

**THE IMPAIRED DUAL SYSTEM
FRAMEWORK OF UNITED STATES DRUNK-
DRIVING LAW: HOW INTERNATIONAL
PERSPECTIVES YIELD MORE SOBER
RESULTS**

I. INTRODUCTION.....	532
II. UNITED STATES' DUAL METHODS OF PROOF IN DRINKING AND DRIVING PROSECUTIONS.....	536
A. <i>The Highly Subjective, Misplaced Field Sobriety Testing System</i>	536
1. <i>General Problems with the Field Sobriety Testing System</i>	537
2. <i>Specific Problems with Standardized Field Sobriety Tests</i>	543
3. <i>Specific Problems with Nonstandardized Field Sobriety Tests</i>	550
B. <i>The Fledgling, Yet Promising .08 Per Se Statutory System</i>	551
1. <i>Tolerable Problems with Breathalyzer Machines</i>	552
2. <i>Lenient Punishment for Refusing a Breath Test.</i>	553
III. INTERNATIONAL, COMPARATIVE ANALYSIS OF DRUNK- DRIVING LAWS IN FOREIGN COUNTRIES	556
A. <i>The Limited Involvement of International Organizations</i>	556
B. <i>Why the United States' System is Impaired: Field Sobriety Tests and Ineffective Enforcement of Per Se Laws</i>	557
C. <i>Scandinavia: The Very Strict Founding Father</i>	560

532	<i>HOUSTON JOURNAL OF INTERNATIONAL LAW</i>	[Vol. 28:2
	<i>D. Great Britain: The Current Leader in Strict Enforcement</i>	564
	<i>E. Australia: Enforcement and Federalism Can Co-exist</i>	567
	<i>F. Canada: Putting Field Sobriety Tests Where They Belong</i>	568
IV.	CONCLUSION	570

I. INTRODUCTION

Throughout the world, alcohol is regarded as both the bringer of elation and discontent, as “[n]o other substance has been so lauded in verse and song or criticized so frequently as has alcohol.”¹ Countries have developed a kind of ambivalence towards alcohol because of the dualistic nature of its exaltation and regulation.² While alcohol historically posed no great threat to communities,³ its devastating effects have become increasingly apparent as an international catastrophe.⁴

Impaired driving is a grave and serious international dilemma that results in countless casualties all over the world.⁵ Despite these tragic consequences, “[t]he incidence of driving

1. RONALD C. DENNEY, *DRINKING AND DRIVING* 23 (1979).

2. *Id.* at 25.

3. *Id.* at 32.

4. See Eileen F.S. Kaner et al., *Impact of Alcohol Education and Training on General Practitioners' Diagnostic and Management Skills: Findings from a World Health Organization Collaborative Study*, 62 *J. STUD. ON ALCOHOL* 621, 621 (Sept. 2001) (describing how alcohol-related problems “have achieved international prominence as health and social issues”). The Industrial Revolution and the resulting advent of motor vehicles increased the danger that society might be harmed by consumption of alcohol. DENNEY, *supra* note 1, at 32; see also NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., DOT HS-808-211, *IMPAIRED PERSPECTIVES: ALCOHOL ON AMERICA'S HIGHWAYS* (1998). “DWI is no longer accepted as an unavoidable price of automobile travel.” *Id.*

5. See John B. Macdonald, *Preface: Towards a Clearer Definition of Alcohol's Role in Casualties*, in *DRINKING AND CASUALTIES: ACCIDENTS, POISONINGS AND VIOLENCE IN AN INTERNATIONAL PERSPECTIVE* 1, 2 (Norman Giesbrecht et al. eds., 1989) (discussing the incidence of alcohol-related U.S. traffic fatalities and the public outrage in many countries toward drunk drivers).

while under the influence of alcohol is one of the most frequently committed crimes throughout the world.”⁶ In Great Britain, sixteen percent of total road deaths are caused by drunk drivers,⁷ while in Ontario, Canada, over 12,000 drunk-driving accidents occur in a single year.⁸ The European Commission contends that in its member countries, up to twenty percent of road accident deaths and serious injuries are attributable to alcohol and amount to an estimated loss of life of ten billion euros per year.⁹

In the United States, of the 42,815 total traffic fatalities that occurred in 2002, forty-one percent were alcohol related.¹⁰ In 2002, 258,000 people were injured in alcohol-related crashes.¹¹ Motor vehicle accidents where the driver is impaired by alcohol cost employers over nine billion dollars a year.¹²

Statistics like these, along with the lobbying of public interest groups like Mothers Against Drunk Driving (MADD)¹³ and Students Against Drunk Driving (SADD), have resulted in “the almost schizophrenic development of drinking-and-driving

6. Carleton W. Kenyon, *Introduction to DRUNK DRIVING LAWS IN VARIOUS FOREIGN COUNTRIES* 1, 1 (Law Library Staff eds., 1983).

7. Lara Naaman, *Sober up, Old Chap: British Forswear Drunk Driving, Turn Keys over to Scooterman*, WASH. TIMES, May 8, 2003, at A2.

8. Manuella Adrian, *Alcohol-Related Casualty Statistics in Canada*, in *DRINKING AND CASUALTIES: ACCIDENTS, POISONINGS, AND VIOLENCE IN AN INTERNATIONAL PERSPECTIVE* 228, 229 (Norman Giesbrecht et al. eds, 1989).

9. Commission Recommendation of 17 Jan., 2001 on the Maximum Permitted Blood Alcohol Content (BAC) for Drivers of Motorized Vehicles, 2001 O.J. (C 48) 3.

10. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEPT OF TRANSP., 2002 ANNUAL ASSESSMENT: MOTOR VEHICLE TRAFFIC CRASH FATALITY AND INJURY ESTIMATES FOR 2002, 7, 33 (2002), <http://www-nrd.nhtsa.dot.gov/pdf/nrd-30/NCSA/Rpts/2003/Assess02BW.pdf>.

11. *Id.* at 36.

12. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEPT OF TRANSP., THE ECONOMIC BURDEN OF TRAFFIC CRASHES ON EMPLOYERS: COSTS BY STATE AND INDUSTRY AND BY ALCOHOL AND RESTRAINT USE 7, <http://www.nhtsa.dot.gov/people/injury/alcohol/EconomicBurden/index.html> (last visited Feb. 4, 2006). A large percentage of these exorbitant costs, which include medical spending, sick leave, and life and disability insurance, are the result of drunk-driving accidents. *Id.* at 9.

13. U.S. Senator Patty Murray praises MADD for making the government respond to problems with drunk driving “perhaps more than any other organization.” *Highway Safety: Hearing Before a Subcomm. of the Comm. on Appropriations*, 107th Cong. 1–2 (2002) (opening statement of Senator Patty Murray).

law” in the United States that is aimed at achieving fast and arguably haphazard prosecutions and convictions of those charged with drunk-driving offenses.¹⁴ According to the National Highway Traffic Safety Administration (NHTSA), resolving this problem requires the cooperation of law enforcement, courts, and medical professionals to assist prosecutors in convicting alleged offenders.¹⁵ The effect is that most states have two entirely different methods of prosecution to prove the offense of Driving While Intoxicated (DWI).¹⁶ This system is not only confusing for the jury and unfair to the criminal defendant, but it is also untenable.¹⁷ One method of proof, consisting primarily of evidence from field sobriety tests, is subjective¹⁸ and inaccurate,¹⁹ while the other method of proof—breath, blood, or urine tests—cannot be properly implemented.²⁰

14. E. John Wherry, Jr., *The Rush to Convict DWI Offenders: The Unintended Unconstitutional Consequences*, 19 DAYTON L. REV. 429, 429–30 (1994); see also John B. Mancke, *DUI Field Sobriety Tests: Have the Courts Missed a Step?*, 73 PA. B. ASS'N Q. 117, 132 (2002) (arguing that Pennsylvania courts have erroneously relied on field sobriety tests and have not resolved the constitutional issues of convicting those charged with driving while intoxicated).

15. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., DOT HS-809-746, THE NATION'S NEW STRATEGY TO STOP IMPAIRED DRIVING 1, 4 (2004). NHTSA was created in 1966, in part, to curb alcohol abuse. See NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., INITIATIVES TO ADDRESS IMPAIRED DRIVING 5 (2003) (noting that soon after its creation, Congress charged NHTSA with delivering a report on alcohol and highway safety), available at <http://www.nhtsa.gov/people/injury/alcohol/IPTRReport/FinalAlcoholIPT-03.pdf>.

16. Wherry, *supra* note 14, at 432–39. Although in many instances, DWI and Driving Under the Influence (DUI) are two terms used interchangeably to refer to the same type of crime, each state applies a different legal and technical meaning to the terms. See SOCIAL CONTROL OF THE DRINKING DRIVER xvii (Michael D. Laurence et al. eds., 1988).

17. Wherry, *supra* note 14, at 439.

18. Mancke, *supra* note 14, at 127 (“[T]he subjective nature of the test results is obvious . . .”); see Jim Fraiser, *Mississippi Informed Consent Law: A Survey of Decisions Responding to Recent Scientific Research on Tests for Intoxication*, 72 MISS. L.J. 1037, 1043 (2003) (claiming that an officer's judgment in finding clues in the horizontal gaze nystagmus test is subjective).

19. J. Gary Trichter & Michael Pena, *DWI/DUI Field Sobriety Testing Revisited: A Common Sense Voir Dire and Cross-Examination to Show the Tests Are Designed to Cause and Score Failures*, 20 CHAMPION 17, 17 (Aug. 1996).

20. See John Hoffman, Comment, *Implied Consent with a Twist: Adding Blood to New Jersey's Implied Consent Law and Criminalizing Refusal Where Drinking and*

Drunk drivers create a very serious social²¹ and international²² problem that needs to be corrected. However, the United States' use of poor investigatory tools to establish proof,²³ ineffectual sanctions for refusal to submit to a breath test,²⁴ and convictions that are obtained haphazardly and improperly²⁵ is not acceptable. This is especially true given that a myriad of other countries and regions, including Scandinavia, Great Britain, Australia, and Canada, have not resorted to such measures.

This Comment engages in a comparative analysis of international and U.S. drunk-driving laws and proposes an optimal solution to the intersection of two cornerstones of American society—alcohol and driving.²⁶ Part I explores the specifics of U.S. drunk-driving laws with a focus on the two biggest problems with U.S. drunk-driving prosecution: field sobriety tests and administrative license revocation. Part II reviews how the drunk-driving laws of Scandinavia, Great Britain, Australia, and Canada can “contribute to our understanding of impaired driving countermeasures and of how the current situation in the United States compares to other countries.”²⁷ Part III uses this international perspective to

Driving Results in Death or Serious Injury, 35 RUTGERS L.J. 345, 358–59 (2003). Defendants can simply refuse to submit to a chemical sample thereby making this method of proof useless. See, e.g., S.D. CODIFIED LAWS § 32-23-10 (2002) (providing that an officer instruct a defendant of his/her right not to submit to a chemical analysis test).

21. Wherry, *supra* note 14, at 431; see *Perez v. Campbell*, 402 U.S. 637, 657 (1971) (Blackmun, J., dissenting) (“The slaughter on the highways of this Nation exceeds the death toll of all our wars.”).

22. See Kenyon, *supra* note 6, at 1 (stating that drunk driving is “one of the most frequently committed crimes throughout the world”).

23. See Fraiser, *supra* note 18, at 1043–64 (condemning field sobriety tests and breathalyzer machines).

24. Amanda Milkovits, *Breath-test Refusal Measure Faces a Tough Road Ahead*, PROVIDENCE J. BULL., Jan. 18, 2006, at B1, available at 2006 WLNR 1048805, at *2–3.

25. See Wherry, *supra* note 14, at 429–32, 469–71 (describing New Jersey's drunk-driving laws which allow for routine convictions that raise constitutional issues).

26. JAMES B. JACOBS, DRUNK DRIVING: AN AMERICAN DILEMMA 3, 15 (1989).

27. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., DOT HS-809-037, ON DWI LAWS IN OTHER COUNTRIES (Mar. 2000), http://www.nhtsa.dot.gov/people/injury/research/pub/DWIothercountries/dwiothercountries.html#_Toc449518804 [hereinafter NHTSA, ON DWI LAWS].

propose a solution that would make U.S. drunk-driving laws more effectual and balanced.

II. UNITED STATES' DUAL METHODS OF PROOF IN DRINKING AND DRIVING PROSECUTIONS

To prevail in prosecuting a drunk-driving offense, the state must prove a driver's intoxication.²⁸ Two key methods exist to prove this condition: 1) field sobriety tests and 2) the results of chemical testing such as blood, urine, breath, or saliva.²⁹

A. *The Highly Subjective, Misplaced Field Sobriety Testing System*

When an officer stops a car³⁰ and makes a determination that the driver may be intoxicated,³¹ he instructs the driver to perform roadside maneuvers that have become known as field sobriety tests.³² The officer will testify to the results of these tests, or the tests will be recorded on a videotape that is ultimately played to the jury or judge, or both.³³

28. See Kenyon, *supra* note 6, at 2 (stating that proving intoxication "is the essence of the drunk driving offense"). Other elements must typically be proven as well but are rarely at issue and will not be addressed by this Comment. These include "(1) operation of a motor vehicle on a highway . . . (2) within the jurisdiction of the court; (3) reasonable . . . suspicion [for the police stop; and] (4) probable cause for arrest." Wherry, *supra* note 14, at 432. For an in-depth treatise discussing every element of the offense of drunk driving, see generally 1 J. GARY TRICHTER & W. TROY MCKINNEY, TEXAS DRUNK DRIVING LAW ch. 1 (Lexis Law Publishing ed., 3d ed. Issue 3 1999).

29. Kenyon, *supra* note 6, at 2.

30. The officer must have a reasonable and articulable suspicion for stopping the car. *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968). An officer's observation of a traffic violation will always meet this burden and hence justify a stop. RICHARD ALPERT ET AL., TEX. DIST. & COUNTY ATTORNEYS ASSOC'N, DWI INVESTIGATION AND PROSECUTION 4 (2003) [hereinafter TDCAA]. NHTSA has tried to predict, using percentages as a measure of likelihood, that a person who commits certain traffic violations, e.g., weaving, has a BAC of .08 or greater. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T. OF TRANSP., DOT HS-808-677, THE VISUAL DETECTION OF DWI MOTORISTS 4–5 (2001).

31. Even though an officer may initially stop a person for a traffic violation, the evolving situation may lead an officer to suspect intoxication. TDCAA, *supra* note 30, at 18–19. Smelling an odor of alcohol on the driver's breath, for example, can be a reasonable and articulable reason to suspect that the driver is intoxicated. *Id.* at 19.

32. See Phillip B. Price, Sr., *DWI: Fear and Field Sobriety*, 24 CHAMPION 57, 57 (Aug./Sept. 2000) [hereinafter Price, *DWI: Fear and Field Sobriety*].

33. See *id.*

1. *General Problems with the Field Sobriety Testing System*

The use of field sobriety tests as a method of proof in DWI prosecutions is unfavorable because of theoretical and practical problems.

Other Causes for Error

The paradigm which validates field sobriety tests is a fallacy.³⁴ The tests assume that if a person exhibits poor coordination, balance, or dexterity, then that person is necessarily intoxicated.³⁵ The tests also presume that a person's level of intoxication can be measured by the way a person walks, talks, or reacts.³⁶ It is upon these premises that "courts seem willing to blindly accept a direct relationship between the results of field sobriety tests and a driver's impairment."³⁷

A direct relationship between these inherently unreliable tests³⁸ and alcohol consumption cannot be proven because countless other reasons may explain a person's performance on the tests. For example, a person may perform poorly because of nervousness,³⁹ drowsiness, or fatigue⁴⁰ and thus display diminished performance. Also, if a person is more than fifty

34. See Mancke, *supra* note 14, at 117 (commenting that there is little or no research to support the "blind faith" connection between field sobriety tests and intoxication).

35. TDCAA, *supra* note 30, at 21.

36. *Id.*

37. Mancke, *supra* note 14, at 117.

38. Robert Clough, Note, *Walking the Line: The Oregon Supreme Court, Field Sobriety Tests, and the Right Against Self-Incrimination*, 32 WILLAMETTE L. REV. 677, 688-89 (1996).

39. Price, *DWI: Fear and Field Sobriety*, *supra* note 32, at 57. Price presents a very detailed, scientifically supported discussion of how levels of stress and anxiety can damage performance. *Id.* at 58-61. Stress or anxiety can "get[] in the way of judgment and fine motor control, . . . cause[] the test to become a threat, not a challenge, . . . [and] damage[] the positive frame of mind you need for high quality performance." *Id.* at 60.

40. See Steven Rubenzer, *DWI: (Part 2) The Psychometrics and Science of the Standardized Field Sobriety Tests*, 27 CHAMPION 40, 41 (June 2003) [hereinafter Rubenzer, *DWI: (Part 2)*] (arguing that the effects of fatigue and drowsiness have not been properly investigated to determine their effect on test performance).

pounds overweight or over the age of sixty, the standardized field sobriety tests (SFST) have questionable validity.⁴¹ The impediments due to age and weight are gradual, meaning that people who are fifty-five years old or forty-five pounds overweight likely experience the same problems with the test as people who are slightly older or heavier.⁴² Thus, NHTSA cutoffs are somewhat arbitrary and illustrate a central problem with the tests: reliance on optimal physical health and age.⁴³ Even in the most favorable conditions, SFSTs are only accurate eighty percent of the time.⁴⁴ Although this appears to be a high rate of accuracy, field sobriety tests are rarely administered under optimal conditions.⁴⁵

Subjectivity Issues

Field sobriety tests are also impaired because they are highly subjective.⁴⁶ Police officers make the ultimate, subjective determination of whether to arrest a suspect, and this determination is often incorrect.⁴⁷ The 1977 and 1981 NHTSA studies of field sobriety tests show large error rates by police officers.⁴⁸ In the 1977 study, police officers mistakenly arrested

41. *Id.*; see NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., DOT HS-806-512, IMPROVED SOBRIETY TESTING 7 (1984); NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., DOT HS-178-R9/04, DWI DETECTION AND STANDARDIZED FIELD SOBRIETY TESTING: PARTICIPANT MANUAL, VIII-11, VIII-14 (2004) [hereinafter NHTSA, PARTICIPANT MANUAL].

42. Rubenzer, *DWI: (Part 2)*, *supra* note 40, at 41.

43. *See id.*

44. *Id.*; see NHTSA, PARTICIPANT MANUAL, *supra* note 41, at VIII-1 (explaining that eighty percent accuracy can only be achieved in a laboratory setting when two of the SFSTs are combined).

45. JACK STUSTER, NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T. OF TRANSP., DOT HS-809-400, DEVELOPMENT OF A STANDARDIZED FIELD SOBRIETY TEST (SFST) TRAINING MANAGEMENT SYSTEM (2001), <http://www.nhtsa.dot.gov/people/injury/alcohol/SFST/contents.htm>. Field sobriety tests are administered on the roadside, possibly under harsh conditions. *See id.* (explaining that, depending on roadside conditions, an officer may not administer an SFST according to the training manual).

46. *See Fraiser, supra* note 18, at 1043.

47. *See infra* note 48 and accompanying text.

48. *See Phillip B. Price, Sr., .10% Solution: Field Sobriety Testing*, 20 CHAMPION 46, 47 (Aug. 1996) [hereinafter Price, *.10% Solution*]. *See generally* MARCELLINE BURNS

people forty-seven percent of the time,⁴⁹ and in the 1981 study, officers were mistaken thirty-one percent of the time.⁵⁰ These mistaken arrests may have occurred, in part, because officers have a predisposition to arrest a suspected drunk driver.⁵¹ The three NHTSA field studies conducted in 1995, 1997, and 1998 show improvements in this error rate, but these studies have too many flaws to be persuasive.⁵²

Standardization Problems

The standardization of field sobriety tests poses a theoretical problem. NHTSA standardized three field sobriety tests in 1977 to promote reliability, accuracy, predictability, and consistency in a very powerful evidentiary tool⁵³ that is often heavily weighted by triers of fact.⁵⁴ However, field sobriety tests are not

& HERBERT MOSKOWITZ, U.S. DEP'T OF TRANSP., DOT HS-802-424, PSYCHOPHYSICAL TESTS FOR DWI ARREST, FINAL REPORT (1977), *available at* http://www.ndaa-apri.org/pdf/psy_tes2.pdf (discussing the results of a study testing the reliability of six tests used by officers in making DWI arrest decisions); V. THARP ET AL., U.S. DEP'T OF TRANSP., DOT HS-805-864, DEVELOPMENT AND FIELD TEST OF PSYCHOPHYSIOLOGICAL TESTS FOR DWI ARREST, FINAL REPORT (1981), *available at* http://www.ndaa-apri.org/pdf/test_dv2.pdf (discussing the results of a study testing the effectiveness of the walk-and-turn test, the one-leg stand test, and the horizontal gaze nystagmus in estimating BACs).

49. Price, *.10% Solution*, *supra* note 48, at 47; BURNS & MOSKOWITZ, *supra* note 48.

50. See THARP ET AL., *supra* note 48 (stating that the officers correctly arrested suspects less than seventy percent of the time, even after training).

51. See THEODORE E. ANDERSON ET AL., NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., DOT HS-806-475, FIELD EVALUATION OF A BEHAVIORAL TEST BATTERY FOR DWI (1983) (asserting that an officer may be influenced by the results of the first test, the horizontal nystagmus, and these results may affect the officer's scoring on the other two tests).

52. See Steven Rubenzer, *DWI: Part 1: The Psychometrics and Science of Standardized Field Sobriety Tests*, 27 CHAMPION 48, 50–51 (May 2003) [hereinafter Rubenzer, *DWI: Part 1*] (stating five reasons why these studies are not reliable, including the fact that the studies were never published in peer review journals, the police officers participating in the study were not representative of those in the field, the tests were not conducted by “blind” or “double blind” methods, and the officers were not constantly monitored to rule out malingering).

53. See STUSTER, *supra* note 45 (discussing the development of the SFST battery from the 1977 Burns & Moskowitz study).

54. See Price, *DWI: Fear and Field Sobriety*, *supra* note 32, at 57 (“When the judge or jury sees or hears the performance, they might mistakenly conclude that the person

standardized in two ways. First, police officers might not perform the three standardized tests in an unvarying, uniform way.⁵⁵ Second, the three SFSTs are not the only tests that are used by police officers; this means that the field sobriety testing experience is not, in and of itself, standardized.⁵⁶

The SFSTs are not always performed uniformly by officers.⁵⁷ One reason for this inconsistency is that officers sometimes make mistakes.⁵⁸ Couple this with the unfettered discretion that police officers are typically afforded in administering SFSTs,⁵⁹ and any practical hope for standardization is essentially lost.

The law in Ohio provides a pertinent example of how the exigency to convict potential DWI offenders has led politicians to bypass standardization.⁶⁰ The Ohio Supreme Court has refused to allow police officers any discretion in administering field

on trial, because of the perceived results of these roadside tests, had consumed too much alcohol.”).

55. *See id.* (“[T]here should be no variation in the way the standardized field sobriety tests are given. The reason they are called standardized tests is because they should be given in a standardized way each time.”); *see also* Price, *.10% Solution*, *supra* note 48, at 46–47 (discussing the error rates of officers in detecting BAC during two studies of the three standardized field sobriety tests).

56. *See* *People v. Leahy*, 882 P.2d 321, 323 (Cal. 1994) (discussing use of the alphabet test and the internal clock test); *Allred v. State*, 622 So. 2d 984, 985–86 (Fla. 1993) (discussing use of the alphabet test and counting test); *State v. Palmer*, 554 N.W.2d 859, 863 (Iowa 1996) (discussing use of the alphabet test and the finger dexterity test); *State v. McKechnie*, 690 A.2d 976, 977 (Me. 1997) (discussing use of the alphabet test and the finger-to-nose test); *Commonwealth v. King*, 706 N.E.2d 685, 687 (Mass. 1999) (discussing use of the alphabet test and the counting backwards test); *State v. Baue*, 607 N.W.2d 191, 196 (Neb. 2000) (discussing use of the alphabet test and the counting backwards test).

57. *See* STUSTER, *supra* note 45 (explaining how “deviations from standardized procedures” can affect test results). This is apparently not an isolated problem, as some courts have ruled that if not administered properly, standardized field sobriety tests are not admissible as evidence. *See* *Emerson v. State*, 880 S.W.2d 759, 763, 769 (Tex. Crim. App. 1994); *State v. Homan*, 732 N.E.2d 952, 955–56 (Ohio 2000), *superseded by statute*, OHIO REV. CODE ANN. § 4511.19 (D)(4)(b) (LexisNexis 2006), *as recognized in* *State v. Schmitt*, 801 N.E.2d 446 (2004).

58. *Cf.* Frederic Whitehurst, *Forensic Crime Labs: Scrutinizing Results, Audits, and Accreditation—Part 1*, 28 CHAMPION 6, 9 (Apr. 2004) (discussing the many mistakes that improperly trained and uneducated police officers can make in the field when collecting forensic evidence).

59. STUSTER, *supra* note 45.

60. *See infra* notes 61–65 and accompanying text.

sobriety tests, even though conditions in the field may be unexpected and imperfect.⁶¹ The court asserted in *State v. Homan* that a field sobriety test cannot be used as evidence of probable cause for arrest if it is not administered in strict compliance with NHTSA standards because “even minor deviations from the standardized procedures can severely bias the [test] results.”⁶² In response to this ruling, the Ohio Legislature amended Ohio’s DWI statute and lessened the compliance standard by allowing field sobriety test evidence if it is conducted in substantial compliance with applicable standards.⁶³ The Ohio Supreme Court responded judiciously⁶⁴ by virtually ignoring the statute as it extended its holding of strict compliance in *Homan* to the exclusion of field sobriety test evidence at trial.⁶⁵

NHTSA has prompted this power struggle between the Ohio Legislature and Judiciary by playing fast and loose. The organization accepts officer deviation from set standards because “ideal conditions do not always exist in the field,”⁶⁶ and yet at the same time, NHTSA states “[i]f any one of the standardized field sobriety test elements is changed, the validity is compromised.”⁶⁷ NHTSA wants it both ways and hopes that

61. See *Homan*, 732 N.E.2d at 955–56. But see *State v. Schmitt*, 801 N.E.2d 446, 451 (Ohio 2004), *superseded by statute*, OHIO REV. CODE ANN. § 4511.19 (D)(4)(b) (LexisNexis 2006) (Lundberg Stratton, J., concurring in part and dissenting in part) (“[A]dministering field sobriety tests in trying environmental conditions is difficult at best.”).

62. *Homan*, 732 N.E.2d at 957.

63. See OHIO REV. CODE ANN. § 4511.19(D)(4)(b) (LexisNexis 2006) (extending the post-*Homan* substantial compliance standard to current version); see also *Schmitt*, 801 N.E.2d at 451 (Lundberg Stratton, J., concurring in part and dissenting in part) (arguing that the Ohio Legislature amended the statute because it believed that substantial compliance rather than strict compliance should be the threshold test to determine the admissibility of field sobriety tests).

64. Compare Douglas R. Richmond, *Appellate Ethics: Truth, Criticism, and Consequences*, 23 REV. LITIG. 301, 341 (2004) (arguing for the panel to uphold the strict compliance standard in *Homan* while at the same time criticizing the panel for ignoring the law to promote favorable results) with *Schmitt*, 801 N.E.2d at 449 (ignoring a statute to promote a favorable legal standard).

65. See *Schmitt*, 801 N.E.2d at 447–49.

66. STUSTER, *supra* note 45.

67. NHTSA, PARTICIPANT MANUAL, *supra* note 41, at VIII-19.

courts will merely view deviations from standardized procedures as affecting the weight of the evidence rather than its admissibility.⁶⁸ Courts have not yet been so pigeonholed, and different states apply different standards.⁶⁹ This unpredictability illustrates how field sobriety tests are innately nonstandardized.

NHTSA has also fueled this confusion by failing to properly curtail police discretion through the standardization of certain aspects of police conduct.⁷⁰ The form and wording of screening questions that officers ask suspects about possible medical problems and conditions are not standardized nor do officer training materials illustrate the proper demeanor and tone for delivering field sobriety test instructions to suspects.⁷¹ NHTSA instructions are placed in quotation marks, and even though this suggests that the instructions are to be read verbatim, NHTSA does not instruct police officers to do so.⁷² Standardization is also ignored because officers are not instructed to record their observations immediately.⁷³ According to NHTSA, the validity of SFST results hinges on whether the officer follows the set procedures for administering the tests.⁷⁴ Nevertheless, NHTSA has left many aspects of field sobriety testing nonstandardized.

The testing experience is also not uniform because a police officer has the discretion to administer any combination of field sobriety tests, including nonstandardized and standardized tests.⁷⁵ Unfortunately, NHTSA implicitly supports police officers who conduct a random assortment of nonstandardized tests in conjunction with SFSTs.⁷⁶ Because NHTSA is a federal agency,

68. See STUSTER, *supra* note 45.

69. See *id.*

70. See Rubenzer, *DWI: (Part 2)*, *supra* note 40, at 40–41.

71. *Id.* at 40.

72. *Id.*

73. *Id.* at 41.

74. NHTSA, PARTICIPANT MANUAL, *supra* note 41, at VIII-19.

75. See TDCAA, *supra* note 30, at 24–25 (encouraging police officers to use nonstandardized tests at the scene).

76. See NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP'T OF TRANSP., DOT HS-808-382, IMPAIRED DRIVING ENFORCEMENT: A PROGRAM GUIDE FOR LAW ENFORCEMENT & HIGHWAY SAFETY ADMINISTRATORS 7 (1996). Note that officers are advised to conduct the finger count, alphabet recital, and simple counting. *Id.* All of these tests are well-

the U.S. government impliedly accepts the field sobriety testing experience is not the same for every person suspected of intoxication⁷⁷ and is thus unfair and capricious.

Field sobriety tests can be further broken down and analyzed by separating them into two categories: standardized and nonstandardized.⁷⁸

2. *Specific Problems with Standardized Field Sobriety Tests*

In 1975, NHTSA sought to create a system of tests to be performed by police officers, either at the station or in the field that would detect whether an operator of a motor vehicle was impaired because of alcohol use.⁷⁹ Sixteen tests were selected for initial consideration, and ultimately, six tests were chosen for an in-depth, evaluative study.⁸⁰ These six tests include the “one-leg stand, walk-and-turn, finger to nose, finger count, alcohol (horizontal) gaze nystagmus, and tracing” tests.⁸¹ After the evaluation, the three best tests—the one-leg stand, walk-and-turn, and alcohol (horizontal) gaze nystagmus—were called the Standardized Field Sobriety Tests (SFSTs) and “were adopted by

known, nonstandardized field sobriety tests. *See* BURNS & MOSKOWITZ, *supra* note 48 (explaining that Burns & Moskowitz selected tests for their study which had previously been used by police officers in the field).

77. Notice the different combinations of tests used for people who are suspected of DWI. *People v. Leahy*, 882 P.2d 321, 323 (Cal. 1994) (discussing use of the alphabet test and the internal clock test); *Allred v. State*, 622 So. 2d 984, 985–86 (Fla. 1993) (discussing use of the alphabet test and counting test); *State v. Palmer*, 554 N.W.2d 859, 863 (Iowa 1996) (discussing use of the alphabet test and the finger dexterity test); *State v. McKechnie*, 690 A.2d 976, 977 (Me. 1996) (discussing use of the alphabet test and the finger-to-nose test); *Commonwealth v. King*, 706 N.E.2d 685, 687 (Mass. 1999) (discussing use of the alphabet test and the counting backwards test); *State v. Baue*, 607 N.W.2d 191, 196 (Neb. 2000) (discussing use of the alphabet test and the counting backwards test).

78. TDCAA, *supra* note 30, at 21.

79. *See* Mancke, *supra* note 14, at 118; Price, *.10% Solution*, *supra* note 48, at 46.

80. Mancke, *supra* note 14, at 118; *see also* BURNS & MOSKOWITZ, *supra* note 48.

81. Mancke, *supra* note 14, at 118.

NHTSA as the only tests to determine sobriety at roadside.”⁸²

Horizontal Gaze Nystagmus (HGN) Test: Science or Science Fiction?⁸³

The HGN test is a SFST in which a police officer attempts to observe an involuntary jerking in a suspect's eye while the suspect's eye gazes to the side.⁸⁴ This involuntary jerking becomes pronounced with alcohol use.⁸⁵ The officer looks for three “clues” per eye, for a total of six clues, that would show pronounced nystagmus.⁸⁶ If four or more clues are present, there is a seventy-seven percent chance that the person's BAC is greater than .08.⁸⁷

Problems with the HGN test are numerous. Enhanced nystagmus may have many other causes besides intoxication.⁸⁸ Because nystagmus can occur naturally or be induced by medication⁸⁹ or fatigue⁹⁰ in some people, the HGN test is not a

82. Bruce Kapsack, *DWI: Everything Old Is New Again: A New Playing Field for Field Sobriety Test Evidence*, 26 CHAMPION 57, 57 (Nov. 2002); Mancke, *supra* note 14, at 118.

83. The HGN test is often referred to, especially by defense attorneys, as the “Here Goes Nothing” test. Trichter & Pena, *supra* note 19, at 17 n.1.

84. NAT'L TRAFFIC LAW CTR. & NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., AM. PROSECUTORS RESEARCH INST. & U.S. DEPT. OF TRANSP., DOT HS-808-938, HORIZONTAL GAZE NYSTAGMUS: THE SCIENCE AND THE LAW: A RESOURCE GUIDE FOR JUDGES, PROSECUTORS, AND LAW ENFORCEMENT 1 (1999) [hereinafter NTLC & NHTSA].

85. *Id.*

86. TDCAA, *supra* note 30, at 23. These clues include: 1) smooth pursuit, in which the officer moves a stimulus (a pen or a finger) to the right and left and notes how the suspect's eye follows the stimulus; 2) maximum deviation, where the officer moves the stimulus as far to the side as possible and holds it for at least four seconds; and 3) onset prior to forty-five degrees, in which the officer checks for nystagmus as the stimulus is moved at a speed of four seconds to reach the edge of the suspect's shoulder. *Id.*; Mancke, *supra* note 14, at 118-19.

87. NHTSA, PARTICIPANT MANUAL, *supra* note 41, at VIII-8.

88. NTLC & NHTSA, *supra* note 84, at 15. Several nonalcohol related types of nystagmus exist, including nystagmus caused by disturbance of the vestibular system, neural activity, pathological disorders, natural nystagmus, and physiological nystagmus. *Id.* at 15-18.

89. Fraiser, *supra* note 18, at 1043.

90. Susan L. Amato-Henderson & Charles R. Honts, Comment, *Horizontal Gaze Nystagmus Test: The State of the Science in 1995*, 71 N. DAK. L. REV. 671, 692 (1995).

reliable tool to assess BAC⁹¹ and is thus not “the best psychophysiological test to estimate BAC.”⁹² NHTSA admits to the shortcomings of this field sobriety test by qualifying that its validity may not exist independently.⁹³ This means that a showing of intoxication from the HGN test should only be accepted if other evidence from the arrest, including factors from other field sobriety tests, supports a finding of intoxication.⁹⁴ Thus, “continued use of the [HGN test] in the field and courtroom [is] questionable.”⁹⁵ Moreover, clinicians indicate that the link between the HGN test and intoxication is only properly determined through a full clinical examination rather than the current method of using a stimulus in the field.⁹⁶ The reliability of the HGN test is also brought into question because no studies have addressed the consistency by which officers can estimate the angle of onset of nystagmus.⁹⁷ Due to these drawbacks, the reliability and validity of the HGN test is uncertain.

Walk and Turn (WAT) Test: Designed for Failure

The WAT test attempts to prove intoxication by illustrating a suspect’s inability to mentally process information and use his or her body to perform instructions.⁹⁸ In a typical WAT test, an officer instructs the suspect to place his or her left foot on a line,

91. *See id.*

92. Rubenzer, *DWI: Part 1*, *supra* note 52, at 52.

93. *See* NTLC & NHTSA, *supra* note 84, at 15 (“[A] properly trained law enforcement officer will not mistake other types of nystagmus, natural or otherwise, with HGN when taking into account all of the facts that contribute to the arrest decision.”).

94. *See id.*

95. Amato-Henderson & Honts, *supra* note 90, at 694.

96. *Id.* at 693–94; Rubenzer, *DWI: Part 1*, *supra* note 52, at 52 (“[E]stimating a 45-degree angle is a poor substitute for laboratory apparatus that can measure angles to a tenth of degree.”). Estimating a 45 degree angle is important because it is at this point when a suspect’s eye can first be seen jerking. NHTSA, PARTICIPANT MANUAL, *supra* note 41, at VIII-5–VIII-6.

97. Amato-Henderson & Honts, *supra* note 90, at 694; *see also* Rubenzer, *DWI: Part 1*, *supra* note 52, at 52 (discussing a study in which “most officers had difficulty accurately estimating 45 degrees”).

98. TDCAA, *supra* note 30, at 23.

which in the field is typically an imaginary line,⁹⁹ and walk heel-to-toe for nine steps with his or her hands down at the side.¹⁰⁰ The officer instructs the suspect to stand in a heel-to-toe position¹⁰¹ but typically does not tell the suspect to remain in this position.¹⁰² The officer then demonstrates how to perform the test, while the suspect is standing in this awkward heel-to-toe position.¹⁰³ If the suspect moves from this position¹⁰⁴ or starts the test too soon, then a clue of intoxication is indicated, with a total of two possible clues during the instructional phase.¹⁰⁵ This means that the suspect is being tested before the actual test has begun.¹⁰⁶ This is unfair because the suspect most likely assumes—and rightly so—that the test should not start until he or she begins to walk the line. At the very least, the police officer should inform the suspect when the test actually starts.

Six other clues apply during the actual performance of the test.¹⁰⁷ Two of these clues are particularly troublesome. First, if a suspect does not keep his or her hands completely down by the sides of his or her body during the WAT test, then the police officer notes a clue of intoxication.¹⁰⁸ A clue is noted even if a suspect does not use his or her hands for balance but merely lets

99. *Id.* at 24. Since no research exists on how the use of an imaginary line affects the validity of the WAT test, its validity should not be assumed. *See* Rubenzer, *DWI: (Part 2)*, *supra* note 40, at 40.

100. TDCAA, *supra* note 30, at 24.

101. Price, *DWI: Fear and Field Sobriety*, *supra* note 32, at 57.

102. This assertion is purely personal and is a conclusion the Author has developed after watching over one hundred tapes of different officers demonstrating how to perform the WAT test in the field. *But see id.* at 57–58 (stating that, typically, a police officer will instruct a suspect to maintain the heel-to-toe position while giving other instructions or demonstrating the test).

103. *See id.* (stating that the officer gives instructions and demonstrates the WAT while the suspect is standing heel-to-toe).

104. This is technically referred to as the suspect not keeping his or her balance. TDCAA, *supra* note 30, at 24.

105. *See id.*

106. *See id.* (explaining that two clues apply during the instruction phase before the actual WAT test begins).

107. *Id.* These clues include: stops walking, misses heel-to-toe, steps off the line, raises arms while walking, takes the wrong number of steps, and turns improperly. *Id.*

108. *Id.* *But see* NHTSA, PARTICIPANT MANUAL, *supra* note 41, at VIII-11 (stating that a clue is only noted when a suspect raises one or both arms more than six inches from his or her side).

them dangle.¹⁰⁹ The WAT test is designed for the suspect to fail because, typically, people do not walk with their hands by their sides; it is extremely unnatural.¹¹⁰ A suspect may assume that his or her hands should be allowed to dangle, as long as they are not used for balance,¹¹¹ because police officers often merely say “keep your hands down to your side” and do not explain the rigidity with which this statement applies.¹¹²

Second, another clue of intoxication is noted if a suspect turns improperly.¹¹³ The proper way to turn is actually not a turn at all and should not be referred to as such. In reality, it is a series of small steps that a suspect must make after he or she has already walked the line once.¹¹⁴ The suspect also must turn on the correct foot, which means that the suspect must keep his or her left foot on the line and pivot with the right foot.¹¹⁵ The reason this sounds complicated is because it is complicated.

There are several reasons why the turn is typically performed improperly that have nothing to do with intoxication. Even though police officers demonstrate how to perform the WAT test, they typically do so only once and in a truncated fashion. Therefore, a suspect’s mistake on the test, especially when turning, may be the result of insufficient instruction rather than intoxication. Also, the turn is performed after the suspect has already walked the line once.¹¹⁶ Suspects may view walking heel-to-toe as the actual test and may not realize the importance of the turn or that the turn is actually part of the test. Many suspects simply turn around in a normal, natural way—simply spinning around or taking one big step around.¹¹⁷

109. *See id.* (noting that if a suspect raises his or her arms while walking, then a clue of intoxication is noted).

110. *See* Trichter & Pena, *supra* note 19, at 18–19 (illustrating this concept through crafty voir dire questions and answers that suggest NHTSA designed its field sobriety tests to cause imbalance and sway).

111. *See id.* (illustrating through voir dire questions and answers that it is a natural human reaction to hold out ones arms to balance oneself).

112. *See* Price, *DWI: Fear and Field Sobriety*, *supra* note 32, at 57.

113. TDCAA, *supra* note 30, at 24.

114. Price, *DWI: Fear and Field Sobriety*, *supra* note 32, at 57–58.

115. *Id.* at 57.

116. *Id.* at 57–58.

117. This is a generalization deduced from watching over one hundred videotapes

The required series of small steps is simply odd and unnatural,¹¹⁸ and if a suspect turns in a usual way, by spinning around or taking one big step around, then the police officer finds a clue of intoxication.¹¹⁹ If almost every single person that performs the WAT test in a given sample does not turn properly, then one should assume the test is likely flawed, rather than assume that every person is intoxicated.¹²⁰ For these reasons, many prosecutors do not find the turn to be a conclusive factor in determining whether a person is intoxicated.¹²¹ Instead, the turn is given less weight and viewed more skeptically than other clues.¹²²

The WAT test is designed to allow police officers to collect clues. If a suspect does something wrong, it probably has more to do with being human than with intoxication.¹²³ Each clue is given the same level of accuracy in predictability, even though some clues are inadequate.¹²⁴ Ultimately, even if a police officer collects four or more clues, there is only a sixty-eight percent chance that the suspect is intoxicated.¹²⁵ For these reasons, the WAT test is flawed.

in which most suspects either spun around or took one big step to swing around on the turn portion of the WAT test.

118. This assertion is purely personal and comes from a personal experience in attempting to perform the WAT test with the correct turn.

119. See TDCAA, *supra* note 30, at 24 (stating that an improper turn is a clue of intoxication).

120. See *supra* note 110 and accompanying text.

121. Interview with Rifian Newaz, Assistant District Attorney, Harris County District Attorney's Office, in Houston, Tex. (Feb. 1, 2005).

122. *Id.*

123. See Trichter & Pena, *supra* note 19, at 18–19 (illustrating the design flaws of the WAT test and how a clue of intoxication is just a function of what a typical human with common sense would do during the WAT test).

124. See Rubenzer, *DWI: (Part 2)*, *supra* note 40, at 41 (emphasizing that the WAT test may be invalid and unreliable because no data exists to verify the validity of individual clues).

125. TDCAA, *supra* note 30, at 24.

One Leg Stand (OLS) Test: Designed to Induce Sway

The OLS test, much like the WAT test, is designed to divide the suspect's attention between listening to and performing instructions.¹²⁶ The suspect is instructed to stand with feet together and arms at the side while listening to the instructions.¹²⁷ The officer tells the suspect to hold one leg six inches off the ground, point his or her toe forward, keep the hands down by his or her sides, stare at his or her foot, and count out loud until the officer instructs him or her to stop.¹²⁸ An officer looks for four clues of intoxication,¹²⁹ and if two or more are found, there is a sixty-eight percent likelihood that the suspect is intoxicated.¹³⁰

This test has primarily the same drawbacks as the WAT test. Standing with feet together and arms down at the sides while listening to instructions is not a typical way for a person to stand.¹³¹ Some critics assert that the OLS test is designed to induce sway and imbalance rather than to measure intoxication.¹³² Also, even if the test is valid, in optimal conditions it can only predict intoxication sixty-eight percent of the time.¹³³ Accuracy slightly above fifty percent should not be considered adequate as evidence of the accused at trial.¹³⁴ These flaws emphasize this field sobriety test cannot accurately predict intoxication.

126. *Id.*

127. Price, *DWI: Fear and Field Sobriety*, *supra* note 32, at 58.

128. *Id.*

129. TDCAA, *supra* note 30, at 24. These clues include: swaying while balancing, using arms to balance, hopping, and putting foot down. *Id.*

130. *Id.*

131. See Trichter & Pena, *supra* note 19, at 18.

132. *Id.*

133. TDCAA, *supra* note 30, at 24.

134. Rubenzer, *DWI: (Part 2)*, *supra* note 40, at 42 (arguing that a twenty percent error rate in field sobriety tests is not good enough since the tests are used as evidence to establish intoxication beyond a reasonable doubt). The error rate of the OLS test is over thirty percent. TDCAA, *supra* note 30, at 24.

3. *Specific Problems with Nonstandardized Field Sobriety Tests*

Nonstandardized tests possess “an even greater potential for confusion and prejudice” than do standardized tests.¹³⁵ These tests are used quite extensively by law enforcement officers even though studies suggest that they are not indicators of intoxication.¹³⁶ The 1977 study fully examined the finger-to-nose,¹³⁷ finger-count,¹³⁸ and tracing tests¹³⁹ and interchangeably examined the letter cancellation,¹⁴⁰ subtraction, counting backwards,¹⁴¹ and Romberg tests.¹⁴² None of these tests were considered reliable enough to standardize.¹⁴³ Moreover, these

135. Mancke, *supra* note 14, at 126.

136. See Price, *.10% Solution*, *supra* note 48, at 46.

137. During the finger-to-nose test, the subject must stand erect with closed eyes, head tipped back, and hands extended horizontally. He or she then must touch the tip of his or her index finger to the tip of his or her nose, using both the left and right hand as the officer instructs. Price, *DWI: Fear and Field Sobriety*, *supra* note 32, at 58.

138. During the finger-count test, the subject must touch and count each finger in succession counting, “1-2-3-4, 4-3-2-1” out loud. *Id.* The subject does this twice. *Id.*

139. During the tracing test, the subject traces a defined figure with his finger, and the police officer observes any deviation. James J. Fazzalano, *The Use of Field Sobriety Testing in Drunk Driving Enforcement* (Nov. 9, 2000), http://64.233.179.104/search?q=cache:2vRn_AHVPwMJ:www.drunkdrivingdefense.com/general/report-on-nhtsa-standardized-field-tests-claims-made.htm++tracing+test+and+driving+while+intoxicated&hl=en.

140. During the letter cancellation test, the subject has thirty seconds to cancel out all of a given letter in a paragraph of text. See BURNS & MOSKOWITZ, *supra* note 48.

141. During the counting backwards test, the subject counts out loud backwards, starting with one number and ending with another number, e.g., starting with the number sixty-eight and ending with the number fifty-three. Price, *DWI: Fear and Field Sobriety*, *supra* note 32, at 58.

142. See BURNS & MOSKOWITZ, *supra* note 48. During the Romberg test, the subject stands with feet together, arms at sides, eyes closed, and head tilted backwards (typically estimating thirty seconds in his or her mind) while the officer observes the subject for any body sway. Fazzalano, *supra* note 139.

143. See Price, *.10% Solution*, *supra* note 48, at 46. These tests were considered for a study and thus had at least a modicum of respectability. See BURNS & MOSKOWITZ, *supra* note 48. Other less respected tests are used throughout the country. For example, a commonly used field sobriety test involves having suspects pick up coins. See, e.g., *State v. Bennett*, 524 So. 2d 1297, 1300 (La. Ct. App. 3d Cir. 1988); *People v. Mankowski*, 329 N.E.2d 266, 267 (Ill. App. Ct. 1975); *State v. Gregory*, 383 P.2d 965, 966 (Kan. 1963). Also, other states use the alphabet test, in which a person recites the alphabet by beginning with a specific letter other than A and ending with a letter other

tests were not selected as indicators of intoxication, and Marcelline Burns, Ph.D., the researcher who conducted the study, referred to the Romberg test and finger-to-nose test as nonpredictive.¹⁴⁴ Thus, the rampant use of these tests by police officers in the field is improper, especially since no valid study supports the tests, and NHTSA has not set performance standards for them.¹⁴⁵ NHTSA only evaluates and accredits its standardized battery of tests.¹⁴⁶ The mere reference to nonstandardized “physical exercises as ‘tests’ [erroneously] suggests that they possess a high reliability value.”¹⁴⁷

B. The Fledgling, Yet Promising .08 Per Se Statutory System

The second way for the prosecution to prove that a motorist is intoxicated is through a state’s per se law. Every state in the United States has adopted a law which makes it a crime for a person to operate a motor vehicle with a BAC at or above .08.¹⁴⁸

than Z, e.g. beginning with the letter “E” and stopping with the letter “P”. Price, *DWI: Fear and Field Sobriety*, *supra* note 32, at 58; NHTSA, PARTICIPANT MANUAL, *supra* note 41, at VI-5.

144. Price, *.10% Solution*, *supra* note 48, at 46 (citing sworn testimony of Marcelline Burns taken December 9, 1994 in Florida v. Meador, Case Number 93-810MM10A).

145. Mancke, *supra* note 14, at 126.

146. See STUSTER, *supra* note 45.

147. Mancke, *supra* note 14, at 126.

148. Mothers Against Drunk Driving, *Alcohol-Related Laws, Full Report by Law*, <http://www.madd.org/Laws/fulllaw> (last visited Feb. 4, 2006) [hereinafter MADD Report]. Legal limits for BAC are expressed in different ways; .08 is the same as .08% and 80 mg/100 ml. (80 milligrams of alcohol in 100 milliliters of blood). William J. Bailey, Indiana Prevention Resource Center, FactLine on Alcohol Doses, Measurements, and Blood Alcohol Levels, <http://www.happinessonline.org/BeTemperate/p15.htm> (last visited Feb. 4, 2006). Currently, all fifty states plus Washington, D.C. have set the BAC level at .08% or higher. MADD Report, *supra*. However, in May 2004, Colorado, Delaware, and Minnesota had not yet enacted per se .08 laws. American Prosecutors Research Institute & National Defense Attorneys Association, *States with .08 Legislation (as of May 2004)*, <http://www.ndaa-apri.org/pdf/08%20States.pdf> (last visited Feb. 4, 2006). This sudden uniformity is in response to President Clinton’s March 3, 1998 directive that called for a national legal limit of .08 BAC above which it would be per se illegal to operate a motor vehicle. NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP’T OF TRANSP., DOT HS-808-756, PRESIDENTIAL INITIATIVE FOR MAKING .08 BAC THE NATIONAL LEGAL LIMIT: RECOMMENDATIONS FROM THE SECRETARY OF TRANSPORTATION 1 (1998). The uniformity is also in response to the portion of the Transportation Appropriations Bill that authorizes the government to withhold two percent of federal

The prosecution does not need to prove impairment through the use of subjective field sobriety tests or other means; rather, impairment is assumed because of the correlation between BAC and impaired driving.¹⁴⁹ States have different measures for proving a BAC of .08 or greater, but the most common measure is a breath test.¹⁵⁰ The breathalyzer machine is the most common breath test machine, and it analyzes a sample of breath from a person to determine the alcohol content of that person's blood.¹⁵¹ Breathalyzer readings are based on scientific proof that there is an alcohol concentration ratio of 1:2100 between blood and breath.¹⁵² The operation of the breathalyzer involves little more than pushing a button; however, the operator must be certified to handle the machine.¹⁵³

1. *Tolerable Problems with Breathalyzer Machines*

Many critics of the breathalyzer machine state that the ratio of breath to blood does not always apply to every individual.¹⁵⁴ This ratio is based on a model population, and therefore, may vary in its application to some individuals.¹⁵⁵ However, courts give defendants the benefit of the doubt,¹⁵⁶ and if a defendant's actual alcohol breath-to-blood ratio is lower than 2100:1, then the evidence goes to the jury to be weighed.¹⁵⁷ Another problem is that the breathalyzer measures the person's BAC at the time

highway construction funds if a state fails to adopt a .08 per se law by 2004. *Highway Safety: Hearing Before a Subcomm. of the S. Comm. on Appropriations*, 107th Cong. 29 (2002). The penalty will increase to eight percent by 2007. *Id.*

149. JACOBS, *supra* note 26, at 70.

150. *Id.* at 72. Blood is another common sample. *See, e.g.*, TEX. TRANSP. CODE ANN. § 724.017 (Vernon Supp. 2005).

151. JACOBS, *supra* note 26, at 72.

152. Fraiser, *supra* note 18, at 1046. This ratio is based on Henry's Law that establishes a relationship between the same chemical substance present in liquid and vapor. *Id.* at 1064 n. 40.

153. JACOBS, *supra* note 26, at 72.

154. Fraiser, *supra* note 18, at 1046–47.

155. JACOBS, *supra* note 26, at 72–73.

156. *Id.* at 73.

157. Fraiser, *supra* note 18, at 1047. However, in these situations, some judges will exclude the results of the breath test altogether. *Id.*

the breath test is taken.¹⁵⁸ The relevant consideration, though, is the suspect's BAC at the time he or she was operating the motor vehicle.¹⁵⁹ The majority view is that extrapolation evidence, which will calculate a person's BAC at the time of driving, is not required.¹⁶⁰ The minority view finds that this testimony is necessary.¹⁶¹ There is also the issue of the breathalyzer's inherent margin of error.¹⁶² Some courts have the jury apply the margin of error to the test results in determining whether the per se statute is violated, while others ignore the margin of error believing that it has already been considered by Congress.¹⁶³ This result illustrates how the U.S. criminal justice system has found an effective way not only to deal with the problems of the breathalyzer but to provide an equal playing field for both the prosecution and defense.

2. *Lenient Punishment for Refusing a Breath Test*

The biggest obstacle in per se .08 statutory enforcement is that in a typical drunk-driving scenario, a person cannot be forced to give a chemical sample.¹⁶⁴ If no chemical sample is taken, then there is no way for the state to prove intoxication

158. *Id.* at 1050–51.

159. *Id.*

160. *See* *State v. Greenwood*, 115 S.W.3d 527, 532 (Tenn. Crim. App. 2003); *Stewart v. State*, 129 S.W.3d 93, 96 (Tex. Crim. App. 2004); *Commonwealth v. Wirth*, 936 S.W.2d 78, 83–84 (Ky. 1996); *Hass v. State*, 597 So. 2d 770, 774 (Fla. 1992); *State v. Kubik*, 456 N.W.2d 487, 500–01 (Neb. 1990).

161. *See* *State v. Ladwig*, 434 N.W.2d 594, 595 (S.D. 1989); *Desmond v. Superior Court*, 779 P.2d 1261, 1268 (Ariz. 1989).

162. Fraiser, *supra* note 18, at 1056.

163. *Id.* at 1057–58.

164. *See* JACOBS, *supra* note 26, at 96 (explaining that no state explicitly grants authorities the right to forcibly take a breath sample from a suspect). Technically, under the Constitution, however, this result is possible. *Id.* at 96–97; *see* *Schmerber v. California*, 384 U.S. 757, 761 (1966), *superseded in Illinois by statute*, 625 ILL. COMP. STAT. 5/11-501.2 (C)(2) (2005), *as recognized in* *People v. Jones*, 800 N.E.2d 1127 (Ill. App. Ct. 2003) (holding that coercing suspects to provide a sample does not involve self-incrimination because this evidence is not testimonial). Most states allow a chemical sample to be taken forcibly if the alleged drunk-driving incident resulted in a fatality. *See* American Prosecutors Research Institute & National Traffic Law Center, *Forced Blood Draws* (Apr. 10, 2002), http://www.ndaa-apri.org/pdf/forced_blood_draw_state_chart.pdf.

under .08 statutes. Thus, a defendant is more than able to refuse a breath test and thwart the effectiveness of per se laws, which makes “the relatively new technology of chemical testing for blood alcohol content [meaningless].”¹⁶⁵ It is unacceptable for the United States to leave the effectiveness of per se regulations, and in essence the ability to obtain drunk-driving convictions, in the hands of defendants who would appropriately, in the spirit of our adversary structure, do everything in their power to cripple the system.

In an effort to combat this possibility and make per se legislation effective, many states compel individuals to provide a sample by suspending the driving privileges of those who refuse to provide a specimen.¹⁶⁶ This compulsion is based on the premise that when a person applies and receives a license, he or she has implicitly agreed to submit to a BAC test if stopped by a police officer with probable cause to suspect intoxication.¹⁶⁷ These laws are called implied consent laws¹⁶⁸ or administrative license revocation laws.¹⁶⁹ Thus, if a defendant refuses to provide a specimen, the typical punishment in the United States is revocation of the accused’s license.¹⁷⁰ Some administrative¹⁷¹ revocations may last only one month, while others might last a few years.¹⁷²

Unfortunately, this solution is not good enough for two reasons. First, even if a person’s license is suspended, that

165. Hoffman, *supra* note 20, at 356.

166. D. Bernard Zaleha, *Alaska’s Criminalization of Refusal to Take a Breath Test: Is It a Permissible Warrantless Search Under the Fourth Amendment?*, 5 ALASKA L. REV. 263, 264 (1988).

167. Hoffman, *supra* note 20, at 356.

168. JACOBS, *supra* note 26, at 96.

169. James L. Nichols & H. Laurence Ross, *The Effectiveness of Legal Sanctions in Dealing with Drinking Drivers*, in SURGEON GENERAL’S WORKSHOP ON DRUNK DRIVING: BACKGROUND PAPERS 95 (1989).

170. JACOBS, *supra* note 26, at 97.

171. This is an administrative penalty rather than a criminal penalty, which generally means that a finding of criminal guilt is not necessary. Nichols & Ross, *supra* note 169, at 95. It is only necessary to show that the sanction is merited. *Id.*

172. *Id.* at 94; *see also* American Prosecutors Research Institute & National Traffic Law Center, *Admissibility of Chemical Test Refusals*, <http://www.ndaa.org/pdf/AdmissibilityofRefusaltoConsentChart.pdf> (last visited Feb. 4, 2006) (listing the license revocation policy for each state in the United States).

person will probably drive anyway.¹⁷³ Second, the punishment for refusing to provide a breath, blood, or urine sample is relatively minor compared to the punishment for a drunk-driving offense.¹⁷⁴ Therefore, the most rational thing for a defendant to do is refuse to provide a sample because an advantage is secured in doing so. It follows then that a large number of suspects, or at least those that realize this discrepancy in punishment, are not likely to provide a specimen.¹⁷⁵ Since “unrestricted breath testing may reduce dr[u]nk driving fatalities by between one third and one half,”¹⁷⁶ the United States should do more to ensure the retrieval of breath test results. Overall, license suspension does not adequately address how to effectively deter individuals from refusing to provide a specimen; a better solution is needed to ensure the efficacy of .08 statutory legislation. To fashion a proper model for U.S. drunk-driving laws, an international perspective is needed because “[m]uch of the progress that has been made in impaired driving in the last decade or more has been facilitated by lessons learned from other countries.”¹⁷⁷

173. Ann Klein, Editorial, *Drunk Driving*, CHI. TRIB., July 12, 2004, § 1, at 18.

174. Compare TEX. TRANSP. CODE ANN. § 724.015 (Vernon Supp. 2005) (imposing a minimum 180 day suspension for refusing a breath test and a minimum 90 day suspension for any person, age twenty-one or older, who provides a specimen and has an alcohol concentration at a level specified by Chapter 49 of the Texas Penal Code), with TEX. PENAL CODE ANN. § 49.04 (Vernon 2003) (mandating that an offense of driving while intoxicated be a Class B Misdemeanor with a minimum jail sentence of seventy-two hours).

175. See THE LAW REFORM COMM'N, AUSTRALIAN GOV'T, REPORT NO. 4: ALCOHOL, DRUGS, AND DRIVING 8 (1976) (arguing that the punishment for refusing to provide a specimen should be equivalent to the punishment for driving while intoxicated because otherwise a suspect would receive an advantage in not providing a sample).

176. Hans Laurell, *Towards Alcohol Free Roads in Europe*, GLOBE, Issues 1 & 2 2004, at 25, 28.

177. NHTSA, ON DWI LAWS, *supra* note 27.

III. INTERNATIONAL, COMPARATIVE ANALYSIS OF DRUNK-DRIVING LAWS IN FOREIGN COUNTRIES

A. *The Limited Involvement of International Organizations*

A true international solution to the United States' problematic approach to drunk-driving legislation does not currently exist.¹⁷⁸ The World Health Organization (WHO) has identified alcohol as "the fifth largest risk factor for the global burden of injury and disease,"¹⁷⁹ and yet alcohol policies in countries are widely divergent.¹⁸⁰ Since the global community needs an internationally prescribed set of minimum alcohol policies for countries to implement, the WHO has created some tentative international guidelines.¹⁸¹ Unfortunately, an international alcohol policy would be difficult to implement "as international trade and services agreements (such as GATS, the General Agreement on Trade in Services) impinge on the possibilities to influence... the... trade... of alcoholic beverages."¹⁸² Notwithstanding this implementation problem, these proposed international guidelines illustrate that certain policies are preferable to others.¹⁸³ Specifically, the WHO has suggested that countries enact per se legislation establishing a BAC beyond which it is illegal to drive and enforce the law through frequent random breath testing (RBT).¹⁸⁴ These

178. See Lane Porter, *Comparative Drug Treatment Policies and Legislation*, 29 INT'L LAW. 697, 698 (1995) (claiming that no international conventions exist that regulate the use of alcohol).

179. Linda Hill, *Global Status Report: Alcohol Policy*, GLOBE, Issues 1 & 2 2004, at 45.

180. DEP'T OF MENTAL HEALTH AND SUBSTANCE ABUSE, WORLD HEALTH ORG., GLOBAL STATUS REPORT: ALCOHOL POLICY 75 (2004) [hereinafter WHO REPORT].

181. See Hill, *supra* note 179, at 46 (describing the WHO's guidelines as setting a benchmark for effective policy-making regarding alcohol).

182. WHO REPORT, *supra* note 180, at 75.

183. See *id.* at 76-77 (explaining that through trial and error, regional and local communities should determine which alcohol policies are preferable). "[T]here are lessons to be learned from the past and from efforts other countries have made." *Id.* at 77.

184. *Id.* at 76. RBT has been shown to be quite effective in deterring the drunk driver. See THOMAS BABOR ET AL., ALCOHOL: NO ORDINARY COMMODITY: RESEARCH AND

guidelines illustrate the importance of per se legislation and its enforcement and highlight two central problems with U.S. drunk-driving laws: the rampant use of field sobriety tests as proof of intoxication and the inability to enforce per se legislation.

B. Why the United States' System is Impaired: Field Sobriety Tests and Ineffective Enforcement of Per Se Laws

First, the United States is alone in its utilization of field sobriety tests to prove drunk driving.¹⁸⁵ Unlike the rest of the world, the United States has adhered to the "classical" formulation of drunk-driving law,¹⁸⁶ which is proof obtained predominantly through the use of field sobriety tests.¹⁸⁷ Even though the United States implicitly claims field sobriety tests are one method used to prove a driver's intoxication internationally, there is no evidence which substantiates this claim.¹⁸⁸ Some countries regulate drunk driving under the

PUBLIC POLICY 161 (2003). In the United States, sobriety checkpoints, which are roadblocks where police attempt to identify intoxicated drivers, are not inherently unreasonable seizures. *Mich. Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990). However, "[o]ccasional roadblocks where all drivers are tested would not qualify as [a] true RBT," and the Supreme Court has yet to address the constitutionality of true RBTs. WHO REPORT, *supra* note 180, at 36.

185. See WHO REPORT, *supra* note 180, at 35 (identifying the SFSTs as behavioral tests used in the United States as opposed to other countries).

186. "Classical" is in reference to the common law formulation of drunk-driving laws, which is an offense of driving under the influence of alcohol (or words to the same effect). See Kenyon, *supra* note 6, at 2 (referencing classical laws as those which are inapposite to per se laws); THE LAW REFORM COMM'N, *supra* note 175, at 36 (describing the common law formation of driving under the influence); Mark Asbridge et al., *The Criminalization of Impaired Driving in Canada: Assessing the Deterrent Impact of Canada's First Per Se Law*, 65 J. STUD. ON ALCOHOL 450, 451 (2004) (noting that classical laws were the first, early laws).

187. See Kenyon, *supra* note 6, at 2 (referencing field sobriety tests rather than chemical tests as the preferred method of proof of drunk-driving offenses).

188. See *id.* (claiming that evidence of walking a straight line is a method of proof used to prove drunk driving). Because this claim is made in the introduction to the book, this type of proof should be present in at least one of the countries surveyed in the book. However, no country discussed, including Austria, Brazil, Canada, [the former] Czechoslovakia, France, Germany, Great Britain, Italy, Japan, Mexico, Netherlands, Sweden, and Switzerland, uses field sobriety tests as evidence of intoxication. See generally MEMBERS OF THE STAFF, LAW LIBRARY OF CONG., DRUNK DRIVING LAWS IN VARIOUS FOREIGN COUNTRIES (Law Library Staff eds., 1983).

classical formulation rather than through per se laws,¹⁸⁹ but proof is obtained through the testimony of officers and not through field sobriety tests.¹⁹⁰

Given the drawbacks of field sobriety tests, including reliance “on subjective definitions of impairment . . . making the arrest and successful prosecution of inebriated drivers difficult,”¹⁹¹ the United States has much to learn from the international community regarding how to effectively and fairly regulate the incidence of drunk driving.

Second, the United States is not properly implementing and enforcing its per se legislation. The establishment of BAC limits has become the international standard for proving drunk-driving cases.¹⁹² Per se statutes, which establish a BAC limit beyond which it is illegal to drive, are the most common framework for this method of proof; a BAC limit of .08 is the most widely adopted limit.¹⁹³ However, even in countries that rely on a classical or common law formulation of statutory

189. See Kenyon, *supra* note 6, at 2.

190. *Id.* Brazil, Italy, and Mexico rely solely on the testimony of officers to substantiate drunk-driving claims. *Id.* In Brazil, medical experts perform breath, blood, or urine analysis to determine intoxication. Rubens Medina, *Brazil*, in *DRUNK DRIVING LAWS IN VARIOUS FOREIGN COUNTRIES* 17, 20 (Law Library Staff eds., 1983). Mexican law allows officers to take a person to a medical examiner if intoxication is suspected. Armando E. Gonzalez, *Mexico*, in *DRUNK DRIVING LAWS IN VARIOUS FOREIGN COUNTRIES* 107, 108 (Law Library Staff eds., 1983). Italian law seeks to protect the individual from government intrusion, meaning that officers cannot forcibly take samples from a suspect. Giovanni Salvo, *Italy*, in *DRUNK DRIVING LAWS IN VARIOUS FOREIGN COUNTRIES* 87, 89–90 (Law Library Staff eds., 1983). However, a new point-based system has been created which provides motorists with twenty points. *Drunk Driving [sic] Blamed for 50% of Road Accidents*, ANSA ENGLISH MEDIA S., Nov. 11, 2004, at 1, available at LEXIS, News Library. Points are deducted from a motorist for traffic offenses and for drunk driving. *Id.* A person’s license is suspended upon losing all twenty points. *Id.*

191. Asbridge et al., *supra* note 186, at 451.

192. See Kenyon, *supra* note 6, at 2 (explaining that of the thirteen countries studied, most have established per se legislation rather than relying solely on the testimony of law enforcement officers).

193. Kenyon, *supra* note 6, at 2–3. Austria, Canada, [the former] Czechoslovakia, France, Great Britain, and Japan are among these countries. *Id.* But see Driveandstayalive.com, A Fresh Look at Drink-Drive Deaths and Injuries in Britain (Jan. 11, 2005), http://www.driveandstayalive.com/info%20section/news/individual%20news%20articles/x_050111_drunk-driving-deaths-reappraised_uk.htm (explaining that many lobbyists in Great Britain are calling for a reduction in the statutorily prescribed BAC limit from .08 to .05).

drunk-driving laws,¹⁹⁴ evidence of breath or blood samples is essentially the only way to prove driver impairment.¹⁹⁵

The mere establishment of a per se statute in the United States is not sufficient. The Clinton Administration believed that its federal push for a per se .08 law made the United States as tough on drunk driving as Australia and Canada.¹⁹⁶ However, the United States has lagged behind the rest of the world in creating effective alcohol policy,¹⁹⁷ and enacting a per se law does not necessarily bring the United States up to par with Australia and Canada. For example, Australia's per se BAC limit of .05 is stricter than the United States' limit of .08.¹⁹⁸ Also, Canada's punishment for refusing to provide a breath sample does not merely provide for license revocation as in the United States; instead, the punishment for refusing to provide a breath sample is identical to the punishment for impaired driving.¹⁹⁹ Furthermore, Australia, Canada, and Great Britain "have a longer history of drunk-driving interventions than we do in America."²⁰⁰

194. See, e.g., Medina, *supra* note 190, at 19 (describing Brazil's law as forbidding driving in a state of drunkenness).

195. See, e.g., *id.* at 20 (describing how medical experts in Brazil often perform blood, urine and breath tests for enforcement agencies, even though Brazil's law does not require this practice); Gonzalez, *supra* note 190, at 109 (describing the Mexican practice of taking a person suspected of driving under the influence to a physician for BAC testing). Such chemical tests are used by Brazil and Mexico, even though these two countries rely solely on testimonial evidence of officers to prove intoxication. Kenyon, *supra* note 6, at 2.

196. Steven A. Holmes, *House and Senate Agree on Drunken-Driving Law: Bill Uses U.S. Aid to Make States Comply*, N.Y. TIMES, Oct. 4, 2000, at A27. Australia and Canada were likely selected for comparison with the United States because of similarities in culture, language, and beliefs. The Clinton Administration believed these two countries to be strict on drunk driving because of their statutorily prescribed BAC limit to define impairment. See *id.*

197. See *id.*

198. WHO REPORT, *supra* note 180, at 37.

199. Stephen F. Clarke, *Canada, in DRUNK DRIVING LAWS IN VARIOUS FOREIGN COUNTRIES* 25, 31 (Law Library Staff eds., 1983). This assertion is still valid as Canada's DWI law has not substantively changed. See Asbridge et al., *supra* note 186, at 451 (discussing the impact of Canada's 1969 per se law).

200. H. Laurence Ross, *Deterrence-based Policies in Britain, Canada, and Australia, in SOCIAL CONTROL OF THE DRINKING DRIVER* 64, 64 (Michael D. Laurence et al. eds., 1988) [hereinafter Ross, *Deterrence-based Policies*].

In order to further explain these differences, the drunk-driving laws of Australia and Canada will be discussed in greater detail, along with those of Scandinavia and Great Britain. Each country's alcohol policy has a particular strength that should be adopted in the United States. Through this comparative analysis, it will be clear that the United States²⁰¹ should rely primarily on per se statutes and the collection of chemical samples, rather than on common law formulations like field sobriety testing, as its legal framework for DWI prosecutions. The United States should also increase the level of punishment for refusing to submit to chemical tests.

C. Scandinavia: The Very Strict Founding Father

The Scandinavian²⁰² system is important because of its historical significance in departing from classical common law notions of drunk-driving enforcement and its strict enforcement of statutory per se laws. When the possibility for chemical testing of BAC became possible in the 1930s,²⁰³ Norway became the first country in the world to enact a per se limit, with Sweden following in 1941.²⁰⁴ Scandinavian countries harnessed the technology of this scientific revolution and parlayed it into

201. Federalism concerns prohibit any type of nationalization of drunk-driving policy, and any type of solution that suggests statutory changes cannot be nationally enacted. See Michael D. Laurence, *The Legal Context in the United States*, in SOCIAL CONTROL OF THE DRINKING DRIVER 136, 137 (Michael D. Laurence et al. eds., 1988) (stating that drunk-driving policy-making is decentralized in the United States because of federalism). However, mechanisms exist to invoke national change. See *id.* at 142 (arguing the federal government can directly influence the states through funding schemes). This is the reason why every state in the United States has passed a .08 law. See *supra* note 148 and accompanying text.

202. Scandinavia is comprised of Denmark, Norway, and Sweden; culturally, Finland and Iceland should also be included. Johannes Andenaes, *The Scandinavian Experience*, in SOCIAL CONTROL OF THE DRINKING DRIVER 43, 44 (Michael D. Laurence et al. eds., 1988) [hereinafter Andenaes, *The Scandinavian Experience*]. This Comment deals with Scandinavia in a broad sense but also occasionally singles out Norway and Sweden.

203. DOUGLAS J. BEIRNESS & HERB M. SIMPSON, TRAFFIC INJURY RESEARCH FOUND., THE SAFETY IMPACT OF LOWERING THE BAC LIMIT FOR DRIVERS IN CANADA 8 (2002).

204. Johannes Andenaes, *The Effects of Scandinavia's Drinking-and-Driving Laws: Facts and Hypotheses*, in 6 SCANDINAVIAN STUDIES IN CRIMINOLOGY: DRINKING AND DRIVING IN SCANDINAVIA 35, 35 (Ragnar Hauge et al. eds., 1978).

legislation that is now internationally recognized as the "Scandinavian model."²⁰⁵ Three features generally characterize the system: per se legislation, strict enforcement of breath and blood tests, and punishment that usually includes imprisonment.²⁰⁶ Scandinavian countries do not consider behavioral observations, like field sobriety tests, to be reliable in comparison to the scientific validity of breath or blood tests.²⁰⁷ Given the previously discussed drawbacks with field sobriety tests, the United States should adopt a similar system.

The Scandinavian system is a historical symbol of success despite the criticism it has received.²⁰⁸ Academics and lawyers throughout the world regard the Scandinavian system as the paradigmatic model for successful drunk-driving laws,²⁰⁹ and as such, it has served as the basis for many countries' laws, including "the spectacularly successful" British law.²¹⁰ Nonetheless, a notable critic asserts that the Scandinavian system has no deterrent effect and refers to the international acclaim of this system as the "Scandinavian myth."²¹¹

The fact that the Scandinavian system may not have a deterrent effect is not necessarily damning, especially when applied in the context of U.S. drunk-driving laws. Deterrence should not be at issue or "remain[] the subject of vigorous

205. Andenaes, *The Scandinavian Experience*, *supra* note 202, at 43.

206. *Id.*

207. Finn Henriksen, *Sweden*, in *DRUNK DRIVING LAWS IN VARIOUS FOREIGN COUNTRIES* 125, 133 (Law Library Staff eds., 1983).

208. See Harold L. Votey, Jr., *The Deterrence of Drunken Driving in Norway and Sweden: An Econometric Analysis of Existing Policies*, in 6 *SCANDINAVIAN STUDIES IN CRIMINOLOGY: DRINKING-AND-DRIVING IN SCANDINAVIA* 79, 79, 96 (1978) (arguing that despite H. Laurence Ross' criticism of the Scandinavian system, the laws effectively deter drunk driving).

209. H. Laurence Ross, *Scandinavia's Drinking-and-Driving Laws: Do They Work?*, in 6 *SCANDINAVIAN STUDIES IN CRIMINOLOGY* 55, 55 (1978).

210. *Id.* Since H. Laurence Ross is "skeptical of any alleged deterrent effect" of any drunk-driving law, he may be using sarcasm in reference to Great Britain's law. Lewis R. Katz & Robert D. Sweeney, Jr., *Ohio's New Drunk Driving Law: A Halfhearted Experiment in Deterrence*, 34 *CASE W. RES.* 239, 302 n.174 (1984). However, this is merely a matter of interpretation.

211. H. Laurence Ross, *The Scandinavian Myth: The Effectiveness of Drinking-and-Driving Legislation in Sweden and Norway*, 4 *J. LEGAL STUD.* 285, 285 (1975).

sociological dispute”²¹² for several reasons. First, deterrence was not the reason why Norway and Sweden passed per se laws.²¹³ The real reason these countries enacted per se laws was practical in nature—to depart from vague, classical laws referring to intoxication as “driving under the influence.”²¹⁴ The United States should also depart from these classical laws because per se statutes and the accompanying BAC limit make it easier to prove intoxication.²¹⁵ This in turn “provide[s] for faster disposition of cases without difficult trials.”²¹⁶ Therefore, the Scandinavian system should be praised for its lucidity rather than criticized for something it never promised to produce. Second, it is immaterial if the Scandinavian system does not increase deterrence. No impaired driving legislation, including that of the United States, has produced any long-term deterrent results.²¹⁷ In fact, it is fruitless to try to prove the deterrent effect of any law because of varying methodologies.²¹⁸

Analyzing the Scandinavian model in the context of the United States, NHTSA’s argument that harsher criminal penalties, as opposed to administrative license revocations, have very little added deterrent effect²¹⁹ should be taken with a grain of salt. This Comment is not necessarily advocating Scandinavia’s semimandatory imprisonment for drunk drivers,²²⁰ lower BAC limits,²²¹ or wide use of RBT,²²² but rather,

212. Katz & Sweeney, *supra* note 210, at 278.

213. *Id.* “Regardless of the impetus for their enactment, the Scandinavian laws have been studied extensively as experiments in deterrence.” *Id.*

214. *Id.* (“[I]t gave scientific validity to the previously vague concept of intoxication embodied in traditional statutes”); H. LAURENCE ROSS, DETERRING THE DRINKING DRIVER 24 (1984).

215. Katz & Sweeney, *supra* note 210, at 278 (stating that the “mode of proof required” was relaxed).

216. *Id.*

217. *See id.* at 278–86 (explaining that deterrence policies in general are transient because they rely on public perception and noting the limits of deterrence in Scandinavia, Great Britain, France, New Zealand, and the United States).

218. *See id.* at 278.

219. *See* Nichols & Ross, *supra* note 169, at 95, 98–99.

220. From the 1920s until 1988, Norwegian law included an unsuspended twenty-one day minimum jail sentence. Thomas M. Lockney, *A Comparison of Drinking and Driving Law in Norway and North Dakota: More Than a Difference in Penalties*, 76 N. DAK. L. REV. 33, 54–55 (2000). Currently, this prison sentence should be imposed, but it

it appreciates the fact that these actions denote strict enforcement. The United States needs to adopt Scandinavia's policy of enacting harsher and stricter penalties. The United States' problem is its penalties for refusing to provide a breath, blood, or urine sample are too lenient, and thus, it cannot properly regulate and enforce BAC testing.

Scandinavian countries, on the other hand, require persons to submit to BAC tests.²²³ In Finland, a test is always compulsory if the police officer suspects the individual has been drinking, and in Denmark, testing is always mandatory if the police require such a test.²²⁴ In Sweden, a person cannot refuse the test; Swedish police can actually force a nonconsenting person to submit to a chemical test if necessary.²²⁵ Enacting a similar policy in the United States may not be wise because it would likely violate a person's Fifth Amendment right against self-incrimination.²²⁶ However, Scandinavia's focus on both the absoluteness of per se BAC limits and the strict enforcement thereof should guide future U.S. drunk-driving policy.

can be suspended. *Id.* at 55–56.

221. Both Norway and Sweden have a BAC limit of .02. Eddie Wren, International Blood Alcohol Limits, DRIVE & STAY ALIVE (2003), <http://www.driveandstayalive.com/articles%20and%20topics/drunk%20driving/artcl--drunk-driving-0005--global-BAC-limits.htm>; *Blood Alcohol Concentration Limits Worldwide*, 11 ICAP REP. 3 (May 2002), available at http://www.icap.org/portals/0/download/all_pdfs/ICAP_Reports_English/report11.pdf [hereinafter ICAP]. Finland and Denmark have a BAC limit of .05. Wren, *supra*; ICAP, *supra*, at 3; NHTSA, ON DWI LAWS, *supra* note 27.

222. See NHTSA, ON DWI LAWS, *supra* note 27 (stating that RBT use is frequent in Finland and Sweden and used occasionally in Denmark); WHO REPORT, *supra* note 180, at 37 (noting that RBT is used often in Norway).

223. NHTSA, ON DWI LAWS, *supra* note 27.

224. *Id.*

225. *Id.*

226. See U.S. CONST. amend. V; see also DENNEY, *supra* note 1, at 108 (explaining that Fifth Amendment self-incrimination arguments were an increasingly used defense to typical implied consent or administrative license revocation laws when these laws were first enacted). Requiring the test by force instead of by implied consent is an arguably stronger ground for the Fifth Amendment arguments and would at the very least rejuvenate these type of claims.

D. Great Britain: The Current Leader in Strict Enforcement

It is important to consider drunk-driving laws in Great Britain not only because the United States has historically looked to British law in fashioning its own policy,²²⁷ but also because it is “one of the first and most influential adoptions of the per se approach.”²²⁸ Most importantly, it has one of the most effective enforcement plans in the world.²²⁹

England passed one of the first laws that regulated impaired driving in 1872. It provided:

Every person . . . who is drunk while in charge on any highway or other public place of any carriage, horse, cattle, or steam engine may be apprehended, and shall be liable to a penalty not exceeding forty shillings, or in the discretion of the court of imprisonment . . . for any term not exceeding one month.²³⁰

In 1967, Great Britain adopted the Road Safety Act, based upon Scandinavia’s revolutionary experiment in per se statutes regulating impaired driving, which established the BAC “as the scientific criterion of a person’s unfitness to drive.”²³¹ It gave police wide discretion to demand a test from a driver involved in a traffic violation or accident, or when a police officer had reasonable cause to believe that the driver had been drinking.²³²

In its current form, Great Britain’s statute provides for a common law formulation where a person is intoxicated if he or

227. A SNAPSHOT REPORT OF NATIONAL AND INTERNATIONAL DWI PROGRAMS AND SANCTIONS 11, http://www.cjcc.org/download/DWI_Report.pdf.

228. BEIRNESS & SIMPSON, *supra* note 203, at 11.

229. Ross, *Deterrence-based Policies*, *supra* note 200, at 68.

230. BEIRNESS & SIMPSON, *supra* note 203, at 7 (discussing the Licensing Act of 1872). This law changed over the years but still left the definition of the term “drunk” undefined. *Id.* at 7–8. The evolving law was still problematic because it provided no standard of impairment. Kersi B. Shroff, *Great Britain, in DRUNK DRIVING LAWS IN VARIOUS FOREIGN COUNTRIES* 75, 75 (Law Library Staff eds., 1983).

231. Shroff, *supra* note 230, at 75.

232. Ross, *Deterrence-based Policies*, *supra* note 200, at 66; see H. LAURENCE ROSS, NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEP’T OF TRANSP., DOT HS-805-820, DETERRENCE OF THE DRINKING DRIVER: AN INTERNATIONAL SURVEY, 27 (1981) [hereinafter ROSS, INTERNATIONAL SURVEY].

she “is unfit to drive through drink.”²³³ A person is presumed unfit to drive if the person’s “ability to drive properly is for the time being impaired.”²³⁴ This evidence is typically obtained through the police officer’s observation of the suspect’s driving, interaction between the police and the driver, and the driver’s behavior and appearance.²³⁵ Interestingly, most of the drivers are subject to a medical examination; however, the accused must be informed by the doctor of what will occur, and consent must be obtained.²³⁶ Great Britain provides a per se definition which states that a person is guilty of an offense if the person consumes “so much alcohol that the proportion of it in his breath, blood or urine exceeds the prescribed limit,”²³⁷ which is a BAC of .08.²³⁸

Great Britain is able to make its per se law effective because police officers may require a driver to take a test.²³⁹ If a person refuses to submit to a chemical test without a reasonable excuse, then that person has committed an offense.²⁴⁰ An excuse is not reasonable “unless the person . . . is physically or mentally unable to provide it or . . . [it] would entail a substantial risk to his health.”²⁴¹ Requiring a person to submit to a test is definitely an infringement on personal liberty, but Great Britain properly balances this limitation with the excuse provision.

233. Road Traffic Act, 1988, c. 52, § 4(1).

234. *Id.* § 4(5).

235. H.J. WALLS & ALISTAIR R. BROWNLIE, DRINK, DRUGS AND DRIVING 125–26 (1970).

236. *Id.* at 126–27. The supposed purpose of this examination is to exclude illness or injury as a cause for the driver’s alleged impaired behavior or actions. *Id.* at 126. The doctor is called as an expert witness to testify in court proceedings. *Id.* at 127. Therefore, this practice of conducting medical examinations can be likened to the United States’ use of field sobriety tests—both of which are used to try to make prosecution under a subjectively defined intoxication statute seem more scientific and accurate.

237. Road Traffic Act § 5(1)(b).

238. *Id.* § 11(2)(b).

239. *Id.* § 6(1); Katz & Sweeney, *supra* note 210, at 282.

240. Road Traffic Act § 6(4).

241. ROY LIGHT, CRIMINALIZING THE DRINK-DRIVER 112 (1994) (citing the case of *R v. Lennard* [1973] R.T.R. 252); see also IAN MCLEAN & PETER MORRISH, THE TRIAL OF BREATHALYSER OFFENCES 41, 66 (1975). Whether a person has a reasonable excuse is a question of fact or degree, and the burden is on the prosecution to negate it. *R v. John (Graham)* (1974) 1 W.L.R. 624 (Eng.) (citing *Law v. Stephens*, [1971] R.T.R. 353, 358).

In Great Britain, the penalties for the offense of failure to provide a sample are practically the same as for the offense of drunk driving.²⁴² However, the offense of drunk driving can be punished with a possible jail sentence, whereas failure to provide a breath test can only be punished by a fine.²⁴³ Thus, this supposed uniformity in punishment may be more form than substance. In practice, though, a jail sentence is rarely imposed for a first offense of drunk driving, and a fine is usually the highest form of punishment given.²⁴⁴ Thus, realistically, the punishments for the two offenses are equal.

In many respects, the United States and Great Britain are very similar in their regulation of drunk driving. Both have resisted pressure to lower BAC limits.²⁴⁵ Also, both never use the enforcement mechanism of RBT to deter drunk drivers.²⁴⁶ The two real differences, and the two things that the United States can learn from Great Britain, are that Britain does not rely on field sobriety tests, and penalties for refusing to submit to a chemical test are harsher in Britain.²⁴⁷ The United States would not be able to adopt the latitude afforded to British police in requiring or compelling people to provide a sample,²⁴⁸ but it could make the punishment for refusal to submit to a test equivalent to the punishment for a drunk-driving offense. Thus, much like Great Britain's law, states could make refusal to submit to a breath test a separate offense thereby preventing

242. WALLS & BROWNLIE, *supra* note 235, at 131.

243. *Id.* at 149–51.

244. NHTSA, ON DWI LAWS, *supra* note 27.

245. See BEIRNESS & SIMPSON, *supra* note 203, at 12 (stating that the United States was slow to adopt per se laws); Driveandstayalive.com, *Reduce the Drink-Driving Limit, Says the British Medical Association*, Dec. 17, 2004, http://www.driveandstayalive.com/infosection/news/individualnewsarticles/x_041218_bma-call-for-reduc-in-uk-bac-limit.htm (noting that the British Medical Association has called for a reduction in the BAC limit to .05 since 1990).

246. WHO REPORT, *supra* note 180, at 37.

247. See Driveandstayalive.com, *Tougher Measures to Target Drug Drivers in Britain*, Dec. 22, 2004, http://driveandstayalive.com/info%20section/news/individual%20news%20articles/x_041222_uk-drug-drivers-targeted.htm (commenting that in Great Britain, a driver suspected of drinking and driving is required to give a breath specimen and that the penalties for refusal are equivalent to the penalties for having a BAC over .08); Katz & Sweeney, *supra* note 210, at 282.

248. Katz & Sweeney, *supra* note 210, at 282.

individuals from gaining any advantage in refusing to provide a sample.

E. Australia: Enforcement and Federalism Can Co-exist

Australia is very similar to Scandinavia and Great Britain in that it prioritizes the strict enforcement of its per se laws, but it also provides a better comparison to the United States because of the structure of its government. Australia is a federal system like the United States.²⁴⁹ Its states have the jurisdiction to pass laws relating to drunk driving.²⁵⁰ Therefore, even in a federal system, drunk driving can be effectively curtailed.

The most internationally recognized feature of the Australian system is its commitment to “the introduction and vigorous enforcement of” RBT to enforce per se laws.²⁵¹ The state of Victoria first introduced this technique in 1976, and since then, it has been adopted in the other seven states in the country.²⁵² As previously mentioned, providing the police with virtually unlimited powers would likely not work in the United States because it would severely infringe on civil liberties.²⁵³ However, two features of the Australian system are responsible for its remarkable success.²⁵⁴ First, police officers do not attempt to ascertain any evidence of intoxication through the use of field sobriety tests.²⁵⁵ Second, refusal to take the test is regarded as a failure of that test.²⁵⁶

In most Australian states, a refusal to take the test is tantamount to failing and is enforced during both normal and

249. Ross, *Deterrence-based Policies*, *supra* note 200, at 72.

250. *Id.*

251. ICAP, *supra* note 221, at 5; BEIRNESS & SIMPSON, *supra* note 203, at 54.

252. BEIRNESS & SIMPSON, *supra* note 203, at 54. All of Australia’s states use RBT frequently, and in many of these states, its rampant use has been around since the 1980s. NHTSA, ON DWI LAWS, *supra* note 27.

253. Ross, *Deterrence-based Policies*, *supra* note 200, at 75.

254. See ICAP, *supra* note 221, at 5 (describing the RBT system as effective). *But see* Ross, *Deterrence-based Policies*, *supra* note 200, at 76 (concluding that RBT is not a necessity in reducing alcohol-related injuries).

255. Ross J. Homel, *Random Breath Testing the Australian Way: A Model for the United States?*, 14 ALCOHOL HEALTH & RES. WORLD 70 (1990), available at http://www.findarticles.com/p/articles/mi_m0847/is_n1_v14/ai_9356459.

256. *Id.*

RBT stops. For instance, the Australian Capital Territory institutes a fine, imprisonment for one year, or both for refusal to take a test, which ensures that individuals cannot obtain any advantage by refusal.²⁵⁷ Also, most of the states provide that it is compulsory for suspects to submit to chemical testing.²⁵⁸

Australia illustrates it is possible to have strict, mostly uniform enforcement of per se laws in a federal system. Given the United States' federal stronghold over influencing state decisions in the realm of drunk-driving laws,²⁵⁹ implementing the reforms suggested by analyzing the laws of Scandinavia, Great Britain, and Australia—which include a de-emphasis on field sobriety tests and a punishment for refusal to submit to a chemical test—would not be difficult.

F. Canada: Putting Field Sobriety Tests Where They Belong

Canadian drunk-driving law is very similar in form to both British²⁶⁰ and American law, although its historical auspices are derived from Scandinavia.²⁶¹ It provides yet another example of effective enforcement of chemical testing and, most importantly, a solution for the field sobriety testing problem.

The Criminal Law Amendment Act of 1969, which is the Canadian federal criminal law still in effect today, attempts to parallel Great Britain's Road Safety Act of 1967.²⁶² It also prohibits driving with a BAC exceeding .08, but this is where the similarities end.²⁶³ The Canadian law is "weaker and less innovative" than its British counterpart because it does not grant the police carte blanche to demand chemical tests; rather, police must have reasonable or probable cause, or both.²⁶⁴ Its

257. THE LAW REFORM COMM'N, *supra* note 175, at 8. Also, much like the law of Great Britain, the Australian Capital Territory stipulates that a defense to prosecution is obtained if a suspect has reasonable grounds for refusing to provide a sample. *Id.*

258. NHTSA, ON DWI LAWS, *supra* note 27.

259. See Ross, *Deterrence-based Policies*, *supra* note 200, at 72.

260. *Id.* at 69.

261. *Id.*

262. *Id.*

263. *Id.* at 69–70.

264. *Id.* at 70; ROSS, INTERNATIONAL SURVEY, *supra* note 232, at 56.

punishment for refusal is a mere fine.²⁶⁵ This is not disastrous, however, because the Canadian law still makes breath tests compulsory, and refusal to provide a sample is made an offense “equivalent to that of driving with a BAC in excess of 80 mg/dL.”²⁶⁶ Probably in an attempt to make U.S. law appear on par with the rest of the world, NHTSA has categorized Canadian BAC testing rules as only allowing officers to request a sample.²⁶⁷ However, in reality, Canadian enforcement is tougher than this because it allows for compulsory testing—something that the United States does not allow.²⁶⁸

If there is a snag in the fabric of this carefully woven Canadian law, it is that much like current U.S. law, police officers have to rely on the behavioral actions of the suspect before a breath test can be initiated.²⁶⁹ Even though Britain and Scandinavia’s laws are arguably more effective because they do not require police officers to so rely,²⁷⁰ the requirement of probable or reasonable cause is a symbolic hallmark of how the United States, and apparently Canada, seek to protect liberty. Its use, therefore, cannot be undermined.

On the other hand, unlike the United States, Canada does not have a system in place by which this behavioral evidence is viewed to be as valuable as that derived from chemical testing.²⁷¹

265. *Id.*

266. BEIRNESS & SIMPSON, *supra* note 203, at 14; ROSS, INTERNATIONAL SURVEY, *supra* note 232, at 56.

267. NHTSA, ON DWI LAWS, *supra* note 27.

268. *See* BEIRNESS & SIMPSON, *supra* note 203, at 14 (discussing Canada’s tough stance on punishing refusals and how it maintained this stance when it revised its Criminal Code in 1976 to make breath tests compulsory).

269. *See* NHTSA, ON DWI LAWS, *supra* note 27 (noting that a request for a breath or blood test must be based on a suspicion that alcohol is present). Canadian police do not have to rely on using field sobriety tests, since these tests are merely a legal fiction created by the United States, but rather, they rely on signs of intoxication. *See id.*

270. *See* Andenaes, *The Scandinavian Experience*, *supra* note 202, at 48 (discussing the frequent use of RBT in Scandinavia where police do not need any suspicion to perform a test); Ross, *Deterrence-based Policies*, *supra* note 200, at 70 (stating Canadian police cannot demand tests in the absence of suspicion as is the practice of British police).

271. *See* Legislative Summary, LS-489E, Bill C-16: An Act to Amend the Criminal Code (Impaired Driving), 38th Parliament, 1st Session, Nov. 4, 2004, at 1 (Can.) (describing a new bill, not yet passed, that would allow Canadian police to administer

Put simply, Canada does not have an entire section of a governmental department devoted to field sobriety testing.²⁷² Instead, behavioral evidence serves its proper purpose—giving police officers the information needed to develop probable or reasonable cause.²⁷³ Canadian law illustrates that field sobriety testing can serve a vital purpose, but it should not in any way detract from the effectiveness of per se laws by pretending to be an effective way of proving intoxication.

IV. CONCLUSION

The success of the drunk-driving policies in Great Britain, Canada, and Australia may be a result of following the heralded and successful Scandinavian model.²⁷⁴ The United States has followed this model to the extent that its states have enacted per se statutes, but this is not sufficient. Per se laws are a waste of time without effective enforcement.

There must be some reason why the United States lags behind the rest of the international community when it comes to alcohol policy. Perhaps the United States is different because of lobbying interests by the automobile industry.²⁷⁵ Perhaps the United States is different because we, as Americans, are different. Whatever the reason, this country should have drunk-driving laws that not only mesh with those of the international community but are also logical and fair.

Advertising campaigns across Texas warn Texas drivers: “Drink. Drive. Go to Jail.”²⁷⁶ This, however, is not the law. The law is that a person cannot drive with a BAC of .08 or over, which on average, allows a person to drink two alcoholic

field sobriety tests).

272. *See id.* (demonstrating that currently there is no Canadian law authorizing field sobriety tests).

273. *See* Ross, *Deterrence-based Policies*, *supra* note 200, at 69–70 (describing how Canadian police use behavioral cues to develop reasonable cause to submit the driver to a breath test).

274. *Id.* at 76.

275. *See id.*

276. Jeff Mosier, *Fighting MADD over the DWI Lie*, DALLAS MORNING NEWS, Apr. 22, 2004, at 1B.

beverages and legally operate a motor vehicle. The law allows people to drink and drive, but it does not allow people who are intoxicated to drive. The law should be enforced the way it is written—meaning that if .08 is the law, then people should not be convicted unless their BAC is at or above that limit. Unfortunately, the law is enforced in a way that allows both intoxicated and nonintoxicated people to be convicted.

The following problematic hypothetical is commonplace in America.²⁷⁷ An individual has only one drink and is not intoxicated. That individual drives home and does not use a signal as he is turning onto his home street. He is pulled over by a police officer. That officer notices a smell of alcohol on his breath. The individual tells the officer that he has had only one drink. The officer performs field sobriety tests on the individual, and because of the inherent problems with the field sobriety system, notes a number of clues of intoxication. The individual then refuses to provide a chemical sample because he knows that the punishment for refusal is less severe than it is for drunk driving. Furthermore, he feels that giving the police potentially incriminating evidence violates his right against self-incrimination. In short, the individual is arrested and charged with DWI based on the flimsy evidence of field sobriety tests. The individual is then forced to spend thousands of dollars to get out of jail and hire an attorney. He will probably not spend extra money to go to trial; rather, he will accept probation, a fine, community service, or time already served in jail. The conviction will stay on his record and will not be expunged. All of this results from the individual following the law—believing that he could have one drink and be safe to drive, or rather be safe from breaking the law.

This country needs to make its drunk-driving laws fair to avoid harsh results like these. Per se laws should be the primary method by which intoxication is proven. As it currently stands, most states do not have a mechanism in place to deter people from refusing to provide a breath sample.²⁷⁸ There is some effort

277. This is the Author's purely personal assertion developed after much experience at a criminal defense firm and second-hand experience at a District Attorney's Office.

278. Arguably, administrative license revocation is a deterrence, but this Author

in Alaska and Nebraska to deter refusal, as these states have criminalized the offense of refusal to provide a breath sample and made the punishment equivalent to that of drunk driving.²⁷⁹ Other states should institute similar legislation, and the federal government should induce them to do so.

After examining the laws of Scandinavia, Great Britain, Australia, and Canada, it is clear that the international community does not support the imposition of field sobriety tests or lackadaisical punishment for refusing to provide a breath sample. Much needed reforms can and should occur to make the United States an international leader in the fight to prevent drunk driving.

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contends it is not effective enough. *See generally* Nichols & Ross, *supra* note 169.

279. Zaleha, *supra* note 166, at 264.

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