A Review of Federal and State Constitutional Laws Concerning Sobriety Checkpoints

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ABSTRACT

The differences between federal and state constitutional law are described, using *Michigan v. Sitz*, the U. S. Supreme Court case deciding the constitutionality of sobriety checkpoints as an example. Differences in the various states' decisions concerning checkpoints are identified, and the highway safety research on the effectiveness of checkpoints is reviewed. Properly conducted sobriety checkpoints are a legal and effective tool for use in deterring alcohol-impaired driving.

In recent years states have enacted a variety of new laws and have begun using innovative techniques to reduce the incidence of alcohol-impaired driving. After a sharp decline in the 1980s, the percentage of fatally injured drivers with high blood alcohol concentrations (BAC) (0.10 percent or greater) has remained at about 40 since 1987 (Insurance Institute, 1993). One effective deterrent aimed at reducing this problem is the use of sobriety checkpoints, which have been implemented in several jurisdictions.

Extensive dependency on privately owned vehicles for transportation and the easy availability and widespread use of alcohol contribute to the prevalence of alcohol-impaired driving in the United States. A 1986 survey of nighttime drivers revealed that 3 percent of a national sample of passenger vehicle drivers had BACs at or above 0.10 percent (Lund and Wolfe, 1991). Because only a small number of offenders are actually arrested, drinking drivers believe that they can escape detection. Estimates of the likelihood of being arrested for alcohol-impaired driving range from one arrest for every 200 offenders to one in 2,000 (Jones and Joscelyn, 1978; Presidential Commission, 1983).

Well-publicized, consistent enforcement efforts are effective deterrents to alcohol-impaired driving because they make the public aware of active enforcement and increase the public's perception of the likelihood of being caught. Sobriety checkpoints are especially valuable in this regard because they are highly visible. All drivers passing through the checkpoint are evaluated for signs of impairment. Thus the likelihood of being detected at a checkpoint is far greater than the likelihood of being detected by an officer on patrol. As an Arizona Justice noted, "[i]t is only fortuitous that an officer happens to be in a position to see a drunk entering the freeway on the off-ramp before that drunk happens to kill some innocent person" *State ex rel. Ekstrom v. Justice Court*, 136 Ariz. 1, 663 P.2d 992 (1983).

The National Highway Traffic Safety Administration (NHTSA) has developed model guidelines for police departments to follow in their checkpoint programs (NHTSA, 1983; Rev. Ed., 1990). The guidelines require supervisory police officials to determine the time and place of sobriety checkpoints and to be present during checkpoint operations to assure that procedures are carefully followed. Typically, factors that are considered in site selection are crash history in the area and/or the incidence of alcohol-impaired driving in the area. The safe operation of the checkpoint for both

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police officers and drivers is always an important factor. For example, there must be sufficient clearance area for police to safely approach the stopped vehicle and for drivers to pull out of the stream of traffic for closer investigation when impairment is suspected. Checkpoint lanes must be well lighted and clearly marked. Checkpoints are often conducted on weekend nights when alcohol-impaired driving is most common.

At sobriety checkpoints, police stop all vehicles, or a random selection of vehicles, passing through the checkpoint to evaluate drivers for signs of alcohol impairment. To minimize public concern and fear, signs are posted at the approaches to checkpoints notifying drivers that a sobriety checkpoint is ahead; officers are in uniform; and there are sufficient numbers of officers and officials present to make it highly unlikely that an individual officer would act arbitrarily. In some states drivers are permitted to turn around to avoid a checkpoint; in others, drivers attempting to avoid checkpoints are stopped and evaluated for possible alcohol impairment.

Police approach drivers and identify themselves, describe the purpose of the stop, and ask drivers general questions designed to elicit a response that will permit the officer to observe the driver's manner of speaking. For example, an officer may ask for a drivers license and registration or may ask the driver his name and address. Drivers who do not appear impaired are immediately waived on and those who show signs of impairment are directed to a holding area where they are further investigated and then either released or arrested.

Some police are also using passive alcohol sensors at checkpoints. The passive alcohol sensor is a device that senses alcohol in the air close to a subject's mouth when the subject is speaking. It indicates whether alcohol is present in the subject's breath and the approximate amount. Passive alcohol sensors have been shown to enhance the ability of police officers to quickly identify the high BAC population (Ferguson et al., 1993; Kiger et al., 1993; Jones and Lund, 1986; Voas et al., 1985).

Legal Issues

The Fourth Amendment of the U.S. Constitution prohibits police from conducting unreasonable searches and seizures. This has been interpreted to prevent police from stopping an individual without cause. The threshold issue in a Fourth Amendment case is whether the police action complained of constitutes a search or seizure. Stopping a person on the street whether on foot or in a vehicle is a seizure. Therefore, the Fourth Amendment applies to checkpoint operations. In deciding whether the stop is reasonable or not, courts apply a balancing test in which they evaluate

both the state's interest in following the procedures the police used and the personal interest infringed upon by that procedure.

In 1979, the U.S. Supreme Court held that a lone patrol officer could not, guided only by his own discretion, stop vehicles if the only purpose was to conduct a license and registration check. *Delaware v. Prouse*, 440 U.S. 648 (1979). The officer in *Prouse* had not been busy on the night in question and had decided to do a license and registration check. The Court found that permitting a patrol officer without on-site supervision to exercise unfettered discretion to stop anyone he chose created an unacceptable potential for abuse. The Court noted that it was not foreclosing the possibility that police could stop vehicles solely for the purpose of enforcing license and registration laws if they did so under a properly designed plan that assured motorists would be stopped in a truly random fashion.

Since *Prouse*, courts have generally upheld sobriety checkpoints when they have been designed and conducted according to neutral guidelines strictly limiting officers discretion. Those that have not upheld particular checkpoints under constitutional attacks usually have done so because the police failed to use proper procedures, not because they found sobriety checkpoints to be inherently unconstitutional (LaFave, 1987 (1994 Supp)).

To avoid the problems the U.S. Supreme Court identified in *Prouse*, police conducting checkpoints must scrupulously follow carefully constructed procedures for selecting times and locations of checkpoints and establishing neutral criteria for selecting the vehicles to stop. For example, all vehicles are stopped in one direction and each driver is approached. If this procedure results in undue delay and large backups of traffic, supervising officers are allowed to pass all but randomly selected vehicles through. For example, every third vehicle will be stopped.

The U.S. Supreme Court did not directly address sobriety checkpoints until it decided *Michigan v. Sitz*, 496 U.S. 444 (1990). The checkpoint at issue in *Sitz* was conducted according to guidelines developed by the Michigan State Police. In *Sitz*, the Court held that the state's interest in reducing the incidence of alcohol-impaired driving was sufficient to justify the brief intrusion occasioned by a properly conducted sobriety checkpoint.

Checkpoint Litigation in Michigan

The history of *Sitz* is instructive not only for the checkpoint issue but also for the relationship between federal constitutional law and state constitutional, statutory, and common law. Both state and federal courts interpret the U.S. Constitution, but once the U.S. Supreme Court has decided a federal

constitutional question, state and federal courts are bound to follow the precedent. Similarly, both federal and state courts interpret state law, but both lower state courts and federal courts must accept the decision of the highest court in any state concerning an issue of state law.

The U.S. Constitution establishes a minimum level of protection for individuals in both state and federal proceedings. States are not free to give individuals less protection than the U.S. Constitution affords, but they may grant an individual more protection in state prosecutions than the individual is required to be given under the U.S. Constitution. Commonly, courts interpret state constitutions to provide no greater protection than the federal constitution. And the language regarding search and seizure in state constitutions commonly is very similar to that in the Fourth Amendment. Consequently, courts use federal constitutional principals to guide them in interpreting state constitutions. However, unless a state has very strong precedent indicating that its constitution will not be interpreted more generously than the federal constitution, there is room even after the U.S. Supreme Court's decision in *Sitz* to challenge sobriety checkpoints as a violation of state law.

Before *Sitz*, sobriety checkpoints were challenged in state courts as violating the U.S. Constitution and state constitutional law issues were not frequently raised. Thus the majority of those pre-*Sitz* cases failed to address the checkpoint issue under state constitutional law.

At the trial level, the *Sitz* court held sobriety checkpoints invalid, finding that the arrest rate at checkpoints was not sufficiently high to justify their use under *both* the Michigan and the U.S. Constitutions. The Michigan Court of Appeals agreed with the trial court's interpretation of the U.S. Constitution. Having found a violation of the U.S. Constitution, the court did not address the issue of the legality of checkpoints under the Michigan Constitution. *Sitz v. Department of State Police*, 170 Mich. App. 433, 429 N.W.2d 180 (1988).

The Michigan Supreme Court did not agree to hear the case and Michigan petitioned the U.S. Supreme Court. The Supreme Court accepted the case and reversed the Michigan courts' interpretation of the U.S. Constitution, finding, by a majority of six to three, that the minimal intrusion occasioned by a well conducted checkpoint did not outweigh the state's interest in using sobriety checkpoints to enforce laws against alcohol-impaired driving.

> [T]he balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program. We therefore hold that it is consistent with the Fourth Amendment. 496 U.S. 444 (1990).

The U.S. Supreme Court did not address the issue of the constitutionality of sobriety checkpoints under the Michigan constitution. It has no authority to interpret a state law or constitution absent a claim that it violates the federal constitution.

The case then went to the Michigan Court of Appeals, which decided sobriety checkpoints violate the Michigan Constitution, 193 Mich.App. 690, 485 N.W.2d 135 (1992). From there, the case went to the Michigan Supreme Court. After an extensive review of Michigan and federal search and seizure law, the Michigan Supreme Court concluded that the U.S. Supreme Court radically departed from established precedent when it authorized suspicionless stops under the Fourth Amendment. It held that Michigan police may not "engage in warrantless and suspicionless seizures of automobiles for the purpose of enforcing the criminal law." *Sitz v. Michigan Department of State Police, et al.*, 506 N.W.2d 209 (1993).

A review of other states' decisions reveals considerable diversity in the approaches taken on the state law issues. The Appendix provides a summary of decisions of state courts on the constitutionality of sobriety checkpoints, indicating whether the decisions were based on the federal or the state constitution. The highest courts in 18 states have considered and upheld checkpoints (Arizona, Arkansas, California, Colorado, Florida, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Mississippi, New York, North Dakota, Pennsylvania, South Dakota, Vermont, and Virginia). Fourteen of these cases involved sobriety checkpoints; the others dealt with other types of checkpoints (Arkansas, Mississippi, North Dakota, and South Dakota). The majority of intermediate courts that have decided checkpoint cases have found that, properly conducted, they are legal. By statute, two states specifically authorize sobriety checkpoints (Hawaii and North Carolina) and one prohibits them (Wisconsin). The highest courts in 7 states have found sobriety checkpoints illegal (Idaho, Louisiana, Michigan, New Hampshire, Oregon, Rhode Island, and Washington).

The Idaho Supreme Court has held that absent statutory authority, checkpoints violate the state constitution; Kansas has held there is no need for specific statutory authorization for checkpoints. *State v. Henderson*, 114 Idaho 293, 756 P.2d 1057 (1988); *Davis v. Kansas Dept. of Revenue*, 252 Kan. 224, 843 P.2d 260 (1992). Texas lower courts are divided on the need for state legislative authority. Some Texas courts have narrowly interpreted the U.S. Supreme Court's decision in *Sitz* to require state statutory authority before checkpoints may be conducted. *Garcia v. State*, 853 S.W.2d. 157 (Tex.App.—Corpus Christi 1993); *State v. Wagner*, 821 S.W.2d 288 (Tex.App.—Dallas 1991); *King v. State*, 816 S.W.2d 447 (Tex.App.—Dallas 1991). Other Texas courts have held that a sobriety checkpoint was not automatically arbitrary absent a statewide legislatively developed plan, *Texas v.*

Holt, 852 SW.2d 47 (Tex.App.—Fort Worth 1993); *Texas v. Hubacek*, 840 S.W.2d 751 (Tex.App.—Fort Worth 1992).

Statutes that authorize vehicle and registration checks but do not mention sobriety checkpoints have been interpreted to permit only those checkpoints that are specified. For example, Texas law permits license and registration checkpoints but not sobriety checkpoints. Courts there have found that vehicle and registration checks were mere pretexts under which police were looking for alcohol-impaired drivers and have struck them down. *Garcia v. Texas*, 853 S.W.2d 157 (Tex.App.—Corpus Christi 1993). Similarly, vehicle and registration checks that were held to be pretexts for drug enforcement efforts in the District of Columbia were held invalid. *Galberth v. U.S.*, 590 A.2d 990 (D.C.App. 1991). Where checkpoints were found to have legitimate traffic related objectives, they were upheld in D.C., even though they had a "halo" effect of deterring illicit drug activity. *U.S. v. McFayden*, 865 F.2d 1306 (D.C. Cir. 1989).

Prior to the U.S. Supreme Court's decision in *Sitz*, Oklahoma interpreted the Fourth Amendment to prohibit checkpoints. *State v. Smith*, 674 P.2d 562 (Okl.Cr. 1984). Until a checkpoint is challenged under state law, Oklahoma's position on the issue will not be clear. Currently, Oklahoma does not do sobriety checkpoints, but police have authority under Oklahoma statutes to do vehicle and registration checks at which impaired drivers are sometimes arrested.

The need to publicize checkpoints is another area in which courts are divided. In *State v. Parms*, a Louisiana court emphasized, along with other defects, that no advance publicity was provided to alert citizens that police would be conducting checkpoints. 523 So.2d 1293 (La. 1988). Courts in Massachusetts and Indiana have held that advance publicity is not an indispensable precondition for a legal checkpoint. *Commonwealth v. Amaral*, 398 Mass. 98, 495 N.E.2d 276 (1986); *Covert v. Indiana*, 612 N.E.2d 592 (1993). However, the *Covert* court recognized the deterrent effect of advanced publicity, noting that advance publicity "weighs very heavily in determining whether and to what degree the roadblock advances the public interest."

The California Supreme Court, in *Ingersoll v. Palmer*, 743 P.2d 1299 (1987) said, "[a]dvance publicity is important to the maintenance of a constitutionally permissible sobriety checkpoint. Publicity both reduces the intrusiveness of the stop and increases the deterrent effect of the roadblock." One California appellate court has found that a single, brief newspaper article is sufficient. *People v. Squire*, 15 Cal.App.4th 775, 19 Cal.Rptr.2d. 121 (1993). The *Squire* court noted the apparent conflict between the U.S. Supreme Court's decision in *Sitz*, which did not appear to require advance publicity, and *Ingersoll*, which appears to require advance publicity, and indicated it was not resolving the issue

but holding that, if required, the publicity generated by the checkpoint in question was sufficient. In contrast, *People v. Morgan* found "substantial" advance publicity to be required for a constitutional checkpoint. 221 Cal.App.3d Supp. 1, 270 Cal.Rptr. 597 (1990). In December 1993, the California Supreme Court resolved the issue holding advance publicity is not required. *People v. Banks*, 6 Cal.4th 926, 863 P.2d 769, 25 Cal.Rptr.2d 524.

Courts in Minnesota are divided regarding the publicity issue. One Minnesota court has held that by giving the media unrestricted access to a sobriety checkpoint, the police violated reasonable privacy expectations of motorists and rendered the checkpoint invalid under the U.S. Constitution. The court found that the objective intrusion caused by the checkpoint was not unreasonable but concluded that by allowing media unrestricted access to the checkpoint, police "grossly magnified the subjective intrusion experienced by those passing through the checkpoint." *Ascher v. Commissioner of Public Safety*, 505 N.W.2d 362, 1993 WL 326926 (Minn. App. 1993). The *Ascher* court also found that, "absent empirical evidence that sobriety checkpoints advance the public interest, such wholesale, suspicionless seizures violate ... the Minnesota Constitution." The court based its decision on the state's failure to offer evidence that checkpoints are more productive than traditional enforcement.

The *Ascher* court failed to consider the general deterrent value of sobriety checkpoints. The court did not address the need for publicity to educate the public on sobriety checkpoints to diminish the public fear and concern about checkpoint operations. In addition, the court expressed concern "that law enforcement officials are using sobriety checkpoints as publicity exercises. ... [and that] the state may justify its use of sobriety checkpoints on the basis that such checkpoints symbolize the public's interest in 'getting tough on drunk drivers.'" The court found the state's interest in promoting symbolism to be an impermissible justification for a seizure.

Another Minnesota court considered the legality of a sobriety checkpoint under both the U.S. and the Minnesota Constitutions at which television cameras were permitted but restricted to an area from which they could not violate motorists' right to privacy. *Gray v. Commissioner of Public Safety*, 505 N.W.2d 357, 1993 WL 326921 (Minn. App. 1993). The *Gray* court found no violation of either Constitution. The court noted that media presence "may have heightened a motorist's anxiety," but not to the extent that it rendered the checkpoint a constitutionally impermissive intrusion. Interestingly, the court said that media presence "may ... safeguard against possible abuses of police power." The court also pointed out that the police have no basis, absent unreasonable or dangerous interference by the media, to deny them access to a checkpoint. The issue is before the Minnesota Supreme Court, *John L. Gray v. Commissioner of Public Safety*, C6 93 262.

The following section provides a brief summary of highway safety research on the effectiveness of sobriety checkpoints. This information on the effectiveness of checkpoints as a deterrent to alcohol-impaired driving should be useful for police agencies designing enforcement programs. It is also intended to be useful to attorneys as this information is highly relevant to the factors courts use in balancing the state's interests against the intrusion occasioned by the use of sobriety checkpoints.

Effectiveness of Sobriety Checkpoints

Numerous research studies have found that the use of checkpoints deters alcohol-impaired driving. The standard model of deterrence has three elements: a perception of the likelihood of detection and arrest (Jones and Joscelyn, 1978); the speed and certainty of punishment after arrest; and the severity of punishment (Ross, 1984). Of the three elements, by far the most important is the public's perception of the risk of arrest. Researchers have estimated the probability of being arrested for alcohol-impaired driving and found it to be very low. Estimates vary from one in 200 to one in 2,000 (Jones and Joscelyn, 1978; Presidential Commission, 1983). Where the perception that the probability of arrest is low, deterrent efforts inevitably fail, regardless of the severity of punishment for those few offenders who are apprehended.

A 1984 study demonstrated that sobriety checkpoints and accompanying publicity are effective in increasing the public's evaluation of the risk of being apprehended for alcohol-related driving offenses (Williams and Lund, 1984). Researchers compared public perceptions of the risk of being arrested for alcohol-impaired driving in two jurisdictions: Fairfax County, Virginia, which has a long history of serious enforcement and relatively high arrest rates and, Montgomery County, Maryland, a geographically and demographically similar jurisdiction with historically lower arrest rates. During the study period, Montgomery County used well publicized sobriety checkpoints in its enforcement program, while Fairfax County relied on drinking-driver patrols that had little or no associated publicity.

Telephone surveys of licensed drivers over 18 years old revealed that public awareness of enforcement programs was far greater in Montgomery County than in Fairfax County, even though Montgomery County's arrest rate had been lower than Fairfax County's in all but the most recent year. Respondents from *both* counties incorrectly believed that the probability of arrest was higher in Montgomery County than in Fairfax County (Williams and Lund, 1984).

Similarly, analysis of an enforcement program in British Columbia, Canada, illustrates both the effectiveness of sobriety checkpoints, in combination with publicity, and the potentially misleading nature of arrest rate statistics (Mercer, 1985). That study found that arrest rates and numbers of drivers passing through checkpoints were unrelated but that alcohol-related crashes declined with increased checkpoint activity and publicity. Arrest rates, in contrast, tended to go up when alcohol-related crashes were more frequent and to decline when crashes declined; thus arrest rates did not reflect the deterrent effects of checkpoint activity. The study also underlined the importance of media coverage of enforcement activities, as one checkpoint blitz held during a period of newspaper strikes failed to generate news stories and also failed to reduce alcohol-related crashes.

The advantage sobriety checkpoints have over traditional methods in deterring alcohol-impaired driving is that they reach vastly greater numbers of people (Voas et al., 1985). Every time police conduct a sobriety checkpoint, they come in direct contact with hundreds of drivers who either pass through the checkpoint or pass the checkpoint going in the opposite direction. There can be no mistaking a properly conducted sobriety checkpoint for anything other than an enforcement effort aimed at alcohol-impaired driving. For safety reasons and to prevent the public from being unduly surprised or concerned about checkpoints, sobriety checkpoint guidelines require police to place conspicuous signs identifying sobriety checkpoints well ahead of the stopping areas (NHTSA, 1983; Rev. Ed. 1990).

In contrast, when police stop an individual on suspicion of alcohol-impaired driving, passers-by have no reason to associate that stop with a specific enforcement program. Checkpoints by their very nature increase public awareness of the problem of alcohol-impaired driving, the possibility of an arrest, and the presence of an active enforcement program.

The Presidential Commission on Drunk Driving (1983) noted in its *Final Report* that, on average, a uniformed officer makes only two arrests for alcohol-impaired driving each year. The Commission recommended the use of sobriety checkpoints to raise the actual and the perceived risk of arrest. Checkpoints are intended to create general deterrence, and to the extend that they are successful in this, the number of alcohol-impaired drivers on the roads and the numbers arrested will be lower than without checkpoints. Thus, productivity measured in terms of arrest per unit of time will be lower.

The pertinent arrest rate to use in evaluating the effectiveness of sobriety checkpoints is not the percentage of all drivers passing through the checkpoint who are arrested. Rather, it is the rate for the number of *alcohol-impaired drivers* passing through the checkpoint. In the last national roadside

survey conducted, in 1986, about three percent of weekend nighttime drivers had BACs at or above 0.10 percent (Lund and Wolfe, 1991). In a Charlottesville, Virginia, checkpoint program involving 94 checkpoints during the period December 30, 1983 to December 31, 1984, one to two percent of the drivers passing through the checkpoints were arrested for alcohol-impaired driving (Voas et al., 1985). This arrest rate is comparable to the rate experienced in Saginaw County, Michigan, which the U.S. Supreme Court upheld in *Sitz*. A one to two percent arrest rate suggests that about one-third to two-thirds of alcohol-impaired drivers passing through checkpoints are arrested. This is at least the equivalent of the arrest rate for traditional patrols (Lund and Jones, 1987; Pagano and Taylor, 1980).

Arrest rates from sobriety checkpoints compare favorably with patrols by a second measure, the number of arrests per police man-hour. In the Charlottesville program, police achieved a higher arrest rate at the checkpoints than from patrols and the number of officer hours per arrest at checkpoints (6.5) was 20 percent lower than for patrols (7.9) (Voas et al., 1985).

Evaluations of checkpoint programs in Virginia, Florida, New Jersey, New York, in New South Wales, Australia, and, most recently in Victoria, Australia, have demonstrated that checkpoints are effective (Voas et al., 1985; Lacy et al., 1986; Levy et al., 1989; Wells et al., 1992; Homel et al., 1988; Maloney, 1993).

A well-publicized enforcement program designed to increase seat belt use and deter alcohol-impaired driving in Binghamton, New York was evaluated. There was a reduction of 39 percent in the number of drivers who had been drinking stopped at checkpoints from fall 1988 to fall 1989, which was sustained through fall 1990. Drivers with BACs 0.10 percent or higher were relatively unaffected by the program. Even so, researchers estimated the program resulted in a 24 percent reduction in injury producing crashes and a 23 percent reduction in late-night crashes in the months when checkpoints were held (Wells et al., 1992).

In New Jersey, checkpoints, along with two educational programs, were associated with a drop of 10 to 15 percent in single-vehicle nighttime crashes (a commonly used measure of alcohol-impaired driving). Moreover, the effect was not temporary but lasted for several years (Levy et al., 1989).

Similarly, a year-long checkpoint program in Charlottesville, Virginia, was associated with a 13 percent reduction in alcohol-related crashes (Voas et al., 1985). Use of sobriety checkpoints was accompanied by both fewer police reports of alcohol-involvement in nighttime crashes and a lower incidence of nighttime crashes. Similar results were obtained under a checkpoint program in Clearwater and Largo, Florida, which experienced a 12 percent reduction in alcohol-related crashes following checkpoint operations (Lacy et al., 1986).

The most dramatic results were reported in Victoria, Australia and New South Wales, Australia. In the mid-1970s, 49 percent of drivers of passenger cars and motorcycles killed in crashes in Victoria had BACs over 0.05 percent. By 1992, that figure had dropped to 20 percent and Victoria Police estimate the figure for 1993 will be even lower. Much of this reduction is attributable to a random breath testing (RBT) program under which half of the licensed drivers were tested in 1992 (Maloney, 1993). The Victoria Parliament allowed police to test drivers without any suspicion of alcohol-impairment, but only at RBT stations, which had to be clearly marked and placed near roadways.

The Victoria experience confirms the importance of using highly visible enforcement programs. The Victoria RBT program, although initially effective, became even more effective with the introduction of conspicuously marked "booze buses." When the program was continued with a less visible profile, it was less successful.

In 1982 over 70,000 RBT tests were administered, up from about 40,000 in 1978. The proportion of drivers killed with BACs over 0.05 percent dropped to 37 percent in 1982. When the booze buses were introduced in 1983-84, almost 200,000 tests were given and the proportion of drivers killed with BACs over 0.05 dropped to 33 percent. In 1985 and 1986, the public profile of the RBT program was lower and the number of fatally injured drivers with BACs over 0.05 increased to 38 percent. Police in Victoria were given expanded authority to test any driver anywhere in 1987. Testing increased, but the program was less highly visible because of a reduction in the use of the buses. Screening tests increased to about 400,000 each year for the period 1987-1990, but the number of drivers killed with BACs over 0.05 percent remained constant.

In response to an analysis of the RBT experience in New South Wales, which stressed the importance of consistent and highly visible efforts, in 1989, the Victoria RBT program was redesigned to guarantee that it would have a high public profile. By the end of 1990, the proportion of fatally injured drivers with BACs above 0.05 percent was reduced to 30 percent. The 1992 figure was even more impressive, 20.4 percent. The 1993 results, as of the end of October, show further reductions over the comparable period in 1992.

In New South Wales, Australia, alcohol-related fatal crashes dropped by an estimated 30 percent following introduction of widespread driver BAC testing under the RBT program and remained low for four to five years (Homel et al., 1988). Analysis of the New South Wales program concluded it was essential that the RBT program be highly visible, rigorously enforced, sustained over time, and well publicized (Homel et al., 1988).

U.S. policymakers cannot expect sobriety checkpoints to achieve the results experienced in Australia because Australian law permits police to stop and test individual drivers without suspicion and thereby makes it possible to test a high percentage of licensed drivers each year. Because of the restrictions U.S. law places on checkpoints, it is highly unlikely that nearly that number of drivers will be stopped at checkpoints. Also, U.S. law does not permit all drivers stopped at checkpoints to be tested.

The Australian RBT program demonstrates the value of a highly visible enforcement effort aimed at the public and designed to deter alcohol-impaired driving, not restricted to those few drivers who appear to be alcohol-impaired. Experience with the program over the years had demonstrated that "in order to assess the true effectiveness of RBT, it is necessary to measure the *driving public's reaction to it* rather than the *police activity within it.*" (Melbourne, Australia, Police, 1993)

A critical evaluation of the literature on the deterrent effects of sobriety checkpoints, prepared for the National Highway Traffic Safety Administration, included nine American studies and several foreign studies. It concluded,

> Both U.S. and foreign experiences support the proposition that sobriety checkpoints are capable of reducing the extent of drunk driving and of deaths and injuries on the highways. It is no longer necessary to ask whether sobriety checkpoints can deter (Ross, 1992).

CONCLUSION

Sobriety checkpoints are valuable tools in the state's arsenal against alcohol-impaired driving. Courts evaluating checkpoints under state law should recognize their deterrent value and permit their use.

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APPENDIX

Summary of Appellate Decisions Concerning Sobriety Checkpoints (November 1993)

Sobriety checkpoints are permitted in the majority of the states in which the issue has been decided by the states' appellate courts. They are prohibited in Idaho, Louisiana, Michigan, New Hampshire, Oregon, Rhode Island, Washington, and Wisconsin.

The weight of authority in favor of checkpoints is so strong that in the majority of states where there are no definitive appellate cases, checkpoints are being conducted.

The following indicates how state courts have decided checkpoint cases.

Alabama — **Yes under the Federal Constitution.** Checkpoints were established to enforce licensing, equipment, and alcohol laws. Defendant approaching checkpoint turned into a private driveway. The court held there was probable cause under Alabama law for police to stop him because his avoidance of the checkpoint was suspicious. The checkpoint was approved under the exception mentioned in *Delaware v. Prouse*. The court noted, "the [U.S.] Supreme Court [in *Prouse*] made it clear that a state was free to develop other methods for spot checks which involved less intrusion or did not involve the 'unconstrained exercise of discretion.' The 'questioning of all oncoming traffic at roadblock-type stops' was one suggested alternative." *Smith v. State*, 515 So.2d 149 (Ala.Cr.App. 1987).

Alaska — **No cases.**

Arizona — **Yes under the Federal Constitution.** The court approved a properly constituted checkpoint under the U.S. Constitution. It did not address state law. *State v. Superior Court*, 143 Ariz. 45, 691 P.2d 1073 (1984).

Arkansas — **Supporting, but not decisive authority.** Cases dealt with license checkpoints and approved them under the Fourth Amendment, without reference to state law. *Coffman v. State*, 26 Ark.App. 45, 759 S.W.2d 573 (1988); *Tims v. State*, 26 Ark.App. 102, 760 S.W.2d 78 (1988); *Camp v. State*, 26 Ark.App. 299, 764 S.W.2d 463 (1989).

California — **Yes under both the Federal Constitution and state law.** "... within certain limitations a sobriety checkpoint may be operated in a manner consistent with the federal and state constitutions." *Ingersoll v. Palmer*, 43 Cal.3d 1321, 241 Cal.Rptr. 42, 743 P.2d 1299 (1987); *People v. Banks*, 6 Cal.4th 926, 863 P.2d 769, 25 Cal.Rptr.2d 524 (1993).

Colorado — **Yes under both the Federal Constitution and state law.** The court approved checkpoints. It noted that the pertinent section of the Colorado Constitution tracks the language of the Fourth Amendment, but that it has been interpreted

to provide more protection than the Fourth Amendment. However, courts use Fourth Amendment cases for guidance in interpreting the Colorado Constitution and in this instance found no reason to reach a different conclusion than that reached under the U.S. Constitution. "We hold that under the facts presented in this case the balance under article II, section 7, should be struck in favor of the reasonableness of the highway checkpoint stops." *People v. Rister*, 803 P.2d 483 (Colo. 1990).

Connecticut — **No cases.** Sobriety checkpoints are conducted.

Delaware — **Supporting but not decisive authority.** Checkpoints were upheld in an unreported decision, *State v. Stroman*, Del. Super., IN83-02-0055T, N83-04-0132T, N83-04-0620T, Stiftel, P.J. (May 1984). *Stroman* was cited with approval in *Howard v. Voshell*, 621 A.2d 804 (Del.Super. 1992).

District of Columbia — **Supporting but not decisive authority.** A defendant challenged "Operation Clean Sweep," under which police attempted to control open air drug markets by conducting checkpoints in high crime areas with visible drug activity. The court held that checkpoints to generally enforce the law are impermissible. The case was remanded to determine if the purpose of the checkpoint was to enforce traffic laws to ease traffic congestion or for general law enforcement purposes. *Galberth v. U.S.*, 590 A.2d 990 (D.C.App. 1991). *U.S. v. McFayden* held that if the "principal purpose of" a checkpoint is "to regulate vehicular traffic by allowing police to check drivers' licenses and vehicle registrations. The fact that there may have been a 'halo' or 'spin-off' effect of deterring drug sellers and buyers ... did not make an otherwise legitimate checkpoint unlawful." 865 F.2d 1306.

Florida — **Yes under the Federal Constitution.** The court upheld the state's authority to conduct alcohol checkpoints on the basis of the U.S. Constitution. A footnote noted that the issue under the Florida Constitution was not briefed. The court found checkpoints acceptable, but invalidated this one because of the arrest procedure used. *State v. Jones*, 483 So.2d 433 (1986).

Georgia — **Yes under the Federal Constitution.** The court addressed a DUI Task Force, deciding that a checkpoint did not violate the Fourth Amendment. It did not discuss state law. *State v. Golden*, 171 Ga.App. 27, 318 S.E.2d 693 (1984).

Hawaii — **Statutory authority.** Checkpoint procedures are described in HAW. REV. STAT. §286-162.6.

Idaho — **No under state law.** The court addressed the constitutionality of checkpoints under state law. An Idaho statute describes the circumstances under which police can set up a roadblock. It requires particularized suspicion. The court held "that where police lack express legislative authority, particularized suspicion of criminal wrongdoing and prior judicial approval, roadblocks established to apprehend drunk drivers cannot withstand constitutional scrutiny.

... we base our decision today solely on art. 1, section 17 of the Idaho Constitution." *State v. Henderson*, 114 Idaho 293, 756 P.2d 1057 (1988).

Illinois — **Yes under the Federal Constitution.** A DWI checkpoint was evaluated on the basis of the Fourth Amendment only. The court held, "no probable cause and no individualized suspicion is required to establish a roadblock designed to deter and detect DUI violators, and that this roadblock was established and operated in accordance with constitutionally acceptable procedures." *People v. Bartley*, 109 Ill.2d 273, 93 Ill.Dec. 347, 486 N.E.2d 880 (1985).

Indiana — **Yes under the Federal Constitution.** The court upheld a checkpoint set up to apprehend drunk drivers and improperly licensed drivers. The court looked only to the Fourth Amendment. "The procedure used in the roadblock in the immediate case is a good example of constitutionally valid roadblock operation." *State v. Garcia*, 500 N.E.2d 158 (Ind. 1986).

Iowa — **Yes under the Federal Constitution.** Defendant challenged constitutionality of checkpoint under the Fourth Amendment and Art. 1, sec. 8 of the Iowa Constitution. The state constitutional issues were not briefed and the court deemed the state constitutional argument waived. It found that the procedures used comported with the exception outlined in *Prouse* under which checkpoints could be conducted. *State v. Riley*, 377 N.W.2d 242 (Iowa App. 1985).

Kansas — **Yes under both the Federal Constitution and state law.** The court indicated the scope of the Kansas Bill of Rights is identical to that of the Fourth Amendment and went on to find that the DWI checkpoint at issue violated neither constitution. *State v. Deskins*, 234 Kan. 529, 673 P.2d 1174 (1983). Specific statutory authority for checkpoints not required. *Davis v. Kansas* Dept. of Revenue, 252 Kan. 224, 843 P.2d 260 (1992).

Kentucky — **Yes under the Federal Constitution.** The court found that the unfettered discretion objected to in *Prouse* was not present at a sobriety and license checkpoint. The court relied on the fact that all vehicles were stopped. There was no discussion of the state constitution. *Kinslow v. Commonwealth*, 660 S.W.2d 677 (Ky.App. 1983).

Louisiana — **No under state law.** Defendant challenged, under both the U.S. and Louisiana Constitutions, a checkpoint in which the officer exercised broad discretion. There was no advance warning of an approaching checkpoint; no procedure or policy was adopted on how to do a checkpoint. The court found that under the Fourth Amendment, checkpoints are permissible, but not this one. The court said that checkpoints "certainly smack of police state measures, and it is doubtful if they could ever pass muster under the Louisiana Constitution." The court found no evidence of a compelling state interest.

The Louisiana Constitution protects against unreasonable invasions of privacy, not just against unreasonable searches and seizures. Therefore, it is not likely

that the court would permit police to conduct properly constituted checkpoints. *State v. Parms*, 523 So.2d 1293 (La. 1988).

Maine — **Yes under the Federal Constitution.** A DWI checkpoint was challenged under the Fourth Amendment. The court applied *Prouse* and approved the checkpoint. *State v. Leighton*, 551 A.2d 116 (Me. 1988).

Maryland — **Yes under both the Federal Constitution and state law.** A sobriety checkpoint was challenged under both the Fourth Amendment and Art. 26 of the Maryland Bill of Rights. The court found "no Fourth Amendment or Art. 26 violation occurred when appellants were stopped at the sobriety checkpoint involved in the present case." *Little v. State*, 300 Md. 485, 479 A.2d 903 (1984).

Massachusetts — **Yes under both the Federal Constitution and state law.** This was a challenge to sobriety checkpoints under both the Fourth Amendment and the Massachusetts Declaration of Rights. Two issues were certified: (1) in order to justify its use of checkpoints, does the state have to show that it has no less intrusive alternative? (2) assuming "yes" to (1), is the standard of proof clear and convincing or a preponderance of the evidence? The court concluded "that neither of these provisions [the Fourth Amendment and Article 14 of the Declaration of Rights] requires the Commonwealth to prove that there are no equally effective yet less intrusive alternatives for enforcing [DUI law] .., than roadblocks. We therefore, answer question one in the negative and need not address question two." *Commonwealth v. Shields*, 402 Mass. 162, 521 N.E.2d 987 (1988).

Michigan — **No under state law.** Although the U.S. Supreme Court held that sobriety checkpoints do not violate the Fourth Amendment *Michigan v. Sitz*, 496 U.S. 444, 110 L.Ed.2d 412 (1990), the Michigan Supreme Court held that sobriety checkpoints violate the Michigan Constitution. *Sitz v. Michigan Dept. of State Police*, 506 N.W.2d 209 (1993).

Minnesota — **No decisive authority.** Sobriety checkpoint was challenged under Fourth Amendment and state law. The court upheld the checkpoint under the Fourth Amendment, applying *Sitz*. Defendant argued state law should be interpreted to require individualized suspicion for a stop. The court declined to do so. *Chock v. Comm. of Public Safety*, 458 N.W.2d 692 (Minn.App. 1990). Lower courts disagree on the effect of television cameras at checkpoints. *Gray v. Comm. of Public Safety*, 505 N.W.2d 357, 1993 WL 326921 (Minn. App. 1993); *Ascher v. Comm. of Public Safety*, 505 N.W.2d 362, 1993 WL 326926 (Minn. App. 1993). The *Ascher* court also held that absent evidence of a net advance in arresting drunk drivers due to the use of checkpoints, they violate the Minnesota Constitution.

Mississippi	**Supporting but not decisive authority.** This case decided that a checkpoint for the purpose of conducting license checks was permissible under the Fourth Amendment. No state claim was raised. The court relied on *Prouse*. This was a drug case. *Miller v. State*, 373 So.2d 1004 (Miss. 1979).
Missouri	**Yes under both the Federal Constitution and state law.** This case was brought under the Fourth Amendment and the Missouri Constitution, Art. I, Section 15. The court indicated that the Missouri Constitution gives essentially the same protection as the Fourth Amendment and held that sobriety checkpoints are not unconstitutional under the Missouri Constitution. The court found no violation of *Prouse*, and therefore no violation of the Fourth Amendment. The court noted that the procedures used in the case involved no acts or omissions that have caused other jurisdictions to hold checkpoints unconstitutional. *State v. Welch*, 755 S.W.2d 624 (Mo.App. 1988).
Montana	**Statutory authority.** Checkpoints are authorized under the safety spot check law, MONT. CODE ANN. §46-5-501 et seq. (No specific mention of sobriety checkpoints.)
Nebraska	**Supporting, but not decisive authority.** Cases dealing with license/registration checkpoints and game checkpoints permitted the checkpoints. One case held that a checkpoint conducted by field officers acting without standards, guidelines or procedures that was moved at will violated the Fourth Amendment under *Prouse*. The court said that a "driver's reasonable expectation of privacy was rendered subject to arbitrary invasion solely by the unfettered discretion of officers in the field." *State v. Crom*, 222 Neb. 273, 383 N.W.2d 461 (1986) In a post *Sitz*, decision although the Nebraska Court of Appeals held the drug checkpoint at issue was not legal, it indicated a checkpoint meeting the *Sitz* guidelines would be permissible in Nebraska. *Nebraska v. Kingsbury*, 1 Neb.C.A. 1337, 1992 WL 211396 (Neb.App. 1992)
Nevada	**Statutory Authority.** NEV. REV. STAT. §484.359 establishes minimum standards for conducting administrative roadblocks. (No specific mention of sobriety checkpoints.)
New Hampshire	**No under state law.** DWI checkpoints were challenged under both the New Hampshire and U.S. Constitutions. The New Hampshire Constitution, art. 19, gives greater protection to citizens than the Fourth Amendment. The court found that the New Hampshire Constitution requires the state to show that its objective cannot be met through less intrusive means in order to justify an intrusion. The court indicated that there is no evidence that checkpoints are greater deterrents to DWI than well publicized roving patrols. The court did not reach the Fourth Amendment issue because it disposed of the case on state grounds. *State v. Koppel*, 127 N.H. 286, 499 A.2d 977 (1985).

New Jersey — **Yes under both the Federal Constitution and state law.** The court used a cost benefit approach and found that sobriety checkpoints were effective at the site they were used and upheld the checkpoints under both the U.S. and New Jersey Constitutions. The court held "the warrantless stopping of defendant's vehicle that led to the discovery of his intoxicated condition was reasonable under the Fourth Amendment of the U.S. Constitution and Art. I, paragraph 7 of the New Jersey Constitution." 281. *State v. Mazurek*, 237 N.J.Super. 231, 567 A.2d 277 (N.J.Super. A.D. 1989)

New Mexico — **Yes under the Federal Constitution.** This case involved a DWI checkpoint. There was no discussion of state constitutional law. The court held that properly constituted checkpoints are constitutional under the Fourth Amendment. *City of Las Cruces v. Betancourt*, 105 N.M. 655, 735 P.2d 1161 (1987).

New York — **Yes under the Federal Constitution.** A DWI checkpoint was challenged on Fourth Amendment grounds. The state constitution was not discussed. The court found that checkpoints are not a violation of the Fourth Amendment. The issues noted were productivity in terms of arrests; the state's purpose to create general deterrence was approved; and the court found no problem in that the sites were moved. *People v. Scott*, 63 N.Y.2d 518, 483 N.Y.S2d 649, 473 N.E.2d 1 (1984).

North Carolina — **Statutory authority.** N.C. GEN. STAT. §20-16.3A details sobriety checkpoint procedures.

North Dakota — **Supporting but not decisive authority.** This case involved a safety inspection checkpoint that was challenged under the Fourth Amendment and Art. I, sec. 8 of the North Dakota Constitution. A single officer stopped an appropriate selection of vehicles. The court found the checkpoint was constitutional without any specific discussion of the state constitution. The court approved the N.D. Highway Patrol's policy of allowing a trooper to randomly stop a vehicle, inspect it and then "stop the next available vehicle when safe." *State v. Wetzel*, 456 N.W.2d 115 (N.D. 1990).

Ohio — **Supporting but not decisive authority.** This case challenged the constitutionality of safety searches under the Fourth Amendment. There was no discussion of state issues. The court approved the procedure under *Prouse*. *State v. Goines*, 16 Ohio App.3d 168, 474 N.E.2d 1219 (CA 1984).

Oklahoma — **No decisive authority.** In a case decided before the U.S. Supreme Court decided *Sitz*, an Oklahoma court found a DUI checkpoint violated the Fourth Amendment. The case was not decided on state grounds. *State v. Smith*, 674 P.2d 562 (Okl.Cr. 1984). Vehicle safety checks are conducted in Oklahoma.

Oregon — **No under state law.** The court found checkpoints unconstitutional under the state constitution, Art. I, section 9. It didn't reach the Fourth Amendment issues. The court found that there must be individualized suspicion to stop and

search for the purposes of bringing a criminal prosecution. The court suggested that if the purpose of the checkpoint were to enforce administrative regulations, the result might be different. "Before government officials can embark on a search or seizure for evidence to be used for this purpose [to gather evidence for a criminal prosecution], they must have individualized suspicion of wrongdoing." *State v. Boyanovsky*, 304 Or. 131, 743 P.2d 711 (1987), *State v. Anderson*, 304 Or. 139, 743 P.2d 715 (1987).

Pennsylvania — **Yes under state law.** This case involved a DWI checkpoint which was challenged under Article I, section 8 of the Pennsylvania Constitution. The court stated that the Pennsylvania Constitution can provide more rights than the Fourth Amendment in appropriate cases. It went on to hold that a properly constituted checkpoint does not violate the Pennsylvania Constitution. The court cited 75 PACS, section 6308(b) which authorizes "a systematic program of checking vehicles or drivers." The court held that checkpoints conducted after its effective date (1985) are legal. *Commonwealth v. Tarbert*, 517 Pa. 277, 535 A.2d 1035 (1987).

Rhode Island — **No under state law.** This is a DUI checkpoint case in which the court held that they violate Article I, Section 6 of the Rhode Island Constitution. Although the court said that it pays great deference to cases interpreting the U.S. Constitution, the Rhode Island Constitution can be more protective than the U.S. Constitution. The court said, "[w]e therefore find that police roadblocks for drunk driving are so violative of our citizen's rights that they must be declared unconstitutional." The court's rationale was that the Rhode Island Constitution prohibits searches without reasonable suspicion or probable cause. *Pimental v. Rhode Island*, 561 A.2d 1348 (RI 1989).

South Carolina — **No cases.** Sobriety checkpoints are being conducted.

South Dakota — **Supporting but not decisive authority.** This case dealt with a game checkpoint site, not an alcohol checkpoint. The game checkpoint was held to be permissible as the only reasonable means to enforce game laws. The court noted that hunting is a privilege and that a hunter tacitly consents to inspection of any game animal in his possession when he gets a license. The defendant was not hunting. The court held that the intrusion on the rights of non-hunters is light and outweighed by the public interest. This case was decided on both the Fourth Amendment and the South Dakota Constitution. *State v. Halverson*, 277 N.W.2d 723 (S.D. 1979).

Tennessee — **No cases.** Sobriety checkpoints are being conducted.

Texas — **No decisive authority.** Intermediate courts have held sobriety checkpoints impermissible under both the Texas Constitution (Article I, section 9) and the Fourth Amendment. *Sitz* was held to require a "legislatively developed administrative scheme." No such scheme exists in Texas. *King v. State*, 816 S.W.2d 447 (Tex.App.—Dallas 1991); *State v. Wagner*, 821 S.W.2d 288

(Tex.App.—Dallas 1991); *Garcia v. Texas*, 853 S.W.2d 157 (Tex.App.—Corpus Christi 1993). *State v. Holt*, 852 S.W.2d 47 (Tex.App.—ort Worth 1993) found a legislatively developed scheme is not a prerequisite to a proper checkpoint.

Utah — **Statutory authority.** UTAH CODE ANN. §77-23-101 et seq. authorizes checkpoints.

Vermont — **Yes under the Federal Constitution.** A DUI checkpoint was challenged under the Fourth Amendment. There was no discussion of state law and the court declined to address the state constitutional question until a case was brought before it with the issues fully briefed. The court upheld checkpoints under the Fourth Amendment. *State v. Martin*, 145 Vt. 562, 496 A.2d 442 (1985).

Virginia — **Yes under the Federal Constitution and state law.** Charlottesville sobriety checkpoints were challenged under the Fourth Amendment and the Virginia Constitution. The court held that the checkpoints were constitutionally valid. There was no separate discussion of the Virginia and Federal Constitutions. In a footnote, the court stated that the Virginia and Federal Constitutions are substantially the same. *Lowe v. Commonwealth*, 230 Va. 346, 337 S.E.2d 273 (1985), cert. den., 475 U.S. 1084 (1986).

Washington — **No under state law.** The Supreme Court of Washington reversed a decision that upheld sobriety checkpoints under the Washington and U.S. Constitutions. The court first analyzed the issues under the Washington Constitution and found the sobriety checkpoint program to be "illegal based on adequate and independent state grounds. Any federal cases cited are used for the purpose of guidance and do not by themselves compel the result reached." *City of Seattle v. Mesiani*, 110 Wash.2d 454, 755 P.2d 775 (1988).

West Virginia — **Supporting but not decisive authority.** This case involves a stop based on a bad tag. The court said, "[t]he weight of authority is that without violating the Fourth Amendment ... or West Virginia Constitution ... motorists may be stopped for no other reason than examination of licenses and registrations when such examinations are done on a random basis pursuant to a preconceived plan, such as the stopping of every car at a check point, ... or any other non-discriminatory procedure." *State v. Frisby*, 161 W.Va. 734, 245 S.E.2d 622 (W.Va. 1978).

Wisconsin — **Statutory prohibition.** Checkpoints are prohibited under WIS. STAT. §349.02(2)(a).

Wyoming — **No cases.**