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Lynn W. Davis

Kenneth R. Wallentine

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*Judge Lynn W. Davis**
*Kenneth R. Wallentine***

Throughout the nation police departments have resorted to roadblocks for enforcement of drunk driving laws. Utah is no exception, and should not be. However, courts and legislatures need direction on how to approach the constitutionality of such roadblocks. This article presents a model for analyzing the constitutionality of sobriety checkpoints.

Officers of one major Utah city police department established roadblocks at random, without supervisory or prosecutorial review. At these roadblocks, drivers were stopped on a busy city center street under the guise of a driver's license checkpoint. There were no warning signs and no advance public notice. Not coincidentally, the roadblock was positioned in front of the city's most popular bar. The individual officers determined how long, if at all, each driver would be detained. A police car flashing a red spotlight blocked the right traffic lane, while two officers stood in the left lane. If a driver was to be detained for sobriety tests, his vehicle was placed in front of the police car, and roadblock operations terminated.[1]

Another roadblock, operated by the police department in a major Utah city, draws a sharp contrast to the roadblock described above. The police department plans roadblocks in conjunction with the City Attorney's office, and a deputy city attorney is present at the roadblock to monitor conditions. The operational plan for the roadblock is defined well in advance, after study of areas with high drunk driving arrest

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* Judge Davis is a judge with the Fourth Circuit Court, State of Utah. Prior to his appointment he had an active career in public law, private practice and legal teaching. He graduated with the charter class from the J. Reuben Clark Law School in 1976.

** Kenneth R. Wallentine is a candidate for graduation, J. Reuben Clark Law School, 1990. He is a veteran police officer, now working with the firm of Watkiss & Campbell, Salt Lake City.

1. The second co-author participated in such roadblocks operated as part of a "shotgun" approach to cleaning up the downtown area of a principal Utah city. Other roadblocks were operated at random, and entirely at the individual officer's discretion. The Chief of Police sometime later considered the practice and prohibited further roadblocks of any type. While this may well be a worst-case occurrence, several police agencies in Utah continue to operate roadblocks under questionable circumstances.

rates. Intrusion is kept to a minimum under guidelines drafted by the city attorney, after careful consideration of constitutional law. Officers are specially trained in traffic control and roadblock safety. A mobile Breathalyzer unit is used at the roadblock site. Front page news stories, and radio broadcasts, warn the public in advance of the roadblock.[2]

Several Utah State trial courts, both District and Circuit, have considered sobriety roadblocks, resulting in inconsistent decisions.[3] While the extent of analysis and decisive factors in these cases vary significantly, they do provide some guidance. However, opinions which lack a detailed reference to the operational facts, guidelines, standards and policies of the respective law enforcement agencies offer but limited concrete guidance. Only one of the cases references the Utah Constitution; none address the issue of statutory authorization for roadblocks; and all the decisions appear to rely exclusively on general fourth amendment jurisprudence arguments. These decisions parallel the vast majority of other state courts which also conduct their analysis exclusively in fourth amendment terms. This apparent weak analysis may be the result of inadequate briefing and lack of articulation of pertinent legal points by trial counsel.

Neither the Utah Supreme Court nor the Utah Court of Appeals has had the occasion to analyze the constitutionality of employing roadblocks to detect drivers who are under the influence of alcohol or drugs.[4] Nor has either court addressed the issue of roadblocks con-

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2. News stories concerning the roadblock operated by West Valley City were published in the Deseret News, October 11, 1988, at B-1. Roadblocks were conducted by the West Valley Police Department on three successive weekends beginning October 15, 1988.

3. Decisions of Utah District and Circuit Courts: State v. Sims, No. 151-D (4th Dist. Ct. Feb. 24, 1989)(denying a motion to suppress evidence, relying on the minimal intrusion at the highly structured roadblock, but ignoring extensive briefing of constitutional issues under the Utah Constitution); West Valley City v. Lujan, No. CRA 84-85 (3rd Dist. Ct., Jun. 6, 1985)(affirming the decision of the Cir. Ct., upholding the constitutionality of the roadblock); State v. Crary, No. CRA 83-82, (3rd Dist. Ct. Aug. 3, 1984)(finding the search and seizure unreasonable and reversed the decision of the 3rd Cir. Ct., Murray Department); Holt v. Schwendiman, No. C84-2955 (3rd Dist. Ct. Oct. 2, 1984)(in a civil appeal from a driver's license suspension, ruling that the subject mass roadblock stop constituted an "unreasonable seizure under the Fourth Amendment"); State v. Zisumbo, No. 020534 (2nd Cir. Ct. Jan. 11, 1984)(granting a motion to suppress all evidence gathered from a roadblock stop and agreeing with the analysis set out by the Oklahoma Supreme Court in State v. Smith, 674 P.2d 562 (Okla. 1984), and the Illinois Appellate Court in People v. Bartley, 125 Ill. App. 3d 575, 466 N.E.2d 346 (1984)).

4. One case concerning a roadblock has been decided by the Utah Court of Appeals, however the perfunctory opinion was withheld from publication. In State v. Timothy Joe, 870537-CA (Utah App. Sept. 30, 1988)(opinion withheld from publication), the court invalidated a DUI conviction. The defendant was arrested at a police roadblock. The state failed to file a brief and failed to appear for oral argument. The court stated that it was not inclined to perform prosecution counsel's research and briefing duties.

ducted for administrative purposes.[5] The United States Supreme Court has never ruled on the constitutionality of a non-permanent, "routine" sobriety roadblock and thus has not conclusively balanced competing individual and governmental interests.

It is futile to attempt to proclaim the precise limits within which all roadblocks may be considered to be constitutionally permissible, since courts have examined the validity of a roadblock by careful dissection of the operational facts. Practitioners and judges alike in Utah are required to analyze the constitutionality of administrative and sobriety checkpoints without benefit of clear precedent. In light of the above, we suggest the following as a possible analytical approach and model for proper briefing of the issue in Utah courts (as well as other state's courts which have called for analysis under their respective state constitutions).

I. Proposed Model for Analysis

A. *State Statutory Considerations*

In order to be constitutional a roadblock must be premised upon state statutory authority, either explicit or implicit. Without such authority the roadblock is per se unconstitutional.

B. *State Constitutional Authority*

The constitutionality of a roadblock should also be considered in light of article I, section 14 of the Utah Constitution.

C. *U. S. Constitution Fourth Amendment Jurisprudence*

A judge or practitioner should then couple her state constitutional inquiry with that of a federal analysis. Although she may choose to rely solely upon one approach to the exclusion of the other, it is important to review the ever-expanding, and often confusing, body of case law which relies upon fourth amendment considerations to give understanding to current Utah law and how future decisions may diverge from federal constitution-based analysis. Certain justices of the Utah Supreme Court have indicated that they desire briefs considering both constitutions.[6] The balance of the discussion details and supports the

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5. In a "non-roadblock" case the Utah Supreme Court intimated that a roadblock might be constitutionally permissible under exigent circumstances. The court did not address sobriety roadblocks. State v. Torres, 29 Utah 2d 269,271, 508 P.2d 534, 536 (1973). Roadblocks which are operated temporarily to apprehend fleeing felons have long been upheld as reasonable. *See, e.g.*, United States v. Harper, 617 F.2d 35 (4th Cir. 1980).

6. *See infra* notes 66-67.

above-suggested analytical procedure.

II. State Statutory Considerations

The major question is whether, irrespective of constitutional questions, Utah law enforcement agencies are explicitly or implicitly authorized by state law to establish checkpoints where vehicles are stopped for sobriety investigation or for other administrative purposes. The U.S. Supreme Court does not assume that officers are entitled to conduct any search or seizure unless specifically proscribed by the fourth amendment; rather statutory authority is required. For example, in the case of *Colonnade Catering Corp. v. United States,*[7] the Court ordered suppression of evidence seized in an unconsented search because the officers lacked statutory authority, even though their actions would not have violated the fourth amendment.[8] Prosecutors must be prepared to meet this concern with statutory authority, express or implied. Otherwise, the ground is ripe for suppression of any evidence gained through a roadblock at the most preliminary stage of the inquiry. The Oregon Supreme Court, in *Nelson v. Lane County,* stated that it had often "stressed the need to examine statutory authority and the limitations imposed by the authority before reaching any constitutional question."[9]

A. *Authority in Utah*

There is no express authority found in Utah law which would sanction sobriety roadblock activities.[10] In order to enforce "Driving Under the Influence" (DUI) laws, enforcement agencies must rely upon general police powers providing for public safety and welfare.[11] Some implication of a specific charge to enforce DUI law is found in the application of the state excise tax on beer, which is intended to finance the efforts of police to combat the DUI epidemic, as well as to fund rehabilitation of offenders.[12]

Sheriffs and their deputies are granted authority to preserve the

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7. 397 U.S. 72 (1970).

8. *Id.* at 77.

9. Nelson v. Lane County, 304 Or. 97, 102 n.2, 743 P.2d 692, 695 n.2 (1987).

10. We know of no extant authority under Utah law which would support a finding of implied power to conduct a roadblock, sobriety or otherwise. We cannot be certain whether the Utah Supreme Court would expand general police powers to this degree. Nonetheless, implied authority may well be argued through the empowering statutes for the various enforcement agencies.

11. *See infra* notes 12-14.

12. Utah Code Ann. § 32A-1-14 (Supp. 1988).

peace and make all lawful arrests.[13] Municipal police officers are granted authority "at all times to preserve the public peace, prevent crime, detect and arrest offenders . . . protect persons and property, remove nuisances existing in the public streets, roads and highways, enforce every law relating to the suppression of offenses, and perform all duties required of them by ordinance or resolution."[14] The State Highway Patrol is authorized to enforce the state laws and rules and regulations governing use of the state highways and to regulate traffic on all state highways and roads, as well as operate the ports of entry.[15] Further, the powers and duties conferred upon the Commissioner of Public Safety and members of the Highway Patrol are supplementary to, and not a limitation upon the powers and duties of other peace officers in the state.[16] The Highway Patrol has comprehensive powers, while a county sheriff has the least statutory authority, explicit or implicit.[17]

Since Utah appellate courts have not considered a roadblock case, they have never addressed the issue of "explicit v. implicit" statutory authority to conduct a roadblock, although other jurisdictions have done so. States remain divided on the issue. The Oregon Supreme Court, in the recent case of *Nelson v. Lane County,*[18] observed "roadblocks are seizures of the person or the person's effects. For this reason, the authority to conduct roadblocks *cannot be implied.* Before they search or seize, executive agencies must have explicit authority from outside the executive branch."[19] This case was a civil action for a declaratory judgment. The court noted that the authority relied upon by the state police was not sufficiently specific, leaving open the possibility that a direct statute would cure the authority deficiency.[20] The Oregon Supreme Court recognized that enforcement of many criminal laws is conducted through methods authorized by statutes charging the police agencies with their general duties. Yet the court also decided two other roadblock cases on the same day,[21] and in both cases, it ordered that evidence obtained at the roadblock be suppressed on the grounds that the roadblock operation lacked explicit statutory authority.

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13. UTAH CODE ANN. § 17-22-2 (1987).

14. UTAH CODE ANN. § 10-3-914 (1986).

15. UTAH CODE ANN. § 27-10-7 (Supp. 1988).

16. *See* UTAH CODE ANN. § 27-10-4 (Supp. 1988).

17. UTAH CODE ANN. §§ 27-10-4 to -5, 41-1-17 (1953, 1988 & Supp. 1988).

18. 304 Or. 97, 743 P.2d 692 (1987).

19. 304 Or. at 103-04, 743 P.2d at 695 (emphasis added).

20. *Id.*

21. State v. Boyanovsky, 304 Or. 131, 743 P.2d 711 (1987); State v. Anderson, 304 Or. 139, 743 P.2d 715 (1987).

An Oklahoma court, in *State v. Smith,*[22] was not persuaded by the state's theory which would sanction roadblock stops on the basis of its police power to provide for the public safety and welfare. The court found "no statutory authority which would support, directly or indirectly, the [s]tate's contention that it has the power to establish checkpoints to inspect all motorists to discern if any are intoxicated."[23]

A middle ground between requiring explicit statutory authority as opposed to allowing roadblocks under general police powers is found in the leading case of *Ingersoll v. Palmer.*[24] There the California Supreme Court denied a writ of mandamus which sought to prevent the California Highway Patrol from operating roadblocks. The court found that the roadblocks were administered as part of a regulatory administrative scheme authorized by state law, aimed at improving highway safety through deterring drunk drivers rather than detection of violators.[25] This case can be distinguished from *Nelson v. Lane County*[26] insofar as the California court was able to rely on the administrative scheme aimed at improving highway safety. Although the administrative or regulatory argument may be convincing, it has no current applicability in the state of Utah. Unlike a number of state legislatures which have enacted statutes authorizing the implementation of roadblocks[27], to date the Utah Legislature has not done so.

Many courts are willing to accept evidence obtained in roadblocks operated under a presumption of implied statutory authority. An Illinois appellate court stated that

> [c]*riminal statutes do contain an implied right of the police to enforce them.* While there are state and federal constitutional limitations on the means of enforcement, these limits are constitutional and not inherent in every criminal statute . . . . Absent evidence of some contrary intent, the police should be able to enforce those laws in a constitutional manner.[28]

Even though the Oregon Court in *Nelson* declined to accept an implied authority theory, it summarized the "implicit authority" argument in the following language:

> Much criminal and regulatory law enforcement activity takes place

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22. 674 P.2d 562 (Okla. Crim. App. 1984).

23. *Id.* at 565.

24. Ingersoll v. Palmer, 43 Cal. 3d 1321, 743 P.2d 1299, 241 Cal. Rptr. 42 (1987).

25. *Id.*

26. 304 Or. 97, 103-04, 743 P.2d 692, 695-96 (1987).

27. *See* People v. Scott, 63 N.Y.2d 518, 529 n.4, 473 N.E.2d 1, 6 n.4, 483 N.Y.S.2d 649, 654 n.4 (1984).

28. People v. Estrada, 68 Ill. App. 3d 272, 386 N.E.2d 128, 133-34 (1979)(emphasis added).

> pursuant to authority implied from a broad statutory directive. A broad directive to enforce criminal laws, . . . together with the specification of crimes developed by lawmakers, implies authority to undertake tasks necessary to carry out the delegated function. By and large, agencies of the executive branch are free to carry out their assigned responsibilities in ways of their own choosing. Making explicit the manner in which an agency is to accomplish its task falls to the agency head or that official's designee to instruct or sub-delegate to subordinate officials.[29]

We agree with the Oregon Supreme Court that if no explicit or implicit authority to conduct the roadblock activity is found, the arrest must fail.[30]

B. Additional Statutory Concerns

If a court accepts implied authority or finds explicit authority, its inquiry is not complete. The court must further examine any applicable statutory limitations. Consider the language of the following excerpts from the Utah Code, "[a] peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions."[31] The authority of municipal police officers to effect an arrest is likewise statutorily limited:

> The members of the police force shall have the power and authority, without process, to arrest and take into custody any person who shall commit or threaten or attempt to commit in the presence of the officer, or within his view, any breach of the peace, or any offense directly prohibited by the laws of this state or by ordinance.[32]

Note that the foregoing statutory restraints may arguably be more stringent than the fourth amendment, as Utah law requires "reasonable suspicion" as a necessary prerequisite to making a stop. The fourth amendment does not always so require. While the United States Supreme Court has required "some quantum of individual suspicion" as a general prerequisite to a constitutional search and seizure, it has ruled that the fourth amendment imposes no "irreducible requirement" of such suspicion. The Court has carved out a few established and well-delineated exceptions dealing with airport security, zoning violation en-

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29. Nelson v. Lane County, 304 Or. 97, 103, 743 P.2d 692, 695 (1987).

30. *Nelson*, 304 Or. at 105, 743 P.2d at 696 (*citing* State v. Atkinson, 298 Or. 1, 8-9, 688 P.2d 832, 836-837 (1984)).

31. UTAH CODE ANN. § 77-7-15 (1982).

32. UTAH CODE ANN. § 10-3-915 (1986).

forcement, border control activity, frisk searches and warrantless administrative searches of commercial property.[33]

III. State Constitutional Considerations

A. Separate Analyses Under State and Federal Constitutions Are Judicially Proper

The United States Supreme Court has expressed its respect for state courts through abstaining from review when practicable. Review of state court decisions interpreting a right guaranteed under the United States Constitution is limited to cases where the state court may have erred.[34] When there are bona fide adequate and separate state grounds for the result, the federal courts will not act.[35] In the past few years, the Utah Supreme Court has begun to shape and refine the parameters of protection afforded by the fourth amendment, but it has never decided a search and seizure case by exclusive reliance on adequate and separate state grounds. Article I, section 14 of the Constitution of Utah provides:

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

The foregoing language of the Utah Constitution is nearly identical to the fourth amendment of the United States Constitution. That may be *one* reason why the Utah Supreme Court "has never drawn distinctions between the protections afforded by the respective constitutional provisions. Rather, the [c]ourt has always considered the protections afforded to be one and the same."[36] Judge Greenwood of the Utah Court of Appeals has also noted that the Utah Supreme Court has decided search and seizure cases under the United States Constitution's fourth

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33. *See generally* Terry v. Ohio, 392 U.S. 1 (1968); United States v. Biswell, 406 U.S. 311 (1972); Wyman v. James, 400 U.S. 309 (1971); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970); See v. City of Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967); United States v. Davis, 482 F.2d 893 (9th Cir. 1973); United States v. Schafer, 461 F.2d 856 (9th Cir. 1972); Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972).

34. *See generally* Michigan v. Long, 463 U.S. 1032 (1983).

35. *Id.*

36. State v. Watts, 750 P.2d 1219, 1221 (Utah 1988). In his dissenting opinion, Justice Zimmerman denounces that text as dictum squarely at odds with the tone of footnote number eight in the majority opinion. The Utah Supreme Court continues to rely on federal precedent interpreting the fourth amendment in search and seizure cases. *See, e.g.*, State v. Banks, 720 P.2d 1380, 1382-84 (Utah 1986); State v. Kelly, 718 P.2d 385, 389-92 (Utah 1986).

amendment, "eschewing a different standard."[37]

That position is further strengthened by reference to the record respecting the adoption of article I, section 14. There is nothing in the textual language or in the legislative history of its adoption which would suggest that the framers intended that it be differently interpreted from the fourth amendment.[38] In addition, there are numerous criminal cases (not involving search and seizure issues) where the Utah Supreme Court has concluded that the state constitutional provision has the same scope of protection as its federal counterpart.[39] In light of these observations, why should a state constitutional consideration based on article I, section 14, be part of any analytical model for the Utah bar? In the following section we propose several practical reasons for using a separate analysis.

While it is true that the Utah Supreme Court has consistently refused to interpret article I, section 14 of the Utah Constitution differently from the fourth amendment, it has not foreclosed that possibility. The question remains open.[40] The court confirmed in *State v. Brooks,*[41]

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37. State v. Larocco, 742 P.2d 89, 95 n.7 (Utah App. 1987)(citations omitted).

38. Article I, section 14 was mentioned only in brief passing in the proceedings and debates of the State Constitutional Convention. The entire record appears as follows: "The Chairman: Gentlemen, we will take up section 14. section 14 was read and passed without amendment." OFFICIAL REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION: 1895, 319 (1898).

39. *See* Brief for the State of Utah at 20-21, State v. Babbell, Case No. 21033, (pending before the Utah Supreme Court)(*citing* State v. Nelson 725 P.2d 1353, 1357 (Utah 1986)(admission of hearsay statements not a violation of the right to confrontation under either U.S. CONST. amend. VI or UTAH CONST. art. I, § 12); State v. Schreuder, 712 P.2d 264, 275 (Utah 1986)(rule that admission of out-of-court statements under the circumstances of the case created no confrontation problem is the same under federal and state constitution); State v. Banks, 720 P.2d 1380, 1385 (Utah 1986)(interpreting in parallel fashion the speedy trial provisions contained in UTAH CONST. art. I, § 12 and U.S. CONST. amend. VI); State v. Bishop, 717 P.2d 261, 265-67 (Utah 1986)(holding that the "Utah and the federal cruel and unusual punishment provisions apply to this case in the same fashion", and equal protection analysis is the same under both constitutions); State v. Hygh, 711 P.2d 264, 267 (Utah 1985)(holding that, as under federal law, inventory searches are permitted by UTAH CONST. art. I, § 14); State v. Amicone, 689 P.2d 1341, 1343 (Utah 1984)(in the context of the instant case "article I, § 9 [of the Utah Constitution] does not give the defendant more extensive protections than those afforded by the eighth amendment [of the federal constitution]); State v. Lairby, 699 P.2d 1187, 1203-06 (Utah 1984)(ineffective assistance of counsel analysis same under UTAH CONST. art. I, § 12 and U.S. CONST. amend. VI.); State v. Norton, 675 P.2d 577, 585 n.5 (Utah 1984) *cert. denied,* 466 U.S. 942 (1984) ("[The Utah Supreme Court] recognizes no distinction between the protection against *ex post facto* laws provided by the Utah and the United States Constitutions"); McNair v. Hayward, 666 P.2d 321, 323 (Utah 1983)(the double jeopardy provisions of the U.S. CONST. amend. V and of the UTAH CONST. art I. § 12 "have the same content")).

40. *See, e.g.,* State v. Nielsen, 727 P.2d 188, 193 (Utah 1986)(noting that what the appropriate remedy might be if the defendant has argued that the officer's action violated his rights under article I, § 14 of the Utah Constitution is an open question).

41. 638 P.2d 537 (Utah 1981).

that a "state may construe its own constitution more narrowly than the federal constitution even though the provisions involved may be similar."[42] That principle paved the way for the court to announce that the construction of a state constitutional provision was not controlled by the federal court's construction and application of its federal counterpart.[43] In civil cases, the court has actively looked to the Utah Constitution to decide a variety of issues.[44]

B. State Constitutions May Provide Greater Protections Against Unreasonable Searches

Judge Billings, in her dissenting opinion in *State v. Larocco,*[45] recognized the need for a state constitutional analysis in the vehicle search and seizure area. She observed that "[s]tate courts responding to the confusing and restrictive new federal interpretations are relying on an analysis of their own search and seizure provisions to expand constitutional protection beyond those mandated by the fourth amendment, often directly avoiding applicable United States Supreme Court precedent."[46]

In a recent opinion the Utah Supreme Court announced its interest in the applicability of a Utah Constitution, article I, section 14 argument by stating that "[i]ndeed, choosing to give the Utah Constitution a somewhat different construction may prove to be an appropriate method for insulating the state's citizens from the vagaries of inconsistent interpretations given to the fourth amendment by the federal courts."[47]

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42. *Id.* at 539.

43. Malan v. Lewis, 693 P.2d 661, 670 (Utah 1984). The Utah Supreme Court stated

> [a]lthough article I, section 24 of the Utah Constitution incorporates the same general fundamental principles as are incorporated in the Equal Protection Clause, our construction and application of article I, section 24 are not controlled by the federal court's construction and application of the Equal Protection Clause. Case law developed under the fourteenth amendment may be persuasive in applying article I, section 24, but that law is not binding so long as we do not reach a result that violates the Equal Protection Clause.

Id. (citations omitted). It must be stressed that the language of article I, § 24 of the Utah Constitution and the fourteenth amendment of the United States Constitution is dissimilar, although these provisions embody the same general principle.

44. *See generally* Malan v. Lewis, 693 P.2d 661 (Utah 1984); Johnston v. Stoker, 685 P.2d 539, 540-43 (Utah 1984); Timpanogos Planning & Water Management Agency v. Central Utah Water Conservancy Dist., 690 P.2d 562, 568-70 (Utah 1984); Kearns-Tribune Corp. v. Lewis, 685 P.2d 515, 520-22 (Utah 1984); KUTV v. Conder, 668 P.2d 513, 521 (Utah 1983). *See also* Note, *The Utah Supreme Court and the Utah Constitution,* 1986 UTAH L. REV. 320-21.

45. 742 P.2d 89 (Utah App. 1987).

46. *Id. at* 104 (Billings, J., dissenting).

47. State v. Watts, 750 P.2d 1219, 1221 n.8 (Utah 1988)(citations omitted).

The U.S. Supreme Court has affirmed the wisdom of a separate body of state constitutional law. In *Michigan v. Long*,[48] Justice O'Connor noted that "[i]t is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions."[49] The New Jersey Supreme Court has noted several compelling reasons for finding that their state constitution is a more appropriate vehicle to resolve questions concerning search and seizure issues. The court specifically opined that local issues are best resolved through state constitutional analysis.[50] The landmark case of *Delaware v. Prouse*,[51] often cited in support of roadblocks, acknowledged that highway safety and law enforcement is primarily a local concern.[52]

In many cases, state constitutions may provide a greater limitation on the government than do the parallel provisions in the United States Constitution. State courts have the latitude to look to their respective constitutions.[53] A growing number of states are deciding roadblock cases exclusively on independent state grounds. A New Jersey appellate court stated in *State v. Kirk*[54] that "structural differences in the state and federal constitutions and matters of particular state interest or local concern are two factors to be considered in developing an independent body of state constitutional law."[55] The court in *Kirk* found that the subject roadblock was unconstitutional since it rested too heavily on the discretion of the field officers. The well-reasoned opinion was rendered on state constitutional grounds exclusively, not on federal constitutional grounds.[56] A recent New Hampshire roadblock decision also relied solely on state constitutional grounds to find a roadblock unconstitutional.[57]

In addition, the Washington Supreme Court recently found a sobriety checkpoint illegal based on independent state grounds. The court stated that "[w]hen parties allege violation of rights under both the United States and Washington Constitutions, this court will first independently interpret and apply the Washington Constitution in order,

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48. 463 U.S. 1032 (1983).

49. *Id.* at 1041 (citations omitted).

50. State v. Hunt, 91 N.J. 338, 358-72, 450 A.2d 952, 962, 969 (1982).

51. 440 U.S. 648 (1979).

52. *Id.*

53. State v. Hunt, 91 N.J. 338, 450 A.2d 952 (1982); State v. Williams, 93 N.J. 39, 459 A.2d 641 (1983). *See generally* Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977); *Developments in the Law—Interpretation of State Constitutional Rights,* 95 HARV. L. REV. 1324 (1982).

54. 202 N.J. Super. 28, 493 A.2d 1271, 1274 (N.J. Super. Ct. App. Div. 1985).

55. *Id.* at pinpoint, 493 A.2d at 1274.

56. *Id.*

57. State v. Koppel, 127 N.H. 286, 499 A.2d 977 (1985).

among other concerns, to develop a body of independent jurisprudence, and because *consideration of the United States Constitution first would be premature.*"[58] The court went on to say that "the textual language of article 1, section 7 [of the Washington Constitution], provides greater protection to individual privacy interests than the [f]ourth [a]mendment."[59]

State constitutional grounds were also at the foundation of a recent Idaho decision. In *State v. Henderson,*[60] the Idaho Supreme Court reversed a denial of a suppression order after scrutiny of the roadblock under the Idaho Constitution, which is identical to the fourth amendment of the United States Constitution. The court considered IDAHO CODE § 19-621, which authorizes roadblocks to apprehend persons reasonably believed to be in violation of Idaho law, and found reasonable suspicion to be a condition precedent to the use of a roadblock. Justice Huntley, writing for the majority, stated that the court reached its conclusion solely on the grounds of the state constitution.[61]

Nearly every court which has addressed the constitutionality of roadblock stops has adopted a balancing test involving the factors of public interest against the right of an individual to personal security, free from arbitrary interference by law enforcement officers. In Utah the permissibility of a particular law enforcement practice likewise probably would be judged by balancing its intrusion on the citizen's article 1 § 14 interests against its promotion of legitimate state interests. One can make a compelling argument that the state constitutional analysis is a "more appropriate vehicle" to resolve the competing state and personal interests. Regardless, the prominent balancing test advanced in *Brown v. Texas*[62] is equally applicable to a state or federal constitutional analysis. While the majority of the arguments rely on fourth amendment cases and concerns, most are also applicable to a state constitutional consideration, since the competing interests are the same.

C. A Standard for State Constitutional Review of Sobriety Roadblocks and an Incentive for Its Use

In formulating an argument under a state or federal constitutional analysis, a practitioner or court may look to a growing number of Utah cases enunciating a reasonable suspicion standard for a "criminal inves-

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58. City of Seattle v. Mesiani, 110 Wash. 2d 454, 755 P.2d 775, 776 (1988)(emphasis added).

59. *Id.*

60. 114 Idaho 293, 756 P.2d 1057 (1988).

61. *Id.*

62. Brown v. Texas, 443 U.S. 47 (1979). *See infra* note 78.

tigative stop."[63] Once this review is completed, argument may be advanced respecting constitutionality under the Utah and United States Constitutions. Similar though they may be, one cannot make the error of proceeding to a federal analysis without examining the state constitution. The Mississippi Supreme Court recently underscored that "[a] procedure may be perfectly in accord with the United States Constitution and yet run afoul of state constitutional or statutory requirements."[64]

Justice Zimmerman of the Utah Supreme Court has observed that the Supreme Court has not yet undertaken independent state constitutional analysis of remedies for improper searches.[65] We believe that it is fair to say that the Utah Supreme Court has traditionally followed the federal lead on search and seizure cases; indeed, it has not departed dramatically from the growing body of federal law in its analysis.[66]

While Utah has developed no independent or separate body of state constitutional search and seizure law, both Justices Durham and Zimmerman of the Utah Supreme Court have expressed a willingness to seriously consider an analytical approach premised on article I, section 14 arguments.[67] Justice Zimmerman has stated that "[t]he federal law as it currently exists is certainly not the only permissible interpretation of the search and seizure protections contained in the Utah Con-

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63. The concept of a reasonable suspicion standard was advanced in Terry v. Ohio, 392 U.S. 1, 30 (1968). The Court found that a limited frisk search was justified where a "police officer observes unusual conduct which leads him to reasonably conclude in light of his experience that criminal activity is afoot." For further Supreme Court discussion of a reasonable suspicion test see United States v. Brignoni-Ponce, 422 U.S. 873 (1975). For Utah State Supreme Court cases discussing reasonable suspicion standards see generally State v. Deitman, 739 P.2d 616 (Utah 1987); State v. Swanigan, 699 P.2d 718 (Utah 1985); State v. Carpena, 714 P.2d 674 (Utah 1986); State v. Mendoza, 748 P.2d 181 (Utah 1987); State v. Gibson, 665 P.2d 1302 (Utah 1983); State v. Valdez, 689 P.2d 1334 (Utah 1984); State v. Torres, 508 P.2d 534 (Utah 1973). For Utah Court of Appeals cases *see* State v. Arroyo, 102 Utah Adv. Rpt. 34 (Utah App. 1989); State v. Sery, 758 P.2d 935 (Utah App. 1988); State v. Johnson, 771 P.2d 326 (Utah App. 1989); State v. Baumgaertel, 762 P.2d 2 (Utah App. 1988); State v. Aquilar, 758 P.2d 457 (Utah App. 1988); State v. Baird, 763 P.2d 1214 (Utah App. 1988); State v. Sierra, 754 P.2d 972 (Utah App. 1988); State v. Larocco, 742 P.2d 89 (Utah App. 1987); State v. Trujillo, 739 P.2d 85 (Utah App. 1987).

64. Drane v. State, 493 So. 2d 294, 297 (Miss. 1986).

65. State v. Hygh, 711 P.2d 264, 273 (Utah 1985)(Zimmerman, J., concurring); State v. Mendoza, 748 P.2d 181, 187 (Utah 1987)(Zimmerman, J., concurring).

66. *See supra* note 42.

67. *See, e.g.*, State v. Earl, 716 P.2d 803 (Utah 1986); State v. Bishop, 717 P.2d 261 (Utah 1986)(Durham, J., concurring on Utah Constitution, article I & V grounds); State v. Mendoza, 748 P.2d 181 (Utah 1987)(Zimmerman, J., concurring); State Farm Ins. Co. v. Mastbaum, 748 P.2d 1042 (Utah 1987)(Durham, J., dissenting); State v. Hygh, 711 P.2d 264, 271-73 (Utah 1987)(Zimmerman, J., concurring); American Fork City v. Cosgrove, 701 P.2d 1069 (Utah 1985)(Durham, J., for the majority, relies upon the Utah Constitution's self-incrimination provision, articles I & XII; Zimmerman, J., concurring suggests an article I, section 14 analysis).

stitution."[68] Such an analysis may extend the scope of individual protection against unreasonable searches and seizures beyond that accorded by the fourth amendment.

Writing for the majority in *State v. Earl,*[69] Justice Durham noted that neither the state nor the defendant had discussed or relied independently on article I, section 14 of the Utah Constitution. She further noted that despite the court's willingness to independently interpret the Utah Constitution in other areas of law, "the analysis of state constitutional issues in criminal appeals continues to be ignored."[70] Justice Durham concluded that "[i]t is imperative that Utah lawyers brief this Court on relevant state constitutional questions."[71] Justice Zimmerman was equally emphatic in *State v. Hygh,*[72] stating that "[s]ound argument may be made in favor of positions at variance with the current federal law respecting both the scope of the individual's right to be free from warrantless searches and seizures and the remedy for any violation of that right."[73]

In light of these frequent announcements of receptivity, any analytical approach, particularly from a defense perspective, must seriously consider a state constitutional analysis. Even with these judicial invitations, counsel have not seriously considered and articulated arguments premised on state constitutional grounds.

Practitioners who wish to advance arguments premised on article I, section 14 are presented with two additional decisions; "the choice of when to raise state constitutional issues, and the choice of theoretical model of analysis and review."

In *State v. Larocco,*[74] the majority agreed with Judge Billing's dissenting opinion on the narrow issue that any departure from a fourth amendment analysis approach should be announced by the Utah Supreme Court, not the Utah Court of Appeals.[75] More recently, however, in *State v. Shamblin,*[76] the defendant analyzed his defense under both article I, section 14 of the Utah Constitution and the fourth amendment. Judge Orme, of the Utah Court of Appeals, stated "[w]e need not accept defendant's invitation to address his rights under our state constitution as we hold that the federal Fourth Amendment [sic]

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68. State v. Hygh, 711 P.2d 264, 273 (Utah 1985).
69. 716 P.2d 803 (Utah 1986).
70. *Id.* at 806.
71. *Id.*
72. 711 P.2d 264 (Utah 1984).
73. *Id.* at 272.
74. 742 P.2d 89 (Utah App. 1987).
75. *Id.* at 95 n.7, 103.
76. 763 P. 2d 425 (Utah App. 1988).

requires suppression of the evidence in question."[77] The reader is left with the impression that but for the disposition of the case under the fourth amendment, that the Utah Court of Appeals may have reached the state constitutional analysis in its decision. If our reading of *Shamblin* is accurate, it manifests a slight departure from the announcement in *Larocco.*

Even more recently in the case of *State v. Johnson*[78], the Utah Court of Appeals declined to entertain a state constitutional argument because the defendant had failed to brief or argue a state constitutional issue at the trial level. It appears that the court reached its decision squarely on the preservation issue. However, there is intimation that, absent the preservation defect, the court may have reached the state constitutional issue. The policy decision announced in *Larocco* to refrain from deciding a case on independent state grounds until such course is announced by the Utah Supreme Court, may be weakening. In *Johnson* the court resorted to a preservation argument in avoiding the state constitutional issue, while it would have been simpler to cite the policy decision of *Larocco.* However, such distinctions may also be fairly attributed to the differences in the various judicial panels of the Court of Appeals. In absence of clarification, we must recommend that state constitutional arguments be raised at every level of the case.

Next, even if the reviewing court were to reach the merits in a roadblock case where the state constitutional arguments were well articulated and adequately argued, it is unclear which of the various models of analysis would then be applied.[79] That choice is dependent upon the view of the Utah Supreme Court respecting the roles of federal and state constitutions. In that regard, the court has sent some inconsistent and mixed signals. In civil cases where the court has independently interpreted the Utah Constitution to reach its decisions the analytical methodology does not appear to be entirely harmonious. One author has suggested that the court has failed to develop ". . . a consistent approach for cases in which both state and federal constitutional claims are made. Some cases fully examine differences between the Utah and United States [Constitution] provisions; others rely exclusively on federal law although state claims were presented."[80] The

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77. *Id.* at 426 n.2.

78. 771 P.2d 326 (Utah App. 1989).

79. Legal scholars have identified three models of review: the dual sovereignty or coequal model, the primacy model, and the interstitial or supplementary model. *See generally Developments in the Law, The Interpretation of State Constitutional Rights,* 95 HARV. L. REV. 1324, 1356-59 (1982).

80. Note, *The Utah Supreme Court and the Utah State Constitution,* 1986 UTAH L. REV. 319, 321.

Utah Supreme Court has never adopted a model because it has never been properly presented with the question in a criminal case. The ultimate choice of model may have direct bearing on the decision.

While references to article I, section 14 arguments are principally in footnotes and dissenting opinions, we can fairly reach one conclusion: a nominal or mere invocation of the state constitution is simply insufficient. The Utah Supreme Court recently announced in *State v. Lafferty,*[81] that "[a]s a general rule, we will not engage in state constitutional analysis unless an argument for different analyses under the state and federal constitutions is briefed."[82] In that respect the court has adhered to the principle of judicial restraint by limiting its analysis to the issues raised at trial and on appeal. That position is consistent with previous decisions and is soundly reasoned; appellate courts ought to hesitate from delving into virgin territory in the absence of helpful and well-researched models which have been advanced by counsel. Undifferentiated state and federal claims or the mere citation of the Utah and federal constitutions in conjunction with an argument grounded in federal constitutional principles will ordinarily lead the court to decide the case under the federal constitution.

While we urge a state constitutional analysis as an important feature of our analytical model, we certainly offer no prediction regarding its ultimate reception or rejection at the appellate level. Search and seizure decisions are fact intensive; they turn not only on the application of the correct analytical approach, but equally important, on a consideration of the totality of the circumstances.

Finally, the Utah Supreme Court has not had the opportunity to give sufficient guidance respecting an article I, section 14 analysis, although it has cited with approval the general state constitutional argument approach found in *State v. Jewitt.*[83] In that decision the Vermont Supreme Court takes counsel to task for failing to employ their state constitution, and gives an able primer on state constitutional argument.

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81. 749 P.2d 1239 (Utah 1988).

82. *Id.* at 1247 n.5. *See also* State v. Ashe, 745 P.2d 1255, 1257 n.2 (Utah 1987); State v. Earl, 716 P.2d 803, 805-6 (Utah 1986); *cf.* State v. Hygh 711 P.2d 264, 271-73 (Utah 1985)(Zimmerman, J., concurring)(arguments for different analyses under the state and federal constitutions should be considered if made); State v. Johnson, 771 P.2d 326, 328 (Utah App. 1989).

83. 146 Vt. 221, 500 A.2d 233 (1985), *cited in* State v. Earl, 716 P.2d 803, 806 (Utah 1986).

IV. Fourth Amendment Perspectives

A. Roadblocks Are Seizures Within the Meaning of the Fourth Amendment, and Thus Must Be Subjected to Fourth Amendment Criteria

It is well-established that roadblocks and checkpoints are seizures within the meaning of the fourth amendment.[84] After all the above concerns have been addressed, the roadblock must still meet the requirements for a lawful search and seizure under the fourth amendment. The traditional test generally demands both that a warrant be obtained and that there be probable cause.[85] The Supreme Court continues to stress that legitimate excusal of the warrant requirement does not affect the probable cause requirement.[86] There are few established exceptions to the probable cause requirement. Among these are "*Terry*-type" stop and frisk detentions, border searches, administrative inspections, inspections of heavily regulated enterprises, airport security checks, and inspection of ocean-going vessels in U.S. waters.[87]

It is probable that roadblocks pass muster under the doctrine of *Carroll v. United States*[88] as a valid exception to the warrant requirement. *Carroll* established that an officer can conduct a warrantless search of a vehicle if "it is not practical to secure a warrant because the vehicle can be quickly moved . . . ."[89] The Court looked ahead to potential abuse of the newly-formed doctrine, however, and cautioned:

> It would be intolerable and unreasonable if a [government] agent were authorized to stop every automobile on the chance of finding

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84. *See generally* United States v. Martinez-Fuerte, 428 U.S. 543 (1976); Terry v. Ohio, 392 U.S. 1, 16 (1968); Delaware v. Prouse, 440 U.S. 648, 653-54 (1979).

85. Almeida-Sanchez v. United States, 413 U.S. 266, 277 (1973)(Powell, J., concurring).

86. New Jersey v. T.L.O., 469 U.S. 325, 342-43 (1985).

87. In 1968 the Supreme Court articulated a lower "reasonable suspicion" standard in Terry v. Ohio, 392 U.S. 1 (1968). Border searches have been upheld as valid to detect undocumented aliens. United States v. Martinez-Fuerte, 428 U.S. 523 (1976). Inspections to detect violations of health codes, building codes and industrial hygiene standards (for certain industries) have been allowed. *See generally* Camara v. Municipal Court, 387 U.S. 523, 537 (1967)(building code inspections held valid without particularized suspicion of violation); Donovan v. Dewey, 452 U.S. 594 (1981)(holding warrantless general inspection of mines to not require particular suspicion); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978)(by virtue of Occupational Safety and Health Act of 1970, Labor Department inspectors may enter and inspect any work area subject to the Act's provisions). In McMorris v. Alioto, 567 F.2d 897 (9th Cir. 1978), the court upheld magnetometer (metal detector) inspection of persons entering a courtroom since the search was reasonably necessary to ensure security, and was not a subterfuge to gather information for criminal prosecution. The unfettered stopping and boarding of ships in U.S. coastal waters has been upheld in United States v. Villamonte-Marquez, 462 U.S. 579 (1983). The Court compared the inspections to those of highly regulated industries, such as liquor distilleries and firearms manufacturers.

88. 267 U.S. 132 (1925).

89. *Id.* at 153.

> liquor . . . [T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.[90]

It is critical to recall that the fourth amendment protects "people, not places."[91] The Supreme Court reaffirmed the restraint required in exercising the automobile exception to the warrant requirement in *Almeida-Sanchez v. United States*,[92] stating, "the *Carroll* doctrine does not declare a field day for the police in searching automobiles. Automobile or no automobile there must be probable cause for the search."[93]

B. Sobriety Roadblocks Are Subject to a Balancing of Interest Analysis in Determining Constitutionality

Because sobriety roadblocks are not based upon probable cause, we must examine the acceptable deviations from the probable cause requirement. Obviously, a roadblock is not similar to established probable cause exceptions such as heavily regulated enterprises, permanent border crossings, boarding of ship on the seas, or health and safety code enforcement. While some tenuous arguments might be made by analogy, we believe that roadblocks do not fit the criteria and formulae which established these particular probable cause exceptions. We conclude rather, that roadblocks must be viewed under an interest-balancing analysis. In automobile search cases over the last few decades the Supreme Court has adopted the interest-balancing approach, which is much less rigorous than traditional fourth amendment analysis.[94] However, the Court has not stated that it would employ a balancing test in all types of automobile searches. In *Brown v. Texas*,[95] a seminal case advancing the balancing analysis in automobile searches, the Court said it would apply the balancing test to "seizures that are less intrusive than a traditional arrest."[96]

The *Brown* Court outlined the three stage balancing analysis as follows. The first step considers the *gravity of public concerns served*

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90. *Id.* at 153-54.

91. Katz v. United States, 389 U.S. 347, 351 (1967).

92. 413 U.S. 266 (1973).

93. *Id.* at 269.

94. The Court has been consistent in applying the balancing analysis when automobile searches and seizures are at issue. *See, e.g.*, Delaware v. Prouse, 440 U.S. 648 (1979); United States v. Martinez-Fuerte, 428 U.S. 543 (1976)(expectation of privacy in an automobile is not as great as that in a personal residence); United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

95. 443 U.S. 47 (1979).

96. *Id.* at 50.

by the seizure as demonstrated by specific, objective facts. Second, the *degree to which the seizure advances the public interest* must be considered. Finally, and perhaps most importantly, the *severity of the intrusion on individual liberty* will be weighed.[97] If sobriety roadblocks are to stand under the fourth amendment, it must be shown that they effectively advance a significant public concern, and that the intrusiveness is reasonable.

C. The Public Interest in Detecting Intoxicated Drivers is of Sufficient Magnitude to Warrant Extraordinary Enforcement Approaches

Without hesitation, any court may take judicial notice of the national concern with the drunk driver. Figures in the pages of newspapers and on the evening news illustrate the epidemic gravity of the problem. Best estimates place the number of persons killed in alcohol-related traffic accidents at 25,000 annually.[98] Well over an additional half million are injured.[99] Property damage is estimated to exceed five billion dollars annually.[100] Congress has acted to withhold federal highway funds from those states failing to enact strict DUI enforcement provisions.[101] The Supreme Court cited the problem of drunk driving in *South Dakota v. Neville,*[102] stating "[t]he situation underlying this case—that of the drunk driver—occurs with tragic frequency on our nation's highways. The carnage caused by drunk drivers is well-documented and needs no detailed recitation here."[103] Justice Blackmun, writing in *Perez v. Campbell,*[104] noted that the "slaughter on the highways exceeds the death toll of all our wars."[105] Several state courts have unequivocally held the state interest to be compelling and overwhelmingly in favor of the state.[106]

Data compiled by the Utah Department of Public Safety support the fact that Utah is not immune from the plague of drunk drivers.[107]

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97. *Id.* at 50-51; *See also* United States v. Brignoni-Ponce, 422 U.S. 873, 878-83 (1975).

98. H. R. REP. No. 867, 97th Cong., 2d Sess., 7 (1982).

99. *Alcohol, Drugs & Driving, Hearing to Examine What Effect Alcohol and Drugs Have on Individuals While Driving, Before the Subcomm. on Alcoholism and Drug Abuse of the Senate Comm. on Labor and Human Resources,* 97th Cong., 2d Sess., 1 (1982).

100. Lauter, The Drunk Driving Blitz, NAT'L L.J., Mar. 22, 1982, at 1, col. 2.

101. 23 U.S.C. § 408 (1982).

102. 459 U.S. 553 (1983).

103. *Id.* at 558 (holding that refusal to submit to a blood alcohol level test may be introduced at trial as evidence of guilt).

104. 402 U.S. 637 (1971).

105. *Id.* at 657 (Blackmun, J., concurring)(footnote omitted).

106. *See, e.g.,* State v. Superior Ct., 143 Az. 45, 48, 691 P.2d 1073, 1076 (1985); State v. McLaughlin, 471 N.E.2d 1125, 1136 (Ind. Ct. App. 1985).

107. UTAH DEP'T OF PUB. SAFETY, 1986 Utah Traffic Accident Summary (1987); UTAH

The gravity of concern in Utah is evidenced by the extensive history of legislative reform aimed at "toughening" the drunk driving statutes. Because of citizen demands, intense lobbying efforts and public outrage, the legislature within the last decade has significantly increased the amount of fines, added a victim restitution program, reduced the blood-alcohol presumptive level, provided for an assessment to fund educational activities, added an "implied consent" statute, and provided for mandatory incarceration. In the 1988 legislative session, Senate Bill 121 was passed, requiring an additional fee to be imposed to fund a Victim Advocate Board for DUI offenders.[108]

Numerous anti-drunk driving groups with catchy, aggressive acronyms have sprung into being in the past decade. Moreover, membership is growing at a rate generally unparalleled in civic interest groups.[109] Public awareness is at a new high. Pressure on law enforcement administrators may well be a reason for increased used of roadblocks. Nearly half the states use roadblocks to some degree in combating drunk drivers.[110] Furthermore, supplemental incentive funds are

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DEP'T OF PUB. SAFETY, Utah Traffic Accident Summary (1988); UTAH DEP'T. OF PUB. SAFETY, UTAH TRAFFIC ACCIDENT SUMMARY (1989). These reports show that in 1986, 104 of 312 traffic fatalities were alcohol-related. In 1987, 82 of the 297 traffic fatalities were alcohol-related. In 1988, 105 of the 297 traffic fatalities were alcohol-related.

108. In 1982, UTAH CODE ANN. § 41-6-44 (1953) was amended to establish the fine for a first offense DUI conviction at $299 (removing the $100-$299 discretionary fine). UTAH CODE ANN. § 41-6-44 (1982). This section was again amended in 1986 to allow the court to sentence a DUI offense as any other Class B misdemeanor, punishable by incarceration for up to 6 months, together with the imposition of a fine up to $1,000, or both. UTAH CODE ANN. § 41-6-44 (1988). A Class A offense (involving personal injury) carries a fine of up to $2,500, together with incarceration up to one year and/or both. The mandatory minimum jail term of 2 days (10 days for a second conviction and 30 days fore a subsequent conviction) was added to § 41-6-44(4) in 1982. The Victim Restitution Fund, carrying an assessment of $100, was created in 1983. In 1979, a comprehensive treatment bill was passed, requiring an assessment of $150 for first-time offenders and an amount equal to the maximum fine for a Class B misdemeanor for repeat offenders. These monies are used to fund DUI rehabilitation programs. The court was also given the power to order reimbursement for social agencies involved in treating the convicted DUI driver. Utah added an "implied consent" law in 1981. Motorists driving within the state are deemed to have given consent to a blood-alcohol test, or tests, requested by police. Refusal results in automatic suspension of driving privileges, with no provision for a limited license. Utah belongs to the Driver's License Compact, extending the suspension to member states.

109. *See* Insurance Information Institute, *Drunk Driving in America, reprinted in* BUS. WK., Oct. 17, 1983, at 176. Groups such as MADD (Mothers Against Drunk Drivers), SADD (Students Against Drunk Drivers), RID (Remove Intoxicated Drivers), have swelled in ranks, undertaking projects such as monitoring of court sentencing for convicted offenders, public information campaigns, civil actions, pledges not to drive after drinking. In Utah, REDDI (Report Every Drunk Driver Immediately) is promoted through the Utah Highway Patrol, citizen band radio clubs, local police and community service agencies.

110. 21 states are using sobriety roadblocks. NTSB, SAFETY STUDY—DETERRENCE OF DRUNK DRIVING: THE ROLE OF SOBRIETY CHECKPOINTS AND ADMINISTRATIVE LICENSE REVOCATIONS, REP. SS-84-01 at 5-6 (1984)(Doc/US TD 1.127:84/01).

available to those states which implement procedures recommended by the National Highway Traffic Safety Administration, which include the use of sobriety roadblocks.[111]

D. The Efficacy of Roadblocks in Detection, Apprehension and Deterrence of the Drinking Driver

One author has characterized roadblocks as being "woefully deficient" in solving the DUI problem.[112] On the other side, in *State v. Superior Court,*[113] the Arizona Supreme Court found that the state had demonstrated a decrease in DUI accidents due to the use of Arizona Department of Public Safety roadblocks. A decrease of approximately 3.5% (at the Christmas season, traditionally a time of increase) was classified by the court as significant.[114] However, in what is perhaps the most exhaustive scholarly treatment of DUI roadblocks to date, Professors James B. Jacobs and Nadine Strossen examined extensive statistical evidence and concluded that the evidence supporting the efficacy of sobriety checkpoints is, at best, inconclusive.[115]

Indeed, the number of potential offenders deterred by roadblocks is debatable. For example, one court concluded that "common sense alone" was sufficient to conclude that roadblocks are effective deterrent measures.[116] In Delaware, the lieutenant governor has credited highway patrol sobriety roadblocks with a 23% decrease in alcohol related fatalities.[117] On the other hand, in a recent Arizona case, the court noted that of 5,763 vehicles stopped at the subject roadblock, only 14 drivers were arrested for DUI (a mere 1 out of every 412 vehicles).[118]

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111. 23 C.F.R. § 1309 (1984).

112. Comment, *Sobriety Checkpoint Roadblocks: Constitutional in Light of Delaware v. Prouse?,* 28 ST. LOUIS U.L.J. 813, 833 (1984).

113. 143 Ariz. 45, 691 P.2d 1073 (1984).

114. *Superior Court,* 143 Ariz. at 48-49, 691 P.2d at 1076-77.

115. Jacobs & Strossen, *Mass Investigation Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks,* 18 U.C. DAVIS. L. REV. 595, 638-45 (1985).

116. People v. Bartley, 109 Ill. 2d 273, 287, 486 N.E.2d 880, 886 (1985). The court conceded that the apprehension rate of roadblocks might not be as high as that of traditional detection methods, nonetheless opining that the deterrent potential was great.

117. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, TRAFFIC SAFETY NEWSLETTER, Oct.-Dec. 1983, at 3 (*quoting* Delaware Lt. Gov. Michael Castle). Castle's remarks are unsupported by any type of empirical data, other than to show that alcohol-related fatalities did decrease in the year following adoption of the federally recommended strict DUI law package. It would be unreasonable to consider the roadblocks as other than just one factor in the decrease; increased public cooperation with the police, heightened traditional enforcement, aggressive patrol, alternative transportation programs, and even increased use of seatbelts might well have also contributed to the decrease.

118. State *ex rel.* Ekstrom v. Justice Court, 136 Ariz. 1, 2, 663 P.2d 992, 993 (1983).

Such minimal success can hardly be expected to deter offenders. A study by the National Highway Traffic Safety Administration of multiple roadblocks in two different programs concluded that no deterrent effect was demonstrated.[119] However, France and Sweden have used roadblocks for over five years and have found a significant deterrent effect.[120] After reviewing such inconsistent data it seems fair, at least at this point, to agree with Jacobs and Strossen in characterizing empirical roadblock data as "inconclusive".[121]

The agency employing roadblocks as a DUI enforcement method should be prepared to offer data, if available, showing local efficacy in apprehension, or at least deterrence. However, mere inconclusive data alone should not prevent the use of roadblocks. No court has even attempted to construct a standard against which empirical data should be measured. Our courts should not be transformed into centers of statistical accountancy to supplant their role in serving law and justice.

E. The "Neutral Criteria" Examined: Limited and Controlled Intrusion Upon the Motorist's Liberty in the Administration of Roadblocks

We now turn to the final element of the balancing analysis: the severity of intrusion upon the motorist's fourth amendment interest. Many courts have proceeded directly to this facet of the analysis, disregarding completely the first two steps, or taking judicial notice of their fulfillment. In *Martinez-Fuerte v. United States,*[122] the Supreme Court weighed both objective and subjective intrusion in considering the constitutionality of a permanent immigration checkpoint. The elements of objective intrusion include the stop itself, the physical inspection, and the questioning of the motorist.[123] Generally, the objective intrusion at a roadblock will be minimal. Most roadblocks require only a few min-

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119. NAT'L HIGHWAY TRAFFIC SAFETY ADMIN., 3 TRAFFIC SAFETY EVALUATION RESEARCH REVIEW 5, Nov.-Dec. 1984. The same review cites a major, prolonged roadblock program in New Jersey where one DUI arrest resulted from every 5.2 man-hours of enforcement. Frankly, the authors cannot accept that a single patrol officer, at the critical hours of the night, could not apprehend more than 1 DUI offender. Such apprehension would be made through observation of objective observation of driving patterns, and the stop based on the less intrusive individualized suspicion, not random roadblocks. This study directly refutes an earlier report of higher levels of efficiency. See NTSB REP. SS-84-01, *supra* note 109 at 5-6 (1984).

120. NTSB REP. 55-84-01, *supra* note 109 at 5-6. Sweden has adopted statutes specifically authorizing sobriety roadblocks. This measure is credited with a level of only 2% of weekend drivers in Sweden having a blood alcohol level greater than .05% (compared with 13% in the United States).

121. Jacobs & Strossen, *supra* note 114.

122. 428 U.S. 543 (1976).

123. *Id.* at 558 (1976).

utes of the motorist's time.[124] Usually the officer speaks momentarily to the driver and views the interior of the vehicle, checking for alcohol containers and weapons.[125] Given the momentary nature of the roadblock, it is unlikely that any roadblock would be invalidated on the sole basis of objective intrusion.[126]

The restraint of subjectivity by officers in roadblocks is critical. Nearly every case assessing the constitutionality of a roadblock addresses the "neutral target criteria" aspect of the roadblock operation, and bases the decision on the presence and comprehensiveness of the operational formula designed to promote objectivity. One court bifurcated its consideration of the subjective intrusion into the element of fright and surprise, and the element of individual officer discretion.[127] Both are considered in the Kansas Supreme Court opinion, *State v. Deskins.*[128] This decision is cited often, and seems to be the emerging authoritative case.[129] There the Kansas court set forth thirteen non-exclusive factors to be considered in arriving at a neutral criteria which would reduce the subjective intrusion to an acceptable minimum. These include:

1) the degree of discretion, if any, left to the officer in the field;
2) the location designated for the roadblock;
3) the time and duration of the roadblock;
4) standards set by superior officers;
5) advance notice to the public at large;
6) advance warning to the individual motorist approaching the roadblock;
7) maintenance of safety conditions;
8) degree of fear or anxiety generated by the operation of the roadblock;
9) average length of time each motorist is detained;

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124. *See generally* Little v. State, 300 Md. 485, 491, 497 A.2d 903, 906 (1984)(fifteen to thirty second detention); State v. Superior Court, 143 Ariz. 45, 47, 691 P.2d 1073, 1077 (1984)(five to twenty second stops); State v. McLaughlin, 471 N.E.2d 1125, 1138 (Ind. Ct. App. 1984)(two to three minute stops).

125. Little v. State, 300 Md. 485, 497 A.2d 903, 907 (1984); State v. McLaughlin, 471 N.E.2d 1125, 1139 (Ind. Ct. App. 1984). *But cf.* People v. Bartley, 125 Ill. App. 3d 575, 466 N.E.2d 346, 348 (1984)(use of flashlight to inspect interior of vehicle was one of the elements making the roadblock a "significant degree of intrusion").

126. Any detention beyond the initial contact gives rise to further probable cause issues. It is not our intent to treat such issues in this paper.

127. State v. McLaughlin, 471 N.E.2d 1125, 1139 (Ind. App. 1984).

128. State v. Deskins, 234 Kan. 529, 673 P.2d 1174 (1983).

129. *See, e.g.,* State v. McLaughlin, 471 N.E.2d 1125, 1134 (Ind. Ct. App. 1984); State v. Kirk, 202 N.J. Super. 28, 493 A.2d 1271, 1280 (1985); *see also* State v. Hilleshiem, 291 N.W.2d 314 (Iowa 1980). All cite State v. Deskins, 234 Kan. 529, 673 P.2d 1174 (Kan. 1983), with approval.

10) physical factors surrounding the location, type, and method of operation;
11) the availability of a less intrusive means for combating the problem;
12) the degree of effectiveness of the procedure; and,
13) any other relevant circumstances which might bear on the test.[130]

The *Deskins* court did not require that each factor be resolved in favor of the state.[131] Certain factors are crucial, such as the effectiveness and the degree of fear by motorists generated by the roadblock operation. These are among factors included in other courts' construction of permissible operational formulae.[132] Each court has placed particular emphasis on the first factor, requiring controls on the discretion left to the field officer. Unbridled discretion certainly could lead to an intolerable level of subjective intrusion. In *State v. Kirk,* the court singled out the discretionary factor, observing that "participation of command or supervisory authority in selecting the time and place based on reasonable evidence of social utility is an essential constitutional ingredient and is necessary to satisfy the objection that the traveller not be subject to the discretion of the official in the field."[133]

While there may be greater focus on a specific set of factors, no single factor is determinative. As with any balancing test, application to

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130. *Deskins,* 234 Kan. at 536, 673 P.2d at 1185.

131. *Id.*

132. *See, e.g.,* State v. Hilleshiem, 291 N.W.2d 314, 318 (Iowa 1980)(establishing a four part formula: 1) selection of site for safety considerations and visibility to oncoming motorists; 2) adequate warning devices, with proper illumination at night, informing motorists of the nature of the impending intrusion; 3) uniformed officers and marked police vehicles to establish the certainty of authority and police power of the community; and, 4) a pre-determination by policy-making administrators of the roadblock time, location, and procedures to be employed, pursuant to carefully formulated standards and neutral criteria); Little v. State, 300 Md. 485, 501, 497 A.2d 903, 911 (1984)(offering a similar four part formula: 1) careful circumscription of field officer's discretion by clear objective regulations previously established by high level administrative officials; 2) approaching motorists are given adequate warning of the roadblock ahead; 3) the likelihood of fear, apprehension or surprise is reduced by a display of legitimate police authority at the roadblock; and, 4) vehicles are stopped on a systematic, non-random basis to show drivers that they are not being singled out for arbitrary reasons); Commonwealth v. McGeoghegan, 389 Mass. 137, 143, 449 N.E.2d 349, 353 (1983)(deciding this case and fourteen companion cases suggesting the following: 1) the inconvenience to the motorist be minimized; 2) the selection procedure not be arbitrary; 3) safety of motorists be assured; 4) the roadblock must be systematic, not random; and, 5) there must be a pre-arranged plan established by supervisory staff); State v. Tourtillott, 289 Or. 845, 864-65, 618 P.2d 423, 433 (1980), *cert. denied,* 451 U.S. 972 (1981)(articulating their test as: 1) an important government interest at stake; 2) consideration of the physical and psychological intrusive nature of the roadblock procedure; 3) the efficiency of the roadblock in reaching the desired goal; and 4) the degree of discretion vested in the field officers).

133. State v. Kirk, 202 N.J. Super. 28, 493 A.2d 1271, 1275 (N.J. Super. Ct. App. Div. 1985)(*quoting* Camara v. Municipal Court, 387 U.S. 523, 532 (1967)).

a particular set of facts may prove difficult.[134] With no clear controlling authority and a multitude of factors to consider, the only avenue is to examine the facts and circumstances of each case. As stated by the Supreme Court, there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails."[135] Law enforcement officials and prosecutors who choose to employ roadblocks may use the foregoing factors in planning their operation. The roadblock which addresses every minutia of constitutional law may never come to pass. Someone will always be prepared to be a Monday-morning quarterback. As the Supreme Court has noted "[a] creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished."[136]

V. Constitutionally Permissible Sobriety Roadblocks: Conclusion and Suggested Approach

It is vital to curb the lamentable and needless deaths on Utah's highways attributable to drinking drivers. Without question there are soundly-reasoned and compelling constitutional arguments, both state and federal, which can be advanced for the promotion of legitimate governmental interests and for an individual's interest in being free from intrusions on fundamental constitutional rights. On balance, assuming a properly administered roadblock, we believe that the gravity of the well-documented public concern in Utah and the degree to which the roadblock procedure facilitates detection and abatement of drunken drivers outweigh the minimal level of interference with individual liberties. It is critical to note that we do not conclude that any extant roadblock procedures now being utilized by law enforcement agencies in Utah can withstand state or federal constitutional scrutiny. Without doubt, the first roadblock described in the introduction would be struck down under even the weakest constitutional examination. The second may or may not withstand the full gauntlet of state and federal constitutional inquiry.

We have suggested, as one facet of any rigorous analytical approach, that roadblock activity be analyzed under article I, section 14 standards of the Utah Constitution. Whether such analysis will carry the day remains to be seen, but with frequent reminders from members

134. State v. Tourtillott, 289 Or. 845, 864-65, 618 P.2d 423, 433 (1980), *cert. denied*, 451 U.S. 972 (1981).

135. Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967).

136. United States v. Sharpe, 470 U.S. 675, 686-87 (1985).

of the Utah Supreme Court regarding the interpretation of Utah's own constitutional provisions, it cannot be ignored. Justice Zimmerman is eagerly optimistic that an independent state constitutional analysis will result in a simplification of fourth amendment jurisprudence, which, in his words is a "labyrinth of rules built upon a series of contradictory and confusing rationalizations and distinctions."[137] While not everyone shares that enthusiasm, few would fault his contention that state constitutional arguments should not be foreclosed from consideration by the court's unanalyzed acceptance of the federal position.[138]

Despite the multitude of obstacles to overcome in constructing a constitutionally permissible roadblock, it is fair to conclude that a sobriety roadblock is constitutional if properly administered.[139] Careful planning and execution will almost assuredly prepare the roadblock to pass constitutional muster. We support without reservation the criteria advanced by the Kansas Supreme Court in *State v. Deskins*.[140] The element of efficiency of roadblocks in a particular jurisdiction can be established only through empirical study. Support may be given to the concept by citation of successes in other regions.

Some consideration may be given to an additional element of preparation—the administrative area search warrant. This type of warrant was authorized by the Supreme Court to allow area searches seeking building code violations.[141] One California court has suggested the area warrant as a precedent to a sobriety roadblock.[142] An affidavit seeking an area search warrant should set forth the elements considered in this article; statutory police power to enforce the subject law, evidence of a local problem, and belief that the roadblock will be effective. Further, the operational plans should be contained in the application, so that the court may give prior review of the neutrality of the criteria designed to reduce intrusiveness. The novelty of this approach should not deter the dedicated prosecutor.

Because of the intricacies involved in balancing of interests, roadblocks must be approached on a case-by-case basis. Although a small number of courts have held sobriety roadblocks to be per se unconstitutional, we do not find their reasoning persuasive. A majority of the courts finding a particular roadblock unconstitutional have suggested or

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137. State v. Hygh, 711 P.2d 267, 271-72 (Utah 1985)(Zimmerman, J., concurring); State v. Johnson, 745 P.2d 452, 456 (Utah 1987)(Zimmerman, J., concurring).

138. *Hygh*, 711 P.2d at 273.

139. State v. Kirk, 202 N.J. Super. 28, 493 A.2d 1271, 1279 (Court 1985).

140. *Supra* note 127.

141. Camara v. Municipal Court, 387 U.S. 523, 535 (1967).

142. *In re* Richard T., 185 Cal. App. 3d 732, 229 Cal. Rptr. 884, 897 (1986)(holding a warrant to be indispensable to the roadblock's validity).

intimated ways in which the fatal defect could have been cured. We believe that through adherence to the approach suggested by this paper, agencies which utilize sobriety roadblocks may avert judicial suppression of evidence.

Judges, prosecutors and the defense bar must not blind themselves to the reality of highway carnage and to the anguish of its innocent victims. More than 25,000 are killed, hundreds of thousands injured, and billions of dollars of property are destroyed each year, with no relief in sight.[143] We do not advocate that the drunk driver be allowed to add the fourth amendment to his list of casualties. However, we believe that careful planning, executed with a dedicated awareness of state and federal constitutional requirements, will allow the employment of sobriety roadblocks, and add one more dependable weapon to the societal battle against the drunk driver.

143. See *supra*, notes 97-99, 101-02 and accompanying text.