SMU | DEDMAN SCHOOL OF LAW

SMU Law Review

Volume 44 | Issue 3 Article 8

1990

Sobriety Checkpoints: Clearing the Roads for Roadblocks under Michigan Department of State Police v. Sitz

Jennifer A. Currie

Follow this and additional works at: https://scholar.smu.edu/smulr

Recommended Citation

Jennifer A. Currie, *Sobriety Checkpoints: Clearing the Roads for Roadblocks under Michigan Department of State Police v. Sitz*, 44 Sw L.J. 1277 (1990)
https://scholar.smu.edu/smulr/vol44/iss3/8

This Case Note is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.

SOBRIETY CHECKPOINTS: CLEARING THE ROADS FOR ROADBLOCKS UNDER MICHIGAN DEPARTMENT OF STATE POLICE V. SITZ

by Jennifer A. Currie

IN 1986, the Michigan Department of State Police devised a sobriety checkpoint program to identify drunk drivers. At selected locations, police would stop all vehicles and briefly examine each driver for signs of intoxication. If the officer subjectively suspected intoxication, he could, at his discretion, require the driver to appear at a secondary location. At this secondary location, the officer would conduct further sobriety tests and examine the driver's license and vehicle registration. If the officer's suspicions persisted, he could arrest the driver. One day prior to the implementation of this program, Rick Sitz filed suit against the Michigan State Police and its director.[1] Sitz sought and obtained a declaratory judgment and injunctive relief prohibiting the initiation of the sobriety checkpoint program.[2]

The Michigan Court of Appeals affirmed the trial court's conclusion that the sobriety checkpoints violated the fourth amendment search and seizure clause of the United States Constitution.[3] The appellate court applied a three-prong balancing test citing "the state's interest in [the] prevention of alcohol related accidents; the sobriety checkpoint's ability to achieve that goal; and the intrusion on individual privacy."[4] The court discussed the state's legitimate interest in implementing the program, but held that the

1. Sitz v. Department of State Police, 170 Mich. App. 433, 429 N.W.2d 180, 181 (Mich. App. 1988). Sitz and the five other plaintiffs were licensed Michigan drivers who traveled throughout the state. *Id.*

2. *Id.*

3. *Id.* at 185. The fourth amendment to the United States Constitution states, inter alia, that "[t]he right of the people to be secure in their persons . . . and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV. Sitz originally claimed that the checkpoint violated both the United States Constitution and the Michigan Constitution. The relevant portion of the Michigan Constitution states that, "[t]he person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation." M.C.L.A. CONST. art. I, § 11. Since the Michigan Court of Appeals held the sobriety checkpoint invalid under the United States Constitution, the Court did not consider the validity of the checkpoint under the Michigan Constitution. *Sitz*, 429 N.W.2d at 185.

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

intrusion substantially interfered with personal liberties[5] and that the state afforded no empirical proof that the checkpoints actually would curtail drunk driving.[6] The United States Supreme Court granted certiorari to determine the constitutionality of the checkpoints under the fourth amendment.[7] *Held, reversed and remanded*: Brief stops at sobriety checkpoints to question drivers for signs of intoxication without probable cause or reasonable suspicion do not violate the individual's right to be free from unreasonable search and seizure under the fourth amendment. *Michigan Department of State Police v. Sitz*, 110 S.Ct. 2481, 2488, 110 L. Ed. 2d 412, 423 (1990).

I. REASONABLENESS UNDER THE FOURTH AMENDMENT

The fourth amendment to the United States Constitution protects "the individual's legitimate expectations [of privacy] that in certain places and at certain times he has the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[8] The Supreme Court has interpreted the fourth amendment as "safeguard[ing] the privacy and security of individuals against arbitrary invasions by governmental officials,"[9] and has mandated courts to weigh the protection provided by the fourth amendment against the reasonableness of an officer's search and seizure under the circumstances.[10]

A traditional search and seizure as a prelude to an arrest requires probable cause and a search warrant.[11] The Supreme Court has recognized that probable cause is not necessarily a prerequisite, however, for a constitutional search and seizure.[12] As a result, searches and seizures which are less intrusive than a traditional arrest may comply with the fourth amendment when

5. *Id.* at 184. Individual intrusion is judged both on the objective level, which includes the stop itself, the visual inspection of the car, and the type of questioning involved, and the subjective level which involves any concern or fear generated in law abiding motorists. *Id.*; *see also* Jacobs and Strossen, *Mass Investigations Without Individualized Suspicion: A Constitutional and Policy Critique of Drunk Driving Roadblocks*, 18 U.C. DAVIS L. REV. 595, 649 (1985) (discussion of objective and subjective intrusion).

6. *Sitz*, 429 N.W.2d at 184. As evidence of the ineffectiveness of the procedures, the court cited the low proportion of arrested drunk drivers to the number of cars stopped at the roadblock. *Id.*

7. Michigan Department of State Police v. Sitz, 110 S. Ct. 2481, 2484, 110 L. Ed. 2d 418, 419 (1990).

8. Winston v. Lee, 470 U.S. 753, 758 (1985) (quoting Olmstead v. United States, 277 U.S. 430, 478 (1927)).

9. *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523, 528 (1967) (discussion of purpose of fourth amendment); Marshall v. Barlows, Inc., 436 U.S. 307, 312 (1978) (fourth amendment serves to safeguard individual's right to privacy); Delaware v. Prouse, 440 U.S. 648, 654 (1979) (discussion of protection from arbitrary invasions by governmental officials).

10. *Camara*, 387 U.S. at 527.

11. Chambers v. Maroney, 399 U.S. 42, 51 (1970). The probable cause requirement is "the best compromise that has been found for accommodating" the opposing interests of individual privacy and effectiveness of law enforcement. Brinegar v. United States, 338 U.S. 160, 176 (1949). For a definition and discussion of the probable cause standard, see Carroll v. United States, 267 U.S. 132, 161 (1925).

12. Terry v. Ohio, 392 U.S. 1, 21 (1968). For an excellent discussion on the application of probable cause and reasonable suspicion by the Supreme Court after Terry v. Ohio, see Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984).

reasonableness can be shown by "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[13] The Court has further held that when procedures are minimally intrusive on individual rights, courts should substitute probable cause and reasonable suspicion for a balancing test weighing the state's interest in implementing the program, the effectiveness of the procedure, and the intrusion on individual liberties.[14]

Specifically, a seizure occurs when a law enforcement officer stops a vehicle.[15] When such seizure occurs, individual states must uphold any fourth amendment protections.[16] The Supreme Court, however, interpreted the fourth amendment to allow state courts addressing search and seizure procedures involving vehicles to require less than the traditional probable cause requirement to satisfy reasonableness.[17] Depending upon the situation, the Supreme Court has articulated three standards to evaluate the constitutional validity of vehicle search and seizure at immigration and administrative checkpoints: probable cause, reasonable suspicion, or a balancing test.[18]

A. Immigration Checkpoints

The Supreme Court has held that in situations where a border patrol officer conducts a search *and* a seizure, the level of intrusion on an individual is not minimal and the officer must have probable cause.[19] The government in *Almeida-Sanchez v. United States*[20] argued that a roving patrol had discretionary authority to stop and search any car for illegal alien transportation.[21] The Supreme Court, concerned with the broad discretionary power

13. *Terry*, 392 U.S. at 21.

14. Brown v. Texas, 443 U.S. 49, 51 (1979).

15. Brower v. County of Inyo, 109 S. Ct. 1378, 1381, 103 L. Ed. 2d 628, 635 (1989). A seizure occurs when the government terminates a person's "movement *through means intentionally applied*." *Id.* (emphasis in original).

16. *See* Mapp v. Ohio, 367 U.S. 643, 660 (1961). The rights under the fourth amendment are made applicable to the individual states through the fourteenth amendment. *Id. See also* Ker v. State of California, 374 U.S. 23, 30 (1963) (fourth amendment is enforceable against states by application of the same constitutional standard prohibiting unreasonableness).

17. South Dakota v. Opperman, 428 U.S. 364, 367 (1976). The Court cited two distinctions between homes or offices and vehicles. First, automobile mobility often makes it impractical to enforce strict warrant requirements in certain circumstances. Second, an individual's expectation of privacy in a vehicle is considerably less than in her home because of extensive governmental regulations involved in vehicle use and licensing, as well as the inherently public nature of driving. *Id.* at 367. The applicability of this case to aircraft, mobile homes, and other forms of transportation has yet to be decided. Mobile homes would seem to present the court with the peculiar issue of whether a mobile home is a house or a vehicle.

18. *See infra* text p. 1279-83. *See* Note, *Curbing the Drunk Driver Under the Fourth Amendment: The Constitutionality of Roadblock Seizures*, 71 GEO. L.J. 1457 (1983) (authored by Richard A. Ifft) (discussion of Supreme Court cases dealing with immigration and administrative checkpoints).

19. *See infra* text p. 1279-81.

20. 413 U.S. 266 (1973) (roving patrol stopped petitioner's car without suspicion or probable cause and, while searching the vehicle, discovered he was transporting marijuana).

21. *Id.* at 267. Three procedures are used to detect illegal aliens: permanent checkpoints consistently maintained in one location, temporary checkpoints varying in time and place, and roving patrols stopping cars at the officer's discretion. *Id.*

given by the statute to officers in selecting which cars to stop, disagreed.[22] The Court held that an officer on roving patrol must have a warrant and either consent or probable cause to search and seize a vehicle.[23]

United States v. Ortiz[24] presented a similar situation. The Court considered whether patrol officers at permanent checkpoints[25] must meet the *Almeida-Sanchez* reasonableness test to stop and search a vehicle as a roving patrol.[26] The government contended that the nature of permanent checkpoints, as opposed to roving patrols, both limited officer discretion[27] and made the search less intrusive.[28] The Supreme Court disagreed and held that the search and seizure of vehicles at permanent checkpoints was intrusive, and although it did not require a warrant, consent or probable cause was required.[29]

In situations where the validity of the search and seizure are separate, the Court will apply a reasonable suspicion standard or a balancing test depending upon whether it has held that if the initial seizure is minimally intrusive on individual rights.[30] A secondary search, which is more intrusive than the initial seizure, may still require consent or probable cause, however.[31]

In *United States v. Brignoni-Ponce*,[32] the government claimed that a roving patrol had the authority to stop a vehicle near the border, question the citizenship of the occupants, and conduct a search at the officer's discretion.[33] The Supreme Court, however, required a less stringent reasonableness standard for the initial questioning.[34] The *Brignoni-Ponce* Court considered the "balance between the public interest and the individual's

22. *Id.* at 270.

23. *Id.* at 273. The Court emphasized that a search at the discretion of an individual police officer without a warrant, probable cause, or reasonable suspicion was "precisely the evil the Court saw . . . when it insisted that the 'discretion of the officials in the field be circumscribed by obtaining a warrant prior to the inspection.' " *Id.* at 270 (quoting Camara v. Municipal Court, 387 U.S. 523, 532 (1967)).

24. 422 U.S. 891 (1975) (border patrol officers stopped vehicle at a permanent checkpoint without reasonable suspicion or probable cause).

25. *Id.* at 893. The checkpoints required all vehicles to pass officers. Officers stopped cars suspected of transporting illegal aliens and questioned the citizenship of each occupant. If the officer continued to suspect that the occupants were transporting aliens, he then had the authority to search the vehicle. *Id.*

26. *Id.* at 892.

27. *Id.* at 894. The government argued that the permanent nature of the checkpoint limited officer discretion in determining which vehicles to stop. *Id.*

28. United States v. Ortiz, 422 U.S. at 894. The government contended that checkpoints were less intrusive since motorists could see officers stopping other vehicles, and could detect officer authority. Drivers, therefore, would be less likely to become annoyed or frightened. *Id.*

29. *Id.* at 897. The Court found that the low percentage of cars police officers actually searched after initial questioning indicated that the discretionary authority of the officer and the intrusion was still considerably high. *Id.* at 895.

30. *See infra* text p. 1280-81.

31. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 567 (1976) (brief stops do not require probable cause or a warrant); United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975) (inspection beyond initial stop must be based on consent or probable cause).

32. 422 U.S. 873 (1975) (roving patrol stopped respondent's car and searched solely because the occupants looked Hispanic).

33. *Id.* at 875.

34. *Id.* at 878.

right to personal security free from arbitrary interference by law officers."[35] The Court held that a limited seizure to question the occupants complied with constitutional standards[36] due to the modest infringement on fourth amendment rights,[37] and significant public interest.[38] The Court held that an officer may seize a vehicle if his observations lead him reasonably to suspect the vehicle contains illegal aliens.[39] A secondary search beyond initial questioning, however, would require traditional probable cause or consent.[40]

United States v. Martinez-Fuerte[41] addressed the more limited issue of whether an officer could stop a motorist for brief questioning at a fixed checkpoint without suspicion that the vehicle contained illegal aliens.[42] Finding the procedure minimally intrusive, the Court judged its reasonableness by balancing the public interest of immigration control against an individual's fourth amendment rights against intrusion.[43] The Court's conclusion centered upon the significant need for routine checkpoint stops[44] and the individual intrusion.[45] Accordingly, since this procedure was "substantially less intrusive than arrest," the Court held that an officer does not need specific suspicion to stop and question a motorist; probable cause could be substituted for the balancing test.[46]

B. Administrative Searches

The Supreme Court used the reasoning of immigration checkpoint opinions in *Delaware v. Prouse*[47] to invalidate roving patrols checking a driver's license and vehicle registration.[48] The Court balanced the individual intru-

35. *Id.*

36. *Brignoni-Ponce*, 422 U.S. at 874. The Court distinguished this case from *Almeida* because the border patrol did not claim any authority to search cars, but only stopped and questioned occupants regarding citizenship or immigration status. *Id.*

37. *Id.* at 880. The Court defined the intrusion as being modest because of the short duration of the stop. On average, an officer does not stop a car for more than one minute, with the inquiry limited to simple questions and possibly requests to produce basic documents. *Id.*

38. *Id.* at 884.

39. *Id.*

40. *Id.* at 881.

41. 428 U.S. 543 (1976) (respondents' vehicles stopped for questioning at permanent illegal alien checkpoints).

42. *Id.* at 545.

43. *Id.* at 555.

44. *Id.* at 552.

45. *Martinez-Fuerte*, 428 U.S. at 559. The Court compared seizure at a fixed checkpoint to seizure by a roving patrol and found the objective intrusion minimal and the subjective intrusion considerably less than at a fixed checkpoint. The Court noted that at permanent checkpoints, motorists saw visual signs of authority, officers stopped cars according to a procedure, officers performed the stops with regularity, individual officers possessed significantly less discretionary authority, the checkpoint purpose was limited, and minimal interference with traffic occurred. *Id.*

46. *Id.* at 562. *See* Dunaway v. New York, 442 U.S. 200, 210 (1979). The *Martinez-Fuerte* Court noted that individualized suspicion is generally required but "the Fourth Amendment imposes no irreducible requirement of such suspicion." *Martinez-Fuerte*, 428 U.S. at 560.

47. 440 U.S. 648 (1978) (roving police officer stopped respondent's car to check license and registration without any suspicion of safety or equipment violations).

48. *Id.* at 658.

sion on the motorist, the promotion of legitimate governmental interests, and the effectiveness of the police procedure.[49] Although the Court found the state interest legitimate, it held the roving stops an ineffective method to promote these state interests[50] because of the significant intrusion on an individual.[51] Since two of the three prongs of the balancing test were inapplicable, the Court held that the search and seizure violated the fourth amendment unless the officer had "at least [an] articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered . . . ."[52] The Court suggested that a more routine and restricted checkpoint involving substantially less discretionary authority by police might be constitutional.[53] The Court further stated that the "[q]uestioning of all oncoming traffic at roadblock-type stops is one possible alternative."[54]

In *Brown v. Texas*[55] the Court finalized a balancing test for evaluating the reasonableness of seizures less intrusive than traditional arrest.[56] Courts must balance ". . . the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."[57]

In determining the validity of sobriety checkpoints under the fourth amendment, state courts have applied a variety of tests resulting in differing analysis and outcomes.[58] The Supreme Court addressed this issue in *Michi-*

---

49. *Id.* at 654.

50. *Id.* at 667. The Court found the subjective intrusion in the administrative stop similar to a roving patrol to detect illegal aliens. Both involved significant discretion on the officer's part and promoted fear and anxiety in the driver being detained. *Id.*

51. *Id.* at 659. The Court cited a number of alternative and effective methods for checking a license and vehicle registration and held that roving spot checks were not significantly more productive than alternative methods. *Id.* at 895.

52. *Id.* at 663.

53. *Id.* at 664. "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." *Id.* (footnote omitted).

54. *Id.* at 664.

55. 443 U.S. 47 (1979) (police lacking any specific suspicion, stopped appellant outside an alley cited as a "high drug problem area").

56. *Id.* at 51.

57. *Id.* The Court reasoned that ". . . a seizure must be based on either specific, objective facts indicating . . . society's legitimate interests . . . [in] seiz[ing] the particular individual, or that the seizure must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Id.* (quoting Delaware v. Prouse, 440 U.S. 648, 663 (1978)).

58. For cases concluding that sobriety checkpoints are constitutional, see Ingersoll v. Palmer, 43 Cal. 3d 1321, 743 P.2d 1299, 1311, 241 Cal. Rptr. 42 (1987) (neutral criteria standard); People v. Bartley, 109 Ill. 2d 273, 486 N.E.2d 880, 883 (1985) (balanced individual intrusion versus need for the intrusion); State v. Deskins, 234 Kan. 529, 673 P.2d 1174, 1184 (1983) (balanced degree of legitimate governmental interest versus intrusion); State v. Coccomo, 177 N.J. Super. 575, 427 A.2d 131, 134 (1980) (balance state interest against inconvenience). For cases holding sobriety checkpoints unconstitutional, see State v. Garcia, 489 N.E.2d 168, 171 (Ind. Ct. App. 1986) (state supervisory decision whether to use individual suspicion or roadblocks); State v. McLaughlin, 471 N.E.2d 1125, 1136 (Ind. Ct. App. 1984) (balance gravity of concern served, degree it advances state interest and severity of intrusion); State v. Smith, 674 P.2d 562, 563 (Okla. Crim. App. 1984) (balance the type of roadblock, its purpose, and degree of intrusion).

gan Department of State Police v. Sitz.[59]

II. MICHIGAN DEPT. OF STATE POLICE V. SITZ

A. The Majority Opinion

In *Sitz*, the Supreme Court addressed the issue of whether the initial stop to question drivers at sobriety checkpoints violated the individual's right to be free from unreasonable search and seizure.[60] Justice Rehnquist, writing for the majority,[61] approved the appellate court's application of the *Brown* test, but disagreed with the court's conclusion on two of the three prongs.[62] The Supreme Court upheld the constitutionality of the sobriety checkpoint[63] after analyzing the substantial public interest in preventing drunk driving tragedies, the effectiveness of this method in achieving the state goal, and the minimal level of infringement the checkpoint has on personal liberties.[64]

The Court first stated that the initial stop constituted a seizure[65] invoking the reasonableness requirement in the fourth amendment.[66] Justice Rehnquist refuted the respondent's contention that the proper method of evaluating reasonableness was the *Brown* balancing test, not reasonable suspicion or probable cause.[67] Respondents interpreted *National Treasury Employees Union v. Von Raab*[68] as holding that law enforcement officials must show a special governmental need before courts will apply a balancing test.[69] The majority disagreed, and relied on *Martinez-Fuerte* and *Brown* as the appropriate authorities because police stops on public highways represent a substantially less intrusive procedure than traditional arrest.[70]

---

59. Michigan Dept. of State Police v. Sitz, 110 S. Ct. 2481, 2485, 110 L. Ed. 2d 412, 419 (1990).

60. *Id.* The Court considered only the officer's initial stop, preliminary questioning, and observations. Subsequent detention of an individual, the Court noted, may require some level of suspicion. *Id.*, 110 L. Ed. 2d at 420.

61. *Id.* at 2481, 110 L. Ed. 2d at 418. Justices White, O'Connor, Scalia and Kennedy joined Justice Rehnquist in this opinion. *Id.*

62. The majority agreed that the state possessed a grave interest in curtailing the drunk driving problem in Michigan. *Id.* at 2485, 110 L. Ed. 2d at 420. The Court, however, disagreed with the appellate court's determination that the roadblock procedure overly intruded on individual rights. *Id.* at 2486, 110 L. Ed. 2d at 421. Further, the Court disagreed with the lower court's conclusion that the procedure did not represent an effective means to curtail drunk driving. *Id.* at 2487, 110 L. Ed. 2d at 422.

63. *Sitz*, 110 S. Ct. at 2488, 110 L. Ed. 2d at 423.

64. *Id.* at 2492, 110 L. Ed. 2d at 428.

65. *Id.* at 2485, 110 L. Ed. 2d at 420. For a discussion on intrusiveness, see *infra* note 5 and accompanying text.

66. *Id.* at 2485, 110 L. Ed. 2d at 420.

67. *Id.* at 2484, 110 L. Ed. 2d at 419.

68. 109 S. Ct. 1384, 103 L. Ed. 2d 685 (1989) (respondents implemented a procedure making customs service employee's promotions contingent on passing a urinalysis test).

69. *Sitz*, 110 S. Ct. at 2485, 110 L. Ed. 2d at 420. The pertinent language is as follows: "[w]here a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interest to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." *Von Raab*, 109 S. Ct. at 1390, 103 L. Ed. 2d at 702.

70. *Sitz*, 110 S. Ct. at 2485, 110 L. Ed. 2d at 420.

Agreeing with the appellate court, the majority in *Sitz* applied the first prong of the *Brown* balancing test and recognized the substantial state interest in curtailing drunk driving accidents on public highways.[71] The Court cited statistics which showed that drunk drivers are responsible for over 25,000 deaths and personal injuries every year.[72] Checking the second prong of the *Brown* test, the majority weighed state interest with personal intrusion on the stopped motorist.[73] The Court compared this intrusion to the immigration stops it approved in *Martinez-Fuerte*[74] and, in contrast to the appellate court, labeled the intrusion minimal.[75] The Court found the "objective" intrusion, or the duration and intensity of the seizure, minimal.[76] Further, the Court found the "subjective" intrusion, or the fear and surprise, modest[77] because "[a]t traffic checkpoints the motorist can see officers stop other vehicles, he can see visible signs of the officers' authority and he is much less likely to be frightened or annoyed by the intrusion."[78]

Looking to the third and final prong of the *Brown* balancing test, the effectiveness of sobriety checkpoints in protecting the state's legitimate interest,[79] the Court majority disagreed with the appellate court conclusion that the procedure was ineffective.[80] First, the Court noted that a governmental procedure need only advance the public interest under the balancing test.[81] State officials with knowledge and experience in the relevant area must, therefore, use discretion in selecting which specific procedure to utilize.[82] The Court held that the judiciary is not authorized to determine which of the many reasonable procedures most effectively achieves this state goal.[83] In distinguishing *Prouse v. Delaware*, the majority concluded its effectiveness analysis by considering whether the empirical evidence indicated that the procedure advanced the public interest. The government in *Prouse* offered no empirical data showing that random stops of vehicles to check license and

---

71. *Id.*

72. *Id. See* 4 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.8(d) (2d ed. 1987). *See also* South Dakota v. Neville, 459 U.S. 553, 558 (1983) (documentation of carnage from drunk drivers); Breithaupt v. Abram, 352 U.S. 432, 439 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield.").

73. *Sitz*, 110 S. Ct. at 2486, 110 L. Ed. 2d at 421.

74. *Id.*, 110 L. Ed. 2d at 422. The Court found no difference between the two types of checkpoints except for the type of questions asked. *Id.*

75. *Id.*

76. *Id.*

77. *Sitz*, 110 S. Ct. at 2486, 110 L. Ed. 2d at 422. The Court judges "subjective" intrusion by the fear and surprise of law abiding citizens, not drunk drivers. Since the Michigan Court of Appeals concluded that the subjective intrusion was unreasonable, the majority assumed that it misread previous Supreme Court cases and included drunk drivers in the analysis. *Id.*

78. *Id.* (quoting United States v. Ortiz, 422 U.S. 891, 894 (1975)).

79. *Id.* at 2487, 110 L. Ed. 2d at 422.

80. *Sitz*, 110 S.Ct. at 2487, 110 L. Ed. 2d at 422.

81. *Id.*; *see Brown v. Texas*, 443 U.S. 47, 51 (1979).

82. *Sitz*, 110 S. Ct. at 2487, 110 L. Ed. 2d at 422.

83. *Id.*, 110 L. Ed. 2d at 423. The majority disagreed with the Michigan Court of Appeals' conclusion that court testimony demonstrated the ineffectiveness of these roadblocks and, as a result, did not futher state interests. *Id.*

registration resulted in increased public safety.[84] The government in *Sitz* offered two forms of evidence. First, the State of Michigan showed that on its single night of operation, the checkpoint in question resulted in two drunk driving arrests out of 126 vehicles stopped. Thus, approximately 1.5 percent of cars checked resulted in arrest.[85] Second, expert testimony verified that the average 1% rate of arrest at sobriety checkpoints was universal.[86] In comparing the similarity between this percentage arrest rate for drunk driving to the rate of deportation cited in *Martinez-Fuerte*,[87] the Court found no reason to differentiate the two cases and held that the procedure's effectiveness and the advancement of public interest existed.[88]

B. Justice Blackmun's Concurrence

Justice Blackmun concurred in the judgment;[89] he agreed with the analysis and resulting conclusion and recalled past opinions which documented his dedication to preventing the dangers posed by drunk drivers on public highways.[90] Justice Blackmun offered no alternative to or disagreement with the majority rationale.[91]

C. Justice Brennan's Dissent

Justice Brennan dissented,[92] objecting to two majority points. First, he criticized the majority's inference that the *Brown* balancing test applied to all police stops on public highways.[93] He questioned the majority's holding that only where the seizure is "substantially less intrusive" than a traditional arrest will the Court dismiss the need for probable cause or reasonableness and substitute a balancing test.[94] Although Justice Brennan acknowledged that the stop in this case constituted a less intrusive procedure than a traditional arrest, he argued that minimal intrusiveness, rather than the actual stop and seizure, properly triggered the *Brown* balancing test.[95]

Second, Justice Brennan disagreed with the majority's parallel application of *Martinez-Fuerte* to *Sitz*.[96] He contended that the Court in *Martinez-Fuerte* allowed police stops without suspicion because heavy traffic flow made it

84. *Id.*; *see also* Delaware v. Prouse, 440 U.S. 648, 659 (1978) (the court held that finding unlicensed drivers at random stops is much less likely than finding unlicensed drivers stopped pursuant to traffic violations).

85. *Sitz*, 110 S. Ct. at 2487, 110 L. Ed. 2d at 423.

86. *Id.* at 2488, 110 L. Ed. 2d at 423.

87. *Id.* The Court upheld ratio of aliens caught and deported to cars stopped equal to .12 percent as adequate empirical data. *Id.*

88. *Id.*

89. *Sitz*, 110 S. Ct. at 2488, 110 L. Ed. 2d at 424.

90. *Id.*; *See* Perez v. Campbell, 402 U.S. 637, 657 (1971) (Blackmun, J., concurring); Tate v. Short, 401 U.S. 395, 401 (1971) (Blackmun, J., concurring).

91. *Id.*, 110 L. Ed. 2d at 424.

92. *Sitz*, 110 S. Ct. at 2488, 110 L. Ed. 2d at 424. Justice Marshall joined Justice Brennan in his dissent. *Id.*

93. *Id.*

94. *Id.* at 2489, 110 L. Ed. 2d at 425.

95. *Id.*

96. *Sitz*, 110 S. Ct. at 2489, 110 L. Ed. 2d at 425.

impossible for officers to scrutinize each car in order to develop a reasonable suspicion as to the presence of illegal aliens.[97] Brennan argued that in *Sitz*, the government presented no evidence that a similar problem existed in detecting drunk drivers.[98] He contended that before sobriety checkpoints could be validated by the fourth amendment, regardless of their intrusiveness, proof must necessarily show that an individualized suspicion standard could not be met through traditional procedures.[99]

D. Justice Stevens' Dissent

In a second dissent, Justice Stevens[100] contended that the majority misapplied the *Brown* balancing test and offered a three part argument in support of his position.[101] In part I, Justice Stevens maintained that temporary drunk driving checkpoints resemble roving patrols, not permanent checkpoints.[102] First, he noted that temporary checkpoints come as a surprise to motorists whereas at permanent checkpoints, the driver has the option of avoiding the checkpoint.[103] Second, a temporary checkpoint creates fear and anxiety in the motorist because a driver approaches unaware of its existence.[104] Third, temporary sobriety checkpoints put more discretionary authority in the hands of police officers.[105] In border and license stops motorists must produce a document, whereas in sobriety checks, police have the discretion to subjectively suspect a driver of being intoxicated.[106] Fourth, Stevens noted that most permanent checkpoints operate during daylight, whereas sobriety checkpoints operate in darkness, and thus are far more offensive to drivers.[107] In contending that *United States v. Brignoni-Ponce* controls the instant case, Justice Stevens would require police to prove that sobriety checkpoints are the most effective means of curtailing drunk drivers in order to justify the intrusion on the individual's fourth amendment rights.[108]

In part II, Justice Stevens agreed with the majority regarding both the indisputable public concern over drunk driving[109] and the modest intrusion

97. *Id.*; *see* United States v. Martinez-Fuerte, 428 U.S. 543, 557 (1976).

98. *Sitz*, 110 S. Ct. at 2489, 110 L. Ed. 2d at 426.

99. *Id.* at 2490, 110 L. Ed. 2d at 426. Justice Brennan acknowledged the state interest, yet noted that ". . . consensus that a particular law enforcement technique serves a laudable purpose has never been the touchstone of constitutional analysis." *Id.*

100. *Sitz*, 110 S. Ct. at 2490, 110 L. Ed. 2d at 426. Justices Brennan and Marshall joined Justice Stevens in parts I and II of his dissent. *Id.*

101. *Id.* at 2492-97, 110 L. Ed. 2d at 428-35.

102. *Id.* at 2492, 110 L. Ed. 2d at 428.

103. *Id.*, 110 L. Ed. 2d at 429. Stevens noted that temporary checkpoints were neither preceded by notice nor predictable from weekend to weekend. *Id.*

104. *Sitz*, 110 S. Ct. at 2493, 110 L. Ed. 2d at 429. Stevens contended that fear and apprehension of being stopped occurs not only in the drunk drivers, but also in law abiding citizens. *Id.*

105. *Id.*

106. *Id.*

107. *Sitz*, 110 S. Ct. at 2493, 110 L. Ed. 2d at 430.

108. *Id.*

109. *Id.* at 2494, 110 L. Ed. 2d at 431.

on private rights,[110] but disagreed that sobriety checkpoints constituted an effective procedure to curtail drunk drivers on public highways.[111] Stevens pointed to both a lack of actual evidence that checkpoints serve as a more effective arrest mechanism than conventional patrols, and a lack of police officer support for sobriety checkpoints as an arrest tool.[112]

In part III, Justice Stevens emphasized the majority's seeming lack of concern with an individual's interest in remaining free from "suspicionless, unannounced, investigatory seizures."[113] He argued that sobriety checkpoints are unacceptable because they are inherently discretionary and occur at times when an individual possesses a reasonable expectation of privacy.[114] Stevens noted that law enforcement officials do not evenly apply the checkpoint procedures, the officer discretionarily decides when and where to set up the checkpoints and may conduct more or less thorough searches depending on the circumstances.[115] Notwithstanding the positive effects that publicity of conducting sobriety checkpoints may have on reducing the number of drunk drivers, Justice Stevens concluded that the checkpoints are too great an infringement on an individual's fourth amendment rights.[116]

III. CONCLUSION

In *Michigan Department of State Police v. Sitz*, the Supreme Court held sobriety checkpoints constitutional under the fourth amendment. The Court applied a three-part balancing test from *Brown v. Texas*, weighing the intrusion on personal rights, the state's public policy interest, and the effectiveness of the program in achieving state goals. The Court found the state's interest in curtailing drunk driving incidents on public highways substantial, the individual intrusion on personal freedom minimal, and the effectiveness of the procedure substantiated through statistical evidence. Justice Brennan dissented and argued that officials should apply the balancing test only if they can demonstrate that a reasonable suspicion standard is ineffective to meet state goals. Justice Stevens, in a second dissent, argued that the majority should not have applied the *Brown* balancing test, and further argued that even if the *Brown* test did apply, law enforcement officials had not met all three prongs of the test.

The majority's decision requires courts to determine the degree to which the checkpoint procedure intrudes on an individual's personal liberty. If the

110. *Id.* at 2495, 110 L. Ed. 2d at 432. Stevens strongly disagreed with this conclusion, but conceded that "my difference with the Court may amount to nothing less than a difference in our respective evaluations of the importance of individual liberty . . . ."

111. *Sitz*, 110 S. Ct. at 2495, 110 L. Ed. 2d at 432.

112. *Id.*, 110 L. Ed. 2d at 433. Given officer praise for the deterrent effect of sobriety roadblocks, the majority's analysis of arrest rates did not prove cogent for Justice Stevens. *Id.*

113. *Id.* at 2497, 110 L. Ed. 2d at 435.

114. *Id.* While verifing his support for other checkpoints that have procedural neutrality, such as in an airline context, Justice Stevens isolated sobriety checkpoints as random and suspicionless. *Id.*

115. *Id.* at 2498, 110 L. Ed. 2d at 436.

116. *Id.* at 2499, 110 L. Ed. 2d at 437; *see* Treasury Employees v. Von Raab, 109 S. Ct. 1384, 1401, 103 L. Ed. 2d 685, 715 (Scalia, J., dissenting).

procedure is substantially less intrusive than a traditional arrest, law enforcement officials can dismiss probable cause and reasonable suspicion and apply a balancing test. If the procedure is substantially intrusive, the officials must meet the probable cause or reasonable suspicion standard. Although this decision is laudable in theory and the public will undeniably embrace it as a positive step toward curtailing the drunk driving problems, the majority's opinion leaves some troubling questions unanswered. First, the majority does not seem to follow its traditional concern for unbridled police discretion. Although the nature of the permanent drunk driving checkpoint reduces police discretion in who they pull over, the officer still looks at a driver's eyes, listens to his speech and evaluates his answers, and then decides whether to subject the driver to a secondary stop. Second, the Court apparently considered no evidence regarding the effectiveness of the permanent roadblocks in relation to other methods of detecting drunk drivers. This consideration was important to the Supreme Courts' decision in *Delaware v. Prouse*. Here, the Supreme Court utilized this evidence to conclude that random stops were not more effective than other methods to check drivers' licenses and registration. It remains to be seen how individual states will evaluate the Supreme Court's factors and whether this decision will have a positive impact on the number of drunk driving deaths on public highways.