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# Giving Sobriety Checkpoints the Cold Shoulder: A Proposed Balancing Test for Suspicionless Seizures under the Minnesota Constitution

Cynthia R. Bartell

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## COMMENTS

### GIVING SOBRIETY CHECKPOINTS THE COLD SHOULDER: A PROPOSED BALANCING TEST FOR SUSPICIONLESS SEIZURES UNDER THE MINNESOTA CONSTITUTION

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[*Note:* As this comment was being typeset, the Minnesota Supreme Court ruled that sobriety checkpoints are unconstitutional under the Minnesota Constitution. See *Ascher v. Commissioner of Public Safety*, No. C3-93-364, 1994 WL 314712 (Minn. June 30, 1994). The court concluded that there was no persuasive reason to dispense with

## I. INTRODUCTION

You are driving home. It's nearly 10:00 p.m. and you want to get there in time for the evening news. You are almost home when you see a large sign flashing a warning—"AHEAD SOBRIETY CHECK." One block later you are directed by uniformed police officers through traffic cones into a single lane of cars that empties into a school parking lot. As you join the line you notice camera crews from local television stations filming motorists as they enter the checkpoint. You see the police question drivers. They let some go, but others are sent to a secondary area where police appear to be conducting field sobriety tests. More camera crews are filming drivers in that area.

It's your turn. A police officer leans over, "Driver's license please." "Had anything to drink tonight?" The officer waits for your answer, attempting to detect the telltale odor of alcohol on your breath. He shines a flashlight on your face to check your pupil reaction and look for glazed or watery eyes. The television camera pans your way. Instead of merely watching the evening news, you might end up featured on it.<sup>1</sup>

Stops such as this one are valid under the United States Constitution despite the absence of suspicion that an offense has been committed.<sup>2</sup> In reaching this conclusion, the United States Supreme Court applies a low level of scrutiny to sobriety checkpoints. Rather than subject checkpoints to the rigors of traditional Fourth Amendment analysis, the Court now gives law enforcement officials broad latitude in deciding how to control the problems associated with drunk driving. At is-

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the traditional individualized suspicion requirement that Minnesota courts have "long held" to be generally required under article I, section 10 of the Minnesota Constitution. *Id.* In reaching this conclusion, Justice Coyne writing for the majority relied on the Brennan and Stevens dissents in *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990). The court reasoned that the balancing in *Sitz* represented a "radical departure" from traditional application of the test because it allowed police officers to decide for themselves the reasonableness of their own conduct. *Id.* Justice Tomljanovich and Chief Justice Keith dissented, arguing that the challenged checkpoints would pass muster under the Fourth Amendment and that there was no reason to use the state constitution to rule independently "[i]n view of the overwhelming importance of public safety." *Id.* The dissent likewise noted that the Minnesota checkpoint was more effective than the *Sitz* checkpoint and that stops "under two minutes" were "hardly burdensome." This Comment illustrates that sobriety checkpoints can be very burdensome and intrusive and argues in favor of the conclusion of the majority of the Minnesota Supreme Court that stopping drivers based on individualized suspicion is a more effective, and constitutional, method of apprehending drunk drivers.]

1. This hypothetical checkpoint is based on the facts set out in Respondent's Brief and Appendix, *Ascher v. Commissioner of Pub. Safety*, 505 N.W.2d 362 (Minn. Ct. App. 1993) (No. C3-93-364), and Appellant's Brief and Appendix, *Ascher* (No. C3-93-364).

2. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 455 (1990) (holding that the highway sobriety checkpoint program in Michigan did not violate the Fourth Amendment).

sue is the degree of intrusion by police officers that a free society will tolerate. The United States Supreme Court reasons that, in light of the severity of the drunk driving problem, the deterrent effect of these stops outweighs the intrusion created.

Many state courts, dissatisfied with the federal approach, have chosen to analyze the validity of sobriety checkpoints independently under their respective state constitutions. As this public policy debate shifts to the state level, state courts are turning to their own constitutions as sources of broader protection for individual liberties. States are deciding for themselves the extent to which an intrusion into a citizen's right to be left alone can be justified in the name of checkpoint benefits.

Recently, Minnesota courts addressed the question.<sup>3</sup> In *Ascher v. Commissioner of Public Safety*,<sup>4</sup> the Minnesota Court of Appeals ruled that sobriety checkpoints violate article I, section 10 of the Minnesota Constitution.<sup>5</sup> On the same day, however, in *Gray v. Commissioner of Public Safety*,<sup>6</sup> a different panel of appellate judges found no compelling reason to justify interpreting the search and seizure provision of the Minnesota Constitution more expansively than the Fourth Amendment.<sup>7</sup> The narrow question in each case was whether permitting media coverage of the checkpoints impermissibly heightened the intrusion for persons stopped.<sup>8</sup> Responding to the *Ascher* and *Gray* split, the Minnesota Supreme Court agreed, for the first time, to consider the constitutionality of sobriety checkpoints.<sup>9</sup>

This Comment surveys how state courts treat sobriety checkpoints, focusing specifically on Minnesota's experiences. Part II explores the historical framework for Fourth Amendment analysis under the United States Constitution. Part III illustrates how states analyze sobriety checkpoints independently under their own respective constitutions. Part IV recommends that states should adopt a strict standard for analyzing search and seizures under state constitutions. Next, the proposed strict standard is applied to the checkpoints conducted in

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3. See *Ascher v. Commissioner of Pub. Safety*, 505 N.W.2d 362, 370 (Minn. Ct. App. 1993), *review granted* (Minn. Oct. 28, 1993) (holding that sobriety checkpoints violate the Minnesota Constitution); *Gray v. Commissioner of Pub. Safety*, 505 N.W.2d 357, 362 (Minn. Ct. App. 1993), *review granted* (Minn. Oct. 28, 1993) (upholding sobriety checkpoints because there are no compelling reasons to interpret the search and seizure provision of the Minnesota Constitution more expansively than the Fourth Amendment of the United States Constitution).

4. 505 N.W.2d 362 (Minn. Ct. App. 1993).

5. *Id.* at 369-70.

6. 505 N.W.2d 357 (Minn. Ct. App. 1993).

7. *Id.* at 362.

8. *Ascher*, 505 N.W.2d at 366; *Gray*, 505 N.W.2d at 361.

9. The Minnesota Supreme Court granted review in both *Ascher* and *Gray* on October 28, 1993. See *supra* note 3 and accompanying text.

*Ascher and Gray* pursuant to Minnesota State Patrol guidelines. Finally, Part V of this Comment concludes that sobriety checkpoints are unconstitutional under the Minnesota Constitution.

## II. HISTORY

### A. *From Probable Cause to Balancing*

The Fourth Amendment prohibits unreasonable searches and seizures absent probable cause and a search warrant.<sup>10</sup> This is a fundamental right<sup>11</sup> that protects individuals from unreasonable intrusions by the government.<sup>12</sup> The Fourth Amendment also protects individuals from overbearing and harassing police conduct.<sup>13</sup> According to the United States Supreme Court, this right is “basic to a free society.”<sup>14</sup>

Courts traditionally define probable cause as “facts and circumstances . . . sufficient to warrant a man of reasonable prudence in the belief that an offense has been or is being committed.”<sup>15</sup> Warrantless searches were considered unreasonable except for certain “carefully defined classes of cases.”<sup>16</sup> In the late 1960s, however, the United

10. The Fourth Amendment to the United States Constitution 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 Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The Fourth Amendment is enforced by the exclusionary rule, which excludes at trial evidence obtained in violation of the Fourth Amendment. *See Weeks v. United States*, 232 U.S. 383 (1914); *see also Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (applying the Fourth Amendment and the exclusionary rule to the states via the Fourteenth Amendment). Prior to *Mapp*, state constitutions were the only source of protection against intrusions by the state. *Id.* at 651-53.

11. *California v. Carney*, 471 U.S. 386, 390 (1985) (considering whether a mobile home falls under the automobile exception to the general rule requiring a warrant for searches).

12. *Katz v. United States*, 389 U.S. 347, 357 (1967). The Fourth Amendment does not guarantee a general right to privacy; however, it does protect a person from unreasonable searches and seizures. *Id.* at 350, 359. *Katz* considered whether a person in a telephone booth had a constitutionally recognized right to privacy. *Id.* at 349-50. The Court concluded that the Fourth Amendment protects people, not places. *Id.* at 351. The proper focus is on the individual's expectation of privacy, not on whether a physical intrusion into a “constitutionally protected area” occurs. *Id.* at 350-51. *See also Terry v. Ohio*, 392 U.S. 1, 8-9 (1968) (holding that the Fourth Amendment protects citizens when they are out on the “streets of our cities”).

13. *Terry*, 392 U.S. at 13-14.

14. *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967) (quoting *Wolf v. Colorado*, 338 U.S. 25, 27 (1949)).

15. 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 3.2, at 556 (2nd ed. 1987) (quoting *United States v. Davis*, 458 F.2d 819 (D.C. Cir. 1972)).

16. *Camara*, 387 U.S. at 528-29, 539 (recognizing the validity of warrantless searches and seizures in “emergency situations”). *Camara* addressed the warrantless inspection

States Supreme Court shifted Fourth Amendment analysis. In instances where the intrusion was deemed minimal, the Court no longer required probable cause and a warrant to justify a governmental intrusion; rather, it determined whether a search or seizure was "reasonable."<sup>17</sup> Moreover, the Court recognized that the Fourth Amendment protected people, not places.<sup>18</sup> Thus, the proper inquiry became whether a person had a reasonable expectation of privacy that society was willing to recognize.<sup>19</sup>

In focusing on the reasonableness of searches and seizures, the Court began to substitute a balancing test for the probable cause requirement. For example, in *Terry v. Ohio*,<sup>20</sup> the Court first allowed warrantless investigative stops even though officers did not have probable cause to make an arrest. *Terry* recognized that a warrantless seizure was justified, despite the lack of probable cause, because police officers must sometimes take "necessarily swift action predicated upon the on-the-spot observations of the officer on the beat . . . ."<sup>21</sup> The Court substituted a balancing test for the technical probable cause requirement because of the unique circumstances involved in a "stop and frisk."<sup>22</sup>

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of an apartment building that was based on a suspicion of violations of the San Francisco Housing Code. *Id.* at 525.

The *Camara* Court cited the following cases that recognized limited exceptions to the warrant requirement: *Stoner v. California*, 376 U.S. 483 (1964) (holding that a warrantless search of a hotel room conducted without the consent of the guest or not incident to the arrest violated the Constitution); *United States v. Jeffers*, 342 U.S. 48 (1951) (holding that an exemption to the warrant requirement arose only incident to the arrest or under exceptional circumstances); *Agnello v. United States*, 269 U.S. 20, 33 (1925) (recognizing that courts do not sanction warrantless searches of private dwelling houses except incident to an arrest).

17. See, e.g., *Terry*, 392 U.S. at 9 ("What the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures."); *Katz*, 389 U.S. at 359 ("Whenever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures."); *Camara*, 387 U.S. at 528 ("[E]xcept in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."); see also John C. Sheldon, *Sobriety Checkpoints, the Rational-Basis Test, and the Law Court*, 8 ME. B.J., March 1993, at 81 (stating that "up until the late 1960's [sic] probable cause was the only measure for determining constitutionality under the Fourth Amendment. Since the Supreme Court's increasing use of balancing tests has frequently resulted in its approval of the searches or seizures in question, one may conclude that under the Rehnquist Court's view of the Fourth Amendment the former is a means to the latter end").

18. *Katz*, 389 U.S. at 351.

19. *Id.* at 361 (Harlan, J., concurring).

20. 392 U.S. 1 (1968).

21. *Id.* at 20. The *Sitz* dissent noted that prior to *Sitz*, a balancing test was applied only when a stop was "substantially less intrusive . . . than a typical arrest . . . ." *Sitz*, 496 U.S. at 457 (Brennan, J., dissenting).

22. *Terry*, 392 U.S. at 20-21 (citing *Camara v. Municipal Court*, 387 U.S. 523, 534-35 (1967)). *Camara* rejected the argument that a housing inspector needed probable

Balancing under the Fourth Amendment eventually evolved into the three-prong inquiry articulated in *Brown v. Texas*.<sup>23</sup> Courts must weigh “the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.”<sup>24</sup>

Some have criticized these changes,<sup>25</sup> arguing that the United States Supreme Court has abandoned its traditional role as protector of individual rights in favor of a more “majoritarian” approach to constitutional analysis.<sup>26</sup> Despite this criticism, the Court has applied its balancing analysis to uphold random bus searches,<sup>27</sup> profile stops at airports,<sup>28</sup> use of drug-sniffing dogs,<sup>29</sup> aerial helicopter searches of pri-

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cause that a dwelling contained housing code violations and a search warrant before conducting an investigative search. *Camara*, 387 U.S. at 534. The Court instead determined whether the inspection was “reasonable.” *Id.* at 535. Specifically, this determination required “balancing the need to search against the invasion which the search entails.” *Id.* at 537.

23. 443 U.S. 47, 50-51 (1979). *Brown* involved the stop of an individual spotted walking away from another man in a drug trafficking area. *Id.* at 48-49. On this ground alone, the officers stopped the defendant and asked him to identify himself. *Id.* at 49. The Supreme Court held that this stop violated the Fourth Amendment. *Id.* at 53. The Court stated, “[i]n the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant’s right to personal security and privacy tilts in favor of freedom from police interference.” *Id.* at 52.

24. *Id.* at 50-51.

25. William J. Brennan, Jr., *The Bill of Rights: State Constitution as Guardians of Individual Rights*, 59 N.Y. St. B.J. 10 (1987). Justice Brennan discusses the “retrenchment” by the Supreme Court from its role as protector of individual rights in the post-Warren Court era. *Id.* at 17. See also Thomas J. Hickey & Michael Axline, *Drunk-Driving Roadblocks Under State Constitutions: A Reasonable Alternative to Michigan v. Sitz*, 28 CRIM. L. BULL. 195, 196 (1992) (arguing that the Rehnquist Court’s philosophical commitment to “majoritarianism as the fundamental guiding principle of its criminal procedure jurisprudence . . . has tilted the individual rights/government authority scale heavily toward the rapid expansion of government authority”).

26. See Hickey & Axline, *supra* note 25, at 196.

27. *Florida v. Bostick*, 111 S. Ct. 2382, 2389 (1991) (holding that random bus searches conducted pursuant to passenger’s consent are not necessarily unconstitutional).

28. See, e.g., *United States v. Sokolow*, 490 U.S. 1, 11 (1989) (holding that there was valid reasonable suspicion to stop defendant at the Honolulu International Airport based on personal characteristics that led police officers to suspect he was a drug dealer); *Florida v. Rodriguez*, 469 U.S. 1, 6 (1984) (upholding a stop based on the unusual behavior of defendant at Miami International Airport which gave police an “articulable suspicion” that a crime was being committed).

29. See, e.g., *United States v. Place*, 462 U.S. 696 (1983). The canine sniff test was justified, first, because it did not require opening luggage. *Id.* at 707. Moreover, the only thing disclosed by the sniff was the presence or absence of contraband. *Id.* Canine sniffs are one of a kind in this respect. *Id.* “We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed . . . .” *Id.*

vate property,<sup>30</sup> garbage searches,<sup>31</sup> and routine employee drug testing.<sup>32</sup> In each case, the once essential requirements of probable cause and a search warrant were lacking.<sup>33</sup>

In *Michigan Department of State Police v. Sitz*,<sup>34</sup> the Supreme Court also relied on a balancing test to find sobriety checkpoints constitutional. The next section describes the evolution of the automobile exception to the warrant requirement that ultimately enabled the Supreme Court to find the suspicionless stops in *Sitz* “reasonable” under the Fourth Amendment.

### B. *The Automobile Exception*

Automobile stops by law enforcement officials trigger Fourth Amendment protection.<sup>35</sup> However, in light of the mobility and pervasive regulation of motor vehicles, the Supreme Court has determined that motorists on public highways have a reduced expectation of privacy.<sup>36</sup>

The Supreme Court first considered suspicionless automobile seizures in the context of efforts by the border patrol to detect illegal

30. See, e.g., *Florida v. Riley*, 488 U.S. 445, 446 (1989) (holding that an investigation by an officer flying 400 feet over residential property in a helicopter which resulted in discovery of marijuana plants did not constitute a “search” for which a warrant was required under the Fourth Amendment); *California v. Ciraolo*, 476 U.S. 207, 215 (1986) (holding warrantless aerial searches of a fenced-in backyard are not unreasonable).

Two district courts have gone even further to conclude that using an infrared heat-seeking device during an aerial search to detect the presence of growing lights inside a building does not constitute a “search” under the Fourth Amendment. See *United States v. Penny-Feeney*, 773 F. Supp. 220, 225 (D. Haw. 1991), *aff’d* 984 F.2d 1053 (9th Cir. 1993) (finding that defendant had no reasonable expectation of privacy in “abandoned” heat); see also *United States v. Kyllo*, 809 F. Supp. 787, 793 (D. Or. 1992) (same). *But see* *United States v. Casanova*, 835 F. Supp. 702, 708 (N.D.N.Y. 1993) (holding that court need not reach defendant’s argument that prewarrant use of LTD to detect radiation emanating from residence constituted an unreasonable search).

31. See, e.g., *California v. Greenwood*, 486 U.S. 35, 40 (1988) (holding that there is no reasonable expectation of privacy in garbage placed outside in opaque bags for collection by trash collector).

32. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 679 (1989) (holding that suspicionless drug testing was reasonable where Customs employees involved in drug interdiction sought promotions in employment status).

33. As recently as 1975, the Minnesota Supreme Court noted that the “sole” exception to the warrant requirement was the “stop and frisk” described in *Terry*. *State v. McKinley*, 305 Minn. 297, 232 N.W.2d 906 (1975).

34. 496 U.S. 444 (1990).

35. See, e.g., *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976).

36. See *California v. Carney*, 471 U.S. 386, 392-93 (1985).



aliens crossing into the United States.<sup>37</sup> Although initially reluctant to sanction roving stops of motorists absent probable cause,<sup>38</sup> the Court eventually recognized that law enforcement officials had difficulty acquiring probable cause under the circumstances and that they had no other effective means to patrol the border.<sup>39</sup> Consequently, the Court sanctioned roving stops based on reasonable suspicion and justified the holding by balancing the State's interest in preventing the illegal entry of aliens against the "modest" intrusion of a stop and brief questioning.<sup>40</sup>

The Court first upheld suspicionless seizures of motorists in *United States v. Martinez-Fuerte*.<sup>41</sup> *Martinez-Fuerte* held that, even without probable cause or reasonable suspicion, fixed border checkpoints to detect illegal aliens were constitutional.<sup>42</sup> Specifically, the *Martinez-Fuerte* Court upheld suspicionless, warrantless stops of every vehicle that passed through a fixed checkpoint.<sup>43</sup> The Supreme Court distinguished fixed border checkpoints from roving patrols that required reasonable suspicion.<sup>44</sup> Fixed checkpoints, the Court reasoned, would not surprise motorists because they would know about the stop in advance.<sup>45</sup> Moreover, law enforcement officers at fixed checkpoints had less discretion over which cars to stop and where to stop them.<sup>46</sup> The Court rejected the argument that a warrant was required for the location of a checkpoint and instead deferred to the judgment of law en-

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37. See, e.g., *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975) (applying the *Terry* reasonable suspicion standard to automobile stops); *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973).

38. *Almeida-Sanchez*, 413 U.S. at 273 (holding warrantless stops and searches of automobiles by roving border patrols were unconstitutional absent probable cause). In *Almeida-Sanchez*, the Court acknowledged that while a moving automobile could be stopped without a search warrant, probable cause was still required. *Id.* at 269.

39. *Brignoni-Ponce*, 422 U.S. at 881.

40. *Id.* at 879-80. The intrusion was "modest" because the stops only lasted approximately one minute. *Id.* The Court specifically rejected suspicionless stops in *Brignoni-Ponce*. *Id.* at 882. Moreover, the Court required that the scope of any subsequent search not exceed the reason for the stop unless the officer obtained consent or had probable cause. *Id.* at 881-82.

41. 428 U.S. 543 (1976).

42. *Id.* at 560-62.

43. *Id.* at 566-67.

44. *Id.* at 558-59 (citing *Brignoni-Ponce*, 422 U.S. at 882).

45. *Id.* at 559.

46. *Martinez-Fuerte*, 428 U.S. at 559.

forcement officials.<sup>47</sup> As a safeguard, the Court required that the scope of any further detention must be appropriately limited.<sup>48</sup>

The United States Supreme Court considered roving stops once more in *Delaware v. Prouse*.<sup>49</sup> In *Prouse*, the State contended that the stop promoted highway safety.<sup>50</sup> The Court applied a slightly recast balancing test to weigh “the importance of the governmental interest at stake, the minimal intrusion of a brief stop, and the absence of practical alternatives for policing . . . .”<sup>51</sup> The *Prouse* Court concluded that roving stops for the promotion of highway safety violated the Fourth Amendment.<sup>52</sup> The Court noted the absence of empirical evidence that would support a conclusion that roving stops were effective and reasoned that other constitutional means to achieve the goal may have existed.<sup>53</sup>

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47. In *Martinez-Fuerte* the Court distinguished *Camara v. Mun. Court* on the grounds that the case involved the search of a private residence. See *id.* at 564-65 (drawing on *Camara*, 387 U.S. 523 (1967)). In *Camara*, the Court was unwilling to abandon the warrant requirement in administrative searches, even where inspections were governed by statutes and ordinances. *Camara*, 387 U.S. 523, 532-33 (1967). The *Camara* Court reasoned that “broad statutory safeguards are no substitute for individualized review . . . .” *Id.* at 533.

*Martinez-Fuerte*, on the other hand, preferred to give “wide discretion” to the Border Patrol for checkpoint location decisions because the “visible manifestations of the field officers’ authority” minimized the intrusion caused by the stops. 428 U.S. at 562-65. The Court stated that checkpoint locations were administrative decisions that should be left to the Border Patrol. *Id.* at 562 & n.15. The Court in *Martinez-Fuerte* did, however, acknowledge that decisions as to location and method of operation must be reasonable and would be subject to post-stop review. *Id.* at 565-66.

48. *Martinez-Fuerte*, 428 U.S. at 566-67 (citing *Terry*, 392 U.S. at 24-27 and *Brignoni-Ponce*, 422 U.S. at 881-82 (requiring consent and probable cause before further detention is allowed)).

Justice Brennan, joined by Justice Marshall, dissented against this “continuing evisceration of Fourth Amendment protections . . . .” *Martinez-Fuerte*, 428 U.S. at 567 (Brennan & Marshall, J.J., dissenting). Brennan argued that the majority drained the Fourth Amendment of its reasonableness requirement and was at odds with other decisions of the Court, including *Brignoni-Ponce* which was decided only one year earlier. *Id.* at 568.

49. 440 U.S. 648 (1979).

50. *Id.* at 658. A Delaware patrolman randomly stopped a motorist to check the driver’s license and vehicle registration. *Id.* at 650.

51. *Id.* at 655 (citing *Brignoni-Ponce*, 422 U.S. 873, 881 (1975)). Compare *id.* with *Brown v. Texas*, 443 U.S. 47, 51 (1979) (weighing “the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty”).

52. *Prouse*, 440 U.S. at 659.

53. *Id.* at 659-60. Justice Rehnquist wrote the lone dissent from the eight-justice majority opinion. *Id.* at 664. Rehnquist argued that because the majority had no evidence such stops *did not* deter unsafe driving, they had not properly weighed the effectiveness of the stops. *Id.* at 666. He suggested that the majority “would apparently prefer that the State check licenses and vehicle registrations as the wreckage is being towed away.” *Id.*

The *Prouse* majority noted in dicta that the decision did not preclude states from instituting “less intrusive” spot checking mechanisms, such as fixed roadblocks,<sup>54</sup> thus providing support for the Supreme Court to subsequently uphold fixed sobriety checkpoints.

### C. The “Rational Basis” Approach

Responding to the invitation of *Prouse*, the Supreme Court held in *Michigan Department of State Police v. Sitz*<sup>55</sup> that fixed roadblock sobriety checkpoints were constitutional.<sup>56</sup> In balancing the interests involved,<sup>57</sup> the Court for the first time deferred almost exclusively to law enforcement officials regarding the “effectiveness” prong of the analysis.<sup>58</sup> The *Sitz* decision prompted a deluge of unfavorable commentary<sup>59</sup> and has been criticized for substituting a rational basis standard

54. *Id.* at 663.

55. 496 U.S. 444 (1990). *Sitz* was decided by a six-justice majority, with three dissents.

56. *Id.* at 455.

57. The Court cited the balancing analysis applied in *Martinez-Fuerte*, 428 U.S. 543 (1976), and *Brown v. Texas*, 443 U.S. 47 (1979). *Sitz*, 496 U.S. at 452-55.

58. *Sitz*, 496 U.S. at 453-54. Chief Justice Rehnquist’s majority opinion clarified the prong of the *Brown v. Texas* test that requires balancing “the degree to which the seizure advances the public interest.” *Id.* (citing *Brown v. Texas*, 443 U.S. at 51). According to Justice Rehnquist, this inquiry:

[W]as not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger. . . . [F]or purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers.

*Id.*

59. See, e.g., B. Gordon Beckstead, *Michigan’s Attempt at Curbing Drunk Drivers Under The Fourth Amendment: The Constitutionality of Sobriety Checkpoints*, 6 B.Y.U. J. PUB. L. 147, 147 (1992) (arguing that *Sitz* only adds to the “tangled web of confusion” surrounding warrantless searches); Sean F. Farley, *Roadblocks to the Fourth Amendment: Michigan Department of State Police v. Sitz*, 13 WHITTIER L. REV. 571, 572 (1992) (contending that *Sitz* was erroneously decided because “the majority failed to recognize recent cases which required a ‘special government need’ before justifying shedding the protections afforded by the Fourth Amendment”); Troy J. Gilchrist, *Michigan Department of State Police v. Sitz: Placing a Road Block on Individual Freedom*, 12 HAMLINE J. PUB. L. & POL’Y 301, 311 (1991) (suggesting that Minnesota should invoke its own constitution in considering sobriety checkpoints and refuse to uphold them as reasonable); Hickey & Axline, *supra* note 25, at 215 (proposing that attorneys turn to state constitutions to challenge sobriety checkpoints); Jon M. Ripans, *Michigan Department of State Police v. Sitz: Sober Reflections on How the Supreme Court Has Blurred the Law of Suspicionless Seizures*, 25 GA. L. REV. 199, 221 (1990) (indicating that *Sitz* “leaves open troubling questions concerning the Court’s eventual response to the prevalence of drugs in this country: What extreme countermeasures will be warranted when drugs are factored into the *Brown* test?”); Fran Small, *Michigan Department of State Police v. Sitz: Has the Supreme Court Abdicated Its Role as the Protector of the Right to Be Let Alone?*, 26 NEW ENG. L. REV. 583, 608 (1991) (concluding that “[t]he *Sitz* Court has further eroded a cherished protection

of review in place of the stricter scrutiny applied in earlier Fourth Amendment analysis.<sup>60</sup>

The Michigan checkpoint at issue in *Sitz* was set up according to guidelines established by a Sobriety Checkpoint Advisory Committee.<sup>61</sup> Pursuant to these guidelines, police stopped all passing vehicles and detained drivers for closer inspection if they showed signs of intoxication.<sup>62</sup>

The Court applied the *Brown v. Texas* balancing test to the Michigan checkpoint. First, the Supreme Court found that no one could seriously dispute the state's interest in deterring drunk driving.<sup>63</sup> Turning to the second factor, by comparison, the Court viewed the intrusion on motorists as slight.<sup>64</sup> The Court measured the "objective" intrusion by the duration of the stop and the intensity of the investigation.<sup>65</sup> The

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of the Fourth Amendment—the right to be let alone"); Nadine Strossen, Michigan Department of State Police v. *Sitz: A Roadblock to Meaningful Judicial Enforcement of Constitutional Rights*, 42 HASTINGS L.J. 285, 285-87 (1991) (concluding that the *Sitz* Court has "breached the bedrock principle that a law enforcement end cannot justify an unconstitutional means . . ."); and David A. Thatcher, Michigan Department of State Police v. *Sitz: A Sobering New Development for Fourth Amendment Rights*, 20 CAP. U. L. REV. 279, 295-96 (1991) (maintaining that the *Sitz* holding writes the word "reasonable" out of the Fourth Amendment).

60. See Sheldon, *supra* note 17, at 81. Sheldon, a Maine District Court Judge, characterizes the *Sitz* majority's deference to "politically accountable officials" as "radical stuff." *Id.* at 81.

If the Chief Justice intended by his deference to local officials to make the final prong of the *Brown* test little more than a rational-basis test then *Sitz* may be the seminal decision in a line of cases in which the Supreme Court applies the rational-basis test of the Due Process and Equal Protection clauses to the Fourth Amendment—with an inevitable lessening of the judicial scrutiny that is traditionally applied to search-and-seizure issues.

*Id.*; see also Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. R. 442, 475 (1990). In Professor LaFave's opinion "*Sitz* is rather disappointing. It does not reflect a commitment by the Court either to take full account of relevant police guidelines or to submit those guidelines to meaningful judicial review."; accord 104 HARV. L. REV. 129, 267 *Leading Cases: The Supreme Court, 1989 Term* (stating that *Sitz* "marks a radical change" by transferring the reasonableness determination to the political branches, thereby removing the "sole protection of an individual's fourth amendment rights against excessive governmental action").

61. *Sitz*, 496 U.S. at 447.

62. *Id.*

63. *Id.* at 451. Justice Stevens argued in dissent that the drunk driving statistics relied on by the majority were outdated and exaggerated the problem. *Id.* at 467 n.7 (Stevens, J., dissenting). While Justice Stevens agreed that the state has a great interest in deterring drunk driving, he noted that the interest was no greater at the time *Sitz* was decided than it was in earlier cases such as *Prouse*, which refused to sanction suspicionless seizures. *Id.* at 468.

64. *Sitz*, 496 U.S. at 451.

65. *Id.* at 451-52. The average delay for each vehicle stopped at the *Sitz* checkpoint was approximately 25 seconds. *Id.* at 458. Of the 126 vehicles stopped, only two were detained for more intensive scrutiny. *Id.*

Court deemed the objective intrusion to be minimal.<sup>66</sup> The *Sitz* Court then described the “subjective” intrusion of the stop as “the fear and surprise engendered in law-abiding motorists by the nature of the stop.”<sup>67</sup> Because uniformed officers made the stops pursuant to pre-established guidelines, the Court found that this “subjective” intrusion was minimal.<sup>68</sup> Regarding the third prong, the *Sitz* majority reasoned that a 1.6% arrest rate made the Michigan checkpoint sufficiently effective.<sup>69</sup>

In support of its decision, the majority distinguished *Delaware v. Prouse*,<sup>70</sup> where no empirical evidence suggested that random stops promoted highway safety.<sup>71</sup> In *Sitz*, the Court deferred to “politically accountable officials” to choose which particular law enforcement mechanism to use.<sup>72</sup> The *Sitz* majority believed that government officials could determine the most effective option in light of the limited law enforcement resources available.<sup>73</sup>

The *Sitz* dissent<sup>74</sup> argued that the majority both overstated the public interest involved and understated the intrusion.<sup>75</sup> Prior cases required at least some level of suspicion before upholding a stop, even where the intrusion was considered minimal.<sup>76</sup> The dissent also objected that the majority failed to properly consider alternate enforcement mechanisms.<sup>77</sup>

Although Justice Scalia joined the six-to-three *Sitz* majority without comment, in a different context he has criticized balancing tests as tantamount to comparing “whether a particular line is longer than a

66. *Id.* at 451.

67. *Sitz*, 496 U.S. at 452.

68. *Id.* at 453.

69. *Id.* at 455. Expert testimony indicated this was greater than the one percent average achieved in other states that conduct similar sobriety checkpoints. It was also greater than the .12% arrest rate approved in *Martinez-Fuerte*. *Id.* (citing *Martinez-Fuerte*, 428 U.S. at 554).

70. 440 U.S. 648 (1979).

71. *Sitz*, 496 U.S. at 454.

72. *Id.* at 453-54.

73. *Id.*

74. Justices Brennan and Stevens filed dissenting opinions, in which Justice Marshall joined. *Id.* at 456, 460.

75. *Id.* at 456, 462-63.

76. *Sitz*, 496 U.S. at 457 (Brennan, J., dissenting) (citing *Delaware v. Prouse*, 440 U.S. 648, 661 (1979)). “By holding that no level of suspicion is necessary before the police may stop a car for the purpose of preventing drunken driving, the Court potentially subjects the general public to arbitrary or harassing conduct by the police.” *Id.* at 458 (Brennan, J., dissenting).

77. The dissent reminded the majority that the Court approved the *Martinez-Fuerte* checkpoints only because officers had no alternative means to detect illegal aliens. *Id.* at 471-72.

particular rock is heavy.”<sup>78</sup> State courts struggling to apply the *Sitz* standard would likely agree with Justice Scalia’s assessment of balancing tests.

Nonetheless, many state courts have relied on *Sitz* to uphold checkpoints.<sup>79</sup> Other states have applied *Sitz* more narrowly to hold checkpoints unconstitutional.<sup>80</sup> A third group of states, however, has turned to an independent source of civil rights protections—state constitutions.<sup>81</sup> The following section examines the trend toward state constitutional analysis that has resulted from the United States Supreme Court’s vacillation and its retreat from protection of individual autonomy.

### III. STATE CONSTITUTIONS

In 1977, Justice Brennan urged state courts to expand protection of individual liberties under state constitutions.<sup>82</sup> In light of the growing reluctance of federal courts to enforce constitutional protections, Justice Brennan advocated greater reliance on independent state grounds.<sup>83</sup> He argued that federal decisions should not be dispositive

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78. *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988). Justice Scalia made this comment in connection with a Commerce Clause analysis, but the rationale is applicable here as well.

79. *See, e.g.*, *People v. Rister*, 803 P.2d 483 (Colo. 1991) (upholding three minute stops on a road that police reasonably believed drunk drivers had previously used, and where all vehicles were stopped and officers could not stop drivers who turned to avoid the checkpoint); *Howard v. Voshell*, No. 90A-10-001, 1992 WL 179502 (Del. Super. Ct. 1992) (stating that sobriety checkpoints do not per se violate the Fourth Amendment as long as there is no unconstrained exercise of officer discretion); *Christopher v. State*, 413 S.E.2d 236 (Ga. Ct. App. 1991) (upholding sobriety checkpoint, set up solely in response to complaints about a loud party, because the totality of circumstances indicated that checkpoint was “authorized” and defendant was not singled out); *State v. Bolton*, 801 P.2d 98 (N.M. Ct. App. 1990), *cert. denied* 801 P.2d 86 (N.M. 1990) (holding that a license checkpoint roadblock was constitutional and not pretextual, even though it involved both Border Patrol and state police officers, and officers asked permission to search all vehicles detained for further inspection); *State v. Everson*, 474 N.W.2d 695 (N.D. 1991) (upholding a drug detection checkpoint conducted under the pretext of a license check because of compelling state interest).

80. *See, e.g.*, *Galberth v. United States*, 590 A.2d 990 (D.C. 1991) (holding that roadblocks were unconstitutional for general law enforcement purposes); *State v. Kingsbury*, No. A-92-403, 1992 WL 211396 (Neb. Ct. App. Sept. 1, 1992) (holding that a narcotics checkpoint was unconstitutional because there was insufficient evidence of effectiveness and because vehicles were stopped selectively at the discretion of officers); *State v. Wagner*, 821 S.W.2d 288 (Tex. Ct. App. 1992) (holding that checkpoints were unconstitutional because of the lack of legislative guidelines); *State v. Sims*, 808 P.2d 141 (Utah 1991) (holding that an “all purpose” checkpoint was unconstitutional because there were no guidelines established by politically accountable officials).

81. *See infra* parts III.A. and III.B. (citing courts that rely on state constitutions).

82. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

83. *Id.* at 495

of state constitutional protections because the Federal Bill of Rights was derived exclusively from state constitutions.<sup>84</sup> Justice Brennan reiterated this position in 1987, responding to the United States Supreme Court's subjugation of individual liberties to the "ever-increasing demands of governmental authority."<sup>85</sup>

Numerous commentators support Justice Brennan's advocacy for state constitutional protection of individual liberties.<sup>86</sup> One prevalent view contends that state constitutions will only be reinvigorated when states develop bodies of law interpreting their own constitutions independently of the federal judiciary.<sup>87</sup>

The following discussion illustrates that, at least in the context of search and seizure analysis, state courts are rising to Justice Brennan's challenge.

### A. Background

Until the 1960s, state constitutions were the sole source of protection of individual rights from encroachment by the state.<sup>88</sup> During the 1960s, the Warren Court incorporated Bill of Rights protections into the Fourteenth Amendment to make these protections applicable to state, as well as federal, action.<sup>89</sup> However, the pendulum of federal protection for individual rights seems to have reached its peak and is now on the downswing. The re-emergence of a federalist<sup>90</sup> philosophy

84. *Id.* at 501-02.

85. Brennan, *supra* note 25, at 16-17. In his 1987 article, Justice Brennan focused on the incorporation of the Federal Bill of Rights into the Fourteenth Amendment so as to apply to encroachment by states as well as by the federal government. *Id.* at 12. Brennan noted, in particular, that the Fourth Amendment "has been most clearly targeted for attack" by the Rehnquist Court. *Id.* at 17.

86. For an excellent article proposing an analytical framework for bringing individual liberties challenges under the Minnesota Constitution, see Melissa Sheridan & Bradford S. Delapena, *Individual Liberties Claims: Promoting a Healthy Constitution for Minnesota*, 19 WM. MITCHELL L. REV. 683 (1993). See also Terrence J. Fleming & Jack Nordby, *The Minnesota Bill of Rights: "Wrapt in the Old Miasmal Mist"*, 7 HAMLINE L. REV. 51 (1984); Jack Nordby, *Thirty-Two Reflections on the Birth, Slumber and Reawakening of the Minnesota Constitution*, 20 WM. MITCHELL L. REV. 245 (1994).

87. Sheridan & Delapena, *supra* note 86, at 706-07; James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 771 (1992) (arguing that state courts have failed to develop state constitutional law despite the voluminous commentary in support of that approach).

88. Sheridan & Delapena, *supra* note 86, at 688-89.

89. See, e.g., Brennan, *supra* note 25, at 12 ("In the years between 1961 and 1969, the Supreme Court interpreted the Fourteenth Amendment to nationalize civil rights, making the great guarantees of life, liberty and property binding on all governments throughout the nation."); accord Sheridan & Delapena, *supra* note 86, at 688-90. Sheridan and Delapena argue that state courts invited this expansion of federal authority by failing to adequately protect defendants under their own constitutions. *Id.*

90. For a discussion of the theory of state judicial independence from federal government, called the "New Federalism," see Gardner, *supra* note 87, at 771.

on the federal bench and an entrenched reluctance to protect individual liberties on the part of the Burger and Rehnquist Courts have caused state courts to resort to their constitutions as the primary source of protection of individual liberties.<sup>91</sup>

### 1. *Why States Rely On State Constitutions*

State courts often find compelling reasons to depart from federal constitutional analysis, which can be characterized in at least six ways.<sup>92</sup> First, and perhaps the most compelling reason for independent analysis, is the fact that state constitutions are historically autonomous, even when dormant.<sup>93</sup> A second basis for independent analysis is the fact that state constitutions frequently guarantee protections using language that is different from that of their federal counterpart.<sup>94</sup> A third justification for recourse to state constitutions is the need to fill gaps in federal analysis under analogous federal provisions.<sup>95</sup> Fourth, state courts can resort to their own constitutions either because of dissatisfaction with vacillating standards and lack of clear guidance from the federal courts or simply because they disagree with the reasoning of the United States Supreme Court on a particular issue.<sup>96</sup> Fifth, state

91. Sheridan & Delapena, *supra* note 86, at 690.

92. See, e.g., *Ascher v. Commissioner of Pub. Safety*, 505 N.W.2d 362, at 367 (Minn. Ct. App. 1993). The *Ascher* court found compelling reasons to focus on the Minnesota Constitution because it was troubled by the *Sitz* Court's substantial departure from "well-established Fourth Amendment analysis." *Id.*

93. Sheridan & Delapena, *supra* note 86, at 689-90, 718-19. Sheridan and Delapena argue that one of the reasons state constitutions atrophied was that federal constitutional law provided more protection than state counterparts. *Id.* at 689-90. See also Fleming & Nordby, *supra* note 87, at 56-57.

94. See, e.g., *State v. Hershberger*, 462 N.W.2d 393, 397 (Minn. 1990) (noting that language in the Minnesota Constitution protecting free exercise of religion "is of a distinctively stronger character than the federal counterpart"). In *State v. Parns*, 523 So. 2d 1293 (La. 1988), the Louisiana Supreme Court found Louisiana's Constitution, like the Oregon and New Hampshire Constitutions, provided expanded protection for individual liberties because it prohibited unreasonable invasions of privacy as well as unreasonable searches and seizures. *Id.* at 1303. "Roadblocks certainly smack of police state measures, and it is doubtful if they could ever pass muster under the Louisiana Constitution." *Id.* (citing *State v. Koppel*, 499 A.2d 977 (N.H. 1985)).

95. Sheridan & Delapena, *supra* note 86, at 721. State courts can invoke this justification where Supreme Court rulings are vague and ambiguous. *Id.* Also, an argument can be made that "open-ended" provisions were intended to be clarified by the states. *Id.* at 722.

96. This rationale is especially valid where the Supreme Court radically diverges from its prior precedent. See Sheridan & Delapena, *supra* note 86, at 717. "State courts are free to disagree with the reasoning underlying the Supreme Court's decision about a particular federal provision. This is especially true in situations where new Supreme Court cases appear to undermine the policies set forth in prior Supreme Court decisions." *Id.* For this very reason, Minnesota independently analyzed the issue of when a person is deemed "seized" by police under the Minnesota Constitution. See *In re Welfare of E.D.J.*, 502 N.W.2d 779 (Minn. 1993).



courts may find that unique local conditions require independent rulings regarding questions of individual liberties.<sup>97</sup> Finally, the case law and statutes of a state can necessitate independent state court analysis.<sup>98</sup>

## 2. *Analysis of State Constitutional Claims*

When ruling on independent state grounds, a court must select an analytical approach. At one end of the spectrum, courts may find the state constitution coextensive with the United States Constitution and rely on federal decisions to resolve issues of constitutionality at the state level.<sup>99</sup> Because federal holdings will continue to dictate the resolution of constitutional questions under this approach, this analytical model is somewhat unsatisfactory to those who advocate the independence and autonomy of state courts.<sup>100</sup>

Consequently, many courts prefer to interpret their state constitutions independently in order to insulate their decisions from federal analysis.<sup>101</sup> As a result, federal precedent<sup>102</sup> and rulings from other

97. Fleming & Nordby, *supra* note 86, at 76. The authors find this “[p]erhaps the most compelling basis for independently interpreting the Minnesota Bill of Rights.” *Id.* A state supreme court will have “superior knowledge of, experience with, and proximity to” controversies that are local in nature. *Id.*

98. Sheridan & Delapena, *supra* note 86, at 718.

99. *See, e.g.,* Hagood v. Town Creek, 628 So. 2d 1057, 1993 WL 333607 (Ala. Crim. App. 1993). In *Hagood* a checkpoint was set up outside the Town Creek Apartments to prevent “trouble,” which was loosely defined as fighting, public drunkenness, and disorderly conduct. *Id.* at 1060. Applying *Sitz*, the Alabama Court of Criminal Appeals found that this checkpoint violated the Fourth Amendment because it was set up for general law enforcement purposes. *Id.* at 1062. However, the court declined to hold checkpoints unconstitutional under the state constitution because the language of the state constitution was “substantially similar” to the Fourth Amendment. *Id.* at 1062, 1063. Moreover, state precedent upholding checkpoints was validated by *Sitz*. *Id.* at 1062.

100. *See* Gardner, *supra* note 87, at 788. Gardner criticizes deference to federal analysis as being confusing, redundant, and often conclusory. *Id.* at 788-93.

101. *See, e.g.,* *People v. Rister*, 803 P.2d 483 (Colo. 1990); *State v. Parmis*, 523 So. 2d 1293 (La. 1988); *Sitz v. Department of State Police*, 506 N.W.2d 209 (Mich. 1993); *State v. Koppel*, 499 A.2d 977 (N.H. 1985); *Pimental v. Department of Transp.*, 561 A.2d 1348 (R.I. 1989); *State v. Sims*, 808 P.2d 141 (Utah Ct. App. 1991).

Sheridan and Delapena strongly urge practitioners and courts to independently analyze state constitutional issues. Sheridan & Delapena, *supra* note 86, at 698-99.

Independence is not a disposition which in any way involves ignoring interpretations of federal law. Rather, independence is a non-deferential stance from which interpretations of federal law will be considered only to the extent that federal law helps to elucidate similar state provisions.

*Id.* at 699.

102. Dissents and prior approaches to a particular constitutional question can be excellent sources of persuasive analysis for state courts to follow, particularly when the Supreme Court has radically diverged from its prior precedent. *See infra* note 109 and accompanying text.

states become persuasive, rather than dispositive, authority.<sup>103</sup> State courts can rely on the language and history of their own constitutions and draw on other sources, such as state statutes, to form their analyses.<sup>104</sup> Prior state case law that interprets the state's constitution also provides guidance.<sup>105</sup>

When relying on state constitutions, state courts often strictly scrutinize sobriety checkpoints in accordance with the federal approach prior to *Sitz*.<sup>106</sup> Whether a state prefers a truly independent or more deferential analysis, a "state court must be sure to make a 'plain statement' that its decision rests on independent and adequate state grounds."<sup>107</sup> In this way, state courts both establish that the analysis was done on independent state grounds and develop an autonomous body of law explaining state constitutions.<sup>108</sup>

### B. Sobriety Checkpoints Under Other State Constitutions

A number of courts have considered the constitutionality of sobriety checkpoints under their state constitutions.<sup>109</sup> Checkpoints were held

103. Sheridan & Delapena, *supra* note 86, at 720. Sheridan and Delapena find other state precedent "at least as persuasive as Supreme Court precedent" because those courts are often enforcing similar rights "unconstrained by federalism concerns." *Id.* at 720.

104. *Id.* at 714, 718.

105. *Id.* at 718.

106. For example, New Hampshire applied a balancing test that required the checkpoint to "significantly" advance the public interest, and also required a showing that no less intrusive means were available. *See State v. Koppel*, 499 A.2d 977, 981 (N.H. 1985); *see also People v. Rister*, 803 P.2d 483, 490 (Colo. 1990) (holding that checkpoints must "reasonably advance" a state interest); *State v. Parns*, 523 So. 2d 1293, 1303 (La. 1988) (emphasizing the greater protection afforded individuals under the Louisiana Constitution than that found in the federal constitution); *Pimental v. Department of Transp.*, 561 A.2d 1348, 1350 (R.I. 1989) (recognizing the right and power of state courts to impose higher standards on searches and seizures under state constitutions); *State v. Sims*, 808 P.2d 141, 149 (Utah Ct. App. 1991) (holding that any suspicionless investigatory motor vehicle roadblock, conducted without legislative authorization, is per se unconstitutional under the Utah constitution).

107. Sheridan & Delapena, *supra* note 86, at 700 (citing *Michigan v. Long*, 463 U.S. 1032, 1041 (1983) (requiring state courts to make a plain statement when using federal law as an interpretive aid)).

108. *Id.* at 706.

109. *See, e.g., Rister*, 803 P.2d 483 (holding checkpoint constitutional); *State v. Henderson*, 756 P.2d 1057 (Idaho 1988) (holding that a checkpoint was unconstitutional absent legislative authority); *State v. Church*, 538 So. 2d 993 (La. 1989) (holding that a checkpoint without reasonable suspicion or probable cause violated state constitution); *Sitz v. Department of State Police*, 506 N.W.2d 209 (Mich. 1993) (holding, upon remand from the Supreme Court (496 U.S. 444) and the Michigan Court of Appeals (485 N.W.2d 135) that highway sobriety checkpoints violate the Michigan Constitution); *State v. Kingsbury*, No. A-92-403, 1992 WL 211396 (Neb. Ct. App. 1992) (holding that a narcotic checkpoint was unconstitutional under both state and federal constitutions); *Koppel*, 499 A.2d 977 (finding insufficient evidence of public benefit to uphold check-

unconstitutional in the majority of states.<sup>110</sup> Some state courts have required legislative authority before upholding checkpoints.<sup>111</sup> Hawaii, North Carolina and Utah, for example, have enacted statutes to regulate the conduct of sobriety checkpoints.<sup>112</sup>

A closer look at the rationales articulated by specific state courts most effectively illustrates the independent approach each has taken. In Rhode Island, for example, the historical underpinnings of the state constitution provided the basis for courts to afford broader search and seizure protection. Rhode Island courts rejected *Sitz* because it would

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points under state constitution); *People v. Rocket*, 594 N.Y.S.2d 568 (N.Y. Just. Ct. 1992) (holding that DWI checkpoints are authorized under state constitution); *State v. Blackburn*, 620 N.E.2d 319 (Mun. Ct. Clark County, Ohio 1993) (holding that checkpoint violated both federal and state constitution); *Nelson v. Lane County*, 743 P.2d 692 (Or. 1987) (holding that checkpoints were invalid absent statutory authorization and specific guidelines); *Commonwealth v. Fioretti*, 538 A.2d 570 (Pa. Super. Ct. 1988) (upholding checkpoints conducted pursuant to statute); *Pimental*, 561 A.2d 1348 (holding that checkpoints violate reasonable suspicion and probable cause requirements of state constitution); *State v. Wagner*, 821 S.W.2d 288 (Tex. Ct. App. 1991) (holding checkpoint unconstitutional under both state and federal constitutions because of no administrative scheme); *Sims*, 808 P.2d 141 (holding suspicionless stops without legislative authorization per se unconstitutional under state constitution); *City of Seattle v. Mesiani*, 755 P.2d 775 (Wash. 1988) (holding that suspicionless stops violate state constitution); see also Harry C. Martin, *The State as a "Font of Individual Liberties": North Carolina Accepts the Challenge*, 70 N.C. L. REV. 1749 (1992); James W. Talbot, *Rethinking Civil Liberties Under the Washington State Constitution*, 66 WASH. L. REV. 1099 (1991).

110. Courts in the following states have found checkpoints to be unconstitutional under their state constitutions: Idaho (*Henderson*, 756 P.2d 1057); Louisiana (*Church*, 538 So. 2d 993); Michigan (*Sitz*, 506 N.W.2d 209); Ohio (*Blackburn*, 620 N.E.2d 319); Nebraska (*Kingsbury*, No. A-92-503, 1992 WL 211396), cert. denied, 113 S. Ct. 2331 (1993); New Hampshire (*Koppel*, 499 A.2d 977); Oregon (*Nelson*, 743 P.2d 692); Rhode Island (*Pimental*, 561 A.2d 1348); Texas (*Wagner*, 821 S.W.2d 288), review refused, (Tex. Feb. 26, 1992); Utah (*Sims*, 808 P.2d 141); Washington (*Mesiani*, 755 P.2d 775). But see Opinion of the Justices, 509 A.2d 744 (N.H. 1986) (finding that proposed checkpoint legislation, if enacted, would comport with state precedent holding checkpoints unconstitutional); *State v. Holt*, 852 S.W.2d 47 (Tex. Ct. App. 1993) (holding that statewide sobriety checkpoint is not automatically arbitrary because of absence of legislative development plan); *State v. Hubacek*, 840 S.W.2d 751 (Tex. Ct. App. 1992) (holding whether sobriety checkpoint violates state constitution is to be determined by reasonableness standard under the circumstances).

111. States requiring legislative authority include: Florida (*Jones v. State*, 459 So. 2d 1068 (Fla. Dist. Ct. App. 1984)); Idaho (*Henderson*, 756 P.2d at 1061); Oregon (*Nelson*, 743 P.2d at 696); Pennsylvania (*Fioretti*, 538 A.2d at 573); and Utah (*Sims*, 808 P.2d at 145).

In New Hampshire, after the state supreme court held that sobriety checkpoints were unconstitutional, the legislature proposed a bill that would require a warrant before conducting a checkpoint. See, e.g., Opinion of the Justices, 509 A.2d 744 (N.H. 1986). The New Hampshire Supreme Court found that the proposed legislation would be constitutional under the state constitution. *Id.* at 744. As of this writing, however, this legislation has not passed.

112. See HAW. REV. STAT. §§ 286-162.5 to .6 (1992); N.C. GEN. STAT. § 20-16.3A (1992); UTAH CODE ANN. § 77-23-104 (Supp. 1993).

“shock and offend” the framers of Rhode Island’s constitution if search and seizure protection was compromised in “the interest of efficient law enforcement.”<sup>113</sup> Essentially, sobriety checkpoints are “too high a price” to pay for any presumed deterrent effect.<sup>114</sup> Instead, Rhode Island prefers to rely on other means to deal with the drunk driving problem.<sup>115</sup>

In Utah, an appellate court focused on state precedent and unique local conditions to require legislative authorization as a prerequisite to sobriety checkpoints and suggested that such authorization should not be forthcoming.<sup>116</sup> The Utah court rejected checkpoints because state precedent favored a warrant approach to automobile searches.<sup>117</sup> Moreover, Utah’s western lifestyle “promotes a greater expectation of privacy.”<sup>118</sup>

Michigan considered sobriety checkpoints independently under its state constitution because it disagreed with the federal rational basis approach.<sup>119</sup> In *Sitz v. Department of State Police*,<sup>120</sup> on remand from the United States Supreme Court, the Michigan Supreme Court applied state constitutional precedent to interpret the Michigan Constitution. The court concluded that “[s]uspicionless criminal investigatory seizures, and extreme deference to the judgments of politically accountable officials is . . . contrary to Michigan constitutional precedent.”<sup>121</sup> With this rejection of the federal approach, Michigan joined

113. *Pimental*, 561 A.2d at 1352. The court warned in this regard that “the tide of law enforcement interest could overwhelm the right to privacy.” *Id.* See also Catherine M. Durning, *Constitutional Law—Supreme Court Refuses to Encroach Upon Constitutional Rights—Drunk Driving Roadblocks Unconstitutional in Rhode Island—Pimental v. Department of Transportation*, 561 A.2d 1348 (R.I. 1989), 24 SUFFOLK U. L. REV. 439 (1990).

114. *Pimental*, 561 A.2d at 1352.

115. *Id.*

116. *State v. Sims*, 808 P.2d 141, 148-50 (Utah Ct. App. 1991) (holding that suspicionless stops without legislative authorization are per se unconstitutional under the state constitution). See also Ronald J. Chleboski, Jr., *Application of Fourth Amendment Search and Seizure Principles to Avoidance of Police Roadblocks (Recent Developments in Utah Law)*, UTAH L. REV. 137 (Winter 1991).

117. *Sims*, 808 P.2d at 148-50. The *Sims* court also asserted that its “uncritical treatment” of the *Sitz* analysis as applied to the Fourth Amendment does not mean that it approves, only that it defers, to the “preeminent position of the United States Supreme Court in construing the United States Constitution.” *Id.* at 147 n.12.

118. *Id.* at 150 n.18. The Utah Supreme Court has effectively declined to review the court of appeals ruling by finding the state constitutional issue moot on appeal. See *State v. Sims*, No. 910218, 1994 WL 236990 at \*1 (Utah May 31, 1994). The court, however, noted the recently enacted state legislation and recognized the court’s power to review the constitutionality of the statute. *Id.* at \*2 n.3 (citing UTAH CODE ANN. § 77-23-104 (Supp. 1993)).

119. See *Sitz v. Department of State Police*, 506 N.W.2d 209 (Mich. 1993) (holding that sobriety checkpoints violated the Michigan Constitution).

120. *Id.*

121. *Id.* at 225.

a growing number of states that have found checkpoints unconstitutional under state constitution analyses.

The following section establishes the foundation for an independent analysis of sobriety checkpoints under the Minnesota Constitution and summarizes Minnesota appellate court decisions addressing the constitutionality of sobriety checkpoints.

### C. *Sobriety Checkpoints Under the Minnesota Constitution*

The Constitution of the State of Minnesota was ratified on October 13, 1857<sup>122</sup> and was revised on November 5, 1974.<sup>123</sup> Article I, section 10 governs search and seizure and exists today as it did in its original 1857 form.<sup>124</sup> With only slight variations in punctuation, this provision is identical to the Fourth Amendment of the United States Constitution.<sup>125</sup> Minnesota included search and seizure protections in response to the general warrants that the English government used "to

122. Election Div., Minn. Secretary of State, THE MINNESOTA LEGISLATIVE MANUAL 1993-1994, 20 (1993). The vote was 30,055 to 571 in favor of acceptance. *Id.* Acrimony between Minnesota Republicans and Democrats tracks back to the Constitutional Convention of June 1, 1857. See MINN. STAT. ANN., Julius E. Haycraft, *Territorial Existence and Constitutional Statehood of Minnesota*, MINN. CONST. art. I, MINN. STAT. ANN. Vol. 1 at 151 (West 1976). Animosity over the slavery issue was so pronounced that the Republicans and Democrats held separate sessions and refused to sign the same constitution. *Id.* at 152. As a result, Minnesota ratified two separate, handwritten versions of a constitution. *Id.* However, they were substantially the same and were always equally obeyed and enforced. *Id.* Copies of both original handwritten constitutions are reproduced at the beginning of Minnesota's annotated statutes. *Id.* at 161. See also Nordby, *supra* note 86; John Simonett, *An Introduction to Essays on the Minnesota Constitution*, 20 WM. MITCHELL L. REV. 227 (1994).

123. Election Div., Minn. Secretary of State, THE MINNESOTA LEGISLATIVE MANUAL, 1993-1994, 20 (1993). A constitutional study commission reviewed the Minnesota Constitution for two years beginning in 1971. *Id.* The commission recommended restructuring and "rewriting [the constitution] in modern language." *Id.* Subsequent changes did not alter the constitution's meaning, and "the original document remains the final authority." *Id.* See also Fred Morrison, , 20 WILLIAM MITCHELL L. REV. — (1994).

124. *Id.*

125. Article I, § 10 of the Minnesota Constitution 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, and particularly describing the place to be searched and the person or things to be seized.

MINN. CONST. art. I, § 10. Compare *id.* with *supra* note 10 (reproducing the language of the Fourth Amendment).

Commentators note with interest that the Minnesota Bill of Rights is contained within article I of the Minnesota Constitution, in a position of priority over the articles establishing state governmental powers. By contrast, the United States Constitution, ratified in 1787, was not amended to include the Bill of Rights until 1791. COMMISSION ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION, THE CONSTITUTION OF THE UNITED STATES at Forward (1988).

search any person and any place they pleased, for the purpose of discovering violations of the law.”<sup>126</sup>

Minnesota courts have a long history of interpreting article I, section 10. As early as 1905, the Minnesota Supreme Court considered a challenge to a grand jury subpoena of bank records from a bankruptcy trustee under the search and seizure provision of the Minnesota Constitution.<sup>127</sup> In 1911, a defendant, charged with putting scrap iron in standing grain shocks to damage his neighbor’s threshing machine, invoked the Minnesota Constitution to suppress a warrantless search of his property for scrap iron.<sup>128</sup> Throughout this century, Minnesota courts have continued to rely on and independently interpret article I, section 10.<sup>129</sup>

Consistent with these holdings, the Minnesota Supreme Court recognizes that it may grant greater protection under the Minnesota Constitution than the United States Supreme Court grants under the Federal Constitution.<sup>130</sup> Moreover, the Minnesota Supreme Court has

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126. *State v. Pluth*, 157 Minn. 145, 149-50, 195 N.W. 789, 791 (Minn. 1923); *see also State v. Blackburn*, 620 N.E.2d 319, 323 (Mun. Ct. Clark Cty., Ohio 1993) (noting that the Ohio Constitution provides that general warrants “shall not be granted”).

127. *State v. Strait*, 94 Minn. 384, 102 N.W. 913 (1905). Defendants were indicted for accepting deposits while their bank was “unsafe and insolvent.” *Id.* The *Strait* court relied on a United States Supreme Court decision to interpret the Minnesota Constitution only because “this is as far, upon investigation, as we are able to discover an interpretation of these safeguards of our American jurisprudence which protects private papers from search or seizure . . . .” *Id.* (relying on *Boyd v. United States*, 116 U.S. 616 (1886)).

128. *State v. Rogne*, 115 Minn. 204, 132 N.W. 5 (1911). The court’s analysis is interesting. Applying Minnesota precedent, the court concluded that there was no constitutional violation because the defendant was neither requested nor required to give evidence against himself. *Id.* Rather, the court determined that the police officers “found” evidence on the defendant’s premises. *Id.* The defendant’s constitutional rights were not violated by the use of the illegally seized evidence in court because the defendant was not “compelled to give evidence against himself.” *Id.* The exclusionary rule had yet to be promulgated.

129. *See, e.g., In re Welfare of E.D.J.*, 502 N.W.2d 779, 783 (Minn. 1993) (analyzing independently whether a fleeing defendant is seized under the Minnesota Constitution); *O’Connor v. Johnson*, 287 N.W.2d 400, 402, 405 (Minn. 1979) (analyzing, under both federal and state constitutions, a search warrant authorizing search of an attorney’s files for evidence of client wrongdoing); *State v. McKinley*, 305 Minn. 297, 232 N.W.2d 906, (1975) (applying both federal case law and state statutory and case law to interpret article I, § 10 as applied to a suspicionless automobile search); *State v. Pluth*, 157 Minn. 145, 149, 195 N.W. 789, 790 (1923) (applying article I, § 10 to a warrantless automobile search which uncovered six one-gallon jugs of intoxicating liquor); *McSherry v. Heimer*, 132 Minn. 260, 261, 156 N.W. 130, 131 (1916) (relying on precedent set by Minnesota and other state courts when applying article I, § 10 to a trespass action against an officer executing a search warrant on grounds that the warrant affidavit lacked particularity).

130. *State v. Fuller*, 374 N.W.2d 722, 726 (Minn. 1985). *But cf. State v. Gray*, 413 N.W.2d 107, 112 (Minn. 1987) (holding the fundamental right to privacy under the state constitution does not encompass a right to engage in sodomy with a prostitute).

stated that, when analyzing fundamental rights under the Minnesota Constitution, it is not bound by federal holdings.<sup>131</sup>

Recently, the Minnesota Supreme Court independently analyzed search and seizure protection in *In re Welfare of E.D.J.*<sup>132</sup> The court decided the matter independently because of the recent “sharp departure” of the United States Supreme Court from the “reasonable person under the totality of the circumstances” standard previously used to determine whether an individual was considered seized.<sup>133</sup> In *California v. Hodari D.*,<sup>134</sup> the United States Supreme Court amended this standard to require actual restraint by the police.<sup>135</sup> Despite the inclination to “invariably turn [ ] in the first instance” to federal law to answer such questions, the Minnesota court identified three reasons for not doing so in this particular case.<sup>136</sup> First, Minnesota courts have considerable experience in applying the prior standard.<sup>137</sup> Next, the court found the federal court’s approach unpersuasive.<sup>138</sup> Finally, the court found no need to depart from the prior standard.<sup>139</sup>

Despite this well-established history of independent search and seizure analysis, the Minnesota Supreme Court has only recently

131. *Gray*, 413 N.W.2d at 111; see also, John M. Stuart, *Introduction to the Minnesota Constitutional Law of Criminal Procedure*, 27th ANN. CRIM. JUST. INST. § XVIII (1992). Stuart considers whether the state constitution is a legitimate source of individual rights. He argues that Minnesota case law supports the proposition that federal constitutional law merely sets minimum standards for individual rights. *Id.* at 1 (citing *In Re Estate of Turner*, 391 N.W.2d 767 (Minn. 1986)). Stuart concludes that, in the area of state criminal justice, the Minnesota Constitution is not dead, but is only sleeping. *Id.* at 4.

132. 502 N.W.2d 779, 783 (Minn. 1993) (holding that the test for “seizure” under the Minnesota Constitution is whether a reasonable person would conclude he or she is not free to leave). Compare *id.* with *State v. Sorenson*, 441 N.W.2d 455, 458 (Minn. 1989) (upholding the federal open fields doctrine, which permits the warrantless search of private land).

133. *In re E.D.J.*, 502 N.W.2d at 780.

134. 499 U.S. 621 (1991).

135. *Id.*

136. *In re E.D.J.*, 502 N.W.2d at 781.

137. *Id.* at 782.

138. The Minnesota court viewed *Hodari D.* as requiring the court first to find that the prior reasonable person standard is met, and, second, to find that the police used physical force or asserted authority to cause the person to submit. *Id.* at 783. The court stated:

Were we persuaded that the additional level of analysis is justified, we would not hesitate to follow the United States Supreme Court’s lead and interpret the identical provision of our state constitution accordingly. However, as we said earlier, we are not persuaded by the majority opinion in *Hodari D.*, and we are persuaded that there is no need to depart from the pre-*Hodari D.* approach.

*Id.*

139. *Id.* at 781. The court noted that Professor LaFave criticized the change by the United States Supreme Court in *Hodari D.* *Id.* at 783 (citing Wayne R. LaFave, “Seizures” *Topology: Classifying Detentions of the Person to Resolve Warrant, Grounds, and Search Issues*, 17 U. MICH. J.L. REF. 417, 424-25 (1984)).

agreed to address the validity of sobriety checkpoints under the Minnesota Constitution.<sup>140</sup> Previous Minnesota appellate court analyses of checkpoints have followed the shifting standards articulated by the United States Supreme Court.<sup>141</sup> For example, the appellate court followed federal precedent in *State v. Larson*<sup>142</sup> to strike down a “stop when safe”<sup>143</sup> checkpoint.<sup>144</sup> The court reasoned that a checkpoint set up informally by a field supervisor, whose only instructions were to stop vehicles when it could be done safely,<sup>145</sup> lacked the specific supervisory instructions or guidelines required by *Sitz*.<sup>146</sup> Minnesota appellate courts have even deferred to the federal standard when faced with a direct state constitutional argument.<sup>147</sup>

Minnesota is poised to break free of any prior deference it paid to federal sobriety checkpoint analysis. In recent decisions, two different Minnesota appellate court panels considered applying independent analysis under the state constitution, with conflicting results.

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140. See, e.g., *Ascher v. Commissioner of Pub. Safety*, 505 N.W.2d 362, 366 (Minn. Ct. App. 1993), review granted (Oct. 28, 1993); *Gray v. Commissioner of Pub. Safety*, 505 N.W.2d 357, 361 (Minn. Ct. App. 1993), review granted (Oct. 28, 1993).

141. See, e.g., *State v. Larson*, 485 N.W.2d 571, 572 (Minn. Ct. App. 1992); *Chock v. Commissioner of Pub. Safety*, 458 N.W.2d 692, 693 (Minn. Ct. App. 1990); *State v. Muzik*, 379 N.W.2d 599, 601 (Minn. Ct. App. 1985).

142. 485 N.W.2d 571 (Minn. Ct. App. 1992).

143. North Dakota upheld a “stop when safe” checkpoint on the grounds that the stop was sufficiently systematic since it complied with state highway patrol policy and thus limited the unbridled discretion of field officers. *State v. Wetzel*, 456 N.W.2d 115, 120-21 (N.D. 1990). The *Larson* court expressly rejected this holding. *Larson*, 485 N.W.2d at 573.

144. *Larson*, 485 N.W.2d at 572-73 (citing *Brown v. Texas*, 443 U.S. 47 (1979); and *Delaware v. Prouse*, 440 U.S. 648 (1979)).

145. *Larson*, 485 N.W.2d at 572. Specifically, “troopers would pull over and check the ‘next clear vehicle that we could pull in without causing a traffic hazard.’” *Id.* (quoting from the testimony of Trooper Jacqueline Sucha).

146. *Id.* at 573. The court was looking for “specific guidelines limiting discretion.” *Id.*

147. See *Chock v. Commissioner of Pub. Safety*, 458 N.W.2d 692, 694 (Minn. Ct. App. 1990) (upholding sobriety checkpoint conducted pursuant to guidelines). The *Chock* court considered for the first time whether Minnesota could find independent state grounds to rule that sobriety checkpoints were unconstitutional absent reasonable suspicion. *Id.* at 694. The court did not address this issue other than to say that the legislature was free to set guidelines limiting sobriety checkpoints but, absent such legislation, the court would follow the United States Supreme Court. *Id.*

In an unpublished opinion written shortly after *Chock*, the appellate court again declined to rule on this issue, deferring to the Minnesota Supreme Court’s power to declare broader liberty interests under the state constitution. See *Sanders v. Commissioner of Pub. Safety*, Nos. C1-89-2108, C3-90-26, 1990 WL 128305, at \*2 (Minn. Ct. App. 1990), review denied (Oct. 25, 1990).



In *Ascher v. Commissioner of Public Safety*,<sup>148</sup> the Minnesota Court of Appeals held that a wholesale, suspicionless seizure violated article I, section 10 of the Minnesota Constitution.<sup>149</sup> The court first applied the federal standard to find that the checkpoint violated the Fourth Amendment because representatives of the media were allowed to film the stops.<sup>150</sup> The court also independently analyzed the checkpoint under article I, section 10 of the Minnesota Constitution. The “televised police inspections” contravened “the Minnesota conception of ordered liberty.”<sup>151</sup> The court rejected the United States Supreme Court’s balancing of the invasiveness and effectiveness prongs of the test in *Sitz* because it “departed substantially from well-established Fourth Amendment analysis.”<sup>152</sup> In addition, the *Ascher* decision likened the televised checkpoint inspections to the use of stocks in colonial times.<sup>153</sup>

In *Gray v. Commissioner of Public Safety*,<sup>154</sup> issued on the same day, a different appellate court panel took a contrary position to find no compelling reasons to consider sobriety checkpoints independently under state law.<sup>155</sup> The court, stating that Minnesota courts had followed federal precedent in prior checkpoint cases, found “no compelling reasons that require . . . diverge[nce] from the Supreme Court’s decision in *Sitz* . . . .”<sup>156</sup>

The following part recommends that the *Ascher-Gray* split be resolved by adopting a strict balancing test to determine the validity of sobriety checkpoints under the Minnesota Constitution. If adopted, this strict test would apply to the checkpoint guidelines established by the Minnesota State Patrol. Under the proposed balancing test, these checkpoint guidelines likely would be unconstitutional. Minnesota should

148. 505 N.W.2d 362 (Minn. Ct. App. 1993), *review granted* (Oct. 28, 1993). In *Ascher*, an individual was stopped at a sobriety checkpoint where television media were both invited and present. *Id.* at 363.

149. *Id.* at 370.

150. *Id.* at 364-66.

151. *Id.* at 369.

152. *Id.* at 367. Instead, the court relied on Justice Steven’s dissent in *Sitz* and on *Delaware v. Prouse* and *State v. Muzik* to analyze whether there were more effective means to deal with the problem of drunk driving than sobriety checkpoints. *Id.* at 367-68 (citing *Sitz*, 496 U.S. at 473; *Delaware v. Prouse*, 440 U.S. 648, 657 (1979); and *State v. Muzik*, 379 N.W.2d 599, 603-04 (Minn. Ct. App. 1985)).

153. *Ascher*, 505 N.W.2d at 369. As the court noted, stocks were used “to ridicule and make spectacles of those citizens who have offended community standards of behavior.” *Id.*

154. 505 N.W.2d 357 (Minn. Ct. App. 1993), *review granted* (Oct. 28, 1993).

155. *Id.* at 362. Appellants urged the court to adopt the balancing standard set out in *Camara v. Municipal Court*, 387 U.S. 523, 535 (1967). *Id.*

156. *Id.* (citing *Larson*, 485 N.W.2d at 572-73; *Chock*, 458 N.W.2d at 693-94). The court thus rejected appellant’s suggestion that the Court follow the standards set out in *Camara*. *Id.*

align itself with the growing number of states that rely on alternative law enforcement techniques to deal with the problems associated with drunk driving.

#### IV. ANALYSIS AND RECOMMENDATIONS

##### A. *Search and Seizure Protection Should Be Independently Analyzed Under the Minnesota Constitution*

Minnesota should decide the constitutionality of sobriety checkpoints independently under the state constitution for several reasons. First, throughout the state's history, the Minnesota Constitution has been considered autonomous. Minnesota has applied article I, section 10 to search and seizure challenges since the early part of this century.<sup>157</sup> In a prohibition-era case, *State v. Pluth*,<sup>158</sup> the Minnesota Supreme Court held that under the Minnesota Constitution police officers needed a search warrant to search an automobile for intoxicating liquor after making a suspicionless stop.<sup>159</sup> With this tradition in mind, the Minnesota Supreme Court must approach the sobriety checkpoint issue knowing that the court need not rely on federal constitutional analysis.

Second, Minnesota has a unique interest in controlling its own criminal laws and local law enforcement activities.<sup>160</sup> Exercise of police powers is traditionally a function of states.<sup>161</sup> Further, highway safety is pervasively regulated by state statute in Minnesota.<sup>162</sup> As a result, Minnesota continually refines and revises its drunk driving laws to make them more effective.<sup>163</sup> For example, in 1992, laws were amended to

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157. See *supra* notes 119, 127-29 and accompanying text.

158. 157 Minn. 145, 195 N.W. 789 (1923).

159. 157 Minn. at 151-52, 195 N.W.2d 791.

160. See, e.g., *State ex rel. Rasmussen v. Tahash*, 272 Minn. 539, 553-55, 141 N.W.2d 3, 13-14 (1965) (establishing procedures for pretrial suppression hearings where search and seizure challenges are raised). *Rasmussen* established procedures to facilitate resolution of constitutional problems at the state trial court level. *Id.* at 552-54, 141 N.W.2d at 12-13. The court recognized that trial courts need to efficiently administer the criminal law in compliance with the growth in federal decisions "giving greater viability to Federal constitutional rights." *Id.* *Rasmussen* illustrates the difficulty state courts encounter when enforcing criminal laws in compliance with changing federal standards.

161. See, e.g., *Slaughter-House Cases*, 83 U.S. 36 (16 Wall.) (1873). "Police power" was characterized in the *Slaughter-House Cases* as securing the social order by subordinating private interests to the general interests of the community. *Id.* at 62. The United States Supreme Court thus recognized that states had the power to enact laws regulating the health, safety and welfare of its citizens, including "those which respect turnpike roads." *Id.* at 63 (quoting *Gibbons v. Ogden*, 9 Wheat. 1 (1824)). See also *Katz v. United States*, 389 U.S. 347, 350-51 (1967).

162. See, e.g., MINN. STAT. chs. 160-174A (1992) (regulating highways and roads).

163. In 1988 the legislature added subdivision 3(a) to MINN. STAT. § 169.121 (1988) to impose mandatory minimum penalties on habitual DWI offenders. 1988 MINN. LAWS ch. 408, § 1 (codified as amended at MINN. STAT. § 169.121(3), subd. a (1992)). Like-

impose a one-year license suspension on drivers who refused to take a breath test<sup>164</sup> and to establish a mandatory fifteen-day waiting period before they could obtain a temporary license.<sup>165</sup> Moreover, Minnesota's Department of Public Safety<sup>166</sup> has the statutory authority to establish motor vehicle inspection programs for "unsafe motor vehicles and motor vehicle equipment."<sup>167</sup> Pursuant to this statutory authority, the Minnesota State Patrol has promulgated unpublished guidelines for conducting sobriety checkpoints.<sup>168</sup>

Thus, Minnesota courts should independently review checkpoints because the state's executive and legislative branches already extensively regulate this area of the law.<sup>169</sup> Presumably, Minnesota courts, applying the Minnesota Constitution, are in a better position than the United State Supreme Court to assure that state policies toward drunk

wise, in 1989, MINN. STAT. § 169.123 was amended to add that a person who refuses testing for intoxication is subject to criminal penalties. 1989 MINN. LAWS ch. 290, art. 10, § 5 (codified as amended at MINN. STAT. § 169.123(2), subd. b(2) (1992)).

164. MINN. STAT. § 169.123(4) (1992). Compare *id.* with *Heddan v. Dirkswager*, 336 N.W.2d 54 (Minn. 1983). When *Heddan* was decided in 1983, test failure resulted in a 90-day license suspension, and test refusal resulted in only a six-month suspension. *Id.* at 60.

165. MINN. STAT. § 171.30(2), subd. a(1) (1992). Compare *id.* with *Heddan v. Dirkswager*, 336 N.W.2d at 60 (stating, "[a] limited license is generally available immediately upon application by a first offender"). See generally *Davis v. Commissioner of Pub. Safety*, 509 N.W.2d 380, 392 (Minn. Ct. App. 1993), review granted, (January 21, 1994) (rejecting a due process challenge to changes in Minnesota's implied consent laws).

The *Davis* court disagreed that police officers need to advise suspects of the consequences of refusing a breath test. *Id.* 386-87. Rather, "the limited right to counsel is the main protection" when an officer invokes the implied consent law. *Id.* at 387. The court likewise rejected defendants' argument that "the implied consent statute has become so punitive and so intertwined with the criminal DWI prosecution that it is now itself a criminal proceeding." *Id.* at 390. *Davis* has been called the court's "most expansive ruling on drunken driving in several years." See Donna Halvorsen, *Police Needn't Fully Advise Drunk Drivers, Court Rules*, STAR TRIB. (Mpls.), Nov. 30, 1993, at 5B.

166. The Department of Public Safety is part of the executive branch of the state government, and the commissioner is appointed by the governor. See Election Div., Minn. Secretary of State, THE MINNESOTA LEGISLATIVE MANUAL 1993-1994, 20 (1993). The department is responsible for law enforcement, traffic safety, liquor control, fire safety, driver and vehicle licensing, emergency management and public safety information. *Id.*

The State Patrol is a subdivision of the Department of Public Safety. The State Patrol is charged to "provide traffic safety and law enforcement on highways and freeways, assist motorists at accidents, and inspect school buses and commercial vehicles." *Id.*

167. MINN. STAT. § 169.771(2) (1992).

168. General Order PO 90-25-001, "Driver/Vehicle Checkpoints," effective Oct. 1, 1990.

169. Fleming and Nordby argue persuasively that, because most criminal prosecutions occur at the state level, independent interpretation of constitutional protections is "perhaps most important and appropriate in the area of criminal procedure." Fleming & Nordby, *supra* note 87, at 74.

driving do not impinge on the reasonable expectations of privacy held by Minnesotans.

Third, Minnesota has one of the lowest drunk driving related traffic fatality rates in the United States.<sup>170</sup> Minnesota's drunk driving statistics, when compared to those of other states, clearly illustrate that there is no uniformity among the states for dealing with drunk drivers. This state has developed its own laws and policies to successfully address the drunk driving problem; it should likewise rule independently on the constitutionality of these mechanisms.

For all of these reasons, sobriety checkpoints should be independently analyzed under the Minnesota Constitution. Minnesota courts are in a unique position to understand and properly balance the needs of Minnesota's citizens and law enforcement agencies.

### *B. Strict Scrutiny Should Be Applied to Search and Seizure Challenges Brought Under the Minnesota Constitution*

Once a state court has decided to consider the validity of state action under its state constitution, it must then select the appropriate analytical model. Sources of alternative analyses include the case law of other states, prior federal case law, federal dissents, and decisions of the particular state's own courts.<sup>171</sup>

Minnesota has a long history of applying the strict scrutiny standard to search and seizure challenges.<sup>172</sup> Although Minnesota courts have applied the *Sitz* balancing test in recent search and seizure analyses,<sup>173</sup>

170. OFFICE OF TRAFFIC SAFETY, MINNESOTA DEPARTMENT OF PUBLIC SAFETY, MINNESOTA MOTOR VEHICLE CRASH FACTS 1992 4 (1992) [hereinafter CRASH FACTS].

171. See *supra* Part III.A.2. (discussing the bases for independent analysis under state constitutions).

172. In *State v. Pluth*, 157 Minn. at 100, 195 N.W. at 791, the Minnesota Supreme Court recognized that the Minnesota Constitution prohibited searches under "general warrants." *Id.* General warrants, which allowed officers to search any person or place they pleased, were used by the English government to both discover violations of the law and to enforce and collect "obnoxious imposts and taxes." *Id.* Search and seizure provisions in the state and federal constitutions were adopted to prohibit these "fishing expeditions" by law enforcement officials. *Id.*

173. Minnesota appellate courts have struck down two sobriety checkpoints relying on *Sitz*. See, e.g., *Ascher*, 505 N.W.2d at 369-70; *State v. Larson*, 485 N.W.2d 571, 572-73 (Minn. Ct. App. 1992) (holding that a "stop when safe" rule violates the Fourth Amendment by giving too much discretion to law enforcement officials).

Minnesota appellate courts also have upheld three checkpoints since *Sitz* was decided. See, e.g., *State v. Wold*, 506 N.W.2d 676, 678 (Minn. Ct. App. 1993) (holding that a sobriety checkpoint does not violate the Fourth Amendment when its location is selected at the administrative level); *Gray*, 505 N.W.2d at 362 (Minn. Ct. App. 1993); *Chock v. Commissioner of Pub. Safety*, 458 N.W.2d 692, 694 (Minn. Ct. App. 1990) (holding that a sobriety checkpoint conducted pursuant to guidelines did not violate the Fourth Amendment).

decisions prior to *Sitz* relied on a stricter approach.<sup>174</sup> Consequently, the analysis for the strict balancing test in suspicionless seizures has already been developed by both the federal and Minnesota courts. Hence, the approach is ripe for adoption—or, more appropriately, resurrection—by the Minnesota Supreme Court under the state constitution.

Minnesota courts should apply a test that weighs the gravity of the public concern,<sup>175</sup> the severity of the interference with individual liberty,<sup>176</sup> and the productivity of the checkpoint against the intrusion.<sup>177</sup> In analyzing the third factor, the court should consider whether alternative, less intrusive mechanisms are available to achieve the same goal.<sup>178</sup> Moreover, courts should consider the substantial risk that the

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174. *O'Connor v. Johnson*, 287 N.W.2d 400 (Minn. 1979) (holding that search of an attorney's office pursuant to a warrant violated article I, § 10, in spite of contrary federal precedent, because the Minnesota Constitution provides greater protection); *State v. Pluth*, 157 Minn. 145, 195 N.W. 789 (Minn. 1923) (holding that an officer must have cause sufficient to justify a warrant before conducting a warrantless search). However, Minnesota courts did not require that relevant, illegally seized evidence must be excluded at trial. *Pluth*, 157 Minn. at 153-54, 195 N.W. at 792-93; *State v. Rogne*, 115 Minn. 204, 132 N.W. 5 (1911); *State v. Strait*, 94 Minn. 384, 102 N.W. 913 (1905).

Nevertheless, in more recent analyses, Minnesota courts have applied the exclusionary rule more rigorously than the federal courts. See, e.g., *State v. Albrecht*, 465 N.W.2d 107, 109 (Minn. Ct. App. 1991) (holding that the federal "good faith exception" does not apply under the Minnesota Constitution); *State v. McCloskey*, 453 N.W.2d 700, 701 n.1 (Minn. 1990) (refusing to address the federal "good faith" exception to the exclusionary rule where officers relied on a warrant).

175. *Brown v. Texas*, 443 U.S. 47, 50-51 (1979).

176. *Id.*; see also *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990) (Stevens, J., dissenting). Courts should keep in mind when evaluating the intrusiveness of sobriety checkpoints that checkpoints are "usually operated at night at an unannounced location. Surprise is crucial to [their] method." *Id.* at 460.

177. *Prouse*, 440 U.S. at 659.

178. *State v. Muzik*, 379 N.W.2d 599, 604 (Minn. Ct. App. 1985) ("The State failed to produce any evidence which demonstrated either the need for the more intrusive method or the superiority of checkpoints."); see also *United States v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976) (noting that it was "impractical" to identify illegal aliens based on reasonable suspicion while traveling in vehicles on inland routes).

See also Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173 (1988). Strossen notes that the Supreme Court already requires this element in balancing tests applied to claims involving freedom of speech and association, free exercise of religion, right to privacy, and procedural due process rights. *Id.* at 1210. Strossen concludes that "the least intrusive alternative requirement is a logically necessary element of any reasonableness standard," including reasonableness under Fourth Amendment balancing. *Id.* at 1238-39. Strossen argues that even if alternative means are less effective, "logic still dictates that the decreased effectiveness be weighed against the increased protection of individual privacy and freedom." *Id.* Elevating law enforcement efficiency over the protection of individual rights "invert[s] the proper relationship between governmental and individual interests embodied in the Bill of Rights." *Id.*

scope of suspicionless searches and seizures might expand beyond their initial justification.<sup>179</sup>

The following part applies the strict scrutiny standard to the checkpoints conducted in Minnesota pursuant to the guidelines established by the State Patrol.

### C. *Applying Strict Scrutiny to Sobriety Checkpoints Conducted in Minnesota*

Prior to *Ascher*, which held that sobriety checkpoints were unconstitutional under state law,<sup>180</sup> Minnesota law enforcement officials conducted checkpoints pursuant to guidelines promulgated by the State Patrol.<sup>181</sup>

#### 1. *The Minnesota State Patrol Guidelines*

The Minnesota State Patrol has promulgated unpublished guidelines for conducting sobriety checkpoints.<sup>182</sup> The State Patrol established the sobriety checkpoint guidelines to promote “the safety of those using the public highways” and to deter “the unsafe operation of motor vehicles upon the highways of the State of Minnesota.”<sup>183</sup> The guidelines purport to “identify persons who are operating a motor vehicle with defective equipment, without valid driver’s licenses and/or operating while under the influence of alcohol or drugs.”<sup>184</sup>

179. *Terry v. Ohio*, 392 U.S. 1, 19 (1968). In *Terry*, the Court reasoned:

The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.

*Id.* at 29. See also *Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975) (requiring that the scope of any subsequent search does not exceed the reason for the stop unless the officer obtained consent or had probable cause).

180. Following the *Ascher* decision, sobriety checkpoints were discontinued. See, e.g., *More Troopers to Patrol Roads This Weekend*, ST. PAUL PIONEER PRESS DISPATCH, Sept. 3, 1993, at 2B (announcing that 20% more officers will be patrolling the roads “in lieu of sobriety checkpoints, whose constitutionality has been questioned”); *Labor Day Weekend DWI Roadblocks Canceled After Conflicting Court Rulings*, ST. PAUL PIONEER PRESS DISPATCH, Sept. 1, 1993, at 2B (“Instead of checkpoints, officers will be assigned to roving patrols across the state.”)

181. See, e.g., Jill Hodges, *Drivers on Drugs are New Target*, STAR TRIB. (Mpls.), Aug. 24, 1992, at 1A (reporting from a checkpoint on July 30, 1992 at 7:00 to 11:00 p.m. where “drug recognition experts” detained 650 automobiles resulting in seven citations for possession of marijuana, but no DUI charges); Tim Nelson, *St. Paul Sobriety Checkpoint Nets 20 Drivers Who Weren’t*, ST. PAUL PIONEER PRESS DISPATCH, Sept. 20, 1992, at 4B; *Patrol on Lookout This 4th*, ST. PAUL PIONEER PRESS DISPATCH, July 3, 1992, at 4B (announcing that state troopers will work 105 shifts on seatbelt and speed limit enforcement and conduct several sobriety checkpoints across the state).

182. General Order PO 90-25-001, “Driver/Vehicle Checkpoints,” Oct. 1, 1990.

183. *Id.* at 1.

184. *Id.*

The guidelines specify the following procedures for operation of a sobriety checkpoint in Minnesota:

a. *Location*: "Location, date, times, and operating procedures . . . must be predetermined and approved by a member of supervisory rank."<sup>185</sup> The State Patrol must consider several factors in choosing a location: safety and visibility; whether there is ample room for patrol personnel; whether there are safe areas for secondary screening; and whether favorable weather conditions are expected.<sup>186</sup> Moreover, the "[l]ocation must [provide a] minimum opportunity for vehicles to avoid or escape the checkpoint."<sup>187</sup> Officers may inform local media that the checkpoints are in operation, but the actual location must remain confidential in order "to increase the deterrent effect."<sup>188</sup>

b. *Warning Signs*: To set up a checkpoint, officers must post "adequate and appropriate warning signs."<sup>189</sup> If a motorist "obviously" tries to evade the checkpoint, officers have probable cause to stop and check the vehicle.<sup>190</sup>

c. *Selection*: "Vehicles must be systematically selected by type (truck or passenger vehicle) and/or number (all vehicles, every third vehicle, every tenth vehicle)."<sup>191</sup> If the checkpoint causes a traffic backup, the "operation will be temporarily discontinued."<sup>192</sup> During the "initial inspection," a driver must display his or her driver's license, and the patrol personnel will look "for any signs of driver impairment, or other indicators of alcohol or drug use."<sup>193</sup> The initial inspection "should be thorough, yet brief causing minimum delay to the motorist."<sup>194</sup>

d. *Secondary Inspection*: Secondary inspection is only permissible if an officer has probable cause to believe that a driver "is in violation of the law."<sup>195</sup> However, a "violation of the law" is not limited to driving under the influence of alcohol. Rather, "[e]vidence of [any] criminal activity . . . may be legally seized by troopers if located within the parameters of 'open view' or other legal methods of search."<sup>196</sup>

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185. *Id.* at 2.

186. *Id.*

187. General Order PO 90-25-001, "Driver/Vehicle Checkpoints," at 2.

188. *Id.*

189. *Id.* at 3.

190. *Id.* at 4.

191. *Id.* at 3.

192. General Order PO 90-25-001, "Driver/Vehicle Checkpoints," at 4.

193. *Id.*

194. *Id.*

195. *Id.* at 4.

196. *Id.*

## 2. *Analysis of Sobriety Checkpoints Conducted Pursuant to Minnesota's Guidelines*

### a. *Magnitude of the State's Interest*

Unquestionably, drunk driving is a grave public interest in Minnesota. Even states that disagree about the constitutionality of sobriety checkpoints concur in the magnitude of the public interest in deterring drunk driving.<sup>197</sup>

As a result of Minnesota's efforts to control this problem, the percentage of alcohol-related fatalities in Minnesota is declining.<sup>198</sup> The most recent state statistics in Minnesota show that alcohol-related injuries and fatalities are as low as they have been since the state started recording these figures in 1984.<sup>199</sup>

While the cause of this decline is unlikely to be determined with any exactitude, a combination of factors provide the rational explanation. Most would concede that increasing the drinking age from eighteen to twenty-one has contributed to the decline. Statistics indicate that DWI arrests of eighteen-year-olds have dropped over the last ten years in Minnesota, while arrests of twenty-five- to twenty-nine-year-olds rose during the same period.<sup>200</sup> From these figures, one may infer that keeping alcohol away from teenagers has helped ameliorate the drunk driving problem. Moreover, there are fewer teenage drivers, suggesting that the "aging of the baby boom has reduced crash incidence."<sup>201</sup>

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197. Decisions that uphold the constitutionality of sobriety checkpoints are almost conclusory on this point. See, e.g., *People v. Rister*, 803 P.2d 483, 487 (Colo. 1990) ("It is beyond debate that drunken driving is a serious problem"); *Christopher v. State*, 413 S.E.2d 236, 237 (Ga. 1991) (taking verbatim from *Sitz*, 496 U.S. at 451, on the "seriousness" prong and adding no further comment); *Chock*, 458 N.W.2d at 694 ("Minnesota has a compelling interest in battling the effects of drunk drivers.").

Courts that hold checkpoints unconstitutional likewise recognize the severity of the drunk driving problem. See, e.g., *State v. Parmis*, 523 So. 2d 1293, 1301 (La. 1988) ("It is undisputed that the state and the public have a vital interest in deterring and detecting drunken driving.").

198. CRASH FACTS, *supra* note 169, at 36. In 1992, 38% of fatal car accidents and 13% of injuries were alcohol-related. *Id.* at 36, 39. By comparison, in 1984, 52% of fatal accidents and 19% of injuries were alcohol-related. *Id.*

199. *Id.*

200. CRASH FACTS, *supra* note 170, at 37. In 1982, 1,327 18-year-olds were arrested for DWI. By 1991, this figure dropped to 740. *Id.* By comparison, the same statistic for 25-to-29 year-olds jumped from 5,229 in 1982, to 7,332 in 1991. *Id.*

201. *Id.* at 2.



Other factors contributing to the decline in alcohol-related injuries and fatalities include: safer cars,<sup>202</sup> safer roads,<sup>203</sup> more effective DWI laws,<sup>204</sup> and the mandatory safety belt law.<sup>205</sup>

Even though Minnesota appears to be making strides toward controlling the problem, drunk driving remains a grave public concern. Thus, the first prong of the balancing test, the significance of the state interest, is met under the proposed strict balancing test.

*b. Severity of the Interference With Individual Liberty*

One of the more controversial issues in the sobriety checkpoint debate is the extent of permissible intrusiveness. Checkpoint proponents argue that a "brief" stop is only a minimal intrusion.<sup>206</sup> Opponents contend that surprise checkpoints, operated at unannounced locations under cover of night, constitute a substantial intrusion.<sup>207</sup> The opposing view is particularly compelling because there are inadequate safeguards to govern the poststop investigation. Under the strict scrutiny standard proposed here, courts must carefully consider the severity of the interference with individual liberty that sobriety checkpoints impose.

Arguably a brief stop of perhaps thirty seconds<sup>208</sup> is minimally intrusive.<sup>209</sup> However, as the cases illustrate, many checkpoint stops involve

202. For example, airbags and seatbelts are now common equipment on new cars. *Id.* at 1.

203. *Id.* at 2.

204. *Id.*

205. See CRASH FACTS, *supra* note 170, at 1-3.

206. *Sitz*, 496 U.S. at 451.

207. *Id.* at 468-69 (Stevens, J., dissenting). Justice Stevens characterizes nighttime checkpoints as the "hallmark of regimes far different from ours." *Id.* at 469.

208. See, e.g., *State v. Wagner*, 821 S.W.2d 288, 290 (Tex. Ct. App. 1991). Texas strictly limits the duration of checkpoint stops. *Id.* Pursuant to Texas guidelines, officers were allowed only 15 seconds to determine whether drivers were intoxicated. *Id.* The officers were allowed to ask two questions: (1) whether the person had been drinking an alcoholic beverage; and (2) whether he or she was taking medication or using drugs. *Id.* The Texas court held the *Wagner* checkpoints unconstitutional because they were not conducted pursuant to legislatively adopted guidelines. *Id.* at 291.

209. Stops lasting an average of 25 seconds, where drivers were "briefly examined for signs of intoxication," were upheld in *Sitz*. *Sitz*, 496 U.S. at 447-48. See also Christopher Slobogin & Joseph E. Schumacher, *Rating the Intrusiveness of Law Enforcement Searches and Seizures*, 17 L. & HUM. BEHAV. 183 (1993).

Slobogin and Schumacher recruited 217 volunteers to rank various scenarios on an "Intrusiveness Rating Scale." *Id.* at 186. "Stopping drivers at a roadblock for 30-second questioning at night" to determine drunkenness ranked 14th on their scale. *Id.* at 188. To put this in perspective, the least intrusive law enforcement technique (rating 1 on a 50 point scale), was "looking in foliage in a public park" in search of a murder weapon. By comparison, the most intrusive (rating 50) was a "body cavity search at the border" for drugs. *Id.* at 189.

These results are interesting, but should not be relied on too heavily. The number of people tested was small. Moreover, the 217 volunteers included University of South-

much more delay than thirty seconds. How intrusive is a stop that lasts not thirty seconds, but three minutes,<sup>210</sup> or ten minutes, or more?<sup>211</sup> A checkpoint may be more intrusive at night than in the light of day.<sup>212</sup> In addition, a driver potentially risks encountering more than one checkpoint during a single night or trip.<sup>213</sup> Devices such as "passive alcohol sensors" of which the driver is unaware may make a stop more intrusive.<sup>214</sup> The intrusion to those singled out for subsequent, "secondary," inspection also must be fully considered.<sup>215</sup> Any intrusion, however minimal, is arguably improper to detect drivers who either have outstanding warrants for parking tickets<sup>216</sup> or are driving

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ern California undergraduate students from a course in law and society (79), University of Florida law students (52), citizens from Gainesville, Florida (25), and Australian law students (61). *Id.* at 186. Only 25 of the test participants were drawn from the general community, while the vast majority tested were students participating in some type of legal study.

210. Respondent's Brief and Appendix at 5, *Ascher* (No. C3-93-364) ("The longest recorded delay to any driver was 3 minutes."); *Chock*, 458 N.W.2d at 693 (stops averaged 2.3 minutes); see also *Rister*, 803 P.2d at 487 (average stop lasted 3 minutes).

211. See, e.g., *State v. Everson*, 474 N.W.2d 695, 702 (N.D. 1991). The North Dakota court held that stops lasting three to ten minutes were still valid where drivers were questioned only if "suspicions were aroused." *Id.* Drivers at this checkpoint were told to produce their license and registration. Subsequently, officers referred vehicles to either an "inspection" area or a "search" area, depending on whether any "illegal activity was observed." *Id.* at 697.

212. Most Minnesota checkpoints are conducted in the middle of the night. See Respondent's Brief and Appendix at RA 3, *Gray* (Nos. C6-93-262, CX-93-264); see also *State v. Church*, 538 So. 2d 993, 994 (La. 1989) (discussing a Louisiana checkpoint that was conducted from midnight to 3:00 a.m.); *State v. Blackburn*, 620 N.E.2d 319, 321 (Mun. Ct. Clark Cty., Ohio 1993) (discussing an Ohio checkpoint that was conducted from 9:00 p.m. to 3:00 a.m.).

213. *State v. Muzik*, 379 N.W.2d 599, 604 (Minn. Ct. App. 1985) (noting that drivers could potentially encounter multiple checkpoints during a single drive if "various state municipalities" were free to simultaneously operate checkpoints).

214. See INSURANCE INSTITUTE FOR HIGHWAY SAFETY, *Why Sobriety Checkpoints Matter and How To Make Them Work Even Better*, 28 STATUS REPORT 1 (Nov. 27, 1993). This article describes a device called a "passive alcohol sensor" that looks exactly like a police officer's flashlight. *Id.* at 4. The "flashlight" is held about six inches from a driver's mouth. As the driver speaks, a pump inside the sensor draws an air sample through a fuel cell that generates an electric current indicating the presence of alcohol. *Id.* The article argues that "[p]assive alcohol sensors can help police conduct effective checkpoints without running afoul of restrictions on breath tests because [other devices] require drivers to blow into a test device." *Id.* at 4-5. The article does not consider the constitutional ramifications of the "secret" surveillance it advocates.

215. See Respondent's Brief and Appendix at RA5, *Ascher* (No. C3-93-364) (noting that officers stop measuring the duration of the stop once a driver is diverted for further screening). The Louisiana Supreme Court has criticized checkpoints on this ground. See, e.g., *State v. Church*, 538 So. 2d 993, 997 (La. 1989) (noting that evidence of the duration of stops did not take into account the length of time drivers were detained for further inspection).

216. See, e.g., *St. Paul/19 Arrested in Drunken-Driving Raid*, STAR TRIB. (Mpls.), May 9, 1993, at 2B (reporting "19 drivers were arrested for drunken driving, outstanding war-

without insurance.<sup>217</sup> Are checkpoints more intrusive when officers cite drivers for drug possession or other nondriving related violations of the law?<sup>218</sup> Under the Minnesota State Patrol Sobriety Checkpoint Guidelines, turning to avoid a checkpoint gives officers probable cause to stop a driver, which can present additional problems.<sup>219</sup> These examples illustrate that checkpoints inevitably involve much more than a brief stop. The problem of linedrawing is immediately apparent and irreconcilably linked to the debate.

Once a court determines the severity of the interference with individual liberty, the interference must be weighed against the other factors of the balancing test.<sup>220</sup> Courts that uphold checkpoints often

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rants, invalid licenses or lack of insurance coverage" at the checkpoint); *3 Motorists Cited For Drunken Driving at Medina Stop*, STAR TRIB. (Mpls.), March 16, 1992, at 5B (reporting that of 300 motorists stopped at checkpoint, seven were cited for outstanding warrants, possession of drugs, or driving with either revoked or expired driver's licenses).

217. See, e.g., Respondent's Brief and Appendix at RA4, *Gray* (Nos. C6-93-262, CX-93-264). The "activity breakdown" for the *Gray* checkpoint reveals that, while 21 motorists were cited for DWI, 12 were cited for insurance violations, and 34 for driver's license violations. *Id.*

218. Jill Hodges, *Drivers on Drugs are New Target*, STAR TRIB. (Mpls.), Aug. 24, 1992, at 1A. This checkpoint processed 650 vehicles, but no DUI charges resulted. However, officers did issue seven citations for possession of marijuana. *Id.* at 12A. See also Tim Nelson, *St. Paul Sobriety Checkpoint Nets 20 Drivers Who Weren't*, ST. PAUL PIONEER PRESS DISPATCH, Sept. 20, 1992, at 4B. In a September 18, 1992 St. Paul checkpoint, 800 vehicles were checked. Of those checked, 40 were towed away, half because their drivers were intoxicated and half for other violations or because the drivers had warrants for their arrest. *Id.*

219. General Order PO 90-25-001, "Driver/Vehicle Checkpoints," (Oct. 1, 1990) at 4. Other state courts have rejected this approach, and so should Minnesota. See *Howard v. Voshell*, 621 A.2d 804 (Del. Super. Ct. 1992) (holding that there was no reasonable suspicion to justify stopping a motorist making a U-turn to avoid roadblock); *State v. Powell*, 591 A.2d 1306 (Me. 1991) (holding the stop of a vehicle that turned around to avoid a roadblock was not based on a reasonable suspicion that the driver was trying to avoid the roadblock); *State v. Talbot* 792 P.2d 489 (Utah Ct. App. 1990) (holding that avoiding a roadblock did not give officers reasonable suspicion to stop motorists). *But see Snyder v. State*, 538 N.E.2d 961 (Ind. Ct. App. 1989) (holding that a driver's attempt to avoid a roadblock gave rise to reasonable suspicion authorizing a stop); *State v. Hester*, 584 A.2d 256 (N.J. Super. Ct. App. Div. 1990) (holding that the constitutionality of a checkpoint does not depend on giving motorists an opportunity to avoid it); *State v. Thill*, 474 N.W.2d 86 (S.D. 1991) (holding that a motorist making U-turn to avoid roadblock gives officer reasonable suspicion to stop).

220. *Sitz*, 496 U.S. at 457 (Brennan, J., dissenting). Justice Brennan argued in *Sitz* that the majority failed to properly weigh this prong of the balancing test. *Id.* As Brennan noted, deciding that an intrusion is minimal is just the beginning, not the end, of the analysis. All it means is that a balancing test, rather than probable cause analysis, is required. Brennan argued that the *Sitz* majority conclusively found that because the intrusion was minimal, the state's interest automatically outweighed the individual's. *Id.*

The *Sitz* majority attempted to dismiss concerns about the intrusiveness of checkpoints by differentiating between their "objective" and "subjective" intrusion. *Id.* at 451-53. The majority measured the "objective" intrusion by the duration of the stop and the

require officers to operate the checkpoint pursuant to guidelines.<sup>221</sup> Guidelines presumably minimize the intrusiveness of checkpoints by limiting officer discretion.<sup>222</sup> Minnesota's guidelines, however, do not prevent arbitrary and harassing police conduct because they do not adequately limit the discretion of officers in the field.<sup>223</sup>

The proper focus of search and seizure analysis centers on whether an individual's reasonable expectation of privacy is violated.<sup>224</sup> Minnesotans need not, and should not, expect to be caught up in general law enforcement dragnet operations. Simply put, a violation of a motorist's expectation of privacy is not less offensive simply because the police did it "by the book." A closer look may reveal that Minnesota's guidelines are better characterized as "window dressing" than a safeguard that comports with constitutional protections.<sup>225</sup>

Minnesota checkpoints are conducted by officers at unannounced locations at night.<sup>226</sup> While the guidelines require officers to "be thor-

intensity of the subsequent investigation. *Id.* at 452. The "subjective" intrusion, on the other hand, was measured by the "fear and surprise" generated in "law-abiding motorists." *Id.*

221. For example, *Sitz* reasoned that, if officers operate checkpoints pursuant to guidelines promulgated by "politically accountable officials," the "subjective" intrusion is minimal. *Id.* at 453-54. LaFave states in this regard, "[t]he Supreme Court in *Sitz* made no effort to examine all the existing guidelines with a view to measuring just how slight and free of arbitrariness would be the intrusions made under the Michigan program." 4 LAFAVE, *supra* note 11, § 10.8, at 10-11 (Supp. 1994).

222. See *Sitz*, 496 U.S. at 453-54; see also *State v. Parmis*, 523 So. 2d 1293, 1302 (La. 1988) (finding, in rejecting roadblocks, that the "discretion of the officers in the field was not governed by neutral criteria and the cars were not stopped in a systematic way, violating the precepts and dicta in *Delaware v. Prouse*"); *State v. Sims*, 808 P.2d 141, 146 (Utah 1991) (reasoning that under *Sitz*, politically accountable officials "are responsible for performing the initial balancing between the fourth amendment and the interests served by the plan").

223. See *supra* Part IV.C.1.d. The guidelines expressly allow officers to employ " 'open view' or other legal methods of search" once drivers are detained for secondary inspection. General Order PO 90-25-001, "Driver/Vehicle Checkpoints," (Oct. 1, 1990) at 4. Officers are expressly permitted to search for evidence of any legal violation, not just those associated with drunk driving. *Id.* For these reasons, the guidelines do not prevent officers from exploiting checkpoints for general law enforcement purposes. *Contra Sitz*, 496 U.S. at 453-54.

224. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

225. See, e.g., *State v. Church*, 538 So. 2d 993, 996 (La. 1989) (noting that, while a "surface analysis" of the Louisiana checkpoints suggests that they comply with the federal standard, "closer analysis" shows that the checkpoint guidelines may have been "mere 'window dressing'"). *Id.* at 996, n.9.

226. See, e.g., *Gray v. Commissioner of Pub. Safety*, 505 N.W.2d 357, 359 (Minn. Ct. App. 1993) (operating checkpoint from 10:00 p.m. until 2:00 a.m.); *Ascher v. Commissioner of Pub. Safety*, 505 N.W.2d at 362, 363 (Minn. Ct. App. 1993) (operating checkpoint from 10:00 p.m. until 2:00 a.m.); *Chock v. Commissioner of Pub. Safety*, 458 N.W.2d 692, 693 (Minn. Ct. App. 1990) (stopping defendant at checkpoint at 1:23 a.m.); *Sanders v. Commissioner of Pub. Safety*, 1990 WL 128305 (Minn. Ct. App. 1990) (operating checkpoint from 12:15 a.m. until 2:30 a.m.); *State v. Muzik*, 379 N.W.2d 599,

ough, yet brief causing minimum delay to the motorist,"<sup>227</sup> they do acknowledge that traffic may become backed up.<sup>228</sup> In practice, the actual individual duration of these stops is not clear. For example, in *Ascher* the recorded delays ranged from one to three minutes.<sup>229</sup> However, of the 975 drivers going through the *Ascher* checkpoint,<sup>230</sup> the officers recorded the duration of only eight stops.<sup>231</sup> There is no way to verify whether the eight stops the officers chose to measure were representative of the delay experienced by the other 967 drivers.

Additionally, officers at the *Ascher* checkpoint did not calculate the duration of these stops based on the actual beginning and end of the intrusion. Rather, to reach the one-to-three minute average, officers measured the delays in *Ascher* from the time "vehicles approached the entrance of the pre-screening area . . ." <sup>232</sup> The correct time frame to measure, however, is from the driver's first encounter with the flashing warning sign that announced the checkpoint until the driver is free to leave.<sup>233</sup>

The officer who logged the *Gray* delays testified that he measured between "the time vehicles approached the entrance of the pre-screening area and the time the vehicles left the pre-screening area."<sup>234</sup> This inadequately measures the "objective" intrusion of the checkpoint. The evidence miscalculates the duration of the stops for drivers who

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600 (Minn. Ct. App. 1985) (operating checkpoint from 10:00 p.m. until 2:00 a.m.); see also Opinion of the Justices, 509 A.2d 744, 745 (N.H. 1986) (reviewing proposed legislation that would require general notice of checkpoints, without disclosure of the precise location, in order to maximize the deterrent effect).

227. General Order PO 90-25-001, "Driver/Vehicle Checkpoints," (Oct. 1, 1990) at 4.

228. *Id.* When delays occur, "the operation will be temporarily discontinued." *Id.*

229. Appellant's Brief and Appendix, *Ascher* at 4 (No. C3-93-364).

230. *Id.*

231. *Id.* at A-25. Of these eight, four lasted one minute, three lasted two minutes, and only one lasted three minutes. *Id.*

232. Respondent's Brief and Appendix at 3, *Gray* (Nos. C6-93-262, CX-93-264). In *Ascher*, the delays were calculated from the time "the motorist first encounters the traffic slowdown." Appellant's Brief and Appendix at A-25, *Ascher* (No. C3-93-364).

233. The standard for when a person is "seized" under the Minnesota Constitution is whether a reasonable person in the same circumstances would conclude that he or she was not free to leave. See *In re Welfare of E.D.J.*, 502 N.W.2d 779, 781-82 (Minn. 1993). The Minnesota Supreme Court gave the "following examples of circumstances that might indicate a seizure, [including] ". . . the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Id.* at 781 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554-55 (1980)).

234. Respondent's Brief and Appendix at 3, *Gray v. Commissioner of Pub. Safety*, 505 N.W.2d 357 (Minn. Ct. App. 1993).

are released after preliminary screening and does not account for drivers who are detained for further investigation.<sup>235</sup>

Not only is the length of the suspicionless stop an important consideration, courts also must carefully scrutinize the events that occur after the stop. The *Sitz* Court declined to address the constitutionality of events subsequent to the initial checkpoint stop except to note that reasonable suspicion “may be” required in order to search further.<sup>236</sup> This gap in the federal analysis invites states to develop their own analyses for this crucial, unaddressed element of checkpoints.<sup>237</sup>

As previously addressed, one substantial risk of checkpoints is that officers may use the opportunity to look for violations of the law unrelated to drunk driving.<sup>238</sup> As early as the 1920s, Minnesota recognized that these types of searches present the same evils as do general warrants.<sup>239</sup> Officers at sobriety checkpoints should not be able to use dragnet operations to probe for violations of the law or to “collect obnoxious taxes” under an unconstitutional general warrant.<sup>240</sup> Nevertheless, this unconstitutional general warrant issues when officers at checkpoints cite drivers for nondrunk driving related violations such as expired tabs, arrest warrants for parking tickets, and expired driver’s licenses.<sup>241</sup>

In fact, the Minnesota State Patrol guidelines expressly authorize officers to legally seize evidence of other criminal activity discovered during a checkpoint stop.<sup>242</sup> This guideline provision violates both Minnesota precedent and persuasive federal analysis. Minnesota courts have recently held that once a motorist who was stopped for a valid reason has been exonerated, the police cannot continue the in-

235. See, e.g., *State v. Church*, 538 So. 2d 993 (La. 1989). The Louisiana Supreme Court noted:

Although the initial time for the stop of a noncited motorist was short, this does not take into account those drivers that were subjected to field sobriety tests and allowed to proceed, or those that failed field sobriety tests and were found to measure less than .10% by a chemical test.

*Id.* at 997.

236. *Sitz*, 496 U.S. at 450-51. But see *Martinez-Fuerte*, 428 U.S. at 563 (finding constitutional the detention of some vehicles for further inspection). LaFave notes that *Martinez-Fuerte* did not require a showing of reasonable suspicion to justify detaining drivers for further investigation. See 4 LAFAVE, *supra* note 11, § 10.8(d) at 84-85. LaFave suggests that reasonable suspicion should be required with sobriety checkpoints because the intrusion is greater. *Id.*

237. Sheridan & DeLapena, *supra* note 87, at 701-04.

238. See *infra* notes 238-40 and accompanying text (discussing nondrunk driving violations cited during Minnesota checkpoints).

239. See *supra* notes 168-71 and accompanying text.

240. *State v. Pluth*, 157 Minn. 145, 151-52, 195 N.W. at 791.

241. See *supra* note 236.

242. General Order PO 90-25-001, “Driver/Vehicle Checkpoints,” (Oct. 1, 1990) at 4.

trusion.<sup>243</sup> Likewise, one of the safeguards the United States Supreme Court imposed in *Terry v. Ohio*<sup>244</sup> for patdown searches following a reasonable suspicion seizure was to strictly limit the scope of the search to its initial justification.<sup>245</sup>

Many of the citations issued at Minnesota checkpoints have been totally unrelated to drunk driving. Minnesota checkpoints have been used for general law enforcement purposes and to collect obnoxious taxes. Thus, Minnesota's experience indicates a substantial likelihood that checkpoints will be exploited for these general purposes even though such purposes extend beyond the limited justification for the checkpoints.<sup>246</sup>

Even where checkpoints are conducted pursuant to guidelines, law enforcement officers' authorization to choose the location contributes to the intrusiveness of checkpoints.<sup>247</sup> In fact, the primary difference between border stops and sobriety checkpoints is that the latter are set up in unannounced locations and purely at the discretion of police officers.<sup>248</sup> A court may find that a checkpoint is unconstitutional

243. *State v. Hickman*, 491 N.W.2d 673 (Minn. Ct. App. 1992); *see also State v. Schinzing*, 342 N.W.2d 105, 111 (Minn. 1983) (holding that an officer cannot imply that the motorist's vehicle will be searched even if the driver does not consent).

244. 392 U.S. 1 (1968).

245. *Id.* at 30-31 (allowing a patdown based solely on concern for the safety of the investigating officer); *see also United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975) (reasoning that, since its holding was based on a requirement of reasonable suspicion before roving stops were upheld, the scope of the search requirement set out in *Terry* should apply); *State v. Blackburn*, 620 N.E.2d 319, 322 (Mun. Ct. Clark Cty., Ohio 1993) ("Seizures are permitted based upon reasonable articulable suspicion of wrongdoing for purposes limited to the scope of the basis for the original seizure which, if not pretextual, may provide the basis for further investigation and detention.") (citing *Terry v. Ohio*, 392 U.S. 1 (1968)). *Cf. State v. Everson*, 474 N.W.2d 695 (N.D. 1991).

The North Dakota court held in *Everson* that a purported license and registration checkpoint was valid, even though its primary purpose was to arrest "drug trafficking" motorists that were traveling to an annual motorcycle rally. The checkpoint's "operation order" stated that, should "probable cause present itself, 'the officers should take advantage of it to search vehicles.'" *Id.* at 696, 700-01. North Dakota's approach should be rejected because it makes a law enforcement mechanism of questionable constitutionality even more invasive.

246. The *Sitz* dissent also recognized that "those who have found—by reason of prejudice or misfortune—that encounters with the police may become adversarial or unpleasant without good cause will have grounds for worrying at any stop designed to elicit signs of suspicious behavior." *Sitz*, 496 U.S. at 465.

247. *See* 4 LAFAYE *supra* note 11, § 10.8(d), at 77-78. LaFave cites *Martinez-Fuerte* dicta that indicates checkpoints may be challenged on grounds that the discretion in locating the checkpoint was exercised unreasonably. *Id.* (citing *Martinez-Fuerte*, 428 U.S. 543, 564-66 (1976)).

248. Justice Stevens argued, in his *Sitz* dissent, that because of the arbitrary aspect, the Michigan checkpoint was more analogous to prior decisions regarding random stops. *Sitz*, 496 U.S. at 463. Stevens maintained that, because sobriety checkpoints are unexpected, the element of surprise and potential distress is much greater than when a motorist confronts a border checkpoint. *Id.*

merely because field officers have too much discretion in locating the stops.<sup>249</sup> Arguably, Minnesota law enforcement officials have abused their discretion when selecting checkpoint locations. The police tend to operate the Minnesota checkpoints in the urban areas around the Twin Cities.<sup>250</sup> However, over seventy-two percent of fatal crashes in Minnesota occur in rural areas.<sup>251</sup>

As this discussion illustrates, sobriety checkpoints entail more than a "minimal" intrusion. Guidelines do not sufficiently minimize the intrusiveness of checkpoint seizures. Minnesota's compelling state interest in deterring drunk driving does not clearly outweigh the suspicionless intrusion of sobriety checkpoints.

*c. A Comparison Between the Effectiveness of Checkpoints and Other Law Enforcement Procedures*

Perhaps the most debated aspect of checkpoints is whether they are truly effective and, if so, to what degree. Proponents argue both that law enforcement officials are in the best position to evaluate methods for deterrence of drunk driving and that checkpoints are a strong deterrent. Opponents counter that no empirical evidence indicates that checkpoints have any deterrent effect and argue that resources are better spent on traditional methods of enforcing drunk driving laws.

The *Sitz* Court upheld a checkpoint that resulted in an arrest for driving under the influence for 1.6% of the drivers stopped.<sup>252</sup> *Sitz* reasoned that law enforcement officials are in a better position to judge which techniques are most effective and cost efficient.<sup>253</sup> While this may be true, courts must not allow law enforcement officials to decide questions of constitutionality under the guise of efficiency.<sup>254</sup>

249. 4 LAFAVE *supra* note 11, § 10.8(d), at 76-78.

250. For example, the *Ascher* checkpoint was in Burnsville. *Ascher*, 505 N.W.2d at 363. The *Gray* checkpoint was in St. Paul. *Gray*, 505 N.W.2d at 359. The *Chock* checkpoint was conducted in Blaine. *Chock*, 458 N.W.2d at 692. See also *St. Paul/19 Arrested in Drunken-Driving Raid*, STAR TRIB. (Mpls.), May 9, 1993, at 2B (reporting checkpoint conducted at Johnson High School parking lot in East St. Paul); Jill Hodges, *Drivers on Drugs Are New Target*, STAR TRIB. (Mpls.), Aug. 24, 1992, at 1A (reporting checkpoint conducted in Bloomington).

251. CRASH FACTS, *supra* note 170, at 24.

252. Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 455 (1990).

253. *Id.* at 453-55.

254. LaFave states in this regard that "*Sitz* is rather disappointing, for it does not reflect a commitment by the Supreme Court either to take full account of relevant police guidelines or to submit those guidelines to meaningful judicial review." 4 LAFAVE, *supra* note 11, § 10.8, at 10 (2d ed. Supp. 1994). LaFave is further critical of the conclusory characterization of checkpoints in *Sitz* as a "reasonable alternative law enforcement technique." *Id.*

Minnesota courts, to date, have required empirical evidence of checkpoint effectiveness. See *Larson*, 485 N.W.2d at 573; *Chock*, 458 N.W.2d at 694.



The checkpoints in Minnesota have produced similarly meager results. For example, in *Gray*, twenty-one DWI arrests resulted from 716 vehicles stopped,<sup>255</sup> representing 2.93% of all drivers stopped.<sup>256</sup> One officer testified that this was "one of the most productive [checkpoints] we have conducted."<sup>257</sup> Approximately sixty officers were required to make those twenty-one DWI arrests.<sup>258</sup> Likewise, in *Ascher*, fourteen DWI arrests resulted from 975 vehicles stopped,<sup>259</sup> representing 1.4% of drivers stopped.<sup>260</sup> Arguably police officers would be more efficient if they stopped drivers based on reasonable suspicion.<sup>261</sup>

Checkpoint proponents also argue that the deterrent effect justifies the intrusion.<sup>262</sup> This argument is unpersuasive for two reasons. First, the deterrent effect of sobriety checkpoints is an elusive quality not

255. *Gray v. Commissioner of Pub. Safety*, 505 N.W.2d 357, 359 (Minn. Ct. App. 1993).

256. *Id.*

257. *Id.*

258. *Id.* (stating that 26 to 30 officers were sworn in and an equal number were on reserve).

259. *Ascher v. Commissioner of Pub. Safety*, 505 N.W.2d 362, 363 (Minn. Ct. App. 1993).

260. *Id.* at 365. See also *State v. Church*, 538 So. 2d 993, 997 (La. 1989) (finding that a 1.36% citation rate was of questionable effectiveness).

261. See *CRASH FACTS*, *supra* note 170, at 36 (noting that police officers made 37,261 drunk driving arrests in 1990 and 33,574 in 1991). Compared to the handful of drunk driving arrests resulting from checkpoint stops in Minnesota, these statistics illustrate that police officers have been quite successful stopping drunk drivers based on reasonable suspicion.

262. The *Sitz* Court argued that drunk driving accident rates have gone down because states have been experimenting with sobriety checkpoints. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451 n.\* [sic] (1990); see also *Rister*, 803 P.2d 483, 488-89 (Colo. 1990) (reasoning that, even though no drunk driving citations resulted from the Colorado checkpoint, the absence of citations, in itself, was evidence that the checkpoint "undoubtedly had some effect on advancing the state's interest in preventing drunken driving").

The *Sitz* dissent effectively counters this deductive assertion:

The Court's analysis of [effectiveness] resembles a business decision that measures profits by counting gross receipts and ignoring expenses. The evidence in this case indicates that sobriety checkpoints result in the arrest of a fraction of one percent of the drivers who are stopped, but there is absolutely no evidence that this figure represents an increase over the number of arrests that would have been made by using the same law enforcement resources in conventional patrols.

*Sitz*, 496 U.S. at 469.

Commendably, Minnesota has never succumbed to the theory that the possibility of discovering illegal activity justifies an unlawful search. See, e.g., *State v. Pluth*, 157 Minn. 145, 152, 195 N.W. 789, 792 (1923) ("A search which is unlawful when it begins is not made lawful by the discovery that an offense has been committed."). While checkpoints are not as yet "unlawful" in Minnesota, this Comment argues that such a conclusion is necessary to maintain the Minnesota tradition of providing protection against unreasonable searches and seizures.

susceptible of any hard, quantitative measurement.<sup>263</sup> Second, even if checkpoints have some deterrent effect, the deterrence does not outweigh the intrusion.<sup>264</sup>

Balancing is the greatest threat to the constitutional protections at stake where an analysis minimizes the intrusion and exaggerates the effectiveness of the police operation.<sup>265</sup> Weighing "individual liberty" against "law and order" is impossible because they involve different kinds of interests.<sup>266</sup> Therefore, these interests must necessarily be subjected to the neutral standard of the constitution.<sup>267</sup> The constitution "embodies the judgment that protecting all citizens against unreasonable searches and seizures *outweighs* society's interest in apprehending and convicting criminals."<sup>268</sup> For these reasons, Minnesota should carefully consider whether the price of the intrusion of

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263. In *Pimental v. Department of Transp.*, 561 A.2d 1348 (R.I. 1989), the Rhode Island court stated:

Even assuming that roadblocks may have some deterrent effect, we believe that it is purchased at too high a price. Doubtless other devices may also increase the effectiveness of law enforcement, including punishment without trial, repealing of the privilege against self-incrimination, dispensing with the right to confrontation of witnesses, and elimination of trial by jury. Such techniques, however, would diminish the rights of all in order to secure the punishment of a few.

*Id.* at 1352. See also *State v. Church*, 538 So. 2d 993, 997 (La. 1989) (noting that, since drunk driving arrests decreased every year prior to the implementation of checkpoints conducted by state police officers, the decline could not be attributed to checkpoints). The *Church* court went on to comment that reliance on an assumed deterrent effect is the type of "stealthy encroachment" by police officers against which courts must protect citizens. *Id.* (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1886)).

264. See, e.g., *Brown v. Texas*, 443 U.S. 47 (1978). The potential for crime prevention did not sway the *Brown* Court if, to achieve this result, officers could stop and demand identification from people traveling in "neighborhood[s] frequented by drug users." *Id.* at 52. "In the absence of any basis for suspecting appellant of misconduct, the balance between the public interest and appellant's right to personal security and privacy tilts in favor of freedom from police interference." *Id.*

265. See, e.g., *State v. Church*, 538 So. 2d 993, 997 (La. 1989) (noting that reliance on an assumed deterrent effect is the type of "stealthy encroachment" by police officers that courts must protect citizens against).

266. See, e.g., Yale Kamisar, *Gates, "Probable Cause," "Good Faith," and Beyond*, 69 IOWA L. REV. 551, 613 (1984). Kamisar, a University of Michigan Professor of Law, so characterized these interests in analyzing whether the exclusionary rule has a deterrent effect on police misconduct. *Id.* Professor Kamisar concluded that adopting a "good faith" exception to the exclusionary rule would "make it look . . . less like a constitutional rule and bring its ultimate demise one step closer." *Id.* at 614. Given the United States Supreme Court's search and seizure decisions in the last ten years, Professor Kamisar's fear of the exclusionary rule's "ultimate demise" arguably applies to the Fourth Amendment of the United States Constitution. *Id.* See *supra* notes 25-33 and accompanying text.

267. See Kamisar, *supra* note 263, at 613.

268. *Id.*

sobriety checkpoints is worth the benefit of an illusory deterrent effect.<sup>269</sup>

In the absence of evidence demonstrating that sobriety checkpoints are more effective than other law enforcement techniques,<sup>270</sup> Minnesota can employ other means to deter drunk driving without compromising its law enforcement efforts. One known effective method is to stop automobiles where police suspect that an individual driver is intoxicated.<sup>271</sup> This method has proven to be effective in Minnesota, and as evidenced by the 33,574 drivers that police arrested for drunk driving in 1991.<sup>272</sup> Other ways to improve highway safety include designing safer roads,<sup>273</sup> safer cars,<sup>274</sup> and both toughening and enforcing drunk driving laws.<sup>275</sup> In fact, driver inattention, distraction, failure to yield the right of way, and speeding cause the majority of accidents in Minnesota.<sup>276</sup> The Minnesota Department of Public

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269. The St. Paul Pioneer Press has editorialized that, since experts question the deterrent value of checkpoints, “[i]n the battle against drunken driving, there must be care not to needlessly add basic liberties to the wreckage.” Editorial, *Don't Add Civil Liberty To DWI Victim List; Shouldn't We Require That a Constitutionally Suspect Enforcement Strategy be Profoundly Beneficial Before We Accept It?*, ST. PAUL PIONEER PRESS, Sept. 6, 1993, at 10A.

270. See, e.g., *State v. Muzik*, 379 N.W.2d 599, 602-04 (Minn. Ct. App. 1985). Although the court in *Muzik* acknowledged the public's grave concern with drunk driving, it noted there was no empirical evidence that checkpoints are more effective than seizures based on individualized suspicion. *Id.* at 604. The *Muzik* court reasoned that most courts required *some* empirical evidence that either (1) the checkpoint is more effective than stops based on individualized suspicion, or (2) it has a deterrent effect evidenced by lowering the incidence of alcohol-related accidents. *Id.* at 602-03 (citing *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979)). In *Muzik*, the court found no empirical evidence showing the checkpoint was a superior enforcement mechanism. *Id.* at 604.

271. See *id.* at 604; see also *State v. Church*, 538 So. 2d 993, 997 (La. 1989). This is also the approach advocated by the *Sitz* dissent. *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 460 (1990) (Stevens, J., dissenting). Justice Stevens argues that there is no way of knowing how many drunk driving arrests would have resulted if all of the officers involved in the Michigan sobriety checkpoint had spent a proportionate amount of time using “more conventional means” to apprehend drunk drivers. *Id.* at 461-62.

272. CRASH FACTS, *supra* note 170, at 37. See also *State v. Blackburn*, 620 N.E.2d 319, 321 (Mun. Ct. Clark Cty., Ohio 1993) (noting that a solo police officer would normally make two to three arrests during a weekend night shift).

273. CRASH FACTS, *supra* note 170, at 1-2.

274. *Id.* (noting that airbags and safety belts help to reduce or eliminate injuries when accidents do occur).

275. *Id.* at 2. “Minnesota has been a leader among the states in the development of innovative drunk driving countermeasures. The Legislature made significant amendments to the DWI law in 1971, 1976, 1978, and in almost every year of the 1980s.” *Id.* See also *State v. Blackburn*, 620 N.E.2d 319, 324 (Mun. Ct. Clark Country, Ohio 1993) (suggesting drunk driver hit lists and telephone tip lines as alternatives).

276. CRASH FACTS, *supra* note 170, at 1-2.

Safety has cited improvement in these areas as contributing to the car crash decline in Minnesota in recent years.<sup>277</sup>

The empirical evidence demonstrates that Minnesota does not need to rely on means of questionable constitutionality to effectively deal with the problem of drunk driving. Sobriety checkpoints are not sufficiently effective to justify the substantial intrusion they entail. When strict scrutiny is applied, the necessary conclusion is that the checkpoints conducted in Minnesota violate article I, section 10 of the Minnesota Constitution.

## V. CONCLUSION

The United States Supreme Court has turned its determination of Fourth Amendment "reasonableness" into a constitutional highwire act. Minnesota and other states must carefully consider whether they are going to join in this analytical circus or provide their own safety net. Minnesotans deserve more than mere rational basis review of sobriety checkpoints. In light of the history, tradition, statutes, and case law of this state, Minnesota courts should independently consider the constitutionality of checkpoints and apply a strict balancing test.

To address the problem of drunk driving while protecting the citizenry, Minnesota and other states must reject suspicionless roadblock seizures under state constitutions. In Minnesota, this kind of intrusion into the right to be left alone violates article I, section 10 of the Minnesota Constitution. This is not a question of interpreting a vague or implied state constitutional right. The Minnesota Constitution explicitly prohibits unreasonable seizures. This protection shapes our understanding of freedom and liberty. State supreme courts can affirm this protection and assure individuals of their rights by finding sobriety checkpoints unconstitutional under their state constitutions.

Applying strict scrutiny, the checkpoints recently conducted in Minnesota are clearly unconstitutional. In conformity with *Brown v. Texas*<sup>278</sup> and other federal and state precedents, Minnesota must require police officers to rely on mechanisms other than suspicionless seizures for the prevention of drunk driving. Alternative means to prosecute drunk driving effectively address this grave public concern without an intrusion into the individual's right to be left alone. Where these nonoffensive, effective mechanisms are readily available, they, rather than sobriety checkpoints, must be used to minimize drunk driving in Minnesota.

*Cynthia R. Bartell*

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277. *Id.* at 2.

278. 443 U.S. 47 (1978).

