A Matter of Life and Death: Statutory Authority Enabling Sobriety Checkpoints to Effectively Fulfill Their Public Safety Role

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Introduction

Eighteen years ago, the Supreme Court of the United States upheld the use of sobriety checkpoints as a constitutional means of combating the public safety threat posed by intoxicated drivers.\(^2\) The constitutionality of a sobriety checkpoint hinges on three factors: 1) its method of operation, 2) its ability to effectively further a state’s substantial public safety interest, and 3) the public safety purpose of the checkpoint.\(^3\) A state’s substantial interest in protecting motorists from the dangers associated with drunken driving is undeniable.\(^4\) Yet in a number of states, sobriety checkpoints have been rendered largely ineffective by state court decisions holding that avoidance of a sobriety checkpoint does not create reasonable suspicion to stop the vehicle.\(^5\) Not only do these holdings allow an intoxicated driver to remain a potential public safety hazard, but they likely render the use of sobriety checkpoints unconstitutional. Since the checkpoints no longer effectively further the state’s substantial public safety interest, they likely fail the second prong for checkpoint constitutionality.

*State v. Heapy,*\(^6\) a recent Supreme Court of Hawai‘i opinion, is a particularly illustrative example of how state courts are stripping the effectiveness, and likely the constitutionality, from sobriety checkpoints.


\(^{3}\) The case law development of these three factors is extensively analyzed in Part I, A of this Note.

\(^{4}\) *Sitz*, 496 U.S. at 451 (stating that “[n]o one can seriously dispute the magnitude of the drunken driving problem or the States’ interest in eradicating it”).


\(^{6}\) 151 P.3d at 769–70.
On June 16, 2004, Maui Police Officer Eric Correa was assigned to work a sobriety checkpoint along the Mokulele Highway. His assignment was to stop vehicles attempting to avoid the sobriety checkpoint. At 6:30 p.m., Officer Correa observed a vehicle come within 150 feet of the checkpoint before abruptly turning onto a dead-end road surrounded by sugarcane fields. The only building on the dead-end road was a closed animal shelter. Officer Correa did not observe the driver commit any traffic violations; however, Officer Correa conducted an investigatory stop based on his belief that the driver avoided the sobriety checkpoint because he was intoxicated. During the stop, the driver, Mr. Raymond Heapy, exhibited signs of intoxication, and was subsequently arrested for operating a motor vehicle under the influence of an intoxicant. On appeal, the Supreme Court of Hawai‘i held that Officer Correa lacked the requisite reasonable suspicion necessary to stop Heapy’s vehicle. Since reasonable suspicion did not exist, the stop constituted an unreasonable seizure and the results of the field sobriety test were suppressed.

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7 *Id.* at 769.
8 *Id.* at 769–770.
9 *Id.*
10 *Id.*
11 *Id.*; see *Terry v. Ohio*, 392 U.S. 1 (1968) (holding that an officer can conduct a brief investigatory detention based on articulable facts constituting reasonable suspicion that a crime has just occurred, is occurring, or is about to occur). Traffic stops based on reasonable suspicion are one type of investigatory detention commonly referred to as a *Terry* stop.
12 *Heapy*, 151 P.3d at 768 (“Defendant was charged on August 4, 2004 with violating HRS § 291E–61 by operat[ing] . . . a vehicle under the influence of an intoxicant . . . .”).
13 *Id.* at 766
14 *Id.* See also *United States v. Martinez-Fuerte*, 428 U.S. 543, 556 (1976) (“[I]t is agreed that checkpoint stops are ‘seizures’ within the meaning of the Fourth Amendment.”); *Mapp v. Ohio*, 367 U.S. 643, 654 (1961) (holding that all evidence obtained in violation of the Constitution is inadmissible in state court); *Weeks v. United States*, 232 U.S. 383, 398 (1914) (evidenced seized during an unreasonable search or seizure is inadmissible in federal court).
The holding in *Heapy* provides drivers on Hawai‘i with the option to avoid stopping at sobriety checkpoints. Intoxicated drivers can drive up to a sobriety checkpoint, make a legal turn, and then remain an imminent roadway hazard. Because of this decision, sobriety checkpoints no longer effectively further Hawai‘i’s significant interest in protecting the safety of drivers on its roadways.

The ability to remove intoxicated drivers from roadways is a matter of life and death. Drunken driving claims more than 16,000 lives annually; approximately one death every 32 minutes.\(^{15}\) By comparison, approximately four times as many people die each year in alcohol-related accidents as have died in the entire Iraq War.\(^{16}\) Every two minutes an American is injured in an alcohol-related accident. This equates to a staggering 305,000 injuries per year.\(^{17}\) Annually, impaired driving costs the public more than $110 billion, of which $51 billion is paid by someone other than the drunk driver.\(^{18}\) Decisions like *Heapy* are detrimental to the states’ substantial public safety interest. By inhibiting the effective use of sobriety checkpoints, courts deal a substantial blow to states’ ability to protect drivers on the roadways.

The solution to the problem of ineffective sobriety checkpoints is for state legislatures to enact statues clearly defining when law enforcement has reasonable suspicion to briefly detain a

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\(^{17}\) *Saturation Patrols & Sobriety Checkpoint Guide*, supra n.15 at 1.

\(^{18}\) *Id.*
driver who avoids a sobriety checkpoint. By defining the circumstances under which an officer can stop a vehicle that avoided a sobriety checkpoint, states legislatures can close the court-created loophole which currently permits avoidance. The model statute provided in this Note clearly defines the circumstances under which avoidance of a sobriety checkpoint constitutes reasonable suspicion to conduct an investigatory stop for the limited purpose of determining driver sobriety. By enabling sobriety checkpoints to effectively further the states’ substantial public safety interest, the model statute returns sobriety checkpoints to a state of constitutionality. If adopted by state legislatures, this model rule would permit law enforcement to fully effectuate the intended purpose of sobriety checkpoints in a constitutionally valid manner.¹⁹

Part I of this Note details both the constitutional development of sobriety checkpoints, and how state courts have stripped them of their effectiveness. It then explains why ineffective sobriety checkpoints are likely unconstitutional. Part II discusses what has historically constituted “reasonable suspicion” to justify an investigatory stop. It then explains when reasonable suspicion is needed while operating a sobriety checkpoint, and why avoidance of a sobriety checkpoint constitutes reasonable suspicion. Finally, Part III explains why a statute is the best solution to restore the effectiveness and constitutionality of sobriety checkpoints. The model statute is then provided, and the ramifications of adoption of the statute for both law enforcement and the public are discussed.

¹⁹ By arguing for the adoption of a model statute to reestablish the effectiveness of sobriety checkpoints, this Note does not address whether such checkpoints are more or less effective than other methods of combating drunk driving. Rather, this Note focuses on providing law enforcement officers one invaluable tool, sobriety checkpoints, among many others that could be used to further protect the public from the dangers associated with drunk driving.
PART I: Sobriety Checkpoints as a Means of Protecting Public Safety

Part A of this section discusses the constitutional development of sobriety checkpoints. Part B analyzes how state court decisions have stripped sobriety checkpoints of their effectiveness. Part C explains why ineffective sobriety checkpoints are no longer constitutional.

A. The Development of Sobriety Checkpoints as Constitutional Tools of Public Safety

During the twenty-one year period from 1979 through 2000, the Supreme Court of the United States handed down three critical opinions which shaped the legal landscape for sobriety checkpoints. After more than two decades of case law development, the test for sobriety checkpoint constitutionality can be boiled down to three critical factors:

1) The checkpoint must be operated pursuant to specific guidelines limiting officer discretion.

2) The checkpoint must be an effective means of furthering the state’s interest in public safety.

3) The primary purpose of the checkpoint must be related to public safety.

The Specific Guidelines Limiting Officer Discretion Prong

In the 1979 case Delaware v. Prouse, the Supreme Court held that random law enforcement spot checks used to verify a driver’s license and insurance violated the Fourth Amendment’s prohibition against unreasonable seizure. In Prouse, a New Castle Police Officer conducted a traffic stop, smelled burnt marijuana when he approached the vehicle, and subsequently seized marijuana lying in plain view on the car floor. The officer testified that “he had observed neither traffic or equipment violations nor any suspicious activity, and that he

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22 Id. at 650.
made the stop only to check the driver’s license and registration.”\textsuperscript{23} He further testified that he was not “acting pursuant to any standards, guidelines, or procedures pertaining to document spot checks,” but rather “‘I saw the car in the area and [I] wasn’t answering any complaints, so I decided to pull them off.’”\textsuperscript{24}

The Supreme Court recognized Delaware’s legitimate public safety interest in ensuring motorists are licensed and insured, but held that this did not justify the use of random spot checks absent reasonable suspicion.\textsuperscript{25} Of particular concern for the Court was the unbridled discretion of officers to conduct suspicionless investigatory stops under the pretense of checking for license and insurance.\textsuperscript{26} The Court emphasized that “[t]his kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent.”\textsuperscript{27} Allowing officers unconstrained discretion to conduct suspicionless stops would circumvent the privacy protections of the Fourth Amendment, and could potentially lead to discriminatory enforcement practices.

\textit{Prouse} left open the possibility for constitutionally permissible checkpoints.\textsuperscript{28} The Court specified that “this holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the

\begin{itemize}
\item {\textsuperscript{23}} Id.
\item {\textsuperscript{24}} Id. at 650–51.
\item {\textsuperscript{25}} Id. at 661 (”The marginal contribution to roadway safety possibly resulting from a system of a spot checks cannot justify subjecting every occupant of every vehicle on the road to a seizure — limited in magnitude compared to other intrusions but nonetheless constitutionally cognizable — \textit{at the unbridled discretion of law enforcement officials.}”) (emphasis added).
\item {\textsuperscript{26}} Id.
\item {\textsuperscript{27}} Id.
\item {\textsuperscript{28}} Id. at 663.
\end{itemize}
unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative.’’²⁹ Eleven years later, the Supreme Court upheld the use of sobriety checkpoints where protocol guidelines restricted officer discretion.³⁰

In *Michigan Department of State Police v. Sitz*, the Court held that suspicionless stops of motorists at highway sobriety checkpoints did not violate the Fourth Amendment’s prohibition of unreasonable seizures.³¹ In 1986, the Director of the Michigan Department of State Police created The Sobriety Checkpoint Advisory Committee. The Committee established guidelines for operating a sobriety checkpoint pilot program in Saginaw County.³² These guidelines directed officers to set up sobriety checkpoints at selected sites where all vehicles passing through would be stopped and drivers would be briefly examined for signs of intoxication.³³ The Court distinguished this case from *Prouse* by emphasizing that the Saginaw checkpoint was conducted pursuant to guidelines, rather than the spot checks conducted pursuant to “standardless and unconstrained discretion”³⁴ in *Prouse*.³⁵

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²⁹ *Id.*


³¹ *Id.*

³² *Id.* at 447 (The Sobriety Checkpoint Advisory Committee was comprised of representatives of the State Police force, local police forces, state prosecutors, and the University of Michigan Transportation Research Institute.).

³³ *Id.*

³⁴ 440 U.S. at 659.

³⁵ *Sitz*, 496 U.S. at 453–54. *C.f.*, *id*. 464–65 (Stevens, Brennan, and Marshall argue in dissent that a sobriety checkpoint does not adequately limit officer discretion. While an officer does not have discretion to determine whom to pull over, an officer may have significant discretion as to the manner in which he determines if the driver is intoxicated.).
Operating checkpoints pursuant to specific guidelines alleviates the potential problems of unconstrained discretion that concerned the Court in *Prouse.*\(^{36}\) Six months after *Sitz*, the National Highway Traffic Safety Administration (“NHTSA”) published *The Use of Sobriety Checkpoints for Impaired Driving Enforcement*, which provided a set of model guidelines for establishing constitutional sobriety checkpoints.\(^{37}\) The NHTSA model guidelines suggest that local law enforcement agencies have pre-approved protocols designating where to establish the checkpoint, how and where to position warning and safety devices, the method of vehicle selection (e.g. every vehicle, every fifth vehicle, etc.), and the method and location for conducting further investigations if required.\(^{38}\) Guidelines like these operate constitutionally in practice, because they impose limitations on officer discretion while operating sobriety checkpoints. By having specific methods of operation that officers must follow, the potential problems that concerned the Court in *Prouse* can be substantially avoided.

*Effective Means of Furthering the State’s Substantial Interest in Public Safety Prong*

That sobriety checkpoints effectively further Michigan’s substantial public safety interest was a critical factor in upholding the constitutionality of sobriety checkpoints.\(^{39}\) During the hour and fifteen minutes of operation, the Saginaw County Sheriff’s Department stopped 126 vehicles at the checkpoint, resulting in an average delay of 25 seconds per vehicle, and the arrests of two

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\(^{36}\) *Prouse*, 440 U.S. at 661


\(^{38}\) *The Use of Sobriety Checkpoints for Impaired Driving Enforcement*, supra note 37 at B2. The model guidelines suggest creating protocol setting out the method for conducting additional investigations into the driver’s sobriety. This alleviates one of the problems noted by the dissent (see note 35).

\(^{39}\) *Sitz*, 496 U.S. at 454–55.
drivers for driving under the influence of alcohol.\textsuperscript{40} Especially noteworthy was that a third driver who drove through the checkpoint without stopping was stopped by the police and subsequently arrested for drunk driving.\textsuperscript{41} While the Supreme Court held that suspicionless stops at the sobriety checkpoint do not require reasonable suspicion,\textsuperscript{42} the Court did not address whether reasonable suspicion was necessary to stop the driver who drove through the sobriety checkpoint.

The majority opinion emphasized that 1.5\% of drivers stopped at the Saginaw County sobriety checkpoint were intoxicated,\textsuperscript{43} and therefore that the sobriety checkpoint did further Michigan’s substantial interest in removing these public safety threats from roadways.\textsuperscript{44} In balancing Michigan’s interest versus the privacy interest of motorists, the majority held that the scales tipped in Michigan’s favor.\textsuperscript{45}

In dissent, Justices Stevens, Brennan, and Marshall adamantly disagreed that the empirical data showed that sobriety checkpoints were effective means of combating the public safety threat of driver-intoxication.\textsuperscript{46} On the contrary, the dissenting Justices argued that motor-vehicle fatality rates were decreasing, alcohol-related accidents were decreasing, and that the man-hours necessary to conduct a sobriety checkpoint was not worth the very few numbers of

\begin{flushright}
\textsuperscript{40} Id. at 448.
\textsuperscript{41} Id.
\textsuperscript{42} Id. at 447.
\textsuperscript{43} Id. at 455–56.
\textsuperscript{44} Id. at 455.
\textsuperscript{45} Id. at 451 (“Conversely, the weight bearing on the other scale — the measure of the intrusion on motorists stopped briefly at sobriety checkpoints — is slight.”); C.f. Id. at 465 (Justice Marshall, Brennan, and Stevens argued in dissent that since most sobriety checkpoints are conducted at night, the surprise and fear caused by these nighttime checkpoints makes the intrusion offensive, not slight.).
\textsuperscript{46} Id. at 461–63.
\end{flushright}
arrests made. The dissent argued that the majority’s overvaluing of an effectiveness standard rendered the balancing test incorrect.\textsuperscript{47}

The demonstrated effectiveness of sobriety checkpoints was a significant point of contention between the majority and dissent in \textit{Sitz}. Based on \textit{Sitz}, it is clear that effectiveness is a core requirement for determining a checkpoint’s constitutionality. If a sobriety checkpoint did not effectively further the state’s substantial interest, then the suspicionless stop of motorists, regardless of the length of the stop, would violate the Fourth Amendment.\textsuperscript{48}

\textit{Primary Purpose Relating to Public Safety Prong}

The public safety function of sobriety checkpoints is also critical to understanding the holding in \textit{Sitz}. The purpose of sobriety checkpoints is not to uncover criminal activity, but rather to promote public safety by deterring dangerous behavior and by removing imminent threats from the roadways.\textsuperscript{49} While suspicionless checkpoint stops are constitutional for public safety reasons,\textsuperscript{50} they are unconstitutional when the primary purpose of the checkpoint is to discover

\textsuperscript{47} \textit{Id.}

\textsuperscript{48} \textit{See} Whren v. United States, 517 U.S. 806, 809–10 (1996) (“Temporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited purpose, constitutes a ‘seizure’ of ‘persons’ within the meaning of [the Fourth Amendment.]”) \textit{and} Chandler v. Miller, 520 U.S. 305, 308 (1997) (“The Fourth Amendment requires government to respect ‘the right of the people to be secure in their persons . . . and against unreasonable search and seizure.’ This restraint on government conduct generally bars officials from undertaking search or seizure absent individualized suspicion.”).


\textsuperscript{50} \textit{See} \textit{Sitz}, 496 U.S. at 447 (“This case poses the question whether a State’s use of highway sobriety checkpoints violates the Fourth and Fourteenth Amendments of the United States Constitution. We hold that it does not.”).
evidence of criminal activity.\footnote{City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000) (“We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes. We cannot sanction stops justified only by the generalized and ever-present possibility that interrogation and inspection may reveal that any given motorist has committed some crime.”).} A decade after \textit{Sitz}, the Court struck down checkpoints with a primary purpose of uncovering ordinary criminal activity.

In 1998, the city of Indianapolis authorized the Indianapolis Police Department (IPD) to utilize checkpoints, conducted pursuant to police-chief-approved guidelines, as a means of curbing the flow of illegal narcotics entering the city.\footnote{\textit{Edmond}, 531 U.S. at 34–35.} These guidelines authorized officers to stop a predetermined number of vehicles, ask the driver for license and registration, look for signs of driver-impairment, and conduct an open-view examination of the vehicle from outside.\footnote{\textit{Id.} at 35.} The directives also authorized an officer to walk a trained narcotics-detection dog\footnote{The use of a narcotics-detection dog to sniff the outside of a container does not constitute a search of that container, and therefore is not subject to Fourth Amendment limitations; \textit{United States v. Place}, 462 U.S. 696, 707 (1983).} around the outside of each stopped vehicle.\footnote{\textit{Id.} at 35.} Absent specific articulable facts constituting reasonable suspicion or probable cause, the investigatory detention could not last more than five minutes.\footnote{\textit{Id.}} While the guidelines authorized officers to briefly seize the vehicle absent reasonable suspicion, the guidelines prohibited them from searching the vehicle without consent of the driver or reasonable suspicion to warrant the search.\footnote{\textit{Edmond}, 531 U.S. at 35.} IPD operated these checkpoints on six occasions. Approximately 9\% of stops resulted in arrests.\footnote{\textit{Id.} at 34–35 (From August to November, Indianapolis Police stopped “1,161 vehicles and arrest[ed] 104 motorists. Fifty-five arrests were for drug-related crimes, while 49 were for offenses unrelated to drugs.”).}
The majority distinguished *Edmond* from other checkpoint cases by noting that “in none of [the checkpoint] cases . . . did we indicate approval of a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing.” In *Sitz*, “[t]he checkpoint program was clearly aimed at reducing the immediate hazard posed by the presence of drunk drivers on the highways, and there was an obvious connection between the imperative of highway safety and the law enforcement practice at issue.” However, the purpose of the checkpoint program in *Edmond* was not related to combating an imminent public safety hazard, but rather for intercepting drug shipments and deterring future trafficking into the city. In other words, the purpose of these checkpoints was for law enforcement rather than public safety.

Although the drug checkpoints in *Edmond* operated in a similar manner to the sobriety checkpoints in *Sitz*, the majority said that the different functions of the two checkpoints was the primary reason drug checkpoints do, and sobriety checkpoints do not, violate the Fourth Amendment. At the end of the majority opinion in *Edmond* the Court reaffirmed their holding in *Sitz*.

It goes without saying that our holding today does nothing to alter the constitutional status of the sobriety . . . checkpoints that we approved in *Sitz* . . ., or of the type of traffic checkpoint that we suggested in *Prouse*. The constitutionality of such checkpoint programs still

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59 *Id.* at 37.

60 *Id.* at 39.

61 *Id.* at 48.

62 *Id.* at 41–42 (“Because the primary purpose of the Indianapolis narcotics checkpoint program is to uncover evidence of ordinary criminal wrongdoing, the program contravenes the Fourth Amendment.”). Chief Justice Rehnquist, Justice Scalia, and Justice Thomas argued in dissent that the constitutionality of checkpoints has been upheld. Therefore, the subjective purpose of the checkpoint should not render it unconstitutional. *Edmond*, 531 U.S. at 51–52 (“Once the constitutional requirements for a particular seizure are satisfied, the subjective expectations of those responsible for it . . . are irrelevant.”) *citing* Whren v. United States, 517 U.S. 806 (1996) (holding that an officer’s subjective intent would not invalidate an otherwise justifiable stop).
depends on a balancing of the competing interests at stake and the effectiveness of the program.\textsuperscript{63}

B. State Courts Have Rendered Sobriety Checkpoints Ineffective

Currently, 39 states and the District of Columbia authorize sobriety checkpoints to combat the public safety dangers associated with driver intoxication.\textsuperscript{64} As discussed in the Introduction, \textit{State v. Heapy}\textsuperscript{65} is a recent example of a state court decision stripping sobriety checkpoints of their ability to operate effectively. Unfortunately, holdings like \textit{Heapy} are not uncommon. The following is a non-exhaustive list of examples from around the nation:

\textsuperscript{63} Id. at 47 (emphasis added).


\textsuperscript{65} Michigan: Ironically, three years after the United States Supreme Court upheld the use of sobriety checkpoints in Michigan, the Michigan Supreme Court held that sobriety checkpoints violated MICH. CONST. art. I, § 11. Therefore, sobriety checkpoints are no longer authorized in Michigan. Sitz v. Dep’t of State Police, 506 N.W.2d 209 (Mich. 1993).

\textsuperscript{65} 151 P.3d 764 (Haw. 2007).
Pennsylvania

In Commonwealth v. Scavello, the Montgomery County Police Department set up a sobriety checkpoint with a chase car to pull over drivers attempting to avoid the checkpoint. The chase car officer pulled over a vehicle after observing the driver make a legal U-turn prior to reaching the roadblock. The Supreme Court of Pennsylvania held that merely observing a driver approach a sobriety checkpoint and make a legal U-turn to avoid the checkpoint did not constitute reasonable suspicion to detain the driver. The court found that although there is statutory authority allowing police to establish roadblocks in Pennsylvania, there is no requirement that a driver must pass through the roadblock. Therefore, failing to do so does not create the requisite reasonable suspicion to conduct an investigatory detention. Absent a violation of the Pennsylvania Motor Vehicle Code, a seizure based solely on avoidance of a checkpoint is unreasonable under the Fourth Amendment.

Maine

In State v. Powell, an Oakland Police Officer assigned the task of stopping drivers who avoided the sobriety checkpoint observed a driver pull into a driveway, back out, and then drive off in the opposite direction. The driver was approximately 700 yards from the checkpoint and

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67 Id.

68 Id. at 387–88 (arguing that since there is no requirement to go through a roadblock, failing to do so does not provide a basis for police intervention).

69 75 PA.C.S. sec. 6308(b)

70 Scavello, 734 A.2d at 433-34.

71 Id.

72 Id.

500 yards from the first cones and warning signs when he turned around in the driveway.\textsuperscript{74} The Supreme Court of Maine affirmed the trial court’s holding that the only thing the officer could have reasonably concluded based on the driver’s actions was that he turned around after observing police officers.\textsuperscript{75} Still, the court found that this did not constitute reasonable suspicion.\textsuperscript{76} Since reasonable suspicion did not exist, the stop violated the Fourth Amendment.

**Delaware**

In *Howard v. Voshell*, the Delaware State Police set up a sobriety checkpoint with lights and flares indicating the upcoming checkpoint 1,000 feet away.\textsuperscript{77} The defendant made a legal U-turn when she saw the flares, and later testified she believed the flares warned of an accident ahead.\textsuperscript{78} The Superior Court of Delaware held that, based on the facts of the case, a legal U-turn made 1,000 feet before the roadblock could not be considered reasonable suspicion. Therefore, the stop was conducted in violation of the Fourth Amendment.\textsuperscript{79}

**Utah**

In *State v. Talbot*, the Garfield County Sheriff and his posse established a checkpoint to stop all vehicles to check for license and registration.\textsuperscript{80} No signs warned of the upcoming

\textsuperscript{74} Id. at 1308.

\textsuperscript{75} Id.

\textsuperscript{76} Id.


\textsuperscript{78} Id.

\textsuperscript{79} Id. at 807.

\textsuperscript{80} State v. Talbot, 792 P.2d 489 (Utah App. 1990). Roadblocks can be constitutionally established to check for license and registration as long as specific guidelines restrict officer discretion regarding who to stop. See Delaware v. Prouse, 440 U.S. 648, 663 (1979).
checkpoint. A driver crested a hill approximately a quarter mile away, saw the flashing police lights, made a legal U-turn, and was then stopped by the Sheriff’s posse. The Court of Appeals of Utah held that, without more, mere avoidance of a sobriety checkpoint does not constitute reasonable suspicion of criminal activity warranting an investigatory detention. Therefore, evidence obtained from the seizure must be suppressed since the basis for the seizure violated the Fourth Amendment.

C. Ineffective Sobriety Checkpoints are No Longer Constitutional

In all five cases discussed in the previous section, the police officers operated a constitutionally valid sobriety checkpoint. In each case, a drunk driver was removed from the road, thereby effectuating the states’ substantial interest in public safety on roadways. However, in each case, the courts have substantially hindered law enforcement officers’ ability to remove similar public safety hazards from roadways in the future. Without the ability to briefly stop drivers who avoid sobriety checkpoints, police officers can no longer effectively operate sobriety checkpoints. Intoxicated drivers can avoid sobriety checkpoints without repercussions, and thereby remain imminent threats to the safety of themselves and other motorists. By stripping the effectiveness from sobriety checkpoints, the state courts have also rendered them unconstitutional.

81 Id.

82 Id.

83 Id. at 495.

84 Id.

85 See State v. Foreman, 527 S.E.2d 921, 924–25 (N.C. 2000) (“Certainly, the purpose of any checkpoint . . . would be defeated if drivers had the option to ‘legally avoid’, ignore or circumvent the checkpoint by either electing to drive through without stopping or by turning away upon entering the checkpoint's perimeters.”).
One of the critical factors for the majority in *Sitz* was that the Saginaw sobriety checkpoint was demonstrated to be effective in furthering Michigan’s public safety interest in removing drunk drivers from the roadways.\(^{86}\) In dissent, Justices Marshall, Brennan, and Stevens questioned the weight the majority gave to the effectiveness prong of the test for checkpoint constitutionality.\(^{87}\) The dissenting Justices believed that the 1.5% arrest rate demonstrated at the Saginaw sobriety checkpoint was insufficient to show that sobriety checkpoints were effective means of furthering Michigan’s substantial interest in public safety.\(^{88}\) They argued that the man-hours required to operate a sobriety checkpoint was not worth the very few arrests made.\(^{89}\) Since they believed that sobriety checkpoints were not effective means of furthering the state’s substantial public safety interest, the dissenting Justices argued the suspicionless stop of motorists at sobriety checkpoints violated the Fourth Amendment.\(^{90}\)

State court decisions prohibiting officers from stopping drivers avoiding sobriety checkpoints makes checkpoints significantly less effective. It is unlikely that many intoxicated drivers will voluntarily stop at a sobriety checkpoint when they have the legal option to avoid it. Without the ability to stop these intoxicated drivers, sobriety checkpoints do not effectively fulfill their purpose of furthering the state’s substantial interest in public safety. Three Justices already thought that a 1.5% arrest rate was simply too low to allow suspicionless stops.\(^{91}\) This percentage will likely drop even lower if the public becomes aware of the legal right to avoid a


\(^{87}\) Id. at 461–63.

\(^{88}\) Id.

\(^{89}\) Id.

\(^{90}\) Id.

\(^{91}\) Id. at 461–63.
sobriety checkpoint. Therefore, the state court decisions discussed in the previous section have likely rendered sobriety checkpoints unconstitutional in Hawai‘i, Pennsylvania, Maine, Delaware, and Utah.

**PART II: The Use of Reasonable Suspicion in Law Enforcement**

Part A of this section briefly discusses the constitutional background of reasonable suspicion. Part B explains when reasonable suspicion is required while operating sobriety checkpoints. Finally Part C explains why avoidance of a sobriety checkpoint constitutes the necessary reasonable suspicion required to stop the vehicle.

**A. Detention Based on Reasonable Suspicion**

The legal concept of “reasonable suspicion” originated in the United States Supreme Court’s landmark decision *Terry v. Ohio*. The Court in *Terry* held:

> It is in [the general interest of crime prevention and detection] which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest.”

Following *Terry*, law enforcement could constitutionally conduct brief investigatory seizures based on reasonable suspicion. However, to have reasonable suspicion, the officer must be able to “point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant that intrusion.” The court emphasized that this standard “allow[ed] officers to draw on their own experience and specialized training to make inferences

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92 392 U.S. 1, 6 (1968) (A Cleveland Police Officer observed two men standing on a street corner. One would walk down a street, look in a specific store window, and then return to confer with the other before repeating these actions at least a dozen times. Based on his reasonable belief that the men intended to rob the department store, the officer conducted an investigatory detention.).

93 *Id.* at 22.

94 *Id.* at 21.
from and deductions about the cumulative information available to them that might well elude an untrained person.”

Following *Terry*, the existence of reasonable suspicion became an oft-litigated point of contention at suppression hearings. The United States Supreme Court offered guidance to reviewing courts in *United States v. Arvizu*, stating that:

> When discussing how reviewing courts should make reasonable-suspicion determinations, we have repeatedly said that they must look at the ‘totality of the circumstances’ of each case to see whether the detaining officer has a ‘particularized and objective basis for suspecting legal wrongdoing. . . .’ Although an officer’s reliance on a mere ‘hunch’ is insufficient to justify a stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.  

This lower standard gives officers important leeway to make critical decisions necessary to detect and prevent crime. If an officer can articulate the facts that led him to an objectively reasonable inference that criminal activity was afoot, this quantum of facts likely constitutes reasonable suspicion to authorize the investigatory detention. However, a detention conducted absent reasonable suspicion violates the Fourth Amendment’s prohibition against unreasonable seizures, and any fruits of that seizure would be suppressed.

Seizures at sobriety checkpoints are an exception to the reasonable suspicion requirement. The Supreme Court settled the issue of whether law enforcement can briefly

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96 Id.
97 Id. at 273.
98 Mapp v. Ohio, 367 U.S. 643, 654 (1961) (holding that all evidence obtained in violation of the Constitution is inadmissible in state court); Weeks v. United States, 232 U.S. 383, 398 (1914) (evidenced seized during an unreasonable search or seizure is inadmissible in federal court).
99 Supra note 50.
detain drivers at sobriety checkpoints absent any reasonable suspicion; however, left unsettled is the issue of whether avoidance of a sobriety checkpoint constitutes reasonable suspicion to briefly detain a driver.

**B. When Reasonable Suspicion is Required While Operating a Sobriety Checkpoint**

Stops made at a sobriety checkpoint constitute seizures under the Fourth Amendment. Ordinarily a seizure is unreasonable in the absence of individualized suspicion of wrongdoing, however, in certain limited circumstances, the Supreme Court has upheld the use of seizures absent reasonable suspicion. As discussed in Part I of this Note, the Supreme Court in *Sitz* held that stops made at sobriety checkpoints do not require reasonable suspicion to be valid under the Fourth Amendment.

Unlike stops made at a sobriety checkpoint, stops made of vehicles that avoid a sobriety checkpoint *do* require reasonable suspicion in order to be valid seizures under the Fourth Amendment. Therefore, in order to constitutionally stop a vehicle avoiding a sobriety checkpoint, the seizing officer must have reasonable suspicion of criminal activity. This requirement is easily satisfied if the officer observes the driver violate a traffic law while

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101 United States v. *Martinez-Fuerte*, 428 U.S. 543, 556 (1976) (“[I]t is agreed that checkpoint stops are ‘seizures’ within the meaning of the Fourth Amendment.”).


103 See, e.g., *Martinez-Fuerte*, 428 U.S. 545–50 (upholding the constitutionality of suspicionless stops made at fixed Border Patrol checkpoints); Michigan Dep’t State Police v. *Sitz*, 496 U.S. 444, 447 (upholding the constitutionality of suspicionless stops made at sobriety checkpoints); Nat’l Treasury Employees Union v. *Von Raab*, 489 U.S. 656, 668 (upholding the constitutionality of suspicionless searches by Customs Agents);

104 *Supra* note 50.

105 United States v. *Villamonte-Marquez*, 462 U.S. 579, 605–06 (1983) (“In short, every one of the vehicle-stop precedents on which the Court relies . . . requires that a stop or search be supported by either probable cause, reasonable suspicion, or another discretion-limiting feature such as use of fixed checkpoints.”)
avoiding the checkpoint. The trickier issue is when a driver avoids the checkpoint without violating traffic laws. Is it reasonable for an officer to believe that a driver is avoiding a sobriety checkpoint because he is intoxicated? Yes.

C. Why Sobriety Checkpoint Avoidance Constitutes Reasonable Suspicion

State courts have mistakenly held that avoidance of a sobriety checkpoint does not constitute reasonable suspicion to conduct an investigatory detention of the driver. In all cases discussed in the Part I of this Note, the courts held that the facts did not constitute reasonable suspicion. These courts erred by failing to view the facts in their proper context. This is the type of error that led the Supreme Court to overturn the Ninth Circuit’s decision in United States v. Arvizu. In Arvizu, a Border Patrol agent working near the Arizona-Mexico border observed a woman driving in a minivan along a rarely used, largely unpaved road, at a high rate of speed. When she saw the border agent’s car she slowed considerably and appeared very rigid. From his training and experience, the agent knew the road had a reputation for being traveled by smugglers attempting to avoid the border checkpoint. The agent stopped the vehicle based on his suspicion that the woman was avoiding the border checkpoint, and this subsequently led to


108 Arvizu, 232 F.3d at 1245–46.

109 Id.

110 Id.
the discovery of large quantities of drugs in the vehicle.\textsuperscript{111} The Ninth Circuit held the agent lacked the requisite reasonable suspicion to detain the driver, because it was just as likely that inferences drawn from the agent’s observations could have been of innocent rather than criminal behavior.\textsuperscript{112} However, the Supreme Court reversed and held that the proper way to review the facts in determining reasonable suspicion was to review them within the totality of the circumstances.\textsuperscript{113}

In most situations, a woman driving in a minivan with her family would not constitute reasonable suspicion. However, when this is done on a rarely used road, known to be frequently used to avoid the border checkpoint, it is reasonable for officers to conduct an investigatory stop. Analogously, under most circumstances, making a legal U-turn or changing direction does not constitute reasonable suspicion. However, when this is done right after the driver likely noticed a sobriety checkpoint, this does create reasonable suspicion for officers to conduct an investigatory detention.

The Supreme Court created the reasonable suspicion standard for the specific purpose of allowing officers to utilize their training and experience to evaluate situations based on the totality of the circumstances.\textsuperscript{114} The officers in each case discussed in Part I of this Note did exactly that. The officers observed a driver approach a sobriety checkpoint and then abruptly, but legally, change direction so as not to be stopped at the sobriety checkpoint. In each case, officers stopped the driver determine whether or not the driver was intoxicated. Yet, as

\textsuperscript{111} \textit{Id.} at 1246–47.

\textsuperscript{112} \textit{Id.} at 1248–52.


\textsuperscript{114} \textit{Id.} at 266, 273.
previously discussed, in each case the court held that observing the driver avoid the checkpoint did not constitute reasonable suspicion of driver-intoxication.

There are legitimate reasons that non-intoxicated drivers may seek to avoid sobriety checkpoints. A sober driver with outstanding warrants or with contraband in the vehicle would likely avoid the brief police confrontation at a sobriety checkpoint. The same might be true for a driver who fears police confrontation. Additionally, a driver in a hurry may circumvent a sobriety checkpoint to avoid a possible delay. Undoubtedly, reasons do exist for non-intoxicated drivers to avoid sobriety checkpoints. However, the fact that some drivers briefly detained for avoiding a sobriety checkpoint will not be intoxicated does not render an officer’s suspicion that the avoidance is due to intoxication any less reasonable.

The determination of whether an officer had reasonable suspicion to detain a driver does not hinge on whether his suspicion turns out to be correct. In *Heapy*, Supreme Court of Hawai‘i emphasized that the fact that Officer Correa’s suspicion of driver-intoxication was correct does not necessarily make the stop reasonable.\textsuperscript{115} The Supreme Court of the United States held in *Terry* that officers could briefly seize an individual based on reasonable suspicion “for the purposes of investigating possible criminal behavior even if there is no probable cause to make an arrest.”\textsuperscript{116} By making this standard lower than probable cause, it is inevitable that completely innocent individuals will occasionally be subjected to investigatory detentions. However, the Court purposefully gave officers this critical leeway to make on-the-spot decisions.\textsuperscript{117} This situation is the same in the context of avoiding sobriety checkpoints. Officers must have

\textsuperscript{115} State v. Heapy, 151 P.3d 764, 774 (Haw. 2007).

\textsuperscript{116} Terry v. Ohio, 392 U.S. 1, 6 (1968) (emphasis added).

\textsuperscript{117} Id.
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flexibility to make on-the-spot decisions to protect the public without fear that their reasonable inferences will be rendered void if the driver is not actually intoxicated. If an officer has reasonable suspicion, based on the totality of the surrounding circumstances, to stop a driver for possible intoxication because he avoided a sobriety checkpoint, that decision remains reasonable even if the driver actually avoided the checkpoint for another reason. The fact that completely innocent drivers would be subjected to investigatory detentions if they attempt to avoid a sobriety checkpoint does not render an officer’s suspicion that the driver is intoxicated any less reasonable.

PART III: Statutory Clarification for Sobriety Checkpoints

In Part A, this section discusses why statutory authority is the best way to enable sobriety checkpoints to be fully effective. Part B of this section provides a model statute, which, if adopted, would allow officers to effectively utilize sobriety checkpoints to protect public safety. Part C of this section discusses the ramifications for both law enforcement and for motorists if the model statute were adopted.

A. Statutory Authority is the Best Way to Enable Sobriety Checkpoints to be Effective

There are two ways in which sobriety checkpoint effectiveness can be restored; either through the creation of a bright-line rule, or by passing state legislation. In Per Se Reasonable Suspicion: Police Authority to Stop Those Who Flee from Road Checkpoints, Shan Patel argues that the Supreme Court should adopt a bright-line rule that allows police to stop vehicles that attempt to evade checkpoints. He argues that this problem should be solved via a bright-

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119 Id. at 1642–52.
line rule because there is a state split regarding whether avoidance of a sobriety checkpoint constitutes reasonable suspicion, and because the Supreme Court’s flight-doctrine already applies to situations like sobriety checkpoint avoidance. The bright-line rule approach has been tried by several Southeastern States. While I agree that something needs to be done to restore the effectiveness of sobriety checkpoints, I disagree with doing so by waiting for the Supreme Court to grant certiorari and subsequently create a bright-line rule.

A state statute clearly defining when an officer has reasonable suspicion to briefly stop a driver avoiding a sobriety checkpoint is the best means of returning sobriety checkpoints to their proper state of effectiveness. State legislatures have a significant interest in having law enforcement remove drunk drivers from roadways. Therefore, it should be the state legislatures that take the initiative of returning sobriety checkpoints to their formally effective, and constitutional, form. The ability to remove drunk drivers from the roads is a matter of life and death, and cannot wait for the Supreme Court to grant certiorari in a sobriety checkpoint avoidance case. Adoption of state legislation regarding this issue can occur much sooner, and this speed will save lives.

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120 Id. at 1639–42.

121 See Illinois v. Wardlow, 528 U.S. 119 (2000) (holding that officers had reasonable suspicion to stop an individual who fled from officers immediately after noticing them in a high-crime area of Chicago).

122 Per Se Reasonable Suspicion, supra note 106, at 1635–39

123 Id. at 1639–40; citing e.g. State v. Forman, 527 S.E.2d 921, 924 (N.C. 2000) (holding that reasonable suspicion existed when a vehicle made an abrupt turn after passing a sign advertising an approaching sobriety checkpoint); Boches v. State, 506 So.2d 254, 256, 264 (Miss. 1987) (holding that pulling into a driveway immediately before a checkpoint is an act of evasion that warrants an investigatory stop); Boyd v. State, 751 So.2d 1050, 1051–52 (Miss. Ct. App. 1998) (finding reasonable suspicion to pull over a vehicle that made a legal turn to avoid a roadblock); Coffman v. State, 759 S.W.2d 573, 574–75 (Ark. Ct. App. 1988) (holding that a Terry stop was justified when a vehicle made a U-turn through a driveway as it approached a checkpoint); Smith v. State, 515 So.2d 149, 151–52 (Ala. Crim. App. 1987) (holding that Terry stop was justified when a vehicle quickly turned into a driveway after coming into view of a roadblock).

124 I do agree with Patel that it appears likely that the Supreme Court would create such a bright-line rule if they granted certiorari in a checkpoint avoidance case; however, since this has yet to happen in the face of a number of
B. Model Statute Clarifying Reasonable Suspicion for Sobriety Checkpoint Avoidance

The model rule in this section clarifies when reasonable suspicion exists in situations of sobriety checkpoint avoidance. If adopted, this statute would allow checkpoints to once again serve as effective implements of public safety.

**Reasonable Suspicion Associated with Sobriety Checkpoint Avoidance**

a) **In General**: When a law enforcement officer is participating in a constitutionally established sobriety checkpoint conducted pursuant to approved guidelines, an officer has reasonable suspicion to conduct an investigatory stop of a vehicle when:

1) The driver of the vehicle is within the perimeter of the sobriety checkpoint, and
2) The officer observes the driver fail to proceed to and stop at the sobriety checkpoint after entering the perimeter by:
   A) Turning onto another street or driveway
   B) Pulling off on the shoulder of the road,
   C) Making a U-Turn, or
   D) Driving through the sobriety checkpoint without stopping

b) **Limitations**: For purposes of this statute —

1) The reasonable suspicion created by any of the actions described in subparagraphs (a)(2)(A)–(D) constitutes reasonable suspicion for the sole purpose of determining whether the driver of the vehicle is intoxicated.
   A) Avoidance of the sobriety checkpoint does not constitute reasonable suspicion to prolong the stop beyond what is reasonably necessary to determine whether the driver is intoxicated.
   B) Absent further articulable facts, avoidance of the sobriety checkpoint alone does not provide the necessary reasonable suspicion to search the vehicle.

2) The method for determining whether the driver is intoxicated shall be the same method approved by the guidelines for use at the sobriety checkpoint.

c) **Definitions**: For purposes of this statute —

3) **Constitutionally Established Sobriety Checkpoints**: This term means a sobriety checkpoint established in accordance with the Supreme Court of the United States decision in *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990).

4) **Perimeter of a Sobriety Checkpoint**: A driver is within the perimeter of a sobriety checkpoint when an objectively reasonable driver would have seen the first sign warning of the upcoming sobriety checkpoint.

This model statute clarifies the circumstances under which reasonable suspicion exists.

Once a driver is within the perimeter of a sobriety checkpoint, failure to proceed to and stop at
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the sobriety checkpoint constitutes reasonable suspicion for the limited purpose of ascertaining whether the driver is intoxicated. The only factual issue a court may need to rule on is whether an objectively reasonable driver could see the first warning sign from the point the driver took action to avoid the sobriety checkpoint. This objective standard allows judges to make this determination without having to get into a subjective analysis of whether the actual driver could see the sign or not. A subjective test would be inappropriate in this situation. Traffic laws do not make an exception for a driver who claims not to have seen a road sign, when an objectively reasonable driver would have seen it.

The model statute also clearly defines the scope of the reasonable suspicion created by avoidance of a sobriety checkpoint. Under this statute, officers only have reasonable suspicion to determine whether or not the driver is intoxicated. Any search unrelated to the determination of driver sobriety, absent facts creating additional reasonable suspicion, would be unreasonable and in violation of the Fourth Amendment. Therefore, while this statute ensures officers can constitutionally stop vehicles avoiding a sobriety checkpoint, the statute also limits the officers’ discretion once the stop has been made.

C. Ramifications for the State and Motorists if the Model Statute is Adopted

The adoption of the model statute would benefit the state in several important ways. First, the model statute furthers the state’s substantial interest in protecting motorists from the imminent dangers associated with driver intoxication by increasing checkpoint effectiveness. By returning to its original effective form, sobriety checkpoints also regain their constitutionality. Additionally, the model statute provides law enforcement officers with specific guidelines regarding when the requisite reasonable suspicion exists to stop a vehicle that avoids a sobriety checkpoint. Officers will now be able to rely on their training and experience safe in the
knowledge that the arrests they make will not result in suppression. Finally, adoption of the model statute is a relative quick action state legislatures can take to immediately improve public safety within their state. When dealing with a matter of life and death, the ability to act quickly is essential for saving lives.

The adoption of the model statute would also aid in the protection of drivers lives and civil liberties. The most obvious benefit would be the effective removal of imminent threats to public safety from the roadways. As increasing numbers of drunk drivers are removed from the road, and more potential drunk drivers are deterred by the prospect of encountering a sobriety checkpoint, the number of drunk-driving related deaths will likely diminish. Additionally, the model statute protects drivers’ civil liberties. By clearly defining the narrow scope of reasonable suspicion that avoiding a sobriety checkpoint creates, officer discretion is limited in what can occur after the stop. Absent further reasonable suspicion, any search or seizure unrelated to confirming or dismissing the suspicion of driver intoxication would violate the Fourth Amendment, and evidence would therefore be subjected to the exclusionary rule.

Conclusion

Across America, drunk drivers have the ability to continually endanger the public by choosing to avoid checkpoints established to eliminate this exact public safety hazard. Most states authorize the use of sobriety checkpoints, yet state courts have undercut these public safety tools by allowing drivers to simply avoid the checkpoint. This option ensures that many intoxicated drivers will continue on their way as a threat to public safety, making the purpose of the checkpoints moot. Since courts have rendered sobriety checkpoints ineffective, state legislatures must take action in order to protect public safety. Adoption of the model rule proposed in this Note would allow sobriety checkpoints to return to a state of full effectiveness,
as well as fulfill the requirements for checkpoint constitutionality. The time for state legislatures to act is now, before additional lives are taken by intoxicated drivers who should have been removed from the roadway. This is a matter of life and death.