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# ***Michigan Department of State Police v. Sitz: Constitutionality of Sobriety Checkpoint Programs***

## **I. Introduction**

The United States Supreme Court decision in *Michigan Department of State Police v. Sitz*<sup>1</sup> is the Court's first decision which specifically addresses the constitutionality of sobriety checkpoint programs.<sup>2</sup> The Court held that sobriety checkpoint programs are facially constitutional.<sup>3</sup> In reaching this decision, the Court balanced the state's interest in preventing drunk driving, the extent to which the checkpoint system can reasonably be expected to advance that interest, and the degree of objective and subjective intrusion imposed on the individual drivers during the brief stop.<sup>4</sup> The *Sitz* decision settled the divergent views adopted by various state courts<sup>5</sup> and established a workable constitutional standard. This decision does, however, open the door to uncertainties in the administration of the checkpoint programs.

Part II of this Note examines the Supreme Court's historical development of the fourth amendment as well as representative state cases which applied these decisions specifically to the issue of sobriety checkpoint programs. Part II also examines federal airport security screening regulations and discusses federal highway grants which provide funds for drunk driving prevention programs.

Part III is a comprehensive examination of the facts and the

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1. 110 S. Ct. 2481 (1990).

2. A sobriety checkpoint program provides that the police set up a roadblock, stop all cars without having any individualized suspicion that a specific driver is intoxicated, and briefly scrutinize all drivers to determine if they are intoxicated. *Id.* at 2484.

3. *Id.* at 2488.

4. *Id.*

5. See Theresa L. Kruk, Annotation, *Validity of Routine Roadblocks by State or Local Police for Purpose of Discovery of Vehicular or Driving Violations*, 37 A.L.R. 4th 10 (1985).

procedural history of *Michigan Department of State Police v. Sitz* and discusses the underlying reasoning of the majority and the two dissenting opinions.

The analysis in Part IV supports the Court's majority decision and vigorously attacks the dissenting opinions. It stresses, however, that the majority did not completely resolve the sobriety checkpoint program issue because clear checkpoint guidelines regarding the operation of the roadblocks were not provided. As a result, Part IV further suggests a set of model guidelines and offers a solution to the limited effectiveness of non-mandatory checkpoint programs.

Part V concludes that the Supreme Court correctly decided *Michigan Department of State Police v. Sitz* and predicts that standardized sobriety checkpoint guidelines and federal legislation mandating sobriety checkpoint programs will be necessary for the programs to be effectively woven into the fabric of the American lifestyle.

## II. Background

### A. *Historical Development of the Fourth Amendment by the Supreme Court*

#### 1. "Stop and Frisk"

The protective role of the fourth amendment<sup>6</sup> was addressed by the Supreme Court in *Terry v. Ohio*,<sup>7</sup> where the Court held that the individual's right to personal security was not breached by a search and seizure in a "stop and frisk" street confrontation.<sup>8</sup> In *Terry*, a police officer stopped an individual walking with his companions back and forth on a street.<sup>9</sup> The officer became suspicious of their actions and, for his protection,

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6. The fourth amendment to the Constitution provides:

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

U.S. CONST. amend. IV.

7. 392 U.S. 1 (1968).

8. *Id.* at 30-31.

9. *Id.* at 6.

patted down the individuals' clothing in a weapons search.<sup>10</sup> The Court recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that individual.<sup>11</sup> In determining that the search and seizure was reasonable, even when probable cause to arrest for a crime was lacking, the Court balanced the government's interest in crime prevention and detection<sup>12</sup> against the nature and quality of the intrusion on individual rights.<sup>13</sup> Using an objective standard, the officer, in light of his experience, was permitted to draw specific, reasonable inferences from the facts but was not allowed to use hunches based on unparticularized suspicion.<sup>14</sup>

## 2. Border Patrols

In *Almeida-Sanchez v. United States*,<sup>15</sup> the Court held that the roving Police Border Patrol's stop and search of an automobile at a point removed from the border, made by an officer without probable cause or consent, for the purpose of detecting the illegal importation of aliens, violated the fourth amendment.<sup>16</sup> The Court reasoned that although the government's interest in deterring unlawful border entry by aliens is a serious one, the pressures of law enforcement are in constant tension with the Constitution's protection of the individual against certain exercises of official power.<sup>17</sup> These conflicting pressures urge a "resolute loyalty to constitutional safeguards."<sup>18</sup>

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10. *Id.* at 6-7.

11. *Id.* at 273-75.

12. *Id.* at 22. The government's interest in crime prevention and detection supports the "recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Id.*

13. *Id.* at 24.

14. *Id.* at 27. The *Terry* Court's inquiry into whether the seizure and search was "unreasonable" focused on "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 20. Among others, three factors were considered: (1) a police officer's observation of unusual conduct; (2) whether the conduct invokes a reasonable suspicion that criminal activity may be afoot; and (3) the officer's ability to point to specific and articulable facts to justify that suspicion. *Id.* at 20-21, 30.

15. 413 U.S. 266 (1973).

16. *Id.* at 273-75.

17. *Id.* at 273.

18. *Id.*

In another roving patrol case, *United States v. Brignoni-Ponce*,<sup>19</sup> officers stopped a car in a border area and questioned the occupants about their citizenship because the occupants appeared to be of Mexican ancestry.<sup>20</sup> The Court stated that the fourth amendment forbids stopping a vehicle and questioning its occupants unless the officers have a founded suspicion<sup>21</sup> that the occupants are illegal aliens.<sup>22</sup> The Court reasoned that the state's interest in preventing the illegal entry of aliens was not strong enough to require interference with highway usage solely at the discretion of Border Patrol officers.<sup>23</sup>

In *United States v. Ortiz*,<sup>24</sup> Border Patrol officers stopped a car for a routine immigration search at a fixed non-border traffic checkpoint that was closed one-third of the time,<sup>25</sup> and where all northbound traffic was screened.<sup>26</sup> The Court held that the stop must be based on probable cause or consent.<sup>27</sup> In distinguishing fixed checkpoints from roving patrols, the government argued that roving patrols have unlimited discretion, often operate during the evening along seldom-traveled roads, and their approach

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19. 422 U.S. 873 (1975).

20. *Id.* at 875.

21. *Id.* at 884-85 (Factors that may be considered in determining whether there is reasonable suspicion to stop a car in the border area include: the area's characteristics, its proximity to the border, the usual traffic patterns on that road, previous experience with alien traffic, information about the area's recent illegal border crossings, the motorist's physical characteristics and behavior, and the vehicle's overall appearance).

22. *Id.* at 884 (footnote omitted). "Except at the border and its functional equivalents, officers on roving patrol may stop vehicles only if they are aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion that the vehicles contain aliens who may be illegally in the country." *Id.*

23. *Id.* at 882. "We are not convinced that the legitimate needs of law enforcement require this degree of interference with lawful traffic." *Id.* at 883.

24. 422 U.S. 891 (1975).

25. *Id.* at 893.

26. *Id.* If the officer noticed anything suspicious about the vehicle or its occupants during the screening process which caused him to suspect that aliens may be in the car, he stopped the car and questioned the occupants about their citizenship; if the officer's suspicions were not dispelled, he searched the vehicle. *Id.* at 893-94.

27. *Id.* at 896-97. In defense of the checkpoint, the government argued that the probable cause standard is not justified for two reasons: (1) the discretion of the officer in deciding which vehicles to stop and search is limited by the checkpoint's location as determined by Border Patrol officials, while roving patrol officers have the authority to stop and search any vehicle within a certain distance of the border; and (2) the checkpoint stop and search operations are far less intrusive than roving patrol stops. *Id.* at 894.

may frighten motorists; whereas motorists stopped at fixed traffic checkpoints can see other vehicles being stopped, can ascertain the officer's authority, and are less likely to be frightened or annoyed by the stop.<sup>28</sup> The *Ortiz* Court disregarded the government's argument, however, and reasoned that the greater regularity of the stop does not mitigate the invasion of privacy that a search entails, and the procedures of a fixed checkpoint do not significantly reduce the likelihood of embarrassment to the motorist.<sup>29</sup> The Court, also troubled by the amount of discretion the officers had at the checkpoint in choosing which vehicles to stop, decided that this degree of discretion<sup>30</sup> is inconsistent with the fourth amendment and stated that probable cause is the minimum requirement for a lawful search.<sup>31</sup>

In a subsequent case, *United States v. Martinez-Fuerte*,<sup>32</sup> the Supreme Court held that a routine stop limited to no more than brief questioning at a non-border permanent checkpoint, comported with the fourth amendment without requiring individualized suspicion.<sup>33</sup> The Court recognized that reasonable suspicion was not a practical standard to employ on major inland routes which smugglers are known to use, because the heavy traffic would not allow for a particularized study of a given car to identify illegal aliens and would not deter the flow of well-disguised smuggling operations.<sup>34</sup> The Court concluded that the government's interest in stopping the smuggling of illegal aliens was great, the intrusion was very limited, and interference with legitimate traffic was minimal.<sup>35</sup> The *Martinez-Fuerte* Court distinguished the intrusion on fourth amendment interests generated by random roving-patrol stops such as the

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28. *Id.* at 894-95.

29. *Id.* at 895. "Motorists whose cars are searched, unlike those who are only questioned, may not be reassured by seeing that the Border Patrol searches other cars as well. Where only a few are singled out for a search . . . motorists may find the searches especially offensive." *Id.*

30. *Id.* at 895-96. "[W]e are not persuaded that the checkpoint limits to any meaningful extent the officer's discretion to select cars for search." *Id.* at 895.

31. *Id.* at 896.

32. 428 U.S. 543 (1976).

33. *Id.* at 562. For a detailed discussion of the *Martinez-Fuerte* decision, see Jeffrey J. Bouslog, Note, *Exploring the Constitutional Limits of Suspicionless Seizures: The Use of Roadblocks to Apprehend Drunken Drivers*, 71 IOWA L. REV. 577, 599-605 (1986).

34. *Martinez-Fuerte*, 428 U.S. at 557.

35. *Id.* at 556-59.

*Brignoni-Ponce* random suspicionless stops near the border and the *Almeida-Sanchez* random suspicionless stops at an area removed from the border, from the intrusion caused by the *Martinez-Fuerte* routine permanent checkpoint stops.<sup>36</sup> As a result, the Court held that the subjective intrusion of generating concern or even fright on the part of lawful travelers is appreciably less at routine permanent checkpoint stops than at random stops.<sup>37</sup>

### 3. *Random Discretionary Stops Without Procedures*

In *Delaware v. Prouse*,<sup>38</sup> a patrolman in a police cruiser, without following standards, guidelines, or procedures relating to document spot-checks, stopped an automobile without having observed traffic violations, automobile equipment violations, or suspicious behavior.<sup>39</sup> The Court held that a random discretionary stop to check for a driver's license and car registration without probable cause or reasonable suspicion was inconsistent with the fourth amendment.<sup>40</sup> After balancing the government's legitimate interest in promoting law enforcement against the individual's interest in being free from the intrusions forbidden by the fourth amendment,<sup>41</sup> the Court reasoned that the marginal contribution to roadway safety possibly resulting from spot-checks cannot justify subjecting all automobile occupants on the roads to seizures<sup>42</sup> "at the unbridled discretion of law enforcement offi-

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36. *Id.* at 555-58. In checkpoint stops, as well as roving-patrol stops, neither the vehicle nor its occupants are searched and visual inspection of the vehicle is limited to what can be seen without a search. However, the surrounding circumstances, including the element of surprise at a random roving-patrol stop, is perceived as more threatening and intrusive than at a permanent checkpoint stop. *Id.* at 558. The *Martinez-Fuerte* permanent checkpoint location was equipped with advance warning signs, flashing lights, orange traffic safety cones to funnel traffic into two lanes, floodlights for nighttime operations, and the Border Patrol agents were dressed in full uniform. *Id.* at 545-46.

37. *Id.* at 558.

38. 440 U.S. 648 (1979).

39. *Id.* at 650.

40. *Id.* at 663.

41. *Id.* at 654.

42. *Id.* at 659. "Given the alternative mechanisms available, both those in use and those that might be adopted, we are unconvinced that the incremental contribution to highway safety of the random spot check justifies the practice under the Fourth Amendment." *Id.*

cials.”<sup>43</sup> However, the *Prouse* dicta alluded to limiting the holding to the type of spot-checks discussed in the case and stated that “[t]his holding does not preclude . . . States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion.”<sup>44</sup> The Court suggested as an alternative, the “[q]uestioning of all oncoming traffic at roadblock-type stops . . . .”<sup>45</sup>

Another type of case involved the random stopping of a pedestrian. In *Brown v. Texas*,<sup>46</sup> one of two police officers cruising in a patrol car got out and stopped a man strolling down an alley and asked the man to identify himself because he looked suspicious, although the officers did not suspect the man of specific misconduct.<sup>47</sup> The Court held that where there is no procedure containing explicit, neutral limitations on the conduct of individual officers, the balance between the public’s interest and the individual’s right to personal security and privacy favors freedom from police interference in the absence of any objective basis for suspecting misconduct.<sup>48</sup> The Court stated that the fourth amendment guarantees do not permit an arbitrary stop based on less than objective criteria.<sup>49</sup>

In the Court’s analysis of seizures less intrusive than traditional arrests, it used a three-prong balancing test which weighed: (1) the gravity of the public concerns served by the seizure (“Public Interest” prong); (2) the degree to which the seizure advances the public interest (“Effectiveness” prong); and (3) the severity of the interference imposed on individual liberty (“Intrusion on Individual Liberty” prong).<sup>50</sup>

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43. *Id.* at 661.

44. *Id.* at 663 (footnote omitted).

45. *Id.* For a commentary on the effect of the *Prouse* dicta, see Lazaro Fernandez, Comment, *DUI Roadblocks: Drunk Drivers Take a Toll on the Fourth Amendment*, 19 J. MARSHALL L. REV. 983, 1002-1004 (1986).

46. 443 U.S. 47 (1979).

47. *Id.* at 48-49.

48. *Id.* at 50-51. In this case, the criteria were not neutral. Therefore, “[i]n the absence of any basis for suspecting . . . 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.* at 52.

49. *Id.* “When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits.” *Id.*

50. *Id.* at 50-51.

#### 4. Drug and Alcohol Screening Programs

In *Skinner v. Railway Labor Executives' Ass'n*,<sup>51</sup> the Federal Railroad Administration promulgated regulations for industry safety standards in light of evidence indicating that alcohol and drug abuse by railroad employees had been a contributing factor in a number of significant train accidents.<sup>52</sup> The Court upheld the regulations which mandated drug and alcohol testing of railroad employees.<sup>53</sup> The Court explained that the tests were reasonable under the fourth amendment although there was neither a probable cause requirement nor reasonable suspicion that a particular employee might be impaired.<sup>54</sup> The compelling government interests served by the testing — that of ensuring the safety of the traveling public and the employees themselves, and of preventing accidents and casualties in railroad operations — outweighed the employees' privacy concerns.<sup>55</sup> The Court reasoned that the government interests presented “‘special needs’ beyond normal law enforcement that justif[ied] a departure from the usual warrant and probable cause requirements.”<sup>56</sup> Also, the Court stated that where individual privacy interests are minimal and where an important governmental interest would be jeopardized by a requirement of individualized suspicion, a search may be reasonable without such suspicion.<sup>57</sup>

In *National Treasury Employees Union v. Von Raab*,<sup>58</sup> the Court upheld the implementation of the United States Customs Service's drug-testing program which required that employees applying for promotion to positions involving the interdiction of

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51. 489 U.S. 602 (1989).

52. *Id.* at 606-07. Regulations were issued under the statutory authority of the Secretary of Transportation pursuant to the Federal Railroad Safety Act of 1970. *Id.* at 606. See Control of Alcohol and Drug Use, 49 C.F.R. § 219 (1990).

53. *Skinner*, 489 U.S. at 634.

54. *Id.*

55. *Id.* at 620-21.

56. *Id.* at 620 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987)). The *Skinner* Court examined the government's interest in ensuring safety by comparing the government's regulation of railroad employees' conduct with its supervision of probationers, regulated industries, government offices, schools, and prisons. *Id.*

57. *Id.* at 624. The Court explained that “a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable.” *Id.*

58. 489 U.S. 656 (1989).

illegal drugs or the carrying of firearms submit urine samples.<sup>59</sup> The Court held that the testing was reasonable despite the absence of a requirement of probable cause or some level of individualized suspicion.<sup>60</sup> It explained that the privacy interests of employees seeking promotions were outweighed by both the government's interest in protecting citizens<sup>61</sup> from the use of deadly force by persons with impaired perceptions and judgment,<sup>62</sup> and its interest in the law enforcement crisis caused by the smuggling of illicit narcotics.<sup>63</sup>

The Court, in its analysis, discussed the government practice of searching all passengers and their carry-on luggage prior to boarding commercial airliners without requiring individualized suspicion.<sup>64</sup> The Court observed that the risk to hundreds of lives and to millions of dollars of property caused by the pirating or exploding of large airplanes meets the reasonableness test if: (1) it is a good-faith search designed for the purpose of preventing hijacking or like damage; (2) the scope of the search is reasonable; and (3) the passenger has been given advance notice of the search so that he can avoid it by not traveling by

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59. *Id.* at 677. After this case was decided by the Court of Appeals in *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), the Supreme Court determined that the Customs Services' program must conform to the regulations governing certain federal employee drug testing programs promulgated by the United States Department of Health and Human Services. *Von Raab*, 489 U.S. at 661-62 n.1. See also Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 Fed. Reg. 11, 979 (1988).

60. *Von Raab*, 489 U.S. at 679. The Court reaffirmed the "principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." *Id.* at 665.

61. *Id.* at 679.

62. *Id.* at 670-71. "[E]nsuring against the creation of this dangerous risk will itself further Fourth Amendment values, as the use of deadly force may violate the Fourth Amendment in certain circumstances." *Id.* at 671.

63. *Id.* at 668.

64. *Id.* at 675 n.3. In 1978, Federal Regulations were promulgated requiring that each airport regularly serving scheduled passenger operations under a Federal Aviation Administration operating certificate or regularly serving scheduled passenger operations of a foreign air carrier adopt and carry out a security program that provides for the safety of persons and property traveling in air transportation and intrastate air transportation against acts of criminal violence and aircraft piracy. Airport Security, 14 C.F.R. § 107 (1990); Airplane Operator Security, 14 C.F.R. § 108 (1990) (providing that no person may enter a controlled access area without submitting to the screening of that person's property in accordance with the procedures being applied to that area).

air.<sup>65</sup>

## B. *Divergent State Court Views on the Constitutionality of Sobriety Checkpoint Programs*

Many states have established sobriety checkpoint programs that have been challenged in the courts. The courts, in holding sobriety checkpoint programs either constitutional or unconstitutional, have relied upon the dicta in *Delaware v. Prouse*,<sup>66</sup> or the three-prong balancing test in *Brown v. Texas*,<sup>67</sup> or variations of that test.<sup>68</sup> In addition, the theme common to most of the cases was the existence or nonexistence of checkpoint program guidelines.<sup>69</sup> The representative cases discussed in this section illustrate those divergent views.

### 1. *Reliance on the Delaware v. Prouse*<sup>70</sup> Dicta

The *Prouse* Court limited its holding by articulating its celebrated dicta: "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 unconstrained exercise of discretion. Questioning of all oncoming traffic at roadblock-type stops is one possible alternative."<sup>71</sup> Courts have relied upon this dicta as authority for establishing fixed sobriety checkpoints to detect drunk drivers.<sup>72</sup>

In *Kinslow v. Commonwealth*,<sup>73</sup> the court applied the

65. *Von Raab*, 489 U.S. at 675 n.3 (quoting *United States v. Edwards*, 498 F.2d 496, 500 (2d Cir. 1974)).

66. 440 U.S. 648 (1979). See *supra* text accompanying notes 44-45; see *infra* notes 71-76 and accompanying text (state courts relying on *Prouse* dicta).

67. 443 U.S. 47 (1979). See *supra* text accompanying note 50; see *infra* notes 88-136 and accompanying text (state courts relying on *Brown* balancing test).

68. See *infra* notes 77-87 and accompanying text (state courts applying variations of *Brown* balancing test).

69. See *infra* notes 83-87, 94-96 and accompanying text (checkpoint program guidelines were considered).

70. 440 U.S. 648 (1979). See *supra* text accompanying notes 44-45.

71. *Prouse*, 440 U.S. at 663.

72. See *infra* notes 73-76 and accompanying text. "The evil implicit in the use by police of standardless and unbridled discretion to stop vehicles, which has been prohibited by *Prouse*, simply is not present here." *State v. Cocomo*, 427 A.2d 131 (N.J. Super. Ct. Law Div. 1980).

73. 660 S.W.2d 677 (Ky. Ct. App. 1983), *cert. denied*, 465 U.S. 1105 (1984).

*Prouse* dicta and held that the roadblock established by the Kentucky State Police and the Warren County Sheriff's Department did not violate the appellant's constitutional right to be free from unreasonable searches and seizures.<sup>74</sup> The roadblock was conducted without permitting the "unconstrained discretion" condemned in *Prouse*.<sup>75</sup> Unlike *Prouse*, where the officers used their discretion to choose which vehicles to stop for a spot check, in *Kinslow*, all vehicles were stopped.<sup>76</sup>

## 2. *Reliance on a Two-Prong Balancing Test*

In addition to the *Prouse* dicta, state courts, in considering the constitutionality of sobriety checkpoints, have also relied on a balancing test which weighs the government's interest in curbing drunk driving against the intrusion on the individual at the checkpoint. These courts have upheld the constitutionality of the checkpoint when the state showed that guidelines limited the officers' discretion.<sup>77</sup> In doing so, the courts adopted the first prong ("Public Interest") and third prong ("Intrusion on Individual Liberty") of the balancing test in *Brown v. Texas*,<sup>78</sup> and also required assurances against randomness and arbitrariness present in *Delaware v. Prouse*.<sup>79</sup>

In *Commonwealth v. Trumble*,<sup>80</sup> the court applied the first and third prongs of *Brown*, and in considering the significance of the second prongs ("Effectiveness") the court mentioned that the effectiveness of "traditional methods" of law enforcement had failed.<sup>81</sup> Also, the checkpoints were a factor in apprehending

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74. *Id.* at 678.

75. *Id.*

76. *Id.*

77. See *State v. Golden*, 318 S.E.2d 693 (Ga. Ct. App. 1984); *Commonwealth v. Trumble*, 483 N.E.2d 1102 (Mass. 1985); *Lowe v. Commonwealth*, 337 S.E.2d 273 (Va. 1985), *cert. denied*, 475 U.S. 1084 (1986).

78. 443 U.S. 47 (1979). The *Brown* three-prong balancing test weighed: (1) the gravity of the public concerns served by the seizure; (2) the degree to which the seizure advanced the public interest; and (3) the severity of interference imposed upon individual liberty. *Id.* See *supra* text accompanying note 50.

79. 440 U.S. 648 (1979). See *supra* text accompanying notes 43-44. The need for neutral limitations was also discussed in *Brown*, 443 U.S. at 51. See *supra* text accompanying note 48.

80. 483 N.E.2d at 1102 (Mass. 1985).

81. *Id.* at 1105 (no need to show that there is no alternative that would be as effective as roadblocks or less intrusive than roadblocks). "Each year, over 25,000 people die

drunk drivers.<sup>82</sup>

*Trumble* demonstrated that the checkpoint stops were constitutional because they were administered without discretion, in accordance with written guidelines employing neutral criteria.<sup>83</sup> However, in *Trumble*, although the state employed appropriate guidelines, the concurring opinion stressed that certain "standardized" guidelines must exist:

Although "there is no 'typical' sobriety checkpoint roadblock," . . . [the following criteria] must exist: "(1) a checkpoint or roadblock location selected for its safety and visibility to oncoming motorists; (2) adequate advance warning signs, illuminated at night, timely informing approaching motorists of the nature of the impending intrusion; (3) uniformed officers and official vehicles in sufficient quantity and visibility to 'show . . . the police power of the community'; and (4) a predetermination by policy-making administrative officers of the roadblock location, time, and procedures to be employed, pursuant to carefully formulated standards and neutral criteria."<sup>84</sup>

The courts did not, however, discuss the necessity or effectiveness of sobriety checkpoints as a law enforcement tool. In contrast to *Trumble* and other cases, a number of state courts ap-

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in traffic accidents in which alcohol consumption is involved." *Id.* at 1105-06 (quoting H.R. REP. NO. 867, 97th Cong., 2d Sess. at 7 (1982), reprinted in 1982 U.S.C.C.A.N. 3367). "This total represents approximately half of the deaths resulting from motor vehicle accidents which occur on our nation's roads each year." *Id.* at 1106. See also *Lowe*, 337 S.E.2d 273, 277 ("tangible results appeared that were not evident under traditional methods of detection").

82. *Trumble*, 483 N.E.2d at 1105. From approximately 11:30 P.M. on July 2, 1983, to approximately 2 A.M. on July 3, 1983, 503 vehicles were stopped at the roadblock; sixteen drivers were detained for further checking, and eight drivers were arrested. *Id.* See also *Lowe*, 337 S.E.2d at 277 (drunk drivers detected at lower blood alcohol content levels than had been detected using routine patrols).

83. *Trumble*, 483 N.E.2d at 1104 (roadblock conducted in manner consistent with guidelines and training sessions); *State v. Golden*, 318 S.E.2d 693, 695 (Ga. Ct. App. 1984) ("operation was carried out pursuant to specific, pre-arranged procedures requiring all passing vehicles to be stopped at the checkpoint and leaving no discretion to the officers in this regard."); *Lowe*, 337 S.E.2d at 277 (plan employed use of procedural manual setting forth site selection, provisions for manning and equipping site, details for stopping and interviewing motorists, and evaluating motorists suspected of driving while intoxicated).

84. *Trumble*, 483 N.E.2d at 1110-11 (Abrams, J., concurring) (quoting Lance D. Rogers, *The Drunk-Driving Roadblock: Random Seizure or Minimal Intrusion?*, 21 CRIM. L. BULL. 197, 204 (1985)) (citations omitted).

plied the first ("Public Interest") and third ("Intrusion on Individual Liberty") prongs of the *Brown* balancing test<sup>85</sup> and held that the sobriety checkpoints were unconstitutional.<sup>86</sup> These courts suggested that if sufficiently precise guidelines had been followed, as in *Trumble*, they would have found the checkpoints constitutional.<sup>87</sup> Again, as in the cases above, there was no meaningful discussion in these cases concerning the necessity or effectiveness of sobriety checkpoints as a law enforcement tool.

### 3. *Reliance on a Three-Prong Balancing Test*

A third manner in which state courts have evaluated the constitutionality of sobriety checkpoints is by relying on the full three-prong *Brown* test.<sup>88</sup> In *State v. Deskins*,<sup>89</sup> the court, in addition to the *Brown* test<sup>90</sup> also weighed thirteen enumerated factors.<sup>91</sup> The court articulated that the state's purpose for sobriety

85. See *supra* text accompanying note 50.

86. See *State v. Jones*, 483 So.2d 433 (Fla. 1986); *State v. Crom*, 383 N.W.2d 461 (Neb. 1986); *State v. Kirk*, 493 A.2d 1271 (N.J. Super. Ct. App. Div. 1985).

87. The *Crom* court stated that there was no plan formulated at the policymaking level which considered, weighed, and balanced the *Prouse* and *Brown* factors; therefore, the driver's reasonable expectation of privacy was subject to arbitrary invasion "solely at the unfettered discretion of officers in the field." 383 N.W.2d at 463. The *Jones* court reasoned that "it is essential that a written set of uniform guidelines be issued before a roadblock can be utilized." 483 So.2d at 438. The *Kirk* court looked to well-known authority, Professor LaFave, and stated that "[w]e also agree with LaFave that it is 'fair to conclude that a DWI road block is constitutional if properly conducted.'" 493 A.2d at 1279, (quoting 3 WAYNE LAFAVE, SEARCH AND SEIZURE, 10.8(g) at 190 (Supp. 1985)).

88. See *supra* text accompanying note 50.

89. 673 P.2d 1174 (Kan. 1983).

90. See *supra* text accompanying note 50.

91. The thirteen *Deskins* factors which should be considered in determining whether the balance favors the state (though not all of the factors need to be favorable for the state to prevail) include:

(1) The degree of discretion, if any, left to the officer in the field; (2) the location designated for the roadblock; (3) the time and duration of the roadblock; (4) standards set by superior officers; (5) advance notice to the public at large; (6) advance warning to the individual approaching motorist; (7) maintenance of safety conditions; (8) degree of fear or anxiety generated by the mode of operation; (9) average length of time each motorist is detained; (10) physical factors surrounding the location, type and method of operation; (11) the availability of less intrusive methods for combating the problem; (12) the degree of effectiveness of the procedure; and (13) any other relevant circumstances which might bear upon the test.

*Deskins*, 673 P.2d at 1185. If law enforcement officials have unbridled discretion, the checkpoint program would run afoul of *Prouse*. *Id.*

checkpoints is two-fold: (1) to apprehend and remove the drunk driver from the road before injury or property damage occurs; and (2) to deter and discourage the potential drunk driver from driving in the first place.<sup>92</sup> The court considered the magnitude of the injury, the damage caused by the drunk driver, and the importance of citizens being protected on streets and roadways, and held that the public interest in properly administered sobriety checkpoints containing appropriate safeguards outweighed the individual's right to be free from fourth amendment intrusions.<sup>93</sup>

In other cases<sup>94</sup> applying the *Brown* three-prong balancing test,<sup>95</sup> the court determined that neutral, non-discretionary guidelines were employed,<sup>96</sup> that the state had an important interest, and that the checkpoint stop entailed only a minimum intrusion on the individual.<sup>97</sup> Also, the courts focused on the effectiveness and/or need for sobriety checkpoints, unlike the

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92. *Id.* at 1182.

93. *Id.* at 1185.

94. See *State v. Superior Ct.*, 691 P.2d 1073 (Ariz. 1984); *Ingersoll v. Palmer*, 221 Cal. Rptr. 659 (Cal. Ct. App. 1985), *aff'd*, 743 P.2d 1299 (Cal. 1987); *People v. Bartley*, 486 N.E.2d 880 (Ill. 1985), *cert. denied*, 475 U.S. 1068 (1986); *Little v. State*, 479 A.2d 903 (Md. 1984); *State v. Cocomo*, 427 A.2d 131 (N.J. Super. Ct. Law Div. 1980); *People v. Scott*, 473 N.E.2d 1 (N.Y. 1984).

95. See *supra* text accompanying note 50.

96. The *Ingersoll* court concluded that "if a sobriety checkpoint is conducted according to the following guidelines, its limited intrusiveness will be far outweighed by its potential effectiveness and the gravity of the public interest in deterring drunk driving." *Ingersoll*, 221 Cal. Rptr. at 666.

In part, the guidelines provided: (1) The decision to establish a sobriety roadblock, the site selection, and the operational procedures must be made and established by supervisory law enforcement personnel; (2) the field officers must not be permitted to exercise discretion in choosing which motorists to detain, and a mathematical formula may be used; (3) sobriety checkpoint supervisory personnel must give their first consideration to safety; (4) the checkpoints must be reasonably located and may be temporary; (5) law enforcement supervisory personnel must exercise good judgment in determining times and durations, with the primary consideration being the safety of motorists; (6) the roadblock should have high visibility, including warning signs, flashing lights, flares, police vehicles, and uniformed officers in attendance; (7) the average time each motorist is detained must be kept to a minimum to reduce intrusiveness of the stop and to avoid traffic tie-ups; and (8) advance media publicity that sobriety checkpoints are planned will diminish their intrusiveness and increase their deterrent effect. *Ingersoll*, 221 Cal. Rptr. at 667-69.

97. See, e.g., *Cocomo*, 427 A.2d at 134 n.7 (defendant did not indicate that the stop of his vehicle or the procedures the police used generated any fright, anxiety, concern or even annoyance).

courts in *Trumble* and analogous cases, which failed to address this issue.<sup>98</sup>

In *State v. Cocomo*,<sup>99</sup> the court held that the checkpoint program was sufficiently productive to qualify as a reasonable law enforcement procedure because numerous arrests for drunk driving had resulted since the inception of the program.<sup>100</sup> Similarly, statistics introduced in *Little v. State*<sup>101</sup> demonstrated that for the short period of its operation, the checkpoint program had been a moderately effective technique for detecting and deterring the drunk driver.<sup>102</sup>

Further, in *People v. Scott*,<sup>103</sup> the court noted that the value of roadblocks in deterring drunk driving is endorsed by the United States Department of Transportation and the Governor's Alcohol and Highway Safety Task Force.<sup>104</sup> The court reasoned that it remains unclear whether substantial reductions in deaths, injuries and damage resulting from drunk driving stem from legislative reforms during that period as distinct from the deterrent effect of roadblocks and other programs, and held that "[t]he State is entitled in the interest of public safety to bring all available resources to bear, without having to spell out the exact efficiency coefficient of each component and of the separate effects

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98. See *supra* text accompanying notes 80-87.

99. 427 A.2d 131 (N.J. Super. Ct. Law Div. 1980).

100. *Id.* at 134-35.

101. 479 A.2d 903 (Md. 1984).

102. *Id.* at 913. For example, in Maryland, there was a seventeen percent decrease in alcohol related accidents in Harford County compared with the preceding three-month interval. In contrast, in Frederick County, where the program was not in operation, conventional drunk driving techniques achieved only a twelve percent decrease. Of even greater significance was the deterrence effect. Police at checkpoints observed that many drunk individuals had a sober spouse or companion drive instead. Taxi companies reported increased business due to intoxicated persons who had been deterred from driving. Therefore, the prospect of a roadblock stop convinced some intoxicated persons to find other means of transportation. *Id.*

103. 473 N.E.2d 1 (N.Y. 1984).

104. *Id.* at 4-5. "A 1983 paper on Safety Checkpoints For DWI Enforcement issued by the Department of Transportation's National Highway Traffic Safety Administration's Office of Alcohol Countermeasures emphasizes the importance of informing the public about DWI checkpoint operations as the chief means of deterring driving while intoxicated . . . ." *Id.* at 4. In addition, "the Governor's Task Force found 'that the systematic, constitutionally conducted traffic checkpoint is the single most effective action in raising the community's perception of the risk of being detected and apprehended for drunk driving.'" *Id.* at 4-5.

of any particular component."<sup>105</sup> In *People v. Bartley*,<sup>106</sup> the court articulated that "the carnage caused by drinking and then driving is so serious it warrants resort to both types of apprehension — stopping automobiles which are being driven erratically and roadblocks to detect drunken drivers before they drive in an erratic manner."<sup>107</sup>

Such sobriety checkpoints have been compared to airport security procedures. In *Ingersoll v. Palmer*,<sup>108</sup> the court suggested that there is a similarity between the rationale justifying sobriety checkpoint programs and the rationale justifying airport pre-departure screening procedures and concomitant searches.<sup>109</sup> The court explained that, similar to the deterrence of hijacking and the detection of potential hijackers, the deterrence of drunk driving and the detection of drunk drivers can also be treated as an "administrative purpose."<sup>110</sup> The majority alluded to the fact that the legislation had already implicitly authorized sobriety checkpoint programs.<sup>111</sup> The *Ingersoll* dissent agreed with the majority's analysis but extended their premise by stating that the legislature, as the elected representatives of the citizenry, and not the court, should do the balancing to determine if sobriety checkpoint programs further the purpose of the drunk driving regulatory scheme.<sup>112</sup> The dissent also noted

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105. *Id.* at 6.

106. 486 N.E.2d 880 (Ill. 1985), *cert. denied*, 475 U.S. 1068 (1986).

107. *Id.* at 886. The court also pointed out that the National Transportation Safety Board's Safety Study mentions that "sobriety checkpoints are visible aspects that drunk driving is being combated and they afford police the opportunity to observe a larger number of motorists than would be possible during typical patrol procedures." *Id.*

108. 221 Cal. Rptr. 659 (Cal. Ct. App. 1985), *aff'd*, 743 P.2d 1299 (1987).

109. *Id.* at 665. Airport searches and pre-departure screening procedures are part of a comprehensive regulatory program to insure that dangerous weapons will not be carried onto an airplane and to deter potential hijackers from attempting to board. *Id.*

110. *Id.*

111. *Id.* "[T]here presently exists a legislatively enacted 'general regulatory scheme' to deter drunk driving. . . . While the Legislature may not have explicitly authorized sobriety checkpoints as part of its regulatory program to deter drunk driving, the conduct of those checkpoints unquestionably furthers that regulatory purpose." *Id.*

112. *Id.* at 671-72 (White, J., dissenting). The dissent then went on to state that "a court should not read silence as a form of authorization." *Id.* at 672.

The Legislature is also better able to devise a comprehensive, state-wide sobriety checkpoint program. The majority's balancing test results depend upon deterrence and upon not unduly burdening or delaying motorists. If only a few municipalities institute sobriety checkpoints, the majority's predictions about deterrence will not

that sobriety checkpoint bills were introduced in the legislature in two successive years and had died in committee.<sup>113</sup>

a. *The "Intrusion on Individual Liberty" (Third Prong of Brown) Was Not Met*

There have also been courts that have applied the same *Brown* three-prong balancing test<sup>114</sup> utilized in cases like *Deskins* and *Ingersoll* and yet found the roadblock unconstitutional because all the prongs were not met.<sup>115</sup> These courts, in negatively applying the *Brown* test, have agreed that the states have an important interest in the eradication and deterrence of drunk driving, but failed to agree that the intrusion on individual liberty was justified by the effectiveness of the checkpoints as compared to the effectiveness of traditional less intrusive procedures.<sup>116</sup>

In *State ex rel. Ekstrom v. Justice Court*,<sup>117</sup> for example, the court illustrated the spirit of the general rule that a stop and seizure without founded suspicion seriously jeopardizes the concept of personal liberty:

I . . . have often thought that getting killed by some intoxicated idiot who crossed the median divider and hit me head-on would be the worst and most senseless way to die.

I mourn for the parents of children who have died at the hands of drunk drivers. But none of this makes a police state acceptable. Freedom doesn't come risk-free. I'm willing to take

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be met. On the other hand, if the motorist driving through Burlingame encountered the roadblocks of a dozen other municipalities along El Camino Real, burden and delay might tip the majority's balance against sobriety checkpoints. Legislative action could provide guidelines aimed at avoiding both of these dangers.

*Id.* at 672 n.\*

113. *Id.* at 672 (White, J., dissenting).

114. See *supra* text accompanying note 50.

115. See *State ex rel. Ekstrom v. Justice Court*, 663 P.2d 992 (Ariz. 1983); *State v. McLaughlin*, 471 N.E.2d 1125 (Ind. Ct. App. 1984); *State v. Muzik*, 379 N.W.2d 599 (Minn. Ct. App. 1985); *State v. Smith*, 674 P.2d 562 (Okla. Crim. App. 1984); *Webb v. Texas*, 695 S.W.2d 676 (Tex. Ct. App. 1985).

116. *Ekstrom*, 663 P.2d at 995-96 (a roadblock, in theory, is less intrusive than roving patrols but this roadblock involved too much discretion and intrusion was not minimal); *Smith*, 674 P.2d at 564 (subjective intrusion imposed on innocent people is simply too great).

117. 663 P.2d 992 (Ariz. 1983).

some risks in exchange for my freedom.<sup>118</sup>

In *Ekstrom*, the roadblocks were established at the discretion of a local highway patrolman, the operation was not run under specific guidelines or directions, and the motorists were taken by surprise because they had no prior notice of the location or the checkpoints' purpose.<sup>119</sup> Approximately 5,763 vehicles were stopped at various roadblocks, resulting in only fourteen arrests for driving while intoxicated.<sup>120</sup> In finding the roadblock unconstitutional, the court reasoned that "[i]f there is an adequate method of enforcing the drunk driving statute, there is no pressing need for the use of an intrusive roadblock device."<sup>121</sup>

The concurring opinion intimated that the state should have argued instead that the true purpose of the roadblock was to deter drunk driving through apprehension of the roadblock itself.<sup>122</sup> "[S]tatistics make it obvious that traditional law enforcement methods, involving the arrest by roving officers of only those whom they can stop upon a founded suspicion of drunk driving, fall short of satisfying society's compelling interest in enforcing compliance with the laws prohibiting drunk driving."<sup>123</sup>

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118. *Id.* at 997 (Feldman, J., specially concurring) (quoting Rooney, *Roadblocks for Drunk Drivers Nibble Away at Our Freedoms*, CHI. TRIB., reprinted in THE ARIZ. REPUBLIC, April 4, 1983, at A7).

119. *Id.* at 996.

120. *Id.* at 993.

121. *Id.* at 996 (no empirical data in the record balanced the reasonableness of the intrusion upon individual rights against the state's needs).

122. *Id.* at 997 (Feldman, J., specially concurring).

123. *Id.* at 999 (Feldman, J., specially concurring) (footnote omitted). "Over the past 10 years the number of persons killed on our highways in motor vehicle accidents involving alcohol has averaged 25,000 per year. In 1980, over 650,000 people were injured in accidents involving alcohol." *Id.* (quoting *Federal Legislation to Combat Drunk Driving Including National Driver Register: Hearing on S. 671, S. 672, S. 2158 Before the Subcomm. on Surface Transportation of the Senate Comm. on Commerce, Science & Transportation*, 97th Cong., 2nd Sess. 65 (1982)). "Between 40 and 55% of drivers who are fatally injured have alcohol concentrations in their blood above the legal limit and this figure rises to 55 to 65% in single-vehicle crashes." *Id.* (quoting *Alcohol, Drugs & Driving: Hearing to Examine What Effect Alcohol & Drugs Have on Individuals While Driving Before the Subcomm. on Alcoholism & Drug Abuse of the Senate Comm. on Labor & Human Resources*, 97th Cong., 2nd Sess. 1 (1982)). "However, 'only 1 of every 2,000 drinking drivers is caught daily, while 70 [people] are killed.'" *Id.* (quoting *Hearing Before the Subcomm. on Surface Transportation*, supra at 112).

In examining the intrusiveness of temporary checkpoints, the court in *State v. Smith*<sup>124</sup> reasoned that permanent checkpoints, like those in *United States v. Martinez-Fuerte*,<sup>125</sup> were not as intrusive as temporary checkpoints because individuals "would not be surprised and fearful of a known roadblock."<sup>126</sup>

b. "Effectiveness" (Second Prong of *Brown*) was Not Met

The effectiveness in advancing the public interest was examined in *State v. McLaughlin*.<sup>127</sup> The court stated that the potential deterrence factor of an unannounced checkpoint in advancing the public interest against drunk driving was lacking.<sup>128</sup> Also, the checkpoint's effectiveness in advancing the public interest could not be proven because empirical data was unavailable.<sup>129</sup> However, the court announced that if there was "a proper showing by the state that the roadblock method is more effective than traditional methods of drunk driving law enforcement [it] might tip the balance in favor of the reasonableness of the roadblock procedure."<sup>130</sup> Similarly, in holding that a checkpoint was unconstitutional, the court in *Webb v. Texas*<sup>131</sup> stated that there was no indication that the particular roadblock was more effective in dealing with drunk driving than the traditional roving patrols' reasonable suspicion stops because no statistics were provided.<sup>132</sup> The *Webb* court also maintained that the state did not meet its burden of establishing the superiority of the roadblock in light of available less intrusive alternative methods of deterrence.<sup>133</sup> Lastly, in *State v. Muzik*,<sup>134</sup> the court commented

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124. 674 P.2d 562 (Okla. Crim. App. 1984).

125. 428 U.S. 543 (1976). See *supra* notes 32-37 and accompanying text.

126. 674 P.2d at 564.

127. 471 N.E.2d 1125 (Ind. Ct. App. 1984).

128. *Id.* at 1138.

129. *Id.* "Although three drunk-driving arrests in one hour are not to be taken lightly, since they represent the prevention of three potential tragedies, we simply have nothing with which we can compare that number in determining the degree to which this roadblock procedure advanced the public interest." *Id.*

130. *Id.* at 1142.

131. 695 S.W.2d 676 (Tex. Ct. App. 1985).

132. *Id.* at 681.

133. *Id.* at 682.

134. 379 N.W.2d 599 (Minn. Ct. App. 1985).

that although case law was not uniform in deciding whether the public interest has been advanced by a checkpoint, it was clear that most courts required evidence indicating that the checkpoint did, in fact, advance the public interest.<sup>135</sup> In *Muzik*, the state failed to demonstrate the superior effectiveness of checkpoints over the less intrusive alternative methods which were based on individualized suspicion.<sup>136</sup>

### C. *Federal Highway Grants Awarded to States for Drunk Driving Prevention Programs*

The National Highway Traffic Safety Administration (NHTSA) has been authorized under the Highway Safety Act to administer a federal grant program that provides funds to states which adopt and implement effective programs to reduce alcohol-related traffic safety problems.<sup>137</sup> The program provides for basic grants if certain criteria are met.<sup>138</sup> Supplemental grants are also available to states that employ other measures, such as roadside sobriety checkpoints.<sup>139</sup>

The NHTSA also awards incentive grants to states that adopt and implement certain comprehensive drunk driving prevention programs.<sup>140</sup> The purpose of these programs is to discourage individuals from driving motor vehicles while under the influence of alcohol.<sup>141</sup> The Code of Federal Regulations defines a "comprehensive drunk driving prevention program" as a "program that reflects the complexity and totality of the State's alco-

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135. *Id.* at 603.

136. *Id.* at 604.

137. 23 U.S.C. § 402 (1988).

138. 23 U.S.C. § 408 (1988). The criteria for eligibility to receive the basic grant are: (1) the state must establish an administrative suspension procedure for driver's licenses; (2) the state must implement a policy for a 0.10% alcohol "per se" violation; (3) the state must mandate incarceration of repeat offenders, and (4) the state must engage in a public-awareness program to inform the public of such enforcement. *Id.*

139. 23 C.F.R. § 1309.6 (1990). To qualify for a supplemental grant, a state must have a license suspension system and meet eight of twenty-two requirements, one of which is the use of a system using roadside sobriety checks. *Id.*

140. 23 C.F.R. § 1313 (1990).

141. 23 C.F.R. § 1313.2 (1990). "Under the influence of alcohol" means operating a motor vehicle during the time the individual's blood or breath has an alcohol concentration of 0.10 or more grams of alcohol per 100 milliliters of blood or 0.10 or more grams of alcohol per 210 liters of breath. The measurement is to be determined by chemical or other tests. *Id.* § 1313.3(f).

hol traffic safety problems, incorporates multiple approaches to these problems over a sustained period of time and ensures that public and private entities work in concert to address these problems."<sup>142</sup>

One of the four basic conditions for federal funding is that the states implement "regularly conducted, peak-hour traffic enforcement efforts consisting of measures, such as roadside sobriety checkpoints or special DWI patrols."<sup>143</sup> The grants are limited to three years and may only be used for the implementation and enforcement of drunk driving prevention programs.<sup>144</sup> The awards are based on a formula apportionment plan.<sup>145</sup>

The grant program indicates that the federal government is significantly interested in preventing drunk driving. While the program mentions roadside sobriety checkpoints as a measure that can be used to reduce alcohol-related safety problems, it does not specifically require implementation of sobriety checkpoints as one of the mandatory criteria for grant eligibility.

#### D. *Summary of Divergent Court Views Leading to Sitz*

In 1968, the Supreme Court held in *Terry v. Ohio* that under certain circumstances, a "stop and frisk" street confrontation was constitutional.<sup>146</sup> Next, a number of Border Patrol stops without probable cause or reasonable suspicion were decided by the Supreme Court. In *Almeida-Sanchez v. United States*, a roving Border Patrol stop at an area removed from the border was held by the Supreme Court to violate the fourth amend-

142. *Id.* § 1313.3(b).

143. *Id.* The three other basic conditions are:

- (2) DWI prosecution, adjudication and sanctioning resources adequate to handle increased levels of DWI arrests;
- (3) other programs directed at forms of prevention other than enforcement and adjudication activities, such as school, worksite or community education; designated driver programs; transportation alternatives; responsible alcohol service programs; server training; or treatment programs; and
- (4) a public information program designed to make the public aware of the problem of drunk driving and of the above efforts in place to address it.

*Id.*

144. *Id.* § 1313.4.

145. *Id.* § 1313.4(b). In addition to the basic or supplemental grant received by a state, it shall receive reimbursements for the cost of its drunk driving prevention program: first year — 75%, second year — 50%, and third year — 25%. *Id.*

146. 392 U.S. 1 (1968). See *supra* notes 7-14 and accompanying text.

ment.<sup>147</sup> A roving patrol stop in a border area was held unconstitutional in *United States v. Brignoni-Ponce*.<sup>148</sup> In a subsequent case, *United States v. Ortiz*, the Supreme Court decided that a fixed non-border traffic checkpoint where not all cars were stopped was unconstitutional, and stated that the greater regularity of the fixed stop does not temper the invasion of privacy, reduce embarrassment, or eliminate discretion.<sup>149</sup> Finally, in *United States v. Martinez-Fuerte*, the Supreme Court held that a routine stop, where all vehicles were briefly stopped at a non-border permanent checkpoint, was constitutional.<sup>150</sup> Three years later, the Supreme Court decided in *Delaware v. Prouse* that random discretionary vehicle stops without probable cause, reasonable suspicion, standards, guidelines, or procedures, violated the fourth amendment.<sup>151</sup> However, dicta in *Prouse* alluded to the notion that states could develop spot check methods involving less intrusion or not involving unconstrained discretion, for example, "roadblock-type" stops.<sup>152</sup> In the same year as the *Prouse* decision, the Supreme Court applied a three-prong balancing test in *Brown v. Texas* and held unconstitutional, the arbitrary stop of a pedestrian without suspicion by a cruising officer who had no authorized procedures to make such a stop.<sup>153</sup> Ten years later, the Supreme Court in *Skinner v. Railway Labor Executives' Ass'n* and *National Treasury Employees Union v. Von Raab*, upheld drug and alcohol screening programs to ensure the safety of the traveling public.<sup>154</sup>

In the interim, sobriety checkpoint programs established by the states have been challenged in the courts. The state courts have examined and applied the Supreme Court decisions and analysis discussed above in holding sobriety checkpoint programs either constitutional or unconstitutional. In doing so, the state courts have relied upon the *Prouse* dicta,<sup>155</sup> the *Brown*

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147. 413 U.S. 266 (1973). See *supra* notes 15-18 and accompanying text.

148. 422 U.S. 873 (1975). See *supra* notes 19-23 and accompanying text.

149. 422 U.S. 891 (1975). See *supra* notes 24-31 and accompanying text.

150. 428 U.S. 543 (1976). See *supra* notes 32-37 and accompanying text.

151. 440 U.S. 648 (1979). See *supra* notes 38-45 and accompanying text.

152. See *supra* notes 44-45 and accompanying text.

153. 443 U.S. 47 (1979). See *supra* notes 46-50 and accompanying text.

154. *Skinner*, 489 U.S. 602 (1989); *Von Raab*, 489 U.S. 656 (1989). See *supra* notes 51-65 and accompanying text.

155. See *supra* notes 71-76 and accompanying text.

three-prong balancing test,<sup>156</sup> or variations of that test, and have also placed weight on the existence or nonexistence of checkpoint program guidelines.<sup>157</sup> The evolution of this confusion culminates in the Supreme Court case which is the subject of this Note.

### III. *Michigan Department of State Police v. Sitz*

#### A. *Facts*

In 1986, the Michigan Department of State Police and its Director established a sobriety checkpoint pilot program.<sup>158</sup> The goals of the program were to: (1) reduce death, injury, and property damage resulting from alcohol and drug-related traffic accidents; (2) conduct the checkpoints with a minimal amount of motorist inconvenience or intrusion; and (3) secure the safety of the public and the law enforcement officers assigned to the checkpoint.<sup>159</sup> In addition, the program was designed to: (1) instill the apprehension of arrest in the minds of drivers who would otherwise drive under the influence of alcohol or controlled substances; (2) protect the individuals' constitutionally guaranteed rights; and (3) remove drunk drivers from the public highways.<sup>160</sup>

In establishing this program, the Director of the Michigan State Police appointed a Sobriety Checkpoint Advisory Committee.<sup>161</sup> This Committee created guidelines setting forth procedures governing checkpoint operations, site selection, and publicity.<sup>162</sup> The guidelines included safety considerations and required that the checkpoints be set up at selected sites along

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156. See *supra* notes 88-136 and accompanying text.

157. See *supra* notes 83-87, 94-96 and accompanying text.

158. *Sitz v. Dep't of State Police*, 429 N.W.2d 180, 181 (Mich. 1988).

159. Brief for Petitioners at 6, *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481 (1990) (No. 88-1897) [hereinafter Brief for Petitioners].

160. *Id.*

161. *Sitz*, 429 N.W.2d at 181.

162. The local media is to be used in publicizing each sobriety checkpoint in order to enhance the checkpoint's deterrent effect among potential drunk drivers. However, the public will not be given advance notice of the exact time and location. Brief for Petitioners, *supra* note 159, at 8. The guidelines also included details on briefing, scheduling, safety considerations, motorist contact, staffing and assignment of duties. *Sitz*, 429 N.W.2d at 181.

state roads.<sup>163</sup> All vehicles would be stopped as they passed through a checkpoint and the drivers would be briefly examined for signs of intoxication.<sup>164</sup> If the checkpoint officer detected signs of intoxication, the motorist would be directed to a location outside of the traffic flow where an officer would check the driver's license and car registration.<sup>165</sup> If warranted, further sobriety tests would be conducted by the officer.<sup>166</sup> If the field tests and the officer's observations suggested that the driver was intoxicated, the driver would be arrested.<sup>167</sup> All other drivers would be permitted to leave the area immediately.<sup>168</sup>

Prior to the Court's decision, the Michigan State Police, in conjunction with the Saginaw County Sheriff's Department, conducted Michigan's first sobriety checkpoint.<sup>169</sup> The checkpoint remained in operation for one hour and fifteen minutes.<sup>170</sup> During that time, 126 vehicles passed through the checkpoint.<sup>171</sup> The average delay for each vehicle was approximately twenty-five seconds.<sup>172</sup> Two drivers were detained for field sobriety testing, and one of the two was arrested for driving under the influence of alcohol.<sup>173</sup> A third individual who drove through without stopping was pulled over by an officer in an observation vehicle and was also arrested for driving while intoxicated.<sup>174</sup>

On May 16, 1986, the day before the checkpoint operation began, plaintiffs filed a complaint for a declaratory judgment

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163. *Sitz*, 429 N.W.2d at 181. The Michigan State Police Sobriety Checkpoint Guidelines required several safety measures. A sufficient number of uniformed police officers would man each checkpoint site. Appropriate safety reflector equipment would be utilized. This could include flares and/or reflectors to illuminate each site and aid in directing traffic. Conspicuously displayed warning signs, flares, cones, and/or emergency lighting equipment would be used to provide advance warning of the upcoming checkpoint stop. Appendix to Petition for Certiorari at 152a-53a, Michigan Dep't of State Police v. *Sitz*, 110 S. Ct. 2481 (1990) (No. 88-1897).

164. *Sitz*, 429 N.W.2d at 181.

165. *Id.*

166. *Id.* (such testing could include a breathalyzer test).

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

and injunctive relief in the Wayne County Circuit Court.<sup>175</sup> Plaintiffs were licensed drivers of the State of Michigan who regularly traveled by automobile throughout the state.<sup>176</sup> Pending the outcome of the case, the defendants agreed to delay implementation of the sobriety checkpoint program.<sup>177</sup>

## B. *Procedural History*

### 1. *The Trial Court Opinion*

In an unpublished opinion dated June 14, 1986, the trial court found that, although there was statutory authority for the sobriety checkpoint operation, the plan violated the fourth amendment to the United States Constitution<sup>178</sup> and Article 1, § 11 of the Michigan Constitution.<sup>179</sup> The trial court applied the *Brown* three-prong balancing test.<sup>180</sup> In doing so, it weighed the gravity of the state's interest in preventing accidents caused by drunk drivers, the effectiveness of sobriety checkpoints in achieving the state's goal, and the degree of intrusiveness on an individual's liberty resulting from the sobriety checkpoint stops.<sup>181</sup>

In its analysis, the trial court indicated that the state had a grave and legitimate interest in curbing drunk driving because evidence indicated that alcohol was a contributing factor in about twenty-five to fifty percent of motor vehicle fatalities.<sup>182</sup> The court concluded, however, that the sobriety checkpoint pro-

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175. *Id.* (challenging the constitutionality of sobriety checkpoint programs).

176. *Id.*

177. *Id.*

178. *See supra* note 6.

179. *Sitz*, 429 N.W.2d at 181-82. The Michigan statute provides in pertinent part: The director of the department of state police shall cause inspection to be made of motor vehicles operating on the public highways to detect defective equipment or other violations of law governing the use of public highways by motor vehicles, operators, and chauffeurs. For that purpose the director may establish temporary vehicle check lanes at appropriate locations throughout the state for checking for inadequacies and violations. A county, city, village, or township police department also may operate a temporary check lane within its limits with the express authorization of the director of the department of state police and under the direct supervision of a designated representative of the director.

MICH. COMP. LAWS § 257.715(2) (1979).

180. *See supra* text accompanying note 50.

181. *Sitz*, 429 N.W.2d at 182.

182. *Id.* at 183.

gram did not significantly further that interest because: 1) the number of arrests was too insignificant to provide more than minimal deterrence; and 2) the deterrent effect of massive publicity was extremely short term.<sup>183</sup>

In measuring the objective intrusion, the trial court found the duration of the seizure and intensity of the investigation to be minimal.<sup>184</sup> The court found, however, that the subjective intrusion on individual liberty interests was substantial<sup>185</sup> because the checkpoints had the potential to cause fear and surprise to motorists.<sup>186</sup>

## 2. *The Michigan Court of Appeals Opinion*

The Michigan appellate court affirmed the trial court's findings that "the State has a 'grave and legitimate' interest in curbing drunken driving; that sobriety checkpoint programs are generally ineffective and, therefore, do not significantly further that interest; and that [while the checkpoints' objective intrusion is slight], their 'subjective intrusion' on individual liberties is substantial."<sup>187</sup>

The Michigan appellate court found it unnecessary to consider the validity of the checkpoint pursuant to the Michigan Constitution because the pertinent provision offers at least the same protection as provided by the fourth amendment.<sup>188</sup> Therefore, the holding under the Michigan Constitution would parallel the holding under the fourth amendment.<sup>189</sup>

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183. *Id.* Dr. Lawrence Ross, plaintiffs' expert witness, testified that "one percent or fewer of the drivers passing through sobriety checkpoints are arrested for drunk driving. . . . [W]hile studies indicated a short-term deterrent effect resulting from various campaigns against drunk driving, the statistics eventually returned to their normal level." *Id.*

Dr. Ross explained that "while the publicity which accompanies the initiation of such programs leads the public to believe that the chances of being caught are high, once people learn that the chances of apprehension are not that high, people return to their normal behavior." *Id.*

184. *Id.* at 184. The delay for each vehicle was approximately twenty-five seconds. *Id.* at 181. See *supra* text accompanying note 172.

185. *Sitz*, 429 N.W.2d at 184.

186. *Id.*

187. *Id.* at 185.

188. *Id.*

189. *Id.*

### C. *The Supreme Court Opinions*

#### 1. *The Majority Opinion*

Chief Justice Rehnquist delivered the opinion of the Court and held that a state's use of highway sobriety checkpoints did not violate the provisions of the fourth amendment to the United States Constitution.<sup>190</sup> Like the lower courts, the *Sitz* Court addressed only the initial stop of the vehicle and the related preliminary questioning of the motorist and observations by checkpoint officers.<sup>191</sup> The Court noted that detention of a motorist for more extensive field sobriety testing could require satisfaction of an individualized suspicion standard.<sup>192</sup>

The *Sitz* Court found that *United States v. Martinez-Fuerte*<sup>193</sup> and *Brown v. Texas*<sup>194</sup> were the relevant authorities in determining the constitutionality of sobriety checkpoints.<sup>195</sup> The majority rejected respondents' reasoning that it should follow the analysis in *National Treasury Employees Union v. Von Raab*,<sup>196</sup> which required a showing of a "special need" before dispensing with the requirements of probable cause or reasonable suspicion.<sup>197</sup> The Court explained that *Von Raab* "was in no way designed to repudiate our prior cases dealing with police stops of motorists on public highways."<sup>198</sup>

The Court stated that all the parties involved correctly agreed that a fourth amendment "seizure" occurs when a vehicle is stopped at a checkpoint.<sup>199</sup> Therefore, the only issue to be decided was whether such seizures are "reasonable" under the

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190. *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481, 2488 (1990).

191. *Id.* at 2485.

192. *Id.*

193. 428 U.S. 543 (1976) (holding that the government interest outweighed minimal intrusion caused by permanent checkpoints near border). *See supra* notes 32-37 and accompanying text.

194. 443 U.S. 47 (1979) (establishing a three-prong balancing test: (1) gravity of public interest, (2) effectiveness in advancing public interest, (3) intrusion on individual liberty). *See supra* text accompanying note 50.

195. *Sitz*, 110 S. Ct. at 2485.

196. 489 U.S. 656 (1989).

197. *Sitz*, 110 S. Ct. at 2485. *See supra* notes 58-65 and accompanying text; *see also* *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989); *see supra* notes 51-57 and accompanying text.

198. *Sitz*, 110 S. Ct. at 2485.

199. *Id.*

fourth amendment.<sup>200</sup>

The Court first dismissed the issue of whether the state had a legitimate interest in combating drunk driving by stating that statistical evidence concerning alcohol-related death and mutilation on the nation's roads clearly substantiates this interest.<sup>201</sup> "No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it."<sup>202</sup>

Next, the Court discussed the measure of the objective intrusion on motorists who were stopped briefly at sobriety checkpoints and concluded that this intrusion was slight.<sup>203</sup> The Court compared this intrusion to the brief highway checkpoint stops for the detection of illegal aliens in *Martinez-Fuerte*.<sup>204</sup> "We see virtually no difference between the levels of intrusion on law-abiding motorists from the brief stops necessary to the effectuation of these two types of checkpoints, which to the average motorist would seem identical save for the nature of the questions the checkpoint officers might ask."<sup>205</sup> Here, the objective intrusion was accurately measured — by the duration of the seizure and the intensity of the investigation — as being minimal.<sup>206</sup>

The Court then discussed the controversy of the subjective intrusion on motorists, and concluded that the Michigan courts misread prior Supreme Court cases concerning the degree of subjective intrusion and the potential for generating fear and surprise.<sup>207</sup> The Court stated that "[t]he 'fear and surprise' to be considered are not the natural fear of one who has been drinking over the prospect of being stopped at a sobriety checkpoint but, rather, the fear and surprise engendered in law abiding motorists by the nature of the stop."<sup>208</sup> The Court found that checkpoint stops, where motorists can see other vehicles being stopped as well as visible signs of officers' authority, are appreciably less intrusive than roving-patrol stops.<sup>209</sup>

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200. *Id.*

201. *Id.* at 2485-86.

202. *Id.* at 2485.

203. *Id.* at 2486.

204. *Id.*; see *supra* text accompanying notes 32-37.

205. *Sitz*, 110 S. Ct. at 2486.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at 2486-87. For a comparison of checkpoint stops to roving patrol stops, see

The *Sitz* Court stated that the Michigan appellate court misinterpreted the *Brown* test.<sup>210</sup> The Court discussed the degree to which the seizure advanced the public interest, the second prong (Effectiveness" prong) of the *Brown* balancing test.<sup>211</sup> The Court explained that it was incorrect for the appellate court to conclude that because the checkpoints produced only a short-term deterrent effect, this prong was not met, and that the court was incorrect to urge an examination for other alternatives.<sup>212</sup> The Court explained that *Brown* was not meant to shift the power and responsibility of determining which law enforcement techniques were to be used to manage a serious danger from politically accountable officials to the courts.<sup>213</sup> "[F]or purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers."<sup>214</sup>

Finally, the Court explained its conclusion that the sobriety checkpoints are effective by discussing the *Brown* test, in light of the *Martinez-Fuerte*<sup>215</sup> and *Prouse*<sup>216</sup> decisions.<sup>217</sup> First, regarding *Prouse*, the Supreme Court disapproved the random stops to apprehend unlicensed drivers and unsafe vehicles because empirical evidence did not demonstrate that such stops would be an effective means of promoting roadway safety.<sup>218</sup> Second, the Court observed in *Martinez-Fuerte* that illegal aliens were discovered in 0.12% of the vehicles passing through the checkpoint and the ratio of illegal aliens to the vehicles stopped was approximately 0.5%.<sup>219</sup> The Court noted that these statistics demonstrated the effectiveness of the *Martinez-Fuerte* checkpoint.<sup>220</sup> In *Sitz*, drunk driving arrests resulting from the checkpoint con-

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*supra* notes 24-31 and accompanying text.

210. *Sitz*, 110 S. Ct. at 2487.

211. *Id.*; see *supra* text accompanying note 50.

212. *Id.*

213. *Id.*

214. *Id.*

215. See *supra* text accompanying notes 32-37.

216. See *supra* text accompanying notes 38-45.

217. *Sitz*, 110 S. Ct. at 2487-88.

218. *Id.* at 2487.

219. *Id.* at 2488.

220. *Id.*

stituted approximately 1.5% of the drivers passing through the checkpoint.<sup>221</sup> Statistics of other states showed that one percent of the drivers passing through sobriety checkpoints were arrested for drunk driving.<sup>222</sup> The Court concluded that the effectiveness was not less in *Sitz* than in *Martinez-Fuerte* and, therefore, it could not justify a different conclusion in *Sitz*.<sup>223</sup>

Thus, the Court reversed the state courts' decisions and held that the sobriety checkpoint program was consistent with the fourth amendment. The Court declared that "the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program."<sup>224</sup>

## 2. *The Concurring Opinion*

Justice Blackmun concurred only in the judgment in order to reiterate his prior comments that the dangers imposed upon society by drunk drivers are serious and the "slaughter on the highways of this Nation exceeds the death toll of all our wars."<sup>225</sup> Justice Blackmun stated, "I am pleased, of course, that the Court is now stressing this tragic aspect of American life."<sup>226</sup>

## 3. *The Dissenting Opinions*

### a. *Justice Brennan's Dissent*

In his dissent, Justice Brennan stated that "the Court misapplies [the balancing test] by undervaluing the nature of the intrusion and exaggerating the law enforcement need to use the roadblocks to prevent drunken driving."<sup>227</sup> He agreed that the initial checkpoint stop is sufficiently less intrusive than an arrest such that the reasonableness of the seizure may be judged by the balancing test.<sup>228</sup> He remarked, however, that the majority opin-

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221. *Id.* at 2487.

222. *Id.* at 2487-88.

223. *Id.* at 2488.

224. *Id.*

225. *Id.* (Blackmun, J., concurring).

226. *Id.*

227. *Id.* (Brennan, J., dissenting).

228. *Id.* at 2489.

ion did not specifically state that the reason for employing the balancing test was the minimally intrusive nature of the seizure.<sup>229</sup> Justice Brennan explained that although the majority asserted that reasonable suspicion is not necessary when the intrusion is slight, no support was offered that the minimum intrusion causes the balance to be weighed in favor of the state program.<sup>230</sup> In asserting that some level of individualized suspicion is necessary, he stated:

[W]e have generally required the Government to prove that it had reasonable suspicion for a minimally intrusive seizure to be considered reasonable. . . . By holding that no level of suspicion is necessary before the police may stop a car for the purpose of preventing drunken driving, the Court potentially subjects the general public to arbitrary or harassing conduct by the police.<sup>231</sup>

In addition, Justice Brennan was troubled by the Court's reliance on *United States v. Martinez-Fuerte*,<sup>232</sup> the only case where suspicionless seizures were upheld.<sup>233</sup> He agreed with Justice Stevens, who also dissented, that the policy of the Michigan sobriety checkpoint program was sufficiently different from the *Martinez-Fuerte* program not to warrant reliance on its holding.<sup>234</sup> Justice Brennan further argued, however, that even if the policies were similar, that would not justify abandoning the requirement of individualized suspicion in this case.<sup>235</sup> Although in *Martinez-Fuerte*, suspicionless stops were justified because holding otherwise would make it impractical to identify illegal aliens traveling in vehicles, the same difficulty did not exist in detecting drunk drivers.<sup>236</sup> "Without proof that the police cannot develop individualized suspicion that a person is driving while impaired by alcohol, I believe the constitutional balance

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229. *Id.* Justice Brennan stated that, generally, probable cause is required for a seizure to be considered reasonable. This requirement is replaced by a balancing test only when the seizure is substantially less intrusive than a typical arrest. *Id.*

230. *Id.*

231. *Id.* See, e.g., *Terry v. Ohio*, 392 U.S. 1 (1968); see *supra* notes 6-14, 19-23 and accompanying text; see also *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (*supra* notes 19-23 and accompanying text).

232. See *supra* text accompanying notes 32-37.

233. Sitz, 110 S. Ct. at 2489 (Brennan, J., dissenting).

234. *Id.*; see *infra* notes 251-58 and accompanying text.

235. Sitz, 110 S. Ct. at 2489 (Brennan, J., dissenting).

236. *Id.*

must be struck in favor of protecting the public against even the 'minimally intrusive' seizures involved in this case."<sup>237</sup> Moreover, Justice Brennan agreed with the Court's rationale in *Almeida-Sanchez v. United States*<sup>238</sup> that loyalty to constitutional safeguards should not be displaced by the tensions of law enforcement.<sup>239</sup>

b. *Justice Stevens' Dissent*

Like Justice Brennan, Justice Stevens contended that the Court misapplied the *Brown* balancing test.<sup>240</sup> "The Court overvalues the law enforcement interest in using sobriety checkpoints, undervalues the citizen's interest in freedom from random, unannounced investigatory seizures, and mistakenly assumes that there is 'virtually no difference' between a routine stop at a permanent, fixed checkpoint and a surprise stop at a sobriety checkpoint."<sup>241</sup>

Justice Stevens asserted that the individual's interest in freedom from suspicionless, unannounced investigatory seizures was given no weight by the Court.<sup>242</sup> "These seizures play upon the detained individual's reasonable expectations of privacy, injecting a suspicionless search into a context where none would normally occur. The imposition that seems diaphanous today may be intolerable tomorrow."<sup>243</sup> He found that the majority's decision was motivated by "symbolic state action — an insufficient justification for an otherwise unreasonable program of random seizures."<sup>244</sup> He explained that the Court, instead of being attracted to the prospect of punishing innumerable intoxicated motorists, should be more concerned with maintaining constitutional protections.<sup>245</sup>

In addition, Justice Stevens claimed that the Court's position that sobriety checkpoint seizures advance the public inter-

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237. *Id.* at 2490.

238. 413 U.S. 266 (1973); see *supra* text accompanying notes 15-18.

239. *Sitz*, 110 S. Ct. at 2490 (Brennan, J., dissenting).

240. *Id.* at 2492 (Stevens, J., dissenting).

241. *Id.*

242. *Id.* at 2497.

243. *Id.* at 2498.

244. *Id.* at 2499.

245. *Id.*

est was indefensible.<sup>246</sup> He stated that "there is absolutely no evidence that this [one percent arrest] figure represents an increase over the number of arrests that would have been made by using the same law enforcement resources in conventional patrols."<sup>247</sup> He saw no proof that the seizures produced any net advance to the public interest in arresting drunk drivers.<sup>248</sup> Justice Stevens offered statistics<sup>249</sup> to show that the benefits of the sobriety checkpoint program in combating drunk driving can be achieved by more conventional means, and that the relationship between sobriety checkpoints and the actual reduction in highway fatalities is not substantial.<sup>250</sup>

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246. *Id.* at 2495.

247. *Id.* (footnote omitted).

248. *Id.*

249. *Id.* at 2491 nn.2-4.

250. *Id.* at 2491. For example, Maryland had operated 125 checkpoints over a period of several years and out of 41,000 motorists passing through those checkpoints, only 143 motorists (0.3%) were arrested for driving while intoxicated. *Id.* The statistics for other states are somewhat comparable to Maryland. *See, e.g., State ex rel. Ekstrom v. Justice Ct.*, 663 P.2d 992, 993 (Ariz. 1983) (5,763 cars stopped, 14 persons, 0.2%, arrested for drunk driving); *Ingersoll v. Palmer*, 743 P.2d 1299, 1303 (Cal. 1987) (233 vehicles screened, no arrests for drunk driving); *State v. McLaughlin*, 471 N.E.2d 1125, 1137 (Ind. Ct. App. 1984) (115 cars stopped, three, 3%, arrests for drunk driving); *State v. Deskins*, 673 P.2d 1174, 1187 (Kan. 1983) (Prager, J., dissenting) (2,000 to 3,000 vehicles stopped, 15, 0.6%, arrests made, 140 police man hours consumed); *Commonwealth v. Trumble*, 483 N.E.2d 1102, 1105 (Mass. 1985) (503 cars stopped, eight, 1.6%, arrests, 13 participating officers); *State v. Koppel*, 499 A.2d 977, 979 (N.H. 1985) (1,680 vehicles stopped, 18, 1.1%, arrests for driving while intoxicated). *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481, 2491 n.3 (1990), (Stevens, J., dissenting).

By comparison, Michigan State Police made 71,000 arrests for drunk driving, without checkpoints, in 1984 alone. *Id.* at 2491. Note that this statistic was taken out of context from the Wayne County Circuit Court opinion, *Sitz v. Michigan Dep't of State Police*, No. 86-613-063-C2 (D. Mich. June 24, 1986), in support of the state's contention that it had no available practical means to advance its interest in curbing drunk driving other than by implementing sobriety checkpoints. The state offered the following statistics:

While from 1958 to 1984, *non alcohol* related accidents had fallen from 2.8 per 100,000,000 miles of road traveled to 1.9; *alcohol* related accidents remained at approximately 1.1 per 100,000,000 miles of road traveled. . . . [D]uring this time period, however, the amount of drunk driving arrests had risen from approximately 17,000 statewide in 1968, to over 71,000 in 1984. . . . [O]n the basis of this data . . . conventional methods of curbing drunk driving have not had a significant impact on the problem.

Appendix to Petition for Writ of Certiorari for Petitioner at 96a-97a, *Michigan Dep't of State Police v. Sitz*, 493 U.S. 806 (1989) (No. 88-1897), *microformed on* U.S. Supreme Court Records and Briefs (Congressional Info. Serv.). For a detailed analysis of the Maryland study, *see* James Jacobs and Nadine Strossen, *Mass Investigations Without Indi-*

Finally, Justice Stevens did not believe that this case was similar to *Martinez-Fuerte*<sup>251</sup> for the following reasons: (1) the element of surprise present in the temporary sobriety checkpoint stops was not present in the permanent interior border stops upheld in *Martinez-Fuerte*;<sup>252</sup> (2) the police had broad discretion in determining the timing and placement of the sobriety checkpoints, but there was no such discretion when the checkpoint is permanent;<sup>253</sup> (3) a driver's license check or an immigration identification check is more easily standardized than a check for evidence of intoxication;<sup>254</sup> (4) an officer at a sobriety checkpoint has practically unlimited discretion to detain the driver on the slightest suspicion;<sup>255</sup> and (5) permanent checkpoint stops in *Martinez-Fuerte* occurred during the daytime and evening hours while sobriety checkpoint stops generally oper-

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*vidualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks*, 18 U.C. DAVIS L. REV. 595, 640 n.200 (1985).

Also, the results of a Maryland study comparing traffic statistics from both a checkpoint county and a control county indicated that alcohol-related accidents in the checkpoint county decreased by ten percent and fatal accidents doubled, whereas the control county experienced an eleven percent decrease in alcohol-related accidents and fatal accidents dropped from sixteen to three. *Sitz*, 110 S. Ct. at 2491-92. Note that Justice Stevens did not indicate the time-frame tested for those statistics, which would be necessary for a clear understanding of the study. The time periods utilized in the analysis of the test were pointed out in the Wayne County Circuit Court opinion:

When compared with the preceding *three month* period, the data indicates both counties experienced rates of decline in alcohol related accidents. Additionally, both counties experienced declines in the rate of fatalities when compared to the data concerning the three month period immediately preceding the test period. . . . [D]uring this time period Maryland was implementing several other programs. The similarity in the decreasing rate of alcohol related injuries which occurred in both counties, checklane and non-checklane, is consistent, if anything, with an overall state wide trend.

Appendix to Petition for Writ of Certiorari for Petitioner at 89a-90a, Michigan Dep't of State Police v. *Sitz*, 493 U.S. 806 (1989) (No. 88-1897).

251. See *supra* text accompanying notes 32-37.

252. *Sitz*, 110 S. Ct. at 2492 (Stevens, J., dissenting).

253. *Id.*

254. *Id.* at 2493.

255. *Id.* Justice Stevens explained that there is a marked difference between the kind of discretion an officer exercises in an immigration check and in a check for intoxication. For example, an identification check merely requires the production of immigration papers, while a search for evidence of intoxication could consist of an examination of a motorist's physical characteristics such as a ruddy complexion, bloodshot eyes, unkempt clothing, or a speech impediment. *Id.*

ated at night — which was more offensive than in daylight.<sup>256</sup> In addition, the subjective fears generated at a checkpoint stop are not solely those of the guilty because a law-abiding individual is not necessarily irreproachable.<sup>257</sup> “[T]hose who have found — by reason of prejudice or misfortune — that encounters with the police may become adversarial or unpleasant without good cause will have grounds for worrying at any stop designed to elicit signs of suspicious behavior.”<sup>258</sup>

#### IV. Analysis

##### A. *A Comparative Analysis of the Sitz Majority and Dissenting Opinions*

###### 1. *The Flaws in the Dissenting Opinions*

###### a. *Correct Application of “Intrusiveness” Prong by Majority*

The three dissenting Justices argued that the *Brown* balancing test<sup>259</sup> was misapplied because the majority did not give enough weight to the element of intrusiveness on the individual.<sup>260</sup> The dissenting opinions are flawed because the majority did properly consider the element of intrusion on individual liberty by splitting its analysis into objective and subjective intrusion and then supporting both elements.

The Court stated that after measuring the duration of the seizure and the intensity of the investigation, the *objective* intrusion was minimal.<sup>261</sup> The facts of the case indicate that the average delay for the stop was approximately twenty-five seconds per vehicle,<sup>262</sup> the intensity of the investigation consisted of only a brief observation of the driver,<sup>263</sup> and no sobriety

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256. *Id.*

257. *Id.*

258. *Id.*

259. For a discussion of the *Brown* balancing test see *supra* text accompanying note 50.

260. *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481, 2488, (1990) (Brennan, J., dissenting); *id.* at 2492 (Stevens, J., dissenting); see *supra* text accompanying notes 227-31 and 241-44.

261. *Sitz*, 110 S. Ct. at 2486; see *supra* text accompanying note 205.

262. See *supra* text accompanying note 172.

263. See *supra* text accompanying note 164.

tests were administered unless the checkpoint officer detected signs of intoxication.<sup>264</sup>

All of the following checkpoint requirements, by alleviating fear and surprise and providing for the safety of the public, serve to diminish the *subjective* intrusion on the individual. The subjective intrusion of fear and surprise, as considered by the Court, is that of a sober driver and not that of a drunk driver who is afraid his drunkenness will be detected at a checkpoint.<sup>265</sup> In addition, because the checkpoints are required to be set up along state roads,<sup>266</sup> motorists can see other vehicles being stopped and can see signs of police officers' authority<sup>267</sup> such as uniformed officers, advance illuminated warning signs, flashing lights, and safety cones.<sup>268</sup> Finally, surprise is also reduced because the checkpoint guidelines require that the public be notified in advance via local media that the checkpoint will be in operation.<sup>269</sup>

b. *Statistical Evidence Insufficient to Refute the Necessity for Sobriety Checkpoints*

Justice Stevens stated that there is no evidence that sobriety checkpoints are superior to conventional methods<sup>270</sup> and produced statistics to support his position.<sup>271</sup> These statistics, however, are flawed for a number of reasons. First, the deterrent effect was not considered because it is not capable of measurement.<sup>272</sup> Furthermore, the dissent disregards the purpose of the checkpoints as being not only to arrest drunk drivers but also to deter drivers from drinking and driving in the first place.<sup>273</sup>

Even if the statistics relied upon by Justice Stevens were

264. See *supra* text accompanying notes 165-66.

265. *Sitz*, 110 S. Ct. at 2486; see *supra* text accompanying note 208.

266. See *supra* text accompanying note 163.

267. See *supra* text accompanying note 209.

268. For a discussion on sobriety checkpoint safety requirements see *supra* note 163.

269. See *supra* note 162.

270. *Sitz*, 110 S. Ct. at 2495-99 (Stevens, J., dissenting); see *supra* text accompanying notes 244-47.

271. See *supra* text accompanying notes 249-50.

272. See *People v. Scott*, 473 N.E.2d 1 (1984) (substantial reductions in deaths and injuries caused by drunken driving may stem from legislative reforms instead of sobriety checkpoints); see *supra* notes 103-07 and accompanying text.

273. See *supra* note 104.

valid, when evaluated in terms of percentages and hourly arrests they actually support the majority view. The 71,000 non-checkpoint arrests in 1984<sup>274</sup> is equal to eight arrests per hour for the entire state of Michigan. In *Sitz*, the one checkpoint in one hour resulted in approximately two arrests.<sup>275</sup> When evaluating the number of drivers arrested at checkpoints in various states in terms of percentages, the arrest rates vary from 0.2 percent to 7 percent.<sup>276</sup> This range far exceeds the 0.5 percent which was held to be effective for detecting aliens hiding in vehicles in the *Martinez-Fuerte* decision.<sup>277</sup>

Finally, for the statistics to be meaningful, the number of police engaged in the random stops must be compared with the number of police employed at the checkpoints. Sobriety checkpoints provide police with the opportunity to observe a larger portion of the motoring public than it can observe through ordinary roving patrol procedures.<sup>278</sup>

Notwithstanding the flawed statistics, evidence of superiority of one method over another is not necessary, even though the number of fatalities and injuries caused by drunk drivers indicates that traditional methods have obviously failed and that a different approach is needed.<sup>279</sup> In the interest of public safety, the state has the right to use all available resources without having to prove the exact effect of each measure taken.<sup>280</sup> Further, the majority made it clear that it is not for the Court to decide which law enforcement techniques to use in combating a serious danger; the choice is the responsibility of the government officials.<sup>281</sup> Because the government officials are elected by the citizens, these officials should decide whether sobriety checkpoint programs further their objective of combating drunk driving.<sup>282</sup>

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274. See *supra* text accompanying note 250.

275. See *supra* text accompanying notes 170-74.

276. *Sitz*, 110 S. Ct. at 2491; see *supra* note 250.

277. See *supra* text accompanying notes 219-23.

278. *People v. Bartley*, 486 N.E.2d 880, 886 (Ill. 1985), *cert. denied*, 475 U.S. 1068 (1986); see *supra* note 107.

279. See *supra* note 81.

280. *People v. Scott*, 473 N.E.2d 1, 6 (1984); see *supra* text accompanying note 105.

281. See *supra* text accompanying notes 212-14.

282. *Ingersoll v. Palmer*, 221 Cal. Rptr. 659 (Cal. Ct. App. 1985) (White, J., dissenting); see *supra* text accompanying note 112.

c. *Permanent Non-Border Checkpoints Similar to Sobriety Checkpoints in Terms of Purpose and Operation*

The dissenting Justices reasoned that the permanent non-border checkpoint stops in *Martinez-Fuerte*<sup>283</sup> cannot be compared to temporary sobriety checkpoints because they impact motorists differently. The dissenters further reasoned that when police apply the individualized suspicion standard, it is more difficult to detect illegal aliens in vehicles than it is to detect drunk drivers.<sup>284</sup> They conclude, therefore, that individualized suspicion should be the standard for stopping drunk drivers, even if "stopping every car *might* make it easier to prevent drunk driving."<sup>285</sup> Permanent and temporary checkpoints, however, are analogous, and the reasoning of the dissenting opinions, therefore, is flawed.

First, when an individual encounters a sobriety checkpoint in a state with a sobriety checkpoint program policy, the stop should not be met with any more surprise than the *Martinez-Fuerte* permanent interior border checkpoint.<sup>286</sup> Both checkpoints have advance warning signs, flashing lights, safety cones, and uniformed officers evidencing the official authority of the stop.<sup>287</sup> Although a cautious and well-traveled individual may have incentive to be cognizant of the location of a permanent non-border checkpoint, especially if he is transporting illegal aliens, the average individual who is not concerned with the smuggling of illegal aliens would probably have the same level of surprise when reaching a permanent non-border checkpoint as a motorist approaching a temporary sobriety checkpoint. The motorist who has nothing to hide should have little apprehension at either stop.<sup>288</sup>

Second, the discretionary factor is identical in both perma-

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283. SEE *supra* notes 32-37 and accompanying text.

284. *Sitz*, 110 S. Ct. 2481, 2489-90 (Brennan, J., dissenting); *id.* at 2490-97 (Stevens, J., dissenting); see *supra* notes 223-56 and accompanying text.

285. *Sitz*, 110 S. Ct. at 2490 (Brennan, J., dissenting).

286. See *supra* text accompanying note 33.

287. See *supra* notes 33 and 163.

288. *State v. Coccoma*, 427 A.2d 131, 134 n.7 (N.J. Super. Ct. Law Div. 1980) (motorist stopped at sobriety checkpoint stop did not indicate that the procedures utilized had generated any fright, anxiety, or concern); see *supra* note 97.

nent and temporary checkpoint situations. The experience of the officer conducting the checkpoint permits him to make a professional evaluation regarding the necessity to expand his inquiry beyond brief questioning and visual inspection.<sup>289</sup> Additionally, the Michigan State Police, as the Border Patrol in *Martinez-Fuerte*, used discretion in making the official decisions regarding the timing and placement of the sobriety checkpoint in *Sitz*.<sup>290</sup> However, the discretionary considerations in temporary checkpoints are mitigated by guidelines which govern such details like operational procedures, site selection, publicity, and the utilization in *Sitz*, of a computerized program to make site selections.<sup>291</sup>

Finally, the problem of effective detection of illegal aliens concealed in vehicles and of alcohol-impaired drivers is indistinguishable. Because the drunk driver does not always appear to be driving erratically,<sup>292</sup> it is the circumstances surrounding the observation that create factors to test the extent of the impairment of the driver's ability to react. For example, traffic moving without incident could not test a driver's reaction time to avoid a collision, and the driver would effectively evade the roving patrolman's detection. The issue is: at what point is it most effective to stop the drunk driver? If the drunk driver is to be stopped before any harm is caused, he should be stopped before he is detected for driving erratically. At that point, he may be as difficult to spot as the illegal alien concealed in a vehicle. Statistics indicate that arrests of only those drunk drivers that could be stopped by roving patrols upon a founded suspicion do not effectively enforce the prohibition against drunk driving.<sup>293</sup> Consequently, sobriety checkpoints can detect drunk drivers before they drive in an erratic manner.<sup>294</sup>

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289. *Martinez-Fuerte*, 428 U.S. at 562 (selective referral of motorists to secondary inspection area was constitutional); see *supra* text accompanying notes 164-68.

290. Brief for Petitioners at 7, *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481 (1990) (No. 88-1897).

291. *Id.* at 7-8.

292. *People v. Bartley*, 486 N.E.2d 880, 886 (Ill. 1985) *cert. denied*, 475 U.S. 1068 (1986) (roadblocks detect drunk drivers before they drive erratically); see *supra* text accompanying note 107.

293. *State ex rel. Ekstrom v. Justice Court*, 663 P.2d 992, 999 (Ariz. 1983) (Feldman, J., concurring); see *supra* note 116 and accompanying text.

294. *People v. Bartley*, 486 N.E.2d 880, 886 (Ill. 1985) *cert. denied*, 475 U.S. 1068

## 2. Majority Wins, Flaws Destroy Dissent — A Summary of Compelling Arguments

The issue is whether the “seizure” that initially occurs when a vehicle is stopped at a checkpoint is “reasonable” under the fourth amendment.<sup>295</sup> The *Brown* three-prong test was utilized in determining this reasonableness.<sup>296</sup> The dissent stated that the *Brown* balancing test was misapplied because the intrusiveness on the individual was not given proper weight.<sup>297</sup> However, the majority did give proper weight to the intrusiveness element. In analyzing the “Individual Liberty” prong of *Brown*, the majority split its analysis into two tracks.<sup>298</sup> Consequently, the majority determined that the “objective” intrusion, measured by the duration of the seizure and the intensity of the investigation, was minimal, and it supported its determination with facts evidencing the brevity of the procedure.<sup>299</sup> Next, the majority clarified that the measurement of the “subjective” intrusion of fear and surprise at a checkpoint stop was that of a sober, law abiding motorist, and that the intrusion was minimal, as compared to a drunk driver fearful of being detected.<sup>300</sup> In addition, the majority correctly reasoned that any surprise element was mitigated by the visible, well-lighted approach to the checkpoint area, and advance media publicity.<sup>301</sup>

Next, the dissent attacked the “effectiveness” of sobriety checkpoint stops by providing statistics demonstrating the effectiveness of conventional methods.<sup>302</sup> However, the majority concluded that the effectiveness of the sobriety checkpoint in *Sitz* was not less than in *Martinez-Fuerte* which the Court determined was effective.<sup>303</sup>

Finally, the dissenters unsuccessfully argued that the *Martinez-Fuerte* decision upholding suspicionless permanent non-bor-

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(1986); see *supra* text accompanying note 107.

295. See *supra* notes 199-200 and accompanying text.

296. See *supra* notes 210-17 and accompanying text.

297. See *supra* notes 227-37 and accompanying text.

298. See *supra* notes 203-09 and accompanying text.

299. See *supra* notes 203-06 and accompanying text.

300. See *supra* note 208 and accompanying text.

301. See *supra* note 209 and accompanying text.

302. See *supra* notes 247-50 and accompanying text.

303. See *supra* notes 219-23 and accompanying text.

der checkpoint stops should not be applied to sobriety checkpoint stops, even if stopping every car might make it easier to prevent drunk driving, because the police have the ability to develop individualized suspicion that a person is driving while impaired by alcohol.<sup>304</sup> The majority articulated that determining which law enforcement techniques to utilize belong to politically accountable officials who have an understanding of the available resources and the danger the techniques are designed to prevent.<sup>305</sup>

### B. *Clear-cut Checkpoint Guidelines — A Suggested Model*

Although the Supreme Court was correct in its decision upholding the constitutionality of sobriety checkpoints in *Michigan Dep't of State Police v. Sitz*,<sup>306</sup> the Court did not completely resolve the sobriety checkpoint program issues because the opinion did not provide clear-cut and uniform checkpoint guidelines. Many state courts have upheld sobriety checkpoint programs where discretion was limited by checkpoint guidelines.<sup>307</sup> A uniform set of guidelines would perhaps eliminate the uncertainty of the constitutionality of a state's program by removing the discretionary element that was present in *Delaware v. Prouse*.<sup>308</sup>

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304. See *supra* notes 232-37, 285 and accompanying text.

305. See *supra* notes 213-14 and accompanying text.

306. 110 S. Ct. 2481 (1990).

307. See *State v. Golden*, 318 S.E.2d 693 (Ga. Ct. App. 1984); *Commonwealth v. Trumble*, 483 N.E.2d 1102 (Mass. 1985); *Lowe v. Commonwealth*, 337 S.E.2d 273 (Va. 1985), *cert. denied*, 475 U.S. 1084 (1986); see *supra* note 77 and accompanying text (checkpoint upheld when the state's discretion is limited by guidelines). See *State v. Jones*, 483 So.2d 433 (Fla. 1986); *State v. Crom*, 383 N.W.2d 461 (Neb. 1986); *State v. Kirk*, 493 A.2d 1271 (N.J. Super. Ct. App. Div. 1985); see *supra* text accompanying notes 85-87; (checkpoints would have been constitutional if precise guidelines had been followed). See *State v. Superior Court*, 691 P.2d 1073 (Ariz. 1984); *Ingersoll v. Palmer*, 221 Cal. Rptr. 659 (Cal. Ct. App. 1985), *aff'd*, 743 P.2d 1299 (Cal. 1987); *People v. Bartley*, 486 N.E.2d 880 (Ill. 1985) *cert. denied*, 475 U.S. 1068 (1986); *Little v. State*, 479 A.2d 903 (Md. 1984); *State v. Cocomo*, 427 A.2d 131 (N.J. Super. Ct. Law Div. 1980); *People v. Scott*, 473 N.E.2d 1 (N.Y. 1984); see *supra* notes 94 and 96 (court determined that neutral, non-discretionary guidelines were utilized). See *supra* text accompanying note 119 (checkpoint was unconstitutional where the operation was not run under specific guidelines or directions).

308. See *supra* notes 38-45 and accompanying text (random discretionary stop without probable cause, reasonable suspicion, standards, guidelines, or procedures was unconstitutional).

The following is a model set of guidelines:<sup>309</sup>

1. Site Selection

a. Safety of citizens and law enforcement personnel shall be considered.

b. There shall be a safe area for stopping a driver.

c. There shall be sufficient sight distance warning for a driver to safely come to a stop.

d. There shall be a minimum amount of inconvenience for the driver to come to a safe stop.

e. There shall be sufficient adjoining space to pull a vehicle off to the side if further inquiry is needed.

2. Safety Measures

a. The site shall have a sufficient number of uniformed officers on duty, including a commissioned officer of at least lieutenant rank.

b. An officer shall be stationed in advance of the checkpoint to direct traffic and warn other officers of dangerous situations.

c. Reflectorized safety equipment shall be utilized.

(1) There shall be flares and reflectors for illuminating the site and for indicating traffic direction.

(2) There shall be equipment to provide advance and conspicuous notice of the stop.

i. Warning signs.

ii. Flares.

iii. Safety cones.

iv. Emergency lighting equipment.

v. Flashlights to direct traffic movement.

vi. Presence of police vehicles.

3. Procedures for motorist contact shall be clear and narrowly defined.

a. All vehicles passing through the checkpoint shall be stopped for a brief but reasonable duration.

b. The police officer shall identify himself.

c. The police officer shall explain the purpose of the stop to

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309. Guidelines were adopted by the author and revised. The following sources were used: *Ingersoll v. Palmer*, 221 Cal. Rptr. 659, 667-69 (Cal. Ct. App. 1985), *aff'd* 743 P.2d 1299 (Cal. 1987), *see supra* note 96 and accompanying text; Appendix to Petition for Certiorari at 152a-56a, *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481 (1990) (No. 88-1897), *see supra* notes 163-68 and accompanying text.

the motorist.

d. The police officer shall distribute literature regarding the stop to the motorist.

e. If there are no signs of intoxication, the motorist shall be permitted to pass through the checkpoint. (Indications of intoxication may include: odor of alcoholic beverages, slurred speech, lack of physical coordination, atypical eye movements or appearance, and disorientation.)

f. If there are signs of intoxication, the driver shall be directed to an out-of-traffic location for additional inquiries. (Additional inquiries may include: request for driver's license and vehicle documents, field sobriety tests, and breath tests.)

g. If sufficient evidence of intoxication is present, the driver shall be arrested; otherwise, the driver shall be released.

#### 4. Publicity

a. The existence of sobriety checkpoint programs shall be publicized regularly.

b. The exact location and time of the checkpoint operation shall not be announced.

### C. *Tie Mandatory Checkpoint Programs to Federal Highway Grants*

The effectiveness of sobriety checkpoint programs is limited because the programs are not mandatory. Airport metal detector searches,<sup>310</sup> drug and alcohol testing of railroad employees,<sup>311</sup> and drug testing of United States Customs Service employees<sup>312</sup> have congressional approval. Sobriety checkpoint programs should have similar legislative authorization as part of a general regulatory scheme to further the health, safety, and welfare of the general public. The prevention of the pirating or explosion of a large airplane eliminates the risk to hundreds of human lives and millions of dollars of property.<sup>313</sup> Drug and alcohol

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310. For a discussion on airport security, see *supra* note 64 and accompanying text.

311. See *supra* note 53 and accompanying text.

312. See *supra* note 59.

313. See *supra* text accompanying note 65. See *Ingersoll v. Palmer*, 221 Cal. Rptr. 659 (1985), *aff'd*, 743 P.2d 1299 (1987) (suggested that airport search and screening procedures were similar to sobriety checkpoints as tools for detection and deterrence and intimated that there should be legislation for sobriety checkpoint programs). See *supra* text accompanying notes 108-11.

testing of railroad employees ensures the safety of the traveling public and the safety of the railroad employees by preventing railroad accidents.<sup>314</sup> Mandating drug testing of customs employees in positions requiring the use of firearms, prevents the risk to individuals of the use of deadly force by drug-impaired persons.<sup>315</sup> Similarly, the risk of death on the nation's roadways as part of the annual statistic of 25,000 people dying in alcohol-related traffic accidents<sup>316</sup> should also be reduced by mandatory sobriety checkpoint programs.

In addition to health, safety, and welfare being served by sobriety checkpoint legislation, burdens and delays caused by successive checkpoint operations at points along an interstate highway could be minimized.<sup>317</sup> The programs could be set up to prevent duplication of efforts and to promote cooperation between states.

Also, sobriety checkpoint stops would become expected and accepted as part of everyday life. This expectation would eliminate the surprise element presently existing under the current system; motorists would be given advance warnings of approaching sobriety checkpoint stops and reminders by mass publicity campaigns.

Because the prevention of drunk driving is an urgent problem, the most efficient method of implementing federal sobriety checkpoint regulations would be to tie the sobriety checkpoint programs directly to federal highway grants. The federal highway grant programs currently provide funds to states which adopt and implement programs to effectively reduce alcohol-related traffic safety problems,<sup>318</sup> but do not specifically mandate the utilization of sobriety checkpoint programs.<sup>319</sup> Therefore, a

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314. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 634 (1989). See *supra* notes 51-56.

315. *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1393, 1397-98. See *supra* text accompanying notes 61-62.

316. *Commonwealth v. Trumble*, 483 N.E.2d 1102, 1105-06 (Mass. 1985). See *supra* note 81. *State ex rel. Ekstrom v. Justice Court*, 663 P.2d 992, 999 (Ariz. 1983) (Feldman, J., specially concurring). See *supra* note 123.

317. See *supra* note 112 (intrastate legislation to prevent motorist from encountering roadblocks in several municipalities during a single trip).

318. 23 U.S.C. § 402 (1982 & Supp. V 1987). See *supra* notes 137-45 and accompanying text.

319. 23 U.S.C. § 402 (1982 & Supp. V 1987). See *supra* note 143 and accompanying

state's receipt of any federal highway grant should be conditioned on its operation of a state-wide sobriety checkpoint program.

### V. Conclusion

The Supreme Court's decision in *Michigan Dep't of State Police v. Sitz*, declaring that sobriety checkpoint programs do not violate the fourth amendment, reconciles the divergent approaches utilized by state courts and begins to establish a constitutional standard. However, the Court should have expanded its decision by including standardized sobriety checkpoint program guidelines to facilitate constitutionally permissible programs. Further, to insure implementation of the programs, the legislature should mandate the establishment of sobriety checkpoint programs as incentives for receiving highway grants. The foregoing suggestions will help to insure that sobriety checkpoint programs will be effectively integrated into the fabric of American society and hopefully save lives.

Janice A. Willner\*

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text.

\* The author dedicates this Note to her husband, Peter D. Willner and her sister, Roslyn G. Grigoleit. Their support and encouragement are sincerely appreciated.