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## Guerillas in the Midst: The Dangers of Unchecked Police Powers through the Use of Law Enforcement Checkpoints

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# GUERILLAS IN THE MIDST: THE DANGERS OF UNCHECKED POLICE POWERS THROUGH THE USE OF LAW ENFORCEMENT CHECKPOINTS

*Freedom is not something that can be achieved once and for all time. It is a continuing process that survives only as it is lived and practiced. In this sense, freedom is an objective that can never be won. It can only be lost.* – Clifford Case, former U.S. Senator from New Jersey

## I. INTRODUCTION

Passing through obligatory checkpoints at airports and international borders, in schools, courthouses and government offices, has become a familiar, if occasionally irritating, ritual to Americans. For more than twenty-five years, law enforcement has used checkpoints in an effort to detect illegal aliens.<sup>1</sup> The uses for checkpoints have expanded to include the prevention of drunk driving, operation of unsafe or stolen vehicles, operation of vehicles by unlicensed drivers, and most recently, the prevention of drug trafficking and apprehension of drug dealers.<sup>2</sup>

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<sup>1</sup> See *United States v. Martinez-Fuerte*, 428 U.S. 543, 553 (1976) (noting use of inland checkpoints to detect illegal aliens as early as 1973).

<sup>2</sup> See *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 447 (1990) (upholding constitutionality of state's use of sobriety checkpoints); *Edmond v. Goldsmith*, 183 F.3d 659, 666 (7th Cir. 1999) (suggesting constitutionality of drug checkpoint if government proved drug dealing in area at "epidemic proportions"), *aff'd sub nom. City of Indianapolis v. Edmond*, 121 S.Ct. 447 (2000); *Brouhard v. Lee*, 125 F.3d 656, 660 (8th Cir. 1997) (upholding sobriety checkpoint where all vehicles passing through stopped by officers); *Merrett v. Moore*, 58 F.3d 1547, 1550-51 (11th Cir. 1995) (finding drug checkpoint constitutional because also intended as drivers' license checkpoint); *United States v. Dillon*, 983 F. Supp. 1037, 1040 (D.Kan. 1997) (concluding sobriety and auto inspection checkpoint at military base constitutional); *United States v. McFayden*, 865 F.2d 1306, 1307 (D.C. Cir. 1989) (holding traffic enforcement checkpoint constitutional despite "spin-off" effect of deterring drug dealing); see also *Utah v. DeBooy*, 996 P.2d 546, 554 (2000) (in-

Troubled by the menacing presence of crime in their neighborhoods, citizens are rallying to the cries of politicians for a return to "law and order."<sup>3</sup> Many citizens proclaim their willingness to sacrifice some of their personal freedoms in exchange for a greater sense of security and insulation from criminal behavior.<sup>4</sup> With the seeming omnipresence of drugs in this country, law enforcement officials in many states have added narcotics checkpoints to their drug-fighting arsenal.<sup>5</sup> Yet, by definition, such checkpoints not only permit brief seizures of individuals and their vehicles without even reasonable suspicion that the individual has committed or is committing a crime, but also directly further the goals of general criminal law enforcement.<sup>6</sup>

While acknowledging the pervasiveness and seriousness of the dangers that drug trafficking poses, courts in a number of states have deemed narcotics checkpoints unconstitutional.<sup>7</sup> Nevertheless, several of these same courts have acknowledged that, under certain circumstances, narcotics checkpoints might be reasonable.<sup>8</sup> The United States Supreme

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validating multi-purpose vehicle checkpoint); *Commonwealth v. Rodriguez*, 2000 WL 29492, at \*6 (Mass. Jan. 18, 2000) (holding checkpoints to apprehend drugs or other contraband violate state constitution); *Missouri v. Damask*, 936 S.W.2d 565, 567 (Mo. 1996) (upholding constitutionality of drug checkpoints); *Galberth v. United States*, 590 A.2d 990, 999 (D.C. App. Ct. 1991) (deeming checkpoint constitutional if primary purpose to check for licenses not drugs).

<sup>3</sup> See Charles W. Colson, *Truth, Justice and Peace: The Foundations of Restorative Justice*, 10 REGENT U.L. REV. 1, 1 (Spring 1998) (observing citizens' approval of tough approach to fighting drugs).

<sup>4</sup> See *id.* The author cites a survey by the *Miami Herald* in which seventy percent of respondents stated they would support roadblocks and random searches of vehicles by police to help combat the presence of drugs in their neighborhoods. *Id.*

<sup>5</sup> See Scott A. White, *The Constitutionality of Drug Enforcement Checkpoints in Missouri*, 63 MO. L. REV. 263, 263 (Winter 1998) (commenting on greater use of drug enforcement checkpoints).

<sup>6</sup> See *Galberth*, 590 A.2d at 997-98 (observing stops to detect drug-related crimes fall in category of general law enforcement).

<sup>7</sup> See *id.* at 999 (pronouncing drug checkpoint unconstitutional due to lack of "empirical evidence" of its effectiveness); *Edmond*, 183 F.3d at 666; see also *United States v. Huguenin*, 154 F.3d 547, 559 (6th Cir. 1998) (finding checkpoint unconstitutional despite "important governmental interest" of stopping drug dealing); *United States v. Morales-Zamora*, 974 F.2d 149, 153 (10th Cir. 1992) (declaring drug checkpoint with ostensible purpose of auto inspection pretextual and unconstitutional); *Wilson v. Commonwealth*, 509 S.E.2d 540, 543 (Va. Ct. App. 1999) (deeming checkpoint designed to halt trespassers and drug dealers at apartment complex unconstitutional).

<sup>8</sup> See *Edmond*, 183 F.3d at 666 (contending drug checkpoint could fall under "special needs" exception to individualized suspicion requirement for seizures); *Huguenin*, 154 F.3d at 563 (implying, with proper safeguards and no pretext, checkpoints for drunk driving and

Court recently addressed the issue of narcotics checkpoints in the case of *City of Indianapolis v. Edmond*.<sup>9</sup> Although the Court invalidated the checkpoint program involved, it left open the possibility of law enforcement officials operating checkpoints with a secondary purpose of intercepting drugs.<sup>10</sup>

This note examines the reasoning behind courts' decisions to either uphold or invalidate checkpoints possessing either a stated or underlying purpose of apprehending drug dealers. It begins by evaluating the test courts uniformly apply when deciding the issue of the reasonableness of a search or seizure in various contexts.<sup>11</sup> Specifically, the note focuses on searches and seizures of vehicles and motorists stopped at checkpoints where individualized suspicion is not a prerequisite for officers to have the authority to stop drivers.<sup>12</sup>

In addition, the note traces the history of decisions involving searches and seizures of automobiles and their occupants, and the evolution of constitutional interpretations of the Fourth Amendment with regard to reasonableness.<sup>13</sup> It examines the contexts within which the United States Supreme Court has ruled that neither probable cause nor a warrant is necessary to effectuate the seizure of an automobile. This note also presents the Court's reasoning in dispensing with the lesser standard of reasonable suspicion in the context of automobile seizures at checkpoints.

Lastly, the note uses judicial rationales and opinions to analyze the reasons why authorizing the use of law enforcement checkpoints poses an insidious threat to the freedoms of every individual in this country by opening further the ever-widening door of unlimited, unconstrained police powers.<sup>14</sup>

## II. THE HISTORY OF CHECKPOINTS

Mandatory stops at roadblocks constitute seizures subject to Fourth Amendment limitations.<sup>15</sup> In 1976, the Supreme Court dispensed with the

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drugs constitutional).

<sup>9</sup> 121 S.Ct. 447 (2000).

<sup>10</sup> See *Edmond*, 121 S.Ct. at 457 n.2.

<sup>11</sup> See *infra* Part III.A-C.

<sup>12</sup> See *infra* notes 32-46.

<sup>13</sup> See *infra* Part II.

<sup>14</sup> See *infra* Part IV.

<sup>15</sup> See *Martinez-Fuerte*, 428 U.S. at 556 (stating checkpoints fall within Fourth Amendment's scope).

requirement of reasonable suspicion for the brief stopping of individual motorists at checkpoints designed to uncover illegal aliens.<sup>16</sup> Noting the impracticability of requiring reasonable, or indeed, any measure of suspicion while still being able to successfully ferret out the large number of illegal aliens on public highways, the Court employed a balancing test.<sup>17</sup> The Court ultimately deemed the government's interest in keeping illegal aliens out of the country greater than the temporary and rather minor intrusion on motorists' freedom of movement and freedom of privacy.<sup>18</sup>

Three years later, the Court distinguished random stops of automobiles from checkpoint stops and held that police may not arbitrarily, without reasonable suspicion, stop vehicles to question the drivers.<sup>19</sup> Nevertheless, in situations where individualized suspicion is "dispensable," the government must employ safeguards to effectively constrain law enforcement officers' discretion to protect individuals from police abuse.<sup>20</sup> Later

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<sup>16</sup> See *id.* at 567. The Court went even further, maintaining that officers could hold drivers for more extensive questioning if the officers had some suspicion the car held illegal aliens, even if the only basis for that suspicion were that an occupant of the car looked Mexican or of Mexican descent. *Id.* at 563.

<sup>17</sup> See *id.* at 557. The Court weighed the governmental need to stop illegal aliens from entering the country against the intrusion the stop posed to those lawfully in the stopped vehicle. *Id.* at 567. The Border Patrol set up the roadblocks at issue, some permanent, and some temporary, on major roads leading away from the border. *Id.* at 552. One checkpoint was sixty-six miles from the border. *Id.* at 545. In 1973, the combination of temporary and permanent checkpoints, along with "roving patrols," caught over 55,000 illegal aliens. *Id.* at 553. The majority of these were at checkpoints. *Id.*

<sup>18</sup> See *id.* at 567. "The principal protection of 4th Amendment rights at checkpoints lies in appropriate limitations on the scope of the stop." *Id.* at 566-67. The view of the Court in *Martinez-Fuerte* stands in stark contrast to the view the Court expressed fifty years earlier in *Carroll v. United States*, 267 U.S. 132 (1925). In *Carroll*, the Court created the so-called "automobile exception" to the warrant requirement when police conduct a search or seizure. *Id.* at 153-54. The Court held that the warrantless search and seizure of an automobile where probable cause exists is a valid exercise of government authority. *Id.* Acknowledging the need to stop people entering the country to have those entering prove their right to be here, the Court continued:

But those lawfully within the Country, entitled to use the public highways, have a right to free passage without interruption or search, unless there is known to be a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. *Id.* at 149.

<sup>19</sup> *Delaware v. Prouse*, 440 U.S. 648, 659 (1986) (holding random, suspicionless stops unreasonable when reasonable alternative means available). The Court went on to add that its decision did not preclude states from devising programs for "spot checks" of all vehicles because they would be less invasive to individuals' rights as long as they gave the officers conducting the checks less discretion. *Id.* at 663.

<sup>20</sup> See *id.* at 654-55 (recognizing dangers of unfettered police discretion).

that same year, the Court announced a three-prong test for determining when a search or seizure conducted without probable cause, a warrant, or reasonable suspicion is reasonable within the meaning of the Fourth Amendment.<sup>21</sup>

These decisions paved the way for state and local authorities to create checkpoint programs designed to combat an array of societal woes.<sup>22</sup> Many of these programs were quickly subject to court challenges.<sup>23</sup> In *Michigan Dep't of State Police v. Sitz*,<sup>24</sup> the United States Supreme Court undertook the issue of whether highway roadblocks established to deter drunk driving violated the Fourth and Fourteenth Amendments' proscriptions against unreasonable searches and seizures.<sup>25</sup> While upholding the constitutionality of the preliminary stop of vehicles at such roadblocks, the Court conceded that a subsequent demand for a driver to submit to field sobriety tests might require some degree of suspicion by the officer that the individual was intoxicated.<sup>26</sup> Although the appellants urged the Court to consider other less intrusive means the state might employ to promote the same goals, the Court responded that the determination of whether a different plan posing less of an encroachment on individual privacy is not within the purview of the courts.<sup>27</sup>

During its most recent term, the United States Supreme Court surprised many Court watchers when it ruled that a checkpoint program whose primary purpose was to uncover illegal drugs violated the Fourth Amendment.<sup>28</sup> Despite acknowledging the gravity of the drug problem,

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<sup>21</sup> See *infra* Part III. See also *Brown v. Texas*, 443 U.S. 47, 50-51 (1979). "Consideration of the constitutionality of such seizures involves a weighing of 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." *Id.*

<sup>22</sup> See, e.g., *Norwood v. Bain*, 166 F.3d 243, 247 (4th Cir. 1999) (upholding weapons checkpoint at motorcycle rally); *Merrett*, 58 F.3d at 1551 (validating checkpoint for drug detection and checking licenses and registrations); *Wilson*, 509 S.E.2d at 540 (involving checkpoint to keep trespassers and drugs out of private apartment complex).

<sup>23</sup> See *id.* (referring to similar cases in other jurisdictions).

<sup>24</sup> 496 U.S. 444 (1990).

<sup>25</sup> *Sitz*, 496 U.S. at 447 (declaring roadblocks subject to constitutional scrutiny).

<sup>26</sup> See *id.* at 450 (looking only at constitutionality of initial stop).

<sup>27</sup> See *id.* at 453-54 (rejecting use of "less intrusive alternative" theory when determining checkpoint's constitutionality); see also *Martinez-Fuerte*, 428 U.S. at 557 n.12 ("[E]laborate less restrictive alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers."); *Brouhard*, 125 F.3d at 660 (agreeing court has no duty to inquire if less intrusive means to halt drunk driving available). But see *Delaware v. Prouse*, 440 U.S. at 659 (considering alternative means already in place and others possible in holding suspicionless random vehicle stops unconstitutional).

<sup>28</sup> *Edmond*, 121 S.Ct. at 451.

the Court maintained that it had never sanctioned any checkpoint designed to find evidence of "ordinary criminal wrongdoing."<sup>29</sup>

### III. ANALYZING THE CONSTITUTIONALITY OF CHECKPOINTS

The United States Supreme Court has emphasized the need for government officials charged with overseeing checkpoint programs to formulate formal guidelines for these programs.<sup>30</sup> The guidelines must sufficiently restrict the actions of the officers who conduct the checkpoints, otherwise courts may invalidate the program because it makes the potential for police abuse too likely.<sup>31</sup> Additionally, in determining whether checkpoint seizures and searches are reasonable, courts must consider factors such as where police set up the checkpoints and the manner in which the police run them.<sup>32</sup> Courts have consistently applied the *Brown*<sup>33</sup> test when analyzing the validity of checkpoint programs.<sup>34</sup>

The factors under the *Brown* test are the following: 1) the importance of the governmental interest in the goal of the checkpoint; 2) the effectiveness of the checkpoint in furthering that governmental interest; and 3) the degree of intrusiveness the checkpoint causes the individual.<sup>35</sup> If the first two factors together outweigh the last, then the court will uphold the checkpoint as a constitutional exercise of governmental authority.<sup>36</sup>

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<sup>29</sup> *Id.* at 454.

<sup>30</sup> See *Sitz*, 496 U.S. at 453 (approving use of guidelines for establishing checkpoints); *Martinez-Fuerte*, 428 U.S. at 565 (requiring routine "method of operation" for checkpoint).

<sup>31</sup> See *Martinez-Fuerte*, 428 U.S. at 559 (asserting need for non-field law enforcement officer deciding on operational details of checkpoint).

<sup>32</sup> *Id.* at 565 (opining "[t]he reasonableness of checkpoint stops, however, turns on factors such as the location and method of operation, ... factors that are not susceptible to the distortion of hindsight").

<sup>33</sup> 443 U.S. 47 (1979) (enumerating factors courts must consider in determining constitutionality of checkpoints).

<sup>34</sup> See *Sitz*, 496 U.S. at 449-50 (confirming *Brown* as correct test for deciding constitutionality of seizures not amounting to actual arrest).

<sup>35</sup> *Brown*, 443 U.S. at 50-51.

<sup>36</sup> *Id.*

*A. Importance of the governmental interest*

Under the *Brown* test, courts first consider the importance of the governmental interest in achieving its expressed goal.<sup>37</sup> There is little disagreement that the government has a very strong interest in promoting and maintaining safety on the roads.<sup>38</sup> Disagreement arises, however, when the government's purported interest does not coincide with the actual or primary purpose of the checkpoint.<sup>39</sup> Some courts have held checkpoint programs invalid if the government misrepresented the true purpose of the program.<sup>40</sup> Other courts look solely at the governmental interest or interests that operation of the checkpoint is in fact promoting, however minimally.<sup>41</sup>

Whereas public safety ranks high as a valid purpose, some courts have expressly forbidden the use of checkpoints as a means to further general law enforcement practices; namely, to apprehend criminals and/or contraband.<sup>42</sup> A roadblock aimed at combating drug trafficking is, by definition, operated to catch criminals and contraband.<sup>43</sup> Yet drug trafficking has attained monstrous proportions that make the interest to the

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<sup>37</sup> *Id.*

<sup>38</sup> See *Prouse*, 440 U.S. at 658 (acknowledging legitimacy of states' serious concern with keeping unfit drivers and autos off road).

<sup>39</sup> Compare *Huguenin*, 154 F.3d at 555 (invalidating checkpoint with alleged road safety purpose and real purpose of catching drug dealers) and *Morales-Zamora*, 974 F.2d at 153 (labeling stop with main purpose not to check licenses but to look for drugs "pretextual") with *Merrett*, 58 F.3d at 1551 (authorizing checkpoint with primary purpose to stop drug dealing and secondary purpose of ensuring licensing of drivers).

<sup>40</sup> See *Huguenin*, 154 F.3d at 554 (opining "a pretextual roadblock has pitfalls that come perilously close to permitting unfettered government intrusion on the privacy interests of all motorists"). The government maintained that the challenged roadblock was designed to get drunk drivers off the public roads to make them safer. *Id.* at 550. Yet a drug-sniffing canine was always at the site while there was never any breathalyzer. *Id.* Any items which the police discovered as evidence of drug dealing could be permanently seized. *Id.* While officers arrested seven for driving under the influence during the two months the checkpoint operated, they arrested 128 people for drug crimes. *Id.* at 555-56.

<sup>41</sup> See *Merrett*, 58 F.3d at 1551 n.2 (contending use of pretextual purpose of checkpoint irrelevant in evaluating checkpoint's validity).

<sup>42</sup> See *Galberth*, 590 A.2d at 998-99 (holding roadblock used to catch criminals and evidence unconstitutional); *Park v. Forest Service of the U.S.*, 1999 WL 692345, at \*9 (W.D. Mo. Jun 11, 1999) (repudiating checkpoint designed to promote general law enforcement).

<sup>43</sup> See *Edmond*, 183 F.3d at 662 (observing reasonableness to search without suspicion allowed for "special needs," not enforcement of criminal laws). The city did not argue that it was actually looking to apprehend drug dealers rather than seeking to ensure public safety on the roads. *Id.* at 664.

government in halting it absolutely critical.<sup>44</sup> In *Sitz*, the Supreme Court permitted sobriety checkpoints, which would, by their nature, further general law enforcement goals because those goals were incidental, or at least secondary, to a goal of public safety.<sup>45</sup>

*B. Effectiveness of the checkpoint in furthering the governmental interest*

In order for a checkpoint to pass the “effectiveness” prong, the checkpoint need not represent the best or even the only means by which to achieve the government’s goal.<sup>46</sup> In terms of the effectiveness of a program, although there is no pre-determined, quantitative measure below which courts will automatically invalidate a checkpoint program, the United States Supreme Court has set an extremely low threshold.<sup>47</sup> Despite the low percentage of programs the Supreme Court has approved, some lower courts have found that programs with higher “hit” rates – usually measured by the number of arrests made and citations issued compared to the total number of vehicles stopped – do not necessarily pass constitutional muster.<sup>48</sup> Likewise, the courts are split on whether to include in their effectiveness calculations all of the arrests and tickets at the checkpoint when the nature of some of the charges differs from the stated purpose of the checkpoint.<sup>49</sup>

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<sup>44</sup> See *Huguenin*, 154 F.3d at 559 (acknowledging war on drugs important governmental interest); *Damask*, 936 S.W.3d at 571 (finding drug crisis in U.S.).

<sup>45</sup> *Sitz*, 496 U.S. at 451 (focusing on grave harm drunk drivers cause).

<sup>46</sup> See *Damask*, 936 S.W.2d at 571 (stating “it is not for the courts to decide ‘as to which among reasonable alternative law enforcement techniques should be employed ...’”) (quoting *Sitz*, 496 U.S. at 453).

<sup>47</sup> See *Sitz*, 496 U.S. at 455 (upholding sobriety checkpoint where 1.6% of stopped drivers arrested for driving under influence); *Martinez-Fuerte*, 428 U.S. at 554 (noting 146,000 autos stopped over eight days and 171 found to contain illegal aliens). Curiously, although the Court repeatedly mentions that of the 820 cars instructed to pull over for a further search, 171, or twenty percent of them, yielded illegal aliens, the Court does not translate the numbers at the original stop, which show that the overall “hit” rate of the checkpoint was just over one-tenth of one percent. *Id.*

<sup>48</sup> See *Edmond*, 183 F.3d at 666 (declaring high hit rate not enough to justify narcotics roadblocks without more evidence of drug problem). Of the 1,161 vehicles stopped, five percent of them concluded in drug arrests and overall, including arrests for offenses such as driving with an expired license, nine percent ended in arrests. *Id.* at 661.

<sup>49</sup> See *Wilson*, 509 S.E.2d at 543 (remarking state presented no evidence any arrests at drug checkpoint for drug offenses). Police arrested the defendant for drunk driving at the checkpoint, which police had set up outside an apartment complex after residents complained of pervasive drug dealing on the premises. *Id.* at 541. See also *Park*, 1999 WL 692345, at \*9 (dismissing statistics government touted for purported sobriety checkpoint).

Where the supposed purpose of the checkpoint does not coincide with the actual purpose, courts may disregard any arrests or citations for the falsely alleged purpose.<sup>50</sup> Some courts have found that the primary purpose of a checkpoint is different from the stated purpose, basing their finding on the nature of the offenses committed by the greatest number of motorists apprehended at the checkpoint.<sup>51</sup> When no data is available to measure and test effectiveness, then the court may speculate as to the expected rate of success.<sup>52</sup>

Courts may also consider the number of law enforcement officials assigned to a roadblock in determining effectiveness, based on a most-efficient-allocation-of-resources theory.<sup>53</sup> Still, such determinations invariably cannot take into account just how great a deterrent effect the

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The court stated that in order to measure effectiveness of the so-called sobriety checkpoint, one should look at the number of arrests for drunk driving, not the number of people without valid licenses or registrations. *Id.*

<sup>50</sup> See *Huguenin*, 154 F.3d at 553-54 (advocating effectiveness measured only as to true purpose of checkpoint). Police operated the checkpoint over sixty-four different days and stopped more than 2,300 autos. *Id.* at 556. They made only seven drunk driving arrests, yet 128 arrests for crimes involving drugs. *Id.* Using only the former figure, the court found that this translated to a .29% apprehension rate, which the court concluded was too low. *Id.* at 559. The court refused to find any significance in the fact that this percentage was more than double that in *Martinez-Fuerte*, which the Supreme Court had upheld. *Id.* at 559 n.11. The court excoriated the Eleventh Circuit's decision in *Merrett v. Moore*, which held that a narcotics checkpoint was effective based on the percentage of drivers who received tickets for driving without a valid license or registration. *Id.* at 553-54.

In *Merrett*, the roadblock had about 2,100 autos drive through over two days. *Merrett*, 58 F.3d at 1549. Highway officers stopped 1,330 of the autos. *Id.* In addition, trained dogs sniffed the vehicles passing through, as well as some vehicles in a nearby rest area. *Id.* The dogs indicated that twenty-eight of the vehicles might contain drugs, yet officers arrested only one individual for drug possession after more thorough searches. *Id.* The officers also handed out sixty-one tickets. *Id.*

<sup>51</sup> See *McFayden*, 865 F.2d at 1312 (finding main goal of roadblock to control traffic). The court accepted the government's assertion that 3% of stopped drivers had violated a traffic or criminal law, justifying arrest. *Id.* at 1313. According to the government, one-half percent of stopped drivers had committed or were committing a crime. *Id.* The court then compared the percentages with those in *Martinez-Fuerte* and concluded that because the percentages before them were higher, that the roadblocks at issue were sufficiently effective. *Id.*

<sup>52</sup> See *Prouse*, 440 U.S. at 659-60 (projecting expected effectiveness of random traffic stops to catch unlicensed drivers very low). Working without any empirical data, the Court mused there are very few unlicensed drivers on the roads, so on average, the police would likely have to stop a lot of vehicles in order to catch just one unlicensed driver. *Id.* at 660.

<sup>53</sup> See *Sitz*, 496 U.S. at 460 (Stevens, J., dissenting) (speculating on how many arrests nineteen officers involved in checkpoint might have made if on regular patrol).

checkpoint has with regard to the targeted behavior.<sup>54</sup>

*C. Degree of intrusiveness of the checkpoint on the individual*

In *Sitz*, the Supreme Court concluded the overall intrusiveness of properly run drunk driving checkpoints was slight.<sup>55</sup> Unlike sobriety checkpoints, narcotics checkpoints typically have a trained, drug-sniffing dog on hand.<sup>56</sup> In *United States v. Place*,<sup>57</sup> the Supreme Court ruled that a trained dog sniffing the exterior of luggage did not constitute a search requiring Fourth Amendment scrutiny.<sup>58</sup> The Court supported its conclusion by observing that the defendant's luggage was in a public place and the dog only had access to the outside of the bags.<sup>59</sup> Courts have applied this holding to other types of property subject to dog sniffs, implying that use of a trained canine poses no greater intrusion to the occupant of a car than the owner of a suitcase.<sup>60</sup>

1. Objective intrusion

To assess the objective intrusion of each checkpoint, courts consider how long the stop lasts, the nature of the search, and, specifically, the questioning involved.<sup>61</sup> While the Supreme Court has set no outer limit on how long a government officer may lawfully detain an individual, whether with or without reasonable suspicion, it has said that such detention may not be protracted.<sup>62</sup> The duration of a stop may be only a few minutes, but

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<sup>54</sup> See *Galberth*, 590 A.2d at 990 (finding no quantitative evidence roadblock successful for reason other than presence of so many officers).

<sup>55</sup> See *Sitz*, 496 U.S. at 452 (labeling length and degree of investigation "minimal").

<sup>56</sup> See, e.g., *Edmond*, 183 F.3d at 661 (leading drug dog around car during stop); *Huguenin*, 154 F.3d at 551 (using drug dog only if reasonable suspicion car contains drugs); *Merrett*, 58 F.3d at 1549; *Morales-Zamora*, 974 F.2d at 149.

<sup>57</sup> 462 U.S. 696 (1983).

<sup>58</sup> *Id.* at 707.

<sup>59</sup> *Id.*

<sup>60</sup> See *Merrett*, 58 F.3d at 1553 (analogizing dog sniff of exterior of car to dog sniff of exterior of suitcase). The court cited *Place*, calling the sniff "minimally intrusive" and pointed out that the cars had been in a public place. *Id.*

<sup>61</sup> See *Sitz*, 496 U.S. at 451 (declaring duration and scope of search yardsticks for measuring objective intrusion).

<sup>62</sup> See *Place*, 462 U.S. at 709-10 (referring to *Terry* stops, when reasonable suspicion exists).

depending on the purpose of the checkpoint, that time may be too long.<sup>63</sup>

Law enforcement officials should limit the on-site officers' questions to those that will assist the officers in achieving the articulated purpose and no more.<sup>64</sup> In addition, law enforcement should station checkpoints in locations where traffic backups and accidents are unlikely to result.<sup>65</sup> If backups occur, the guidelines should provide a means by which to clear them up, such as waving vehicles through.<sup>66</sup> Whether the time spent waiting to pass through the roadblock constitutes a seizure under the Fourth Amendment depends on whether drivers reasonably think that they may not exit the checkpoint line with impunity.<sup>67</sup>

## 2. Subjective intrusion

The extent of the subjective intrusion resulting from a checkpoint depends upon the fear, surprise, and irritation the stop creates in the seized motorist.<sup>68</sup> According to the Supreme Court, checkpoint stops should engender neither fright nor annoyance in law-abiding citizens because the stop is brief, controlled by guidelines, and only a threat to those who have committed, or are committing, a crime.<sup>69</sup> The Court insists that check-

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<sup>63</sup> See *Huguenin*, 154 F.3d at 559 (deciding stop of "at least several minutes" far longer than needed to determine if driver intoxicated). The court compared the twenty-five-second long average stops upheld in *Sitz* with the several minutes here, where both cases addressed checkpoints ostensibly serving the same purpose. *Id.* at 560. See also *Damask*, 936 S.W.2d at 574 (suggesting two-minute stop to check license and registration reasonable); *Brouhard*, 125 F.3d at 660 (labeling objective intrusion slight where stops under thirty seconds and questions confined to seeking signs of drunkenness).

<sup>64</sup> See *id.* (limiting scope of questioning to checkpoint purpose); see also *Huguenin*, 154 F.3d at 558 (concluding objective intrusion unreasonable where questions asked unrelated to determination of drunkenness).

<sup>65</sup> See *Martinez-Fuerte*, 428 U.S. at 559; *Damask*, 936 S.W.2d at 567 (approving checkpoint's operation to keep traffic backups to minimum).

<sup>66</sup> See *Merrett*, 58 F.3d at 1551-52 (emphasizing ease with which police officers can clear up checkpoint traffic jams).

<sup>67</sup> See *id.* at 1552. The Eleventh Circuit found no evidence that many or even any of the drivers delayed by the checkpoint felt bound to wait in line and pass through the checkpoint. *Id.* Yet officers ordered one driver to remain in line for the twenty minutes it took him to get to the front. *Id.* at 1549. The court admitted that this seizure may have violated the driver's constitutional rights. *Id.* at 1552. At times, the checkpoint traffic was backed up for thirty to forty-five minutes. *Id.* at 1549.

<sup>68</sup> See *Sitz*, 496 U.S. at 452-53 (defining measure of subjective intrusion as "fright, surprise and annoyance" of stopped motorist).

<sup>69</sup> See *id.* at 452; see also *Martinez-Fuerte*, 428 U.S. at 560 (reasoning "stops should not be frightening or offensive because of their public and relatively routine nature").

points that operate pursuant to well-delineated standard procedures reassure the public of both the propriety and usefulness of such programs in protecting the public.<sup>70</sup> Oversight by officials who do not participate in the actual running of the checkpoint but who are accountable for its operation helps ensure it operates fairly and efficiently.<sup>71</sup> Guidelines require officers to stop every vehicle or every other vehicle, thus preventing officers from choosing which vehicles to stop based on impermissible criteria.<sup>72</sup> Failure of field officers to adhere to procedure can result in an objectionably high measure of subjective intrusion.<sup>73</sup> Nonetheless, officers may have some latitude in terms of what questions they ask a detained motorist.<sup>74</sup>

By omission, the Supreme Court intimates that motorists need not receive any prior notice of a checkpoint for the program to avoid causing any undue surprise or fear.<sup>75</sup> Nor has advance notice of a checkpoint or other police practice ever comprised a required part of application of the *Brown* test.<sup>76</sup> Regardless, notice, both in terms of advance publicity and actual signs posted along the road, constitutes one fact courts often take into account when measuring the degree of interference with a person's rights.<sup>77</sup> Even the sight of officers in uniform, orange traffic cones and

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<sup>70</sup> See *Martinez-Fuerte*, 428 U.S. at 559 (pronouncing use of set guidelines likely to instill public confidence in checkpoint program).

<sup>71</sup> See *id.* (stressing need for program designers to oversee police officers' adherence to guidelines).

<sup>72</sup> See *Sitz*, 496 U.S. at 453 (noting all drivers stopped and briefly questioned); *Martinez-Fuerte*, 428 U.S. at 546 (mentioning officers stopped and visually inspected all vehicles); *Huguenin*, 154 F.3d at 561 (criticizing absence of signs to assure drivers all vehicles subject to stop); *Brouhard*, 125 F.3d at 660 (approving conditions of checkpoints showing approaching drivers all required to stop).

<sup>73</sup> See *Brown*, 443 U.S. at 51 (concluding "the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers"); *Damask*, 936 S.W.2d at 575 (approving officers' compliance with guidelines).

<sup>74</sup> See *Brouhard*, 125 F.3d at 660 (holding it unreasonable to limit officers to "a rigid, scripted series of questions"). But see *Damask*, 936 S.W.2d at 574-75 (sanctioning use of checkpoint guidelines including what questions officers could pose).

<sup>75</sup> See *Sitz*, 496 U.S. at 452-53. In its discussion of subjective intrusion, a remark that a checkpoint set up so that an approaching driver can see all the cars ahead being stopped and the roadblock itself allay fears, is the nearest mention to notice the Court makes. *Id.* at 453.

<sup>76</sup> See *Dillon*, 983 F. Supp. at 1039. "While advance publicity may be one effective measure to protect the rights of the individual, it is not an absolute requirement when . . . guidelines provide sufficient safeguards for constitutional purposes." *Id.* But see *Galberth*, 590 A.2d at 1001 (finding satisfaction of notice requirement where news conferences held and signs on road posted).

<sup>77</sup> See *McFayden*, 865 F.2d at 1313 (referring to news conference announcing checkpoint and flares at site as notice thereof); *Damask*, 936 S.W.2d at 574 (advocating some

marked police cars may constitute a form of notice, albeit last-minute.<sup>78</sup>

A checkpoint in a relatively isolated location may intensify an individual's unease, especially when signs warning of the upcoming roadblock mislead drivers into believing it lies straight ahead, rather than off of the next exit.<sup>79</sup> Conversely, some courts have endorsed the use of such pretext to lure drivers into unwittingly entering a checkpoint, even though the ruse increases a driver's fear.<sup>80</sup>

#### IV. THE CONSTITUTIONAL PROSCRIPTION AGAINST ALCOHOL AND NARCOTICS CHECKPOINTS

Neither law enforcement officials nor courts can properly justify suspicionless checkpoints based on expediency, even when the government has a well-founded interest.<sup>81</sup> The Fourth Amendment serves to keep the government out of people's private lives.<sup>82</sup> Individuals do not shed their privacy rights upon entering a vehicle that is on the public roads.<sup>83</sup>

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advance notice of checkpoints).

<sup>78</sup> See *Sitz*, 496 U.S. at 453 (remarking on presence of officers in uniform); *McFayden*, 865 F.2d at 1313 (reporting flares, police car and uniformed officers at checkpoint).

<sup>79</sup> See *Huguenin*, 154 F.3d at 561 (finding checkpoint locations purposely designed to heighten surprise). The Sheriff's Department posted signs along the highway advising drivers of a drug/sobriety checkpoint ahead, when in fact the checkpoint was at the end of the next exit ramp after the signs. *Id.* at 549. The ramp curved, obscuring any view of the checkpoint until a driver was almost at it. *Id.* There were no gas stations, convenience stores or restaurants off the ramp. *Id.* The court labeled the checkpoint a "trap" aimed at drivers who had chosen to steer clear of the checkpoint "for whatever reason." *Id.* at 561.

<sup>80</sup> See *Damask*, 936 S.W.2d at 575 (approving use of pretext as to location of checkpoint). The Missouri Supreme Court found the signs on the highway suggesting the checkpoint was a mile ahead when it was, in fact, at the bottom of the next exit ramp, were a useful means to get drug traffickers to enter the checkpoint. *Id.* The court concluded the sign ruse would make it more likely that drug traffickers would take the exit in the belief that they could thereby bypass the checkpoint. *Id.*

<sup>81</sup> See *Sitz*, 496 U.S. at 458 (Brennan, J., dissenting). "That stopping every car might make it easier to prevent drunk driving . . . is an insufficient justification for abandoning the requirement of individualized suspicion." *Id.*

<sup>82</sup> See Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 354 (Spring 1994) (calling Fourth Amendment "gatekeeper that keeps out the government").

<sup>83</sup> See *Prouse*, 440 U.S. at 662 (labeling individuals' privacy expectations when in automobile reasonable); see also *Olmstead v. United States*, 277 U.S. 438 (1967) (Brandeis, J., dissenting) (underscoring Framers' intent to make privacy fundamental right). According to Justice Brandeis, the drafters of the Constitution:

Conferred as against the government, the right to be let

For many Americans a car serves as not only the primary means of transportation, but as an indispensable means as well.<sup>84</sup> Exposing occupants of a vehicle to even a brief detention by a police officer, when the officer possesses no reason to suspect the occupants of any crime, is an unnerving experience, even for the innocent.<sup>85</sup> The safety risk that the government is trying to extinguish must be so substantial as to amount to a "special need."<sup>86</sup> The belief that a safety risk exists must have a rational basis and cannot be wholly speculative.<sup>87</sup> Furthermore, to qualify as a special need, the risk must involve "an immediate or particularly serious risk to the public."<sup>88</sup> Drunk driving poses a very serious risk to the public, but that risk is too widespread, too nebulous in terms of identifying its source, to justify stopping every car on a particular road.<sup>89</sup> Considering the small percentage of the population who traffic in drugs, the same difficulty applies to drug enforcement checkpoints.<sup>90</sup>

Courts need to look at the availability and feasibility of other, less meddlesome methods to accomplish a goal, even when the goal of the government's program is undeniably compelling.<sup>91</sup> The need to protect individuals' liberty interests exceeds courts' interests in limiting the scope of their own analyses.<sup>92</sup> In Justice Stevens' dissent in *Sitz*, he observed that a police officer, parked at the checkpoint location, could likely have caught some, if not many, of the drunk drivers that the checkpoint did, simply by watching their driving.<sup>93</sup> In contrast, in *Martinez-Fuerte* the

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alone, the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. *Id.* at 478.

<sup>84</sup> See *id.* (referring to individuals' increasing reliance on automobiles to tend to daily needs).

<sup>85</sup> See *Sitz*, 496 U.S. at 465 (Stevens, J., dissenting). "Even law-abiding citizens may have justifiable fear of dealing with the police." *Id.* at 464.

<sup>86</sup> See *Norwood*, 166 F.3d at 247 (stating requirement of probable cause or reasonable suspicion only abrogated in limited circumstances).

<sup>87</sup> See *id.* (finding weapons checkpoint at motorcycle rally constitutional where rival gangs with history of violence attended).

<sup>88</sup> *Rodriguez*, 2000 WL 29492, at \*2.

<sup>89</sup> See *Sitz*, 496 U.S. at 458-59 (Brennan, J., dissenting) (rejecting majority's approval of dispensing with individualized suspicion at drunk driving checkpoints).

<sup>90</sup> See *id.* at 462-63 (Stevens, J., dissenting) (opining temporary, nighttime checkpoint stops too intrusive to innocent motorists).

<sup>91</sup> See *Prouse* *supra* note 27.

<sup>92</sup> *Id.*

<sup>93</sup> *Sitz*, 496 U.S. at 470 n.12 (Stevens, J., dissenting). Justice Brennan made a similar

Court perceived that the only way for the government to successfully fulfill its worthwhile objective was to implement permanent roadblocks.<sup>94</sup> While the use of alcohol or drugs adversely affects one's driving ability, sneaking illegal aliens into the country does not.<sup>95</sup>

Even as courts have accurately remarked on the importance of various public safety concerns,<sup>96</sup> they have sometimes given too much weight to the government's contention that checkpoints are a necessary tool of law enforcement.<sup>97</sup> Courts have also misconstrued the nature of the injury to drivers and their passengers who must endure checkpoint detentions.<sup>98</sup> The crucial question is not the degree of intrusiveness, but the type of intrusion the program imposes.<sup>99</sup> By failing to require that an officer have reasonable suspicion to stop a person in his or her vehicle, the United States Supreme Court has opened the door to a far greater potential for police abuse than previously existed.<sup>100</sup> While written guidelines enhance the operation of any program,<sup>101</sup> they cannot replace an individual's constitutional right to be free of unreasonable searches and seizures.<sup>102</sup>

Although the Supreme Court has upheld the constitutionality of sobriety checkpoints for reasons of public safety,<sup>103</sup> it has rejected check-

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observation, noting that the state in *Sitz* failed to show that identifying drunk drivers without checkpoints would constitute a formidable task, while adding that, in *Martinez-Fuerte*, the government did demonstrate the difficulty of identifying illegal aliens merely by watching cars drive by. *Id.* at 458 (Brennan, J., dissenting).

<sup>94</sup> *Martinez-Fuerte*, 428 U.S. at 557 n.12.

<sup>95</sup> See *Sitz*, 496 U.S. at 471-72 (Stevens, J., dissenting) (contrasting police officers' ability to detect drunk drivers by nearby observation with their inability to so detect illegal aliens).

<sup>96</sup> See *supra* notes 2, 22.

<sup>97</sup> See *Sitz*, 496 U.S. at 456 (Brennan, J., dissenting) (noting alternative law enforcement means to fight drugs).

<sup>98</sup> See *id.* (acknowledging seizure as "minimally intrusive" but asserting reasonableness hinges on existence of reasonable suspicion).

<sup>99</sup> See *id.* (insisting majority of Court wrongly focused on scope, rather than nature, of intrusion).

<sup>100</sup> See *id.* at 457. "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.*

<sup>101</sup> See *supra* Part III.

<sup>102</sup> See *Martinez-Fuerte*, 428 U.S. at 578. "But to permit, as the Court does today, police discretion to supplant objectivity of reason and, thereby, expediency to reign in the place of order, is to undermine Fourth Amendment safeguards . . ." *Id.*

<sup>103</sup> See *supra* note 2; see also *Edmond*, 183 F.3d at 664 (concluding checkpoints held constitutional when safety primary purpose). Random checkpoints that courts have held valid were not principally concerned with "catching crooks, but rather with securing the

points designed to primarily interdict drugs.<sup>104</sup> Most courts that have assessed the constitutionality of drug enforcement checkpoints agree that the purpose of such checkpoints relates more directly to law enforcement than public safety.<sup>105</sup> Yet there is also a definite law enforcement component to sobriety checkpoints because the government will very likely prosecute those arrested for drunk driving.<sup>106</sup> By contrast, in *Martinez-Fuerte*, the government simply deported most of the discovered illegal aliens rather than prosecuting them.<sup>107</sup>

Courts tend to look at the specific stop, not at the overall program, when evaluating the legality of a seizure that relates to general law enforcement.<sup>108</sup> To do otherwise threatens the Fourth Amendment rights of all citizens who travel on the public roads.<sup>109</sup> The difficulty arises when government administrators use pretextual and mixed-motive checkpoints.<sup>110</sup> They may present a program under the guise of public safety when, in fact, the program primarily aims to catch criminals and uncover contraband.<sup>111</sup>

Several courts have distinguished alcohol checkpoints from drug checkpoints.<sup>112</sup> In so doing, courts have held the former constitutional and the latter not, usually based on a promotion of public safety analysis.<sup>113</sup> Yet one could reasonably argue that drug checkpoints also further public safety, although perhaps less directly and immediately. The violence associated with drug trafficking is irrefutable.<sup>114</sup> However, the argument

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safety or efficiency of the activity in which the people who are searched are engaged." *Id.*

<sup>104</sup> *Edmond*, 121 S.Ct. at 457-58.

<sup>105</sup> See *supra* note 33; see also *Rodriguez*, 2000 WL 29492, at \*4 (finding drug checkpoints' only purpose to promote "criminal justice goals").

<sup>106</sup> See *Sitz*, 496 U.S. at 448 (remarking prosecution of drunk drivers caught at checkpoints routine).

<sup>107</sup> *Martinez-Fuerte*, 428 U.S. at 553 n.9.

<sup>108</sup> See *Edmond*, 183 F.3d at 662 (stating court's decision as to reasonableness of seizures focuses on particular circumstances of case).

<sup>109</sup> See *id.* "[T]he program approach might well permit deep inroads into privacy. In high-crime areas of America's cities it might justify methods of policing that are associated with totalitarian nations." *Id.*

<sup>110</sup> See *supra* notes 39-41.

<sup>111</sup> See *supra* notes 39-42.

<sup>112</sup> See *Edmond*, 183 F.3d at 664 (supporting "sobriety checkpoints" while rejecting drug checkpoint where lacking true public safety goal); see also *Rodriguez*, 2000 WL 29492, at \*4 (approving alcohol roadblocks while denouncing "drug interdiction roadblocks").

<sup>113</sup> See *supra* notes 38-39.

<sup>114</sup> See *supra* note 44.

against allowing drug and alcohol checkpoints is that highly visible police presence serves as an equally effective deterrent without invading the zone of privacy to which every citizen lays claim.<sup>115</sup>

Law enforcement officials must ascertain the true purpose of a checkpoint program to guide the courts in making a reasonableness determination.<sup>116</sup> Some circumstances so threaten the immediate safety of the public that they justify a temporary intrusion into individuals' privacy.<sup>117</sup> Drunk drivers pose the threat of serious, imminent harm to the public, which supports an argument in favor of alcohol checkpoints, yet the vigilant observation by police out on the public roads obviates the need for checkpoints.<sup>118</sup>

The measure of effectiveness that the United States Supreme Court and lower courts have indicated justifies a slight intrusion on individual privacy rights is disturbingly low in those cases in which the motorists face the threat of prosecution.<sup>119</sup> A number of lower courts have cited the percentages from *Martinez-Fuerte*,<sup>120</sup> despite the fact that the case involved a strictly regulatory checkpoint program and the government simply deported most of the people that it caught.<sup>121</sup> By setting such a low threshold, these courts have essentially written the effectiveness requirement out of the *Brown* balancing test.<sup>122</sup> Surely a relatively high effectiveness rate,

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<sup>115</sup> See *supra* notes 49-50.

<sup>116</sup> See *supra* notes 39-41.

<sup>117</sup> See *Edmond*, 183 F.3d at 662-63 (giving examples of when "special needs" exception would apply). The Seventh Circuit found four general exceptions to the prohibition against suspicionless searches. *Id.* at 665. The four exceptions are: 1) when the police are seeking a dangerous, fleeing felon; 2) when they have reason to believe a violent crime is imminent by an unidentified source; 3) a regulatory search; and 4) a search to keep illegal aliens from entering the country. *Id.* at 665-66. Cf. *Brinegar v. United States*, 338 U.S. 160, 164 (1949) (Jackson, J., dissenting) (supporting roadblocks to save life of person in imminent peril). Justice Jackson cited the example of a kidnapped child where the police set up roadblocks in the vicinity and stop every car. He wrote:

[I]t might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger. *Id.*

<sup>118</sup> See *supra* note 95.

<sup>119</sup> See *supra* note 47.

<sup>120</sup> See *supra* note 51.

<sup>121</sup> See *Martinez-Fuerte*, 428 U.S. at 553 n.9.

<sup>122</sup> See *Sitz*, 496 U.S. at 469 (Stevens, J., dissenting) (observing drunk driving checkpoints yield arrest rate of only around one percent). Although the police made some arrests, Justice Stevens observed that there was no evidence to suggest that the checkpoint

when that rate measures only the real purpose of the checkpoint, represents strong, but not conclusive, evidence of the need for a checkpoint or similar program.<sup>123</sup>

The abuses that can and do arise from police conduct at checkpoints argue against their use except in exigent circumstances.<sup>124</sup> Permitting regulatory roadblocks has led to some illogical findings, such as tentatively validating a roadblock if its main purpose is to check licenses and registrations, while invalidating the same roadblock if its purpose is to rid a neighborhood of an influx of drug trafficking.<sup>125</sup> Claiming the purported need to ensure that only licensed drivers and registered vehicles travel the roads has proved very successful in persuading courts to authorize checkpoints with a principal purpose of preventing drug dealing.<sup>126</sup> Such mixed-motive checkpoints permit searches for evidence of crimes, absent the requisite suspicion.<sup>127</sup>

In *Place*, the Supreme Court held that a canine search of luggage is not a search within the definition of the Fourth Amendment.<sup>128</sup> The Drug Enforcement agents seized the luggage to conduct this "non-search" by a trained dog only after they developed reasonable suspicion to believe the bags contained contraband.<sup>129</sup> The canine sniffs involved in drug and so-called safety inspection checkpoints are not the product of any individualized suspicion.<sup>130</sup> Ironically, if a dog at a roadblock indicates the presence of illegal drugs in a seized car, that indication provides the grounds for reasonable suspicion where none had previously existed.<sup>131</sup> Meanwhile,

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resulted in any net gain to the public in removing drunk drivers from the road. *Id.* at 469-70.

<sup>123</sup> See *supra* notes 44-48.

<sup>124</sup> See *supra* notes 63, 66, 79-80; see also *Brouhard*, 125 F.3d at 659 (refusing to hold unconstitutional further detention of forty-one drivers with blood alcohol limits below legal limit).

<sup>125</sup> See *Galberth*, 590 A.2d at 999 (declaring checkpoint constitutional if main goal to check licenses, unconstitutional if to find drugs).

<sup>126</sup> See *supra* note 50.

<sup>127</sup> See *Huguenin*, 154 F.3d at 557. "The problem with mixed-motive checkpoints is that they allow law enforcement officers the opportunity to use a pretext to question and search for contraband without probable cause, conduct the Supreme Court consistently has frowned upon." *Id.*

<sup>128</sup> See *supra* note 58-60.

<sup>129</sup> *Place*, 462 U.S. at 698-99.

<sup>130</sup> See *supra* note 50.

<sup>131</sup> See *supra* note 50.

the accuracy of these canine sniffs is highly questionable at times.<sup>132</sup> Without the use of the dogs, officers have only their senses and experience on which to rely in looking for drugs.<sup>133</sup> Thus, the absence of trained narcotics dogs diminishes the effectiveness of the program. Nevertheless, the canine sniff constitutes another minor intrusion, but one that impacts a fundamental right, namely the right to be left alone.<sup>134</sup>

While prohibiting alcohol and drug checkpoints makes the war against these serious problems more difficult by inadvertently protecting some criminals, the framers of the Constitution designed it to apply to all citizens.<sup>135</sup> As Justice Scalia wrote in *Arizona v. Hicks*,<sup>136</sup> "There is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all."<sup>137</sup>

## V. CONCLUSION

In theory, checkpoints aimed at the prevention of drunk driving and drug trafficking have a strong appeal. The temptation to use them to rid society of some enormous public safety hazards is almost irresistible. Should not law-abiding citizens make the small sacrifice needed to allow these checkpoints? The problem is that although the sacrifice may appear small, it goes to the very heart of our freedom, the right to go out in public free of fear that the police will harass us. "The imposition that seems diaphanous today may be intolerable tomorrow."<sup>138</sup> The public safety purpose that has helped to justify sobriety checkpoints seems capable of extension to other sorts of checkpoints, such as checkpoint to look for and stop drivers in danger of falling asleep at the wheel.

No set of guidelines, no matter how thoroughly planned and thoughtfully written, can change the fact that law enforcement officials are people, many of them with their own set of biases and preconceived notions that color their actions, even those in their official capacity as public

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<sup>132</sup> See *id.* (questioning accuracy of some canine sniffs).

<sup>133</sup> See *Rodriguez*, 2000 WL 29492, at \*1 (noting officer stuck his head through car window and smelled marijuana).

<sup>134</sup> See *Olmstead*, 277 U.S. at 478 (1928) (Brandeis, J., dissenting) (declaring "right to be let alone ... right most valued by civilized men").

<sup>135</sup> See *Morales-Zamora*, 974 F.2d at 153. "Like the rains from heaven, constitutional rights fall on the just and the unjust." *Id.*

<sup>136</sup> 480 U.S. 321 (1987).

<sup>137</sup> *Id.* at 329.

<sup>138</sup> *Sitz*, 496 U.S. at 474 (Stevens, J., dissenting).

servants. Allowing law enforcement officers to stop people at checkpoints with no reasonable suspicion grants those officers with strong prejudices the power to intimidate and threaten citizens who have done no wrong. Both the government and courts must attempt to minimize the number of situations in which officers' zeal for enforcing the law and protecting the public may overcome sound judgment. Law enforcement at all levels must look for alternative means by which to confront the problems of drunk driving and drug dealing. A more visible police presence in those areas where these problems are severe, as well as community policing, could yield favorable results.

It is reasonable for citizens to have an expectation of some degree of privacy in their automobiles. In today's highly mobile society, people are spending an increasing amount of time in their cars. They eat in them, carry on personal conversations in them, sing in them and much more. In a sense, the car has become an extension of the home. A car on the public road is subject to regulation, but the car itself is not a public place.

In recent years, the Supreme Court of the United States has handed down numerous decisions which have steadily eroded the Fourth Amendment rights of all citizens in the names of law enforcement, public safety and minimal intrusions. The erosion shows little sign of abating. Despite invalidating checkpoints with a primary purpose of drug interdiction, the door is still open for law enforcement to operate checkpoints that include drug interdiction as a secondary purpose. The Court's decision to postpone a determination as to the constitutionality of such multi-purpose checkpoints poses a continual threat to a cornerstone amendment that has supported some long-cherished freedoms. Reasonable suspicion already sets a lower bar than does the constitutionally prescribed probable cause standard. To require no suspicion before conducting a search and seizure completely removes this bar. It could conceivably get to a point where some Americans will be justifiably fearful of stepping out of their houses because Big Brother is watching. This futuristic scenario is not as far-fetched as it seems. One can lose one's freedoms in small, almost imperceptible increments just as easily as in one fell swoop. The results would be equally devastating. States need to step in and accord their citizens the protections that the federal government has chosen not to provide. The reality of checkpoints to prevent drunk driving and drug trafficking is one this nation must avoid in the names of liberty, justice and due process.

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