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Michigan's Attempt at Curbing Drunk Drivers Under The Fourth Amendment: The Constitutionality of Sobriety Checkpoints

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I. INTRODUCTION

The United States Supreme Court recently expanded the doctrine of warrantless searches.[1] The area of warrantless searches is confusing and often irrational,[2] and the Court's decision in *Michigan Department of State Police v. Sitz* only adds to the tangled web of confusion. In referring to this area, Justice Powell stated that the Court "cannot agree even on what it has held previously, let alone on how these cases should be decided."[3] The *Sitz* case is no exception.

This Note discusses how the Court misapplied the balancing test established in *Brown v. Texas*[4] by undervaluing the nature of the intrusion and by exaggerating the law enforcement need to use sobriety checkpoints to prevent drunk driving.[5] This Note does not deny the immense social costs drunk drivers cause, nor does it slight the government's effort to prevent the tragic loss of lives on our public highways. This Note does, however, agree with Justice Stevens conclusion that the *Sitz* decision is "driven by nothing more than symbolic state action—an insufficient justification for an otherwise unreasonable program of random seizures."[6] The Court set its sights on the wrong symbol—"the illusory prospect of punishing countless intoxicated motorists"—when the focus should have been on privacy rights.[7]

II. FOURTH AMENDMENT BACKGROUND

The Fourth Amendment protects "[t]he right of people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures . . . ."[8] Prior to

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1. Michigan Dep't of State Police v. Sitz, 110 S.Ct. 2481 (1990).
2. A majority of the Supreme Court refers to the law of vehicle searches as "this troubled area." United States v. Ross, 456 U.S. 798, 817 (1982).
3. Robbins v. California 453 U.S. 420, 430 (1981) (Powell, J., concurring), *overruled*, United States v. Ross, 456 U.S. 798 (1982).
4. 443 U.S. 47 (1979).
5. Sobriety checkpoints are stops by patrol officers to detect individuals that are drinking and driving.
6. Michigan Dep't of State Police v. Sitz, 496 U.S. 444, ??? (1990) (Stevens, J., dissenting).
7. *Id.*
8. U.S. CONST. amend. IV.

1968, the Supreme Court considered arrests and seizures to be synonymous under the Fourth Amendment, but that has since changed.[9] The difference between an arrest and a seizure now depends upon the scope of the intrusion.[10] Another difference is that an arrest or a seizure having the essential attributes of a formal arrest must always be based upon probable cause,[11] whereas some seizures, like a *Terry* stop,[12] require a lesser standard.[13] The reasonableness of a seizure is based upon whether probable cause exists.[14]

The Court allows seizures of persons so long as only a brief detention is involved.[15] In *Brown*, the Court enunciated a balancing test to govern such searches. The *Brown* Court refined the prior tests by weighing the gravity of the public concern served by the seizure and the degree to which the seizure advances the public interest against the severity of the interference with individual liberty.[16] The objective standard of probable cause or reasonable suspicion, normally used in evaluating the constitutionality of any stop, only gives way to the balancing test under special circumstances.[17] In *National Treasury Employees Union v. Von Raab*, the Court stated that special circumstances arise when the "intrusion serves special government needs, beyond the normal needs of law enforcement . . . ."[18]

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9. Dunaway v. New York, 442 U.S. 200, 207-210 (1979).

10. *See e.g.*, United States v. Hill, 626 F.2d 429, 435-36 (5th Cir. 1980).

11. *See* Michigan v. Summers, 452 U.S. 692, 700 (1981).

12. "[A] police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possible criminal behavior even though there is no probable cause to make an arrest." Terry v. Ohio, 392 U.S. 1, 22 (1968).

13. *See Id.*

14. Ker v. California, 374 U.S. 23, 34-35 (1963).

15. Florida v. Royer, 460 U.S. 491 (1983).

16. Brown v. Texas, 443 U.S. 47, 51 (1979). The Court emphasized that a central concern in the balancing test is that the "privacy is not subject to arbitrary invasions solely at the unfettered discretion of officers in the field." *Id.*

17. *See* National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989).

18. *Von Raab*, 489 U.S. at 665. Immigration checkpoints are necessary to discover illegal aliens. Smuggling illegal aliens does not impair the motorist's driving ability, but if a motorist is intoxicated his driving ability will be impaired. An intoxicated motorist can often be identified by his driving maneuvers, whereas a motorist carrying illegal aliens most likely cannot be spotted by observing driving patterns because he or she shows no sign of carrying illegal aliens. This would be an example of a special governmental need, beyond the normal needs of law enforcement. Without these permanent checkpoints, the government would be severely hampered in its enforcement.

Before *Sitz*, three important cases, involving investigatory stops of motorists, employed a balancing test to determine whether the suspicionless stop of a vehicle was reasonable. The cases are *United States v. Brignoni-Ponce*,[19] *United States v. Martinez-Fuerte*,[20] and *Delaware v. Prouse*.[21]

The first two cases—*Brignoni-Ponce* and *Martinez-Fuerte*—were border patrol cases. These two cases contrasted the differences between roving patrols[22] and permanent checkpoints. In both cases, the Court examined vehicle stops near the Mexican/United States border where agents questioned occupants about their citizenship and immigration status. In the first case, the Court determined that roving patrol stops by officers need to be based upon reasonable, articulable suspicion.[23] The Court, in the second case, stated that stops at permanent checkpoints are reasonable even though based upon no individualized suspicion.[24] In the third case, *Prouse*, the Court determined that random stops to check licenses and vehicle registration were more comparable to roving patrol stops by the border patrol than to permanent checkpoints.[25] The Court found that the physical and psychological intrusions caused by random stops to check documents are the same as roving patrol stops.[26]

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

A. *Facts*

Petitioners, the Michigan Department of State Police and its Director, organized a sobriety checkpoint pilot program in 1986.[27] In February of the same year, the Director appointed a Sobriety Checkpoint Advisory Committee, composed of representatives of the state police, local law enforcement, prosecuting attorneys, and the University of Mic-

19. 422 U.S. 873 (1975).
20. 428 U.S. 543 (1976).
21. 440 U.S. 648 (1979).
22. Roving patrols are random stops of motorists in the absence of specific articulated facts which justify the stop by indicating a reasonable suspicion. Delaware v. Prouse, 440 U.S. 648, 651 (1979).
23. *Brignoni-Ponce*, 422 U.S. at 881, 883.
24. *Martinez-Fuerte*, 428 U.S. at 562.
25. *Prouse*, 440 U.S. at 657.
26. *Id.*
27. Sitz v. Dep't of State Police, 429 N.W.2d 180, 181 (Mich. Ct. App. 1988).

higan Transportation Research Committee.[28] The committee submitted guidelines for implementation and operation of the program. Included in the guidelines were procedures governing "site selection, publicity, and operation of the checkpoint which included briefing, scheduling, safety considerations, motorist contact, staffing, and assignment of duties."[29]

When the checkpoints were set up, all vehicles were to be stopped upon reaching the checkpoint and the drivers "examined for signs of intoxication."[30] If the officer found evidence of intoxication, the officer would direct the driver to another location at the checkpoint for further examination.[31] If the more thorough examination showed the driver to be intoxicated, the officer would arrest the individual.[32] If the driver was not found to be intoxicated at either stage of the examination, the driver would be released.[33]

Prior to the litigation, only one checkpoint operation had been conducted in Michigan. During the operation of the checkpoint, wherein 126 vehicles passed through in a one hour and fifteen minute time period, only two people were arrested.[34] Each vehicle passing through the checkpoint was delayed an average of 25 seconds.[35]

The day before operation of the first checkpoint, Sitz and others filed a complaint in the circuit court seeking declaratory and injunctive relief from subjection to sobriety checkpoints.[36] Michigan agreed to suspend use of checkpoints pending the outcome in court. The trial court held the Michigan sobriety checkpoint to be unconstitutional under the Fourth Amendment.[37] On appeal, the Michigan Court of Appeals affirmed the lower court's decision finding the roadblocks unconstitutional seizures under both the

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28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. "Two drivers were detained for field sobriety testing, and one of the two was arrested for driving under the influence of alcohol. A third driver who drove through without stopping was pulled over by an officer in an observation vehicle and arrested for driving under the influence." *Sitz*, 496 U.S. at ???.
36. *Id.*
37. *Id.*

United States and Michigan Constitutions.[38] The Michigan Supreme Court denied Respondents' Application for Leave to Appeal, so they filed a Petition for Writ of Certiorari. The United States Supreme Court did not consider whether the checkpoints violated the Michigan Constitution, but rather reversed by holding that the Michigan courts misapplied the *Brown* test.[39]

B. The Majority's Application of the Brown *Test*

The *Brown* test weighs the gravity of the public concern served by the seizure and the degree to which the seizure advances the public interest against the severity of the interference with individual liberty.[40]

1. The state's interest in curbing drunk drivers on public highways

Most people agree that drunk driving is a serious problem in the United States and that a state has an important interest in eliminating drunk driving. Statistics show that drunk drivers cause a death toll of over 25,000 and nearly one million personal injuries annually.[41] Drunk drivers also cause more than five billion dollars in property damage per year.[42] "For decades the Court has 'repeatedly lamented the tragedy.'"[43]

2. Effectiveness of the stop

In evaluating the last element of the *Brown* test, the Court held that the Michigan Court of Appeals erred in their evaluation of the effectiveness of the stops.[44] The Court stated that this requirement in *Brown* "was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative

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38. *Id.*
39. *Id.*
40. *Brown*, 443 U.S. at 51.
41. 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.8(d), p. 71 (1987).
42. *Id.*
43. *Sitz*, 496 U.S. at ??? (quoting South Dakota v. Neville, 459 U.S. 553, 558 (1983)).
44. *Id.*

law enforcement techniques should be employed to deal with a serious public danger."[45] Rather, the Court gave great deference to the elected officials to choose among the alternatives.

3. The level of intrusion on the public's rights

While the Court agreed that there is an important state interest in curbing drunk driving, the Court's decision appears to view the individual's interest as very minimal.[46] The Court evaluated the magnitude of the intrusion on individual's rights by considering two different standards—objective and subjective.[47] Objective intrusion is measured by the duration of the stop.[48] In *Sitz*, the duration of the stops was an average of 25 seconds. According to the Court, the stops were but a minimal intrusion according to the objective standard.

Subjective intrusion is measured according to the perception of the individual drivers.[49] Some intrusions can generate concern, and even fear on the part of some drivers.[50] The Court found the intrusion to be less than that generated by a roving patrol because the driver could see others being pulled over.[51]

C. In an Effort to Make the Roads Safer, the Court Erred in Its Application of Brown

When officers detain a person for identification or questioning, they perform a seizure of the person subject to the requirements of the Fourth Amendment.[52] The Fourth Amendment applies to all seizures of the person, including seizures that involve only brief detention.[53] When the government intentionally terminates freedom of movement, a seizure, albeit brief, results.[54] The reasonableness of sei-

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45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. U.S. CONST. amend. IV.
53. Davis v. Mississippi, 394 U.S. 721 (1969); Terry v. Ohio, 392 U.S. 1, 16-19 (1968).
54. Brower v. County of Inyo, 489 U.S. 593, 597 (1989).

zures depends upon balancing the interest of the public with the individual's right to be free from arbitrary interference by law enforcement officials.[55]

1. The Brown *court's balancing test*

In *Brown*, the officers observed two individuals in an alley.[56] Because the officers believed the situation to be suspicious and one of the individuals had never been seen by the officers, the officers stopped him.[57] The individual was asked to identify himself and to explain what he was doing in the area. After refusing to identify himself, the police arrested the individual according to a Texas statute.[58] Following the arrest, the officers searched the individual but found nothing. A Texas court convicted the individual for refusing to give his name to the police officer.[59]

The officers, in support of their detention of the individual, stated that the area is frequented by drug users and is a high crime area.[60] They also stated that it is unusual for people to be in alleys.[61] Because of these factors, the officers detained the individual under a Texas statute which allows an officer to obtain the identity of an individual. The statute is designed to advance a compelling social objective—prevention of crime.[62]

The U.S. Supreme Court reversed the lower court's ruling, finding it an unconstitutional seizure. The Court held that, when a seizure is less intrusive than a traditional arrest, the lower courts must balance between the public interest and the individual's right to personal security free from arbitrary interference by the state.[63] While balancing, courts must also consider how the seizure advances the public's interest.[64] The Court went on to state that a sei-

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55. *Brignoni-Ponce*, 422 U.S. at 878.
56. Brown v. Texas, 443 U.S. 47, 48 (1979).
57. *Id.* at 49.
58. *Id.* (TEX. PENAL CODE ANN., Tit. 8, § 38.02 (a) (West 1974) makes it a criminal act for a person to refuse to give his name and address to an officer "who has lawfully stopped him and requested the information.").
59. *Id.* at 50.
60. *Id.* at 49.
61. *Id.* at 52.
62. *Id.*
63. *Id.*, at 50.
64. *Id.* at 51.

zure, without probable cause, "must be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers."[65] The Texas statute failed this test.

a. Public concern over the problem of drunk driving. The first prong of the *Brown* test looks at the gravity of the public concern.[66] Drunk driving causes many deaths on the highways. However, significant progress has been made in reducing the number of alcohol related highway fatalities and injuries. For example, in 1988 there were 18,501 traffic fatalities involving legally intoxicated persons. The number of legally intoxicated drivers killed in these crashes was 10,210, leaving 8,291 non-drivers killed in the accidents. "The portion of fatally injured drivers who were legally intoxicated dropped from 43.8% in 1982 to 37.5% in 1988."[67] The number of intoxicated drivers involved in fatal accidents has dropped in all age groups.[68] All of these improvements[69] have been achieved without checkpoints or with minimal use of checkpoints.

b. The degree to which seizures advance public interest. The second element of the test is the degree to which seizures advance the public interest.[70] This element of the *Brown* test was the central focus of the lower courts in *Sitz*. Justice Stevens stated in his dissent that courts need to look at the net benefits of the program, for example, the long-term effects and the costs of obtaining the arrests, instead of always looking at the gross receipts,

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65. *Id.*

66. *Id.*

67. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, U.S. DEPARTMENT OF TRANSPORTATION, FATAL ACCIDENT REPORTING SYSTEM 1988 6 (Dec. 1989). "The less alcohol, the less likely there will be an injury or fatality. Further, fatally injured drivers show higher alcohol levels than surviving drivers in all types of crashes and time periods." Brief of Amicus Curiae, MADD at 8, Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (No. ????) (favoring petition for Writ of Certiorari to the Michigan Court of Appeals) (citing NATIONAL CENTER OF STATISTICS AND ANALYSIS, U.S. DEPARTMENT OF TRANSPORTATION/NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, "DRUNK DRIVING FACTS" (Date ??)).

68. *Id.*

69. "[T]he National Highway Traffic Safety Administration estimates that an additional 5,000 lives per year would be saved if the 21 States without mandatory safety belt usage laws were to enact such legislation—even though only 50% of motorists obey such laws." Michigan Dep't of State Police v. Sitz, 496 U.S. 444, ??? n.2 (1990).

70. *Brown*, 443 U.S. at 47.

initial number of arrests.[71] If a business were to look only at gross receipts, all businesses would appear profitable. Most state decisions viewed in this light would also look advantageous. Only by comparing expenses to returns can a true measurement of a program's success be obtained.

From the outset of the program, Michigan's justification for the checkpoints was their deterrent effect, rather than the number of arrests facilitated.[72] Because of the extensive publicity initially given to Michigan's program, checkpoints may have some short-term effect on drunk driving statistics. However, long-term effectiveness of the program will only be achieved if the public perceives an increased risk of being arrested.[73] Once the public learns that there is only a slight risk of being arrested, any deterrent effect will end.[74] The deterrent effect of the checkpoints will also decrease as the media coverage is reduced, and as people realize that they can avoid the checkpoints by turning around. Short-term gains are no justification for an intrusion into an individual's rights.

The Michigan checkpoint program was patterned after a program used in Maryland.[75] Maryland's program illustrates the uselessness of sobriety checkpoints. Of the 125 checkpoints conducted with 41,000 motorists passing through, the state arrested only 143 persons—only .3% of drivers stopped.[76] This rate is even less than the rate achieved in Michigan's first checkpoint—1.5%.[77] The figures for other states are roughly comparable to Michigan and Maryland.[78]

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71. *Sitz*, 496 U.S. at ??? (1990) (Stevens, J., dissenting).

72. Respondent's Brief at 25, Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (No. 88-1897).

73. *Id.*

74. The Michigan trial court concluded:

> [S]obriety checkpoints cannot be expected to achieve any significant level of apprehending drunk drivers. This finding, in the Court's opinion, essentially undermines the whole theoretical basis for concluding that checkpoints can be effective in deterring drunk drivers . . . . Once the public perceives the truth about the low chance of a drunk driver actually being apprehended in a sobriety checkpoint, it cannot reasonably be supposed that those who are inclined to drink and drive will perceive a sobriety checkpoint as a significant threat to their being arrested.

Respondent's Brief at 26-27, *Sitz* (No. 88-1897).

75. *Sitz*, 496 U.S. at ???.

76. *Id.*

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

78. *See, e.g.*, Ekstrom v. Justice Ct., 663 P.2d 992, 993 (Ariz. 1983) (5,763 cars

Checkpoints are, at best, simply unnecessary in the fight against drunk driving. The sheriffs of a number of counties testified that the most efficient use of police resources in checking the evil of drunk driving was not checkpoints but patrol cars.[79] "This testimony was corroborated by witnesses from the Michigan State Police, who testified that state police officers receive considerable training in detecting drunk driving characteristics and are highly skilled in detecting drunk drivers."[80] Checkpoints do not decrease drunk driving, but result in decreased manpower to be used in normal patrolling for drunk drivers.[81]

Even with the small number of resulting arrests, some argue, as the Court did implicitly, that it is better than none at all.[82] These advocates do not take into account the number of officers that checkpoints draw away from those who might have been on patrol.[83] While the checkpoints may result in roughly a 1% arrest rate, there is no evidence that checkpoints are more effective at detecting and arresting drunk drivers. Supporters of checkpoints cannot even document a checkpoint's deterrent effect on drunk drivers. Yet, supporters advocate a program that infringes upon an individual's constitutional rights while patrolling does not.[84]

The Guidelines authored by the Michigan Police Department state that only one sobriety roadblock will be in operation on any given night. Extensive, advance publicity will be given in the target county.[85] Because of the heavy con-

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stopped, 14 arrests); Ingersoll v. Palmer, 743 P.2d 1299, 1303 (Cal. 1987) (233 vehicles screened, no arrests); State v. Garcia, 481 N.E.2d 148, 150 (Ind. Ct. App. 1985); Commonwealth v. Trumble, 483 N.E.2d 1102, 1105 (Mass. 1985) (503 cars stopped, eight arrests).

79. *Sitz*, 429 N.W.2d at 184; Respondent's Brief at 18-19, Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (No. 88-1897) (Brief in Opposition to Petition for Writ of Certiorari).

80. Respondent's Brief at 19, *Sitz* (No. 88-1897).

81. According to the 1987 Michigan Drunk Driving Audit Report, current law enforcement techniques apprehend approximately 75% of drunk drivers. Brief of Amicus Curiae, MADD at 11-12, *Sitz* (No. ????) (citing 1987 Michigan Drunk Driving Audit Report).

82. Michigan Dep't of State Police v. Sitz, 496 U.S. 444, ???.

83. *Sitz*, 429 N.W.2d 180. *See e.g.*, State v. Deskins, 673 P.2d 1174, 1187 (Kan. 1983) (140 police hours consumed in obtaining only 15 arrests); Commonwealth v. Trumble, 483 N.E.2d 1102, 1104-5 (503 cars stopped, eight arrests, 13 participating officers).

84. An officer on patrol can only pull over a driver if the officer has probable cause that the driver is driving under the influence.

85. Brief for the Respondent at 29, Michigan Dep't State Police v. Sitz, 496

centration of officers needed to man a checkpoint, police resources will be reduced elsewhere. This could suggest to drivers in other counties that their chances of being detected have been reduced. Thus, checkpoint programs might increase the number of drunk drivers because of the large number of officers used at the checkpoints. This is especially true if drunk drivers are allowed to bypass the checkpoint upon seeing it ahead of them.[86]

Maryland also conducted a study to see if the number of accidents and fatalities decreased because of the deterrent effect of checkpoints.[87] The study compared traffic accidents in a county using checkpoints with accidents occurring in a county (control county) without checkpoints.[88] The results showed that accidents in the checkpoint county decreased by 10%, while decreasing by 11% in the control county. Fatal accidents in the control county decreased from sixteen to three while in the checkpoint county fatal accidents actually doubled from the prior year.[89] Besides fewer arrests for drunk driving,[90] the checkpoints do not show any decrease in the problem that the majority says is of such great concern to the public—alcohol related traffic accidents. The decrease in the number of accidents and the number of fatalities are the result of other factors, not drunk driving checkpoints.[91]

The Court has effectively eliminated this step, the degree to which the seizure advances the public interest, by stating that it is not the Court's responsibility to second guess which law enforcement techniques a state uses.[92] The Court believes this should be left to the political process.

While the Court should give some deference to the states, complete deference is not wise. Complete deference to the state would result in inefficient law enforcement techniques. The effectiveness requirement in the *Brown* test

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U.S. 444 (1990) (No. 88-1897).

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

87. *Id.* at 184.

88. *Id.*

89. *Id.*

90. Ann M. Overbeck, *A Sobering Look at the Constitutionality Of DUI Roadblocks*, 54 CIN. L. REV. 579, 593 n.110 (1985).

91. *See e.g.*, *Sitz*, 496 U.S. at ??? n.2.

92. *Id.* at ???.

provides a check on inefficient law enforcement techniques. The reasoning applied by the Court allows states to intrude into an individual's rights while trying to cure other societal problems. In 1986, about 19,257 murders and non-negligent manslaughters occurred.[93] The majority of these deaths were caused by firearms and knives. States have an interest in decreasing these numbers, especially when they are greater than the number of innocent individuals killed on the public highways.[94] Under the *Sitz* analysis, the state could stop individuals in a high crime area and at their discretion question the individual.

As mentioned earlier, in *Brown*, the area where the appellant was stopped had a high incidence of drug traffic and the police had never seen the appellant in the area before. After refusing to identify himself, the police arrested the appellant and he was convicted of refusing to give his name to a police officer. The purpose of the statute was to prevent crime and the state believed that this was an effective means. The Supreme Court found this application of the Texas law unconstitutional because the law allowed for seizures by officers without reasonable suspicion.[95] This Court might have reached a different result, if instead of random stops of individuals, the police had stopped all people in the area. The state could have argued that the individual was in a high crime area and that they were trying to stop the passage of drugs within the community. By questioning a person as to his purpose in the area, the officer was enforcing the state interest of keeping out the unwanted drug dealers. This type of program would be as effective as sobriety checkpoints and possibly have greater deterrence than a sobriety checkpoint. When the state can show an important state interest, the Court appears willing to grant complete deference to the state legislature, if the Court considers the intrusion minimal. By giving great deference to the state legislatures, the Court implicitly eradicated the effectiveness prong of the *Brown* test.[96]

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93. *Sitz*, 496 U.S. at ??? n.17.

94. Out of 18,501 alcohol related traffic fatalities, 10,210 of the fatalities were the legally intoxicated. Only 8,291 of those fatalities were nonintoxicated individuals. This also doesn't take into account the number of accidents caused by the nonintoxicated driver. *Id.* This is far fewer than the number of innocent people murdered and killed by firearms each year.

95. *Brown*, 443 U.S. 47, 48-49 (1979).

96. The public also has an interest in alleviating the use of drugs because of

c. The severity of the interference with individual liberty. Individual suspicion has been the core component of Fourth Amendment protection against arbitrary government action.-[97] The state has at its disposal a large array of law enforcement weapons, yet the individual must rely upon the benevolence of the state or the courts to ensure that their rights are not trampled. By allowing cars to be stopped to prevent drunk driving, the Court subjects the public to potentially arbitrary harassment by police officers. Complete deference to the state does not fit within the framework of the Constitution.[98]

The determination of the extent of the intrusion usually is divided into two components, the subjective and the objective nature of the intrusion.[99] Based upon the short amount of time that each car is required to stop, the trial court concluded that the objective intrusion was minimal. In evaluating the intrusiveness of the seizure, the Court must take into account the overall impact on legitimate traffic.[100]

While considering the initial stop, the Court failed to truly consider the intrusiveness of the stop. The intrusiveness of a checkpoint goes significantly beyond what is contained in a single, brief stop. If suspicionless stops are allowed, a number of results will necessarily follow which involve a substantial intrusion. First, after the automobile is stopped at the checkpoint, the officer may compel the occupants of the car to get out.[101] Second, the occupants could be subjected to pat-down searches if an officer reasonably suspects that the person detained might be dangerous.[102]

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the social harms they cause. Currently the government has appointed what is referred to as a "Drug Czar" to wage America's battle against drugs. Because of the high publicity of this public concern, the Court, according to its holding, would grant great deference to the state and federal government in enacting enforcement techniques.

97. Delaware v. Prouse, 440 U.S. 648, 654-55 (1979).

98. The trial court discussed at length the inherent ineffectiveness of drunk driving checkpoints in terms of both arrests and deterrence. Only after the court concluded that roadblocks were ineffective in meeting any of the state's express and implicit goals did the trial court turn to analyzing other forms of law enforcement. Deference should not be given to a state program that cannot and will not accomplish its purposes, and is extremely expensive to operate.

99. United States v. Martinez-Fuerte, 428 U.S. 543, 557-59 (1976).

100. United States v. Brignoni-Ponce, 422 U.S. 873, 882-83 (1975).

101. Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977).

102. *Id.* at 111-12.

Third, the officer could require the driver to produce his license or other vehicle documents.[103] If the occupant has to go to the glove compartment to get the documents, the officer will be able to view what is inside the glove compartment.[104]

By requiring the officers to stop all cars, the program does limit the officer's discretion in choosing whom to subject to the initial stop. However, the discretion of the officer as to who is detained is unlimited. The officer could base his decision on a ruddy complexion, an unbuttoned shirt, or a speech impediment. This may be all that is needed to detain an individual.[105]

Of the 126 drivers who passed through the first checkpoint, only two were detained for further examination and questioning. One of those drivers was arrested. Thus, after the initial stop, the motorist can, at the discretion of the officer, be subject to another round of questioning and testing. Checkpoints are more intrusive than one is initially lead to believe.

Because of police officer discretion, a large number of innocent drivers are subject to very intense scrutiny. A Maryland study indicated that drivers subject to full-fledged investigations at a checkpoint are most likely to be completely innocent of drunk driving charges.[106] For example, a study conducted in North Carolina discovered that of the 940 individuals detained for further questioning, only 290 were arrested for drunk driving. A Delaware study produced similar results—only 231 individuals were arrested of the 701 individuals detained.[107] The Court in evaluating the intrusion failed to take this into consideration.

Despite the Court's assurance, this type of checkpoint is similar to the roving patrol struck down by the Court in *Brignoni-Ponce* because of its intrusion upon the public's Fourth Amendment rights.[108] As with roving patrols, fear and anxiety are an understandable reaction. First, the

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103. Texas v. Brown, 460 U.S. 730 (1983).
104. *Id.*
105. These are only a few of the factors that the officers in charge of the program stated could be used at the checkpoint to detain a motorist. Respondent's Brief at 33, Michigan Dep't State Police v. Sitz, 496 U.S. 444 (1990) (No. 88-1897).
106.
107. *Id.* at 35.
108. Delaware v. Prouse, 440 U.S. 648, 657 (1979).

checkpoints are usually a total surprise to drivers, despite the advanced publicity.[109] Second, the fear factor is heightened by the presence of a large number of officers, chemical testing equipment, and mobile booking and jail vans.[110] This is an unsettling use of authority even to an innocent driver. Even if the driver knows the location of the checkpoint, because of officer discretion, the possibility of prolonged questioning—even when innocent—is troubling.

2. *Comparison of* Sitz *and* Martinez-Fuerte

Because the checkpoints in *Sitz* do not resemble the checkpoints in *Martinez-Fuerte*, the Court had to structure the *Brown* test to meet its needs.

a. Permanent v. temporary. In *Martinez-Fuerte*, the Court limited its holding to "the types of stops described in the opinion, permanent checkpoints. '[A]ny further detention . . . must be based on consent or probable cause.'"[111] The Court had good reason to limit the holding to only permanent checkpoints.

(1) Notice and surprise. Most of the stops at permanent checkpoints take place during the day, whereas sobriety checkpoints are almost always operated at night. Surprise is the key to a sobriety checkpoint,[112] whereas the permanent checkpoint in *Martinez-Fuerte* was to provide an obstacle to using the main highways to ferret illegal aliens into the United States.[113] A seizure followed by an interrogation and even a cursory search at night is more intrusive and offensive than a daytime stop that is almost as routine as going through a toll gate or the fruit checkpoints in California. The motorist knows that the checkpoint is there, what to expect at the checkpoint, and what to do at the checkpoint.

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109. The guidelines only provide for notice of the target county, not the road that the checkpoint will be placed on. Also, one-half of the people further detained by the checkpoints are innocent. These two factors provide the driver with an unsettled feeling upon the sudden appearance of the checkpoint.

110. Respondent's Brief at 36, *Sitz* (No. 88-1897).

111. United States v. Martinez-Fuerte, 428 U.S. 543, 567 (1976).

112. The surprise occurs because the driver has no knowledge of the location of the checkpoint or what to expect. In Michigan, publicity only revealed the targeted county. The publicity did not reveal the road upon which the checkpoint would be located.

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

Unannounced, investigatory seizures, particularly at night, are typical of governments far different from our democracy. Justice Jackson, soon after returning from the Nuremberg Trials in France, stated:

> These [Fourth Amendment rights], I protest, are not mere second-class rights but belong in the catalog of indispensable freedoms. Among the deprivation of rights, none is so effective in cowing a population, crushing the spirit of the individual, and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.[114]

(2) Immigration checkpoints are more necessary than sobriety checkpoints. Immigration checkpoints are necessary to discover illegal aliens.[115] Smuggling illegal aliens does not impair the motorist's driving ability, but if a motorist is intoxicated his driving ability will be impaired.[116] An intoxicated motorist can often be identified by his driving maneuvers,[117] whereas a motorist carrying illegal aliens most likely cannot be spotted by observing driving patterns. A checkpoint is needed because of the lack of alternatives in spotting motorist smuggling illegal aliens.

Alcohol related fatalities are more susceptible to reduction by public information campaigns than are crimes such as smuggling or armed robbery. An intoxicated individual is his own worst enemy. As mentioned earlier, the majority of fatalities are the intoxicated drivers themselves. If the risk of serious personal injury to the body does not deter the

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114. Michigan Dep't of State Police v. Sitz, 496 U.S. 444, ??? n.9. (quoting Almeida-Sanchez v. United States, 413 U.S. 266, 273-274 (1973) (quoting Brinegar v. United States, 338 U.S. 160, 180 (Jackson, J., dissenting)).

115. Estimates of the number of illegal immigrants in the United States vary widely. In 1972, conservative estimates put the figure at 1 million and two years later the estimate was revised upward to around 12 million aliens illegally in the United States. Eighty-five percent of the illegal aliens in the United States are from Mexico. United States v. Brignoni-Ponce, 422 U.S. 873, 878-79 (1974). The number of illegal aliens continues to grow and strain resources needed in detecting them.

116. If a motorist's intoxication did not significantly impair his driving ability, it would not be illegal.

117. Witnesses from the Michigan State Police testified that officers receive substantial training on how to identify drunk drivers and are very skillful in detecting and arresting the drivers. Respondent's Brief at 30, Michigan Dep't State Police v. Sitz, 496 U.S. 444 (1990) (No. 88-1897).

drivers, then it is doubtful that checkpoints will be much of a deterrence.

In *Martinez-Fuerte*, the checkpoints were designed to prevent inland movement.[118] The checkpoints do succeed in apprehending some illegal immigrants and smugglers, but they also deter movement of others by threatening apprehension and increasing the costs of illegal transportation. Thus, besides the arrests, the checkpoints act as a deterrent because of increased costs of transportation. Checkpoints used to detect drunk drivers do not have any long lived deterrent effect.[119]

b. More like a roving patrol. The sobriety checkpoint more closely resembles the roving patrols that required reasonable suspicion. A motorist with advanced notice of the location of a permanent checkpoint has the opportunity to avoid the search entirely, or at least prepare for the search and limit its intrusion upon the motorist's privacy. The sobriety checkpoints can be placed anywhere the state police deem a need exists to try to curb drunk drivers. The possibility exists that they can be placed anywhere on state roads just as a roving patrol could go anywhere on the state's roads; whereas, permanent checkpoints are always in the same place year after year. Checkpoints, despite their advanced publicity, are usually a total surprise to drivers.

The physical and psychological intrusion visited upon motorists by a random stop by a roving patrol or a temporary checkpoint are no different. Both types of stops interfere with freedom of movement, are inconvenient, and consume time. Furthermore, both create substantial anxiety because neither are expected. The State of Michigan could announce that it was allowing roving patrol stops which is the same as announcing sobriety checkpoints, but still the Court would most likely find roving patrols unconstitutional.

3. Discretion

There is a great difference between the kind of discre-

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118. United States v. Brignoni-Ponce, 422 U.S. 873, 879 (1975) (referring to United States v. Martinez-Fuerte, 428 U.S. 543 (1976)).

119. As drivers realize that there is very little chance of being caught, they will not be deterred from drinking and driving. Much of the program's deterrence is associated with the attention the media gives the program. As the media's interest wanes, as it always does, the program's deterrent effect will also decline.

tion an officer can exercise at an immigration checkpoint and the kind of discretion exercised at a sobriety checkpoint. Questions at an immigration checkpoint are for identification papers or driver's license. At a sobriety checkpoint, the officer has unlimited discretion in the type of questions that he can ask. Answers to those questions determine whether or not the motorist is subject to further examination and interrogation at the second stop.

The state's law enforcement officers also have considerable discretion in selecting a location for temporary checkpoints. This discretion allows states to also check for other illegal acts under the guise of a sobriety checkpoint. Thus, the officers are able to bypass other protections provided to individuals.

4. No hinderance to law enforcement if decided the other way

The 1985 task-force set forth thirty-five alternatives for combating alcohol related traffic accidents.[120] Sobriety checkpoints are only one of the alternatives suggested by the task force. The record in *Sitz* never mentions whether any of the other alternatives were even considered or implemented. By declaring sobriety checkpoints unconstitutional, the Court would in no way hinder law enforcement efforts in deterring drunk drivers because other measures would be more effective. As was mentioned earlier, patrol cars result in more arrests and are also more efficient in deterring drunk driving.[121] The Court overvalues the law enforcement's interest by granting the professional politician complete discretion concerning how much of an intrusion is allowed by the programs it picks.

5. The checkpoint was more like a publicity stunt by state officials

The State of Michigan believed that one of the crowning achievements of the program was the media attention that

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

121. *See* Respondent's Brief at 30, Michigan Dep't State Police v. Sitz, 496 U.S. 444 (1990) (No. 88-1897) (indicating that officers are highly trained and very skillful in detecting and arresting drunk drivers); *Sitz*, 429 N.W.2d at 184 (indicating that a number of Michigan county sheriffs testified that patrol cars are more effective at utilizing police resources to combat drunk driving).

sobriety checkpoints received. Lieutenant Cotton of the Maryland State Police testified that the media coverage is overwhelming.[122] Is this a justification for allowing an intrusion upon the rights of individuals? The words of Justice Scalia should be quickly remembered:

> The only plausible explanation, in my view, is what the Commissioner himself offered in the concluding sentence of his memorandum to Custom Service employees announcing the drug program: "implementation of the drug screening program would set an important example in our country's struggle with its most serious threat to our national health and security." What better way to show that the Government is serious about its "war on drugs" than to subject its employees on the front line of the war to this invasion of their privacy and affront to their dignity. To be sure, there is only a slight chance that it will prevent some serious public harm resulting from Service employee drug use, but will show to the world that the Service is "clean," and—most important of all—will demonstrate the determination of the Government to eliminate this scourge of our society! I think it is obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search.[123]

While the fight against drunk driving is laudable, the effectiveness of sobriety checkpoints is questionable. There is only a slight chance that sobriety checkpoints will prevent some serious public harm. The only justifiable reason for the program is the attention that the media is giving to the program which serves to show the public and the world that Michigan is concerned about drunk driving. What Michigan does not say is that sobriety checkpoints deprive individuals of their right against unreasonable searches. All this effort so that the government can be viewed as leading the crusade against drunk drivers. This case is driven by nothing more than a symbolic government action—an insufficient justification for invasion into the private rights of others.

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122. Michigan Dep't of State Police v. Sitz, 496 U.S. 444, ??? n.19 (1990).
123. *Id.* (quoting Scalia, J., dissenting, Treasury Employees v. Von Raab, 489 U.S. 656, 705 (1989)).

IV. CONCLUSION

While the Court's, along with Michigan's, desire[124] to make roads safer is praiseworthy, the Court has failed to follow its analysis announced in earlier decisions. The Court undermined the Fourth Amendment rights of individuals by concentrating only on the initial stop and failing to consider subsequent intrusions. Fourth Amendment rights, in this decision, appear to have become second class rights. The Fourth Amendment was designed to grant an individual a zone of privacy which could only be breached when the reasonable requirements of probable cause were met. Only in special circumstances, when the intrusion serves special government needs beyond the normal needs of law enforcement, does the probable cause standard give way to the balancing test of *Brown*. No special circumstances have arisen in regard to drunk driving which normal law enforcement cannot solve.

Instead, the Court, aroused by fears (perhaps even supported by the majority of citizens) of destruction on the highways, virtually eliminated the second prong: the degree to which the seizure advances the public interest, which provides a check against inefficient law enforcement techniques. The result is a deprivation of an indispensable right for a program that does not obtain, nor will obtain even its stated objective.

B. Gordon Beckstead

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124. "For decades, this Court has 'repeatedly lamented the tragedy.'" *Id.* at 2486 (quoting South Dakota v. Neville, 459 U.S. 553, 558 (1983)). *See also*, Breithaupt v. Abram, 352 U.S. 432, 439 (1957) ("The increasing slaughter on our highways . . . now reaches the astounding figures only heard of on the battlefield.").