

The Drug War Comes to a Highway Near You: Police Power to Effectuate Highway "Narcotics Checkpoints" Under the Federal and State Constitutions

Chris Braeske*

On the night of July 30, 1992, law enforcement authorities set up a "narcotics checkpoint" on Interstate 35W south of Minneapolis, Minnesota, randomly stopping 650 cars.¹ This checkpoint led to drug charges against seven people for possessing small amounts of marijuana.² While Minnesota authorities have previously used this tactic to facilitate arrests of drivers under the influence of alcohol,³ this was the first use of such a checkpoint in Minnesota to search vehicles for illegal drugs.⁴

Drug checkpoints are patterned after drunk driving highway checkpoints which the U.S. Supreme Court recently validated in *Michigan v. Sitz*.⁵ The Minnesota Court of Appeals has used the *Sitz* framework to evaluate drunk driving checkpoint stops by Minnesota law enforcement agencies.⁶ Because this is the first use of the checkpoint stop tactic for the purpose of drug law enforcement, however, these criminal cases are cases of first impression in Minnesota on the question of whether such searches violate state or federal constitutional rights. This article argues that evidence pro-

* B.S., Psychology, University of Illinois, Urbana-Champaign, 1989; J.D. expected, University of Minnesota, 1994.

1. *650 Cars Stopped at Narcotics Checkpoint; 7 Tagged for Marijuana at I-35W and 106th St.*, STAR TRIBUNE (MINNEAPOLIS), Aug. 1, 1992, at 4B [hereinafter *650 Cars Stopped*]; Jill Hodges, *Drivers on Drugs Are New Target; Narcotics Checks Starting in State*, STAR TRIBUNE (MINNEAPOLIS), Aug. 24, 1992, at 1A.

2. *650 Cars Stopped*, *supra* note 1, at 4B; Hodges, *supra* note 1, at 1A.

3. See generally *infra*, part III.C (discussing Minnesota Courts' treatment of drunk driving).

4. Very few courts have addressed the issue of drug checkpoints. Part II.A.iii. of this article will discuss a North Dakota Supreme Court decision, *State v. Everson*, 474 N.W.2d 695 (N.D. 1991), which upheld a drug trafficking checkpoint as constitutional under the U.S. Constitution. Courts have also held that drug checkpoints are unconstitutional under the Fourth Amendment. See *State v. Barcia*, 562 A.2d 246 (N.J. Super. Ct. App. Div. 1989); *U.S. v. Ramos*, 733 F.Supp 260 (S.D. Tex. 1989).

5. 496 U.S. 444 (1990).

6. See *infra* note 160 and accompanying text.

duced by drug checkpoint searches are inadmissible under both U.S. and Minnesota law.⁷

Part I of this article details the procedures used by law enforcement authorities in effectuating a narcotics checkpoint. Part II argues that under the *Sitz* framework such a checkpoint violates the Fourth Amendment of the U.S. Constitution, and that such checkpoints necessarily rely upon the uncontrolled discretion of police officers, resulting in racial and class-based discrimination. Part III posits that regardless of federal law, such stops violate the Minnesota Constitution.

I. The Minnesota Narcotics Checkpoint

On July 30, 1992, Minnesota law enforcement authorities instituted a "narcotics checkpoint," randomly stopping drivers on an exit ramp leaving Interstate 35W.⁸ Over thirty law enforcement officers were involved.⁹ The law enforcement authorities kept the strategy and planning for this checkpoint confidential.¹⁰ Every motorist stopped was given a written statement informing him or her

7. Violations of an individual's Fourth Amendment rights are remedied by excluding the evidence obtained by that violation. See 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.1 (2d ed. 1987 & Supp. 1992) (describing the origins and purposes of the exclusionary rule).

8. Hodges, *supra* note 1, at 1A; *650 Cars Stopped*, *supra* note 1, at 4B.

9. Telephone Interview with Lt. Dunledy, Hennepin County Sheriff's Department, Narcotics Division (Feb. 5, 1993) [hereinafter Telephone Interview with Lt. Dunledy].

10. Tom Kelly, Presentation on Pre-trial Motions, Search and Seizure (Drug Roadblocks) (outline of presentation on file with the *Journal of Law & Inequality*). However, a typical police roadblock has been described as follows:

Generally, the police provide some form of advance notice of the roadblock. Higher ranking officials, not the officers in the field, choose the roadblock sites, and these choices are made according to a written policy. Most roadblocks are placed along major highways, but recently police in Washington, D.C. have located them in residential neighborhoods. They are usually conducted for a number of hours, but less than a full day. A substantial number of officers ordinarily man a roadblock, and they often represent an array of federal, state, or local agencies. Some police roadblocks entail stopping of all vehicles, but since roadblocks can cause traffic congestion, many involve the stopping of cars in a sequence, such as every fifth car or every twentieth car.

Once a driver is pulled over, the police officers ask to see the driver's license and vehicle registration. Roadblock stops provide an opportunity for officers to peer into a vehicle at a time when the driver has not anticipated official inspection. Thus, in many driver's license checkpoints, officers can detect drug or alcohol violations simply by being alert to them . . . the investigative technique of choice is the voluntary consent search. Prior to conducting a consent search, motorists are often asked to sign a "consent search form."

Sandra Guerra, *Criminal Law: Domestic Drug Interdiction Operations: Finding the Balance*, 82 J. CRIM. L. & CRIMINOLOGY 1109, 1132-33 (1992) (footnotes omitted).

of the purpose of the checkpoint.¹¹ The original aim of the checkpoint was to stop every car passing through it, but in order to maintain the flow of traffic, officers stopped every third or fourth car for questioning.¹² Both a uniformed police officer and a narcotics agent questioned the driver of each stopped vehicle.¹³ The officers also had trained drug sniffing dogs available at the checkpoint.¹⁴

The authorities placed signs announcing the checkpoint along the highway just before the 106th Street exit.¹⁵ The officers conducted the operation on the 106th Street exit ramp in an attempt to examine those trying to avoid the checkpoint.¹⁶ The officers asked each driver if he or she lived in the area.¹⁷ An unsatisfactory or suspicious answer to this question led to further investigation.¹⁸ Several of the checkpoint officers were assigned to monitor vehicles approaching the checkpoint and to pursue any vehicle making a suspicious action, such as an abrupt turn or an illegal U-turn.¹⁹

Of the approximately 650 cars that passed through the checkpoint from 7:00 to 11:00 p.m.,²⁰ officers diverted approximately fifty cars out of the flow of traffic for further questioning.²¹ Of the fifty vehicles pulled aside, officers "tagged" seven individuals for possessing small amounts of marijuana.²² According to an officer on the scene, officers tagged some of the individuals after finding marijuana in plain view²³ during the stop, while in other cases, officers tagged individuals after finding marijuana pursuant to a consensual search of the individuals' vehicles.²⁴

11. See Kelly, *supra* note 10.

12. *Id.* Telephone Interview with Lt. Dunledy, *supra* note 9.

13. Telephone Interview with Lt. Dunledy, *supra* note 9.

14. *Id.*

15. Hodges, *supra* note 1, at 1A.

16. *Id.* ("A sign on the highway warned drivers of a checkpoint ahead, and a number of motorists probably gambled wrong and got off at the exit, only to find that the narcotics checkpoint was there, not on the highway.")

17. Telephone Interview with Lt. Dunledy, *supra* note 9.

18. *Id.*

19. *Id.*

20. 650 Cars Stopped, *supra* note 1, at 4B.

21. Telephone Interview with Lt. Dunledy, *supra* note 9.

22. Hodges, *supra* note 1, at 1A. Possession of a small amount of marijuana is a petty misdemeanor in Minnesota, punishable by a fine of up to \$200 and participation in a drug education program. MINN. STAT. § 152.027, Subd. 4. (1992). Possession of over 1.4 grams of marijuana in the passenger compartment of a motor vehicle is a misdemeanor. MINN. STAT. § 152.027, Subd. 3. (1992).

23. If an officer is lawfully present, he or she may observe items in "plain view," but in order to seize evidence in this manner, it must be immediately apparent to the police that they have evidence in front of them. 1 W. LAFAYE, *supra* note 7, at § 2.2(a). See *Coolidge v. New Hampshire*, 403 U.S. 443, 465-66 (1971); *State v. Dickerson*, 481 N.W.2d 840, 844-45 (Minn. 1992).

24. Hodges, *supra* note 1 at 1A.

The exact details of this checkpoint are not known because law enforcement authorities have classified the procedure, strategy, and planning of it as "confidential."²⁵ However, the main characteristics of this Minnesota checkpoint parallel the general model of a search-oriented checkpoint that is detailed in this article. The most important feature of such a checkpoint is the "point man" who is responsible for deciding which vehicles will be detained for further investigation.²⁶ Although this individual may act based on criteria relating to the objectives of the checkpoint, the procedure gives the officer wide discretion to select vehicles for further police attention.²⁷

II. The Minnesota Narcotics Checkpoint Violates the Fourth Amendment of the U.S. Constitution

In the much criticized²⁸ case *Michigan v. Sitz*,²⁹ the U.S. Supreme Court upheld a drunk driving checkpoint seizure³⁰ which the Michigan Court of Appeals previously had found to violate the Fourth Amendment of the U.S. Constitution.³¹ In reversing the Michigan Court, the Supreme Court applied the *Brown v. Texas*³²

25. See Kelly, *supra* note 10 and accompanying text. Although the procedure, strategy, and planning of this checkpoint are "confidential," law enforcement authorities must respond to any discovery request by a criminal defendant charged as a result of this checkpoint and must provide information regarding the purpose of and methods used in the checkpoint operation. The author of this article has attempted to find any of these defendants but has had no success.

26. A recent Minnesota District Court opinion examined a "fish and game" checkpoint conducted by Minnesota authorities, including the State Patrol, which was involved in the narcotics checkpoint. See *Minnesota v. Baumgartner*, Pine Co. File No. K2 92 0992 (1993). This checkpoint involved a "greeter" who separated vehicles to be given further scrutiny. *Id.*

27. During the *Baumgartner* checkpoint, the officer decided which drivers to detain further based on responses as to whether the driver had been hunting or fishing. However, the "greeter" was given discretion to stop any vehicle upon evidence of other illegality, such as intoxication or where the driver exhibited "extreme nervousness." *Id.* The narcotics checkpoint in *Everson* also relied upon a "point man." See *infra* note 74 and accompanying text; *State v. Everson*, 474 N.W.2d 695 (N.D. 1991).

28. See Nadine Strossen, *Michigan Dept. of State Police v. Sitz: A Roadblock to Meaningful Judicial Enforcement of Constitutional Rights*, 41 HASTINGS L.J. 285 (1991); see also Guerra, *supra* note 10; Troy Gilchrist, *Michigan Department of State Police v. Sitz: Placing a Road Block on Individual Freedom*, 12 HAMLINE J. PUB. L. & POLICY 301 (1991); 4 W. LAFAYE, *supra* note 7, at § 10.8.

29. 496 U.S. 444 (1990).

30. *Id.* at 455.

31. *Sitz v. Dept. of State Police*, 429 N.W. 2d 180, 185 (Mich. Ct. App. 1988). The Michigan Court applied the balancing test of *Brown v. Texas*, 443 U.S. 47 (1979). *Sitz II*, 429 N.W.2d at 182. For discussion of the *Brown* balancing test, see *infra* notes 32-38 and accompanying text.

32. 443 U.S. 47 (1979).

Fourth Amendment balancing test.³³ This test involves three prongs: 1) the state's interest in highway safety; 2) the effectiveness of the checkpoint in achieving that goal; and 3) the level of intrusion on the individual's privacy caused by the checkpoint³⁴ — both objective³⁵ and subjective.³⁶ The test is applied by balancing the state's interest against the effectiveness and level of intrusion, the latter two factors weighing against the constitutionality of the seizure.³⁷ Also, the checkpoint operation must be governed by procedures or guidelines that circumscribe the amount of discretion given to the officer to decide which motorists may be detained and investigated during the operation.³⁸

The *Sitz* Court emphasized the compelling state interest in combatting drunk driving, which leads to thousands of deaths on the highway every year.³⁹ On the other side of the balancing test, the Court found that the effectiveness of the checkpoint was acceptable,⁴⁰ and the level of intrusion upon motorists was slight.⁴¹ The

33. *Sitz*, 496 U.S. at 450. The *Brown* Court held that the brief detention of an individual by a police officer violated the Fourth Amendment because the officer had no "specific basis for believing [the individual was] involved in criminal activity." *Brown*, 443 U.S. at 52. The clear holding of *Brown* is not distinguished by the *Sitz* Court: "In the absence of any basis for suspecting [an individual] of misconduct, the balance between the public interest and [the individual's] right to personal security and privacy tilts in favor of freedom from police interference." *Id.* The *Sitz* decision also ostensibly relied upon *U.S. v. Martinez-Fuente*, 428 U.S. 543 (1976), which upheld a fixed, permanent border checkpoint with the purpose of detecting illegal aliens. *Sitz*, 496 U.S. at 450. The *Sitz* Court did not address the distinctions between the *Martinez-Fuente* checkpoint and a roving, temporary drunk driving checkpoint. See Strossen, *supra* note 28, at 307-08 (arguing that neither *Brown* nor *Martinez-Fuente* supports the Court's decision in *Sitz*).

34. *Sitz*, 496 U.S. at 449 (citing *Brown v. Texas*, 443 U.S. 47, 50-51 (1979)).

35. "Objective" intrusion is defined as the "duration of the seizure and the intensity of the investigation." *Sitz*, 496 U.S. at 452.

36. "Subjective" intrusion is generally referred to as "the potential to generate fear and surprise in motorists." *Id.*

37. *Id.* at 448-49.

38. *Id.* at 454 ("the Court . . . has insisted that the discretion of the official in the field be circumscribed, at least to some extent").

39. *Sitz*, 496 U.S. at 451. See Guerra, *supra* note 10, at 1137 ("Previously, the Court had upheld only suspicionless searches and seizures in limited cases where the government could show some 'special governmental needs, beyond the need for law enforcement.' In advocating the 'need' for sobriety checkpoints, the government could show no need beyond the normal need for law enforcement. The Court simply emphasized the severity of the drunk driving problem in this country").

40. This prong of the test was satisfied simply by the fact that two drunken drivers, or 1.5% of the motorists who passed through the checkpoint, were arrested for drunken driving. *Sitz*, 496 U.S. at 455.

41. The Court analyzed the intrusion upon the motorists by first gauging the "objective" intrusion, which was found to be slight — the average detention of each vehicle which passed through the checkpoint was 25 seconds. *Id.* at 444, 451-52. See *infra* part II.C for further discussion of objective intrusion. Next, the Court considered the "subjective" intrusion, initially defined as the potential of the checkpoint to generate "fear and surprise" in approaching motorists, and held that this intrusion

narcotics checkpoint instituted in Minnesota, however, differs from the *Sitz* drunk driving checkpoint with respect to all three of these criteria.

A. *The State's Interest in Drug Checkpoints: Three Possible Rationales*

The state's interest in instituting a drug checkpoint is inherently different from a drunk driving checkpoint. While the primary motivation behind the Minnesota drug checkpoints is not entirely clear,⁴² three possible rationales can be suggested. The first possible state goal in enacting a drug checkpoint is to apprehend drivers impaired by drugs.⁴³ The second possible rationale is to apprehend individuals who possess personal amounts of illegal drugs. The third possible state interest is to intercept drug trafficking and to apprehend drug traffickers.⁴⁴ Each of these state interests, however, differs substantially from the *Sitz* interest in combatting drunken driving.

i. *The State's Interest in Apprehending Drug Impaired Drivers*

Minnesota recently demonstrated its interest in apprehending drug-impaired drivers by creating a program to train law enforcement officials as Drug Recognition Experts (DRE's).⁴⁵ At least one DRE officer was present at the Minnesota checkpoint.⁴⁶ Minnesota DRE officers are given seventy-two hours of specialized training, followed by a certification process.⁴⁷ The drug evaluation procedure administered by a DRE occurs after a suspect has been ar-

did not prohibit a nighttime, temporary, police checkpoint. *Id.* at 452-53 ("The 'fear and surprise' to be considered are not the natural fear of one who has been drinking . . . but, rather, the fear and surprise engendered in law abiding motorists at the nature of the stop."). See *infra* part II.C. for further discussion of subjective intrusion.

42. See *supra* part I. It is not entirely clear that even the officers involved were fully aware of the parameters of the checkpoint operation. In the words of Officer Thompson, Hennepin County Sheriff's Department, Narcotics Division, "... we were looking for drugs and anything in between." Telephone Interview with Officer Thompson (Feb. 5, 1993).

43. MINN. STAT. § 161.121 (1992) criminalizes both driving under the influence of alcohol and driving under the influence of a "controlled substance." *Id.*

44. See *North Dakota v. Everson*, 474 N.W.2d 695, 701 (N.D. 1991) (recognizing the state's interest in apprehending drug traffickers).

45. Karen Herland, Introduction to Minnesota's Drug Recognition Program, Minnesota CLE Presentation at 1992 Fundamentals of DWI Prosecution Seminar, 4-5 (October 29, 1992) (on file with the Journal of Law & Inequality).

46. Telephone Interview with Karen Sprattler, Minnesota Dept. of Safety (November, 1992).

47. Herland, *supra* note 45, at 5-6.

rested and brought to the police station.⁴⁸ The Minnesota drug influence evaluation incorporates the standardized field sobriety tests⁴⁹ but adds many additional tests, as well as extensive questioning of the suspect.⁵⁰

The state interest in apprehending drug impaired drivers reflects the *Sitz* interest in highway safety.⁵¹ In opposition to the stark figures presented to justify the state interest in combatting drunk driving,⁵² however, similar data does not exist to justify a state interest in apprehending drug influenced drivers.⁵³ Further-

48. A controlled environment is necessary to perform several of the steps in the drug influence evaluation. For example, a darkroom examination is one of the steps in the process. See *infra* note 50 and accompanying text. This procedure contrasts with the blood alcohol content (breathalyzer) test, which can be administered at the site of the checkpoint.

49. Herland, *supra* note 45, at 5. The three standard field sobriety tests (SFST's) used by Minnesota officers are the horizontal gaze nystagmus (HGN), the one leg stand, and the walk and turn test. *Id.*

50. *Id.* at 7-10. The arresting officer calls a DRE when the officer feels that the suspect in custody was driving under the influence of drugs. The DRE then administers an evaluation consisting of 12 steps:

1. Breath Alcohol Test.
2. Interview of Arresting Officer. The DRE conducts an interview with the arresting officer regarding the suspect's conduct and evidence found.
3. Preliminary Examination and First Pulse. The DRE asks the suspect 10 questions regarding his/her condition (e.g. "What have you eaten today?", "What have you been drinking?") and takes the suspect's pulse for the first of three times.
4. Eye Examinations.
5. Divided Attention Psychophysical Tests. These tests include the standard field sobriety tests. See *supra* note 49 and accompanying text.
6. Vital Signs and Second Pulse.
7. Dark Room Examination and Ingestion Examination. The DRE check the suspect's eyes under four different lighting conditions and examines the suspect's nose and mouth for signs of drugs.
8. Examination of Muscle Tone.
9. Check for Injection Sites and Third Pulse.
10. Questioning as to Drug Use.
11. Opinion of the Evaluator.
12. Toxicological Examination. The DRE takes a urine sample from the suspect.

Id.

51. It has been suggested that the *Sitz* opinion can be explained in terms of the state's interest in public safety, as opposed to its interest in apprehending criminals. See *State v. Everson*, 474 N.W.2d 695, 705 (N.D. 1991) (Levine, J., dissenting). See also *infra* note 81 and accompanying text.

52. "Drunk drivers cause an annual death toll of over 25,000." *Sitz*, 496 U.S. at 451. See *infra* note 77 and accompanying text.

53. The primary purpose of the Minnesota DRE program is to "recognize impairment in drivers who are under the influence of drugs other than or in addition to alcohol." Herland, *supra* note 45, at 1. The purpose of the DRE officer, therefore, is to compile information necessary for the conviction of drug impaired drivers. See U.S. DEPT. OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, TECHNOLOGY ASSESSMENT: INNOVATIONS, TECHNOLOGIES AID EFFORTS AGAINST IMPAIRED DRIVING (Jan., 1991.)

more, the drug influence evaluation's success in identifying drug impaired individuals is largely untested⁵⁴ and is significantly more invasive than an alcohol test.⁵⁵

ii. The State's Interest in Apprehending Individuals Who Possess Personal Amounts of Illegal Drugs

The state interest in finding small, personal amounts of illegal drugs provides the weakest of the three rationales for such a stop. First, unlike the *Sitz* interest in combatting drunk driving,⁵⁶ the state interest in finding possession amounts⁵⁷ of drugs is not related to highway safety. The use of highway interdiction is rationally related to the task of apprehending drug impaired drivers,⁵⁸ reflecting the state's interest in highway safety.⁵⁹ However, a highway checkpoint targeting individuals with personal amounts of drugs tenuously stretches this connection. Such a checkpoint relies simply upon the "drug problem" as a rationale for a specialized, inquisitorial, and invasive police seizure.⁶⁰

Second, the large scale use of law enforcement resources to conduct inquisitorial operations for the sole purpose of finding small, misdemeanor amounts of illegal drugs is a gross misallocation of police resources. Highway checkpoints are major police operations, normally involving dozens of officers.⁶¹ This concentration of officers undoubtedly reduces police attention to other duties during the checkpoint.⁶²

Since the DRE program is relatively new and untested by the courts, it has not yet produced any meaningful statistics regarding drivers impaired by drugs.

54. See *infra* part II.C.

55. See *supra* notes 49-50 and accompanying text.

56. *Michigan v. Sitz*, 496 U.S. 444, 451 (1990); see also *supra* note 51 and accompanying text.

57. As opposed to distribution or trafficking amounts, possession amounts refers to small quantities of drugs for personal use. The Minnesota statutes which criminalize drug possession do not specifically make this distinction but instead create a five-tiered system based in part upon on the quantity of different drugs seized and "intent to sell." MINN. STAT. §§ 152.021-.025 (1992).

58. Alcohol checkpoints, such as the one validated in *Sitz*, are also rationally related to the state's interest in highway safety.

59. See *supra* part II.A.i.

60. Stopping a vehicle at a highway checkpoint constitutes a Fourth Amendment seizure. *Sitz*, 496 U.S. at 450.

61. For example, the Minnesota narcotics checkpoint on July 31, 1992, utilized over 30 law enforcement officers. Telephone Interview with Lt. Dunledy, *supra* note 9.

62. See Gilchrist, *supra* note 28, at § B.2 (arguing that the costs of high concentrations of officers during a checkpoint operation cause neglect of other police duties and weighs against the "effectiveness" prong of the *Brown-Sitz* balancing test); see also *infra* part II.B.

Furthermore, the argument that small time drug users are also likely to be under the influence is erroneous. As discussed *supra*, drivers under the influence of drugs have not been shown to be a substantial threat as opposed to drunk drivers, and an entirely different, complex and more invasive system is used to identify drug impaired drivers, as evidenced by the Minnesota DRE program.⁶³

Finally, the intrusion necessary to locate these easily concealable substances rises far above that of a drunken driving checkpoint.⁶⁴ As discussed *infra*, drug checkpoints are inherently more invasive than alcohol checkpoints, such as the one upheld in *Sitz*.⁶⁵

While the *Sitz* Court found a compelling state interest in highway safety,⁶⁶ and there is arguably a great state interest in intercepting significant drug traffic,⁶⁷ the interest in finding possession amounts of drugs in individuals' automobiles falls well short of the level necessary to justify the heightened intrusion of a highway drug checkpoint.

iii. The State Interest in Combatting Drug Traffic: *State v. Everson*

In *State v. Everson*,⁶⁸ the North Dakota Supreme Court upheld a checkpoint operation that had the primary purpose of intercepting drug traffickers.⁶⁹ The *Everson* court used the *Sitz* framework to evaluate the checkpoint and found that "the state may validly conduct a checkpoint for the purpose of apprehending drug traffickers, a societal harm at least equal in magnitude to drunk driving."⁷⁰ The *Everson* checkpoint, however, substantially differed from the checkpoint that the U.S. Supreme Court validated in *Sitz*.

The *Everson* checkpoint coincided with a nearby motorcycle rally and occurred on a major interstate highway.⁷¹ Although the

63. See *supra* part II.A.i.

64. The *Sitz* balancing test weighs the state interest against the intrusion upon the motorist. *Sitz*, 496 U.S. at 449. A checkpoint to search for personal amounts of illegal drugs would involve not only a questionable state interest but also a more invasive procedure than is necessary for the identification of drunk drivers, including official pressure for consent to search, dog sniffs, and physical searches of the vehicle. See *infra* part II.C.

65. See *infra* part II.C.

66. See *supra* part II.A (discussing the undisputed state interest in preventing drunk driving).

67. See *infra* part II.A.iii.

68. 474 N.W.2d 695 (N.D. 1991).

69. *Id.* at 704.

70. *Id.* at 701.

71. *Id.* at 696.

checkpoint was conducted under the pretext of a "multi-purpose highway checkpoint,"⁷² the trial court found that the true purpose of the operation was to search for drugs.⁷³ During the operation of the checkpoint, all traffic was stopped by the "point man," who had the option of sending any vehicle to either the "inspection area" for a vehicle-safety inspection or to the "search area" which was staffed by drug enforcement officers.⁷⁴ All officers at the checkpoint were given a "drug courier profile containing a list of 'indicators' of narcotics traffickers."⁷⁵ As a result of the checkpoint, 1,023 vehicles were stopped and thirty-four were searched, resulting in two controlled substance arrests.⁷⁶

The *Everson* Court attempts to draw a parallel between drunk driving and drug trafficking to justify a checkpoint operation, but it overlooks distinctions between the two. The death toll on the highways due to drunken driving is not disputed in *Sitz* and is in fact supported by overwhelming statistics.⁷⁷ The *Everson* Court, how-

72. *Id.*

73. *Id.* at 698. This finding was made in part because the "point man" or lead officer who had "unconstrained discretion" as to which vehicles were to be searched was a criminal investigator rather than a traffic officer. *Id.*

74. *Id.* at 696-97.

75. *Id.* at 697. This "profile" could arguably validate the search of almost any vehicle which the officers wished to search. See *supra* part I.A.iv. The "indicators" identified by the court included:

Vehicle Appearance:

- a. low riding, or low rear end
- b. obvious alterations to body
- c. alterations to suspension - new adjustable air shocks

Interior of Vehicle:

- a. little or no luggage and a long way from alleged home
- b. luggage or spare tire on back seat
- c. coolers / water jugs, fast food wrappers, coffee, bedding
- d. "Bounce" or similar laundry fresheners
- e. multiple air freshening devices, sprays
- f. "Glad" type storage bags or aluminum foil or masking tape

Occupants:

- a. overly courteous, especially if receiving a citation
- b. in a hurry to leave
- c. overly cautious drivers
- d. signs of overt nervousness
- e. won't make eye contact
- f. don't "know" each other
- g. after questioning the driver outside of the car stand away from other occupants, check the story of other occupants as to destinations, purposes of trip, length of stay, where stayed, etc., and check for discrepancies [sic].
- h. unkempt physical appearance, such as 3-day beard growth, matted hair, fatigued, or "wired" from stimulants to stay awake.

Everson, 474 N.W.2d at 697.

76. *Id.* at 702-03.

77. *Sitz*, 496 U.S. at 451. Justice Blackmun's concurring opinion relies solely on the magnitude of the drunken driving problem. *Id.* at 455-56 (Blackmun, J., concur-

ever, simply cites U.S. Supreme Court dicta relating to interdiction efforts at the U.S. border⁷⁸ and urine tests for federal drug agent applicants.⁷⁹ From this, the *Everson* Court concludes that drug trafficking is "a societal harm at least equal in magnitude to drunk driving."⁸⁰ Moreover, as pointed out by the dissent in *Everson*, the checkpoint operation validated in *Sitz* was closely related to its justification: the interest in highway safety.⁸¹ A checkpoint with the goal of intercepting drug traffickers,⁸² however, can claim no such regulatory purpose.

iv. Unequal Treatment: Discretion and Drug Checkpoints

More generally, the *Everson* checkpoint illustrates the dangers of unequal treatment inherent in checkpoint drug investigations. The *Sitz* Court recognized that the "kind of standardless and unconstrained discretion . . . of the official in the field [must] be circumscribed"⁸³ However, the *Everson* checkpoint was based almost solely upon the discretion of the "point man," who had the ultimate authority upon a cursory driver's license check to decide whether a particular vehicle would be directed to the "search area."⁸⁴ This "point man" was not a traffic officer, but rather was a

ring). Justice Brennan's dissent does not dispute the magnitude of the problem, rather it disputes the necessity of checkpoint stops to address it. *Id.* at 456 (Brennan, J., dissenting).

78. See *Everson*, 474 N.W.2d at 701 (citing *U.S. v. Montoya de Hernandez*, 473 U.S. 531, 538, (1985)) (recognizing "the veritable national crisis in law enforcement caused by smuggling of illicit narcotics" in the context of border interdiction).

79. See *id.* (citing *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668 (1989)) (characterizing drug trafficking as "one of the greatest problems affecting the health and welfare of our population").

80. *Id.*

81. *Id.* at 705 (Levine, J. dissenting); see also *Delaware v. Prouse*, 440 U.S. 648, 663 (1979) (suggesting that "safety checks" of all vehicles at a roadblock stop which do "not involve the unconstrained exercise of discretion" are permissible). The *Everson* Court cites *Prouse* in evaluating the checkpoint. *Everson*, 474 N.W.2d at 699.

82. The trial court in *Everson* found that the stated purpose of the checkpoint, a driver's license check and vehicle inspection, was official subterfuge, and the true purpose of the checkpoint was to intercept drug traffickers. *Everson*, 474 N.W.2d at 700.

83. *Sitz*, 496 U.S. at 454 (citing *Delaware v. Prouse*, 440 U.S. 648, 661 (1979)). In *U.S. v. Ramos*, 733 F. Supp. 260 (S.D. Texas 1989), the court held that a stop described as a "roving temporary checkpoint" with no constraints upon the individual narcotics officer's discretion violated the Fourth Amendment. *Id.* at 263. The U.S. Supreme Court upheld a similar procedure in *U.S. v. Martinez-Fuerte*, 428 U.S. 543 (1976), but upheld it because the checkpoint was conducted in an entirely different context. See Strossen, *supra* note 28, at 307-08 (stating that the factual context of this checkpoint involved illegal aliens, permanent checkpoints, an "administrative" inspection, lack of a criminal investigation, and a finding by the Court that the inspections were necessary to enforce immigration laws.).

84. *Everson*, 474 N.W.2d at 697.

criminal investigator.⁸⁵ Further, this criminal investigator's decision to pursue the search of a particular vehicle could be validated by the use of an amorphous profile.⁸⁶ Generally, the use of profiles in the investigation of drug trafficking cases has been roundly criticized.⁸⁷ These profiles have inevitably caused intrusive detention and investigation of innocent individuals in a variety of situations.⁸⁸ The profiles themselves are often built on racial and class-based distinctions.⁸⁹ Furthermore, profiles such as the one documented in *Everson* can be used to validate the investigation of any vehicle or individual which the officer wishes to investigate.⁹⁰ Using the *Everson* profile as a justification, an officer may investigate a vehicle which either has luggage on the back seat or has no luggage anywhere in the vehicle.⁹¹ An individual who is "overly cautious," "overly courteous," or overtly nervous is suspect.⁹² Fast food wrappers, water coolers, coffee, or bedding can also justify an investigation.⁹³

85. *Id.* at 698. The Minnesota checkpoint also used a narcotics officer to initially question drivers. See *supra* note 13 and accompanying text.

86. *Id.* at 702 n.2. See *supra* note 75 and accompanying text.

87. U.S. law enforcement has used profiles primarily in the context of drug traffic interdiction. See Denise A. Michaux, Note, *Drug Courier Profiles and the Infringement of Fourth Amendment Rights*, 9 N.Y.L. SCH. J. HUM. RTS. 435, 457 (1992) ("the use of drug courier profiles for [the purpose of intercepting drug traffickers] infringes upon the Fourth Amendment rights of all citizens, whether they are actual drug couriers or innocent travelers"); Steven K. Bernstein, *Fourth Amendment — Using the Drug Courier Profile to Fight the War on Drugs*, United States v. Sokolow, 109 S. Ct. 1581 (1989), 80 J. CRIM. L. & CRIMINOLOGY 996 (1989) (criticizing *Sokolow*, in which the U.S. Supreme Court generally upheld the use of drug courier profiles).

88. See Michaux, *supra* note 87, at 458 (noting that one drug courier profile program caused the stop and search of innocent travelers simply because their behavior coincided with the "profile").

89. A . . . flaw that has resulted in the targeting of racial minorities or working class people during some interdiction operations stems from discriminatory characteristics of the procedures themselves. The profile used by agents to make highway stops, for instance, appears to include being a Hispanic male as a characteristic of a drug courier, and the original airport drug courier profile in Detroit focused on Black females. . . . Reliance on profile characteristics based on race may bring about a self-fulfilling prophecy. If the police look only for Black and Hispanic drug traffickers, they will find only those drug traffickers who happen to be Black or Hispanic.

Guerra, *supra* note 10, at 1147 (footnotes omitted); see also Michaux, *supra* note 87, at 458 ("The possibility of race being used as a profile characteristic is frightening, but real. A law enforcement agent probably would not admit to using race as a factor even though he or she actually did. It is also possible that race could be one fragment of the 'totality of the circumstances' which the court may consider.")

90. See *supra* note 75 and accompanying text.

91. *Id.*

92. *Id.*

93. *Id.*

Police procedures which rely upon "nervousness" to justify further investigation are especially disconcerting in the checkpoint context. It is safe to say that the relationship between people of color and the police is often fraught with apprehension, distrust, and possibly outright fear.⁹⁴ Checkpoint stops involve a clearly imposing police presence, including numerous officers, inquisitorial questions, bright lights, drug sniffing dogs, and the obvious diversion of selected vehicles off the roadway for further investigation.⁹⁵ These features of a drug checkpoint, intimidating to any motorist, clearly have the potential to cause fear and nervousness when that motorist is a person of color.⁹⁶

Checkpoint stops which rely on discretionary or profile criteria are in stark contrast to *Sitz* drunk driving checkpoints which rely on relatively circumscribed criteria such as driving performance and smell of alcohol.⁹⁷ When the question changes from "Is the driver under the influence of alcohol?" to "Is the driver using or carrying illegal drugs?" the investigating officer makes a wholly different set of determinations. While an investigation can be easily confined to the indicia of alcohol intoxication, the drug checkpoint opens up the scope of the operation to the discretion of the individual officer. This discretion invites the individual officer to investigate those who "look like" drug users or traffickers.⁹⁸

94. See e.g., any account of the Rodney King incident. This equation works both ways, distorting each party's perceptions of the other. See e.g., Brent Staples, *Editorial Notebook: Growing Up to Fear the Law*, N.Y. TIMES, March 28, 1991, at A24, Col. 1; Louis Sahagun, *Police Develop Wary Courtesy, Thick Skin*, L.A. TIMES, March 24, 1991, at A1, Col. 2.

95. See *supra* part I.

96. At least one observer has noticed the disparate impact of a Minnesota "drug checkpoint" upon motorists of color. Barbara Foley, *Letters from Readers: Drug Searches*, STAR TRIBUNE (MINNEAPOLIS), Mar. 28, 1993, at 24A ("I've also observed several 'drug searches' [at the checkpoint]. Each pulled over car I drove by had a black male driver.")

97. See *Sitz*, 496 U.S. 444, 447 (1990).

98. There are two types of flaws in the systematic procedures now used to interdict drugs that allow for the targeting of working class people and racial minorities. First, some procedures afford individual officers unguided discretion to single out people who "look like" drug traffickers. Thus officers have the discretion to exercise their personal prejudices in determining whether an individual should be investigated. Often, officers in this position focus upon racial minorities or people who do not appear well-dressed. Evidence shows this to be the case in with many drug courier profile operations in which officers stop individuals based on no information other than the officers' visual observations of the person. Many drug courier cases indicate that Blacks and Hispanics may be targeted by undercover agents simply because the color of their skin. . . .

Guerra, *supra* note 10, at 1145-46 (footnotes omitted).

Furthermore, this discretion is necessary for all types of drug checkpoints, not merely those which target drug traffickers. Where a search is necessary to uncover personal amounts of drugs, law enforcement officials necessarily make the same discretionary decisions to target particular individuals.⁹⁹ In the case of a drug checkpoint for the purpose of targeting drug influenced drivers, the police must arrest the individual who they suspect to be under the influence of drugs before the drug influence evaluation can be administered.¹⁰⁰

The uncontrolled discretion afforded the drug checkpoint officer carries the inherent risk that an individual officer will be influenced by his or her individual biases or prejudices in selecting persons to investigate.¹⁰¹ As a result, officers may single out working class people and minorities for investigation.¹⁰² This danger is inherent in the drug checkpoint, whether its purpose is to find drugs or drug influenced drivers, and represents one of the most serious flaws in this type of police tactic.

B. Effectiveness of Drug Checkpoints

The U.S. Supreme Court's treatment of the "effectiveness" prong in *Sitz* is one of the most criticized aspects of that opinion.¹⁰³ First, the Court refused to consider the possibility of a less invasive method of apprehending drunk drivers and required no showing that a checkpoint operation was more effective than normal stops based upon probable cause.¹⁰⁴ Second, the number of drunk drivers apprehended as a result of the *Sitz* checkpoint was very low. The *Sitz* drunk driving checkpoint led to the arrest of 1.5% of the

99. See *supra* part II.A.ii; *infra* part II.C.

100. See *supra* part II.A.i; *infra* part II.C. While the field tests for alcohol intoxication may be administered at the checkpoint, a drug influence evaluation must be performed at the police station, after a discretionary arrest by the checkpoint officer. See *supra* part II.A.i.

101. See Guerra, *supra* note 10, at 1114 (arguing that "inquisitorial" methods of law enforcement, such as drug checkpoints and profiles, allow individual officers' bias and prejudice to color the decision of whom to investigate); see also generally *infra* part III.A.

102. The perception of an individual as "suspicious" by a law officer due to that person's race is common. See *Developments in the Law: Race and the Criminal Process*, 101 HARV. L. REV. 1472, 1494-1520 (1988). There is overwhelming evidence that racial minorities are singled out for criminal investigation. See Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 YALE L.J. 214 (1983).

103. See Strossen, *supra* note 28, at 300-02.

104. See *Sitz*, 496 U.S. 444, 451-52 (1990). Before *Sitz*, courts upheld suspicionless searches and seizures only upon a showing of "special need" by the government. See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1985); Strossen, *supra* note 28, at 300-302, 311 n.116.

drivers stopped.¹⁰⁵ The *Sitz* Court validated this statistic as sufficiently effective.¹⁰⁶

In comparison, the Minnesota drug checkpoint found no distribution amounts of drugs nor were any arrests made of drivers under the influence of drugs.¹⁰⁷ Seven individuals were given citations for possessing small amounts of marijuana.¹⁰⁸ Thus, 1.1% of the drivers passing through the Minnesota checkpoint were given drug citations. While this figure falls within the parameters of *Sitz*, it shows a rather small result and thus a questionable use of law enforcement resources.¹⁰⁹ The fact that other law enforcement activities are compromised as a result of checkpoints also weighs against their "effectiveness."¹¹⁰ Furthermore, as discussed *supra*, the institution of a checkpoint stop simply for the purpose of searching automobiles for personal amounts of illegal drugs is the weakest rationale for such a checkpoint and almost certainly does not pass the *Sitz* balancing test.¹¹¹ Of the remaining two possible rationales for instituting a drug checkpoint, apprehending individuals under the influence and intercepting drug traffickers,¹¹² no arrests were made during the Minnesota checkpoint to effectuate these goals. While the U.S. Supreme Court has essentially validated checkpoint operations yielding very low arrest results,¹¹³ the failure of the Minnesota checkpoint to effectuate either of the possibly permissible state interests weighs heavily against its effectiveness.

C. *Intrusion Upon the Privacy of Individuals*

The third prong of the balancing test that examines the intrusion upon an individual's privacy is divided into two separate inquiries: the objective and the subjective intrusion.¹¹⁴ The objective intrusion upon the motorist examines the physical aspects of the

105. *Sitz*, 496 U.S. at 455.

106. *Id.* The Court compared this statistic to that in *Martinez-Fuerte*, 428 U.S. 543 (1976), in which 0.12 of the vehicles stopped at a U.S. border checkpoint with Mexico yielded illegal aliens. *Sitz*, 496 U.S. at 455 (citing *Martinez-Fuerte*, 428 U.S. at 554).

107. *650 Cars Stopped*, *supra* note 1, at 4B.

108. *Id.*

109. See *supra* part II.A.ii. (arguing that the use of a large scale police operation to apprehend those with small, personal amounts of drugs is a misallocation of police resources).

110. See Gilchrist, *supra* note 28.

111. See *supra* part II.A.ii.

112. See *supra* part II.A.i. (discussing the apprehension of drivers under the influence of illegal drugs, highway safety); part II.A.iii. (discussing the interception of drug traffic).

113. See *supra* note 106 and accompanying text.

114. *Michigan v. Sitz*, 496 U.S. 444, 450-451 (1990).

seizure, while the subjective intrusion examines the effect of the seizure upon the motorist.¹¹⁵ Under both of these inquiries, a drug checkpoint constitutes a more invasive intrusion than the checkpoint validated in *Sitz*.

The *Sitz* Court defined objective intrusion as the "duration of the seizure and the intensity of the investigation."¹¹⁶ The average delay to an individual motorist during the *Sitz* checkpoint was twenty-five seconds, and each driver stopped was briefly examined for signs of intoxication.¹¹⁷ The organizers of the Minnesota checkpoint, aware of this finding by the *Sitz* Court, lowered the ratio of cars stopped¹¹⁸ to preserve a thirty second average delay time.¹¹⁹ Although the time factor may be similar, the objective intrusion of a drug checkpoint necessarily differs from that of an alcohol checkpoint.

While an officer at an alcohol checkpoint only needs to briefly question each driver, a drug checkpoint for the purpose of uncovering drugs involves not only a plain view search of the interior of the vehicle but also pressure by officers for consent to a more substantial search.¹²⁰ Where the goal of the checkpoint is the interdiction of drug traffic or the location of possession amounts of drugs, the outcome of the checkpoint will certainly be thorough searches of selected automobiles. However, an alcohol checkpoint need only conduct conversations and field tests of individual drivers.¹²¹ Thus a checkpoint operation to uncover drugs will be more objectively intrusive by nature than an alcohol checkpoint.

Where the goal of the checkpoint is the apprehension of drug impaired drivers, officers use the drug influence evaluation¹²² rather than the standard alcohol impairment test.¹²³ As evidenced

115. *Id.*; see *supra* notes 35-36, 40-41 and accompanying text.

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

117. *Id.* at 447-48.

118. At the outset, the officers at the Minnesota checkpoint were to stop every car passing through the checkpoint, but this rate was modified to stop every third or fourth car as traffic backed up. Telephone Interview with Lt. Dunledy, *supra* note 9.

119. *Id.*; see *supra* note 118 and accompanying text.

120. See Guerra, *supra* note 10, at 1132-33; see also *supra* notes 21-24 and accompanying text. The drug possession citations issued as a result of the Minnesota checkpoint were issued after both plain view and consent searches. Hodges, *supra* note 1, at 1A.

121. See *Sitz*, 496 U.S. at 447.

122. A DRE officer conducts a battery consisting of twelve steps, a "drug influence evaluation." Herland, *supra* note 45, at 4-5. These steps include tests used to gauge alcohol impairment, as well as additional tests which attempt to pinpoint the particular drug or type by which the suspect is influenced. *Id.* These tests are quite involved and must be given at the police station after the suspect has been taken into custody. See *supra* part II.A.i.

123. See *supra* note 49 and accompanying text.

by the drug influence evaluation that the Minnesota DRE officers used, it is sufficiently more difficult to determine drug impairment as opposed to alcohol impairment.¹²⁴ Furthermore, this drug influence evaluation, although used by several law enforcement agencies around the nation, has not yet been widely tested by the courts. In contrast, law enforcement methods for ascertaining alcohol impairment enjoy wide acceptance by the courts and are generally statutorily mandated.¹²⁵ Alcohol checkpoint locations are able to utilize accurate breathalyzer testing at the site of the checkpoint, and this information can clearly be used in the subsequent prosecution. However, an allegedly drug-impaired suspect must be arrested and taken to the police station¹²⁶ for an exhaustive battery of tests which may or may not be admissible in court.¹²⁷ These factors point to the conclusion that a drug influence evaluation is substantially more objectively invasive than standard police tests for alcohol impairment, and certainly so at a checkpoint situation.

The Court, in *Sitz*, defines the subjective intrusion upon motorists as the potential of the checkpoint operation "to generate fear and surprise in motorists."¹²⁸ The Court indicated that a nighttime, temporary police checkpoint does not impose a subjective intrusion upon those motorists stopped.¹²⁹ The Court reached this conclusion by comparing the *Sitz* checkpoint with a fixed, illegal alien checkpoint on the U.S. border that the Court previously validated in *U.S. v. Martinez-Fuerte*¹³⁰ and finding that the subjective intrusion from the *Sitz* stop was "for constitutional purposes indistinguishable from the checkpoint stops we upheld in *Martinez-Fuerte*."¹³¹ This holding has been criticized due to the obvious differences between motorists' perceptions of a fixed border checkpoint and a temporary, roving, nighttime checkpoint.¹³²

124. See *supra* note 50 and accompanying text.

125. See, e.g., MINN. STAT. § 169.121 (1992) (Stating that driving with a blood alcohol content of over .01% is a crime in Minnesota).

126. See *supra* note 50 and accompanying text.

127. The DRE battery of tests have not been widely adopted by courts nationwide, nor have these tests for drug impairment been accepted by the Minnesota courts.

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

129. *Id.* at 452-53 (the proper measure of "subjective" intrusion is the "fear and surprise engendered in law-abiding motorists," not those who are in danger of arrest).

130. See *Martinez-Fuerte*, 428 U.S. 543, 554 (1976).

131. *Sitz*, 496 U.S. at 453.

132. The most obvious of these differences is that a roving checkpoint necessarily relies on the element of surprise for its effectiveness. This increases the concern or "subjective intrusion," experienced by motorists approaching the temporary checkpoint. See Strossen, *supra* note 28, at 313-14; see also *Sitz*, 496 U.S. at 460-76 (Stevens, J., dissenting); Guerra, *supra* note 10, at 1136 n.118.

The prospect of a drug checkpoint, as opposed to an alcohol checkpoint, could certainly increase the subjective fear experienced by a motorist. Inherent in a checkpoint for illegal drugs is the threat of a search — of both the vehicle and the individual passengers — for illegal drugs. This threat contrasts with the *Sitz* ideal of a quick evaluation of the driver for alcohol intoxication. Similarly, the threat of a drug influence evaluation, an exhaustive test in which the subject has to demonstrate to the officer that he or she is not impaired, would certainly alarm even many law-abiding motorists. These considerations indicate that a drug checkpoint has an enhanced "potential to generate fear and surprise in motorists."¹³³

D. Drug Checkpoints Under Federal Law — Conclusion

A drug checkpoint presents substantially different facts for review than a drunken driving checkpoint. Applying the *Sitz* balancing test uncovers substantially different state interests and more intrusive search techniques imposed upon all motorists seized by such a stop. Drug checkpoints also substantially increase police discretion as to which individuals will be focused upon, and thus increase the likelihood of race and class based discriminations. These factors point to the conclusion that a narcotics checkpoint goes well beyond the criteria articulated as constitutional by the U.S. Supreme Court in *Sitz*.

III. The "Narcotics Checkpoint" Violates Article I, Section 10 and Article I, Section 2 of the Minnesota Constitution

A. Criticisms of Sitz

In upholding suspicionless stops of motorists at drunk driving checkpoints, *Sitz* has been widely criticized.¹³⁴ One commentator characterized *Sitz* as the final step in the abdication of "meaningful judicial review of government measures that abridge the personal liberties protected by specific Bill of Rights guarantees"¹³⁵ Many of these criticisms point out that there is no evidence to suggest that these checkpoints are more effective than normal police activities based upon probable cause.¹³⁶ Several commentators have also suggested that the Court misapplied the balancing test

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

134. See Strossen, *supra* note 28; Guerra, *supra* note 10; Gilchrist, *supra* note 28; 4 W. LaFAVE, *supra* note 7, at § 10.8.

135. Strossen, *supra* note 28, at 288.

136. See *id.* at 311 n.116; Guerra, *supra* note 10, at 1137; *Sitz*, 496 U.S. at 469 (Stevens, J. dissenting). This criticism is based upon the fact that a special govern-

used to evaluate the checkpoint.¹³⁷ Another commentator has generally criticized the "inquisitorial" methods of law enforcement which the Court has upheld.¹³⁸

Overall, it is clear that *Sitz* represents one further step in the abdication of the current U.S. Supreme Court from its role as the protector of individual rights. By deferring to law enforcement authorities, the Court has left to the states the responsibility of submitting police procedure to meaningful judicial review.¹³⁹

B. *Sitz on Remand: State Law as the Modern Protector of Individual Rights*

On remand from the U.S. Supreme Court, in *Sitz v. Dept. of State Police*,¹⁴⁰ the Michigan Court of Appeals held that the checkpoint at issue, though permissible under the Federal Constitution, was in violation of the Michigan Constitution.¹⁴¹ In so doing, the Michigan Court of Appeals independently interpreted the Michigan Constitution to afford more protection to the individual right against warrantless searches and seizures.¹⁴²

This decision reflects a nationwide trend towards preserving individual rights which are not protected under the U.S. Constitution by using state constitutional provisions.¹⁴³ Similarly, the Minnesota Supreme Court has recently construed provisions in the Minnesota Constitution to afford greater individual rights,¹⁴⁴ in-

ment need was required for a suspicionless search before *Sitz*. See *supra* note 104 and accompanying text.

137. See Guerra, *supra* note 10, at 1137; *Sitz*, 496 U.S. at 462 (Stevens, J. dissenting).

138. Guerra, *supra* note 10, at 1114.

139. See 4 W. LAFAVE, *supra* note 7, at § 10.8.

140. 485 N.W.2d 135 (Mich. Ct. App. 1992).

141. *Id.* at 139.

142. The Michigan Court of Appeals interpreted Article I § 11 of the Michigan Constitution, which is substantially similar to the Fourth Amendment of the U.S. Constitution:

The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation . . .

MICH. CONST. Art. I, § 11. *Sitz II*, 485 N.W.2d at 139 ("we believe compelling reason exists to interpret the Michigan Constitution as affording greater rights than those found in the federal constitution").

143. See William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Terrence Fleming and Jack Nordby, *The Minnesota Bill of Rights: "Wrapt in the Old Miasmal Mist"*, 7 HAMLINE L. REV. 51, 52 (1984) ("Many United States Supreme Court justices of diverse political ideologies have encouraged this trend.").

144. See e.g. *Friedman v. Commissioner of Public Safety*, 473 N.W.2d 828 (Minn. 1991) (holding that the Minnesota Constitution gives a motorist the right to consult with an attorney before submitting to chemical testing for blood alcohol); *State v.*

cluding protecting key rights against government search and seizure¹⁴⁵ and invalidating laws with racially discriminatory effects.¹⁴⁶

C. Drug Checkpoints Under Article I, Section 10 of the Minnesota Constitution

Minnesota has historically had a strong commitment to individual rights.¹⁴⁷ Furthermore, Minnesota courts have construed article I, § 10, of the Minnesota Constitution,¹⁴⁸ as offering more protection to the individual than the Fourth Amendment of the U.S. Constitution as interpreted by the U.S. Supreme Court.¹⁴⁹ A strict examination of narcotics checkpoints under Minnesota law by the state judiciary would be consistent with these principles.

The Minnesota Supreme Court has not yet heard a highway checkpoint case. The Minnesota Court of Appeals, however, has heard several cases involving arrests made as a result of checkpoint stops. In *State v. Muzik*,¹⁵⁰ a pre-*Sitz* case, the Minnesota Court of Appeals found that a drunken driving checkpoint violated the Fourth Amendment of the U.S. Constitution.¹⁵¹ *Muzik* involved a nighttime "safety checkpoint" which, as the court found, had the

Hershberger, 462 N.W.2d 393 (Minn. 1990) (holding that the Minnesota Constitution protected an Amish defendant's freedom of conscience right from a state statute which mandated display of a slow-moving vehicle emblem).

145. See *infra* note 149 and accompanying text.

146. See *infra* notes 167-73 and accompanying text.

147. See generally Fleming & Nordby, *supra* note 143 (examining the history of Minnesota Bill of Rights' provisions and Minnesota Supreme Court decisions which interpret the Minnesota Constitution in an expansive manner toward individual rights).

148. The text of article I § 10 of the Minnesota Constitution is, absent changes in punctuation, identical to the Fourth Amendment of the U.S. Constitution:

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

MINN. CONST. art. I, § 10.

149. See *O'Connor v. Johnson*, 287 N.W.2d 400, 405 (Minn. 1979). In *O'Connor*, the Minnesota Supreme Court held that a search warrant for an attorney's office may not be issued when the attorney is not suspected of criminal wrongdoing, and there is no evidence that the documents sought will be destroyed. *Id.* The U.S. Supreme Court had upheld such a search in *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); see also *State v. Albrecht*, 465 N.W.2d 107 (Minn. Ct. App. 1991) (declining to accept the "good faith" exception to the exclusionary rule promulgated by the U.S. Supreme Court in *U.S. v. Leon*, 468 U.S. 897 (1984)).

150. 379 N.W.2d 599 (Minn. Ct. App. 1985).

151. *Id.* at 605.

primary purpose of apprehending drivers under the influence of alcohol.¹⁵²

The *Muzik* opinion begins with the assertion that "a DWI checkpoint is constitutional if properly conducted,"¹⁵³ and uses the *Brown*¹⁵⁴ balancing test to evaluate the particular checkpoint.¹⁵⁵ Interpreting federal law as it existed before *Sitz*, the *Muzik* court found that the state must demonstrate a special need for a checkpoint operation.¹⁵⁶ Furthermore, the *Muzik* court determined that the checkpoint in question did not have an explicit plan to circumscribe the discretion of individual officers.¹⁵⁷ Concluding that the state had produced insufficient evidence to show "either the need for the more intrusive method or the superiority of checkpoints to the less intrusive alternative method of apprehension based upon individualized suspicion,"¹⁵⁸ the *Muzik* court found the checkpoint unconstitutional.¹⁵⁹

Post-*Sitz* evaluations of checkpoint seizures have deferred to federal law by refusing to examine Minnesota Constitutional provisions.¹⁶⁰ These cases have specifically refused to recognize the dilution of Fourth Amendment rights by *Sitz* and have declined to interpret the Minnesota Constitution. In *Sanders v. Commissioner of Public Safety*,¹⁶¹ the Court of Appeals specifically refused to consider checkpoint seizures under state constitutional law by deferring to the lack of precedent from the Minnesota Supreme Court.¹⁶²

An examination of Minnesota law, however, finds an expansive interpretation of the right against search and seizure.¹⁶³ Of particular importance in the constitutional scrutiny of a checkpoint operation, Minnesota law extends the *Terry* doctrine¹⁶⁴ to automo-

152. *Id.* at 600.

153. *Id.* at 602 (citation omitted).

154. *Brown v. Texas*, 443 U.S. 47 (1979); see *supra* notes 32-36 and accompanying text.

155. *Muzik*, 379 N.W.2d at 599.

156. *Id.* at 604. See Strossen, *supra* note 28, at 300-02, 311 n.116.

157. *Muzik*, 379 N.W.2d at 603-04.

158. *Id.* at 604.

159. *Id.* at 605.

160. See *State v. Larson*, 485 N.W.2d 571 (Minn. Ct. App. 1992); *Sanders v. Commissioner of Public Safety*, Nos. C1-89-2108, C3-90-26, 1990 WL 128305, at 2 (Minn. Ct. App. Sept. 11, 1990); *Chock v. Commissioner of Public Safety*, 458 N.W.2d 692 (Minn. Ct. App. 1990).

161. Nos. C1-89-2108, C3-90-26, 1990 WL 128305 (Minn. Ct. App. Sept. 11, 1990).

162. *Id.* See also *Chock*, 458 N.W.2d 692 (Minn. Ct. App. 1990); *Larson*, 485 N.W.2d 571 (Minn. Ct. App. 1992).

163. See *supra* note 149 and accompanying text.

164. The *Terry* doctrine allows the police in certain circumstances to question or "stop and frisk" individuals in the absence of grounds for an arrest. See *Terry v. Ohio*, 392 U.S. 1 (1968); see generally 4 W. LAFAYE, *supra* note 7 at § 9. Justification for roadblock stops does not arise from the *Terry* doctrine. *Id.* at § 9.5(b).

bile stops, holding that the "police may not perform single, nonsystematic stops without having a specific and articulable suspicion of a violation."¹⁶⁵ Although checkpoints in general are held to be "systematic" stops and exempt from this language, it gains new significance in the context of a drug checkpoint which gives unfettered discretion to an individual officer to detain and investigate individuals on the basis of highly subjective criteria.

The *Sitz* decision signalled a departure from previous Fourth Amendment jurisprudence. Furthermore, drug checkpoints unconstitutionally stretch even the *Sitz* model. Both must be examined under article I, § 10 of the Minnesota Constitution.¹⁶⁶ First, the validity of checkpoint operations in general as promulgated by *Sitz* must be examined in light of its many and serious criticisms. Second, the validity of drug checkpoints must be addressed. To preserve meaningful judicial scrutiny of police procedures within Minnesota, a role abdicated by the U.S. Supreme Court in *Sitz*, article I, § 10 of the Minnesota Constitution must rise to the forefront.

D. Drug Checkpoints Under Article I, Section 2 of the Minnesota Constitution

In *Minnesota v. Russell*,¹⁶⁷ the Minnesota Supreme Court, invalidated a state statute under article I, § 2 of the Minnesota Constitution¹⁶⁸ because of its discriminatory impact upon racial

165. *State v. Hickman*, 491 N.W.2d 673, 674 (Minn. Ct. App. 1992) (citing *Marben v. State Dept. of Public Safety*, 294 N.W.2d 697, 699 (Minn. 1980)).

166. On August 31, 1993, as this article went to press, the Minnesota Court of Appeals released two opinions that reached opposite conclusions in evaluating drunk driving checkpoints under the Minnesota Constitution. In *Gray v. Commissioner of Public Safety*, 1993 WL 326921 (Minn. Ct. App. Aug. 31, 1993), the court held that there were no compelling reasons to interpret article I, § 10 of the Minnesota Constitution more expansively than the Fourth Amendment of the U.S. Constitution, and thus, *Sitz* controls. *Id.* at *5. Reaching the opposite conclusion was *Ascher v. Commissioner of Public Safety*, 1993 WL 326926 (Minn. Ct. App. Aug. 31, 1993), in which the court held that, in the absence of empirical evidence that sobriety checkpoints advance the public interest, these checkpoints violate article I, § 10 of the Minnesota Constitution. *Id.* at *8. These conflicting decisions by the Minnesota Court of Appeals have opened the door for consideration by the Minnesota Supreme Court of drunk driving checkpoints under the Minnesota Constitution.

167. 477 N.W.2d 886 (Minn. 1991). The Court in *Russell* invalidated a state law which attached a heavier criminal penalty to the possession of crack cocaine (used mainly by African-Americans) as opposed to powder cocaine (used mainly by whites). *See id.*

168. This provision provides:

No member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers.

MINN. CONST. art. I, § 2 (1857, amended 1974).

minorities.¹⁶⁹ In so doing, the court validated a "Minnesota rational basis" test under article I, § 2, the state equivalent of the Equal Protection Clause, which test requires stronger scrutiny than its federal counterpart.¹⁷⁰ The court enacted this standard in response to the federal standard¹⁷¹ which places "an insurmountable burden upon the challenger [of the government action] . . . [and] also defies the fundamental tenets of equal protection."¹⁷² The practical effect of this enhanced scrutiny under the Minnesota Constitution, as evidenced by *Russell*, is to invalidate government action which is discriminatory, absent a reasonable connection demonstrated by the government between the discrimination in practice and the statutory goals.¹⁷³

As stated above, the discretion given to individual officers which is necessary for a drug checkpoint most certainly results in discrimination against racial minorities and low income individuals.¹⁷⁴

The increasing use of drug checkpoints both in Minnesota and nationally may provide evidence of discrimination resulting from the wide discretion needed to effectuate such checkpoints.¹⁷⁵ Thus, the stage will be set for the evaluation of drug checkpoints under article I, § 2 of the Minnesota Constitution. Because such a checkpoint is an executive action of state and local government, these entities must provide a "reasonable connection between the actual . . . effect of the [government action] and [its] goals."¹⁷⁶ Thus, the government will have to show a rational relation, under the Minnesota test, between the racial and class based discriminations which result from these checkpoints¹⁷⁷ and the policy goals of highway drug interdiction. Such a connection will certainly be difficult to show, and unless the government can show a "genuine and substan-

169. *Russell*, 477 N.W.2d at 891.

170. *Id.* at 888-89.

171. Under the federal standard, the challenger of government action under the Equal Protection Clause must show that the government acted "because of," not merely "in spite of" an anticipated racially discriminatory effect." *Id.* at 888 n.2 (citing *McCleskey v. Kemp*, 481 U.S. 279, 298 (1987)).

172. *Id.* at 888 n.2.

173. *Id.* at 888-89 ("[W]e have required a reasonable connection between the actual, not just the theoretical, effect of the challenged classification and the statutory goals").

174. See *supra* part II.A.iv.

175. Statistics are not currently available as to which motorists are more frequently detained or arrested as a result of drug checkpoints.

176. *Russell*, 477 N.W.2d at 889.

177. See *supra* part II.A.iv.

tial" basis¹⁷⁸ for the necessity of drug checkpoints, they will fail constitutional scrutiny under article I, § 2.

IV. Conclusion

Narcotics checkpoint seizures, as effectuated by police road-block operations such as the one conducted south of Minneapolis on August 24, 1992, go beyond the factual criteria deemed constitutional by the U.S. Supreme Court in *Michigan v. Sitz*, and are therefore unconstitutional. These drug checkpoints also rely upon the unchecked discretion of law enforcement officials, leading to racial and class based discrimination. Furthermore, due to the serious criticisms and concerns raised by *Sitz* and the history of Minnesota law in preserving individual rights, Minnesota courts should find narcotics checkpoint seizures violative of the Minnesota Constitution.

178. *Russell*, 477 N.W.2d at 888.