 541 N.W.2d at 443. Justice Levine concurred with this finding of harmless error, but only because the defendant raised an entrapment defense. *Id.* (Levine, J., concurring). "When a defendant claims entrapment in a jurisdiction applying a subjective entrapment test, the government may rebut this defense with prior conviction evidence relevant to the defendant's predisposition to commit the offense. *Id.* She cited seven federal cases and one treatise for that proposition, but did not explain how the priors in *Murchison*, for felony terrorizing and felony aggravated assault, were relevant to a predisposition to sell five joints. *Id.*

283. *See, e.g.*, State v. Zink, 519 N.W.2d 581, 584 (N.D. 1994) (affirming the trial court's suppression of a blood alcohol content (BAC) test result under section 39-20-07(9) of the North Dakota Century Code because of chemist's unavailability for which the State was at least negligent and thus partially responsible).

284. 470 N.W.2d 226 (N.D. 1996).

285. 453 N.W.2d 783 (N.D. 1990).

286. 453 N.W.2d 778 (N.D. 1990).

287. State v. Huether, 453 N.W.2d 778, 783 (N.D. 1990).

JUSTICE LEVINE WAS A GREAT STATE SUPREME COURT JUSTICE

Thus far, I have indicated a variety of specific examples of Justice Levine's significant opinions in criminal appeals. But what is it about her work in these cases that justifies this tribute essay and the law review issue prompting it? Some might claim that opinions reaching proper results are the mark of a great justice. But what is a proper result? Thousands of volumes of jurisprudence have failed to resolve that question. Moreover, nearly everyone who thinks seriously about what makes good appellate judges agrees it is not only the results for which they vote. In other words, most thoughtful citizens, and certainly lawyers, would agree that a judge might write poor opinions in cases reaching correct results, however they define correct, and vice versa.

In other words, although results are of course important, certainly of most importance to the general public, it is common to separate the opinion from the result. Professor James Boyd White, in his marvelous book *Justice as Translation*, points out that:

> It is, after all, to a large degree in the opinion, not the decision, that the great judge manifests her greatness: anyone can vote her intuitions or biases or feelings—for or against the plaintiff, the poor, the rich, the government—and in the nature of things all our decisions of that kind are ultimately mysterious, even to ourselves. The great contribution of the judicial mind is not the vote but the judicial opinion, which gives meaning to the vote. . . . Of course results matter too; but most cases that reach the Supreme Court, at least, are hard—decent and intelligent people could vote either way and in fact have usually done so—and in an important sense what distinguishes the work of a good judge is not the vote but the achievement of mind, essentially literary in character, by which the results are given meaning in the context of the rest of law, the rest of life.[288]

Professor White describes the common feeling of lawyers that there is "often something to admire in an opinion with the result of which we disagree (in the simple sense that we would have voted the other way) and often something to deplore in opinions that 'come out' the way we would vote if we had the responsibility of judging."[289] Unfortunately, we have no particularly satisfactory language for describing the basis for our admiration. Indeed "[i]t may be surprising to suggest that those of us who are lawyers, at least, do not know how to criticize judicial opin-

288. JAMES BOYD WHITE, JUSTICE AS TRANSLATION 91-92 (1990).
289. *Id.* at 93.

ions well, for in law school, both as students and as teachers, we seem to do little else. The judicial opinion is the core of a legal education."[290] But it is very difficult to articulate, much less agree upon, the basis for our judicial criticism.

What is it, then, about the a judge's votes and opinions that justifies the label *great*? Perhaps the composite of evaluations in this tribute issue provide sufficient basis for its professional readers to draw their own conclusions. My description of her work provides a wide canvass of my personal reasons for regretting Justice Levine's departure from our Court.

One problem, however, with views like White's that de-emphasize results as the mark of a great appellate judge, is that they leave evaluation primarily to the insiders, the judges and lawyers who read judicial opinions and law reviews. For example, another heavy hitter jurisprude, Ronald Dworkin, conceives of an idealized judge named Hercules who, in paraphrase of his early book's title, takes rights seriously.[291] Dworkin postulates "a lawyer of superhuman skill, learning, patience and acumen" whom he calls Hercules.[292] Of course the key word here is "superhuman" and thus the mythic and godlike appellation. I assume that Justice Levine is the closest we will find in this worldly realm (North Dakota's corner, at least) and that it is praise enough to describe her as a lawyer of uncommon skill, learning, and acumen.[293]

Dworkin's Hercules decides issues of constitutional law, statutory interpretation, and common law (judge made law) on the basis of principles derived from a grand scheme of law supported by political philosophy and institutional detail.[294] In my view, the closest we have come in North Dakota in my time here to a supreme court justice who self-consciously searches for underlying principles and then articulates them as bases for her judicial opinions, a truly Herculean task, is our first woman on the Court, Justice Levine. In North Dakota jurisprudence, the wisdom of Athena supplants the strength of Hercules.

But I am troubled by a view of judging that relies entirely on the philosophical sensibilities of the elite professional few or the even fewer of that number who read treatises such as Dworkin's or White's. I would like to believe that a good justice should also be appreciated by the general populace of North Dakota, at least if they were aware of her

290. *Id.*

291. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

292. *Id.* at 105.

293. *Id.* After seeing her in action several times during oral argument, talking with lawyers who have undergone that process, and reading her opinions in *City of Mandan v. Fern*, 501 N.W.2d 739 (N.D. 1993), and *Vitko v. Vitko*, 524 N.W.2d 102 (N.D. 1994) (Levine, J., concurring), I will leave it for others to judge the extent of her patience.

294. DWORKIN, *supra* note 291, at 107.

work. Newspaper columnist Mike Royko describes conversations with his old friend, Slats Grobnik, for the view of the person on the street.[295] I am not sure whether Slats is real or only Royko's rhetorical device for giving us his supposed common viewpoint. While writing this essay, I did indeed consult a lunch companion, my own version of Slats. I'll call him Coach, since that's what he is. Coach has a college degree in history, and does not appear to have ever read a court opinion of any kind.

When I asked Coach what he thought makes a state supreme court justice great, he first replied that he had never thought about it, but considered it an interesting question. After a moment's reflection, he came up with qualities such as good character and a penchant for hard and long work. I told him that those would be hard to argue with and I would assume Justice Levine is of good character and works hard, but that I would have to rely for my essay on qualities demonstrated by the judge's written opinions. He then said that he thought the most important characteristic for a good justice would be the ability to see others' points of view and understand their situations. In Coach's word, a justice should demonstrate empathy. Coach's intuitive lunch time theory seems to me consistent and somewhat resonant with Professor White's suggestion that one virtue of good judicial writing is what he calls its openness.[296]

> A common view of the judicial opinion is that it is a kind of brief, a mobilization of all the arguments that can colorably be made on behalf of the result chosen, with somewhat less superficial acknowledgment of what can be said on the other side than one finds in a lawyer's brief. But it might be thought that the task of the judge in writing an opinion is to expose to the reader the grounds upon which her judgment actually rests, with as full and fair a statement of her doubts and uncertainties as she can manage.[297]

White admits that no United States Supreme Court Justice has "consistently written out of such an understanding; Harlan comes closest, but one can see instances of such authenticity of mind in the work of others as well, including Holmes, Jackson, Black, and Douglas."[298] In North Dakota, I rank Justice Levine as closest to such federal greats. Justice Levine's experience of life and other people; her growth and change; her process of reciprocal interaction with people,

295. See, for the most relevant example I could find, Slats's opinion on David Souter's nomination by President Bush to the United States Supreme Court. Mike Royko, *Souter's Normal, and That's Scary*, CHI. TRIB., July 31, 1990, at 3.

296. WHITE, *supra* note 288, at 224.

297. *Id.*

298. *Id.*

language, and nature; all these were uniquely reflected in her judicial writing. White's felicitous synthesis of the arts of translation, integration, and judging helps me to better understand both my own evaluation of Justice Levine as a great judge and my own inability to articulate a knock-down argument for a benchmark.[299]

> The practice of translation, and interpretation too, demands an excellence, fully attainable by no one, that is ethical as well as intellectual in character: that one be a certain sort of person, with a certain attitude, ready to act out of fidelity to the text in constantly new contexts; it calls for art and invention, for a quality of consciousness that can be heard in the voice; and in doing so it defines a set of opportunities for us as both lawyers and as people.
>
> In the law, the practical effect of such a consciousness, if we could attain it, would be the perpetual erosion of the force and authority of the merely bureaucratic, for the central vice of bureaucratic language—by which I mean the language of planning and the language of theory alike—is that it has no way to admit the value of any other way of talking, any other way of being. The translator, or the translator-lawyer, would thus perpetually resist the claim of bureaucratic language, and of its forms of life, that everything can be translated with out loss into its terms; she would similarly challenge the formulations by which the power of one person (or a group) over the lives of another in the private sphere is justified or made to seem natural, by languages that assert their own unquestioned validity. It is the genius of the law to provide a place in which unheard voices can be heard and responded to; it is our task as lawyers to realize this possibility.[300]

Excellence, both intellectual and ethical, characterizes the quality that Justice Levine consistently demonstrated. Moreover, as the first woman, she added a new language or voice[301] to the artistic collective we call a court. Her language of excellence added empathy, an ear for the previously unknown voices, to our Court's traditional artistry.

To test out my hypothesis on Coach, I described a recent case, *State v. Halton*,[302] in which Justice Levine dissented.[303] I told him a defendant was charged with the version of gross sexual imposition that we used to

299. *Id.* at 267.

300. *Id.*

301. CAROL GILLIGAN, IN A DIFFERENT VOICE (1982) (exploring the notion of psychological differences in the way women and men deal with moral questions).

302. 535 N.W.2d 734 (N.D. 1995).

303. State v. Halton, 535 N.W.2d 734, 739 (N.D. 1995) (Levine, J., dissenting).

call statutory rape.[304] The defendant admitted having sex with the victim, but said he thought she was older, which is no defense in this case.[305] His defense lawyer and the prosecutor agreed that in exchange for a guilty plea the prosecutor would recommend a sentence of eighteen months with six months suspended, that is, one year to serve.[306] I explained that judges are never bound to accept bargained for sentences, but that when a sentence is agreed to between the defendant and the prosecutor, if the judge rejects it, the defendant can withdraw his guilty plea and ask for a trial if he wants.[307] However, in a case like this, where the prosecutor agrees only to recommend a sentence, the judge is still free to reject the (recommended) sentence, but the defendant is stuck with his guilty plea.[308]

So, I told Coach, in this case, the judge told the defendant that the one year sentence was only a recommendation; but later, at the sentencing hearing, the judge gave him 10 years, with six suspended conditioned upon successful completion of a sex offender treatment program.[309] Coach's immediate response to this sentence, four to ten times longer than that recommended by the prosecutor, was that it was a "bait and switch." I reminded him that the defendant had been told the one year sentence was only a recommendation, to which the judge was not bound, and although it wasn't clear to me from the opinion, it appeared that the North Dakota Supreme Court believed that the defendant was told that he wouldn't be able to change his mind later if the judge didn't follow the recommendation.[310]

Coach wasn't convinced. Neither was Justice Levine.[311] Both believed that a person in the defendant's situation would understand that the judge and the lawyers were part of a system which was telling him that he would be quite a bit better off if he would plead guilty and save the system the time and trouble of a trial.[312] The system of plea bargaining of course, doesn't work without that wholesale institutional reality. At retail, the recommendation of a central player in the system, the prosecutor, is reasonably considered more significant to the defendant than the solemn incantations of the judge that the court is not bound by the recommendation. Nonetheless, the defendant is bound by his guilty

304. *See id.* at 735; *see also* N.D. CENT. CODE § 12.1-20-03(1)(d) (Supp. 1995) (prohibiting sexual intercourse with someone under fifteen years of age).

305. *Halton*, 535 N.W.2d at 735, 737.

306. *Id.* at 736.

307. *Id.*; *see also* N.D. R. CRIM. P. 11(d)(4).

308. *Halton*, 535 N.W.2d at 736.

309. *Id.*

310. *Id.* at 736-37.

311. *Id.* at 739 (Levine, J., dissenting) (stating the defendant ought to be allowed to withdraw a guilty plea following an unaccepted sentence recommendation).

312. *Id.*; *see also* State v. Thompson, 504 N.W.2d 315, 320-21 (N.S. 1993) (Levine, J., dissenting).

plea in the sense that he can't withdraw it just because this time, although he took the bait, the judge made a big, big switch.

Justice Levine's dissent relied on her previous dissent on the issue two years earlier in *State v. Thompson*.[313] There, she found persuasive the Michigan Supreme Court's decision based "on the defendant's perspective" that a judge rejecting a recommendation should allow withdrawal of the guilty plea.[314] She quoted from the Michigan opinion:

> "Although the prosecutorial 'recommendation' would seem to inform the defendant of the consequences of his plea that the prosecutor is merely suggesting a sentence and that the judge is not bound to follow the recommendation—the truth is that most defendants rely on the prosecutor's ability to secure the sentence when offering a guilty plea. This is true even when the court specifically admonishes the defendant that it is not bound by the prosecutor's recommendation. All disclaimers that the court is not bound are often viewed as ceremonial incantations.
>
> . . .
>
> "To most defendants, the distinction between a sentence agreement and a sentence recommendation is little more than a variation in nomenclature."[315]

The point is not that the majority in *Halton* is wrong,[316] and Justice Levine, Coach, and the Michigan Supreme Court, are right.[317] Instead, I offer this as an example of Justice Levine's empathy (to use Coach's non-professional benchmark) and her ability to see different sides to a question that appears legally cut-and-dried to less empathetic judges. Or, to use White's term, it is an example of her openness.

Of course, Coach did not really understand that in jurisdictions such as North Dakota, without sentencing guidelines or appellate review of legal sentences, there is no standard whatsoever for proper sentencing within the legislatively prescribed range. Sentencing judges have virtual-

313. 504 N.W.2d 315 (N.D. 1993).

314. State v. Thompson, 504 N.W.2d 315, 320 (N.D. 1993) (Levine, J., dissenting).

315. *Id.* (quoting People v. Killebrew, 330 N.W.2d 834, 842 (Mich. 1982)).

316. Indeed, the North Dakota Supreme Court's position appears to be the majority position. *See e.g.*, CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE vol. 1, § 175.1, vol. 5, §§ 537-539 (2d ed. 1982) (discussing the federal approach under Federal Rule of Criminal Procedure 11(e)(1)(B)).

317. Chief Justice VandeWalle, concurred in the majority opinion in *Thompson*, agreeing with the majority's result under North Dakota Rule of Criminal Procedure 11(d), but also agreeing with Justice Levine that the Rule should be amended to allow the defendant to withdraw the plea. *Thompson*, 504 N.W.2d at 319 (VandeWalle, C.J., concurring). He observed that "[a]lthough such a procedure may result in less realistic plea bargaining by the defendants, that result is, in my opinion, outweighed by the real possibility that defendants do not always understand the Rule 11 process as well as prosecutors, defense counsel and judges would like to believe." *Id.* at 319-20. Apparently that possibility was not worth another separate opinion, as he concurred in *Halton* without comment.

ly absolute and unreviewable discretion, absent disclosure of an unconstitutional factor. In other words, there are no legal limits to the sentencing process, absent a showing of constitutionally suspect factors such as race or religion.[318] Thus, with the bliss of ignorance, he asked a question that in our system seems to have not only no good answer, but no answer at all: why did the prosecutor recommend the light sentence if the judge knew the defendant deserved more? But that's a subject for another essay.

I believe that Justice Levine demonstrated White's criterion of openness to other views, Dworkin's ideal of a Herculean judicial quest for principled opinions, and Coach's wish for judicial empathy. Because such a combination of judicial attributes is so rare, she will be missed. Her quest merited her synonymous title: Justice.

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318. Footnote one of *Halton* really makes clear how unguided and strange our system is, especially compared to United States jurisdictions with sentencing guidelines or European jurisdictions, such as Norway, where a primary function of appellate courts is to review sentences and provide what becomes, in effect, a common law (meaning judge made) set of sentencing guidelines.

> 1. North Dakota state courts are not bound by sentencing guidelines. A list of factors to be considered is found in N.D.C.C. § 12.1-32-04. The statute does not control the trial court's discretion and the court does not have to explicitly refer to the factors at sentencing.
>
> Under N.D.C.C. § 12.1-32-02(6), the trial court is to prepare a written statement to accompany the sentence. The statute does not change our review of the court's discretion. Ennis at 382.
>
> These sections do not require a sentencing court to make explicit reference to the factors and do not affect the trial court's discretion. Contrary to Halton's contention, the trial court did not abuse its discretion by failing to specifically address the sentencing factors.

535 N.W.2d at 739 n.1 (citation omitted).